No. 08-1332

IN THE
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF *AMICI CURIAE* LOS ANGELES TIMES COMMUNICATIONS LLC, THE PRESS-ENTERPRISE COMPANY, THE ASSOCIATED PRESS, THE E.W. SCRIPPS CO., THE CALIFORNIA NEWSPAPERS PUBLISHERS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE FIRST AMENDMENT COALITION AND CALIFORNIANS AWARE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

Amici Curiae are media and publishing organizations, who themselves or whose members own and operate newspapers, magazines, and television and radio stations in California and throughout the United States. The issues presented by this case, which involve the government's right to access and review communications created by a government employee on government time, using government equipment, potentially have broad application to all persons and entities interested in the conduct of government employees and the ability of the public and press to scrutinize government operations, including *Amici Curiae*.

As media and publishing organizations, *Amici Curiae* have a unique perspective concerning the government's obligations to disclose information about the conduct of public employees under the California Public Records Act and similar laws. These obligations require the government to review electronic and other communications in which its employees engage during their working hours, using government-provided equipment. The particular interests of *Amici Curiae* are further detailed below.

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[1] Pursuant to Rule 37.6, counsel for *Amici Curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *Amici* made a monetary contribution to the preparation and submission of this brief. Written consent of petitioners and respondents to the filing of the brief has been filed with the Clerk. Respondent Debbie Glenn waived her right to respond on May 6 2009.

Los Angeles Times Communications LLC, dba *Los Angeles Times*, a privately owned corporation, publishes the *Los Angeles Times*, the largest metropolitan daily newspaper circulated in California. Los Angeles Times also publishes the *Newport Beach-Costa Mesa Daily Pilot*, *Glendale News-Press, Burbank Leader*, *Foothill Leader*, and the *Huntington Beach Independent*. The Times also maintains the website www.latimes.com, a leading source of national and international news.

The Press-Enterprise is a daily newspaper owned by Belo Corp., a media company with a diversified group of market-leading television broadcasting, newspaper publishing, cable news and interactive media operations in the United States. Belo owns nineteen television stations that reach 13.9% of U.S. television households, and publishes four daily newspapers, including the Press-Enterprise. In addition, Belo owns or operates seven cable news channels. Belo's Internet subsidiary, Belo Interactive, Inc., includes over 30 internet websites, several interactive alliances and a broad range of internet-based products.

The Associated Press ("AP") is a mutual news cooperative organized under the Not-for-Profit Corporation Law of New York. AP gathers and distributes news of local, national and international importance to its member newspapers and broadcast stations and to thousands of other customers in all media formats across the United States and throughout the world.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television

stations, newspapers, local news and information Web sites, and licensing and syndication. Nationwide, it operates daily newspapers in 14 markets (including the California papers the *Record Searchlight* (Redding) and the *Ventura County Star*), 10 local broadcast television stations, Internet news web sites related to the newspapers and broadcast stations, and a national licensing and syndication business that owns and license the marks for products such as *Peanuts* and *Dilbert*.

The California Newspaper Publishers Association ("CNPA") is a nonprofit trade association representing approximately 850 daily, weekly and student newspapers in California. For well over a century, CNPA has defended the rights of publishers to disseminate and the public to receive information about all records associated with government deliberations, including rights guaranteed by the First Amendment, the California Constitution and the California Public Records Act.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment litigation since 1970.

The First Amendment Coalition ("FAC") is a nonprofit public interest organization dedicated to advancing free speech and open-government rights. A membership organization, FAC's activities include educational and informational programs, strategic

litigation to enhance First Amendment and access rights for the largest number of citizens, legal information and consultation services, and legislative oversight of bills affecting free speech. FAC's members are newspapers and other news organizations, bloggers, libraries, civic organizations, academics, freelance journalists, community activists, and ordinary individuals seeking help in asserting rights of citizenship.

Californians Aware is a nonprofit organization established to help journalists and others keep Californians aware of what they need to know to hold government and other powerful institutions accountable for their actions. Its mission is to support and defend open government, an enquiring press and a citizenry free to exchange facts and opinions on public issues.

STATEMENT

The City of Ontario provided pagers to its officers in the Ontario Police Department, including SWAT Sergeant Jeff Quon, to assist those officers in performing their responsibilities as public employees. In particular, Sergeant Quon's pager was intended for his use during emergency situations, to permit him to quickly and easily coordinate with other members of the police department. As a SWAT officer, likely to be called to duty during the most dangerous and unpredictable situations, his pager provided an important tool to facilitate communication between Sergeant Quon and his superiors, and with his subordinate officers, when other methods of communication might not be available or practical. Following an emergency or

critical incident, a review of messages sent and received by Sergeant Quon and other officers could reveal key information about the police department's and SWAT unit's response to a given situation, providing possibly the best source of information concerning actions taken by the police.

