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

No. 23-12342-H

BENSHOT, L.L.C.,
Appellant,
v.
2 MONKEY TRADING, L.L.C., ET AL.,
Appellees.

**BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE CENTER, CENTRO DE LOS
DERECHOS DEL MIGRANTE, FLORIDA LEGAL SERVICES, GEORGIA
LEGAL SERVICES PROGRAM, NATIONAL CENTER FOR LAW AND
ECONOMIC JUSTICE, NATIONAL EMPLOYMENT LAW PROJECT, AND
SOUTHERN POVERTY LAW CENTER, IN SUPPORT OF APPELLANT**

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October 17, 2023

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT
No. 23-12342-H**

The Public Justice Center, *Amicus Curiae*, certifies that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1, and Eleventh Circuit Rules 26.1-1, 28-1(b) and 29-2:

1. Centro de los Derechos del Migrante, Inc.
2. Florida Legal Services, Inc.
3. Georgia Legal Services Program
4. National Center for Law and Economic Justice
5. National Employment Law Project
6. Southern Poverty Law Center

All *amici* are not-for-profit corporations exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. §501(c)(3). They do not have a parent corporation, and no publicly-held company has a 10 percent or greater ownership interest in any of the *amicus* organizations.

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STATEMENTS 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., Avion Funding v. GFS Industries*, 23-50237 (5th Cir. filed Apr. 7, 2023) (*amicus*); *In re Cleary Packaging, LLC*, 36 F.4th 509 (4th Cir. 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.

ARGUMENT¹

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, *Employers Steal Billions from*

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).

Workers' Paychecks Each Year, Econ. Pol'y Inst., 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, *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year*, Econ. Pol'y Inst., 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 ("USDOL") 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., <https://tinyurl.com/329y3mrd> (last visited October 8, 2023).

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 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)). The Eleventh Circuit has taken a similar view on “honest” debtors. *See TransSouth Fin. Corp. of Fla. v. Johnson*, 931 F.2d 1505, 1508 (11th Cir. 1991) (“[T]he Bankruptcy Code... was designed to protect the *honest* debtor. The debtor attempting to abuse the proceedings of bankruptcy is not entitled to the complete medley of Bankruptcy Code protections.”); *First Nat. Bank of Mobile v. Roddenberry*, 701 F.2d 927, 930 (11th Cir. 1983) (“By rendering fraudulently obtained debts nondischargeable, the bankruptcy laws implicitly attempt to discourage abuse of bankruptcy proceedings by those whom the laws were not intended to protect.”).

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 gain 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, making illegal deductions from paychecks, and misclassifying employees as independent contractors. Bobo, *supra*, at 7–8, 28–44. Violations are most common in low-wage industries like farming, construction, retail, food services, landscaping, 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, *It’s Always the Right Time to Watch for Time Card*

Falsification, Horizon Payroll Solutions (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., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities*, Nat’l Emp. L. Project, 1, 5 (2009), <https://s27147.pcdn.co/wpcontent/uploads/2015/03/BrokenLawsReport20.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, including Florida and Georgia, workers lost nearly a quarter of their 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 USDOL 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 gaps. U.S. Dep’t of Just., *Employment Tax Enforcement* (Apr. 2023), <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 records

compensable time, 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, *Exposing Wage Theft Without Fear*, Nat'l Emp. L.

Project, 1, 4 (June 2019), [https://s27147.pcdn.co/wp-content/uploads/Retal-](https://s27147.pcdn.co/wp-content/uploads/Retal-Report-6-26-19.pdf)

[Report-6-26-19.pdf](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 USDOL 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), <https://www.esquire.com/news-politics/a3638/fifth-avenue-uptown/>. “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 from wage theft. 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); Costa et al., *Federal labor standards enforcement in agriculture*, *Econ. Pol’y Inst.*, 1,6 (December 15, 2020) <https://www.epi.org/publication/federal-labor-standards-enforcement-in->

agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/ (“Farmworkers who are employed by farm labor contractors are more likely to suffer wage and hour violations than those who are hired directly by farms.”). These same industries disproportionately employ women, Black people, Latine people, or immigrants. *See* Finkin, *supra*, at 851-55.

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. Wage theft perpetuates the cycle of poverty, and 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 Eleventh Circuit.

