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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 08-1332, the City of  
5 Ontario v. Quon.

6 Mr. Richland.

7 ORAL ARGUMENT OF KENT L. RICHLAND

8 ON BEHALF OF THE PETITIONERS

9 MR. RICHLAND: Mr. Chief Justice, and may it  
10 please the Court:

11 Under the less restrictive constitutional  
12 standards applied when government acts as employer, as  
13 opposed to sovereign, there was no Fourth Amendment  
14 violation here.

15 First, Ontario Police Sergeant Jeff Quon had  
16 no reasonable expectation of privacy vis-à-vis the  
17 Ontario Police Department in text messages on his  
18 department-issued pager in light of the operational  
19 realities of his workplace, which included the explicit  
20 no privacy in text messages policy.

21 CHIEF JUSTICE ROBERTS: The written policy?

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: The whole -- the  
24 argument here, of course, is that that was modified by  
25 the instructions he got from the lieutenant. Do we

1 follow the written policy or the policy they allegedly  
2 enforced in practice?

3 MR. RICHLAND: That is the argument,  
4 Mr. Chief Justice. But, in fact, there was no  
5 inconsistency between the no privacy in text messages  
6 aspect of the written policy and the oral information  
7 he was given.

8 First of all, the written policy itself was  
9 broad enough to cover text messages. It stated, for  
10 example, at Appendix 152, that it applied to city-owned  
11 computers and all associated equipment. And again at  
12 152: "City-owned computer equipment, computer  
13 peripheral, city networks, the Internet, e-mail, or  
14 other city-related computer services." And, finally, the  
15 agreement to the policy was that it applied -- this is  
16 at Appendix 156 -- to city-owned computers and related  
17 equipment.

18 So certainly the written policy itself was  
19 broad enough to cover text messaging pagers, but in  
20 addition to that, nothing in the oral statements made by  
21 Lieutenant Duke undermined the no-privacy aspect of the  
22 written policy.

23 CHIEF JUSTICE ROBERTS: Well, we are dealing  
24 with Mr. Quon's reasonable expectations, right?

25 MR. RICHLAND: Yes, yes.

1 CHIEF JUSTICE ROBERTS: And even with the  
2 written policy, he has the instructions -- everybody  
3 agrees -- you can use this pager for private  
4 communications.

5 MR. RICHLAND: That's correct.

6 CHIEF JUSTICE ROBERTS: We're not going to  
7 audit them. Right? That's what he said. He has to pay  
8 for them. Right? Now, most things, if you're paying for  
9 them, they're yours. And this -- it particularly covered  
10 messages off-duty.

11 Now, can't you sort of put all those  
12 together and say that it would be reasonable for him to  
13 assume that private messages were his business? They  
14 said he can do it. They said, you've got to pay for  
15 it. He used it off duty. They said they're not going  
16 to audit it.

17 MR. RICHLAND: Not when he was told at the  
18 same time that these text messages were considered  
19 e-mail and could be audited, and that they were  
20 considered public records and could be audited at any  
21 time; that is, it has to do with a different aspect of  
22 what the policy -- the oral policy --

23 JUSTICE GINSBURG: In addition to -- that  
24 was said at the meeting -- and Lieutenant Duke, who was  
25 the same one who later says: I'm not going to monitor

1 as long as you pay the difference. There was the  
2 statement at the meeting by that same person. Wasn't  
3 there something in writing by the police chief to follow  
4 up after that meeting?

5 MR. RICHLAND: Yes, there was,  
6 Justice Ginsburg. There was a memo that was sent that  
7 memorialized the statements at the meeting, that  
8 specifically stated that the text messages were treated  
9 as e-mail under the written policy.

10 CHIEF JUSTICE ROBERTS: Let me ask you --

11 JUSTICE SOTOMAYOR: Counsel --

12 CHIEF JUSTICE ROBERTS: Let me ask you to  
13 put the written policy aside. Hypothetical case: There's  
14 no written policy. Would he have a reasonable  
15 expectation in the privacy of his personal e-mail, text  
16 messages, in that case?

17 MR. RICHLAND: Not --

18 CHIEF JUSTICE ROBERTS: In other words,  
19 all we know is the list that I went through earlier.

20 MR. RICHLAND: Yes. Yes, Mr. Chief Justice.  
21 Assuming all the other factors in this case were  
22 present --

23 CHIEF JUSTICE ROBERTS: Yes.

24 MR. RICHLAND: That is, he is using his  
25 department-issued pager; he is a police officer and

1 indeed a member of the high-profile SWAT team of the  
2 police department. He should be aware just by virtue of  
3 that fact that there is going to be litigation involving  
4 incidents that the SWAT team gets involved in where there  
5 will be requests for the communications that are made on  
6 that official department-issued pager.

7 And, in addition, he should be aware of the  
8 fact -- and this is something that the dissenters to  
9 denial of en banc said below. He should be aware that  
10 there may be inquiries from boards of the police to  
11 determine whether the conduct of the police in a particular  
12 incident is appropriate.

13 JUSTICE SCALIA: Mr. Richland, a little  
14 earlier you referred us to page 152 and 156 of --

15 MR. RICHLAND: Of the appendix to the  
16 petition.

17 JUSTICE SCALIA: Oh, the appendix to the  
18 petition.

19 MR. RICHLAND: Yes, and that's the policy.  
20 That is the written policy, Justice Scalia. I'm sorry  
21 for the confusion.

22 CHIEF JUSTICE ROBERTS: Well, that's the  
23 written policy.

24 MR. RICHLAND: That is the written policy,  
25 and the --

1 CHIEF JUSTICE ROBERTS: But the policy  
2 itself, from the point of view of Officer Quon, is a  
3 little bit more complicated than that.

4 MR. RICHLAND: Well, of course, what the --  
5 what Officer Quon's point of view is must also be  
6 tempered by what we are reasonably going to accept as a  
7 society of his understanding of the circumstances.

8 JUSTICE SOTOMAYOR: Counsel --

9 CHIEF JUSTICE ROBERTS: You would agree, I  
10 think, that if the SCA, the Stored Communications Act --

11 MR. RICHLAND: Yes.

12 CHIEF JUSTICE ROBERTS: If that made it illegal  
13 to disclose these e-mails, then he would certainly be correct  
14 that he has a reasonable expectation of privacy; isn't that  
15 right?

16 MR. RICHLAND: No, Mr. Chief Justice. We  
17 would not agree with that.

18 CHIEF JUSTICE ROBERTS: It's not reasonable  
19 to assume that people are going to follow the law?

20 MR. RICHLAND: Well, for several reasons.  
21 Number one, this Court has repeatedly stated that the  
22 mere fact that something is contrary to the law does not  
23 in itself permit a reasonable expectation of privacy.  
24 Just two terms ago, in *Virginia v. Moore*, this Court  
25 said precisely that. And of course it said it earlier



1 in California v. Greenwood, and in a number of other  
2 cases -- Oliver v. United States.

3 Because the effect of that, of course, would  
4 mean that we would be constitutionalizing every positive  
5 law that might be enacted by a State or the  
6 Federal legislature.

7 JUSTICE KENNEDY: Well, on that point, do we  
8 take it as the law of the case or as a given that it was  
9 illegal for I think Arch to turn over the transcripts to  
10 the police department? What do we do with that part of  
11 the case?

12 MR. RICHLAND: Justice Kennedy, I don't  
13 believe it is law of the case that is binding on this  
14 Court, since this Court is a higher court. Although it  
15 is true that this Court denied certiorari on that issue,  
16 I don't believe it is bound by the Ninth Circuit  
17 determination of that, and in fact it is our contention  
18 that that was incorrectly decided.

19 JUSTICE KENNEDY: On remand -- has there been  
20 a final judgment issued as to Arch, or is that just  
21 being held --

22 MR. RICHLAND: I don't believe so,  
23 Justice Kennedy. I believe that everything has been  
24 stayed pending the determination by this Court.

25 JUSTICE SOTOMAYOR: Counsel, let's assume

1 that in this police department, everyone knew, the  
2 supervisors and everyone else, that the police  
3 department people spoke to their girlfriends at night.

4 MR. RICHLAND: Yes, Justice Sotomayor.

5 JUSTICE SOTOMAYOR: And one of the chiefs,  
6 out of salacious interest, decides: I'm going to just  
7 go in and get those texts, those messages, because I  
8 just have a prurient interest. Does that officer have  
9 any expectation of privacy that his boss won't just  
10 listen in out of prurient interest?

