
IN THE COURT OF APPEALS OF MARYLAND

COA-REG-0017-2021

MARIO ERNESTO AMAYA, *et al.*,

Appellants,

v.

DGS CONSTRUCTION, LLC, *et al.*,

Appellees.

**BRIEF OF *AMICUS CURIAE* THE PUBLIC JUSTICE CENTER
IN SUPPORT OF APPELLANTS, 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.,* *Roley v. Nat’l Prof. Exchange, Inc.*, 474 F. Supp. 3d 708 (D. Md. 2020) *aff’d*, No. 20-1898, 2021 WL 2432640 (4th Cir. June 15, 2021); *Pinnacle Group, LLC v. Kelly*, 235 Md. App. 436 (2018); *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646 (2014); *Salinas v. Com. Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017); *Perez v. Mountaire Farms Inc.*, 650 F.3d 350 (4th Cir. 2011) (amicus); *Heath v. Perdue Farms*, 87 F. Supp. 2d 452 (D. Md. 2000). The PJC has an interest in ensuring that Maryland’s wage laws are liberally interpreted consistent with the General Assembly’s humanitarian objectives.

INTRODUCTION

This appeal turns on the Court’s interpretation of Maryland’s wage statutes. The Court of Special Appeals opened its discussion with a fundamental tenet of such an analysis: “Our primary goal in statutory construction is ‘to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision.’” *Amaya v. DGS Constr., LLC*, 249 Md. App. 462, 468 (2021) (quoting *Doe v. Montgomery Cnty. Bd. of Elections*, 406 Md. 697, 712 (2008)).

But the lower court’s subsequent construction of Maryland’s wage statutes betrayed this principle. It concluded that the federal Portal-to-Portal Act controls the definitions of terms in the Maryland Wage and Hour Law and the Maryland Wage Payment and Collection Law. Then, applying its interpretation to the facts here—where an employer directed, controlled, and required hours of travel and wait time—the lower court allowed the employer to pay its workers less than the full measure of their work, contrary to the statutes’ language and remedial purpose. Under that reading, Maryland’s wage laws will fail to adequately remedy an evil they were intended to combat: the evil of wage theft.

The statutes demand a different outcome. A proper application of interpretive principles here vindicates the legislative purpose of Maryland’s wage laws and respects the dignity of Maryland’s most vulnerable workers. Rather than imposing federal constraints on Maryland law, the Court should construe Maryland’s wage laws liberally, as its precedents require. The Court should conclude that the compulsory travel and wait time here is “work” under Maryland law, vindicating the legislature’s intent to shield against the scourge of wage theft.

ARGUMENT

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), <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>.

Even that vast toll may understate the scale of the problem. Wage theft is hard to accurately measure. Many workers do not know that violations are taking place. Women, Black and Latine people, and immigrants are at the highest risk but underreport in fear of retaliation. Certain industries—including construction—capitalize on these dynamics by incorporating wage theft into their business models. This race to the bottom accelerated during the COVID-19 recession as workers faced unprecedented challenges. See Gretchen Morgenson & Lisa Cavazuti, *The Hidden Scourge of Wage Theft*, NBC News (Sept. 6, 2021), <https://www.nbcnews.com/business/business-news/hidden-scourge-wage-theft-when-higher-profits-come-out-workers-n1272238> (reporting on wage theft in the construction industry, finding that “incidents typically rise during economic downturns, such as the one caused by Covid-19”); see, e.g., Scott MacFarlane et al., *Wage Theft Alleged at High-Profile Worksites*, NBC 4 Wash. (Aug. 11, 2021), <https://www.nbcwashington.com/investigations/wage-theft-alleged-at-high-profile-worksites> (reporting on wage theft during the pandemic in the D.C. area affecting essential workers in the hospitality, construction, and food service industries).

Maryland is no exception. Wage theft is a dire problem for many of the most vulnerable Marylanders, especially Maryland’s robust population of immigrant workers in low-wage jobs who are more susceptible to workplace exploitation. It is imperative that this Court uphold the promise of Maryland’s wage laws, which were enacted to

ensure that workers are paid all wages due, to promote the general health and wellbeing, to protect against unfair competition, and to decrease reliance on public benefits. *See* Md. Code Ann., Lab. & Empl. § 3-402; *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646, 660 (2014); *see also Qun Lin v. Cruz*, 247 Md. App. 606, 631–32 (2020) (citing this Court’s precedents to support that the wage laws are interpreted broadly to effectuate the legislature’s remedial and humanitarian purposes).

