COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-11917

MARIANNE AJEMIAN AND ROBERT AJEMIAN
PLAINTIFFS-APPELLANTS
v.
YAHOO!, INC.
DEFENDANT-APPELLEE

ON APPEAL FROM A JUDGMENT OF
THE NORFOLK PROBATE AND FAMILY COURT DEPARTMENT

BRIEF OF *AMICI CURIAE* NAOMI CAHN, JAMES D. LAMM, MICHAEL OVERING, AND SUZANNE BROWN WALSH IN SUPPORT OF PLAINTIFFS-APPELLANTS

Mason Kortz, BBO #691257
Cyberlaw Clinic
Harvard Law School
1585 Massachusetts Ave.
Suite 5018
Cambridge, MA 02138
Tel: (617) 495-2845
Fax: (617) 495-7641
mkortz@cyber.law.harvard.edu

Dated: February 21, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST vi

ARGUMENT 1

1. The SCA's "lawful consent" provision does not prohibit personal representatives from gaining access to decedents' electronic accounts. 2

1.1. Express consent is not the only valid form of "lawful consent" under the SCA. 2

1.2. Personal Representatives' Power to "Lawfully Consent" to Disclosing Decedents' Stored Communications is Consistent with their Statutory and Common Law Powers. 5

1.3. Prohibiting personal representatives from "lawfully consenting" under the SCA would create unnecessary conflict between state and federal laws. 7

1.4. The cases cited by Yahoo do not compel a different result. 9

2. THE SCA'S "LAWFUL CONSENT" PROVISION SHOULD BE READ IN LINE WITH THE SIGNIFICANT PUBLIC POLICY INTEREST IN PRESERVING THE VALUE OF ESTATES. 12

2.1. Estate law already sufficiently accommodates the diminished privacy interests of the dead. ... 17

3. This court should not rule on Yahoo's terms of service argument. 19

CONCLUSION 21

IDENTITY OF *AMICI CURIAE* ..... Add. 1

STATUTORY ADDENDUM ..... Add. 3

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES

Ajemian v. Yahoo! Inc., NO-09E-0079 (Mass. Probate and Family Ct. March 10, 2016) 8, 20

Ajemian v. Yahoo!, Inc., 83 Mass. App. Ct. 565 (2013)20

Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780 (Tex. 2006) 6

Bower v. Bower, 808 F. Supp. 2d 348 (D. Mass. 2011). 10

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 1647 (1994) 4

Clymore v. Fed. R.R. Admin., No. 14-cv-00101, 2015 WL 7760086 (E.D. Cal. Dec. 2, 2015) 11

Commonwealth v. Augustine, 467 Mass. 230 (2014)..... 1

Damon v. Damon, 312 Mass. 268 (1942)..... 12

DiCarlo v. Suffolk Const. Co., 86 Mass. App. Ct. 589 (2014), *aff'd*, 473 Mass. 624 (2016) 5

Dist. Attorney for Norfolk Dist. v. Magraw, 417 Mass. 169 (1994) 6

Eyerman v. Mercantile Trust Co., 524 S.W.2d 210 (Mo. Ct. App. 1975) 13

In re Facebook, Inc., 923 F. Supp. 2d 1204 (N.D. Cal. 2012) 11

In re Will of Pace, 400 N.Y.S.2d 488 (N.Y. Sur. Ct. 1977) 13

Inv. Co. of the Sw. v. Reese, 875 P.2d 1086 (N.M. 1994) 5

Kraft Power Corp. v. Merrill, 464 Mass. 145 (2013)... 6

Meghrig v. KFC W., Inc., 516 U.S. 479 (1996)..... 4

Negro v. Superior Court, 230 Cal. App. 4th 879 (2014). 9, 10

O'Rourke v. Sullivan, 309 Mass. 424 (1941)..... 6

Riley v. California, 134 S. Ct. 2473 (2014)..... 17

Ross v. United States, 374 F.2d 97 (8th Cir. 1967)... 9

Sullivan v. Brabazon, 264 Mass. 276 (1928)..... 6

Suzlon Energy Ltd. v. Microsoft Corp., 671 F.3d 726 (9th Cir. 2011) 10

Turner v. Morson, 316 Mass. 678 (1944) 5

United States v. Warshak, 631 F.3d 266 (6th Cir. 2010) 1

Watt v. Alaska, 451 U.S. 259 (1981) 7

Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) . 7

Statutes

5 U.S.C. § 9101 (2015) 3

15 U.S.C. § 1681b (2012) 3

18 U.S.C. § 1702 (2012) 8

18 U.S.C. § 2510 (2012) 2

18 U.S.C. § 2702 (2015) ..... passim

18 U.S.C. § 2711 (2012) 2

18 U.S.C. § 2721 (2012) 3

26 U.S.C. § 2031 (2014) 8

26 U.S.C. § 6012 (2012) 8

47 U.S.C. § 551 (2012) 3

G. L. c. 190B, § 2-101 12

G. L. c. 190B, § 3-703 6

G. L. c. 190B, § 3-709 7

G. L. c. 190B, § 3-715 ..... 5, 6

Legislative History

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

Other Authorities

Am. Ass'n of Retired Persons, Where There is a Will… (Apr. 2000) 16

Banta, Death and Privacy in the Digital Age, 94 N.C. L. Rev. 927 (2016) 13, 18, 20

