The Battle Between Privacy and Policy in *Quon v. City of Ontario*: Employee Privacy Rights and the Operational Realities of the Workplace on Display at the Supreme Court

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I. INTRODUCTION

We hold this truth to be self-evident: we live in a digital age. A person would be hard-pressed to walk down a crowded city block without seeing a single soul talking on a cell phone, listening to music on an iPod, or catching up on some reading on a Kindle. In the last fifteen years, the public has witnessed an explosion of communications and media devices into the market. These products mobilize users and free them of the tethers of desktop computers and landline telephones. The widespread use of such devices has signaled a dramatic shift in the day-to-day operations of the workplace, vastly increasing efficiency and allowing employers increased freedom. However, 

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1 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).


such freedom inevitably comes with a price.

Employers in the United States currently spend 59 billion dollars on plans and devices that enable their employees to communicate with one another. Thus, employers have an interest in maintaining control over how each device is used, broadening the supervisory role of the employer to include the monitoring of employee communications on employer-issued devices. In today’s hyper-socialized society, it is inevitable that employees will step outside the lines of a device’s permitted purpose and use them for personal reasons. In light of these circumstances, questions arise as to whether or not an employer can lawfully monitor the actions of their employees on the issued device and, if so, what notice is required to adequately inform the employee. In June 2010, the Supreme Court of the United States promulgated a response to an integral piece of this very inquiry, albeit in a narrow context.

On December 14, 2009, the Court granted the petition for writ of certiorari in City of Ontario v. Quon, a case from the United States Court of Appeals for the Ninth Circuit. Sergeant Jeffrey Quon, a member of the City of Ontario’s SWAT team, filed a claim under 42 U.S.C. §1983, alleging a Fourth Amendment violation when his superiors reviewed the transcripts of text messages that he had been sending on his employer issued two-way pager. Joining him in his suit were the people with whom he exchanged the majority of his text messages: his wife, Jerilyn Quon; a SWAT team dispatcher, April Florio, with whom he was romantically involved; and another SWAT team member, Steven Trujillo. In an exercise of judicial discretion, the Supreme Court did not consider two of the three major issues that were reviewed in the lower courts—the Stored Communications Act, and qualified immunity—and qualified immunity

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8 City of Ontario v. Quon (Quon III), 130 S. Ct. 2619 (2010).
11 U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).
12 Quon v. Arch Wireless Operating Co., Inc. (Quon II), 529 F.3d 892, 895 (9th Cir. 2008).
13 Paging Systems, BITPIPE.COM, http://www.bitpipe.com/tlist/Paging-Systems.html (last visited Jan. 1, 2011) (“A two-way pager ... allows you to send data as well as receive it. Some two-way pagers can handle alphanumeric input [sic] and display and can send and receive e-mail and SMS messages”).
14 Quon II, 529 F.3d at 895.
and instead focused solely on the allegation that the appellee’s employer vio-
lated the appellant’s Fourth Amendment rights.\textsuperscript{17}

The Court’s decision will surely have wide-ranging implications in the fields
of communications, labor, and employment law. Considered a “new frontier in
Fourth Amendment jurisprudence that has little been explored,”\textsuperscript{18} the Court
dipped their proverbial toes into the sea of electronic communications, issuing
a ruling that although did not create black letter law, will shape laws governing
the ever-expanding world of electronic communications. This note will first
focus on a substantive analysis of the Ninth Circuit’s ruling in \textit{Quon v. Arch
Wireless Operating Company},\textsuperscript{19} chronicling the pathway that was forged by the
lower courts leading to the Supreme Court. Next, the note explores the merits
and weakness of each parties’ claims, in light of the spectrum of related case
law. Then, the note will look at both the oral arguments given by the relevant
counsels before the Supreme Court and the unanimous ruling that was eventu-
ally issued. Lastly, this note will detail the applicability of the ruling to the
workplace and the various implications it will have for the functional opera-
tions that occur when an employer chooses to issue a communications device
to his employees.

II. SUBSTANTIVE ANALYSIS OF \textit{QUON V. CITY OF ONTARIO}

A. Factual Background

In October 2001, the City of Ontario (“City”) entered into a contract with
Arch Wireless Operating Company (“Arch Wireless”) for wireless text-
messaging services for its employees that limited the per-month character al-
lotment for each device.\textsuperscript{20} The City of Ontario Police Department (“OPD”)
issued pagers to its SWAT team members to facilitate mobilization and re-
sponse to emergency situations.\textsuperscript{21} Since late 1999, the City employed a com-
puter privacy policy that governed appropriate employee use of communica-
tions over city-owned computers and gave OPD the right to monitor communi-

ally are shielded from liability for civil damages insofar as their conduct does not violate
clearly established statutory or constitutional rights of which a reasonable person would
have known”).

\textsuperscript{17} See U.S. CONST., \textit{supra} note 11.

\textsuperscript{18} \textit{Quon II}, 529 F.3d at 904.

\textsuperscript{19} \textit{Id.} at 892.

\textsuperscript{20} \textit{Quon II}, 529 F.3d at 897.

\textsuperscript{21} Quon v. Arch Wireless Operating Co., Inc. (\textit{Quon I}), 445 F. Supp. 2d 1116, 1122
(C.D. Cal. 2006) (noting that the primary reason for the pagers was to “enable better coordi-
nation and a more rapid and effective response to emergencies”).
cations without prior notice. The policy generally prohibited the employees from using the regulated devices for non-work related purposes, with a caveat that allowed for “light personal use”. A few months after implementation of the Policy, in early 2000, Jeffrey Quon and Steven Trujillo each signed an acknowledgement of the Policy, as required for their employment as members of the City’s SWAT team. Although the policy did not expressly apply to text messages over mobile devices, OPD informed its employees that it would treat text messages over employer-issued devices according to the policy. At a meeting in April 2002, at which Quon was present, Lieutenant Steven Duke stated that the messages that are sent via the pagers were to be characterized the same way as those sent via computers and therefore would “fall under the City’s policy as public information and would be eligible for auditing.” Immediately following the meeting, Police Chief Lloyd Scharf, who had been in attendance, drafted and sent a memo to the office reiterating in writing what Duke had stated in the meeting. Quon and other employees of the SWAT team received one of the two-way alphanumeric pagers.

Beginning in April 2002, Quon exceeded the allowable character allotment on his pager, and continued to do so for the next four months. At the end of

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22 Quon II, 529 F.3d at 896. The Policy provided: “[T]he use of City-owned computers and all associated equipment, software, programs, networks, Internet, e-mail and other systems operating on these computers is limited to City of Ontario related business. The use of these tools for personal benefit is a significant violation of City of Ontario policy.” Id. The Policy also provided:

[a]ccess to all sites on the Internet is recorded and will be periodically reviewed by the City. The City of Ontario reserves the right to monitor and log all network activity, including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources. Access to the Internet and e-mail system is not confidential; and information produced either in hard copy or electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other information may not fully delete the information from the system. The use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated.

Id.

23 Id. (The Policy allowed for “some incidental and occasional personal use of the e-mail system” which “may consist of personal greetings or person meetings arrangements.”).

24 Id. at 896.

25 Id. at 896. Quon contests whether Duke phrased his comments in this exact manner. Although Quon admits to attending the meeting, he stated that he only “vaguely” remembered doing so and did not recall “at all” any comments made by Duke that would insinuate that the pagers were under the same restrictions as computer usage. Id.

26 Id.

27 Quon II, 529 F.3d at 896.

28 Id. at 895. A total of twenty-one two-way pagers were issued at the time that Quon received one. Id.

29 Id.
each month, Duke would contact Quon and inform him of his overages. According to Quon, Duke never threatened the possibility of an audit and permitted officers who exceeded their allotment to pay “if [they] don’t want the Ontario Police Department to read [the messages].” In this way, Duke created an informal policy that allowed employees to submit payment when they exceeded their monthly character allotment.

