No. 08-1332

In The Supreme Court of the United States

CITY OF ONTARIO, CALIFORNIA,
ONTARIO POLICE DEPARTMENT,
and LLOYD SCHARF,

Petitioners,

v.

JEFF QUON, JERILYN QUON,
APRIL FLORIO, and STEVE TRUJILLO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

While individuals do not lose Fourth Amendment rights merely because they work for the government, some expectations of privacy held by government employees may be unreasonable due to the "operational realities of the workplace." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion). Even if there exists a reasonable expectation of privacy, a warrantless search by a government employer—for non-investigatory work-related purposes or for investigations of work-related misconduct—is permissible if reasonable under the circumstances. *Id.* at 725-726 (plurality opinion). The questions presented are:

1. Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers.

2. Whether the Ninth Circuit contravened this Court's Fourth Amendment precedents and created a circuit conflict by analyzing whether the police department could have used "less intrusive methods" of reviewing text messages transmitted by a SWAT team member on his SWAT pager.

3. Whether individuals who send text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellees below): City of Ontario, California; Ontario Police Department; Lloyd Scharf.

Respondents (plaintiffs and appellants below): Jeff Quon; Jerilyn Quon; April Florio; Steve Trujillo.

Additional defendants and appellees below: Debbie Glenn; Arch Wireless Operating Company, Inc.

Additional plaintiff below (not a party to the appellate proceedings): Doreen Klein.

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 529 F.3d 892 (9th Cir. 2008). Appendix to the Petition for a Writ of Certiorari ("App.") at 1-40. The Ninth Circuit's order denying rehearing and rehearing en banc, including a one-judge concurring opinion and a seven-judge dissenting opinion, is reported at 554 F.3d 769 (9th Cir. 2009). App. 124-150. The opinion of the United States District Court for the Central District of California is reported at 445 F. Supp. 2d 1116 (C.D. Cal. 2006). App. 41-116.

JURISDICTION

The Ninth Circuit issued its decision on June 18, 2008. App. 1. Petitioners City of Ontario, California, and Ontario Police Department timely filed a petition for rehearing and rehearing en banc, which was denied on January 27, 2009, with one judge concurring in and seven judges dissenting from the denial of rehearing en banc. App. 124-125, 136. Petitioners timely filed a petition for a writ of certiorari on April 27, 2009. This Court granted the petition on December 14, 2009, and has jurisdiction under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the

District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Ontario Police Department SWAT Sergeant Jeff Quon used his Department-issued text-messaging pager to exchange hundreds of personal messages—many sexually explicit—with, among others, his wife (Jerilyn Quon), his girlfriend (April Florio), and a fellow SWAT sergeant (Steve Trujillo), while he was on duty. He did so notwithstanding an explicit City policy warning employees not to expect any privacy in electronic communications on City equipment. After the Department later reviewed transcripts of the text messages, Sergeant Quon and his text-messaging partners sued the police chief and the City, alleging a Fourth Amendment violation.

A. The Ontario Police Department's Official No-Privacy Policy And Its Review Of Transcripts Of Text Messages On Sergeant Quon's Department-Issued Pager.

Since at least December 1999, the City of Ontario had a written "Computer Usage, Internet and E-mail Policy," which permitted employees only limited personal use of "City-owned computers and all associated equipment," including e-mail systems, and warned employees not to expect privacy in such use. App.

151-152. The City's written policy advised employees, among other things, that:

> • "The use of these tools for personal benefit is a significant violation of City of Ontario Policy." App. 152, ¶ II.
>
> • "The use of any City-owned computer equipment, . . . e-mail services or other City computer related services for personal benefit or entertainment is prohibited, with the exception of 'light personal communications' . . . ." *Id.*, ¶ III.A.

The policy explained that "[s]ome incidental and occasional personal use of the e-mail system is permitted if limited to 'light' personal communications[,]" which "may consist of personal greetings or personal meeting arrangements." App. 153, ¶ III.F.

As for privacy and confidentiality, the policy informed employees they should expect none:

> • "The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." App. 152, ¶ III.C.
>
> • "Access to the Internet and the e-mail system is not confidential; and information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information

> may not fully delete the information from the system." App. 153, ¶ III.D.
>
> • "[E-mail] messages are also subject to 'access and disclosure' in the legal system and the media." *Id.*, ¶ III.F.

The policy additionally stated that "[t]he use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated." *Id.*, ¶ III.E.

Plaintiffs Jeff Quon and Steve Trujillo were sergeants with the Department and members of its SWAT team. Supplemental Excerpts of Record ("S.E.R.") 395, 397. In early 2000, each signed an employee acknowledgment of the policy, which reiterated that the City reserved the right to monitor e-mail usage and that employees "should have no expectation of privacy or confidentiality when using these resources." App. 156-157.

In October 2001, the City obtained alphanumeric (i.e., text-messaging) pagers from defendant Arch Wireless Operating Company, Inc., and contracted with Arch Wireless for the City's wireless communications needs. S.E.R. 415-416. The Department issued pagers to SWAT team members, including Sergeants Quon and Trujillo; as the district court stated, the purpose was to "enable better coordination and a more rapid and effective response to emergencies[.]" App. 45-46; *see also* S.E.R. 423-424, 428.

At a supervisory staff meeting in April 2002, which Sergeant Quon attended, Lieutenant Steve

Duke of the Department's Administration Bureau reminded all present that the pager messages "were considered e-mail" messages, meaning that "messages would fall under the City's policy as public information and eligible for auditing." Joint Appendix ("J.A.") 30, 42, 61. Chief Scharf attended that meeting and issued a memorandum to all supervisory staff, including Sergeant Quon, memorializing Lieutenant Duke's reminder. J.A. 28-30.

Under the City's contract with Arch Wireless, each pager had a monthly character limit of 25,000, above which the City had to pay extra. S.E.R. 471-472. When the pagers were first issued, the character allotment had been 10,000 per month, but the City had increased it to 25,000 after receiving the first bill. *Id.*

Lieutenant Duke—whose Administration Bureau handled "fiscal responsibility" for the Department, including "grants, purchasing and receiving, [and] budget" (J.A. 64-65)—was in charge of the Arch Wireless contract. J.A. 66. When Sergeant Quon exceeded the character limit within the first or second billing cycle after the pagers were distributed, Lieutenant Duke relayed to him what the district court called his "unwritten policy regarding the conditions under which an audit of a pager would take place for overages[.]" App. 50; *see also* J.A. 40.

Lieutenant Duke told Sergeant Quon that his messages "were considered e-mail and could be audited" (S.E.R. 174; *see also* J.A. 82), but also stated

"that it was not his intent . . . to audit employees' text messages to see if the overage is due to work-related transmissions." S.E.R. 174; *see also* J.A. 83. He advised Sergeant Quon that he "could reimburse the City for the overage" (J.A. 83); otherwise, Lieutenant Duke would "have to audit the transmission and see how many messages were non-work related." J.A. 40; *see also* J.A. 83. Lieutenant Duke also told Sergeant Quon that the messages were "public records and could be audited at any time." J.A. 40; *see also* J.A. 85. Sergeant Quon went over the monthly character limit three or four times and paid the City for the overages. J.A. 50-51.

In August 2002, two officers, one of whom was Sergeant Quon, exceeded the 25,000 character limit. *See* J.A. 61. In response to Lieutenant Duke's complaint that he was "tired of being a bill collector with guys going over the allotted amount of characters on their text pagers[,]" Chief Scharf asked Lieutenant Duke to order the transcripts for those two pagers for review. *See* S.E.R. 261; J.A. 61. Chief Scharf ordered the review, as a jury would later find, to "determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses." App. 119. The Department, as customer on the account with Arch Wireless, then requested and obtained from Arch Wireless the pager transcripts for the two officers. J.A. 61-62; S.E.R. 477, 480-481.

The Department's review "showed Sergeant Quon had exceeded his monthly allotted characters by

15,158 characters." J.A. 34. After initial Department review, the matter was referred to internal affairs to determine whether Sergeant Quon was wasting time attending to personal issues while on duty. App. 9. Sergeant Patrick McMahon, of internal affairs, with the help of Sergeant Debbie Glenn, redacted the transcripts to eliminate messages that did not occur on duty. App. 9, 56; *see also* J.A. 37.

The redacted pager transcripts revealed that Sergeant Quon—who said the SWAT team members "were given the pager and allowed to use it in any fashion we wanted to" (S.E.R. 423)—engaged in extensive personal text messaging while on-duty:

- He had "a total of 456 personal transmissions during his normally scheduled workdays for the month of August [2002]. The most was 80 on August 14, and the least was 6 on August 29." J.A. 143.

- "On average, Sergeant Quon would send and receive 28 transmissions during his normally scheduled shift[,]" of which only "3 would be business related and the rest would be non-work related." J.A. 43.

Some of the messages "were directed to or from his wife, [plaintiff] Jerilyn Quon," who was a former Department employee, "while others were directed to and from his mistress, [plaintiff April] Florio," who was a Department employee. App. 54-55; *see also* Excerpts of Record ("E.R.") 4, 38, 741-742; S.E.R. 303, 307, 424. Many were not "light personal communications," as defined in the policy, but rather were, in the

district court's words, "to say the least, sexually explicit in nature." App. 54; *see also* S.E.R. 532, 539, 546, 551-553 (redacted transcripts of selected text messages).

Sergeant McMahon reported to Chief Scharf that Sergeant Quon had violated Department policy by "not us[ing] proper care with Department equipment[,]" and by using the pager for "personal benefit or entertainment[.]" J.A. 43-44.

