CASE N^{o} 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 AT CINCINNATI

PROOF REPLY BRIEF FOR DEFENDANT-APPELLANT UNITED STATES OF AMERICA

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INTRODUCTION

In reaching the merits of Warshak's constitutional claim, the district court erroneously leapfrogged over the fundamental issues of standing, the absence of *any* evidence in the record, and the rule that a facial challenge to a statute can succeed only if there is no constitutional application to the statute. Indeed, it is ironic that Warshak now claims that Judge Dlott's opinion was "based on the evidence then before her," Warshak Brief ("Warshak Br.") at 4, because there was no evidence: the district court ruled on nothing more than Warshak's motion and the unsupported assertions of counsel. In a case bringing a novel challenge to a twenty-year-old statute governing compelled disclosure of e-mail, one would expect a plaintiff to present evidence regarding how ISPs function and the nature of stored e-mail, the similarities and differences among the wide range of entities that provide e-mail service, and evidence regarding the plaintiff's own use of e-mail. There is none of that here.

Instead, regarding basic questions such as how ISPs function, Warshak's brief brims with assertions unsupported by the record. For example, Warshak claims that "to the extent that ISPs 'access' their customers' email, such 'access' is generally accomplished through computerized processes, *without* human scrutiny." Warshak Br. at 51-52. Baseless conjecture about ISP operations cannot possibly justify striking down a federal statute. Warshak attempts to excuse his failure to

present evidence by stating that the district court held only "a *telephonic* hearing scheduled solely for the purpose of hearing the arguments of counsel." Warshak Br. at 3 n.3 (emphasis in original). Needless to say, the fact that the district court held a hearing by telephone does not excuse Warshak's failure to carry his burden of proof. *See Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) ("A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it.").

ARGUMENT

I. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION TO ISSUE THE PRELIMINARY INJUNCTION

A. Warshak Lacks Standing

Warshak lacks standing in this case because he has failed to carry his burden of establishing the "irreducible constitutional minimum of standing" mandated by the case-or-controversy requirement of Article III. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Warshak confuses the constitutional requirement that he state general factual allegations in his complaint establishing an injury-in fact with the unremarkable pleading standard that such allegations need not be more specific than necessary to establish the elements. *See* Warshak Br. at 11, 24. As his own cases make clear, to establish standing to seek prospective relief,

Warshak's complaint must allege sufficient facts to demonstrate that he faces a real and immediate threat of sustaining a direct injury in the future. Warshak Br. at 11. Warshak's failure to do so here warrants dismissal at the pleading stage. *See, e.g.*, *Steel Co.*, 523 U.S. at 110 (reinstating district court's grant of motion to dismiss complaint for lack of standing); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (reinstating district court's grant of judgment on the pleadings for lack of standing); *Warth v. Seldin*, 422 U.S. 490 (1975) (affirming grant of motion to dismiss complaint for lack of standing).

Here, even assuming *arguendo* that Warshak could allege that past 2703(d) orders were unconstitutional and had unlawfully harmed him (and he cannot), allegations of past injury are insufficient to carry his burden to establish standing. *Steel Co.*, 523 U.S. at 108-09; *Lujan*, 504 U.S. at 564; *Lyons*, 461 U.S. at 105 (holding plaintiff's past injury "does nothing to establish a real and immediate threat that [the plaintiff] would again" suffer similar injury in the future). Similarly, prohibiting future 2703(d) orders does nothing to cure any alleged harm or "continuing, adverse effects" caused by past orders. Thus, Warshak's claim of an ongoing injury (newly asserted in Warshak's Brief) caused by past 2703(d) orders is irrelevant here because the injunction Warshak sought and received is strictly limited to prohibiting the government from obtaining *ex parte* 2703(d) orders *in the future* for e-mail accounts "not yet seized" by the government. Order

at 2 ("In his present Motion . . ., Warshak seeks to *prospectively* enjoin the United States from obtaining and enforcing any *future* 2703(d) orders.") (emphasis added), 17; JA__.

For Warshak to have standing to seek the prospective relief he requests, he must show a real and immediate threat of future injury caused by future *ex parte* 2703(d) orders, not an indefinite threat based purely on his "subjective apprehensions" about what could happen *if* the government serves such process in the future. *Lyons*, 461 U.S. at 107 n.8. Yet Warshak fails to identify a single paragraph in his complaint alleging facts that would, if true, support his speculation that the government will issue 2703(d) orders affecting him in the future. In fact, Warshak does not dispute that his e-mail communications currently are not subject to disclosure pursuant to pending 2703(d) orders, and he does not actually contend that additional orders are imminent. Indeed, the absence of any such process since 2005 itself demonstrates that they were not imminent when Warshak filed his original complaint on June 12, 2006, nor when Warshak filed his motion for preliminary injunction on June 30, 2006. And now that Warshak is aware of the investigation and has been indicted, the likelihood of a new *ex parte* 2703(d) order that could allegedly cause him injury is especially low. *See* 18 U.S.C. § 2705(a) (stating that delayed notice available only when notice would seriously jeopardize an investigation or cause similar harms). Even the district

court observed that the prospect of future 2703(d) orders affecting Warshak is purely speculative. *See* Order at 17; JA __ ("this Court obviously cannot predict what the United States will do in the future").

