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## Certified Fair Wage®: Utilizing Certification Marks in the Fight Against Wage Theft

Anne E. Parrish

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# **CERTIFIED FAIR WAGE®: UTILIZING CERTIFICATION MARKS IN THE FIGHT AGAINST WAGE THEFT**

**By: Anne E. Parrish\***

## **ABSTRACT**

This paper argues utilizing certification marks in the fight against wage theft is a powerful consumer-side approach to the wage theft crisis, building public attention, fostering a social norm against wage theft, bolstering current approaches to the crisis, and spurring meaningful political action. Current approaches to the wage theft crisis are floundering, and certification marks, a subset of trademarks “used to show . . . goods and[] services . . . meet certain standards,” offer a unique approach to the problem. By highlighting certification marks’ unique attributes, showcasing other labor movements’ successful adaptation of certification marks, and utilizing a hypothetical certification mark within the wage theft context, this paper seeks to expose certification marks’ untapped potential as tools in the fight against wage theft and serves to urge those involved in the fight to take advantage of that potential.

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## INTRODUCTION

Wage theft is a largely hidden crisis wreaking havoc on low wage and middle-income workers across virtually all industries throughout the United States.<sup>1</sup> Wage theft, or, essentially, “[employers’] failure to pay workers the full wages to which they are legally entitled,”<sup>2</sup> encompasses a wide array of employers’ malicious acts that directly harm their employees.<sup>3</sup> In the 10 most populous states, employers annually steal \$8 billion from 2.4 million employees through wage theft.<sup>4</sup> An average victim of wage theft faces an annual loss of \$3,300, earning only \$10,500 per year.<sup>5</sup> The wage theft crisis also has indirect effects on those who are dependent on victims of wage theft, taxpayers, local economies, and, essentially, all individuals who participate in or benefit from the tax system.<sup>6</sup> Current approaches to the problem of wage theft, which focus on local wage theft legislation,<sup>7</sup> lawsuits against employers engaging in wage theft,<sup>8</sup> and filing complaints with government entities,<sup>9</sup> are

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<sup>1</sup> Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POLICY REV. 93, 102 (2018); KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 1652–653 (New Press 4<sup>th</sup> ed. 2014).

<sup>2</sup> David Cooper & Theresa Kroeger, *Employers Steal Billions from Workers’ Paycheck’s Each Year*, ECON. POLICY INST. (May 10, 2017), <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/> [<https://perma.cc/TEW9-X2LC>].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Hallett, *supra* note 1, at 101.

<sup>6</sup> See *infra* Section I(b).

<sup>7</sup> See Marc Doussard & Ahmad Gamal, *The Rise of Wage Theft Laws: Can Community-Labor Coalitions Win Victories in State Houses?*, 52 URB. AFF. REV. 780, 780 (2015).

<sup>8</sup> Bradley Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POLICY INST. (Sept. 11, 2014), <https://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/> [<https://perma.cc/UJ76-J7RJ>].

<sup>9</sup> Hallett, *supra* note 1, at 106.

floundering.<sup>10</sup> These approaches have also failed to capture public attention, leaving the crisis hidden from the public eye.<sup>11</sup>

Certification marks, a subset of trademarks “used to show consumers that particular goods and/or services, or their providers, have met certain standards,”<sup>12</sup> offer a unique approach to the problem of wage theft. Certification marks are powerful consumer-side approaches to ethical problems connected to goods and services, such as wage theft, because they are capable of using goods and services to draw public attention to ethical problems, which, in turn, can create and encourage social norms that have a positive impact.<sup>13</sup> Throughout history, different labor movements have utilized certification marks to successfully further their cause.<sup>14</sup> A certification mark in the context of wage theft would be a mark indicating to consumers goods and services were made by employers who do not engage in wage theft and employees who are not victims of wage theft.

This paper argues utilizing certification marks in the fight against wage theft would be a powerful consumer-side approach to the crisis, building public attention, fostering a social norm against wage theft, bolstering current approaches, and spurring meaningful political action. Section II provides background on the problem of wage theft and points to a gap in the current approaches to the problem. Section III outlines the proposed approach to the problem, defining certification marks in the context of labor movements and introducing a hypothetical certification mark in the wage theft context. Section IV explains how certification marks could fill the gap in the current approaches to wage theft introduced in Section II. Finally, Section V explains how utilizing certification marks in the fight against wage theft would help build a social norm against wage theft and spur meaningful political action addressing the problem. Certification marks have great untapped potential as tools in the fight

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<sup>10</sup> See *infra* Section I(d).

<sup>11</sup> See *infra* Section I(e).

<sup>12</sup> *Certification Mark Applications*, USPTO (Oct. 4, 2021 8:21 AM), <https://www.uspto.gov/trademarks/apply/certification-mark-applications> [<https://perma.cc/28P3-BZSY>].

<sup>13</sup> See *infra* Section III(b).

<sup>14</sup> See *infra* Section III(c).

against wage theft, and this paper serves to urge those involved to take advantage of that potential in order to be better equipped to battle.