B. Plaintiffs' Suit In The District Court.

Sergeant Quon and his text-messaging partners sued the Chief of Police, the City, the Department ("Ontario defendants"), and others, under 42 U.S.C. section 1983, alleging Fourth Amendment violations. *See* App. 58.[1] On cross-motions for summary judgment, the district court first held that Sergeant Quon had a reasonable expectation of privacy in his pager transcripts as a matter of law under the "operational realities of the workplace" standard from *O'Connor v.*

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[1] Plaintiffs made other claims and sued other defendants, including police sergeant Debbie Glenn and Arch Wireless, asserting, among other things, claims under the Stored Communications Act ("SCA"), 18 U.S.C. sections 2701-2712, and the California Constitution. *See* App. 58. Ontario defendants do not address those claims here. Ontario defendants prevailed in the district court on the SCA claims against them, and plaintiffs thereafter abandoned those claims on appeal. App. 11 n.3. The Ninth Circuit's resolution of plaintiffs' privacy claims under the California Constitution hinged entirely on the Fourth Amendment claims. *See* App. 21, 39.

Ortega, 480 U.S. 709, 717 (1987) (plurality opinion). App. 88-97. The court based its decision on Lieutenant Duke's informal arrangement whereby "he would *not* audit [officers'] pagers so long as they agreed to pay for any overages." App. 90 (emphasis in original).

The court next considered whether the review of the transcripts was reasonable under the circumstances. App. 97. It determined there was a genuine issue of material fact as to "the actual *purpose* or *objective* Chief Scharf sought to achieve[.]" *Id.* (emphasis in original). The court reasoned—again based on Lieutenant Duke's accommodation—that the transcript review was *not* reasonable if it "was meant to ferret out misconduct by determining whether the officers were 'playing games' with their pagers or otherwise 'wasting a lot of City time conversing with someone about non-related work issues[.]' " App. 98. But the court reasoned the transcript review *was* reasonable at the inception if the purpose was to "determin[e] the utility or efficacy of the existing monthly character limits." App. 99. The court also determined that the scope of the review was reasonable for this purpose. App. 103. Denying summary judgment, the district court ruled that a jury would decide "which was the primary purpose" of the review. *Id.*

A jury found that Chief Scharf's purpose in ordering review of the transcripts was to determine the character limit's efficacy. App. 119. As a result, the district court ruled there was no Fourth

Amendment violation, and judgment was entered in favor of defendants. App. 119-120.

C. Plaintiffs' Appeal.

Plaintiffs appealed, challenging, among other rulings, the denial of their motion for summary judgment. Ontario defendants responded that the judgment in their favor should be affirmed on the ground (among others) that *their* motion for summary judgment should have been granted because, as a matter of law, plaintiffs had no reasonable expectation of privacy and the review of the pager transcripts was reasonable under *either* purpose submitted to the jury. Ontario defendants relied on the "firmly entrenched rule" that, even without cross-appealing, an appellee may assert any ground for affirmance that is apparent on the record as long as the appellee does not seek to enlarge the relief obtained below. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479-480 (1999).

The Ninth Circuit reversed, in an opinion authored by Judge Wardlaw and joined by Judge Pregerson and District Judge Leighton (sitting by designation). The panel ruled that plaintiffs were entitled to summary judgment in their favor against the City and the Department. App. 40. Applying the *O'Connor* "operational realities of the workplace" standard, 480 U.S. at 717, the panel concluded Sergeant Quon had a reasonable expectation of privacy

based on Lieutenant Duke's informal accommodation allowing officers to pay for overages. App. 29-30.

The panel also held that the other three plaintiffs had a reasonable expectation of privacy in messages they had sent to Sergeant Quon's pager, but not based on Lieutenant Duke's bill-paying arrangement. App. 27 n.6. Rather, analogizing text messages to email messages, regular mail, and telephone communications (App. 23-28), the panel concluded that, "[a]s a matter of law, Trujillo, Florio, and Jerilyn Quon had a reasonable expectation that the Department would not review their messages absent consent from either a sender or recipient of the text messages." App. 28-29.

In evaluating the reasonableness of the search under *O'Connor*, the panel concluded that given the jury's special verdict that the purpose of the search was to determine the character limit's efficacy, the search was reasonable at its inception to ensure that officers were not being required to pay for work-related expenses. App. 33-34. Nevertheless, relying on *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1336 (9th Cir. 1987), the panel reasoned that if "less intrusive methods" were feasible, then the search was unreasonable. App. 35. The panel hypothesized that there were "a host of simple ways" the Department could have conducted its administrative investigation without intruding on plaintiffs' Fourth Amendment rights. *Id.* The panel therefore concluded that the search violated the Fourth Amendment as a matter of law. App. 36, 39.

D. Ontario Defendants' Rehearing Petition.

The City and the Department petitioned for panel rehearing and rehearing en banc on the grounds that: (1) the panel's ruling on a government employee's reasonable expectation of privacy in text messaging on a government-issued pager dramatically undermined the "operational realities of the workplace" standard of *O'Connor*, 480 U.S. at 717 (plurality opinion); (2) the panel erroneously overextended Fourth Amendment protection with its sweeping ruling that individuals who send text messages to a government employee's workplace pager—rather than to a privately owned pager—reasonably expect that their messages will be free from the employer's review; and (3) the panel's reliance on *Schowengerdt*'s "less intrusive methods" analysis required review in light of this Court's and other circuits' "repeatedly" rejecting the "existence of alternative 'less intrusive' means" as a basis for evaluating the reasonableness of government activity under the Fourth Amendment, as exemplified in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989) (citations omitted). The United States filed an amicus curiae brief supporting the petition. App. 158-180.

Panel rehearing and rehearing en banc were denied. App. 125. However, Judge Ikuta, joined by six other judges, dissented from the denial of rehearing en banc. App. 136-150. The dissent disagreed with the panel's conclusion that the search violated the Fourth Amendment for two main reasons:

- "First, in ruling that the SWAT team members had a reasonable expectation of privacy in the messages sent from and received on pagers provided to officers for use during SWAT emergencies, the panel undermines the standard established by the Supreme Court in *O'Connor v. Ortega*, 480 U.S. 709 (1987), to evaluate the legitimacy of non-investigatory searches in the work-place." App. 136-137 (parallel citations omitted).

- "Second, the method used by the panel to determine whether the search was reason-able conflicts with binding Supreme Court precedent, in which the Court has repeatedly held that the Fourth Amendment does not require the government to use the 'least intrusive means' when conducting a 'special needs' search. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 837 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989)." App. 137 (parallel citations omitted).

Judge Wardlaw filed an opinion concurring in the denial of rehearing en banc, asserting the dissent was mistaken as to the facts and the law. App. 125-136.

SUMMARY OF ARGUMENT

The Ninth Circuit panel viewed this case as an opportunity to explore what it considered "a new frontier in Fourth Amendment jurisprudence that has been little explored"—"[t]he recently minted standard of electronic communication via e-mails, text messages, and other means[.]" App. 23-24. Even privacy advocates marveled at the extent to which the court extended Fourth Amendment protection to messages sent and received on an employer-issued text-messaging pager.[2] The problem is that the Ninth Circuit failed to appreciate the most salient facts of the case: that Sergeant Quon was a SWAT officer using a text-messaging pager provided by the police department to facilitate SWAT operations; that the City had a written no-privacy policy that applied to the pager; and that any messages exchanged on the pager were potentially subject to disclosure under the California Public Records Act.

Summarizing two of the Ninth Circuit panel's errors, the opinion dissenting from the denial of rehearing en banc stated:

> [b]y holding that a SWAT team member has a reasonable expectation of privacy in the

[2] *E.g.*, Jennifer Granick, *New Ninth Circuit Case Protects Text Message Privacy from Police and Employers*, Electronic Frontier Foundation, June 18, 2008, http://www.eff.org/deeplinks/2008/06/new-ninth-circuit-case-protects-text-message-priva ("[E]ven if your employer pays for your use of third party text or email services, your boss can't get copies of your messages from that provider without your permission. Wow.").

> messages sent to and from his SWAT pager, despite an employer's express warnings to the contrary and "operational realities of the workplace" that suggest otherwise, and by requiring a government employer to demonstrate that there are no . . . less intrusive means available to determine whether its wireless contract was sufficient to meet its needs, the panel's decision is contrary to "the dictates of reason and common sense" as well as the dictates of the Supreme Court.

App. 149-150. Compounding those two errors, the Ninth Circuit extended Fourth Amendment protection to the other plaintiffs, who knowingly exchanged text messages with Sergeant Quon on his SWAT pager.

As a result, the Ninth Circuit ruled that plaintiffs should have been granted summary judgment. The court erred; it was the City, the Department, and the Chief who were entitled to summary judgment.

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), two enduring principles were announced regarding application of the Fourth Amendment to a government workplace search: first, to warrant Fourth Amendment protection, a government employee's expectation of privacy must be one "'that society is prepared to consider reasonable'" under the "operational realities of the workplace," *id.* at 715, 717 (plurality opinion); *see also id.* at 737 (Blackmun, J., dissenting) (agreeing that "in certain situations, the 'operational realities' of the workplace may remove some expectation of privacy on the part of the employee"); and

second, given a government employer's special needs, it may conduct work-related workplace searches as long they are reasonable. *Id.* at 725-726 (plurality opinion); *see also id.* at 732 (Scalia, J., concurring in the judgment). Since then, *O'Connor*'s core principles have been amplified in this Court's decisions involving broader principles that the government acting as an employer is less constitutionally restricted than when acting as sovereign and that citizens who accept public employment must also accept limitations on their constitutional rights.

