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 RESPONDENTS

DIETER C. DAMMEIER
Counsel of Record
MICHAEL A. MCGILL
LACKIE, DAMMEIER & MCGILL
367 North Second Avenue
Upland, California 91786
(909) 985-3285
Dieter@policeattorney.com

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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 725-26 (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 no formal no-privacy policy pertaining to text-message transmissions and the operational realities of the police department are such that SWAT team members are explicitly told their messages would remain private if they paid any additional overage charges.

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.

QUESTIONS PRESENTED – Continued

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.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

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 (hereinafter "App.") at 1-40. The Ninth Circuit's order denying rehearing and rehearing en banc, including a concurring opinion and a dissenting opinion, is reported at 554 F.3d 769 (9th Cir. 2009). App. 124-50. 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.

STATEMENT OF THE CASE

Ontario Police Department SWAT Sergeant Jeff Quon used his Department-issued text-messaging pager to exchange private communications after being told that his messages would not be reviewed as long as he paid any overage charges. Quon paid the overage charges, but the Department still reviewed his messages.

In 2001, the City of Ontario began issuing text-message pagers to members of its Police Department's SWAT team. At the time, the City had no explicit written policy governing the use of the pagers. Instead, Lieutenant Steven Duke – a Department Commander and the person in charge of the use and provision of the Department's electronic equipment – advised supervisory officers, including Sergeant Quon, that the City's existing *general* computer policy, which

did not mention pagers, would govern the usage of the pagers. Although the existing computer policy stated that the City could access employees' work computers and audit their emails, the City never amended the policy to expressly include pagers and never issued any notice to any of its rank-and-file employees of Lieutenant Duke's announcement.

At the same time, Lieutenant Duke – the only individual to announce that the computer policy governed the use of the pagers – initiated another policy of agreeing *not* to audit the use of the pagers so long as the personnel in question paid the Department for the overage charge. Only when the officer in question disputed the overages, either claiming that the use was work-related or otherwise, did Lieutenant Duke make clear that he would endeavor to audit the contents of the messages sent and received on the pager.

Lieutenant Duke's policy became the Department's practice. In fact, various officers, including Sergeant Quon, exceeded the monthly character limit on several occasions. Each time, the officers, including Quon, paid the overage charge and the City honored the officer's privacy.

However, in August 2002, Lieutenant Duke grew tired of collecting the overage charges and notified Chief of Police Lloyd Scharf. Notwithstanding the policy and practice of maintaining privacy, Chief Scharf and Lieutenant Duke decided to audit the text-messages of the two officers who had exceeded

the character limit that month. Sergeant Quon happened to be one of those officers. Ignoring the clear expectation of privacy that was established, Lieutenant Duke ordered the text-messages from the service provider, Arch Wireless, and reviewed them. After discovering this, Sergeant Quon, along with three other individuals he exchanged text-messages with, filed suit alleging the City and Chief Scharf violated their Fourth Amendment rights.

A. The City Of Ontario's "Computer Usage" Policy And Its Contract With Arch Wireless.

At no time did the City of Ontario have an explicit policy governing the use of text-message pagers. *See* App. 4, 47.

Instead, the City maintained a general "Computer Usage, Internet and E-mail Policy," which states that "[t]he use of City-owned computers and all associated equipment, software, programs, networks, Internet, e-mail and other systems operating on these computers is limited to City of Ontario related business. The use of these tools for personal benefit is a significant violation of City of Ontario Policy." *See* Excerpts of Record (hereinafter "E.R.") 866-67. The policy also provides:

> C. Access to all sites on the Internet is recorded and will be periodically reviewed by the City. 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.
>
> D. 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.
>
> E. The use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated.

E.R. 866-67.

Although the policy states that "[t]he use of these tools for personal benefit is a significant violation," *id*., the policy does expressly allow for personal use: "[I]ncidental and occasional personal use of the email system is permitted if limited to 'light' personal communications," which "may consist of personal greetings or personal meeting arrangements." App. 153, ¶ III(F).

Furthermore, the policy explains that "[a]ccess to the Internet and the e-mail system is not confidential" and that the "City of Ontario reserves the right to monitor and log all network activity including

e-mail and Internet use, with or without notice." *Id*. at 152-53.

As part of its provision of *computer* desktop equipment to its personnel, the Ontario Police Department had all of its employees review and sign a written statement of the Department's policy concerning use of this equipment. *Id*. at 47-48. Sergeant Jeff Quon received a copy of this written policy and signed the form acknowledging he had reviewed and understood the policy on March 18, 2000, almost a year before the City ever obtained the text-message pagers. *Id*.

In 2001, the City of Ontario contracted with Arch Wireless Operating Company, Inc., to provide wireless text-messaging services for the City of Ontario Police Department's SWAT team. Pet. Br. 5. The decision to supply SWAT members with text-message pagers stemmed from the fact that the SWAT members were required to be on call "24/7" and the City's "refusal to pay overtime or stand-by pay to officers who must be available for SWAT call-outs." App. 126-27; *see also* Joint Appendix (hereinafter "J.A.") 35.

The City received twenty two-way alphanumeric pagers, which it distributed to its SWAT employees, including Sergeant Quon and Sergeant Steve Trujillo. Pet. Br. 5. The text-messages, sent and received through Arch Wireless' pagers, were not stored or otherwise maintained or kept by the City of Ontario. App. 46. According to Steven Niekamp, Director of Information Technology for Arch Wireless:

A text message originating from an Arch Wireless two-way alphanumeric text-messaging pager is sent to another two-way text-messaging pager as follows: The message leaves the originating pager via a radio frequency transmission. That transmission is received by any one of many receiving stations, which are owned by Arch Wireless. Depending on the location of the receiving station, the message is then entered into the Arch Wireless computer network either by wire transmission or via satellite by another radio frequency transmission. Once in the Arch Wireless computer network, the message is sent to the Arch Wireless computer server. Once in the server, a copy of the message is archived. The message is also stored in the server system, for a period of up to 72 hours, until the recipient pager is ready to receive delivery of the text message. The recipient pager is ready to receive delivery of a message when it is both activated and located in an Arch Wireless service area. Once the recipient pager is able to receive delivery of the text message, the Arch Wireless server retrieves the stored message and sends it, via wire or radio frequency transmission, to the transmitting station closest to the recipient pager. The transmitting stations are owned by Arch Wireless. The message is then sent from the transmitting station, via a radio frequency transmission,

> to the recipient pager where it can be read by the user of the recipient pager.

Id. at 3-4.

B. The City's Policy Maintaining Officer's Privacy And Its Impulsive Decision To Violate That Policy.

Two years later, in April 2002, Sergeant Quon attended a meeting during which Lieutenant Duke, a Commander with the Ontario Police Department's Administration Bureau, informed all present that pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." App. 5-6. At the time, Lieutenant Duke was the person in charge of the use and provision of the Department's electronic equipment and was responsible for maintaining the Arch Wireless contract. *Id*. Quon "vaguely recalled attending" the meeting, but did not recall Lieutenant Duke stating that use of the pagers was governed by the City's general computer policy. *Id*. This statement was later recorded in the minutes from the staff meeting and distributed to supervisory staff. *Id*. at 48. However, the City never amended its computer policy to expressly include text-message pagers and never advised anyone other than supervisory staff of Lieutenant Duke's policy statement. *Id*. at 4.

In addition, as the district court found, "Lieutenant Duke's representation that the Department could

audit the pagers was not entirely accurate." *Id*. at 49. The Department's supervisory staff itself did not have the ability to review the contents of the text-messages sent or received by the pagers issued to its employees. *Id*. Supervisory staff could not access what transpired over the pagers from their own computers, nor could they log onto Arch Wireless' network from their computers at work to do the same. *Id*. Instead, to review the contents of the text-message sent or received from one of the city-owned pagers, supervisory staff had to contact an Arch Wireless representative and request for them to generate a copy of the transcripts of those messages. *Id*.

More importantly, the district court found that the Department had a policy of agreeing *not* to audit the use of the pagers whenever overages existed so long as the personnel in question paid the Department for the overage: "Only when the personnel in question disputed the overages – either claiming that the use was work-related or otherwise – did Lieutenant Duke make it clear that he would endeavor to audit the contents of the messages sent and received on the pager." App. 49.

Lieutenant Duke, who was the only individual to ever inform supervisors that the City's computer policy governed the use of the text-message pagers, related the new policy regarding the conditions under which an audit of a pager would take place for overages to Sergeant Quon. App. 50. Within the first or second billing cycle after the pager was issued to Quon, Lieutenant Duke approached Quon because he

had exceeded his maximum number of allotted characters. *Id*. During this conversation, Lieutenant Duke told Quon that the text-messages sent over the City-owned pager "were considered e-mail and could be audited," but went on to say "that it was not his intent to audit employee's text messages to see if the overage is due to work related transmissions." *Id*. Instead, Quon "could reimburse the City for the overage so he would not have to audit the transmission and see how many messages were non-work related." *Id*.

At deposition, Lieutenant Duke further explained the policy:

> [W]hat I told Quon was that he had to pay for his overage, that I did not want to determine if the overage was personal or business unless they wanted me to, because if they said, "It's all business, I'm not paying for it," then I would do an audit to confirm that. And I didn't want to get into the bill collecting thing, so he needed to pay for his personal messages so we didn't – pay for the overage so we didn't do the audit.

