UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAURENCE WOLF, d/b/a
LAURENCE WOLF PROPERTIES, individually,
and on behalf of a class of similarly-situated
persons and entities,

Plaintiff,

Case No. 2:23-cv-11645
Hon. Brandy R. McMillion
Magistrate Kimberly G. Altman

v.

CITY OF DETROIT,
a municipal corporation,

Defendant.

PLAINTIFF'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FED. R. Civ. P 56 ON THE ISSUE OF OBSTACLE PREEMPTION

Plaintiff Laurence Wolf ("Plaintiff"), by his attorneys, Kickham Hanley P.C. hereby moves the Court for partial summary judgment as a matter of law on the issue of obstacle preemption.

For the reasons discussed more fully in the accompanying brief in support of this motion, Plaintiff requests that this Court find as a matter of law that Defendant City of Detroit's (the "City") practice of imposing additional restrictive requirements upon Approved Landlords (as defined in Plaintiff's First and Second Amended Complaints) prior to the City allowing payment in full of federal emergency rental assistance relief funds that the Approved Landlords both qualified for and were

awarded was preempted by Federal law. Specifically, the City's imposing additional and more restrictive requirements upon Approved Landlords is preempted by the plain language and legislative intent of the Consolidated Appropriations Act ("CARES" Act) and the American Rescue Plan Act (the "Relief Acts"), and therefore, because they are preempted, the City's additional restrictive requirements were unlawful.

Plaintiff requests that the Court specifically hold that the City's requirement that an Approved Landlord first obtain a Certificate of Compliance (or exception to same) prior to receiving all awarded emergency rental assistance relief funding is preempted by the plain language and expressly stated objectives of the Relief Acts.

In support of this motion, Plaintiff relies upon and incorporates the facts and law stated in the brief filed in support of this motion.

As certified in the brief in support of this motion, pursuant to L.R. 7.1(a) the Parties have made a good faith effort to resolve the dispute presented in this Motion and have been unable to do so.

/s/ Jamie Warrow

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Counsel for Plaintiff and the Putative Class

Date: December 3, 2024

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2024, I served Plaintiff's Renewed Motion for Partial Summary Judgment pursuant to F.R.Civ.P 56 on the Issue of Obstacle Preemption and the Brief in Support on all counsel of record using the Court's electronic filing system.

/s/ Jamie Warrow
Jamie Warrow

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BRIEF IN SUPPORT OF PLAINTIFF'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FED. R. Civ. P 56 ON THE ISSUE OF OBSTACLE PREEMPTION

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STATEMENT OF ISSUES PRESENTED

1. The City of Detroit required landlords who applied for emergency rental relief pursuant to 15 USCS § 9058a and 15 USCS § 9058c (hereinafter, the "Relief Acts") and were subsequently approved for payment of emergency rental relief funds under the Relief Acts to first obtain a City-required Certificate of Compliance (or exception to same) prior to receiving the full amount of awarded and duly owed emergency rental relief funds under the federal Relief Acts.

   Do the federal Relief Acts preempt the City of Detroit's additional condition requiring a Certificate of Compliance (or exception to same) under the doctrine of obstacle preemption?

   Plaintiff states: Yes.

   Defendant will state: No.

   The Court should state: Yes.

2. Should the Court grant Plaintiff's request for partial summary judgment on the issue of obstacle preemption and expressly find that the plain language of, legislative intent of, and relief provided pursuant to the Relief Acts preempts the City of Detroit from requiring a Certificate of Compliance under the doctrine of obstacle preemption?

   Plaintiff states: Yes.

   Defendant will state: No.

   The Court should state: Yes.

STATEMENT OF MOST CONTROLLING AUTHORITY

15 USCS § 9058a; 15 USCS § 9058c (the "Relief Acts")

Obstacle Preemption Authority: *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941); *Wyeth v. Levine,* 555 U.S. 555, 565; 129 S Ct 1187; 173 L Ed 2d 51 (2009); *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996).

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Exhibit	Description
A.	Consolidated Appropriations Act and the American Rescue Plan Act, 15 USCS § 9058a; 15 USCS § 9058c
B.	Executive Order No. 2020-134
C.	Grant A. Driessen, Maggie McCarty & Libby Perl, Cong. Rsch. Serv., R46688, *Pandemic Relief: The Emergency Rental Assistance Program* 1-2 (2023)
D.	US Treasury Guidance
E.	Biden Administration "Fact Sheet" dated August 25, 2021
F.	City Document Acknowledging That Rental Assistance Was To Be Paid Directly To Landlords
G.	Data from the City's Open Data Portal-Residential Certificate of Compliance, September 2023 and November 2024
H.	Edward Lynch, AICP, Detroit Future City, *Understanding The Rental Landscape: A Profile Analysis Of Detroit Landlords To Inform Lead-Safe Housing Policy* (2022)
I.	State of Michigan's COVID Emergency Rental Assistance Program Guidance
J.	Help for Landlords (cfpb.gov)
K.	MSHDA CERA Guidelines
L.	Department of Treasury Frequently Asked Questions
M.	COVID19 Emergency Rental Assistance (CERA) Rental Compliance Guide
N.	U.S. Treasury Department Website Information
O.	Senate Amendment 1578 to H.R.748
P.	U.S. Department of Treasury, Office Of Recovery Programs: American Rescue Plan Second Anniversary Report
Q.	MacDonald, Christine, "Detroit Landlords Ignoring Rental Inspection Rules, City Says" *Detroit News* August 6, 2018
R.	*Softa Group, Inc v Taylor*, 1993 U.S. Dist. LEXIS 8713, at *1 (ND Ill, June 24, 1993)

S. *American Nat'l Property & Cas. Co. v. Campbell Ins. Inc*, 2010 U.S. Dist. LEXIS 42476 (M.D. Tenn. 2010)

T. *Genbiopro, Inc v Sorsaia*, 2023 U.S. Dist. LEXIS 149195 at *16 (SD W Va, Aug. 24, 2023)

U. *Bryant v Stein*, 2024 U.S. Dist. LEXIS 78176, at *63 (MDNC, Apr. 30, 2024)

V. City's Response to Plaintiff's Request for Admission Nos. 4 & 5.

STATEMENT OF CONCURRENCE PURSUANT TO L.R. 7.1(A)

On both September 26, 2024 and October 4, 2024 the parties' counsel conferred in good faith and in a meaningful manner regarding this motion. The conferences were held via telephone. Plaintiff's counsel was able to reasonably explain the nature of the motion, the legal basis for the motion, and the nature of the relief sought. On November 27, 2024, Plaintiff again emailed the City's counsel regarding this motion. Plaintiff requested but did not obtain concurrence in the relief sought.

/s/ Jamie Warrow
Jamie Warrow

I. INTRODUCTION

This is a class action brought by and on behalf of residential landlords in the City of Detroit (the "City") challenging the City's unconstitutional practice of withholding, and/or requiring two Housing Assessment and Resource Agencies ("HARAs") to withhold, a percentage of Covid emergency rental assistance funds ("CERA" funds) provided through federally-funded rental assistance programs—specifically, the Consolidated Appropriations Act ("CARES" Act) and the American Rescue Plan Act (hereinafter, the "Relief Acts").[1] The Relief Acts were designed to keep tenants in their homes "while **facilitating prompt payment to landlords**" during the pandemic lockdown—ensuring by their express language that rent payments were made directly to landlords whose tenants demonstrated eligibility for CERA payments (the "Approved Landlords").[2] *See e.g.* 15 USCS § 9058a(c)(2)(C), Exhibit A hereto; Exhibit B, Executive Order No. 2020-134, p. 2 (emphasis added).[3]

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[1] Exhibit C, Grant A. Driessen, Maggie McCarty & Libby Perl, Cong. Rsch. Serv., R46688, *Pandemic Relief: The Emergency Rental Assistance Program* 1-2 (2023) (Congress created a $25 billion Emergency Rental Assistance (ERA) program in the Consolidated Appropriations Act, 2021 (Division N of P.L. 116-260). A second round of ERA funding—$21.55 billion was included in Section 3201 of the American Rescue Plan Act of 2021 (P.L. 117-2)).

[2] Landlord eligibility for CERA funding was based on their tenant's needs. To become an "Approved Landlord" under the Relief Acts, a tenant's household income, financial hardship and housing situation was considered *See* Exhibit J hereto, p. 2.

[3] With regard to the exhibits/evidence relied upon by Plaintiff in support of this motion, the Court may take judicial notice of adjudicative facts that are not subject to reasonable dispute because they are either generally known within the court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy

The undisputed and expressly stated purpose for the Relief Acts was to "protect vulnerable tenants **and landlords**" and "to aid the **struggling landlords** and renters most at risk for eviction." *See* Exhibit E, Biden Administration "Fact Sheet" dated August 25, 2021 (emphasis added). Here, the Biden Administration clearly emphasized the need for accelerated, rapid rental assistance—explicitly stating that "no state or locality should delay distributing resources that have been provided by Congress to meet families' critical need and prevent the tragedy of unnecessary eviction." *Id.* (Emphasis added).

Indeed, the City ***admits*** that the CERA Funds provided under the Relief Acts were both (a) "**designed to help landlords** and tenants" and (b) were to be **paid directly to landlords**. *See* Exhibit F hereto (emphasis added). Thus, it cannot be reasonably disputed that distribution of the CERA Funds under the Relief Acts was intended to be implemented quickly, without obstruction by state or local government, and that CERA Funds were designed to both protect eligible households from eviction

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cannot reasonably be questioned. Fed. R. Evid. 201(a)-(b). A court may take judicial notice at any stage in the proceedings, including when ruling on summary judgment motions. Fed. R. Evid. 201(d); *Grason Elec. Co. v. Sacramento Municipal Utility Dist.,* 571 F.Supp. 1504, 1521 (D.C. Cal. 1983).

The court may take judicial notice of a government website and may consider matters of which it takes judicial notice on a motion for summary judgment. *Coleman v. Dretke,* 409 F.3d 665, 667 (5th Cir. 2005)(per curiam) (taking judicial notice of Texas agency's website). Moreover, courts routinely take judicial notice of "[p]ublic records and government documents available from reliable sources on the Internet[.]" *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015).

and benefit Approved Landlords by securing rent payments owed by tenants that were financially harmed by the pandemic lockdown.

But that is not what the City did.

Incredibly, despite the urgency of the Federal Government's dictate that "no state or locality should delay distributing resources," the City used Congress' emergency rental relief program as an opportunity to enforce the City's unsuccessful "Certificate of Compliance" program that it has been trying to bolster since at least 2018.[4] Thus, instead of simply heeding the federal mandate to expedite distribution of CERA Funds "to aid struggling landlords and renters" the City did the exact opposite—exploiting its control over the CERA Funds to coerce Approved Landlords into compliance with additional City requirements that were wholly untethered to the Relief Acts' stated objectives.

Here, unlike other Grantees in Michigan and across the U.S., the City's implementation and oversight of the CERA program baked-in obstructive conditions ***not*** required by the federal statute—but which had to be met before the City would permit a HARA to fully release all of the federally-granted CERA Funds awarded to an Approved Landlord. Specifically, the City required Approved Landlords to first obtain

[4] *See* Exhibit Q, MacDonald, Christine, "Detroit Landlords Ignoring Rental Inspection Rules, City Says" *Detroit News* August 6, 2018 (documenting the City's struggles to get local landlords to follow through with obtaining a certificate of compliance only six months after the City launched a campaign to inspect all rentals (Link to Article)).

a Certificate of Compliance ("CoC", or exception to same) prior to all awarded CERA Funds being distributed. If the Approved Landlord did not have a CoC, then the City mandated that the HARA escrow 20% of the Approved Landlord's awarded CERA Funds until a CoC (or exception) was somehow obtained by the Approved Landlord.

Leaving aside the fact that obtaining a CoC was within the sole control of the City and that it was a virtually impossible requirement to achieve even under nonemergency circumstances,[5] the City's actions in foisting this requirement upon Approved Landlords as a precondition to obtaining the full amount of awarded ***emergency relief*** funds—funds that Congress intended to be distributed without delay—clearly shows that the City impeded the stated objective of the Relief Acts. In doing so, the City deprived Approved Landlords of full payment of emergency relief funds awarded to, and owed to, these landlords under the Relief Acts. Simply, the City-imposed CoC requirement was an unconstitutional obstacle to achievement of the express objective of the Relief Acts—to quickly disseminate the Relief Funds.

[5] Data from the City's Open Data Portal demonstrates that as of September 19, 2023, only approximately **10% of residential rental properties** have obtained a CoC. *See:* https://data.detroitmi.gov/datasets/detroitmi::residential-certificates-of-compliance/explore, (website snapshot Exhibit G hereto, p. 1) and Edward Lynch, AICP, Detroit Future City, *Understanding The Rental Landscape: A Profile Analysis Of Detroit Landlords To Inform Lead-Safe Housing Policy* (2022) at p. 12, Exhibit H. This data documents 8594 Certificates of Compliance issued for an estimated 82,235 residential rental properties. A year later, by November 8, 2024, the City only issued an additional 2,238 Certificates of Compliance for a total of 10,832 Certificates of Compliance and an increase to 13%. (website snapshot Exhibit G hereto, p. 2).

Obstacle preemption exists under these circumstances—when state laws or policies serve as an obstacle to the purposes and objectives embodied in a federal law. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992); *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941). Plaintiff now brings this motion for partial summary judgment on the limited legal issue of obstacle preemption.[6] Plaintiff seeks a ruling that the City-imposed requirement that mandated Approved Landlords to first obtain a CoC (or exception) prior to receiving full payment of all Relief Funds awarded to them under the Relief Acts obstructed the express purpose of, and was thus preempted by, the Federal Relief Acts.

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[6] This motion is properly framed as a "motion for partial summary judgment" because Plaintiff seeks a ruling on an insular issue in order to narrow the issues presented at trial. A "partial summary judgment" is merely an order deciding one or more issues in advance of trial. *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 990 F.2d 342, 346 (7th Cir. 1993). In "light of the doctrine that requires a motion for summary judgment to seek a judgment, entry of partial summary 'judgment' is a prerogative of the court"—meaning that an order on the issue may be entered instead of a full judgment. *Softa Group, Inc v Taylor*, 1993 U.S. Dist. LEXIS 8713, at *1 (ND Ill, June 24, 1993)(Exhibit R). For example, "a motion brought under Rule 56(c) seeking to establish liability alone is also referred to as a partial summary judgment." *Id.*

Indeed, "numerous courts have…entertained and decided motions for partial summary judgment which address particular issues rather than claims." *Johnson v City of Memphis*, 355 F Supp 2d 911, 916 (WD Tenn, 2005)(granting motion for partial summary judgment on the issue of disparate impact in "the interest of narrowing the issues for trial"). "A motion for partial summary judgment is recognized as a useful pretrial tool; the Advisory Committee Notes to the 1946 amendment to Rule 56 state: 'The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This type of adjudication serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact.'" *Id.*

II. STATEMENT OF MATERIAL FACTS

1. Starting in December 2020, as part of its sweeping Covid relief programs, the federal government created emergency rental assistance programs that made funding available to assist households that were unable to pay rent or utilities because of the lockdown restrictions imposed under such orders as the "Michigan Stay Home, Stay Safe" protocol. *See* Plaintiff's First Amended Complaint ("FAC") at ¶ 26, ECF No. 15, PageID.208; City's Answer to FAC ¶ 26 ECF No. 16, PageID.375.[7]

2. Two separate rental assistance programs were established by Congress, one under the Consolidated Appropriations Act of 2021("CARES" Act) and the other under the American Rescue Plan Act of 2021. *See* Exhibit A; Exhibit C hereto.

3. Under the Relief Acts, billions of rental assistance funds were provided directly to states and local governments (the "Grantees") for distribution to qualifying

[7] Plaintiffs note that, on November 26, 2024, they filed a Second Amended Complaint, which the City has not yet answered. But regardless of the City's forthcoming answers to the allegations of the Second Amended Complaint, the admissions that the City made in its answer to the First Amended Complaint remain evidentiary admissions notwithstanding the filing of the Second Amended Complaint. *See, e.g., Pennsylvania R.R. Co. v. City of Girard*, 210 F.2d 437, 440 (6th Cir. 1954) ("the fact that the original petition was withdrawn and that these statements were eliminated in the amended cross-petition is immaterial, **for pleadings withdrawn or superseded by amended pleadings are admissions against the pleader in the action in which they were filed**. 14 A.L.R. 65-72, and cases cited) (emphasis added)); *American Nat'l Property & Cas. Co. v. Campbell Ins. Inc*, 2010 U.S. Dist. LEXIS 42476 *6-7 (M.D. Tenn. 2010) (Exhibit S hereto) ("Under Sixth Circuit law, a statement made in a pleading, even if the pleading is subsequently amended or superseded, can constitute an admission against interest…").

landlords, utility providers, and renters. Grantees were expressly charged with using Federal rental assistance funds to aid eligible households through existing or newly created rental assistance programs. The State of Michigan and the City are both "Grantees" under the Relief Acts. 15 USC § 9058a(k)(2); City's Answer to FAC ¶ 9; ¶ 30, ECF No. 16, PageID.368 and PageID.376 (admitting the State and City were Grantees under the Relief Acts, "utilizing local HARAs to facilitate distribution of CERA funds").

4. Emergency Rental Assistance ("ERA") Grantees were obligated to comply with the requirements outlined in their ERA Award Terms, including the relevant ERA statute, all other applicable federal statutes, regulations, executive orders, and Treasury's guidance (FAQs, reporting guidance, etc.). *See* US Treasury Guidance at p. 2 (Exhibit D, hereto); City's Answer to FAC ¶ 31, ECF No. 16, PageID.376 (admitting same).

5. Michigan's Covid Emergency Rental Assistance Program ("CERA") was established by the Michigan State Housing Development Authority ("MSHDA"). FAC ¶ 32, ECF No. 15, PageID.212; City's Answer to FAC ¶ 32, ECF No. 16, PageID.376; Exhibit I, State of Michigan's COVID Emergency Rental Assistance Program Guidance, at p. 3.

6. As a Grantee, the City operated as a fiduciary over the CERA Funds distributed by the Federal Government through MSHDA's CERA program. FAC ¶¶ 9, 36, ECF No. 15, PageID.204, 212-213; City's Answer to FAC ¶ 9, ECF No. 16,

PageID.368 (objecting to the term "fiduciary" as a "legal conclusion"—but not denying that the City operated as one.

7. Under the plain language of the Relief Act statutes, Grantees were **required** to pay rental assistance **directly** to Approved Landlords—except and unless the Approved Landlord refused to accept payment from the grantee. *See* 15 U.S.C. § 9058a (c)(2)(C)(i)(1): "an eligible grantee **shall make payments to a lessor**…on behalf of the eligible household, **except that**, if the lessor…does not agree to accept such payment from the grantee…the grantee may make such payments directly to the eligible household **for the purpose of making payments to the lessor**." [Emphasis added.] *See also* Exhibit F, City Document acknowledging that rental assistance was to be paid directly to landlords; City's Answer to FAC ¶ 2, ECF No. 16, PageID.365 (admitting that the "Relief Acts were designed to keep tenants in their homes and that one way of accomplishing this was to allow direct payments to landlords on behalf of households that demonstrated eligibility for CERA payments").

8. The City used local HARAs to facilitate distribution of the CERA Funds to Approved Landlords. FAC ¶ 9, PageID.204; City's Answer to FAC ¶ 9, ECF No. 16, PageID.368.

9. A HARA was generally the first point of contact for an applicant seeking relief under the CERA program and was charged with collecting the required

documentation to prove eligibility for CERA Funding. *See* Exhibit I, p. 39.[8]

10. Landlords, like Plaintiff, were encouraged to apply to recover back rent on behalf of their tenants, and eligibility for federal assistance was based upon the tenant's financial hardship. *See* Exhibit J, "Help for Landlords" at p. 2; City's Answer to FAC ¶ 33, ECF No. 16, PageID.376 (admitting that Landlords "were encourage to apply to recover back rent on behalf of their tenants").

11. Plaintiff applied for, and was awarded, CERA relief on behalf of certain of his tenants based upon these applications making him an "Approved Landlord."[9] FAC ¶¶ 34, 47 ECF No. 15, PageID.212, 217; City's Answer to FAC ¶ 34, ECF No. 16, PageID.376 (admitting Plaintiff applied for CERA relief on behalf of his tenants).

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[8] The HARAs involved here are the Wayne Metropolitan Community Action Agency ("Wayne Metro") and the United Community Housing Coalition ("UCHC") which at all times acted as agents and representatives of the City and acted at the direction and under the control of the City, in approving, administering, distributing and withholding the CERA Funds. *See* City's Answer to FAC ¶¶ 73 and 74, ECF No. 16, PageID.387-388 (admitting that "the HARAs were delegated authority by the City to carry out the provisions of the City's CERA protocol" and that the City "City admits that it authorized the HARAs to carry out the CERA program in accordance with federal, state and local guidelines and requirements.") Neither the City nor the HARAs had a property interest in the CERA Funds once they were awarded to Approved Landlords, who had a vested property right to receive CERA Funds under the Relief Acts. *See* ECF 41 PageID.1264-PageID.1265 (determining that Plaintiff had sufficiently alleged a property interest in awarded CERA funds); 15 U.S.C. § 9058a (c)(2)(C)(i)(1)(Relief Act provision requiring direct payment to landlords).

[9] However, Plaintiff was denied full payment of awarded CERA Funds because of the City's requirement that HARAs escrow 20% of CERA Funds awarded until a CoC or exception to same was acquired. Plaintiff tried to comply with the City's conditions—he registered his property, applied for and attempted to acquire a CoC, but was unable to obtain a CoC from the City despite efforts to do so over a period of months.

12. Once a CERA application was granted and CERA Funds approved by the HARA, the Approved Landlord who rented to that tenant had a property interest in—*i.e.*, was the legal owner of—100% of the allocated CERA Funds (the "Approved Landlord's CERA Funds"). 15 U.S.C. § 9058a(c)(2)(C)(i)(1) ("an eligible grantee **shall** make payments to a lessor…"); ECF 41 PageID.1264-PageID.1265 (determining that Plaintiff had sufficiently alleged a property interest in awarded CERA funds). At that point Grantees, like the City, were fiduciaries over the Approved Landlord's CERA Funds, holding these Funds as a trustee for the benefit of the Approved Landlord. FAC ¶¶ 9, 36, ECF No. 15, PageID.204, 212-213; City's Answer to FAC ¶ 9, ECF No. 16, PageID.368 (objecting to the term "fiduciary" as a "legal conclusion"—but not denying that the City operated as one).

13. Local administration of CERA Funds, under MSHDA's guidance, permitted a Grantee to impose additional rules and restrictions, specifically providing that: "local programs may administer the CERA program with additional rules to coincide with existing local codes/ordinances so long **as the additional rules do not conflict with US Treasury regulations or slow the pace of serving eligible tenants and landlords**." *See* Exhibit I, p. 3; MSHDA CERA Guidelines; Exhibit K, at p. 5 (emphasis added). City's Answer to FAC ¶ 37, ECF No. 16, PageID.377 (admitting same).

14. U.S. Treasury guidelines applicable to Emergency Rental Assistance specifically state that a Grantee may not impose additional eligibility criteria as a

condition for households successfully applying for CERA funding—clearly prohibiting Grantees from "augmenting ERA eligibility requirements" by imposing conditions that are more restrictive than those permitted by the Relief Acts:

> 44. May ERA grantees impose additional eligibility criteria, including employment or job[1]training requirements, as a condition of providing ERA assistance to households?
>
> The statutes that authorize the ERA1 and ERA2 programs provide specific criteria for establishing a household's eligibility. These eligibility requirements include financial hardship, risk of homelessness or housing instability, qualifying income, and an obligation to pay rent. **While the statutes authorizing the ERA programs and Treasury's policy guidance afford grantees discretion in structuring their programs, grantees do not have the authority to augment the ERA eligibility requirements by conditioning assistance on a tenant's employment status, compliance with work requirements, or acceptance of employment counseling, job-training, or other employment services**. **To the extent that grantees would impose other eligibility criteria or would require tenants to be employed, accept employment services, or comply with work requirements, such additional requirements are not permissible**. [Exhibit L, Department of Treasury Frequently Asked Questions No. 44, p. 19. Emphasis added. *See also* City's Answer to FAC ¶¶ 31 and 37-39, ECF No. 16, PageID.376, 377—admitting the City was obligated to comply with applicable federal statutes, regulations, executive orders, and **Treasury guidelines** and that "U.S. Department of Treasury Frequently Asked Questions No. 44 speaks for itself." Emphasis added.]

15. In contravention to the Treasury guidelines, under the City's additional rules and restrictions, even Approved Landlords whose tenants had satisfied **all** of the requirements of the Relief Acts, thus entitling these Landlords to full payment of the Relief Funds awarded, still could not receive all of the CERA Funds to which they were awarded and entitled to unless and until their residential rental properties were: (a)

registered with the City, (b) subject to periodic inspections for code compliance, and (c) had obtained a Certificate of Compliance. *See* Exhibit M, COVID19 Emergency Rental Assistance (CERA) Rental Compliance Guide. (Found at: Detroit CERA Rental Compliance Guide). *See also* City's Answer to FAC ¶ 11 (admitting that "instead of distributing the entire amount of potential CERA funds, the City's HARAs applied additional requirements that had to be met before 100% of the CERA funds would be released") and ¶¶ 44 and 45, ECF No. 16, PageID.369 and PageID.378-379 (admitting that "the City's implementation and oversight of the CERA program included additional requirements not expressly contained in the federal statute, which had to be met before HARAs would fully release the CERA Funds to eligible Households" and further admitting that ¶ 45 of Plaintiff's FAC "states requirements necessary before 100% of CERA Funds would be released by the HARAs").

16. Specifically, the City required Approved Landlords to first obtain a Certificate of Compliance (or "accepted exception" to same) prior to all CERA Funds being distributed. The City's Certificate of Compliance ("CoC") was purportedly required to ensure that the leased premises were habitable. *Id.* *See also* City's Answer to FAC ¶¶ 12, ¶ 14, PageID.370-371 (admitting that that "the property being rented ("the Rental Property") had to receive either (1) a Certificate of Compliance or (2) a rental registration certificate and an accepted Certificate of Compliance Exception before 100% of the CERA funds would be released" and further that this "requirement that the Rental Property have either a Certificate of Compliance or a rental registration

certificate and an accepted Certificate of Compliance Exception before the remaining 20% of potential CERA funds were released **is not contained in the Relief Acts or specifically mandated by the federal government**…")(emphasis added).

17. If no Certificate of Compliance was obtained by an otherwise Approved Landlord and no "accepted exception" applied, then, under the City's directive, the HARA distributed only 80% of CERA Funds to the Approved Landlord and placed the remaining 20% into an escrow account until the Approved Landlord obtained a Certificate of Compliance. *Id. See also* City's Answer to FAC ¶¶ 73 and 74, ECF No. 16, PageID.387-388 ("the City admits that the HARAs were delegated authority by the City to carry out the provisions of the City's CERA protocol" and further admits that it "authorized the HARAs to carry out the CERA program in accordance with federal, state and **local** guidelines and requirements." [Emphasis added.]

18. Thus, regardless of whether an applicant landlord met all of the requirements set forth under the Relief Acts and became an Approved Landlord who was entitled to full payment of CERA funding awarded under the Relief Acts, the City imposed yet another hurdle—the elusive Certificate of Compliance (or "accepted exception" to same)—that the City simply could not timely provide even if the Approved Landlord applied for it. *Id. See* Exhibit G (showing that the City was only able to issue approximately 2200 CoCs in the span of a year not impacted by the pandemic. Exhibit Q, Detroit News Article documenting City's struggle with enforcing CoC program.

19. In fact, in order to obtain distribution of ***any*** of the CERA Funds to which the Approved Landlord demonstrated it is entitled, the City, through its HARAs, coerced Approved Landlords, like Plaintiff, to "agree" to the 20% escrow in "consent agreements" that required Approved Landlords to obtain a CoC within a certain number of days—or forfeit the remaining funding.[10] FAC ¶ 51, ECF No. 15, PageID.218-219.

20. When the Approved Landlord failed to obtain the CoC (a process that was totally within the City's control), the CERA Funds were either held in escrow or, in some cases, paid directly to the tenant to be used as the tenant sees fit—depriving Approved Landlords access to specific funds awarded to them that are rightfully theirs under the Relief Acts and providing a windfall to tenants who are not required to, and have no legal incentive to, forward these funds to Approved Landlords to pay their rental arrears. FAC ¶ 53, ECF No. 15, PageID.219-220.

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[10] Such consent agreements reflect the Approved Landlord's effort to mitigate the financial consequences of the City's unlawful actions. Predictably, however, though Approved Landlords attempted to obtain a CoC (or "accepted exception") pursuant to these "consent agreements" they were unable to—primarily because of the City's sheer inability or unwillingness to timely provide the CoC (or "accepted exception"). FAC ¶ 51, ECF No. 15, PageID.218-219. Worse, if an Approved Landlord balked at the 20% escrow requirement imposed by the City and did not "agree" to the unilaterally imposed and non-negotiable "consent agreement," then that otherwise Approved Landlord received no CERA funding. Simply, if the Approved Landlord "agreed" to the "consent agreement" in order to obtain 80% of the CERA Funds owed to that Approved Landlord it was virtually impossible for that otherwise Approved Landlord to obtain a CoC (or "accepted exception") and receive the remaining 20% owed. FAC ¶ 52, ECF No. 15, PageID.219.

21. Thus, despite the fact that the Relief Funds were designed to "help struggling landlords" by paying rent to Approved Landlords, alleviate rental arrearage, and avoid tenant eviction—keeping people housed during the pandemic—the City arbitrarily withheld, escrowed, or reallocated to tenants 20% of the rent that rightfully belonged to Approved Landlords who were without recourse to collect it.[11] Worse, Approved Landlords were not provided notice of when the HARA reallocated the CERA Funds to tenants and were not provided an opportunity to contest the reallocation of 20% of their CERA Funds to a tenant who has failed to pay rent in the first instance.

22. Based upon the City's actions, Plaintiff, and those similarly situated, were deprived full payment of awarded Relief Funds that rightfully belonged to them.

23. The City's practice of withholding of 20% of the Relief Funds awarded to Approved Landlords contravened the stated objectives of the Relief Acts. Thus, this

[11] The City's CERA protocols in actual practice and effect deprived Approved Landlords of full payment of Relief Funds by design. Here, it is worth noting that the City could have issued a temporary CoC to Approved Landlords, which (as the City admits) would have been a proper exception to the more stringent (impossible) requirement of obtaining a CoC under the City's CERA program. Moreover, a temporary CoC would have entitled Approved Landlords to immediate payment of 100% of the CERA Funds awarded. *See* Exhibit V, City's Response to Plaintiff's Request for Admission No. 4. However, the City did not issue any temporary CoCs. *See* Exhibit V City's Response to Plaintiff's Request for Admission No. 5. Thus, though the City's CERA Protocols readily permitted this "exception" no effort was made in this regard to protect an Approved Landlord's right to 100% payment of the awarded Relief Funds—another clear example of the City's protocols thwarting the intent and purpose of the Relief Acts.

motion seeks a ruling that the City's practice was unlawful because it was preempted by Federal Law.

III. ARGUMENT

A. STANDARD OF REVIEW

Summary judgment pursuant to F. R. Civ. P. 56 is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Facts are "material" in a summary judgment analysis if they are outcome influencing under the substantive law governing the action. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A dispute over facts found to be material is "genuine" if from the evidence a reasonable jury could find for the non-moving party. *See id.* at 248. In the absence of such disputes, the outcome can be determined as a matter of law.

"Courts consider the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 679 (6th Cir. 2013). The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby* at 251-52.

Rule 56 expressly authorizes motions for **partial** summary judgment. *See* Fed. R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense – **or the part of each claim or defense** – on which summary judgment is sought.") (emphasis added). Therefore, a motion for partial summary judgment is an

appropriate vehicle for obtaining a dispositive ruling on the obstacle preemption issue. *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1015 (W.D. Wisc. 2000) (granting plaintiff's motion for partial summary judgment as to the issue of obstacle preemption, finding that a state condemnation statute was preempted by federal law).

B. THE SUPREMACY CLAUSE & PREEMPTION GENERALLY

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2; *Arizona v United States*, 567 US 387, 399; 132 S Ct 2492; 183 L Ed 2d 351, 368 (2012); *Genbiopro, Inc v Sorsaia*, 2023 U.S. Dist. LEXIS 149195 at *16 (SD W Va, Aug. 24, 2023)(Exhibit T). It follows that "Congress has the power to preempt state law." *Arizona,* 567 U.S. at p. 399; *Genbiopro* at *16. *See also McDaniel v Upsher-Smith Laboratories*, 893 F3d 941, 944 (6th Cir. 2018)(When state and federal laws clash, federal law reigns supreme and state law is preempted. U.S. Const., art. VI, cl. 2). State laws subject to preemption include the laws and official policies of local state governments. *See e.g. United Automobile, Aerospace & Agricultural Implement Workers of America Local 3047 v Hardin Co, Ky*, 842 F3d 407, 410 (6th Cir. 2016) (finding that local regulation of union-security agreements was preempted by federal law); *We Are America v. Maricopa County*, 297 F.R.D. 373, 393-394 (D. Az. 2013) (holding Maricopa County Attorney's Office's policy of charging and prosecuting non-smuggling migrants was preempted by federal immigration statutes; granting summary judgment to Plaintiff on preemption issue).

The "**purpose of Congress is the ultimate touchstone in every preemption case**." *Wyeth v. Levine,* 555 U.S. 555, 565; 129 S Ct 1187; 173 L Ed 2d 51 (2009); *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). Congress may "indicate pre-emptive intent through a statute's express language or through its structure and purpose." *Genbiopro* at *16; *Altria Grp., Inc. v. Good,* 555 U.S. 70, 76, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008). *See also McDaniel, supra,* at p. 944 *citing Yates v. Ortho-Mcneil-Janssen Pharms., Inc.*, 808 F.3d 281, 293 (6th Cir. 2015) ("State-law claims can be preempted expressly in a federal statute or regulation, or impliedly, where congressional intent to preempt state law is inferred"); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982) (In the absence of an express preemption statute, as here, federal law may impliedly preempt state law to the extent the two laws conflict).

C. OBSTACLE PREEMPTION

Obstacle preemption exists when state law serves as an obstacle to the purposes and objectives embodied in a federal law. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992); *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941). Under the principle of obstacle preemption, "a state may not adopt laws impairing 'the accomplishment and execution of the full purposes and objectives of Congress.'" *People v Rinehart*, 1 Cal 5th 652, 660; 206 Cal Rptr 3d 571; 377 P3d 818 (2016). *See also Marsh v Genentech, Inc*, 693 F3d 546, 550 n 4 (6th Cir. 2012)(federal law impliedly preempts a state law if the state law "creates an unacceptable

'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" *citing Wyeth*, 555 U.S. at 563-64; *Hines,* 312 U.S. at 67); *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U. S. 472, 133 S. Ct. 2466, 186 L. Ed. 2d 607 (2013)(state tort law preempted because imposed additional requirements that were inconsistent—*i.e.*, in conflict—with federal law).

Cases of obstacle preemption generally fit into the following mold: "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *N.J. Thoroughbred Horsemen's Ass'n v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 477, 138 S. Ct. 1461, 200 L. Ed. 2d 854 (2018). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). Moreover, enforcing obstacle preemption can play an important role in preventing states from creating—inadvertently or otherwise—functional impediments that materially constrain legitimate federal objectives. *People v Coulthard*, 90 Cal App 5th 743, 760-61; 307 Cal Rptr 3d 383 (2023).

The threshold for establishing obstacle preemption "requires proof Congress had particular purposes and objectives in mind, a demonstration that leaving state law in place would compromise those objectives, and reason to discount the possibility the Congress that enacted the legislation was aware of the background tapestry of state law

and content to let that law remain as it was." *Rinehart* at p. 661. Thus, determining whether a state law "stands as an obstacle" to federal law is a two-step process: first determine Congress' objectives' in passing the federal law and second determine whether the state law stands 'as an obstacle to the accomplishment of the federal objective. *Guthrie v PHH Mtg Corp*, 79 F.4th 328, 338 (4th Cir. 2023)(citing *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330, 131 S. Ct. 1131, 179 L. Ed. 2d 75 (2011)) (cleaned up), *aff'd*, 139 S. Ct. 1894, 204 L. Ed. 2d 377 (2019).

The question regarding whether a state law is invalid as conflicting with Federal laws touching the same subject is not to be determined according to any "rigid formula or rule," but depends upon whether, "under the circumstances of a particular case, the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines, supra*, at p. 67.

Finally, the issue of obstacle preemption is appropriate for determination through a motion for partial summary judgement. *See e.g. Wis Central Ltd v City of Marshfield*, 160 F Supp 2d 1009, 1011 (WD Wis, 2000)(plaintiff's motion for partial summary judgment granted because state condemnation statute was preempted by federal law under obstacle preemption). *See also, Bryant v Stein*, 2024 U.S. Dist. LEXIS 78176, at *63 (MDNC 2024)(Exhibit U)(granting in part plaintiff's motion for summary judgment, holding that certain provisions of North Carolina's Abortion Laws were unconstitutional in violation of the Supremacy clause under a theory of obstacle preemption); *Pub Interest Legal Foundation, Inc v Bellows*, 664 F Supp 3d 153, 162-65 (D

Me, 2023)(granting Plaintiff's motion for summary judgment because a state regulation limited disclosure of information within the ambit of federal law—the National Voter Registration Act's Public Disclosure Provision, posed a sufficient obstacle to the accomplishment and execution of Congress's purposes.

D. THE "FULL PURPOSES AND OBJECTIVES" OF THE RELIEF ACTS.

Plaintiff asserts that the City's practice of imposing additional restrictive conditions—most specifically the City's requirement that an Approved Landlord obtain a "CoC" or exception—were not permitted by the plain language of the Relief Acts, and as such, the City's conditions conflicted with and were preempted by Federal law.

Any preemption analysis begins with identifying the purpose of the Relief Acts.

When determining the purpose of the Relief Acts, the Court must "begin by analyzing the statutory language" in order to enforce the "plain and unambiguous statutory language according to its terms." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010). Moreover, Congressional intent must be determined in context, as "interpretation of [statutory] language does not occur in a contextual vacuum." *Medtronic*, 518 U.S. at 485.

1. Congress' Stated Legislative Purpose of the Relief Acts

The Coronavirus Aid, Relief, and Economic Security (CARES) Act (2020) and the Coronavirus Response and Consolidated Appropriations Act (2021) were designed to provide ***fast***, ***direct economic assistance*** for American workers, families, small businesses, and industries. *See* Exhibit N, (U.S. Treasury Department Website, emphasis

added). The CARES Act was passed by Congress on March 25, 2020, signed into law on March 27, 2020 and implemented a variety of programs to address economic issues related to the onset of the COVID-19 pandemic. *Id.* The express purpose of the CARES Act, as stated by Senate Amendment 1578 was to provide "**emergency** assistance and health care response for individuals, families, and businesses affected by the 2020 coronavirus pandemic." *See* Exhibit O, S.Amdt. 1578 to H.R.748 (emphasis added).

The Consolidated Appropriations Act was passed by Congress on December 21, 2020 and signed into law on December 27, 2020. Exhibit N. The Consolidated Appropriations Act "continued many of the programs initiated by the CARES act by adding new phases, new allocations, and new guidance to address issues related to the continuation of the COVID-19 pandemic." *Id.* The purpose of the Consolidated Appropriations Act, is stated in the statute's synopsis as: "An Act Making consolidated appropriations for the fiscal year ending September 30, 2021, providing coronavirus ***emergency*** **response and relief**, and for other purposes." *See* 116 P.L. 260, 2020 Enacted H.R. 133, 116 Enacted H.R. 133 (emphasis added).

Thus, based upon the foregoing, the clearly stated purpose of the Relief Acts was to provide emergency relief—quickly and directly—to those economically affected by the pandemic and associated lockdowns.

2. The Plain Language of the Relief Acts

The CARES Act,[12] expressly appropriated funds for "Emergency Rental Assistance" under the terms stated in the statute. With regard to the use of funds allocated for emergency rental assistance, 15 USCS 9058a provides in pertinent part:

> **(c) Use of funds.**
>
> **(1)** In general. An eligible grantee shall only use the funds provided from a payment made under this section to provide financial assistance and housing stability services to eligible households.[13]
>
> **(2)** Financial assistance.
>
> **(A)** In general. Not less than 90 percent of the funds received by an eligible grantee from a payment made under this section shall be used to provide financial assistance to eligible households, including the payment of
>
> **(i)** rent;
>
> **(ii)** rental arrears;
>
> **(iii)** utilities and home energy costs;
>
> **(iv)** utilities and home energy costs arrears; and
>
> **(v)** other expenses related to housing incurred due, directly or indirectly, to the novel coronavirus disease (COVID-19) outbreak, as defined by the Secretary.
>
> Such assistance shall be provided for a period not to exceed 12 months except that grantees may provide assistance for an additional 3 months only if necessary to ensure housing stability for a household subject to the availability of funds.

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[12] This section was enacted at the time of the Consolidated Appropriations Act, as part of Act Dec. 27, 2020, P.L. 116-260, and not as part of the initial CARES Act March 27, 2020, P.L. 116-136. *See* Exhibit A, 15 USCS 9058a (explanatory note).

[13] 15 USCS § 9058a(b)(1)(B): The eligible grantees described in this subparagraph are the following: (i) A State that is 1 of the 50 States or the District of Columbia. (ii) A unit of local government located in a State described in clause (i). *See also* 15 USCS § 9058a(k)(2).

****

(C) Distribution of financial assistance.

(i) Payments.

(I) In general. **With respect to financial assistance for rent and rental arrears** and utilities and home energy costs and utility and home energy costs arrears provided to an eligible household from a payment made under this section, **an eligible grantee *shall* make payments to a lessor** or utility provider **on behalf of the eligible household**, except that, if the lessor or utility provider does not agree to accept such payment from the grantee after outreach to the lessor or utility provider by the grantee, the grantee may make such payments directly to the eligible household for the purpose of making payments to the lessor or utility provider. [15 USCS 9058a (LexisNexis, Lexis Advance through Public Law 117-214, approved October 19, 2022), attached hereto as Exhibit A (emphasis added)].

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(f) Application for assistance by landlords and owners.

(1) In general. Subject to paragraph (2), nothing in this section shall preclude a landlord or owner of a residential dwelling from—

(A) assisting a renter of such dwelling in applying for assistance from a payment made under this section; or

(B) applying for such assistance on behalf of a renter of such dwelling.

(2) Requirements for applications submitted on behalf of tenants. If a landlord or owner of a residential dwelling submits an application for assistance from a payment made under this section on behalf of a renter of such dwelling—

(A) the landlord must obtain the signature of the tenant on such application, which may be documented electronically;

(B) documentation of such application shall be provided to the tenant by the landlord; and

(C) any payments received by the landlord from a payment made under this section shall be used to satisfy the tenant's rental obligations to the owner. [Exhibit A, 15 USCS § 9058a.]

Thus, the express language of the Relief Acts permitted landlords to apply for the rental assistance on behalf of their tenants, and mandated that the emergency rental assistance funds awarded "shall" be paid directly to the landlord.

3. Context for the Relief Acts.

Finally, "interpretation of [statutory] language does not occur in a contextual vacuum." *Medtronic*, 518 U.S. at 485. Here, the Congressional intent of the Relief Acts cannot be divorced from the *emergency* context under which these statutes were passed—a time when the pandemic lockdown had suffocated the American economy and particularly threatened the already-vulnerable housing industry. As noted by the U.S. Treasury in a recent report regarding the American Rescue Plan's efficacy:

> The COVID-19 pandemic put millions of renters at risk of losing their homes, aggravating a crisis in housing affordability that pre-dated the pandemic. By December 2020, nearly one in five renters reported being behind on rent, with renters of color especially likely to report being behind. One in seven renters viewed the risk of eviction within the next two months as "very likely." The Emergency Rental Assistance (ERA) program provided a critical lifeline to renters throughout the pandemic, while helping to build lasting eviction prevention infrastructure across the country. [Exhibit P, U.S. Department of Treasury, Office Of Recovery Programs: American Rescue Plan Second Anniversary Report at p. 15.]