The Ninth Circuit opinion contravenes these principles in multiple ways.

First, the opinion dramatically undercuts *O'Connor*'s "operational realities of the workplace" standard. The Ninth Circuit mistakenly reasoned that the employer's explicit no-privacy policy was abrogated by a lower-level supervisor's informal arrangement regarding his review of text messages for bill-paying purposes, and discounts entirely the potential disclosure of the messages under public records laws. As the judges dissenting from the denial of rehearing en banc noted: "In doing so, the panel improperly hobbles government employers from managing their workforces." App. 137.

O'Connor requires considering *all* the circumstances making up the operational realities of the workplace in determining whether a public employee's expectation of privacy is objectively reasonable.

- First and foremost here is the fact that Sergeant Quon was a SWAT leader in a public police force who was using a pager issued by the Department to facilitate logistical communications during SWAT emergencies, circumstances in which it would be unreasonable to assume the pager communications "would not be subsequently reviewed by an investigating board, subjected to discovery in litigation arising from the incidents, or requested by the media." App. 142 (Ikuta, J., dissenting from denial of rehearing en banc).

- Sergeant Quon also was subject to the City's official written policy warning employees not to expect privacy in e-mail communications on the City's equipment, and he was told that policy applied to the pager. No-privacy policies like this one are prevalent and vital to public employers for maintaining the security and efficiency of electronic communications equipment.

- The public also had potential access to transcripts of messages on Sergeant Quon's Department-issued pager under the California Public Records Act. Under that statute, public records are defined broadly, and exemptions construed narrowly, to promote government accountability to the public, an especially strong concern in the case of a SWAT officer's government-issued pager. Sergeant Quon and the other plaintiffs chose to exchange their messages in a medium to which the public had potential access.

> Contrary to the Ninth Circuit's reasoning, it does not matter how frequently the public had made requests for public employees' text messages—the salient fact is that the text messages were potentially open to any member of the public who requested them.

Against all these circumstances, the Ninth Circuit relied exclusively on the informal arrangement of a non-policymaking administrative officer—Lieutenant Duke—as defining the operational realities of the workplace. But Lieutenant Duke's accommodation for bill-paying purposes could not reasonably be interpreted by a SWAT leader such as Sergeant Quon as meaning that, absent his consent, the text messages would under all circumstances be free from review by either the Department or the public.

Second, in holding that the scope of the police department's review of transcripts of the messages that Sergeant Quon exchanged on his Department-issued pager was unreasonable, the Ninth Circuit relied on a "less intrusive methods" analysis that this Court and many other circuits have rejected as a basis for evaluating the reasonableness of government activity under the Fourth Amendment. *E.g.*, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989) (citations omitted). The Ninth Circuit's "less intrusive methods" approach not only conflicts with those authorities, but also, as the dissenting judges discerned, "makes it exceptionally difficult for public employers to go about the business of running government offices." App. 137.

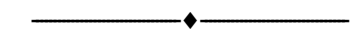
Even if there were a reasonable expectation of privacy in the text messages under *O'Connor*, the Department's review was lawful under the Fourth Amendment because it was justified at its inception—for the purpose (as the jury found) of determining the efficacy of the monthly character limit *or* for the purpose of investigating whether officers were misusing the pagers—and was reasonable in scope, i.e., reasonably related to the purposes necessitating the search. *O'Connor*, 480 U.S. at 726 (plurality opinion). Unlike the Ninth Circuit, which inappropriately hypothesized its own "less intrusive" methods of conducting the review, the district court carefully considered the actual search undertaken by the Department and properly concluded it was reasonable.

Because the search was justified at its inception for either reason identified by the district court and was reasonable in scope, the Ninth Circuit erred in determining that plaintiffs' summary judgment motion should have been granted and that Ontario defendants' summary judgment motion should not have been granted. This Court should so hold to reflect the proper balance between the minimal interests that plaintiffs had in exchanging personal messages on Sergeant Quon's pager, while he was on duty, against the important interests of the police department in managing the efficient, safe, and effective uses of its resources.

Third, the Ninth Circuit compounded the erroneous resolution of Sergeant Quon's claim by also extending Fourth Amendment protection to the other

three plaintiffs as well. These plaintiffs, who knowingly exchanged text messages with a police officer on his *police department* pager—rather than on a privately owned pager—could not reasonably expect that their messages would be free from the department's review in its capacity as a public employer. Privacy cannot reasonably be expected because public employers, as well as private ones, typically have no-privacy policies governing electronic communications and computer usage. Moreover, extending Fourth Amendment protection to the other plaintiffs only further hobbles public employers' ability to effectively and efficiently utilize electronic communications equipment and enforce no-confidentiality policies.

Accordingly, this Court should reverse the Ninth Circuit and order it to affirm the district court judgment in favor of Ontario defendants in order to (a) restore reasonableness to the *O'Connor* "operational realities of the [government] workplace" standard; (b) settle once and for all the inapplicability of any "less-intrusive means" analysis under the Fourth Amendment; and (c) curb the Ninth Circuit's startling extension of Fourth Amendment privacy rights to individuals who exchange electronic communications with government employees on the employees' government-issued communications devices.



ARGUMENT

I. A PUBLIC EMPLOYEE'S FOURTH AMENDMENT RIGHTS VIS-À-VIS AN EMPLOYER ARE TEMPERED BY THE "OPERATIONAL REALITIES" OF THE PUBLIC WORKPLACE AND THE PUBLIC EMPLOYER'S SPECIAL NEEDS TO CONDUCT WORK-RELATED SEARCHES.

A. *O'Connor v. Ortega* Established The "Operational Realities Of The Workplace" Principle Governing Public Employee Expectations Of Privacy And The "Special Needs" Principle Of Public Employers To Conduct Reasonable Workplace Searches.

The Fourth Amendment applies to "[s]earches and seizures by government employers or supervisors of the private property of their employees[.]" *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) (plurality opinion); *see also id.* at 730-731 (Scalia, J., concurring in the judgment); *id.* at 732-733 (Blackmun, J., dissenting). But the Fourth Amendment is implicated only where the search "infringe[s] 'an expectation of privacy that society is prepared to consider reasonable.'" *O'Connor*, 480 U.S. at 715 (plurality opinion) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)); *see also Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

"The operational realities of the workplace . . . may make *some* employees' expectations of privacy

unreasonable when an intrusion is by a supervisor rather than a law enforcement official." *O'Connor*, 480 U.S. at 717 (plurality opinion); *id.* at 737 (Blackmun, J., dissenting) ("[I]n certain situations, the 'operational realities' of the workplace may remove some expectation of privacy on the part of the employee."). Thus, "[p]ublic employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *O'Connor*, 480 U.S. at 717 (plurality opinion).

Even where the operational realities of the government workplace do not foreclose a reasonable expectation of privacy, however, the "special needs" of a government employer—to provide services to the public promptly and efficiently—make the warrant and probable cause requirements of the Fourth Amendment impracticable. *O'Connor*, 480 U.S. at 722-725 (plurality opinion); *see also id.* at 732 (Scalia, J., concurring in the judgment) ("Such 'special needs' are present in the context of government employment."). Accordingly, public employers' searches for noninvestigatory, work-related purposes and for investigations of work-related misconduct are "judged by the standard of reasonableness under all the circumstances." *O'Connor*, 480 U.S. at 725-726 (plurality opinion); *see also id.* at 732 (Scalia, J., concurring in the judgment) ("[G]overnment searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort

that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment.").

B. *O'Connor*'s Principles Have Resonated In This Court's Decisions Under The Fourth Amendment And More Generally In The Public Employment Context.

In a variety of Fourth Amendment contexts, this Court has reaffirmed *O'Connor* and its core principles that the operational realities of the workplace may diminish employee expectations of privacy and that government employers may conduct reasonable workplace searches without a warrant or probable cause. For example, shortly after *O'Connor* was decided, the Court upheld regulations permitting state probation officers to search a probationer's home based on "reasonable grounds" without a warrant. *Griffin v. Wisconsin*, 483 U.S. 868, 870-873 (1987). *Griffin* analogized to *O'Connor*'s public employment context, describing "a situation in which there is an ongoing supervisory relationship—and one that is not, or at least not entirely, adversarial—between the object of the search and the decisionmaker." *Id.* at 879.

Two years later, in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989), the Court rejected in large part a Fourth Amendment challenge to a drug-screening program that required urinalysis tests of government employees seeking

transfer or promotion. The Court relied on *O'Connor* for a number of principles, including that:

- "requiring the Government to procure a warrant for every work-related intrusion would conflict with the common-sense realization that government offices could not function if every employment decision became a constitutional matter[,]" *Nat'l Treasury Employees Union*, 489 U.S. at 666 (internal quotation marks and citation omitted);

- "the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions[,]" *id.* at 668 (citation omitted); and

- "the operational realities of the workplace may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts." *Id.* at 671 (internal quotation marks and citation omitted).

The same day, in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the Court upheld government-mandated drug and alcohol testing of railroad employees, relying on *O'Connor* for another key Fourth Amendment principle operative in the government employment context: that "[w]hen faced with such special needs, we have not hesitated to balance the governmental and privacy interests to

assess the practicality of the warrant and probable-cause requirements in the particular context." *Id.* at 619; *see also id.* at 620.

