No. 13-388

In The
Supreme Court of the United States

DEBRA SEITZ and GREG WELTER,

Petitioners,

v.

CITY OF ELGIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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OTHER AUTHORITIES

STATUTORY PROVISIONS

In addition to the statutory provision identified in the Petitioners' Petition for Writ of Certiorari, the following statutory provisions also are involved in this case:

18 U.S.C. § 2510(6):

> As used in this chapter – "person" means any employee, or agent of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

18 U.S.C. § 2511(1)(c)-(d):

> Except as otherwise specifically provided in this chapter any person who – (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . . shall be punished as provided in subsection

(4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511(3):

(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

STATEMENT OF THE CASE

A. Factual Background

This case is about a former City of Elgin ("City") police officer, Petitioner Greg Welter ("Welter"), who utilized his position and authority in the Police Department to obtain information about private citizens' vehicles for personal use. The City received an anonymous letter that asserted that Welter had engaged in this unlawful conduct. Specifically, the anonymous letter contained copies of emails between Welter and Petitioner Debra Seitz ("Seitz"), his business partner. These emails showed that Welter accessed the City's Law Enforcement Agencies Data System ("LEADS") account to determine the owners of vehicles that were

parked in front of one of the Petitioners' real estate properties.

Because access to LEADS is limited to criminal justice agencies for criminal justice purposes, the City, as it was required to, initiated an investigation into this misconduct.[1] Welter admitted to the improper use of the LEADS system and resigned his employment.

The Petitioners then filed a lawsuit against Tamara Welter, now Petitioner Welter's former wife, and her romantic interest, Robert Beeter. The Petitioners asserted claims against Tamara Welter and Robert Beeter for violation of the Federal Wiretap Act, 18 U.S.C. §§ 2510, *et seq.*, the Stored Communications Act, 18 U.S.C. §§ 2701, *et seq.*, the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and for intrusion upon seclusion under state and federal law based upon Tamara Welter's and Robert Beeter's purported unauthorized access to the Petitioners' email accounts. The Petitioners much later added a claim against the City, asserting that the City violated the

[1] On August 24, 2012, while this case against the City was pending, Welter filed a separate lawsuit against the City, the City Manager, the City's Corporation Counsel, the City's Police Chief, and the City's Professional Standards Officer, asserting that as a result of the City's investigation, he was coerced into resigning his employment in violation of his procedural and substantive due process rights. *See Welter v. City of Elgin*, Case No. 12-cv-6837. On March 29, 2013, the district court dismissed those claims with prejudice. *See Welter v. City of Elgin*, No. 12-cv-6837, 2013 WL 1337347 (N.D. Ill. Mar. 29, 2013).

Federal Wiretap Act ("FWA"), 18 U.S.C. § 2511(1)(c)-(d),[2] by reading the copies of emails that were included with the anonymous letter sent to the City.[3]

B. Proceedings Below

The Petitioners fail to accurately summarize the proceedings below. Accordingly, the City includes the following additional facts about the District Court proceedings.

In the District Court, the City moved to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), the only claim against it on three grounds – not on one ground as suggested by the Petitioners. First, the City argued that municipalities were not subject to suit under the FWA. Second, the City argued that the Petitioners had failed to allege a contemporaneous interception. Third, the City argued that the Petitioners failed to allege that the City knew the emails had been intercepted within the meaning of the FWA.

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[2] The Petitioners incorrectly state that they named the City as a defendant for "violating Section 2510 of the FWA." Pet. For Writ at 3. FWA Section 2510 is the definitions section and contains no substantive provisions. *See* 18 U.S.C. § 2510. Further, the Petitioners' Third Amended Complaint stated that they brought claims against the City for violations of FWA Section 2511(1)(c)-(d).

[3] The Petitioners filed their claims against the City through the Second Amended Complaint on May 31, 2012, nearly a year after the original complaint had been filed, and nearly two years after Welter had resigned his employment with the City.

The District Court granted the City's motion to dismiss, holding that municipalities were immune from suit under the FWA. Because the District Court dismissed the Petitioners' claim against the City on this basis, it did not reach the City's additional arguments for dismissal.[4]

C. The Seventh Circuit's Decision

The Seventh Circuit affirmed the District Court's decision. However, it disagreed with the District Court's reasoning. The Seventh Circuit did not determine that municipalities were generally immune from suit under the FWA. Rather, the Seventh Circuit agreed with the Petitioners that government entities could be sued under the FWA because Section 2520's use of the term "entity" – when providing that a person harmed by a violation of the FWA may recover from the "person or entity" who engaged in the violation – included government entities (App. at 8a). The

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[4] The District Court granted the City's motion to dismiss on November 13, 2012. On December 20, 2012, pursuant to Federal Rule of Civil Procedure 54(b), the District Court entered an Order making that judgment final. On December 18, 2012, the Petitioners' claims against Tamara Welter, and her cross-claims against Welter, were dismissed pursuant to a settlement agreement. The claims remaining in the District Court, therefore, are the Petitioners claims against Defendant Robert Beeter for violations of the FWA, the SCA, the Computer Fraud and Abuse Act, and state and federal law for intrusion upon seclusion, as well Defendant Beeter's cross-claims against Welter for violations of the FWA and SCA.