Id. at 50-51. In other words, "pay for the overage so [the City] didn't [have to] do the audit." *Id*. at 51.

Accordingly, Quon's understanding of the Department's policy was "if you don't want us to read [your messages], pay the overage fee." App. 128; *see also* J.A. 35 ("In exchange [for receiving the pagers], the S.W.A.T. officers agreed to not put in for stand-by pay or other overtime compensable under FLSA and city

rules" and as a result there "was *never* a discussion concerning restrictions on the use of the pagers."). Thus, "at no time was [Quon] told the pager could not be used for personal messages or that text transmissions would be retrieved from electronic storage." J.A. 35. Instead, it had been the "City's unwritten practice" to notify officers of overages and require them to write a check for the difference. *Id.* As a result, the "use of the pager was for both, city and personal communications with any overages to be brought to the officer's attention for repayment." *Id*.

The practice at the Department was consistent with Lieutenant Duke's statement of the policy and Sergeant Quon's understanding of the policy. App. 8, 50. Sergeant Quon exceeded the monthly character limit "three or four times" and paid the City for the overages. *Id*. Each time, "Lieutenant Duke would come and tell [Quon] that [he] owed X amount of dollars because [he] went over [his] allotted characters," and Quon would pay the City for the overages. *Id*. Pursuant to the policy, the City did not review any of Quon's messages on any of those occasions. *Id*.

In August 2002, Sergeant Quon and another officer again exceeded the 25,000-character limit. App. 8. Inexplicably, Lieutenant Duke became upset and indicated at a command staff meeting that he was "tired of being a bill collector with guys going over the allotted amount of characters on their text pagers." *Id*. In response, Chief of Police Lloyd Scharf ordered Lieutenant Duke to "request the transcripts of those pagers for auditing purposes." *Id*. Chief Scharf asked

Lieutenant Duke "to determine if the messages were exclusively work related, thereby requiring an increase in the number of characters officers were permitted, which had occurred in the past, or if they were using the pagers for personal matters. *Id*. One of the officers whose transcripts [he] requested was plaintiff Jeff Quon." *Id*.

When ordering the transcripts, Chief Scharf was aware of Lieutenant Duke's policy of allowing the use of pagers for personal matters when he ordered him to do the audit in question, and he was also aware that the two officers whose pager transcripts he was ordering to be audited had already paid for their overages for the period under review. *Id*. at 52. Lieutenant Duke acknowledged that the Department unilaterally and without prior notice simply "stopped the practice" of maintaining officer's privacy. *Id*. at 51.

Furthermore, Chief Scharf admitted at his deposition that he was not concerned in the slightest when pressed whether such an audit may uncover personal information about the officers in light of Lieutenant Duke's policy that was in effect during the time the transmissions were made allowing officers to use the pagers for personal, non-worked related purposes. *Id*. at 53. Chief Scharf indicated that he gave no consideration to Quon's privacy expectations. *Id*.

At the conclusion of the meeting, Chief Scharf ordered Lieutenant Duke to obtain the transcripts for the text-messages sent on Sergeant Quon's and the other officer's pagers for the period of August to

September 2002, and review the contents of the pager transmissions. *Id*. at 119. 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." *Id*.

The Department's contact person requested from Arch Wireless the transcripts for the two pagers. *Id*. at 54. The Arch Wireless representative confirmed only that the pagers were owned by the City and that the request for transcripts came from the designated contact person with the City. *Id*. After satisfying itself of these two points, Arch Wireless provided the transcripts of the text-message communications sent and received by the pagers during the time in question. *Id*.

Upon review, the City determined that Quon sent text-messages both on and off duty, with many of the messages containing private content, some of which was sexually explicit. *Id*. at 54-55. Messages were exchanged between Sergeant Quon and his wife Jerilyn Quon, who he was separated from at the time. *Id*. Other messages were exchanged with his girlfriend, April Florio, and his fellow SWAT member, Sergeant Steve Trujillo. *Id*. at 55.

C. The District Court Proceedings.

After the City's actions were discovered, Sergeant Quon, Sergeant Trujillo, April Florio and Jerilyn Quon (hereinafter collectively referred to as "plaintiffs" or

"respondents") filed suit in the District Court, for the Central District of California. Their suit was brought against the City of Ontario, its Police Department, Chief of Police Lloyd Scharf, and Sergeant Debbie Glenn (hereinafter collectively referred to as "Ontario defendants" or "petitioners"), under 42 U.S.C. § 1983, alleging Fourth Amendment violations based upon the Ontario defendants' review of plaintiffs' text-messages. Plaintiffs also named Arch Wireless Operating Company, Inc. as a defendant, and alleged that its disclosure of the text-messages violated the Stored Communications Act (hereinafter "SCA"), 18 U.S.C. § 2701 et seq.

After numerous rounds of cross-motions for summary judgment, the district court first determined that Sergeant Quon had a reasonable expectation of privacy in his text-messages under the "operational realities of the workplace" standard established in *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987). The district court found that

> [t]his 'operational reality,' however, was fundamentally transformed by Lieutenant Duke's conscious decision not to enforce th[e general computer] policy. . . . 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. Given that Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, his statements carry a great deal of weight. Indeed, before the events that transpired in this case the

> department did not audit any employee's use of the pager for the eight months the pagers had been in use. This was true even when overages were involved. Lieutenant Duke in effect turned a blind eye to whatever purpose an employee used the pager, thereby vitiating the department's policy of any force or substance. By doing so, Lieutenant Duke effectively provided employees a reasonable basis to expect privacy in the contents of the text messages they received or sent over their pagers; the only qualifier to guaranteeing that the messages remain private was that they pay for any overages.

App. 90-91.

The district court next considered whether the review of the text-messages was reasonable under the circumstances, ultimately determining that a genuine issue of material fact existed as to "the actual *purpose* or *objective* Chief Scharf sought to achieve" in ordering the search. *Id*. at 97. The court held that if the search was meant to ferret out misconduct by determining whether the officers in questions were "playing games" with their pagers or otherwise "wasting a lot of City time conversing with someone about non-related work issues," the search would *not* have been justified at its inception. *Id*. at 98. The court's finding was predicated upon the fact that the officers' pagers were searched during the period of time when Lieutenant Duke's informal, but express policy of not auditing the pagers was in effect:

> Given this policy, it cannot be said that determining whether the officers went over the character limits during this period because they used the pagers for personal matters . . . was 'misconduct'; it was the very conduct Lieutenant Duke's informal policy allowed, condoned, and even encouraged. For a search to be considered justified at the inception when it is meant to discover workplace misconduct, there must exist 'reasonable grounds' to suspect that such evidence of misconduct would be uncovered by the search in question. In light of Lieutenant Duke's policy, search would not have revealed misconduct; rather, it would have uncovered conduct permitted by Lieutenant Duke to occur.

App. 98-99.

Conversely, the other possible purpose of the search – to determine the utility or efficacy of the existing monthly character limits – would have rendered the search justified at its inception. *Id*. at 99. The district court held that evidence existed demonstrating that the audit was conducted to address the City's concern that officers were paying too much in overages because the character limits were not high enough to capture all the work-related usage of the pagers. *Id*. at 100. The court held that if this was the purpose of the search, the search would be justified at its inception and reasonable in scope. *Id*. at 101. The court denied the parties' cross-motions for

summary judgment and the matter was presented to a jury.[1] *Id*. at 103.

A jury found that Chief Scharf's purpose in ordering the review of the transcripts was to determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses. *Id*. at 119. As a result, the district court found that no Fourth Amendment violation had occurred, and entered judgment in favor of the Ontario defendants.

D. The Plaintiffs' Appeal.

Plaintiffs timely appealed, challenging the district court's ruling that the search of the transcripts was reasonable in light of the jury's determination that the purpose of the search was for noninvestigatory purposes. *Id*. at 21. Plaintiffs agreed with the district court's conclusion that they possessed a reasonable expectation of privacy in the text-messages, but argued that the issue regarding Chief Scharf's intent in authorizing the search never should have gone to trial because the search was unreasonable as a matter of law. *Id*.

---

[1] The district court also granted Arch Wireless' motion for summary judgment, holding that Arch Wireless did not violate the SCA. The district court found that Arch Wireless was a "remote computing service" under 18 U.S.C. § 2702(a), and as a result, the disclosure of the electronic text-messages to a "subscriber," the City, was lawful. App. 58-84.

The Ninth Circuit reversed, holding that plaintiffs were entitled to summary judgment in their favor and against the Ontario defendants. Applying the *O'Connor* "operational realities of the workplace" standard, 480 U.S. at 717, the Ninth Circuit agreed with the district court that the Department's policy that the text-messages would not be audited if the officers paid the overages rendered Quon's expectation of privacy in those messages reasonable. *Id*. at 29. The Ninth Circuit, like the district court, considered all of the record evidence and found that Lieutenant Duke's express and specific policy was an important consideration and crucial to Sergeant Quon's expectation of privacy.

The Ninth Circuit also held that the other three plaintiffs had a reasonable expectation of privacy in the messages they sent to Sergeant Quon. This conclusion was reached after reviewing its own jurisprudence relative to e-mail messages, regular mail and telephone communications, and finding no meaningful difference. *Id*. at 23-28.

