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Federal-State Partnership: How the Federal Government Should Better Support Its State Unemployment Insurance Offices in Times of Crisis

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FEDERAL-STATE PARTNERSHIP: HOW THE FEDERAL GOVERNMENT SHOULD BETTER SUPPORT ITS STATE UNEMPLOYMENT INSURANCE OFFICES IN TIMES OF CRISIS

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ABSTRACT

In March 2020, the COVID-19 pandemic caused millions of people to lose their jobs and become dependent on unemployment benefits. State unemployment offices were not prepared for this sudden onslaught of claims. Offices could not increase staffing levels because they were not given money by the federal government to do so. As offices were overwhelmed, a scammer group named Scattered Canary took this opportunity to fraudulently claim millions of dollars from several states. Because the federal government supplies administrative funds to states based on average previous need, the system is not designed to support states' increased needs during sudden economic downturns. This Note argues that the federal government should allot a portion of money within the currently existing Federal Unemployment Fund to create a source of emergency money for states during emergencies. These funds would provide as-requested grants to states to increase staffing more quickly than would otherwise be possible through existing emergency routes. Through the creation of this fund, the federal government would fulfill its part of the federal-state partnership and prevent widespread harm to states during economic crises.

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INTRODUCTION

Millions of people in the United States rely on unemployment benefits to help them survive when they lose their jobs. When these benefits are delayed or put on hold, people are unable to pay their bills, which leads to debt, loss of services such as utilities, and, in some cases, eviction. There is little recourse for those affected by delayed benefits other than to simply wait.

Unemployment claims spiked in the spring of 2020, as more and more people were laid off due to shutdowns caused by the COVID-19 pandemic.[1] As claims increased, a scammer group called Scattered Canary took the opportunity to submit thousands of fraudulent unemployment claims in a handful of states, including Washington.[2] Washington's Employment Security Department said the group had already stolen "hundreds of millions of dollars" by the time the fraud was discovered.[3] The state paused its benefits distribution to sort through its fraudulent claims,[4] leaving thousands of Washington residents who were seeking benefits without this income.[5] Scattered Canary and other fraudulent claimants also targeted most other states.[6]

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1. *See* Jim Brunner, Paul Roberts & Patrick Malone, *How Missed "Red Flags" Helped Nigerian Fraud Ring "Scattered Canary" Bilk Washington's Unemployment System Among Coronavirus Chaos*, SEATTLE TIMES (June 4, 2020, 6:18 PM), https://www.seattletimes.com/seattle-news/times-watchdog/how-missed-red-flags-helped-nigerian-fraud-ring-scattered-canary-bilk-washingtons-unemployment-system-amid-coronavirus-chaos/ [https://perma.cc/S3C8-GT8Z].
2. *Id.*
3. *Id.*
4. *Id.*
5. *See id.*
6. *See Massive Fraud Against State Unemployment Insurance Programs*, U.S. SECRET SERV. (May 14, 2020), https://www.documentcloud.org/documents/6891584-GIOC-Alert-20-027-I-State-Unemployment-Fraud-002.html [https://perma.cc/933Q-ZQMN]; *see also* Lily Hay Newman, *The Nigerian Fraudsters Ripping off the Unemployment System*, WIRED (May 19, 2020, 7:00 AM), https://www.wired.com/story/nigerian-scammers-unemployment-system-scattered-canary/

The Social Security Act of 1935 ("SSA") created an unemployment insurance program run by individual states with federal oversight and subsidy.[7] The Act also created a federal fund within the U.S. Treasury that pays the states to administer their unemployment offices.[8] The administrative funds that states receive are then used to pay employees at unemployment benefit offices.[9] Because the base amount paid to each state is determined through an analysis of the previous year's costs and unemployment demands,[10] the system is poorly set up to handle unforeseeable crises. During sudden unemployment spikes, like the one caused by the COVID-19 economic crisis, unemployment offices throughout the country do not have sufficient staff to handle the surge in benefits requests.

States have few options when they need extra money for administrative costs. They can request more money from the federal government, but this can only be done quarterly, and full payment is not guaranteed.[11] States may also receive money through other trusts within the Federal Reserve, but these funds depend on congressional action.[12] In the face of an immediate crisis, a state's only option is simply to make do with the administrative money currently on hand.

The Federal Unemployment Account (FUA) gives loans to states for the payment of unemployment benefits when states' accounts are overdrawn.[13] In this Note, I propose that FUA allocate a portion of its funding to a second emergency fund, created specifically to help states pay higher administrative costs in the face of a sudden economic crisis. In contrast to how FUA currently distributes emergency funds, this pot of money would be given to the states as grants, not loans (after all, administrative costs are the responsibility of the federal government).[14] These funds would be administered immediately after states request them, upon states meeting certain criteria, and would not depend on congressional action. With this program in place, states would be able

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[https://perma.cc/RRJ9-R34A]; Joe Henke, *State Says Fraud Investigations Slowing Unemployment Benefit Investigations*, 11 ALIVE (July 24, 2020, 7:09 PM), https://www.11alive.com/article/news/health/coronavirus/georgia-unemployment-benefits-delayed-by-fraud-investigations/85-ac844f39-8bd8-4714-b756-9c748bb36b01 [https://perma.cc/HG6T-T3Z6].

7. *Social Security Programs in the United States – Unemployment Insurance*, SOC. SEC. ADMIN., https://www.ssa.gov/policy/docs/progdesc/sspus/unemploy.pdf [https://perma.cc/EZM4-5FL3].

8. 42 U.S.C. § 1101.

9. 2 U.S.C. § 1101(c).

10. U.S. DEP'T OF LAB., UNEMPLOYMENT INSURANCE DIRECTORS' GUIDE 13 (2015), https://oui.doleta.gov/unemploy/docs/ui_directors_Sep2015.pdf [https://perma.cc/9TLU-S7NX] [hereinafter DIRECTORS' GUIDE].

11. *Id.* at 14.

12. *See* 42 U.S.C. § 1105.

13. *See* 42 U.S.C. § 1104(g).

14. 42 U.S.C. § 1101.

to quickly acquire staff during an economic crisis and more efficiently prevent unemployment benefit fraud and slowdowns.

Part I examines the current federal unemployment insurance statute and the Scattered Canary scam. Part II considers how current law underfunds state offices when crises occur and explain why this is a problem. Part II also details and rejects alternative hypotheses for reform. Finally, Part III explains the reforms that the federal government must implement to prevent unemployment insurance fraud and reduce delays in disbursing unemployment benefits.

I. UNEMPLOYMENT INSURANCE LAW AND SCATTERED CANARY

A. *Understaffing Due to Underfunding*

Unemployment benefits in the United States are part of a federal program executed by the individual states. In general, each state must generate the funds necessary to pay unemployment benefits through state unemployment taxes imposed on employers.[15] The federal government supplies funds for administrative costs, such as paying office employees, to states with federally approved unemployment benefits programs.[16] These funds are allocated on a yearly basis, and states are not guaranteed extra funds when they need them.[17]

Section 904 of the SSA authorizes a portion of the Federal Treasury to be allocated to the Unemployment Trust Fund to cover costs apart from direct unemployment benefits payments.[18] Within the Unemployment Trust Fund are many smaller funds. These include the Employment Security Administration Account (ESAA), which funds state administrative costs;[19] the Extended Unemployment Compensation Account (EUCA), which pays benefits to claimants who qualify for extended compensation after their normal state-allocated benefits run out;[20] and the Federal Unemployment Account (FUA), which houses emergency funds that states can borrow when their own funds run out during economic downturns.[21] Each state's individual

15. *See Federal Unemployment Tax*, INTERNAL REVENUE SERV. (Sept. 15, 2021), https://www.irs.gov/individuals/international-taxpayers/federal-unemployment-tax [https://perma.cc/63LY-NG3M].

