



AMERICAN  
BANKRUPTCY  
INSTITUTE

# 2020 Midwestern Virtual Bankruptcy Institute

## Frank W. Koger Memorial Lecture **Bankruptcy as a Social Safety Net: Policy Considerations in a Time of Pandemic**

*Sponsored by Spencer Fane LLP*

**Prof. Andrea J. Boyack, Moderator**

*Washburn University School of Law | Topeka, Kans.*

**Prof. Brook E. Gotberg**

*University of Missouri Law School | Columbia, Mo.*



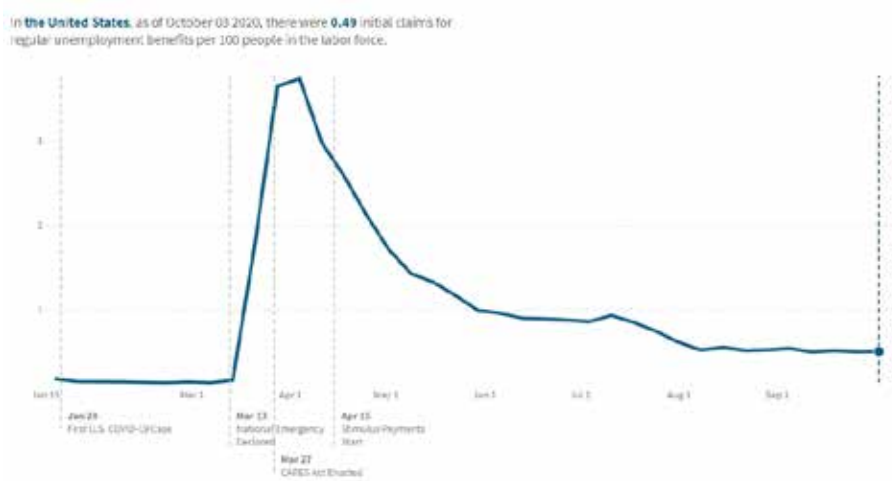
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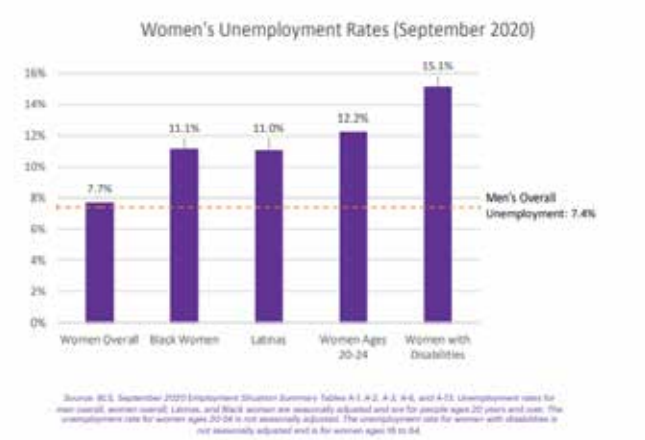
Where are we now?



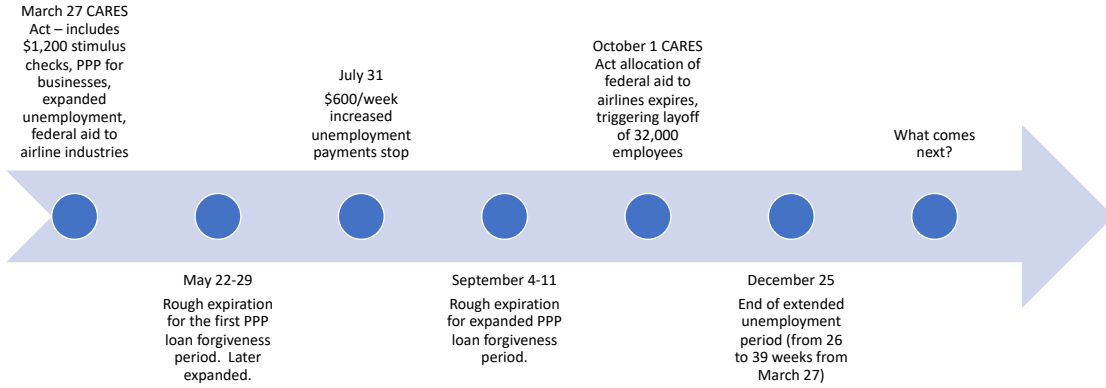
# Where are we now?



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# Where are we now?



# Where are we now?

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OMB Control No. 0920-1303  
Expiration Date: 12/31/2020

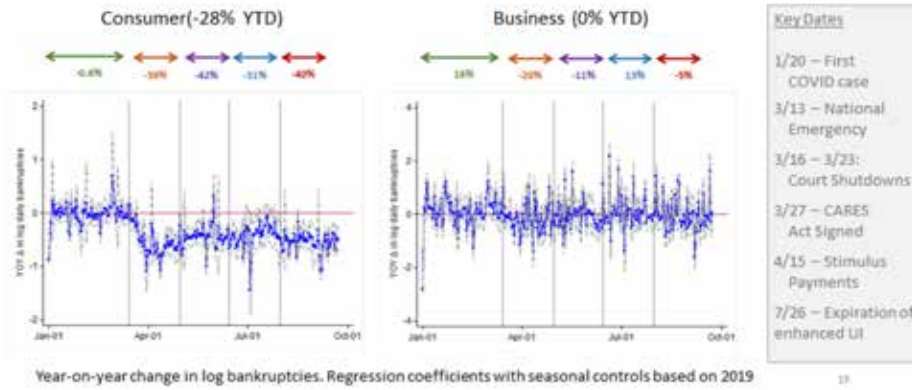
**[FORM] DECLARATION UNDER PENALTY OF PERJURY FOR  
THE CENTERS FOR DISEASE CONTROL AND PREVENTION'S TEMPORARY  
HALT IN EVICTIONS TO PREVENT FURTHER SPREAD OF COVID-19**

This declaration is for tenants, lessees, or residents of residential properties who are covered by the CDC's order temporarily halting residential evictions (not including foreclosures on home mortgages) to prevent the further spread of COVID-19. Under the CDC's order you must provide a copy of this declaration to your landlord, owner of the residential property where you live, or other person who has a right to have you evicted or removed from where you live. Each adult listed on the lease, rental agreement, or housing contract should complete this declaration. Unless the CDC order is extended, changed, or ended, the order prevents you from being evicted or removed from where you are living through December 31, 2020. You are still required to pay rent and follow all the other terms of your lease and rules of the place where you live. You may also still be evicted for reasons other than not paying rent or making a housing payment. This declaration is sworn testimony, meaning that you can be prosecuted, go to jail, or pay a fine if you lie, mislead, or omit important information.

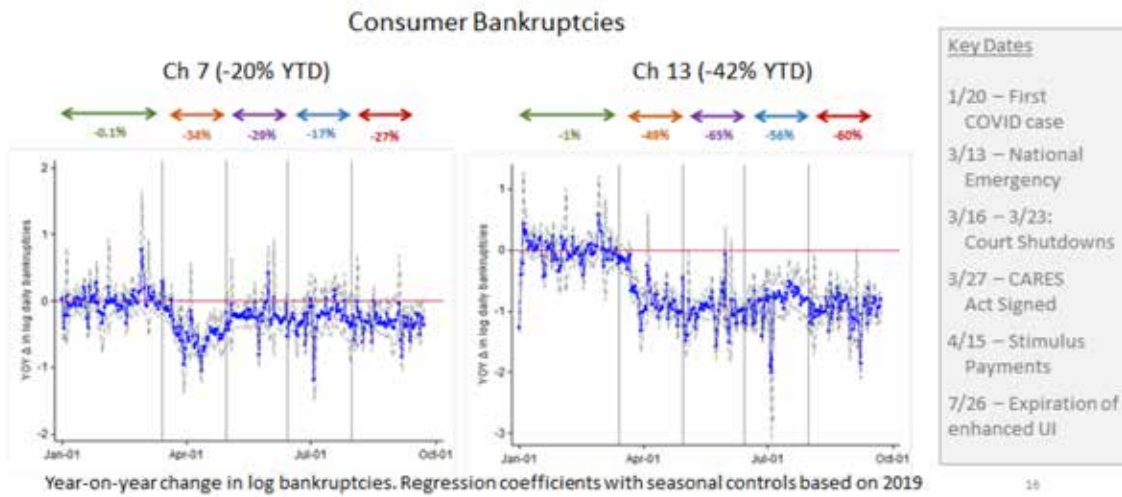
I certify under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing are true and correct:

- I have used best efforts to obtain all available government assistance for rent or housing;<sup>1</sup>

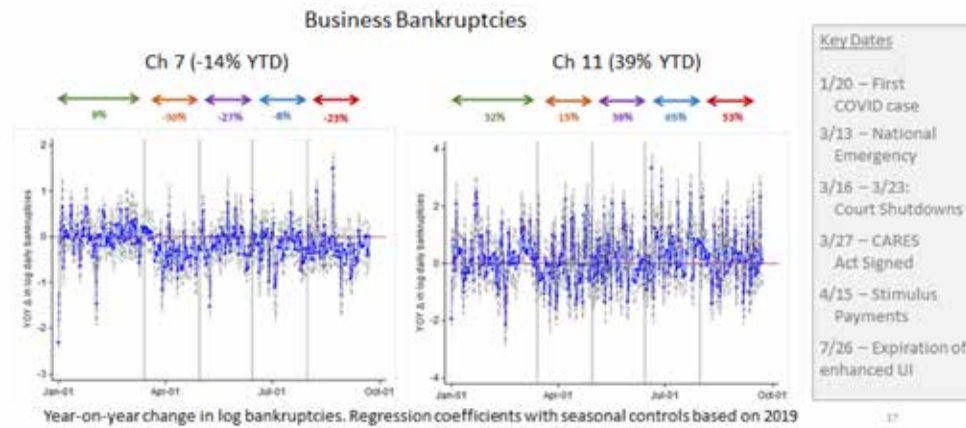
### Consumer Bankruptcies Dropped Significantly Starting In Mid-March



### Chapter 7 and 13 Diverged Starting in Mid-April



## Business Chapter 11 Filings are Up





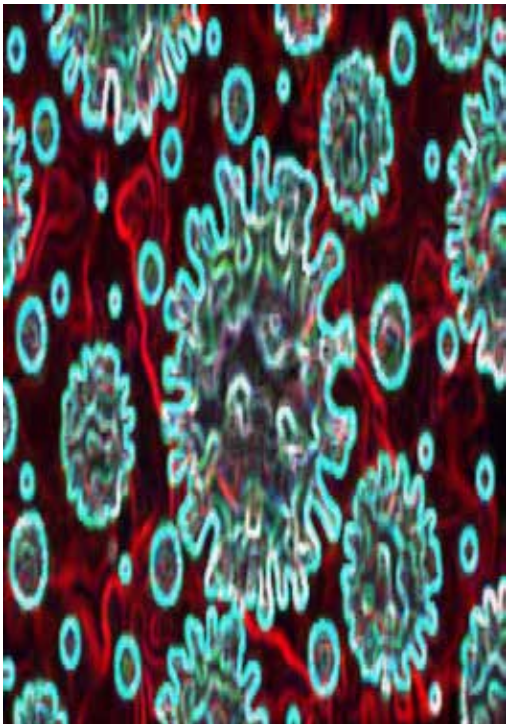
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OCTOBER 29-30, 2020

Frank W. Koger Memorial Lecture

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BANKRUPTCY AS A  
SOCIAL SAFETY NET:

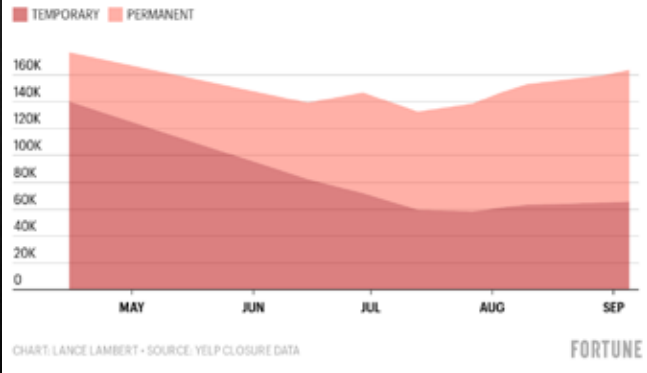
POLICY CONSIDERATIONS  
IN A TIME OF PANDEMIC

PROFESSOR BROOK E. GOTBERG  
&  
PROFESSOR ANDREA J. BOYACK

# Pandemic & Shutdown

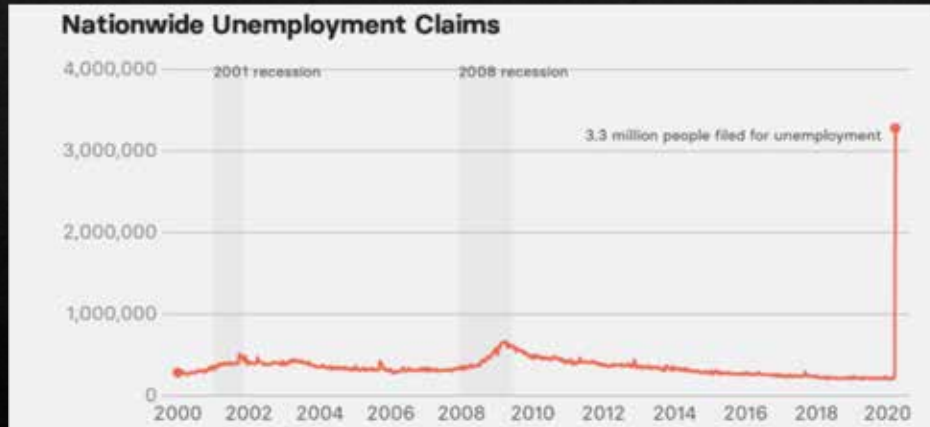


**Temporary business closures are turning into permanent closures**

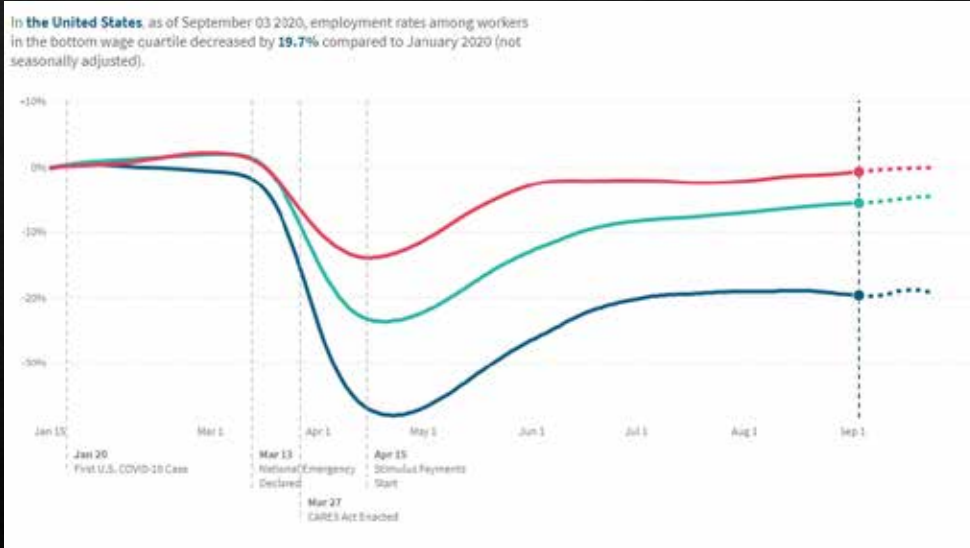


## March 2020 Unemployment filings surge

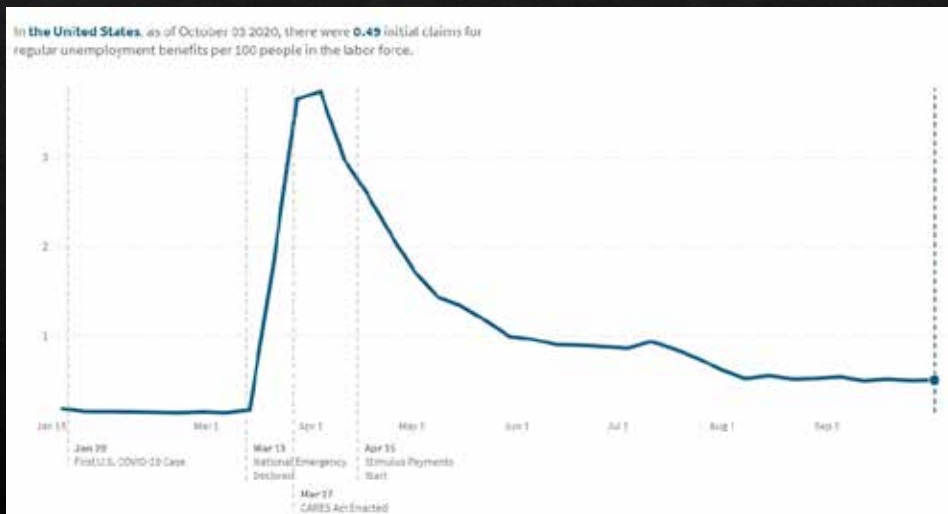
Initial unemployment claims for the week ending March 21 soared to 3,307,000, nearly 15 times higher than the 211,000 claims filed just two weeks before and shattering the previous high of 692,000, reached in 1982.



