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NOTE

A TECHNOLOGICAL UPGRADE FOR THE 21ST CENTURY AND BEYOND: FOCUSING ON A BROAD INTERPRETATION OF THE STORED COMMUNICATIONS ACT

Nicole R. Canale[†]

ABSTRACT

In the 21st century, it is more likely that your e-mail account will be hacked than your home burglarized. E-mail is used by hundreds of thousands of individuals, and this technological dependence only continues to grow. Individuals want and need this electronic communication to be protected. To satisfy this desire, Congress passed the Stored Communications Act ("SCA"). This statute prohibits an individual from obtaining or altering access to a wire or electronic communication while it is in electronic storage. In other words, Congress designed the SCA to protect an individual's e-mail access. However, the SCA—passed in the 1980s—was not intended to deal with the evolving technology of e-mail.

Due to this upgrade in technology, the SCA is inconsistently applied among the courts. Specifically, the Eighth and Ninth Circuits have split over the interpretation of the SCA in the cases of *Anzaldua v. Northeast Ambulance & Fire Protection District* and *Theofel v. Farey-Jones*, respectively. In *Theofel*, the Ninth Circuit held to a broad interpretation of the SCA, while the Eighth Circuit in *Anzaldua* kept to a narrower interpretation of the SCA. Consequently, the holdings of the courts were completely different—only one holding that the e-mail was protected—even though they dealt with similar issues.

There is a need for many areas of e-mail privacy protection to be strengthened—or at the very least defined—so that individuals may take precautions. This Note will address this missing gap in our technological world and provide a recommendation that the SCA be broadly interpreted. It will show that a narrow interpretation is not proper, as it avoids the original intent of the SCA. This Note will show that a broad interpretation

is also capable of being applied by all courts due to the canons of construction in statutory interpretation. This interpretation will allow for a solution that will be an adequate protection as technology changes in the years to come.

I. INTRODUCTION

In 2015, over 205 billion e-mails were sent and received per day, and this figure is only expected to grow.[1] By 2019, individuals will send more than 246 billion e-mails per day.[2] E-mail has become an individual's way to communicate quickly, efficiently, and easily with anyone in the world. While individuals seldom give thought to how an e-mail gets to the recipient, most have strong views on who may view that e-mail. Most of these individuals also have strong views about the importance of this privacy in their everyday lives.[3] They believe it is important—often very important—that they maintain privacy and confidentiality in commonplace activities of their lives.[4]

This Note will focus on Title II of the Electronic Communications Privacy Act ("ECPA"): The Stored Communications Act ("SCA"), and its application to individuals maintaining privacy and confidentially with their e-mail. It will begin with an analysis of the ECPA, the SCA, and the legislative history behind these Acts. This Note will explain how the SCA relates to the issue of e-mail with its phrase, "electronic storage for backup purposes," and how courts have interpreted this language differently to afford e-mail protection only when it is interpreted broadly.

In *Anzaldua v. Northeast Ambulance & Fire Protection District*, 793 F.3d 822 (8th Cir. 2015), and *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004), both courts interpreted "electronic storage for backup purposes" from the viewpoint of current technology, rather than looking at technology back with the SCA was enacted in the 1980's. Although looking at technology from the same view, and under similar facts, the two courts took

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1. THE RADICATI GROUP, INC., *E-mail Statistics Report, 2015-2019,* http://radicati.com/wp/wp-content/uploads/2015/02/Email-Statistics-Report-2015-2019-Executive-Summary.pdf.

2. *Id.*

3. Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RESEARCH CENTER (May 20, 2015), http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/.

4. *Id.* 93% of adults say that being in control of who can get information about them is important; 74% feel this is "very important," while 19% say it is "somewhat important." *Id.*

very different approaches to their interpretation of the phrase. *Anzaldua*, interpreting the phrase narrowly, concluded the e-mail was not protected. *Theofel*, holding to a broad interpretation, found that the e-mail was protected.

As such, there is a gap in privacy coverage under the SCA. This Note will suggest a way Congress may interpret electronic storage to bridge that gap. It will argue for a broad interpretation of the SCA, one that will be applicable in the years to come.

II. The Electronic Communications Privacy Act and the Stored Communications Act

As e-mail use is growing exponentially in the 21st century, an individual's electronic property increasingly needs to be protected from prying eyes. This was Congress' original intent when it passed 18 U.S.C. §§ 2510-2522—the Electronic Communications Privacy Act of 1986.[5] The ECPA is made up of three titles: Title I (Wiretap Act), Title II (Stored Communications Act), and Title III (Pen Register and Trap and Trace Devices).[6] It is ultimately the Stored Communications Act that primarily protects an individual's e-mail use.

A. The Electronic Communications Privacy Act

The ECPA was adopted to protect wire, oral, and electronic communications that are being made, are in transit, and when they are stored on computers.[7] Title II: The Stored Communications Act,[8] added new statutory provisions that explicitly strengthened the protection of e-mail by strengthening the privacy of stored electronic communications, either before such a communication is transmitted to the recipient or after it is delivered and stored as a copy.[9]

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5. U.S. Department of Justice, *Electronic Communications Privacy Act of 1986 (ECPA)*, Justice Information Sharing (July 30, 2013), https://it.ojp.gov/privacyliberty/authorities/statutes/1285.

6. *Id.*

7. *Id.* It applies to communication like e-mail, telephone conversations, and data stored electronically. *Id.*

8. 18 U.S.C.A. §§ 2701-12 (West).

9. Offices of the United States Attorneys, *1061. Unlawful Access to Stored Communications*, United States Department of Justice, https://www.justice.gov/usam/criminal-resource-manual-1061-unlawful-access-stored-communications-18-usc-2701.

B.   The Stored Communications Act

1.   Original Intent of the SCA

Congress' original intent in passing the SCA was to address the growing problem of unauthorized persons deliberately gaining access to, or tampering with, electronic or wire communications that were not intended to be available to the public.[10] In light of this importance of communications to interstate and foreign commerce, the SCA's prevention of unauthorized access to the systems used for such communication was for a legitimate federal concern.[11]

2.   What is Protected by the SCA?

The opening section of the Stored Communications Act, § 2701, sets the scope of an individual's e-mail protection. § 2701(a) makes it an offense to intentionally access without authorization, or to exceed an authorization to access, *an electronic communication service* and thereby obtain, alter, or prevent authorized access to a *wire or electronic communication* while it is in *electronic storage* in such system.[12] To ultimately understand what the SCA protects, one must understand each of the Act's integral elements: (1) electronic communication service; (2) wire or electronic communication; and (3) electronic storage.

a.   Electronic storage[13]

The SCA protects communication if it is in electronic storage. § 2510(17) of the ECPA defines electronic storage as: "(a) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission; or (b) any storage of such communication by an electronic communication service for purposes of backup protection of such communication."[14]

Electronic storage focuses when, what, and why the communication was stored. For the SCA to provide protection, the ECPA is concerned that the wire or electronic communication is stored temporarily or intermediately,

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10.   Electronic Communications Privacy Act, H.R. Rep. No. 99-647, 62 (1986).