## I. BACKGROUND ON THE PROBLEM OF WAGE THEFT AND THE GAP IN CURRENT APPROACHES TO THE PROBLEM

### A. *What is Wage Theft?*

The term “wage theft” covers a wide range of employers’ insidious acts against their workers. It encompasses “a constellation of behaviors by employers that result in workers not receiving wages to which they are legally entitled.”<sup>15</sup> Employers of all types engage in wage theft, and the atrocity “is widespread and pervasive.”<sup>16</sup> For example, studies suggest “60 percent of nursing homes[,] . . . 89 percent of nonmonitored garment factories in Los Angeles[,] . . . 62 percent of garlic producers[,] . . . 78 percent of restaurants in New Orleans[,] . . . [and] 100 percent of poultry plants” engage in wage theft.<sup>17</sup> Wage theft primarily affects low wage workers.<sup>18</sup> However, wage theft also “affects many middle-income workers too, including construction workers, nurses, dieticians, writers, bookkeepers, and many more.”<sup>19</sup> As a concept, wage theft is old—employers withholding pay from their employees is a historical problem<sup>20</sup>—but, as a term, it “is relatively new[,] . . . [p]opularized in the last decade by labor activists and progressive scholars,” largely due to Kim Bobo’s use of the term in her 2009 book, *Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid—And What We Can Do About It*.<sup>21</sup>

While all wage theft leads to the same result, “[employers’]

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<sup>15</sup> Hallett, *supra* note 1, at 98.

<sup>16</sup> BOBO, *supra* note 1, at 1652. *See id.* for several more studies revealing the depth and prevalence of wage theft in a diverse array of industries.

<sup>17</sup> *Id.* at 1652–653.

<sup>18</sup> *Id.* at 1653.

<sup>19</sup> *Id.*

<sup>20</sup> *See generally* Alexia Fernández Campbell & Joe Yerardi, *Ripping Off Workers Without Consequences*, CENTER FOR PUBLIC INTEGRITY (May 4, 2021), <https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/cheated-at-work/ripping-off-workers-with-no-consequences/> (includes data of reported withheld workers’ pay in excess of hundreds of millions of dollars since 2005).

<sup>21</sup> Hallett, *supra* note 1, at 98; BOBO, *supra* note 1, at 1652.

failure to pay workers the full wages to which they are legally entitled,"<sup>22</sup> the term encompasses a diverse array of malicious acts. Sometimes employers simply fail to pay their workers, giving workers checks that bounce, claiming insolvency, or refusing to pay workers their final paycheck after employment ends.<sup>23</sup> Other times employers fail to pay their workers the legal minimum wage.<sup>24</sup> For example, "[i]n the 10 most populous states in the country, each year 2.4 million workers covered by state or federal minimum wage laws report being paid less than the applicable minimum wage in their states—approximately 17 percent of the eligible low-wage workforce."<sup>25</sup> Other examples of wage theft involve employers failing to pay overtime, forcing workers to work off-the-clock, failing to provide breaks (e.g., meal breaks), taking illegal deductions from wages and withholding pay stubs, illegally confiscating workers' tips or failing to pay the difference between minimum wage and the workers' tips, and falsely classifying workers as independent contractors in order to pay the workers below minimum wage.<sup>26</sup> This culmination of bad acts, along with other methods employers have used to avoid paying their workers fairly, constitutes wage theft.

#### B. *The Present State and Impact of Wage Theft in the United States*

Wage theft is an epidemic in the United States, directly affecting millions of workers and their dependents and indirectly affecting local economies, communities, and taxpayers.<sup>27</sup> Estimates suggest "[w]age theft is . . . one of the most common crimes committed in the United States."<sup>28</sup> Counting only "the total amount of money *recovered*

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<sup>22</sup> Cooper & Kroeger, *supra* note 2.

<sup>23</sup> Hallett, *supra* note 1, at 98.

<sup>24</sup> Cooper & Kroeger, *supra* note 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; Hallett, *supra* note 1, at 98–99.

<sup>27</sup> See Gretchen Morgenson & Lisa Cavazuti, *The Hidden Scourge of 'Wage Theft': When Higher Profits Come Out of Workers' Pockets*, NBC NEWS (September 6, 2021), <https://www.nbcnews.com/business/news/hidden-scurge-wage-theft-when-higher-profits-come-out-workers-n1272238> [<https://perma.cc/58F8-GMQW>]; Meixell & Eisenbrey, *supra* note 8.

<sup>28</sup> Hallett, *supra* note 1, at 97.



for the victims of wage theft [in 2012]" amounts to a sum "almost three times greater than all the money stolen in robberies that year."<sup>29</sup> Employers committing wage theft steal more money per year than all "bank robberies, convenience store robberies, street and highway robberies, and gas station robberies combined."<sup>30</sup> In the 10 most populous states, "2.4 million workers lose \$8 billion" per year to wage theft.<sup>31</sup> On an individual level, estimates suggest "the average victim of wage theft loses \$3,300 per year, receiving only \$10,500 in annual wages."<sup>32</sup>

The impact of wage theft goes beyond workers who are victims of wage theft and those who depend on their wages. When wage theft occurs, "the government collects less in tax revenue, and taxpayers must provide additional funding for social welfare programs to fill the gaps that employers created."<sup>33</sup> On a local level, "[l]ocal economies are hurt by the practice because employers paying cash to workers may not pay local taxes, reducing revenues for cities and towns."<sup>34</sup> For example, "wage theft in the construction industry affects about 1 in 5 workers in Wisconsin, Minnesota and Illinois[, and] [t]he annual cost to taxpayers in those states exceeds \$362 million."<sup>35</sup> Additionally, there is a "possib[ility] that part of the minimal increase in low-income workers' wages is due to employers' wage-theft behaviors."<sup>36</sup> The present state of wage theft in the United States is directly harming workers and indirectly harming taxpayers, local economies, and, essentially, all individuals who participate in or benefit from the tax system.