Bort, College Professor: I Lost Tons of Critical Files Because of Dropbox, Business Insider (Sept. 18,

2013), http://www.businessinsider.com/professor-suffers-dropbox-nightmare-2013-9 15

Cahn, Probate Law Meets the Digital Age, 67 Vand. L. Rev. 1697 (2014) 18

Census Bureau Projects U.S. and World Populations on New Year's Day, U.S. Census Bureau (Dec. 28, 2016), http://www.census.gov/newsroom/press-releases/2016/cb16-tps158.html 16

Checking Accounts, Santander Bank, https://www.santanderbank.com/us/personal/banking/checking (last visited Feb. 15, 2017) 14

Digital Limbo: Rocket Lawyer Uncovers How Americans Are (or Aren't) Protecting Their Digital Legacies, Rocket Lawyer (Apr. 21, 2015), http://www.marketwired.com/press-release/digital-limbo-rocket-lawyer-uncovers-how-americans-are-arent-protecting-their-digital-2011658.htm 16

Estate Planning FAQs, Am. Bar Ass'n, http://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/estate_planning_faq.html 15

LexisNexis Risk Solutions-Sponsored Survey Finds More Than One-Third of Americans Store Tax, Bank, Health and Other Sensitive Records in Email, Cloud and Electronic Systems, LexisNexis (Oct. 3, 2016), http://www.lexis nexis.com/risk/newsevents/press-release.aspx? id=1475510276968488 14

Mass. Practice, Probate Law and Practice (2d ed.).... 9

McCarthy, Digital Assets and Intestacy, B.U. J. Sci. & Tech. L. 384 (2015) 15, 17

Restatement (Second) of Torts (1977)..... 18

Strahilevitz, The Right to Destroy, 114 Yale L. J. 781 (2005) 13

Sykas, Waste Not, Want Not: Can the Public Policy Doctrine Prohibit the Destruction of Property by Testamentary Direction?, 25 Vt. L. Rev. 911 (2001) 13

U.S. Postal Serv., Domestic Mail Manual..... 9

Wilkens, Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?, 62 Hastings L.J. 1037 (2011) 18

Yahoo Terms of Service,Yahoo (Mar. 16, 2012), https://policies.yahoo.com/us/en/yahoo/terms/utos/ 20

Yahoo, Upload Photos and Videos to Flickr, https://help.yahoo.com/kb/SLN15623.html 19

STATEMENT OF INTEREST

As identified in the accompanying Addendum, *amici* are scholars and practitioners of trusts and estates law who have been engaged for the last several years in scholarly, legislative, and advocacy efforts to ensure fiduciary access to digital assets consistent with the longstanding principles of trusts and estates law that apply to sensitive and valuable personal property in the "real world."

Amici Cahn and Walsh are Reporter and Chair, respectively, of the Uniform Law Commission's Drafting Committee on the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA). In September 2015, the Commission released the final text of the RUFADAA, a uniform law that sets up a framework for fiduciary access to digital assets and has been enacted into in 21 states, with legislation introduced and pending in a further 16 states.

Amici Lamm and Overing are attorneys from Minnesota and California whose practices center on representing clients wishing to plan their digital estates. *Amicus* Lamm was also involved in drafting UFADAA, and both *amici* speak, write, and lobby on these issues.

Each of the *amici* have a strong interest in this case, as this Court's interpretation of § 2702(b)(3) of the Stored Communications Act will significantly impact

personal representatives' ability to access and administer decedents' digital assets. In this brief, *amici* advocate for the removal of barriers to estate administration in today's world, where an increasingly large proportion of estate property is in digital form and held by private companies.

ARGUMENT

This case presents what *amici* understand to be a question of first impression in the United States:[1] absent express instructions from the decedent to the contrary, can the personal representative of an estate access the decedent's stored electronic communications?

The answer turns on the application of the Stored Communications Act (SCA), 18 U.S.C. § 2701 et seq. The text of the statute is silent on this issue, as its framers 30 years ago could not imagine a world where vast quantities of valuable data are stored "in the cloud." How the SCA applies to estate property is, therefore, an open question.

Amici acknowledge that the SCA protects significant privacy interests, and that courts are right to interpret its protections jealously. *See*, *e.g.*, *Commonwealth v. Augustine*, 467 Mass. 230, 255 (2014) (requiring warrant for cell-site location information); *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) (extending warrant protection to emails more than 180 days old). But preserving the SCA's privacy protections does

[1] Courts in privacy-protective foreign jurisdictions have ruled that estate administrators can lawfully access a decedent's electronic accounts. *See*, *e.g.*, *In re Facebook Ireland*, Landgericht Berlin [Berlin Regional Court], Dec. 22, 2015, No. 20 O 172/15.

not require reading it in the stilted manner Yahoo proposes. Interpreting it as condemning to purgatory the data of all those who die without expressing their post-mortem preferences runs against the important public policy of preserving the property and value of a deceased's estate for the benefit of the living.

Given the tremendous value of the data we store with Yahoo and its competitors, and the law's recognition that the dead have diminished privacy interests, this Court should read the SCA in line with estate law and hold that the power to "lawfully consent" in life is entrusted to a decedent's fiduciary in death, the personal representative.

