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 Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

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

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

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

INTERESTS OF *AMICI CURIAE*[1]

The League of California Cities (League) is an association of 480 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance. The Committee has identified this case as being of such significance.

[1] Pursuant to Rule 37.2(a) of the Rules of the Supreme Court of the United States, *amici curiae* provided at least ten days' notice of their intent to file this brief to counsel of record for all parties. The parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amici curiae* made a monetary contribution to this brief's preparation or submission.

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

The *amici*, as representatives of local public entities throughout California, have a vital interest in ensuring that their employees use municipal electronic equipment for proper purposes in order to avoid taxpayer rancor and municipal liability. If allowed to stand, the Ninth Circuit decision in this case, and its legal analysis, is likely to have significant adverse impacts on municipalities' ability to enforce written policies regarding use of government-issued equipment.

SUMMARY OF ARGUMENT

The City of Ontario has a written policy governing the use of City computers, the Internet and email, which covers the use of City pagers. In spite of this written policy, the Ninth Circuit held that Sergeant Jeff Quon, an Ontario SWAT officer, had a reasonable expectation of privacy in the text messages archived

for the City by its wireless service provider. The holding was based on an informal accounting practice that the pager account manager initiated to address text character limits in the pager contract. If an officer exceeded the monthly character limit on the plan, the account manager simply collected the cost of the overage from the officer. This procedure eliminated the need to audit the text messages, separate the work-related and personal messages, and then bill the officer for all of the personal messages. The Ninth Circuit concluded that this accounting practice created an expectation of privacy in the text messages, despite the formal written policy. But this holding directly contradicts this Court's Fourth Amendment jurisprudence that no reasonable expectation of privacy exists where a government employer has a policy discouraging personal use of the area searched.

At most, the informal billing practice here created a subjective expectation of privacy for Sergeant Quon. But the operational realities of the police department made any subjective expectation of privacy in those messages unreasonable. These policies included the written policy, the potential the text messages could be subject to public disclosure pursuant to a public records request, and the fact that the text messages were sent to and archived by a third party and Quon had no access to the messages once he sent them.

ARGUMENT

In addition to the reasons set forth in the Petitioners' Petition for a Writ of *Certiorari* (Petition), the following is of particular importance to the *amici curiae* due to its impact on government agencies at all levels:

I. THIS COURT'S REVIEW WOULD PROVIDE GUIDANCE ON THE ISSUES LEFT UNRESOLVED IN THE *O'CONNOR* PLURALITY DECISION

This Court's opinion in *O'Connor v. Ortega,* 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987), because it was a plurality decision, left unresolved the issues of the extent to which the "special needs" exception applies to government employees and the proper test to apply to work-related searches conducted by a government employer. Four members of this Court found the government employee had a reasonable expectation of privacy in the area searched, but that the search was still reasonable. Justice Scalia agreed with the plurality that the search was reasonable, but he disagreed with the reasoning and the standard articulated. He took issue with the standard that requires a case-by-case analysis because such a standard creates uncertainty for police and government employers. He would have found that "special needs" exist in the context of a government employer conducting searches to retrieve work-related materials or investigate violations of workplace rules. The result would be eliminating the

distinction between private and public employers for non-criminal work-related searches.

Because no rule emerged from *O'Connor*, lower courts such as the Ninth Circuit here, have had little guidance on how to apply the Fourth Amendment reasonableness analysis in the government employment context. This case presents an opportunity to revisit the issues that this Court sought to resolve in *O'Connor*.

II. REVIEW WOULD CLARIFY HOW TO APPLY THE "OPERATIONAL REALITIES OF THE WORKPLACE" STANDARD IN A GOVERNMENT EMPLOYMENT CONTEXT

The Justices in *O'Connor* agreed that some consideration of the operational realities of government employment conditions is appropriate in the Fourth Amendment analysis, but reached no consensus on how to apply the inquiry for public employers.

