No. _____

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

PETITION FOR A WRIT OF CERTIORARI

MARC J. ZWILLINGER
Counsel of Record
JACOB A. SOMMER
JEFFREY G. LANDIS
NURY A. SIEKKINEN
ZWILLGEN PLLC
1900 M Street, NW
Suite 250
Washington, DC 20036
(202) 296-3585
marc@zwillgen.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Should a court-appointed legal representative, such as an estate administrator, be able to provide lawful consent under the Electronic Communications Privacy Act, 18 U.S.C. § 2701 *et seq*., to the disclosure of private email messages stored in an online email account by a user who died without a will or any other indication of actual consent?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

Yahoo! Inc. sold its operating business, and transferred the assets and liabilities related to that business, effective June 13, 2017, to Yahoo Holdings, Inc., which changed its name to Oath Holdings, Inc., effective January 1, 2018. Petitioner Oath Holdings, Inc. is a wholly-owned subsidiary of Verizon Communications Inc. Yahoo! Inc. was the appellee in the Supreme Judicial Court of Massachusetts and the defendant in the probate court. Respondents Robert Ajemian and Marianne Ajemian were the appellants in the Supreme Judicial Court of Massachusetts and the plaintiffs in the probate court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT	ii
INTRODUCTION	1
OPINION BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Legal Background	3
B. Factual Background	6
C. Legal Proceedings in This Case	6
D. The Supreme Judicial Court's Decision	8
REASONS FOR GRANTING YAHOO'S PETITION	9
I. The Court Should Review the SJC's Decision Now Because it Undermines Federal Law and May Lead to a Nationwide Erosion of Email Privacy	9
A. The Plain Text of ECPA Prohibits Yahoo from Disclosing Email Content to Third Parties, Including the Decedent's Estate Administrators	9
B. The SJC's Preemption Analysis Is Flawed	15

TABLE OF CONTENTS – Continued

Page

II. The SJC's Decision Creates a Conflict With Existing Case Law From Both State and Federal Courts and Leads to Absurd Results 17

III. The Issue Presented Could Affect Every User of Electronic Communications and its Importance Necessitates Immediate Review 20

A. The SJC's Decision Degrades the Privacy of the Online Accounts of Millions of Americans 20

B. This Court Should Exercise Jurisdiction Now 22

IV. States Are Struggling to Address the Issue of Access to Communications After Death Because of the Lack of Clarity 24

V. This Case Is an Excellent Vehicle for Resolving This Issue 26

CONCLUSION 28

APPENDIX

Ajemian v. Yahoo! Inc. (Supreme Judicial Court of Massachusetts opinion) ..... App. 1

Ajemian v. Yahoo! Inc. (probate court judgement and opinion) ..... App. 31, 33

18 U.S.C. § 2702 ..... App. 53

18 U.S.C. § 2703 ..... App. 57

TABLE OF AUTHORITIES

Page

CASES

Ajemian v. Yahoo!, Inc., 83 Mass. App. Ct. 565 (2013) 7

Ajemian v. Yahoo! Inc., 84 N.E.3d 766 (Mass. 2017) 2

Bower v. Bower, 808 F. Supp. 2d 348 (D. Mass. 2011) 3, 9, 18

Bunnell v. Motion Picture Association of America, 567 F. Supp. 2d 1148 (C.D. Cal. 2007) 15

Clark v. Allen, 331 U.S. 503 (1947) 27

Com. v. Augustine, 4 N.E.3d 846 (Mass. 2014) 9, 12

Coventry Health Care of Missouri, Inc. v. Nevils, 137 S. Ct. 1190 (2017) 27

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 22, 23

In re American Airlines, Inc., Privacy Litigation, 370 F. Supp. 2d 552 (N.D. Tex. 2005) 13, 14

In re Irish Bank Resolution Corp. Ltd. (in Special Liquidation), 559 B.R. 627 (Bankr. D. Del. 2016) 18

James v. City of Boise, Idaho, 136 S. Ct. 685 (2016) 27

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 27

TABLE OF AUTHORITIES – Continued

Page

Matter of Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation, 829 F.3d 197 (2d Cir. 2016), *cert. granted*, 138 S. Ct. 356 (2017).....3

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988) 22

Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010).....3

Negro v. Superior Court, 179 Cal. Rptr. 3d 215 (Ct. App. 2014).....14, 15

O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72 (2006).....4, 12, 16

Southland Corp. v. Keating, 465 U.S. 1 (1984).....22, 23

Suzlon Energy Ltd. v. Microsoft Corp., 671 F.3d 726 (9th Cir. 2011).....12, 17

Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568 (1985) 27

TRW v. Andrews, 534 U.S. 19 (2001) 12

United States v. Ackerman, 831 F.3d 1292 (10th Cir. 2016) 10

United States v. Chavarriya-Mejia, 367 F.3d 1249 (11th Cir.), *cert. denied*, 543 U.S. 907 (2004).....13

United States v. Councilman, 418 F.3d 67 (1st Cir. 2005) 11, 12

Viacom Int'l, Inc. v. Youtube, Inc., 253 F.R.D. 256 (S.D.N.Y. 2008) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES, RULES AND REGULATIONS