1. THE SCA'S "LAWFUL CONSENT" PROVISION DOES NOT PROHIBIT PERSONAL REPRESENTATIVES FROM GAINING ACCESS TO DECEDENTS' ELECTRONIC ACCOUNTS.

1.1. EXPRESS CONSENT IS NOT THE ONLY VALID FORM OF "LAWFUL CONSENT" UNDER THE SCA.

Yahoo contends that, unless decedents expressly provide for the disposition of their electronic accounts, 18 U.S.C. § 2702(a) prohibits Electronic Communications Service (ECS) and Remote Computing Service (RCS) providers[2] from disclosing decedents' stored communications to their personal representatives. Specifically, Yahoo argues that the "lawful consent" exception, which

[2] As defined in 18 U.S.C. §§ 2510 & 2711.

authorizes providers to disclose stored communications "with the lawful consent of the originator or an addressee or [the] intended recipient," 18 U.S.C. § 2702(b)(3), applies only when the "actual, *de facto* consent of the user" has been secured. Br. Appellee at 9. Thus, if the decedent "did not consent to the disclosure of the content of his emails" while alive, *id.* at 10, his personal representative is forever barred from obtaining them. To rule otherwise would, in Yahoo's view, "[r]ead[]…an exception into the statute" that "contravene[s] Congress' intent and disregard[s] courts' well-established precedent." *Id.* at 24.

It is actually Yahoo that asks this Court to ignore the will of Congress and read new terms into the SCA. Congress knew full well how to impose an express consent requirement when it enacted the SCA. Other federal statutes require private and public entities to obtain express consent before disclosing a customer's private information. *See, e.g.*, 47 U.S.C. § 551 (requiring "prior written or electronic consent" before a cable operator may disclose subscriber information); 15 U.S.C. § 1681b (requiring "specific written consent" before a consumer reporting agency can disclose medical information); 18 U.S.C. § 2721 (requiring "express consent" before a state Department of Motor Vehicles may disclose personal information); 5 U.S.C. § 9101 (re-

quiring "written consent" before an agency may obtain a "criminal history" record).

Congress chose not to require express, affirmative, or prior consent under 18 U.S.C. § 2702(b)(3). Where, as here, Congress has opted not to use specific language in one statute that it has used elsewhere, courts must effectuate this choice. *See*, *e.g.*, *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485 (1996) (comparing two statutes before concluding that the first "does not provide [the] remedy" Congress expressly provided in the second); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-77 (1994) (finding "Congress knew how to impose aiding and abetting liability when it chose to do so," and that its choice not to use the words "aid" or "abet" indicates its intent not to do so). Moreover, the SCA's legislative history shows that Congress distinguished the phrase "lawful consent" from express or written consent. H.R. Rep. No. 99-647, at 66 (1986) ("'[L]awful consent,' in this context, need not take the form of a formal written document of consent."). This Court should give effect Congress' choice and reject Yahoo's attempt to read words into the SCA.

1.2. Personal Representatives' Power to "Lawfully Consent" to Disclosing Decedents' Stored Communications is Consistent with their Statutory and Common Law Powers.

State courts interpreting federal statutes should do so "in light of the common law, examin[ing] the intentions of [C]ongress in passing the law, and plac[ing] the law in the context of relevant public policies." *Inv. Co. of the Sw. v. Reese*, 875 P.2d 1086, 1089 (N.M. 1994). Where, as here, a personal representative's access to estate property is at issue, the Court's interpretation of the SCA should be informed by the law of estates. In view of the broad powers granted to personal representatives, this Court should rule that personal representatives can "lawfully consent" to the disclosure of decedents' stored communications.

Estate law vests personal representatives with significant powers to exercise in discharging their duties—such that they are held to "stand[] in [the] shoes" of the decedent for many purposes. *Turner v. Morson*, 316 Mass. 678, 688 (1944); *DiCarlo v. Suffolk Const. Co.*, 86 Mass. App. Ct. 589, 590 (2014), *aff'd*, 473 Mass. 624 (2016). The Massachusetts Uniform Probate Code (MUPC), G. L. c. 190B, gives personal representatives many of the decision-making powers that the decedent held in life, including the power to perform, compromise, or repudiate the decedent's contracts, *id.* § 3-715 (a) (3), and to manage the decedent's property

and assets, *id.* § 3-715 (a) (6). Personal representatives have "the same standing to sue and be sued […] as the decedent had immediately prior to death," *id.* § 3-703 (c), and can bring, defend, or settle many kinds of claims on the decedent's behalf. *See*, *e.g.*, *Kraft Power Corp. v. Merrill*, 464 Mass. 145, 149-51 (2013); *O'Rourke v. Sullivan*, 309 Mass. 424, 427 (1941).

The personal representative's powers extend to the decedent's most sensitive affairs. Personal representatives can waive decedents' testimonial privileges in the estate's best interests. *See Sullivan v. Brabazon*, 264 Mass. 276, 286 (1928) (attorney-client privilege); *Dist. Attorney for Norfolk Dist. v. Magraw*, 417 Mass. 169, 172 (1994) (psychiatrist-patient privilege). They may also sue a decedent's attorney for malpractice since "the estate 'stands in the shoes' of a decedent, [and] is in privity with the decedent's [] attorney." *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 787 (Tex. 2006).

