
**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 23-50237

AVION FUNDING, L.L.C.,
Appellant,
v.
GFS INDUSTRIES, L.L.C.,
Appellee.

BRIEF OF *AMICI CURIAE*

**THE PUBLIC JUSTICE CENTER; CENTRO DE LOS DERECHOS DEL
MIGRANTE; FE Y JUSTICIA WORKER CENTER; MOUNTAIN STATE
JUSTICE; THE NATIONAL EMPLOYMENT LAW PROJECT; THE
NORTH CAROLINA JUSTICE CENTER; AND THE WORKPLACE
JUSTICE PROJECT**

IN SUPPORT OF APPELLANT, BY WRITTEN CONSENT

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STATEMENT OF INTEREST

The **Public Justice Center** (“PJC”) is a non-profit civil rights and anti-poverty legal organization established in 1985. The PJC uses impact litigation, public education, and legislative advocacy through a race equity lens to accomplish law reform for its clients. The PJC’s Appellate Advocacy Project expands and improves representation of indigent and disadvantaged persons and civil rights issues before the Maryland and federal trial and appellate courts. The organization has a longstanding commitment to ending wage theft. *See, e.g., In re Cleary Packaging, LLC*, 36 F.4th 509 (2022) (*amicus*); *Salinas v. Com. Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017); *Pinnacle Grp., LLC v. Kelly*, 235 Md. App. 436 (2018); *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646 (2014). The Statements of Interest of co-*amici* are contained in the attached Appendix.

INTRODUCTION¹

Wage theft is pervasive in low-wage, labor-intensive industries. Minimum wage violations alone account for an estimated \$15 billion withheld from workers each year. *See* David Cooper & Teresa Kroeger, Econ. Pol’y Inst., *Employers Steal Billions from Workers’ Paychecks Each Year* 1–4 (May 10, 2017),

¹ This Brief is based on an *Amicus* brief filed by Michael Abrams, the Public Justice Center’s 2021-2022 Murnaghan Appellate Advocacy Fellow, in *In re Cleary Packaging, LLC*, 36 F.4th 509 (4th Cir. 2022) (holding that the discharge exceptions in Subchapter V of Chapter 11 apply to both individual debtors and corporate debtors).

<https://files.epi.org/pdf/125116.pdf>. Estimates of the total cost of all forms of wage theft reach as high as \$50 billion. Brady Meixell & Ross Eisenbrey, Econ. Pol’y Inst., *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year* 1–2 (2014), <https://files.epi.org/2014/wage-theft.pdf>. More recent data paints a similarly startling picture for workers in low-wage industries. The U.S. Department of Labor’s Wage and Hour Division (WHD) found that for fiscal year 2022, workers in health care were owed more than \$32.5 million in back wages; workers in construction were owed \$32.9 million; agriculture workers were owed more than \$5.8 million; retail workers were owed more than \$7.4 million; workers in food service were owed more than \$27.1 million; and workers in building services were owed \$ 9.9 million. *WHD by the Numbers 2022*, U.S. Dep’t of Lab., available at <https://tinyurl.com/329y3mrd>.

Inadequate legal enforcement exacerbates wage theft. It is a common practice for employers who commit wage theft to use corporate bankruptcy to avoid wage judgments won by their employees. The approach of a sister circuit is instructive. While discharge provides honest debtors with a “fresh start,” the Fourth Circuit has emphasized that it is “*equally* concerned with ensuring that perpetrators of fraud are not allowed to hide behind the skirts of the Bankruptcy Code.” *In re Biondo*, 180 F.3d 126, 130 (4th Cir. 1999) (emphasis added); *see also Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (“[I]n the same breath that we

have invoked this ‘fresh start’ policy, we have been careful to explain that the Act limits the opportunity” to “honest” debtors) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). This approach is consonant with this Court’s prior decisions protecting the interests of workers caught up in employers’ bankruptcies. See *In re Missionary Baptist Found. of America, Inc.*, 667 F.2d 1244, 1247 (5th Cir. 1982) (emphasizing that “[u]nder the former Bankruptcy Act of 1989, the judicial policy to allow priority to assigned wage claims was designed for the protection of the workers,” as “[o]therwise, simply to make ends meet, the employees might be forced to assign at ruinous discounts their claims for unpaid wages”); see also *Hernandez v. Larry Miller Roofing, Inc.*, 628 Fed. App’x 281, 287 (5th Cir. 2016) (holding “that the release provisions in the Plan are not specific enough to release [the plaintiff’s] FLSA claim against [defendant]”).

Thus, the wage theft crisis is more than an incidental concern. Businesses engaged in wage theft are prone to be smaller, undercapitalized entities likely to take advantage of Subchapter V. The lower court’s statutory construction—exempting corporate debtors in Subchapter V bankruptcy from the 11 U.S.C. § 523(a) discharge exceptions for fraud and willful and malicious injuries (the “malicious injury exceptions”)—would further empower unscrupulous businesses to use bankruptcy proceedings to dodge liability. Such an outcome undermines the rule of law at the expense of exploited workers.

To properly interpret 11 U.S.C. § 1192(2), this Court must consider the purpose of the malicious injury exceptions and Congress’s intent in incorporating them in Subchapter V. Because Subchapter V extends small businesses special advantages, applying the malicious injury exceptions to *all* debtors, whether corporate or individual, is necessary. Otherwise, corporate debtors evading wage theft judgments could earn a windfall “at the expense of creditors with claims that Congress has deemed should be excepted from discharge.” William L. Norton III, 5 Norton Bankr. L. & Prac. 3d § 107:20 (Oct. 2021). Workers with wage claims are a prime example of creditors that Congress intended to protect in bankruptcy proceedings. *See, e.g.,* Omar Kamhi, *Getting More than Justice on Paper: Bankruptcy Priorities and the Crisis of Unpaid Wages*, 44 Hofstra L. Rev. 107, 122–24 (2015) (explaining that Congress has provided a special priority to worker-creditors since 1841).

