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

No. 21-1981

CANTWELL-CLEARY, CO., INC.,

Appellant,

v.

CLEARY PACKAGING, LLC,

Appellee.

BRIEF OF *AMICI CURIAE*

**THE PUBLIC JUSTICE CENTER; THE LEGAL AID JUSTICE CENTER;
MOUNTAIN STATE JUSTICE; THE NORTH CAROLINA JUSTICE
CENTER; CASA; CENTRO DE LOS DERECHOS DEL MIGRANTE; THE
FARM LABOR ORGANIZING COMMITTEE, AFL-CIO; THE
NATIONAL BLACK WORKER CENTER; AND THE NATIONAL
EMPLOYMENT LAW PROJECT**

IN SUPPORT OF APPELLANT, BY WRITTEN CONSENT

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STATEMENT OF INTEREST

The **Public Justice Center** (“PJC”)¹ 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., 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.

INTRODUCTION

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.

¹ *Amici* have the written consent of all parties to appear and file this brief.

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>.

Inadequate legal enforcement is one reason that wage theft has proliferated to this extent. It is a common practice for employers who commit wage theft to use corporate bankruptcy to avoid wage judgments won by their employees. While discharge provides honest debtors with a “fresh start,” this Court is “*equally* concerned with ensuring that perpetrators of fraud are not allowed to hide behind the skirts of the Bankruptcy Code.” *In re Biondo*, 180 F.3d 126, 130 (4th Cir. 1999) (emphasis added); *see also Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (“[I]n the same breath that we have invoked this ‘fresh start’ policy, we have been careful to explain that the Act limits the opportunity” to “honest” debtors) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

Thus, the wage theft crisis is more than a merely incidental concern here. Businesses engaged in wage theft are especially likely 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 those unscrupulous businesses to use bankruptcy proceedings to dodge

liability. Such an outcome undermines the rule of law at the expense of exploited workers.

Instead, 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 as to *all* debtors, whether corporate or individual, is necessary. Otherwise, corporate debtors evading wage theft judgments could earn a windfall "at the expense of creditors with claims that Congress has deemed should be excepted from discharge." William L. Norton III, 5 Norton Bankr. L. & Prac. 3d § 107:20 (Oct. 2021). And 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 that this Circuit will be the first in the nation to decide the question presented, 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.

To appreciate the relevance of wage theft to the construction of 11 U.S.C. § 1192(2), one must first recognize its staggering scope. 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, 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). But 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 keeps the money which is the workers’ by rights. This language aligns with how businesses refer to similar practices when, in their view, they are done by

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

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

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

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

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

And 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>. 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.* 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. 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 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, construction, 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.*

The restaurant industry, which gave rise to the wage judgment in the case the lower court relied on,² is an apt example. Restaurant workers often earn a subminimum wage supplemented by tips, and those tipped workers are significantly more likely to live in poverty. Univ. Cal. Berkeley Food Lab. Res. Ctr. et al, *Working Below the Line* 1–6 (2015), https://www.law.berkeley.edu/wp-content/uploads/2015/04/WorkingBelowTheLine_FULL-LR-2.01PM-151207.pdf. Women, people of color, and immigrants are heavily overrepresented among subminimum wage earners and, ultimately, “workers of color experience poverty at nearly twice the rate of white restaurant workers.” *Id.* at 1, 24–25. Differences between the higher and lower paying roles in restaurants are stark, and workers of color “are relegated to the lowest paying jobs under the worst workplace conditions.” *See id.* at 24–25 & n.212.

² The lower court relied almost entirely on another decision, which has since been vacated. *See In re: Cleary Packaging LLC*, 630 B.R. 466, 472 (Bankr. D. Md. 2021) (incorporating by reference the *Satellite* court’s statutory analysis); *see also Gaske v. Satellite Rests. Inc. Crabcake Factory USA*, No. 1:21-CV-00740-SAG, slip op. at 1 (D. Md. Oct. 15, 2021) (dismissing bankruptcy appeal as moot and vacating bankruptcy court’s order as to § 523(a)’s applicability).

