No. 17-1005

IN THE

Supreme Court of the United States

OATH HOLDINGS, INC.,

Petitioner,

v.

MARIANNE AJEMIAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF FACEBOOK, INC., GOOGLE LLC, DROPBOX, INC., EVERNOTE CORP., GLASSDOOR, INC., THE INTERNET ASSOCIATION AND NETCHOICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Facebook, Inc., Google LLC, Dropbox, Inc., Evernote Corp., Glassdoor, Inc., the Internet Association, and NetChoice (together, "Amici") move under Supreme Court Rule 37 for leave to file an amicus brief in support of Oath Holdings, Inc.'s petition for a writ of certiorari.[1] Amici have vital interests in this case.

First, Amici are entrenched in the current developments and nationwide debate about the propriety of requests for their account holders' communications, including communications that belong to deceased account holders. On this issue, Amici are at the leading edge of creating technological tools to allow people to choose how their accounts are treated after they die. Amici are also working diligently with legislators to address probate and estate administration processes consistent with the privacy protections of federal law.

Second, Amici offer services subject to the federal Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2701, *et seq*., which generally prohibits covered providers from disclosing the contents of an account holder's electronic communications but, in relevant part, allows disclosure with the "lawful consent" of specific individuals identified in the statute. The Massachusetts Supreme Judicial Court interpreted that lawful-consent exception expansively to mean that implied-in-law or constructive consent from a person not listed in the statute—an estate administrator, in this case—would suffice. That interpretation

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[1] Petitioner consents to this filing. Respondents do not. Amici provided Respondents with notice of their intent to file on February 8, 2018.

conflicts with extensive authority, including a decision of the U.S. Court of Appeals for the Ninth Circuit, which is where many ECPA-covered service providers are headquartered. Thus, the Supreme Judicial Court's decision will subject Amici to conflicting legal obligations (and potential liability) when faced with demands to disclose communications. Amici receive thousands of non-governmental demands for private communications each year.

Third, as providers of widely used electronic communications and storage services, Amici seek to protect the privacy rights and expectations of the people who use their services. If left uncorrected, the decision below will erode the privacy rights of millions of Americans by exposing to court-appointed administrators (and anyone else a court may deem capable of consenting on behalf of an account holder) private communications that were never meant to be shared. Put simply, people's communications will be disclosed against their will.

These are "relevant matter[s]" that may not be brought fully to this Court's attention by the parties and that "may be of considerable help to the Court." Sup. Ct. R. 37(1). Moreover, Amici are in a unique position to bring these matters to the Court's attention.

Amici therefore respectfully request that this Court grant them leave to file this amicus brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amici offer popular services for creating, sharing, and storing electronic communications, including emails, blogs, messages, posts, photographs, and videos.

Like Petitioner, Amici offer "electronic communications services" and "remote computing services" as defined and covered by the federal Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2701, *et seq*. ECPA establishes the mechanisms by which Amici may voluntarily disclose or be compelled to disclose their account holders' information, and helps protect the privacy rights and expectations of people who use Amici's services.

Facebook provides a free Internet-based social-media service that gives more than two billion people the power to build communities and bring the world closer together. People use Facebook to stay connected with friends and family, to build communities, to discover what is going on in the world, and to express what matters to them.

Google's mission is to organize the world's information and make it universally accessible and useful. Google offers a wide variety of web-based products and services, including Search, Gmail, Google+, Drive, Docs, Maps, YouTube, and Blogger.

Dropbox provides file storage, synchronization, and collaboration services. With more than 500 million users, people around the world use Dropbox to work the way they want, on any device, wherever they go.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than Amici, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief.

When users put their files in Dropbox, they can rest assured that their data is secure and their own.

Evernote provides a platform that allows individuals and teams to bring their life's work together in one digital workspace. More than 150 million people and more than 20,000 businesses trust Evernote to help them collect their best ideas, write meaningful words, and move important projects forward.

Glassdoor is one of the largest and fastest growing job and recruiting companies in the world today. Set apart by the tens of millions of reviews and insights provided by employees and candidates, Glassdoor combines all the jobs with this valuable data to make it easy for people to find a job that is uniquely right for them. As a result, Glassdoor helps employers hire truly informed candidates at scale through effective recruiting solutions like job advertising and employer branding products. Launched in 2008, Glassdoor now has reviews and insights for more than 740,000 companies in more than 190 countries.

The Internet Association (the "IA") represents 40 of the world's leading Internet companies.[2] Its mission is to foster innovation, promote economic growth, and empower people through the free and open Internet. As the voice of the world's leading Internet companies, the IA helps ensure that all stakeholders understand

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[2] The IA's members include Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, Reddit, Salesforce.com, Snap, Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber, UpWork, Yahoo, Yelp, Zenefits, and Zynga.

the benefits the Internet brings to our economy and society in general.

