

IN THE SUPREME COURT OF THE UNITED STATES

March Term, 2011

Povtak Group,

Petitioner,

v.

Local 12-22, Professional Electrical Workers Union and Roberta Wagner

Respondent.

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

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE ISSUES PRESENTED

- I. Whether an employer violated the Fourth Amendment privacy rights of an employee for discharging the employee after conducting a search of the employee's private, personal social networking profile.

- II. Whether a successor is bound to the substantive terms of its predecessor's collective bargaining agreement when it retains the entire unionized workforce, failed to set any pre-conditions to employment, and did not inform the employees prior to hiring that it would operate as an "at will" employer.

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STATEMENT OF THE CASE

Ms. Roberta Wagner (hereinafter “Wagner”) and Local 12-22, Professional Electrical Workers Union (hereinafter “Local 12-22”) instituted this action against Povtak asserting its actions of searching for the identity of a blog poster, a supervisor’s action of reviewing her personal Facepage profile, and reviewing the contents of her Ephone violated her Fourth Amendment right to privacy. (R. at 20) The second claim was that Povtak was a successor to Crimaldi and, therefore, subject to the substantive provisions of the collective bargaining agreement (hereinafter “CBA”). (R. at 16) A jury trial on the Fourth Amendment claim ensued. (R. at 20) The jury returned a verdict in favor of Ms. Wagner on her privacy claim. Id. The district court, however, granted the defendant’s FRCP 50 motion and set aside the jury verdict. (R. at 19) The judge ruled in favor of the Defendants as a matter of law. Id. As to the second claim, the court granted the Defendant’s motion for summary judgment. Id.

Local 12-22 and Wagner appealed the August 6, 2009 motion for summary judgment and the December 18, 2009 judgment in favor of Defendant-Appellee Povtak Group (hereinafter “Povtak”) from the United States District Court for the Western District of Froessel. Local 12-22, Prof’l Elec. Workers Union v. Povtak Group, 1214 F.3d 1,1 (13th Cir. 2010). The Thirteenth Circuit Court of Appeals reversed the district court on both issues. Id. at 15. Specifically, the Court found Povtak violated Wagner’s Fourth Amendment right to privacy and Povtak is a successor to Crimaldi subject to the grievance procedures of the CBA. Id. Subsequently, this Court granted Certiorari.

STATEMENT OF THE FACTS

In 1953, the City of Dynes (hereinafter “Dynes”) contracted with Crimaldi to provide transportation services. (R. at 2) The Professional Electrical Workers Union, Local 12-22, (hereinafter “Local 12-22”) represented electrical workers there since 1957. Id. Local 12-22 had an established collective bargaining (hereinafter “CBA”) with Crimaldi. Id. The contract is set to expire on August 31, 2012. Id. In 2008, Dynes elected to not renew the Crimaldi’s contract for the Dynes terminal following the indictment of several of Crimaldi corporate officials. Id. Dynes began accepting bids and eventually awarded the government contract to Povtak for the Dynes terminal. Id.

City officials held a pre-bid conference attended by Local 12-22 members. Id. One question asked during the conference was whether Povtak would retain Crimaldi employees. Id. The response by Chief Financial Officer, Deborah Quine, was “Povtak would need all the help it could get.” Id. Povtak subsequently hired 212 former Crimaldi employees. All sixteen electricians in Local 12-22 were hired. (R. at 3)

Povtak adopted the bus fleet and garages maintained by Crimaldi, but made adjustments. Id. It began operating electrical or organic- diesel burning engines, cleaner exhaust systems, and installed retro purple headlights. Id. Povtak enhanced the bus routes to accommodate more citizens and provide shorter travel distances. Id. Two federal government agencies provided grants for the green initiative. Id. The electricians’ duties slightly expanded in accordance with the upgrade for which Povtak provided additional training to the electricians. Id.

Roberta Wagner, an electrician and member of Local 12-22, worked for Crimaldi since 2004. (R. at 4) When Crimaldi lost the Dyne’s contract, Povtak retained her. (R. at 3) Ms. Wagner worked in the light rail division until Povtak transferred her to the bus division. (R. at 4,

5) There was no decrease in salary or fringe benefits. (R. at 5) After Povtak hired its workforce, it issued an Electronic Communications Policy (hereinafter “ECP”). (R. at 3) The policy closely resembled that of Crimaldi’s with the relevant exception being it updated the technology. (R. at 3) Povtak’s policy pertained to the use of mobile devices, whereas, Crimaldi’s policy did not because those devices were not in popular use at the time. (R. at 3, 4) Povtak required all its employees to sign a document acknowledging they read and understood the ECP. (R. at 4) Wagner signed with the belief signing was a formality because the policy closely resembled Crimaldi’s policy. Id.

Within the same month as the ECP was distributed, Povtak created a Facepage profile. Id. Povtak strongly encourage employees to “friend” it on Facepage and post positive comments about the “green” projects. Id. Wagner complied. Id. Wager created her own Facepage account in 2006. Id. Even though she “became friends” with Povtak, she did not do the same with her supervisors. Id. The only connection between Wagner and her supervisors was through Povtak’s Facepage. Id. Her own facepage was set to “friends,” which limits the accessibility of information to others users. Id.

Povtak also upgraded Crimaldi’s phones to ones with internet capability, i.e., ephones. Id. Employees had exclusive use of the phone. Id. Wagner downloaded four applications: two work related and two not. (R. at 5) The non-work related download linked to Facepage and an electrician blog entitled “Crossing the Wires.” Id. Wagner showed the application to her supervisor, Shane Leibson. Id.

As urged, Wagner continued to post positive messages about her job and the green initiatives of Povtak on its Facepage profile. Id. On her own profile, Wagner posted links to articles critical of Povtak projects. Id. These posts occurred during working hours, via her

ePhone and non-working hours, via her home computer. Id. Her working-hour posts did not affect her work productivity. Id. Wagner linked a blog posting made under the username “Pugluv86” to her Facepage profile that later appeared in an local newspaper article. (R. at 6) The posting contained details about the inner workings of Povtak and was highly critical of Povtak’s green initiatives. Id. The post charged the ineptness of certain Povtak supervisors, who were mentioned by name, as the reason for the green initiatives were failing. Id. Many at Povtak believed that a disgruntled employee made the blog post because of the inside information contained therein. Id.

Povtak supervisors began to investigate the article’s allegations, but also focused on discovering the identity of “PugLuv86.” Id. Povtak demanded all shift supervisors review their employees’ comments on Povtak’s Facepage profile. Id. Around this time, Wagner received a routine employee performance review by Povtak’s Human Resources Department (“HR”). Id. One aspect was an audit of the employee’s comments on Povtak’s Facepage profile. Id.