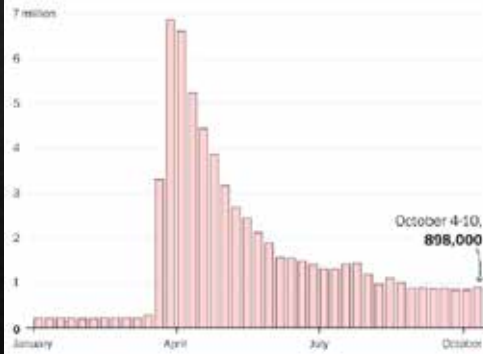
# Where are we now?



# Where are we now?



U.S. initial claims for unemployment insurance in 2020



## Continuing Unemployment

The U.S. economy added more than 660,000 non-farm jobs during September, but the total U.S. unemployment rate is still more than double (3.7%) the average unemployment rate for 2019

Note: Seasonally adjusted  
Source: Labor Department

Chart 1. Unemployment rate, seasonally adjusted, September 2018 – September 2020

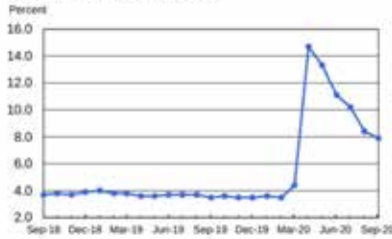
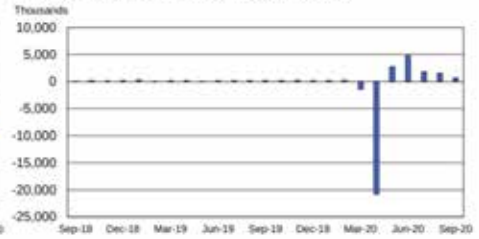
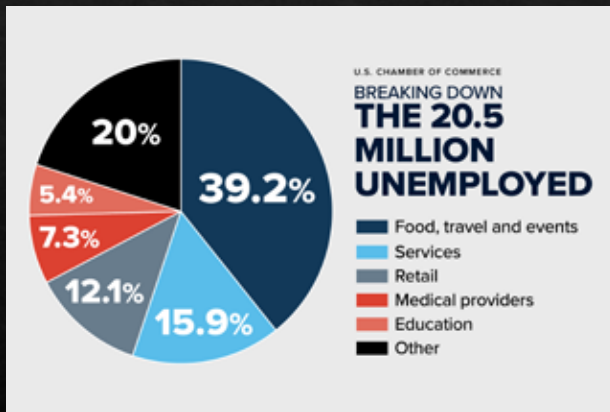


Chart 2. Nonfarm payroll employment over-the-month change, seasonally adjusted, September 2018 – September 2020



## Sector-Specific Recession

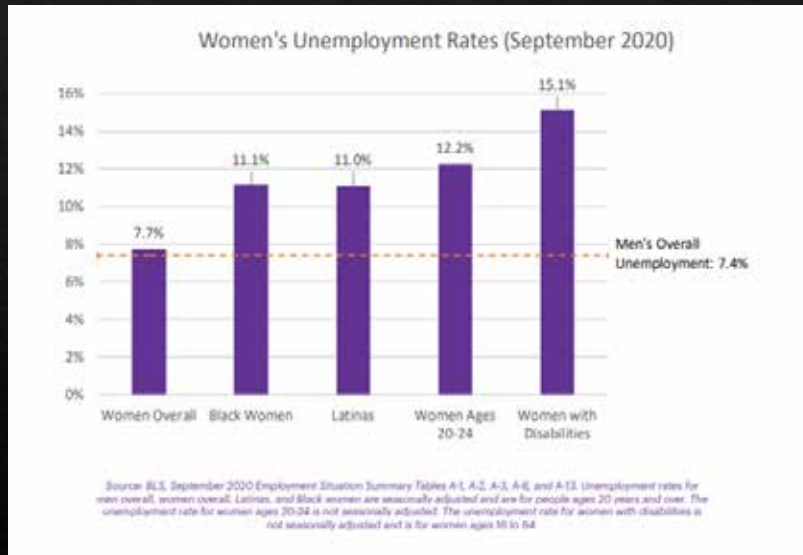


Up to 1/3 of US workers are vulnerable to job loss related to the pandemic shutdown, and more than 80% of these are low income.

Certain sectors have been devastated:  
Food, travel, events, retail, and services



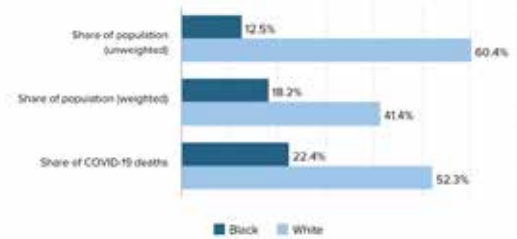
# Disparate Impact on Women



# Disparate Racial Impact

**Black Americans make up 12.5% of the U.S. population but account for 22.4% of COVID-19 deaths**

Shares of population vs. shares of COVID-19 deaths, by race

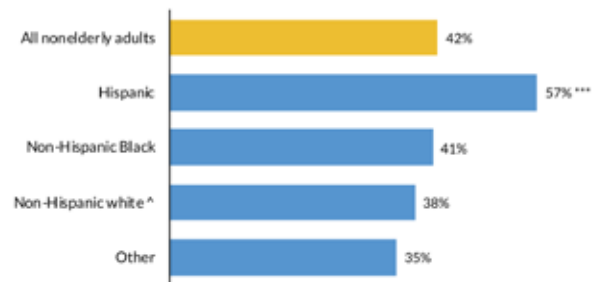


Notes: White refers to non-Hispanic whites, black refers to blacks alone. All shares are as of May 13, 2020. Shares of COVID-19 deaths are based on provisional death counts. Weighted population shares reflect the racial distribution of the geographic locations where COVID-19 outbreaks are occurring, and help to ascertain whether disproportionate deaths are occurring within certain racial groups.

Source: Centers for Disease Control and Prevention (CDC), Provisional Death Counts for Coronavirus Disease (COVID-19) Weekly State-Specific Data Updates.

Economic Policy Institute

**Share of Adults Ages 18 to 64 Whose Families Lost Jobs, Work Hours, or Work-Related Income during the Pandemic, by Race and Ethnicity, March and April 2020**



URBAN INSTITUTE

Source: The Health Reform Monitoring Survey for the first quarter of 2020. The survey was conducted between March 25 and April 10, and 74.5 percent of respondents completed the survey by March 31.

Notes: "Other" includes non-Hispanic adults who are not Black or white or who are more than one race.

\*\*\* Estimate differs significantly from reference group (-) at the 0.10/0.05/0.01 level, using two-tailed tests.

## Housing Insecurity

- ◇ Housing is “unaffordable” for nearly half of the nation’s renters
- ◇ Half of low-income & 70% of extremely low income renters allocate more than half of their income to stay housed
- ◇ Only ¼ of low-income renters who qualify for rental assistance actually get it
- ◇ Before the pandemic: 500,000 were homeless

*“The coronavirus pandemic has been the “great revealer,” laying bare the inequities in our society, and reminding us how our homes affect every aspect of our lives, including our health.” – Sen. Sherrod Brown*

## Pandemic Era Efforts to Shore Up Housing

- ◇ State & local moratoria on evictions
- ◇ Federal foreclosure & eviction moratoria
  - ◇ Fannie/Freddie & FHA
  - ◇ CDC Rental Eviction Moratorium (September – December 2020)
  - ◇ Approx. 20% of renters are not paying their rents
  - ◇ \$25 billion (\$25,000,000,000!) is owed in back rent

Form Approved  
OMB Control No. 0920-1100  
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## KANSAS CITY, MISSOURI

Eviction filings in Jackson County, MO (Kansas City) have fallen sharply in the last two months. Compared to equivalent periods in previous years (2012-2015), eviction filings were down nearly 80% in April and May.

More detail on eviction protections in Missouri can be found on the [COVID-19 Housing Policy Scorecard](#).

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## Changes in eviction filings

Eviction filings in Kansas City were slightly below average in January and February of this year.<sup>1</sup> That pattern intensified in March. Less than 180 cases were filed in both April and May.

**FILINGS THIS YEAR**  
relative to average

<sup>1</sup> Average eviction filings taken from Eviction Lab data for 2012-2015

<sup>2</sup> Filing data for 2020 collected by [January Advisors](#)



## ST. LOUIS, MISSOURI

Of the 2,696 filings in St. Louis since March 15th, 1542 were filed in St. Louis County and 1154 were filed in the City of St. Louis.

While the state of Missouri has not enacted any protections for renters, the 22nd Judicial Circuit (City of St. Louis) did suspend eviction proceedings in mid-March through July 22nd. Eviction filings in St. Louis declined precipitously in April, May and June before picking up again in July. Since early August, the execution of eviction orders have been suspended until at least November 9th.

More detail on eviction protections in Missouri can be found on the [COVID-19 Housing Policy Scorecard](#).

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## Changes in eviction filings

Eviction filings in St. Louis were slightly above average in January and February of this year, but began to fall in March. Filings in April and May were significantly below average. For example, nearly 1,200 eviction cases are usually filed in May in St. Louis, but this year there were only 56.

**FILINGS THIS YEAR**  
relative to average

<sup>1</sup> Average eviction filings taken from Eviction Lab data for 2012, 2013, 2015, and 2016

<sup>2</sup> Filing data for 2020 collected by [January Advisors](#)

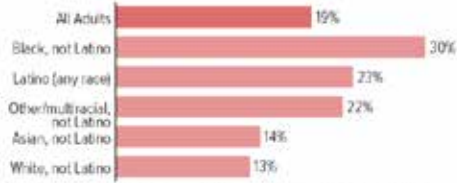


FILING COUNTS

FILINGS RELATIVE TO AVERAGE

**1 in 5 Renters Behind on Rent During Pandemic, With Black and Latino Renters Facing Greatest Hardship**

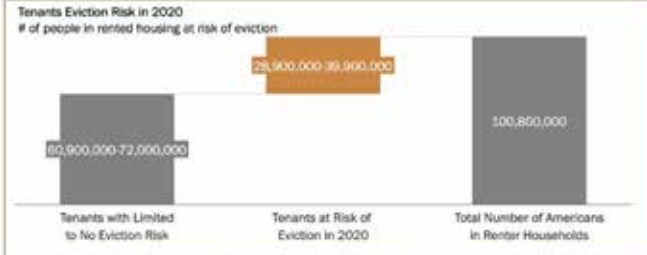
Share of adult renters saying they are behind on last month's rent, as of July 7, 2020



Note: Other/Multiracial, not Latino = people identifying as American Indian, Alaska Native, Native Hawaiian or Pacific Islander, or those that are race. Excludes on rent = did not pay or delinquent rent. Chart excludes renters who did not respond to the question.  
Source: CBPP analysis of Census Bureau Household Pulse Survey

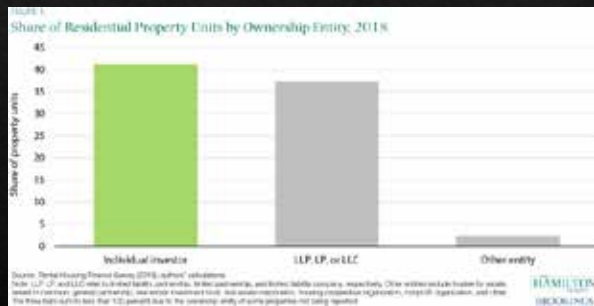
COURTESY OF HUDSON AND WOOD'S CONSULTING | CHARTS

**AN ESTIMATED 30-40 MILLION RENTERS COULD BE AT RISK OF EVICTION**

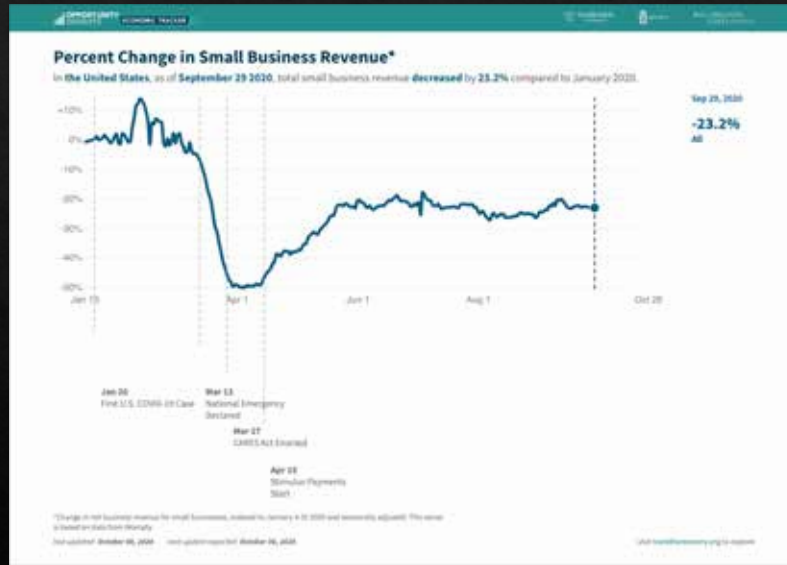


The chart above reflects the analysis of the Aspen Institute Financial Security Program / COVID-19 Eviction Defense Project (CEEP) as it relates to renters with No or Slight Confidence in the ability to pay next month's rent as well as the analysis of additional renters with a Moderate Confidence in the ability to pay next month's rent completed by Slout Riskus Ross, LLC. Independent analysis by Slout Riskus Ross, LLC of renters reporting No or Slight Confidence in the ability to pay next month's rent aligns with Aspen Institute-CEEP methodology above.