Imposing the federal Portal-to-Portal Act on Maryland law—in a way that denies workers like the Appellants compensation for travel and waiting time mandated by their employers—would sanction coercive off-the-clock labor, undermining the state framework and exacerbating wage theft. This Court should reject the extra-textual call to judicially limit the protections of Maryland’s wage laws when the legislature has declined to do so. *Cf. Stearman v. State Farm Mut. Auto. Ins. Co.*, 381 Md. 436, 454 (2004) (“We will not invade the province of the General Assembly and rewrite the law for them, no matter how just or fair we may think such a new law or public policy would be.”).

I. Wage Theft Is Widespread and Deeply Harmful to Workers, Their Communities, and the Economy

The state wage laws at issue are Maryland’s legal protection against unfair pay practices. According to this Court, their interpretation should adhere to that protective purpose. This case calls for interpreting how the statutes apply to a mandatory workplace practice that takes hours of unpaid time from workers every day. This practice is one example of the pervasive problem known as wage theft. That problem is more than a merely incidental concern in this case. Understanding the broader context of wage theft

is vital to the statutory analysis. *Sinai Hosp. of Balt.. Inc. v. Dep’t of Emp. & Training*, 309 Md. 28, 39–40 (1987) (stating, when “dealing with a question of legislative intent,” that “[w]e . . . consider the particular problem or problems the legislature was addressing, and the objective it sought to attain”). Wage theft keeps working families in poverty, increases reliance on public benefits, and stunts local economies. Because the legislative purpose of the statutes is to prevent these harms, the following context should factor into the Court’s construction of the statutory text.

A. Wage theft is commonplace and enormously expensive.

Wage theft occurs when a business denies an employee 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, but common examples include 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). True, wage laws are

complex, and some portion of these violations arise from employers' unintentional misreadings, good faith mistakes, and even clerical errors. *Id.* Still, the term appropriately reflects the reality for the workers who are victimized: they go home with less in their pocket than their work should have earned, while their employer—knowingly or not—keeps the money which is the workers' by rights. After all, this language aligns with how businesses refer to similar practices when, in their view, they are carried out 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.horizonpayroll.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) (quoting Wal-Mart employee handbook, in 2002, referring to long breaks, as “theft of company time”); *cf.* Hallett, *supra*, at 98 n.21 (explaining that the term “wage theft” arose in the workers' rights context around 2009).

Further, the sheer prevalence of wage 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 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>.

But even these grave statistics likely underestimate the damage. The nature of wage theft makes precise measurement elusive. “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. And 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. In any case, 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>.

Factors like these tend to impart a downwards skew on the survey data on which researchers rely. Bernhardt et al., *Broken Laws, supra*, at 12; see also Daniel J. Galvin et al., *Appendix: A Roadmap for Strategic Enforcement* 2, <https://smlr.rutgers.edu/sites/>

default/files/Documents/Centers/CIWO/20_0728_smlr_appendix.pdf (noting “downward-bias” from undercounting Latine workers and undocumented persons, underrepresentation of low-wage workers, and failure to reach “underground” workers). Other data sources are hard to come by. For example, misclassification of employees is rampant. Sarah Leberstein, Nat’l Emp. L. Project, *Independent Contractor Misclassification* 4 (July 2015), <https://www.stoberlaw.com/wp-content/uploads/sites/1200984/2019/05/Independent-Contractor-Costs.pdf> (referring to a Maryland agency action that found 537 misclassified workers at a single company, causing over \$2 million in unreported taxable wages). But researchers’ best source of data for quantifying misclassification’s prevalence is state unemployment insurance audits, which grossly underestimate the problem because many offenders make no reports to the unemployment insurance agencies at all. *Id.* The bottom line is that 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 further costs in fees and penalties and, eventually, legal problems like eviction or debt collection. *Id.* The spectre of eviction “looms larger and larger over time,” and if evicted, the wage theft victim then faces “homelessness, . . . joblessness, hunger, [and] trauma.” *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