Performance review by supervisors was also included. Id. Wagner’s former shift supervisor, Shane Leibson, submitted positive reviews. Id. Liebson expressly noted that Wagner had informed him about the four applications downloaded onto her ePhone and that these applications actually improved her work performance. Id. Leibson praised Wagner’s quick email turn-around time and her ability to solve computer issues quickly due to the Ephone applications. (R. at 6, 7) In fact, he encouraged other employees to download the same applications as Wagner. (R. at 7)

Wagner’s new supervisor in bus division, Frank Milmine, submitted several screen shots of Wagner’s Facepage profile, which he accessed through Povtak’s profile. (R. at 7) Because Wagner was not Facepage friends with any of her supervisors, the only way Milmine could view

Wagner's profile was through the Povtak page. Id. Some posted comments criticized Povtak's green programs. Id. There is doubt about as to whether Milmine viewed Wagner's personal profile as part of the performance evaluation or as part of the investigation into the identity of PugLuv86. Id.

Wagner reported a problem with her ePhone a few days after the review. Id. She sent the phone into Povtak's Technical Support Office. Id. A support technician reviewed the device and noticed that Wagner had installed four applications. Id. The technician filed a report with his supervisor. Id. The supervisor then noted possible connections between the "Crossing the Wires" application and the newspaper article. (R. at 8) Povtak fired Wagner the next day for allegedly violating the ECP. Id.

Union officials, Roth and Blacato, attempted to submit grievance to HR pursuant to the collective bargaining agreement ("CBA") for Wagner's termination. Id. Roth and Blacato handed the grievance to HR secretary, Arko, expressly stating it was pursuant to CBA Article 14. Id. They asserted Wagner's termination violated the "just cause" provision. Id. Audrey Livramento, assistant HR manager, scheduled a meeting for March 10, 2008. Id. Livramento claimed the sole purpose was to explain the EPC under which Wagner was fired. Id. Tension escalated during the meeting with the union officials asserting their right of notification to which Livramento responded, "[w]e don't even need a reason." Id. Roth and Blacato then sent an email with the grievance attached to George Daks, the HR general manager. (Ex. at 1) Daks failed to reply. Id. The union officials sent a follow-up email informing Daks they were proceeding to arbitration under CBA Article 14.2. Id. Daks responded that Povtak would not participate. Id. He characterized Povtak as an "at will" company in the March 22 email. Id.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend IV guarantees:

“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated”

29 U.S.C.A. § 185 authorizes:

“[S]uits for violation of contracts between an employer and a labor organization representing employees.”

STANDARD OF REVIEW

This is an appeal from the Thirteenth Circuit’s decision reversing the District Court of Froessel’s order granting the Petitioner’s Motion for Summary Judgment. The proper standard of review for summary judgment is *de novo*. U.S. v. Diebold, Inc., 369 U.S. 654 (1962).

SUMMARY OF THE ARGUMENT

The Fourth Amendment must not be lost in cyberspace. The Thirteenth Circuit Court of Appeals correctly reversed the decision of the district court below, which set aside a jury verdict favoring Ms. Wagner’s privacy claim. Povtak is a state-actor. Therefore, the Fourth Amendment must govern. In *O’Connor*, this Court applied the Fourth Amendment to the workplace through a two-step analysis. First, the Court must examine the workplace to determine if an employee has an expectation of privacy. If an expectation of privacy exists, the second step is to examine if the search was work-related and reasonable. A warrantless search by a government employer is reasonable if justified at inception and not excessive in scope.

Ms. Wagner had a reasonable expectation of privacy in both her work-provided iPhone and her Facepage account. The search of the Ms. Wagner’s Facepage profile was unreasonable at inception and in scope. The search was not conducted solely for work-related purposes.

Because the search went beyond work-related monitoring or investigating for work-related misconduct, it was not justified at inception or limited in scope. The search was unreasonable and thus in violation of the Fourth Amendment.

Constitutional clauses guaranteeing protection against abuses of government power must be able to adapt to a changing world. In *Katz v. United States* and its progeny, this Court interpreted the Fourth Amendment as providing protection to “people not places.” This forward-thinking rationale has helped this Court interpret the Fourth Amendment in a manner which has protected citizens from warrantless searches in ever-changing societal conditions. The internet, social media, and high-tech communication devices have rapidly created dramatic changes in societal conditions. In order to provide meaningful protection, the Fourth Amendment of the future must extend to cyberspace. This protection is crucial in the modern workplace where distinctions between private life and work life are not easily identifiable.

Povtak does not contest its designation as a “successor.” The dispute centers on whether Povtak must adopt the substantive provisions its predecessor’s CBA. The answer is undoubtedly yes. Povtak must assume the CBA for two reasons. First, it is a perfectly clear successor because failed to establish “new employment terms on conditions” at the onset when it retained the Crimaldi Local 12-22 electricians. Povtak also misled the employees into “believing that they would be retained without changes” in working conditions when it commented favorably on employment prospects at the pre-bid conference. Therefore, under the *Spruce Up* analysis, Povtak is bound to the CBA substantive provisions as a perfectly clear successor.

Povtak also implicitly adopted the CBA in that it “repeatedly acted in accordance” with the explicit provisions. From the technological upgrades to the EPC policy, Povtak implicitly

followed the CBA terms in that the CBA has contemplated and anticipates such actions at its adoption. By acting in accordance with the express provision, Povtak cannot now claim it is not bound. In the alternative, the Court should, at minimum, order Povtak to arbitrate its obligations to CBA. The interests at stake such as “industrial stability” and “protecting employees in times of great uncertainty” are simply too high for this Court to hold otherwise. For the preceding reasons, this Court should hold Povtak to the substantive provisions of the CBA.

ARGUMENT

I. BECAUSE MS. WAGNER HAD A VALID EXPECTATION OF PRIVACY IN HER WORK-PROVIDED EPHONE AND HER FACEPAGE PROFILE, THE WARRANTLESS, INVESTIGATORY SEARCH CONDUCTED BY POVTAKE WAS IN VIOLATION OF HER FOURTH AMENDMENT RIGHTS.

This case turns on the application of the Fourth Amendment right to privacy, which includes the right to be free from “unreasonable searches and seizures.” The Fourth Amendment to the United States Constitution guarantees: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated” U.S. Const. amend IV. At the core of the Fourth Amendment is the fundamental concept that “any governmental intrusion into an individual’s . . . expectation of privacy must be strictly circumscribed.” Payton v. New York, 445 U.S. 573, 589-90 (1980).

