

No. 08-1332

In The
Supreme Court of the United States

—◆—
CITY OF ONTARIO, 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 THE LEAGUE OF CALIFORNIA
CITIES AND CALIFORNIA STATE ASSOCIATION
OF COUNTIES, AS *AMICI CURIAE* IN SUPPORT
OF PETITIONERS CITY OF ONTARIO, ONTARIO
POLICE DEPARTMENT, AND LLOYD SCHARF**

—◆—
NANCY B. THORINGTON
Counsel of Record
JOSEPH M. QUINN
MEYERS, NAVE, RIBACK,
SILVER & WILSON
555 12th Street, Suite 1500
Oakland, CA 94607
Tel: (510) 808-2000
Fax: (510) 444-1108

*Attorneys for Amici Curiae
League of California Cities and
California State Association
of Counties*

TABLE OF CONTENTS

	Page
BRIEF ON BEHALF OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS <i>AMICI CURIAE</i> IN SUPPORT OF PETITIONERS	1
INTERESTS OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. QUON HAD NO REASONABLE EXPECTATION OF PRIVACY IN TEXT MESSAGES SENT ON A CITY-ISSUED PAGER BASED ON THE REALITIES OF THE WORKPLACE	4
A. A City Employee Could Not Reasonably Expect a Police Lieutenant’s Informal, Oral Billing Practice Could Nullify the City Manager’s City-Wide Written Electronic Communications Policy	4
B. It Is Unreasonable for a Public Employee to Believe that Records of a Public Agency Are “Private,” Especially Under California Law	8
1. Public Records Include Electronic Media	8
2. CPRA Requests Are Prevalent	9

TABLE OF CONTENTS – Continued

	Page
3. The Mere Process of Evaluating Whether Records Are Subject to Disclosure Makes Any Expectation of Privacy Unreasonable.....	10
4. Text Messages Are Also Subject to Civil Lawsuit Discovery Requests....	12
C. The Technology Involved in Using a Pager System Makes Any Expectation of Privacy in the Text Messages Unreasonable.....	13
II. A WARRANT REQUIREMENT IN THIS CONTEXT IS UNWORKABLE AND UN-DULY BURDENSOME.....	15
A. A Warrant Requirement Would Compromise a Public Employer’s Ability to Effectively Run Its Workplace	15
B. A Search Warrant Is Impracticable for Workplace Investigations	16
C. A Public Agency Acting as an Employer Is a “Special Needs” Situation for Which an Exception to the Warrant Requirement Should Apply	19
CONCLUSION.....	21

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bohach v. City of Reno</i> , 932 F. Supp. 1232 (D. Nev. 1996).....	13
<i>Camara v. Municipal Court</i> , 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).....	17
<i>City of Pasadena v. Estrin</i> , 212 Cal. 231, 298 P. 14 (1931).....	7
<i>Flagg v. City of Detroit</i> , 252 F.R.D. 346 (E.D. Mich. 2008).....	8, 9, 12
<i>Katz v. United States</i> , 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).....	14
<i>Marshall v. Barlow's, Inc.</i> , 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978).....	17
<i>Narducci v. Moore</i> , 572 F.3d 313 (7th Cir. 2009).....	14
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).....	19
<i>O'Connor v. Ortega</i> , 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987).....	19, 20
<i>Quon v. Arch Wireless Operating Company, Inc.</i> , 445 F. Supp.2d 1116 (C.D. Cal. 2006).....	14
<i>Quon v. Arch Wireless Operating Company, Inc.</i> , 529 F.3d 892 (9th Cir. 2008).....	<i>passim</i>
<i>Quon v. Arch Wireless Operating Company, Inc.</i> , 554 F.3d 769 (9th Cir. 2009).....	18
<i>Smith v. Maryland</i> , 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).....	13

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Comprehensive Drug Testing, Inc.</i> , 579 F.3d 989 (9th Cir. 2009)	17, 18
<i>United States v. Jacobsen</i> , 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984).....	4, 5
<i>United States v. Lifshitz</i> , 369 F.3d 173 (2nd Cir. 2004)	13
<i>United States v. Meriwether</i> , 917 F.2d 955 (6th Cir. 1990)	15
<i>Vernonia School District 47J v. Acton</i> , 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)	4
<i>Zaffuto v. City of Hammond</i> , 308 F.3d 485 (5th Cir. 2002)	14

STATUTES

Stored Communications Act

18 U.S.C. §§ 2701-2711

10

California Public Records Act (CPRA)

Cal. Gov't Code §§ 6250-6276.48 (West 2009).....