Taking a worker’s time without paying wages—the form of wage theft at issue here—is no different from a withheld paycheck or stolen tips; it may even be worse, considering factors beyond dollar value. Off-the-clock labor lowers overall wages relative to hours of the day committed to work, and it reduces hours that would otherwise be counted towards overtime. *See, e.g.*, Muhammad Faraz et al., *Working Off the Clock and Its Impact*, 122 J. Bus. Ethics 395, 400–03 (2014). Losing uncompensated hours to work exacerbates the “time poverty” that already burdens working families. *See* Fabiola Santiago et al., Inst. for Rsch. on Lab. & Emp., *Health Impact Assessment of the Proposed Los Angeles Wage Theft Ordinance* 25–26 (2014), <https://escholarship.org/uc/item/3fj8v9fv>. Many workers have to work long hours for little pay to make ends meet. Unlike most professional workers, they get no choice in scheduling the time their work

takes from them. *Id.* (explaining that tight schedules limit workers’ ability to obtain healthcare, get exercise, and be active parents). Many workers report that they would use the uncompensated time they lose to work to improve their English abilities or learn vocational skills—in other words, activities that “could provide a gateway into better paying jobs.” *Id.* Losing hours to unnecessary idling for an employer, without pay, exacerbates the cycle of poverty.

These cascading effects of wage theft fall hardest on the same communities historically subject to exploitation at work: women, Black and Latine people, and immigrants. In one of the surveys discussed above, 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). And although immigration status is not relevant to this case—and 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 and 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, landscaping, agriculture, hotels, moving services, or cleaning services as examples). These same industries disproportionately employ women, Black people, Latine people, or documented and undocumented immigrants. *See id.* Construction, relevant here, is an apt example: “general contractors push heavily on subcontractors to reduce project costs, which leads—intentionally or not—to neglect for workers’ rights,” and the industry employs high rates of minority and immigrant workers. *See* Catherine Ruckelshaus, et al., Nat’l Emp. L. Project, *Who’s The Boss* 27–28 (May 2014), <https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf>. These disparities were borne of racism, which remains an influence today, be it systemic or individualized. *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 a worker would have to file a claim and wait for the outcome, 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.* 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 face the consequences. *See id.* Simply put, they have less power in the workplace. *See, e.g.,* Jenny R. Yang & Jane Liu, Econ. Pol’y Inst., *Strengthening Accountability for Discrimination* 12–13 (Jan. 19, 2021), <https://files.epi.org/pdf/218473.pdf> (finding that “the wage gaps between white men and three different groups—Black men, Black women, and white women—existed throughout their careers” and widened over time, and women and Black people “are more likely to face backlash in pay negotiations”).

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.” *Id.* For example, the Workers Defense Project relays the story of Miguel and Dolores, a husband and wife from El Salvador hired to do cleaning work on a commercial construction site. Workers Def. Project, *Build a Better Nation* 9 (2013), <https://workersdefense.org/wp-content/uploads/2020/10/research/Build%20a%20Better%20Nation.pdf>. Their employer refused to pay them, withholding \$2,000 in wages, so they initiated a wage claim. *Id.* When the employer heard of the claim, he threatened to “call immigration” if they continued pursuing it. *Id.* The couple persisted, and shortly after, Miguel was deported to El Salvador. *Id.* With the case still open, Dolores said, “I’m scared to try and recover my wages because my husband was deported, and I’m afraid [our employer] will do the same thing to me.” *Id.* So not only does wage theft

perpetuate the cycle of poverty, but it falls hardest on those already facing barriers to progress.

Though the most vulnerable shoulder the greatest burden, 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; *see also* Elizabeth J. Kennedy, *Wage Theft as Public Larceny*, 81 Brooklyn L. Rev. 517, 529–32 (2015) (“By engaging in wage theft, employers can illegally—and significantly—reduce their payroll costs and underbid competitors.”). Meanwhile, the local government bears the cost of lost tax revenue. Kennedy, *supra*, at 531. 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 enormous toll of wage theft falls most directly on low-wage workers, especially those in more marginalized groups, everyone pays the price.

II. Interpreting the Maryland Wage Statutes as Constrained by the Federal Portal-to-Portal Act Would Exacerbate Wage Theft

Wage theft harms Maryland workers, and the express purpose of Maryland’s wage laws is to proscribe against such harms. Unless those laws are construed and enforced

against wage theft practices, some businesses will use violative tactics to unfairly maximize profits. Forcing the Portal-to-Portal Act onto Maryland’s wage laws to conclude that the time taken from the Appellants was not compensable will effectively sanction a method of cutting costs at workers’ expense.

A. Wage theft affects Maryland and is inadequately policed.

In Maryland alone, one study estimated minimum wage violations deprive 580,000 workers of \$875 million in gross wages each year. Rachel Deutsch & Kate Hamaji, Ctr. for Popular Democracy, *Combatting Wage Theft with the Maryland Paystub Transparency Act of 2016* 2 (Feb. 2016), <https://populardemocracy.org/sites/default/files/MD%20Pay%20Stub-web.pdf>.