11.   *Id.* at 63.

12.   Stored Communications Act, 18 U.S.C.A § 2701(a) (West) (emphasis added).

13.   To avoid redundancy, this Note starts with the definition of element (3) "electronic storage" because within this definition, both elements (1) and (2) are mentioned.

14.   Electronic Communications Privacy Act, 18 U.S.C.A. § 2510(17) (West). This note will have a focus on analyzing case law under Section 2510(17)(B) when courts have interpreted the phrase "for the purposes of backup protection."

or that wire or electronic communication, stored by an electronic communication service, was stored purposefully as backup protection.[15]

b. Wire or electronic communication

For the SCA to grant protection under § 2510(17)(A) and (B), the communication must be wire or electronic in both instances. Section A of § 2510(17) is fairly straightforward in this application because it explicitly protects "wire or electronic communication" if temporarily or immediately placed in storage.[16] However, section B of § 2510(17), does not explicitly mention the words "wire or electronic communication." Nevertheless, communication under Section B must be in this form for the SCA to grant protection. This is due to the words "such communication." Courts have determined that the phrase "such communication" is simply referencing § 2510(17)(A) when it uses the language "wire or electronic communication."[17]

Wire communication is defined by the ECPA as:

> [A]ny aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce.[18]

Electronic communication is defined by the ECPA as:

> [A]ny transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical

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15. For the purposes of this Note, ultimately, the focus will be on whether an electronic communication is stored for the purpose of backup protection and therefore, this section will break down only 2510(17)(B). Section 2510(17)(A) is included for the interpretation and understanding of the SCA as a whole and Section (B) in particular to the phrase "such communication."

16. Electronic Communications Privacy Act, 18 U.S.C.A. § 2510(7) (West).

17. Bailey v. Bailey, 2008 WL 324156, at *6 (E.D. Mich. Feb. 6, 2008). It does not also include the requirement that the electronic communications be "incidental to the electronic transmission." If that were the case, there would be no need to write them as two separate meanings. *Id.*

18. Electronic Communications Privacy Act, 18 U.S.C.A. § 2510(1) (West).

system that affects interstate or foreign commerce, but does not include—

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.[19]

c.   Electronic Communication Service

The SCA's protection does not apply until the wire or electronic communication is stored by an electronic communication service. Electronic communication service ("ECS") is broadly defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications."[20] Unless the wire or electronic communication fits within this SCA protected category, only the Fourth Amendment will protect the communication.[21]

d.   For the purposes of backup protection

Finally, for the SCA to protect the wire or electronic communication that has been stored by an ECS, the communication must have been stored for the purposes of backup protection.[22] The ECPA has not defined exactly what "for the purposes of backup protection" means. Therefore, this element of the SCA has been left to the interpretation of the courts. Unfortunately, courts like the Eighth and Ninth Circuits have not been able to discern Congress' intent regarding this phrase, which has caused multiple circuit splits as to what is protected under the SCA.[23]

III. E-MAIL IS PROTECTED UNDER THE SCA

Having defined the broad elements that must be met for the SCA to grant protection: (1) an electronic communication service; (2) wire or

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19.   Electronic Communications Privacy Act, 18 U.S.C.A. § 2510(12) (West).

20.   Electronic Communications Privacy Act, 18 U.S.C.A. § 2510(15) (West).

21.   Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1213 (2004).

22.   Electronic Communications Privacy Act, 18 U.S.C.A. § 2510(17)(B) (West).

23.   *See infra* Section V.

electronic communication; and (3) electronic storage,[24] this Note will now apply the SCA's scope of protection to e-mail.

The SCA protects any electronic communication when it is a wire or electronic communication and stored by an ECS. This includes the transmission of e-mail. E-mail is protected because it is a form of electronic communication, that when stored by an ECS, can meet the definition of electronic storage if stored for the proper purposes. It is this last requirement, the purpose of why the e-mail was stored, which causes courts to continue to have difficulty determining the SCA's scope of protection to e-mail in the 21st century.

A.   *E-mail as an Electronic Communication*

The definition of electronic communication is broad enough to include e-mail. For example, almost all internet communications qualify as electronic communications.[25] As such, "there can be no doubt that [the definition of electronic communication] is broad enough to encompass e-mail communications."[26]

B.   *E-mail is Stored by an Electronic Communication Service*

Both unopened and opened e-mails are stored by electronic communication services. When e-mail is received, but sits *unopened* on the internet service provider's ("ISP") server, the ISP is acting as a provider of ECS. [27] Internet service providers are companies such as Comcast Xfinity, At&T internet, or Version Fios,[28] and will receive the e-mail from e-mail clients or web mail. Therefore, the e-mail is protected under the SCA by the ISP.

The protections under the SCA are not as clear-cut for *opened* e-mails. Traditionally, courts reasoned that when an individual left a copy of an already-accessed e-mail stored on a server, the e-mail no longer fell under

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24.   Stored Communications Act, 18 U.S.C. § 2703(a).

25.   Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 876 (9th Cir. 2002).

26.   In re Application of United States, 416 F. Supp. 2d 13, 16 (D.D.C. 2006).

27.   Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1215 (2004); *see also* In re Doubleclick Inc., Privacy Litig., 154 F. Supp. 2d 497, 511 n.20 (S.D.N.Y. 2001).

28.   20 Top Internet Service Providers, PRACTICALECOMMERCE, https://www.practicalecommerce.com/20-Top-Internet-Service-Providers.

an electronic communication service; rather, the e-mail was just in remote storage.[29]

However, this line of reasoning changed with *Theofel v. Farey-Jones*. The Ninth Circuit concluded that all e-mails held by a server were protected under the ECS rules until "the underlying message [] expired in the normal course."[30] This was regardless of whether the e-mail had been opened or not.[31]

While the SCA broadly protects ECS storage, it is not designed to protect the privacy of all Internet communications.[32] The ECS rules require that, for the SCA's scope of protection to be granted, the ECS must be accessed without permission, leading to the alteration of electronic communication in electronic storage.[33]

C. *E-mail is Electronic Storage*

Since e-mail is an electronic communication that may be stored by an ECS, the only element left to prove that e-mail is electronic storage (and thus protected under the SCA) is whether it was stored as electronic storage in either: (1) temporary, intermediate storage, or (2) for the purposes of backup protection.