Across industries, 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.* And for undocumented workers, there is the “deportation threat dynamic.” Fritz-Mauer, *supra*, at 775–76 (“[E]mployers assume, often correctly, that the Spanish-speaking people they hire will not report wage theft because they are afraid of government authorities.”). Ultimately, businesses know that women, Black people, Latine people, and immigrants “are less likely to have the luxury of the time it takes” to challenge exploitation and overcome the consequences. *See* Hallett, *supra*, at 107–

08. Simply put, they have less power in the workplace. So not only does wage theft perpetuate the cycle of poverty, but it falls hardest on those already facing barriers to progress.

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 enormous 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 Fourth Circuit.

Wage theft affects low-wage workers across the Fourth Circuit. And even when workers manage to win wage claims, businesses engaged in wage theft

commonly use bankruptcy proceedings to avoid judgments. If Subchapter V's incorporation of the malicious injury exceptions is read to exempt corporate entities, unscrupulous businesses can obtain all the benefits of Subchapter V bankruptcy while still dodging wage theft enforcement, contrary to congressional intent.

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

Throughout the Fourth Circuit, low-wage workers experience various forms of wage theft. 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://popular-democracy.org/sites/default/files/MD%20Pay%20Stub-web.pdf>. A West Virginia study conservatively estimated that workers lost at least \$90 million to minimum wage violations in 2015, while federal enforcement in the state achieved only \$1.9 million in minimum wage backpay awards over the prior *decade*. See Matthew Massie, W. Va. Ctr. on Budget & Pol'y, *Wage Theft in West Virginia* 3–4 (2019), <https://wvpolicy.org/wp-content/uploads/2019/08/WVCBP-Policy-Brief-Wage-Theft-final.pdf>. And the Virginia Attorney General recently announced a new wage theft enforcement unit because “[t]housands of Virginians are being robbed of their pay.” Stephanie Hudson, *Virginia Attorney General Herring Vows to*

Protect Workers from Wage Theft, 10 WAVY (Mar. 3, 2021), <https://www.wavy.com/news/politics/virginia-politics/virginia-attorney-general-herring-vows-to-protect-workers-from-wage-theft>.

Meanwhile, South Carolina is one of only six states without statutory retaliation protection for wage theft claimants, and Oxfam America recently ranked North Carolina as the worst state for workers in the country, in part because “[t]here are scant statewide policies that fully protect workers from issues such as wage theft.” Noreen Ahmed, Nat’l Emp. L. Proj., *Exposing Wage Theft Without Fear is Possible and Necessary* (Sept. 16, 2019), <https://www.nelp.org/blog/exposing-wage-theft-without-fear-possible-necessary>; Aaron Sánchez-Guerra, *Oxfam Ranks North Carolina as Worst State in the U.S. for Wages and Worker Protections*, News & Observer (Sept. 6, 2021), <https://www.newsobserver.com/news/business/article253918398.html>.

For the reasons discussed above, the region’s most disadvantaged communities are most affected. For example, research during the COVID-19 pandemic on home care workers in Maryland—87 percent of whom were women, and 76 percent people of color—found widespread wage theft through misclassification, which “cut[s] them out of the social safety net,” “increas[es] worker turnover,” and “damag[es] the continuity and quality of care.” 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, 53 (2020) (noting that misclassification is also widespread in other industries that employ Black and Latine people at high rates, like construction, cleaning, and driving).

And Maryland, Virginia, and North Carolina 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, “Maryland,” “Virginia,” and “North Carolina,” respectively). For example, every year hundreds of Mexican women migrate to Maryland’s Eastern Shore to work seasonal crab-picking jobs. 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>. Despite recently adopted regulatory protections for these workers—which “exist largely on paper and are very difficult to enforce”—employers “circumvent [the regulations’] purpose” to get away with paying workers less. *Id.* at 2–7, 23–24 (describing how crab businesses manipulate piece rates to suppress wages, violate minimum work-hour requirements, and dock pay for safety equipment and tools of the trade). In Virginia’s construction industry, recent

investigations found that wage theft was “specifically targeted at lower-income, immigrant employees,” including even in the state-contracted construction of a new building for the Virginia General Assembly. Scott MacFarlane et al., *Dozens of Wage Theft Investigations Conducted in DC Area*, NBC News 4 (Aug. 5, 2021), <https://www.nbcwashington.com/investigations/dozens-of-wage-theft-investigations-conducted-in-dc-area/2760638>.