Quon paid the overages every month until August 2002, when Quon once again violated his 25,000-character allotment. Duke informed Chief Scharf that he “was tired of being a bill collector,” to which Scharf demanded that he “request the transcripts of the text messages for auditing purposes.” Significantly, the purpose of the request was to conduct an audit to determine if Quon’s pager was used for business or personal use. If the messages concerned business matters, the City would consider the possibility of contracting for a higher character allotment. Duke received the transcripts from Arch Wireless, reviewed the messages, and reported his findings to Scharf. Duke concluded that Quon had “exceeded his monthly character allotment by 15,158 characters,” spurring an internal affairs investigation. After an extensive review of the transcripts of messages sent and received during business hours, the Department concluded that Quon had violated official policy. The violation was based not only upon Quon’s quantitative usage of his pager, but also on the fact that many of the messages were sexually explicit and suggestive in nature. McMahon reported his findings to Scharf, who in turn brought the investigation to the attention of Quon. Quon, his wife J. Quon, Florio, and

30 Id.
31 Quon II, 529 F.3d at 897.
32 Id.
33 Id.
34 Id.
35 Id. at 897-98.
36 Quon II, 529 F.3d at 898.
37 Id.
38 Id.
39 Id.
40 Id.
41 Quon II, 529 F.3d at 898.
42 Brief of Petitioners at 8, City of Ontario v. Quon, 560 U.S., 130 S. Ct. 2619 (2010) (No. 08-1332). (The investigation found that Quon had sent “a total of 456 personal transmissions during his normally scheduled workdays for the month of August 2002” and that “on average, Quon would send and receive 28 transmissions during his normally scheduled shift,” including that “only three would be business related and the rest would be non-work related.”)
43 Id. at 8-9. Many of the messages were sent to the other parties of the suit, including Jerilyn Quon (Quon’s wife), April Florio (Quon’s mistress), and fellow SWAT team member Steven Trujillo. Id.
44 Quon I, 445 F. Supp. 2d at 1127.
Trujillo sued the City, the Ontario Police Department, Chief Scharf, and another member of the Department's Internal Affairs department,\(^4\) claiming violations of the Fourth Amendment,\(^4\) article I, section I of the California Constitution\(^4\); and the Stored Communications Act.\(^4\)

B. Procedural Background

1. The District Court—A Victory for the City

Each side filed cross motions for summary judgment.\(^4\) The district court maintained that in order for a Fourth Amendment violation to be sustained, the plaintiffs needed to show that a reasonable expectation of privacy existed in the text messages that were sent on the pagers and that the search of the text messages was unreasonable.\(^4\) The district court relied on the framework provided by the \textit{O'Connor v. Ortega} plurality to determine that a reasonable expectation of privacy existed in the content of messages.\(^4\) Under this analytical framework, any determination of whether a public employee has a legitimate expectation of privacy must consider "the operational realities of the workplace" to determine if the Fourth Amendment is implicated.\(^4\) The Court ruled that the informal agreement between Lieutenant Drake and the SWAT team members to pay for overages "fundamentally transformed" such operational realities, giving the SWAT team members a reasonable expectation of privacy in the messages.\(^5\)

After determining that Quon had a reasonable expectation of privacy in the text messages on his city-issued pager, the Court had to decide whether the audit of the messages was "reasonable under the circumstances."\(^4\) Whether or not the audit was reasonable depended on Scharf's purpose for initiating the audit. The court found that the reason for the search of the messages, which Scharf claimed was to determine if the messages were personal in nature,\(^5\) was

\(^{45}\) *Id.* at 1128.
\(^{46}\) U.S. CONST. amend. IV.
\(^{47}\) Cal. Const. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending . . . privacy.").
\(^{48}\) See Stored Communications Act, supra note 15.
\(^{49}\) See generally \textit{Quon I}, 445 F. Supp. 2d 1116. The district court denied the plaintiffs' summary judgment. The defendants were granted summary judgment in party and denied in part. *Id.*
\(^{50}\) *Id.* at 1139-46.
\(^{51}\) *Id.* at 1143.
\(^{52}\) *Id.*
\(^{53}\) \textit{Quon I}, 445 F. Supp. 2d at 1141.
\(^{54}\) *Id.* at 1144.
\(^{55}\) *Id.*
an issue of material fact and ordered a jury trial to determine intent. The jury found that Scharf had a legitimate purpose for initiating the audit, rendering the defendants not liable for the review of the text messages. The plaintiffs immediately appealed the ruling.

2. The Ninth Circuit rules in favor of Quon

The Ninth Circuit reviewed the case and ruled on whether the Arch Wireless agreement violated the Stored Communications Act; whether the City, Department, and Scharf violated Quon’s rights and the rights of the recipients of the messages under the Fourth Amendment and the California Constitution; and whether Scharf was entitled to the protections of qualified immunity. The Circuit Court reversed the lower court’s decision, finding that Quon’s constitutional rights had been violated when his text messages were reviewed without consent. Citing O’Connor v. Ortega as support, the court analyzed the constitutional issue in two prongs: first, whether appellants had a reasonable expectation of privacy in the text messages; and second, whether the search performed by the Department was reasonable in scope.

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56 Brief of Petitioners, supra note 42, at 10. If Scharf’s intent was to ensure that City employees were not being forced to pay for work-related overages, the search would be considered reasonable. However, if the jury found that Scharf’s intent was to make sure that City employee’s were not “wasting time” or “playing games” the search would be found to be unreasonable. Id.

57 Id.

58 Id. at 11. The plaintiffs appealed challenging the ruling and that their motion for summary judgment should not have been denied. To counter, the defendant’s countered that the ruling should be affirmed and with the assertion that their motion for summary judgment should have been granted because “as a matter of law, plaintiff’s had no reasonable expectation of privacy and the review of the pager transcripts was reasonable under either purpose submitted to the jury.” Brief of Petitioners, supra note 42, at 10.

59 The United States Courts for the Ninth Circuit, http://www.ce9.uscourts.gov (last visited Jan. 1, 2011). The Ninth Circuit has a slightly different process than most courts and instead of having a single judge preside over the case, a panel consisting of three judges makes the ruling. Id.

60 For purposes of this note, only the Fourth Amendment claim will be reviewed. As such, the Ninth Circuit determined “[t]he ‘privacy’ protected by the California Constitution is no broader in the area of search and seizure . . . protected by the Fourth Amendment . . . [and so] accordingly our analysis proceeds under the Fourth Amendment.” Quon II, 529 F.3d at 903.

61 Id. at 911.

62 See generally O’Connor v. Ortega, 480 U.S. 709 (1987). In O’Connor, a state hospital employed Ortega and searched his office investigating a sexual harassment claim, which lead to Ortega’s termination. Ortega argued the search violated his Fourth Amendment rights. The Court found Ortega had a reasonable expectation of privacy in his tangible workspace and the search performed by the hospital was unreasonable in its scope and inception. Id. at 1495-96, 1498.

63 Id. (O’Connor’s test goes further than its two prongs and suggest that not only must
In its analysis of the first prong, the court delved into the area of law that dictates how much privacy an individual should expect when using employer-issued devices, which is one that has yet to take concrete form.\textsuperscript{64} Because of this fact, the analogy was made to other forms of communications, including e-mails, phone calls and letters.\textsuperscript{65} Using case law that spanned nearly forty years\textsuperscript{66}, the court determined that like senders of the aforementioned communications, Quon had a reasonable expectation of privacy in the content of the text messages he sent on his pager.\textsuperscript{67} The Court pinpointed the informal policy, which allowed Quon to pay for his overages as a way of avoiding audit, as the genesis of his expectation of privacy.\textsuperscript{68} Although the court recognized that a formal policy was in place that strictly forbade the use of computers and related tools for personal reasons, it found instructive the factual events that surrounded the interactions between Duke, the “bill-collector,” and Quon. The court ultimately determined that Quon’s reliance on the informal policy established by Duke trumped any implications made by the formal counterpart.\textsuperscript{69}

When determining the hierarchy of the policies, the court introduced the concept of the “operational reality” of a workplace, which reviews all of the circumstances that surround the issue being analyzed and adduces, sometimes regardless of formal policy, how employees view that issue.\textsuperscript{70} In this instance, the Court found Quon’s reliance on the informal policy persuasive, factoring in that before the audit in question occurred, there had not been a similar investigation for the duration of time since the pagers had been issued.\textsuperscript{71} The court also viewed Quon’s repeated violation of the 25,000-character allotment without incurring an audit as support for the “operational reality” that the informal policy was the controlling policy with the Department.\textsuperscript{72}