In evaluating the reasonableness of the search under *O'Connor*, and in light of the jury's special verdict regarding the purpose of the search, the Ninth Circuit found that the search was reasonable at its inception but unreasonable in scope. *Id*. at 34. Applying the *O'Connor* framework, the court held that the search was reasonable "at its inception" because the Department conducted the search for the work-related purpose of ensuring that "officers were not being required to pay for work-related expenses," as

the jury had found. *Id*. In evaluating the scope of the search, the Ninth Circuit examined whether the measures adopted were "reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." *Id*. at 34-35. However, because "the Department opted to review the contents of all the messages, work-related and personal, without the consent of Quon," the search "was excessively intrusive in light of the noninvestigatory object of the search," *Id*. at 34-36; *see also id*. at 133-34. The holding was based on the court's "conclusion that Quon's 'reasonable expectation of privacy in those messages' was not outweighed by the government's interest – again, as found by the jury – in auditing the messages." *Id*. at 35-36; *see also id*. at 134.

In its opinion, the Ninth Circuit did not utilize a "less intrusive means" test, but rather discussed other ways the City could have verified the efficacy of the 25,000-character limit merely to illustrate the conclusion that the search was "excessively intrusive" under *O'Connor*, when measured against the purpose of the search as found by the jury. *Id*. at 134. Accordingly, the court of appeals concluded that the search violated the Fourth Amendment.[2] *Id*. at 36.

---

[2] Plaintiffs also successfully appealed the district court's summary judgment ruling against them and in favor of Arch Wireless. The Ninth Circuit reversed the district court, holding that Arch Wireless clearly fit the definition of a "provider" of an "electronic communication service" when it provided

(Continued on following page)

E. The Petitions For Rehearing.

The Ontario defendants petitioned for panel rehearing and rehearing en banc on the grounds that: 1) the panel's ruling undermined the "operational realities of the workplace" standard of *O'Connor*, 480 U.S. at 717 (plurality opinion); 2) the panel erroneously utilized a "less intrusive methods" test when reviewing the scope of the search; and 3) the panel overextended Fourth Amendment protection to individuals who send text-messages to a government employee's workplace pager.

Panel rehearing and rehearing en banc were denied. *Id*. at 125. Judge Ikuta, joined by six other judges, dissented from the denial of rehearing en banc. *Id*. at 136-50. Judge Wardlaw filed an opinion concurring in the denial of rehearing en banc. *Id*. at 125-36.

SUMMARY OF ARGUMENT

Although the Ninth Circuit viewed this case as an opportunity to examine what it considers "a new frontier in Fourth Amendment jurisprudence that has little been explored," App. 24, its analysis did not

---

text-messaging services to the City. *See* App. 14-21. As a result, when Arch Wireless divulged the messages to the City, who was a "subscriber," and not "an addressee or intended recipient of such communication," without the consent of plaintiffs, it violated the SCA.

stray from this Court's principles in *O'Connor v. Ortega*, 480 U.S. 709 (1987). In *O'Connor*, a plurality of this Court reiterated that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government," *id.* at 717, and announced that government employees' expectations of privacy in the workplace must be judged by the "operational realities of the workplace," *id*. at 715. As a result, the analysis is necessarily fact-driven and requires an examination of all the circumstances surrounding the search. While petitioners state that they agree with the sound principles under *O'Connor*, their analysis suggests otherwise.

First, petitioners argue that Sergeant Quon cannot have a reasonable expectation of privacy given the employer-employee nature of his relationship with the City of Ontario. Pet. Br. 15, 29-31. In the petitioners' words, "[w]hatever expectation of privacy a sender or recipient of text-messages on a government employer's equipment can ever legitimately have – if any – certainly none existed within the operational realities of the Ontario Police Department." *Id*. at 29. However, *O'Connor* dispels this very argument, reiterating that government employees do not lose their constitutional rights by virtue of their employment.

Second, petitioners suggest that the Ninth Circuit failed to appreciate that the City of Ontario "had a written no-privacy policy that applied to the pager," *id*. at 15, 31-35, and that messages could be disclosed under the California Public Records Act, *id*. at 15,

35-41. In light of these "most salient facts of the case," *id*. at 15, petitioners argue that the Ninth Circuit erred. However, by carefully focusing only on those facts which support of their argument, petitioners mischaracterize the Ninth Circuit's decision as one that dramatically undercuts *O'Connor*'s "operational realities of the workplace" standard.

As stated by the Ninth Circuit, the "operational reality . . . was fundamentally transformed" within the Ontario Police Department "by Lieutenant Duke's conscious decision not to enforce" the general computer policy. App. 90. Both the Ninth Circuit and the district court recognized the City had no express policy governing the use of text-message pagers. *Id*. at 4, 47. Rather, Lieutenant Duke simply announced at a supervisory staff meeting that the City's computer policy would govern the use of the newly-acquired pagers. *Id*. at 48. His announcement was later documented in the minutes of the meeting. *Id*. The City never bothered to revise its computer policy to include the text-message pagers, nor did it ever issue a written directive to its employees. Furthermore, Lieutenant Duke modified his own announcement that the computer policy applied to the pagers by stating that he would not audit the text-messages as long as personnel paid for any overage charges. Thus, Lieutenant Duke – the only individual to announce a no-privacy policy for the pagers – implemented a different policy guaranteeing officers their privacy.

Moreover, petitioners faced the additional legal burden of having no lawful means to actually conduct their search without the consent of respondents. The text-messages were kept by Arch Wireless, and could only be disclosed after obtaining the consent of the plaintiffs. In the absence of such consent, the messages could not legally be turned over without violating the SCA. Because the SCA protects the communications from disclosure, those communications are statutorily exempted from the California Public Records Act. Against each of these factual and legal circumstances, the Ninth Circuit properly affirmed the district court's assessment of the operational realities of the workplace, and concluded that Sergeant Quon possessed a reasonable expectation of privacy in his messages.

Third, petitioners argue that the Ninth Circuit improperly relied upon a "less intrusive methods" analysis when considering the scope of the search. Pet. Br. 19, 45-52. This notion is quickly dispelled by both the opinion itself and the panel's concurring opinion in the denial of rehearing en banc. Instead, public employer searches for noninvestigatory, work-related purposes must be justified at their inception and must be reasonably related in scope and not excessively intrusive. *O'Connor*, 480 U.S. at 726.

Here, the Ninth Circuit erred in finding that petitioners' search was justified at its inception. In order to be justified at its inception, there must be reasonable grounds for suspecting that the search is necessary. Lieutenant Duke's policy of not auditing

the officers' messages in exchange for paying the overages rendered the search unnecessary for its stated purpose. The officers were told that if they felt the messages were work-related, they could contest the overage charges and not have to pay. App. 50. As the district court found, this practice "allowed, condoned and even encouraged" officers to exceed the character limit. *Id*. at 98. Consequently, a search designed to ensure that officers were not being required to pay for work-related text-messages was unnecessary under these particular circumstances.

Nevertheless, the Ninth Circuit properly found that the search was excessively intrusive in light of the narrow purpose of the search. The court carefully balanced the parties' interests and determined that the search was excessively intrusive when measured against the purpose of the search as found by the jury. As explained by the Ninth Circuit's concurring opinion in the denial of rehearing en banc, the court of appeals "did not apply a 'less intrusive means' test." *Id*. at 134.

Finally, the Ninth Circuit reviewed this Court's precedents, resulting in its determination that the remaining plaintiffs, Steve Trujillo, April Florio and Jerilyn Quon, each had a reasonable expectation of privacy. While challenging that determination, petitioners neglect to explain their belief that the Ninth Circuit's analysis is "mistaken." *Id*. at 61. The Ninth Circuit applied this Court's various principles and likened text-messaging – a primary method of communication in this country – to telephone calls and

letters. Finding no meaningful difference between these methods of communication, the Ninth Circuit found that the remaining plaintiffs possessed an expectation of privacy. In this sense, the Ninth Circuit's opinion is rather straightforward and a practical application of the rule of law.

Further, the existence of the SCA and the fact that the remaining plaintiffs were also employed by the City, but were never told that the computer policy applied to the pagers, bolsters their expectation of privacy. Indeed, Steve Trujillo, April Florio and Jerilyn Quon's expectations of privacy are reinforced by the City's violation of the SCA in order to obtain the personal communications. Sergeant Trujillo was also a SWAT member and likely aware of Lieutenant Duke's policy allowing officers to use the pagers for personal use as long as they pay for their overages. April Florio and Jerilyn Quon were dispatchers for the Police Department, but were never advised of Duke's announcement that purportedly incorporated text-messages into the computer policy. Consequently, the Ninth Circuit's conclusion that the remaining plaintiffs possessed a reasonable expectation of privacy is supported by the facts.

Accordingly, this Court should affirm the Ninth Circuit's opinion.

ARGUMENT

I. THE APPROPRIATE STANDARD FOR NON-INVESTIGATIVE SEARCHES BY GOVERNMENT EMPLOYERS IS SET FORTH IN *O'CONNOR V. ORTEGA*.

A. The Plurality In *O'Connor* Appropriately Reconciled The Privacy Interests Of Government Employees With Government Employers' Legitimate Interests In An Efficient Workplace.

The Fourth Amendment, as applied to the States and municipalities through the Fourteenth Amendment, *see South Dakota v. Opperman*, 428 U.S. 364, 365 (1976), protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." *id*. at 381 (quoting U.S. Const. amend IV). A person has Fourth Amendment rights only in those areas and items where he or she has "an expectation of privacy that society is prepared to consider reasonable." *O'Connor*, 480 U.S. at 715.

