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## Short-Time Work: An Alternative to Ad Hoc Legislation for Saving Employment During Economic Crises

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## INTRODUCTION

Readers hardly need to be reminded of how the sudden onset of COVID-19 in early 2020 turned the world upside down. Countries closed their borders.<sup>1</sup> Toilet paper became scarce.<sup>2</sup> And hospitals in population-dense areas operated at capacity.<sup>3</sup> The year 2020 also saw devastating wildfires in California and Oregon,<sup>4</sup> an unprecedented election cycle,<sup>5</sup> and mass protests.<sup>6</sup> It was a veritable dumpster fire of a year. Besides worrying about contracting the virus, seeing loved ones die, and suffering from social isolation, many workers in the United States also had to cope with losing their jobs due to the shuttering of businesses.<sup>7</sup>

The United States faced higher rates of infection and unemployment than any other wealthy Organization for Economic Co-operation and

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<sup>1</sup> *Coronavirus: Travel Restrictions, Border Shutdowns by Country*, AL JAZEERA (June 3, 2020), <https://www.aljazeera.com/news/2020/6/3/coronavirus-travel-restrictions-border-shutdowns-by-country> [https://perma.cc/PL6D-PHUG].

<sup>2</sup> Andrew Moore, *How the Coronavirus Created a Toilet Paper Shortage*, N.C. STATE UNIV. (May 19, 2020), <https://cnr.ncsu.edu/news/2020/05/coronavirus-toilet-paper-shortage/> [https://perma.cc/2SFW-FBV3].

<sup>3</sup> Matthew Conlen et al., *How Full Are Hospital I.C.U.s Near You?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/covid-hospitals-near-you.html> [https://perma.cc/E8BN-9XNW].

<sup>4</sup> *California and Oregon 2020 Wildfires in Maps, Graphics and Images*, BBC NEWS (Sept. 18, 2020), <https://www.bbc.com/news/world-us-canada-54180049> [https://perma.cc/XWW3-KDFE].

<sup>5</sup> Sam Gringlas et al., *Step Aside Election 2000: This Year's Election May Be the Most Litigated Yet*, NPR (Sept. 22, 2020, 5:00 AM), <https://www.npr.org/2020/09/22/914431067/step-aside-election-2000-this-years-election-may-be-the-most-litigated-yet> [https://perma.cc/7H2Q-Q634].

<sup>6</sup> Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [https://perma.cc/WF7Q-RDFT].

<sup>7</sup> Ruth Simon, *Covid-19's Toll on U.S. Business? 200,000 Extra Closures in Pandemic's First Year*, WALL ST. J. (Apr. 16, 2021, 9:43 AM), <https://www.wsj.com/articles/covid-19s-toll-on-u-s-business-200-000-extra-closures-in-pandemics-first-year-11618580619> [https://perma.cc/K6VS-GRRW].

Development (OECD)<sup>8</sup> country.<sup>9</sup> To aid small businesses and prevent massive unemployment, the United States enacted the Paycheck Protection Program (PPP) as part of the larger Coronavirus Aid, Relief, and Economic Security (CARES) Act.<sup>10</sup> The PPP offered government-secured, forgivable bank loans to small businesses (businesses with fewer than 500 employees) that used the majority of the loan to maintain and pay their employees.<sup>11</sup> Unfortunately, the PPP largely failed to target the small businesses most in need of support and had little effect on employment rates.<sup>12</sup>

By contrast, countries that relied on “short-time work” (STW)<sup>13</sup> avoided the same degree of devastating employment loss suffered by the United States.<sup>14</sup> Short-time work is a scheme that allows employees to keep their jobs despite lack of demand for their labor.<sup>15</sup> In short-time work countries, employers reduce employees’ hours instead of laying them off, with the government making up the difference in pay.<sup>16</sup> Although around half of the states in the United States have STW programs, these programs are widely considered ineffective because there is low awareness among businesses and poor coordination with the federal government.<sup>17</sup>

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<sup>8</sup> The OECD is an “international organization that works to build better policies for better lives.” Its membership includes the world’s biggest economic players, like the United States, the United Kingdom, Australia, Japan, and many others. *About: Who We Are*, OECD, <https://www.oecd.org/about/> (last visited Mar. 17, 2022).

<sup>9</sup> Harry J. Holzer, *COVID Outcomes Update: Health and Employment Impacts in the US Compared to Other Countries*, BROOKINGS (Sept. 16, 2020), <https://www.brookings.edu/research/covid-outcomes-update-health-and-employment-impacts-in-the-us-compared-to-other-countries/> [<https://perma.cc/6H9W-L2RW>].

<sup>10</sup> 13 C.F.R. § 120 (2020).

<sup>11</sup> *Id.*

<sup>12</sup> See generally João Granja et al., *Did the Paycheck Protection Program Hit the Target* (Nat’l Bureau of Econ. Rsch., Working Paper No. 27095, 2020), [https://www.nber.org/system/files/working\\_papers/w27095/w27095.pdf](https://www.nber.org/system/files/working_papers/w27095/w27095.pdf) [<https://perma.cc/4RWB-SYCN>].

<sup>13</sup> Short-time work is interchangeably referred to as “worksharing” and “short-time compensation” in literature on the subject, but I will use “short-time work” or “STW” in this Comment.

<sup>14</sup> See, e.g., Hailey Becker & Lily Roberts, *Improving the Worksharing System to Absorb Employment Shocks*, CTR. FOR AM. PROGRESS (Nov. 13, 2020), <https://www.americanprogress.org/issues/economy/reports/2020/11/13/492886/improving-worksharing-system-absorb-employment-shocks/> [<https://perma.cc/2HPY-4PLT>]; *OECD Economic Survey: Germany 2020*, OECD, [https://www.oecd-ilibrary.org/economics/oecd-economic-surveys-germany-2020\\_91973c69-en](https://www.oecd-ilibrary.org/economics/oecd-economic-surveys-germany-2020_91973c69-en) [<https://perma.cc/MS3G-4T4N>].

<sup>15</sup> Becker & Roberts, *supra* note 14, at 1.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3.

Countries like Japan and Italy successfully managed employment during COVID-19 using STW programs,<sup>18</sup> but Germany has the paradigmatic STW program, called *Kurzarbeit* (translated as short-term work).<sup>19</sup> *Kurzarbeit* has been in place since the 1920s and has proved effective at saving jobs time and again, most recently during the Great Recession, during which Germany saw relatively little employment loss despite suffering a severe economic downturn.<sup>20</sup>

This Comment argues that the United States should adopt an STW program at the federal level instead of passing ad hoc legislation as economic crises arise. Permanent federal STW legislation would allow the government to respond more quickly to economic crises, save jobs, and maintain employment relationships, signaling to employees that they are not disposable.

Part I details the employment landscape in the United States and abroad in the wake of the COVID-19 recession. This Part also compares employment outcomes during COVID-19 to employment outcomes during the Great Recession beginning in 2008. Part II describes how the Small Business Administration (SBA) administers loans and how the PPP was meant to take advantage of that infrastructure. Using Germany as a model, Part III explains how the PPP and STW programs operate. Part IV evaluates the PPP's efficacy. Part V argues that the United States should adopt a permanent federal STW program and responds to potential objections. Finally, this Comment concludes that the United States could better manage employment loss during economic crises by adopting an STW program.

## I

### EMPLOYMENT LANDSCAPE FOLLOWING THE COVID-19 CRISIS

The COVID-19 pandemic wrought a unique kind of economic crisis. People stopped shopping, traveling, and purchasing leisure services not because they did not have enough cash but to avoid in-person interaction due to the virus.<sup>21</sup> This fact renders much of what we know

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<sup>18</sup> See OECD, *JOB RETENTION SCHEMES DURING THE COVID-19 LOCKDOWN AND BEYOND* (Oct. 12, 2020), [https://read.oecd-ilibrary.org/view/?ref=135\\_135415-6bardplc5q&title=Job-retention-schemes-during-the-COVID-19-lockdown-and-beyond](https://read.oecd-ilibrary.org/view/?ref=135_135415-6bardplc5q&title=Job-retention-schemes-during-the-COVID-19-lockdown-and-beyond) [https://perma.cc/4TZY-6QDE].