Indeed, when touting the important economic remedies contained in the Relief Acts, the White House clearly expressed that the purpose for the Relief Acts was to "protect vulnerable tenants **and landlords**" and "to aid the **struggling landlords** and renters most at risk for eviction." *See* Exhibit E, Biden Administration "Fact Sheet" dated August 25, 2021 (emphasis added). The Biden Administration emphasized the

need for accelerated, rapid rental assistance—explicitly stating that "no state or locality should delay distributing resources that have been provided by Congress to meet families' critical need and prevent the tragedy of unnecessary eviction." *Id.* (Emphasis added). The City knows this—admitting that the CERA Funds provided under the Relief Acts were both (a) "**designed to help landlords** and tenants" and (b) were to be **paid directly to landlords**. *See* Exhibit F hereto (emphasis added); City's Answer to FAC ¶ 2, ¶ 5 ECF No. 16, PageID.365. Thus, it cannot be reasonably disputed that distribution of the CERA Funds under the Relief Acts was intended to be implemented quickly, without obstruction by state or local governments, and that CERA Funds were designed to both protect eligible households from eviction ***and*** benefit Approved Landlords by securing rent payments owed by tenants that were financially harmed by the pandemic lockdown.

E. THE CITY'S ADDITIONAL CONDITIONS ARE PREEMPTED BY THE EXPRESS LANGUAGE AND PURPOSE OF THE RELIEF ACTS.

To survive obstacle preemption analysis, "state law must not 'actually conflict' with the means Congress chose to effect its purpose." *Millsaps v. Thompson*, 259 F.3d 535, 548 (6th Cir. 2001) (citing *Hines supra*, 312 U.S. at 67). Moreover, it is well established that federal regulations and guidelines are relevant to the preemption analysis. *See e.g. McDaniel, supra* 893 F3d at 944. (State-law claims can be preempted in a federal statute or **regulation**); *Yates v. Ortho-Mcneil-Janssen Pharms., Inc.,* 808 F.3d 281, 293 (6th Cir. 2015).

As discussed above, the evidence in this case shows that Congress sought to strip the States and Local Governments of authority to impede dissemination of the relief funds. Specifically, White House and Treasury guidelines demonstrate that the Relief Funds were intended to be distributed quickly and were not to be conditioned upon extra criteria (*see e.g.* Exhibit E, Biden Administration "Fact Sheet," Exhibit I, State of Michigan's COVID Emergency Rental Assistance Program Guidance, Exhibit K, MSHDA CERA Guidelines, and Exhibit L, #44, p. 19 of Treasury Facts).

Having demonstrated that "Congress had particular purposes and objectives in mind" when enacting the Relief Acts—to wit, to provide emergency relief **quickly and directly** to those economically affected by the pandemic lockdown—it is clear that the City's additional requirement that Approved Landlords first obtain a CoC or exception prior to receiving payment in full of awarded emergency rental assistance funds actually conflicts, and is inconsistent with, Congress's stated objectives of the Relief Acts. *Rinehart*, *supra* at p. 661. This is because the City's condition either fails to pay all CERA Funds awarded and owed to Approved Landlords—which completely denies relief as to the 20% withheld by the City or its agents—or improperly delays paying Approved Landlords 20% of the CERA Funds owed. Simply, the City's actions in imposing the CoC requirement (or "accepted exception") contravened and obstructed the Relief Acts because they "slow[ed] the pace of serving eligible tenants and landlords" and imposed additional conditions that were more restrictive than those permitted under the Relief Acts.

Accordingly, the City's additional requirements "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and are thus preempted by federal law. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000); *Chrysler Group LLC v Fox Hills Motor Sales, Inc*, 776 F3d 411, 424, 428 (6th Cir. 2015).

F. THE CITY'S PRACTICE IS PREEMPTED BECAUSE IT IMPERMISSIBLY PLACES LOCAL RESTRICTIONS ON THE RECEIPT OF FEDERAL BENEFITS.

Further, there is no question that the CERA payments awarded to landlords are federal benefits. The Courts have routinely stricken state and local restrictions on the receipt of federal benefits by finding those restrictions were invalid under conflict or obstacle preemption principles.

For example, In *Raskin v. Moran*, 684 F.2d 472 (7th Cir. 1982), the Court held that a state statute that reduced the salary of certain judges by an amount equal to any federal social security benefits received by the judges was preempted by the federal Social Security Act. In relying upon obstacle preemption principles, the Court observed:

> In the instant case, the Wisconsin statute, although not expressly preempted, similarly frustrates the design of section 203(f) (3) of the SSA by setting off against the plaintiffs' salaries an amount exactly equal to their federal social security benefits. Without such a statutory provision, plaintiffs undeniably would, in accordance with federal policy, receive larger incomes upon attainment of age 70. They would receive full social security benefits regardless of their other earned income. We believe that a state statute which is applied to "cancel out" the receipt of a protected federal benefit, as in the instant case, clearly stands as an obstacle to frustrate the quite apparent underlying goals of the federal statute. [684 F.2d at 480]

In reaching this result, the *Raskin* Court relied extensively on *Perez v. Campbell*, 402 U.S. 637, 29 L. Ed. 2d 233, 91 S. Ct. 1704 (1971), in which the Supreme Court struck down an Arizona statute that conflicted with section 17 of the Bankruptcy Act of 1898, 11 U.S.C. § 35 (1976) (repealed). In applying *Perez*, the *Raskin* Court observed:

> Section 17 provided that a discharge in bankruptcy discharges all but certain specified judgments. The conflicting Arizona statute provided that the state would not recognize a discharge in bankruptcy of an automobile accident tort judgment in that, if the debtor-driver did not pay the judgment, the state would withhold driving privileges.
>
> It was undisputed in *Perez* that Arizona generally possesses plenary authority to regulate the drivers of automobiles on its highways (just as Wisconsin, in the instant case, possesses plenary authority to regulate judges' salaries) and that insuring the financial responsibility of such drivers was a legitimate state policy undergirding the state statute. But meritorious and important purposes alone were insufficient to save the Arizona statute from federal preemption when the effect of the state statute was to frustrate the federal statute's protection of debtors discharged in bankruptcy. Similarly in the instant case, the Wisconsin statute frustrates another federal protective provision – section 203(f) (3)'s elimination of the retirement test. This provision guarantees that eligible social security beneficiaries over age 70 will receive their benefits notwithstanding continued gainful employment. **Surely the protections of the federal statute are thwarted when the federal government puts money in the plaintiffs' left pocket while Wisconsin takes a precisely equal amount of money from their right pocket *solely because* the money was received through the social security program"**. [684 F.2d at 479 (emphasis added)]

The Supreme Court has consistently held that state and local laws impairing the receipt of federal benefits are preempted. *See, e.g., Townsend v. Swank*, 404 U.S. 282, 30 L. Ed. 2d 448, 92 S. Ct. 502 (1971) (state statute denying AFDC benefits to persons 18 through 20 years old attending college impermissibly conflicts with SSA provision

defining eligible recipients as including dependents age 18 to 20 years attending college); *Nash v. Florida Industrial Commission*, 389 U.S. 235, 19 L. Ed. 2d 438, 88 S. Ct. 362 (1967) (state statute denying unemployment benefits to persons who filed charges with NLRB impermissibly conflicts with federal statute designed to protect employees utilizing NLRB processes); *Free v. Bland*, 369 U.S. 663, 8 L. Ed. 2d 180, 82 S. Ct. 1089 (1962) (state statute denying rights of survivorship to persons purchasing federal bond with "community" assets impermissibly conflicts with federal regulation designed to allow co-ownership of bonds with rights of survivorship).

Here, the City's policy – which imposes additional requirements not found in the Relief Acts -- directly interferes with the Approved Landlord's receipt of federal funds that they have been awarded under the Relief Acts. As such, the policy "creates an unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Marsh v Genentech, Inc*, 693 F3d 546, 550 n 4 (6th Cir. 2012). Accordingly, the Court should find that the City's policy is preempted by federal law.

PRAYER FOR RELIEF

The Relief Acts were enacted to provide emergency relief—not delayed or conditioned relief—to Americans affected by the economic hardships caused by the pandemic. The City's imposition of additional conditions upon Approved Landlords that impeded full distribution of ***emergency*** *rental relief funds* awarded and owed to them expressly contravenes the objectives embodied in language of the Relief Statutes—establishing an obstacle to effecting the purpose of the Relief Acts.

Plaintiff requests that the Court find that the City's additional conditions are preempted by Federal law and therefore are unlawful. Plaintiff requests that the Court specifically hold that the City's requirement that an Approved Landlord first obtain a CoC (or exception to same) prior to receiving all awarded emergency CERA funding is preempted by the plain language and expressly stated objectives of the Relief Acts.

/s/ Jamie Warrow

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Date: December 3, 2024

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2024, I served the Plaintiff's Renewed Motion for Partial Summary Judgment pursuant to F.R.Civ.P 56 on the Issue of Obstacle Preemption and the Brief in Support on all counsel of record using the Court's electronic filing system.

/s/ Jamie Warrow
Jamie Warrow

4899-2244-1731, v. 1

EXHIBIT A

15 USCS § 9058a

Current through Public Law 117-214, approved October 19, 2022.

United States Code Service > TITLE 15. COMMERCE AND TRADE (Chs. 1 — 120) > CHAPTER 116. CORONAVIRUS ECONOMIC STABILIZATION (CARES ACT) (§§ 9001 — 9141) > ECONOMIC STABILIZATION AND ASSISTANCE TO SEVERELY DISTRESSED SECTORS OF THE UNITED STATES ECONOMY (§§ 9041 — 9141) > CORONAVIRUS ECONOMIC STABILIZATION (§§ 9041 — 9063)

§ 9058a. Emergency rental assistance

(a) Appropriation.

(1) In general. Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for making payments to eligible grantees under this section, $25,000,000,000 for fiscal year 2021.

(2) Reservation of funds for the territories and tribal communities. Of the amount appropriated under paragraph (1), the Secretary shall reserve—

(A) $400,000,000 of such amount for making payments under this section to the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa; and

(B) $800,000,000 of such amount for making payments under this section to eligible grantees described in subparagraphs (C) and (D) of subsection (k)(2); and

(C) $15,000,000 for administrative expenses of the Secretary described in subsection (h).

(b) Payments for rental assistance.

(1) Allocation and payments to states and units of local government.

(A) In general. The amount appropriated under paragraph (1) of subsection (a) that remains after the application of paragraph (2) of such subsection shall be allocated and paid to eligible grantees described in subparagraph (B) in the same manner as the amount appropriated under subsection (a)(1) of section 601 of the Social Security Act (*42 U.S.C. 801*) is allocated and paid to States and units of local government under subsections (b) and (c) of such section, and shall be subject to the same requirements, except that—

(i) the deadline for payments under section 601(b)(1) of such Act [*42 USCS § 801(b)(1)*] shall, for purposes of payments under this section, be deemed to be not later than 30 days after the date of enactment of this section [enacted Dec. 27, 2020];

(ii) the amount referred to in paragraph (3) of section 601(c) of such Act shall be deemed to be the amount appropriated under paragraph (1) of subsection (a) of this Act that remains after the application of paragraph (2) of such subsection;

(iii) section 601(c) of the Social Security Act [*42 USCS § 801(c)*] shall be applied—

(I) by substituting "1 of the 50 States or the District of Columbia" for "1 of the 50 States" each place it appears;

(II) in paragraph (2)(A), by substituting "$200,000,000" for "$1,250,000,000";

(III) in paragraph (2)(B), by substituting "each of the 50 States and District of Columbia" for "each of the 50 States";

(IV) in paragraph (4), by substituting "excluding the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa" for "excluding the District of Columbia and territories specified in subsection (a)(2)(A)"; and

(V) without regard to paragraph (6);

(iv) section 601(d) of such Act [*42 USCS § 801(d)*] shall not apply to such payments; and

(v) section 601(e) [*42 USCS § 801(e)*] shall be applied—

(I) by substituting "under section 501 of subtitle A of title V of division N of the Consolidated Appropriations Act, 2021" for "under this section"; and

(II) by substituting "local government elects to receive funds from the Secretary under section 501 of subtitle A of title V of division N of the Consolidated Appropriations Act, 2021 and will use the funds in a manner consistent with such section" for "local government's proposed uses of the funds are consistent with subsection (d)".

(B) Eligible grantees described. The eligible grantees described in this subparagraph are the following:

(i) A State that is 1 of the 50 States or the District of Columbia.

(ii) A unit of local government located in a State described in clause (i).

(2) Allocation and payments to tribal communities.

(A) In general. From the amount reserved under subsection (a)(2)(B), the Secretary shall—

(i) pay the amount equal to 0.3 percent of such amount to the Department of Hawaiian Home Lands; and

(ii) subject to subparagraph (B), from the remainder of such amount, allocate and pay to each Indian tribe (or, if applicable, the tribally designated housing entity of an Indian tribe) that was eligible for a grant under title I of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) (*25 U.S.C. 4111* et seq.) for fiscal year 2020 an amount that bears the same proportion to the such remainder as the amount each such Indian tribe (or entity) was eligible to receive for such fiscal year from the amount appropriated under paragraph (1) under the heading "native american programs" under the heading "Public and Indian Housing" of title II of division H of the Further Consolidated Appropriations Act, 2020 (*Public Law 116-94*) (*42 U.S.C. 1437* et seq.) to carry out the Native American Housing Block Grants program bears to the amount appropriated under such paragraph for such fiscal year, provided the Secretary shall be authorized to allocate, in an equitable manner as determined by the Secretary, and pay any Indian tribe that opted out of receiving a grant allocation under the Native American Housing Block Grants program formula in fiscal year 2020, including by establishing a minimum amount of payments to such Indian tribe, provided such Indian tribe notifies the Secretary not later than 30 days after the date of enactment of this Act [enacted Dec. 27, 2020] that it intends to receive allocations and payments under this section.

(B) Pro rata adjustment; distribution of declined funds.

(i) Pro rata adjustments. The Secretary shall make pro rata reductions in the amounts of the allocations determined under clause (ii) of subparagraph (A) for entities described in such clause as necessary to ensure that the total amount of payments made pursuant to such clause does not exceed the remainder amount described in such clause.

(ii) Distribution of declined funds. If the Secretary determines as of 30 days after the date of enactment of this Act [enacted Dec. 27, 2020] that an entity described in clause (ii) of subparagraph (A) has declined to receive its full allocation under such clause then, not later than 15 days after such date, the Secretary shall redistribute, on a pro rata basis, such allocation among the other entities described in such clause that have not declined to receive their allocations.

(3) Allocations and payments to territories.

(A) In general. From the amount reserved under subsection (a)(2)(A), subject to subparagraph (B), the Secretary shall allocate and pay to each eligible grantee described in subparagraph (C) an amount equal to the product of—

(i) the amount so reserved; and

(ii) each such eligible grantee's share of the combined total population of all such eligible grantees, as determined by the Secretary.

(B) Allocation adjustment.

(i) Requirement. The sum of the amounts allocated under subparagraph (A) to all of the eligible grantees described in clause (ii) of subparagraph (C) shall not be less than the amount equal to 0.3 percent of the amount appropriated under subsection (a)(1).

(ii) Reduction. The Secretary shall reduce the amount of the allocation determined under subparagraph (A) for the eligible grantee described in clause (i) of subparagraph (C) as necessary to meet the requirement of clause (i).

(C) Eligible grantees described. The eligible grantees described in this subparagraph are—

(i) the Commonwealth of Puerto Rico; and

(ii) the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa.

(c) Use of funds.

(1) In general. An eligible grantee shall only use the funds provided from a payment made under this section to provide financial assistance and housing stability services to eligible households.

(2) Financial assistance.

(A) In general. Not less than 90 percent of the funds received by an eligible grantee from a payment made under this section shall be used to provide financial assistance to eligible households, including the payment of

(i) rent;

(ii) rental arrears;

(iii) utilities and home energy costs;

(iv) utilities and home energy costs arrears; and

(v) other expenses related to housing incurred due, directly or indirectly, to the novel coronavirus disease (COVID-19) outbreak, as defined by the Secretary.

Such assistance shall be provided for a period not to exceed 12 months except that grantees may provide assistance for an additional 3 months only if necessary to ensure housing stability for a household subject to the availability of funds.

(B) Limitation on assistance for prospective rent payments.

(i) In general. Subject to the exception in clause (ii), an eligible grantee shall not provide an eligible household with financial assistance for prospective rent payments for more than 3 months based on any application by or on behalf of the household.

(ii) Exception. For any eligible household described in clause (i), such household may receive financial assistance for prospective rent payments for additional months:

(I) subject to the availability of remaining funds currently allocated to the eligible grantee, and

(II) based on a subsequent application for additional financial assistance provided that the total months of financial assistance provided to the household do not exceed the total months of assistance allowed under subparagraph (A).

(iii) Further limitation. To the extent that applicants have rental arrears, grantees may not make commitments for prospective rent payments unless they have also provided assistance to reduce an eligible household's rental arrears.

(C) Distribution of financial assistance.

(i) Payments.

(I) In general. With respect to financial assistance for rent and rental arrears and utilities and home energy costs and utility and home energy costs arrears provided to an eligible household from a payment made under this section, an eligible grantee shall make payments to a lessor or utility provider on behalf of the eligible household, except that, if the lessor or utility provider does not agree to accept such payment from the grantee after outreach to the lessor or utility provider by the grantee, the grantee may make such payments directly to the eligible household for the purpose of making payments to the lessor or utility provider.

(II) Rule of construction. Nothing in this section shall be construed to invalidate any otherwise legitimate grounds for eviction.

(ii) Documentation. For any payments made by an eligible grantee to a lessor or utility provider on behalf of an eligible household, the eligible grantee shall provide documentation of such payments to such household.

(3) Housing stability services. Not more than 10 percent of funds received by an eligible grantee from a payment made under this section may be used to provide eligible households with case management and other services related to the novel coronavirus disease (COVID-19) outbreak, as defined by the Secretary, intended to help keep households stably housed.

(4) Prioritization of assistance.

(A) In reviewing applications for financial assistance and housing stability services to eligible households from a payment made under this section, an eligible grantee shall prioritize consideration of the applications of an eligible household that satisfies any of the following conditions:

(i) The income of the household does not exceed 50 percent of the area median income for the household.

(ii) 1 or more individuals within the household are unemployed as of the date of the application for assistance and have not been employed for the 90-day period preceding such date.

(B) Nothing in this section shall be construed to prohibit an eligible grantee from providing a process for the further prioritizing of applications for financial assistance and housing stability services from a payment made under this section, including to eligible households in which 1 or more individuals within the household were unable to reach their place of employment or their place of employment was closed because of a public health order imposed as a direct result of the COVID-19 public health emergency.

(5) Administrative costs.

(A) In general. Not more than 10 percent of the amount paid to an eligible grantee under this section may be used for administrative costs attributable to providing financial assistance and housing stability services under paragraphs (2) and (3), respectively, including for data collection and reporting requirements related to such funds.

(B) No other administrative costs. Amounts paid under this section shall not be used for any administrative costs other than to the extent allowed under subparagraph (A).

(d) Reallocation of unused funds. Beginning on September 30, 2021, the Secretary shall recapture excess funds, as determined by the Secretary, not obligated by a grantee for the purposes described under subsection (c) and the Secretary shall reallocate and repay such amounts to eligible grantees who, at the time of such reallocation, have obligated at least 65 percent of the amount originally allocated and paid to such grantee under subsection (b)(1), only for the allowable uses described under subsection (c). The amount of any such reallocation shall be determined based on demonstrated need within a grantee's jurisdiction, as determined by the Secretary.

(e) Availability.

(1) In general. Funds provided to an eligible grantee under a payment made under this section shall remain available through September 30, 2022.

(2) Extension for funds provided pursuant to a reallocation of unused funds. For funds reallocated to an eligible grantee pursuant to subsection (d), an eligible grantee may request, subject to the approval of the Secretary, a 90-day extension of the deadline established in paragraph (1).

(f) Application for assistance by landlords and owners.

(1) In general. Subject to paragraph (2), nothing in this section shall preclude a landlord or owner of a residential dwelling from—

(A) assisting a renter of such dwelling in applying for assistance from a payment made under this section; or

(B) applying for such assistance on behalf of a renter of such dwelling.

(2) Requirements for applications submitted on behalf of tenants. If a landlord or owner of a residential dwelling submits an application for assistance from a payment made under this section on behalf of a renter of such dwelling—

(A) the landlord must obtain the signature of the tenant on such application, which may be documented electronically;

(B) documentation of such application shall be provided to the tenant by the landlord; and

(C) any payments received by the landlord from a payment made under this section shall be used to satisfy the tenant's rental obligations to the owner.

(g) Reporting requirements.

(1) In general. The Secretary, in consultation with the Secretary of Housing and Urban Development, shall provide public reports not less frequently than quarterly regarding the use of funds made available under this section, which shall include, with respect to each eligible grantee under this section, both for the past quarter and over the period for which such funds are available—

(A) the number of eligible households that receive assistance from such payments;

(B) the acceptance rate of applicants for assistance;

(C) the type or types of assistance provided to each eligible household;

(D) the average amount of funding provided per eligible household receiving assistance;

(E) household income level, with such information disaggregated for households with income that—

(i) does not exceed 30 percent of the area median income for the household;

(ii) exceeds 30 percent but does not exceed 50 percent of the area median income for the household; and

(iii) exceeds 50 percent but does not exceed 80 percent of area median income for the household; and

(F) the average number of monthly rental or utility payments that were covered by the funding amount that a household received, as applicable.

(2) Disaggregation. Each report under this subsection shall disaggregate the information relating to households provided under subparagraphs (A) through (F) of paragraph (1) by the gender, race, and ethnicity of the primary applicant for assistance in such households.

(3) Alternative reporting requirements for certain grantees. The Secretary may establish alternative reporting requirements for grantees described in subsection (b)(2).

(4) Privacy requirements.

(A) In general. Each eligible grantee that receives a payment under this section shall establish data privacy and security requirements for the information described in paragraph (1) that—

(i) include appropriate measures to ensure that the privacy of the individuals and households is protected;

(ii) provide that the information, including any personally identifiable information, is collected and used only for the purpose of submitting reports under paragraph (1); and

(iii) provide confidentiality protections for data collected about any individuals who are survivors of intimate partner violence, sexual assault, or stalking.

(B) Statistical research.

(i) In general. The Secretary—

(I) may provide full and unredacted information provided under subparagraphs (A) through (F) of paragraph (1), including personally identifiable information, for statistical research purposes in accordance with existing law; and

(II) may collect and make available for statistical research, at the census tract level, information collected under subparagraph (A).

(ii) Application of privacy requirements. A recipient of information under clause (i) shall establish for such information the data privacy and security requirements described in subparagraph (A).

(5) Nonapplication of the paperwork reduction act. Subchapter I of chapter 35 of title 44, United States Code, shall not apply to the collection of information for the reporting or research requirements specified in this subsection.

(h) Administrative expenses of the Secretary. Of the funds appropriated pursuant to subsection (a), not more than $15,000,000 may be used for administrative expenses of the Secretary in administering this section, including technical assistance to grantees in order to facilitate effective use of funds provided under this section.

(i) Inspector General oversight; recoupment.

(1) Oversight authority. The Inspector General of the Department of the Treasury shall conduct monitoring and oversight of the receipt, disbursement, and use of funds made available under this section.

(2) Recoupment. If the Inspector General of the Department of the Treasury determines that a State, Tribal government, or unit of local government has failed to comply with subsection (c), the amount equal to the amount of funds used in violation of such subsection shall be booked as a debt of such entity owed to the Federal Government. Amounts recovered under this subsection shall be deposited into the general fund of the Treasury.

(3) Appropriation. Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated to the Office of the Inspector General of the Department of the Treasury, $6,500,000 to carry out oversight and recoupment activities under this subsection. Amounts appropriated under the preceding sentence shall remain available until expended.

(4) Authority of inspector general. Nothing in this subsection shall be construed to diminish the authority of any Inspector General, including such authority as provided in the Inspector General Act of 1978 (5 U.S.C. App.)

(j) Treatment of assistance. Assistance provided to a household from a payment made under this section shall not be regarded as income and shall not be regarded as a resource for purposes of determining the eligibility of the household or any member of the household for benefits or assistance, or the amount or extent of benefits or assistance, under any Federal program or under any State or local program financed in whole or in part with Federal funds.

(k) Definitions. In this section:

(1) Area median income. The term "area median income" means, with respect to a household, the median income for the area in which the household is located, as determined by the Secretary of Housing and Urban Development.

(2) Eligible grantee. The term "eligible grantee" means any of the following:

(A) A State (as defined in section 601(g)(4) of the Social Security Act (*42 U.S.C. 801(g)(4)*).

(B) A unit of local government (as defined in paragraph (5)).

(C) An Indian tribe or its tribally designated housing entity (as such terms are defined in section 4 of the Native American Housing Assistance and Self-Determination Act of 1996 (*25 U.S.C. 4103*)) that was eligible to receive a grant under title I of such Act (*25 U.S.C. 4111* et seq.) for fiscal year 2020 from the amount appropriated under paragraph (1) under the heading "native american programs" under the heading "Public and Indian Housing" of title II of division H of the Further Consolidated Appropriations Act, 2020 (*Public Law 116-94*) (*42 U.S.C. 1437* et seq.) to carry out the Native American Housing Block Grants program. For the avoidance of doubt, the term Indian tribe shall include Alaska native corporations established pursuant to the Alaska Native Claims Settlement Act (*43 U.S.C. 1601* et seq.).

(D) The Department of Hawaiian Homelands.

(3) Eligible household.

(A) In general. The term "eligible household" means a household of 1 or more individuals who are obligated to pay rent on a residential dwelling and with respect to which the eligible grantee involved determines—

(i) that 1 or more individuals within the household has

(I) qualified for unemployment benefits or

(II) experienced a reduction in household income, incurred significant costs, or experienced other financial hardship due, directly or indirectly, to the novel coronavirus disease (COVID-19) outbreak, which the applicant shall attest in writing;

(ii) that 1 or more individuals within the household can demonstrate a risk of experiencing homelessness or housing instability, which may include—

(I) a past due utility or rent notice or eviction notice;

(II) unsafe or unhealthy living conditions; or

(III) any other evidence of such risk, as determined by the eligible grantee involved; and

(iii) the household has a household income that is not more than 80 percent of the area median income for the household.

(B) Exception. To the extent feasible, an eligible grantee shall ensure that any rental assistance provided to an eligible household pursuant to funds made available under this section is not duplicative of any other Federally funded rental assistance provided to such household.

(C) Income determination.

(i) In determining the income of a household for purposes of determining such household's eligibility for assistance from a payment made under this section (including for purposes of subsection (c)(4)), the eligible grantee involved shall consider either

(I) the household's total income for calendar year 2020, or

(II) subject to clause (ii), sufficient confirmation, as determined by the Secretary, of the household's monthly income at the time of application for such assistance.

(ii) In the case of income determined under subclause (II), the eligible grantee shall be required to re-determine the eligibility of a household's income after each such period of 3 months for which the household receives assistance from a payment made under this section.

(4) Inspector general. The term "Inspector General" means the Inspector General of the Department of the Treasury.

(5) Secretary. The term "Secretary" means the Secretary of the Treasury.

(6) Unit of local government. The term "unit of local government" has the meaning given such term in paragraph (2) of section 601(g) of the Social Security Act (*42 U.S.C. 801(g)*), except that, in applying such term for purposes of this section, such paragraph shall be applied by substituting "200,000" for "500,000".

(l) Termination of program. The authority of an eligible grantee to make new obligations to provide payments under subsection (c) shall terminate on the date established in subsection (e) for that eligible grantee. Amounts not expended in accordance with this section shall revert to the Department of the Treasury.

History

Dec. 27, 2020, *P.L. 116-260*, Title V, Subtitle A, § 501, *134 Stat. 2069*; Mar. 11, 2021, *P.L. 117-2*, Title III, Subtitle B, § 3201(h), *135 Stat. 58*.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Amendment Notes

2021.

Explanatory notes:

This section was enacted as part of Act Dec. 27, 2020, *P.L. 116-260*, and not as part of Act March 27, 2020, *P.L. 116-136*, which generally comprises this chapter.

Amendment Notes

2021.

The 2021 amendment by P.L. 117-2 substituted "September 30, 2022" for "December 31, 2021" in (e)(1).

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End of Document

15 USCS § 9058c

Current through Public Law 117-214, approved October 19, 2022.

United States Code Service > TITLE 15. COMMERCE AND TRADE (Chs. 1 — 120) > CHAPTER 116. CORONAVIRUS ECONOMIC STABILIZATION (CARES ACT) (§§ 9001 — 9141) > ECONOMIC STABILIZATION AND ASSISTANCE TO SEVERELY DISTRESSED SECTORS OF THE UNITED STATES ECONOMY (§§ 9041 — 9141) > CORONAVIRUS ECONOMIC STABILIZATION (§§ 9041 — 9063)

§ 9058c. Emergency rental assistance

(a) Funding.

(1) Appropriation. In addition to amounts otherwise available, there is appropriated to the Secretary of the Treasury for fiscal year 2021, out of any money in the Treasury not otherwise appropriated, $21,550,000,000, to remain available until September 30, 2027, for making payments to eligible grantees under this section—

(2) Reservation of funds. Of the amount appropriated under paragraph (1), the Secretary shall reserve—

(A) $305,000,000 for making payments under this section to the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa;

(B) $30,000,000 for costs of the Secretary for the administration of emergency rental assistance programs and technical assistance to recipients of any grants made by the Secretary to provide financial and other assistance to renters;

(C) $3,000,000 for administrative expenses of the Inspector General relating to oversight of funds provided in this section; and

(D) $2,500,000,000 for payments to high-need grantees as provided in this section.

(b) Allocation of funds to eligible grantees.

(1) Allocation for States and units of local government.

(A) In general. The amount appropriated under paragraph (1) of subsection (a) that remains after the application of paragraph (2) of such subsection shall be allocated to eligible grantees described in subparagraphs (A) and (B) of subsection (f)(1) in the same manner as the amount appropriated under section 501 of subtitle A of title V of division N of the Consolidated Appropriations Act, 2021 (*Public Law 116-260*) [*15 USCS § 9058a*] is allocated to States and units of local government under subsection (b)(1) of such section, except that section 501(b) of such subtitle A [*15 USCS § 9058a(b)*] shall be applied—

(i) without regard to clause (i) of paragraph (1)(A);

(ii) by deeming the amount appropriated under paragraph (1) of subsection (a) of this Act that remains after the application of paragraph (2) of such subsection to be the amount deemed to apply for purposes of applying clause (ii) of section 501(b)(1)(A) of such subtitle A [*15 USCS § 9058a(b)(1)(A)*];

(iii) by substituting "$152,000,000" for "$200,000,000" each place such term appears;

(iv) in subclause (I) of such section 501(b)(1)(A)(v) [*15 USCS § 9058a(b)(1)(A)(v)*], by substituting "under section 3201 of the American Rescue Plan Act of 2021 [*15 USCS § 9058c*]" for "under section 501 of subtitle A of title V of division N of the Consolidated Appropriations Act, 2021 [*15 USCS § 9058a*]"; and

(v) in subclause (II) of such section 501(b)(1)(A)(v) [*15 USCS § 9058a(b)(1)(A)(v)*], by substituting "local government elects to receive funds from the Secretary under section 3201 of the American Rescue Plan Act of 2021 [*15 USCS § 9058c*] and will use the funds in a manner consistent with such section" for "local government elects to receive funds from the Secretary under section 501 of subtitle A of title V of division N of the Consolidated Appropriations Act, 2021 [*15 USCS § 9058a*] and will use the funds in a manner consistent with such section".

(B) Pro rata adjustment. The Secretary shall make pro rata adjustments in the amounts of the allocations determined under subparagraph (A) of this paragraph for entities described in such subparagraph as necessary to ensure that the total amount of allocations made pursuant to such subparagraph does not exceed the remainder appropriated amount described in such subparagraph.

(2) Allocations for territories. The amount reserved under subsection (a)(2)(A) shall be allocated to eligible grantees described in subsection (f)(1)(C) in the same manner as the amount appropriated under section 501(a)(2)(A) of subtitle A of title V of division N of the Consolidated Appropriations Act, 2021 (*Public Law 116-260*) [*15 USCS § 9058a(a)(2)(A)*] is allocated under section 501(b)(3) of such subtitle A [*15 USCS § 9058a(b)(3)*] to eligible grantees described under subparagraph (C) of such section 501(b)(3) [*15 USCS § 9058a(b)(3)*], except that section 501(b)(3) of such subtitle A [*15 USCS § 9058a(b)(3)*] shall be applied—

(A) in subparagraph (A), by inserting "of section 3201 of the American Rescue Plan Act of 2021 [*15 USCS § 9058c*]" after "the amount reserved under subsection (a)(2)(A)"; and

(B) in clause (i) of subparagraph (B), by substituting "the amount equal to 0.3 percent of the amount appropriated under subsection (a)(1)" with "the amount equal to 0.3 percent of the amount appropriated under subsection (a)(1) of section 3201 of the American Rescue Plan Act of 2021 [*15 USCS § 9058c*]".

(3) High-need grantees. The Secretary shall allocate funds reserved under subsection (a)(2)(D) to eligible grantees with a high need for assistance under this section, with the number of very low-income renter households paying more than 50 percent of income on rent or living in substandard or overcrowded conditions, rental market costs, and change in employment since February 2020 used as the factors for allocating funds.

(c) Payment schedule.

(1) In general. The Secretary shall pay all eligible grantees not less than 40 percent of each such eligible grantee's total allocation provided under subsection (b) within 60 days of enactment of this Act [enacted March 11, 2021].

(2) Subsequent payments. The Secretary shall pay to eligible grantees additional amounts in tranches up to the full amount of each such eligible grantee's total allocation in accordance with a procedure established by the Secretary, provided that any such procedure established by the Secretary shall require that an eligible grantee must have obligated not less than 75 percent of the funds already disbursed by the Secretary pursuant to this section prior to disbursement of additional amounts.

(d) Use of funds.

(1) In general. An eligible grantee shall only use the funds provided from payments made under this section as follows:

(A) Financial assistance.

(i) In general. Subject to clause (ii) of this subparagraph, funds received by an eligible grantee from payments made under this section shall be used to provide financial assistance to eligible households, not to exceed 18 months, including the payment of—

(I) rent;

(II) rental arrears;

(III) utilities and home energy costs;

(IV) utilities and home energy costs arrears; and

(V) other expenses related to housing, as defined by the Secretary.

(ii) Limitation. The aggregate amount of financial assistance an eligible household may receive under this section, when combined with financial assistance provided under section 501 of subtitle A of title V of division N of the Consolidated Appropriations Act, 2021 (*Public Law 116-260*) [*15 USCS § 9058a*], shall not exceed 18 months.

(B) Housing stability services. Not more than 10 percent of funds received by an eligible grantee from payments made under this section may be used to provide case management and other services intended to help keep households stably housed.

(C) Administrative costs. Not more than 15 percent of the total amount paid to an eligible grantee under this section may be used for administrative costs attributable to providing financial assistance, housing stability services, and other affordable rental housing and eviction prevention activities, including for data collection and reporting requirements related to such funds.

(D) Other affordable rental housing and eviction prevention activities. An eligible grantee may use any funds from payments made under this section that are unobligated on October 1, 2022, for purposes in addition to those specified in this paragraph, provided that—

(i) such other purposes are affordable rental housing and eviction prevention purposes, as defined by the Secretary, serving very low-income families (as such term is defined in section 3(b) of the United States Housing Act of 1937 (*42 U.S.C. 1437a(b)*)); and

(ii) prior to obligating any funds for such purposes, the eligible grantee has obligated not less than 75 percent of the total funds allocated to such eligible grantee in accordance with this section.

(2) Distribution of assistance. Amounts appropriated under subsection (a)(1) of this section shall be subject to the same terms and conditions that apply under paragraph (4) of section 501(c) of subtitle A of title V of division N of the Consolidated Appropriations Act, 2021 (*Public Law 116-260*) [*15 USCS § 9058a(c)*] to amounts appropriated under subsection (a)(1) of such section 501 [*15 USCS § 9058a*].

(e) Reallocation of funds.

(1) In general. Beginning March 31, 2022, the Secretary shall reallocate funds allocated to eligible grantees in accordance with subsection (b) but not yet paid in accordance with subsection (c)(2) according to a procedure established by the Secretary.

(2) Eligibility for reallocated funds. The Secretary shall require an eligible grantee to have obligated 50 percent of the total amount of funds allocated to such eligible grantee under subsection (b) to be eligible to receive funds reallocated under paragraph (1) of this subsection.

(3) Payment of reallocated funds by the Secretary. The Secretary shall pay to each eligible grantee eligible for a payment of reallocated funds described in paragraph (2) of this subsection the amount allocated to such eligible grantee in accordance with the procedure established by the Secretary in accordance with paragraph (1) of this subsection.

(4) Use of reallocated funds. Eligible grantees may use any funds received in accordance with this subsection only for purposes specified in paragraph (1) of subsection (d).

(f) Definitions. In this section:

(1) Eligible grantee. The term "eligible grantee" means any of the following:

(A) The 50 States of the United States and the District of Columbia.

(B) A unit of local government (as defined in paragraph (5)).

(C) The Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa.

(2) Eligible household. The term "eligible household" means a household of 1 or more individuals who are obligated to pay rent on a residential dwelling and with respect to which the eligible grantee involved determines that—

(A) 1 or more individuals within the household has—

(i) qualified for unemployment benefits; or

(ii) experienced a reduction in household income, incurred significant costs, or experienced other financial hardship during or due, directly or indirectly, to the coronavirus pandemic;

(B) 1 or more individuals within the household can demonstrate a risk of experiencing homelessness or housing instability; and

(C) the household is a low-income family (as such term is defined in section 3(b) of the United States Housing Act of 1937 (*42 U.S.C. 1437a(b)*).

(3) Inspector General. The term "Inspector General" means the Inspector General of the Department of the Treasury.

(4) Secretary. The term "Secretary" means the Secretary of the Treasury.

(5) Unit of local government. The term "unit of local government" has the meaning given such term in section 501 of subtitle A of title V of division N of the Consolidated Appropriations Act, 2021 (*Public Law 116-260*) [*15 USCS § 9058a*].

(g) Availability. Funds provided to an eligible grantee under a payment made under this section shall remain available through September 30, 2025.

(h) [Omitted]

History

March 11, 2021, *P.L. 117-2*, Title III, Subtitle B, § 3201, *135 Stat. 54*.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

This section was enacted as part of Act March 11, 2021, *P.L. 117-2*, and not as part of Act March 27, 2020, *P.L. 116-136*, which generally comprises this chapter.

Subsec. (h), which has been omitted, amended *15 USCS § 9058a*.

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End of Document

EXHIBIT B

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST II
LT. GOVERNOR

SECRETARY OF SENATE
2020 JUN 26 PM 3:36

EXECUTIVE ORDER

No. 2020-134

Eviction diversion program for COVID-19-related debtors

Rescission of Executive Order 2020-118

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the EPA, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the EMA.

Those executive orders have been challenged in *Michigan House of Representatives and Michigan Senate v. Whitmer*. On May 21, 2020, the Court of Claims ruled that Executive Order 2020-67 is a valid exercise of authority under the Emergency Powers of the Governor Act but that Executive Order 2020-68 is not a valid exercise of authority under the Emergency Management Act. Both of those rulings are being challenged on appeal.

On June 18, 2020, I issued Executive Order 2020-127, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature had declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

Executive Order 2020-118 and its predecessors, which temporarily prohibited removal or exclusion of a tenant or mobile home owner from their residential premises, were issued because removing or excluding people from their residences was likely to exacerbate the public health threat of COVID-19. Although COVID-19 remains a deadly pandemic, conditions in Michigan are improving. As a result, it is now reasonable and necessary to replace the eviction moratorium with a special judicial process for addressing COVID-19-related debts. This process will keep people in their homes, while facilitating prompt payment to landlords.

To facilitate this transition, this order temporarily extends, and then rescinds, the eviction moratorium. Beginning July 16, 2020, Michigan landlords and lenders are strongly encouraged to take advantage of COVID-19 housing debt remedies, rather than pursuing eviction or foreclosure.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Executive Order 2020-118 is temporarily extended and will remain in effect through July 15, 2020. Effective July 16, 2020 at 12:01 am, Executive Order 2020-118 is rescinded.

2. "COVID-19 housing debt" means a money debt resulting at least in part from a breach of a residential lease, residential executory contract, or residential mortgage

due to failure to make a required payment during a state of emergency or state of disaster arising out of the COVID-19 pandemic.

3. A conditional dismissal, pursuant to Michigan Court Rule 2.602, of a claim based on COVID-19 housing debt may provide for the Eviction Diversion Program (EDP) or any similar relief fund established at the county or municipal level to satisfy up to 90% of the amount due to the plaintiff via a lump sum rental assistance payment, subject to availability of funds.

   (a) Rental assistance under this section is available only for COVID-19 housing debt.

   (b) Non-COVID-19 housing debt must be paid by the tenant either in a lump sum or as part of a conditional dismissal.

   (c) A conditional dismissal that includes EDP rental assistance must require the defendant's share of the amount due to be paid in 12 equal monthly payments.

   (d) In order to receive a lump sum rental assistance payment, plaintiff must waive any late fees or penalties, and must forgive one-ninth of one dollar of the remaining amount due for every dollar received as a lump sum payment. For example: (i) if a plaintiff receives $900 from the Eviction Diversion Program on a $1,000 arrearage, they must forgive the remaining $100; (ii) if a plaintiff receives $450 from the Eviction Diversion Program on a $1,000 arrearage, they must forgive $50, and the defendant tenant is responsible for paying the remaining $500 in twelve equal monthly payments.

4. Eligibility for rental assistance payments under section 3 will be based on tenant income and household size.

   (a) Households up to 100% of area median income (AMI), calculated based on income during the period for which assistance is sought, will be eligible for rental assistance, with a target of half of funds reserved for households earning less than 50% of AMI.

   (b) Tenant responsibility will vary based on AMI and amount due.

   (c) The Department of Labor and Economic Opportunity (LEO) must issue program guidance to implement this section.

5. LEO will issue grants to Housing Assessment and Resource Agencies (HARAs) to administer the Eviction Diversion Program. HARAs are responsible for making rental assistance payments under section 3 of this order, consistent with the eligibility criteria in section 4 and relevant LEO guidance.

6. Any statutory limits on the court of this state to adjourn any proceedings, toll any redemption periods or limitations periods, or extend any deadlines are suspended through July 31, 2020 at 11:59 pm.

7. For purposes of this order, "Eviction Diversion Program" refers to the rental assistance program funded by section 506 of Enrolled Senate Bill 690 of 2020.

8. A copy of this order will be transmitted to the State Court Administrative Office.

Given under my hand and the Great Seal of the State of Michigan.



Date: June 26, 2020

Time: 11:45 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

EXHIBIT C



Congressional Research Service
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Pandemic Relief: The Emergency Rental Assistance Program

Updated January 10, 2023

Congressional Research Service
https://crsreports.congress.gov
R46688

CRS REPORT
Prepared for Members and
Committees of Congress

Congressional Research Service
Informing the legislative debate since 1914

Pandemic Relief: The Emergency Rental Assistance Program

In response to concerns about the economic effects of the COVID-19 pandemic on renters and their landlords, Congress created a $25 billion Emergency Rental Assistance (ERA) program in the Consolidated Appropriations Act, 2021 (Division N of P.L. 116-260). A second round of ERA funding—$21.55 billion—was included in Section 3201 of the American Rescue Plan Act of 2021 (P.L. 117-2). Throughout this report, when there are relevant distinctions between the two laws, the program is accordingly referred to as either ERA-1 or ERA-2.

