American Bar Association
www.supremecourtpreview.org

No. 08-1332

IN THE

Supreme Court of the United States

CITY OF ONTARIO, CALIFORNIA, *et al.*,
Petitioners,

v.

JEFF QUON, *et al.*,
Respondents.

**On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

LYNN K. RHINEHART
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. SERGEANT QUON HAD A REASONABLE EXPECTATION OF PRIVACY IN THE PERSONAL TEXT MESSAGES HE SENT AND RECEIVED VIA HIS PAGER	5
II. THE SCOPE OF THE POLICE DEPARTMENT'S SEARCH OF QUON'S PERSONAL TEXT MESSAGES WAS NOT REASONABLY RELATED TO ITS OBJECTIVE AND WAS EXCESSIVELY INTRUSIVE IN LIGHT OF ITS PURPOSE	12
CONCLUSION	17

TABLE OF AUTHORITIES

CASES Page

Biby v. Board of Regents of the University of Nebraska at Lincoln, 419 F.3d 845 (8th Cir. 2005) 15-17

Garcetti v. Ceballos, 547 U.S. 410 (2006) 2

Leventhal v. Knapek, 266 F.3d 64 (2d Cir. 2001) .. 10, 15-16

Minnesota v. Carter, 525 U.S. 83 (1998) 5

New Jersey v. T.L.O., 469 U.S. 325 (1985) 13

O'Connor v. Ortega, 480 U.S. 709 (1987) .... *passim*

Skinner v. Rwy. Labor Executives' Assn., 489 U.S. 602 (1989) 13

United States v. Angevine, 281 F.3d 1130 (10th Cir. 2002) 9

United States v. Jacobsen, 466 U.S. 109 (1984) 4

United States v. Long, 64 M.J. 57 (C.A.A.F. 2006) .. 11-12

United States v. Simons, 206 F.3d 392 (4th Cir. 2000) 9-10

United States v. Slanina, 283 F.3d 670 (5th Cir. 2002) 10-11

STATUTES

Cal. Gov't Code §6250 9

Cal. Gov't Code §6252(e) 9

Cal. Gov't Code §6254(c) 9

IN THE

Supreme Court of the United States

CITY OF ONTARIO, CALIFORNIA, *et al.*,
Petitioners,

v.

JEFF QUON, *et al.*,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 57 national and international labor organizations with a total membership of 11.5 million working men and women.[1] This case concerns the extent to which the Fourth Amendment protects public employees from unreasonable work-related searches by their public employers.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

Many of the employees represented by AFL-CIO affiliates are public employees. The AFL-CIO has, therefore, frequently filed *amicus curiae* briefs in cases affecting the constitutional rights of public employees. *See*, *e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 413 n.* (2006).

SUMMARY OF ARGUMENT

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), this Court set forth the standards for determining whether a public employer's work-related search of a public employee's workplace violates the Fourth Amendment. Under *Ortega*, a public employer violates the Fourth Amendment by conducting a search that violates an employee's reasonable expectation of privacy, if the scope of the search is not reasonably related to or is excessively intrusive in light of the purpose of the search.

I. The City of Ontario's search of the text messages sent and received via Sergeant Jeff Quon's pager infringed Quon's reasonable expectation of privacy. Under *Ortega*, a public employee's reasonable expectation of privacy is determined by the "operational realities of the workplace." The relevant "operational realities" regarding Quon's use of his pager are: i) the City required Quon to have the pager on his person at all times, even when off duty; ii) the City expressly gave him permission to use the pager for personal messages, charging him for that use; and iii) the person the City placed in charge of auditing the pagers told Quon that his messages would not be audited so long as Quon paid for potential personal use by reimbursing the City for any monthly overage. These "operational realities" are materially similar to those that caused this Court in *Ortega* and several lower courts applying *Ortega*'s teaching to conclude that government employees had a reasonable expectation of privacy with regard to personal materials stored in various types of government-issued workplace equipment.

