No. 06-4092

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVEN WARSHAK,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Ohio

PETITION OF THE UNITED STATES FOR REHEARING EN BANC

Gregory G. Lockhart
United States Attorney
Southern District of Ohio

Donetta D. Wiethe
Benjamin C. Glassman
Assistant United States Attorneys
Southern District of Ohio

John H. Zacharia
Nathan P. Judish
Attorneys, Computer Crime and Intellectual Property Section
Criminal Division
U.S. Department of Justice
Washington, D.C. 20005

Steven L. Lane
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave. NW, Rm. 1264
Washington, D.C. 20530
(202) 514-3740

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STATEMENT REQUIRED BY RULE 35(b)

The United States respectfully requests rehearing en banc of the panel's decision holding, at the preliminary injunction stage, that portions of the Stored Communications Act, 18 U.S.C. §§ 2701-2712 ("SCA"), are facially invalid under the Fourth Amendment. The invalidated provisions permit the government to obtain a court order compelling the disclosure of certain stored electronic communications from an e-mail service provider upon a showing of less than probable cause and without advance notice to the subscriber. *See* 18 U.S.C. §§ 2703(d), 2705. For more than 20 years, such *ex parte* 2703(d) orders have provided an important, widely-used tool in criminal investigations involving fraud, terrorism, child pornography, drug trafficking, and other crimes. Until now, no court has declared the challenged portions of the SCA unconstitutional. This case raises at least two exceptionally important issues warranting en banc review.

First, the panel's holding that Warshak had standing to seek an injunction barring *ex parte* 2703(d) orders conflicts with settled Supreme Court precedent establishing that past injury from an ongoing government practice or policy is insufficient to establish the imminent "injury in fact" that is necessary for standing to seek prospective injunctive relief. *See Los Angeles v. Lyons*, 461 U.S. 95, 105-107 (1983). The possibility that the government will again seek an *ex parte* 2703(d) order to obtain Warshak's emails is speculative at best, and the fact that he

is under indictment makes that possibility even more remote. Indeed, given Warshak's knowledge of the investigation, it is unlikely that the government could carry its statutory burden of demonstrating that additional *ex parte* 2703(d) orders are necessary to protect the investigation's integrity. Further, the availability of a suppression motion in the criminal case and a suit for damages precludes Warshak's claim for injunctive relief.

Second, in barring use of the challenged provisions, the panel sidestepped the settled restrictions on facial attacks which, outside the First Amendment and abortion contexts, may succeed only if the aggrieved party establishes that there is "no set of circumstances" in which the provision in question may be constitutionally applied. *See United States v. Salerno*, 481 U.S. 739, 745-746 (1987). In doing so, the panel issued what amounts to an advisory opinion on the SCA's constitutionality: Reaching far beyond the facts of Warshak's case, the panel surveyed a range of possible applications of the challenged provisions and barred the use of *ex parte* 2703(d) orders in situations in which they are plainly constitutional, such as when a user agrees that the provider may access his emails at will and disclose them in response to legal process. The panel's decision not only eliminates an important investigative tool, but also exposes other statutes and policies to similar facial attacks.

STATEMENT

1. Enacted in 1986, the SCA allows the government to compel a provider of electronic communication service to disclose certain communications by court order, but only when the government presents "specific and articulable facts" demonstrating "reasonable grounds to believe" that the information sought is "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). The SCA generally requires the government to give the subscriber prior notice of a 2703(d) order targeting the content of communications, but notification may be delayed when the issuing court determines that advance notice may have an adverse result, such as "seriously jeopardiz[ing] an investigation." 18 U.S.C. §§ 2703(b), 2705(a)(2). In all cases, the subscriber must ultimately receive notice of a 2703(d) order seeking such content. *See* 18 U.S.C. § 2705(a)(5).

