No. 12-831

IN THE
Supreme Court of the United States

M. LEE JENNINGS,

Petitioner,

v.

HOLLY BROOME,

Respondent.

On Petition for a Writ of Certiorari to the South Carolina Supreme Court

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent disputes few of the significant factors that weigh mightily in favor of a grant of *certiorari*. For starters, she does not dispute the exceptional importance of the Stored Communications Act's ("SCA") e-mail privacy protections at issue in this case. Nor does she contest that these critical protections should apply consistently from jurisdiction to jurisdiction—or that they currently do not. She does not challenge the fact that e-mail is ubiquitous in our daily lives and does not respond, at all, to the nineteen national privacy, civil liberties, and consumer rights organizations urging the Court to grant *certiorari* to rectify the untenable uncertainty in the privacy of digital messages. *See* Amici Br. Elec. Privacy Info. Ctr., *et al.* And she

does not disagree that having a definitive interpretation of the SCA from this Court would benefit law enforcement, Internet service providers, and Internet users alike.

Instead, she endeavors to downplay the extent of the divergence in the case law—even as she admits the unmistakable "tension" that exists—and tries to write off the split between the South Carolina Supreme Court and the Ninth Circuit as "illusory." Opp. 7, 16. As a last resort, she claims there are purported "vehicle" problems with the case. None of these contentions provides a reason to deny *certiorari*.

As for the first argument, there is a definite split, and it is plainly outcome-determinative. Three Justices of the five-member South Carolina Supreme Court clearly rejected the interpretation of the SCA that the Ninth Circuit offered in *Theofel* v. *Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004). Respondent agrees that two of the South Carolina Justices did so, but describes the third Justice as "not categorically foreclos[ing] open e-mails from being 'in electronic storage' under subsection (B)." Opp. 11. That description is flatly inconsistent with what the third Justice—Justice Pleicones—said. He said: "[S]ubsection (B) * * * *does not include* an original e-mail that * * * *remains on the provider's server after the recipient has opened it*." Pet. App. 18a n.4. It is hard to imagine a clearer, more "categorical[ ]" statement than that. As Professor Kerr, Respondent's "leading commentator" (Opp. 19), has stated, the decision below "'creates a clear split with *Theofel*.'" Pet. 15 (citation omitted). Respondent cannot erase this split by mischaracterizing Justice Pleicones' opinion.

Respondent's outcome-determinative argument is just as illusory. The Opposition repeatedly asserts that this case would have come out the same way even if it had been litigated in the Ninth Circuit. Opp. 8, 12-13. Not so. In the Ninth Circuit opinion authored by Judge Kozinksi, "prior access is *irrelevant* to whether the messages * * * were in electronic storage." *Theofel*, 359 F.3d at 1071 (emphasis added). In South Carolina, however, prior access is now not only relevant, it is *determinative* of whether a message is in electronic storage. As a result, Petitioner's e-mails would have been in electronic storage under the Ninth Circuit's interpretation; they were not under South Carolina's.

The supposed vehicle problems that Respondent spends significant effort concocting are chimerical. The meaning of the term "electronic storage"—on which all of the SCA's privacy protections hinge—is directly teed up for this Court to resolve. The facts are clear and not in dispute. And the guidance the Court can provide is sorely needed. There is no reason for the Court to wait for a "criminal case" presenting the same question, when the statutory question at the heart of this case is identical to the criminal one. If any doubt exists, the Court should, at a minimum, call for the views of the Solicitor General. But that step is not necessary, given the deep need for this Court to provide guidance about this foundational statute at a time when the lives of nearly all Americans are online.

In the end, the Opposition amounts to a plea for more percolation. While ordinarily a conflict between a State Supreme Court and the Ninth Circuit may call for additional percolation, it would be a mistake here. The ambiguity in this important

law has "percolated" for thirty years, and courts are in disarray. What law enforcement, technology companies, and American citizens need now is not "percolation"; they need an answer. And this case presents the rare opportunity to provide one. The Court should grant the writ.

ARGUMENT

CERTIORARI IS WARRANTED.