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<sup>29</sup> Meixell & Eisenbrey, *supra* note 8.

<sup>30</sup> Ross Eisenbrey, *Wage Theft is a Bigger Problem Than Other Theft—But Not Enough is Done to Protect Workers*, ECON. POL'Y INST. (April 2, 2014), <https://www.epi.org/publication/wage-theft-bigger-problem-theft-protect/> [<https://perma.cc/2DSA-P8WB>].

<sup>31</sup> Cooper & Kroeger, *supra* note 2.

<sup>32</sup> Hallett, *supra* note 1, at 101.

<sup>33</sup> Cooper & Kroeger, *supra* note 2.

<sup>34</sup> Morgenson & Cavazuti, *supra* note 27.

<sup>35</sup> *Id.*

<sup>36</sup> Hallett, *supra* note 1, at 102.

### C. *The Motive of Employers Committing Wage Theft*

There are two prominent semi-competing theories concerning the motive of employers committing wage theft: greed and unequal power theory and economic theory.<sup>37</sup> The greed and unequal power theory, as explained by Kim Bobo, argues wage theft occurs because “[s]ome employers are just greedy and don’t want to share profits with their employees. Some don’t view the minority or female workers as human beings, who have the same needs and desires as they.”<sup>38</sup> Others think the wage theft problem is deeper and more economic than the greed and unequal power theory suggests on its face: wage theft is essentially the result of a cost-benefit analysis by employers who will often conclude wage theft is a smart, “profit-maximizing” option because it lowers employers’ costs, and it carries “low enforcement rates and weak penalties.”<sup>39</sup> While these theories do not proffer identical motivations behind employers’ decisions to commit wage theft, they both tease out the same general underlying inducements: employers are willing to commit wage theft, employers benefit from committing wage theft, and there are little to no consequences when employers do commit wage theft.

### D. *Current Approaches to the Problem of Wage Theft and Their Flaws*

Current approaches to the problem of wage theft rely largely on governmental and legislative processes, and these approaches have made negligible headway in reducing instances of wage theft or increasing the rate of recovery for victims of wage theft. Activism against wage theft has focused on creating local wage theft laws and making changes to those laws already in existence,<sup>40</sup> increasing the number of lawsuits against employers engaging in wage theft,<sup>41</sup> and filing complaints with the Department of Labor (the “DOL”) and

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<sup>37</sup> *Id.* at 98–103.

<sup>38</sup> BOBO, *supra* note 1, at 1652.

<sup>39</sup> Hallett, *supra* note 1, at 103.

<sup>40</sup> See Doussard & Gamal, *supra* note 7.

<sup>41</sup> Meixell & Eisenbrey, *supra* note 8.

other government entities.<sup>42</sup> Beginning with local wage theft laws, efforts to both create laws and make changes to existing laws have not created penalties and enforcement rates high enough to make a large difference in the fight against wage theft.<sup>43</sup> While studies suggest “strengthening a state’s legal protection against wage theft, increasing penalties, and bolstering enforcement capacities may help reduce the incidence of” wage theft,<sup>44</sup> changes to state laws have not yet brought about substantial improvements.<sup>45</sup> In the United States, labor laws are still vastly out of date, and “a . . . study by the Progressive States Network gave . . . [44] states failing grades for what state laws they have in place” addressing wage theft.<sup>46</sup> A 2016 study analyzing the effect of new wage theft laws found the vast majority had no “statistically significant effect on the probability of minimum wage violation.”<sup>47</sup>

Lawsuits have also struggled to make a significant dent in the wage theft crisis.<sup>48</sup> Prosecutions for wage theft violations are rare: there were “only eleven wage theft prosecutions between 2011 and 2013 in the entire country.”<sup>49</sup> At this rate, “the odds of getting convicted for committing wage theft are similar to the odds of getting hit by lightning.”<sup>50</sup> Further, the penalties that go along with conviction are extremely low.<sup>51</sup> For example, “[t]he maximum civil monetary penalty for failure to pay the minimum wage or the required overtime premium is \$1,100.”<sup>52</sup> As with complaints to the DOL and other state government labor entities, government labor departments have few investigative resources, leading to low rates of

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<sup>42</sup> See Hallett, *supra* note 1, at 106.

<sup>43</sup> See Meixell & Eisenbrey, *supra* note 8.

<sup>44</sup> Cooper & Kroeger, *supra* note 2.

<sup>45</sup> See Meixell & Eisenbrey, at 2–3.

<sup>46</sup> Morgenson & Cavazuti, *supra* note 27.

<sup>47</sup> David Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERP. ON POL. 324, 339 (2016).

<sup>48</sup> See *supra* notes 36–39.

<sup>49</sup> Hallett, *supra* note 1, at 120.

<sup>50</sup> *Id.*

<sup>51</sup> Meixell & Eisenbrey, *supra* note 8.

<sup>52</sup> *Id.*

investigation and enforcement,<sup>53</sup> and workers are unlikely to file complaints.<sup>54</sup> Wage theft laws, lawsuits, and complaint processes, if improved, likely all have the potential to reduce instances of wage theft and improve the lives of workers, but, currently, these approaches are floundering.

