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

BRIEF IN OPPOSITION

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INTRODUCTION

Yahoo's Petition for Certiorari should be denied for two simple reasons. First, the decision of the Supreme Judicial Court of Massachusetts ("SJC") does not conflict with the decision of a United States court of appeals or the decision of another state court of last resort. Second, the SJC did not decide any important questions of federal law that should be resolved by this Court at this time.

The SJC's decision makes manifest that there is no conflict between its decision and that of any United States court of appeals or another state court of last resort. The SJC acknowledged that it was "confronted with the **novel question** whether lawful consent for purposes of access to stored communications properly is limited to actual consent, such that it would exclude a personal representative from consenting on a decedent's behalf." App. 13 (emphasis added). Indeed, the Court expressly noted that "[t]here is **no** Federal or State case law of which we are aware construing the meaning of lawful consent in this context." App. 21, n.17 (emphasis added). Thus, there is no genuine judicial "conflict" that warrants this Court's intervention.

Nor did the SJC decide an important question of federal law that should be decided by this Court at this time. It is telling that the Electronic Communications Privacy Act ("ECPA") and its component part, the Stored Communications Act ("SCA"), were enacted in 1986. Yet, 30 years later, the SJC is both the first and

currently only state court of last resort or federal court of appeals to reach the issue of what constitutes "lawful consent" under the SCA in this context. Yahoo transparently claims that the decision below constitutes an "expansive, flawed and dangerous interpretation of a federal statute." Petition at 1. In fact, the SJC came to the wholly unremarkable conclusion that Massachusetts probate law recognizes that the personal representative of a decedent's estate may provide lawful consent under the SCA on behalf of the decedent, just as personal representatives may, among other things: (i) initiate federal or state lawsuits that the decedent could have brought at the time of death; (ii) waive the decedent's attorney-client, physician-patient, and psychotherapist-patient privileges in federal and state court; (iii) consent to the disclosure of a decedent's private health information as protected by HIPAA; and (iv) sell a decedent's property. Indeed, it is settled that personal representatives may collect and open a decedent's mail. In concluding that Massachusetts personal representatives may provide lawful consent under the SCA, the SJC simply confirmed that email is the digital analog of its paper predecessor.

In short, Yahoo's petition does not implicate an important question of federal law that should be decided, once and for all, by this Court at this time. As a result, Yahoo's petition should be denied.

STATEMENT OF THE CASE

A. Proceedings Below

On August 10, 2006, John Ajemian was struck and killed by a motor vehicle while riding his bicycle. App. 2. Robert and Marianne Ajemian (the "Ajemians"), the decedent's brother and sister, were appointed as personal representatives of his estate.[1] App. 2. On September 9, 2009, the Ajemians commenced this case against Yahoo!, Inc. with the filing of a complaint in the Norfolk County, Massachusetts Probate Court. The Ajemians brought this case for one reason: they seek access to the contents of their late brother's Yahoo email account. App. 36.

On November 9, 2009, Yahoo moved to dismiss the complaint. That motion was allowed by the probate court. App. 36. That led to the first round of appeals in this now almost nine-year-old legal battle. On May 7, 2013, the Massachusetts Appeals Court reversed the decision of the probate court and remanded the case to the probate court. *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565 (2013).

On remand, both parties filed cross-motions for summary judgment in October 2015. On March 10, 2016, the probate court granted Yahoo's motion for summary judgment and again dismissed the Ajemians' complaint, this time finding that the SCA prohibited Yahoo from disclosing the contents of John's email

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[1] For ease of reference, as the SJC did in its opinion, we refer to the Ajemians by their first names.

account. App. 31-52. The Ajemians timely appealed and the SJC transferred the case to its own docket. The second round of appeals was thus underway.

The case was argued in the SJC in March 2017. The SJC issued its decision reversing the order of the probate court on October 16, 2017, *Ajemian v. Yahoo!, Inc.*, 478 Mass. 169 (2017), and remanded to the probate court for further proceedings.

B. The Supreme Judicial Court's Decision

We will not needlessly rehash the decision of the Supreme Judicial Court of Massachusetts. It speaks for itself.

However, in its petition Yahoo repeatedly mischaracterizes the SJC decision. For example, in the Introduction, Yahoo claims that "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**." Petition at 1 (emphasis added). The SJC decision says no such thing. No fair reading of the decision supports such a conclusion.

Yahoo repeats this assertion later in its petition, claiming that the SJC interpreted lawful consent "to include consent by court-appointed estate administrators, without any regard to the decedent's wishes." Petition at 9. This again is a flat misstatement. In fact, under Massachusetts law, personal representatives (whether nominated by the decedent or appointed

by the probate court) are fiduciaries, subject to the supervision of the court, who must effectuate the terms of a will except in very narrowly prescribed circumstances.

