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No. 08-1332

IN THE

Supreme Court of the United States

CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, AND LLOYD SCHARF,
Petitioners,

v.

JEFF QUON, JERILYN QUON, APRIL FLORIO, AND STEVE TRUJILLO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a police department's review of text messages sent to and from a government-issued pager subject to an express no-privacy policy was consistent with the Fourth Amendment because (1) the review did not violate a reasonable expectation of privacy, and (2) the review was a reasonable employment-related search.

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INTEREST OF *AMICI CURIAE*

Amici are national organizations of city and county governments and their members throughout the United States.[1] As employers of millions of workers engaged in a wide range of government functions, they have a very strong interest in preserving their ability, as managers, to promulgate and enforce reasonable and necessary workplace rules such as the City of Ontario's no-privacy policy for computers, e-mail, and other electronic devices. As modes of electronic communication proliferate, the need for such policies will become commensurately greater.

Two Terms ago, this Court reaffirmed as a foundational principle of public employment law that "[t]he government's interest in achieving its goals as effectively and efficiently as possible" is "a significant one when it acts as employer." *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2151 (2008). This principle is all the more compelling when, as in this case, the government function is law enforcement. Although Respondent Jeff Quon did not lose all of the protections of the Fourth Amendment when he became a SWAT officer in the Ontario Police Department, his privacy interest in personal text

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[1] The parties have consented to the filing of this amicus brief and their consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

messages sent to and from his Department-issued pager pales in comparison to the City's need to reasonably regulate personal use of SWAT team pagers in order to provide effective law enforcement.

Unless reversed, the judgment of the court of appeals in Respondents' favor seriously threatens the effective and efficient management of municipal services and municipal workforces. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.

SUMMARY OF THE ARGUMENT

The Ontario Police Department's review of text messages sent to and from Respondent Jeff Quon's Department-issued SWAT team pager did not violate Respondents' Fourth Amendment rights. Respondents had no reasonable expectation of privacy in those messages because the Department had an explicit policy in place providing that messages sent through Department-issued communications devices were subject to inspection, and because the messages were subject to public disclosure under state law. Moreover, even if Respondents had a reasonable expectation of privacy in the text messages, the Department's review of those messages was a reasonable employment-related search justified by the City's interests in maintaining efficiency and protecting public safety.

1. a. Respondents did not have a reasonable expectation that their text messages would remain private. A public employee's expectation of privacy in information sent to and from a work-issued pager cannot be reasonable where the employer has notified users through an official policy that those

communications are subject to inspection by the employer.

The Department's policy made clear that employees should not use their work equipment for personal business, and it notified them that their computers and pagers were subject to inspection at any time without notice. These were the "operational realities" of the workplace. *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987); *Engquist*, 128 S. Ct. at 2151. That a Lieutenant charged with monitoring pager use chose not to exercise the discretion afforded to him under the Department's policies does not make Respondents' subjective expectation that their messages would *never* be inspected by anyone an expectation that society is prepared to recognize as reasonable.

b. Respondents had no reasonable expectation of privacy in the records of their work-related communications because those communications are public records subject to disclosure under state law. The messages thus are similar to other objects and information that this Court has held are not subject to Fourth Amendment protection, such as trash left on the curb, information about an individual's movement through public places, and conversations in front of strangers. When an individual exposes an object or information to the public, his expectation that it will remain private is unreasonable.

The court of appeals' conclusion that Respondents had a reasonable expectation of privacy in personal text messages sent to and from Respondent Quon's pager because it was unlikely that any member of the public would actually request those messages is incorrect. It is the public's access to information, not

the frequency of such access, that determines whether an individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.

2. a. Even if Respondents had a reasonable expectation of privacy in their text messages, the Department's review of the messages was a reasonable employment-related search. This Court has long recognized that the efficient operation of the workplace and protection of public safety are overriding government interests. *See, e.g.*, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989); *Engquist*, 128 S. Ct. at 2151. The Department issued pagers to its SWAT team members to facilitate rapid communication during SWAT operations, and it has a strong public safety interest in making sure that its officers will not be distracted with personal messages being delivered to those pagers during an emergency. Because Respondent Quon's misuse of his SWAT pager could have serious public safety consequences during a SWAT operation, the limited intrusion of reviewing messages sent to and from the pager was a reasonable employment-related search.

b. A public employer's workplace decisions need not be the "least restrictive means" to be reasonable under the Fourth Amendment. An employment-related search passes constitutional muster if it is reasonable at the outset and reasonable in scope. *Ortega*, 480 U.S. at 726. The court of appeals concluded that the Department's review of Respondents' text messages was unreasonable in scope because there were less intrusive means through which the Department could have obtained

the information it sought. This Court's precedents on "special needs" searches under the Fourth Amendment preclude the Ninth Circuit's least restrictive means analysis.