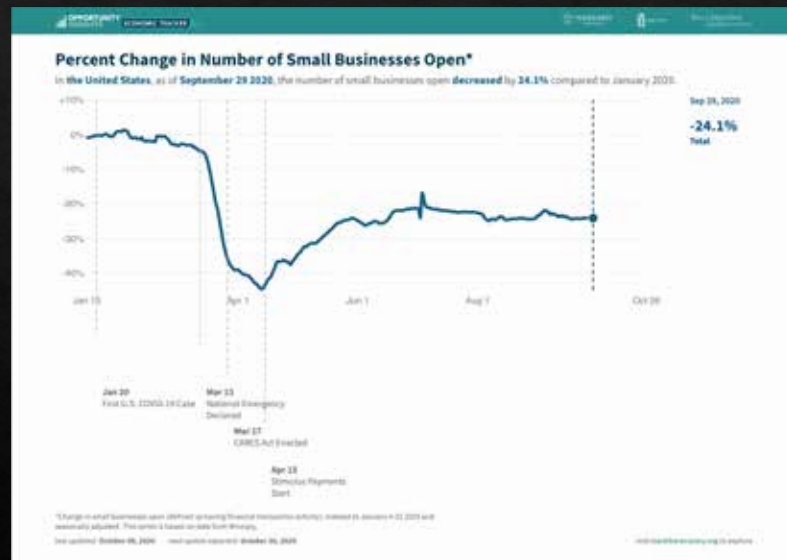
# Impact of Eviction Moratoria on Landlords



# Small Business Revenue



# Small Business Closures



# Where are we now?

March 27 CARES Act - includes \$1,200 stimulus checks, PPP for businesses, expanded unemployment, federal aid to airline industries

July 31 \$600/week increased unemployment payments stop

October 1 CARES Act allocation of federal aid to airlines expires, triggering layoff of 32,000 employees

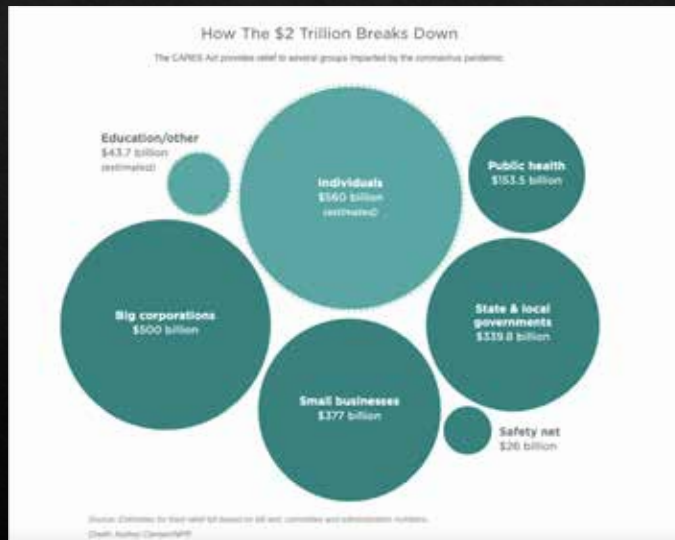
What comes next?

May 22-29 Rough expiration for the first PPP loan forgiveness period. Later expanded.

September 4-11 Rough expiration for expanded PPP loan forgiveness period.

December 25 End of extended unemployment period (from 26 to 39 weeks from March 27)

# Coronavirus Aid, Relief, and Economic Security (CARES) Act



## Debts & Defaults: Consumers

- ◇ Mortgages (& Foreclosure protection)
  - ◇ Moratoria
- ◇ Student Debt
  - ◇ Deferred payments (interest freeze)
- ◇ Medical Costs
  - ◇ Whither Affordable Care Act/Medicaid Expansion?
- ◇ Consumer bankruptcy
  - ◇ Are we just waiting for the shoe to drop?



## Will There Be Another Stimulus? (what's going on with talks on a \$2trillion relief package?)

◇ We need to provide aid to local governments and states

◇ We need to insulate employers from liability due to employee infection with Covid-19

- ◇ Enhanced unemployment benefits
- ◇ Aid to small businesses
- ◇ Money for increased testing/contract tracing
- ◇ Money for schools



# Where's the Vaccine?

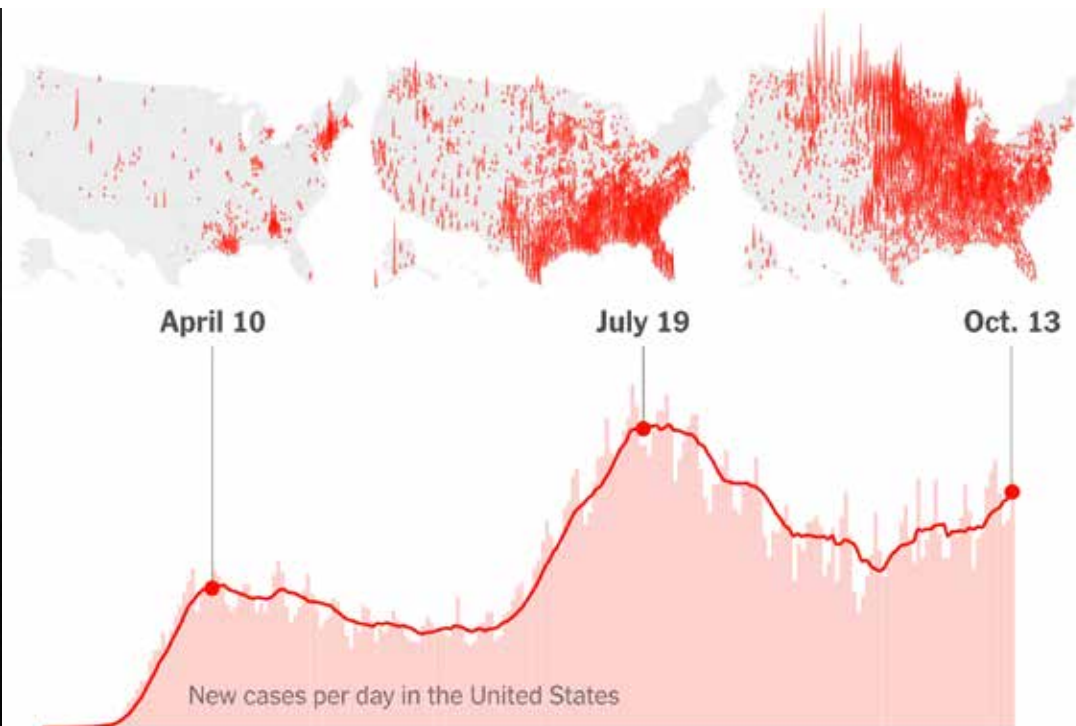
◇ “Despite the president’s repeated claims that a vaccine will be available in October, scientists, companies and federal officials all say that most people won’t get one until well into next year.” – New York Times (10/23/2020)



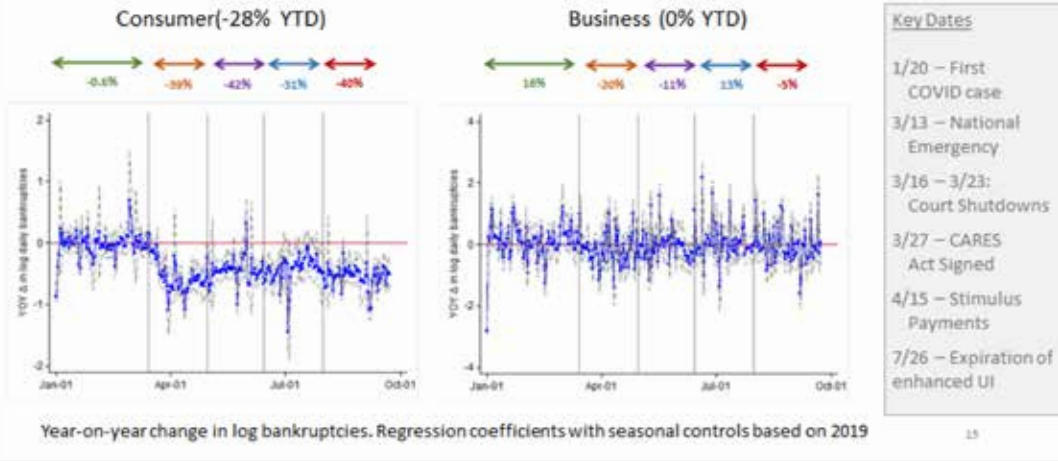
**\*\*MEANWHILE – the virus continues to SURGE**

On 10/24/20 in the US:

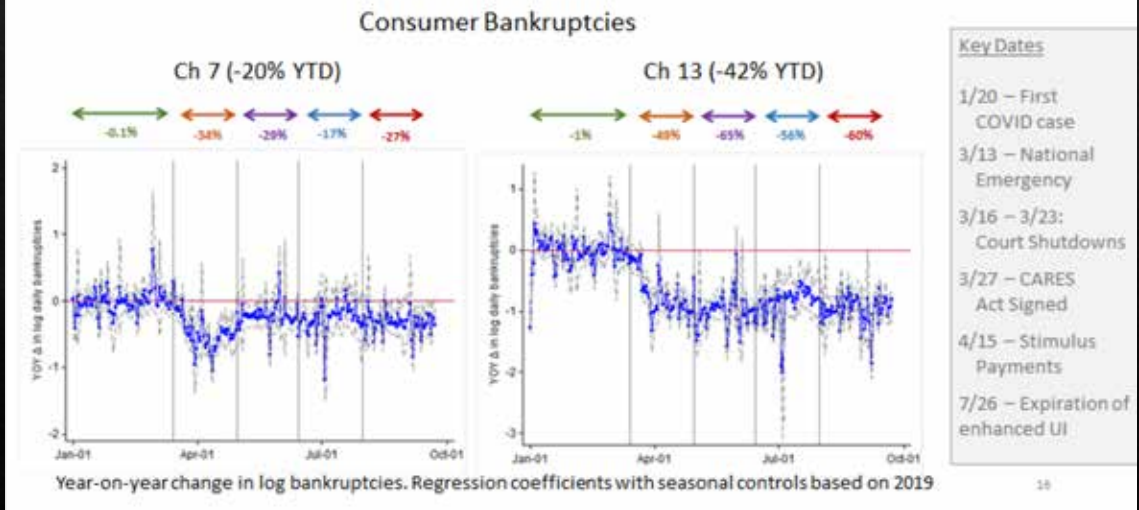
- ◇ 871 new coronavirus deaths
- ◇ 78,702 new cases
- ◇ Average new daily cases has increased 32% this past week from the average 2 weeks earlier
- ◇ As of 10/24:
  - ◇ 8,700,100+ people in the United States have been infected
  - ◇ At least 225,100 people in the US have died
- ◇ – New York Times (10/25/2020)

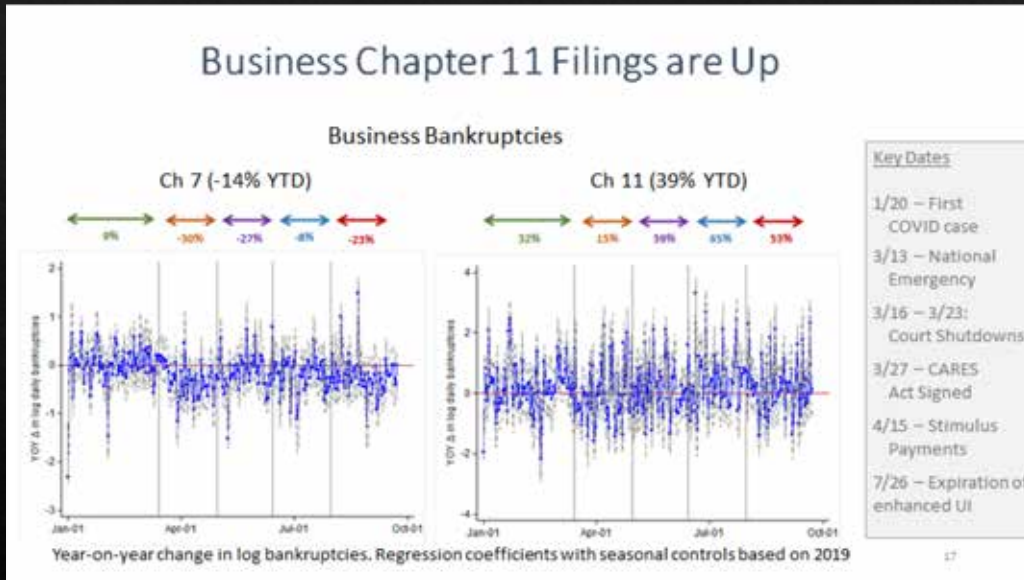


## Consumer Bankruptcies Dropped Significantly Starting In Mid-March

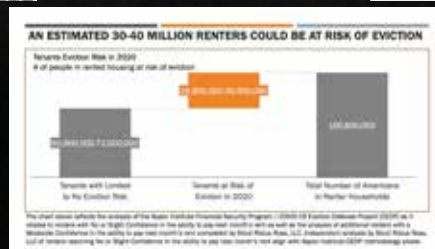
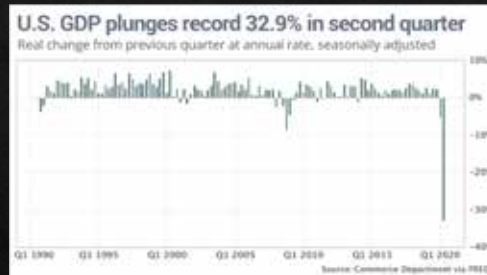
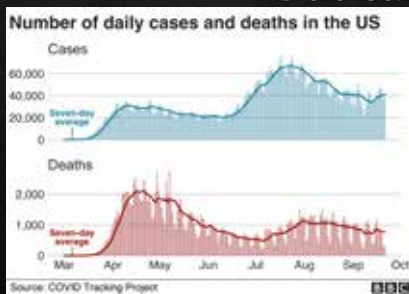


## Chapter 7 and 13 Diverged Starting in Mid-April





## We Got 99 Problems... But can they be solved by bankruptcy?



## Bankruptcy vs. Permanent Solution?

- ◇ Automatic stay → breathing room
  
- ◇ What bankruptcy doesn't solve:
  - uncertainty (restructuring needs some certainty about the future)
  - lack of income
  - bad / outdated business models
  - sustainable housing

## Bankruptcy & COVID 19 Working Group Large Corporate Committee Letters

May 7, 2020; June 10, 2020 – Congress

- Please hire more bankruptcy judges, clerks, and other necessary personnel to deal with the coming flood.
- See Iverson, et al.

## Bankruptcy & COVID 19 Working Group Small Business Committee Letters

May 26, 2020 – Congress

- Create “bankruptcy lite” option in subchapter V for 180 days;
- Extend time periods for debtors to cure executory contracts and leases, including amortizing over the life of the plan;
- Treat interest accumulated on undersecured debt after March 13, 2020 as unmatured;
- Echo call for more bankruptcy judges.

July 21, 2020 – Data Providers

- Provide regular updates to the public on the state of small business lending and loan performance.

## Bankruptcy & COVID 19 Working Group Consumer Committee Letter

July 28, 2020 – Congress

1. Halt all wage garnishments except for child support/alimony;
2. Make any debt collection efforts by a debt collector unfair practices through the end of 2020;
3. Extend the foreclosure moratorium through 2020;
4. Halt evictions through 2020;
5. Amend the Bankruptcy Code to ensure tenants can remain in rental housing;
6. Allow chapter 13 filers a 10% cushion on their budgets;
7. Fix the chapter 7 fees disparity;
8. Permit debtors to sign electronically.

