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 DISTRICT OF OHIO

RESPONSE OF PLAINTIFF-APPELLEE STEVEN WARSHAK TO PETITION OF THE UNITED STATES FOR REHEARING EN BANC

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REASONS WHY THE PETITION SHOULD BE DENIED.

The government seeks *en banc* review of only two narrow aspects of the panel's opinion: (1) whether the panel's conclusion that Warshak had constitutional standing to seek injunctive relief was correct, and (2) whether the remedy chosen by the panel was permissible under *United States v. Salerno*, 481 U.S. 739 (1987). As this response will demonstrate, the panel's resolution of these issues does not, as the government contends, conflict with controlling Supreme Court precedent, nor are theses issues "questions of exceptional importance" warranting *en banc* review under Fed. R. App. P. 35. The government's petition should, therefore, be denied.

I. WARSHAK HAD STANDING TO SEEK TO ENJOIN THE GOVERNMENT'S USE OF SECRET *EX PARTE* §2703(D) ORDERS.

The underlying civil action arose from the government's secret utilization of 18 U.S.C. §2703(d) orders to seize thousands of Warshak's private emails from two internet service providers ("ISPs"), and search their contents, without a showing of probable cause, without particularization of subject matter or time frame, and without notice to him until long after the fact. After he finally received notice of the government's invasion of his private email correspondence, Warshak filed his complaint and sought the government's assurance that it would not, pending litigation of Warshak's Fourth Amendment claims, seek additional *ex parte* §2703(d) orders directed at Warshak's email accounts, an assurance which the government declined

to give, instead insisting upon maintaining what it viewed as its investigative prerogatives. That negative response led Warshak to seek the preliminary injunction which was the subject of the government's challenge on appeal. In response to a direct question from the district court during the preliminary injunction hearing, the government refused to rule out future use of secret §2703(d) orders to obtain Warshak's emails. Only *after* Judge Dlott entered the preliminary injunction did the government begin asserting that no further use of §2703(d) orders against Warshak was "imminent," a strategic response to the district court's opinion rather than a commitment that no further §2703(d) orders would be forthcoming.

The panel was unquestionably correct that *Los Angeles v. Lyons*, 461 U.S. 95 (1983),[1] is a dispositively different case from this one for a number of compelling reasons. *See Warshak v. United States*, 490 F.3d 455, 465-67 (6th Cir. 2007). In *Lyons*, the Court found no standing where the plaintiff, who had been subjected to a choke hold by police in the past, failed to establish "a real and immediate threat that

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[1] *Lyons* is one of many Supreme Court cases which have addressed constitutional standing, applying the applicable standards to the circumstances of the case before the Court. The panel accurately articulated the standards governing the determination of constitutional standing and carefully considered the government's contention that the facts of this case were sufficiently similar to those in *Lyons* as to preclude a finding of standing. Whether the panel's assessment of the facts and circumstances of this case in relation to those present in *Lyons* was correct is not a "question of exceptional importance" warranting review by the full Court.

he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." 461 U.S. at 105. This is a very different case from *Lyons* because here (1) the challenged practice is expressly authorized by DOJ policy; (2) the government, by its own admission, has engaged in this practice for 20 years; (3) the government actively defends its right to pursue this practice; (4) the government twice used *ex parte* §2703(d) orders to obtain Warshak's private emails; (5) the government expressly refused to rule out use of secret *ex parte* §2703(d) orders directed at Warshak's email accounts during the pendency of this litigation; and (6) the government's investigation of Warshak was intensive and ongoing.[2] Unlike the plaintiff in *Lyons*, Warshak has shown considerably more than just past

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[2] The government seeks to undercut the panel's reasoning by suggesting that once Warshak knew of government's investigation, and particularly since he has been indicted, it likely could not convince a court to permit delayed notice on the theory that advance notice would compromise its investigation. *See* Petition at 2, 6. The fact of the matter, however, is that the secret *ex parte* §2703(d) orders were obtained by the government *after* its March 16, 2005, search of Warshak's corporate headquarters supplied dramatic knowledge of the government's investigation. In any event, standing is to be determined at the time the complaint was filed, *see, e.g., Cleveland Branch, NAACP v. Parma*, 263 F.3d 513, 524 (6th Cir. 2001), *not* at the time of appellate review, a distinction which the petition effectively ignores. That the government has not sought *ex parte* §2703(d) orders targeting Warshak's email since Warshak's complaint was filed, Petition at 8, is hardly significant, as it has been enjoined from doing so since July 21, 2006. Even "a defendant's *voluntary* cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000)(emphasis added).

injury and a wholly speculative and vanishingly unlikely prospect of recurrence.[3]

Unlike the defendant in *Lyons*, who could avoid being subjected to a choke hold in the future if he conducted himself peaceably during any hypothetical future encounters with the police (unless he had the misfortune to encounter a rogue officer who would choke him into unconsciousness without provocation in *violation* of L.A.P.D. policy), it was not within Warshak's power to prevent future invasions of his personal privacy by the government pursuant to policies which it had followed for 20 years and still maintains its right to follow. Under the government's theory, a person aggrieved by the unlawful seizure of his emails through secret *ex parte* §2703 process would *never* be able to prevent another such violation of his Fourth Amendment rights through recourse to the courts. Since the *ex parte* process would *always* have been executed before the victim of an unconstitutional §2703 seizure learned of it, the government would remain free to violate his Fourth Amendment