Electronic Communications Privacy Act, 18 U.S.C. § 2701 *et seq*.....1, 3, 9

18 U.S.C. § 2702 4

18 U.S.C. § 2702(a).....10

18 U.S.C. § 2702(a)(1)-(2).....5

18 U.S.C. § 2702(b).....5

18 U.S.C. § 2702(b)(1) 5, 9, 10

18 U.S.C. § 2702(b)(2) 5

18 U.S.C. § 2702(b)(3) .....*passim*

18 U.S.C. § 2702(b)(4)-(8).....5

18 U.S.C. § 2703 4

18 U.S.C. § 2707 .....10, 26

28 U.S.C. § 1257(a).....2, 24

Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA") (2015) 24

RUFADAA § 7(5)(C)(ii) 25

RUFADAA § 16(f) 26

Massachusetts General Laws ch. 190B, § 3-203(b)(2).....11

LEGISLATIVE MATERIALS

H.R. Rep. No. 99-647 (1986) 4, 15

S. Rep. No. 99-541 (1986).....3, 4

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Administrative Office of the Probate and Family Court, MUPC Estate Administration Procedural Guide 24 (2nd Ed.) (June 2016), https://www.mass.gov/files/documents/2016/08/vb/mupc-procedural-guide.pdf 11

Michelle Castillo, *Verizon just hit the data jackpot with Yahoo's billion users*, CNBC (July 26, 2016), https://www.cnbc.com/2016/07/26/verizon-just-hit-the-data-jackpot-with-yahoos-billion-users.html.....20

Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, GALLUP News (May 18, 2016), http://news.gallup.com/poll/191651/majority-not.aspx.....21

Kristen Purcell, *Search and Email Still Top the List of Most Popular Online Activities*, Pew Research Center (Aug. 9, 2011), http://www.pewinternet.org/2011/08/09/search-and-email-still-top-the-list-of-most-popular-online-activities/ 20

Restatement (Third) of Agency § 1.01 (2006) 11

INTRODUCTION

This case concerns who decides what happens to the content of Americans' personal, often private, email accounts when they die. During their lifetimes, most people will have sent emails they considered private – to their friends, doctors, lawyers, and lovers. They will have protected the privacy of those emails with passwords intentionally withheld from others. Their emails may say unflattering things about children, parents, and spouses, or contain embarrassing revelations, which they intended to remain private, even after death. Yet, under its interpretation of federal law, the Supreme Judicial Court of Massachusetts said that court-appointed estate administrators can access all private email accounts, irrespective of the decedent's actual wishes. The Supreme Judicial Court's decision effectively eliminates personal privacy in email content after death by giving estate administrators complete control over those private communications. Yahoo petitions this Court for a writ of certiorari to restore privacy protections Congress created for email users.

This Court should grant Yahoo's petition to correct an expansive, flawed, and dangerous interpretation of a federal statute, the Electronic Communications Privacy Act. The Supreme Judicial Court of Massachusetts held that an estate administrator for a deceased email account user can give "lawful consent" to disclose the contents of an email account where the user has not given express or implied consent. By interpreting "lawful consent" to encompass instances where the

user has not actually consented, but where consent is imposed by operation of law, the Supreme Judicial Court of Massachusetts bucked the universal trend of other courts that have protected email content against third-party access. In doing so, the Supreme Judicial Court opened the door for other courts to find implied-in-law consent in a variety of other areas, which would threaten and undermine the important federal policy in favor of email privacy.

OPINION BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported at *Ajemian v. Yahoo! Inc.*, 84 N.E.3d 766 (Mass. 2017) and set forth in the Appendix at App. 1 to App. 30. The opinion of the Probate Court is unreported and set forth in the Appendix at App. 31 to App. 52.

JURISDICTION

The Supreme Judicial Court of Massachusetts issued an opinion vacating and remanding the Probate Court's judgment on October 16, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Electronic Communications Privacy Act, 18 U.S.C. § 2701, *et seq*. are reproduced at App. 53-62.

STATEMENT OF THE CASE

A. Legal Background

Congress passed the Electronic Communications Privacy Act, 18 U.S.C. § 2701, *et seq.* ("ECPA") to safeguard privacy in individuals' personal information and stored electronic communications, while protecting the government's legitimate law enforcement needs. ECPA's statutory framework "focus[es] on protecting the privacy of the content of a user's stored electronic communications." *Matter of Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation*, 829 F.3d 197, 217 (2d Cir. 2016), *cert. granted*, 138 S. Ct. 356 (Oct. 16, 2017). Courts long have acknowledged that ECPA's "primary emphasis" is on "protecting user content – the 'object of the statute's solicitude.'" *Id.* (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 267 (2010)). *See also Bower v. Bower*, 808 F. Supp. 2d 348, 350 (D. Mass. 2011) (ECPA's purpose was to "create[] a zone of privacy to protect internet subscribers from having their personal information wrongfully used and publicly disclosed by 'unauthorized private parties.'") (quoting S. Rep. No. 99-541, at 3 (1986)). ECPA thus codified users' expectations of privacy in "new forms of

telecommunications and computer technology" which were emerging when Congressed passed the statute. S. Rep. No. 99-541, at 5.

