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

MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

John W. Whitehead
Counsel of Record
Douglas R. McKusick
John M. Beckett
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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

MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Comes now The Rutherford Institute and files this motion pursuant to Sup. Ct. R. 37.3(b), for leave to file an *amicus curiae* brief in support of the Respondents in the above-styled case presently before this Court for oral argument.

In support of this motion, The Rutherford Institute first avers that it requested the consent to the filing of an *amicus curiae* brief from each of parties to this case, but consent was withheld by Respondent Debbie Glenn.

The Rutherford Institute requests the opportunity to present an *amicus curiae* brief in this case because the Institute is keenly interested in protecting the civil liberties of individuals from interference and infringement by the government. The issue presented in this case, the extent of protection afforded government workers by the Fourth Amendment, is an issue of pressing national concern in light of the expanding size of the governmental workforce and the ever-increasing time demands placed on such workers. It is crucial that the privacy interest of these workers be recognized and protected and that it is assured that citizens do not forfeit the fundamental protections of the Constitution when they accept government employment.

As a civil liberties organization, The Rutherford Institute and the brief set forth, *infra*, brings a discerning analysis to the issues presented in this case. The Institute specializes in protecting the constitutional rights of individuals and its experience in these matters will bring to light matters which will assist the Court in reaching a just solution to the questions presented.

Moreover, The Rutherford Institute specializes in advocating for individual rights and the proposed brief will allow the Court to better understand the interests of government employees, such as the Respondents, in securing their privacy. The Petitioner has already received the support of five *amicus curiae* briefs, and the Court will obtain a

more balanced analysis of the issues in this case if the Institute's brief in support of the Respondent is accepted.

Wherefore, The Rutherford Institute respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
John M. Beckett
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon, and in educating the public about constitutional and human rights issues.

Attorneys affiliated with the Institute have represented parties and filed *amicus curiae* briefs in this Court on numerous occasions. Institute attorneys have a long history of filing briefs before this Court on a wide range of constitutional law questions, and are currently handling numerous cases of local and national import, including many cases that concern the interplay between government and citizens.

The Rutherford Institute is interested in the instant case because it will greatly affect the privacy interests of government workers and their ability to rely upon the actual practices and assurances of superiors with respect to the degree of privacy

---

[1] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief.

afforded in the workplace. Additionally, the Institute is interested in assuring that the rights of privacy are fully extended in the context of new technologies, including the kind of text messages at issue in this case.

STATEMENT OF FACTS

Amicus incorporates by reference the statement of facts set forth in the Respondents' Brief.

SUMMARY OF ARGUMENT

The Fourth Amendment has protected citizens in their homes since the founding days of these United States. In recent years, the workplace has become increasingly an extension of the home: people spend a significant percentage of their lives at the office, undertaking personal as well as work-related tasks. Our society recognizes this and requires affording workers a significant measure of privacy in the workplace absent clear disclaimers to the contrary by employers.

The reality in the modern workplace, both private and government, is that employers often tend not to discourage their employees from storing personal materials at work, browsing the internet for personal use during their breaks or after work, or engaging in other non-work related tasks. In other cases, even where official non-privacy policies do exist, employers do not often enforce them, or alternatively – as in the instant case – go as far as to

contradict them with assurances that official policies will not be enforced provided that certain conditions are met. It is the conflict between "official policy" and actual practices and assurances that is at the center of the dispute over an employee's right to privacy in this case.

Rather than establish an inequitable and unrealistic standard that makes purported official policy preeminent, this Court should reaffirm its existing precedent that Fourth Amendment rights, particularly those in government workplaces, must be assessed on a case-by-case basis looking to all the circumstances. Expectations of privacy turn on particular factual circumstances, which differ in significant ways from case to case and from workplace to workplace. As such, the current test, established in *Katz v. United States*, 389 U.S. 347 (1967) and its progeny – which requires a subjective expectation of privacy that is objectively reasonable, and demands that any breach of such a well-founded expectation by a government employer be justified – should be upheld and reaffirmed by this Court.

Thus, this Court should clarify that where a government employer contradicts its own official anti-privacy policy – formally or informally, explicitly or tacitly – the employer cannot reasonably expect courts to assess privacy interests on the basis of the stricter policy to the detriment of the employee. Employees' expectations are based upon their employers' daily practices and the treatment of those around them vis-à-vis monitoring, auditing of

messages, reading of e-mails etc., and this Court should explicitly recognize that fact in the case at bar.