ERA is administered by the Department of the Treasury. Funding under both ERA-1 and ERA-2 was provided to states, localities, and territories via a per capita formula allocation. The formula for allocating ERA-1 funding guaranteed states a minimum initial allocation of $200 million. ERA-1 also included a set-aside for tribes. The formula for allocating ERA-2 funding guaranteed to states a $152 million minimum initial allocation. ERA-2 did not include a tribal set-aside, but did include a set-aside of $2.5 billion for "high need" grantees.

SUMMARY

R46688

January 10, 2023

Grant A. Driessen
Specialist in Public Finance

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Specialist in Housing Policy

For a copy of the full report, please call 7-5700 or visit www.crs.gov.

P.L. 116-260 established various parameters for how the ERA-1 funding can be used. Among other requirements, states and localities must use the bulk of funds for financial assistance, defined to include rental assistance and utility assistance (including payment of arrearages as well as prospective rental payments). Remaining funds may be used for housing stability services (case management and other supports to help families retain their housing) and administrative expenses. Renters are eligible for assistance if they are low-income, experiencing financial hardship due to the pandemic, and at risk of homelessness or housing insecurity. Grantees were directed to prioritize very low-income renters for assistance. The law also established obligation and expenditure deadlines and imposed various reporting requirements on the Treasury Secretary.

These parameters were changed somewhat for ERA-2. Specifically, the amount that can be spent on administrative expenses was increased for ERA-2, and grantees may be able to use ERA-2 funds that remained unobligated as of October 1, 2022, for a broader range of affordable housing and eviction prevention activities. Further, eligibility for assistance was broadened to include households experiencing financial hardship *during* the pandemic. P.L. 117-2 also extended the availability of ERA-1 funding from December 31, 2021, to September 30, 2022; ERA-2 funding was made available through September 30, 2025. The laws governing ERA-1 and ERA-2 directed Treasury to recapture and reallocate unused ERA funding from slow spending grantees to fast spending grantees.

Within the statutory requirements—and any additional guidance established by Treasury—states and localities have had flexibility in designing their ERA programs. The ability of states and localities to structure their programs differently means that the experience of similarly situated renters seeking assistance varied geographically. Similarly, there has been geographic variability in the degree to which existing resources—both ERA and other funds—have been adequate to meet demand for rental assistance and the speed at which grantees have been able to disburse assistance.

One concern since the ERA program initially launched has been the relatively slow rate of expenditure. Slow expenditure may be attributable to grantees struggling to launch programs (particularly if they had no prior experience administering emergency rental assistance); having difficulty attracting or processing eligible renters; receiving too much funding relative to demand (particularly in the case of some smaller states); and other factors. As of the cover date of this report, Treasury had completed four rounds of ERA-1 recapture and reallocation (as well as one round of tribal recapture and reallocation) and one round of ERA-2 recapture and reallocation, redirecting more than $3.1 billion in ERA-1 funding and more than $500 million in ERA-2 funding among grantees with higher expenditure rates. Of the amount redistributed, about 58% of ERA-1 funds were redistributed within the same state, with the remaining funds redistributed across states, often from small states (those that received the minimum allocation) to larger states.

Grantees have reported some basic information to Treasury on how they have spent ERA funding and who they have served. Data from the first quarter of 2021 through the second quarter of 2022 showed that grantees had provided ERA to 5.35 million unique households, the majority of which had incomes at or below 30% of local area median income. Roughly 70% of those served received rental assistance and about 64% received assistance with rental arrears. About 14% received utility assistance and 27% received assistance with utility arrears. The U.S. Department of Housing and Urban Development is funding a study to better understand the range of impacts the ERA program has had on program participants and their communities.

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Introduction

The Emergency Rental Assistance (ERA) program was created to help cover the unmet rent and utility expenses of low-income households affected by the economic consequences of the COVID-19 pandemic. The program received two rounds of funding.

The Consolidated Appropriations Act, 2021 (P.L. 116-260) initially funded the ERA program with an appropriation of $25 billion.[1] The ERA program was funded through the Coronavirus Relief Fund (CRF), a program created as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136), and administered by the Department of the Treasury, to assist state, local, territorial, and tribal governments.[2] While the CARES Act CRF appropriation could be used for multiple purposes, the ERA appropriation in P.L. 116-260 was directed only to rent and utility assistance and related housing stability services. A second appropriation for ERA—of $21.550 billion—was included in Section 3201 of the American Rescue Plan Act of 2021 (P.L. 117-2). Throughout this report, when there are relevant distinctions between the two laws, the program is accordingly referred to as ERA-1 or ERA-2.

This report briefly describes the need for rental assistance during the COVID-19 pandemic, provides information about the allocation of ERA funds, describes the parameters of the ERA program, and concludes with an analysis of how the program is being implemented, including the reallocation of funds to-date, a review of some of the administrative considerations in the program, and information about who the program has served.

Background: Rental Assistance During the COVID-19 Pandemic

Even before the onset of the COVID-19 pandemic, low-income renters struggled with housing affordability. The Joint Center on Housing Studies reported that in 2018, nearly half (48%) of all renters were cost burdened (i.e., paying more than 30% of their income in rent), with higher numbers for lower-income (80%), Black (55%), and Hispanic (53%) renters.[3]

The pandemic and its economic effects made renters' housing arrangements even more precarious. Efforts to assist renters included eviction moratoriums at the state and federal levels, including a nationwide moratorium on evictions for nonpayment of rent issued by the Centers for Disease Control and Prevention (CDC) that was in effect from September 4, 2020, until August 3, 2021.[4] However, moratoriums did not prevent arrearages from accumulating, and renters still faced risks of eviction, particularly after moratoriums ended.

Prior to enactment of ERA, some states and localities used federal funds appropriated as part of the CARES Act, including funds distributed through CRF and the Community Development Block Grant (CDBG), to operate rental assistance programs designed to prevent evictions.[5]

[1] See Division N, Title V, Section 501 of P.L. 116-260.

[2] For more information about CRF in the CARES Act, see CRS Report R46990, *General State and Local Fiscal Assistance and COVID-19: Eligible Purposes, Allocations, and Use Data*.

[3] Joint Center for Housing Studies, *America's Rental Housing 2020*, January 2020, pp. 26-29, https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf.

[4] For more information, see CRS Insight IN11673, *The CDC's Federal Eviction Moratorium*.

[5] See examples from the National Conference of State Legislatures, which tracks the ways in which states used their CRF allocations: https://www.ncsl.org/research/fiscal-policy/state-actions-on-coronavirus-relief-funds.aspx. The

Organizations representing both tenants and landlords advocated for additional federal funds to help tenants pay rental arrearages that had accumulated during eviction moratoriums.[6] Legislation was introduced in the 116th Congress that would have provided as much as $100 billion to help tenants pay rent.[7] Ultimately, Congress appropriated nearly $47 billion for emergency rent and utility assistance through the ERA program.

Initial State and Local Allocations

P.L. 116-260 (ERA-1)

P.L. 116-260 provided a total of $25.000 billion in ERA support. Payments (denoted as ERA-1 payments here and in Treasury documentation) were distributed across these jurisdictions as follows:

- $23.785 billion was allocated to eligible local governments, the 50 states, and the District of Columbia based on their populations (as projected by the U.S. Census Bureau for July 2020),[8] with no state receiving less than $0.200 billion;[9]
- $0.800 billion was set aside for governments in tribal areas, with individual government allocations distributed in proportion to relative payments made under the Native American Housing Block Program in FY2020;[10]
- $0.400 billion was allocated to the territories of Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa, with $0.325 billion provided to Puerto Rico and $0.075 billion distributed to the remaining territories based on their relative population share; and
- $0.015 billion was set aside to cover federal administrative costs related to program implementation.

ERA-1 payments were generally provided to state (or territorial) governments. Local governments serving a population of at least 200,000 (as measured by the U.S. Census Bureau in 2019),[11] could elect to receive their own direct allocations from Treasury. Direct payments made to localities reduced Treasury's initial allocation to their state government (keeping the total amount provided across each state constant), and were the product of (1) the state or territorial

National Low Income Housing Coalition tracked the way in which CARES Act funding more broadly was used for rental assistance: https://bit.ly/RA-database.

[6] See, for example, National Housing Conference, "31 housing organizations tell administration and Congress to immediately return to negotiations," press release, August 21, 2020, https://nhc.org/press-release/31-housing-organizations-tell-administration-and-congress-to-immediately-return-to-negotiations/.

[7] See the Heroes Act (H.R. 6800) and the Emergency Rental Assistance and Rental Market Stabilization Act (H.R. 6820, S. 3685).

[8] U.S. Census Bureau, "Vintage 2020 Population Estimates for the United States and States," December 2020, https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates.html. Allocations are determined by total state populations, including nonrenters; for recent estimates of state renter populations, see U.S. Census Bureau, "American Community Survey 2015-2019 5-Year Data Release," December 2020, https://www.census.gov/newsroom/press-kits/2020/acs-5-year.html.

[9] The District of Columbia was treated as a state for both the ERA-1 and ERA-2 allocations.

[10] For more on the Native American Housing Block Grant program, see CRS Report R43307, *The Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA): Background and Funding*.

[11] U.S. Census Bureau, "Subcounty Resident Population Estimates: April 1, 2010 to July 1, 2019," May 2020, https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-cities-and-towns.html.

allocation amount, (2) the percentage of the state or territorial population attributable to the local government, and (3) 45%.

In many cases, populations were served by more than one local government eligible for direct assistance from ERA (e.g., a city with a population of 300,000 located in a county with 200,000 people living in other localities in the county, and thus having a county population of 500,000). Treasury clarified that in such cases, overlapping governments were eligible for assistance.[12] However, direct assistance payments to larger localities was calculated using only their unique population, or was reduced by any amounts also attributable to smaller localities receiving assistance (i.e., in the above example, the county government would only use a population of 200,000 for its direct payment calculation).

P.L. 117-2 (ERA-2)

P.L. 117-2 appropriated an additional $21.550 billion in ERA support to local, state, and territorial governments. Unlike P.L. 116-260, P.L. 117-2 did not include a separate allocation of funds for tribal governments. Payments (denoted as ERA-2 payments here and in Treasury documentation) were distributed across eligible jurisdictions as follows:

- $18.712 billion was allocated to eligible local governments, the 50 states, and the District of Columbia based on their populations (as projected by the U.S. Census Bureau for July 2020),[13] with no state receiving less than $0.152 billion;
- $0.305 billion was allocated to the territories of Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa, with $0.240 billion provided to Puerto Rico and $0.065 billion distributed to the remaining territories based on their relative population share;
- $2.500 billion was set aside for high-need grantees, to be distributed by the Treasury Secretary using statistics on high-need housing, rental market costs, and unemployment (ERA-2 High Need); and
- $0.033 billion was set aside to cover federal administrative costs related to program implementation.

Direct local allocation eligibility, calculations, and division of payments across overlapping governments in ERA-2 were consistent with the methodology from ERA-1. However, P.L. 117-2 directed that ERA-2 funds be staggered in their distribution. Specifically, Treasury was directed to distribute no less than the first 40% of ERA-2 funds within 60 days of enactment, with the remainder to be distributed after grantees expended 75% of their initial ERA-2 allocation.[14]

[12] U.S. Department of the Treasury, "Emergency Rental Assistance Program: Data and Methodology for State, Local Government, and Territory Allocations," January 2021, https://home.treasury.gov/system/files/136/Emergency-Rental-Assistance-Data-and-Methodology-1-11-21.pdf.

[13] U.S. Census Bureau, "Vintage 2020 Population Estimates for the United States and States," December 2020, https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates.html. Allocations are determined by total state populations, including nonrenters; for recent estimates of state renter populations, see U.S. Census Bureau, "American Community Survey 2015-2019 5-Year Data Release," December 2020, https://www.census.gov/newsroom/press-kits/2020/acs-5-year.html.

[14] See P.L. 117-2, §3201(c) available at https://www.congress.gov/bill/117th-congress/house-bill/1319/text#H61B6162AB8EC496ABB590ADA8F6898FF.

Table 1 shows ERA-1 and ERA-2 initial allocations broken out by state and territory, and government level.[15]

Table 1. Emergency Rental Assistance Initial Allocations in P.L. 116-260 (ERA-1) and P.L. 117-2 (ERA-2)

(allocations in millions of dollars)

	Allocations to State Governments		Allocations to Local Governments		
State or Territory	**ERA-1**	**ERA-2**	**ERA-1**	**ERA-2**	**Grand Total**
Alabama	263	224	63	65	615
Alaska	165	125	35	27	352
American Samoa	10	9	0	0	19
Arizona	290	229	203	199	921
Arkansas	174	137	27	22	360
California	1,498	1,210	1,113	1,376	5,197
Colorado	248	196	137	138	719
Connecticut	236	222	0	0	458
Delaware	200	96	0	56	352
District of Columbia	200	152	0	0	352
Florida	871	740	570	575	2,756
Georgia	552	479	158	159	1,348
Guam	33	29	0	0	62
Hawaii	125	95	75	71	366
Idaho	176	125	24	27	352
Illinois	566	474	268	288	1,596
Indiana	372	324	76	74	846
Iowa	195	149	15	17	376
Kansas	169	126	31	26	352
Kentucky	264	233	33	32	562
Louisiana	249	192	59	70	570
Maine	200	126	0	26	352
Maryland	258	204	143	148	754
Massachusetts	421	353	36	83	893
Michigan	623	403	38	190	1,254
Minnesota	289	229	86	84	688
Mississippi	187	145	13	13	358

[15] U.S. Department of the Treasury, "Emergency Rental Assistance Program," May 2021, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program.

	Allocations to State Governments		Allocations to Local Governments		
State or Territory	**ERA-1**	**ERA-2**	**ERA-1**	**ERA-2**	**Grand Total**
Missouri	324	270	84	94	771
Montana	200	152	0	0	352
Nebraska	159	121	41	36	357
Nevada	125	99	83	87	394
New Hampshire	179	115	21	37	352
New Jersey	354	272	235	260	1,121
New Mexico	161	123	39	36	359
New York	801	673	481	639	2,594
North Carolina	547	490	156	138	1,331
North Dakota	200	152	0	0	352
Northern Mariana Islands	10	9	0	0	19
Ohio	565	496	210	205	1,476
Oklahoma	210	166	54	55	485
Oregon	204	156	77	88	525
Pennsylvania	570	500	278	263	1,611
Puerto Rico	325	240	0	0	565
Rhode Island	200	152	0	0	352
South Carolina	272	232	74	73	651
South Dakota	200	152	0	0	352
Tennessee	383	313	73	93	862
Texas	1,308	1,080	639	660	3,686
U.S. Virgin Islands	21	18	0	0	40
Utah	150	113	65	64	392
Vermont	200	152	0	0	352
Virginia	525	396	45	113	1,079
Washington	322	278	188	190	978
West Virginia	200	152	0	0	352
Wisconsin	322	281	65	67	735
Wyoming	200	152	0	0	352
All Tribal Governments	800	0	0	0	800
Totals	**18,305**	**14,531**	**6,680**	**6,964**	**46,480**

Source: U.S. Department of the Treasury, "Emergency Rental Assistance Program," May 2021, https://home.treasury.gov/policy-issues/cares/emergency-rental-assistance-program; and U.S. Treasury, "ERA2

Allocations for Eligible Entities," May 2021, https://home.treasury.gov/policy-issues/cares/emergency-rental-assistance-program.

Notes: Recipients may choose to subgrant funds to governments within their jurisdiction, but are not obligated to do so. Sums may not equal totals due to rounding. ERA-2 payments include those categorized as high-need payments.

Funding Availability

P.L. 116-260 made ERA-1 funds available to grantees through December 31, 2021; the ERA-1 deadline was subsequently extended to September 30, 2022, by P.L. 117-2. Beginning September 30, 2021, the law directed the Treasury Secretary to recapture any "excess" unobligated ERA-1 funds (as determined by the Secretary) and to reallocate them to grantees that had obligated at least 65% of their ERA-1 funds for eligible purposes. Grantees receiving reallocated ERA-1 funds were eligible for an up to 90-day extension of the funding availability deadline, to December 29, 2022.

P.L. 117-2 made ERA-2 funds available to grantees until September 30, 2025. However, beginning March 31, 2022, the law directed the Treasury Secretary to reallocate *undisbursed* ERA-2 funds[16] only to grantees that have obligated 50% or more of their total allocated ERA-2 funds. These reallocated funds can only be used for financial assistance, not housing stability services or administrative costs. The law permits grantees that have obligated at least 75% of their ERA-2 funds for eligible purposes as of October 1, 2022, to obligate remaining unobligated funds for a broader range of other affordable rental housing and eviction prevention purposes for very low-income families.

ERA-1 Recapture and Reallocation Process

The law that created ERA-1 left the Treasury Secretary discretion regarding how to structure the recapture and reallocation process. The process developed by the agency was described in guidance, initially published in October 2021, and subsequently revised several times.[17] Under that guidance, grantees were subject to recapture of unobligated funding if they had "excess" ERA-1 funding. Treasury periodically determined whether grantees had "excess funds" by evaluating their spending against expenditure ratios, which increased over time. Generally, the expenditure ratio is calculated as the share of a grantee's allocation (excluding 10% for administrative costs) spent on assistance to eligible households. For grantees with spending below the expenditure ratio, the amount subject to recapture was the difference between the grantee's expenditures and the applicable ratio at the time of evaluation.[18]

[16] As noted earlier, P.L. 117-2 directed Treasury to disburse ERA-2 funding allocations in phases, based on grantee spending rates. Specifically, Treasury was directed to distribute no less than the first 40% of ERA-2 funds within 60 days of enactment, with the remainder to be distributed after grantees expend 75% of their initial ERA-2 allocation. It is these undisbursed ERA-2 funds held by Treasury that are subject to potential reallocation.

[17] U.S. Department of the Treasury, "Emergency Rental Assistance Under the Consolidated Appropriations Act, 2021 Reallocation Guidance," October 4, 2021, https://home.treasury.gov/system/files/136/ERA1-ReallocationSummary-October-2021.pdf; "Emergency Rental Assistance Under the Consolidated Appropriations Act, 2021 Reallocation Guidance," updated March 30, 2022, https://home.treasury.gov/system/files/136/Updated-ERA1-Reallocation-Guidance%203-30-%202022.pdf; "Emergency Rental Assistance Under the Consolidated Appropriations Act, 2021, Addendum to Reallocation Guidance for Tribal Governments," June 1, 2022, https://home.treasury.gov/system/files/136/ERA_Tribal_Guidance_Addendum.pdf; and "Emergency Rental Assistance Under the Consolidated Appropriations Act, 2021 Reallocation Guidance," updated September 6, 2022, https://home.treasury.gov/system/files/136/UpdatedERA1ReallocationGuidanceSep6.pdf.

[18] For example, see "Emergency Rental Assistance Under the Consolidated Appropriations Act, 2021 Reallocation

Treasury gave grantees the ability to avoid or lessen recapture if they submitted and complied with a Program Improvement Plan. If a grantee failed to submit required reports under the Program Improvement Plan, the grantee could also be determined to have excess funds subject to recapture in an amount equal to 10% of the grantee's allocation.

In order to prevent recapture, Treasury also allowed grantees to request that a portion of their ERA-1 funds be voluntarily reallocated to another designated grantee (either other localities within the same state or the state grantee) that had obligated at least 65% of its funds.

Once Treasury made a recapture, it started a process to reallocate funds to other grantees. According to the Treasury guidance,

- grantees were eligible to apply for reallocated funds if they had obligated at least 65% of their initial ERA-1 allocations and they submitted a request to Treasury;
- if more requests were received than there were excess funds to be reallocated, Treasury would develop a relative share formula for allocating funds:
  - when feasible, Treasury prioritized reallocation within the same state; and
  - Treasury reserved the right to prioritize grantees likely to expend all remaining ERA-1 and ERA-2 funds promptly.

Treasury ultimately conducted four rounds of ERA-1 recapture and reallocation, and one round of tribal reallocation.[19] Through the recapture and reallocation process, $3.140 billion dollars—or nearly 13% of all ERA-1 funding—was redistributed among grantees.

ERA-2 Recapture and Reallocation Process

As with ERA-1, the statute left Treasury with discretion to structure the recapture and reallocation process for ERA-2. In late March 2022, Treasury released ERA-2 reallocation guidance, which was subsequently revised in November 2022.[20] The recapture process was structured similarly to the ERA-1 process, with grantee expenditures being evaluated quarterly against increasing expenditure ratios. Unlike the ERA-1 process, the ERA-2 process did not allow for Program Improvement Plans or cure periods. Another important difference is that the only ERA-2 funding subject to recapture is funding still held by Treasury. (As noted earlier, ERA-2 directed that Treasury only disburse the first 40% of a grantee's funding initially, retaining the remaining 60% until 75% of the initial allocation had been spent.) Thus, the first 40% of all ERA-2 grant allocations is protected from recapture.

Guidance," updated September 6, 2022, p. 3, https://home.treasury.gov/system/files/136/UpdatedERA1ReallocationGuidanceSep6.pdf

[19] Round 1 reallocation was announced January 7, 2022; Round 2 reallocation was announced March 14, 2022; Round 3 reallocation was announced September 26, 2022; Tribal Reallocation was announced October 21, 2022; Round 4 (final) reallocation was announced October 28, 2022. Reallocation data are available on Treasury's website, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program.

[20] U.S. Department of the Treasury, "Emergency Rental Assistance Under the American Rescue Plan Act of 2021 (ERA2) Reallocation Guidance," March 30, 2022, https://home.treasury.gov/system/files/136/Updated-ERA1-Reallocation-Guidance%203-30-%202022.pdf, and "Emergency Rental Assistance Under the American Rescue Plan Act of 2021 (ERA2) Reallocation Guidance," updated November 15, 2022, https://home.treasury.gov/system/files/136/ERA2-Reallocation-Guidance-March-30-2022.pdf.

As of December 2022, Treasury had conducted one round of ERA-2 reallocation, for Quarter 1, 2022, in which almost $521 million was redistributed among grantees. In terms of future reallocations of ERA-2 funding, a December 2, 2022, notice issued by Treasury stated:

> Grantees have continued to draw down and obligate their ERA2 funds at high rates, diminishing the need to conduct additional reallocation following the already-announced Quarter 2 and Quarter 3 2022 Assessments [based on expenditures as of June 30, 2022 and September 30, 2022]. Accordingly, Treasury will not conduct the optional Final Undrawn Funds Assessment described in the Guidance until at least June 2023, if ever.[21]

ERA Program Parameters

When P.L. 116-260 created the ERA program, it established parameters for how ERA-1 funds could and should be spent. Treasury issued Frequently Asked Questions (FAQs) regarding how certain aspects of the law are to be applied.[22] For ERA-2 funding, P.L. 117-2 made some changes that are applicable to ERA-1 (i.e., expenditure deadlines); and others that are applicable only to ERA-2 (i.e., income eligibility and a different cap on administrative expenses). Treasury has revised its FAQs multiple times to reflect the requirements of both ERA-1 and ERA-2 and in response to stakeholder feedback.[23]

ERA funds are provided from Treasury to grantees, which can use the funds to design their own rental assistance programs within the requirements of the law and Treasury guidance. Some grantees were able to use the new funds to supplement existing rental assistance programs created with CARES Act or other funds, to the extent their existing programs aligned with ERA statutory requirements (which are outlined below); others had to develop new programs from scratch.

Eligible Use of Funds

P.L. 116-260 directed that 90% of ERA-1 funds be spent on direct financial assistance and that up to 10% could be spent on administrative expenses and housing stability services. Treasury guidance further interpreted these limits to allow grantees to use up to 10% of ERA-1 funds for housing stability services, and up to 10% of total funds for administrative expenses.

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[21] U.S. Department of the Treasury, "Emergency Rental Assistance (ERA2) Under the American Rescue Plan Act of 2021, Notice Regarding the ERA2 Final Undrawn Funds Assessment," December 2, 2022, https://home.treasury.gov/system/files/136/ERA2-FinalAssessmentNotice-FINAL12222.pdf.

[22] Treasury FAQs can be found at https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program/faqs.

[23] Treasury's ERA website contains a change log of FAQs, available at https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program/faqs/change-log. FAQs were initially published in January 2021; see the January 19, 2021, FAQs at https://home.treasury.gov/system/files/136/ERA-Frequently-Asked-Questions_Pub-1-19-21.pdf. As of the cover date of this report, the FAQs have been changed seven times, in February, March, May, June, and August of 2021 and twice in July 2022. See February 22, 2021, FAQs at https://home.treasury.gov/system/files/136/ERA-Frequently-Asked-Questions_Pub-2-22-21.pdf; March 16, 2021, FAQs at https://home.treasury.gov/system/files/136/ERA-Frequently-Asked-Questions_Pub-3-16-21.pdf; May 7, 2021, FAQs at https://home.treasury.gov/system/files/136/ERA2FAQs%205-6-21.pdf; June 24, 2021, FAQs at https://home.treasury.gov/system/files/136/ERA_FAQs_6-24-21.pdf; August 25, 2021, FAQs at https://home.treasury.gov/system/files/136/ERA-FAQ-8-25-2021.pdf; July 6, 2022, FAQs at https://home.treasury.gov/system/files/136/ERA_FAQ_7622.pdf; and July 27, 2022, FAQs at https://home.treasury.gov/system/files?file=136/ERA-FAQ-7.27.22.pdf.

For ERA-2, P.L. 117-2 directed that no more than 15% of ERA-2 funds be spent on administrative expenses and 10% be spent on housing stability services, leaving at least 75% to be spent on direct financial assistance.

Financial Assistance

P.L. 116-260 defined financial assistance as assistance to tenants for

- rent and rental arrears,
- utilities and home energy costs and arrears, and
- other expenses related to housing incurred due, directly or indirectly, to the COVID-19 outbreak, as defined by the Treasury Secretary.

The definition of financial assistance under P.L. 117-2 for ERA-2 is nearly identical, except when it comes to other expenses related to housing; ERA-2 does not require that the expenses be related to the COVID-19 outbreak.

Treasury issued an FAQ in January 2021 clarifying that telecommunications services are not considered utilities under this program.[24] However, Treasury revised the FAQ in February 2021 to define "other expenses" eligible for assistance to include internet service, if it allows renters to engage in distance learning, telework, and telemedicine and obtain government services.[25] Additional "other expenses" identified in the FAQ include relocation expenses and rental fees (if a household has been displaced due to COVID-19), and accrued late fees.

Length of Assistance

Under ERA-1, assistance could be provided for no more than 12 months, with the possibility of one 3-month extension. Payments made for prospective rent were subject to additional limitations; they could only be provided in 3-month increments and only if rental arrearages were addressed.

Under the terms of P.L. 117-2, recipients can receive no more than 18 months of assistance under both rounds of ERA combined, with ERA-1 assistance still limited to no more than 15 months.

Treasury's May 7, 2021, FAQs clarified that grantees must prohibit landlords from evicting tenants for nonpayment of rent during the period for which they have received prospective rent payments or for which rental arrearages were paid. Treasury's guidance also encourages grantees to set policies prohibiting landlords who receive payment for rental arrearages from evicting tenants for nonpayment of rent for some period, consistent with applicable law.[26]

Payments

P.L. 116-260 directed that ERA-1 payments be made directly to landlords or utility providers, but it allowed payments to be made directly to tenants if landlords or utility providers were unwilling to accept such payments. In its May 7, 2021, FAQs, Treasury reduced the amount of time grantees

[24] January 9, 2021, FAQ #1, https://home.treasury.gov/system/files/136/ERA-Frequently-Asked-Questions_Pub-1-19-21.pdf.

[25] February 22, 2021, FAQ #7, https://home.treasury.gov/system/files/136/ERA-Frequently-Asked-Questions_Pub-2-22-21.pdf.

[26] May 7, 2021, FAQ #32, https://home.treasury.gov/system/files/136/ERA2FAQs%205-6-21.pdf.

under ERA-1 were required to wait for landlords or utility providers to respond to outreach efforts before making payments directly to tenants.[27]

ERA-1 guidance clarified that landlords are permitted to aid their tenants in applying for assistance, or they may apply directly. Landlords who apply directly must meet certain conditions (including obtaining tenant signatures, notifying tenants of the application, and ensuring any funds received are applied to tenants' rental obligations).

The requirements in P.L. 117-2 for ERA-2 are not as specific about landlord involvement, and, according to guidance in the May 7, 2021, FAQs, grantees may use their ERA-2 funding to offer assistance directly to tenants without first attempting to contact landlords or utility providers.[28]

Additionally, a revision to the FAQs issued on June 24, 2021, permitted grantees under both ERA-1 and ERA-2 to enter into data sharing agreements and bulk payment arrangements for large landlords and utility providers.[29] The August 25, 2021, revisions to the FAQs allow grantees to make bulk payments to landlords and utility providers in advance of tenant eligibility determination, as long as application and documentation requirements are met within six months.[30]

The August 2021 FAQs further allow that, upon the request of a tenant, a grantee may provide both ERA-1 and ERA-2 assistance for rental and utility arrears after an otherwise eligible tenant has vacated a unit.[31]

Administrative Costs and Housing Stability Services

For ERA-1, grantees were authorized to use up to 10% of grant amounts each for housing stability services and administrative costs.[32]

P.L. 116-260 defined "housing stability services" as case management and other services related to COVID-19, to be defined by the Secretary, that are intended to keep tenants stably housed. It restricted administrative expenses to those tied to providing financial assistance and housing stability services, including for data collection and reporting requirements.

For ERA-2, P.L. 117-2 established a cap of up to 15% of total grant funding for administrative expenses and up to 10% for housing stability services. The law defined "housing stability services" as case management and other services intended to keep households stably housed, without reference to COVID-19. It defined "administrative expenses" as those included under P.L. 116-260, as well as costs associated with other affordable rental housing and eviction prevention activities.

Individual Eligibility and Prioritization

For ERA-1, P.L. 116-260 established a three-part eligibility test based on income level, income loss or other financial hardship, and risk of homelessness or housing instability. It also established

[27] May 7, 2021, FAQ #12, https://home.treasury.gov/system/files/136/ERA2FAQs%205-6-21.pdf.

[28] Ibid.

[29] June 24, 2021, FAQ #38, https://home.treasury.gov/system/files/136/ERA_FAQs_6-24-21.pdf.

[30] August 25, 2021, FAQ #38, https://home.treasury.gov/system/files/136/ERA-FAQ-8-25-2021.pdf.

[31] August 25, 2021, FAQ #40, https://home.treasury.gov/system/files/136/ERA-FAQ-8-25-2021.pdf.

[32] March 25, 2021, FAQ #29, https://home.treasury.gov/system/files/136/ERA-Frequently-Asked-Questions_Pub-3-16-21.pdf.

a set of income targeting requirements to guide states and localities in prioritizing assistance. P.L. 117-2 largely adopted the same requirements for ERA-2, but with some changes.

Eligibility

Under ERA-1, to be eligible for direct financial assistance or housing stability services, households must be renters and

- low-income, defined (consistent with federal housing law) as having income at or below 80% of local area median income as established by the Department of Housing and Urban Development (HUD);
- experiencing financial hardship, as evidenced by receipt of unemployment benefits or a written attestation of other financial hardship (income loss or increased expenses) related directly or indirectly to the COVID-19 pandemic; and
- have at least one member at risk of homelessness or housing instability, as evidenced by past due rent or utility notices (including eviction notices), unsafe living conditions, or other evidence as established by the grantee.

The eligibility definition for ERA-2 is largely the same, although it does not include the detail as to how an individual can demonstrate a risk of homelessness or housing insecurity that was included for ERA-1; nor does ERA-2 require that financial hardship be related to the COVID-19 pandemic. A household is eligible for assistance under ERA-2 as long as hardship has occurred due to *or* during the pandemic.

Neither ERA-1 nor ERA-2 addresses noncitizen eligibility for assistance under the ERA program.[33]

Prioritization

Under both ERA-1 and ERA-2, grantees are to prioritize the following individuals for direct financial assistance and housing stability services:

- very low-income tenants, defined (consistent with federal housing law) as having income at or below 50% of local area median income as established by HUD; and
- applicants who are unemployed and have been unemployed for the prior 90 days.

The law permits states and localities to further establish their own prioritization policies.

Documentation

P.L. 116-260 specified that for ERA-1, grantees may determine an applicant's income eligibility based on annual income or current monthly income (subject to three-month recertification).

P.L. 117-2 does not include provisions related to income determination for ERA-2.

[33] Some questions have arisen as to whether noncitizen eligibility restrictions under the Personal Responsibility and Work Responsibility Act of 1996 (PRWORA; Title IV of P.L. 104-193, as amended) apply to assistance under the ERA program. To date, Treasury has not issued guidance on the applicability of PRWORA noncitizen restrictions to these funds. For more information about PRWORA's restrictions, see CRS Report R46510, *PRWORA's Restrictions on Noncitizen Eligibility for Federal Public Benefits: Legal Issues*.

Treasury's May 7, 2021, FAQs encouraged grantees to be flexible in establishing eligibility for both ERA-1 and ERA-2. The FAQs state: "Treasury strongly encourages grantees to avoid establishing documentation requirements that are likely to be barriers to participation for eligible households."[34] For example, the FAQs say a grantee may rely on an applicant's self-attestation of income under certain circumstances as well as financial hardship related to COVID-19.[35] Treasury also authorized the use of categorical eligibility and fact-specific proxies for confirming eligibility.[36]

Reporting Requirements

The Treasury Secretary, in consultation with the Secretary of Housing and Urban Development, is required under P.L. 116-260 to provide quarterly reports on a number of specified ERA-1 program indicators, including the number of households served by the program, their income profiles, the acceptance rate of applicants, and the types and amounts of assistance. Grantees must establish data privacy guidelines for collecting information. Treasury publishes data from these reports on its website.[37]

P.L. 117-2 did not contain reporting requirements for ERA-2. Treasury's May 7, 2021, FAQs encouraged ERA-2 grantees to comply with the data privacy and security requirements established for ERA-1.[38] Treasury subsequently released reporting guidance applicable to both ERA-1 and ERA-2 grantees.[39]

Program Performance and Future Considerations

ERA was unique in the context of federal housing assistance programs in that it was implemented rapidly, and on a large scale, effectively from scratch. HUD has announced it is funding research to better understand how the program functioned in its goal of preventing eviction and housing instability among low-income households during the COVID-19 pandemic.[40] While findings from that research will not be available for several years, data and information are available that provide some indication of how the program has functioned and who it has served.

Funding Distribution and Reallocation

The formula that was used to allocate ERA-1 funding was based solely on population. The same formula was used to distribute ERA-2 funding, although a portion of funds were set aside to be

[34] May 7, 2021, FAQ #1, https://home.treasury.gov/system/files/136/ERA2FAQs%205-6-21.pdf.

[35] May 7, 2021, FAQ #4, #2, https://home.treasury.gov/system/files/136/ERA2FAQs%205-6-21.pdf.

[36] May 7, 2021, FAQ #4, https://home.treasury.gov/system/files/136/ERA2FAQs%205-6-21.pdf.

[37] See https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program.

[38] May 7, 2021, FAQ # 14, https://home.treasury.gov/system/files/136/ERA2FAQs%205-6-21.pdf.

[39] See ERA Reporting Guidance, issued June 30, 2021, at https://home.treasury.gov/system/files/136/ERA-Reporting-Guidance.pdf.

[40] U.S. Department of Housing and Urban Development, *Notice of Funding Opportunity,* Impact Evaluation of the Emergency Rental Assistance (ERA) Program, August 25, 2022, https://www.hud.gov/sites/dfiles/SPM/documents/ImpactEvaluationofTheEmergencyAssistanceERAProgramV.2FY22_NOFO.pdf and U.S. Department of Housing and Urban Development, "HUD Awards $2 Million to Assess the Impact of Emergency Rental Assistance on Housing Stability," press release, November 3, 2022, https://www.hud.gov/press/press_releases_media_advisories/hud_no_22_226.

distributed to jurisdictions considered to have "high needs" based on factors including rental market costs and high cost burdens among low-income renter households. The formula included a small state minimum, which meant that low population states (those that received the small state minimum) were given larger per-capita allocations than large population states.[41]

Observers have critiqued the formula for directing too much funding to smaller states with relatively fewer renters in need and not enough to states with the highest proportion of vulnerable renters. For example, Abt Associates released a report in January 2022 based on a study of eight states, in which they report: "representatives from the less populous states noted that their allocations were likely too large given the need for rental assistance in their states."[42] A December 2022 Government Accountability (GAO) report had similar findings, noting that 4 of the 21 grantees they interviewed reported that funding in excess of the needs of eligible renters was an obstacle to their spending.[43]

The GAO report compared initial ERA-1 allocations to the number of low-income renters in each state and found the total amount of funding available to low-income renters varied significantly across states, from as low as $602 per low-income renter in New York to $4,588 per low-income renter in Wyoming.[44]

As noted earlier, $3.1 billion, or 12.6%, of ERA-1 funding was ultimately redistributed from relatively slower-spending grantees to relatively faster-spending grantees. Some of that funding moved between grantees within states and some moved across states.

Table 2 presents information on ERA-1 redistribution amounts across states, tribes, and territories. The state-level figures presented reflect the aggregated totals for all grantees within a state (both state and local grantees, but not tribes within a state). The states are sorted by amount of redistributed funding received within or forfeited outside of the state; states receiving the small state minimum are italicized. (Because ERA-2 reallocations are still taking place, that information is not included.)

Table 2. ERA-1 Reallocation

State	ERA-1 Initial Allocation ($ in millions)	Change in ERA-1 Total Funding Based on Reallocation ($ in millions)	Relative Change in ERA-1 Total Funding Based on Reallocation (%)
California	2,611	406	16%
New York	1,282	298	23%
Texas	1,947	148	8%
New Jersey	589	140	24%
Illinois	835	38	5%

[41] U.S. Government Accountability Office (GAO), *Emergency Rental Assistance: Treasury's Oversight is Limited by Incomplete Data and Risk Assessment*, GAO-23-105410, December 2022, p. 15, https://www.gao.gov/assets/gao-23-105410.pdf (hereinafter, *Emergency Rental Assistance: Treasury's Oversight is Limited by Incomplete Data and Risk Assessment*).

[42] Abt Associates, *Lessons from Eight States Regarding Factors That Have Contributed to States' ERA1 Spending Rates*, January 18, 2022, pp. 3-4, https://www.abtassociates.com/files/insights/reports/2022/era-findings-from-8-states_abt-2021.pdf (hereinafter, *Lessons from Eight States Regarding Factors That Have Contributed to States' ERA1 Spending Rates*).

[43] *Emergency Rental Assistance: Treasury's Oversight is Limited by Incomplete Data and Risk Assessment*, p. 15.

[44] *Emergency Rental Assistance: Treasury's Oversight is Limited by Incomplete Data and Risk Assessment*, pp. 17-18.

District of Columbia	200	33	17%
Minnesota	375	33	9%
Pennsylvania	848	27	3%
Oregon	281	21	7%
Washington	510	20	4%
Florida	1,441	19	1%
Virginia	570	16	3%
North Carolina	703	15	2%
Colorado	385	12	3%
Louisiana	308	8	3%
Hawaii	200	7	3%
Nevada	208	6	3%
Massachusetts	457	5	1%
Nebraska	200	3	2%
Maryland	402	3	1%
Connecticut	236	3	1%
Georgia	710	2	0%
Arizona	492	2	0%
Missouri	408	2	0%
Oklahoma	264	1	1%
Kansas	200	1	1%
Alaska	200	1	1%
South Carolina	346	0	0%
New Mexico	200	0	0%
Michigan	661	0	0%
Iowa	210	-	0%
Maine	200	-	0%
Rhode Island	200	-	0%
Wisconsin	387	(0)	0%
Indiana	448	(4)	-1%
Arkansas	201	(9)	-4%
Ohio	775	(11)	-1%
Utah	216	(19)	-9%
Kentucky	297	(20)	-7%
Mississippi	200	(25)	-12%
Vermont	200	(31)	-16%
New Hampshire	200	(57)	-29%
Tennessee	457	(72)	-16%

Delaware	200	(74)	-37%
Idaho	200	(77)	-38%
West Virginia	200	(91)	-46%
Alabama	326	(110)	-34%
Montana	200	(137)	-69%
North Dakota	200	(151)	-76%
Wyoming	200	(168)	-84%
South Dakota	200	(183)	-91%
American Samoa	10	(6)	-64%
Guam	34	(7)	-21%
Northern Mariana Islands	10	-	0%
Puerto Rico	325	(85)	-26%
Virgin Islands	21	(16)	-77%
Tribal Governments	800	47	6%

Source: Prepared by CRS based on data reported by the U.S. Department of the Treasury.

Note: The 50 states and the District of Columbia are ordered from largest dollar reallocation received to largest dollar recapture.

Grantees in small states (a total of 18 states, defined as those that received the small state minimum) accounted for a disproportionate share of funding that was redistributed. Nearly 33% ($994 million) of the $3.1 billion in ERA-1 funding that was ultimately redistributed came from grantees in 10 of those small states. Grantees in those 10 states, in aggregate, had 50% of their overall initial allocation redistributed to other states; individual states' losses ranged from 12% (Mississippi) to 91% (South Dakota) of their overall allocations.

Five larger population states (California, New York, Texas, New Jersey, and Illinois) combined received more than $1.0 billion in addition to their initial ERA-1 allocations. Together, they received more than 33% of all reallocated funding. Although large states received the largest share of reallocated funds, six small states were net recipients of reallocated funding, in aggregate receiving $45 million, or about 1% of all reallocated funding. Individual small state gains relative to their overall allocations ranged from less than 0.2% (New Mexico) to 16.5% (District of Columbia).

While **Table 2** presents information about how money moved, in aggregate, across states, territories, and tribal governments, it does not show how much money moved between grantees *within* states. As noted earlier, Treasury prioritized in-state reallocation of ERA funding in two ways: (1) grantees at risk of having funds recaptured could voluntarily reallocate all or a portion of their excess funding to other grantees in the state; and (2) for funds that were involuntarily recaptured, Treasury prioritized first reallocation to grantees within a state before out-of-state reallocations, where possible.

As shown in **Table 3**, the majority of reallocated ERA-1 funding was reallocated between grantees within the same state. Of the within-state redistribution, the vast majority of funds (89%) were voluntarily reallocated by grantees to other designated entities within their state. Often, these voluntary reallocations happened between states and local governments or between local governments; but in some cases, state and local governments transferred funding to tribal governments (which is part of the reason for the increase in tribal funding shown in **Table 2**).

Table 3. ERA-1 Reallocation

(dollars in billions)

	Total	Share
Reallocation Within State	1.820	58%
Voluntary Reallocation to Designated In-State Entity	*1.624*	*89%*
Reallocation Out of State	1.293	42%
Total Reallocated Funding	**3.113**	**100%**

Source: Prepared by CRS based on reallocation information publicly released by the U.S. Department of the Treasury.

While redistribution may have addressed some of the shortcomings of the initial ERA-1 allocation formula by allowing funding to move from grantees that were unable to use it to those that could, Treasury's decision to prioritize in-state reallocation limited the ability of reallocation to fully rebalance funding disparities in the program. According to GAO's analysis, "large differences in the amount of funding per low-income renter in each state remained after reallocation, especially in states that received relatively low allocations."[45]

Limitations in the ERA-1 funding distribution formula may have played a role in the relatively slow spending and large redistribution of ERA-1 funding; however, other factors are also likely at play. For example, demand for assistance likely varied across geographies, which may be related to the proportion of renters in the state relative to population. Further, grantees had different degrees of administrative challenges in implementing their programs (which is discussed in the next section of this report).