ECPA serves not only to give users confidence in the privacy of their electronic communications and trust in the companies providing those services, but also to alleviate the "legal uncertainty" and "severe administrative burdens" that technology providers would face in responding to third party requests for the content of their users' communications. *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 87-88 (Ct. App. 2006). To that end, the statute only *requires* production of stored user content in response to specified law enforcement process, 18 U.S.C. § 2703; App. 57-62, while affording providers the ability to *voluntarily* disclose content in other instances. 18 U.S.C. § 2702; App. 53-56. The combination of user trust and legal certainty ECPA fosters has allowed companies like Yahoo to provide free Internet-based communications services to billions of users, revolutionizing the way people around the world communicate. ECPA's effect on communications technology was not accidental. Rather, Congress sought to eliminate the legal uncertainty surrounding the discoverability of electronic communications to encourage Americans to use electronic communications services. *See* H.R. Rep. No. 99-647, at 19 (1986).

ECPA protects user privacy by providing a robust framework that generally *prohibits* providers from disclosing the contents of electronic communications stored on their systems. Providers of an "electronic communication service" or a "remote computing

service" "shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1)-(2); App. 53.[1] This blanket prohibition against disclosure applies unless one of the specifically enumerated exceptions within Section 2702(b) permits disclosure. App. 53-56. Even when one of those exceptions applies, disclosure by the provider is voluntary, not compulsory. *Id.* at 54 ("A provider . . . ***may*** divulge the contents of a communication. . . .") (emphasis added). The two relevant exceptions are: (1) disclosure to the "agent of such addressee or intended recipient" of a communication, 18 U.S.C. § 2702(b)(1); and, (2) disclosure "with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber. . . ." 18 U.S.C. § 2702(b)(3). App. 54. Other exceptions allow, *inter alia*, disclosure to an addressee or intended recipient, or one of their agents, disclosure to a governmental entity or law enforcement agency with the appropriate legal process, and reporting to the National Center for Missing and Exploited Children ("NCMEC"). *See id.* §§ 2702(b)(2), (4)-(8); App. 54-55. None of these exceptions applies to an estate administrator who seeks to access the private communications of a decedent where the decedent has provided no consent, express or implied, for the estate to do so.

---

[1] Any distinction between an electronic communication service and a remote computing service is irrelevant in this matter because the prohibition on disclosure of content to private parties applies to both. *Id.*

B. Factual Background

On or about August 19, 2002, either John Ajemian ("John") or his brother Robert Ajemian ("Robert") created a Yahoo email account for John's use. App. 33-34. On August 10, 2006, John died in a bicycle accident. App. 2. He left no will or any instructions about the posthumous disposition of his email. App. 34. After John's death, Robert attempted to access the account but was unable to do so because he did not have the password. App. 4. The Norfolk Probate and Family Court (the "Probate Court") appointed Robert and his sister Marianne Ajemian (together with Robert, the "Administrators") co-administrators of John's estate. App. 4.

C. Legal Proceedings in This Case

In 2007, the Administrators filed a complaint in the Probate and Family Court of Norfolk County seeking to compel Yahoo! Inc. ("Yahoo")[2] to disclose only subscriber records and email header information – i.e., sender, recipient, and date – for John's account. App. 35. Yahoo did not object to this request because ECPA permits disclosure of account records and header information (as opposed to content).[3] Accordingly, on January 15, 2008, Yahoo provided the

---

[2] "Yahoo" shall refer to both Petitioner Oath Holdings, Inc., and its predecessor, Yahoo! Inc.

[3] This could provide at least some information needed for estate administration, such as the identification of banks and other institutions potentially holding estate assets.

requested information to the Administrators, revealing the persons or entities who had corresponded with John through that email account. App. 35. The Administrators never attempted to get consent for disclosure of email content from those persons or entities. App. 35-36.

On September 9, 2009, the Administrators filed a second Probate Court action against Yahoo, this time seeking a declaration that they were entitled to gain "complete and unfettered access to the contents of the [Account]." App. 36. On November 9, 2009, Yahoo moved to dismiss the complaint. App. 36. The Probate Court granted Yahoo's motion, finding that Yahoo's terms of service required the case to be heard in a California court, and that res judicata barred the Administrators' claim. App. 36. On May 7, 2013, the Massachusetts Appeals Court reversed the Probate Court's order and remanded the case for further proceedings. App. 36-37. *See also Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565 (2013). After engaging in discovery, on October 16, 2015, the parties filed cross-motions for summary judgment.

By a Memorandum and Order dated March 10, 2016, the Probate Court granted Yahoo's motion for summary judgment and denied the Administrators' motion, rejecting the Administrators' arguments that they were entitled to the contents of the Account and holding that ECPA prohibited Yahoo from disclosing the contents of the Account to the Administrators. App. 52. The Probate Court found that the Administrators were not entitled to the Account's contents under the

"agency exception"; it reasoned that personal representatives, while fiduciaries, do not meet the requirements for agency where they are appointed by, and responsible to, a court instead of a decedent. App. 40-41. The Probate Court also rejected the Administrators' attempt to invoke ECPA's "consent exception" because John never consented to Yahoo disclosing the contents of his Account, and because the Court could not impute to John consent from the Administrators. App. 42. The Probate Court further held that neither party was entitled to summary judgment on the issue whether Yahoo's terms of service gave it the right to refuse access to John's account. App. 49. This question remains open. Even though the Administrators have done nothing outside this litigation concerning the administration of John's estate in years, App. 36, and conceded that they knew of nothing in the emails that would be necessary for administration of John's estate, Pl. Opp. Sum. J. at 5, the Administrators appealed.