16. 42 U.S.C. § 1101.

17. DIRECTORS' GUIDE, *supra* note 10, at 13.

18. 42 U.S.C. § 1104(a), (g).

19. 42 U.S.C. § 1101(a).

20. 42 U.S.C. § 1105(a).

21. 42 U.S.C. § 1104(g).

unemployment fund is also housed within the Unemployment Trust Fund.[22]

Under the SSA, ESAA funds the establishment and maintenance of public employment offices.[23] These offices then administer unemployment benefits.[24] These payments go to states that have an unemployment compensation program approved by the Secretary of Labor.[25] The money states receive is determined by several factors, including state population, the expected number of people who will need unemployment benefits, the cost of administering those benefits, and "such other factors" that the Secretary of Labor deems relevant.[26] Additionally, section 503(a)(1) requires state unemployment programs to be "reasonably calculated to insure full payment of employment compensation when due."[27] According to *California Department of Human Resources Development v. Java*, one of the few cases about unemployment insurance ever decided by the Supreme Court, 503(a)(1)'s language means that payment must be disbursed to applicants as soon as administratively possible.[28]

According to the Department of Labor, state workforce agencies must submit a Resource Justification Model each year.[29] This report contains cost data from state unemployment offices for the preceding fiscal year.[30] The Department of Labor then combines this cost information and the states' actual workload from the previous year with unemployment projections for the upcoming year to determine staffing levels for the next year.[31] By multiplying these staffing levels by salary rates, the Department determines the "base allocation" for each state, which is announced in June or July of each fiscal year.[32] When actual workloads exceed these projections, states may apply for grants for "above-base" administrative funding.[33] If approved, based on various factors including the "equitable treatment" of other states asking for assistance, the grants are provided quarterly to the Secretary of the Treasury.[34] But because these "above-base" grants must still fit within the budget set by the Department of Labor at the beginning of the year,

22. 42 U.S.C. § 1104(e).
23. 42 U.S.C. § 1101(c).
24. 42 U.S.C. § 1101(c)(2).
25. 42 U.S.C. § 502(a).
26. *Id.*
27. 42 U.S.C. § 503(a)(1).
28. *See* Cal. Dep't of Hum. Res. Dev. v. Java, 402 U.S. 121, 130 (1971).
29. DIRECTORS' GUIDE, *supra* note 10.
30. *Id.* at 13.
31. *Id.* at 14.
32. *Id.*
33. *Id.*
34. 20 C.F.R. § 601.6 (2020).

there is no guarantee states will receive any funding beyond their projected need.[35]

B. *Unemployment Insurance Fraud in 2020*

When unexpected circumstances cause a sharp increase in unemployment claims, state offices are often left without resources to process the extra claims. Because administrative funding is often set before an economic emergency occurs, allocated federal funds do not allow offices to staff at sufficient levels. Furthermore, extra funding requests are not always granted. This leaves state offices with an inadequate number of staff to handle the influx of claims. As a result, offices experience backups, which can cause them to cut corners to shorten processing times so claimants can receive benefits faster. Although eliminating extra steps (such as checking for fraud) may hasten the process upfront, it can cause extreme slowdowns later if scammers take advantage of the lessened security, as they did in Washington.

This Section details how Washington handled increased unemployment insurance claims in early 2020, during the beginning of the COVID-19 pandemic. To speed up claims processing, the state eliminated certain measures intended to catch fraud.[36] Scammers exploited this practice, which cost the state millions of dollars and delayed relief to Washington residents.[37] This Note uses Washington as an example of a wider phenomenon that affected states across the country during the COVID-19 pandemic.

Seattle, Washington was among the first cities in the United States to be affected by the COVID-19 pandemic. Washington Governor Jay Inslee issued a stay-at-home order for all nonessential workers in March 2020, just days after closing all bars and restaurants in the state.[38] As all nonessential businesses shut down, many people lost their jobs and had to apply for unemployment benefits with the state. Claims quickly rose from 5,000–7,000 per week to "a peak of 181,975 initial claims in a single week," an increase of 2900% over pre-pandemic levels.[39]

The staff in the Washington Employment Security Department (ESD) offices could not keep up with the increased demand, and

35. DIRECTORS' GUIDE, *supra* note 10, at 14 (noting that although states may request extra funds, "the reimbursement rate per FTE may be less than 100% of the base funding rate.").

36. Brunner et al. *supra* note 1.

37. *Id.*

38. Rachel La Corte, *Washington Governor Issues Two-Week Stay-at-Home Order*, AP NEWS (Mar. 23, 2020), https://apnews.com/article/5abcb144b6d0f106436e67c7930a5243 [https://perma.cc/VV4D-9ZFK].

39. Brunner et al., *supra* note 1.

because there was no funding for extra personnel, the offices were quickly overwhelmed.[40] The state suspended the waiting period, which was previously in place to catch fraud, to lower staff workload and expedite payments to the thousands of Washingtonians in need.[41] Although this helped with the overcrowding of the unemployment system, it also meant the offices could no longer efficiently check new benefits applications for fraud.[42] A group called Scattered Canary quickly stepped in to exploit this change in protocol.[43]

Scattered Canary is a fraud ring based in Nigeria.[44] The group began modestly, running scams on Craigslist, but has grown over the past decade and now targets businesses, governments, and individuals on a mass scale.[45] After Congress passed legislation in response to COVID-19 in late March 2020—which expanded the number of people eligible for unemployment benefits, and thus further increased claims—Scattered Canary was able to hide its fraudulent activity amidst the nationwide rise in unemployment benefits requests.[46] Washington was one of many states attacked by Scattered Canary,[47] but the state was hit especially hard because of its unique combination of overrun offices and slashed fraud-catching protocols.

Washington allows its residents to file unemployment claims online using information that is easily accessible to fraudsters who use common identity theft tactics.[48] In this instance, Scattered Canary submitted claims using data gathered from previous data breaches[49] and payroll data theft from March and April.[50] These fraudulent claims were filed before the actual unemployed persons had a chance to do so, or in some cases, for people who had not even lost their jobs.[51] Due to a temporarily suspended waiting period, which was shelved to help expedite the backlog of incoming unemployment claims, Washington's

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40. *Id.*; *see supra* Section I.A.

41. Brunner et al., *supra* note 1. Washington and other state systems usually have a mandatory delay between when a claim is filed and paid in order to give unemployment offices the opportunity to investigate each claim for fraud.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act in late March 2020, approving an extra $600 per week per laid-off worker to combat widespread unemployment resulting from the COVID-19 pandemic. H.R. 748, 116th Cong., 134 Stat. 281, 318 (2020).

47. *See US Unmasks "Scattered Canary," a Nigerian Online Scam Gang*, PAGEONE (May 20, 2020), https://pageone.ng/2020/05/20/us-unmasks-scattered-canary-a-nigerian-online-scam-gang/ [https://perma.cc/TP3M-NYKV] [hereinafter PAGEONE].