8

Cal. Gov't Code § 6252, subd. (e) (West 2009).....

8

Cal. Gov't Code § 6252, subd. (g) (West 2009).....

8

Cal. Gov't Code § 6254, subd. (f) (West 2009).....

10

Cal. Gov't Code § 34851 (West 2009)

6

Cal. Gov't Code § 34852 (West 2009)

6

Cal. Gov't Code § 36501, subd. (a) (West 2009).....

6

TABLE OF AUTHORITIES – Continued

	Page
Ontario, California, Municipal Code art. I, § 2-3.101 (2010).....	6
Ontario, California, Municipal Code art. I, §§ 2-3.102, 2-3.107, subd. (b)(1) (2010).....	6
Ontario, California, Municipal Code art. I, §§ 2-3.107, subd. (b)(2), 2-3.204, subd. (a) (2010).....	6
Ontario, California, Municipal Code art. I, § 2-3.107, subd. (j) (2010).....	6
Ontario, California, Municipal Code art. I, §§ 2-3.201, 2-3.202 (2010).....	6

CONSTITUTIONAL PROVISION

U.S. Const. amend. IV.....	5, 12, 16, 17, 20
----------------------------	-------------------

RULES

Rules of the Supreme Court of the United States

Rule 37.3(a)	1
Rule 37.6.....	1

**BRIEF ON BEHALF OF THE LEAGUE
OF CALIFORNIA CITIES AND THE
CALIFORNIA STATE ASSOCIATION
OF COUNTIES AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

The League of California Cities and California State Association of Counties respectfully submit this brief on the merits as *amici curiae* in support of Petitioners.



INTERESTS OF *AMICI CURIAE*¹

The League of California Cities (League) is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies

¹ Pursuant to Rule 37.3(a) of the Rules of the Supreme Court of the United States, the parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amici curiae* made a monetary contribution to this brief's preparation or submission.

those cases that are of statewide – or nationwide – significance. The Committee has identified this case as being of such significance.

The California State Association of Counties (CSAC) is a non-profit corporation with membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsel's Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The *amici*, as representatives of local public entities throughout California, have a vital interest in ensuring that public entities as employers can adequately supervise the workplace and, among other things, ensure their electronic equipment purchased with taxpayer funds is used principally to serve taxpayers', not personal, interests.



SUMMARY OF ARGUMENT

The City of Ontario has a written policy governing the use of City computers, the Internet and email. This policy, which covers the use of City pagers, prohibits the use of City-owned electronic equipment for personal use, except for light personal use, and clearly states that users have no expectation of

privacy or confidentiality when using such equipment. In spite of this written policy, the Ninth Circuit held that Sergeant Jeff Quon, an Ontario SWAT officer, had a reasonable expectation of privacy in the text messages archived for the City by its wireless service provider. The holding was based on the court's conclusion that a mid-tier supervisor's preferred approach for addressing pager text accounts superseded the City's written policy.

But the operational realities of the police department demonstrate that, even in light of the one supervisor's approach, Sergeant Quon's expectation of privacy in the text messages was not reasonable. The City Manager had established a written policy. His policy supersedes any practices of subordinate employees. Moreover, the text messages are potentially disclosable pursuant to a public records request to the City. And the text messages were sent to and archived by a private third party. Thus, Quon had no access or control over the text messages once he sent them.

