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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

While individuals do not lose Fourth Amendment rights merely because they work for the government, some expectations of privacy held by government employees may be unreasonable due to the "operational realities of the workplace." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality). 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). The questions presented are:

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

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

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

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellees below):

CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, and LLOYD SCHARF

Respondents (plaintiffs and appellants below):

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

Additional defendants and appellees below:

DEBBIE GLENN

ARCH WIRELESS OPERATING COMPANY, INCORPORATED

Additional plaintiff below:

DOREEN KLEIN

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Petitioners City of Ontario, Ontario Police Department, and Lloyd Scharf (collectively, Ontario defendants) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

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

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

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

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

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

STATEMENT OF THE CASE

1. Ontario Police Department SWAT team Sergeant Jeff Quon used his Department-issued text-messaging pager to exchange hundreds of personal messages – many sexually explicit – with, among others, his wife (Jerilyn Quon), his girlfriend (April Florio), and a fellow SWAT team sergeant (Steve Trujillo). He did so notwithstanding the City of Ontario's written "Computer Usage, Internet and E-mail Policy" – which both Sergeants Quon and Trujillo acknowledged in writing – that permitted employees only limited personal use of City-owned computers and associated equipment, including e-mail systems, and warned them not to expect privacy in such use. App., *infra*, 151-157.

The City's written policy advised employees, among other things, that:

- "The use of these tools for personal benefit is a significant violation of City of Ontario Policy." App., *infra*, 152.
- "The use of any City-owned computer equipment, . . . e-mail services or other City computer related services for personal benefit or entertainment is

> prohibited, with the exception of 'light personal communications.'" *Id.*

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

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

- "The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." App., *infra*, 152.
- "Access to the Internet and the e-mail system is not confidential;. . . . As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system." App., *infra*, 153.
- "[E-mail] messages are also subject to 'access and disclosure' in the legal system and the media." *Id.*

The policy additionally stated that "[t]he use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail

system will not be tolerated." *Id.* When the Department obtained text-messaging pagers to facilitate logistical communications among SWAT team officers, it informed the officers that the e-mail policy applied to pager messages. App., *infra*, 5, 29, 48.

Under the City's contract with its wireless provider – Arch Wireless Operating Company, Inc. – each pager had a monthly character limit, above which the City had to pay extra. App., *infra*, 6, 45. The officer in charge of administration of the pagers – Lieutenant Steve Duke – had an informal arrangement whereby he would not audit pagers that had exceeded the monthly character limit if the officers agreed to pay for any overages. App., *infra*, 6-8, 29-30. Certain officers, including Sergeant Quon, repeatedly exceeded the character limit. *See* App., *infra*, 8, 50-51. In response to Lieutenant Duke's report that he was tired of being a bill collector, the Chief of Police ordered a review of the pager transcripts for the two officers with the highest overages – one of whom was Sergeant Quon – to determine whether the City's monthly character limit was insufficient to cover business-related messages. App., *infra*, 8, 51. The Department then obtained the pager transcripts for the two officers from Arch Wireless. App., *infra*, 8-9.

After initial Department review, the matter was referred to internal affairs to determine whether Sergeant Quon was wasting time attending to personal issues while on duty. App., *infra*, 9. Sergeant

Patrick McMahon, of internal affairs, with the help of Sergeant Debbie Glenn, redacted the transcripts to eliminate messages that did not occur on duty. App., *infra*, 9, 56; *see also* Supplemental Excerpts of Record ("SER") 251. During the month under review, Sergeant Quon sent and received 456 personal messages while on duty – on average per shift, 28 messages, only 3 of which were business related. SER 254; *see also* App., *infra*, 54-55. "Some of these messages were directed to or from his wife, [plaintiff] Jerilyn Quon," who was a former Department employee, "while others were directed to and from his mistress, [plaintiff April] Florio," who was a police dispatcher. App., *infra*, 54-55; *see also* SER 303, 307. Many of their text messages were not "light personal communications," as defined in the policy, but rather were, in the district court's words, "to say the least, sexually explicit in nature." App., *infra*, 54; *see also* SER 532, 539, 546.

2. Sergeant Quon and his text-messaging partners sued the Chief of Police, the City, the Department, and others, alleging Fourth Amendment violations under 42 U.S.C. section 1983. *See* App., *infra*, 58.[1] On cross-motions for summary judgment, the district court first held that Sergeant Quon had a reasonable expectation of privacy in his pager

[1] Plaintiffs made other claims and sued other defendants, including a separately represented police sergeant – Debbie Glenn – and Arch Wireless. *See* App., *infra*, 58. For brevity's sake, we do not discuss those claims.

transcripts as a matter of law under the "operational realities of the workplace" standard from *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality). App., *infra*, 88-97. The court based its decision on Lieutenant Duke's informal policy that "he would *not* audit their pagers so long as they agreed to pay for any overages." App., *infra*, 90 (emphasis in original).