A. The Split Between The Decision Below and *Theofel* Is Outcome-Determinative.

In this case, a majority of the South Carolina Supreme Court unequivocally rejected *Theofel*'s central holding in interpreting when emails are within the SCA's privacy protections. Those three Justices created a clear split between South Carolina and the Ninth Circuit as to which emails are protected and which emails are not. This Court should grant *certiorari* to resolve it.

Theofel held that "prior access is irrelevant to whether [a] message[] [is] in electronic storage." 359 F.3d at 1077. In particular, the Ninth Circuit held that "messages remaining on an ISP's server after delivery * * * are stored 'for purposes of backup protection,'" *id.* at 1075 (quoting 18 U.S.C. § 2510(17)(B)), and thus "literally fall within the statutory definition" of electronic storage, *id.* Chief Justice Toal and Justice Beatty "reject[ed]" this holding "entirely," which Respondent does not dispute. Pet. App. 12a. Justice Pleicones, in his separate opinion, wrote that "[t]he 'backup' covered by subsection (B) * * * does not include an original e-mail that has been transmitted to the recipient and remains on the provider's server after the recipient has opened or downloaded it." Pet. App. 18a n.4.

Respondent's claim that "Justice Pleicones' approach does not categorically foreclose open e-mails from being 'in electronic storage' under subsection (B)" is wrong. Opp. 11. Justice Pleicones could hardly have said it more clearly: Subsection (B) "*does not include*" an e-mail that "remains on the provider's server *after the recipient has opened it*." Pet. App. 18a (emphases added). Justice Pleicones answered "no" to the question presented; the Ninth Circuit answered "yes." That is a "conflict" under any conceivable definition.

This conflict, moreover, is outcome-determinative. Respondent is wrong to suggest that this case would be decided the same way in the Ninth Circuit—despite the South Carolina Supreme Court's express "rejection" of *Theofel*. The Ninth Circuit held that "prior access is *irrelevant*" to whether a message is "in electronic storage." 359 F.3d at 1077 (emphasis added). Under the decision below, a web-based e-mail message is in electronic storage until it is accessed, and not in electronic storage after it has been accessed. In other words, far from "irrelevant," prior access is the precise fact on which the case turns.

The conflict is sharply reinforced by the Ninth Circuit's later decision in *Quon* v. *Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 2619 (2010). In *Quon*, the plaintiffs used a text-messaging service operated by the defendant, Arch Wireless. Arch Wireless would "archive" a copy of every text message sent and received by a user. The plaintiffs' employer asked Arch Wireless to turn over copies of their text messages. When Arch Wireless complied, the plaintiffs sued it for violating § 2702(a)(1) of the

SCA, which prohibits an "electronic communications service" (ECS) from "divulg[ing] to any person or entity the contents of a communication while it is in electronic storage." As in this case, *Quon* turned on whether the archived text messages were in electronic storage.

Arch Wireless argued that the messages were not in electronic storage, because Arch Wireless was only holding the messages "for storage purposes," and not "for backup purposes," and thus they did not fall within subsection (B)—just as Justice Hearn argued below. 529 F.3d at 902. But the Ninth Circuit squarely rejected that argument: "*Theofel*'s holding—that the e-mail messages stored on [a provider's] server after delivery were for 'backup protection,' and that [a provider] was undisputedly an ECS—forecloses Arch Wireless's position." *Id.* at 903. Notably, the court *never* asked whether copies of the relevant messages were also stored on the plaintiffs' pagers. *Quon* thus confirms that *Theofel* meant exactly what it said: "prior access is irrelevant" to whether a communication is "in electronic storage." That holding is in direct conflict with the decision below, and determines the outcome of this case.

Respondent's assertion that this case would not have come out differently in the Ninth Circuit is grounded in one sentence in *Theofel*: "A remote computing service might be the only place a user stores his messages; in that case, the messages are not stored for backup purposes." 359 F.3d at 1077; *see* Opp. 13. But that sentence is by its own terms inapplicable. It addresses a *remote computing service*, not an electronic communications service,

which is at issue in this case.[1] Respondent does not dispute that "a provider of e-mail services * * * can provide both RCS and ECS services for copies of a particular e-mail." Opp. 3. And Yahoo is clearly acting in that dual capacity here. *See* 18 U.S.C. § 2510(15). Thus, *Theofel* dicta about what happens when a "remote computing service is the *only* place user stores his messages" is simply irrelevant. The fact that Yahoo *also* meets the statutory definition of a remote computing service does not authorize Respondent or law enforcement to violate the privacy provisions related to electronic communications services.