ARGUMENT

I. The Right To Privacy Is Well-Established, And Is Not Automatically Voided In A Workplace Context

The question of how to balance Fourth Amendment rights is not always straightforward. However, the dissent in the court below – one which painted the reasoned decision of the majority as being "contrary to the dictates of reason and common sense" – erroneously portrays Fourth Amendment rights as obstacles to government efficiency in the workplace. *Quon v. Arch Wireless Operating Company, Inc.*, 554 F.3d 769, 779, denial of rehearing and rehearing *en banc* (9th Cir. 2009) (Ikuta J., dissenting).

The reality is far more nuanced. As the Fourth Amendment clearly enumerates, and as the common law has long recognized, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." This fundamental right was heavily influenced by the English case of *Entick v. Carrington* [1765] EWHC KB J98, in which Lord Camden wrote: "The great end, for which men entered into society, was to secure their property." *Id.*

From *Entick v. Carrington* emerged a fundamental and inviolable proposition: government could not interfere with citizens' privacy without a proper legal justification. From that starting point emerged a jurisprudence in both England and the United States that fiercely protected unwarranted searches and seizures – firmly grounded in the belief of the architects of the Bill of Rights who "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis J., dissenting).

In practice – as *Entick v. Carrington* openly acknowledged – the right to privacy is not absolute: it may be infringed where there is sufficient justification to do so. *Id*. In other words, the Fourth Amendment codifies a qualified right. Yet, as this Court clarified in *Katz*, 389 U.S. at 361 (Harlan, J., concurring), in effect overruling the holding in the earlier case of *Olmstead*, "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 361 (Harlan J., concurring). The concurrence of Justice Harlan in *Katz*[2] went on to outline the test which has since been applied to determine whether or not a

[2] The concurrence of Justice Harlan is widely regarded as the controlling opinion handed down in that case. *See, e.g. Smith v. Maryland*, 442 U.S. 735, 740-41 (1979) (discussing Justice Harlan's two-part test and citing cases).

person has a right of privacy protected by the Fourth Amendment:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person has exhibited an actual (subjective) expectation, and, second, that the expectation be one that society is prepared to recognize as reasonable."

Id.

Under this two-part test, an individual first must show a subjective expectation of privacy in the area searched or the item seized, and then show that the expectation is one that society is prepared to recognize as reasonable. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *United States v. Anderson*, 154 F.3d 1225, 1229 (10th Cir. 1998), *cert. denied*, 526 U.S. 1159 (1999). As the *Anderson* court acknowledged, any definition of what constitutes a reasonable expectation of privacy is likely to be determined by "all the surrounding circumstances," *id.*, though it is clear that any successful Fourth Amendment claim must be based upon a subjective expectation of privacy that is objectively reasonable. *Smith*, 442 U.S. at 740.

Application of these principles in the government workplace is controlled by this Court's decision in *O'Connor v. Ortega*, 480 U.S. 709 (1987). *O'Connor* left no doubt that the Fourth Amendment

applies to searches by government employers in public workplaces and made clear that the scope of employees' rights can be reduced or expanded by "the operational realities of the workplace." *Id.* at 717. In ruling that the operational realities of the government workplace "may make *some* employees' expectations of privacy unreasonable," the Court was clearly indicating that the assumption is that an expectation of privacy does exist. Thus, the decision went on to rule that "[p]ublic employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, *may be reduced by virtue of actual office practices and procedures*, or by legitimate regulation." *Id.* at 717 (emphasis added).

II. The Modern Workplace Is Not Readily Distinguishable From The Home

As Justice Blackmun pointed out in *O'Connor*, the modern workplace and the home are not always easily distinguishable from one another; employees often spend time at work or during lunch breaks dealing not only with work-related business, but also personal tasks and private activities. Much of this derives from the tendency of employees to work longer hours, and as a consequence of the blurring of the two spheres, "the tidy distinctions between the workplace and professional affairs, on the one hand, and personal possession and private activities, on the other, do not exist in reality." *O'Connor*, 480 U.S. at 739 (Blackmun, J, dissenting). As the dissenters pointed out:

> [T]he reality of work in modern time, whether done by public or private employees, reveals why a public employee's expectation of privacy in the workplace should be carefully safeguarded and not lightly set aside. It is, unfortunately, all too true that the workplace has become another home for most working Americans. Many employees spend the better part of their days and much of their evenings at work. . . . Consequently, an employee's private life must intersect with the workplace[.]"

