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Creola Johnson

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# Crushed by COVID-19 Medical Bills, Coronavirus Victims Need Debt Relief Under the Bankruptcy Code and Workers' Compensation Laws

Creola Johnson\*

## ABSTRACT

After the U.S. declared COVID-19 a pandemic, cracks in the U.S.'s fragile privatized healthcare system were exposed. At the start of the pandemic, 74 million U.S. residents were already uninsured or underinsured. To date, over 7.7 million recently terminated employees have lost their employer-provided health insurance, while over 24.6 million individuals have been infected with COVID-19 and 800,000 have been hospitalized. As a result, coronavirus survival often comes with astronomical medical bills like the \$1.1 million hospital bill received by Michael Flor, a 70-year-old survivor who spent 62 days in the hospital for treatment.

This Article examines how the U.S.'s flawed healthcare system and federal bankruptcy law may work together to unfairly penalize debtors burdened with medical debts arising from treatment for an infectious disease, like COVID-19. The financial fate of many burdened with infectious-disease medical bills will depend on whether a court characterizes such bills as "consumer" debts. Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, individuals with "primarily consumer debts" are subject to a complex calculation known as the "Means Test." Debtors who have their massive medical bills characterized as *non-consumer debts* are allowed to wipe out those bills quickly in a Chapter 7 case. Debtors who have such bills characterized as *consumer debts* and who fail the Means Test are forced into a five-year repayment plan in a Chapter 13 case, where they pay down their unsecured debts, including medical bills. As a result, courts

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are effectively penalizing debtors who lack adequate health insurance and who involuntarily contract a contagious disease.

To prevent such perverse results, this Article proposes that bankruptcy law be amended to exclude infectious-disease medical bills from the definition of consumer debt. Also, to obviate the need for some individuals to file for bankruptcy relief, this Article proposes that workers' compensation ("workers' comp") laws be amended to include COVID-19 as an occupational disease for any "essential worker," as defined in each state, so that infected essential workers can have their medical bills paid from workers' comp funds. If a former U.S. president infected with COVID-19 was considered essential for the nation's survival and, therefore, entitled to taxpayer-funded medical care in state-of-the-art facilities, then front-line employees—who are required to work for the benefit and survival of us all—should absolutely receive COVID-19 treatment at no cost to them. Legislative action is especially needed due to the current spread of new, highly contagious mutations of COVID-19 in the U.S. With the proposed legislative amendments in place, the U.S. would ensure that survivors are protected from financial devastation due to involuntarily contracting an infectious disease.

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### INTRODUCTION

On a cold January day, William Sijan, suffering from a fever and struggling to breathe, went to the local emergency room (“ER”).<sup>1</sup> The ER doctors diagnosed him with severe pneumonia and told him that he needed to be admitted immediately.<sup>2</sup> Mr. Sijan initially objected but relented after the doctors said that he would be dead within hours if he refused treatment.<sup>3</sup> Thereafter, he was intubated and put on a ventilator machine for two weeks.<sup>4</sup> He received treatment in the hospital for an additional four weeks to be cleared of pneumonia.<sup>5</sup> He then underwent physical therapy for ten weeks to regain sufficient strength to return to

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1. *See In re Sijan*, 611 B.R. 850, 852 (Bankr. S.D. Ohio 2020).

2. *See id.*

3. *See id.*

4. *See id.* at 852–53.

5. *See id.* (stating that he was treated in the intensive care unit (ICU) for three more weeks and, subsequently, isolated in the hospital for another week before being released).

work.<sup>6</sup> He ended up owing over \$324,600 in medical debts.<sup>7</sup> Of that amount, Broward Health Medical Center was by far his largest creditor, sending Mr. Sijan a bill for \$300,550.99.<sup>8</sup> Because Mr. Sijan could not pay his six-figure medical debts,<sup>9</sup> he ended up filing for Chapter 7 bankruptcy relief.<sup>10</sup> His medical bills comprised nearly 90% of all his unsecured debts.<sup>11</sup> In other words, enormous medical bills drove Mr. Sijan into bankruptcy, not excessive consumer spending.

Prior to 2005, Mr. Sijan's Chapter 7 bankruptcy case would have been simple and unremarkable; that is, it would have been closed within a matter of a few months, and Mr. Sijan's enormous medical debt would have been wiped out—discharged.<sup>12</sup> However, in 2005, President George W. Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA),<sup>13</sup> intending to force more individual debtors out of Chapter 7 cases and into Chapter 13 cases, where they have to pay back a portion of their unsecured debts through a mandatory five-year plan.<sup>14</sup> The United States Trustee (the “Trustee”), after scrutinizing Mr. Sijan's documents, concluded that Mr. Sijan had \$1,408 in monthly disposable income<sup>15</sup> and that, over a five-year plan, he could make 60 monthly payments yielding a total payout of \$84,480 to

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6. *See id.* at 853.

7. *See id.*

8. *See id.*

9. *See* Official Form 106A/B: Schedule A/B: Property of William H. Sijan at 3, *In re Sijan*, 611 B.R. 850 (Bankr. S.D. Ohio 2020) (No. 19-53347).

10. *See In re Sijan*, 611 B.R. at 853.

11. *See id.*

12. *See* THOMSON REUTERS, BANKR. PRACTICE HANDBOOK § 4:2 (2d ed. 2020) (stating that “a Chapter 7 debtor will receive a discharge after a few months, and in most cases without doing anything after the requisite documents are filed other than attending a meeting of creditors”).

13. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 23 (codified as amended at 11 U.S.C. § 707 (2014)).

14. The BAPCPA has been widely criticized as a flawed reform law for numerous reasons. *See, e.g.,* Jean Braucher, *Bankruptcy 2.0(05) Chapters, Changes, and Challenges: A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1319–20, 1322 (2006); Sara Sternberg Greene, *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 AM. BANKR. L.J. 241, 248 (2015).

15. Under the BAPCPA, if a debtor's income is above median and if his debts are primarily consumer debts, the debtor is forced to complete the “Means Test,” a complex mathematical formula that determines whether the debtor has sufficient disposable income to pay towards unsecured debt. *See* 11 U.S.C. § 707(b)(2)(A)(i) (2018) (indicating that the Means Test creates a presumption of abuse to be rebutted by the debtor); *Morse v. Rudler (In re Rudler)*, 576 F.3d 37, 50 (1st Cir. 2009) (“A number of courts have in fact concluded that a specific intent to limit the bankruptcy court's discretion underlies the means test and accounts for Congress's adoption of a ‘mechanical formula’ for presuming abuse of Chapter 7.”).

unsecured creditors.<sup>16</sup> Therefore, the Trustee asked the bankruptcy court to characterize Mr. Sijan's medical debts as "consumer" debt and to dismiss his Chapter 7 case unless Mr. Sijan agreed to convert it to a Chapter 13 case and use all his disposable income to pay down his unsecured debt, almost all of which was medical debt.<sup>17</sup>

Unfortunately, other debtors in Mr. Sijan's position may face similar legal challenges from the Trustee, who seeks to have their enormous medical debts characterized as consumer debts and attempts to require them to spend five years in Chapter 13 bankruptcy paying off those debts.<sup>18</sup>

This Article contends that medical bills arising from a debtor's treatment for an infectious disease, including the novel coronavirus, COVID-19, should be considered "non-consumer" debt because the debtor's contracting of an infectious pathogen is involuntary, the debtor's medical treatment is not an elective service, and the debtor's treatment benefits all U.S. residents by helping to contain the spread of an infectious disease.<sup>19</sup>

Part I of this Article provides an overview of the bankruptcy system and its connection to the United States' broken healthcare system during the COVID-19 pandemic, which, to date, has infected over 24.6 million individuals in the U.S.<sup>20</sup> Before the pandemic, an estimated 74 million U.S. residents were already uninsured and underinsured.<sup>21</sup> In the midst of

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16. See Motion of the United States Trustee to Dismiss Pursuant to 11 U.S.C. §§ 707(b)(2) or 707(b)(3) with Memorandum and Affidavit in Support Thereof, at 4, *In re Sijan*, 611 B.R. 850 (Bankr. S.D. Ohio 2019) (No. 19-53347).

17. *Id.* at 3-4; see also 11 U.S.C. § 707(b)(2) (requiring the court to engage in a complicated series of calculations, commonly known as the Means Test, in order to determine whether the presumption arises); *In re Robinson*, No. 1202313EE, 2013 WL 5567265, at \*4 (Bankr. S.D. Miss. Oct. 9, 2013) (stating that "Section 707(b)(2) requires the court to engage in a complicated series of calculations, commonly known as the means test, in order to determine whether the presumption arises").

18. Under § 707(b), the Trustee must review all materials submitted by an individual debtor who files a Chapter 7 petition to determine "whether the debtor's case would be presumed to be an abuse." Under § 704(b), the Trustee has to follow certain instructions when pursuing an abuse dismissal, but that section does not provide any guidance regarding when the Trustee should decline to file a dismissal motion. See Laura B. Bartell, *Section 704(b)(2)—The Back Door into Chapter 7 for the Above-Median Debtor*, 92 AM. BANKR. L.J. 489, 497; see also *infra* Section II.B. (discussing case law involving the Trustee's attempt to have debtors' Chapter 7 cases dismissed where debtors asserted their medical debts should be characterized as non-consumer debts).

19. See *infra* Section II.C. (explaining why infectious-disease medical debts should be characterized as non-consumer debt).

20. *Coronavirus Resource Center*, JOHNS HOPKINS U. & MED., <https://bit.ly/3kSeFF5> (last visited Jan. 22, 2021).

21. See *New American Heart Association Health Care Principles Call for Evidence-Based Approaches to Eliminate Inequities*, AM. HEART ASS'N: CTR. FOR HEALTH METRICS & EVALUATION (Feb. 3, 2020), <https://bit.ly/3jIZa7z> (stating that 74 million individuals are uninsured and under-insured).

the pandemic, the American workforce has not only experienced record-breaking job losses, but 14.6 million people have thus far lost employer-sponsored healthcare insurance.<sup>22</sup> As a result, the uninsured, along with the inadequately insured, often amass five-figure or six-figure medical debts for the diagnosis and treatment of numerous diseases.<sup>23</sup> Consider Michael Flor, a 70-year-old COVID-19 survivor, who is waiting to see if he will be charged a co-payment for a medical bill exceeding \$1.1 million after a 62-day stay in the hospital.<sup>24</sup> Unfortunately, many individuals like Mr. Flor will amass astronomical medical debt for infectious-disease treatment and will resort to filing for bankruptcy relief.<sup>25</sup>

Part II of this Article addresses the fact that debtors with enormous medical debts face an uncertain future if they choose to file for bankruptcy relief. Part II analyzes the split of authority regarding the characterization of medical debts in individual bankruptcy cases. One line of cases holds that medical debts are *consumer* debts because the individual debtor directly benefits from the medical treatment and voluntarily elects to receive the treatment.<sup>26</sup> Another line of cases holds that medical bills from emergency treatment are *non-consumer* debts because the emergency treatment is not an elective procedure, and the debt arising therefrom neither involves an extension of credit nor results from the consumption of typical goods and services.<sup>27</sup> A court's

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22. See Paul Fronstin & Stephen A. Woodbury, *How Many Americans Have Lost Jobs With Employer Health Coverage During the Pandemic?*, EMP. BENEFIT RES. INST. (Oct. 7, 2020), <https://bit.ly/2TGJuXR> (describing a study that found, as of June 2020, 7.7 million individuals had lost employer-sponsored insurance and that 6.9 million dependents of these individuals also lost coverage, thereby bringing the total number of people losing employer-sponsored insurance to more than 14 million); see also Patricia Cohen, *Rise in Unemployment Claims Signals an Economic Reversal*, N.Y. TIMES (July 23, 2020), <https://nyti.ms/2JIXwFD> (“About 30 million people—roughly one in five American workers—are drawing jobless benefits.”).

23. See generally Lorie Konish, *This Is the Real Reason Most Americans File for Bankruptcy*, CNBC (Feb. 11, 2019, 11:32 AM), <https://cnb.cx/2Hx04qy> (quoting an expert who stated, “[h]ealth insurance is only very partial protection” against the high cost of medical bills); *Unnecessary Coronavirus Deaths; Insurers Face Lawsuits, Congressional Inquiries; Black Americans Twice as Likely to Die from Coronavirus*, PUB. CITIZEN (Aug. 17, 2020), <https://bit.ly/2RZvPud> (describing the predicament of a family facing large bills arising from a loved one's medical treatment for the Coronavirus before he eventually died and stating that his employer dropped healthcare insurance for laid-off workers).

24. See Danny Westneat, *Coronavirus Survival Comes with a \$1.1 Million, 181-Page Price Tag*, SEATTLE TIMES (June 12, 2020, 4:53 PM), <https://bit.ly/3mVqvGr>.

25. See *infra* Section I.A. (discussing data regarding COVID-19 infections in the U.S. and how the number of hospitalizations is expected to rise due to continuing problems associated with COVID-19 testing).

26. See *In re Zgonina*, No. 19-90467, 2019 WL 6170776, at \*3 (Bankr. C.D. Ill. Nov. 19, 2019).

27. See *In re Sijan*, 611 B.R. 850, 855–57 (Bankr. S.D. Ohio 2020).

characterization of a debtor's massive medical bills as either consumer or non-consumer is critical to the debtor's ability to obtain debt relief.<sup>28</sup> For instance, if a bankruptcy court holds that infectious-disease medical bills constitute *consumer* debts, then debtors who earn above-median income will have to complete a complicated calculation known as the "Means Test."<sup>29</sup> If that debtor's disposable income is high enough under the Means Test, that debtor will be forced to dismiss her Chapter 7 case or convert to a Chapter 13 case and pay all of her disposable income for five years to pay down her unsecured debts, including medical debts.<sup>30</sup> In bankruptcy law parlance, the debtor's Chapter 7 filing would be considered an "abuse" of the bankruptcy system. In reality, the debtor is being penalized—made to submit to a mandatory five-year repayment plan—not due to profligate spending, but due to the debtor being either uninsured or underinsured in America's flawed healthcare system.

Part III suggests possible solutions to protect debtors from financial devastation after amassing infectious-disease medical debts. One proposal seeks to protect individuals employed as "essential" workers by amending workers' compensation ("workers' comp") laws to include COVID-19 and other infectious diseases as occupational diseases for infected workers.<sup>31</sup> This Article proposes amendments to workers' comp laws<sup>32</sup> to expand coverage for COVID-19 infected workers by including a presumption of compensability for any essential employee, as defined under state and local laws and executive orders.<sup>33</sup> If Donald Trump, a former president infected with COVID-19, was considered essential for

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28. If a court characterizes such massive bills as non-consumer debt, that debtor will not have to complete the Means Test and, therefore, will be able to file a Chapter 7 case and get a discharge of all general unsecured debts, including the medical bills. See Mark A. Neal & Sandra Manocchio, *Means Testing: The Heart of BAPCPA*, 40 Md. B.J. 26, 28–29 (2007); Cara O'Neill, *Debts that Cannot Be Discharged in Bankruptcy*, THEBANKRUPTCYSITE, <https://bit.ly/3bNDKDW> (last updated Mar. 27, 2019).

29. See Neal & Manocchio, *supra* note 28, at 28.

30. See *id.*; see also O'Neill, *supra* note 28.

31. See *infra* Section III.A. A bill recently introduced in Congress would prevent healthcare providers from engaging in certain debt-collection practices during the pandemic, including seizing patients' bank accounts and garnishing their wages. See COVID-19 Medical Debt Collection Relief Act of 2020, S. 4350, 116th Cong. (2020). Because this bill does nothing to reduce the amount of medical debt owed, it will not provide consumers with any permanent debt relief. See *id.*

32. Although workers' comp laws vary in all 50 states and U.S. territories, several states have recently created a presumption of compensability for first responders and healthcare professionals infected with COVID-19. See Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. ST. LEGISLATURES (Aug. 28, 2020), <https://bit.ly/33jYa3R>.

33. See Michael Felsen, *COVID-19: Essential Workers Deserve Workers' Comp*, HILL (May 14, 2020, 12:30 PM), <https://bit.ly/3iqLX8k> (explaining the justification for expanding the list of workers considered essential for purposes of coverage under workers' comp laws).



the nation's survival and, therefore, entitled to taxpayer-funded, experimental drug treatment and around-the-clock medical care in state-of-the-art facilities, then frontline employees—who are required to perform essential work for the benefit and survival of us all—should absolutely receive COVID-19 treatment at no cost to them.<sup>34</sup> Thus, as long as the employee was working as an essential worker when infected, the cost of all of the employee's medical treatment would be paid for with workers' comp funds and, as a result, the employee would not need to file for bankruptcy relief.<sup>35</sup>

However, because revisions to workers' comp laws in more than 50 jurisdictions may be unattainable, this Article also proposes changing bankruptcy law as another viable solution.<sup>36</sup> The BAPCPA should be amended to exclude medical bills arising from the treatment of infectious diseases from the definition of "consumer" debt.<sup>37</sup> This proposed solution is purposefully narrow because this Article's premise that infectious-disease medical debts are involuntary is uncontroversial and apolitical. Given that five separate federal laws have already been passed in 2020 to ameliorate various disastrous effects of COVID-19,<sup>38</sup> the

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34. See Steve Contorno, *Large Crowd Awaits Trump's Return to Florida's Campaign Trail After COVID Diagnosis*, MIAMI HERALD (Oct. 12, 2020, 7:03 PM), <https://hrl.d.us/3eshlykp> (describing Mr. Trump's medical care at Walter Reed National Military Medical Center and at the White House after he contracted COVID-19 and stating that his treatment was far from typical and that he received experimental drugs that are not available to most individuals).

35. See Brittany Atkinson & CHARTWELL LAW, *Proposed Presumptive Workers' Compensation Legislation Would Eliminate Burden of Proof on Essential Workers for COVID-19 Claims*, JD SUPRA (May 13, 2020), <https://bit.ly/304f4mb> (noting the benefits for essential workers if employers were limited in their ability to rebut the presumption that an infected employee contracted COVID-19 while working).