Controversially, the Ninth Circuit allegedly broke from its sister circuits\textsuperscript{73}
and ruled that the search performed by the Department was unreasonable at its inception, primarily due to the assumptions that a "less intrusive means" of determining the efficacy of the text messages was available to Scharf.74

Applying the district court's jury finding that the primary purpose of Scharf's search was "determining the efficacy of the existing character limits to ensure that officers were not being required to pay for their work,"75 the court admitted that requesting the transcripts without Quon's consent was a reasonable means to meet those ends.76 However, the court reasoned that the search ran contrary to the O'Connor standard77 and was not reasonable in scope.78 The court drew a parallel between Quon's case and Schowengerdt v. General Dynamic Corp79, which held that if there was a less intrusive means by which to obtain the information being sought by the employer, those means must be utilized over any other methodology.80 Interestingly, the court rejected the lower court's assertion that Scharf's request of the transcript was the only reliable way by which to determine the nature of the text messages sent by Quon.81 Instead they remarked that Scharf could have sought Quon's consent to review the messages or could have put Quon on instructive warning that the following month all messages would be reviewed.82 The court viewed the request as the linchpin of the appellant's case, and found a violation of Quon's Fourth Amendment protections.83

Furthermore, the court ruled that Quon's text message partners, Jerilyn Quon, April Florio, and Steve Trujillo, had also been deprived of their Fourth Amendment rights.84 Despite the fact that each individual knowingly sent text messages to an employer-issued pager,85 the court reasoned that each had a reasonable expectation of privacy in the messages, validating the belief that urinalysis of students participating in competitive extracurricular]; Skinner v. Ry Labor Executives' Ass'n, 489 U.S. 602, 629.9 (1989) [drug and alcohol testing of railroad employees]; Vernonia Sch. Dist. 473 v. Acton, 515 U.S. at 646, 663 (2002) [random urinalysis testing of student athletes]; United States v. Montoya de Hernandez, 473 U.S. 521, 542 (1985) [16-hour detention of suspected alimentary canal smuggler by customs official]; United States v. Sharpe, 470 U.S. 675, 686-687 (1985) [20 minute-Terry stop of pickup truck diver by DEA agent]).

74 Id.
75 Quon II, 529 F.3d at 908.
76 Id.
77 Id. at 908-909.
78 Id. at 908.
79 Schowengerdt v. General Dynamic Corp., 823 F.2d 1328 (9th Cir. 1987).
80 Id. at 1336.
81 Quon II, 529 F.3d at 909.
82 Id.
83 Id.
84 Id.
85 Id.
they would not be reviewed without consent.86

3. Petition for rehearing en banc denied—The Judge Ikuta versus Judge Wardlaw showdown

The foreshadowing of the showdown that took place when the Supreme Court heard arguments in the spring can be found in the opinion and dissent for the denial of the appellees’ petition for a rehearing.87 Both Judge Wardlaw and Judge Ikuta wrote impassioned responses to the denial, the latter penning a detailed dissent that was joined by six other judges analyzing the significant flaws in the Ninth Circuit’s ruling.88 Judge Ikuta challenged the crux of the decision as it related to the Fourth Amendment violation claims,89 asserting a misapplication of both of the O’Connor prongs by the circuit court. She further noted that the newly minted standard set forth by the Ninth Circuit would create major hurdles for public employers in conducting business within their offices.90 Moreover, she asserted that the ruling was inconsistent with Supreme Court precedent and sister circuit decisions.91

Judge Ikuta reasoned that by determining that Quon and others had a reasonable expectation of privacy in the text messages, the ruling ran counter to the standard set forth in O’Connor.92 Her conclusions focused on one of the cornerstones of the Supreme Court’s ruling in that case, namely that the “operational realities of the workplace” must be taken into consideration in the application of the reasonableness of an employee’s expectation of privacy.93 It is in that argument that the judge found her strongest contentions, which was the seminal debate during oral arguments before Justices during the final argument for Quon. Judge Ikuta contended that the operational reality of the workplace in which Quon found himself was the exact opposite of what the

86 Id. at 909.
87 Quon v. Arch Wireless Operating Co., Inc., 554 F.3d 769 (9th Cir. 2009) (The City and the Department filed for a panel rehearing and a rehearing en banc asserting that: 1) the court’s finding that the Quon had a reasonable expectation of privacy in text messages sent on a government-issued device severely abrogated the “operation realities of the workplace” O’Connor standard; 2) the court falsely extended Fourth Amendment protections to those individuals who willingly and knowing sent explicit text messages to Quon’s government-issued device; 3) the court’s reliance on “less intrusive means” analysis is in direct conflict with the Supreme Court and other circuit court’s “repeated rejection” of such a test.).
88 Quon v. Arch Wireless Operating Co., Inc., 554 F.3d 769, 774 (9th Cir. 2009) (Ikuta, J., dissenting).
89 Id. (Ikuta, J., dissenting).
90 Id. (Ikuta, J., dissenting).
91 Id. (Ikuta, J., dissenting).
92 Id. at 776 (Ikuta, J., dissenting).
93 Id. (Ikuta, J., dissenting).
Ninth Circuit envisioned.\textsuperscript{94} She pointed out that it was not contested whether the SWAT team members were aware of both the formal and informal policies related to the various methods of communications afforded to them by the Department.\textsuperscript{95} In addition, the state of California has in place a public records law, which allows the public to access most police documents and mandates that the Department disclose various documents.\textsuperscript{96} Meaning that at any time, however unlikely, any member of the public may request transcripts of the very text messages that have been the cause of the entire legal discourse.\textsuperscript{97} The plurality in \textit{O'Connor} clearly states that a court must view all of the circumstances that surround an employer’s search when determining that it was reasonable, including whether or not the employer in question was a public or private entity.\textsuperscript{98} Judge Ikuta refuted the notion that the conversations between Duke and Quon were enough to establish a reasonable expectation of privacy.\textsuperscript{99} Judge Ikuta logically concluded that a statement by a non-superior officer that he would not audit another SWAT team member’s messages if he paid for the overages does not amount to enough to overcome the lessened expectation of privacy that is supported by looking at a totality of the circumstances.\textsuperscript{100}

The opinion displays a strong difference in views of the Ninth Circuit’s original “application” of the less intrusive means test.\textsuperscript{101} Specifically, Judge Wardlaw denied that the appellate court used the test, stating that the discussion about “less intrusive means” focused on the jury trial’s finding related to Scharf’s reasoning for conducting the search.\textsuperscript{102} Judge Wardlaw maintained that there is a stark distinction between mentioning a “less intrusive means test” that \textit{could} have been used by Scharf as a way to review the text message and actually mandating the application of the test.\textsuperscript{103} The judge’s distinction sought to fend off the allegations that the court’s opinion splits with seven other circuits and the Supreme Court, each of which has maintained that a less intrusive means test should not be employed when analyzing the reasonable—

\textsuperscript{94} Id. at 776-77 (Ikuta, J., dissenting).
\textsuperscript{95} Id. at 776 (Ikuta, J., dissenting).
\textsuperscript{96} Id.; see CAL. GOV’T CODE § 6253(a) (West 2008) (“Public records are open to inspection by the public at all times during the office hours of the state of local agency and every person has a right to inspect any public record.”).
\textsuperscript{97} See Quon III, 554 F.3d at 776.
\textsuperscript{99} See Quon v. Arch Wireless Operating Co., Inc., 554 F.3d 769, 775 (9th Cir. 2009).
\textsuperscript{100} Id. at 776-77.
\textsuperscript{101} Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 289, 909 (9th Cir. 2009). (In regards to Scharf’s decision to pull Quon’s transcripts as a method to determine the efficacy of the messages, the court stated “There were a host of simply ways to verify the efficacy of the 25,000 character limited without intruding on Appellants’ Fourth Amendment rights . . . .This was excessively intrusive in the light of the noninvestigatory object of the search”).
\textsuperscript{102} See Quon v. Arch Wireless Operating Co., Inc., 554 F.3d 769, 773 (9th Cir. 2009).
\textsuperscript{103} Id. at 773.
ness of any particular government activity as it related to the Fourth Amend-
ment. Judge Ikuta acquiesced and admitted that the circuit court did not “ex-
plicitly state” that it was implementing a less intrusive means test, but that it
nevertheless implicitly did so. In the end, Judge Wardlaw proved victorious
and the petitioner’s request was denied. Soon after, petitioners filed a writ of
certiorari to have the case heard before the Supreme Court, which was subse-
quently granted.