48. Brunner et al., *supra* note 1.

49. *Id.*

50. Hay Newman, *supra* note 6.

51. *Id.*

unemployment benefits offices did not realize that the payments were sent to mostly out-of-state bank accounts with no connection to the named beneficiaries.[52]

ESD offices also missed that many of the email addresses provided by the fraudsters were seemingly random and duplicative.[53] Scattered Canary exploited a quirk in how Gmail reads its email addresses to create many unemployment claims under one managing address; the Google algorithm does not recognize periods as characters, so addresses like scatteredcanary@gmail.com and scatter.ed.canar.y@gmail.com both route to the same inbox.[54] By inserting periods at random, Scattered Canary scammers could create multiple unemployment accounts from one email inbox.[55] In one extreme example, 259 separate accounts were set up using variations of the same email address.[56] The offices likely would have been able to catch the repeating email addresses under normal circumstances, but the extreme surge in cases forced the state to cut corners—namely fraud-detection measures—to process its claims.[57]

By May 19, 2020, at least 174 fraudulent claims had been submitted and paid in Washington alone.[58] By the time the state managed to take any action, millions of dollars had been stolen.[59] Eventually, Washington had to pause all unemployment payments in order to dedicate its unemployment office staff to differentiating between real and fraudulent claims.[60] This pause hurt Washingtonians, as it prevented many from collecting their only source of income.[61]

52. *See Massive Fraud Against State Unemployment Insurance Programs*, *supra* note 6.

53. Brunner et al., *supra* note 1.

54. PAGEONE, *supra* note 47.

55. *Id.*

56. Emma Woollacott, *African Cybercriminals Net Millions in Fraudulent COVID-19 Government Claims*, FORBES (May 20, 2020, 6:39 AM), https://www.forbes.com/sites/emmawoollacott/2020/05/20/african-cybercriminals-net-millions-in-fraudulent-covid-19-government-claims/#475a8ab2944f [https://perma.cc/3BUQ-X4G5].

57. *See* Brunner et al., *supra* note 1.

58. Hay Newman, *supra* note 6.

59. *Id.*

60. Jim Brunner & Paul Roberts, *Washington Halts Unemployment Payments for 2 Days After Finding $1.6 Million in Fraudulent Claims amid Coronavirus Pandemic*, SEATTLE TIMES (May 14, 2020, 2:03 PM), https://www.seattletimes.com/business/economy/washington-halts-unemployment-payments-for-two-days-after-finding-1-6-million-in-fraudulent-claims-amid-coronavirus-pandemic/ [https://perma.cc/P3FL-CHHM].

61. *See* Victor Ordonez & Layne Winn, *States Are Running out of Unemployment Money, but Claimants Shouldn't Worry*, ABC NEWS (May 7, 2020, 5:04 AM), https://abcnews.go.com/Business/states-running-unemployment-money-claimants-shouldnt-worry/story?id=70495863 [https://perma.cc/7T6P-KNKQ].

C. *Other Sources of Funding Cannot Help Here*

States like Washington needed emergency administrative funding to increase staffing to keep up with the demands of the COVID-19 pandemic, and states will need these funds during inevitable future economic crises. During the coronavirus pandemic, state offices were forced to cut corners because of insufficient funding, which fueled the fraud crisis. Money allocated through ESAA based on previous averages and projected future need was insufficient because ESAA could not dole out extra funds quickly enough to meet individuals' needs. Unfortunately, other existing funding sources cannot effectively respond to crises such as the COVID-19 pandemic either. Namely, states cannot access EUCA funds in a timely manner because they must wait for appropriation from Congress, and FUA loans can only cover unemployment benefits, not administrative costs.

EUCA provides funds for extended unemployment (a federal program) and serves as a funding source for congressionally sanctioned emergency payments, such as those that were included in the 2020 CARES Act.[62] Withdrawals from EUCA may also be used to cover administrative costs, but only pursuant to an act of Congress.[63] This means that states may use this money to increase staffing levels during crises, but only if Congress passes an act allowing them to do so. In the case of the COVID-19 pandemic, when thousands of state residents were filing new claims each week,[64] even short delays created overwhelming backlogs in the unemployment insurance system.[65] States needed to be able to hire new staff immediately to process the increasing number of new claims.

The other available federal fund, FUA, grants loans to states whose own reserves have been exhausted during times of heightened unemployment.[66] But this money must be used exclusively to pay unemployment benefits; it cannot be used to cover administrative costs, such as hiring new staff.[67] In fact, states jeopardize their resident employers' federal tax credit eligibility if they use the funds to pay administrative costs.[68] Additionally, states could lose federal approval

62. *See generally* 42 U.S.C. § 1105.

63. *See* 42 U.S.C. § 1103(c)(2).

64. *See* KATELIN P. ISAACS & JULIE M. WHITTAKER, CONG. RSCH. SERV., IF11475, UNEMPLOYMENT INSURANCE PROVISIONS IN THE CARES ACT (Apr. 9, 2020), https://crsreports.congress.gov/product/pdf/IF/IF11475 [https://perma.cc/5GDT-EWC6].

65. *See e.g.*, Brunner et al., *supra* note 1.

66. *See* 42 U.S.C. § 1321(a)(1).

67. *See* 42 U.S.C. § 1321(a)(3)(C).

68. *See* U.S. DEP'T OF LAB., UNEMPLOYMENT COMPENSATION: FEDERAL-STATE PARTNERSHIP 3 (2019), https://oui.doleta.gov/unemploy/pdf/partnership.pdf [https://perma.cc/QWA5-QPS6].

of their own state unemployment taxes.[69] This means that FUA funds are off-limits, regardless of administrative need.

States can request loans from FUA during periods of prolonged unemployment,[70] but the structure of the federal unemployment tax prevents states from using FUA funds for their administrative needs. The account is funded almost entirely through the Federal Unemployment Tax Act (FUTA).[71] FUTA generates its funds by placing a 6% tax on the first $7,000 earned by each employee.[72] States also may have their own unemployment taxes.[73] Employers operating in states with an additional state unemployment tax may have up to 5.4 percentage points removed from the federal tax to accommodate state taxes.[74] This means that, in states with their own unemployment taxes, the effective federal tax rate shrinks to 0.6% "or a maximum [tax] of $42 per worker" per year.[75] This tax is imposed directly on employers, not deducted from employees' wages.[76]

States cannot use FUA funds for administrative spending without risking these federal tax credits. For an employer to be eligible for the "normal" tax credits (of up to 5.4 percentage points), the unemployment insurance law in the employer's state must satisfy several requirements.[77] One of these requirements mandates that "[a]ll of the money withdrawn from the state unemployment trust fund account must be used solely to pay compensation, exclusive of expenses for administration . . . ."[78] Consequently, states cannot use FUA funds to supplement their administrative costs in times of crisis without risking state employers' eligibility for FUTA tax credits.

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69. *See* 26 U.S.C. § 3304(a) (stating that the Secretary of Labor will approve state unemployment insurance programs that meet certain criteria, including that "all money withdrawn from the unemployment fund . . . shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration," implying that state plans which do not meet this criterion will not be approved).

70. *See generally* JULIE M. WHITTAKER, CONG. RSCH. SERV., RS22954, THE UNEMPLOYMENT TRUST FUND (UTF): STATE INSOLVENCY AND FEDERAL LOANS TO STATES (2020), https://crsreports.congress.gov/product/pdf/RS/RS22954 [https://perma.cc/2JHJ-9WVG].

71. *See id.* at 1. FUA primarily receives funding through transfers from EUCA, which receives twenty percent of all collected FUTA money every month. *See id.* at 3.

72. 26 U.S.C. § 3301.

73. *See* 42 U.S.C. § 3304.

74. WHITTAKER, *supra* note 70, at 2.

75. *Id.*

76. *Id.*

77. U.S. DEP'T OF LAB., *supra* note 68, at 3.

78. *Id.*

D. *Summary*

The SSA created an unemployment insurance program which requires states to submit their policies for approval in exchange for administrative funding.[79] States receive administrative funding based on their previous year's expenses.[80] During crises like the COVID-19 pandemic, state offices must rely on their base funding unless the Department of Labor grants excess money or Congress enacts a law providing emergency funding.[81] In short, state unemployment benefit offices must manage more work with the same amount of staff during crises because of inadequate emergency funding.