36. See *infra* Section III.B.

37. See *infra* Section III.B.

38. See generally NACo Summary: *COVID-19 Funding Packages*, NAT'L ASS'N CTYS., <https://bit.ly/35xcGb1> (last updated May 28, 2020) (listing the first four federal bills and their purposes in order of enactment: (1) Coronavirus Preparedness and Response Supplemental Appropriations Act provided \$8.3 billion to support public health services and coronavirus research efforts; (2) Families First Coronavirus Response Act provided over \$1 billion for causes such as food assistance and unemployment aid, among others, to address the economic crisis brought on by the pandemic; (3) Coronavirus Aid, Relief and Economic Security Act allowed \$2 trillion to be distributed among qualifying U.S. residents, hospitals, state and local governments, and others as additional economic relief during the pandemic; (4) Paycheck Protection Program and Health Care Enhancement Act provided \$484 billion to aid small business and hospitals and increase COVID-19 testing); see also Coronavirus Aid, Relief, and Economic Security (CARES) Act, 15 U.S.C. §§ 9001–9080 (2018 & Supp. 2020); Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020) (summarizing key parts of two of the federal laws allowing consumers to get free testing for COVID-19 and putting certain limitations on how much out-of-pocket expenses health insurance companies can charge consumers treated for the disease). On December 27, 2020, former President Trump signed the Consolidated Appropriations Act, 2021 (Pub. L. No. 116-

proposed BAPCPA amendment is a solution that could be passed by a bipartisan majority of the U.S. Congress.<sup>39</sup> Individuals fortunate enough to recover from an infectious disease, such as COVID-19, did not amass medical debts from profligate spending on consumer goods.<sup>40</sup> Therefore, such individual debtors should not be forced into Chapter 13 repayment plans to bear the burden of America's broken healthcare system. Instead, these debtors should achieve a fresh start<sup>41</sup> and be allowed to use their future income to regain financial stability.

#### I. THE COVID-19 VIRUS, A BROKEN HEALTHCARE SYSTEM, AND A FLAWED BANKRUPTCY REFORM

In the near future, a huge spike in consumer-bankruptcy filings is anticipated due, at least in part, to consumers being burdened with what this Article calls “infectious-disease medical debt”<sup>42</sup>—debt arising from the diagnosis and medical treatment of a person who has contracted a

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260, 134 Stat. 1182 (the “Appropriations Act of 2021”). This 5,593-page appropriations law contains a few temporary amendments to sections of the Bankruptcy Code to help businesses and consumer debtors dealing with certain hardships arising from the COVID-19 pandemic, but none of the amendments addresses medical bills incurred by debtors for COVID-19 medical treatment. *See Year-End Appropriations and COVID Stimulus Bill Revises Sections of the Bankruptcy Code*, PRACTICAL LAW BANKR. & RESTRUCTURING, <https://bit.ly/3sWvvh1> (last visited Jan. 22, 2021) (law stated as of Jan. 4, 2021); NAT'L ASS'N CTYS., NACO LEGISLATIVE ANALYSIS FOR COUNTIES: COVID-19 RELIEF & OMNIBUS SPENDING PACKAGE (Dec. 22, 2020), <https://bit.ly/2KF3sl7> (summarizing the \$2.3 trillion legislative package that Congress passed on December 1, 2020, which contained appropriations for Fiscal Year 2021 and additional COVID-19 relief). The Appropriations Act of 2021 does, however, include the “No Surprises Act,” which protects patients from surprise medical bills by preventing insurers from charging fees by out-of-network service providers and limiting patients to being responsible for the cost of care as if they had received care from in-network providers. *See* Edward S. Kornreich et al., *No Surprises: Congress Enacts Surprise Bill Law and Adds Mandatory Billing Transparency*, NAT'L L. REV. (Jan. 9, 2021), <https://bit.ly/2KHxNQ0>.

39. *See* PRACTICAL LAW BANKRUPTCY & RESTRUCTURING, *CARES Act: Revised Sections of the Bankruptcy Code to Mitigate Effects of COVID-19*, THOMSON REUTERS (2020) (describing a recently enacted federal law that allows consumers who file for bankruptcy relief to exclude from an income calculation the \$1,200 stimulus check received by qualified taxpayers); *see also* Coronavirus Aid, Relief, and Economic Security (CARES) Act, 15 U.S.C. §§ 9001–9080 (2018 & Supp. 2020).

40. *See In re Zgonina*, No. 19-90467, 2019 WL 6170776, at \*1–2 (Bankr. C.D. Ill. Nov. 19, 2019); Braucher, *supra* note 14, at 1322; Neal & Manocchio, *supra* note 28, at 27–28 (discussing how the debtors can obtain a discharge of general unsecured debts, including medical bills, in Chapter 7 bankruptcy cases).

41. *See* Braucher, *supra* note 14, at 1319. *See generally* THOMSON REUTERS, *supra* note 12, § 4:2 (explaining the “fresh start” goal in bankruptcy cases).

42. *See* Megan Leonhardt, *Here's What You Need to Know if You're Considering Filing for Bankruptcy Because of Coronavirus*, CNBC (Apr. 16, 2020, 2:47 PM), <https://cnb.cx/2ZwgJk1>.

disease caused by a virus, bacterium, or other pathogen.<sup>43</sup> The term is sufficiently broad to cover debts amassed by the previously mentioned Mr. Sijan, who contracted pneumonia, as well as the thousands who become seriously ill annually from the flu and the millions who have already become ill from COVID-19.

*A. COVID-19 Is the Perfect Example of a Pathogen That Can Lead to Enormous Medical Debts*

Because of the worldwide spread of COVID-19 and its devastating impact on individuals, this virus is a perfect example of an infectious disease that can lead U.S. consumers to amass enormous medical debts. In 2019, months before the COVID-19 pandemic declaration, 29.8 million individuals under the age of 65 lacked health insurance,<sup>44</sup> and an additional 44 million were estimated to be underinsured.<sup>45</sup> Moreover, after the start of the pandemic, millions of U.S. residents lost employer-sponsored healthcare insurance due to being terminated or furloughed.<sup>46</sup> Even though the U.S.'s privatized healthcare system is the most expensive in the world, it does not yield better health outcomes than systems in peer countries.<sup>47</sup>

43. See *Pathogen*, OXFORD DICTIONARY: LEXICO, <https://bit.ly/3i5kun8> (last visited Jan. 7, 2021).

44. The U.S. Congressional Budget Office issued a report discussing reasons why 29.8 million individuals lacked insurance and finding that about two-thirds of them were eligible for some form of subsidized healthcare insurance, including under the Affordable Care Act (ACA). See CONGR. BUDGET OFF., WHO WENT WITHOUT HEALTH INSURANCE IN 2019, AND WHY? (Sept. 2020), <https://bit.ly/3oO3uGj> (briefly summarizing the purpose of the ACA and describing the ACA's expansion of "Medicaid eligibility to all adults with family income up to 138 percent of the poverty level").

45. See AM. HEART ASS'N: CTR. FOR HEALTH METRICS & EVALUATION, *supra* note 21 (discussing the limitations on access to cardiovascular healthcare to the estimated 30 million uninsured and 44 million underinsured individuals).

46. See generally David Blumenthal et al., *Covid-19 — Implications for the Health Care System*, 383 NEW ENG. J. MED. 1483 (2020) (stating that although millions of unemployed individuals should be eligible during the pandemic for subsidized healthcare under the Affordable Care Act (ACA), such coverage is lacking due, in part, to the failures of the Trump administration that include failing to "educate[] the newly unemployed about their immediate eligibility outside of open enrollment periods for subsidized insurance in the federally run ACA marketplaces" and failing to "open[] special enrollment periods for those wishing to enroll"); Julie Carter, *COVID-19 Harming Older Adult Employment, Increasing Strain on Medicare*, MEDICARE RTS. CTR. (Oct. 8, 2020), <https://bit.ly/3oPm8h5> (stating that more than one million individuals over age 65 lost their jobs as of July 2020 and that among that group, Asian and Latino adults had high rates of unemployment).

47. See Roosa Tikkanen & Melinda K. Abrams, *U.S. Health Care from a Global Perspective, 2019: Higher Spending, Worse Outcomes?*, COMMONWEALTH FUND (Jan. 30, 2020), <https://bit.ly/3316L67>; see also Karen Feldscher, *What's Behind High U.S. Health Care Costs*, HARV. GAZETTE (Mar. 13, 2018), <https://bit.ly/3mfDIK4>. An estimated 5.4 million U.S. residents have lost employer-provided healthcare insurance since February 2020. See Sheryl Gay Stolberg, *Millions Have Lost Health Insurance in Pandemic*

The U.S.'s flawed healthcare system predated the COVID-19 pandemic, which, to date, has resulted in the hospitalization of over 800,000 and the death of nearly 410,000 individuals in the U.S. alone.<sup>48</sup> Moreover, the U.S. has by far the world's largest number of cases with nearly 24.6 million U.S. residents having tested positive for COVID-19.<sup>49</sup> Some individuals have no symptoms, while others have symptoms ranging from mild to severe enough to require hospitalization.<sup>50</sup> According to medical experts, COVID-19 is highly contagious and is spread primarily from person to person, including by asymptomatic individuals.<sup>51</sup>

To make matters worse, throughout 2020, accurate and widespread testing for COVID-19 was difficult for U.S. residents to obtain.<sup>52</sup> Testing and contact tracing of infected persons remain vital since a substantial number of asymptomatic persons with COVID-19 spread the virus to others.<sup>53</sup> Testing needs to increase to the level experts believe is

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*Driven Recession*, N.Y. TIMES (July 13, 2020), <https://nyti.ms/2HSpjUk> (citing a study by Families USA, a non-partisan consumer advocacy group).

48. The actual number of total hospitalizations is much greater than 800,000 because the tracking project's data is based on reporting from only 38 states. *COVID-19 Hospitalization Tracking Project*, UNIV. MINN.: CARLSON SCH. OF MGMT., <https://carlsonschool.umn.edu/mili-misrc-covid19-tracking-project> (last visited Jan. 22, 2021); *Coronavirus Resource Center*, *supra* note 20.

49. See *Coronavirus Resource Center*, *supra* note 20 (reporting that the U.S. has more than double the number of COVID-19 cases in India, which has the second largest number of total cases at over 10.1 million).

50. See *Coronavirus Disease 2019 (COVID-19): Symptoms of Coronavirus*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://bit.ly/33XbBad> (last updated May 13, 2020); see also Jon Hamilton, *After the ICU, Many COVID-19 Survivors Face a Long Recovery*, NPR (Apr. 21, 2020, 4:15 PM), <https://n.pr/36l6yTV> (remarking that in especially severe cases of COVID-19, it can take weeks in the hospital in addition to months, or even years, of rehabilitation for patients to fully recover from the virus).

51. See *Coronavirus Disease 2019 (COVID-19): Protect Yourself*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://bit.ly/2GMG9DB> (last updated Nov. 27, 2020); see also David Shukman, *Coronavirus: The Mystery of Asymptomatic 'Silent Spreaders'*, BBC NEWS (May 31, 2020), <https://bbc.in/2RZDuZA> (noting one study that found as many as three quarters of individuals contracting, and thus spreading, COVID-19 are asymptomatic).

52. See Sarah Mervosh & Manny Fernandez, *Months into Virus Crisis, U.S. Cities Still Lack Testing Capacity*, N.Y. TIMES (July 15, 2020), <https://nyti.ms/2ZkOpRu>; Lisa Song, *Rapid Testing Is Less Accurate Than the Government Wants to Admit*, PROPUBLICA (Nov. 16, 2020, 5:00 AM), <https://bit.ly/34SvFW5> (describing several types of COVID-19 tests and their limitations and discussing the Trump administration's failure to develop accurate and widespread testing protocols for nursing homes, schools, and other entities).

53. See *Coronavirus Disease 2019 (COVID-19): Prevent Getting Sick*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://bit.ly/3bHSnZo> (last updated July 30, 2020) [hereinafter *CDC's Guidelines to Prevent Getting Sick*]; Song, *supra* note 52 (stating that according to one expert, "[a]bout 40% of infections are spread by asymptomatic people with high viral loads"). Contact tracing varies across the U.S. and is not as effective or widespread as experts believe tracing should be to serve as an essential component in containing the virus's spread. Song, *supra* note 52 (quoting an epidemiologist as stating

necessary to help slow the spread of the virus.<sup>54</sup> After almost a year of dealing with testing delays, failures, and shortages, more Americans are expected in 2021 to have access to rapid, inexpensive, accurate COVID-19 testing.<sup>55</sup> Moreover, several states have begun administering recently approved COVID-19 vaccines; however, vaccinations may not be widely available to the general public until mid- to late-2021 and, notably, such vaccines are not a cure for those who become seriously ill from the virus.<sup>56</sup> While the slow roll of vaccine distribution is an important

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that testing alone is insufficient and that “any testing plan must be paired with a strong program of contact tracing, isolation and quarantine”); Paige Winfield Cunningham, *The Health 202: U.S. Isn't Ready for the Contact Tracing It Needs to Stem the Coronavirus*, WASH. POST: POWERPOST (June 15, 2020, 7:24 AM), <https://wapo.st/332ZJ7e> (describing contract tracing as a process that can allow officials to quickly discover individuals who came into contact with a person who tested positive for COVID-19 and then notify those individuals that they must get tested or self-quarantine).

54. See William Wan, *America is Finally About to Get a Lot More Coronavirus Tests*, WASH. POST (Dec. 18, 2020, 4:17 PM), <https://wapo.st/3sIXpgB> (describing a new report by the Rockefeller Foundation concluding that COVID-19 testing should be the nation's top priority and urging the federal government to allocate \$42.5 billion to administer 300 million tests per month to employees and students in U.S. schools so that schools can safely open and remain open); Ben Conarck & Daniel Chang, *A New Generation of COVID Tests May Be Florida's Best Shot at Containing Virus Spread*, MIAMI HERALD (July 29, 2020, 6:09 PM), <https://hrl.d.us/2S1EW4>.

55. See Song, *supra* note 52 (describing several shortcomings of the Trump administration, including the failure to have a national testing strategy, and describing several testing problems, including false positives and false negatives, and stating that the federal government could have provided more testing protocols to weed out false positives); Wan, *supra* note 54 (reporting that 50 leading infectious-disease experts sent a letter to Congress urging that it allocate \$10 billion to fund a year-long plan to test large segments of the population with rapid, inexpensive testing to curb virus transmission until a vaccine is widely available to the general population). Currently, the primary way to be tested for COVID-19 is for a doctor to evaluate an individual's symptoms and decide that the individual meets the CDC's criteria to be tested. See *CDC's Guidelines to Prevent Getting Sick*, *supra* note 53. In other words, due to these strict requirements, in some locations, one cannot simply ask for a test and receive one, and this is especially true for asymptomatic persons who believe that they may have the virus. See *id.*; Kristen Taketa, *San Diego Unified Asks Gov. Newsom for 10,000 Daily COVID Tests*, SAN DIEGO UNION-TRIB. (Oct. 16, 2020), <https://bit.ly/3o4MwTG> (reporting that the second largest district in California has asked the state's governor to supply the district with 10,000 COVID-19 tests each day and stating that most of the school districts in San Diego County do not have any testing programs for asymptomatic persons); Amanda Blanco, *Education Commissioner Continues to Encourage In-Person Learning*, HARTFORD COURANT (Oct. 8, 2020), <https://bit.ly/34QMJcK> (stating that “Connecticut school districts, with the exception of Hartford, are not testing asymptomatic students per Centers for Disease Control and Prevention recommendations”). Unfortunately, the strict criteria for testing have resulted in only a relatively small number of Americans being able to get tested. See *CDC's Guidelines to Prevent Getting Sick*, *supra* note 53.

56. See Carolyn Y. Johnson, et al., *Your Questions About Coronavirus Vaccines, Answered*, WASH. POST (Dec. 21, 2021), <https://wapo.st/3c4oJ2I>. Researchers are actively looking for a drug treatment that will cure seriously ill individuals stricken with COVID-19. See Michelle Roberts, *Coronavirus: Dexamethasone Proves First Life-Saving Drug*, BBC NEWS (June 16, 2020), <https://bbc.in/33YXK38> (reporting that a drug-testing trial in

development, the U.S. now has to deal with the threat of a continuing surge in cases due to the discovery of two new strains of the coronavirus recently documented in several states and, according to experts, these strains are highly contagious.<sup>57</sup> As a result of the foregoing, U.S. residents will in the foreseeable future continue to contract the virus until the U.S. successfully implements a nationwide strategic-containment plan that includes widespread vaccinations, accurate testing, and contact tracing.<sup>58</sup>

As of this writing, COVID-19 cases are surging nationwide at record-breaking levels—over 100,000 new cases daily—and are expected to continue to rise due, in part, to “pandemic fatigue,” where individuals—wary of virus containment measures—fail to consistently wear masks and follow other guidelines.<sup>59</sup> The surge is also being fueled, in part, by pandemic deniers—individuals who either believe COVID-19 is a hoax or that it is not a serious infectious disease and, therefore, refuse to wear masks and comply with state and local medical guidelines and mandates implemented to slow the virus’s spread.<sup>60</sup> For example,

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the United Kingdom shows that “low-dose steroid treatment dexamethasone is a major breakthrough in the fight against the deadly virus”). Even after the recently approved COVID-19 vaccines become available to the general public, some Americans have already stated that they will not get the vaccine, which will further prolong health officials’ virus-containment process. See Julie Rosenberg et al., *What’s Ahead in the Pandemic Fight*, ATLANTA J. CONST. (Nov. 22, 2020), <https://bit.ly/3aEtHCQ> (discussing vaccines developed by Pfizer and Moderna that preliminarily show an effectiveness rate exceeding 90% and stating that vaccine opponents increase their own risk, but “increase the risk also to the most vulnerable parts of the population”).

57. See Jonathan Saltzman, *Buoyed by Study, Scientists Increasingly Hopeful First Two COVID-19 Vaccines Effective Against New Strains*, BOSTON GLOBE (Jan. 9, 2021, 2:13 PM), <https://bit.ly/2Y6pFvu> (reporting that scientists connected to the development of the first two FDA-approved vaccines in the U.S. claim that the vaccines will be effective against two highly contagious strains of the coronavirus, one originating from England and the other from South Africa).

