

No. 19-2246

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UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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In re George Burciaga,

Debtor.

Appeal from the United States District  
Court for the Northern District of  
Illinois

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George Burciaga,

Debtor-Appellant,

Case No: 1:18-cv-05293

v.

Hon. Manish S. Shah

Alex Moglia, Trustee for the Bankruptcy  
Estate of George Burciaga,

Trustee-Appellee

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**BRIEF AND ARGUMENT OF *AMICI CURIAE*  
NACBA AND LEGAL AID CHICAGO  
IN SUPPORT OF GEORGE BURCIAGA  
DEBTOR-APPELLANT,  
AND IN SUPPORT OF REVERSAL.**

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2246

Short Caption: Burciaga v. Moglia

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- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: National Association of Consumer Bankruptcy Attorneys – amicus supporting Debtor-Appellant.
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Illinois law. Legal Aid's knowledge and experience with exemptions generally, and with debtors who struggle to support themselves and their families in the face of underpayment of wages, delayed pay, or outright wage theft, will assist this Court in understanding important aspects of the question this case presents.

#### Amicus NACBA

The National Association of Consumer Bankruptcy Attorneys, or NACBA, is a non-profit organization of almost 3000 consumer bankruptcy attorneys practicing throughout the country. Incorporated in 1992, NACBA is the only nationwide association of attorneys organized specifically to protect the rights of consumer bankruptcy debtors. Among other initiatives and directives, NACBA works to educate the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. NACBA also advocates for consumer debtors on issues that cannot be addressed adequately by individual member attorneys.

NACBA has filed numerous amicus briefs in cases involving the rights of consumer debtors. *See, e.g., Schwab v. Reilly*, 560 U.S. 770 (2010); *United States Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010); *In re Sterling*, 933 F.3d 828 (7th Cir. 2019).

NACBA's breadth of experience will assist this Court in understanding how the Illinois exemption for unpaid wages comports with the policies embodied in the Bankruptcy Code generally.

#### Authority to File Amicus Brief

Both parties have, through their counsel, consented to the filing of an amicus brief by Legal Aid Chicago and NACBA.







was contrary to the intent of the legislature. *People ex rel. Ill. Dep't of Corr. v. Hawkins*, 2011 IL 110792, ¶ 34.

In *Hawkins*, the defendant was a prisoner who had worked in a prison job for many years. *Id.* ¶ 8. Pursuant to statute, the Department of Corrections had withheld a portion of his wages to offset the costs of imprisonment, and the remainder of the wages were paid to him. *Id.* ¶ 12; see 730 ILCS 5/3-12-5. Over the years he had saved approximately \$11,000, which first went into his prison account, but then was transferred to an outside account. *Hawkins*, 2011 IL 110792, ¶ 8. The Attorney General sued to recover the costs of imprisonment from the assets of the prisoner. *Id.* ¶ 9. The prisoner's only asset was the outside account containing the money he had saved from his prison wages. *Id.* ¶ 19.

The Illinois Supreme Court held that "such wages were *not* assets 'which ought to be subjected to the claim of the Department under' section 3-7-6." *Id.* ¶ 32. In so holding, the Court observed that the stated legislative purpose was to ensure that upon their release prisoners will have learned a skill and a work ethic and also will have "saved some money to come back into the community." *Id.* ¶ 33, quoting 86th Ill. Gen. Assem., Senate Proceedings, May 25, 1989, at 429 (statements of Senator Collins). The Court also reasoned that the Department's literal interpretation "produces a result that is absurd, unjust, and . . . not contemplated by the legislature." *Id.* ¶ 34. Since the Department had conceded that the prisoner's account contained only wages already subject to withholding under section 3-12-5, they could not be subject to further attachment. *Id.*

While *Hawkins*, unlike *Despensa*, *Gathing*, and *Mancilla*, did not involve a creditor's attempt to recover from unpaid wages, its conclusion, that collection from a debtor's wages should be scrutinized in light of the legislature's policy concerning wages, comports with those cases and supports the conclusion that the legislature intended to provide comprehensive protection of the exempt wages across all venues. These cases bolster the Debtor's argument that wage garnishments and citations to discover assets are exclusive remedies for creditors seeking to reach a debtor's wages. There is no implied exception or overriding policy reason that can breach the protection of exempt wages.

