

No. 12-831

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IN THE  
*Supreme Court of the United States*

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M. LEE JENNINGS,

*Petitioner,*

v.

HOLLY BROOME,

*Respondent.*

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

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**BRIEF OF *AMICI CURIAE* NINETEEN  
NATIONAL PRIVACY, CIVIL LIBERTIES, AND  
CONSUMER ORGANIZATIONS IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI**

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## INTEREST OF THE *AMICI CURIAE*

The privacy of e-mail and other electronic communications is a critically important issue for every American.<sup>1</sup> The *amici* organizations are focused on protecting privacy, consumer rights, and civil liberties. Electronic communications are an essential component of our lives. Messages are exchanged every day in businesses, schools, political groups, advocacy organizations, newspapers, and between billions of individuals across the world. Congress recognized in 1986 when it enacted the Electronic Communications Privacy Act that without privacy there could be no commerce or vibrant exchange of ideas across digital networks. The privacy of electronic communications is even more important today than it was when ECPA was enacted, and the Court must act to clarify the application of privacy rules to digital messages.

This brief is filed on behalf of nineteen national privacy, civil liberties, and consumer rights organizations.

### *Privacy and Civil Liberties Organizations*

#### Electronic Privacy Information Center

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to

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<sup>1</sup> Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.2. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC routinely participates as *amicus curiae* before this Court and other courts in cases concerning federal privacy statutes: *Maracich v. Spears*, 133 S. Ct. 98 (2012); *FAA v. Cooper*, 132 S. Ct. 1441 (2012); *Ben Joffe v. Google*, No. 11-17483 (9th Cir. Oct. 17, 2011); *United States v. Councilman*, 418 F.3d 67 (5th Cir. 2005).

#### Bill of Rights Defense Committee

The Bill of Rights Defense Committee (“BORDC”) is a national non-profit organization. BORDC defends rights, liberties, and the rule of law when they are threatened by overbroad national security and counter-terrorism policies. It pursues that end by supporting an ideologically, ethnically, geographically, and generationally diverse grassroots movement and by encouraging widespread civic participation.

#### Center for Digital Democracy

The Center for Digital Democracy (CDD) is recognized as one of the leading consumer protection and privacy organizations in the United States. CDD’s public education programs are focused on informing consumers, policy makers, and the press about contemporary digital marketing issues, including its impact on public health, children and youth, and financial services.

### Center for Financial Privacy and Human Rights

The Center for Financial Privacy and Human Rights (“CFPHR”) was founded in 2005 to defend privacy, civil liberties, and market economics. The Center is a non-profit human rights and civil liberties organization whose core mission recognizes traditional economic rights as a necessary foundation for a broad understanding of human rights. CFPHR is part of the Liberty and Privacy Network, a non-governmental advocacy and research 501(c)(3) organization.

### Center for Media and Democracy

The Center for Media and Democracy (CMD) is a non-profit investigative reporting group. Our reporting and analysis focus on exposing corporate spin and government propaganda. We publish PRWatch, SourceWatch, and BanksterUSA.

### Consumer Action

Consumer Action is a non-profit organization that has championed the rights of underrepresented consumers nationwide since 1971. Throughout its history, the organization has dedicated its resources to promoting financial and consumer literacy and advocating for consumer rights in both the media and before lawmakers to promote economic justice for all.

### Consumer Watchdog

Consumer Watchdog is a tax-exempt 501(c)(3) nonprofit organization dedicated to educating and advocating on behalf of consumers for over 25 years.

Its mission is to provide an effective voice for the public interest. Consumer Watchdog's programs include health care reform, oversight of insurance rates, energy policy, protecting privacy rights, protecting legal rights, corporate reform, and political accountability.

#### Federation of Genealogical Societies

The Federation of Genealogical Societies (FGS) was founded in 1976 and represents the members of hundreds of genealogical societies.

#### The FoolProof Initiative

FoolProof provides a high school curriculum to all fifty states, which teaches privacy issues and concerns to young people.

#### Remar Sutton, Founder, The Privacy Rights Now Coalition

The Coalition highlights the work of dozens of privacy groups nationally.

#### Knowledge Ecology International

Knowledge Ecology International (KEI) is a non-profit organization that searches for better outcomes, including new solutions, to the management of knowledge resources. KEI focuses on the management of these resources in the context of social justice.

### The National Workrights Institute

The National Workrights Institute is a not-for-profit research and advocacy organization whose mission is increasing protection for human rights in the workplace.

### Liberty Coalition

The Liberty Coalition works to help organize, support, and coordinate trans-partisan public policy activities related to civil liberties and basic human rights. We work in conjunction with groups of partner organizations that are interested in preserving the Bill of Rights, personal autonomy, and individual privacy.

### Patient Privacy Rights

Patient Privacy Rights (PPR) works to empower individuals and prevent widespread discrimination based on health information using a grassroots, community organizing approach. We educate consumers, champion smart policies, and expose and hold industry and the government accountable.

