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

REPLY BRIEF FOR PETITIONERS

DIMITRIOS C. RINOS
Rinos & Martin, LLP
17862 East 17th Street, Suite 104
Tustin, California 92780
(714) 734-0400

KENT L. RICHLAND
(Counsel of Record)
KENT J. BULLARD
Greines, Martin, Stein & Richland LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811

Counsel for Petitioners

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

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Respondents do not dispute that this case presents important Fourth Amendment issues involving the "operational realities of the workplace" standard – enunciated in *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion) – for reasonable expectations of privacy in electronic communications in the workplace. Respondents fail to answer the petition's showing, amplified by amici curiae the League of California Cities and California State Association of Counties supporting the petition, that the Ninth Circuit opinion significantly and adversely impacts public entities' ability to ensure safe and efficient use of electronic communications. Nor do respondents offer any response to the demonstration by petitioners, and by the United States as amicus curiae supporting the petition for rehearing en banc in the Ninth Circuit, that the opinion casts doubt on employee agreements and privacy policies widely used in both the private and public sectors to ensure safe and efficient use of electronic communications resources.

Respondents make three arguments for denying the petition, none of which withstands scrutiny. First, they deny that the Ninth Circuit opinion adopts a "less intrusive means" test – which this Court and seven other circuits have rejected – for gauging whether the scope of a government workplace search is reasonable. But the opinion *expressly* applies that test. Second, they contend the opinion faithfully

applies *O'Connor*'s "operational realities of the workplace" standard. However, like the Ninth Circuit opinion, they focus exclusively on a non-policymaker's informal accommodation and ignore other vital realities such as the City's official no-privacy policy and potential disclosure of the communications as public records. Third, they rely on facts that are simply absent from the opinion to attempt to cabin its sweeping extension of Fourth Amendment protection to parties who send communications *to* a government workplace.

As petitioners explain below, respondents provide no basis to deny the petition or not to summarily reverse.

A. In Direct Conflict With Opinions Of This Court And Seven Other Circuits, The Ninth Circuit Opinion Undeniably Resurrects A Disapproved "Less Intrusive Means" Test.

Respondents argue that the Ninth Circuit opinion did not actually adopt the "less intrusive means" test of whether the search was reasonable in scope. Opp.2, 7-10. They rely almost exclusively on the opinion concurring in the denial of rehearing en banc. Opp.7-9. For reasons explained in the petition (Pet.22-23) and below, that reliance is futile.

The Ninth Circuit opinion plainly states that "'if less intrusive methods were feasible, ... the search would be unreasonable,'" quoting *Schowengerdt v.*

General Dynamics Corp., 823 F.2d 1328, 1336 (9th Cir. 1987). App.35. *Schowengerdt* purported to apply the *O'Connor* analysis for determining whether a government employer's search was reasonable in scope, but added requirements – no "less intrusive methods" and "no broader than necessary," 823 F.2d at 1336 – that were absent from, and incompatible with, *O'Connor*. Under *O'Connor*, "public employers must be given wide latitude" in carrying out administrative searches, which serve to "ensure the efficient and proper operation of the agency." 480 U.S. at 723 (plurality opinion).

While respondents contend that the opinion in this case "never adopted a less intrusive means test" (Opp.7), seven dissenting Ninth Circuit judges read the opinion as "do[ing] just that." App.145. The seven dissenting judges are not alone; commentators read it the same way. As one correctly observed, "the panel mistakenly used language from the *Schowengerdt* decision and found the OPD's search to be unreasonable based on an analysis of less intrusive means the city could have used when conducting the search of Quon's text messages." Justin Conforti, *Somebody's Watching Me: Workplace Privacy Interests, Technology Surveillance, and the Ninth Circuit's Misapplication of the* Ortega *test in* Quon v. Arch Wireless, 5 Seton Hall Cir. Rev. 461, 483 (2008-2009); *see also* Heather Wolnick, *The Extension of Privacy Rights to Workplace Text Messages under* Quon v. Arch Wireless, 39 Golden Gate U. L. Rev. 351, 356

(Spring 2009) (noting that "[t]he [*Quon*] court applied the 'least intrusive means' test").