The issue presented must be addressed in a way that allows public employers to effectively manage their workplaces. The Ninth Circuit's holding would require that public employers obtain a search warrant before reviewing their own electronic text data. Such a requirement is manifestly unworkable and would impede supervisorial reviews. Warrants will be sought only in the most extreme cases where substantial harm to the public agency has already occurred. The workplace interests will have already

been subverted, and the taxpayers' interests will have already been compromised.

◆

ARGUMENT

I. QUON HAD NO REASONABLE EXPECTATION OF PRIVACY IN TEXT MESSAGES SENT ON A CITY-ISSUED PAGER BASED ON THE REALITIES OF THE WORKPLACE

Assuming the Fourth Amendment protects pager text messages in general, the question is whether it is reasonable for a public entity, acting as an employer, to access the text messages. The reasonableness of a search is based on the nature of the privacy interest involved in the search, the character of the intrusion complained of, and the nature and immediacy of the governmental concern at issue and the efficacy of the means for meeting it. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 654, 658, 660, 115 S.Ct. 2386, 2391, 2393, 2394, 132 L.Ed.2d 564 (1995).

A. A City Employee Could Not Reasonably Expect a Police Lieutenant's Informal, Oral Billing Practice Could Nullify the City Manager's City-Wide Written Electronic Communications Policy

The Fourth Amendment does not protect subjective expectations of privacy. *United States v. Jacobsen*,

466 U.S. 109, 122-123, 104 S.Ct. 1652, 1661, 80 L.Ed.2d 85 (1984). Rather, the Fourth Amendment only protects expectations of privacy that society is prepared to consider reasonable. *Id.* at 113, 104 S.Ct. at 1656. Thus, a legitimate expectation of privacy means more than a subjective expectation of not being discovered. *Id.* at n. 22.

Where, as here, a public entity maintains a written policy stating that only light personal use of the City's computer-related equipment is permitted and providing that the City reserves the right to monitor all network activity, email, and Internet use without notice and that "[u]sers should have no expectation of privacy or confidentiality when using these resources" (Appendix to Petition for Writ of *Certiorari* (Pet. App.) at 152), an employee can have no reasonable expectation of privacy in the pager text messages he sends on his City-issued pager. Yet the Ninth Circuit held that Sergeant Quon did have a reasonable expectation of privacy in the text messages. The court found that the informal practice initiated by Lieutenant Duke to streamline the accounting functions for the City-issued pagers created an expectation of privacy. *Quon v. Arch Wireless Operating Company, Inc.*, 529 F.3d 892, 907 (9th Cir. 2008), Pet. App. at 31. But the court's conclusion ignores the operational realities of the police department and the City.

The decision-making authority of a general law city in California flows from the city council to the city manager to the various department heads. Cal.

Gov't Code §§ 36501, subd. (a), 34851, 34852 (West 2009), Ontario, California, Municipal Code art. I, §§ 2-3.102, 2-3.107, subd. (b)(1) (2010). The City of Ontario is a general law city, with a city manager form of government. Ontario, California, Municipal Code art. I, § 2-3.101 (2010). The Ontario City Manager's duties include exercising control over all departments within the City and appointing the Police Chief. Ontario, California, Municipal Code art. I, §§ 2-3.107, subd. (b)(2), 2-3.204, subd. (a) (2010). The City Manager also exercises general supervision over the City's property. Ontario, California, Municipal Code art. I, § 2-3.107, subd. (j) (2010). In his supervisory capacity, the City Manager issued the "Computer Usage, Internet and E-Mail Policy" dated December 20, 1999, which was explicitly applicable to all employees. Pet. App. at 151. Quon signed the policy and attended a meeting at which the department told the SWAT officers the policy applied to the pagers. *Quon, supra*, 529 F.3d at 906, Pet. App. at 29.

Moreover, the City's Municipal Code establishes the Police Chief as the head of the police department, under the supervision of the City Manager. Ontario, California, Municipal Code art. I, §§ 2-3.201, 2-3.202 (2010). The City Manager's electronic communications policy specifically provided that "[i]n the event of a dispute as to what constitutes 'light' personal [use], the Agency Head or Department Director will determine if a specific e-mail fits the criteria of 'light' personal communications." Pet. App. at 153. Thus, based on the clear language in the written policy, the

Police Chief, not a lieutenant, had the authority to determine what constituted “light use.”

