No. 08-1332

In The Supreme Court of the United States

CITY OF ONTARIO, CALIFORNIA,
ONTARIO POLICE DEPARTMENT,
and LLOYD SCHARF,

Petitioners,

v.

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

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

ARGUMENT

I. GIVEN THE "OPERATIONAL REALITIES OF THE WORKPLACE," SERGEANT QUON HAD NO REASONABLE EXPECTATION OF PRIVACY VIS-À-VIS THE DEPARTMENT IN TEXT MESSAGES SENT ON A DEPARTMENT-ISSUED PAGER.

A. Sergeant Quon's Expectation Of Privacy Vis-À-Vis The Department Was Diminished By The Fact He Was A SWAT Leader Using A Department-Issued Pager.

Petitioners established that under *O'Connor*, a government "employee's expectation of privacy *must* be assessed *in the context of the employment relation*." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion) (emphasis added). Respondents essentially ignore that here that relation is between a police officer and the department that employs him—a relationship this Court has recognized necessarily entails some compromise in the rights the officer might possess if he were in another, less publicly sensitive position. *E.g.*, *Kelley v. Johnson*, 425 U.S. 238, 245-247 (1976).

Sergeant Quon's employment as a police officer—indeed as a leader on the highly-visible SWAT team—surely affected the reasonableness of his expectation of privacy in communications on a Department-issued SWAT pager. As the dissenting opinion below explained, Sergeant Quon could not reasonably expect that the messages would never be reviewed by the

Department if requested by an investigating board or in litigation generated by SWAT actions or by the media. App. 142.

B. Sergeant Quon's Expectation Of Privacy Vis-À-Vis The Department Was Diminished By The Official, Explicit No-Privacy Policy That He Was Repeatedly Informed Applied To The Pagers.

Respondents have conceded that "[v]irtually all governmental agencies have or will enact no privacy policies, which if remain undisturbed by practice, *would negate* or diminish an expectation of privacy." C.A. Ans. Br. to Pet. Reh'g 12 n.3 (emphasis added). Now, however, respondents switch gears and argue that even an express policy could not "completely extinguish an employee's expectation of privacy." Resp. Br. 40. They cite a footnote in *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979), in which this Court discussed the effectiveness of the "reasonable expectation of privacy" test on the hypothesis that the government "suddenly announced 'on nationwide television that all homes henceforth would be subject to warrantless entry . . . .'" Resp. Br. 40.

Smith offers respondents no support. Certainly the government may not unilaterally take away the privacy that every citizen enjoys in his own home. But that proposition says nothing about how a government employer may regulate the terms on which it loans its own property to its employees.

Compare Kyllo v. United States, 533 U.S. 27, 31 (2001) (privacy in home lies at core of Fourth Amendment) *with Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2151 (2008) (government has significantly greater leeway with government employees than with citizens at large).

Moreover, the *Smith* footnote points out that in the event such a policy were announced aimed at mitigating an expectation of privacy, "a normative inquiry would be proper." 442 U.S. at 740 n.5. Such an inquiry here would only bolster *petitioners'* position. Some of the very cases cited by respondents have looked to employers' no-privacy policies to determine whether employees' expectations of privacy were reasonable. Resp. Br. 29-30 (citing, inter alia, *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001) (Sotomayor, J.) and *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000)). The fact is that no-privacy policies like that present here *are* the norm (*see* authorities cited at Pet. Br. 32-33)—and for good reasons. As the United States explained in its amicus brief, "[t]here are numerous valid reasons—indeed, compelling reasons—why most public and private employers adopt comparable policies," including protecting against malicious software, potential legal liability, and the breach of confidentiality of sensitive data. U.S. Amicus Br. 9; *see also id.* 18-21.

Respondents also concede, as they must, that Sergeant Quon was advised "that the City's existing *general* computer policy, which did not mention pagers, would govern the usage of the pagers." Resp.

Br. 1-2. And even while describing the informal overages accommodation on which respondents rely, Lieutenant Duke simultaneously and expressly *reminded* Sergeant Quon of the official policy's applicability to text messages. As respondents themselves state: "During this conversation, Lieutenant Duke told Quon that the text-messages sent over the City-owned pager 'were considered email and could be audited,' but went on to say 'that it was not his intent to audit employee's text messages to see if the overage is due to work related transmissions.'" Resp. Br. 9. In turn, under the official policy, users of email, and thus text messaging, were expressly warned to "have no expectation of privacy or confidentiality," and that email, and thus text messaging, was "not confidential" and was "considered City property." App. 152-153, ¶ III.C.-D.[1]

[1] Respondents argue that the City's official policy precluding privacy in electronic communications was ineffective here because it did not expressly mention the pagers. Resp. Br. 32-34. Of course, the absence of explicit mention of pagers makes perfect sense since the policy was issued before the Department even obtained the pagers. App. 151; Supplemental Excerpts of Record ("S.E.R.") 415-416. Moreover, as even respondents note, the policy's language broadly stated that it applied to the "'use of City-owned computers *and all associated equipment* . . . .'" Resp. Br. 33 n.3 (emphasis added) (quoting App. 151); *see also* App. 152, ¶ III.A. ("or other City computer related services"), 153, ¶ III.D. ("email or other electronic information"). The policy acknowledgments signed by Sergeant Quon and Sergeant Trujillo similarly described "[t]he use of City owned computers *and related equipment*, email and the Internet[.]" App. 156-157 (emphasis added). Thus, although the