# AMERICAN BANKRUPTCY INSTITUTE

## Consumer Bankruptcy & COVID-19 Working Group

Honorable Nancy Pelosi Speaker House of Representatives 1236 Longworth House Office Building Washington, DC 20515	Honorable Mitch McConnell Senate Majority Leader United States Senate 317 Russel Senate Office Building Washington DC 20510
Honorable Kevin McCarthy House Minority Leader House of Representatives 2468 Rayburn House Office Building Washington, DC 20515	Honorable Charles Schumer Senator Minority Leader United States Senate 322 Hart Senate Office Building Washington, DC 20510

July 28, 2020

Dear Sens. McConnell and Schumer, and Reps. Pelosi and McCarthy:

We are an interdisciplinary group of scholars who study consumer financial health, debt, collections, and the bankruptcy system (the “Consumer Committee of the Bankruptcy Scholars & COVID-19 Working Group”).<sup>1</sup> The COVID-19 pandemic will continue to have reverberating effects for American households as the country braces for the impact of the recent climb in COVID-19 cases. The increase in cases is coming at an incredibly inopportune time for Americans. Households’ economic insecurity is poised to rise even more as the Coronavirus Aid, Relief, and Economic Security (CARES) Act’s unemployment insurance provisions and foreclosure and eviction moratoria expire soon. Debt collections, foreclosures, and evictions may spike as many people are unable to return to work, as more people are laid off, and as states slow reopening plans to combat the continued public health emergency.<sup>2</sup>

Without targeted interventions that protect households from debt collection, foreclosure, and eviction, millions of Americans may consider filing bankruptcy.<sup>3</sup> Bankruptcy courts are not well-equipped to deal with such an increase in filings when the pandemic has already led to a surge in business filings.<sup>4</sup>

As Congress considers a second stimulus package to help American households, we write to highlight how Congress can avoid a wave of consumer bankruptcy filings and also how Congress can ensure

<sup>1</sup> The Consumer Committee of the Bankruptcy Scholars & COVID-19 Working Group Committee is one of four committees that are part of a larger Working Group studying financial distress and COVID-19, each focused, respectively, on either (1) large corporations, (2) small businesses, (3) consumers, or (4) municipalities. The Consumer Committee of the Bankruptcy Scholars & COVID-19 Committee includes, with institutional affiliations included for identification purposes only: Pamela Foohey, Professor of Law, Indiana University Maurer School of Law; Sara S. Greene, Professor of Law, Duke University School of Law; Tal Gross, Associate Professor of Markets, Public Policy and Law, Questrom School of Business, Boston University; Dalié Jiménez, Professor of Law, University of California, Irvine School of Law; Raymond Kluender, Assistant Professor, Harvard University; Michelle M. Miller, Associate Professor of Economics, Loyola Marymount University; John A. E. Pottow, John Philip Dawson Collegiate Professor of Law, University of Michigan Law School; Felipe Severino, Associate Professor of Business Administration, Dartmouth College, Paige Marta Skiba, Professor of Law, Vanderbilt University. Members of the Working Group who agree with our recommendations are listed as additional signatories below.

<sup>2</sup> “The Debt Collection Pandemic,” Pamela Foohey, Dalié Jiménez & Christopher K. Odet, *California Law Review*, May 2020, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3598623](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3598623).

<sup>3</sup> “Life in the Sweatbox,” Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *Notre Dame Law Review*, 94(1), 2018.

<sup>4</sup> U.S. Chapter 11 bankruptcy filings surge in May, *Reuters*, Jun. 20, 2020, <https://www.reuters.com/article/us-health-coronavirus-bankruptcy/u-s-chapter-11-bankruptcy-filings-surge-in-may-idUSKBN23B2K3>.

that bankruptcy is financially useful to those who file. Our recommendations fall into two categories: those designed to avoid a wave of consumer bankruptcy filings and those designed to improve the bankruptcy system's ability to help people who still file.

## I. Avoiding a Wave of Consumer Bankruptcy Filings

We have four recommendations to aid households with the continued financial fallout of the COVID-19 crisis. Each recommendation is tailored to deal with the debt collections, foreclosures, and evictions that households experience when they are unable to remain current with their debts. Given that the COVID-19 crisis continues unabated, millions more Americans may lose their jobs, many of those people who are currently unemployed are unlikely to find new employment, and as schools and daycares continue to be closed or close again, more people (primarily women) will be forced to leave the workforce to take care of children. Overall, tens of millions of American households are likely to be unable to repay their debts. For many households, the financial problems may be temporary. With financial assistance and a pause on collections, foreclosures, and evictions, they will be able to weather the COVID-19 storm without filing for bankruptcy. Our goal is to provide disaster relief while also not ending up in a situation in which lenders are unwilling to lend or landlords are unable to make ends meet. In these extraordinary times, we believe these policies will be net beneficial despite imposing costs on some business owners.

**Recommendation #1.** Halt all wage garnishments except for earnings currently allowed to be garnished for child support and alimony by amending § 303 of the Federal Wage Garnishment Law, Consumer Credit Protection Act's Title III (CCPA), 15 U.S.C. § 1671 et seq., to provide that 0% of an individual's earnings may be garnished until at least the end of 2020. The Federal Wage Garnishment Act currently protects only 75% of the worker's paycheck, or 30 times the minimum wage, whichever is greater. At this time and during the pendency of the COVID-19 crisis, people will need all of their wages to support themselves and their families. Halting wage garnishments except for domestic support obligations will give people much-needed breathing room while their incomes stabilize.

**Recommendation #2.** Declare that any collection of debt by a debt collector is an unfair practice in violation of the Fair Debt Collection Practices Act (FDCPA), § 808, until at least the end of 2020. Research shows that people file bankruptcy in response to creditor collection efforts.<sup>5</sup> During this crisis, through patch-work efforts, some states have halted debt collections.<sup>6</sup> Through the FDCPA, Congress can provide consistent and uniform relief to struggling families as they grapple with the financial fallout from the pandemic.

**Recommendation #3.** Extend the foreclosure moratorium provided in the CARES Act through at least the end of 2020, and expand forbearance coverage to all "federally related mortgage loans," as defined in § 3 of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 et seq. This extension, both in time and scope, will protect almost all home mortgages from foreclosure. Providing relief from mortgage debt will avoid economically untenable foreclosures and prevent people's need to file bankruptcy to deal with mortgage delinquencies that threaten their housing. At a time when

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<sup>5</sup> "Life in the Sweatbox," *supra* note 3.

<sup>6</sup> "The Debt Collection Pandemic," *supra* note 2.

people need to “shelter at home,” temporarily pausing home foreclosures is crucial in controlling the public health crisis.

**Recommendation #4.** Halt all proceedings to evict tenants from rental housing through at least the end of 2020. Congress has the power to enact such temporary legislation under the Commerce Clause. There is existing legislative precedent for such protection in § 3951 of the Servicemembers Civil Relief Act of 2003 (SCRA), 50 U.S.C. § 3901 et seq., which Congress can refer to as a model. Crucially, Congress must not only extend the eviction moratorium provided in the CARES Act, but also expand the protection to cover almost all renters. The CARES Act’s eviction moratorium proved too limited in scope, resulting in reports of evictions and states stepping in to offer an ineffective patchwork of eviction relief.<sup>7</sup> As with the foreclosure moratorium, at a time when people need to shelter-at-home, providing a consistent and uniform law that temporarily pauses rental evictions is crucial to managing the public health crisis.

## II. Making the Bankruptcy System Responsive to the Pandemic’s Unique Conditions

Although the recommendations above are targeted to prevent an onslaught of consumer bankruptcy filings in the wake of debt collection, foreclosures, and evictions, some Americans will nevertheless seek bankruptcy protection due to and during the pandemic. We have four recommendations to improve the bankruptcy system’s ability to help people who file during the conditions prompted by the COVID-19 crisis. Each recommendation is tailored to the unique and rapidly evolving financial situations of households during the crisis.

**Recommendation #5.** Ensure that tenants can remain in rental housing after they file bankruptcy. This recommendation requires two minor changes to the Bankruptcy Code, 11 U.S.C. § 101 et seq. First, amend § 365(b) to provide that debtor-tenants who file chapter 7 are not required to pay past-due rent arrearages in order to remain in rental units, as this section currently reads to require. Second, amend § 362(b)(22) to provide that the automatic stay remains in place even if a landlord had initiated an eviction proceeding prior to an individual’s bankruptcy filing. At present, this section provides that the automatic stay expires 30 days following the petition date to permit landlords to continue eviction proceedings against debtor-tenants. As noted above, ensuring that people have a place to live is crucial to controlling the public health crisis. We recognize that this may mean some landlords will not be able to make ends meet and thus require additional small-business relief.

**Recommendation #6.** Provide that debtors who file chapter 13 may add an amount equivalent to 10% of their pre-tax monthly income to their monthly expense total that is used to calculate the amount of disposable income to be distributed to creditors through repayment plans, § 1325(b). At present, repayment plans provide no cushion to account for changes to debtors’ monthly expenses. Debtors must move to modify their repayment plans per § 1329, a process which is expensive and time consuming. Likewise, debtors currently making payments under a confirmed chapter 13 plan should be allowed to amend their plans to include this 10% cushion. The Code currently assumes that households’ budgets will remain relatively steady. This is likely not to be true for many people during the COVID-19 crisis. Providing chapter 13 debtors with a small cushion will allow them to meet their plans’ requirements during a time when their budgets may change month-to-month.

**Recommendation #7.** Amend the Code to address the current disparity in the timing of payment of attorney’s fees in chapter 7 versus chapter 13 cases. At present, as summarized in the Final Report of

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<sup>7</sup> “Measuring Evictions During the COVID-19 Crisis,” <https://www.clevelandfed.org/en/newsroom-and-events/publications/community-development-briefs/db-20200717-measuring-evictions-during-the-covid-19-crisis.aspx#>

the American Bankruptcy Institute’s (ABI) Commission on Consumer Bankruptcy<sup>8</sup> (pp. 89–93), attorneys who represent people filing chapter 7 normally require that their fees be paid prior to the filing. But many people will not have sufficient liquidity to pay these fees prior to filing, leading some debtors to file chapter 13 even though it might not be the most appropriate financial and legal decision.<sup>9</sup> Crucially, attorneys charge about \$2,000 more to assist with a chapter 13 case,<sup>10</sup> which is a longer and more complicated proceeding. The ABI Commission on Consumer Bankruptcy recommends amendments to the Code whereby attorney’s fees are excepted from discharge, with procedural protections to ensure the reasonableness of attorney’s fees, as outlined on pp. 96–97. We support this recommendation. Ensuring that people are not deterred from filing under the chapter suited to their financial and legal needs because they do not have money to pay attorney’s fees prior to filing will improve access to bankruptcy and the functioning of the bankruptcy system.

**Recommendation #8.** Allow debtors to sign documents electronically and ensure that all bankruptcy courts provide a way for *pro se* debtors to file their petitions and other documents electronically. A handful of bankruptcy courts still require debtors to sign paper petitions with a wet ink signature. Likewise, although some bankruptcy courts presently allow *pro se* debtors to file electronically, not all bankruptcy courts across the country have implemented electronic filing for people who file without an attorney. Congress should allocate resources to those courts to ensure that all people can file with electronic signatures and electronically regardless of whether they have assistance from a bankruptcy attorney.

Finally, the Large Corporate Committee of our working group of scholars has written to you several times recommending the appointment of additional temporary bankruptcy judges and budget increases for employing staff such as law clerks and judicial assistants. We support that Committee’s recommendations regarding additional bankruptcy court staffing and funding. Like the Large Corporate Committee, we have every confidence in our existing bankruptcy judges, but are concerned that a wave of business bankruptcy cases will cause a bottleneck for consumer cases.

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<sup>8</sup> American Bankruptcy Institute Commission on Consumer Bankruptcy Final Report (2019), <https://www.nclc.org/images/pdf/bankruptcy/rpt-abi-commission-on-consumer-bankruptcy.pdf>.

<sup>9</sup> “No Money Down Bankruptcy,” Pamela Foohey, Robert M. Lawless, Katherine Porter, & Deborah Thorne, *Southern California Law Review* 1055 (2017).

<sup>10</sup> *Id.*

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We would welcome the opportunity to discuss these recommendations with you.

Sincerely,

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cc:

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## 2020 MIDWESTERN VIRTUAL BANKRUPTCY INSTITUTE

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\* Additional Signatories are members of the Bankruptcy & COVID-19 Working Group who are not part of the Consumer Committee but elected to sign this letter because they support its conclusions. Institutional affiliations are included for identification purposes only.

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May 7, 2020

Dear Sens. McConnell and Schumer, and Reps. Pelosi and McCarthy:

We are an interdisciplinary group of scholars who study the corporate bankruptcy system and the problems associated with financial distress. We have formed a committee (the “Large Corporations Committee of the Bankruptcy & COVID-19 Working Group” or the “Large Corporations Committee”)<sup>1</sup> to analyze the effect of the global COVID-19 pandemic on large American businesses and to consider changes that might be needed to improve the ability of the bankruptcy system to cope with the crisis. While we are in the early stages of our work, we write today to recommend strongly that Congress add capacity to the bankruptcy system to prepare for what we fear could be a flood of large corporate bankruptcies arising out of this pandemic. In particular, we urge Congress to appoint additional temporary bankruptcy judges and to increase the budgets of our existing bankruptcy courts so they can bolster their ranks with retired judges, additional clerks, and other necessary personnel that enhance the capacity of the bankruptcy system.

We strongly believe that our bankruptcy system, if properly staffed, will be capable of managing the financial distress that the pandemic has created for large corporations. The

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<sup>1</sup> The Large Corporations Committee of the Bankruptcy & COVID-19 Working Group is one of four committees that are part of a larger group studying financial distress and COVID-19, each focused, respectively, on either (1) large corporations, (2) small businesses, (3) consumers, or (4) municipalities. The Large Corporations Committee includes, with institutional affiliations included for identification purposes only: Barry Adler (New York University Law School), Edward Altman (New York University Stern School of Business), Ken Ayotte (UC Berkeley Law), Efraim Benmelech (Northwestern University Kellogg School of Management), Jared A. Ellias (University of California Hastings College of the Law), Stuart Gilson (Harvard Business School), Edith Hotchkiss (Boston College Carroll School of Management), Troy McKenzie (New York University School of Law), Greg Nini (Drexel University LeBow College of Business), Michael Ohlrogge (New York University Law School), Robert K. Rasmussen (University of Southern California Gould School of Law), Mark Roe (Harvard Law School), Steven L. Schwarcz (Duke University School of Law), Alan Schwartz (Yale Law School), Lindsey Simon (University of Georgia School of Law), David C. Smith (University of Virginia McIntire School of Commerce), Frederick Tung (Boston University School of Law), George Triantis (Stanford Law School), Wei Wang (Queen’s University Smith School of Business) and Jay Westbrook (University of Texas School of Law). This Letter represents the consensus view of the Large Corporations Committee, all of whom are signatories to it. Additional members of the Working Group who agree with our recommendations are listed as additional signatories below.

bankruptcy code is now mature law, well-understood by lawyers and businesses and the system has shown an impressive capability to speedily and predictably resolve the wide range of issues that a bankruptcy filing often creates. While no legal regime is perfect, our high-quality bankruptcy law is a key comparative advantage for the United States in this unprecedented pandemic. Bankruptcy law will help many American businesses restructure their operations to re-emerge as strong competitors and employers. To be sure, additional reforms may be needed as the crisis advances, but the existing bankruptcy system proved capable of handling many crises in the past and it will likely be up to this challenge as well.

However, we are concerned with economic indicators that suggest that a wave of bankruptcies is coming, in particular:

- As of the end of 2019, large corporations had borrowed approximately \$1.5 trillion of high-yield bond debt and \$1.4 trillion in the leveraged loan market. Analysts are now projecting that over the next calendar year, 7-16% and 5-7% of these debts could be in default; by the end of 2021, these default rates could reach or exceed 20% and 17%;
- Combined, this equates to expected corporate defaults on as much as \$500 billion in debt over the next 18 months, with much of this likely to end up in the bankruptcy system;
- These sobering projections are already reflected in debt market prices, as more than 34% of high-yield bonds and 40% of leveraged loans are trading at a significant discount to face value, with 14% of high-yield bonds and 9% of leveraged loans trading at a level that credit analysts usually treat as indicating financial distress;
- Bank of America has warned that another \$200 billion of additional, investment grade debt could be subject to a downgrade by the end of the year, and iconic American firms like Occidental Petroleum, Ford and Kraft Heinz have already been downgraded to junk status;
- Additionally, many municipal entities have been downgraded by credit ratings agencies, reflecting their deteriorating finances and signaling a future need for Chapter 9 bankruptcy;
- The unemployment rate, a traditional leading indicator of consumer bankruptcy filings, may have reached 16% in April according to consensus estimates.