The Supreme Court has already rejected Warshak's notion that past injury, combined with a subjective apprehension of future injury, is sufficient to satisfy the injury-in-fact requirement. In *Lyons*, the Supreme Court held that a plaintiff lacked standing to seek an injunction against enforcement of an allegedly unlawful police chokehold policy that had been applied to the plaintiff in the past because he could not credibly allege that he faced a realistic threat from the policy in the future at the time that he had filed his complaint – even though that official policy was still in place when he filed his complaint. 461 U.S. at 105-06, 107 n.7. As *Lyons* emphasized, "it is surely no more than speculation to assert either that [plaintiff] himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of the chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury." *Id.* at 108.[1] Thus, not only does Warshak merely speculate as to when, if

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[1] Warshak attempts to distinguish *Lyons* by incorrectly claiming that the plaintiff in *Lyons* could have established standing if he had alleged that there was an official policy authorizing the use of choke holds without provocation. Warshak Br. at 15. In fact, the plaintiff in *Lyons did* allege that such a policy existed, and the Court held that this allegation fell "far short" of establishing a case or controversy because he (like Warshak) did not also allege that "*all* police officers in Los Angeles *always* choke any citizen with whom that happen to have

ever, he may again be subject to *ex parte* 2703(d) orders, but such conjecture is further attenuated because it is dependent on the same additional contingencies as in *Lyons*. *Id.*; *Lujan*, 504 U.S. at 564-65 n.2. Accordingly, as in *Lyons*, Warshak has failed to allege facts that, if true, would establish that his request for prospective injunctive relief is based on an injury in fact that is "actual or imminent, not 'conjectural or hypothetical.'" *Steel Co.*, 523 U.S. at 103; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

Warshak attempts to sidestep his obligation to demonstrate that such process will imminently injure him by misstating the law on what "imminent" means, erroneously claiming that the term "imminent" "is not a temporal concept requiring injury which is on the verge of occurring." Warshak Br. at 18. On the contrary, the Supreme Court has squarely held that imminence *is* a temporal concept that requires that an injury-in fact be "certainly impending." *Lujan*, 504 U.S. at 564-65 n.2 ("Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is 'certainly impending.'")

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an encounter." 461 U.S. at 105-06 (emphasis in original). Without such an allegation, the complaint "did not indicate why Lyons might be realistically threatened by police officers who acted within the strictures of the City's policy." *Id.* at 106. Warshak's allegations are insufficient for the same reasons as in *Lyons*: they did not indicate why Warshak might be realistically threatened by future 2703(d) orders.

(citing *Whitmore*, 495 U.S. at 155, 158 ("A threatened injury must be 'certainly impending' to constitute injury in fact.")).

Unable to carry his burden to establish an injury-in-fact, Warshak attempts to shift this burden to the government in three distinct (and improper) ways. First, Warshak contends that it is somehow the government's burden to "disavow" and show that it will *not* imminently serve 2703(d) orders that could injure Warshak in the future. *See* Warshak Br. at 13-14, 18. However, the party invoking the court's jurisdiction (here, Warshak) has the burden of alleging facts sufficient to establish that all the elements of standing existed at the time he filed his complaint, *e.g.*, *Steel Co.*, 523 U.S. at 104, and Warshak has failed to carry his burden. Second, Warshak mistakenly contends that he does not have to meet the standing requirement because the government has not forever disavowed future use of *ex parte* 2703(d) order directed to his e-mail and because he would not receive sufficient notice to challenge such orders. *See* Warshak Br. at 13-14, 18-19. As Warshak now admits in his Brief, *see id.* at 19 n.10, this argument is an attempt to invoke the "capable of repetition, yet evading review" exception to mootness. However, as noted in the government's Proof Brief ("Pr. Br.") at 24 n.3, the standing doctrine does not include an exception for controversies capable of

repetition, yet evading review.[2] Third, Warshak cannot rely on the "voluntary cessation" doctrine (*see* Warshak Br. at 18-19) because it too is not an exception to standing. Pr. Br. at 24 n.3.

Accordingly, the district court lacked subject matter jurisdiction to issue the preliminary injunction because Warshak did not satisfy the "injury-in-fact" element of standing pursuant to Article III.