It is well-settled that persons dealing with a city or public agency are charged with knowing the limitation of authority of its officers and agents. *See, e.g., City of Pasadena v. Estrin*, 212 Cal. 231, 235, 298 P. 14 (1931). The City Manager’s written policy legally superseded Lieutenant Duke’s billing practices, and the Police Chief had the duty and authority to review all police department electronic communications to determine whether those communications complied with the City Manager’s policy. These are the “operational realities” that provide the context for Lieutenant Duke’s statements to the SWAT officers. He told the officers that, if they paid the charges when they exceeded the minimum text character limits in a given month, *he* would not audit their text messages. *Quon, supra*, 529 F.3d at 907, Pet. App. at 30. Because a lieutenant clearly lacks the legal authority to set policy or override the City Manager’s authority, no reasonable police officer could believe that neither the Police Chief nor the City Manager could audit the text messages. Consequently, any subjective expectation of privacy Sergeant Quon claims in the pager text messages is unreasonable.

B. It Is Unreasonable for a Public Employee to Believe that Records of a Public Agency Are “Private,” Especially Under California Law

1. Public Records Include Electronic Media

Under the California Public Records Act (CPRA), public agencies must make their records available to the public upon request, unless the records are exempt from disclosure. Cal. Gov’t Code §§ 6250-6276.48 (West 2009). Public records include “any writing containing information relating to the conduct of the public’s business” that the public agency has prepared, uses or retains. Cal. Gov’t Code § 6252, subd. (e) (West 2009). The CPRA defines “writing” very broadly, and includes emails, faxes and any other means of recording a communication, “and any record thereby created, regardless of the manner in which the record has been stored.” Cal. Gov’t Code § 6252, subd. (g) (West 2009).

Moreover, just months after the *Quon* decision was published, another published case discussed a public records request from the Detroit Free Press for police pager text messages. *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008). There, the plaintiff was seeking discovery of the pager text messages in a civil lawsuit. While the case was pending, the Detroit Free Press sought disclosure of the text messages from the City of Detroit’s wireless service provider. *Id.* at 348. The Eastern District of Michigan noted, “[t]here is no question . . . that at least some of the

SkyTel text messages satisfy the statutory definition of ‘public records,’ insofar as they capture communications among City officials or employees ‘in the performance of an official function.’” *Id.* at 355.

2. CPRA Requests Are Prevalent

The operational realities of municipalities in California include a constant need to process public records requests. Indeed, local police departments in California routinely receive and respond to CPRA requests. Inquiries often focus on fiscal issues, such as officer salaries and overtime pay. Some requests relate to a particular officer or incident, especially when the incident is considered newsworthy. SWAT units, by their nature, respond to high-profile situations that are often newsworthy. This increases the likelihood that local or even national interest in an incident will result in a CPRA request from the media.

Accordingly, based on the frequency of CPRA requests in general, and the high profile nature of SWAT units, it is likely that, at some point, the pager text messages would be the subject of a CPRA request.

The district court and the Ninth Circuit found the CPRA had no significant impact on the reasonableness of Quon’s privacy expectation. *Quon, supra*, 529 F.3d at 907-908, Pet. App. at 31-33. But the fact that text messages may be subject to disclosure under the state Public Records Act is most certainly a

relevant operational reality and clearly suggests that an expectation of privacy in those text messages is unreasonable.