The economy may very well recover quickly enough that some of these worrying indicators turn out to be false positives and not signs of a coming bankruptcy surge. But Congress can prepare for a bankruptcy surge at a relatively low cost today. Even in the best economic times, our bankruptcy judges often have busy dockets with some mix of consumers, municipalities, small businesses and large corporations in one unified court system. As a result, a surge among consumers, for example, will reduce the capacity the bankruptcy courts have for the needs of large firms, municipalities and small businesses. By bolstering the bankruptcy courts, Congress can create additional resources that can be deployed against a wide range of possibilities in an uncertain time.

We have every confidence in our existing bankruptcy judges, but we also fear that their courts may be overwhelmed by this flood of cases. To be sure, it is difficult to project the future under any circumstances, and especially so now, but if there is a wave of large corporate bankruptcies caused by this pandemic we will want the bankruptcy courts to have the capacity to handle them well. In normal times, bankruptcy judges are able to hear important requests for judicial orders to stabilize reorganizing businesses on very short notice. This responsiveness is especially critical for large businesses that need the protection of bankruptcy law to hold together complex global operations and supply chains. To the extent that bankruptcy courts become too busy, it will impact

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not only bankrupt firms but also their employees and, indirectly, the healthy companies that do business with Chapter 11 debtors and who also rely on the bankruptcy courts to protect Chapter 11 debtors.

Accordingly, we urge Congress to (i) appoint additional temporary bankruptcy judges to increase the capacity of district courts and (ii) increase the budget that Congress provides bankruptcy judges to spend on operations, especially, without limitations, funds for recalling retired judges, supporting the travel of judges providing service outside their appointed districts, and employing staff such as law clerks and judicial assistants. By adding judges, Congress can put capacity in place now that could be brought to bear as our bankruptcy courts begin to fill up with large corporations, consumers, municipalities and small businesses. Under normal circumstances, it takes about a year to fill a vacancy on the bankruptcy courts. While this process can be accelerated, the time to act is now before any flood of bankruptcies begins. As a more immediate measure, Congress can give judges additional money to support recalling additional retired judges, the movement of judges between districts, and the hiring of law clerks and other staff, thus providing new resources for our existing judges to help ensure that corporations and creditors receive the due process that is a hallmark of our bankruptcy system.

Sincerely,

/s/ Jared A. Elias

Jared A. Elias, Chair  
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\* “Additional Signatories” are members of the Bankruptcy & COVID-19 Working Group who are not part of the Large Corporate Committee but elected to sign this Letter because they support its conclusions. Institutional affiliations are included for identification purposes only.

<sup>†</sup> Denotes Bankruptcy & COVID-19 Working Group organizer.

## AMERICAN BANKRUPTCY INSTITUTE

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May 26, 2020

Dear Sens. McConnell and Schumer, and Reps. Pelosi and McCarthy:

This proposal is intended to assist small businesses struggling to survive in the wake of the economic crisis provoked by the COVID-19 pandemic. Specifically, we propose changes to the Small Business Reorganization Act of 2019 (now subchapter V of Chapter 11) that would give debtors essential breathing room to manage their debts in the wake of the national shutdown, allowing viable debtors to reorganize and return to profitability in the near future.

We are an interdisciplinary group of scholars who study the corporate bankruptcy system and the problems associated with financial distress. We have formed a committee (the “Small Business Committee of the Bankruptcy & COVID-19 Working Group” or “Committee”) to analyze the effect of the COVID-19 pandemic on small American businesses and to consider changes that might be needed to improve the ability of the bankruptcy system to cope with the crisis. While we are in the early stages of our work, and there are many issues still to cover, we write today to recommend strongly that Congress adopt temporary changes to the Bankruptcy Code that allow small business owners to delay proceedings until economic activity has been substantially restored.

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<sup>1</sup> The Small Business Committee of the Bankruptcy & COVID-19 Working Group is one of four committees that are part of a larger group studying financial distress and COVID-19, each focused, respectively, on either (1) large corporations, (2) small businesses, (3) consumers, or (4) municipalities. The Small Business Committee includes, with institutional affiliations included for identification purposes only: Anthony Casey (University of Chicago Law School), Brook Gotberg (University of Missouri School of Law), Robin Greenwood (Harvard Business School), Benjamin Iverson (BYU Marriott School of Business), Edward Janger (Brooklyn Law School), Song Ma (Yale University School of Management), Edward Morrison (Columbia University Law School), Katherine Waldock (Georgetown University McDonough School of Business), Jialan Wang (University of Illinois Urbana-Champaign Business School), Michelle White (University of California San Diego and NBER), and Yesha Yadav (Vanderbilt University Law School). Additional members of the Working Group who agree with our recommendations are listed as additional signatories below.

We recommend an automatic six-month suspension of small business cases commenced under Subchapter V of Chapter 11 during the COVID-19 pandemic.<sup>2</sup> During this suspension, small businesses would receive the protection of the automatic stay and permission to continue operating in the ordinary course. In all other respects, the Chapter 11 case would be functionally on hold, with internal bankruptcy deadlines tolled and motions to lift the automatic stay delayed. Secured creditors would be deemed adequately protected.<sup>3</sup> Further, obligations that would typically require payment in full prior to the confirmation of the plan, including cure amounts for assumed contracts and leases, would be eligible for amortization as part of a confirmed plan.

The overarching issue that our proposal aims to address is uncertainty about the prospects of financially distressed small businesses. Chapter 11 bankruptcy is designed to differentiate between viable and non-viable businesses, and current law is geared to perform this filtering in a functioning economy. But this differentiation will be difficult, if not impossible, in the current economic environment of artificially depressed cash flows. The problem is further complicated by possible structural changes in the U.S. economy following the pandemic. Under the current regime, standard deadlines and mandatory motions will force judges, creditors, and owners to make decisions with little indication of the long-term viability of restructuring firms. Without reform, we anticipate that a significant fraction of viable small businesses will be forced to liquidate, causing high and irreversible economic losses. Workers will lose jobs even in otherwise viable businesses. Assets will be sold at steep discounts and at effectively fire-sale valuations, pushing asset values down across Main Street. Alternatively, tight deadlines may lead to overly-optimistic restructuring plans and subsequent re-filings that will congest courts and delay future recoveries.

Below, we detail the unique problems that the COVID-19 pandemic has created for small businesses that may seek relief through Chapter 11. For each problem, we propose temporary solutions that will help smooth the transition back to a robust economy.

**Problem 1: If a business has impaired cash flows and there is lingering uncertainty about future recovery, it will be difficult to form a restructuring plan within currently-prescribed time frames.**

Small business debtors need more time to allow economic uncertainty to decrease. We recommend the law be amended to automatically extend the following deadlines by 180 days for all small business debtors commencing cases under Subchapter V of Chapter 11:

- The 30-day deadline for a hearing on a motion to lift the automatic stay; *see* 11 U.S.C. § 362(e)
- The 30-day deadline for filing all schedules and statements of financial affairs; *see* 11 U.S.C. §§ 1116, 1187
- The 60-day deadline for a status conference; *see* 11 U.S.C § 1188(a)

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<sup>2</sup> The definition of a small business would be that adopted by the Small Business Reorganization Act (SBRA), as amended by the CARES Act. *See* 11 U.S.C. § 101(51D); CARES Act § 1113. The same sunset provision applicable to the bankruptcy provisions of the CARES Act would also apply to these proposals.

<sup>3</sup> See “Problem 3” below for discussion of additional protections for creditors.

- The 90-day deadline to file a plan; *see* 11 U.S.C § 1189(b)
- The 300-day absolute deadline to file a plan; *see* 11 U.S.C § 1121(e)(2)
- The deadline for the payment of filing fees; *see* 28 U.S.C § 1930(a)(6)(A)

We further recommend that ongoing reporting requirements be likewise suspended for 180-days. *See* 11 U.S.C. § 308.

**Problem 2: Business owners need permission to use cash so that they can pay their employees and continue operating during bankruptcy. This is true whether or not a business is actually operating or, like many, shut down for an extended period as “non-essential” in a time of pandemic.**

In order for a business owner in bankruptcy to meet expenses associated with the maintenance of the business as a going concern, she must first receive permission from the court. These expenditures include payments to employees and essential suppliers. Sources of financing for these expenditures typically include cash collateral and, in some cases, post-petition credit provided by external lenders.

We recommend that, for small business debtors whose deadlines have been tolled as set forth above, the following motions, if submitted, should nonetheless be heard at the outset of the case:

- Motions to pay prepetition wages and to continue paying wages and benefits in the ordinary course
- Motions to use cash collateral as necessary to continue operating in the ordinary course of business (“cash collateral motions”)
- Motions to give administrative expense priority to claims arising from essential supplier agreements (“critical vendor motions”)
- Motions to permit debtors to obtain, on a super-priority basis, any additional funds needed to maintain operations during the case (“debtor-in-possession financing motions”)

We further recommend that, for purposes of cash collateral motions, a business that remains fully or partially shut down pursuant to state order, the recommendation of health officials, or the economic realities of the moment can be considered operating in the ordinary course of business.

**Problem 3: While in bankruptcy, some businesses may fail to preserve the value of assets. Courts should ensure that the value of collateral is protected while avoiding lengthy disputes during the suspension period.**

While in bankruptcy, some businesses may not have proper incentives to preserve the value of assets that are pledged as collateral to secured creditors. Those creditors should have the right to ensure that their collateral is adequately protected. At the same time, systemic asset price disruptions resulting from the pandemic should not serve as justification for secured creditors to

seek relief from the automatic stay. Those relief motions may act as nuisances that entangle business owners in court battles, or, even worse, act as fuel that aggravates the fire sale of assets.

Many small business owners who are unable to pledge substantial collateral for loans instead rely on personal guarantees of their business debts. To some extent, creditors seeking judgments for those personal guarantees operate outside the bankruptcy system. However, any deadlines that are tolled for a small business case should also be tolled for an individual case that results from the enforcement of a personal guarantee of that business's debt.

We recommend that, for small business debtors whose deadlines have been tolled as set forth above, the Bankruptcy Code be amended, to give the court the additional power to:

- Suspend motions for relief of stay until the end of the 180-day period
- Hear any motions for adequate protection brought by secured creditors and set amounts for adequate protection without relying on a motion for relief of stay
- Apply the 180-day tolling of deadlines to any individual Chapter 7, Chapter 11, or Chapter 13 cases that arise as a result of a judgment associated with a personal guarantee of any business debt that is part of the original small business case

**Problem 4: Small businesses may have accumulated significant unpaid obligations prior to bankruptcy that, under normal circumstances, would be due immediately following a bankruptcy filing, and which would prove onerous to any plan of reorganization.**

Given the current crisis, small businesses may enter bankruptcy with unprecedented levels of unpaid lease and mortgage obligations. Small businesses in the current environment are unlikely to have the resources to make these payments up front, and may struggle to make the payments at all.

For small business debtors whose deadlines have been tolled as set forth above, we recommend the following changes to alleviate the pressure of these obligations:

- The prompt cure provision for unpaid executory contracts or lease obligations be temporarily relaxed so that small business owners can negotiate and amortize these payments over the life of a confirmed plan; *see* 11 U.S.C § 365(b)
- For secured obligations for which the value of the collateral exceeds the value of the debt, interest accumulated between March 13, 2020<sup>4</sup> and the date of the bankruptcy filing be treated as “unmatured” and therefore disallowed; *see* 11 U.S.C §§ 502(b)(2); 506(b)

**Problem 5: Small businesses may not be able to make lease payments while the effects of COVID-19 persist.**

For many small businesses, it will be critical for the maintenance of ongoing operations that they remain in the same commercial space. However, they may not be able to perform under

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<sup>4</sup> March 13, 2020 was the date of the national emergency proclamation concerning COVID-19.

lease agreements that were executed prior to the pandemic. Debtors need time to restore cash flows before these leases can be fully renegotiated. However, landlords should be entitled to assurance that the value of their property will be reasonably protected during the pendency of the bankruptcy case and that missed rent payments will not be readily extinguished upon confirmation of a plan.

We recommend that, for small business debtors whose deadlines have been tolled as set forth above, the following changes should be made to the Bankruptcy Code:

- Allow debtors 210 days to assume or reject leases; *see* 11 U.S.C. § 365(d)(4)(A)
- Suspend the requirement that the debtor perform its obligations under unexpired leases of nonresidential real property within 60 days after the order for relief, provided that the court finds that the debtor is continuing to experience a material financial hardship due, directly or indirectly, to the COVID-19 pandemic;<sup>5</sup> *see* 11 U.S.C. § 365(d)(3)

In addition, we recommend that the following motions (if submitted) should be heard promptly:

- Motions for the payment of utilities, insurance premia, and maintenance agreements
- Motions for the adequate protection of nonresidential commercial property, provided that landlords present evidence of significant diminution of value

**Problem 6: Even with the option to defer proceedings, courts may be flooded with cases as the economy stabilizes.**

We anticipate a dramatic increase in bankruptcy filings in the near future, as unpaid debts accumulate and lenders begin collection efforts. Although bankruptcy filings are currently down, we expect that a wave is coming. More filings require more resources from the bankruptcy system.

We propose the following solutions:

- Appoint additional bankruptcy judges, even if only on a temporary basis
- Select additional SBRA subchapter V trustees, even if only on a temporary basis

Notwithstanding any of the recommendations made above, we believe that courts should have the flexibility to dismiss any case for which a global settlement among parties is reached. Any case that is not dismissed by the end of the 180-day deferral period should proceed according to the rules of the Code as modified by the SBRA.

We look forward to discussing these recommendations with you.

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<sup>5</sup> *See* *In re Pier 1 Imports, Inc.*, No. 20-30805 (KRH), 2020 WL 2374539, (Bankr. E.D. Va. May 10, 2020)

**2020 MIDWESTERN VIRTUAL BANKRUPTCY INSTITUTE**

Sincerely,

/s/ Brook Gotberg

Brook Gotberg, Chair

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June 10, 2020

Dear Sens. McConnell and Schumer, and Reps. Pelosi and McCarthy:

We write to supplement our letter (the “Original Letter”), dated May 20, 2020, in which we urged Congress to add capacity to the bankruptcy system to prepare for a potential flood of cases. In particular, we urged you to appoint additional temporary bankruptcy judgeships. After we distributed the Original Letter and had discussions with congressional staff and others, we decided it would be helpful to study the extent of the anticipated shortfall and to present our analysis and conclusions about where it would be most severe. This letter (the “Letter”) summarizes our analysis, and the attached Appendix presents our methodology and conclusions in greater detail.

As a reminder, we are an interdisciplinary group of scholars who study the corporate bankruptcy system and the problems associated with financial distress. We have formed a committee (the “Large Corporations Committee of the Bankruptcy & COVID-19 Working Group” or the “Large Corporations Committee”)<sup>1</sup> to analyze the effect of the global COVID-19 pandemic

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<sup>1</sup> The Large Corporations Committee of the Bankruptcy & COVID-19 Working Group is one of four committees that is part of a larger group studying financial distress and COVID-19, each focused, respectively, on either (1) large corporations, (2) small businesses, (3) consumers, or (4) municipalities. The Large Corporations Committee includes, with institutional affiliations included for identification purposes only: Barry Adler (New York University Law School), Edward Altman (New York University Stern School of Business), Ken Ayotte (UC Berkeley Law), Efraim Benmelech (Northwestern University Kellogg School of Management), Diane Dick (Seattle University School of Law), Jared A. Elias (University of California Hastings College of the Law), Stuart Gilson (Harvard Business School), Edith Hotchkiss (Boston College Carroll School of Management), Troy McKenzie (New York University School of Law), Greg Nini (Drexel University LeBow College of Business), Michael Ohlrogge (New York University Law School), Robert K. Rasmussen (University of Southern California Gould School of Law), Mark Roe (Harvard Law School), Steven L. Schwarcz (Duke University School of Law), Alan Schwartz (Yale Law School), Lindsey Simon (University of Georgia School of Law), David C. Smith (University of Virginia McIntire School of Commerce),

on large American businesses and to consider changes that might be needed to improve the ability of the bankruptcy system to cope with the crisis.