The reasonableness of a government employee's expectation of privacy in his or her workplace was addressed in *O'Connor*, the Court rejected the notion that public employees can never have a reasonable expectation of privacy in their place of work. Quite to the contrary, the Court declared that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *Id.* at 717; *see also id*. at 731 (Scalia, J.,

concurring in the judgment) ("Constitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer.").

"The operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable. . . ." *Id*. at 717. 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." *Id*. But the Court made it clear that an inquiry into whether an employee possesses a reasonable expectation of privacy is a highly fact-driven assessment of the *actual* working conditions. "Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *Id*. at 718.

Furthermore, when a right of privacy is implicated, courts must weigh the nature and quality of the intrusion against the governmental interests at stake. *Id*. at 719; *see also United States v. Place*, 462 U.S. 696, 703 (1983) and *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967). Thus, in the case of searches conducted by a public employer, the invasion of an employee's legitimate expectations of privacy must be balanced against the government's need for supervision, control, and the efficient operation of the workplace. *O'Connor*, 480 U.S. at 719-20.

Accordingly, public employer intrusions on the constitutionally protected privacy interests of employees for noninvestigatory, work-related purposes are to be "judged by the standard of reasonableness under all the circumstances." *Id*. at 725-26. Under this reasonableness standard, both the "inception" and the "scope" of the intrusion must be reasonable:

> Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.

O'Connor, 480 U.S. at 726 (citations and internal quotation marks omitted).

The search will be permissible in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

B. This Court Should Adopt The *O'Connor* Plurality As A Majority Decision.

1. *O'Connor*'s Case-By-Case Approach To Assessing A Public Employee's Fourth Amendment Rights Is The Only Practical Manner In Which To Deal With The Divergent Workplaces That Exist.

In *O'Connor*, this Court made it clear that "[w]e have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable." *O'Connor*, 480 U.S. at 715. Instead, the Court must rely on such factors as "the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Id*. (citing *Oliver v. United States,* 466 U.S. 170, 178 (1984)).

Thus, *O'Connor*'s approach to determining the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, requires an extensive analysis of the case-specific facts. Such analysis is necessarily fact-driven and all of the relevant factual circumstances surrounding the search must be considered.

In *O'Connor*, this Court introduced and applied its "operational realities of the workplace" standard for determining whether an individual possessed a reasonable expectation of privacy. In *O'Connor*, the

Court unanimously recognized that Dr. Ortega had a reasonable expectation of privacy in his office and file cabinets. *O'Connor*, 480 U.S. at 718. That recognition was based upon record evidence disclosing the various operational practices, including that Dr. Ortega did not share his desk or file cabinets with other employees and that he occupied the office for 17 years and stored private property there. *Id.* Moreover, the employer did not establish any legitimate regulation or policy discouraging employees from storing personal property in their offices. *Id*.

The dissent in *O'Connor* agreed that "[g]iven . . . the number and types of workplace searches by public employers that can be imagined – ranging all the way from the employer's routine entry for retrieval of a file to a planned investigatory search into an employee's suspected criminal misdeeds – development of a jurisprudence in this area might well require a case-by-case approach." *Id*. at 733 n.2 (Blackmun, J. dissenting). Simply put, there would be no other way to accurately assess an employee's expectation of privacy without considering the unique situations presented by each employer's working conditions.

2. Circuit Courts Have Successfully Relied On This Framework.

The principle in *O'Connor* that the reasonableness of public employees' privacy expectations are to be measured on a case-by-case basis has become the rubric by which the circuit courts assess such cases.

Without question, those courts have successfully evaluated the actual working conditions, by assessing the various nuances within each employment setting.

For example, the Second Circuit, in *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001) (Sotomayor), adopted the *O'Connor* approach to determine whether, under the "particular facts of [the] case," a New York state employee had a right to privacy in the contents of his work computer. *Id*. at 73-76 (citing *O'Connor*, 480 U.S. 709).

The Fourth Circuit, in *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000), considered whether an engineer employed by the CIA had a reasonable expectation of privacy regarding information stored on his office computer. In its discussion of the Fourth Amendment, the Court cited a Seventh Circuit case to establish that the "holding of the *O'Connor* plurality governs" its analysis of whether government employees have a legitimate expectation of privacy in their workspaces. *See id.* at 398 (citing *Shields v. Burge*, 874 F.2d 1201, 1203-04 (7th Cir. 1989)). The Court went on to conduct a fact-intensive analysis consistent with the case-by-case rule outlined in *O'Connor*.

The Fifth Circuit, in *United States v. Johnson*, 16 F.3d 69 (5th Cir. 1994), articulated the *O'Connor* approach in appraising the reasonableness of a government employer's search of an employee's office in the wake of the employee's arrest. *See id*. at 73-74 (explaining that the employer's intrusion should "be

judged by the standard of reasonableness under all the circumstances." (quoting *O'Connor*, 480 U.S. at 725-26)). The Sixth Circuit, in *American Postal Workers Union, Columbus Area Local AFL-CIO v. U.S. Postal Service*, 871 F.2d 556, 560 (6th Cir. 1989), expressly adopted the *O'Connor* case-by-case approach to analyze whether postal employees had a reasonable expectation of privacy regarding the contents of their work lockers.

Likewise, the Seventh Circuit, in *Gossmeyer v. McDonald*, 128 F.3d 481, 490 (7th Cir. 1997), used the *O'Connor* approach to determine whether a state child protective investigator had a reasonable expectation of privacy regarding the contents of a personally-owned file cabinet located in her government office. *Id*. at 496 ("The [*O'Connor*] plurality observed that given the variations of work environments in the public sector, an employee's reasonable expectation of privacy must be assessed on a case-by-case basis." (citing *O'Connor*, 480 U.S. at 718)). The Seventh Circuit has since stated its understanding that *O'Connor* "necessarily requires a case-by-case inquiry." *Narducci v. Moore*, 572 F.3d 313, 321 (7th Cir. 2009).

The Eighth Circuit, in *United States v. Thorn*, 375 F.3d 679 (8th Cir. 2004), *vacated on other grounds by* 543 U.S. 1112 (2005), utilized the *O'Connor* framework in analyzing whether a government employee had a reasonable expectation of privacy in his office and the contents of his office computer. *Id*. at 683-85 (analyzing particularized facts of the case under *O'Connor* standard).

The Court of Appeals for the District of Columbia Circuit, in *Stewart v. Evans*, 351 F.3d 1239 (D.C. Cir. 2003), relied on *O'Connor* to determine whether a federal employee had a reasonable expectation of privacy to personal documents kept in a safe by her employer. *See id.* at 1243 ("[T]he reasonableness of an expectation of privacy . . . is understood to differ according to context. . . ." (quoting *O'Connor*, 480 U.S. at 715)).

Accordingly, a review of the various Circuit Courts demonstrate that *O'Connor*'s case-by-case approach has been successfully applied by the several circuits without question.

II. BY ILLEGALLY OBTAINING AND REVIEWING THE TRANSCRIPTS FROM ARCH WIRELESS, IN VIOLATION OF THE STORED COMMUNICATIONS ACT, THE ONTARIO DEFENDANTS VIOLATED SERGEANT QUON'S FOURTH AMENDMENT RIGHTS.

A. Sergeant Quon Had A Reasonable Expectation Of Privacy In His Text-Messages.

1. The City's Only Written No-Privacy Policy Did Not Expressly Apply To Text-Message Pagers.

Although "legitimate regulation" may reduce public employees' expectation of privacy in the workplace, *O'Connor*, 480 U.S. at 717 (plurality opinion), here, the City of Ontario had none. While many employers

may have explicit no-privacy policies regarding computers and electronic communications equipment that include text-messages, the City of Ontario never amended its computer policy to include text-message pagers. Both the district court and the Ninth Circuit reviewed the record evidence and found that the City did not have an explicit policy governing the use of text-message pagers. App. 4, 47.

Instead, the City maintained a general "Computer Usage, Internet and E-mail Policy" which does not mention the pagers. That policy dealt specifically with the use of email and computer Internet usage, but never indicated that it applied to any other electronic devices, let alone alphanumeric pagers issued and maintained by an outside vendor.[3] Although, petitioners are quick to emphasize in their brief with great detail the no-privacy warning given to Quon and Trujillo, the fact remains that it has no legal effect.

In 2000, well before the text-message pagers were acquired, Quon and Trujillo signed the acknowledgment form indicating they were aware of the computer policy. Since they signed the acknowledgment forms before the City ever acquired the pagers, and because the policy clearly does not encompass pagers, the City's computer policy in and of itself

[3] Indeed, the computer policy explicitly applies to the "use of City-owned computers and all associated equipment. . . ." App. 151.

could never be viewed as a "legitimate regulation" that would reduce plaintiffs' expectation of privacy in the content of their text-messages. Under such an analysis, this case would be more akin to *O'Connor*, where no written policy existed.

2. Lieutenant Duke Established The Department's Policy That It Would Not Review Text-Messages.

Approximately eight months after obtaining the text-message pagers and knowing that the City did not have a written policy governing the use of those pagers, Lieutenant Duke, a Commander with the Ontario Police Department's Administration Bureau, informed his supervisory staff at a meeting that the text-messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." App. 5-6.