Ultimately, Congress’s decision to make debts arising from malicious injuries nondischargeable “reflect[s] a decision by Congress that the fresh start policy is not always paramount.” *In re Jercich*, 238 F.3d 1202, 1206 (9th Cir. 2001) (quoting *In re Janc*, 251 B.R. 525, 543–44 (Bankr. W.D. Mo. 2000)). Rather, the exceptions “are based on a corollary of the policy of giving honest debtors a fresh start, which would be to *deny dishonest* debtors a fresh start.” *Id.* (emphasis added). When interpreting Congress’s incorporation of the malicious

injury exceptions in Subchapter V, the problem of wage theft—and how bankruptcy may be manipulated to facilitate it—must be considered to avoid violating Congressional intent by “negat[ing] this fundamental policy.” *See id.* Subchapter V provides honest entities a fresh start, but this case requires the Court to enforce its equal priority that dishonest entities be prohibited from hiding behind bankruptcy.

In other words, this is not merely a bankruptcy case. Despite the nature of the dispute and the parties involved, this is also a worker’s rights case. Given the many workers in this circuit victimized by wage theft, *see infra* Part II, the stakes for low-wage workers and other similar creditors could not be higher. Because the bankruptcy court’s reading effectively authorizes the use of Subchapter V bankruptcy proceedings to avoid wage theft judgments even in cases of malicious injury, the Court should reverse.

I. Wage theft is widespread and deeply harmful to workers, their communities, and the economy.

Wage theft’s staggering scope renders it relevant to the construction of 11 U.S.C. § 1192(2). The following context on wage theft shows how exempting Subchapter V corporate-debtors from the discharge exceptions runs counter to Congressional intent.

A. Wage theft is commonplace and enormously expensive.

Wage theft occurs when an employer denies workers the wages or benefits to which they are entitled. See Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. Irvine L. Rev. 655, 661 (2014) (defining wage theft as “nonpayment of wages for work performed”); Kim Bobo, *Wage Theft In America* 7 (2009) (“Wage theft occurs when workers are not paid all their wages . . . [or] [w]hen an employer violates the law and deprives a worker of legally mandated wages.”).

This definition covers many different practices, including payment below the legally mandated minimum wage, withholding overtime pay, and misclassifying employees as independent contractors. Bobo, *supra*, at 7–8, 28–44. Violations are most common in low-wage industries like construction, retail, food services, cleaning services, and home health care. Nicole Hallett, *The Problem of Wage Theft*, 37 Yale L. & Pol’y Rev. 93, 100, 125 (2018).

Framing this issue as one of “theft” may strike some as overwrought or unfairly maligning of business. See *id.* at 99 & n.29 (collecting criticisms). But the term appropriately reflects the reality for the workers who are victimized: they go home with less in their pocket than their work earned, while their employer keeps the money which is the workers’ by right. This language aligns with how businesses refer to similar practices when, in their view, they are done by workers.

See, e.g., Brad Johnson, Horizon Payroll Solutions, *It's Always the Right Time to Watch for Time Card Falsification* (June 6, 2018), <https://www.horizonpayrollsolutions.com/blog/its-always-the-right-time-to-watch-for-time-card-falsification> (cautioning, in blog post for payroll company, that employees “steal time” and commit “time fraud” and “time theft”). For example, Wal-Mart, the world’s largest private employer, has long referred to work breaks beyond the slated 15 or 30 minutes as “theft of company time.” See, e.g., *Bynum v. Wal-Mart Stores, Inc.*, No. CIV 03-682 JP/RLP, 2004 WL 7337843, at *2 (D.N.M. June 22, 2004).

The sheer prevalence of violations makes clear that many businesses knowingly decide to shortchange their employees. A landmark survey of workers in New York City, Los Angeles, and Chicago revealed that one-quarter of workers suffered minimum wage violations and that three-quarters of overtime-eligible workers suffered overtime violations. Annette Bernhardt et al., *Employers Gone Rogue: Explaining Industry Variation in Violations of Workplace Laws*, 66 *Indus. Lab. Rev.* 808, 817–18 (2013). The same dataset showed that 68 percent of workers experienced at least one wage-related violation in just the week prior. Annette Bernhardt et al., Nat’l Emp. L. Project, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities* 5 (2009), <https://s27147.pcdn.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

Employers required some form of off-the-clock work from 17 percent of workers, and 12 percent of tipped employees had tips withheld. *Id.* at 3, 20. In general, “[m]ost low-wage workers will become victims of wage theft at some point in their careers.” Hallett, *supra*, at 99.

The resulting loss is substantial. In a study of the ten most populous states, workers lost nearly a quarter of earnings to minimum wage violations each week, amounting to \$3,300 per year, leaving only \$10,500 in annual wages. Cooper & Kroeger, *supra*, at 9. That is an \$8 billion loss for the workers studied and indicates a \$15 billion loss for workers nationwide. *Id.* The economic injury “exceeds the value of property crimes committed in the United States each year.” *Id.* at 28 (referring to FBI data on robberies, burglaries, larceny, and vehicular theft). A U.S. Department of Labor study found even higher costs—up to double the impact—in some places: weekly minimum wage violations accounted for \$10.2 million in lost income in New York and \$22.5 million in California, or 37 percent and 49 percent, respectively, of the earned income of those affected. Dep’t of Lab., *The Social and Economic Effects of Wage Violations* ES-2–ES-3 (2014), <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/WageViolationsReportDecember2014.pdf>. And misclassification of employees as independent contractors imparts a massive cost, too. Employment tax violations represent more than \$91

billion of the annual gross tax gap. U.S. Dep't of Just., Employment Tax Enforcement (2021), <https://www.justice.gov/tax/employment-tax-enforcement-0>.