As elsewhere, wage theft affects low-wage workers across the Eleventh 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 in this Circuit, contrary to congressional intent.

A. Wage theft affects low-wage workers across the Eleventh Circuit.

Throughout the Eleventh Circuit, low-wage workers experience wage theft. In Florida, the state labor department was abolished in 2002, but six counties within the state have enacted “anti-wage theft ordinances with distinct versions of complaint procedures.” Susan Ferriss & Joe Yerardi, *Wage theft hits immigrants – hard*, The Ctr. for Pub. Integrity, (Oct. 24, 2021), <https://publicintegrity.org/inequality-poverty-opportunity/garment-immigrant-workers-wage-theft/> (“In Miami-Dade county, workers are steered to a service that mediates disputes over, on average, about \$1,800”). Alabama and Georgia are two of “eight states that do not recover wages for employees” through their state agencies or attorney general offices. *See Ihna*

Manguundayao et al, *More than \$3 billion in stolen wages recovered from workers between 2017 and 2020*, Econ Pol’y Inst., (Dec. 22, 2021),

<https://www.epi.org/publication/wage-theft-2021/>. Because Georgia, Alabama, and most of Florida do not have state agencies that enforce wage labor laws, workers rely on the WHD to address wage theft in each state. It is difficult to discern the total annual wages not paid to workers in these individual states. Cynthia S. Hernandez & Carol Stepick, *Wage theft: an economic drain on Florida*, Res. Inst. on Soc. and Econ. Pol’y Ctr. For Lab. Res. and Stud. Fla. Int’l U., (2012)

https://risep.fiu.edu/research-publications/workers-rights-econ-justice/wage-theft/2012/wage-theft-how-millions-of-dollars-are-stolen-from-floridas-workforce/wage-theft_how-millions-of-dollars-are-stolen-from-floridas-workforce_finaldocx1.pdf (According to a 2014 report of wage theft in Florida,

“[t]he WHD does not record data on cases for which employers refuse to pay wages that are owed, does not report amounts claimed to be owed by employees, nor cases that fall outside their jurisdiction.”). Despite the lack of information, recent federal enforcement actions suggest that the problem is widespread in these states. *See, e.g.*,

Erika Ruthman, *U.S. Department of Labor Recovers \$161K in Back Wages, Damages for 19 Georgia Auto Shop Workers After Finding Minimum Wage, Overtime Violations*, U.S. Dep’t of Lab. (June 9, 2022),

<https://www.dol.gov/newsroom/releases/whd/whd20220609>; Eric R. Lucero, *U.S.*

Department of Labor Recovers \$80K in Back Wages, Liquidated Damages After Temporary Staffing Agency Denied Overtime to 108 Hospitality Workers, Dep’t of Lab. (Aug. 23, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220823-3>; Eric R. Lucero, U.S. Department of Labor Recovers \$181K in Back Wages for Birmingham Workers After Investigation Finds Improper Claim of Overtime Pay Exemption, Dep’t of Lab. (May 25, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20220525-1>. 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.

Alabama, Georgia, and Florida 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, “Alabama,” “Georgia,” and “Florida,” 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.”); Fernández-Esquer et al, *supra*, at 345-356. (“Though wage theft is a common labor law violation experienced by US workers, those most likely to experience it include low-income and racial ethnic minority workers such as Latino day laborers.”).

Reports from states in the Eleventh Circuit reflect this national problem. In the aftermath of a fatal, but preventable, industrial accident in Georgia that killed five Mexican nationals and injured many more, the Center for Public Integrity found that “even if workers are not themselves undocumented, members of their family or co-workers might be. Fear that employers will call immigration authorities can deter workers from trusting that they won’t suffer consequences by complaining.” Susan Ferriss, *These essential workers are afraid to report labor violations*, The Ctr. for Pub. Integrity, March. 4, 2022, <https://publicintegrity.org/inside->

publici/newsletters/watchdog-newsletter/immigrants-fear-reporting-labor-violations/.