The court next considered whether reviewing the transcripts was reasonable under the circumstances. App., *infra*, 97. It determined there was a genuine issue of material fact as to "the actual *purpose* or *objective* Chief Scharf sought to achieve." *Id.* (emphasis in original). The court reasoned that the transcript review was *not* reasonable if it "was meant to ferret out misconduct by determining whether the officers were 'playing games' with their pagers or otherwise 'wasting a lot of City time conversing with someone about non-related work issues.'" App., *infra*, 98. But the court reasoned the transcript review *was* reasonable if the purpose was to "determin[e] the utility or efficacy of the existing monthly character limits." App., *infra*, 99. The court also determined that the scope of the audit was reasonable for the purpose of determining the efficacy of the character limit. App., *infra*, 103.

Denying summary judgment, the district court ruled that a jury would decide "which was the primary purpose of the audit." *Id.* The court also rejected Chief Scharf's qualified immunity defense, reasoning that if the jury found that he "order[ed] the audit, under the guise of seeking to ferret out

misconduct," he would not be entitled to qualified immunity. App., *infra*, 104, 108.

A jury found that Chief Scharf's purpose in ordering review of the transcripts was to determine the character limit's efficacy. App., *infra*, 119. As a result, the district court ruled that there was no Fourth Amendment violation, and judgment was entered in favor of defendants. App., *infra*, 119-120.

3. Plaintiffs appealed. On appeal, Ontario defendants argued that they should have been granted summary judgment in their favor because, as a matter of law, plaintiffs had no reasonable expectation of privacy and the search was reasonable under either purpose submitted to the jury.

The Ninth Circuit reversed, in an opinion authored by Judge Wardlaw and joined by Judge Pregerson and District Judge Leighton (sitting by designation). The panel ruled that plaintiffs were entitled to summary judgment in their favor against the City and the Department. App., *infra*, 40. Applying the *O'Connor* plurality's "operational realities of the workplace" standard, 480 U.S. at 717, the panel concluded Sergeant Quon had a reasonable expectation of privacy because of Lieutenant Duke's informal policy of allowing officers to pay for overages. App., *infra*, 29.

The panel also held that the other three plaintiffs had a reasonable expectation of privacy in messages they had sent to Sergeant Quon's pager, but not based on Lieutenant Duke's bill-paying arrangement. App.,

infra, 27 n.6. Rather, analogizing text messages to e-mail messages, regular mail, and telephone communications, App., *infra*, 23-28, it concluded that, "[a]s a matter of law, Trujillo, Florio, and Jerilyn Quon had a reasonable expectation that the Department would not review their messages absent consent from either a sender or recipient of the text messages." App., *infra*, 28-29.

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

The panel determined, however, that Chief Scharf was entitled to qualified immunity because "there was no clearly established law regarding whether users of text-messages that are archived, however temporarily, by the service provider have a

reasonable expectation of privacy in those messages." App., *infra*, 37-38.

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

The United States filed an amicus curiae brief supporting the petition. App., *infra*, 158-180. CSAC Excess Insurance Authority – a California Joint Powers Authority representing 54 of California's 58 counties – sought leave to file an amicus curiae brief supporting the petition.

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

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

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

629 n.9 (1989)." App., *infra*, 137 (parallel citations omitted).

Judge Wardlaw filed an opinion concurring in the denial of rehearing en banc, arguing that the dissent was mistaken as to the facts and the law. App., *infra*, 125-136. No other judges joined the concurrence.

REASONS TO GRANT THE PETITION

The Ninth Circuit panel viewed "[t]he recently minted standard of electronic communication via e-mails, text messages, and other means" as "open[ing] a new frontier in Fourth Amendment jurisprudence that has been little explored." App., *infra*, 23-24. The panel's opinion literally "wowed" privacy advocates,[2] and it surprised more mainstream media.[3] For good

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

[3] *E.g.*, Jennifer Ordoñez, *They Can't Hide Their Pryin' Eyes – An Appeals Court Ruling Makes It More Difficult For Employers To Sniff Around In Workers' Electronic Communications*, Newsweek, July 14, 2008, at 22 ("For desk jockeys everywhere, it has become as routine as a tour of the office-supply closet: the consent form attesting that you understand and accept that any e-mails you write, Internet sites you visit or business you conduct on your employer's computer network are subject to inspection.").

reason: public and private employers alike typically have in place policies establishing that employees should have no expectation of privacy in electronic communications and other computer usage on employer-owned equipment. As the United States explained in its amicus brief in the Ninth Circuit, these policies are intended to "prevent abuse and promote the public's safety and security." App., *infra*, 162-163.