If the law entrusts personal representatives with the power to waive privileges decedents held in life, personal representatives can also "lawfully consent" on the decedents' behalf to the disclosure of their stored communications under 18 U.S.C. § 2702(b)(3). A fiduciary the law trusts to exercise the decedent's rights against his or her attorney is surely one whom the law

trusts to stand in the decedent's shoes in relation to ECS and RCS providers.

1.3. PROHIBITING PERSONAL REPRESENTATIVES FROM "LAWFULLY CONSENTING" UNDER THE SCA WOULD CREATE UNNECESSARY CONFLICT BETWEEN STATE AND FEDERAL LAWS.

Personal representatives must be able to "lawfully consent" to the disclosure of a decedent's stored communications to avoid needless conflicts between the SCA and other bodies of federal and state statutory and common law. *See*, *e.g.*, *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (declining to find two federal statutes "in irreconcilable conflict without seeking to ascertain the actual intent of Congress"); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (historic state powers "[are] not to be superseded by [] Federal Act unless that was the clear and manifest purpose of Congress" (internal quotations omitted)).

If this Court accepts Yahoo's argument that only the decedent's express consent can authorize the disclosure of stored communications after death, the orderly operation of state estate law and federal tax law, to name two examples, would be disrupted.

Consider the personal representative's duty under the MUPC to gather and take possession of the decedent's property. G. L. c. 190B, § 3-709 (a). The Probate Court below ruled that the decedent's emails stored with Yahoo are estate property, *Ajemian v. Ya-*

hoo! Inc., NO-09E-0079, at 10 (Mass. Probate and Family Ct. March 10, 2016), and this finding has not been challenged on appeal. Thus, the personal representatives here are duty-bound to take possession of the decedent's emails. Yet Yahoo's reading of the SCA would bar them from doing so, even though nothing in the SCA's text, history, or structure requires this result.

Likewise, consider the personal representative's federal statutory duty to file an income tax return on the decedent's behalf, 26 U.S.C. § 6012(b)(1), and to file an estate tax return, *id.* § 6012(b)(4). The latter return must reflect the total value of the estate, *id.* § 2031(a), comprising "all property, real or personal, tangible or intangible, wherever situated." *Id.* If personal representatives are unable to gather the financial records and valuable digital property that is often stored in electronic accounts, as further discussed in Section 2, below, they cannot effectively discharge these duties.

Similar conflicts would have arisen if the federal obstruction of correspondence statute, 18 U.S.C. § 1702, had been interpreted in the same stilted manner that Yahoo urges here. That statute makes it a felony for anyone to "open[], secret[], embezzle[], or destroy[]" mail "before it has been delivered to the person to whom it was directed." *Id.* To avoid absurd re-

sults under a statute that, like the SCA, says nothing about a decedent's silence, courts have held that personal representatives may indeed open a decedent's mail for they are, by operation of law, secondary addressees. *Ross v. United States*, 374 F.2d 97, 103 (8th Cir. 1967). Indeed, personal representatives are advised to review the decedent's mail—and other records—for information about assets and debts. *See* 21 Mass. Prac., Probate Law and Practice § 32.1 (2d ed.). The U.S. Postal Service even provides a procedure for forwarding a decedent's mail to an administrator or executor. U.S. Postal Serv., Domestic Mail Manual, §508.1.4.4.

Just as personal representatives must be able to lawfully open physical letters addressed to the decedent, they must be deemed to be able to "lawfully consent" to the disclosure of the contents of their email and other stored electronic communications under § 2702(b)(3) of the SCA.

1.4. The cases cited by Yahoo do not compel a different result.

Yahoo cites several cases holding that implied consent does not "lawful consent" make under the SCA, but none are controlling and all are easily distinguished. The Court in *Negro v. Superior Court*, 230 Cal. App. 4th 879, 889-91 (2014), held that "consent by judicial fiat" is not "lawful consent" when a defendant in a civil

suit *explicitly refuses* to divulge the contents of his email account "on pain of discovery sanctions," yet a judge nevertheless imputes his consent to disclosure. *Negro* is distinguishable since (1) the potential recipient here is not adverse, but rather a fiduciary; (2) the decedent has not affirmatively opposed the disclosure in life; and (3) the decedent's death forever deprives him of the ability to consent. Accordingly, the policy concerns underpinning the *Negro* decision do not apply here.

Likewise, the court in *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 730-31 (9th Cir. 2011), held that a party to a lawsuit, who had "consistently objected to the disclosure of his [] emails" to its opponent, could not be held to consent by operation of law. And in *Bower v. Bower*, 808 F. Supp. 2d 348, 349-50 (D. Mass. 2011), the court found that a fugitive party in a civil suit had not "impliedly consented" to disclosure of her emails to the adverse party.

The subpoenas at issue in *Negro*, *Suzlon*, and *Bower* implicated the privacy interests of living individuals with the ability to consent (or not) to hand over their stored communications to litigation adversaries. Here, the disclosure sought is of the stored communications of a decedent who died "digitally intestate," and there is no question of overriding anyone's stated privacy

preferences. In these circumstances, the Court should not impute *lack* of consent to a decedent who said nothing, but rather leave the issue to the decedent's fiduciary.