2. In 2005, during a criminal fraud investigation, the government obtained, under Section 2703(d) of the SCA, court orders directing e-mail providers NuVox and Yahoo! to produce Warshak's customer account information and the contents of certain e-mails that Warshak had chosen to store with the providers. J.A. 113-114. Pursuant to 18 U.S.C. § 2705, the court found that prior notice would jeopardize the investigation and allowed the government to delay notice for 90 days. *Id.* at 114. The government later notified Warshak (albeit belatedly). *Id.*

3. In June 2006, Warshak (joined by two others) filed this civil action for declaratory and injunctive relief. J.A. 112. In his preliminary injunction motion, Warshak contended that Section 2703(d)'s standard of proof violates the Fourth Amendment. Applying the four-factor test for a preliminary injunction, the district court determined that the factors weighed in favor of Warshak. *Id.* at 112-130. Although the court recognized that a party who reveals information to a third party assumes the risk that the third party will disclose that information to authorities, the court was "not persuaded -- as an initial matter -- that an individual surrenders his reasonable expectation of privacy in his personal e-mails once he allows those e-mails (or electronic copies thereof) to be stored on a subscriber account maintained on the server of a commercial [provider]." *Id.* at 122. The court found problematic the SCA's "combination of a standard of proof less than probable cause and potentially broad *ex parte* authorization." *Id.* at 128. Accordingly, the court preliminarily enjoined the use of 2703(d) orders to obtain the content of e-mail communications from accounts in the name of any resident of the Southern District of Ohio "without providing the relevant account holder or subscriber prior notice and an opportunity to be heard." *Id.* at 129.

4. The government appealed. A motions panel granted a stay of the district court's order, except as applied to the contents of personal e-mail accounts

maintained in Warshak's name. *See* 12/12/06 order.

In an opinion by Judge Martin, a different panel affirmed the district court's injunction with one modification. The merits panel first concluded that Warshak had standing to seek prospective injunctive relief, asserting that "the past e-mail seizures, the ongoing nature of the investigation against Warshak, and the government policy of seizing e-mails without a warrant or notice to the account holder" created "a sufficiently imminent threat of future injury." 2007 WL 1730094 ("Panel Op."), at *6. On the merits of the preliminary injunction, the panel concluded that "individuals maintain a reasonable expectation of privacy in e-mails that are stored with, or sent or received through, a commercial [service provider]." *Id.* at *13. According to the panel, that expectation is not undermined by terms of service that "provide for access only in limited circumstances, rather than wholesale inspection, auditing, or monitoring," *id.*, or by the fact that providers use computers to scan e-mails for "viruses, spam, and child pornography." *Id.* at *14. The panel modified the district court's injunction in one "narrow" respect, holding that, "if the government can show specific, articulable facts, demonstrating that [a service provider] or other entity has complete access to the e-mails in question and that it actually relies on and utilizes this access in the normal course of business, sufficient to establish that the user has waived his

expectation of privacy with respect to that entity," then compelled disclosure can occur if the provider is afforded notice and an opportunity to be heard. *Id.* at *15.

The panel rejected the government's argument that Warshak's facial challenge must fail unless he could prove that the statute was invalid in all its applications. *See Salerno*, 481 U.S. at 745-746. In holding *Salerno* inapplicable, the panel cited a pre-*Salerno* decision, *Berger v. New York*, 388 U.S. 41 (1967), for the proposition that "facial invalidation is justified where the statute, on its face, endorses procedures to authorize a search that clearly do not comport with the Fourth Amendment." Panel Op. *16. The panel further asserted that, even if *Salerno* applied, "the government has not shown that the challenged application of the statute can be constitutionally applied." *Id.* at *17.

5. After the government appealed, Warshak was indicted on 107 counts of fraud, money laundering, and other offenses. The charges remain pending.

REASONS FOR GRANTING THE PETITION

I. The Panel's Conclusion That Warshak Had Constitutional Standing to Seek Injunctive Relief Conflicts with Supreme Court Precedent

To establish standing, "[t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Lyons*, 461 U.S. at 101-102

(citing cases). When prospective injunctive relief is sought, "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy * * * if unaccompanied by any continuing, present adverse effects.'" *Id.* at 102 (citation omitted).