II. The City's search of the contents of Sergeant Quon's pager messages was excessively intrusive in light of the objective of the search. Under *Ortega*, the reasonableness of a public employer's search conducted for a noninvestigatory work-related purpose depends on whether the search is reasonably related to and not unduly intrusive in light of that purpose. The objective of the City's search of Quon's pager was to determine whether the City's pager contract provided a sufficient number of paid-for characters to cover official use. This objective could have been achieved without reviewing the contents of every message on Quon's pager, including highly personal messages sent to or received from obviously private pagers. The City's search was, therefore, unreasonable and in violation of Quon's right to privacy under the Fourth Amendment.

ARGUMENT

The question presented by this case is whether the City of Ontario, California, violated the Fourth Amendment by conducting a search that consisted of printing and reading the contents of personal text messages sent and received via pager by one of its employees, Sergeant Jeff Quon. The City had supplied the pager to Quon and required that he have it on his person at all times, including times when he was off duty. The City expressly authorized Quon to send and receive personal messages via the pager, and the official in charge of the City's pager program assured Quon that his personal pager messages would not be monitored so long as Quon paid for usage in excess of the monthly allotment of characters covered by the flat monthly fee paid by the City to its outside wireless communications provider. In this context, the court below properly held that the City's inspection of Quon's personal messages was an unreasonable search under this Court's decision in *O'Connor v. Ortega*, 480 U.S. 709 (1987). Pet. App. 35-36.

In *O'Connor v. Ortega*, this Court unanimously "reject[ed] the contention . . . that public employees can never have a reasonable expectation of privacy in their place of work" and held that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." 480 U.S. at 717. While a five member majority of the *Ortega* Court held that "a public employer's work-related search of its employee's [workplace] offices, desks, or file cabinets" is not subject to the Fourth Amendment's ordinary warrant and probable cause requirements, *id.* at 720-721, those same Justices made clear that the "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer." *Id.* at 717-18 (plurality opinion), 731 (Scalia, J., concurring) (emphasis in original).

Ortega prescribes a two-step analysis for determining whether a government employer's work-related search violates the Fourth Amendment. First, it is necessary to determine whether the search "infringed 'an expectation of privacy that society is prepared to consider reasonable.'" 480 U.S. at 715, quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Once it has been determined that the employee "had a reasonable expectation of privacy" that was infringed by the search, it is necessary to determine whether the search was "reasonable" by "balanc[ing] the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace." *Id.* at 719-20.

In what follows, we first show that the courts below correctly determined that Quon had a reasonable expectation of privacy with regard to the contents of his personal text messages on his pager. We then show that the

court of appeals was correct in concluding that the City's search of Quon's personal text messages was "excessively intrusive in light of the noninvestigatory object of the search." Pet. App. 36.

I. SERGEANT QUON HAD A REASONABLE EXPECTATION OF PRIVACY IN THE PERSONAL TEXT MESSAGES HE SENT AND RECEIVED VIA HIS PAGER

"[I]n order to claim the protection of the Fourth Amendment, [an individual] must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). "Neither party disputes that Quon . . . had a subjective expectation of privacy in the text-messages sent or received on the pager[]." Pet. App. 88 n. 6. And the highly personal nature of the text messages clearly demonstrates that Quon strongly believed that their contents were private and not subject to public disclosure. The City does dispute, however, the findings of both courts below that Quon's expectation was objectively reasonable.

A. The plurality opinion in *Ortega* emphasized that "when an intrusion is by a supervisor" into a work-related area, the reasonableness of "[p]ublic employees' expectations of privacy" can be affected by "actual office practices and procedures, or by legitimate regulation." 480 U.S. at 717. Thus, the focus of the "reasonable expectations" inquiry must be the "operational realities of the workplace." *Ibid.*

In this case, the "operational realities" are: i) the City required Quon to have the pager on his person at all times, even when off duty; ii) the City expressly gave him permission to use the pager for personal messages, charging him for that use; and iii) the person the City placed in charge of auditing the pagers told Quon that his messages

would not be audited so long as Quon paid for potential personal use by reimbursing the City for any monthly overage. Given those "operational realities," the conclusion that Quon's expectation of privacy was reasonable follows directly from *Ortega*.