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[3] The Supreme Court has recognized that past wrongs are "evidence bearing on whether there is a real and immediate threat of repeated injury." *Lyons*, 461 U.S. at 102. When past wrongs arose from established policy (especially one which, as here, the government defends its right to pursue), the case for standing is strong. *See, e.g., Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003)("alleged risk of harm aris[ing] from an established government policy" is "critical factor that weighs in favor of finding that standing exists"); *see also 31 Foster Children v. Bush*, 329 F.3d 1255, 1266 (11th Cir. 2003)("when the threatened acts that will cause injury are authorized as part of a policy, it is significantly more likely that injury will occur again"); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000)("the government's failure to disavow application of the challenged provision [is] a factor in finding standing").

rights with impunity. One does not, however, "have to await consummation of threatened injury to obtain preventive relief." *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982).

If Warshak does not have standing, whoever would? The panel correctly concluded that there was "a sufficiently imminent threat of future injury to meet the injury in fact element of standing under *Lyons*." *Warshak*, 490 F.3d at 467.[4]

II. THE PANEL PROPERLY ENJOINED THE GOVERNMENT'S USE OF SECRET *EX PARTE* §2703(D) ORDERS.

The panel correctly concluded that "individuals maintain a reasonable expectation of privacy in e-mails that are stored with, or sent or received through, a commercial ISP." *Warshak*, 490 F.3d at 473. It did not, however, facially invalidate §2703(d) in its entirety. Instead, following the procedure described in *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006), it narrowed its ruling so that only the unconstitutional applications of §2703 would be enjoined – those in which the government, without a warrant based on probable cause and without notice to the subscriber, obtained the content of email communications in which the subscriber had

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[4] Warshak has no adequate remedy at law against future violations of his Fourth Amendment rights. The *only* remedy which is adequate is one which will *prevent* the government from unconstitutionally invading the privacy of private email correspondence. After-the-fact awards of damages or suppression of evidence may penalize the government for its unlawful conduct, but such remedies can never restore the privacy of the communications read by government agents.

a reasonable expectation of privacy.[5] *Warshak*, 490 F.3d at 475-76, 479-80. This, the panel reasoned, would "obviate any problems under *Salerno*." 490 F.3d at 480. As narrowed, the panel opinion does not "enjoin[] the enforcement of a law even in circumstances in which enforcement is, or would be, constitutional." Petition at 10.

Moreover, the panel correctly concluded that the statute's facial validity is more appropriately assessed in light of *Berger v. New York*, 388 U.S. 41 (1967), than under the rigid "no set of circumstances" standard articulated in dictum in *United States v. Salerno*, 481 U.S. 739 (1987).[6] Under *Berger*, as the panel correctly

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[5] *Ayotte* may have been an abortion case, *see* Petition at 11 n.3, but the Court was plainly speaking in terms of general applicability in the portion of its opinion on which the panel relied. *See Ayotte*, 546 U.S. at 967 ("*Generally speaking*, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force . . . or to sever the problematic portions while leaving the remainder intact" (emphasis added)). Neither of the two cases on which the *Ayotte* Court relied in support of this general proposition – *United States v. Raines*, 362 U.S. 17 (1960), and *United States v. Booker*, 543 U.S. 220 (2005) – were abortion cases. The *Ayotte* Court left it open to the lower court on remand to once again invalidate the statute in its entirety, notwithstanding the fact that it was only unconstitutional in some circumstances. *See* 546 U.S. at 969. As the panel pointed out, "*Ayotte* seems to counsel against the extreme reading of *Salerno* that the government advances here." *Warshak*, 490 F.3d at 479 n.10.

[6] The appropriateness and applicability of the *Salerno* formulation remains a matter of intense debate in the Supreme Court; it is not the hard-and-fast rule of near-universal applicability which the government represents. In *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), a plurality of the Supreme Court stated: "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself." *See also United States v. Quinones*, 313 F.3d

reasoned, "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." *Warshak*, 490 F.3d at 477. Like the statute in *Berger*, and unlike the statute in *Sibron v. New York*, 392 U.S. 40 (1968), *see* Petition at 12, §2703 sets forth procedures through which the government may invade the privacy of personal emails which are facially defective under the Fourth Amendment.[7] Under §2703(d), the government may, without a warrant, without probable cause, and without advance notice to the account holder that would permit him to contest the intrusion *before* it takes place, invade an area in which an individual has a constitutionally-protected reasonable expectation of privacy and secretly obtain unfettered access to the most private areas of his life – his ideas, his thoughts, his beliefs, his hopes, his dreams, as

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49, 60 n.8 (2d Cir. 2002); *United States v. Frandsen*, 212 F.3d 1231, 1235 n.3 (11th Cir. 2000). *See generally* David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 Iowa L. Rev. 41 (2006); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L.Rev. 235 (1994).