E. *Gaps in the Current Approaches to the Problem of Wage Theft and the Importance of Public Attention in the Fight Against Wage Theft*

The current approaches to wage theft are largely back-end, dealing with legislatures and government entities, and focus on procedures that retrospectively address wage theft.<sup>55</sup> This has left the wage theft crisis out of the public eye.<sup>56</sup> Without public attention, progress in the fight against wage theft is hindered, leading the public and policymakers to misunderstand the crisis in front of them.<sup>57</sup> For instance, “policymakers have focused more on increasing the minimum wage than they have on enforcing existing minimum wage laws.”<sup>58</sup> In the end, with the current approaches to wage theft in action, “very little national political attention is paid to the problem of wage theft, even among progressive politicians,” and wage theft “is a crisis unfolding largely out of public view.”<sup>59</sup> This is a detrimental

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<sup>53</sup> See e.g., Marianne Levine, *Behind the Minimum Wage Fight, a Sweeping Failure to Enforce the Law*, POLITICO (Feb. 28, 2018), <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644> (“[S]ix states have no investigators to handle minimum-wage violations, while 26 additional states have fewer than 10 investigators.”); Campbell & Yerardi, *supra* note 20 (“Lawyers who represent workers in wage theft cases say they often discourage clients from filing a complaint with the Labor Department because they rarely get paid damages or see quick results. The typical case took 108 days to investigate, according to the agency’s data.”).

<sup>54</sup> See e.g., Morgenson & Cavazuti, *supra* note 28 (“[M]any workers are afraid to lodge complaints . . .”); Hallett, *supra* note 2, at 104–05 (“[M]ost victims of wage theft never file a complaint.”).

<sup>55</sup> See *supra* Section I(b).

<sup>56</sup> See e.g., Hallett, *supra* note 1, at 102 (“It is a crisis unfolding largely outside of public view.”).

<sup>57</sup> See *id.* (“[V]ery little national political attention is paid to the problem of wage theft, even among progressive politicians.”).

<sup>58</sup> *Id.* at 97.

<sup>59</sup> *Id.*

loss in the fight against wage theft because public attention can drive policy changes.<sup>60</sup> The gap in current approaches to wage theft hinders progress. Filling this gap with an approach that focuses on bringing public attention to the problem of wage theft and building a social norm against wage theft has the potential to directly address the problem and bolster public and political action to increase the effect of local laws, lawsuits, and complaint processes current approaches utilize.

## II. THE PROPOSED APPROACH TO THE PROBLEM OF WAGE THEFT: UTILIZING CERTIFICATION MARKS

### A. *What is a Certification Mark?*

Certification marks, a subclass of trademarks, have great potential to be essential tools in the fight against wage theft. Certification marks differ from typical trademarks, which “show[] the commercial source or brand of particular goods and services.”<sup>61</sup> The United States Patent and Trademark Office (the “USPTO”) defines the certification mark as “a type of trademark that is used to show consumers that particular goods and/or services, or their providers, have met certain standards.”<sup>62</sup> Section 4 of the Lanham Act allows “persons, and nations, States, municipalities, and the like,” to register certification marks.<sup>63</sup> Certification marks have been used to show “goods or services come from a specific geographic region, . . . goods or services meet standards with respect to quality, materials, or how they are manufactured, . . . [and] work or labor on the goods or services was performed by a union member or member of another organization or the provider of those services met certain standards.”<sup>64</sup> For example, *Figure 1* below is a certification mark signifying goods are manufactured with 100% recycled paperboard. This mark is owned by 100% Recycled Paperboard Alliance, Inc., and the company offers producers and brands licensing agreements to use the mark which

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<sup>60</sup> See Hallett, *supra* note 1, at 102.

<sup>61</sup> *Certification Mark Applications*, *supra* note 12.

<sup>62</sup> *Id.*

<sup>63</sup> 15 U.S.C. § 1054 (last amended 1999).

<sup>64</sup> *Certification Mark Applications*, *supra* note 12.

“confirms the packaging is made of 100% recycled paperboard.”<sup>65</sup> This mark signifies to consumers that they are purchasing goods made using only recycled paperboard because goods can only bear the mark if the 100% Recycled Paperboard Alliance, Inc. has granted certification and confirmed compliance with their standards.<sup>66</sup> Goods bearing this mark provide consumers clear and relevant information about the sustainability of the good at the point of purchase.<sup>67</sup> This paper proposes a mark that would similarly notify consumers that the good or service they are purchasing is made or provided free of wage theft.



Figure 1. U.S. Registration No. 4754199

#### B. Certification Marks as Consumer-Side Approaches: Building Public Attention and Social Norms

Certification marks offer a consumer-side approach to social issues involving goods and services, and they have the potential to build public attention and create social norms. Consumers pay attention to what they purchase, “want[ing] to know that their products and services are safe, reliable, eco-friendly, humanely produced, and verifiably from a particular geographic origin,” and certification marks make this information readily available.<sup>68</sup> Certification marks are visibly present on the goods and services consumers purchase,<sup>69</sup> so when consumers examine those goods and services, the

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<sup>65</sup> *What We Do*, RECYCLED PAPERBOARD ALL. (last visited Nov. 10, 2021), <https://www.rpa100.com/what/what-we-do/>.