The Fourth Amendment also applies to searches and seizures of employees’ property conducted by government employers or supervisors. See O’Connor v. Ortega, 480 U.S. 709, 715 (1987). In *O’Connor*, this Court addressed the application of the Fourth Amendment to the workplace. Id. “Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer.” Id. at 716. The *O’Connor* plurality concluded that this issue demanded a two-step analysis. First, the Court must examine the employee’s

workplace to determine whether an employee has a reasonable expectation of privacy. O'Connor, 480 U.S. at 718. If a reasonable expectation of privacy is found, the second step is to examine whether the search for “investigatory or non-investigatory work-related purposes was reasonable under all . . . circumstances.” Id. at 725-26. A government employer’s work-related warrantless search is reasonable if it is justified at its inception and is not excessive in scope. Id.

In the case *sub judice*, Ms. Wagner had a reasonable expectation of privacy in both her work-provided iPhone and her Facepage account. Whether a public employee has a reasonable expectation of privacy depends on the context of the employment relationship and must be determined on a case-by-case basis. Id. at 717-18. Ms. Wagner worked in a garage with no public contact and her iPhone was issued for her exclusive use. Ms. Wagner utilized privacy controls on her Facepage account to only permit “friends” to view her profile. Because Ms. Wagner had a reasonable expectation of privacy, the analysis must continue.

The search of Ms. Wagner’s Facepage profile was unreasonable at inception and scope. A search is ordinarily “justified at inception” when there are reasonable grounds for suspecting the search to turn up evidence of work-related misconduct or when the search is necessary for a non-investigatory work-related purpose. Id. at 726. The search conducted by the Povtak supervisor in the case before the Court was not conducted solely for work-related purposes, but instead conducted to discover the identity of “PugLuv86.” If a search goes beyond work-related monitoring or an investigatory search for work-related misconduct, it is not justifiable at its inception or limited in scope. Thus, the search is unreasonable and in violation of the Fourth Amendment.

Constitutional clauses guaranteeing the individual protection against specific abuses of government power must have a capacity of adapting to a changing world. *See* Olmstead v.

United States, 277 U.S. 438, 472-72 (1928) (Brandeis, J. dissenting) (noting that the Fourth Amendment must recognize and adapt to changing conditions in society). In *Katz v. United States* and its progeny, this Court interpreted the Fourth Amendment as providing protection to “people not places.” Katz, 389 U.S. 347 at 351 (1967). This forward-thinking rationale has helped the Court to interpret the Fourth Amendment in a manner which has protected citizens from warrantless searches in ever-changing societal conditions.

The internet, social media, and high-tech communication devices have created a rapid and dramatic change in societal conditions. It is important that the Fourth Amendment is not “lost in cyberspace.” For the Fourth Amendment of the future to provide any meaningful protection at all, this Court must again provide forward-looking guidance and extend Fourth Amendment privacy protections to cyberspace. This protection is especially crucial given the realities of the modern work place where, due to technology and economic conditions, clear distinctions between private life and work life are not easily identifiable.

More specifically, the Court should uphold the opinion of the Thirteenth Circuit Court of Appeals below for three reasons (1) Ms. Wagner had a reasonable expectation of privacy in her ePhone cellular device and Facepage profile; (2) the investigatory search conducted by Povtak was unreasonable at its inception and in its scope; and (3) in an age of rapidly evolving high-tech communications, including social networking, it is important that the Fourth Amendment evolve to provide meaningful protection to citizens, especially in an age when clear distinctions between private life and work life are not easily identifiable.

A. Ms. Wagner Had a Reasonable Expectation of Privacy in Her Work-provided ePhone and Her Facepage Account.

1. The *O'Connor* case-by-case approach is the most practical way to deal with the wide array of existing work environments.

Ms. Wagner had a reasonable expectation of privacy in both her work-provided iPhone and her Facepage account and is therefore entitled to Fourth Amendment protection. Povtak does not contest its status as a government actor because it accepts transportation contracts with the City of Dynes and accepts federal funds for its various programs. The Fourth Amendment applies to states and municipalities through the Fourteenth Amendment. See South Dakota v. Opperman, 428 U.S. 364, 365 (1976). Fourth Amendment protections apply when the government acts in its capacity as an employer. Treasury Employees v. Von Raab, 489 U.S. 656, 665 (1989).

This Court in *O'Connor v. Ortega* set forth the proper framework for analyzing searches by government employers. The two-step analysis employed by the plurality in *O'Connor* examined (1) the operational realities of the workplace to determine whether the employee had a reasonable expectation of privacy and (2) if the employee had a legitimate expectation of privacy, was the work-related intrusion by the employer reasonable. O'Connor, 480 U.S. at 718. Justice Scalia's concurring opinion dispensed the "operational realities" inquiry. This Court, in its recent decision in *City of Ontario, California v. Quon*, noted both approaches. Nevertheless, the distinction between the *O'Connor* plurality decision and Justice Scalia's concurrence is inconsequential because Ms. Wagner had a reasonable expectation of privacy, therefore satisfying the first step of the *O'Connor* test.

In *Quon*, this Court assumed, *arguendo*, that the employee had a reasonable expectation of privacy but noted that extreme care must be taken "when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer." Quon, 130 S.Ct. 2619 at 2629 (2010). The *O'Connor* case-by-case approach is the only practical manner in which to deal with the wide array of existing workplace environments.

Moreover, it has become the standard rubric by which circuit courts analyze cases of this nature, including the Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits, as well as the Court of Appeals for the District of Columbia, and the Court of Appeals for the Armed Forces.¹

2. The conditions of Ms. Wagner’s work environment, her exclusive control over her work-provided ePhone, and the endorsement of her actions by her supervisor establish a reasonable expectation of privacy in her ePhone.

While the relevant search in the case before the Court is the search of Ms. Wagner’s Facepage account, Ms. Wagner also had a reasonable expectation of privacy in her work-provided ePhone under the *O’Connor* standard. Ms. Wagner did not work in a bustling office. Her workplace was in the Povtak garage where she had little-to-no contact with the public. The company issued ePhone was for her exclusive use. The fact that Ms. Wagner did not own the ePhone is not dispositive. This Court put that notion to rest in *Katz* when it rejected the contention that those who seek to invoke Fourth Amendment protections must have “a property right in the area searched.” Mancusi v. DeForte, 392 U.S. 364 at 368 (1968) (citing Katz, 389 U.S. at 352).