### Privacy Activism

Privacy Activism is a non-profit organization whose goal is to enable people to make well-informed decisions about the importance of privacy on both a personal and societal level. To achieve this goal we use graphics, videos, games, and stories to make privacy more relevant to every day life, and to show the ramifications of privacy losses. We take great interest in this case because email has become the

method in which most people communicate with colleagues, business partners, spouses, and friends. A loss of privacy in these communications would burden both economic and social activities.

### Privacy Camp

Privacy Camp is a non-profit organization that holds educational events worldwide for privacy advocates. In addition, Privacy Camp hosts Privacy Chat or #PrivChat every Tuesday at Noon ET where privacy advocates, industry representatives, academics, and consumers discuss the latest privacy stories of the week. More about Privacy Camp can be found at our twitter page @PrivacyCamp.

### Privacy Rights Clearinghouse

The Privacy Rights Clearinghouse (PRC) is a nonprofit consumer education and advocacy organization based in San Diego, California. Established in 1992, the PRC focuses on consumers' rights and interests relating to informational privacy, answers individual consumer inquiries, and maintains a robust website of practical privacy protection tips.

### Privacy Times

Since 1981, Privacy Times has provided its readers with accurate reporting, objective analysis and thoughtful insight into the events that shape the ongoing debate over privacy and Freedom of Information.

World Privacy Forum

The World Privacy Forum is a public interest research group based in San Diego, California. WPF was founded in 2002 to conduct original research and consumer education on issues relating to privacy and technology, understanding that the effectiveness of established privacy protections for consumer data may change as technologies shift and mature.

## SUMMARY OF THE ARGUMENT

This case presents a clear conflict in an essential federal privacy statute. The decision below is directly at odds with the recent holding of a federal appeals court. Left unresolved, courts will lack clear direction as to the interpretation of a key privacy law, and Internet users, service providers, and government agencies will be left without guidance as to their rights and responsibilities.

The question of what constitutes electronic storage is central to the Electronic Communications Privacy Act now that the majority of e-mails and other messages are stored and accessed remotely by Internet users. Cloud-based services have become standard for personal use, business use, educational use, and even governmental use. Internet companies routinely synchronize copies of messages and files across many devices and servers, making the question of what constitutes “electronic storage” the keystone of the federal communications privacy law.

Rather than provide useful guidance, the decision below will create substantial confusion. The problem is particularly acute for Internet users. Privacy protection is the necessary pre-condition for a functional communications network. Privacy protection enables the free exchange of ideas as well as the growth of online commerce. This Court needs to act to provide clarity in the application of federal privacy law to digital communications.



**ARGUMENT**

Congress recognized the importance of protecting electronic communications when it passed the Electronic Communications Privacy Act of 1986 (“ECPA”), Pub. L. 99-508, 100 Stat. 1848. It recognized a “gap” in the protection of digital messages, and sought to provide protections equal to those afforded traditional mail and telephone services. As Congress noted, this gap creates uncertainty that can

discourage potential customers from using innovative communications systems. It probably encourages unauthorized users to obtain access to communications to which they are not a party. It may discourage American businesses from developing new innovative forms of telecommunications and computer technology. The lack of clear standards may expose law enforcement officers to liability and may endanger the admissibility of evidence.

More importantly, the law must advance with the technology to ensure the continued vitality of the fourth amendment. Privacy cannot be left to depend solely on physical protection, or it will gradually erode as technology advances.

S. Rep. No. 99-541, at 5 (1986). This case presents the same kind of legal uncertainty that Congress sought to prevent when it passed the ECPA, and the Court must act to provide clarity in this federal privacy law.

I. **Given the Central Importance of E-mail to Our Economic and Social Activities, It Is Critical to Clarify the Application of Current Electronic Privacy Rules**

***A. E-mail is the Primary Method of Electronic Communication and an Important Part of All Modern Business, Education, and Social Life***

The use of e-mail and other electronic messaging services has expanded rapidly over the last two decades. When Congress first enacted the ECPA, e-mail was a new technology with unknown potential. Since then it has become an essential component of all modern communications systems.<sup>2</sup>

Recent industry reports estimate that there are more than two billion e-mail users worldwide. Thomas Buckley, The Radicati Group, Inc., *Executive Summary: Email Market, 2012-2016*, at 2 (Sara

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<sup>2</sup> From 1981 to 1995, a search of the keyword ‘email’ in the New York Times article archive generates 268 articles, and a search isolated between 1995-1998 generates 1,564 results. Finally, a search that isolates 1998 to 2013 yields 87,042 articles. Obtained by a search of the word ‘email’ on <http://www.nytimes.com/ref/membercenter/nytarchive.html> on January 15, 2013. By 1989, the New York Times – which had published the two earlier articles doubting email’s future – recognized that email had become increasingly prevalent in society: “The number of installed publicly accessible electronic mailboxes in the United States grew to 1.8 million from 210,000 between 1980 and 1989, while the number of in-house computer mail systems jumped to 6.8 million from 220,000.” John Markoff, *Computer Mail Gaining a Market*, N.Y. Times, Dec. 26, 1989, <http://www.nytimes.com/1989/12/26/business/computer-mail-gaining-a-market.html?scp=9&sq=email&st=nyt>.