Several years later, this Court returned to *O'Connor* in upholding a public school district's drug policy requiring urine testing of student athletes. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995). There, the Court analogized the school drug testing to the workplace search in *O'Connor* as follows:

> Just as when the government conducts a search in its capacity as employer (a warrantless search of an absent employee's desk to obtain an urgently needed file, for example), the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in, see [*O'Connor*]; so also when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.

Id. O'Connor has thus become woven into the fabric of this Court's Fourth Amendment jurisprudence.

Even outside the Fourth Amendment context, *O'Connor* constitutes an important strand in this Court's public employment jurisprudence. Recently, in *Engquist v. Oregon Department of Agriculture*, 128 S. Ct. 2146 (2008), the Court held that a class-of-one equal protection claim is not cognizable in the context of public employment. Echoing *O'Connor*, the Court emphasized that when the government acts in its

capacity as employer—rather than as sovereign—it has a significant interest in "achieving its goals as effectively and efficiently as possible[.]" *Id.* at 2151 (citation and internal quotation marks omitted). The Court cited precedent going as far back as *Ex parte Curtis*, 106 U.S. 371, 373 (1882), for the proposition that "the government has a legitimate interest in promoting efficiency and integrity in the discharge of official duties, and in maintaining proper discipline in the public service[.]" *Engquist*, 128 S. Ct. at 2151 (internal quotation marks and brackets omitted).

Engquist summarized *O'Connor* as follows: "[a]lthough we recognized that the 'legitimate privacy interests of public employees in the private objects they bring to the workplace may be substantial,' we found that '[a]gainst these privacy interests . . . must be balanced the realities of the workplace, which strongly suggest that a warrant requirement would be unworkable.'" 128 S. Ct. at 2151 (quoting *O'Connor*, at 480 U.S. at 721 (plurality opinion)). More broadly, *Engquist* identified *O'Connor* as exemplifying the Court's "recogni[tion] that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Id*.

The concomitant was recognized not long before *Engquist*, in *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006): "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." Emphasizing that a government employer needs more control over its employees' speech than over citizens' speech, the

Court held that a deputy district attorney's official statements were not protected from employer discipline by the First Amendment. *Id.* at 418-424; *see also id.* 434 (Souter, J., dissenting) (agreeing with majority that "government needs civility in the workplace, consistency in policy, and honesty and competence in public service").

Resonating the special considerations that *O'Connor* found to temper a public employee's Fourth Amendment rights, "two main principles" thus inform this Court's government employment cases:

> • "First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context." *Engquist*, 128 S. Ct. at 2152.
>
> • "Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Id.*

In this case, these principles frame the Ninth Circuit's error in invalidating the Department's reasonable review of the transcripts of text messages sent and received on a Department-issued pager, messages in which Sergeant Quon and the other plaintiffs had no reasonable expectation of privacy.

II. UNDER THE FOURTH AMENDMENT, IN LIGHT OF THE OPERATIONAL REALITIES OF THE ONTARIO POLICE DEPARTMENT, SERGEANT QUON HAD NO REASONABLE EXPECTATION OF PRIVACY IN TEXT MESSAGES ON A POLICE DEPARTMENT PAGER.

A. Using A Pager Issued By The Police Department For SWAT Operations Diminished Any Expectation Of Privacy In The Text Messages.

A government "employee's expectation of privacy must be assessed in the context of the employment relation." *O'Connor*, 480 U.S. at 717 (plurality opinion). Here, the employment relation is that between police officer and police department. Whatever expectation of privacy a sender or recipient of text messages on a government employer's equipment can ever legitimately have—if any[3]—certainly none existed within the operational realities of the Ontario Police Department.

"Public employees . . . often occupy trusted positions in society." *Garcetti*, 547 U.S. at 419. This Court

[3] In its amicus brief supporting rehearing en banc, the United States pointed out the serious analytical errors in the Ninth Circuit's conclusions, arguing, among other things, that there generally is no reasonable expectation of privacy in text messages sent and received. App. 163-180.

has recognized that police officers' constitutional rights as public employees are not equivalent to their rights as private citizens. *E.g.*, *Kelley v. Johnson*, 425 U.S. 238, 245 (1976) (recognizing as "highly significant" that police officer brought § 1983 liberty interest challenge to hair-grooming standards as a public employee and "not as a member of the citizenry at large"). Thus, "[p]rivate citizens perhaps cannot be prevented from wearing long hair, but policemen can." *Rutan v. Repub. Party of Ill.*, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting) (citing *Kelley*, 425 U.S. at 247). The Ninth Circuit too had previously recognized, in the context of a police officer suing a police department, that the public legitimately holds police officers to more rigorous standards of conduct than ordinary citizens. *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008); *see also Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 885 (9th Cir. 1990).

But in this case, the Ninth Circuit ignored that Sergeant Quon was a police officer using a police pager. As the dissenting judges correctly discerned, "[g]iven that the pagers were issued for use in SWAT activities, which by their nature are highly charged, highly visible situations, it is unreasonable to expect that messages sent on pagers provided for communication among SWAT team members during those emergencies would not be subsequently reviewed by an investigating board, subjected to discovery in

litigation arising from the incidents, or requested by the media." App. 142. All the more true as to Sergeant Quon, who was, in his own words, a "team leader, team sergeant, responsible for training and planning of the execution of high-risk warrants, also rescue, all the tactical stuff." J.A. 46-47.

Any reasonable police officer—let alone a SWAT leader—understands these operational realities and necessarily would have a reduced expectation of privacy in text messages on a Department-issued pager, particularly messages sent while on duty.

B. The City's Explicit No-Privacy Policy Further Diminished Any Expectation Of Privacy.

"[L]egitimate regulation" may reduce public employees' expectations of privacy in the workplace. *O'Connor*, 480 U.S. at 717 (plurality opinion). Significantly, in *O'Connor*, "there was no evidence that the Hospital had established any reasonable regulation or policy discouraging employees such as Dr. Ortega from storing personal papers and effects in their desks or file cabinets . . . ." 480 U.S. at 719 (plurality opinion).

Most employers, however, do have explicit no-privacy policies regarding computers and electronic communications equipment. "[T]he abuse of access to workplace computers is so common (workers being

prone to use them as media of gossip, titillation, and other entertainment and distraction) that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible." *Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002); *see also TBG Ins. Servs. Corp. v. Superior Court*, 96 Cal. App. 4th 443, 451-452, 117 Cal. Rptr. 2d 155 (2002) (no reasonable expectation of privacy in computer provided for employee's home use, noting that "more than three-quarters of this country's major firms monitor, record, and review employee communications and activities on the job, including their telephone calls, e-mails, Internet connections, and computer files").

In particular, "numerous government agencies," like the City of Ontario, have adopted "policies [that] typically require employees to acknowledge that their e-mail records are subject to inspection, monitoring, and public disclosure; that they have no right of privacy or any reasonable expectation of privacy in workplace e-mails; that the e-mails are owned by the agency, not the employee; and that e-mails are presumptively considered to be public records." Peter S. Kozinets, *Access to the E-Mail Records of Public Officials: Safeguarding the Public's Right to Know*, 25 Comm. Law. 17, 23 (Summer 2007). For example, the United States, as it pointed out in its amicus brief below, is "a public employer that extensively uses 'no confidentiality' policies with respect to the workplace and work-issued equipment[.]" App. 162. These "no confidentiality" policies "prevent abuse and promote

the public's safety and security." App. 162-163. They directly promote the very goals of government efficiency and effectiveness that *O'Connor* recognized and this Court continues to recognize. *Engquist*, 128 S. Ct. at 2151.

Here, of course, the City had a written no-privacy policy for e-mail and computer network use. The policy clearly reserved the City's right to "monitor and log all network activity including e-mail and Internet use," and it warned employees that "[u]sers should have no expectation of privacy or confidentiality when using these resources." App. 152, ¶ III.C. The policy further explained that access to the Internet and e-mail system was "not confidential" and that "information produced in either hard copy or electronic form is considered City property." App. 153, ¶ III.D. The acknowledgment form attached to the policy reiterated that employees should have "no expectation of privacy or confidentiality"—"barely two inches from the signature line." App. 173. Sergeant Quon and Sergeant Trujillo both executed the acknowledgment form. App. 156-157; S.E.R. 454-455. And Sergeant Quon attended a meeting at which it was made clear that the policy fully applied to the pagers, an announcement memorialized in writing in a memo from Chief Scharf to Sergeant Quon and the other attendees. App. 29, 156; *see also* J.A. 30, 61. Specifically, Sergeant Quon was informed that "the city owned and issued alphanumeric pagers were considered e-mail, and that those messages would fall

under the City's policy as public information and eligible for auditing." J.A. 30, 61.

As the United States argued: "[w]hen a written policy formally announces that parties 'should have no expectation of privacy or confidentiality,' a party's expectation of privacy cannot be one that 'society is prepared to consider reasonable[.]' " App. 173 (quoting *Illinois v. Caballes*, 543 U.S. 405, 408 (2005)). "Nothing could be more unreasonable than to expect privacy after being told there is none." App. 173.