Even these grave statistics likely underestimate the damage. Wage theft's nature makes it difficult to measure. "Employers are unlikely to admit that they are paying workers less than the minimum wage, denying workers meal breaks, or otherwise breaking the law." Bernhardt et al., *Broken Laws, supra*, at 11.

Employees cannot complain about wage theft if they do not know it is occurring.

See Matthew Fritz-Mauer, *The Ragged Edge of Rugged Individualism*, 54 Mich. J.

L. Reform 735, 769 (2021) (citing research showing that unawareness of legal

rights limits enforcement and that "many low-wage workers do not have a clear

understanding of their workplace rights"). Employers may not keep adequate

records, and "it is not easy or convenient for people to track their hours, check their

own records against their paystubs, and do the weekly math required to verify that

they are being paid correctly." *Id.* at 770. Further, low-wage workers facing

precarious economic conditions often underreport in fear of retaliation. *Id.* at 771–

77. And for good reason: in a survey of 4,000 workers, 43 percent of those who

complained of wage theft experienced retaliation from their employer. Laura

Huizar, Nat'l Emp. L. Project, *Exposing Wage Theft Without Fear* 4 (June 2019),

<https://s27147.pcdn.co/wp-content/uploads/Retal-Report-6-26-19.pdf>. At base, the

cost of wage theft surpasses even the staggering sums established by existing research.

B. The damage wrought by wage theft is consequential, disproportionate, and far-reaching.

The costs are deeply felt by those who bear them. The U.S. Department of Labor found that, in New York and California, wage violations kept 67,000 families living below the poverty line. Dep't of Lab., *supra*, at ES-3. And “wage theft is about more than just an immediate loss of money.” Fritz-Mauer, *supra*, at 748–51. “Being denied payment often cascades into other escalating harms” because most low-wage workers do not have significant savings and live paycheck-to-paycheck. *Id.*

“Anyone who has ever struggled with poverty knows how extremely expensive it is to be poor.” James Baldwin, *Fifth Avenue, Uptown*, Esquire, July 1960, at 70. “The essence of poverty lies in how a person’s hardships coalesce, interact, and build upon one another.” Fritz-Mauer, *supra*, at 748–51. If wages are late, short, or unpaid, a worker may be forced to decide what to prioritize: rent, utility bills, medicine, a car note, other bills, or the grocery store. *Id.* That decision might trigger fees and penalties and, eventually, legal problems like eviction or debt collection. *Id.* Facing this cycle, “many low-income families who suffer wage theft . . . [must] rely more heavily on public assistance programs.” Cooper & Kroeger, *supra*, at 13–15

These cascading effects impact low-wage workers across all demographics, but they fall hardest on the same communities historically subject to greater exploitation at work: women, Black and Latine people, and immigrants. One survey found that the rate of minimum wage violations for Black workers was three times higher than for white workers. Bernhardt et al., *Broken Laws, supra*, at 48. “Women were significantly more likely than men to experience minimum wage violations, and foreign-born workers were nearly twice as likely as their U.S.-born counterparts.” *Id.* at 5, 43. Foreign-born day laborers are highly vulnerable to wage theft and unsurprisingly suffer high violation rates. *See, e.g.*, Maria Eugenia Fernández-Esquer et al., *Exploring the Association between Wage Theft, Mental Health, and Injury Among Latino Day Laborers*, 31 *Ethnicity & Disease* 345, 346–48, 353–54 (2021). Although immigration status is never relevant to wage law protections, it is highly relevant to who suffers. Indeed, immigration status is “[p]erhaps the biggest inflection point for worker exploitation.” Fritz-Mauer, *supra*, at 775–76.

Several compounding factors cause these disproportionate burdens. Wage theft is most prevalent in under-regulated industries with low-wage workforces, which often involve cash payments, tipping, or small subcontractors. *See* Matt Finkin, *From Weight Checking to Wage Checking*, 90 *Ind. L. J.* 851, 851–55 (2015) (listing food service, construction, landscaping, agriculture, hotels, moving

services, or cleaning services as examples). These same industries disproportionately employ women, Black people, Latine people, or immigrants.

See id.

Across industries, these disparities were borne of racism, which remains an influence today. *See Bobo, supra*, at 47–49 (explaining the role of segregation in shaping the demography of who provides hard labor for low wages); Fernández-Esquer et al., *supra*, at 345 (noting the factor of “racist beliefs that individuals who lack legal documentation are of inferior status and therefore, rightfully excluded from society”).

Businesses looking to minimize labor costs while avoiding penalties target these populations because they are the least empowered to complain. “[E]mployers understand that the odds that one of their employees will file a claim against them is miniscule,” and “they can decrease the likelihood . . . by retaliating against any worker who does complain.” *See Hallett, supra*, at 107–08. Retaliation is illegal, but filing and processing a claim takes time, and “[i]n the meantime, the worker is out of a job, unable to pay his or her bills (or deported to his or her home country, unable to return).” *Id.* For undocumented workers, there is the “deportation threat dynamic.” Fritz-Mauer, *supra*, at 775–76 (“[E]mployers assume, often correctly, that the Spanish-speaking people they hire will not report wage theft because they are afraid of government authorities.”). Ultimately,

businesses know that women, Black people, Latine people, and immigrants “are less likely to have the luxury of the time it takes” to challenge exploitation and overcome the consequences. *See* Hallett, *supra*, at 107–08. Simply put, they have less power in the workplace. So not only does wage theft perpetuate the cycle of poverty, but it falls hardest on those already disadvantaged.