According to the record, Sergeant Quon used his pager for department communications. But he used it much more often to send personal messages to his wife, his mistress (who was also an employee of the police department) and another City officer. The vast majority of these personal messages were sent during working hours. For example, according to the record, on one day in August, he sent *eighty* messages – ten each hour, on average. During the one-month period reviewed by the City, Sergeant Quon's average was twenty-eight messages every day he worked. During that month, Sergeant Quon exceeded his 25,000 character limit by 15,158 characters – texting more than 40,000 characters in a single month.[2] Many of the messages were, as the trial court described them, "to say the least, sexually explicit in nature." A jury found that the City of Ontario reviewed the messages for valid, work-related reasons – including an audit to determine why Sergeant Quon was exceeding his monthly allowance by such a wide margin. The Ninth Circuit, however, rejected the jury's verdict, holding that reviewing Sergeant Quon's text messages invaded his privacy.

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[2] By way of comparison, this *Amicus Curiae* brief contains 41,599 characters, excluding the spaces (and not counting the caption or tables).

SUMMARY OF ARGUMENT

The California Public Records Act, as well as a panoply of other similar federal and state laws, imposes unique disclosure obligations on governmental agencies. These obligations undercut any public employee's claim to privacy in electronic communications conducted on government-issued equipment, for, in order to comply with the obligations, governmental agencies must have the ability to collect and review electronic records reflecting the conduct of their employees. Whether or not a private employer is restricted in its ability to review its employees' electronic communications – an issue that this Court need not reach – government employers necessarily must have the ability to do so.

The broad leeway that governmental agencies have to monitor their employees' conduct serves several salutary ends. As the California Public Records Act and other disclosure laws recognize, government employees often have a powerful ability to affect the lives of the citizens with whom they interact. Police officers, in particular, have tremendous power – including the special authority to exercise lethal force – which carries with it a high level of responsibility and accountability. The government has an obligation to the public to ensure that its employees, especially those placed in positions of power, do not abuse the trust placed in them. And even more basically, governmental agencies have an obligation to monitor their employees' activities to ensure efficiency and to enforce basic standards of acceptable conduct in the

workplace. Particularly now, as local and state governments are shedding employees, and trying desperately to balance budgets stretched thin by the troubled economy, governments should not be hamstrung from doing everything within their power to maintain an efficient, effective workforce.

ARGUMENT

THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE GOVERNMENT'S OBLIGATIONS TO DISCLOSE INFORMATION ABOUT THE CONDUCT OF PUBLIC EMPLOYEES UNDER THE CALIFORNIA PUBLIC RECORDS ACT AND SIMILAR LAWS

This Court has held on several occasions that state and local laws allowing public access undercut an individual's claim that he has a reasonable expectation of privacy under the Fourth Amendment. *See Florida v. Riley*, 488 U.S. 445, 451 (1989) (plurality opinion) (search from helicopter was reasonable in part because the helicopter was legally in public airspace); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (no Fourth Amendment violation because property was viewed from airspace the public legally could navigate); *Dow Chemical Co. v. United States*, 476 U.S. 227, 239 (1986) (same). Thus, as the Fourth Circuit has put it, state statutory law "is relevant to the determination of whether there is a 'societal understanding' that [an individual] has a legitimate expectation of privacy in" particular records. *Doe v. County of Fairfax*, 225 F.3d 440, 450 (4th Cir. 2000) (citing cases). Such is the case here.

I. *The Government Must Have The Freedom To Review Its Employees' Communications To Comply With Its Obligations To The Public.*

California, like virtually every other state and the federal government, has a public records act that mandates the immediate disclosure, upon request of any member of the public, of records reflecting the functioning of state and local agencies. Cal. Gov't Code § 6250, *et seq.* The California Public Records Act ("CPRA") reflects a fundamental public policy in California to facilitate the public's strong interest in overseeing the actions of public officials. Yet despite this strong public policy, the Ninth Circuit reasoned that public records requests for the kind of information at issue here are not so widespread that an officer's reasonable expectation of privacy would be reduced as a result. The Ninth Circuit's conclusion underestimates the importance of public records acts in California and throughout the Nation, and fails to recognize the increasing importance of electronic communications in the conduct of government affairs.

A. *California Has A Strong Policy Favoring Public Access To Government Records.*

California, like the federal government and every other state,[3] has a public records act that

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[3] 5 U.S.C. § 552; Ala. Code 36-12-40 *et seq.*; Alaska Stat. 40.25.110 to .125; Ariz. Rev. Stat. Ann. 39-121 to -128; Ark. Code Ann. § 25-19-101 *et seq.*; Cal. Gov't Code §§ 6250 to 6270; C.R.S. 24-72-201 *et seq.*; Conn. Gen. Stat. § 1-200 *et seq.*; 29 Del. C. § 10001 *et seq.*; D.C. Code Ann. § 2-531 *et seq.*; Fla. Stat. Ann. 119.01 to 119.15; Ga. Code Ann. 50-18-70 to -77; Haw. Rev. Stat. § 92F-1 *et seq.*; Idaho Code 9-338 to -347; 5

reflects the state's strong public policy of providing public access to the actions of public employees. California enacted its public records act, the California Public Records Act (CPRA), Government Code §§ 6250 *et seq.*, nearly four decades ago. Seeking to ensure public access to information about its government, the Legislature declared:

> In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

Cal. Gov't Code § 6250.