III. MERITS AND WEAKNESSES OF THE BRIEFS FILED WITH THE
SUPREME COURT

Before the Supreme Court heard oral arguments, each side filed briefs that
presented the merits of its case in a manner that transposed each Justice into
the minds of Quon and the other respondents. At issue was the crucial inquiry
as to whether, considering the circumstances, each plaintiff would have rea-
sonably believed that the messages that were sent on the pagers were “pri-
vate”. As the months passed, many believed that the petitioners possessed
the stronger argument. It is no secret that if the average person went through
the same experience of the respondents, he would have the mindset that his
communications were not private from his superiors. However, this is not a
case of the average person; indeed, this case settles upon a very narrow set of
facts and will likely apply to similarly narrow circumstances in the future.

Some commentators pointed out that the Supreme Court could use this op-
portunity to address the very ambiguities within the current law that apply to

104 Id. at 778.
105 Id.
106 Id. at 769.
107 Transcript of Oral Argument at 1, City of Ontario v. Quon, 560 U.S., 130 S. Ct. 2619
(2010) (No. 08-1332).
108 Id. at 1-8.
109 Orin Kerr, Communicating with Those Who Have No Privacy Rights: The Hard
http://volokh.com/2010/03/31/communicating-with-those-who-have-no-privacy-rights-the-
110 Id.
111 See Orin Kerr, The Surprising Narrow Top-Side Merits Brief in City of Ontario v.
ontario-v-quon (asserting the Court’s decision has the possibility to not apply to all govern-
ment employees who send messages via employer issued devices but may only affect those
employees who are in a government workplace at which there is a formal policy that does
not, in writing, address the type of device that he or she used and who have been orally in-
formed that the policy does not cover that device).
the use of employer-issued (both public and private) devices.\textsuperscript{112} Specifically, the Court could definitively settle how future courts should apply the \textit{O'Connor} test when determining whether a violation of an employee's Fourth Amendment rights has occurred.\textsuperscript{113} Additionally, the legal community commented that it would be beneficial to communications law and employment law if the Court handed down a bright-line ruling on the application of a "less intrusive means test", whether explicitly or implicitly.\textsuperscript{114} The briefs that were submitted by both sides offered up clues as to the strategy that each side would eventually employ in the quest of securing victory for their clients.

A. Quon's Reasonable Expectation of Privacy in the Text Messages

It is well-established that in order to have a reasonable expectation of privacy in what is being searched, a person must have exhibited an actual (subjective) expectation of privacy, and that the expectation is one that society is prepared to recognize as reasonable.\textsuperscript{115} In the case of an employer-employee search, a court must look at the totality of the circumstances and consider certain facts that paint the picture of the "operational reality" of the workplace, a concept that has the power to change level of an employee's expectation of privacy.\textsuperscript{116}

Here, both sides used the concept of the operational reality of a workplace to make their case. Quon asserted, victoriously so in the lower courts, that it was the Department's "informal-but express and specific-policy and practices that governed the use of the pagers."\textsuperscript{117} In essence, he argued that because he had been operating under a certain assumption, however false it may have been, his expectation of privacy was a reasonable one.\textsuperscript{118} He also maintained that because there was no official policy that governed the use of the pagers,\textsuperscript{119} he was reasonable in his belief that if he paid the overages that Duke requested, the

\begin{footnotes}
\item[112] Id.
\item[113] Brief for the League of California Cities et al as Amicus Curiae Supporting Petitioners, \textit{Quon v. City of Ontario}, 78 U.S.L.W. 3359 (May 29, 2009) (No. 08-1332) ("This Court's opinion in \textit{O'Connor v. Ortega}, because it was a plurality decision, left unresolved the issues of the extent to which the "special needs" exception applies to government employees and the proper test to apply to work-related searches conducted by a government employer.").
\item[114] See Kerr, supra note 111.
\item[116] \textit{O'Connor v. Ortega}, 480 U.S. 707, 725-26 (1987) ("[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees . . . should be judged by the standard of reasonableness under all the circumstances.").
\item[117] Brief in Opposition of Respondents Jeff Quon, et. al, Petition for Writ of Certiorari, 529 F.3d. 892 (No. 08-1332).
\item[119] Id.
\end{footnotes}
Department would conduct an internal audit of his communications.\textsuperscript{120}

Alternatively, the petitioners claimed that under the same "totality of the circumstances" approach, the operational "reality" was that no member of the SWAT team should have had any expectation of privacy.\textsuperscript{121} To argue their case, they pointed to the formal policy\textsuperscript{122} that was in place at the Department during the time that Quon illicitly used his pager. Further, they emphasized the salient fact that Duke held a meeting that Quon attended at which the attendees were specifically instructed to be of the mindset that the (then newly-issued pagers) would be considered to be a "tool" that is bound by the restrictions of the policy.\textsuperscript{123} Petitioners poked holes in the assertion that any "informal" policy that Duke created within the workplace in order to ease his day-to-day tasks was not administratively binding,\textsuperscript{124} and that it was a "professional courtesy" that Duke extended to his fellow colleagues.\textsuperscript{125} The petitioners asserted that that the respondents misconstrued Quon "pressing his luck" with this "professional courtesy" when forming the assumption that his actions were shielded from review.\textsuperscript{126} They contended that, even if Quon believed that he would not be audited because of Duke's informal policy, he had no reason to believe that he would not have been audited by his true superiors if they were to find out about his overages.\textsuperscript{127}

Nowhere in the record is there support that Duke held the "magic key" that would unlock some sort of alternate policy that would allow Quon to enter into a pattern of behavior so diametrically opposed to the policies that the Department had in place.\textsuperscript{128} Petitioners claimed that Duke was simply the employee who was tasked with the undesirable job of asking fellow colleagues to pay overages when they violated the agreement of the 25,000-character allotment.\textsuperscript{129} The petitioners vehemently stressed that he was not a policy-maker nor was he of the level within the department that a person, like Quon, should reasonably believe that he would be able to unilaterally create a certain sub-policy that would trump a formal agreement and give Quon leeway to act in the manner in which he did.\textsuperscript{130} Duke's actions could have been construed simply as an act of kindness rather than anything else,\textsuperscript{131} allowing Quon to avoid

\textsuperscript{120} Id. at 20.
\textsuperscript{121} Brief of Petitioners, supra note 42, at 29.
\textsuperscript{122} Quon II, 529 F.3d at 896 (9th Cir. 2008).
\textsuperscript{123} Brief of Petitioners, supra note 42, at 33.
\textsuperscript{124} Id. at 41.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 42.
\textsuperscript{128} Brief of Petitioners, supra note 42, at 42.
\textsuperscript{129} Id. at 53.
\textsuperscript{130} Id. at 42.
\textsuperscript{131} Id. at 41.
the annoyance (and embarrassment) of an audit by paying overages; and that ultimately it was a stretch to imagine that extending such a kindness created an expectation of privacy that society would be willing to accept as legitimate.132

Petitioners also used the California Public Records Act133 persuasively to establish that Quon had a diminished expectation of privacy. Although there is nothing in the record to state that Quon had been formally introduced to the statute, it is a widely-accepted doctrine within the ranks of government employees throughout the state.134 The fact that any member of the public, at any time, could have requested the very same type of transcript that Scharf requested, calls into question how reasonable Quon’s belief was that his text messages were for his eyes only.135 However, whether or not a private citizen would actually request the transcripts of the text messages is an entirely different question. Petitioners claimed that it is not far-fetched to think that members of the community may want to know what public servants say to one another, especially if it is at the time of an incident.136 Respondents counter-argued that the proper inquiry is not the possibility that a private citizen could request a transcript of Quon’s text messages at any time but rather the probability that someone would do so.137 Respondents contended that the odds that someone would actually demand such information from the government are so that slim that this fact should not reduce any expectation of privacy.138