As a reminder, we are concerned that our bankruptcy system, the best in the world, may be overwhelmed in this time of crisis. Our bankruptcy courts are a place of refuge for financially distressed consumers, small businesses, municipalities and large corporations, all of whom stand to lose if bankruptcy judges are forced to ration their attention. Consumers may be forced to wait to receive their bankruptcy discharge. Municipalities may struggle to get the hearings they need to deal with their complex challenges. And large corporations may be slowed from restructuring as quickly as possible, delaying our economic recovery. In our unified bankruptcy system, a spike in consumer bankruptcies reduces the time that judges, and their staffs, have for business bankruptcies, and vice versa.

In our May 20 letter, we indicated our concern that economic indicators pointed to an eventual surge in bankruptcy filings. Since then, our concern has increased:

- Analysts are projecting that unemployment rate will remain above 10% for at least a year—and high unemployment has been a leading indicator of bankruptcy filings;
- The bankruptcy system in May already had, by some measures, the highest rate of large corporate bankruptcies since 2009 and the highest ever rate of mega-bankruptcies with more than \$1 billion in assets and liabilities;
- On the consumer and small business side, we are fortunately seeing far fewer bankruptcy filings than we saw during the same period last year. We suspect though this to be a sign of temporary payment forbearance and increased unemployment benefits, combined with deep uncertainty and public health concerns that may prevent current bankruptcy filings. If so, consumer and small business filings will rise in the coming months; and
- State and municipal budgets continue to collapse, pointing to deep distress among American municipalities, who may need to seek Chapter 9 bankruptcy relief as a result.

Accordingly, we estimated how many bankruptcy judges would be needed to handle the bankruptcy filings that this pandemic could create. Our analysis relies on the historic relationship between the unemployment rate and the bankruptcy filing rate. Studying recent history, we find that increases in unemployment are usually followed, months later, by increases in bankruptcy filings. To be sure, we cannot guarantee that the relationship between the unemployment rate and the bankruptcy filing rate will follow absolute historic patterns, given the staggering amount of uncertainty in the economy. However, we strongly believe that it will be prudent to consider what the result would be if the historic relationship between unemployment and bankruptcy filings remains similar to past recessions.

As we explain in greater detail in the attached Memorandum, our analysis starts with the national unemployment rate, which we adjust at the county level to reflect the fact that each judicial district contains a different mix of industries that are differentially impacted by COVID-19. We

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Frederick Tung (Boston University School of Law), George Triantis (Stanford Law School), Wei Wang (Queen's University Smith School of Business) and Jay Westbrook (University of Texas School of Law). This Letter represents the consensus view of the Large Corporations Committee, all of whom are signatories. Additional members of the Working Group who agree with our recommendations are listed as additional signatories below.

then estimate the historic relationship between unemployment and bankruptcy filings for each judicial district. Next, we use the Federal Judicial Center’s (“FJC”) estimates of how many court hours each type of bankruptcy requires.<sup>2</sup> We adjust further to capture the extra time that large corporate cases require of judges, which were otherwise grouped with small businesses under the generic category of “Chapter 11.” We then assume, as is typical in these estimates, that each judge spends half of her workday presiding over court hearings and the other half performing her other judicial tasks, such as writing opinions and preparing for those hearings. We further assume that Congress would like to have enough bankruptcy judges such that the average judge would not be pressed to work more than the rate that bankruptcy judges did nationally in 2010, when the rise in filings stressed the bankruptcy courts—about 50 hours a week on average, based on the data we have available. While our bankruptcy judges could surely work more, at some point it becomes impossible to continue working at peak levels of effectiveness.

Given how sharp the recent rise in unemployment has been, we were not surprised when the model projected that we would need 246 additional bankruptcy judges, a very large number. Even if the unemployment rate falls somewhat over the next year from 13.3% to 12.74% — an average of the most recent projections from the Congressional Budget Office and the Federal Reserve Bank of Philadelphia’s survey of economists — the projected need for additional bankruptcy judges only drops to 219.

True, the sudden increase in unemployment that we have seen across the United States may be shorter-lived than previous spikes because of the unique attributes of the COVID-19 pandemic. For example, many people may return to work in a quick burst as public health rules are relaxed. There is some survey evidence that reflects this possibility, as the share of workers who believe that they are only temporarily unemployed is 56% higher than normal. If their belief turns out to be accurate — and we should be careful not to assume that it will be, only that it is plausible and that we should assess the impact if turns out to be accurate — current unemployment may not translate into as many future bankruptcies. If a “return to work” happens relatively quickly, it would reduce the projected need for additional judges, but our model would still suggest a need for a substantial number — 50 — additional bankruptcy judges.

Our unemployment-based models consistently indicate that the need will be most severe in the Middle District of Florida, the Northern District of Georgia, the District of Delaware and the Northern District of Texas. Other districts that appear to be at risk of becoming overwhelmed include the Northern District of Illinois, the Southern District of Florida and the Eastern District of Michigan.

Finally, we note that the judicial appointment process is important and cannot be quickly completed as soon as the courts begin to feel capacity pressure. We understand that the appointment process typically takes the better part of a year from its start to a judge being sworn

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<sup>2</sup> As we explain in greater detail in the Appendix, these “case-weight” projections are the product of a bankruptcy judge diary study that the FJC performed in 1991 at the request of the Judicial Conference of the United States. The reliability of these case-weights was generally affirmed in a GAO report in 2009, which questioned only the estimate of time spent in “mega” Chapter 11 cases, which we adjust for in our analysis. After we completed this analysis, the Judicial Conference provided us with their 2010 case-weights, which were updated in 2014, and gave us permission to use them. We recently re-estimated our projections with these updated case-weights and doing so did not materially alter our results, so we use the publicly available 1991 numbers for the purposes of this analysis. To the extent the 2010 case-weights would change our results, that change would point in the direction of somewhat *increasing* the number of judges our model predicts the system could need.

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in. It would be reasonable to start with some combination of re-appointing or making permanent all temporary judgeships, looking for volunteers among the nation's capable corps of retired bankruptcy judges, and seeking new temporary judges.<sup>3</sup> We also urge you to maintain the current temporary judgeships, as those judges are concentrated in the judicial districts that are likely to be the most severely impacted. We support the Federal Judicial Center's recent recommendation on this subject.

Accordingly, we urge Congress to (i) appoint additional temporary bankruptcy judges, (ii) increase the budget that Congress provides bankruptcy judges to spend on operations and staff, including the support necessary for retired judges who are recalled and willing to serve, and (iii) increase the number of U.S. Trustees appropriately. An appropriate, conservative target would aim to quickly start the process to fill the minimum plausibly estimated need — 50 — and then revise the estimates as we see economic and bankruptcy developments.

Ben Iverson, Jared Ellias and Mark Roe formed the subcommittee that investigated the impact, with Ben Iverson doing the primary work on the attached model. We are available to answer any questions.

Sincerely,

/s/ Jared A. Ellias

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<sup>3</sup> The Federal Judicial Center's registry indicates approximately 100 retirees, with about one-third of them demonstrably professionally active. It may be appropriate for Congress to suspend 28 U.S.C. § 377(m)(2) for the duration of the COVID-19 situation, which could otherwise impede the return of some of the most professionally-active retired judges.

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APPENDIX

**ESTIMATING THE NEED FOR ADDITIONAL  
BANKRUPTCY JUDGES IN LIGHT OF THE COVID-19 PANDEMIC**

Benjamin Iverson, Jared A. Elias, and Mark Roe<sup>1</sup>

**Abstract.**

This Memorandum (the “Memorandum”) assesses the bankruptcy system’s ability to absorb an anticipated surge of financial distress among American consumers, businesses and municipalities as a result of COVID-19. This document summarizes our research methodology, which uses economic data to estimate the court time pressure that consumers, small businesses and large firms could place on the bankruptcy system, district-by-district.

Historically, an increase in the unemployment rate has been a leading indicator of the volume of bankruptcy filings that will occur months later. If prior trends hold constant, the May 2020 unemployment rate of 13.3% will result in a substantial increase in all types of bankruptcy filings. Clearly, mitigation, governmental assistance, the unique features of the COVID-19 pandemic, and judicial triage will help reduce the volume of bankruptcies to some extent, and it is plausible that the impact of the recent unemployment spike will be smaller than history would otherwise predict. We hope this will be so. Yet, even assuming that the worst-case scenario could be averted, our analysis suggests substantial, temporary investments in the bankruptcy system may be needed.

Our model assumes that Congress would like to have enough bankruptcy judges such that the average judge would not be pressed to work more than was the case during the last bankruptcy peak in 2010, when the bankruptcy system was pressured and the public case-weights indicate that judges worked 50 hour weeks on average.

To keep the judiciary’s workload at 2010 levels, we project that, in the worst-case scenario, the bankruptcy system could need as many as 246 temporary judges, a very large number. But even in our most optimistic model, the bankruptcy system will still need 50 additional temporary bankruptcy judgeships, as well as the continuation of all temporary judgeships.

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<sup>1</sup> BYU Marriott School of Business; University of California, Hastings College of the Law; and Harvard Law School. The authors thank Jacob Barrera, Denise Han, Jessica Ljustina, Spencer Kau, Victor Mungary, Julia Staudinger, and Sara Zokaei for their helpful research assistance.

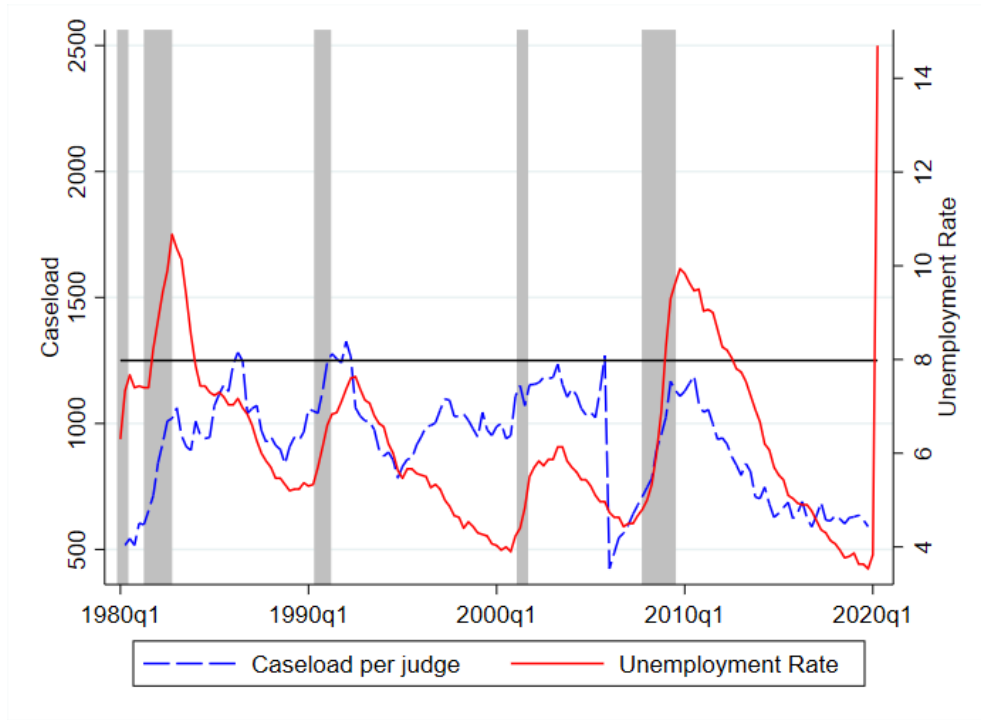
### Introduction

The Bankruptcy Act of 1978 created a unified bankruptcy system to address the financial distress of businesses, consumers, and municipalities. The Bankruptcy Code creates several options for distressed consumers and businesses that offer different forms of relief for distressed debtors. While COVID-19 has devastated the American economy, we are confident that the bankruptcy system will be up to the challenge of providing relief for distressed consumers and businesses. The bankruptcy system can restructure public firms that have a sound underlying business, putting losses on investors instead of taxpayers, and preserving jobs at the reorganized firms. Bankruptcy courts can also offer crucial relief to consumers and municipalities.

However, as we show below, the unprecedented increase in unemployment resulting from the COVID-19 pandemic is likely to yield a surge in financial distress that will challenge the bankruptcy system's ability to perform its traditional function as a safety net for American consumers and businesses. We expect a rise of both consumer and business bankruptcies as financial distress permeates our society. Accordingly, we recommend increasing the number of bankruptcy judges, both through the appointment of temporary judges and by recalling retired judges. We also urge Congress to provide supplemental appropriations so judges can hire additional court staff as necessary.

In this Memorandum, we estimate the demands that American businesses and consumers will make on the bankruptcy system and study the capacity of the existing bankruptcy system to meet that demand. Prediction is always a fraught exercise, and especially so during an unprecedented global pandemic. However, in a crisis it is quite sensible to take precautions based on the challenges we see in the data today, even though we know full well that subsequent developments may change our estimates.

We begin our analysis with a basic intuition: the unemployment rate is a historically reliable leading indicator of future demand for bankruptcy relief. Job losses today are indicators of the level of financial distress of not only consumers but also businesses and municipalities in the months to come. As Figure 1 shows, the blue, dashed line of unemployment claims rises and falls very roughly in line with the bankruptcy court caseload. In rough terms, a percentage point increase in the unemployment rate corresponds to a 30% increase in bankruptcy caseloads within three to six months. The unemployment rate dropped in May but has risen approximately 10% from its end-of-2019 low.



**Figure 1. The Unemployment Rate and Bankruptcy Caseload by Quarter, from 1980.**

Our analysis follows these basic steps:

1. For each judicial district, we calculate the historical relationship between the local unemployment rate and the number of bankruptcy cases in that district;
2. We analyze the projected results using the May 2020 national unemployment rate of 13.3%;
3. We adjust for differential impacts of COVID-19 across districts in two ways. First, we compute county-level adjustments of the national unemployment rate based on the labor share in COVID-19 afflicted industries and aggregate these to the bankruptcy district level. Second, we create projections using April 2020 unemployment rates for individual counties as May 2020 unemployment rates by county are not yet available;
4. We then project the number of bankruptcies that will occur in each district based on this local unemployment rate;
5. The Federal Judicial Center has studied how many hours a bankruptcy judge can expect to spend presiding over court hearings for each type of bankruptcy case and produced case-

weights that can be used in this type of analysis to project the potential total “caseload” over the coming year. We incorporate these into our analysis;<sup>2</sup>

6. In line with a 2009 GAO review of the bankruptcy courts’ caseload, we adjust the FJC’s case weights to reflect the prior undercount of the hours needed for Chapter 11 filing patterns of large corporate debtors;
7. We multiply that number by 2 to reflect an assumption that court hours are about half of a judge’s work time;<sup>3</sup>
8. Using the 2010 financial crisis workload as a baseline of what is plausible to expect of the bankruptcy judiciary when working at peak effectiveness, the FJC’s case-weights numbers lead to an average of nearly 50 hours per week judicial workload in 2010 (represented by the solid horizontal line in Figure 1);
9. We then identify the districts that we estimate will have too few judges to handle the potential volume of work with each judge working the same number of hours that bankruptcy judges did in 2010.

In our most straightforward analysis, we assume that the May 2020 13.3% unemployment rate remains constant over the next year and has the historically predicted impact on bankruptcy filings. If those assumptions turn out to hold, we estimate that the bankruptcy system will be 246 judges shy of meeting the expected bankruptcy demand.