3. The Mere Process of Evaluating Whether Records Are Subject to Disclosure Makes Any Expectation of Privacy Unreasonable

The process of responding to public records requests further makes a public employee's expectation of privacy in electronic communications unreasonable. Given that text messages are "records" under the CPRA, an employee of an agency that receives a public records request for text messages would have to review the records for responsiveness. For example, if a fatal shooting involving SWAT officers occurred, a member of the press or public might request all text messages sent and received on the date of the incident. The CPRA contains very specific provisions governing what law enforcement records the agency must disclose. Cal. Gov't Code § 6254, subd. (f) (West 2009). Thus, to produce the responsive records, all text messages for all officers called to the scene would have to be reviewed to determine if any of the messages were exempt.²

² This discussion assumes the City can retrieve its text messages from the wireless service provider. The Ninth Circuit found that the City could not, based on its interpretation of the Stored Communications Act, 18 U.S.C. §§ 2701-2711. This Court denied the service provider's petition for writ of *certiorari*, so the
(Continued on following page)

That process would be no different from the “search” that occurred with Quon’s text messages here. The Police Chief directed a staff member to review the text messages to determine which ones related to City business and which were personal. *Quon, supra*, 529 F.3d at 897-898, Pet. App. at 6-8. None of the records were released to the public. But, had the need for reviewing the records arisen in a CPRA context, the records would potentially be viewed not only by staff, but also by the public. In fact, they could be published in a newspaper if they were responsive and not exempt. Even the sexually-explicit messages sent by Quon might be the subject of a CPRA request where, for instance, a member of the public was seeking to determine whether public money was being spent on the salary of a public employee who was not doing his job.³ Accordingly, the potential for disclosure of the text messages under the CPRA makes any expectation of privacy in those messages unreasonable.

validity of the Ninth Circuit’s interpretation is not before the Court.

³ It should be noted that a CPRA request analysis is complex and involves exceptions that must be reviewed on a case-by-case basis. A full discussion of the disclosure analysis is beyond the scope of this brief.

4. Text Messages Are Also Subject to Civil Lawsuit Discovery Requests

Besides being subject to a public records request, the SWAT pager text messages could also be subject to discovery in a civil lawsuit. In fact, a federal district court in Michigan held that electronically stored text messages exchanged among public agency officials and employees on agency-issued pagers were subject to discovery in a civil lawsuit. *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008). In this context, the Fourth Amendment would not apply. Federal civil rights lawsuits against governmental agencies are common, particularly when a police-inflicted injury occurs. The name for which the acronym “SWAT” stands – “Special Weapons and Tactics” – suggests the often violent situations that the officers routinely encounter. Thus, it is not uncommon for injuries to occur during such encounters and for a victim to sue the responding police department. As the *Flagg* case demonstrates, a SWAT officer’s pager text messages could be subject to a civil discovery request. Therefore, based on these operational realities, Sergeant Quon’s expectation of privacy in his text messages sent and received on his City-issued pager was further unreasonable.

C. The Technology Involved in Using a Pager System Makes Any Expectation of Privacy in the Text Messages Unreasonable

As noted in *Smith v. Maryland*, “[t]his Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” *Smith v. Maryland*, 442 U.S. 735, 743-744, 99 S.Ct. 2577, 2582, 61 L.Ed.2d 220 (1979). Thus, where a person “exposes” his information to a third party, such as a telephone company, he assumes the risk that the company will reveal the information to the police. *Id.* at 744, 99 S.Ct. at 2582. As the Second Circuit found, although individuals do generally have a reasonable expectation of privacy in information stored on their home computers, “[t]hey may not, however, enjoy such an expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient.” *United States v. Lifshitz*, 369 F.3d 173, 190 (2nd Cir. 2004).

In a case involving pager text, the court noted that “all messages are recorded and stored not because anyone is ‘tapping’ the system, but simply because that’s how the system works. It is an integral part of the technology.” *Bohach v. City of Reno*, 932 F. Supp. 1232, 1234 (D. Nev. 1996). Similarly here, the pager system that the City of Ontario used involved text messages being sent to Arch Wireless, where they were held temporarily until receiving pagers were ready to receive them. *Quon, supra*, 529 F.3d at 895-896, Pet. App. at 3-4. Once conveyed, the messages

were archived in the Arch Wireless system. *Quon, supra*, 529 F.3d at 896, Pet. App. at 3.