The opinion dissenting from the denial of rehearing en banc summarized that

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

App., *infra*, 149-150.

The dissenting judges were right. To warrant Fourth Amendment protection, a government employee's expectation of privacy must be one "'that society is prepared to consider reasonable'" under the "operational realities of the workplace." *O'Connor v.*

Ortega, 480 U.S. 709, 715, 717 (1987) (plurality) (citation omitted). Concluding that a government employee has a reasonable expectation of privacy in text messages sent and received on a pager issued by his employer, the Ninth Circuit panel mistakenly reasons that the employer's explicit no-privacy policy is abrogated by a lower-level supervisor's informal arrangement allowing some personal use of the pager, and discounts entirely the potential disclosure of the messages under public records laws. As the dissent notes: "In doing so, the panel improperly hobbles government employers from managing their workforces." App., *infra*, 137.

And in holding that the scope of the government employer's administrative review of transcripts of the employee's text messages was unreasonable, the Ninth Circuit relied on a "less intrusive methods" analysis that this Court and multiple other circuits have repeatedly rejected as a basis for evaluating the reasonableness of government activity under the Fourth Amendment. *E.g.*, *Skinner*, 489 U.S. at 629 n.9 (citations omitted). The panel's "less intrusive methods" approach not only conflicts with this Court's and other circuits' authority, but also, as the dissent discerns, "makes it exceptionally difficult for public employers to go about the business of running government offices." App., *infra*, 137.

Making matters worse, the Ninth Circuit extends Fourth Amendment protection beyond any reasonable parameters by concluding that even individuals who knowingly send text messages *to* a government

employee's *workplace* pager – rather than to a privately owned pager – reasonably expect that their messages will be free from the recipient's employer's review. App., *infra*, 28. The panel thus further hobbles employers' ability to monitor electronic communications and enforce no-confidentiality policies.

Below we demonstrate that certiorari should be granted (a) to restore reasonableness to the *O'Connor* "operational realities of the workplace standard" as it applies to expectations of privacy in electronic communications in the workplace; (b) to settle once and for all the split among the circuits on the applicability of a "less-intrusive means" analysis under the Fourth Amendment; and (c) to curb the Ninth Circuit's startling extension of Fourth Amendment privacy rights to individuals who send electronic communications to government employees' government-issued communications devices.

Simply put, the SWAT team sergeant failed to comport himself as a reasonable officer would have, and he and the other plaintiffs embarrassed themselves through their lack of restraint in using a City-owned pager for personal and highly private communications. The City of Ontario should not have to pay for that in this case, nor should other government employers be hobbled by the Ninth Circuit's ruling. Certiorari should be granted.

I. THE NINTH CIRCUIT OPINION UNDERMINES THE "OPERATIONAL REALITIES OF THE WORKPLACE" STANDARD FOR MEASURING FOURTH AMENDMENT PROTECTION IN GOVERNMENT WORKPLACES BY ERRONEOUSLY HOLDING THAT A POLICE LIEUTENANT'S INFORMAL POLICY CREATES A REASONABLE EXPECTATION OF PRIVACY IN TEXT MESSAGING ON A POLICE DEPARTMENT PAGER IN THE FACE OF THE DEPARTMENT'S EXPLICIT NO-PRIVACY POLICY AND POTENTIAL DISCLOSURE OF THE MESSAGES AS PUBLIC RECORDS.

The Department had a written no-privacy policy for e-mail and computer use, Sergeant Quon signed an acknowledgment of it, and he attended a meeting at which it was made clear that the policy fully applied to the pagers. App., *infra*, 29, 156; *see also* SER 320, 463-64.) "If that were all," the Ninth Circuit panel reasoned, the case would be governed by the rule that employees have no reasonable expectation of privacy where they have notice of employer policies permitting searches. App., *infra*, 29 (citing *Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002) and *Bohach v. City of Reno*, 932 F. Supp. 1232, 1234-35 (D. Nev. 1996)). To that point, the panel's reasoning is a straightforward application of *O'Connor*'s "operational realities of the workplace" standard, to which government employers and employees have become accustomed. *See, e.g.*, *Biby v. Bd. of Regents*,

419 F.3d 845, 850-51 (8th Cir. 2005); *United States v. Angevine*, 281 F.3d 1130, 1134-35 (10th Cir. 2002); *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000).

