

---

Docket No. 03/2011

---

In the

SUPREME COURT OF THE UNITED STATES

March Term, 2011

---

POVTAK GROUP,

*Petitioner*

v.

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

*Respondent.*

---

On Writ of Certiorari to the  
Supreme Court of the United States

---

BRIEF FOR PETITIONER

---

Team No. 50  
*Counsel for Petitioner*

---

## **QUESTIONS PRESENTED**

- I. Whether a public employer violates the Fourth Amendment privacy rights of a public employee when the operational realities of the public workplace limit an employee's expectation of privacy; the public employee agreed to limited privacy expectations through acquiescence of the employer's policy; and the public employee was discharged for making statements on a social networking site through a company-issued communication device, in violation of the public employer's electronics policy.
  
- II. Whether Povtak Group, as a successor employer, is bound by the substantive provisions of its predecessor's collective bargaining agreement when Povtak Group did not consent to the adoption of its predecessor's collective bargaining agreement; Povtak Group is not an "alter ego" of its predecessor; and Povtak Group does not fall under the narrow exception of the *Wiley – Burns – Howard Johnson* doctrine.

**TABLE OF CONTENTS**

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW.....1

STATUTES INVOLVED.....1

STANDARD OF REVIEW .....1

STATEMENT OF THE CASE.....1

STATEMENT OF FACTS .....3

**A. The City of Dynes contracted with Povtak Group to provide public transportation services in the city. ....3**

**B. Povtak made changes at the bus terminal. ....4**

**C. Wagner became discontent with her job. ....5**

**D. Povtak fired Wagner for violating the ECP. ....6**

**E. Povtak refused to accept the grievance that Local 12-22 attempted to file. ....7**

SUMMARY OF THE ARGUMENT .....7

ARGUMENT .....11

**I. POVTAK GROUP DID NOT VIOLATE THE FOURTH AMENDMENT PRIVACY RIGHTS OF ROBERTA WAGNER WHEN SHE MADE STATEMENTS ON A SOCIAL NETWORKING SITE THROUGH A COMPANY-ISSUED EPHONE.....11**

**A. A public employee has a limited expectation of privacy in the workplace.11**

**i. The Fourth Amendment privacy rights of public employees are tempered by the “operational realities of the workplace” principles. ....11**

ii.	<b>The operational realities of Roberta Wagner’s workplace did not create a reasonable expectation of privacy in her use of the company-issued ePhone.</b>	14
iii.	<b>The informal acknowledgement of Wagner’s ePhone usage by a former supervisor does not counteract the operational realities of the workplace to create a reasonable expectation of privacy.</b>	16
B.	<b>An individual has no expectation of privacy in the information placed on a social network website.</b>	17
II.	<b>POVTAK GROUP IS NOT BOUND TO THE SUBSTANTIVE PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT ENTERED INTO BY CRIMALDI UNDER SECTION 301 OF THE TAFT-HARTLEY ACT, 29 U.S.C. § 185.</b>	21
A.	<b>A successor employer is only bound to the substantive provisions of the CBA entered into by its predecessor in limited instances.</b>	21
i.	<b>The successor adoptions the predecessor’s CBA.</b>	21
ii.	<b>The “alter ego” doctrine.</b>	22
iii.	<b>The <i>Wiley – Burns – Howard Johnson</i> doctrine.</b>	23
B.	<b>Povtak Group is not bound to the substantive provisions of the CBA entered into by Crimaldi.</b>	25
i.	<b>Povtak did not adopt Crimaldi’s CBA.</b>	25
ii.	<b>Povtak is not an alter ego of Crimaldi.</b>	26
iii.	<b>The <i>Wiley – Burns – Howard Johnson</i> doctrine does not apply to Povtak.</b>	27
C.	<b>The lower court misconstrued the <i>Wiley – Burns – Howard Johnson</i> doctrine.</b>	28
i.	<b>The “sliding scale” approach.</b>	29
ii.	<b>The sliding scale approach is unattainable and contrary to the majority of the Circuits.</b>	29
	<b>CONCLUSION</b>	30

**TABLE OF AUTHORITIES**

**UNITED STATES SUPREME COURT CASES:**

*City of Ontario, Cal.v. Quon*, 130 S.Ct. 2619 (2010).....14

*Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).....24

*Garcetti v. Caballos*, 547 U.S 868 (1987) .....13

*Griffin v. Wisconsin*, 438 U.S. 868 (1987).....13

*Howard Johnson Co., Inc. v. Detroit Local Jt. Exec. Bd.*, 417 U.S. 249  
(1974).....21, 22, 23, 24, 25, 26

*Illinois v. Caballes*, 543 U.S. 405 (2005) .....14, 15

*John Wiley & Sons v. Livingston*, 367 U.S. 544 (1964).....21, 23, 27

*Katz v. United States*, 389 U.S. 347 (1967) .....11

*Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) .....11, 13

*NLRB v. Burns Int’l Sec. Services, Inc.*, 406 U.S. 272 (1972).....21, 22, 23, 24, 25, 26, 27, 28

*O’Connor v. Ortega*, 480 U.S. 709 (1987) .....11, 12, 13, 14

*Ornelas v. United States*, 517 U.S. 690, 697-98 (1996) .....1

*Smith v. Maryland*, 422 U.S. 735 (1979) .....11, 16, 17

**UNITED STATES COURT OF APPEALS CASES:**

*Local 348-S, UFCW, AFL-CIO v. Meridian Mgmt. Corp.*, 583 F.3d 65 (2d Cir. 2009) .....29

*Amalgamated Meat Cutters & Bucher Workmen v. NLRB*, 663 F.2d 223 (D.C. Cir. 1980) .....22

*Ameristeel Corp. v. Int’l Bhd. of Teamsters*, 267 F.3d 264 (3d Cir. 2001).....23, 29, 30

*Biby v. Bd. Of Regents*, 419 F.3d 845 (8th Cir. 2005) .....15

*Carpenters Local Union No. 1864 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982) .22. 27

*Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 636 (2001).....1

<i>Guest v. Leis</i> , 255 F.3d 325 (6th Cir. 2001).....	18
<i>Leventhal v. Knapek</i> , 266 F.3d 64 (2d Cir. 2001).....	15, 17
<i>Local 7-517 v. Uno-Ven Co.</i> , 170 F.3d 779 (7th Cir. 1999).....	22, 30
<i>Muick v. Glenayre Elecs.</i> , 280 F.3d 741 (7th Cir. 2002).....	14
<i>New England Mech., Inc. v. Local Union 294</i> , 909 F.2d 1339 (9th Cir. 1990).....	24, 30
<i>NLRB v. Hosp. San Rafael, Inc.</i> , 42 F.3d 45 (1st Cir. 1994).....	22, 30
<i>NLRB v. Houston Bldg. Servs., Inc.</i> , 128 F.3d 860 (5th Cir. 1997).....	21, 30
<i>Orange Place Ltd. P’ship v. NLRB</i> , 333 F.3d 860 (5th Cir. 1997).....	21
<i>Prof’l Electrical Workers Union, Local 12-22, et al. v. Povtak Group</i> , 1214 F.3d 1 (13th Cir. 2010).....	1, 2, 16, 19, 2, 21, 26, 27, 28, 29
<i>Road Sprinkler Fitters Local Union No. 669, AFL-CIO v. Indep. Sprinkler Corp.</i> , 10 F.3d 1563 (11th Cir. 1994).....	23, 30
<i>Sheet Metal Workers Int’l Assoc. v. Arizona Mechanical &amp; Stainless, Inc.</i> , 863 F.2d 647 (9th Cir. 1998).....	21, 22
<i>Southward v. South Cent. Ready Mix Supply Corp.</i> , 7 F.3d 487 (6th Cir. 1993).....	22, 23, 30
<i>Stardyne, Inc. v. NLRB</i> , 41 F.3d 141 (3d Cir. 1994).....	22
<i>Sullivan Indus. v. NLRB</i> , 957 F.2d 890 (D.C. Cir. 1992).....	22, 30
<i>United States v. Angevine</i> , 281 F.3d 1130 (10th Cir. 2002).....	15
<i>United States v. Barrows</i> , 481 F.3d 1246 (10th Cir. 2007).....	18
<i>United States v. Borrowy</i> , 2010 WL 537501 (9th Cir. 2010).....	18
<i>United States v. Jacobsen</i> , 466 U.S. 109, 113 (1984).....	11
<i>United States v. Lifshitz</i> , 369 F.3d 173 (2nd Cir. 2004).....	18
<i>United States v. Simons</i> , 206 F.3d 392 (4th Cir. 2000).....	15

