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P R O C E E D I N G S

(11:06 a.m.)

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

Mr. Richland.

ORAL ARGUMENT OF KENT L. RICHLAND
ON BEHALF OF THE PETITIONERS

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

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

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

CHIEF JUSTICE ROBERTS: The written policy? The whole -- the argument here of course is that that was modified by the instructions he got from the lieutenant. Do we follow the written policy or the policy they allegedly enforced in practice?

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

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

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

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

23 MR. RICHLAND: Yes, yes.

24 CHIEF JUSTICE ROBERTS: And even with the
25 written policy, he has the instructions, everybody

1 agrees you can use this pager for private
2 communications.

3 MR. RICHLAND: That is correct.

4 CHIEF JUSTICE ROBERTS: We are not going to
5 audit them. Right? That's what he said. He has to pay
6 for them. Right? Now, most people will say, well, if
7 you're paying for them, they are yours. And it
8 particularly covered messages off-duty.

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

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

21 JUSTICE GINSBURG: In addition to -- that
22 was said at the meeting, and Lieutenant Duke, who was
23 the same one who later says: I'm not going to monitor
24 as long as you pay the difference. There was the
25 statement at the meeting by that same person. Wasn't

1 there something in writing by the police chief to follow
2 up after that meeting?

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

8 CHIEF JUSTICE ROBERTS: Let me ask you --
9 let me ask you to put the written policy aside.
10 Hypothetical case, there is no written policy. Would he
11 have a reasonable expectation in the privacy of his
12 personal e-mail, text messages, in that case? In other
13 words, all we know is the list that I went through
14 earlier.

15 MR. RICHLAND: Yes. Yes, Mr. Chief Justice.
16 Assuming all the other factors in this case were
17 present. That is, he is using his department-issued
18 pager; he is a police officer and indeed a member of the
19 high-profile SWAT team of the police department. He
20 should be aware just by virtue of that fact that there
21 is going to be litigation involving incidents that the
22 SWAT team gets involved in where there will be requests
23 for the communications that are made on that official
24 department-issued pager.

25 And in addition, he should be aware of the

1 fact -- and this is something that the dissenters to
2 denial of en banc said below. There may be inquiries
3 from boards of the police to determine whether the
4 conduct of the police in a particular incident is
5 appropriate.

6 JUSTICE SCALIA: Mr. Richland, a little
7 earlier you referred us to page 152 and 156?

8 MR. RICHLAND: Of the appendix to the
9 petition.

10 JUSTICE SCALIA: Oh, the appendix to the
11 petition.

12 MR. RICHLAND: Yes, and that's the policy.
13 That is the written policy, Justice Scalia. I'm sorry
14 for the confusion.

15 CHIEF JUSTICE ROBERTS: Oh, that is the
16 written policy?

17 MR. RICHLAND: That is the written policy,
18 and the --

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

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

1 CHIEF JUSTICE ROBERTS: You would agree, I
2 think, that if the SCA, the Stored Communications Act,
3 if that made it illegal to disclose these e-mails, then
4 he would certainly be correct that he has a reasonable
5 expectation of privacy; isn't that right?

6 MR. RICHLAND: No, Mr. Chief Justice. We
7 would not agree with that.

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

10 MR. RICHLAND: Well, for several reasons.
11 Number one, this Court has repeatedly stated that the
12 mere fact that something is contrary to the law does not
13 in itself permit a reasonable expectation of privacy.
14 Just two terms ago, in Virginia v. Moore, this Court
15 said precisely that. And of course it said it earlier
16 in California v. Greenwood, and in a number of other
17 cases: Oliver v. United States.

18 Because the effect of that, of course, would
19 mean that we would be constitutionalizing every clause
20 of the law that might be enacted by a State or the
21 Federal legislature.

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

1 the case?

2 MR. RICHLAND: Justice Kennedy, I do not
3 believe it is law of the case that is binding on this
4 Court, since this Court is a higher court. Although it
5 is true that this Court denied certiorari on that issue,
6 I don't believe it is bound by the Ninth Circuit
7 determination of that, and in fact it is our contention
8 that that was incorrectly decided.

9 JUSTICE KENNEDY: On remand, has there been
10 a final judgment issued as to Arch, or is that just
11 being held --

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

15 JUSTICE SOTOMAYOR: Counsel, let's assume
16 that in this police department, everyone knew, the
17 supervisors and everyone else, that the police
18 department people spoke to their girlfriends at night.

19 MR. RICHLAND: Yes, Justice Sotomayor.

20 JUSTICE SOTOMAYOR: And one of the chiefs,
21 out of salacious interest, decides: I'm going to just
22 go in and get those texts, those messages, because I
23 just have a prurient interest. Does that officer have
24 any expectation of privacy that his boss won't just
25 listen in out of prurient interest?

1 MR. RICHLAND: Justice Sotomayor, as to the
2 first aspect, the question of reasonable expectation of
3 privacy, the motive should have no impact. The motive
4 of looking should have no impact. The question of
5 reasonable expectation of privacy must be analyzed
6 according to the relationship between the officer and
7 his -- and his employer.

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

13 MR. RICHLAND: Yes.

14 JUSTICE SOTOMAYOR: The limits of it have to
15 be limited for all of the reasons you said. Doesn't
16 this case begin and end on whether or not what the jury
17 found is reasonable grounds for what the city did?

18 MR. RICHLAND: I think that what this case
19 begins and ends with, if we assume that there was a
20 reasonable expectation of privacy, is under the
21 plurality opinion in O'Connor: Whether the search
22 itself was reasonable. And the jury did, of course,
23 make a determination as to the purpose of the search.

24 JUSTICE SCALIA: I guess we don't decide
25 our -- our Fourth Amendment privacy cases on the basis

1 of whether there -- there was an absolute guarantee of
2 privacy from everybody. I think -- I think those cases
3 say that if you think it can be made public by anybody,
4 you don't -- you don't really have a right of privacy.

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

9 MR. RICHLAND: I think that's correct,
10 Justice Scalia.

11 JUSTICE SCALIA: I think it is.

12 MR. RICHLAND: And I think the reason why
13 you must have the two-step analysis in a case of this
14 sort -- that is, first look at the question as to
15 whether there is a reasonable expectation of privacy,
16 and then determine, if there was, whether the search was
17 reasonable -- is precisely for the reason that, without
18 that, what we will have in every case is the claim that
19 there was a salacious reason, that that was the reason.
20 And we will be litigating every one of those cases.