North Carolina is distinguished by its especially high proportion of undocumented immigrants, who are most likely to experience wage theft. *See* State Immigr. Fact Sheets (undocumented immigrants constitute 39% of the community in North Carolina, compared to 29% in Maryland and 27% in Virginia). A study of migrant farmworkers in the state found that 45% of farmworkers without H-2A visas experienced wage theft compared to 4% of farmworkers with those visas. Erin Robinson et al., *Wages, Wage Violations, and Pesticide Safety Experienced by Migrant Farmworkers in North Carolina*, 21 *New Solutions* 251, 257–58 (2011); *see also* Nichola Lowe & Natasha Iskander, *Power Through Problem Solving: Latino Immigrants and the Inconsistencies of Economic Restructuring*, 23 *Population Space & Place* e2023, at 3 (2016) (finding, in North Carolina construction, undocumented immigrants are hired “through elaborate, often informal networks of labor subcontractors,” with wage violations and misclassification being “commonplace”).

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

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

This dynamic plays out in the Fourth Circuit. For example, the Maryland Division of Labor and Industry received 887 formal wage payment complaints in 2012, resulting in only 89 wage orders. Rebecca Lineberry, Comment, *Combatting Wage Theft*, 77 Md. L. Rev. 1229, 1235–36 (2018). Of those 89 orders, 79 were referred for collection after going unpaid by the offending businesses. *Id.*

Similarly, in Virginia, the Legal Aid Justice Center obtained data for nearly 4,000 wage complaints, finding that the state labor agency rejected almost half of them without investigation. Nicholas Marritz & Krupskaya Elliot, *Getting Workers What They're Owed 2* (Dec. 2019), <https://www.justice4all.org/wp-content/uploads/2019/12/DOLI-Report-12-4-19.pdf>. The agency actually recovered wages in only 18% of cases. *Id.*

In North Carolina, the Wage and Hour Bureau receives 95,000 calls about wage complaints each year, but “cannot adequately respond . . . due to limited resources and staff.” H. Esteban Diaz et al., UNC Immigration & Human Rights Pol’y Clinic, *Picking Empty Pockets* 51 (2013), <https://law.unc.edu/wp-content/uploads/2019/10/emtypocketsfinal.pdf>. While the majority of victims in the state are Spanish speaking, in 2013 only two of the agency’s five intake officers spoke Spanish, and there was only a single Spanish language document on the agency’s website. *Id.* at 54–55. And South Carolina is one of seven states in the country that “dedicates not a single government employee to investigate minimum wage

and overtime violations.” Marianne Levine, *Behind the Minimum Wage Fight, a Sweeping Failure to Enforce the Law*, Politico (Feb. 18, 2018), <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644>. South Carolina’s labor agency instead directs complainants to federal authorities, which take cases “selectively” based on the size of the claim and the number of workers affected. *Id.* Individual workers with “ordinary” wage-theft claims are effectively left without an enforcement mechanism.

In sum, workers can risk retaliation, report a violation, and try to prevail in litigation, or they can report to a government agency and hope that the complaint receives attention. Altogether, unscrupulous employer practices, institutional barriers, and lack of employee knowledge create a “self-perpetuating enforcement gap in low-wage workplaces” that leaves the Fourth Circuit’s 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).

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

When wage theft victims manage to win favorable judgments, they often then struggle to collect. A study of California wage enforcement found, over three years, *only 17%* of workers who won judgments were able to enforce them, while the corresponding employers were *more likely than not* to have “suspended,

forfeited, cancelled, or dissolved business status” and “hidden assets[] or shut down operations and reorganized as a new entity.” Eunice H. Cho et al., Nat’l Empl. L. Proj., *Hollow Victories 2* (2013), <https://s27147.pcdn.co/wp-content/uploads/2015/02/Hollow-Victories.pdf>; *see also* Kamhi, *supra*, at 108 (over a three-year period in Oregon, “almost three quarters of the monetary findings against employers were not recovered”).