**UNITED STATES DISTRICT COURT CASES**

*Beye v. Horizon Blue Cross Blue Shield of New Jersey*, 06-5337 (D.N.J. December 13, 2007)...18  
*Bohach v. City of Reno*, 932 F.Supp.1232 (D. Nev. 1996).....15  
*Prof'l Electrical Workers Union, Local 12-22, et al. v. Povtak Group*, 185 F. Supp.3d 1 (W.D. Frl. 2009).....1, 2, 3, 4, 5, 6, 7, 12, 26, 27, 28  
*Prof'l Electrical Workers Union, Local 12-22, et al. v. Povtak Group*, 231 F.Supp.3d 20 (W.D. Frl. 2009).....2  
*Smyth v. Pillsbury Co.*, 914 F. Supp.97 (E.D. Pa. 1996) .....18  
*United States v. Charbonneau*, 979 F. Supp. 1177 (S.D. Ohio 1997) .....17, 18

**STATE COURT CASES**

*Dexter v. Dexter*, 2007 WL 1532084 (Ohio Ct. App. Portage Co. 2007).....19  
*Moreno v. Hanford Sentinel Inc.*, 172 Cal. App.4<sup>th</sup> 1125 (Ct. App. 5 Dist. 2009).....18, 19  
*Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010).....19  
*United States v. Monroe*, 52 M.J. 326 (C.A.A.F. 2000) .....18  
*White v. White*, 781 A.2d 85 (Ch. Div. 2001).....18

**STATUTORY AND REGULATORY PROVISIONS:**

29 U.S.C § 185.....1, 2, 3, 9, 23  
U.S. Const. amend. IV .....1, 8, 11

**OTHER AUTHORITIES:**

Am. Jur 2d, Searches and Seizures § 5 .....17  
Justin Conforti. *Somebody’s Watching Me: Workplace Privacy Interests, Technology Surveillance, and the Ninth circuit’s Misapplication of the Ortega Test in Quon v. Arch Wireless*, 5 Seton Hall Cir. Rev. 461 (2008-2009). .....17

## **OPINIONS BELOW**

The opinion of the United States District Court for the Western District of Froessel is published at *Prof'l Electrical Workers Union, Local 12-22, et al. v. Povtak Group*, 185 F. Supp.3d 1 (W.D. Frl. 2009), and the opinion of the United States Court of Appeals for the Thirteenth Circuit is published at *Prof'l Electrical Workers Union, Local 12-22, et. al. v. Povtak Group*, 1214 F.3d 1 (13th Cir. 2010).

## **STATUTES INVOLVED**

The issues in this case involve the interpretation and application of the Fourth Amendment to the United States Constitution, U.S. Const. amend. IV, and section 301 of the Taft-Hartley Act of 1947, 29 U.S.C § 185.

## **STANDARD OF REVIEW**

The two issues upon which this Court reviews are questions of law. Questions of law are reviewed by the Court *de novo* because “‘*de novo* review tends to unify precedent’ and ‘stablize the law’”. *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 636 (2001) (quoting *Ornelas v. United States*, 517 U.S. 690, 697-98 (1996)). Here, the appropriate standard of review is *de novo*.

## **STATEMENT OF THE CASE**

After meeting with representatives from the Professional Electrical Workers Union, Local 12-22, on March 5, 2008, Roberta Wagner (“Wagner”) filed a Verified Complaint with the United States Equal Opportunity Employment Commission (“EEOC”) that alleged Povtak Group (“Povtak”) discrimination against her. *Prof'l Electrical Workers Union, Local 12-22, et al. v. Povtak Group*, 185 F. Supp.3d 1, 9 (W.D. Frl. 2009). The EEOC’s final Determination and Order found no probable cause to sustain Wagner’s allegations, and issued Wagner a “right to

sue” letter on June 19, 2008. Wagner then instituted a civil action within ninety days of her receipt of the “right to sue” letter. *Id.*

A civil lawsuit was filed against Povtak in the United States District Court for the Western District of Froessel alleging illegal employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §2000e *et seq*; and violations of her Fourth Amendment Right to be free from unreasonable search and seizures. 42 U.S.C. § 1983. Additionally, Local 12-22 joined with Wagner in the lawsuit and sued Povtak under section 301 of the Taft-Hartley Act of 1947, 29 U.S.C § 185, to enforce the terms of a collective bargaining agreement entered into by Local 12-22 and Povtak’s predecessor, Crimaldi.

On August 6, 2009, the District Court granted the Defendant’s Motion for Summary Judgment regarding Wagner’s privacy claim and dismissed Wagner’s employment discrimination claim. *Prof’l Electrical Workers Union, Local 12-22*, 185 F. Supp.3d at 19. Further, on December 19, 2009, after a jury verdict in favor of Wagner’s privacy claim, Povtak asserted a Rule 50 motion with respect to the jury verdict, which was granted by the District Court. *Prof’l Electrical Workers Union, Local 12-22, et. al. v. Povtak Group*, 231 F.Supp.3d 20 (W.D. Frl. 2009).

Wagner appealed the District Court’s decision, and on October 21, 2010, the United States Court of Appeals for the Thirteenth Circuit heard arguments. After hearing arguments, the Thirteenth Circuit reversed the lower court’s judgment as a matter of law. *Prof’l Electrical Workers Union, Local 12-22, et. al. v. Povtak Group*, 1214 F.3d 1 (13th Cir. 2010). Wagner timely petitioned the Thirteenth Circuit’s decision for certiorari, and this Court granted certiorari on two issues: (1) “Whether an employer violates the Fourth Amendment privacy rights of an employee for discharging the employee for statements made on a social networking site through

a company-issued communication device,” and (2) “Whether a successor employer will be bound to the substantive provisions of a collective bargaining agreement entered into by a predecessor employer under section 301 of the Taft Hartley Act, 29 U.S.C. § 185.”

### **STATEMENT OF FACTS**

#### **A. The City of Dynes contracted with Povtak Group to provide public transportation services in the city.**

Beginning in 1953, the City of Dynes (“City”) contracted Crimaldi to provide public bus transportation. *Prof’l Electrical Workers Union, Local 12-22, et al. v. Povtak Group*, 185 F.Supp.3d 1, 2 (W.D. Frl. 2009). The Professional Electrical Workers Union, Local 12-22 (“Local 12-22”) was certified as the bargaining representative for the electrical workers at Crimaldi in 1957. *Id.* The Collective Bargaining Agreement (“CBA”) between Crimaldi and Local 12-22 contained a “just cause” termination provision and a grievance/arbitration provision.<sup>1</sup> *Id.* at 3.

