NO. 08-1332

IN THE
SUPREME COURT OF THE UNITED STATES

CITY OF ONTARIO, CALIFORNIA, ET AL.,
Petitioners,

v.

JEFF QUON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS AND CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The National School Boards Association (NSBA), founded in 1940, is a not-for-profit organization representing state associations of school boards and their over 14,500 member districts across the United States, which serve the nation's 50 million public school students. Collectively, school districts are the largest public employer in the nation.

In existence since 1916, the National Association of Secondary School Principals (NASSP) is the preeminent organization of and national voice for middle level and high school principals, assistant principals, and aspiring school leaders from across the United States and more than 45 countries around the world. The mission of NASSP is to promote excellence in school leadership. NASSP administers the National Honor Society, National Junior Honor Society, National Elementary Honor Society and National Association of Student Councils.

The California School Boards Association (CSBA) is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local school board governance and

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[1] This brief is submitted with the consent of all parties. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

advocates on behalf of school districts and county offices of education. As part of CSBA, the Education Legal Alliance (the "Alliance") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The Alliance represents its members, just under 800 of the state's 1,000 school districts and county offices of education, by addressing legal issues of statewide concern to school districts. The Alliance's activities include joining in litigation where the interests of public education are at stake.

Amici are committed to supporting and advocating on behalf of school boards and local administrators to promote safe learning environments, as well as the efficient and effective operation of school districts. At a time when technology is becoming ubiquitous in schools, *amici* strongly believe that in order to prevent employee misconduct and ultimately safeguard students, school districts must be empowered to regulate the use of workplace technologies through their officially enacted policies, despite potential imperfect implementation of these policies by non-policy making employees. School boards have a crucial interest in maintaining this discretion so that school administrators can once again rely on their officially enacted policies without fear of litigation, and turn their attention to the business of educating students.

SUMMARY OF THE ARGUMENT

The Ninth Circuit Court of Appeals' decision in *Quon v. Arch Wireless Operating Company, Inc.*, 529 F.3d 892 (9th Cir. 2008), finding a reasonable expectation of privacy in employer-issued pagers despite an official policy to the contrary, has significant repercussions for public entities in general, and school districts in particular.

While school district employees do not shed their Fourth Amendment rights merely by virtue of their public employment, it is also true that "[t]he operational realities of the workplace may make *some* employees' expectations of privacy unreasonable." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality). The Ninth Circuit's holding that an unauthorized informal policy can create an expectation of privacy in workplace electronic communications, despite an official policy to the contrary and the public nature of the communication under public records laws, eviscerates a school district's ability not only to efficiently and effectively manage the workplace, but also to ensure the health, welfare and safety of its students. The decision imposes an unattainable standard of perfect policy enforcement, and ignores the "operational realities of the workplace." *See Quon,* 529 F.3d at 892. Under the circumstances presented here, employees should have no objectively reasonable expectation of privacy.

Even if employees do have a reasonable expectation of privacy, a school district's interests in maintaining a safe school environment, and an effective and

efficient workplace, far outweigh an employee's expectation of privacy in workplace electronic communications. Unfortunately, employee misconduct in the school context can have dire consequences. School leaders must be able to investigate inappropriate relationships between teachers and students, and other problematic behavior. U.S. Department of Education, Office of the Under Secretary, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, Washington, D.C., 2004.

A byproduct of the increase in workplace technology is the attendant increased means for such inappropriate relationships to develop unnoticed. *See* Christy Oglesby, *Cells, Texting Give Predators Secret Path to Kids*, CNN, Jan. 11, 2008, available at http://www.cnn.com/2008/CRIME/01/11/teachers.charged/index.html. Absent electronic evidence, the inappropriate conduct often would not be discovered and students would continue to be harmed. School board technology use agreements, in which employees are almost universally required to acknowledge that they have no expectation of privacy in electronic communications, are vital to ensuring that schools monitor their workforce and keep students safe.