Here, too, the most disadvantaged community members are most affected. One in five workers in Maryland is an immigrant. *See* Am. Immigration Council, *Immigrants in Maryland* 1 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_maryland.pdf. And immigrants are most represented in the same Maryland industries where wage theft is most prevalent: health care, accommodation, food services, retail, and—as in this case—construction. *Id.* at 2; *see also* Liza Zamd, *All in a Day’s Work: Advocating the Employment Rights of Day Laborers*, *Modern American*, Summer-Fall 2007, at 56 (“[I]n immigrant communities in Maryland, . . . wage theft occurs with alarming frequency.”). A labor lawyer who represented Latine day laborers in Maryland found that workers would approach her “after not having been paid by the employer for weeks, months, or sometimes even years.” Zamd, *supra*, at 56. Employers often tried to justify their lack of payment by

criticizing the workers' performance or questioning their immigration status, neither of which provides a valid legal basis for withholding payment. *Id.* at 57–58. Those excuses do show, however, that the identity and social position of the workers exposed them to wage theft.

Similarly, research on home healthcare workers in Maryland during the COVID-19 pandemic found widespread wage theft through misclassification. *See* David J. Rodwin, *Independent Contractor Misclassification Is Making Everything Worse: The Experience of Home Care Workers in Maryland*, 14 St. Louis U. J. Health L. & Pol'y 47, 48 (2020). Those workers are largely Black and Latina women. *Id.* at 53 (finding 87 percent of home care workers are women, and 76 percent are people of color); *see also id.* (noting that misclassification is widespread in other industries that employ Black and Latine people at high rates, like construction, cleaning, and driving). The widespread misclassification of Maryland home care workers as independent contractors “cut[s] them out of the social safety net and hurt[s] consumers by increasing worker turnover and damaging the continuity and quality of care.” *Id.* at 56. Beyond misclassification, “home care workers have been . . . denied overtime pay for overtime work and denied pay for the time they spent traveling.” *Id.*

Perhaps the most apropos example is the wage theft in Maryland's crab industry. *See generally* Centro De Los Derechos Del Migrante et al., *Breaking the Shell: How Maryland's Migrant Crab Pickers Continue to be Picked Apart* (2020), <https://cdmigrante.org/wp-content/uploads/2020/09/Breaking-The-Shell.pdf>. Every year, hundreds of Mexican women migrate to the Eastern Shore to work seasonal crab-picking

jobs. *Id.* at 2–7. Despite greater regulatory protections for these workers, some employers “circumvent [the regulations’] purpose to pay workers less.” *Id.* at 2–7, 23 (“[T]hose greater protections exist largely on paper and are very difficult to enforce.”). The regulations set wages based on the “prevailing wage” in the industry—an hourly rate—but crab workers are paid via “piece rate”—a set wage per pound of crab meat picked—and crabs are getting smaller. *Id.* So, even though the piece rate has increased, overall take-home pay has not; the workers produce less crabmeat, and employers fail to make up the difference as required by law. *Id.* Similarly, employers must guarantee employees at least 30 weekly hours, but work can dry up when the harvest is low, and rather than employ fewer workers for the required hours, employers deny workers their legally guaranteed shifts. *Id.* at 24. Employers also make unlawful deductions from workers’ paychecks—like charges for safety equipment, knives, gloves, and other tools of the trade. *Id.* Ultimately, “crab pickers’ wages are far less than they should be to comply with statutory protections.” *Id.*

As is true elsewhere, wage theft in Maryland goes largely unredressed. Workers often are unaware of the violations, 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 is seeking in relief. *See* Bernhardt et al., *Broken Laws, supra*, at 24–25. The high incidence of retaliation “creates a culture of hopelessness and helplessness” that pervades low-wage workplaces. Brittany Scott, Raise the Floor Alliance & Nat’l Econ. & Soc.

Rts. Initiative, *Challenging the Business of Fear* 17 (2016), https://issuu.com/raisethefloor/docs/challenging_the_business_of_fear_re.