Thus, it was Lieutenant Duke who made the *sole* pronouncement that the City's computer usage policy now applied to the text-message pagers. That Lieutenant Duke is the only individual to ever establish the City's policy on text-message pagers defeats much of petitioners' claims.

First, that Lieutenant Duke would have to announce that the computer policy applied to the text-message pagers demonstrates that the written policy did not encompass the pagers. Why would Lieutenant Duke need to announce something that was already

spelled out in the policy? As a result, and as explained above, the existence of the computer policy by itself does not aide petitioners.

Second, and more importantly, it was also Lieutenant Duke who modified *his own* pronouncement that the policy applied. Buried in their argument, petitioners suggest that it was Chief Scharf who established the policy that the computer policy applied to the pagers. However, it was not. Lieutenant Duke made *his* pronouncement at the staff meeting and *his* pronouncement was memorialized in "the minutes" which were distributed to supervisory staff.

The April 29, 2002 memorandum from Chief Scharf contained the subject header: "SUPERVISORY STAFF MEETING MINUTES – APRIL 18, 2002." *See* J.A. 28. The memorandum, which read as minutes, contains separate headers for each supervisor's announcements. Under the header, "LT. DUKE," Lieutenant Duke indicated a "[r]eminder that two-way pagers are considered e-mail messages. This means that messages would fall under the City's policy as public information and eligible for auditing." *Id*. at 30. Chief Scharf made his announcements separate from Lieutenant Duke. *See id.* at 31. As a result, the only person responsible for advising Sergeant Quon that the computer policy governed the use of the pagers was Lieutenant Duke.[4]

[4] Petitioners' suggestion that it was the Police Chief that formally expanded the "computer" policy to the text pagers is

(Continued on following page)

The fact that Lieutenant Duke is the only individual to attempt to establish a "no-privacy" policy that applied to the pagers is important. It renders Sergeant Quon and Trujillo's expectation of privacy objectively reasonable since the only individual to initially say they had no privacy later said that they did. Petitioners' argument that "Lieutenant Duke, in fact, lacked the power to countermand the official policy because . . . he was not a Department policy-maker" – simply carries no weight. Pet. Br. 42. The petitioners cannot have it both ways. Petitioners cannot wield Lieutenant Duke with policy-making authority to incorporate text-messages into the computer policy, but in the next breath claim he lacks the authority to amend the very same policy he enacted.

Here, the district court found 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. Given that Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, his statements carry a great deal of weight. Indeed, before the events that transpired in this

---

without force. The minutes contain announcements by several individuals on a myriad of subjects, including the distribution of flag ribbons, J.A. 29 (announcement by Detective Courtney), and a requirement to sign out any training videos, J.A. 32 (announcement by Sergeant Cover). Merely announcing something at a meeting does not make it policy simply because the Chief of Police happened to be in the room.

> case, the department did not audit any employee's use of the pager for the eight months the pagers had been in use.

App. 90.

The district court found that Lieutenant Duke's actions "fundamentally transformed" the "operational reality" within the Department, and "[b]y doing so, Lieutenant Duke effectively provided employees a reasonable basis to expect privacy in the contents of the text-messages they received or sent over their pagers; the only qualifier to guaranteeing that the messages remain private was that they pay for any overages." *Id*. at 90-91. Accordingly, Lieutenant Duke's policy of not auditing the pagers became the context by which the Department operated an express policy that Sergeant Quon and Trujillo could and did reasonably rely upon.

The Ninth Circuit was guided by the fact that public employer searches must be guided by the "standard of reasonableness *under all the circumstances*." *Id*. at 30-31 (citing *O'Connor*, 480 U.S. at 725-26). The analysis is necessarily fact-driven, and all the factual circumstances surrounding the search must be considered. Here, both the district court and the Ninth Circuit considered all of the record evidence and reached the same conclusion, namely that Sergeant Quon possessed a reasonable expectation of privacy in his text-messages.

O'Connor's "operational realities" approach has been applied under virtually identical facts in the

U.S. Court of Appeals for the Armed Forces. In *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006), the court was presented with questions "regarding the reasonable expectation of privacy a military person has in e-mail messages sent and stored on a government computer system." *Id*. at 58. The service member was charged with violations of the Uniform Code of Military Justice, based upon several e-mails that she had sent and received. *Id*. at 59. She brought a suppression motion claiming that the e-mails were obtained in violation of her Fourth Amendment rights.

In analyzing her claim, the court of appeals understood that the inquiry into one's expectation of privacy "is understood to differ according to context" and that the case involved "emails sent and received on a government computer." *Id*. at 61. The court was also well aware "the military workplace is not the usual workplace envisioned by the Supreme Court in *O'Connor*" and the "military workplace can range from an office building to a bunker or tent in a combat zone." *Id*. at 62. In addition, the court was aware that every time an employee logged in to their email, a notification banner was displayed that informed the user that "[t]his is a Department of Defense computer system" and he or she should expect no privacy in their communication. *Id*. at 60.

However, like the present case, the military's "network administrator" established an office practice of not monitoring communications, because he felt it was "a privacy issue." *Id*. at 64. Although the emails were "originally prepared in an office in HQMC on a

computer owned by the Marine Corps and issued to [the employee]," and "were transmitted over the HQMC network system, stored on the HQMC server, and retrieved by the HQMC network administrator," these factors could not overcome the "persuasive" testimony describing the actual "agency practices and policies." *Id*. Consequently, just as in the present case, "the policies and practices of [the government] reaffirm rather than reduce the expectations regarding privacy on office computers." *Id*.

3. An Employee's Reasonable Expectation Of Privacy Cannot Be Defeated Merely By Announcing That It Will Not Be Respected.

In *O'Connor*, the Solicitor General and petitioners argued that public employees can never have a reasonable expectation of privacy in their place of work. *O'Connor*, 480 U.S. at 717. However, this Court rejected that notion, stating that individuals do not lose Fourth Amendment rights merely because they work for the government. As a result, the "operational realities of the workplace" standard was adopted.

Here, the Solicitor General and petitioners again make the exact same argument. Petitioners suggest that because the employment relation is that of a police officer and police department, no expectation of privacy can ever exist. Pet. Br. 29; *see also* Amicus Br., United States, 12. In that same vein, petitioners

suggest that by simply enacting a far-reaching no-privacy policy – which Ontario did not do here – an employer could completely extinguish an employee's expectation of privacy. However, that position has already been foreclosed.

In *Smith v. Maryland*, 442 U.S. 735 (1979), the Court wrote:

> Situations can be imagined, of course, in which *Katz*' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. . . . In such circumstances, where an individual's subjective expectations had been 'conditioned' by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a 'legitimate expectation of privacy' existed in such cases, a normative inquiry would be proper.

Smith, 442 U.S. at 740 n.5.

Indeed, in *O'Connor*, a majority of Justices found that the "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make

reasonable intrusions in its capacity as employer." *O'Connor*, 480 U.S. at 731 (Scalia, J., concurring); *id.* at 738 (Blackmun, J., dissenting) (quoting Justice Scalia). "[L]egitimate regulation" may only *reduce* a public employee's expectations of privacy in the workplace. *O'Connor*, 480 U.S. at 717.

An opposite rule, along the lines that petitioners suggest, would essentially result in the complete evisceration of Fourth Amendment rights by public employees – something this Court has already denounced. *See Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (public employees do not surrender all of their rights by virtue of their employment).

Similarly, in *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), this Court held that random drug testing of student-athletes constituted a "search" under Fourth Amendment principles, even though the school put the student-athletes on notice that such drug testing would be mandatory and required consent.

An employee's expectation of privacy must be assessed in the context of the employment relation, which includes an assessment of all workplace conditions. To allow a no-privacy policy to completely disavow all employees' expectations of privacy, without regard for the unique circumstances existing in the workplace, would not be legitimate regulation.

4. The California Public Records Act Has No Applicability To Records Maintained By Arch Wireless.

Petitioners argue that respondents' expectation of privacy is diminished by the existence of the California Public Records Act (hereinafter "CPRA"), Cal. Gov't Code § 3250 et seq., as a "related operational reality attendant to Sergeant Quon's employment as a SWAT officer." Pet. Br. 35. To make this argument, petitioners adopt the Ninth Circuit's dissenting opinion that "[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. . . ." *Id*. (citing App. 142-43). However, petitioners have cited no cases, nor has research revealed any, where courts have found that the mere existence of the CPRA or its federal analog, the Freedom of Information Act (hereinafter "FOIA"), have been deemed to constitute an operational reality. *Cf. Brunner v. U.S.*, 70 Fed. Cl. 623, 645 n.17 (2006) ("The Court holds that potential contractors cannot be imputed with knowledge of the contents of this manual . . . merely because an individual might ultimately secure the release of certain provisions of the manual by making a request under the Freedom of Information Act. . . .").[5]

---

[5] In the context of the FOIA, the Ninth Circuit has recognized that lower level officials generally have a stronger interest in personal privacy than do senior officials. *See Hunt v. FBI*, 972 F.2d 286, 289 (9th Cir. 1992). This Court has further distinguished

(Continued on following page)

Even if the CPRA amounts to an "operational reality," respondents' text-messages were not public records under the CPRA. Public records are defined by the CPRA 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). Here, the City of Ontario did not prepare, own, use, or retain the text-messages. And, as explained further below, the City had no legal right or means to access the content of plaintiffs' text-messages without their consent. *See* App. 20-21 ("When Arch Wireless knowingly turned over the text-messaging transcripts to the City, . . . it violated the [Stored Communications Act].").