(Continued on following page)

In this key respect, respondents misplace reliance on—and flatly misrepresent the facts of—*United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006). In *Long*, the relevant agency policy was stated in a "log-on banner" on the office computer. *Id.* at 60. While respondents claim that the banner informed the user that "he or she should expect no privacy in their communication" (Resp. Br. 38), in reality, it did no such thing: "The banner in the instant case did not provide Appellee with notice that she had no right of privacy." *Long*, 64 M.J. at 65. And the court expressly relied on that lack of warning to *distinguish* the case from one where the log-on banner *did* provide such notice and where the court thus found no reasonable expectation of privacy. *Id.* (citing *United States v. Angevine*, 281 F.3d 1130, 1133 (10th Cir. 2002)). Here, like *Angevine* and unlike *Long*, the policy expressly warned of no privacy.

Respondents argue, however, that because it was Lieutenant Duke who also made the informal arrangement concerning auditing text messages for billing purposes, his announcement that text messages were subject to the official no-privacy policy was ineffective; thus, they claim, Sergeant Quon could reasonably have expected privacy in his text messages "since the only individual to initially say

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official policy did not expressly refer to the yet-to-be acquired pagers, it was broadly framed to encompass equipment other than just computers and modes of communication other than just email.

[officers] had no privacy later said that they did." Resp. Br. 36.

However, as respondents tacitly admit, Lieutenant Duke, unlike Chief Scharf, was not a policymaker, as illustrated by respondents' labored attempt to show that only Lieutenant Duke, and not Chief Scharf, gave the reminder that text messages were considered email under the written policy. *See* Resp. Br. 35 ("Lieutenant Duke made *his* pronouncement at the staff meeting . . . .") (emphasis in original). To the extent they characterize "Lieutenant Duke's policy-making authority" as "a factual dispute not presented to the district court" (Resp. Br. 50), they waived this contention by failing to raise it in their opposition to certiorari. Sup. Ct. R. 15; *City of Okla. City v. Tuttle*, 471 U.S. 808, 815 (1985). In any event, the Ninth Circuit expressly acknowledged that "Lieutenant Duke was not the official policymaker, or even the final policymaker" (while at the same time dismissing that fact as irrelevant because it did "not diminish the chain of command"). App. 31.

And while Lieutenant Duke was the spokesperson who delivered the reminder that the Department considered pager messages to be emails within the official no-privacy policy, he clearly did so under the auspices of Chief Scharf, whom respondents have described as the Department's "final policy maker." C.A. Appellants' Opening Br. 40. Lieutenant Duke made the announcement at a supervisory staff meeting at which the Chief—the head of the Department—was present. J.A. 28.

Indeed, it was Chief Scharf who distributed the memorandum memorializing the announcement to all supervisory personnel, including Sergeant Quon. J.A. 28, 30. Sergeant Quon could not reasonably think the Chief did not endorse the announcement.

C. Lieutenant Duke's Informal Bill-Paying Accommodation Did Not In Any Way Undermine The Applicability Of The Department's Official No-Privacy Policy To Text Messages.

Respondents rely on Lieutenant Duke's informal overages accommodation as the principal basis for their claim that Sergeant Quon had a reasonable expectation of privacy. But even if Lieutenant Duke had the authority to exempt pager use from the official no-privacy policy, he did not do so. Lieutenant Duke simply told Sergeant Quon that "he [Quon] could reimburse the City for the overage so that he [Duke] would not have to audit the transmission[s] and see how many messages were non-work related." J.A. 40. On its face, this was a *financial* arrangement intended to streamline the allocation of charges for pager use, not a privacy guarantee.

In fact, not only did Lieutenant Duke never tell Sergeant Quon he could expect *privacy* vis-à-vis the Department, he told him the opposite. When he told him that he would not audit in connection with billing for monthly overages (J.A. 83; S.E.R. 174), at the same time, he also expressly reminded him that

the text messages "were considered email" (S.E.R. 174) and were "public records" that "could be audited at any time." J.A. 40.

Furthermore, in setting out his procedure for dealing with *overages*, Lieutenant Duke simply did not address any number of situations in which the Department might review the messages without monthly overages being in issue. No reasonable officer could legitimately expect that Lieutenant Duke's financial arrangement could keep their text messages private from the Department given the ever-present potential for internal affairs investigations, media requests, public records requests, and litigation demands.

And even if Lieutenant Duke's bill-paying accommodation could somehow unreasonably be misinterpreted as a forbearance of the official no-privacy policy, that would not suffice to alter the official policy. As the United States has pointed out, "[a] brief period of underenforcement by a single subordinate officer does not detract from the force of a policy." U.S. Amicus Br. 26 (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). Here, the Department had the pagers only a few months when Lieutenant Duke complained to Chief Scharf that he was tired of being a bill collector, and Chief Scharf responded immediately by ordering a review. Pet. Br. 5-7.