Respondents cannot contest that this Court has "repeatedly" rejected "the existence of alternative 'less intrusive' means" as a basis for evaluating the reasonableness of searches under the Fourth Amendment. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989) (collecting cases) (citations omitted). The *Skinner* Court did so specifically in the context of workplace searches. *Id.* Seven other circuits have adhered to the Court's precedent. *See* Pet.21-22; App.147-49. "[B]y citing a pre-*Skinner* decision that is no longer good law as part of its analysis under the second [*O'Connor*] prong, the *Quon* panel not only departed from Supreme Court precedent and split from seven sister circuits but also upset the balance struck by the [*O'Connor*] plurality between the conflicting privacy interests of employers and employees." Conforti, *supra*, at 482.

In contrast, the Second Circuit set out what has been called "the model analysis" of a search's scope under *O'Connor*: "a court will identify the employer's interest at stake in the search and then determine whether the actual search conducted is reasonable in comparison." Conforti, *supra*, at 481 (citing *Leventhal v. Knapek*, 266 F.3d 64, 75-76 (2d Cir. 2001) (Sotomayor, J.)). Respondents gainsay the police department's interests here as "relatively insignificant." Opp.10. But *O'Connor* confirms that "public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in

a proper and efficient manner." 480 U.S. at 724 (plurality opinion). That interest is particularly strong when the employer is a police department. *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008). On the other hand, respondents do not offer any countervailing interest on their part to use Sergeant Quon's Department-issued pager for highly personal, sometimes sexually graphic communications, even while he was on duty. Government employees' privacy interests in the workplace are diminished, *O'Connor*, 480 U.S. at 725 (plurality opinion), and Sergeant Quon "could have avoided exposure of his sexually explicit text messages simply by using his own cell phone or pager." App.143.

There is no merit to respondents' plea to simply ignore the opinion's reference to *Schowengerdt*'s less intrusive means test and to focus instead on the "substance" of the court's analysis. Opp.9-10. In form and substance, the opinion employs a less intrusive means analysis, hypothesizing "a host of simple ways" the Department could have conducted its administrative investigation. App.35. Again, petitioners and the seven dissenting judges are not the only ones who read the court's opinion as actually employing a less intrusive means analysis. *See* Conforti, *supra*, at 487-88 ("[T]he Ninth Circuit inquired into the reasonableness of the city's investigation based not on the actual search conducted, but rather on a litany of hypothetical less-intrusive means the city could have used when conducting the search...."); *see also id.* at 488 (citing the opinion's

"alternative, potentially burdensome methods the OPD could have utilized to discover the reason for Quon's regular monthly overages").

The concurrence's belated attempt to downplay the less intrusive means test does not ameliorate the damage done by the actual opinion. Respondents repeatedly refer to the concurrence as an opinion by the "panel." *E.g.*, Opp.2, 7, 9; *see also* Opp.9 (referring to the concurrence's "authors"). But no other judges joined the concurring judge's opinion. *See* App.125. Even more important, the panel did not amend the actual opinion to eliminate the express adoption and application of the discredited "less intrusive means" test of *Schowengerdt*.

If anything, the concurrence exacerbates the need for review by stating that the Department's review did not even constitute a "special needs" search. App.135. This is incompatible with *O'Connor*'s recognition of public employers' "special needs" to conduct legitimate work-related, noninvestigatory searches and investigations of work-related misconduct. 480 U.S. at 725 (plurality opinion); *accord*, *id.* at 732 (Scalia, J., concurring in the judgment).

Concurrence or not, as it now stands, the law in the Ninth Circuit – in direct conflict with multiple opinions of this Court and seven other circuits – is that lower courts must apply the less intrusive means test in assessing the scope of a search under *O'Connor*. On that ground alone, this Court should

grant the petition or summarily reverse. But if, as respondents assert, the Ninth Circuit's analysis somehow did not constitute a less intrusive means inquiry, then this Court should review this case to clarify what does constitute a less intrusive means analysis and under what circumstances a court may engage in the kind of analysis employed below.

B. The Opinion Undermines *O'Connor* By Exalting A Non-Policymaker's Informal Accommodation Above All Other Realities Of The Workplace.

As the petition established, the Ninth Circuit opinion mistakenly reasons that an employer's explicit no-privacy policy is abrogated by a lower-level supervisor's informal accommodation, and discounts entirely the potential disclosure of the text messages under public records laws, thus significantly impairing government employers' ability to manage their workforces. Pet.16-20. The opposition provides no adequate response.