Crimaldi’s contract was automatically renewed for over 50 years. *Id.* at 2. However, criminal indictments were brought against several board members at Crimaldi, and City decided not to renew Crimaldi’s contract when it expired on February 1, 2008. *Id.* at 2. In anticipation of accepting bids for the public transportation contract, a pre-bid conference was held by City officials so Crimaldi employees could ask questions regarding their employment at City’s transportation terminal. *Id.*

Povtak Group’s (“Povtak”) Chief Financial Officer Deborah Quine was present at the pre-bid conference. *Id.* In response to a question asked by an attendee, Quine said, “[Povtak] would need all the help [it] can get.” *Id.* After the pre-bid conference, City opened the contract for bids. Povtak Group (“Povtak”) won the City contract in January 2008, and true to Quine’s

---

<sup>1</sup> Appendix A: Collective Bargaining Agreement between Professional Electrical Workers Union, Local 12-22, and Crimaldi.

word, Povtak hired 212 of the 342 former Crimaldi employees, including all sixteen members of Local 12-22. *Id.* at 2-3.

### **B. Povtak made changes at the bus terminal.**

Once it began operations, Povtak took steps to improve the environmental footprint of the public transportation system in the City. *Id.* For example, Povtak replaced the engines in the bus fleet with either organic-diesel burning or electric engines and redrew the bus routes to transport more citizens while using less fuel. *Id.* The electricians' duties at Povtak increased because of the implementation of electric engines in some of the bus fleet. *Id.* Povtak provided training to the former Crimaldi electricians so they could perform these new duties. *Id.*

Povtak also issued an Electronic Communications Policy ("ECP") when it took over operations of the bus terminal.<sup>2</sup> *Id.* The ECP is similar to provisions found in the old Crimaldi Employee Handbook, but the ECP contains provisions regarding the use of mobile cellular phones. *Id.* at 4. Povtak required all employees to read the ECP and sign a document acknowledging they read and understood the ECP, and agreed to abide by its terms. *Id.* Roberta Wagner ("Wagner"), who was hired around June 8, 2004, as a junior electrician, signed the document acknowledging that she agreed to abide by the terms of the ECP. *Id.*

Another change that Povtak instituted was the creation of a Facepage profile ("profile") and the issuance of new ePhones to all Povtak employees. *Id.* Povtak launched its profile in early February 2008 and encouraged employees to become friends with its profile.<sup>3</sup> *Id.* Wagner,

---

<sup>2</sup> Appendix B: Electronic Communications Policy

<sup>3</sup> By becoming friends with a profile, parties can view each others' profiles subject to certain privacy restrictions set by the creator of the profile. Facepage has a wide variety of privacy settings: 1) "Everyone" – allows all users on Facepage to view the profile; 2) "Friends" – only individuals accepted as a friend by the creator can view the creator's profile; 3) "Only Me" – only the profile creator can view the information of the creator's profile. Povtak's viewing restrictions are set to "Everyone," which allows all users on Facepage to see its profile, even those who are not friends with Povtak. Wagner's profile during the time period in question here was set to "Friends," limiting her profile to be viewed only by friends she had individually approved." *Prof'l Electrical Workers, et al.*, 185 F.Supp.3d at 4 n. 5.

who already had a profile that she created in early 2006, became friends with Povtak on Facepage. *Id.* Wagner also downloaded a total of four applications onto her new iPhone. *Id.* at 5. Only two of those applications were work related. *Id.* The two that were not work related linked Wagner's iPhone to Facepage and to a public blog for electricians, which was named "Crossing the Wires." *Id.*

### **C. Wagner became discontent with her job.**

Povtak performance reviews are conducted by reviewing employee postings on Povtak's Facepage profile and the submission of written evaluations by supervisors. *Id.* at 6. When Wagner was hired, Wagner began working in the light rail division at the bus terminal. *Id.* at 4. While working in the light rail division, Wagner's supervisor, Shane Leibson ("Leibson"), submitted positive reviews about her to Povtak's Human Resources Department ("HR") during routine performance reviews. *Id.* at 6. Leibson noted in the performance review that Wagner informed him that she downloaded four applications to her iPhone, and that the work related applications improved her work performance. *Id.* at 6-7.

Wagner was transferred to the bus division in February 2005. *Id.* at 5. The transfer did not reduce her pay or benefits. *Id.* at 5. Wagner was angry with her transfer, though, and posted on her Facepage profile that she had "[j]ust been transferred to the ghetto." *Id.* Wagner continued to post negatively about her job and supervisors on her profile, but, at the same time, she posted positively about her job and Povtak's environmental consciousness on Povtak's profile. *Id.* All of the posts that Wagner made during working hours were done via her company-issued iPhone. *Id.*

Wagner also posted links on her profile to articles on the "Crossing the Wires" blog that criticized Povtak. *Id.* at 6. One of the more critical blog postings from "Crossing the Wires" that

Wagner posted was later published in the local newspaper. *Id.* The posting, which was made by an individual with the username PugLuv86, attacked Povtak's green initiatives and alleged that the supervisors at Povtak were the reason the initiatives were failing. *Id.* Due to the nature of the details in the posting, many at Povtak believed that the author was a disgruntled employee. *Id.* Povtak ordered all supervisors to read employees' postings on the Facepage profile to determine the identity of the individual making the disparaging remarks. *Id.*

When it came time for her performance evaluation in the bus division, Wagner's new supervisor, Frank Milmine ("Milmine"), submitted several screen shots of Wagner's Facepage profile to HR. *Id.* at 7. Milmine accessed Wagner's profile through Povtak's profile, which he was permitted to do as a supervisor. *Id.* The screen shots from Wagner's profile contained negative comments on the same Povtak projects that she praised on Povtak's profile. *Id.* The screen shots also showed negative comments about her job and co-workers. *Id.* HR placed the screen shots in Wagner's employee profile. *Id.*

#### **D. Povtak fired Wagner for violating the ECP.**

Wagner reported a problem with her ePhone to Povtak's Technical Support Office. *Id.* While troubleshooting the problem, a technician found that Wagner installed four applications on her ePhone and filed a report about his findings. *Id.* The technician's supervisor reviewed the report and made additional comments in the report about a possible connection involving Wagner, the "Crossing the Wires" blog application, and the "Crossing the Wires" blog that was published in the newspaper. *Id.* at 7-8. The next day, Wagner was fired for violating the ECP. *Id.* at 8.

**E. Povtak refused to accept the grievance that Local 12-22 attempted to file.**

Upon learning that Wagner was terminated, agents from Local 12-22 visited HR to file a grievance protesting that Wagner was fired without just cause. *Id.* The Local 12-22 agents gave the piece of paper that contained the grievance to Human Resources Administrative Assistant Christian Arko because Assistant Human Resources Manager Audrey Livramento (“Livramento”) was not available.<sup>4</sup> *Id.*

Livramento and the Local 12-22 agents met on March 10, 2008. *Id.* Livramento began the meeting by explaining that its purpose was to explain the ECP and that Wagner was fired for violating the ECP. *Id.* The Local 12-22 agents interjected and explained to Livramento that the union should have been notified before Wagner was terminated pursuant to the CBA. *Id.* However, Livramento maintained that such notification was not necessary. *Id.*

After the meeting with Livramento, the Local 12-22 agents sent several emails to Human Resources General Manager George Daks.<sup>5</sup> *Id.* At first, the Local 12-22 agents wanted to meet with Daks to discuss Wagner’s termination, but in a subsequent email demanded arbitration. *Id.* at 9. Daks responded to the Local 12-22 agents via email and stated that Povtak would not participate in arbitration. *Id.*

**SUMMARY OF THE ARGUMENT**

The first issue that this Court must decide is whether a public employer violates Fourth Amendment privacy rights of a public employee for discharging the employee for statements made on a social networking site through a company-issued communication device. The Fourth Amendment of the United States Constitution provides “[the rights of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be

---

<sup>4</sup>Appendix C: Deposition Transcript of Christian Arko.