ARGUMENT

At issue is a school district's ability to fulfill its obligation to ensure the safety of its pupils by searching the electronic communication of its employees. Such searches by a school district implicate an employee's Fourth Amendment rights

only if the employee has a reasonable expectation of privacy in the subject of the search, which is one "that society is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). While it is true that school district employees do not shed their Fourth Amendment rights merely by virtue of their public employment, it is also true that "[t]he operational realities of the workplace may make *some* employees' expectations of privacy unreasonable."[2] *O'Connor,* 480 U.S. at 717.

This Court long ago recognized, and has since reaffirmed, that searches by public employers for work-related, non-investigative purposes or to investigate workplace violations implicate "special needs" that warrant a "reasonableness under all the circumstances" standard, rather than the typical warrant and probable cause requirement. *O'Connor*, 480 U.S. at 725; *accord id.* at 732 (Scalia, J., concurring in the judgment); *see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995); *New Jersey v. T.L.O.* 469 U.S. 325, 341 (1985). These "special needs" are nowhere more apparent than in the school context, where, unfortunately, inappropriate contact between an employee and student is often effectuated through the use of technology, particularly e-mails and text messages.

Since *O'Connor* established a framework for analyzing the reasonableness of public employer

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[2] See *O'Connor*, 480 U.S. at 718 (finding employee had a reasonable expectation of privacy in office desk and file cabinets which employee did not share, and employee occupied the office for 17 years, kept personal documents in the office, and training files were kept outside the office).

searches, school boards have been careful to adopt policies that make clear that employees have no expectation of privacy in the content of their electronic communications, often explicitly requiring employees to consent to searches of such content.[3] A rule, like the one established by the Ninth Circuit in this case, that an unauthorized informal policy can create an expectation of privacy, despite a school board-approved official policy to the contrary, eviscerates a school district's ability not only to efficiently and effectively manage the workplace, but also to ensure the health, welfare and safety of its students. It requires an unattainable standard of perfect policy enforcement, which ignores the "operational realities of the workplace." *See Quon,* 529 F.3d at 904-05.

[3] *See*, *e.g.*, California School Boards Association Sample Board Policy & Administrative Regulation 4040, Employee Use of Technology, Personnel, available at http://www.gamutonline.net/DisplayPolicy/244945/4; Colorado Sample Board Policy, Electronic Communication, available at http://nepnpolicies.nsba.org/viewHit.php; Connecticut Association of Boards of Education Sample Board Policy, Electronic Mail, available at http://nepnpolicies.nsba.org/viewHit.php.

I. SCHOOL DISTRICT POLICIES PROVIDING ACCESS TO EMPLOYEE ELECTRONIC COMMUNICATIONS, AS WELL AS THE PUBLIC NATURE OF SUCH COMMUNICATIONS, REMOVE ANY EXPECTATION OF PRIVACY DESPITE ERRANT ENFORCEMENT OR INTERPRETATION BY SUPERVISORS.

A. Technology use policies and agreements, often incorporating employee consent to monitor and search electronic communications, are so widespread that it is unreasonable to find an expectation of privacy in electronic communications where such policies are in place.

The operational reality of the modern workplace includes the proliferation of the use of technology, which has dramatically transformed the workplace. Amanda J. Lavis, Note, *Employers Cannot Get the Message: Text Messaging and Employee Privacy*, 54 Vill. L. Rev. 513, 518 (2009) ("E-mail, the internet, cell phones, and text messages have all revolutionized communications in the new digital workplace."). Text messaging, in particular, has become "a major means of communication around the world and a tool utilized by many businesses."[4] Lavis, *supra*, at 514-16. This technological transformation is equally, if not more, dramatic for school districts. Pedagogical forces often drive

[4] In 2007, 189 billion text messages were sent in the United States. Lavis, *supra*, at 515.

schools to strive to integrate new technologies with conventional teaching methods and school administration, making these technologies both ubiquitous and readily available to both employees and students.[5]

Attendant to this technological proliferation is the widespread adoption of technology use policies, often called "acceptable use" policies. These policies, recognizing that use of these technologies by employees will be prolific and is essential to accomplishing their educational goals, reasonably limit use to work-related purposes. School employees frequently are given copies of the policy and sign forms granting explicit consent for the district to examine all their electronic communications at will. These policies make it patently unreasonable to find an expectation of privacy in such communications.