B. Application of the Less Intrusive Means Test

In this case, the controversy surrounding the “less intrusive means test” is

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133 Brief of Petitioners, supra note 42, at 35.
134 Quon v. Arch Wireless Operating Co., Inc., 554 F.3d 769, 776 (9th Cir. 2009) (Ikuta, J., dissenting) (“Government employees in California are well aware that every government record is potentially discoverable at the mere request of a member of the public, and their reasonable expectation of privacy in such public records is accordingly reduced.”).
135 CPRA defines a public record as “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” CAL. GOV’T CODE § 6252(e) (West 2008).
136 Brief of Petitioners, supra note 42, at 47 (“The public legitimate interest in the identity and activities of its peace officer’s is even greater than its interest in those of the average public servant.”) (internal quotation marks omitted).
138 Brief in Opposition of Respondents Jeff Quon, et. al, Petition for Writ of Certiorari, 529 F.3d. 892 (No. 08-1332). (“There is no evidence before the court suggesting that CPRA requests to the department are so widespread and so frequent as to constitute an open atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable.”)
not whether it is technically “appropriate” for such a standard to be applied, but whether it was applied at all. With seven other circuits disallowing such a methodology when evaluating workplace claims, a finding that the test was applied would have severely weakened the petitioner’s case.

Respondents, supported by Judge Wardlaw, asserted that the Ninth Circuit did not apply such a test and that the outcome of the case would have been no different if the court’s suggestions for a “less intrusive method” of determining the efficacy of the text message was ever mentioned. They agreed with Judge Wardlaw that the only reason the court stated such a litany of “other ways” the Department could have utilized was “merely to illustrate the conclusion that the search was ‘excessively intrusive’ under O’Connor.” Respondents did not need to debate the merits of whether or not there was a break from the other circuits in the court’s ruling because of the belief that the test was, as a matter of fact, never employed.

The petitioners based their contention that the less intrusive means test was used on a “substance over form” argument. Admittedly, the lower court did not explicitly apply such a test, yet in the end that implicitly is exactly what they did. To give force to the assertion, petitioners highlighted the fact that six judges joined Judge Ikuta’s assessment of the Ninth Circuit’s application of the test, which would indicate a divergence from previous jurisprudence. The petitioners also cited to Skinner, in which the Supreme Court elucidated why the less intrusive means test should not be used in a situation similar to Quon’s, pointing out that it is a simple task for a judicial body to review decisions made by someone else in the past. This is exemplified by the circuit court’s suggestions as to how Scharf could have determined the nature of Quon’s text messages otherwise. Yet it is far from settled that any of the proscribed methods would have produced truthful information regarding the text messages given the circumstances surrounding the events in question. These methods

139 Quon v. Arch Wireless Operating Co., Inc., 554 F.3d 769, 779 (9th Cir. 2009).
140 Brief of Respondents at 22-24, City of Ontario, No. 08-1332 (S. Ct. Feb. 2010).
141 Quon v. Arch Wireless Operating Co., Inc., 554 F.3d 769, 773 (9th Cir. 2009).
142 Id. at 769, 779.
143 Brief of Petitioners, supra note 42, at 3.
144 Quon v. Arch Wireless Operating Co., Inc., 554 F.3d 769, 776 (9th Cir. 2009) (J. Ikuta dissenting).
145 Brief of Petitioners, supra note 42, at 21 (“It is obvious to the logic of . . . elaborate less restrictive-alternate arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers, because judges engaged in post hoc evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished.”).
146 Quon II, 529 F.3d at 909.
147 Quon I, 445 F. Supp. 2d at 1125. The text messages were explicit in nature and were evidence of an affair that Quon was having with Florio. The likelihood that Quon would make a greater effort to keep these facts hidden from his superiors is quite high.
did not remedy the past issue of noncompliance with the policy, both as to the rules related to "non-personal use" of the communications devices and the obscene nature of the texts.148

C. Permissibility of the Search by an Employer

The plurality in O'Connor stated that given an employer’s special needs, he or she may conduct work-related workplace searches as long as they are reasonable.149 When analyzing whether or not a search is reasonable, the court must determine if the search was 1) reasonable in scope and 2) reasonable at its inception.150

As discussed above, the district court instructed a jury to determine Scharf’s intent when he demanded a review of Quon’s text messages.151 Had the jury determined that Scharf attempted to weed out those employees who were “playing games” the jury would have found the search to be unreasonable.152 However, it was determined153 that Scharf ordered the review to determine the efficacy of the text messages and to ensure that people like Quon were not being forced to pay for “work-related expenses.”154

Petitioners first articulated in their appeal to the circuit court that even if respondents had a reasonable expectation of privacy, the review of the transcripts was lawful because, under the O’Connor standard, the search was justified at its inception.155 They pointed to the entrenched rule that “special needs” are present in the context of government employment.156 In the case of a public employer, the court must take into consideration, under the totality of the circumstances, whether or not the government interests outweigh those of the individual.157 The petitioners claimed that the Ninth Circuit did not sufficiently weigh Quon’s interest in the text messages that he sent on a Department issued

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148 Id. There is no reference in the records that any of Quon’s superiors believes that the messages, although possibly personal in nature and too frequent, would be sexually explicitly and implicate him in an extramarital affair with another member of the SWAT team.
150 Id. at 726.
151 Quon I, 445 F. Supp. 2d at 1125, 1144.
152 Id. at 1125
153 Id. at 1143-1144.
154 Id. at 1125.
155 Brief of Petitioners, supra note 42, at 47.
156 O’Connor, 480 U.S. at 732. (J. Scalia concurring.) ("[G]overnment searches to retrieve work-related materials or to investigate violations of workplace rules - searches of the sort that are regarded as reasonable and normal in the private-employer context - do not violate the Fourth Amendment").
157 Enquist v. Oregon Dep’t. of Agric., 128 S. Ct. 2146, 2151-52 (2008) ("The government has a legitimate interest in promoting efficiency and integrity in the discharge of official duties, and in maintaining proper discipline in the public service.").
pager against the Department’s “direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner.” Furthermore, they claimed that Scharf promoted one of the primary goals of the police department, to maintain a solidified workforce that focuses on protecting its citizens.

D. Third Party’s Reasonable Expectation of Privacy in the Text Messages

The respondents claimed that the Ninth Circuit’s ruling that Steven Trujillo, April Florio, and Jerilyn Quon all had a reasonable expectation of privacy in their text messages to Quon is consistent with Supreme Court precedent and should be affirmed. The court analogized the text messages at issue to e-mails that had been involved in a prior case that dealt with an employer search. There, the court determined that the sender of an e-mail had a reasonable expectation of privacy in the content of the e-mails, but not in any information that was necessary to determine the recipient of the e-mail. Respondents claimed that their expectation of privacy was based on the same informal policy created by Duke, noting that all three of the additional respondents worked for the SWAT team and were aware of the agreement between Quon and Duke. Consequently, they claimed that none of the additional respondents would have any belief that the text messages that they sent to Quon would be available for review.