Furthermore, disclosure is specifically exempted under the CPRA when the disclosure is prohibited by statute. Cal. Gov't Code § 6254(k). In those cases, the document is not considered "a writing" under the CPRA. *See id*.; *see also Copley Press, Inc. v. Superior Court*, 141 P.3d 288 (Cal. 2006) (holding police records at issue were exempted from disclosure under the CPRA by penal code provision); *Int'l Fed'n of Prof'l and Technical Eng'rs, Local 21, AFL-CIO v. Superior Court*, 165 P.3d 488 (Cal. 2007). Because disclosure of the text-messages in this case is exempted under

---

between those public records which are "hard to obtain," and those records that are "freely available." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763-64 (1989).

California Government Code section 6252(k), the messages do not fall under the purview of the CPRA. Accordingly, petitioners' argument that the CPRA diminishes respondents' expectation of privacy necessarily fails.

Curiously, petitioners cite a few district court cases to show that some CPRA requests have been litigated. Pet. Br. 39 n.4. Those cases seem to do more harm than good to petitioners' argument. For example, the court in *State ex rel. Glasgow v. Jones*, 894 N.E.2d 686 (Ohio 2008), held that the request made under Ohio's Public Record Act for e-mail messages, text-messages, and correspondence sent to and from a state representative over a general period of time in her official capacity in the General Assembly was overbroad. The court noted that "[t]he requested text-messages and correspondence, however, are not records. The evidence is uncontroverted that Jones's text-messages do not document work-related matters. They are therefore not records subject to [the Ohio Public Records Act]." *Id*. at 691.

The disclosure of the text-messages at issue in this case violated the Stored Communications Act. As such, those messages are exempted from the CPRA by statute. Thus, the CPRA is not an operational reality as contemplated in *O'Connor*. As the district court reasoned, "There is no evidence before the [c]ourt suggesting that CPRA requests to the department are so widespread or frequent as to constitute 'an open atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable.'" App.

31-32 (quoting *Leventhal,* 266 F.3d at 74). While a member of the public might have been free to request Sergeant Quon's text-messages under the CPRA, there were no legal means by which they could actually have been obtained absent his consent. As such, the mere existence of the CPRA does not diminish the plaintiffs' expectation of privacy under the facts of this case.

5. The Release Of The Text-Messages To The City And The Concomitant Violations Bolster Each Plaintiffs' Expectation Of Privacy.

Respondents agree with the premise underlying petitioners' CPRA argument – that statutes may indeed reflect whether society is willing to recognize an expectation of privacy as reasonable. *See, e.g., Florida v. Riley*, 488 U.S. 445, 451 (1989) (plurality opinion) (analyzing defendant's expectation of privacy by reference to FAA regulations); *California v. Greenwood*, 486 U.S. 35, 55 n.4 (1988) ("To be sure, statutes criminalizing interference with the mails might reinforce the expectation of privacy in mail. . . ."); *Doe v. Broderick,* 225 F.3d 440, 450 (4th Cir. 2000) (recognizing that a criminal statute prohibiting release of medical records is "relevant to the determination of whether there is a 'societal understanding' that [a patient] has a legitimate expectation of privacy in his treatment records"); *Rosales v. City of Los Angeles*, 82 Cal. App. 4th 419 (2000) (evaluating whether peace officers have an expectation of

privacy in light of state laws). Here, the SCA, as well as various state statutes, demonstrate society's recognition of a reasonable expectation of privacy in text-messaging given the context of this case.

The Ninth Circuit held that Arch Wireless violated the SCA by divulging Sergeant Quon's text-messages to the City of Ontario. App. 20-21. The SCA prevents "providers" of communication services from divulging electronic communications to certain entities and/or individuals. *Id*. at 13. In short, the SCA lawfully permits a provider of a "remote computing service" (hereinafter "RCS") to divulge communications "with the lawful consent of . . . the subscriber." 18 U.S.C. § 2702(b)(3). However, the SCA only permits providers of an "electronic communication service" (hereinafter "ECS") to divulge communications with the lawful consent of "an addressee or intended recipient of such communication." *Id.* § 2702(b)(1), (b)(3). In this case, it was undisputed that the City of Ontario was a "subscriber" of the service, and plaintiffs were either "addressee[s] or intended recipient[s]." App. 14.

The Ninth Circuit reviewed the plain language of the SCA as well as its rather unambiguous legislative history to find that Arch Wireless' services were properly considered an ECS under the SCA. Since Arch Wireless provided an ECS, it could not lawfully disclose the text-messages without permission of an "addressee or intended recipient." Accordingly, the

Ninth Circuit held that Arch Wireless' disclosure violated the SCA.[6]

That the SCA would foreclose Arch Wireless from disclosing the text-messages in question to the City of Ontario reinforces the reasonableness of all plaintiffs' expectations of privacy. Congress passed the SCA in 1986 as part of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522, 2701-2712. *See* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1209-13 (2004). It was enacted with the understanding that with the advent of the Internet came a host of potential privacy breaches that the Fourth Amendment does not address. *Id.* The legislative history behind the SCA indicates that the legislature was concerned that "Americans have lost the ability to lock away a great deal of personal and business information." S. Rep. No. 99-541, at 3 (1986), *as reported in* 1986 U.S.C.C.A.N. 3555, 3556-57. The SCA was therefore enacted to instill a sense of security amongst users of electronic communications, including individuals like plaintiffs.

Because the SCA was enacted for the very purpose of instilling a sense of security amongst

---

[6] Arch Wireless sought panel review and review en banc. Judge Ikuta issued a decision dissenting from the denial of rehearing en banc, but did not express any opinion about the Ninth Circuit's decision with regard to the SCA claim against Arch Wireless.

users, and because that very law prohibited the City from legally obtaining Sergeant Quon's transcripts, plaintiffs' expectation of privacy is objectively reasonable. Given the reality that the City could only view the communications with consent or by violating federal law, how could one not have a reasonable expectation of privacy?

Petitioners ask this Court to focus exclusively on three factors, each alleged to have eliminated Sergeant Quon's expectation of privacy. They include the police department/police employee relationship between Quon and the City, the existence of the City's written computer policy, and the existence of the California Public Records Act. Each of these factors are properly assessed under the *O'Connor* "operational realities" standard. However, the inescapable operational reality is that the City had no legal means to obtain the transcripts from Arch Wireless. Because the SCA precluded disclosure, the employment relationship and the City's policy authorizing an audit have no effect.[7]

---

[7] Petitioners also argue that plaintiffs had a lessened expectation of privacy in the pagers because "[p]ublic employees . . . often occupy trusted positions in society," Pet. Br. 29 (quoting *Garcetti*, 547 U.S. at 419), and "the public legitimately holds police officers to more rigorous standards of conduct than ordinary citizens." *Id*. at 30 (quoting *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008)). The district court soundly rejected this same argument stating that it "loses its salience in light of the particular circumstances of this case." *Id*. at 93. "Appeals to broad societal norms quickly give way once an employer, like the defendants in this case, promulgates and announces a policy to its employees detailing how much privacy to expect in using specified equipment. At that point such general norms are

(Continued on following page)

Consequently, each of these operational realities affirm the reasonableness of the plaintiffs' expectation of privacy.

The Fourth Amendment protects "expectation[s] of privacy that society is prepared to consider reasonable." *O'Connor*, 480 U.S. at 715 (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). By enacting the SCA, the legislature has decided that it is not only reasonable, but it is crucial that individuals maintain their privacy in their electronic communications.[8] Accordingly, it is reasonable for Sergeant Quon, and the remaining plaintiffs, to rely upon the SCA as a guarantee that their text-messages would not be reviewed.

---

trumped by the *particular* norm that was implemented in the work place in question." *Id*. (quoting *United States v. Ziegler*, 456 F.3d 1138, 1145 (9th Cir. 2006) ("[W]e take societal expectations as they are, not as they could or (some think) should be.")).

[8] In addition, the California Invasion of Privacy Act, California Penal Code § 630 et seq., recognizes the privacy rights of its citizens in their telegraphic and telephonic communications. Section 637 criminalizes the unauthorized disclosure of such communications by third parties.

6. The Operational Realities Of The Workplace Make Clear That Sergeant Quon Had A Reasonable Expectation Of Privacy In His Text-Messages.

O'Connor holds that an employee's expectation of privacy must be viewed in light of the "operational reality" of the workplace. *O'Connor*, 480 U.S. at 717. Here, the operational reality is that the City had no official policy governing the use of text-message pagers. App. 6. The only individual who ever allegedly informed Sergeant Quon that his text-messages were covered under the general computer policy, also "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*. at 30.

Indeed, Lieutenant Duke's policy was that he would not read the text-messages and would allow officers to maintain their privacy, as long as the officer in question paid the overage charge. *Id*. Quon was told, "if you don't want us to read it, pay the overage fee." *Id*. at 8. And in fact, Quon paid the overages 3 or 4 times and was not audited. *Id*. at 31.

