

No. 11-0107

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In the

**Supreme Court of the United States**

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**POVTAK GROUP,**

*Petitioner,*

v.

**ROBERTA WAGNER & PROFESSIONAL ELECTRICAL WORKERS UNION, LOCAL 12-22,**

*Respondents.*

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRTEENTH DISTRICT*

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**BRIEF FOR THE RESPONDENTS**

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*Team #29*

## **QUESTIONS PRESENTED**

1. Whether an employer violates the Fourth Amendment privacy rights of an employee by discharging the employee for statements made on a personal social networking profile through a company-issued device.
2. Whether a successor employer will be bound to an arbitration clause of a collective bargaining agreement entered into by a predecessor employer under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185.

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## **INTRODUCTION AND STATEMENT OF THE CASE**

This case arises out of petitioner Povtak Group's ("Povtak") termination of respondent Roberta Wagner ("Ms. Wagner") after an anonymous poster on the blog "Crossing the Wires" began criticizing Povtak's "green" initiatives. Povtak assumed the transportation services contract for the City of Dynes ("Dynes"), which was previously held by Crimaldi Corporation ("Crimaldi"). After assuming the contract, Povtak hired a substantial number of the former Crimaldi employees, including all sixteen of the electrical employees represented by Professional Electrical Workers Union, Local 12-22 ("Local 12-22"). Shortly after assuming the contract, a local newspaper in Dynes ran the "Crossing the Wires" article that was critical of Povtak and their "green" initiatives. During the course of Povtak's investigation into the identity of the author of the article, Povtak searched Ms. Wagner's private, personal Facepage profile, which contained some comments that were critical of Povtak. Povtak then terminated Ms. Wagner for a violation of their Electronic Communication Policy and refused to recognize the arbitration clause in Local 12-22's Collective Bargaining Agreement, claiming that the Collective Bargaining Agreement did not apply to Povtak. Ms. Wagner and Local 12-22 sued Povtak for Povtak's invasion of Ms. Wagner's Fourth Amendment privacy rights by searching her personal Facepage profile and to enforce the arbitration clause in the Collective Bargaining Agreement.

### **A. Factual Background.**

#### *1. Povtak's Assumption of Crimaldi's Contract with Dynes.*

From 1957 to 2008, the Dynes contracted out its transportation services to Crimaldi. Local 12-22, Prof'l Elec. Workers Union v. Povtak Corp., 185 F. Supp. 3d 1, 2 (W.D. Fr. 2009). Dynes choose not to renew Crimaldi's transportation contract, instead accepting bids prior to the February 1, 2008 termination of the contract. Id.

Povtak successfully bid on the contract and Dynes awarded it to Povtak in January of 2008. Id. In a pre-bid conference, Povtak Chief Financial Officer Deborah Quine (“Quine”) represented to Crimaldi employees that Povtak would be hiring some of the former Crimaldi employees, stating that they would need “all the help [they] can get.” Id. Povtak did in fact hire 212 of the 342 Crimaldi employees, including all sixteen of Crimaldi’s electrical workers represented by Local 12-22. Id. at 3. The Collective Bargaining Agreement between Crimaldi and Local 12-22 included both “just for cause discharge” and grievance/arbitration provisions. Id.

After assuming Crimaldi’s contract, Povtak operated in essentially the same manner as Crimaldi had under the contract, performing essentially the same services. See Id. Povtak did make some collateral changes to the operations, including retrofitting the busses to make them more environmentally friendly, by adding electric engines, and altering some of the bus routes. Id. The electricians’ responsibilities increased slightly because of these changes. Id. Povtak’s changes allowed them to receive U.S. Department of Transportation and U.S. Environmental Protection Agency funds for operating “green transportation.” Id.

## *2. Povtak’s Electronic Communication Policy and Related Practices.*

After assuming Crimaldi’s contract, Povtak issued the Electronic Communications Policy (“ECP”) to their employees. 185 F. Supp. 3d at 3. The ECP mirrored similar policies found in the Crimaldi employee handbook. Id. The ECP states that employees subject to the policy “should not maintain any expectation of privacy with respect to any usage of the Company’s Electronic Systems” and that employees “waive any right of privacy in e-mail messages, other electronic communications, or Electronic Systems use.” (App. B, Elec. Comm’n. Policy, at 4. (hereinafter, “ECP”)) Additionally, the ECP limits Electronic Systems use to “business purposes

or for limited and reasonable personal use during non-work time which does not unreasonably interfere with production, productivity, and/or discipline.” Id. at 2. Povtak required the employees to sign the ECP, acknowledging that they read and understood it. 185 F. Supp. 3d at 4. Ms. Wagner signed the ECP shortly after receiving it, believing it to mirror Crimaldi’s policies. Id.

Povtak encouraged employees to “become friends with” Povtak’s Facepage profile and to post positive stories on the profile. Id. Ms. Wagner frequently acquiesced to Povtak’s request, posting positive stories on Povtak’s Facepage profile. Id. at 5. Ms. Wagner’s only Facepage connection to Povtak was through Povtak’s official Facepage profile. Id. Additionally, Povtak issued the employees ePhones. Id. Ms. Wagner downloaded four applications onto her ePhone. Id. at 5-6. One of the applications linked Ms. Wagner’s phone to Facepage and another accessed “Crossing the Wires,” a public blog. Id. Ms. Wagner informed her supervisor, Shane Leibson, of the applications, and Leibson responded positively, noting on her performance review that the applications improved her work performance. Id. at 6. Leibson also encouraged other employees to download the same applications. Id.

### 3. *Povtak’s Termination of Ms. Wagner.*

Povtak transferred Ms. Wagner from the light rail division to the bus division shortly after assuming the contract. Id. at 5. On her personal Facepage profile, Ms. Wagner commented on her dissatisfaction with her new work environment in the bus division; Ms. Wagner continued, however, to post positive stories on Povtak’s Facepage profile, per the company’s request. Id. at 5. Ms. Wagner also placed links on her private Facepage profile to stories on “Crossing the Wires” which criticized Povtak. Id. Ms. Wagner made these posts during both

working and non-working hours; this activity, however, did not affect her work productivity. Id.  
The working hour posts were made with her ePhone. Id.

Ms. Wagner never posted any comments or links on the “Crossing the Wires” blog. Id.  
Ms. Wagner did, however, post a link to a “Crossing the Wires” story on her personal Facepage profile that was particularly critical of Povtak and some of Povtak’s supervisors. Povtak believed the article, written under the user name “PugLuv86,” was actually written by a disgruntled employee. Id. at 6. Povtak therefore began an investigation to discover the identity of PugLuv86. Id. Part of the investigation required Povtak’s shift supervisors to review employee comments on Povtak’s Facepage profile. Id.

Around the same time as the investigation into the “Crossing the Wires” article, Ms. Wagner came up for her annual performance review. Id. As part of the review, Povtak audited the comments Ms. Wagner left on Povtak’s Facepage profile. Id. The performance review also included positive reviews from Ms. Wagner’s former supervisor, Liebsen, who mentioned the applications Ms. Wagner added to her ePhone. Id. at 7.