Program Design and Administration

When the ERA program was created, there was strong evidence that renters nationwide were in need of assistance.[46] Yet the process of directing ERA funds to households was relatively slow to get underway. ERA was a new program for both Treasury, which administered funds at the federal level, and for many of the state, local, and tribal jurisdictions that administered funds to households. While the ERA enacting laws established some program parameters, many aspects of ERA were governed by Treasury guidance, which was initially minimal, and subsequently updated a number of times over the course of the program.

Through May 2021, almost six months after funds had been made available to grantees, $1.5 billion (about 6% of total ERA-1 funds) had been expended on rent and utility payments, an expenditure rate that was generally considered to be too slow.[47] In addition to potential

[45] *Emergency Rental Assistance: Treasury's Oversight is Limited by Incomplete Data and Risk Assessment*, p. 22.

[46] For example, see Davin Reed and Eileen Divringi, *Household Rental Debt During COVID-19*, Federal Reserve Bank of Philadelphia, October 2020, https://www.philadelphiafed.org/-/media/frbp/assets/community-development/reports/household-rental-debt-during-covid-19.pdf; and Stout, Risius Ross LLC, *Analysis of Current and Expected Rental Shortfall and Potential Eviction Filings in the U.S.*, National Council of State Housing Finance Agencies, September 25, 2020, https://www.ncsha.org/wp-content/uploads/Analysis-of-Current-and-Expected-Rental-Shortfall-and-Potential-Evictions-in-the-US_Stout_FINAL.pdf.

[47] See, for example, U.S. Department of the Treasury, "Emergency Rental Assistance Data Shows Programs Ramping Up, but States and Localities Must Do More to Accelerate Aid," https://home.treasury.gov/system/files/136/2021-07-02-ERA-Data-Blog-Post-vF.pdf. See also *Emergency Rental Assistance: Treasury's Oversight is Limited by Incomplete Data and Risk Assessment* (reporting that as of May 2021, 22% of grantees had made no payments at all).

mismatches in the geographic distribution of funds, the design and implementation of state and local programs may have contributed to slow spending rates.

Factors that may have contributed to the ability of jurisdictions to distribute funding expeditiously include the following:

- **Previous experience administering pandemic rental assistance.** As described earlier in this report, some jurisdictions used CARES Act appropriations for programs such as CDBG and CRF to establish rental assistance programs. Jurisdictions that had already established an administrative process to distribute rental assistance and had experience doing so may have been in a better position to begin distributing ERA-1 funds quickly.[48]
- **Outreach and communication.** Efforts to advertise and conduct community outreach may have affected initial awareness of available rental assistance, particularly among hard-to-reach populations.[49] Further, outreach to landlords may have influenced their willingness to participate in the program.[50]
- **Documentation requirements.** There is evidence that applicant failure to complete rental assistance applications often occurred at the point where they had to provide documentation to verify eligibility.[51] In its May 7, 2021, FAQs, Treasury made clear that applicants could self-certify for certain ERA requirements including income and financial hardship (see the "Documentation" section of this report). Adopting these flexibilities may have contributed to increased program expenditures.[52] After the FAQ release, in June 2021, ERA-1 expenditures doubled compared to May 2021, and they continued to increase each month through September 2021.[53] Treasury's reported application acceptance rate also began to increase.[54]

ERA grantee jurisdictions also had to balance quickly spending funds (and avoiding recapture) with concerns over fraudulent applications. Treasury FAQs stated that in cases of applicant self-attestation, "grantees must have in place reasonable validation or fraud-prevention procedures to

[48] *Lessons from Eight States Regarding Factors That Have Contributed to States' ERA1 Spending Rates*, p. 9 ("States that had previous experience managing an emergency rental assistance program, typically using Coronavirus Relief Fund money, gained valuable experience that carried over to their ERA1-funded programs, despite the need to redesign the programs to meet Treasury's requirements.").

[49] See, for example, Claudia Aiken, Vincent Reina, and Julia Verbrugge et al., *Learning from Emergency Rental Assistance Programs Lessons from Fifteen Case Studies*, Housing Initiative at Penn, National Low Income Housing Coalition, and NYU Furman Center, March 10, 2021, https://furmancenter.org/files/ERA_Programs_Case_Study_-_Final.pdf (hereinafter, *Learning from Emergency Rental Assistance Programs Lessons from Fifteen Case Studies*).

[50] See U.S. Department of the Treasury, *Intentional Landlord Engagement*, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program/promising-practices/landlord-engagement.

[51] *Learning from Emergency Rental Assistance Programs Lessons from Fifteen Case Studies*, p. 9 and *Emergency Rental Assistance: Treasury's Oversight is Limited by Incomplete Data and Risk Assessment*, p. 12.

[52] See, for example, Claudia Aiken, Isabel Harner, and Vincent Reina et al., *Treasury Emergency Rental Assistance Programs in 2021: Preliminary Analysis of Program Features and Spending Performance*, Housing Initiative at Penn and National Low Income Housing Coalition, December 2021, p. 2, https://www.housinginitiative.org/uploads/1/3/2/9/132946414/2021_treasury_era_program_features_and_spending_report.pdf.

[53] See June ERA Report, https://home.treasury.gov/system/files/136/June-2022-ERA-Monthly-Data.xlsx.

[54] See ERA1 & ERA2 Quarterly Demographic Data for Q1 2021 through Q2 2022, https://home.treasury.gov/system/files/136/Q1-2021-Q2-2022-ERA-Demographic-Data.xlsx. Note that Treasury indicates that some reported data may need to be updated.

prevent abuse."[55] This tension may have made some grantees reluctant to allow for self-certification. GAO released a report in February 2022 in which it noted that "because some grantees remain uncertain about how Treasury will evaluate their payments and controls, they may face a difficult tradeoff between adopting the administrative flexibilities to avoid recapture and managing the potential risk of improper payments and recoupment."[56]

Households Served

Grantees have reported some basic information to Treasury on how they have spent ERA funding and who they have served. As shown in **Table 4**, from the first quarter of 2021 through the second quarter of 2022, grantees provided ERA assistance to 5.35 million unique households, the majority of which had incomes at or below 30% of local area median income. Roughly 70% of those served received rental assistance and about 64% received assistance with rental arrears. About 14% received utility assistance and 27% received assistance with utility arrears.

Table 4. Data on Households Served by the ERA Program

(data as of June 2022)

	ERA-1	ERA-2	Combined
Unique Households Served	3,395,745	1,953,567	5,349,312
Share of Households, Income Below 30% AMI	64.3%	62.9%	63.8%
Share of Households Served Receiving:			
Rent Assistance	69%	72%	70%
Assistance with Rental Arrears	64%	63%	64%
Utility Assistance	15%	13%	14%
Assistance with Utility Arrears	29%	24%	27%
Other Housing Assistance	11%	5%	9%

Source: Prepared by CRS based on Treasury data contained in Emergency Rental Assistance Quarterly Demographic Data: Q1 2021–Q2, 2022, available at https://home.treasury.gov/system/files/136/Q1-2021-Q2-2022-ERA-Demographic-Data.xlsx.

Notes: Data are based on reporting by state, local, tribal, and territorial governments. Some grantees did not report data or may have reported inaccurately, so data may be subject to change.

The December 2022 GAO report compared grantees self-reported data to low-income renter populations and found that, for grantees with available data, ERA funds served from 0.4% to 15.6% of estimated low-income renters.[57]

While this descriptive information helps explain how ERA resources have been used, it does not answer questions about the effectiveness and efficiency of the program in promoting housing stability and reducing evictions. In order to address those questions, the federal government is funding research to better understand the range of impacts the ERA program has had on program

[55] May 7, 2021, FAQ #1, https://home.treasury.gov/system/files/136/ERA-Frequently-Asked-Questions_Pub-3-16-21.pdf.

[56] U.S. Government Accountability Office, *Emergency Rental Assistance: Grantee Monitoring Needed to Manage Known Risks*, February 10, 2022, p. 8, https://www.gao.gov/assets/gao-22-105490.pdf.

[57] *Emergency Rental Assistance: Treasury's Oversight is Limited by Incomplete Data and Risk Assessment*, p. 26. Figures represent 5th and 95th percentiles.

participants and their communities. In November 2022, HUD announced an award of $2 million to three research organizations to conduct an impact evaluation of the ERA program, with a focus on housing stability and eviction outcomes.[58] The estimated project end date is October 2024, after which time findings may become available.

Future of Emergency Rental Assistance

As communities exhaust their federal ERA program funding, questions have been raised about the future of emergency rental assistance, both generally and in anticipation of future economic shocks or downturns.

As noted earlier, some communities leveraged other pandemic relief funding prior to the creation of the ERA program to create their own emergency rental assistance programs. Further, Treasury has encouraged grantees to consider using another source of temporary pandemic aid—State and Local Fiscal Recovery Fund (SLFRF)—to meet emergency rental assistance needs once ERA funding is exhausted.[59] However, like ERA, SLFRF is temporary, as obligations must be incurred by December 31, 2024.

Some states and localities have begun looking for ways to continue to provide some form of emergency rental assistance for families at risk of eviction after ERA funds are expended. Sources of regular federal funding, such as CDBG or Emergency Solutions Grants, can be used for eviction prevention or emergency rental assistance.[60] However, these funds can be also be used for other purposes and they are much smaller in scale than the federal ERA program. States and localities can also use their own funds for eviction prevention or emergency rental assistance. For example, California provided nearly $2 billion in its state budget for emergency rental assistance, although this funding was only sufficient to serve families who had already applied for assistance but were unable to be served because federal ERA funding had been exhausted.[61]

Legislation has also been introduced in Congress to fund a permanent emergency rental assistance program. For example, in the 117th Congress, the Eviction Crisis Act (S. 2182) and the Stable Families Act (H.R. 8327) both would have created a grant program to provide federal funding to states and localities to prevent evictions, homelessness, and other housing instability, modeled on the ERA program. Both would have authorized funding at $3 billion annually through FY2026 and at such sums as may be necessary thereafter.

[58] U.S. Department of Housing and Urban Development, "HUD Awards $2 Million to Assess the Impact of Emergency Rental Assistance on Housing Stability," press release, November 3, 2022, https://www.hud.gov/press/press_releases_media_advisories/hud_no_22_226.

[59] U.S. Department of the Treasury, "Treasury Announces $30 Billion in Emergency Rental Assistance Spent or Obligated with Over 4.7 Million Payments Made to Households Through February 2022," press release, March 30, 2022, https://home.treasury.gov/news/press-releases/jy0688.

[60] For more information, see CRS Report R47204, *Federal Role in Preventing Evictions*.

[61] Office of Governor Gavin Newsom, "Governor Newsom Signs Budget Putting Money Back in Californians' Pockets and Investing in State's Future," press release, June 30, 2022, https://www.gov.ca.gov/2022/06/30/governor-newsom-signs-budget-putting-money-back-in-californians-pockets-and-investing-in-states-future/.

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EXHIBIT D

U.S. DEPARTMENT OF THE TREASURY

EMERGENCY RENTAL ASSISTANCE PROGRAM

Allocations and Payments

Award terms

Guidance

FAQs

FAQs by Category

Change log

Latest FAQs

Program & service design

Promising Practices

Promote the program

Report fraud, waste, and abuse

Reporting

Renters and landlords

ERA Self-Service Resources

Looking for rental assistance?

Renters and landlords can find out what emergency rental assistance covers, how it works, and who's eligible on the interagency housing portal hosted by the Consumer

Financial Protection Bureau (CFPB).

Guidance

ERA grantees must comply with the requirements outlined in their ERA Award Terms, including the relevant ERA statute, all other applicable federal statutes, regulations, executive orders, and Treasury's guidance (FAQs, reporting guidance, etc.).

ERA2 Reallocation Guidance

- Guidance: ERA2 Reallocation Guidance (published March 30, 2022, updated November 16,2022)

ERA2 Fact Sheet (3/30/2022)

- ERA Fact Sheet Summary of Reallocation Guidance (published March 30, 2022)

Frequently Asked Questions (FAQs)

- All FAQs (7/27/2022)
- Browse FAQs by category
- View all changes

ERA Fact Sheet (6/24/2021)

- ERA Fact Sheet (5/7/2021)

ERA1 Reallocation Guidance

- Forms
  - Request for reallocated funds: Grantees should input their requests for reallocated funds directly in the Treasury Portal, which is accessible through ID.me or Login.gov. Please do

not submit previously issued Request for Reallocated Fund forms by portal, email, or otherwise.

- Request for voluntarily reallocated funds: Grantees that wish to request funds that are being voluntarily reallocated should directly input their requests for reallocated funds and identify the grantee transferring the funds in the Treasury Portal, which is accessible through ID.me or Login.gov. Please do not submit previously issued Request for Reallocated Fund forms by portal, email, or otherwise.
- Grantees that wish to have excess funds reallocated should input their requests directly to the Portal, which is accessible through ID.me or Login.gov. Please do not submit previously issued Template Letter for Requesting Excess funds to be Voluntarily Reallocated forms by portal, email, or otherwise.
- Program Improvement Plan form

- Guidance
  - Guidance on ERA reallocation (updated September 6, 2022)
  - Addendum to Reallocation Guidance for Tribal Governments (updated June 1, 2022)
- Communications
  - On July 29, 2022 Treasury released a notice regarding extensions of the deadline to obligate reallocated ERA1 funds .
  - On July 18, 2022, Treasury released a notice regarding ERA1 recapture for Tribal Governments.
  - On October 25, 2021, Deputy Secretary Adeyemo published a letter to all grantees to highlight additional detail on the reallocation process.
  - On October 4, 2021, Treasury sent letter from Deputy Secretary Adeyemo to ERA grantees about the reallocation guidance.
  - On October 4, 2021, Treasury published a summary on ERA reallocation highlights.
  - On September 24, 2021, Deputy Secretary Adeyemo published a letter to all grantees providing further insight into how Treasury intends to approach the reallocation process.

Other Guidance

Allocations and Payments

Reporting Guidance

2022 ERA Compliance Supplement

ERA1 Closeout Resource (published September 19, 2022)

EXHIBIT E

AUGUST 25, 2021

FACT SHEET: Biden Administration Takes Additional Steps to Prevent Evictions as the Delivery of Emergency Rental Assistance Continues to Increase

Today, the Biden Administration is announcing new actions to help protect vulnerable tenants and landlords, including steps the Treasury Department is taking to strengthen existing guidance and implement new policies to ensure that state and local grantees can further accelerate Emergency Rental Assistance (ERA) to aid the struggling landlords and renters most at risk of eviction.

For months, the Administration has worked to speed up state and local grantees' delivery of ERA and help keep American families stably housed. As the President has made clear, no state or locality should delay distributing resources that have been provided by Congress to meet families' critical needs and prevent the tragedy of unnecessary eviction.

Most notably, today Treasury is providing even more explicit permission for grantees to utilize self-attestation without further documentation in order to speed the delivery of assistance to households in need during the public health emergency. In addition to the enhancements of the Emergency Rental Assistance program, the Administration continues to take an all of government approach to protect families at-risk of eviction. Today, the U.S. Departments of Agriculture (USDA), Health and Human Services (HHS), Housing and Urban Development (HUD), and Veterans Affairs (VA) are taking additional action to protect and support vulnerable renter households.

Additionally, the Treasury Department is releasing new data on ERA spending in July. Last month, 341,000 households received rental and utilities assistance, up from 293,000 in June and 157,000 in May. State and local agencies have provided approximately one million assistance payments

to benefit households at-risk of eviction, and have spent more than $5.1 billion in ERA funding. Treasury data also show that ERA is reaching the lowest income tenants – over 60 percent of the households served earn no more than 30 percent of area median income.

Treasury Announces New Guidance to Encourage States and Localities to Expedite Relief, Including Through Efficient Self-Attestation

The Biden Administration continues to work with and listen to rental assistance administrators, tenant advocates, landlords, and other stakeholders to prevent evictions and provide the clearest possible guidance to state and local programs to improve the speed and effectiveness with which they deliver assistance to tenants, landlords, and utility providers.

Today, Treasury is further clarifying existing policies and taking the following new steps to ensure that state and local grantees can further accelerate emergency rental assistance to families at-risk of eviction.

- **Self-attestation can be used in documenting each aspect of a household's eligibility for ERA, including with respect to: a) financial hardship, b) the risk of homelessness or housing instability, and c) income.** The use of self-attestation for documenting household eligibility clearly speeds up the processing of applications for rental assistance. Treasury is providing even greater clarity and specificity with regard to the use of self-attestation and is encouraging grantees to simplify application processes to use self-attestation when other forms of documentation are not immediately available.

- **During the public health emergency, state and local ERA programs may rely on self-attestation alone to document household income eligibility when documentation is not available.** During the period of the public health emergency, in order to rapidly provide assistance, Treasury is clarifying that grantees may rely solely on a self-attestation of income when applicants are unable to provide other documentation of their income.

- **State and local grantees may provide an advance on expected assistance to landlords and utility providers.** To speed assistance, Treasury is establishing guidelines for providing a portion of estimated

bulk payments to landlords and utility providers in anticipation of the full satisfaction of application and documentation requirements. These changes balance the need to assist households served by larger landlords and utilities while also protecting taxpayers.

- **State and local grantees may enter into partnership with nonprofits to deliver advance assistance to households at risk of eviction while their applications are still being processed.** Where an expedited payment could reasonably be viewed as necessary to prevent an eviction that may occur under a grantee's standard application process, Treasury is establishing guidelines for state and local programs to engage with non-profit organizations able and willing to take on the financial risk of advancing assistance prior to an application being fully processed to speed aid to at-risk households.

- **Grantees may make additional payments to landlords who take on tenants who face major barriers to securing a lease, including those who have been evicted or experienced homelessness in the past year.** State and local ERA programs may make an additional rental payment required as a condition for entering into a lease with a "hard-to-house" household that would not otherwise qualify under a pre-existing and lawful screening or occupancy policy.

- **Past arrears at previous addresses may be covered.** To remove barriers a household may face in accessing new housing if they have outstanding debt in collections, Treasury guidance makes clear that state and local grantees may—at an eligible tenant's request—provide assistance to cover remaining rental or utility arrears at a previous address.

- **A tenant's costs associated with obtaining a hearing or appealing an order of eviction may be covered with ERA funds as an eligible "other expense."** Many states and localities require tenant payments of rent to a court on behalf of the landlord (often referred to as "rent bonds") as a condition for a tenant to have the opportunity to defend herself in court before being evicted. New guidance makes clear that rent bonds are an eligible ERA expense.

These policies are meant to accelerate assistance to the thousands of applicants who are in the pipeline in many state and local programs, on top of those who have already received aid through the end of July. Treasury and

the Department of Justice are also working to encourage states and localities to put in place additional protections against evictions, including for tenants whose applications are awaiting review.

This new guidance builds on the work Treasury has already done to make clear through past guidance on May 7 and June 24 and via presentations by Treasury and White House officials that grantees have significant flexibility to award ERA funds quickly by using simplified forms and allowing for self-attestation. This previous guidance has helped to unlock faster, more streamlined assistance, including, for example, cutting wait times before assistance must be offered to tenants with non-responsive landlords and allowing aid to flow directly to tenants at the point of application; outlining approaches for helping families who are currently unhoused or transitioning to new living situations; establishing options for bulk payments to landlords or utility providers servicing large numbers of eligible tenants; and offering the use of self-attestation and fact-based proxies to reduce burdens in supporting determinations of eligibility. Building on promising practices like those previously highlighted by Treasury, many grantees have made significant strides in successfully getting assistance to families most in need.

Continuing an All-of-Government Approach to Prevent Evictions

The Biden Administration continues to take actions to accelerate aid to renters and landlords, and ensure available support quickly reaches families in need. In addition to today's announced enhancements of the Emergency Rental Assistance program, Departments across the Administration are taking further action to protect families at-risk of eviction, including:

- **Preventing evictions for non-payment in USDA multifamily properties.** The US Department of Agriculture (USDA) will collaborate with the owners of 400,000 rental units in USDA-backed multifamily properties to mitigate all pending evictions. Additionally, USDA is:
    - Offering additional support to property owners waiting to access available ERA resources by allowing them access to reserves for operating shortfalls;
    - Providing financial incentives to property management agents that tap ERA to clear arrearages;

- Continuing to leverage field staff to perform outreach to local leaders and public housing authorities.

- **Ensuring tenants in public housing and properties with project-based rental assistance facing eviction for non-payment of rent have a fair chance to receive emergency rent relief.** HUD will act to require public housing authorities and owners participating in HUD's project-based rental assistance program to provide tenants facing eviction for non-payment of rent with additional time and other protections to allow them the opportunity to secure ERA help that may stave off eviction entirely. For the duration of the presidentially-declared national emergency related to the COVID-19 pandemic, HUD will extend the time its programmatic regulations require before a tenant is required to vacate a unit once a notice of eviction for non-payment has been issued from 14 days to 30 days, consistent with CARES Act protections. Additionally, in order to initiate eviction, HUD may require additional steps of covered landlords.

- **Increasing rental support to at-risk veterans and their families.** The Department of Veteran Affairs (VA) will expand its Supportive Services to Veteran Families (SSVF) program, which provides supplemental rental assistance to very low-income Veteran households, from 7 states and the District of Columbia, to all 50 states, Puerto Rico, the Virgin Islands, Guam, and the District of Columbia.

- **Continuing to spread awareness of available assistance through federal programs.** Following up from the July 28th call to action on ERA that reached tens of millions of households, government agencies continue to leverage their networks to spread the word about rental assistance. For example, HHS has distributed letters to health centers, grantees, and networks through its Bureau of Primary Health Care, Administration of Children and Families, and Administration for Community Living. In the coming weeks, HHS will send an additional letter to child welfare leaders to facilitate participation in ERA and will remind Medicare Advantage plans that rental support is a permissible benefit for certain enrollees.

Today's announcements build on the all-of-government approach taken by the Biden Administration to help keep families in their homes. In

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addition to previous policy announcements on May 7 and June 24th, this work includes White House-led summits in June and July focused on encouraging local action and collaboration to prevent evictions and a July 28 call to action that resulted in commitments from companies, non-profits, and government agencies to help alert families to the availability of emergency rental assistance. On August 11, Attorney General Merrick Garland met with over 35 chief justices of state supreme courts to emphasize eviction diversion strategies and highlight the Associate Attorney General's June letter outlining steps that state courts could take to raise awareness of emergency rental assistance and to implement eviction diversion strategies in their jurisdictions. On August 17, Administration officials from the White House, and Departments of Labor, Treasury, Justice, and Health and Human Services, plus the Centers for Disease Prevention and Control, met with the U.S. Conference of Mayors to discuss eviction diversion strategies and best practices for the swift delivery of emergency rental assistance funds.

###

EXHIBIT F

COVID-19 Emergency Rental Assistance (CERA)

CERA is designed to help landlords and tenants

- Direct financial assistance in the form of rental arrears & utility assistance

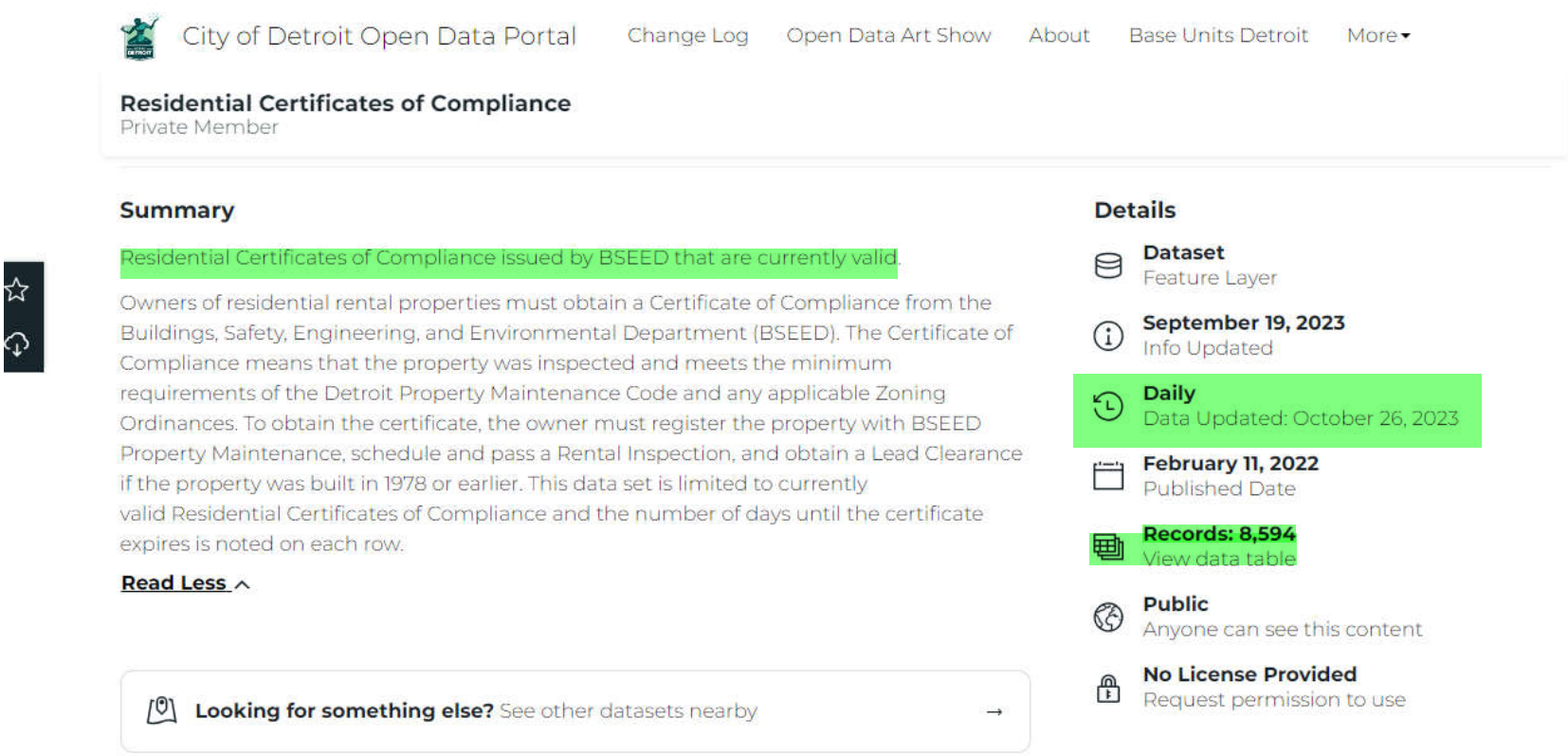
Payouts are made directly to landlords

- UNLESS unresponsive after 14 days: payments can go directly to tenant

CERA does **not** require eviction proceedings

- A past-due notice from landlord meets program requirements

EXHIBIT G



82,235-estimated rental parcels; 137,346 estimated rental units (Detroit Future City Report).

Detroit Data Portal - Last Visited 11-26-24

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Residential Certificates of Compliance
Private Member

Summary

Residential Certificates of Compliance issued by BSEED that are currently valid.

Owners of residential rental properties must obtain a Certificate of Compliance from the Buildings, Safety, Engineering, and Environmental Department (BSEED). The Certificate of Compliance means that the property was inspected and meets the minimum requirements of the Detroit Property Maintenance Code and any applicable Zoning Ordinances. To obtain the certificate, the owner must register the property with BSEED Property Maintenance, schedule and pass a Rental Inspection, and obtain a Lead Clearance if the property was built in 1978 or earlier. This data set is limited to currently valid Residential Certificates of Compliance and the number of days until the certificate expires is noted on each row.

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Dataset
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Info Updated

Daily
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EXHIBIT H



UNDERSTANDING THE RENTAL LANDSCAPE:

A PROFILE ANALYSIS OF DETROIT LANDLORDS TO INFORM LEAD-SAFE HOUSING POLICY

DETROIT FUTURE CITY

UNDERSTANDING THE RENTAL LANDSCAPE:
A PROFILE ANALYSIS OF DETROIT LANDLORDS TO INFORM LEAD-SAFE HOUSING POLICY

A publication of Detroit Future City

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INTRODUCTION

Among the substantial challenges facing the city of Detroit is the condition of its housing stock. In many parts of the city, housing is aging, and much of it has experienced considerable deferred maintenance. This is an issue not only for the condition of the city's neighborhoods, but also for the health of the city's residents, especially its children.

Ninety percent of Detroit's housing was constructed before 1980, and a third was built prior to 1940. Housing built prior to 1978, when lead paint was banned, has an increased risk of exposing children to lead. This is especially true for housing built prior to 1940, with 85% of housing units still containing lead-based paint.[1] Lead-based paint is a large contributor to elevated blood-lead levels (EBLLs) in people, and is most dangerous in children. Exposure to the highly toxic metal can be linked to "brain and kidney damage, slowed growth and development, learned and behavioral problems, and hearing and speech problems."[2] In 2020, 5.6% of Detroit children tested had an elevated blood-lead level. This is more than twice the rate for the entire state of Michigan (2.4%).

[1] American Healthy Homes Survey II Lead Findings, U.S. Department of Housing & Urban Development (HUD)

[2] "Health Effects of Lead Exposure." Centers for Disease Control and Prevention, 7 Jan. 2020, www.cdc.gov/nceh/lead/prevention/health-effects.htm.



The City of Detroit has taken steps to improve the condition of rental housing and has adopted one of the most stringent rental ordinances in the country. Currently, landlords are required to register their rental properties, and, if the property was built before 1978, it must undergo a lead inspection, a risk assessment, and (assuming lead-based paint hazards are found) a clearance exam. This is in addition to the non-lead-specific, general condition inspection. Only after that will a certificate of compliance be issued. Though there are regulations in place to provide for lead-safe housing, an overwhelming majority of properties in the city remain out of compliance. The combination of stringent requirements, low property values and the rent commanded by substandard rental properties can make compliance with the current regulations onerous and financially infeasible for many landlords, who, in turn, will choose to not register their properties.

To be able to begin successfully addressing the condition of rental housing in the city, there must be a better understanding of the rental housing system and who owns the city's rental housing stock. This information will answer vital questions about housing in the city, such as how many landlords there are in the city and some general characteristics about who they are.

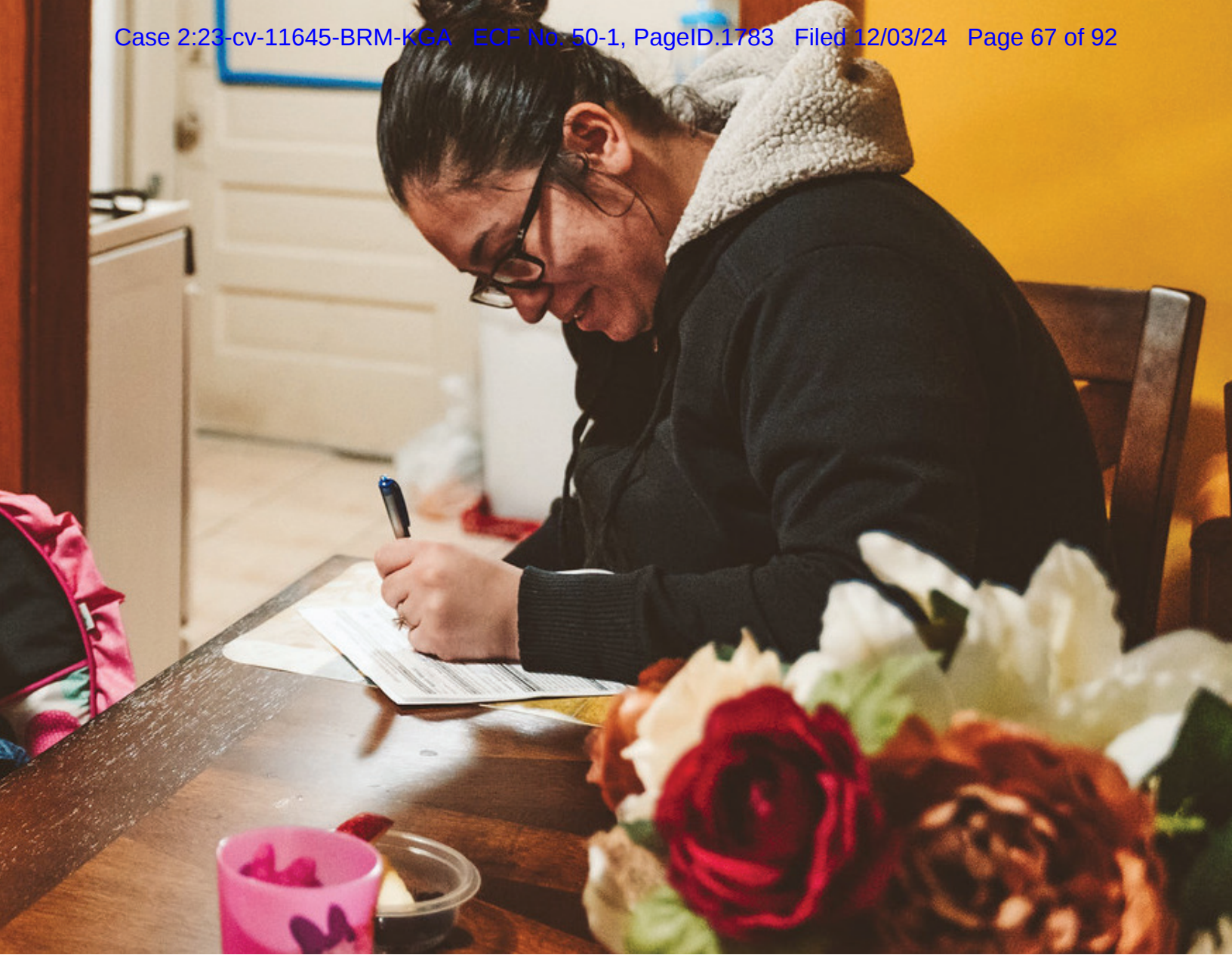


PURPOSE AND GOAL OF THIS PROJECT

A major challenge in regulating Detroit's rental housing market is the lack of data on rental housing in the city. This project provides a look into who owns these properties. This project seeks to adapt a method developed in Cleveland[3] to classify that city's landlords, and the Property Praxis data base developed by Dr. Joshua Akers at the University of Michigan-Dearborn.

The rental study for lead–safe homes is focused on classifying landlords within Detroit into distinct groups based on a series of shared characteristics, including the number of properties owned, the properties' value, and whether the property

[3] Coulton, C. et. al, Characteristics of Rental Properties and Landlords in Cleveland: Implications for Achieving Lead Safe Rental Housing



is owned by a corporate entity. In doing so, this report will create a better understanding of who owns and maintains these properties. This will allow for the development of more effective programs and resources for landlords, creating safer and more affordable living conditions for tenants within the city.

Given the number of lives affected by housing quality across the city, this work is critical. More importantly, we must be proactive about analyzing the data available to us and utilizing that data to create change via research, policy, advocacy, and education.



CLASSIFYING DETROIT'S LANDLORDS

To better understand the universe of landlords and the rental housing system, the project team built on work conducted in Cleveland and worked through a four-step process to identify a typology of landlords. These four steps were:

1. Identify the **residential** universe

Identify which parcels in the city are used for housing

2. Identify the **rental** universe

Identify from the residential parcels, which are used as rental housing

3. Identify the **landlord** universe

Identify the unique owners of rental housing

4. Identify **typologies** of landlords

Classify the owners of rental housing into groups based on similar characteristics



Datasets used to identify rental housing

To begin the analysis and identification of the universe of landlords in Detroit, the project team started with Data Driven Detroit's Integrated Property Data System (IDPS). Within this, the City of Detroit assessor's file from 2021 served as a base. The team used 10 other datasets as filters to first identify the universe of residential housing, then rental housing and, finally, landlords. (See Appendix 1 for a full list and description.)

The process began with the Southeast Michigan Council of Governments (SEMCOG) Building Footprints dataset, which used LIDAR data to identify where buildings are located in the region. The team then added Detroit Land Bank Authority data on demolitions to provide a picture of which properties have structures on them, and Valassis mailing data (which provide information on whether a property is vacant). Data from the City of Detroit's Buildings, Safety Engineering, and Environmental Department (BSEED) provide a series of datasets that show connections with the city's rental system and whether properties are likely to be rentals. Finally, Property Praxis provides a detailed look at bulk ownership of properties within the city and connects corporate entities, such as LLCs, to their owners.

THE RESIDENTIAL HOUSING UNIVERSE

The first step in developing the universe and typologies of landlords is to identify the universe of residential parcels within the city of Detroit. The City assessor's parcel file that serves as a base for this analysis covers all 380,000 parcels in Detroit. That file contains every parcel, regardless of use or presence of a structure. To filter these down to just the occupied residential parcels, those that met the following conditions were removed from the analysis:

- **Removed industrial and tax-exempt parcels**
  This step worked from the assessor's file and ensured that properties that are only residential, or possibly residential (such as certain types of commercial-classed properties), are included in the residential universe dataset.

- **Removed parcels owned by the Detroit Land Bank Authority as of August 2021**
  Parcels owned by the Detroit Land Bank cannot be owned by a landlord or rented legally.

- **Removed parcels following demolitions**
  Any parcels with a demolition according to the Detroit Land Bank's demolition dataset, 2014-21, were removed from the dataset.

- **Removed parcels without structures**
  Parcels without any structures according to the 2020 SEMCOG Building Footprints dataset were removed from the dataset.

- **Added back parcels with rental certificates, certificates of occupancy, certificates of compliance, or lead clearance reports**
  These datasets represent a variety of ways that landlords can interact with the City regarding their rental properties. If a landlord has pulled one of these certificates recently, one can be fairly confident that the property is actively a rental, thus residential.[4]

- **Removed parcels that have been vacant since the third quarter of 2019 as likely long-term vacant properties**
  Using Valassis United States Postal Service data, this indicator removed housing that had been vacant for two years, as it is unlikely to be an active residential property.

Through this process, the complete universe of parcels in the city was filtered to contain occupied residential parcels. There were 198,086 likely residential parcels identified through the filtering process.

[4] The exception is a certificate of occupancy, which, in retrospect, should not have been included because it does not necessarily indicate a rental property, rather that a property has had construction performed. Though these should not have been added to the residential universe, this did not strongly impact the rental universe. Many properties that were incorrectly added had additional rental unit flags, but a small number of commercial-use, non-residential properties were added back into the dataset.



IDENTIFICATION OF THE RENTAL UNIVERSE

After the 198,000 parcels were identified, an analysis was conducted to determine which properties were likely rentals.

Properties were filtered by whether they met a set of criteria that would identify them as likely rental properties. These criteria were:

- Being included in the City's rental system through having at least one of the following:
  - A rental certificate
  - A certificate of occupancy[5]
  - A certificate of compliance
  - A lead clearance report
- Having been cited for a blight violation related to a rental cause
- A property where the owner's address was different from the parcel address
- Having a taxpayer name that included "LLC" or "Inc."
- Being classified as residential without a Primary Residence Exemption
- Having an eviction case filed in 36th District Court in 2020

There were 82,235 parcels that were identified through this analysis as being likely rental properties. Since each residential parcel can contain more than one housing unit, the residential parcels were combined with the Valassis mailing data to determine the number of units at each parcel, creating an estimate of 137,346 rental units. This estimate is within the margin of error for the 2019 one-year American Community Survey estimate for rental units.[6]

Figure 1: Rental analysis

INDICATOR	COUNT	SHARE
Estimated residential parcel universe	198,086	
Estimated rental parcels	82,235	42% of residential parcels
Estimated occupied rental units	137,346	57% of occupied housing units
Estimated occupied non-rental units	105,083	43% of occupied housing units

2019 ACS – Five-year estimates

UNIVERSE	COUNT	MARGIN OF ERROR
Total occupied housing units	263,688	+/- 2,056
Renter-occupied units	139,136	+/- 2,202
Owner-occupied units	124,552	+/- 1,883

[5] This was misidentified as part of the rental universe and pulled in 198 non-residential properties.
[6] For a detailed description of the differences between parcels, units, and addresses, see https://base-units-detroitmi.hub.arcgis.com.

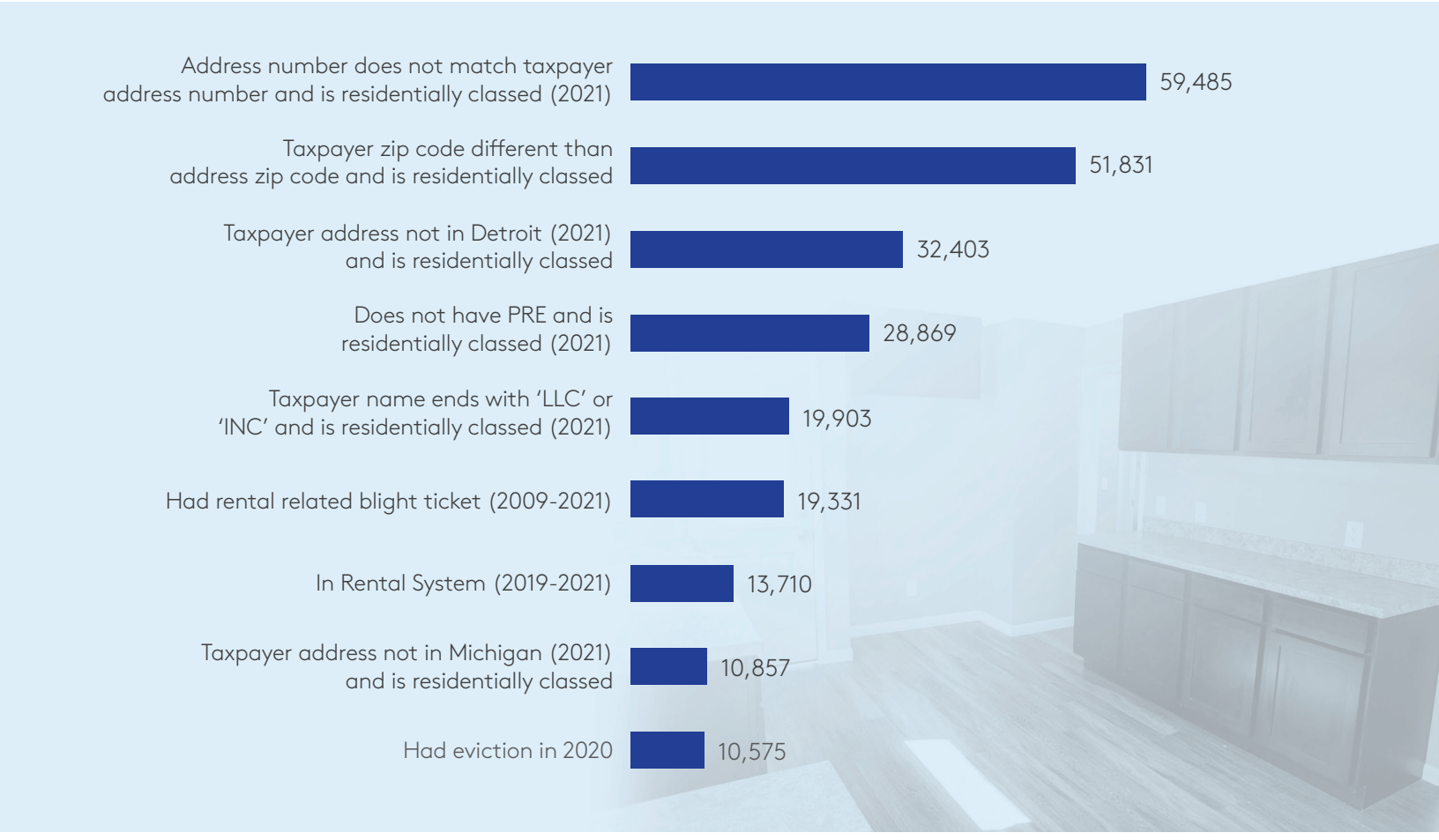
Characteristics of rental properties

When examining the residential property universe, there were just over 82,000 properties that contained at least one indicator that it was a rental property, with the most common being related to the address of the taxpayer, with 72% of rental properties having an address in a different parcel listed as the address, and 63% having a different ZIP code.

When looking at the totality of the nine distinct characteristics that were screened to create the rental universe, nearly 72% of properties had more than one indicator of being a rental property.

