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## The Debt Collection Pandemic

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# The Debt Collection Pandemic

Pamela Foohey\*, Dalié Jiménez\*\* and Christopher K. Odinet\*\*\*

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## INTRODUCTION

To curb the rapid spread of the coronavirus set to overwhelm the United States’ healthcare system, in mid-March 2020, the federal government declared a national emergency.<sup>1</sup> Many states followed suit by implementing shelter-at-home orders<sup>2</sup> and people began social distancing across America.<sup>3</sup> As of this writing, the United States’ reaction to the unique and alarming threat of COVID-

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1. *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, WHITE HOUSE (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> [<https://perma.cc/7UM4-AVJY>].

2. Alicia Lee, *These States Have Implemented Stay-At-Home Orders. Here’s What That Means for You*, CNN (Apr. 7, 2020), <https://www.cnn.com/2020/03/23/us/coronavirus-which-states-stay-at-home-order-trnd/index.html> [<https://perma.cc/4EK6-TJP5>].

3. Chris Canipe, *The Social Distancing of America*, REUTERS (Apr. 2, 2020), <https://graphics.reuters.com/HEALTH-CORONAVIRUS/USA/qmypmkmwpra/> [<https://perma.cc/9CU6-ZMH2>].

19 has partially succeeded in slowing the virus's spread.<sup>4</sup> Saving people's lives, however, has come at a severe economic cost. Economic activity plummeted. Unemployment numbers soared to figures not seen since the Great Depression<sup>5</sup> and countless other people saw their income disappear.<sup>6</sup>

Americans' economic anxiety has understandably spiked.<sup>7</sup> With no end in sight to the crisis, people have feared they would be unable to meet their basic expenses, such as buying food and paying for utilities.<sup>8</sup> Those who have lost their jobs also now have had to find money to pay for health insurance.<sup>9</sup> And car, house, and rent payments would be coming due soon and then again every month, regardless of whether people still had income.<sup>10</sup> These worries were more acute among minority communities and lower-income households, who already faced concerns about their financial stability before the crisis.<sup>11</sup>

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4. See Kelsey Piper, *Data Shows Social Distancing Has Slowed Down the Coronavirus Outbreak. But What's Next?*, VOX (Apr. 15, 2020, 12:50 PM), <https://www.vox.com/future-perfect/2020/4/15/21217027/coronavirus-social-distancing-flatten-curve-new-york> [https://perma.cc/XGD3-EU25]; Abby Goodnough, et al., *Testing Falls Woefully Short as Trump Seeks an End to Stay-At-Home Orders*, N.Y. TIMES (Apr. 15, 2020), <https://www.nytimes.com/2020/04/15/us/coronavirus-testing-trump.html> [https://perma.cc/5S4M-4T3R].

5. Julia Horowitz, *US Unemployment Hasn't Looked This Bad Since the 1930s*, CNN (May 3, 2020, 10:55 AM ET), <https://www.cnn.com/2020/05/03/investing/stocks-week-ahead/index.html> [https://perma.cc/X762-S5J7].

6. See Nelson D. Schwartz, et al., *Stymied In Seeking Benefits, Millions of Unemployed Go Uncounted*, N.Y. TIMES (Apr. 30, 2020), <https://www.nytimes.com/2020/04/30/business/economy/coronavirus-unemployment-claims.html> [https://perma.cc/EMJ2-GSQB]; Kim Parker, et al., *About Half of Lower-Income Americans Report Household Job or Wage Loss Due to COVID-19*, PEW RES. CTR. (Apr. 21, 2020), <https://www.pewsocialtrends.org/2020/04/21/about-half-of-lower-income-americans-report-household-job-or-wage-loss-due-to-covid-19/#many-adults-have-rainy-day-funds-but-shares-differ-widely-by-race-education-and-income> [https://perma.cc/WG64-XBDM].

7. David Brancaccio & Rose Conlon, *There's Been a Dramatic Spike in American's Economic Anxiety*, MARKETPLACE (May 5, 2020), <https://www.marketplace.org/2020/05/05/covid-19-economic-anxiety-spike-food-groceries-rent-mortgages-health-care/> [https://perma.cc/3Z9G-CQVS]; Mitchell Hartman, *People Across Most Income Groups Are More Anxious About the Economy During COVID-19*, MARKETPLACE (May 5, 2020), <https://www.marketplace.org/2020/05/05/covid-19-economic-anxiety-income-levels/amp/> [https://perma.cc/8G8B-EQ23].

8. Alexandra Sternlicht, *The Number of Mothers Reporting Food Insecurity Has Jumped More Than 200% Since Start of Pandemic*, FORBES (May 7, 2020 12:01 PM EDT), <https://www.forbes.com/sites/alexandrasternlicht/2020/05/06/the-number-of-mothers-reporting-food-insecurity-has-jumped-more-than-200-since-start-of-pandemic/> [https://perma.cc/62QC-LS6Q]; Tim Stanley, *'The Need Has Been Eye-Opening,' Catholic Charities' Food Pantry Serving 1,500 Families A Week During Pandemic*, TULSA WORLD (May 6, 2020), [https://www.tulsaworld.com/news/local/watch-now-the-need-has-been-eye-opening-catholic-charities-food-pantry-serving-1-500/article\\_e9d681a0-70e9-59b7-8158-7def31b0170e.html](https://www.tulsaworld.com/news/local/watch-now-the-need-has-been-eye-opening-catholic-charities-food-pantry-serving-1-500/article_e9d681a0-70e9-59b7-8158-7def31b0170e.html) [https://perma.cc/N2AN-K6HN].

9. See Brancaccio & Conlon, *supra* note 7; Meghan McCarty Carino, *Laid-Off Workers Now Worry About Health Care During Health Crisis*, MARKETPLACE (Mar. 25, 2020), <https://www.marketplace.org/2020/03/25/laid-off-workers-now-worry-about-health-care-during-health-crisis/> [https://perma.cc/B24J-YQWX].

10. Conor Dougherty, *31% Can't Pay the Rent: 'It's Only Going To Get Worse'*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/business/economy/coronavirus-rent.html> [https://perma.cc/4F5Z-KZSW].

11. See *id.*; Connor Maxwell & Danyelle Solomon, *The Economic Fallout of the Coronavirus for People of Color*, CTR. FOR AMERICAN PROGRESS (Apr. 14, 2020, 9:20 AM), <https://www.american>

People's anxieties about money have necessarily included what might happen if they could not cover already outstanding debts.<sup>12</sup> In addition to auto loans and mortgages, debts like credit cards, medical bills, student loans, and past-due taxes are high on the minds of many households. If people defaulted on any of these debts, creditors and debt collectors could garnish their bank accounts and wages, repossess their cars, and foreclose on their homes and other property.<sup>13</sup> The nearly 70 million Americans with debts already in collection are facing heightened anxiety about their inability to pay.<sup>14</sup> As with people's worries about money generally, these fears continue to be more acute for communities of color. Black and Latinx Americans are sued by creditors and debt collectors more often than others, and lawsuits against them are more likely to end with default judgments that lead to garnishments.<sup>15</sup> They also are subject to heightened policing that saddles them with parking tickets, court fees, and other government debts that force them into modern-day debtors' prison.<sup>16</sup>

The coronavirus pandemic is set to metastasize into a debt collection pandemic. The federal government can and should do something to put a halt to debt collection until people can get back to work and earn money to pay their debts. Yet it has done nothing to help people deal with their debts. Instead, states have tried to solve issues with debt collection in a myriad of patchwork and inconsistent ways. These efforts help some people and are worthwhile. But more efficient and comprehensive solutions exist. Because American families' finances are unlikely to recover as soon as the crisis ends, debt collection brought by the COVID-19 crisis also will not dissipate anytime soon. Even after the crisis ends, the need to implement comprehensive, longer-lasting solutions will remain. As we detail below, these solutions largely fall on the shoulders of the federal government, though state attorneys general have the necessary power to

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[progress.org/issues/race/news/2020/04/14/483125/economic-fallout-coronavirus-people-color/](https://progress.org/issues/race/news/2020/04/14/483125/economic-fallout-coronavirus-people-color/)  
[<https://perma.cc/LZZ3-QNN8>].