Ms. Wagner’s supervisor in the bus division, Frank Milmine, submitted screen shots of Ms. Wagner’s personal Facepage profile as part of her performance review. Id. Milmine accessed Ms. Wagner’s personal profile through Povtak’s profile. Id. Povtak did not inform either Ms. Wagner or Local 12-22 of the inclusion of the personal Facepage profile into Ms. Wagner’s personnel file. Id.

Two days after her performance review, Ms. Wagner turned her phone into Povtak’s technical support office for repairs. Id. After examining the phone, the technical support office supervisor documented the applications Ms. Wagner added to her ePhone and commented on the

possible connection to the “Crossing the Wires” article. Id. at 8. The next day, Povtak terminated Ms. Wagner, citing her violation of the ECP. Id.

After Ms. Wagner’s termination, Local 12-22 agents submitted a grievance to Povtak for discharging Ms. Wagner without just cause. Id. Povtak’s HR representative initially refused to meet with the Local 12-22 agents, but later acquiesced to a meeting to explain the ECP violation for which Povtak terminated Ms. Wagner. Id. The Local 12-22 agents also emailed George Daks, the General manager of Povtak Human Resources, attaching the grievance and appealing the termination to arbitration under Article 14.2 of the CBA. Id. at 9. Povtak refused to participate in the arbitration. Id.

#### **B. Proceedings Below.**

On March 5, 2008, Ms. Wagner and Local 12-22 filed a Verified Complaint with the U.S. Equal Opportunity Employment Commission (“EEOC”). Id. at 9. The EEOC’s Determination and Order found no probable cause and the EEOC issued a “right to sue” letter on June 19, 2008. Id.

Within 90 days of receiving the right to sue letter, Ms. Wagner and Local 12-22 filed suit in the U.S. District Court for the Western District of Froessel. Id. On August 6, 2009, the District court granted partial summary judgment, with respect to Ms. Wagner’s discrimination claim and successorship claim. Id. at 19. Ms. Wagner’s Fourth Amendment claim was tried before a jury, who returned a verdict in favor of Ms. Wagner. Local 12-22, Prof’l Elec. Workers Union v. Povtak Group, 231 F. Supp. 3d 20 (W.D. FrI. 2009). Following the trial, the District Court granted Povtak’s Rule 50 motion, overturning the jury verdict in favor of Ms. Wagner. Id.

Ms. Wagner timely appealed to the U.S. Court of Appeals for the Thirteenth Circuit the District Court’s grant of summary judgment on the successorship issue and its grant of judgment

as a matter of law on the Fourth Amendment issue. Local 12-22, Prof'l Elec. Workers Union v. Povtak Group, 1214 F.3d 1 (13th Cir. 2010). The Thirteenth Circuit reversed both the District Court's decisions to grant summary judgment on the successorship issue and to grant judgment as a matter of law on the Fourth Amendment issue. Id. at 15.

On January 10, 2011, this Court granted Povtak's petition for writ of certiorari on the Fourth Amendment and successorship issues.

## ARGUMENT

### **I. POVTAK VIOLATED WAGNER’S FOURTH AMENDMENT RIGHTS WHEN IT SEARCHED WAGNER’S FACEPAGE PROFILE AND COMPANY-ISSUED EPHONE BECAUSE WAGNER REASONABLY EXPECTED THESE MATTERS TO REMAIN PRIVATE AND POVTAK’S SEARCHES WERE UNREASONABLE.**

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. This Court applies a two-step approach to determine whether a government actor has violated this essential right to privacy: first, the court must determine whether a Fourth Amendment search has occurred; second, if a Fourth Amendment search has occurred, the court must determine whether the search was unreasonable. See Katz v. United States, 389 U.S. 347, 353–54 (1967).

A Fourth Amendment search occurs when a government actor intrudes upon a person’s actual expectation of privacy and that expectation is “one that society is prepared to recognize as ‘reasonable.’” Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). There is “no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable.” O’Connor v. Ortega, 480 U.S. 709, 715 (1987) (plurality opinion). Put another way, whether an expectation of privacy is reasonable depends entirely on the facts.

Likewise, whether a Fourth Amendment search is unreasonable is wholly fact-dependent. See id. at 722. Generally, a Fourth Amendment search is per se unreasonable if the government actor performing the search does so without probable cause and a duly issued warrant. See Katz, 389 U.S. at 357. However, there are “a few specifically established and well-delineated exceptions” to the general rule. Id. If an exception applies, the court must determine whether the search was reasonable by “careful[ly] balancing . . . governmental and private interests.” N.J. v. T.L.O., 469 U.S. 325, 341 (1985). Under either the probable-cause standard or the

balancing standard, a court must evaluate whether the search was “justified at its inception,” and whether it “was reasonably related in scope to the circumstances which justified the interference in the first place.” O’Connor, 480 U.S. at 726.

Both issues presently before this Court are of first impression. This Court has not addressed (1) whether a person may reasonably expect that her activity on a social networking website will remain private or (2) the standard of reasonableness that applies to a search of an employee’s personal profile on such a site. Based on the standards applied in analogous cases, however, this Court should affirm the Thirteenth Circuit and find that Wagner’s expectation of privacy was reasonable and that Povtak’s search was unreasonable.

**A. A Fourth Amendment search occurred because Wagner exhibited an actual expectation of privacy and that expectation was reasonable under the circumstances.**

Based on the facts established in the record, it is clear that Wagner manifested a subjective expectation of privacy that society would deem reasonable. This Court should affirm the Thirteenth Circuit and find that (1) Wagner exhibited a subjective expectation of privacy; (2) as a matter of general proposition, a person may reasonably expect that her private Facepage activity will remain private; and (3) none of the circumstances specific to Wagner render her expectation of privacy unreasonable.

- 1. Wagner exhibited a subjective expectation of privacy because she set her Facepage profile’s privacy setting to “friends” and was selective in who she became friends with on the site.*

To establish that a Fourth Amendment search occurred, a person must show that he “manifest[ed] his own subjective intent and desire to maintain privacy.” Cal. v. Ciraolo, 476 U.S. 207, 211 (1986). The thrust of this test is that a person must take some affirmative step to gain or maintain privacy. For example, a person may manifest a subjective expectation of privacy by building a fence or closing a phone-booth door behind him. See Ciraolo, 476 U.S. at

211; Katz, 389 U.S. at 352. Like most facets of Fourth Amendment analysis, this element is entirely dependent upon the specific facts of the case. See Tri-State Steel Constr., Inc., v. Occupational Safety & Health Review Comm'n, 26 F.3d 173, 176 (D.C. Cir. 1994).

Wagner manifested her subjective desire to maintain privacy by setting the privacy restrictions on her Facepage profile to “friends” and by “becoming friends” with only those profiles she wished to grant access to her profile. By doing so, she took affirmative steps to keep the contents of her profile private—she manifested an expectation that only the owners of those profiles she “became friends” with would have access to the contents of her profile. She used Facepage’s privacy settings in the same way a person might use a fence to exclude others from her backyard. This Court, therefore, should find that Wagner exhibited a subjective expectation that her profile would remain private.