In addition, the district court lacks subject matter jurisdiction because Warshak cannot satisfy standing's redressability element. The preliminary injunction prohibits the issuance of future *ex parte* 2703(d) orders and thus cannot redress Warshak's alleged injuries (even alleged ongoing injuries) caused by past 2703(d) orders. Warshak claims that the issuance of past *ex parte* 2703(d) orders is sufficient to satisfy the redressability requirement. Warshak Br. at 21-22. However, federal courts uniformly preclude plaintiffs from seeking prospective injunctive relief for past injuries. *E.g.*, *Steel Co.*, 523 U.S. at 108 (holding that plaintiff failed to satisfy the redressability requirement because prospective injunctive relief "cannot conceivably remedy any past wrong"); *see also* Pr. Br. at

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[2] Moreover, 2703(d) orders do not evade judicial review. Warshak would have standing to seek review of any past or future 2703(d) orders in a suit for damages upon receiving notice, *see Lyons*, 461 U.S. at 105, 109, and in a post-indictment motion to suppress. Thus, Warshak has adequate opportunity to challenge the validity of 2703(d) orders, and the government therefore cannot act, as Warshak alleges, "with impunity." *See* Warshak's Br. at 17, 25.

25-26. Thus, the district court also lacks subject matter jurisdiction to issue the injunction because Warshak has not carried his burden to satisfy standing's redressability requirement.

B. Warshak's Claims Are Not Ripe

Even if Warshak could establish standing (and he cannot), his claims are not ripe. Pr. Br. 26-29. Warshak repeats his reliance on the "capable of repetition, yet evading review" doctrine, *see* Warshak Br. at 15-16, but that doctrine applies only to mootness and does not save constitutionally unripe claims. *See supra* at 7. The district court has already made clear that it issued the preliminary injunction without a "ripe, concrete context" in which to apply Warshak's constitutional claim. Order at 17; JA__ (issuing injunction to allow Warshak to present his constitutional challenge in some future "ripe, concrete context of a specific email account targeted but not yet seized by the United States").

In addition, prudential ripeness bars jurisdiction because, as the district court conceded, "this Court obviously cannot predict what the United States will do in the future." Order at 17; JA__. Hence, Warshak's facial challenge to *ex parte* 2703(d) orders is unfit for judicial review because neither the parties nor the Court have any idea whether or when such orders will occur. *See Texas v. United States*, 523 U.S. 296, 300 (1998). Similarly, withholding consideration of Warshak's abstract constitutional challenge to future 2703(d) orders does not constitute a

hardship on him. Had Warshak alleged damages caused by past 2703(d) orders in his complaint, *then* he would have a ripe, concrete context for a damages claim. *See Lyons*, 461 U.S. at 105, 109. In addition, if the government states its intent to use previously disclosed e-mails against Warshak at trial in the criminal case, *then* he would have a ripe, concrete context for a suppression motion. *See also Texas*, 523 U.S. at 301.

Warshak contends that the Court should ignore the ripeness doctrine and issue an advisory opinion on the constitutionality of 2703(d) orders. "Warshak's facial challenge to the constitutionality of the §2703 is a legal one," and Warshak has alleged no facts to which the Court may test his legal theories because "[w]hatever facts are necessary to the determination of that issue can be presented to the district court in the course of this litigation." Warshak Br. at 24. Warshak invites the Court to make an impermissible "advisory opinion" based on a complaint that has not yet alleged a ripe context in which to apply his legal theories. Order at 17; JA __. It is axiomatic that federal courts do not issue advisory opinions, *Steel Co.*, 523 U.S. at 101, and the government respectfully submits that the Court should decline Warshak's invitation to do so.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN ISSUING THE PRELIMINARY INJUNCTION

A. Warshak's Facial Challenge to the SCA Fails Because the SCA Is Capable of Constitutional Application

This Court "will only uphold a facial challenge to a statute if the challenging party can demonstrate that there is no constitutional application of the statute." *Coleman v. DeWitt*, 282 F.3d 908, 914 (6th Cir. 2002) (citing *United States v. Salerno*, 481 U.S. 739, 745-46 (1987)). Warshak protests that the *Salerno* standard does not apply to this case, but he cites only a three-Justice plurality opinion from a vagueness case and footnotes from other appellate courts questioning *Salerno*. Warshak Br. at 45. These opinions cannot and do not overrule *Salerno*, and this Court has continued to apply *Salerno* after these decisions. *See Rosen v. Goetz*, 410 F.3d 919, 933 (6th Cir. 2005); *Coleman* 282 F.3d at 914. Similarly, older cases such as *Berger v. New York*, 388 U.S. 41 (1967), provide no basis for ignoring *Salerno*, as the *Salerno* doctrine was established well after *Berger*. Warshak concedes that his facial challenge to the Stored Communications Act ("SCA") is "a straightforward legal challenge" and "not an overbreadth challenge." Warshak Br. at 46. *Salerno* applies in such circumstances. *See McGuire v. Reilly*, 386 F.3d 45, 57 (1st Cir. 2004) (noting that *Salerno* applies unless "overbreadth (and possibly also vagueness) are at issue"). Moreover, *Salerno* is controlling law in the Fourth Amendment context. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 632 n.10 (1989).

