

No. 11-0107

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In the Supreme Court of the United States

POVTAK GROUP

*Petitioner,*

v.

LOCAL 12-22, PROFESSIONAL ELECTRICAL WORKERS UNION and

ROBERTA WAGNER,

*Respondent.*

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

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**BRIEF FOR THE PETITIONER**

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**Respectfully Submitted,**

**TEAM 5**

*Counsel of Record for the Petitioner*

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## **QUESTIONS PRESENTED**

- I. Under 301 of the Taft-Hartley Act, 29 U.S.C.A. § 185, is an employer who wins a third-party service contract from a municipality bound to the substantive provisions of a predecessor's collective bargaining agreement when the employer operates its business independently from the predecessor and denied any of the predecessor's legal obligations under the collective bargaining agreement?
  
- II. Under the Fourth Amendment, does an employer who issues an electronic communications policy violate an employee's protection from unreasonable search where the employer discovered applications, downloaded by the employee, during the repair of an employer-issued wireless communications device and where the employee invited the employer to view comments she made about the employer on a social networking site?

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## STATEMENT OF THE CASE

Petitioner Povtak Group (“Povtak”) requests this Court reverse the judgment of the Court of Appeals for the Thirteenth Circuit, and reinstate the District Court of Froessel’s summary judgment order in favor of Petitioner as well as Petitioner’s Rule 50 motion for judgment as a matter of law.

Until 2008, Crimaldi provided transportation services for the city of Dynes (“Dynes”). *Wagner v. Povtak Group*, 185 F.Supp.3d 1, 2 (W.D. Frl. 2009). During its tenure as transportation provider, Crimaldi used forty buses equipped with traditional combustible engines. *Id.* Crimaldi also executed a Collective Bargaining Agreement (“CBA”) with Professional Electrical Workers, Local 12-22 (“Local”) that included provisions requiring “just-cause” for discharge and an arbitration and grievance procedure. *Id.* at 3. Dynes informed Crimaldi that it would be accepting bids for a new transportation provider prior to February 1, 2008 expiration of the contract. *Id.* at 2. Before bids were solicited, Dynes held a pre-trial conference where Crimaldi employees were allowed to make inquiries regarding their employment status because some city officials worried about Crimaldi employees striking as a result of their loss of job security. (App. C 5). At the conference, Povtak’s Chief Operating Officer Deborah Quine (“Quine”) was asked if any Crimaldi employees would be hired, she responded, “[Povtak] would need all the help [it] could get.” *Id.*

Povtak received the contract with Dynes and hired 212 of the 342 employees previously employed by Crimaldi including all 16 Local electricians. 185 F.Supp.3d at 3. Local’s union

members only composed around 8% of Crimaldi's previous workforce. *Id.* Roberta Wagner ("Wagner") was hired by her previous employer, Crimaldi, on or about June 8, 2004, as a junior electrician in the light rail division and was hired by Povtak in 2008. 185 F.Supp.3d at 3. As soon as Povtak assumed the transportation contract, it made changes to the fleet of buses that included refitting the buses with either electric or organic-diesel burning engines, cleaner exhaust systems, and retro purple headlights. *Id.* Povtak also shortened the routes to transport more citizens. *Id.* With these changes, employee responsibilities also changed. *Id.* Because the electricians were unfamiliar with the new engines, Povtak held training sessions so they could assist on the new buses. *Id.* Additionally, since these changes have been implemented, Povtak has obtained funds from the U.S. Department of Transportation and the U.S. Environmental Protection Agency for operating "green transportation" and maintaining "green jobs." *Id.*

Povtak also required its employees to sign an Electronic Communications Policy ("ECP"). *Id.* The ECP does not specifically include ePhones or mobile communication devices by name. The policy is concerned, however, with "hardware, software . . . (e-mail), Internet/Web access and voice mail." (App. B 1). The policy also notifies Povtak employees that the company retains an "absolute right to access, monitor and view all electronic communications" and that electronic communications may be read or disclosed "for any purpose with or without permission from the employee." *Id.* Furthermore, the ECP expressly states that employees lack any "expectations of

privacy,” “right of privacy,” or confidentiality in electronic communications. *Id.* The ECP also restricts users from downloading unauthorized software and using the devices during work hours that lead to decreased productivity. (App. B 2-3). The ECP expressly advises that it is “not all inclusive.” *Id.* at 1-2. It further reminds employees that all violations of the ECP “may be subject to disciplinary action . . . including discharge . . . .” *Id.* at 4. Wagner acknowledged that she read and understood the ECP by signing the “User Acknowledgment Form” shortly after receiving it. *Id.* at 4. The form reiterated the company’s reservation of a right to monitor and the termination provisions found in the ECP. *Id.*

Povtak also replaced Crimaldi-issued phones with ePhones for all employees. *Id.* The ePhone can access e-mail, the internet, voice mail, and download software. *Id.* at 5. When Wagner received hers, she downloaded four applications on her Povtak-issued ePhone. *Id.* Two applications were work-related and two were not. *Id.* One work-related application linked Wagner’s ePhone to the technical support office of the manufacturer of the light-rail cars Povtak used, and the other linked to her work email. *Id.*

A non-work-related application linked to an electrician blog called “Crossing the Wires” (“CTW”) where a person creates a user name to post blog comments by that name. *Id.* The blog is public and can be viewed by any person using the internet. *Id.* The other non-work related application linked to a social networking site, Facepage. *Id.* A Facepage user can control

individual profile privacy settings and decide who may or may not make posts on her profile. *Id.* at 4, n. 5. When a user invites another user as a “friend,” the users can view each other’s profile. Povtak created its own Facepage profile (“profile”) and selected that its posts could be viewed by any Facepage user. *Id.* at 4, n. 5-6. Wagner, on the other hand, created her personal profile two years earlier and set her privacy settings so that only her friends could see her profile. *Id.* at 4, n. 5. She invited Povtak as a “friend” to view her profile, and followed Povtak’s suggestion by posting positive comments to Povtak’s profile to help bolster the company’s “green” image. *Id.* at 4.

In February 2008, Wagner was transferred from the light rail division to the bus division. *Id.* at 5. After the transfer, she posted, “Just been transferred to the ghetto,” on her own profile which prompted a comment from a friend who warned Wagner to be careful about what she wrote on her profile. *Id.* Wagner continued to post positive messages on Povtak’s profile while she simultaneously complained about her work environment and new supervisors on her own profile. *Id.* Wagner’s use of Facepage, including posting CTW blog links critical of Povtak on her profile, occurred during working and non-working hours. *Id.* The working hour posts were made on her company owned iPhone. *Id.* One CTW blog post that Wagner linked on her profile, however, appeared in an article in the local newspaper, the Lerner Gazette. *Id.* at 6. The blog contained intimate details about Povtak, included the names of supervisors, and was critical of Povtak’s green initiatives. *Id.* CTW username “PugLuv86” posted the controversial blog. *Id.* Because many at

Povtak believed that a disgruntled employee must have made the post, Povtak supervisors mentioned in the article began investigating the article's allegations and the identity of PugLuv86.