But the panel concluded that "such was not the 'operational reality' at the Department" because "'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.'" App., *infra*, 30. Here the panel mistakenly relied on Lieutenant Duke's informal accommodation – in the face of the Department's express policy – as determinative of whether an expectation of privacy in the text messages was reasonable.

The district court aptly characterized Lieutenant Duke's bill-paying arrangement as his "generous way of streamlining administration and oversight over the use of the pagers because, as he reminded [Sergeant] Quon, he could, 'if anybody wished to challenge their overage, . . . audit the text transmissions to verify how many were non-work related.'" App., *infra*, 50. Given the official, explicit, Department-wide "no privacy" policy as to all electronic communications, an officer could not reasonably interpret Lieutenant Duke's informal policy to mean that the Department would never review messages sent on the Department's pagers without first getting the officer's additional consent.

As the panel acknowledged, but dismissed as unimportant, Lieutenant Duke was not a Department

policymaker. App., *infra*, 31. Thus, holding the City and Department liable based on Lieutenant Duke's informal policy amounts to an end-run around well-established principles that only official policies or acts of official policymakers may give rise to municipal liability under 42 U.S.C. section 1983. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); *Monell v. Dep't of Soc. Services*, 436 U.S. 658, 694 (1978); *see also Bennett v. City of Eastpointe*, 410 F.3d 810, 819 (6th Cir. 2005) (plaintiffs could not base section 1983 claims on memorandum that had been written by current police chief when he "was simply a lieutenant, and not a policy-making official").

The thousands of government offices throughout the nation have supervisors like Lieutenant Duke attempting to oversee employees' use of a seemingly never-ending stream of new technologies, from e-mailing to text messaging to instant messaging to using Twitter. It simply isn't realistic to avoid informal statements that arguably contradict formal no-privacy policies. But that squarely raises the issue of whether it is reasonable under the Fourth Amendment for government employees to ignore official, explicit no-privacy policies to the contrary.

Within the operational realities of a police department, the answer is certainly no. "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 communication among SWAT team members during those

emergencies would not be subsequently reviewed by an investigating board, subjected to discovery in litigation arising from the incidents, or requested by the media." App., *infra*, 142 (Ikuta, J., dissenting from denial of rehearing en banc.). "The public expects [police] officers to behave with a high level of propriety, and, unsurprisingly, is outraged when they do not do so." *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008). A reasonable police officer understands these operational realities and thus cannot reasonably expect privacy in text messages on a Department-issued pager, particularly messages sent while on duty.

A related operational reality is the public's potential access to the pager transcripts under the California Public Records Act ("CPRA") (Cal. Gov't Code § 6250, *et seq.*). The panel reasoned that the CPRA would not preclude a reasonable expectation of privacy – even if the pager messages were public records – absent evidence that CPRA requests were sufficiently "'widespread or frequent.'" App., *infra*, 32. But that misses the point. As the judges dissenting from denial of rehearing en banc correctly discerned, "[g]overnment employees in California are well aware that every government record is potentially discoverable at the mere request of a member of the public, and their reasonable expectation of privacy in such public records is accordingly reduced." App., *infra*, 142-143.

Whether an expectation of privacy was objectively reasonable must be evaluated under the

totality of these operational realities, not by ignoring the City's no-privacy policy and by downplaying the potential for public disclosure. Permitting informal accommodations for some personal use to trump government employers' explicit no-privacy policies threatens to disembowel the "operational realities" standard. In its amicus curiae brief in the Ninth Circuit, the United States warned that the panel's error in relying on the informal policy of a non-policymaker "puts into doubt employee agreements and privacy policies used across the private sector and government to assist internal investigators in identifying possible corruption, threats to security, or abuse of government resources or authority." App., *infra*, 172-173.

And, with the panel's opinion extant, government employers would be wise to curtail *any* flexibility in electronic communications policies in order to maintain the viability of no-privacy policies. This Court therefore should take this opportunity to restore reasonableness and common sense to *O'Connor*'s "operational realities of the workplace" standard.

II. THE NINTH CIRCUIT OPINION CONTRAVENES THIS COURT'S DECISIONS AND CREATES A SPLIT AMONG THE CIRCUITS ON WHETHER A "LESS INTRUSIVE MEANS" ANALYSIS MAY BE APPLIED TO DETERMINE WHETHER A SEARCH IS REASONABLE UNDER THE FOURTH AMENDMENT.

This Court has "repeatedly" rejected the "existence of alternative 'less intrusive' means" as a basis for evaluating the reasonableness of government activity under the Fourth Amendment. *Skinner*, 489 U.S. at 629 n.9 (collecting cases) (citations omitted). "It is obvious that the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers . . . because judges engaged in post hoc evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished." *Id.* (internal citations and quotations omitted).