Radicati ed., Oct. 22, 2012)<sup>3</sup> This is nearly one-third of the world's population,<sup>4</sup> and the user base has grown an estimated 50% over the past three years alone.<sup>5</sup> A recent Pew study found that “[a]mong online adults, 92% use email, with 61% using it on an average day.” Kristen Purcell, Pew Internet & Am. Life Project, *Search and Email Still Top the List of Most Popular Online Activities 2* (Aug. 9, 2011).<sup>6</sup> Not only is e-mail use almost universal, it has become habitual.

The benefits of e-mail in the workplace were recognized early on. See John Markoff, *Computer Mail Gaining a Market*, N.Y. Times, Dec. 26, 1989. Indeed, the initial growth of email was attributed, in part, to the usefulness and ease with which it allowed employees to “append spoken voice notes to standard text messages and documents” and cut “through layers of corporate bureaucracy, more than does the

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<sup>3</sup> Available at <http://www.radicati.com/wp/wp-content/uploads/2012/10/Email-Market-2012-2016-Executive-Summary.pdf>.

<sup>4</sup> World population is at 7,059,863,462 as of January 15, 2013. *U.S. & World Population Clocks*, United States Census Bureau, <http://www.census.gov/main/www/popclock.html> (last visited Jan. 15, 2013).

<sup>5</sup> A May 2009 Radicati report announced that there were 1.4 billion email users worldwide. Masha Khmartseva, The Radicati Group, Inc., *Executive Summary: Email Statistics Report, 2009-2013*, at 2 (Sara Radicati ed., May 6, 2009), <http://www.radicati.com/wp/wp-content/uploads/2009/05/email-stats-report-exec-summary.pdf>.

<sup>6</sup> Available at [http://pewinternet.org/~media/Files/Reports/2011/PIP\\_Search-and-Email.pdf](http://pewinternet.org/~media/Files/Reports/2011/PIP_Search-and-Email.pdf).

telephone or paper mail . . . [since] a middle-level manager is more likely to send a message to the chief executive over the computer than to telephone or place a note in the office mail.” *Id.* As a result, businesses were early adopters of new communications technology. *See id.* (“[I]n many corporations electronic mail is becoming a significant alternative to the fax machine, the telephone and to what electronic mail advocates like to call snail mail, or paper mail”).

These early predictions have been borne out more than anyone could have imagined in the late 1980s. According to a recent Pew study, more than 80% of workers use e-mail and find that it improves their ability to do their job. Mary Madden & Sydney Jones, Pew Internet & Am. Life Project, *Networked Workers* (Sept. 24, 2008).<sup>7</sup> This technology is especially important because it improves the ability to communicate with coworkers, and it enables employees to stay connected even when they are out of the office. *Id.*

In addition to e-mail, other electronic communications services are increasingly popular. For example, Microsoft, Facebook, and Google all provide messaging services, and these services typically include archive of historical conversations.<sup>8</sup>

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<sup>7</sup> Available at [http://pewinternet.org/~media/Files/Reports/2008/PIP\\_Networked\\_Workers\\_FINAL.pdf](http://pewinternet.org/~media/Files/Reports/2008/PIP_Networked_Workers_FINAL.pdf).

<sup>8</sup> *See, e.g., Chat History*, Google Talk Help, [http://support.google.com/talk/answer/29289?hl=en&ref\\_topic=1187](http://support.google.com/talk/answer/29289?hl=en&ref_topic=1187) (last visited on Jan. 17, 2013); *Changing Your Chat History Settings*, Google Talk Help,

This new mix of instant messaging and e-mail services provides users with a centralized repository of communications that they can access whenever and wherever they are. The increasing use of e-mail and other electronic messaging services underscores the need to clarify the privacy protections applicable to stored messages. Users are sending billions of messages each day, and the largest telecommunications companies in the United States are responsible for ensuring the privacy of their users' messages.

***B. The Increased Use of Cloud-based E-mail Services Among Government, Businesses, Education Institutions, and Consumers Heightens the Need for Clarity***

As storage costs have decreased and users have embraced mobile devices, cloud-based email has become commonplace. The largest telecommunications providers, including Google and Microsoft, currently offer cloud-based communications services. These services are being widely adopted by universities, government agencies, and businesses. This case directly implicates the degree of legal protection afforded electronic messages maintained by these providers, and all users will be affected by the outcome.