The one thing in *Ortega* that all nine Justices agreed on was "that Dr. Ortega had a reasonable expectation of privacy in his [hospital] desk and file cabinets." 480 U.S. at 718. Three aspects of the "operational realities of [Ortega's] workplace," *id.* at 717, led the plurality – which took the most restrictive position – to this conclusion. First, "Dr. Ortega did not share his desk or file cabinets with any other employees." *Id.* at 718. Second, "he kept materials in his office, which included personal correspondence, medical files, correspondence from private patients unconnected to the Hospital, personal financial records, teaching aids and notes, and personal gifts and mementos." *Ibid.* Third, "there was no evidence that the Hospital had established any reasonable regulation or policy discouraging employees such as Dr. Ortega from storing personal papers and effects in their desks or file cabinets." *Id.* at 718-19. In each of these three respects, the "operational realities" of Quon's use of his employer-provided pager are closely analogous to Ortega's use of his hospital desk and file cabinets.

First, Quon "did not share his [pager] with any other employees." *Ortega*, 480 U.S. at 718. Quon's pager was assigned to him exclusively. Access to the pager by another employee was, in fact, impossible, because the City required Quon to keep the pager on his person at all times, including times when he was not on duty. J.A. 52.

Second, Quon "kept [personal] materials," in the form of personal text messages, on his pager. 480 U.S. at 718. And, Quon actually paid the City for his personal use of the pager. Pet. App. 8.

Third, "there was no evidence that the [City] had established any reasonable regulation or policy discouraging employees such as [Quon] from [using their City-provided pagers for] personal [messages]." *Ortega*, 480 U.S. at 719. To the contrary, the showing that the City "allowed, condoned, and even encouraged" its employees' "use[of] the pagers for personal matters" was so strong that the district court ruled a search of employee pager messages conducted for the purpose of uncovering such personal use would not be "justified at the inception," because "the search would not have revealed misconduct[but] rather . . . would have uncovered conduct permitted [by the City] to occur." Pet. App. 98-99.

B. In arguing that Quon did not have a reasonable expectation of privacy in personal messages on his pager, the City relies heavily on the point that "Sergeant Quon was informed that 'the city owned and issued alphanumeric pagers were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing.' J.A. 30, 61." Pet. Br. 33-34. The circumstances and content of that communication completely undermine the City's reliance on this point.

The statement in question was made by Lieutenant Steven Duke, "the person in charge of the use and provision of the department's electronic equipment," Pet. App. 48, in the course of a broader discussion encompassing many items at a general workplace meeting held on April 29, 2002. J.A. 28-32. During this same time period, Duke specifically informed Quon that Duke would not audit Quon's pager messages if Quon reimbursed the City for charges due to Quon's use of the pager in excess of the City's normal monthly allotment under its contract. Pet. App. 50; J.A. 84. Duke's statement at a group meeting that pager messages were generally "*eligible* for auditing" does not contradict Duke's specific assurance to Quon

that his pager messages *would not in fact* be audited if Quon reimbursed the City for overage charges. The City cannot claim that it was unreasonable for Quon to rely on Duke's statements made to Quon personally regarding the privacy of Quon's text messages, when it is Duke's statements to a group meeting that the City relies upon to establish the application of the computer usage policy to pagers.

Second, the City also relies on the general "Computer Usage, Internet and E-Mail Policy" that was distributed to City employees in late 1999. Pet. App. 151-55. That reliance is doubly flawed. At the threshold, that policy does not expressly refer to, much less purport to govern, pagers, which would not be provided to City employees until two years later. Pet. App. 45. And, even if the policy were understood to cover text messages sent via pager, the policy's general declarations – that "[t]he City of Ontario reserves the right to monitor and log all network activity including e-mail" and that "[u]sers should have no expectation of privacy or confidentiality when using these resources," Pet. App. 152 – do not negate the reasonable expectation of privacy created by the post-2001 "operational realities of the workplace" regarding pagers. *Ortega*, 480 U.S. at 717. Aside from "the person in charge of the use and provision of the department's electronic equipment," Pet. App. 48, specifically assuring Quon that his pager messages would not be audited, Pet. App. 50, the "operational reality" was that – unlike e-mail, which was run on a city-operated network and thus could be directly audited by the City – the pagers communicated through an outside, privately-run network, which the City could not directly audit, and, prior to the incidents that gave rise to this case, the City had never requested access to pager messages from the outside provider. J.A. 62, 72, 77.