Until this panel opinion, the circuit courts uniformly heeded this Court's admonitions. The opinion dissenting from the denial of rehearing en banc points out – and the concurring opinion does not contest – that "[s]even other circuits have followed the Supreme Court's instruction and explicitly rejected a less intrusive means inquiry in the Fourth Amendment context." App., *infra*, 147-149 (citing *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir.

2008); *Lockhart-Bembery v. Sauro*, 498 F.3d 69, 76 (1st Cir. 2007); *Cassidy v. Chertoff*, 471 F.3d 67, 79 (2d Cir. 2006); *Shell v. United States*, 448 F.3d 951, 956 (7th Cir. 2006); *United States v. Prevo*, 435 F.3d 1343, 1348 (11th Cir. 2006); *Shade v. City of Farmington*, 309 F.3d 1054, 1061 (8th Cir. 2002); *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052 (10th Cir. 1994)). The panel opinion, however, creates a split in the circuits by reintroducing a "less intrusive means" analysis into Fourth Amendment jurisprudence.

The opinion concurring in the denial of rehearing en banc argues that the panel did not actually engage in a less intrusive means analysis, but as the dissent notes, the panel opinion "does exactly" that. App., *infra*, 145.

- The panel quoted the Ninth Circuit's opinion in *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987), for the proposition that "'if less intrusive methods were feasible, . . . the search would be unreasonable.'" App., *infra*, 35 (quoting *Schowengerdt*, 823 F.2d at 1336).

- The panel posited that "[t]here were a host of simple ways to verify the efficacy of the 25,000 character limit (if that, indeed, was the intended purpose) without intruding on [plaintiffs'] Fourth Amendment rights." App., *infra*, 35.

- The panel provided examples that were never even suggested by plaintiffs. *Id.*

It is difficult to understand how this approach could *not* be considered a "less intrusive means" test.

As the dissent from the denial of rehearing cogently observed, "[r]ather than evaluate whether the search '*actually* conducted' by the police department was 'reasonably related to the objectives of the search and not excessively intrusive in light of [its purpose], as *O'Connor* requires us to do, 480 U.S. at 726, . . . (emphasis added), the panel looks at what the police department *could* have done." App., *infra*, 145 (parallel citation omitted). The panel thus engaged in precisely the kind of "post-hoc exercise of imagining some other path of conduct the government could have taken," *Taylor v. O'Grady*, 888 F.2d 1189, 1195 (7th Cir. 1989), or "'Monday morning quarterbacking[,]'" *Shade*, 309 F.3d at 1061, that other circuits have concluded is not permissible under this Court's Fourth Amendment jurisprudence.

The opinion concurring in the denial of rehearing en banc also suggests that this Court's prohibition against using a "less intrusive means" analysis applies only to "special needs" searches and states that this case did *not* involve a 'special needs' search." App., *infra*, 135 (citation omitted). The concurrence is wrong on both points.

First, even though cases in which this Court has rejected the "least restrictive means" mode of analysis "have often involved circumstances in which the

government had engaged in 'years of investigation and study' that resulted in 'reasonable conclusions' that the government conduct was necessary," App., *infra*, 135 (citing *Skinner*, 489 U.S. at 629 n.9), many such cases have *not* involved elaborate deliberative processes. *E.g.*, *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985) (20-minute *Terry* stop of pickup truck driver by DEA agent); *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (administrative search of arrestee's personal effects at police station); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (warrantless search of car trunk). Nor have other circuits read this Court's precedents in such a limited manner. *E.g.*, *Lockhart-Bembery*, 498 F.3d at 71, 76 (police officer giving routine police assistance to disabled motorist whose car posed a traffic hazard on a busy road and ordering motorist to move car); *Shade*, 309 F.3d at 1057, 1061 (police officer's pat-down search of student for knife); *Melendez-Garcia*, 28 F.3d at 1052 (*Terry* stop of automobile to search for drugs).

Second, this Court in *O'Connor* expressly concluded that public employer searches *are* "special needs" searches: "In sum, we conclude that the 'special needs, beyond the normal need for law enforcement make the . . . probable-cause requirement impracticable,' . . . for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct are present in the context of government employment." 480 U.S. at 725 (plurality); *accord*, *id.* at 732 (Scalia, J., concurring in the judgment) ("'[S]pecial needs' are

present in the context of government employment.") As *O'Connor* explained, "public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner," and 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 723-24 (plurality).

