

United States Court of Appeals for the Sixth Circuit

WARSHAK

v.

UNITED STATES

Decided and Filed: July 11, 2008.

SUTTON, Circuit Judge

Since 1986, Title II of the Electronic Communications Privacy Act of 1986, commonly referred to as the Stored Communications Act, has authorized the federal government to require internet service providers to disclose the contents of “electronic communication[s]” of their customers in certain circumstances, including by way of an *ex parte* court order. The government obtained two such orders in 2005 to search Steven Warshak's e-mails. When Warshak learned about the orders, roughly a year later, he filed a declaratory judgment action, seeking to invalidate § 2703(d) under the Fourth Amendment, and he moved for a preliminary injunction, seeking to enjoin the government from conducting further *ex parte* e-mail searches. The district court granted the motion and enjoined the government from using § 2703(d) to seize the contents of “any personal email account[]” belonging to Warshak or “any resident of the Southern District of Ohio” without “prior notice and an opportunity to be heard.” We vacate the preliminary injunction because Warshak's constitutional claim is not ripe for judicial resolution.

I.

A.

The Stored Communications Act prohibits unauthorized access to certain electronic communications and places restrictions on a service provider's disclosure of certain communications. It also permits a “governmental entity” to compel a service provider to disclose the contents of communications in certain circumstances.

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. . . The government may obtain the contents of e-mails that are “in electronic storage” with an electronic communication service for 180 days or less “only pursuant to a warrant.” The government has three options for obtaining communications stored with a remote computing service and communications that have been in electronic storage with an electronic service provider for more than 180 days: (1) obtain a warrant; (2) use an administrative subpoena; or (3) obtain a court order under § 2703(d).

Under § 2703(d), the provision at issue in this case, “a court of competent jurisdiction” may issue an order based on “specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.”

Although the statute generally requires the government to give the user prior notice of the disclosure unless it obtains a warrant, it contains an exception, which says the government may delay notice in 90-day increments, if notification would result in “(A) endangering the life or physical safety of an individual; (B) flight from prosecution; (C) destruction of or tampering with evidence; (D) intimidation of potential witnesses; or (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.”

B.

Warshak is the president and sole owner of Berkeley Premium Nutraceuticals, Inc., which became the target of an investigation into “mail and wire fraud, money laundering, and other federal offenses” based on its “nationwide marketing, distribution, and sale of products.” The government sought permission from a magistrate judge to require Warshak’s internet service providers-NuVox Communications and Yahoo!-to turn over Warshak’s account information, “[a]ll [l]og files and backup tapes” and the contents of e-mails that had been “accessed, viewed, or downloaded” or that were more than 181 days old.

On May 6, 2005, and again on September 12, 2005, the magistrate judge granted the applications under § 2703(d) of the Act. As required, the orders were based on “specific and articulable facts showing that there [were] reasonable grounds to believe that the records or other information sought [were] relevant and material to an ongoing criminal investigation.” As permitted, the orders did not give Warshak immediate notice of the disclosures. Concluding that notice to Warshak “would seriously jeopardize the investigation,” the magistrate judge ordered the government to delay notice for 90 days and mandated that the “[o]rder[s][be] sealed until otherwise ordered by the Court.”

On May 31, 2006, roughly a year after the court issued the first § 2703(d) order, the government gave Warshak notice of the orders. In response, he sued the government on June 12, seeking declaratory and injunctive relief. Among other complaints, Warshak alleged that § 2703(d) violated the Fourth Amendment on its face and as applied because the searches were based on a showing of less than probable cause and were not supported by a warrant.

On June 30, Warshak filed a motion for a preliminary injunction. . . .

On September 20, 2006, a federal grand jury indicted Warshak for bank fraud, mail fraud and money laundering, among other federal crimes. On February 22, 2008, a jury convicted him on 93 counts.

II.

The Constitution does not extend the “judicial Power” to any legal question, wherever and however presented, but only to those legal questions presented in “Cases” and “Controversies.” A claim is not “amenable to ... the judicial process” when it is filed too late (making it moot) or when the claimant lacks a sufficiently concrete and redressable interest in the dispute (depriving the plaintiff of standing). This case implicates at least two of these doctrines today, ripeness and standing, both of which “unquestionably . . . overlap,” and at some point could well implicate the third (mootness) in view of the motion to suppress that Warshak filed in his criminal case. As there is no obligation to favor one of these justiciability doctrines over the other and as none of these questions goes to the merits of the case, we may address them in any sequence we wish. We start-and end-with ripeness.

Like standing, ripeness “is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.” The ripeness doctrine serves to “avoid[] ... premature adjudication” of legal questions and to prevent courts from “entangling themselves in abstract” debates that may turn out differently in different settings. In ascertaining whether a claim is ripe for judicial resolution, we ask two basic questions: (1) is the claim “fit[] . . . for judicial decision” in the sense that it arises in a concrete factual context and concerns a dispute that is likely to come to pass? and (2) what is “the hardship to the parties of withholding court consideration”?