Nevertheless, the effects of wage theft reach everyone. For the “many people genuinely seek[ing] to run law-abiding businesses,” wage theft “distorts the competitive market.” Fritz-Mauer, *supra*, at 755–57. Meanwhile, the local government bears the cost of lost tax revenue. Elizabeth J. Kennedy, *Wage Theft as Public Larceny*, 81 Brooklyn L. Rev. 517, 529–32 (2015). Then, “[i]n a double blow to state and local economies, since low-income workers are likely to circulate their earnings in the local economy by spending on basic necessities like food, clothing, and housing,” wage theft also burdens local businesses where workers would have spent that money. *Id.* at 531–32. Plus, “the workers and their families are often forced to rely on already strained public safety nets, such as food stamps, food banks, . . . subsidized housing, and shelters.” *Id.* at 532; Cooper & Kroeger, *supra*, at 13–15 (showing, empirically, that wage theft losses increase reliance on public assistance). While the toll of wage theft falls most directly on the most marginalized low-wage workers, everyone pays the price.

II. Exempting corporate debtors from the malicious injury exceptions in Subchapter V would exacerbate wage theft in the Fifth Circuit.

Wage theft affects low-wage workers across the Fifth Circuit. Even when workers manage to win wage claims, businesses engaged in wage theft commonly use bankruptcy proceedings to avoid judgments. If Subchapter V’s incorporation of the malicious injury exceptions is read to exempt corporate entities, unscrupulous businesses can obtain all the benefits of Subchapter V bankruptcy while still dodging wage theft enforcement, contrary to congressional intent.

A. Wage theft affects low-wage workers across the Fifth Circuit and is inadequately regulated.

Throughout the Fifth Circuit, low-wage workers experience wage theft. A 2017 study found that in Texas, “the average victim of a minimum wage violation is cheated out of over 30 percent of earned pay.” Cooper & Kroeger, *supra*, at 3. In the aggregate, this led to total annual wages not paid to workers in Texas of \$1,165,000,000—the second highest in the country. *Id.* at 10. The situation in Mississippi and Louisiana is difficult to discern, as they are two of “eight states that do not recover wages for employees” through their state agencies or attorney general offices. See Ihna Manguundayao, Celine McNicholas, Margaret Poydock, & Ali Sait, Econ Pol’y Inst., *More than \$3 billion in stolen wages recovered from workers between 2017 and 2020*, 12-13 (Dec. 22, 2021), <https://www.epi.org/publication/wage-theft-2021/>. Recent federal enforcement

actions, however, suggest that the problem is widespread in these states, too. *See, e.g.,* Erika Ruthman, U.S. Dep’t of Lab., *US Department of Labor Recovers \$134K in Wages for Mississippi Delta Farmworkers, Assesses Agriculture Employers \$122K in Penalties* (Nov. 21, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20221121>; Juan Rodriguez, U.S. Dep’t of Lab., *US Department of Labor Recover More Than \$162K in Overtime Back Pay, Damages for Louisiana home Healthcare Workers Denied Overtime* (Nov. 17, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20221117-0>. Low-wage workers in Louisiana and Mississippi are further disadvantaged by the states’ failure to pass minimum wage laws. *See State Minimum Wages*, National Conference of State Legislatures (Aug. 30, 2022), <https://tinyurl.com/2tjte5yk>. Thus, applying existing workers’ protections is especially critical for employees in these states, as their position is particularly precarious even as compared to other low-wage workers across the country.

And Louisiana, Mississippi, and Texas have robust immigrant communities, with their immigrant workers being most employed in the same industries where wage theft is most prevalent. Am. Immigr. Council, *State Fact Sheets* (2020) [hereinafter *State Immigr. Fact Sheets*], <https://www.americanimmigrationcouncil.org/topics/state-by-state> (select, from drop-down menu, “Louisiana,” “Mississippi,” and “Texas,” respectively). Nationally, immigrant

workers face rampant wage theft. See Joe Yerardi & Susan Ferriss, *As guest workers increase, so do concerns of wage cheating*, AP News (Mar. 2, 2022), <https://apnews.com/article/immigration-coronavirus-pandemic-business-health-louisiana-88905383231ba9a51897cc670563abb2> (“From 2005 to 2020, U.S. employers around the country were ordered to pay more than \$42.5 million in back wages to 69,000 workers who perform seasonal low-wage jobs on H-2A and H-2B visas.”). Extreme exploitation of immigrant workers harms everyone, as it drives down wages for all workers, including citizen-workers. See Daniel Costa, *Employers Exploit Unauthorized Immigrants to Keep Wages Low*, N.Y. Times (Sept. 3, 2015), <https://tinyurl.com/4656nney> (“The bargaining power of U.S.-born workers competing in the low-wage labor market is undercut when millions of unauthorized workers cannot safely complain to the Labor Department or sue for unpaid wages.”).