In sum, what is missing from any of Lieutenant Duke's statements to Quon is a single instance where,

even if he could, he purported to overrule the official policy's *no-privacy* provisions. The potential for review of the messages under the official policy diminished any expectation of privacy vis-à-vis the Department that Lieutenant Duke's accommodation could possibly have fostered. *See Smith*, 442 U.S. at 745; *California v. Greenwood*, 486 U.S. 35, 39 (1988) (rejecting argument premising Fourth Amendment protection on fact that "there was little likelihood that [items] would be inspected by anyone").

D. The Ninth Circuit's Ruling Against Arch Wireless Under The SCA Does Not Retroactively Create A Reasonable Expectation Of Privacy Vis-À-Vis The Department.

Respondents argue that because the Ninth Circuit reversed the district court and held that Arch Wireless ("Arch") violated the Stored Communications Act ("SCA"), 18 U.S.C. sections 2701-2712, when it voluntarily provided the text message transcripts to the Department, Sergeant Quon's "expectation of privacy is objectively reasonable." Resp. Br. 48. Not so.

Preliminarily, although respondents now tout SCA protection as "the inescapable operational reality" in this case (Resp. Br. 48), in the Ninth Circuit they did not rely on the SCA at all for this purpose and instead touted Lieutenant Duke's bill-paying accommodation as the "inescapable reality."

C.A. Ans. Br. to Pet. Reh'g 12. Accordingly, the certiorari petition presented no SCA issue. This Court declined to grant Arch's conditional cross-petition, as respondents themselves urged.

Respondents attempt to exploit those rulings by contending that because the Ninth Circuit has now held that the SCA prohibited Arch from disclosing the messages, it was "illegal" for the petitioners to obtain the messages from Arch. But while respondents accuse petitioners of "illegally obtaining" the transcripts from Arch and "violating federal law" (Resp. Br. 32, 48), they offer no support for such a claim. In fact, respondents *abandoned* their SCA claims against petitioners after the district court identified fundamental flaws in those claims and granted summary judgment to petitioners.[2] Respondents concede that "the City of Ontario was a 'subscriber' of the service" (Resp. Br. 46), and they offer no support for their bald assertion that it was "illegal" for the City as subscriber and as an employer conducting a workplace review to ask for and receive the transcripts from Arch.

[2] The district court explained that petitioners (1) were not service providers under the SCA and (2) could not otherwise be liable under the SCA because "[s]ection 2703 concerns a governmental entity's attempt to gain information in electronic storage *during the course of a criminal investigation*." App. 60-61. Respondents did not further pursue those claims in the Ninth Circuit. App. 11 n.3.

In any event, respondents cite no controlling authority for the proposition that statutory protections *confer* a reasonable expectation of privacy, let alone one held by an employee vis-à-vis a government employer. They cite a footnote in *Greenwood* for the proposition that "'statutes criminalizing interference with the mails might reinforce the expectation of privacy in mail . . . .'" Resp. Br. 45 (quoting 486 U.S. at 55 n.4). But respondents fail to acknowledge that the quote is from a *dissenting* opinion, and even that dissenting opinion stated in the same sentence that "the expectation of privacy in no way depends on statutory protection." *California v. Greenwood*, 486 U.S. at 55 n.4. (Brennan, J., dissenting). As for the majority opinion, it *rejected* the suggestion that "expectation of privacy in [the defendant's] garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law." *Id.* at 43 (majority op.). Respondents also cite the plurality opinion in *Florida v. Riley*, 488 U.S. 445, 451 (1989), but that plurality relied on the fact that a law enforcement helicopter was *not* violating Federal Aviation Administration regulations in holding that a homeowner did *not* have a reasonable expectation of privacy that his greenhouse was protected from observation by the helicopter. *Id.* at 451.

And even if the question whether Arch violated the SCA were relevant, the Ninth Circuit wrongly resolved that issue. Both the district court and the

Ninth Circuit reasoned that whether the SCA permitted Arch to provide the transcripts to the City hinged on whether Arch was acting as a "remote computing service" ("RCS") (and thus permitted to provide the transcripts to the City as "subscriber" under 18 U.S.C. § 2702(b)(3)) or as an "electronic communications service" ("ECS") (and thus prohibited from doing so without the consent of an "addressee or intended recipient" of the messages under 18 U.S.C. § 2702(b)(1)). App. 13-14, 63. While the district court concluded Arch was acting as an RCS, the Ninth Circuit concluded that it was acting as an ECS. App. 14, 20, 80. The Ninth Circuit thus held that "[w]hen Arch Wireless knowingly turned over the text-messaging transcripts to the City, which was a 'subscriber,' not 'an addressee or intended recipient of such communication,' it violated the SCA, 18 U.S.C. § 2702(a)(1)." App. 20-21.