Principally, respondents argue that petitioners seek to ignore Lieutenant Duke's informal bill-paying accommodation. Opp.10-12. Not so. Rather, petitioners encourage this Court to clarify that *O'Connor* requires considering *all* the circumstances in which the informal accommodation was made, including that:

- Lieutenant Duke was not a policymaker;
- the police department pagers were issued to facilitate SWAT team operations;
- the City had an official policy of no privacy in electronic communications;
- the public has high expectations of propriety in police departments; and
- there was a significant possibility of public disclosure under the California Public Records Act.

See Pet.16-20. Respondents ignore these salient circumstances and focus on only one circumstance: Lieutenant Duke's accommodation.

But that accommodation neither justifies the Ninth Circuit ordering summary judgment in plaintiffs' favor nor makes this case any less worthy of this Court's review. Respondents badly misread the petition by claiming that it "concedes" that the opinion's reliance on Lieutenant Duke's accommodation was a straightforward application of *O'Connor*. Opp.11. The petition – quite clearly – referred to only the following specific portion of the Ninth Circuit's reasoning as a straightforward application of *O'Connor*: that the Department had a written no-privacy policy for e-mail and computer use; that Sergeant Quon signed an acknowledgment of it; that he attended a meeting at which it was made clear that the policy fully applied to the pagers; and that, "[i]f that were all," the case unquestionably would be governed by the rule that employees have

no reasonable expectation of privacy where they have notice of employer policies permitting searches. Pet.16 (citing App.29).

Respondents also contend that there was no official policy governing the pagers. Opp.12. But this contention is both a fiction and a red herring. There is no meaningful factual dispute: as just explained, even the Ninth Circuit opinion acknowledges that Sergeant Quon attended the meeting where it was announced that the official no-privacy policy for electronic communications applied to the pagers. App.29. He was even copied on a written memorandum memorializing the announcement. SER 320, 463-64. Respondents' contention is also irrelevant because the Ninth Circuit opinion, as explained above, expressly proceeds on the basis that Sergeant Quon *was* informed that the official policy applied to the pagers. App.29. The problem is that the opinion then ignores the official policy, and all other circumstances, except for Lieutenant Duke's informal bill-paying procedure.

An accommodation for bill-paying purposes could not reasonably be interpreted by a SWAT team leader such as Sergeant Quon as affording a right to privacy in the text messages for all purposes and for all time subject only to his further consent. Notwithstanding Lieutenant Duke's accommodation, Sergeant Quon had no *reasonable* expectation of privacy (i.e., one that society is prepared to accept) vis-à-vis the police department in communications sent and received on

the Department-issued pager, especially while on duty.

In effect, the Ninth Circuit opinion affords Fourth Amendment protection to irresponsible plaintiffs' *un*reasonable expectations of privacy and thus encourages public employers to curtail any accommodations in electronic communications – even to employees who behave reasonably and have reasonable expectations of privacy – lest the employers end up liable for trying to improve their agencies' efficiency and safety. *See* Conforti, *supra*, at 486 ("If an Information Technology specialist or general manager gives employees the impression that the company will not actually conduct surveillance, then the employee may be found to have enjoyed a reasonable expectation of privacy that then limits how the employer may conduct a workplace search.").

Respondents also contend that Lieutenant Duke's accommodation makes this case unique and thus unworthy of this Court's review. Opp.11-12. Respondents have it backwards. Lieutenant Duke's accommodation and the Ninth Circuit's undue reliance on it are reasons for this Court to *grant* certiorari, not deny it. Fourth Amendment reasonableness analyses are inherently fact-specific. This Court cannot abdicate its responsibility to elucidate what is reasonable under the Fourth Amendment simply because each case presents a unique set of facts. Moreover, the question that warrants the Court's attention is not how courts should address situations where there is nothing mitigating an employer's

official, written no-privacy policy. After all, even the Ninth Circuit agreed Sergeant Quon's expectation of privacy would be foreclosed by existing case law were it not for Lieutenant Duke's accommodation. *See* App.29.

Rather, the question this Court needs to address is what happens when public employees seize on informal accommodations like Lieutenant Duke's bill-paying arrangement to try to expand expectations of privacy beyond those that society is prepared to recognize as reasonable. Government agencies are by nature large, bureaucratic institutions and undoubtedly many employ individuals trying to make accommodations like the one Lieutenant Duke made in this case. Under *O'Connor*, that should not create a *reasonable* expectation of privacy in communications made on government-owned equipment, especially when there is an official no-privacy policy.

