

THE FOLLY OF CREDIT AS PANDEMIC RELIEF

Pamela Foohey*
Dalié Jiménez**
Christopher K. Odinet***

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INTRODUCTION

Within mere weeks of the coronavirus pandemic appearing in the United States, the American economy came to a grinding halt. In March 2020, 701,000 people lost their jobs, which marked the largest single-month change in employment in the United States since 1975.¹ Even before March had ended, the unprecedented modern health crisis and the collapsing economy forced Congress to make a critical choice about how to help American families survive financially. As we detail in this Essay, they made the wrong choice. But, in the

* Associate Professor of Law, Indiana University Maurer School of Law

** Professor of Law, University of California, Irvine School of Law

*** Associate Professor of Law, University of Oklahoma College of Law

¹ Anneken Tappe & Annalyn Kutz, *The US Economy Lost 701,000 Jobs in March -- Worst Report Since 2009*, CNN (Apr. 3, 2020 1:47 PM ET), <https://www.cnn.com/2020/04/03/economy/march-jobs-report-coronavirus/index.html>.

coming months, they will have additional opportunities to make more humane and effective choices.

To support individuals, Congress had two basic options. It could enact policies that provided direct and meaningful financial support to people, without the necessity of later repayment. Or it could pursue policies that temporarily relieved people from their financial obligations, but required that they eventually pay amounts subject to payment moratoria later. The first option would lift up Americans and forgive them for a situation beyond their control. The second option would provide Americans with a moment to breathe, during which they could try to fortify themselves for a coming onslaught of uncertain payment obligations that many likely still would lack the resources to meet.

In passing the CARES Act, Congress primarily chose the second option.² This option reflects a belief that offering people credit can bring them meaningful relief. That is, part of a robust social safety net can be access to consumer credit. As Professor Abbye Atkinson has argued, the idea that credit is a “social provision” is flawed because credit is “a device that requires future growth”³ within the timeline of when the credit will need to be repaid. That is, credit as social provision assumes that people will have the ability to pay back the loan as it becomes due.

The assumption that people will be able to repay credit masquerading as “relief” in the wake of the pandemic is an even more serious error that will have enduring negative consequences. In the long term, direct and meaningful support that carries people through the crisis, and that not merely gives them a temporary crutch, is critical to ensuring that the people who fuel that American economy can get back on their feet after the crisis abates. In the short term, it is crucial to stymying the spread of covid-19 and abating the health crisis so that the United States can recover as quickly and as safely as possible.

To the extent that Congress gave people money, what the CARES Act provides will be too little and often too late.⁴ Congress got the balance between providing true money versus what amount to credit products to Americans fundamentally backwards. But given that, unfortunately, the effects of the pandemic likely will continue for months, if not years, it is not too late for

² 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> (last visited Apr. 24, 2020). The full text of the bill is available at <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> [hereinafter CARES Act].

³ Abbye Atkinson, *Rethinking Credit As Social Provision*, 71 STAN. L. REV. 1093, 1101 (2019).

⁴ 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 (noting that the CARES Act’s “financial support will prove to be shockingly minimal”) [hereinafter Foohey, Jiménez, & Odinet, *Gimmicks*].

Congress to adopt a family financial well-being approach to relief that provides meaningful, widespread, and expanded direct payments to households in distress.

I. HOW CONGRESS FOCUSED (WRONGLY) ON CREDIT AS RELIEF

The federal government's response to coronavirus-related household financial distress has primarily focused on offering Americans the equivalent of consumer credit products. The CARES Act includes two key moratoria—a foreclosure moratorium for homeowners and an eviction moratorium for renters.⁵ On the surface, both of these might seem quite helpful. Housing-related costs comprise a large part of most households budgets.⁶ Lessening those costs during a time of reduced or eliminated income makes sense. Yet, to the extent that a household is eligible for one of these moratoria, both only temporarily modify existing debt obligations, leaving homeowners and renters to pay the allowed-to-be-missed payments sometime in the future. And they modify home loans and rental agreements in ways that are likely to leave families scrambling to keep their homes and rental units once the moratoria are lifted.⁷

A. Foreclosure Moratorium for Homeowners

The CARES Act's foreclosure moratorium allows homeowners with federally-backed mortgages to ask their mortgage servicers⁸ for a six month forbearance, with the option to request an additional six months.⁹ During

⁵ The CARES Act also includes what primarily is a moratorium on payment of student loan debt, which we omit from detailed discussion, but which has some of the same problems as discussed here in regard to the foreclosure and eviction moratoria. CARES Act, § 3513; see Cody Hounanian & Lindsay Clark, *Here's How the CARES Act Impacts Your Student Loans*, THE NATION (Apr. 23, 2020), <https://www.thenation.com/article/economy/heres-how-the-cares-act-impacts-your-student-loans/>.

⁶ Shaina Mishkin, *This Is How Much the Average American Spends on Housing At Every Age. How Do You Stack Up?*, MONEY (June 19, 2019), <https://money.com/housing-costs-by-age/> (drawing on data from the U.S. Bureau of Labor Statistics).

⁷ Pamela Foohey, Dalí Jiménez, & Christopher K. Odinet, *The Cares Act Could Put People on the Street--Here's a Solution*, BLOOMBERG L. (April 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> [hereinafter Foohey, Jiménez, & Odinet, *On the Street*].

⁸ CHRISTOPHER K. ODINET, FORECLOSED: MORTGAGE SERVICING AND THE HIDDEN ARCHITECTURE OF HOMEOWNERSHIP IN AMERICA 40-61 (2019) (explaining the structure and business model of mortgage servicing firms).

⁹ CARES Act, § 4022. See also *Guide to Coronavirus Mortgage Relief Options*, CFPB (Apr. 24, 2020), <https://www.consumerfinance.gov/about-us/blog/guide-coronavirus-mortgage-relief-options/>.

forbearance, interest continues to run, but the monthly mortgage amount need not be paid. And, importantly, late fees and related penalties do not accrue.