The petitioners were deeply concerned with the expansion of Fourth Amendment protections to Trujillo, Florio and J. Quon. For each person, they claimed that there could not have been any expectation of privacy in those messages because they knowingly and willingly sent them to a pager that belonged to the Department. Additionally, because Quon had consented to a

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158 Brief of Petitioners, supra note 42, at 45-46 (citing O’Connor, 480 U.S. at 724).
159 Brief of Petitioners, supra note 42, at 45-47.
161 Quon II, 529 F.3d at 905 (discussing United States v. Forrester, 512 F.3d 500 (9th Cir. 2008)).
162 United States v. Forrester, 512 F.3d 500, 509-10 (9th Cir. 2008); see also Smith v. Maryland, 442 U.S. 735, 742, 745 (1979) (holding the government’s warrantless use of pen register to record the telephone numbers that one dials does not violate the Fourth Amendment because people “realize they must convey phone numbers to a telephone company, since it is through the telephone company switching the equipment that their calls are completed . . .”).
164 Id.
165 Brief of Petitioners, supra note 42, at 60-61.
166 Id. at 61-62 (“The Ninth Circuit opinion fails to account for the fact that the other plaintiffs were fully aware that they were sending messages to Sergeant Quon’s Depart-
review of the messages, there could not have been an expectation of privacy.\textsuperscript{167} The petitioners believed that Quon consented when he signed the Policy and noted that he was told both orally and in a non-signed statement that the policy applied to the pagers.\textsuperscript{168} Moreover, at the heart of the argument, insomuch that Quon had a reasonable expectation of privacy due to the alleged “operational reality” created by Duke’s actions, there is a failure to bridge the gap as to how that could extend to the respondents who had little or no interaction with Duke.\textsuperscript{169} Petitioners also attempted to appeal to the common-sense beliefs of society, remarking that the average person knows that most public employers have no privacy policies\textsuperscript{170} in place and that this is especially likely in the scenario involving the policy force.\textsuperscript{171}

IV. QUON COMES BEFORE THE COURT

A. Oral Arguments

When the Court finally heard oral arguments on April 19, 2010\textsuperscript{172} the scene was one of acute questioning by the Justices regarding the applicability of the basic Fourth Amendment rights to an individual’s personal communications blended with an obvious gap in understanding about the technological minutiae of how modern electronic communications function. Poignantly, the Acting Solicitor General argued on behalf of the United States for the Justices to exercise restraint when analyzing such an unfamiliar set of circumstances, for fear of creating black letter law that would be difficult to augment as the world of

\textsuperscript{167} Id. at 62-63.
\textsuperscript{168} Id. at 33, 64.
\textsuperscript{170} Brief of Petitioners, supra note 42, at 21. In particular, “numerous government agencies” like the City of Ontario, have adopted “policies [that] typically require employees to acknowledge that their e-mail records are subject to inspection, monitoring, and public disclosure; that they have no right of privacy or any reasonable expectation of privacy in workplace e-mails; that the e-mails are owned by the agency, not the employee; and that the e-mails are presumptively considered to be public records” For example, the United States is “a public employer that extensively uses “no confidentiality’ policies with respect to its workers. See Peter S. Kozinet, Access to the E-Mail Records of Public Officials: Safeguarding the Public’s Right to Know, 25 COMMLAW 17, 23 (2007).
\textsuperscript{171} Brief of Petitioners, supra note 42, at 21; Id. at 65 (“As a matter of common sense, senders should understand that communications with law enforcement agencies often involve the reporting of crimes or emergencies.”).
communications expands. Chief Justice Roberts seemingly rebuked this warning, expressing concern about leaving gaps in determining how to review constitutional rights that attach to electronic communications.

Counsel for the Petitioners echoed the arguments set forth in the written brief that they were of the belief that not only did Quon not have a reasonable expectation of privacy in his text messages, but that additionally the search of the text messages by the City was a reasonable one regardless of Quon's Fourth Amendment concerns. The first of those two prepositions consumed most of the Justices' questions, honing the focus on the first prong of a Fourth Amendment analysis. Justice Ginsburg spent a majority of her time piecing together many of the facts of the case so that a clear picture of Quon's understanding of the how the City's written policy and Duke's informal policy related to one another could be presented. Throughout the oral arguments, it became clear that the Court would indeed make the two step determination based upon the facts: first, whether Quon had a reasonable expectation of privacy; second, if Quon did have an expectation of privacy, whether the search by the Department of the messages was reasonable. Petitioner's counsel fervently argued that Quon should never have believed that his messages were excluded from audit by the Department. Pointing to the written formal policy in conjunction with the meeting that was held explaining that the newly acquired pagers fell within the restrictions set forth in the policy, it was argued that Quon should have understood that the Department was within its discretion to review any communication he sent on the pager. In addition, the City's counsel highlighted that the very nature of Quon's work should preclude

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173 Id. at 21. (Acting Solicitor General Neal Katyal warned the Court that, "These technologies that are rapidly in flux, in which we don't have intuitive understandings the way we do about, say trash and so on. And it's precisely that reason I think that the Court should be very careful to constitutionalize and general Fourth Amendment rules in this area at the first instance. To do so I think really does freeze...into place something that the legislature can't then fix...); see also id. at 25. ("But what I think would be dangerous is to have a blanker rule that constitutionalizes and says you always have reasonable expectations of privacy in this technology").

174 Id. at 22.

175 Id. at 2 (stating that the petitioners were represented by Kent L. Richland); GMSR: Kent L. Richland, Partner, GMSR, http://www.gmsr.com/attorneys_profile.cfm?id=1008 (last visited Jan. 1, 2011) (stating that Kent L. Richland is, a partner at the Los Angeles office of Greines, Martin, Stein & Richland, LLP).


177 Id. at 12-17.

178 Id. at 5.

179 Id. at 3-17.

180 Id. at 3-7.
any expectation of privacy in any communications he sent during his time on the job, a fact that was repeatedly pointed out by the lower courts. They also highlighted the briefs that were submitted to the Court by both petitioners and amici. Lastly, although it was acknowledged that the Court would not be reviewing any merits of Quon’s contentions stemming from the Stored Communications Act, this did not eviscerate the issue from creeping up during the Justices’ questioning. The Justices repeatedly asked City’s counsel about the effect that any violation of the Stored Communications Act would have had on Quon’s Fourth Amendment protections. Counsel distilled the arguments in the written brief down to one salient point, noting that even if the Stored Communications Act had been violated, under the law articulated by the Court in Virginia v. Moore, “the mere fact that something is contrary to the law does not in itself permit a reasonable expectation of privacy,” which seemed to satisfy the Justices. The Acting Attorney General buttressed this assertion by reiterating that even if the Act was hypothetically violated, it was the belief of the United States government that the City could still prevail.

Going further with the government’s arguments, it was obvious that the main concern centered on what the workability of work-place policies would be, should the Court find that the informal policy put in place by Duke super-

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181 Transcript of Oral Arguments at 6-7, City of Ontario v. Quon, 130 S. Ct. 2619 (2010) (No. 08-1332), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1332.pdf (“... [Quon] is using his department-issued pager; he is a police officers and indeed a member of the high-profile SWAT team of the police department. He should be aware just by virtue of the fact that there is going to be litigation involving incidents that the SWAT team gets involved in where there will be requests for the communications that are made on that official department-issued pager. And in addition, he should be aware of the fact that...there may be inquiries from boards of police to determine whether the conduct of the police in a particular incident is appropriate”).

Id. at 16-20.

182 Quon I, 445 F. Supp. 2d 1116, 1116-41; Quon II, 529 F.3d at 896-907.


185 Id. at 8-9 (statement of Chief Justice Roberts). (“You would agree, I think, that if the SCA, the Stored Communications Act, if that made it illegal to disclose these e-mails, then he would certainly be correct that Quon has a reasonable expectation of privacy; isn’t that right?”).

186 Id. at 8; See Brief of Petitioners, supra note 42, at iii-vi.

187 Id. at 8; See Brief of Petitioners, supra note 42, at iii-vi.

seded the formal policy implemented by the Department.\textsuperscript{189} It was the government’s contention that because a written policy was in place, its contents should have provided the boundaries of an employee’s expectation of privacy, allowing for a workable standard in the workplace as well as one that could be easily administered in the courts.\textsuperscript{190} As previously mentioned in this note, the counsel went on to caution that the Court would not be prudent in making a decision that would be binding for both employees and employers alike in an area that is “rapidly in flux”.\textsuperscript{191} Indeed, the area of electronic communications is so rapidly evolving that not all of the Justices fully understood how the devices used by Quon and the rest of the Department actually worked.\textsuperscript{192} However, Justice Sotomayor, perhaps relying on her previous exposure to a related case in the Second Circuit\textsuperscript{193}, attempted to determine what effect a written policy has on the expectation of privacy of an employee.\textsuperscript{194} In essence, the Court pondered the exact contention that the government was making.\textsuperscript{195}

Justices Breyer and Stevens reserved most of their questioning for the coun-

\textsuperscript{189} See id. at 28-31. Acting Attorney General Katyal stated, Millions of employees today use technologies of their employers under policies established by those employers. When a government employer has a no-privacy policy in place that governs the use of those technologies, ad hoc statements by a non-policy member cannot create a reasonable expectation of privacy. Put most simply, the computer help desk cannot supplant the chief’s desk. That simple, clear rule should have decided this case.