Reports from states in the Fifth Circuit reflect this national problem. A recent study found that in Texas, “wage theft by underpayment and being abandoned at the worksite are significantly associated with laborers’ immigration status or racial category, with a greater proportion of Latin[e] immigrants and citizens reporting having experienced these types of violations at least once.” Nancy Plankey-Videla & Cynthia Luz Cisnero Francos, *“Lots of Time They Don’t Pay”*: *Understanding Wage-Theft and Resistance in Bryan, Texas through Critical*

Community-Engaged Research, 102 Soc. Sciences 1, 10 (2022),
file:///C:/Users/hahnh/Downloads/socsci-11-00102.pdf. Guest workers in the H-2A
program in Louisiana face similar challenges. See H. Claire Brown, *Louisiana
sugarcane workers sue Lowry Farms for wage theft, breach of contract*, The
Counter (Aug. 11, 2020), [https://thecounter.org/farmworkers-sue-arkansas-based-
lowry-farms-wage-theft-breach-of-contract/](https://thecounter.org/farmworkers-sue-arkansas-based-lowry-farms-wage-theft-breach-of-contract/) (recounting alleged failure by
employers to reimburse H-2A workers for their visa and travel expenses or pay
them the wages stipulated in their contracts). Similar problems plague
farmworkers in Mississippi. See Sara DiNatale, *After allegations of racist hiring
on Delta farms, DOL finds 11 more employers misusing visa program*, Mississippi
Today (Nov. 28, 2022), [https://mississippitoday.org/2022/11/28/dol-fine-
mississippi-delta-farms/](https://mississippitoday.org/2022/11/28/dol-fine-mississippi-delta-farms/) (reporting that “[t]he [U.S.] labor department’s Wage and
Hour Division fined the 11 farms a total of \$112,610 and recovered wages for 45
workers totaling \$134,532” and “found violations against both local workers and
those working on temporary visas through the H-2A visa program”).

Texas has an especially high proportion of undocumented immigrants, who
are highly susceptible to wage theft. See State Immigr. Fact Sheets (demonstrating
that undocumented immigrants constitute 35.3% of the community in Texas,
compared to 29.4% in Louisiana and 28.3% in Mississippi). Officials in El Paso,
Texas, report that “[f]arm workers, particularly those who commute from Mexico,

are often the ones most likely to not get paid and the least likely to report wage theft and other violations.” Julian Resendiz, *Consulate out to eradicate wage theft, labor abuse against immigrants*, Border Report (Aug. 29, 2022), <https://tinyurl.com/yc23assh>. Immigrant workers are particularly vulnerable to wage theft, as “the competition to be hired and not deported ma[kes] them unlikely to report employers for wage theft or work safety issues.” Kara Takasaki, Matt Kammer-Kerwick, Mayra Yundt-Pacheco, & Melissa I.M. Torres, *Wage Theft and Work Safety: Immigrant Day Labor Jobs and the Potential for Worker Rights Training at Worker Centers*, Research Square 20 (2021), <https://tinyurl.com/45xcpa3t>.

The situation in the Rio Grande Valley is particularly dire. This area “has the highest number of undocumented immigrants per capita in the nation, accounting for 10.2 percent of the population of more than 806,000 residents.” Luke Whyte, *Migrants not paid for work; Valley is hot spot for ‘modern-day slavery’ Workers who complain are threatened*, San Antonio Express-News (Oct. 14, 2018). There, “[w]age theft often is an early symptom of the more severe problem of labor trafficking,” which is recognized as “a form of modern-day slavery where workers are forced or coerced to perform labor or services.” *Id.* Thus, failure to address wage theft can subject immigrant workers to even more egregious forms of exploitation.

Immigrant workers in Louisiana and Mississippi are also vulnerable. Of the “[t]housands of Latino immigrants” who assisted with New Orleans’ recovery after Hurricane Katrina, as of 2015, “[m]any became victims of wage theft and still ha[dn’t] gotten paid for the work they did to help rebuild New Orleans—even 10 years after the storm.” Griselda Nevarez, *Latino Workers Helped Rebuild New Orleans, But Many Weren’t Paid*, NBC News (Aug. 28, 2015), <https://tinyurl.com/3rekjhv9>. Conditions for immigrant workers in Mississippi are similarly bleak. See Gabriela Szymanowska, *Immigrant workers, youth, activists demand protection for workers, respect in workplace*, Clarion Ledger (Nov. 28, 2021), <https://tinyurl.com/2w7m9k3m> (recounting action by immigrant laborers in poultry plants where participants “share[d] their stories of workplace abuse, discrimination, wage theft and the impact of the [2019 ICE] raids”); see also Anna Wolfe, *ICE raids cause labor decline in sector already seeking to fill thousands of positions*, Mississippi Today (Aug. 9, 2019), <https://tinyurl.com/7esjvmd> (“Workers alleged their supervisors hit Hispanic employees and charged them money to use the bathroom.”). For the sake of all workers, including those whose wages are driven down by wage theft even if they are not direct targets of the practice, the Court must interpret 11 U.S.C. § 1192(2) to hold corporate employers equally accountable with individual ones.

The violations taking place in the Fifth Circuit go largely unredressed. Workers often are unaware of the theft, do not know of available procedures for reporting, and fear retaliation. Fritz-Mauer, *supra*, at 763–85. Retaliation takes the form of decreased hours, increased workloads, or termination; exactly the opposite of what the worker seeks in relief. See Bernhardt et al., *Broken Laws*, *supra*, at 24-25. But “[e]ven when workers know their rights,” and choose to assert them, “they face severe obstacles in coming forward.” Hallett, *supra*, at 105. To sue, the worker must choose between the daunting challenge of navigating the system *pro se* or finding a lawyer or organization willing to bet on the case. See *id.* Either way, the costs of litigation could easily outpace the damages a low-wage worker is seeking in the first place. *Id.*

The alternative path is to report to a regulatory agency. *Id.* at 106. But those agencies are notoriously under-resourced for wage theft enforcement. See *id.* “Most complaints sit in lengthy queues, or worse, go uninvestigated altogether.” See, e.g., *id.* at 106 & n.66–69 (showing that the relevant unit within the U.S. Department of Labor “mishandled or failed to investigate nine out of ten complaints filed,” while New York’s state agency, in 2013, “had a backlog of 14,000 cases”); accord Lee & Smith, *supra*, at 769–71 (“A 2018 investigation found that six states lacked a single investigator to investigate minimum wage violations,” and twenty-six more had no more than ten).