*Id.* In addition, a memorandum was issued from Povtak corporate headquarters to all shift supervisors to review their employees' comments on Povtak's profile. *Id.*

Around this time, Wagner received performance evaluations from her former light rail supervisor, Shane Leibson ("Leibson"), and bus supervisor Frank Milmine ("Milmine"). *Id.* Leibson's review was positive, and it also noted that Wagner had previously showed him the four applications on her iPhone in the break room before her transfer. *Id.* Leibson noted that only the work-related applications linked to her e-mail and technical support improved her work performance. *Id.* Leibson did not comment on the non-work related applications. *Id.* Milmine accessed Wagner's profile through Povtak's page and submitted screenshots of her comments that were subsequently placed in her personnel file. *Id.* at 7.

Two days later, Wagner's iPhone was dropping calls and she took it to technical support after suspecting a battery issue. *Id.* Upon review of the device, the technician noticed that Wagner had installed four applications and noted them in a report filed with his supervisor. *Id.* at 7-8. Then, the supervisor made additional notes about the applications, citing a possible connection between the applications and the article featuring the CTW blog. *Id.* at 8. The following day Wagner was terminated for violating the ECP. *Id.*

After Wagner’s termination, Local representatives, Rahim Roth (“Roth”) and Stefan Blancato (“Blancato”) submitted a grievance to Christian Arko, a secretary in human resources, because Assistant HR Manager, Ashley Livramento (“Livramento”), was not present. *Id.* The grievance protested Wagner’s discharge pursuant to Article 14.1, Step 4 of the CBA that Local maintained with Crimaldi for a violation of Article 7.1—discharge without just cause. (App. A 7). The grievance demanded reinstatement, full back-pay, benefits, and seniority rights. 185 F.Supp.3d at 8. Livramento called Blancato to schedule a meeting on Monday, March 10, 2008. *Id.* Before the meeting began, Livramento explicitly stated that the purpose of the meeting was to explain the ECP because its policies were the reason for termination. *Id.* Blancato and Roth stated they should have been notified before Wagner was discharged, and Livramento replied, Povtak “did not need a reason.” *Id.* Two days later, Roth contacted George Daks (“Daks”), General Manager of HR, and submitted a grievance. *Id.* at 9. After no response, Roth sent another e-mail notifying Daks that they were appealing the termination to arbitration under Article 14.2 of the CBA. *Id.* Daks responded that Povtak would not participate in arbitration. *Id.*

After exhausting her administrative remedies, Wagner and Local initiated this action in the District Court of Froessel alleging a violation of Title VII of the Civil Rights Act of 1964, violations of the Fourth Amendment, and violation under 301 of the Taft-Hartley Act of 1947, 29 U.S.C. § 185 to enforce the terms of the CBA against Povtak. *Id.* Povtak and Respondents each moved for

summary judgment. The claim alleging discrimination on the basis of national origin failed on the merits and the district court granted Povtak summary judgment. *Id.* at 11. This issue is not before the Court. Regarding Wagner's Fourth Amendment claim, the district court held that Wagner presented enough evidence to raise a genuine issue of material fact that Povtak was a government actor and denied Povtak's motion for summary judgment on this issue. *Id.* at 13.

Finally, in addressing Local's claim to enforce the provisions of the CBA, the district court found, using the *Fall River* factors test, that there was no substantial continuity between Povtak and Crimaldi. 185 F.Supp.3d at 19. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). Thus, the district court granted summary judgment in favor of Povtak and subsequently denied Plaintiffs' counter motion for summary judgment. 185 F.Supp.3d at 19. From December 7, 2009 to December 10, 2009, the Fourth Amendment claim was tried before a jury. *Wagner v. Povtak Group*, 231 F.Supp.3d 20, 20 (W.D. FrI. 2009). The jury ultimately rendered a verdict in favor of Wagner, however, on December 18, 2009, the Court entered a judgment in favor of Povtak's Rule 50 motion asserting that Wagner failed to satisfy her burden in showing that an expectation of privacy existed for her iPhone and Facepage profile. *Id.* at 22.

Both defendants appealed to the Court of Appeals of the Thirteenth Circuit. On October 21, 2010, the case was argued and submitted. *Local 12-22 v. Povtak Group*, 1214 F.3d 1, 1 (13th Cir. 2010). Plaintiffs-Appellants raised two issues on appeal. First, Appellants appeal the judgment

which granted Povtak's Rule 50 motion regarding Wagner's Fourth Amendment rights. Fed. R. Civ. P. 50. The Thirteenth Circuit reversed the district court's decision to grant Povtak's judgment as a matter of law and decided that the subject of the violation was her Facepage profile, not the E-phone. 1214 F.3d at 3. In the circuit court, the only mention of whether Povtak was a government actor appears in Justice Gould's concurrence which states that it is "established" that Povtak was a government actor. *Wagner v. Povtak Group*, 1214 F.3d 1, 16 (13th Cir. 2010). The threshold determination of whether Povtak is a government actor has not been decided; the district court only denied summary judgment on the issue. Further, Wagner had a legitimate expectation of privacy in her Facepage profile and Povtak's intrusion violated her Fourth Amendment rights. 1214 F.3d at 15. Additionally, Local appealed the summary judgment order granted in favor of Povtak regarding the CBA. 1214 F.3d at 2. The court reversed the summary judgment order and granted Local's cross motion because the court thought "substantial continuity" existed under the Falls River test and that, in the interest of preventing labor unrest, Povtak was bound to the CBA. 1214 F.3d at 15. Povtak then filed a writ of certiorari which was granted by this Court to be heard in the Spring 2011 Term.

## **SUMMARY OF THE ARGUMENT**

Povtak should not be bound to the substantive provisions of the CBA because no evidence in the record raises a genuine issue of material fact that substantial continuity exists between Povtak and Crimaldi. Substantial continuity is not present, nor is Povtak an alter ego of Crimaldi, where Povtak implemented extensive alterations in its business operations, and additional training was required for former Crimaldi employees. Because Povtak never assumed Crimaldi's CBA provisions as a successor, the underlying policies of collective bargaining favor Povtak's ability to establish fair terms to govern its own employment relationships.