Yahoo's citations to *In re Facebook, Inc.*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012), and *Clymore v. Fed. R.R. Admin.*, No. 14-cv-00101, 2015 WL 7760086 (E.D. Cal. Dec. 2, 2015), are also inapposite. The court in *Facebook* held that compelled consent was insufficient to permit disclosure of a decedent's emails, 923 F. Supp. 2d at 1206, but the court did not reach the question of whether the decedent's survivors could provide consent. It did, however, observe that "nothing prevents Facebook from concluding on its own that [survivors] have standing to consent [to disclosure on the decedent's behalf]." *Id.* In *Clymore*, the court found that the issue of "whether the SCA governs [a subpoena for electronic communications] or whether Facebook properly declined to comply with [that] subpoena" was not before it. 2015 WL 7760086 at *2. Here, by contrast, the SCA issues are very much before this Court, as evinced by its amicus announcement.

Permitting personal representatives to access a decedent's stored electronic communications does not require this Court to "judicially manufacture[]" consent, as Yahoo puts it. Br. Appellee at 26. Rather, it is Ya-

hoo that asks the Court to "manufacture" a lack of consent from the silence of the decedent. Common sense and centuries of estate law counsel that where a decedent is silent, the personal representative is empowered to decide. Allowing a trusted fiduciary to access a decedent's stored communications effectuates, rather than frustrates, the intent attributed to the dead who were silent in life.

2. THE SCA'S "LAWFUL CONSENT" PROVISION SHOULD BE READ IN LINE WITH THE SIGNIFICANT PUBLIC POLICY INTEREST IN PRESERVING THE VALUE OF ESTATES.

Yahoo's proposed interpretation reads unwritten limitations into the SCA, runs contrary to the broad powers of personal representatives, and creates unnecessary conflict with state and federal laws. Moreover, it requires the Court to ignore centuries of estate law and the realities of today's digital world.

Estate law rests on two fundamental premises. First, absent a stated intent to the contrary, family members are presumed to be the decedent's beneficiaries. G. L. c. 190B, § 2-101 (a). Second, where decedents have made their wishes clear, those wishes are carried out unless they "contravene some positive rule of law, or are against public policy." *Damon v. Damon*, 312 Mass. 268, 271 (1942). Yahoo's argument turns these premises on their head.

Public policy abhors the "waste and destruction of resources." *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 217 (Mo. Ct. App. 1975) (refusing to enforce a will provision ordering the destruction of a house). *See also In re Will of Pace*, 400 N.Y.S.2d 488, 491 (N.Y. Sur. Ct. 1977) (testator's intent "should not be carried out when the results would be absurd, abhorrent or a waste of the assets of an estate"). This policy is so strong that "wills that order the destruction of property are rarely upheld." Sykas, Waste Not, Want Not: Can the Public Policy Doctrine Prohibit the Destruction of Property by Testamentary Direction?, 25 Vt. L. Rev. 911, 924 (2001). It exists because the law prioritizes the interests of the living and focuses on "preventing a loss to the estate and the beneficiaries." Strahilevitz, The Right to Destroy, 114 Yale L. J. 781, 796 (2005). Its application is most compelling when the property a decedent wants destroyed is valuable. For example, the instructions of Franz Kafka and Vladimir Nabokov that their papers be destroyed after their death were disregarded in view of their enormous value. Banta, Death and Privacy in the Digital Age, 94 N.C. L. Rev. 927, 956-57 (2016).

Yahoo nevertheless argues that whenever someone dies without making specific provision for the disposition of electronic accounts, the ambiguous language of the

SCA requires that person's data—including contents of electronic accounts of significant economic and sentimental value—to be forever locked away. Yahoo asks this Court to impute to all who die digitally intestate an intent that might not be enforced even if made express. This reading of the "lawful consent" provision is illogical and at odds with public policy—especially given certain facts of life (and death) in the digital age.

First, we now store massive amounts of data with ECS and RCS providers—much of which is enormously valuable in every sense of the word. A recent study finds that more than one-third of Americans store tax, bank, health, and other sensitive records "in the cloud," with services offered by Yahoo and its competitors. LexisNexis Risk Solutions-Sponsored Survey Finds More Than One-Third of Americans Store Tax, Bank, Health and Other Sensitive Records in Email, Cloud and Electronic Systems, LexisNexis (Oct. 3, 2016), http://www.lexisnexis.com/risk/newsevents/press-release.aspx?id=1475510276968488. Banks now induce their customers to "go paperless" by charging them fees for paper statements. *See*, *e.g.*, Checking Accounts, Santander Bank, https://www.santanderbank.com/us/personal/banking/checking (last visited Feb. 15, 2017)." Much like a decedent's physical mail, email can provide valuable information to an executor such as: notice of outstand-

ing debt, notification of financial accounts and other insights into a decedent's life. Dobra, An Executor's Duty Toward Digital Assets, 59 No. 5 Prac. Law. 21, 28 (2013). Barriers to, or even delay in, accessing such information could reduce the value of an estate.

More generally, the rise of "cloud" storage means that valuable works, such as manuscripts, photographs, and original films, may exist only on the servers of ECS and RCS providers. *See*, *e.g.*, Bort, College Professor: I Lost Tons of Critical Files Because of Dropbox, Business Insider (Sept. 18, 2013), http://www.businessinsider.com/professor-suffers-dropbox-nightmare-2013-9. And, increasingly, items of sentimental value such as memoirs, recipes, and family snapshots "are never printed and remain part of the digital world." McCarthy, Digital Assets and Intestacy, B.U. J. Sci. & Tech. L. 384, 398 (2015). Vast quantities of valuable data no longer exist as tangible objects, but as files on some distant server.