11 MR. RICHLAND: Justice Sotomayor, as to the  
12 first aspect, the question of reasonable expectation of  
13 privacy, the motive should have no impact. The motive  
14 of looking should have no impact. The question of  
15 reasonable expectation of privacy must be analyzed  
16 according to the relationship between the officer and  
17 his -- and his employer.

18 JUSTICE SOTOMAYOR: But if in fact -- and  
19 whether we agree with this conclusion or not, we accept  
20 the lower court's views that there was an expectation  
21 that the chiefs were not going to read these things,  
22 some expectation of privacy --

23 MR. RICHLAND: Yes.

24 JUSTICE SOTOMAYOR: -- the limits of it have  
25 to be limited for all of the reasons you've said, doesn't

1    this case begin and end on whether or not what the jury  
2    found is reasonable grounds for what the city did?

3                   MR. RICHLAND:  I think that what this case  
4    begins and ends with, if we assume that there was a  
5    reasonable expectation of privacy, is under the  
6    plurality opinion in O'Connor:  Whether the search  
7    itself was reasonable.  And the jury did, of course,  
8    make a determination as to the purpose of the search.

9                   JUSTICE SCALIA:  I guess we don't decide  
10   our -- our Fourth Amendment privacy cases on the basis  
11   of whether there -- there was an absolute guarantee of  
12   privacy from everybody.  I think -- I think those cases  
13   say that if you think it can be made public by anybody,  
14   you don't -- you don't really have a right of privacy.

15                  So when the -- when the filthy-minded police  
16   chief listens in, it's a very bad thing, but it's not --  
17   it's not offending your right of privacy.  You expected  
18   somebody else could listen in, if not him.

19                  MR. RICHLAND:  I think that's correct,  
20   Justice Scalia.

21                  JUSTICE SCALIA:  I think it is.

22                  MR. RICHLAND:  And I think the reason why  
23   you must have the two-step analysis in a case of this  
24   sort -- that is, first look at the question as to  
25   whether there's a reasonable expectation of privacy,

1 and then determine, if there was, whether the search was  
2 reasonable -- is precisely for the reason that, without  
3 that, what we will have in every case is the claim that  
4 there was a salacious reason, that that was the reason.  
5 And we'll be litigating every one of those cases --

6 JUSTICE GINSBURG: Then, according to what  
7 you just said, the jury determination was superfluous.  
8 If there was no reasonable expectation of privacy  
9 because the officers were told this is just -- we  
10 treat this just like e-mails, it can be monitored, it  
11 can be made public, then there would be no reasonable  
12 expectation of privacy and there would be no question to  
13 go to the jury.

14 MR. RICHLAND: That's correct,  
15 Justice Ginsburg. And it is our position that this  
16 should never have gone to the jury, that summary  
17 judgment should have been granted in favor of the  
18 Ontario Police Department.

19 JUSTICE KENNEDY: So you have two arguments:  
20 One, that it's -- there's no reasonable expectation of  
21 privacy; even if there were, that this was a reasonable  
22 search.

23 MR. RICHLAND: That's correct.

24 JUSTICE SCALIA: Is reasonable expectation  
25 of privacy a judge question or a jury question?

1 MR. RICHLAND: Well, if there is a conflict  
2 in the facts, I presume the jury must resolve those --  
3 that factual conflict. But in this case, I don't  
4 believe there is a conflict in the facts, and, therefore,  
5 it is a judge question.

6 CHIEF JUSTICE ROBERTS: Did your client  
7 treat on-duty text messages different from off-duty text  
8 messages?

9 MR. RICHLAND: It did, once there was an  
10 initial determination made as to the --

11 CHIEF JUSTICE ROBERTS: Why did it do that?

12 MR. RICHLAND: Excuse me. I'm sorry.

13 CHIEF JUSTICE ROBERTS: Why did it treat  
14 them differently? Under your theory, they're all the  
15 same -- no expectation of privacy.

16 MR. RICHLAND: It treated them differently  
17 out of -- because there were two aspects to the case.  
18 One aspect was the initial determination that Chief  
19 Sharp ordered to say: I just want to know, is our  
20 character limit efficacious here, or do we need to have  
21 a higher character limit? And for that purpose, they  
22 needed to just look at all of them. And they did; they  
23 looked at all of the text messages.

24 But then when they saw that some of them may  
25 have involved violations of department regulations, then

1 it was sent to Internal Affairs, and they redacted the  
2 off-duty messages because they were --

3 JUSTICE KENNEDY: Is that something like the  
4 plain view argument? In search and -- search and --

5 MR. RICHLAND: I suppose.

6 JUSTICE KENNEDY: Well, I'm serious. In  
7 other words, there is, under your view --

8 MR. RICHLAND: Yes.

9 JUSTICE KENNEDY: -- legitimate grounds to  
10 look at the messages, and then once they see it, they  
11 don't have to ignore it.

12 MR. RICHLAND: I think that's correct,  
13 Justice Kennedy.

14 CHIEF JUSTICE ROBERTS: Well, why did -- I'm  
15 sorry. I still don't understand. It redacted them,  
16 right?

17 MR. RICHLAND: Redacted because the inquiry  
18 -- the second stage of the inquiry in Internal Affairs --

19 CHIEF JUSTICE ROBERTS: Yes.

20 MR. RICHLAND: -- was simply to determine how  
21 much time was being spent on duty sending personal messages.

22 CHIEF JUSTICE ROBERTS: Right.

23 MR. RICHLAND: So the Internal Affairs  
24 Department said: We don't need to look at the off-duty  
25 messages. We're going to redact them. Why get into all

1 of that? We don't have to look.

2 The department was pretty scrupulous. And I  
3 think that's part of what makes the entire approach that  
4 they took to this reasonable. It makes the search  
5 aspect of the case reasonable. And I think it's  
6 important, in that regard, to look at the nature --

7 JUSTICE SCALIA: Excuse me. You said they  
8 did get to the off-duty text messaging later?

9 MR. RICHLAND: No, it was the other way  
10 around. They looked at the on-duty text messaging at  
11 the later stage, at the Internal Affairs stage. But  
12 they looked at all of the text messages when the only  
13 purpose for the inquiry was to determine how many of the  
14 text messages in general are job-related and how many  
15 were personal? Because the question was: Do we need to  
16 raise the character limit --

17 CHIEF JUSTICE ROBERTS: Well, you don't have  
18 to look at the messages to determine that with respect  
19 to the off-duty messages, right?

20 MR. RICHLAND: Well -- well, you did,  
21 because of the fact, Mr. Chief Justice, that there were  
22 job-related communications even while there was  
23 off-duty. These officers were SWAT team officers. They  
24 were on duty, as Sergeant Quon said, 24/7. That was one  
25 of the reasons why they had the text messaging pagers.

1 JUSTICE ALITO: If someone wanted to send a  
2 message to one of these pagers, what sort of a device  
3 would you need? Do you need to have another pager, or  
4 can you -- could you send a message to one of these  
5 devices from some other type of device?

6 MR. RICHLAND: No, there were messages that  
7 were sent from various other devices. Is the question  
8 whether that could be physically done, electronically  
9 done? Because, yes, clearly that was --

10 JUSTICE ALITO: Yes. What other type of  
11 device could you use to send a message to one of these  
12 pagers?

13 MR. RICHLAND: It -- oh. I'm not certain  
14 if it was something other than another text messaging  
15 pager. It did appear that there were some e-mail  
16 entries in the transcripts themselves, which suggested  
17 that there might have been a way to communicate to them  
18 with e-mail, but that's just -- that's all in the record  
19 that suggests that.

20 JUSTICE SCALIA: You know, if they were  
21 on duty 24/7, there weren't any off-duty messages, were  
22 there?

23 (Laughter.)

24 MR. RICHLAND: Well, I may have misspoke.  
25 They were on call 24/7. They were the SWAT team, and



1 they had to respond to emergencies.

2 JUSTICE GINSBURG: If we take it that the  
3 Stored Communications Act does say that the provider may  
4 not give out the transcripts, if we take that as given,  
5 then how can the department lawfully use the  
6 transcripts?

