

December 14, 2020

The Honorable Elizabeth Warren
United States Senate
317 Hart Senate Office Building
Washington DC 20510

Dear Senator Warren:

We are 74 law professors who specialize in bankruptcy and consumer law. We write to express our support for the Consumer Bankruptcy Reform Act of 2020, S.4991. The consumer bankruptcy system is expensive and complex, and it too often fails to provide effective relief. People who need to file bankruptcy can be shut out altogether when they cannot afford to hire an attorney to help them navigate the bankruptcy process. We support the Consumer Bankruptcy Reform Act because it will address these systemic issues as well as many other problems that plague the current consumer bankruptcy system.

Congress enacted our current Bankruptcy Code in 1978. Much has changed since then. Even after adjusting for population growth and inflation, Federal Reserve data show that credit-card debt has tripled. In 1978, student-loan debt was such a small part of household finances that the Federal Reserve did not even separately track it. Today, student-loan debt is the largest component of household debt except for home mortgages. In 1978, asset securitization was in its infancy. Mortgages and auto loans are now routinely bundled and sold to investors, separating the servicing of the loan from the financial institutions that own the loan. Advances in technology have made it easier for debt collectors to hound consumers even for debts that are decades old. In 1978, what we now think of as the Internet was a little-known research tool for academics instead of a global information revolution that has affected how Americans interact, including with consumer lenders, attorneys, and the court system. Given all these changes, it is little surprise that a forty-year-old bankruptcy law no longer serves our needs today.

The central piece of the Consumer Bankruptcy Reform Act is to create a new chapter 10 for individual bankruptcy filers. The Act also eliminates chapter 7 as an option for individual filers and repeals chapter 13. Individuals will remain able to file under chapter 11 (those with debts over \$7.5 million will be required to use that chapter), but for most people, the new chapter 10 will be a single point of entry into the bankruptcy system.

The single point will substantially improve the consumer bankruptcy system by replacing the current structure where consumer debtors must choose between a chapter 7 liquidation bankruptcy or a chapter 13 repayment plan bankruptcy. There are substantial differences around the country in the rates at which people use chapter 7 and chapter 13. In 2019, only 9.6% of the bankruptcy cases in the District of Idaho were chapter 13 cases as compared to 81.0% of the cases in the Southern District of Georgia. The gaping disparity itself is an indictment of a federal system that the Constitution directs to be “uniform.”

Academic studies and media articles have documented that Black households are more likely to end up in chapter 13. Although chapter 13 can be a good choice for people who wish to

retain assets they would otherwise lose in a chapter 7, chapter 13 is far more expensive, and it takes years rather than months for a debtor to complete a chapter 13 plan and receive a bankruptcy discharge. Also, more than 50% of chapter 13 debtors do not receive a discharge because they are unable to complete their repayment plan. The racial disparity in chapter choice is deeply troubling, especially given that bankruptcy lawyers must necessarily play a role in the chapter-choice decisions.

For most chapter 10 debtors, relief will be swift. Immediately upon filing a chapter 10 petition, a consumer bankruptcy debtor will face a screen for income and assets reasonably available to pay creditors. Debtors who pass this screen will receive an immediate discharge and be sent on their way. Debtors who have income or assets to pay creditors will have a minimum payment obligation they meet over three years. Debtors will not have to wait to receive a discharge but, if they fail to pay, they will be pursued by the bankruptcy trustee for nonpayment.

A debtor's minimum payment obligation is based on a combination of the value of all nonexempt assets plus the amount by which the debtor's income exceeds 135% of their state's median income for a household of like size. Debtors can satisfy this minimum payment obligation by surrendering nonexempt, unencumbered assets to the bankruptcy trustee or by paying out of future income. These asset and income screens are a reasonable approach to catching the few "can pay" debtors while getting the many more "can't pay" debtors out of the system quickly, efficiently, and cheaply.