<sup>5</sup>Appendix C: Deposition of Christian Arko, Exhibit

violated...” U.S. Const. amend. IV. While it has been established that public employees can have a reasonable expectation of privacy in their place of employment, such expectations can be diminished by actual office procedures, regulation, or the environment of the government offices. Here, the Court of Appeals for the Thirteenth Circuit misinterpreted Roberta Wagner’s (“Wagner”) expectation of privacy regarding comments made on a social networking site using a company owned electronic device.

In evaluating Fourth Amendment claims against government employers, the first step of such an evaluation considers the operational realities of the workplace in order to determine if an employee has implicated their Fourth Amendment Rights. Here, Povtak had established an electronic communications policy which stated that an employee did not have any expectation to privacy with regard to electronic devices or communications through company owned networks or devices. Because of this, the ‘operational realities’ of the workplace at Povtak was that an employee did not have a reasonable expectation of privacy.

However, if it is determined that an employee does have a legitimate expectation of privacy, the analysis moves onto the second step. This step requires weighing whether an employer’s intrusion on that expectation for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all circumstances. Moreover, as the rise of social networking has taken hold in society, limitations on privacy expectations have been narrowed by Courts. Because the searches would be deemed reasonable under all circumstances, and given that Wagner had no reasonable expectation of privacy in her Facepage profile, the lower Court erred in ruling that Wagner did have a reasonable expectation of privacy regarding the comments she made on her Facepage profile.

The second issue that this Court must decide is whether a successor employer is bound to the substantive provisions of a collective bargaining agreement (“CBA”) entered into by a predecessor employer under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185. A successor employer is not ordinarily bound to the substantive provisions of the CBA entered into by its predecessor. However, three exceptions to this general rule have been developed in decisions by the United States Supreme Court and United States Courts of Appeal. Here, the lower court misconstrued one of the exceptions and found that Povtak was bound to the CBA entered into by Crimaldi.

The first exception occurs when a successor consents to its predecessor’s CBA. The second exception is the alter ego doctrine. Under the second exception, a successor is bound to its predecessor’s CBA where, through a factual analysis, a successor is found to be an alter ego of its predecessor. For example, a successor could be found to be an alter ego where the successor and predecessor have continuity in management, operation, and customers. The Thirteenth Circuit correctly found that Povtak did not consent to its predecessor’s CBA and that Povtak is not an alter ego of Crimaldi.

The third exception developed by the courts is known as the *Wiley – Burns – Howard Johnson* doctrine. Under this narrow doctrine, a successor is bound to the arbitration provision of its predecessor where a merger between the successor and predecessor took place and there was substantial continuity in the workplace. The doctrine has been construed to the narrow context of a merger because substantial continuity in the workplace is not enough to bind a successor to its predecessor’s CBA.

Here, Povtak does not fall under any of the three exceptions. First, Povtak did not consent to the adoption of Crimaldi’s CBA. The only public statements that Povtak made

regarding Crimaldi dealt with the hiring of former Crimaldi employees and the only private statements concerned Povtak rejecting the union's proposal for arbitration. Second, Povtak is not an alter ego of Crimaldi because each is a separate corporation and Povtak actually contracted with the City of Dynes, not Crimaldi. Third, Povtak did not merge with Crimaldi, and although there is some similarity between Povtak and Crimaldi, that is simply not enough to bind Povtak to Crimaldi's CBA.

However, the Thirteenth Circuit incorrectly read the *Wiley – Burns – Howard Johnson* doctrine and held Povtak obligated to Crimaldi's CBA. The Thirteenth Circuit found rationale in a dissenting opinion, and support in only the Second Circuit, for its position that a sliding scale analysis of the continuity in the workplace best applies the *Wiley – Burns – Howard Johnson* doctrine.

The Thirteenth Circuit is clearly wrong. The sliding scale analysis places too much emphasis on the continuity in the workplace between the successor and its predecessor, which the Supreme Court said was an insufficient basis to rely upon to impose a predecessor's CBA on its successor. Furthermore, not one decision by the First, Third, Fifth, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits utilize the sliding scale analysis.

## ARGUMENT

### **I. POVTAK GROUP DID NOT VIOLATE THE FOURTH AMENDMENT PRIVACY RIGHTS OF ROBERTA WAGNER WHEN SHE MADE STATEMENTS ON A SOCIAL NETWORKING SITE THROUGH A COMPANY-ISSUED EPHONE.**

#### **A. A public employee has a limited expectation of privacy in the workplace.**

##### **i. The Fourth Amendment privacy rights of public employees are tempered by the “operational realities of the workplace” principles.**

The Fourth Amendment to the United States Constitution provides, “[t]he right of 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. Indeed, the Fourth Amendment applies to “searches and seizures by government employers or supervisors of the private property of their employees.” *O’Connor v. Ortega*, 480 U.S. 709, 715 (1987) (plurality opinion); *see also Id.* at 730-731 (Scalia, J. concurring in the judgment); *Id.* at 732-733 (Blackmun, J., dissenting). However, the Fourth Amendment is only engaged where the search “infringe[s] ‘an expectation of privacy that society is prepared to consider reasonable.’” *O’Connor*, 480 U.S. at 715 (plurality opinion) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also Smith v. Maryland*, 422 U.S. 735, 740 (1979); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

To establish a Fourth Amendment Constitutional Violation in this situation, it must first be established that the search was conducted by or with the participation of a government agent. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (observing that even when the government acts as an employer, an individual is protected by the Fourth Amendment from unreasonable searches.) Here, it has been established that Povtak is a government agent.

*Prof'l Electrical Workers Union, Local 12-22, et al. v. Povtak Group*, 185 F. Supp.3d 1 (W.D. FrI. 2009).

While it has been established that public employees can have a reasonable expectation of privacy in their place of employment, such expectations can be diminished by actual office procedures, regulation, or the environment of the government offices. *O'Connor*, 480 U.S. 709. “The operational realities of the workplace . . . may make some employees’ expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official.” *O'Connor*, 480 U.S. at 717 (plurality opinion); *Id.* at 737 (Blackmun, J., dissenting) (“In certain situations, the ‘operational realities’ of the workplace may remove some expectation of privacy on the part of the employee.”). Consequently, “[p]ublic employees’ expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and *procedures*, or by legitimate regulation.” *O'Connor*, 480 U.S. at 717 (plurality opinion) (emphasis added).

Where operational realities of the government workplace do not exclude a reasonable expectation of privacy, the special needs of a government may deem the probable cause and warrant requirements embedded in the Fourth Amendment unfeasible. *O'Connor*, 480 U.S. at 722-725 (plurality opinion); *see also Id.* at 732 (Scalia, J., concurring in the judgment) (“Such ‘special needs’ are present in the context of government employment.”). The special needs of a government employer are, most importantly, to provide services to the public in a prompt and efficient manner. *O'Connor*, 480 U.S. at 722-725 (plurality opinion). Consequently, searches conducted surrounding public employees for non-investigatory, work-related purposes and for work-related investigations regarding misconduct are “judged by the standard of reasonableness under all the circumstances.” *O'Connor*, 480 U.S. at 725-726 (plurality opinion); *see also Id.* at

732 (Scalia, J., concurring in the judgment) (“[G]overnment searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment.”).

This Court has consistently upheld the Fourth Amendment issues from *O’Connor* and the fundamental principles that the operational realities of the workplace may lessen privacy expectations of public employees and that workplace searches without a warrant or probable cause by government employees may occur. *See Griffin v. Wisconsin* 438 U.S. 868, 870-873 (1987) (holding that regulations permitting state probation officers to search a probationer’s home based on “reasonable grounds” without a warrant was acceptable); *see also Nat’l Treasury Employees Union*, 489 U.S. at 679 (rejecting a Fourth Amendment challenge to drug-screening government employees, stating “requiring the Government to procure a warrant for every work-related intrusion would conflict with the common-sense realization that government offices could not function if every employment decision became a constitutional matter”)

Furthermore, the Court has applied *O’Connor* in *Garcetti v. Ceballos*. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (stating that “[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom”) The *Garcetti* Court emphasized that because of the role of its employees in government, it is imperative that a government employer exercise more control over its employees’ speech. *Id.* at 418-424; *see also Id.* 434 (Souter, J., dissenting) (agreeing with the majority that “government needs civility in the workplace, consistency in policy, and honesty and competence in public service”).