In *Leventhal v. Knapek*, the Second Circuit found that a plaintiff had a reasonable expectation of privacy in his office computer in a private office where he had exclusive use of the computer and did not share the use of his computer with other employees, visitors, or the public. Leventhal, 266 F.3d 64 at 73-74 (2d Cir. 2001). This is analogous to the case *sub judice* in which Ms. Wagner had exclusive control over her ePhone. Additionally, the Fifth Circuit in

¹ See, e.g., Leventhal v. Knapek, 266 F.3d 392 (2d Cir. 2001); U.S. v. Simmons, 206 F.3d 392 (4th Cir. 2000); U.S. v. Johnson, 16 F.3d 69 (5th Cir. 1994); Gossmeier v. McDonald, 128 F.3d 481 (7th Cir. 1997); U.S. v. Thorn, 375 F.3d 679 (8th Cir. 2004); U.S. v. Ziegler, 474 F.3d 1184 (9th Cir. 2007); Stewart v. Evans, 351 F.3d 1239 (D.C. Cir. 2003); U.S. v. Long, 64 M.J. 57 (C.A.A.F. 2006).

Finley held that a defendant had a reasonable expectation of privacy and could therefore contest the validity of a search of his employer-provided cellular phone. U.S. v Finley, 477 F.3d 250, 258 (5th Cir. 2007).

However, privacy expectations in the workplace may be affected by office practices, procedures, or regulations. O'Connor, 480 U.S. at 717. Povtak asserts that the company ECP prevents any reasonable expectation of privacy. The Seventh Circuit came to a similar conclusion in *Muick v. Glenayre Electronics* holding that because the employer had announced it could inspect the laptops it furnished to the employees, no expectation of privacy could exist. Muick, 280 F.3d 741, 743 (7th Cir. 2002). However, *Muick* did not involve a situation where other office practices or procedures varied from the inspection regulation. Just as office practices and procedures may limit privacy expectations as they did in *Muick*, they may also increase privacy expectations as they did in the case before the Court. When Ms. Wagner showed her supervisor, Shane Leibson, the ePhone applications that allegedly violated the EPC, Leibson did not reprimand her or terminate her. Instead, he approved of the use of these applications and encouraged other employees to download the applications. Leibson's actions constituted an endorsement of Ms. Wagner's behavior.

Furthermore, the ECP provides for "reasonable *personal use* during non-work time which does not unreasonably interfere with production, productivity and/or discipline" As this Court noted in *Quon*, "many employers expect or at least tolerate personal use of such [electronic] equipment by employees because it often increases worker efficiency." Quon, 130 S.Ct. at 2629. Leibson himself noted that the ePhone applications downloaded by Ms. Wager improved her work performance. She had quicker email turn-around time. The technical support application Ms. Wagner downloaded to her ePhone helped her solve issues with the light

rail cars more quickly. When considering the conditions of her work environment, the actions of her supervisor, and the fact that the iPhone was issued to Ms. Wagner for her exclusive use, Ms. Wagner had a valid expectation of privacy.

3. After taking affirmative steps to ensure its security, Ms. Wagner had a reasonable expectation of privacy in her Facepage account.

Ms. Wagner had an expectation of privacy in her Facepage account. In *Smith v. Maryland*, this Court set forth a two-part inquiry into whether an individual has a reasonable expectation of privacy: (1) whether the individual, by her conduct, has exhibited subjective expectation of privacy and (2) whether the expectation is one that society is prepared to recognize. Smith v. Maryland, 442 U.S. 735, 740 (1979).

Ms. Wagner had a subjective expectation of privacy in her Facepage account. This is evident, as noted by the Thirteen Circuit below, by the fact that Ms. Wagner utilized privacy settings which allowed her to decide what information others were able to view. Local 12-22, Prof'l Elec. Workers Union v. Povtak Group, 1214 F.3d 1, 4-5 (13th Cir. 2010) (hereinafter “Povtak”). In *Ziegler*, the Ninth Circuit noted that the government did not even contest that the plaintiff had a subjective expectation of privacy in his password protected computer. U.S. v. Ziegler, 474 F.3d 1184, 1189 (9th Cir. 2007) (holding that password was “sufficient evidence of such expectation”) *see also* Keeping Secrets in Cyberspace: Establishing Fourth Amendment Protection for Internet Communication, 110 Harvard L. Rev. 1591, 1603 (1997) (noting that passwords and privacy settings are “factors necessary to establish an expectation of privacy”). Ms. Wagner’s Facepage privacy settings are analogous to a password. The privacy settings shielded all but those she specifically chose to permit to see the information on her account.

While Ms. Wagner’s actions establish a subjective expectation, whether this expectation

of privacy is one that society is prepared to recognize is admittedly more difficult to analyze. When applying the Fourth Amendment to cyberspace it is important to analogize to prior applications, but it is equally important to use the proper analogies. The minority opinions of Judge Gould and Judge Homfelt below indicate the confusion surrounding the exact nature of Facepage and social networking sites.

Judge Gould compares Facepage to internet chat rooms, citing to U.S. v. Charbonneau, 979 F.Supp. 1177, 1182 (S.D. Ohio 1997) (holding that individuals who post on internet “chat rooms” maintain no reasonable expectation of privacy). However, an internet chat room and a “limited profile” Facepage account are vastly different. While internet chat rooms like the one in *Charbonneau* are open to the public at large, a “limited profile” Facepage account, such as Ms. Wagner’s – which she had set to the “friends” setting - is able to be viewed only by people Ms. Wagner permitted.

On most social media sites, this setting is not the default. Instead, a user must actively change the setting to restrict access. Mathew J. Hodge, The Fourth Amendment and Privacy Issues on the “New” Internet: Facebook.com and Myspace.com, 31 S. Ill. Univ. L. J. 95, 110 (2006) (describing a “limited profile” and privacy settings on Facebook). This is an expectation of privacy society is prepared to recognize. In fact, it is telling that once Facebook began to provide privacy controls, it rapidly surpassed its competitors who did not offer privacy controls, such as MySpace. James Grimmelmann, Saving Facebook, 94 Iowa L. Rev 1137, 1185 (2009).

One of the “core principles” of Facebook, which is nearly identical to Facepage, is that users “should have control over personal information.”² Facebook offers a “staggeringly comprehensive set of privacy options.” Id. In fact, Chris Kelly, the Chief Privacy Officer of

² *Facebook Principles*, Facebook, <http://www.facebook.com/policy.php>.

Facebook, called its controls “extensive and concise” when testifying before Congress, emphasizing Facebook’s goal to “give users . . . effective control over their information” through its “privacy architecture.”³ As Grimmelmann noted in *Saving Facebook*, “The powerful, if unspoken, message is that what you say on Facebook will reach your contacts and desired contacts but no one else.” Grimmelmann, *supra*, at 1162. This is an expectation of privacy society desires and is therefore fully prepared to recognize as valid.