Yahoo goes on to claim that the "SJC's decision conflicts with several other federal and state court decisions. . . ." Petition at 17. This is misleading because no other state court of last resort and no United States court of appeals has ruled on the question presented by this case – and that is the relevant inquiry. And, in any event, the SJC distinguished every single case that Yahoo presented in its petition.

Finally, Yahoo claims as follows:

> 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.

Petition at 21. This again is a blatant mischaracterization of the decision. The focus of the SJC's decision is on the concept of "lawful consent." Personal representatives of an estate in Massachusetts are fiduciaries who must always act in the best interests of the estate.

Yahoo's assertion that such fiduciaries might act on a "whim" is unsupportable hyperbole.

REASONS FOR DENYING YAHOO'S PETITION

Yahoo asks this Court to review the SJC's interpretation of the "lawful consent" provision of the SCA. Because there is no compelling reason for the Court to do so at this time, Yahoo's petition should be denied.

A. There Is No Compelling Reason for the Court to Grant Yahoo's Petition

Supreme Court Rule 10 provides a non-exhaustive list of factors the Court may consider in deciding whether there are "compelling reasons" for the Court to grant a writ of certiorari. None of these factors supports granting Yahoo's petition.

1. There Is No Conflict Among Federal Courts of Appeals on An Important Federal Question

No federal court of appeals has decided whether a decedent's fiduciary can offer "lawful consent" under the Stored Communications Act, 18 U.S.C. § 2702(b)(3). Thus, *a fortiori*, there can be no conflict among the circuits on this issue. This factor supports the denial of Yahoo's petition.

2. The SJC Decision Does Not Conflict with the Decision of Another State Court of Last Resort or of a United States Court of Appeals on An Important Federal Question

Similarly, other than the SJC, no state court of last resort has decided whether a decedent's fiduciary can offer "lawful consent" under 18 U.S.C. § 2702(b)(3). As a result there is no conflict that warrants the Court's intervention.

3. The SJC Did Not Decide An Important Question of Federal Law That Has Not Been, But Should Be, Settled By This Court

Yahoo appears to rely principally on factor (c) of Rule 10.[2] However, that factor likewise supports denial rather than allowance of Yahoo's petition.

While the outcome of this case is of obvious importance to the parties, the **federal** question at issue is not of sufficient importance to merit the Court's attention at this time. Whether emails are property of an estate is an important question of state property law properly reserved for the states. But the narrow question of federal law decided by the SJC is limited to who may provide "lawful consent." Yahoo's petition fails to establish that this is an issue of federal law of sufficient importance for this Court to intervene at this time.

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[2] Yahoo's brief makes no reference or citation to the factors listed in Supreme Court Rule 10.

In an attempt to bolster its claim that the petition raises a federal issue of national importance, Yahoo repeatedly relies on overstatement and hyperbole. For example, Yahoo proclaims that hundreds of millions of people have email accounts and all of them eventually will die. Yahoo is correct that the mortality rate in the United States is holding steady at 100%. But Yahoo's dire observation ignores the fact that a variety of protections already exist to provide for the orderly disposition of a decedent's digital assets.

In the first instance, users may provide express written instructions concerning post-mortem access to accounts. Such instructions can be provided in a will or by means of an electronic tool made available by the email provider. Indeed, Yahoo's putative amici in this case – Google and Facebook – provide such tools to make it easy for their users to decide for themselves. Yahoo notably does not.

Second, as noted in the petition, in the eight (8) years since the Ajemians filed their lawsuit, numerous states have enacted the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA") while others have enacted their own rules for the disposition of digital assets upon the death of the user. Yahoo's argument that those laws are inconsistent, thereby somehow requiring this Court's intervention, simply misses the mark. There is nothing "compelling" about different states having different laws governing state property rights. That is the prerogative of the various states – and that prerogative implicates no federal question, let alone an important one.

Third, in the remaining states, the courts have yet to decide if personal representatives are capable as a matter of state law of granting "lawful consent" under the provisions of the SCA. The SJC's decision that Massachusetts personal representatives may do so is not binding on any other state or federal court's interpretation of the SCA. Unless and until there is a critical mass of such decisions that provide a genuine conflict, there is no issue of "national importance" for the Court to decide.

Briefly put, Yahoo asks the Court to exercise its extraordinary certiorari powers to solve a problem that Yahoo has the power to make go away tomorrow simply by changing its email processes to include a vehicle for users to specify how they wish the contents of the account to be handled upon death. That Yahoo – unlike many of its competitors – has not done so is Yahoo's problem and not a matter of national importance.[3] There is no need for the Court to intervene.