This analysis revealed several notable findings, the first being the location of property owners. More than 60% of parcels had an owner with a Detroit address, and 87% had a Michigan address. The other notable finding was the relatively low connection to the formal rental system in the city, with only 17% of parcels being connected through one of the mechanisms noted above.

Figure 2: Rental indicators



LANDLORDS IN DETROIT

Identifying landlords

Having identified the universe of rental housing in the city, the next step in the process was to use that dataset to identify ownership. To do this, the rental dataset was combined with ownership information from two sources: the City of Detroit Assessor's Office and the Property Praxis data that was assembled by the University of Michigan-Dearborn. Part of this process was an extensive look at the ownership of corporate entities to provide light on who owns multiple properties across different groups[7], which was used to identify property owners in the city.

Through the use of these two datasets, 42,191 unique landlords were identified.[8]



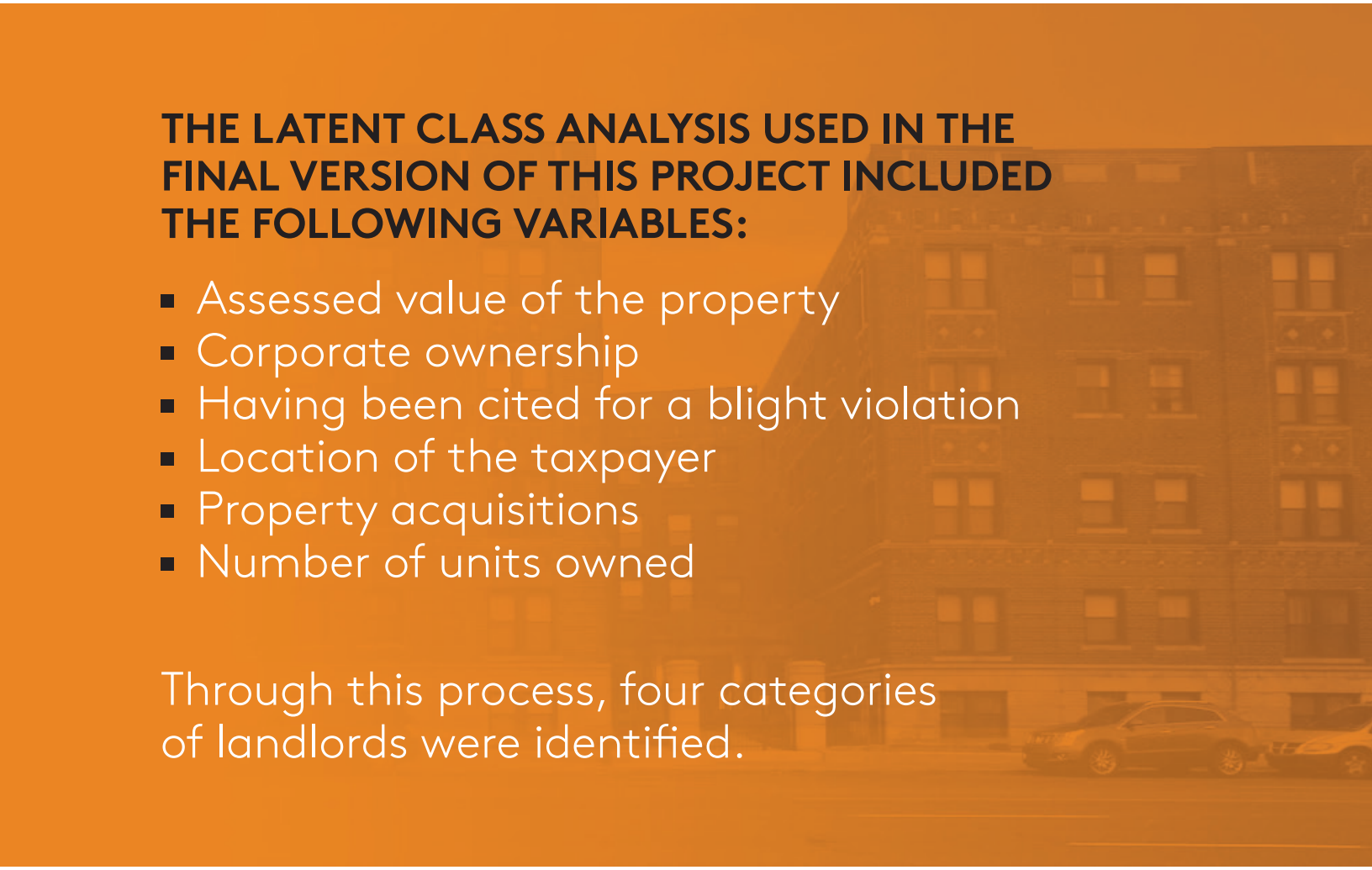
[7] www.propertypraxis.org

[8] The inclusion of the Property Praxis data aided greatly in understanding the scope of corporate owners of property in the city. One substantial challenge identifying owners is that many corporate owners may lead back to a single owner. The Property Praxis data has connected the owners to their corporate entities for some property in the city, but further iterations of this study could take a deeper look at corporate ownership in the city. Doing so would likely increase the number of type 3 and 4 landlords.

LANDLORD TYPOLOGIES

Creating typologies of landlords

With the identification of the landlord universe, the Data Driven Detroit team created typologies of landlords. To do this, a statistical process called Latent Class Analysis was performed, which was used to sort the typologies and identify distinct categories of landlords based on a specific set of variables, listed below. This is similar to the process conducted in Cleveland, however, the variables for the analysis used to identify the typologies of Detroit landlords were adapted based on the availability of data and the specific characteristics of Detroit's rental housing market. One example of this was the assessed value of the property, which was notably lower in Detroit than in Cleveland, with 27% of Detroit's occupied rental properties having an assessed value of less than $10,000.



THE LATENT CLASS ANALYSIS USED IN THE FINAL VERSION OF THIS PROJECT INCLUDED THE FOLLOWING VARIABLES:

- Assessed value of the property
- Corporate ownership
- Having been cited for a blight violation
- Location of the taxpayer
- Property acquisitions
- Number of units owned

Through this process, four categories of landlords were identified.

TYPOLOGY 1

The general characteristics of this group are that they own one to two properties, and the properties are predominantly single-family housing. This group also exhibits limited indicators of broad professionalization – they are not well integrated into the rental system, have lower prevalence of corporate ownership (LLC, Inc., etc.) and limited recent blight violations or evictions.

This typology comprises 29,410 landlords and accounts for 43,018 units. This is the largest group of landlords, accounting for 70% of the landlords in the city. However, given that each landlord in this set owns only one or two properties, they own only 40% of the rental properties and 30% of the rental units in the city.

This class of landlord is also more likely to be local to Detroit than other classes, with 73% of Typology 1 landlords having a Detroit mailing address.

TYPOLOGY 2

Accounting for 7,228 landlords and 33,827 rental units, owners under Typology 2 are similar to those in Typology 1, with owners in this group owning one or two properties. However, this group differs in its degree of professionalization.[9] Sixty-four percent of landlords in this class have corporate ownership. There are also higher rates of engagement with the rental system, with 46% of these landlords having a property on the City's rental registry, 53% having a code violation in the past three years, and 29% having filed an eviction.

TYPOLOGY 3

Typology 3 includes landlords that own three to four properties. There are signs of growing professionalization, with 28% being on the City's rental registry and 30% having corporate ownership. Additionally, one-third of landlords in this group own multifamily housing.

At 3,280, these landlords account for the smallest share of properties among the four typologies. This group also holds a relatively small number of units and properties.

TYPOLOGY 4

Typology 4 is comprised of the largest landlords, those who own five or more properties. Though this group accounts for only 5%, or 2,273 of the landlords in the city, collectively, they own more units than any other group, and about one-third of the rental units in the city. Even though landlords in this typology are the city's biggest owners, for many, their portfolio remains relatively small, with 57% owning fewer than 10 units, and 87% owning fewer than 25.

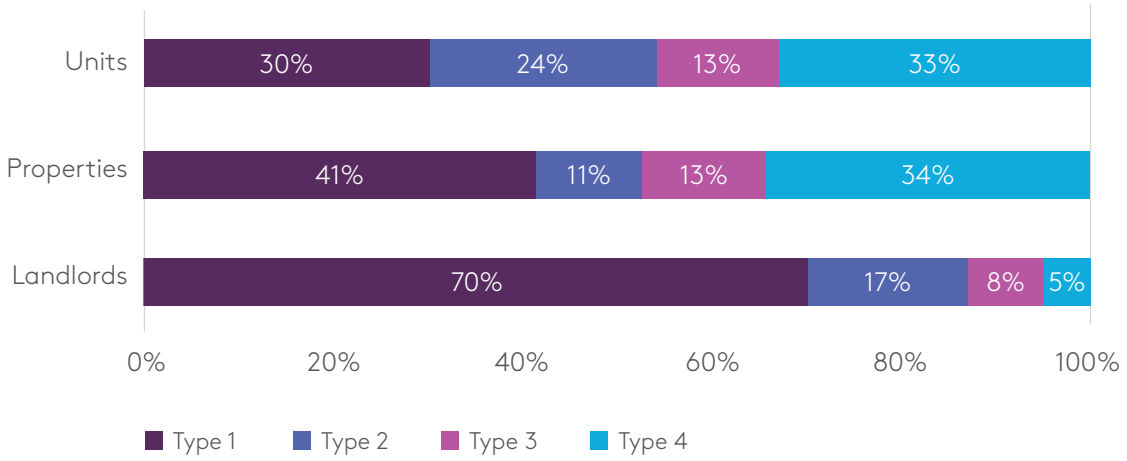
This group of landlords exhibits the highest levels of professionalization. In addition to owning multiple properties, they are more likely than other types to own multifamily housing, and more likely to be involved in the City's rental housing system, with 62% on the City's rental registry and 66% having filed an eviction in the past two years. They also have a high rate of corporate ownership, accounting for more than half of the landlords in this group.

[9] Among the limitations in the data is the lack of a clear understanding of corporate owners, and which individual is the owner of each corporate entity. The Property Praxis data do address this for some properties, but not all. For this reason, this group may contain some landlords under Typology 4.

Figure 3: Landlord typology counts

	TYPE 1	TYPE 2	TYPE 3	TYPE 4	TOTAL
Number of Landlords	29,410	7,228	3,280	2,273	42,191
Number of Properties	33,716	9,127	10,897	28,183	81,923
Number of Units	43,018	33,827	18,187	46,584	141,616

Figure 4: Share of landlord typologies



Note: Because of rounding, numbers may not add up to 100%

Figure 5: Property counts by landlord type

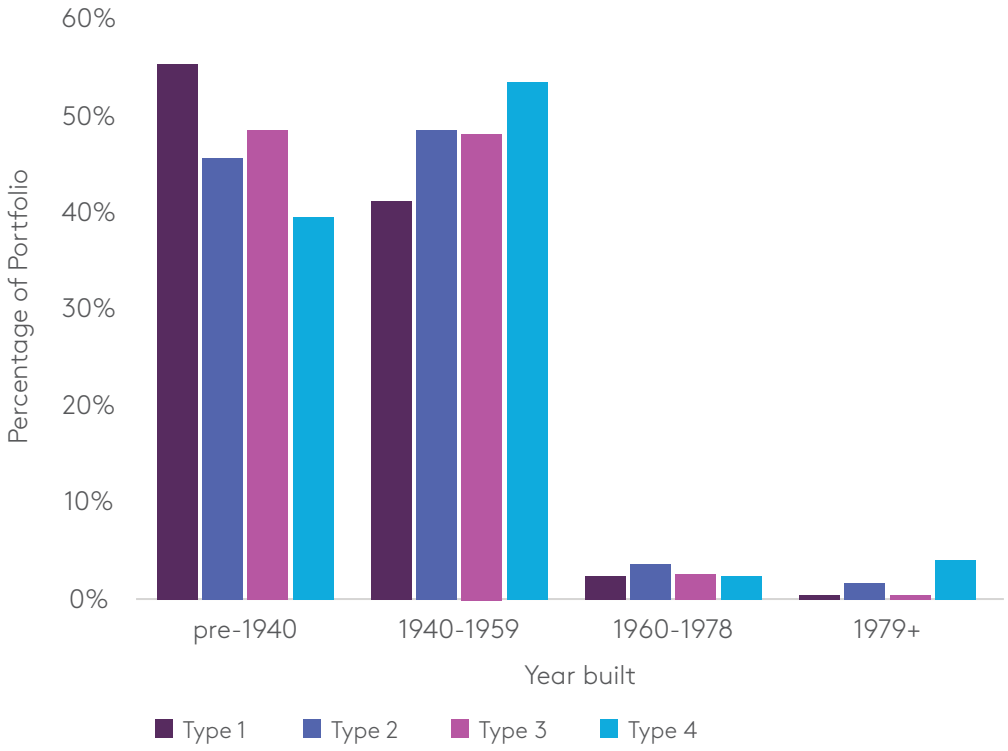
LANDLORDS WITH	TYPE 1	TYPE 2	TYPE 3	TYPE 4
1-2 properties	29,410	7,228	-	-
3-4 properties	-	-	3,280	-
5+ properties	-	-	-	2,273
Only single-family	84%	77%	67%	52%
Corporate ownership	0.4%	64%	30%	53%

For a detailed data on each of the typologies, see Appendix 2.



THE CHARACTERISTICS OF LANDLORDS IN DETROIT

Figure 6: Year built by landlord type



The distribution of properties by ownership type is reflective of the age of housing within Detroit, with two massive waves of construction in the pre- and post-World War II periods. What stands out is the overrepresentation of landlords in Typologies 1 and 2 – those who own only one or two rental properties – who are renting housing constructed before 1940. These older properties are more likely to have lead hazards; nationally, 78% of housing built before 1940 poses a significant lead-based paint hazard.[10] Type 4 landlords also tend to own newer housing, which is less likely to have a significant lead hazard, although many of those units were built in the 1950s and '60s – before lead paint was banned – and are aging.

[10] American Healthy Homes Survey II Lead Findings, HUD

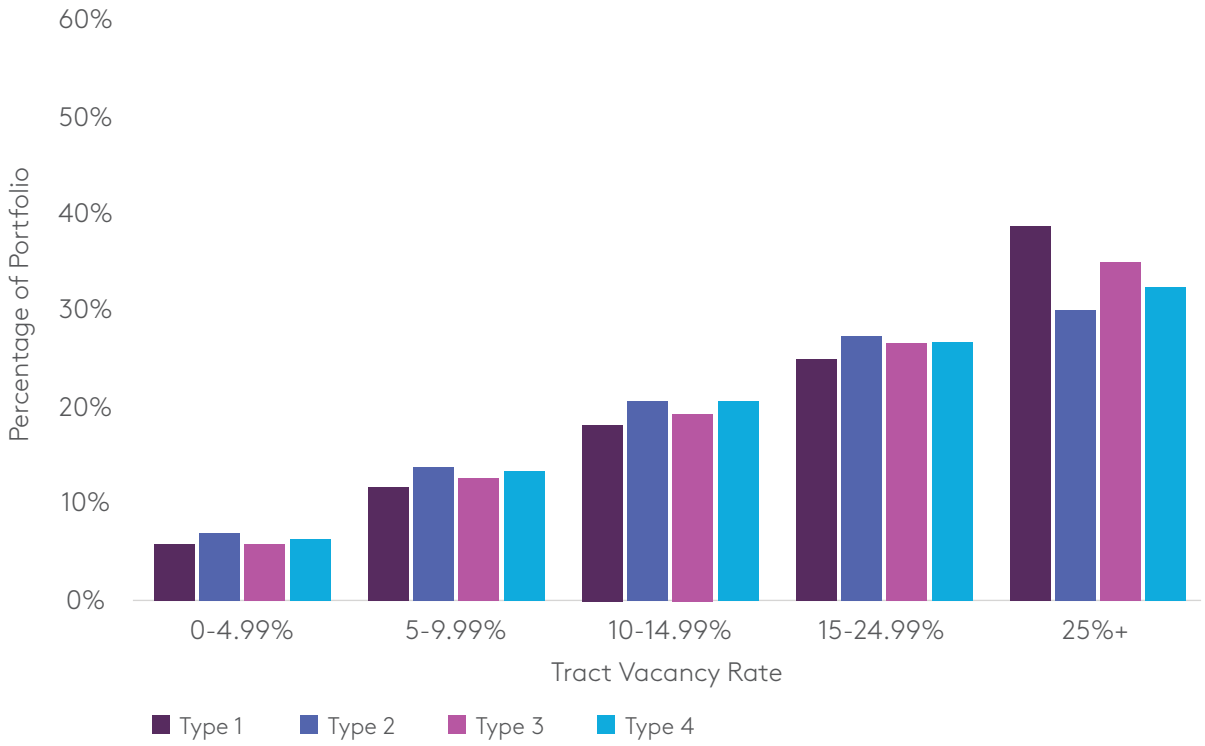
Figure 7: Median gross rent of census tract by landlord type



The amount of rent that any rental unit can support is a major factor that influences the condition of the housing in the city. Though quality data on the rate rental housing units can garner is limited, there is information that can be gleaned from the location of those units. The majority of Detroit properties fall in census tracts[11] where the median gross rent (which includes utilities) is below $900 a month. This is especially true for Type 1 landlords, where 62% of properties are in these tracts. This can present a substantial challenge for Type 1 landlords and their ability to conform with the City's stringent rental ordinance when the lower income from their rental property may mean that compliance is cost prohibitive.

[11] Census tracts are relatively compact and allow data to be reported for geographically small areas. These are defined by the U.S. Census Bureau and often follow visible barriers, such as major roads or freeways, or non-visible barriers, such as city boundaries. Though census tracts vary in size, they generally contain between 1,200 and 8,000 people, with a target size of 4,000.

Figure 8: Vacancy rate of census tract by landlord type

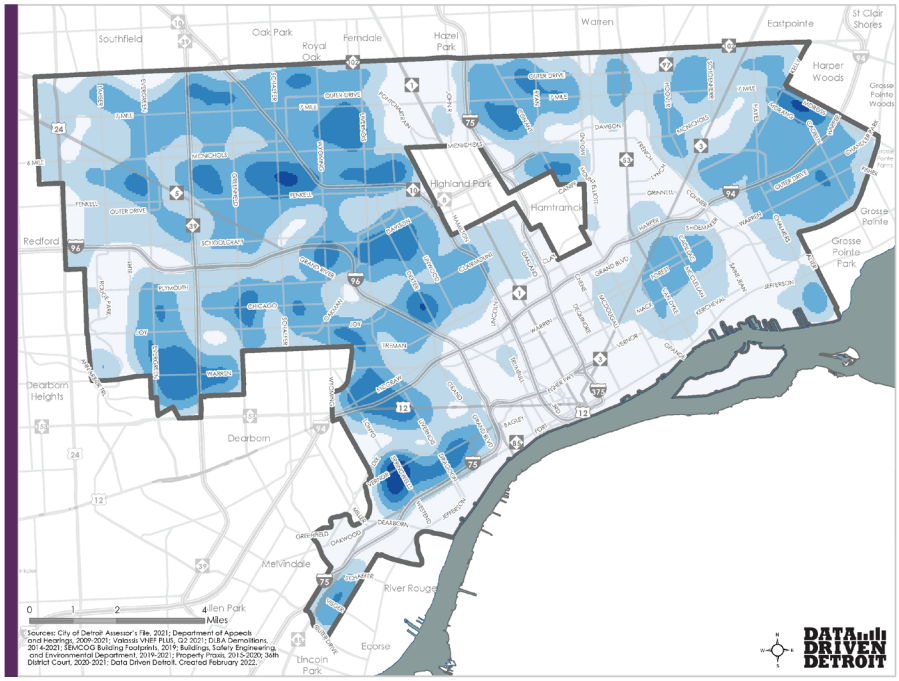


An additional measure of neighborhood condition is the vacancy rate. Based on the vacancy rate of the census tract in which the property is located, the Type 1 landlords have a greater share of their properties located in neighborhoods with extremely high rates of vacancy.

The geography of ownership

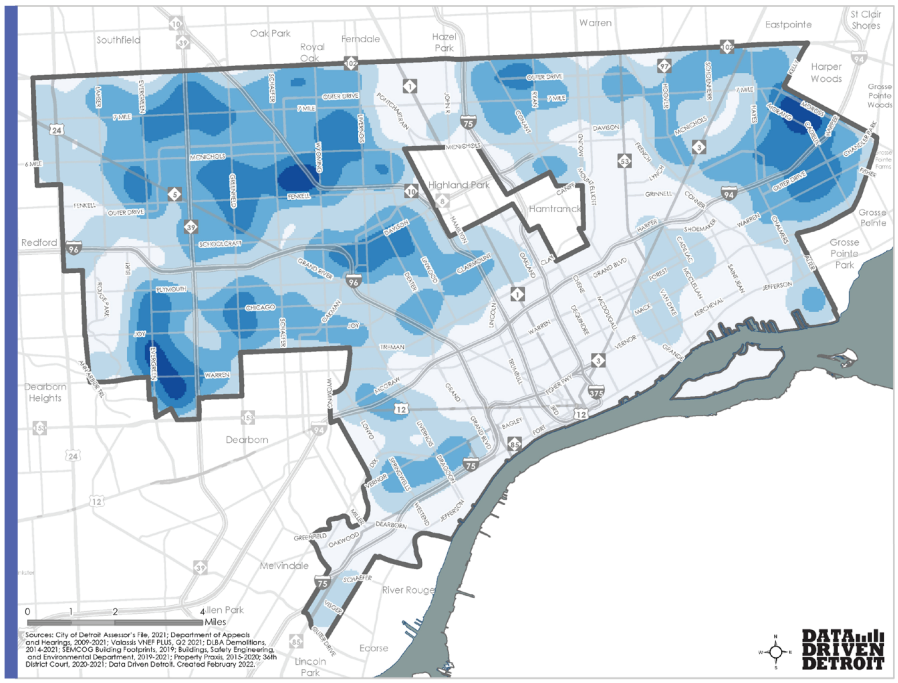
There is a noticeable pattern among the types of landlords in the city. Although these are broadly reflective of the location of housing in the city, there are important patterns that begin to emerge when properties are examined spatially.

One factor that affects the housing in the city is the general stability of neighborhoods. This is reflected in the ownership of rental housing. Type 1 landlords – those who own only one or two properties and show limited signs of professionalization – have the largest geographic dispersion, owning units across much of the city. For the larger and



Properties per square mile owned by TYPE 1 landlords, Detroit, MI 2021

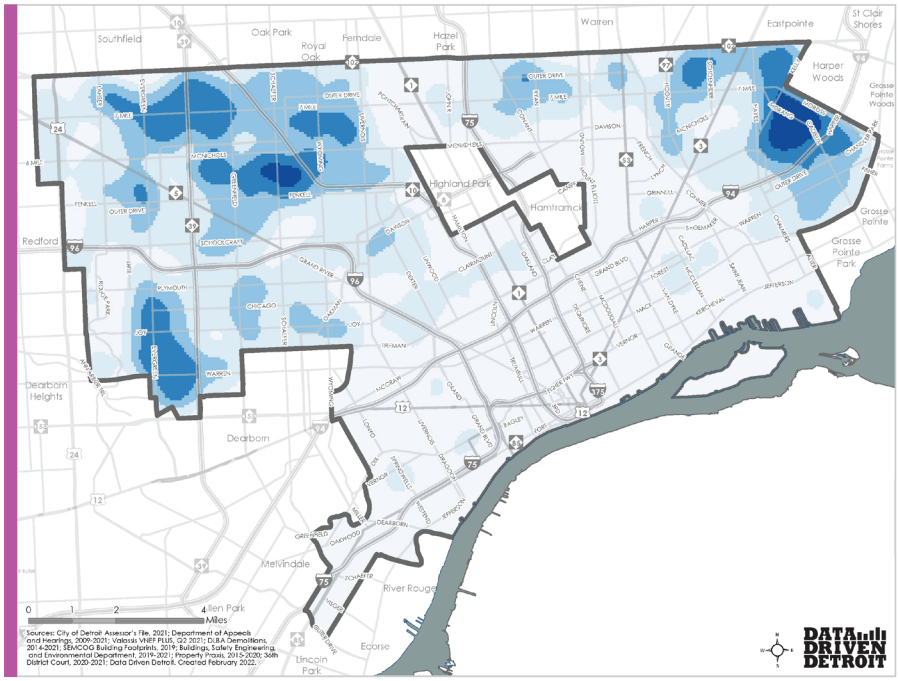
- 0 - 140
- 141 - 280
- 281 - 420
- 421 - 560
- 561 - 696



Properties per square mile owned by TYPE 2 landlords, Detroit, MI 2021

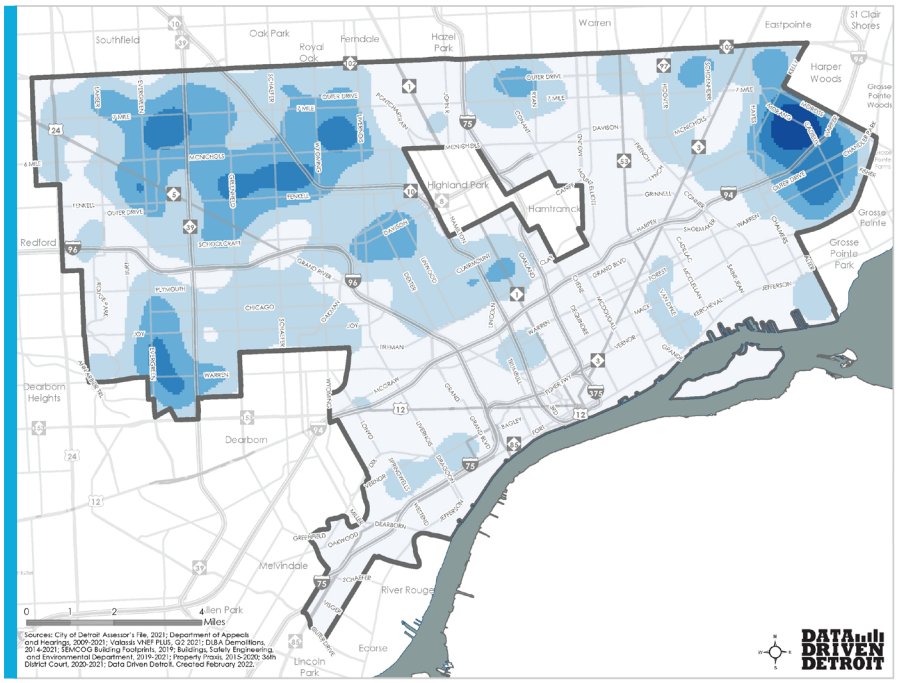
- 0 - 45
- 46 - 90
- 90 - 135
- 136 - 180
- 181 - 227

more professional property owners, such as the Type 3 and Type 4 landlords, a far more concentrated area of ownership is observed. These landlords tend to have property holdings in only the more stable neighborhoods. This would indicate a level of sophistication in the selection of properties.



Properties per square mile owned by TYPE 3 landlords, Detroit, MI 2021

- 0 - 150
- 151 - 300
- 301 - 450
- 451 - 600
- 601 - 776



Properties per square mile owned by TYPE 4 landlords, Detroit, MI 2021

- 0 - 50
- 51 - 100
- 101 - 150
- 151 - 200
- 201 - 263



COMPARING LANDLORDS IN DETROIT AND CLEVELAND

Though this analysis is modeled after prior work conducted in Cleveland, there were adjustments made to the methodology to fit the conditions and the availability and quality of data in Detroit. The most notable of these changes is the expansion of the number of classifications from three in Cleveland to four in the Detroit study. Even with these changes, there can be comparisons to Cleveland's landlord universe to better understand how Detroit compares to other cities.



There are similarities in the characteristics of landlords between the two cities. In both Detroit and Cleveland, the vast majority of landlords own only a few properties. These small landlords also own the majority of units in both cities, 67% of the units in Detroit and 70% in Cleveland. The number of local landlords is also similar in both cities, with 62% of landlords having a local address. There are also similar degrees of corporate ownership, 23% in Cleveland and 24% in Detroit.

The many similarities between the two cities present the opportunity for continued learning between them as they work to address the issues in their rental housing systems and provide better and healthier options for residents.



KEY TAKEAWAYS

This dive into the universe of Detroit landlords provides the most detailed look yet at who owns rental property in Detroit. There is now a foundation built on data to better understand ownership of the city's rental housing stock, providing a base of information from which to better work with landlords to improve the quality of rental housing in the city.

The most important findings to help work toward this goal include:

The majority of landlords in the city own only 1 or 2 properties

Of Detroit's 42,000 landlords, 87% own only one or two properties, accounting for just over half the units in the city. This is an important consideration that must be taken into account when supporting and regulating the rental housing market in the city. The nearly 37,000 Type 1 and 2 landlords, who own one or two properties, are more likely to have their units in areas with high rates of vacancy and command lower rates of rent than the Type 3 and 4 landlords, who control a larger portion.

A few landlords own a large number of properties

One potential inroad to improving Detroit's housing stock is through the Type 4 landlords, those who own more than five properties. A third of the rental housing stock is controlled by a small number of landlords. This group is also the most connected with the rental housing system, with more than half having at least one unit registered on the City's rental registry. Working with this group of landlords, a group already connected to the formal rental system, could provide an opportunity to improve rental housing in the city.

Lots of local landlords

Within the rental housing system in Detroit, 64% of properties are owned by those with a Detroit address. With such a large share of landlords within the city, this is an opportunity to further economic equity in Detroit. The local ownership and control of rental housing in the city allows Detroit residents to build wealth in the community through renting and improving the city's housing stock.

Though there are many paths to increase compliance within the rental housing system, given the large number of local owners, the City should look for ways to work with small local landlords to be able to assist them in improving the quality of their housing and better serve their tenants.

A better understanding of the city's Type 2 landlords could also help build equity in the housing system. These landlords own a small number of rental properties but also show signs of professionalization. This is a group of landlords that should be better understood, and the challenges that they face can be used to better assist other small landlords as they expand and professionalize.

Limited connections to the formal rental housing system

Among the landlords in the city, there is limited connection to the city's rental housing system, with the largest group that owns rental property in the city – Type 1 – having only 2% of landlords with a registered property. Connecting this group of landlords to the formal rental housing system should be a key step to improving the condition of housing in the city and reducing exposure to lead.

With the current state of regulation in the city being a substantial challenge for many landlords, there should be an approach that seeks to understand the challenges they face and how that limits their willingness to engage in the formal rental housing system in the city. This greater understanding can lead to the development of a system of regulation that takes into account the challenges landlords are facing and supports them, contingent on their engagement with the City's formal housing rental housing system. The result can be a system that is better for landlords and tenants alike.

DATA CHALLENGES

Though the data environment in Detroit has improved greatly over the last decade, there are still many data challenges. These include challenges with ownership information, such as lagging updates, conflicting information on ownership, misspellings of owner names, and unreliable information on the Principal Residence Exemption.

There is also a lack of information on the current condition of housing in the city, with the latest citywide survey on property condition having been conducted in 2014, and even then, it examined only the exteriors of buildings. There is a need for quality, public data on rental rates and a standard measure of the condition of neighborhoods in the city. This leads to an opportunity to improve data on housing conditions and begin to further understand the scope of the challenges, not only in the rental market, but in the city in general. Clear, accurate and timely data is a necessary step to build a better system of housing supports that will improve the quality of the city's housing stock and the quality of life for Detroiters, while reducing the risk of lead poisoning in children.

CONCLUSION

This report takes a deep look into rental housing in Detroit and begins to identify the number and basic characteristics of landlords in the city. It is a first step to beginning to improve housing quality for renters and reducing the exposure of the city's children to lead. Given the many data challenges that exist, this report sets a foundation that can be used to inform policies that can better serve and regulate rental housing in the city. This is a first step and can be used to influence a regulatory approach to helping landlords strengthen the rental system; to inform project design and the creation of programs and financial products that can better serve landlords; and to affect change that leads to safer housing options for Detroit's renters.

The data in this report offer the clearest look so far at the city's 42,191 landlords. Although this report does not provide all the answers necessary to create better housing options for the city's renters, it does provide the foundational data necessary to craft better regulations and supports that can build a stronger system to better serve both landlords and residents.

APPENDIX 1:
DATASETS USED IN ANALYSIS

- Blight tickets (2009-21)
- Valassis VNEF PLUS (Q2 2021)
- DLBA demolitions (2014-21)
- SEMCOG building footprints (2019)
- BSEED rental certificates (2019-21)
- BSEED certificates of occupancy (2019-21)[12]
- BSEED certificates of compliance (2019-21)
- BSEED lead clearance reports (2019-21)
- Property Praxis (2015-20)
- Evictions filed in 36th District Court (2019-21)



[12] This is the dataset that was misidentified as part of the rental universe and pulled in 198 nonresidential properties.

APPENDIX 2:
CHARACTERISTICS OF LANDLORDS IN DETROIT

Figure 9: Latent class analysis indicators

INDICATOR	RENTAL UNIVERSE	
Parcel Count	82,235	
ASSESSED VALUE[13] (2021)		
Property assessed > $25,000	7,728	9%
Property assessed $25,000 - $15,000	25,968	32%
Property assessed $15,000 - S10,000	26,802	33%
Property assessed under $10,000	21,756	27%
CORPORATE OWNER[14] (2021)		
Has LLC or Inc.	20,718	25%
BIGHT TICKETS[15] (2018-2021)		
0 Blight tickets	60,017	73%
1-2 Blight tickets	9,848	12%
3-5 Blight tickets	9,646	12%
More than 5 blight tickets	2,724	3%
TAXPAYER LOCATION[16] (2021)		
Taxpayer city is Detroit	48,044	58%
Taxpayer address in Michigan	70,183	85%
PROPERTY ACQUISITIONS (2019-2021)		
Property acquisitions in 2019	9,980	12%
Property acquisitions in 2020	4,090	5%
Property acquisitions in 2021	184	0.2%
Property with multiple acquisitions *(from 2019-21)*	6,114	7%
NUMBER OF UNITS (2021 Q2)		
Number of properties with 1-2 units	79,896	97%
Number of properties with 3-4 units	947	1%
Number of properties with 5-20 units	784	1%
Number of properties with 20+ units	610	0.7%

[13] The assessed value of a property is half its market value.
[14] Income properties are often held by corporate entities for ownership and legal protections.
[15] City of Detroit tickets on rental properties for non-compliance and other environmental/nuisance issues.
[16] Indication if the rental property is owned by a city resident.

Figure 10: Characteristics of landlord properties by type

LANDLORDS WITH AT LEAST 1 PROPERTY	TYPE 1	TYPE 2	TYPE 3	TYPE 4
Assessed under $10,000	9,198	1,463	1,644	1,615
	31%	20%	50%	71%
With code violation in 3 years	3,721	3,824	1,637	1,799
	13%	53%	50%	79%
On rental registry	550	3,309	907	1,168
	2%	46%	28%	51%
With eviction in past 2 years	1,765	2,095	931	1,398
	6%	29%	28%	62%
Taxpayer outside of Detroit	8,117	4,126	1,537	1,505
	28%	57%	47%	66%
Property transaction in 3 years	733	526	224	303
	3%	7%	7%	13%

Figure 11: Property counts by landlord type

LANDLORDS WITH	TYPE 1	TYPE 2	TYPE 3	TYPE 4
Only single-family homes	24,757	5,536	2,205	1,187
	84%	77%	67%	52%
Corporate ownership	131	4,609	988	1,199
	0%	64%	30%	53%

Figure 12: Property ownership: Owns only single family vs single and multi-family

LANDLORD OWNS	TYPE 1	TYPE 2	TYPE 3	TYPE 4
Only single-family properties	24,757	5,536	2,205	1,187
	84%	77%	67%	52%
Single- and multi-family	4,653	1,692	1,075	1,086
	16%	23%	33%	48%



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DETROIT FUTURE CITY

EXHIBIT I

State of Michigan's COVID Emergency Rental Assistance

Program Guidance

July 23, 2021

This guidance will be expanded upon or amended as the work continues.

Updates are highlighted throughout the document.

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PROGRAM SUMMARY

The State of Michigan's COVID Emergency Rental Assistance Program ("the Program") is designed to keep Michigan residents who fell behind on their rent and utilities during the COVID-19 pandemic in their homes. In addition, the Program may assist households that have an executed Writ of Restitution/Order of Eviction or are doubled up with other families or experiencing Category 1 Homelessness with motel assistance while they search for permanent housing. These families may then be eligible for additional assistance that may include application fees, security deposit, future rent, utility and internet assistance. The program utilizes a collaborative community process to expedite rental and utility assistance to COVID-19 affected tenants and their landlords.

Rental, utility, internet, motel and additional assistance in the amount of $560 million will be distributed through MSHDA's network of Emergency Solutions Grant Fiduciaries and then sub-granted to Housing Assessment and Resource Agencies and other local service agencies. $62 million in program funds are available for housing stability services, case management, legal services and administrative costs. Service Agencies will work with tenants and landlords to provide rental, utility and internet assistance for eligible renter households. Homeless households will be provided with case management if they are housed in a motel paid for by the Program. Legal services for renters will be provided by local legal aid organizations funded by grants made through the Michigan State Bar Foundation.

MSHDA is administering the Program and has convened a state leadership team comprised of staff from MSHDA, MDHHS, SCAO, Michigan Poverty Law Program and the Michigan State Bar Foundation. Their purpose is to guide the program's execution, monitor program outcomes, and distribute information within their respective agencies/areas of influence to aid in program effectiveness.

The Program is a partnership between multiple community organizations: Housing Assessment and Resource Agencies (HARA), Community Action Agencies (CAA), local Legal Services programs, judges and district court administrators. Other organizations can be added as necessary. These organizations will come together to design a local process whereby (1) tenants and landlords are served by the program so that tenants remain stably housed and landlords recoup rental arrears, (2) for court involved cases, the Landlord/Tenant docket is managed in a manner consistent with Michigan Supreme Court Administrative Order 2020-17 (as amended) and to facilitate service delivery by Legal Services and the HARA and (3) tenants and landlords are informed about the program, tenants are assisted by Legal Services and all parties work with the HARA to resolve eviction cases.

Partners will meet at least bi-weekly to design program operations, communicate results and other program issues, and discuss changes to improve processes and outcomes. HARAs will convene these meetings. HARAs will work with the courts and legal aid programs to distribute program flyers in Summons and Complaint mailings to share information on the program.

HARAs and other agencies involved in CERA utility assistance should contact utility providers to discuss CERA assistance and determine how to most efficiently serve tenants in need. When possible, arrangements for batch payments should be made with utility providers along with a plan for handling future utility assistance payments made on behalf of the tenants.

Based on consultation with MSHDA, local programs may administer the CERA program with additional rules to coincide with existing local codes/ordinances so long as these additional rules do not conflict with US Treasury regulations or slow the pace of serving eligible tenants and landlords.

The expenditure deadline for the ERA 1 funds is September 30, 2022. However, the US Treasury Department may recapture any funds not obligated by grantees as of September 30, 2021 if 65 percent of the funds are not obligated and reallocate/repay those amounts to grantees who, as of that time, have obligated at least 65 percent of their original grant.

MSHDA will be closely monitoring the expenditure of funds throughout the state and will work with each Continuum of Care/Local Planning Body (CoC/LPB) to address any problems that may arise regarding the expenditure of the funds. If it appears that the funding needs for any CoC/LPB were overestimated, the amount of funding for that area may be reviewed and some funds may be moved to a CoC/LPB where the funding needs may have been underestimated.

Program characteristics and guidance may change at any time based on funding availability, program experience, or revised US Treasury guidance.

HOW THE PROGRAM WORKS

- Grants will be made from MSHDA to the established fiduciary from the Continuum of Care (CoC) or Local Planning Body (LPB) for the Emergency Solutions Grant (ESG) program. The fiduciary will then sub-contract with the Housing Assessment and Resource Agency (HARA) and other local service providers.
- HARAs will, in collaboration with local stakeholders, design an eviction prevention, utility and internet assistance process where tenants and landlords are notified about the program and ideally cases are resolved using a Settlement Statement before a court filing, and filed cases are resolved as often as possible by Conditional Dismissal Orders.
- CRF Emergency Rental Assistance funds should be expended on eligible households before accessing any other sources of eviction diversion or utility assistance funding (i.e. ESG, CSBG, CDBG, etc.). The exception to this is whenever possible, eligible homeless families should be served with ESG-CV Rapid Rehousing or Prevention Funds.
- HARAs and other local agencies providing Program assistance will provide case management to homeless families not eligible for ESG-CV who are benefitting from CERA with motel stays while searching for housing. These households may also be eligible for Program assistance with application fees, security deposit and future rent utility and internet assistance.
- Conditional Dismissal Orders, based on MCR 2.602, will outline the terms by which the landlord and tenant may resolve a rent dispute in a court case. Those terms will typically include eligible lump sum payments from the Program and other sources and the landlord's required waiver of late fees over $400.
- Using a Conditional Dismissal Order instead of a judgment will protect the tenant's credit history.
- Tenants with incomes up to 80% of area median income are eligible for the rental and utility assistance.
- The Program is not compulsory for landlords and utility providers. If they refuse to participate, the rental and/or utility assistance payment will be made to the tenant so the tenant can pay the landlord and/or utility provider the amount due and any future payments if applicable.
- Using a Conditional Dismissal Order instead of a judgment will protect the tenant's credit history.
- Financial Status Reports (FSR) are required monthly to document program expenditures. Agencies may submit FSRs more frequently if needed to address cash flow issues. Agencies are also encouraged to establish a line of credit to assist with cash flow and timely program assistance payments.

TENANT ELIGIBILITY

- Tenant household income must be no more than 80% of Area Median, **and**
- One or more individual in the household currently or at some point after March 13, 2020,
    - qualified for unemployment benefits or
    - experienced a reduction in household income or
    - incurred significant costs or
    - experienced other financial hardship due directly or indirectly to the corona virus outbreak, **and**
- The household:
    - is currently defined as Category 1 Homeless (Literally Homeless (1) Individual or family who lacks a fixed, regular, and adequate nighttime residence, meaning: (i) Has a primary nighttime residence that is a public or private place not meant for human habitation; (ii) Is living in a publicly or privately operated shelter designated to provide temporary living arrangements (including congregate shelters, transitional housing, and hotels and motels paid for by charitable organizations or by federal, state and local government programs); or (iii) Is exiting an institution where (s)he has resided for 90 days or less and who resided in an emergency shelter or place not meant for human habitation immediately before entering that institution or
    - is doubled up with another household or
    - has an executed Writ of Restitution/Order of Eviction or
    - can demonstrate a risk of experiencing homelessness or housing instability which may include a:
        - past due utility notice or
        - past due rent notice (including a ledger or statement showing rent arrears or a Notice to Quit) or an eviction notice
- Households may not receive CERA assistance to cover rental arrearages that were part of the landlord forgiveness for MSHDA's Eviction Diversion Program or paid for with MSHDA's Eviction Diversion Program funding (or any agency's eviction prevention program). Tenants may be eligible for CERA assistance to pay the balance due on the tenant repayment agreement from the Eviction Diversion Program if the tenant was not able to fulfill the repayment obligation to the landlord and the arrearages are from on or after March 13, 2020. A case note describing the situation and the outstanding balance amount should be included in the case file. The outstanding balance amount should be included on the CERA Program Worksheet on the "Total Rental Arrears after March 13, 2020" line.