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<http://support.google.com/chat/bin/answer.py?hl=en&answer=29290&rd=1> (last visited Jan. 17, 2013); *Basics*, Facebook Messaging Help, <https://www.facebook.com/help/336759363070078/> (last visited Jan. 17, 2013).

Federal agencies have been using cloud-based systems since 2010. Steve Hoffman, U.S. Gen. Servs. Admin., No. 10694, *GSA Becomes First Federal Agency to Move Email to the Cloud Agencywide* (Dec. 1, 2010).<sup>9</sup> Google's cloud-based service, Google Apps for Government, is currently used by government entities in 45 states. Sundar Pichai, *Chrome & Apps @ Google I/O: Your Web, Everywhere*, Google Official Blog (Jun. 28, 2012).<sup>10</sup> Similarly, Microsoft Office 365 for Government has been adopted by federal, state, and local entities such as the City of Chicago, the Environmental Protection Agency, and the Federal Aviation Administration. *Microsoft 365 for Government*, Microsoft.<sup>11</sup>

The use of cloud-based services has grown rapidly in the business sector, especially for small entities. Small business spending on cloud technology increased by 41% from 2010 to 2011, and was projected to grow by another 25% in 2012. Cicely K. Dyson, *Can the Cloud Help Small Businesses*, Wall

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<sup>9</sup> Available at <http://www.gsa.gov/portal/content/208417>.

<sup>10</sup> <http://googleblog.blogspot.co.at/2012/06/chrome-apps-google-io-your-web.html>.

<sup>11</sup> <http://www.microsoft.com/industry/government/products/office/365/default.aspx> (last visited Jan. 16, 2013). *see also* Angela Moscaritolo, *Chicago Moving Employee Email, Apps to Microsoft Cloud*, PC Magazine (Jan. 4, 2013), <http://www.pcmag.com/article2/0,2817,2413870,00.asp>; Josh Henretig, *EPA Migrating to Microsoft Cloud*, Microsoft Green Blog (Oct. 31, 2012), <http://blogs.msdn.com/b/microsoft-green/archive/2012/10/31/epa-migrating-to-microsoft-cloud.aspx>.

Street Journal, Jan. 9, 2013.<sup>12</sup> The amount of email activity generated by the business community is staggering: one survey estimated that the business users sent, on average, 41 email messages per day, and received 100 email messages per day. Quoc Hoang, The Radicati Group, Inc., *Survey: Corporate Email, 2011-2012*, at 1-3 (Sara Radicati ed., 2011).<sup>13</sup> As businesses increasingly adopt cloud-based services, this activity will migrate to the cloud as well.

One of the major advantages of cloud-based e-mail is the nearly unlimited storage it provides for archived messages.<sup>14</sup> As Yahoo! describes, “[y]ou never need to delete another email, unless you want to.” *How Much Storage Space Do I Have in Yahoo!*

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<sup>12</sup> Available at

<http://online.wsj.com/article/SB10001424127887323706704578230641145851624.html>.

<sup>13</sup> Available at <http://www.radicati.com/wp/wp-content/uploads/2011/09/Survey-Corporate-Email-2011-2012-Executive-Summary.pdf>.

<sup>14</sup> Gmail offers 10.332 gigs (as of Jan. 14, 2013) of free storage for emails, and storage is constantly increasing. Users are encouraged to “archive” their messages rather than delete them so that they can access them in future. From the Google Help website: “[d]eleting unimportant mail is a great way to free up some of your storage, but with Gmail's free storage, you can probably keep those messages, too! If it's possible that you'll need a message or conversation in the future, we recommend archiving.” *Archiving vs. Deleting*, Gmail Help, <https://support.google.com/mail/bin/answer.py?hl=en&answer=32608&topic=1669015&ctx=topic> (last visited Jan. 16, 2013). Outlook has “virtually unlimited storage” for free. *Compare Outlook.com*, Windows, <http://windows.microsoft.com/en-US/windows/outlook-compare> (last visited Jan. 16, 2013).

*Mail?*, Yahoo! Help.<sup>15</sup> This is particularly relevant to the interpretation of protected “electronic storage” under ECPA. The three largest e-mail service providers all offer virtually unlimited storage and encourage users to retain messages rather than delete them. Indeed, these companies compete against each other to provide the most storage on the market.<sup>16</sup> As a result, users no longer need to delete messages, and they are more likely to keep all email messages “just in case.”<sup>17</sup> A wealth of personal and private messages are now stored remotely in the cloud, and their protection depends on the interpretation of “electronic storage” under ECPA.

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<sup>15</sup>[http://help.yahoo.com/kb/index?page=content&y=PROD\\_MAIL\\_ML&locale=en\\_US&id=SLN4702&pir=7HthGQlibUlfPalRk9tbOEXwzlWdqV6ynVEdNQ](http://help.yahoo.com/kb/index?page=content&y=PROD_MAIL_ML&locale=en_US&id=SLN4702&pir=7HthGQlibUlfPalRk9tbOEXwzlWdqV6ynVEdNQ). (last visited Jan. 16, 2013).