**ii. The operational realities of Roberta Wagner’s workplace did not create a reasonable expectation of privacy in her use of the company-issued iPhone.**

Given that the appropriate test for evaluating Fourth Amendment claims against government employers comes from the *O’Connor* plurality, the first step of such an evaluation must consider the operational realities of the workplace in order to determine if an employee has implicated their Fourth Amendment Rights. *City of Ontario, Cal. V. Quon*, 130 S.Ct.2619 (2010); *see also O’Connor*, 480 U.S. at 717 (plurality opinion); *Id.* at 737 (Blackmun, J., dissenting). Because of this requirement, the question of whether an employee had a reasonable expectation of privacy must be discussed on a case-by-case basis. *Id.* The second step of this analysis is that where an employee has a legitimate expectation of privacy, an employer’s intrusion on that expectation for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all circumstances. *City of Ontario, Cal.*, 130 S. Ct. 2619 (2010); *see also O’Connor*, 480 U.S. at 717 (plurality opinion); *Id.* at 737 (Blackmun, J., dissenting).

Povtak, like many employers, is not alone in having explicit no-privacy policies regarding electronic communications and devices. “[T]he abuse of access to workplace computers is so common (workers being prone to use them as media of gossip and other entertainment and distraction) that reserving a right of inspection is so far from being unreasonable that that the failure to do so might well be thought irresponsible.” *Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002).

Furthermore, courts have consistently held that when policies are implemented affirming that employees should have limited or no privacy expectations or confidentiality, employee privacy cannot be one that society as whole would consider reasonable. *Illinois v. Caballes*, 543

U.S. 405, 408 (2005); *see also Bohach v. City of Reno*, 932 F. Supp. 1232, 1234-1235 (D. Nev. 1996) (diminished expectation of privacy in police pagers where department order notified employees that messages would be logged onto the computer system); *Biby v. Bd. Of Regents*, 419 F.3d 845, 850-851 (8th Cir. 2005) (no privacy expectation in state university computer system where state university warned users not to expect privacy); *United States v. Angevine*, 281 F.3d 1130, 1134-1135 (10th Cir. 2002) (no reasonable expectation of privacy on university network where university notified users of no confidentiality on the network); *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) (no reasonable expectation of privacy where federal agency's policy allowed monitoring of employee computer activity). Such examples should be contrasted with *Leventhal v. Knapek*, where it was held that an employee did have a reasonable expectation of privacy where a state agency had not provided notice to the public employee that he should not have an expectation of privacy in the contents of his computer. 266 F.3d 64, 74 (2d Cir. 2001).

In this situation, the operational realities of the workplace should not have given Roberta Wagner ("Wagner") the belief that she had a reasonable expectation of privacy in her place of employment or in her company-issued communicate device. Povtak, like many other employers, has implemented its own Electronic Communication Policy ("ECP"). The scope of the ECP includes "electronic systems", which are defined to include "computers, printers, networks, hardware, software, electronic mail (e-mail), [i]nternet/[w]eb access, and voicemail." Append. B: Electronic Communications Policy at 1.

The ECP also states that "[a]ll electronic systems...are not the property of any employees, and users should not maintain any expectation of privacy with respect to any usage of the Company's Electronic Systems." *Id.* Additionally, Wagner certified on January 9, 2007,

that she was “aware that the Company reserves and will exercise the right to review, audit, intercept, access and disclose all matters on the Company’s Electronic Systems at any time, with or without notice and that [the employee] expressly consent[s] to such monitoring. *Id.* at 4. These guidelines make clear that Wagner had no reasonable expectation of privacy in her ePhone. Additionally, any reasonable expectation of privacy Wagner could have had was terminated when she signed the user acknowledgement form. *Id.*

**iii. The informal acknowledgement of Wagner’s ePhone usage by a former supervisor does not counteract the operational realities of the workplace to create a reasonable expectation of privacy.**

Before Wagner’s transfer to the bus division, she discussed the new ePhone with her supervisor, Shane Leibson (“Leibson”). *Prof’l Electrical Workers Union, Local 12-22*, 1214 F.3d at 6. During this discussion, Wagner showed Leibson the applications which she had downloaded. *Id.* Leibson did not object to Wagner’s applications. *Id.* In his performance review of Wagner, Leibson mentioned the applications and commended Wagner for her good work performance. *Id.* However, Wagner’s new supervisor did not approve of her job performance or of her comments made on her Facepage profile. *Id.* at 7.

Despite Leibson’s acknowledgement and approval of the applications that Wagner downloaded onto her ePhone, Wagner does not have a reasonable expectation of privacy in her ePhone. The approval from Leibson, a supervisor, means little with respect to actual company policy. Leibson was merely a supervisor in the light rail division of Povtak. Leibson did not work within the human resources department (“HR”), or create the ECP. In fact, Leibson was not a company policy maker and did not have the authority to revoke company policy.

Because of Povtak’s official policy, Wagner did not gain a legitimate expectation of privacy from Leibson’s acquiescence of her downloaded applications. *See Smith v. Maryland*,

442 U.S. at 745. This situation would only differ “[i]f an Information Technology specialist or general manager gives employees the impression that the company will not actually conduct surveillance, then the employee may be found to have enjoyed a reasonable expectation of privacy that then limits how the employer may conduct a workplace search.” Justin Conforti, *Somebody’s Watching Me: Workplace Privacy Interests, Technology Surveillance, and the Ninth Circuit’s Misapplication of the Ortega test in Quon v. Arch Wireless*, 5 Seton Hall Cir. Rev. 461, 486 (2008-2009).

Therefore, Wagner had no reasonable expectation of privacy in her iPhone. The “operational realities of the workplace” from *O’Connor* and *Quon* are clearly applicable here. Povtak’s operational realities of the workplace undoubtedly limited the Wagner’s privacy in the workplace. As such, “[w]ithout a reasonable expectation of privacy, a workplace search by a public employer will not violate the Fourth Amendment, regardless of the search’s nature and scope.” *Leventhal*, 266 F.3d at 73.

**B. An individual has no expectation of privacy in the information placed on a social network website.**

Because Wagner had no reasonable expectation of privacy in her Facepage profile, Povatak’s actions did not violate the Fourth Amendment. Whether an individual has a legitimate expectation of privacy for the Fourth Amendment does not rest with whether an individual desires to conceal “private activity.” Instead, the inquiry is whether the intrusion by the government employer violates the societal and personal values shielded in the Fourth Amendment. Am. Jur. 2d, Searches and Seizures § 5. While Facepage and social media are an emerging area of jurisprudence in the United States, Courts have slowly issued opinions dealing with internet privacy. Courts have held that, in general, an individual has no reasonable expectation of privacy in e-mail communications or in e-mail inboxes. *See United States v.*

*Charbonneau*, 979 F. supp. 1177 (S.D. Ohio 1997); *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996); *United States v. Monroe*, 52 M.J. 326 (C.A.A.F. 2000); *White v. White*, 781 A.2d 85 (Ch. Div. 2001).

Further, it has been held that an individual did not have a reasonable expectation of privacy regarding computer files that were accessible by the public due to the installation of a peer-to-peer file-sharing computer program even though privacy settings in the program had been implemented. *United States v. Borrowy*, 2010 WL 537501 (9th. Cir. 2010); *see also United States v. Barrows*, 481 F.3d 1246 (10th Cir. 2007) (holding that a city employee had no reasonable expectation of privacy in a personal computer used for work-related use when the computer was hooked up to the city's network, was continuously on, and had no privacy settings established). Moreover the United States Court of Appeal for the Second Circuit, citing the Sixth Circuit, held:

[Internet] users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting. They would lose a legitimate expectation of privacy in an e-mail that had already reached its recipient; at this moment, the e-mailer would be analogous to a letter-writer whose expectation of privacy ordinarily terminates upon delivery of the letter.