ILCS 140/1 – 140/11.5; Ind. Code Ann. 5-14-3-1 to -10; Iowa Code Ann. 22.1 to .14; Kan. Stat. Ann. 45-215 to -250; Ky. Rev. Stat. Ann. 61.870 to .884; La. Rev. Stat. Ann. 44:31-41; Me. Rev. Stat. Ann. 1-13 § 401-412; Md. Code Ann. State & Govt. 10-611 to -630; Mass. Gen. Laws Ann. Ch. 4, § 7, Ch. 66, § 10; MCL 15.231 *et seq.*; Minn. Stat. Ann. 13.03; Miss. Code Ann. 25-61-1 *et seq.*; Mo. Ann. Stat. 109.180 to .190; Mont. Code Ann. 2-6-101 to -111; Neb. Rev. Stat. §§ 84-1201-1227; Nev. Rev. Stat. Ann. 239.001 to .030; NHRev. Stat. 91-A:1-9; N.J.S.A. 47:1A-1 *et seq.*; 14-2-1 NMSA 1978 *et seq.*; NY Pub. Off. Law Sec. 84-90; N.C. Gen. Stat. 132-1 to -10; N.D. Cent. Code 44-04-18 to -32; Ohio Rev. Code. Ann. 149.43; Okla. Stat. Ann. Tit. 51.24A.1 to .29; Or. Rev. Stat. Ann. 192.410 to .505; Pa. Cons. Stat. Ann. Tit. 65 P.S. § 67.101 *et seq.*; R.I. Gen. Laws 38-2-1 to -15; S.C. Code Ann. § 30-4-10 *et seq.*; S.D. Codified Laws Ann. 1-27-1 to -45; Tenn. Code Ann. 10-7-503 *et seq.*; Texas Code § 552.001 *et seq.*; Utah Code. Ann. 63-2-201 to-207; 1 V.S.A. § 315-320; Va. Code § 2.2-3704; W. Va. Code S 29B-1-1 *et seq.*; Wash. Rev. Code Ann. 42.56.001 *et seq.*; Wis. Stat. Ann. 19.31 to .39; Wyo. Stat. Ann. 9-2-401-419, 16-4-201 *et seq.*

The CPRA recognizes a presumptive right of access to public records. And by its express terms, the CPRA extends to all forms of electronic data, including email and text messages. *See* Cal. Gov't Code § 6252(g) (defining writing to include "transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation"); *California Comm'n on Peace Officer Stds. & Training v. Superior Court*, 42 Cal. 4th 278 (2007) (ordering disclosure of records kept in electronic format).[4] Therefore, under the CPRA, Sergeant Quon's text messages were public records from their inception.

The CPRA gives citizens an important mechanism for scrutinizing government conduct. As the California Supreme Court has explained:

> Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.

CBS, Inc. v. Block, 42 Cal. 3d 646, 651 (1986). To achieve these goals, California's Supreme Court has declared that "[m]aximum disclosure of the conduct

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[4] Other states agree, even extending the reach of their public records acts to metadata where it reflects on the functioning of the government. *E.g.*, *Lake v. City of Phoenix*, 218 P.3d 1004 (Ariz. 2009).

of governmental operations" is necessary. *Id.* at 651-652.

Californians reaffirmed this important principle in 2004 by overwhelmingly approving Proposition 59, which elevated the public's right of access to government records to the state Constitution.[5] Thus, the California Constitution now guarantees that:

> (b)(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
>
> (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access....

Cal. Const., Art. I, § 3(b). With the passage of this constitutional amendment, the presumption in favor of public access to government records in California grew even stronger, putting it on the same level as state constitutional privacy rights. Agencies thus must now meet an even more rigorous standard to justify withholding such records. *See id.*, Analysis of Legislative Analyst.

Even before this constitutional amendment, it was well established that the CPRA embodies "a

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[5] *See* California Secretary of State, Ballot Measures, General Election, 11/2/04, available at www.vote2004.ss.ca.gov/Returns/prop/00.htm.

strong policy in favor of disclosure of public records, and any refusal to disclose public information must be based on a specific exception to that policy." *California State University v. Superior Court*, 90 Cal. App. 4th 810, 831 (2001). To justify secrecy, the government agency is required to demonstrate a "clear overbalance on the side of confidentiality." *Id.* (internal quotation marks omitted).