D. The Supreme Judicial Court's Decision

The Supreme Judicial Court of Massachusetts (the "SJC") transferred the case to its own docket, *sua sponte*, pursuant to Massachusetts Appellate Procedure Rule 11. App. 7. The case was argued on March 9, 2017. App. 1. The SJC issued its opinion on October 16, 2017, reversing the Probate Court's Memorandum and Order. App. 1, 27. The SJC held that the Administrators were not "agents" of John's and entitled to disclosure of content under the agency exception in 18 U.S.C.

§ 2702(b)(1). App. 10-12. The SJC, however, interpreted "lawful consent" in 18 U.S.C. § 2702(b)(3) to include consent by court-appointed estate administrators, without any regard to the decedent's wishes. App. 12-24. The SJC remanded the case for further proceedings on the question whether Yahoo's terms of service allow it to bar access to the account's contents. App. 24-27.

REASONS FOR GRANTING YAHOO'S PETITION

I. The Court Should Review the SJC's Decision Now Because it Undermines Federal Law and May Lead to a Nationwide Erosion of Email Privacy.

A. The Plain Text of ECPA Prohibits Yahoo from Disclosing Email Content to Third Parties, Including the Decedent's Estate Administrators.

Congress enacted ECPA to safeguard individuals' privacy in their personal information and stored electronic communications, while still protecting the government's legitimate law enforcement needs. 18 U.S.C. § 2701 *et seq*.; *Com. v. Augustine*, 4 N.E.3d 846, 852 (Mass. 2014). The purpose of the statute was to "create[] a zone of privacy to protect internet subscribers from having their personal information wrongfully used and publicly disclosed by 'unauthorized private parties.'" *Bower v. Bower*, 808 F. Supp. 2d at 350. *See also supra* pp. 2-5.

ECPA accomplishes that purpose by prohibiting both electronic communication service ("ECS") providers and remote computing service ("RCS") providers from "knowingly divulg[ing] to any person or entity the contents of a communication." *See* 18 U.S.C. § 2702(a); App. 53. Congress provided a limited number of carefully delineated and narrow exceptions to this all-encompassing prohibition. If none of those exceptions apply, a provider is prohibited from disclosing the contents of a user's electronic communications. ECPA provides for the enforcement of this disclosure bar by granting a private right of action to anyone "aggrieved" by a violation of the Act, complete with statutory damages and attorneys' fees. *See* 18 U.S.C. § 2707. Even when one of the exceptions applies, disclosure by the provider is entirely voluntary. *Id.* at 54. ("A provider . . . ***may*** divulge the contents of a communication. . . .") (emphasis added).

Congress could have provided an exception for disclosure to court-appointed fiduciaries such as estate administrators, but it did not. Rather, ECPA permits disclosure to one specific class of non-governmental[4] third parties – agents. 18 U.S.C. § 2702(b)(1); App. 54. The inclusion of agents as permissible recipients of content makes sense because, as the SJC correctly noted, "an 'agent' 'act[s] on the principal's behalf and

---

[4] The NCMEC has been held to be a government actor or a government agent for purposes of the Fourth Amendment. *See United States v. Ackerman*, 831 F.3d 1292, 1295-96 (10th Cir. 2016).

[is] subject to the principal's control.'" App. 11 (quoting Restatement (Third) of Agency § 1.01 (2006)).

Thus, the agent reports directly to the principal, who can control what the agent does with the content of the electronic communications. That cannot be said of estate administrators like the Administrators, who "were appointed by, and are subject to the control of," the Probate Court. *Id.* Indeed, under Massachusetts law, a legally separated spouse, a Public Administrator appointed by the state, and even a creditor[5] may serve as an estate administrator. *See* Mass. Gen. Laws ch. 190B, § 3-203(b)(2). Congress's wisdom in excluding these third-parties from the list of persons that may obtain a decedent's most intimate electronic communications is self-evident and entirely consistent with ECPA's animating purpose – protecting the privacy of stored communications.