2. *Generally, a person’s expectation that her Facepage postings will remain private is one that society is willing to accept as reasonable.*

Given the expanding and vital role social networking sites have come to play in communication, it is reasonable for modern Americans to expect that those communications will remain private. The Fourth Amendment principally “protects people, not places.” Katz, 389 U.S. at 352. A matter that a person seeks to keep private may be constitutionally protected, even if that matter is in an area that is accessible to the public. See Rios v. United States, 364 U.S. 253 (1960) (holding that the Fourth Amendment protects a taxicab passenger against an unreasonable search). Whether the Fourth Amendment protects a person’s privacy depends solely upon whether her expectation of privacy is reasonable, regardless of whether the search takes place in the home, in a phone booth, or in cyberspace. See, e.g., Kyllo v. United States, 533 U.S. 27 (2001); Katz, 389 U.S. at 357; United States v. Maxwell, 45 M.J. 406 (C.A.A.F. 1996).

Reasonableness is a moving target that evolves along with steadily changing social norms. Compare Olmstead v. United States, 277 U.S. 438 (1928) (holding that the Fourth Amendment did not protect telephone communications), with Katz, 389 U.S. at 352 (holding that the Fourth Amendment protects telephone communications and stating that “[t]o read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication”). Because of evolving societal norms, reasonableness is amorphous in nature, leading some commentators to describe Fourth Amendment analysis as “unstable.” See Lloyd L. Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 49 (1974).

The nebulous reasonableness standard is often difficult to apply, especially when a new form of technology is involved. However, courts have developed a few tools to aid them in this analysis. In cases of first impression, courts often apply the principles of property law to determine reasonableness. See Orin S. Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801 (2004). Also, when applying the reasonable expectation of privacy framework to a new technology, courts often analogize the technology in question to older forms of technology to determine whether an expectation of privacy is reasonable. See Scott A. Sundstrom, You’ve Got Mail (and the Government Knows It): Applying the Fourth Amendment to Workplace E-mail Monitoring, 73 N.Y.U. L. Rev. 2064 (1998).

Applying property-law principles and using analogy both lead to the conclusion that a person has a reasonable expectation of privacy in her Facepage activity.

- i. *The reasonableness of a person’s privacy expectation is closely tied to the existence of a right to exclude others.*

The Fourth Amendment and real property law are closely related. One commentator notes that “[d]escriptively speaking, the basic contours of modern Fourth Amendment doctrine

are largely keyed to property law.” Kerr, supra, at 809. In many cases, “an expectation of privacy becomes ‘reasonable’ only when it is backed by a right to exclude borrowed from real property law.” Kerr, supra, at 809–810.

Fourth Amendment protection in the home is illustrative of this principle. A person enjoys a high level of privacy within the home. See Kyllo, 533 U.S. at 28 (stating that it is reasonable to expect that all “details” inside the home will remain private). Whether a person owns or rents a home, so long as the person retains rightful possession of the home and the right to exclude others from the home, she may reasonably expect that matters in the home will remain private. See, e.g., Silverman v. United States, 365 U.S. 505, 511 (1961); Chapman v. United States, 365 U.S. 610, 617 (1961). When a person loses property rights in a home, however, she also loses the right to reasonably expect privacy. See Simpson v. Sarhoff, 741 F. Supp. 1073, 1078 (S.D.N.Y. 1990); United States v. Botelho, 360 F. Supp. 620, 624 (D. Haw. 1973). Thus, the right to exclude is closely tied to a reasonable expectation of privacy in the home.

The same is true in other contexts. For example, a person may reasonably expect that the contents of a hotel room or a storage locker will remain private for the duration of the rental period, as long as she complies with the rental contract. See Stoner v. Cal., 376 U.S. 483, 489 (1964); United States v. Karo, 468 U.S. 705, 721 n.6 (1984). When her property interest in the hotel or locker lapses, however, her Fourth Amendment protections vanish. See United States v. Dorais, 241 F.3d 1124, 1128 (9th Cir. 2001) (stating that a person “has no reasonable expectation of privacy in a hotel room when the rental period has expired and the hotel has taken affirmative steps to repossess the room”). The right to exclude is tied to the reasonableness of an expectation of privacy in other contexts, as well. See, e.g., Bumper v. North Carolina, 391 U.S. 543, 548 n.11 (1968) (holding that an unreasonable search of a house owned by a grandmother

violated her grandson's right to privacy); Ark. v. Sanders, 442 U.S. 753, 763–64 (1979) (holding that the Fourth Amendment protected the contents of a suitcase so long as it was not abandoned).

Since a Facepage user has the right to exclude others from her profile—assuming that she exercises that right, as Wagner did—an expectation of privacy in the contents of her profile is reasonable. Facepage users have the right to exclude people from viewing their profile, and are given a mechanism with which to do so. Users may alter their privacy settings to make their profiles as private as they wish. A person who wishes to waive her right to privacy may set her privacy settings to “everyone,” meaning that anyone may view the contents of her profile. Most people, including Wagner, set their profiles' privacy setting to “friends,” so that only the owners of those profiles which they “become friends” with may view the contents of their own. By setting one's profile on “friends,” a user exercises her right to exclude anyone other than a “friend” from entering her own profile. Just as one reasonably expects privacy through the right to exclude in her home and even hotel room, Facepage users expect privacy because of the mechanisms designed to limit public access to their profile.

Because Facepage's privacy mechanisms allow users to exercise their right to exclude, a user may reasonably expect that no one other than a “friend” will view her profile. Someone who is not a “friend” of a profile set on “friends” would have to use guile and deceit to view that profile, much like Povtak did when it viewed Wagner's profile. Facepage users may reasonably expect that others will refrain from such seedy conduct.

- ii. *Because a Facepage posting is analogous to an e-mail sent to a limited number of people, it is apparent that a person may reasonably expect a Facepage posting to remain private.*

Determining the reasonableness of a person's expectation of privacy is especially difficult when a new form of technology is involved. For example, “[i]t took nearly forty years for the Court to reject [Olmstead's] view of the Fourth Amendment and find that wiretapping

was indeed included within its scope.” Sundstrom, supra, at 2079. The reasonableness standard set forth in Katz requires courts to determine societal values, both in an actual and a normative sense. Understandably, courts often find difficulty when determining societal values, especially when applying the standard to new technologies.

When applying the Katz framework to new technologies, courts have regularly used analogies to compare the technology at issue with other forms of technology on which this Court has already ruled. See, e.g., Maxwell, 45 M.J. at 417 (comparing e-mail to telephone communication and postal mail); Fla. v. Riley, 488 U.S. 445, 453–54 (1989) (comparing observation from a helicopter to ground-level observation). Courts use this method in an effort to “translate” the Fourth Amendment—their purpose is to “read beyond the specific applications the Framers had in mind, to find the meaning they meant to constitutionalize.” Lawrence Lessig, Reading the Constituion in Cyberspace, 45 Emory L.J. 869, 873 (1996).

Assuming a Facepage user has set her privacy setting to “friends,” the closest analogy to a Facepage posting is an e-mail sent to a limited number of people. Drawing this analogy is helpful because courts have already ruled that a person may reasonably expect that her e-mails will remain private. See United States v. Charbonneau, 979 F. Supp. 1177, 1184 (S.D. Ohio 1997); Maxwell, 45 M.J. at 417.