<sup>66</sup> *See id.*

<sup>67</sup> *See id.*

<sup>68</sup> *Certification Marks*, JUSTIA (Oct. 2021) <https://www.justia.com/intellectual-property/trademarks/categories-of-marks/certification-marks/>.

<sup>69</sup> *Certification Mark Applications*, *supra* note 12.

certification mark provides information about an aspect of the goods and services for consumers to process. For example, when consumers examine goods or services bearing the mark pictured in *Figure 1*, they become aware the good or service is made with 100% recycled paperboard. From this information, the consumer realizes this good or service has a sustainable feature. This is the awareness certification marks can bring to consumers. While not all consumers care about the sustainability of goods and services, many do.<sup>70</sup> Consumers aware of the importance of sustainability now know sustainability is directly relevant to the good or service they are purchasing as well as similar goods and services, and consumers unaware of the importance of sustainability are at least put on notice of its importance and given the opportunity to learn and make purchases with their acquired knowledge.

Returning to the consumer who observes the certification mark pictured in *Figure 1* on a product. Perhaps this consumer, either aware or newly aware of the importance of sustainability for the environment, will now seek out products and services bearing the mark displayed in *Figure 1*, products and services with similar certification marks (e.g., the USDA organic certification mark<sup>71</sup>), or simply more sustainable products in general. This is the social norm building that certification marks can bring about. There is evidence that certification marks encouraging consumers to make purchases aligning with a cause can influence consumer purchases.<sup>72</sup> For example, “green certification marks[, marks indicating sustainability, eco-friendliness, recyclability, etc.,] can successfully promote green consumption.”<sup>73</sup> Certification marks are powerful consumer-side approaches to problems connected to goods and services because they are capable of building public attention which, in turn, can create and encourage social norms.

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<sup>70</sup> See *Certification Marks*, *supra* note 68.

<sup>71</sup> *How is the USDA Organic Seal Protected*, USDA, (last visited Jan. 7, 2023) <https://www.ams.usda.gov/rules-regulations/organic/organic-seal>.

<sup>72</sup> See, e.g., Julie Dostal, *Do Green Certification Marks Lead to Greener Consumption?*, LEGAL INTELLIGENCER: INTELL. PROP. 4, (March 24, 2021).

<sup>73</sup> *Id.*

C. *How Have Certification Marks Helped Other Labor Movements?*

Throughout history, different labor movements have used certification marks to further their cause. Unions regularly utilize certification marks to show “work or labor on the goods or services was performed by a union member or member of another organization or the provider of those services met certain standards.”<sup>74</sup> In the late 1700s, during the slave trade era, “shops and traders who wanted to promote ethical goods” made without slave labor faced high prices sourcing slave-trade-free goods.<sup>75</sup> To avoid losing customers to the high prices at which slave-trade-free goods had to be sold to make a profit, shops and traders began to use labeling (comparable to certification marks, as the Lanham Act was centuries away from creation) to “build[] an abolitionist brand, and trad[e] on their reputations.”<sup>76</sup> This labeling was a win-win for sellers and customers interested in ethically sourced goods, and shopkeepers could “secure new, ethically aware customers, but also . . . generate sales of new products.”<sup>77</sup> In one example of this labeling, a business dealing in sugar engraved their sugar basins with the words “East India Sugar not made by Slaves” to “appeal[] to new customers who might otherwise have been lost entirely in an outright boycott of sugar,” which was typically sourced through slave labor.<sup>78</sup>

In a more modern example, Fairtrade America uses the certification mark FAIRTRADE AMERICA with a corresponding design, the “[m]ost recognized ethical label in the world,”<sup>79</sup> to indicate to customers that products bearing the mark meet “a blend of social, economic and environmental criteria that support the sustainable development of small producer organizations and agricultural workers in

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<sup>74</sup> *Certification Mark Applications*, *supra* note 12.

<sup>75</sup> BRONWEN EVERILL, NOT MADE BY SLAVES, 80 (2020).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 86-87.

<sup>78</sup> *Id.* at 87.

<sup>79</sup> *Fairtrade Means Trust*, FAIRTRADE AM. (last visited November 2, 2021), [https://www.fairtradeamerica.org/shop-fairtrade/fairtrade-products/?gclid=Cj0KCQjww4OMBhCUARIsAILndv4uYAKiEnkgi\\_1j1Jmi-LYeaQLfqN97Ts69VIVESKpReEQxCx2VjmXgaAtsgEALw\\_wcB](https://www.fairtradeamerica.org/shop-fairtrade/fairtrade-products/?gclid=Cj0KCQjww4OMBhCUARIsAILndv4uYAKiEnkgi_1j1Jmi-LYeaQLfqN97Ts69VIVESKpReEQxCx2VjmXgaAtsgEALw_wcB).



the Global South.”<sup>80</sup> Within labor, Fairtrade America’s criterion for certification “does not allow exploitative child labor or any discriminatory employment practices[, and their] [s]tandards cover things like working conditions (such as having employment contracts), the ability for workers to organize and democratic voting as part of their membership.”<sup>81</sup> A multitude of well-known businesses and brands have recognizing the significance of Fairtrade America’s certification mark and have certified products with Fairtrade America.<sup>82</sup> These businesses and brands include Aldi, Ben & Jerry’s, Kind, Nespresso, Starbucks, and many more.<sup>83</sup> The certification marks discussed in this sections, along with many others, have proved to be useful tools for improving labor conditions across the globe.