The current system often turns on what the debtor spends. In contrast, the new chapter 10 focuses on what the debtor has. By doing so, chapter 10 would get the bankruptcy courts out of the business of making decisions best left to the family. Debtors who want to sacrifice in some areas to meet a payment obligation so their children can attend a private religious school will not have to explain why their decision is reasonable. Debtors with what might be considered nontraditional families will not have to justify the choices they have made about whose expenses belong to the household. Chapter 10 will not be a free ride, but it will recognize the diversity of American households.

Importantly, chapter 10 eliminates unnecessary complexity and useless paperwork and ineffective credit counseling for the vast majority of bankruptcy filers. Although chapter 10 will catch "can pay" debtors, study after study has shown that most every bankruptcy filer arrives in bankruptcy court in dire financial shape, suffering not from bad choices but from bad luck. Under current bankruptcy law, attorneys must document the debtor's income from the past six months even when it is apparent the debtor's income is far below any threshold where it would be legally relevant. These requirements drive up costs to no one's benefit, and understandably lead lawyers to charge more to help with bankruptcy cases because of the increased burdens on their time. The Consumer Bankruptcy Reform Act will allow debtors to establish income with basic documentation and will allow attorneys to rely on that documentation unless it shows that the debtor was within 80% of the relevant threshold. The Consumer Bankruptcy Reform Act also eliminates other unnecessary filing requirements for debtors. In combination with its simpler procedures, chapter 10's streamlined disclosures should lower attorney's fees and provide better access to the bankruptcy system for those who need it.

The Consumer Bankruptcy Reform Act also creates a pathway for people to pay for their attorneys. Because bankruptcy wipes out a filer's obligations, bankruptcy attorneys usually will ask for payment upfront before filing a chapter 7. At present, consumers without the money to afford an attorney might use chapter 13 to pay for that attorney. If so, the cost of their bankruptcy

case will now be closer to the \$3,800 it costs for a typical chapter 13 rather than the \$1,300 it costs for a typical chapter 7. Nevertheless, many people are forced into chapter 13 just to pay for attorney representation, only to have their chapter 13 case fail when they cannot complete the plan payments. The Consumer Bankruptcy Reform Act creates a procedure for debtors to pay their attorneys over time through the bankruptcy plan. Unlike in chapter 13, however, if the debtor is ultimately unable to pay the attorney's fees, the debtor's discharge will not be jeopardized. The Consumer Bankruptcy Reform Act ensures that bankruptcy attorneys are fairly compensated for their services—and thus will continue to provide those services—without letting the fees become an obstacle to access to justice.

The Consumer Bankruptcy Reform Act streamlines the bankruptcy process in other ways. Like current law, it gives a debtor tools to try to save a family home or motor vehicle, but it unpackages those tools into their own separate components. A consumer who is having problems with a home mortgage or an auto loan can use chapter 10 to deal only with that mortgage or auto loan, leaving the rest of the consumer's financial affairs out of the bankruptcy case. By doing so, the Consumer Bankruptcy Reform Act should incentivize a home or auto lender to reach an out-of-court solution for a loan that has fallen behind. If the home or auto lender does not want to cooperate, chapter 10 gives the debtor a tool to deal with that loan only. This streamlined process should further lower costs to consumers by eliminating the need for a full-blown bankruptcy case just to deal with one troubled loan.

The Bankruptcy Code has never given effective tools for renters to try to stay in their residences. Renters have always been required to immediately catch up on all back rent if they want to keep their residence—usually an impossible task. The Consumer Bankruptcy Reform Act remedies that gap by giving renters the ability to stay in a lease and treat several months of rent arrearage like any other debt.

Bankruptcy is also a type of debt collection procedure, and legal scholarship has documented many abusive debt collection practices spilling over into bankruptcy. Many consumer debts themselves were incurred in violation of various federal and state consumer protection laws. The Consumer Bankruptcy Reform Act tackles these abuses head on. It provides for the disallowance of claims if the underlying debt violates consumer financial protection laws, and it enables debtors to obtain compensation from creditors that harass them in violation of the bankruptcy discharge injunction. The Consumer Bankruptcy Reform Act also gives the Consumer Financial Protection Bureau a role in bankruptcy, enabling the Bureau to appear in bankruptcy cases and to create a process for informal resolution of complaints of individual debtors. Additionally, the Consumer Bankruptcy Reform Act provides much needed updating and inflation indexing of the remedial provisions of federal consumer financial protection laws, which date back to the 1970s without inflation adjustment.