Applying those principles in *Lyons*, the Supreme Court held that allegations almost identical to Warshak's failed to establish a case or controversy regarding injunctive relief. 461 U.S. at 107. Lyons sought an injunction barring the use of chokeholds by city police officers absent the imminent threat of deadly force. He alleged that the city had a policy authorizing the use of chokeholds absent such threat, that he had been injured by its past application to him, and that such chokeholds were routinely employed by the police. 461 U.S. at 105-107 & n.7.[1] The Supreme Court held that those allegations fell "far short" of establishing that Lyons would suffer an imminent injury in fact from the use of police chokeholds. *Id.* at 105. The Court explained that to demonstrate the immediate threat necessary for standing, Lyons would have had "to allege that he would have another encounter with police," and either "that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter," or "that the [c]ity

[1] Contrary to the panel's assertion, *see* Panel Op. *6, the Supreme Court accepted Lyons' allegations that the city had a "policy" authorizing the use of chokeholds absent the threat of deadly force, and that city police "routinely appl[ied]" chokeholds in such situations. 461 U.S. at 105-107 & n.7.

ordered or authorized police officers to act in such manner" -- *i.e.*, that the city authorized officers *always* to apply chokeholds. *Id.* at 105-106.

The panel's decision cannot be reconciled with *Lyons*. At the time Warshak filed his complaint on June 12, 2006, there were neither pending nor imminent *ex parte* 2703(d) orders that applied to Warshak or his e-mail communications, and there have been no new orders since that time. *Lyons* makes clear that Warshak's alleged injuries from past *ex parte* 2703(d) orders, and the government's continued use of such orders generally, fail to establish that Warshak himself is realistically and imminently threatened by future *ex parte* 2703(d) orders. 461 U.S. at 105-107 & n.7. The additional fact relied on by the panel, the government's ongoing investigation, does not enhance Warshak's position. Indeed, because the government disclosed its investigation to Warshak before he filed his complaint, it is extremely unlikely that the government could meet its statutory burden of establishing that prior notice to Warshak would seriously jeopardize its investigation. *See* 18 U.S.C. § 2705(a). Thus, there is no "real and immediate threat" that Warshak will be subject to further *ex parte* 2703(d) orders.

Contrary to the panel's conclusion, "the government's *ex parte* approach to obtaining Warshak's e-mails" neither "precludes the possibility of judicial review at a subsequent and more appropriate time" nor otherwise supports the panel's

conclusion that Warshak had standing. *See* Panel Op. *8. To begin, there is no exception to the standing requirement for challenged conduct that is "capable of repetition, yet evading review." *Lyons*, 461 U.S. at 109; *Friends of the Earth, Inc. v. Laidlaw Environ. Servs.*, 528 U.S. 167, 191 (2000). And, in any event, Warshak is aware of the past *ex parte* 2703(d) orders obtained by the government and must receive notice of any future *ex parte* orders. 18 U.S.C. § 2705(a)(5). He therefore can challenge any such orders in a suppression motion in his criminal case or in a suit for damages. *See* 18 U.S.C. § 2712. The availability of such remedies at law precludes injunctive relief. *Lyons*, 461 U.S. at 109-111.

II. The Panel's Facial Invalidation of Substantial Portions of the Stored Communications Act Conflicts with Settled Supreme Court and Circuit Precedent

A. A facial challenge is a "claim that [a] law is 'invalid *in toto* -- and therefore incapable of any valid application.'" *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (citation omitted). Because a facial challenge seeks the invalidation of the statute in all its applications, it logically follows that a litigant bringing such a challenge must show that the statute has no valid application. The Supreme Court most clearly articulated that principle in *Salerno*, in which it stated that "[a] facial challenge to a legislative Act is * * * the most difficult challenge to mount successfully, since the

challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. Since *Salerno*, the Supreme Court and this Court have consistently applied the "no set of circumstances" test to facial challenges in various contexts.[2] Adherence to that standard respects the separation of powers by ensuring that a court does not "frustrate the expressed will of Congress or that of the state legislatures" by enjoining the enforcement of a law even in circumstances in which enforcement is, or would be, constitutional. *Barrows v. Jackson*, 346 U.S. 249, 256-257 (1953). It also provides a readily administrable test and avoids the need for contemplating hypothetical applications of a law in circumstances not before the court. *Sabri v. United States*, 541 U.S. 600, 609 (2004) (facial challenges "invite judgments on fact-poor records").