Although this may seem like a fix, it is merely a band aid, and probably not a very effective one for many people at that. Problems lie in the subtleties. Forbearance does not mean forgiveness. Homeowners have to pay deferred amounts at some point in the future. The CARES Act does not provide for when these missed payments are due.¹⁰ Instead, servicers are left to decide when the deferred payments are due. Servicers could work with homeowners to revise their loans to provide for sustainable and realistic payments, such as tacking on missed payments to the end of the loan and extending the payment term. Or they could require that homeowners pay the missed payments in one lump sum at the end of the forbearance period. With varying levels of government agency guidance, each servicer will adopt its own method of deciding whether a homeowner qualifies for a loan modification and what that modification will look like.¹¹

If the 2008 financial crisis provides any clues, many mortgage servicers will opt to require a lump-sum payment.¹² Indeed, some servicers are already telling homeowners that this is what will be required if they invoke the CARES Act's foreclosure moratorium.¹³ For many homeowners, the end result of the

¹⁰ As of this writing, the FHFA purports to tell homeowners that “no lump sum [is] required at the end of forbearance.” See “No Lump Sum Required at the End of Forbearance” says FHFA’s Calabria, FHFA (Apr. 27, 2020), <https://www.fhfa.gov/Media/PublicAffairs/Pages/No-Lump-Sum-Required-at-the-End-of-Forbearance-says-FHFAs-Calabria.aspx>. Confusingly, Freddie Mac’s script for mortgage servicers to read when discussing forbearance with homeowners provides: “You are still required to eventually fully repay your forbearance, but you won’t have to repay it all at once -- *unless you are able to do so.*” (emphasis added). See *COVID-19 Script for Servicer Use with Homeowners*, FREDDIE MAC (2020), http://www.freddiemac.com/about/pdf/covid_19_forbearance_servicer_script.pdf.

¹¹ *CARES Act Mortgage Forbearance: What You Need to Know*, CFPB (at 3:00 minutes), <https://www.consumerfinance.gov/coronavirus/cares-act-mortgage-forbearance-what-you-need-know/> (last visited April 22, 2020); see also *Summary of Foreclosure Alternatives for Borrowers with COVID-19 Hardships*, NAT’L CONSUMER L. CTR. (Apr. 21, 2020), https://library.nclc.org/sites/default/files/COVID19_Mortgage_Chart_0.pdf.

¹² For a discussion of loan modification failures during the financial crisis, see ODINET, *supra* note 8, at 45-47.

¹³ See Michelle Singletary, *If You Can’t Pay Your Mortgage, Here’s What You Need to Know*, WASH. POST (Apr. 7, 2020), https://www.washingtonpost.com/business/personal-finance/if-you-cant-pay-your-mortgage-heres-what-you-need-to-know/2020/04/07/81a0706c-7905-11ea-b6ff-597f170df8f8_story.html; Paul Kierman, *Getting a Mortgage-Payment Break Isn’t the Boon Many Expected*, WALL ST. J. (Apr. 23, 2020, 5:30 AM), <https://www.wsj.com/articles/getting-a-mortgage-payment-break-isnt-the-boon-many-expected-11587634200>.

foreclosure moratorium could be foreclosure.¹⁴ In the worst case scenario, a homeowner obtains a forbearance, must make a balloon payment in six to twelve months, cannot do so, loses the home, and ends up on the streets. A better but still gut-wrenching result is that a homeowner obtains a mortgage forbearance, but must wait with mounting anxiety for six or more months to hear from his or her servicer before finding out whether a feasible loan modification will be granted.¹⁵

B. Eviction Moratorium for Renters

In crafting the CARES Act, Congress also sought to provide relief for the 43 million households who rent.¹⁶ As Congress was negotiating the relief package, the President declared that the tenant-related provisions of the bill would furnish a significant life line to renters.¹⁷ That promise, however, was not met.

One of the key problems with the eviction moratorium is scope. The CARES Act provides an all-purpose moratorium on evictions for a little under four months. But it only applies to individuals whose leases or rented properties are related to a federal housing program, such as public housing or the section 8 voucher program, or whose landlords have mortgage loans guaranteed by

¹⁴ Evan Weinberger, *U.S. Stimulus May Merely Delay Coronavirus Foreclosure Wave*, BLOOMBERG L. (Apr. 17, 2020), <https://news.bloomberglaw.com/banking-law/u-s-stimulus-may-merely-delay-coronavirus-foreclosure-wave>.

¹⁵ Ruth Bender & Rachel Pannett, *Coronavirus Pandemic Takes Toll on Mental Health*, WALL ST. J. (Apr. 9, 2020), <https://www.wsj.com/articles/coronavirus-pandemic-takes-toll-on-mental-health-11586433603>. The scope of the forbearance provision brings another problem: it only covers 62% of mortgages. Excluded homeowners must rely on uncertain state-level responses for help with mortgage payments. See Foohey, Jiménez, & Odinet, *On the Street*, *supra* note 7; *Covid-19 State Foreclosure Moratoriums and Stays*, NAT'L CONSUMER L. CTR., <https://www.nclc.org/issues/foreclosures-and-mortgages/covid-19-state-foreclosure-moratoriums-and-stays.html> (last visited Apr. 25, 2020).

¹⁶ *Renter Households*, in *America's Rental Housing*, JOINT CTR. FOR HOUSING STUDIES (2017), https://www.jchs.harvard.edu/sites/default/files/02_harvard_jchs_americas_rental_housing_2017.pdf.