In Maxwell, the court drew parallels between e-mail and both postal mail and telephone communication. First, the court noted that “the technology used to communicate via e-mail is extraordinarily analogous to a telephone conversation” because “e-mail is transmitted from one computer to another via telephone communication, either hard line or satellite.” 45 M.J. at 417. The court then pointed out that other courts have, in the past, held that the Fourth Amendment protects telephone communications because “the maker of a telephone call has a reasonable

expectation that police officials will not intercept and listen to the conversation.” Id. at 418. So, the fact that e-mail and telephone communication are analogous indicated that e-mail should be protected. Next, the court drew a parallel between e-mail and postal mail, finding them to be very similar forms of communication. Id. at 417–18. The court found that the sender of an e-mail, like the sender of a letter, “enjoys a reasonable expectation that the initial transmission will not be intercepted by the police.” Id. at 418. Further, the fact that a third-party might use guile or deception to “intercept an e-mail message does not diminish the legitimate expectation of privacy in any way.” Id. The postal-mail analogy, paired with the telephone analogy, led the court to hold that a person could reasonably expect that her e-mails would remain private. Although the question has not been addressed by this Court, other courts have agreed with Maxwell’s holding. See, e.g., Charbonneau, 979 F. Supp. at 1184.

The analogy between e-mail and Facepage postings is more apt than either of the ones used by the Maxwell court. The technology used to send an e-mail is exactly the same as that used to make a Facepage posting—they are both electronic messages sent via the Internet. The only difference is that, when sending an e-mail, a person must type in the addresses of her intended recipients, while a Facepage user goes through a different process when choosing her intended recipients—she “becomes friends” with them. Assuming that a Facepage user sets her profile’s privacy setting to “friends” like Wagner did, making a status update is no different from sending an e-mail to all her “friends.” Therefore, this Court should follow the reasoning of the multiple courts that have already determined that a person may reasonably expect e-mail to remain private, and apply that reasoning to analogous Facepage postings.

3. *None of the circumstances specific to Wagner rendered her expectation of privacy unreasonable.*

Given that a person's expectation of privacy in her activity on a social networking site is generally reasonable, it must be true that Wagner's expectation of privacy was reasonable unless the "operational realities of the workplace" made her expectation unreasonable. O'Connor, 480 U.S. at 717. In assessing the context of the realities of the workplace, this Court looks at factors such as legitimate privacy regulations and whether the allegedly private matter is "so open to fellow employees or the public that no expectation of privacy is reasonable." Id. at 718. Workplace realities can diminish an employee's expectation of privacy—a generally reasonable expectation could be rendered unreasonable by these realities. See, e.g., Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). It is important to note courts' emphasis on "reality"; even if an employer has a written policy in place that would make a privacy expectation unreasonable, the policy does not affect the reasonableness of an employee's privacy expectation if supervisors and employees do not in fact observe the policy. See Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 907 (9th Cir. 2008), rev'd on other grounds, 130 S. Ct. 2619 (2010) (the Supreme Court assumed *arguendo* that there was a reasonable expectation of privacy and reversed because the search was not unreasonable).

No workplace realities vitiate against the reasonableness of Wagner's privacy expectation. As a preliminary matter, it is not clear that Wagner's personal Facebook profile was part of the workplace, since many of the posts were made from her home computer. However, even assuming that Wagner's profile can be considered part of the workplace, there was no reason for Wagner to expect her privacy to diminish. The record establishes that there was no workplace practice wherein any supervisor or other employee would ever have any occasion to visit Wagner's personal profile. The best justification for this practice that Povtak can assert is

that their routine performance review included an audit of employees' comments on Povtak's profile. This, however, only would have required a supervisor to view Povtak's profile—there would not have been any reason to look at an employee's personal profile. Thus, this office practice had no effect on Wagner's reasonable expectation of privacy.

Povtak also argues that its Electronic Communications Policy renders Wagner's expectation of privacy unreasonable because it states that "users should not maintain any expectation of privacy with respect to any usage of the Company's Electronic Systems." ECP, at 1. However, regardless of what the policy says about employees' expectation of privacy, the "reality of the workplace" was that employee Facepage usage, even on company-issued hardware, was encouraged by Povtak supervisors and kept private. Much like in the Quon case, supervisors such as Leibson instituted an informal policy that differed from Povtak's formal policy. Under the informal policy, employees were encouraged to install on their iPhones applications that were not work-related. In this way, the informal policy was in direct conflict with the paragraph 9 of the formal policy. ECP, at 3. Because the informal policy materially differed from the formal policy, it would have been reasonable for employees to expect that other provisions of the formal policy would be ignored. Therefore, the informal policy neutralized Povtak's attempt to lessen its employees' expectation of privacy by issuing the Electronic Communications Policy.

Because Wagner exhibited an actual expectation of privacy that society would accept as reasonable, a Fourth Amendment search occurred. The only remaining inquiry is whether that search was unreasonable. For the following reasons, this Court should rule that the search was unreasonable.

**B. Povtak subjected Wagner to an unreasonable search because the search did not fall within any established exception to the probable-cause requirement and, to any extent that the search did fall within an exception, it was unreasonable in its inception and scope.**

Having established that a Fourth Amendment search took place, the reasonableness of the search must be determined. A search must be reasonable in its inception and scope. See Terry v. Ohio, 392 U.S. 1, 20 (1968). Unless the circumstances of the case place it within one of a “few specifically established and well-delineated exceptions,” a search is unreasonable in its inception unless the actor has probable cause and a duly issued warrant. See Katz, 389 U.S. at 357. This Court has expanded these exceptions somewhat in recent years, but only when the government actor showed the presence of “exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” O’Connor, 480 U.S. at 720.

Since Wagner’s case does not fall within any established exception, and because Povtak has not shown that any “special needs” existed, this Court should apply the probable-cause and warrant requirements. Further, to any extent that this Court finds a “special need” existed, the search was nonetheless unreasonable because it was not justified in its inception or scope.

*1. This case does not fall within any established exception to the probable-cause and warrant requirements.*

This Court has never established an exception to the probable-cause and warrant requirements for investigations of non-work-related conduct. In O’Connor, the plurality established that the probable-cause and warrant requirements do not apply when a government employer intrudes on an employee’s expectation of privacy for “noninvestigatory work-related” reasons or for “investigatory search[es] for evidence of suspected work-related employee

misfeasance.” 480 U.S. at 723. This Court specifically stated that it had only established exceptions for those two types of searches within the employment context. Id. Povtak carried out a Fourth Amendment search of Wagner’s Facepage profile without probable cause or a warrant. For the search to have been reasonable, it would have to fall within one of the two exceptions set forth in O’Connor. It is unclear why a Povtak supervisor viewed Wagner’s personal Facepage profile, but one thing is clear: it was not for any work-related purpose. Therefore, the search does not fall within either of O’Connor’s exceptions. Povtak’s stated reason for searching Wagner’s profile is that it did so as part of a routine performance evaluation. However, the only Facepage-related aspect of that evaluation was to audit Wagner’s comments on Povtak’s profile. There would have been no need to look at Wagner’s personal profile—the only content relevant to the evaluation appeared on Povtak’s profile alone. 185 F. Supp. 3d at 6. Thus, searching Wagner’s profile was outside the bounds of the evaluation and therefore not work-related.