Salerno is fatal to Warshak's facial challenge to the SCA. In its Proof Brief at 32-35, the government pointed to four circumstances in which compelled

disclosure of e-mail was plainly consistent with the Fourth Amendment: waiver, terms of service, abandonment, and fraud. Warshak's challenges to the constitutionality of compelled disclosure in these situations are meritless. Moreover, Warshak faces a heavy burden: a facial challenge to the SCA fails if the SCA is constitutional in any of these, or any other, circumstances.

First, an e-mail account owner can waive any possible expectation of privacy, and compelled disclosure cannot violate the Fourth Amendment when the account owner has no reasonable expectation of privacy. Pr. Br. at 32-33. Warshak concedes that an individual employee can waive any expectation of privacy in his e-mail, but he asserts without support that the district court's injunction does not reach such situations because in the workplace, the account holder for all accounts is the employer. Warshak Br. at 48. He is mistaken: when an employer provides Internet access and e-mail to an employee, the employer is the service provider, and the employee is the account owner. *See Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 114-15 (3d Cir. 2004).

Moreover, although privacy waivers are most common in the employment context, *see Muick v. Glenayre Electronics*, 280 F.3d 741, 743 (7th Cir. 2002), they are made elsewhere as well. In *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001), this Court held that there was no expectation of privacy in an electronic bulletin board based on its privacy disclaimer. Warshak attempts to distinguish

Guest by noting that the bulletin board "expressly warned that no messages posted should be considered private." Warshak Br. at 48 n.24. This warning confirms the government's argument: any expectation of privacy can be waived, even in a service available to the pubic. E-mail accounts can and do include similar disclaimers, and compelled disclosure from such accounts does not violate the Fourth Amendment.

Second, compelled disclosure of e-mail is permissible under most providers' terms of service. Warshak asserts without support that contractual agreements cannot affect the constitutionality of compelled disclosure, Warshak Br. at 50-51, but this assertion ignores established Fourth Amendment doctrine: a party "having joint access or control [to a location] for most purposes" can consent to a search. *See United States v. Gillis*, 358 F.3d 386, 390 (6th Cir. 2004) (quoting *United States v. Matlock*, 415 U.S. 164, 172 n.7 (1974)). Terms of service frequently confirm the existence of such authority. For example, in *United States v. Young*, 350 F.3d 1302, 1308-09 (11th Cir. 2003), the court held that Federal Express's terms of service, which allowed it to inspect customers' packages, gave it authority to consent to a warrantless government search of a package. For Fourth Amendment purposes, the terms of service in *Young* are indistinguishable from Yahoo!'s: Yahoo! reserves the right "in their sole discretion to pre-screen, refuse, or move any Content that is available via the Service." Pr. Br. at 34. A provider

that can disclose the contents of a package to the government voluntarily may surely disclose the contents in response to compulsory process. Thus, because Yahoo! has access to and control over the e-mail stored on its servers, it may disclose e-mail to the government in response to compulsory process.[3]

In addition, terms of service often expressly authorize the provider to disclose e-mail in response to legal process. *See id.* The Fourth Amendment allows a third party to consent to the search of another's container when the owner "expressly authorize[s] the third party to give consent." *Young*, 350 F.3d at 1308. Similarly, a service provider (which owns its own servers) may surely disclose e-mail in response to compulsory process when account holders have explicitly authorized the disclosures.

Third, some e-mail accounts are abandoned, as when the owner stops paying for service and the account is terminated. Warshak suggests that such e-mail retains a reasonable expectation of privacy (presumably forever), *see* Warshak Br. at 48-49. However, in analogous physical circumstances, the owner of the

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[3] Warshak asserts without support that ISP access to customer e-mail is "generally accomplished . . . *without* human scrutiny." Warshak's Br. at 51-52. However, because Yahoo! has access to and control over e-mail stored on its servers, it does not matter how often its employees review customer e-mail. Moreover, in *Smith v. Maryland*, 442 U.S. 735, 745 (1979), in which the Supreme Court upheld the constitutionality of pen registers, the Court *rejected* the argument that for Fourth Amendment purposes, "automatic switching equipment differs from a live operator." *Id.*

premises may consent to a warrantless search of items left behind, *see United States v. Poulsen*, 41 F.3d 1330, 1335-37 (9th Cir. 1994), and the owner may therefore also comply with a subpoena compelling their disclosure. Warshak offers no support for the notion that e-mail should receive greater protection than items in a private residence.