58. See *Coronavirus Disease 2019 (COVID-19): Protect Yourself*, *supra* note 51.

59. See ASSOCIATED PRESS, *Coronavirus Deaths Rising Across US, Just as Experts Feared*, CHI. SUN TIMES (Oct. 26, 2020, 6:30 PM), <https://bit.ly/3mEqZ2X> (stating that factors leading to a rise in COVID-19 cases include “pandemic fatigue,” where people are not abiding by safety protocols as they venture outside their homes and cold temperatures, which force more people to stay inside “where the virus can spread more easily”); see also Mark Johnson, *Frustrated Health Officials Warn Against False Optimism, Saying Pandemic May Not Be Quelled Until Well into 2021*, MILWAUKEE J. SENTINEL (Oct. 26, 2020), <https://bit.ly/381WwaM> (stating that in addition to fatigue, the virus is spreading due to false optimism, where some people are failing to follow safety protocols because they are overly optimistic about a vaccine being quickly produced to solve the pandemic crisis).

60. See Zacc Ritter & Megan Brenan, *New April Guidelines Boost Perceived Efficacy of Face Masks*, GALLUP (May 13, 2020), <https://bit.ly/3bLRdwc> (showing one poll where only 36% of Americans reported that they always wear a mask in public); see also Deborah Netburn, *New Forecasts Show Why Masks Are the Easiest—and Cheapest—Way to Save U.S. Lives*, L.A. TIMES (Oct. 23, 2020, 8:00 AM), <https://lat.ms/3oPoht9> (citing a study finding that wearing face masks could save well

former President Trump, before and after contracting the virus, repeatedly downplayed the seriousness of the virus, rarely ever wore a mask, and frequently mocked others for mask-wearing.<sup>61</sup>

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over 100,000 U.S. lives and that “only 49% of Americans said they ‘always’ wore a mask in public”). A study by the Center for Health Metrics and Evaluation at the University of Washington found that over 100,000 lives in the U.S. could be saved by February 2021 if 95% of people would wear masks. *See id.*; *see also* ASSOCIATED PRESS, *supra* note 59 (stating that another factor leading to rise in cases is “pandemic anger,” which Dr. Michael Osterholm, an infectious-disease expert, describes as arising from people who do not believe the COVID-19 pandemic is a real threat); Jennifer Hunt, *The COVID-19 Pandemic vs Post-Truth*, GLOBAL HEALTH SECURITY NETWORK (Aug. 2020), <https://bit.ly/3mZZT5U> (discussing numerous actions taken and statements made by several politicians, including Mr. Trump and political pundits, that undermine and hamper efforts by public healthcare professionals to get individuals to wear masks and follow virus-mitigation measures).

61. After nearly eight months of publicly downplaying the seriousness of COVID-19, rarely ever wearing a mask, and belittling those who did, Mr. Trump announced that he contracted the virus following the first presidential debate in September 2020. *See* Peter Sullivan & Brett Samuels, *Trump’s COVID-19 Case Draws New Attention to Handling of Pandemic*, HILL (Oct. 3, 2020, 12:12 PM), <https://bit.ly/3kIWZIQ> (stating that former President Trump “repeatedly downplayed the risks of the coronavirus and mocked his opponent, Joe Biden, for wearing a mask”); *see also* Andrew Restuccia, *Trump and His Aides Have Long Played Down Importance of Face Masks, Distancing*, WALL ST. J. (Oct. 2, 2020, 2:18 PM), <https://on.wsj.com/2HWtiz3>. In interviews recorded while speaking with journalist Bob Woodward in February 2020, Mr. Trump admitted that he intentionally downplayed the virus even though he said it was perhaps five times more deadly than the flu. *See id.*; *see also* Aaron Blake, *There Is No Good Explanation for Trump’s Coronavirus Comments to Bob Woodward*, WASH. POST (Sept. 9, 2020), <https://wapo.st/2Jj0DoC> (reporting that Mr. Trump at that time “made a months-long series of often bizarre comments about the coronavirus—from frequently downplaying it and saying it would just go away, to hyperbolically pitching unproven treatments for it, to ridiculing masks and then briefly embracing them before ridiculing them again”). Even after recovering from COVID-19, Mr. Trump resumed having large campaign rallies to mostly maskless crowds. *See, e.g.*, Josh Dawsey & Yasmeen Abutaleb, *Emboldened by His Recovery, Trump Waves Off Disease*, WASH. POST (Oct. 14, 2020), <https://wapo.st/34O9p6t> (stating that Mr. Trump threw face masks to a rally audience of mostly maskless supporters in Sanford, Florida). Former President Trump contracted COVID-19 after hosting a White House event, which Dr. Anthony Fauci, the nation’s top infectious disease expert, called a “super spreader” event because many attendees thereafter tested positive. *See* Katie Shepherd, *Fauci ‘Absolutely Not’ Surprised by Trump’s COVID-19 Diagnosis: ‘I Was Worried that He Was Going to Get Sick’*, WASH. POST, (Oct. 19, 2020, 4:59 AM), <https://wapo.st/34PJWZW> (stating that the White House super-spreader event was Mr. Trump’s announcement of the nomination of Judge Amy Coney Barrett to the Supreme Court and that, during a CBS interview, Dr. Fauci said that he was worried the president would get sick after seeing him “in a completely precarious situation of crowded, no separation between people, and almost nobody wearing a mask”). Super-spreader outbreaks have occurred in various settings. *See, e.g.*, Lindy Washburn, *States Confront Second Wave of Coronavirus*, REC., Oct. 20, 2020, at A6 (detailing several outbreaks connected to long-term healthcare facilities and to college campuses and stating that “Monmouth University in West Long Branch traced most of its 343 cases . . . to an off-campus party . . . a . . . super-spreader event”). In the runup to the November 2020 election day, former President Trump held numerous campaign rallies contrary to the advice of public-health officials. *See, e.g.*, Corey Jones, *Ahead of Trump Rally, Tulsa Officials Were Sounding Alarms, Emails Show*, TULSA WORLD (Aug. 3,

In addition to pandemic deniers, many Americans are “anti-vaxxers” or, at least, “vaccine hesitant,” as evidenced by reports that a substantial number of healthcare workers across the U.S. have refused to get vaccinated and that a large percentage of Americans in the general population have indicated they will not get the vaccine even if it is free.<sup>62</sup> While optimism now exists due to the distribution of vaccines to some healthcare workers, President Biden will need a considerable amount of time to implement a successful nationwide virus-containment strategy, which must include convincing the large majority of U.S. residents to be vaccinated.<sup>63</sup> Consequently, COVID-19 will most certainly be a long-

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2020), <https://bit.ly/3kP0nMa> (stating that Trump’s June 2020 campaign rally in Tulsa, Oklahoma drew in an estimated crowd of about 10,000, of which 6,200 were Trump supporters, and reporting that public officials warned against having the rally out of concerns that it would be a super-spreader event); Emily Pyrek, *Hours Before Rally Cancellation Announced, Wisconsin Physicians Urged President Trump to Cancel Local Visits Due to COVID-19*, LA CROSSE TRIB. (Oct. 1, 2020), <https://bit.ly/3oJZOpb> (stating that a group of Wisconsin physicians asked President Trump to cancel his scheduled campaign rallies and quoting one physician as stating that the President “has treated COVID-19 ‘like a laughing matter,’ underplaying the severity and toll of the disease and igniting prejudiced and racially-charged rhetoric by calling it the ‘Chinese virus’ or ‘Kung Flu’”).

62. See, e.g., Colleen Shalby, et al., *Some Healthcare Workers Refuse to Take COVID-19 Vaccine, Even with Priority Access*, L.A. TIMES (Dec. 31, 2020, 5:00 AM), <https://lat.ms/3sMZSXl> (reporting that a significant number of hundreds of nurses, doctors, and other frontline workers have chosen not to get the vaccine in two counties in California, and discussing a survey by the Kaiser Family Foundation that found that 27% of the general population were “vaccine hesitant” and, surprisingly, 29% of healthcare workers were also hesitant). Findings by researchers at Goucher College showed that a majority of rural voters, Conservative voters, and African-American voters in Maryland would not get a coronavirus vaccine even if it was free. See Mileah Kromer and Tara de Souza, *GOUCHER COLLEGE POLL RESULTS: MARYLAND RESIDENTS DIVIDED ON TAKING A CORONAVIRUS VACCINE; MAJORITY SUPPORT PACE OF REOPENING, BUT CONCERNS OVER CONTRACTING VIRUS REMAIN* (Oct. 13, 2020), <https://bit.ly/3hpN8kb>. See Hunt, *supra* note 60 (citing several polls, including a Gallop poll that found at least one-third of respondents indicated that they would not get a COVID-19 vaccination when it becomes available); *Expectations for a COVID-19 Vaccine*, ASSOCIATED PRESS-NORC CTR. FOR PUB. AFFAIRS RES., <https://bit.ly/3n4Sh2o> (last visited Jan. 22, 2021) (reporting that while most Americans believe a vaccine will be available in 2021, only 49% stated that they would accept vaccination, 20% stated that they would refuse vaccination, and 31% reported being unsure).

63. See Kalea Hall, *Biden Talks Economy with Biz, Labor Leaders*, DETROIT NEWS (Nov. 17, 2020), <https://bit.ly/3hrCDwx> (summarizing a virtual meeting that then-President-Elect Biden had with business and labor leaders from several sectors of the economy and stating that, according to Mr. Biden, “everyone on the call agreed part of the effort to stop COVID-19 means backing a national strategy with measures that include a face-mask mandate, increased availability of testing, the use of therapeutics, and safe and free distribution of a vaccine”); Mark Johnson, *Frustrated Health Officials Warn Against False Optimism, Saying Pandemic May Not Be Quelled Until Well into 2021*, MILWAUKEE J. SENTINEL (Oct. 26, 2020), <https://bit.ly/381WwaM> (stating that in addition to fatigue, the virus is spreading due to false optimism, where some people are failing to follow safety protocols because they are overly optimistic about a quick vaccine production solving the COVID-19 crisis).



term healthcare crisis; many will continue to become infected daily, some becoming seriously ill and, therefore, accruing infectious-disease medical debts.

Unlike COVID-19-infected former president Trump, who received taxpayer-funded, top-notch medical care available to no one else,<sup>64</sup> individuals who receive infectious-disease treatment in the ER and are hospitalized will eventually have to deal with large medical bills. Of the estimated 24.6 million who have tested positive in the U.S., over 800,000 individuals have been hospitalized.<sup>65</sup> Some individuals who contract COVID-19 experience severe pneumonia in both lungs and require

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64. After several months of rarely ever wearing a mask and refusing to follow other safety protocols, Mr. Trump tested positive for COVID-19 and was admitted to Walter Reed National Military Medical Center, where he received medical care available to virtually no one else. See ASSOCIATED PRESS, *Virginia's Governor Says He's Developed Mild COVID Symptoms*, ABC NEWS (Oct. 6, 2020, 11:33 AM), <https://abcn.ws/34ObCih> (reporting that Governor Ralph Northam and his spouse tested positive and that Governor Northam, a former military doctor who served at Walter Reed, said that the former president had "access to the best medical care, medications, treatments other people don't have access to"); Sarah Kliff, *How Much Would Trump's Coronavirus Treatment Cost Most Americans?*, N.Y. TIMES (Oct. 7, 2020), <https://nyti.ms/35WWH10> (stating that most Americans would incur more than \$100,000 in costs for treatment similar to Mr. Trump's, which included a cost-free helicopter ride, three-day stay in the hospital, and "multiple coronavirus tests, oxygen, steroids and an experimental antibody treatment"); see also Sarah Kliff, *A \$52,112 Air Ambulance Ride: Coronavirus Patients Battle Surprise Bills*, N.Y. TIMES (Oct. 13, 2020), <https://nyti.ms/35T25G7> (describing the surprising fees and high costs of COVID-19 for many Americans and highlighting the experience of one COVID-19 patient who received a bill of \$52,112 for a life-or-death helicopter ride from one local hospital to another one 20 miles away).

65. See *COVID-19 Hospitalization Tracking Project*, UNIV. MINN. CARLSON SCH. MGMT., <https://bit.ly/3kPmsto> (last visited Jan. 12, 2021) (stating that only 38 states are reporting the number of hospitalizations). The non-reporting states and territories are Alaska, California, Delaware, Illinois, Louisiana, Michigan, Missouri, North Carolina, Nevada, Pennsylvania, Texas, West Virginia, and Washington D.C. See *id.* Consequently, the 800,000 figure only accounts for approximately 75% of the United States. See *id.* By extrapolating the data ( $800,800 \div .75 = 1,066,667$ ), we can infer that the total number of cumulative hospitalizations mostly likely exceeds one million. Another tracking project estimates the number of hospitalizations at 733,017, as of Jan 11 2021, based on reporting from only 38 states. See *U.S. Coronavirus Hospitalizations*, YCHARTS, <https://bit.ly/3md45Ah> (last visited Jan. 11, 2021) (cautioning that the reported number of hospitalizations is below the true number of U.S. hospitalizations because many states are not disclosing the exact number of patients hospitalized with COVID-19); *Coronavirus Resource Center*, *supra* note 20; see also *Coronavirus Disease 2019 (COVID-19): Hospitalizations*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://bit.ly/2ZteNZv> (last updated Jan. 8, 2021) (reporting that the CDC had documented 109,500 "laboratory-confirmed COVID-19-associated hospitalizations," and that when it compared hospitalizations of White persons, "hospitalization rates were 3.4 times higher among Hispanic or Latino persons; 3.3 times higher among Non-Hispanic American Indian or Alaska Native persons; and 3.0 times higher among non-Hispanic Black persons"); *COVID-19 Dashboard*, OHIO DEP'T HEALTH, <https://bit.ly/3hkozDt> (last updated Jan. 11, 2021, 2:00 PM) (reporting that, as of January 21, 2021, Ohio had a total of 784,957 COVID-19 cases and a total of 41,377 hospitalizations due to COVID-19 infection).

intensive medical treatment, such as ventilator support.<sup>66</sup> The financial burden imposed on those unfortunate enough to be hospitalized for such treatment will be substantial. For instance, one uninsured patient exhibited COVID-19 symptoms and made several trips to the emergency room before doctors eventually diagnosed her with the disease.<sup>67</sup> Her treatment cost her nearly \$35,000.<sup>68</sup>

The cost of diagnosis and treatment can vary wildly and is difficult to predict, at least for now. A recent analysis by the Kaiser Foundation estimated an average cost of \$9,763 for a person who received COVID-19 treatment and had employer-sponsored insurance but did not need a ventilator and did not experience any material complications.<sup>69</sup> The estimated cost is expected to be more than twice that amount, \$20,292, for a person treated for complications.<sup>70</sup> But an uninsured person is expected to incur about \$34,928 in costs for COVID-19 testing and treatment not including a ventilator.<sup>71</sup> Individuals may see the cost of care dramatically increase if they are treated with promising but unproven experimental drugs, such as Remdesivir, which for a five-day course of treatment costs \$3,120 per patient.<sup>72</sup> For an average American to undergo the same experimental cocktail drug treatment received by former President Trump, the cost of such treatment, if available at all, would be substantially more.<sup>73</sup>

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66. See *Coronavirus and Pneumonia*, WEBMD, <https://wb.md/2GML9rH> (last visited June 11, 2020); see also SAFIYA RICHARDSON ET AL., JAMA NETWORK, PRESENTING CHARACTERISTICS, COMORBIDITIES, AND OUTCOMES AMONG 5700 PATIENTS HOSPITALIZED WITH COVID-19 IN THE NEW YORK CITY AREA 2020 (Apr. 22, 2020), <https://bit.ly/33mBzUe> (reporting one study that found that 20% of patients hospitalized with COVID-19 in New York and participating in the study needed ventilators); see also Kevin Hur et al., *Factors Associated with Intubation and Prolonged Intubation in Hospitalized Patients with COVID-19*, 163 OTOLARYNGOLOGY–HEAD AND NECK SURGERY 170, 170 (2020), <https://bit.ly/2ZusPtS> (detailing another study that found that 28% of patients hospitalized with COVID-19 in the Chicago area and participating in the study needed ventilators).

67. Abigail Abrams, *Total Cost of Her COVID-19 Treatment: \$34,927.43*, TIME (Mar. 19, 2020), <https://bit.ly/32jhYoE>.

68. See *id.*

69. See *id.*

70. See *id.*

71. See *id.* (reporting that the medical bill would be much more substantial if that uninsured person required a ventilator); see also Kimberly Lankford, *How to Pay for Coronavirus Medical Expenses*, U.S. NEWS (Apr. 16, 2020, 11:40 AM), <https://bit.ly/3hpQ7r0>.

72. See Vidya Krishnan, *How Secret Deals Could Keep a COVID-19 Drug Out of Reach for Millions*, L.A. TIMES (July 1, 2020, 5:46 PM), <https://lat.ms/3mfvMIK> (criticizing Gilead Sciences for charging different price levels for its drug Remdesivir and thereby limiting access to the drug).

73. See *id.*; see also Press Release, Univ. of Minn.: Ctr. for Infectious Disease Research & Policy (CIDRAP), In New Report, CIDRAP at the University of Minnesota Addresses the Shortages of Critical Medications During COVID-19 (Oct. 22, 2020),

Another group of researchers estimates the total cost of treatment not including experimental drugs to be as low as \$12,692 for coronavirus-related pneumonia without major complications and as high as \$88,114 for coronavirus-related pneumonia with major complications requiring ventilator support for more than four days.<sup>74</sup> Similarly, other researchers place the average cost of treatment for COVID-19 patients who require an inpatient visit of over six days at \$73,300, with variations for severity.<sup>75</sup> The average cost for patients with major complications or comorbidities is estimated at \$74,310, while the average treatment cost for patients with neither complications nor comorbidities is estimated at \$42,486.<sup>76</sup> FAIR Health also estimated that insurers would only pay an average of \$38,755 for patients with major complications and \$21,936 for patients with no complications, thereby leaving insured patients with the burden of paying tens of thousands of dollars in medical bills out-of-pocket.<sup>77</sup>

In 2020, Congress enacted several pandemic-related laws, the first of which was the Families First Coronavirus Response Act (FFCRA) to allow for, among other things, individuals to receive cost-free diagnostic testing and testing-related services.<sup>78</sup> For the uninsured, that means the diagnostic tests for COVID-19 would be free.<sup>79</sup> For individuals who have insurance, the FFCRA requires group health plans and health insurance companies to cover qualifying diagnostic testing and related services for COVID-19 without individual patients having to make any cost-sharing

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<https://bit.ly/3izQf9K> (reporting the findings by CIDRAP researchers who found that, in the U.S. and England, numerous drugs are increasingly in short supply and that “[t]wenty-nine (73%) out of the 40 COVID-19 treatment drugs and 67 (43%) of the 156 critical acute drugs are in shortage status”).