In 2010, the Southern Poverty Law Center conducted extensive interviews of 150 immigrant women who lived in Florida, Georgia, and other southern states and worked in fields or factories that provided food for the United States. *Injustice on Our Plates*, Southern Poverty Law Center, (Nov. 8, 2010),

<https://www.splcenter.org/20101107/injustice-our-plates#exploitation>. The report found that “intensified enforcement of immigration by the U.S. government has pushed these immigrants further underground – having the effect of lowering their pay as they become even more susceptible to workplace exploitation.” *Id.* Guest workers in the H-2A program in Florida and Georgia face similar challenges. *See Tina Vásquez, Human trafficking or a guest worker program? H-2A’s systemic issues result in catastrophic violations*, Prism (April 14, 2023),

<https://prismreports.org/2023/04/14/h2a-visa-wage-theft-exploitation/> (“In the fall of 2021, Prism, Futuro Investigates, and Latino USA obtained records from...[US]DOL that showed \$7.2 million in unpaid wages due to thousands of H-2A workers victimized by wage theft over the previous decade had never been returned to them.”). Similar problems plague Alabama. *See Mary Scott Hodgin, Alabama Organizers File Federal Lawsuit, Take Stand Against Wage Theft*, Public Radio WBHM (June 20, 2016), <https://wbhm.org/2016/local-organizers-take-a-stand-against-wage-theft/> (reporting that “a group of Alabama organizers filed a federal

lawsuit on behalf of immigrant laborers who say their employer never paid them”).

Workers without work authorization, who travel to places like Florida to aid in natural disaster recovery, are highly susceptible to wage theft. *See* Emily Timm, *The connection between wage theft and climate disasters*, Route-Fifty (July 6, 2022), <https://www.route-fifty.com/management/2022/07/connection-wage-theft-and-climate-disasters/373912/> (reporting that “day laborers are regularly exploited, denied pay and subjected to unsafe work environments” and “the companies who hire these workers profit from disasters, even as many fail to pay workers, fail to pay on time and fail to ensure a safe work environment.”); *see also* Nik Theodore, *After the storm: Houston’s day labor markets in the aftermath of Hurricane Harvey*, U. of Ill. at Chi. (November 2017), https://greatcities.uic.edu/wp-content/uploads/2017/11/After-the-Storm_Theodore_2017.pdf; Alicia Victoria Lozano, *Immigrant workers face wage theft and unsafe conditions as they rebuild Florida*, NBC News (Oct. 9, 2022) <https://www.nbcnews.com/news/latino/immigrant-workers-face-wage-theft-unsafe-conditions-rebuild-florida-rcna51220> (reporting that after Hurricane Ian, advertisements for day labors targeted recently arrived immigrants and asylum seekers in New York who were desperate for work to try “to exploit people for hard work and low wages.”). 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.

B. WHD lacks adequate resources to address wage theft violations in Alabama, Georgia, and Florida.

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.* This dynamic plays out in the Eleventh Circuit. As noted, Georgia and Alabama state agencies do not enforce wage laws, thus, “workers can’t file minimum wage or overtime claims.” 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 [USDOL], which takes cases only selectively.” *Id.* USDOL has limited resources dedicated to wage theft enforcement. See Hallet *supra*, at 106. The WHD employed roughly the same number of investigators in 2015 as it did in 1945. Cooper & Kroeger, *supra*, at 5 (“WHD employed 1,000 investigators in 1948 and fewer than 1,000 in 2015.”). The lack of staff has resulted in a 63% decrease in the number of cases investigated by the agency. *Id.* Further, in 2020, the WHD conducted a record number of audits of companies, but despite that the amount in wages recovered by the agency was 20% less in 2020 than in 2019. *Id.*

The WHD 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 Alabama and Georgia 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 Alabama and Georgia lack meaningful avenues to vindicate their rights.

Wage theft victims in Florida face similar issues. At the state level, Florida “does not have any mechanism or personnel to investigate wage theft cases,” therefore, a majority of the state must bring their wage theft claims to WHD. Bruce Nissen, *Wage theft in St. Petersburg, Florida*, Res. Inst. on Soc. and Econ. Pol’y Ctr.

for Lab. Res. and Stud. Fla. Int'l U., (Dec. 2014), <https://risep.fiu.edu/research-publications/workers-rights-econ-justice/wage-theft/2015/wage-theft-in-st-petersburg-florida/wage-theft-report-for-st-petersburg.pdf>. (“A June 2009 report released by the Government Accountability Office (GAO) found that Miami’s WHD office failed to return multiple phone calls and record all cases in its database.”); *see also* Hernandez & Stepick, *supra*, at 14; Nissen, *supra*, at 7 (Miami-Dade County, which passed a wage theft ordinance in 2010 estimated that “between 60% and 80% of cases handled by the county have been referred by the federal inspectors, because those cases fall outside the confines of the national laws”).