In his minority opinion below, Judge Gould mistakenly concluded that through her use of Facepage, Ms. Wagner intended her comments to be available “for all to see.” *Povtak, supra*, at 17. As noted above, this is simply not the case. However, Judge Gould also claimed there is “no need to have a Facepage profile” and that Ms. Wagner had chosen not to use a private means of communication. *Id.* Once the privacy settings and operational realities of Facepage are understood, however, it is easy to analogize Facepage to other, protected forms of communication.

The courts have previously compared emails to first-class mail and telephone calls and found privacy protections therein. *See Hodge, supra*, at 104. Facepage transmissions on a “limited profile” are similar to first-class mail. The user decides who is permitted to view the communication or who the recipient will be. The fact that an unlawful postman might intercept the letter does not diminish the legitimate expectation of privacy in any way. *See U.S. v. Maxwell*, 45 M.J. 406, 418 (C.A.A.F. 1996) (comparing email to first-class mail). In this manner, the fact that the communication is turned over to a third-party does not diminish privacy

³ Privacy Implications of Online Advertising Hearing Before the S. Comm. Of Commerce, Science, & Transportation, 110 Cong. 2 (2008) (statement of Chris Kelly, Chief Privacy Officer of Facebook), <http://www.insidefacebook.com/wp-content/uploads/2008/07/chriskellyfacebookonlineprivacytestimony>.

expectations. Facepage is simply a piece of infrastructure like the mail system or the phone lines. The fact that Facepage is exceedingly efficient should not limit its Fourth Amendment protections. This is especially important when considering the millions of users Facebook and other social networking sites have attracted (due, at least in part, to their privacy settings). The Fourth Amendment must continue to adapt to the expectations of society.

Even if it is true that, as Judge Gould asserts, there is “no need to have a Facepage profile,” the citizenry has flocked to this new, efficient means of communication. Society seeks privacy rights in cyberspace and is prepared to find this expectation of privacy reasonable. This is reflected by the fact that the jury below rendered a verdict in favor of Ms. Wagner’s privacy claim. Povtak, 231 F.Supp.3d 20 (W.D. Frl. 2009). This Court should provide the necessary forward-thinking guidance and recognize the expectation of privacy in a “limited profile” Facepage account.

B. The Warrantless Investigatory Search of Ms. Wagner’s Facepage Account Conducted by Povtak was not Justified at its Inception and Excessive in Scope and therefore in Violation of the Fourth Amendment.

The search of Ms. Wagner’s Facepage account was not justified at inception and was excessive in scope. Fourth Amendment protections against “unreasonable” searches are enforced after a “careful balancing of governmental and private interests.” New Jersey v. T.L.O., 469 U.S. 325 at 341 (1984). Therefore, once it is established that an employee has an expectation of privacy, the search must also be reasonable when considering the circumstances. O’Connor, 480 U.S. at 725-26. Under this standard, the Court must evaluate whether the search was “justified at its inception” and “reasonably related in scope to the circumstances which justified the interference in the first place.” Id. at 726.

1. The search was not justified at inception.

In order to be justified at inception, a search by an employer must be made with reasonable grounds for suspecting that the search will turn up evidence of work-related misconduct or that the search is necessary for non-investigatory, work-related purposes. *Id.* The record before the Court shows that all employees were subject to an audit of the comments they placed on the Povtak Facepage profile. Povtak was certainly permitted to review its own Facepage profile. The company believed that positive posts by an employee demonstrated positive feelings for the company. Therefore, the search auditing *its own Facepage profile* was conducted for a non-investigatory work-related purpose.

However, the search of Ms. Wagner's Facepage profile had no work-related purpose. It was not part of the procedure of regular work evaluations. Furthermore, the search was conducted by supervisor Frank Milmine amidst Mr. Milmine's search for the identity of "PugLuv86." While Wagner was encouraged to post positive comments on the Povtak Facepage profile, Wagner had specifically chosen (through her privacy settings and her choice not to become "friends" with her supervisors) to keep her comments private from the public at large. The search of Ms. Wagner's personal Facepage account had no reasonable work-related purpose and was purely investigatory.

In *Thorne v. El Segundo*, the Ninth Circuit correctly held that the Constitution prohibited unregulated, unrestrained employer inquiries into personal matters that have no bearing on job performance. *Thorne*, 726 F.2d 459, 471 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984). The search of Ms. Wagner's Facepage profile was a search into personal matters that had no connection to job performance. The search for the identity of "PugLuv86" was investigatory and not work-related.

In *Quon*, this Court found the city’s review of employee text messages reasonable. This search is not analogous to the case before the Court. The search in *Quon* was conducted for a reasonable non-investigatory work-related purpose – to ensure that employees were not being forced to pay for necessary work-related expenses. *Quon, supra* at 2631. Here, no such rationale exists. Supervisor Milmine exploited his access to Povtak’s profile to conduct the investigatory, non-work-related search of Ms. Wagner’s personal Facepage profile. This search was not justified at its inception and therefore violated Ms. Wagner’s Fourth Amendment rights.

2. The search was excessive in scope.

Even if the search of Ms. Wagner’s Facepage is deemed to have been work-related, the search was excessive in scope. In order to be reasonable in scope, a search must be “reasonably related in scope to the circumstances which justified the interference in the first place.” *T.L.O., supra*, at 341. The search does not have to be conducted in the absolute least intrusive manner. *Quon, supra*, 2632.

If the search of Ms. Wagner’s Facepage profile was conducted in order to find out her opinion of Povtak, to find out if she had any ideas for work-related improvements, or for some other hypothetical work-related purpose, the search of her entire Facepage profile by supervisor Milmine (who Ms. Wagner had never authorized to view her Facepage account) was excessive. Ms. Wagner’s Facepage account contained private information meant only for her friends. Any search should have been limited to specific information. In *Quon*, the search of employee text messages validated by this Court was conducted for a reasonable work-related purpose and was limited in scope. Text messages sent when employees were off-duty were redacted. This served to reduce the intrusiveness.

In the case before the Court, Ms. Wagner's Facepage profile contained information posted during both working and non-working hours. Furthermore, Ms. Wagner posted some of the information from her own personal computer in her residence. However, the search conducted by supervisor Milmine was in no way restricted. It was extremely intrusive and in no way limited in scope to a work-related purpose. The warrantless search of Ms. Wagner's Facepage profile violated the Fourth Amendment.

C. In an Age of Rapidly Evolving High-tech Communications, including Social Networking, it is Important that the Fourth Amendment Evolve to Provide Meaningful Protection to Citizens, Especially in an Age When Clear Distinctions Between Private Life and Work Life are not Easily Identifiable.