Even the Ninth Circuit agreed that "[i]f that were all," the case would be governed by the rule that employees have no reasonable expectation of privacy where they have notice of employer policies permitting searches. App. 29 (citing *Muick*, 280 F.3d at 743 (employer's announcement that it might inspect laptop computers "destroyed any reasonable expectation of privacy that [employee] might have had and so scotches his claim") and *Bohach v. City of Reno*, 932 F. Supp. 1232, 1234-1235 (D. Nev. 1996) (any expectation of privacy in police pagers was diminished by department order warning that messages would be logged onto the system and banning certain types of messages)); *see also, e.g.*, *Biby v. Bd. of Regents*, 419 F.3d 845, 850-851 (8th Cir. 2005) (no reasonable expectation of privacy in employee's office computer files where state university warned users not to expect privacy); *United States v. Angevine*, 281 F.3d 1130, 1134-1135 (10th Cir. 2002) (no reasonable expectation of privacy in state university computer where university warned of no confidentiality on

university network); *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) (no reasonable expectation of privacy in Internet use on office computer where federal agency's known policy allowed monitoring of employee computer activity); *compare Leventhal v. Knapek*, 266 F.3d 64, 74 (2d Cir. 2001) (Sotomayor, J.) (reasonable expectation of privacy where state agency had *not* "placed [employee] on notice that he should have no expectation of privacy in the contents of his office computer").

C. The California Public Records Act Further Diminished Any Expectation Of Privacy.

A related operational reality attendant to Sergeant Quon's employment as a SWAT officer was the public's potential access to the pager transcripts under the California Public Records Act ("CPRA") (Cal. Gov't Code § 6250, *et seq*.). As the dissenting judges correctly stated, "[g]overnment employees in California are well aware that every government record is potentially discoverable at the mere request of a member of the public, and their reasonable expectation of privacy in such public records is accordingly reduced." App. 142-143.

The dissent accurately reflects the public's robust right to obtain public records under the CPRA. As the California Supreme Court has reaffirmed, "'[i]mplicit in the democratic process is the notion that government should be accountable for its actions. In order to

verify accountability, individuals must have access to government files.'" *Int'l Fed'n of Prof'l & Technical Eng'rs v. Superior Court*, 42 Cal. 4th 319, 328-329, 64 Cal. Rptr. 3d 693, 165 P.3d 488 (2007).

Consonant with the public's need for access, the CPRA broadly defines a public record as any "writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Cal. Gov't Code § 6252(e). Such records "must be disclosed unless one of the statutory exceptions applies." *Int'l Fed'n of Prof'l & Technical Eng'rs*, 42 Cal. 4th at 329. While the CPRA does provide numerous exemptions to the definition of "public record" (Cal. Gov't Code § 6254), those exemptions are "narrowly construed." *BRV v. Superior Court*, 143 Cal. App. 4th 742, 751, 756, 49 Cal. Rptr. 3d 519 (2006).

None of the specific, narrowly-construed exemptions expressly encompasses the transcripts of text messages that Sergeant Quon sent and received. If the public requested them, the Department likely would have to invoke the CPRA's "catch-all" provision, under which a public agency may justify withholding a record "by demonstrating that . . . on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Cal. Gov't Code § 6255(a). But this "catch-all" provision is quite limited, as it would require the Department "to demonstrate a 'clear overbalance' on

the side of confidentiality" to prevent disclosure. *BRV*, 143 Cal. App. 4th at 756. Making that showing would be difficult, at best, as to the hundreds of Sergeant Quon's text messages sent and received on his Department-issued pager, especially ones exchanged while he was on duty.

Police officers' text messages are particularly logical candidates for requests under public records laws because "'public issues,' indeed, matters of 'unusual importance,' are often daily bread-and-butter concerns for the police . . . ." *Garcetti*, 547 U.S. at 448 (Breyer, J., dissenting). A member of the public seeking the pager transcripts would have a strong argument that the public has a right to know what the police officers hired to protect the public are doing while on duty. "The public's legitimate interest in the identity and activities of peace officers is even greater than its interest in those of the average public servant." *Comm'n on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278, 297, 64 Cal. Rptr. 3d 661, 165 P.3d 462 (2007). "'In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers.'" *Id.* (quoting *New York Times Co. v. Superior Court*, 52 Cal. App. 4th 97, 104-105, 60 Cal. Rptr. 2d 410 (1997), *disapproved on other grounds by Copley Press v. Superior Court*, 39 Cal. 4th 1272, 1297-1298, 48 Cal. Rptr. 3d 183, 141 P.2d 288 (2006)). That Sergeant Quon and the other plaintiffs chose to discuss highly personal matters in this context would not by itself prevent a member of

the public from obtaining the text messages; "[f]ear of possible opprobrium or embarrassment is insufficient to prevent disclosure." *New York Times*, 52 Cal. App. 4th at 104.

Underscoring the unreasonableness of any expectation of privacy, the principals to the communications—the plaintiffs in this case—would have "no right under [the] Act to prevent disclosure of the record to any other person." *Los Angeles Police Dep't v. Superior Court*, 65 Cal. App. 3d 661, 668, 135 Cal. Rptr. 575, 579 (1977). Only "the agency" has a right to assert an exemption to the CPRA. Cal. Gov't Code § 6255. Thus, even if, as plaintiffs argued below, purely personal messages would not be subject to disclosure to the public under the CPRA (E.R. 380), the City itself would have to review the transcripts just to determine which ones fell in that category. *E.g.*, *Denver Pub. Co. v. Bd. of County Comm'rs of County of Arapahoe*, 121 P.3d 190, 199 (Colo. 2005) ("To determine whether the records kept by the agency are public or non-public records, the agency must look to the content of the records to resolve whether they relate to the performance of public functions or involve the receipt or expenditure of public funds.").

The Ninth Circuit nevertheless reasoned that the CPRA would not preclude a reasonable expectation of privacy—even if the pager messages were public records—absent evidence that CPRA requests were sufficiently " 'widespread or frequent[.]' " App. 32. But requests for public employee text messages as public

records are not rare. Many requests get litigated,[4] while others result in messages being turned over to the public without litigation.[5]

The Ninth Circuit's ruling overlooks an important principle noted in *O'Connor*: that "'[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" 480 U.S. at 718 (plurality opinion) (quoting *Katz*, 389 U.S. at 351); *id.* at 731 (Scalia, J., concurring in the judgment) (same). In the context of an invasion of privacy claim, this Court

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[4] *See, e.g.*, *State ex rel. Glasgow v. Jones*, 119 Ohio St. 3d 391, 392, 894 N.E.2d 686 (2008) (request for Ohio General Assembly representative's text messages); *Denver Pub. Co.*, 121 P.3d at 192 (request for messages of elected official and public employee "sent using the County's e-mail and text-pager systems"); *Flagg v. City of Detroit*, 252 F.R.D. 346, 348 (E.D. Mich. 2008) (noting related state court action in which Detroit Free Press was seeking production of City officials' text messages under the Michigan Freedom of Information Act).

[5] *See, e.g.*, Tami Abdollah, *O.C. Sheriff's Officials Sent Mocking Texts at Board Meeting*, Los Angeles Times, February 4, 2009, http://articles.latimes.com/2009/feb/04/local/me-ocdeputies4 (noting that transcripts of Orange County, California sheriff's officials' text messages were released after "Ordinary California Citizens Concerned with Safety" filed public records request); *Text Messages Turned Over in Public Records Act Request*, Humboldt Mirror, posted March 6, 2008, http://humboldtmirror.wordpress.com/2008/03/06/text-messages-turned-over-in-public-records-act-request/ ("A string of text messages between Humboldt County Supervisor Bonnie Neely and several of her closest advisers was released late Thursday in response to a California Public Records Act request filed by the Humboldt Mirror.").

also has observed that "interests in privacy fade when the information involved already appears on the public record." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-495 (1975). Sergeant Quon was specifically told that the pager messages "would fall under the City's [e-mail] policy as public information[.]" J.A. 30, 61. The policy itself warned that "[d]eletion of e-mail or other electronic information may not fully delete the information from the system" and that e-mail messages were "subject to 'access and disclosure' in the legal system and the media." App. 153, ¶¶ III.D., III.F.

This potential for public review eliminated any *legitimate* expectation of privacy. In *Smith v. Maryland*, this Court rejected an argument that there was a legitimate expectation of privacy in local telephone numbers dialed where, although telephone companies had the ability to record all telephone numbers dialed, "in view of their present billing practices, [they] usually do not record local calls." 442 U.S. at 745. As the Court explained, "[r]egardless of the phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record." *Id.* Analogously here, any expectation of privacy when the messages may well have constituted matters of public record and were *potentially* accessible to the public through the CPRA was inherently unreasonable, no matter how frequently such requests are actually made.

D. Given These Operational Realities, No Reasonable Expectation Of Privacy Was Created By An Administrative Lieutenant's Informal Procedure Accommodating Some Personal Use Of The Pager.

Despite the police department setting, the official no-privacy policy, and the California Public Records Act, the Ninth Circuit concluded that a lack of any reasonable expectation of privacy "was not the 'operational reality' at the Department." App. 30. The court reasoned that "'Lieutenant Duke made it clear to the staff, and to Quon in particular, that he would *not* audit their pagers so long as they agreed to pay for any overages.'" *Id.* Here, the Ninth Circuit mistakenly relied on Lieutenant Duke's informal accommodation—in the face of the Department's express policy—as determinative of whether an expectation of privacy in the text messages was reasonable. This accommodation was incapable of supporting a reasonable expectation of privacy for multiple reasons.

Foremost, Lieutenant Duke's statements concerned auditing messages based on overages, *i.e.*, an accounting audit, not officers' privacy rights vis-à-vis the Department. His bill-paying arrangement was, as the district court aptly characterized it, his "generous way of streamlining administration and oversight over the use of the pagers because, as he reminded [Sergeant] Quon, he could, 'if anybody wished to challenge their overage, . . . audit the text transmissions to verify how many were non-work related.'" App. 50.