Fourth, a hacker who obtains Internet services and e-mail using stolen credit cards has no reasonable expectation of privacy in his account. There is no reasonable expectation of privacy in a stolen car or a laptop computer obtained by fraud. S*ee United States v. Hensel*, 672 F.2d 578, 579 (6th Cir. 1982); *United States v. Caymen*, 404 F.3d 1196, 1201 (9th Cir. 2005). Any expectation of privacy in such circumstances "is not a legitimate expectation that society is prepared to honor." *Id.* Warshak apparently believes that a fraudulently obtained e-mail account retains a reasonable expectation of privacy until the provider terminates the account. *See* Warshak Br. at 49-50. Even if Warshak were correct, he is still mistaken in claiming that the SCA can never be constitutionally applied. By his reasoning, there is no reasonable expectation of privacy in the contents of an e-mail account obtained through fraud after the service provider has terminated the account.

In each of these four circumstances, the SCA is capable of constitutional application, and a facial challenge to the SCA must be rejected. Accordingly,

Warshak can only challenge the SCA's constitutionality in the ripe, concrete context of an as-applied challenge.

B. A Reasonableness Standard Governs Compelled Disclosure

Compelled disclosure is subject only to a reasonableness standard. This principle is based on the language of the Fourth Amendment, which by its terms imposes a probable cause requirement only on the issuance of warrants, *see U.S. Const. amend. IV* ("and no Warrants shall issue, but upon probable cause"), and it has been uniformly affirmed by a century of Supreme Court jurisprudence. *See, e.g.*, *Wilson v. United States*, 221 U.S. 361, 376 (1911); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 413-15 (1984). It is also based on the rule that the government is entitled to obtain evidence from anyone who may assist an investigation. *See Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); 8 J. *Wigmore, Evidence* § 2192 (McNaughton rev. 1961) ("For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence.").

Warshak's Fourth Amendment claim is based on the theory that e-mail is not "permissibly obtainable" through a subpoena because the government cannot compel disclosure of the contents of a closed container. Warshak Br. at 29-31, 38. However, he fails to cite a single case supporting his notion that certain items are

exempt from compelled disclosure. Such a rule would signal the end of compulsory process, for nearly every item or document subject to compelled disclosure is likely to be stored in a home, office, filing cabinet, or some other closed container.

Warshak states that there are "limits to what the government may accomplish" via subpoena, and he lists (without citation) several examples of circumstances in which he asserts that the government could not use a subpoena to compel disclosure of information. Warshak Br. at 31-32. A simple rule resolves all of his examples: the government may compel an entity to disclose any item that is within its control and that it may access. This rule is consistent with every compelled disclosure case cited by the government or Warshak, and it is supported both by the rule that a party with "joint access or control for most purposes" may consent to a search, *see Matlock*, 415 U.S. at 172 n.7, and also by the rule that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." *Smith v. Maryland,* 442 U.S. 735, 744 (1979) (quoting *United States v. Miller*, 425 U.S. 435, 443 (1976) (citing *Hoffa v. United States*, 385 U.S. 293, 302 (1966)); *see also Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (holding that where two parties jointly used a

duffle bag, the defendant "assumed the risk" that the other party would consent to a search).[4]

For example, Warshak claims (without support) that the government cannot use a subpoena to search "a footlocker shipped via a third party." Warshak Br. at 31. However, in *Young*, the Eleventh Circuit concluded that because Federal Express had "full possession and control along with the right to inspect" a package,

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[4] Warshak suggests without support that *Miller* is limited to information revealed in commercial transactions, *see* Warshak's Br. at 51, but the principle that information revealed to third parties may be turned over to the government is not so limited. For example, *Hoffa* approved of an informant's disclosure of the content of confidential communications that took place in a hotel room. *Hoffa*, 385 U.S. at 302. Similarly, in the context of cordless telephone calls broadcast by radio, courts applied the "assumption of risk" doctrine of *Matlock*, *Smith v. Maryland*, *Miller*, and *Hoffa* to the content of telephone conversations. Although such calls were indistinguishable from other calls with respect to content, courts uniformly held that there was no reasonable expectation of privacy in such calls. *See, e.g.*, *McKamey v. Roach*, 55 F.3d 1236, 1238-1239 (6th Cir. 1995) (citing multiple cases); *In re Askin*, 47 F.3d 100, 105 (4th Cir. 1995) ("The common characteristic of the government informant and the cordless phone user is that they are both unreliable recipients of the communicated information."). In addition, *amici* cite *Katz v. United States*, 389 U.S. 347 (1967) and *Berger v. New York*, 388 U.S. 41 (1967), but these cases involve surreptitious eavesdropping on conversations. Cases such as *Matlock*, *Miller*, and *Frazier* set the rules for when a party in possession of a stored item may disclose it to the government, not the eavesdropping cases. There is a fundamental distinction between using compulsory process to require someone to disclose information in his current possession and compelling him to become a prospective participant in surreptitious surveillance. Finally, any claim that subpoenas cannot be used to compel disclosure of private information is incompatible with cases like *Branzburg*, 408 U.S. at 690 (upholding subpoena to newsman for confidential sources) and *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201 (1990) (upholding subpoena for confidential peer review materials).