As bankruptcy and consumer law scholars, we have focused this letter on the important structural changes the Consumer Bankruptcy Reform Act would make, but we would be remiss not to mention one specific change that will have great benefits for many consumers. The Act would make student loans like any other debt by making them subject to the bankruptcy discharge. Student loan debt is crushing households across America. Money that would be going into purchasing new homes and building new families is instead going to pay overwhelming student loan debt, often from a predatory educational institution that failed to deliver the education it had promised. Again, chapter 10 will not be a free ride. Debtors who can pay will not be able to walk away from their obligations. For debtors who cannot pay, allowing student-

debt relief is not only the right thing to do but also helps the economy by freeing up income for productive investment to help people build their financial lives.

Although we have listed our titles and affiliations below, we speak for ourselves and not our institutions. Similarly, the signatures on this letter should be not be understood as any individual's endorsement of every word of the bill now or after it is amended. The Consumer Bankruptcy Reform Act provides a thoughtful, workable, and comprehensive response to the problems that plague the current consumer bankruptcy system, which is why we support it.

Sincerely,

Richard M. Alderman, Professor Emeritus, Director of the Center for Consumer Law, University of Houston Law Center

Abby Atkinson, Assistant Professor of Law, UC Berkeley School of Law

Kenneth Ayotte, Robert L. Bridges Professor of Law, U.C. Berkeley School of Law

Laura B. Bartell, Professor of Law, Wayne State University Law School

Susan Block-Lieb, Cooper Family Professor in Urban Legal Issues, Fordham Law School

Andrea J. Boyack, Norman R. Pozez Chair of Business and Transactional Law, Professor of Law, Washburn University School of Law

Christopher G. Bradley, Associate Professor of Law, University of Kentucky College of Law

Ralph Brubaker, Carl L. Vacketta Professor of Law, University of Illinois College of Law

Kara J. Bruce, Professor of Law, University of Toledo College of Law

Matthew A. Bruckner, Associate Professor of Law, Howard University School of Law

Mark E. Budnitz, Bobby Lee Cook Professor of Law Emeritus, Georgia State University College of Law

Daniel J. Bussel, Professor of Law, UCLA School of Law

Laura N. Coordes, Associate Professor of Law, Arizona State University Sandra Day O'Connor College of Law

Prentiss Cox, Professor of Law, University of Minnesota Law School Clinic

Susan L. DeJarnatt, Professor of Law, Temple University Beasley School of Law

Diane Lourdes Dick, Professor of Law, Seattle University School of Law

A. Mechele Dickerson, University Distinguished Teaching Professor, Arthur L. Moller Chair in Bankruptcy Law and Practice, The University of Texas at Austin School of Law

Danielle F. D'Onfro, Associate Professor of Law, Washington University Law

Benjamin P. Edwards, Associate Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law

Kate Sablosky Elengold, Assistant Professor of Law, University of North Carolina at Chapel Hill