This dynamic plays out in the Fifth Circuit. The Texas Workforce Commission lacks the resources to respond to wage theft, as “[o]ut of a \$1.7 billion budget for 2018, only about \$4 million is dedicated to ‘labor law enforcement.’” Gus Bova, *Wage Wars*, Texas Observer (June 13, 2018), <https://www.texasobserver.org/wage-wars/>. Consequently, employers can “dodge accountability” by “intimidat[ing] workers into dropping allegations, bog[ging] down claims in endless appeals, declar[ing] bankruptcy, and lobby[ing] against any legislative crackdowns.” *Id.* Likewise, because “employers commonly misclassify Louisiana low-wage workers,” many employees’ claims under Louisiana’s Wage Payment Act are not cognizable to courts, “unless the worker challenges” their designation—a costly, complicated process for vulnerable workers. Luz M. Molina, et al., *Vulnerabilities of Low-Wage Workers and Some Thoughts on Improving Workplace protections: The Experience of the Workplace Justice Project*, 17 Loy. J. Pub. Int. L. 215, 231 (2016). Employees alleging exploitation must rely on over-worked federal agencies, as the state lacks an agency charged with enforcing wage and hour standards. See Jacob Meyer & Robert Greenleaf, *Enforcement of State Wage and Hour Laws: A Survey of State Regulations*, Colum. L. Sch. Nat’l State Att’ys Gen. Program 3 (2022), <https://tinyurl.com/3dktc5r8>.

In fact, because neither Louisiana and Mississippi have state minimum wage laws, “workers can’t file minimum wage or overtime claims” with state agencies.

Marianne Levine, *Behind the Minimum Wage Fight, a Sweeping Failure to Enforce the Law*, Politico (Feb. 18, 2018), <https://tinyurl.com/jnv25jkv>. Employees must instead bring their wage theft claims “to the U.S. Department of Labor, which takes cases only selectively.” *Id.* The U.S. Department of Labor lacks jurisdiction over certain types of wage claims—for example, those involving comparatively small businesses. *See* 29 U.S.C. § 203(s)(1)(A)(ii) (defining a business enterprise subject to FLSA as “an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 . . .”). In practice, then, workers seeking to vindicate their rights in Louisiana and Mississippi oftentimes possess only a private right of action under state law, for which they bear full financial and legal responsibility. Thus, victims of wage theft in Louisiana and Mississippi lack meaningful avenues to vindicate their rights.

In sum, workers can risk retaliation, report a violation, and try to prevail in litigation, or they can report to a government agency and hope that the complaint receives attention. Altogether, unscrupulous employer practices, institutional barriers, and lack of employee knowledge create a “self-perpetuating enforcement gap in low-wage workplaces” that leaves already-vulnerable workers more at risk for exploitation. *See* Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 *Ind. L.J.* 1089, 1107 (2014). Recognizing that employers cannot use bankruptcy proceedings to shield

themselves from meritorious wage theft claims is therefore critical to ensuring that vulnerable workers can vindicate their rights.

B. Businesses engaged in wage theft use bankruptcy proceedings to evade legal enforcement.

Even when wage theft victims manage to win favorable judgments, they often struggle to collect. A study of California wage enforcement found, over three years, *only 17%* of workers who won judgments were able to enforce them, while the corresponding employers were *more likely than not* to have “suspended, forfeited, cancelled, or dissolved business status” and “hidden assets[] or shut down operations and reorganized as a new entity.” Eunice H. Cho et al., Nat’l Empl. L. Proj., *Hollow Victories 2* (2013), <https://s27147.pcdn.co/wp-content/uploads/2015/02/Hollow-Victories.pdf>; *see also* Kamhi, *supra*, at 108 (over a three-year period in Oregon, “almost three quarters of the monetary findings against employers were not recovered”).

“Employers are able to avoid paying judgments through several methods, such as filing for bankruptcy, hiding their assets, or shutting down operations and reorganizing as a new business entity.” Diaz et al., *supra*, at 83. For example, the “Goodfellas Restaurant” in Connecticut was subject to wage theft judgments in actions brought by the Department of Labor in 2009 and 2010, before then being sued by its workers again in 2015 for the same unlawful conduct. Hallett, *supra*, at 112. “In each case, the restaurant reorganized under a different corporation owned

by the same couple,” sustaining the same exploitative and illegal business practices. *Id.* In the case of the “Charm Thai” restaurant in New York City, after workers obtained an \$830,000 judgment for minimum wage and overtime violations, “the owners . . . responded by closing several of their businesses, transferring assets between them, and eventually declaring bankruptcy.” *Id.* at 110. The owners then “drain[ed] all assets out of their businesses and disappear[ed],” and “[t]he workers never received a dime from the judgment.” *Id.*

Manipulation of the bankruptcy process is central to corporate evasion of judgments. *See* Llezlie L. Green, *Wage Theft in Lawless Courts*, 107 Cal. L. Rev. 1303, 1317 & n.63 (2019). In fiscal year 2010, Texas reported wages ordered of \$11,980,673.42. *See* Meyer & Greenleaf, *supra*, at 148. But the agency only reported \$6,598,779 in wages collected. *Id.* This phenomenon occurs despite the Bankruptcy Code’s priority of employee wage claims over other unsecured creditors. Kamhi, *supra*, at 109, 122–24 (citing 11 U.S.C. § 507(a)(4)–(5)). “While the priority allows the employees to receive their claims before the unsecured creditors, it does not, in any way, guarantee that the employer has sufficient assets from which the employees can recover.” *Id.* at 132.