1. When is an E-mail Protected as Temporary, Intermediate Storage?

"There is no question that the SCA protects unopened e-mails stored on e-mail servers before they are delivered to, and opened by, their recipients."[34] The SCA applies in instances such as these because *unopened* e-mails fall into § 2510(17)(A) and are in "temporary, intermediate storage" when pending delivery.[35]

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29. Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1217 (2004). The Stored Communications Act does have protections in place for remote storage (RCS), but they are not at issue in this Note since the change with *Theofel*.

30. *Id.*

31. *Id.*

32. *Id.* at 1214.

33. Stored Communications Act, 18 U.S.C.A § 2701(a) (West).

34. Pierre Grosdidier, *When Hacking an E-mail Account Doesn't Violate the SCA*, HAYNES   AND   BOONE, http://www.haynesboone.com/~/media/files/attorney%20publications/2013/law360%20_wh en_hacking_an_e-mail_account_doesnt_violate_the_sca.ashx (last visited Oct. 24, 2016).

35. Pierre Grosdidier, *When Hacking an E-mail Account Doesn't Violate the SCA*, HAYNES   AND   BOONE,

2. When is an E-mail Protected For the Purposes of Backup Protection?

Once *opened*, server-resident e-mails are no longer protected by the SCA under 18 U.S.C. § 2510(17)(A) because in *Cruz Lopez v. Pena* the court found that this type of e-mail is "no longer stored incident to transmission."[36] The question then is whether opened e-mails are protected under 18 U.S.C. § 2510(17)(B), "for purposes of backup protection."[37]

This status for opened e-mails remains unclear. Courts under the Eighth and Ninth Circuits struggle with the fact that neither the SCA nor the ECPA define "backup protection."[38] Courts like *Theofel* have held that yes, e-mail opened on an ISP is stored for the purposes of backup protection. However, courts like *Anzaldua*, have held the opposite and found that because the e-mail was not stored for backup protection, it was not electronic storage, and therefore, not granted protection under the SCA. This Note will discuss these cases, their holdings, and argue that *Theofel's* broad interpretation illuminates the intent of the SCA, yet still grants adequate protection to individuals as technology advances in e-mail.

IV. The SCA in a 21st Century Context

When Congress enacted the SCA, technology was vastly different than the digital landscape individuals face today. In the 21st century, access to e-mail servers is broader than it was in the 1980s.

Generally speaking, there are two types of e-mail accounts: (1) e-mail clients and (2) web mail.[39] E-mail clients are programs such as Microsoft Office or Thunderbird.[40] Web mail is provided through browsers like Gmail, Yahoo!, or Hotmail.[41] With the expansion of these web-based programs, e-mail has become easier to access and store for the individual.

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http://www.haynesboone.com/~/media/files/attorney%20publications/2013/law360%20_when_hacking_an_e-mail_account_doesnt_violate_the_sca.ashx (last visited Oct. 24, 2016).

36. *Id.* (citing *Lopez* I, at *4).

37. 18 U.S.C. § 2510(17)(B).

38. Pierre Grosdidier, *When Hacking an E-mail Account Doesn't Violate the SCA*, Haynes and Boone, http://www.haynesboone.com/~/media/files/attorney%20publications/2013/law360%20_when_hacking_an_e-mail_account_doesnt_violate_the_sca.ashx (last visited Oct. 24, 2016).

39. *Web Mail v. Email Clients*, BasicComputerInformation.ca, http://www.basiccomputerinformation.ca/web-mail-vs-email-clients/ (last visited Oct. 24, 2016).

40. *Id.*

41. *Id.*

As such, the SCA has been interpreted to no longer covers certain e-mail storage, leaving individuals without critical privacy protection. To help fix this, Congress enacted amendments for e-mail privacy throughout the years, but such a patch will be insufficient to account for upcoming technological advances.

A.   *A Technological Upgrade in E-mail*

When the SCA was created in 1986, public e-mail services were in their infancy and individuals only used e-mail clients.[42] When using an e-mail client, the individual's e-mail resided permanently on the ISP's server.[43] Therefore, to access the e-mail, an individual needed to connect with the ISP server and download messages.[44] Subscribers connected to private ISP networks though phone lines and they read e-mails on their personal computers.[45]

In contrast, today, 56% of people use webmail services such as Hotmail, Gmail, or Yahoo! e-mail, over any other e-mail service.[46] In fact, the first webmail service, Hotmail, was not created until 1996—ten years after the SCA was enacted.[47] When an individual uses a webmail service, he can check for e-mail messages on any computer that has a web browser installed.[48] To retrieve those e-mails, the individual only has to go to the web browser and find the webmail service.[49] Once at the service, all the

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42. Pierre Grosdidier, *When Hacking an E-mail Account Doesn't Violate the SCA*, HAYNES AND BOONE, http://www.haynesboone.com/~/media/files/attorney%20publications/2013/law360%20_when_hacking_an_e-mail_account_doesnt_violate_the_sca.ashx, (last visited Oct. 24, 2016).

43. *Web-Based Email Vs. ISP*, IT STILL WORKS, http://itstillworks.com/webbased-email-vs-isp-3867.html (last visited Oct. 24, 2016).

44. *Id.*

45. *Id.*; *see also* Pierre Grosdidier, *When Hacking an E-mail Account Doesn't Violate the SCA*, HAYNES AND BOONE, http://www.haynesboone.com/~/media/files/attorney%20publications/2013/law360%20_when_hacking_an_e-mail_account_doesnt_violate_the_sca.ashx (last visited Oct. 24, 2016).

46. John B. Horrigan, *Use of Cloud Computing Applications and Services*, PEW RESEARCH CENTER (Sept. 12, 2008), http://www.pewinternet.org/2008/09/12/use-of-cloud-computing-applications-and-services/.

47. *World Wide Web Timeline*, PEW RESEARCH CENTER, http://www.pewinternet.org/2014/03/11/world-wide-web-timeline/ (last visited Oct. 24, 2016).

48. *Web-Based E-mail Vs. ISP*, IT STILL WORKS, http://itstillworks.com/webbased-email-vs-isp-3867.html (last visited Oct. 24, 2016).