Moreover, even before it became a constitutional mandate, Cal. Const. Art. I, § 3(b)(2), it was well-established law in California that the CPRA's "[s]tatutory exemptions from compelled disclosure are narrowly construed." *Id.* As one court explained recently, "[s]ince disclosure is favored, all exemptions are narrowly construed." *County of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 1321 (2009) (citations omitted); *see also Board of Trustees of California State University v. Superior Court*, 132 Cal. App. 4th 889, 896 (2005) ("exemptions are to be narrowly construed, and the government agency opposing disclosure bears the burden of proving that one or more apply in a particular case") (citations omitted); *Braun v. City of Taft*, 154 Cal. App. 3d 332, 342 (1984); 68 Ops. Cal. Atty. Gen. 73, 1985 WL 167464 *3 (1985) ("[a]s with the other exemptions contained in Section 6254, the 'personnel' exception of subdivision (c) is to be read narrowly") (citations omitted).

Thus, even though the CPRA has an exemption protecting privacy interests, this exemption is extremely narrow. *See* Cal. Gov't Code § 6254(c) (exempting "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted

invasion of personal privacy"). The exemption "typically appl[ies] to public employee's personnel folders or sensitive personal information which individuals *must* submit to government." *Register Div. of Freedom Newspapers v. County of Orange*, 158 Cal. App. 3d 893, 902 (1984) (internal quotation omitted). And California courts consistently have held that the *voluntary* disclosure of private information to the agency waives any privacy interest that may have existed in that information. *Id.* at 902-903.[6] Under this well-established principle, if any information is *truly* private and is not in the government's hands through a voluntary act, the law may exempt it from disclosure. Even under these circumstances, however, 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. *See* Cal. Gov't Code § 6253.

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[6] *Accord Lorig v. Medical Board*, 78 Cal. App. 4th 462, 468 (2000) (psychiatrist's home address may be publicly disclosed when psychiatrist chooses to use the home address as her "address of record"); *see also Dobronski v. F.C.C.*, 17 F.3d 275, 279 (9th Cir. 1994) (holding that public employees' privacy interests in their sick leave records was minimal, and could not overcome the significant public interest in obtaining those records); *Lissner v. U.S. Customs Srvc.*, 241 F.3d 1220, 1223-1224 (9th Cir. 2001) (in interpreting law enforcement exemption, which provides exemption for personal information similar to that in the CPRA, the Ninth Circuit held that details regarding the arrest of city police officers for importing steroids was not private information, in part because "by becoming public officials, their privacy interests are somewhat reduced").

B. *Government Agencies May Not Avoid The CPRA By Adopting Policies That Would Render Public Documents Exempt From Disclosure.*

The Ninth Circuit held that Lieutenant Duke's statements to Sergeant Quon and others that he would not review the text messages if Sergeant Quon paid any overage charges stripped the Sergeant's messages of their public character and rendered them wholly private. Yet, even accepting the evidence concerning Lieutenant Duke's alleged promises at face value, the Ninth Circuit should not have given the statements any weight because they contravened the CPRA.

California courts have rejected attempts to turn public information into private information by virtue of a "promise" like the one allegedly made here. The courts have reasoned, and appropriately so, that if government agencies are permitted to make binding promises of confidentiality, public officials would have an easy means of avoiding the disclosure obligations imposed on them under the CPRA. Thus, for example, in *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 748-749 (2006), the court noted the school district's promise to seal a school Superintendent's personnel file, but that did not dissuade the court from ordering disclosure of the report at issue there.

Similarly, in *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 775 (1983), the court ordered disclosure of financial statements used to evaluate a rate increase granted to a disposal company that contracted with the city under a promise of confidentiality. As the court explained,

"[a]ssurances of confidentiality by the City to the Disposal Company that the data would remain private [were] not sufficient to convert what was a public record into a private record." *Id.*; *see also Register Div. of Freedom Newspapers*, 158 Cal. App. 3d at 909 (rejecting request "that settlement agreement should remain confidential because it was entered into with the expectation its provisions would remain confidential").

The California Supreme Court reached a similar result in *Williams v. Superior Court*, 5 Cal. 4th 337, 355 (1993), where it recognized that an agency may not shield a public record from disclosure by placing it in a file labeled "investigatory." *Accord New York Times Co. v. Superior Court*, 52 Cal. App. 4th 97, 103 (1997) (public scrutiny under CPRA may not be avoided by placing into personnel file what would otherwise be unrestricted information), *overruled in part by Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272 (2006).

Nor is California unique in its interpretation of its public records act. Other states interpreting their own laws likewise have concluded that governmental agencies and employees cannot defeat public records laws by their own machinations. As the Wisconsin Supreme Court recently explained:

> [W]e cannot accept [the] argument that parties may, through the collective bargaining process, contract away the public's rights under Wis. Stat. § 19.35(1)(a). To hold otherwise would be contrary to the public interest, and would

> have the potential to eviscerate the Public Records Law through private agreements.

Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin., 768 N.W.2d 700, 718 (Wis. 2009).[7]

Petitioners' written policies reflected the statutory reality in which they functioned. Under the CPRA, petitioners had no right to establish a policy that would exempt electronic data, including text messages, from the automatic disclosure requirements of the statute. Nor could they promise Sergeant Quon or any other officer any degree of confidentiality in the text messages sent or received during the course and scope of their employment. If such a promise were made, it would not have been enforceable, because any citizen, for any reason, had a right to demand copies of Sergeant Quon's text messages.