Nor was the search work-related if it was part of Povtak’s investigation into the identity of PugLuv86, the author of the controversial blog post. Povtak was investigating the conduct of a person who may or may not have been an employee of the company. Even if PugLuv86 was an employee, his or her authorship of the blog post was not “work-related misconduct” because it did not affect Povtak’s efficiency or productivity and no company policy forbade posting on blogs. The only way this conduct could be deemed “work-related misconduct” is if it was revealed that the post was written by an employee during working hours, which would have affected productivity. However, it was not Povtak’s purpose in searching Wagner’s personal Facepage profile to uncover evidence to show that that was the case—its purpose was only to

find the author's identity. Therefore, the search was not calculated to reveal evidence of "work-related misconduct."

Since Povtak lacked a work-related purpose in searching Wagner's profile, no established exception to the probable-cause and warrant requirements apply. Because Povtak carried out a Fourth Amendment search without probable cause or a warrant, that search was unreasonable.

2. *This Court should not create a new exception to the probable-cause and warrant requirements for searches that are not work-related and are investigatory in nature.*

Based on this Court's rationale in establishing the exceptions to the probable-cause and warrant requirements, this Court should not establish a new exception for searches like the one at issue here. In establishing the few limited exceptions it has in recent years, this Court has found a "special need" to do so. See O'Connor, 480 U.S. at 725; T. L. O., 469 U.S. at 341; Terry, 392 U.S. at 21. A "special need" exists only "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." T. L. O., 469 U.S. at 341.

In the employment context, this Court established in O'Connor that only "special needs" justify intrusions into the privacy of government employees for noninvestigatory work-related purposes and investigations of work-related misconduct because "a probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employers." 480 U.S. 725. In these cases, this Court is willing to lower the standard because of the strong governmental and public interests in the "efficient and proper operation of the workplace," and applying a probable-cause standard to work-related searches would place an undue burden on government employers and lessen efficiency. Id.

The same is not true for searches that are not work-related. No public or governmental interest exists that justifies lowering the standard for searches that are not work-related.

Allowing a government employer to investigate matters that are not work-related without probable cause or a warrant would not increase or maintain efficient operation of the agency. Moreover, intrusive searches such as the one Wagner endured are the very reason the probable-cause requirement exists. This Court should not establish a new exception for government-employer searches that are not work-related.

3. *To any extent that Povtak's search falls under the balancing standard rather than the probable-cause standard, the search was not justified in its inception or scope.*

For a Fourth Amendment search to be reasonable, it must be justified in its inception and “reasonably related in scope to the circumstances which justified the interference in the first place.” Terry, 392 U.S. at 20. As discussed above, the general rule is that a search is only justified if the government actor has probable cause and a warrant. This Court will only lower the standard where a “special need” exists, and the only change to the analysis is to the inception prong. Where a “special need” exists within the employment context, a search is justified in its inception if “there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose.” O'Connor, 480 U.S. at 726. The test for reasonableness in scope remains the same—the search must be tailored to accommodate the interest which justified the search in its inception. See id.

This Court should not find any “special need” in this case, but to any extent that a “special need” exists, the fact remains that Povtak’s search was unjustified in its inception. Based on the facts established in the record, it is clear that Povtak’s purpose was to investigate into the identity of PugLuv86. If this was the case, Povtak’s search was not calculated to turn up evidence of work-related misconduct. As explained above, posting on a blog cannot be deemed either “work-related” or “misconduct.” Even if Povtak’s purpose was only to complete its

routine performance review, a search of Wagner's personal profile was unjustified in its inception because it was not necessary for a noninvestigatory work-related purpose. The only Facepage-related aspect of that evaluation was to audit an employee's comments on Povtak's profile, which only requires viewing Povtak's profile. Thus, neither of the search's alleged purposes justify it in its inception.

To any extent that there was a legitimate interest which justified the search in its inception, the search was still unreasonable because it was unjustified in scope. Even if the search began because of a work-related purpose, there would have been no reason to view Wagner's profile. Again, there was no relation between Wagner's profile and her work at Povtak. Regardless of which of the two alleged purposes was Povtak's true purpose in carrying out the search, the search was not related to workplace efficiency or productivity. Therefore, the search was unreasonable in scope.

Since Wagner's subjective expectation of privacy was reasonable and Povtak's search was unreasonable in its inception and scope, this Court should affirm the Thirteenth Circuit's holding that Povtak violated the Fourth Amendment.

**II. UNDER THIS COURT'S SUCCESSORSHIP JURISPRUDENCE AND IN LIGHT OF A NATIONAL POLICY IN FAVOR OF ARBITRATING LABOR DISPUTES, A SUCCESSOR CAN HAVE A DUTY TO ARBITRATE UNDER THE CBA OF A PREDECESSOR.**

The question in this case regarding the survivability of certain provisions of Local 12-22's Collective Bargaining Agreement with Crimaldi raises an issue, long-debated in the labor and employment arena, known as "successorship." Despite the wealth of case law on this topic, the extent to which obligations under a CBA continue to bind a successor employer after a change in ownership remains uncertain. As one authority in the area has noted, "[t]he law provides neither a fixed definition of 'successor,' nor a uniformly accepted set of obligations that

flow from the determination that, in certain circumstances, a party is a ‘successor.’” Hardin and Higgins, The Developing Labor Law 1019 (4th ed. 2001) (citing Howard Johnson Co., Inc. v. Detroit Local Joint Exe. Bd., Hotel and Restaurant Employees and Bartenders Int’l Union, AFL-CIO, 417 U.S. 249, 262 (1974)). There is, however, one constant theme that emerges from the convoluted web of successorship law, particularly from Supreme Court’s jurisprudence: a determination of the successor’s obligations under a predecessor’s CBA is fact-specific and requires a case-by-case approach. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964); NLRB v. Burns International Security Service, Inc., 406 U.S. 272, 274 (1972); Howard Johnson, 417 U.S. at 256. That truism, in and of itself, suggests that successors, like Povtak, can be bound to arbitrate under a predecessor’s CBA, and further, advises against dispatching with these cases at the summary judgment stage. Indeed, when the facts of the present case are considered against the backdrop of “successorship” doctrine, such as it is, a genuine issue of material fact as to Povtak’s duty to arbitrate with Local 12-22 emerges.

**A. An objective reading of this Court’s successorship jurisprudence reveals that a successor can be bound by substantive provisions of the predecessor’s CBA, particularly the arbitration clause, where there is substantial continuity between the identity of the workforce and business enterprise.**

The law of successorship comes from five Supreme Court decisions. The last three decisions in the chronology shed light on how the first two should be read and provide some guideposts for setting up a framework for analyzing successorship issues.

*1. Wiley.*

In John Wiley & Sons, Inc. v. Livingston, the Supreme Court held that a successor can be bound to arbitrate under a CBA between the predecessor and its employees’ union even though the successor was not a signatory to the CBA and had not otherwise agreed to arbitrate. 376 U.S. 543, 548 (1964). Half of the predecessor Interscience’s eighty employees in that case were

represented by a union. Id. at 545. The successor, Wiley, was much larger, employing over 300 non-unionized workers in separate offices and facilities. Id. After a merger between the two, Interscience ceased to exist, and all but a few of its unionized employees continued in the employment of Wiley. Id. The union sought to have Wiley recognize certain rights under the CBA, but the successor refused to arbitrate. Id. at 545–46. To compel arbitration, the union instituted an action under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185.