Not surprisingly, since Lieutenant Duke's responsibility was merely to oversee administrative aspects of the pagers, he never said that his bill-paying accommodation would prevent the Department from ever reviewing the messages for investigatory or administrative purposes. What if, for example, the Department was required to review communications concerning a SWAT shooting in response to media inquiries? Or to produce those communications in litigation? Sergeant Quon could not reasonably expect that Lieutenant Duke's bill-paying accommodation would totally shield the contents of text messages sent on the Department-issued pager from Department review. Indeed, the City's no-privacy policy specifically warned officers that "messages are also subject to 'access and disclosure' in the legal system and the media." App. 153, ¶ III.F.

Lieutenant Duke, in fact, lacked the power to countermand the official policy because—as the Ninth Circuit acknowledged but dismissed as unimportant—he was not a Department policymaker. App. 31. The written policy itself underscored the importance of the policymakers' decision by noting that any dispute as to whether "a specific e-mail fits the criteria of 'light' personal communications" would be decided by "the Agency Head or Department Director." App. 153, ¶ III.F. This further rendered unreasonable any reliance on Lieutenant Duke's accommodation as creating Fourth Amendment privacy rights vis-à-vis the Department. *Cf. Bennett v. City of Eastpointe*, 410 F.3d 810, 819 (6th Cir. 2005)

(plaintiffs could not base section 1983 claims on memorandum that had been written by current police chief when he was "simply a lieutenant, and not a policy-making official"). But even more important, it rendered unsound the Ninth Circuit's decision to exalt Lieutenant Duke's accommodation above all the other operational realities of the Department workplace.

No doubt thousands of government offices throughout the nation have employees like Lieutenant Duke overseeing day-to-day implementation of other employees' use of ever-evolving forms of electronic communications, from e-mailing to text messaging to instant messaging to "tweeting." It is simply unrealistic to prevent informal statements that arguably contradict formal no-privacy policies. But that does not make it reasonable under the Fourth Amendment for government employees to ignore official, explicit no-privacy policies to the contrary. In light of the Department's official policy, no *legitimate* expectation of privacy would be fostered by Lieutenant Duke's election not to review the messages. *See Smith v. Maryland*, 442 U.S. at 745.

As the United States explained below, the panel's error "puts into doubt employee agreements and privacy policies used across the private sector and government to assist internal investigators in identifying possible corruption, threats to security, or abuse of government resources or authority." App. 172-173. After all, under the Ninth Circuit's reasoning, "[i]f an Information Technology specialist or general manager

gives employees the impression that the company will not actually conduct surveillance, then the employee may be found to have enjoyed a reasonable expectation of privacy that then limits how the employer may conduct a workplace search." Justin Conforti, *Somebody's Watching Me: Workplace Privacy Interests, Technology Surveillance, and the Ninth Circuit's Misapplication of the* Ortega *test in* Quon v. Arch Wireless, 5 Seton Hall Cir. Rev. 461, 486 (2008-2009).

* * *

Whether an expectation of privacy was objectively reasonable must be evaluated under the totality of the operational realities, not by ignoring the police department context and the City's no-privacy policy and downplaying the potential for public disclosure. Permitting informal accommodations for bill-paying purposes to trump public employers' explicit no-privacy policies effectively eviscerates those policies and turns the "operational realities" standard on its head.

This Court therefore should take this opportunity to restore reasonableness and common sense to *O'Connor*'s "operational realities of the workplace" standard by holding that Sergeant Quon had no reasonable expectation of privacy. "Without a reasonable expectation of privacy, a workplace search by a public employer will not violate the Fourth Amendment, regardless of the search's nature and scope." *Leventhal*, 266 F.3d at 73. Ontario defendants were

therefore entitled to summary judgment. The Court should reverse and instruct the Ninth Circuit to affirm the district court judgment in favor of Ontario defendants.

III. THE NINTH CIRCUIT ERRONEOUSLY USED A "LESS INTRUSIVE METHODS" ANALYSIS TO INVALIDATE THE DEPARTMENT'S SPECIAL-NEEDS REVIEW OF THE TEXT MESSAGES, WHICH WAS REASONABLE AND THEREFORE LAWFUL UNDER THE FOURTH AMENDMENT.

Even if Sergeant Quon had had a reasonable expectation of privacy in the text messages, the Department's review of the transcripts would pass Fourth Amendment muster so long as the search was "reasonable" under the circumstances. *O'Connor*, 480 U.S. at 725-726 (plurality opinion); *see also id.* at 732 (Scalia, J., concurring in the judgment).

To determine whether a search is reasonable, the Court "'balanc[es] [the search's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Vernonia*, 515 U.S. at 652-653 (citations omitted). The Ninth Circuit did not adequately balance the competing interests: the plaintiffs' minimal interests in using Sergeant Quon's *Department-issued* pager for personal communications—even highly private, sexually graphic ones (*see* S.E.R. 532, 539, 546, 551-553)—against the Department's "direct and

overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner." *O'Connor*, 480 U.S. at 724 (plurality opinion). "[T]he interest of the City in maintaining the effective and efficient operation of the police department is particularly strong." *Dible*, 515 F.3d at 928.

In balancing the requirements of a public employer and the rights of a public employee, it is pertinent that here the employee's asserted right to privacy in text messages on a workplace pager does not even strongly "implicate[ ] the basic concerns of the relevant constitutional provision." *Engquist*, 128 S. Ct. at 2152. It is privacy in the home—not the workplace—that lies "'[a]t the very core' of the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (at core of Fourth Amendment "'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'"). *O'Connor* thus teaches that "privacy interests of government employees in their place of work . . . are far less than those found at home or in some other contexts." 480 U.S. at 725 (plurality opinion).

O'Connor further explains that "[g]overnment offices are provided to employees for the sole purpose of facilitating the work of an agency[,]" and "[t]he employee may avoid exposing personal belongings at work by simply leaving them at home." 480 U.S. at 725 (plurality opinion). Analogously here, "Quon could have avoided exposure of his sexually explicit

text messages simply by using his own cell phone or pager." App. 143 (Ikuta, J., dissenting from denial of rehearing en banc). The City and Department should not be punished because a legitimate workplace search happened to turn up sexually explicit messages that plaintiffs need not and should not have sent on government-issued equipment in the first place. *Cf. Simons*, 206 F.3d at 400 (government employer "did not lose its special need for 'the efficient and proper operation of the workplace' [under *O'Connor*] merely because the evidence obtained was evidence of a crime").

Ignoring this lopsided imbalance of legitimate interests, the Ninth Circuit instead applied its own "less intrusive methods" test to invalidate what was a perfectly reasonable review of text messages undertaken by the Department in its role as a public employer. As we explain, this test has been thoroughly discredited—for excellent reasons.

A. The Ninth Circuit Opinion Endorsed And Applied A Disapproved "Less Intrusive Methods" Test For Determining Whether The Department's Action Was Reasonable.

This Court has "repeatedly" rejected the "existence of alternative 'less intrusive' means" as a basis for evaluating the reasonableness of government activity under the Fourth Amendment. *Skinner*, 489 U.S. at 629 n.9 (citations omitted). *Skinner* involved an employment-related search. *Id.* at 606 (drug and

alcohol testing of railroad employees). But for decades the Court has rejected the "less intrusive means" mode of analysis in a variety of Fourth Amendment contexts. *See, e.g.*, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 837 (2002) (suspicionless urinalysis of students participating in competitive extracurricular activities); *Vernonia*, 515 U.S. at 663 (random urinalysis testing of student athletes); *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (16-hour detention of suspected alimentary canal smuggler by customs officials); *United States v. Sharpe*, 470 U.S. 675, 686-687 (1985) (20-minute *Terry* stop of pickup truck driver by DEA agent); *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (administrative search of arrestee's personal effects at police station); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (warrantless search of car trunk).

Skinner reiterated why "less intrusive means" analysis is inappropriate:

> It is obvious that the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers . . . because judges engaged in post hoc evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished.

489 U.S. at 629 n.9 (internal citations and quotations omitted). Even more recently, this Court re-affirmed these principles and again rejected parties' suggestions

that less intrusive means could have been employed to effect searches in *Vernonia*, 515 U.S. at 663, and in *Earls*, 536 U.S. at 837.

Until this Ninth Circuit opinion, the circuit courts were uniformly in compliance. As the dissenting opinion below points out, "[s]even other circuits have followed the Supreme Court's instruction and explicitly rejected a less intrusive means inquiry in the Fourth Amendment context." App. 147-149 (citing *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir. 2008); *Lockhart-Bembery v. Sauro*, 498 F.3d 69, 76 (1st Cir. 2007); *Cassidy v. Chertoff*, 471 F.3d 67, 79 (2d Cir. 2006); *Shell v. United States*, 448 F.3d 951, 956 (7th Cir. 2006); *United States v. Prevo*, 435 F.3d 1343, 1348 (11th Cir. 2006); *Shade v. City of Farmington*, 309 F.3d 1054, 1061 (8th Cir. 2002); *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052 (10th Cir. 1994)). Even the Ninth Circuit previously had acknowledged that "the government does not have to use the least restrictive means to further its interests." *Yin v. California*, 95 F.3d 864, 870 (9th Cir. 1996) (citing *Vernonia*); *accord*, *Int'l Bhd. of Teamsters v. Dep't of Transp.*, 932 F.2d 1292, 1305 (9th Cir. 1991) (citing *Skinner*).