II. THE CURRENT SYSTEM DOES NOT WORK

The federal government's yearly allocation of administrative funding leaves states with too few resources when unemployment claims suddenly spike, leading to delays in unemployment insurance payments. During the COVID-19 pandemic, scammers fraudulently claimed millions of dollars in unemployment benefits by taking advantage of overwhelmed unemployment offices that were forced to cut corners to keep up with claims.[82] This created more delays as offices had to re-check their work. In turn, many residents lost their only source of income, and some even faced the possibility of paying back previously received benefits.

To fix this problem, the federal government should create a new fund within FUA to give states emergency administrative funding during crises like the COVID-19 pandemic. Currently available solutions will not work because of loopholes in the SSA and potential economic ramifications, such as causing additional layoffs. This Part explains why the current federal payment structure is ill-equipped to handle situations like sudden economic crises, the effects this structure can have on state residents, and why other solutions cannot fix this problem.

A. *The Problem*

When the COVID-19 pandemic began, ESD offices were staffed to handle their average weekly workload of 5,000–7,000 new

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79. *Id.* at 5.
80. DIRECTORS' GUIDE, *supra* note 10, at 14.
81. *See supra* Section I.C.
82. Brunner et al., *supra* note 1.

unemployment claims.[83] As claims skyrocketed, peaking at 181,975 in one week, the offices became overwhelmed.[84] By the end of April, the state had received around 860,000 new claims, and staff simply could not keep up.[85]

The problem ESD offices faced is not unique to Washington. It is inherent in the staffing model that states are forced to adopt because of the way the federal government allocates money. States are inadequately prepared to respond to crises because unemployment funding is allocated based on average need and may not increase when new unemployment claims unexpectedly and rapidly rise,[86] as they do during economic downturns. The Department of Labor's response to processing backlogs created by poor economic conditions has been criticized since 1996.[87] Legal professor and scholar Jerry Mashaw notes that "funding tends to be inadequate to process claims in accordance with timeliness demands and that, because of the structure of the funding mechanism, funding always lags behind workload rather than anticipating it."[88]

When Washington first paused payments to investigate the rising fraud, it had just begun to hire new employees to help process the incoming claims.[89] This likely means that, for the first two months of the pandemic, the state was processing more unemployment claims than it would have during a normal year but with the same number of staff.

Other states faced staffing shortages and eventual slowdowns in payments because they lacked sufficient administrative funding. For example, as unemployment claims skyrocketed in Michigan during the second quarter of 2020, unemployment offices could not keep up.[90] Clinical Professor Rachael Kohl stated that, "[b]ecause unemployment exploded overnight . . . state agencies started this crisis extremely understaffed."[91] Michigan began the pandemic with approximately 635

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83. *Id.*

84. *Id.*

85. *Id.*

86. *See* DIRECTORS' GUIDE, *supra* note 10, at 13–14.

87. Jerry L. Mashaw, *Unemployment Compensation: Continuity, Change, and the Prospects for Reform*, 29 U. MICH. J.L. REFORM 1, 19 (1996) (discussing a study on the timelines of unemployment claims-handling across the country).

88. *Id.*

89. Connie Thompson, *State Boosts Efforts to Stop Unemployment Claim Impostors Trying to Cash in*, KOMO NEWS (May 14, 2020), https://komonews.com/news/consumer/state-boosts-efforts-to-stop-unemployment-claim-impostors-trying-to-cash-in [https://perma.cc/K4RR-XR97].

90. Meredith Bruckner, *U-M Law Professor Explains Unemployment Challenges in Michigan During Pandemic*, ALL ABOUT ANN ARBOR (June 8, 2020, 12:29 PM), https://www.clickondetroit.com/all-about-ann-arbor/2020/06/08/u-m-law-professor-explains-unemployment-challenges-in-michigan-during-pandemic/ [https://perma.cc/2E7M-LRVN].

91. *Id.*

unemployment agency employees.[92] Normally, these 635 employees process around 300,000 claims annually.[93] But in 2020, the offices soon were processing over 300,000 new claims *per week*, amounting to 1.8 million new claims by June.[94] As the offices struggled to keep up, unemployed workers faced roadblocks and delays while trying to access their much-needed benefits.[95] Michigan, like Washington, eventually interrupted payments to hundreds of thousands of people to investigate fraud.[96]

Supplying administrative funding based on a state's recent needs would work perfectly if the United States' economy were static. If the stock market, unemployment rates, and the broader economy were constant, or even on a steady upward or downward trajectory, it would make sense to predict states' future needs based on the past. But the U.S. economy ebbs and flows. There have been fourteen recessions since the Great Depression,[97] and most had a fairly sudden onset.[98] Unemployment offices have struggled to keep up with demand during both the Great Recession in 2008 and the 2020 pandemic,[99] yet the government continues to fund offices in a way that ignores the realities of the cyclical economy.

Because economic downturns are inevitable, the structure of the unemployment insurance program should account for economic crises. The current system overworks employees, which creates backlogs in claims, delays in payment, and opportunities for fraud. For example, Washington lost millions of dollars to fraud in 2020.[100] Perhaps more importantly, delays in payment because of fraud created difficult economic circumstances for many unemployed people. Between March and May of 2020, about one million people filed new unemployment claims in Washington.[101] Half of these people were still waiting for money in May.[102]

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92. *Id.*

93. *See id.*

94. *Id.*

95. *Id.*

96. Matt Durr, *340,000 Michigan Unemployment Accounts Flagged for Potential Fraud*, MLIVE (June 5, 2020, 5:43 PM), https://www.mlive.com/public-interest/2020/06/340000-michigan-unemployment-accounts-flagged-for-potential-fraud.html [https://perma.cc/J8GY-Q8KK].

97. Tom Huddleston, *How Many Recessions You've Actually Lived Through and What Happened in Every One*, CNBC (Apr. 9, 2020, 1:29 PM), https://www.cnbc.com/2020/04/09/what-happened-in-every-us-recession-since-the-great-depression.html [https://perma.cc/Z5V3-93G8].

98. *See id.* (detailing the bursting "bubbles" or similar circumstances which have led to most recent recessions).

99. Ordonez & Winn, *supra* note 61.

100. Brunner et al., *supra* note 1.

101. Linzi Sheldon, *State Pauses Unemployment Payments to Deal with Fraudsters*, KIRO 7 NEWS (May 14, 2020, 11:55 AM), https://www.kiro7.com/news/local/washingtons-unemployment-system-sees-spike-impostors/6472HVRTLRGLDOXKNT45AB5YDE/#:~:text=The%20Washington%

Because of the nature of the economy and the structure of the unemployment benefits program, backups in processing happen exactly when people need money most. As Professor Mashaw notes, "when pressures build up on the system because of poor economic conditions, timeliness in performance slips at precisely the time that delay is most costly."[103] The SSA does nothing to protect those who are simply left waiting for payment.[104] As a result, most claimants can do nothing but wait and hope for the best when unemployment offices are backed up.

For Washington unemployment offices, inadequate resources during the COVID-19 pandemic created a backlog of claims, which led to delays in payment as the offices dealt with a surge in applications and a fraud crisis. Because more than seventy-five percent of Americans live paycheck-to-paycheck,[105] these delays had a terrible effect on many workers' ability to pay their bills. Seattle residents Silvia Muhammad and her husband were unemployed in the early days of the pandemic but were lucky enough to receive timely payments.[106] Then, Silvia's husband received notice from ESD that he might have to pay back all of his benefits because the state, in its hurry to catch fraud, erroneously determined that his application was fraudulent.[107] This false determination not only jeopardized Silvia's husband's previously paid benefits, but also halted subsequent payments.[108] The couple struggled to pay rent and other bills without unemployment benefits.[109] Daniella Nichols waited three weeks to receive unemployment benefits when Washington paused its unemployment payments.[110] A mother of four, Daniella was forced to "sell things from my home, including my son's car," just so she could pay her bills while she waited for support from the state.[111] In both cases, Washington residents were adversely affected because the state's lack of resources allowed fraudulent claims to slip through the cracks, creating delays in payments as ESD offices worked to catch all of the fraud.