7 MR. RICHLAND: Well, Justice Ginsburg, first  
8 of all, there was no -- there is no current claim that  
9 anything that the department did with respect to the  
10 Stored Communications Act was unlawful. So it may be  
11 that the other entity, Arch Wireless, violated the  
12 Stored Communications Act, but that would not preclude  
13 the department -- which was, after all, the subscriber  
14 -- from requesting to see what, in fact, the transcripts  
15 disclosed.

16 But in addition to that, there is also the  
17 fact that, as I said before, a reasonable expectation of  
18 privacy couldn't be based simply on the fact that there  
19 was a statute, and particularly not a statute like the  
20 Stored Communications Act, because that's a statute that's  
21 extremely, extremely technical. And there is a --  
22 one has to determine whether an entity was working  
23 either as an electronic communications service or a  
24 remote computing service, and so on. Courts are all  
25 over the board on this. As this Court noted in United

1 States v. Payner, a complicated law like that simply  
2 cannot be the basis for a reasonable expectation of  
3 privacy.

4 And if I may reserve the rest of my time,  
5 thank you.

6 CHIEF JUSTICE ROBERTS: Certainly, counsel.  
7 Mr. Katyal.

8 ORAL ARGUMENT OF NEAL K. KATYAL,  
9 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
10 SUPPORTING THE PETITIONERS

11 MR. KATYAL: Thank you, Mr. Chief Justice,  
12 and may it please the Court:

13 Millions of employees today use technologies  
14 of their -- of their employers under policies  
15 established by those employers. When a government  
16 employer has a no-privacy policy in place that governs  
17 the use of those technologies, ad hoc statements by a  
18 non-policy member cannot create a reasonable expectation  
19 of privacy. Put most simply, the computer help desk  
20 cannot supplant the chief's desk. That simple, clear  
21 rule should have decided this case.

22 Instead, the Ninth Circuit found that the  
23 1999 policy applied to pagers, but then concluded that  
24 that 1999 policy was informally modified years later.  
25 And that decision should be reversed. It disregards

1 this Court's repeated holdings, including 2 years ago in  
2 the Chief Justice's opinion in Engquist v. Oregon about  
3 the greater amount of leeway that the government has  
4 when it acts as an employer. And it also is not  
5 consistent with the plurality opinion in O'Connor, which  
6 observed that when the government adopts a policy that  
7 its employees lack privacy, no reasonable expectation of  
8 privacy exists.

9 JUSTICE KENNEDY: Let me ask you this:  
10 Suppose the department asks for opinion of legal  
11 counsel whether or not transmittal of the transcripts by  
12 Arch to the department was a violation of the Act, and  
13 the counsel said: This was a violation of the Act; they  
14 had no right to send them to you. Would the department  
15 then still have had a right to look at the transcripts?

16 MR. KATYAL: So the question is if the  
17 Stored Communications Act is violated?

18 JUSTICE KENNEDY: Yes. Yes.

19 MR. KATYAL: We don't think the Stored  
20 Communications Act was --

21 JUSTICE KENNEDY: No, but -- no, my  
22 hypothetical is that the -- that there is a legal  
23 counsel's opinion that this was in violation of the Act,  
24 and let's say the district court said it is in violation  
25 of the Act. Let's say we say it's in violation of the

1 Act. Is that the end of case? The department cannot  
2 look at the transcripts?

3 MR. KATYAL: Oh, absolutely not. I mean, I  
4 think this Court has repeatedly said that -- that  
5 various privacy laws don't determine the scope of the  
6 Fourth Amendment. I think it said so most clearly in  
7 California v. Greenwood. And I think that's for a very  
8 simple reason, that things like the Stored  
9 Communications Act, Justice Kennedy, the Electronic  
10 Communications Privacy Act, came about --

11 JUSTICE KENNEDY: Well, California v.  
12 Greenwood was a question of -- of a Fourth Amendment  
13 standard that had to be nationwide. So you say it's the  
14 same -- same thing here?

15 MR. KATYAL: I -- I do think it's the same,  
16 and for this simple reason, that when you have a  
17 nationwide standard or a State standard, it's to fill  
18 the gap, whatever isn't necessarily protected by the  
19 Fourth Amendment. And here --

20 JUSTICE KENNEDY: Well, but Greenwood was in  
21 the -- in the context of the exclusionary rule in  
22 criminal proceedings. I certainly think that States --  
23 at least we could make the reasonable argument that  
24 States can have different policies with respect to their  
25 employees, that have to be respected.

1                   MR. KATYAL: Absolutely, Justice Kennedy. I  
2   don't disagree with that. I think the only question is,  
3   if the -- if I understand your question it's, does a  
4   Federal statute about privacy somehow matter to the  
5   Fourth Amendment analysis about reasonable expectations  
6   of privacy? And there our contention is, no; it's  
7   precisely because Congress enacted the Stored  
8   Communications Act to fill gaps in Fourth Amendment law.  
9   That -- that's why it's enacted.

10                  And for -- for this Court to then use that  
11   very Act to be the template on which reasonable  
12   expectations of privacy may spring I think would be a  
13   very -- it would be a novel proposition. Nor should --

14                  JUSTICE ALITO: Well, that's -- that's a  
15   little bit puzzling because there are -- electronic  
16   communications are stored all over the place in -- and  
17   there isn't a history -- these are -- these are  
18   relatively new. There isn't a well-established  
19   understanding about what is private and what isn't  
20   private. It's a little different from putting garbage  
21   out in front of your house, which has happened for a  
22   long time.

23                  If -- if statutes governing the privacy of  
24   that information don't have any bearing on reasonable  
25   expectation of privacy under the Fourth Amendment, it's

1   some -- I -- I'm at something of a loss to figure out  
2   how to determine whether there is a reasonable  
3   expectation of privacy regarding any of those things.

4                   MR. KATYAL: Well, Justice Alito, I do think  
5   that the underlying premise of your question is one with  
6   which we entirely agree. These are technologies that  
7   are rapidly in flux, in which we don't have intuitive  
8   understandings the way we do about, say, trash and so  
9   on. And it's precisely for that reason I think the  
10  Court should be very careful to constitutionalize and  
11  generate Fourth Amendment rules in this area at the  
12  first instance.

13                   To do so I think really does freeze into --  
14  into -- into place something that the legislature can't  
15  then fix, going to Justice Kennedy's opinion in, for  
16  example, *Murray v. Giaratano*, in which he said that  
17  constitutionalizing in that area -- constitutionalizing  
18  may pretermitt legislative solutions.

19                   Now, here the Stored Communications Act is  
20  not violated under any way, shape, or form. The Stored  
21  Communications Act has two different provisions in it,  
22  one having to do with remote -- remote computing  
23  services, RCSs. That's when an entity offers storage  
24  facilities. And the other is for an electronic  
25  communications service. That is essentially transmission

1 of messages from point to point.

2 CHIEF JUSTICE ROBERTS: Your point that you  
3 made just a moment ago, that we don't want to freeze into  
4 place the constitutional requirements with respect to  
5 new technology, I wonder if it cuts the other way. We're  
6 dealing with an amendment that looks to whether  
7 something is reasonable. And I think it might be the  
8 better course to say that the Constitution applies, but  
9 we're going to be more flexible in determining what's  
10 reasonable because they are dealing with evolving  
11 technology.

12 MR. KATYAL: Well, I think that the -- the  
13 best way -- I think the most -- the easiest way for the  
14 Court to resolve this is to simply say that when we are  
15 dealing with what is reasonable, we look to the policy.  
16 And here there's a policy by the employer, it says that  
17 computer-associated -- computer-related equipment and  
18 others, there's no expectation of privacy. You have a  
19 person who is told that repeatedly.

20 CHIEF JUSTICE ROBERTS: Well, but that puts  
21 a lot of weight -- I mean, there are some things where we  
22 don't bind them. You know, you get the usual parking  
23 garage thing that has got all this small print on the  
24 back. We -- we don't say that you're bound by that,  
25 because nobody reads it.

1                   But in here, I just don't know. I just  
2   don't know how you tell what's reasonable -- I suspect  
3   it might change with how old people are and how  
4   comfortable they are with the technology -- when you have  
5   all these different -- different factors.

6                   You know, they're told you can use it for  
7   private; you've got to pay for it. I think if I pay for  
8   it, it's mine, and it's not the employer's.

