No. 17-1005

In The
Supreme Court of the United States

OATH HOLDINGS, INC.,

Petitioner,

v.

MARIANNE AJEMIAN, co-administrator of the estate of JOHN G. AJEMIAN, and ROBERT AJEMIAN, individually and as co-administrator of the estate of JOHN G. AJEMIAN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

REPLY BRIEF

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INTRODUCTION

Death is a certainty, but the erosion of email privacy need not be. The SJC's decision – interpreting ECPA's consent provision in a manner that conflicts with every federal court to consider the same provision – need not be permitted to stand, especially when it may cause serious harm to individuals and families nationwide. The dangers set forth in Yahoo's Petition and Amici's Brief[1] are not hyperbole. The SJC's decision unequivocally transfers control over private emails away from the senders and recipients of those messages and gives it to estate administrators who act with a different set of interests in mind. Under the SJC's reasoning, administrators can override decedents' wishes to keep their emails confidential, whether those desires were expressed, as here, by not sharing their passwords or by explicit instructions in their wills. This outcome not only violates user expectations, but ECPA as well. Under the Supremacy Clause, the SJC is free to interpret the Commonwealth's probate law however it likes, but it cannot run roughshod over Federal law.

Although arising in a new context, the question whether implied-by-law consent is valid under ECPA has been addressed by other courts, all of which reached a contrary conclusion, as the cases Yahoo cited in its Petition show. Respondents try to avoid those

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[1] This Court granted the Motion of Amici Curiae Facebook, Google, Dropbox, Evernote, Glassdoor, the Internet Association, and NetChoice ("Amici") for Leave to File Brief on February 27, 2018.

cases by taking an absurdly narrow view of the question presented. By limiting the issue to estate administrators, and not to the underlying issue of consent imputed by operation of law, Respondents attempt to cast this case as "novel." Not so. As numerous state and federal courts – including the Ninth Circuit Court of Appeals – have held, ECPA's bar on the disclosure of email content has only eight limited exceptions and courts may not create new or implied exceptions to get around that bar to disclosure. Moreover, other courts have held specifically that consent imputed by a court is not sufficient under the "lawful consent" exception.

Those cases, and the Brief of Amici, demonstrate that this is a case of national importance, worthy of this Court's immediate review. Amici include many internet-based communications providers, and two trade associations representing even more providers, servicing hundreds of millions of Americans. They share Yahoo's concern that the SJC's decision not only imperils user privacy, but opens the door to a patchwork of different and conflicting legal obligations for providers. Congress intended ECPA to eliminate that confusion and unpredictability. Accordingly, this Court should step in to resolve the split in authority, restore legal certainty, and safeguard the important federal policy in favor of email privacy expressed in ECPA.

ARGUMENT

I. The SJC's Decision Creates a Conflict of Authority.

The SJC's decision is an outlier and conflicts with a decision of the Ninth Circuit and decisions of other federal and state courts. As such, certiorari review is appropriate under both Sup. Ct. R. 10(b) and (c).[2] Though ignored by both the SJC and Respondents, the Ninth Circuit, along with other courts, held that courts may not create implied exceptions to ECPA's general bar on disclosure of content. *See Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 730 (9th Cir. 2011) (declining to recognize "implicit exception to [ECPA]" for any purpose because doing so "would erode the safety of the stored electronic information and trigger Congress' privacy concerns"); *Viacom Int'l, Inc. v. YouTube, Inc.*, 253 F.R.D. 256, 264 (S.D.N.Y. 2008); *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 86 (Ct. App. 2006). As stated in the Petition, the SJC's expansive interpretation of "lawful consent" to include legal substitutes is tantamount to recognizing a new, implied exception to ECPA's bar on disclosure. Pet. 12-13. That ruling contradicts the Ninth Circuit's holding in *Suzlon* that implied exceptions may not be created to circumvent ECPA's disclosure bar. Amici noted that this conflict in

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[2] The categories of Supreme Court Rule 10 are not exclusive. Sup. Ct. R. 10 (the categories are "neither controlling nor fully measuring the Court's discretion"). Even if this case does not fit the Rule 10 categories, Yahoo's Petition should still be granted under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). *See infra* at 10.

authority potentially exposes email and other internet-based communications providers to conflicting legal obligations. Amici Brief 18-19. Accordingly, this Court may exercise jurisdiction over this matter under Sup. Ct. R. 10(b).