21 JUSTICE GINSBURG: Then, according to what
22 you just said, the jury determination was superfluous.
23 If there was no reasonable expectation of privacy
24 because the officers were told: This is just -- we
25 treat this just like e-mails, it can be monitored, it

1 can be made public, then there would be no reasonable
2 expectation of privacy and there would be no question to
3 go to the jury.

4 MR. RICHLAND: That is correct,
5 Justice Ginsburg. And it is our position that this
6 should never have gone to the jury, that summary
7 judgment should have been granted in favor of the
8 Ontario --

9 JUSTICE KENNEDY: So you have two arguments:
10 One, that it's -- there is no reasonable expectation of
11 privacy; even if there were, that this was a reasonable
12 search.

13 MR. RICHLAND: That is correct.

14 JUSTICE SCALIA: Is reasonable expectation
15 of privacy a judge question or a jury question?

16 MR. RICHLAND: Well, if there is a conflict
17 in the facts, I presume the jury must resolve those --
18 that factual conflict. But in this case, I don't
19 believe there is a conflict in the facts and therefore
20 it is a judge question.

21 CHIEF JUSTICE ROBERTS: Did your client
22 treat on-duty text messages different from off-duty text
23 messages?

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

1 CHIEF JUSTICE ROBERTS: Why did it do that?

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

3 CHIEF JUSTICE ROBERTS: Why did it treat
4 them differently? Under your theory, they are all the
5 same -- no expectation of privacy.

6 MR. RICHLAND: It treated them differently
7 out of -- because there were two aspects to the case.
8 One aspect was the initial determination that Chief
9 Sharp ordered to say: I just want to know, is our
10 character limit efficacious here, or do we need to have
11 a higher character limit? And for that purpose, they
12 needed to just look at all of them. And they did; they
13 looked at all of the text messages.

14 But then when they saw that some of them may
15 have involved violations of department regulations, then
16 it was sent to internal affairs, and they redacted the
17 off-duty messages.

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

20 MR. RICHLAND: Well, I suppose.

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

23 MR. RICHLAND: Yes.

24 JUSTICE KENNEDY: -- legitimate grounds to
25 look at the messages, and then once they see it they

1 don't have to ignore it.

2 MR. RICHLAND: I think that is correct,
3 Justice Kennedy.

4 CHIEF JUSTICE ROBERTS: Well, why did -- I'm
5 sorry. I still don't understand. It redacted them,
6 right?

7 MR. RICHLAND: Redacted because the inquiry
8 -- the second stage of the inquiry in internal affairs
9 was simply to determine how much time was being spent
10 on-duty sending personal messages.

11 CHIEF JUSTICE ROBERTS: Right.

12 MR. RICHLAND: So the internal affairs
13 department said: We don't need to look at the off-duty
14 messages; we are going to redact them, why get into all
15 of that? We don't have to look.

16 The department was pretty scrupulous. And I
17 think that's part of what makes the entire approach that
18 they took to this reasonable. It makes the search
19 aspect of the case reasonable. And I think it's
20 important, in that regard, to look at the nature --

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

23 MR. RICHLAND: No, it was the other way
24 around. They looked at the on-duty text messaging at
25 the later stage, at the internal affairs stage. But

1 they looked at all of the text messages when the only
2 purpose for the inquiry was to determine how many of the
3 text messages in general are job-related and how many
4 were personal? Because the question was: Do we need to
5 raise the character limit --

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

9 MR. RICHLAND: Well -- well, you did,
10 because of the fact, Mr. Chief Justice, that there were
11 job-related communications even while there was
12 off-duty. These officers were SWAT team officers. They
13 were on duty, as Sergeant Quon said, 24/7. That's one
14 of the reasons why they had the text messaging pagers.

15 JUSTICE ALITO: If someone wanted to send a
16 message to one of these pagers, what sort of a device
17 would you need? Do you need to have another pager, or
18 can you -- could you send a message to one of these
19 devices from some other type of device?

20 MR. RICHLAND: No, there were messages that
21 were sent from various other devices. Is the question
22 whether that could be physically done, electronically
23 done? Because yes, clearly that was --

24 JUSTICE ALITO: Yes. What other type of
25 device could you use to send a message to one of these

1 pagers?

2 MR. RICHLAND: Yes -- oh. I'm not certain
3 if it was something other than another text messaging
4 pager. It did appear that there were some e-mail
5 entries in the transcripts themselves, which suggested
6 that there might have been a way to communicate to them
7 with e-mail, but that's just -- that's all in the record
8 that suggests that.

9 JUSTICE SCALIA: You know, if they were
10 on-duty 24/7, there weren't any off-duty messages, were
11 there?

12 MR. RICHLAND: Well, I may have misspoke.
13 They were on call 24/7. They were the SWAT team and
14 they had to respond to emergencies.

15 JUSTICE GINSBURG: If we take it that the
16 Stored Communications Act does say that the provider may
17 not give out the transcripts, if we take that as given,
18 then how can the department lawfully use the
19 transcripts?

20 MR. RICHLAND: Well, Justice Ginsburg, first
21 of all, there was no -- there is no current claim that
22 anything that the department did with respect to the
23 Stored Communications Act was unlawful. So it may be
24 that the other entity, Arch Wireless, violated the
25 Stored Communications Act, but that would not preclude

1 the department -- which was, after all, the subscriber
2 -- from requesting to see what, in fact, the transcripts
3 disclosed.

4 But in addition to that, there was also the
5 fact that, as I said before, a reasonable expectation of
6 privacy couldn't be based simply on the fact that there
7 was a statute, and particularly not a statute like the
8 Stored Communications Act, because that's a statute that
9 is extremely, extremely technical. And there is a --
10 one has to determine whether an entity was working
11 either as an electronic communications service or a
12 remote computing service, and so on. Courts are all
13 over the board on this. As this Court noted in *United*
14 *States v. Payner*, a complicated law like that simply
15 cannot be the basis for a reasonable expectation of
16 privacy.

17 And if I may reserve the rest of my time,
18 thank you.

19 CHIEF JUSTICE ROBERTS: Certainly, counsel.

20 Mr. Katyal.

21 ORAL ARGUMENT OF NEAL K. KATYAL,

22 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

23 SUPPORTING THE PETITIONERS

24 MR. KATYAL: Thank you, Mr. Chief Justice,

25 and may it please the Court:

1 Millions of employees today use technologies
2 of their -- of their employers under policies
3 established by those employers. When a government
4 employer has a no-privacy policy in place that governs
5 the use of those technologies, ad hoc statements by a
6 non-policy member cannot create a reasonable expectation
7 of privacy. Put most simply, the computer help desk
8 cannot supplant the chief's desk. That simple, clear
9 rule should have decided this case.