*D. FAIR WAGE®: What a Certification Mark as a Tool to Fight Wage Theft Would Look Like*

The approach to the problem of wage theft this paper proposes is a certification mark signaling to consumers that certified goods and services come from sources that do not engage in wage theft. For explanatory purposes, this paper will use the hypothetical word mark FAIR WAGE to embody the proposed approach. The FAIR WAGE mark would have a corresponding design complementary to anti-wage theft themes. As discussed in Section III(a), “persons, and nations, States, municipalities, and the like,” can register a certification mark with the USPTO.<sup>84</sup> This means any union, worker center, or labor organization, or even multiple of these entities acting in collaboration, could register the FAIR WAGE mark and corresponding design with the USPTO.<sup>85</sup> From there, the owner or owners of the registered FAIR WAGE mark could license out the use of the mark to producers and brands who meet certain certification standards.<sup>86</sup>

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<sup>80</sup> *Fairtrade Standards*, FAIRTRADE AM. (last visited November 2, 2021), <https://www.fairtradeamerica.org/the-standards/>.

<sup>81</sup> *Id.*

<sup>82</sup> *Fairtrade Means Trust*, *supra* note 80.

<sup>83</sup> *Id.*

<sup>84</sup> 15 U.S.C. § 1054.

<sup>85</sup> *See id.* § 1054.

<sup>86</sup> *See Certification Mark Applications*, *supra* note 12.

The FAIR WAGE mark owner would have complete control over these certification standards, and therefore could create a certification process that attempts to ensure producers and brands do not engage in wage theft.<sup>87</sup> The certification process could include examining applicants' financial records, criminal history, physical facilities, compliance programs, operations, and other business aspects. The process could even include monitoring applicants' operations for the duration of the application process for signs of wage theft or making permanent monitoring a certification condition. However, it is crucial to acknowledge it would be an impossible task for a mark owner to create a certification process that totally ensures certified entities do not engage in wage theft. Even with the most rigid application process and certification standards, wage theft, in its many forms,<sup>88</sup> will often be impossible for mark owners to detect and instances of wage theft may still occur among certified entities. This being acknowledged, the success of this proposal does not rest on the complete elimination of all wage theft from all certified producers and brands—it instead rests on overall reduction of wage theft and a large increase in awareness of the crisis, as Section IV and V emphasize. This paper assumes a strong certification process can prevent most instances of wage theft among certified producers and brands, and it assumes most applicants will not be malicious, knowingly engaging in wage theft and concealing wage theft practices. While these assumptions may be overly optimistic, they are not so unreasonable as to preclude acknowledging the potential benefits of the proposal itself. Certification marks are not a solution to the wage theft crisis; they are helpful tools in the complex and challenging fight against wage theft.

Facing the consequence of a trademark infringement action, producers and brands would be unable to use the FAIR WAGE mark in connection with goods and services without meeting the criteria set out by the owner or owners and obtaining a license for use.<sup>89</sup> Goods and services rightfully bearing the FAIR WAGE mark would be certified wage theft free, and those goods and services would

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<sup>87</sup> See *infra* Section III(a).

<sup>88</sup> See *supra* Section II(a).

<sup>89</sup> See *infra* Section III(a).

signify that fact to consumers.

### III. HOW UTILIZING CERTIFICATION MARKS AS AN APPROACH TO THE PROBLEM OF WAGE THEFT WOULD HELP FILL THE GAP IN THE CURRENT APPROACHES TO WAGE THEFT

#### A. *The Certification Mark as a Consumer-Side Approach to The Problem of Wage Theft*

The FAIR WAGE mark would function as a consumer side approach to the problem of wage theft, which the current movement is lacking.<sup>90</sup> With wage theft “unfolding largely outside of public view,”<sup>91</sup> the crisis calls for an approach that will help shed light on the atrocities happening behind closed doors of warehouses, factories, and other places of employment. The FAIR WAGE mark would help solve this problem because certification marks are consumer-side approaches that not only rely on, but also encourage, public visibility.<sup>92</sup> The FAIR WAGE mark would be on public display on goods and in connection with services, bringing the wage theft crisis to the forefront of industries, at the point of purchase. The current approaches to the problem of wage theft have failed to grasp public attention,<sup>93</sup> and the FAIR WAGE mark has the potential to remedy this failure.

#### B. *Increased Awareness and Valuable Ethical Information*

The increasing presence of the FAIR WAGE mark in connection with goods and services would raise awareness of the wage theft crisis among consumers and offer valuable ethical information. Recall how 100% Recycled Paperboard Alliance, Inc.’s certification mark, discussed in Section II(a), makes consumers aware the good or service they are examining has a sustainable feature.<sup>94</sup> As producers and brands became certified, the FAIR WAGE mark would cause a

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<sup>90</sup> See *supra* Section II(d).

<sup>91</sup> Hallett, *supra* note 1, at 102.

<sup>92</sup> See *supra* Section II(b).

<sup>93</sup> See *supra* Section II(b).