ARGUMENT

I. THERE IS NO REASONABLE EXPECTATION OF PRIVACY IN MESSAGES SENT TO OR FROM A GOVERNMENT-ISSUED PAGER SUBJECT TO AN EXPRESS NO-PRIVACY POLICY AND TO PUBLIC INSPECTION.

"[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Absent a justified expectation of privacy, there can be no "search" for purposes of the Fourth Amendment. *See id.*

In this case, Respondents had no reasonable expectation of privacy in messages sent to and from Respondent Quon's government-issued pager. The Ontario Police Department has adopted a written policy that all text messages are subject to inspection, and has specifically informed users that they have no expectation of privacy or confidentiality when using Department-issued devices. In addition, Respondents' messages are subject to public disclosure under state law.

A. There Is No Reasonable Expectation Of Privacy In Messages Sent To Or From A Government-Issued Pager When The Government Employer Has Adopted An Express No-Privacy Policy.

The Ontario Police Department has adopted a written "Computer Usage, Internet and E-mail Policy." Pet. App. 4. That policy expressly provides, among other things: (i) that the Department "reserves the right to monitor and log all network activity including e-mail and Internet use"; (ii) that users "should have no expectation of privacy and confidentiality when using these resources"; (iii) that "[a]ccess to the Internet and the e-mail system is not confidential . . . [and a]s such, these systems should not be used for personal or confidential communications"; and (iv) that e-mail messages "are also subject to 'access and disclosure' in the legal system and the media." Pet. App. 152-53. The Department convened a meeting at which officers were informed that text messages were subject to this no-privacy policy, and the Chief of Police issued a memorandum confirming that the policy was applicable. J.A. 28, 30. Respondents Quon and Trujillo both signed written acknowledgements that they were aware of the no-privacy policy. Pet. App. 156-57.

In these circumstances, Respondents had no reasonable expectation of privacy in messages sent to or from Respondent Quon's Department-issued pager. The court of appeals' holding that the Department's policy was abrogated by a non-policymaking employee destabilizes policies of all varieties at all levels of government, and poses a

threat to the efficient and effective administration of government.

In *O'Connor v. Ortega*, a plurality of this Court concluded that, in some circumstances, the "operational realities of the workplace" may eliminate a public employee's reasonable expectation of privacy from oversight by a supervisor. 480 U.S. at 717; *see also Engquist*, 128 S. Ct. at 2152 ("[A]lthough government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context."). The reasonableness of a public employee's privacy expectations must be assessed on a case-by-case basis "in the context of the employment relation." *Ortega*, 480 U.S. at 717-18; *see also Engquist*, 128 S. Ct. at 2151-52 (articulating framework for analyzing public employees' constitutional claims).

"Public employees . . . often occupy trusted positions in society." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). In the law enforcement context, "[a] trustworthy police force is a precondition of minimal social stability . . . ." *Biehunik v. Felicetta*, 441 F.2d 228, 230 (2d Cir. 1971). Because the police "carry upon their shoulders the cloak of authority to enforce the laws of the state," *Comm'n on Peace Officer Standards & Training v. Superior Court*, 165 P.3d 462, 473 (Cal. 2007) (internal quotation marks omitted), abuses within a police department have great potential for social harm, *Coursey v. Greater Niles Twp. Publ'g Corp.*, 239 N.E.2d 837, 841 (Ill. 1968).

In this case, the operational realities of the Ontario Police Department demonstrate that SWAT

team members have no reasonable expectation of privacy in electronic communications on their Department-issued pagers. The Department distributed the pagers for the purpose of facilitating logistical communications among SWAT team officers. Pet. App. 45-46. The Department has an obvious interest in monitoring such communications to ensure the efficient and effective operation of a police unit that deals with high-stakes emergencies involving public safety and the safety of its officers.