NetChoice is a trade association of leading e-commerce businesses and online companies.[3] It promotes value, privacy, and trust in Internet business models. NetChoice works to prevent and remove unnecessary barriers on new businesses, make the Internet more accessible and ubiquitous, and promote e-commerce, which is the new backbone of economic growth. NetChoice's members provide services including email, direct message, social network, blog and comments services, allowing users to connect with one another and access online goods and services.

Every day, billions of people use Amici's services to communicate with family and friends, express thoughts and opinions, conduct business, and discover information. They trust Amici to respect their choices about how and with whom they share their lives. The decision below undermines that trust by authorizing estate administrators to override account holders' choices. The decision also thwarts Congress's intent to establish nationwide, uniform rules for who is (and who is not) authorized to access Americans' private electronic communications.

Amici understand that access to a loved one's online accounts can be an emotional issue. Amici also understand that estate administrators have a difficult and important job to do. But there are ways to address those issues without undermining privacy rights and

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[3] NetChoice members include 21st Century Fox, Alibaba Group, AOL, DJI, DRN, eBay, the Electronic Retailing Association, Expedia, Facebook, Google, HomeAway, Liberty Interactive Corporation, Lyft, Overstock.com, PayPal, Travel Tech, Verisign, Vigilant Solutions, and Yahoo.

second-guessing Congress's policy choices. Amici therefore urge this Court to grant the petition and reverse the decision below.

SUMMARY OF ARGUMENT

This case is about who should be able to authorize the disclosure of private electronic communications stored in an individual's online email account. Congress settled that issue when it enacted ECPA in 1986.

ECPA generally prohibits covered service providers, such as Amici, from disclosing the contents of their account holders' electronic communications unless one of eight narrow exceptions applies. 18 U.S.C. § 2702(a).[4] The exception at issue here provides that "the originator or an addressee or intended recipient" of electronic communications, "or the subscriber in the case of remote computing service," may provide "lawful consent" to the disclosure of those electronic communications. *Id.* § 2702(b)(3).

As confirmed by a long line of decisions, only actual consent from one of the individuals listed in the statute satisfies this exception. Implied-in-law or constructive consent is insufficient, as is consent from someone other than an originator, addressee, intended recipient, or subscriber.

Congress's decision to limit the categories of people authorized to consent to disclosure aligns with account holders' expectations. They expect their communications to remain private, even after they pass away. *See Privacy Afterlife Poll*, NetChoice, https://netchoice.

[4] ECPA also provides a framework for ensuring that governmental entities may compel disclosure of private communications in criminal investigations. *See* 18 U.S.C. § 2703. Those provisions are not at issue.

org/library/decedent-information/#poll (last visited Feb. 19, 2018) ("More than 70 percent of Americans think that their private online communications and photos should remain private after they die—unless they gave prior consent for others to access.").

Unfortunately, the Massachusetts Supeme Judicial Court reached a conclusion at odds with Congress's intent and account holders' expectations. Specifically, the court held that court-appointed estate administrators may authorize the disclosure of decedents' private communications, even if decedents never intended that result or expressly provided for a contrary result.

This Court should grant the petition for certiorari and reverse that decision for at least three reasons.

First, the decision erodes privacy rights. ECPA expressly limits the categories of people who may consent to disclosure of private communications. Estate administrators do not fall within any of those categories. Thus, authorizing estate administrators to consent to disclosure conflicts with the plain language of ECPA. It also conflicts with the expectations of most Americans, who believe that communications stored in password-protected accounts should remain private, even after they die, unless they direct otherwise. More broadly, the decision below undermines privacy rights by suggesting that courts may ignore (or re-write) ECPA's protections whenever they are in tension with probate laws or other laws that are not specifically preempted.

Second, the decision below conflicts with extensive authority, including a decision of the Ninth Circuit, holding that the lawful-consent exception requires actual consent from one of the people identified in the statute. If this Court does not resolve that split in

authority, then providers will be subject to one set of legal obligations in Massachusetts and another set of obligations in the nine states that comprise the Ninth Circuit.

Third, the decision below thwarts Congress's intent to establish a nationwide and uniform set of rules governing electronic privacy. The Supreme Judicial Court held that state laws bearing on access to electronic communications take precedence over ECPA unless ECPA indicates a "clear" intent to preempt those specific state laws. Pet. App. at 23. But express preemption is not the only way that Congress can displace state law, and for good reason: Congress cannot always foresee every conceivable conflict with state laws.

