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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTICT OF OHIO AT CINCINNATI

BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION, *ET AL.,* OPPOSING THE PETITION OF THE UNITED STATES FOR REHEARING EN BANC

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Federal Rules of Appellate Procedure 26.1, *amici curiae* Electronic Frontier Foundation ("EFF"), ACLU of Ohio Foundation, Inc. ("ACLU of Ohio"), and Center for Democracy and Technology ("CDT"), 501(c)(3) non-profit corporations incorporated in the States of Massachusetts, Ohio, and Washington, D.C., respectively, make the following disclosure:

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September 5, 2007

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STATEMENT OF *AMICI CURIAE*

Amici curiae are non-profit public interest organizations seeking to ensure the preservation of Fourth Amendment protections in the face of advancing technology.

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect free speech and privacy rights in the online world. As part of that mission, EFF has served as counsel or *amicus* in key cases addressing electronic privacy statutes and the Fourth Amendment as applied to the Internet and other new technologies. With more than 12,000 dues-paying members, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age, and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to web sites in the world, www.eff.org.

The ACLU of Ohio Foundation, Inc. ("ACLU of Ohio") is devoted to the preservation and advancement of civil liberties for all Ohioans through public education and litigation. The ACLU of Ohio regularly appears in this Court as either direct counsel or *amicus* to serve those ends. Because of its particular commitment to rights of privacy and due process, the ACLU of Ohio has a special interest in, and expertise to address, the application of the law in this case.

The Center for Democracy and Technology ("CDT") is a non-profit public interest organization focused on privacy and other civil liberties

issues affecting the Internet and other communications networks. CDT represents the public's interest in an open, decentralized Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

Plaintiff-Appellee Steven Warshak and Defendant-Appellant United States of America have consented to the filing of this *amicus* brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici urge denial of the government's petition for en banc review of the panel opinion, which narrowly holds that certain provisions of the Stored Communications Act ("SCA") establishing a statutory procedure for judicial authorization of the search and seizure of stored email without probable cause are facially invalid under the Fourth Amendment. *See Warshak v. United States*, 490 F.3d 455 (6th Cir. 2007).[1] Contrary to the government's argument,[2] the panel's facial invalidation of these provisions was consistent with Supreme Court precedent. Forty years ago, the Supreme Court facially invalidated a statutory procedure for judicial authorization of electronic eavesdropping. *Berger v. New York*, 388 U.S. 41 (1967). *Berger* provides the appropriate standard for judging the facial validity of the SCA, not *United States v. Salerno*, 481 U.S. 739 (1987). Nor does the Supreme Court's decision in *Sibron v. New York*, 392 U.S. 40 (1968), disturb this conclusion.[3]

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[1] Specifically, the panel invalidated 18 U.S.C. § 2703(b)(1)(B)'s allowance for delay of notice under 18 U.S.C. § 2705, where the government seeks to obtain email without a showing of probable cause based on a court order issued under 18 U.S.C. § 2703(d). *See Warshak*, 490 F.3d at 481 (enjoining seizure of email pursuant to an order under § 2703(d), absent notice to the email account holder or a showing that the email account holder lacks a reasonable expectation of privacy); *id.* at 462 (identifying § 2703(b)(1)(B)'s allowance for delayed notice as "the root of the present controversy").

[2] *See* Petition of the United States for Rehearing En Banc, *Warshak v. United States*, No. 06-4092, at 9-15 (6th Cir. filed Aug.1, 2007) ("Petition").

[3] *Amici* do not address the government's contention that Mr. Warshak lacks standing, which is well-refuted in the Response of Plaintiff-Appellee Steven Warshak to the Petition of the United States for Rehearing En Banc,

ARGUMENT

I. THE PANEL'S RELIANCE ON *BERGER V. NEW YORK* WAS PROPER.

As the panel did here, the Supreme Court in *Berger v. New York*, 388 U.S. 41 (1967), considered the constitutionality of a statutory procedure authorizing issuance of court orders for the search and seizure of private communications, *see id.* at 43-44, although there it was in the context of a challenge by a criminal defendant who had been convicted based on evidence acquired using court orders issued under a New York State eavesdropping statute. *See id.* at 44-45. That statute's procedure for the issuance of such orders required only a showing that "there is reasonable ground to believe that evidence of crime may be thus obtained," *Id.* at 54, rather than a probable cause showing. Those procedures also failed to require particularity as to the conversations to be seized, *see id.* at 55-60, an especially serious failing in the context of eavesdropping since "[by] its very nature eavesdropping involves an intrusion on privacy that is broad in scope." *Id.* at 56; *see also id.* at 63 ("Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.").