20Employment%20Security%20Department%20will%20pause%20unemployment,to%20stop%20fraudsters%20who%20are%20abusing%20the%20system [https://perma.cc/4SVW-P3MY].

102. *Id*.

103. Mashaw, *supra* note 87.

104. *See* 42 U.S.C. § 503(a).

105. Jessica Dickler, *Most Americans Live Paycheck to Paycheck*, CNBC (Aug. 24, 2017, 8:17 AM) https://www.cnbc.com/2017/08/24/most-americans-live-paycheck-to-paycheck.html#:~:text=Seventy-eight%20percent%20of%20full-time%20workers%20said%20they%20live,from%2068%20percent%20a%20year%20ago,%20CareerBuilder%20said [https://perma.cc/UVH6-LU8C].

106. Brunner et al., *supra* note 1.

107. *Id.*

108. *Id.*

109. *Id.*

110. Sheldon, *supra* note 101.

111. *Id.*

B. *The Existing System Does Not Work*

An obvious solution to problems associated with underfunding unemployment benefits offices would be to simply allocate more federal funding to these offices so they can maintain higher levels of staffing, even during non-emergency times. But this would be inefficient. Moreover, this solution ignores the fact that the current system does work, but only when the economy is relatively stable. Immediate access to extra funds and staffing is required only when unemployment levels increase suddenly and substantially. Although these sudden increases happen often enough to warrant some sort of support mechanism, increasing staffing levels altogether would be excessive.

The best way to protect unemployed workers during times of widespread economic distress is to create a separate pot of money, namely a federal emergency fund within FUA, from which administrative grants to the states can be issued. States can get extra funding in the current system, but they cannot receive money quickly enough to prevent widespread harm during sudden emergencies. The rest of this Part introduces, analyzes, and rejects arguments that suggest impractical solutions or attempt to weaken the case for a new emergency fund.

1. Federal Law in Crisis

Section 303(a)(1) of the SSA mandates that states must pay benefits "when due" to unemployed workers.[112] On its face, this statute seems like it could provide a simple answer to the problem at hand: since states are federally required to pay unemployment insurance promptly, we need only demand that states follow the law.

This solution would not help states like Washington in 2020 for two reasons. First, as recognized in *Java*, the SSA's core purpose was for "workers [to] be paid their benefits at the earliest point that was administratively feasible."[113] But it simply *was not* administratively feasible to distribute unemployment benefits in a timelier manner in spring 2020.

Second, payments are only required *when due*, or when allowed, under state law, according to the *Java* Court.[114] To comply with the statute, states must have methods of administration that reasonably

112. 42 U.S.C. § 503(a)(1).

113. Cal. Dep't of Hum. Res. Dev. v. Java, 402 U.S. 121, 130 (1971).

114. Gerard Hildebrand, *Federal Law Requirements for the Federal-State Unemployment Compensation System: Interpretation and Application*, 29 U. MICH. J.L. REFORM 527, 538 (1996).

ensure the payment of unemployment benefits to those eligible under state law.[115] Those submitting fraudulent claims are not eligible for payments under law, so postponing payment to investigate potential fraud does not run afoul of the *Java* Court's holding. Because the presence of so much unemployment insurance fraud throughout Washington meant that the claims were potentially *not* due under the state's laws, the delays caused by investigations likely did not violate the federal statute. Even if courts were to hold that states like Washington violated the SSA by delaying payments, it is likely that any legal challenge to the delays would take far longer to settle than it would to receive payment.

One could also argue that the above reasoning only applies when a state is overwhelmed by the number of fraud investigations it must undertake, and therefore that it is too narrow to be an overarching critique of the "when due" provision. However, there is also a glaring hole in the way the "when due" provision is enforced.

The federal government enforces the SSA's "when due" provision counterproductively, by blocking federal funding to states yet punishing states that cannot pay unemployment benefits in a timely manner due to inadequate staffing. In other words, the federal government's main avenue to encourage unemployment offices to issue timely payments is to cut off administrative funding to states that do not do so.[116] Although the threat of lost funding is meant to incentivize states to create functional and efficient unemployment programs (and to prevent states from arbitrarily denying benefits to unemployed workers), it is ineffective when payments are not being made *because of* a lack of administrative funding. For example, the threat of reduced funding would have been useless during the COVID-19 pandemic because state unemployment offices were already underfunded—and therefore understaffed—and could not comply with the "when due" provision. Removing all federal funding would only make this problem worse, and states would be unable to do much of anything to try to fix backlogs by themselves.

In summary, the "when due" provision of the SSA is inapt in the context of sudden economic downturns that create spikes in unemployment claims. Even when states cannot process payments that are promptly "due" because of lack of funding, the federal government's only means of enforcing the provision—namely, withholding federal funding—cannot prevent delays the way it may in other contexts.

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115. *Id.*

116. Sharon M. Dietrich & Cynthia L. Rice, *Timeliness in the Unemployment Compensation Appeals Process: The Need for Increased Federal Oversight*, 29 U. MICH. J.L. REFORM 235, 241 (1996).

2. Current Systems Are Too Slow

Section 903(c)(2) of the SSA allows states to withdraw emergency funds from EUCA and use a portion for administrative purposes.[117] This provision provides states with some recourse when unemployment claims suddenly spike, and it seems like it could solve the underfunding problem by changing the way federal administrative funding is dispersed to states. States would receive money based on quarterly averages and have the added security of EUCA grants when times get tough.

Unfortunately, states can only access EUCA funds pursuant to an act of Congress, such as the CARES Act. Congressional action is slow; the bills signed by the president in 2020 spent, on average, more than 380 days moving through Congress before they became law.[118] By these standards, the CARES Act passed relatively quickly, but it still did not provide immediate relief. Unemployment numbers had been spiking for weeks by the time that the CARES Act became law in late March.[119] Additionally, many states struggled to understand and implement the CARES Act for a month or more after it had been enacted, further hindering state responses to the nationwide unemployment spike.[120] Because unemployment insurance is so complicated, it can take up to six weeks to train new staff.[121] It therefore is imperative to begin hiring as soon as it becomes apparent that more staff will be needed. The current system requiring a congressional mandate forces state offices to wait for funds that would allow hiring to happen.

Alternatively, states can supplement their unemployment insurance funding with money from FEMA's Disaster Relief Fund, but acquiring such funding often takes too long to cover emergency staffing. For example, President Trump authorized FEMA to supply grants to states "to make supplemental lost wages payments to those receiving unemployment insurance compensation," but this occurred in August 2020, five months after most states first saw spikes in

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117. 42 U.S.C. § 1103(c)(2).

118. *See Advanced Search for Legislation*, GOVTRACK (Apr. 14, 2021) https://www.govtrack.us/congress/bills/browse?congress=116&status=28,29,32,33 [https://perma.cc/D2Q3-HFJL] (listing the introduction and enactment dates of every law passed by the 116th Congress).

119. ISAACS & WHITTAKER, *supra* note 64.

120. *See* MICHIGAN LAW WORKERS' RIGHTS CLINIC, LESSONS FROM A PANDEMIC: THE NEED FOR STATUTORY REFORM TO MICHIGAN'S UNEMPLOYMENT SYSTEM 9 (2021) http://sites.fordschool.umich.edu/poverty2021/files/2021/05/Statutory-Reform-to-Michigans-Unemployment-System-UM-Workers-Rights-Clinic.pdf [https://perma.cc/7PBW-RBYP] (awarding lower scores to states that took more than a month to implement the CARES Act).