Finally, the City argues that the "potential for public

review" under the California Public Records Act "eliminated any *legitimate* expectation of privacy" Quon may have had regarding his personal text messages. Pet. Br. 40 (emphasis in original). *See id.* at 35-40. But that Act has no application to Quon's personal pager messages. The Act requires disclosure only of "public records," which it defines as records "containing information relating to the conduct of the public's business." Cal. Gov't Code § 6252(e). What is more, even if Quon's personal messages could somehow be considered "relat[ed] to the conduct of the public's business," they would be subject to the exemption for records "the disclosure of which would constitute an unwarranted invasion of personal privacy." *Id.* § 6254(c). *See also id.* § 6250 (expressing the legislature's concern with "the right of individuals to privacy").

C. Against that background, it is not surprising that the lower court decisions cited by the City as supporting its argument that the "operational realities of the workplace" here negate any reasonable expectation of privacy provide no such support. Pet. Br. 34-35. In *United States v. Angevine*, 281 F.3d 1130, 1132-33 (10th Cir. 2002), the "operational realities" were: i) that the employer's computer use policy stated that the employer "reserves the right to view or scan any file or software stored on the computer or passing through the network, and will do so periodically" and that "[t]he University cannot guarantee confidentiality of stored data;" ii) that the employer displayed a "splash screen" visible to computer users every time they turned on the computer informing the users of the university's right to audit or investigate violations of law or the computer use policy; and iii) that the university did, in fact, regularly audit computer use. *Id.* at 1133-34. Similarly, in *United States v. Simons*, 206 F.3d 392, 395-98 (4th Cir. 2000), the government employer: i) explicitly restricted use of an employee's computer to

government business; ii) clearly informed employees of its policy to "'audit, inspect, and/or monitor' [employees'] use of the Internet, including all file transfers, all websites visited, and all e-mail messages, 'as deemed appropriate;'" and iii) did, in fact, regularly conduct such monitoring.

Thus, the cases relied upon by the City involved clear, consistent policy statements regarding monitoring of employees' electronic communications that were directly applicable to the employee use at issue and were actually implemented by the employers. By contrast, the most clear and direct advice the City gave Quon regarding his personal pager messages was that he could expect them to remain private, advice which was consistent with the City's actual practice of *not* auditing pager messages.

In contrast, in the lower court cases in which the "operational realities" were similar to the realities in this case, the courts have ruled that the employees did have a reasonable expectation of privacy. In *Leventhal v. Knapek*, 266 F.3d 64, 74 (2d. Cir. 2001), the Second Circuit held that public employees have a reasonable expectation of privacy in work computers assigned for their exclusive use, so long as any employer access is not "frequent, widespread, or extensive." In this regard, the Second Circuit concluded that "infrequent and selective search[es] for maintenance purposes or to retrieve a needed document, justified by reference to the 'special needs' of employers to pursue legitimate work-related objectives, do[] not destroy any underlying expectation of privacy that an employee could otherwise possess in the contents of an office computer." *Ibid.*

In *United States v. Slanina*, the Fifth Circuit rejected the government's argument that a city employee did not have a reasonable expectation of privacy in his office and computer because other employees could have accessed his private office with a master key, computer personnel

regularly accessed his computer to upgrade software, and the computer was city property. 283 F.3d 670, 676-677 (5th Cir. 2002). The Fifth Circuit based its conclusion that the employee had a reasonable expectation of privacy on the fact that his office was private, and although co-workers occasionally had access to the office, it was not "so open to fellow employees or the public that no expectation of privacy is reasonable." *Id.* at 676 (quoting *Ortega*, 480 U.S. at 718). Access to the employee's computer by other employees was not "frequent, widespread, or extensive" enough to defeat a reasonable expectation of privacy in the computer's contents. *Id.* The city's ownership of the computer was not dispositive given the fact that the city had no official policy preventing employees from storing personal information on it or putting employees on notice that their computer use would be monitored. *Id.*

And, in *United States v. Long*, 64 M.J. 57, 64 (C.A.A.F. 2006), the Court of Appeals for the Armed Forces held that a Marine lance corporal had a reasonable expectation of privacy in personal e-mails she sent on a Department of Defense computer at her workstation at Marine Corps Headquarters. This conclusion was reached despite the unique nature of the military workplace and the fact that a "log-on banner" was displayed every time the lance corporal logged on to the network, notifying her that the network was monitored and that use of the computer constituted consent to monitoring. *Id.* at 60. The factors supporting a reasonable expectation of privacy included the fact that e-mail accounts were password protected and the fact that monitoring of the system was limited to certain conditions. The network administrator testified that "it was general policy to avoid examining e-mails and their content because it was a 'privacy issue.'" *Ibid.* It was also significant that the sending and receiving of limited personal e-mails was

condoned and that light use of the system for personal messages was considered authorized use under the written policy in effect at the Headquarters. *Id.* at 64.