49. *Id.*

individual has to do is log into the service, and the browser downloads the e-mail.[50] "In the absence of an e-mail client, messages are not downloaded to the user's personal device and remain on the server until expressly deleted."[51]

B. *The E-mail Privacy Act of 2016*

When the SCA was passed, Congress could not have foreseen technological advances such as webmail. As a result, when e-mail evolved, it left individuals with gaps in their privacy protection.[52] Accordingly, leading individuals in cyberspace law have said, "[i]t is time for Congress to step in and be more specific as to what stored communications means, and at the very least, make references to current technologies."[53]

In 2015, the House tried to be more specific by passing on to the Senate the E-mail Privacy Act.[54] This amendment to the ECPA, among other things, "prohibit[s] a provider of remote computing service or electronic communication service to the public from knowingly divulging to a governmental entity the contents of any communication that is in electronic storage" and it will eliminate the difference in stored communications, whether such communications had been stored for fewer than, or more than, 180 days.[55]

However, the E-mail Privacy Act is still under the Senate's review.[56] Even if both the House and Senate pass the Act, courts will still need explicit guidance on how to define electronic storage as technology advances quickly in the years to come. The E-mail Privacy Act will only clear up certain, narrow privacy issues. It will still leave several questions and conflicts regarding the definition of electronic storage for backup purposes

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50. *Id.*

51. Pierre Grosdidier, *When Hacking an E-mail Account Doesn't Violate the SCA*, HAYNES AND BOONE, http://www.haynesboone.com/~/media/files/attorney%20publications/2013/law360%20_wh en_hacking_an_e-mail_account_doesnt_violate_the_sca.ashx (last visited Oct. 24, 2016).

52. Kristen L. Burge, *Circuit Split Creates Data Protection Uncertainty*, LITIGATION NEWS (Nov. 11, 2015), https://apps.americanbar.org/litigation/litigationnews/top_stories/111115-electronic-storage-protection.html (last visited Oct. 5th, 2016).

53. *Id.*

54. E-mail Privacy Act, H.R. 699, 114th Cong. (2015).

55. *Id.*; *see also* 18 U.S.C. § 2703(a) (West) (This section contains the old 180-day rule. If the E-mail Privacy Act passes in the Senate, it will be removed).

56. E-mail Privacy Act, H.R. 387, 115th Cong. (2017-2018). Found at https://www.congress.gov/bill/115th-congress/house-bill/387.

unanswered. As a result, courts will remain split at both the federal and the state level.[57]

V. THE CIRCUIT SPLIT OVER THE DEFINITION OF ELECTRONIC STORAGE FOR BACKUP PURPOSES

The most notable split to date regards the Eighth and Ninth Circuits. When faced with nearly the same factual situation and issue—whether an individual's e-mails were protected by the SCA—the two circuits reached opposite conclusions.[58] Each circuit analyzed whether the e-mail was stored for backup purposes under the electronic storage definition of 18 U.S.C. § 2510(17)(B), but only the Ninth Circuit concluded that the e-mails were protected under the SCA.[59]

The Ninth Circuit determined the standard definition of electronic storage for backup purposes in its 2004 decision, *Theofel v. Farey-Jones*.[60] There, the court held to a broad interpretation of electronic storage. It allowed e-mail to be protected under the SCA until the underlying message expired in the normal course of business because after that it would no longer be serving a backup function.[61] The court also found that e-mails, which had been received, read, and left on the server, were stored for purposes of backup protection, and therefore were within the protection of the SCA.[62]

However, under the Eighth Circuit's decision in *Anzaldua v. Northeast Ambulance & Fire Protection District*,[63] the SCA may no longer protect stored communication a user considers saved as a backup.[64] The plaintiff in that case relied on the Ninth Circuit's *Theofel* interpretation of electronic storage.[65] He argued that his e-mail was protected under the SCA because it still served a backup purpose.[66]

The Eighth Circuit disagreed. The court noted that the "electronic storage" requirement is commonly misunderstood because the statutory

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57. Burge, *supra* note 52.

58. *Id.*

59. *Id.*

60. Theofel v. Farey-Jones, 359 F.3d 1066 (9th Cir. 2004).

61. *Id.* at 1070.

62. *See generally id.*

63. Anzaldua v. Northeast Ambulance & Fire Prot. Dist., 793 F.3d 822 (8th Cir. 2015).

64. Burge, *supra* note 52.

65. *Id.*

66. *Id.*

definition is much narrower than its name suggests.[67] The court acknowledged that, under common parlance, while the plaintiff's e-mail remained on the server it would serve as a "backup" for the sender; it no longer qualified as electronic storage under the SCA.[68] The Eighth Circuit held this way because the plaintiff had no reason to access the purported backup copy after the e-mail had been successfully delivered.[69]

As a result of these split decisions, individuals must "be very careful because [they] cannot expect to know how the court is going to interpret stored communications, especially if the content is stored in the e-mail system and accessible by the sender of the message."[70] To minimize the risk of litigation, "it is crucial to implement policies limiting or prohibiting access to personal accounts to avoid stored communication disputes.[71]

A. The Ninth Circuit's Decision

The Ninth Circuit began first by interpreting the Stored Communications Act "in light of the common law."[72] The court dissected the SCA's definition of electronic storage into two parts: "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission . . . and (B) any storage of such communication by an electronic communication service for the purposes of backup protection of such communication."[73] The court focused on part (B) of the definition: whether the e-mail was stored for purposes of backup protection.[74]

The court viewed the subsection under the plain language of the Act.[75] Under the Ninth Circuit's interpretation, the SCA offers protection when the purpose of storing a message on an ISP server after delivery is to provide a second copy of the message in the event that the user needed to download

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67. *Id.*

68. Kristen L. Burge, *Circuit Split Creates Data Protection Uncertainty*, LITIGATION NEWS   (Nov.   11,   2015), https://apps.americanbar.org/litigation/litigationnews/top_stories/111115-electronic-storage-protection.html (last visited Oct. 5, 2016).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Theofel*, 359 F.3d at 1072.

73. *Id.*

74. *Id.*

75. *Theofel*, 359 F.3d at 1075.

it again.[76] The court rejected a Third Circuit interpretation in *Fraser v. Nationwide Mut. Ins. Co.*[77] that backup protection included only temporary backup storage pending delivery and not any form of post transmission storage.[78]

The court noted that subsection (B) of the definition of electronic storage must include post transmission storage because "subsection (B) does not distinguish between intermediate and post transmission storage," as subsection (A) does, and "since temporary backup storage pending transmission would already seem to qualify as 'temporary, intermediate storage' with the meaning of subsection (A), subsection (B) would then be rendered superfluous."[79] It is only when the underlying message has expired in the normal course that any copy will have thereby expired and would no longer be performing any backup function.[80] It is only then that the e-mail would not be protected by the SCA.