121. Bruckner, *supra* note 90.

claims.[122] Additionally, only five percent of those funds could go towards states' administrative costs.[123] The problem with FEMA funding, much like with EUCA funding, is that states can only receive it following presidential action.[124] The president can, of course, issue unilateral decisions quickly. But relying on presidential action creates uncertainty and can cause delays when the president fails to act swiftly, which happened during the COVID-19 pandemic. Until the president approves the use of FEMA funds to fill unemployment funding gaps, states must do without.

Gerard Hildebrand notes that "purely federal system[s]," such as the EUCA and FEMA funding processes, "necessitate decisions at the outset,"[125] or generic decision-making that does not address state-specific needs. Hildebrand states that "[a]s a result, mistakes in a federal plan would have wider repercussions than mistakes under a federal-state plan,"[126] because the latter allows narrower tailoring. In the context of unemployment insurance, every decision that is left to Congress or the president affects unemployed workers throughout the country. Congress's slow bicameralism and President Trump's unwillingness to act until five months into the pandemic[127] forced millions of people to wait for the unemployment benefits they so desperately needed.

In contrast, a new fund that gives states access to additional funding without a federal act could bridge emergency funding gaps almost immediately. During the 2020 pandemic, states like Washington could have used resources from such a fund to increase their staff just days after the spikes in unemployment claims became apparent. New staff could have processed claims weeks earlier, and unemployed workers could have had money in their pockets much sooner than was possible under the existing regime.

Of course, it takes about six weeks to train new staff,[128] so there would still be a waiting period before unemployment offices could be fully staffed. But a new pot of funding available by request during

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122. *Lost Wages Supplemental Payment Assistance Guidelines*, FEMA (Mar. 5, 2021) https://www.fema.gov/disasters/coronavirus/governments/supplemental-payments-lost-wages-guidelines [https://perma.cc/D9BZ-VDBV].

123. 42. U.S.C. § 5174(f)(1)(B).

124. *Id.*

125. Hildebrand, *supra* note 114, at 529–30.

126. *Id.* at 530.

127. *See* Memorandum from President Donald J. Trump on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019 to the Sec'y of Lab., the Sec'y of Homeland Sec. & the Adm'r of the Fed. Emergency Mgmt. Agency (Aug. 8, 2020) https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-authorizing-needs-assistance-program-major-disaster-declarations-related-coronavirus-disease-2019/ [https://perma.cc/693N-G6XG] (showing the Presidential memorandum dated as August 8, 2020, five months into the pandemic).

128. Bruckner, *supra* note 90.

emergencies would allow state offices to start training staff as soon as unemployment claims begin to skyrocket instead of after congressional or presidential action, which would help workers get the relief they need when they need it.

3. Borrowing Can Cause Problems

An alternative reform would allow states to borrow extra funds from FUA to help cover administrative costs during emergencies. This would mirror the program that allows states to borrow money when they have too few funds to pay their unemployment claims. It would be easy to implement, as the infrastructure already exists, and the federal government would not lose any money in the long term. But this reform would be unfair to the states, which are entitled to federal administrative funding, not federal loans, and it could lead to layoffs and hurtful state reforms after an economic crisis subsides. Additionally, FUA is effectively limitless because it is backed by the Federal Treasury,[129] so requiring states to pay back these administrative funds is unnecessary.

This alternative reform also raises questions about fairness. As stated in the SSA, the U.S. unemployment insurance program is a federal-state partnership; the states create funds to pay workers' unemployment claims,[130] and the federal government covers administrative costs.[131] Administrative funding levels are determined by the federal government, and although states can request extra money, there is no guarantee that they will get it.[132] Suddenly requiring states to pay back the federal government because the federal government underestimated their needs seems incredibly unfair.

More importantly, states have to pay back FUA loans to the federal government *with interest*.[133] When states are required to pay back FUA loans, they often "pass a bill that increases taxes and cuts payments."[134] This means limiting which unemployment benefits are

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129. JULIE M. WHITTAKER, CONG. RSCH. SERV., RS22077, UNEMPLOYMENT COMPENSATION (UC) AND THE UNEMPLOYMENT TRUST FUND (UTF): FUNDING UC BENEFITS 3 (2016), https://greenbook-waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/RS22077%20-%20Unemployment%20Compensation%20and%20UTF%20-%20Funding%20UC%20Benefits_1.pdf#:~:text=Title%20XII%20of%20the%20SSA%20allows%20the%20FUA,Treasury%20and%20the%20federal%20debt%20would%20be%20decreased. [https://perma.cc/E3DH-Z3BK].

130. *See Federal Unemployment Tax*, *supra* note 15.

131. 42 U.S.C. § 1101.

132. DIRECTORS' GUIDE, *supra* note 10, at 14.

133. DIRECTORS' GUIDE, *supra* note 10, at 10. *See also* Bruckner, *supra* note 90. Professor Kohl mentions that to prepare for the next recession, the federal government should offer "noninterest" and "interest-free" loans to states.

134. Ordonez & Winn, *supra* note 61.

available to workers and other cost-cutting measures that hurt states' unemployed populations.

For example, Michigan owed the federal government almost $4 billion following the Great Recession.[135] Michigan also paid out around $200 million in "overpayments" during the crisis.[136] The state's fix was to introduce the Michigan Integrated Data Automated System (MiDAS), a computer system designed to automatically catch more fraud than State employees had during the recession.[137] Michigan's goal was to lower its expenses by automating and thereby enhancing its fraud-catching system, so the State could pay back its debt to the federal government.[138] Unfortunately, MiDAS ended up erroneously flagging many requests as fraudulent, and unemployed workers across the state unfairly lost their payments and were precluded from receiving more until they paid back claims the system considered fraudulent.[139] Other workers, like Lindsay Perry and her husband, were fined astronomical sums of money as punishment for receiving "fraudulent" payments.[140] For the Perrys, this fine had lasting consequences, as it forced them into bankruptcy and ruined their credit.[141] Ironically, MiDAS still was unable to catch fraudulent Scattered Canary claims in 2020.[142]

Other states choose to fund their debt payments by demanding more money from employers, which often forces layoffs, even after the economic crisis is over.[143] To raise money from employers, states often pass bills that both increase unemployment taxes and cut unemployment benefits.[144] Workers bear the brunt of these actions through smaller payments and the threat of another round of layoffs at the end of the crisis.[145]

Forcing states to take out additional FUA loans to increase staffing would prolong economic crises. States would respond to economic slowdowns by cutting unemployment benefit payments and increasing

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135. Sarah Alvarez & Jonathan Oosting, *Michigan Unemployment System Designed to Slow Payments Working All Too Well*, BRIDGE MICH. (July 20, 2020), https://www.bridgemi.com /michigan-government/michigan-unemployment-system-designed-slow-payments-working-all-too-well [https://perma.cc/48C9-REXX].

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. Alejandro de la Garza, *States' Automated Systems Are Trapping Citizens in Bureaucratic Nightmares with Their Lives on the Line*, TIME (May 28, 2020) https://time.com/5840609/algorithm-unemployment/ [https://perma.cc/2VYU-BSHB].

141. *Id.*

142. *Id.*

143. Ordonez & Winn, *supra* note 61.

144. *Id.*

145. *Id.*

taxes on employers. This would create desperate conditions for unemployed workers who no longer qualify for payments and cause employers to lay off employees, thereby increasing the pool of unemployed workers. Because the federal government is responsible for paying administrative costs, it should continue to do so when states need emergency administrative funding.