Accordingly, as with many federal statutes, ECPA is written in broad, general terms. When those terms conflict with state law, or when applying state law would frustrate ECPA's goals, state law must give way. Holding otherwise would mean that ECPA preempts few, if any, state laws regarding access to stored electronic communications, rendering ECPA a virtual nullity.

Of course, that result would undermine Congress's intent in enacting ECPA. It would also be unwise as a policy matter. Deciding who should be able to authorize disclosure of electronic communications requires balancing a variety of competing policy concerns, including privacy for individuals, clarity for providers, and the needs of law enforcement. Courts are not well-equipped to balance those concerns.

Amici are keenly aware that this case involves an emotional and complicated issue. When loved ones die,

their online accounts may hold precious photographs, videos, messages, and mementos. And in some cases, access to account content may aid in the administration of a decedent's estate. Amici also recognize that estate administrators have a difficult and important job to do, and Amici do not wish to make that job any more challenging.

But there are ways to address those concerns without undermining federal law. Facebook and Google, for example, have created technical tools that allow people to designate how their accounts should be disposed of after they die, thereby ensuring that their privacy wishes are respected. Furthermore, dozens of state legislatures are enacting or have enacted the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA"), which facilitates estate administration while deferring to the protections that Congress enshrined in ECPA. And, finally, litigants can seek email header information from the service provider (as Respondents did in this case), and then obtain copies of communications from the other parties to those communications (which Respondents chose not to do here).

The Supreme Judicial Court's decision is no solution at all. Its novel interpretation of ECPA will undermine Americans' privacy rights, subject Amici to a patchwork of conflicting legal obligations, and thwart the legislative goals embodied in ECPA. Amici therefore urge this Court to grant the petition and reverse the decision below.

BACKGROUND

John Ajemian used the online email service provided by Yahoo! Inc. ("Yahoo"). Pet. App. at 4. In 2006,

John died in a bicycle accident. *Id.* at 2. He left no will and no instructions for how his emails should be treated after his death. *Id.* at 4.

The Norfolk Probate and Family Court ("Probate Court") appointed Respondents as the administrators of John's estate. *Id*. Respondents initially sought to compel Yahoo to disclose only subscriber records and email header information (i.e., sender, recipient, and date) for John's account, rather than the contents of John's emails. *Id.* at 4-5. Yahoo did not object to that request because ECPA permits providers to disclose account records and header information. *Id.* at 4. Yahoo therefore disclosed the requested information to Respondents in January 2008. Although that information indicated the persons and entities with whom John corresponded, Respondents did not try to obtain consent to disclosure of email content from those persons and entities. *Id.* at 35-36.

Respondents then sought to compel Yahoo to disclose the contents of John's emails. *Id.* at 5. The reasons for Respondents' further demand remain unclear; they have conceded that they know of nothing in the emails that would be necessary for administration of John's estate. Pet. at 8.

Ultimately, the Probate Court granted summary judgment in favor of Yahoo, holding that ECPA barred Yahoo from disclosing the contents of John's emails and rejecting Respondents' argument that they could consent to disclosure on John's behalf under ECPA's lawful-consent exception. Pet. App. at 52.

Respondents appealed. The Massachusetts Supreme Judicial Court then transferred the case to its own docket and reversed the Probate Court. *Id.* at 7.

In its decision, the Supreme Judicial Court began by explaining that, when it interprets federal statutes, it "presume[s] that Congress did not intend to intrude upon traditional areas of State regulation or State common law unless it demonstrates a clear intent to do so." *Id.* at 15.

Turning to ECPA's lawful-consent exception, the court reasoned that if "lawful consent . . . is limited to actual consent, such that it would exclude a personal representative from consenting on a decedent's behalf," then ECPA would "preclude personal representatives from accessing a decedent's stored communications and thereby result in the preemption of State probate and common law." *Id.* at 13-14. The court therefore reviewed ECPA, and the lawful-consent exception in particular, for a "clear" declaration of congressional intent to preempt "probate and common law allowing personal representatives to take possession of the property of the estate." *Id.* at 13-15. The court found "[n]othing in the statutory language or the legislative history" of the statute "evinc[ing] a clear congressional intent to intrude upon State prerogatives with respect to personal representatives of a decedent's estate." *Id.* at 18. Thus, the court concluded that "lawful consent" was not limited to "actual consent."