Seventh Circuit went on to determine, however, that Section 2520 of the FWA did not itself create any substantive rights, but instead provided a "cause of action to vindicate rights identified in other portions of the FWA, specifically communications 'intercepted, disclosed or intentionally used *in violation of this chapter*.'" (*Id.*).

With its holding regarding FWA Section 2520, the Seventh Circuit then examined the specific substantive right that the Petitioners accused the City of violating to determine whether the Petitioners had a cause of action against the City for that particular violation (*Id.* at 8a-10a). The Petitioners claimed that the City violated Section 2511(1)(c)-(d), which prohibits "any person" from intentionally disclosing or using communications that were intercepted in violation of the FWA when that person knows or has reason to know that the information was obtained through an illegal interception. Because Section 2511(1)(c)-(d) prohibits only acts by a "person," which does not include municipalities, and not an "entity," which does, the Seventh Circuit held that the Petitioners had no cause of action against the City for a violation of this specific section of the FWA (*Id.*).

In reaching this holding, the Seventh Circuit acknowledged that the Sixth Circuit in *Adams v. City of Battle Creek*, 250 F.3d 980 (6th Cir. 2001), had determined that municipalities were subject to suit under the FWA (App. at 11a). The Seventh Circuit's decision agreed with this general proposition that municipalities were subject to suit under the FWA,

through Section 2520 (*Id*. at 8a). The Seventh Circuit, however, went on to assess which specific violations of the FWA could be vindicated through Section 2520 (*Id.*). The Seventh Circuit determined that only persons, and not entities, could violate Section 2511(1) (*Id.* at 8a-9a). Therefore, because the City could not violate Section 2511(1) in the first instance, it could not be sued for a violation of that Section of the FWA (*Id.* at 9a). The Seventh Circuit reconciled its decision with the Sixth Circuit's decision in *Adams* because the *Adams* Court ended its inquiry with whether municipalities were subject to suit under Section 2520 (*Id.* at 11a).[5]

[5] It is also valuable to understand the context of the issue reaching the Sixth Circuit and how the issue was argued (or non-argued). The district court never addressed or decided whether the defendant city was subject to suit under the FWA. *See Adams v. City of Battle Creek*, No. 1:98-CV-233, 1999 WL 425885 (W.D. Mich. April 28, 1999). It appears that the defendant city did not argue that municipalities were not subject to suit under the FWA in the district court. *See id.* In the Sixth Circuit, the defendants dedicated only one line to the issue of municipal liability under the FWA, stating that there was a significant question as to whether the defendant city was even properly sued under the FWA. The plaintiff did not address this argument at all. Therefore, the Sixth Circuit addressed this issue without the benefit of developed briefing and argument on this particular issue.

D. Response To The Petitioners' Question Presented

The Petitioners characterize the Question Presented as "[w]hether the Federal Wiretap Act ("FWA"), 18 U.S.C. §§ 2510, *et seq.*, as amended by the PATRIOT Act, authorizes a cause of action against municipalities." Pet. For Writ at i. The City disagrees with the Petitioners that this is an issue because the Seventh Circuit held that municipalities were subject to suit for certain violations of the FWA.

ARGUMENT

A. Review Is Not Warranted Because There Is No Circuit Split As To Whether Municipalities Are Subject To Suit Under The Federal Wiretap Act

The Petitioners claim that the Seventh Circuit's decision "opened up a circuit split on the applicability of the FWA to municipalities." Pet. For Writ at 3. The Petitioners' characterization is inaccurate. In fact, the Seventh Circuit's decision in this case actually reconciled the Seventh Circuit's earlier decisions on the lack of municipal liability under the FWA with the Sixth Circuit's decision in *Adams v. City of Battle Creek*, 250 F.3d 980 (6th Cir. 2001), which held that municipalities are subject to suit under the FWA. Therefore, rather than creating a circuit split, the Seventh Circuit's decision in this case actually eliminated a circuit split.