10 Instead, the Ninth Circuit found that the
11 1999 policy applied to pagers, but then concluded that
12 that 1999 policy was informally modified years later,
13 and that decision should be reversed. It disregards
14 this Court's repeated holdings, including 2 years ago in
15 the Chief Justice's opinion in *Engquist v. Oregon* about
16 the greater amount of leeway that the government has
17 when it acts as an employer. And it also is not
18 consistent with the plurality opinion in *O'Connor*, which
19 observed that when the government adopts a policy that
20 its employees lack privacy, no reasonable expectation of
21 privacy exists.

22 JUSTICE KENNEDY: Let me ask you this:
23 Suppose the department asks for the opinion of legal
24 counsel whether or not transmittal of the transcripts by
25 Arch to the department was a violation of the Act, and

1 the counsel said: This was a violation of the Act; they
2 had no right to send them to you. Would the department
3 then still have had a right to look at the transcripts?

4 MR. KATYAL: So the question is if the
5 Stored Communications Act is violated?

6 JUSTICE KENNEDY: Yes.

7 MR. KATYAL: We don't think the Stored
8 Communications Act was --

9 JUSTICE KENNEDY: No, but -- no, my
10 hypothetical is that the -- that there is the legal
11 counsel's opinion that this was in violation of the Act,
12 and let's say the district court said it is in violation
13 of the Act. Let's say we say it is in violation of the
14 Act. Is that the end of case? The department cannot
15 look at the transcripts?

16 MR. KATYAL: Oh, absolutely not. I mean, I
17 think this Court has repeatedly said that -- that
18 various privacy laws don't determine the scope of the
19 Fourth Amendment. I think it said so most clearly in
20 California v. Greenwood. And I think that's for a very
21 simple reason, that things like the Stored
22 Communications Act, Justice Kennedy, the Electronic
23 Communications Privacy Act, came about --

24 JUSTICE KENNEDY: Well, California v.
25 Greenwood was a question of -- of a Fourth Amendment

1 standard that had to be nationwide. So you say it's the
2 same -- same thing here?

3 MR. KATYAL: I -- I do think it is the same,
4 and for this simple reason, that when you have a
5 nationwide standard or a State standard, it is to fill
6 the gap, whatever is not necessarily protected by the
7 Fourth Amendment. And here --

8 JUSTICE KENNEDY: Well, but Greenwood was in
9 the -- in the context of the exclusionary rule in
10 criminal proceedings. I certainly think that States --
11 at least we could make the reasonable argument that
12 States can have different policies with respect to their
13 employees that have to be respected.

14 MR. KATYAL: Absolutely, Justice Kennedy. I
15 don't disagree with that. I think the only question is,
16 if the -- if I understand your question it is, does a
17 Federal statute about privacy somehow matter to the
18 Fourth Amendment analysis about reasonable expectations
19 of privacy. And there our contention is, no, it is
20 precisely because Congress enacted the Stored
21 Communications Act to fill gaps in Fourth Amendment law.
22 That -- that's why it's enacted.

23 And for -- for this Court to then use that
24 very act to be the template on which reasonable
25 expectations of privacy may spring, I think would be a

1 very -- it would be a novel proposition. Fortunately --
2 JUSTICE ALITO: Well, that's -- that's a
3 little bit puzzling because there are -- electronic
4 communications are stored all over the place in -- and
5 there isn't a history -- these are -- these are
6 relatively new. There isn't a well-established
7 understanding about what is private and what isn't
8 private. It's a little different from putting garbage
9 out in front of your house, which has happened for a
10 long time.

11 If -- if statutes governing the privacy of
12 that information don't have any bearing on reasonable
13 expectation of privacy under the Fourth Amendment, it's
14 some -- I -- I'm at something of a loss to figure out
15 how to determine whether there is a reasonable
16 expectation of privacy regarding any of those things.

17 MR. KATYAL: Well, Justice Alito, I do think
18 that the underlying premise of your question is one with
19 which we entirely agree. These are technologies that
20 are rapidly in flux, in which we don't have intuitive
21 understandings the way we do about, say, trash and so
22 on. And it's precisely for that reason I think the
23 Court should be very careful to constitutionalize and
24 generate Fourth Amendment rules in this area at the
25 first instance.

1 To do so I think really does freeze into --
2 into -- into place something that the legislature can't
3 then fix, going to Justice Kennedy's opinion in, for
4 example, *Murray v. Giarrantano*, in which he said that
5 constitutionalizing in that area -- constitutionalizing
6 may pretermit legislative solutions.

7 Now, here the Stored Communications Act is
8 not violated under any way, shape or form. The Stored
9 Communications Act has two different provisions in it,
10 one having to do with remote -- remote computing
11 services, RCS's. That's when an entity offers storage
12 facilities. And the other is for an electronic
13 communications service, that is essentially transmission
14 of messages from point to point.

15 CHIEF JUSTICE ROBERTS: Your point that you
16 made just a moment ago that we don't want to freeze into
17 place the constitutional requirements with respect to
18 new technology, I wonder if it cuts the other way. We
19 are dealing with an amendment that looks to whether
20 something is reasonable. And I think it might be the
21 better course to say that the Constitution applies, but
22 we are going to be more flexible in determining what is
23 reasonable because we are dealing with evolving
24 technology.

25 MR. KATYAL: Well, I think that the -- the

1 best way -- I think the most -- the easiest way for the
2 Court to resolve this is to simply say that when we are
3 dealing with what is reasonable, we look to the policy.
4 And here there is a policy by the employer, it says that
5 computer-associated and computer-related equipment and
6 others, there is no expectation of privacy. You have a
7 person who is told that repeatedly.

8 CHIEF JUSTICE ROBERTS: But that puts a lot
9 of weight -- I mean, there are some things where we
10 don't bind them. You know, you get the usual parking
11 garage thing that has got all this small print on the
12 back. We -- we don't say that you are bound by that
13 because nobody reads it.

14 But in here, I just don't know. I just
15 don't know how you tell what is reasonable. I suspect
16 it might change with how old people are and how
17 comfortable they are with the technology when you have
18 all these different -- different factors.