From that premise, the court reasoned that estate administrators in Massachusetts are legally empowered to consent to disclosure on behalf of deceased account holders, even though the plain language of ECPA does not identify "estate administrators" as one of the classes of individuals authorized to consent to disclosure. *Id.* at 23-24. Accordingly, the Supreme Judicial Court vacated the Probate Court's order

granting summary judgment to Yahoo and remanded for further proceedings. *Id.* at 27.[5]

ARGUMENT

A. THE DECISION BELOW UNDERMINES AMERICANS' PRIVACY RIGHTS AND EXPECTATIONS AS ENSHRINED IN ECPA.

Millions of Americans send, receive, and store billions of private electronic communications in online services such as those provided by Amici. Those communications are no longer limited to emails; they now include informal chats, shared photographs and videos, and collaborative tools. *See, e.g.*, *United States v. Mullins*, 613 F.3d 1273, 1281 (10th Cir. 2010) (noting "the ubiquity of electronic communications in our day and age"); *Facebook, Inc. v. Super. Ct.*, 192 Cal. Rptr. 3d 443, 445 (Ct. App. 2015) (observing that "digital platforms on which users may post communications, commentary, photographs, video clips, or other items" have become "ubiquitous in our society"), *review granted and opinion superseded*, 362 P.3d 430 (Cal. 2015); Orin Kerr, *The Next Generation Communications Privacy Act*, 162 U. Pa. L. Rev. 373, 392 (2014) ("[A] typical Gmail user stores more than seventeen thousand emails in her account at any given time.").

Congress enacted ECPA to protect the privacy of these electronic communications. *See, e.g.*, *Theofel v. Farey-Jones*, 359 F.3d 1066, 1072 (9th Cir. 2004) ("[ECPA] protects individuals' privacy and proprietary

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[5] The Supreme Judicial Court also ruled, correctly, that Respondents could not seek disclosure of John's emails under ECPA's "agency exception" because Respondents are not John's agents. *Id.* at 12; *see also* 18 U.S.C.§ 2702(b)(1).

interests. The Act reflects Congress's judgment that users have a legitimate interest in the confidentiality of communications in electronic storage at a communications facility."); *Cousineau v. Microsoft Corp.*, 992 F. Supp. 2d 1116, 1121 (W.D. Wash. 2012) ("The primary intent of [ECPA] is to protect the privacy of individuals' personal information by prohibiting the government and private parties from accessing that information.").

Section 2702(a) of ECPA prohibits service providers from disclosing the contents of electronic communications, including emails, to any other person or entity. *See* 18 U.S.C. § 2702(a)(1) (prohibiting providers of "electronic communication service to the public" from disclosing communications content); *id*. § 2702(a)(2) (prohibiting providers of "remote computing service to the public" from disclosing communications content). Section 2702(b) then creates eight exceptions to the rule against disclosure. Service providers may voluntarily disclose the content of electronic communications if one of those exceptions applies. *See id.* § 2702(b)(1)-(8).

The exception at issue here allows providers to disclose content with the "lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of a remote computing service." *Id*. § 2702(b)(3). Congress crafted this exception to place responsibility for the disposition of private communications in the hands of those most likely to be affected by disclosure: originators, recipients, addressees, and subscribers.

The Massachusetts Supreme Judicial Court, however, interpreted the lawful-consent provision to mean that implied-in-law or constructive consent from a person *not* listed in the statute—specifically, an estate

administrator—would suffice. That interpretation reads into Congress's exhaustive list an entirely new category of people authorized to consent to disclosure, namely, "court-appointed estate administrators of decedents who die intestate." It also authorizes people who may be complete strangers to account holders to obtain the account holders' private communications, as well as the most private communications of others with whom the account holders corresponded. Nothing in the text or legislative history of ECPA justifies that novel result. And even if there are policy reasons for expanding the list of people who may consent to disclosure, that is a choice to be made by Congress, not the courts.

Furthermore, the court's decision is directly at odds with Americans' expectations. Indeed, "[m]ore than 70 percent of Americans think that their private online communications and photos should remain private after they die—unless they gave prior consent for others to access." *Privacy Afterlife Poll*, NetChoice, https://netchoice.org/library/decedent-information/#poll (last visited Feb. 19, 2018). And 70% of Americans believe that "the law should err on the side of privacy when someone dies without documenting their preference about how to handle their private communications and photos." *Id*.[6]

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[6] Other key findings from the same survey include: (1) only 15% of Americans believe that estate attorneys and executors should have the discretion to decide what happens to private communications when no prior consent was given; (2) 75% said that they would either make arrangements for friends and family to have access to private communications or didn't want anyone to access them; and (3) fewer than 10% would want to give consent for an estate attorney or executor to have full access to private communications. *See id.*

These statistics show that Americans' expectations of privacy in their electronic communications are different than their expectations of privacy in traditional forms of communication (e.g., letters or diaries). Nor is that surprising. A reasonable person understands that if she retains a box of letters under her bed, then those letters may be found and read after she dies. But there is no reason for that same person to expect that a password-protected account will be accessed after her death. Moreover, Congress enacted a comprehensive statutory scheme that specifically protects the privacy of electronic communications.