The Department's express no-privacy policy eliminates any reasonable expectation of privacy in messages sent to and from Department-issued pagers. In similar circumstances, courts have recognized that a public employer's no-privacy policy prevents any reasonable expectation of privacy from attaching to electronic communications in the workplace. *See, e.g.*, *United States v. Thorn*, 375 F.3d 679, 683 (8th Cir. 2004) (no reasonable expectation of privacy in employee's computer when employee signed policy prohibiting its unauthorized use, providing for government audits, and disclaiming any privacy rights), *vacated on other grounds*, 543 U.S. 1112 (2005); *United States v. Angevine*, 281 F.3d 1130, 1134 (10th Cir. 2002) (no reasonable expectation of privacy in data downloaded to a public university professor's computer due to a policy warning that computer usage was subject to audit and disclaiming confidentiality in its use); *United States v. Simons*, 206 F.3d 392, 398-99 (4th Cir. 2000) (no reasonable expectation of privacy in Internet use because Federal Government had policy prohibiting Internet use for non-government activities and allowing for usage audits); *cf. Ortega*,

480 U.S. at 719 (noting that employer did not have a policy discouraging office storage of personal items); *Leventhal v. Knapek*, 266 F.3d 64, 73-74 (2d Cir. 2001) (Sotomayor, J.) (finding a reasonable expectation of privacy in an office computer that was exclusively controlled by an employee, in part because there was no policy disclaiming any such privacy expectations).[2]

The court of appeals correctly recognized that, based on the Police Department's written policy governing use of its Department-issued communications devices, it was unreasonable for Respondent Quon to expect any level of privacy in communications conducted using that equipment. Pet. App. 29. But the court of appeals nevertheless determined that Respondent Quon had a legitimate expectation of privacy because Lieutenant Duke, a non-policymaking employee who was charged with monitoring pager use, had an "informal policy" that text messages would not be audited if the officer paid the additional costs that the Department incurred when the officer exceeded the monthly allotment of 25,000 characters. *Id.*

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[2] Courts have reached similar conclusions in cases involving private employers. *See, e.g.*, *Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002) (no reasonable expectation of privacy because of policy providing for employer inspection of employer-issued laptops); *Miller v. Blattner*, __ F. Supp. 2d __, No. 08-3788, 2009 WL 4929036, at *9 (E.D. La. Dec. 14, 2009) (citation not yet available) (dismissing claim for invasion of privacy against private employer because employer policy stated that all e-mails on the employer's computers were employer's property).

This holding threatens to undermine the enforceability of policies that are critical to the effective and efficient management of law enforcement agencies, as well as other government agencies. It is also incorrect. Respondents could have no reasonable expectation that Lieutenant Duke's informal practice of allowing officers to pay the overage if they exceeded the monthly character limit prevented *any* Department official – including the Chief of Police – from ordering a review of their text messages for *any* purpose, including an assessment of whether the Department should increase its monthly character limit.

In short, the "operational realities" of the Ontario Police Department made it unreasonable for Respondents to have any expectation of privacy in communications sent or received on Department-issued pagers.

B. There Is No Reasonable Expectation Of Privacy In Electronic Communications That Are Available For Public Inspection.

To maintain its trust in the police, "the public must be kept fully informed of the activities of its peace officers." *Comm'n on Peace Officer Standards & Training*, 165 P.3d at 473; *see also Waller v. Georgia*, 467 U.S. 39, 47 (1984) (citation and internal quotation marks omitted) (noting that there is a "strong interest in exposing . . . police misconduct to the salutary effects of public scrutiny"). California provides citizens with broad access to public records, including police department records, under the California Public Records Act ("CPRA"), Cal. Gov't Code §§ 6250 *et seq.* Under California law, such

access to public records is "a fundamental and necessary right of every person." Cal. Gov't Code § 6250; *see also* Cal. Const. art. I, § 3(b)(1) ("Sunshine Amendment"). Because communications to and from a Department-issued pager are public records subject to disclosure under the CPRA, *see* Pet. Br. 35-40, Respondents can have no reasonable expectation of privacy in such communications.

1. There Is No Reasonable Expectation Of Privacy In Communications Subject To Public View.

"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. In *California v. Greenwood*, for example, the Court held that there was no reasonable expectation of privacy in the contents of opaque trash bags left at the curb, an "area particularly suited for public inspection." 486 U.S. 35, 40-41 (1988) (citation and internal quotation marks omitted). Similarly, in *United States v. Knotts*, the Court found that an individual had no reasonable expectation of privacy in his public movements because he "voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction." 460 U.S. 276, 281-82 (1983).