Furthermore, no reasonable jury could conclude that Wagner has Fourth Amendment protections for her Facepage profile or her ePhone. She intended for her "friends" to view her Facepage profile and, by inviting Povtak, she does not have a reasonable expectation of privacy in her comments. Pursuant to Povtak's ECP disclaimers about expectations of privacy, Wagner also could not have expected confidentiality in the ePhone, especially where downloading unauthorized applications violated the ECP. Moreover, Povtak's acted reasonably when technical support reviewed the ePhone for a justified non-investigatory, work-related repair. Thus, the judgment of the Thirteenth Circuit should be reversed, and the District Court of Froessel's grant of summary judgment denying enforcement of the CBA and judgment as a matter of law on Wagner's Fourth Amendment allegations should be reinstated in favor of the Petitioner.

## STANDARD OF REVIEW

The Thirteenth Circuit erred as a matter of law when it reversed the District Court of Froessel's decision. This Court accepts a district court's findings of fact unless clearly erroneous, but decides questions of law *de novo*. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Regarding judgment as a matter of law, the Court reviews the record *de novo*, independent of the rationales that determined judgment in the lower courts. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466 (1992).

## ARGUMENT

**I. This Court should reverse the Thirteenth Circuit's judgment because Respondents cannot raise a genuine issue of material fact that Povtak was a successor bound to Crimaldi's collective bargaining agreement or that Povtak assumed any of the agreement's provisions.**

Because Povtak is not a successor and did not implicitly or expressly agree to any provision in the CBA, this Court should not bind Povtak to an agreement it did not assume. A moving party is entitled to summary judgment as a matter of law if the non-movant fails to raise a genuine issue of material fact for an essential element of the case to which she has the burden of proof. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The National Labor Relations Act's ("NLRA") provisions generally govern labor law. *See, e.g.*, 29 U.S.C. § 151-169 (2010). In this case, the relevant portion of the NLRA is the Labor Management Relations (Taft-Hartley) Act of 1947 ("Act")—specifically 301, section 29, of the United States Code which addresses a union's right to sue and enforce its CBA. *See, e.g.*, 29 U.S.C. § 185. Ultimately, these questions are left to the courts to apply federal

common labor law. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1957).

This Court has discussed three primary situations where an employer is a “successor” and may be held to the previous employer’s collective bargaining agreement. An employer may be a “successor” because substantial continuity exists between the enterprises, it is considered an alter ego of the predecessor, or it may have expressly or impliedly assumed the provisions in the contract. *Southward v. South Central Ready Mix Supply Co.*, 7 F.3d 487, 493 (6th Cir. 1993).

Determining what legal obligations are owed to the predecessor’s employees under the CBA is the primary question used in determining a successor’s duties. *Howard Johnson Co. v. Hotel Emps.*, 417 U.S. 249, 262 (1974). This Court further stated that binding an entity under the Act applies to more than just arbitration; binding may also include other substantive provisions because if the successor cannot be bound to the substantive terms of the CBA, arbitration would be pointless. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). Additionally, this Court does not distinguish among mergers, consolidations, or purchases of assets in its analysis of successors. *Howard Johnson*, 417 U.S. at 256. Conclusively, Povtak should not be bound the substantive provisions of Crimaldi’s CBA with Local because (A) Povtak’s business is a completely different entity in its operational structure; (B) unconsenting successors should not be bound by substantive provisions of a predecessor’s CBA; and (C) compelling arbitration is futile since substantive portions of the CBA should not apply to Povtak.

**A. Because Povtak’s business is fundamentally different than Crimaldi’s; Povtak is not a successor.**

This Court should not bind Povtak to the substantive provisions of Crimaldi’s CBA because there is no substantial continuity between the two companies. To bind a company to a predecessor company’s CBA, a court must first find that the current company is a “successor” within the requirements of the doctrine. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973). In *Wiley*, continuity was necessary to determine a successor because without continuity, the duty to honor the provisions would be “something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved.” 376 U.S. at 551.

Additionally, this Court has also recognized that there is no single definition of “successor” applicable to every legal context. *Howard Johnson*, 417 U.S. at 262 (noting that a case-by-case approach is appropriate). A successor analysis is based upon the totality of the circumstances, focusing on whether the acquired substantial assets and business operations are substantially changed. *Id.* Povtak is not a “successor,” and should not be bound to the provisions of the CBA, because (1) there is no substantial continuity between Povtak and Crimaldi and (2) since Povtak is a completely independent entity, it is not an alter ego of Crimaldi.

**1. Because Povtak is a completely separate entity and has made substantial changes to its business, substantial continuity does not exist between Povtak and Crimaldi.**

A new employer qualifies as a successor to its predecessor if there is “substantial continuity” between the enterprises. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43

(1987). To find substantial continuity, a court looks for a “substantial change” in the new company’s business and considers the similarity between business operations, employee tasks, working conditions, supervision, production, and customer base. *CitiSteel USA, Inc. v. NLRB*, 53 F.3d 350, 354 (D.C. Cir. 1995) (citing *Fall River*, 482 U.S. at 43). In this case, there is no substantial continuity between Povtak and Crimaldi because (a) Povtak’s business operations are substantially different from Crimaldi; (b) the employees have new responsibilities under new management; and (c) Povtak’s product and process have been altered to create a substantially different image than Crimaldi.

**a. Because Povtak made substantial changes in its business operations, this Court should find no substantial continuity is present.**

There is no substantial continuity between Crimaldi and Povtak because substantial changes to Povtak’s business operations have made it a fundamentally different company. The focus “is not on the continuity of the business structure in general, but rather on the particular operations of the business . . . .” *United Food & Commercial Workers Int’l Union (UFCW) v. NLRB*, 768 F.2d 1463, 1472 (D.C. Cir. 1985). Substantial continuity may exist where the same plant is operated, the same name is used, and the same products are produced with the same equipment and methods of production. *Stotter Div. of Graduate Plastics Co. v. Dist. 65*, 991 F.2d 997 (2d. Cir. 1993). Also, when companies are competitors, the likelihood of substantial continuity is diminished even where businesses render essentially the same service. *See Bakery, Confectionary & Tobacco Workers Union Local No. 19 v Ryan’s I. G. A.*, 642 F Supp 1131 (N.D. Ohio 1986).

When a company's operating methods are substantially different than its predecessor, courts have found no substantial continuity present. *See Kessel Food Markets, Inc. v NLRB*, 868 F.2d 881 (6th Cir. 1989) (holding no substantial continuity where operating methods changed to enhance customer service). *See also Int'l Asso. of Machinists v Shawnee Indus., Inc.*, 224 F. Supp. 347 (W.D. Okla. 1964) (finding no similarity where intangibles like a trade name was not transferred, and no control over business interests were retained by the transferring corporation); *But cf. Systems Mgmt., Inc. v NLRB*, 901 F.2d 297 (3d Cir. 1990) (finding similar business operations because a maintenance services company did not use new techniques, no new practices were employed, and different products or services were not offered).