<sup>94</sup> *Supra* Section II(a).

similar awareness in customers, informing them about whether goods and service are connected to wage theft. For consumers unaware of wage theft, the FAIR WAGE mark could provide enlightenment as to the crisis itself and put them on notice of its prevalence. Additionally, for these consumers, and for consumers already aware of the wage theft crisis, the FAIR WAGE mark would provide ethical information about specific goods and services. Consumers, who “want to know that their products and services are safe, reliable, eco-friendly, humanely produced, and verifiably from a particular geographic origin,”<sup>95</sup> would likely find this information valuable. In this way, the FAIR WAGE mark would educate and inform consumers about the wage theft crisis and allow those consumers to avoid entities engaging in wage theft, bringing public attention to wage theft capable of filling the gap in the current approaches.<sup>96</sup>

C. *The Certification Mark Would Increase Ethical Consumer Purchases*

The presence of the FAIR WAGE on products would likely lead to an increase in overall ethical consumer purchases. Recall “green certification marks[, marks indicating sustainability, eco-friendliness, recyclability, etc.] can successfully promote green consumption”<sup>97</sup> and the potential positive influence certification marks can have over ethical consumption.<sup>98</sup> Based off what is known about certification marks and consumers,<sup>99</sup> the FAIR WAGE mark would likely cause consumers to select goods and services bearing the mark over similar goods and services that do not. Additionally, as with 100% Recycled Paperboard Alliance, Inc.’s certification mark,<sup>100</sup> after becoming aware of the FAIR WAGE mark and its significance, consumers who found the cause compelling would seek out goods and services bearing the mark, goods and services with similar marks (if

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<sup>95</sup> *Certification Marks*, *supra* note 68.

<sup>96</sup> *See supra* Section II(b).

<sup>97</sup> Dostal, *supra* note 73.

<sup>98</sup> *See supra* Section III(b)-(c).

<sup>99</sup> *See supra* Section III(b)-(c).

<sup>100</sup> *See supra* Section III(b)-(d)

multiple entities addressing the wage theft crisis registered different certification marks), or simply more ethical goods and services in general. All of these outcomes would have a positive impact in the overall fight against wage theft, supplementing the current approaches to the crisis,<sup>101</sup> and begin to build a social norm among ethically conscious consumers to seek goods made free of wage theft.

*D. The Certification Mark Would Encourage and Ensure Employer Compliance with Guidelines Eliminating Wage Theft*

The FAIR WAGE mark would motivate producers and brands to go through the mark owner's certification process, which would attempt to ensure the certified producers and brands are not engaging in wage theft. Producers and brands might seek FAIR WAGE certification due to their own ethical beliefs. Similar to the "shops and traders who wanted to promote ethical goods" made without slave labor,<sup>102</sup> producers and brands who seek to avoid goods and services procured by victims of wage theft could use the FAIR WAGE mark to signal their ethical stance to consumers and mitigate any higher prices wage theft free procurement may cause.

Producers and brands unmotivated by ethical concerns of their own would still find motivation to go through the certification process from their consumers' concerns. Consumers pay attention to what they purchase, "want[ing] to know that their products and services are safe, reliable, eco-friendly, humanely produced, and verifiably from a particular geographic origin," and certification marks make this information readily available.<sup>103</sup> Consumers who are aware of the wage theft crisis or interested in making ethical purchases are going to create a demand for goods and services bearing the FAIR WAGE mark, signifying the good or service was made free of wage theft. Uncertified producers and brands would run the risk of losing consumers to direct competitors whose goods and services

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<sup>101</sup> See *supra* Section II(b)-(d)

<sup>102</sup> BRONWEN, *supra* note 75, at 80.

<sup>103</sup> *Certification Marks*, *supra* note 68.

bear the FAIR WAGE mark.<sup>104</sup> Additionally, certification marks provide producers and brands the opportunity to expand their customer base by marketing to ethically inclined consumers.<sup>105</sup> Producers and brands could utilize the FAIR WAGE mark to attract new ethically-conscious consumers who are seeking ethically sourced or wage theft free goods and services. The number of well-known brands certified under the FAIRTRADE mark discussed in Section II(c) is an example of how motivating obtaining a certification mark license can be.<sup>106</sup>

These incentives for employers to become FAIR WAGE certified increase the cost of wage theft for employers and decrease the cost of creating a wage theft free environment, which would help negate the current motives<sup>107</sup> employers have to commit wage theft. As discussed in Section I(c), the competing theories for why employers commit wage theft both suggest employers are willing to commit wage theft, encounter economic benefits from committing wage theft, and face little to no consequences for committing wage theft.<sup>108</sup> The FAIR WAGE mark would essentially create a lucrative market for wage theft free goods and services, and employers who engage in wage theft would be denied entrance to that market. This market creates an economic consequence for engaging in wage theft (no access to the market) and an economic incentive for employers to not engaging in wage theft (market participation), which would likely make employers less willing to commit wage theft. Whether through their own ethical concerns or concerns inherited from consumers and emphasized by economic incentives, producers and brands would be motivated to go through the certification process and obtain a license to use the FAIR WAGE mark on their goods and services. In this way, the FAIR WAGE mark encourages compliance with guidelines

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<sup>104</sup> See *infra* Section IV(c) (“Based off what is known about certification marks and consumers, the FAIR WAGE mark would likely cause consumers to select goods and services bearing the mark over similar goods and services that do not.”).