12. See *Household Debt Tops \$14 Trillion as Mortgage Originations Reach Highest Volume Since 2005*, FED. RES. BANK OF N.Y. (Feb. 11, 2020), <https://www.newyorkfed.org/newsevents/news/research/2020/20200211> [<https://perma.cc/4KA7-4CV4>].

13. See *What Can Happen When You Don't Pay Bills?*, UNIV. OF WISCONSIN-MADISON, <https://fyi.extension.wisc.edu/toughtimes/keeping-up-with-credit-and-debt/77-2/>  
[<https://perma.cc/DW37-N5LK>] (last visited May 5, 2020).

14. Andrew Warren, *Before COVID-19, 68 Million US Adults Had Debt in Collections. What Policies Could Help Them*, URBAN INST. (Apr. 17, 2020), <https://www.urban.org/urban-wire/covid-19-68-million-us-adults-had-debt-collections-what-policies-could-help> [<https://perma.cc/EZ6G-NRWN>].

15. See *How Debt Collectors Are Transforming the Business of State Courts*, PEW CHARITABLE TRUSTS (May 6, 2020), <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts> [<https://perma.cc/2QEH-PC27>] [hereinafter PEW, *Debt Collectors*].

16. See Whitney Bennis & Black Strode, *Debtors' Prison in 21st-Century America*, THE ATLANTIC (Feb. 23, 2016), <https://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378/> [<https://perma.cc/WN6G-5DKP>]; Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917 (2017) (discussing how penal debt is disproportionately concentrated in economically and socially disenfranchised communities).

help people effectively. If the government continues on its present course, a debt collection pandemic will follow the coronavirus pandemic.

## I.

### DEBT COLLECTION: FROM EPIDEMIC TO PANDEMIC

Debt collection has long plagued American households. Between 1993 and 2013, debt collection lawsuits doubled in the United States.<sup>17</sup> One in every four civil cases was related to debt collection.<sup>18</sup> More troubling, 70 percent of these cases were resolved with a default judgment against the debtor.<sup>19</sup> The issuance of a default judgment means that people did not show up to court or respond to defend the suit. Instead, the judgment gives debt collectors the right to garnish people's wages or bank accounts or take their property without any evidence of the validity of the collectors' claims.<sup>20</sup> The current COVID-19 crisis will only make this problem worse. And although Congress recently attempted to support families financially, it wasn't designed to be truly effective.<sup>21</sup> As detailed below, Americans were already in the debt hole and COVID-19 will only make that hole deeper.

#### A. America's Pre-Pandemic Indebtedness

Before the coronavirus pandemic emerged, many Americans were financially unprepared for any sustained interruption in their income.<sup>22</sup> For years, income inequality and depressed wages have exacerbated people's inability to accumulate any meaningful savings.<sup>23</sup> This is particularly true for racial and ethnic minorities, who have not recovered the wealth they lost in the Great Recession.<sup>24</sup> Going into the crisis, less than half of American households had

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17. PEW, *Debt Collectors*, *supra* note 15, at 8-10.

18. *Id.* at 4.

19. *Id.* at 15-16.

20. *Id.* at 15-18; *see also* Dalié Jiménez, *Ending Perpetual Debts*, 55 HOUS. L. REV. 609, 614-617 (2018) (describing the prevalence and consequences of default judgments).

21. Pamela Foohey, Dalié Jiménez, & Christopher K. Odinet, *CARES Act Gimmicks: How Not to Give People Money During a Pandemic And What To Do Instead*, 2020 U. ILL. L. REV. ONLINE 81 (2020).

22. *See generally* LISA SERVON, *THE UNBANKING OF AMERICA: HOW THE NEW MIDDLE CLASS SURVIVES* (2017).

23. *See* Pamela Foohey & Nathalie Martin, *Reducing The Wealth Gap Through Fintech "Advances" in Consumer Banking and Lending*, 2021 U. ILL. L. REV. \_\_\_, Part II (forthcoming), <https://ssrn.com/abstract=3551469> [<https://perma.cc/ELC9-YQ2K>] (detailing widening income and wealth gaps over recent decades).

24. *See* Edward Wolff, *The Decline of African-American and Hispanic Wealth Since the Great Recession*, VOX (Dec. 23, 2018), <https://voxeu.org/article/decline-african-american-and-hispanic-wealth-great-recession> [<https://perma.cc/9C2H-3ELU>]; Valerie Wilson, *10 Years After The Start of the Great Recession, Black and Asian Households Have Yet To Recover Lost Income*, ECON. POL'Y INST. (Sept. 12, 2018), <https://www.epi.org/blog/10-years-after-the-start-of-the-great-recession-black-and-asian-households-have-yet-to-recover-lost-income/> [<https://perma.cc/ZLU9-PQ8V>]; Foohey & Martin, *supra* note 23, at Part II.

sufficient savings to cover three months' of their necessary expenses.<sup>25</sup> Among lower-income Americans, that percentage was less than one-quarter.<sup>26</sup> This reflects multiple reports finding that many American households have very little savings to carry them through rough waters.<sup>27</sup>

Along with being financially unprepared for an even somewhat prolonged drop in income, American households were also dealing with another crisis as the pandemic spread to the United States—the rise in outstanding consumer credit.<sup>28</sup> Not having enough income to accumulate savings also means that people do not have enough income to meet their expenses over the long term, especially if they are hit with an unexpected emergency expense. When this happens, Americans have turned to consumer credit, such as for medical expenses.<sup>29</sup> And they increasingly have done the same to finance big-ticket but necessary purchases, such as automobiles.<sup>30</sup> The coronavirus crisis has shone a light on the already existing instability of this trend.

Right now, and in addition to having to pay for basic expenses, the nearly three-quarters of Americans who have outstanding debt must pay their creditors or face the prospect of default followed by debt collection.<sup>31</sup> Likewise, the nearly

25. See Parker, et al., *supra* note 6.

26. See *id.*

27. See, e.g., Ann Carrns, *Even in Strong Economy, Most Families Don't Have Enough Emergency Savings*, N.Y. TIMES (Oct. 25, 2019), <https://www.nytimes.com/2019/10/25/your-money/emergency-savings.html> [<https://perma.cc/7JGA-88QT>]; Eric Rosenbaum, *Millions of Americans Are Only \$400 Away From Financial Hardship. Here's Why*, CNBC (May 23, 2019, 12:38 PM EDT), <https://www.cnbc.com/2019/05/23/millions-of-americans-are-only-400-away-from-financial-hardship.html> [<https://perma.cc/B6FY-PLRN>]; Emmie Martin, *This Chart Shows How Much Money Americans Have In Savings At Every Age*, CNBC (Mar. 12, 2018, 8:30 AM EDT), <https://www.cnbc.com/2019/03/11/how-much-money-americans-have-in-their-savings-accounts-at-every-age.html> [<https://perma.cc/8UHN-UW9C>].

28. See Christopher K. Odet, *Securitizing Digital Debts*, 52 ARIZ. ST. L.J. 505, 508-09 (2020) (“As of the end of the second quarter of 2019, household debt stood at \$13.86 trillion, which is higher than the financial crisis peak in 2008”); see generally LENDOL CALDER, *FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT* (2001) (chronicling the evolution and rise of consumer credit among American households); Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1093 (2019) (arguing that “the problem of entrenched and enduring poverty that leaves people consistently unable to afford basic necessities cannot be addressed by a device that requires future prosperity and economic growth”).