The court held that there was no dispute that messages remaining "on [the] server after delivery [were] stored 'by an electronic communication service'" whether or not they had been previously delivered.[81] The messages therefore served a backup purpose and were covered by the SCA.[82]

B. *The Eighth Circuit's Decision*

The Eighth Circuit determined that while the district court erred in finding that the defendant had authorized access to the plaintiff's e-mail account, he was still not afforded protection under the SCA because his e-mails were not electronic storage within the Eighth Circuit's interpretation of the Act.[83] The court held that the plaintiff's e-mails did not serve any backup function merely because copies of them remained on a webmail

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76. *Id.* The court noted that "the mere fact that a copy could serve as a backup does not mean it is stored for that purpose." *Id.* at 1076 (emphasis omitted). There are "many instances were an ISP could hold messages not in electronic storage," such as an "e-mail sent to or from the ISP's staff, or messages a [individual] has flagged for deletion from the server." *Id.* at 1076.

77. Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623 (E.D. Pa. 2001).

78. *Theofel,* 359 F.3d at 1075.

79. *Id.* at 1075-76.

80. *Id.*

81. *Id.* at 1075-77.

82. *Id.*

83. *Anzaldua,* 793 F.3d at 838.

server.[84] The apparent test in the Eighth Circuit for serving a backup function is whether the user has "reason to believe that they may need to access an additional copy of the file in the future."[85] The plaintiff only argued that copies existed and did not further his argument by discussing a future need to access it.[86] As such, the e-mails did not fall within the protection of the SCA according to the Eighth Circuit.[87]

VI. *ANZALDUA* AND *THEOFEL* IN THE CONTEXT OF OTHER CIRCUITS

Due to the 21st century changes in technology, now, more than ever, the SCA needs to be interpreted to include this growing expanse of electronic communication. Today, "people store e-mails by leaving them in their inboxes, sent mailbox, or deleted folders, where they can keep copies indefinitely."[88] By classifying these communications as electronic storage, the *Theofel* court expanded protection to e-mails stored on web-based servers.[89]

Within the context of other circuits, one can not only see how courts have agreed and disagreed with the *Theofel* holding, but it becomes apparent that the interpretation of the SCA must be held in a broad manner. This broad interpretation allows for the protection of e-mails and is within the original intent of the protections guaranteed by the SCA.[90] Otherwise, individuals will be left with a wide gap in critical privacy protections.

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84. *Id.* at 842. An e-mail service that kept permanent copies of temporary messages could not be described as "backing up" those messages. *Id.* (quoting Theofel v. Farey-Jones, 359 F.3d 1066, 1076 (9th Cir. 2004)).

85. Orin S. Kerr, *A User's Guide to the Stored Communications Act, and A Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1218 (2004).

86. *Anzaldua*, 793 F.3d at 840, 842. Anzaldua claimed his draft e-mail to Dr. Tan was in temporary storage and therefore covered under 18 U.S.C. 2510(17)(A). Such a situation is beyond the scope of this note (18 U.S.C. 2510(17)(B)).

87. *Id.* at 842.

88. Kristen L. Burge, *Circuit Split Creates Data Protection Uncertainty*, LITIGATION NEWS (Nov. 11, 2015), https://apps.americanbar.org/litigation/litigationnews/top_stories/111115-electronic-storage-protection.html (last visited Oct. 5th, 2016).

89. *Id.*

90. *See supra* Section II.B.1.

A.   *A Narrow Interpretation: Cases in Agreement with Anzaldua*

Many courts have followed *Anzaldua* and interpreted the SCA in a narrower light. The Central District of California in *Crispin v. Christian Audigier Inc.* implicitly assumed that the plaintiff's opened e-mail on his webmail were not downloaded, and as such, it held that these e-mails were not in backup storage and were not protected by the SCA's § 2701(a)).[91] Similarly, in *Jennings v. Jennings*, the court held that because the copy of the e-mail was read and the webmail server was the only copy retained, there was no "backup" under the SCA.[92]

B.   *A Broad Interpretation: Cases in Agreement with Theofel*

A number of other courts have followed *Theofel* and interpreted the SCA in a broad manner. The Central District of Illinois found that accessing server e-mail copies fell under the SCA's purview when the plaintiff downloaded the e-mails to Outlook.[93] Likewise, the Northern District of Iowa held that a plaintiff who downloaded e-mails to Outlook on his laptop computer properly alleged an SCA claim when defendants had accessed the Exchange server copies.[94]

Courts that have interpreted the SCA under *Theofel's* broader interpretation have not just protected downloaded e-mail from clients, but also e-mails opened on a webmail server. In *Bailey v. Bailey*, the plaintiff brought a suit under the SCA when the defendant accessed two of his Yahoo! e-mail accounts without permission.[95] Agreeing with the reasoning in *Theofel,* this court found that "the plain language of the [SCA] seem[ed] to include e-mails received by the intended recipient where they remain stored by an electronic communication service."[96] In *Fischer v. Mount Olive Lutheran Church Inc.*, the plaintiff sued the defendants under the SCA after they accessed his Hotmail account by guessing his password.[97] The court cited the legislative history to hold "that Congress intended the [SCA] to

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91.   Crispin v. Christian Audigier Inc., 717 F. Supp. 2d 965, 987 (C.D. Cal. 2010).

92.   Jennings v. Jennings, 736 S.E.2d 242, 245 (S.C. 2012).

93.   *See* Shefts v. Petrakis, No. 10-cv-1104, 2011 WL 5930469, at *2, *6 (C.D. Ill. Nov. 29, 2011).

94.   *See* Cornerstone Consultants, Inc. v. Prod. Input Sols., L.L.C., 789 F. Supp. 2d 1029, 1032-33, 1055 (N.D. Iowa 2011).

95.   Bailey v. Bailey, No. 07-11672, 2008 WL 324156, at *6 (E.D. Mich. Feb. 6, 2008).

96.   *Id.* at *6.