74. Matthew Rae et al., *Potential Costs of COVID-19 Treatment for People with Employer Coverage*, PETERSEN-KFF HEALTH SYSTEM TRACKER (Mar. 13, 2020), <https://bit.ly/2GPEqxb>. To estimate these costs, this article

[A]nalyzed a sample of medical claims obtained from the 2018 IBM Health Analytics MarketScan Commercial Claims and Encounters Database, which contains claims information provided by large employer plans . . . [and] used claims for almost 18 million people representing about 22% of the 82 million people in the large group market in 2018.

*Id.*

75. See BRIEF: COVID-19: THE PROJECTED ECONOMIC IMPACT OF THE COVID-19 PANDEMIC ON THE U.S. HEALTHCARE SYSTEM, FAIR HEALTH, at 2 (Mar. 25, 2020), <https://bit.ly/337jucM>.

76. See *id.* (reporting that FAIR Health’s study “draws on its database of over 30 billion private healthcare claim records, and on estimates of Medicare and Medicaid costs, to project US costs for COVID-19 patients requiring inpatient stays”).

77. See *id.*

78. See Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020).

79. See *id.* (allowing states to choose whether to provide COVID-19 healthcare coverage for uninsured individuals or to opt-out).

payments, including deductibles and co-payments.<sup>80</sup> Congress also enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which, among other things, expanded the range of diagnostic testing and related services that issuers must cover.<sup>81</sup>

Although these recently enacted federal laws intend to provide individuals with free testing, individuals may remain on the hook for these costs due to the lack of clarity regarding the specifics of testing.<sup>82</sup> Such testing has not been free for many asymptomatic and pre-symptomatic individuals even though former President Trump repeatedly promised free COVID-19 testing for all who wanted it.<sup>83</sup> Moreover, when a provider runs a battery of tests to determine the underlying cause of a person's symptoms, some of those tests may not be free.<sup>84</sup> As a result, some individuals may be financially responsible for the substantial costs incurred for various diagnostic tests.<sup>85</sup>

Once an individual has tested positive for COVID-19, the individual will most likely be responsible for at least some of the treatment costs.<sup>86</sup> Under the CARES Act, hospitals can receive funding to defray the cost of providing services to uninsured individuals, and health insurance companies can request funding to offset the cost of the pandemic across group and individual health plans.<sup>87</sup> Funds-receiving companies have the right to require individuals to make cost-sharing payments, but under the CARES Act, companies are limited in how much out-of-pocket expenses they can require insured individuals to pay.<sup>88</sup> As of this writing, several insurers have announced they are waiving co-pays and other co-sharing

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80. *Id.*

81. See Coronavirus Aid, Relief, and Economic Security (CARES) Act, 15 U.S.C. §§ 9001–9080 (2018 & Supp. 2020).

82. See Blake Farmer, *Insurers May Only Pay for Coronavirus Tests When They're 'Medically Necessary'*, NPR (June 19, 2020, 5:00 AM), <https://n.pr/30az4DI>; see also Cara Sterling et al., *Have You Thought About . . . Who Will Pay for Asymptomatic Carrier Testing?*, JD SUPRA BLOG (June 11, 2020), <https://bit.ly/3mVEHJ9>.

83. See Sterling et al., *supra* note 82; see also Noah Weiland, *Anyone Who Wants a Coronavirus Test Can Have One, Trump Says. Not Quite, Says His Administration.*, N.Y. TIMES (Mar. 7, 2020), <https://nyti.ms/3j5lkQK> (reporting about President Trump's contradictory positions of promising universal, free testing but calling for testing to slow down).

84. See Kao-Ping Chua & Rena M. Conti, *Despite the Families First Coronavirus Response Act, COVID-19 Evaluation Is Not Necessarily Free*, HEALTH AFF. BLOG (Apr. 1, 2020), <https://bit.ly/3b4TRPt>.

85. See *id.*

86. See Elizabeth Kastner et al., *Surprise COVID-19 Medical Bills; What Providers Can and Cannot Do*, JD SUPRA BLOG (June 2, 2020), <https://bit.ly/3hkqGqJ>.

87. See Coronavirus Aid, Relief, and Economic Security (CARES) Act, 15 U.S.C. §§ 9001–9080 (2018 & Supp. 2020).

88. See Kastner et al., *supra* note 86.

costs related to COVID-19 *treatment*.<sup>89</sup> However, such waivers are only temporary and limited to certain costs, and former President Trump refused to expand the Affordable Care Act (ACA)<sup>90</sup> to provide health insurance coverage to uninsured individuals impacted by the pandemic.<sup>91</sup> Moreover, former President Trump, along with Republican governors from 18 states, fought to take away healthcare from millions of Americans during a pandemic by arguing that the U.S. Supreme Court should strike down the ACA as unconstitutional.<sup>92</sup> President Biden and a

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89. See John Tozzi, *Cigna, Humana Waive Cost Sharing for COVID-19 Treatment*, BLOOMBERG (Mar. 29, 2020, 6:06 PM), <https://bloom.bg/2KUrn5B>.

90. On March 23, 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act, usually referred to as the Affordable Care Act or the ACA. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). The ACA sought to “increase the number of Americans covered by health insurance and decrease the cost of health care” through several key reforms, including prohibiting insurers from denying coverage to or charging higher premiums because of an individual’s pre-existing medical condition. See *Nat’l Fed’n of Indep. Buss. v. Sebelius*, 567 U.S. 519, 538 (2012).

91. See Patient Protection and Affordable Care Act, *supra* note 90; see also Chris Conte, *She Survived COVID-19, Then Came the Medical Bills*, DENVER CHANNEL (July 10, 2020, 12:50 PM) <https://bit.ly/35o7aHM> (reporting the story of a 33-year-old woman who survived COVID-19 and is now facing a co-payment obligation of roughly \$75,000 for medical bills totaling \$400,000); Amy Lotven, *Public Citizen: Don’t Rely On Insurers’ Whim For Cost-Free Treatment*, INSIDE HEALTH POL’Y (May 28, 2020, 6:57 PM), <https://bit.ly/2HskBfH> (reporting that Public Citizen, a consumer advocacy group, is demanding that Congress enact legislation “guaranteeing cost-free coverage of COVID-19 treatment so that Americans don’t have to depend on the whim of insurance companies”); Selena Simmons-Duffin, *Some Insurers Waive Patients’ Share of Costs for COVID-19 Treatment*, NPR (Mar. 30, 2020, 6:36 PM), <https://n.pr/3iqufNM>. Despite calls from governors of several states, Mr. Trump refused to create a special open-enrollment period for the Affordable Care Act so more Americans could get healthcare coverage during the COVID-19 pandemic. See *The ACA Marketplaces Are Poised to Weather COVID-19*, CTR. FOR AM. PROGRESS (Aug. 21, 2020, 9:01 AM) <https://ampr.gs/3mfubm4> (discussing the refusal to create a COVID-19 special open enrollment period (SEP) for “the 38 states that use the HealthCare.gov enrollment platform” while states that operate their own exchanges have implemented a SEP to provide healthcare coverage for more residents of their states). See Blumenthal et al., *supra* note 46 (discussing the millions of unemployed Americans lacking healthcare insurance during the pandemic and then analyzing various causes, including failures by the Trump administration to expand healthcare coverage under the Affordable Care Act).

92. Although former President Trump received the best taxpayer-funded medical care after he contracted the virus, see Contorno, *supra* note 34, he repeatedly tried to take away healthcare from millions of Americans. See generally Sumit Agarwal & Benjamin Sommers, *Insurance Coverage After Job Loss – The Importance of the ACA during the COVID-Associated Recession*, 838 NEW ENG. J. MED. 1603 (2020) (arguing that the ACA is urgently needed in the middle of a pandemic and recession and stating that Mr. Trump’s administration has filed a brief with the Supreme Court in support of striking down the ACA, and that Mr. Trump “repeated his intent to ‘terminate’ the ACA”); Mark Sherman, *High Court Indicates Lifeline for ACA*, CHI. TRIB., Nov. 11, 2020, at A1 (describing oral arguments by several lawyers seeking to have the ACA struck down and stating that, based on questions from the bench, the Justices, including three Trump appointees, did not seem inclined to strike down the law).

Democrat-controlled Congress now have the opportunity to pursue expansion of ACA coverage for more Americans who have lost employer-sponsored healthcare insurance during the pandemic.<sup>93</sup>

While the fate of the ACA is uncertain, physicians have discovered that many COVID-19 survivors suffer from symptoms that can last several months and be classified as pre-existing health conditions that may not be covered by insurance if the ACA is declared unconstitutional.<sup>94</sup> Doctors admit that they do not know the causes of such long-term symptoms and that treatment for such symptoms is still evolving.<sup>95</sup> Thousands of COVID-19 survivors, referred to as “long haulers,”<sup>96</sup> suffer nearly 100 different symptoms ranging from mild (such as persistent dry coughs) to very serious (such as heart attacks and strokes).<sup>97</sup> These survivors often go to several different specialists or

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93. In a special election runoff in January 2021, Democratic candidates Jon Ossoff and Rev. Raphael Warnock unseated Georgia’s two Republican senators, thereby effectively giving Democrats control of the U.S. Senate and the chance to pursue passage of progressive legislation through their control of both chambers of Congress. *See generally*, Zach Cohen, *Democrats Pledge ‘Bold Change’ with Unified Power in Washington*, NAT’L. J. DAILY (Jan. 8, 2021), <https://bit.ly/39a863X> (discussing the limitations on the Democrats’ ability to forge a progressive agenda).

94. *See, e.g.*, Kevin B. Blackstone, *Football Players Will Feel the Loss if the Supreme Court Tosses Obamacare*, WASH. POST (Oct. 27, 2020, 6:15 AM), <https://wapo.st/34OjYGs> (stating that football players who contract COVID-19 can suffer heart damage and that they all sustain injuries and, therefore, they all have pre-existing conditions that would not be covered if the ACA is struck down); Michael Ollove, *COVID-19 ‘Long-Haulers’ Worry About Coverage, Costs*, PEW: STATELINE (Oct. 9, 2020), <https://bit.ly/3jHdFJe> (describing the symptoms suffered by long haulers and stating that protections for those pre-existing conditions “would vanish if the Supreme Court invalidates the ACA, as the Trump administration and Republican governors or attorney generals [sic] in 20 states are urging it to do”).

95. *See, e.g.*, Emily Brindley, *Hartford HealthCare Launches Hub for ‘Long-Hauler’ Coronavirus Patients Who Still Have Symptoms After Recovery*, HARTFORD COURANT (Oct. 14, 2020, 1:46 PM), <https://bit.ly/34MxvIq> (stating that “initial research shows that up to 10% of coronavirus patients may experience ‘long-hauler phenomenon,’ meaning they continue to experience noticeable symptoms after they’ve survived the disease itself”).

96. Survivors with long-term COVID-19 symptoms number in the thousands and have formed several different support groups. *See id.* (estimating that 6,200 survivors in Connecticut are long haulers); *see also* Lenny Bernstein, *‘Nobody Has Very Clear Answers for Them’: Doctors Search for Treatments for Covid-19 Long-Haulers*, WASH. POST (Oct. 16, 2020, 9:00 AM), <https://wapo.st/2GjcFNR> (stating that physicians lack clear answers regarding the cause of the long-term physical symptoms suffered by survivors and discussing the psychological toll on survivors); Erika Edwards, *COVID-19 ‘Long-Haulers’ Report Nearly 100 Symptoms for More than 100 Days*, NBC NEWS (July 29, 2020, 5:31 PM), <https://nbcnews.to/2TICXfl> (discussing a survey of 1,500 survivors who are members of Survivor Corps and discussing the symptoms of Amy Watson, who described her symptoms as long hauler on 137th day of her survival and her formation of a support group called Long Haul COVID Fighters).

97. *See, e.g.*, Edwards, *supra* note 96 (reporting the findings of a survey conducted by an associate professor, Professor Natalie Lambert, who compiled symptoms described by 1,500 COVID-19 survivors who experienced nearly 100 different symptoms,

specialized programs to find effective treatments for their long-term symptoms.<sup>98</sup> None of the recently passed laws contain healthcare provisions that specifically cover long haulers.<sup>99</sup>

In its last pandemic-related legislation enacted in 2020, Congress included the “No Surprises Act,” which limits the ability of insurers to make individuals liable for surprise medical bills from out-of-network providers; but this Act affords no current relief from COVID-19 medical debt as it does not take effect until 2022.<sup>100</sup>

In summary, many individuals will find themselves unable to pay for the costs of their diagnosis and treatment after contracting a highly contagious virus.<sup>101</sup> In fact, a recent study of persons at risk of becoming severely ill from COVID-19 found that 18.2 million individuals are either uninsured or underinsured, and that Black and Native American individuals are much more likely than White individuals to become severely ill and to lack adequate health-insurance coverage.<sup>102</sup> Although insurance companies have promised to waive certain costs and recent federal legislation attempts to afford individuals with some financial

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including “dizziness, anxiety, headache, rashes, joint pain, shortness of breath, heartburn, diarrhea and fevers”).

98. *See id.* (stating that “no specific treatments” exist for long haulers, “only symptom management”). A few healthcare providers have started post-COVID-19 clinics and programs to specifically provide care to long haulers. *See, e.g.*, Bernstein, *supra* note 96 (stating that hospitals have opened numerous post-COVID clinics and programs, including the Center for Post-Covid Care operated by the Mount Sinai healthcare system in New York City and a program for survivors with neurocognitive problems at Northwestern Memorial Hospital in Chicago); Brindley, *supra* note 95 (stating that Hartford HealthCare Hospital recently opened a coronavirus recovery center for survivors to contact in order to be matched with physicians that have the expertise to address their symptoms).

99. *See supra* notes 78–88 and accompanying text (discussing recently enacted pandemic related legislation). *See also* Amy Faith Ho, *Covid-19 Pandemic Has Pushed Us into Universal Health Care Without Fanfare*, HERALD TRIB. (Oct. 26, 2020, 6:02 AM), <https://bit.ly/3jRXQzf> (reporting that, according to one emergency room physician, the “financial cost associated with COVID-19 healthcare doesn’t begin to encompass the indirect costs from loss of productivity” and from “COVID-19 patients who never required hospitalization [but] are displaying ‘long hauler’ effects, which include chronic symptoms like shortness of breath, fatigue, brain fog, body aches and chest pains”).

100. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2021) (enacting several new laws, including the “No Surprises Act”). For a discussion of the No Surprises Act, see Kornreich, *supra* note 38. For examples of surprise medical bills, see Kliff, *A \$52,112 Air Ambulance Ride: Coronavirus Patients Battle Surprise Bills*, *supra* note 64 (providing examples of surprise medical bills that can lead to huge COVID-19 treatment costs and highlighting the experience of one COVID-19 patient who received a bill of \$52,112 for a life-or-death helicopter ride from one local hospital to another one 20 miles away).

101. *See generally supra* INTRODUCTION (discussing a debtor’s inability to pay over \$300,000 medical bills incurred for the treatment of a severe case of pneumonia).

102. *See* Adam Gaffney, *18.2 Million at Increased Risk of Severe COVID-19 Are Uninsured or Underinsured: Harvard Study*, PHYSICIANS FOR NAT’L HEALTH PROGRAM (PNHP) (June 10, 2020), <https://bit.ly/3bNTt5W>.

relief, researchers believe such measures are woefully inadequate.<sup>103</sup> Dr. Adam Gaffney, a critical care physician at Harvard Medical School, stated, “having COVID-19 is scary enough without worrying that you’ll be bankrupted by medical bills.”<sup>104</sup>

*B. A Flawed Bankruptcy System Leaves Certain Debtors Burdened with Enormous Infectious-Disease Medical Debt*

Because of the broken U.S. healthcare system, many individuals will face the possibility of being bankrupted by enormous medical bills after recovering from COVID-19. While this Article focuses on COVID-19 as a case-study pathogen that can lead to huge infectious-disease medical debt, readers should be mindful that other existing pathogens can have the same effect.<sup>105</sup>

Burdensome medical debt is already a leading cause in consumer bankruptcy filings, and some individuals burdened with infectious-disease medical debt will resort to filing for bankruptcy due, in part, to the debt-collection practices perpetrated against them.<sup>106</sup> Many hospitals and healthcare providers, as well as the law firms they retain, are known to engage in legal but aggressive debt-collection practices (for example, post-judgment garnishment of wages).<sup>107</sup> In fact, a recent investigation

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103. *See id.*

104. *See Gaffney, supra*, note 102.

105. *See generally supra* INTRODUCTION (discussing the experience of William Sijan, who incurred over \$300,000 in medical bills after contracting pneumonia and eventually filed for bankruptcy relief). Doctors are discovering new pathogens. For example, before the COVID-19 pandemic, the media regularly reported in 2019 about a mystery illness that caused children to suffer polio-like symptoms, including paralysis. *See Eve Glazier & Elizabeth Ko, Ask the Doctors: New Research Could Advance Understanding Of AFM*, TULSA WORLD (Nov. 6, 2019), <https://bit.ly/36c7SYX>. Researchers eventually identified the illness as acute flaccid myelitis (AFM) and found that its cause was “enterovirus D68, one of more than 100 known non-polio enteroviruses.” *Id.* One parent racked up over \$3 million in medical bills, which were not covered by insurance, for the treatment of his daughter for AFM. *See Sharyl Attkisson, ‘Full Measure’: Mystery Virus*, ABC 7: WJLA (D.C.) (June 4, 2017), <https://bit.ly/2ZucWnq>.