In the private sector, where constitutional concerns do not apply, monitoring of employee e-mails and internet usage is common for similar reasons—to

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[5] Chris Dede, *Emerging Influences of Information Technology on School Curriculum*, 32 J. Curriculum Stud. 281 (2000) ("In developed countries, sophisticated computers and telecommunications are on the verge of reshaping the mission, objectives, content and processes of schooling. . . . In response, all forms of societal institutions are altering slowly, but radically—even schools. Since one of education's goals is to prepare students for work and citizenship, schools are attempting to change their policies, practices, and curriculum to meet the challenge of making pupils ready for a future quite different than the immediate past.") (citations omitted); *see also* Howard D. Mehlinger, *School Reform in the Information Age*, Phi Delta Kappan, Feb. 1996, at 400-07.

ensure employees are using their employer's time and resources for work-related purposes. A recent survey conducted by the American Management Association in conjunction with the ePolicy Institute found that of the 304 companies that participated, 66% monitor internet usage and 43% monitor e-mail. Am. Mgmt. Ass'n & ePol'y Inst., 2007 Electronic Monitoring & Surveillance Survey (2007), available at http://www.amanet.org/training/seminars/2007-Electronic-Monitoring-and-Surveillance-Survey-41.aspx. Of the companies that monitor employee technology use, 83% inform employees that the company is monitoring content, keystrokes, and time at the keyboard, 84% inform them that the company reviews computer files, and 71% are notified of e-mail monitoring. *Id*.

These survey results support the fact that, in the face of acceptable use policies and agreements, neither society, nor employees themselves, find an expectation of privacy in workplace electronic communications reasonable.[6] The lack of an expectation of privacy under these circumstances is amplified in the public sector where it is well established that a citizen entering government service "must accept certain limitations on his or her freedom." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

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[6] See Lavis, *supra*, at 513, 538-39; *Id*. at 526, n. 66 (citing Paul M. Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy-Control, and Fair Informational Practices*, 2000 Wis. L. Rev. 743, 770 (2000) ("Most participants in the American workplace leave their informational privacy at the door of work."); Larry Armstrong, *Someone to Watch Over You*, Bus. Week, July 10, 2000, at 189 ("When it comes to privacy in the workplace, you don't have any.").

Even more compelling is the fact that school district acceptable use policies often require the employee to agree explicitly that they have no expectation of privacy in workplace electronic communications, and consent to monitoring and searches of such communication. It is anomalous that under the general warrant and probable cause standard applied in non-special needs contexts, consent destroys a Fourth Amendment claim, yet under the Ninth Circuit's application of the less exacting reasonableness standard, an employee can establish a Fourth Amendment violation even though he or she has already acknowledged no expectation of privacy in the communications and consented to monitoring.[7] *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (it is "well settled that one of

[7] Here, the employees whose pager messages were seized signed an "Employee Acknowledgment" indicating that they had "read and fully understand the City of Ontario's Computer Usage, Internet and E-mail policy." *Quon,* 529 F.3d at 896. The Employee Acknowledgment also stated that "[t]he City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." *Id*. Though the policy did not explicitly address text messages, a meeting was convened in which all present were informed that the pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." *Id*. This statement was later memorialized in a memorandum sent to all supervisory personnel, including the employees at issue. *Quon v. Arch Wireless Operating Co., Inc.*, 445 F.Supp.2d 1116, 1124 (C.D. Cal. 2006). Despite these explicit signed acknowledgements, the Ninth Circuit, nevertheless found that the employees have an expectation of privacy in the text messages. *Quon*, 529 F.3d at 906-08.

the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent").

B. Finding an expectation of privacy based on an unauthorized practice by a rogue employee in the face of an official policy to the contrary completely ignores the operational realities of public agencies in general, and school districts in particular.