9                   MR. KATYAL: Well, I think the clearest way,  
10   Mr. Chief Justice, to decide what is reasonable and what  
11   isn't is actually the terms of the policy. And it seems  
12   to me very little is more unreasonable than expecting  
13   a right to privacy after you've been told in a  
14   policy you have no privacy.

15                  JUSTICE SCALIA: Suppose we find a right of  
16   privacy. Is that the end of the case? I mean, wouldn't  
17   you also -- in order to sustain this lawsuit, wouldn't  
18   you also have to find that it was an unreasonable --

19                  MR. KATYAL: Absolutely. There are two  
20   arrows in the city's quiver, and I think they're right  
21   as to both of them. But --

22                  JUSTICE SCALIA: What's the government's  
23   position on the unreasonableness of the search?

24                  MR. KATYAL: The government's position is  
25   that the Ninth Circuit just from the get-go got the



1 standard wrong by citing -- by using a Schowengerdt test  
2 which was, was this -- was this search the least  
3 restrictive alternative? And we think this Court has  
4 repeatedly said that's the wrong way of thinking about  
5 it, that that puts judges in the position of  
6 second-guessing searches on the ground, that they're  
7 not really fully -- fully equipped to do so.

8 So I do think that is a possible way to  
9 resolve this, Justice Scalia, but --

10 JUSTICE SCALIA: Maybe an easier way, huh?

11 MR. KATYAL: Well, I don't know that it's  
12 easier, in the following sense: I think that thousands  
13 of employers across the country rely on these policies  
14 and millions of employees. And the Ninth Circuit's  
15 decision puts that reliance in some jeopardy, because it  
16 said that you can have an official policy and it can be  
17 taken back by what some ad hoc subordinate says. And  
18 that is, I think, a very destructive notion to the idea  
19 of reliance on these policies and setting --

20 CHIEF JUSTICE ROBERTS: So, your -- your  
21 position would require people basically to have two of  
22 these things with them, two whatever they are,  
23 text messenger or the BlackBerries or whatever, right?  
24 Because assuming they're going to get personal things,  
25 you know, some emergency at home, they're also going to

1 get work things --

2 MR. KATYAL: To the -- under this policy,  
3 yes. You might have an employer that sets a different  
4 policy and allows for some de minimis use and a zone of  
5 privacy in that use. You can have a variety of  
6 different things. But what I think would be dangerous  
7 is to have a blanket rule that constitutionalizes and  
8 says you always have reasonable expectations of privacy  
9 in this technology. The result may be,  
10 Mr. Chief Justice, that employers then won't give that  
11 technology at all to their employees and -- and  
12 eliminate even that de minimis use.

13 Mr. Chief Justice, you had also asked before  
14 about the standpoint of Quon in -- in evaluating  
15 the reasonableness of the search -- of the search in his  
16 perspective of the policy. We think that is the wrong  
17 way of looking at it. Instead, we think the proper test  
18 is the written policy, what it says, and that is the  
19 simplest way, I think, to provided administrability to  
20 the lower courts. They can simply say was this policy  
21 in existence, and not get into those questions of is it  
22 like a parking ticket, did I flip through it too  
23 quickly, did I understand that the policy and the like.

24 JUSTICE SOTOMAYOR: You want to -- you want  
25 to -- you want to undo O'Connor's operational realities

1 of the workplace and say the minute you issued a written  
2 policy that renders all searches okay, even if the  
3 operational realities are different?

4 MR. KATYAL: Not at all, Justice Sotomayor.  
5 I take it the language about operational realities in  
6 the workplace, what is right next to it is looking to  
7 whether or not there are regulations in place, and here  
8 a policy is a regulation. And so --

9 JUSTICE SOTOMAYOR: You may have an argument  
10 that the nature of the policy here and all of the  
11 activities related to it don't prove an operational  
12 reality of privacy, but I don't know why -- you want a  
13 flat rule that says once you have a written policy,  
14 there's no expectation of privacy.

15 MR. KATYAL: And I think that is -- that is  
16 what O'Connor says with respect to the -- as long as the  
17 policy is in place, that -- that's what O'Connor  
18 permits.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 Mr. Dammeier.

21 ORAL ARGUMENT OF DIETER DAMMEIER

22 ON BEHALF OF THE RESPONDENTS

23 MR. DAMMEIER: Thank you, Mr. Chief Justice,  
24 and may it please the Court:

25 I think an underlying fact that we might be

1 skipping over is -- is -- and both the lower courts  
2 recognize this -- that the computer policy that the  
3 department had didn't apply to the pagers on its own.  
4 It -- it only came into play after Lieutenant Duke  
5 modified that policy and told people at the -- at the  
6 meeting that was referred to earlier that the pagers are  
7 now going to be applying with -- with this policy.  
8 It -- it --

9 JUSTICE GINSBURG: Why is -- why is that so?  
10 I mean, it did say associated equipment. And -- and if  
11 an employee is told now e-mails aren't private, so we're  
12 warning you, we can monitor them, wouldn't such an  
13 employee expect the same thing to apply to the pager?

14 MR. DAMMEIER: Well, the policy itself has  
15 two components to it. One is, don't use our equipment,  
16 all associated equipment for personal business.

17 The other part of that policy deals with the  
18 no privacy, and it informs the people there could be  
19 monitoring. And specifically on the acknowledgment form  
20 of that policy, which is at Appendix 156 of the  
21 petition, it specifically says the city will  
22 periodically monitor e-mail, Internet use, and computer  
23 usage.

24 And -- and, again, I think this is why the --  
25 both lower courts came to the conclusion that the

1 computer policy on its own wasn't in play until  
2 Lieutenant Duke announced that, hey, now the pagers are  
3 going -- are going to be in play with this computer  
4 policy. This is the same Lieutenant Duke --

5 JUSTICE GINSBURG: But my question is, an  
6 employee reads this policy and says, oh, my e-mails are  
7 going to be subject to being monitored --

8 MR. DAMMEIER: Sure.

9 JUSTICE GINSBURG: Wouldn't that employee  
10 expect that the policy would carry over to pagers? I mean,  
11 would -- when you think of what's the reason why they want  
12 to look at the e-mails, wouldn't the same reason apply?

13 MR. DAMMEIER: Well, I'm sure the same  
14 reasons could apply, but the -- the city is the one that  
15 writes the rules here. The -- if they want to make it  
16 clear on what it applies to, it certainly should be on  
17 them to write them clear so the employee understands.

18 CHIEF JUSTICE ROBERTS: Maybe -- maybe  
19 everybody else knows this, but what is the difference  
20 between a pager and e-mail?

21 MR. DAMMEIER: Sure. The e-mail, looking at  
22 the computer policy -- that goes through the city's  
23 computer, it goes through the city's server, it goes  
24 through all the equipment that -- that has -- that the  
25 city can easily monitor. Here the pagers are a separate

1 device that goes home with you, that travels with you,  
2 that you can use on duty, off duty, and --

3 CHIEF JUSTICE ROBERTS: You can do that with  
4 e-mails.

5 MR. DAMMEIER: Certainly, certainly. But in  
6 this -- in this -- in this instance with the pagers, it went  
7 through no city equipment; it went through Arch Wireless  
8 and then was transmitted to another -- another person.

9 So, again, to Duke -- Duke is the one that  
10 said: Hey, this -- this comes into play. But  
11 Lieutenant Duke is also the one that gave the privacy  
12 guarantee to the SWAT team members and said: As long as  
13 you pay the overages, we're not going to look at your  
14 pagers; we're not going to look at the messages. So if  
15 -- if you couple both of those modifications, both by  
16 the same lieutenant -- and he wasn't just some  
17 subordinate; he was the lieutenant in charge of the  
18 administrative bureau; he was the administrative bureau  
19 commander.

20 JUSTICE GINSBURG: I thought that he said --  
21 he was saying: But as far as billing is concerned, I'm  
22 not going to look at these; if you use more than 25,000  
23 characters, you pay the extra, and that will be the end  
24 of it. If you contest that, then I'll look to see  
25 whether those in excess of 25,000 characters were for

1 work purposes or private purposes.

2 And so he's talking about the billing. He  
3 hasn't retracted what was said at the meeting about -- that  
4 these text messages are subject to audit.

5 MR. DAMMEIER: This -- this is what Sergeant  
6 Quon testified to, that he attributed to Lieutenant  
7 Duke: If you don't want us to read it, pay the overage  
8 fee.