106. *See Donald D. Hackney et al., What Is the Actual Prevalence of Medical Bankruptcies?*, 43 INT’L. J. SOC. ECON. 1284, 1295 (2016) (studying data regarding consumer bankruptcy files and finding that medical debts are incorrectly under-counted as a leading factor in a consumer’s choice to file for bankruptcy relief). For an example of unlawful, aggressive debt-collection practices, see *CFPB Takes Action Against Two Law Firms for Misrepresenting Attorney Involvement to Collect on Medical Debts*, CONSUMER FIN. PROT. BUREAU (Jan. 9, 2017), <https://bit.ly/2F7szKi>.

107. *See Hackney et al., supra* note 106, at 1295; Kliff, *A \$52,112 Air Ambulance Ride: Coronavirus Patients Battle Surprise Bills*, *supra* note 64 (stating that Air Methods, one of the nation’s largest air-ambulance-transportation companies, is facing several class-action lawsuits, where patients have alleged the company charged them excessive fees and subjected them to aggressive debt-collection practices, including attempting to garnish \$53,034 from one patient’s bank account).



by ProPublica found that companies are continuing aggressive medical-debt-collection practices during the COVID-19 pandemic.<sup>108</sup> Therefore, consumers strapped with infectious-disease medical debt cannot expect to encounter a “merciful” law firm or debt-collection agent.

Consider, for example, KC Roberts, whose trip to the ER due to a mysterious, debilitating pain resulted in her getting an appendectomy and accruing medical debt exceeding \$30,000.<sup>109</sup> Uninsured at the time, Ms. Roberts, a small-business owner, was allowed to pay \$25 per month for some time, but the hospital eventually assigned the collection of her debt to a law firm, which sued her.<sup>110</sup> In a TV interview about her debt ordeal, Ms. Roberts told her husband, “I wish you’d have let me die.”<sup>111</sup> After news coverage of Ms. Roberts’s experience brought negative attention to the hospital’s debt-collection practices, a legal-aid organization stepped in to assist Ms. Roberts, and her debt was subsequently lowered from \$37,000 to only \$5,000, and the lawsuit filed against her was dropped.<sup>112</sup> As a result, Ms. Roberts did not have to file for bankruptcy relief. However, unlike Ms. Roberts, many individuals who have racked up five-figure debt from COVID-19 treatment will have to file a bankruptcy case to stop aggressive debt-collection practices.<sup>113</sup>

The ultimate objective in a consumer bankruptcy case is for the debtor to discharge as much debt as allowable and thereby emerge from bankruptcy with the proverbial “fresh start.”<sup>114</sup> The quickest way for a consumer debtor to achieve a fresh start is by filing a Chapter 7 case, which typically lasts only a few months and usually results in zero

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108. See Alec MacGillis, *One Thing the Pandemic Hasn’t Stopped: Aggressive Medical-Debt Collection*, PROPUBLICA (Apr. 28, 2020, 2:05 PM), <https://bit.ly/31T0KWN>; see also Caitlin Owens, *Hospitals Still Suing Patients in Coronavirus Hotspots*, AXIOS (Aug. 21, 2020), <https://bit.ly/3jRNDUa> (reporting that Community Health Systems hospitals have filed debt-collection lawsuits against patients in Florida, Texas, and Arizona since the start of the pandemic and that “a random sampling of those lawsuits show that hospitals have sued to collect medical bills ranging from less than \$1,000 to, in one case, \$125,999.53”).

109. See Anna Werner, *Alabama Couple Struggling After Hospital Sues Over Medical Debt: “I Wish You’d Have Let Me Die”*, CBS NEWS (Feb. 20, 2020, 9:53 AM), <https://cbsn.ws/359UyUz> (noting the medical bill was for the surgery and a one-day stay in the hospital).

110. See *id.*

111. *Id.* (stating that she made several unsuccessful attempts to get the hospital to renegotiate payment of the debt).

112. See Anna Werner, *Outpouring of Goodwill for Alabama Woman Battling Hospital Lawsuit*, CBS (Mar. 5, 2020), <https://cbsn.ws/3hZHdf> (stating that the remaining balance was paid by an anonymous donor).

113. See 11 U.S.C. § 362(a)(1)–(8) (2018) (banning all entities from seeking to collect pre-petition debt from a debtor who has filed a bankruptcy petition).

114. Braucher, *supra* note 14, at 1319.

payments to unsecured creditors.<sup>115</sup> However, Congress passed a law in 2005—the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)—that took away *all* consumers’ ability to choose between filing a Chapter 7 or a Chapter 13 bankruptcy case.<sup>116</sup> The BAPCPA overhauled the Bankruptcy Code by implementing a complex formula known as the “Means Test” to ferret out consumer “abuse” and force “can-pay” consumers into filing a Chapter 13 case.<sup>117</sup> Consumer debtors forced into Chapter 13 must submit to a five-year payment plan that, among other things, requires the debtors to pay at least a portion of their unsecured debts.<sup>118</sup>

Unlike typical non-dischargeable debts (for example, student loans, child-support payments, and certain tax debts), unpaid medical debts are dischargeable in an individual’s Chapter 7 bankruptcy case.<sup>119</sup> In other words, a debtor is freed from the obligation to pay any outstanding medical debt at the close of the debtor’s Chapter 7 case.<sup>120</sup> As a result, a debtor who is able to discharge exorbitant medical bills has the ability to emerge from bankruptcy with a fresh start. That is, he or she is once again able to be a productive member of society through gainful employment, responsible spending, and wise saving.<sup>121</sup>

Nevertheless, due to the BAPCPA, debtors can now be kicked out of a Chapter 7 case and forced to pay some of their medical debts in a Chapter 13 case.<sup>122</sup> Debtors who initially file a Chapter 7 case can be

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115. *See generally* THOMSON REUTERS, *supra* note 12, § 4:2 (“After comparing the legal effect of discharge under Chapter 7 with that under Chapter 13, one might conclude that there is no difference, except that a Chapter 7 debtor will receive a discharge after a few months, and in most cases without doing anything after the requisite documents are filed other than attending a meeting of creditors, while the Chapter 13 debtor must perform all of that and more, and then wait for years as there is no discharge in that chapter until—and unless—the plan is completed.”).

116. *See id.*

117. *See id.*; David R. Jones, *Savings: The Missing Element in Chapter 13 Bankruptcy Cases?*, 26 AM. BANKR. INST. L. REV. 243, 244–46 (2018).

118. *See id.* at 244.

119. Unless an unsecured debt is among the debts specifically enumerated as non-dischargeable (e.g., student loans) in § 523(a) of the Bankruptcy Code, that unpaid unsecured debt would be dischargeable—wiped out—at the close of a Chapter 7 bankruptcy case. *See* 11 U.S.C. § 523(a) (2018); O’Neill, *supra* note 28.

120. *See id.*

121. *See* Jones, *supra* note 117, at 246, 255 n.75 (arguing, from the perspective of a bankruptcy judge, that Chapter 13 debtors should be allowed to direct a portion of their disposable income to fund a savings account so that debtors will have money to help them with the financial ups and downs that happen over the course of three-to-five year Chapter 13 plans); *see also In re Zimont*, No. 2:19-bk-09079-DPC, 2020 WL 2373591, at \*7 (Bankr. D. Ariz. May 11, 2020).

122. *See* Braucher, *supra* note 14; *see also* Greene, *supra* note 14.

labeled as an “abuser” of the bankruptcy system if they fail the Means Test.<sup>123</sup>

Under the BAPCPA, debtors begin with the threshold question: “Who must complete the Means Test?” This question is similar to the initial taxpayer question: “Who has to file a tax return?” If the debtor has below-median income, she does *not* have to complete the Means Test calculation.<sup>124</sup> As a result, it does not matter whether a court labels the medical bills “consumer” or “non-consumer.”<sup>125</sup> The below-median-income debtor will have the choice of filing either a Chapter 7 or a Chapter 13 case.<sup>126</sup> An example of this type of debtor would be a person who is employed as a cashier earning minimum wage at a grocery store and who becomes seriously ill after contracting COVID-19.

However, if the debtor has above-median income, the court must decide if her medical bills are consumer debts and if all of her debts are *primarily* consumer debts.<sup>127</sup> For illustrative purposes, assume that the debtor is the head manager at a Kroger store, and her income is above the median for her state. Assume further that her unsecured debts consist of \$30,000 in medical bills from treatment for a COVID-19 infection and \$20,000 in credit-card debt. If her medical bills are not counted as consumer debt, then the majority (\$30k/\$50k) of her debts would be comprised of *non*-consumer debt, and she would be eligible for a voluntary Chapter 7 case, in which she would receive a discharge of her unsecured debts.<sup>128</sup>

If, on the other hand, a court classifies the debtor’s infectious-disease medical debt as “consumer” debt, then her medical and credit-card debts would constitute primarily consumer debt, and she would have to complete the Means Test.<sup>129</sup> If her disposable income—as calculated and analyzed under the Means Test—is above a triggering amount, then she would either have to dismiss her Chapter 7 case or file a Chapter 13 bankruptcy case and commit to using all her disposable income to pay down her unsecured debts,<sup>130</sup> the majority of which would

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123. Braucher, *supra* note 14, at 1296 (footnotes omitted) (citations omitted) (“‘The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005’ commits two counts of intentional fraud in its name alone. The law . . . does not do a good job of preventing abuse and also does not protect consumers but rather puts new burdens on all filers, even the worst-off who are clearly not abusers.”).

124. *Id.* at 1324.

125. *See id.*

126. *See id.* at 1319–20.

127. *See* Neal & Manocchio, *supra* note 28, at 27–28; *see also In re Zgonina*, No. 19-90467, 2019 WL 6170776, at \*1 (Bankr. C.D. Ill. Nov. 19, 2019).

128. *See* Braucher, *supra* note 14, at 1322; *see also In re Zgonina*, 2019 WL 6170776, at \*2.

129. *See In re Zgonina*, 2019 WL 6170776, at \*1.

130. *See* Neal & Manocchio, *supra* note 28, at 28.

consist of medical bills. She would still enjoy some of the benefits of a bankruptcy filing but would not benefit from a relatively quick discharge of general unsecured debts. If, for instance, her monthly disposable income is \$250, the debtor would pay a total of \$15,000 (\$250 multiplied by 60 months) toward her unsecured debts, with the majority of that sum going to the medical-debt claimants in a Chapter 13 case. In contrast, the debtor who passes the Means Test—or, does *not* have sufficiently high disposable income—will be able to file a Chapter 7 case and receive a quick discharge of general unsecured debts, including the medical bills. That Chapter 7 debtor could then save for a rainy day or for a down payment for the purchase of a house.

Because of the relatively small payout (\$15,000) in this example, the above-median-income debtor is essentially penalized for being uninsured or underinsured and is consequently forced to make monthly payments for five years to pay back part of her medical bills. Because the Bankruptcy Code makes no distinction between infectious-disease medical debts and other unsecured debts incurred for enjoyment purposes (for example, a family vacation to Disneyland), the debtor with medical debt is treated as an “abuser” of the bankruptcy system when she simply became seriously ill after contracting a contagious disease. The next Part of this Article discusses the legal reasoning for the divergent characterization of medical debts as consumer and non-consumer debts.

## II. BANKRUPTCY COURTS ARE SPLIT ON THEIR CHARACTERIZATION OF MEDICAL DEBTS

The thousands of consumers who are likely to seek relief from their COVID-19 medical debts may suffer two different fates, depending on how different bankruptcy judges characterize such debts. Under the Bankruptcy Code, consumer debts are defined as debts incurred by individuals primarily for personal, family, or household purposes.<sup>131</sup> The Official Form of Voluntary Petition allows debtors to check the box describing their debts as “consumer,” “business,” or another type.<sup>132</sup> As discussed below, characterization of infectious-disease medical debts owed by an above-median-income debtor will make a huge difference in the outcome of the case.

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131. *See* 11 U.S.C. § 101(8) (2018).

132. *See* OFFICIAL FORM 101: VOLUNTARY PETITION FOR INDIVIDUALS FILING FOR BANKRUPTCY, U.S. CTS. 7 (2020), <https://bit.ly/2GKX4pY>.

A. *Case Law That Holds Medical Debt Is Consumer Debt Can Effectively Derail a Debtor's Fresh Start in a Chapter 7 Case*

The most recent case to hold that medical debt constitutes consumer debt is *In re Zgonina*.<sup>133</sup> There, the debtor, Erin Zgonina, prior to filing a Chapter 7 case, had accrued medical bills exceeding \$82,000 to treat “unforeseen complications from [a] medically necessary procedure” related to a chronic condition.<sup>134</sup> Ms. Zgonina argued that her medical bills should be treated similar to tax debts, which have been held by several courts to be non-consumer debts, because tax debts: (1) are imposed on, not voluntarily incurred by, the individual, (2) are levied for a public purpose, and (3) are not from the debtor’s consumption of goods or obtainment of a credit extension.<sup>135</sup>

In *In re Zgonina*, the bankruptcy court distinguished taxes from medical bills by noting that taxes are levied for public purposes without regard to any direct personal benefit to the taxpayer.<sup>136</sup> In contrast, receiving medical services, according to the court, is a personal expense and provides a benefit that is direct and traceable to the debtor.<sup>137</sup> Therefore, the court held that her medical bills were squarely within the definition of a consumer debt.<sup>138</sup> As a result of this holding, Ms. Zgonina’s medical bills had to be added to the rest of her unsecured debt, making her total debt *primarily* consumer debt, thus requiring her to complete the Means Test.<sup>139</sup> Because Ms. Zgonina’s annual income was roughly \$100,000—far above the median<sup>140</sup>—her consequent disposable income would cause her to fail the Means Test.<sup>141</sup> Thus, she would have to pay a significant amount of her unsecured debt if she converted her

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133. See *In re Zgonina*, 2019 WL 6170776, at \*3.

134. *Id.* at \*1.

135. See *id.* at \*3 (citing *IRS v. Westberry (In re Westberry)*, 215 F.3d 589, 591 (6th Cir. 2000), which held that tax debts are not consumer debts because they are involuntarily imposed for a public purpose and not incurred for personal or household purposes, and such debts do not involve consumption or credit extensions); see also *In re Greene*, 157 B.R. 496, 497 (Bankr. S.D. Ga. 1993).

136. *In re Zgonina*, 2019 WL 6170776, at \*3.

137. See *id.*

138. See *id.*

139. See *id.*

140. See *id.* at \*1.

141. Individuals with above-median income must prove that they can pass the Means Test in order to be in a Chapter 7 case. See 11 U.S.C. § 707(b)(2) (2018). The applicable state median income on the petition date in Ms. Zgonina’s case was \$54,238, and her annual income (roughly \$100,000) was almost double the state’s median income. See U.S. Trustee’s Motion to Dismiss Pursuant to 11 U.S.C. §§ 707(b)(1) and 707(b)(2) or in the Alternative § 707(b)(3), Case No. 2:19-bk-90467, (Bankr. C.D. Ill Aug. 27, 2019). As a result, she would have a large amount of *disposable income* and would, therefore, fail the Means Test. See *id.* at 3 (arguing that Ms. Zgonina’s monthly disposable income would be \$2,658.41 under the Means Test calculation and that, therefore, her Chapter 7 case should be dismissed).

case to a Chapter 13 case, and the majority of those payments would go to the medical-debt claimants (for example, the hospital).<sup>142</sup>

*B. Case Law That Holds Medical Debt Is Not Consumer Debt Affords High-Income Debtors a Debt Discharge and, Therefore, a Fresh Start*

In stark contrast to the Illinois bankruptcy court in *In re Zgonina*, an Ohio bankruptcy court in *In re Sijan* held that medical debts were not consumer debts.<sup>143</sup> Mr. Sijan, who was introduced at the beginning of this Article, filed for Chapter 7 relief after he realized that he could not afford to repay over \$320,000 in medical bills arising from his diagnosis and emergency treatment of severe pneumonia.<sup>144</sup> The Trustee sought to dismiss the case, arguing that Mr. Sijan's medical debts were consumer debts and that, under the totality of the circumstances, Mr. Sijan's case was an abuse of the bankruptcy system.<sup>145</sup>

At the outset, the bankruptcy court emphasized that "one of the primary goals of Chapter 7 relief is to offer debtors a 'fresh start' through discharge in exchange for [a] liquidation of the debtor's assets for the benefit of [his or her] creditors."<sup>146</sup> Importantly, the court made clear that bankruptcy law is intended to relieve honest debtors, and that bankruptcy courts are capable of balancing the goal of providing debtors with a fresh start with the goal of preventing debtors from abusing the bankruptcy system.<sup>147</sup> In holding that the debtor's medical debt was not consumer debt, the court focused on the involuntariness of the debtor's emergency medical bills.<sup>148</sup> The court specifically distinguished *voluntarily-incurred* medical debt from *involuntary* medical debt arising from an emergency and suggested that routine doctor's visits and cosmetic surgery would qualify as consumer debt, whereas emergency medical services would not.<sup>149</sup> Because of the court's holding, Mr. Sijan was able to maintain his Chapter 7 case and receive a discharge of his general unsecured debts, over 90% of which was medical debt.<sup>150</sup> Mr. Sijan, who lived in an

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142. Rather than fight the Trustee, Ms. Zgonina voluntarily dismissed her Chapter 7 case. *See In re Zgonina*, Ch. 7 Case No. 2:19-bk-90467, slip op. at 5 (Bankr. C.D. Ill. May 9, 2019).

143. *In re Sijan*, 611 B.R. 850, 856 (Bankr. S.D. Ohio 2020). The debtor was represented by Michael Cox, a former student in my bankruptcy law course.

144. *See id.* at 852–53.

145. *See id.* at 853.

146. *Id.* at 854.

147. *See id.*

148. *See id.* at 856. Although it did not rule directly on the matter because the current case involved emergency-medical debts, the court did state that non-emergency and voluntary medical debts are examples of consumer debt. *See id.*

149. *See id.*

150. *See id.* at 857.

apartment at the time of his bankruptcy filing,<sup>151</sup> was then able to use his future income to save toward homeownership and retirement.