29. See Lorie Konish & Sharon Epperson, *One-Third of Credit Card Users Have Debt Due to Medical Costs. These Steps Can Help You Manage Those Bills*, CNBC (Dec. 13, 2019 4:30 PM EST), <https://www.cnbc.com/2019/12/13/33percent-of-credit-card-debt-is-medical-bills-how-to-manage-those-debts.html> [<https://perma.cc/9NQZ-Y52E>]; David U. Himmelstein, Robert M. Lawless, Deborah Thorne, Pamela Foohey, & Steffie Woolhandler, *Medical Bankruptcy: Still Common Despite the Affordable Care Act*, 109 AM. J. PUB. HEALTH 431 (2019).

30. See Patrick George, *America's Auto Loan Debt Is Truly Out of Control*, JALOPNIK (Oct. 2, 2019), <https://jalopnik.com/americas-auto-loan-debt-is-truly-out-of-control-1838713860> [<https://perma.cc/9WHY-WLDW>]; R. J. Cross et al., *Driving Into Debt: The Hidden Costs of Risky Auto Loans To Consumers And Our Communities*, U.S. PIRG, <https://uspig.org/feature/usp/driving-debt> [<https://perma.cc/XGF9-QJVU>] (last visited May 5, 2020).

31. Megan Leonhardt, *Here's How Much Debt Americans Have At Any Age*, CNBC (Aug. 20, 2018 11:39 AM EDT), <https://www.cnbc.com/2018/08/20/how-much-debt-americans-have-at-every-age.html> [<https://perma.cc/9MXD-Q8KD>].

70 million Americans with a debt in collections before the coronavirus crisis are left to assess how they will deal with creditors' continued collection efforts.<sup>32</sup> But now millions of Americans have little to no income to service their debt.

### B. Congressional COVID-19 Aid for Households

People's fears about money and debt stem, in part, from what Congress both did and did not do to help American families weather the crisis financially. The Coronavirus Aid, Relief, and Economic Security (CARES) Act<sup>33</sup> provided people with economic relief in two primary ways. First, it promised Americans money in the form of relief rebates and enhanced unemployment benefits.<sup>34</sup> Second, it put a pause on some of their debt obligations through the foreclosure, eviction, and student loan moratoria.<sup>35</sup>

The money relief quickly proved to be too little and to come too late.<sup>36</sup> The \$1,200 to \$2,400 (plus \$500 per child) relief rebate payment only took a small bite out of people's mounting bills.<sup>37</sup> One-third of Americans said that the money would not sustain them for even a month, and 84 percent said they needed at least one more stimulus check.<sup>38</sup> And the extent to which people actually would receive the enhanced unemployment benefits in any timely manner has been uncertain because of states' persistent inability to process so many requests in such a short period of time.<sup>39</sup>

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32. Warren, *supra* note 14.

33. Congress passed and the President signed the CARES Act into law on March 27, 2020. *The CARES Act Works For All Americans*, U.S. DEPT. OF TREASURY, <https://home.treasury.gov/policy-issues/cares> [<https://perma.cc/4BG5-8SHC>] (last visited Apr. 24, 2020). The full text of the bill is available at <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> [<https://perma.cc/986G-F9S7>] [hereinafter CARES Act].

34. The CARES Act also provides for some additional paid sick leave, but the Department of Labor slashed benefits such that most people will be ineligible for paid sick leave. See Emily Peck, *Trump's Labor Department Takes a Hacksaw to Coronavirus Paid Sick Leave*, HUFFPOST (Apr. 2, 2020, 6:52 PM), [https://www.huffpost.com/entry/trumps-labor-departmenthacksaws-coronavirus-paid-sick-leave\\_n\\_5e865661c5b6a9491833a797](https://www.huffpost.com/entry/trumps-labor-departmenthacksaws-coronavirus-paid-sick-leave_n_5e865661c5b6a9491833a797) [<https://perma.cc/9H2B-NP3Z>].

35. See generally Pamela Foohey, Dalié Jiménez, & Christopher K. Odinet, *The Folly of Credit As Pandemic Relief*, 68 UCLA L. REV. DISC. \_\_\_ (forthcoming 2020), <https://ssrn.com/abstract=3588355> [<https://perma.cc/4UCE-S9DQ>] [hereinafter Foohey, Jiménez, & Odinet, *Credit as Pandemic Relief*] (detailing the CARES Act's provisions to support American families); Foohey, Jiménez, & Odinet, *CARES Act Gimmicks*, *supra* note 21; see also Kristen Evans, *What You Need To Know About Student Loans And The Coronavirus Pandemic*, CFPB (Apr. 9, 2020), <https://www.consumerfinance.gov/about-us/blog/what-you-need-to-know-about-student-loans-and-coronavirus-pandemic/> [<https://perma.cc/GB49-RRLZ>].

36. Foohey, Jiménez, & Odinet, *CARES Act Gimmicks*, *supra* note 21.

37. See Anita Sharpe, et al., *Americans Agonize Over Coronavirus Stimulus Payments, Worried That \$1,200 Isn't Enough*, TIME (Apr. 17, 2020, 4:09 PM EDT), <https://time.com/5823508/coronavirus-stimulus-checks/> [<https://perma.cc/4BKV-4V2B>].

38. Nicole Lyn Pesce, *84% of Americans Say They Need Another Stimulus Check*, MARKETWATCH (Apr. 23, 2020, 9:40 AM ET), <https://www.marketwatch.com/story/1-in-3-americans-say-their-stimulus-checks-wont-sustain-them-for-even-a-month-2020-04-08> [<https://perma.cc/M89S-UGZA>].

39. See Foohey, Jiménez, & Odinet, *Credit As Pandemic Relief*, *supra* note 36; Ben Zipperer & Elise Gould, *New Survey Confirms That Millions of Jobless Were Unable To File An Unemployment*

The moratoria brought a host of problems that will last long after the crisis abates. Each moratorium left out millions of Americans.<sup>40</sup> Most egregious was the eviction moratorium, which only halted the eviction of one-quarter of all renters because it only applied to federal housing programs and leased premises subject to federally-related mortgages, leaving the rest to the mercy of their state governments.<sup>41</sup> Across all moratoria, the relief offered to eligible Americans amounted to modifications of their pre-existing loans and rental agreements.<sup>42</sup> The debt remains. And because the CARES Act does not detail how mortgage servicers<sup>43</sup> and landlords are to recoup missed mortgage and rental payments, many Americans will likely face having to make lump-sum payments of accrued amounts when the moratoria are lifted.<sup>44</sup> The same is true for student loans, which has led to calls to cancel student loan debt rather than merely put off people's payments for a few months.<sup>45</sup>

The CARES Act thus establishes a system of relief for Americans that is likely to result in people being hit with even more debt to pay in the future, potentially immediately after the moratoria end. Conceptually, the moratoria represent "credit as relief."<sup>46</sup> Congress primarily offered people the ability to restructure some of their existing debts: to put off paying them for a few months, with the missed payments to be made up at some unspecified future date and in some unspecified future way. Alternatively, Congress could have provided people with relief in the form of actual money, similar to the relief rebate payments, but in a greater amount and for a more sustained period of time. People could have used this money to pay their rent, mortgage, student loans, and for other necessities, like utilities and food, for now and for months in the future as

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*Insurance Claim*, WORKING ECON. BLOG (Apr. 28, 2020, 7:00 AM), <https://www.epi.org/blog/unemployment-filing-failures-new-survey-confirms-that-millions-of-jobless-were-unable-to-file-an-unemployment-insurance-claim/> [<https://perma.cc/8KMW-2DXC>]; Megan Cassella & Katy Murphy, *States Overwhelmed By Previously Unimaginable Layoff Numbers*, POLITICO (Apr. 1, 2020, 4:49 PM EDT), <https://www.politico.com/news/2020/04/01/unemployed-workers-benefits-coronavirus-159192> [<https://perma.cc/PVR5-7AT3>].