Kathleen C. Engel, Research Professor, Suffolk University Law School

David Epstein, George E. Allen Chair, University of Richmond Law School

Adam Feibelman, Sumter Davis Marks Professor of Law, Tulane Law School

Pamela Foohey, Professor of Law, Indiana University Maurer School of Law
Judith Fox, Clinical Professor of Law, Notre Dame Law School
Brook E. Gotberg, Professor of Law, J. Reuben Clark Law School, Brigham Young University
Sara S. Greene, Professor of Law, Duke University School of Law
Susan E. Hauser, Professor of Law, North Carolina Central University School of Law
John Patrick Hunt, Professor of Law and Martin Luther King, Jr. Research Scholar, University of California, Davis School of Law (King Hall)
Melissa B. Jacoby, Graham Kenan Professor of Law, University of North Carolina at Chapel Hill
Edward Janger, David M. Barse Professor of Law, Associate Dean for Faculty Research and Scholarship, Brooklyn Law School
Dalié Jiménez, Professor of Law, University of California, Irvine School of Law
Creola Johnson, President's Club Professor of Law, The Ohio State University College of Law
Jason Kilborn, Professor of Law, UIC John Marshall Law School, The University of Illinois at Chicago
Robert M. Lawless, Max L. Rowe Professor of Law, University of Illinois
Adam J. Levitin, Anne Fleming Research Professor and Professor of Law, Georgetown University Law Center
Jonathan C. Lipson, Harold E. Kohn Professor of Law, Temple University—Beasley School of Law
Angela Littwin, Ronald D. Krist Professor of Law, University of Texas at Austin
Lynn M. LoPucki, Security Pacific Bank Distinguished Professor of Law, UCLA School of Law
Stephen J. Lubben, Harvey Washington Wiley Chair in Corporate Governance & Business Ethics, Seton Hall University School of Law
Lois R. Lupica, Visiting Professor of Practice, University of Denver Sturm College of Law, Maine Law Foundation Professor of Law, Emerita, University of Maine School of Law
Joshua C. Macey, Assistant Professor, The University of Chicago Law School
Cathy Lesser Mansfield, Senior Instructor in Law, Case Western Reserve University School of Law
Bruce A. Markell, Professor of Bankruptcy Law and Practice, and Edward Avery Harriman Lecturer in Law, Northwestern Pritzker School of Law
Nathalie Martin, Frederick M. Hart Chair in Consumer and Clinical Law, Associate Dean for Faculty Development, University of New Mexico School of Law
Ted Mermin, Center for Consumer Law & Economic Justice, UC Berkeley School of Law
Juliet M. Moringiello, Professor of Law and Associate Dean for Research and Faculty Development, Widener University Commonwealth Law School
Gary Neustadter, Professor of Law, Emeritus, Santa Clara University School of Law
Christopher K. Odinet, Professor of Law, University of Iowa College of Law
Chrystin Ondersma, Professor of Law, Judge Morris Stern Scholar, Rutgers Law School
Rafael I. Pardo, Robert T. Thompson Professor of Law, Emory University

John A. E. Pottow, John Philip Dawson Collegiate Professor of Law, University of Michigan Law School

Claire Johnson Raba, Clinical Teaching Fellow, Consumer Law Clinic, University of California, Irvine School of Law

Nancy B. Rapoport, Garman Turner Gordon Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas

Robert K. Rasmussen, J. Thomas McCarthy Trustee Chair in Law and Political Science, USC Gould School of Law

David Reiss, Professor of Law, Brooklyn Law School

Alexandra Everhart Sickler, Associate Professor of Law, University of North Dakota School of Law

Lindsey Simon, Assistant Professor of Law, University of Georgia School of Law

Paige Marta Skiba, Economist and Professor of Law, Vanderbilt University

Neil L. Sobol, Professor of Law, Texas A&M University School of Law

Michael D. Sousa, Associate Professor of Law, University of Denver Sturm College of Law

Jeff Sovern, Professor of Law, St. John's University School of Law

Laura Spitz, Professor of Law, University of New Mexico

Charles J. Tabb, Mildred Van Voorhis Jones Chair in Law Emeritus, University of Illinois College of Law, Distinguished Visiting Lecturer, Stetson University College of Law

Frederick Tung, Howard Zhang Faculty Research Scholar and Professor of Law, Boston University School of Law

Stacey L. Tutt, Visiting Clinical Professor, Director of the Consumer Law Clinic, University of California, Irvine School of Law

Rory Van Loo, Associate Professor of Law, Boston University School of Law

Adrian J. Walters, Ralph L. Brill Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology

G. Ray Warner, Professor of Law, St. John's University School of Law

Jay Lawrence Westbrook, Benno C. Schmidt Chair of Business Law, The University of Texas School of Law

Alan White, Professor of Law, City University of New York School of Law

Jack F. Williams, Professor of Law, Georgia State University, College of Law/Middle East Studies Center

Lauren E. Willis, Associate Dean for Research and Professor of Law, Loyola Law School Los Angeles

William J. Woodward, Professor of Law Emeritus, Temple University Beasley School of Law