* * *

In sum, "the operational realities of [Quon's] workplace" were materially similar to the "operational realities" that led the courts in *Ortega*, *Leventhal*, *Slanina*, and *Long* to conclude that the government employees in those cases had a reasonable expectation of privacy with regard to personal materials stored in various types of government-issued workplace equipment.

II. THE SCOPE OF THE POLICE DEPARTMENT'S SEARCH OF QUON'S PERSONAL TEXT MESSAGES WAS NOT REASONABLY RELATED TO ITS OBJECTIVE AND WAS EXCESSIVELY INTRUSIVE IN LIGHT OF ITS PURPOSE

In *Ortega*, this Court held "that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Ortega*, 480 U.S. at 725-26. To pass "this reasonableness standard, both the inception and the scope of the intrusion must be reasonable." *Id.* at 726.

A search is reasonable at its inception if an employer has reasonable grounds to believe "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." *Ortega*, 480 U.S. at 726. And a search is reasonable "in its 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 or the noninvestigatory work-related purpose].'" *Ibid.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)). *See Skinner v. Rwy. Labor Executives' Assn.*, 489 U.S. 602, 625 (1989) ("special needs" search must "not constitute an unduly extensive imposition on an individual's privacy").

A. In this case, a jury found, by a special verdict, that the City searched the contents of Quon's pager "[t]o determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses." Pet. App. 119. The district court concluded that a search conducted for this noninvestigatory work-related purpose would be reasonable at its inception, because "the audit was done for the benefit of (not as a punishment against) the officers who had gone over the monthly character limits." Pet. App. 99. The Ninth Circuit agreed that "the purpose [of] ensur[ing] that officers were not being required to pay for work-related expenses . . . [wa]s a legitimate work-related rationale." Pet. App. 34.

The Ninth Circuit went on to hold that "the search was *not* reasonable in scope" on the grounds that "review[ing] the contents of all [of Quon's] messages, work-related and personal . . . was excessively intrusive in light of the noninvestigatory object of the search." Pet. App. 34 & 36 (emphasis added). In this regard, the Ninth Circuit found that the City could have easily limited its search in a way that would have allowed it to "verify the efficacy of the 25,000 character limit . . . without intruding on [Quon's] Fourth Amendment rights." Pet. App. 35. The Ninth Circuit's conclusion is clearly correct.

To audit Quon's official use of his pager, the City simply "review[ed] the contents of the pager transmissions to determine if the usage was on duty or off duty" without "consider[ing] whether there was a less intrusive means

of conducting the audit." Pet. App. 53 (quotation marks and brackets omitted). The critical point here is that, given the purpose of the search, the City had no reason to "actually look at the transcripts of [all] the text-messages." Pet. App. 101. Rather, the City could have easily limited its search by first separating text messages that were obviously personal from those that were possibly official and then reviewing the content of only the latter.

In the first place, simply "[l]ooking at the telephone numbers dialed by the officers" on their official pagers would have provided the City with the "means of determining whether the person who was paged was a co-worker" using an official pager. Pet. App. 102. Messages to or from a personal pager could not possibly concern official business, and thus the City had no reason to read such personal messages. The most personal of the pager messages at issue were those between Quon and his wife or his girlfriend, and both "were using their own personal pagers" in communicating with Quon. Pet. Br. 62, citing Ninth Circuit S.E.R. 303-04, 307. The City's review of the transcripts of messages between Quon and these obviously unofficial pagers had no relation to determining the number of characters contained in official communications. And, the City's completely unnecessary review of the messages between Quon's pager and his wife and his girlfriend's personal pagers was highly intrusive.