Since Povtak has substantially changed its business operations, it should not be considered the same company as Crimaldi. Like *Ryan's I. G. A.* and *Shawnee Industries*, Povtak and Crimaldi were competitors, Crimaldi did not maintain any control over Povtak's business, and no assets or trade names were shared by either because the city contract is a third-party service contract. 185 F.Supp.3d. at 2. Moreover, unlike the company in *Systems Mgmt.*, Povtak is not operating the same business because it has made substantial changes and is now operating as a "green" transportation company. *Id.* at 3. Povtak transformed its business by making substantial changes to the buses, including refitting engines with electric and diesel burning ones, as well as cleaner exhaust systems—all requirements to receive federal transportation and environmental funding. *Id.* at 3. *See, e.g.*, 49 C.F.R. § 624.3 (2011) (describing the requirements to receive federal funding for green transportation). Based on the record, Crimaldi did not attempt to receive any

federal funding. Furthermore, gas requirements and engine maintenance for the refitted buses are substantially different than the buses Crimaldi operated. *Id.* at 1. Because Povtak’s business operations are substantially different, this Court should find no substantial continuity is present.

**b. Povtak’s employees work in substantially different conditions under new management, and therefore no substantial continuity exists between Povtak and Crimaldi.**

Povtak’s employees are working under conditions that are distinct from Crimaldi; therefore, substantial continuity does not exist. *Golden State Bottling Co.* found substantial continuity may be present when “employees who have been retained will understandably view their job situations as essentially unaltered.” 414 U.S. at 184. *See also Fall River*, 482 U.S. at 43 (substantial continuity may exist if the employees remain in essentially the same position). On the other hand, courts have held that no substantial continuity existed where a minority number of employees were hired from the predecessor. *See Howard Johnson*, 417 U.S. at 262; *Smegal v. Gateway Foods of Minneapolis, Inc.*, 819 F.2d 191 (8th Cir. 1987).

If a change in tasks or skills is required, courts also frequently hold that there is no substantial continuity. The District Court of Oregon held that, because employees’ skills were limited in a new company, substantial continuity did not exist where the successor employer required paving of streets and highways compared to the predecessor’s sand and gravel operation. *Hoisting and Portable Eng’rs. Local No. 701 v. Pioneer Const. Co.*, 313 F.Supp. 753 (D.C. Or. 1970); *CitiSteel*, 53 F.3d at 354 (performing different tasks under different supervisors resulted in no substantial continuity); *But cf. Pennsylvania Transformer Tech., Inc. v. NLRB*, 254 F.3d 217, 224

(D.C. Cir. 2001) (finding substantial continuity present because the employees used the same skills with no new training and the new employer stated it intended to use the skill set of the predecessor's workforce).

The District Court of New Jersey rejected the idea that a court should examine the sameness of the workforce by calculating the entire workforce of the succeeding employer. *Local 19 Distillery, Rectifying, etc. v Key Wines & Liquors of New Jersey*, No. 82-3518, 1983 WL 2136 \*1 (D. N.J. July 8, 1983). Instead, the court observed that determinations of a majority of a group employed by the predecessor company should not be made by merely looking at union and non-union employees together. *Id.* In fact, combining the groups is inconsistent with the NLRA as the law applies to union members' relations with employers. *Id.* See, e.g., *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1062 (D.C. Cir. 2009) (finding substantial continuity where a "large majority" of 168 employees was part of the same bargaining unit which consisted of almost a third of the total employees of successor company).

Here, Crimaldi employees found themselves in a similar situation as those in *Hoisting and Portable Engineers*, where a court found the employees' skills insufficient to complete the new tasks. The expectations of the new employees are substantially different because—before Povtak trained the employees—the electricians would have been unable to perform the obligations demanded by Povtak as a result of the new engines. 185 F.Supp.3d at 3. Moreover, this case is

analogous to *Citisteel* because ex-Crimaldi employees are working under new supervisors. *Id.*

Furthermore, Quine's comments that Povtak "would need all the help it can get" did not speak to any particular skill. *Id.* at 3. Therefore, this case is distinguished from *Pennsylvania Transformer* because Local's skills were not transferrable, and Povtak did not intend to use the electricians' skill sets without additional training to work on the modified buses. *Id.*

Also, Local's electricians comprised a very small number of Crimaldi employees who were hired by Povtak. *Id.* If Local relies on the numbers of the entire workforce for the benefit of only its sixteen members, the rationales followed in *Local 19 Distillery* and *Dean Transp.* reinforce the unfairness in finding substantial continuity supported by the number of non-union members included in an entire workforce. Conclusively, because there have been substantial changes to the tasks and skills expected of Povtak's employees, this Court should find that Respondents cannot raise a genuine issue of material fact that substantial continuity is present.

**c. Because Povtak instituted a different process for its product and has limited its body of customers by route changes, substantial continuity should not be found between Povtak and Crimaldi.**

Substantial continuity can be found if production process is the same, the company produces the same products, and basically has the same body of customers. *Fall River*, 482 U.S. at 43. The NLRB, in an order that found no substantial continuity, concluded that the companies were not the same because of the differences in product. *Apex Record Corp.*, 162 NLRB 333, 338 (1966)

(observing that even though both companies produced records, they produced different types). *See also Georgetown Stainless Mfg. Corp.*, 198 NLRB 234 (1972) (finding no substantial continuity because the employer brought in new machinery and substantially changed the shop layout as part of the new employer's effort to switch production to a cheap, mass basis).

In this case, Povtak's operation of the transportation contract is considerably different than Crimaldi. The order in *Apex Record* is particularly analogous to this case because, while Crimaldi and Povtak both provided transportation services to Dynes, the type of bus used was substantially different. *Id.* at 3. Povtak altered the buses to create a different appearance and operation. *Id.* The buses have retro-fitted equipment including new electric or diesel engines and exhaust systems. *Id.* If a Local electrician attempted to perform maintenance on a bus using the same process as she did on Crimaldi's buses, maintenance would be unsuccessful because the equipment is not compatible. Furthermore, Povtak would not have received federal funding if it kept the buses in the same condition as Crimaldi. For these reasons, Povtak's production process should not be considered equivalent to Crimaldi's, and substantial continuity should not be found.

**2. Because Povtak is not a continuance of Crimaldi, Povtak is not an alter ego and should not be bound to the CBA.**

Povtak is not an alter ego of Crimaldi because it is not "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). Companies considered alter egos of their predecessors involve a mere technical change in the structure or

identity of the employing entity without any substantial change in its ownership or management.

*Howard Johnson*, 41 U.S. at 261. Here, Povtak and Crimaldi are completely separate entities, related only because Povtak won the contract Crimaldi previously held with Dynes. Povtak does not share any managers or ownership with Crimaldi and there was not merely a “technical change” in the structure. Therefore, no genuine issue exists that Povtak should be considered an alter ego of Crimaldi; therefore, Povtak should not be bound by the substantive provisions of the CBA.