As society, and particularly communications technology evolves over time, this Court has been continually challenged to apply the Fourth Amendment to new frontiers. Often, this Court is hesitant to apply the Fourth Amendment to new technologies, particularly complex technologies that the Court may not fully understand. In *Olmstead*, this Court refused to apply Fourth Amendment protections to telephone calls (the high-tech communication of the day) citing that there were other, protected means of communication such as first class mail. *Olmstead*, *supra*, 568. In his famous dissent, Justice Brandeis argued that this limited reading of the Fourth Amendment failed to recognize or protect changing societal conditions. *Id.* at 471-72.

After nearly forty years of want, the view of Justice Brandeis won a majority in *Katz*. In *Katz*, this Court extended Fourth Amendment protections to "people not places." This forward-thinking statement has helped this Court protect citizens from warrantless searches in ever-changing societal conditions. In order for the Fourth Amendment of the future to provide any meaningful protection whatsoever it must be extended to cyberspace. The internet has provided

a dramatic change in societal conditions and facilitated an efficient, wildly popular, and increasingly dominant means of communication such as social networking sites.

In this way, the internet and social networking sites are more akin to communication infrastructure such as first-class mail or the telephone system. When citizens make use of the increasingly sophisticated and thorough privacy settings offered by social networking sites, they should be protected by the Fourth Amendment. The Fourth Amendment must not be lost in cyberspace. The citizenry has entered cyberspace. The Fourth Amendment should follow.

Similarly, this Court should not hesitate to apply adequate Fourth Amendment protections to the workplace. In *Quon*, this Court took note of the fact that a growing number of employers expect and tolerate personal use of high-tech communications equipment by employees. *Quon, supra*, 2629-30. As Justice Brennan noted in his dissent in *Ortega*, “the work-place has become another home for most working Americans.” *Ortega, supra*, at 739. Given the economic and social conditions in American society today, “tidy distinctions” between home and workplace “do not exist in reality.” *Id.* Therefore, the expectation of privacy of an employee in the workplace should be carefully safeguarded and “not lightly set aside.” *Id.*

II. THIS COURT SHOULD FIND POVTAK BOUND TO THE SUBSTANTIVE PROVISIONS OF THE CBA BECAUSE IT IS A PERFECTLY CLEAR SUCCESSOR AND IMPLICITLY ASSUMED THE CBA PROVISIONS OR, IN THE ALTERNATIVE, BIND POVTAK TO THE ARBITRATION CLAUSE BECAUSE SUBSTANTIAL CONTINUITY EXISTS BETWEEN CRIMALDI AND POVTAK.

Section 301 of the Labor Management Relations Act authorizes “suits for violation of contracts between an employer and a labor organization representing employees.” 29 U.S.C.A. § 185 (1947). At issue in this case, is the application of the successorship doctrine and the theories under which a successor will be held to the terms of its predecessor’s CBA. The general rule is

that a successor is not bound by the substantive provisions of a collective bargaining agreement (“CBA”). N.L.R.B. v. Burns Int’l Sec. Serv., Inc., 407 U.S. 272, 284 (1972). However, limited circumstances warrant an exception. There are three applicable situations. First, a perfectly clear successor will be held to the terms of the agreement. Second, an implicit assumption of the CBA will bind a successor. Third, substantial continuity may result in an assumption of at least the arbitration clause. Some courts have applied a two-part test where the successor must have substantial continuity and an additional designation such as perfectly clear successor. This Court should bind Povtak to the substantive provisions of the CBA because it is a perfectly clear successor and has implicitly agreed to be bound.

A. Povtak Established Itself as “Perfectly Clear Successor” When it Failed to Clearly Establish New Terms of Employment Before Hiring Crimaldi Employees and Misleading the Employees During the Pre-bid Conference into Believing Employment Retention Would Not Constitute a Change in the Employment Conditions.

Court precedent clearly establishes that a “successor is normally free to set initial terms on which he will hire the employees of a predecessor.” Burns, 407 U.S. at 294. However, there is an exception when a successor makes it “perfectly clear” the employer plans to retain all employees. Id. at 294-95. This constitutes the “rare circumstance” where a successor can be bound to the substantive terms of the CBA. S & F Mkt. St. Healthcare LLC v. N.L.R.B., 570 F.3d 354, 358 (D.C. Cir. 2009). The successor may be held to have adopted the CBA terms in one of two ways. First, the successor “fail[s] to clearly announce its intent to establish a new set of terms and conditions prior to inviting its predecessor's employees to accept employment with it, or[;] [second,] misled[s] its predecessor's employees into believing that they would be retained without changes in the conditions of their employment” Spruce Up Corp., 209 NLRB 194, 195 (1974). To avoid the exception, it has been advised that a cautious employer should “refrain

from commenting favorably at all upon employment prospects of old employees for fear he would forfeit his right to unilaterally set initial terms” Id. Changes must be expressed before the hiring of the workforce “to prevent an employer from inducing possibly adverse reliance upon the part of employees it misled or lulled into not looking for other work.” S&F Mkt. St., 570 F.3d at 359.

Under the *Spruce Up* analysis, Povtak is bound to the substantive terms of the CBA. First, Povtak did not express its intent to establish new terms prior to hiring its predecessor’s employees. No requirement existed for Crimaldi employees with respect to employment with Povtak. No new employment terms were set forth. Even the ECP, which Povtak attaches great weight to, was no a pre-condition to employment. The first assertion of “at will” employment terms was on March 22, almost 2 months after the initial hiring of Crimaldi’s employees. This practice is clearly unfair to the employees and deceives the employees into thinking that employment conditions remain the same as under Crimaldi. Clearly established law requires a notice of employment changes *before* the hiring process, not after.

Second, the pre-bid conference provides direct evidence that Povtak misled Crimaldi’s employees into “believing they would be retained without changes in conditions of employment.” Spruce Up, *supra*, at 195. When asked about the job prospects of the Crimaldi employees, Povtak’s Chief Financial Officer, Ms. Quine, replied: “Povtak would certainly need all the employees Povtak can get.” This statement carried weight due to Ms. Quine’s position with the company and her statement seemed to provide the answer. (App. C-6, 7). The purpose of the conference was to allow Crimaldi employees to ask questions about future employment. (App. C-6) The Povtak official acted contrary to judicial advice and “comment[ed] favorably . . . upon employment prospects of old employees.” Spruce Up, *supra*, at 195. Due to Povtak’s lack

of cautiousness, it meets the second requirement of a perfectly clear successor. Therefore, under the *Spruce Up* requirements, Povtak is a perfectly clear successor and as such is bound to the substantive terms its predecessor's CBA.

B. Povtak Implicitly Agreed to be Bound by Substantive Provisions When it Repeatedly Acted in Accordance with the Explicit Terms Set Forth in the CBA.