it had authority to consent to a government request to search the package without a warrant. *Young*, 350 F.3d at 1309.[5] Similar reasoning applies to the provision of e-mail: service providers have authority to access the e-mail on their servers, and they thus may produce the e-mail in response to a subpoena or 2703(d) order. Indeed, throughout this litigation, the government has stressed that service providers have access to e-mail stored on their servers based on industry practices, terms of service, statutory law, and case law. (R.15, Response in Opposition re Motion for TRO at 9-12.; JA __). In contrast, there is not a shred of evidence in the record that e-mail service providers have limited access to the e-mail they store.[6]

None of the cases cited by Warshak supports the notion that compelled disclosure is based on a probable cause standard. In *United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 39-40 (D. Conn. 2002), the government subpoenaed a computer and, in an abundance of caution, obtained a warrant before searching it. Nothing in *Triumph Capital* suggests that it would violate the Fourth

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[5] This holding does not depend on package's contents, as the shipper will not know the contents before consenting to the government search.

[6] Thus, cases involving parties with significantly limited access to an item, such as a hotel's janitorial staff, do not affect e-mail service providers' ability to respond to compulsory process. *Compare Young*, 350 F.3d at 1308-09 (holding shipper had authority to consent to search based on its unrestricted access to packages) *with Chapman v. United States*, 365 U.S. 610, 616 (1961) (holding that limited authority of landlord to enter premises was insufficient to enable landlord to consent to search).

Amendment to subpoena the contents of a computer from anyone with authority to access its contents. Similarly, in *United States v. Barr*, 605 F. Supp. 114, 119 (S.D.N.Y. 1985), the court upheld a subpoena compelling disclosure of unopened mail from a third-party service that received and held mail on behalf of the defendant. In *Barr*, the government did not require the mail service to open the mail, as the service had no right to access its contents. Instead, the government used a search warrant for that purpose. *Id.* at 116. *Barr* supports the government's position: to the extent a third-party entity controls and can access an item, it can be compelled to disclose it.[7]

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[7] The other cases cited by Warshak do not involve compelled disclosure and have no relevance to this case. In *Wilson v. Moreau*, 440 F. Supp. 2d 81, 108 (D.R.I. 2006), the court held that law enforcement agents could violate the Fourth Amendment if they coerced an e-mail account owner (by threatening him with arrest) into giving them access to his e-mail account. Nothing in *Wilson* suggests that the government would have violated the Fourth Amendment had it chosen to subpoena the targeted e-mail from the provider or the account owner. Law enforcement is not permitted to coerce disclosure of information without using appropriate compulsory process. Similarly, *Baranksi v. Fifteen Unknown Agents*, 452 F.3d 433, 445 (6th Cir. 2006), holds only that the Reasonableness Clause of the Fourth Amendment imposes requirements on the execution of search warrants, not that the Warrant Clause imposes a probable cause requirement on compelled disclosure. *Amici* cite *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006), a public sector warrantless search case analyzed under *O'Connor v. Ortega*, 480 U.S. 709 (1987). *Long* does not involve compulsory process; it held only that a user retained an expectation of privacy on a government computer system. In contrast, *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 1999), held that a defendant had "no reasonable expectation of privacy in his e-mail messages or e-mail box." Both *Long* and *Monroe* analyze the particular facts and terms of service associated with e-mail accounts, an approach that Warshak rejects.