[7] In *Sibron*, the Court declined to address the facial validity of a state statute which authorized certain warrantless encounters in "extraordinarily elastic" terms susceptible to a "wide variety of interpretations." 392 U.S. at 59-60. In so doing, the Court distinguished the substantive issues presented by the statute before it from the procedural questions at issue in *Berger*. *See* 392 U.S. at 59 (statute at issue presented questions "quite different from the question of the adequacy of the procedural safeguards written into a statute which purports to authorize the issuance of search warrants in certain circumstances"). Notably, the *Sibron* Court did *not* state that it was *foreclosed* from consideration of the statute's facial constitutionality but only that it would not undertake the task for prudential reasons.

embodied in his email correspondence. Such invasions are *per se* unreasonable under the Fourth Amendment where the account holder has a reasonable expectation of privacy in the content of his emails, as do the vast majority of ISP email subscribers,[8] as the panel rightly concluded in invalidating the statutory procedure through which the government was able to secretly invade core areas of personal privacy, leaving itself in possession of private emails, free to read through them at will, no matter how intensely private and irrelevant they were to its investigation.[9]

The Supreme Court has never applied the *Salerno* standard to challenges to statutes or regulations predicated on the Fourth Amendment.[10] It has, however,

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[8] As the panel correctly reasoned, this reasonable expectation of privacy differentiates this case from cases such as *United States v. Miller*, 425 U.S. 435 (1976), on which the government relies, Petition at 13, *see Warshak*, 468-69, and thus the panel opinion does not, as the government argues, "call[] into question settled rules regarding third-party disclosures." Petition at 15.

[9] As written, §2703(d) does not require, as the Fourth Amendment does with respect to warrants and as Title III does with respect to electronic surveillance orders, that the government particularize the object of the search or minimize the intrusion into unrelated areas. *See Warshak*, 490 F.3d at 476 n.8. The §2703(d) orders in this case demanded production of all emails falling within the government's interpretation of the statutory parameters, without limitation as to subject matter.

[10] The Supreme Court did not apply the *Salerno* standard to a Fourth Amendment challenge in *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 632 n.10 (1989). *See* Petition at 13. Instead, it merely noted, in a brief footnote near the end of its opinion, that because the drug screening tests at issue had been shown to be reliable "in the overwhelming majority of cases," concern for unreliability would not warrant invalidation of the entire administrative scheme, citing not to *Salerno*, but to the discussion in *Bell v. Wolfish*, 441 U.S. 520, 560 (1979), of the

invalidated statutes as violative of the Fourth Amendment without reference to whether there might be circumstances under which the statute could be applied in a manner which did not violate the Fourth Amendment. *See Payton v. New York*, 445 U.S. 573 (1980)(invalidating state statute authorizing warrantless entry into home to arrest); *see also Torres v. Puerto Rico*, 442 U.S. 465 (1979)(invalidating statute which authorized police to search the luggage of anyone entering Puerto Rico).

Application of the *Salerno* standard to Fourth Amendment facial challenges would be particularly pernicious, as it would permit statutes authorizing the most flagrant Fourth Amendment violations – even ones which were unconstitutional in almost all circumstances – to remain in force so long as the court could hypothesize a scenario in which application of the statute would not violate the Fourth Amendment. That courts can conjure hypothetical circumstances in which employment of the challenged statutory procedures would not violate the Fourth Amendment – for example, abandonment or consent – does not relieve courts of their critical responsibility to prevent flagrant violations of privacy rights in the overwhelming majority of cases.

Contrary to the government's argument, the remedy crafted by the panel is not inconsistent with either Supreme Court precedent or with prior decisions of this Court. Nor, the government's *in terrorem* invocations of its investigative needs

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Fourth Amendment reasonableness of body-cavity inspections of prison inmates.

notwithstanding, *see* Petition at 1, 2, 15, does the remedy, as modified by the panel, preclude the government from pursuing any investigative avenues permissible under the Fourth Amendment. Under the panel opinion, the government can still obtain access to the content of private emails in at least three ways: it can obtain a warrant based upon probable cause, it can utilize a §2703 order or subpoena with notice to the account holder,[11] or it can proceed without notice to the subscriber if it can demonstrate that the subscriber has no reasonable expectation of privacy in the content of his emails. If an individual has a reasonable expectation of privacy in the content of his emails, as Warshak did and as the vast majority of ISP email subscribers do, secret warrantless governmental invasion of that protected sphere is inconsistent with fundamental Fourth Amendment guarantees.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,
By his attorneys,

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[11] There is no danger that advance notice to the account holder will result in the destruction of the emails sought, as the government can seek a preservation order under §2703(f) to maintain the status quo until the issues can be litigated.

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CERTIFICATE OF SERVICE

I, Martin G. Weinberg, hereby certify that the foregoing Response of Plaintiff-Appellee Steven Warshak to Petition of the United States for Rehearing En Banc was served this 24th day of August, 2007, by first-class mail, postage prepaid, upon the following attorneys for the United States:

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