The Ninth Circuit's ruling was wrong. As the district court correctly explained, Arch was variously acting as both an ECS and an RCS, but it acted solely in its capacity as an RCS when it provided archived copies of the text messages to the City in its capacity as subscriber on the account:

> Certain aspects of Arch Wireless' service—the provision of text messaging (perhaps including the 72-hour short-term storage of such messages *before* they are opened and read by the recipient)—were the provision of purely electronic communications system, while others—the retrieval of the contents of

> those text messages kept in long-term storage on its computer network after they had been received—were that of a remote computing service.

App. 80 (relying on S. Rep. No. 99-541, at 14 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3568 ("Existing telephone companies and electronic mail companies are providers of electronic communication services. Other services like remote computing services may also provide electronic communication services.")); *see also* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1215 (2004) ("most network service providers are multifunctional" and statutory classification is "context sensitive").

The Ninth Circuit's error has not gone unnoticed. *See Flagg v. City of Detroit*, 252 F.R.D. 346, 362 (E.D. Mich. 2008) (reviewing the Ninth Circuit and district court rulings on whether Arch was acting as an ECS or RCS and "find[ing] the lower court's reasoning more persuasive, on a number of grounds"); Alyssa H. DaCunha, Casenote & Comment, *Txts R Safe 4 2Day:* Quon v. Arch Wireless *and the Fourth Amendment Applied to Text Messages*, 17 Geo. Mason L. Rev. 295, 322 (Fall 2009) (noting that the district court's determination of Arch's status under the SCA "better accords" with SCA's text and legislative history). This Court certainly should not predicate Fourth Amendment protection on the Ninth Circuit's erroneous SCA ruling.

But whether the Ninth Circuit was correct or incorrect, protection under the SCA cannot form the basis for an objectively reasonable expectation of privacy in text messaging on a government employer's equipment, because whether the statute prevents disclosure of the messages to the employer depends on the application of complex statutory provisions to facts that the employee and those sending messages to the employee did not even know and could not control. *See United States v. Payner*, 447 U.S. 727, 732 n.4 (1980) (rejecting reliance on complex foreign law of bank secrecy as creating a "blanket guarantee of privacy" where it contained numerous exceptions and had not been construed). Respondents themselves have acknowledged that the facts regarding the actual service provided are key to how the SCA applies, noting that "not every 'storage' maintained by a provider of electronic communication will automatically constitute 'electronic storage[,]' " and "[a] court will be required to review the actual service provided between the entity and the provider." Opp. to Cert. 24.[3] And even if armed with the requisite facts, a government employee could not confidently prognosticate that the SCA would prohibit the service provider from providing its subscriber—the employer—with copies of the messages sent on

[3] Here, for example, respondents had no idea what sort of service that Arch contracted to provide the City or how Arch's service worked. They did not even know that Arch archived copies of the messages. *See* App. 3; S.E.R. 303-304, ¶ 4; S.E.R. 307-308, ¶ 4.

the subscriber's equipment. "Courts and commentators alike agree on only one aspect of the statute: it is highly technical and difficult to apply." DaCunha, *supra*, at 312.

Moreover, here respondents could not have known that the SCA provisions on which respondents rely would apply at all. As the United States points out, the Department could have demanded that Sergeant Quon turn over the Department pager he was using, thereby gaining access to any messages that had been delivered and were stored in the pager's memory. *See* U.S. Amicus Br. 29. Indeed, respondents' theory all along has been that the City *could* audit but, pursuant to Lieutenant Duke's accommodation, Sergeant Quon could simply pay overages to avoid Department review. Resp. Br. 10.

In sum, respondents could not reasonably rely on the SCA to confer privacy. There is no basis in fact or law for respondents' assertion that they could have harbored an objectively reasonable expectation of privacy based on the fact that years after the conduct in question, a court erroneously determined that an obscure and complex statute should have prevented a third party from providing records of the communications to the subscriber/employer.

E. Any Reasonable Expectation Of Privacy Vis-À-Vis The Department Was Also Diminished Because The Text Messages Were Potentially Subject To Review And Disclosure In Response To Public Records Requests.

Respondents make no attempt to defend the lower courts' reasoning that potential public access under the California Public Records Act ("CPRA") (Cal. Gov't Code § 6250, *et seq*.) precludes a reasonable expectation of privacy only if CPRA requests were widespread or frequent. App. 32. Thus, they offer no response to petitioners' point that *Smith v. Maryland* holds that it is the *potential* for review that eliminates any legitimate expectation of privacy. *See* Pet. Br. 40.

Moreover, respondents do not respond to petitioners' further point that they could have no reasonable expectation of privacy vis-à-vis the Department because, when public records requests are made, the public agency itself must review the requested records to determine whether disclosure is required. As one amicus explains, even where it is claimed that the information sought is purely private, "the agency must review its own records to fulfill its statutory obligation of determining whether any information is private, and if so, to weigh the privacy interests against any legitimate public interest in disclosure of the information requested." L.A. Times Amicus Br. 13.