The Ninth Circuit's decision sends a clear message that an informal unauthorized policy instituted haphazardly by a non-policymaking employee will trump officially adopted policies. The court acknowledged that the employees signed the general "Computer Usage, Internet and E-mail Policy," attended a meeting in which it was made clear that the policy applied to the use of pagers, and that the informal policy was implemented by a non-policy making official, but nonetheless found that a reasonable expectation of privacy existed based on statements by the employee's direct supervisor who was also in charge of the pagers.

For school districts, which are governed by officially adopted school board policies and regulations, this rationale is particularly troubling because it completely undermines the existence and minimizes the utility of such policies. *See*, *e.g.*, Cal. Educ. Code § 35031(b) ("The governing board of each school district shall prescribe and enforce rules not inconsistent with law, or with the rules prescribed by the State Board of Education, for its own

government."). It is no exaggeration to say that the Ninth Circuit's disregard for officially adopted policies essentially undoes the basic governance structure of school districts.

Such a rule also goes against the weight of this Court's authority, which has traditionally credited officially adopted policies over a lower level employee's failure to adhere to these policies when analyzing a public entity's liability pursuant to 42 U.S.C. § 1983 (2010). For example, this Court said in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988), that "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies."

The decentralized nature of school districts is one in which school governance depends on official policy superseding the unauthorized practices of lower level employees. Any other standard radically diminishes a school district's ability to maintain an efficient and effective workplace, as well as safe schools.

School districts, like many other public entities, are decentralized and can be bureaucratic. Structurally, the final official policymaker for a school district is the local school board. For most districts, the school superintendent is next in the hierarchy and is the

chief executive officer charged with the day-to-day management of the district, including implementation of the school board's vision, directives, and policies. Below the superintendent are other "district level" administrators that answer to the superintendent (*e.g.*, typically cabinet level administrators like assistant superintendents, and other lower level administrators like directors). Finally, "school site" administrators are responsible for the management of a particular school, and directly supervise teachers and other site level staff, typically answering to "district level" administrators. For large school districts, there can be hundreds of school sites and thousands of site level administrators, each with direct supervisory responsibility for school staff.[8]

While all school employees are expected to adhere to all school board policies, the operational realities of any workplace and common sense dictate that not all employees will obey the rules all the time. Because of the decentralized nature of the day-to-day supervision of school employees, inconsistent enforcement of official policies, lax monitoring, and the emergence of unauthorized informal policies are inevitable. It would not be surprising to find supervisors within the same school site making contradictory statements or implementing policies differently from one another. Under the Ninth

[8] For example, the Los Angeles Unified School District has 891 K-12 school sites. *See* http://notebook.lausd.net/pls/ptl/docs/page/ca_lausd/lausdnet/offices/communications/communications_facts/09-10engfingertip%20factsrev-2.pdf. The New York City public school system is made up of over 1600 schools. *See* http://schools.nyc.gov/AboutUs/default.htm.

Circuit's ruling this would mean that some school district employees had an expectation of privacy while others did not, depending on the actions or statements of their respective supervisors. For example, would the employees of a supervisor who never monitors a subordinate's emails have a reasonable expectation of privacy while the subordinates of an administrator who routinely monitors emails would not? At the extreme end of the spectrum, there will likely be some school supervisors that seek to manipulate official policies or implement unauthorized practices for their own personal gain.

Given these operational realities, the Ninth Circuit decision presents school districts with an insurmountable hurdle: perfectly implement technology acceptable use policies and agreements, or lose the right to implement them at all without risking a Fourth Amendment claim. Such a rule turns the hierarchy of school district governance on its head by stripping school boards of their policy making authority and elevating the status of a rogue employee to final decision maker, with no clear standard for determining what types of actions by the employee effectively negate the policy. The same employee, ironically, could be disciplined for failing to implement official policies. Establishing such a low threshold for finding a reasonable expectation of privacy in the face of official policy to the contrary will prevent schools from monitoring the electronic communication of teachers and school staff, ultimately to the detriment of students.

C. Part of the operational reality of a school district is the pervasive awareness and utilization of public records laws, making an expectation of privacy in such records unreasonable.