¹⁷ Kevin Breuninger, *Trump Says HUD Will Suspend Foreclosures And Evictions Until End of April Amid Coronavirus Response*, CNBC (Mar. 18, 2020, 12:17 PM), <https://www.cnn.com/2020/03/18/coronavirus-trump-says-hud-will-suspend-foreclosures-evictions-until-end-of-april.html>. Even when Trump made this declaration, it was clear that what federal agencies were proposing would provide relief for only a minority of renters. Ken Sweet, *Most Renters Won't Receive Eviction Protections Amid Coronavirus Pandemic Under Trump Proposal*, FORTUNE (Mar. 20, 2020 9:44 AM EDT), <https://fortune.com/2020/03/20/renters-coronavirus-eviction-moratorium-protection/>.

some federal agency.¹⁸ These purportedly robust protections only cover about 12.3 million of America's total 43 million tenants--a mere 28%.¹⁹

For renters whose leases are covered, the CARES Act creates more questions than answers. The most obvious question is: what happens to all the missed rental payments during the roughly four-month period? Similar to the mortgage forbearance provisions, late fees and penalties do not accrue under the lease when the tenant is excused from making rental payments during this period. The law, in effect, creates an automatic rent forbearance. But, yet again, the CARES Act contains no language specifying when those missed rental payments must be made-up.

Can the landlord demand the missed rent all at once, immediately when the moratorium period ends? This would create the same lump sum problem for tenants that the mortgage forbearance provision creates for homeowners. The problem, however, will be worse for renters. As noted, one option for mortgage servicers is to agree to modify the loan term such that missed payments are tacked onto the back-end of the loan for as many months as the foreclosure moratorium lasted. That sort of arrangement does not work for a lease under which the right of possession and use is for a limited duration. Landlords almost certainly will ask their tenants for the missed rent in a lump sum, or, if they have the financial flexibility, over perhaps a couple payments. Many tenants will not have that amount of cash available, their landlords will evict them, and they too will end up on the streets.²⁰

A separate question for those renters covered by the eviction moratorium is, how are they to know that the law applies to them? The CARES Act seems to assume that tenants will know that their landlords participate in a government-sponsored housing program, thus giving tenants the right to invoke the law's eviction protection. Weeks after the law went into effect, public reporting indicated that some landlords covered by the CARES Act were

¹⁸ CARES Act, § 4022.

¹⁹ *The CARES Act Eviction Moratorium Covers All Federally Financed Rentals--That's One in Four US Rental Units*, URBAN INSTITUTE (Apr. 2, 2020), <https://www.urban.org/urban-wire/cares-act-eviction-moratorium-covers-all-federally-financed-rentals-thats-one-four-us-rental-units>.

²⁰ See James Drew, *What Happens When State's Eviction Moratorium Ends?*, NEWS TRIBUNE (Mar. 26, 2020), <https://www.thenewtribune.com/news/coronavirus/article241505591.html> (noting the potential for a lump-sum missed rent payment); Amal Ahmed, *Evictions Have Stopped, But Texas Renters Will Face a Crisis In The Months Ahead*, TEXAS MONTHLY (Apr. 8, 2020), <https://www.texasmonthly.com/politics/evictions-rent-payments-unemployment-coronavirus/> (same).

nonetheless moving ahead with evictions, declaring that they were unaware of the law or that it applied to them.²¹

As for the overwhelming majority of tenants who are not protected by the CARES Act, they must look to their state governors, mayors, and legislatures for relief. Recognizing the potential for a wide-spread eviction problem and the limitations of the CARES Act, by April 2020, essentially all states had implemented some kind of relief for tenants. But that relief varied in both form and substance depending on the jurisdiction, and all variations are premised on the idea of credit as relief.

For instance, the Governor of Iowa used her temporary authority during periods of emergency to suspend evictions related to nonpayment of rent.²² In Oklahoma, in comparison, a suspension in evictions was created only indirectly because the state supreme court closed the courthouses²³ and sheriffs refused to enforce orders to evict.²⁴ This again leaves open questions about accrual of fees and penalties, in addition to missed rental payments. Closing the doors to the court house does not change the terms of a lease contract, which almost certainly provides for extra fees and added interest upon rental payment default.²⁵ And, as with the CARES Act, when the states' eviction moratoria end, landlords likely can evict tenants if payment, including the added interest and fees, is not forthcoming immediately. In short, the fate of all renters is left up to millions of unregulated or lightly regulated landlords scattered across the country.

At their core, both the foreclosure moratorium and the eviction moratorium augment American households' existing credit relationships with mortgage companies and landlords. By pausing evictions and foreclosures, the government is, from an economic perspective, giving Americans a modification

²¹ Jeff Ernsthause, Ellis Simani, & Justin Elliott, *Despite Federal Ban, Landlords Are Still Moving to Evict People During the Pandemic*, PROPUBLICA (April 16, 2020, 5:00 AM EDT), <https://www.propublica.org/article/despite-federal-ban-landlords-are-still-moving-to-evict-people-during-the-pandemic>.

²² *Gov. Reynolds Signs New Proclamation Continuing State Public Health Emergency Declaration*, OFFICE OF THE GOV. OF IOWA (Apr. 2, 2020 4:00 PM), <https://governor.iowa.gov/press-release/gov-reynolds-signs-new-proclamation-continuing-state-public-health-emergency-2> (suspending eviction proceedings).

²³ *Second Emergency Joint Order Regarding The Covid-19 State of Disaster*, Supreme Court of the State of Oklahoma, Scad No. 2020-29 (Mar. 27, 2020), <https://www.oscn.net/images/news/SCAD-2020-29.pdf>.

²⁴ Jessica Bruno, *Evictions Stopped to Help Struggling Oklahomans Amid COVID-19 Pandemic*, KFOR (Mar. 18, 2020, 6:42 PM CDT), <https://kfor.com/health/coronavirus/evictions-stopped-to-help-struggling-oklahomans-amid-covid-19-pandemic/>.