This "public inspection" principle is fully applicable to written or oral statements. As Justice Harlan said in *Katz*, "conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." 389 U.S. at 361 (Harlan, J., concurring). In *Hoffa v. United States*, the Court held that the Fourth Amendment did not apply to

statements voluntarily made to an individual who, unbeknownst to the speaker, was a government informant. 385 U.S. 293, 303 (1966) (citing *Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting)); *see also United States v. Fisch*, 474 F.2d 1071, 1077-78 (9th Cir. 1973) (finding no reasonable expectation of privacy in comments made in a hotel room that were audible to the unaided ear in the adjoining room).

Tort law provides further support for the proposition that there is no reasonable expectation of privacy in information available for public inspection. In examining the tort of invasion of privacy, this Court has noted that "the interests of privacy fade when the information involved already appears on the public record." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975). Consequently, "'there is no liability for the examination of a public record . . . or of documents . . . requir[ed] to [be] available for public inspection.'" *Id.* at 494 (quoting Restatement (Second) of Torts § 652B cmt. c (Tentative Draft No. 13, 1967)).

Because the communications at issue in this case are subject to disclosure upon request by any member of the public, Respondents lack a reasonable expectation that their communications will remain private.

2. The Likelihood That The Public Will Request A Given Public Record Is Not Relevant To Fourth Amendment Analysis.

The court of appeals held that Respondents had a reasonable expectation of privacy in their text

messages despite the CPRA because "'[t]here is no evidence . . . suggesting that CPRA requests are. . . widespread or frequent.'" Pet. App. 32 (quoting dist. ct. op.). This analysis is flawed. In holding that public exposure destroys a reasonable expectation of privacy, this Court has not inquired into the likelihood that exposure will lead to discovery. In *Greenwood*, *Knotts*, and *Hoffa*, the Court did not consider the probability that someone would search a bag of garbage left at the curb, follow a person's movements, or report a conversation to the authorities. *See Greenwood*, 486 U.S. at 40-41; *Knotts*, 460 U.S. at 281-82; *Hoffa*, 385 U.S. at 303. Instead, exposure to the public is sufficient to defeat a reasonable expectation of privacy in these events.

Similarly, in *California v. Ciraolo*, the defendant was growing marijuana in his backyard, around which he had erected two tall fences. 476 U.S. 207, 209 (1986). He did nothing to protect the plants from aerial view, and police observed the yard from an airplane flying over the property. *Id.* The Court analogized the airways to "public thoroughfares" and determined that police officers were not required "to shield their eyes" from seeing what was readily visible from such places. *Id.* at 213.

Three years later, in *Florida v. Riley*, the Court addressed whether there was a reasonable expectation of privacy in a partially covered backyard greenhouse that contained marijuana plants. 488 U.S. 445 (1989). The Court followed *Ciraolo* and held that there was no such expectation because the plants were readily visible from a place where the public could legally be – a helicopter flying in the airspace above the greenhouse. *Id.* at 449-52.

See William Shepard McAninch, *Unreasonable Expectation: The Supreme Court and the Fourth Amendment*, 20 Stetson L. Rev. 435, 454 (1991) ("*Riley* tells the officer that so long as he is in a place where he has a legal right to be, no matter how unlikely it is that anyone might be there, his observations from that vantage point do not implicate fourth amendment interests . . . .").[3]

In *Kyllo*, the Court held that the Fourth Amendment protects an individual's privacy interest in infrared radiation emitted from a home. 533 U.S. at 40. The Court noted that the infrared emissions are visible only with a thermal imaging device that is "not in general public use." *Id.* at 34. In contrast to a thermal imaging device, the CPRA is available for

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[3] Justice O'Connor's concurring opinion in *Riley* suggests that the frequency with which members of the public enter an area is relevant to whether an expectation of privacy is reasonable. *See* 488 U.S. at 454 (O'Connor, J., concurring in the judgment) ("[W]e must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with *sufficient regularity* that Riley's expectation of privacy from aerial observation was not one that society is prepared to recognize as reasonable." (emphasis added) (internal citation and quotation marks omitted)). Justice O'Connor made clear, however, that any such inquiry is general: "[I]f the public can *generally be expected* to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation." *Id.* at 455 (O'Connor, J., concurring in the judgment) (emphasis added). Under this standard, requests under public records laws are sufficiently common to preclude any reasonable expectation of privacy in information subject to those requests. *See, e.g.*, Federal Bureau of Investigation, Record/Information/Dissemination Section (RIDS), *at* http://foia.fbi.gov/rids.htm (estimating that the FBI receives 13,200 requests for information under the Freedom of Information and Privacy Acts each year and currently employs roughly 300 people whose job it is to respond to these requests).

all members of the public and is widely used to obtain government records.