**B. Even if this court finds substantial continuity, Povtak should not be bound to the substantive provisions of Crimaldi’s collective bargaining agreement because Povtak did not assume the provisions of the agreement and binding Povtak contravenes the purpose the collective bargaining process.**

Because Povtak’s actions are devoid of any manifestation to assume any CBA provisions, this Court should not bind it to Crimaldi’s CBA. This Court has expressly stated that successorship is “simply not meaningful in the abstract.” *Howard Johnson*, 417 U.S. at 262. *See also AmeriSteel Corp. v. Int’l Bhd. of Teamsters*, 267 F.3d 264 (3d Cir. 2001) (finding successorship was of little help in resolving the issue of compelling arbitration under the predecessor’s CBA). Similarly, successor employers “are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them.” *NLRB v. Burns Intern. Sec. Servs., Inc.*, 406 U.S. 272, 284 (1972). *See, e.g., Ameristeel*, 267 F. 3d at 264; *Southward v. S. Cent. Ready Mix Supply Corp.*, 7 F.3d 487 (6th Cir. 1993); *Sullivan Indus. v. NLRB*, 957 F.2d 890 (D.C. Cir. 1992). Therefore, Povtak should not be bound by the provisions of the CBA because (1) it did not assume any provision in the agreement and (2) holding that Povtak is

not bound by the CBA reinforces the purpose of collective bargaining for all parties.

**1. Povtak did not assume any of the obligations in the CBA, and therefore, should not be bound to any of its provisions.**

Because Povtak did not assume any of the provisions in the CBA it should not be bound to any of its provisions. In *Burns*, a successor service company “in no way agreed” to the existing CBA and could not be compelled to accept contract provisions against its will, even if it was aware of its existence. 406 U.S. at 282. *See also Hosp. and Indus. Workers v. Pasatiempo Dev. Corp.*, 627 F.2d 1011, 1012 (9th Cir. 1980) (binding successors only if the substantive obligations are “expressly or impliedly” assumed); *Howard Johnson*, 417 U.S. at 258 (successor company could not be bound because it was “perfectly clear the Company refused to assume any obligations under the agreements.”). Although *Wiley* held a company may be bound by a predecessor’s CBA, this Court limited its holding, describing it as a “guarded, almost tentative statement . . . focusing on the limited factual context in which *Wiley* arose.” *Howard Johnson*, 417 U.S. at 256.

Courts have found that even a company with notice of a prior CBA did not assume a collective bargaining agreement. *Howard Johnson*, 41 U.S. at 258. *See also Wood v. Int’l Bhd. of Teamsters, Chauffeurs*, 807 F.2d 493, 499 (6th Cir. 1986) (observing that even if the company had notice of a successor clause in the predecessor CBA, the company later expressly renounced the prior agreement with the union and could not be bound). Additionally, acceptance is also not

assumed when a company may have acted in a manner consistent with provisions of the predecessor's agreement. *Pasatiempo Dev.*, 627 F.2d at 1011 (settling of employee grievances does not constitute an assumption of an agreement to arbitrate because the company had its own reasons to settle). Further, if a company rejects some provision of a prior CBA, it suffices even if it was unclear whether the company rejected the whole CBA. *Local 1115 Joint Bd. Nursing Home and Hosp. Emp., Florida Div.*, 436 F.Supp. 1203 (D.C. Fla. 1977).

This case is analogous to *Wood* because Livramento and Daks rejected any suggestion by Local that it was bound to any of the provisions in the CBA. 185 F.Supp.3d at 8-9. Local's contention that Povtak assumed the obligations of the grievance process also does not raise a genuine issue because Livramento explicitly stated that the reason for the meeting was solely to discuss the ECP for which Wagner was terminated. *Id.* As the court found in *Pasatiempo Dev.*, a company can follow procedures if it has an interest in doing so and it is reasonable for a prudent employer, like Povtak, to explain why someone is being terminated in an attempt to protect itself from future litigation. Furthermore, *Wiley* is not applicable here because no merger existed to give notice to Povtak that a CBA had been agreed upon. Also unlike *Wiley*, state law in this case does not address the obligations of the merging companies. Forcing Povtak to arbitrate would not be "within the reasonable expectations of the parties" because Povtak was unaware of the CBA until Union representation submitted the grievance regarding Wagner's dismissal. *Howard Johnson*, 417

U.S. at 259-260. Conclusively, Povtak should not be bound by the CBA because Respondents cannot raise a genuine issue that Povtak assumed the provisions in the agreement.

**2. This Court should not bind Povtak to the CBA because the purpose of collective bargaining demands open negotiation among employers, employees, and unions.**

This Court should not force Povtak to comply with Crimaldi's CBA because Povtak was never able to exercise its freedom to bargain. This Court recognized "[P]rivate bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract" is a "fundamental premise" of the federal labor laws. *Burns*, 406 U.S. at 287 (quoting *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)). *Burns*, however, did not ignore the protection of employees as the Court realized that there are competing interests that need to be weighed. *Id.* at 287. When this Court stated that "preventing industrial strife is an important aim of federal labor legislation," it placed considerable emphasis on employer freedom. *Id.* *Howard Johnson* reinforced the holding in *Burns* stating that it "must be taken into account" because what the Union wanted in that case was "completely at odds with the basic principles this Court elaborated in *Burns*." *See also AmeriSteel*, 267 F.3d at 275 (stating *Burns*' "language and logic have been reinforced in later cases.").

When companies have an opportunity to negotiate with union representatives, the negotiations are "likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). Additionally, when a union that has signed a collective bargaining

contract is no longer active, the succeeding union is not bound by the prior contract. *Id.* Even if the terms of the old contract have not yet expired, the successor union need not administer the CBA and may demand negotiations for a new contract. *See, e.g., American Seating Co.*, 106 N.L.R.B. 250 (1953).

Because only 16 employees are affected by this CBA, any claim that enforcing the CBA would actually "prevent labor strife" is without merit because, unlike *Wiley*, no such factor is present. 376 U.S. at 549. Had Povtak not hired any of the Crimaldi employees, many of Local's union employees would have been unemployed and would have found no recourse in the CBA they had with Crimaldi. Further, when city council members addressed their concern for the Dynes terminal employees' job security at the pre-bid conference, they were referencing potential strife during the transition period between Crimaldi and Povtak. (App. C. 5). That concern did not extend to labor strife after Povtak began operating the terminal. Moreover, the record does not indicate any uneasiness among employees regarding wages, benefits, or working conditions. *Id.* Furthermore, *Wiley's* rationale concerned corporate mergers, not a company in an arm's length transaction with a third-party. Therefore, *Burns* and *Howard Johnson's* rationale, supporting a company's ability to collectively bargain, should apply in this case.