B. The Court Need Not Exercise Jurisdiction At This Time

In asserting that the Court should exercise jurisdiction over this case, Yahoo relies on this Court's

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[3] In fact for at least the 2006-2016 time period, one of Yahoo's major competitors, Microsoft, had a written policy of providing to surviving family members a user's emails upon death. *See, e.g.*, Darrow and Ferrera, *Who Owns A Decedent's E-mails: Inheritable Probate Assets or Property of the Network?*, 10 N.Y.U. J. Legis. & Pub. Pol'y 281 (2007). Respondents are unaware of any civil or criminal proceedings resulting from Microsoft's policy.

decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In *Cox*, the Court identifies four categories of cases where circumstances may permit a departure from the requirement of finality for federal appellate jurisdiction. *Id.* at 477. The Court has explained that these circumstances are "very few" (*see Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)), and a "limited set" (*see O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982)). Still, Yahoo argues that this case presents sufficient justification for immediate review despite the fact that the SJC remanded the case for further proceedings in the probate court. Because this case does not fall into any of the four categories identified by *Cox*, and because there is no need or justification for the Court to immediately decide the federal issue, the Court should decline to exercise jurisdiction at this time.

The first category of cases identified by *Cox* arises where there are further proceedings yet to occur in the state courts but the federal issue is conclusive or the outcome of the further proceedings is preordained. *Cox*, 420 U.S. at 479. Yahoo's petition does not fit into this category because the SJC's decision interpreting the SCA is not conclusive of the state court proceedings, and the further proceedings are not preordained in that the Massachusetts courts have yet to finally determine whether Yahoo's terms of service argument bars the Ajemians from obtaining John's emails.

The second category of cases are those in which the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of

the outcome of future state court proceedings. *Id.* at 480. Yahoo's petition does not fit into this category because, if Yahoo prevails on its arguments below, the federal issue will be moot and not require decision.

The third category of cases are those in which the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had regardless of the outcome of the state court proceedings. *Id.* at 481. Here, in the event the Ajemians prevail in the state courts below, Yahoo would be entitled to seek this Court's review of the SJC's decision once a final judgment has been entered.[4] As a result, the third *Cox* category is inapplicable.

Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the petitioner might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, this Court may assume jurisdiction and decide the important federal issue. *Id.* at

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[4] If the probate court eventually rules against Yahoo and Yahoo appeals, other federal appeals courts or state courts of last resort may in the meantime have weighed in on what constitutes "lawful consent" under the SCA. This Court might at that time determine that certiorari is appropriate. *Cf. United States v. Ohio Power Co.*, 353 U.S. 98 (1957).

482-483. This category is inapplicable here because the SJC decision does nothing to erode an important federal policy. The SCA embodies a federal policy to provide privacy protections to electronic communications. It says nothing about – and there is no cognizable federal policy concerning – an estate administrator's access to such electronic communications. Tax returns and medical records are granted privacy protections by federal law, yet estate administrators are routinely granted access to such records without fear of eroding any federal policy. There is nothing "unique" or "urgent" here that changes the equation or requires the immediate attention of this Court, particularly where further proceedings are still pending below.

The SCA was enacted in 1986. In the ensuing 31 years there were **zero** federal appeals court decisions and **one** state court of last resort decision (the SJC's decision) determining whether "lawful consent" under the SCA is limited to the actual consent of the user. If this discreet issue of statutory construction were as important nationally as Yahoo posits, presumably there would be a robust body of appellate decisions by now. The dearth of such precedent is telling. Unless and until there are conflicting decisions on this issue from federal courts of appeals or state courts of last resort, there is no need or basis for the Court to decide this issue.

Finally, *Cox* involved a Georgia statute providing criminal and civil penalties for members of the press who publish the name of a rape victim. The Georgia Supreme Court ruled that the statute did not violate

the First or Fourteenth Amendment, but remanded the case to the trial court for resolution of remaining state law issues. In granting certiorari, the Supreme Court found that "[d]elaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom of the press under the First Amendment,' 'an uneasy and unsettled constitutional posture [that] could only harm the operation of a free press.'" *Cox*, 420 U.S. at 485-486, *quoting Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974). The present case lacks anything even remotely resembling the important First Amendment question or uneasy and unsettled constitutional posture that led the Court to exercise jurisdiction in *Cox*.

CONCLUSION

For the reasons set forth above, the Court should deny Yahoo's petition for a writ of certiorari.

Respectfully submitted,

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