19 You know, they are told you can use it for
20 private, you got to pay for it. I think if I pay for
21 it, it's mine and not the employer's.

22 MR. KATYAL: Well, I think the clearest way,
23 Mr. Chief Justice, to decide what is reasonable and what
24 isn't is actually the terms of the policy. And it seems
25 to me very little is more unreasonable than expecting

1 the right to privacy after you have been told in a
2 policy you have no privacy.

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

7 MR. KATYAL: Absolutely. There are two
8 arrows in the city's quiver, and I think they're right
9 as to both of them.

10 JUSTICE SCALIA: What is the government's
11 position on the unreasonableness of the search?

12 MR. KATYAL: The government's position is
13 that the Ninth Circuit just from the get-go got the
14 standard wrong by citing -- by using a Schowengerdt test
15 which was, was this -- was this search the least
16 restrictive alternative? And we think this Court has
17 repeatedly said that's the wrong way of thinking about
18 it, that that puts judges in the position of
19 second-guessing searches on the ground, that they are
20 not really fully -- fully equipped to do this.

21 So I do think that is a possible way to
22 resolve this, Justice Scalia.

23 JUSTICE SCALIA: Maybe an easier way, huh?

24 MR. KATYAL: Well, I don't know that it's
25 easier, in the following sense. I think that thousands

1 of employers across the country rely on these policies
2 and millions of employees. And the Ninth Circuit's
3 decision puts that reliance in some jeopardy, because it
4 said that you can have an official policy and it can be
5 take back by what some ad hoc subordinate says. And
6 that is, I think, a very destructive notion to the idea
7 of reliance on these policies and that --

8 CHIEF JUSTICE ROBERTS: So, your -- your
9 position would require people basically to have two of
10 these things with them, two of whatever they are, the
11 text messenger or the BlackBerries or whatever, right?
12 Because assuming they are going to get personal things,
13 you know, some emergency at home, they are also going to
14 get work things?

15 MR. KATYAL: To the -- under this policy,
16 yes. You might have an employer that sets a different
17 policy and allows for some de minimis use and a zone of
18 privacy in that use. You can have a variety of
19 different things. But what I think would be dangerous
20 is to have a blanket rule that constitutionalizes and
21 says you always have reasonable expectations of privacy
22 in this technology. The result may be,
23 Mr. Chief Justice, that employers then won't give that
24 technology at all to their employees, and -- and
25 eliminate even that de minimis use.

1 Mr. Chief Justice, you had also asked before
2 about the standpoint of Quon in base -- in evaluating
3 the reasonableness of the search -- of the search in his
4 perspective of the policy. We think that is the wrong
5 way of looking at it. Instead, we think the proper test
6 is the written policy, what it says, and that is the
7 simplest way, I think, to provided administrability to
8 the lower courts. They can simply say was this policy
9 in existence, and not get into those questions of is it
10 like a parking ticket, did I flip through it too
11 quickly, did I understand that the policy and the like.

12 JUSTICE SOTOMAYOR: You want to -- you want
13 to -- you want to undo O'Connor's operational realities
14 of the workplace and say the minute you issued a written
15 policy that renders all searches okay, even if the
16 operational realities are different?

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

22 JUSTICE SOTOMAYOR: You may have an argument
23 that the nature of the policy here and all of the
24 activities related to it don't prove an operational
25 reality of privacy, but I don't know why -- you want a

1 flat rule that says once you have a written policy there
2 is no expectation of privacy?

3 MR. KATYAL: And I think that is -- that is
4 what O'Connor says with respect to the -- as long as the
5 policy is in place, that -- that's what O'Connor
6 permits.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Dammeier.

9 ORAL ARGUMENT OF DIETER DAMMEIER

10 ON BEHALF OF THE RESPONDENTS

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

13 I think an underlying fact that we might be
14 skipping over is -- is -- and both the lower courts
15 recognize this -- that the computer policy that the
16 department had didn't apply to the pagers on its own.
17 It -- it only came into play after Lieutenant Duke
18 modified that policy and told people at the -- at the
19 meeting that was referred to earlier that the pagers are
20 now going to be applying with -- with this policy.
21 It -- it --

22 JUSTICE GINSBURG: Why is -- why is that so?
23 I mean, it did say associated equipment. And -- and if
24 an employee is told, now e-mails aren't private, so we
25 are warning you, we can monitor them, wouldn't such an

1 employee expect the same thing to apply to the pager?

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

5 The other part of that policy deals with the
6 no privacy, and it informs the people there could be
7 monitoring. And specifically on the acknowledgment form
8 of that policy, which is at Appendix 156 of the
9 petition, it specifically says "The city will
10 periodically monitor e-mail, Internet use and computer
11 usage."

12 And -- and again, I think this is why the --
13 both lower courts came to the conclusion that the
14 computer policy on its own wasn't in play until
15 Lieutenant Duke announced that, hey, now the pagers are
16 going -- are going to be in play with this computer
17 policy. This is the same Lieutenant Duke --

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

21 MR. DAMMEIER: Sure.

22 JUSTICE GINSBURG: Wouldn't that employee
23 expect that the policy would carry over to pagers? When
24 you think of what's the reason why they want to look at
25 the e-mails, wouldn't the same reason apply?

1 MR. DAMMEIER: Well, I'm sure the same
2 reasons could apply but the -- the city is the one who
3 writes the rules here. The -- if they want to make it
4 clear on what it applies to, it certainly should be on
5 them to write them clear so the employee understands it.

6 CHIEF JUSTICE ROBERTS: Maybe -- maybe
7 everybody else knows this, but what is the difference
8 between the pager and the e-mail?

9 MR. DAMMEIER: Sure. The e-mail, looking at
10 the computer policy, that goes through the city's
11 computer, it goes through the city's server, it goes
12 through all the equipment that -- that has -- that the
13 city can easily monitor. Here the pagers are a separate
14 device that goes home with you, that travels with you,
15 that you can use on duty, off-duty.

16 CHIEF JUSTICE ROBERTS: You can do that with
17 e-mails.

18 MR. DAMMEIER: Certainly, certainly. But --
19 but in this -- in this instance with the pagers it went
20 through no city equipment, it went through Arch Wireless
21 and then was transmitted to another -- another person.