“Even 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, filing fees and court costs alone could reach the amount of damages a low-wage worker is seeking in the first place, and they may face challenges collecting. Hallett, *supra*, at 105; *see also* Rebecca Lineberry, Comment, *Combatting Wage Theft*, 77 Md. L. Rev. 1229, 1235–36 (2018) (“[L]egal aid services cannot always represent workers . . . because the amount of money owed is negligible compared to the cost of litigating the case, and collecting a favorable judgment for an employee can cost thousands more dollars.”); Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 Wash. L. Rev. 759, 770 (2019) (discussing how employers avoid paying judgments and citing a California study that found most employers subject to such judgments abandoned their corporate form within a year of the claim).

The alternative path is to report to a regulatory agency. Hallett, *supra*, 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 Maryland. Historically, the Employment Standards Service was responsible for enforcement of Maryland’s wage and hours laws, but its budget was cut in 1991 “render[ing] State enforcement of the [Wage] Act a virtual nullity.” *Balt. Harbor Charters, Ltd. v. Ayd*, 365 Md. 366, 382–83 (2001). After “the crippling of the [agency’s] ability to enforce” the laws, the General Assembly in 1993 provided a private right of action. *Friolo v. Frankel*, 373 Md. 501, 516 (2003). As explained above, private suits alone are hardly a sufficient mechanism. In the years since, agency enforcement has not improved to the degree necessary. For example, in 2012, the Maryland Division of Labor and Industry received 887 wage payment complaints. Lineberry, *supra*, at 1235. Most were “resolved informally,” but the agency issued 89 wage orders against employers. *Id.* Of those 89 orders, 79 were referred for collection. *Id.* (“[E]mployers use a plethora of creative tactics to avoid paying the judgments entered against them, such as dissolving corporations, filing for bankruptcy, or moving out of state.”). The Public Justice Center regularly faces these tactics and more in its work combatting wage theft.

In the end, workers who decide to report a violation can try to get a suit filed, win, *and* collect the judgment, or they can report to a government agency and hope that the complaint receives adequate attention. *See also* Md. Code Ann., Lab & Empl. §§ 3-1100–3-1110 (providing, additionally, for pre-judgment wage liens on employer property, though that vehicle presents similar procedural challenges and remains

underutilized). Altogether, the lack of employee knowledge, unscrupulous employer practices, and institutional barriers create a “self-perpetuating enforcement gap in low-wage workplaces” that leaves already vulnerable Marylanders most at risk for exploitation. Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 Ind. L.J. 1089, 1107 (2014).

B. Without enforced legal restraint, employers use wage theft to maximize profits at workers’ expense.

When legal restrictions are insufficient or underenforced, some employers will use wage theft to improve their bottom lines and seek a competitive edge. If this Court sanctions a practice that requires workers’ time without pay, employers will surely take advantage of the legalized wage theft. They will face no incentive to adjust their business practices for fairness and efficiency, and a host of new, unpaid mandates on workers’ time will result.

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. This calculation means that “workers who are more vulnerable . . . will suffer from higher rates of wage theft because employers know [those workers] risk more by complaining and have fewer options if they lose their job.” *Id.* at 104. 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 choose wage theft.

When it comes to off-the-clock wage theft, in cases the Public Justice Center has litigated, we have seen how—when wage theft goes unaddressed—businesses maintain inefficiencies, so long as they fall on workers. For instance, in *Trotter v. Perdue Farms, Inc.*, No. CIV.A.99-893-MPT, 2002 WL 34226966 (D. Del. Aug. 5, 2002), poultry plant employees spent about 8 unpaid minutes a day obtaining, donning, and doffing personal protective equipment off the clock, which added up to about \$500 unpaid wages per worker per year. Steven Greenhouse, *Poultry Plants to Pay Workers \$10 Million in Compensation*, *N.Y. Times*, May 10, 2002, at A-10. This company, one of the largest employers on Maryland’s Eastern Shore, tried to save millions of dollars by nickel and diming its workers this way. Once required to pay, the company changed its process to reduce the time involved. *Id.*

Without enforcement, employers will carry on shifting costs to their workers. Because “the [worker] complaint rate remains abysmally low,” and businesses often evade judgments even when an enforcement action succeeds, the cost-benefit ratio is all too enticing for a business willing to skirt the law. Hallett, *supra*, 108–13. Some employers will knowingly engage in wage theft and regard any penalties as a cost of doing business. *Id.* (giving the example of a restaurant that was sued three times, each time settling and then renegeing on the terms and terminating the complaining workers).

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 sanctions a wage theft tactic, the practice will become even more profitable, businesses will take advantage, and workers will foot the bill. *Id.* at 112–13.