This Court explicitly recognized the survivability of a CBA through a change in ownership, holding:

[T]he disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and . . . in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.

Wiley, 376 U.S. at 548. The “national labor policy” of preventing “industrial strife” requires such a rule. Id. at 549. Especially where the employees and their union took no part in such restructuring, a mere “change in corporate structure or ownership” cannot remove an already-established duty to arbitrate labor disputes. Id. at 549. Otherwise, the workers have no means of protecting their interests, which will undoubtedly be greatly affected. Id. The freedom of management units to restructure their businesses must “be balanced by some protection to the employees from a sudden change in the employment relationship” to avoid the industrial strife that would likely ensue. Id. Requiring arbitration is a fair and efficient way to achieve this balance. Id. at 549–50.

The general rule of contracts—that a non-signatory to a contract cannot be bound to arbitrate under it—does not hold in this context because “a collective bargaining agreement is not an ordinary contract.” Id. at 500. This instrument, which “covers the whole employment

relationship,” represents more than “the simple product” of a consensual meeting of the minds. Id. Arbitration under its provisions is the only means by which employees like those in Wiley—those who were unionized under a CBA with a nonexistent predecessor and now find themselves in the employ of a successor with no CBA—can seek redress for adverse actions taken by the successor and enforce their previously vested rights. Id.

This duty to arbitrate is not absolute, however. This Court qualified its holding by acknowledging that “there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change” absolves the successor of the duty. Id. at 551. Thus, the concept of “substantial continuity,” which has since been the focal point of successorship law, was born. In Wiley, this Court found sufficient “similarity and continuity of operation across the change in ownership” in the “wholesale transfer” of Interscience’s unionized employees to Wiley. Id. Based on this finding of substantial continuity and the importance of the national policy favoring labor arbitrations, this Court required Wiley to arbitrate under Interscience’s CBA. Id.

## 2. Burns.

Some eight years later, this Court decided NLRB v. Burns International Security Service, Inc. and issued an opinion that seems directly contradictory to Wiley on the question of the successor’s duty to arbitrate under the predecessor’s CBA. 406 U.S. 272 (1972). This Court affirmed the Second Circuit’s decision, 441 F.2d 911 (2d Cir. 1971), to require the successor to bargain with the incumbent union but not to adopt the CBA between the incumbent union and the predecessor. Burns, 406 U.S. at 294–96. Upon closer inspection of the case’s facts, procedural posture, and the specific language of this Court’s holding, it becomes apparent that, far from overruling or narrowing Wiley, Burns is distinguishable from its predecessor. Indeed,

the distinction was preserved explicitly in this Court's jurisprudence two years later in a decision that leaves Wiley very much alive. See Howard Johnson, 417 U.S. 249 (1974).

In Burns, the predecessor and successor were in the industry of providing security services at high profile manufacturing plants. Id. at 274. The predecessor employer, Wackenhunt, was replaced by the successor, Burns, at a Lockheed Martin plant. Id. Twenty-seven of the 42 guards Burns initially employed had been unionized employees of Wackenhunt. Id. After Burns refused to bargain with the union and honor its CBA with Wackenhunt, the union filed an unfair labor practice charge against Burns with the National Labor Relations Board. Id.

Burns' major points of distinction with Wiley cannot be ignored, as they formed the basis for the decision. More importantly, when examined, the distinctions reveal that the present case more closely resembles Wiley. First, the factual circumstances of Wiley and Burns differed greatly. Unlike the merged entity in Wiley, Burns was not a successor, but a competitor, of Wackenhunt. Id. at 307–08 (Rehnquist, J., dissenting). Wackenhunt simply lost a contract; their ability to continue to operate as an independent business was not hindered. Interscience, on the other hand, ceased to exist. Second, the procedural posture of the cases differed: Wiley involved a suit to compel arbitration under § 301 of Taft-Hartley, the same claim made by Local 12-22 in the present case; Burns, on the other hand, arose in the context of an unfair labor practice claim made under 29 U.S.C. § 158, a different provision of the National Labor Relations Act, before the NLRB. Burns, 406 U.S. at 285–86. These differences are significant because they led this Court to rely on different policies in coming to a conclusion. Id. Equal in importance to the policy of preventing industrial strife is the policy in favor of freedom of potential employers and against “inhibit[ing] the transfer of capital.” Burns, 406 U.S. at 288. As the argument goes, a

potential employer would be discouraged from vying for a job, contract or acquisition, if its ability to restructure the resulting business would be restricted by a duty to bargain with the incumbent union or assume any of the obligations the union was owed by the business it replaced or acquired. *Id.* at 287–90. This argument applies more squarely in *Burns* because the unfair labor practice charge made by the union was that Burns should have been required to recognize and assume Wackenhunt’s CBA whole-cloth after outbidding Wackenhunt for a contract. A rule forcing a competitor to assume the contractual obligations of a bested opponent would stifle competition by making many capital investment transactions prohibitively expensive and thereby “saddling” businesses either in need of investment or unhappy with a current service provider with unprofitable arrangements. *Burns*, 406 U.S. at 288. Thus, this Court limited Burns’ duty to the incumbent union to bargaining. *Id.* at 281.

3. *Howard Johnson*.

In the context of a § 301 suit to compel arbitration where the defendant employer is a successor rather than a mere competitor, the pendulum swings back toward the policy in favor of settling labor disputes through peaceful arbitration. *Howard Johnson*, 417 U.S. at 256–57 (noting also that neither of the competing policies becomes irrelevant just because the procedural posture is such that one is more applicable). The present case and *Wiley* both present circumstances in which workers, unionized under a CBA with a now-defunct former employer, were kept on by a successor to do the same jobs in the operation of the same business. In a § 301 action, the incumbent union of those workers seeks not to bind the successor to the entirety of the old CBA, but to arbitrate disputes that have arisen between those workers and the successor. As the Supreme Court explained in the third of the successorship cases, requiring arbitration under the CBA in these circumstances fulfills the “reasonable expectations of the parties.” *Howard*

Johnson, 417 U.S. at 257. Moreover, at that point, arbitration is the only means available to the workers by which they can exercise their rights that vested under the CBA. Id.

Howard Johnson involved the purchase by a franchisor, Howard Johnson, of all the assets a franchisee was using in its operations of a restaurant and motor lodge. Id. at 251–52. Of the forty-five employees the franchisor hired to continue the operation of those facilities, only nine had been previously employed by the franchisee. Id. The union which represented those nine as well as the forty-four other former employees of the franchisee sought to require Howard Johnson to hire all of the franchisee’s former employees and to arbitrate the extent of Howard Johnson’s obligations to those employees under their CBA. Id. at 253. Refusing to find an “irreconcilable conflict between Wiley and Burns,” this Court instead embraced a case-by-case approach and decided the case on its specific facts in light of the distinction between the two previous decisions. Id. at 256. Its ultimate holding that Howard Johnson had no duty to arbitrate was based on the factual divergence between Wiley and the hotel company’s situation and not at all on an interpretation of Burns as foreclosing the possibility of a successor having to arbitrate under a predecessor’s CBA. Id. at 262–65.