22 So again, to Duke -- Duke is the one that
23 said: Hey, this -- this comes into play. But
24 Lieutenant Duke is also the one that gave the privacy
25 guarantee to the SWAT team members and said: As long as

1 you pay the overages, we are not going to look at your
2 pagers; we're not going to look at the messages. So if
3 -- if you couple both of those modifications, both by
4 the same lieutenant -- and he wasn't just some
5 subordinate; he was the lieutenant in charge of the
6 administrative bureau; he was the administrative bureau
7 commander.

8 JUSTICE GINSBURG: I thought that he said --
9 he was saying: But as far as billing is concerned, I'm
10 not going to look at these; if you use more than 25,000
11 characters, you pay the extra and that will be the end
12 of it. If you contest that, then I will look to see
13 whether those in excess of 25,000 characters were for
14 work purposes or private purposes.

15 And so he's talking about the billing. He
16 hasn't retracted what was said at the meeting about that
17 these text messages are subject to audit.

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

22 JUSTICE BREYER: But what is wrong with his
23 deciding, I don't want to do this any more? I don't
24 want to collect all this money; it's too complicated;
25 and so I don't know how many of these messages are

1 related to work and how many they are just mucking
2 around prying into each other's business.

3 MR. DAMMEIER: He can certainly --

4 JUSTICE BREYER: So I would like to know, so
5 therefore I'm going to look and see. What is
6 unreasonable about that?

7 MR. DAMMEIER: Well, he certainly could say
8 I don't want to do this any more. And he just --

9 JUSTICE BREYER: Oh, no. I'm saying what's
10 -- the city owns the pager. It's a pager used for work.
11 They are giving a privilege to people if they want to
12 use it off work. It seems to be involving a big amount
13 of collection, and so what he wants to do is he wants to
14 see how much of this is being used for work and how much
15 is it not being used for work.

16 My question, which I just repeated, is why
17 is that an unreasonable thing?

18 MR. DAMMEIER: I don't think that request is
19 unreasonable.

20 JUSTICE BREYER: Fine. And then if that is
21 not unreasonable, why is -- what went on here that is
22 any different?

23 MR. DAMMEIER: Well, here the jury -- the
24 only fact that was determined by the jury was the reason
25 for the search. And that's found at appendix to the

1 petition page 119. This is the only finding that the
2 jury made as to the purpose of the search: To determine
3 the efficacy of the existing character limits to ensure
4 that officers were not being required to pay for the
5 work-related expenses.

6 JUSTICE BREYER: How does that differ from
7 what I just said?

8 MR. DAMMEIER: Well, it -- it comes into
9 play on -- on the scope of the search.

10 JUSTICE BREYER: I understand. I thought
11 it's just a more -- a few more words to say just what I
12 said. That they wanted to look into this because they
13 are tired about collecting so much money.

14 It's the third time I've said the same
15 thing; probably it's my fault by not being clear. But
16 it looked as if they wanted to know how many were being
17 sent for work purposes, how many for private purposes
18 including prying into people's business, which wasn't
19 too desirable, and -- and -- so that they could get
20 the -- the charges right.

21 Now that sounds like what the jury said they
22 were doing, too. And my question was, I don't see
23 anything, quite honestly, unreasonable about that, where
24 you are the employer, where it's a SWAT team, where --
25 where -- where you are paying for this in the first

1 place. So the reason I ask it, is I would like you
2 clearly to explain what's unreasonable about it?

3 MR. DAMMEIER: The scope of the search was
4 unreasonable.

5 JUSTICE BREYER: That's the conclusion, now
6 what's your reason?

7 MR. DAMMEIER: Under -- under -- looking at
8 O'Connor, you have to -- you have to look to make sure
9 that the search is not excessively intrusive. Here,
10 what they did was they took all the messages and started
11 reading them. Given the purpose, the limited purpose
12 that was found by the jury for the search, they didn't
13 need to do that.

14 JUSTICE BREYER: Well, explain that one to
15 me.

16 MR. DAMMEIER: They --

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

22 (Laughter.)

23 JUSTICE BREYER: Okay? So I start off
24 thinking that seems to be reasonable to me. That's what
25 I would do.

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

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

4 MR. DAMMEIER: That's one of the ways they
5 could have done it. They could have got -- they could
6 have got consent from the officers first to do it. They
7 could have had the officers themselves count the
8 messages. After all, the officers were the ones that
9 were paying for the --

10 JUSTICE BREYER: All right. But your
11 officers might say I don't want to read these messages
12 because they happen to be about the sexual activity of
13 some of my coworkers and their wives and me, which
14 happened to be the case here.

15 MR. DAMMEIER: Right.

16 JUSTICE BREYER: So I guess if you had asked
17 for consent, the officer would have said no. Now he
18 says, I still want to know. I will be repeating it.
19 All right. So what -- that didn't sound very practical.
20 What's the other way?

21 MR. DAMMEIER: Well, they could have -- they
22 could have had the officers themselves count the
23 messages.

24 JUSTICE BREYER: Well, the officer is going
25 to say hey, these are all big -- work-related. I will

1 tell you that. I only had two.

2 MR. DAMMEIER: Well --

3 (Laughter.)

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

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

9 JUSTICE BREYER: That would have been rough
10 on them. Because you want to let them have a few; you
11 need pizza when you are on duty. You want to -- there
12 are --

13 MR. DAMMEIER: Look --

14 JUSTICE BREYER: So far I listened to four
15 things and I'm just being naive about it; I will read it
16 more closely, but I don't see why these four things are
17 so obviously more reasonable than what they did.

18 MR. DAMMEIER: They also -- they could have
19 had the officers redact the private messages, and then
20 given it -- given it to the department.

21 JUSTICE SOTOMAYOR: As far as notification
22 of how much was being spent on business-related, all of
23 your suggestions about having the officer do things does
24 nothing about their application.

25 MR. DAMMEIER: Well --

1 JUSTICE SOTOMAYOR: You are -- you are
2 relying on the very person you are auditing to do the
3 audit for you. That doesn't seem either practical or
4 business-wise.

5 MR. DAMMEIER: Well, other than my one
6 sample of -- example of saying, hey, let's -- let's stop
7 the personal use and we are going to have a test month
8 to determine exactly how many messages we need for our
9 business-related purposes.

10 JUSTICE SOTOMAYOR: That goes back to -- I
11 don't understand that. You are still relying on the
12 person you are auditing to say to you, I am only using
13 it for business. That -- that's just not logical.