*C. Resolving Differences in the Sijan and Zgonina Cases in Light of the Current Coronavirus Pandemic*

Given the courts' holdings in *In re Sijan* and *In re Zgonina*, it is uncertain how a bankruptcy court would rule concerning infectious-disease medical debt, such as arises for COVID-19 treatment. The *Sijan* decision suggests that debtors who incur medical debt due to COVID-19 can remain in Chapter 7 bankruptcy because it will not constitute consumer debt.<sup>152</sup> Conversely, the court's decision in *Zgonina* at first appears to prevent an above-median-income debtor from being able to stay in Chapter 7. However, upon closer inspection, the *Zgonina* decision does not foreclose this possibility. The court in *Zgonina* acknowledged that "a debtor has no choice in [receiving certain emergency medical treatment]," but rejected the analogy between medical debt and tax debt on the premise that the latter was incurred for a "public purpose" while the former was incurred for a "direct personal benefit."<sup>153</sup>

In the context of the current pandemic, medical debt incurred from seeking a COVID-19 diagnosis and subsequent treatment serves *primarily* a public purpose. Public health experts agree that more testing is necessary to slow the spread of COVID-19, and they regularly urge those who may have been exposed to the virus or who are suffering from coronavirus-like symptoms to get tested so those individuals can receive treatment and thus contain the virus's spread.<sup>154</sup> Recently passed federal legislation affords both uninsured and insured individuals free coronavirus testing.<sup>155</sup> In several states, asymptomatic and pre-symptomatic individuals now have access to free testing, depending on

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151. See Official Form 106J: Schedule J: Your Expenses, at 1–2, *In re Sijan*, 611 B.R. 850 (Bankr. S.D. Ohio 2020).

152. Cf. *In re Sijan*, 611 B.R. at 857.

153. *In re Zgonina*, No. 19-90467, 2019 WL 6170776, at \*3 (Bankr. C.D. Ill. Nov. 19, 2019).

154. See, e.g., *Evaluating and Testing Persons for Coronavirus Disease 2019 (COVID-19)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://bit.ly/2FnYart> (last updated Mar. 24, 2020). Public health experts also urge those who believe they have been exposed to the virus to get tested just in case they are asymptomatic. See Meg Wingerter, *New Cases of COVID-19 in Colorado Reach Record High as Hospitalizations Continue to Climb*, DENVER POST (Oct. 20, 2020, 6:00 AM), <https://dpo.st/3oP6vqb> (detailing the pleas of Colorado's public health epidemiologist, Dr. Rachel Herlihy, for individuals to get tested).

155. See *supra* notes 81–91 and accompanying text (discussing the Families First Coronavirus Response Act and the CARES Act).

exposure circumstances.<sup>156</sup> Moreover, those who test positive but do not need hospitalization are urged to stay home and isolate themselves until their symptoms have clearly subsided, thereby further benefiting the public.<sup>157</sup>

As a result of the court's reasoning in the *Zgonina* case, ER nurses, grocery store workers, truck drivers, and all other essential workers can strengthen their arguments that their diagnoses and treatments are involuntary. Essential workers are forced to continue working outside of their homes because they produce goods and perform services deemed necessary for all Americans.<sup>158</sup> Essential workers are, therefore, involuntarily exposed to a highly contagious disease. If they then become seriously ill after contracting the virus, their emergency medical treatment is not an elective service. This is especially true as such medical treatment benefits not only the infected essential worker but also all Americans, including those who are privileged to have occupations that allow them to work from home.

Moreover, COVID-19 medical debt is, in some respects, a consequence of the federal government's failure in 2020 to protect essential workers with a nationwide strategy for widespread COVID-19 testing, scaled-up production of personal protective equipment, or other recommended measures to contain the virus.<sup>159</sup> According to experts,

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156. *See supra* notes 52–54 and 81–91 and accompanying text (stating free testing is now available in some locations but the availability of accurate, widespread testing remains a problem in the U.S.).

157. *See Coronavirus Disease 2019 (COVID-19): Isolate If You Are Sick*, CTFS. FOR DISEASE CONTROL & PREVENTION, <https://bit.ly/3isGEAO> (last updated Nov. 18, 2020) (instructing those who test positive and are asymptomatic to isolate for ten days after the day they tested positive).

158. *See In re Zgonina*, 2019 WL 6170776, at \*3.

159. Although President Biden plans to implement a national strategy to curb the spread of the virus, *see* Hall, *supra* note 63, the feasibility of such a plan is not yet evident. Former President Trump's actions in 2020 show that he bears some responsibility for over 22 million U.S. residents who contracted COVID-19 before he left office. *See Coronavirus Resource Center, supra* note 20 (reporting that, as of Jan. 22, 2021, over 24.6 individuals had contracted the virus). In recorded interviews, former President Trump admitted as early as February 2020 that he knew how deadly COVID-19 could be but that he intentionally downplayed the seriousness of the virus in public. *See supra* note 61 and accompanying text (discussing how Mr. Trump minimized the seriousness of the virus and, among other things, mocked former Vice President Joe Biden for wearing a face mask). Later, Mark Meadows, Mr. Trump's chief of staff, admitted that "we're not going to control the pandemic." Zeke Miller et al., *Trump, Biden Hit Battleground Pennsylvania Amid Pandemic*, RICHMOND TIMES-DISPATCH (Oct. 26, 2020, 7:34 PM), <https://bit.ly/2HXQILw>. Moreover, then-Vice President Mike Pence continued a hectic schedule of holding daily campaign rallies, even though five of his close aides, including Marc Short, his chief of staff, tested positive for the coronavirus. *See id.* (stating that Mr. Pence was claiming to be an "essential" employee and, therefore, presumably not required to stay home and self-quarantine in accordance with CDC guidelines). In an unprecedented move, the editorial board of the New England Journal of



thousands of lives could have been saved, and thousands could have avoided getting infected if Mr. Trump would have taken such actions in the early stages of the pandemic.<sup>160</sup> Thus, for all the above reasons, infectious-disease medical debt arising from COVID-19 is involuntary and should be characterized as non-consumer debt.

Infectious-disease medical debt can further be distinguished because it is not the result of a debtor engaging in excessive consumer spending, but rather is from an unforeseen calamity impacting the entire U.S.<sup>161</sup> First, more than 24.6 million individuals in the U.S. have been infected with the novel coronavirus, and millions have lost their jobs as various businesses deemed non-essential have had to comply with state and local orders to shut down temporarily.<sup>162</sup> At the same time, tens of millions of individuals are considered essential workers and, therefore, have been

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Medicine issued a stunning rebuke of the Trump administration's leadership. *See* The Editors, *Dying in a Leadership Vacuum*, 338 *NEW ENG. J. MED.* 1479, 1480 (2020) ("Instead of relying on expertise, the administration has turned to uninformed 'opinion leaders' and charlatans who obscure the truth and facilitate the promulgation of outright lies."). The article specifically identifies the federal agencies the Trump administration has weakened:

The Centers for Disease Control and Prevention, which was the world's leading disease response organization, has been eviscerated and has suffered dramatic testing and policy failures. The National Institutes of Health have played a key role in vaccine development but have been excluded from much crucial government decision making. And the Food and Drug Administration has been shamefully politicized, appearing to respond to pressure from the administration rather than scientific evidence. Our current leaders have undercut trust in science and in government, causing damage that will certainly outlast them.

*Id.* (citations omitted); *see also* Ariel Shapiro, *Maryland Gov. Hogan Takes Extraordinary Steps to Keep Feds from Confiscating COVID Tests*, *FORBES* (Apr. 30, 2020, 3:45 PM), <https://bit.ly/2RkG1x8> (detailing how, despite Mr. Trump's original unwillingness to offer federal aid to states to facilitate the distribution of required personal protective equipment (PPE)—an action that left states like Maryland having to resort to foreign vendors to get the supplies—the federal government made threats to confiscate any PPE independently collected by states); Elizabeth Cohen & Wesley Bruer, *US Stockpile Stuck with 63 Million Doses of Hydroxychloroquine*, *CNN* (June 17, 2020, 10:51 PM), <https://cnn.it/2ZxOdP8> (noting how the U.S. Strategic National Stockpile has an unusable surplus of hydroxychloroquine, a drug touted by Mr. Trump as a treatment of COVID-19, after multiple studies confirmed the drug is not effective in treating the virus).

160. *See* The Editors, *supra* note 159 (stating that at least "tens of thousands" of Americans lives were lost "because of weak and inappropriate government policies"); *see also* Netburn, *supra* note 60 (reporting modeling by a university study concluding that over 100,000 lives can be saved by February 2021 if 95% of people wear masks).

161. *In re Sijan*, 611 B.R. 850, 855 (Bankr. S.D. Ohio 2020) (citing *In re White*, 49 B.R. 869, 872 (Bankr. W.D.N.C. 1985)) (stating that Mr. Sijan "did not intend to have a near death experience and be subjected to six weeks of medical treatment after visiting the emergency room" and that his medical debt was "more akin to judgment from a tort action, in which some sort of accident occurs and the debtor is found liable for the unforeseen damage").

162. *See id.*

ordered to return to work, where they risk contracting the virus.<sup>163</sup> For example, in April 2020, then-President Trump, refusing to implement a national strategy for testing and the production of personal protective equipment, issued an executive order requiring meat-packing companies to keep their facilities open and operational.<sup>164</sup> Thus, Mr. Trump and others have forced essential workers into dangerous choices, such as refusing to return to work under the threat of losing a job and unemployment benefits or going back to work under the risk of contracting COVID-19.<sup>165</sup>

Nationwide, workers have chosen the practical yet dangerous decision to continue working in environments where exposure to the virus is highly probable and where many workers have, in fact, already been infected.<sup>166</sup> A continuing high probability of exposure is evidenced

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163. See *Essential Workforce*, OFFICIAL CAL. ST. GOV'T WEBSITE, <https://bit.ly/33IOVQG> (last updated Dec. 3, 2020, 11:15 AM); see also Eoin Higgins, “Only in Trump’s America”: Despite Covid-19, Employees in Texas and Iowa Told to Get Back to Work or Lose Unemployment Benefit, COMMON DREAMS (Apr. 29, 2020), <https://bit.ly/35SA8OG>.

164. See The Editors, *supra* note 159 (identifying instances of failures by the federal government to contain the spread of COVID-19); Jennifer Jacobs & Lydia Mulvany, *Trump Orders Meat Plants to Stay Open in Move Unions Slam*, BLOOMBERG (Apr. 28, 2020, 12:18 PM), <https://bloom.bg/35wLWHS>. Several months into the pandemic, workers across sectors lacked access to employer-provided COVID-19 testing and lacked personal protective equipment (PPE) needed to limit the spread of the virus in workplaces. See, e.g., Noam Schieber, *Employers Avoid Covid Tests Over Cost*, N.Y. TIMES, Nov. 20, 2020, at B5 (discussing the results of a survey by the World Economic Forum and Arizona State University, which found that most of the more than 1,000 surveyed companies avoided testing workers primarily due to the costs, and reporting that one researcher involved in the survey stated there is “a lot of confusion and uncertainty as to how tests work’ in the absence of a national testing strategy”); *A Shameful Shortage of Protective Gear*, Editorial, L.A. TIMES, Nov. 16, 2020, at A1 (quoting one physician, who is in charge of a grassroots project called “Get Us PPE,” who stated that “[w]e are just as bad off as we were in March” and reporting survey findings that as of late August 2020, 20% of nursing-home workers lacked a week’s supply of at least one type of PPE).

165. See Briana Rice, *Ohio’s Stay-at-Home Order Extended Until May 1, Here’s What the New Order Includes*, COLUMBUS DISPATCH (Apr. 3, 2020, 8:32 AM), <https://bit.ly/3bOYhrY>; Higgins, *supra* note 163 (discussing announcements by several Republican governors, including Iowa’s Governor’s announcement that “anyone in the state refusing to return to work due to concerns over contracting COVID-19, which has as of press time killed over 59,000 Americans, would be considered as a ‘voluntary quit’ from their job and ineligible for unemployment benefits”); see also *Back to Work or Lose Benefits*, ARK. DEMOCRAT GAZETTE (May 1, 2020) (quoting Damon Silvers, the Director of Policy and Special Counsel for the AFL-CIO, who stated that Iowa, Oklahoma, and other states “are offering people the choice to endanger your life or starve”). But see Arthur Delaney, *Trump Administration Says It’s Not Forcing People Back to Work. Workers Disagree.*, HUFFPOST (June 13, 2020, 7:00 AM), <https://bit.ly/2ZKreR9>.

166. See Mica Rosenberg, *Immigrant Couple Face Double Jeopardy in U.S. Coronavirus Epidemic*, REUTERS (May 14, 2020), <https://reut.rs/2TNKQQA> (discussing the difficult choices faced by meat-packing workers in light of Mr. Trump’s executive order and stating that in early May 2020, the United Food and Commercial Workers Union reported that 30 meat-packing workers had died of COVID-19 and roughly

by the fact that the U.S. Chamber of Commerce, along with over 200 business groups, has lobbied both state and federal lawmakers to pass laws granting employers immunity from liability in lawsuits filed by employees who contract the virus.<sup>167</sup> Thus, treating infectious-disease medical debt as non-consumer debt fits the most likely scenario, where the debtor is involuntarily exposed to the virus to keep a job and pay for basic necessities such as food and shelter.

Additionally, infectious-disease medical debt should be counted as non-consumer debt for *all debtors*, not just the debtors employed as essential workers. Because many goods and services cannot be supplied at someone's home, U.S. residents still have to leave their homes, at least periodically, to obtain goods and services, such as a mammogram to detect breast cancer or a root canal to treat an infected tooth. In the months following the pandemic declaration, Mr. Trump, while limiting support for widespread testing and repeatedly minimizing the seriousness

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100,000 workers had contracted it); *The Indicator: Essential Workers*, NAT'L PUB. RADIO (Apr. 30, 2020, 7:07 PM), <https://n.pr/3bQYDhG> (discussing how many essential workers have jobs that do not provide health insurance or paid sick leave and are thus forced to put both their health and financial stability at risk by going to work); *see also* Sara Ashley O'Brien, *Amazon Insists Sharing Data on Coronavirus Cases in Its Warehouses Isn't Useful*, CNN (May 15, 2020, 1:14 PM), <https://cnn.it/2ZzD2We> (reporting that Amazon, despite knowing the exact number of its essential workers who have contracted COVID-19, has not disclosed that information to its employees, thus preventing its essential workers from making informed decisions about their workplace safety).

167. *See* Protecting Protein Production and Consumer Access Act of 2020, H.R. 6883, 116th Cong. (2020); Alex Gangitano, *House Republican Introduces Bill to Give Meatpacking Plants Liability Shield*, HILL (May 15, 2020, 5:11 PM), <https://bit.ly/3j7doQc> (noting that the House bill was introduced shortly after Mr. Trump signed an executive order mandating that meat-packing employees remain working during the pandemic); *see also* (i) An Act to Provide Aid to North Carolinians in Response to the Coronavirus Disease 2019 (COVID-19) Crisis, sec. 4.14(a) § 66-460, 2020 N.C. Sess. Laws 3; (ii) An Act Relating to Civil Liability; Defining Terms; Establishing Immunity from Liability for Persons or Entities From Certain Civil Actions; Establishing Requirements for Certain Immunity; Clarifying Applicability of Act; Providing for Codification; and Declaring an Emergency, sec. 1(B), S. B. 1946, 57th Leg., 2d Reg. Sess. (Okla. 2019); (iii) An Act Relating to Product Liability; Creating the COVID-19 Product Protection Act; Establishing Immunity from Certain Civil Actions; Clarifying Applicability. Emergency, S. B. 1947, 57th Leg., 2d Reg. Sess. (Okla. 2019); (extending employer liability protection beyond businesses complying with Oklahoma's safety guidelines to employers manufacturing or donating products to help with the pandemic); (iv) Contagious Virus Provisions, S. B. 3007, 63d Leg., 3d Spec. Sess. (Utah 2020). *See generally* Sabrina Eaton, *Ohio U.S. Sen. Sherrod Brown Decries Calls for Business Liability Relief in COVID-19 Legislation*, CLEVELAND.COM (June 11, 2020), <https://bit.ly/3mFODMo> (discussing lobbying efforts by businesses to pass federal legislation shielding them from liability and discussing a Public Citizen report about various companies—including grocery stores, nursing homes, and meat packing plants—that experienced COVID-19 outbreaks after employees complained about unsafe working conditions, such as the lack of employer-provided personal protective equipment).

of COVID-19,<sup>168</sup> demanded that churches resume in-person services, schools reopen in-person instruction, colleges restart football games, and governors reopen businesses in their states.<sup>169</sup> Even though the U.S. is averaging its highest number of daily cases since the pandemic started,<sup>170</sup> most governors have, in fact, opened their states to businesses in numerous industries, but mask-wearing is not mandatory in several jurisdictions.<sup>171</sup> Accordingly, U.S. residents risk contracting the virus by leaving their homes, and they do so despite the spread of new highly-

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168. See Rhea Mahbubani, *Trump Pulled Support for Testing Sites in 5 States as He's Trying to Push Coronavirus Test Numbers Downward. Health Officials Say the Move Could Have 'Catastrophic Cascading Consequences.'*, BUS. INSIDER (June 25, 2020, 11:49 AM), <https://bit.ly/32c3FSC>; see also Maggie Haberman, *Trump Admits Downplaying the Virus Knowing It Was 'Deadly Stuff'*, N.Y. TIMES, (Sept. 9, 2020), <https://nyti.ms/320bVob>. See generally Times Union Editorial Board, *Editorial: The Real Viral Disaster*, TIMES UNION (Oct. 21, 2020), <https://bit.ly/34NwDcZ> (summarizing the last presidential debate where Mr. Trump claimed that we are turning the corner on the virus and reporting that he said in early spring that the virus would “magically” disappear by Easter).