40. See Foohey, Jiménez, & Odinet, *Credit as Pandemic Relief*, *supra* note 36 (detailing the foreclosure and eviction moratoria).

41. *Id.*

42. The granting of credit as "relief" reflects an unfortunately and potentially quite harmful idea that credit is a "social provision." Abbye Atkinson, *Rethinking Credit As Social Provision*, 71 STAN. L. REV. 1093, 1096 (2019); see also Foohey, Jiménez, & Odinet, *Credit As Pandemic Relief*, *supra* note 36.

43. CHRISTOPHER K. ODINET, *FORECLOSED: MORTGAGE SERVICING AND THE HIDDEN ARCHITECTURE OF HOMEOWNERSHIP IN AMERICA* 40 (2019) (detailing the mortgage servicing industry); see also Christopher K. Odinet, *Banks, Break-Ins, and Bad Actors in Mortgage Foreclosure*, 83 U. CIN. L. REV. 1155, 1175 (2015).

44. Foohey, Jiménez, & Odinet., *Credit as Pandemic Relief*, *supra* note 36.

45. Cody Hounanian & Natalia Abrams, *Now Is The Time To Cancel Student Debt*, THE NATION (Mar. 18, 2020), <https://www.thenation.com/article/society/now-is-the-time-to-cancel-student-debt/> [<https://perma.cc/F5XT-7H68>], see also Dalié Jiménez & Jonathan Glater, *Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. CIV. RIGHTS & CIV. LIBERTIES J. \_\_\_ (forthcoming 2020).

46. Foohey, Jiménez, & Odinet., *Credit as Pandemic Relief*, *supra* note 34.



the United States continues to work to control the health crisis. This would have allowed American families to be on more solid financial footing when the country finally emerges from the crisis.<sup>47</sup>

Instead, the credit as relief provided by the CARES Act will result in a debt collection pandemic.<sup>48</sup> Because minorities are more likely to incur higher amounts of debt relative to their income, more likely to default on debts, and more likely to be sued in debt collection actions, they are on course to bear the brunt of the debt collection pandemic.<sup>49</sup> Unless the government intervenes soon, communities of color will be double-hit with COVID-19 and debt collection.<sup>50</sup>

Despite the obvious problems with shutting down an economy while millions of Americans rely on credit to survive financially, Congress did nothing in the CARES Act or otherwise to protect people from continued debt collection. Indeed, the federal government did not even protect rebate relief payments from debt collection, despite being alerted to an easy-to-implement solution.<sup>51</sup> These inactions put people at a heightened risk for debt collection, many of whom likely never thought they would be in such a position. If robust efforts to help people deal with currently unmanageable debts are not enacted soon, Congress risks setting America on a collision course with a debt collection pandemic.

## II.

### STATES' EFFORTS TO COMBAT DEBT COLLECTION DURING CORONAVIRUS

Absent federal action, states have been left to deal with the building storm of debt collection activities themselves. Yet their efforts have been variable and often limited, likely because taking action during a pandemic that has fundamentally disrupted the country is challenging, even if that action is

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47. See generally *id.*

48. See Pamela Foohey, Dalié Jiménez, & Christopher K. Odinet, *The Cares Act Could Put People on the Street—Here's a Solution*, BLOOMBERG L. (Apr. 28, 2020, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-the-cares-act-could-put-people-on-the-street-heres-a-solution> [<https://perma.cc/K3YG-34GP>] [hereinafter Foohey, Jiménez, & Odinet, *On the Street*].

49. See Emanuel Nieves, *What We've Learned About Debt in Black Communities*, PROSPERITY NOW (Feb. 7, 2019), <https://prosperitynow.org/blog/what-weve-learned-about-debt-black-communities> [<https://perma.cc/4Z5U-P5UZ>]; Jiménez & Glater, *supra* note \_\_.

50. See Samantha Artiga, et al., *Growing Data Underscores That Communities of Color Are Being Harder Hit By COVID-19*, KAISER FAMILY FOUNDATION (Apr. 21, 2020), <https://www.kff.org/coronavirus-policy-watch/growing-data-underscore-communities-color-harder-hit-covid-19/> [<https://perma.cc/8H7D-HJXA>].

Lower-income Americans, as well as communities of color, also seem to have worse health outcomes from covid-19 infections, which likely also will be true as to debt collection actions filed against them. See Wyatt Koma, *Low-Income and Communities of Colors at Higher Risk of Serious Illness If Infected with Coronavirus*, KAISER FAMILY FOUNDATION (May 7, 2020), <https://www.kff.org/disparities-policy/issue-brief/low-income-and-communities-of-color-at-higher-risk-of-serious-illness-if-infected-with-coronavirus/> [<https://perma.cc/G8N5-JX4A>].

51. See Pamela Foohey, Dalié Jiménez, & Chris Odinet, *Time Is Running Out to Protect Americans' Relief Payments from Debt Collectors*, HARV. L. REV. BLOG (Apr 7, 2020), <https://blog.harvardlawreview.org/time-is-running-out-to-protect-americans-relief-payments-fromdebt-collectors/> [<https://perma.cc/9L2S-3FCX>] [hereinafter Foohey, Jiménez, & Odinet, *Debt Collectors*].

crucial.<sup>52</sup> Only a handful of states have attempted to address debt collection broadly. Most have instead focused on protecting certain assets from debt collectors—namely, CARES Act relief and related pandemic payments, as well as occasionally vehicles. The sources of the debt collection relief have also varied. States have relied on state supreme courts through their supervision of lower courts, on governors through the exercise of emergency powers, on the application of specific statutes, on local government efforts, and—in at least one case—on an expansive reading of a state constitution’s due process clause.

#### A. Relief from the State High Courts

State high courts seem to have been the most active in dealing with issues surrounding debt collection during a pandemic. New York’s high court stands out as taking the most muscular action. It prohibited clerks of court from accepting litigation filings except for those related to a limited set of topics, mainly discrete issues in criminal matters and family law.<sup>53</sup> Debt collection actions and general civil matters did not make that list.

In contrast, most state high courts have focused exclusively on protecting CARES Act relief rebate payments, with varying levels of clarity. For instance, in Indiana, the state supreme court invoked its emergency rulemaking authority relative to governing and controlling the “practice and procedure in all the courts of Indiana”<sup>54</sup> to protect CARES Act stimulus payments from attachment or garnishment.<sup>55</sup> Although the court noted its wide authority to “suspend issuance of all hold, attachment, or garnishment orders during [the] emergency,” it opted to “order a much narrower and more carefully tailored subset of that relief” during the duration of the crisis.<sup>56</sup>

In Texas, the state supreme court carved out even more limited relief. Drawing on its power to “modify or suspend procedures for the conduct of any court during a period of disaster declared by the governor,” it allowed writs of garnishment to be issued, but prohibited them from being served until May 25, 2020.<sup>57</sup> Thus, a Texas state court could continue to issue garnishment orders. But

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52. For a comprehensive and continuously updated list of consumer-related governmental responses, see *COVID-19 and Consumer Protections*, NAT’L CONSUMER L. CTR., <https://www.nclc.org/special-projects/covid-19-consumer-protections.html> [<https://perma.cc/MZ4D-Y4MP>] (last visited May 4, 2020).

53. Administrative Order AO/78/20 (Mar. 22, 2020), <https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf> [<https://perma.cc/43DH-GFE5>] (see Exhibit A for allowable filings).