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

18 JUSTICE BREYER: But the question, in the
19 Constitution, the word is "unreasonable." Is it a
20 reasonable or unreasonable. So the question, what I
21 asked was -- maybe you would have gotten a better result
22 if you had hired Bain Associates and Bain would have
23 done a 4-month study at a cost of \$50,000.

24 But I could say, a person who doesn't want
25 to hire Bain and who doesn't want to rely on the

1 unverified word of the officers who were using these for
2 God knows what, is not being unreasonable. That's the
3 ultimate issue. And that's why I am putting it to you
4 to show me that what they did was unreasonable.

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

7 CHIEF JUSTICE ROBERTS: The only reason --
8 the only reason the officer would not be accurate -- I
9 mean don't understand why the redaction is such a bad
10 idea. He just says these are private. And that allows
11 -- and then you can look at everything else. You can
12 see if he's going too far because then everything else
13 would be there. But in terms of -- the jury found this
14 was not done to find out what was in the messages, so
15 they don't need to find out what is in the messages.
16 That's just a question. He has to pay for everything he
17 -- he redacts.

18 MR. DAMMEIER: That -- that's exactly what
19 we are saying. I mean the interest here is -- is for
20 the officer to be upfront as far as what is
21 business-related. If he's paying for things that he
22 shouldn't be paying for I'm sure he would -- he would be
23 forthright about that.

24 CHIEF JUSTICE ROBERTS: I mean, it's no
25 different than the police coming in and saying well, we

1 are going to look at, you know, what's in every drawer
2 and then -- you know, then if it turns out to be
3 personal and private, we won't -- you know, we won't --
4 it just happens that we came upon, I guess that is
5 Justice Kennedy's point. It's kind of the plain view
6 doctrine, except they get to decide how broad what they
7 can view is.

8 MR. DAMMEIER: That's true. I agree with
9 that.

10 JUSTICE STEVENS: I ask you this question
11 about the basic background of a reasonable expectation
12 of privacy. This is a SWAT team. Supposing it was the
13 officer answering 911 calls or things like that. Isn't
14 there sort of a background expectation that sooner or
15 later, somebody might have to look at communications for
16 this particular kind of law enforcement officer?

17 MR. DAMMEIER: Well, certainly -- certainly
18 that could happen in any number of --

19 JUSTICE STEVENS: I mean, wouldn't you just
20 assume that that whole universe of conversations by SWAT
21 officers who were on duty 24/7 might well have to be
22 reviewed by some member of the public or some of their
23 superiors?

24 MR. DAMMEIER: But that -- that could be a
25 possibility on any -- on anything that they do in their

1 lives, whether it be their personal life or --

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

5 MR. DAMMEIER: Correct. Correct.

6 JUSTICE KENNEDY: I certainly -- criminal
7 defense attorneys challenging probable cause would want
8 to look at these. They would want to see if there is
9 exonerating evidence, under the rules that all
10 exonerating evidence has to be submitted. It would seem
11 to me that it's quite likely, as Justice Stevens'
12 question indicates, that there is going to -- that these
13 are going to be discoverable.

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

17 JUSTICE KENNEDY: But you are not -- you are
18 not a police officer who is making arrests. I mean,
19 this -- this is part and parcel of determining probable
20 cause and mitigating evidence.

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

24 JUSTICE SCALIA: Mr. Dammeier, you would say
25 the same thing about private phones. There are

1 obviously circumstances in which whether you were making
2 a call between certain times becomes relevant to
3 litigation. So you could say that destroys the
4 expectation of privacy? I'm not sure. I hope we don't
5 say that.

6 MR. DAMMEIER: No. No. It's like -- this
7 -- in O'Connor, all nine justices in O'Connor found an
8 expectation of privacy in Dr. Ortega's desk, because
9 even though it was a state-owned desk, you still have an
10 expectation of privacy.

11 JUSTICE STEVENS: Yes, but there is no
12 normal reason for going through somebody's desk, whereas
13 there would be a very ordinary -- ordinary reason for
14 reviewing calls made to the SWAT -- members of the SWAT
15 team, it seems to me.

16 MR. DAMMEIER: Well, there are -- as talked
17 about in O'Connor, there are certainly a lot of valid
18 reasons to go through a public employee's desk, if you
19 are looking for a public file or -- or for a corporate
20 investigation. But still, there was that expectation of
21 privacy. You are talking about employees that -- in
22 today's society, I think work and private life get
23 melded together. Here, we are talking about SWAT people
24 -- 24/7 --

25 JUSTICE SCALIA: Well, to say that there is

1 an expectation of privacy in the desk doesn't say that
2 every intrusion into that expectation of privacy is an
3 unreasonable one. There could be that expectation of
4 privacy and still, for some reason -- let's assume there
5 has been a theft in the building, and it's known that
6 what was taken has not gotten out of the building. It's
7 conceivable that that would be a valid reason to intrude
8 upon the expectation of privacy, right?

9 MR. DAMMEIER: Correct. I don't think we
10 are taking away the government's ability to do searches
11 under proper circumstances.

12 JUSTICE SCALIA: Well, why isn't this a
13 proper circumstance?

14 MR. DAMMEIER: The initial circumstance
15 might be proper, but how they effectuated it was not.
16 It was excessively intrusive. They did not -- the
17 purpose was to find out if they were paying for enough
18 work-related messages. They did not need to look at
19 these, what they knew were going to be private messages.
20 They knew -- the lieutenant had this arrangement they
21 could use this for personal purposes. They knew what
22 they were going to be looking at.

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

25 MR. DAMMEIER: Not until they read them.

1 JUSTICE SCALIA: Not until they read them.

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

5 Here --

6 JUSTICE ALITO: What was the arrangement
7 that Lieutenant Duke had in place? I thought all he
8 said was: I don't have an intent to read all these,
9 because it's too much trouble, so if you go over and you
10 pay me the extra, I'm not going to read them.

11 MR. DAMMEIER: His --

12 JUSTICE ALITO: Did he ever say that -- that
13 I'm not -- that you have a privacy right in all these
14 things?

15 MR. DAMMEIER: No, but according to Sergeant
16 Quon's testimony, he told him: As long as you pay the
17 overages, we are not going to read them. And --

18 JUSTICE GINSBURG: Did he say "we"? Even
19 Quon didn't say that. Duke said he wouldn't do it. But
20 earlier, the -- at the meeting, the statement was made
21 that these are open to audit. Didn't say only by
22 Lieutenant Duke.