²⁵ Joey Rodman, *What Renters Need to Know About Evictions During COVID-19 Crisis*, OKLAHOMA CITY FREE PRESS (Apr. 9, 2020), <https://freepressokc.com/what-renters-need-to-know-about-evictions-during-covid-19-crisis/>.

of their home loans or rental agreements. People can keep the money that they would otherwise have to pay right now and, instead, can pay it back later at some unspecified time and under some unspecified payment structure. This extension of credit is helpful in the moment, of course, but as Atkinson points out, when credit is squared with “wage stagnation and persistent insecurity with respect to employment, income, and expenses”—in this case, generated by a pandemic and global economic shutdown—it provides “only short-term, quasi-palliative relief.”²⁶

As with all consumer credit, it assumes that people will have more money available later. That assumption is questionable even in “normal” times, particularly for the lower-income and black, Latinx, and other minority households that truly need to rely on this credit to meet expenses.²⁷ But this assumption is made ridiculous during a pandemic that is rapidly putting innumerable Americans out of work or slashing their monthly earnings.²⁸ In general, American families are now using what little savings and ongoing income they have to put food on the table, pay utility bills, and cover medical expenses, which may have increased when people were laid off.²⁹ Credit as relief will prove not to be the help people need, but merely a delay of the pain. Critically, as with consumer credit during normal times, communities of color will bear the brunt of this pain, as is already evident in black and Latinx communities.³⁰

²⁶ Atkinson, *supra* note 3, at 1148-49.

²⁷ See *id.* at ___; Pamela Foohey & Nathalie Martin, *Reducing The Wealth Gap Through Fintech “Advances” in Consumer Banking and Lending*, 2021 U. ILL. L. REV. ___, Part III.C (forthcoming 2021), <https://ssrn.com/abstract=3551469> (discussing higher usage of high-cost lending by communities of color).

²⁸ Carmen Reinicke, *Fewer Than Half of Working Americans Will Have a Paycheck in May as Devastating Coronavirus Layoffs Persists*, *Economist Says*, BUSINESS INSIDER (Apr. 24, 2020, 12:12 PM), <https://www.businessinsider.com/layoffs-coronavirus-less-than-half-american-workers-paycheck-wage-may-2020-4>; Paul Kiernan, *Getting A Mortgage-Payment Break Isn’t The Boon Many Expected*, WALL ST. J. (Apr. 23, 2020 5:30 AM ET), <https://www.wsj.com/articles/getting-a-mortgage-payment-break-isnt-the-boon-many-expected-11587634200>.

²⁹ If someone loses their job, they have to pay for health insurance: for COBRA, to temporarily continue employer-provided insurance, or to purchase an individual plan on the open market. *Your Options If You Lose Job-Based Health Insurance*, HEALTHCARE.GOV, <https://www.healthcare.gov/have-job-based-coverage/if-you-lose-job-based-coverage/> (last visited Apr. 25, 2020).

³⁰ See Anneken Tappe, *America’s Black and Hispanic Communities Are Bearing the Brunt of the Coronavirus Crisis*, CNN BUS. (Apr. 21, 2020 12:10 AM EST), <https://www.cnn.com/2020/04/21/economy/coronavirus-burden-black-hispanic-workers/index.html>. A couple other provisions of the CARES Act effectively provide credit to people in that they give loans to small businesses. *The CARES Act Provides Assistance To Small Businesses*, U.S. DEPT. TREASURY, <https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses> (last visited Apr. 25, 2020). Early evidence shows that these loans quickly ran out, disproportionately went to large

II. HOW CONGRESS FOCUSED (INADEQUATELY) ON DIRECT SUPPORT AS RELIEF

Although the CARES Act primarily focused on credit relationships, some parts were indeed aimed at household financial relief. These provisions furnished limited direct payments of cash to American families. We argue that this approach can give meaningful support to families financially affected by the coronavirus, provided that it is robust. But Congress's mechanism for providing this direct relief in the CARES Act was suboptimal. The Act contains two provisions that give direct money relief to Americans in the form of "recovery rebates"³¹ and augmented unemployment benefits.³² But neither were ever likely to provide meaningful support.

A. Direct Payments for Households

The CARES Act authorizes one-time so-called "recovery rebates" for American households.³³ For a single individual making \$75,000 or those serving as head of household making \$112,500 or less, the amount distributed was \$1,200. For married couples making \$150,000 or less, the amount was \$2,400. Added to these amounts was an extra \$500 per child under the age of 16 or living in the household.³⁴ Households making more than the applicable thresholds were subject to a sliding-scale decrease in the payment amount.³⁵ Data on how much people made were drawn from the most recently filed 2019 or 2018 tax return or other information the IRS had on file.³⁶

The principal problem with the recovery rebates is the amount. Many Americans have little savings upon which they can fall back on. A study conducted in March 2020 found that fewer than half of all Americans have savings that will cover three months of expenses. Less than a quarter of lower-

companies, and disproportionately were not awarded to minority and women owned businesses. See Hugh Son, *US Issues New Guidance For Small Business Loans, Pressures Public Companies To Return Funds*, CNBC (Apr. 23, 2020 10:37 AM EST), <https://www.cnbc.com/2020/04/23/us-issues-new-guidance-for-small-business-loans-to-make-it-harder-for-public-companies-to-get-funds.html>; Neil Hare, *Paycheck Protection Program, Round 2: Can Your Business Receive Any of This Money?*, FORBES (Apr. 25, 2020, 12:37 PM EDT), <https://www.forbes.com/sites/allbusiness/2020/04/25/paycheck-protection-program-can-your-business-receive-this-money/>.

³¹ I.R.C. § 6428 (as added to the Internal Revenue Code by the CARES Act, § 2201).

³² CARES Act, § 2107. The CARES Act also included additional paid sick leave, which we omit from detailed discussion. *Id.* § 3602.

³³ I.R.C. § 6428.

³⁴ *Id.* § 6428(a), (c).

³⁵ *Id.* § 6428(c).

³⁶ *Id.* § 6428(f)(1), (f)(5).

income Americans have enough saved for three months of expenses.³⁷ This means that many households facing the loss of a job will quickly burn through both their savings and the recovery rebate.