“Employers are able to avoid paying judgments through several methods, such as filing for bankruptcy, hiding their assets, or shutting down operations and reorganizing as a new business entity.” Diaz et al., *supra*, at 83. For example, the “Goodfellas Restaurant” in Connecticut was subject to wage theft judgments in actions brought by the Department of Labor in 2009 and 2010, before then being sued by its workers again in 2015 for the same unlawful conduct. Hallett, *supra*, at 112. “In each case, the restaurant reorganized under a different corporation owned by the same couple,” sustaining the same exploitative and illegal business practices. *Id.* In the case of the “Charm Thai” restaurant in New York City, after workers obtained an \$830,000 judgment for minimum wage and overtime violations, “the owners . . . responded by closing several of their businesses, transferring assets between them, and eventually declaring bankruptcy.” *Id.* at 110. The owners then “drain[ed] all assets out of their businesses and disappear[ed],” and “[t]he workers never received a dime from the judgment.” *Id.*

Manipulation of the bankruptcy process is central to corporate evasion of judgments. See Llezlie L. Green, *Wage Theft in Lawless Courts*, 107 Cal. L. Rev. 1303, 1317 & n.63 (2019). For example, in 2011, actions by North Carolina’s wage law enforcement agency resulted in judgments worth a total of \$4.7 million, but only \$1.8 million was ultimately collected. Alexandra F. Sirota & Sabine Schoenbach, N.C. Just. Ctr., *Brief: Wage Theft* 1–2 (Jan. 2012), <https://www.ncjustice.org/wp-content/uploads/2018/12/NCJC-Brief-Wage-theft-2012.pdf>. The agency reported that over \$1.5 million of the outstanding damages were uncollectable specifically “due to employer bankruptcies.” *Id.* And 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 is essential to unscrupulous employers’ ability to elude the rule of law in this way. “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. By enacting Subchapter V, Congress "provide[d] qualifying debtors with some powerful and cost-saving restructuring tools not otherwise available to Chapter 11 debtors." *See In re Keffer*, 628 B.R. 897, 902 (S.D.W. Va. 2021) (quoting *In re Wetter*, 620 B.R. 243, 251 (W.D. Va. 2020)). 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).

Workers holding wage theft judgments are a prime example of creditors that Congress intended to protect under the Code. Congress intended for such debts to be nondischargeable, given both the priority Congress extended to worker-

creditors and its general policy of preventing dishonest debtors from hiding behind bankruptcy. *See* Kamhi, *supra*, at 122–24; *Biondo*, 180 F.3d at 130. But if a corporate entity can access the powerful tools of Subchapter V without the balancing protection afforded by the malicious injury exceptions, corporations engaged in wage theft will have an even more efficient pathway for evading wage enforcement than exists now.

C. Exempting corporations from the malicious injury exceptions will 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.³ For example, nonstandard pay—“flat weekly or daily pay, project-

³ This is not to suggest that wage theft is not a concern at large firms. A report analyzing thousands of successful collective wage actions filed since 2000 found that Fortune 500 companies, and other companies of comparable size, were responsible for “half of the cases . . . and 74 percent of the penalty dollar total.” Good Jobs First & Jobs with Just. Educ. Fund, *Grand Theft Paycheck* 2–6 (2018),

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.

https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft_report_revised.pdf.