Far from giving the Department wide latitude, the panel expressly followed *Schowengerdt*, in which the Ninth Circuit had added a "less intrusive methods" and "no broader than necessary" gloss to the *O'Connor* analysis. 823 F.2d at 1336. But this gloss – in addition to conflicting with the opinions of the seven circuits listed above – is incompatible with *O'Connor* itself.

Further contravening *O'Connor*, the panel's suggested "less intrusive" means effectively require employees' consent (notwithstanding their agreement to the employer's no-privacy policy) for the employer to investigate at all. While valid consent may obviate a warrant or probable cause, 4 Wayne R. LaFave, *Search & Seizure* (4th ed. 2004) § 8.1, at 4-5 & n.9, probable cause is not needed for a public employer's search under *O'Connor*, 480 U.S. at 725 (plurality); *id.* at 732 (Scalia, J., concurring in the judgment).

Instead of hypothesizing "less intrusive" means, the panel should have "'balanc[ed] [the search's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate

governmental interests.'" *Vernonia*, 515 U.S. at 652-53 (citations omitted). But the panel failed to balance the interests: It didn't weigh the plaintiffs' interests in using Sergeant Quon's *Department-issued* pager for personal communications – even highly private, sexually graphic ones – while he was on duty, *see* SER 532, 539, 546, against the Department's "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); *see also Dible*, 515 F.3d at 928 ("[T]he interest of the City in maintaining the effective and efficient operation of the police department is particularly strong.").

The panel opinion gives no recognition to *O'Connor*'s teaching that "privacy interests of government employees in their place of work . . . are far less than those found at home or in some other contexts." *O'Connor*, 480 U.S. at 725 (plurality). Just as the *O'Connor* plurality explained that "[t]he employee may avoid exposing personal belongings at work by simply leaving them at home," *id.*, the opinion dissenting from the denial of rehearing en banc in this case aptly explains that "Quon could have avoided exposure of his sexually explicit text messages simply by using his own cell phone or pager." App., *infra*, 143. The City and Department should not be punished because a legitimate workplace search happened to turn up sexually explicit messages that plaintiffs need not and should not have sent on government-issued equipment in the first place. *Cf. Simons*, 206 F.3d at 400 (government

employer "did not lose its special need for 'the efficient and proper operation of the workplace' [under *O'Connor*] merely because the evidence obtained was evidence of a crime").

In fact, as Ontario defendants argued in the Ninth Circuit, the transcript review was reasonable even if Chief Scharf's purpose in ordering it was to investigate misconduct. Under *O'Connor*, even if there exists a reasonable expectation of privacy, a warrantless search may be legal if it is both work-related – for example to investigate work-related misconduct – and reasonable under the circumstances. 480 U.S. at 724-25 (plurality); *id.* at 732 (Scalia, J., concurring in the judgment).[4]

Put simply, "the relevant question is whether th[e] intrusion upon privacy is one that a reasonable employer might engage in." *Vernonia*, 515 U.S. at 665

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[4] The opinion concurring in the denial of rehearing en banc contends the City did not file its own appeal and "for reasons of its own, was quite content to have the jury find a legitimate purpose for Chief Scharf's search." App., *infra*, 131. However, the concurrence omits that the City argued that the Ninth Circuit should affirm on the alternative grounds that the City was entitled to *summary judgment in its favor* because, as a matter of law, plaintiffs had no reasonable expectation of privacy and the review of the pager transcripts was reasonable under *either* purpose submitted to the jury by the District Court. The City relied on the "firmly entrenched rule" that, even without cross-appealing, an appellee may assert any ground for affirmance that is apparent on the record as long as the appellee does not seek to enlarge the relief obtained below. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479-80 (1999).

(citing *O'Connor*). Here, the answer is yes. But the panel's decision encourages government employees to act unreasonably and prevents government employers – even ones with explicit no-privacy policies – from undertaking reasonable searches without the employees' further consent.

III. THE NINTH CIRCUIT OPINION EXTENDS FOURTH AMENDMENT PROTECTION BEYOND REASONABLE LIMITS BY HOLDING THAT INDIVIDUALS SENDING TEXT MESSAGES TO A GOVERNMENT EMPLOYEE'S GOVERNMENT-ISSUED PAGER HAVE A REASONABLE EXPECTATION OF PRIVACY.

The Ninth Circuit's sweeping holding that plaintiffs Trujillo, Florio, and Jerilyn Quon reasonably expected that their messages to Sergeant Quon would be free from Department review is mistaken and further damages government employers' ability to effectively use and monitor communications equipment.