Even with respect to messages between Quon's pager and other official pagers, the City could have further tailored its search by providing Quon with a list of communications between his pager and other City-provided pagers and asking him to identify those messages that were possibly of an official nature. Quon would have had an incentive to identify all official messages, because doing so would have been "for the benefit of . . . the officers." Pet. App. 99. He would have had little incentive to

misidentify possibly official messages as personal – other than protecting against the disclosure of some highly personal messages. And, this incentive to undercount official messages could have been completely eliminated by allowing Quon to first review the transcripts himself so that he could separate out purely personal communications before the transcripts were turned over to a City supervisor for inspection.

In sum, the City could have achieved its objective of determining whether the existing character limit under its pager contract was sufficient to cover the usual number of official text messages by first limiting its search to messages to or from official telephone numbers – which by itself would have substantially reduced the intrusion on Quon's privacy – and then further limiting its search to those messages that Quon identified as official in nature. Instead, the City began its search by using the most intrusive means, reviewing the actual contents of all messages sent or received by Quon's pager.

B. The Ninth Circuit's conclusion that the scope of the City's search was unreasonable is supported by comparison with the manner in which the New York Department of Transportation conducted the search found reasonable in *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001), and with the manner in which the University of Nebraska conducted the search found reasonable in *Biby v. Board of Regents of the University of Nebraska at Lincoln*, 419 F.3d 845 (8th Cir. 2005).

In *Leventhal v. Knapek*, the Second Circuit held that "the scope of the searches" conducted by the New York Department of Transportation on an employee's office computer "was not 'excessively intrusive in light of the nature of the misconduct,' [*Ortega*, 480 U.S.] at 726," precisely because the searches were conducted in stages with each stage calibrated to intrude no further than necessary to

achieve the employer's legitimate purpose. 266 F.3d at 76. In the first stage of the search – which was occasioned by the DOT's suspicion that Leventhal had loaded unauthorized software on his work computer to use for his private tax practice – "the DOT investigators printed out a list of file names found on Leventhal's office computer" but "did not run any program or open any files" and "limited their search to viewing and printing file names that were reasonably related to the DOT's need to know whether Leventhal was misusing his office computer." *Id.* at 75-76. In the next stage of the search, the investigators focused on files that they "reasonably suspected . . . were part of [an unauthorized] tax program" based on the file names. *Id.* at 76. At the subsequent stages, the "searches were limited to copying onto a laptop computer the 'PPU' directories that they later identified as referring to 'Pencil Pushers,' a tax preparation program, and the 'Morph' directories, pertaining to a graphics program, to printing out additional copies of the file names, and to opening a few files to examine their contents." *Ibid.*

The Second Circuit concluded that "the DOT investigators were justified in returning to confirm the nature of the non-standard DOT programs loaded on Leventhal's computer by copying directories, printing file names, and opening selected files," because "the first search yielded evidence upon which it was reasonable to suspect that a more thorough search would turn up additional proof that Leventhal had misused his DOT office computer." 554 F.3d at 76-77. Significantly, even in the later stages, the DOT investigators did not "open[] and examine[] any computer files containing individual tax returns." *Id.* at 76.

In *Biby v. Board of Regents of the University of Nebraska at Lincoln*, the Eighth Circuit approved a similarly limited search of an employee's work computer by a public university in preparation for an arbitration. 419 F.3d at

851. The Eighth Circuit held that the university's search of the employee's computer was reasonable because it was limited in the following ways: "the search was conducted within the discovery period for the arbitration," *ibid*; the search was conducted by using "key word[s] . . . related to the [arbitration] dispute," *id*. at 849; and the computer specialist conducting the search "immediately closed any file that appeared not to relate to the dispute," *ibid*.

By contrast with *Leventhal* and *Biby*, the public employer in this case "did not consider whether there was a less intrusive means of conducting the audit." Pet. App. 53. Rather, the City immediately conducted the most intrusive search possible by "review[ing] the contents of all the messages, work-related and personal," Pet. App. 36, and in the process exposed private communications that were both highly sensitive and completely irrelevant to the City's investigation. Applying the standard established in *Ortega*, the City's search was not reasonable in scope, because it was "excessively intrusive in light of . . . the nature of the [noninvestigatory work-related purpose]." 480 U.S. at 726.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

LYNN K. RHINEHART
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005