<sup>16</sup> See *Compare Outlook.com*, Windows, <http://windows.microsoft.com/en-US/windows/outlook-compare> (last visited Jan. 16, 2013), which compares Hotmail/Outlook to Gmail; Jim Hu, *Yahoo Boosts Free E-mail Storage to 100MB*, CNET News (May 13, 2004), [http://news.cnet.com/2100-1032\\_3-5212262.html?tag=nefd.top](http://news.cnet.com/2100-1032_3-5212262.html?tag=nefd.top), which also demonstrates how dramatically email storage has expanded in the past eight years; Jeremy Kirk, *Microsoft Trumps Google on Free E-mail Storage Limit*, InfoWorld (Aug. 14 2007), <http://www.infoworld.com/d/developer-world/microsoft-trumps-google-free-e-mail-storage-limit-456>.

<sup>17</sup> See Todd Yamasaki, The Radicati Group, Inc., *Information Archiving Market, 2012-2016* (Sara Radicati ed., 2012), available at <http://www.radicati.com/wp/wp-content/uploads/2012/07/Information-Archiving-Market-2012-2016-Executive-Summary.pdf>.



***C. All Service Providers Maintain Redundant Copies to Ensure Backup Protection, and the Decision Below Will Only Cause Harmful Confusion***

The decision below will cause real confusion for e-mail users, service providers, and legislators alike. This is especially evident in the court's confused analysis of the significance of redundant or "backup" copies. The justices disagreed over when a message is "stored for backup purposes" under Section 2510(17)(B) based on either (1) the user's decision to keep multiple copies, or (2) the service provider's creation or maintenance of a backup copy.<sup>18</sup> This analysis entirely misunderstands the current state of data storage technology.

The most critical component of any electronic communications service is its message data. See Microsoft, *High Availability and Site Resilience* (2012).<sup>19</sup> See also Sanjay Ghemawat et al., *The Google File System* (2003).<sup>20</sup> It is especially important for cloud-based e-mail providers to ensure that stored messages will not be lost or unintentionally deleted. As a result, these providers have invested heavily in data center storage in order to ensure redundancy. For example, Google's goal is to provide their users with "zero-loss" of stored data in all circumstances.

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<sup>18</sup> The justices also disagreed about the relevance of whether the message has been "delivered" or "opened" by the user. See *Jennings v. Jennings*, No. 27177, 2012 WL 4808545 (S.C. Oct. 10, 2012).

<sup>19</sup> <http://technet.microsoft.com/en-us/library/dd638137.aspx> (last modified Nov. 13, 2012).

<sup>20</sup> Available at <http://research.google.com/archive/gfs.html>.

See Rajen Sheth, Senior Product Manager, Google Apps, *Disaster Recovery by Google*, Google Enterprise Blog (Mar. 4, 2010).<sup>21</sup> Their solution involves the use of “live synchronous replication: every action you take in Gmail is simultaneously replicated in two data centers at once.” *Id.* It would be inaccurate to characterize – as did the decision below, Pet. App. 7a – a message stored on such a server as the “only copy.” See Orin Kerr, *South Carolina Supreme Court Creates Split with Ninth Circuit on Privacy in Stored E-mails – and Divides 2-2-1 on the Rationale*, Volokh Conspiracy (Oct. 10, 2012).<sup>22</sup>

One major innovation in data storage and security over the last decade has been the development of efficient and inexpensive methods for automatic storage and backup of critical data. See generally The Exchange Team, *Robert’s Rules of Exchange: Storage Planning and Testing*, Technet (Jan. 7, 2011).<sup>23</sup> These new systems rely on massive redundancy in order to create robust systems using inexpensive hardware. *Id.* For example, the Microsoft Exchange Server, used by many service providers,

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<sup>21</sup> <http://googleenterprise.blogspot.com/2010/03/disaster-recovery-by-google.html>.

<sup>22</sup> <http://www.volokh.com/2012/10/10/sourth-carolina-supreme-court-deepens-split-on-privacy-in-stored-e-mails-and-divides-2-2-1-on-the-rationale/>.

<sup>23</sup> <http://blogs.technet.com/b/exchange/archive/2011/01/07/robert-s-rules-of-exchange-storage-planning-and-testing.aspx>. In particular, this article discusses the significance of new JBOD (“Just a Bunch of Disks”) architectures. *Id.* The benefits of a JBOD system are redundancy and low cost. See Greyhole, <http://www.greyhole.net/>.

enables the capability to store up to 16 copies of email data – though 2-6 copies are typical. *Id.*

For cloud providers and others using these redundant systems, it would be confusing to focus legal analysis on whether a particular copy is a “backup.” In a redundant system, every copy is a backup, and in modern configurations each piece of data can be accessed through a different disk or pathway. See Sanjay Ghemawat et al, *The Google File System* at 4.3 (2003) (discussing a system designed to access data in “chunks” across a widely distributed network of inexpensive hard drives).<sup>24</sup> The user typically has no awareness of which server they are accessing at any given time, and with a redundant system traffic can be re-routed seamlessly.<sup>25</sup>

In simple terms, as Windows describes regarding their Hotmail service, providers have

[M]ultiple servers and keep multiple copies of your data that are constantly

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<sup>24</sup> “Chunk replicas are created for three reasons: chunk creation, re-replication, and rebalancing.” Sanjay Ghemawat et al, *The Google File System* at 4.3 (2003).