C. Narrowing Maryland’s wage laws by judicially imposing the Portal-to-Portal Act will facilitate wage theft, undermining their legislative purpose.

This Court has repeatedly explained that it interprets Maryland’s wage laws to further the General Assembly’s purpose of ensuring fair pay practices and shielding against abuse. *See, e.g., Peters*, 439 Md. at 662 (acknowledging that treble damages are available “to cure what the Legislature saw as a problem with ‘wage theft’”); *Cunningham v. Feinberg*, 441 Md. 310, 350 (2015) (Adkins, J., concurring) (collecting cases that reflect the “remedial terms” of the wage statutes); *Ocean City, Md. v. Barufaldi*, 434 Md. 381, 384–85 (2013) (explaining, “in light of the purpose of [the wage laws],” they should be liberally construed, and declining to apply purportedly equivalent federal law in part because of the statutes’ remedial purpose).

Indeed, Maryland’s wage laws share the “remedial and humanitarian” purpose of their federal equivalent, the Fair Labor Standards Act, *Qun Lin*, 247 Md. App. at 631–32, but are even more protective, and there is no reason Maryland law must be subject to identical construction. *Cf. Haas v. Lockheed Martin Corp.*, 396 Md. 469, 482 n.10 (2007) (“Maryland appellate courts have interpreted state statutes . . . differently than analogous federal provisions on numerous occasions, even where the state provision is modeled after its federal counterpart.”).

Limiting the protection provided by Maryland’s wage laws by judicially imposing the federal Portal-to-Portal Act—to conclude that the travel and wait time an employer directs, controls, and requires of their workers is not compensable—would not construe the statutes liberally and would be contrary to the legislature’s remedial and humanitarian purpose. *Cf. Stearman*, 381 Md. at 454 (“The formidable doctrine of separation of powers demands that the courts remain in the sphere that belongs uniquely to the judiciary—that of interpreting, but not creating, the statutory law.”). The Court need only consider the consequences of such a ruling here to see why that is true.

In the subcontractor bidding process for the MGM development project, general contractor Whiting-Turner expressly regarded the Rosecroft site as part of the project “Site.” *See* E. 47; E. 1145–46 (defining the project site as the beltway parcel *and* “incidental areas,” including “parking areas located within a twenty-five (25) mile radius of the beltway parcel and which are under control of Prime General Contractor and whose use is related to work performed at the Project”); E. 285 (showing the Rosecroft site was a parking lot within 25 miles of the beltway parcel, was under Whiting-Turner’s control, and was used in relationship to the MGM project). Whiting-Turner included Rosecroft to facilitate a “good-neighbor policy” with the surrounding businesses and residential areas, which helped its bid for the contract. *See* E. 736. Thus, Whiting-Turner required the subcontractors, like DGS Construction, to agree to use the Rosecroft site for parking when submitting their bids.

But Whiting-Turner cut costs by failing to provide adequate buses to meet workforce travel needs. The burden fell on the subcontractors to ensure that their

workers complied with the requirement to park at Rosecroft and ride the bus to the MGM site. Caught between their contractual obligation to use the Rosecroft site and the inadequate arrangements made for its use, DGS Construction refused to pay its workers for the unreasonable and unnecessary travel time that it mandated for their employment.

DGS Construction and Whiting-Turner bet on not having to pay employees for the travel and wait time they required and had no incentive to get the employees to the MGM site efficiently. Instead, they promised what was necessary to secure their contracts and then shifted the costs onto the workers. As a result, employees were forced to forfeit an average of two hours of their day, every day, sitting and waiting for a 2.3-mile bus ride. Had they been forced to pay for this time—as a proper reading of the statutes requires—DGS Construction and Whiting-Turner would have promptly implemented a better system, like Perdue did at its poultry plants after the Public Justice Center’s clients sued. By contrast, if this Court effectively approves the practice, it will actively incentivize businesses to mandate unpaid inefficient waiting and travel time and shift costs onto workers whenever possible. That interpretation of Maryland’s wage laws conflicts with the legislature’s purpose in enacting the statutory framework and should be rejected.

CONCLUSION

For these reasons, *Amicus Curiae* respectfully urges this Court to rule for Appellants.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 6,427 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Michael R. Abrams

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 20-201(g), on September 23, 2021, the foregoing Brief of *Amicus Curiae* in Support of Appellants was served via the MDEC File and Serve Module, and that, pursuant to Rule 8-502(c), two copies each were mailed, postage prepaid, first-class, to:

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