We show this in Scenario 1 in Table 1 below. While the number is quite high, it reflects an unprecedented rise in unemployment with no parallels in modern times. Importantly, we note that the most recent projections from the Congressional Budget Office and the Federal Reserve Bank of Philadelphia’s survey of professional forecasters show expectations of high unemployment at about or near the current rate for at least a year, with an average unemployment rate of 12.74%. Using this figure only reduces the projected need for new judges from 246 to 219.

We next present two additional alternative scenarios with more optimistic assumptions. The current unemployment figures reflect those workers who have lost jobs because of temporarily closed businesses and workers who have been furloughed. Estimates provided by the Bureau of Labor Statistics in May 2020 show that only 34.4% of unemployed workers expect their unemployment to be permanent. This is a break from historical patterns, as traditionally many more of the unemployed thought they were permanently unemployed - about 58% in historic data. Thus, the share of *permanent* unemployment is 59.31% (34.41%/58%) of the normal distribution of assumed-permanent versus assumed-temporary employees because many jobless workers expect their unemployment to be temporary. Assuming that these workers will in fact soon return to work, we may see fewer individual bankruptcies. Accordingly, we also estimate how many additional bankruptcy judges will be needed, if all temporarily unemployed workers do, in fact,

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<sup>2</sup> The time weights per type of case are reported in Elizabeth C. Wiggins, Gordon Bermant & Patricia A. Lombard, *A Day in the Life: The Federal Judicial Center’s 1988-1989 Bankruptcy Court Time Study*, 65 AM. BANKR. L.J. 491, 503 (1991).

<sup>3</sup> See *id.*

return to work quickly, and we reduce the expected relationship between unemployment and subsequent bankruptcies to 59.31% of normal as well. This leads to a projected need for 50 judges. This is Scenario 2 in Table 1.

Our third scenario uses local-level unemployment rates reported in April 2020 rather than adjusting the national unemployment rate for COVID-19 impacted industries as we do in Scenarios 1 and 2. This has the benefit of more accurate local-level data, at the cost of slightly more stale data since the most recently released county-level unemployment rates are from April 2020 instead of May 2020. In this scenario, we again include the 59.31% adjustment for temporary unemployment as in Scenario 2. Under this analysis, we project a need for 69 judges. Importantly, we note that local unemployment rates suggest that particular districts have seen very high unemployment that Scenarios 1 and 2 do not capture, leading to larger needs for more judges.

Importantly, in all cases, we begin with the assumption that current temporary judges will have their terms extended. The bottom-line numbers are net of these extensions.

This range — of a need for 50 new judges up to 246 — is summarized in Table 1. We add to this table the most likely district-by-district allocations, as the caseload impact estimates are not even across the country. The districts are listed in order of their average capacity need across the three scenarios. Across all specifications, four districts are expected to be especially pressured: the Middle District of Florida; the Northern District of Georgia; the District of Delaware; and the Northern District of Texas. Additional districts that will very likely need additional support include the Northern District of Illinois; the Southern District of Florida; the Eastern District of Michigan; the District of Nevada; and the District of Utah. We also note that our model may not capture direct impacts of COVID-19 health costs on bankruptcies, which could impact heavily COVID-19 impacted areas such as the Southern District of New York.

**Table 1. Total and distribution of estimated additional capacity needed under three unemployment scenarios<sup>4</sup>**

	<b>Scenario 1</b>	<b>Scenario 2</b>	<b>Scenario 3</b>	
Assumed Unemployment	13.3%	13.3%	District-level April 2020	
Adjustment for temporary unemployment	None	59.31%	59.31%	
<b>Total New Judges Needed</b>	<b>246</b>	<b>50</b>	<b>69</b>	
District				Current Temporary Judgeships
Middle District of Florida	14	5	5	1
Northern District of Georgia	14	5	5	
District of Delaware	12	4	6	7

<sup>4</sup> The rows are sorted in descending order of the average ranking of the need in each court across all three scenarios.

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Northern District of Texas	10	3	3	
Northern District of Illinois	9	1	5	
Southern District of Florida	9	3	2	1
Eastern District of Michigan	6	1	7	2
Eastern District of Virginia	9	3	2	
District of Nevada	4	1	7	
District of Utah	7	3	2	
Southern District of Indiana	6	2	3	
District of New Jersey	7	1	3	
Middle District of Tennessee	6	2	3	
Southern District of Texas	7	2	2	
District of Arkansas	5	2	1	
District of Massachusetts	7	1	0	1
Western District of Texas	6	1	1	
Southern District of New York	7	0	0	
Western District of Tennessee	5	1	1	
Middle District of Alabama	3	1	1	
District of Arizona	5	0	0	
District of Colorado	4	1	0	
Middle District of Georgia	4	1	0	
Southern District of Georgia	4	1	0	
Eastern District of Texas	3	1	1	
Northern District of Alabama	4	0	0	
Northern District of Indiana	2	0	2	
Western District of Louisiana	3	1	0	
District of Massachusetts	3	0	1	
Eastern District of Missouri	3	1	0	
Eastern District of North Carolina	3	1	0	
Eastern District of New York	4	0	0	
Eastern District of Tennessee	3	0	1	
Western District of Washington	3	0	1	
District of Minnesota	3	0	0	
District of Nebraska	2	1	0	
Southern District of Ohio	3	0	0	
District of South Carolina	3	0	0	
Central District of California	2	0	0	
Northern District of California	2	0	0	
District of Hawaii	1	0	1	
Western District of Michigan	1	0	1	
Western District of Missouri	2	0	0	
Northern District of Mississippi	1	0	1	
Western District of North Carolina	2	0	0	

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District of New Hampshire	1	0	1
Eastern District of Pennsylvania	2	0	0
Western District of Pennsylvania	2	0	0
Eastern District of Wisconsin	2	0	0
Southern District of Alabama	1	0	0
District of Connecticut	1	0	0
Northern District of Florida	1	0	0
District of Idaho	1	0	0
District of Kansas	1	0	0
Eastern District of Kentucky	1	0	0
Western District of Kentucky	1	0	0
Eastern District of Louisiana	1	0	0
Southern District of Mississippi	1	0	0
Middle District of North Carolina	1	0	0
Northern District of New York	1	0	0
Northern District of Ohio	1	0	0
Western District of Oklahoma	1	0	0
Middle District of Pennsylvania	1	0	0
Western District of Virginia	1	0	0
Western District of Wisconsin	1	0	0

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The remainder of this Memorandum proceeds as follows. Section I describes our research methodology, the sources of our data and the assumptions underlying our analysis. Section II discusses other appropriations and legislative reforms that can help bolster court capacity, such as making it easier for retired judges to retake the bench in this crisis. Section III presents our conclusions. In Table 1 of the Appendix, we use our model to provide suggested allocations of new judgeships if Congress were to decide to seek 100, 30, 25 or 10 additional judges.

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I. Research Methodology.

In this Section, we identify the data we rely on in this Memorandum. Our analysis required gathering economic data and information on the bankruptcy system.

1. The historic relationship between unemployment and bankruptcy filings in each district.<sup>5</sup>

We used historical data of the relationship between the unemployment rate and the number of bankruptcy filings in each district to estimate the number of expected bankruptcy filings. For each district, we first calculated the unemployment rate and total bankruptcy filings of each type in each year from 2001-2019.<sup>6</sup> The types of bankruptcy that we tracked were: Chapter 11, Chapter 12, business Chapter 7, consumer Chapter 7, Chapter 13 and “other.” We then estimated how many additional bankruptcy filings of each type are associated with each additional unemployed worker.

As an example, suppose a district has a workforce of 645,000 and an unemployment rate of 5%. We would calculate  $0.05 * 645,000 = 32,250$  unemployed. If that district has 5,000 consumer Chapter 7 bankruptcies in a year, we calculate that there are  $(5,000 / 32,250) = 0.155$  Consumer Chapter 7 bankruptcy filings for each unemployed person. We do this individually for each of the categories of bankruptcy filings.

For example, in Arizona, each additional unemployed person was associated with the following incremental workload for the bankruptcy court.

Ch. 11	Ch. 12	Business Ch. 7	Ch. 13	Other	Consumer Ch. 7
0.0008672	0.0002055	0.003728	0.1239716	0.00000655	0.137918

2. The current unemployment rate.

Our analysis begins with the current, end-of-May unemployment rate of 13.3% and we then adjust for temporary unemployment as described in step 4 below. An alternative would have been to rely on unemployment forecasts for the next year, but doing so does not materially affect our estimates. Specifically, we identified two sources of unemployment forecasts: (a) the Federal Reserve Bank of Philadelphia’s Survey of Professional Forecasters, which projects average unemployment of 12.33%;<sup>7</sup> and (b) the Congressional Budget Office, which projects average unemployment of 13.15% over the next year.<sup>8</sup> Using the midpoint of these two estimates, 12.74%, we found only reduces the projected need for additional judges under scenarios 1 and 2 to 219 judges and 45 judges, respectively.

<sup>5</sup> Our analysis omits discussion of the needs of territories because of data constraints. Also, we combine the two districts in Arkansas and treat them as a single district because they share bankruptcy judges.

<sup>6</sup> We drop 2005 and 2006 because BAPCPA caused huge changes in filings unrelated to the unemployment rate. Results are similar if we only use post-BAPCPA data from 2007-2019.

<sup>7</sup> This is a quarterly survey of professional economists’ forecasts from April 2020. See *Second Quarter 2020 Survey of Professional Forecasters*, FED. RES. BANK PHILA. (May 15, 2020), <https://philadelphiafed.org/research-and-data/real-time-center/survey-of-professional-forecasters/2020/survq220>.

<sup>8</sup> See *Interim Economic Projections for 2020 and 2021*, CONG. BUDGET OFF.: DATA (May 19, 2020) <https://www.cbo.gov/publication/56351#data>.

3. Assessing the county level unemployment rate.

We seek to assess the impact of COVID-19 on the local economies of each judicial district. We do this in two ways. For Scenarios 1 and 2, which rely on the May 2020 national unemployment rate, we use the May 2, 2020 Census Small Business Pulse Survey, which provides industry-level estimates of the net share of businesses that have reduced employee work hours as a result of COVID-19.<sup>9</sup> Across all industries, 51.2% of businesses have reduced employee hours, while 5.6% have increased employee hours, leaving a net reduction of 51.2% - 5.6% = 45.6%.<sup>10</sup> We calculate this same figure for each industry classification in the Census data individually. Then, for each industry, we calculate a severity score,  $s$ , which we define as the ratio of the industry net share of businesses reducing employment over the average net share across all industries (45.6%). This identifies whether the industry is more or less severely affected by COVID-19 relative to the average industry. Formally, for each industry  $x$ , we define:

$$s_x = \frac{\text{net\_share\_reducing\_hours}_x}{\frac{1}{n} \sum_{i=0}^n \text{net\_share\_reducing\_hours}_i}$$

So, for example, a net 57.5% of education services have reduced hours, so  $s_{\text{education}} = \frac{57.2\%}{45.6\%} = 1.26$ , meaning education has been hit 26% harder than average.<sup>11</sup>

We then use Census County Business Patterns to calculate the county-level employment share for the 19 industries covered by the Census Small Business Pulse Survey.<sup>12</sup> We multiply the percentage of workers in each industry category by the severity score for that industry and then sum across all industries to get a county-level estimate of the severity of the COVID-19 shock. We then take the population-weighted average across all counties in a bankruptcy district to create a severity score for each district. Districts that have high employment in industries most affected by COVID-19 will have severity scores greater than one, while less affected districts will have severity scores less than one. For example, the Southern District of West Virginia has a severity score of 1.044, indicating an estimated 4.4% worse impact from COVID-19 than the national average. We multiply this severity score by the national unemployment rate of 12.74% to forecast that district’s unemployment as 13.3%, slightly worse than the anticipated national average.

A more straightforward method is to use county-level unemployment rates, which reflect actual conditions in each county. These are available for April 2020 and form the basis of Scenario 3. We aggregate to district-level unemployment by calculating the population-weighted average of all counties within a bankruptcy district. These realized district-level unemployment rates vary

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<sup>9</sup> Jane Callen, *Weekly Census Bureau Survey Provides Near-Real-Time Info on Businesses*, U.S. CENSUS BUREAU (May 14, 2020), <https://www.census.gov/library/stories/2020/05/new-small-business-pulse-survey-shows-breadth-of-covid-19-impact-on-businesses.html>.

<sup>10</sup> The remaining 43.2% of businesses had no change in hours worked.

<sup>11</sup> The calculations for each industry category are available in the Appendix Spreadsheet in the Tab “[Census Unemployment Adjustments Data](#).”

<sup>12</sup> We use data from the most recently available County Business Patterns: 2017. *See County Business Patterns: 2017*, U.S. CENSUS BUREAU (Nov. 21, 2019), <https://www.census.gov/data/datasets/2017/econ/cbp/2017-cbp.html>.

quite a bit more than adjusted unemployment rates used in Scenarios 1 and 2, and likely better reflect local economic conditions. However, the data is released with nearly a one-month lag and given the dynamic situation of the economy we recognize that local-level unemployment could change dramatically over time.

Projecting caseloads based on Steps 1, 2 and 3 returns a very high gap between projected judicial capacity and current judicial capacity, as indicated in Scenario 1 of Table 1. We are not surprised by this very high projection, as the increase in unemployment this year is unprecedented in the past three-quarters of a century.

We would expect that the judiciary will use different strategies to adapt if this crush of cases eventuates, such as mitigation (e.g., use of mediation), triage (of easier to process cases moving first), and by encouraging restructurings that require less judicial attention (such as pre-packaged plans). Moreover, as we have said, this analysis assumes that the historical previous relationship between unemployment and bankruptcy caseload persists. Perhaps it will not. For example, a substantial portion of the people who are currently unemployed expect to be unemployed only temporarily. We already adjust for this, first, by checking whether the most recent consensus unemployment projections, 12.74%, make a material difference. They do not. In Step 4 we present an alternative adjustment.

#### 4. Adjusting for the temporarily unemployed.

The unusual circumstances of COVID-19 may mean, and hopefully will mean, that many of the currently unemployed will return to furloughed jobs as the country reopens. If this is the case, the relationship between current unemployment, actual unemployment and subsequent bankruptcy filings could be tempered relative to the historical relationship. To account for this possibility, we use monthly Bureau of Labor Statistics Surveys from 2001-2019, which show that, prior to the pandemic, an average of 58% of unemployed workers had permanently lost their jobs.<sup>13</sup> Meanwhile, the May 2020 survey of the unemployed indicates that only 34.4% of the unemployed expect their unemployment to be permanent.<sup>14</sup> Hence, current estimates suggest that current unemployment figures have  $34.4\% / 58\% = 59.32\%$  of the normal amount of permanent unemployment. Assuming that it is permanent unemployment and correspondingly permanent business closures that drive consumer and business bankruptcies, we reduce the estimated number of bankruptcies in each district by  $(100\% - 59.32\%) = 40.68\%$ .

Hence, in Scenarios 2 and 3, we assume that, since permanent unemployment is 59.32% of normal, current unemployment will lead to only 59.32% of the bankruptcies we would expect based on the historical data.

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<sup>13</sup> Table A-11. *Unemployed Persons by Reason for Unemployment: Monthly, Seasonally Adjusted*, FED. RES. BANK ST. LOUIS (May 15, 2020), <https://fred.stlouisfed.org/release/tables?rid=50&eid=3077#snid=3081>. Following estimates in Lawrence Katz and Bruce Meyer, *The Impact of the Potential Duration of Unemployment Benefits on the Duration of Unemployment*, 41 J. PUB. ECON. 45 (1990), we adjust these figures assuming that 28% of expected temporary job losses are actually permanent, and 13% of expected permanent job losses are actually temporary.

<sup>14</sup> Table A-11. *Unemployed Persons by Reason for Unemployment*, U.S. BUREAU LAB. STAT.: ECON. RELEASES (May 11, 2020), <https://www.bls.gov/news.release/empsit.t11.htm>.