It follows that electronic communications should not be equally accessible to court-appointed estate administrators when decedents pass away.

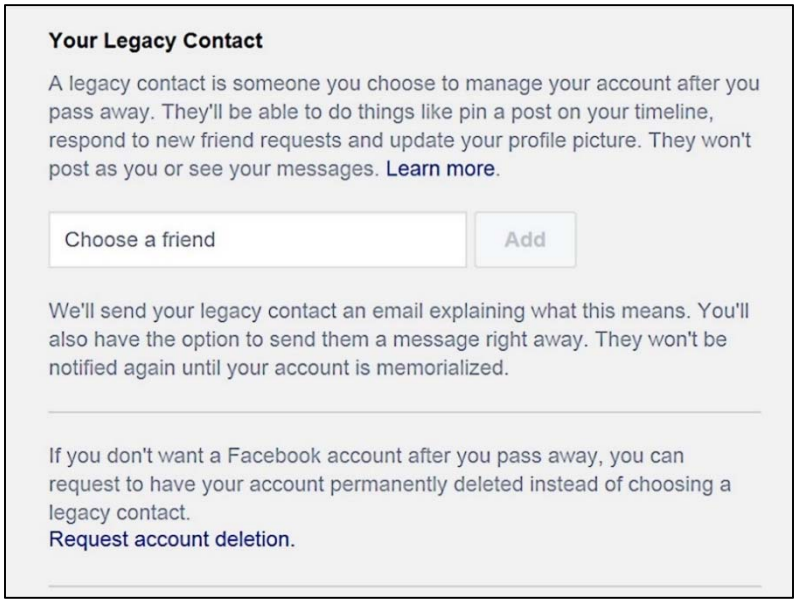
Accordingly, the best way to reconcile the needs of state probate law with ECPA's goals and account holders' expectations is not to devise new, judge-made methods for accessing account holders' private emails without their consent. Rather, it is to defer to the privacy choices that account holders made while they were alive. Fortunately, there are ways to both ascertain account holders' wishes *and* to obtain communications, when necessary, consistent with those wishes.

First, and most obviously, account holders may designate in their wills or other estate documents their wishes for disposing of or providing access to their stored electronic communications after they have died.

Second, on a daily basis, account holders decide who to include as recipients on emails, with whom to share social network posts, and where to comment online. Even after an account holder dies, those electronic communications remain available to anyone who received them, and can be accessed directly through those other individuals.

Third, service providers offer technological tools so that account holders can establish how their communications should be treated after they die. For example, Facebook account holders may identify a "legacy contact" and memorialize how their Facebook data, including their private communications, should be treated after death. *See* Fig. 1.[7]

Figure 1: Facebook Account General Settings

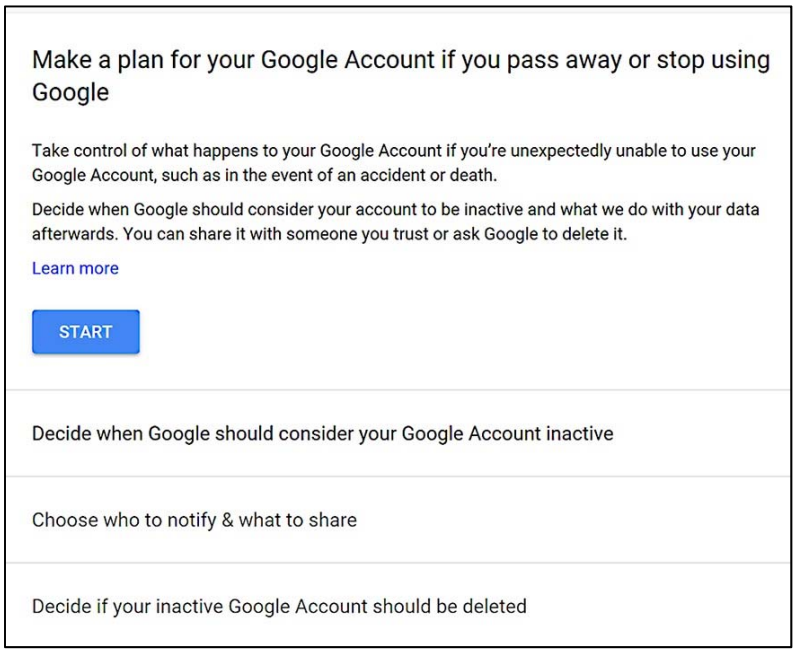


Google's Inactive Account Manager tool also permits account holders to control how their communications and data are treated "in the event of an accident or death." Specifically, as shown below, the Inactive Account Manager tool allows account holders to decide whether their accounts and data should be deleted or

[7] To be clear, a Facebook Legacy Contact is not authorized to access any of a decedent's private communications that were not shared with the Legacy Contact while the decedent was still alive.

shared with a trusted person if they pass away. *See* Fig. 2.

