The Honorable Nancy Pelosi
Speaker
House of Representatives
1236 Longworth House Office Building
Washington, D.C. 20151

The Honorable Mitch McConnell
Senate Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Kevin McCarthy
House Minority Leader
House of Representatives
2469 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Charles Schumer
Senate Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

June 10, 2020

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

/s/ Jared A. Ellias

Jared A. Ellias, Chair
Large Corporations Committee of the Bankruptcy & COVID-19 Working Group

cc: The Honorable Lindsey Graham
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     The Honorable Jerrold Nadler
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     The Honorable Jim Jordan
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[3] The Federal Judicial Center's registry indicates approximately 100 retirees, with about one-third of them demonstrably professionally active. It may be appropriate for Congress to suspend 28 U.S.C. § 377(m)(2) for the duration of the COVID-19 situation, which could otherwise impede the return of some of the most professionally-active retired judges.

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

[†]   Denotes Bankruptcy & COVID-19 Working Group organizer.

APPENDIX

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

Benjamin Iverson, Jared A. Ellias, and Mark Roe[1]

Abstract.

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

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

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

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

Introduction

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

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

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

We begin our analysis with a basic intuition: the unemployment rate is a historically reliable leading indicator of future demand for bankruptcy relief. Job losses today are indicators of the level of financial distress of not only consumers but also businesses and municipalities in the months to come. As Figure 1 shows, the blue, dashed line of unemployment claims rises and falls very roughly in line with the bankruptcy court caseload. In rough terms, a percentage point increase in the unemployment rate corresponds to a 30% increase in bankruptcy caseloads within three to six months. The unemployment rate dropped in May but has risen approximately 10% from its end-of-2019 low.
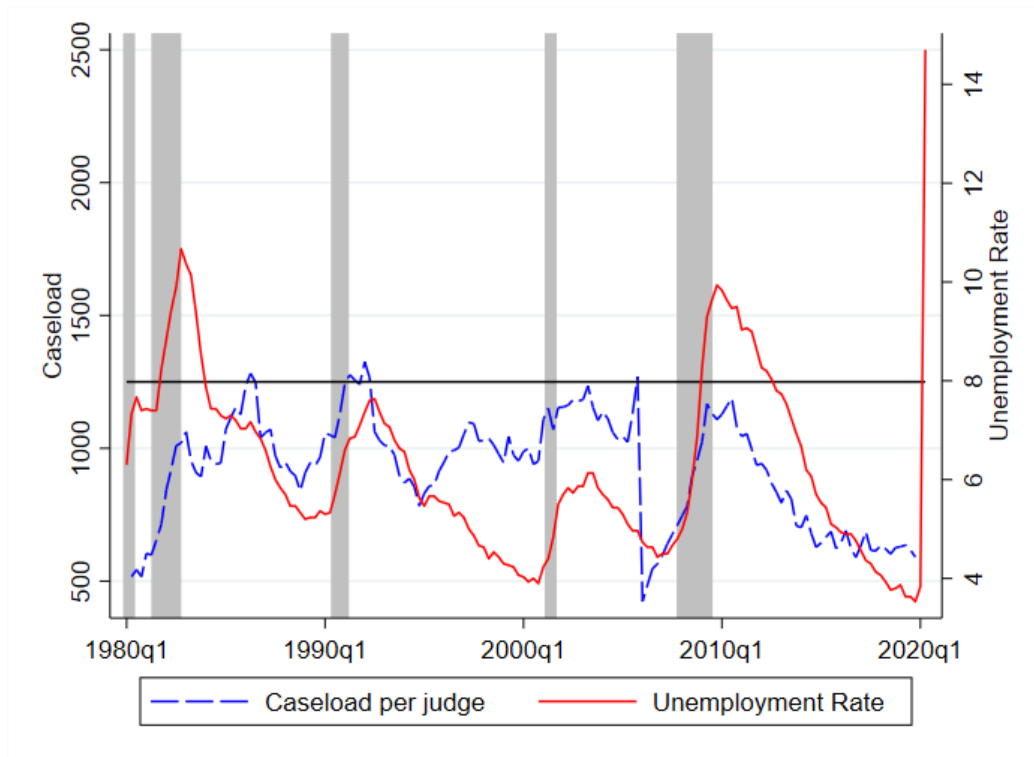
Figure 1. The Unemployment Rate and Bankruptcy Caseload by Quarter, from 1980.

Our analysis follows these basic steps:

1. For each judicial district, we calculate the historical relationship between the local unemployment rate and the number of bankruptcy cases in that district;

2. We analyze the projected results using the May 2020 national unemployment rate of 13.3%;

3. We adjust for differential impacts of COVID-19 across districts in two ways. First, we compute county-level adjustments of the national unemployment rate based on the labor share in COVID-19 afflicted industries and aggregate these to the bankruptcy district level. Second, we create projections using April 2020 unemployment rates for individual counties as May 2020 unemployment rates by county are not yet available;

4. We then project the number of bankruptcies that will occur in each district based on this local unemployment rate;

5. The Federal Judicial Center has studied how many hours a bankruptcy judge can expect to spend presiding over court hearings for each type of bankruptcy case and produced case-

weights that can be used in this type of analysis to project the potential total "caseload" over the coming year. We incorporate these into our analysis;[2]

6. In line with a 2009 GAO review of the bankruptcy courts' caseload, we adjust the FJC's case weights to reflect the prior undercount of the hours needed for Chapter 11 filing patterns of large corporate debtors;

7. We multiply that number by 2 to reflect an assumption that court hours are about half of a judge's work time;[3]

8. Using the 2010 financial crisis workload as a baseline of what is plausible to expect of the bankruptcy judiciary when working at peak effectiveness, the FJC's case-weights numbers lead to an average of nearly 50 hours per week judicial workload in 2010 (represented by the solid horizontal line in Figure 1);

9. We then identify the districts that we estimate will have too few judges to handle the potential volume of work with each judge working the same number of hours that bankruptcy judges did in 2010.

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

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

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

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

[3] *See id.*

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

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

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

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

Table 1. Total and distribution of estimated additional capacity needed under three unemployment scenarios[4]

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

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[4] The rows are sorted in descending order of the average ranking of the need in each court across all three scenarios.

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

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

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

I.   Research Methodology.

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

1. The historic relationship between unemployment and bankruptcy filings in each district.[5]

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

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

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

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

2. The current unemployment rate.

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

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

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

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

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

3. Assessing the county level unemployment rate.

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

$$s_x = \frac{net\_share\_reducing\_hours_x}{\frac{1}{n}\sum_{i=0}^{n} net\_share\_reducing\_hours_i}$$

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

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

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

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

[10] The remaining 43.2% of businesses had no change in hours worked.

[11] The calculations for each industry category are available in the Appendix Spreadsheet in the Tab "Census Unemployment Adjustments Data."

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

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

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

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

4. Adjusting for the temporarily unemployed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.   Other interventions that can bolster court capacity.

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

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

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

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

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

III.   Conclusion.

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

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[15] 28 U.S.C. § 377(m)(2) (2020).

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

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

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

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[16] However, *see* note 15 and the accompanying text.

Other Scenarios

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

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

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

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