An amicus curiae brief supporting respondents argues, however, that to hold that potential production under the CPRA destroys a reasonable expectation of privacy would mean that "any document potentially subject to mere review—not even disclosure—whether under the CPRA [or similar statutes] would be stripped of *any* protection under the Fourth Amendment." E.F.F. Amicus Br. 33. Not so. That argument ignores what is actually at issue here: a reasonable expectation of privacy vis-à-vis Sergeant Quon's *government employer*, not law enforcement in general. As petitioners pointed out—and respondents do not dispute—only the City, and not respondents, would even have a right to assert exemptions under the CPRA. Pet. Br. 38.

There is no merit to respondents' contention that "the City of Ontario did not prepare, own, use, or retain the text-messages" (Resp. Br. 43) and thus they did not constitute public records at all within the meaning of the statute, which defines a public record as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Cal. Gov't Code § 6252(e). The City's official policy stated that "information produced in either hard copy or in electronic form is considered City property." App. 153, ¶ III.D. Moreover, at least *some* of Sergeant Quon's text messages were actually job-related, i.e., were prepared and used for City business. Also, as petitioners pointed out, amici amplified, and respondents

fail to dispute, the public would have a very strong argument that even purely private messages by a SWAT officer abusing public resources would be subject to disclosure. Pet. Br. 37, 58; League of Cal. Cities Amicus Br. 11; L.A. Times Amicus Br. 20. And, as discussed above, the City in any event would have to review all text messages to determine if they were purely personal.

Here, too, respondents argue that under the Ninth Circuit's SCA ruling, petitioners had "no legal right or means to access the content of plaintiffs' text-messages without their consent." Resp. Br. 43. They argue that disclosure would therefore be "specifically exempted under the CPRA when the disclosure is prohibited by statute." *Id.* (citing Cal. Gov't Code § 6254(k)). As explained above, the Ninth Circuit's SCA ruling was wrong. In any event, though, section 6254(k) should not be interpreted to prohibit disclosing information based on where that information is stored, but rather based on the content. *Cf. Comm'n on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278, 291, 64 Cal. Rptr. 3d 661, 165 P.3d 462 (2007) ("We consider it unlikely the Legislature intended to render documents confidential based on their location, rather than their content."). Respondents' reliance on the SCA is therefore misplaced.

Finally, respondents argue that "[b]oth the district court and the Ninth Circuit's ruling on these disputed facts are not clearly erroneous and should thus be upheld." Resp. Br. 51-52. Their cited cases

involve factual findings after court trials. Resp. Br. 52 (citing, inter alia, *Blau v. Lehman*, 368 U.S. 403, 408-409 (1962)). There was no court trial on these issues, and the lower courts did not make any such factual findings on the CPRA issues, or any other issues for that matter; rather, they discussed the CPRA in ruling on cross-motions for summary judgment. The only factual finding in this case was the jury's special verdict that the purpose of the transcript review was to determine the efficacy of the monthly character limit.

II. THE DEPARTMENT'S SEARCH OF THE TEXT MESSAGES WAS REASONABLE AT ITS INCEPTION AND IN ITS SCOPE, AND THE NINTH CIRCUIT'S "LESS INTRUSIVE METHODS" APPROACH WAS ERRONEOUS AND REQUIRES REVERSAL.

Even if there was a reasonable expectation of privacy in the text messages, the Department's search of the text messages was lawful under the Fourth Amendment as long as it was reasonable under the circumstances. *O'Connor*, 480 U.S. at 725-726 (plurality opinion); *see also id.* at 732 (Scalia, J., concurring in the judgment). To determine reasonableness, the Court employs a balancing test, weighing the search's "intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995) (citations and internal quotation marks omitted).

Here the Ninth Circuit abdicated this role and instead utilized an improper "less intrusive methods" test to invalidate the search. Properly assessed, the search was reasonable in its inception and scope.

A. The Ninth Circuit Improperly Hypothesized "Less Intrusive Methods" And Failed To Balance The Interests.

In holding the search was unreasonable, the Ninth Circuit panel *expressly* applied a "less intrusive" means test (App. 35) that this Court has repeatedly rejected. *E.g.*, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989). Respondents attempt to deny this reality with repeated references to the one-judge opinion concurring in the denial of rehearing en banc as an opinion by the "panel" or the "Ninth Circuit." Resp. Br. 22, 23. But not one other judge joined the concurring opinion. *See* App. 125. Nor did the Ninth Circuit panel ever amend the actual opinion to eliminate the express adoption and application of the discredited "less intrusive means" test from the Ninth Circuit's own pre-*Skinner* opinion in *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1336 (9th Cir. 1987). *See* App. 35.

The dissenting judges below correctly noted that applying "less intrusive means" analysis is "exactly" what the panel did. App. 145. If the panel's analysis is not an improper use of "less intrusive means" methodology, it renders meaningless this Court's

admonition that "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." *Skinner*, 489 U.S. at 629 n.9 (internal citations and quotations omitted).