The paucity of the rebate is evident when considered against the rising cost of living in America. For instance, over the past decade housing costs have risen 26% and medical expenses have risen 33%.³⁸ Rising costs in the face of stagnant incomes³⁹ means that it takes years for people to save even a month's worth of expenses. A couple with a child making between \$50,000 and \$70,000 a year would have to save for more than two years to cover just one month's worth of expenses.⁴⁰ Although \$1,200 or \$2,400 may seem like a lot in a vacuum, the reality of household financial health versus the cost of necessities reveals how few expenses this amount will actually pay.⁴¹

There also are issues with timing and the method of delivery of the rebate relief payments. The first wave of payments were direct deposits to bank accounts on file with the IRS.⁴² But glitches in the IRS system resulted in money being deposited into incorrect bank accounts.⁴³ For those Americans who pay for tax preparation services through so-called "refund anticipation checks," the payments were sent to temporary bank accounts that people do not even know exist.⁴⁴ And the more than 50% of people from whom the IRS does not have

³⁷ *Report on the Economic Well-Being of U.S. Households in 2017*, FED. RES. (May 2018), <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf>.

³⁸ Christopher Maloney & Adam Tempkin, *America's Middle Class Is Addicted to a New Kind of Credit*, BLOOMBERG (Oct. 29, 2019, 3:57 PM), <https://www.bloomberg.com/news/articles/2019-10-29/america-s-middle-class-is-getting-hooked-on-debt-with-100-rates>.

³⁹ See Foohey & Martin, *supra* note 27, at Part II.A (discussing wage stagnation in America).

⁴⁰ Alissa Quart & Yaryna Serkez, *Who Has Enough Cash To Get Through the Coronavirus Crisis?*, THE N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/interactive/2020/04/23/opinion/emergency-savings-coronavirus.html>.

⁴¹ YiLi Chien, *How Long Will the Relief Check Last?*, FED. RES. BANK OF ST. LOUIS (Apr. 6, 2020), <https://research.stlouisfed.org/publications/economic-synopses/2020/04/06/how-long-will-the-relief-check-last>.

⁴² Marty Johnson, *First Coronavirus Relief Checks Hit Americans' Bank Accounts*, THE HILL (Apr. 11, 2020, 8:15 PM), <https://thehill.com/policy/finance/economy/492375-first-coronavirus-relief-checks-hit-americans-bank-accounts>.

⁴³ Dalvin Brown & Josh Peter, *Some Stimulus Checks Are Being Sent to Wrong Accounts: 'The Bank Account Number Is Not Even Close'*, USA TODAY (April 15, 2020, 8:08 PM ET), <https://www.usatoday.com/story/money/2020/04/15/stimulus-checks-going-wrong-bank-account-many-yes/5140966002/>.

⁴⁴ See Adam Levitin, *Corona Cash and Refund Anticipation Checks*, CREDIT SLIPS (Apr. 12, 2020, 4:17 PM), <https://www.creditslips.org/creditslips/2020/04/corona-cash-and-refund-anticipation-checks.html>.

bank account information⁴⁵ will be paid by paper check and may have to wait as long as five months to receive their checks,⁴⁶ long after the check would have saved them from having their utilities shut off or helped them to pay to continue their health insurance.

B. Enhanced Unemployment Benefits

The CARES Act's other main attempt to provide direct payments to struggling Americans--enhanced unemployment benefits--is even more fraught. The CARES Act built upon existing unemployment insurance state-based programs that operate in partnership with the federal government.⁴⁷ This necessarily meant that the direct payments were constrained by existing program requirements. Although the federal government grants states some flexibility in designing their programs, all versions of unemployment insurance have similar limitations.

The goal of unemployment insurance is to help people through financially difficult times without forcing them to make significant shifts in their spending habits.⁴⁸ As such, to be eligible for the benefit, most states require that the recipient must have lost their job through no fault of their own, usually due to a lay off.⁴⁹ Additionally, the recipient must have been working a certain minimum number of hours or earning a certain minimum amount over a pre-set look-back period.⁵⁰ And the benefit itself is limited to the lesser of approximately half of prior earnings or the state's average earnings. In the early part of 2020, the average unemployment benefit nationally was \$387 per week,

⁴⁵ See Matthew Daly, *Some Americans May Have To Wait Until August For Their Stimulus Check, Memo Says*, TIME (Apr. 3, 2020 2:27 AM EDT), <https://time.com/5814926/us-stimulus-checks-august/>.

⁴⁶ See Lisa Rein, *IRS to Begin Issuing \$1,200 Coronavirus Payments April 9, But Some Americans Won't Receive Checks Until September, Agency Plan Says*, WASH. POST (April 2, 2020, 6:05 PM), https://www.washingtonpost.com/politics/irs-to-begin-issuing-1200-coronavirus-payments-april-9-but-some-americans-wont-receive-checks-until-september-agency-plan-says/2020/04/02/8e0cfc84-751e-11ea-85cb-8670579b863d_story.html.

⁴⁷ Lucy A. Williams & Margaret Y.K. Woo, *The "Worthy" Unemployed: Societal Stratification and Unemployment Insurance Programs in China and the United States*, 33 COLUM. J. TRANSNAT'L L. 457, 478 (1995) (describing the history of the U.S. system of unemployment insurance); see, e.g., 26 U.S.C. § 3301; 20 C.F.R. § 604.

⁴⁸ *The Importance of Unemployment Insurance for American Families and the Economy*, BROOKINGS (Dec. 4, 2012), <https://www.brookings.edu/research/the-importance-of-unemployment-insurance-for-american-families-and-the-economy/>.

⁴⁹ Williams & Woo, *supra* note 47, at 480–81.