A.

There are several reasons why this claim is not “fit” for judicial review. To start, we have no idea whether the government will conduct an *ex parte* search of Warshak's e-mail account in the future and plenty of reason to doubt that it will, making this a claim that depends on “contingent future events that may not occur as anticipated, or indeed may not occur at all.” Answering difficult legal questions before they arise and before the courts know how they will arise is not the way we typically handle constitutional litigation.

. . . In conducting its previous searches of Warshak's e-mails, the government obtained judicial permission to delay notice to Warshak on the ground that disclosure would “seriously jeopardiz[e][the] investigation.” That possibility no longer exists. Warshak has ample notice of the investigation-indeed notice of the worst sort: He has been indicted (and now convicted). The question, as framed by the complaint, is not whether the government will conduct another search of Warshak's e-mails; it is whether the government will conduct another *ex parte* search of his e-mails, a possibility that is exceedingly remote given that the reason the government kept these searches confidential-that they would jeopardize the ongoing investigation-no longer exists. It is within the realm of possibility, we suppose, that a new investigation could commence or that some other reason for delaying notice could arise, such as the need to avoid “endangering the life or physical safety of an individual; ... flight from prosecution; ... destruction of or tampering with evidence; ... intimidation of potential witnesses; or ... unduly delaying a trial.” But these possibilities are just that-possibilities (and remote possibilities at that)-making it eminently unpredictable whether, when, or why the government would seek judicial permission to conduct another *ex parte* search of Warshak's e-mails.

Not only do “we have no idea whether or when” such a search will occur but we also “have no idea” what e-mail accounts, or what types of e-mail accounts, the government might investigate. That uncertainty looms large in a debate about the expectations of privacy in e-mail accounts. The underlying merits issue in the case is this: In permitting the government to search e-mails based on “reasonable grounds,” is § 2703(d) consistent with the Fourth Amendment, which generally requires “probable cause” and a warrant in the context of searches of individuals, homes and, perhaps most analogously, posted mail? The answer to that question will turn in part on the expectations of privacy that computer users have in their e-mails-an inquiry that may well shift over time, that assuredly shifts from internet-service agreement to internet-service agreement and that requires considerable knowledge about ever-evolving technologies. . .

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Nor can we rely on *previous* government searches of Warshak's e-mails to hypothesize the factual context of the next search. Even if the record contained the full text of the NuVox and Yahoo! service-provider agreements (it does not; it contains just part of the Yahoo! agreement), we would run into a similar conjecture problem. Just as there is little basis for assuming the government will conduct another *ex parte* search of Warshak's e-mails, there is little basis for assuming any future search will concern e-mails facilitated by these service providers, as opposed to e-mails facilitated by other service providers. . . .

Concerns about the premature resolution of legal disputes have particular resonance in the context of Fourth Amendment disputes. In determining the “reasonableness” of searches under the Fourth Amendment and the legitimacy of citizens' expectations of privacy, courts typically look at the “totality of the circumstances,” reaching case-by-case determinations that turn on the concrete, not the general, and offering incremental, not sweeping, pronouncements of law. Courts thus generally review such challenges in two discrete, *post-enforcement* settings: (1) a motion to suppress in a criminal case or (2) a damages claim under § 1983 or under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the officers who conducted the search. In both settings, the reviewing court looks at the claim in the context of an actual, not a hypothetical, search and in the context of a developed factual record of the reasons for and the nature of the search. A pre-enforcement challenge to future e-mail searches, by contrast, provides no such factual context. . . .

* * *

Making matters worse, Warshak's complaint sought, and the district court's injunction gave him, pre-enforcement relief not just on behalf of himself but on behalf of *all* e-mail users. . . .

That is not how constitutional litigation typically proceeds, and that is why the federal courts do not lightly uphold facial challenges. . . . When “determining whether a law is facially invalid,” as when determining whether a case is ripe, “we must be careful not to . . . speculate about ‘hypothetical’ or ‘imaginary’ cases” or to “premature [ly] interpret[] . . . statutes on the basis of factually barebones records.” . . .

* * *

The Supreme Court has been especially reluctant to invalidate statutes on their face under the Fourth Amendment. . . .

Even outside the case-by-case imperatives of Fourth Amendment decisionmaking, the Supreme Court has expressed increasing skepticism of facial challenges in recent years. . . .

This trend continued in the Supreme Court's most recent Term. In *Crawford v. Marion County Election Board* [Editor's Note: See Equal Protection, Voting Rights and Voter I.D.]

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B.