The panel here engaged in the very sort of conjecture that the "no set of circumstances" standard is intended to avoid. On a record largely devoid of facts, and in a preliminary injunction posture, the panel addressed a number of questions ranging far beyond the facts of Warshak's case. Panel Op. *17-*18 (finding

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[2] *See Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995); *Reno v. Flores*, 507 U.S. 292, 301 (1993); *Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990); *Rosen v. Goetz*, 410 F.3d 919, 933 (6th Cir. 2005); *Coleman v. DeWitt*, 282 F.3d 908, 914 (6th Cir. 2002); *Sam & Ali, Inc. v. Ohio Dep't of Liquor Control*, 158 F.3d 397, 402 n.7 (6th Cir. 1998); *Aronson v. City of Akron*, 116 F.3d 804, 809 (6th Cir. 1997); *Dean v. McWherter*, 70 F.3d 43, 45 (6th Cir. 1995).

privacy expectations in abandoned and fraudulently obtained e-mail accounts).

B. The Supreme Court has recognized an exception to the "no set of circumstances" test for First Amendment overbreadth challenges. *See Salerno*, 481 U.S. at 745. This Court and others also have applied a different standard in certain abortion-related cases. *See Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 368 (6th Cir. 2006); *Women's Med. Prof. Corp. v. Voinovich*, 130 F.3d 187, 194 (6th Cir. 1997). But outside those contexts, the "no set of circumstances" standard controls. *E.g., Coleman v. DeWitt*, 282 F.3d 908, 914 (6th Cir. 2002).[3]

Contrary to the panel's conclusion, the Supreme Court's 1967 decision in *Berger* did not establish a different standard for facial Fourth Amendment challenges. *See* Panel Op. *16. In *Berger*, the Court reversed a criminal defendant's convictions because the statute authorizing the eavesdropping warrants that yielded the evidence against him failed, among other things, to mandate a particular description of the conversations sought or crimes suspected. 388 U.S. at 58-60. Although the *Berger* Court passed on the facial validity of the statute, subsequent authority not discussed by the panel makes clear that *Berger* did not

[3] Accordingly, the panel erred in relying on *Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006), an abortion case, in deviating from the "no set of circumstances" test. Moreover, the unanimous Court in *Ayotte* reversed the lower courts' facial invalidation of the statute at issue (which was unconstitutional only in "a few applications"), and emphasized that courts should not invalidate a statute in its entirety when a narrower remedy is feasible. *Id.* at 968-969.

generally approve facial Fourth Amendment attacks.

Only a year later, in *Sibron v. United States*, 392 U.S. 40, 59-62 (1968), the Court narrowly construed *Berger* in refusing to entertain a post-conviction facial Fourth Amendment attack on a statute authorizing police to stop and frisk individuals upon reasonable suspicion. *Sibron v. United States*, 392 U.S. 40, 59-62 (1968). The *Sibron* Court explained that *Berger* involved the adequacy of the procedures in a statute purporting to "authorize the issuance of search warrants in certain circumstances," and asserted that "[n]o search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate to ensure the sort of neutral contemplation by a magistrate of the grounds for the search and its proposed scope." *Id.* at 59. By contrast, the stop-and-frisk law contained "elastic" terms authorizing warrantless searches in varying circumstances. *Id.* The Court explained that the constitutionality of such searches, which turns on "[r]easonable[ness]" rather on than the Fourth Amendment's specific requirements for warrants, *id.* at 62, "is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case," *id.* at 59. Review of the stop-and-frisk law for facial "compatib[ility]" with the Fourth Amendment would be "abstract and unproductive." *Id.*

In the four decades between *Sibron* and the panel decision, neither the

Supreme Court nor any federal court of appeals relied on *Berger* in sustaining a facial Fourth Amendment challenge. Instead, the Supreme Court has repeatedly stressed that facial challenges are rarely appropriate. *E.g., Sabri*, 541 U.S. at 609-610. And, and the Court has applied the "no set of circumstances" standard to at least one post-*Salerno* facial Fourth Amendment challenge. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 632 n.10 (1989) (regulations mandating warrantless drug testing). The panel's broad reading of *Berger* cannot be reconciled with this subsequent precedent.