Moreover, several other courts – also ignored by both the SJC and Respondents – have grappled with the issue whether a legal substitute or a court order can provide "lawful consent" necessary to allow a provider to disclose content under ECPA. Those courts were unanimous: only the actual, *de facto*, consent of the user was sufficient under ECPA – the consent of a court-appointed substitute or consent imputed by a court was not. *See Negro v. Superior Court*, 179 Cal. Rptr. 3d 215, 228 (Ct. App. 2014) (court could not impute consent to disclosure of email contents after litigant's failure to abide by discovery order); *Bower v. Bower*, 808 F. Supp. 2d 348 (D. Mass. 2011) (absent litigant could not be "deemed" to have consented as a sanction for her failure to appear); *In re Irish Bank Resolution Corp. Ltd.* (*in Special Liquidation*), 559 B.R. 627, 652 (Bankr. D. Del. 2016) (bankruptcy court lacked the authority to transfer to foreign representative the power to give lawful consent to disclosure of contents of a third-party's email account). The issue whether consent imputed by a court is sufficient to allow disclosure under ECPA – an unsettled issue of national importance, *see infra* at 8-11 – has not been determined by this Court. Thus, this Court may also exercise jurisdiction over the matter under Sup. Ct. R. 10(c).

Respondents disregard the many cases cited above by attempting to limit the issue at hand to the capacity of only estate administrators to give "lawful consent."[3] This view of the case is unreasonably narrow because there is no reason to distinguish between the decision of a court-appointed administrator to allow disclosure of email content and the decision of a court (*Negro*) or another court-appointed substitute (*Irish Bank*) to do so. The SJC's reasoning implicates a wide range of potential disclosures of email content to other court-appointed fiduciaries, such as conservators, guardians *ad litem*, and receivers. The effect is the same: someone other than the user makes the decision to disclose email content and strips those communications of privacy protections afforded by ECPA, a result that Section 2702 simply does not permit.

Similarly, the SJC's flawed preemption analysis applies with equal force to laws concerning state court civil subpoenas. Congress didn't specifically preempt state court civil procedure rules, the reasoning goes, therefore providers must disclose email content in response to civil subpoenas. Not only does this conflict with every other case to have passed on this issue, *see Negro*, 179 Cal. Rptr. 3d at 222; *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d at 86; *cf. Irish Bank*, 559 B.R. at 652 (bankruptcy code does not supersede ECPA), it

[3] To the extent this case is considered to present a "novel" issue, it does not represent the first attempt by a state to address the problem of the disposition of emails after death. A majority of states have passed or have proposed to enact laws based on the Revised Uniform Fiduciary Access to Digital Assets Act. *See* Pet. 24.

creates an exception to ECPA that is far greater than what Congress intended.

II. The SJC's Erroneous, Far-Reaching Decision Violates the Supremacy Clause and Should Be Corrected Now.

The SJC's decision that Massachusetts probate law supersedes ECPA is not an "unremarkable" matter of purely state law. Resp. 2. Respondents go astray in their effort to recast the SJC's decision as a creature of Massachusetts probate law, with only an incidental effect on ECPA. The decision constitutes a violation of the Supremacy Clause which this Court should remedy. That alone is reason enough for this Court to grant certiorari under Sup. Ct. R. 10(c) and *Cox*, 420 U.S. 469, permits the Court do so.