*United States v. Lifshitz*, 369 F.3d 173 (2nd Cir. 2004) *citing*, *Guest v. Leis*, 255 F. 3d 325 (6th Cir. 2001). Most recently, as the rise of social networking has taken hold in society, limitations on privacy expectations have been narrowed by courts. *See Beye v. Horizon Blue Cross Blue Shield of New Jersey*, 06-5337 (D.N.J. December 13, 2007) (stating, "the privacy concerns [on a social network] are far less where the beneficiary herself chose to disclose the information..." where an individual wrote an on-line journal through Myspace<sup>6</sup>); *see also Moreno v. Hanford*

---

<sup>6</sup> According to the Myspace, "Myspace, Inc. is a leading social entertainment destination powered by the passions of fans. Aimed at a Gen Y audience, Myspace drives social interaction by providing a highly personalised experience around entertainment and connecting people to the music, celebrities, TV, movies, and games that they

*Sentinel Inc.*, 172 Cal. App.4th 1125 (Ct. App. 5 Dist.2009) (stating that there is no reasonable expectation of privacy where a person took action to post one's own writing on Myspace and thus making it available to anyone with a computer); *Dexter v. Dexter*, 2007 WL 1532084 (Ohio Ct. App Portage Co. 2007) (no reasonable expectation of privacy concerning Myspace writings open to public inspection). Moreover, a court in the State of New York has extended these rulings by holding that a plaintiff in a personal injury action did not have a reasonable expectation of privacy in information published on social networking websites. *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010).

As demonstrated supra, courts have held that an individual does not have a reasonable expectation of privacy in regard to postings on social networking websites. Even with privacy settings on Facepage, Wagner had no privacy expectations. Moreover, Wagner's privacy settings on her Facepage profile were not completely private. *Prof'l Electrical Workers, Local 12-22*, 1214 F.3d at 4. Instead, Wagner's privacy settings were selected as "friends." *Id.* This meant that "only individuals accepted as a friend by the creator can view the creator's profile." *Id.* In fact, had Ms. Wagner desired to have privacy in her Facepage profile, she could have selected the "[o]nly me" setting which would have allowed "only the profile creator [to] view the information of the creator's profile." *Id.*

Because Wagner did not make her profile completely private, her expectation of privacy in her Facepage profile is not one that society as whole would consider reasonable for two reasons: (1) Wagner did not select a privacy setting that would have created total privacy; (2) when Wagner opened her page up to her friends, she had no way of knowing who would view

---

love. These entertainment experiences are available through multiple platforms, including online, mobile devices, and offline events." *About us*, Myspace, <http://www.myspace.com/Help/AboutUs>.

her profile from her “friends” pages. These two facts alone are enough to show that society would not have a reasonable expectation of privacy.

When using Facepage, “by becoming friends with a profile, parties can view each others’ profiles...” *Id.* When Ms. Wagner became “friends” with Povtak on Facepage, because of her privacy settings, she consented to the administrators of Povtak’s Facepage profile to view her profile. By doing so, anything she posted on her profile was visible to anyone who had administrative access to Povtak’s Facepage profile. Although Wagner had no idea who would administer Povtak’s page, Wagner knew that whoever did administer Povtak’s page would be able to view her profile and all of her posts to her profile.

Moreover, the access of Wagner’s Facepage profile by her supervisor was in conjunction with an investigation of work-related misconduct surrounding the identity of PugLuv86. Based on the factors from *O’Connor* as well as the trend in Court decisions to limit the privacy expectations an individual has regarding electronic communications and on-line social networking, one can conclude that such a search was reasonable. Further, because Wagner had become “friends” with Povtak, she could not expect to have a continued privacy interest from anyone at Povtak.

Wagner’s Facepage information was also accessible to the technician who repaired her phone. Such access occurred during a non-investigatory, work-related purpose. The technician’s report to his supervisor did nothing more than notify his supervisor that non-work-related applications had been installed on the ePhone. Therefore, Povtak’s actions did not give Wagner a reasonable expectation of privacy regarding the posts she made on her Facepage profile through her work issued ePhone.

**II. POVTAK GROUP IS NOT BOUND TO THE SUBSTANTIVE PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT ENTERED INTO BY CRIMALDI UNDER SECTION 301 OF THE TAFT-HARTLEY ACT, 29 U.S.C. § 185.**

A successor employer is not bound to the collective bargaining agreement (“CBA”) of its predecessor, except in three limited circumstances: (1) where the successor adopts its predecessor’s CBA; (2) where the successor is an alter ego of its predecessor; and (3) where the successor falls under the *Wiley – Burns – Howard Johnson* doctrine. *John Wiley & Sons v. Livingston*, 367 U.S. 544, 548 (1964); *NLRB v. Burns Int’l Sec. Services, Inc.*, 406 U.S. 272, 274 (1972); *Howard Johnson Co., Inc. v. Detroit Local Jt. Exec. Bd.*, 417 U.S. 249, 257 (1974). The Thirteenth Circuit incorrectly found that Povtak was bound to the substantive provisions of the collective-bargaining agreement of its predecessor, Crimaldi. *Prof’l Electrical Workers Union, Local 12-22*, 1214 F.3d 1. As shown below, Povtak is not bound to the substantive provisions of Crimaldi’s CBA.

**A. A successor employer is only bound to the substantive provisions of the CBA entered into by its predecessor in limited instances.**

**i. The successor adopts the predecessor’s CBA.**

In *Burns*, the Court noted that a successor may consent to the adoption of its predecessor’s CBA. 406 U.S. at 291; *Orange Place Ltd. P’ship v. NLRB*, 333 F.3d 646, 654 (6th Cir. 2003) (reasoning that “a new employer is not bound by the substantive terms of a collective bargaining agreement entered into by its predecessor absent an express or implied assumption of the agreement”); *NLRB v. Houston Bldg. Servs., Inc.*, 128 F.3d 860, 864 n.6 (5th Cir. 1997) (stating that a “perfect successor” is one where successor employer assumes its predecessor’s CBA); *Sheet Metal Workers Int’l Assoc. v. Arizona Mechanical & Stainless, Inc.*, 863 F.2d 647, 651 (9th Cir. 1988) (stating that a successor “is not bound by the substantive terms of its

predecessor's CBA unless it assumes or adopts those obligations"); *see also Local 7-517 v. Unoven Co.*, 170 F.3d 779 (7th Cir. 1999); *NLRB v. Hosp. San Rafael, Inc.*, 42 F.3d 45 (1st Cir. 1994); *Sullivan Indus. v. NLRB*, 957 F.2d 890 (D.C. Cir. 1992). Furthermore, it does not follow that a successor consented to the CBA "as a matter of law from the mere fact than an employer is doing the same work in the same place with the same employees as his predecessor." *Burns*, 406 U.S. at 291. Therefore, the determination whether a successor adopted the predecessor's CBA must be made on the basis of the facts presented. *Id.*

**ii. The "alter ego" doctrine.**

The Court, in *Howard Johnson*, stated that a successor is obligated to its predecessor's CBA if the successor is an "alter ego" of its predecessor. 417 U.S. at 261 n.5. The Court stated that a successor is an alter ego of its predecessor where there is "a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." *Id.*; *Stardyne, Inc. v. NLRB*, 41 F.3d 141 (3d Cir. 1994); *Southward v. South Cent. Ready Mix Supply Corp.*, 7 F.3d 487, 494 (6th Cir. 1993) (stating that where the successor is an alter ego of its predecessor, it may be bound by the CBA); *see also Hosp. San Rafael, Inc.*, 42 F.3d 45; *Amalgamated Meat Cutters & Butcher Workmen v. NLRB*, 663 F.2d 223 (D.C. Cir. 1980).