54. In the Indiana Supreme Court, *In re Petition to the Indiana Supreme Court to Engage in Emergency Rulemaking to Protect CARES Act Stimulus Payments From Attachment or Garnishment From Creditors* (April 20, 2020), <https://www.in.gov/judiciary/files/order-other-2020-20S-MS-258a.pdf> [<https://perma.cc/T37E-2GZX>].

55. *Id.* at 2.

56. *Id.* at 2.

57. In the Supreme Court of Texas, *Misc. Docket No. 20-9061, Fourteenth Emergency Order Regarding the COVID-19 State of Disaster* (April 29, 2020), <http://www.txcourts.gov/media/1446486/209061.pdf> [<https://perma.cc/8XKB-Y2WS>].

the recipient of the order, such as a creditor or debt collector, could not send the order to a bank or an employer immediately. This effectively meant that enforcements of new garnishments were stayed for a few months.

Troublingly, the Texas judicial order stated that for any bank accounts already subject to garnishment, “parties are strongly encouraged to reach an agreement on garnishment, and courts are encouraged to aid and facilitate quick adjudication.”<sup>58</sup> What this language meant to accomplish is unclear. A garnishment order generally follows an adjudication on the merits; that is, a judgment that liquidates the claim has already been rendered.<sup>59</sup> Garnishment orders allow creditors and debt collectors to take money from people’s bank accounts. As such, this provision could have left debtor-creditor rights intact and Americans fearful that money in their bank accounts would disappear. All this was rendered moot—at least for now—because the Texas supreme court ruled that evictions and debt collection can resume as of May 26, consistent with its initial order of relief.<sup>60</sup>

### B. Relief by Order of the Governors

In other states, governors have stepped in to deal with debt collection through executive orders. These orders have been far from uniform and some have generated questions as to scope. In Iowa, for example, the governor broadly suspended a number of debt collection devices.<sup>61</sup> Secured creditors, such as auto lenders, are not allowed to seek judicial seizure of personal property subject to a security interest (a writ of replevin),<sup>62</sup> although self-help repossession appears to still be allowed.<sup>63</sup> Also, all garnishment actions of any kind are suspended, except for actions related to domestic support obligations.<sup>64</sup>

Similarly, in the interest of “ensuring individuals are able to engage in permitted travel,” the governor of Illinois suspended the ability of secured

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58. *Id.*

59. 38 C.J.S. GARNISHMENT § 1 (“A writ of garnishment is a means of enforcing a judgment; garnishment enables the judgment creditor to enforce its judgment against the judgment debtor even though the judgment debtor is not in possession of the property.”). Any state statutes that purport to allow for prejudgment garnishments are likely unconstitutional. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); see also *Fuentes v. Shevin*, 407 U.S. 67 (1972); ADAM J. LEVITIN, CONSUMER FINANCE: MARKET AND REGULATION 725 (2018).

60. See Emma Platoff & Juan Pablo Garnham, *Eviction Proceedings and Debt Collections Can Resume This Month, Texas Supreme Court Orders*, TEXAS TRIBUNE (May 14, 2020, 8:00 PM), <https://www.texastribune.org/2020/05/14/texas-evictions-debt-collections-resume-may-moratoriums-lifted/> [https://perma.cc/2YGH-AJTE]; *supra* note 69.

61. State of Iowa, Executive Department, Proclamation of Disaster (Apr. 24, 2020), <https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Proclamation%20-%202020.04.24.pdf> [https://perma.cc/UQ3K-DCQ2] [hereinafter Iowa Order]

62. *Id.* § 26

63. IOWA CODE ANN. § 554.9609(2)(b).

64. Iowa Order, *supra* note 61, § 28.

creditors to repossess vehicles (either judicially or using self-help)<sup>65</sup> and then later suspended the ability of creditors to serve “garnishment summons, wage deduction summons, or a citation to discover assets on a consumer debtor or consumer garnishee.”<sup>66</sup> This essentially created a procedural prohibition on some, but not all kinds of debt collection activities.

The governor of Maryland took a narrower approach. Noting the “loss of employment and other detrimental economic impacts” as a result of COVID-19, Governor Larry Hogan’s order exempts CARES Act relief payments from garnishment.<sup>67</sup> It also instructs financial institutions holding such payments on deposit for customers (such as banks) to treat the funds as though they were exempt under federal law as a federal benefit payment.<sup>68</sup> While not entirely clear, this part of the order appears to be aimed at protecting CARES Act payments that come into bank accounts when a person’s account already is subject to a garnishment order by treating the payment as a type of federal benefit, like social security, that is exempt from garnishment.<sup>69</sup> Consistent with other governors’ orders, Maryland also placed a moratorium on the repossession of vehicles,<sup>70</sup> and allowed garnishments related to child support to continue.<sup>71</sup>

Other gubernatorial protection extends beyond CARES Act payments. In California, the governor issued an executive order designed to allow “individuals who receive financial assistance under the CARES Act” to make use of those funds for their “immediate financial needs.”<sup>72</sup> The substance of the order actually provides that *any* kind of COVID-19-related financial assistance from the state, local, or federal government (not merely relief under the CARES Act) is exempt from garnishment or seizure. However, the order maintains garnishment related to child support, spousal support, and the collection of criminal restitution for victims.<sup>73</sup>

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65. Illinois Executive Order 2020-16 (Mar. 28, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-16.aspx> [<https://perma.cc/589H-T3VJ>].

66. Illinois Executive Order 2020-25 (Apr. 14, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-25.aspx> [<https://perma.cc/M87A-7NXL>].

67. See Order of the Governor of the State of Maryland, No. 20-04-29-03, State of Maryland, at 2 (Apr. 29, 2020), <https://htv-prod-media.s3.amazonaws.com/files/garnishments-4-29-20-1588274273.pdf> [<https://perma.cc/7T8S-UN99>] [hereinafter Maryland Order]. The term “garnishment” is defined to include broadly “execution, levy, attachment, garnishment, or other legal process.” See *id.* at 1-2.

68. *Id.*

69. *Id.* at 2 (citing Maryland Rules 2-645.1 and 3-645.1); see also Foohey, Jiménez, & Odinet, *Debt Collectors*, *supra* note 48.

70. See Order of the Governor of the State of Maryland, No. 20-04-01-01, State of Maryland, at 3 (Apr. 3, 2020), <https://governor.maryland.gov/wp-content/uploads/2020/04/Evictions-Repossessions-Foreclosures-AMENDED-4.3.20.pdf> [<https://perma.cc/3R5G-TMCY>].

71. Maryland Order, *supra* note 63, at 2.

72. Executive Order N-57-20, Executive Department, State of California, at 2 (Apr. 23, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/04/4.23.20-EO-N-57-20.pdf> [<https://perma.cc/FK22-93MD>].

73. Executive Order N-57-20, *supra* note 72. The governor had previously suspended the state’s ability to garnish relief payments in connection with obligations owed to the State of California. *Cf.*

Finally, Nevada's governor issued the most expansive order to date. It protects against *all* garnishment actions, not just those related to seizing CARES Act or related funds. Like other states, the order does not apply to enforcement of child or spousal support or to crime victim restitution.<sup>74</sup>

### C. Relief by Legislation, Regulation, and Equity

In states in which high courts and governors have not acted, relief from some debt collection actions has been cobbled together through legislative, administrative, and judicial maneuvers. Again, the relief varies. Alaska and the District of Columbia passed temporary moratoria on the repossession of vehicles by auto lenders.<sup>75</sup> A number of local governments, such as the City of Las Vegas, have stepped in to provide various forms of relief via ordinance or local court rule.<sup>76</sup>

Some states' attorneys general have stepped in to help. The attorney general of Ohio issued a warning to debt collectors that his office would treat the CARES Act relief payments as exempt under Ohio law.<sup>77</sup> Specifically, Attorney General Dave Yost invoked a provision in Ohio's state exemption statute providing protection from seizure and garnishment for payments made to individuals "in compensation for loss of future earnings of the person . . . to the extent reasonably necessary for the support of the debtor and any . . . dependents."<sup>78</sup> The traditional use of this exemption has been in the context of whether wrongful death or retirement benefits were necessary to "sustain present and future needs"

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Executive Order N-52-20, Executive Department, State of California (Apr. 15, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/04/4.16.20-EO-N-52-20-text.pdf> [<https://perma.cc/2KCD-LX94>].