9 JUSTICE BREYER: But what's wrong with his  
10 deciding: I don't like to do this anymore? I don't  
11 want to collect all this money; it's too complicated;  
12 and so I don't know how many of these messages are  
13 related to work and how many they are just mucking  
14 around prying into each other's business.

15 MR. DAMMEIER: He can certainly --

16 JUSTICE BREYER: So I would like to know, so  
17 therefore I'm going to look and see. Now, what's  
18 unreasonable about that?

19 MR. DAMMEIER: Well, he certainly could say  
20 I don't want to do this anymore, and he could --

21 JUSTICE BREYER: Oh, no.

22 MR. DAMMEIER: And he could tell everybody.

23 JUSTICE BREYER: I'm saying what's  
24 -- the city owns the pager. It's a pager used for work.  
25 They are giving a privilege to people if they want to

1 use it off work. It seems to be involving a big amount  
2 of collection, and so what he wants to do is he wants to  
3 see how much of this is being used for work and how much  
4 is of this not being used for work.

5 My question, which I just repeated, is why  
6 is that an unreasonable thing?

7 MR. DAMMEIER: I don't think that request is  
8 unreasonable, Your Honor.

9 JUSTICE BREYER: Fine. And then if that's  
10 not unreasonable, why is what went on here that is  
11 any different?

12 MR. DAMMEIER: Well, here the jury -- the  
13 only fact that was determined by the jury was the reason  
14 for the search. And that's found at the appendix to the  
15 petition page 119. This is the only finding that the  
16 jury made as to the purpose of the search: To determine  
17 the efficacy of the existing character limits to ensure  
18 that officers were not being required to pay for the  
19 work-related expenses.

20 JUSTICE BREYER: How does that differ from  
21 what I just said?

22 MR. DAMMEIER: Well, it -- it comes into  
23 play on -- on the scope of the search. Again --

24 JUSTICE BREYER: No, I understand. I thought  
25 it's just a more -- a few more words to say just what I



1 said. That they wanted to look into this because they  
2 are tired about collecting so much money.

3 It's the third time I've said the same  
4 thing; probably it's my fault I'm not being clear. But  
5 it looked as if they wanted to know how many are being  
6 sent for work purposes, how many for private purposes  
7 including prying into people's business, which wasn't  
8 too desirable, and -- and -- so that they could get  
9 the -- the charges right.

10 Now, that sounds like what the jury said they  
11 were doing, too. And my question was -- I don't see  
12 anything, quite honestly, unreasonable about that, where  
13 you're the employer, where it's a SWAT team, where --  
14 where -- where you're paying for this in the first  
15 place. So the reason I ask it is I would like you  
16 clearly to explain what's unreasonable about it.

17 MR. DAMMEIER: The scope of the search was  
18 unreasonable.

19 JUSTICE BREYER: That's the conclusion. Now,  
20 what's your reason?

21 MR. DAMMEIER: Under -- under -- looking at  
22 O'Connor, you have to -- you have to look to make sure  
23 that the search is not excessively intrusive. Here,  
24 what they did was they took all the messages and started  
25 reading them. Given the purpose, the limited purpose

1 that was found by the jury for the search, they didn't  
2 need to do that.

3 JUSTICE BREYER: Well, explain that one to  
4 me.

5 MR. DAMMEIER: They --

6 JUSTICE BREYER: Being naive about this, if  
7 I had a -- like, 20, 30,000 characters in 1,800 messages  
8 and I wanted to know which are personal and which are  
9 work-related, a good way to get at least a good first  
10 cut would be to read them.

11 (Laughter.)

12 JUSTICE BREYER: Okay? So I start off  
13 thinking that seems to be reasonable to me. That's what  
14 I would do.

15 MR. DAMMEIER: Well, that's certainly one --

16 JUSTICE BREYER: So all right. Now you tell  
17 me why that isn't reasonable.

18 MR. DAMMEIER: That's one of the ways they  
19 could have done it. They could have got -- they could  
20 have got consent from the officers first to do it. They  
21 could have had the officers themselves count the  
22 messages. After all, the officers were the ones that  
23 were paying for the overages.

24 JUSTICE BREYER: All right. But the  
25 officers might say: I don't want you to read these

1 messages because they happen to be about the sexual  
2 activity of some of my coworkers and their wives and me,  
3 which happened to be the case here.

4 MR. DAMMEIER: Right.

5 JUSTICE BREYER: So I guess if you had asked  
6 for consent, the officer would have said no.

7 (Laughter.)

8 JUSTICE BREYER: Now, he says, I still want to  
9 know. I will be repeating it. All right. So what -- that  
10 didn't sound very practical. What's the other way?

11 MR. DAMMEIER: Well, they could have -- they  
12 could have had the officers themselves count the  
13 messages.

14 JUSTICE BREYER: Well, the officer is going  
15 to say, hey, these are all big -- work-related. I'll  
16 tell you that. I only had two.

17 MR. DAMMEIER: Well --

18 (Laughter.)

19 JUSTICE BREYER: Okay. What's a third way?

20 MR. DAMMEIER: Okay. They -- the lieutenant  
21 could have said, hey, we're going to stop this practice  
22 that I started, and from this month forward make sure  
23 all you do is business-related. No more --

24 JUSTICE BREYER: That would have been rough  
25 on them. Because you want to let them have a few; you

1     need pizza when you're out on duty. You want to -- there  
2     are --

3                     MR. DAMMEIER: The --

4                     JUSTICE BREYER: Look, so far I listened to four  
5     things, and I'm just being naive about it. I'll read it  
6     more closely, but I don't see why these four things are  
7     so obviously more reasonable than what they did.

8                     MR. DAMMEIER: They also -- they could have  
9     had the officers redact the private messages and then  
10    given it -- given it to the department.

11                    JUSTICE SOTOMAYOR: But suppose that their  
12    application of what -- how much was being spent on  
13    business-related, all of your suggestions about having  
14    the officer do things does nothing about their application.

15                    MR. DAMMEIER: Well --

16                    JUSTICE SOTOMAYOR: You're -- you're  
17    relying on the very person you're auditing to do the  
18    audit for you. That doesn't seem either practical or  
19    business-wise.

20                    MR. DAMMEIER: Well, other than my one  
21    sample of -- example of saying, hey, let's -- let's stop  
22    the personal use and we're going to have a test month  
23    to determine exactly how many messages we need for our  
24    business-related purposes.

25                    JUSTICE SOTOMAYOR: That goes back to -- I

1 don't understand that. You're still relying on the  
2 person you're auditing to say to you I'm only using  
3 it for business. That -- that's just not logical.

4 MR. DAMMEIER: Well, but the -- the sole  
5 purpose of the search was only to find out if officers  
6 were paying for business-related messages that they  
7 didn't need to pay for.

8 JUSTICE BREYER: But the question, in the  
9 Constitution, the word is "unreasonable." Is it a  
10 reasonable or unreasonable? So the question -- what I  
11 asked is not maybe you would have gotten a better result  
12 if you had hired Bain Associates and Bain would have  
13 done a 4-month study at a cost of \$50,000.

14 But I could say a person who doesn't want  
15 to hire Bain and who doesn't want to rely on the  
16 unverified word of the officers who were using these for  
17 God knows what is not being unreasonable. That's the  
18 ultimate issue. And that's why I'm putting it to you  
19 to show me that what they did was unreasonable.

20 MR. DAMMEIER: I think it comes down from  
21 that perspective on the excessiveness of the search.

22 CHIEF JUSTICE ROBERTS: The only reason --  
23 the only reason the officer would not be accurate -- I  
24 mean, I don't understand why the redaction is such a bad  
25 idea. He just says these are private. And that allows

1 -- and then you could look at everything else. You can  
2 see if he's going too far because then everything else  
3 would be there. But in terms of -- the jury found this  
4 was not done to find out what was in the messages, so  
5 they don't need to find out what's in the messages.  
6 That's just a question. He has to pay for everything he  
7 -- he redacts.

8 MR. DAMMEIER: That -- that's exactly what  
9 we're saying. I mean, the interest here is -- is for  
10 the officer to be upfront as far as what's  
11 business-related to -- if he's paying for things that he  
12 shouldn't be paying for, I'm sure he would -- he would be  
13 forthright about that.