<sup>19</sup> *Id.* at 4.

<sup>20</sup> Megan Felter, *Short-Time Compensation: Is Germany's Success with Kurzarbeit an Answer to U.S. Unemployment?*, 35 B.C. INT'L & COMPAR. L. REV. 481, 481 (2012).

<sup>21</sup> See generally Raj Chetty et al., *How Did COVID-19 and Stabilization Policies Affect Spending and Employment? A New Real-Time Economic Tracker Based on Private Sector*

about economic crises somewhat moot and opens the door for a less conventional approach to managing unemployment during times of economic crisis. This Part will highlight the economic consequences of the pandemic in the United States and abroad, emphasizing the differences between this pandemic-related recession and the Great Recession of 2008. These differences will inform a later analysis of the appropriate policy responses to current pandemic-related recessions.

### *A. COVID-19's Economic Effect in the United States*

The COVID-19 recession had drastically disparate effects on different facets of the economy.<sup>22</sup> While unemployment remained high throughout the country, and travel continued to suffer, the housing market boomed, stocks reached “near all-time highs,” and online spending skyrocketed.<sup>23</sup> In effect, low-paying industries that require in-person interactions were devastated while the rest of the economy flourished.<sup>24</sup> The COVID-19 recession contrasts with the Great Recession in which many more business sectors suffered due to structural weaknesses in the lending market that led to a much deeper economic crisis.<sup>25</sup> The Great Recession had nothing to do with fears of contracting a virus; consequently, the economic downturn was not concentrated in industries providing in-person services.

Industries that require in-person interaction, such as hospitality and leisure, had significantly higher unemployment rates than the national average. The hospitality and leisure industries faced a peak

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*Data* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27431, 2020), [https://www.nber.org/system/files/working\\_papers/w27431/w27431.pdf](https://www.nber.org/system/files/working_papers/w27431/w27431.pdf) [<https://perma.cc/9P2R-DKZM>].

<sup>22</sup> See generally Tomaz Cajner et al., *The U.S. Labor Market During the Beginning of the Pandemic Recession* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27159, 2020), [https://www.nber.org/system/files/working\\_papers/w27159/w27159.pdf](https://www.nber.org/system/files/working_papers/w27159/w27159.pdf) [<https://perma.cc/679Q-RZ8U>].

<sup>23</sup> *Tracking America's Recovery*, CNN BUS., <https://www.cnn.com/business/us-economic-recovery-coronavirus> [<https://perma.cc/Z7YX-3J6H>].

<sup>24</sup> See, e.g., Besart Avdiu & Gaurav Nayyar, *When Face-to-Face Interactions Become an Occupational Safety Hazard: Jobs in the Time of COVID-19*, BROOKINGS (Mar. 30, 2020), <https://www.brookings.edu/blog/future-development/2020/03/30/when-face-to-face-interactions-become-an-occupational-hazard-jobs-in-the-time-of-covid-19/> [<https://perma.cc/577X-M7F9>].

<sup>25</sup> See, e.g., Daniel Bukszpan, *Industries Hit Hardest by the Recession*, CNBC (Jan. 29, 2014, 4:44 PM), <https://www.cnbc.com/2012/06/01/Industries-Hit-Hardest-by-the-Recession.html> [<https://perma.cc/S5CY-XCDH>]; *The Recession of 2007-2009*, U.S. BUREAU OF LAB. STATS. (Feb. 2012), <https://www.bls.gov/spotlight/2012/recession/> [<https://perma.cc/GZZ3-5RDP>].

unemployment rate of 16.3%,<sup>26</sup> while the highest average rate across all industries reached only 6.9%.<sup>27</sup> Relatedly, workers in low-income households,<sup>28</sup> young workers, workers with low educational attainment, part-time workers, and racial and ethnic minorities experienced higher rates of unemployment than higher-earning, educated, white employees.<sup>29</sup> These statistics reflect a recession that disproportionately affected already vulnerable low-income households.

Much of the disparate impact can be attributed to the nature of the current recession: in-person services, typically supplied by low-wage employees, were devastated due to fear of contracting the virus.<sup>30</sup> By contrast, during prior recessions spending on services went largely unaffected, whereas spending on durable goods plummeted.<sup>31</sup> This difference is likely due to the fear of contracting the virus instead of reductions in income. Therefore, the people affected by this recession were not the same ones imperiled during the Great Recession, and their needs were correspondingly different.

The largest reduction in U.S. Gross Domestic Product (GDP) during the pandemic was because of reduced consumer spending,<sup>32</sup> further supporting the claim that workers in leisure and hospitality suffered disproportionately from businesses shuttering. High-income households accounted for most of the reduction in spending: they reduced spending by 17%, while low-income households reduced spending by only 4%.<sup>33</sup> The incomes of the wealthy, however, fell relatively little during the COVID-19 recession.<sup>34</sup> Because those with disposable income account for the majority of spending in hospitality and leisure, those sectors were disproportionately affected by the recession.<sup>35</sup> This incongruence

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<sup>26</sup> Peak unemployment during the great recession reached ten percent. *The Recession of 2007-2009*, *supra* note 25.

<sup>27</sup> See generally GENE FALK ET AL., CONG. RSCH. SERV., R46554, UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC (2021), <https://fas.org/sgp/crs/misc/R46554.pdf> [<https://perma.cc/2BS3-W633>].

<sup>28</sup> Cajner et al., *supra* note 22, at 3.

<sup>29</sup> FALK ET AL., *supra* note 27.

<sup>30</sup> Chetty et al., *supra* note 21, at 3.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 3.

<sup>35</sup> A National Bureau of Economic Research (NBER) study found spending and employment did not rise even in states that “opened” their economies, suggesting that the change in spending habits was not because businesses were closed. Cajner et al., *supra* note 22, at 4.

suggests that high-income households reduced consumer spending because of health concerns rather than reductions in income.<sup>36</sup>

Because fewer people went out to restaurants and other service-sector businesses, employment in leisure and hospitality fell by 45%, and employment in retail fell by 30% in late April.<sup>37</sup> Paralleling this job loss by industry, 35% of all workers in the bottom quintile of the wage distribution lost their jobs through April,<sup>38</sup> since low-wage workers are more likely to be concentrated in restaurant, retail, and leisure services and are more likely to work in smaller businesses.<sup>39</sup>

Consequently, small business revenues in the most affluent areas in large cities fell by more than 70% between March and April, compared to 30% in less affluent ZIP codes.<sup>40</sup> Further compounding this effect, overall employment losses for workers in large businesses were less severe than in small businesses, which likely lacked liquidity or the means to pivot to other business modes, such as delivery or online retail.<sup>41</sup> Therefore, the sectors most affected by reductions in spending tended to be small, local businesses that serve customers in their community.<sup>42</sup>

In contrast to these discouraging employment outcomes for low-income workers, wealthier employees largely retained their jobs.<sup>43</sup> Whereas 35% of all workers in the bottom quintile of the wage distribution lost their jobs through April, only 9% of workers in the top quintile suffered job losses.<sup>44</sup> Highly paid jobs were less likely to be eliminated because many do not require in-person interaction. The finance and insurance sector, for instance, saw only a 0.7% increase in job losses between February and May.<sup>45</sup> Indeed, overall income losses were modest because few high-income employees lost their jobs.<sup>46</sup> Further highlighting the disproportionate effect of COVID-19 on in-person services, spending at online retailers increased by 11% over 2019, and spending on luxury goods, such as installation of home pools

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<sup>36</sup> Chetty et al., *supra* note 21, at 3.

<sup>37</sup> Cajner et al., *supra* note 22, at 10.

<sup>38</sup> *Id.* at 3.

<sup>39</sup> *Id.* at 15.

<sup>40</sup> *Id.* at 3.

<sup>41</sup> Chetty et al., *supra* note 21, at 24.

<sup>42</sup> *Id.* at 3.

<sup>43</sup> Cajner et al., *supra* note 22, at 3.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 11.