Id. at 739. If anything, this blending of home and work has increased since the decision in *O'Connor*.

These changes to how Americans are working today serve to illustrate how traditional home/work distinctions have been broken down, something that has been facilitated by the convenience offered by technology and its myriad applications. As a recent law journal article pointed out, even as of 1999, one in three workers surfed the internet for personal reasons during their work hours, and as of 2004, almost 21 million Americans worked from home; all of which makes it inevitable "that perhaps employees do not realize their communications on employer-provided laptops, cell phones and BlackBerries may be monitored for their content." Justin Conforti, *Somebody's Watching Me: Workplace Privacy*

Interests, Technology Surveillance, And The Ninth Circuit's Misapplication of the Ortega Test in Quon v. Arch Wireless, 5 Seton Hall Circuit Rev. 461, 462-63 (2009).

In addition, every month, users of cell phones in the United States send 110 billion text messages (more than the number of phone calls made each month); text messages are widely used by more than 270 million Americas to "vote for their American Idols, remind their political constituents to vote, send their friends and relatives holiday greetings, order pizzas, and learn about their travel delays." Alyssa H. DaCunha, *Txts R Safe 4 2Day: Quon v. Arch Wireless and the Fourth Amendment Applied to Text Messages*, 17 Geo. Mason L. Rev. 295, 295 (2009).

All of this adds up to a world in which electronic media are frequently used to convey a wide range of messages in various contexts. It is therefore not surprising that users expect different levels of privacy in their communications: a private photograph taken on a cell phone will likely be more private by nature than a text about what some movie a person is planning to see. It is these varying degrees of what one author terms "privacy expectations" that create and lead to "different Fourth Amendment conclusions about the legality of a search." Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 Santa Clara L. Rev. 101, 105 (2010).

And it is precisely these differences in expectations that led this Court in *O'Connor* to articulate a case-by-case approach: it is not the location taken alone which determines whether there is a reasonable expectation of privacy; the nature of the communication itself must play a part in establishing whether that expectation can exist. And, most crucially, the "actual office practices and procedures" determine whether an employee has a legitimate expectation of privacy. *O'Connor*, 480 U.S. at 717.

III. Employees' Expectations of Privacy May Be Enhanced Or Reduced By Workplace Operational Realities

As the Seventh Circuit has noted, based on its reading of *O'Connor*, "the idea that one could conduct confidential business at work, and have an expectation of privacy when doing so, is not per se unreasonable." *Narducci v. Moore*, 572 F.3d 313, 320 (7th Cir. 2009). Given the "operational realities of the workplace", and the "great variety of work environments in the public sector," the *O'Connor* court mandated a "case-by-case approach to determining whether an employee has a reasonable expectation of privacy" in the workplace. *O'Connor*, 480 U.S. at 717-18.

Such an approach essentially highlights how a range of situational factors must be taken into account when examining the objective and subjective

strands of this Court's test as laid out in *O'Connor* and subsequent cases; the expectation of privacy of government employees may be tempered or reduced "by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* at 717.

One framework adopted in considering whether the employer has limited its employees' reasonable expectation of privacy is the four-factor test laid out in *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005), which was also adopted in *Brown-Criscuolo v. Wolfe*, 601 F.Supp.2d 441 (D.Conn. 2009), a case involving a public school employee. The factors relied upon in those cases were: "(1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?" *In re Asia Global Crossing, Ltd.*, 322 B.R. at 257.

The last of these factors is the one which has been identified as the most significant by courts of appeals when making determinations regarding what constitutes reasonable interference with employees' Fourth Amendment rights, and has frequently proven instrumental in resolving the issue.

For example, in *United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002), the Tenth Circuit held that an employee could have no reasonable

expectation of privacy because when he turned on his computer, a "splash screen" displayed the message that private communications were subject to monitoring and were not confidential. *Angevine*, 281 F.3d at 1133.

In *United States v. Ziegler*, 474 F.3d 1184, 1191-92 (9th Cir. 2007), the Ninth Circuit also held that even where an employee has a subjective expectation of privacy (because his computer was password protected) that was objectively reasonable (he didn't share the office with anyone else), because of a range of opposing factors – IT employees had complete administrative access to anybody's machine, the company had a firewall in place to monitor traffic and monitoring was routine, and upon joining the company, employees were told that "computers were company-owned and not to be used for activities of a personal nature" – the employer could consent to a government search of the computer without infringing on Ziegler's Fourth Amendment rights.