Second, a majority (55 percent) of Americans "die without a will or estate plan." Estate Planning FAQs, Am. Bar Ass'n, http://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/estate_planning_faq.html (last visited Feb. 14, 2017). And only a small percentage (30 percent) of those who die testate

make provision for their digital accounts. *See* Digital Limbo: Rocket Lawyer Uncovers How Americans Are (or Aren't) Protecting Their Digital Legacies, Rocket Lawyer (Apr. 21, 2015), http://www.marketwired.com/press-release/digital-limbo-rocket-lawyer-uncovers-how-americans-are-arent-protecting-their-digital-2011658.htm. If Yahoo's reading of the SCA finds purchase, the data in the electronic accounts of at least half of the three million Americans who will die this year will effectively perish with them. Census Bureau Projects U.S. and World Populations on New Year's Day, U.S. Census Bureau (Dec. 28, 2016), http://www.census.gov/newsroom/press-releases/2016/cb16-tps158.html. This impact will be felt disproportionally by poor and vulnerable individuals who are even more likely to die intestate. *See*, *e.g.*, Am. Ass'n of Retired Persons, Where There is a Will…, at 3 (Apr. 2000), available at http://assets.aarp.org/rgcenter/econ/will.pdf (likelihood of dying testate increases with household income).

If Congress wanted this result, it would have drafted the SCA's "lawful consent" to clearly do so. But it did not. Accordingly, *amici* urge the Court to read the SCA's "lawful consent" provision as empowering personal representatives to decide, in line with their fiduciary duties, what to do with this data. This approach ac-

cords with both the long-standing policies governing estate law and the modern realities of the digital age.

2.1. Estate law already sufficiently accommodates the diminished privacy interests of the dead.

In so arguing, *amici* recognize that electronic accounts contain information that is very sensitive. Even more so than our cell phones, ECS and RCS accounts, "[w]ith all they contain and all they may reveal, […] hold for many Americans "the privacies of life."" *Riley v. California*, 134 S. Ct. 2473, 2495 (2014), quoting *Boyd v. United States*, 116 U.S. 616, 625 (1886). The risk of unauthorized access to such data is, of course, why Congress enacted the SCA and why it needs to remain effective. Yet the mere fact that these accounts may sometimes contain compromising materials is not a sound policy reason to deny every personal representative access to their contents, for the following reasons.

First and foremost, as discussed above, these accounts often contain a tremendous amount of valuable data, and this value should be preserved for a decedent's heirs. McCarthy, *supra*, at 396-400.

Second, personal representatives must already wade through reams of sensitive material in discharging their duties, such as personal effects, financial records, and indeed, the data we store on our personal electronic devices. *See* Wilkens, Privacy and Security

During Life, Access After Death: Are They Mutually Exclusive?, 62 Hastings L.J. 1037, 1044 (2011). Compromising materials existed long before the internet, but the law recognizes that personal representatives need to access and review them to distribute the estate's assets. Cahn, Probate Law Meets the Digital Age, 67 Vand. L. Rev. 1697, 1716 (2014) (noting that "some invasion of privacy is inherent in the process of administering any estate…; the goal of such invasion is, however, to act in the individual's best interests").

Third, the law recognizes that, while the dead have ongoing privacy interests, they are diminished. Neither the common law nor the Fourth Amendment recognizes the dead as having enforceable privacy rights, for example. Banta, *supra*, at 932-37, 939-44; Restatement (Second) of Torts § 652I (1977) (no common law cause of action for invasions of privacy occurring after death).

If the Court accepts Yahoo's argument, a personal representative's ability to access sensitive digital materials will turn on whether a decedent, rather than storing files locally, took Yahoo or one of its competitors up on the offer to "back up [one's] memories to [their] safe and secure servers for free." Yahoo, Upload Photos and Videos to Flickr, https://help.yahoo.com/kb/SLN15623.html (last visited Feb. 18, 2017) (promoting Yahoo's Flickr photo and vid-

eo service, which offers users "almost 500,000 photos worth of [storage] space"). The resulting policy would be arbitrary and unnecessary, considering that personal representatives have long had to deal with decedents' sensitive analog materials. And in an age where more of our data is moving to "the cloud" each day, the balance of equities weighs in favor of giving the living access to the valuable materials possessed by decedents who expressed no contrary will in their lifetime.

3. THIS COURT SHOULD NOT RULE ON YAHOO'S TERMS OF SERVICE ARGUMENT.

The appellants have explained fully in their reply brief, at 14-18, why Yahoo's alternative argument based on its Terms of Service (TOS) must fail as a matter of law. *Amici* agree, and additionally wish to underscore the grave consequences of finding, on an undeveloped record, that Yahoo's TOS give it sole discretion to "deny access to user accounts," "delete content stored within user accounts," and "cancel [its] service at any time for any reason." Br. Appellee at 37.