School districts, like other public entities, constantly receive and respond to public records requests from members of the public and media. Public records laws, applicable to a broad spectrum of government communications, are pervasive and exist in one form or another in every state. Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 Urb. Law. 65 (1996). Contrary to the Ninth Circuit's implication that such a request by a "hypothetical member of the public" does not make an employee's belief in the privacy of a public record unreasonable, these requests are a significant part of the operational reality of school districts and are widespread and frequent. Indeed, the atmosphere in a public school work place is widely known to be open, such that an expectation of privacy is unreasonable.[9]

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[9] While it is true that not all electronic communications generated by a school district will be considered public records (*e.g.*, some "personal" communications, depending on state law), this nonetheless should not create a reasonable expectation of privacy in records that would otherwise be public. *See Griffis v. Pinal County*, 156 P.3d 418 (Ariz. 2007); *Denver Publ'g Co. v. Bd. of County Comm'rs,* 121 P.3d 190 (2005); *State v. Clearwater*, 863 So.2d 149 (2003). Since, under such public records laws, determining whether a record is public is a content-driven inquiry that will likely be conducted by someone other than the creator of the record, the individual creating the record will not know in advance its public or private nature

The localized nature of school districts and the proclivity for parent and community involvement in schools, make public record requests a salient feature of school governance. As a result, school boards typically adopt policies governing the maintenance and disclosure of records, and employees and staff are more often than not explicitly aware that they have no expectation of privacy in public records. In fact, school staff themselves assist in compiling records responsive to a public records request, particularly if they are in immediate possession of the responsive records.[10]

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and, therefore, should have no expectation that it will remain private.

For example, in a recent Michigan case, the court considered whether certain e-mail messages sought during the course of contract negotiations were public records under Michigan's version of the Freedom of Information Act. *Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ.*, No. 288977, __ N.W.2d __, 2010 WL 290515 (Mich. App. Jan. 26, 2010). Although the court found that, since the e-mails pertained to union business they were "personal" and therefore not subject to disclosure under the public records law, during the course of litigation, 5,500 e-mails were reviewed to determine their nature. *Id.* at 6. The court also noted that personal emails can be transformed into public records (*e.g.*, if personal e-mails were used to support discipline imposed on a teacher for abusing an acceptable use policy, the e-mails would become public records). *Id.* at 8.

[10]The Ninth Circuit cites *Zaffuto v. City of Hammond*, 308 F.3d 485 (5th Cir. 2002) in support of its conclusion that the employees have a reasonable expectation of privacy in the text messages, despite the fact that they are public records. However, that case merely mentions public records law in passing. The court only noted that the city raised an argument that the existence of public records law suggests no expectation of privacy. *Id.* at 489. In *Zaffuto*, an officer made a personal

Schools are no doubt highly visible public entities. A school's duty to keep students safe is one of its most important functions. Therefore, employee misconduct in the school context can generate significant public concern. The type of misconduct by a school employee toward a student that is most concerning and is most likely to be evidenced by electronic communication is often highly sensationalized by the media. *See* Oglesby, *supra*; *see also* U.S. Department of Education, *supra,* at Appendix 1 (citing over 500 newspaper, news wire and broadcast references to school-related sexual abuse). It is not far-fetched to believe that such electronic communication would be the subject of a

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phone call from his office phone to his wife, which was recorded and disseminated. *Id*. at 487. The police department had a policy of recording phone calls, which was understood by the officers to mean that only incoming calls would be recorded. *Id*. at 489. The *Zaffuto* court found that the officer had a reasonable expectation of privacy in his outgoing phone call to his wife. *Id*. The court neither reached the public records question on its merits, nor provided any analysis of the issue.