\textsuperscript{190} Id. at 25-26.

\textsuperscript{191} Id. at 22.

\textsuperscript{192} Id. at 43-44. Chief Justice Roberts wondered if two messages were sent at the same time would “one kind trump the other or does [a sender] get a busy signal?”

\textsuperscript{193} In 2001, Justice Sotomayor, while a federal judge for the Second Circuit, heard a case that asked many of the same questions as those in Quon. In Leventhal \textit{v.} Knapek, a Department of Transportation employee asserted Fourth Amendment infringements when his employers searched a computer in his office after accusations of workplace-related violations. Judge Sotomayor, writing for the three-judge panel, found that the employee had a reasonable expectation of privacy in the contents of his computer because there was a complete absence of a formal or informal policy that governed the use of the device. However, she went on to quote Justice Scalia in \textit{O’Connor \textit{v.} Ortega} and found that the Department’s search of the computer was justifiable under the determination that the search was initiated to determine if the employee had been violating workplace policy. In the present case, not only has it been determined by the lower courts that the City’s reason for searching Quon’s text message transcript was a reasonable one, it was undisputable that there were various policies in place that governed the use of the pagers. Intuitively, in order for Justice Sotomayor’s decision to be consistent with her prior rulings, she would have to focus on the “operational reality” of Quon’s workplace and whether the informal agreement between Quon and Duke trumps the formal policies that the City had in place. \textit{See generally} Leventhal \textit{v.} Knapek, 266 F.3d. 64, 64-74 (2d Cir. 2001); \textit{Quon I}, 445 F. Supp. 2d at 1123-1146.


\textsuperscript{195} Id. at 27.
sel representing Quon and the other parties to his suit. Both were concerned with the concept of the less intrusive means that had been so ardently argued over in the lower courts and in the written briefs submitted to the Court. Although counsel for the respondents consistently argued with the Justices regarding the other means that could have been used to determine the nature of the text messages, including asking an employee to consent to a review of the text messages or asking the employee to black out the transcript where he felt the messages were of a personal nature, both Justices were hesitant to agree that any of the methods suggested would be practical in application. While respondent’s counsel was being questioned by the Court, Justice Scalia took the opportunity to revisit the O’Connor case, where he had written a strong dissent asserting that the Court should never look to the “operational workplace reality” when analyzing an alleged Fourth Amendment violation in the workplace. Foreshadowing how the Court would ultimately rule, Justice Scalia pointed out that, like in O’Connor, a person could have a reasonable expectation of privacy in the their work desk, or even the text messages sent on their employer issued device, but that the scope of the search of that individual’s property could be reasonable and therefore withstand a Fourth Amendment challenge.

B. The Court Renders a Narrow Decision

As legal scholars had noted, the Court was faced with a decision as to how far it would go in the ruling in Quon. Academics and legal commentators alike pondered whether the Court would tailor a holding to the specific facts in the case or utilize the opportunity to make strides in the field of electronic communications. Justice Kennedy, writing for the Court, answered these ques-

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196 Id. at 33-39.
197 Id.
198 Id. at 26-27
tions a mere three sentences in, stating that "[t]hough the case touches issues of far reaching significance, the Court concludes it can be resolved by settled principles determining when a search is reasonable." Those hoping that the Court would promulgate new rules that would help lower courts analyze issue relating to e-communications are left wanting, yet the opinion is not without significance to that area of law.

In a unanimous decision, the Court found in favor of the City, and dismissed all of the claims by Quon and the other parties to his suit. The Court reversed the Ninth Circuit's ruling and found that an employer's search of a work-issued device is permissible as long as it is not excessive in scope and reasonably related to a work purpose, even if the employee had a reasonable expectation of privacy in those messages. Ultimately, they found that the Department's search was reasonably related to the goal of determining the efficacy of the character allotment that was given to the employees. The Court also determined that reviewing Quon's text message transcripts was not excessive. However, the Court refused to determine if Quon had a reasonable expectation of privacy in the messages he had sent, and instead "assumed" that he did for purposes of their analysis. Yet, the Court subtly suggested that even in assuming some privacy in those messages, Quon would have been unreasonable in assuming that all of the messages were exempt from any scrutiny. The refusal to rule on whether Quon had a reasonable expectation of privacy marks reluctance by the judiciary to address privacy expectations in different forms of electronic communications, for fear that they would create law in an area that is not nearly settled. The Court specifically cited to the fact that Olmstead was eventually overturned by Katz because the Court contemporaneous to those rulings was not fully versed in the technologies that were implicated in


203 Quon III, 130 S. Ct. at 2624 (2010).
204 Id. at 2630 (Not wanting to address privacy implications that specifically attached to Quon, Justice Kennedy wrote, "It is preferable to dispose of this case on narrower grounds.")
205 Id. at 2633.
206 Id. at 2630, 2633.
207 Id. at 2633.
208 Quon III, 130 S. Ct. at 2630.
209 Id. at 2631 ("Even if [Quon] could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny.").
210 Id. at 2629 ("The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.").
those specific searches.\footnote{Id., see also Katz v. U.S., 389 U.S. 347, 353 (1967) (stating that the Court “conclude[d] that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling”).} Instead, the Court proceeded under the assumption that Quon possessed at least a minimal expectation of privacy in his messages, and applied the standard articulated in O'Connor.\footnote{Quon III, 130 S. Ct. at 2630. The Court noted: Under the approach of the O'Connor plurality, when conducted for a ‘noninvestigatory, work-related purpose’ or for the ‘investigation of work-related misconduct,’ a government employer’s warrantless search is reasonable if it is ‘justified at its inception’ and if ‘the measures adopted are reasonably related to the objectives of the search and is not excessively intrusive in light of’ the circumstances giving rise to the search.} In essence, the Court mimicked what the district court had determined at the first phase of the litigation, ruling that “the search [by the Department] satisfied the standard of the O'Connor plurality and was reasonable under that approach.”\footnote{Id.} Justice Scalia balked at what he perceived was a “disregard of duty” by the Court’s refusal to address how expectations of privacy apply to electronic messages, and instead making hypothetical assessments about Quon.\footnote{Justice Scalia noted: Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court’s implication, ante, at 10, that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible. The-times-they-are-a-changin’ is a feeble excuse for disregard of duty.} Although he concurred in the judgment, he scolded the Court for not facing the question of first impression head on, and instead deferring the very important Fourth Amendment issues that were in question in the case.\footnote{Id., at 2635.}

The Court did, however, address the concept of the “operational realities” and how it is intertwined with an individual’s expectation of privacy. Although the Court did not make a factual determination as to the operational reality at the Department, it did acknowledge that when assessing the expectation of privacy an inquiry into the workplace environment would be called for.\footnote{Quon III, 130 S. Ct. at 2634 (2010) (Scalia, A., concurring in part).} This assertion insures that the concept of the operational reality of a workplace is safe and sound in its place in a Fourth Amendment analysis.