A. The Ninth Circuit Mischaracterizes the Relevant "Operational Realities" of Government Employers, Including the Significance of the California Public Records Act, in the Reasonableness Analysis

The Ninth Circuit completely dismisses as irrelevant to the Fourth Amendment inquiry the fact that the text messages could be subject to public disclosure under the California Public Records Act

(CPRA). Cal. Gov't Code §§ 6250-6270 (West 2008). Under the CPRA, public agencies must make their records available to the public upon request, unless the records are exempt from disclosure. Public records include "any writing containing information relating to the conduct of the public's business" that the public agency has prepared, uses or retains. Cal. Gov't Code § 6252, subd. (e) (West 2008). The CPRA defines "writing" very broadly, and includes emails, faxes and any other means of recording a communication. Cal. Gov't Code § 6252, subd. (g) (West 2008). In 2003, the California voters passed Proposition 59 (Cal. Const. art. I, § 3, subd. (b)), which added the State's policy regarding disclosure of public records to the California Constitution. It provides, "(b)(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Cal. Const. art. I, § 3, subd. (b)(1). Statutes and court orders must be construed broadly in favor of disclosure of public records. Cal. Const. art. I, § 3, subd. (b)(2). Moreover, if a public agency fails to disclose a public record that is subject to disclosure, the CPRA *requires* the court to award attorneys' fees to the requester in any action in which a court finds the government failed to comply with the CPRA. Cal. Gov't Code § 6259, subd. (d) (West 2008).

The operational realities of municipalities in California include a constant need to process public

records requests. Indeed, local police departments in California routinely receive and respond to CPRA requests. Inquiries often focus on fiscal issues, such as officer salaries and overtime pay. Some requests relate to a particular officer or incident, especially when the incident is considered newsworthy. In a large city such as Los Angeles or Oakland, these requests can consume considerable police staff time.

Despite the clear disclosure mandates of the CPRA and the real impact of the CPRA on police department operations, both the district court and the Ninth Circuit found the CPRA had no significant impact on the reasonableness of Quon's privacy expectation. The Ninth Circuit found that there was no "evidence" before the court "suggesting that CPRA requests to the department are . . . widespread or frequent." *Quon v. Arch Wireless Operating Company, Inc.,* 529 F.3d 892, 907-908 (9th Cir. 2008), Petitioners' Appendix (Pet. App.) at 31-32. Thus, the possibility of a CPRA request was too "hypothetical" to undermine a public employee's expectation of privacy. *Id.*

But as the dissent in the denial of rehearing and denial of rehearing *en banc* correctly noted:

> Given that the pagers were issued for use in SWAT activities, which by their nature are highly charged, highly visible situations, it is unreasonable to expect that messages sent on pagers provided for communications among SWAT team members during those emergencies would not be subsequently reviewed by

> an investigating board, subjected to discovery in litigation arising from the incidents, or requested by the media. *Quon v. Arch Wireless Operating Company, Inc.*, 554 F.3d 769, 776, denial of rehearing and rehearing *en banc* (9th Cir. 2009), Pet. App. at 142 (dissenting opinion of Ikuta).

The dissent accurately portrays the "operational realities" involved here.

In fact, just months after the *Quon* decision was published, another published case discussed a public records request from the Detroit Free Press for police pager text messages. *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich., So. Div., 2008). There, the plaintiff was seeking discovery of the pager text messages in a civil lawsuit. While the case was pending, the Detroit Free Press sought disclosure of the text messages from the City of Detroit's wireless service provider. *Id.*, at 348. The court granted the Detroit Free Press leave to file an *amicus* brief in the civil suit because the court determined that the resolution of the discovery issue was likely to impact the Detroit Free Press lawsuit. *Ibid.* The Eastern District of Michigan noted, "[t]here is no question . . . that at least some of the SkyTel text messages satisfy the statutory definition of 'public records,' insofar as they capture communications among City officials or employees 'in the performance of an official function.'" *Id.*, at 355. Consequently, in a case decided just two months after *Quon*, a public records request of the type the Ninth Circuit dismissed as "hypothetical"

occurred with the same type of record at issue here. Even the sexually-explicit messages sent by Quon might be the subject of a CPRA request where, for instance, a member of the public was seeking to determine whether public money was being spent on the salary of a public employee who was not doing his job.[2]

B. Because of the Operational Realities of Using a Pager System, the Text Messages Were Not in Quon's Control, So He Could Not Have a Reasonable Expectation of Privacy in Them