Respondents nevertheless contend that the Ninth Circuit's "holding was based on the court's 'conclusion that Quon's "reasonable expectation of privacy in those messages" was not outweighed by the government's interest—again, as found by the jury—in auditing the messages.'" Resp. Br. 18 (purporting to quote App. 35-36 (Ninth Circuit opinion) but actually quoting App. 134 (opinion concurring in denial of rehearing)). This is simply another attempt to pass off the opinion of the lone judge concurring in the denial of rehearing en banc as if it were the Ninth Circuit's opinion. The actual opinion says nothing about balancing competing interests.

Amici curiae for respondents argue that the lines between home and the workplace have become blurred, thus tipping the balance in favor of employee privacy in employer-provided equipment. But even if their premise is correct, that fact does not override a government employer's legitimate needs to promote efficiency, integrity, and safety. *See Engquist*, 128 S. Ct. at 2151.

As petitioners have also explained, accommodating *limited* personal use of electronic communications may make sense for both employers and

employees; but affording Fourth Amendment protection vis-à-vis the employer based on such accommodations would only incentivize employers to curtail such accommodations altogether. *See* Pet. Br. at 58-59 (citing William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 Stan. L. Rev. 553, 579 (1992)). One amicus curiae for respondents argues instead that the burden should be on the employer to implement elaborate "data minimization" techniques and then, to conduct a search for data, submit to court-supervised protocols. E.P.I.C. Amicus Br. 6-12, 25-36. But even according to that amicus, "[s]ecurity experts agree that the best way to prevent loss or misuse of sensitive personal information is to avoid gathering or storing it in the first place." E.P.I.C. Amicus Br. 7-8. Here, Sergeant Quon could have done that simply by using a personal pager.

In sum, as explained below, under the *O'Connor* paradigm, the Department's review of the text message transcripts was certainly "work-related" and "reasonable[,]" 480 U.S. at 725-726 (plurality opinion); *id.* at 732 (Scalia, J., concurring in the judgment), in "both the inception and the scope[.]" *Id.* at 726 (plurality opinion).

B. The Text Message Review Was Reasonable At Its Inception.

Petitioners' brief explains that the review of the text messages was reasonable whether undertaken to

determine the efficacy of the character limit, as the jury found, or to investigate pager misuse. Pet. Br. 53-59. Respondents have no adequate response.

Respondents argue the review was not justified at its inception for the former purpose because it was not "*necessary* to insure that [Sergeant Quon] was not being required to pay for work-related messages." Resp. Br. 53 (emphasis in original). They contend that Lieutenant Duke's bill-paying arrangement was working well. But while no officer had thus far complained about Lieutenant Duke's bill-paying arrangement, there was no necessity to wait for a complaint; it was certainly reasonable for the Department to ensure that the officers were being treated fairly under that arrangement by checking to see that the character limit was adequate to cover job-related text messages.

Moreover, although respondents acknowledge that Lieutenant Duke "grew tired of being a bill collector," they suggest this was not a valid basis on which the Department could proceed to investigate the character limit's efficacy. Resp. Br. 54. But they ignore that, according to Lieutenant Duke, it was "very labor intensive to get people to pay for overages." J.A. 85; *see also* Resp. Br. 2 (contending that "various officers, including Sergeant Quon, exceeded the monthly character limit on several occasions"). In the interests of efficiency alone, it was reasonable for the Department to seek a means of redressing this "labor intensive" task.

Plaintiffs also argue that the "written computer policy allows personal communication," thus making the review unnecessary. Resp. Br. 56. This is a non sequitur. The review was needed to determine the *amount* of personal communications as opposed to job-related communications. Reviewing the messages themselves was clearly a reasonable method of making that determination.

At bottom, respondents' argument that the motivation for the search was unreasonable boils down to the claim that the Department was forced to stick with Lieutenant Duke's arrangement, no matter how unfair or inefficient it turned out to be. That does not comport with *O'Connor*'s recognition that government employers need "wide latitude" to carry out workplace searches to "ensure the efficient and proper operation of the agency." 480 U.S. at 723-724 (plurality opinion).

As for searching for misconduct, respondents point to the district court's reasoning that Lieutenant Duke's bill-paying accommodation somehow "encouraged" personal pager use. Resp. Br. 54. But respondents simply ignore that even if Lieutenant Duke's accommodation arguably condoned *some* personal use, it did not condone (1) *excessive* personal use or (2) *on-duty* personal use. Pet. Br. 57-58. Spending an inordinate amount of time texting means not attending to the job, and that is misconduct even if *some* personal use is allowed.

Respondents also attempt to make much of the fact that the Department had not previously undertaken any reviews of text messages. But Chief Scharf ordered the review only a few months into the pager program and immediately after Lieutenant Duke first voiced concerns about bill-collecting. There is nothing unreasonable about a government employer seeking to remedy a problem only when it first emerges. Under respondents' argument, even where an employer has a valid no-privacy policy, the first nonconsensual search of communications on any newly acquired technology necessarily violates the Fourth Amendment because there has been no previous enforcement of the policy. And, perversely, under that rule, more and more searching by an employer prevents—rather than causes—Fourth Amendment violations. That is neither a reasonable rule nor one required by the Fourth Amendment.