REQUIRED DOCUMENTATION

- Proof of Income: The household's 2020 calendar year income or present income (within the past 60 days of application) will be used to determine eligibility and assistance amounts. Income verification may be shown through:
    - 2020 calendar year income (first two pages of IRS form 1040) or
        - The Adjusted Gross Income on line 11 of the 1040 is to be used
    - SNAP/Food Assistance Program "Notice of Case Action" letter if it is dated January 2020 or later.
        - Families that have three or less household members and are currently enrolled in the SNAP (Supplemental Nutrition Assistance Program) with income determination/redetermination since January 2020 are categorically eligible per US Treasury.
            - Household with four or more members are not include as categorically eligible because the income limits for FAP are higher than 80% AMI in many counties.
        - The Notice of Case Action letter can be accessed in the applicant's MI Bridges account
    - paystubs for all income sources, W-2s or other wage statements such as a 1099, bank statements demonstrating regular income, or a statement from an employer.
        - Paystubs
            - must be dated within 60 days of the application date
            - do not have to be consecutive
    - Self-attestation accompanied by agency case notes as proof of income is acceptable only when all other verification options are not reasonably or readily available, not for applicant convenience or agency efficiency.
- ID: Tenant state ID (or an alternate form of identification, as necessary) is required for only the primary adult household member
    - Expired IDs are acceptable.
    - Alternate identification may include a birth certificate, military ID, student ID, Medicaid or other health coverage card, voter registration card, or any type of official documentation including verification from a DHHS worker.
    - Verification of residency as noted below will be required for any form of identification that does not state the unit address. If the family lacks a current state ID, the case manager should work with the family to set up a plan for the household member to obtain one.

- Proof of Address:
    - If the tenant ID address does not match the address of the unit, the tenant must provide a recent utility bill, benefit statement, some other official documentation, or other reliable evidence verifying they occupy the unit for which the assistance has been requested. If the tenant has received any court filings, the court filings may be used as verification of residency or
    - Verification of Category 1 Homelessness provided in writing by the HARA or other local homeless service provider or
    - Verification of being doubled up with another household provided in writing by the household permanently residing at the unit

- Proof of Occupancy
    - Copy of the lease agreement if a written lease was completed.
    - If the lease is not signed, an email or documented phone call confirmation from the other party verifying the lease document/amounts and basic information are correct should be placed in the file.
    - Verbal lease agreements are also acceptable. Verbal lease agreements will need to be substantiated by utility bills in the tenant's name at the unit address, cancelled checks or other proof of prior rental payments such as a ledger, or other reliable evidence. Documents need to clearly place the tenant at the unit address during the time period assistance is being sought.
    - If there is not a written lease and the tenant has a Complaint – Termination of Tenancy – Non-Payment of Rent, this document may be used as verification of occupancy.

- Tenant Application
    - Required for all cases even if the landlord is applying on behalf of the tenant.
    - Applicants cannot be denied Program assistance due to not providing a social security number for any member of the household.
    - Paper applications must be provided to tenants that cannot or will not complete an online application.

- Landlord Application
    - A ledger can be attached to the application in lieu of completing the rental payment history.
    - Paper applications must be provided to landlords and tenants that cannot or will not complete an online application.
    - The landlord application is not required for tenants using a paper application seeking utility assistance only. Please see Utility Assistance Payment Information for additional details.

- Proof of Tenant Supplied Utilities: Copy of current utility bill(s) (gas, electric, water/sewer, trash removal and energy costs such as fuel oil) as stated in the lease as being tenant responsibility to pay.

  - Trash removal will only be paid if it is included within another utility bill such as water or sewer. If trash is billed separately it will not be paid.
  - If there is no written lease the utility bills must be in the tenant's name or the tenant must be able to show a history of having paid the utility bills in the past for CERA to provide utility assistance.
  - Utility bills do not need to show an arrearage for the tenant to be considered for future utility assistance.
  - Current account detail statements provided by the utility company are an acceptable substitute for a copy of the current utility bill if they include the same information included on a bill such as name, service address, account number, balance due, dates, etc.

- Proof of Internet Service: Copy of current internet bill showing service was in place or suspended due to non- payment at the time of program application, if tenant is requesting assistance with internet payments.
- Proof of Rental Arrears: Documentation showing tenant has rental arrears (statement from landlord, ledger, Notice to Quit, Complaint for Eviction or other court documentation)
- Proof of Court Costs: Court documentation verifying court costs if applicable. Court costs can only include expenses paid to the court and verified as court expenses. Attorney fees are not included in court costs.
- Rental Assistance Calculation Worksheet
- Landlord W-9 Form (if rent payment is made directly to the landlord)
- Proof of Agreement: Settlement Statement or Conditional Dismissal Order – All funds must be secured with a Settlement Statement or Conditional Dismissal Order in place before Program funds are dispersed to the landlord except for cases in which a landlord or utility refuses to participate in CERA and the payment is made directly to the tenant. By signing the application, the landlord and tenant are agreeing upfront to the Settlement Statement terms at the time of application. If a repayment agreement is part of the Settlement Statement or Conditional Dismissal Order, the tenant will be responsible for making those payments in the future as outlined in the Settlement Statement or Conditional Dismissal Order.
- Proof of COVID-Related Hardship
  - Documentation of one COVID hardship based on the chart below.
  - Hardships must have occurred on or after March 13, 2020 and may have since been resolved.
  - Automatic denials for no COVID hardship should not be issued. While the COVID pandemic has caused most households in Michigan experience some type of increase in costs or significant expenses since March 13, 2020, some applicants will mark "No" for the COVID hardship questions on the application. If the tenant marks "No" for all COVID hardship questions and the comment box (portal application) or hardship letter (paper application) is not clear and/or does not provide details indicating a COVID hardship, the

agency must follow up with the tenant. The agency should make at least two attempts to reach out to the tenant to get clarification on the COVID hardship response. These attempts and any additional information obtained must be documented in the portal by adding Notes in the audit log area. When talking with an applicant who has marked "No" for these questions, it may be beneficial to explore with the applicant what each question means with the reminder that there is not a threshold dollar amount to meet this program requirement. Some examples of COVID hardships that would meet the eligibility requirements include:

- Purchasing PPE
- Having to pay for delivery of groceries or supplies due to not being able to ride public transportation or go into a store
- Having to pay additional expenses due to children being home from school during the day. Examples include increased costs for food, school supplies, keeping the heat turned up during the day, childcare, etc.
- Having to pay increased prices and/or shipping for items due to lack of availability of products in the store
- Having to purchase more cleaning products such as disinfecting wipes, cleaners and hand sanitizer
- Reducing work hours to stay home and care for children
- Reducing hours or discontinuing employment for health reasons (for example leaving a job due to concerns of increased exposure)

Type of COVID Hardship	**Best Documents to Show Proof**	**Alternate Documents to Show Proof**
A member of my household qualified for unemployment after March 13, 2020	Unemployment Monetary Determination Letter OR screen shots from unemployment website showing payments and person's name	Signed letter from applicant stating the time period they received unemployment benefits
A member of my household has had a reduction in income after March 13, 2020	Signed letter from applicant outlining your original hours and pay rate and reduced hours and pay rate during the COVID outbreak	
A member of my household has incurred significant costs after March 13, 2020	Signed letter from applicant stating what type of increased expenses the household incurred during the COVID outbreak	
A member of my household experienced other financial hardship after March 13, 2020	Signed letter from applicant stating what type of financial hardship occurred during the COVID outbreak	

Online applicants only need to check the appropriate box regarding the COVID Hardship and provide a brief explanation in the comments box. A separate letter regarding COVID Hardship is not required for online applicants if they check a COVID Hardship box and complete the comment box.

SELF-ATTESTATION OF INCOME and OTHER FACTORS

- While the Program seeks to be flexible about documentation requirements and to avoid undue documentation burdens, self-attestation should be used as verification as a last resort under limited circumstances.
- Self-attestation is acceptable only when all other options of verification are not reasonably or readily available, not for applicant convenience or agency efficiency.
- Applicants should be notified that self-attestation may delay the processing of their application because additional information may be required.
- Self-attestation is not acceptable verification of utility or internet bills.
- Agencies may not have more than 25% of their cases use self-attestation to verify income unless additional fraud prevention measures have been implemented by the agency and a description of these measures has been provided to and approved by MSHDA in writing.
- Zero income is considered self-attestation if there is no verification showing the loss of income.
- Situations when self-attestation may be relied upon:
    - To accommodate applicants with a disability
    - Extenuating circumstances related to the pandemic or household circumstances
    - Lack of technological access
    - Imminent eviction (within 14 days) and standard verification is not immediately available
    - Various income sources and/or self-employment that are cash payments and/or may not have a standard paystub such as babysitting, lawn care and plasma donations and the income source does not or will not provide written verification of the income.
- Case notes describing why self-attestation was used must be included for all cases with self-attestation. The case notes must include an analysis of why verifications could not be obtained and why it was acceptable to use self-attestation. For example:
    - Applicant babysits for cash and does not have any form of recordkeeping. Applicant states parents of children are not willing to write a statement of the income provided to applicant therefore self-attestation of this income was accepted.
    - Applicant has a disability that impedes ability to obtain verification; has a final court date in 10 days for eviction. Applicant is not able to locate paystubs, does not have a phone with a camera to screenshot electronic paystubs and does not have immediate access to a computer and printer to print paystubs. Employer will not provide another printed copy of paystubs to applicant therefore self-attestation of this income was accepted.

FACT-SPECIFIC PROXY USAGE TO ENABLE SELF-ATTESTATION OF HOUSEHOLD INCOME

US Treasury FAQ dated 5/7/21 introduced the ability to establish a fact-specific proxy in conjunction with income eligibility determinations. The FAQ states:

> *Fact-specific proxy: A grantee may rely on a written attestation from the applicant as to household income if the grantee also uses any reasonable fact-specific proxy for household income, such as reliance on data regarding average incomes in the household's geographic area.*

MSHDA has evaluated census data and will use a fact-specific proxy based on zip codes and household incomes. MSHDA will allow self-attestation of household income in zip codes where the median household income is less than 70% of the county Area Median Income (AMI).

Both the online and paper application will prompt the household to disclose all household income sources and upload/include third party verifications (pay stubs, benefit statements, etc.). When service agencies are evaluating the case for eligibility in zip codes within the fact specific proxy list, they will use all provided information from the household to determine the income level, but not seek out additional information from the tenant if less than full documentation was received. If the income isn't fully documented, the Reviewer or Approver will mark the 'Income Self-Attested' area as 'Yes' while they are processing the case in the CERA portal.

If the household reports income that is over 80% AMI, they will be denied assistance. For applications received outside of the fact specific proxy zip code list, service agencies will request additional information from tenants so that the household income is sufficiently documented as described in guidance.

Zip Code	City	County	Zip Code	City	County	Zip Code	City	County
48705	Barton City	Alcona	48743	Long Lake	Iosco	48756	Prescott	Ogemaw
48737	Glennie	Alcona	48748	National City	Iosco	48761	South Branch	Ogemaw
48728	Curran	Alcona	48739	Hale	Iosco	48635	Lupton	Ogemaw
48745	Mikado	Alcona	48770	Whittemore	Iosco	48654	Rose City	Ogemaw
48740	Harrisville	Alcona	49903	Amasa	Iron	49912	Bruce Crossing	Ontonagon
49839	Grand Marais	Alger	49902	Alpha	Iron	49960	Rockland	Ontonagon
49825	Eben Junction	Alger	49915	Caspian	Iron	49953	Ontonagon	Ontonagon
49884	Shingleton	Alger	49935	Iron River	Iron	49910	Bergland	Ontonagon
49895	Wetmore	Alger	48896	Winn	Isabella	49665	Marion	Osceola
49450	Pullman	Allegan	48858	Mount Pleasant	Isabella	49631	Evart	Osceola
49747	Hubbard Lake	Alpena	49263	Norvell	Jackson	49677	Reed City	Osceola
48703	Au Gres	Arenac	49202	Jackson	Jackson	48636	Luzerne	Oscoda
48658	Standish	Arenac	49074	Nazareth	Kalamazoo	48647	Mio	Oscoda
49073	Nashville	Barry	49007	Kalamazoo	Kalamazoo	49401	Allendale	Ottawa
48708	Bay City	Bay	49006	Kalamazoo	Kalamazoo	49743	Hawks	Presque Isle
49616	Benzonia	Benzie	49001	Kalamazoo	Kalamazoo	48630	Houghton Lake Heights	Roscommon
49683	Thompsonville	Benzie	49048	Kalamazoo	Kalamazoo	48656	Saint Helen	Roscommon
49084	Riverside	Berrien	49052	Fulton	Kalamazoo	48651	Prudenville	Roscommon
49022	Benton Harbor	Berrien	49507	Grand Rapids	Kent	48601	Saginaw	Saginaw

49098	Watervliet	Berrien	49503	Grand Rapids	Kent	48607	Saginaw	Saginaw
49103	Berrien Springs	Berrien	49509	Wyoming	Kent	48724	Carrollton	Saginaw
49224	Albion	Calhoun	49548	Grand Rapids	Kent	48602	Saginaw	Saginaw
49799	Wolverine	Cheboygan	49504	Grand Rapids	Kent	48060	Port Huron	Saint Clair
49788	Kincheloe	Chippewa	49512	Grand Rapids	Kent	48039	Marine City	Saint Clair
49768	Paradise	Chippewa	49505	Grand Rapids	Kent	48097	Yale	Saint Clair
49736	Goetzville	Chippewa	49901	Ahmeek	Keweenaw	48453	Marlette	Sanilac
49710	Barbeau	Chippewa	49642	Idlewild	Lake	49883	Seney	Schoolcraft
49748	Hulbert	Chippewa	49304	Baldwin	Lake	49836	Germfask	Schoolcraft
49793	Trout Lake	Chippewa	49656	Luther	Lake	49027	Breedsville	Van Buren
48625	Harrison	Clare	49644	Irons	Lake	49043	Covert	Van Buren
48632	Lake	Clare	48440	Hadley	Lapeer	49056	Grand Junction	Van Buren
48831	Elsie	Clinton	48727	Clifford	Lapeer	49026	Bloomingdale	Van Buren
48853	Maple Rapids	Clinton	48444	Imlay City	Lapeer	49057	Hartford	Van Buren
49864	Nahma	Delta	48760	Silverwood	Lapeer	49013	Bangor	Van Buren
49829	Escanaba	Delta	49256	Morenci	Lenawee	49045	Decatur	Van Buren
49852	Loretto	Dickinson	48139	Hamburg	Livingston	49090	South Haven	Van Buren
49802	Kingsford	Dickinson	48816	Cohoctah	Livingston	48109	Ann Arbor	Washtenaw
49877	Ralph	Dickinson	49838	Gould City	Mackinac	48198	Ypsilanti	Washtenaw
49764	Oden	Emmet	48089	Warren	Macomb	48104	Ann Arbor	Washtenaw
49722	Conway	Emmet	48091	Warren	Macomb	48197	Ypsilanti	Washtenaw
49718	Carp Lake	Emmet	48015	Center Line	Macomb	48211	Detroit	Wayne
49769	Pellston	Emmet	48043	Mount Clemens	Macomb	48201	Detroit	Wayne
48505	Flint	Genesee	48066	Roseville	Macomb	48204	Detroit	Wayne
48529	Burton	Genesee	48021	Eastpointe	Macomb	48203	Highland Park	Wayne
48504	Flint	Genesee	48036	Clinton Township	Macomb	48208	Detroit	Wayne
48503	Flint	Genesee	49619	Brethren	Manistee	48218	River Rouge	Wayne
48502	Flint	Genesee	49626	Eastlake	Manistee	48238	Detroit	Wayne
48507	Flint	Genesee	49879	Republic	Marquette	48213	Detroit	Wayne
48458	Mount Morris	Genesee	49458	Walhalla	Mason	48234	Detroit	Wayne
48506	Flint	Genesee	49410	Fountain	Mason	48210	Detroit	Wayne
48532	Flint	Genesee	49402	Branch	Mason	48206	Detroit	Wayne
49968	Wakefield	Gogebic	49305	Barryton	Mecosta	48227	Detroit	Wayne
49959	Ramsay	Gogebic	49307	Big Rapids	Mecosta	48228	Detroit	Wayne
49938	Ironwood	Gogebic	49863	Nadeau	Menominee	48212	Hamtramck	Wayne
49911	Bessemer	Gogebic	49848	Ingalls	Menominee	48209	Detroit	Wayne
49969	Watersmeet	Gogebic	49874	Powers	Menominee	48215	Detroit	Wayne
49666	Mayfield	Grand Traverse	49847	Hermansville	Menominee	48229	Ecorse	Wayne
49637	Grawn	Grand Traverse	48618	Coleman	Midland	48202	Detroit	Wayne
48801	Alma	Gratiot	49667	Merritt	Missaukee	48205	Detroit	Wayne
48856	Middleton	Gratiot	48157	Luna Pier	Monroe	48217	Detroit	Wayne
49961	Sidnaw	Houghton	48133	Erie	Monroe	48216	Detroit	Wayne

49921	Dodgeville	Houghton
49931	Houghton	Houghton
49963	South Range	Houghton
49942	Kearsarge	Houghton
49917	Copper City	Houghton
49913	Calumet	Houghton
49922	Dollar Bay	Houghton
49965	Toivola	Houghton
48720	Bay Port	Huron
48933	Lansing	Ingham
48910	Lansing	Ingham
48915	Lansing	Ingham
48911	Lansing	Ingham
48912	Lansing	Ingham
48906	Lansing	Ingham
48823	East Lansing	Ingham
48870	Palo	Ionia
48865	Orleans	Ionia

48161	Monroe	Monroe
48852	Mcbrides	Montcalm
48829	Edmore	Montcalm
49756	Lewiston	Montmorency
49709	Atlanta	Montmorency
49746	Hillman	Montmorency
49440	Muskegon	Muskegon
49442	Muskegon	Muskegon
49444	Muskegon	Muskegon
49309	Bitely	Newaygo
49312	Brohman	Newaygo
48342	Pontiac	Oakland
48340	Pontiac	Oakland
48341	Pontiac	Oakland
48030	Hazel Park	Oakland
48034	Southfield	Oakland
48033	Southfield	Oakland
48237	Oak Park	Oakland

48235	Detroit	Wayne
48207	Detroit	Wayne
48141	Inkster	Wayne
48219	Detroit	Wayne
48214	Detroit	Wayne
48224	Detroit	Wayne
48126	Dearborn	Wayne
48223	Detroit	Wayne
48122	Melvindale	Wayne
48221	Detroit	Wayne
48120	Dearborn	Wayne
48146	Lincoln Park	Wayne
48225	Harper Woods	Wayne
48184	Wayne	Wayne
48125	Dearborn Heights	Wayne
48185	Westland	Wayne
48180	Taylor	Wayne
48127	Dearborn Heights	Wayne
48174	Romulus	Wayne
49638	Harrietta	Wexford

GENERAL INFORMATION

- Rental assistance does not need to be provided to assist with utility, energy, or internet costs.
- Landlords and owners may apply on behalf of tenants meeting the eligibility requirements, so long as:
    - the tenant cosigns the application and provides required documentation to the landlord to be included with the application,
    - the landlord provides information on the rental assistance payment to the tenant and
    - the payments are used to satisfy the tenant's rental obligation to the owner.
- Rental, utility, and internet assistance can only be paid for amounts due on or after March 13, 2020.

- If a tenant has arrearages from before and after March 13, 2020 and some payments have been made during that time, those payments should be applied to the oldest arrearages, charges and fees regardless of the date the payments were made. For example, if a tenant did not pay rent for March and April and then paid rent in May, the tenant payment made in May should be applied to March rent.

- To calculate the number of months in arrears, take the total rental arrears (less late or other fees that were applied after March 13,2020) and divide it by the monthly rent due and round that number up. For example, if the household has arrears (without late fees) of $5,000 and their monthly rent is $800, they are 7 months in arrears because $5,000/$800 = 6.25 months.

- When calculating total rental arrears, late fees applied prior to March 13, 2020 do not need to be removed. Ideally the landlord will forgive these late fees. If the landlord will not forgive late fees applied prior to March 13, 2020 they will be the tenant's responsibility to pay. The landlord and tenant will need to agree upon a payment plan if necessary.

- 70% of the rental assistance will be reserved for households at or below 50% AMI.

    - Grantees must track their spending by tenant income category so that they ensure at least 70% of funds are spent on households at or below 50% AMI.

- Tenants will only be eligible to participate in the CERA program one time unless there are insufficient applications to fully spend down the funding.
- SER applications are <u>not</u> required to qualify for Program assistance.

    - SER applications are encouraged for households that are below 50% of AMI and have rental arrearages that exceed program limits.

- College students are eligible for Program assistance so long as they are named on the lease.

- For tenants with variable incomes, the averaged income amount should be used when calculating annual income in the calculation worksheet.

Zero Income

- When interviewing the tenant it is important to inquire about all types of income, earned and unearned.

- If the household has zero income this must be noted on the tenant application and the family will be considered below 50% AMI.

Types of Housing

- Homeless - Category 1 Homeless and Doubled Up Homeless: May be assisted with a motel while searching for housing (see Motel Assistance for Non-Lease Holders) or may be immediately assisted with application fees, security deposit, future rent and utilities and internet if applicable.

- Renting from a Relative: If the tenant and landlord are related, the case manager should investigate to ensure that the tenant has actually been living in the unit and past rent has been paid to the landlord.

- Mobile Homes: Tenants living in mobile homes may be assisted with Program funds. If the tenant is renting the mobile home and the lot, apply the FMR for the number of bedrooms in the unit (if there is only one person in the household apply the one-bedroom FMR regardless of the number of bedrooms in the unit). If the tenant owns the mobile home and is only renting the lot, the MH FMR should be used.

- Cooperatives: Tenants living in cooperatives are eligible for Program assistance.

- Land Contracts: Persons buying a property on a land contract are NOT eligible for assistance. Tenants renting a property from a land contract buyer are eligible for assistance.

- Motels: Tenants living in self-paid for motels are NOT eligible for assistance. These households should be evaluated for ESG assistance.

- Commercial Buildings: Tenants living in commercial buildings (stores, warehouses, etc.) are NOT eligible for assistance.

- Subsidized Housing: An eligible household that occupies a federally subsidized residential or mixed-use property may receive assistance, provided program funds are not applied to costs that have been or will be reimbursed under any other federal assistance.

    - If an eligible household receives a monthly federal subsidy (e.g., a Housing Choice Voucher, Public Housing, or Project-Based Rental Assistance) and the tenant rent is adjusted according to changes in income, the renter household may receive ERA assistance for the tenant-owed portion of rent or utilities that is not subsidized.

    - The agency must review the household's income and sources of assistance to confirm that the Program assistance does not duplicate any other assistance, including federal, state, or local assistance provided for the same costs.

    - Agencies may rely on an attestation from the applicant regarding nonduplication with other government assistance in providing assistance to a household.

    - Utility assistance provided to tenants through their rental subsidy program does not need to be considered for CERA.

Tenants Renting a Room

- Obtain the following information and submit the request to MSHDA-CERA@michigan.gov for a determination:
  - Is there a lease?
  - Is there verification of past payments made to the landlord?
  - Are the tenant and landlord related and if so, what is the relationship?
  - Has the tenant ever lived in the unit without being required to pay rent?
  - Has the landlord filed for eviction?
- If MSHDA determines that the tenant can be assisted with Program funds, 0-bedroom size unit should be used for the purpose of FMR.

Roommate Situations

- Review documentation verifying the rent arrearage for the name(s) of the person(s) applying for assistance.
- Household income is calculated based on the income of the adult(s) listed on verification of past due rent.
- Unit size is based on the number of bedrooms the persons listed occupy unless there is only one roommate using one bedroom being evicted. If there is only one roommate being evicted and that person only occupies one of the bedrooms, use 0 bedrooms for FMR.
- If the person being evicted has children, the number of bedrooms used by the children need to be added to the number of bedrooms for FMR.
- If one or more roommates are assisted at the same time, any other roommates in the unit are not eligible to apply for Program assistance for the same time period/rental arrearage.

Moving Tenants

- If the tenant wishes to move of their own volition shortly after the rental arrears assistance is provided, that is allowable.
- Future rental assistance may be provided, for eligible tenants, on the new unit if the new landlord completes the application and submits the required documents for payment.
- If the tenant is being required to move against their will, CERA can only be provided to the current landlord if it will allow the tenant to stay in the unit for the entire time period that CERA is paying forward rent payments. If a landlord refuses to allow the tenant to stay through the time period that could be covered by future payments, the rental arrears will be paid directly to the tenant so the tenant can pay the financial obligation or judgment against them. Future rent payments may be made to a future landlord once a lease has been signed and the landlord application and required documents have been submitted.
- Tenants moving out of units to doubled up situations with friends or family members will not be eligible for future rent payments to pay rent to the friend or family member.

RENT-TO-OWN LEASES versus LAND CONTRACTS

Default of either a Rent-to-Own Lease or a Land Contract can result in an eviction, but a Rent-to-Own Lease is eligible for CERA benefits, while a Land Contract is not.

The problem: the title at the top of an agreement may not match what is actually going on. Sometimes a Rent-to-Own Lease is a Land Contract in disguise.

How can you tell what kind of agreement it really is? Unfortunately, there are no easy answers on this topic: Michigan law does not draw a clear line between the two kinds of agreements. Both are considered legal, if written properly, but what kind of agreement it actually is comes down to the particular terms – what they legally agree to defines the document, not the label at the top.

As you read the terms of the agreement, look for some Red-Light clues that suggest a Land Contract, and some Green-Light clues that suggest a proper Lease:

Red Lights (could be a Land Contract):

- Tenant has to pay property insurance and/or property taxes.
- Significant amount of "rent" is credited toward purchase price (*more than 5% of the monthly payment).*

  The more money the tenant has paid to landlord towards the purchase price, the more the tenant stands to lose if the landlord evicts them for defaulting on payments.
- Significant deposit required toward purchase price or purchase option (*5-7% of final purchase price or more*).
- If the rent-to-own agreement says it may be recorded (*whether it is actually recorded or not*).
- Term of Years is more than one year. (*Most Michigan residential leases are for 12 months, then going month-to-month thereafter.*)
- The document talks about forfeiture or foreclosure if the Tenant defaults.

Green Lights (could be Lease eligible for CERA):

- Tenant has no obligation to purchase the property at the end of the contract and does not own the property at the end of the contract: the tenant just has an option to purchase for additional payment.
- Very little or no money is required as a cash "deposit" towards the purchase portion of the agreement.

  Proper leases often have a security deposit requirement, which is allowed under the law; a disguised land contract may have an additional cash deposit toward the purchase price or may try to say that the security deposit will be applied toward the purchase price.
- Tenant does not have to insure anything other than their own personal belongings.

If you have any questions or concerns about whether a Rent-to-Own agreement is eligible for CERA benefits as a lease, or ineligible as a land contract, spend some extra time studying the terms, and asking for additional input.

RENTAL ASSISTANCE PAYMENT INFORMATION

- Rental Assistance will be based on income level with households at lower income levels being offered longer periods of rental assistance.
- Rental arrears attributed to late fees charged on or after March 13, 2020 are capped at $400.
    - Monthly late fee charges cannot exceed the late fee amount stated in the lease.
    - Late fees for tenants without a lease are limited to $50/month.
    - Landlord must forgive any remaining late fees charged on or after March 13, 2020.
- Actual court costs of up to $150 incurred on or after March 13, 2020 may be included for cases that have already filed for eviction. Landlord must forgive any remaining court costs charged on or after March 13, 2020.
- If the landlord is not participating in CERA and the funds are paid directly to the tenant to pay the landlord, the tenant will still owe the late fees and court costs above the program limits. If these fees and costs are not paid by the tenant, the tenant will risk eviction.
- Tenant is responsible for late fees charged prior to March 13, 2020.
- Tenant is responsible for arrearages and any other charges from prior to March 13, 2020.
- Tenant responsibility arrearages may be put into a payment plan agreed upon by the tenant and landlord with payments generally being split over a 12-month period.
- Tenants at or below 50% AMI can be considered for ESG, SER, CSBG, CDBG or other funds if these funds are necessary to fully pay the rent arrearage.
- Monthly rental assistance will be capped at 150% of HUD's Fair Market Rent (FMR) levels adjusted by county and unit size. Tenants are not disqualified from the program if their monthly rent exceeds this amount, but Program assistance is capped at 150% of FMR based on the unit size. Tenants may be referred to other programs such as ESG-CV or SER for possible assistance with the difference.
- A single tenant's maximum rental assistance will be 150% of the one-bedroom FMR regardless of actual unit size.
- For households with more than one person, assistance is based on the number of bedrooms in the unit, not the number of people in the household. For example, two people living in a three-bedroom unit would be assisted up to 150% of the FMR for a three-bedroom unit.
- Utilities will not be included when determining the FMR.
- Tenants are responsible for monthly rental amounts over 150% of FMR and must pay the landlord this portion. This may be done through a payment plan if agreed to by the landlord and tenant.
- The tenant is not required to accept the future rent assistance; however, this decision must be made by the tenant, not the agency providing Program assistance. If the tenant declines future

rent assistance it must be noted on the worksheet that the tenant has specifically expressed that they do not want future rent to be paid.

- The tenant must be living in the unit at the time the Program assistance funds are disbursed. Persons temporarily away from the unit (e.g., hospitalization, family visit) are eligible for assistance.
- Agencies must make payments directly to a landlord on behalf of the eligible household unless the landlord does not agree to accept the payment, in which case the agency may make payments directly to a member of the eligible household. Agencies must make reasonable efforts to obtain the cooperation of landlords to accept payments from the Program. The final outreach attempt or notice to the landlord must be documented. The cost of contacting landlords would be an eligible administrative cost. Outreach will be considered complete if:
    - a request for participation is sent in writing, by mail, to the landlord, and the addressee does not respond to the request within 14 calendar days after mailing; or
    - the agency has made at least three attempts by phone, text, or e-mail over a 10 calendar-day period to request the landlord participation; or
    - a landlord confirms in writing that the landlord does not wish to participate.

- Future rent payments may be made on a monthly basis or in one lump sum based on agency preference.

- If the landlord will not participate in any part of the of application process:

    - the tenant must provide a current utility bill or some other type of official mail that shows that they live at the address.

    - case workers should attempt to get confirmation of the rental arrearage, a copy of the ledger and monthly rent amount from the landlord over the phone or email. This documentation should be uploaded in the supporting documents area of the portal.

    - if the case worker is only able to get verbal confirmation of some information from the landlord, add a Note in the Audit/Activity Log section of the portal to document the information received.

    - if the tenant cannot provide a copy of the lease and no information is obtained from the landlord, the tenant must have some type of proof of the amount of rent that was paid to the landlord in the past. If the tenant cannot provide proof of the amount of rent paid to the landlord, FMR is the maximum rent amount permitted.

- If the household AMI has increased from up to and including 50% AMI to 51-80% AMI by the time the household returns for the additional three months of rental assistance, the household will still be eligible for up to 15 months of rental assistance if they meet other eligibility requirements.

- If a tenant declines rental assistance and only wishes to receive utility assistance, but then requests rental assistance after the Fiscal process is completed for the utility assistance, the tenant may only be considered for three months of rental assistance as a returning CERA participant. Agencies should proceed with the request based on the Additional Rental Assistance Guidance found later in this document.

Rental Assistance

Tenant AMI	**Total Full Months Rental Assistance (including up to 3 months future rent assistance)**	**Late Fees**	**Court Costs and Court**
Up to and including 50% AMI	12 months	$400 maximum	$150 maximum
51-80% AMI	10 months	$400 maximum	$150 maximum

- **An additional three months of rental assistance may be provided if necessary, for housing stability, but is subject to availability of funds.**
- **Rental assistance is capped at 15 months total for households up to and including 50% AMI.**
- **Rental assistance is capped at 13 months total for households 51-80% AMI.**
- **Rental assistance for households moving from homeless/doubled situations is capped at 3 months of initial assistance and 3 months of additional assistance.**

Rental Assistance Examples

Up to and including 50% AMI:

- Example #1
    - 9 months of arrears on or after March 13, 2020
    - Tenant eligible for 9 months of arrears and 3 months future rent (12 months total)
    - Tenant may be eligible for one additional assistance block of three months future rent based on availability of funding and redetermination of eligibility through recertification process
- Example #2
    - 6 months of arrears on or after March 13, 2020
    - Tenant eligible for 6 months of arrears and 3 months future rent (9 months total)
    - Tenant may be eligible for one additional assistance block of three months future rent based on availability of funding and redetermination of eligibility through recertification process
- Example #3
    - 10 months of arrears on or after March 13, 2020
    - Tenant eligible for 10 months of arrears and 2 months future rent (12 months total)

- Tenant may be eligible for one additional assistance block of three months future rent based on availability of funding and redetermination of eligibility through recertification process

- Example #4
  - 12 months of arrears on or after March 13, 2020 and 4 months of arrears prior to March 13, 2020
  - Tenant eligible for 12 months of arrears for the arrearage amount from on or after March 13, 2020
  - Refer tenant to other sources of funding to assist with the 4 months of arrears prior to March 13, 2020 or the tenant and landlord can resolve the balance due
  - Tenant is immediately eligible for 3 months future rent based on availability of funding
- Example #5
  - 16 months of arrears on or after March 13, 2020
  - Tenant eligible for 12 months of arrears
  - An additional 3 months of arrears may be provided based on the availability of funding
  - Refer tenant to other sources of funding to assist with the 16th month and any additional months not covered by CERA due to funding limitations or the tenant and landlord can resolve the balance due
  - Tenant is not eligible for any future rent assistance
- Example #6
  - No rental arrears
  - Past due utility bill
  - Tenant eligible for 3 months of future rent assistance
  - Tenant may be eligible for one additional assistance block of three months future rent based on availability of funding and redetermination of eligibility through recertification process
- Example #7
  - No rental arrears
  - No past due utility bill
  - Tenant is not eligible for any CERA assistance

51-80% AMI:

- Example #1
    - 5 months of arrears on or after March 13, 2020
    - Tenant eligible for 5 months of arrears and 3 months future rent (8 months total)
    - Tenant may be eligible for one additional assistance block of three months future rent based on availability of funding and redetermination of eligibility through recertification process
- Example #2
    - 14 months of arrears on or after March 13, 2020 and 3 months of arrears prior to March 13, 2020
    - Tenant eligible for 10 months of arrears from after March 13, 2020
    - An additional 3 months of arrears may be provided based on the availability of funding
    - Refer tenant to other sources of funding to assist with the 3 months of arrears prior to March 13, 2020, the 14th month of arrears from after March 13, 2020, and any additional months not covered by CERA due to funding limitations or the tenant and landlord can resolve the balance due
- Example #3
    - No rental arrears
    - Past due utility bill
    - Tenant eligible for 3 months of future rent assistance
    - Tenant may be eligible for one additional assistance block of three months future rent based on availability of funding and redetermination of eligibility through recertification process
- Example #4
    - No rental arrears
    - No past due utility bill
    - Tenant is not eligible for any CERA assistance

IMMINENT THREATS TO HEALTH AND SAFETY/RELOCATION

Substandard Housing Conditions

- Tenants living in units with imminent threats to health and safety due to the unit being in poor repair may be assisted by the Program once the case has been processed to determine CERA eligibility.
- If the tenant had to move out of the unit due to the repairs not being done, the agency must determine eligibility based on the application date, when the tenant moved out, if the tenant fully moved out without the intention of returning or if the tenant is temporarily living elsewhere but has belongings in the unit with the intent to return to live in the unit. If the tenant moved out of the unit prior to the CERA application date with no intention of moving back to the unit, the tenant is not eligible for CERA assistance and should be referred to other housing assistance programs.
- The rent payments should be held by the agency or put into escrow until it has been verified both with the tenant and in writing (receipts or verification from a contractor or local code compliance) that the repairs have been made. If the repairs are not made, the originally escrowed funds are returned to the grant and, if applicable, the funds needed for relocation are drawn from the grant.
- Imminent threats to health and safety are defined as:
  - no heat due to heat source issues
  - no water due to plumbing issues
  - no hot water
  - raw sewage
  - black mold
  - significant holes in the roof where there are significant amounts of water in the unit every time it rains or snows
  - other conditions that present an immediate and significant threat to household health and safety
- If, while processing the case, the tenant states one or more of the imminent threats listed above is present in their unit, the tenant needs to communicate with the landlord in writing using all methods available (mail, email, text) to advise the landlord of the problem. Whenever possible, copies of these communications should be submitted to the agency for the tenant file.
- If the tenant has a court case the tenant should be referred to Legal Services.
- If the tenant does not have a court case, the agency will contact the landlord using all methods available (mail, fax, email, text) regarding the need to make necessary repairs and provide verification to the agency that the repairs have been made. The landlord must be notified that the agency will withhold the payment until the repairs have been verified. Copies of all communications/attempted communications should be retained in the tenant file.
- The landlord must be given the opportunity to make repairs before relocation will be considered.
- The LL must provide in writing from themselves or a contractor if necessary, within 5 days of request, the date of when the work will begin. If the documentation of when the work will begin is not provided within 5 business days or the work does not begin by the day stated in the written documentation, the tenant may be authorized to move.
- Repairs should generally be completed within one week from the start of the project. If the repairs are not completed within one week, the landlord must explain why it is taking longer. A determination of whether the additional time needed will be allowed will be made by the agency.
- Partial rent assistance payments (up to 50%) may be made to the landlord if the funds are needed to cover the expense of completing the repairs.

- If the landlord will not make repairs, with MSHDA approval, the family may possibly be assisted with a security deposit, application fees and up to 3 months rent to relocate.
- If the landlord is not responsive to any available means of communications from the tenant or agency within 14 calendar days, the tenant may be considered for relocation.
- Relocation determinations will be made by MSHDA. Agencies must send details of the situation and available documentation to mshda-cera@michigan.gov for a determination.
- Households that are assisted with relocation must be informed that they will be responsible for any penalties due to breaking the lease, if applicable.
- Households that are assisted with relocation may be assisted with both rental arrears (to prevent a judgment against the tenant) and future rent. Two CERA worksheets must be used for relocation cases, one for each unit to determine eligibility.
- Partner agencies are not responsible for finding a new unit for the tenant but should do whatever they can within reason to assist the tenant in locating decent housing. If agencies have a significant number of these cases, they may wish to dedicate a staff member or sub-grant a small amount of the funds to another CoC member to help the tenants in need of relocation.

Landlord Supplied Utilities Shut Off

- Tenants living in units without heat, water or hot water due to unpaid utility bills may be assisted because it may be presumed that the payments will allow for the utility arrearages to be paid so the utility services may be reinstated.
    - The landlord must be notified in writing that landlord supplied utilities must be reinstated within three business days of receipt of CERA payment or the tenant may be given the option to receive assistance with relocation.
- Future rent assistance payments should be made monthly rather than in a lump sum payment until utility issues are resolved.
- If there are tenant responsibility utilities for the unit, future utility assistance payments should be held until it has been verified that the landlord paid utilities have been reinstated.
- CERA will not assist with relocation due to only a lack of landlord supplied utilities in the unit. If the rental assistance has been paid and the landlord does not pay the utility bills to have the utilities reinstated, the agency should request assistance from Legal Services and/or the local municipality code compliance.

Very Urgent/Severe Situations

- CERA is not intended to replace systems and resources already in place to address immediate needs for various types of emergency situations.
- Resources that are already in place such as emergency shelters, code compliance and other programs intended to meet emergency needs should be utilized for households in need of immediate relief from their unsafe living situation while the CERA application is processed and the relocation determination is made, if applicable.

- Tenants that need to leave the unit and are already engaged with Rapid Rehousing may benefit more from working with Rapid Rehousing rather than CERA because they can receive longer forward rental assistance without the need to reapply.

"Landlords" Not Owning the Unit

- If a tenant thought they were living lawfully in a unit, but then finds out the person they were renting from is not the property owner, if the tenant is otherwise eligible for CERA (must have a utility arrearage since rental arrearages will not be considered in this situation), the tenant may be considered for relocation.
- Rental arrears will not be paid to the person posing as the landlord.
- With MSHDA approval, the household may possibly be assisted with a security deposit, application fees and up to three months rent to relocate. Details and documentation of the situation must be sent to mshda-cera@michigan.gov for a determination.

Locked Out Tenants

- Tenants who have been illegally locked out of the unit due to non-payment of rent should be referred to the police department for assistance.
- If the situation cannot be resolved by the police and the tenant does not have access to the unit, with MSHDA approval, the family may possibly be assisted with a security deposit, application fees and up to 3 months rent to relocate. Details and verification of the situation must be sent to mshda-cera@michigan.gov for a determination.

MOTEL ASSISTANCE FOR NON-LEASE HOLDERS

Whenever possible, eligible homeless families should be served with ESG-CV Rapid Rehousing or Prevention Funds. Homeless families not eligible for ESG-CV may be assisted by CERA with motel stays while searching for housing, application fees, security deposit and future rent assistance. Agencies will use their discretion to determine if a household should be referred to CERA for motel assistance based on ESG-CV eligibility, shelter availability and the household situation.

Eligibility

Household must be:

- Assessed through the normal Coordinated Entry System
- Currently living in a doubled up or Category 1 Homeless situation
- Actively searching for permanent housing or in the process of recovering from a medical situation with the intention of actively searching for permanent housing as soon as possible
- Determined eligible for CERA through the standard CERA application process and if applicable, recertification process.
    - Households may apply with a paper application or through the portal using an alternate email address for the landlord email address.
    - If there is an immediate safety issue requiring motel assistance before a CERA determination can be made, the agency should use the general emergency shelter program/existing resources to meet the immediate need. If the family is later determined to be eligible for CERA, motel costs from that point forward may be paid for with CERA funds.

Financial Assistance May Include:

- Motel assistance provided on a weekly basis for up to 3 months with the possibility of one 3-month extension (total 6 months, all paid on a weekly basis) if eligible after recertification process
- Rent application fees
- Security Deposit
- Three months future rent (recertification may be required)
- Additional three months future rent (recertification required)
- Utility arrearages from previous unit only if the utility arrearage prevents the tenant from having utility assistance turned on once housed with a lease
- Future utility assistance once housed with a lease if there are tenant responsibility utilities
- Internet assistance once housed with a lease if the tenant wishes to establish internet service

Recertification and Extension Process

Households benefitting from CERA motel assistance for a full three months must be recertified using the standard CERA recertification process prior to receiving an additional three-month block of assistance, whether it be for motel assistance or future rent assistance.

In addition, if a household needs motel assistance beyond the initial three months, the agency must submit a request for up to an additional three months of motel assistance. MSHDA expects that the vast majority of households will be permanently housed before exceeding three months in hotel stays, so this process should be conducted rarely. The request must be submitted to MSHDA-CERA@michigan.gov 7-14

days in advance of the last night in the motel. The request for up to three additional months in the motel must include the following information:

- Head of household name and CERA#
- Has the household completed the CERA recertification process and been determined eligible?
- Is the household participating in weekly case management check in appointments with the agency?
- What housing search/relocation/case management assistance has been provided to the household?
- What progress has the household made in securing housing?
- What progress has the household made in securing income to support future housing?
- Where (county and city) is the household searching for housing?
- What special housing needs does the family have (accessible, large family/high number of bedrooms, walkable community/public transportation needed, specific location required for work, etc.)?
- What additional barriers are causing delays in locating housing?
- Estimate of how much longer it will take to secure housing for the household.

MSHDA-CERA@michigan.gov will respond to the agency by email with a determination on the motel extension request.

Example One

- Household assisted with motel for 6 weeks
- Household assisted with three months future rent assistance
- Recertified and determined eligible for CERA
- Household assisted with final future three months rent assistance

Example Two

- Household assisted with motel for two months
- Household assisted with three months future rent assistance
- Recertified and determined eligible for CERA
- Household assisted with final future three months rent assistance

Example Three

- Household assisted with motel for two months
- Household assisted with three months future rent assistance
- Recertified and determined over income for CERA
- Household is not eligible for additional CERA assistance

Example Four:

- Household assisted with motel for three months
- Recertified and determined eligible for CERA
- Request for up to an additional three months of motel assistance submitted to MSHDA and approved

- Household assisted with motel for final three months
- Recertified and determined eligible for CERA
- Household assisted with three months future rent assistance
- Recertified and determined eligible for CERA
- Household assisted with final future three months rent assistance

Case Management

- Households and agencies must minimally have a weekly telephone check in to discuss the household housing needs, housing search and progress made. Case managers should work with households to problem solve, provide information and referral, and connect households with services that may benefit the household.
- Case managers should reinforce motel policies requirements during weekly check ins, covering issues such as allowing staff in for cleaning, no guests, etc. Households should be informed that failure to follow motel rules may result in motel assistance being revoked.
- Agencies must minimally check in with the motel on a weekly basis to verify that the household is residing in the room and following motel rules.
- Households should be reminded of the recertification process requirements in a timely manner and assisted by the case manager with the recertification process if necessary.