Furthermore, in the determination of whether the successor is an alter ego of its predecessor, "the [National Labor Relations Board] will often look to factors which bear some similarity to those involved in a single employer question; in particular, whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership." *See Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 507 (5th Cir. 1982).

### iii. The *Wiley* – *Burns* – *Howard Johnson* doctrine.

In *Wiley*, which began as a lawsuit under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185, to compel arbitration, the United States Supreme Court held that in limited circumstances a successor employer is obligated to arbitrate under a predecessor's CBA. 367 U.S. at 548. Specifically, the Court in *Wiley* addressed the merger of the successor and predecessor corporations and reasoned “that the disappearance by merger of a corporate employer which had entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees.” *Id.* at 548; *Road Sprinkler Fitters Local Union No. 669, AFL-CIO v. Indep. Sprinkler Corp.*, 10 F.3d 1563, 1567 (11th Cir. 1994) (reasoning that in “a merger in which the original employer has disappeared and the new employer has hired all of the old employer's workers, the successor may be required to honor an arbitration provision”).

However, the Supreme Court stated that “[w]e do not hold that in every case in which the ownership or corporate structure of an enterprise is change the duty to arbitrate survives.” *Wiley*, 376 U.S. at 551. But, where there existed “similarity and continuity of operation across the change in ownership” between a successor and its predecessor, the successor corporation is bound by the disappearing predecessor's CBA. *Id.*

At first, the holding in *Wiley* seems quite broad. However, subsequent decisions by the Court in *Burns* and *Howard Johnson* stressed the narrow scope of *Wiley*'s holding. *Burns*, 406 U.S. at 274; *Howard Johnson*, 417 U.S. at 257; *see also Ameristeel Corp. v. Int'l Bhd. of Teamsters*, 267 F.3d 264 (3d Cir. 2001); *Southward*, 7 F.3d at 494. In *Burns*, the Court reasoned that *Wiley*'s “narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations [sic] the surviving corporations is liable for the obligations of the disappearing corporations.” *Burns*, 406 U.S. at 286.

Then, in *Howard Johnson*, the Court reaffirmed the narrowness of *Wiley*'s holding when it reasoned that the decision was influenced by state law that held the successor corporation in merger situations liable for the disappearing corporation's obligations. *Howard Johnson*, 417 U.S. at 257. Specifically, the Court stated that "the disappearance of the original employing entity in the Wiley merger meant that unless the union [sic] were afforded some remedy against Wiley, it would have no means to enforce the obligations voluntarily undertaken by the merged corporation." *Id.* Finally, in regard to *Wiley*, the Court in *Howard Johnson* warned against "an unwarranted extension of *Wiley* beyond any factual context it may have contemplated." *Id.*

*Burns* and *Howard Johnson* are also significant because both cases address the "similarity and continuity" of the workplace language from *Wiley*. In *Burns*, which involved an appeal of a National Labor Relational Board bargaining order, the Court held that a successor is bound to bargain with a union when there is substantial continuity in the workforce between the successor and predecessor and when the bargaining unit was recently certified. 406 U.S. at 281, 285. However, the Court reasoned that "[i]t does not follow . . . from *Burns*' duty to bargain that it was bound to observe the substantive terms of the collective-bargaining contract . . . which *Burns* had in no way agreed." *Id.* at 281-282; *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987) (reinforcing that a successor "is not bound by the substantive predecessor's collective-bargaining agreement"); *New England Mech., Inc. v. Local Union 294*, 909 F.2d 1339, 1342 (9th Cir. 1990) (reasoning that "the Supreme Court has continually indicated that a successor employer is only bound to bargain with a union which had a CBA with the predecessor").

The Court in *Burns* stated that "[h]ere there was no merger or sale of assets, and there were no dealing whatsoever between [the predecessor and successor] . . . they were competitors

for the same work, each bidding for the service contract.” 406 U.S. at 286. Noting the similarity and continuity of the workplace between the successor and its predecessor in *Burns*, the Court reasoned that “this consideration is a wholly insufficient basis for implying either in fact or in law that [the successor] had agreed or must be held to have agreed to honor [the predecessor’s] collective-bargaining agreement.” *Id.* at 286-287.

Then, in *Howard Johnson*, the Court applied the *Burns* rationale to the facts of that case, which involved a § 301 lawsuit to compel arbitration. *Howard Johnson*, 417 U.S. at 255. The Court stated that “we do not believe that the fundamental policies outlined in *Burns* can be so lightly disregarded.” *Id.* at 255. Also that “[i]t would be plainly inconsistent . . . to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301 . . . [c]learly the reasoning of *Burns* must be taken into account here.” *Id.* at 256.

Thus, although the Court in *Howard Johnson* did not answer whether there was conflict between *Wiley* and *Burns*, it is evident that the decisions in *Burns* and *Howard Johnson* relegated *Wiley* to its specific facts and required more than similarity and continuity in the workplace to bind a successor to its predecessor’s CBA. *Howard Johnson*, 417 U.S. at 257; *Ameristeel*, 267 F.3d at 269 (reasoning that “the ‘substantial continuity’ concept . . . should properly be viewed as a necessary but not a sufficient condition for the imposition of arbitration on an unconsenting successor”).

**B. Povtak Group is not bound to the substantive provisions of the CBA entered into by Crimaldi.**

**i. Povtak did not adopt Crimaldi’s CBA.**

A successor employer may consent to its predecessor’s CBA, which is determined from the facts presented. *Burns*, 406 U.S. at 291. Povtak did not consent to the arbitration provision

in Crimaldi's CBA through comments or emails made by Povtak Chief Financial Officer Deborah Quine ("Quine"), Assistant HR Manager Audrey Livramento ("Livramento"), or HR General Manager George Daks ("Daks"), which the Thirteenth Circuit correctly found. *Prof'l Electrical Workers, Local 12-22*, 1214 F.3d at 8-9.

Here, in response to a question at a pre-bid conference, Quine stated that "[Povtak] would need all the help [it] can get." *Prof'l Electrical Workers Union, Local 12-22*, 185 F.Supp.3d at 2. However, this statement cannot be taken as acceptance of Crimaldi's CBA. First it was merely a statement made to ease fears about jobs. Second, Quine never mentioned Crimaldi's CBA. *See Id.*

Furthermore, once the grievance was delivered to Livramento and a meeting scheduled with Local 12-22 agents, it was clear that Povtak did not accept the CBA.<sup>7</sup> *Append. C: Arko Depo.* at 8-12. At the meeting, Livramento specifically informed Local 12-22 agents that the meeting's purpose was to explain Povtak's ECP. *Id.* at 11. Livramento also stated that Povtak did not need a reason to fire an employee. *Id.* at 11-12.

Additionally, acceptance of Crimaldi's CBA is not found in email correspondence between Local 12-22 and Daks. *See Append. C: Arko Depo, Exhib.* To the contrary, in Daks's reply to the assertion that Local 12-22 agents were pursuing arbitration, Daks stated that "[w]e [Povtak] will in no way participate in arbitration." *Id.* Therefore, Povtak did not, explicitly or implicitly, adopt Crimaldi's CBA.