Furthermore, Lieutenant Duke's policy-making authority – a factual dispute not presented to the district court – is irrelevant here. The City is content to rely upon Lieutenant Duke's policy that the text-message pagers are covered by the computer policy. However, in doing so, the City must be prepared to accept his ability to modify that same policy through

what petitioners label as an "accommodation." Pet. Br. 42. In any event, whether a decision-maker possesses final authority to establish municipal policy is only necessary to determine whether liability attaches to a municipality. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-82 (1986). Here, the task before the Court is a fact-specific inquiry into whether an expectation of privacy is reasonable in light of the "operational realities" of the workplace. Since Lieutenant Duke effectively set the policy, it would of course not be unreasonable to rely on his change of that policy.

Finally, the existence of the CPRA has no impact on the Court's "operational reality" analysis because Sergeant Quon's text-messages are not public records as defined by the CPRA. California Government Code section 6254(k) provides an exemption for "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law. . . ." Since the disclosure of Sergeant Quon's text-messages was prohibited from disclosure under federal law, namely the SCA, those messages could not be disclosed under the CPRA. It follows that because the CPRA statutorily exempted the text-messages from disclosure, the CPRA cannot possibly be considered to have been part of Quon's operational reality. Since the City had no lawful means to obtain the text-messages and they are not subject to disclosure under the CPRA, Sergeant Quon maintained a reasonable expectation of privacy. Both the district court and the Ninth Circuit's ruling on these disputed facts are not clearly

erroneous and should thus be upheld. *See Blau v. Lehman*, 368 U.S. 403, 408-09 (1962); *Faulkner v. Gibbs*, 338 U.S. 267, 268 (1949); *United States v. Dickinson*, 331 U.S. 745, 751 (1947) (The "two-court" rule is the "long-established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous.").

B. The City's Search Of Sergeant Quon's Text-Messages Was Unreasonable.

1. The Search Was Not Justified At Its Inception.

The Fourth Amendment's protection against "unreasonable" searches is enforced by "a careful balancing of governmental and private interests." *T.L.O.*, 469 U.S. at 341. Thus, after it is established that an employee has a reasonable expectation of privacy, the search must also be reasonable under all the circumstances. "[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, . . . should be judged by the standard of reasonableness under all the circumstances." *O'Connor*, 480 U.S. at 725-26. Under this standard, courts must evaluate whether the search was "justified at its inception," and whether it "was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 726.

Ordinarily, a search is reasonable "at its inception" if "the search is *necessary* for a noninvestigatory

work-related purpose." *Id*. at 726 (emphasis added). Here, a jury decided that the purpose of the search was to insure that officers were not being required to pay for work-related text-messages. App. 33-34. Thus, the relevant question before this Court is whether the search of Sergeant Quon's private text-messages is *necessary* to insure that he was not being required to pay for work-related messages. The clear answer to this question is that it could not be.

First and foremost, a search that can only be accomplished through unlawful means can never be considered reasonable under the Fourth Amendment. It was not necessary to violate federal law in order for the City to determine whether Sergeant Quon was being required to pay for work-related text-messages. *See* App. 35-36 (Ninth Circuit's discussion of other ways in which the efficacy of the character limit could have been verified).

The *O'Connor* analysis presumes that the government has both the authority and the means to conduct the search. But because petitioners violated the SCA in this case, one can only conclude that they did not have the authority to conduct the search. As such, the search could not have been justified at its inception.

Notwithstanding this glaring defect, both lower courts agreed with petitioners, concluding with no analysis that a search to reveal the efficacy of the character limit is a legitimate work-related rationale and thus justified at its inception. App. 34, 102-03.

However, the proper focus is not only whether the employer has a legitimate purpose, but whether the search is "necessary" to achieve that purpose. *O'Connor*, 480 U.S. at 726.

The City had no reasonable basis to believe the search was necessary. The City already knew that officers were electing to pay overages rather than have their messages audited. More importantly, the officers were well aware that if they believed the overages resulted from work-related messages, they could contest the charge and have their messages reviewed. In practice, this process worked well. Officers paid for any overages and if they felt that the overages were for work-related matters they could contest the charge. The record is clear that Lieutenant Duke simply grew tired of being a bill collector. Since the City had already implemented safeguards to insure that the officers were not being forced to pay the City's bill, it is impossible to conclude that the search was "necessary." Because it was not necessary, it was not justified at its inception; and because it was not justified at its inception, it was unreasonable under *O'Connor*.

Furthermore, the district court specifically found that Lieutenant Duke's policy could not be said to reveal "misconduct," since Lieutenant Duke's actions "allowed, condoned, and even encouraged" officers to go over the character limit. App. 98. The district court indicated, "[i]n light of Lieutenant Duke's policy, the search would not have revealed misconduct; rather, it would have uncovered conduct permitted by

Lieutenant Duke to occur." *Id*. at 98-99. The factual finding made by the district court – that Lieutenant Duke's policy encouraged officers to exceed the monthly character limit (in return for paying the overage charges) – proves that the search lacked a reasonable basis, which also renders it unreasonable at its inception.

2. The Search Was Unreasonable In Scope And Was Excessively Intrusive.

A search is reasonable in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." *O'Connor*, 480 U.S. at 726 (quoting *T.L.O.*, 469 U.S. at 342). Here, the Ninth Circuit balanced the competing interests, and held that there was a serious disconnect between the purpose of the search and the means in which the search was carried out. In light of the fact that the City explicitly agreed to maintain Sergeant Quon's privacy so long as he paid his overage charges, and because Lieutenant Duke's practice actually encouraged officers to exceed the character limit, the City's search was found by the Ninth Circuit to be excessively intrusive.

First, Sergeant Quon's Fourth Amendment rights are significant. The officers were specifically afforded the right to use the pagers for personal communication. In that regard, the pagers were issued to the

SWAT members as a benefit in order to relieve the City of financial liability for forcing them to be on-call 24 hours a day, 7 days a week. The written computer policy allows personal communication, and as the district court found, Lieutenant Duke's unwritten policy actually encouraged officers to use the pagers for that purpose. Thus, the City specifically allowed the officers to use the pagers as a *primary* method of personal communication, in addition to work-related business. In light of this, Quon's expectation of privacy is great and his interests are significant.

Petitioners fail to explain why Quon has no protected interest in using his pager for personal communications. Pet. Br. 45. Petitioners ignore the purpose for acquiring the pagers and their own written policy which expressly allows personal communication. Also, petitioners make no mention of Lieutenant Duke's privacy policy. That some of Sergeant Quon's messages were eventually discovered to be sexual in nature adds nothing to the analysis. In fact, many of Sergeant Quon's messages were sent off-duty and were not sexual in nature.

Second, contrary to petitioners' suggestion, the City's interest justifying the search was hardly as broad as to ensure "the work of the agency is conducted in a proper and efficient manner." *Id*. at 46 (citing *O'Connor*, 480 U.S. at 724). Rather, the purpose of the search was to determine if officers were paying for work-related charges – something the officers were already told they could challenge if they thought was the case. As a result, the Ninth Circuit

was charged with balancing these competing interests and found the search excessively intrusive. In light of all the circumstances, the finding is relatively straightforward.

In this regard, the most glaring problem with the petitioners' actions is that they opted to review the contents of all of Sergeant Quon's text-messages, work-related and personal, without his consent, and in violation of the SCA. The City did this despite Lieutenant Duke's stated policy stating that they would not. Thus, the Ninth Circuit properly held that Sergeant Quon's reasonable expectation of privacy – established primarily by the City itself – was not overcome by the City's interest in determining the efficacy of the character limit.

In *Narducci*, an employee brought a Fourth Amendment claim against his employer for surreptitiously recording phone calls in the department that he worked in. *Narducci*, 572 F.3d at 316-18. The employer recorded all phone calls, including personal calls, for the purpose of monitoring threatening calls. *Id*. at 321. The Seventh Circuit applied the *O'Connor* analysis, and found that the search was excessively intrusive in "that recording every single phone call made on those lines for years without ever notifying the employees was not a reasonable scope for the search." *Id*. In other words, the search was excessively intrusive in light of its purpose.

In contrast, in *Leventhal*, a government employee's computer was searched after receiving an

anonymous tip that the employee was engaging in misconduct by conducting personal affairs during work hours. *Leventhal*, 266 F.3d at 75. Acknowledging that the employee had an expectation of privacy in his computer, the employer implemented a systematic approach to searching his computer. *Id*. at 76. Rather than simply start opening up files and running programs, the employer began by printing out a list of file names to determine if the file names revealed whether they were work-related or not. After determining that certain files, based upon their names, were not work-related and therefore evidence of misconduct, the employer conducted three subsequent searches that consisted of copying the identified files and opening a few of them. *Id*. at 76-77. As a result, the Second Circuit carefully balanced the scope of the search and found that it was not excessively intrusive. *Id*. at 76.

Here, the Ninth Circuit identified several ways in which the City could have verified the efficacy of the character limit in order to demonstrate that the search was "excessively intrusive" under *O'Connor*:

> [T]he Department could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame. Alternatively, if the Department wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to

> redact personal messages and grant permission to the Department to review the redacted transcript. Under this process, Quon would have an incentive to be truthful because he may have previously paid for work-related overages and presumably would want the limit increased to avoid paying for such overages in the future. *These are just a few of the ways in which the Department could have conducted a search that was reasonable in scope*.

App. 35-36 (emphasis added).

Reviewing all of the text-messages is an excessive manner in which to determine if the City needed to increase its character allotment. This is particularly so here, where the City told the officers it would not review their messages as long as they paid the overages and the officers did in fact pay the overages without issue. Petitioners opted to review all the messages – work-related and personal. This was excessively intrusive in light of the noninvestigatory object of the search. Under all the circumstances, the search was not reasonable in scope.