<sup>25</sup> See, e.g., Google, *Postini Services : Data Center Backup / Redundancy*, [http://www.google.com/support/enterprise/static/postini/docs/admin/en/admin\\_ee\\_cu/arch\\_secondary\\_data.html#995217](http://www.google.com/support/enterprise/static/postini/docs/admin/en/admin_ee_cu/arch_secondary_data.html#995217) (last visited Jan. 30, 2013). “During normal operations, the message security service filters and processes your email through a cluster of servers at its *primary data center*. . . . The secondary data center has the same capacity and capabilities of its primary counterpart. During a continuation event, your email traffic is directed to the secondary data center, and *there’s no change to your email flow or level of protection.*” *Id.*

synchronized. If one server has a failure, another one is ready to take over in seconds. All in all [they] keep four copies of your data on multiple drives and servers to minimize the chance of data loss due to a hardware failure.

Arthur de Haan, *A Peek Behind the Scenes at Hotmail*, Inside Windows Live (Dec. 22, 2009).<sup>26</sup>

## II. **E-mail Privacy is a Necessary Element of Economic and Social Activities**

### *A. Privacy Enables Candid Interactions, Intimate Relationships, and Privileged Conversations*

Congress enacted ECPA to ensure that e-mails and other electronic communications were afforded the same degree of protections as traditional letters and telephone conversations. *See* S. Rep. No. 99-541, at 2-3 (1986). (“With the advent of computerized recordkeeping systems, Americans have lost the ability to lock away a great deal of personal and business information.”). It would be difficult to overstate the importance of these privacy protections, but it is worth revisiting their underlying value.

The protection of private and anonymous speech has been a constant priority throughout American history, and has played a “central role” in promoting free speech. Jeffrey Rosen, *The Unwanted Gaze* 168-67 (2000). Privacy allows us to construct and maintain intimacy, avoid undue embarrassment,

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<sup>26</sup>[http://blogs.windows.com/windows\\_live/b/windowslive/archive/2009/12/22/a-peek-behind-the-scenes-at-hotmail.aspx](http://blogs.windows.com/windows_live/b/windowslive/archive/2009/12/22/a-peek-behind-the-scenes-at-hotmail.aspx).

and prevent misuse of our personal information. See Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1212-17 (1998) (outlining core privacy values).

Protecting the privacy of conversations promotes the easy exchange of ideas without the need to focus on unnecessary formality. As Judge Posner noted, this linguistic economy could not exist without privacy. “The rise of privacy has facilitated private conversation and thereby enabled us to economize on communication – to speak with a brevity and informality apparently rare among primitive peoples. This valuable economy of communication would be undermined by allowing eavesdropping.” Richard Posner, *An Economic Theory of Privacy*, Reg. 19, 23 (May/June 1978).

Our hurried and unedited thoughts, as captured in private electronic communications, present an easy target for misuse and misunderstanding out of context. This results from the fact that “[e]-mail combines the intimacy of the telephone with the retrievability of a letter. . . . Because e-mails are often dashed off quickly and sent immediately, without the opportunity for second thoughts that ordinary mail provides, they may, when wrenched out of context, provide an inaccurate window on someone’s emotions at any particular moment.” Jeffrey Rosen, *The Unwanted Gaze* 75 (2000). The monitoring of private e-mail messages “threatens to subvert the Internet’s greatest strength, which is to increase privacy and free expression by giving individuals more autonomy to decide how much of themselves to disclose to others.” *Id.* at 90.

It is essential to protect electronic messages because our digital economy cannot function without secure communications. “Security of electronic communication is as essential in this environment as security of transportation and storage have been to businesses throughout history. The communication system must ensure that orders for goods and services are genuine, guarantee that payments are credited to the proper accounts, and protect the privacy of business plans and personal information.” Whitfield Diffie & Susan Landau, *Privacy On The Line* 5 (2007).

Protecting the privacy of our communications is also necessary to preserve our democratic process. “Change often begins most tentatively, and political discussion often starts in private. Journalists need to operate in private when cultivating sources. Attorneys cannot properly defend their clients if their communications are not privileged.” Diffie at 170.