The Court also concluded that the Ninth Circuit improperly employed a “less intrusive means” test when it dictated other hypothetical methods that the Department could have used in attempting to determine the nature of Quon’s
text messages.\textsuperscript{217} Citing the fact that it was contrary to controlling precedents that have been issued by the judiciary, the Court stated that it has “repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonably under the Fourth Amendment.”\textsuperscript{218}

The Court also agreed with both counsel for the City and the Acting Attorney General,\textsuperscript{219} deciding that although a violation of the Stored Communications Act is not an inquiry for the Court, even if the Act had been violated, it would not make the Department’s search unreasonable and a violation of the Fourth Amendment.\textsuperscript{220} The Court agreed with aforementioned counsel, citing Supreme Court precedent that held that “the existence of a statutory protection does not render a search \textit{per se} unreasonable under the Fourth Amendment.”\textsuperscript{221}

Lastly, the Court summarily dismissed the claims levied by those parties who exchanged and received the text messages from Quon.\textsuperscript{222} In a mere six sentences, the Court used the respondent’s claim that because “the search was unreasonable as to Sergeant Quon, it was also unreasonable as to his correspondents” as the crux for their decision.\textsuperscript{223} Because the respondents never asserted that those who received messages from Quon could prevail in their suit without Quon's doing so as well, the Court did not engage in a constitutional analysis of their claims but simply dismissed their contention based on their “litigating position.”\textsuperscript{224}

V. APPLICABILITY TO THE OUTSIDE WORLD

The outcome of the Quon case is set to have implications for all employers, whether they are public or private.\textsuperscript{225} Establishing a more concise understanding of the plurality opinion set forth in \textit{O’Connor} would allow the holding to apply to both the public and private sectors.\textsuperscript{226} If painted with a broad brush, the ruling in the case will not only affect messages sent on a device similar to the one issued by the OPD, but all electronic communication devices, including computers, cell phones, Blackberries and any other instrument that conveys

\textsuperscript{217} Id. at 2632.
\textsuperscript{218} Id.
\textsuperscript{219} See discussion generally Part IV.A.
\textsuperscript{220} Quon III, 130 S. Ct. 2619, 2632 (2010).
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 2633.
\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} Daniel I. Prywes, \textit{Electronic Privacy and the Supreme Court}, \textit{LAW TECHNOLOGY NEWS} (Feb. 9, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202442982294&Elec tronic_Privacy_and_the_Supreme_Court.
\textsuperscript{226} Id.
messages. More specifically, the Court's assessment of both the concept of the "operational reality" of the workplace and the negation of the debated "less intrusive means test" is extremely relevant in the work sphere. In addition, there are a host of public policy considerations that will be implicated by the Supreme Court's ruling. The issue of whether taxpayer dollars are being utilized to maximize efficiency is an ever-growing concern in today's society and economic times.

Yet, the stark realization that comes through the words of Justice Kennedy is that the current Court, minus Justice Scalia, does not believe that the time is right to begin to delve deep into the constitutional privacy concerns of those who employ electronic means of communication. Although the ruling is the first step in what is sure to be a long litany of rulings that will develop the law in this area, the Court's reluctance leaves the public wanting.

A. Operational Realities

At the heart of this case is the "reality" of the policy that governed the two-way pager that Quon used to send and receive text messages. Respondents asserted that, taking into consideration all of the facts and circumstances, Quon reasonably believed that his text messages would never be reviewed as long as he continued to pay for any overage charges that he incurred. Conversely, petitioners made the case that the exact opposite it true; that whatever informal agreement that Quon had established with his colleagues regarding the payment of overages did not trump formal and written policy implemented by the OPD that clearly stated that each user of the pagers was to operate under the notion that anything sent or received on them was reviewable at any time. The petitioners also relied heavily on the implications of a 'public records act' to establish that the reality of the situation that the respondent found himself in was one that gave him no privacy protections in regards to this text messages.

Review of this concept has wide-ranging ramifications on both employers and employees. By the Court stating that if they had decided to review Quon's expectation of privacy they would have looked to the circumstances that cre-

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227 Id.
228 Id.
231 Brief of Petitioners, supra note 42, at 41.
232 Id. at 35.
233 Id. at 35-37.
ated the operational reality of the work environment of the Department, the Court implicitly keeps this concept alive. Employers around the country will be forced to revisit their policies, both formal and informal, regarding the use of provided devices. In a ruling such as this, the Court has established a standard that could allow informal policies, albeit even oral policies created by non-policy makers, to trump formal agreements. This should signal to employers the need to implement strict policies and inform each and every employee that is involved with the enforcement of the policy to refrain from activities that could be construed as creating a supplemental policy. In order to protect their interests, it would behoove employers to give their employees full notice and disclosure that their actions are being monitored and that in no way can that assertion be overcome.

The ruling is not without benefits for the employer. By suggesting that Quon, by way of working at a highly publicized SWAT team that consistently works with the public, would have been remiss to believe that his messages were completely exempt from review, those employers who function in a similar way to the Department could reasonably believe that their employees will have a diminished expectation of privacy in their messages.

B. Deciding the “Less-Intrusive Means” Test

The Court would have been hard pressed to reach a decision unless it was decided whether the Ninth Circuit employed a “less-intrusive means” test or if the panel just suggested some methods which are “less intrusive” in passing. If nothing more, the Court's ruling will have a strong effect on how future judges construct their opinions. Judge Wardlaw defended the Ninth Circuit's “use” of the least intrusive means test by asserting that it wasn't really used as a “test” but merely as way to illustrate examples of how the petitioners could have rectified the situation with Quon without the non-consensual review of his text messages. Judge Wardlaw went even further by suggesting that the Ninth Circuit's opinion would not materially change if the words “less intrusive” never appeared in the ruling.

Yet, petitioners relied on the court's use of this test to assert their main contention for reversal. Neither side argued that the Supreme Court and various circuit courts have found that the implementation of a less intrusive means test

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235 Quon v. Arch Wireless Operating Co., Inc., 554 F.3d 769, 777 (9th Cir. 2009).
236 Id. at 773.
237 Id.
238 Brief of Petitioners, supra note 42, at 45.
is allowed, agreeing that precedent clearly dictates that the test should not be utilized. Therefore, if the Court were to find that the Ninth Circuit did just that, it would be potentially fatal to their case and would strongly suggest that future courts avoid any type of rhetoric that resembles a similar standard. By finding that the Ninth Circuit’s ruling was inconsistent with both Court precedent and sister circuits’ rulings, the Court signals that the allowance of using language that mirrors the litany of methods suggested by the lower court as a way of infringing on employee’s constitutionally protected privacy rights will not be tolerated.

C. Public Policy Considerations

Technically, any device that is given to a government employee is paid for by the individuals who pay taxes to the larger entity, the employer. Therefore, the use of a device for non-work related purposes could be seen as a serious waste of taxpayer dollars. Although this does not go to the heart of the privacy rights issue debated, it is not something that should be overlooked. Individual taxpayers place their trust in government officials, even more so when it is a person that works in law enforcement. Taxpayers want to be reassured that government employees are working to the best of their ability and that time and money is not being wasted. This desire is heightened when applied to law enforcement. The primary task of a person who is in the employ of government law enforcement, like the City of Ontario’s SWAT team, is to make sure that each citizen is secure and safe. It can hardly be said that an individual who is sending upwards of one hundred text messages a day while on duty is abiding by the standard. The only method by which an individual who is not in a supervisory role could determine if a law officer (or any other government employee) is making efficient use of taxpayer’s dollars would be to request documents that could show how an employee uses his time. In this case, if a member of the City of Ontario community made the decision to request transcripts of text messages sent by SWAT team members while on active duty, he or she would only be able to receive these documents as long as the sender’s privacy rights were not being infringed. The restriction of the ability to review text message transcripts could be seen as enabling the waste of taxpayer dollars.

In the converse, today more than ever, people are afraid of the wide latitude that the government has to access personal information. By the Court finding


in favor of the petitioner, it gave the government and other employers another quiver in their bow by which to review information that is not readily accessible. Stretching farther than the realm of the government, there is a constant tension between the employer and the employee in any sector of the workforce. It is the employer’s job to ensure that employees are utilizing their time in the most efficient manner that will be beneficial to the principal, which can be a trying task in today’s society where technology makes it easier for an employee to engage in non-work related activities while at the office. The employee, on the other hand, wishes to be free from employer’s constant review of each and every action that he or she takes while at the workplace. The ruling in this case, no matter from which side one looks at it, will affect the schematic of how much an employer can monitor an employee’s actions on any of the various communication devices that, in modern times, are integral to almost any office.

VI. CONCLUSION

The ruling in *Quon v. City of Ontario* is one of the first in what will be a long history of cases that focus on the dynamic between employer, employee, and the information that the latter chooses to exchange vis-à-vis an employer-issued device. The Court’s hesitation to address how constitutional protections formally attach to such exchanges ensures that a future Court will hear many of the same arguments addressed during *Quon*. As the workplace inches forward through the technological age, it is only logical that those very arguments will not fade into the background. As with most technology, only time can expose the advantages and disadvantages each new device brings to the public. With the advent of the majority of employers issuing communication devices to aid in the efficiency of an office, clearly defining the legal boundaries that govern the use of the device will be beneficial to both employer and employee alike.