Warshak v. United States, No. 06-4092, at 1-5 (6th Cir. filed Aug. 24, 2007) ("Response"). *Amici* also do not address the propriety of the panel's underlying Fourth Amendment holdings, which the government barely mentions. However, the Law Professor *amici* fully explain why those holdings were proper. *See generally* Brief for Professors of Electronic Privacy Law and Internet Law as *Amicus Curiae* Opposing the Petition of the United States for Rehearing En Banc, *Warshak v. United States*, No. 06-4092 (6th Cir. filed Sep. 5, 2007).

Recognizing that such wiretapping of or eavesdropping on private conversations constitutes a Fourth Amendment search and seizure, *see id.* at 51 (holding that "'conversation' [is] within the Fourth Amendment's protections, and that the use of electronic devices to capture it [is] a 'search' within the meaning of the Amendment"), the Court measured the adequacy of the statute's procedures against the requirements of the Warrant Clause. *See id.* at 54-60. Although noting the "immediately observable" "broad sweep" of the statute's "reasonable grounds" standard, which raised "a serious probable cause question under the Fourth Amendment," the Court refrained from deciding whether that standard satisfied the Warrant Clause's probable cause requirement. *Id.* at 54-55. Instead, the Court held that the statute's other flaws—most importantly, its failure to require adequate particularity as to the communications to be seized, *see id.* at 55-60—provided sufficient reason to invalidate it. *Id.* at 55. The Court concluded that the statute was "deficient on its face," because its "blanket grant of permission to eavesdrop is without adequate judicial supervision or protective measures." *See id.* at 60.

Faced with the modern equivalent of the electronic surveillance at issue in *Berger*, the panel here simply followed the *Berger* court: it measured a statutory procedure authorizing the issuance of a court order for the search and seizure of private communications against the requirements of the Warrant Clause and found that procedure lacking on its face. *See Warshak*, 490 F.3d at 475-77. The only difference is that unlike the *Berger*

court, the panel rested its holding primarily on the statute's lack of a probable cause requirement rather than on its lack of particularity, *see id*. at 469,[4] although such lack of particularity was also a basis for its holding, *see id*. at 476, n. 8. As the panel correctly found, the SCA is for lack of these safeguards just as fatally infirm on its face as the *Berger* statute.

II. ***SIBRON V. NEW YORK*, FAR FROM SUGGESTING ERROR, SUPPORTS THE PANEL'S APPROACH.**

The government contends that the Supreme Court's decision in *Sibron v. New York*, 392 U.S. 40 (1968), precludes the application of *Berger* in this case. Petition at 12. However, *Sibron* is easily distinguishable from both *Berger* and *Warshak*, and actually reinforces *Berger*'s holding, as relied upon by the panel, "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." *See Warshak*, 490 F.3d at 477.

In *Sibron*, the Supreme Court took care to preserve the holding of *Berger* while refraining from addressing the facial constitutionality of a different search statute. *See Sibron,* 392 U.S. at 59. That statute, New York State's stop-and-frisk law, permitted police officers to stop and question individuals in public without probable cause, based on a reasonable suspicion that the individual had committed, was committing, or would commit a felony or specific enumerated crime. *See id*. at 43. If the officer

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[4] The parties agree that the standard of proof required by the relevant SCA provision, 18 U.S.C. § 2703(d), falls short of probable cause. *See Warshak*, 490 F.3d at 463.

reasonably suspected the individual was dangerous, he could also search the individual for weapons. *See id.* at 44.

Two appellants challenged the validity of the searches that led to their convictions as well as the facial validity of the statute. *See id.* Neither search, however, squarely presented the question of the statute's constitutionality. *See id.* at 60-62. The search of appellant Sibron violated the stop-and-frisk law, as there was no reasonable suspicion to justify his being stopped or searched. *See id.* at 62-66. The search of appellant Peters, meanwhile, was supported by probable cause and therefore constitutional. *See id.* at 66-67.

The *Sibron* court did not narrow its holding in *Berger* that statutes providing for court authorization of searches and seizures must facially satisfy the Fourth Amendment's Warrant Clause. *See id.* at 59 (reiterating *Berger*'s holding regarding "the adequacy of the procedural safeguards written into a statute which purports to authorize the issuance of search warrants in certain circumstances," i.e. that "[n]o search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate….").

Rather, the Court as a matter of prudence chose not to address the constitutionality of the stop-and-frisk statute without a proper fact situation – namely, an unconstitutional application of the statute – from which to assess its possible deficiencies. *See id.* at 61-62. The *Sibron* court further distinguished *Berger* by noting that the statute at issue there purported to

authorize judicial approval of searches and seizures, the stop-and-frisk statute in *Sibron* did not, instead authorizing certain warrantless searches and seizures in "extraordinarily elastic" terms susceptible to a "wide variety of interpretations." *See id* at 59-60. In *Sibron*, unlike in *Berger*, there simply was no statutory procedural scheme for judicial authorization of searches and seizures that the Court could judge against the Warrant Clause.