The corporate vehicle enables unscrupulous employers to flout the rule of law. “Corporations may declare bankruptcy, reorganize, or more easily hide their assets than individuals,” and “it is easier for a corporation than for an individual to

recover from the impact of a judgment on their credit.” Green, *supra*, at 1317. After all, the “corporate body can dissolve and reemerge with a new corporate identity.” *Id.*

Therefore, to vindicate Congress’s policy of prohibiting dishonest debtors from using the Bankruptcy Code to dodge liability, the malicious injury exceptions incorporated in Subchapter V must apply to corporate entities. To be sure, honest debtors, whether corporate or individual, should be able to avail themselves of this new and powerful tool. To balance that extension of power, and “to ensure that equity does not obtain a windfall at the expense of creditors with claims that Congress has deemed should be excepted from discharge,” however, Congress incorporated the malicious injury exceptions as to *all* debtors. See Norton, *supra*, at § 107:20 & n.8; see also William L. Norton III & James B. Bailey, *The Pros and Cons of the Small Business Reorganization Act of 2019*, 36 Emory Bankr. Devs. J. 383, 386 & n.25 (2020) (observing that Subchapter V mirrors Chapter 12, where Congress extended similar tools to debtors and incorporated the malicious injury exceptions, and courts applied the exceptions to individuals and corporations alike). The Fourth Circuit recently adopted this interpretation, holding that the discharge exceptions in Subchapter V of Chapter 11 applies to “*both* individual and corporate debtors.” See *In re Cleary Packaging, LLC*, 36 F.4th 509, 515 (2022) (emphasis in original).

Workers holding wage theft judgments are a prime example of creditors that Congress intended to protect under the Code. Congress made such debts nondischargeable because of the priority Congress extended to worker-creditors and its general policy of preventing dishonest debtors from hiding behind bankruptcy. *See* Kamhi, *supra*, at 122–24; *Biondo*, 180 F.3d at 130. But if a corporate entity can access the powerful tools of Subchapter V without the balancing protection afforded by the malicious injury exceptions, corporations engaged in wage theft will have an even more efficient pathway for evading wage enforcement than exists now.

C. Exempting corporations from the malicious injury exceptions would facilitate wage theft, undermining Congressional intent at the expense of low-wage workers.

Many of the kinds of businesses that engage in wage theft—and look to the bankruptcy system to avoid accountability—are especially likely to benefit from Subchapter V bankruptcy. In a comprehensive empirical study, researchers found that “industries with larger firms had lower violation rates than industries with a preponderance of small firms.” Bernhardt et al., *Employers Gone Rogue*, *supra*, at 827; *see also id.* at 824 (finding that “[l]arge employers have an estimated violation rate that is two-thirds of that of small or medium employers”).

Smaller firm size correlates with the factors that incentivize and facilitate wage theft.² For example, nonstandard pay—“flat weekly or daily pay, project-based pay, piece-rates, and so forth”—correlated with higher industry violation rates. *Id.* at 819, 824, 827. These pay arrangements reflect factors like “informality and, in particular, the probable absence of centralized human resource departments and computerized payroll systems,” which enable wage theft and are more common in smaller firms. *See id.* Violations were also more common in “decentralized employment relationships,” such as those of “housekeepers, childcare workers, home health care workers, and residential construction workers,” with the lower-wage subcontractors tending to be smaller and more susceptible to wage theft practices. *See id.* at 820, 827–28 (giving the example of franchising industries like fast-food, where violation rates are higher “among franchises compared to company-owned establishments”). “[A] range of industries, including beauty and nail salons, dry cleaning, car washes, ethnic retail, and independent restaurants are highly informalized, with disproportionate numbers of small firms that employ some or all of their workers off the books, face

² This is not to suggest that wage theft is not a concern at large firms. A report analyzing thousands of successful collective wage actions filed since 2000 found that Fortune 500 companies, and other companies of comparable size, were responsible for “half of the cases . . . and 74 percent of the penalty dollar total.” Good Jobs First & Jobs with Just. Educ. Fund, *Grand Theft Paycheck* 2–6 (2018), https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft_report_revised.pdf.

razor-thin profit margins, and may not themselves be registered businesses.” *Id.* at 829. As a result, these businesses face both greater pressure to cut costs and more opportunity to commit wage violations.

Because smaller firms are especially likely to engage in wage theft, it is particularly important that Subchapter V protect only honest debtors as Congress intended. If this Court grants corporate entities the powerful tools of Subchapter V while exempting them from the malicious injury exceptions—effectively codifying a pathway for avoiding wage theft judgments—dishonest debtors will take full advantage.

That is because—despite being illegal and immoral—wage theft turns on an economically rational equation. “[A]n employer’s decision to pay less than the minimum wage involves a cost-benefit analysis that takes into account the probability of detection, the expected penalties that would occur if detected, and the profit the employer expects to make by violating the law.” Hallett, *supra*, at 103. Businesses that cut labor costs via wage theft cause a compounding effect, as the cost-benefit balance shifts to place even greater pressure on subcontractors and competitors to reduce their own labor costs respectively. David Weil, *Enforcing Labour Standards in Fissured Workplaces: The U.S. Experience*, 22 *Econ. & Lab. Rel. Rev.* 33, 37 (2011). That pressure, combined with the cost-savings, may lead otherwise law-abiding businesses to steal workers’ wages.