⁵⁰ This period is typically four calendar quarters, excluding the most recent two quarters at the time of filing. See *What Is An "Alternative Base Period" & Why Does My State Need One?*, NAT'L EMP. L. PROJECT (2015), <https://www.nelp.org/wp-content/uploads/2015/03/Alternative-Base-Period.pdf> (providing an example of how the calculation is typically made).

but with ranges as high as \$550 in Massachusetts and as low as \$161 in Puerto Rico.⁵¹

The CARES Act augments this system by adding people, money, and time. Anyone who certifies that they are unable to work (either part time or full-time) for any number of a variety of reasons related to Covid-19 can apply for benefits, even if they do not otherwise meet their state program's requirements.⁵² This makes independent contractors, such as gig economy workers, eligible for benefits.⁵³ In addition to the amount an individual would normally receive, the CARES Act adds \$600 per week until the end of July 2020, paid for by the federal government.⁵⁴ And it expands the payment period by 13 weeks, for a total of 9 months.⁵⁵

This augmentation has every main problem identified as to other provisions of the CARES Act: scope, actual amount distributed, and timing. First, it excludes people who are seeking work but have not worked before and those who voluntarily leave a job because of health related concerns. For instance, a person with a pre-existing condition working an "essential" job under a state's shelter-in-place order may choose to leave work to decrease exposure risk. That person would not be eligible for unemployment.

This problem will intensify as states lift their shelter-in-place orders, employers may feel forced to re-open non-essential businesses. All workers who do not return to those businesses, whether the business actually needs them to work or not, will only be eligible for unemployment if their employer lays them off. Concerns about the possibility of this unnecessarily worsening the spread of Covid-19 and the public health crisis permeated discussions about the Governor of Georgia's decision to make Georgia one of the first states to lift its shelter-in-place order.⁵⁶

In addition, the extra \$600 per week may seem like a lot of money. But the payments end on July 31, 2020.⁵⁷ It will take months, if not years for the

⁵¹ *Policy Basics: Unemployment Insurance*, CTR. ON BUDGET & POL'Y PRIORITIES (last updated Apr. 1, 2020), <https://www.cbpp.org/research/economy/policy-basics-unemployment-insurance>.

⁵² CARES Act, § 2102(a)(3).

⁵³ *Id.* § 2102(a)(3)(A)(ii)(II).

⁵⁴ *Id.* §§ 2104(b)(1)(B), (c)(2), 2102(a)(1)(A).

⁵⁵ *Id.* § 2102(c)(2).

⁵⁶ Cleve R. Wootson Jr. & Haisten Willis, *Short on Cash, Scared of Coronavirus, Georgia Businesses Grapple With Reopening*, WASH. POST (Apr. 24, 2020 9:07 PM EDT), https://www.washingtonpost.com/politics/short-on-cash-scared-of-coronavirus-georgia-businesses-grapple-with-reopening/2020/04/24/098b3032-8623-11ea-a3eb-e9fc93160703_story.html.

⁵⁷ CARES Act, § 2104(e)(2).

economy to recover.⁵⁸ Of more immediate concern, states historically are slow to distribute unemployment benefits. Money is only sent once applications are submitted and approved, which can take three to four weeks.⁵⁹ Once the CARES Act went into effect, reports piled up about state unemployment agencies' websites crashing under the weight of applications, and lines being jammed with people hoping to submit applications over the phone.⁶⁰ Some states struggled just to implement the new rules. For instance, Ohio reported that it would not start processing CARES Act claims until May 15, a month and a half after payments were to begin.⁶¹

This all leads to questions about how much eligible people will receive and when they will receive it. Once scrutinized, as with the relief rebates, the enhanced unemployment benefits provided by the CARES Act are already proving to be too tailored, too late, and probably too little--nothing more than mere gimmicks.⁶²

III. ADOPTING A FAMILY FINANCIAL WELL-BEING APPROACH

Despite seeming to provide much needed cash to American families struggling through the height of the coronavirus storm, the CARES Act instead mainly offers people what will amount to high-cost credit that could land them on the streets.⁶³ This is the exact opposite of what the federal government should be doing to help people and to stem the tide of the pandemic's havoc on the American health system and economy. In the coming months, the government must abandon this paradigm of credit-oriented relief in favor of

⁵⁸ See Jim Tankersley, *Economic Pain Will Persist Long After Lockdown Ends*, THE N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/business/coronavirus-economy.html>.

⁵⁹ See, e.g., *Receiving your unemployment benefits by direct deposit or DUA debit card*, MASS. GOV., <https://www.mass.gov/guides/receiving-your-unemployment-benefits-by-direct-deposit-or-dua-debit-card> (last visited Apr. 2, 2020).

⁶⁰ See Ella Nilsen, *Getting Unemployment Insurance Has Been a Nightmare for Millions of People Across the Country*, VOX (April 20, 2020, 7:40 AM), <https://www.vox.com/2020/4/20/21220931/unemployment-insurance-coronavirus-websites-crashing>; Carolyn Adolph & Kim Malcolm, *High Traffic Causes Washington's Unemployment Website Crash. More Help Is On The Way*, NPR: KUOW (Apr. 20, 2020, 5:58 PM), <https://www.kuow.org/stories/high-volume-causes-unemployment-website-crash-more-help-on-the-way>; Zack Budryk, *Surge of Unemployment Claims Crashed New York's System, Cuomo Says*, THE HILL (Apr. 21, 2020, 8:25 PM), <https://thehill.com/homenews/state-watch/494025-surge-of-unemployment-claims-crashed-new-yorks-system-cuomo>.

⁶¹ Patricia Cohen, *Jobless Numbers Are 'Eye-Watering' But Understate the Crisis*, THE N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/23/business/economy/unemployment-claims-coronavirus.html>.

⁶² Foohey, Jiménez, & Odinet, *Gimmicks*, *supra* note 4.

⁶³ Foohey, Jiménez, & Odinet, *On the Street*, *supra* note 7.

providing meaningful, widespread, and expanded direct payments to households in distress.