<sup>46</sup> *Id.* at 15.

and landscaping services, increased slightly in April.<sup>47</sup> Those who had disposable income before the pandemic did not lose their wealth; instead, they channeled money that may otherwise have been spent on in-person services into home improvement and online shopping.

Another difference between the Great Recession and the current recession is the health risk of interacting with the public, regardless of whether stay-at-home orders are in place. Some commentators, mostly on the political right,<sup>48</sup> suggested that “reopening” the economy by lifting mandatory stay-at-home orders would rehabilitate the economy. A study by the National Bureau of Economic Research (NBER), however, shows that spending and employment did not rise more rapidly in states that reopened earlier relative to comparable states that delayed reopening.<sup>49</sup> This finding, in combination with statistics showing that wealthy households are responsible for large reductions in consumer spending, indicates that people are spending less because of health concerns as opposed to reductions in income. This showing should have influenced the type of economic policy with which the government addressed the COVID-19 recession.

While it is unsurprising that low-income workers are particularly vulnerable to economic shocks, the nature of the COVID-19 health crisis disproportionately affected low-income workers, while other sectors of the economy remained largely unchanged or even benefitted from the COVID-19 recession.<sup>50</sup> This employment landscape suggests that economic policy should have focused its assistance on the industries and demographics suffering the most, as other industries carried on business as usual or even benefitted from the COVID-19 economic downturn. Short-time work programs would assist businesses that have to reduce their employees’ hours due to weakened demand. Only those businesses that are suffering from economic uncertainty and weakened demand would receive funds from the government to help pay their employees until the economy recovers. An STW program would effectively target the businesses and industries most in need.

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<sup>47</sup> Chetty et al., *supra* note 21, at 17.

<sup>48</sup> See, e.g., Meg Kinnard, *Republicans Eager to Reopen Economy; Democrats More Cautious*, U.S. NEWS & WORLD REP. (Apr. 24, 2020, 12:37 PM), <https://www.usnews.com/news/politics/articles/2020-04-24/republicans-leap-to-reopen-economy-democrats-more-cautious?context=amp>.

<sup>49</sup> Cajner et al., *supra* note 22, at 4.

<sup>50</sup> *Tracking America’s Recovery*, *supra* note 23.



### ***B. COVID-19's Economic Effect in Germany***

This section will give a brief overview of the economic fallout from COVID-19 in Germany and offer some observations regarding its similarities to the United States' economic downturn.

Historically, Germany's workforce has been less vulnerable to economic crises than the United States' workforce.<sup>51</sup> While peak unemployment in the United States reached 14% in April 2020, Germany saw only 3.8% unemployment in April 2020.<sup>52</sup> The United Kingdom and Japan have experienced even lower unemployment during the same time.<sup>53</sup> STW is a likely factor in these countries' employment successes because employers are able to reduce their employees' hours instead of laying workers off.

Still, those who lost their jobs tended to be low-wage earners and women, who have historically been concentrated in the industries most affected by the pandemic.<sup>54</sup> Women, despite constituting nearly 50% of Germany's workforce, account for nearly 60% of employees in food and accommodation services.<sup>55</sup> Similarly, low-wage earners comprise nearly 70% of Germany's food and accommodation services.<sup>56</sup> Thus, the closing of hotels, restaurants, and other in-person services disproportionately affected low-wage earners and women.

While low-wage earners were disproportionately affected by closures due to COVID-19, Germany's white-collar employees suffered negligible job loss.<sup>57</sup> Those in public service, finance, and insurance saw de minimis job loss,<sup>58</sup> suggesting that Germany's economic downturn, like that of the United States, is due to fear of contracting the virus rather than structural economic weaknesses that affect all aspects of the economy.

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<sup>51</sup> See, e.g., Ulf Rinne & Klaus F. Zimmermann, *Another Economic Miracle? The German Labor Market and the Great Recession*, IZA J. LAB. POL'Y (Oct. 9, 2012), <https://izajolp.springeropen.com/articles/10.1186/2193-9004-1-3#citeas> [<https://perma.cc/2C5E-E26R>].

<sup>52</sup> Mike Bird, *Cash or Jobs: How U.S. Economic Protection Stacks Up Internationally*, WALL ST. J. (Aug. 6, 2020, 6:21 AM), [https://www.wsj.com/articles/cash-or-jobs-how-u-s-economic-protection-stacks-up-internationally-11596709129?mod=searchresults\\_pos3&page=1](https://www.wsj.com/articles/cash-or-jobs-how-u-s-economic-protection-stacks-up-internationally-11596709129?mod=searchresults_pos3&page=1) [<https://perma.cc/UT54-9Q4J>].

<sup>53</sup> *Id.*

<sup>54</sup> *OECD Economic Survey: Germany 2020*, *supra* note 14, at 20, 51.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 52 fig. 1.25.

<sup>57</sup> *Id.* at 26 fig. 1.8.

<sup>58</sup> *Id.*

Similarly, during the Great Recession, Germany experienced very little job loss despite experiencing its largest economic downturn in its postwar history.<sup>59</sup> While the U.S. unemployment rate increased from 5.8% in 2008 to 10% in 2009, Germany's increased by only 0.4% during the same period.<sup>60</sup> Germany's endurance can largely be attributed to its short-term work program called *Kurzarbeit*, while the United States' vulnerability can be explained by politics and greater confidence in the market than in the government.

## II POLICY RESPONSES

The United States' and Germany's economic support policies focus on different aspects of employment. The United States responded to the COVID-19 crisis by providing cash payments and elevated unemployment benefits to citizens; the United States also created the Paycheck Protection Program (PPP), which was meant to support employment but largely failed to meet its goals of keeping Americans employed and supporting small businesses.<sup>61</sup> Germany, by contrast, has focused on maintaining employment relationships in addition to liquidity support and unemployment insurance schemes.<sup>62</sup> These divergent policies reflect different values and have produced starkly contrasting outcomes, which will be discussed later in this Comment.

### *A. United States' Paycheck Protection Program*

Faced with unprecedented unemployment and the shuttering of businesses because of stay-at-home orders, the United States Congress passed the PPP to "provide relief to America's small businesses expeditiously" and to "keep[] workers paid and employed across the United States."<sup>63</sup> These two important goals conflicted with each other, reducing the efficacy of the PPP. First, I will explain the background of the Small Business Administration's (SBA) lending program and its

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<sup>59</sup> Carolyn Look, *Explaining Kurzarbeit, or Saving Jobs the German Way*, BLOOMBERG (Apr. 3, 2020), <https://www.bloomberg.com/news/articles/2020-04-03/how-germany-pays-workers-when-their-work-dries-up-quicktake> [https://perma.cc/JN6G-733K].

<sup>60</sup> Felter, *supra* note 20, at 483.

<sup>61</sup> See generally Granja et al., *supra* note 12; Cajner et al., *supra* note 22.

<sup>62</sup> *OECD Economic Survey: Germany 2020*, *supra* note 14.

<sup>63</sup> 13 C.F.R. § 120 (2020); Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20813 (Apr. 15, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-04-15/pdf/2020-07672.pdf> [https://perma.cc/2X8V-9HHV].

role in administering the PPP. Then I will detail some important critiques of the bill as written.

In normal times, the SBA guarantees loans to small businesses, ensuring favorable loan terms for otherwise ineligible borrowers.<sup>64</sup> To qualify for an SBA loan, borrowers must be unable to get funds from any other financial lender, and they must meet certain size requirements.<sup>65</sup> Congress passed the PPP as sections 1102 and 1106 of the CARES Act and added a new product to the SBA's existing loan program.<sup>66</sup> Congress administered the PPP through the SBA's loan program to take advantage of its existing infrastructure, which it hoped would expedite the loan process to businesses in crisis.<sup>67</sup> The PPP provided a total of \$800 billion in guaranteed forgivable loans over its three cycles.<sup>68</sup>

PPP loans are not subject to the same exacting eligibility standards as regular SBA loans.<sup>69</sup> Only businesses with fewer than 500 employees would be eligible, and the PPP waived the SBA qualification that borrowers could not obtain funds through other means, broadening the pool of potential borrowers.<sup>70</sup> The amount of the loan would depend on payroll costs, and the maximum loan amount was \$10 million.<sup>71</sup> Additionally, borrowers had to certify in "good faith" that "current economic uncertainty ma[de] this loan request necessary to support the ongoing operations of the applicant."<sup>72</sup> Banks would be allowed to rely on the certifications of the borrower to determine eligibility.<sup>73</sup> Eligibility for the loan was, therefore, a very low bar to meet.