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[7] *See also Bradley v. Saranac Bd. of Ed.*, 565 N.W.2d 650, 658 (Mich.1997) (Michigan "FOIA requires disclosure of all public records not within an exemption," and "the defendant school district cannot eliminate its statutory obligations to the public merely by contracting to do so" with administrators) (quotation omitted); *Hearst Corp. v. Hoppe*, 580 P.2d 246, 254 (Wash. 1978) ("an agency's promise of confidentiality or privacy is not adequate to establish the nondisclosability of information; promises cannot override the requirements of the disclosure law") (citation omitted); *Hechler v. Casey*, 333 S.E.2d 799, 809 (W. Va. 1985) ("an agreement as to confidentiality between the public body and the supplier of the information may not override the Freedom of Information Act").

C. *Public Records Acts Inform Privacy Inquiries Regardless Of How Often The Acts Are Invoked.*

The Ninth Circuit dismissed Petitioners' reliance on the CPRA, reasoning that CPRA requests are not "so widespread or frequent as to constitute 'an open atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable.'" Op. at 7024. But that reasoning misses the point. A public record belongs to the public, as established at its inception. It may be withheld from the public *only* if it fits within one of the narrow exemptions from the CPRA's automatic disclosure requirements – and the agency is obliged to review it to determine whether to invoke an exemption. Thus, if documents are within the scope of the CPRA, it necessarily follows that a public employee can have no reasonable expectation that the documents will be kept private from his or her employer.[8] The statute itself, in other words,

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[8] Even on the federal level, the Privacy Act of 1974 restricts the dissemination of individually identifiable records maintained by agencies, but its restrictions explicitly exclude any information that is open to the public under FOIA. See 5 U.S.C. § 552a(t)(2) ("[n]o agency shall rely on any exemption in [the Privacy Act] to withhold from an individual any record which is otherwise accessible to such individual under the provisions of [FOIA]"); *id.* § 552a(b)(2). The D.C. Circuit found that this exemption "represents a Congressional mandate that the Privacy Act not be used as a barrier to FOIA access." *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982); *Crumpton v. Stone*, 59 F.3d 1400, 1405 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1147 (1996). And although this is a statutory limitation, it represents sound policy – it makes little sense to create a privacy interest in information

undercuts any claim to privacy protection, regardless of how often it is actually invoked.

As this Court has held, whether or not an objectively reasonable expectation of privacy exists does not turn on whether a third party has previously shown interest in the allegedly private information. Thus, the Court held that the Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection outside a home, rejecting the argument that the Fourth Amendment applied because "there was little likelihood that it would be inspected by anyone." *California v. Greenwood*, 486 U.S. 35, 39 (1988). As the Court explained, "[i]t may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public," but "[a]n expectation of privacy does not give rise to Fourth Amendment protection … unless society is prepared to accept that expectation as objectively reasonable." *Id.* at 39-40. Noting "the unanimous rejection of similar claims by the Federal Courts of Appeals," the Court found that any expectation of privacy in garbage left outside the curtilage of a home was not reasonable and thus beyond the Fourth Amendment's protection. *Id.* at 41.

The same reasoning applies here. Even if it is true that public records act requests are not prevalent enough to reduce Sergeant Quon's *subjective* expectation of privacy, it remains true

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which, by statute or state constitutional right, is open to the public.

that the information potentially is available to any member of the public who asks, and that any such request will prompt a review by Sergeant Quon's employer. Because Sergeant Quon had no right to control access to this information, he cannot have held a reasonable expectation that it would be private.[9]

II. *Public Records Acts Serve Many Beneficial Ends That Would Be Defeated By Allowing Public Employees – Especially Police Officers – To Keep Electronic Communications Private.*

There is a "paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). For this reason, "anything which might touch on an official's fitness for office is relevant," including issues such as "dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." *Id.*; *see also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272-274 (1971).

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[9] As one California court recently explained, information is private only if the individual retains the right to control who will learn that information. *Moreno v. Hanford Sentinel*, 172 Cal. App. 4th 1125, 1130 (2009). "[T]he claim of a right of privacy is not so much one of total secrecy as it is of the right to define one's circle of intimacy – to choose who shall see beneath the quotidian mask." *Id.* (citation, internal quotes omitted). Where information may be made available to the public under a state or federal public records act, however, it is not private information regardless of how many, or few, people have actually seen it. *Id.*

The current statutory scheme under the CPRA, as with other state and federal public records laws, balances the public's strong interest in information about the conduct of government officials against instances where legitimate countervailing interests exist. Against this backdrop, it is clear that government agencies must be permitted to review their employees' emails, text messages and similar data. Public records acts ensure that the public can oversee the operations of the government, and thereby heighten the obligation of government agencies to monitor their employees' activities and ensure that they are operating efficiently and effectively. The strong public policies that motivated every legislature in the nation to adopt a public records act strongly support Petitioners' actions here. Ultimately, the government's obligation to the public it serves, and the unique role of public employees within society, mandate that the government be given broad leeway in reviewing all electronic communications from public employees when they are acting on public time, using public equipment.