Courts should not read implied exceptions into ECPA. In *United States v. Councilman*, the First Circuit applied to ECPA the interpretive principle that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a

---

[5] Although Massachusetts elected not to adopt the provision of the Uniform Probate Code that grants creditors priority as estate administrator if no person with higher priority can be found, creditors in Massachusetts may be appointed if a formal petition is presented to, and signed by, a judge. *See* Administrative Office of the Probate and Family Court, MUPC Estate Administration Procedural Guide 24 (2nd Ed.) (June 2016), https://www.mass.gov/files/documents/2016/08/vb/mupc-procedural-guide.pdf

contrary legislative intent." 418 F.3d 67, 75-76 (1st Cir. 2005) (en banc) (*citing TRW v. Andrews*, 534 U.S. 19, 28 (2001)). *See also Augustine*, 4 N.E.3d at 852; *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 730 (9th Cir. 2011). Indeed, all courts except the SJC have declined to recognize "implicit exceptions to [ECPA]" for any purpose because doing so "would erode the safety of the stored electronic information and trigger Congress' privacy concerns." *Suzlon*, 671 F.3d at 730. Rejected exceptions have included disclosure in civil litigation, bankruptcy proceedings, and where the opposing party in a litigation has fled the country (*see* Section II, *infra*); *see also Viacom Int'l, Inc. v. Youtube, Inc.*, 253 F.R.D. 256, 264 (S.D.N.Y. 2008) (finding ECPA "contains no exception for disclosure of such communications pursuant to civil discovery requests"); *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d at 86 ("The treatment of rapidly developing new technologies profoundly affecting not only commerce but countless other aspects of individual and collective life is not a matter on which courts should lightly engraft exceptions to plain statutory language without a clear warrant to do so."). By holding that disclosure to an estate administrator is implied in the consent exception, the SJC impermissibly expanded the scope of that exception, effectively rewriting ECPA.

Aside from creating an implied exception where none exists, the SJC's expansive interpretation of the consent exception is fundamentally flawed. The court viewed the word "lawful" in the term "lawful consent" as expanding the scope of consent beyond actual

consent to include consent by legal substitutes. App. 18-19. That is wrong. In ECPA, "lawful" serves as a modifier that *narrows* consent to forms of consent that are lawfully recognized, rather than, for example, off-hand remarks flippantly made.

ECPA's interpretive case law and legislative history supports this narrower interpretation. In *In re American Airlines, Inc., Privacy Litigation*, 370 F. Supp. 2d 552 (N.D. Tex. 2005), the court concluded that American Airlines' disclosure of certain information did not violate ECPA because, as the intended recipient, it could consent to the disclosure of that information. *Id.* The court rejected the plaintiffs' argument that such consent to disclosure was not "lawful" under ECPA because the disclosure violated the contract between plaintiffs and the airline. *Id.* Instead, the court likened the concept of "lawful consent" in § 2702(b)(3) "to that found in other criminal statutes, *i.e.*, consent given by one who has the legal capacity to consent," noting that criminal law recognizes that children are not capable of consenting to sexual contact. *Id.* at 561 (*citing United States v. Chavarriya-Mejia*, 367 F.3d 1249, 1251 (11th Cir.), *cert. denied*, 543 U.S. 907 (2004)). The airline's breach of contract did not rob it of the legal capacity to give consent to disclosure under ECPA.

A California appellate court concluded that ECPA's "requirement of 'lawful consent' is manifestly intended to invest *users* with the final say regarding disclosure of the contents of their stored messages while limiting the burdens placed on service

providers. . . ." *Negro v. Superior Court*, 179 Cal. Rptr. 3d 215, 228 (Ct. App. 2014). The California Court of Appeal determined that a court cannot, under ECPA, deem a subscriber to have consented when he has not actually done so. In *Negro*, an employer sued a former employee and sought access to the contents of the employee's Gmail account. Denying Google's petition to quash the subpoena because ECPA prohibited disclosure, the California lower court imputed consent to the employee and concluded that "court ordered consent" was sufficient. 179 Cal. Rptr. 3d at 220. The Court of Appeal disagreed, holding that "[t]he 'lawful consent' exception to the prohibitions of [ECPA] is not satisfied by consent that is . . . *imputed* to the user by a court." *Id.* at 222 (internal citation omitted, emphasis in original). Rather, consent for purposes of ECPA "must be consent in fact." *Id.* (internal quotation marks and citations omitted). Although acknowledging that a court can use the coercive power of discovery sanctions to obtain a litigant's actual consent to the disclosure, the Court of Appeal held that courts cannot "bypass this step and simply declare that users have consented when in fact they have not." *Id.* at 223.

ECPA's legislative history supports the narrow interpretation espoused by *American Airlines* and *Negro*. Congress made clear that "lawful consent" was consent that emanated from the user, noting:

> If conditions governing disclosure or use are spelled out in the rules of an electronic communication service, and those rules are available to users or in contracts for the provision

> of such services, it would be appropriate to imply consent on the part of a user to disclosures or uses consistent with those rules.

H.R. Rep. No. 99-647, at 66 (1986). Put another way, a user may contractually consent to disclosure by the provider. ECPA's legislative history also provides that "consent . . . need not take the form of a formal written document" and may flow from "action that evidences acquiescence to . . . disclosure or use." *Id.* These examples of acceptable consent involve affirmative conduct *by the user*: forming a contract or making a statement regarding disclosure. Thus, under Section 2702(b)(3), "lawful consent" always has arisen from the user's words or conduct so long as it is in a form that is lawfully recognized. "Lawful consent" never has been interpreted to include consent by court-appointed fiduciaries like estate administrators merely because they are acting in their lawful capacity as fiduciaries. Accordingly, the SJC's expansive interpretation of "lawful consent" finds no support in ECPA's plain text, its legislative history, or cases interpreting it.