97.   Fischer v. Mount Olive Lutheran Church, Inc., 207 F. Supp. 2d 914, 916-17, 920 (W.D. Wis. 2002).

cover the exact situation in this case."[98] In its determination of *Fischer*, however, the court cited to nothing in its opinion to suggest that the plaintiff's e-mails had been downloaded to a client; it can be presumed that the e-mails stayed on the webmail server after being read by the plaintiff.[99]

The broad interpretation was most recently followed in 2013. In *Cheng v. Romo*, the court held that previously opened web-based e-mails were in "electronic storage" as defined by SCA because the Act did not specify for whose purposes the backup protection must be intended.[100] The e-mail need only be backed up.[101]

C.   Courts May Have Followed Anzaldua Due to the E-mail Type

Some analysts have tried to downplay the circuit split and reconcile the cases by explaining that each court's reasoning as to its interpretation of the SCA was due to the different type of e-mail account used in each case.[102] In *Theofel*, the plaintiff's e-mail was on an ISP—a client e-mail.[103] In contrast, the plaintiff in *Anzaldua* used Gmail as his e-mail provider.[104]

While *Anzaldua*'s interpretation may be the court's attempt to interpret the SCA under the technological changes to e-mail accounts, the heart of the discrepancy in the Act's interpretation is not the type of e-mail provider, it is purpose for why the e-mail has been backed up. Since the SCA fails to define what a proper backup purpose is, the type of e-mail account used cannot be the only factor a court uses to interpret the SCA's scope. Courts such as the Eastern District of Michigan and the United States District

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98.   *Fischer*, 207 F. Supp. at 925–26 (citing S. Rep. No. 99-541, at 36 (1986) (e-mail subscriber would violate SCA's § 2701(a) by accessing other subscribers' e-mails).

99.   Pierre Grosdidier, *When Hacking an E-mail Account Doesn't Violate the SCA*, HAYNES   AND   BOONE, http://www.haynesboone.com/~/media/files/attorney%20publications/2013/law360%20_wh en_hacking_an_e-mail_account_doesnt_violate_the_sca.ashx, (last visited Oct. 24, 2016).

100.   Cheng v. Romo, No. 11—10007—DJC, 2013 WL 6814691, at *3 (D. Mass. Dec. 20, 2013).

101.   *Id.*

102.   Pierre Grosdidier, *When Hacking an E-mail Account Doesn't Violate the SCA*, HAYNES   AND   BOONE, http://www.haynesboone.com/~/media/files/attorney%20publications/2013/law360%20_wh en_hacking_an_e-mail_account_doesnt_violate_the_sca.ashx, (last visited Oct. 24, 2016); *see also* Martha K. Gooding and Isabelle M. Carrillo, *LAWYER? TRESPASSER?: How An Overly Broad Subpoena Can Turn Civil Discovery Into Snooping In Violation Of Federal Law*, ABTL REPORT (Fall 2003), http://www.abtl.org/report/oc/abtlocvol5no3.pdf.

103.   *Theofel*, 359 F.3d at 1071.

104.   *Anzaldua*, 793 F.3d at 827.

Court, District of Massachusetts are willing to be flexible in applying the SCA to warrant e-mail protection.[105]

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VII. RECOMMENDING A MOVEMENT TOWARDS A
BROAD INTERPRETATION OF THE SCA

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To determine what may be included as electronic storage, it is important to remember the original intent of the SCA. It was created to prevent unauthorized access "[b]ecause looking at another's e-mail is generally considered to be bad conduct, [and] courts have a tendency to want to find a violation."[106] The SCA must be interpreted under a broad interpretation like that of *Theofel* to keep the original intent of the Act.

The SCA is notoriously hard to interpret.[107] Even after centuries of judicial and scholarly effort, "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[108] Nevertheless, the courts have been tasked to interpret statutes like the SCA and must do so to protect the privacy of individuals. Without a definition, as to what electronic storage for a backup purpose is, courts have scant direction on how to interpret the SCA in any context, let alone in the current digital age. The SCA should be uniformly interpreted among courts, preventing circuit splits like those of *Theofel* and *Anzaldua*, and thereby adequately protecting the privacies of individuals in this technological age by giving them a standard to which they will expect their e-mail communications to be safeguarded.

A. Canons of Construction

Despite the inherent difficulty that comes with statutory interpretation, the "canons of construction" provide the courts with guidance on how statutes should be interpreted. Accordingly, courts should use these canons, and use them correctly, in interpreting the SCA.

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105. *Id.*

106. Jannis E. Goodnow, *Party Held Liable for Unauthorized E-mail Access*, LITIGATION NEWS   (Apr.   25,   2014), https://apps.americanbar.org/litigation/litigationnews/top_stories/042514-stored-communications-act.html (last visited Nov. 1, 2016).

107. Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 874 (9th Cir. 2002) (acknowledging the difficulty in interpreting the Act because "the ECPA was written prior to the advent of the Internet and the World Wide Web").

108. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., The Foundation Press 1994).

A court may only apply these canons if the statute is found to be ambiguous.[109] Courts have generally held that a statute is ambiguous when reasonably well-informed persons could understand the language in either of two or more senses.[110] Here, the SCA's language for "backup purposes" has quite clearly been understood in two senses because the courts in *Theofel* and *Anzaldua* came to two opposite conclusions regarding the language. Therefore, this part of the SCA is ambiguous and it is appropriate to apply the canons of construction.

The canons of construction are theories, which guide the methods and sources used in statutory interpretation.[111] "The three dominant theories of how statutes should be interpreted—new textualism, intentionalism, and pragmatism—are each comprised of a collection of assertions about which interpretive rules are appropriate."[112]

When interpreting a statute, the interpreter will choose a particular canon due to his or her preferred methodology.[113] "When a legislature enacts a statute, its members have certain ideas about how those words convey meaning."[114] "

Regardless of the theory of interpretation applied, a broad interpretation of the SCA should prevail. Each of the three theories militates for the conclusion that the *Theofel* court came to—that the SCA should protect e-mail even after it has been sent and simply stays on the server. This is in contrast to the *Anzaldua* court's narrow interpretation of the SCA wherein an e-mail that is simply left on a server does not serve a backup purpose and therefore is not afforded protection under the SCA.[115]

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109. Under the "plain-meaning" rule, if the intention of the legislature is "so apparent from the face of the statute that there can be no question as to its meaning, there is no need for the court to apply canons of construction." *Canons of Construction*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/canons-construction (citing Overseas Educ. Ass'n v. Fed. Labor Relations Auth., 876 F.2d 960 (D.C. Cir. 1989)).

110. Neelen v. Lucas, 24 Wis. 2d 262, 267 (1964).

111. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEORGETOWN L.J. 341, 343 (2010).

112. *Id.*

113. *Id.* While an interpreter's preferred method may be used when looking at the 'canons of construction' the first time, once a court interprets the statute, other courts usually will not go through the exercise again, but rather will enforce the statute as interpreted by the other court. *Statutory Construction*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/statutory_construction.

114. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEORGETOWN L.J. 341, 343 (2010).

115. *See supra* Section VI.A.

1. New Textualism

For new textualists, the statutory language itself . . . is the best evidence of legislative intent."[116] Under the new textualist theory, the courts look to linguistic inferences that encourage interpreters to follow the ordinary usage of text, unless the legislature has itself defined the word or the phrase has acquired a technical meaning.[117] Because dictionaries report common usage, the dictionary rule supports consulting widely used dictionary definitions of terms the legislature has not defined.[118]

In applying this to the SCA, the legislature did not define and ordinary usage of the text "backup protection." Therefore, it is appropriate to look to the dictionary definition of these words. Merriam-Webster defines "backup" as, "one that serves as a substitute or support."[119] It also defines protection as, "the act of protecting."[120] Merriam-Webster then defines "protect" as, "to cover or shield from exposure, injury, damage, or destruction."[121] Under new textualism then, "backup protection" is a substitute, which is meant to cover or prevent something from destruction. With this theory, the SCA will allow for e-mail to be protected when its storage on a server is for the purpose of a substitute to shield the e-mail from destruction.

New textualism allows "for the purpose of backup protection" to be satisfied under both e-mail clients and webmail providers, even though the storage of e-mail has changed. The storage of e-mail under an e-mail client is active, one has to purposefully download the e-mail to view and save it.

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116. *Id.* at 348.

117. *See* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 228 (1994) (using ordinary usage canon to hold that the Federal Communication Commission's authority to "modify" tariff requirements does not allow it to waive tariffs because "'[m]odify,' in [the Court's] view, connotes moderate change" and stating that "[i]t might be good English to say that the French Revolution 'modified' the status of the French nobility—but only because there is a figure of speech called understatement and a literary device known as sarcasm.").

118. *See* Muscarello v. United States, 524 U.S. 125, 128 (1998) (consulting the Oxford English Dictionary,
Webster's Third New International Dictionary, and Random House Dictionary of the English Language
Unabridged for the meaning of the word "carry").

119. *Backup*, MERRIAM-WEBSTER (1828); also found at https://www.merriamwebster.com/dictionary/backup?utm_campaign=
sd&utm_medium=serp&utm_source=jsonld.

120. *Protection*, MERRIAM-WEBSTER (1828); also found at https://www.merriam-webster.com/dictionary/protection.

121. *Protect*, MERRIAM-WEBSTER (1828); also found at https://www.merriam-webster.com/dictionary/protecting.

Webmail storage, on the other hand, is more passive because messages are not downloaded to the user's personal device; they simply remain stored on the server until expressly deleted. However, this does not mean that the purpose of the storage needs to change.

In order to be protected under the SCA, the e-mail, not only needs to be stored for backup purposes, but also needs to be stored as electronic storage. "To store" is defined as, "to place or leave in a location . . . for preservation or later use or disposal."[122] Therefore, for an e-mail to be stored, it must be left in a location for preservation or later use. With both e-mail clients and webmail providers, it can be said that e-mail is stored. For an e-mail client, e-mail is stored when the individual places the e-mail on his personal device; this occurs the moment he downloads it for the use of viewing the e-mail. With a webmail provider, e-mail can only be stored on the server because it downloads the e-mail automatically to enable an individual to view it right away. In leaving the e-mail on the server, an individual stores it to simply preserve it (shown by the decision not to delete it) or for future use in his work.

Whether e-mail is stored for the purpose of backup needs to be evaluated on a case-by-case basis because an individual's purpose is a subjective argument. Nevertheless, the argument for protection under the SCA can be made with both types of e-mail because in either case an e-mail may be held as a substitute to shield it from destruction. With an e-mail client, an individual will have initially downloaded the e-mail for the purpose of viewing it, but an individual may decide to keep the e-mail so that she has a second copy, or she may want to keep the information as a reminder. Therefore, this would satisfy the definition of "backup purposes" under Merriam-Webster, and therefore the definition of new textualism. Similarly, an e-mail viewed on a webmail application may also serve as "backup protection" under the statute even if it simply stays on the server because an individual may choose to keep it on the server so that it is not lost.

Accordingly, new textualism lends itself to a broad interpretation of the SCA by allowing e-mail simply stored on a server to be protected under the SCA[123] because it may be stored for a purpose within the definition of "backup protection."

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122. The word *storage* is not defined within the SCA, so the dictionary is an appropriate source. *Store*, MERRIAM-WEBSTER (1828); also found at https://www.merriam-webster.com/dictionary/store.

123. *See supra* Section VI.B.

2. Intentionalism

"Intentionalist theories emphasize the realization of legislative intent as the aim of statutory interpretation."[124] "Democratic values play a critical part in shaping intentionalism."[125] "Statutes are the product of representative democracy, and the will of the legislative body is what constitutes 'intent.'"[126]

The intentionalist theory, in its bent towards legislative intent, also lends itself to a broad interpretation of the SCA. When legislators first wrote the SCA, they intended it to protect against the growing problem of unauthorized persons deliberately gaining access to, and sometimes tampering with, electronic or wire communications that were not intended to be available to the public.[127] If the SCA is interpreted under the narrow viewpoint of *Anzaldua* where an e-mail simply left on a webmail provider is never be protected because an individual will not have any further use for it,[128] this e-mail will be open to tampering and unauthorized access because the SCA will not protect it. An individual will be left vulnerable to the whims of a hacker or unscrupulous individual.

However, this would not be the case if the SCA were held to the broad interpretation of *Theofel*. Under a broad interpretation, e-mail is protected when held by either an e-mail client or a webmail provider. Therefore, it will stop the growing problem of unauthorized access to e-mail because the individual will have a course of action against an individual who tampers with his e-mail. In its focus on the legislature's intent (which was to protect individual privacy). This dominant theory of statutory interpretation lends itself to a broad interpretation.

3. Pragmatism

"Pragmatic theories reflect a more dynamic and flexible view."[129] "[P]ragmatism relies on multiple supporting arguments rather than any conclusive single argument such as statutory text, specific legislative intent, imaginative reconstruction, legislative purpose, evolution of statute, or current democratic, rule of law, and social values."[130] Pragmatism

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124. *Id.*

125. *Id.*

126. *Id.*

127. H.R. REP. NO. 99-647, at 62 (1986).

128. *Anzaldua*, 793 F.3d at 842.

129. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEORGETOWN L.J. 341, 349 (2010).

130. *Id.*

recommends a broad interpretation of the SCA through the idea of evolution and current social values.