A. *In The Electronic Age, The Public's Ability To Review Communications Made Through Text Messages Or Other Electronic Devices Is Critical To Ensure Effective Oversight Of Government Agencies And Officials.*

The use of text messages and other forms of electronic communication has ballooned in recent years, as society has embraced instant messaging in both business and personal settings. Text messaging, in particular, has tremendous value

because it gives people the ability to relay vital information instantly. The City had good reason to provide pagers to its officers; when used properly, such pagers can be a valid use of public funds.

But the value of these devices goes well beyond the instant in which they are used. Pagers, like email, may provide a written record of events as they occur. They can help reconstruct an emergency situation for a variety of purposes, far more reliably than the memories of the participants, whose perceptions and recall may be skewed because of the stress of an emergency situation. The written record of such communications provides valuable information to the public and to individuals who might be impacted by the events.[10]

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[10] Thus, for example, enormous public interest was sparked when the website Wikileaks released more than half a million pager messages sent by New York City police officers, public officials, and members of the public at the time of the September 11 attacks. *See*, *e.g.*, Ed Pilkington, *Plane has hit WTC. Pls call, love your wife. Wikileaks publishes 570,000 messages capturing chaos of 9/11*, Guardian, Nov. 26, 2009, at 3 (noting that "[t]he massive archive includes thousands of messages from US officials including Pentagon workers and New York police, as well as members of the public from all over America, which together provide an insight into the initial chaos and confusion, followed by a dawning horror as 9/11 unfolded"); John Lauinger, *Thousands of 9/11 messages released*, N.Y. Daily News, Nov. 26, 2009, at 6 (noting that the messages "provid[ed] a chilling 'real-time' reminder of the terrorist attacks"). Public interest in the messages was so intense that several programmers created tools to search, analyze and visualize the messages sent on September 11. Jennifer Lee, *Digital Tools to Sift Through WikiLeaks' 9/11 Messages*, available at http://cityroom.blogs.nytimes.com/ 2009 /12/01/digital-tools-to-sift-through-wikileaks-911-messages.

E-mails and pagers also can reveal valuable information about the flaws in government – a key goal of the CPRA and other public records acts. Recently, for example, a California group filed a public records request for text messages sent by Orange County sheriff's officials during a 2008 Board of Supervisors meeting. When released, the text messages "show[ed] the law enforcement leaders using cell phones to ridicule activists and even supervisors during a public hearing on gun permit policies." Norberto Santana Jr. and Tony Saavedra, *Text messages comment on gun activists; Sheriff's officials secretly disparaged speakers at a meeting on permits*, Orange Co. Register, Feb. 3, 2009, at A1. Even more importantly, one county supervisor concluded that "the texts gave credence to accusations that sheriff's officials increased security at the next meeting to stifle opposition" to Sheriff Sandra Hutchens' concealed weapons policies. *Id.*

Similarly, Detroit mayor Kwame Kilpatrick resigned and pleaded guilty to obstruction of justice after the Detroit Free Press obtained text messages revealing that he had lied under oath. Jim Schaefer and M.L. Elrick, *Kilpatrick, chief of staff lied under oath, text messages show*, the Detroit Free Press, Jan. 24, 2008, at 1A. Kilpatrick and an aide "had given testimony in court and in a deposition denying that they had a sexual relationship or that they fired two police officers who they feared might expose their affair. But sexually explicit text messages between them, sent on city-issued pagers, contradicted that testimony…." Nick Bunkley, *Aide to Former Detroit Mayor Pleads Guilty in Sex Scandal,* N.Y. Times, Dec. 2, 2008, at A26.

A tragic reminder of the need to scrutinize texting behavior during working hours occurred recently, when a Metrolink engineer crashed the train he was operating, killing 25 people. Brief at 57 n.6. The public release of text messages sent by the engineer, which were presented as evidence in a National Transportation Safety Board hearing regarding the collision, revealed that the engineer "not only allowed unauthorized rail enthusiasts to sometimes ride in his cab, but on at least one occasion let a teen take the controls." Robert J. Lopez and Rich Connell, *Metrolink engineer let teen take throttle*, L.A. Times, Mar. 4, 2009, at A1. Sadly, the documents revealed that the engineer sent a text message only 22 seconds before the crash and a total of 57 messages on the day of the crash – strong evidence that his attention was not focused on the safety of his train.[11] Indeed, this disclosure led the state to take important safety measures: the day after federal investigators confirmed that the engineer had been sending and receiving text messages just before the crash, state regulators "voted unanimously to bypass normal procedures and impose an immediate ban on the use of wireless devices by train engineers, conductors and brakemen while on duty." Rich Connell and Robert J. Lopez, *Cellphones banned for train crews*, L.A. Times, Sep. 19, 2008, at B8.