<sup>105</sup> See *infra* Section IV(c) (“This labeling was a win-win for sellers and customers interested in ethically sourced goods, and shopkeepers could ‘secure new, ethically aware customers, but also . . . generate sales of new products.’” (quoting BRONWEN, *supra* note 76, at 86)).

<sup>106</sup> See *supra* Section II(c).

<sup>107</sup> See *supra* Section II(c).

<sup>108</sup> See *supra* Section I(c).

eliminating wage theft, something the current approaches to wage theft have failed to do.<sup>109</sup>

#### IV. HOW UTILIZING CERTIFICATION MARKS AS AN APPROACH TO THE PROBLEM OF WAGE THEFT WOULD HELP BUILD SOCIAL NORMS AGAINST WAGE THEFT AND SPUR MEANINGFUL POLITICAL ACTION

##### *A. An Increasingly Popular Certification Mark Would Reflect a Growing Social Norm Against Wage Theft*

With consumers creating a demand for wage theft free goods and services and employers meeting that demand<sup>110</sup> the FAIR WAGE mark would lead to a growing social norm against wage theft. The FAIR WAGE mark allows consumers to make an active choice against wage theft. Additionally, employers would be incentivized to become FAIR WAGE certified and create environments free of wage theft.<sup>111</sup> These choices, by consumers and employers alike, would be the building blocks of a growing social norm against wage theft. As the FAIR WAGE mark became more prevalent, so would consumer and employer actions against wage theft. Consumers would begin to recognize the FAIR WAGE mark and, in turn, recognize the wage theft crisis and the devastation it has caused. A successful certification mark provides a simple approach to increasing public attention and building a social norm against wage theft.

##### *B. Workers Could Identify and Seek Out Work Environments Free of Wage Theft*

Another benefit of the FAIR WAGE mark is the opportunity it provides workers to identify FAIR WAGE certified employers when seeking employment. The owner or owners of the FAIR WAGE mark could make the certified employers publicly available through a website or database, like Fairtrade America,<sup>112</sup> to make it easy for

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<sup>109</sup> See *supra* Section II(d).

<sup>110</sup> See *supra* Section II(d).

<sup>111</sup> See *supra* Section II(d).

<sup>112</sup> See *supra* Section II(c).

those seeking employment to find information about certified employers. Additionally, the owner or owners of the mark could make certification criteria publicly, like Fairtrade America,<sup>113</sup> so workers know exactly what standards employers who are FAIR WAGE certified will be held to. This information would allow those seeking employment to limit their search to FAIR WAGE certified employers or inquire about any standards against wage theft uncertified employers have in place.

This information is also powerful for workers who are already employed. Workers are consumers too, and, if they encountered the FAIR WAGE mark on goods or services, it may prompt them to learn about the crisis and identify instances of wage theft in their personal employment. Wage theft is not largely discussed or easily understood,<sup>114</sup> so victims of wage theft may not even know they are victims. A successful certification mark would increase attention surrounding the wage theft crisis and spread valuable information about the crisis to workers, helping them recognize wage theft and find wage theft free employment.

### C. *Strong Social Norms Against Wage Theft Could Spur Meaningful Political Action*

If the FAIR WAGE mark created a strong enough social norm against wage theft, meaningful political action to address the wage theft crisis could result. The wage theft crisis currently suffers from a lack of public attention and policymakers misunderstanding the problem.<sup>115</sup> Gaps in the current approaches to the crisis hinder political action.<sup>116</sup> The FAIR WAGE mark draws public attention, utilizing consumers, employers, and workers and creating a social norm against wage theft.<sup>117</sup> This social norm against wage theft would have the potential to fill the gaps<sup>118</sup> in current approaches to wage theft.

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<sup>113</sup> See *supra* Section II(c).

<sup>114</sup> Hallet *supra* note 1, at 93.

<sup>115</sup> *Id.* at 102. (“[V]ery little national political attention is paid to the problem of wage theft, even among progressive politicians.”).

<sup>116</sup> See *supra* Section I(e).

<sup>117</sup> See *supra* Section IV(a)-(b).

<sup>118</sup> See *supra* Section IV(a)-(b).



Ideally, the FAIR WAGE mark would lead newly informed consumers, employers, and workers to join those already informed about the wage theft crisis in demanding more from employers, politicians, government officials, and policymakers. In turn, employers would strive to create environments free of wage theft, politicians and government officials would think of new and creative approaches to the wage theft crisis, and policymakers would seek to create adequate laws addressing wage theft and providing redress to victims of the crisis.

## CONCLUSION

Certification marks are powerful tools within labor movements, and utilizing them as an approach to the problem of wage theft would bolster the currently floundering approaches and build momentum in the fight for wage theft free work environments. A certification mark addressing wage theft would help fill the gap in current approaches to the problem of wage theft, build a social norm against wage theft, and spur meaningful political action. Certification marks are simple to create and easy to register, meaning any organization that decided to create a certification mark and corresponding certification guidelines would find the process more user-friendly than the current approaches involving fighting for the attention of lawmakers and government officials, bringing complex lawsuits against employers, and filing complaints that are likely to go unnoticed. This is a way to get employers, consumers, and workers involved in the movement to end wage theft. Finally, this paper does not offer a solution to problem of wage theft, as ending the crisis will take a great deal more time, effort, and creativity, but it does offer a tool that will prove quite useful in battle.