B. The Federal Consumer Credit Protection Act does not preempt the exemptions in Illinois for unpaid wages.

The Federal Consumer Credit Protection Act (CCPA), 15 U.S.C. §§ 1671-1677, places limits on wage garnishment. 15 U.S.C. § 1673. The CCPA does not itself create an exemption that can be asserted in bankruptcy. *Kokoszka v. Belford*, 417 U.S. 642 (1974). *Kokoszka* was cited as authority by two cases relied upon by the trustee, *In re Thum*, 329 B.R. 848 (Bankr. C.D. Ill. 2005), and *In re Koeneman*, 410 B.R. 820 (Bankr. C.D. Ill. 2009). However, while the CCPA does not create a bankruptcy exemption, neither does it preempt any State from providing an exemption for unpaid wages that is couched in similar terms. Thus in *In re Brissette*, 561 F.2d 779 (9th Cir. 1977), the court held that a California statute that incorporated the limits on garnishment found in the CCPA was an exemption statute that was adopted for use in bankruptcy proceedings, a process that the court

referred to as “double adoption.” *Brissette*, 561 F.2d at 784, 786. As the court observed,

Superficially, it may seem to be anomalous that the CCPA is not an exemption statute to which the Bankruptcy Act refers, and at the same time it becomes an exemption statute for all practical purposes via California law. The process of double adoption, however, is entirely consistent with Bankruptcy Act policy.

*Id.* at 786. The court rejected any claim that the California exemption of a portion of wages was preempted by the CCPA, noting that such preemption would result in stripping the wage earner of his entire exemption, which the court recognized as a “totally unacceptable result.” *Id.* The court rightly recognized such an outcome as “inconsistent both with the purposes of Congress in creating the CCPA, as well as Congress’ intention to provide debtors protection from their creditors in bankruptcy pursuant to provisions of state law.” *Id.* at 786–87.

II. A FINDING THAT UNPAID WAGES ARE NOT EXEMPT WOULD BE CONTRARY TO CLEARLY EXPRESSED INTENT OF THE ILLINOIS GENERAL ASSEMBLY THAT WORKERS SHOULD BE ABLE TO USE THEIR EARNINGS TO SUPPORT THEMSELVES AND THEIR FAMILIES.

A. The limitations on garnishments or citations against wages are designed to allow workers to use protected wages to support a basic standard of living.

The minimum wage in Illinois did not exceed the federal minimum wage for many years. In 2004, the minimum wage in Illinois was increased to \$6.50 an hour, which was more than the federal minimum wage at the time, \$5.15 an hour. For a few years the limits on wage garnishment in Illinois were still tied to the Federal minimum wage. But in 2005, the legislature amended the garnishment statute so that the amount of wages that were totally exempt from collection was linked to the

greater of the Federal or Illinois minimum wage. *See* Pub. Act 094-0306, approved July 21, 2005, effective January 1, 2006. The same legislature also applied those protections to wage assignments, effective upon enactment. Pub. Act 094-0305, amending 740 ILCS 170/4. The legislature made these changes to enable workers in Illinois to use the increase in their wages for their intended purpose – to provide for necessities first, and only after basic needs have been met, to apply any extra funds towards payment of past debts. The trustee’s position would put debtors making only the minimum wage at risk of losing all of their earnings, if the “wild card” exemption has been fully used on other assets.

- B. Workers who are paid irregularly are as much in need of the protected portion of their wages as workers who are always paid on a regular basis.

The inability to exempt protected but unpaid wages would primarily affect debtors who do not receive an even flow of earned income. These debtors should not be prevented from using the amount that the Illinois legislature has determined is necessary to meet basic needs.

The reasons for irregular payment can range from the benign to the criminal. For some debtors, such as the Koenemans, the employer’s payroll practices may leave them vulnerable to having unpaid wages seized by the bankruptcy trustee. In their case, the trustee sought turnover of all of the husband’s regular paycheck, which on the date of the petition had been earned but was paid a few days post-petition, which came to \$2,037.50. *Koeneman*, 410 B.R. at 822. Employees represented by unions who do not go on strike may receive a lump sum because



he files for bankruptcy he is owed the equivalent of two and a half months' pay. If the trustee's position is accepted, this debtor, who has been living on one quarter of his normal income and has had greater financial hardship than the regularly paid debtor, will lose all of the money he is owed. This result is contrary to the Illinois legislature's policy of ensuring that working residents of the state will have enough money to pay for their basic needs.

C. Denial of any exemption for unpaid wages would result in an absurd and unjust result for debtors who are the victims of wage theft.

Employees whose employers commit wage theft also stand at an arbitrary disadvantage under the trustee's position. "Wage theft" refers to "the failure to pay workers the full wages to which they are legally entitled," including failure to pay the minimum wage, failure to comply with overtime pay requirements, employee misclassification, requiring employees to work off the clock, failing to provide required meal or rest breaks, stealing tips, and the many other ways employers violate basic fair pay standards. David Cooper & Teresa Kroeger, Economic Policy Institute, *Employers Steal Billions From Workers' Paychecks Each Year* 4, 7 (May 10, 2017), available at <https://www.epi.org/files/pdf/125116.pdf>. Wage theft is widespread across the country and across industries, costing workers and local economies billions of dollars annually. *Id.* at 2–3. Based on their analysis of data from the ten most populous states, Cooper and Kroeger concluded that in those ten states, 2.4 million workers—or approximately 17 percent of the eligible low-wage workforce—lost \$8 billion each year in unpaid minimum wages. *Id.* In Illinois, the

study found that surveyed minimum-wage-eligible workers experienced average weekly underpayment of \$53, an average of \$2,800 per year, or approximately 20% of the wages they are legally entitled to. *Id.* at 10, 52.