## **ii. Povtak is not an alter ego of Crimaldi.**

Where a successor is an alter ego of its predecessor, the successor is bound by the CBA. *Howard Johnson*, 417 U.S. at 261 n.5. Furthermore, like the determination of whether a

---

<sup>7</sup> Mere acceptance of the piece of paper that the grievance was written upon by Povtak Human Resources Department Administrative Assistant Christian Arko ("Arko") cannot constitute legal acceptance of the arbitration agreement from the CBA between Local 12-22 and Crimaldi. *Append. C: Arko Depo.* at 7.

successor adopted its predecessor's CBA, the finding that a successor is an alter ego is a question of fact. *See Carpenters Local Union No. 1846*, 690 F.2d at 507. The Thirteenth Circuit correctly found that Povtak was not an alter ego of Crimaldi. *Prof'l Electrical Workers Union, Local 12-22*, 1214 F.3d at 7-10.

Here, as it was highlighted above, Povtak and Crimaldi are two separate corporations, and Povtak only assumed control over public transportation for the City of Dynes ("Dynes") after it won a bid for the contract to provide those services. *Prof'l Electrical Workers Union, Local 12-22*, 185 F.Supp.3d at 2. Moreover, "although, arguendo, Crimaldi and Povtak share the same business purpose, operation, equipment, and customers, the ownership and management are under the complete control of Povtak." *Id.* at 7-8. Thus, Povtak is not an alter ego of Crimaldi, and, therefore not bound by the substantive provisions of Crimaldi's CBA.

**iii. The Wiley – Burns – Howard Johnson doctrine does not apply to Povtak.**

As discussed supra, the *Wiley – Burns- Howard Johnson* doctrine is a narrow exception to the general rule that a successor employer is not bound to the substantive terms of its predecessors CBA. *Burns*, 406 U.S. at 286; *Fall River*, 482 U.S. at 40. This exception is applicable when a successor and predecessor merge into one corporation. *Wiley*, 367 U.S. at 548; *Burns*, 406 U.S. at 286; *Howard Johnson*, 417 U.S. at 257. Furthermore, as the Court explained in *Burns* and later applied to § 301 lawsuits in *Howard Johnson*, the similarity and continuity of the workplace "is a wholly insufficient basis for implying either in fact or law that the [successor] had agreed or must be held to have agreed to honor [the predecessor's] collective-bargaining agreement." *Burns*, 406 U.S. at 286-287.

Here, Povtak and Crimaldi are two separate corporations. *Prof'l Electrical Workers Union, Local 12-22*, 185 F.Supp.3d at 2-3. Povtak did not merge with Crimaldi, but, rather,

Povtak only assumed control over public transportation for the City of Dynes (“Dynes”) after it won a bid for the contract to provide those services. *Id.* at 2. As it was stated in *Burns*, “there was no merger or sale of assets, and there were no dealing whatsoever between [the predecessor and successor] . . . they were competitors for the same work, each bidding for the service contract.” 406 U.S. at 286.

Povtak did hire a majority of Crimaldi’s former employees and all sixteen members of the Professional Electrical Workers Union, Local 12-22. *Prof’l Electrical Workers Union, Local 12-22*, 185 F.Supp.3d at 2-3. Also, both Povtak and Crimaldi provided the same service: public transportation to the citizens of Dynes. *Id.* However, this “is a wholly insufficient” consideration is determining whether Povtak is obligated to accept Crimaldi’s CBA. *Burns*, 406 U.S. at 286-287. Therefore, because Povtak did not merge with Crimaldi and because the similarity between Povtak and Crimaldi is not determinative, Povtak is not bound to the substantive terms of Crimaldi’s CBA under the *Wiley – Burns- Howard Johnson* doctrine.

**C. The lower court misconstrued the *Wiley – Burns – Howard Johnson* doctrine.**

The Thirteenth Circuit incorrectly applied this doctrine to find that Povtak was bound to the substantive provisions of Crimaldi’s CBA. *Prof’l Electrical Workers, Local 12-22, et al. v. Povtak Group*, 1214 F.3d at 15. In its decision, the Thirteenth Circuit applied the “sliding scale” analysis of the *Wiley – Burns – Howard Johnson* doctrine as propounded by Chief Judge Becker in his *AmeriSteel* dissent. *Prof’l Electrical Workers Union, Local 12-22*, 1214 F.3d at 12; *AmeriSteel*, 267 F.3d at 279-288 (Becker, Ch. J. dissenting). However, the sliding scale analysis as applied by the Thirteenth Circuit in its decision below, and in *Local 348-S, UFCW, AFL-CIO v. Meridian Mgmt. Corp.*, is an incorrect reading of the *Wiley – Burns – Howard Johnson* doctrine. 583 F.3d 65 (2d Cir. 2009).

**i. The “sliding scale” approach.**

According to Chief Judge Baker’s dissent, “*Wiley* established that the notion of ‘substantial continuity in the identity of the business enterprise’ is the principal criterion for determining successorship liability,” and that the *Wiley – Burns – Howard Johnson* doctrine sets forth “a ‘sliding scale’ for what types of burdens can be imposed on what types of successors.” *AmeriSteel*, 267 F.3d at 277, 285 (Becker, Ch. J. dissenting); *Meridian*, 583 F.3d at 74 (stating that “the issue is whether there exists a ‘substantial continuity of identity of the work force’”) (citations omitted). Thus, pursuant to the sliding scale approach, where there is a strong relationship between the successor and predecessor as evidenced by a substantial continuity in the business, the successor is required to arbitrate under the predecessor’s CBA. *Id.*

**ii. The sliding scale approach is unattainable and contrary to the majority of the Circuits.**

The sliding scale approach “confuses the circumstances in which a ‘successor employer’ has a duty to recognize and bargain with a labor union, with the much more limited circumstances in which that employer is bound to arbitrate with a union under a collective bargaining agreement to which it has not agreed.” *Meridian*, 583 F.3d at 78-79 (Livingston, J. dissenting). By imposing a sliding scale, “all successor employers who hire the bulk of a predecessor’s employees have a duty not only to bargain with and recognize a union but also to arbitrate with it the extent to which it is bound by the previous CBA.” *Id.* at 80. However, *Burns* made it explicit that a substantial continuity of the workforce “is a wholly insufficient basis for implying either in fact or in law that [the successor] had agreed or must be held to have agreed to honor [the predecessor’s] collective-bargaining agreement.” 406 U.S. at 286-287.

Furthermore, the First, Third, Fifth, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits do not proscribe to the sliding scale analysis. *See Hosp. San Rafael, Inc.*, 42 F.3d 45; *Ameristeel*, 267

F.3d 264; *Houston Bldg. Servs., Inc.*, 128 F.3d 860; *Southward* 7 F.3d 487; *Uno-Ven Co.*, 170 F.3d 779; *New England Mech., Inc.*, 909 F.2d 1339; *Road Sprinkler Fitters Local Union No. 669*, 10 F.3d 1563; *Sullivan Indus.* 957 F.2d 890. Therefore, the Thirteenth Circuit misconstrued the *Wiley – Burns – Howard Johnson* doctrine by applying the sliding scale analysis and erred in finding Povtak obligated to the arbitration provisions of Crimaldi’s CBA.

### **CONCLUSION**

Because Povtak Group (“Povtak”) has shown that it did not violate the Fourth Amendment privacy rights of Roberta Wagner (“Wagner”) when the operational realities of the public workplace limited Wagner’s expectation of privacy; Wagner agreed to limited privacy expectations through acquiescence of Povtak’s policies; and Wagner was discharged for making statements on a social networking site through a company-issued communication device in violation of the public employer’s electronic communication policy, we ask this Court to reverse the Thirteenth Circuit’s decision and reinstate the District Court’s judgment.

Furthermore, because Povtak has shown that it did not consent to the adoption of Crimaldi’s collective bargaining agreement; Povtak is not an alter ego of Crimaldi; and Povtak does not fall under the narrow exception of the *Wiley – Burns – Howard Johnson* doctrine, we ask this Court to reverse the Thirteenth Circuit’s decision and reinstate the District Court’s grant of summary judgment.

Respectfully submitted,

---

Team No. 50  
*Counsel for Petitioner*