B. The Differing Interpretations Of The SCA Have Real-Life Consequences For All E-mail Users.

Respondent calls this dispute "academic" and "hypothetical," admonishing the Court not to "sit to satisfy a scholarly interest" in legal issues. Opp. 17-18. It is hard to imagine, however, a case with more concrete ramifications. And not only for the litigants themselves: The Court's decision in this case will affect every American that regularly uses e-mail, text messages, Facebook, or a host of other Internet applications. Underscoring the real word consequences, nineteen privacy, civil liberties, and consumer organizations submitted an amicus brief in support of the Petitioner that testifies to the far-reaching effects a decision in this case will have.

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[1] If, for example, someone who uses web-based e-mail downloaded opened messages from the server, and then uploaded an archive of those messages into a folder on a cloud-based computing service, such as Dropbox, Dropbox would be acting solely as a remote computing service and the messages in the Dropbox folder would not be in electronic storage. *See* 18 U.S.C. § 2711(2).

Respondent does not take issue with any of these points.

Respondent dismisses the Google statistics—which show that the government requests user data from nearly a hundred accounts per day—by wrongly asserting that the data "do[es] not specify whether these requests are made pursuant to the procedures set forth in the SCA." Opp. 24. In fact, it does. The Google Transparency Report states that a subpoena is "[b]y far" the "most common" type of legal request it receives from the U.S. government, "followed by search warrants." Google Transparency Report, Legal Process.[2] And it explains: "A federal statute called the Electronic Communications Privacy Act, known as ECPA, regulates how a government agency can use these types of legal process to compel companies like Google to disclose information about users." *Id.* The Stored Communications Act is the relevant part of ECPA.

C. This Case Is An Ideal Vehicle To Decide The Question Presented.

This case has clean and undisputed material facts. The e-mails in question were stored in Petitioner's Yahoo e-mail account, he had already opened and read them, he did not use his Yahoo account in conjunction with Outlook or any other similar program that downloads e-mails, and Respondent accessed these e-mails "without authorization." The pure legal question is whether e-mails are in "electronic storage" in these circumstances. *See* 18 U.S.C. § 2701(a).

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[2] *Available at* http://www.google.com/transparencyreport/userdatarequests/legalprocess/.

None of the purported vehicle problems Respondent points to in the Opposition hold water. Respondent firsts contends that the Court should not address the question presented in "a case between two private individuals" because the most important function of the SCA is to regulate law enforcement. Opp. 20. That is unpersuasive. The definition of electronic storage is fixed. It does not vary depending upon whether the issue arises in a criminal or a civil case. That a decision from the Court will have broad application—in both the civil and criminal context—on an issue that arises every day only underscores the importance and cert-worthiness of the issue.

The Opposition (at 22-23) strives to assure the Court that the issue "will generate more federal decisions" in the "law enforcement context." But the best support it can muster to substantiate this assurance is a single district court case that did not even result in a decision. That case is the exception that proves the rule: the SCA is rarely litigated in the criminal context, and for a straightforward reason. Such a case requires an Internet service provider—whose privacy interests are not directly at stake—to disobey a subpoena and risk contempt liability just to prove a point. This case is not just a good vehicle; it may well be the only vehicle. The SCA has existed for almost three decades and is invoked day in and day out by law enforcement. Yet, no appellate court has *ever* considered the meaning of "electronic storage" in a criminal case. Respondent has no answer to the essential point that the lack of a suppression remedy means that these intrusive searches are not challenged. Pet. 21. This civil case—containing both clean facts and a clear

dispute with *Theofel*—presents a rare opportunity for the Court to clarify the SCA.