As noted in *Smith v. Maryland*, "[t]his Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743-744, 99 S.Ct. 2577, 2582, 61 L.Ed.2d 220 (1979). Thus, where a person "exposes" his information to a third-party, such as a telephone company, he assumes the risk that the company will reveal the information to the police. *Id.*, at 744, 99 S.Ct., at 2582, quoting *United States v. Miller*, 425 U.S. 435, 443, 96 S.Ct. 1619, 1624, 48 L.Ed.2d 71 (1976). As the Second Circuit found, although individuals do generally have a reasonable expectation of privacy in their

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

home computers, "[t]hey may not, however, enjoy such an expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient." *United States v. Lifshitz*, 369 F.3d 173, 190 (2nd Cir. 2004).

In a case involving pager text, the court noted that "all messages are recorded and stored not because anyone is 'tapping' the system, but simply because that's how the system works. It is an integral part of the technology." *Lifshitz*, *supra*, 369 F.3d, at 190. Similarly here, the pager system that the City of Ontario used involved text messages being sent to Arch Wireless, where they were held temporarily until receiving pagers were ready to receive them. *Quon, supra,* 529 F.3d, at 895-896, Pet. App. at 3-4. Once conveyed, the messages were archived in the Arch Wireless system. *Quon, supra,* 529 F.3d, at 896, Pet. App. at 3. At no time during the transmission or storage were the messages in either Quon's or the City's control. *Quon v. Arch Wireless Operating Company, Inc.*, 445 F.Supp.2d 1116, 1131 (C.D. Cal. 2006), Pet. App. at 65. Consequently, Quon had no reasonable expectation of privacy in those communications.

The Ninth Circuit's decision also ignored the operational realities of government agencies in its interpretation of the Stored Communications Act (SCA). 18 U.S.C. §§ 2701-2711. The court erroneously held that the City's wireless service provider acted exclusively as an electronic communications service (ECS) (18 U.S.C. § 2510(15)) and not a remote computing service (RCS) (18 U.S.C. § 2711(2)) under the SCA. 18

U.S.C. §§ 2701-2711. While this fact bears mainly on Arch Wireless' liability, it also has implications on the reasonableness of Quon's expectation of privacy.

An ECS provides "temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof" and storage of such communication for backup purposes. 18 U.S.C. § 2510(17). In contrast, an RCS provides long term storage, or "archiving," of electronic communications. 18 U.S.C. § 2510(14). Under the SCA, unless an exception exists, an ECS may not knowingly disclose the contents of a customer's communication while in electronic storage, except to the sender or recipient.[3] 18 U.S.C. § 2702(a)(1). But, an RCS may disclose the communication to the subscriber as well. 18 U.S.C. § 2702(b)(3).

Both the district court here and the Eastern District of Michigan found that wireless service providers such as Arch Wireless, that provide electronic pager text services, function as both an ECS and an RCS. *Quon, supra*, 445 F.Supp.2d, at 1137, Pet. App. at 80; *Flagg, supra*, 252 F.R.D., at 362-363. This conclusion makes sense because a text message that gets sent to the wireless service provider must stay in temporary storage while waiting for the receiving device to accept the message. *Quon, supra,* 529 F.3d, at 895-896,

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[3] Although there are other exceptions to disclosure, it is beyond the scope of this brief to discuss them because they were not raised in the lower court.

Pet. App. at 3-4. At this stage, the service is acting as an ECS. *Quon, supra,* 445 F.Supp.2d, at 1137, Pet. App. at 80. But when the messages get archived, as they were here, the service provider is acting as an RCS – providing long-term storage. *Ibid.*

Had the Ninth Circuit correctly concluded that Arch Wireless was acting as an RCS in archiving the text messages at issue, Quon could not have a reasonable expectation of privacy in those messages. Under the SCA, the City, as the subscriber, would have access to the archived messages. 18 U.S.C. § 2702(b)(3). In fact, *only* the City would have had such access pursuant to the terms of the contract with Arch Wireless. *Quon, supra,* 529 F.3d, at 898, Pet. App. at 8-9. As the account representative for Arch Wireless stated, she "would only deliver messages to the 'contact' on the account, and . . . she would not deliver messages to the 'user' unless he was also the contact on the account." *Quon, supra,* 529 F.3d, at 898, Pet. App. at 9. The contact here was the City. Accordingly, Quon could not have a reasonable expectation of privacy in messages he could not even access.