Unfortunately, PPP eligibility requirements excluded key segments of the economy. Businesses whose ownership included someone convicted of a felony within the last five years, convicted of a crime of

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<sup>64</sup> See generally *Loans*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/funding-programs/loans> [<https://perma.cc/4JMB-GEST>].

<sup>65</sup> *Id.*

<sup>66</sup> Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. at 20811.

<sup>67</sup> *Id.* at 20812.

<sup>68</sup> Thomas Wade, *Tracker: Paycheck Protection Program Loans*, AM. ACTION F. (June 1, 2021), <https://www.americanactionforum.org/research/tracker-paycheck-protection-program-loans/> [<https://perma.cc/8SAQ-N6NM>].

<sup>69</sup> Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. at 20812.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 20814.

<sup>73</sup> *Id.*

“moral turpitude,” or on probation or parole could not receive a PPP loan.<sup>74</sup> Businesses that provided goods or services of “a prurient sexual nature” also could not receive a PPP loan, although it is unclear what would fall in this category.<sup>75</sup> And finally, businesses that provided goods or services that are federally illegal could not obtain a loan,<sup>76</sup> disqualifying the cannabis industry, even though recreational cannabis is legal in eighteen states and the District of Columbia.<sup>77</sup> Although these failings are beyond the scope of this Comment, it is worth noting that while the PPP was overinclusive, in that many undeserving businesses received loans, it was also underinclusive because certain segments of the population were disqualified from its inception.

The guidelines governing use of the loans have evolved over the life of the program, but generally, for the loan to be forgivable, borrowers have to spend the majority of the loan on maintaining and paying employees.<sup>78</sup> The interest rate on the loans was 1%, and banks would receive various levels of fees based on the size of the loan: 5% on loans less than \$350,000, 3% on loans between \$350,000 and \$2 million, and 1% on loans of \$2 million or more.<sup>79</sup> This fee structure incentivizes banks to grant larger loans: a lender could collect \$17,000 on a \$350,000 loan, or \$100,000 on a \$10 million loan.<sup>80</sup> This incentive structure contributed to larger businesses collecting larger shares of PPP loans.

The PPP’s broadening of eligibility allowed large, wealthy businesses to receive money, drawing criticism. Large corporations like Shake Shack and AutoNation received tens of millions of dollars in forgivable loans due to the low bar for eligibility and a provision in the PPP that tied the size of borrowers to physical location rather than corporation-wide numbers.<sup>81</sup> The PPP functioned how it was designed to; the PPP “was clearly intended to assist a wide range of businesses, specifically including multinational hotel and restaurant chains. The story of the

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<sup>74</sup> *Id.*

<sup>75</sup> 13 C.F.R. § 120.110 (2020).

<sup>76</sup> *Id.*

<sup>77</sup> *Map of Marijuana Legality by State*, DISA, <https://disa.com/map-of-marijuana-legality-by-state> [<https://perma.cc/X9CT-DRS7>].

<sup>78</sup> See 13 C.F.R. § 120 (2020); Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811.

<sup>79</sup> *Id.* at 20813.

<sup>80</sup> Thomas W. Joo & Alex Wheeler, *The “Small Business” Myth of the Paycheck Protection Program*, 54 U.C. DAVIS L. REV. ONLINE 21, 32 (2020).

<sup>81</sup> *Id.* at 34.

PPP is . . . one of normal business conduct . . . .”<sup>82</sup> By loosening eligibility criteria, financially savvy (*read*: successful, wealthy) businesses incorporated the loans into their business models because obtaining free money or low-interest loans makes financial sense.<sup>83</sup>

Despite considering using more exacting criteria, such as including a post hoc revenue test,<sup>84</sup> Steven Mnuchin, a chief architect of the bill, instead “expected the certification requirement to prompt borrowers to ‘self-select appropriately.’”<sup>85</sup> In hindsight, broad eligibility did not work: “[F]irms in the professional, scientific, and technical services industry received a greater share of the PPP loans than accommodation and food services,” despite suffering far less unemployment and financial uncertainty.<sup>86</sup> Large businesses applying for these loans may have been politically unpopular, but it certainly made rational financial sense. The blame should be placed on the lawmakers who considered, but ultimately rejected, more exacting eligibility requirements.<sup>87</sup>

### ***B. Short-Time Work Programs and Germany’s Kurzarbeit***

*Kurzarbeit*, literally translated as “short-term work,”<sup>88</sup> is Germany’s social insurance program whereby employers reduce their employees’ working hours instead of laying them off.<sup>89</sup> During economic downturns, employees share available work for which they are paid their full wages, and the government pays up to 87% of normal hours not worked.<sup>90</sup> This scheme encourages businesses to retain their employees instead of laying them off, avoiding potentially high unemployment numbers.<sup>91</sup> The program has existed since the early

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<sup>82</sup> *Id.* at 23.

<sup>83</sup> *See generally id.*

<sup>84</sup> Under the rejected criteria, the PPP would have given “loan forgiveness only to companies that saw a reduction in revenue over the loan period.” *Id.* at 36.

<sup>85</sup> *Id.*

<sup>86</sup> Chetty et al., *supra* note 21, at 34.

<sup>87</sup> Joo & Wheeler, *supra* note 80.

<sup>88</sup> Greg Rosalsky, *Are We Firing Too Many People in the U.S.?*, NPR: PLANET MONEY (Apr. 7, 2020, 6:31 AM), <https://www.npr.org/sections/money/2020/04/07/828081285/are-we-firing-too-many-people> [<https://perma.cc/WVF5-MNVH>].

<sup>89</sup> *Kurzarbeit: Germany’s Short-Term Work Benefit*, INT’L MONETARY FUND (June 15, 2020), <https://www.imf.org/en/News/Articles/2020/06/11/na061120-kurzarbeit-germanys-short-time-work-benefit>.

<sup>90</sup> *Id.*

<sup>91</sup> Elke Asen, *A German Export for Times of Crises: The Short-Time Work Scheme*, TAX FOUND. (Mar. 25, 2020), <https://taxfoundation.org/kurzarbeit-germany-short-work-subsidy-scheme/> [<https://perma.cc/2CFJ-D5DD>].

1900s but gained fame during the Great Recession when Germany stood out as one of the few countries that did not suffer catastrophic employment losses.<sup>92</sup>

Germany modified its eligibility criteria for *Kurzarbeit* to suit the needs of the COVID-19 crisis.<sup>93</sup> Pre-pandemic, 30% of a business's employees must have faced more than a 10% reduction in income due to economic crisis to trigger the program.<sup>94</sup> The government would pay 60% of employees' lost wages, or 67% for employees with children, for up to 12 months.<sup>95</sup> In response to COVID-19, Germany modified how much employees could receive for how long: now, businesses can register if only 10% of their employees face more than a 10% reduction in income, and the government will supply 80% of employees' wages (87% for employees with children) for up to 21 months.<sup>96</sup> Part-time workers are also eligible.<sup>97</sup>

*Kurzarbeit* was extremely successful during the Great Recession. Germany was the only Group of Seven (G7) country<sup>98</sup> that did not experience significant employment losses in the 2009 recession.<sup>99</sup> While Germany saw only a 0.4% increase in unemployment, the entire European Union experienced a 1.9% increase in unemployment, and the United States' unemployment rate increased by 3.4%.<sup>100</sup> Germany's success inspired Denmark, Norway, Sweden, and the United Kingdom to enact similar programs in hopes of preventing future employment crises.<sup>101</sup> *Kurzarbeit* is not without its detractors. Some economists worry that keeping employees in their prerecession jobs will prevent the market from responding to new and evolving demands, masking

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<sup>92</sup> Guy Chazan & Richard Milne, *Kurzarbeit: A German Export Most of Europe Wants to Buy*, FIN. TIMES (Mar. 22, 2020), <https://www.ft.com/content/927794b2-6b70-11ea-89df-41bea055720b> [<https://perma.cc/S5QK-A8WG>].