Respondents contend that the SJC held that administrators "are capable as a matter of state law of granting 'lawful consent' " much like they are empowered to "collect and open a decedent's mail." Resp. 2, 9. Respondents have it right in one sense. The SJC did hold that email is the digital analog of its paper predecessor. However, therein lies the problem. Congress designed ECPA specifically to provide ***more*** protection to email in the hands of a third party than a physical letter in the hands of a recipient. Indeed, Congress specifically noted that email differs from regular paper mail in important ways:

> First, email is provided by private parties and thus not subject to governmental control or

> regulation under the postal laws. Second, it is interactive in nature and can involve virtually instantaneous "conversations" more like a telephone call than mail. Finally, email is different from regular mail because the electronic communication provider as part of the service may technically have access to the contents of the message and may retain copies of transmissions.

H.R. Rep. No. 99-647 (1986) at 22 (footnote omitted). Through ECPA, Congress sought to resolve the legal uncertainty surrounding the privacy of electronic communications resulting from the lack of "Federal statutory standards to protect the privacy and security of [electronic] communications. . . ." S. Rep. No. 99-541 (1986) at 5. Congress also recognized that such uncertainty

> may unnecessarily discourage potential customers from using innovative communications systems. [. . .] It may discourage American businesses from developing new innovative forms of telecommunications and computer technology.

Id.

To remedy this, Congress enacted an entirely new and comprehensive legislative scheme – ECPA – to regulate the privacy and disclosure of those new modes of communication, ensuring legal predictability. *See id.* The SJC's decision upsets that scheme and displaces

ECPA's uniformity and legal certainty in favor of a patchwork of conflicting legal obligations.[4]

III. The SJC's Decision Endangers the Email Privacy of Millions of Americans: an Issue of National Importance.

A. The SJC's Decision Leaves Email Privacy to the Whim of Administrators, Which Is Precisely What Happened in this Case.

Yahoo's warning that this case effectively destroys email privacy after death is not hyperbole. Indeed, in this case, the SJC disregarded John Ajemian's choice not to share his password with his brother in favor of Respondents' desire to see those emails for sentimental reasons.[5] John's choice was a manifestation of

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[4] Denying administrators the ability to strip federal privacy protections from emails does not leave them without the tools necessary to distribute estate assets and otherwise comply with their fiduciary duties. Administrators can seek financial records directly from banks and other institutions. They can also seek consent for disclosure of important emails from the person communicating with the decedent, something that Respondents failed to do in this case. Pet. 7. Accordingly, there is no pressing probate law concern that requires the judicial re-writing of a federal statute.

[5] In this case, Respondents have no need to access to John's emails in order to administer his estate, distribute assets, or fulfill any fiduciary duties to the estate. Indeed, in media interviews, Respondents have admitted that they want access for "sentimental reasons," in other words a mere whim, unrelated to their fiduciary duties. *See* Bob McGovern, *Yahoo Asks Supreme Court to Overturn Mass. Court Ruling on Estate Rights to Dead's Emails*, Boston Herald (Feb. 8, 2018), http://www.bostonherald.com/business/

his decison to keep his emails private. Whatever the reason for that decision, it should not be trumped by the post-mortem desires of Respondents and nothing in ECPA allows for that result. By resetting the default rule under ECPA to allow estate administrators to access email content, the SJC's decision allows an administrator's whims to displace important federal privacy protections.

Respondents contend that Yahoo's concern about the SJC's decision allowing estate administrators to annul the wishes of decedent users is overblown. But that concern is not an exaggeration. Amici see the same danger. *See* Amici Brief 16. By holding that an administrator may provide "lawful consent" as if they were the deceased user, the SJC empowered that administrator to act as the user by allowing him to override the express wishes of the deceased user as set forth in a will or other instrument. Put another way, an administrator effectively can change the user's mind and consent to disclosure where the user had previously withheld consent. Respondents claim that the Court need not be concerned with the prospect of administrators flouting the decedent's wishes in this regard because of their fiduciary duties. But their explanation gives no comfort. Any fiduciary duty is owed to those with an interest in the estate, not to the decedent. *See* 31 Am. Jur. 2d *Executors and Administrators* § 342 ("The personal representative acts in a fiduciary capacity on behalf of those having an interest in the