The fact that the Opposition suggests *Lopez* v. *Pena*, 2013 WL 819373 (N.D. Tex. Mar. 5, 2013), would be a better vehicle demonstrates how far off-base its "vehicle" arguments are. *Pena* was a *pro se* suit against a Customs and Border Patrol officer in his individual capacity under the SCA. The officer accessed the plaintiff's e-mail account after discovering his password during an inspection. Respondent offers no reason that *Pena*, or a case like it, would offer any additional factual information that would aid the Court in answering the purely legal question presented by the petition. Moreover, *Pena* was dismissed under Rule 12(b)(6), on qualified immunity grounds because there was no "clearly established" federal law on the issue. The lack of clearly established federal law is exactly the problem. As the dismissal order explains, "courts diverge on whether an ECS provider continues to provide ECS post-opening, and in turn whether subsection B exists on a timeline at all distinct from that of subsection A." *Id.* at *5. There is no "clearly established understanding of whether backup protection extends to opened emails." *Id.* Indeed, "courts are in hot debate over [the] meaning" of electronic storage. *Id.* at *4. It is precisely this "hot debate" that the Court should now resolve.

The Opposition also stresses that another statute besides the SCA—the Computer Fraud and Abuse Act—addresses e-mail privacy. Opp. 25. The existence of that statute has no bearing on *certiorari* here. Its civil action is only available if a person can prove a "loss" of "at least $5,000 in value," which will often be impossible. 18 U.S.C. § 1030(g),

(c)(4)(A)(i)(I); *see, e.g. Mintz* v. *Mark Bartelstein & Assocs.*, 2012 WL 5391779 (C.D. Cal. 2012). The injury to Petitioner in this case, for example, was not financial; it was the invasion of his personal privacy. Even more significant, the CFAA does not address two of the primary contexts covered by the SCA: law enforcement access to e-mail and voluntary disclosure by e-mail service providers. These are crucial aspects of the SCA, and Respondent has not pointed to a single other statute that covers them. The fact that the CFAA provides other protections in other contexts does nothing to undercut the urgency or wisdom of interpreting the SCA now.

D. The Decision Below Is Wrong On The Merits.

The Opposition spends all of two pages half-heartedly defending the decision below. Its main contention is that "such communication" in subsection (B) refers only to communications that already satisfy subsection (A). Opp. 27-28. But as Judge Kozinksi cogently explained in *Theofel*, that is wrong "as a matter of grammar." 359 F.3d at 1076. Moreover, that reading renders subsection (B) completely superfluous. Respondent does not even address—let alone offer a persuasive response to—that fatal flaw in her reading. *Certiorari* is warranted to reverse this deeply problematic reading, which has enormous implications for the lives of every American.

The Petition explained that interpreting the SCA's protections to hinge on whether another copy of a communication exists would be unworkable. Law enforcement, for example, would be compelled to ascertain whether a suspect uses e-mail in conjunction with Outlook, a smart-phone, or some other mode of downloading. Respondent's only

counter-argument is that her reading of the statute is not "predicated on downloading"; rather, the meaning of electronic storage would turn "on the existence *vel non* of 'another copy [of the communication] in *any other* location.' " Opp. 27 (quoting Pet. App. 7a) (emphasis in Opp.). This does not make implementing the statute any more feasible. For one thing, it does nothing to ameliorate the fact that law enforcement would still be forced to undertake burdensome factual investigation just to know whether e-mail is accessible in the first place.

There is yet another flaw in Respondent's reading: As the *amici* explain, cloud-based e-mail providers *always* save several copies of each message on several different servers. They "have invested heavily in data center storage in order to ensure redundancy." EPIC Amici Br. 17. In Microsoft's Hotmail service, for example, "multiple servers * * * keep multiple copies of your data that are constantly synchronized." *Id.* at 19-20. Therefore, when it comes to web-mail, "every copy is a backup." *Id.* at 19. Respondent's concession that the existence of another copy "in *any other* location" is enough to transform a stored e-mail into a backup is fatal in light of the fact that there are always several copies of any web-based e-mail. In short, Respondent's reading—like the decision below—"entirely misunderstands the current state of data storage technology." *Id.* at 17. *Certiorari* should be granted to correct this misunderstanding.

CONCLUSION

The split is unmistakable and outcome-determinative, this case is an ideal vehicle for resolving the question presented, and the decision

below is indefensible on the merits. The petition should be granted.

Respectfully submitted,

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