74. Blake Apgar, *Sisolak Signs Directive Protecting Stimulus Money From Garnishment*, LAS VEGAS REV. J. (May 1, 2020, 11:14 AM), <https://www.reviewjournal.com/news/politics-and-government/nevada/sisolak-signs-directive-protecting-stimulus-money-from-garnishment-2018970/> [<https://perma.cc/2U32-9FQG>].

75. Senate Bill 241 (Laws of Alaska 2020) (Apr. 10, 2020), <http://www.akleg.gov/PDF/31/Bills/SB0241Z.PDF> [<https://perma.cc/6VJK-ZYUF>]; D.C. Act 23-286 (Apr. 10, 2020), <http://lms.dccouncil.us/Download/44543/B23-0733-SignedAct.pdf> [<https://perma.cc/R475-USVQ>]; see also *Major Consumer Protections Announced in Response to COVID-19*, NAT'L CONSUMER L. CTR., <https://library.nclc.org/major-consumer-protections-announced-response-covid-19> [<https://perma.cc/F42A-DRZY>] (last visited May 6, 2020).

76. See, e.g., Justice Court, Las Vegas Township, Clark County, Nevada, In the Administrative Matter Regarding Temporary Procedures in Criminal and Civil Cases, Admin Order 20-09 (Apr. 22, 2020), <http://www.lasvegasjusticecourt.us/Admin%20Order%2020-09.pdf> [<https://perma.cc/Z88P-7Q74>]; Melissa Sanchez & Elliott Ramos, *Chicago Temporarily Halts Some Debt Collections and Ticketing Amid Coronavirus Pandemic*, PROPUBLICA (Mar. 18, 2020, 4:30 PM), <https://www.propublica.org/article/chicago-temporary-halt-some-debt-collections-ticketing-covid-19-coronavirus-pandemic> [<https://perma.cc/C3D6-9JV7>].

77. *Notice of Applicability of State Law Exemption to Payments Under the Federal Cares Act*, Ohio Attorney General (Apr. 13, 2020), [https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/STATE\\_LAW\\_EXEMPTION\\_FOR\\_WEB.aspx](https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/STATE_LAW_EXEMPTION_FOR_WEB.aspx) [<https://perma.cc/T2AM-5LZ2>] [hereinafter Ohio Attorney General Alert].

78. OHIO REVISED CODE § 2329.66(A)(12)(d).

in the context of bankruptcy.<sup>79</sup> Notably, Ohio courts typically require a showing that the property seeking to be held exempt is necessary to cover the “current payment of basic living expenses,”<sup>80</sup> but the attorney general declared, as a blanket matter, that CARES Act relief payments “are exempt from attachment, garnishment or execution” as a matter of Ohio law.<sup>81</sup>

A particularly creative use of existing legislation in order to address debt collection during the crisis came from the attorney general of Massachusetts.<sup>82</sup> Exercising her rulemaking authority under the Massachusetts Consumer Protection Act, Attorney General Maura Healey issued an emergency rule making it a *per se* unfair and deceptive act or practice to engage in a wide array of debt collection activities.<sup>83</sup> A little over a month after Attorney General Healey issued the emergency regulation, a federal judge struck down the measure as a violation of the First Amendment.<sup>84</sup>

Perhaps the most unique example of debt collection relief during a pandemic comes from a West Virginia state court. The court was asked to issue an injunction to prevent the enforcement of a garnishment order served on the plaintiff-debtors’ bank account in favor of a healthcare provider.<sup>85</sup> The plaintiffs, a nurse (the sole provider of her family of four) and her husband (a recently laid-off coal miner), filed the suit in an effort to protect their forthcoming CARES Act relief payment.<sup>86</sup> The court granted the emergency injunction based on the due process clause of West Virginia’s constitution.<sup>87</sup> In one part, and unremarkably, the court held that the closure of the state courts and the shelter-in-place order would prevent the plaintiffs from challenging the garnishment before a judge regarding the applicability of any state law exemptions—essentially, resolving the issue on *procedural* due process grounds.<sup>88</sup> It reasoned

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79. See, e.g., *In re Metzner*, 157 B.R. 332 (Bankr. N.D. Ohio 1993) (retirement benefits); *In re Cluckey*, 221 B.R. 192 (Bankr. N.D. Ohio 1998) (retirement benefits); *In re Michel*, 332 B.R. 557 (Bankr. N.D. Ohio 2005) (wrongful death); *In re Abbott*, 466 B.R. 118 (Bankr. N.D. Ohio 2012) (wrongful death).

80. See *In re Phillips*, 45 B.R. 529, 531 (Bankr. W.D. Ohio 1984) (discussing the legislative history of the exemption in § 2329.66(A)(12)(d)).

81. Ohio Attorney General Alert, *supra* note 73.

82. Press Release, AG’s Office Issues Emergency Regulation to Protect Consumers from Harmful Debt Collection Practices During Covid-19 Emergency (Mar. 27, 2020), <https://www.mass.gov/news/ags-office-issues-emergency-regulation-to-protect-consumers-from-harmful-debt-collection> [<https://perma.cc/G3ZM-A3U3>].

83. Unfair and Deceptive Debt Collection Practices During the State of Emergency Caused by COVID-19 (940 CMR 35:00), MASS. ATTY. GEN., <https://www.mass.gov/doc/ma-reg/download> [<https://perma.cc/7EAU-YHVU>].

84. See Chris Villani, *Mass. COVID-19 Debt Collection Ban Struck Down*, LAW360 (May 6, 2020, 6:31 PM EDT), <https://www.law360.com/articles/1271151/mass-covid-19-debt-collection-ban-struck-down> [<https://perma.cc/2ZHR-9989>].

85. *Long v Clear Mountain Bank, Inc.*, No. 20-C-38, 2020 WL 1906842 (W. Va. Cir. Ct. Apr. 15, 2020).

86. *Id.* at \*1.

87. *Id.* at \*1, 7.

88. *Id.* at \*6.

that the funds should be released to the debtors “until such time as the courts are available to provide a meaningful opportunity to be heard.”<sup>89</sup>

More remarkably, the court also ordered the funds released on what appeared to be *substantive* due process grounds.<sup>90</sup> It stated that the “seizure of the [CARES Act funds] by a judgment creditor would contravene the mandated purpose of the funds,” which is to assist people in paying for “food, utilities, rent, medicine, and other basic necessities at a time when most have to stay at home or will otherwise lose income.”<sup>91</sup> Seizure would “thus violate the West Virginia Constitution.”<sup>92</sup>

Considered together, the actions of state high courts, governors, legislatures, and other government officials address few of the debt collection worries that Americans face right now and will have to deal with soon in the future. Saving the \$1,200 to \$2,400 (plus money for children) that people received<sup>93</sup> and halting some repossessions of people’s means of transportation is useful. But these efforts do not acknowledge the range and depth of many Americans’ pre-existing relationships with credit. Nor do they acknowledge the coming challenges people will have meeting re-activated, potentially higher payment obligations for homes, rental units, and student loans.<sup>94</sup> To the extent that states provided greater relief, that relief comes with interpretation questions that are time-consuming and costly at a time when people need reassurance that they will not be pushed off the financial cliff. Some of these interpretations also bring constitutional challenges, such as the Massachusetts attorney general’s emergency rule.<sup>95</sup> And people living in some states have no protection at all. In short, this piecemeal approach to debt collection is flawed.