<sup>93</sup> *Kurzarbeit*, *supra* note 89.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Asen, *supra* note 91.

<sup>98</sup> The G7 is an "informal forum bringing together the leaders of the world's leading industrial nations." *Role of the G7*, EUR. COMM'N, [https://ec.europa.eu/info/food-farming-fisheries/farming/international-cooperation/international-organisations/g7\\_en](https://ec.europa.eu/info/food-farming-fisheries/farming/international-cooperation/international-organisations/g7_en) [<https://perma.cc/2S6B-6PZC>].

<sup>99</sup> *Id.*

<sup>100</sup> Andreas Crimmann et al., *The German Work-Sharing Scheme: An Instrument for the Crisis*, INT'L LAB. OFF. GENEVA (2010), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_145335.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_145335.pdf) [<https://perma.cc/MMH7-L377>].

<sup>101</sup> Chazan & Milne, *supra* note 92.

“long-lasting impacts as temporary work hiatuses.”<sup>102</sup> The United States’ employment-at-will model, by contrast, allows workers to fill job openings more easily, leading to more market efficiency by allowing businesses that are no longer viable to fail—or so the argument goes.<sup>103</sup>

### III POLICY IMPACTS ON EMPLOYMENT

The PPP largely failed to inhibit unemployment, while STW programs consistently kept workers employed. This section will discuss how the PPP affected employment in the United States and will explain why the PPP was unable to meet its goals. Then, it will examine the impact of STW programs abroad and why they have been successful.

#### *A. Paycheck Protection Program*

The PPP can largely be considered a failure in terms of keeping American workers employed and targeting businesses most in need.<sup>104</sup> An NBER study “find[s] no evidence that funds flowed to areas that were more adversely affected by the economic effects of the pandemic.”<sup>105</sup> The opposite has instead held true: funds flowed to the areas *least* affected, with “the fraction of establishments receiving PPP loans . . . greater in areas with better employment outcomes, fewer COVID-19 related infections and deaths, and less social distancing.”<sup>106</sup>

The PPP clearly failed to hit its target; small businesses struggled to remain open and pay their employees during the COVID-19 economic downturn. Accommodation and food services accounted for half the total decline in employment between February and March 2020, while employment in white-collar jobs accounted for less than 5% of the decline—yet the latter received a greater share of PPP loans.<sup>107</sup> Because the loans were issued on a first-come, first-served basis, the funds were

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<sup>102</sup> See, e.g., Bird, *supra* note 52.

<sup>103</sup> See, e.g., Tom Fairless & David Harrison, *In the COVID-19 Recession, Europe Props up Jobs While the U.S. Props Up Workers*, WALL ST. J. (Aug. 24, 2020), <https://www.wsj.com/articles/in-the-covid-19-recession-europe-props-up-jobs-while-the-u-s-props-up-workers-11598271229> [<https://perma.cc/8TRK-2XCH>].

<sup>104</sup> See Granja et al., *supra* note 12; Cajner et al., *supra* note 22.

<sup>105</sup> Granja et al., *supra* note 12, at 3.

<sup>106</sup> *Id.*

<sup>107</sup> Chetty et al., *supra* note 21, at 34.

quickly depleted,<sup>108</sup> and the large businesses that received the loans faced public outrage.<sup>109</sup> Some surprising recipients of the loans include investment firms that manage billions of dollars, such as Semper Capital Management; major law firms;<sup>110</sup> the Los Angeles Lakers basketball team;<sup>111</sup> businesses with addresses at Trump and Kushner real estate properties;<sup>112</sup> and, ironically, the Ayn Rand Institute,<sup>113</sup> whose figurehead called for the “separation of state and economy.”<sup>114</sup> Public backlash compelled the Lakers team to return its \$4.6 million loan,<sup>115</sup> and other businesses, such as Shake Shack, followed suit.<sup>116</sup>

I suggest two major explanations for this failure: first, the bar for eligibility was so low that large firms that were not in need could take advantage of the loans; second, administering the program through banks instead of directly through the government created accessibility problems and incentivized lenders to prioritize larger loans to existing customers.

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<sup>108</sup> Christopher Neilson et al., *Information Frictions and Access to the Paycheck Protection Program* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27624, 2020), [https://www.nber.org/system/files/working\\_papers/w27624/w27624.pdf](https://www.nber.org/system/files/working_papers/w27624/w27624.pdf) [<https://perma.cc/83HU-V4K7>]; Danielle Kurtzleben, *Small Business Emergency Relief Program Hits \$349 Billion Cap in Less than Two Weeks*, NPR (Apr. 16, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/16/835958069/small-business-emergency-relief-program-hits-349-billion-cap-in-less-than-2-week> [<https://perma.cc/LP7F-CH5P>].

<sup>109</sup> Thomas Franck et al., *As Others Cave, Several Public Companies That Took Small Business Loans Are Not Giving Back the Cash*, NBC (Apr. 27, 2020, 10:09 AM), <https://www.cnbc.com/2020/04/24/public-companies-split-on-whether-to-return-small-business-loans.html> [<https://perma.cc/2GN3-3GQF>].

<sup>110</sup> *Follow the Money*, N.Y. TIMES (Jan. 14, 2021), <https://www.nytimes.com/2020/07/07/business/dealbook/ppp-loan-names.html> [<https://perma.cc/PF7D-KZWW>].

<sup>111</sup> Jim Zarroli, *Even the Los Angeles Lakers Got a PPP Small Business Loan*, NPR: CORONAVIRUS UPDATES (Apr. 27, 2020, 3:47 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/27/846024717/even-the-la-lakers-got-a-ppp-small-business-loan> [<https://perma.cc/G6C8-RYYY>].

<sup>112</sup> Ben Popken & Andrew W. Lehren, *Release of PPP Loan Recipients' Data Reveals Troubling Patterns*, NBC NEWS (Dec. 1, 2020), <https://www.nbcnews.com/business/business-news/release-ppp-loan-recipients-data-reveals-troubling-patterns-n1249629> [<https://perma.cc/Z5D2-RJQH>].

<sup>113</sup> *Follow the Money*, *supra* note 110.

<sup>114</sup> *About Ayn Rand*, AYN RAND ORG., <https://aynrand.org/about/about-ayn-rand/> [<https://perma.cc/DS6K-3AVH>].

<sup>115</sup> Zarroli, *supra* note 111.

<sup>116</sup> Bill Chappell, *Shake Shack Returns \$10 Million Loan to U.S. Program for Small Businesses*, NPR (Apr. 20, 2020, 9:58 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/20/838439215/shake-shack-returns-10-million-loan-to-u-s-program-for-small-businesses> [<https://perma.cc/LM55-2VXC>].



### 1. Eligibility

Eligibility criteria for PPP loans were lax. Banks were expressly allowed to rely on the good faith certifications of businesses that claimed they were facing economic uncertainty. Facing economic uncertainty, however, is always common to all businesses; no business knows what the future will hold even in normal, non-COVID times. The law even acknowledged and encouraged the SBA to “pay special attention to underrepresented and disadvantaged business owners . . . [but] the SBA had failed to issue such guidance.”<sup>117</sup> Consequently, the necessity prong of the PPP did not filter out businesses that applied for the loans merely because it made good business sense as opposed to businesses actually in danger of shuttering.