The SCA—originally passed in the infancy of the internet—continues to face criticism for its lack of protection for individuals. In order to help the SCA evolve, Congress implemented two reforms: the E-mail Privacy Act[131] and The Electronic Communications Privacy Act Amendments Act of 2015.[132] Both of these acts are very similar. Both seek to strengthen the need for warrants and to remove the reliance on the definition of "electronic storage," which has confused lower courts.[133] Both areas of reform show that the legislature is trying to apply "electronic storage for backup protection" in the SCA to the 21st century. This mentality is found in a broad interpretation, not a narrow interpretation, as a broad interpretation works to apply electronic storage to changing technology patterns, thereby providing more protection to individuals.

Social consensus shows a need for more protection of individuals' e-mail. Most Americans have strong views about the importance of privacy in their everyday lives.[134] The majority of Americans believe it is important—often very important—that they be able to maintain privacy and confidentiality in commonplace activities of their lives.[135] Americans are entitled to know which of their personal items are protected from unauthorized access,[136] and a broad interpretation of the SCA will allow for this deserved protection. A broad interpretation would protect both an e-mail client and a webmail provider. Therefore, individuals would know if their e-mail would be protected from unwanted access. A universal allowance of a broad SCA interpretation will align with the social consensus for privacy.

Therefore, pragmatism—the last of the major theories of statutory interpretation—also militates for a broad interpretation in its use of

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131.	*See supra* Section IV.B.

132.	Electronic Communications Privacy Act Amendments Act of 2015, H.R. 283 (114th Cong. (2015)).

133.	Richard M. Thompson II & Jared P. Cole, *Stored Communications Act: Reform of the Electronic Communications Privacy Act (ECPA)*, CONGRESSIONAL RESEARCH SERVICE (May 19, 2015), https://fas.org/sgp/crs/misc/R44036.pdf.

134.	Mary Madden & Lee Raine, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RESEARCH CENTER (May 20, 2015), http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/.

135.	*Id.* 93% of adults say that being in control of who can get information about them is important; 74% feel this is "very important," while 19% say it is "somewhat important." *Id.*

136.	*See generally* United States v. Maxwell, 45 M.J. 406 (C.A.A.F. 1996) (stating that individuals have a reasonable expectation of privacy in the content of an e-mail message).

textualism, legislative intent, the evolution of the SCA, and current social values. As such, all three areas of statutory interpretation, when applied to the SCA, lend themselves to a broad interpretation.

B. *Congress Can Ensure a Broad Interpretation of the SCA.*

In the near future, Congress should implement reforms to ensure a broad interpretation of the SCA. This will explicitly enhance e-mail protection. In his article published in the Harvard Law Review, Nicholas Quinn Rosenkranz argues that (1) Congress can and should help select the tools for interpreting federal statutes, (2) that it has the constitutional power to do so, and (3) that it would be wise to exercise this power.[137] While Congressional enactment of interpretive strategies tends to be rare, tentative, and *ad hoc*, it may be done through three proposals: dictionary definitions, canons, and legislative history.[138] All three of these methods may be used to ensure that Congress interprets the SCA in a broad manner to allow the same of future courts.

1.   Dictionary Definitions

Rosenkranz argues that the dictionary would relieve one form of miscommunication because it would allow for a legislator to simply look up a word he did not understand in a statute—thereby rendering a statute more determinate.[139] While not a total relief of statutory ambiguity, it would be a step in the right direction. Congress could be free to define simply what a backup purpose would be in future SCA reform.

2.   Canons of Construction

Another option that Rosenkranz proposes is the use of the canons of construction. Presented above, each of the three theories of construction lend themselves to a broad interpretation of the SCA. However, Congress could use clear statement rules in SCA reform, which would allow for explicit ways to achieve certain goals.[140] The statements could implement a broad interpretation of the SCA that would cover technology changes in the future. This would eliminate a great deal of uncertainty with respect to these goals and leave all power over them squarely in the hands of Congress.[141]

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137. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002).

138. *Id.* at 2147-51.

139. *Id.* at 2147.

140. *Id.* at 2149.

141. *Id.*

3. Legislative History

The final proposal looks to legislative history. While a fierce debate rages as to whether this is a proper way to interpret statutes, Congress does have the power to say (and thus end this issue) what "for the purpose of background protection" means.[142] All it would take is one sentence: "Backup protection shall include any . . ."[143] While this may be initially seen as a narrow interpretation, Congress could ensure, using the canons of construction, that it is broadly constructed to cover future technological advances. These options may be an answer to help ensure a broad interpretation because they allow Congress to explicitly control how the statute is interpreted, instead of allowing the inconsistencies that the SCA now faces. It would allow the SCA to be controlled under an interpretation granting privacy protection for technology now and in the future.

VIII. CONCLUSION: A BROAD INTERPRETATION MEANS PROTECTION FOR YEARS TO COME

The Stored Communications Act, a part of the Electronic Communications Privacy Act, is a Congressional enactment intended to protect against unauthorized access to electronic communications in electronic storage—including both temporary storage and storage for the purposes of backup protection.

The problem with the SCA lies in the definition of electronic storage because Congress never defined what exactly "electronic storage for backup protection" included. As a result, this led to a circuit split between the Eighth and Ninth Circuits in the cases *Anzaldua v. Northeast Ambulance & Fire Protection District* and *Theofel v. Farey-Jones*, respectively. Each court came to an opposite conclusion as to whether e-mail was protected under the SCA. *Theofel* allowed for a broad interpretation of backup protection, an interpretation that would include protection for e-mail under e-mail clients and webmail providers. However, *Anzaldua* worked with a more narrow definition, and as a result, e-mail simply left on a webmail's server was not protected under the SCA. Given the growth of technology and the individuals' desire for protection, a narrow interpretation will not allow for these needs. A broad interpretation, however, does.

The SCA needs to be universally interpreted under this broad viewpoint. By looking to the canons of construction, courts may do interpret the SCA in this broad manner. The three main interpretations—new textualism,

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142. *Id.*

143. Rosenkranz, *infra* note 137, at 2150-51.

intentionalism, and pragmatism—all speak to allowing for a broad interpretation due to dictionary definitions, Congress' original intent behind the SCA, the Act's evolution, and social consensus theories. All showcase the need for more protection of e-mail.

Finally, and most importantly, a broad interpretation of the SCA, will allow for the protection of e-mail in the years to come. A broad interpretation will allow the SCA to incorporate e-mail as it changes because it will allow for courts to take into account the original intent of Congress, the privacy wants of individuals, and ultimately, the privacy needs that individuals are entitled to in their everyday use of e-mail.