SUPREME COURT OF THE UNITED STATES

No. 08–1332

CITY OF ONTARIO, CALIFORNIA, ET AL.,
PETITIONERS *v.* JEFF QUON ET AL.

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

[June 17, 2010]

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the Court's opinion except for Part III–A. I continue to believe that the "operational realities" rubric for determining the Fourth Amendment's application to public employees invented by the plurality in *O'Connor* v. *Ortega*, 480 U. S. 709, 717 (1987), is standardless and unsupported. *Id.*, at 729–732 (SCALIA, J., concurring in judgment). In this case, the proper threshold inquiry should be not whether the Fourth Amendment applies to messages on *public* employees' employer-issued pagers, but whether it applies *in general* to such messages on employer-issued pagers. See *id.*, at 731.

Here, however, there is no need to answer that threshold question. Even accepting at face value Quon's and his co-plaintiffs' claims that the Fourth Amendment applies to their messages, the city's search was reasonable, and thus did not violate the Amendment. See *id.*, at 726 (plurality opinion); *id.*, at 732 (SCALIA, J., concurring in judgment). Since it is unnecessary to decide whether the Fourth Amendment applies, it is unnecessary to resolve which approach in *O'Connor* controls: the plurality's or mine.*

*Despite his disclaimer, *ante*, at 2, n. (concurring opinion), JUSTICE STEVENS' concurrence implies, *ante*, at 1–2, that it is also an open

That should end the matter.

The Court concedes as much, *ante*, at 9, 12–17, yet it inexplicably interrupts its analysis with a recitation of the parties' arguments concerning, and an excursus on the complexity and consequences of answering, that admittedly irrelevant threshold question, *ante*, at 9–12. That discussion is unnecessary. (To whom do we owe an *additional* explanation for declining to decide an issue, once we have explained that it makes no difference?) It also seems to me exaggerated. Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court's implication, *ante*, at 10, that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible. The-times-they-are-a-changin' is a feeble excuse for disregard of duty.

Worse still, the digression is self-defeating. Despite the Court's insistence that it is agnostic about the proper test, lower courts will likely read the Court's self-described "instructive" expatiation on how the *O'Connor* plurality's approach would apply here (if it applied), *ante*, at 9–11, as a heavy-handed hint about how *they* should proceed. Litigants will do likewise, using the threshold question whether the Fourth Amendment is even implicated as a

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question whether the approach advocated by Justice Blackmun in his *dissent* in *O'Connor* is the proper standard. There is room for reasonable debate as to which of the two approaches advocated by Justices whose votes supported the judgment in *O'Connor*—the plurality's and mine—is controlling under *Marks* v. *United States*, 430 U. S. 188, 193 (1977). But unless *O'Connor* is overruled, it is assuredly false that a test that would have produced the *opposite* result in that case is still in the running.

basis for bombarding lower courts with arguments about employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees' use of electronic media. In short, in saying why it is not saying more, the Court says much more than it should.

The Court's inadvertent boosting of the *O'Connor* plurality's standard is all the more ironic because, in fleshing out its fears that applying that test to new technologies will be too hard, the Court underscores the unworkability of that standard. Any rule that requires evaluating whether a given gadget is a "necessary instrumen[t] for self-expression, even self-identification," on top of assessing the degree to which "the law's treatment of [workplace norms has] evolve[d]," *ante*, at 11, is (to put it mildly) unlikely to yield objective answers.

I concur in the Court's judgment.