Regular SBA loans require that borrowers are unable to obtain funds from any other source. The PPP waived this requirement, “clearly impl[y]ing that illiquidity was not a prerequisite” for obtaining a forgivable loan.<sup>118</sup> Therefore, the PPP policy directly conflicted with Steven Mnuchin’s misrepresentations to the public that businesses with other sources of liquidity would not be allowed to take the loan.<sup>119</sup> Senator Marco Rubio, another architect of the bill, dismissed calls for more stringent eligibility requirements by claiming that “additional paperwork would have disproportionately benefitted more sophisticated businesses.”<sup>120</sup> Yet, this is exactly the outcome we are presented with: financially sophisticated businesses took advantage of attractive loans because it made good business sense to do so. Even for businesses with enough liquidity to weather the COVID-19 storm, a low-interest or forgivable loan is always desirable.

### 2. Accessibility

It has been widely reported that minority business owners waited longer for their loans than other borrowers.<sup>121</sup> One possible explanation is that major banks seriously underperformed in granting PPP loans

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<sup>117</sup> Joo & Wheeler, *supra* note 80, at 33.

<sup>118</sup> *Id.* at 37.

<sup>119</sup> *Id.* at 39.

<sup>120</sup> *Id.* at 36.

<sup>121</sup> See, e.g., Joyce M. Rosenberg & Justin Myers, *Minority-Owned Companies Waited Months for Paycheck Protection Loans, Data Shows*, ASSOCIATED PRESS (Jan. 2, 2021), <https://apnews.com/article/technology-small-business-new-york-coronavirus-pandemic-7613e946275f085367b5fc8c9a496aea> [<https://perma.cc/VF9L-KYHC>].

compared to their market share.<sup>122</sup> The United States' top four major banks (JPMorgan Chase, Bank of America, Wells Fargo, and Citibank) alone accounted for 36% of the total number of small business loans but disbursed less than 3% of all PPP loans during the first round of lending.<sup>123</sup> This statistic flies in the face of Congress's reasoning that PPP funds would be distributed faster because they would go through existing lending relationships. One study found that in ZIP Codes with underperforming local banks, businesses received higher portions of PPP loans from nonlocal banks, credit unions, and Fintech lenders<sup>124</sup> that did not have existing SBA loan infrastructure.<sup>125</sup> However, these nontraditional lenders were unable to offset the dislocations from underperforming banks during the first round.<sup>126</sup>

The banks that did participate in PPP lending tended to prioritize loans for larger amounts first, disadvantaging small businesses with fewer employees. While this trend reversed itself during the second round of lending, reporting by the Associated Press showed:

Larger companies with connections to major national or regional banks got priority treatment in the program's initial phase . . . while many smaller businesses said they were turned away because the banks required them to have a checking account, a credit card and a previous loan to be considered.<sup>127</sup>

Had the program been administered through neutral governmental channels, these qualification standards likely would not have prohibited businesses without substantial financial history from securing loans.

A further explanation for the racial disparity in lending practices is that small businesses without employees were not allowed to apply for the loans during the first week of the program. This timing is crucial when we take into account that funds for the first round of PPP loans were exhausted in just two weeks.<sup>128</sup> Disallowing small businesses without employees to apply for the first week was especially devastating for minority business owners. The United States Black Chambers

<sup>122</sup> Granja et al., *supra* note 12.

<sup>123</sup> *Id.* at 4.

<sup>124</sup> Fintech lenders are nontraditional financial technology companies. Julia Kagan, *Financial Technology – Fintech*, INVESTOPEDIA (Aug. 27, 2020), <https://www.investopedia.com/terms/f/fintech.asp> [<https://perma.cc/W6TP-9AV8>].

<sup>125</sup> Granja et al., *supra* note 12, at 18, 21.

<sup>126</sup> *Id.* at 21–22.

<sup>127</sup> Joyce M. Rosenberg, *Head of the Line: Big Companies Got Coronavirus Loans First*, ASSOCIATED PRESS (July 20, 2020), <https://apnews.com/article/38e820a06d0346e7a662d5051926cb37> [<https://perma.cc/A585-G6EF>].

<sup>128</sup> Rosenberg & Myers, *supra* note 121.

reports that of the 2.6 million Black-owned companies in business before the pandemic, 2.1 million were non-employer firms.<sup>129</sup> While this statistic does not help explain why the PPP did not affect employment, it does highlight some of the targeting issues that plagued the PPP.

#### IV

#### THE UNITED STATES SHOULD ADOPT AN STW PROGRAM

The United States should adopt a federally backed STW program as a more equitable and effective means of preserving employment during economic downturns. Doing so would benefit employees, employers, and the government. Further, the passage of STW legislation is politically feasible because it has bipartisan support. Although twenty-six states already have some form of STW program, they are widely considered ineffective due to low awareness and poor coordination with the federal government.<sup>130</sup> Although the ineffectiveness of state-run STW programs is outside the scope of this Comment, the consensus that they are ineffective<sup>131</sup> lends support to the proposition that the United States should have a centralized, federal STW program.

This Part will explain why a permanent federal STW program makes more sense for retaining employment than the PPP. Then, it will consider and respond to potential criticisms.

##### *A. STW Is Good for Employers*

Maintaining employees helps employers avoid losing skilled employees and incurring the costs associated with hiring and training new employees. If employers can keep their employees, they will not have to invest in training new employees, which can be costly.<sup>132</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> See Ezra Klein, *German Worksharing Might Not Work in America*, WASH. POST (Dec. 6, 2011), [https://www.washingtonpost.com/blogs/ezra-klein/post/german-worksharing-might-not-work-in-united-states/2011/12/06/gIQAKv9cZO\\_blog.html](https://www.washingtonpost.com/blogs/ezra-klein/post/german-worksharing-might-not-work-in-united-states/2011/12/06/gIQAKv9cZO_blog.html) [https://perma.cc/7XNX-GE5D]; Becker & Roberts, *supra* note 14; David E. Balducchi & Stephen A. Wandner, *Work Sharing Policy: Power Sharing and Stalemate in American Federalism*, 38 PUBLIUS: J. FEDERALISM 111 (Sept. 29, 2007), <https://academic.oup.com/publius/article/38/1/111/1899975> [https://perma.cc/Z8WN-CF9R].

<sup>131</sup> *Id.*

<sup>132</sup> Tess C. Taylor, *The Costs of Training New Employees, Including Hidden Expenses*, FORBES (June 2, 2017), <https://www.forbes.com/sites/adp/2017/06/02/the-costs-of-training-new-employees-including-hidden-expenses/?sh=33b5f9e7afb2> [https://perma.cc/Z3FH-SL7Z].

Beyond cost, keeping employment relationships intact has additional benefits. Especially in small businesses, employers often develop personal relationships with their employees, which would be harmed by termination of the employment relationship. Further, job security would likely increase employee morale, contributing to higher productivity.<sup>133</sup> Studies have found that job insecurity is correlated with reduced mental and physical health, negatively affecting job performance.<sup>134</sup> One study even found that job insecurity caused workers to pay less attention to safety and to not report injuries.<sup>135</sup>

STW programs give businesses more flexibility to respond to economic crises. Changes in demand could affect staffing needs—if all a business’s employees are retained, it can more flexibly shift employees to address its needs. For example, restaurants that do not have indoor dining because of the virus could give more shifts to hosts dealing with takeout orders while retaining valuable servers who are familiar with the restaurant’s food and culture.<sup>136</sup>

Finally, in contrast to PPP loans, an STW program would allow businesses to close or reduce their hours in response to demand. The PPP gave forgivable loans to businesses that stayed open and paid their employees.<sup>137</sup> But this seems wasteful when there is no demand. In the unique context of COVID-19, keeping businesses open and employees employed at full capacity is not only wasteful; it is also dangerous.<sup>138</sup> STW would have allowed businesses both to respond to decreased demand by reducing their hours and to keep their employees safe from the virus by allowing them to stay home without fear of losing their jobs.

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<sup>133</sup> See Alina Tugend, *Uncertainty About Jobs Has a Ripple Effect*, N.Y. TIMES (May 16, 2014), <https://www.nytimes.com/2014/05/17/your-money/uncertainty-about-jobs-has-a-ripple-effect.html> [<https://perma.cc/LD8K-F9H9>].