Financial Information

- Motel payments are capped at $85/night or $595/week unless there is no such option available due to seasonal or special event rates. Higher motel costs may be paid at agency discretion when there is no other option. Exceptions to the $85/night cap should be made only in rare situations.
- If a household is assisted with a motel room that exceeds the $85/night cap, the family will need to relocate to a lower costing room/motel at the end of the week or when one becomes available.
- Motel payments should be made on a weekly basis. Shorter time periods of assistance should be provided if the family will be moving into a different housing situation in less than seven days.
- CERA financial assistance funds will be used to pay for motel assistance.
- Agencies should not complete the fiscal process for CERA motel assistance cases until the future rental assistance is determined.
    - Once the household moves to new unit, the agency should complete steps to approve the case in the portal.
    - If the household decides to move in with family or another situation where they will not be a lease holder/paying rent, the agency should close out the case in the portal reflecting only the motel assistance.

Additional Information

- CERA motel assistance is not intended to be a high-volume part of the program and should be limited based on HARA discretion through the Coordinated Entry Process.
- CERA does not provide food assistance.
- Once permanent housing is secured, CERA funds should be used to pay future rental assistance rather than referring the household to a different program.
- Motel assistance must be provided with respect to the motel room capacity limits with an adult present in each assisted room or set of adjoining rooms.

- Assisted households are expected to use the hotel room every day/night.
- Motel reservations must be based on specific individual family needs. Agencies should not pay for blocks or rooms that may not be used.
- If the motel requires a household to leave the motel due to motel rule violations, the agency will use its discretion to determine if the household will be assisted at a different motel.

ADDITIONAL RENTAL ASSISTANCE

Tenants assisted with **one** CERA Initial Assistance payment may be eligible for up to three additional months of assistance (subject to the availability of funds) based on the chart below:

Total Number of Months Initial Assistance Provided (arrears + future rent = total)	Up to and including 50% AMI Additional Months Allowed	51-80% AMI Additional Months Allowed
1	3	3
2	3	3
3	3	3
4	3	3
5	3	3
6	3	3
7	3	3
8	3	3
9	3	3
10	3	3
11	3	2
12	3	1
13	2	0
14	1	0
15	0	0

Eligibility Requirements:

- Tenant has been assisted with only one CERA rental assistance payment.
- Initial CERA assistance did not reach the maximum allowable number of months of rental assistance.
- Gross household income is below 80% area median income (AMI), for the area.
- At risk of homelessness.
- Currently renting.
    - If the tenant has moved, future rent may be paid to the new landlord if the required documentation is submitted by the landlord.

- If the initial CERA payment was paid directly to the tenant, agencies should attempt to verify with the landlord that the tenant paid the initial payment to the landlord.
    - If the landlord does not respond or will not disclose this information, the tenant will still be eligible for additional assistance.
    - If the landlord states the tenant did not pay the landlord the amount of rent assistance issued in the initial assistance payment to the tenant, this issue must be resolved with the tenant before additional assistance may be provided, unless the additional assistance is issued directly to the landlord.

Required Documentation:

- CERA Tenant Application for Additional Assistance
- Proof of Income: earned and unearned income for household members that live at the property and that are over the age of 18
    - Household income/benefits (unemployment, SSI, etc.) for one month, OR
    - Food Assistance Program Notice of Case Action form (only applicable for households with 3 or less people) OR
    - No additional income verification is required for households that were determined eligible for CERA initial assistance based on 2020 tax documents or FAP verification for households of 3 people or less
- Owner/Landlord or Management Agent W-9: only required if tenant has moved and is renting from a new landlord
- The Settlement Statement is not required for additional assistance.

Additional Information:

- A tenant may apply for additional assistance up to 45 days prior to the next rent payment due date that is not covered by CERA. Applications received early may be held for processing within 45 days of the rent due date.
- Additional assistance payments may be requested anytime within the 3 months following the last month paid by the initial CERA payments. Additional rent assistance payments may be used to cover past due and future rent payments but cannot cover months paid for in the initial assistance payment.
- Service agency must notify the landlord on file that the tenant has applied for additional rental assistance and confirm their business address for payment before payment is issued.
- The tenant's current income band will dictate how many additional months of rental assistance, if any, they are eligible for.
- If the tenant income is over 80% AMI, the tenant is not eligible for additional assistance regardless of what income band they were in for the initial assistance.
- Additional assistance payments should be made in one payment to the landlord.
- Additional assistance payments may be made directly to the tenant if the landlord will not participate in the program. Please refer to CERA Guidance on how to proceed when a landlord will not participate in CERA.
- Additional assistance only covers rent. Additional assistance does not include utility or internet assistance.

- If a tenant declined utility assistance or internet assistance during the initial assistance period, the tenant is not eligible to receive utility assistance or internet assistance at a later date.
- If a tenant declined future rent assistance during the initial assistance request, the tenant will only be eligible for up to three months of assistance in the additional assistance process.
- Tenants that are not eligible for additional assistance and/or are in need of additional utility assistance should be referred to other resources for possible assistance.

UTILITY ASSISTANCE PAYMENT INFORMATION

- If the tenant is eligible for utility assistance and declines rental assistance, verification that the unit is a rental unit and not owner occupied should be obtained whenever possible and saved with supporting documents. Verification of property ownership can often be obtained through municipality websites.
- If tenants do not request utility assistance when applying for CERA, the agency may at its own discretion choose to follow up with these tenants to confirm whether they want utility assistance. Utility assistance cannot be added to a case once it is processed in Fiscal. Tenants seeking utility assistance after the Fiscal process is complete should be referred to DHHS for assistance.
- Households under 50% AMI are eligible for up to an additional $500 beyond the household size limit if this is necessary to fully pay all utility arrears.
- The tenant must be living in the unit at the time the Program assistance funds are disbursed. Persons temporarily away from the unit (e.g., hospitalization, family visit) are eligible for assistance.
- Agencies must make payments directly to a utility/home energy provider on behalf of the eligible household unless the utility/home energy provider does not agree to accept the payment, in which case the agency may make payments directly to a member of the eligible household. Agencies must make reasonable efforts to obtain the cooperation of utility providers to accept payments from the Program. The final outreach attempt or notice to the utility provider must be documented. The cost of contacting utility providers would be an eligible administrative cost. Outreach will be considered complete if:
    - a request for participation is sent in writing, by mail, to the utility provider, and the addressee does not respond to the request within 14 calendar days after mailing; or
    - the agency has made at least three attempts by phone, text, or e-mail over a 10 calendar-day period to request the utility provider's participation; or
    - a utility provider confirms in writing that the provider does not wish to participate.
- If a utility payment is made directly to the tenant, the CERA Tenant Payment Statement must be completed and mailed to the tenant with the utility assistance payment.
- If the lease states the tenant is responsible for utility payments and the utilities are in the landlord's name, the utility payment may be made to the landlord.
- Utilities and home energy costs that are covered by the landlord will be treated as rent.
- If the tenant is eligible for utility assistance but is not behind on the utility bills, and the utility company will accept payment, the payment must go to the utility company and the tenant will have a credit with the utility company.
- The tenant is not required to accept the future utility assistance; however, this decision must be made by the tenant, not the agency providing Program assistance. If the tenant declines future utility assistance it must be noted on the worksheet that the tenant has specifically expressed that they do not want future utility payments made on their behalf.
- Late fees charged by utility providers may be included in the utility assistance payment.
- A utility priority list should be developed on the local level to determine how to apply utility payments when tenants have arrearages with multiple utility providers for a total amount greater than the maximum program utility assistance allowed. For example, it may be determined that gas and electricity will be prioritized over other utility assistance because locally there is another program that assists with water and sewer bills.
- Tenants with arrearages in amounts greater than the maximum program utility assistance amount should be referred to SER and other resources for possible additional utility assistance payments.

- When calculating utility arrearages, the total arrearage includes the past due amount plus the current balance on the utility bill.
- Future utility assistance payments will result in a credit towards months that have not yet been billed.
- Deliverable fuel is limited to the future assistance cap amount unless there is a past due amount.
- If the lease states the tenant is responsible for utilities (regardless of whether the tenant pays a fixed monthly utility amount or a variable amount based on actual usage) and the tenant pays the landlord for the utlilities:
    - All utilities paid for by the tenant will be entered into the Utility tab of the worksheet
    - Utility arrearages owed to the landlord will need to be separated out from other charges on the ledger, totaled and entered on the utility worksheet.
    - If the utility amount is noted in the lease as a fixed amount but is not separated out on the ledger, for partial payments the agency can select to apply the partial payment to the rent or utility arrearage, whichever is in the tenant's favor for increased assistance.
    - If the landlord is listed on the utility worksheet tab as the utility provider, the future utility payment will be made to the landlord at the same time as the payment for rental arrears.

Utility Assistance

Household Size	**Maximum Total One Time Utility Payment (Includes Future Payment)**	**Maximum Future Utility Payment as a Credit**
1-2 persons	$1,500	$300
3-4 persons	$2,000	$500
5+ persons	$2,500	$500

Tenants up to 50% AMI are eligible for up to an additional $500 if needed to fully pay utility arrears.

Utility Assistance Examples

- Example #1
    - 1 person household under 50% AMI
    - Utility arrears $750
    - Utility assistance payment $750 + $300 future payment = $1,050
- Example #2
    - 6-person household 51-80% AMI
    - Utility arrears $2,200
    - Utility assistance payment $2,200 + $300 future payment = $2,500
- Example #3
    - 3-person household under 50% AMI

  - Utility arrears $2,600
  - Utility assistance payment $2,500
  - Refer household to SER and other resources for possible assistance with the $100 arrearage not covered by the program
  - No future payment available
- Example #4
  - 3-person household 51-80% AMI
  - Utility arrears $2,600
  - Utility assistance payment $2,000
  - Refer household to SER and other resources for possible assistance with the $600 arrearage not covered by the program
  - No future payment available
- Example #5
  - 3-person household, either income category
  - Household has utilities in their name but no utility arrears
  - Household has rental arrears
  - Household eligible for $500 future utility payment
- Example #6
  - 3-person household, either income category
  - Household has no utility arrears
  - Household has no rental arrears
  - Household is not eligible for any CERA assistance

INTERNET ASSISTANCE PAYMENT INFORMATION

Internet assistance will be structured as follows:

- Internet assistance may be provided to a residence if it is a service that allows renters to engage in distance learning, telework, telemedicine and/or to obtain government services, or other significant life activity.
- Tenant must have a current internet bill showing service was in place or suspended due to non-payment at the time of program application.
- Eligible households will receive a one-time payment of $50/month for internet services for six months (total $300) paid directly to the applicant household member in one payment at the time eligibility is determined. The assistance is a fixed amount regardless of the actual cost of the internet service.
- The program will not pay for internet service acquired after the time of program application.
- Agencies may choose to pay the internet provider directly or pay the tenant for the internet assistance.
- If the internet provider will not accept an agency payment, the internet assistance must be paid directly to the tenant.
- If the internet assistance payment is made directly to the tenant, the CERA Tenant Payment Statement must be completed and mailed to the tenant with the internet assistance payment.
- If tenants do not request internet assistance when applying for CERA, the agency may at its own discretion choose to follow up with these tenants to confirm whether they want internet assistance. Internet assistance cannot be added to a case once it is processed in Fiscal.

THE ASSISTANCE PROCESS

- Generally, the HARA will be the first point of contact for the tenant. The tenant's first contact may also be with legal aid or a court, which should refer the client to the HARA.
- Landlord and tenant applications will be completed.
- The HARA will collect the required documentation to determine eligibility.
- Every tenant with a court case should be evaluated for Legal Services. This should be relayed to the tenant as part of the Program process.
- Tenants without court cases may still be evaluated for Legal Services if the HARA believes there are any significant repair issues with the housing, or disagreements between tenant and landlord about terms of the lease or amount owed. This should be relayed to the tenant as part of the assistance process.
- The HARA and Legal Services (if involved in the case) will work with the Court and the landlord on the proposed resolution.
- The resolution will be documented either in a Conditional Dismissal Order (through the court), Settlement Statement (pre-court cases) or Tenant CERA Payment Statement (landlord opts out of participation in CERA and payment is made directly to the tenant).
- CERA applicants with court cases that require imminent resolution will be given priority over applicants without court cases throughout the duration of CERA. Tenants against whom judgments (or Conditional Orders of Dismissal) have been entered, where the tenants continue to live in the rental unit and are within their judgment payment period, are eligible for CERA and should be the highest priority applicants. Ideally these tenants will get an amended judgment/Conditional Order of Dismissal, but only when it is not at the expense of rapid handling of the application. The online application system will assist in prioritizing court cases. If agencies have staff capacity to process court cases as well as non-court cases, they should do so, but sufficient staff time should be dedicated to court cases that have the most imminent possible eviction. This does not mean that all eviction cases must be processed before all non-court cases. Only court cases that require imminent resolution will be giving priority for processing, agencies should be in frequent contact with their legal service counterparts to communicate on which cases are the most urgent.

Additional Information

- The HARA staff are not required to participate in hearings unless ordered to do so by the Court. This is something that should be discussed with the local court on how to best interact with the court system. It may be beneficial in certain areas or situations to have the HARA participate in the hearings or be available to speak with Legal Services and/or tenants during hearings.
- Amounts not covered in a rental arrearage payment are considered the tenant's responsibility and must be provided for in a Conditional Dismissal Order, Settlement Statement or CERA Tenant Payment Statement before a Program Assistance Payment is made.

- Tenants may attempt to secure additional financial assistance from other eviction prevention programs to pay for any arrearages not covered by the Program. These should also be reflected in the Conditional Dismissal Order, Settlement Statement or CERA Tenant Payment Statement if available at the time those documents are executed.
- The Conditional Dismissal Order (with the exception stated in the next bullet), Settlement Statement or CERA Tenant Payment Statement will document the payment terms/dates by all parties. The Program worksheet may be attached to these documents to provide additional details.
- If the Conditional Dismissal Order is written to include late fees and court costs over the program limit on these expenses, and the landlord has signed the CERA application, the landlord must waive the late fees beyond $400 and the court costs above $150 regardless of what the Conditional Dismissal Order says. If the LL did not sign the application, then the payment needs to go to the tenant and the LL might be permitted to collect the additional late fees and court costs.
- Ineligible applicants should be referred to other eviction prevention resources that may be able to assist, including Legal Services.
- Households may be assisted by the Program one time only, except in the case of additional future rent payments for which the household may be eligible.

Pending Cases

- A pending case
    - is an application lacking necessary information or documentation for a determination to be made and
    - lacks response from the tenant (or landlord if the landlord is applying on behalf of the tenant) for up to 30 days.
- Care should be taken to follow up with tenants and landlords frequently and by any means possible (telephone, email, mail, fax, text, etc.) to obtain required documentation.
- Applicants with cases in a pending status should be sent written notice using the agency's standard request for information form. The notice should specifically list the missing documents and state that the case is in a pending status until the required documentation is submitted.

Denials

- Tenants may be denied Program assistance for five primary reasons:
    - Tenant is over income
    - Tenant does not have past due rent or past due utilities
    - Tenant has not experienced a COVID related economic hardship since March 13, 2020
    - Tenant has not responded to requests for information for 30 days
    - Tenant is facing eviction for reasons other than non-payment of rent, unless payment of CERA assistance will resolve the eviction threat

  - Agencies should evaluate the situation to determine if assistance should be considered if the tenant is not otherwise at fault for the eviction, for example the landlord has decided to not renew the lease. Providing assistance may prevent a judgment against the tenant.
  - Agencies should send details of the case to mshda-cera@michigan.gov for exceptions to this type of denial.

- Tenants denied Program assistance should be sent written notice using the agency's standard denial form. The denial form should provide details about the agency's appeal process.
- Tenants should be referred to other eviction prevention resources, including Legal Services.

GENERAL INFORMATION REGARDNG THE ROLE OF LEGAL SERVICES

COVID Emergency Rental Assistance and the role of the Legal Services provider ("LSP") will vary in each Continuum of Care ("CoC")/Local Planning Body ("LPB") based on previous eviction diversion program activity, any agreed upon arrangement between Housing Assessment and Resource Agency ("HARA") and the LSP, and other variables. Regardless, the intent of CERA is that most participants with a court case (and occasionally tenants without court cases) will benefit from the LSP being involved in their case.

In general, the role of the LSP is to advocate for tenants in the CERA process, and to ensure that tenant interests are served and their rights protected and secured. Among the ways the LSP will perform this role are:

- Notify the HARA if there's a need to change the total rent arrearage amount stated in the calculation worksheet for any reason;
- Consultation with tenants (and the HARA, as necessary) about any legal defenses and claims (such as repair issues) and any other issues relevant to their cases;
- Represent the tenant, as necessary, in negotiation or mediation of the dispute with the landlord, and possibly formally appear for the tenant in an eviction court case;
- Negotiate terms of Conditional Dismissal Order or Settlement Statement between the tenant and the landlord/landlord's attorney.

In some areas and situations LSP staff will be present in the courthouse meeting (in-person or via Zoom) directly with tenants as they move through the CERA process. In other areas, the arrangement will not allow for the LSP to make immediate contact with a tenant, requiring that the HARA refer the tenant to Legal Services. This referral should be made as soon as practicable (including in cases where a court complaint has not been filed); while not necessary, a written referral is preferred. Upon referral, the LSP should follow up with the tenant to provide information about CERA related services it can provide. The tenant may decline LSP assistance, and the LSP may also decline assistance if there is a conflict of interest or other valid reason the LSP cannot assist the tenant. The LSP will determine what level of service the tenant will get, ranging from advice only to full representation.

The HARA should recommend that the tenant meets with the LSP so that they understand the legal issues related to the eviction, including potential defenses. If the tenant declines the offer of legal assistance, the HARA, to the extent possible, shall perform the roles outlined above.

If established in a Memorandum of Understanding (MOU), in some parts of the state, mediation services may be provided by an additional agency. Agencies providing mediation services may do so as a subgrantee of the HARA. Mediation should only be used if the tenant is represented by a lawyer or has expressly agreed to proceed with mediation without a lawyer. For mediation services, the HARA may choose to use up to 1/6 of its case management/admin funding to support these services. Mediation services are not a substitute for legal services.

Eviction Prevention for Immigrants – Michigan Poverty Law Program

The Michigan Poverty Law Program (MPLP) has limited capacity to assist immigrants facing eviction who are not eligible for help from other legal aid programs. Many, but not all, immigrants are eligible for help

from their local LSP; this program is for those immigrants who cannot be helped by their local LSP. Eligible persons will receive legal advice (and possibly representation) to help avoid an eviction, regardless of immigration status. Services are available statewide. HARAs should consider making referrals of these tenants who need legal assistance and cannot be helped by their local LSP.

To make a referral, contact: edp-mplp@lsscm.org or 734-714-3237.

ELIGIBLE COSTS

- Admin costs can be incurred starting January 1, 2021.
- Case management costs can be incurred starting March 8, 2021.
- Financial Assistance funds may be used for rental, utility and internet assistance.
- Financial Assistance funds **can** be used for relocation to a new rental unit if the current unit is in an uninhabitable condition (examples: no heat, extreme plumbing issues like sewage backups, significant roof leaks, etc.) or is extremely unsafe (for example history or threat of domestic violence).
- Case Management funds may be used for:
    - any staffing costs for staff providing housing stability service to clients
        - Activities related to assisting tenants to apply for CERA and community outreach to increase program awareness and reach underserved populations
        - Landlord engagement/negotiation and assisting them to complete applications
        - Case management and housing navigation services for households with hotel stays and those needing new rental units
        - Case management and referrals to additional agency services that will promote housing stability
        - Financial counseling
        - Legal services (through contracts with Michigan State Bar Foundation) and staff time connecting households with legal services
    - interpretation services – an invoice for services is sufficient for financial reporting
- Administrative costs may be used for activities directly in support of Financial Assistance or Case Management activities:
    - costs related to technology purchases, both hardware and software, printing/supply costs, office supplies, telephones, travel or other typical administrative costs.
    - staffing costs that are not directly related to housing stability services
        - staff time for application eligibility review and work in the portal to approve applications
        - staff time for HR, accounting, other CERA supporting activities
    - line of credit interest and fees
    - marketing and promotional items
- Indirect administrative costs may be billed to this program.

FORMS

- Tenant Initial Assistance Application
- Landlord application
- Calculation worksheet
- Settlement Statement
- CERA Tenant Payment Statement
- Additional Assistance Application
- Monitoring Checklist

Signature Requirements

- Electronic, typed and verbal signatures are acceptable on all Program documents and should be noted with the tenant's name, type of signature, case manager's initials and date:
  - Electronic: John Smith – electronic CM 3-31-21
  - Typed: John Smith – typed CM 3-31-21
  - Verbal: John Smith – verbal CM 3-31-21

Instructions on How to Complete the Settlement Statement

SETTLEMENT STATEMENT –

RELEASE AND WAIVER OF RENT ARREARAGE

STATE OF MICHIGAN COVID EMERGENCY RENTAL ASSISTANCE PROGRAM

"CERA"

This Settlement Statement and Release and Waiver of Rent Arrearage is prepared on Date Settlement Statement Completed, 2021, by and between:

Landlord: *Name and address as listed in Lease*

Tenant: *Name(s) and address as listed in Lease*

RECITALS

A. The purpose of this Statement is to document terms between a Landlord and Tenant where the Tenant has unpaid rent accruing during the COVID-19 covered period of March 13, 2020 through December 31, 2021.

B. Tenant and Landlord entered in to a lease dated Date of Lease_____, for the property located at Address_____, Michigan, Zip Code____ (the "Lease").

C. On or about Date of Notification_____, 2021, Landlord delivered to Tenant a Demand for Possession claiming breach of the Lease for non-payment of rent by the Tenant, or notice of accrued past-due rent.

TERMS

1. Tenant and Landlord agree that the Tenant owes Landlord unpaid rent, as of the date hereof, per the terms of the Lease is in the amount of $Grand total amount owed to LL including amount from prior to March 13, 2020.

2. Landlord and Tenant agree the CERA program applicable total rent arrearage is $Total amount of CERA rental arrearage, utility arrears and future payment if due to the landlord, late fee and court cost

assistance payment plus tenant portion__ (the "CERA Settlement"). Any and all remaining balance of past-due rent and all late fees and penalties accrued as of the date of this Agreement are herewith forgiven and released by Landlord according to the terms hereof.

3. The amount due to the Landlord shall be paid as follows:

   a. The CERA program shall pay Landlord $ Total assistance minus future rental assistance from calculation worksheet_ no later than Date payment will be issued by agency_____, 2021 (the "Program Portion"). Agency fulfilling Program Portion payment: Name of agency issuing rental assistance payment_____.

   b. In addition, The CERA program shall pay the Landlord $Future monthly payment amount___ per month for Number of months of future rent payments, cannot exceed 3___ months beginning on Date of first future monthly rent payment_____, 2021.

   c. Tenant shall pay regular monthly rent, as required by the Lease, for all future rent when due after their CERA assistance has ended.

   d. In addition, Tenant shall pay Landlord $tenant portion from calculation worksheet no later than Date the tenant portion will be paid in full to the LL___, 2021 (the "Tenant Portion").

4. By making application to CERA the Landlord has agreed to:

   a) The settlement amount will be the Tenant's total obligation for rent, late fees, court costs, and other charges (recognizing that, if the CERA payment includes prospective rent, that payment might surpass the Tenant's present financial obligation). The settlement amount shall not include and the Landlord/Owner waives any late fees assessed after March 13, 2020 in excess of $400 and any court costs in excess of $150.
   b) When the CERA payment will not fully satisfy Tenant's financial obligation to Owner/Landlord and the settlement includes an installment repayment plan, if Tenant is performing that plan's repayment terms, which performance Owner/Landlord will cooperate with, Owner/Landlord will not take steps to evict Tenant for non-payment of the rent (or any other charges) that plan covers.
   c) It will waive any other present and known grounds for eviction against Tenant other than its nonpayment of rent claim or a claim based on a serious and continuing violation of the lease or law.
   d) Except for grounds permitted by Paragraph 3 above, or in MCL 600.5714(1)(b), (c)(i), (d), (e), or (f), or MCL 600.5775, Owner/Landlord will not take steps to terminate a tenancy anytime before 1 month after a CERA payment, or, if a CERA payment covers a period of prospective rent, until at least 1 month after that period.
   e) It has not received any other eviction diversion or rental assistance payments for this same arrearage for this Tenant.

5. By making application to CERA the Tenant has agreed that if funded, this application only resolves the issue of rent arrears and fees owed through the date of payment of rental assistance, and that all other obligations of the Lease remain enforceable.

CERA SOFTWARE

IT Support

- As questions arise regarding the CERA software, agency staff should attempt to resolve questions by watching the training videos provided by Kinetech, working with peers within their own agency and working with their management and/or IT staff who are familiar with the software.
- If agencies are not able to resolve their own questions, CERA software questions may be submitted by the agency management staff to MSHDA-CERA-IT-Support @michigan.gov. This email address is only for agency staff use and not for landlords and tenants in need of assistance with the application portal.
- If landlords or tenants have problems completing the online application process, agency staff should assist the tenants and landlords. If the agency staff are unable to resolve the tenant and landlord concerns, the same steps noted above should be followed and if necessary, management staff may email MSHDA-CERA-IT-Support@michigan.gov for assistance in resolving the tenant or landlord issue.

New CERA Software Users

New user requests must be submitted through the portal. Please click on "Partner Org Access Request" below the blue "Apply Now" button to submit your request. An agency Assigner must approve the user request (by using the "Access Request" area in their "Eviction Overview" dashboard) and then the system will send it to MSHDA for approval. When MSHDA approves the request, an email will go out to the user with their login credentials.

Helpful Process Information

- **Required Documentation**
    - All CERA required documentation, including the W-9 must be uploaded to the portal for each case.
- **Entering Paper Applications**
    - When the paper application entry is complete it requests a signature. Agency staff should sign their name/put their initials and print their name in the box.
    - The signed tenant and landlord applications, calculation worksheet and Settlement Statement must be uploaded in supporting documents.
- **Paper Tenant Application/Landlord Portal Application**
    - The paper application cannot be uploaded in the portal and connected with the landlord's existing application in the portal.
    - There are two options to resolve this situation:
        - Agency enters the tenant's paper application in the portal and sends the link for that application to the landlord to redo the landlord application in the portal, so it is connected to the tenant application or
        - Agency resends the application link to the tenant from the landlord application in the Call Center role and the tenant submits an electronic application so it is connected to the landlord application.

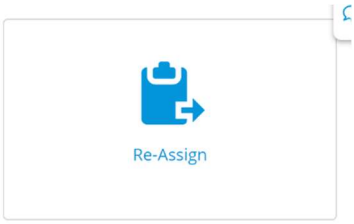
- **For processing networks with an agency processing utilities only:**
    - Assigner assigns case to a rental assistance Reviewer
    - Rent Reviewer:
        - determines overall program eligibility and rental assistance amounts
        - completes the calculation worksheet for rental assistance
        - uploads the calculation worksheet
        - completes the Rental Assistance boxes in the Basic Information Tab
        - adds a note to the case that rental assistance review is complete
        - "un-claims" the application which will send it back to submitted status
        - sends an email to the Assigner letting the Assigner know the CERA # and that it is ready to be assigned to a utility Reviewer
    - Assigner assigns the case to the utility Reviewer.
    - Utility Reviewer:
        - examines the utility documents and confirms payment amounts for each utility provider
            - completes the calculation worksheet for utilities
            - uploads the calculation worksheet
            - completes the Utility boxes in the Basic Information tab
            - "signs" the application to move the case to Processing status
        - Assigner assigns case to Processor
        - Processor:
            - reviews case to determine if it can be approved
            - when case is ready to approve, hits the "approve" button which sends the approval email to the tenant
        - The Fiscal roles for each agency work together on exporting the data from the system and making payments to the landlord and utility providers.

- **Fiscal Process**

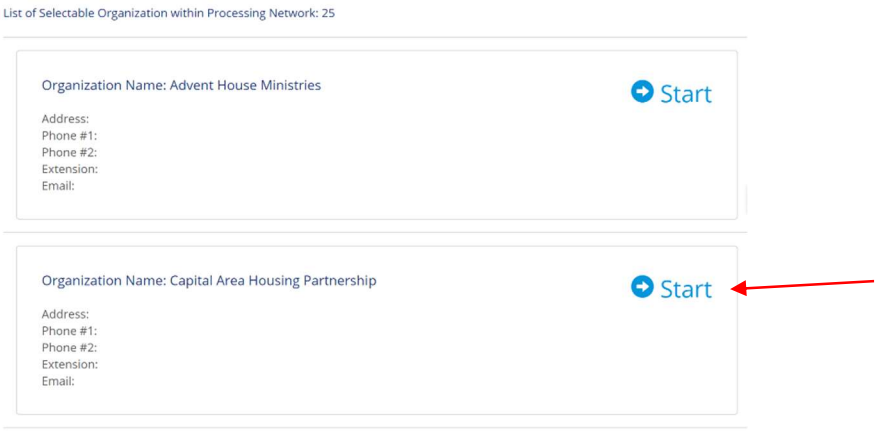
The fiscal process should be done as the agency is paying out on each case, or at a minimum once a week. Ideally, the fiscal process is done before the finance staff are actually paying the case as the excel spreadsheet export is designed to have the necessary information to enable the finance staff to make the payment.

Re-Assign Cases to Another Agency in Your Processing Network

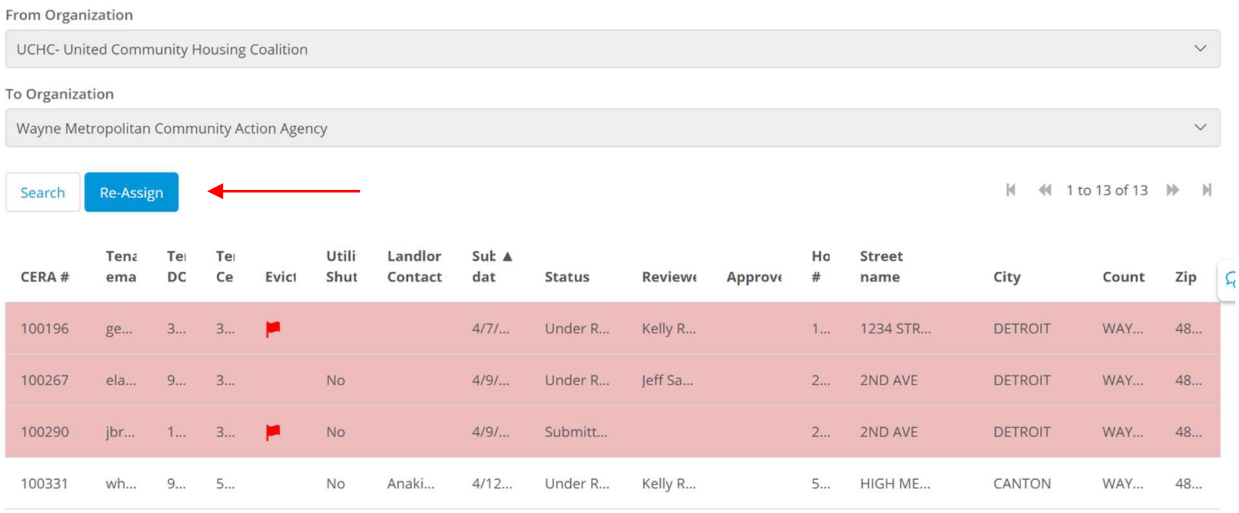
To begin an Assigner must login to the online portal. They will start by clicking on the Re-Assign area in their dashboard.



They will then see then see the agencies in your processing network. Click on the "Start" area for the agency you wish to transfer cases to (not your organization).



You will then see the cases and click on the cases you wish to transfer. They will turn red and then you will click "Re-Assign". The selected cases will disappear, and they are now transferred to the selected agency.



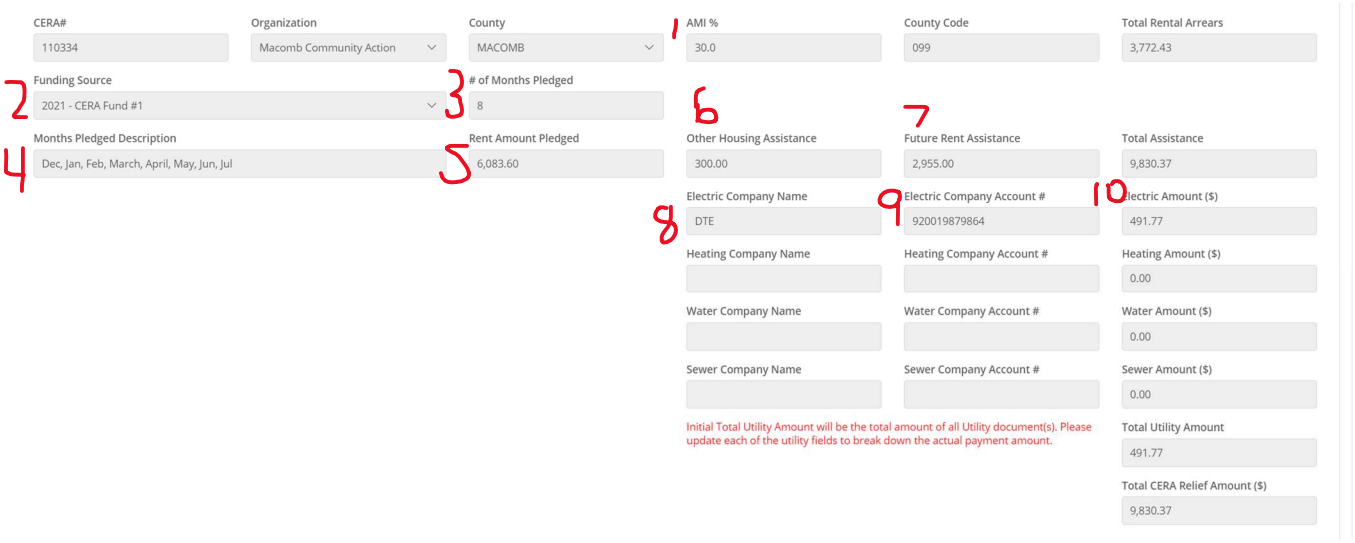
CERA Reviewer/Approver Task Guide

Agencies have flexibility to determine which steps will be performed by the Reviewer or the Approver except for the last "Approve" step. The final "Approve" step must be completed by the Approver, when the case is formally approved and assistance amounts are emailed to tenant and landlord notifying them that the case has been approved and will be scheduled for payment.

- ✓ All uploads are clear; account numbers are visible on utility statements
- ✓ Rental assistance was not covered by the Eviction Diversion Program
- ✓ If request if for additional 3 months assistance, review previous CERA assistance details to determine how many additional months or rental assistance tenant may be eligible for
- ✓ Address on lease matches address on application and ID/utility bills
- ✓ Use Google maps or Zillow to confirm that unit address is a residential property
- ✓ For utility assistance only cases, for single family homes, confirm through local municipality records that the tenant applicant does not own the home
- ✓ There are no significant differences between tenant and landlord applications for utilities (who is responsible), rent arrearage, monthly rent, # bedrooms in unit
- ✓ COVID Hardship documents (unemployment) or explanation (other hardships) meet eligibility requirements
- ✓ Past due rent notice or past due utility statement is present
- ✓ If internet stipend is requested, internet statement is present
    - In Household member's name and address matches unit
- ✓ Income documents included:
    - One month of income documents have been provided for each income source
    - Income documents are no more than one month old (most recent pay sub end date can be no more than 30 days from application review date)
    - Recurring monthly benefits like SSI only need one statement dated within the past 12 months
    - If the first two pages of the IRS 1040 is uploaded, that will suffice for income documents
    - If FAP/SNAP Award Letter is submitted, verify the family has 3 or less persons
    - Self-attestation documents present if applicable

- ✓ Landlord W-9 and 220 form, if applicable, match what they put in application fields
- ✓ Terms of lease are consistent with application from landlord and tenant
    - Current rent may be increased from lease amount if past initial lease period
- ✓ Review landlord payment ledger to determine actual rental arrearage after March 13, 2020
    - Ledger is reviewed for consistency with tenant/landlord application and lease
        - Amount of arrearage
        - Amount of monthly rent
- ✓ Review income documents
    - If income varies between pay stubs, income will be averaged
- ✓ Complete calculation worksheet to determine tenant income and rental assistance, late fees and court fee amounts and uploads the excel doc into the case file
    - If utility documents are uploaded use calculation worksheet to calculate utility benefit
- ✓ Complete necessary fields in the Basic Information tab for months of assistance, AMI % , Funding Source, Rental and Utility Assistance amounts
- ✓ Complete Settlement Statement and/or CERA Tenant Payment Statement (if applicable) and upload into case file
- ✓ Landlord has uploaded Conditional Dismissal Order if applicable
- ✓ “Approve” case and enter required fields for rental, utility and internet assistance.
    - Attach Settlement Statement, CERA Tenant Payment Statement and/or Conditional Dismissal Order to Approval email

CERA Basic Information Tab Data Fields



1. AMI—For tenants that are under 30% AMI enter 30. For those that are between 30-50% enter 50. For those that are between 50-80% AMI enter 80.
2. Funding Source—select 2021 CERA Fund #1
3. # of Months Pledged is the total months of rental assistance for both arrears and forward.
4. Months Pledged Description—enter the months paid for.
5. Rent Amount Pledged—this is the total rental arrears plus late fees and court costs. If utilities are paid to the landlord they are included in this area as well.
6. Other Housing Assistance--$300 internet stipend goes here.
7. Future Rent Assistance—the total future rent assistance approved.
8. Electric Company Name—enter the utility company name for any utilities paid to a provider.
9. Electric Company Account #--enter the account number.
10. Electric Amount—enter the total payment to the electric provider.

Continue to enter utility information for other utilities that are applicable. The Total Assistance, Total Utility Amount and Total CERA Relief Amount will auto calculate. All of the rental assistance and utility assistance fields are used to populate the Fiscal payment spreadsheets, so if they are not entered those spreadsheets will be incomplete.

FUNDS AND AGENCY REPORTING REQUIREMENTS

- Engage in meetings and webinars with MSHDA staff
- Respond to requests for periodic check-in information
- 70% of the rental assistance will be reserved for households at 50% AMI and below. The fiduciary will be responsible for monitoring and tracking to ensure that at least 70% of the assistance is provided to households at or below 50% AMI.
- Agencies must complete 1099 forms for any landlord receiving rental assistance through the program.
- All applications must be entered into the online application system once it becomes available.
- Paper applications received after the online application system becomes available must entered into the online application system within 5 business days of receipt.

CERA: Financial Status Reports Guidance

- Fiduciaries will submit FSRs on a monthly basis on the 15th of each month, beginning in April.
- FSRs will include documentation of how funds from advances were expended and/or provide documentation for expenses to be reimbursed. Each document should be named in MATT as it is uploaded. Required FSR documents are as follows:
  - FSR spreadsheet
  - General ledger that clearly denotes grant name (i.e. CERA) and budget category for all expenses
  - Any other documents an agency may use to track tenant-level financial assistance
- The grant allows for both advances and reimbursements. Grantees will start with a 25% advance and additional 25% advances with each monthly FSR.
- Any questions related to FSR submission should be sent to MSHDA-CERA@michigan.gov

COMMUNICATIONS AND OVERSIGHT

Program Communications

- COVID Emergency Rental Assistance local workgroup meetings
- Periodic Check-In Meetings with MSHDA and/or written response to check-in questions
- FAQs
- mshda-cera@michigan.gov
- MSHDA's Website

Additional Information

- Send problems, concerns, success stories and helpful tips to share with other CoC/LPB groups to mshda-cera@michigan.gov

Partner Agency Websites

Agency websites must be updated to include:

- Link to MSHDA's online application portal
- Maintaining CERA tenant and landlord applications (or a link to michigan.gov/cera) for applicants who cannot or do not wish to use the applicant portal
- Information about how to submit paper applications to your agency which must at a minimum include email and US mail options

CERA: Monitoring Guidance

MSHDA will select number of tenant files each month to review for accuracy and compliance. Fiduciaries are responsible for resolving issues with any audit findings.

Monitoring Checklist

COVID Emergency Rental Assistance – Initial Assistance

Tenant Name: _____

Landlord Name: _____

Assisted Unit Address: _____

Requirement Checklist:

- Rental assistance sought now was not covered by the Eviction Diversion Program
- Tenant has not received CERA assistance
- Tenant Initial Assistance Application
- Landlord Application
- Copy of tenant state ID (or alternate form of ID) for the primary adult household member only
- Verification of tenant address if the ID address does not match the unit address or verification of homelessness
- Copy of lease agreement (or substantiating documents if there is no written lease)
- Copy of COVID Hardship documentation/statement:
    - Qualification for unemployment benefits OR
    - Reduction in household income OR
    - Incurred significant costs or other financial hardship
- Copy of verification of risk of homelessness or housing instability (not applicable if homeless):
    - Past due rent notice, notice to quit/demand for possession, court ordered summons, complaint, judgment or conditional dismissal OR
    - Past due utility notice
- Copy of income verification:
    - 2020 calendar year income (first two pages of IRS form 1040) OR
    - FAP/SNAP award letter OR
    - Paystubs for the past month for all income sources OR
    - Tenant self-attestation when allowable under program guidance
- Case notes regarding use of self-attestation, if applicable
- Copy of current utility bill(s) for CERA to provide utility assistance, if applicable

- Copy of current internet bill for CERA to provide internet assistance, if applicable
- Copy of court documentation verifying court costs, if applicable
- Assistance has been provided based on the rent and utility assistance chart
- Subsidy does not exceed 150% of the FMR based on unit size (one bedroom for single person households)
- Assistance Calculation Worksheet
- Settlement Statement (for pre-court cases)
- Conditional Dismissal Order (for court cases)
- CERA Tenant Payment Statement (if rent, utility and/or internet payment made to tenant)
- Landlord W-9 Form (if rent payment is being made directly to the landlord)

Important Reminders:

- CERA funds cannot cover rent arrearages incurred prior to March 13, 2020.
- Tenant should be referred to Legal Services if the landlord has filed for eviction or if tenant reports significant repair issues or disagreement with landlord over lease terms or amount owed.