The Ninth Circuit could also have cited to authority that mentions public records laws and finds *no* reasonable expectation of privacy. *E.g*., *United States v. Angevine*, 281 F.3d 1130, 1133 (10th Cir. 2002) (mentioning policy that notified college professor that all electronic messages are presumed to be public records and contain no right of privacy or confidentiality except by statute, and finding no reasonable expectation of privacy); *Walls v. City of Petersburg*, 895 F.2d 188, 193-94 (4th Cir. 1990) (no reasonable expectation of privacy in information because it is already a part of the public record); *Biby v. Bd. of Regents of the Univ. of Nebraska at Lincoln*, 419 F.3d 845, 848 (8th Cir. 2005) (mentioning in passing that university computer policy states it will only search files if a legitimate reason exists, including response to a public records request, and finding no reasonable expectation of privacy).

public records request, eliminating a reasonable expectation of privacy in such communications.

The important and prominent position of schools in the community, as well as state public records laws that are meant to ensure transparent governance, make it doubtful that society is prepared to consider an expectation of privacy in workplace electronic communications reasonable.

II. A SCHOOL DISTRICT'S INTEREST IS NOT ONLY IN THE SUPERVISION, CONTROL AND EFFICIENT OPERATION OF THE WORKPLACE, BUT MORE IMPORTANTLY, IN SAFEGUARDING THE HEALTH, SAFETY AND WELFARE OF ITS STUDENTS.

Even if public employees do have a reasonable expectation of privacy in workplace electronic communications despite an official policy to the contrary, a school district's interest in the efficient and effective operation of the workplace, combined with its more important task of safeguarding student safety, far outweigh an employee's privacy interest in such communications. *See O'Connor*, 480 U.S. at 719-20 ("In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace.").

Public employers have legitimate interests in regulating workplace electronic communications,

including the "government's need for supervision, control, and the efficient operation of the workplace." *O'Connor,* 480 U.S. at 719-20. Employers may also be held liable for the conduct of employees who irresponsibly use workplace technologies, particularly in the areas of sexual harassment and hostile work environment claims. H. Jospeh Wen, Dana Shwieger & Pam Gershuny, *Internet Usage Monitoring in the Workplace: Its Legal Challenges and Implementation Strategies*, 24 Info. Sys. Mgmt. 185, 191 (2007); Lavis, *supra*, at 524. The improper use of workplace technologies often implicates performance issues, the waste of valuable time and resources, and theft of the employer's resources, all of significant concern to public employers that are entrusted with tax-payer dollars. *Id.*

Public school employers also must guard against the improper sharing of confidential information. School districts are responsible for securely maintaining, not only employment records, but pupil records as well. Mark C. Blom, *How Safe Is A School District's Information*? Inquiry & Analysis (NSBA's Council of School Attorneys, Alexandria, VA), Oct. 2009, at 6, 7. The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2010), the Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d (2010), special education laws, and state records laws all impose legal obligations on schools to secure confidential records, a task which has become increasingly difficult to do as such records have become computerized. In reality, the burden of maintaining the confidentiality of such information rests most heavily on the average school employee that accesses this information, as a matter of course,

on a daily basis. It is crucial that schools maintain the ability to monitor the electronic media accessible to employees, to ensure compliance and to enforce these confidentiality laws. In fact, the United States Department of Education recommends that, in the wake of an unauthorized disclosure, school districts investigate and determine how the incident occurred, including who had control or responsibility for the compromised information. This necessarily implicates an employer's right to search electronic communications to determine the source of a breach, prevent future unauthorized disclosures, and remedy any harm done by the breach.

Even more important than these considerations is the district's interest in maintaining student safety. School teachers enjoy a position of trust and influence with their students.[11] In recognition of teachers' influential role, many states have incorporated a moral character component into teacher licensing and dismissal statutes.[12] This Court has recognized that "school authorities have

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[11] *See Bd. of Educ. of City of Los Angeles v. Swan,* 41 Cal.2d 546, 552 (1953) ("A teacher. . .in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the children coming under her care and protection.") (citing Voorhees, The Law of Public Schools, § 62, p. 136) *abrogated on other grounds by Bekiaris v. Board of Educ.*, 6 Cal.3d. 575, 588 (1972); *accord Clarke v. Board of Educ. of School District of Omaha*, 215 Neb. 250, 256-57 (1983).