Finally, one could argue that states must pay back emergency administrative money because FUA could run out of money before the end of any given crisis, but that is unlikely to happen. FUA had $78 billion available at the beginning of the pandemic.[146] By July, states had requested $38 billion.[147] But this is not as big a problem as it seems. If FUA runs out of money, Title XII of the SSA allows the fund to borrow directly from the U.S. Treasury.[148] Although issuing new securities for these loans would increase the United States' deficit, additional unemployment benefits would have the same effect. What would be the point of funding additional unemployment benefit claims if there is not enough staff to process them?

C. *Summary*

The federal-state system for funding unemployment benefits is complicated. Although states can obtain additional administrative funding during emergencies within the current system, this system does not allow states to access such funds without congressional or presidential action. For this reason, states during crises are forced to process more claims with the same number of staff, which delays unemployment benefit payments and creates widespread financial hardship.

III. MONEY SHOULD BE REALLOCATED TO A NEW EMERGENCY FUND TO PREPARE FOR UNEMPLOYMENT CRISES

As Section II.C of this Note explains, FUA began the COVID-19 crisis with $78 billion in available funds.[149] Some states requested loans from FUA when they ran out of their base funding for unemployment benefits.[150] These loans could be requested as needed and did not require congressional or presidential action.[151]

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146. *Id.*
147. *Id.*
148. WHITTAKER, *supra* note 129, at 3.
149. Ordonez & Winn, *supra* note 61.
150. *Id.*
151. *See id.*

Although these loans gave states the money they needed to distribute unemployment insurance benefits to residents in need, they did little to alleviate rising administrative costs. This is because the federal government restricts how states can spend FUA loans.[152] As a result, unemployment offices were seriously overworked, and payments slowed as staff struggled to keep up with the surge in claims.[153] Then, scammers took advantage of employee shortages, and states were forced to pause their operations and delay benefits to investigate fraud.[154]

If emergency administrative funds had been more accessible, state offices could have increased their staffing levels as soon as it became apparent that claims were on the rise. This Part explains how and why emergency administrative funds should be set aside to prevent administrative backlogs during future crises.

A. *Method for Reform*

To better assist states during economic crises, the Department of Labor should make FUA money available to states in the form of grants that supplement states' administrative funding. These grants should be available upon request by the states when those states meet certain criteria, such as a significant, unexpected increase in new unemployment claims.

By authorizing funds on an as-requested basis, the Department of Labor would enable states to access this money much more quickly than they could if forced to wait for congressional action (e.g., the CARES Act) or presidential action (e.g., FEMA funding). These states could determine the amount of funding they need for themselves, without relying on a one-size-fits-all program by the federal government, and they could get funding more quickly than through any other program.

This funding must be given as grants. Although FUA traditionally provides emergency loans to states when their own unemployment benefit coffers run dry,[155] this new money would be different as it would be solely for administrative expenses. Under the current system, states are not responsible for paying their own administrative costs; that is the job of the Department of Labor.[156] Thus, requiring states to take out loans to pay for additional, unexpected administrative costs would be

152. *See* 42 U.S.C. § 1321(a).
153. Brunner et al., *supra* note 1.
154. *Id.*
155. 42 U.S.C. § 1321.
156. 42 U.S.C. § 1101(c).

unfair and would create more economic turmoil, as Part II of this Note discusses.

Supplemental administrative funding could theoretically also come out of EUCA or ESAA. Both would provide certain benefits, but of the three, FUA is the best equipped to begin distributing these funds. ESAA provides normal administrative funding to states, yet it is only set up to do so through the usual allocation process based on yearly averages and projected need.[157] Adding as-needed distribution would require ESAA to create new request intake processes. FUA, on the other hand, can already process as-needed requests, as it currently distributes unemployment funding loans to the states upon request.[158]

EUCA could also provide emergency administrative funding, but it is poorly set up to do so. EUCA disburses emergency funds to the states.[159] Although this fund seems primed to provide states with emergency administrative funds, creating processes to do so would be inefficient because FUA already has these capabilities.

Creating an emergency administrative fund within EUCA may also generate redundancies. During the COVID-19 pandemic, states needed extra administrative support from both FEMA allocations and the CARES Act.[160] This need for funding highlights the benefits to states of having access to more than one source of financial assistance: immediate emergency funding and long-term congressional relief. Adding emergency administrative funds to FUA, not EUCA, would create a distinct way for states to meet their administrative needs while waiting for Congress to act. FUA is already administering loans upon request by the states. Thus, FUA is best suited to distribute extra administrative money during economic crises.

B. *Emergency Fund Precedent*

The existence of a national emergency reserve, whether it be a fund or a stockpile of goods, is not a new concept in the United States. For example, the Federal Emergency Management Agency (FEMA) and the Strategic National Stockpile are both reserves that provide goods, services, or money to states during crises.[161] The difference between

157. *See* DIRECTORS' GUIDE, *supra* note 10, at 14.

158. *See* 42 U.S.C. § 1104.

159. *See generally* 42 U.S.C. § 1105.

160. *See Lost Wages Supplemental Payment Assistance Guidelines*, FEMA (Mar. 5, 2021), https://www.fema.gov/disasters/coronavirus/governments/supplemental-payments-lost-wages-guidelines [https://perma.cc/52XU-V9N6]; *see also* ISAACS & WHITTAKER, *supra* note 64.

161. *See Strategic National Stockpile*, U.S. DEP'T OF HEALTH & HUM. SERVS.: PUB. HEALTH EMERGENCY, https://www.phe.gov/about/sns/Pages/default.aspx [https://perma.cc/5PPX-9S4Q] (Aug. 9, 2021) ("The supplies, medicines, and devices for lifesaving care contained in the stockpile

these funds and the proposed FUA fund is that FEMA and the Stockpile provide supplemental resources to states that are unprepared to handle certain crises, whereas the new FUA fund would help states bridge funding gaps created by the federal government. Thus, while the distribution of FEMA and Stockpile resources require presidential or congressional approval, the disbursement of FUA funds should not.

One reserve that was essential at the beginning of the COVID-19 pandemic was the Strategic National Stockpile. The Public Health Service Act authorizes the U.S. Department of Health and Human Services (HHS) to create a stockpile of "drugs, vaccines, and other medical products and supplies" to keep in reserve for major health emergencies in the United States and its territories.[162] According to HHS, the Stockpile's goal is to supplement state and local medical supplies during emergencies.[163] Stockpile products are only available to states after the U.S. Food and Drug Administration authorizes them for emergency use.[164]

Another widely recognized source of federal emergency aid is FEMA. FEMA can distribute wide varieties of aid across the country, but only after the president has declared an area a "disaster."[165] This aid can be anything from emergency workers to grant money.[166] FEMA can be loosely classified as an emergency reserve because Congress allocates funds to it[167] in order to help states in trouble. Like the dissemination of goods from the Strategic National Stockpile, FEMA's aid can only be distributed pursuant to a formal act from the president.[168] FEMA aims "to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters."[169] In other words, like the Strategic National

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can be used as a short-term, stopgap buffer when the immediate supply of these materials may not be available or sufficient."); *See How a Disaster Gets Declared*, FEMA, https://www.fema.gov/disasters/how-declared [https://perma.cc/BTG4-QLAQ] (Sept. 3, 2021) (describing the type of aid FEMA is allowed to provide once a disaster has been declared).

162. *Strategic National Stockpile Fact Sheet*, ASS'N OF STATE AND TERRITORIAL HEALTH OFFS., https://astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Use-Authorization-Toolkit/Strategic-National-Stockpile-Fact-Sheet/ [https://perma.cc/7YK6-XZAF].