In sum, it is the public's access to information, not the frequency of such access, that informs the reasonableness inquiry. *See* Manish Kumar, Note, *Constitutionalizing E-Mail Privacy by Informational Access*, 9 Minn. J. L. Sci. & Tech. 257, 269-74 (2008). Applied to electronic communications, the reasonableness of privacy expectations "turns on whether the public has general access to the electronic information." *Id.* at 274. Under this standard, Respondents have no reasonable expectation of privacy in communications to and from a Department-issued pager.

II. A POLICE DEPARTMENT'S REVIEW OF TEXT MESSAGES SENT TO OR FROM A GOVERNMENT-ISSUED PAGER IS REASONABLE.

Even if Respondents could somehow establish that they had a reasonable expectation of privacy in text messages sent to and from Respondent Quon's pager, their Fourth Amendment claim would fail because the Department's review of the text messages was reasonable. This Court's precedents recognize that public employers have substantial latitude to manage their offices and employees, consistent with the strong government interest in the efficient and effective administration of public agencies. When managing public safety officers, state and local government employers can take reasonable actions designed to administer law enforcement agencies efficiently and effectively, without micromanagement by federal courts erroneously using a "least restrictive means" test.

A. The Police Department's Substantial Interests In Public Safety And Efficient Management Outweigh Respondents' Limited Privacy Interests.

This Court has long recognized that "government offices could not function if every employment decision became a constitutional matter." *Connick v. Myers*, 461 U.S. 138, 143 (1983); *see also Ortega*, 480 U.S. at 722 ("[R]equiring a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome."). Consequently, "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418.

The Court has stated repeatedly that a state or local government employer "has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist*, 128 S. Ct. at 2151; *see also Garcetti*, 547 U.S. at 418 ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."); *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign."); *Ortega*, 480 U.S. at 732 (Scalia, J., concurring) (employment-related searches do not violate Fourth Amendment if they are "of the sort that are regarded as reasonable and normal in the private-employer context").

In analyzing Fourth Amendment claims by public employees, the Court has weighed the "privacy interests of government employees in their place of work" against "the substantial government interest in the efficient and proper operation of the workplace." *Ortega*, 480 U.S. at 725; *see also Engquist*, 128 S. Ct. at 2152. That analysis leads to the conclusion that the Police Department's actions in this case were reasonable.

1. Respondents' Privacy Interests Are Limited.

A public employee's privacy interests in his place of work are "far less than those found at home." *Ortega*, 480 U.S. at 725. As the *Ortega* plurality noted, "[g]overnment offices are provided to employees for the sole purpose of facilitating the work of an agency." *Id.* Consequently, "[t]he employee may avoid exposing personal belongings at work by simply leaving them at home." *Id.* In this case, Respondent Quon could have avoided an audit of his text messages simply by limiting the use of his Department-issued pager to public business and using a private cell phone or pager for private text messaging.

By 2002, private alphanumeric pagers and cell phones with text-messaging capability were commonplace. *See, e.g.*, BBC News, *The Pager Rings Off* (Jan. 26, 2001), *available at* http://news.bbc.co.uk /2/hi/uk_news/1137923.stm (reporting that by 2001, text-messaging mobile phones had rendered alphanumeric pagers obsolete). Respondent Quon's wife and girlfriend each had a personal device for text messaging. It would have been simple enough for him to "lea[ve] [his conversations] at home" by

using a personal device. *Ortega*, 480 U.S. at 725. Instead, he abused his City-owned pager by using it to send hundreds of inappropriate text messages, and then forced the City to defend this § 1983 action after his misuse led the Department to audit the pager.

Contrary to the court of appeals' view, Chief Scharf's review of the text messages was not a "[s]earch and seizure[]" of a government employee's "private property." Pet. App. 22-28. The messages were sent to and from a Department-issued pager that was paid for by the City and provided to Respondent Quon as a member of the Department's SWAT team "to enable better coordination and a more rapid and effective response to emergencies." Pet. App. 45-46. In this context, Respondents' reasonable privacy interests are limited at best, and "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary." *Connick*, 461 U.S. at 146.

2. A Police Department Has A Substantial Interest In Monitoring Messages Sent To And From SWAT Team Members Using A Department-Issued Pager.

"[P]ublic employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe." *Ortega*, 480 U.S. at 724. This is especially true in the case of law enforcement officers. *See Garcetti,* 547 U.S. at 419 (deputy district attorney). The Court has accordingly recognized the important government interests at

stake in upholding the reasonableness of searches of public safety officers under the Fourth Amendment.