Finally, contrary to petitioners' suggestion, the Ninth Circuit did not adopt or apply a "less intrusive means" test for determining whether the search was reasonable. In the concurring opinion in support of denial of rehearing en banc, Judge Wardlaw addressed this very issue, stating unequivocally that the court "did not adopt a 'less intrusive means.'" App. 133. The opinion makes clear the City's actions

were excessively intrusive in light of the noninvestigatory object of the search. *Id*. at 133-34. The Ninth Circuit reached this holding based on the conclusion that Quon's "reasonable expectation of privacy in those messages" was "not outweighed by the government's interest-again, as found by the jury-in auditing the messages." *Id*. at 134.

In short, petitioners clearly lacked any reasonable basis to conclude that such the search was necessary. Officers were allowed, both by written policy and Lieutenant Duke's practice, to use their pagers for personal matters. *See* Pet. Br. 57. Officers were advised that if they felt the overages were the result of work-related business, they could contest the charge. As a result, a search to determine the efficacy of the character limit was not necessary and a search that entails reviewing every message for that purpose is excessively intrusive. For these reasons, the search was unreasonable.

III. SINCE THE SEARCH WAS UNREASONABLE AS TO SERGEANT QUON, IT WAS ALSO UNREASONABLE AS TO HIS CORRESPONDENTS.

The district court, the Ninth Circuit, and now petitioners, all acknowledge that *O'Connor*'s plurality opinion guides this Court's analysis of the electronic communications sent and received via Sergeant Quon's text-message pager. Thus, *O'Connor* applies whenever the government infringes upon "an

employee's expectation of privacy that society is prepared to consider reasonable."[9] *O'Connor*, 480 U.S. at 715.

It is well-settled that, "since 1878, . . . the Fourth Amendment's protection against 'unreasonable searches and seizures' protects a citizen against the warrantless opening of sealed letters and packages addressed to him in order to examine the contents." *Ex parte Jackson*, 96 U.S. 727 (1877); *see also United States v. Jacobsen*, 466 U.S. 109, 114 (1984) ("Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy.").

Accordingly, in *Katz v. United States*, 389 U.S. 347 (1967), this Court held that individuals have a reasonable expectation of privacy in the content of their telephone calls and the placement of a listening device on a telephone violated the individual's Fourth Amendment right. The Court reasoned:

> One who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the

[9] Petitioners do not dispute that all plaintiffs maintained a subjective expectation of privacy in the sending and receiving of text-messages. App. 88 n.6.

> public telephone has come to play in private communication.

Id. at 352.

However, this Court drew a meaningful distinction between the content of the communication, which is entitled to full Fourth Amendment protection, and the addressing information, such as the dialed telephone numbers, which are not protected. *See Smith,* 442 U.S. at 742. In *Smith*, this Court held that the use of a pen register – a device that records the phone numbers one dials – does not violate the Fourth Amendment because it did not acquire "the *contents* of communications." *Id.* at 741.

Thus, *Katz* and *Smith* held that a telephone caller does not forfeit his privacy right in the contents of the conversation, even though "[t]he telephone conversation itself must be electronically transmitted by telephone company equipment, and may be recorded or overheard by the use of other company equipment." *Smith*, 442 U.S. at 746 (Stewart, J., dissenting). These combined precedents recognize a heightened protection of the content of the communications.

The Ninth Circuit has applied these principles in two important decisions. In *United States v. Hernandez*, 313 F.3d 1206 (9th Cir. 2002), the Ninth Circuit applied the rationale from *Smith* to written letters, holding that individuals maintain privacy in the content of their written letters, but do not enjoy a reasonable expectation of privacy in what they write

on the outside of the envelope. *Id*. at 1209-10. In *United States v. Forrester*, 512 F.3d 500 (9th Cir. 2008), the Ninth Circuit extended the pen register and outside-of-envelope rationales to the "to/from" line of e-mails, stating that "e-mail . . . users have no expectation of privacy in the to/from addresses of their messages . . . because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information." *Id*. at 510.

Over 40 years later, after *Katz* was decided, one cannot ignore the vital role that electronic communications, like text-messaging, has come to play in today's private communications. The content of a text-message is the modern-day equivalent of the content of a sealed postal letter and the substance of a telephone conversation. Whether we like it or not, text-messaging is steadily becoming the primary manner of communication for the masses.[10]

Circuit courts have found that individuals do have an expectation of privacy in the content of a text-message. *Quon v. Arch Wireless Operating Company, Inc.*, 529 F.3d 892, 905 (9th Cir. 2008); *Warshak v. United States*, 490 F.3d 455, 473-75 (6th

[10] As of June 2008, over 75 billion text-messages are sent every month. To put that into perspective, a typical U.S. mobile subscriber sends or receives 357 text-messages per month, compared to placing or receiving 204 phone calls. *See* CellSigns, Text-Message Statistics, http://www.cellsigns.com/industry.shtml (last visited Mar. 12, 2010).

Cir. 2007), *vacated on other grounds*, 532 F.3d 521 (2008) (en banc); *cf. United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007) (finding reasonable expectation of privacy in text-messages). While the contents of electronic communications are given to a provider in a way that content of a letter is not, providers do not monitor the content of the communications. *Quon*, 529 F.3d at 895-96 (Text-messages are sent and received via a radio frequency transmission and are kept on a computer network and distributed electronically); *Warshak*, 490 F.3d at 473-75. That Arch Wireless may have been able to access the contents of the messages for its own purposes also does not defeat a sender's reasonable expectation of privacy. *See United States v. Heckenkamp*, 482 F.3d 1142, 1146-47 (9th Cir. 2007) (holding that a student did not lose his reasonable expectation of privacy in information stored on his computer, despite a university policy that it could access his computer in limited circumstances while connected to the university's network); *United States v. Ziegler*, 474 F.3d 1184, 1189-90 (9th Cir. 2007) (holding that an employee had a reasonable expectation of privacy in a computer in a locked office despite a company policy that computer usage would be monitored).

Since there is virtually no difference between the privacy rights of the sender of text-messages and those of letters or telephone calls, the same standards apply. Accordingly, the Ninth Circuit found no meaningful

difference between the sending of letters and e-mails versus text-messages.

Furthermore, when an individual engages in communication with another individual, his or her reasonable expectation of privacy depends on that other individual. The Ninth Circuit noted that absent an agreement to the contrary, plaintiffs Trujillo, Florio, and Jerilyn Quon had no reasonable expectation that Sergeant Quon would maintain the private nature of their text-messages, or vice versa. *See United States v. Maxwell*, 45 M.J. 406, 418 (C.A.A.F. 1996) ("[T]he maker of a telephone call has a reasonable expectation that police officials will not intercept and listen to the conversation; however, the conversation itself is held with the risk that one of the participants may reveal what is said to others." (citing *Hoffa v. United States*, 385 U.S. 293, 302 (1966))). Thus, had Sergeant Quon voluntarily permitted the City to review his text-messages, the remaining plaintiffs would have had no privacy claims. *See United States v. White*, 401 U.S. 745 (1971) (no Fourth Amendment violation when the government gains one party's consent to eavesdrop on a telephone conversation). Since Sergeant Quon maintained an expectation of privacy in his text-messages, so too did the remaining plaintiffs.

Finally, petitioners argue that it would always be unreasonable to believe that a sender of a text-message to a government pager would have an expectation of privacy in the message. Pet. Br. 63. In order to have an expectation of privacy, petitioners

argue that the sender would have to believe that the recipient's employer does *not* have a no-privacy policy in place. Petitioners argue that such a belief would be unreasonable, presumably without examining the context or all of the relevant circumstances. The record involving the plaintiffs in this case is clear and contains no evidence that plaintiffs Florio and Jerilyn Quon were ever told by Lieutenant Duke that the computer policy governed the use of the pagers. As a result, the only evidence on this point is that they had no reason to believe the City could review the messages they sent to Sergeant Quon. *See* petitioners' Supplemental Excerpts of Record 303, 307 (declarations of Florio and Jerilyn Quon attesting to a lack of knowledge of any policy that would allow the City to review the private text-messages that were sent to Jeff Quon). Additionally, Sergeant Trujillo was a SWAT member and would have been aware of Lieutenant Duke's policy not to review the text-messages. Consequently, the facts support the reasonableness of the remaining plaintiffs' expectation of privacy based upon their own operational realities.

In short, the Ninth Circuit properly applied this Court's precedent to what is rapidly becoming the primary mode of communication for many citizens. Trujillo, Florio and Jerilyn Quon's expectations of privacy are all inherently linked with Sergeant Quon's in this case. Accordingly, the search was unreasonable as to all respondents.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's judgment should be affirmed in favor of respondents Jeff Quon, Steve Trujillo, April Florio and Jerilyn Quon.

March 2010

Respectfully submitted,

DIETER C. DAMMEIER
Counsel of Record
MICHAEL A. MCGILL
LACKIE, DAMMEIER & MCGILL
367 North Second Avenue
Upland, California 91786
Phone: (909) 985-3285
Facsimile: (909) 985-3299
Email: Dieter@policeattorney.com

Counsel for Respondents
Jerilyn Quon, April Florio,
Jeff Quon and Steve Trujillo