[12] *E.g.*, Cal. Educ. Code § 44345 (2010) (application for issuance of teaching credential may be denied if applicant fails or refuses to furnish reasonable evidence of good moral character); Cal. Educ. § 44932 (immoral conduct as ground for teacher termination).

the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society. . . ." *Adler v. Bd. of Educ.,* 342 U.S. 485, 493 (1952) *overruled on other grounds by Keyishian v. Bd. of Regents of Univ. of State of New York.,* 385 U.S. 589 (1967).

An unfortunate reality for school districts is that some school employees will engage in inappropriate relationships with children. In 2004, the United State Department of Education conducted a review of existing literature regarding educator sexual misconduct. U.S. Department of Education, *supra*, at 1.0. The report found that, based on existing literature, the prevalence of educator sexual misconduct ranged from 13% to 34% of females and 7% to 16% of males reporting abuse. *Id*. at 3.0. Sadly, these are not insignificant numbers.[13]

Research shows that most educator sexual abuse is characterized by "grooming" behaviors and enticement. U.S. Department of Education, *supra*,

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[13] *See also Doe 20 v. Bd. of Educ. of Cmty. Unit Sch. Dist., No. 5*, No. 09-1158, __ F.Supp.2d. __, 2010 WL 145782 (C.D. Ill. Jan. 11, 2010) (first grade teacher alleged to have assaulted female students, as well as used school district computer and e-mail to view and subscribe to pornography); *K.J. v. Arcadia Unified Sch. Dist.*, 172 Cal.App.4th 1229, 1234-35 (2009) (teacher that allegedly maintained sexual relationship with student had history of late night frequent e-mails to other female students as well); *Baumgardt v. Wausau Sch. Dist. Bd. of Educ.*, 475 F.Supp.2d 800, 802 (W.D. Wis. 2007) (high school coach allegedly text messaged female student that he loved her, wanted to be with her, and eventually sexually assaulted student).

at 6.2; *see also* Donald F. Austin & Michael A. Patterson, *Protecting Children From Sexual Misconduct by School Employees*, Inquiry & Analysis (NSBA's Council of School Attorneys, Alexandria, VA), May 2008, at 1. Grooming is a process "where an abuser selects a student, gives the student attention and rewards, provides the student with support and understanding, all the while slowly increasing the amount of touch or other sexual behavior. The purpose of grooming is to test the child's ability to maintain secrecy, to desensitize the child through progressive sexual behaviors, to provide the child with experiences that are valuable and that the child won't want to lose, to learn information that will discredit the child, and to gain approval from parents. Grooming allows the abuser to test the student's silence at each step. It also serves to implicate the student, resulting in children believing that they are responsible for their own abuse because, 'I never said stop.'" *Id.* (citation omitted). Importantly, grooming behaviors often involve engaging in peer-like behavior, which in today's digital age, includes communication via cell phone, text message, e-mails, and electronic social networking media, like Myspace, Facebook and Twitter.[14]

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[14] *See* Jennifer Steinhauer & Laura M. Holson, *As Text Messages Fly, Danger Lurks*, N.Y. Times, Sept. 20, 2008, available at http://www.nytimes.com/2008/09/20/us/20messaging.html (noting that "[t]eenagers and young adults have adopted text-messaging as a second language" and 13 to 17 year old American teenagers sent or received an average of 1,742 text messages in the second quarter of 2008); *see also* Austin & Patterson, *supra*, at 5 (inappropriate boundary invasions into a child's personal space and life include "[u]sing

It is not difficult to see how the nature of the teacher-student relationship makes children particularly vulnerable to such misconduct. It is within this context that schools must effectively manage the proliferation of new technologies. A byproduct of the increased use of technologies is the increased potential for abuse by employees, putting students directly at risk. A CNN news brief reported, "[i]t's happened again. A teacher is accused of having sex with a student and, like many times before, cell phone calls and texting reportedly had a role in sexually abusing a minor." *See* Oglesby, *supra*. The article goes on to note that "[t]he same cell phones that parents buy as safety devices for their children are the gadgets that pedophiles and predators use to prep kids for sexual encounters."[15] *Id*. Before cell phones and other forms of electronic communication, "grooming" behaviors could have been perceived by other adults. Now, technology allows a teacher to show no outward signs of interest in a child, but still maintain an ongoing relationship. *Id*. According to Betsy Ramsey, chair of the DeKalb County Domestic Violence Task Force, "[t]he wooing via text

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e-mail, text-messaging, or websites to discuss personal topics or interests with students.").