14 CHIEF JUSTICE ROBERTS: I mean, it's no  
15 different than the police coming in and saying, well,  
16 we're going to look at, you know, what's in every drawer  
17 and then -- you know, then if it turns out to be  
18 personal and private, we won't -- you know, we won't --  
19 it just happens that we came upon, I guess, is  
20 Justice Kennedy's point. It's kind of the plain view  
21 doctrine, except they get to decide how broad what they  
22 can view is.

23 MR. DAMMEIER: That's true. I agree with  
24 that.

25 JUSTICE STEVENS: Can I ask you this question

1 about the basic background of a reasonable expectation  
2 of privacy? This is SWAT team work. Supposing it was an  
3 officer answering 911 calls or things like that. Isn't  
4 there sort of a background expectation that sooner or  
5 later, somebody might have to look at communications for  
6 this particular kind of law enforcement officer?

7 MR. DAMMEIER: Well, certainly -- certainly  
8 that could happen in any number of --

9 JUSTICE STEVENS: I mean, wouldn't you just  
10 assume that that whole universe of conversations by SWAT  
11 officers who are on duty 24/7 might well have to be  
12 reviewed by some member of the public or some of their  
13 superiors?

14 MR. DAMMEIER: But that -- that could be a  
15 possibility on any -- on anything that they do in their  
16 lives, whether it be their personal life or --

17 JUSTICE STEVENS: Well, but it's over  
18 official -- it's over the official communications  
19 equipment that they use for purposes of law enforcement.

20 MR. DAMMEIER: Correct. Correct.

21 JUSTICE KENNEDY: I certainly -- criminal  
22 defense attorneys challenging probable cause would want  
23 to look at these. They would want to see if there is  
24 exonerating evidence, under the rule that all  
25 exonerating evidence has to be submitted. It would seem

1 to me that it's quite likely, as Justice Stevens'  
2 question indicates, that there is going to -- that these  
3 are going to be discoverable.

4 MR. DAMMEIER: Well, it's just like my mail  
5 that I might send out to somebody. It might be  
6 discoverable in litigation, but that doesn't --

7 JUSTICE KENNEDY: But you're not -- you're  
8 not a police officer who is making arrests. I mean,  
9 this -- this is part and parcel of determining probable  
10 cause and mitigating evidence.

11 MR. DAMMEIER: No, it -- obviously, there  
12 are different reasons that could come into play that  
13 would legally produce these messages, certainly.

14 JUSTICE SCALIA: Mr. Dammeier, you could say  
15 the same thing about private phones. There are  
16 obviously circumstances in which whether you were making  
17 a call between certain times becomes relevant to  
18 litigation. So you could say that destroys the  
19 expectation of privacy? I'm not sure. I hope we don't  
20 say that.

21 MR. DAMMEIER: No. No. It's like -- this  
22 -- in O'Connor, all nine Justices in O'Connor found an  
23 expectation of privacy in Dr. Ortega's desk, because  
24 even though it was a state-owned desk, you still have an  
25 expectation of privacy.



1 JUSTICE STEVENS: Yes, but there's no  
2 normal reason for going through somebody's desk; whereas,  
3 there would be a very ordinary -- ordinary reason for  
4 reviewing calls made to the SWAT -- members of the SWAT  
5 team, it seems to me.

6 MR. DAMMEIER: Well, there are -- as talked  
7 about in O'Connor, there are certainly a lot of valid  
8 reasons to go through a public employee's desk, if you're  
9 looking for a file or if you're looking for --

10 JUSTICE STEVENS: Yes.

11 MR. DAMMEIER: Or for -- or for an  
12 investigation. But still, there was that expectation of  
13 privacy. You're talking about employees that -- in  
14 today's society, I think work and private life get  
15 melded together. Here, we're talking about SWAT people  
16 24/7 --

17 JUSTICE SCALIA: Well, to say that there's  
18 an expectation of privacy in the desk doesn't say that  
19 every intrusion into that expectation of privacy is an  
20 unreasonable one. There could be that expectation of  
21 privacy and, still, for some reason -- let's assume there  
22 has been a theft in the building, and it's known that  
23 what was taken has not gotten out of the building. It's  
24 conceivable that that would be a valid reason to intrude  
25 upon the expectation of privacy, right?

1                   MR. DAMMEIER: Correct. I don't think we're  
2 taking away the government's ability to do searches  
3 under proper circumstances.

4                   JUSTICE SCALIA: Well, why isn't this a  
5 proper circumstance?

6                   MR. DAMMEIER: The initial circumstance  
7 might be proper, but how they effectuated it was not.  
8 It was excessively intrusive. They did not -- the  
9 purpose was to find out if they were paying for enough  
10 work-related messages. They did not need to look at  
11 these, what they knew were going to be private messages.  
12 They knew -- the lieutenant had this arrangement that they  
13 could use this for personal purposes. They knew what  
14 they were going to be looking at.

15                  JUSTICE SCALIA: They didn't know which ones  
16 were private messages, did they?

17                  MR. DAMMEIER: Not until they read them.

18                  JUSTICE SCALIA: Not until they read them.

19                  MR. DAMMEIER: But there certainly -- they  
20 certainly knew what might be coming because of the  
21 arrangement that Lieutenant Duke had in place.

22                  Here -- here I think that's --

23                  JUSTICE ALITO: What was the arrangement  
24 that Lieutenant Duke had in place? I thought all he  
25 said was: I don't have an intent to read these,

1 because it's too much trouble, so if you go over and you  
2 pay me the extra, I'm not going to read them.

3 MR. DAMMEIER: His --

4 JUSTICE ALITO: Did he ever say that -- that  
5 I'm not -- that you have a privacy right in these  
6 things?

7 MR. DAMMEIER: No, but according -- according  
8 to Sergeant Quon's testimony, he told him: As long as you  
9 pay the overages, we're not going to read them. And that --

10 JUSTICE GINSBURG: Did he say "we"? He -- even  
11 Quon didn't say that. Duke said he wouldn't do it. But  
12 earlier, the -- at the meeting, the statement was made  
13 that these are open to audit. Didn't say only by  
14 Lieutenant Duke.

15 MR. DAMMEIER: True. True. I agree. But  
16 it was Lieutenant Duke, the one that was making the  
17 announcement that now these pagers are going to fall  
18 under the computer policy, the same lieutenant who then  
19 gave the assurance that as long as you pay the overages,  
20 we're not -- we're not going to look at them.

21 I mean, when you're talking about the  
22 operational reality of O'Connor, that was the  
23 operational reality. The SWAT members knew: As long as  
24 I pay the overages, my messages aren't going to be  
25 reviewed.

1 CHIEF JUSTICE ROBERTS: What happens, just  
2 out of curiosity, if you're -- he is on the pager and  
3 sending a message and they're trying to reach him for,  
4 you know, a SWAT team crisis? Does he -- does the one  
5 kind of trump the other, or do they get a busy signal?

6 MR. DAMMEIER: I don't think that's in the  
7 record. However, my understanding is that you would get  
8 it in between messages. So messages are going out and  
9 coming in at the same time, pretty much.

10 CHIEF JUSTICE ROBERTS: And would you know  
11 where the message was coming from?

12 MR. DAMMEIER: I believe so. It identifies  
13 where it's coming from. It identifies the number of  
14 where it's coming from. If you know the number, you  
15 know where it's coming from.

16 JUSTICE KENNEDY: And he's talking with  
17 a girlfriend, and he has a voice mail saying that your  
18 call is very important to us; we'll get back to you?

19 (Laughter.)

20 MR. DAMMEIER: Well, I think with the text  
21 messages -- and that's what we are talking about the  
22 transcripts of, were the text messages that were data  
23 transferred from device to device, and here, you know,  
24 we come back to -- I did want to touch a little bit on  
25 the Stored Communications Act having play on somebody's

1 expectation of privacy -- you know, it's -- lawfully,  
2 those messages were protected. And I think, looking at  
3 people's expectation of privacy, that should be a  
4 component. It certainly may be not the end-all to the  
5 question, but it should be a factor in determining  
6 whether or not there's going to be an expectation of  
7 privacy.