B. The SJC's Preemption Analysis Is Flawed.

The SJC's preemption analysis wrongly focused on whether ECPA expressly preempted state probate law. App. 18. That ECPA was not aimed directly at state probate law is not significant. With ECPA, Congress created a comprehensive set of rights and responsibilities of users, providers, and government actors concerning the privacy of electronic communications. *See Bunnell v. Motion Picture Ass'n of America*, 567

F. Supp. 2d 1148, 1154 (C.D. Cal. 2007) ("The scheme of the ECPA is very comprehensive: it regulates private parties' conduct, law enforcement conduct, outlines a scheme covering both types of conduct and also includes a private right of action for violation of the statute."). As such, ECPA affects many areas of law, including some traditionally regulated by state law.

For example, ECPA preempts state civil discovery rules, insofar as those rules would require a service provider to disclose email content in response to a subpoena without the lawful consent of the user. *See Negro*, 179 Cal. Rptr. 3d at 222. This is so, even though ECPA "does not declare civil subpoenas unenforceable" but rather "does not mention them at all." *Id.* at 231. *See also O'Grady v. Superior Court*, 44 Cal. Rptr. 3d at 86 (holding that "there is no pertinent ambiguity in the language of the statute" and ECPA "clearly prohibits any disclosure of stored email other than as authorized by enumerated exceptions"). This view of ECPA – that it is a comprehensive legislative scheme and that contrary or inconsistent state laws must give way – makes sense. In contrast, the SJC's opinion wrongly assumes that Congress must identify each area of law that could be affected for the federal law to remain supreme.

Aside from requiring an express statement by Congress of its intent to preempt probate law, the SJC further erred in looking to state law for the meaning of "lawful consent" rather than federal law. The SJC looked to Massachusetts state probate law to determine whether estate administrators can give lawful

consent to disclosure under ECPA. App. 19-20. This leaves the meaning of "lawful consent" in flux and unnecessarily dependent on the law of the state in which the decedent died. Instead of state law, courts must look to ECPA itself, and to federal law more generally, to interpret its terms. *See supra* Section I.A.

II. The SJC's Decision Creates a Conflict With Existing Case Law From Both State and Federal Courts and Leads to Absurd Results.

The SJC's decision conflicts with several other federal and state court decisions that have rejected consent by a legal substitute for the user. In a variety of contexts, from bankruptcy to family law, these courts have refused to accept a third party's consent and have insisted that ECPA demands the *de facto* consent of the user, whether express or implied.

Courts have found repeatedly that persons other than the actual subscriber may not lawfully consent to disclosure of the contents of a private email account. *See Negro*, 179 Cal. Rptr. 3d at 220. In *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d at 730, the Ninth Circuit held that "[d]eclaring an implicit exception to [ECPA] for civil litigation would erode the safety of the stored electronic information and trigger Congress' privacy concerns." The court also rejected the argument that the subscriber, as a litigant, impliedly consented to the production of his emails because he had a duty to produce the documents under the Australian

law. Similarly, in *Bower v. Bower*, 808 F. Supp. 2d 348 (D. Mass. 2011), the court rejected a contention that a mother who had allegedly abducted her children and left the country and who had refused to appear could be "deemed" to have consented to disclosure of contents contained in her email account to the children's father and legal custodian. The court found nothing in the mother's actions from which it could imply an intent to consent to the disclosure of the electronically stored information. *Id.*

The equitable power of a bankruptcy court also has been deemed inadequate to transform the consent of a legal substitute into the actual consent of the user under ECPA. In *In re Irish Bank*, the bankruptcy court concluded that it lacked authority under ECPA "to compel a service provider to divulge the contents of a private email solely at the request of a third-party after the account user has failed to give his or her consent." *In re Irish Bank Resolution Corp. Ltd. (in Special Liquidation)*, 559 B.R. 627, 652 (Bankr. D. Del. 2016). In that case, the bankruptcy estate representatives previously obtained an order deeming them, and not the account holder, the "subscribers" of the account for purposes of ECPA. *Id.* at 636. However, the bankruptcy court held that the estate representatives were not capable of giving lawful consent to such disclosure, as required under ECPA, because ECPA requires the actual consent of the user. *Id.* at 652. The court further held that a court order purporting to empower someone other than the user to give "lawful consent" "should not be used to circumvent [ECPA's disclosure] prohibition"

and that a court-appointed fiduciary who was not the user was "incapable" of giving "lawful consent" under ECPA. *Id.* at 653.

The SJC's opinion is inconsistent with this edifice of federal and state precedent requiring actual user consent under Section 2702(b)(3) and this Court should intervene now to prevent a further splintering of authority. Absent this Court's intervention and correction now, states will reach varied conclusions regarding the interaction of ECPA and state probate law. In Massachusetts, estate administrators will be able to demand user content following the SJC's ruling. Other states could follow the majority of courts and conclude that ECPA requires the deceased user's actual consent in order to allow providers to disclose content to administrators.[6] Moreover, the SJC's reasoning could extend to areas beyond probate law. For example, a state could conclude that ECPA does not preempt family law, a traditional province of state law, and therefore a wife would not need her husband's consent to compel a provider to produce his email content to her pursuant to a subpoena. Indeed, nearly every time ECPA prohibits (or, at least, does not allow) a disclosure otherwise allowed under state or common law, a court could reach the same conclusion. These results would severely undermine the privacy and legal predictability goals

[6] Indeed, the Revised Uniform Fiduciary Access to Digital Access Act, passed by the majority of states, assumes that ECPA requires a deceased user's consent and that the consent of an estate administrator is not sufficient to allow disclosure under ECPA. *See infra* Section IV.

embodied in ECPA. This Court should intervene to correct the SJC's split from the weight of authority.