The Ninth Circuit opinion in this case conflicts with this wall of authority by pursuing "less intrusive methods" under its pre-*Skinner* opinion in *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1336 (9th Cir. 1987). *Schowengerdt* had added a "less intrusive methods" and "no broader than necessary" gloss to the *O'Connor* analysis. *Id.*

But the Ninth Circuit's "less intrusive means" gloss from *Schowengerdt*—and now this case—is not only foreclosed by the above authorities, it is incompatible with *O'Connor* itself. *O'Connor* expressly concluded that a court "must determine whether the search as *actually conducted* 'was *reasonably related* in scope to the circumstances which justified the interference in the first place.'" 480 U.S. at 726 (plurality opinion) (citation omitted and emphasis added); *see also id.* (search must not be "'*excessively* intrusive'" in light of nature of misconduct) (citation omitted and emphasis added). Hypothesizing "less intrusive means" is a far cry from examining whether a search actually conducted is reasonably related to the circumstances justifying the search.

As the dissent below observed, "[r]ather than evaluate whether the search '*actually* conducted'" was reasonable, "as *O'Connor* requires us to do, 480 U.S. at 726, . . . (emphasis added), the panel looks at what the police department *could* have done." App. 145 (parallel citation omitted). The panel erred, for "the real question is not what 'could have been achieved,' but whether the Fourth Amendment *requires* such steps." *Illinois v. Lafayette*, 462 U.S. at 647. The Court should explain that the Ninth Circuit opinion in this case embodies precisely the kind of less-intrusive means analysis that courts must *not* employ under the Fourth Amendment.

B. Properly Assessed, The Department's Review Of The Text Message Transcripts Was Reasonable.

"In the case of searches conducted by a public employer, [the Court] must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace." *O'Connor*, 480 U.S. at 719-720 (plurality opinion). Even if there exists a reasonable expectation of privacy, *O'Connor* teaches that a warrantless search by a public employer is legal if it is work-related and reasonable. *Id.* at 725-726 (plurality opinion); *id.* at 732 (Scalia, J., concurring in the judgment). To be legal, "both the inception and the scope of the intrusion must be reasonable." *Id.* at 726 (plurality opinion). A public employer's search is justified at its inception when the employer reasonably needs to conduct a search for a noninvestigatory work-related purpose or reasonably suspects the employee has committed work-related misconduct. *Id.* (plurality opinion). Under these standards, the Department's review of the pager transcripts was reasonable both in its inception and in its scope.

The lower courts properly agreed that the Department's review was justified at the inception because, as the jury found, it was intended to ensure that the existing monthly character limit on the pagers was sufficient. And the district court properly determined that the Department's review was reasonable in scope if the purpose was, as the jury found,

to determine the efficacy of the character limit. The Ninth Circuit, however, erroneously employed its "less intrusive methods" test in determining that the scope of the search was not reasonable and that *plaintiffs'* motion for summary judgment therefore should have been granted.

Because, as we explain below, the review was also reasonable at its inception and in its scope even if conducted to investigate workplace misconduct, *Ontario defendants'* motion for summary judgment should have been granted. The lower courts erroneously determined—again by mistakenly exalting Lieutenant Duke's accommodation—that the search would not have been justified if aimed at investigating possible misconduct. But because investigating possible misuse of the pager would have been a legitimate justification for the search, it follows that there was no *material* issue of fact as to Chief Scharf's purpose in ordering the pager transcripts. Under *either* purpose that the district court's summary judgment order identified—to investigate misconduct *or* to determine the character limit's efficacy —the transcript review was reasonable. And because the scope of the search was also reasonable, for either purpose, summary judgment should have been granted in favor of Ontario defendants.

1. The transcript review was reasonable if undertaken, as the jury found, for the non-investigatory purpose of determining the efficacy of the monthly character limit on the Department pagers.

In light of the Department's legitimate, strong interests in operating as efficiently as possible, the lower courts properly agreed that the Department's review of transcripts was justified at the inception if Chief Scharf's purpose was to investigate the efficacy of the monthly character limit on the pagers. As the head of the police department, Chief Scharf was responding to information that Lieutenant Duke—the officer in charge of administrative and fiscal matters—was tired of spending excess time and energy as a "bill collector." *See* S.E.R. 261; J.A. 61; *see also* S.E.R. 113 (Chief Scharf recalls Lieutenant Duke complaining that there were "a lot of the overages" and that some officers were "killing trees in the overages"). It was, in Lieutenant Duke's words, "very labor intensive to get people to pay for overages." J.A. 85.

Therefore, as the district court determined, the Department could legitimately review the transcripts "to see, in fact, how many characters were being used for business reasons" in order to "make sure that some of the overages for which the officers were paying was not work-related[.]" App. 100. "If more than the monthly character limits were so used, the department would increase the character limits so

that the officers would not have to pay for any of their work related duties out of their own pocket." *Id.* The Ninth Circuit agreed that this was a "legitimate work-related rationale" for the Department to review the transcripts. App. 34.

As to whether the search was reasonable in scope, the district court examined the Department's transcript review and concluded it was reasonable. App. 101-102. The Ninth Circuit, however, disagreed, erroneously employing its "less intrusive methods" test to determine that the search was not reasonable and therefore violated the Fourth Amendment. App. 35-36.

In contrast to the Ninth Circuit panel's hypotheses of "less intrusive methods," the dissenting opinion identified the proper standard for determining whether a public employer's workplace search is reasonable in scope: whether it is "'reasonably related to the objectives of the search and not excessively intrusive in light of [its purpose.]'" App. 145 (quoting *O'Connor*, 480 U.S. at 726 (plurality opinion)); *accord*, *Leventhal*, 266 F.3d at 73. Under this standard, the district court's analysis of the actual search conducted by the Department soundly demonstrated the reasonableness of the search.

Specifically, the district court explained that the scope of the search was reasonable in light of the purpose of determining whether the monthly character limit was causing officers to bear "hidden work-related costs[.]" App. 101. The court carefully

considered the scope of the Department's actual review of the transcripts. "[T]he department limited its audit to just those officers that had exceeded the monthly character limits for the time in question, which would be understandable if the reason for the audit was to make sure officers who have exceeded the character limits were not paying hidden work-related costs . . . ." *Id.* The court determined that "the only way to accurately and definitively determine whether such hidden costs were being imposed by the monthly character limits that were in place was by looking at the actual text-messages used by the officers who exceeded the character limits." App. 102. Merely interviewing Sergeant Quon would not have sufficed because reviewing the transcripts would still be necessary to "confirm that [his] recollection was accurate," and looking at just the telephone numbers would "not provide any definitive answer as to *what* those individuals were text-messaging each other about." *Id.* The court's findings were supported by, among other things, Sergeant McMahon's affidavit explaining that the only way for internal affairs to determine the amount of personal text messaging while on-duty was to review actual, redacted transcripts, and his report explaining that process. J.A. 142-143; *see also* J.A. 142 (when asked by Department investigator, Sergeant Quon "indicated that he could not state how much time he spent on the pager during work hours"). In short, it was reasonable for the Department to review the actual pager transcripts.

Because the transcript review was reasonable if undertaken for the purpose of determining the efficacy of the monthly character limit, the district court properly denied plaintiffs' summary judgment motion. Therefore, at a minimum, the Ninth Circuit should have affirmed the judgment in favor of Ontario defendants on this ground.

2. The transcript review was also reasonable if undertaken as an investigatory search for possible employee misconduct in using the Department pagers.

As Ontario defendants argued in the Ninth Circuit, the transcript review was reasonable even if Chief Scharf's purpose was to investigate misconduct. Since, as explained below, the search was reasonable regardless of which was the motivating purpose (investigatory or non-investigatory), the issue should never have gone to the jury. It was Ontario defendants' motion for summary judgment that should have been granted, and the judgment in their favor should have been affirmed on this alternative ground.

Under *O'Connor*, even if there exists a reasonable expectation of privacy, a warrantless search by a public employer is lawful if it is undertaken to investigate work-related misconduct and is reasonable under the circumstances. 480 U.S. at 724-725 (plurality opinion); *id.* at 732 (Scalia, J., concurring in

the judgment). It is perfectly reasonable for a police chief to investigate whether officers are, in Chief Scharf's words, "wasting a lot of City time" by texting about non-work-related matters while on duty. J.A. 88.

Lieutenant Duke's policy, even if it accommodated some personal use of the pagers, would not make it any less reasonable to investigate possible misuse of the pagers. Permitting moderate personal use of the pagers did not condone excessive personal use. If an officer is spending an inordinate amount of time sending and receiving personal messages and not doing his job, that is misconduct regardless of whether there is a policy allowing *some* personal use. In fact, in dangerous professions that directly affect the public's safety, personal text messaging while on duty can have deadly consequences.[6]

Lieutenant Duke never suggested he approved personal use of the pagers *while on duty*. He simply allowed officers to pay for overages. While this arguably allowed for some pager use for personal matters, it said nothing about *on-duty* personal use. The

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[6] *See* Robert J. Lopez, Rich Connell, and Steve Hymon, *Train Engineer Sent Text Message Just Before Crash*, October 2, 2008, http://articles.latimes.com/2008/oct/02/local/me-crash2 ("A Metrolink engineer sent a text message from his cellphone 22 seconds before he collided with an oncoming freight train in an accident that killed 25 people last month, according to preliminary information released Wednesday by federal authorities.").

Department's official policy, of which Sergeant Quon signed an acknowledgment (App. 156), prohibited personal use but allowed some light personal communications. App. 152, ¶ III.A. A reasonable officer would know that it is misconduct to engage in personal text messaging while on duty, other than the "light personal communications"—e.g., "personal greetings or personal meeting arrangements"—allowed by the policy. App. 153, ¶ III.F.