The consensus forecast of 12.74% unemployment appears to be more pessimistic, potentially anticipating that a smaller number of these self-assessed temporarily unemployed return to work later this year than the self-assessment anticipates.

5. Projecting the number of new bankruptcies in each district.

After identifying the projected incremental bankruptcy court workload per unemployed person, we returned to the district-level unemployment estimates *supra*. We began by multiplying the projected district-level unemployment rate by size of the workforce in the district to get a forecast of the number of unemployed. We then multiplied the forecasted number of unemployed by the incremental number of bankruptcies associated with each unemployed person. Finally, for Scenarios 2 and 3 in Table 1, we accounted for the high share of temporary unemployment by multiplying these forecasted bankruptcy filings by 59.32%, as described in step 4 *supra*.

For example, for Scenario 2 we project an unemployment rate of 13.2% in Arizona, or slightly less severe than the national average. Based on the historic relationship between unemployed persons and bankruptcy filings in Arizona, and after reducing this relationship to account for temporary unemployment, we project that over the course of a year, this will lead to the following estimated bankruptcy filings: 71 Chapter 11 cases, 17 Chapter 12 cases, 304 business Chapter 7 cases, 10,094 Chapter 13 cases, 11,286 Consumer Chapter 7 cases and 1 filing under another provision of the bankruptcy code. Meanwhile, under Scenario 3 we use Arizona’s actual unemployment rate in April 2020 of 10.3% and then follow the same process to project a slightly lower number of bankruptcies over the next year.

6. Projecting the workload that each additional bankruptcy filing creates.

To translate projected bankruptcy filings into court “caseload,” we use court data on how many hours of a judge’s day each case-type takes to figure out how many hours of a judge’s time this anticipated workload will require. To do this, we draw on a 1991 Federal Judicial Center (“FJC”) estimate of how many hours it would take a bankruptcy judge to handle a certain matter. This is called a “case-weight,” and the FJC builds them for each court system within the federal judiciary using time diaries from judges.

The 1991 FJC style predicts that each of the following case-types requires the following number of court hours to hold public hearings:

- Consumer Ch. 7: 0.101
- Business Ch. 7: 0.397
- Ch. 11: 7.559
- Ch. 12: 4.04
- Ch. 13: 0.381
- Other: 0.194

This case-weight was validated by the Governmental Accountability Office in their 2009 review. The GAO questioned only the non-breakout of so-called “mega-11s,” or Chapter 11

restructurings of companies with more than \$100 million in assets, which they assumed took more time and were more prevalent in 2009 than in 1991. We address this point below.

Case-weight can be thought of as the approximate number of hours it would take a judge to administer all cases assigned to her. The same FJC study suggests that direct case-related work and public hearings take 50% of a judge's time, so we can multiply this number by 2 to get a sense of the work that the financial distress of COVID-19 will generate for bankruptcy judges.

7. Adjusting the weights for the pattern of large corporate bankruptcy filings.

Large corporate bankruptcies are not evenly distributed across districts, and some districts, such as Delaware, draw a disproportionate number of them. As we noted, the 2009 GAO report validated most of the older 1991 case-weights, but did not validate the time spent in large firm restructurings in chapter 11. To ensure that our estimates of projected caseloads incorporate the fact that large Chapter 11s demand more judicial time than small Chapter 11s, we increase the "Chapter 11 weight" to reflect the fact that some districts get "mega" corporate bankruptcies — cases with more than \$100 million in assets or liabilities — at a greater rate than others. We use Bankruptcy Data Source's data on large filings between 2010 and 2019 to identify what percentage of a district's Chapter 11 docket are "mega cases", assuming the distribution of cases over the next year will follow a similar pattern, and that mega cases take 60 hours. The assumption of 60 hours is based on our best estimates from information in the GAO report and elsewhere. Thus, for example, Delaware had 6,184 total Chapter 11s between 2010-2019. Of those, 432, or 7%, were "mega cases," a much higher percentage than the national average of 1.2%. Accordingly, for Delaware, we use an adjusted Chapter 11 weight of 11.02, from 7.559.

In 2010, the Judicial Conference of the United States, based upon a study conducted by the Federal Judicial Center, updated the earlier case-weights to account for changes in the bankruptcy system since 1991 and resulting from BAPCPA, new case management procedures, and improvements in technology. In 2014, the Judicial Conference adopted an additional adjustment to the weights to account for the extraordinary judicial time required in very large chapter 11 cases. After we completed the analysis we present *infra*, the Judicial Conference provided us the updated case weights to allow us to evaluate our projections. We re-estimated the three models with the updated weights and the results were not materially different. Our best attempt to use the updated weights with our own data, which is less detailed than the Judicial Conference's case-weights, resulted in slightly higher projections for additional bankruptcy judges.

8. Projecting the number of judges needed to handle this volume of work.

Next, we combine the estimated level of bankruptcies in each district with our data on the number of court hours required for that level, and we compare that number to the judicial capacity in each district. We used these case-weights to calculate a judicial workload for 2010 as the benchmark of what is plausible to expect of the bankruptcy judiciary. That yielded a benchmark national average of close to 50 hours of work per week for bankruptcy judges in 2010, the peak of the Financial Crisis. Indeed, since 1980, peak judicial caseload has always been near this level, as can be seen in Figure 1. From that base, we calculated what the additional workload for each

district would be, if the historical (and adjusted) patterns persist (of cases rising months after unemployment rises).

For example, COVID-19 is projected to create 33,503 hours of work for bankruptcy judges in the Middle District of Florida over the next year, or 670 hours of work per week. The 8 judges currently in that district would need to work 83.76 hours to handle this caseload over the next year. This district needs 5 new judges to allow each judge to work at a caseload of 50 hours per week.

## II. Other interventions that can bolster court capacity.

The caseload is not evenly distributed across districts. That imbalance provides an opportunity for some judges in low caseload districts to potentially handle some of the work in overloaded districts, as the statute and practice now contemplate. For example, our models project that bankruptcy courts in California may have some excess capacity relative to the busiest districts. However, this may require dislocation, and the borrowed judges will be less familiar with local circumstances and perhaps less effective because they will not be part of the communities they are serving.

That also leads to the observation that the most valuable increase in judicial capacity is likely to be the first judges added, as they will go (if the projections are in fact where the caseload increases most sharply) to the districts with the highest caseload increase, not to the districts where the caseload is most manageable.

Funding will, of course, be an issue. One possibility that has come up, but which we have not studied for impact and plausibility, is that the filing fee structure could be altered to offset increased costs without requiring additional appropriations from Congress.

We note, but have not analyzed, the potential for an existing limit on recalling retired judges to pose an obstacle to restoring retired judges to the bench. Some retired bankruptcy judges are ineligible now for recall if they retired under particular retirement provisions and have practiced law subsequent to their retirement. Congress may wish to consider suspending this provision—with appropriate conflict-of-interest safeguards—for the duration of the COVID-19 crisis.<sup>15</sup>

US Trustees, court staff, and the clerk-of-courts office play significant roles in the bankruptcy process. Any sharp increase in filings will mean that each of these offices should be staffed sufficiently and additional funding would help to bolster those ranks as well.

## III. Conclusion.

With the data currently available, we have estimated the range of potential need for additional bankruptcy judges over the next year. If the relationship between the unemployment rate and future bankruptcy filings remains consistent with historic data, the pressure on the bankruptcy judiciary will be enormous. If unemployment declines quickly and the economy recovers, then that pressure will be reduced, but the current estimates of plausible decline still lead

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<sup>15</sup> 28 U.S.C. § 377(m)(2) (2020).

to the need for additional bankruptcy judges, especially in the districts that appear likely to be hardest hit. We expect that over time better information will be available, and our estimates can be updated with new economic information and new information on the actual extent of bankruptcy filings.

One potential strategy for Congress is to staff up at the optimistic level -- which estimates a shortfall of 50 judges -- while keeping an eye on developments that lead to a greater need. The advantage of doing so could be particularly advantageous even if the impact on bankruptcy is higher than the lowest estimate because these judges would be going to the districts most likely to be most heavily overloaded.

However, this strategy is imperfect in another dimension. Presumably, the lower level need could be filled primarily from recently retired judges. (There are about 100 bankruptcy judges who have retired in the past 8 years.) The advantage of doing so is that retired judges already have the needed experience, many are still active professionally,<sup>16</sup> and the recall process presumably would be quicker than that for appointing a new judge. But if most of the immediate needs are filled by retired judges and a higher than minimal surge occurs, the newest judges would have to go through the judicial appointments process, which we understand is a year-long effort. A mixed strategy might well be warranted, of immediately beginning the appointment process for (say) half of the needed temporary judges and turning to the retired judges for the other half.

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<sup>16</sup> However, *see* note 15 and the accompanying text.

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Other Scenarios

These scenarios all assume that all temporary judges are retained or made permanent.

**Table 2. Recommended Allocation of Judges if Congress Creates 100, 30, 20, or 10 Judgeships, based on Scenario 3 of Table 1**

Total New Judges	100	30	20	10
District				
District of Nevada	8	5	4	3
Eastern District of Michigan	8	4	4	3
District of Delaware	7	4	3	2
Middle District of Florida	7	3	2	1
Northern District of Georgia	6	2	2	0
Northern District of Illinois	7	2	1	0
Southern District of Indiana	4	2	1	0
Middle District of Tennessee	3	2	1	1
Northern District of Texas	4	1	1	0
Southern District of Florida	3	1	0	0
Northern District of Indiana	2	1	1	0
District of New Jersey	4	0	0	0
Southern District of Texas	3	1	0	0
Eastern District of Texas	2	1	0	0
District of Utah	2	1	0	0
Eastern District of Virginia	3	0	0	0
Southern District of New York	2	0	0	0
Eastern District of Tennessee	2	0	0	0
Western District of Tennessee	2	0	0	0
Western District of Texas	2	0	0	0
Western District of Washington	2	0	0	0
Middle District of Alabama	1	0	0	0
District of Arkansas	1	0	0	0
District of Arizona	1	0	0	0
District of Colorado	1	0	0	0
Southern District of Georgia	1	0	0	0
District of Hawaii	1	0	0	0
Eastern District of Kentucky	1	0	0	0
Western District of Louisiana	1	0	0	0
District of Massachusetts	1	0	0	0
Western District of Michigan	1	0	0	0
Northern District of Mississippi	1	0	0	0
Eastern District of North Carolina	1	0	0	0

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District of New Hampshire	1	0	0	0
Eastern District of New York	1	0	0	0
Northern District of Ohio	1	0	0	0
Western District of Pennsylvania	1	0	0	0
District of South Carolina	1	0	0	0

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July 21, 2020

To Whom It May Concern:

This proposal respectfully requests that the leading monitors of credit – including Experian, Dun and Bradstreet, Equifax, and Transunion – as well as the leading small business lenders – Wells Fargo, Bank of America, and JPMorgan Chase – provide regular updates to the public on the state of small business lending and loan performance in the United States. This information is currently unavailable to the public, but it is essential for the productive study of the challenges posed by the current crisis and the suggestion of solutions to best address those challenges.

We are an interdisciplinary group of scholars who study the corporate bankruptcy system and the problems associated with financial distress. We have formed a committee (the “Small Business Committee of the Bankruptcy & COVID-19 Working Group” or “Committee”)<sup>1</sup> to analyze the effect of the COVID-19 pandemic on small American businesses and to consider changes that might be needed to improve the ability of the bankruptcy system to cope with the

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<sup>1</sup> The Small Business Committee of the Bankruptcy & COVID-19 Working Group is one of four committees that are part of a larger group studying financial distress and COVID-19, each focused, respectively, on either (1) large corporations, (2) small businesses, (3) consumers, or (4) municipalities. The Small Business Committee includes, with institutional affiliations included for identification purposes only: Anthony Casey (University of Chicago Law School), Brook Gotberg (University of Missouri School of Law), Robin Greenwood (Harvard Business School), Benjamin Iverson (BYU Marriott School of Business), Edward Janger (Brooklyn Law School), Song Ma (Yale University School of Management), Edward Morrison (Columbia University Law School), Katherine Waldock (Georgetown University McDonough School of Business), Jialan Wang (University of Illinois Urbana-Champaign Business School), Michelle White (University of California San Diego and NBER), and Yesha Yadav (Vanderbilt University Law School). Additional members of the Working Group who agree with our recommendations are listed as additional signatories below.

crisis. While we are in the early stages of our work, and there are many issues still to cover, an urgent and pressing issue that has arisen in our research is a lack of data on the financial health of small and medium size businesses in the United States.

One of the major concerns in the current crisis is the survival of small and medium sized businesses struggling to remain viable during and in the wake of government mandated shutdowns. Over the past two months, real-time data on economic activity has become available in a number of domains, including restaurant receipts, consumer spending, and high frequency employment statistics.<sup>2</sup> However, there is still insufficient data on the state of American small business, with much being gleaned from anecdotal and press accounts.

Recently, some scholars and the U.S. Census Bureau have publicized the ongoing plight of small business based on survey data.<sup>3</sup> More complete regional and national statistics are sorely lacking. Are businesses managing to renegotiate their financial obligations? Once lockdowns are lifted, are businesses re-emerging and making good on their obligations? How overdue are small businesses on their loans and lines of credit?

We call on the leading monitors of credit and the leading small business lenders in the country to provide more regular statistical updates to the public. Such updates will be of enormous value for policymakers, and would serve as an important input in scholarly endeavors to assist policymakers in making timely decisions. Alternatively, these entities may choose to make more granular yet anonymized data available for preparation of digestible statistical data by others.<sup>4</sup>

Specifically, we seek statistical reports on the following fields, with data split into cells, anonymized, and aggregated by county and by business size (e.g. revenues, number of employees, or loan size) and industry code (e.g. SIC, NAICS, or GICS sector code), updated on a weekly or monthly basis.

- Number of firms monitored
- Average revenues, number of employees, loan size, and/or other measures of firm size
- Average balance outstanding, credit limit, and/or monthly payment for observed liabilities, where relevant
- Fraction of firms current on rent, bank debt, and/or other liabilities observed
- Fraction of firms more than 90 days overdue on observed liabilities
- Average days in arrears on observed liabilities

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<sup>2</sup> See for example <https://www.opentable.com/state-of-industry>, and <https://tracktherecovery.org/> among many others.

<sup>3</sup> Bartik, Alexander, Marianne Bertrand, Zoë B. Cullen, Edward L. Glaeser, Michael Luca, and Christopher Stanton. "The Impact of COVID-19 on Small Business Outcomes and Expectations." Harvard Business School Working Paper, No. 20-102, April 2020; United States Census Bureau Small Business Pulse Survey <https://portal.census.gov/pulse/data/>

<sup>4</sup> The SafeGraph Consortium hosts numerous anonymized datasets and thousands of researchers using these data to address the COVID-19 public health and economic crisis <https://www.safegraph.com/covid-19-data-consortium>

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Not all lenders and data providers addressed in this letter will have information on each of the bulleted items above. However, we are confident that each addressee can contribute useful data on at least a subset of the items. Doing so will provide the public with a better picture of what is happening with small businesses in the United States. We also recognize that the lenders and data providers addressed in this letter have other pressing business concerns during a challenging time. Putting together and releasing these statistical reports while preserving client privacy will consume time and resources. Nonetheless, additional visibility into the small business sector is paramount to a strong and speedy economic recovery, and provision of this information is in the national interest.

We applaud efforts by several addressees who have led the way in releasing regular reports on other aspects of the economy, e.g. Equifax's Market Pulse reports, J.P. Morgan's Daily Consumer Spending Tracker.

We would be pleased to engage with any of you to advise on how such data may best be presented and used. Thank you for your attention to this matter of national economic importance.

Sincerely,

/s/ Brook Gotberg

Brook Gotberg, Chair

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