The Appeals Court, at an earlier stage in this litigation, observed that "the record does not reflect that the [TOS] were reasonably communicated or that they were accepted." *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 576 (2013). Accordingly, it declined to enforce the TOS forum selection clause. On remand, the

Probate Court likewise observed that "Yahoo! did not provide [the] Court with any information regarding whether the provisions of the TOS were reasonably communicated and accepted," and denied summary judgment as to the enforceability of the TOS. *Ajemian v. Yahoo! Inc.*, NO-09E-0079, at 9-10.

The Court should not rule lightly that Yahoo has unilateral authority to destroy or deny access to the (demonstrably valuable) contents of its users' accounts under the terms of an agreement "which may be updated by [Yahoo] from time to time *without notice to* [the user]." Yahoo Terms of Service, §1, Yahoo (Mar. 16, 2012), https://policies.yahoo.com/us/en/yahoo/terms/utos/ (emphasis added). In view of the stakes and the possibility for the record to be developed more fully below on remand, *amici* urge this Court to leave this question for another day. *See* Banta, *supra*, at 966 ("If we are to reshape posthumous privacy rights in a digital future, the conversation about how far those rights should extend needs to occur in a public forum, not in terms of service agreements posted online that most people do not read.").

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the Probate Court's order, hold that the SCA permits the personal representative of a decedent's estate to lawfully consent to the disclosure of the decedent's emails, and remand for further proceedings consistent with that holding.

Respectfully submitted,*

Mason Kortz, BBO #691257
Cyberlaw Clinic
Harvard Law School
1585 Massachusetts Ave.
Suite 5018
Cambridge, MA 02138
Tel: (617) 495-2845
Fax: (617) 495-7641
mkortz@cyber.law.harvard.edu

Dated: February 21, 2017

* *Amici* wish to thank Harvard Law School Cyberlaw Clinic students Danielle Kehl, Vinitra Rangan, and Xinshu Sui for their invaluable contributions to this brief.

IDENTITY OF *AMICI CURIAE*

Professor Naomi Cahn is the Harold H. Greene Professor of Law at The George Washington University Law School. She has written extensively in the areas of elder law, family law, and trusts and estates, and is the coauthor of a trusts and estate casebook. Many of her scholarly works involve the intersection of trusts and estates law and digital assets. She is also a member of the American Law Institute. Professor Cahn served as the Reporter for the Uniform Law Commission's Drafting Committee on the Revised Uniform Fiduciary Access to Digital Assets Act.

Ms. Suzanne Brown Walsh is a Partner in the Trusts and Estates Department at Murtha Cullina LLP. She is a Fellow of the American College of Trusts and Estates Counsel (ACTEC) and chairs its Digital Property Taskforce. She has served as one of Connecticut's Commissioners on Uniform Laws since 2005. At the Uniform Law Commission, Ms. Walsh chaired the Drafting Committee on the Revised Uniform Fiduciary Access to Digital Assets Act and is also a member of the Regulation of Virtual Currencies Act and Directed Trust Drafting Committees.

Mr. James D. Lamm is a third-generation estate planning attorney and a Principal at the Gray Plant Mooty law firm. He is an Adjunct Associate Professor teaching Estate Planning at the University of Minnesota Law

School, and he is nationally-known for his speaking and writing on advanced estate planning topics, including estate planning for digital property. He authors the *DigitalPassing.com* blog and was the founding Chair of the Digital Property Task Force of the American College of Trust and Estate Counsel. He coauthored the proposal for, and actively participated in, the drafting of the Uniform Fiduciary Access to Digital Assets Act.

Mr. Michael S. Overing is a practicing attorney as well as an adjunct professor at the Annenberg School of Communication at the University of Southern California. He teaches graduate and undergraduate courses in Internet Law, Digital Rights Management, Media, Censorship and Communications Law. He is a columnist for the *Online Journalism Review* and has written extensively on intellectual property, jurisdiction, and First Amendment rights. He has testified before the California Senate Select Committee on the Legal, Social & Ethical Consequences of Emerging Technologies regarding the ownership of email following the death of the account-holder.

STATUTORY ADDENDUM

FEDERAL STATUTES

18 U.S.C. § 1702

Obstruction of correspondence

Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2702

Voluntary disclosure of customer communications or records

(a) Prohibitions.--Except as provided in subsection (b) or (c)--

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service--

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) solely for the purpose of providing storage or computer processing services to such subscriber or

customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

(b) Exceptions for disclosure of communications.-- A provider described in subsection (a) may divulge the contents of a communication--

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

(2) as otherwise authorized in section 2517, 2511(2)(a), or 2703 of this title;

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;

(4) to a person employed or authorized or whose facilities are used to forward such communication to its destination;

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(6) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 2258A;

(7) to a law enforcement agency--

(A) if the contents--

(i) were inadvertently obtained by the service provider; and

(ii) appear to pertain to the commission of a crime; or

(8) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency.

…

26 U.S.C. § 6012

Persons required to make returns of income.

…

(b) Returns made by fiduciaries and receivers.--

(1) Returns of decedents.--If an individual is deceased, the return of such individual required under subsection (a) shall be made by his executor, administrator, or other person charged with the property of such decedent.

…

Massachusetts Statutes

G. L. c. 190B, § 2-101

Intestate Estate

(a) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this part, except as modified by the decedent's will.

(b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed the intestate share.

G. L. c. 190B, § 3-703

General duties; relation and liability to persons interested in estate; standing to sue

(a) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by chapter 203C. A personal representative shall have the duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. The personal representative shall use the authority conferred by this code, by the terms of the will, if any, and by any order in proceedings to which the personal representative is party for the best interests of successors to the estate.