Payments must increase in both amount and frequency. And they must actually reach American families. As to amount, it must be calibrated to the cost of living in different parts of the country. A couple living in rural Indiana will find a \$2,400 cash infusion much more meaningful than another couple living in Manhattan. Most federal programs recognize the variance in the cost of living.⁶⁴ For example, benefits under the section 8 housing choice voucher program are keyed to area fair market rent⁶⁵ and the living expense allocated to a consumer in a chapter 13 bankruptcy repayment plan is derived from Census Bureau data.⁶⁶

The amount also must increase to reflect families ongoing necessary expenses. Rather than playing debt games related to evictions and mortgage forbearance, to potentially and even likely disastrous results, the payments should be sufficient to allow Americans to cover their housing expenses. This includes not only rent and mortgage payments, but also the cost of electricity and other utilities. As the increasingly hot summer months approach,⁶⁷ the importance of keeping utilities operational is a matter of public health. The payments also should cover families' food, health, and other critical expenses, including for comprehensive childcare to help essential workers now and as people return to their jobs.⁶⁸ An analysis of already-available government data relative to how much households need to survive provides easy-to-calculate guidance about the necessary amount.⁶⁹

In addition, eligibility for any direct payments must not be tied to past earnings information that can quickly become outdated, such as via tax returns. Changes in employment, marriage, divorce, births, and adoptions render information from a year prior obsolete. Relying on prior employment is particularly tricky during a pandemic when people essentially may be out-of-

⁶⁴ *Importance of the Data*, U.S. CENSUS BUREAU, <https://2020census.gov/en/census-data.html> (last visited Apr. 23, 2020) (explaining how data on various parts of the country, including income levels, drives federal spending).

⁶⁵ 42 U.S.C. § 1437f; 24 CFR § 982.503.

⁶⁶ *Means Testing*, U.S. DEP'T JUST., <https://www.justice.gov/ust/means-testing> (last visited Apr. 16, 2020).

⁶⁷ *Heat Waves and Climate Change*, CTR. FOR CLIMATE AND ENERGY SOLUTIONS, <https://www.ces.org/content/heat-waves-and-climate-change/> (last visited April 23, 2020).

⁶⁸ Anna North, *Exclusive: Sens. Elizabeth Warren and Tina Smith Have a Plan To Fix The Pandemic Child Care Crisis*, VOX (Apr. 15, 2020, 8:00 AM EDT), <https://www.vox.com/2020/4/15/21220111/coronavirus-child-care-warren-plan>.

⁶⁹ See ADAM J. LEVITIN, CONSUMER FINANCE LAW: MARKETS AND REGULATION 3-5 (2019) (analyzing a median income family and typical expenses, noting the minimal amount of savings possible each month).

work, even though they are not laid off or entirely unable to find work, including through commission or tip based self-employment.

Of course, the use of prior information reflects a natural desire to ensure that only people who need direct money support receive it. But drawing a fine line between the “worthy” and “unworthy” is fraught,⁷⁰ time-consuming, and undermines the entire endeavor of getting money to people who need it so that the health and economic crisis is not magnified simply because people cannot survive day-to-day.⁷¹ Instead, in accordance with the magnitude of the crisis, Congress should be overly inclusive on the front end by sending the funds to everyone and then recapturing the money from those who did not need it on the back end, such as through next year’s tax return.⁷²

Beyond eliminating the reliance on credit as relief and increasing the amount, the payments must timely reach American families. Besides the well-documented delivery issues with the relief rebates,⁷³ a more fundamental problem with assuming that payments generally can be sent to bank accounts is that 8.4 million (or 6.5% of) American households are unbanked.⁷⁴ This means that they cannot receive payments other than via checks delivered to their postal address, assuming they have one, and then they will need to pay fees to cash their checks.⁷⁵ These people are most in need of aid⁷⁶ but will have to wait months to receive money.⁷⁷ Problems in delivering CARES Act relief rebates expose how clunky, out-of-date, and adrift from its core purposes the American banking and payment system has become.⁷⁸ For now, because the federal

⁷⁰ Mehrsa Baradaran, *The U.S. Should Just Send Checks—But Won't*, ATLANTIC (Apr. 9, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/the-us-should-just-write-checks-but-wont/609637/>.

⁷¹ See generally LISA SEVRON, *THE UNBANKING OF AMERICA: HOW THE NEW MIDDLE CLASS SURVIVES* (2018).

⁷² Foohey, Jiménez, & Odinet, *On the Street*, *supra* note 7.

⁷³ See *supra* text accompanying notes 42-44.

⁷⁴ 2017 FDIC National Survey of Unbanked and Underbanked Households, FDIC (2018), <https://www.fdic.gov/householdsurvey/> (last visited Apr. 25, 2020); see also Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L.J. 483 (2013).

⁷⁵ See Trent Hamm, *Do Check-Cashing Services Provide a Banking Alternative?*, THE SIMPLE DOLLAR (Nov. 13, 2019), <https://www.thesimpledollar.com/banking/blog/a-deeper-look-at-check-cashing-services-do-they-really-provide-an-alternative-banking-opportunity/> (noting that check cashing fees are around 3%).

⁷⁶ See MEHRSA BARADARAN, *HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY* 138-40 (2015).

⁷⁷ See *supra* note 46.

⁷⁸ The Editorial Board, *Stop Dawdling. People Need Money.*, THE N.Y. TIMES (Apr. 15, 2020, Section A, Page 22), <https://www.nytimes.com/2020/04/15/opinion/coronavirus-stimulus-check-payment.html>; see also Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283 (2014).

government does not have a system to get money into the hands of Americans quickly and efficiently, it needs to find a different delivery system.