The Fourth and Seventh Circuits have taken similar approaches in holding that employer-implemented anti-privacy policies are capable of overcoming an employee's reasonable expectation of privacy. *See, e.g. United States v. Simons*, 206 F.3d 392, 395 (4th Cir. 2000), and *Muick v. Glenayre Elecs*., 280 F.3d 741, 743 (7th Cir. 2002) ("Glenayre had announced that it could reasonably inspect the laptops that it furnished for the use of its employees,

and this destroyed any reasonable expectation of privacy").

Conversely, in *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001), the court found that where there is no anti-privacy policy in place, and no general practice of routine searches of employee computers, employees have a reasonable expectation of privacy. *Id*. at 74. There, the Court held:

> [An] infrequent and selective search for maintenance purposes or to retrieve a needed document, justified by reference to the "special needs" of employers to pursue legitimate work - related objectives, does not destroy any underlying expectation of privacy that an employee could otherwise possess in the contents of an office computer.

Id. at 74.

IV. This Case Does Not Fit Comfortably Into The Fourth Amendment Analysis Of The Circuit Courts Nor This Court's Prior Case Law

In the court below, the Ninth Circuit found that there was "no meaningful distinction" between e-mails, text messages, and letters. *Quon v. Arch Wireless Operating Co*., 529 F.3d 892, 905-06 (9th Cir. 2008). Such a holding is highly significant,

representing as it does the first case from the circuit courts on the question of whether the Fourth Amendment's protections extend to text messages in addition to e-mails.

In particular, the court below recognized that employees have the same expectation of privacy in e-mails and text messages, notwithstanding the fact that both are stored as electronic media, and might be considered more "public" than the written messages contained in letters. As such, under this ruling, government employers cannot evade Fourth Amendment protections simply because the medium of communication more easily lends itself to – and tends to be used more freely for purposes of – surveillance.

V. Sergeant Quon Had A Reasonable Expectation Of Privacy In His Text Messages

The court below found that Sergeant Jeff Quon had a reasonable expectation of privacy in his text messages. *Quon*, 529 F.3d at 908. Its finding was based on the fact that the Ontario Police Department had a practice of permitting its employees to pay their overage charges, which made it reasonable for Quon to have a legitimate expectation of privacy in his texts. *Id.* Moreover, the court below clarified the point that although the City had a general anti-privacy policy in place, it did not have a formal, written policy governing the use of the pagers used by its SWAT team members. *Id.* at 896.

Further, the general anti-privacy policy that Quon signed was put in place before the advent of pagers in the department, and was, by its terms, a policy governing only "Computer Usage, Internet and E-mail Policy." *Id.* The closest the department came to instituting a policy concerning pager privacy was at a meeting on April 18, 2002, "during which Lieutenant Steve Duke, a Commander with the Ontario Police Department's Administration Bureau, informed all present that the pager messages were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." *Id.* (internal quotes omitted).

Although the department had promulgated no official policy governing the use of pagers, it did have an informal policy; employees who exceeded the 25,000 character-per-month limit were allowed to pay the overage charge themselves and thereby maintain the privacy of those messages. *Id.* at 897. As Lieutenant Duke (the same department official whose statement is relied upon as the basis for extending the general policy on computer usage to text messages) stated for the record: "[t]he practice was, if there was overage, that the employee would pay for the overage that the City had … [W]e would usually call the employee and say, 'Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage[?]'" *Id.*

Furthermore, the record reflects that Lieutenant Duke expressly told Quon that "it was not his intent to audit employee's [sic] text messages to see if the overage is due to work related transmissions" and that if he (Quon) paid the overage charges, Duke "would not have to audit the transmission and see how many messages were non-work related." *Id.*

It is clear that even if the written policy concerning computer, internet and e-mail privacy was orally extended by Lieutenant Duke to pager text messages, Duke's stated assurances to Quon that his texts would not be audited, provided Quon paid the overage charges, effectively undermined the viability of the no-privacy policy as it applied to text messages. In light of the oral assurance given to Quon by Duke, it is natural and entirely reasonable that Quon should believe that his texts would not be audited.

Moreover, as the court below pointed out, "Quon went over the monthly character limit three or four times and paid the City for the overages." *Id.* at 897. This established a precedent which Quon certainly relied upon in sending private messages each month, and caused him to trust his supervisor's assurances that, provided he paid the overage charges, he would not be audited. Indeed, it was only in August 2002 (after several months of Quon paying the charges as directed, in order to maintain the privacy in his private messages) that his messages were audited. *Id.* at 897-98.