Additionally, binding Povtak to Crimaldi's CBA is unfair to any successor company who chooses to employ predecessor union workers. Unions should not be given the freedom to reject a

predecessor union's unfavorable agreement while a company is burdened to follow a predecessor's agreement for which it never bargained. Furthermore, as *Burns*' noted, a new company may not refuse to hire the employees of his predecessor solely because they were union members. 406 U.S. at 280-281. This places employers in an increasingly difficult situation and further inhibits purchases, mergers, and sales of fledgling companies because of an employer's substantiated fear of losing its bargaining power. Consequently, this Court should not bind Povtak to the substantive provisions of the CBA because it would fairly balance the competing interests of all involved and reinforces the purpose of collective bargaining.

**C. Because Povtak cannot be bound to any of the substantive provisions of the CBA, this Court should not compel Povtak to arbitrate.**

Compelling Povtak to arbitrate is unnecessary because the substantive provisions of Crimaldi's CBA are not enforceable against Povtak. A company should not be required to submit to arbitration because it "is a matter of contract and a party cannot be required to submit to . . . any dispute which he has not agreed so to submit." *AT & T Technologies, Inc. v. Commc'ns. Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). See also *Local Union No. 637, Intern. Broth. of Elec. Workers, AFL-CIO v. Davis*, 13 F.3d 129, 131 (4th Cir. 1993) (finding "just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate . . . [an employer] cannot be compelled to arbitrate if an arbitration clause does not bind it at all."). In addition, compelling arbitration is legitimate where it "draws its essence from the collective bargaining agreement . . . ."

*United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

In this case, Povtak seeks to compel arbitration for a grievance procedure under Article 14.1 of the CBA. (App. A 7). This dispute, however, is rooted in Article 7.1 of the CBA which states that the employer has “the right to discipline/discharge employees for just cause.” (App. A 5). Since the requirement of discharge for just cause does not apply to Povtak, there is no need for a grievance procedure, and subsequently nothing to arbitrate as Povtak’s discharge is not at issue before the Court. If this Court compels arbitration, its effect would fall “into the realm of the arbitrator's own notion of industrial justice.” *Ameristeel*, 267 F.3d at 265. Consequently, Wagner cannot raise a genuine issue of material fact that Povtak can be bound by Crimaldi’s CBA; therefore, this Court should not compel Povtak to arbitrate.

**II. No reasonable jury could find that Povtak violated Wagner’s Fourth Amendment right to be free from unreasonable searches because she did not have a reasonable expectation of privacy in her Facepage profile or ePhone and Povtak’s actions were reasonable under the circumstances.**

Because Wagner controlled her own Facepage privacy and she initiated the inspection of her ePhone, no reasonable jury could conclude that she had a reasonable expectation of privacy. Judgment as a matter of law should be granted if “there can be, but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the impact of the evidence, then the motion should not be granted.” Fed. R. Civ. P. 50; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). The Fourth Amendment states, “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. “People, not places,” are protected from unreasonable searches and seizures, and the protection must be invoked by the individual claiming an infringement upon her personal rights. *Katz v. United States*, 389 U.S. 347, 351 (1967). More specifically, in the employment context, an employee claiming a violation of Fourth Amendment rights against her employer must satisfy several requirements.

First, the search must have been conducted by a government employer, or a private actor on behalf of the government. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 388 (1971) (holding that a violation of the Fourth Amendment by a federal agent acting under color of federal authority gives rise to a cause of action). Second, the employer’s conduct must qualify as a Fourth Amendment “search” as a result of the employer’s infringement upon the individual’s reasonable expectation of privacy. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Finally, if a search did occur, a Fourth Amendment violation occurs only if the search is unreasonable in its inception and scope under all the circumstances. *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion) (determining that the “operational realities of the workplace” shape an employee’s expectation of privacy). Wagner’s allegations that Povtak acted unreasonably regarding her Facepage profile or ePhone fail because (A) Povtak is not a government actor; (B) Povtak did not conduct a search of her Facepage; and (C) Povtak’s actions were reasonable in their inception and scope.

**A. Povtak is not a government actor for the purpose of Wagner’s Bivens action because the action applies to governmental actors, not private entities who satisfy government contracts.**

Because Povtak is only fulfilling a service contract, it should not be considered a government actor merely for accepting federal funding to provide “green” transportation for Dynes. Determining whether an employer is a government actor is “fairly included” as a threshold question because a Bivens action depends upon an employer’s status as a government actor. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001). Generally, threshold questions are “fairly included” in the questions presented and will be considered by this Court. Sup. Ct. R. 14.1 (a); *But cf.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp.*, 510 U.S. 27 (1993) (exercising caution in considering issues not presented in a petition). If an issue must necessarily be resolved to accurately address the question presented, it may be “fairly included.” *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 (1996). To resolve any Bivens action, a government actor must be identified or *Bivens* does not apply to the private entity. *Malesko*, 534 U.S. at 63.

Government contracts do not necessarily subject a private company to a Bivens action as a government actor. *Id.* In fact, this Court declined to find that a private corporation which operated a halfway house under a government contract with the Bureau of Prisons was a government actor for a former federal inmate’s Bivens action. *Malesko*, 534 U.S. at 63 (noting that *Bivens*’ purpose was the deterrence of individual federal officers from violating constitutional protections).

Like *Malesko*, where a private entity acted pursuant to a government contract, Povtak's acceptance of Dynes' transportation contract and its use of federal funding for its green initiatives does not make Povtak a government actor. 185 F.Supp.3d at 3. Because Povtak is not a government actor, Wagner should not be able to maintain an action against Povtak for violation of her Fourth Amendment rights.

**B. Even if Povtak is a government actor, no search of Wagner's Facepage profile occurred to trigger her Fourth Amendment protection because she does not have a reasonable expectation of privacy in her profile.**

Wagner does not have a reasonable expectation of privacy in her profile because she chose her privacy settings and invited Povtak to read her profile comments. An employer's alleged conduct against an employee must qualify as a "search or seizure" to trigger the employees' Fourth Amendment protections. *Katz*, 389 U.S. at 361-62 (Harlan, J., concurring); *see, e.g., Kyllo v. United States*, 533 U.S. 27, 32-33 (2001). First, the individual must demonstrate "an actual (subjective) expectation of privacy." *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Second, the individual's expectation of privacy must be "one that society is prepared to recognize as reasonable." *Id.*

Justice Harlan's threshold inquiry to determine whether a search has occurred is particularly important regarding Wagner's Facepage profile because the existence of an employer-employee relationship does not automatically initiate the workplace inquiry present in *Ortega*. *Ortega*, 480

U.S. at 717-18. The concern in *Ortega* focused on the employee's expectation of privacy at work regarding personal items and office furniture such as desks and file cabinets. *Id.* See also *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) (applying *Ortega*'s employment context test to a pager issued to a city police officer and used for work-related and non-work related text messages).