A successor is bound to the CBA when it implicitly assumes the agreement by evincing a “consistent pattern of conduct conforming to the agreement.” *Audit Services, Inc. v. Rolfson*, 641 F.2d 757, 763-64 (9th Cir. 1981). In *Audit Services*, the court held a successor to the terms of the CBA because it repeatedly made contribution to the union trust fund in accordance with provisions set forth in the CBA. *Id.* Successors are bound to the terms of the CBA when there is implicit assumption of the contract through repeated actions of the successor. *Id.* ; *Zim's Foodliner, Inc. v. N.L.R.B.*, 495 F.2d 1131, 1143 (7th Cir. 1974) (an employer who maintained the same wage scale as set forth in the CBA was bound by those terms).

Povtak repeated engaged in actions set forth or contemplated in the CBA. The training provided by Povtak provides an example. The CBA sets forth in section 3.2 that the company can provide “training in specialized areas such in the event the nature of their work so requires.” (App. A-2) This section shows that the Local 12-22 members at least anticipated the company may need to provide additional training. Povtak cannot assert that the training established new terms because the employees could not have possibly foreseen this a change from Crimaldi when the CBA clearly establishes the parties' expectation of it.

Likewise, the CBA contemplated the technological upgrades and route expansions employed by Povtak. The employees would not have viewed the “green” upgrade as new because the CBA clearly contemplated it. Article 15, section 1 provides management with the

““right to introduce new and improved methods” and “to change existing methods” “run plant efficiently.” (App. A-8,9) Povtak equipped the buses with electric or organic-diesel engines, clean exhaust systems, and retro purple headlights. These features improve the method of transportation and allow the buses to operate more “efficiently.” Article 15 permits the company to “transfer within and between classifications.” When Povtak transferred Ms. Wagner to the bus division it acted in compliance with the CBA. Povtak did not decrease her wages or benefits, which would have contradicted Article 12 “reduction of wages” provision. (App. A-6)

Povtak’s EPC policy also adduces evidence of implicit adoption. Crimaldi had a policy in effect similar to Povtak’s EPC. The policy closely mirrored Crimaldi’s, except for the introduction of the new technology used. As with the other technological advances, the CBA anticipated this change and provided the company with permission to alter as “improve methods” become available.

Povtak also seemed to proceed along with the grievance procedures enumerated in Article 14. Union officials filed the grievance in specific accordance with that Article and met at “mutually convenient time and place” as 14.3 mandates. (App. A-7,8) The company maintains that the meeting on March 10 was to discuss the ECP, not the grievance. However, if Povtak was in fact an “at will” company there was no need for Livramento to explain the policy under which Wagner was terminated. Livramento scheduled the meeting with full knowledge that Roth and Blancato were union officials whose purpose was to submit a grievance over Wagner’s termination. (App. C-8, 9). The meeting contradicts the entire purpose of “at will” employment. Instead, as Judge Hamfelt points to in his dissent, “Livramento fully abided by Povtak’s responsibilities at Step 4.” Povtak, 1214 F.3d at 20 (Hamfelt, J., dissenting). Thereafter, union officials filed for arbitration pursuant to Article 14, section 2. Povtak acted in

accordance with CBA terms instead of contradicting or altering them. There is adequate evidence to establish Povtak implicitly adopted the CBA.

C. Substantial Continuity in the Identity of the Bargaining Unit Workforce Between Crimaldi and Povtak Establishes an Obligation on the Part of Povtak to Arbitrate the Extent of its Obligations Under the CBA.

1. Under the Second and Fifth Circuits' approach, substantial continuity in workforce identity can independently bind a successor to the arbitration clause of the CBA.

Substantial continuity determines the obligations of a successor. The factors considered include the following: “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 Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27, 43 (1987). Those factors are viewed from the perspective of the employees. Id. at 43. The test was first applied in Wiley where the Court held a successor to the arbitration clause of the predecessor’s CBA. John Wiley & Sons v. Livingston, 376 U.S. 543, 559 (1964). The Court did not directly address whether the successor must adopt the substantive provisions, but rather placed that inquiry in the province of the arbitrator. Id. The key factor for the Court was the retention of the majority of the workforce and the heavy deference afforded to the arbitration of labor disputes. Id. at 550-51. In Wiley, the successor retained all the bargaining unit employees. Id. at 545. In the subsequent Burns case, the Court seemed to place more emphasis on freedom of contract rather than the workforce identity. 406 U.S. at 284. The Court held that the successor is not bound to the substantive terms of the CBA. Id. at 287. In Burns, the successor expressly rejected being bound by the

CBA by setting forth pre-conditions to employment such as requiring employees to become members of a different union. Id. at 275, 286. The Court failed to find substantial continuity resting its holding on the finding that the employers were “competitors for the same work.” Id. at 286.

Courts of Appeal have struggled in formulating a cohesive rule. Under this approach adopted by the Fifth and Second Circuits, substantial continuity alone may be sufficient to bind to, at a minimum, the arbitration clause. In *Boeing*, the Fifth Circuit did not find substantial continuity, but acknowledged that a finding alone could bind the successor. Boeing Co. v. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, 504 F.2d 307, 322 (5th Cir. 1974). The factual scenario presented in *Boeing* mirrored that in *Burns*. Both cases involved a contractor outbidding another contractor. Burns, 406 U.S. at 274; Boeing, 504 F.2d at 309. The *Boeing* court attempted to reconcile *Wiley* and *Burns* when it stated: [W]here the relationship between the predecessor and successor employers is one of replacement in the periodic rebidding context . . . the continuity in the identity of the workforce must be more substantially established than would be required where the relationship . . . [is] one of merger, or purchase and sale.” Boeing, 504 F.2d at 323. *Boeing* distinguishing *Burns* and *Wiley* by using the heavy policy of arbitration: “[In] *Burns* . . . arbitration was not in issue, and the interest in labor stability was insufficiently substantial to outweigh the policy against governmental imposition of specific contract terms.” Id. at 315.

Similarly, the Second Circuit held in *Meridian* that the main focus in whether a successor is bound to arbitrate its CBA obligation is the substantial continuity of the workforce identity. Local 348-S, UFCW, AFL-CIO v. Meridian Mgmt. Corp., 583 F.3d 65, 74 (2d Cir. 2009). There, the successor retained the majority of the workforce. Id. at 66. Based on its findings, the Court

ordered the parties to arbitrate their obligations under the CBA. *Id.* at 74. The Court held: “[R]equiring arbitration on this issue is the most efficient and fair means by which the parties can settle their dispute, particularly in cases . . . where the dispute arises out of the employer's refusal to honor a particular term of the CBA.” *Id.* at 65. Unlike *Burns*, the successor in *Meridian* made no express rejections of the CBA. *Id.* at 74-75.