In *National Treasury Employees Union v. Von Raab*, this Court upheld suspicionless drug testing of customs officers seeking transfer or promotion to certain positions. 489 U.S. at 677. The Court determined that the government interests at stake were "compelling," noting that the public interest "demands effective measures to prevent the promotion of drug users to positions that require [them] to carry a firearm." *Id.* at 670. Because of the important public safety concerns of drug-users handling firearms and protecting the borders, this Court held that a privacy intrusion as substantial as taking a urine sample from employees was a reasonable employment-related search. *Id.* at 677.[4]

In weighing a government employee's rights against a public employer's need to manage its workforce, this Court has stated repeatedly that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418;[5] *see also*

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[4] *See also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989) (holding that suspicionless drug testing of railroad employees involved in accidents was reasonable under the Fourth Amendment based on safety threat of alcohol and drug use); *cf. Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995) (holding that suspicionless drug testing of student-athletes was reasonable under the Fourth Amendment based on safety risk to students participating in athletics).

[5] In *Engquist*, the Court specifically noted that "public-employee speech cases are particularly instructive" in analyzing (...continued)

Ortega, 480 U.S. at 721, 724 (the "need to complete the government agency's work in a prompt and efficient manner" is an "overriding" government interest).

Most recently, in *Engquist*, the Court noted that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as employer." 128 S. Ct. at 2151 (citation and internal quotation marks omitted). As a result, the Court has allowed restrictions on individual freedom in government employment so long as the "basic concerns" of the Constitution are protected. *Id.* at 2152; *see also Connick*, 461 U.S. at 145-46 (preserving for public employees the First Amendment's most critical function of protecting speech on matters of public concern).

The Ontario Police Department issued pagers to its SWAT team members "to facilitate the department's goal of 'enabl[ing] better coordination and a more rapid and effective response to emergencies by providing nearly instantaneous situational awareness to the team as to the other members['] whereabouts.'" Pet App. 142. When SWAT team members use their SWAT pagers for personal messages, they put those operations at risk. Officers who are supposed to be using the pagers to coordinate SWAT operations easily could be distracted by personal messages being sent to their

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public employee claims under other constitutional provisions. 128 S. Ct. at 2152.

pagers by their wives, girlfriends, and others. Because there are strong public safety and workplace efficiency interests in avoiding such misuse of police department communications devices, the Department's review of messages sent and received on such devices, pursuant to a written policy that has been communicated to its officers, is reasonable.

B. Public Employers' Workplace Decisions Are Not Subject To A "Least Restrictive Means" Test.

Under the Fourth Amendment, the balance between individual rights and the need for efficiency in the government workplace is achieved by requiring workplace searches to be "reasonable" at their inception and in their scope. *Ortega*, 480 U.S. at 726. A search is reasonable at its inception if "there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose." *Id.* The search is reasonable in scope "when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct].'" *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

In this case, the court of appeals correctly concluded that the Department's decision to review Respondent Quon's text messages was reasonable at its inception as a work-related search designed to ensure that the Department's text messaging plan was appropriate for its needs. Pet. App. 34. The court further held, however, that the search was unreasonable in scope. The court reached this

conclusion by applying a "least restrictive means" test and concluding that "[t]here were a host of simpler ways to verify the efficacy of the 25,000 character limit . . . without intruding on Appellants' Fourth Amendment rights," such as giving Respondent Quon a one-month notice that it would be reviewing his text messages, or by giving Respondent Quon the opportunity to review the messages himself and redact personal messages before giving the transcripts to his superiors. Pet. App. 35-36.

This Court's precedents foreclose the court of appeals' application of a least restrictive means test in this situation. In *Skinner*, the Court concluded that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative or 'less intrusive' means." 489 U.S. at 629 n.9 (internal citation and quotation marks omitted); *see also Vernonia Sch. Dist.*, 515 U.S. at 663 ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."); *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 837 (2002) ("[T]his Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means."); *cf. Garcetti*, 547 U.S. at 423 ("[The] displacement of managerial discretion by judicial supervision finds no support in our precedents.").

* * * * *

Government employers have an overriding interest in knowing whether public employees – particularly police officers assigned to SWAT teams –

are being distracted from their official duties by personal text messages being sent to and from their employer-issued pagers. The Department's review of the messages sent to and from Respondent Quon's pager was entirely reasonable given Respondents' limited privacy interests and the City's overriding interests in public safety and efficiency.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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