The issue underlying both the Sixth Circuit's decision, and the Petitioners' argument, is an amendment to Section 2520 of the FWA. Section 2520 provides for a cause of action for violations of the FWA. *See* 18 U.S.C. § 2520. As originally enacted in 1968, Section 2520 provided that "[a]ny person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use, such communications." P.L. 90-351, Title III, § 802, June 19, 1968. This Section was amended in 1986, through the Electronic Communications Privacy Act ("ECPA"), so that 2520 of the FWA provided in relevant part "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation." P.L. 99-508, Title I, § 103, Oct. 21, 1986. Section 2520 was again amended in 2001 through the USA PATRIOT Act, which added the language "other than the United States" after the word "entity." 18 U.S.C. § 2520.[6]

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[6] This Amendment was part of the USA PATRIOT Act, which focused specifically on the federal government's access to and use of electronic and wire communications to combat terrorism. As part of the PATRIOT Act amendments, a separate and new cause of action was created under the Stored Communications Act ("SCA"), 18 U.S.C. § 2712, which provided for an exclusive remedy against the United States for certain willful violations of both the FWA

(Continued on following page)

Despite multiple amendments to Section 2520, the definition of "person" found in Section 2510 of the FWA has remained unchanged since its enactment. This definition of "person" explicitly excludes government entities. P.L. 90-351, Title III, § 802, June 19, 1968 (defining person as "any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation"); 18 U.S.C. § 2510(6) (same); *see also* S. Rep. No. 90-1097, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2179 ("The definition [of person] explicitly includes any officer or employee of the United States or any State or political subdivision of a State . . . Only the governmental units themselves are excluded.").

The Petitioners assert that the Sixth Circuit correctly decided the issue of whether municipalities are subject to suit under the FWA because in *Adams*, the Sixth Circuit determined that the FWA provides for a cause of action against municipalities under Section 2520 of the FWA. Pet. For Writ at 5; *Adams*, 250 F.3d at 985 ("we hold that governmental entities may be liable under 18 U.S.C. § 2520"). In so holding, the Sixth Circuit evaluated whether "entity" as used in Section 2520 included government entities such as municipalities. *Adams*, 250 F.3d at 985. Specifically, the Sixth Circuit determined that "entity," as added to Section 2520 through the 1986 Amendment, must

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and the SCA. Accordingly, the federal government was explicitly exempted from the reach of the FWA for any other violations.

refer to government entities because the definition of person already included business entities. *Id.* Therefore, the Sixth Circuit reasoned that government entities must be subject to suit under Section 2520, or else the word "entity" as used in this Section would be superfluous. *Id.*

In an attempt to present an issue deserving review by this Court, the Petitioners assert that the Seventh Circuit's decision exempted municipalities entirely from the reach of the FWA under Section 2520 and, in so doing, has "openly disagreed with the Sixth Circuit." Pet. For Writ at 4-5 ("the Seventh Circuit issued its opinion holding that the Federal Wiretap Act provides no cause of action against a municipality under § 2520" and "has exempted municipalities from liability under the FWA"). The Petitioners misrepresent the Seventh Circuit decision. Rather than rejecting the Petitioners' argument that municipalities were not immune under the FWA, the Seventh Circuit agreed with the Petitioners and with the Sixth Circuit that the term "entity" as used in FWA Section 2520 includes government units, and thus, that a municipality can be sued for violations of the FWA pursuant to Section 2520 (App. at 8a). In fact, the Seventh Circuit explicitly stated "we agree with plaintiffs that 'entity' as used in § 2520 includes government units" and that a government unit could be sued, pursuant to Section 2520, for violations of the FWA that specifically provide a right against an entity (*Id.*).

The Seventh Circuit went on to determine that although FWA Section 2520 includes municipalities within its reach, it does not itself confer any substantive rights (*Id.*). Instead, Section 2520 "provides a cause of action to vindicate rights identified in other portions of the FWA, specifically communications 'intercepted, disclosed, or intentionally used *in violation of this chapter*.'" (*Id.* (quoting 18 U.S.C. § 2520(a)).) Therefore, the Seventh Circuit determined that one must look at the scope of the specific substantive right being asserted to determine if that right could be asserted against a municipality (*Id.*).

Ultimately, the Seventh Circuit determined that Section 2511(1)(c)-(d) – the Section under which the Petitioners asserted a claim against the City – did not provide a cause of action against municipalities because Section 2511(1)(c)-(d) prohibits "any person" from intentionally disclosing or using communications intercepted in violation of the FWA (*Id.* at 8a-9a). Because Section 2511(1) prohibits only actions by a person, which as explicitly defined by the FWA does not include government entities, the Petitioners could not sue the City for a violation of Section 2511(1) (*Id.*).