The present case is directly analogous to *Berger* and distinguishable from *Sibron*. Like *Berger* and unlike *Sibron*, the statutory scheme at issue details procedures for the issuance of court orders authorizing the search and seizure of private communications, rather than providing a general and "elastic" allowance for searches and seizures outside the context of judicial approval. Also like *Berger* and unlike *Sibron*, the facts of this case put the constitutionality of the statute directly at issue, because the searches and seizures that Warshak complains of and seeks to enjoin were and are authorized under the statute's procedures, *see Warshak*, 490 F.3d at 460-61, and are indeed representative of the government's routine use of the statute, *see* Petition at 1 ("such *ex parte* orders [are] a widely-used tool").

In short, nothing in *Sibron* disturbs the *Berger* court's conclusion that where a statute establishes procedures for obtaining judicial authorization to search or seize, it must provide adequate Fourth Amendment safeguards in order to pass constitutional muster.[5] *See id.* at 64 ("The Fourth Amendment

[5] Notably, the Supreme Court has considered the facial validity of statutes under the Fourth Amendment post-*Sibron*, further weakening the

... prescribe[s] a constitutional standard that must be met before official invasion is permissible."). The panel correctly found that the SCA's procedures for issuance of a court order authorizing the government's secret acquisition of private emails, without probable cause and without particularity, facially fall below this constitutional floor.

III. THE PANEL WAS NOT BOUND BY *UNITED STATES V. SALERNO*'S "NO SET OF CIRCUMSTANCES" DICTUM.

The government argues that the panel erred in not applying dictum from *United States v. Salerno*, 481 U.S. 739 (1987), that a statute should only be facially invalidated where there is "no set of circumstances" in which it may be constitutionally applied. *See id.* at 745-46; Petition at 9-11. However, the government cannot point to a single case where the Supreme Court has applied the embattled "no set of circumstances" standard, a standard which does not accurately reflect the Supreme Court's holdings in this area,[6] to a facial challenge based on the Fourth Amendment.[7]

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government's claim that *Sibron* significantly narrowed *Berger*'s impact. *See Payton v. New York*, 445 U.S. 573 (1980) (invalidating state statute authorizing warrantless entry into home to arrest); *Torres v. Puerto Rico*, 442 U.S. 465 (1979) (invalidating statute which authorized police to search the luggage of anyone entering Puerto Rico); *see also Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 52-54 (1974) (considering facial validity of the Bank Secrecy Act under Fourth Amendment).

[6] *See, e.g., Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174 (1996) (Mem) (citing multiple cases where the Supreme Court has not applied the *Salerno* standard); *see also Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997, *cert. denied*, 523 U.S. 1036 (1998) (refusing to apply *Salerno* in facial challenge to abortion regulations).

The government attempts to counter the Supreme Court's failure to consistently apply *Salerno* by arguing that it has narrowly recognized exceptions to the *Salerno* standard only in First Amendment and abortion cases. Petition at 11. However, since *Salerno*, the Supreme Court has invalidated statutes outside of those contexts and without applying the "no set of circumstances" standard. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996) (facially invalidating Colorado statute that discriminated against gays and lesbians for violating Fourteenth Amendment Equal Protection Clause); *City of Chicago v. Morales*, 527 U.S. 41, 52-53, 60 (1999) (holding, without resort to First Amendment overbreadth doctrine, that a gang loitering statute was facially unconstitutional because it lacked guidelines to prevent arbitrary and discriminatory enforcement and conferred "vast discretion" on the police). Facial invalidation like that in *Morales*, based on the standardless discretion that a statute vests in government agents, has a long pedigree. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (invalidating criminal statute for vagueness because its lack of standards "vest[ed] virtually complete discretion in the hands of the police"); *see also Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (invalidating statute making it a crime to be a gang member) ("If on its face the challenged provision is repugnant to the due process clause, specification of details of

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[7] As already addressed in Warshak's Response to the Petition, the government's citation to *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), is inapposite. Response at 8, n. 10.

the offense intended to be charged would not serve to validate it."). The Supreme Court's facial invalidation of the statute in *Berger*—and therefore, the panel's invalidation of portions of the SCA under the authority of *Berger*—falls squarely within this set of cases.

CONCLUSION

For the foregoing reasons, the petition of the United States for rehearing en banc should be denied.

DATED: September 5, 2007

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,201 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

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I hereby certify that the foregoing brief for *Amici Curiae* Electronic Frontier Foundation, *et al.*, was served on this 5th day of September, 2007, by first class mail to the counsel listed below, and that, pursuant to Fed. R. App. P. 25(a)(2)(B)(ii), said brief was filed by dispatching an original and twenty-five paper copies via third-party commercial carrier for delivery to the Clerk of the Court within three calendar days.

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