Usefully, the structure for such a system already exists in the United States Postal Service. As others have advocated for years, post offices can once again become banks.⁷⁹ Every American adult can be issued a free deposit account with the local post office. Alternatively, every individual can be given an account at the Federal Reserve (a benefit already enjoyed by banks)⁸⁰ or an expanded “Treasury Direct Account” set-up for deposit-holding.⁸¹ If these seemingly easy-to-implement ideas are unpalatable, payments can be loaded onto reusable debit cards, deliverable through direct mail, in-person pick-up, or via at-risk outreach, as was proposed during debates about the legislation that became the CARES Act.⁸²

Indeed, as the fundamental flaws in the CARES Act’s household support provisions became more and more apparent, a handful of leaders and scholars have outlined plans for future legislation that reflects our family financial well-being approach. Representative Rashida Tlaib was the first on the scene, even before the CARES Act’s passage, with a call for the same \$1,000 monthly payments to all Americans, including children via their parents, until the end of the crisis.⁸³ Later proposals are more tailored, but still are based on direct payment relief, rather than false relief based on credit.

For example, the Emergency Money for People Act, introduced in April 2020, by Representatives Ro Khanna and Tim Ryan, proposes to pay every American aged 16 or over \$2,000 per month for at least 6 months, plus \$500 for each child up to 3 children. If an individual does not have a bank account, the

⁷⁹ See BARADARAN, *supra* note 76, at 183, 210; Mehrsa Baradaran, *It’s Time for Postal Banking*, 127 HARV. L. REV. F. 165 (2014); Adam Levitin, *Postal Banking: Maybe Not So Crazy After All*, AM. BANKER (Jan. 31, 2014), <https://www.americanbanker.com/opinion/postalbanking-maybe-not-so-crazy-after-all>.

⁸⁰ Andrew Cockburn, *Forget Checks, How About Giving Everyone A Federal Reserve Account?*, AM. CONSERVATIVE (Mar. 21, 2020, 12:01 AM), <https://www.theamericanconservative.com/articles/forget-checks-how-about-giving-everyone-a-federal-reserve-account/>.

⁸¹ 31 CFR § 363.10; *see also* Robert Hockett, *The Treasury Dollar: An Immediate Funding and Digital Banking Plan for Pandemic Relief and Beyond* (draft dated Mar. 14, 2020), <https://ssrn.com/abstract=3567829>.

⁸² Rep. Rashida Tlaib, *Automatic Boost to Communities Act Policy Proposal*, <https://tlaib.house.gov/sites/tlaib.house.gov/files/Automatic%20Boost%20to%20Communities%20Act%20.pdf>.

⁸³ *Id.* This proposal depends on coining money, which is a power the government has under the Constitution. *See* Rohan Grey, *Administering Money: Coinage, Debt Crises, and The Future of Fiscal Policy* (draft dated Feb. 11, 2020), <https://ssrn.com/abstract=3536440>.

bill allows people to get paid via prepaid debit card or mobile money platforms.⁸⁴ Although this proposal solves amount and delivery problems, it bases eligibility on income as reported in prior tax returns.⁸⁵

Finally, any relief package that includes robust money payments to American families must be coupled with protections from issues people may encounter with their current credit relationships. As proposed by Senators Elizabeth Warren and Sherrod Brown, this includes cancellation of student loans, protections against the garnishment of relief payments by creditors and debt collectors,⁸⁶ and a more accessible and affordable way for people to file bankruptcy.⁸⁷

Reorienting the government's approach from one based on credit as relief to one that adopts a muscular focus on the financial well-being of families is the best way, by far, to manage the economic fallout of this crisis. Many Americans still cannot go to work and many no longer have a work to go to, at least for the foreseeable future. Because ordering people to shelter-in-place is the only effective way to stem the spread of the virus, many states will continue to order people to stay at home even if the federal government lifts the national state of emergency. And once people begin to emerge, they naturally will spend less as they adjust to the new normal.⁸⁸

Carrying households through the crisis will additionally alleviate pressure on other parts of the economy and on the state and federal government support network. It will eliminate much of the pressure people feel when they think about paying mortgages and rent, about ensuring they have power and other utilities, and maintaining health insurance. It also will eliminate the need for states to create a patchwork of responses to their citizens' financial needs,

⁸⁴ See Terina Allen, *Emergency Cash: Monthly Payments Up To \$5,500 For Families and \$2,000 For Individuals*, FORBES (Apr. 24, 2020, 10:29 AM EDT), <https://www.forbes.com/sites/terinaallen/2020/04/24/emergency-cash-monthly-payments-up-to-5500-for-families-and-2000-for-individuals>.

⁸⁵ https://khanna.house.gov/sites/khanna.house.gov/files/Final_Emergency%20Money%20For%20the%20People.pdf.

⁸⁶ 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-from-debt-collectors/>.

⁸⁷ Emily Stewart, *Exclusive: Elizabeth Warren and Sherrod Brown's Plan to Protect Consumers From Financial Ruin*, VOX (Apr. 21, 2020 12:00 PM EDT), <https://www.vox.com/policy-and-politics/2020/4/21/21229412/elizabeth-warren-sherrod-brown-cares-act-consumer-proposals>; see also *What States Should Do: Stabilizing Consumer Finances During the Coronavirus Crisis*, NAT'L CONSUMER L. CTR. (April 2020), https://www.nclc.org/images/pdf/special_projects/covid-19/WSCD_Summary_Crisis.pdf.

⁸⁸ Cohen, *supra* note 61 (quoting an economist that unemployment "problems will affect the shape of the recovery when the pandemic eases").

including administering augmented unemployment benefits. And it will eliminate the need for the Congress or the Federal Reserve to have to bailout the mortgage servicing industry and banks months from now.⁸⁹

The most humane and economically efficient action for the federal government to take is to provide direct relief to American families, not saddle them with continuing credit obligations that will prove to be more expensive for them than when the crisis began. As a business matter, investing in people now will save state and federal governments more over the long term. A family financial well-being approach to pandemic relief is, from both an economic and societal perspective, the only sensible path forward.

⁸⁹ Mary Childs & Jacob Goldstein, *Episode 989: What If No One Pays Rents?*, PLANET MONEY (Apr. 8 2020, 9:01 PM), <https://www.npr.org/2020/04/08/830237502/episode-989-what-if-no-one-pays-rent> (explaining the nonbank mortgage servicer liquidity problem generated by the CARES Act's forbearance provisions).