### III.

#### WHAT MUST BE DONE TO QUELL THE STORM

States should not be blamed unduly for their ad hoc approach to dealing with debt collection issues. The federal government effectively forced state actors to step in where it has been entirely absent. Of course, what states have cobbled together leaves significant gaps in who and what is protected, as well as how long protections last. There are better ways. Perhaps the best way is for the federal government to take the actions it should have taken at the outset of the

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89. *Id.*

90. *Id.*; see also *Substantive Due Process*, CONSTITUTIONAL LAW DESKBOOK § 8:111 (Aug. 2019) (“Substantive due process is distinguished from procedural due process which attends to the means by which policies are executed. Judicial review of the reasonableness of legislative enactments allows the Court actively to intervene in policy judgments more than it could if review were confined to procedural considerations.”).

91. *Long v Clear Mountain Bank, Inc.*, No. 20-C-38, 2020 WL 1906842, at \*6 (W. Va. Cir. Ct. Apr. 15, 2020).

92. *Id.*

93. See *supra* text accompanying note 21.

94. See *supra* text accompanying note 22.

95. See *supra* text accompanying note 82.

crisis. If that does not happen, state governments have powers that, if used collectively and in concert, can provide people with meaningful relief to weather the coming debt collection pandemic. In what follows, we explain how.

*A. What the Federal Government Can (And Should) Do*

The most comprehensive and ideal solution is for Congress to halt all debt collection activities on a nationwide basis for a prescribed period. This will eliminate the patchwork problem created by states' efforts and provide more consistent and uniform relief to struggling families as they try to manage through the crisis and its aftermath.

Beyond its nationwide scope, congressional action is far better than state action because of constitutional and legislative considerations. States' actions can be limited by nuanced restrictions in individual state constitutions or statutory codes. Congress, however, can exercise its authority under the Commerce Clause to regulate debt collection activities nationwide.<sup>96</sup> Indeed, this is how it passed the Fair Debt Collection Practices Act in 1977.<sup>97</sup> Our recommendation is a more aggressive, but still constitutional, use of that power in a time of national emergency. After all, to quote Chief Justice White in the Supreme Court's 1917 decision of *Wilson v. New*: "An emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed."<sup>98</sup>

The Takings Clause also poses little problem for our recommendation. Although the Fifth Amendment prohibits the taking of private property (including regulatory takings) except when accompanied by a public purpose and with just compensation given, not every deprivation creates a taking.<sup>99</sup> In *Lucas v. South Carolina Coastal Council*, the Supreme Court made clear that property "cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."<sup>100</sup> Suspending debt collection activities creates a pause in the ability of creditors to collect on debts. This does not mean the debts are no longer due. Stated

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96. *Delawder v. Platinum Fin. Servs. Corp.*, 443 F. Supp. 2d 942, 951 (S.D. Ohio 2005) ("Congress passed the FDCPA pursuant to its enumerated power under the Commerce Clause"); see also *Smith v. Steinkamp*, No. IP011290CHS, 2002 WL 1364161, at \*5 (S.D. Ind. May 22, 2002), *aff'd*, 318 F.3d 775 (7th Cir. 2003).

97. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874, 15 U.S.C. §§ 1692-92p. "Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce." 15 U.S.C. § 1692(d).

98. *Wilson v. New*, 243 U.S. 332, 348 (1917) (discussing Congress' exercise of the Commerce Clause dealing with the work hours and wages of railroad workers in the face of a national railroad strike).

99. See U.S. CONST. art. V; *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (recognizing a so-called "regulatory taking"); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

100. 505 U.S. 1003, 1016 (1992).



differently, the claim is not valueless simply because a creditor temporarily cannot enforce it.<sup>101</sup>

Besides Congress, the Consumer Financial Protection Bureau (CFPB) has two tools at its disposal to help American households overwhelmed by debt collection.<sup>102</sup> First, during the Great Recession financial overhaul, Congress assigned to the CFPB rulemaking authority and enforcement of the Fair Debt Collection Practices Act (FDCPA).<sup>103</sup> This gives it the power to issue a regulation that specifically addresses debt collection during a pandemic. As proof of this power, the agency recently issued the first ever FDCPA rule.<sup>104</sup>

But rulemaking takes time.<sup>105</sup> During this crisis, time is of the essence. Instead or concurrently with rulemaking, the CFPB should use its role as enforcer of the FDCPA to help Americans immediately and into the future.<sup>106</sup> The FDCPA provides that “[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.”<sup>107</sup> With this in hand, the CFPB can issue a warning letter<sup>108</sup> alerting the debt collection industry that it will

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101. Congress also would be acting in response to a national health and economic emergency, thereby likely bolstering its power to avoid the takings issue. *See* Wilson, 243 U.S. at 348.

102. *See generally* Richard Cordray, Diane E. Thompson, & Christopher Lewis Peterson, *Consumer Financial Protection in the COVID-19 Crisis: An Emergency Agenda* (draft dated Apr. 6, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3569357](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3569357) [<https://perma.cc/Y8HA-QXZD>].

103. *See* 15 U.S.C. § 1692l(d).

104. On May 7, 2019, the CFPB issued a notice of proposed rulemaking under the FDCPA to create new debt collection rules under Regulation F. *See* Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274 (May 21, 2019), <https://www.federalregister.gov/documents/2019/05/21/2019-09665/debt-collection-practices-regulation-f> [<https://perma.cc/SN9T-AEBQ>].

105. Rachel Augustine Potter, *Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking*, 3 J. OF POLITICS 79 (2017), <https://www.journals.uchicago.edu/doi/full/10.1086/690614> [<https://perma.cc/G477-LDNY>]. The CFPB could argue that regulatory action under the crisis’s circumstances presents an emergency that allows it to proceed without the notice and comment period required by the Administrative Procedures Act (APA), § 553. *See* JARED B. COLE, CONG. RESEARCH SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION (2016), <https://crsreports.congress.gov/product/pdf/R/R44356/3> [<https://perma.cc/G5SN-NCD6>]. This argument, however, presents uncertainties of its own about its validity that will again add a layer of concern and potentially even more time to rulemaking. In either event, current CFPB leadership does not appear inclined to go down any of these paths and has instead focused on relaxing regulatory burdens for industry. Kate Berry, *5 Ways the CFPB Has Eased Industry’s Coronavirus Burden*, AM. BANKER (May 20, 2020), <https://www.americanbanker.com/list/5-ways-the-cfpb-has-eased-industrys-coronavirus-burden> [<https://perma.cc/R2WK-K5J6>].

106. 12 U.S.C. § 5564(a) (authoring the CFPB to enforce the “federal consumer financial law”); *see also* 12 U.S.C. § 5481(14) (defining “federal consumer financial law” as including certain pre-existing federal laws transferred to the CFPB under the Dodd-Frank Act: called the “enumerated consumer laws”); 12 U.S.C. § 5481(12). The enumerated consumer laws include, among others, the Fair Debt Collection Practices Act. 12 U.S.C. § 5481(12)(H).

107. 15 U.S.C. § 1692f.

108. *Warning Letters*, CFPB, <https://www.consumerfinance.gov/policy-compliance/enforcement/warning-letters/> [<https://perma.cc/7UQ7-QR7L>] (last visited May 4, 2020) (“Sometimes the CFPB will send a warning letter to advise recipients that certain actions may violate federal consumer financial law. These are not accusations of wrongdoing. Instead, they are meant to help recipients review certain practices and ensure that they comply with federal law.”).

consider any attempt to collect a debt during this national emergency to be an unfair or unconscionable act, and that it will act against any collector attempting to do so.<sup>109</sup>

This immediate CFPB action, however, is second best to congressional action. The scope of who this CFPB warning letter will apply to is limited by the FDCPA's definition of debt collector. The definition only includes those that collect debts on behalf of others, and thus does not include those who collect debt on their own behalf.<sup>110</sup> The letter's effect also will depend on debt collection companies heeding the warning. There, of course, is a possibility that companies will disregard the letter and continue with collection efforts in hopes that the CFPB's enforcement action will take time or not happen at all. Nonetheless, the debt collection industry is immense.<sup>111</sup> A warning is likely to have an immediate market impact on at least some market participants, which is a better outcome than the status quo.