Warshak's attempts to distinguish cases upholding compelled disclosure should fail. First, in *Schwimmer v. United States*, 232 F.2d 855, 861-63 (8th Cir. 1956), the court upheld a reasonably limited subpoena served on a storage facility for documents stored in the facility by an attorney. Warshak asserts that *Schwimmer* "is no longer good law," Warshak Br. at 39, but his only arguments against its validity are its age and the untenable assertion that the government cannot compel disclosure of the contents of a closed container, an assertion that would end the use of compelled disclosure. Second, in *Newfield v. Ryan*, 91 F.2d 700, 703-05 (5th Cir. 1937), the court upheld a subpoena to a telegraph company for certain telegrams in its possession that had been sent or received by the targets of an investigation. Warshak claims that the subpoenas in *Newfield* are less broad than the two 2703(d) orders directed at his e-mail accounts. Warshak Br. at 40. However, any allegation that the particular 2703(d) orders directed to Warshak's e-mail are unreasonable cannot serve as the basis for a facial challenge to the SCA, as 2703(d) orders may vary in the range of information they seek. Third, in *United States v. Palmer*, 536 F.2d 1278 (9th Cir. 1976), an attorney had received the contents of a car and disclosed those items in response to a subpoena; items from the contents were admitted into evidence at trial. The defendant in *Palmer* claimed a reasonable expectation of privacy in the subpoenaed items, which the attorney had received *for purposes of shipping* on behalf of the defendant. *Id.* at 1281. The

critical holding in *Palmer*, which Warshak fails to address, is that the court did not need to "explore the issue of a reasonable expectation of privacy . . . because the use of a properly limited subpoena does not constitute an unreasonable search and seizure under the fourth amendment." *Id.* at 1281-82.

The propriety of compelled disclosure of e-mail is further supported by the statutory framework. Although Congress is not the "final arbiter" of the constitutionality of compelled disclosure, Warshak Br. at 41, there is a "strong presumption of constitutionality" to federal statutes challenged on Fourth Amendment grounds. *United States v. Watson*, 423 U.S. 411, 416 (1976). Moreover, the statutory framework here is significant not only because it authorizes compelled disclosure of e-mail (and has done so since e-mail was in its infancy), but also because it specifies that service providers have full access to their own servers: the SCA provides civil and criminal penalties for unauthorized access to stored communications held by service providers, but it exempts the service providers from this provision. 18 U.S.C. § 2701(a), (c)(1). Critically, Warshak concedes that "the ISP may access stored email." Warshak Br. at 42. This concession is fatal to his claim that compelled disclosure of e-mail violates the Fourth Amendment. *See Young*, 350 F.3d at 1308-09.

Warshak does not dispute that under *SEC v. Jerry T. O'Brien Inc.*, 467 U.S. 735, 743, 750-51 (1984), the Fourth Amendment does not require notice to the

target of an investigation of compulsory process directed to a third party, and he cites no case to the contrary. *See also Barr*, 605 F. Supp. at 118-19 (approving compelled disclosure of unopened mail without notice to the owner).[8] Instead, Warshak seeks to distinguish *O'Brien* by asserting that the SCA prohibits a service provider from notifying a customer of a 2703(d) order. Warshak Br. at 44.[9] However, a nondisclosure order does not violate the rights of the target of an investigation, as the target has no right to notice in the first place under *O'Brien*. Moreover, such a nondisclosure order is reasonable under the Fourth Amendment, as it may be issued by a court only on a finding that there is reason to believe that notification will result in endangering the life or physical safety of an individual, seriously jeopardizing an investigation, or other similar harms. *See* 18 U.S.C. §

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[8] *O'Brien*'s holding is based on the principle of *Miller* and *Hoffa* that when an individual communicates information to a third party "even on the understanding that the communication is confidential, he cannot object if the third party conveys that information . . . to law enforcement." *O'Brien*, 467 U.S. at 743. *Miller* and *Hoffa* are not limited to information regarding commercial transactions, *see supra* note 6, and neither is *O'Brien*.

[9] Not every 2703(d) order includes a nondisclosure provision directed to the provider. In general, the government must provide prior notice to an account holder of a 2703(d) order for the content of e-mail unless it obtains authorization to delay notice pursuant to § 2705(a) of the SCA. Even when a court authorizes the government to delay notice under § 2705(a), the provider remains free to notify the account holder of the compelled disclosure unless the government also obtains a nondisclosure order under § 2705(b). *See* 18 U.S.C. §§ 2703(b), 2705.

2705(b).[10] Thus, the preclusion of notice provisions of § 2705 do not violate the Fourth Amendment.

C. Warshak Fails in His Attempt to Distinguish 2703(d) Orders from Subpoenas

Perhaps recognizing the inescapable conclusion that subpoenas are subject only to a reasonableness requirement, Warshak attempts to distinguish 2703(d) orders from subpoenas. Warshak Br. at 33-37. His efforts fail, however, because a 2703(d) order is issued by a court based on a higher standard than a subpoena and is otherwise executed in the same manner as a subpoena. Pr. Br. at 39-40. Moreover, subjecting 2703(d) orders to greater constitutional scrutiny than subpoenas would serve no purpose: whenever 2703(d) orders may be used to compel disclosure of e-mail, subpoenas may also be used. *See* 18 U.S.C. § 2703(b).