The Ninth Circuit's finding that Arch Wireless is an ECS also has serious practical ramifications on a governmental agency's ability to access its own records. If third-party wireless service companies that provide pager text messaging services are ECS's, government agency subscribers cannot access their archived text messages absent consent of the sender or recipient of the messages or a search warrant. But,

as the court in *Flagg* noted, "it is difficult to see how an archive of text messages would be of any use or value to a customer if the service provider did not also offer a mechanism for retrieving messages from this archive." *Flagg, supra,* 252 F.R.D., at 359. The Ninth Circuit's reasoning results in a government agency contracting and paying for an archiving and retrieval service, but having no access to the records in the archive.

C. Based On the Operational Realities of a Police Department, A Written and Signed Department Policy Governing the Use of Electronic Equipment and Communications Makes Any Expectation of Privacy in the Equipment or Communications *Per Se* Unreasonable

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

Here, the City of Ontario had a written policy specifically stating that only light personal use of the City's computer-related equipment was permitted. Pet. App. at 152-153. The policy further provided that the City reserved the right to monitor all network

activity, email, and Internet use without notice and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Pet. App. at 152-153. The policy also prohibited "[t]he use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language" through the City's email system. Pet. App. at 153.

The Ninth Circuit acknowledged the existence of the policy. The court even noted that Quon signed the policy and attended a meeting at which Quon was present, where the department told the SWAT officers the policy applied to the pagers. *Quon, supra*, 529 F.3d, at 906, Pet. App. at 29. Subsequently, the Ninth Circuit inexplicably stated, "the City had no official policy expressly governing the use of the pagers." *Quon, supra,* 529 F.3d, at 897, Pet. App. at 6; *see also, Quon, supra,* 554 F.3d, at 770, denial of rehearing and rehearing *en banc*, Pet. App. at 127 (reiterating the incorrect statement that "the record is clear that the City had no official policy governing the use of the pagers.") Based on this erroneous assertion, the Ninth Circuit then found that the informal practice initiated by Lieutenant Duke to streamline the accounting functions for the City-issued pagers, created an expectation of privacy in the text messages. *Quon, supra,* 529 F.3d, at 907, Pet. App. at 31. But the court's conclusion ignores the operational realities of a police department or any governmental agency. To function smoothly, government employers must create policies that apply to employees consistently across all departments. It was unreasonable for Quon to believe that Lieutenant Duke, a non-policy-making

employee, who was not Quon's supervisor, had the authority to create a policy that contradicted the city-wide electronic equipment policy. Accordingly, at most, Lieutenant Duke's informal procedure created a subjective, not a reasonable, expectation that the content of Quon's personal messages would not be revealed.

Whether an expectation of privacy is reasonable also depends on the steps taken to ensure privacy and the extent of control the person exercised over the place searched. *See, e.g., Katz v. United States*, 389 U.S. 347, 351-352, 88 S.Ct. 507, 511-512, 19 L.Ed.2d 576 (1967). Here, Quon had no control over the text messages after he sent them. In fact, as noted above, he could not even access the messages at all once they were sent. Consequently, Quon had no ability to ensure the privacy of his text messages.

If this opinion stands, government employers will lose their ability to oversee the use of their electronic equipment. An informal practice of any low-level government employee will override long-standing, formal, written and signed policies addressing use and privacy expectations with respect to electronic equipment and communications – even those adopted formally by their governing bodies. The Ninth Circuit's decision here eviscerates oversight of government employees and "improperly hobbles government employers from managing their workforces." *Quon, supra,* 554 F.3d, at 774, denial of rehearing and rehearing *en banc*, Pet. App. at 137 (dissenting opinion of Ikuta).

CONCLUSION

This case presents the Court with an opportunity to provide a clear rule on the reasonableness standard in the government employment context left unresolved in *O'Connor*. Such a rule is needed at this time because the existing operational realities for government employers include the constant need to access their offices, file cabinets and electronically-stored information. Without this Court's guidance on what constitutes a reasonable search for routine employment operations and non-criminal investigations, government employers potentially face employee lawsuits any time they go into an employee's office to retrieve a file.

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Respectfully submitted,

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