23 MR. DAMMEIER: True. True. I agree. But
24 it was Lieutenant Duke, the one that was making the
25 announcement that now these pagers are going to fall

1 under the computer policy, the same lieutenant who then
2 gave the assurance that as long as you pay the overages,
3 we are not -- we are not going to look at them.

4 I mean, when you are talking about the
5 operational reality of O'Connor, that was the
6 operational reality. The SWAT members knew: As long as
7 I pay the overages, my messages aren't going to be
8 reviewed.

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

14 MR. DAMMEIER: I don't think that's in the
15 record. However, my understanding is that you would get
16 it in between messages, so messages are going out and
17 coming in at the same time, pretty much.

18 CHIEF JUSTICE ROBERTS: Would you know where
19 the message was coming from?

20 MR. DAMMEIER: I believe so. It identifies
21 where it's coming from. It identifies the number of
22 where it's coming from. If you know the number, you
23 know where it's coming from.

24 JUSTICE KENNEDY: And he's talking to the
25 girlfriend and he says -- he gets a voice message that

1 says: Your call is very important to us; we will get
2 back to you?

3 MR. DAMMEIER: I think with the text
4 messages -- and that's what we are talking about the
5 transcripts of, were the text messages that were data
6 transferred from device to device, and here, you know,
7 we come back to -- I did want to touch a little bit on
8 the Stored Communications Act having play on some
9 justification of privacy -- you know, it's -- lawfully,
10 those messages were protected. And I think, looking at
11 people's expectation of privacy, that should be a
12 component. It certainly may be not the end-all to the
13 question, but it should be a factor in determining
14 whether or not there is going to be an expectation of
15 privacy.

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

18 MR. DAMMEIER: That's not in -- that's not
19 in the record. That is not in the record. But --

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

21 MR. DAMMEIER: Right. Well, we can assume
22 that, but we also --

23 JUSTICE SCALIA: What difference would that
24 make?

25 MR. DAMMEIER: I still don't think anything,

1 given the operational realities --

2 JUSTICE SCALIA: How could it affect his
3 expectation of privacy, if he didn't even know about it?

4 MR. DAMMEIER: Well, it's -- it's just like
5 the California Public Records Act. We should also
6 assume he didn't know about that as well, because the --
7 petitioners make an argument that because there is this
8 California Public Records Act, that that may diminish
9 one's expectation of privacy. Certainly, if we are
10 going to have that, then we should also be having the
11 Stored Communications Act that might enhance the --

12 JUSTICE SCALIA: Ignorance of the law is no
13 excuse, is what you are saying?

14 JUSTICE SOTOMAYOR: Do you have any theory,
15 or do you make any argument that Florio, Trujillo and
16 Quon's wives can succeed in their Fourth Amendment
17 claims, if Quon can't?

18 MR. DAMMEIER: I do. We, in our brief, try
19 to analogize that to the mail. I think when they sent
20 messages to -- to Sergeant Quon, that was a letter that
21 I sent. And here, the department didn't go get that
22 letter from Sergeant Quon after -- after delivery,
23 meaning go get it from his pager. They went to the
24 equivalent of the Post Office, which was Arch Wireless,
25 and got a copy off of their server. So I -- I think --

1 and again, I think -- again analogizing it to the mail
2 -- they have an expectation of privacy while that
3 message is in the course of delivery.

4 JUSTICE ALITO: Unless, of course, it was
5 perfectly clear that -- and suppose that the department
6 gave Mr. Quon a policy -- a statement that says: Sign
7 this, you acknowledge that your pager is to be used only
8 for work and that you have no privacy interest in it
9 whatsoever; we are going to monitor this every day.

10 And then these other individuals sent him
11 messages. You would still say they have an expectation
12 of privacy in those messages?

13 MR. DAMMEIER: Until the point that it is on
14 Quon's pager. I think under that scenario, that they
15 could have obtained the messages from Quon, but they
16 went over to Arch, the equivalent of the Post Office,
17 and got them from them.

18 It's like if I -- I make a copy of a letter
19 before I send it to somebody. You know, down the road,
20 I might not know what happens and I might lose my
21 expectation of privacy down the road, but that copy I
22 kept, I think there is still some expectation.

23 JUSTICE SCALIA: Well, what -- when you send
24 a text message to somebody else, aren't you quite aware
25 that that text message will remain confidential only to

1 the extent that either the recipient keeps it
2 confidential -- and he can disclose it -- or somebody
3 else who has power over the recipient or over the
4 recipient's phone chooses to look at it. Don't -- isn't
5 that understood when you send somebody a text message?

6 MR. DAMMEIER: I -- I -- I agree with that.

7 JUSTICE SCALIA: Well, so she should have
8 understood that, you know, whoever could get ahold of
9 his phone lawfully can read the message. In other
10 words, I don't see that she's in a -- in a different
11 position from Quon himself.

12 MR. DAMMEIER: I think it's just a slightly
13 different one. I mean, first of all they didn't
14 lawfully get it; there was a violation of the Stored
15 Communications Act.

16 JUSTICE SCALIA: Well, that's a different
17 issue.

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

21 CHIEF JUSTICE ROBERTS: Again, it depends
22 upon their reasonable expectation. Do any of these
23 other people know about Arch Wireless? Don't they just
24 assume that once they send something to Quon, it's going
25 to Quon?

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

3 CHIEF JUSTICE ROBERTS: Well, then they
4 can't have a reasonable expectation of privacy based on
5 the fact that their communication is routed through a
6 communications company.

7 MR. DAMMEIER: Well, they -- they expect
8 that some company, I'm sure, is going to have to be
9 processing the delivery of this message. And --

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

13 MR. DAMMEIER: Well --

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

16 (Laughter.)

17 MR. DAMMEIER: It's -- I mean, it's like
18 with e-mails. When we send an e-mail, that goes through
19 some e-mail provider, whether it be AOL or Yahoo, it
20 it's going through some service provider, just like when
21 we send a letter or package, it's going through -- some
22 provider is going to move that for us, until it gets to
23 the recipient. And like the mail that message enjoys an
24 expectation of right to privacy while it's with the Post
25 Office.

1 JUSTICE SCALIA: Can you print these things
2 out? Could Quon print these -- these spicy
3 conversations out and circulate them among his buddies?

4 MR. DAMMEIER: Well, he could have
5 ultimately, sure.

6 JUSTICE SCALIA: Well --

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

13 CHIEF JUSTICE ROBERTS: But just -- just to
14 be clear. You think if these messages went straight to
15 Quon that there would be no problem from the point of
16 view of the senders? I mean no problem in searching,
17 getting them from Quon?