Prior to August 2002, the City had no history of auditing employees' pager records, and the record does not detail any previous departmental history of employees' phone or e-mail records being investigated or audited in any manner other than in one separate case.

Furthermore, although employees were required to sign the blanket privacy policy upon joining the department, the record below does not indicate that an anti-privacy warning banner (such as those discussed in other cases above) was displayed upon their hand-held pagers each time the device was switched on. Nor does the record suggest that employees were under the impression that their devices would be routinely monitored or audited. This was partly due to the fact that the department did not have the means to audit the pagers itself, but instead had to contact Arch Wireless and request them to generate a copy of the transcripts of messages. *Quon v. Arch Wireless Operating Co., Inc.*, 445 F. Supp. 2d 1116, 1124 (2006).

The facts of this case stand in stark contrast to other cases, such as *Ziegler*, 474 F. 3d at 1191-92, in which the Ninth Circuit held that any expectation of privacy held by employees had been defeated by numerous factors, including the company's regular monitoring of workplace computers, the existence of an anti-privacy policy informing them that monitoring would occur, and distribution among the employees of a policy stating that any use of work

computers for private purposes would defeat any expectation of privacy they could reasonably have. *Id*. at 1191.

By contrast, in *Leventhal v. Knapek*, *supra*, a case more similar to the instant case, the Second Circuit found that a state employee had a reasonable expectation of privacy in his computer and matters contained therein despite the existence of an official policy prohibiting the use of state equipment for personal business. The court there pointed out that there was no general practice of the state agency to routinely search employee computers and had not made clear that employees had no right of privacy in the computers. Moreover, the agency had no policy prohibiting the storage of personal matters on employee computers. *Leventhal*, 266 F.3d at 74.

To the same effect, the Sixth Circuit has ruled that employees had a reasonable expectation of privacy, where the City "did not routinely monitor officer's pagers or give notice to officers that random monitoring of their department-issued pagers was possible", and where the official policy against personal use of pagers "had not been enforced." *Adams v. City of Battle Creek*, 250 F.3d 980, 984 (6th Cir. 2001).

In these cases, the courts have addressed situations in which employers' acts have caused what the *Ziegler* Court termed "societal expectations" to be altered, irrespective of anti-privacy policies the employer may have had in place, and often in direct

contravention of those policies. What the case law makes apparent is that no one single factor – including the existence of an anti-privacy policy to which an employee has consented – is dispositive in determining whether an employee has a reasonable expectation of privacy that has been breached without adequate justification. As the Seventh Circuit helpfully put it:

> The touchstone of Fourth Amendment inquiry is reasonableness, a standard measured in light of the totality of the circumstances and determined by balancing the degree to which a challenged action intrudes on an individual's privacy and the degree to which the action promotes a legitimate government interest.

Green v. Butler, 420 F.3d 689, 694 (7th Cir. 2005).

In the instant case, the oral assurances of Lieutenant Duke served to limit the effect of the department's written anti-privacy policy and created an expectation of privacy for Quon that was objectively reasonable. This is especially true given the fact that the "official" policy did not, by its terms, extend to pager text messages and the only basis for extending the policy to text messages is an announcement by Lieutenant Duke himself. Thus, it was certainly reasonable for Quon to rely upon the specific assurance of Lieutenant Duke regarding the practice applicable to pagers and that they would not

be audited if overages were paid for. This was the department's actual practice upon which employees like Quon came to rely and which should be the standard for deterimining the objective reasonableness of his expectation of privacy.

As the trial court found in holding that Quon had a legitimate expectation of privacy:

> Here, Lieutenant Duke's actions eroded any attempt on defendant's part to lessen the expectation of privacy its employees had in the use of the pagers issued to them; indeed, his actions could be said to have *encouraged* employees to use the pagers for personal matters. *See* [*O'Connor*], 480 U.S. at 719 (holding employee had a reasonable expectation of privacy where there was no evidence that the Hospital had established any reasonable regulation or policy discouraging employees . . . from storing personal papers and effects in their desks or file cabinets.

Quon, 445 F.Supp. 2d at 1142. (emphasis in original).