III. The Issue Presented Could Affect Every User of Electronic Communications and its Importance Necessitates Immediate Review.

A. The SJC's Decision Degrades the Privacy of the Online Accounts of Millions of Americans.

Most United States residents have online accounts with stored communications and content. The vast majority of Americans (92%) use web-based email and most Americans (61%) use email on an average day. *See* Kristen Purcell, *Search and Email Still Top the List of Most Popular Online Activities*, Pew Research Center (Aug. 9, 2011), http://www.pewinternet.org/2011/08/09/search-and-email-still-top-the-list-of-most-popular-online-activities/. Yahoo has over 1 billion monthly active users. *See* Michelle Castillo, *Verizon just hit the data jackpot with Yahoo's billion users*, CNBC (July 26, 2016), https://www.cnbc.com/2016/07/26/verizon-just-hit-the-data-jackpot-with-yahoos-billion-users.html. Every single one of those users will pass away.

The SJC's decision effectively revokes the privacy rights of users in their email content, as established by ECPA, the moment they die. Instead, complete control to publish or keep the emails confidential shifts to the estate administrator, who could be a trusted family

friend or a complete stranger to the decedent. Most Americans do not have a will and will likely die intestate, leaving no direction to estate administrators concerning their digital assets. *See* Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, GALLUP News (May 18, 2016), http://news.gallup.com/poll/191651/majority-not.aspx. Even when users do leave wills, many of those wills do not address consent to the disclosure of the content of online accounts. Users who die intestate or without specific direction as to their digital assets would have their private online accounts exposed to estate administrators and anyone else those administrators desired, without regard to the decedent's actual wishes.

In fact, a will specifically prohibiting disclosure of email content would likely offer no protection from the same result. Under the SJC's reasoning in this case, an estate administrator is capable of giving consent as if she was the user herself. Accordingly, even where a user had indicated expressly in a will or other instrument his desire that his estate not get access to his account upon his death, the estate could circumvent that intent simply by itself consenting to release on behalf of the user after he dies. Thus, under the SJC's opinion, privacy in email content after death, is at the whim of the estate administrator.

B. This Court Should Exercise Jurisdiction Now.

This matter presents a compelling case for the exercise of the Court's jurisdiction under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Under *Cox*, the Court held that it should exercise jurisdiction and immediately review the judgment of a state supreme court where: (1) the federal issue would be moot if the petitioner succeeded in lower court proceedings, but there is nevertheless justification for immediate review; (2) the federal issue has been finally decided, and the petitioner might succeed on the merits thereby mooting review of the federal issue, and reversal of the state court on federal grounds would be preclusive of any further litigation on the relevant cause of action; and (3) a refusal to review the state court decision would seriously erode federal policy in a way that is somewhat unique or urgent. *Id.* at 477-79. This case fits all three of those criteria.

First, Yahoo might prevail on non-federal grounds in subsequent proceedings in the Probate Court because Yahoo's terms of service allow Yahoo to terminate the account and delete content, potentially mooting the federal issue. *See id* at 477. Second, this Court's reversal of the SJC's ruling "in this setting will terminate litigation of the merits of this dispute." *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984). The SJC has finally decided the federal issue – whether ECPA bars Yahoo from disclosing email content to the Administrators and the issue is now "ripe for review" by this Court. *See Mississippi Power & Light Co. v.*

Mississippi ex rel. Moore, 487 U.S. 354, 370 n.11 (1988) (judgment of the Mississippi Supreme Court was "final" for their purposes because "[t]he critical federal question – whether federal law pre-empts such proceedings while the FERC order remains in effect – has, however, already been answered by the State Supreme Court and its judgment is therefore ripe for review").

In satisfaction of the third prong of *Cox*, leaving the SJC's opinion unreviewed would result in a serious erosion of ECPA's federal policy in favor of the privacy of email content. *See Cox Broadcasting Corp.*, 420 U.S. at 483. This Court has taken immediate review of a state supreme court judgement in such circumstances. In *Southland Corp.*, "the effect of the judgment of the California court [holding that the Federal Arbitration Act did not preempt a California law] [wa]s to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration." 465 U.S. at 7. That judgment threatened the federal policy in favor of arbitration as set forth in the FAA and the Court exercised its jurisdiction to review whether the FAA preempted a state law. *See id.* So, too, here. The SJC's opinion allows the disclosure of email content to an estate administrator without the user's consent. Without this Court's review, that opinion would remain in effect despite the federal prohibition on disclosure of content in the absence of lawful consent of the user, thereby jeopardizing the federal policy – embodied in ECPA – of protecting the privacy of email content.