(b) Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning appointment or fitness to continue, or a supervised administration proceeding. Nothing in this section shall affect the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children and any pretermitted child of the decedent as described elsewhere in this code.

(c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in the commonwealth at death has the same standing to sue and be sued in the courts of the commonwealth and the courts of any other jurisdiction as the decedent had immediately prior to death.

G. L. c. 190B, § 3-709

Duty of personal representative; possession of estate

(a) Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property,

except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection and preservation of, the estate in the personal representative's possession. The personal representative may maintain an action to recover possession of property or to determine the title thereto.

(b) Whoever injuriously intermeddles with any personal property of a deceased person, without being thereto authorized by law, shall be liable as a personal representative in his own wrong to the person aggrieved.

(c) A personal representative in his own wrong shall be liable to the rightful personal representative for the full value of the personal property of the deceased taken by him and for all damages caused to the estate by his acts; and he or she shall not be allowed to retain or deduct any part of such estate, except for funeral expenses or debts of the deceased or other charges actually paid by him and which the rightful personal representative might have been compelled to pay.

G. L. c. 190B, § 3-715

Transactions authorized for personal representatives; exceptions

(a) Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 3-902, a personal representative other than a special personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;

(2) receive assets from fiduciaries, or other sources;

(3) perform, compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(i) execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(ii) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement;

(4) satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;

(5) if funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements or other prudent investments which would be reasonable for use by trustees generally;

(6) acquire or dispose of tangible and intangible personal property for cash or on credit, at public or private sale; and manage, develop, improve, exchange, change the character of, or abandon an estate asset;

(7) make repairs or alterations in buildings or other structures, demolish any improvements, structures, raze existing or erect new party walls or buildings;

(8) subdivide, develop or dedicate land to public use; adjust boundaries; or adjust differences in valuation by giving or receiving considerations; or dedicate easements to public use without consideration;

(9) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration;

(10) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(11) abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered, or is in condition that it is of no benefit to the estate;

(12) vote stocks or other securities in person or by general or limited proxy;

(13) pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;

(14) hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the personal representative is liable for any act of the nominee in connection with the security so held;

(15) insure the assets of the estate against damage, loss and liability and the personal representative against liability as to third persons;

(16) borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate;

(17) effect a fair and reasonable compromise with any debtor or obligor, or extend, renew or in any

manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, the personal representative may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien;

(18) pay taxes, assessments, compensation of a personal representative other than a special personal representative, and other expenses incident to the administration of the estate;

(19) sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(20) allocate items of income or expense to either estate income or principal, as permitted or provided by law;

(21) employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ 1 or more agents to perform any act of administration, whether or not discretionary;

(22) defend and prosecute claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of duties;

(23) sell, or lease any personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for unpaid balances;

(23 ½) sell, lease or encumber to an arm's length third party any real estate of the estate, or an interest in that real estate, for cash, credit or for part cash and part credit, with or without security for unpaid balances and whether the personal repre-

sentative has been appointed formally or informally; the sale, lease or encumbrance shall be conclusive notwithstanding section 3-302 or any contest of the informal probate proceeding, provided that: (i) if the decedent died without a will, a license has been issued under chapter 202; or (ii) if the decedent died with a will, either: (a) the will, probated formally or informally, empowered the personal representative to sell, lease or encumber that real estate or an interest in that real estate, or (b) a license has been issued under chapter 202.

(24) continue any unincorporated business or venture in which the decedent was engaged at the time of death (i) in the same business form for a period of not more than 4 months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business including good will, (ii) in the same business form for any additional period of time that may be approved by order of the court in a formal proceeding to which the persons interested in the estate are parties; or (iii) throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

(25) incorporate any business or venture in which the decedent was engaged at the time of death;

(26) provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate;

(27) satisfy and settle claims and distribute the estate as provided in this code.

(b) Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 3-902, a special personal representative acting reasonably for the benefit of the interested persons, may properly exercise only those powers set forth in subsections (1), (2),

(3), (5), (7), (12), (15), (18), (19), (20), (21), (22), (24) and (26) of paragraph (a).

Other Materials

U.S. Postal Service, Domestic Mail Manual, §508

…

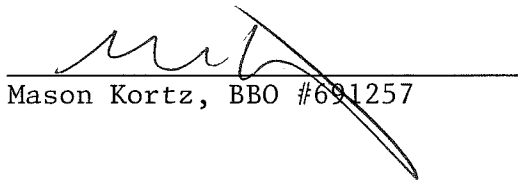
1.4.4 Deceased Person

Mail addressed to a deceased person may be received at the address of the deceased by anyone who would normally receive the addressee's mail at that address. The mail may also be forwarded to a different address, such as that of an appointed executor or administrator, if an order of request is filed at the Post Office.

…

CERTIFICATE OF COMPLIANCE

I, Mason Kortz, hereby certify pursuant to Mass. R. App. P. 16(k) that the instant brief complies with the rules of court pertaining to the filing of briefs, including, but not limited to, Mass. R. App. P. 16(a)(6), (b), (e), (f), and (h), 17, 18, and 20.



Mason Kortz, BBO #691257

Dated: February 21, 2017