VI. The Department Had No Justification For Auditing Quon's Pager Without His Consent

As discussed above, once a reasonable expectation of privacy has been established, the next

point of inquiry is whether there was a justification behind the employer's infringement of the employee's privacy; or as this Court phrased the test, whether the measures adopted were "reasonably related to the objectives of the search and not excessively intrusive in light of … the nature of the [misconduct]." *O'Connor*, 480 U.S. at 726. (internal quotes omitted). Once again, resolution of this question requires a balancing exercise and must turn on the facts specific to each case. As Professor Orin Kerr has written:

> [A] true balancing of interests requires context. To know the costs and benefits of using an investigative method, we need to know the overall threat to civil liberties and how much the technique's use will advance government interests in the contexts in which the technique will actually be used.

Orin Kerr, *Do We Need a New Fourth Amendment*? 107 Mich. L. Rev. 951, 963 (2009).

The court below resolved this second question by reference to the fact that "the Department opted to review the contents of *all* the messages, work-related and personal, without the consent of Quon", and stated that because of that fact, the search was "excessively intrusive in light of the non-investigatory object of the search." *Quon*, 529 F.3d at 909. (emphasis added).

Under the standard laid out in *O'Connor*, a search is reasonable "at its inception" if there are "reasonable grounds for suspecting . . . that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file." *O'Connor*, 480 U.S. at 726. As the trial court and the Ninth Circuit acknowledged, the auditing of Quon's messages was to determine whether the character allowance given to employees was adequate, or whether they were being asked to pay for work-related texts, and as such, was a "legitimate work-related rationale." *Quon*, 529 F.3d at 908.

However, the Ninth Circuit went on to hold that the search was "not reasonable in scope" under the "operational realities" standard established in *O'Connor*, stating as follows:

> Because the Department opted to review the contents of all the messages, work-related and personal, without the consent of Quon, . . . the search was excessively intrusive in light of the noninvestigatory object of the search . . . [and] based on our conclusion that Quon's reasonable expectation of privacy in those messages was not outweighed by the government's interest . . . as found by the jury in auditing the messages.

Quon, 554 F.3d at 772. (9th Cir. 2009).

The Ninth Circuit was clearly right in finding that the government's interest did not outweigh Quon's right to privacy in the content of his texts. Even taking the Department's assurances at face value (which we must since the jury did so), the purpose of the audit of Quon's text history was to ascertain whether or not the department allowed its officers a sufficient allowance of work-related texts every month.

The reason the court below appeared to employ the "least intrusive means" test was simply because it discussed the other methods the Department could have used to investigate Quon's messages. *Id.* at 772-73. It was by reference to these less intrusive methods that the court below was able to determine that the government's interest in auditing Quon's texts in the way that it chose was disproportionate when balanced against Quon's reasonable expectation of privacy. *Id.*

This Court's rejection of the least intrusive means test does not prevent courts from considering whether the method of government interference with employees' Fourth Amendment rights was disproportionate or whether it outweighed an employee's right to privacy. To suggest otherwise would be to prevent courts from determining, by reference to similar situations, how the balance of interests should be set, and would make the standard articulated by this Court in *O'Connor* unworkable. Moreover, as the Ninth Circuit noted, the instant

case does "not involve a 'special needs' search." *Id.* at 773.

Accordingly, it is impossible to see how the Department could have been able to read the contents of all of Quon's text messages without infringing his Fourth Amendment rights; the most cursory of examinations would have revealed which numbers were private and which were work-related (for example, by looking at one number to which numerous texts had been sent and briefly determining the nature of the message's contents), and there should have been no need for the employer to read every other text sent to that number once he had established that it was personal by nature.

CONCLUSION

The foregoing discussion makes apparent the reasons why Fourth Amendment cases such as this one can be properly resolved only by reference to the particular facts of each case, and cannot be determined solely through the use of a simple, catch-all test. Although this Court has expressed its dissatisfaction on past occasions with the case-by-case approach to resolving Fourth Amendment issues[3], there is no alternative, reliable litmus test to which cases can be subjected and fairly resolved.

---

[3] *See, e.g. Oliver v. United States*, 466 U.S. 170 (1984), in which this Court opined that it "repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances." *Id.* at 181.

One thing is clear: employers must be clear and consistent with their anti-privacy policies, where they decide to implement such policies. This case illustrates that employees' expectations are dictated by real-world factors – such as being told their text messages will not be audited, despite an official policy to the contrary, or the absence of frequent auditing in the workplace – rather than any contradictory non-specific policies an employer may have in place.

As such, this Court should affirm the judgment below and hold that Quon had a reasonable expectation of privacy in the texts sent from his government-owned pager and that the Fourth Amendment was violated when the texts were audited without his consent.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
John M. Beckett
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888