Furthermore, in distinguishing the case with Wiley, this Court actually reaffirmed the concept of “substantial continuity” as the factor determinative of a successor’s legal obligations to the employees hired from the predecessor and their union. Focusing on the “substantial continuity in the identity of the work force across the change in ownership,” this Court found a great disparity between the ““wholesale transfer”” of Interscience employees to Wiley and the crossover of only nine of the franchisee’s employees to Howard Johnson. Id. at 263–64. This Court believed that basing its holding on that fact—whether the successor *chose* to hire a majority of the predecessor’s employees—struck the right balance between the competing

policies of protecting employees through a change in ownership and giving the new employer enough freedom to operate the business as it see fit. Id. at 264. While giving credence to the policy concerns expressed in Burns, this Court left Wiley intact and reestablished “substantial continuity” as the factual standard for determining a successor’s obligations under a predecessor’s CBA.

4. Golden State and Fall River.

In between Burns and Howard Johnson, this Court approved an NLRB decision to require a successor to reinstate with a backpay an employee who had been wrongfully discharged by the predecessor. Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168, 170–72 (1973). In doing so, this Court noted the doctrine of successorship’s breadth, reiterating the strong policy in favor of arbitrating labor disputes and echoing the idea espoused in Wiley that CBAs are not to be regarded as ordinary contracts. See id. at 182 n.5. Whereas the purchaser of a corporation’s assets is generally “not responsible for the seller’s debts or liabilities,” successorship can entail the honoring of a predecessor’s labor obligations whether it is effected by the purchase of assets, merger, or competitive bid. Id. “The refusal to adopt a mode of analysis . . . [that] distinguish[es] among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the ‘employing industry,’ the public policies underlying the doctrine will be served by its broad application.” Id. This holding reinforces the primacy of a factual case-by-case approach focused on substantial continuity and, by making the mode of successorship inconsequential, discounts any distinction of Wiley based on the fact that it involved a merger.

In the fifth and final of its major successorship cases, the Supreme Court turned its attention to the “substantial continuity” standard itself. See Fall River Dyeing and Finishing

Corp. v. NLRB, 482 U.S. 27, 42–44 (1987). It approved the Board’s “totality of the circumstances” approach as analogous to the case-by-case approach it had adopted, see Burns, 406 U.S. at 280–81, and its focus on several factors: “whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.” Fall River, 482 U.S. at 43. In the interest of industrial peace, it held further, the analysis of these factors should be conducted from the “employees’ perspective,” with the overarching question being “whether ‘those employees who have been retained will understandably view their job situations as essentially unaltered.’” Id. (quoting Golden State, 414 U.S. at 184).

5. *The Resulting Framework for Determining Whether a Successor Has a Duty to Arbitrate under a Predecessor’s CBA.*

As loose and difficult to decipher as it may be, these five decisions provide a workable framework for analyzing a successor’s legal obligations to an incumbent union, namely, whether a successor has a duty to arbitrate under the union’s CBA with the predecessor. Admittedly, the framework is marked more by guideposts than bright line rules, but its very existence informs employers, unions, workers, and the NLRB that a successor can be required to observe provisions of its predecessor’s CBA and can be compelled to arbitrate to determine the extent of those obligations. Whether a new employer is a successor and what its obligations are to an incumbent union under its CBA is a factual question demanding consideration of the totality of the circumstances. The benchmark is “substantial continuity” between the predecessor and successor’s business operations. Assuming that the alter ego and voluntary assumption theories do not apply, a finding that a substantial continuity is lacking generally absolves the successor of any obligations to the incumbent union and the workers it represents. If, however, there is

factual evidence tending to support a finding of substantial continuity, the possibility of having to bargain with the incumbent union and arbitrate a dispute under its CBA emerges. The factors relevant to a determination of substantial continuity are the continuity of the workforce across the change in ownership and, from the perspective of the holdover employee, the similarity in the old and new business enterprises, which concerns the sameness of the working conditions, jobs, production processes, facilities, supervisory structure, and customers. This approach is justified by the strong national policy in favor of arbitrating labor disputes, preserves the successor employer's freedom to restructure the business it has acquired, and protects a worker's rights at a time when they are most vulnerable.

6. *There is a genuine issue of material fact whether substantial continuity exists sufficient to create a duty on the part of Povtak to arbitrate under Crimaldi's CBA.*

A consideration of the Fall River factors reveals that a reasonable fact finder could conclude that substantial continuity exists between Crimaldi's business enterprise and that of Povtak.

- i. *Substantial Continuity of the Identity of the Workforce.*

As explained by the Supreme Court in Howard Johnson, the benchmark "in determining the legal obligations of the successor in § 301 suits under Wiley" is "whether the successor employer hires a majority of the predecessor's employees." 417 U.S. at 263–64 (emphasis added). The Wiley Court found substantial continuity in the "wholesale transfer" of Interscience's employees to Wiley. Wiley, 376 U.S. at 551; see also Stotter Div. of Graduate Plastics Co., Inc. v. Dist. 65, UAW, AFL-CIO, 991 F.2d 997, 1001 (2d Cir. 1993) (finding substantial continuity where most of the predecessor's employees stay on with successor). While a "wholesale transfer" is certainly enough, it is not required, however. In Fall River this Court upheld a finding of substantial continuity on the mere fact that a majority of the successor's

workforce was temporarily comprised of employees from the predecessor. 482 U.S. at 52–54. Within a couple of months of the succession in Fall River, thirty-six of the successor’s fifty-five employees had worked for the predecessor. Id. at 33. Before the year was out, the predecessor’s representation in the successor’s expanding workforce had shrunk to a minority, but this Court still recognized the substantial continuity in it. Id. at 52–54.

Also indicative of substantial continuity in the workforce is the extent to which “the [successor] intends to take advantage of the trained work force of its predecessor.” Id. at 41. This consideration reflects this Court’s recognition of the policy concern for the protection of workers’ rights when they become vulnerable due to circumstances beyond their control. Despite the fact that the successor in Fall River sought to hire workers not formerly employed by the predecessor by advertising in local media, this Court found “clear” evidence of such intent in the successor’s purchase of the predecessor’s machinery and hiring of the employees who had operated it. Id. at 44.

In the record is evidence of both the majority and intent elements sufficient to support an inference of substantial continuity in the workforce. Povtak hired 212 of Crimaldi’s 342 employees, a clear majority 185 F. Supp. 3d at 3, bringing its workforce into direct compliance with this Court’s statement of the rule in Howard Johnson. Moreover, Povtak took on all sixteen of Crimandi’s electrical workers. Id. This “wholesale transfer” of the entire Local 12-22 contingent from predecessor to successor serves not only to satisfy the majority requirement but also to demonstrate Povtak’s intent to take advantage of the unique skills and experience of Crimaldi’s electrical workers. With plans to retrofit many of the buses with electric engines, Povtak knew it would need a team of electrical workers to service them. Id. And indeed, the responsibilities of the 16 they hired expanded as a result of the modifications. Id. Further

evidence of the intent to exploit the expertise of the Local 12-22 electricians is the statement of Povtak's CFO Quine, made at the pre-bid conference, that "[Povtak] would need all the help [it could] get." Id. at 2. Thus, there is evidence sufficient to support a fact-finder's conclusion that there was substantial continuity in the identity of the workforce.