2. This Court Should Apply the Second and Fifth Circuits’ Approach for Substantial Continuity and Bind Povtak to the Arbitration Clause Under the CBA.

Under the Fall River Dyeing factors, substantial continuity exists. The Thirteenth Circuit correctly held Povtak was a successor, but the court did not express an opinion as to Povtak’s obligations under the CBA. Povtak does not challenge a finding of substantial continuity since the finding is required to establish a company as a successor. The designation of successor is not at issue because Povtak does not challenge the finding. The issue for consideration here is whether Povtak can be held to the arbitration provision espoused in the CBA. Even though the Appeals Court correctly found substantial continuity, it underplayed the importance in the continuity of the workforce. The Local 12-12 bargaining unit consisted of sixteen (16) electrical workers and electricians. Povtak hired all 16 employees. *Wiley, Boeing, and Meridian* placed significant emphasis on this aspect. Here, continuity in workforce was without dispute. It was established when Povtak hired all the bargaining unit employees. The district court incorrectly disregarded “how many employees Povtak employed from Crimaldi” when case law clearly establishes its importance. All Court decisions examined this factor and weighed it in their decision. In *Burns*, the Court considered this factor, but ultimately gave greater weight to Burn’s express rejection of the CBA. Here, there is no such express rejection before the assumption of the Crimaldi’s business as in *Burns*.

Two important facts change this issue from the one presented in *Burns*. First, as distinct from *Burns*, here the contractors were not competitors. Crimaldi's contract could not be renewed and therefore it could not be a competitor to Povtak. Crimaldi could not bid for the contract. As in *Wiley*, Crimaldi "disappeared" as a viable entity. Wiley, *supra*, at 548. Second, arbitration is at issue and, in the words of the *Boeing* court, the "interest of labor stability" is at stake. Boeing, *supra*, at 315. This Court should follow the guidance of the Fifth Circuit and order Povtak to arbitrate with Local 12-22 because arbitration provides the "most efficient and fair" means of resolving a dispute involving the "an employer's refusal to honor a particular term of the CBA." Meridian, *supra*, at 76.

D. The Third Circuit Adopted an Approach Requiring a Showing of Substantial Continuity Plus an Additional Theory Such as Perfectly Clear Successor to Bind a Successor to Substantive Provisions of the CBA, Including the Arbitration Clause.

1. The *Ameristeel* approach is inconsistent with the Court precedent and disregards important policy underpinnings of the Court's decision in *Wiley*.

The Third Circuit, contrary to *Boeing* and *Meridian*, held that substantial continuity is a requisite, but alone is not sufficient to bind a successor. AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 269 (3d Cir. 2001).⁴ The court required, along with substantial continuity, a successor must show an additional theory of successorship applies, such as perfectly clear successor. Id. The decision relied heavily on an expansive reading of *Burns* while restricting the holding of *Wiley* to the specific facts presented in that case, namely a merger. Id. at 273-74. The successor in *Ameristeel* expressly rejected the CBA agreement and

⁴ See also New England Mechanical Inc. v. Laborers Local Union 294, 909 F.2d 1339 (9th Cir. 1990); Esmark, Inc. v. NLRB, 887 F.2d 739 (7th Cir. 1989); Sullivan Indus. V. NLRB, 957 F.2d 890 (D.C. Cir. 1992); Sheet Metal Workers Int'l Assoc. v. Ariz. Mech. & Stainless, Inc., 863 F.2d 647 (9th Cir. 1988).

established new terms prior to employment, similar to *Burns*. Id. at 273. The decision was influenced by the description of *Wiley* as a “guarded almost tentative statement.” Id. at 272. The dissent in *Ameristeel* criticized the majority for overlooking and nearly disregarding *Wiley*. Id. at 282 (Becker, J., dissenting). The following quote highlights his critique: “*Burns's* admonition that its decision ‘turns to a great extent on the precise facts involved here’ serves as a clear warning to lower courts not to read these opinions as providing expansive rules about successors in general.” Id. at 285.

Through its progression of case law, the Court has balanced the competing interests of a successor and employees. In *Wiley*, the Court described the CBA as “not an ordinary contract[.]” but rather “a generalized code” that “covers the whole employment relationship” and serves as “the common law of a particular industry.” 376 U.S. at 550. The Court stressed “need to afford some protection to the interests of the employees during a change of corporate ownership.” Howard Johnson v. Detroit Local Joint Executive Bd, et al., 417 U.S. 249, 254 (1974). However, there is also the concern of “inhibit[ing] the free transfer of capital, and the new employers must be free to make substantial changes in the operation of the enterprise.” Id. at 255. A strong preference and heavy deference exists to resolve labor disputes through the arbitration process to “prevent industrial strife.” Id. at 254. The arbitrator is well suited to handle workplace conflicts in unionized settings and apply the workplace “common law.” Id. at 550.

- 2. Under the *Ameristeel* approach, Povtak would still be bound to the substantive terms of the CBA because the policy consideration of “industrial stability” mandate such an outcome.**

Under the *Ameristeel* approach, Povtak would still be bound to the terms of the CBA. As discussed, *supra*, Povtak is a perfectly clear successor and has a duty to assume the substantive provisions. The Ameristeel court incorrectly narrowed the holding of Wiley to the point that it essentially acted as if Wiley could only apply in a merger situation. That is clearly not the law.

Policy mandates Povtak be held the CBA provisions. With “industrial stability” at stake, the Court should, at minimum, order Povtak to either arbitrate its obligations under the CBA or adopt the provisions. Local 12-22 has represented the employees since 1957. It has developed a long established relationship with the employees. Wagner herself had belonged to the union since 2004. The specific policy underlying the successorship doctrine is to protect employees from the instability resulting from a change in employers. Here, the employer did not inform the employees it would not adopt the CBA. With such a long history of union representation, the employees naturally assumed it would continue. Even under the *Ameristeel* approach, this Court should find Povtak bound to the substantive provisions because as discussed *supra*, it meets the element for a perfectly clear successor and implied assumption of the CBA. Therefore, this Court should find that even under the *Ameristeel* approach, Povtak is bound to the substantive provisions of the CBA or, alternatively, allow the arbitrator to determine Povtak’s obligations under the CBA. To hold otherwise, would leave employees unprotected in a time of great uncertainty when employees would look to the union to enforce vested rights.

CONCLUSION

For the foregoing reasons, this Court should affirm the holding of the Thirteenth Circuit Court of Appeals as it related to Povtak’s violation of Ms. Wagner’s Fourth Amendment rights and find that Povtak is bound to the substantive provisions of its predecessor’s CBA.