Even if Povtak used Facepage comments as part of Wagner's performance review, Povtak had no control over her Facepage profile as a "workplace area." *Ortega*, 480 U.S. at 717-18. Because none of the workplace concerns such as the openness of the office, interaction with co-workers, or employer policies present in *Ortega* or *Quon* are analogous to Wagner's Facepage profile to consider it part of the workplace, *Katz*' two-prong expectation of privacy inquiry is applicable to general allegations of a search. Furthermore, no search occurred because (1) Wagner does not have a subjective expectation of privacy in her Facepage and (2) Wagner does not have an objective expectation of privacy which society is prepared to recognize as reasonable.

- 1. Wagner cannot have a subjective expectation of privacy for her Facepage profile because she chose the privacy settings that allowed Povtak to access to her profile when she accepted Povtak as a Facepage "friend."**

To demonstrate a subjective expectation of privacy, Wagner must have actually intended to preserve the statements as private. *Katz*, 389 U.S. at 351 (exposing information knowingly to the public precludes Fourth Amendment protection). In *Katz*, this Court recognized a privacy expectation in the contents of a telephone conversation in a closed public phone booth which

police overheard from a transmitter placed on the booth. *Katz*, 389 U.S. at 352-53 (stressing the individual's intent to exclude "the *uninvited ear*" from the conversation) (emphasis added). *See, e.g., Smith v. Maryland*, 442 U.S. 735, 743-44 (1976) (releasing dialed telephone numbers to the public telephone which were collected by police officers using a pen register did not support a subjective expectation of privacy). Similarly, a subjective expectation of privacy does not exist in other relationships that many laypersons may mistakenly consider confidential. *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (confiding in another on the assumption that he will not disclose the information to a third party or the police does not justify an expectation of privacy); *United States v. White*, 401 U.S. 745, 752 (1971) (applying *Hoffa*'s rationale to circumstances where law enforcement used recording and transmission devices placed on informants).

Wagner's Facepage posts correspond with the settled rationale from *Hoffa* and *White* that sharing information with a third-party, regardless of trust, does not support subjective privacy. *Hoffa*, 385 U.S. at 302; *White*, 401 U.S. at 752. As a Facepage "friend," Povtak, and its supervisors with access to its profile, could view any comment Wagner posted on her profile. 185 F.Supp.3d at 4. Unlike the expectation of privacy upheld in *Katz*, Wagner did not intend to protect a privacy interest from an "uninvited" user because she was the only person in control of her Facepage privacy settings and exercised the option to invite Povtak. *Katz*, 389 U.S. at 352-53.

Notwithstanding the online medium, no reasonable jury could find a subjective expectation

of privacy in Wagner’s words if she invited all of her friends—including her employer—to a party and then criticized the employer in the presence of the whole crowd. Even if Povtak supervisors used Facepage as a tool to view the contents of Wagner’s profile, any invited “friend” could conceivably speak to the public about her comments, take a screen shot, or copy and e-mail the comments to the local newspaper or her supervisors. 185 F.Supp.3d at 7. Because the traditional rationales of *Hoffa*, *White*, and *Katz* apply even where the setting is on the internet, Wagner does not have a subjective expectation of privacy where she knowingly invited, and intended for, her “friends” to read her profile.

**2. Wagner does not have an objective expectation of privacy in her Facepage because content placed on the internet is frequently available to the public even if a user intended to preserve the content as private or limited in its availability to others.**

Wagner does not have “an expectation of privacy that society is prepared to consider reasonable” because the internet preserves digital content for a world-wide audience once a user makes it available. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Generally, internet users do not have an expectation in privacy for “transmissions over the internet or e-mail that have already arrived at the recipient.” *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (citing *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001)). *Lifshitz* and *Guest* reasoned that someone who sends an e-mail is analogous to a person who writes a letter. *Guest*, 255 F.3d at 333 (citing *United States v. King*, 55 F.3d 1193, 1196 (6th Cir.1995)). When a letter is sent, any subjective expectation of

privacy the sender may have ceases to be objectively reasonable upon receipt because the recipient may use the letter for any purpose he desires. *Id.* Thus, society could not reasonably consider an expectation of privacy for an internet user when her content reaches another's computer screen. *Id.*

Furthermore, several criminal cases involving peer to peer file-sharing of child pornography on the internet have also held that no objective expectation of privacy exists where the user made the content publicly available to others. *United States v. Stults*, 575 F.3d 834, 843 (8th Cir. 2009). *See also United States v. Ganoie*, 538 F.3d 1117, 1127 (9th Cir. 2008) (reasoning that defendant "opened up his download folder to the world" by using online software to share files).

Despite surface distinctions between Wagner's Facepage profile and the file sharing cases, the important connection is the user's ability to choose with whom information is shared. Therefore, those cases are analogous in that content was made available to an online audience by an individual user. Society could not find an objectively reasonable expectation of privacy where content was immediately available to the public with no limitations on privacy settings or passwords. On the other hand, an expectation of privacy may be reasonable with respect to individuals who are not Wagner's Facepage "friends." *See Pietrylo v. Hillstone Restaurant*, No. 06-5745, 2008 WL 6085437 \*1 (D. N.J. July, 25, 2008) (finding by jury that employees had an expectation of privacy where supervisors were gaining unauthorized access to an online space with customized privacy settings). Here, however, where Wagner had two years of experience using

Facepage, and she made her posts available to a particular group that included her employer, an objective expectation of privacy is unreasonable. 185 F.Supp.3d at 4.

This Court cautioned in *Quon*, “The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.” *Quon*, 130 S. Ct. at 2629. Where it is clear that Wagner cannot satisfy the traditional subjective and objective expectation of privacy prongs of *Katz*’, the Court should not need to reach a new doctrinal holding. Therefore, Wagner’s Facepage was not searched, and her Fourth Amendment protections are not triggered.

**C. Povtak’s alleged search of Wagner’s company-issued ePhone was not unreasonable because Wagner did not have legitimate expectation of privacy in the ePhone and Povtak’s inspection of the phone was reasonable.**

Povtak’s technician performed a reasonable inspection of Wagner’s ePhone because he was attempting to remedy a battery problem that Wagner reported. Five Justices of the Court in *Ortega*, the plurality and Justice Scalia’s concurrence, agreed that employees are generally protected from unreasonable searches by government employers. *Id.* at 726-731. *Ortega*’s workplace analysis attempts to balance the invasion of the “employees’ legitimate expectations of privacy against the [government employer’s] need for supervision, control, and the efficient operation of the workplace.” *Ortega*, 480 U.S. at 719-720. In balancing these interests, Wagner’s ePhone was not free from employer intrusion because Povtak’s ECP expressed that employees’ electronic

communications could be accessed by Povtak at any time and for any reason. (App. B 1). Wagner cannot demonstrate that Povtak’s search of the ePhone was unreasonable because (1) Wagner does not have an expectation of privacy in the ePhone; and (2) even if she did, the search of the phone was justified in its inception; and (3) it was justified in scope.