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

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

Because “the [worker] complaint rate remains abysmally low,” and businesses 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. Without adequate enforcement of legal judgments, employers will carry on shifting costs to their workers. That is all the more true 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. The Court should instead reverse the bankruptcy court and vindicate Congress’s intent to incorporate the malicious injury exceptions into Subchapter V as to individuals and corporations alike.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF RULES COMPLIANCE

1. This brief contains 6,019 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

I hereby certify that on November 19, 2021, the foregoing Brief of *Amici Curiae* in Support of Appellants was served via CM/ECF system to:

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APPENDIX

The **Legal Aid Justice Center** (“LAJC”) is a Virginia nonprofit legal aid organization that provides legal advice and direct legal representation each year to thousands of low-income individuals who cannot afford private counsel in civil practice areas such as consumer protection, landlord-tenant, employment, immigration, and civil rights. LAJC’s interest in this case flows from its long history of representing low-income workers in civil actions to recover their pay. LAJC has helped hundreds of workers, in various industries, in both federal and state courts, to establish contractual and statutory liability for unpaid wages. LAJC’s experience has allowed it to see firsthand how little a judgment for workers matters, unless that judgment can be collected. Routinely, LAJC attempts to assist workers in collecting on their judgments, only to see employers attempt to hide assets, refuse to comply with subpoenas, or otherwise use barriers to refuse payment. In this context, LAJC views permitting employers to obtain discharge for the kind of debts described in § 523 – those involving bad faith and, in some cases, actual fraud – as both an unwarranted extension of the law, and a blank check for employers looking to defraud workers out of their hard-earned pay.

Mountain State Justice (“MSJ”) is a non-profit legal services firm dedicated to redressing entrenched and emerging systemic social, political, and economic imbalances of power for underserved West Virginians, through legal

advocacy and community empowerment offered regardless of ability to pay.

Among its areas of focus, MSJ represents West Virginia workers in employment discrimination, black lung, and workplace safety litigation. MSJ has a strong interest in ensuring that the West Virginia workers it represents are able to recover unpaid judgments from their employers through the bankruptcy process.

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

CASA is the largest membership-based immigrant rights organization in Maryland and in the Mid-Atlantic region, with an all-time membership of over 115,000 Black and Brown immigrants and working families. As immigrant

workers, CASA members are especially vulnerable to workplace exploitation and suffer disproportionately from wage-theft and other abuses. A large portion of our members live paycheck to paycheck and allowing employers to evade liability for failing to meet their legal obligation to pay these workers via Subchapter V bankruptcy proceedings would be disastrous for them and their families. We believe that it is vital that not only individuals, but also corporations, are bound to pay their workers a fair wage and believe that any interpretation of the law allowing evasion of these vital obligations is harmful to those who can least afford it - low wage workers, like our members.

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.

The **Farm Labor Organizing Committee, AFL-CIO** (“FLOC”), is a labor union representing thousands of agricultural workers in the US South and Mid-West. FLOC’s mission is to improve working and living conditions of agricultural workers and to develop just compensation for work through self-organization, public actions and collective bargaining. FLOC members regularly fight against rampant wage theft in the agricultural industry and assist members in numerous ways, including grievances through collective bargaining agreements and legal proceedings in the State and Federal courts. FLOC members have important interests in ensuring that employers do not use bankruptcy proceedings to avoid paying low-wage workers that prevail in legal proceedings.

The **National Black Worker Center** (“NBWC”) launched in 2012 in response to the two-dimensional job crisis that Black workers face: the crisis of unemployment, and the crisis of low-wage and low-quality work. NBWC has 12 local worker centers across the country, including in Baltimore, MD and Raleigh-Rocky Mount, NC. Wage theft is a priority issue area for NBWC because it greatly harms our base of Black working-class people across the U.S. including in states throughout the Fourth Circuit. NBWC focuses on mobilizing Black workers and providing them with the resources necessary to take on systems of worker oppression, including industries and policies that have benefitted from Black worker exploitation for generations. Through our extensive experience in

organizing and advocacy, we understand first-hand the challenges workers who are paid low wages face, including difficulty in collecting wage theft judgments from employers who declare bankruptcy.

The **National Employment Law Project** (“NELP”) is a non-profit legal and research organization with fifty years of experience advocating for the employment rights of workers in low-wage industries. NELP’s areas of expertise include wage and hour protections. NELP has collaborated closely with state and federal agencies, community-based worker centers, unions and state policy groups throughout the country and the Fourth Circuit, 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.