8 JUSTICE SCALIA: Did -- did he know about  
9 that statute? I didn't know about it.

10 MR. DAMMEIER: That's not in -- that's not  
11 in the record. That is not in the record. But --

12 JUSTICE SCALIA: Can we assume he didn't?

13 MR. DAMMEIER: Right. Well, we can assume  
14 that, but we also --

15 JUSTICE SCALIA: And what difference would that  
16 make?

17 MR. DAMMEIER: I still don't think anything,  
18 given the operational realities --

19 JUSTICE SCALIA: I don't see how it can affect  
20 his expectation of privacy, if he didn't even know about it.

21 MR. DAMMEIER: Well, it's -- it's just like  
22 the California Public Records Act. We should also  
23 assume he didn't know about that as well, because the --  
24 Petitioners make an argument that because there is this  
25 California Public Records Act, that that may diminish

1 one's expectation of privacy. Certainly, if we're  
2 going to have that, then we should also be having the  
3 Stored Communications Act that might enhance the --

4 JUSTICE SCALIA: Ignorance of the law is no  
5 excuse, is what you're saying?

6 JUSTICE SOTOMAYOR: Do you have any theory,  
7 or do you make any argument that Florio, Trujillo, and  
8 Quon's wife can succeed in their Fourth Amendment  
9 claims, if Quon can't?

10 MR. DAMMEIER: I do. We, in our brief, try  
11 to analogize that to the mail. I think when they sent  
12 messages to -- to Sergeant Quon, that was a letter that  
13 I sent. And here, the department didn't go get that  
14 letter from Sergeant Quon after -- after delivery,  
15 meaning go get it from his pager. They went to the  
16 equivalent of the Post Office, which was Arch Wireless,  
17 and got a copy off of their server. So I -- I think --  
18 and, again, analogizing to the mail, they have an  
19 expectation of privacy while that message is in the  
20 course of delivery.

21 CHIEF JUSTICE ROBERTS: Well --

22 JUSTICE ALITO: Well, suppose it was  
23 perfectly clear that -- I mean, suppose that the department  
24 gave Mr. Quon a policy -- a statement that says: Sign  
25 this, you acknowledge that your pager is to be used only

1 for work and that you have no privacy interest in it  
2 whatsoever; we're going to monitor this every day.  
3 And then these other individuals sent him messages.  
4 You would still say they have an expectation  
5 of privacy in those messages?

6 MR. DAMMEIER: Until the point that it's on  
7 Quon's pager. I think under that scenario, that they  
8 could have obtained the messages from Quon, but they  
9 went over to Arch, the equivalent of the Post Office,  
10 and got them from them.

11 It's like if I -- I make a copy of a letter  
12 before I send it to somebody. You know, down the road,  
13 I might not know what happens and I might lose my  
14 expectation of privacy down the road, but that copy I  
15 kept, I think there is still an expectation.

16 JUSTICE SCALIA: Well, what -- when you send  
17 a text message to somebody else, aren't you quite aware  
18 that that text message will remain confidential only to  
19 the extent that either the recipient keeps it  
20 confidential -- and he can disclose it -- or somebody  
21 else who has power over the recipient or over the  
22 recipient's phone chooses to look at it? Don't -- isn't  
23 that understood when you send somebody a text message?

24 MR. DAMMEIER: I -- I agree with that, and --

25 JUSTICE SCALIA: Well, so she should have

1 understood that, you know, whoever could get ahold of  
2 his phone lawfully can read the message. In other  
3 words, I don't see that she's in a -- in a different  
4 position from Quon himself.

5 MR. DAMMEIER: I think it's just a slightly  
6 different one. I mean, first of all, they didn't  
7 lawfully get it; there was a violation of the Stored  
8 Communications Act to get it.

9 JUSTICE SCALIA: Well, that's a different  
10 issue.

11 MR. DAMMEIER: But here, again, had they  
12 gotten consent from -- from Quon and got it from him  
13 directly, that's a -- that's a different story.

14 CHIEF JUSTICE ROBERTS: Well, again, it depends  
15 upon their reasonable expectation. Do any of these  
16 other people know about Arch Wireless? Don't they just  
17 assume that once they send something to Quon, it's going  
18 to Quon?

19 MR. DAMMEIER: That's -- that is true. I  
20 mean, they expect --

21 CHIEF JUSTICE ROBERTS: Well, then they  
22 can't have a reasonable expectation of privacy based on  
23 the fact that their communication is routed through a  
24 communications company.

25 MR. DAMMEIER: Well, they -- they expect



1     that some company, I'm sure, is going to have to be  
2     processing the delivery of this message.  And --

3                 CHIEF JUSTICE ROBERTS:  Well, I didn't -- I  
4     wouldn't think that.  I thought, you know, you push a  
5     button; it goes right to the other thing.

6                 (Laughter.)

7                 MR. DAMMEIER:  Well --

8                 JUSTICE SCALIA:  You mean it doesn't go  
9     right to the other thing?

10                (Laughter.)

11                MR. DAMMEIER:  It's -- I mean, it's like  
12     with e-mails.  When we send an e-mail, that goes through  
13     some e-mail provider, whether it be AOL or Yahoo.  It's  
14     going through some service provider.  Just like when  
15     we send a letter or package, it's going through -- some  
16     provider is going to move that for us, until it gets to  
17     the end recipient.  And like the mail, that message enjoys  
18     an expectation of privacy while it's with the Post  
19     Office --

20                JUSTICE SCALIA:  Can you print these things  
21     out?  Could Quon print these -- these spicy  
22     conversations out and circulate them among his buddies?

23                MR. DAMMEIER:  Well, he could have  
24     ultimately, sure.

25                JUSTICE SCALIA:  Well --

1                   MR. DAMMEIER: And -- and like, when I get a  
2 piece of mail from somebody, I could do that as well,  
3 but that doesn't mean that the government gets to go to  
4 the Post Office and get my mail before I get it. I  
5 think -- I think that, you know, certainly adds a little  
6 bit to the correspondence that dealt with --

7                   CHIEF JUSTICE ROBERTS: But just -- just to  
8 be clear: You think if these messages went straight to  
9 Quon that there'd be no problem from the point of  
10 view of the senders? I mean, no problem in searching --  
11 getting them from Quon?

12                  MR. DAMMEIER: I think it's certainly a  
13 harder argument for me to make --

14                  CHIEF JUSTICE ROBERTS: Yes.

15                  MR. DAMMEIER: -- that they have an  
16 expectation after -- after Quon has it.

17                  CHIEF JUSTICE ROBERTS: So we have to assume  
18 for your argument to succeed that they know that this goes  
19 somewhere else and then it's processed and then it goes  
20 to Quon.

21                  MR. DAMMEIER: Yes, but I think in today's  
22 -- I think in today's society that's -- that's a  
23 reasonable assumption to make. One --

24                  JUSTICE SCALIA: Yes, I didn't know.

25                  MR. DAMMEIER: I think it might have been

1 Florio testified that she actually called her carrier to  
2 find out, you know, if -- if the messages that she would  
3 transmit would be maintained and that was -- that they  
4 didn't maintain a copy. So there was some understanding  
5 of how the process worked.

6 JUSTICE ALITO: Can an officer who has one  
7 of these pagers delete messages from the pager --

8 MR. DAMMEIER: Yes.

9 JUSTICE ALITO: -- so that they can't be  
10 recovered by the department if the pager is turned into  
11 the department?

12 MR. DAMMEIER: Sure. Yes.

13 JUSTICE ALITO: They can delete them?

14 MR. DAMMEIER: They can delete them. Just  
15 like if they received a letter, they could be put in the  
16 shredder.

17 JUSTICE SCALIA: Suppose I sent somebody a  
18 letter and -- and I have privacy in that letter, and  
19 let's assume it's intercepted at the Post Office, but I  
20 have also published the letter in a letter to the editor  
21 of the newspaper. I have written the following letter  
22 to Sergeant Quon. Do I still have a right -- a right of  
23 privacy in that letter?

24 MR. DAMMEIER: Well, I think then certainly  
25 your expectation may be diminished.

1 JUSTICE SCALIA: Well, but that's the  
2 situation here. The -- the central location that stores  
3 the message is one thing, but she's made -- made the  
4 message public effectively by sending it to Quon. Once  
5 it gets to Quon, she knows that Quon can make it public  
6 or that the employer can -- can find out about it.