169. See Laura Meckler, *Trump Pushes and Threatens in Bid to Fully Reopen Schools*, WASH. POST (July 7, 2020, 9:35 PM), <https://wapo.st/37MsdV7> (reporting that four months before the presidential election date, “Trump . . . pressed local and state officials to reopen businesses and churches and to lift coronavirus restrictions” and has threatened to cut off federal funding to schools that refuse to fully reopen); see also Brady Dennis & Jacqueline Dupree, *U.S. Reports Highest Number of Covid-19 Deaths in One Day Since Mid-May*, WASH. POST (Aug. 12, 2020, 7:52 PM), <https://wapo.st/3kPR9z5> (reporting that, on a day when the U.S. had its highest number of daily COVID-19 infection cases since mid-May, Trump said: “We’ve got to open up our schools and open up our businesses,” and said “let them play [football]”); Siobhán O’Grady et al., *Trump Dismisses Coronavirus Cases in Children, Says They’re a ‘Tiny Fraction’ of Deaths*, WASH. POST (Aug. 10, 2020, 11:45 PM), <https://wapo.st/3egrR11> (reporting that Trump, who falsely claimed that kids are immune to COVID-19, said that schools should reopen in-person classes, and tweeted “Play College Football”).

170. See *Coronavirus Resource Center*, *supra* note 20 (displaying a graph showing that the U.S.’s rolling seven-day average of daily new cases has been above 150,000 and that the daily number of new cases have exceeded 200,000 for each day of the first 11 days of 2021).

171. See Jasmine C. Lee et al., *See How All 50 States Are Reopening (and Closing Again)*, N.Y. TIMES, <https://nyti.ms/2Zwf6CO> (last updated Dec. 24, 2020); Ruobing Su & Holly Secon, *An Interactive Map Reveals State-by-State Rules for Shopping at Retail Stores, Eating at Restaurants, and Wearing Masks in Public*, BUS. INSIDER (May 16, 2020, 8:15 AM), <https://bit.ly/3htTkWt> (stating only 11 states are requiring residents to wear masks in public); see also Brad Harper, *Montgomery City Council Votes Down Mask Ordinance, Sends Doctors Out in Disgust*, MONTGOMERY ADVERTISER (June 16, 2020, 8:21 PM), <https://bit.ly/2Zxuoav> (discussing one city council’s decision to strike down a mask ordinance, despite the pleas of doctors who cited the increasing number of hospitalized COVID-19 patients in the city—90% of whom are black—as a dire concern and stated that masks can provide 95% protection from the virus). Although President Biden wants a national mask mandate, see Hall, *supra* note 63, it is not clear at this juncture that such a mandate is feasible given the strong unwillingness of many Americans to mask wearing. See *supra* notes 59–61 and accompanying text (discussing pandemic fatigue and COVID-19 deniers, who generally refuse to wear masks and follow other virus-containment recommendations).

contagious mutations of COVID-19, the limited availability of vaccines, the lack of widespread testing, and the lack of a proven cure for those who become seriously ill.<sup>172</sup>

Thus, like essential workers, U.S. residents are expected to leave their homes and patronize businesses to save the U.S. economy,<sup>173</sup> even though the U.S. has the world's largest number of cases, amounting to 20% of the more than 91.2 million confirmed COVID-19 cases globally.<sup>174</sup> U.S. residents who patronize businesses are also helping state and local authorities restore tax revenue by paying state and local taxes with the purchase of goods and services.<sup>175</sup> In short, individuals who engage in consumer spending outside the home benefit public and private entities due to their willingness to risk their lives to buy goods and services.<sup>176</sup> As a result, U.S. residents who file for bankruptcy relief after

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172. See Saltzman, *supra* note 57 and accompanying text (reporting that two new strains of COVID-19 have been confirmed in cases in several states); Jared S. Hopkins & Arian Campo-Flores, *Slow COVID-19 Vaccine Rollout in U.S. Could Portend More Problems*, WALL ST. J. (Jan. 2, 2021, 1:42 AM), <https://on.mktw.net/2Y7iYcE> (reporting that only a fraction of the 20 million vaccinations promised by Trump administration officials had been administered by end of 2020 to individuals with high-priority access and blaming the limited number of vaccinations on “disorganization and conflicting priorities among states, counties and hospitals”); Grace Schneider & Deborah Yetter, *Pandemic Fatigue[:J Why Experts Fear the Weeks Ahead*, COURIER J. (Oct. 22, 2020), <https://bit.ly/3jNvwOA> (stating that medical experts and hospital administrators are sounding the alarm regarding the surge in COVID-19 cases in Kentucky and southern Indiana and quoting the chief medical officer at the University of Louisville Health as saying “even though people may feel done with wearing masks and social distancing, ‘unfortunately, these are still the only proven strategies for reducing the virus’”).

173. See Megan Cassella, *‘It’s Going to Be a Slow Slog’: Economists Knock Down Hopes of Quick Rebound*, POLITICO (June 18, 2020, 1:57 PM), <https://politi.co/2GMe8Mk>; see also Justin Peters, *The 13 Kinds of Pandemic Ads*, SLATE (May 21, 2020, 11:49 AM), <https://bit.ly/3k52Fh2> (noting how businesses are refocusing advertising campaigns with new commercials sporting messages like, “We’re Clean Now” and “God Bless Our Heroes,” in order to have consumers associate their brands with reliable, safe, and trustworthy messages and thus spend more during the pandemic); *Last Week Tonight with John Oliver: Coronavirus IV* (HBO Apr. 12, 2020), <https://itsh.bo/3kKinH4> (remarking on the hypocrisy of Amazon broadcasting commercials praising its warehouse workers when, in reality, those same Amazon workers have been vocal about the company not providing safe working conditions for them during the pandemic).

174. See *Coronavirus Resource Center*, *supra* note 20.

175. See generally Heidi Grover, *Masks, Driver Shields, Artificial Intelligence: How Do We Make Public Transit in the Puget Sound Area Safe Amid COVID-19?*, SEATTLE TIMES (Aug. 24, 2020), <https://bit.ly/34Uocfq> (discussing the huge decline in ridership on public transportation during the pandemic and the resulting plummeting tax revenue and describing how transit agencies are trying to make public transportation safe for riders).

176. See Ohio Department of Health, *All of Us*, YOUTUBE (July 8, 2020): <https://bit.ly/36cGIBa> (encouraging all Ohioans to wear a mask and follow other healthcare guidelines and featuring Gary Callicot, a restaurant owner, who stated that “businesses can stay open and don’t close again and our economy can recover and jobs

accruing infectious-disease medical debt should be able to count that debt as non-consumer.

Courts construing medical debt as non-consumer debt would also comport with the “fresh start” canon. Almost a century ago, the Supreme Court of the United States, in *Local Loan Co. v. Hunt*,<sup>177</sup> established that an honest yet distressed debtor should be given a “fresh start” and, thereby, freed from oppressive indebtedness.<sup>178</sup> The “fresh start” precept imbues the entire Bankruptcy Code.<sup>179</sup> Bankruptcy law in the U.S. affords to “a deserving debtor an economic rehabilitation.”<sup>180</sup> Thus, the fresh start not only benefits the individual debtor by allowing her to discharge debts, but it also confers “a commensurate benefit to society and the economy: People are freed from emotional and financial burdens to become more energetic, healthy [societal] participants.”<sup>181</sup>

In summary, the fate of debtors with infectious-disease medical debt is unclear given the conflicting case law in *In re Sijan* and *In re Zgonina*. What is clear is that Mr. Sijan received a fresh start, and Ms. Zgonina did not. Both debtors were single, had no dependent children, and did not own a home; yet only Mr. Sijan received a discharge of his unsecured debts, almost all of which were medical debts, and only Mr. Sijan was free to use future earnings to save money for a rainy day, save for a down payment on a home, and save for retirement.

Even if a strong argument exists that Mr. Sijan and other similarly situated debtors receive a personal benefit from infectious-disease medical treatment, an equally strong argument exists that the public receives a benefit from every infected debtor who obtains a diagnostic test and subsequent treatment. COVID-19-related medical debt is a result of individuals being exposed to a contagious virus during a worldwide pandemic (1) while employed individuals work to produce goods and provide services deemed essential, and (2) while individuals patronize businesses to buy goods and services to keep the U.S. economy going.

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can come back”); see Deborah Netburn, *Is It Safe to Shop and Eat Out Yet? We Assess the Risk*, L.A. TIMES (June 17, 2020, 10:51 AM), <https://lat.ms/36dBPIin>.

177. See *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934).

178. See *id.* at 244 (noting that “[o]ne of the primary purposes of the bankruptcy act is to ‘relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh’”).

179. To provide historical context, the Supreme Court recognized the fresh start doctrine in 1885. See *Traer v. Clews*, 115 U.S. 528, 541 (1885) (“The policy of the bankrupt act was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities, and enable him to take a fresh start.”). See generally *Butler v. Wojtkun (In re Wojtkun)*, No. 13-12719-MSH, 2018 WL 4057348, at \*5 (Bankr. D. Mass. Aug. 23, 2018), *aff’d*, 596 B.R. 74 (D. Mass. 2019) (“All honest debtors are entitled to a fresh start. This precept is enshrined in the Bankruptcy Code as one of its foundational principles.”).

180. *In re Kedia*, 607 B.R. 101, 108 (Bankr. E.D.N.Y. 2019).

181. *In re Engen*, 561 B.R. 523, 550 (Bankr. D. Kan. 2016).

When a debtor is saddled with medical debt incurred as the result of a highly-contagious pathogen, bankruptcy courts should not mischaracterize the debt as consumer debt.<sup>182</sup> By correctly characterizing the medical debt as non-consumer debt, bankruptcy courts will accord the debtor the option to seek relief in a Chapter 7 case and obtain a fresh start.

### III. PROPOSED SOLUTIONS TO PROVIDE RELIEF TO CONSUMERS BURDENED WITH INFECTIOUS-DISEASE MEDICAL DEBTS

Rather than waiting to see how many consumers will file for bankruptcy relief or how many bankruptcy courts will mischaracterize infectious-disease medical debts, both state and federal lawmakers can do something now. As explained fully below, state lawmakers should act by amending workers' compensation ("workers' comp") laws to include a COVID-19 infection as a compensable occupational disease for employees. Moreover, Congress should amend the BAPCPA to exclude infectious-disease medical debts from the definition of consumer debt.

#### *A. Amend Workers' Compensation Law to Include a COVID-19 Infection as an Occupational Disease for Consumers Employed in Essential Jobs*

To obviate the need for consumers to file bankruptcy, all U.S. jurisdictions must amend their workers' comp laws to include a COVID-19 infection as a compensable occupational disease. Former President Trump, who was hospitalized after contracting the virus, and former Vice President Pence were both assumed to be essential and did not have to worry about the cost of their care.<sup>183</sup> Similarly, as explained below, while no one can grant U.S. employees access to the best medical care, employees who perform essential work should have the cost of their COVID-19 testing, diagnosis, and treatment covered by workers' comp funding.

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182. Such a characterization would occur if, for example, a court were to find that medical debt incurred from the testing and treatment of COVID-19 was within the ambit of consumer debt under 11 U.S.C. § 101(8). *See* 11 U.S.C. § 101(8) (2018).

183. *See supra* note 64 and accompanying text (describing the type of top-notch healthcare Mr. Trump received after contracting COVID-19 even though he had, for months, downplayed the seriousness of the virus and rarely ever wore a mask and, even after his recovery, continues to downplay the virus by claiming that we're turning the corner on the virus). Even after several close aides, including his chief of staff, contracted COVID-19, Mr. Pence declared himself to be "essential" and has continued speaking at large campaign rallies. *See* Miller et al., *supra* note 159 (stating that Mr. Pence tested negative).

Generally speaking, specific provisions of workers' comp laws vary in all 50 states, the District of Columbia, and U.S. territories.<sup>184</sup> However, the common purpose of workers' comp laws is to compensate workers for economic losses caused by employment-related injuries and diseases.<sup>185</sup> Communicable ordinary-life diseases, like the flu, are excluded from being an occupational disease because of the near impossibility of proving that an employee contracted such ordinary diseases while he or she was at work.<sup>186</sup>

Since COVID-19 was declared a nationwide pandemic, the majority of jurisdictions have amended workers' comp laws, issued executive orders, or passed regulations to include COVID-19 as an occupational disease for certain "essential" workers.<sup>187</sup> In many jurisdictions, the shortcoming of these legal measures is that the list of employees who qualify as essential workers is relatively small because jurisdictions seek to protect the essential workers who are perceived to be at the greatest risk of contracting the virus.<sup>188</sup>

However, workers' comp laws must be expanded to cover all essential workers identified by gubernatorial and mayoral executive orders in each worker's state of employment. Several states limit workers' comp coverage to COVID-19-infected first responders, such as police officers and firefighters, and health professionals, such as doctors and nurses.<sup>189</sup> However, this narrow list only includes workers who will typically already have employer-sponsored health insurance coverage.<sup>190</sup>

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184. See Josh Cunningham, *Workers' Compensation: Keeping Injured and Ill Workers in the Workforce*, NAT'L CONF. ST. LEGISLATURES (May 24, 2019), <https://bit.ly/2Zwni65>.

185. See *id.*

186. See Cunningham, *supra* note 32; see also LEX K. LARSON, 4 LARSON'S WORKERS' COMP. LAW § 52.03 (2020) (noting how states often distinguish "ordinary diseases of life," such as the flu, from occupational diseases in workers' comp laws).

187. See Cunningham, *supra* note 32 (listing the states that have attempted to amend workers' comp laws in response to the pandemic, the exact actions those states have taken, and the statuses of those attempts, as of April 2020); see also Jill Vorobiev, *It's Official: Illinois Law Presumes COVID-19 Is a Workplace Injury for Essential Workers*, REED SMITH: EMP'T L. WATCH (July 8, 2020), <https://bit.ly/341StYB>; 2020 Ill. Legis. Serv. P.A. 101-633 (H.B. 2455) § 310(g)(1) (West) (creating a rebuttable presumption that contraction of COVID-19 by "a COVID-19 first responder or front-line worker" arises out of the course of the first responder's or front-line worker's employment and is "causally connected to the hazards or exposures of his or her employment).

188. See Cunningham, *supra* note 32.

189. See *id.*; see also 2020 N.H. Legis. Serv. Exec. Ord. 2020-014 (Mar. 13, 2020) (ensuring "worker's compensation coverage for New Hampshire first responders exposed to COVID-19"); 2020 Minn. Sess. Law. Serv. Ch. 732 (HF 4537) (West); Ashley Prickett Cuttino et al., *COVID-19 Employment Legislation and Litigation FAQs*, NAT'L L. Rev. (June 22, 2020), <https://bit.ly/33mEkVv> (stating that "[s]ome states have limited the workers' compensation expansion to health care and emergency response workers, but other states do not have this limitation and expand presumptive coverage to more classes



States with a narrow list exclude many *unsung* workers, also considered essential, who are more likely to earn lower incomes and be uninsured or underinsured.<sup>191</sup> For example, a hospital ER cannot function without the cleaning services of janitorial staff, and thus such employees must go to work during the pandemic. These workers are at high risk of getting infected with COVID-19—indeed, some have been infected and, sadly, some have died.<sup>192</sup> Consequently, by limiting workers' comp coverage to *only* first responders and healthcare professionals, states are unfairly discriminating against low-income, essential workers who are most in need of government-sponsored coverage of their medical bills. The definition of an essential worker should be defined in statutes broadly to include any worker in an occupation deemed essential or in any business deemed to provide essential goods and services,<sup>193</sup> so long as that worker tested positive for COVID-19 while employed.

In addition to amending workers' comp laws to cover a broad list of essential workers, these laws must also create a presumption that essential workers with COVID-19 contracted the virus while working on the job. A few jurisdictions explicitly create a presumption in favor of infected workers, but the presumption is rebuttable.<sup>194</sup> If a state law creates a rebuttable presumption in favor of the worker, it should also limit the employer's ability to unfairly derail the worker's case for coverage. For example, state law should require employers and insurance companies to present independent, objective evidence when attempting to rebut the presumption. Those who have been defense attorneys know how law firms can use discovery and other litigation tactics to unfairly

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of workers, primarily those workers deemed to work for essential businesses defined by a state's executive order").

190. See Ruqaiyah Yearby & Seema Mohapatra, *Structural Discrimination in COVID-19 Workplace Protections*, HEALTH AFF.: HEALTH AFF. BLOG (May 29, 2020), <https://bit.ly/3kaRxr7>; see also Annie Lowrey, *Don't Blame Econ 101 for the Plight of Essential Workers*, ATLANTIC (May 13, 2020), <https://bit.ly/2RruSKN> (noting that "[o]ne in seven essential workers lacks health insurance").

191. See Lowrey, *supra* note 190; see also Andrew Hammond et al., *How the COVID-19 Pandemic Has and Should Reshape the American Safety Net*, 105 MINN. L. REV. (forthcoming 2020) (manuscript at 2–3), <https://bit.ly/3hy4IXb> (commenting how the low-paid essential workers in the United States are disproportionately African-American and Latino).

192. See Lindsey Schnell, *'We're Heroes, Too:' Hospital Janitors Risk Lives to Stop Spread of COVID-19*, USA TODAY (June 12, 2020, 7:00 AM), <https://bit.ly/342I66S>; Christina Jewett et al., *Nearly 600 U.S. Health Care Workers Have Died of COVID-19*, ABC NEWS (June 8, 2020, 11:53 AM), <https://abcn.ws/2FrNVIQ>.

193. See, e.g., ILL., EXEC. ORD. NO. 8 (EXEC. ORD. IN RESPONSE TO COVID-19) (Mar. 9, 2020), [://bit.ly/3kV82rE](https://bit.ly/3kV82rE) (providing an extensive list of job categories considered "essential").

194. See Cunningham, *supra* note 32; see also An Act Concerning Employment, 30 ILL. COMP. STAT. 559 / 20–25 (2020).

burden plaintiffs to such a degree that they will drop their claims.<sup>195</sup> Although employees impacted by COVID-19 have been trying to get courts to hold companies liable for failing to provide employees with appropriate protective equipment and failing to follow safety regulations, employers have, thus far, been successful in getting such claims against them dismissed.<sup>196</sup> As a result, it would be unfair to allow employers and insurance companies to challenge the COVID-19 presumption without any objective, supporting evidence that employees contracted the virus in non-work settings.<sup>197</sup>

However, changing workers' comp laws in all jurisdictions to broadly cover all essential workers may be politically impossible due to employer resistance to expanding coverage.<sup>198</sup> Therefore, an amendment to bankruptcy law as an alternative solution is discussed below.