Figure 2: Google Inactive Account Manager



About Inactive Account Manager, Google, https://support.google.com/accounts/answer/3036546 (last visited Feb. 19, 2018).

Respecting the wishes expressed through these tools is not just consistent with ECPA and the expectations of account holders; it also addresses key operational concerns for providers like Amici. The Supreme Judicial Court's ruling creates an operational vulnerability whereby misidentified accounts (e.g., account names containing typographical errors) would be subject to improper disclosure. Service providers typically do not verify the identities of those who use their services. As a result, it is often difficult to ensure that an offline person's estate corresponds to a specific account.

Because administrators will be unable to log into the accounts at issue, and indeed, may have never communicated with these accounts, providers will have no reliable way to confirm that the administrators are, in fact, attempting to access the correct account. That is a risk that neither service providers nor their account holders should be forced to bear.

In sum, there are multiple and increasing methods for people to decide how they want their communications to be treated after they die and to communicate those choices. Those choices are highly personal and implicate the privacy rights of both account holders and their correspondents. Court-appointed administrators should not be allowed to second-guess those decisions, undermine account holders' privacy rights, and increase providers' operational burdens and legal exposure.

Yet that is exactly what the Supreme Judicial Court's decision invites. For example, a Facebook or Google account holder could instruct either to delete her account upon her death. *See* Figs. 1, 2. But under the Supreme Judicial Court's reasoning, that instruction would be meaningless. A Massachusetts court could still seek to order disclosure of the contents of the account communications based on the "lawful consent" of a court-appointed administrator.

Nor is there any reason to believe that the effects of the decision below will be confined to the specific issues associated with deceased account holders. The court's reasoning is not limited to the factual context from which it arose. It therefore allows lower courts to fashion new, judge-made exceptions to ECPA's privacy protections whenever they are perceived to interfere

with state law bearing on disclosure of electronic communications.

For example, state-court litigants routinely rely on state discovery laws to seek to compel providers to disclose private emails, often against the wishes of account holders. Courts just as routinely reject such requests because they are barred by ECPA.[8] But the Supreme Judicial Court's reasoning arguably compels a different result: Because ECPA does not clearly and expressly preempt state discovery laws, service providers must disclose private emails pursuant to state-court discovery demands, even if account holders object to disclosure. Of course, that rule would severely undermine Americans' privacy rights.

The Supreme Judicial Court's reasoning is ripe for other abuses as well. Consider: If court-appointed estate administrators are authorized to consent to disclosure of private emails to aid in the execution of their duties under state law, then why shouldn't other court-appointed representatives have the same authority—even when account holders are still alive? Pet. App. at 14 (citing cases suggesting that ECPA does not preempt any "areas of traditional [S]tate regulation," including "family law"); *id.* at 23 (suggesting that "Congress did not intend to place

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[8] *See, e.g.*, *Facebook, Inc. v. Super. Ct.* ("*Facebook II*"), 223 Cal. Rptr. 3d 660, 674 (2017) ("California's discovery laws cannot be enforced in a way that compels [a provider] to make disclosures violating the [ECPA]."") (citation omitted), *review granted and opinion superseded sub nom. Facebook v. S.C. (Touchstone)*, 408 P.3d 406 (Cal. 2018); *O'Grady v. Super. Ct.*, 44 Cal. Rptr. 3d 72, 86 (Ct. App. 2006) ("[T]here is no pertinent ambiguity in the language of the statute. It clearly prohibits any disclosure of stored email other than as authorized by enumerated exceptions.").

stringent limitations on lawful consent even for living users"). On that reasoning, courts could authorize other court-appointed representatives with official duties (including court-appointed guardians or bankruptcy trustees, for example) to consent to disclosure of account holders' emails.

That is a far cry from what Congress intended when it enacted strong protections for the privacy of Americans' electronic communications.

B. LOWER COURTS ARE DIVIDED ON THE MEANING OF "LAWFUL CONSENT" WITH REGARD TO DISCLOSURE OF ELECTRONIC COMMUNICATIONS UNDER ECPA.

This Court should also grant the petition and reverse the decision of the court below because it creates a split in authority with respect to the meaning of "lawful consent" under ECPA—a critical issue for people who use electronic communications services and the companies that provide those services.