Warshak contends that subpoenas may be contested in advance of production, and he asserts that this protection "is entirely lacking in the context of *ex parte* § 2703(d) orders." Warshak Br. at 35. This assertion is simply false: a service provider may always contest a 2703(d) order before compliance. The statute explicitly states that "[a] court issuing an order pursuant to this section, on a

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[10] This standard is the same as that for delaying notice of a search warrant under 18 U.S.C. § 3103a. In addition, nondisclosure orders are not unique to the SCA. For example, they are a standard feature of pen register orders. 18 U.S.C. § 3123(d). Pen register orders are based on a standard lower than 2703(d) orders. *Compare* 18 U.S.C. § 3122(b) *with* 18 U.S.C. § 2703(d).

motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider." 18 U.S.C. § 2703(d). Warshak is unhappy that a court may delay notice to an *account holder*, but such notice is not required by the Fourth Amendment. The Supreme Court has held that the target of an investigation has no right to notice of third-party compelled disclosure. *See O'Brien*, 467 U.S. at 750-51 ; *see also Barr*, 605 F. Supp. at 118-19 (approving compelled disclosure of unopened mail without notice to the owner). Moreover, when the Supreme Court adopted the no-right-to-notice rule of *O'Brien*, it recognized that its holding would "have the effect in practice of preventing some persons under investigation . . . from asserting objections to subpoenas." 467 U.S. at 751.

Warshak is also mistaken to claim that 2703(d) orders are "swift, sudden," and "command[] a physical intrusion." Warshak Br. at 34-35. In fact, 2703(d) orders are not executed not by force but in the same manner as subpoenas. They are sent to the service provider, and (unless the provider moves to quash) an employee of the provider copies and produces the relevant files from its server. The government exercises no physical intrusion whatsoever.

Warshak also asserts that 2703(d) orders differ from subpoenas because they do not satisfy the relevance standard applicable to subpoenas. *See* Warshak Br. at

36-37. Again, he is mistaken. Subpoenas must seek information relevant to an investigation. *See In re Administrative Subpoena John Doe, D.P.M.,* 253 F.3d 256, 265 (6th Cir. 2001). In contrast, a 2703(d) order can be issued only when a court finds that the government has offered "specific and articulable facts" demonstrating that the information it seeks is "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). This evidentiary standard is "higher than a subpoena." H. Rep. No. 103-827(I), at 31 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3511.[11]

D. The District Court Improperly Applied the Law in Balancing the Remaining Preliminary Injunction Factors

As the government demonstrated in its Proof Brief at 51-56, the district court improperly applied the law in balancing the remaining preliminary injunction factors. In particular, the preliminary injunction should be vacated for the independent reason that Warshak has failed to meet the Supreme Court's requirement that he show an immediate irreparable injury to obtain injunctive relief. *Lyons*, 461 U.S. at 111.

Even if Warshak could make such a showing (and he cannot), Warshak has failed to show that he has no other adequate remedy at law. Warshak has at least

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[11] Warshak claims that the particular 2703(d) orders directed to his e-mail were overly broad. Warshak's Br. at 36. Though incorrect, this claim might be included in an as-applied challenge, but it cannot possibly be relied upon to facially invalidate the SCA.

two adequate remedies at law: an action for money damages and a motion to suppress disclosures. Pr. Br. at 53-54. Warshak rejects these alternatives simply because they are "[a]fter-the-fact." Warshak Br. at 53. This unsupported position contradicts the well-settled Sixth Circuit rule that an injunction should issue only when courts of law cannot afford an adequate remedy in damages, *Detroit News Publishing Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876-877 (6th Cir. 1973), a remedy that, by definition, occurs "after the fact." *See Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

Finally, requesting an ISP to preserve e-mails pursuant to 18 U.S.C. § 2703(f) does not assuage the injunction's harm, because the government cannot obtain needed evidence in a timely manner through a preservation letter. The harm to the government is particularly great because of the injunction's sweeping scope, which extends far beyond the relief sought by Warshak. "[S]uch broad relief is rarely justified because injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003).

CONCLUSION

For these reasons, as well as those set forth in the Proof Brief, the United States respectfully requests that the Court vacate the preliminary injunction in this case.

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Respectfully submitted,

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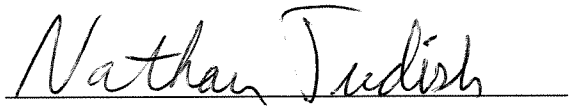
CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure. The foregoing brief contains 6991 words of Times New Roman (14 pt) proportional type. Microsoft Word is the word-processing software that I used to prepare this brief.



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CERTIFICATE OF SERVICE

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