7 MR. DAMMEIER: But that would create a  
8 free-for-all in service providers. If -- if while this  
9 message, after it's sent and it's in transit --

10 JUSTICE SCALIA: Right.

11 MR. DAMMEIER: It's a free-for-all. The  
12 government could just go in and --

13 JUSTICE SCALIA: Exactly. That -- and  
14 that's why you have the statute, because the Fourth  
15 Amendment wouldn't solve the problem, because you are  
16 effectively making it public by sending it to somebody  
17 whom you don't know is immune from disclosure. So, in  
18 order to stop the intermediary from making it public,  
19 you needed the statute. Otherwise you wouldn't need it;  
20 the Fourth Amendment would solve the problem, right?

21 MR. DAMMEIER: Well, certainly, obviously  
22 the statute could come into play in addition to the  
23 Fourth Amendment. But here, you know, I come back to  
24 the mail analogy. Just because at the end of the line  
25 somebody might disseminate my letter doesn't lose an

1 expectation in the copy that I make that I may keep or  
2 that in the course of delivery the Post Office might  
3 keep. I still enjoy an expectation -- and the Fourth  
4 Amendment certainly protects that copy, that either I  
5 kept or the Post Office is keeping in the course of  
6 delivery.

7 Certainly, at the end of the line, that letter  
8 could be published to the world, but that's not the same  
9 thing as the government coming in and getting a copy of  
10 it while it was being delivered.

11 JUSTICE ALITO: Are you sure that -- are you  
12 sure about your answer to the question of deletion?  
13 It's not like deleting something from a computer which  
14 doesn't really delete it from the computer?

15 MR. DAMMEIER: Honestly, I'm not -- that's  
16 not in the record, and the -- how that pager works as  
17 far as deleting, I couldn't be certain that it would be  
18 deleted forever. I would certainly not.

19 One -- one of the points to -- to raise,  
20 too, was that most of these texts took place off duty  
21 when dealing with Sergeant Quon. So, again, back to  
22 looking at the actual practice that O'Connor has us look  
23 at, you know, here again --

24 JUSTICE SOTOMAYOR: I thought the factual  
25 record was the opposite, that in fact most of the calls

1     were -- not most, but a huge number of calls were  
2     happening on duty.

3                   MR. DAMMEIER:   There were -- there were a  
4     large number on-duty.   I think it was broken down to  
5     where the average was 27 in a work shift and the most on  
6     one day was 80.   But also they talked about -- they took  
7     about 15 seconds.   So you're talking about an average  
8     of about 7 minutes during -- during a work day.

9                   But the testimony of Sergeant Quon was that  
10    most of these were actually off-duty.   And, you know, I  
11    certainly -- I think that should come into play, given  
12    the department -- they gave them pagers.   And it wasn't  
13    a one-way use; it wasn't, hey, this is, you know, for the  
14    benefit of the employee.   The department received a benefit.  
15    I mean, they wanted to be able to have these SWAT guys  
16    show up quickly, respond quickly, and there was a mix on  
17    -- on the reasons for these pagers.

18                   The exchange was, we're going to let you  
19    use these for personal purposes, and given that reality,  
20    you should be able to have some -- some expectation of  
21    privacy in that use.   It's like if I pick up a phone and  
22    I'm a public employee and I call my wife, I should be  
23    able to have some expectation of privacy in a  
24    conversation, especially given, you know -- you talk  
25    about guys that are on 24/7.   Do they have no private

1 life, now? Do they not have --

2 JUSTICE GINSBURG: I thought the policy was  
3 limited personal use.

4 MR. DAMMEIER: The computer policy was  
5 limited personal use. Again, depending on how that  
6 comes into play with what Lieutenant Duke --

7 JUSTICE GINSBURG: But the -- the notice was  
8 we're going to treat these just like e-mails, and  
9 e-mails were limited personal use.

10 MR. DAMMEIER: Correct. With -- with the  
11 additional modification by -- by Duke, that you could  
12 also use them for personal purposes, from day one when  
13 the pagers were issued.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MR. DAMMEIER: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Richland, you  
17 have 3 minutes remaining.

18 REBUTTAL ARGUMENT OF KENT L. RICHARDS

19 ON BEHALF OF THE PETITIONERS

20 MR. RICHLAND: Thank you. I would first  
21 like to just make it clear that what it is being claimed  
22 was the guarantee of privacy by Lieutenant Duke is  
23 really absolutely not that at all. And I would refer  
24 the Court to Joint Appendix page 40, which does summarize  
25 that, and it says -- here is what precisely what

1 Lieutenant Duke said: "Because of the overage  
2 Lieutenant Duke went to Sergeant Quon and told him the  
3 city-issued two-way pagers were considered e-mail and  
4 could be audited." So that's what he said first.

5 Then he said -- he told Sergeant Quon it was  
6 not his -- his intent to audit employees' text messages  
7 to see if the overages were due to work-related  
8 transmissions.

9 He advised Sergeant Quon he, Sergeant Quon,  
10 could reimburse the city for the overages so he, Duke,  
11 would not have to audit the transmission and see how  
12 many messages were non-work-related. Lieutenant Duke  
13 told Sergeant Quon he is doing this because if anybody  
14 wished to challenge their overage, he could audit the  
15 text transmissions to verify how many were  
16 non-work-related, and then, finally, Lieutenant Duke  
17 added, the text messages were considered public records  
18 and could be audited at any time.

19 That is what is being characterized as a  
20 guarantee of privacy. It's hard to see how that in any  
21 way undercuts the official written policy.

22 JUSTICE SCALIA: Mr. Richland, do you take  
23 any position on whether Jerilyn Quon, April Florio, and  
24 Steve Trujillo stand in the same position as Sergeant  
25 Quon insofar as this lawsuit is concerned?



1           MR. RICHLAND: We do, with respect -- in at  
2     least one respect, and that is: If Sergeant Quon loses,  
3     then we think the other plaintiffs must also lose.

4           JUSTICE SCALIA: Why?

5           MR. RICHLAND: Yes. The reason for that is  
6     that this Court has held on many occasions that, once  
7     one has sent a communication or an object to another  
8     person, they lose their expectation of privacy in --

9           JUSTICE SOTOMAYOR: That means the  
10    government can set up an interception mechanism on  
11    telephone transmissions, on e-mail, computer  
12    transmissions --

13          MR. RICHLAND: It -- it does not mean that,  
14    Justice Sotomayor.

15          JUSTICE SOTOMAYOR: If it doesn't mean that,  
16    answer his argument that, yes, you could take anything  
17    from Quon, but the storage -- you went to the storage  
18    facility, which is a Post Office.

19          MR. RICHLAND: And he says it's a Post  
20    Office, but the truth is that all of these plaintiffs  
21    admitted that they knew that this was a  
22    department-issued pager, and this wasn't a Post Office.  
23    Arch Wireless was the department's agent.

24                 These text messages were being sent to  
25    someplace. Both the written policy and the oral policy

1 indicated that they were being stored ---

2 JUSTICE SOTOMAYOR: So you have to get  
3 into who owned --

4 MR. RICHLAND: Excuse me.

5 JUSTICE SOTOMAYOR: Whether this was a -- we  
6 have to get into the Storage Act and figure out whether  
7 this was an RCN or ACS?

8 MR. RICHLAND: Well, I think that -- I  
9 don't know that it's necessary to do that, because I  
10 think that all that must be determined is -- and I don't  
11 think whether it's an ECS or RCS is -- you would require  
12 that to determine who owned it, because it was clear  
13 that Arch acted solely as the city's agent.

14 JUSTICE SCALIA: Whoa, whoa. I'm not sure  
15 you're doing the city a favor by making Arch the city's  
16 agent --

17 MR. RICHLAND: I understand --

18 JUSTICE SCALIA: -- as opposed to an  
19 independent contractor who is doing business with the  
20 city.

21 MR. RICHLAND: The point is --

22 JUSTICE SCALIA: You sure you want to live  
23 with that?

24 MR. RICHLAND: I don't mean "agent" in -- in  
25 the most literal sense, Justice Scalia.

1 JUSTICE SCALIA: Oh, okay.

2 MR. RICHLAND: What I mean is that they  
3 were -- in effect, when there was a delivery to Arch  
4 Wireless, it was a delivery to the city. And all of  
5 these individuals knew that this was city equipment, and,  
6 therefore, this was being delivered to the city.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 12:08 p.m., the case in the  
10 above-entitled matter was submitted.)

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