Many of our most personal experiences now involve digital exchanges, but “[t]houghts and values still develop in the age-old traditions of talk, reflection, and argument” that require trust and privacy. *Id.* at 171. If our privacy laws cannot protect the content of our communications then they do not promote our core values because “confidentiality – and the perception of confidentiality – are as necessary for the soul of mankind as bread is for the body.” *Id.*

***B. The Significance of E-mail Privacy Was Vividly Demonstrated After the Recent Resignation of the CIA Director***

Privacy is such an essential component of digital interactions that users remain largely

unaware of risks to exposure of their private communications. They assume, rightfully so, that there are legal and technical protections in place to prevent unauthorized access to and disclosure of their private affairs. However, the recent scandal surrounding former CIA Director David Petraeus vividly demonstrates the collateral damage caused by exposure of private conversations.

In November 2012, CIA Director David Petraeus resigned after an FBI investigation revealed the existence of his extramarital affair. Michael D. Shear, *Petraeus Resigns at C.I.A.: F.B.I. Discovered an Affair*, N.Y. Times, Nov. 10, 2012, at A1.<sup>27</sup> The FBI investigation that led to the Director's downfall resulted in the damaging disclosure of the contents of private e-mails from at least four individuals involved: Petraeus himself, his biographer Paula Broadwell, Florida resident Jill Kelley, and General John Allen, the top U.S. commander in Afghanistan. The FBI began the investigation in response to a complaint by Ms. Kelley, who received several anonymous, harassing emails. Scott Shane & Eric Schmitt, *Author's E-Mails to a Third Party Led to Petraeus*, N.Y. Times, Nov. 11, 2012, at A1.<sup>28</sup> The FBI determined that the emails had been sent by Ms. Broadwell, which then led the agency to Mr. Petraeus. *Id.* These and other private e-mails were

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<sup>27</sup> <https://www.nytimes.com/2012/11/10/us/citing-affair-petraeus-resigns-as-cia-director.html?pagewanted=all&pagewanted=print>.

<sup>28</sup> Available at <https://www.nytimes.com/2012/11/11/us/fbi-said-to-have-stumbled-into-news-of-david-petraeus-affair.html>.

accessed by federal investigators, presumably pursuant to the ECPA, and their contents were later disclosed to various news organizations.

Importantly, these messages were unrelated to any crime. The thin basis on which the original investigation was launched and the apparent lack of criminal conduct did not, of course, prevent law enforcement from gaining access to a large volume of private messages. Nor did it prevent the parties involved from suffering substantial embarrassment and economic loss as the contents of their private emails were accessed and publicized.

This type of unauthorized disclosure cannot be properly addressed without clarifying the application of the ECPA to stored e-mails. The Petraeus scandal sensitized the press and public to the problem of unauthorized access to email and the weakness of the current legal regime. The New York Times, for example, asked “[i]f David H. Petraeus couldn’t keep his affair from prying eyes as director of the Central Intelligence Agency, then how is the average American to keep a secret?” Nicole Perlroth, *Trying to Keep Your E-Mails Secret When the C.I.A. Chief Couldn’t*, N.Y. Times, Nov. 17, 2012, at B1.<sup>29</sup> Given the increased use of cloud-based email services, it is critical to understand what statutory provisions apply to these electronic communications.

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<sup>29</sup> Available at

<https://www.nytimes.com/2012/11/17/technology/trying-to-keep-your-e-mails-secret-when-the-cia-chief-couldnt.html?pagewanted=all>.



***C. E-mail Systems Face Persistent Threats from Criminals Attempting to Gain Unauthorized Access***

The type of unauthorized access to e-mail present in this case is neither unusual nor insignificant. Indeed, the security firm Sophos identified cloud-based services as an emerging problem in its 2013 report. Sophos, *Security Threat Report 2013: New Platforms and Changing Threats*, at 4 (2013). Similarly, Symantec's most recent assessment found "the number of daily targeted attacks increasing from 77 per day to 82 per day" and that attackers had broadened the focus of their attacks to include small companies in addition to the public sector and government. Symantec, *Internet Security Threat Report, Volume 17* (2012). And the National Institute for Standards and Technology wrote that cloud computing presented "formidable" security challenges and that many of its beneficial features "can also be at odds with traditional security models and controls." Wayne Jansen & Timothy Grance, Nat'l Inst. of Standards & Tech., U.S. Dep't of Commerce, Special Pub. No. 800-144, *Guidelines on Security and Privacy in Public Cloud Computing* vi (2011).<sup>30</sup>

The criminal hack of Wired Magazine senior writer Mat Honan provides a devastating example of the damage that unauthorized access can produce. In August 2012, hackers were able to gain access to his Apple ID account and use the information contained

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<sup>30</sup> Available at [http://www.nist.gov/customcf/get\\_pdf.cfm?pub\\_id=909494](http://www.nist.gov/customcf/get_pdf.cfm?pub_id=909494).