*ii. Substantial Continuity in the Business Operations.*

The other broad criterion in the substantial continuity determination is that of the business enterprise, which encompasses the sameness of the jobs, working conditions, products, production process, and customers. Fall River, 482 U.S. at 43. The degree of this continuity must be assessed from the perspective of the employees who went from the predecessor to the successor. Id. Despite the tweaking done to the buses and routes, there is enough evidence of substantial continuity in the business operations of Crimaldi and Povtak to justify the question going to the finder of fact.

The continuity in the business operations would be apparent to the casual observer as well as the everyday employee. Povtak took over the same contract that had belonged to Crimaldi for over 50 years. 185 F. Supp. 3d at 2. Pursuant to it, the successor provided the same transportation services for the citizens of Dynes in the same fashion—running bus routes. Id. at 3. Povtak operates out of Crimaldi's old garages and serves the same market in a geographic and demographic sense with the same buses that Crimaldi used. Id. Wagner and her fellow Local 12-22 electrical workers continue to work at what appear to be substantially the same jobs, on the same machines, and in the same city terminal. Id. at 2-3. Even the ECP is substantially similar to the Crimaldi Employee Handbook. Id. at 3. When the job classifications, working conditions, facilities, machines, and process for delivering services are substantially the same, as they appear to be here, the substantial continuity standard is considered met. See Fall River, 482

U.S. at 44; Stotter, 991 F.2d at 1001; Ameristeel Corp. v. Int'l Brotherhood of Teamsters, 267 F.3d 264, 279–80 (3d Cir. 2001) (finding substantial continuity in the business enterprise where successor operates out of the predecessor's plant, producing the same product with the same equipment).

The fact that Povtak made minor modifications to the buses and routes does not change the analysis, especially in light of the substantial continuity also present in the makeup of the workforce. In Fall River, the Supreme Court found substantial continuity in the business enterprise even though the successor abandoned “converting dyeing,” which had comprised some 70% of the predecessor's business. 482 U.S. at 44. The Tenth Circuit recognized substantial continuity despite changes a successor rubber company made to the product mix, sales methods, and marketing strategy, and a “sixteen-month hiatus of operations at the [predecessor's] plant.” Nephi Rubber Products Corp. v. NLRB, 976 F.2d 1361, 1365 (10th Cir. 1992); see also Fall River, 482 U.S. at 45 (tolerating a seven-month hiatus of operations). In the Sixth Circuit, substantial continuity in the motel industry has withstood changes in management, substantial renovations, acquisition of new insurance coverage, an increase in rates, and an overhaul of the recordkeeping and other administrative procedures. NLRB v. Interstate 65 Corp., 453 F.2d 269, 272–74 (6th Cir. 1971). Likewise, the Seventh Circuit has found substantial continuity in the face of a successor's adoption of new personnel policies, restructuring of the supervisory hierarchy, and reclassification of the various subordinate positions. NLRB v. Jarm Enterprises, Inc., 785 F.2d 195, 200–01 (7th Cir. 1986). Finally, substantial continuity has been found to exist despite the integration of local discount stores into a large national chain. NLRB v. Zayre Corp., 424 F.2d 1159, 1162–64 (5th Cir. 1970); see also

Wiley, 376 U.S. at 551 (substantial continuity found despite merger of predecessor into much larger successor).

The above case law demonstrates the basic principle that a successor cannot avoid substantial continuity by making minor changes to the predecessor's business operations. Indeed, as the cases illustrate, modifications much more significant than those made by Povtak have been tolerated where the majority element is present and substantial continuity is reasonably perceived by the holdover employees. The "greening" of the buses amounts to no more than a modification of the predecessor's equipment, which can be equated to the motel renovations deemed inconsequential by the circuit courts. And the slight changes made to the routes seem no more drastic than changes in product mix and marketing strategy. Povtak neither abandoned a substantial portion of the existing business, as Fall River did, nor did it wait several months before resuming operations, as Wiley did. There has been no reclassification of jobs or altering of working conditions. All of the electrical workers continue to work with the same equipment, for apparently the same pay, in the same terminal, to the same end—to maintain the means of providing transportation for the city's citizens. The fact that they received some training in the electrical engines does not diminish this substantial continuity. From the electrical employees' perspective, nothing has changed. At the least, the evidence is sufficient to create a factual question as to substantial continuity.

All business owners must periodically update their equipment to remain competitive in what has become a fast-paced technology-driven economy. Povtak's efforts to inject "green" technology—a move at least partially motivated to receive government funds—only changed the operation of the business superficially. In turn, the training of personnel must be updated accordingly for the business to be able to realize the full potential of its investments. Given the

inevitability of this process, to allow a business acquirer to avoid successorship liability merely by making minor, routine changes to physical assets, like buses, and production methods, like routes, would be fatal to the doctrine. Such a result would leave millions of workers completely vulnerable to the whims of the few who have the power to restructure corporations and orchestrate mergers, consolidations, stock sales, asset purchases, and auctions. In recognition of the unacceptability of such circumstances, this Court recognizes not only successorship, but also a national policy in favor of arbitrating labor disputes, as immutable protectors of these workers' rights.

**B. The Supreme Court and Circuit Courts' successorship jurisprudence supports imposing Crimaldi's CBA upon Povtak, especially in light of this Court's public policy favoring arbitration.**

Contrary to what the Petitioner maintains, a fair and objective reading of the Supreme Court and Circuit Courts' successorship jurisprudence supports the conclusion that a successor employer can be bound by certain substantive provisions of a predecessor's CBA, particularly the arbitration provision. By requiring non-signatory successors to arbitrate the extent of such obligations with the incumbent union, this doctrine of successorship ensures that workers always have a forum for exercising their rights, even amid changes in corporate ownership. Thus, it gives the workers some protection against the whims of management and business owners, who rarely have the interests of workers in mind when they construct deals to transfer the ownership of their businesses.

The extent to which a successor is obliged to honor the terms of a predecessor's CBA with an incumbent union depends on the degree of substantial continuity between the identity of a predecessor's workforce and business enterprise and that of the successor. A purely factual determination, it considers whether a majority of the workforce has remained the same and examines the continuity of several factors across the change in ownership: job classifications,

working conditions, products, production processes, equipment, facilities, and customers. The determination is made from the perspective of a holdover employee. When present, substantial continuity may not be undone by even somewhat significant changes to physical assets, administrative procedures, products offered, and management structure. What matters is whether the holdover employee perceives that he is doing the same job in the same place. From the evidence in the present case, a reasonable person could conclude that Wagner and the rest of the electrical workers of Local 12-22 are doing just that. Such a finding should compel Povtak to arbitrate with Local 12-22 the extent to which it is bound by the grievance and termination provisions in Crimaldi's CBA.

### **CONCLUSION**

The Thirteenth Circuit correctly held that Povtak violated Ms. Wagner's Fourth Amendment right to privacy through its illegal search of Ms. Wagner's personal, private Facepage profile. Additionally, the Thirteenth Circuit correctly held that a genuine issue of material facts exists as to Povtak's responsibility to arbitration with Local 12-22.

Therefore, for the above-mentioned reasons, this Court should affirm the Thirteenth Circuit's decision.