Several courts have held that the lawful-consent exception applies only if service providers receive *actual consent* from one of the people specifically authorized to provide that consent. The Supreme Judicial Court, however, interpreted the lawful-consent provision to mean that *implied-in-law or constructive consent* from persons not listed in the statute would suffice. That interpretation conflicts directly with the interpretation of the Ninth Circuit, which is where Amici (and many other service providers) have their headquarters. *See Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 731 (9th Cir. 2011) (rejecting an "argument for implied consent" where, as here, there was no evidence that the account holder actually consented to disclosure).

It also conflicts with the interpretations of other courts across the country, including courts in Massachusetts. *See Bower v. Bower*, 808 F. Supp. 2d 348, 351 (D. Mass. 2011) (rejecting argument that account holder's consent could be imputed or inferred); *In re Irish Bank Resolution Corp. Ltd. (in Special Liquidation)*, 559 B.R. 627, 649 (Bankr. D. Del. 2016) ("[T]he required consent must be given by a party to the communication or the account subscriber, and . . . such consent cannot be compelled by a court on a theory of imputed consent."); *Lazette v. Kulmatycki*, 949 F. Supp. 2d 748, 757 (N.D. Ohio 2013) (consent to disclosure of electronic communications required evidence of actual consent); *Negro v. Super. Ct.*, 179 Cal. Rptr. 3d 215, 222, 228 (Ct. App. 2014) (holding that the lawful consent exception is "manifestly intended to invest users with the final say regarding disclosure of the contents of their stored messages" and "is not satisfied by consent that is merely constructive, implied in law, or otherwise *imputed* to the user by a court"; it requires "consent in fact").

That split in authority will have serious practical consequences. Each year, Amici receive thousands of demands for disclosure of account holders' private communications from non-governmental actors. Now, because of the diverging interpretations of "lawful consent," Amici could be subject to conflicting legal obligations regarding those requests. For example, if a Massachusetts court orders Amici to disclose a decedent's emails based on the consent of estate administrators, then Amici could be found in contempt for failure to comply. *See, e.g.*, *In re Roche*, 411 N.E.2d 466, 468-69 n.1 (Mass. 1980) (noting that disobedience of a discovery order may lead to "an adjudication of contempt"). But if Amici do comply, they may be found liable for improper disclosure in other jurisdictions

(notably the Ninth Circuit) that have not adopted the Massachusetts Supreme Judicial Court's expansive understanding of "lawful consent." *See Suzlon*, 671 F.3d at 728 (absent a valid exception, disclosure of an account holder's communications is "illegal" under ECPA); *see also* 18 U.S.C. § 2707(a) (granting a private right of action to any "person aggrieved by any violation of this chapter").

Forcing Amici and other service providers to bear the risks and burdens of conflicting legal obligations is ill-advised and unworkable, especially given the nationwide reach of Amici's businesses. This Court should therefore grant the petition and resolve the split in authority. *See* Sup. Ct. R. 10(b) (this Court may grant a petition where, as here, "a state court of last resort has decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals"); *see also Montana v. Hall*, 481 U.S. 400, 406 (1987) ("In listing the considerations that are important in deciding whether review should be granted, we mention such things as conflicting decisions from other courts and unsettled questions of federal law."); *United States v. Estate of Grace*, 395 U.S. 316, 318 (1969) (noting that the Court granted certiorari "because of an alleged conflict between the decision below and certain decisions in the courts of appeals and because of the importance of the issue").

C. THE DECISION BELOW THWARTS CONGRESS'S GOAL OF ESTABLISHING UNIFORM RULES GOVERNING ACCESS TO PRIVATE ELECTRONIC COMMUNICATIONS.

In enacting ECPA, Congress declared its intent "to protect the privacy of our citizens" with a comprehensive statutory scheme codifying privacy rights in "new

forms of telecommunications and computer technology." S. Rep. No. 99-541, at 5 (1986). Both the language and legislative history of ECPA make clear that Congress meant for the law's standards to be nationwide, uniform, and beyond adjustment by state legislatures and courts.

Consistent with that intent, courts have repeatedly held that ECPA preempts contrary state *and* federal law. *See, e.g.*, *Facebook II*, 223 Cal. Rptr. 3d at 674; *Negro*, 179 Cal. Rptr. 3d at 222; *O'Grady*, 44 Cal. Rptr. 3d at 86.