A 2009 study by the Center for Urban Economic Development of the University of Illinois at Chicago, National Employment Law Project, and the UCLA Institute for Research on Labor and Employment surveyed over 4,000 workers in low-wage industries in Chicago, Los Angeles and New York, and found that 26 percent were paid less than the required minimum wage in the previous work-week, and more than two thirds experienced at least one pay-related violation, such as failure to pay overtime, not being paid for all hours worked, and stolen tips. Annette Bernhardt *et al.*, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 2–3, 5 (2009), available at <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>. The report estimates that workers surveyed lost an average of 15 percent, or \$2,634, of their annual wages due to workplace violations. *Id.* at 50.

Several industry-specific studies have uncovered similar rates of wage-related violations. For instance, a 2012 University of Illinois study of car wash workers in Chicago found widespread violations of wage and hour laws. Robert Bruno *et al.*, Univ. of Ill. at Urbana-Champaign, *Clean Cars, Dirty Work* (2012), available at [https://ler.illinois.edu/wp-content/uploads/2015/01/Clean-Cars-Dirty-Work\\_Bruno-Quesada-Manzo.pdf](https://ler.illinois.edu/wp-content/uploads/2015/01/Clean-Cars-Dirty-Work_Bruno-Quesada-Manzo.pdf). The study found that over three quarters of the surveyed workers earned below the Illinois minimum wage. *Id.* at 2. Further, while



or three years if the employer's violations were willful. 29 U.S.C. § 255. Thus a not atypical debtor who is the victim of wage theft may have a claim for unpaid wages ranging from about \$2,600—the yearly shortfall found by Bernhardt *et al.*, in *Broken Laws, Unprotected Workers*—to over \$8,800 (two years of the average stolen wages found by Bruno *et al.*, in *Clean Cars, Dirty Work*). These are amounts that bankruptcy trustees in Illinois have shown themselves to be willing to seize for the benefit of the bankruptcy estates they are administering. In *Koeneman* the amount in question was \$2,037.50; in *Thum* the after tax amount was \$2,133.42.

As wage theft, and efforts to combat it, proliferate, the most successful lawsuits can garner much greater amounts. For example, a group of car wash employees in New York recently received a multi-million dollar recovery. By the summer of 2019, the 106 workers who eventually signed on as plaintiffs will have received a share of roughly \$8.5 million. Tracy Tullis, *A Multimillion-Dollar Payday, at the Carwash*, N.Y. Times, February 22, 2019, <https://www.nytimes.com/2019/02/22/nyregion/car-wash-wage-dispute.html?searchResultPosition=2>, see also Michael Gartland, *Long Island gas station workers win \$285K in wage theft legal battle against ex-owner*, N.Y. Daily News, September 2, 2019, <https://www.nydailynews.com/new-york/ny-metro-gas-station-wage-theft-adhikaar-keshtgar-20190902-xqtrvnd3ufantfxaw26xnyuica-story.html>. But such successes are newsworthy precisely because they are rare; “the really surprising twist to this unlikely story: the carwasheros, as they call themselves, won.” Tullis, *Multimillion-Dollar Payday, at the Carwash*. These

examples do illustrate that whatever remains of the \$4,000 wild card exemption, 735 ILCS 5/12-1001(b), may not be sufficient to protect the money owed to debtors who are victims of wage theft.

Frequently, employees are in need of bankruptcy relief precisely because of nonpayment of wages or salary. Often they cannot delay filing of bankruptcy until wages are paid because they need to restore disconnected utility service, or need to prevent repossession of a vehicle. If paid on a regular basis, they would be able to choose how to spend money for family needs, or to pay for unexpected expenses without having to borrow at high interest rates. Faced with a loss of income, for many low-income debtors in financial distress, high-interest, small-dollar loans—payday loans and title loans—and not bankruptcy, are their first resort. But if the delay in payment persists, the spiraling cost of those loans may lead them to filing bankruptcy.

It would be a perverse interpretation of Illinois law and the Bankruptcy Code if workers who were impelled into bankruptcy because they could not make ends meet due to unpaid wages, would also lose access to their wages when eventually paid. Such a result is one that the protections enacted by the Illinois legislature were designed to prevent.

## CONCLUSION

For the reasons stated above, and in Debtor's brief, this Court should find that Illinois' protections against wage garnishment are an exemption that should be recognized in bankruptcy, and reverse the decisions of the District Court and the Bankruptcy Court.

Respectfully submitted,

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## PROOF OF SERVICE

I hereby certify that on September 17, 2019, I electronically filed the foregoing with the Clerk of the Court for the U.S Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Miriam Hallbauer \_\_\_\_\_

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