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[11] *See* Robert J. Lopez, Rich Connell and Steve Hymon, *Train engineer sent text messages just before crash*, L.A. Times, Oct. 2, 2008, available at http://articles.latimes.com /2008/oct/02/ local/me-crash2.

It does not require much imagination to come up with a variety of other situations where the disclosure of electronic communications by government employees would serve an important public interest, and where the Ninth Circuit's decision would imperil the public's ability to scrutinize the conduct of such employees:

- A high school teacher exchanges messages on a school-issued pager with a student, revealing inappropriate communications between the teacher and the student. Acting on an anonymous tip, the local newspaper seeks access to the text messages but the school refuses, arguing that the teacher has a privacy interest in the messages that precludes the school's review.

- A citizen claims that a police officer made inappropriate demands during a routine stop and seeks access to the officer's pager messages surrounding the incident. The police department refuses, explaining that officers were informally promised privacy in their text messages and the police department is precluded from reviewing or producing those communications.

- The driver of a public bus is accused of harassing and abusive behavior towards riders, and often can be seen texting messages following such incidents. One rider requests access to all of the driver's text messages sent during business hours. The city rejects the request, claiming that

the rider has no interest sufficient to overcome the driver's privacy interest in the communications.

- A city council decides to begin treating their email communications during business hours, using city equipment, as private. A local activist seeks access to one councilmember's email communications with a real estate developer for whom the councilmember has begun advocating. The city denies the request, relying on its recently-adopted policy.

In short, the Ninth Circuit's decision potentially stymies the public's right of access to valuable information about its government in the digital age.

B. *The Societal Interest In Monitoring Police Officers' Electronic Messages Is Particularly Strong.*

The preceding section shows that there are significant public policy interests in monitoring the text messages of all governmental employees. But these general principles have even greater force with respect to police officers. "Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers." *New York Times*, 52 Cal. App. 4th at 104-105.

Indeed, law enforcement officers "hold one of the most important positions in our society." *City of Hemet v. Superior Court*, 37 Cal. App. 4th 1411, 1428 (1995). Because "[p]olice officers are public servants sworn to serve and protect the general public," and because the "[p]erformance of police duties … is a matter of great public importance," courts repeatedly have affirmed the manifest public interest in information about law enforcement activities. *Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997). As one court explained, "[i]t is indisputable that law enforcement is a primary function of local government and that the public has a … great[] interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an 'on the street' level." *Gomes v. Fried*, 136 Cal. App. 3d 924, 933 (1982).

Sergeant Quon had an important role in the Ontario Police Department, as a commander on the elite SWAT force. His job carried tremendous responsibility, as he addressed life-and-death situations in some of the most challenging operations in Ontario.[12] The public has a profound

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[12] The City describes the vital role of its SWAT team on its website:

> The SWAT Team consists of a predetermined number of specially selected sworn personnel, who receive continuous specialized training. They are brought together primarily for the purpose of implementing the use of their tactics and equipment in certain high-risk situations. The primary goal of SWAT is a reduction in risk and protection of life and property.

interest in knowing if this function is being properly performed when one of the City's employees sends *eighty* text messages in a single day – *ten every hour* on average. J.A. 143. This is not the occasional text message to exchange a grocery list, which would have been authorized by the City's written policy. Sergeant Quon was spending a substantial amount of time while on the job exchanging personal emails with his wife and two co-workers, one of them his mistress. Both the public and the City have a legitimate interest in evaluating whether this kind of activity interferes with an officer's job performance.

As the California Supreme Court recently recognized, one reason for public access under the CPRA is "to expose corruption, incompetence, inefficiency, prejudice, and favoritism." *International Federation of Prof. & Tech. Eng., Local 21 v. Superior Court*, 42 Cal. 4th 319, 333 (2007)

> SWAT is called upon to handle situations such as an armed or barricaded suspect, with or without hostages. These persons pose the potential of extreme risk to the lives and safety of officers and citizens when they refuse to submit to arrest. SWAT is utilized to execute high-risk search and arrest warrants, and provide executive protection.
>
> SWAT is supplemented by a Hostage Negotiations Team. SWAT relies heavily on the professional negotiations expertise and strong working relationship provided by the Hostage Negotiations Team.

See SWAT, Special Weapons and Tactics Team, City of Ontario Police Department, available at http://www.ci. ontario. ca.us/index.cfm/2969.

(citation, internal quotes omitted). Of course, some records reflecting police activities are exempt from disclosure under the CPRA. For example, Government Code § 6254(f) expressly exempts law enforcement investigatory records. *See Williams*, 5 Cal. 4th at 354. Yet, even if particular records might be reviewed and found to be exempt from disclosure under the CPRA, Sergeant Quon could not have had any *reasonable* expectation that they would not be reviewed in the first instance. Without question, the public policies that support disclosure gave his employer the unencumbered right to review his messages and determine for itself if they reflected inappropriate or wasteful behavior by Sergeant Quon.