Furthermore, whether an expectation of privacy is reasonable also depends on the steps taken to ensure privacy and the extent of control the person exercised over the place searched. *See, e.g., Katz v. United States*, 389 U.S. 347, 351-352, 88 S.Ct. 507, 511-512, 19 L.Ed.2d 576 (1967). Here, Quon had no control over the text messages after he sent them. In fact, at no time during the transmission or storage were the messages in either Quon's or the City's control. *Quon v. Arch Wireless Operating Company, Inc.*, 445 F. Supp.2d 1116, 1131 (C.D. Cal. 2006), Pet. App. at 65. Rather, the messages could only be accessed after they were archived, and then only by the City, not by Quon. *Quon, supra*, 529 F.3d at 898, Pet. App. at 8-9. As the account representative for Arch Wireless stated, she "would only deliver messages to the 'contact' on the account, and . . . she would not deliver messages to the 'user' unless he was also the contact on the account." *Quon, supra*, 529 F.3d at 898, Pet. App. at 9. The contact here was the City.

Since the *Katz* decision in 1967, courts have found that, absent a search warrant, a public employee has a reasonable expectation of privacy in telephone calls, even those conducted on the employer's equipment. *Narducci v. Moore*, 572 F.3d 313, 323 (7th Cir. 2009); *Zaffuto v. City of Hammond*, 308 F.3d 485, 489 n.3 (5th Cir. 2002). But telephone conversations and pager text messages differ in key respects. First, a pager message produces a written record, which is

stored as part of the technology. *Quon, supra*, 529 F.3d at 895-896, Pet. App. at 3-4. Second, as the Sixth Circuit noted, “Unlike the phone conversation where a caller can hear a voice and decide whether to converse, one who sends a message to a pager has no external indicia that the message actually is received by the intended recipient.” *United States v. Meriwether*, 917 F.2d 955, 959 (6th Cir. 1990). As a result, the confidentiality of pager messages is “quite uncertain.” *Id.* Third, a telephone call produces a record of the number called and the date and time of the call, and an email contains the recipient’s email address, along with the date and time of the email. In contrast, the only record of a pager text message is the message itself. Thus, the only method of determining which transmissions were work-related here was by actually looking at the transmissions. Joint Appendix on Writ of *Certiorari* (J.A.) at 142. Accordingly, Quon could not have a reasonable expectation of privacy in messages he could not even access and over which he had no control once they were sent.

II. A WARRANT REQUIREMENT IN THIS CONTEXT IS UNWORKABLE AND UN-DULY BURDENSOME

A. A Warrant Requirement Would Compromise a Public Employer’s Ability to Effectively Run Its Workplace

Under the Ninth Circuit’s holding here, absent consent, a public employer would be precluded from searching the employee’s private office for a file or

searching the employee's computer for data without a search warrant.

Consequently, an employer who needed a file for a non-investigatory work-related purpose could not search the employee's office, desk, or file cabinets if the employee was out to lunch, on vacation, or home sick, unless the employer obtained a warrant. Or, if an employee was suspected of downloading pornography using an agency-issued computer, the agency would be precluded from entering the employee's office and accessing the data files on the computer without a warrant.

B. A Search Warrant Is Impracticable for Workplace Investigations

The Ninth Circuit's holding creates an undue burden on public agencies by requiring them to seek a search warrant prior to conducting routine workplace investigations. But a public agency would not necessarily be able to obtain a warrant for such investigations. The Fourth Amendment states that "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. Workplace investigations such as the one here do not involve criminal activity, even if an employee allegedly violated an agency policy. The need to search does not involve an administrative search pursuant to legislation, as with the OSHA inspectors in *Marshall*

v. Barlow's, Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) or an area inspection pursuant to a municipal code as in *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Consequently, there would be no “probable cause” upon which the warrant could be based. Because the Fourth Amendment specifically states that no warrant may be issued “but on probable cause,” no warrant could issue for purposes of workplace investigations.