[15] The article also chronicles a case in Fayette County, Georgia in which a teacher sent a message to a 14-year old student's cell phone asking for a nude picture of her, a case in Pennsylvania where a third grade teacher sent a young girl poems via e-mail, which gradually escalated into a sexual relationship, and a case in Florida in which a teacher sent a 13-year-old boy pornography and illicit messages via e-mail. Oglesby, *supra*.

messages, cell phone calls and e-mail is so subtle, so affirming and so indulgent, that by the time a teacher makes inquiries involving nudity, a child probably isn't alarmed." *Id.*

In school, students are taught to trust teachers, and teachers are more often believed than students. U.S. Department of Education, *supra*, at 6.1. As a result of this power imbalance and the potential invisibility of employee misconduct due to new technologies, monitoring workplace technologies and viewing the content of electronic communications are essential to detecting and providing a clear record of a wide range of employee misconduct.[16] School boards must have meaningful enforceable policies that allow them to intervene in the case of any teacher misconduct. Stopping "inappropriate boundary invasions" early can prevent more serious abuse from occurring. Austin & Patterson, *supra*, at 6. Similarly, school board policies that permit access to employee electronic communications facilitate awareness of dual relationships that exist between teachers and students in small communities (*e.g.*, students may interact with teachers in the community, whether through church or Little League teams), so that school administrators can exercise appropriate judgment when evaluating a teacher-student relationship and

[16] *See Leventhal v. Knapek*, 266 F.3d 64, 73-74 (2d Cir. 2001) (where investigation was broadly aimed at uncovering evidence that employee was using office computer for non-work purposes and viewing of computer content accomplished the task of uncovering such evidence, Fourth Amendment rights not violated despite some expectation of privacy).

be alert to any potential misconduct.[17] Therefore, given the significant interest of school districts in maintaining safe schools and curbing employee misconduct, a policy allowing employers to monitor electronic communications of employees is especially important for school districts.

CONCLUSION

The dissent in the Ninth Circuit's denial of rehearing *en banc* noted that "[t]his case is, at its core, a workplace privacy case. The panel turns its back on the 'common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *Quon v. Arch Wireless Operating Co., Inc.*, 554 F.3d 769, 779, denial of rehearing and rehearing

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[17] Notably, the Texas educators' code of ethics explicitly proscribes grooming-type behaviors, including prohibitions against revealing confidential information to students, furnishing alcohol or drugs, and soliciting or engaging in sexual conduct. 19 Tex. Admin. Code § 247.2 (2010).

Additionally, at least one state, Louisiana, has found these concerns so pressing that it has enacted legislation specifically requiring school boards to formulate policies and procedures requiring all electronic communication by a school employee to a student related to educational services be via means provided by the school system, and prohibiting such communication for any purpose not related to the provision of educational services. La. Rev. Stat. § 17:81(Q)2(b) (2009). School boards must also institute a monitoring policy requiring school employees to report any time they communicate electronically with students by a means not provided by the school system, and implement consequences for violations of these policies. *Id.* at §§ 17.81(Q)(2)(c) & (e).

en banc (9th Cir. 2009)(Ikuta, dissenting)(quoting *O'Connor*, 480 U.S. at 722). Should the Ninth Circuit's decision stand, a school district will be faced with the specter of litigation each time it seeks to investigate employee misuse of workplace technologies, despite the existence of explicit acceptable use policies and agreements. Such an outcome "improperly hobbles government employers from managing their workforces." *Quon*, 554 F.3d at 774. For schools, this outcome jeopardizes student safety.

For the foregoing reasons, this Court should reverse the decision of the Ninth Circuit of Appeals in this matter.

Respectfully submitted,

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