Berger is inapposite here. The constitutionality of a compelled disclosure under the SCA, which authorizes such disclosures on a showing of less than probable cause and in varying circumstances, depends not on the Fourth Amendment's specific requirements for warrants, but on reasonableness under the circumstances. *E.g., United States v. Miller*, 425 U.S. 435, 445-446 (1976). The adequacy of the statutory procedures is thus properly decided on the concrete facts of the individual case. *See Sibron*, 392 U.S. at 59-62.

C. The panel's alternative conclusion that Warshak satisfied the "no set of circumstances" standard is plainly wrong. Initially, the panel improperly shifted to the government the burden of showing that the SCA is not unconstitutional. *Compare Salerno*, 481 U.S. at 745, *with* Panel Op. *17. And, in any event, the

panel acknowledged the existence of circumstances in which the compelled-disclosure provisions of the SCA are capable of constitutional application. *See id.* at *15 (compelled disclosure without advance notice to subscriber permissible if the government establishes provider's complete access to e-mails and actual use of that access). That acknowledgment alone is fatal to Warshak's facial challenge.

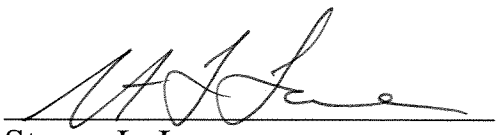
Furthermore, the SCA is plainly capable of constitutional application in a much broader range of circumstances. E-mail providers' terms of service usually include terms confirming their authority to access e-mail at will and/or disclose e-mail in response to legal process. Here, for instance -- in a passage overlooked by the panel -- Yahoo!'s terms of service require subscribers to acknowledge that "Yahoo! and its designees shall have the right (but not the obligation) in their sole discretion to pre-screen, refuse, or move any Content that is available via the Service." J.A. 89. Yahoo!'s terms also give it the right to access and disclose e-mail content to "comply with legal process." *Id.* Decisions in analogous contexts establish that consent to such terms can undermine any reasonable expectation of privacy, regardless of whether the terms are routinely invoked. *See Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (privacy disclaimer in an electronic bulletin board); *Muick v. Glenayre Electronics*, 280 F.3d 741, 743 (7th Cir. 2002) (employer announcement that it could inspect laptops); *United States v. Young*, 350

F.3d 1302, 1308-1309 (11th Cir. 2003) (terms of service giving FedEx authority to consent to package search). Of course, whether such an expectation exists and whether a particular intrusion is reasonable necessarily depends on the totality of the circumstances of the individual case. *E.g., Sibron*, 392 U.S. at 59-62. In a striking departure from that precedent, the panel here held that consent to terms of service allowing the provider to access e-mails at will and disclose them in response to compulsory process is categorically inadequate to defeat a subscriber's privacy interest unless the government also shows that the provider "actually relies on and utilizes this access in the normal course of business." Panel Op. *15. That unprecedented requirement threatens to impede investigations and calls into question settled rules regarding third-party disclosures.

CONCLUSION

The petition should be granted. Respectfully submitted.

Gregory G. Lockhart
United States Attorney
Southern District of Ohio



Steven L. Lane
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave. NW, Rm. 1264
Washington, D.C. 20530
(202) 514-3740

Donetta D. Wiethe
Benjamin C. Glassman
Assistant United States Attorneys
Southern District of Ohio

John H. Zacharia
Nathan P. Judish
Attorneys, Computer Crime and Intellectual Property Section
Criminal Division
U.S. Department of Justice

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing Petition for Rehearing En Banc by causing a true and correct copy thereof to be dispatched by Federal Express, designated for delivery on the next business day, to each of the following addressees:

Martin G. Weinberg
20 Park Plaza, Suite 905
Boston, MA 02116
(617) 227-3700

Martin S. Pinales
105 W. 5th Street, Suite 920
Cincinnati, OH 45202
(513) 721-4876

Kevin S. Bankston
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333 x126

Patricia L. Bellia
Notre Dame Law School
P.O. Box 780
Notre Dame, IN 46556
(574) 631-3866

Susan Freiwald
University of San Francisco School of Law
2130 Fulton Street
San Francisco, CA 94117
(415) 422-6467

Dated: August 1, 2007

Steven L. Lane