Even if a government agency could obtain a warrant, the Ninth Circuit has created such onerous protocols for warrants pertaining to information contained on electronic storage media that doing so would be impractical for work-related searches. In *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009), the Ninth Circuit set out the following guidelines for obtaining a search warrant for electronically-stored data:

1. Magistrates should insist that the government waive reliance upon the plain view doctrine in digital electronic cases. . . .
2. [Information should be segregated and redacted.] Segregation and redaction must be either done by specialized personnel or an independent third party. . . . If the segregation is to be done by government computer personnel, it must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.

3. Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora. . . .
4. The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents. . . .
5. The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept. *Id.* at 1006.

Attempting to comply with these protocols just to obtain a file on an employee's hard drive or the text messages at issue here would be nearly impossible. And, as Judge Callahan noted in her dissent, having to have dedicated staff or a consultant segregate and redact information will place an onerous financial burden on governmental entities, particularly smaller jurisdictions, that will have to have dedicated computer technicians or pay for outside consultants. *Id.* at 1013 (dissenting opinion of Callahan).

Thus, the Ninth Circuit's decision here eviscerates oversight of government employees and "improperly hobbles government employers from managing their workforces." *Quon v. Arch Wireless Operating Company, Inc.*, 554 F.3d 769, 774 (9th Cir. 2009), (dissenting opinion of Ikuta) denial of rehearing and rehearing *en banc*, Pet. App. at 137.

C. A Public Agency Acting as an Employer Is a “Special Needs” Situation for Which an Exception to the Warrant Requirement Should Apply

Justice Scalia’s concurring opinion in *O’Connor v. Ortega* articulates a practical approach to work-related searches conducted by governmental agencies acting in their roles as employers. *O’Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987). First, he concluded that the Fourth Amendment generally protects the offices of government employees against a warrantless search. *Id.* at 731, 107 S.Ct. at 1505 (SCALIA, J., concurring in judgment). Justice Scalia then noted that the case turned on whether the intrusion was reasonable. *Id.* He stated that it was in the reasonableness analysis that the government’s status as employer, and the employment-related character of the search, are relevant. *Id.* (SCALIA, J., concurring in judgment). Justice Scalia noted that, although warrantless searches are generally *per se* unreasonable, the Court has “recognized exceptions when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. . . .’ *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 749, 83 L.Ed.2d 720 (1985) (BLACKMUN, J., concurring in judgment). Such ‘special needs’ are present in the context of government employment.” *Id.* (SCALIA, J., concurring in judgment). Accordingly, no search warrant would be required for work-related searches by public employers.

Justice Scalia’s opinion recognizes that a public employer’s need to function efficiently would be severely hampered if it must obtain a search warrant to conduct its daily business. “The government, like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes.” *O’Connor v. Ortega, supra*, 480 U.S. at 731, 107 S.Ct. at 1505. (SCALIA, J., concurring in judgment). Justice Scalia concluded that work-related searches by a government employer do not violate the Fourth Amendment, regardless of whether the search is to retrieve files or conduct a work-related investigation: “I would hold that government 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-employment context – do not violate the Fourth Amendment.” *Id.* (SCALIA, J., concurring in judgment). In contrast to the Ninth Circuit’s holding here, Justice Scalia’s opinion in *O’Connor v. Ortega* demonstrates a realistic understanding of how requiring a warrant for work-related searches would preclude government employers from effectively managing their workforces.



CONCLUSION

Because Sergeant Quon's expectation of privacy here was unreasonable, and the Ninth Circuit's holding is unworkable and unduly burdensome on public agencies as employers, the judgment of the Court of Appeals should be reversed.

Dated: February 11, 2010

Respectfully submitted,

NANCY B. THORINGTON

Counsel of Record

JOSEPH M. QUINN

MEYERS, NAVE, RIBACK, SILVER & WILSON

555 12th Street, Suite 1500

Oakland, CA 94607

Tel: (510) 808-2000

Fax: (510) 444-1108

*Attorneys for Amici Curiae League of California Cities
and California State Association of Counties*