Now is the appropriate time to review this case. This matter will not require any further review of other federal issues at a later point because ECPA's prohibition on disclosure is the only federal issue present. It makes sense to review the SJC's opinion promptly, rather than await more rounds of briefing in the Probate Court and the Massachusetts appeals courts. If this Court rules in Yahoo's favor on the federal issue, no further proceedings will be necessary. Thus, review of the federal issue at this time best serves judicial economy. Accordingly, this Court should exercise jurisdiction under Section 1257(a) and immediately review the SJC's ruling.

IV. States Are Struggling to Address the Issue of Access to Communications After Death Because of the Lack of Clarity.

In recent years, state legislatures have attempted to address whether and when court-appointed fiduciaries, like estate administrators, can access their decedent's email content. Most states[7] have passed laws like the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA"), which "gives fiduciaries the legal authority to manage digital assets and electronic communications in the same way they manage

[7] According to the Uniform Laws Commission, 35 states have adopted a form of RUFADAA and another 7 have introduced bills modeled on RUFADAA. *See* Fiduciary Access to Digital Assets Act, Revised (2015), http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20%282015%29.

tangible assets and financial accounts, ***to the extent possible***." RUFADAA, Prefatory Note at 1 (emphasis added). This model law, along with the many state laws based upon it, illustrate the confusion and uncertainty on the issue of whether ECPA permits providers to divulge email content to estate administrators when the decedent user has not given actual consent prior to death. Such confusion provides yet another reason for this Court to grant certiorari and resolve the uncertainty.

RUFADAA, promulgated by the Uniform Laws Commission and meant to empower fiduciaries such as estate administrators to marshal digital assets, implicitly acknowledges that disclosure of electronic communications content without prior consent from the deceased user may violate ECPA but fails to illuminate when disclosures are permissible. For example, RUFADAA allows an estate administrator to access content directly from a provider like Yahoo after a court has found that "disclosure of the content . . . would not violate [ECPA]." RUFADAA § 7(5)(C)(ii). Thus, RUFADAA contemplates that at least some disclosures of content to estate administrators would violate ECPA.[8] RUFADAA thus pushes the ultimate question – whether a particular disclosure to an estate administrator violates ECPA – to individual state courts.

---

[8] The SJC's opinion actually renders this provision of RUFADAA meaningless. If an estate administrator can give "lawful consent" under ECPA, as the SJC's opinion concluded, no disclosure of content to an administrator would violate ECPA and there would be no need for a court to find that ECPA was satisfied.

Although it does not clarify what kind of disclosures of email content are permissible, RUFADAA's immunity provision amounts to a tacit acknowledgment that disclosures could result in liability under other laws including ECPA. RUFADAA purports to immunize custodians of email content like Yahoo from liability when they disclose content in accordance with the model law. RUFADAA § 16(f) ("A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this [act]."). This presumes that at least some disclosures to estate administrators would run afoul of existing law, including ECPA and its civil enforcement provisions. *See* 18 U.S.C. § 2707 (allowing anyone aggrieved by a violation of ECPA to recover damages of at least $1,000 plus attorneys' fees and punitive damages in a civil action). Putting aside the question whether a state statute effectively can protect against civil liability under a contradictory federal statute, this immunization represents an attempt to deal with the uncertainty of whether certain disclosures violate ECPA. RUFADAA thus underscores the confusion surrounding this issue and the need for this Court to rectify it.

V. This Case Is an Excellent Vehicle for Resolving This Issue.

The SJC's decision presents a clear and direct case for resolving part of the conundrum of what happens to digital accounts after the user's death. It presents a purely legal question – under ECPA, can an estate

administrator or other legal representative consent to the disclosure of the contents of communications, absent evidence of the user's actual consent to such disclosure. There are no factual disputes bearing upon this issue of pure legal interpretation of a federal statute. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (finding a case ripe for review in part because "[t]he issue presented . . . is purely legal, and will not be clarified by further factual development").

Moreover, this case presents an issue of national importance. *See supra* Section III.A. The question whether ECPA protects email privacy after death will affect millions of Americans. This Court should grant certiorari in order to answer that question. *See Clark v. Allen*, 331 U.S. 503, 507 (1947) ("The case is here again on a petition for a writ of certiorari which we granted because the issues raised are of national importance."); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties. . . ."). Aside from its clear national importance, this case involves the interpretation of a federal statute that has not yet been reviewed by this Court in this context. It is particularly the province of this Court "to say what a [federal] statute means." *James v. City of Boise, Idaho*, 136 S. Ct. 685, 686 (2016) (per curiam). *See also Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190

(2017) (granting certiorari to resolve conflicting interpretations of a federal statute bearing on whether that statute preempted state law). With this case, the Court can interpret ECPA in a context that helps states, companies, and individuals plan for the life of email after death.

CONCLUSION

For these reasons, the Court should grant Yahoo's petition and issue a writ of certiorari to the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

MARC J. ZWILLINGER
Counsel of Record
JACOB A. SOMMER
JEFFREY G. LANDIS
NURY A. SIEKKINEN
ZWILLGEN PLLC
1900 M Street, NW
Suite 250
Washington, DC 20036
(202) 296-3585
marc@zwillgen.com

Counsel for Petitioner