In sum, low wage workers in the Eleventh Circuit who are victims of wage theft have very few options. Workers can (1) pursue a private lawsuit and take on the burdensome costs associated with that and risk retaliation or (2) report a violation to WHD/state/local agency, if covered, and hope that the complaint receives attention. Unscrupulous employer practices and institutional barriers 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 willfully injurious 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.

C. 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., *Hollow Victories*, Nat’l Empl. L. Proj., 1, 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.” H. Esteban Diaz et al., UNC Immigration & Human Rights Pol’y Clinic, *Picking Empty Pockets* 51 1, 83 (2013), <https://law.unc.edu/wp-content/uploads/2019/10/emptypocketsfinal.pdf>. For example, A Texas construction worker won four separate wage theft cases within four years. The worker stated that “every time he wins a case, the companies that owe disappear” and the state can[not] recover any of his money. Chris Hacker, et

al., *Wage theft often goes unpunished despite state systems meant to combat it*, CBS News (June 30, 2023), <https://www.cbsnews.com/news/owed-employers-face-little-accountability-for-wage-theft/>. 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.” Hallet, *supra*, 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). 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. However, 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,” 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).

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.

D. 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

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

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 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

& Jobs with Just. Educ. Fund, *Grand Theft Paycheck* 2–6 (2018),
https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft_report_revise

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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1. This brief contains 6,489 words, in compliance with Rule 29(a)(5), excluding the parts of the brief exempted from the word count by Rule 32(f).
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CERTIFICATE OF SERVICE

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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.

Florida Legal Services, Inc. (FLS) is a statewide leader in advancing economic, social, and racial justice. FLS advocates for poor, vulnerable, and hard-to-reach individuals through impact litigation, legislative and administrative advocacy, education, and strategic partnerships. FLS is a 501(c)(3) nonprofit civil legal aid provider serving clients across Florida, including many individuals working in agricultural and hospitality industries who have been victims of wage theft. FLS has successfully litigated a number of cases on behalf of workers that have resulted in substantial judgments for our clients which defendants have sought to discharge the debts owed to workers through bankruptcy proceedings.

The **Georgia Legal Services Program** (GLSP) provides civil legal services to persons with low incomes in Georgia, creating equal access to justice and opportunities out of poverty. For over 45 years, GLSP's Farmworker Rights Division has represented farmworkers seeking compensation and vindication of their employment rights, including the right to be paid their earned wages. Agriculture, Georgia's leading industry, relies heavily on farm labor contractors, who are usually small businesses, to employ thousands of migrant and seasonal farmworkers every year. GLSP has a significant interest in ensuring that farmworkers can collect judgments against farm labor contractors and other small businesses that employ farmworkers, and that those who circumvent the law to cheat farmworkers of their hard-earned wages are not allowed to use the bankruptcy system to get away with it.

The **National Center for Law and Economic Justice** (NCLEJ) advances economic justice for low-income families, individuals, and communities across the country through impact litigation, policy advocacy, and support of grassroots organizing. NCLEJ fights discrimination against people of color, women, immigrants, and works to build systems that provide economic security and full participation in society for all. NCLEJ has worked extensively to secure low-representing misclassified and historically excluded workers. NCLEJ is committed to ensuring that all workers are afforded dignity and fair treatment on the job and advocates against wage theft and labor abuses in numerous industries. Since its founding in 1965, NCLEJ has been involved, as counsel or amicus curiae, in many

significant cases involving the legal and economic rights of low-income individuals and workers.

The **National Employment Law Project** (NELP) is a non-profit legal and research organization with over fifty years of experience advocating for the employment rights of workers in low-wage industries. 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.

Southern Poverty Law Center (SPLC) is a nonprofit 501(c)(3) organization that is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy and advance the human rights of all people. SPLC regularly litigates cases on behalf of individuals who are the victims of wage theft, many of whom work in low-wage industries such as forestry, agriculture, and food processing. Several of SPLC's cases on behalf of forestry and agricultural workers have resulted in large judgments and/or settlements in which the individual

and corporate defendants attempted to discharge the debts owed to workers in bankruptcy proceedings.