The panel began by asserting that "[t]he extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question." App., *infra*, 23. Next the panel framed the issue as if these plaintiffs had sent text messages to Sergeant Quon on his personal pager and as if he had his own account with Arch Wireless, ignoring the fact that they had sent the messages to a police officer on his Department-issued pager. *See* App., *infra*, 24 ("Do users of text

messaging services such as those provided by Arch Wireless have a reasonable expectation of privacy in their text messages stored on the service provider's network?"). With respect to these plaintiffs, as opposed to Sergeant Quon, the panel expressly did *not* rely on Lieutenant Duke's bill-paying arrangement, App., *infra*, 27 n.6, and the opinion is silent as to their knowledge of it. In fact, the panel fails to account for the fact that the other plaintiffs were fully aware that they were sending messages to Sergeant Quon's Department-issued pager.[5]

Analogizing text messages to telephone calls, regular mail, and e-mail, the panel broadly held that plaintiffs had a reasonable expectation of privacy in the content of messages they sent to Sergeant Quon such that their consent or his consent was required for the Department to review the messages. *See* App.,

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[5] Sergeant Trujillo was a fellow member of the SWAT team and also using a Department-issued pager himself. *See* App., *infra*, 2, 5. Police dispatcher April Florio and Sergeant Quon's wife, Jerilyn Quon, were using their own personal pagers but knew that Sergeant Quon's pager was issued by the Department. SER 303-04, 307. The panel opinion drew no distinctions among them, treating all three essentially as if they were third parties sending text messages to Sergeant Quon. As the United States pointed out, "[t]hough the panel stated that it did 'not endorse a monolithic view of text message users' reasonable expectation of privacy, as this is necessarily a context-sensitive inquiry,' the panel discussed few contextual facts other than whether Quon 'voluntarily permitted the Department to review his text messages.'" App., *infra*, 164-165 (quoting the panel opinion at App., *infra*, 28).

infra, 24-28. But whether users of text messaging *generally* have a reasonable expectation of privacy in the content of text messages is not the issue.[6] Neither the panel's reasoning nor the authorities it cited address a sender's expectation of privacy in communications sent to the recipient's *workplace* equipment – here a government employer's equipment.[7]

It is not objectively reasonable to expect privacy in a message sent to someone else's workplace pager, let alone to a police officer's department-issued pager. To have such an expectation, the sender would have to believe the recipient's employer does *not* have a no-privacy policy in place as to that employer's electronic communications equipment. That is *un*reasonable. As the United States aptly pointed out, "[n]ot only do

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[6] In its amicus brief supporting rehearing en banc, the United States pointed out additional problems with the panel's categorical determination that all users of text messaging have a reasonable expectation that their messages are private. App., *infra*, 163-171. Foremost, the United States argued that the panel's ruling was erroneous "because it made categorical conclusions about entire modes of communication without considering all relevant circumstances," and that "the Sixth Circuit, en banc, had recently rejected a similarly sweeping categorical conclusion about the privacy of e-mail." App., *infra*, 163 (citing *Warshak v. United States*, 532 F.3d 521, 527 (6th Cir. 2008) (en banc). The United States also argued that there generally is no reasonable expectation of privacy in text messages sent and received. App., *infra*, 177-180.

[7] None of the cases involving telephone calls, letters, e-mails, or computer usage cited by panel even addressed government employer searches; they addressed law enforcement searches. *See* App., *infra*, 24-28.

senders lack knowledge of what privacy policy applies to a recipient, but few actions demonstrate an expectation of privacy less than transmission of information to the work account of a public employee charged with enforcing the law." App., *infra*, 179.

Most employers have explicit no-privacy policies. "[T]he abuse of access to workplace computers is so common (workers being prone to use them as media of gossip, titillation, and other entertainment and distraction) that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible." *Muick*, 280 F.3d at 743; *see also TBG Ins. Servs. Corp. v. Superior Court*, 117 Cal. Rptr. 2d 155, 161-62, 96 Cal. App. 4th 443, 451 (2002) (finding no reasonable expectation of privacy in computer provided by employer for employee's home use and noting report that "more than three-quarters of this country's major firms monitor, record, and review employee communications and activities on the job, including their telephone calls, e-mails, Internet connections, and computer files").

In particular, "numerous government agencies," like the City of Ontario, have adopted "policies [that] typically require employees to acknowledge that their e-mail records are subject to inspection, monitoring, and public disclosure; that they have no right of privacy or any reasonable expectation of privacy in workplace e-mails; that the e-mails are owned by the agency, not the employee; and that e-mails are presumptively considered to be public records." Peter

S. Kozinets, *Access to the E-Mail Records of Public Officials: Safeguarding the Public's Right to Know*, 25-SUM Comm. Law. 17, 23 (2007). For example, the United States is "a public employer that extensively uses 'no confidentiality' policies with respect to the workplace and work-issued equipment." App., *infra*, 162.