C. The Review Was Reasonable In Its Scope.

The proper analysis of the scope of an employer search under *O'Connor* is whether it is "reasonably related to the objectives of the search and not excessively intrusive in light of [its purpose.]" 480 U.S. at 726 (plurality opinion); *accord Leventhal*, 266 F.3d at 73. Under this standard, the review of Sergeant Quon's text messages easily passes muster.

The review was restrained and limited to two months and the two officers who had most exceeded

the character limit. Notably, the period under review was *after* Sergeant Quon officially had been informed that the general no-privacy policy applied to the pagers. Contrary to plaintiffs' argument (Resp. Br. 57-59), the search here was limited and targeted—nothing like the one determined unreasonable in *Narducci v. Moore*, 572 F.3d 313, 321 (7th Cir. 2009), which "include[d] the recording of every phone call, for at least a six-year period, with no notice to the affected employees."

Moreover, as the district court explained in detail—and petitioners' brief pointed out (Pet. Br. 55) but respondents fail to respond to—it *was* necessary to look at the contents of the text messages in order to accomplish the purpose of the search:

> Even if talking to the officers beforehand may have brought to light information that some of the overages in question were for work-related reasons, only by performing an audit of the text messages themselves could the department confirm that the officers' recollection was accurate (which may be less than reliable given the passage of time since the messages were typed or read on the pager by the officer). Looking at the telephone numbers dialed by the officers is equally problematic. Although the telephone numbers may be a means of determining whether the person who was paged was a co-worker, that fact alone does not provide any definitive answer as to *what* those individuals were text-messaging each other

> about. As demonstrated by the actual audit that was performed in this case, text-messaging a fellow employee could be done largely for personal, not work-related, reasons. Thus, the only way to accurately and definitively determine whether such hidden costs were being imposed by the monthly character limits that were in place was by looking at the actual text-messages used by the officers who exceeded the character limits.

App. 102. And, contrary to one amicus curiae's argument, the fact that plaintiffs Florio and Jerilyn Quon were using private pagers did not necessarily mean messages exchanged with them were personal (AFL-CIO Amicus Br. 14); people sometimes use personal equipment to conduct official business. *See State ex rel. Glasgow v. Jones*, 119 Ohio St. 3d 391, 396, 894 N.E.2d 686 (2008) (state representative concedes that even email messages on private email account may document work-related activities under state public records act).

As the United States pointed out, the "less intrusive" means hypothesized by the Ninth Circuit "all depended on Quon's accurate and timely cooperation, see Pet. App. 35-36, which the City could reasonably think would not be forthcoming." U.S. Amicus Br. 28. Whether or not other less intrusive alternatives were available, under all the circumstances present here, reviewing the actual text messages for only a limited period and of only the two officers who had most exceeded the character limit

was *a* reasonable means of determining whether the then-current character limit was adequate for job-related text messages. And it was certainly reasonable in light of the policy that warned officers that they should not use the pagers expecting privacy—a policy in no way undermined by Lieutenant Duke's accommodation—because in light of that warning there was no reason to expect that the search would uncover highly sensitive personal material. Because the search was reasonable, the Ninth Circuit ruling should be reversed with an order to affirm the district court judgment.

III. SERGEANT QUON'S TEXT-MESSAGING PARTNERS HAD NO REASONABLE EXPECTATION OF PRIVACY VIS-À-VIS THE DEPARTMENT IN TEXT MESSAGES SENT TO A DEPARTMENT-ISSUED PAGER.

Respondents and their amici apparently recognize that the Fourth Amendment claims of the remaining three respondents hinge on whether Sergeant Quon's claim succeeds. *See* Resp. Br. 60 ("Since the search was unreasonable as to Sergeant Quon, it was also unreasonable as to his correspondents."); E.F.F. Amicus Br. 37 (remaining plaintiffs' Fourth Amendment claims succeed if Sergeant Quon's succeeds but fail if his fails). Petitioners agree in part: If Sergeant Quon's claim fails, so too do the remaining plaintiffs' claims. But their claims fail in any event for the additional reason that they were knowingly sending messages to

Sergeant Quon's government *workplace* pager and could never have formed any reasonable expectation of privacy vis-à-vis his government employer.

As petitioners' brief explains, Sergeant Quon's text-messaging partners could have no reasonable expectation of privacy in messages they sent to a Department-issued pager in light of the prevalence of employers' no-privacy policies and the fact that they knew they were sending messages to a Department-issued pager rather than to a personal pager. Pet. Br. 61-62. Because most employers—and government employers in particular—notoriously have no-privacy policies that apply to the recipient's workplace electronic communications, the senders could not reasonably assume that their messages would not be reviewed by the Department. *See* Pet. Br. 60-65; *see also id.* at 31-33. Respondents provide no answers to these points.

Respondents instead simply adopt the Ninth Circuit's reasoning analogizing text messages to telephone calls, regular mail, and email, arguing that Sergeant Quon's text-messaging partners had a reasonable expectation of privacy in the *content* of messages they sent to Sergeant Quon that could be vitiated only by his consent. This approach fails for multiple reasons.