Bucking that view, the Supreme Judicial Court held that ECPA does not preempt any state law unless ECPA clearly indicates an intent to displace that specific law. Pet. App. at 23-24. But when writing a federal law, Congress cannot identify and list every conceivable conflict with every state's laws. Thus, when federal statutes are written in general terms, and when state law conflicts with those terms or cannot be enforced without frustrating Congress's intent, state law must give way. *See, e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (this Court does not distinguish "between conflicts that prevent or frustrate the accomplishment of a federal objective and conflicts that make it impossible for private parties to comply with both state and federal law"; rather, "both forms of conflicting state law are nullified by the Supremacy Clause") (internal quotation marks and citations omitted); *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) ("[S]tate law is pre-empted to the extent that it actually conflicts with federal law . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (internal quotation marks and citation omitted).

That is precisely the case here. Authorizing court-appointed estate administrators in Massachusetts to consent to disclosure of decedents' communications conflicts with Congress's intent to limit that authority to specifically identified individuals. More broadly, this new, judge-made exception to ECPA frustrates Congress's goal of establishing nationwide, uniform privacy protections for electronic communications.

The Supreme Judicial Court justified its novel approach on the ground that it was necessary to ensure that estate administrators can obtain decedents' emails. Pet. App. at 17-18. There are two answers to that argument. First, enforcing ECPA's lawful-consent provision as written would not "prevent[] personal representatives from gaining access to a decedent's stored communications" altogether. *Id.* at 17. As the Petition explains, there are other ways to obtain decedents' communications, including by obtaining addressing information from providers (as Respondents did in this case) and seeking copies of relevant communications from the people who corresponded with the decedents. *See* Pet. at 6-7.

Second, and more importantly for this Court, even if the requirements of the lawful-consent exception make it more difficult for administrators to obtain decedents' emails, it does not follow that courts may override Congress's policy choices and revise the statute. In ECPA, Congress restricted both the circumstances under which service providers could disclose private emails and the individuals who could lawfully consent to such disclosure. *See* S. Rep. No. 99-541, at 3. If these decisions are to be revisited, they must be revisited by Congress, not by the courts, which lack the authority and competency to correct perceived deficiencies in statutes. *See, e.g.*, *Henson v. Santander Consumer*

USA Inc., 137 S. Ct. 1718, 1725 (2017) ("[I]t is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced."); *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015) (noting that the Court "lack[s] the authority to rewrite" a statute).

D. NOW IS THE TIME FOR THE COURT TO RESOLVE THIS ISSUE.

This Court should grant the petition for certiorari and resolve this issue now. It is unlikely to arise again in the Ninth Circuit, which resolves most of the disputes involving legal requests that Amici receive, because the Ninth Circuit has already interpreted the lawful-consent provision to mean what it says. *See Suzlon*, 671 F.3d at 731. Nor is it sensible to await additional decisions from state courts. As this case shows, it may take many years for a state court order to work its way to this Court and present an opportunity for review.

Further, waiting to resolve the issue would have at least three negative consequences. First, many states are reviewing and revising their probate laws to account for the prevalence of electronic communications. More than 35 states have enacted RUFADAA, which updates state fiduciary laws for the Internet age and establishes a framework, consistent with ECPA, that ensures that the privacy choices made by account holders during their lifetimes are respected after death. *See* Uniform Law Comm'n Legislation, Revised Uniform Fiduciary Access to Digital Assets Act, http://www.uniformlaws.org/Legislation.aspx?title=Fiduciary+Access+to+Digital+Assets+Act%2c+Revised+(2015) (last visited Feb. 19, 2018). Amici are actively engaged

in outreach and discussion related to those efforts. Those efforts will be complicated by the decision below because it creates a split in authority regarding the extent to which ECPA preempts contrary state laws.

Second, Amici and other providers will continue to receive thousands of demands to disclose private communications each year. Those demands will now include orders from Massachusetts state courts holding that constructive consent from a person not identified in ECPA satisfies the lawful-consent exception. In addition to subjecting Amici to conflicting legal obligations in different jurisdictions, those orders may force providers to ignore account holders' declared intentions regarding the privacy of their electronic communications. At the very least, as explained above, those orders will increase the risk of inadvertent disclosure of the wrong account holders' private communications.

Third, if Americans and Amici cannot rely on the provisions of ECPA as clear rules for when, how, and to whom account holders' communications may be divulged, it may chill the use of Amici's services and Americans' willingness to communicate electronically. If people who share their innermost thoughts and feelings through private accounts fear that a court will second-guess their privacy choices, it stands to reason that they will be constrained in their speech. *See, e.g.*, *Anonymity, Privacy, and Security Online* 7, Pew Research Center (Sept. 5, 2013) (68% of respondents believe current laws provide insufficient protections for online privacy), http://www.pewinternet.org/2013/09/05/anonymity-privacy-and-security-on line/.

For these and the other reasons identified above, this Court should grant certiorari and reverse the judgment of the court below.

Respectfully submitted,

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