**1. Wagner does not have expectation of privacy in the use of her ePhone because Povtak’s ECP governed the operational realities of the workplace for use of the company’s electronic systems.**

Wagner should not have an expectation of privacy in her company-issued ePhone because she acknowledged that she read and understood Povtak’s ECP. The *Ortega* plurality held that the appropriate standard for an expectation of privacy at work depends upon the “operational realities of the workplace.” *Ortega*, 480 U.S. at 715-16 (describing the “workplace” as areas “generally within the employer’s control” regardless of whether an employee places personal items in those areas). Employees' expectations of privacy may also be reduced by “office practices and procedures, or by legitimate regulation.” *Id.* at 717. Relying on *Ortega*, postal workers argued that postal authorities had only conducted searches of employee lockers with prior written notice and these actions modified the “actual office practices and procedures” to support an expectation of privacy. *Am. Postal Workers Union, Columbus Area Local AFL-CIO v. United States Postal Serv.*, 871 F. 2d 556, 560-61 (6th Cir. 1989) (citing *Ortega*, 480 U.S. at 717)). The circuit court stated that the argument ignored that the postal service could conduct locker inspections at any time, with or

without notice, pursuant to its collective bargaining agreement. *Id.* at 561.

In *City of Ontario v. Quon*, this Court also relied on *Ortega* and an employer policy to understand the workplace realities present where city police officers were issued pagers that sent text messages. *Quon*, 130 S. Ct. at 2625. This Court only assumed *arguendo* that officer Quon had a reasonable expectation of privacy in the city's transcripts of his text messages where: the city's policy did not apply on its face to text messaging; it permitted some limited personal use of the employer-issued property; and Quon was told by his lieutenant that his texts would not be reviewed if they were work-related and he paid for any excess use over a monthly limit. *Id.* Some lower courts have found that employees' expectations of privacy are eliminated by employer policies. *Biby v. Bd. of Regents*, 419 F.3d 845, 850-51 (8th Cir. 2005) (reserving a right to search computers in response to discovery requests); *United States v. Angevine*, 281 F.3d 1130, 1133-35 (10th Cir. 2002) (reserving a right of access to equipment and monitoring); *Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002) (destroying employees' expectation of privacy by informing them that laptops were subject to search).

Here, Wagner consented to Povtak's review of the phone when she voluntarily turned her iPhone into technical support for repair so she should not have an expectation of privacy. 185 F.Supp.3d at 6. In addition to that consent, the operational realities of the workplace revolve around Povtak's ECP. Like the city's policy in *Quon*, Povtak's policy warned that employees' should not

have an expectation of privacy in employer-issued property. (App. B 1). Povtak's ECP is extensive in its reservations of rights for the company and limitations for the individual rights of the employees in their use of ". . . hardware, software, electronic mail (e-mail), Internet/Web access and voice mail." *Id.* Although the ePhone is not named in the policy, it was subject to the terms and conditions of the ECP because the ePhone is company hardware, it accesses e-mail and voice mail, and it downloads software applications from the internet. 185 F.Supp.3d at 5. Because the ECP also restricts users from downloading unauthorized software, regardless of their productivity, non-work related applications like Facepage and the CTW blog implicate the policy. (App. B 2-3).

Leibson's awareness of the applications and absence of discipline against Wagner is not a waiver of the ECP. 185 F.Supp.3d at 6. In fact, Leibson only commented favorably on the e-mail and the technical support applications; he said nothing about the Facepage or CTW applications. *Id.* at 7. Leibson's actions, even taken together, do not waive Povtak's express policy because failure to "implement . . . authority in the past [does] not negate the explicit provisions" of an employer's policy. *Am. Postal Workers Union*, 871 at 560-61. Because any expectation of privacy based on Leibson's comments is unreasonable, Povtak warned employees about a lack of confidentiality in the ECP and agreement form, and Wagner voluntarily turned the phone into technical support, Wagner does not have a legitimate expectation of privacy in the ePhone. (App. B 1-4).

**2. Even if Wagner had a legitimate expectation of privacy in the ePhone, Povtak was justified when it diagnosed the ePhone for battery problems and discovered inappropriate applications during a non-investigatory, work-related repair.**

When Wagner reported that her phone was dropping calls because of a battery problem, Povtak's alleged search of her ePhone was immediately justified. An employer's search of an item in which an employee has a legitimate expectation of privacy is justified in its inception when the employer's search is necessary for a non-investigatory, work-related purpose. *Ortega*, 480 U.S. at 725 (describing entry into an office for need of a file as a non-investigatory work-related purpose). Furthermore, in *Quon*'s unanimous decision, the search of an employer-issued pager was reasonable because it was motivated by legitimate work-related purposes to determine why officers were surpassing monthly character limits on texts. *Quon*, 130 S. Ct. at 2619. Here, Wagner turned her ePhone into technical support because of battery problems. Consequently, in the course of necessary repair, the technician found the applications. 185 F.Supp.3d at 7-8. He documented the installed applications only after inspecting the phone's problems. *Id.* Any connection to the Pugluv86 identity was documented by the technician's supervisor, after he saw the technician's comments. *Id.* Neither the technician nor the supervisor performed an investigatory search, and the repair was work-related. Accordingly, the alleged search was justified in its inception.

**3. The alleged search of the ePhone was also reasonably related in scope to the battery problem that initiated the review of the ePhone.**

Povtak's discovery of the inappropriate applications was directly related in the scope of the

inspection for battery problems with the ePhone and *Ortega* only requires that an employer's search must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Ortega*, 480 U.S. at 725-26. Not only did Wagner initiate the inspection to fix the phone, but the technician's failure to diagnose the phone and its functions would actually be unreasonable for the maintenance of Povtak's property. *See generally Muick*, 280 F. 3d at 741. Therefore, because inspection was both justified in its inception and reasonably related in scope to the battery problem, no reasonable jury could find that Wagner's Fourth Amendment protections were violated even if she had a legitimate expectation of privacy in the ePhone.

### **CONCLUSION**

Respondents cannot raise a genuine issue of material fact that Povtak assumed the provisions in Crimaldi's CBA, nor that substantial continuity is present because Povtak made substantial changes in its business operations and additional training was required for employees. Therefore, Povtak should not be bound to Crimaldi's CBA for the purpose of arbitrating Wagner's grievance. Furthermore, no jury could find that Povtak's actions were unreasonable under the Fourth Amendment where Wagner intended for her "friend," Povtak, to view her Facepage comments and she downloaded unauthorized applications on the ePhone. Povtak's technical support was also justified in viewing the phone for a non-investigatory, work-related repair. Thus, the Thirteenth Circuit should be reversed, and the district court's judgments reinstated.