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business_markets/2018/02/yahoo_asks_supreme_court_to_overturn_mass_court_ruling_on_estate.

estate. . . . "). Indeed, in other contexts, estate representatives have published material or effectively consented to publication, contrary to the express wishes of the decedent to destroy or keep the material private. *See* Natalie M. Banta*, Death and Privacy in the Digital Age*, 94 N.C. L. Rev. 927, 956-57 (2016) (noting instances in which estates disregarded the instructions of authors that their papers be destroyed or not published after their death and the material was published posthumously). Thus, even if Yahoo had a "vehicle for users to specify how they wish the content of the account to be handled upon death," Resp. 9, the SJC's decision allows an administrator to ignore that wish.[6] Nothing in the SJC's decision purports to limit that power to override user privacy wishes in any way.

This case thus fits squarely within the fourth category of cases deemed appropriate for certiorari review under *Cox*, 420 U.S. 469. Respondents do not contest that this case meets the first two of three criteria in *Cox*'s fourth category. *See* Pet. 22. Rather, they focus on the last criterion – whether a refusal to review the state court decision would seriously erode federal policy in a way that is somewhat unique or urgent. Resp. 12-13. Though conceding that ECPA embodies a federal policy to protect email privacy, Respondents contend that disclosure of such protected emails is no

[6] Indeed, as set forth in Amici's Brief, Facebook and Google believe that their user tools for the disposition of accounts after death would be "second-guess[ed]" by administrators under the SJC's reasoning. Amici Brief 16. Moreover, the recent advent of such tools may not reach older accounts that predate those tools.

different than the disclosure of tax returns or medical records – also protected under federal statutes – to administrators. Therefore, the argument goes, emails should be disclosed, too. But ECPA is different from the IRC (protecting tax returns) and HIPAA (protecting medical records) in one crucial way: both of those statutes ***expressly provide*** that third parties may provide otherwise protected information to administrators. *See* 26 U.S.C. § 6103(e)(1)(E) (allowing disclosure of tax returns to estates); 45 C.F.R. § 164.502(g)(1) (allowing disclosure of medical records to court-appointed fiduciaries). ECPA ***does not***. ECPA's strong policy in favor of user privacy is thus seriously eroded by the disclosure of emails through a judicially-created exception. Accordingly, this Court should not wait until more courts have followed the SJC's lead and further diminish email privacy. Rather, the Court should grant certiorari to prevent any further erosion of important federal policy embodied in ECPA.

B. Amici's Support Further Underscores that the Question Presented Affects Millions of Americans.

That many of the nation's largest providers of web-based communications services, directly and through trade associations, have urged this Court to take this case shows that it presents an issue of national importance. Amici have informed the Court that "[i]f left uncorrected, the decision below will erode the privacy rights of millions of Americans" and that "people's communications will be disclosed against their

will." Amici Motion 2. In addition to the threat to the email privacy of millions of Americans, the SJC's decision imperils the legal uniformity and certainty engendered by ECPA that allow providers like Yahoo and Amici to develop and offer at massive scale the free services upon which so many Americans rely.

As Amici note, the SJC's decision also contradicts the common-sense privacy expectations of email users. More than 70% of Americans surveyed want their emails to remain private after they die and 70% want the law to "err on the side of privacy" when users die without a specific direction as to the disposition of their online accounts. Amici Brief 12. Not surprisingly, only 15% of Americans want to leave the privacy of their online lives in the hands of executors in the absence of prior user consent to do so. *Id.* n.6. These user expectations are consistent with ECPA's plain text, and not the SJC's reimagining of it. This Court should grant certiorari to restore ECPA's privacy protections.

CONCLUSION

For these reasons and those stated in Yahoo's Petition, this Court should grant Yahoo's Petition and issue a writ of certiorari to the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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