<sup>134</sup> *Id.*

<sup>135</sup> See generally Tahira M. Probst et al., *Leader-Member Exchange: Moderating the Health and Safety Outcomes of Job Insecurity*, J. SAFETY RSCH. 47 (2016), <https://reader.elsevier.com/reader/sd/pii/S0022437515000985?token=52D7FD12AE0DCEACFAC955D594B1C204902095DA33CE4A08FE4E4FA66AAA2873B5EECF1085CFBD219DE064BFF6D57510&originRegion=us-east-1&originCreation=20220110195128> [<https://perma.cc/7H3B-XE87>].

<sup>136</sup> Becker & Roberts, *supra* note 14, at 8.

<sup>137</sup> 13 C.F.R. § 120 (2020).

<sup>138</sup> See *Guidance for Businesses and Employers: Plan, Prepare and Respond to Coronavirus Disease 2019*, CDC (Mar. 8, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> [<https://perma.cc/PF5C-8RDF>]; see also *What the Experts Say About COVID-19 Risks*, INFECTIOUS DISEASES SOC’Y OF AM., <https://www.idsociety.org/globalassets/idsa/public-health/covid-19/activity-risk.pdf> [<https://perma.cc/BYH8-F9CQ>].

### ***B. STW Is Good for Employees***

Losing one's job can be devastating. It most obviously affects a person's ability to earn income, but for many it also means the loss of health insurance and a huge blow to self-confidence. By the summer of 2020, an estimated 14.6 million Americans lost their employer-sponsored health care due to job loss.<sup>139</sup> This loss is especially devastating in the midst of a pandemic, where millions have gotten sick, hundreds of thousands have died, and many face further complications after recovering from the virus.

A steady job can bring feelings of stability and safety. Losing a job causes uncertainty about the future. While unemployment benefits help people weather the storm, they are merely a temporary fix.<sup>140</sup> Not only can job loss cause uncertainty about the future, but an employee's skills also languish while she searches for other jobs, and her employment gap could negatively affect her job prospects.<sup>141</sup> When someone is uncertain about her future employment, she is less likely to plan for the future and to contribute to the economy because she has to save her money, anticipating a long period of unemployment.<sup>142</sup>

Finally, maintaining the employment relationship contributes to an employee's feeling of being a valued member of her team. In our current at-will employment landscape, it is very easy for an employer to hire and fire her employees. Showing that the employer values her employees and the work they do could contribute to a stronger and more productive employment relationship.

### ***C. STW Is Good for the Government***

A permanent federal STW program would be easier to administer than unemployment insurance benefits or PPP loans, would have potential bipartisan support in Congress, and would provide stability to a volatile system.

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<sup>139</sup> Becker & Roberts, *supra* note 14, at 7.

<sup>140</sup> Unemployment insurance in the United States lasts for 26 weeks in most states. *See generally State Unemployment Insurance Benefits*, U.S. DEP'T OF LAB., <https://oui.doleta.gov/unemploy/uifactsheet.asp> [<https://perma.cc/Q4JJ-VR5F>].

<sup>141</sup> Jennie E. Brand, *The Far-Reaching Impact of Job Loss and Unemployment*, 41 ANN. REV. SOCIO. 359 (Feb. 11, 2015), <https://www.annualreviews.org/doi/pdf/10.1146/annurev-soc-071913-043237> [<https://perma.cc/R3Y9-NL4L>].

<sup>142</sup> Peter Ganong & Pascal Noel, *How Does Unemployment Affect Consumer Spending?*, CONSUMER FIN. PROT. BUREAU (Jan. 4, 2016), [https://files.consumerfinance.gov/f/documents/060\\_Ganong\\_HowDoesUnemploymentAffectConsumerSpending.pdf](https://files.consumerfinance.gov/f/documents/060_Ganong_HowDoesUnemploymentAffectConsumerSpending.pdf) [<https://perma.cc/3CYS-LHQ5>].

### *1. Administrative Ease*

A federal STW program would be easier to administer than unemployment benefits or PPP loans. First, there would be fewer applicants for STW than for unemployment benefits because employers, rather than individuals, would apply. If fewer people need unemployment benefits because they have retained their jobs through an STW program, then, presumably, fewer individuals will apply for unemployment insurance. Employers, representing a smaller number of individuals, would apply for STW programs to retain employees who would otherwise apply for unemployment insurance benefits.

Second, administering a job-saving program through the federal government would be more equitable than going through private banks. Many of the problems associated with the PPP related to the accessibility of the loan and whom the loan targeted. Access issues are reduced if the federal government, or a state with the backing of the federal government, administers the loans. In doing so, a business's banking history will not interfere with its ability to receive loans. As we saw with the PPP, many major banks underperformed compared to their market share of SBA loans in their respective areas.<sup>143</sup> A central point of access would further level the playing field by avoiding issues associated with underperforming banks. Targeting issues, too, would be eliminated because only those businesses that have experienced economic turmoil would be eligible to receive the loans.

Third, maintaining an STW program would make the government quicker to respond to economic crises because it would administer the program via established channels. In practice, the novelty of the PPP was problematic because it was unclear to whom banks could administer loans and the guidelines frequently changed. An entrenched STW program would provide clarity to beneficiaries and administrators alike.

### *2. Political Support*

Opinions on short-term work regimes tend not to fall along partisan lines. While a government program interfering with the free market redistribution of jobs would, at first blush, appear to offend the American Right's free-market sensibility, this has not been the case. Instead, major Republican players have voiced support for such a program. A top advisor to President Trump published a study in 2014 arguing for the implementation of a short-term work program to prevent

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<sup>143</sup> Granja et al., *supra* note 12, at 4.

long-term unemployment,<sup>144</sup> and Tucker Carlson of Fox News has advocated for adopting a system like Germany's.<sup>145</sup> Democrats similarly, though not surprisingly, support such a centralized, government-run safety net.<sup>146</sup> Bipartisan support for STW programs suggests that STW legislation could be passed in our otherwise fiercely partisan Congress<sup>147</sup>

By contrast, the PPP limped through Congress because of political infighting, preventing a quicker rollout of the program.<sup>148</sup> By administering the PPP through banks, those institutions could take advantage of existing relationships, which should have expedited the process.<sup>149</sup> But an alternative reason for administering the PPP through banks was perhaps a lack of political appetite for a large government program.<sup>150</sup> With the famously pro-small government Republican Party in charge and capable of preventing the passage of legislation it disapproved of, a large government bailout would have been unlikely. Further, as subsequent stimulus bills have demonstrated, congressional infighting has stalled the distribution of funds and the enactment of policies meant to stem the tide of the growing crisis.<sup>151</sup> For example, the second round of cash payments to qualifying households was delayed for weeks by disputes between the parties over what should be included in the broader COVID-19 relief bill.<sup>152</sup>

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<sup>144</sup> Alex MacGillis, *How Germany Saved Its Workforce from Unemployment While Spending Less per Person than the U.S.*, PROPUBLICA (June 3, 2020, 5:00 AM), <https://www.propublica.org/article/how-germany-saved-its-workforce-from-unemployment-while-spending-less-per-person-than-the-u-s> [<https://perma.cc/CMH2-WDSB>].

<sup>145</sup> Tucker Carlson, *Tucker Carlson: If You Want to Help People Weather the Coronavirus Crisis, Save Their Jobs*, FOX NEWS (Mar. 17, 2020), <https://www.foxnews.com/opinion/tucker-carlson-coronavirus-crisis-economy-jobs> [<https://perma.cc/SR9C-3ACD>].

<sup>146</sup> See Patricia Cohen, *This Plan Pays to Avoid Layoffs. Why Don't More Employers Use It?*, N.Y. TIMES (Aug. 27, 2020), <https://www.nytimes.com/2020/08/20/business/economy/jobs-work-sharing-unemployment.html> [<https://perma.cc/X9YD-BTA9>].

<sup>147</sup> Bob Abeshouse, *The Disunited States: How Partisan Politics Is Polarising the US*, AL JAZEERA (Aug. 2, 2019), <https://www.aljazeera.com/features/2019/8/2/the-disunited-states-how-partisan-politics-is-polarising-the-us> [<https://perma.cc/42DB-U4CR>].