The Ninth Circuit, however, ignored the prevalence of such policies. In fact, it even ignored the explicit policy in this case, concluding that "[h]ad Jeff Quon voluntarily permitted the Department to review his text messages, the remaining Appellants would have no claims." App., *infra*, 28. But Sergeant Quon *did* consent by signing the City's written policy.[8]

The panel failed to consider whether the senders' expectation of privacy is objectively reasonable for Fourth Amendment purposes in light of all these surrounding circumstances. Remarkably, the panel concluded that plaintiffs "prevail *as a matter of law*." App., *infra*, 40 (emphasis added). The panel's sweeping extension of Fourth Amendment protection threatens any government employer's ability to monitor even its *own* employees' electronic communications, which inevitably will include messages sent from third-party senders. The Ninth Circuit opinion thus further hamstrings public employers' ability to

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

prevent abuse and protect the integrity of workplace communications.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO ADDRESS *O'CONNOR*'S APPLICATION TO NEW WORKPLACE TECHNOLOGIES; THERE IS NO BASIS FOR THE FACTUAL CONCERNS POSITED BY THE OPINION CONCURRING IN THE DENIAL OF REHEARING EN BANC.

As we have explained, there is no merit to the concurring opinion's criticisms of the legal analysis provided by the opinion dissenting from the denial of rehearing en banc. The concurrence also takes the dissent to task for supposedly taking liberties with the facts of the case. App., *infra*, 125-131. But the record soundly refutes these criticisms as well. For example:

- The concurrence says "the record is clear that the City had no official policy governing the use of the pagers." App., *infra*, 127. But the panel opinion itself says that "Quon signed [the Department's general "Computer Usage, Internet and E-mail Policy"] and attended a meeting in which it was made clear that the Policy also *applied to use of the pagers*." App., *infra*, 29 (emphasis added); *see also* App., *infra*, 48 (district court noting meeting and also subsequent memorandum that memorialized meeting and was sent to

Sergeants Quon and Trujillo). What more does it take for a City to have an official policy governing pagers? As we discussed above, even the panel expressly acknowledged that the written policy would control if not for Lieutenant Duke's informal policy. App., *infra*, 29-30.[9]

- According to the concurrence, "[t]he record belies the dissent's assertion that the OPD officers were permitted to use the pagers only during SWAT emergencies." App., *infra*, 126. But the dissent did not make that assertion. Rather, the dissent said that the Department "obtained two-way pagers for its SWAT team members to enable better coordination, and more rapid and effective responses to emergencies," App., *infra*, 138; *see also* App., *infra*, 142, which not only comports with common sense but also is exactly what the district court found. App., *infra*, 45-46.

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[9] The panel's reasoning suggests that government employees can use a newly-acquired technology however they please unless and until the employer issues a policy expressly covering it and that it is not enough to inform the employees that existing policies cover new technologies. This notion is antithetical to the reasonableness standard of the Fourth Amendment and to the special needs of government employers articulated in *O'Connor*.

- The concurrence says the dissent ignores the jury's finding that Chief Scharf's purpose in having Lieutenant Duke audit Sergeant Quon's pager messages was to determine the efficacy of the Department's existing character limits. App., *infra*, 130. But the dissent did acknowledge that Chief Scharf ordered the audit "to determine whether the police department's contract with their service provider was sufficient to meet its needs for text messaging." App., *infra*, 139-140 (citing the panel opinion). If anything, it was the panel that was reluctant to accept the jury's verdict on this issue, hypothesizing other ways "to verify the efficacy of the 25,000 character limit (*if that, indeed, was the intended purpose*)." App., *infra*, 35 (emphasis added).

- The concurrence chides the dissent for stating that "Chief Scharf 'sent the matter to internal affairs for an investigation "to determine if someone was wasting . . . City time not doing work when they should be."'" App., *infra*, 130. But the dissent's statement is nearly *identical* to what the panel opinion said: "Chief Scharf referred the matter to internal affairs 'to determine if someone was wasting . . . City time not doing work when they should be.'" App., *infra*, 9; *see also* App., *infra*, 55 (district court stating same).

And while the concurring opinion emphasizes that the panel's holding was "fact-driven," App., *infra*, 126, most Fourth Amendment cases are. As the concurrence itself later states, the *O'Connor* "analysis is necessarily fact-driven." App., *infra*, 132. That is no reason for this Court to turn a blind eye on a circuit court opinion that seriously undermines Fourth Amendment jurisprudence on issues of great importance.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the Ninth Circuit's ruling manifestly contravenes this Court's Fourth Amendment precedents, the Court should consider summary reversal.

Respectfully submitted.

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