therein to subsequently access his Google and Twitter accounts, and to remotely erase the data stored on his iPhone, iPad, and MacBook. Mat Honan, *How Apple and Amazon Security Flaws Led to My EPIC Hacking*, *Wired* (Aug. 8, 2012).<sup>31</sup> Honan realized that the only information needed to start the chain of digital break-ins was an e-mail address, a billing address, and the last four digits of a credit card on file. *Id.* When Honan managed to confront the hacker responsible for the attack, the hacker confirmed the ease with which cloud-based accounts could be accessed: “You honestly can get into any email associated with apple.” *Id.*

More recently, the New York Times revealed that it had been waging a four-month battle against Chinese hackers that had infiltrated its computer systems. Nicole Perlroth, *Hackers in China Attacked The Times for Last 4 Months*, *N.Y. Times*, Jan. 30, 2013, at A1.<sup>32</sup> E-mail was central to the success of the infiltration, as the Times’ security investigators suspect that the hackers used a “spear-phishing” attack, sending e-mails with malicious code that installs remote access tools when the recipient clicks on a link in the e-mail or downloads an attachment. *Id.* The Chief Security Officer at the Times said that e-mail was now the preferred method of breaching computers: “Attackers no longer go after our firewall.

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<sup>31</sup> <http://www.wired.com/gadgetlab/2012/08/apple-amazon-mat-honan-hacking/all/>.

<sup>32</sup> *Available at* [https://www.nytimes.com/2013/01/31/technology/chinese-hackers-infiltrate-new-york-times-computers.html?hp&pagewanted=all&\\_r=0](https://www.nytimes.com/2013/01/31/technology/chinese-hackers-infiltrate-new-york-times-computers.html?hp&pagewanted=all&_r=0).

They go after individuals. They send a malicious piece of code to your e-mail account and you're opening it and letting them in." *Id.*

### **III. The Court Should Remedy This Key Ambiguity Where Congress Has Left the Statutory Language Untouched for More Than Twenty Years**

Perhaps aware that its decision would frustrate the public's expectations regarding email privacy, the Supreme Court of South Carolina guarded its opinion by invoking traditional principles of judicial deference. "The SCA is ill-fitted to address many modern day issues," Chief Justice Toal wrote in a concurring opinion, "but it is this Court's duty to interpret, not legislate." *Jennings v. Jennings*, No. 27177, 2012 WL 4808545 at \*7 (S.C. Oct. 10, 2012). *Amici* agree with the wisdom of this insight but disagree with its application in this instance.

The Stored Communications Act was passed in 1986 as part of the ECPA, long before e-mail was the widespread phenomenon it is today. But almost immediately, commentators recognized the growing importance of the statute as email use became more widespread. See Russell S. Burnside, *The Electronic Communications Privacy Act of 1986: The Challenge of Applying Ambiguous Statutory Language to Intricate Telecommunication Technologies*, 13 Rutgers Computer & Tech. L.J. 451, 516-17 (1987) (lamenting "the 1986 Act's circumscription of legal protections for electronic communications, E-Mail, and remote computer services . . ."). The drumbeat for reform continued over the ensuing decades, particularly in response to various judicial interpretations. See, e.g., Gregory L. Brown, *Steve*

*Jackson Games, Inc. v. United States Secret Service: Seizure of Stored Electronic Mail Is Not an "Interception" Under the Federal Wiretap Act*, 69 Tul. L. Rev. 1381, 1390-91 (1995) (discussing a decision by the Fifth Circuit on the meaning of the term "intercept" and calling for congressional reform); Katherine A. Oyama, *E-Mail Privacy After United States v. Councilman: Legislative Options for Amending ECPA*, 21 Berkeley Tech. L.J. 499, 501 (2006) ("[I]t is imperative that Congress amend ECPA and close the gap in privacy safeguards for e-mail highlighted in *Councilman*.").

Despite the growth of e-mail and an increased focus on the importance of ECPA protections, over the last twenty years Congress has not passed even modest ECPA reforms.<sup>33</sup> The Court should resolve the interpretive ambiguity presented by the decision below. Just this week the California Supreme Court, in considering a state privacy statute, held:

Fidelity to legislative intent does not "make it impossible to apply a legal text to technologies that did not exist when the text was created . . . . Drafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances they could not possibly envision." (Scalia & Garner,

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<sup>33</sup> See, e.g., S. Rep. No. 112-283 (2012) (containing a proposed amendment that would have eliminated the "180-day rule" under the SCA but would not have changed the definition of "electronic storage").

Reading Law: The Interpretation of  
Legal Texts (2012) pp. 85–86.).

Apple v. Superior Court, \_\_\_ P.3d \_\_\_, 2013 WL  
406586 at \*5 (Cal. 2013).

To ensure the ongoing viability of the federal communications privacy law, the Court, at this point, need only interpret a key definition. It would be a mistake to allow this issue to percolate further given the importance of the privacy protections at issue and the rare opportunity for the Court to provide clarity.

**CONCLUSION**

For the foregoing reasons, *amici* respectfully ask this Court to grant the Writ of Certiorari.

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