Second, the CFPB can exercise its power under Section 1036 of the Consumer Financial Protection Act.<sup>112</sup> That provision allows it to engage in rulemaking and enforcement<sup>113</sup> relative to acts and practices by a "covered person" that are unfair, deceptive, or abusive.<sup>114</sup> Covered persons include anyone who collects consumer debts.<sup>115</sup> Again, the CFPB can issue guidance stating that the agency would consider any debt collection activities to be unfair<sup>116</sup> during this public health emergency.

### B. What the States Could Do

While not as ideal as a federal response, states have the ability to take action to suspend debt collection activities. These abilities are more or less universal, meaning every state could act in concert to help American families.

First, every state has a statute similar to Section 1036 of the Consumer Financial Protection Act that bans activities or practices that are unfair or

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109. See Diane Thompson & Seth Frotman, *It's Time to Ban Dangerous Debt Collection Threatening Public Health During COVID-19*, MORNING CONSULT (Apr. 30, 2020), <https://morningconsult.com/opinions/its-time-to-ban-dangerous-debt-collection-threatening-public-health-during-covid-19/> [<https://perma.cc/HQ8W-UKLZ>].

110. 15 U.S.C. § 1692a(6).

111. Jack Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. TIMES MAGAZINE (Aug. 15, 2015), <https://www.nytimes.com/interactive/2014/08/15/magazine/bad-paper-debt-collector.html> [<https://perma.cc/NNL6-WQLF>].

112. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1036, 124 Stat. 2010, 12 U.S.C. § 5536(a)(1)(B) (2018).

113. 12 U.S.C. § 5531.

114. *Id.* § 5536(a)(1)(B).

115. *Id.* §§ 5481(6)(A), (15)(A)(x).

116. *Id.* § 5531(c)(1) (providing the definition of "unfairness" as requiring a showing that the act or practice causes or is likely to cause substantial injury to consumers, which cannot be otherwise reasonably avoided by consumers, and that the injury is not outweighed by countervailing benefits to consumers or competition").

deceptive.<sup>117</sup> These standards-based statutes (often called “UDAP laws”) are meant as “an alternative to common law remedies in tort and contract, which [over time] proved inadequate for addressing fraud in a progressively more complex marketplace.”<sup>118</sup> State attorneys general typically have enforcement power, and can use the statutes, as in the case of Massachusetts,<sup>119</sup> to police debt collection activities during the pandemic. Even if a given attorney general lacks rulemaking authority under the relevant UDAP statute, issuing guidance on enforcement is another solution that will be more effective than remaining silent about the problems of debt collection during and following a pandemic.

States attorneys general’s use of UDAP laws is a second-best solution to federal action because, most notably, many of these laws have significant limitations. They either prescribe only a narrow set of activities or acts that are actionable or they carve-out certain kinds of activities and entities from their purview. Oklahoma’s UDAP law provides a useful example.<sup>120</sup> It purports to cover a wide array of activities,<sup>121</sup> including any practice that is broadly “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.”<sup>122</sup> But it also includes significant exceptions. Any act or transaction that is regulated by any “regulatory body or officer acting under statutory authority of this state or the United States” is exempt from the law’s purview.<sup>123</sup> The vagaries of this provision leave open the possibility that any number of creditors could escape the law’s coverage.<sup>124</sup> And Oklahoma is not unique in this regard. As Professor Adam Levitin has observed: “the strength of UDAP statutes varies considerably among the states, even if the basic legal concept of a statutory prohibition on unfairness and deception is broadly shared.”<sup>125</sup>

Even if attorneys general lack robust authority under their own states’ laws, the Consumer Financial Protection Act gives state enforcement officials an extra set of tools to use in aiding American households in financial distress. State attorneys general are granted the ability to enforce the same federal consumer

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117. See, e.g., CAL. BUS. & PROF. CODE §§ 17200–10; IOWA CODE 714.16–16A; IND. CODE 24-5-0.5-1–12.

118. Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 42 (2018).

119. See *supra* text accompanying notes 78-79.

120. OKLA. STAT. ANN. tit. 15, § 753.

121. *Id.*

122. *Id.* § 752(14).

123. *Id.* § 754(2).

124. For example, payday and other small dollar lenders are licensed by the Oklahoma Department of Consumer Credit, which suggests the UDAP statute does not apply to them. OKLA. STAT. ANN. tit. 59, §§ 3101-19. Also, hospitals are licensed by the Oklahoma Department of Health, thereby creating an argument that they too are exempted. OKLA. STAT. ANN. tit. 63, §§ 1-701-06. Taken to an extreme, most all businesses are regulated by at least some state official.

125. LEVITIN, *supra* note 59, at 81.

financial laws as the CFPB.<sup>126</sup> This includes the 1036 UDA(A)P provisions and the FDCPA.<sup>127</sup>

Relatedly, each state has an official or commission that is charged with licensing and regulating firms that offer consumer financial products and services, such as mortgage lenders, payday lenders, vehicle-title lenders, and other kinds of small dollar finance companies.<sup>128</sup> The Consumer Financial Protection Act also grants to these state officials the power to enforce both the federal UDA(A)P statute and the FDCPA with respect to the firms they license.<sup>129</sup> Through federal law, state officials who otherwise may lack sufficient authority have powerful tools at their disposal to provide significant debt collection relief to families across America.

#### CONCLUSION

Almost immediately upon the coronavirus' emergence in the United States, the federal and state governments took necessary actions to save human lives by enforcing shelter-at-home orders and mandating social distancing. The inevitable result, though, was to put millions of Americans at risk for debt collection. In the short term, these collection actions might end with garnishment of bank accounts and wages and repossession of their cars. In the coming months, these actions threaten people's housing situations. Given the state of people's financial situation already, communities of color and low-income Americans will be hit hardest by debt collection, just as they come off of being hit the hardest by COVID-19.<sup>130</sup>

Congress and the CFPB owe it to American families—the people who have put their lives on the line and the people who have put their lives on hold—to ensure that one of the consequences of their actions is not to lose their homes, cars, and savings to debt collection. Without protection from debt collectors at this time and as households continue to recover from the crisis' shock to their everyday lives and livelihoods, American families will emerge from the crisis in a much worse financial place, which could reverberate throughout the economy as it too tries to recover. Congress, in particular, has the power to ameliorate these effects. Secondarily, the CFPB could help. But if they continue to sit idly by and watch families struggle, state attorneys general and state financial services commissioners can and should step in to give people some needed room

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126. 12 U.S.C. § 5552(a)(1).

127. See 12 U.S.C. § 5536. The FDCPA is an enumerated consumer law under 12 U.S.C. § 5481(12), and enumerated consumer laws are part of the definition of federal consumer laws. 12 U.S.C. § 5481(14). See Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115 (2013).

128. Christopher K. Odinet, *Consumer Bitcredit and Fintech Lending*, 69 ALA. L. REV. 781, 812 (2018) (describing state licensing of nonbank companies); see also Christopher K. Odinet, *The New Data of Student Debt*, 92 S. CAL. L. REV. 1617, 1683-84 (2019) (discussing same).

129. 12 U.S.C. § 5552(a)(1).

130. See *supra* notes 46-47.

to breathe. These are far from normal times. Before we ask Americans to go back to work, let's make sure we create the breathing room they need to do so successfully.

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