Thus, allowing *some* personal use of the pagers did not eliminate the Department's legitimate need to investigate *excessive* on-duty personal use. For activities such as this, a little may be acceptable, but too much becomes misconduct. For example, while some absenteeism is expected, excessive absenteeism is grounds for discharge. *See*, *e.g.*, *Rivera v. Nat'l R.R. Passenger Corp.*, 331 F.3d 1074, 1079 (9th Cir. 2003) (Amtrak employee terminated for excessive absenteeism).

Accommodating limited personal use of employer resources to attend to personal matters, such as making appointments, may well allow an employer to operate more effectively and efficiently and provide some measure of convenience to employees. But such accommodations should not be interpreted as a carte blanche for irresponsible public employees to flagrantly exploit public resources while on duty. That, however, is what the Ninth Circuit's ruling encourages. Employers, in turn, are encouraged to curtail any accommodations in electronic communications—even to employees who behave reasonably—

lest the employers end up losing their ability to maintain their agencies' efficiency and safety. *See* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 Stan. L. Rev. 553, 579 (1992) (noting that "if the law were to forbid these ordinary work-related entries, employers would have a substantial incentive to restructure the work environment to recover their ability to retrieve information").

Apart from these efficiency concerns, the lower courts did not properly balance the Department's—as well as the public's—very strong interests in the conduct of their police officers against whatever minimal expectation of privacy that Lieutenant Duke's payment arrangement could have fostered. *See Dible*, 515 F.3d at 928 (city has especially strong interest in maintaining effective and efficient police department). The Department would have been fully justified in reviewing Sergeant Quon's pager transcripts to discover the extent to which he was sending personal text messages on the public's time. After all, Sergeant Quon had already exceeded the monthly character limit a number of times and, during the month under review, he exceeded the 25,000 character limit by more than 15,000 characters. J.A. 34, 50.

Not only was a search for misconduct justified at the inception, but the actual search was reasonable in scope whether undertaken for this purpose or to determine the efficacy of the character limit, for the same reasons identified by the district court and

discussed above. *See supra* Argument III.B.1; App. 101-102; J.A. 142-143. Ontario defendants were therefore entitled to summary judgment in their favor.

* * *

The Department was acting in its capacity as Sergeant Quon's employer, not in the capacity of the sovereign investigating a citizen. As *O'Connor* explains, "public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner." 480 U.S. at 724 (plurality opinion). Put simply, "the relevant question is whether th[e] intrusion upon privacy is one that a reasonable employer might engage in[.]" *Vernonia*, 515 U.S. at 665 (citing *O'Connor*). Here, the answer is yes. The Ninth Circuit ruling therefore should be reversed with an order to affirm the district court judgment.

IV. THE INDIVIDUALS WHO SENT TEXT MESSAGES TO SERGEANT QUON'S DEPARTMENT-ISSUED PAGER HAD NO REASONABLE EXPECTATION OF PRIVACY IN THOSE MESSAGES, AND THEREFORE WERE NOT ENTITLED TO FOURTH AMENDMENT PROTECTION WHEN THE DEPARTMENT, AS SERGEANT QUON'S EMPLOYER, REVIEWED THE MESSAGES.

The Ninth Circuit's sweeping holding that plaintiffs April Florio, Jerilyn Quon, and Sergeant Trujillo

had objectively reasonable expectations of privacy under the Fourth Amendment is mistaken and further damages government employers' ability to effectively use and monitor communications equipment—particularly where, as here, the public employer is a law enforcement agency. The court erroneously concluded that these other three plaintiffs legitimately expected that their text messages with Sergeant Quon would be free from Department review even though Sergeant Quon, a police officer, was not using a private pager, but rather a police department pager.

Here, even more than in its discussion of Sergeant Quon's Fourth Amendment claim, the Ninth Circuit's opinion is untethered to the specific facts of the case. The court began by asserting that "[t]he extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question." App. 23. Next the court framed the issue as if these plaintiffs had exchanged text messages with an individual citizen on his personal pager and as if he had his own account with Arch Wireless. *See* App. 24 ("Do users of text messaging services such as those provided by Arch Wireless have a reasonable expectation of privacy in their text messages stored on the service provider's network?"). In reality, and ignored by the court, these plaintiffs knowingly had exchanged the text messages with a police officer on his *Department-issued* pager.

In fact, the Ninth Circuit opinion fails to account for the fact that the other plaintiffs were fully aware

that they were sending messages to Sergeant Quon's Department-issued pager: Sergeant Trujillo was a fellow SWAT officer and also using a Department-issued pager himself (*see* App. 2, 5); police dispatcher April Florio and Sergeant Quon's wife, Jerilyn Quon, were using their own personal pagers but knew that Sergeant Quon's pager was issued by the Department. S.E.R. 303-304, 307. But the Ninth Circuit ignored these undisputed facts, treating all three essentially as if they were third parties sending text messages to Sergeant Quon's private pager.

As the United States pointed out in its amicus brief in the Ninth Circuit, "[t]hough the panel stated that it did 'not endorse a monolithic view of text message users' reasonable expectation of privacy, as this is necessarily a context-sensitive inquiry,' the panel discussed few contextual facts other than whether Quon 'voluntarily permitted the Department to review his text messages.'" App. 164-165 (quoting the Ninth Circuit opinion at App. 28). And with respect to the other plaintiffs, as opposed to Sergeant Quon, the Ninth Circuit did not even rely on Lieutenant Duke's bill-paying arrangement (App. 27 n.6), and the opinion is silent as to their knowledge of it.

Untethered to any contextual facts, the Ninth Circuit analogized text messages to telephone calls, regular mail, and e-mail, broadly holding that the other three plaintiffs had a reasonable expectation of privacy in the content of messages they exchanged with Sergeant Quon such that either their consent or

his consent was required for the Department to review the messages. *See* App. 24-28. But whether users of text messaging *generally* have a reasonable expectation of privacy in the content of text messages is not the issue here. Neither the Ninth Circuit's reasoning nor the authorities it cited address a third party's expectation of privacy in communications exchanged with a person on that person's *workplace* equipment—here a police department's equipment. In fact, the cases cited by the Ninth Circuit involving telephone calls, letters, emails, and computer usage did not address government employers' work-related searches at all; they addressed law enforcement searches. *See id.*

Whatever amount of privacy one might reasonably expect vis-à-vis the government acting in its capacity as sovereign in a text message sent from one privately-owned pager to another—and, again, it bears noting that in the Ninth Circuit, the United States argued there was *none* (App. 177-180)—it is not objectively reasonable to expect privacy in text messages sent to someone else's workplace pager, let alone a police officer's department-issued pager. To have such an expectation, the sender would have to believe the recipient's employer does *not* have a no-privacy policy in place as to that employer's electronic communications equipment. That is *un*reasonable.

As we have demonstrated, public and private employers alike typically have in place policies establishing that employees should have no expectation of privacy in electronic communications and other

computer usage on employer-owned equipment. *See supra* Argument II.B.; *see also Kozinets, supra*, 25 Comm. Law. at 23. And this is common knowledge: "For desk jockeys everywhere, it has become as routine as a tour of the office-supply closet: the consent form attesting that you understand and accept that any e-mails you write, Internet sites you visit or business you conduct on your employer's computer network are subject to inspection." Jennifer Ordoñez, *They Can't Hide Their Pryin' Eyes – An Appeals Court Ruling Makes It More Difficult For Employers To Sniff Around In Workers' Electronic Communications*, Newsweek, July 14, 2008, at 22; *see also Muick*, 280 F.3d at 743; *TBG Ins. Servs. Corp.*, 96 Cal. App. 4th at 451 (noting that three quarters of firms have such policies).

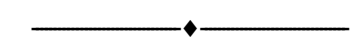
The Ninth Circuit, however, ignored the prevalence of such policies. In fact, it even ignored the explicit policy in this case, concluding that "[h]ad Jeff Quon voluntarily permitted the Department to review his text messages, the remaining Appellants would have no claims." App. 28. But Sergeant Quon effectively *did* consent, as he signed the City's written policy as a City employee.[7]

As the United States aptly pointed out, "[n]ot only do senders lack knowledge of what privacy policy

[7] Again, the Ninth Circuit relied on Lieutenant Duke's informal policy only when it addressed whether *Sergeant Quon* had a reasonable expectation of privacy. App. 27 n.6.

applies to a recipient, but few actions demonstrate an expectation of privacy less than transmission of information to the work account of a public employee charged with enforcing the law." App. 179. As a matter of common sense, senders should understand that communications with law enforcement agencies are often recorded or monitored because they often involve reporting crimes or emergencies.

In short, the Ninth Circuit failed to consider whether the senders' expectation of privacy is objectively reasonable for Fourth Amendment purposes —one that society is prepared to recognize as reasonable, *Smith v. Maryland,* 442 U.S. at 740—in light of these prevailing circumstances. Remarkably, the court concluded that plaintiffs "prevail *as a matter of law*." App. 40 (emphasis added). This startling extension of Fourth Amendment protection hinders any government employer's ability to monitor even its *own* employees' electronic communications, which inevitably will include messages sent from third-party senders. The Ninth Circuit opinion thus further hamstrings public employers' ability to prevent abuse and protect the integrity of workplace communications, providing another reason to reverse the Ninth Circuit's ruling and order affirmance of the district court judgment.



CONCLUSION

The Ninth Circuit's judgment should be reversed, with directions to affirm the district court's judgment in favor of petitioners City of Ontario, California, Ontario Police Department, and Lloyd Scharf for the reasons stated above.

Respectfully submitted,

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