163. *Strategic National Stockpile*, *supra* note 161.

164. *Products*, U.S. DEP'T OF HEALTH & HUM. SERVS.: PUB. HEALTH EMERGENCY, https://www.phe.gov/about/sns/Pages/products.aspx [https://perma.cc/LMH4-HL92] (Aug. 9, 2021).

165. FEMA, *supra* note 160.

166. *Id.*

167. *See* JUSTIN MURRAY, CONG. RSCH. SERV., RL33226, EMERGENCY SUPPLEMENTAL APPROPRIATIONS LEGISLATION FOR DISASTER ASSITANCE: SUMMARY DATA FY1989 TO FY2006 1 (July 10, 2006), https://www.everycrsreport.com/files/20060710_RL33226_5b74b98962ac83628052b8d21d2ffde659721f7f.pdf [https://perma.cc/6E9P-KRQ3] (detailing the amount of supplemental funding allocated to FEMA from 1989–2006 for disaster relief measures).

168. FEMA, *supra* note 161.

169. 42 U.S.C. § 5121 (101(b)).

Stockpile, FEMA is a source of aid to states when states' individual reserves are insufficient.

The difference between the existing reserves mentioned above and this Note's proposed reform are twofold. First, both existing reserves are structured differently from the proposed fund in FUA. The Strategic National Stockpile holds medical goods in reserve instead of funds,[170] and FEMA's "reserve" serves a much wider purpose than FUA's would.[171] Second, and more importantly, the Strategic National Stockpile and FEMA both serve as stopgaps for when states do not do enough to prepare to provide for their residents during widespread crises. Because states are expected to make their own preparations for emergencies, such as natural disasters and pandemics, FEMA and the Stockpile are sources of last resort when states lack sufficient supplies. This contrasts the proposed FUA emergency fund, which would make up for the *federal* government's inadequate preparation. In other words, the FUA emergency fund would bridge funding gaps when the federal government's original allocations to state unemployment benefit offices are insufficient. While FEMA and the Strategic National Stockpile make up for states' own unpreparedness, the proposed fund within FUA would supplement existing, mandatory federal aid.

Because FEMA and the Stockpile differ in purpose from the proposed FUA fund, it makes sense that these existing reserves can be given to states only after authorization from higher authorities. Without this added precaution, states could strategically plan to be unprepared for disasters and use the Stockpile and FEMA to provide for all of their residents' needs.

In contrast, funds from a FUA reserve must be granted on an as-requested basis. States cannot choose to be more or less prepared to cover additional unemployment administration costs during sudden economic downturns because these costs are not supposed to be their responsibility. The federal government is required to cover these costs, so it makes little sense to force states to wait for Congress to pass an emergency act to fix the federal government's mistake.

The existence of emergency funds and stockpiles shows that it is possible to create federal reserves to help states during emergencies. Because FEMA and the Strategic National Stockpile serve different purposes than the proposed FUA fund, it makes sense that they are only available to states pursuant to federal authorization. But these differences also underscore why FUA funds must be available to states upon request; otherwise, states in need would suffer because of the federal government's poor planning.

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170. *See* U.S. DEP'T OF HEALTH & HUM. SERVS.: PUB. HEALTH EMERGENCY, *supra* note 164.

171. *See* FEMA, *supra* note 160 (detailing the scope and structure of FEMA allocations).

C. *What Will This Emergency Fund Do?*

A new pot of emergency funding would protect states against inevitable, yet unpredictable, economic downturns. Without this fund, the U.S. government would continue allocating administrative funds in a way that is at odds with the fluctuation of the national economy. To put it in perspective, administrative funding given to states by ESAA increased by less than two percent between 2019 and 2020.[172] But many states' new unemployment claims more than doubled in 2020 due to the COVID-19 pandemic.[173] This means that, across the country, state unemployment offices had to respond to rapidly rising unemployment claims and award astronomical amounts of benefits using a fraction of the necessary staff.

If this emergency funding had been available at the beginning of the COVID-19 pandemic, Washington's ESD offices could have started increasing their staff as soon as businesses began to shut down. Then, by the time the CARES Act expanded unemployment benefits to more residents, the offices could have been more prepared for the second wave of claims. With extra staff, offices would have been able to investigate fraud, like the scams Scattered Canary perpetrated, much earlier. Offices could have used extra staff to investigate claims more thoroughly in April and May and catch fraudulent requests before they became such a widespread problem. Perhaps most importantly, if this extra funding had been more readily available, states like Washington would have been in a better position to quickly get benefits to their residents in need.

CONCLUSION

In times of economic crisis, one of the most important functions of a government is to distribute money to its citizens. The benefits of this are twofold: people obtain the money they need to survive and then use this money to stimulate the failing economy. In *Java*, one of only a few Supreme Court cases dealing with unemployment benefits, the Court invokes a former Secretary of Labor's explanation of why increasing distressed individuals' purchasing power through unemployment benefits is crucial to economic recovery:

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172. ESAA paid $3.51 billion in administrative funding in 2019 and $3.58 billion in 2020. This is an increase of 1.99%. *See* U.S. DEP'T OF LAB., UNEMPLOYMENT INSURANCE PROGRAM OUTLOOK: PRESIDENT'S BUDGET 2021, at 14 (2021), https://oui.doleta.gov/unemploy/pdf/prez_budget_21.pdf [https://perma.cc/G98C-GZCE]; U.S. DEP'T OF LAB., UNEMPLOYMENT INSURANCE PROGRAM OUTLOOK: PRESIDENT'S BUDGET 2020, at 14 (2020), https://oui.doleta.gov/unemploy/pdf/prez_budget_20.pdf [https://perma.cc/28Q5-HJBL].

173. *See e.g.*, Brunner et al., *supra* note 1; Bruckner, *supra* note 90.

> I think that the importance of providing purchasing power for these people, even though temporary, is of very great significance in the beginning of a depression. I really believe that putting purchasing power in the form of unemployment-insurance benefits in the hands of the people at the moment when the depression begins and when the first groups begin to be laid off is bound to have a beneficial effect. Not only will you stabilize their purchases, but through stabilization of their purchases you will keep other industries from going downward, and immediately you spread work by that very device.[174]

Existing mechanisms for facilitating unemployment benefit payments are ill-equipped to handle quick economic downturns like the one caused by the COVID-19 pandemic. Because administrative funds are issued based on average need, they do not allow states to expand their personnel when the economy calls for such expansion. This leaves state agencies struggling to keep up with the influx of new unemployment claims. During the COVID-19 pandemic, states were so overwhelmed by claims that they missed many instances of fraud from the scammer group Scattered Canary. By the time the fraud was discovered, the fraudsters had stolen "hundreds of millions of dollars."[175]

To fix this problem, Congress should create a new emergency fund within the Unemployment Trust Fund—specifically within the Fund's Federal Unemployment Account—to go to states on an as-requested basis in times of economic hardship. This money would be granted to states and would allow them to increase their staffing levels so that they may efficiently distribute unemployment benefits to all who are eligible. This increase in staffing would also allow unemployment insurance offices to investigate new applications more thoroughly for fraud, increasing the chances it would be detected from the outset.

Without this new emergency fund, unemployment offices will remain unable to handle sudden increases in unemployment claims due to recessions and other economic downturns. Scattered Canary and other fraud rings will continue to exploit holes in the administration of state unemployment benefits. Unemployed residents will have to wait for their payments, undermining their financial stability and reducing their quality of life. FUA must allow states to access emergency administrative grants to ensure social and economic stability during times of crisis.

174. Cal. Dep't of Hum. Res. Dev. v. Java, 402 U.S. 121, 132 (1971) (citation omitted).

175. Brunner et al., *supra* note 1.