Moreover, the nature of Sergeant Quon's messages further undermined any reason to believe they would be private. During business hours, using a pager supplied by the public's money, Sergeant Quon exchanged sexually explicit emails with two different co-workers, one of whom was his mistress. Pet. App. 54; S.E.R. 532, 539, 546, 551-553. Certainly, the City as employer has a strong interest in preventing sexual harassment, and affairs in the work environment can give rise to or provide evidence for sexual harassment claims in an unexpected array of circumstances. *E.g.*, *Miller v. Department of Corrections*, 36 Cal. 4th 446 (2005) (employees who did *not* have an affair with supervisory employee stated sexual harassment claim based on apparent *quid pro quo* between supervisory employee and other employees with whom he had affairs); *Bihun v. AT&T Information Systems, Inc.*, 13 Cal. App. 4th 976, 988 (1993)

(evidence of affair between alleged harasser and a subordinate employee was properly admitted in sexual harassment claim by a different employee), *overruled in part on other grounds by Lakin v. Watkins Associated Industries*, 6 Cal. 4th 644 (1993); *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538, 552 (N.J. 2000) (employer has obligation to prevent harassing behavior within the workplace); *see generally* Charles J. Muhl, *Workplace e-mail and Internet use: employees and employers beware*, Monthly Labor Review, Feb. 2003 at 36 (discussing employers' potential legal liability for employees' inappropriate use of e-mail system and Internet).[13]

Beyond that, the public has a profound interest in evaluating actions that may give rise to liability against the City, and records detailing such acts are disclosable under the CPRA. In *Poway Unified School District v. Superior Court*, 62 Cal. App. 4th 1496 (1998), for example, a California court ordered disclosure of claims forms submitted to the government which detailed a hazing incident in which a fifteen-year-old was "brutally sodomized" with a broomstick. In *Copley Press, Inc. v. Superior Court*, 63 Cal. App. 4th 367 (1998), the court then

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[13] *See also American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 568 (1982) ("[i]n a wide variety of areas, the federal courts … have imposed liability upon principals for the misdeeds of agents acting with apparent authority"); *Investors Group v. Avaya, Inc.*, 564 F.3d 242, 252 (3d Cir. 2009) ("[a] corporation is liable for statements by employees who have apparent authority to make them") (citations omitted); *Manale v. City of New Orleans, Dept. of Police*, 673 F.2d 122, 126 (5th Cir. 1982) ("where an employee makes a slanderous statement within the course and scope of his employment, the employer is solidarily liable").

reversed an order sealing the court records relating to the settlement of the same minor's claim. The court explained that "the public has a legitimate interest in knowing how public funds are spent and how claims (formal or informal) against public entities are settled." *Id.* at 376 (citing *Register Div. of Freedom Newspapers*, 158 Cal. App. 3d at 909).

The California Supreme Court recently reiterated the public's strong interest in understanding how public funds are spent. In an opinion that was unanimous on the main issue presented, the Court held that the CPRA requires disclosure of individually-identifiable public salary information because it furthers the public's strong interest in overseeing use of public funds. *International Federation*, 42 Cal. 4th at 333 ("[c]ounterbalancing any cognizable interest that public employees may have in avoiding disclosure of their salaries is the strong public interest in knowing how the government spends its money"); *see also New York Times Co. v. Superior Court*, 218 Cal. App. 3d 1579, 1585-1586 (1990) (disclosure of users of excess water resources ensures individuals do not receive special privileges or, alternatively, are not subject to discriminatory treatment).

Here, Sergeant Quon was being paid by the City for the time he spent sending these messages – 40,000 characters in a single month. One of the City's employees, Lieutenant Duke, spent an inordinate amount of time policing the use by Sergeant Quon and others of their pagers, and their reimbursement of overage charges to the City. S.E.R. 261; J.A. 61. Given the frequency of the text

messages, the City had a strong interest in ensuring that Sergeant Quon's personal interactions during work hours were appropriate and would not expose the City to liability. So too, the public had a strong interest in ensuring that the City's resources were spent appropriately, and that the City was not unnecessarily exposed to liability through the inappropriate conduct of one of its employees. Given all of these considerations, there can be no question that Sergeant Quon did not have a *reasonable* expectation of privacy in the content of these communications.

CONCLUSION

The government's obligations to the public it serves transcend any privacy interest that might exist in communications sent on government time, using government equipment, which reveal inefficient, inappropriate and potentially abusive behavior by a government employee. At a minimum, Sergeant Quon had no *reasonable* expectation that his employer would not review his text messages, so their review cannot give rise to a Fourth Amendment claim.

For the foregoing reasons, *Amici Curiae* respectfully urge the Court to reverse the decision of the Ninth Circuit and to reinstate the decisions in the trial court in favor of petitioners.

Respectfully submitted,

February 11, 2010

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