As the Seventh Circuit noted, the Sixth Circuit's decision in *Adams* did not address, or consider, that FWA Section 2520 did not create any substantive rights (*Id.* at 11a). Instead, the *Adams* Court ended its analysis by determining that the term "entity" in Section 2520 included government units and that government units were, in turn, subject to suit under

the FWA. The Seventh Circuit reached this same conclusion (*Id.* at 8a). The Seventh Circuit, however, took its analysis a step further to reconcile the specific language of Section 2511(1), which refers only to "person," with the language of Section 2520, which refers to "person or entity" (*Id.* at 8a-9a). The *Adams* Court did not take this step and did not reach that holding. In addition, the Seventh Circuit noted that Section 2511(3) prohibits actions by a "person or entity" that can be vindicated through Section 2520, and therefore, the Seventh Circuit's analysis gave meaning to each word in Section 2520 (*Id.* at 10a).

In sum, there is no circuit split between the Sixth and Seventh Circuits on the Petitioners' Question Presented. Both courts are in agreement that municipalities are subject to suit under FWA Section 2520. The Seventh Circuit simply conducted a further analysis of this general determination that reconciles all of the language of the FWA, which the Sixth Circuit did not do.

Even if there is a perceived conflict between the Sixth and Seventh Circuits, this issue is not yet ripe for consideration by this Court. First, the Sixth and Seventh Circuits did not address the same issue because the Sixth Circuit did not consider how a government unit could be found to have violated Section 2511(1) when Section 2511(1) does not cover entities, or how the language of Sections 2511 and 2520 could be reconciled. The Seventh Circuit has now done this. Second, the Sixth Circuit and other circuit courts should be given the opportunity to now consider this

issue in light of the Seventh Circuit's ruling. Thus, this Court should allow this issue to develop more fully in the lower courts, as the Seventh Circuit's decision and reasoning in this case may be addressed by other courts, especially because the Seventh Circuit's decision does not directly conflict with these courts' holdings or reasoning. If this issue is permitted to emerge through examination by the lower courts, either a consensus among the lower courts will be found, or this Court will have the benefit of more fully developed arguments and analysis concerning under what circumstances municipalities may be subject to suit under the FWA.

For these reasons, there is no circuit split justifying review of the Seventh Circuit's decision. Accordingly, the Petition should be denied.

B. Review Is Not Warranted Because This Case Does Not Rise To The Level Of A National Concern

The Petitioners claim that the issue of whether municipalities are subject to suit for specific violations of the FWA presents a "substantial issue of national importance." Pet. For Writ at 6. In order to create an issue where one does not exist, the Petitioners suggest that the Seventh Circuit's decision opens the floodgates for municipalities to freely wiretap and intercept the private electronic communications of citizens. *Id*. In reality, a municipality being sued under the FWA has arisen infrequently, as is clear

from the limited number of district court cases that have addressed this issue. Underscoring this further is the fact that the only circuit courts to have addressed this issue are the Sixth and Seventh Circuits, and they have taken up this issue most recently in 2001 and 2013, respectively. The Petitioners' cries of national concern and infringement on the rights of private citizens is not grounded in reality.

The uniqueness of the present case further undermines any claim that this matter is of national importance. What the Petitioners fail to acknowledge is what this case is really about. This case is not about the City wiretapping a third party's communications. It is not about wiretapping at all. This case is about a public employer, the City, reading copies of emails that were sent to it anonymously that demonstrated that one of its employees, a police officer, was using his position with the police department to illegally access a law enforcement website for personal gain. These facts hardly represent a matter of national importance (or even an issue that is likely to arise again), as evidenced by the absence of a single case with the same or even similar alleged unlawful conduct.[7] Furthermore, this case is also unique and poorly suited for review by this Court because of the

[7] Of further note is the contrast in the facts of this case with those presented in *Adams*. In *Adams*, the City of Battle Creek police department had cloned the pager that was issued to one of its officers, without notifying the officer, so that it could monitor the officer's pages. *Adams*, 250 F.3d at 982, 984.

two additional grounds upon which the City moved for dismissal of the Petitioners' claim against it: (1) the Petitioners' failure to allege a contemporaneous interception; and (2) the Petitioners' failure to allege that the City knew that the emails had been intercepted within the meaning of the FWA. These other grounds present additional bases upon which the Petitioners' claim should be dismissed, and the decisions of the lower courts may be affirmed, without reaching the issue of whether municipalities are subject to suit under FWA Section 2511(1).

For these reasons, there is nothing about the Petitioners' claim in this case that presents a matter of national importance. Accordingly, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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