This Court should review this case to restore a reasonableness standard to the *O'Connor* analysis.

C. The Opinion Overextends Fourth Amendment Protection To Individuals Who Lack Any Reasonable Expectation Of Privacy In Electronic Communications Sent To A Government Workplace.

The petition further established that the Ninth Circuit had no basis for its sweeping extension of Fourth Amendment protection to plaintiffs Trujillo, Florio, and Jerilyn Quon for messages they sent to

Sergeant Quon. Pet.28-33. Respondents offer only a series of unsupportable factual and legal quibbles.

Petitioners do not, as respondents contend, argue merely that the opinion reached the wrong result. Opp.13. Rather, respondents argue that the opinion utterly fails to account for the prevalence of employers' no-privacy policies and the fact that the three other plaintiffs knew they were sending messages to Sergeant Quon's Police Department-issued pager, not to a personal pager. Pet.28-29.

Respondents claim that petitioners offer no legal or factual support for the proposition that it is not objectively reasonable for someone to expect privacy in electronic communications sent to someone else's workplace. Opp.13. On the contrary, the petition provides factual and legal support, which respondents simply choose to ignore, that most employers, particularly government employers, have no-privacy policies that would apply to the recipient's workplace electronic communications, and hence any expectation of privacy on the part of the senders would be unreasonable. Pet.31-32.

Respondents also contend that the other three plaintiffs, like Sergeant Quon, reasonably could have relied on Lieutenant Duke's arrangement. Opp.14. This is another red herring. The opinion expressly relies on Lieutenant Duke's informal bill-paying accommodation only with respect to Sergeant Quon's expectation of privacy. App.27 n.6. It analyzes the other three plaintiffs' privacy expectations without

regard to whether they knew of Lieutenant Duke's accommodation. App.27-29. In any event, the opposition cites nothing in the record to support the contention that all three other plaintiffs knew of Lieutenant Duke's accommodation. Opp.14. The declarations of Jerilyn Quon and April Florio do not mention Lieutenant Duke. SER 303-04, 307-08. And, to the extent their expectation of privacy hinged on whether Sergeant Quon ultimately complied with Lieutenant Duke's arrangement by paying for overages, that could not constitute a *reasonable* expectation of privacy.

Likewise, in determining that the other plaintiffs had a reasonable expectation of privacy, the opinion does not mention their employment status. App.23-29. Both April Florio and Jerilyn Quon admitted that they used their own personal pagers to send messages to Sergeant Quon. SER 303, 307. And respondents cite nothing in the record to indicate that Lieutenant Duke informed staff who did not even receive Department-issued pagers of the bill-paying accommodation that he made for SWAT team members who did receive Department-issued pagers. Opp.14.

Lastly, respondents argue that these plaintiffs' privacy expectations were supported by the Stored Communications Act ("SCA"). Opp.15. But plaintiffs had no objectively reasonable basis not to expect Arch Wireless to provide copies of their text messages to the Department. They did not know how Arch Wireless's service worked – for example, that Arch

Wireless archived copies of the messages. *See* App.3; SER 303-04, ¶4 (Florio: "It never occurred to me that the transcripts of the messages were saved anywhere by Arch Wireless or that they could be accessed."); SER 307-08, ¶4 (Jerilyn Quon: "I had no reason to believe that transcripts of the messages were saved anywhere by Arch Wireless or that they could be accessed."). The opinion reasons that under the SCA the Department's right to obtain those copies depended on whether the relevant service provided by Arch Wireless was a "remote computing service" or an "electronic communication service." App.13-20. But when plaintiffs sent text messages to Sergeant Quon in 2002, they could have had no reasonable expectation one way or the other – after all, the district court and the Ninth Circuit reached opposite conclusions four and six years later. App.20, 80.

In short, respondents cannot support the Ninth Circuit's sweeping, categorical extension of Fourth Amendment rights to individuals sending electronic communications to a government workplace. That ruling hampers public agencies' ability to monitor employees' workplace electronic communications and provides yet another reason to grant certiorari.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted or the Ninth Circuit opinion should be summarily reversed.

Respectfully submitted,

DIMITRIOS C. RINOS
Rinos & Martin, LLP
17862 East 17th Street, Suite 104
Tustin, California 92780
(714) 734-0400

KENT L. RICHLAND
(Counsel of Record)
KENT J. BULLARD
Greines, Martin, Stein & Richland LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811

Counsel for Petitioners

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