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195. See John R. Allison, *Five Ways to Keep Disputes Out of Court*, HARV. BUS. REV., Jan.-Feb. 1990, <https://bit.ly/3mjshkn>.

196. See, e.g., *Arnold v. Corrective of Tenn., LLC*, No. 20-CV-0809 W (MDD), 2021 WL 63109, at \*6 (S.D. Cal. Jan. 6, 2021) (holding that a prison employee's claims that his employer failed, during the COVID-19 pandemic, to provide proper personal protective equipment and to follow regulations requiring safe working conditions are barred by California's workers' compensation exclusivity rule). See also Schieber, *supra* note 164 (discussing an academic survey finding that most of the more than 1,000 surveyed companies avoided testing their employees primarily due to the cost of testing).

197. Rebutting the presumption could perhaps be possible if the worker has engaged in activities that show a reckless disregard for public-health guidelines. For months, the CDC has advised people to wear masks and practice social distancing in public, but the media has repeatedly shown individuals on crowded beaches and in busy bars not complying with state or federal guidelines. See *COVID-19: Considerations for Wearing Masks*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://bit.ly/35sgUAL> (last updated Aug. 7, 2020); see also Jake Zuckerman, *A Pandemic Is Raging. So Are Ohio's Bars.*, ABC NEWS 5 CLEVELAND (July 29, 2020, 7:25 AM), <https://bit.ly/3kWurov>.

198. See, e.g., Shelly Bradbury, *Colorado Workers Infected with Coronavirus Face Uphill Battle to Claim Workers' Compensation Benefits*, DENVER POST (July 26, 2020, 6:00 AM), <https://dpo.st/331BvUM> (reporting that several associations have joined Colorado's largest insurance provider for the state's workers' compensation program in opposing a bill (on the grounds of costs, redundancy to benefits, undue burden and expense, and over-breadth) that would create a presumption of compensability in favor of employees working as essential workers outside of their homes if they tested positive for the coronavirus). As expected, employers and various trade industries are fighting expansion of workers' comp laws. For example, after the Illinois Workers' Compensation Commission adopted an emergency rule that created a rebuttable presumption that COVID-19 infection is compensable under the Illinois Workers' Compensation Act for first responders and front-line workers, two industry associations filed a state court action to have the rule declared invalid. See *Ill. Mfrs.' Ass'n v. Ill. Workers' Comp. Comm'n*, No. 2020-CH-000098 (Ill. Cir. Ct. filed April 21, 2020). Shortly thereafter, the Commission withdrew the rule, thereby making it impossible for a COVID-19 infected employee to qualify for benefits under the state's workers' comp statute. See Mark Johnson et al., *Illinois Worker's Compensation Emergency Rules Establishing Rebuttable Presumption for COVID-19 Have Been Withdrawn*, JD SUPRA (Apr. 27, 2020), <https://bit.ly/3p9Z9NL> (stating that the Commission cited "costly litigation" as the reason

*B. Amend the Bankruptcy Code to Exclude Infectious-Disease Medical Debt from the Definition of Consumer Debt*

Because COVID-19-infected workers in many U.S. jurisdictions may not be covered by workers' comp laws,<sup>199</sup> Congress should amend the Bankruptcy Code to afford workers a means of discharging massive infectious-disease medical debts. Federal lawmakers have already passed five different bills that address various devastating effects of the pandemic on the U.S. economy and consumers.<sup>200</sup> For example, under the CARES Act, a qualified single taxpayer received a \$1,200 payment, and a parent received \$500 for each eligible child under 17 years old (collectively, the "stimulus payment").<sup>201</sup>

The CARES Act also made several changes to the BAPCPA, but the most significant change for consumer debtors in a Chapter 7 case was excluding the stimulus payment from the definition of income.<sup>202</sup> Recall that the BAPCPA implemented the Means Test calculation to force can-

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for withdrawing the rule and stating that no medical evidence can prove that an employee contracted the virus in the workplace).

199. See Bradbury, *supra* note 198 (reporting on the failure of a state senate committee to pass a Colorado bill that would have expanded coverage for COVID-19-infected employees under workers' comp law so long as the employees were employed as essential workers).

200. See *supra* notes 78–88 and accompanying text (discussing recently enacted pandemic related legislation); *NACo Summary: COVID-19 Funding Packages*, *supra* note 38. A bill is pending before Congress to prevent healthcare providers from engaging in certain debt-collection practices (e.g., garnishment of wages) during the pandemic. See COVID-19 Medical Debt Collection Relief Act of 2020, S. 4350, 116th Cong., 2d Sess. However, this bill would not be effective in helping consumer debtors obtain permanent relief from their medical debts. See *id.*

201. See U.S. BANKR. CT., S. DIST. OF ALA., QUARTERLY BANKRUPTCY SECTION MEETING 1, at 1–2 (May 12, 2020), <https://bit.ly/2Zux6O0>. Although the CARES Act does not refer to these checks as "stimulus payments," the payments authorized by the CARES Act are colloquially referenced by this phrase. See *id.*; see also Coronavirus Aid, Relief, and Economic Security (CARES) Act, 15 U.S.C. §§ 9001–9080 (2018 & Supp. 2020). After much debate, Congress afforded individuals a second stimulus payment of only \$600 in its final enacted pandemic-related legislation in 2020. See Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182 (2021); *Year-End Appropriations and COVID Stimulus Bill Revises Sections of the Bankruptcy Code*, *supra* note 38 (reporting that despite a public demand by former President Trump for a higher payment of \$2,000, Congress only afforded a second stimulus payment of \$600 for an individual taxpayer and \$600 for each child qualifying as a dependent of the taxpayer).

202. See PRACTICAL LAW BANKRUPTCY & RESTRUCTURING: CARES ACT: REVISED SECTIONS OF THE BANKRUPTCY CODE TO MITIGATE EFFECTS OF COVID-19 (Apr. 1, 2020) (Westlaw); see also 15 U.S.C. §§ 9001-9080. The Consolidated Appropriations Act also made several amendments to the Bankruptcy Code but none are relevant here. See Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182 (2021) (including § 1001, entitled "Bankruptcy Relief"); *Year-End Appropriations and COVID Stimulus Bill Revises Sections of the Bankruptcy Code*, *supra* note 38 (describing several amendments, including one allowing Chapter 13 debtors with federally-backed residential and multifamily mortgages to request payment forbearance due to COVID-19-related hardships and to request modification of payments in Chapter 13 plans).

pay debtors into filing a Chapter 13 bankruptcy case where they must agree to a five-year payment plan that uses all of their disposable income to pay off a portion of their general unsecured debts.<sup>203</sup> However, the CARES Act provides that, if a stimulus payment recipient files for bankruptcy relief, that person is allowed to exclude the stimulus payment from the calculation of the debtor's current monthly income ("CMI") when completing the Means Test.<sup>204</sup>

This stimulus-payment exclusion is important because it falls in line with previously expressed congressional intent to prevent a person's CMI from including certain benefits received by the debtor.<sup>205</sup> For purposes of performing the Means Test calculation, Section 707(b) of the BAPCPA uses the term "current monthly income" multiple times, but the BAPCPA expressly excludes Social Security benefits from the definition of CMI.<sup>206</sup> As pointed out by the U.S. Bankruptcy Appellate Panel (BAP) of the Ninth Circuit, Congress's purpose in creating the Social Security benefits exclusion from CMI was "to help courts separate 'can-pay' debtors from 'can't-pay' debtors."<sup>207</sup> The Ninth Circuit BAP explained further that Congress's decision to exclude Social Security benefits when identifying "can-pay" debtors "is reasonable" because various Social Security programs "are intended to benefit people who are needy in some respect: they are aged, sick, physically or mentally disabled, suffering

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203. See *supra* notes 78–88 and accompanying text.

204. See 11 U.S.C. § 101(10A)(B)(ii)(V) (2018 & Supp. 2020) (excluding from CMI any "[p]ayments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act . . . with respect to the coronavirus disease 2019 (COVID-19)"). This exclusion amendment to CMI is scheduled to sunset (expire) on March 27, 2021 unless extended by Congress. See Coronavirus Aid, Relief, and Economic Security (CARES) Act, 15 U.S.C. § 1113(b)(2)(A)–(B); see also U.S. BANKR. CT., S. DIST. OF ALA. QUARTERLY BANKRUPTCY SECTION MEETING, *supra* note 201.

205. See *Adinolfi v. Meyer (In re Adinolfi)*, 543 B.R. 612, 620 (B.A.P. 9th Cir. 2016).

206. Although the Social Security benefit exclusion is the most common exclusion from CMI calculations, the definition of CMI had four express exclusions prior to the CARES Act: (i) benefits received under the Social Security Act; (ii) certain payments to victims of war crimes or crimes against humanity; (iii) certain payments to victims of international terrorism or domestic terrorism; and (iv) certain military service-related disability and death benefits. See 11 U.S.C. § 101(10A)(b)(V) (2018); see also 11 U.S.C. § 101(10A)(B)(ii)(I) (2018). In Chapter 13 cases where debtors must submit repayment-plan payments, courts have determined that the amounts received from sources excluded from the definition of CMI are also excluded from calculations of debtors' disposable income. See, e.g., *Anderson v. Cranmer (In re Cranmer)*, 697 F.3d 1314, 1317–18 (10th Cir. 2012) (holding that the debtor's "projected disposable income is calculated using his [current] disposable income and, therefore, need not include his [Social Security income]," which is "expressly excluded from . . . [current monthly] disposable income"); see also *In re Adamson*, 615 B.R. 303, 308 (Bankr. D. Colo. 2020).

207. *In re Adinolfi*, 543 B.R. at 620.

from family separation or abuse, or the like.”<sup>208</sup> Similar to various Social Security benefits, the CARES stimulus payment was deemed necessary for consumers to make their mortgage payments and pay for other necessities for themselves and their dependent children.<sup>209</sup>

Given that Congress has already decided that certain payments and benefits are excluded from the calculation of CMI,<sup>210</sup> Congress can and should amend Section 101 of the Bankruptcy Code to statutorily exclude infectious-disease medical debts from the definition of consumer debt. Congress’s exclusion of infectious-disease medical debts would prevent courts from using such debts when identifying “can-pay” debtors under the Means Test calculation.<sup>211</sup> For example, consider recent pandemic-related legislation in New Jersey, which defines the term “infectious disease” broadly and makes it unlawful for an employer, during the coronavirus pandemic, to terminate or penalize an employee for requesting time off or taking time off due to the employee’s testing positive for, or being exposed to, an infectious disease.<sup>212</sup> Based on New Jersey’s broad definition of infectious disease, the Bankruptcy Code should be amended to exclude from the definition of consumer debt<sup>213</sup> any costs incurred by the debtor or a dependent of the debtor for the diagnosis and treatment of “a disease caused by a living organism, [a coronavirus,] or other pathogen, including, fungus, bacterium, parasite, protozoan, virus or prion.”<sup>214</sup>

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208. *Id.*

209. *See* Coronavirus Aid, Relief, and Economic Security (CARES) Act, 15 U.S.C. §§ 9001-9080 (2018 & Supp. 2020).

210. *See supra* note 204 and accompanying text.

211. Of course, the Trustee could still pursue a court’s finding of abuse against a debtor who engaged in reckless behavior that showed disregard of CDC guidelines. *See* 11 U.S.C. § 707(b)(3)(B) (2018) (allowing a trustee to move for dismissal of a debtor’s case when “the totality of the circumstances . . . of the debtor’s financial situation demonstrates abuse”); *see also* Zuckerman, *supra* note 197 and accompanying text (describing individuals engaging in reckless behavior by going to crowded parties, bars, and beaches without wearing masks or social distancing).

212. *See* N.J. STAT. ANN. § 34:11D-12 (West 2020) (“An employer shall not, during the Public Health Emergency and State of Emergency declared by the Governor in Executive Order 103 of 2020 concerning the coronavirus disease 2019 pandemic, terminate or otherwise penalize an employee if the employee requests or takes time off from work based on the written or electronically transmitted recommendation of a medical professional licensed in New Jersey that the employee take that time off for a specified period of time because the employee has, or is likely to have, an infectious disease . . . which may infect others at the employee’s workplace.”).

213. *See* 11 U.S.C. § 101(8)(3) (2018) (currently defining “consumer debt” as “debt incurred by an individual primarily for a personal, family, or household purpose”).

214. *See* N.J. REV. STAT. § 26:13-2 (West 2012) (defining “Infectious disease” to mean “a disease caused by a living organism or other pathogen, including a fungus, bacteria, parasite, protozoan, virus, or prion. An infectious disease may, or may not, be transmissible from person to person, animal to person, or insect to person.”). New Jersey law also defines “quarantine” as “the physical separation and confinement of an

By excluding infectious-disease medical debts from the definition of consumer debt, the Bankruptcy Code would prevent Chapter 7 debtors from being penalized for lacking sufficient health insurance and for involuntarily contracting a virus that caused them to become seriously ill.<sup>215</sup>

If some lawmakers become concerned that the proposed amendment would result in too much medical debt being discharged in Chapter 7 cases, lawmakers could instead allow essential workers to exclude infectious-disease medical debt from their list of consumer debts. The case for the medical-debt exclusion becomes even stronger for debtors employed as bus drivers, police officers, meat-packing workers, or the dozens of other job positions now considered essential.<sup>216</sup> Because essential workers are expected to leave their homes to provide necessary goods and services to all Americans, these workers are at a greater risk of contracting the coronavirus. In fact, hundreds of thousands of essential workers have already contracted it.<sup>217</sup> Furthermore, medical treatment for essential workers benefits all Americans because such workers, while in

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individual or groups of individuals, who are or may have been exposed to a contagious or possibly contagious disease and who do not show signs or symptoms of a contagious disease, from non-quarantined individuals, to prevent or limit the transmission of the disease to non-quarantined individuals.” *Id.*

215. See *supra* notes 129–130 and accompanying text.

216. California’s list of essential workers includes employees in various industries, such as healthcare, manufacturing, food and agriculture, transportation, water, and energy, to name a few. See *Essential Workforce*, *supra* note 163; see also Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), <https://nyti.ms/3mg1syU> (reporting that there are approximately 48,710,000 essential workers in the United States); *COVID-19: Essential Workers in the States*, NAT’L CONF. ST. LEGISLATURES (May 21, 2020), <https://bit.ly/3i8NFFZ> (providing an interactive map with state-by-state guidance on the jobs that classify as essential).

217. For example, in the nursing-home industry, the Centers for Medicare and Medicaid Services reported, as of December 27, 2020, that the U.S. had over 425,000 confirmed COVID-19 infections among nursing home staff, of whom 1,292 have died of the disease. See *COVID-19 Nursing Home Data*, CTRS. FOR MEDICARE AND MEDICAID SERVS., <https://bit.ly/3o8ARSP> (last visited Jan. 11, 2021); see also *The Plight of Essential Workers During the COVID-19 Pandemic*, LANCET (May 23, 2020), <https://bit.ly/36doPm0> (providing data showing how essential workers have contracted COVID-19 at high rates and noting that Black and Latino Americans, who make up a significant portion of essential workers, have had the highest rates of COVID-19 contraction); Hannah Fry, *Coronavirus Cases Spike Among Marin County Essential Workers as More Testing Is Urged*, L.A. TIMES (June 2, 2020, 10:06 AM), <https://lat.ms/35pnSqe>; Lisa Riordan Seville, *These Are the Most Dangerous Jobs You Can Have in the Age of Coronavirus*, NBC NEWS (May 8, 2020, 7:13 PM), <https://nbcnews.to/334X790> (listing certified nursing assistants, transit workers, janitors, meatpackers, emergency responders, farmworkers, and corrections officers as individuals most at risk of contracting COVID-19 at work); David Waldstein, *C.D.C. Says More Than 9,000 Health Care Workers Have Contracted Coronavirus*, N.Y. TIMES (Apr. 14, 2020), <https://nyti.ms/2G2XHLy>.

treatment, are not spreading the virus in their workplaces and will be able to return to their jobs when cured and continue to perform essential work. The bottom line is that infectious-disease medical debts should be excluded from consumer debts, just like income taxes,<sup>218</sup> because such debts arose from medical treatment that benefits all U.S. residents.

## CONCLUSION

Before the coronavirus pandemic, tens of millions of Americans already lacked health insurance and often were driven into bankruptcy due to massive medical bills. Because of the U.S.'s flawed healthcare system, thousands of individuals infected with COVID-19 are either uninsured or under-insured; consequently, many will incur enormous medical debt to be treated for the infectious disease.

To make matters worse, judicial interpretation of the Bankruptcy Code may prevent many of those debtors from completely discharging infectious-disease medical debts in a Chapter 7 bankruptcy case. The financial fate of individual debtors will depend on whether courts characterize their medical debts as "consumer" or "non-consumer" debts. Debtors whose medical debts are classified as consumer debt risk failing the BAPCPA's Means Test and may be forced into a Chapter 13 bankruptcy case, where they must comply with a mandatory five-year payment plan to pay down unsecured debt, including infectious-disease medical debts. Such an outcome effectively penalizes debtors for lacking adequate health insurance and forces them to pay the costs of debts incurred to treat an involuntarily contracted, highly contagious disease.

To prevent such a perverse outcome, Congress should amend the Bankruptcy Code to explicitly exclude infectious-disease medical bills from the definition of consumer debt. Such an exclusion is needed now that new, highly contagious mutations of COVID-19 are spreading in the U.S. Then debtors involuntarily stricken with COVID-19 and other infectious diseases will obtain a fresh start—a chance for honest but unfortunate debtors to start over, freed from oppressive indebtedness.

To obviate the need for some individuals to resort to filing bankruptcy, states should also amend workers' compensation laws to afford coverage to all COVID-19 infected employees who are considered essential workers.

With the enactment of the above-proposed amendments, the U.S. would ensure that Americans fortunate enough to have won the battle against COVID-19, or any other infectious disease, do not have to be shackled with astronomical medical debts. Survivors would then have the

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218. See *supra* notes 135–36 and accompanying text.

chance to use their future income to regain financial stability and to participate fully in the U.S. economy.



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