There also is no meaningful risk of “hardship” to Warshak “of withholding court consideration.” The prototypical case of hardship comes from the claimant who faces a choice

between immediately complying with a burdensome law or “risk[ing] serious criminal and civil penalties.” Yet Warshak faces no such conflict. The relevant provisions of the Act do not require Warshak to do anything. . . .

Hardship is difficult to maintain on this record for another reason. Individuals subjected to allegedly unconstitutional searches and seizures have at least two alternatives short of a pre-enforcement, facial attack on the enabling statute. They may file a motion to suppress in the event the government tries to use the evidence against them in a criminal prosecution. Or they may file a § 1983 or a *Bivens* action against the officers who conducted the search. . . .

. . . Even accepting for a moment Warshak's premise that one of the “hardship” concerns that may ripen a claim into a justiciable controversy is a litigant's interest in obtaining a constitutional ruling, Warshak is only half right. Yes, *Leon* permits courts to decide the good-faith question without determining whether the search was valid. And indeed, since the oral argument in this case, the district court has rejected Warshak's suppression motion solely on the ground that the officers acted in good faith.

* * *

Also unavailing is Warshak's concern that, without a constitutional ruling, he will be exposed to future unconstitutional searches. That contention, as we have shown, turns on a long list of speculative assumptions—that (1) the government will again seek to obtain his e-mail contents, even though he has already been indicted and convicted, (2) it will choose to do so through § 2703(d), as opposed to a search warrant or subpoena, (3) a court will determine that the § 2703(d) requirements are met, (4) the government will seek to invoke the delayed-notice provision and (5) a court will find that notice of the search would imperil the existence of an already-known investigation. That is not a plausible theory of hardship.

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BOYCE F. MARTIN, JR., Circuit Judge, dissenting, with whom Judges DAUGHTREY, MOORE, COLE and CLAY join.

. . . I dissent because I not only believe this case is ripe for review, but because the majority gives unwarranted deferential treatment to the government. Such treatment would not be afforded a private litigant defending against a motion for preliminary injunction, and should not be given here.

I.

. . . What the majority leaves out is the fact that while the government was initially granted a 90-day delay before being required to notify Warshak of its searches of his email accounts, when the 90 days expired, the government ignored the statute and failed to notify Warshak of its searches. Over a year went by before Warshak became aware that his emails had been searched. While members of this Court may argue over whether or not the delayed notification section of the Stored Communications Act is constitutional, it is uncontroverted that the government violated the law by failing to notify Warshak 90 days after searching his emails.

. . . Not only is Warshak alleging that the delayed notification provision of the act is unconstitutional, but he is also alleging that the government cannot be trusted to abide by the actual requirements of that law as written.

II.

. . . This Circuit has held that a ripeness analysis involves three-not two-questions: (1) the “likelihood that the harm alleged by [the] plaintiffs will ever come to pass”; (2) “whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties’ respective claims”; and (3) “the hardship to the parties if judicial relief is denied at [this] stage in the proceedings.” . . .

. . . [The majority] argues that the only reason the government gave in its application for delaying notice of the searches was that disclosure would seriously jeopardize the investigation, and because Warshak has now been indicted, there is no longer any possibility that the investigation would be jeopardized by disclosing a subsequent search of his emails. From this reasoning, the majority further posits that because Warshak is aware of the investigation, the government has no reason for keeping the searches confidential, and the possibility that the government will conduct another *ex parte* search without notice has therefore become “exceedingly remote.” Respectfully, I disagree with the majority’s Pollyannish view of federal criminal investigations.

First, the government’s stated reason in the prior applications for delayed notification is not the only reason recognized by the statute. The statute allows a court to delay notice if it would result in “(A) endangering the life or physical safety of an individual; (B) flight from prosecution; (C) destruction of or tampering with evidence; (D) intimidation of potential witnesses; or (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.” . . .

* * *

The majority disagrees and contends that the factual record is insufficient because it has “no idea” what types of email accounts the government might investigate and, thus, has no basis for determining whether Warshak has a reasonable expectation of privacy in any single account. I could not disagree more. The original panel opinion sufficiently addressed this issue, analyzing the relevant facts, and pertinent Supreme Court opinions, as well as the most recent precedents of our sister circuits. That panel, as well as the district court, concluded “that individuals maintain a reasonable expectation of privacy in e-mails that are stored with, or sent or received through, a commercial ISP.” . . .

* * *

Turning to the final prong of this Circuit’s ripeness analysis, I believe the only party that would suffer undue hardship if the preliminary injunction were not granted is Warshak. The government’s *ex parte* approach to obtaining Warshak’s e-mails precludes the possibility of judicial review at a subsequent and more appropriate time. Thus, as Warshak points out, he will likely suffer the hardship of continuing to have his Fourth Amendment rights violated with limited legal recourse if his current claims are deemed unripe. The government, on the other

hand, suffers no hardship if the preliminary injunction is granted. . . .
Based on the foregoing, I respectfully dissent.

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