<sup>148</sup> See Emily Cochrane & Jim Tankersley, *Senate Approves Aid for Small-Business Loan Program, Hospitals and Testing*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/04/21/us/politics/congress-business-relief-ppp.html> [<https://perma.cc/KP89-ZYJ4>].

<sup>149</sup> See Granja et al., *supra* note 12, at 4.

<sup>150</sup> Joo & Wheeler, *supra* note 80, at 31.

<sup>151</sup> Natalie Andrews, *Lawmakers' Efforts to Restart PPP Stalled by Broader Fight*, WALL ST. J. (Aug. 8, 2020, 10:36 AM), <https://www.wsj.com/articles/lawmakers-efforts-to-restart-ppp-stalled-by-broader-fight-11596897383> [<https://perma.cc/WND5-SEV9>].

<sup>152</sup> *Id.*

### 3. *Stability*

The entire economy and polity are likely to benefit from the stability and certainty that an entrenched STW program would foster. Employees would have cash in their pockets that they could spend on goods and services that would help keep the economy afloat. Employers would be less reactive to uncertain economic landscapes because the STW would assure that, once the economy recovers, their team would remain intact and could return to work sooner.

Stability would also improve the nation's confidence in its elected officials and could engender a sense of pride in the United States government. In times of crisis, when people are being evicted from their homes, starving, dying, losing their jobs, and getting sick, dramatic political infighting is likely to make Americans feel as though their elected officials do not care about them. A quick, predictable response to such traumas is sure to increase faith in our government.

#### ***D. Hurdles for STW in the United States***

Despite STW's benefits, it faces a few hurdles to enactment in the United States. First, STW programs are most effective for temporary crises. Second, the at-will nature of the United States' employment landscape gives employers an easier alternative to keeping their employees around. Third, Congress would likely have to complement an STW program with liquidity support to the businesses adopting it.

##### *1. STW Programs Are Effective Only for Temporary Crises*

One worry associated with STW programs is that employees will be locked into jobs that may become obsolete if the market cannot correct itself.<sup>153</sup> Maintaining movie theater employees, for example, could merely delay job losses if movie theaters fail due to prolonged closures. The at-will nature of the United States employment landscape, by contrast, allows failing businesses to fail and workers to meet new labor needs more quickly when they lose their jobs.

This critique is misguided in several respects. While retaining jobs that may become obsolete is valid for a prolonged recession, the

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<sup>153</sup> See, e.g., Tom Fairless & David Harrison, *In the COVID-19 Recession, Europe Props Up Jobs While the U.S. Props Up Workers*, WALL ST. J. (Aug. 24, 2020, 8:13 AM), <https://www.wsj.com/articles/in-the-covid-19-recession-europe-props-up-jobs-while-the-u-s-props-up-workers-11598271229> [<https://perma.cc/HC8Z-8U8S>].



COVID-19 recession was short-term.<sup>154</sup> Preserving an increasingly obsolete job for a limited time seems unlikely to put the brakes on the economy in any substantial way. Industries might take years to fizzle out and fail. For example, the movie rental industry faded away very slowly as streaming services took over.<sup>155</sup> Maintaining jobs in a potentially failing industry for a limited time far outweighs the theoretical economic consequences complained of. Even if we accept that Germany's short-time work system slows the economy by a year of growth, job security for millions of people is inherently good. For example, declining mental health is well associated with job insecurity and uncertainty, which in turn hurts productivity.<sup>156</sup>

## 2. *The At-Will Nature of United States Employment*

The at-will nature of employment in the United States is distinctive insofar as it makes retaining employees more costly than simply firing them or laying them off. At-will employment means that employees and employers may end the employment relationship at any time for any reason, or no reason at all.<sup>157</sup> Without union backing or an employment contract, an employer could fire her employee simply because she does not like the same kind of music—employers have immense freedom to fire employees. Therefore, terminating an employee in the United States is typically much less costly than in other nations with stronger employee rights, such as Germany.<sup>158</sup> In those settings, an employer typically must have good cause for termination or give notice as defined by statute.<sup>159</sup> Otherwise, the

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<sup>154</sup> See Laurel Wamsley, *How We'll Know When the COVID-19 Crisis Is Over*, NPR (July 10, 2021, 8:04 AM), <https://www.npr.org/2021/07/10/1014374383/covid-19-coronavirus-pandemic-when-its-over> [<https://perma.cc/TQZ2-ZUSE>].

<sup>155</sup> See, e.g., Sarah Whitten, *The Death of the DVD: Why Sales Dropped More than 86% in 13 Years*, CNBC (Nov. 8, 2019, 3:57 PM), <https://www.cnbc.com/2019/11/08/the-death-of-the-dvd-why-sales-dropped-more-than-86percent-in-13-years.html> [<https://perma.cc/K3RL-ASZR>].

<sup>156</sup> See, e.g., Denis Campbell, *Extent of Mental Health Crisis in England at 'Terrifying' Level*, THE GUARDIAN (Apr. 9, 2020, 4:42 AM), <https://www.theguardian.com/uk-news/2021/apr/09/extent-of-mental-health-crisis-in-england-at-terrifying-level> [<https://perma.cc/32UW-UGK2>].

<sup>157</sup> *At-Will Employment – Overview*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 15, 2008), <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> [<https://perma.cc/DE4L-VJ5W>].

<sup>158</sup> Liliane Jung, *National Labour Law Profile: Federal Republic of Germany*, INT'L LAB. ORG. (Apr. 2001), [https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS\\_158899/lang-en/index.htm](https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158899/lang-en/index.htm) [<https://perma.cc/R59E-38X7>].

<sup>159</sup> *Id.*

employer would face penalties, such as reinstatement, back pay, or regular compensation.<sup>160</sup>

While at-will employment does pose challenges to implementing an STW program in the United States, STW would still be a net good and could represent a step toward strengthening employee rights. Although beyond the scope of this Comment, employees are historically vulnerable to the whims of their employers.<sup>161</sup> Unions have corrected this to some extent, but most United States employees do not belong to a union.<sup>162</sup> Strengthening the employment relationship and further protecting employees should be a goal. An STW program that values that relationship would further empower employees and show that their work is valued.

### *3. Businesses Need Liquidity to Pay Their Employees Up Front*

For small businesses implementing an STW program, liquidity is a major issue.<sup>163</sup> The PPP provided liquidity but did not save jobs.<sup>164</sup> An STW program, by contrast, would save jobs but not provide the liquidity needed to pay employees. In many existing STW programs, liquidity is a difficult problem to solve because a business pays an employee's full wages and is then reimbursed for the time that the employee did not actually work. Paying employees up front requires cash on hand that many small-margin businesses, like restaurants, simply do not have.

Ultimately, the success of an STW program hinges on Congress. Congress would need to either (a) pass complimentary legislation providing liquidity support for businesses facing potential layoffs or (b) find another way in which to administer an STW program that does not require employers to pay employees upfront.

## CONCLUSION

The PPP failed to meet its goals. The program did not preserve jobs in any significant way, nor did it reach the small businesses most in

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<sup>160</sup> *Id.*

<sup>161</sup> See generally Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000).

<sup>162</sup> See News Release, Bureau of Labor Statistics, Union Members—2021 (Jan. 20, 2022), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/57SS-B8RL>].

<sup>163</sup> See, e.g., Giulia Giupponi, *Building Effective Short-Time Work Schemes for the COVID-19 Crisis*, VOX EU (Apr. 2, 2020), <https://voxeu.org/article/building-effective-short-time-work-schemes-covid-19-crisis> [<https://perma.cc/DQY2-QEJG>].

<sup>164</sup> See generally Chetty et al., *supra* note 21; Granja et al., *supra* note 12.

need. Furthermore, it had an inequitable and confusing rollout. A permanent, federally backed STW program could more efficiently and equitably keep Americans employed. Maintaining employment relationships through an economic crisis would both cushion the fallout from a severe economic downturn and promote workers' rights by strengthening employment relationships. Hopefully, before the next global pandemic, the United States will have the important social safety net of an STW program to soften the blow.