Neither that reasoning nor their cited authorities address a third party's expectation of privacy in communications sent to a person's *workplace*, let alone to a police department. They do not involve, for

example, sending a letter addressed to a police officer at the police department and whether one would have any reasonable expectation that the Department would not view the letter's contents. Obviously, that would be entirely unreasonable—the Department, as the officer's employer, could have any number of valid reasons to review the contents of the letter before or after delivering it to the officer named on the envelope and could have in place a policy of doing exactly that.

Nor is it relevant that here the text messages were obtained from the City's account with Arch as opposed to a City-owned server or the pager itself. The City is the subscriber on the Arch account; Arch was the City's agent. Delivery of the messages to Arch was analogous to delivery of mail to an employer's mailroom: In both circumstances, further delivery may be needed before the messages reach their ultimate recipients, but senders can have no reasonable expectation of privacy in the contents of the messages that have been delivered to the employer's agents.

Indeed, respondents' argument and authorities do not address government employers' work-related searches at all, but only law enforcement searches. Whether or not one could have a reasonable expectation of privacy in a text message sent to a private party's pager vis-à-vis the government in its law enforcement capacity, it is not objectively reasonable to expect privacy in a text message sent to

a government employee's government-issued pager vis-à-vis the government in its capacity as employer.[4]

"[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. at 743-744. Senders of text messages to an employee's workplace pager voluntarily convey even the contents of the messages to the intended recipient's employer. Given the prevalence of employer no-privacy policies governing employees' electronic communications, the sender is voluntarily exposing the contents of messages to review by the intended recipient's employer. *Cf. California v. Ciraolo*, 476 U.S. 207, 215 (1986) ("In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet.").

As petitioners demonstrated, and respondents ignore, by 2002, when Sergeant Quon and the remaining plaintiffs exchanged text messages on the Department pager, a California appellate court had noted a study finding 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, emails,

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[4] In this context, Sergeant Quon effectively *did* consent to review by the employer, as he acknowledged in writing that he was subject to the City's written policy as a City employee.

Internet connections, and computer files." *TBG Ins. Servs. Corp. v. Superior Court*, 96 Cal. App. 4th 443, 451-452, 117 Cal. Rptr. 2d 155 (2002) (no reasonable expectation of privacy in computer provided for employee's home use). Petitioners also demonstrated, and respondents do not dispute, that the remaining plaintiffs all knew their messages were going to a Department pager and not to a personal pager. *See* Pet. Br. 61-62. Therefore, even if the senders subjectively intended that their messages would be viewed by only the employee, they would have no objectively reasonable basis to expect that the employer would not view the contents of the message. *See Greenwood*, 486 U.S. at 39-40 (no reasonable expectation of privacy in opaque garbage bags left by homeowner for pick up by garbage collectors).

Respondents argue, however, that "[s]ince Sergeant Quon maintained an expectation of privacy in his text-messages, so too did the remaining plaintiffs." Resp. Br. 65. But Sergeant Quon's claim to privacy is premised principally on what Lieutenant Duke told him about his informal bill-paying accommodation. And plaintiffs cite nothing in the record suggesting that Florio and Jerilyn Quon knew of Lieutenant Duke's accommodation, which is the entire basis for their claim that Sergeant Quon maintained privacy. Plaintiffs flatly misstate that "April Florio and Jerilyn Quon were dispatchers for the Police Department." Resp. Br. 24. According to their own operative complaint, Jerilyn Quon's employment with the Department ended "in 1995 or

1996." Excerpts of Record 38, ¶ 124. Although Florio was a police dispatcher, plaintiffs cite nothing in the record to indicate that Lieutenant Duke informed staff who did *not* receive Department-issued pagers of the bill-paying accommodation that he made for SWAT team members who *did* receive pagers and had overages. Not surprisingly, Jerilyn Quon and Florio, in the very declarations upon which respondents rely, did not even purport to have any knowledge of Lieutenant Duke's policy. S.E.R. 303-304, 307-308.

To be sure, Sergeant Trujillo was a fellow SWAT officer using a Department pager, but he could have had no objectively reasonable basis for expecting his messages to Sergeant Quon to remain private. Not only did he sign an acknowledgment of the official no-privacy policy as to electronic communications, but any reasonable SWAT officer knew the operational realities that made it unreasonable to expect privacy in messages sent to the Department pager used by Sergeant Quon, including possible misconduct investigations, media requests, public records requests, and litigation requests. Respondents cite nothing demonstrating Sergeant Trujillo's understanding of Lieutenant Duke's informal accommodation, but, in any event, that accommodation could not and did not promise privacy from the Department.

Finally, the United States' brief provides ample additional reasons for this Court to reject the Ninth Circuit's sweeping, categorical extension of Fourth Amendment rights to individuals sending electronic

communications to a government workplace. U.S. Amicus Br. 28-32. In any event, because the Department viewed their messages sent to a Department-issued pager during a reasonable workplace search for the reasons explained in Argument II above, there was no Fourth Amendment violation.

CONCLUSION

The Ninth Circuit's judgment should be reversed, with directions to affirm the district court's judgment.

Respectfully submitted,

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April 2010