18 MR. DAMMEIER: I think it's certainly a
19 harder argument for me to make that they have an
20 expectation after -- after Quon has it.

21 CHIEF JUSTICE ROBERTS: So we have to assume
22 for your argument to succeed that they know this goes
23 somewhere else and then it is processed and then it goes
24 to Quon.

25 MR. DAMMEIER: Yes, but I think in today's

1 -- I think in today's society that's -- that's a
2 reasonable assumption to make. One --

3 JUSTICE SCALIA: Yeah, I didn't know.

4 MR. DAMMEIER: I think it might have been
5 Florio testified that she actually called her carrier to
6 find out you know, if -- if the messages that she would
7 transmit would be maintained and that was -- that they
8 didn't maintain a copy. So there was some understanding
9 of how the process worked.

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

12 MR. DAMMEIER: Yes.

13 JUSTICE ALITO: -- so that they can't be
14 recovered by the department if the pager is turned into
15 the department?

16 MR. DAMMEIER: Sure. Yes.

17 JUSTICE ALITO: They can delete them?

18 MR. DAMMEIER: They can delete them. Just
19 like if they received a letter, it could be put in the
20 shredder.

21 JUSTICE SCALIA: Suppose I sent somebody a
22 letter and -- and I have privacy in that letter, and
23 let's assume it is intercepted at the Post Office, but I
24 have also published the letter in a letter to the editor
25 of the newspaper. I have written the following letter

1 to Sergeant Quon. Do I still have a right -- a right of
2 privacy in that letter?

3 MR. DAMMEIER: Well, I think then certainly
4 your expectation may be diminished.

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

11 MR. DAMMEIER: But that would create a
12 free-for-all in service providers. If -- if while this
13 message, after it is sent and is in transit --

14 JUSTICE SCALIA: Right.

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

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

25 MR. DAMMEIER: Well, certainly, obviously

1 the statute could come into play in addition to the
2 Fourth Amendment. But here, you know, I come back to
3 the mail analogy. Just because at the end of the line
4 somebody might disseminate my letter doesn't lose an
5 expectation in the copy that I make that I may keep or
6 that in the course of delivery the Post Office might
7 keep. I still enjoy an expectation -- and the Fourth
8 Amendment certainly protects that copy, that either I
9 kept or the Post Office is keeping in the course of
10 delivery.

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

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

19 MR. DAMMEIER: Honestly, I'm not -- that's
20 not in the record, and the -- how that pager works as
21 far as deleting, I couldn't be certain that it would be
22 deleted forever.

23 One -- one of the points to -- to raise,
24 too, was that most of these texts took place off-duty
25 when dealing with Sergeant Quon. So again, back to

1 looking at the actual practice that O'Connor has us look
2 at, you know, here again --

3 JUSTICE SOTOMAYOR: I thought the factual
4 record was the opposite, that in fact most of the calls
5 were -- not most, but a huge number of calls were
6 happening on duty.

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

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

22 The exchange was, we are going to let you
23 use these for personal purposes, and given that reality,
24 you should be able to have some -- some expectation of
25 privacy in that use. It's like if I pick up a phone and

1 I'm a public employee and I call my wife, I should be
2 able to have some expectation of privacy in a
3 conversation, especially given, you know -- you talk
4 about guys that are on 24/7. Do they have no private
5 life, now? Do they --

6 JUSTICE GINSBURG: I thought the policy was
7 limited personal use.

8 MR. DAMMEIER: The computer policy was
9 limited personal use. Again, depending on how that
10 comes into play with -- what kind of duty.

11 JUSTICE GINSBURG: But the -- the notice was
12 we are going to treat these just like e-mails, and
13 e-mails were limited personal use.

14 MR. DAMMEIER: Correct. With -- with the
15 additional modification by -- by Duke, that you could
16 also use them for personal purposes, from day one when
17 the pagers were issued.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 MR. DAMMEIER: Thank you.

20 CHIEF JUSTICE ROBERTS: Mr. Richland, you
21 have 3 minutes remaining.

22 REBUTTAL ARGUMENT OF KENT L. RICHARDS

23 ON BEHALF OF THE PETITIONERS

24 MR. RICHLAND: Thank you. I would first
25 like to just make it clear that what it is being claimed

1 was the guarantee of privacy by Lieutenant Duke is
2 really absolutely not that at all. And I would refer
3 the Court to Joint Appendix page 40 which does summarize
4 that, and it says -- here is what precisely what
5 Lieutenant Duke said: "Because of the overage
6 Lieutenant Duke went to Sergeant Quon and said the
7 city-issued two-way pagers were considered e-mail and
8 could be audited." So that's what he said first.

9 Then he said -- he told Sergeant Quon it was
10 not his -- his intent to audit employees' text messages
11 to see if the overages were due to work-related
12 transmissions.

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

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

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

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

8 JUSTICE SCALIA: Why?

9 MR. RICHLAND: Yes. The reason for that is
10 that this Court has held on many occasions that, once
11 one has sent the communication or an object to another
12 person, they lose their expectation of privacy in --

13 JUSTICE SOTOMAYOR: That means the
14 government can set up an interception mechanism on
15 telephone transmissions, on e-mail, computer
16 transmissions --

17 MR. RICHLAND: It -- it does not mean that,
18 Justice Sotomayor.

19 JUSTICE SOTOMAYOR: If it doesn't mean that,
20 answer his argument that: Yes, you could take anything
21 from Quon, but the storage -- you went to the storage
22 facility, which is a Post Office.

23 MR. RICHLAND: And he says it's a Post
24 Office, but the truth is that all of these plaintiffs
25 admitted that they knew that this was a

1 department-issued pager, and this wasn't a Post Office.
2 Arch Wireless was the department's agent.

3 These text messages were being sent to
4 someplace. Both the written policy and the oral policy
5 indicated that they were being stored ---

6 JUSTICE SOTOMAYOR: You still have to get
7 into who owns -- we have to get into the Storage Act and
8 figure out whether this was an RCN or ACS?

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

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

18 MR. RICHLAND: I understand --

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

22 MR. RICHLAND: The point is --

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

25 MR. RICHLAND: I don't mean "agent" in -- in

1 the most literal sense, Justice Scalia.

2 JUSTICE SCALIA: Oh, okay.

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

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

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

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