Because “the [worker] complaint rate remains abysmally low,” and businesses evade judgments even when an enforcement action succeeds, the cost-benefit ratio is too enticing for a business willing to skirt the law. Hallett, *supra*, 108–13. Without adequate enforcement of legal judgments, employers will carry on shifting costs to their workers. That is even truer if Subchapter V is read to provide an even more efficient vehicle for dodging liability to corporate debtors.

At bottom, “the probability of being caught for wage theft is so low that it makes economic sense for employers to commit wage theft on a massive scale.” Hallett, *supra*, at 97. The more that wage theft is penalized and enforced against, and the closer the practice gets to being unprofitable, the less workers will be exploited. *Id.* But if the Court affirms the statutory construction that enables corporate debtors to dodge wage-theft judgments, the practice will become even more profitable, businesses will take advantage, and workers will bear even more of the burden. *Id.* at 112–13. That outcome frustrates Congress’s intent to protect worker-creditors and prevent dishonest debtors—whether they are corporations or individuals—from hiding behind the Bankruptcy Code. *See Biondo*, 180 F.3d at 130; *Grogan*, 498 U.S. at 286–87. This Court should instead reverse the bankruptcy court and vindicate Congress’s intent to incorporate the malicious injury exceptions into Subchapter V as to individuals and corporations alike.

CONCLUSION

For these reasons, *Amici Curiae* respectfully urge this Court to rule for Appellant.

Respectfully submitted,

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CERTIFICATE OF RULES COMPLIANCE

1. This brief contains 6,499 words, in compliance with Rule 29(a)(5), excluding the parts of the brief exempted from the word count by Rule 32(f).
2. This brief complies with the font, spacing, and type size requirements stated in Rule 32(a).
3. This brief was not funded or authored, in whole or in part, by a party's counsel or any other person aside from *Amici*, their members, and their counsel.

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2023, the foregoing Brief of *Amici Curiae* in Support of Appellants was served via CM/ECF system to:

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APPENDIX

Centro de los Derechos del Migrante, Inc. (CDM, or the Center for Migrant Rights) is a U.S. section 501(c)(3) migrant workers' rights organization with offices in Baltimore, Maryland; Mexico City; and Oaxaca, Mexico. Through litigation, policy advocacy and community education, CDM seeks to ensure access to justice for migrant workers who suffer labor abuses in U.S. employment. From the point of recruitment abroad through coerced payment of illegal fees in the U.S. workplaces, the migrant workers who CDM works alongside experience pervasive wage theft. Employers of migrant workers are frequently undercapitalized and use a variety of schemes to avoid enforcement of wage judgments. CDM therefore has a significant interest in ensuring that these employers cannot misuse the bankruptcy system to avoid paying workers the wages they are due.

At **Fe y Justicia Worker Center**, we share a deep commitment to advancing the rights and well-being of workers within the Fifth Circuit. We firmly believe that all individuals, whether as individual or corporate debtors, should be held accountable for any wage theft offenses. The departure from the Fourth Circuit's opinion in *In re Cleary Packaging* raises concerns about the consistency and fair application of discharge exceptions in Subchapter V of Chapter 11. It is imperative to address this inconsistency to ensure that workers' rights are protected and upheld uniformly across the circuit.

Mountain State Justice (“MSJ”) is a non-profit legal services firm dedicated to redressing entrenched and emerging systemic social, political, and economic imbalances of power for underserved West Virginians, through legal advocacy and community empowerment offered regardless of ability to pay. Among its areas of focus, MSJ represents West Virginia workers in employment discrimination, black lung, and workplace safety litigation. MSJ has a strong interest in ensuring that the West Virginia workers it represents are able to recover unpaid judgments from their employers through the bankruptcy process.

The **National Employment Law Project** (“NELP”) is a non-profit legal and research organization with fifty years of experience advocating for the employment rights of workers in low-wage industries. NELP’s areas of expertise include wage and hour protections. NELP has collaborated closely with state and federal agencies, community-based worker centers, unions and state policy groups throughout the country, has litigated and participated as amicus in numerous cases addressing workers’ wage and hour rights under federal and state laws, and has published extensive research on wage theft and workplace rights. NELP has seen firsthand through our litigation, collaboration with worker groups and research the staggering scope of wage theft and the inability of workers to collect unpaid wages, and has a strong interest in ensuring workers can collect the wages they are owed from their employers through the bankruptcy process.

The **North Carolina Justice Center** (“Justice Center”) is a non-profit legal advocacy organization. The mission of the Justice Center is to secure economic justice for disadvantaged persons and communities in North Carolina. The Justice Center provides legal assistance in civil matters to poor people, including civil matters involving the rights of workers. In 2013, the Justice Center authored *Wage Theft in North Carolina: The Hidden Crime Wave Robbing Workers and Communities*, documenting a minimum of \$33 million stolen from North Carolina workers in the previous five years, a figure that likely represents a significant underestimate. The Justice Center has represented low-wage workers in bankruptcy proceedings involving wage theft on multiple occasions, and has a strong interest in ensuring that workers whose employers owe them wages are able to collect those wages through the bankruptcy process.

The **Workplace Justice Project**, a section of the clinical program at the Loyola College of Law-New Orleans, was created in December 2005 as a response to labor abuses following Hurricane Katrina. Its work during the last 18 years has focused on policy advocacy and litigation related to wage theft and discrimination in the workplace. In this regard, we have built a robust database of facts which document wage theft in its many forms, as well as the difficulty in collecting judgments obtained on behalf of our clients. The problem is staggering; the consequences to its victims, unacceptable. For these reasons, we have a major interest in holding employers accountable in those

instances where bankruptcy proceedings would otherwise release employers from their legal obligation to pay the wages earned by its employees.