

No. -----

In the
Supreme Court of the United States

OCTOBER TERM, 1927

ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G.
HEALY, CLIFF MAURICE, TOM NAKAGAWA, ED-
WARD ENGDAHL, MYER BERG, JOHN EARL, and
FRANCIS RICHARD BROWN, *Petitioners,*

—vs.—

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the
Ninth Circuit

BRIEF OF PETITIONERS

Notice of Submission, with Respondent's Acceptance
of Service of Petition, Brief in Support of Petition,
and Transcript of Record.

JOHN F. DORE,
F. C. REAGAN,
J. L. FINCH,
Counsel for Petitioners.

Seattle, Washington.

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ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G. HEALY, CLIFF MAURICE, TOM NAKAGAWA, EDWARD ENGDAHL, MYER BERG, JOHN EARL, and FRANCIS RICHARD BROWN, *Petitioners,* No.-----

—vs.—

UNITED STATES OF AMERICA, *Respondent.*

Petition of Roy Olmstead, Jerry L. Finch, Clarence G. Healy, Cliff Maurice, Tom Nakagawa, Edward Engdahl, Myer Berg, John Earl, and Francis Richard Brown for a Writ of Certiorari to Review the Judgment and Decree of the United States Circuit Court of Appeals for the Ninth Circuit, Wherein Petitioners Were Plaintiffs in Error and Respondent was Defendant in Error.

To the Honorable the Supreme Court of the United States:

The petition of Roy Olmstead, Jerry L. Finch, Clarence G. Healy, Cliff Maurice, Tom Nakagawa, Edward Engdahl, Myer Berg, John Earl and Francis Richard Brown, respectfully shows to this Honorable Court:

1. Your petitioners were indicted in the United States District Court for the Western District of

Washington, Northern Division, January 19, 1925, for a conspiracy to violate the National Prohibition Act, (R. 1-44), and were convicted on said charge, February 20, 1926, (R. 250-4, 259-268).

2. A writ of error was sued out from the United States Circuit Court of Appeals for the Ninth Circuit, where the convictions were affirmed on May 9, 1927, (R. 756-772), Judge Rudkin dissenting, (R. 772-9), and a rehearing was denied July 18, 1927, (R. 781), and an order entered staying the issuance of mandate pending the filing of a petition for a writ of certiorari in the Supreme Court of the United States by September 1, 1927, (R. 783).

3. The record shows that before trial in the lower court one of your petitioners, Roy Olmstead, petitioned that court to suppress certain evidence that had been obtained by federal prohibition agents "tapping" the telephone wire leading into his home, and listening in to conversations passing over such wire, upon the ground that such evidence was obtained in violation of his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States, (R. 172, par. 17). And another petitioner, Jerry L. Finch, a practicing lawyer, likewise petitioned the court to suppress like evidence obtained by the same agents "tapping" the telephone wire leading to his office, (R. 213, par. 12). These petitions were considered together, and denied, and exceptions duly taken (R. 223; 233; 236). Upon the trial, over objections and exceptions of all your petitioners,

evidence was introduced of conversations passing over both such wires, and also over a telephone wire designated in the record as Elliott 6585, which was a common telephone of all your petitioners except the said Finch, (R. 433; 527; 590; 615; 633; 640; 644).

4. Error was assigned upon these rulings, (R. 333; 346). The Circuit Court of Appeals affirmed the ruling, (R. 768), Judge Rudkin dissenting, (R. 775).

5. Judge Rudkin says, speaking of telephones:

“And, it is the contents of the letter, not the mere paper that is thus protected. What is the distinction between a message sent by letter and a message sent by telegraph or by telephone? True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed and the other unsealed, but these are distinctions without a difference. A person using the telegraph or telephone is not broadcasting to the world. His conversation is sealed from the public as completely as the nature of the instrumentalities employed will permit, and no federal officer or federal agent has a right to take his message from the wires in order that it may be used against him. Such a situation would be deplorable and intolerable to say the least. Must the millions of people who use the telephone every day for lawful purposes have their messages interrupted and intercepted in this way? Must their personal, private and confidential

communications to family, friends and business associates pass through any such scrutiny on the part of agents, in whose selection they have no choice, and for the faithful performance of whose duties they have no security? Agents, whose very names and official stations are in many instances concealed and kept from them. If ills such as these must be borne, our forefathers signally failed in their desire to ordain and establish a government to secure the blessings of liberty to themselves and their posterity.” (R. 778.)

6. And your petitioners submit:

(a) That this is a question not only of grave constitutional law, but one of supreme importance to the general public;

(b) That the question has never been passed upon by any court, except as it was passed upon by the said District Court and the said Circuit Court of Appeals for the Ninth Circuit, in the instant case, and it was only decided by the latter court by a majority of two to one, Judge Rudkin of that court filing a dissenting opinion of most vigorous and persuasive force;

(c) That it is a Federal question, and has been decided in a way in conflict with applicable decisions of this court;

(d) That the decision of said Circuit Court of Appeals is untenable;

(e) That the question is an important one of Federal law which has not been, but should be, decided by the Supreme Court of the nation.

7. An original certified copy of the entire record of said case in the Circuit Court of Appeals, together with nine copies thereof, has heretofore been transmitted direct by the Clerk of the Circuit Court of Appeals to the Clerk of this Honorable Court, to be used in connection with this petition, and the references herein made are to such certified copy of such record, which is hereby made a part hereof.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, entitled Roy Olmstead, Jerry L. Finch, Clarence G. Healy, Cliff Maurice, Tom Nakagawa, Edward Engdahl, Myer Berg, John Earl and Francis Richard Brown, Plaintiffs-in-Error, versus United State of America, Defendant-in-Error, No. 5016 of the records and files of said court, to the end that the said case may be reviewed and determined by this court as provided by section 240, Judicial Code, or that your petitioners may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with said provi-

sions of the judicial code, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

JOHN F. DORE,
F. C. REAGAN,
J. L. FINCH.

UNITED STATES OF AMERICA, }
STATE OF WASHINGTON, } SS.
COUNTY OF KING. }

John F. Dore, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the petitioners in the foregoing entitled matter; that he has read the foregoing petition, knows the contents thereof, and believes the matters and things therein contained are true.

JOHN F. DORE.

Subscribed and sworn to before me, this 23rd day of August, 1927.

(Seal)

IRENE DYCHES,
Notary Public in and for the State
of Washington, residing at Seattle.

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UNITED STATES OF AMERICA, }
STATE OF WASHINGTON, } SS.
COUNTY OF KING. }

I hereby certify that I am one of counsel for the petitioners named in the foregoing petition and application for a writ of certiorari; that in my opinion the same is well founded and the case is one in which the prayer of the petitioners should be granted by this court. The application is not made for the purpose of delay.

Seattle, Washington, August 23, 1927.

JOHN F. DORE.