EXHIBIT J

cfpb Consumer Financial Protection Bureau (cfpb.gov/)

Help is available for landlords

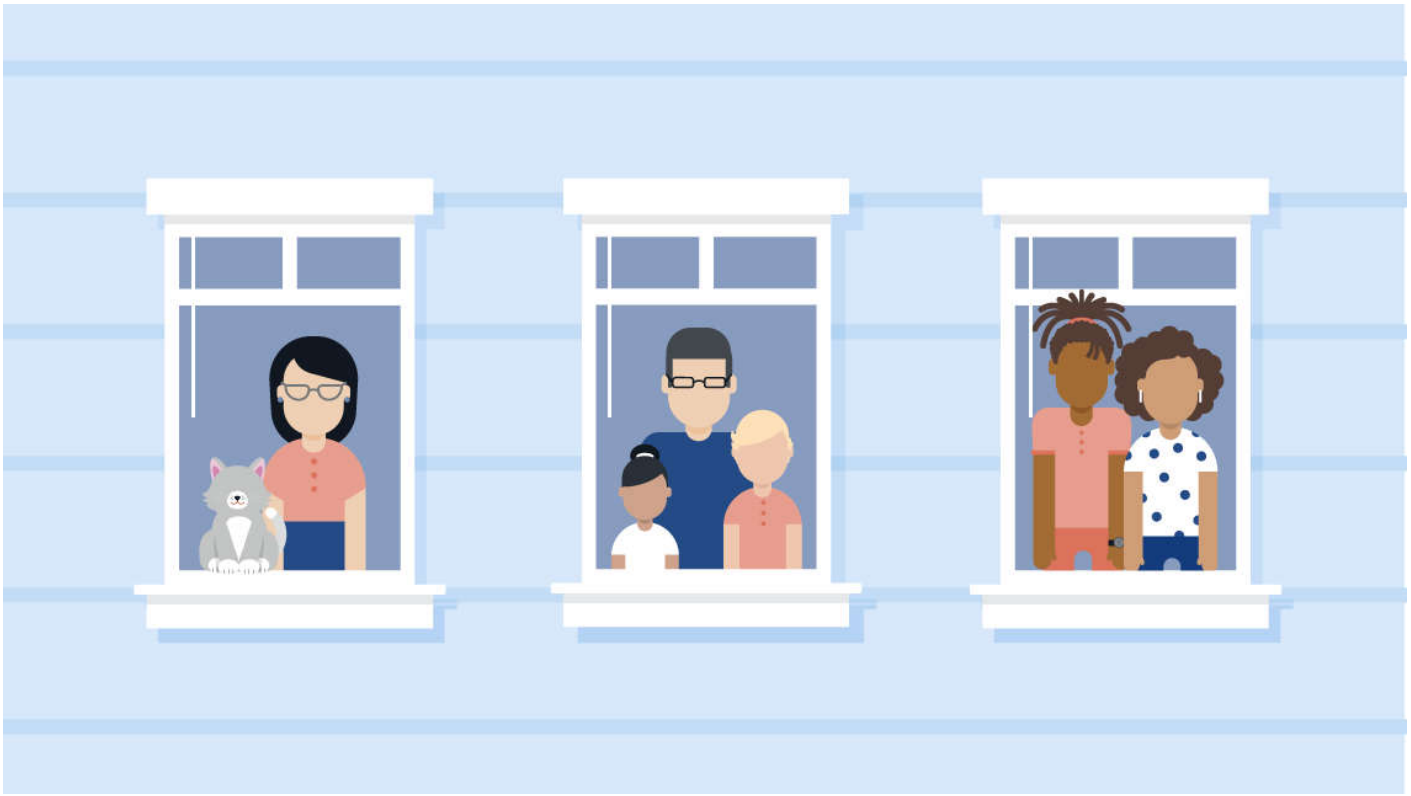
Landlords can get help too. You can apply for money to cover rent and utilities.

Start with a program in your area (cfpb.gov/coronavirus/mortgage-and-housing-assistance/renter-protections/find-help-with-rent-and-utilities/)

Help for landlords

English Español (cfpb.gov/es/coronavirus/asistencia-hipotecas-y-viviendas/asistencia-para-arrendad

The COVID-19 pandemic has caused money struggles for both renters and landlords. You're an important part of the rental economy. If your rental income has fallen, you can take advantage of options to keep you in control of your property and your financial situation.



Know your options

- Recover back rent - apply for rental assistance
- Stay in control by working through all your options
- Explore forbearance to pause your mortgage payments
- Understand renting to veterans, servicemembers and military families

Case 2:23-cv-11645-BRM-KGA ECF No. 50-2, PageID.1869 Filed 12/03/24 Page 61 of 179

Recover back rent – apply for rental assistance

Rental assistance can help you recover rent that your tenants owe and get your finances back on track. Here's what you need to know to get started.

1. **You may need to apply for your tenants.**

   As a landlord, you may think that rental assistance is for tenants. But right now, 3 in 4 programs funded by the U.S. Treasury Department's Emergency Rental Assistance (ERA) Program take applications from landlords.

   Where tenants can apply, they usually need information from you to complete the process. Why? Rent payments are usually delivered straight to the housing provider.

2. **Eligibility is based on your tenant's needs.**

   Eligibility for federal rental assistance is based on your tenant's household income, financial hardships they're facing, and their housing situation.

3. **Is rental assistance worth the trouble? You do the math.**

   Consider all your options. Money from federal rental assistance **could cover up to 18 months of rent** – including unpaid rent incurred during the COVID-19 pandemic and future rent in certain cases – when the money is available. Evicting tenants can be time-consuming and expensive. When it's over, you may never recover unpaid rent.

Find a rental assistance program for your state, tribe, or local area (cfpb.gov/coronavirus/mortgage-and-housing-assistance/renter-protections/find-help-with-rent-and-utilities/)

Learn about eligibility and what the money covers (cfpb.gov/coronavirus/mortgage-and-housing-assistance/renter-protections/emergency-rental-assistance-for-renters/)

Tell your friends and family about rental assistance

Like other folks, you probably rely on friends and family, work colleagues, and other trusted professionals to stay on top of rapid developments during the pandemic. If you've found this information helpful, please share our handouts (cfpb.gov/coronavirus/mortgage-and-housing-assistance/housing-insecurity-media-toolkit/#handouts) with your networks as well as your tenants

Stay in control by working through all your options

You have options and applying for federal emergency rental assistance is a good first step. At the same time, don't underestimate the power of an open conversation with your tenant about realistic ways you can continue your rental relationship.

Check out our tips for having a fruitful conversation (cfpb.gov/coronavirus/mortgage-and-housing-assistance/renter-protections/conversation-about-payment-agreements/)

Explore forbearance to pause your mortgage payments

Many homeowners are having trouble making their monthly mortgage payments. This includes property owners who depend on rental income to make ends meet. If it has become harder to pay your mortgage during the coronavirus pandemic, you may be eligible for forbearance. This is a temporary pause or reduction in your monthly mortgage payments. Some owners may be concerned about their credit. However, during the pandemic emergency, getting forbearance may not affect your credit. (cfpb.gov/about-us/blog/protecting-your-credit-during-coronavirus-pandemic/)

Learn about forbearance (cfpb.gov/coronavirus/mortgage-and-housing-assistance/help-for-homeowners/learn-about-forbearance/)

Understanding renting to veterans experiencing homelessness

You can serve as a landlord to a veteran of the armed forces and make a positive difference to a person who has served our country.

See tips and information on renting to veterans (https://www.va.gov/HOMELESS/Strategies_for_Leasing_to_Veterans_During_COVID_19.asp)

Understand protections for servicemembers and military families

The Servicemembers Civil Relief Act (SCRA) provides legal and financial protections to those who have answered the nation's call to serve. If your tenant is on active duty in the military or uniformed service, a reservist on active duty, a member of the National Guard on active duty, or a dependent of one of these active-duty servicemembers, you are required to comply with the Servicemembers Civil Relief Act. SCRA protections start on the date when active duty orders are received. Under the SCRA:

- **Servicemembers and their dependents have eviction protection rights –** If rent costs less than $4,214.28 a month (as of 2022), you can't evict a servicemember or their dependents from a residential home during their military service, or seize their property as payment of rent, unless you have a court order.
- **Servicemembers can pause a court eviction –** If you are pursuing an eviction in court, servicemembers and their dependents can pause the eviction for up to 90 days upon request. The court can also order a pause on its own, without a request.
- **You must reimburse rent paid in advance –** If a servicemember receives orders to deploy or for a permanent change of station, you must reimburse any advance payments they made toward their rent within 30 days of the lease termination.
- **Servicemembers may terminate their leases –** Servicemembers must be allowed to terminate residential leases without penalty if they receive orders to deploy or for a permanent change of station (PCS), even if the lease began before their military service.

See more about the SCRA and its rights and protections (https://files.consumerfinance.gov/f/documents/cfpb_servicemembers-civil-relief-act_factsheet.pdf)

Get expert help

Talk to a housing counselor

Be proactive. Talk with a local expert who can help you locate rental assistance programs in your area, understand your options as a property owner, and make an action plan. Contact a HUD-approved housing counseling agency in your area.

Talk to a housing counselor (cfpb.gov/find-a-housing-counselor/)

FEDERAL CORONAVIRUS RESOURCES

White House Coronavirus Task Force

Information about COVID-19 from the White House Coronavirus Task Force in conjunction with CDC, HHS, and other agency stakeholders.
Visit coronavirus.gov (https://www.coronavirus.gov/)

USAGov

Information on what the U.S. Government is doing in response to COVID-19.
Visit usa.gov (English) (https://www.usa.gov/coronavirus)
Visit usa.gov (Spanish) (https://www.usa.gov/espanol/coronavirus)

Page last modified: April 18, 2022

An official website of the United States government

EXHIBIT K

Michigan.gov

MSHDA

COVID Emergency Rental Assistance (CERA)

As of 9:00 p.m. on June 30, 2022, the COVID Emergency Rental Assistance (CERA) portal is closed to new applications. If you have already applied, you can check your application status by clicking the button below.

As of October 14, 2022, the COVID Emergency Rental Assistance (CERA) portal is closed to new applications. If you have already applied, you can check your application status by clicking the button below.

Check Application Status

Applications submitted before the portal closure will continue to be reviewed and processed until all program funds are used. It is likely that more applications have been received than will be able to be funded, so a submitted application does not guarantee that there will be funds available to process the application.

Attention Wayne County residents: If you have not already applied for CERA and need rental assistance, the Wayne County Emergency Rental Assistance Program is open for applications at Wayne County Emergency Rental Assistance Program (ERAP) | Economic Development. **Please be aware that you cannot receive assistance from both CERA and Wayne County's program for the same time period.**

If you did not submit a CERA application and need information and referral, please contact your local CERA Partner Agency. Please see the CERA Contact Agency List for the service agency in your county (on the right side of this page under CERA Resources.)

View our dashboard to see CERA application and approval information statewide and by county. We also have demographic and household income information on our approved applications. Check it out to see how CERA is serving renters and landlords in your area. **[** See the CERA dashboard... **]**

CERA RESOURCES

CERA FAQ's
CERA Income Limits
CERA Contact List **Most offices are not taking walk-in clients.**

WHO IS ELIGIBLE?

CERA serves renter households that have incomes less than 80% of Area Median Income (AMI) who meet the following conditions:

- Individual(s) in the household has qualified for unemployment benefits or has experienced a reduction in household income, incurred significant costs, or has experienced other financial hardship due directly or indirectly to the coronavirus outbreak; and
- Individual(s) in the household can demonstrate a risk of experiencing homelessness or housing instability by being past due on rent.

HOW DO I APPLY?

- Use the secure online application portal ("Apply Now" button above) to submit your application for assistance.
- This is the best way to apply for those that have a smart phone, tablet, or computer. Tenants and landlords can also apply through their local service agency.
- If you cannot apply online, please see the CERA Contact List for the service agency in your county (at the top of this page under CERA Resources).

WHAT TENANT DOCUMENTS ARE REQUIRED TO DETERMINE ELIGIBILITY?

- Completed CERA Tenant application.
- Copy of state ID or passport for the tenant applicant (with proof of residency if address does not match the unit.) (Alternate IDs may be acceptable some circumstances)
- Most current copy of lease agreement in tenant's name (if a written lease was completed.)
- Provide all available proof of earned and unearned income for household members that live at the property and that are over the age of 18.
    - Pay stubs or benefit statements for household income or benefits (unemployment, Social Security, etc.) for two weeks, OR

- Copy of submitted 2020 or 2021 IRS form 1040 (first two pages)

- Copy of ALL utility statements the tenant is responsible for, if applicable.
- Copy of Internet bill/statement, if applicable.

WHAT DOCUMENTS WILL THE LANDLORD NEED TO PROVIDE?

Landlords will need to provide:

- Completed CERA Landlord Application
- Copy of the lease (if a written lease was completed)
- Ledger showing tenant's payment history in 2020 and 2021
- W-9
- Verification of court costs, if applicable
- Landlords may be asked to provide ownership documents if ownership can't be verified through publicly available online property tax records

WHO IS NOT ELIGIBLE?

- Households that have incomes above 80% of Area Median Income.
- Households that cannot show a "COVID-19 economic hardship" (outlined above) or risk of homelessness or housing instability.
- Households that are homeowners, land contract holders or those that live in commercial properties.
- Renter households that were not behind rent before March 30, 2022.

MY LANDLORD HAS FILED FOR EVICTION. CAN I GET LEGAL ASSISTANCE FOR MY COURT CASE?

Yes, free legal assistance is available with the CERA program. Please go to www.michiganlegalhelp.org to get connected to a legal services agency in your area.

CAN I GET HELP WITH MY UTILITIES?

Yes, eligible households for CERA can receive utility assistance for tenant supplied electricity, home heating (any type of fuel), water, sewer and trash (if billed along with another utility).

As of January 1, 2022, MSHDA will not be approving households that are solely behind on their utilities. These households should apply for utility assistance through MDHHS at MI Bridges.

Utility Assistance

Household Size	Maximum Total One Time Utility Payment (Includes Future Payment)	Maximum Future Utility Payment as a Credit
1-2 persons	$1,500	$300
3-4 persons	$2,000	$500
5+ persons	$2,500	$500

Tenants up to 50% AMI are eligible for an additional $500 if needed to fully pay utility arrears.

HOW MUCH RENTAL ASSISTANCE CAN I RECEIVE?

- Up to 50% AMI-up to 18 months of rental assistance
- 50-80% AMI-up to 16 months of rental assistance
- Tenants may apply for an additional 3 months of rental assistance if necessary, for housing stability so long as this does not exceed the 16 or 18-month maximums
- CERA program can only pay rent through September 30, 2022. Rent due after this time frame is not eligible for CERA payment and must be paid by the tenant.

IS THERE ANY LIMIT ON HOW MUCH PER MONTH I CAN RECEIVE?

Yes, the program limit is 150% of the HUD Fair Market Rent based on your home size and county.

I NEED HELP PAYING FOR HOME INTERNET, IS THAT COVERED IN THE PROGRAM?

Yes, a flat $300 internet stipend is available for households that have home internet and include a recent internet bill/statement in their application package. The $300 payment will be made to either the Internet service provider or the tenant.

LOCAL PROGRAM ADMINISTRATION

Based on consultation with MSHDA, local programs may administer the CERA program with additional rules to coincide with existing local codes/ordinances so long as these additional rules do not conflict with US Treasury regulations or slow the pace of serving eligible tenants and landlords.

PRIORITIZATION OF HOUSEHOLDS

The federal Emergency Rental Assistance Program requires a prioritization of assistance for households with incomes less than 50% of area median income or households with one or more individuals that have not been employed for the 90-day period preceding the date of application. MSHDA has implemented this prioritization by reserving 70% of CERA program funds for these households as well as allowing the full 18-months of assistance. Households that are not within this priority group are only eligible for 16-months of assistance.

MY LANDLORD HAS FILED FOR EVICTION. CAN I GET LEGAL ASSISTANCE FOR MY COURT CASE?

Please go to www.michiganlegalhelp.org to get connected to a legal services agency in your area.

COVID Emergency Rental Assistance (CERA)

Copyright State of Michigan

EXHIBIT L

U.S. Department of the Treasury
Emergency Rental Assistance
Frequently Asked Questions

Revised July 27, 2022

The Department of the Treasury (Treasury) is providing these frequently asked questions (FAQs) as guidance regarding the requirements of the Emergency Rental Assistance program (ERA1) established by section 501 of Division N of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (Dec. 27, 2020) and the Emergency Rental Assistance program (ERA2) established by section 3201 of the American Rescue Plan Act of 2021, Pub. L. No. 117-2 (March 11, 2021).

These FAQs apply to both ERA1 and ERA2, except where differences are specifically noted. References in these FAQs to "the ERA" apply to both ERA1 and ERA2. These FAQs will be supplemented by additional guidance.[1] Grantees must establish policies and procedures to govern the implementation of their ERA programs consistent with the statutes and these FAQs. To the extent that these FAQs do not provide specific guidance on a particular issue, a grantee should establish its own policy or procedure that is consistent with the statutes and follow it consistently. Additions and changes to FAQs are tracked in a change log.

1. Who is eligible to receive assistance under the Act and how should a grantee document the eligibility of a household?

A grantee may only use the funds provided in the ERA to provide financial assistance and housing stability services to eligible households. To be eligible, a household must be obligated to pay rent on a residential dwelling and the grantee must determine that:

i. for ERA1:

a. one or more individuals within the household has qualified for unemployment benefits or experienced a reduction in household income, incurred significant costs, or experienced other financial hardship due, directly or indirectly, to the

[1] On January 19, 2021, initial FAQs were released for ERA1. On February 22, 2021, the initial FAQs were revised to, among other things, clarify program requirements and provide additional flexibility with respect to documenting the eligibility of households. On March 16, 2021, FAQ 7 was revised to add rental security deposits as a permissible relocation expense and clarify that application or screening fees are permissible rental fees and FAQs 26–28 were added. On March 25, 2021, FAQ 29 was added. On May 7, 2021, these FAQs were revised to provide initial guidance for ERA2, to clarify differences between ERA1 and ERA2, and to clarify how ERA should be used to promote housing stability for eligible households. On June 24, 2021, these FAQs were revised to further clarify how to promote housing stability for eligible households; specifically, FAQs 14, 23, 31, 33, and 35 were revised and FAQs 36–39 were added, in addition to other non-substantive changes. On August 25, 2021, these FAQs were revised to provide further clarification on the use of self-attestation and to describe methods of speeding payments to eligible households. Specifically, substantive revisions were made to FAQs 3, 4, 7, 11, and 38; FAQs 40-42 were added; and additional edits were made for clarity. On July 6 2022, these FAQs were revised to provide further information regarding: the documentation and eligibility requirements for housing stability services; program accessibility for protected classes; documentation requirements related to bulk payments; the applicability of source-of-income discrimination laws; the permissibility of job and employment requirements; and the remediation of payments made by multiple grantees intended to cover the same expenses. Specifically, substantive revisions were made to FAQs 1, 15, 23, 37, and 38; FAQs 43-45 were added; and additional edits were made for clarity

COVID-19 outbreak;

b. one or more individuals within the household can demonstrate a risk of experiencing homelessness or housing instability; and

c. the household has a household income at or below 80 percent of area median income.

ii. for ERA2:

a. one or more individuals within the household has qualified for unemployment benefits or experienced a reduction in household income, incurred significant costs, or experienced other financial hardship during or due, directly or indirectly, to the coronavirus pandemic;

b. one or more individuals within the household can demonstrate a risk of experiencing homelessness or housing instability; and

c. the household is a low-income family (as such term is defined in section 3(b) of the United States Housing Act of 1937 (42 U.S.C. 1437a(b))).[2]

While there are some differences in eligibility between ERA1 and ERA2, the eligibility requirements are very similar, and Treasury is seeking to implement ERA2 consistently with ERA1, to the extent possible, to reduce administrative burdens for grantees.

The FAQs below describe the documentation requirements for each of these conditions of eligibility. These requirements provide for various means of documentation so that grantees may extend this emergency assistance to vulnerable populations without imposing undue documentation burdens. As described below, given the challenges presented by the COVID-19 pandemic, grantees may be flexible as to the particular form of documentation they require, including by permitting photocopies or digital photographs of documents, e-mails, or attestations from employers, landlords, caseworkers, or others with knowledge of the household's circumstances. Treasury strongly encourages grantees to avoid establishing documentation requirements that are likely to be barriers to participation for eligible households, including those with irregular incomes such as those operating small businesses or gig workers whose income is reported on Internal Revenue Service Form 1099. However, grantees must require all applications for assistance to include an attestation from the applicant that all information included is correct and complete.

When documenting eligibility for households to receive housing stability services without any

[2] As of the date of these FAQs, the definition of "low-income families" in 42 U.S.C. 1437a(b) is "those families whose incomes do not exceed 80 per centum of the median income for the area, as determined by the Secretary [of Housing and Urban Development] with adjustments for smaller and larger families, except that the Secretary may establish income ceilings higher or lower than 80 per centum of the median for the area on the basis of the Secretary's findings that such variations are necessary because of prevailing levels of construction costs or unusually high or low family incomes."

financial assistance, special considerations apply. The ERA1 statute specifies these services may be provided only to "eligible households," meaning the household must meet all ERA1 eligibility requirements. When housing stability services represent the only ERA1 assistance a household will receive (i.e., no payments using ERA1 funds will be made either to the household, to the landlord, or to a utility provider), grantees are encouraged to rely on a household's self-attestations for purposes of confirming eligibility. If all eligibility requirements are expressly addressed by the household's self-attestation, the grantee is not required to collect additional income documentation, past due notices, or other eligibility-verification documents as described above or below. Further, the ERA2 statute does not restrict the provision of housing stability services to "eligible households." As a result, grantees are not required to document a household's eligibility if the grantee provides the household with no assistance other than housing stability services paid with ERA2 funds. However, for both ERA1 and ERA2, a grantee must collect any demographic or other information from the household needed to fulfill the grantee's reporting obligations.

In all cases, grantees must document their policies and procedures for determining a household's eligibility to include policies and procedures for determining the prioritization of households in compliance with the statute and maintain records of their determinations. Grantees must also have controls in place to ensure compliance with their policies and procedures and prevent fraud. Grantees must specify in their policies and procedures under what circumstances they will accept written attestations from the applicant without further documentation to determine any aspect of eligibility or the amount of assistance, and in such cases, grantees must have in place reasonable validation or fraud-prevention procedures to prevent abuse.

2. How should applicants document that a member of the household has qualified for unemployment benefits, experienced a reduction in income, incurred significant costs, or experienced other financial hardship during or due to the COVID-19 outbreak?

A grantee must document that one or more members of the applicant's household either (i) qualified for unemployment benefits; or (ii) (a) for ERA1, experienced a reduction in household income, incurred significant costs, or experienced other financial hardship due, directly or indirectly, to the COVID-19 outbreak or (b) for ERA2, experienced a reduction in household income, incurred significant costs, or experienced other financial hardship during or due, directly or indirectly, to the coronavirus pandemic.[3] If the grantee is relying on clause (i) for this determination, or if the grantee is relying on clause (ii) in ERA2, the grantee is permitted to rely on either a written attestation signed by the applicant or other relevant documentation regarding the household member's qualification for unemployment benefits. If the grantee is relying on clause (ii) for this determination in ERA1, the statute requires the grantee to obtain a written attestation signed by the applicant that one or more members of the household meets this condition. While grantees relying on clause (ii) in ERA1 must show financial hardship "due, directly or indirectly, to" COVID-19, grantees in ERA2 are also permitted to rely on financial hardship "during" the pandemic.

It may be difficult for some grantees to establish whether a financial hardship experienced during the pandemic is due to the COVID-19 outbreak. Therefore, Treasury strongly encourages grantees to rely on the self-certification of applicants with regard to whether their financial hardship meets

[3] Treasury is interpreting the two different statutory terms ("the COVID-19 outbreak" and "the coronavirus pandemic") as having the same meaning.

these statutory eligibility requirements. Further, because the standard in ERA2 is broader than the standard in ERA1, any applicant that self-certifies that it meets the standard in ERA1 should be considered to meet the standard for purposes of ERA2.

3. How should a grantee determine that an individual within a household is at risk of experiencing homelessness or housing instability?

The statutes establishing ERA1 and ERA2 both require that one or more individuals within the household can demonstrate a risk of experiencing homelessness or housing instability. Such a demonstration may include (i) a past due utility or rent notice or eviction notice, (ii) unsafe or unhealthy living conditions (which may include overcrowding), or (iii) any other evidence of risk, as determined by the grantee. Grantees may establish alternative criteria for determining whether a household satisfies this requirement, and should adopt policies and procedures addressing how they will determine the presence of unsafe or unhealthy living conditions and what evidence of risk to accept in order to support their determination that a household satisfies this requirement. A grantee may rely on an applicant's self-certification identifying the applicable risk factor or factors, without further documentation, if other documentation is not immediately available.

4. The statutes establishing ERA1 and ERA2 limit eligibility to households based on certain income criteria. How is household income defined for purposes of the ERA? How will income be documented and verified?

Definition of Income: With respect to each household applying for assistance, grantees may choose between using the Department of Housing and Urban Development's (HUD) definition of "annual income" in 24 CFR 5.609[4] and using adjusted gross income as defined for purposes of reporting under Internal Revenue Service Form 1040 series for individual federal annual income tax purposes.

Definition of Area Median Income: For purposes of ERA1, the area median income for a household is the same as the income limits for families published by the Department of Housing and Urban Development (HUD) in accordance with 42 U.S.C. 1437a(b)(2), available under the heading for "Access Individual Income Limits Areas" at https://www.huduser.gov/portal/datasets/il.html.[5] When determining area median income with respect to Tribal members, Tribal governments and TDHEs may rely on the methodology authorized by HUD for the Indian Housing Block Grant Program as it pertains to households residing in an Indian area comprising multiple counties (*see* HUD Office of Native American Programs, Program Guidance No. 2021-01, June 22, 2021).

Methods for Income Determination: The statute establishing ERA1 provides that grantees may determine income eligibility based on either (i) the household's total income for calendar year 2020, or (ii) sufficient confirmation of the household's monthly income at the time of application, as determined by the Secretary of the Treasury (Secretary).

[4] *See* https://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=24:1.1.1.1.5#se24.1.5_1609.

[5] Specifically, 80 percent of area median income is the same as the "low income limit" as published by HUD. For purposes of prioritizing rental assistance as described in FAQ 22 below, 50 percent of area median income for the household is the same as the "very low-income limit" for the relevant area.

If a grantee in ERA1 uses a household's monthly income to determine eligibility, the grantee should review the monthly income information provided at the time of application and extrapolate over a 12-month period to determine whether household income exceeds 80 percent of area median income. For example, if the applicant provides income information for two months, the grantee should multiply it by six to determine the annual amount. If a household qualifies based on monthly income, the grantee must redetermine the household income eligibility every three months for the duration of assistance.

For ERA2, if a grantee uses the same income determination methodology that it used in ERA1, it is presumed to be in compliance with relevant program requirements; if a grantee chooses to use a different methodology for ERA2 than it used for ERA1, the methodology should be reasonable and consistent with all applicable ERA2 requirements. In addition, if a household is a single family that the grantee determined met the income requirement for eligibility under ERA1, the grantee may consider the household to be eligible under ERA2, unless the grantee becomes aware of any reason the household does not meet the requirements for ERA2. Finally, if multiple families from the same household receive funding under an ERA2 program, the grantee should ensure that there is no duplication of the assistance provided.

Documentation of Income Determination: Grantees in ERA1 and ERA2 must have a reasonable basis under the circumstances for determining income. A grantee may support its determination with both a written attestation from the applicant as to household income and also documentation available to the applicant, such as paystubs, W-2s or other wage statements, tax filings, bank statements demonstrating regular income, or an attestation from an employer. In appropriate cases, grantees may rely on an attestation from a caseworker or other professional with knowledge of a household's circumstances to certify that an applicant's household income qualifies for assistance.

Alternatively, a grantee may rely on a written attestation without further documentation of household income from the applicant under three approaches:

- *Self-attestation Alone* – In order to provide assistance rapidly, during the public health emergency related to COVID-19 the grantee may rely on a self-attestation of household income without further verification if the applicant confirms in their application or other document that they are unable to provide documentation of their income. If a written attestation without further verification is relied on to document the majority of the applicant's income, the grantee must reassess the household's income every three months, by obtaining appropriate documentation or a new self-attestation. Income attestations should specify the monthly or annual income claimed by the household to ensure that the household meets the applicable ERA requirements and to enable appropriate reporting. Under this approach, grantees are encouraged to incorporate self-attestation to demonstrate income eligibility into their application form. Similarly, grantees may rely on self-attestations to demonstrate applicants' financial hardship and risk of homelessness or housing instability as described above in FAQs 2 and 3 above. Thus, grantees are encouraged to simplify applications to allow for self-attestation for income eligibility during the public health emergency, as well as to allow self-attestation to demonstrate applicants' financial hardship and risk of homelessness or housing instability as described above in FAQs 2 and 3.

- *Categorical Eligibility* – If an applicant's household income has been verified to be at or below 80 percent of the area median income (for ERA1) or if an applicant's household has been verified as a low-income family as defined in section 3(b) of the United States Housing Act of 1937 (42 U.S.C. 1437a(b)) (for ERA2) in connection with another local, state, or federal government assistance program, grantees are permitted to rely on a determination letter from the government agency that verified the applicant's household income or status as a low-income family, provided that the determination for such program was made on or after January 1, 2020.

- *Fact-specific proxy* – A grantee may rely on a written attestation from the applicant as to household income if the grantee also uses any reasonable fact-specific proxy for household income, such as reliance on data regarding average incomes in the household's geographic area.

Grantees also have discretion to provide waivers or exceptions to this documentation requirement to accommodate disabilities, extenuating circumstances related to the pandemic, or a lack of technological access. In these cases, the grantee is still responsible for making the required determination regarding the applicant's household income and documenting that determination. Treasury encourages grantees to partner with state unemployment departments or entities that administer federal benefits with income requirements to assist with the verification process, consistent with applicable law.

5. ERA funds may be used for rent and rental arrears. How should a grantee document where an applicant resides and the amount of rent or rental arrears owed?

Grantees must obtain, if available, a current lease, signed by the applicant and the landlord or sublessor, that identifies the unit where the applicant resides and establishes the rental payment amount. If a household does not have a signed lease, documentation of residence may include evidence of paying utilities for the residential unit, an attestation by a landlord who can be identified as the verified owner or management agent of the unit, or other reasonable documentation as determined by the grantee. In the absence of a signed lease, evidence of the amount of a rental payment may include bank statements, check stubs, or other documentation that reasonably establishes a pattern of paying rent, a written attestation by a landlord who can be verified as the legitimate owner or management agent of the unit, or other reasonable documentation as defined by the grantee in its policies and procedures.

Written Attestation: If an applicant is able to provide satisfactory evidence of residence but is unable to present adequate documentation of the amount of the rental obligation, grantees may accept a written attestation from the applicant to support the payment of assistance up to a monthly maximum of 100 percent of the greater of the Fair Market Rent or the Small Area Fair Market Rent for the area in which the applicant resides, as most recently determined by HUD and made available at https://www.huduser.gov/portal/datasets/fmr.html. In this case, the applicant must also attest that the household has not received, and does not anticipate receiving, another source of public or private subsidy or assistance for the rental costs that are the subject of the attestation. This limited payment is intended to provide the most vulnerable households the opportunity to gather additional documentation of the amount of the rental obligation or to negotiate with landlords in order to avoid eviction. The assistance described in this paragraph may only be

provided for three months at a time, and a grantee must obtain evidence of rent owed consistent with the above after three months in order to provide further assistance to such a household; Treasury expects that in most cases the household would be able to provide documentation of the amount of the rental obligation in any applications for further assistance.

6. ERA funds may be used for "utilities and home energy costs" and "utilities and home energy costs arrears." How are those terms defined and how should those costs be documented?

Utilities and home energy costs are separately stated charges related to the occupancy of rental property. Accordingly, utilities and home energy costs include separately stated electricity, gas, water and sewer, trash removal, and energy costs, such as fuel oil. Payments to public utilities are permitted.

All payments for utilities and home energy costs should be supported by a bill, invoice, or evidence of payment to the provider of the utility or home energy service.

Utilities and home energy costs that are covered by the landlord will be treated as rent.

7. The statutes establishing ERA1 and ERA2 allow the funds to be used for certain "other expenses," as defined by the Secretary. What are some examples of these "other expenses"?

Under the statute establishing ERA1, funds used for "other expenses" must be related to housing and "incurred due, directly or indirectly, to the novel coronavirus disease (COVID-19) outbreak." In contrast, the statute establishing ERA2 requires that "other expenses" be "related to housing" but does not require that they be incurred due to the COVID-19 outbreak.

For both ERA1 and ERA2, other expenses related to housing include relocation expenses (including prospective relocation expenses), such as rental security deposits, and rental fees, which may include application or screening fees. It can also include reasonable accrued late fees (if not included in rental or utility arrears), and Internet service provided to the rental unit. Internet service provided to a residence is related to housing and is in many cases a vital service that allows renters to engage in distance learning, telework, and telemedicine and obtain government services. However, given that coverage of Internet would reduce the amount of funds available for rental assistance, grantees should adopt policies that govern in what circumstances that they will determine that covering this cost would be appropriate. In addition, rent or rental bonds, where a tenant posts a bond with a court as a condition to obtaining a hearing, reopening an eviction action, appealing an order of eviction, reinstating a lease, or otherwise avoiding an eviction order, may also be considered an eligible expense.

All payments for housing-related expenses must be supported by documentary evidence such as a bill, invoice, or evidence of payment to the provider of the service. If a housing-related expense is included in a bundle or an invoice that is not itemized (for example, internet services bundled together with telephone and cable television services) and obtaining an itemized invoice would be unduly burdensome, grantees may establish and apply reasonable procedures for determining the portion of the expense that is appropriate to be covered by ERA. As discussed in FAQ 26, under certain circumstances, the cost of a hotel stay may also be covered as an "other expense."

8. Must a beneficiary of the rental assistance program have rental arrears?

No. The statutes establishing ERA1 and ERA2 permit the enrollment of households for only prospective benefits. For ERA1, if an applicant has rental arrears, the grantee may not make commitments for prospective rent payments unless it has also provided assistance to reduce the rental arrears; this requirement does not apply to ERA2.

9. May a grantee provide assistance for arrears that have accrued before the date of enactment of the statute?

Yes, but not for arrears accrued before March 13, 2020, the date of the emergency declaration pursuant to section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5191(b).

10. Is there a limit on how many months of financial assistance a tenant can receive?

Yes. In ERA1, an eligible household may receive up to twelve (12) months of assistance (plus an additional three (3) months if necessary to ensure housing stability for the household, subject to the availability of funds). The aggregate amount of financial assistance an eligible household may receive under ERA2, when combined with financial assistance under ERA1, must not exceed 18 months.

In ERA1, financial assistance for prospective rent payments is limited to three months based on any application by or on behalf of the household, except that the household may receive assistance for prospective rent payments for additional months (i) subject to the availability of remaining funds currently allocated to the grantee, and (ii) based on a subsequent application for additional assistance. In no case may an eligible household receive more than 18 months of assistance under ERA1 and ERA2, combined.

11. Must a grantee pay for all of a household's rental or utility arrears?

No. The full payment of arrears is allowed up to the limits established by the statutes, as described in FAQ 10 above. A grantee may structure a program to provide less than full coverage of arrears. Grantees are encouraged to consider whether payments of less than the full amount of arrears may result in a significant disincentive for landlord participation in the ERA program. Moreover, consistent with FAQ 32, grantees should consider methods for avoiding evictions for nonpayment or utility cutoffs in cases where arrearages are paid only in part.

12. What outreach should be made by a grantee to a landlord or utility provider before determining that the landlord or utility provider will not accept direct payment from the grantee?

Treasury expects that in general, rental and utility assistance can be provided most effectively and efficiently when the landlord or utility provider participates in the program. However, in cases where a landlord or utility provider does not participate in the program, the only way to achieve the statutory purpose is to provide assistance directly to the eligible household.

In ERA1, grantees must make reasonable efforts to obtain the cooperation of landlords and utility providers to accept payments from the ERA program. Outreach will be considered complete if (i) a request for participation is sent in writing, by mail, to the landlord or utility provider, and the addressee does not respond to the request within seven calendar days after mailing; (ii) the grantee has made at least three attempts by phone, text, or e-mail over a five calendar-day period to request the landlord or utility provider's participation; or (iii) a landlord confirms in writing that the landlord does not wish to participate. The final outreach attempt or notice to the landlord must be documented. The cost of contacting landlords would be an eligible administrative cost.

ERA2 does not require grantees to seek the cooperation of the landlord or utility provider before providing assistance directly to the tenant. However, if an ERA2 grantee chooses to seek the cooperation of landlords or utility providers before providing assistance directly to tenants, Treasury strongly encourages the grantee to apply the same ERA1 requirements as described above.

13. Is there a requirement that the eligible household have been in its current rental home when the public health emergency with respect to COVID-19 was declared?

No. There is no requirement regarding the length of tenure in the current unit.

14. What data should a grantee collect regarding households to which it provides rental assistance in order to comply with Treasury's reporting and recordkeeping requirements?

Treasury provided interim guidance to ERA1 grantees regarding reporting requirements covering the period January through May 2021. The interim guidance required grantees to report limited data elements for the first quarter of 2021, as well as monthly for April to August. A grantee's failure to submit required reports to Treasury on a timely basis may constitute a violation of the ERA award terms.

Treasury has provided grantees with additional guidance regarding quarterly reporting requirements. Grantees are required to submit reports in accordance with the additional guidance beginning with the first quarter of 2021 for ERA1 and the second quarter of 2021 for ERA2, with the first reports under the additional guidance being due in October 2021.

ERA1 grantees will be required to submit monthly reports from September to December 2021, which will be consistent with monthly reports that were previously required for April to August.

Treasury's Office of Inspector General may require the collection of additional information in order to fulfill its oversight and monitoring requirements.[6] Grantees under ERA1 must comply with the requirement in section 501(g)(4) of Division N of the Consolidated Appropriations Act, 2021, to establish data privacy and security requirements for information they collect; grantees

[6] Note that this FAQ is not intended to address all reporting requirements that will apply to the ERA but rather to note for grantees information that they should anticipate needing to collect from households with respect to the provision of rental assistance.

under ERA2 are also encouraged to comply with those requirements.[7]

The assistance listing number assigned to the ERA is 21.023.

15. The statute establishing ERA1 requires that payments not be duplicative of any other federally funded rental assistance provided to an eligible household. Are tenants of federally subsidized housing, e.g., Low Income Housing Credit, Public Housing, or Indian Housing Block Grant-assisted properties, eligible for the ERA?

An eligible household that occupies a federally subsidized residential or mixed-use property or receives federal rental assistance may receive assistance in the ERA, provided that ERA1 funds are not applied to costs that have been or will be reimbursed under any other federal assistance. Grantees are required to comply with Title VI of the Civil Rights Act (which prohibits discrimination on the ground of race, color, or national origin in programs or activities receiving federal financial assistance) and Section 504 of the Rehabilitation Act of 1973 (which prohibits discrimination because of disability in programs or activities receiving federal financial assistance), and should evaluate whether their policies and practices regarding assistance to households that occupy federally subsidized residential or mixed-use properties or receive federal rental assistance comply with Title VI and Section 504. In addition, grantees are required to comply with the Fair Housing Act, which prohibits discrimination in housing because of race, color, national origin, sex (including gender identity and sexual orientation), religion, disability, and having, expecting, adopting, or fostering a child under the age of 18. With respect to ERA2, grantees must not refuse to provide assistance to households on the basis that they occupy such properties or receive such assistance, due to the disproportionate effect such a refusal could have on populations intended to receive assistance under the ERA and the potential for such a practice to violate applicable law, including Title VI, Section 504, and the Fair Housing Act.

If an eligible household participates in a HUD-assisted rental program or lives in certain federally assisted properties (e.g., using a Housing Choice Voucher, Public Housing, or Project-Based Rental Assistance) and the tenant rent is adjusted according to changes in income, the renter household may receive ERA1 assistance for the tenant-owed portion of rent or utilities that is not subsidized. Grantees are encouraged to confirm that the participant has already reported any income loss or financial hardship to the Public Housing Authority or property manager and completed an interim re-examination before assistance is provided.

Treasury encourages grantees to enter into partnerships with owners of federally subsidized housing to implement methods of meeting the statutory requirement to prioritize assistance to households with income that does not exceed 50 percent of the area median income for the household, or where one or more individuals within the household are unemployed as of the date of the application for assistance and have not been employed for the 90-day period preceding such date.

[7] Specifically, the statute establishing ERA1 requires grantees to establish data privacy and security requirements for certain information regarding applicants that (i) include appropriate measures to ensure that the privacy of the individuals and households is protected; (ii) provide that the information, including any personally identifiable information, is collected and used only for the purpose of submitting reports to Treasury; and (iii) provide confidentiality protections for data collected about any individuals who are survivors of intimate partner violence, sexual assault, or stalking.

Pursuant to section 501(k)(3)(B) of Division N of the Consolidated Appropriations Act, 2021, and 2 CFR 200.403, when providing ERA1 assistance, the grantee must review the household's income and sources of assistance to confirm that the ERA1 assistance does not duplicate any other assistance, including federal, state, or local assistance provided for the same costs.

Grantees may rely on an attestation from the applicant regarding non-duplication with other government assistance in providing assistance to a household. Grantees with overlapping or contiguous jurisdictions are particularly encouraged to coordinate and participate in joint administrative solutions to meet this requirement. The requirement described in this paragraph does not apply to ERA2; however, to maximize program efficacy, Treasury encourages grantees to minimize the provision of duplicative assistance.

16. In ERA1, may a Tribe or Tribally Designated Housing Entity (TDHE) provide assistance to Tribal members living outside Tribal lands?

Yes. Tribal members living outside Tribal lands may receive ERA1 funds from their Tribe or TDHE, provided they are not already receiving ERA assistance from another Tribe or TDHE, state, or local government.

17. In ERA1, may a Tribe or TDHE provide assistance to non-Tribal members living on Tribal lands?

Yes. A Tribe or TDHE may provide ERA1 funds to non-Tribal members living on Tribal lands, provided these individuals are not already receiving ERA assistance from another Tribe or TDHE, state, or local government.

18. May a grantee provide assistance to households for which the grantee is the landlord?

Yes. A grantee may provide assistance to households for which the grantee is the landlord, provided that the grantee complies with the all provisions of the statute establishing ERA1 or ERA2, as applicable, the award terms, and applicable ERA guidance issued by Treasury, and that no preferences (beyond the prioritization described in FAQ 22) are given to households that reside in the grantee's own properties.

19. May a grantee provide assistance to a renter household with respect to utility or energy costs without also covering rent?

Yes. A grantee is not required to provide assistance with respect to rent in order to provide assistance with respect to utility or energy costs. For ERA1, the limitations in section 501(c)(2)(B) of Division N of the Consolidated Appropriations Act, 2021, limiting assistance for prospective rent payments do not apply to the provision of utilities or home energy costs.

20. May a grantee provide ERA assistance to homeowners to cover their mortgage, utility, or energy costs?

No. ERA assistance may be provided only to eligible households, which is defined by statute to include only households that are obligated to pay rent on a residential dwelling. However,

homeowners may be eligible for assistance under programs using funds under the Homeowner Assistance Fund, which was established by Treasury under the American Rescue Plan Act of 2021.

21. May grantees administer ERA programs by using contractors, subrecipients, or intergovernmental cooperation agreements?

Yes. Grantees may use ERA payments to make subawards to other entities, including non-profit organizations and local governments, to administer ERA programs on behalf of the grantees.

The subrecipient monitoring and management requirements set forth in 2 CFR 200.331–333 will apply to such entities. Grantees may also enter into contracts using ERA payments for goods or services to implement ERA programs. Grantees must comply with the procurement standards set forth in 2 CFR 200.317–327 in entering into such contracts. Grantees are encouraged to achieve administrative efficiency and fiduciary responsibility by collaborating with other grantees in joint administrative solutions to deploying ERA resources.

22. ERA requires a prioritization of assistance for households with incomes less than 50 percent of area median income or households with one or more individuals that have not been employed for the 90-day period preceding the date of application. How should grantees prioritize assistance?

Grantees should establish a preference system for assistance that prioritizes assistance to households with incomes less than 50 percent area median income[8] and to households with one or more members that have been unemployed for at least 90 days. Grantees should document the preference system they plan to use and should inform all applicants about available preferences.

Treasury will require grantees to report to Treasury on the methods they have established to implement this prioritization of assistance and to publicly post a description of their prioritization methods, including on their program web page if one exists, by July 15, 2021.

23. ERA1 and ERA2 both allow for up to 10 percent of the funds received by a grantee to be used for certain housing stability services. What are some examples of these services?

ERA1 and ERA2 have different requirements for housing stability services.

Under ERA1, these funds may be used to provide eligible households with case management and other services related to the COVID-19 outbreak, as defined by the Secretary, intended to help keep households stably housed.

Under ERA2, these services do not have to be related to the COVID-19 outbreak and the ERA2 statute does not restrict the provision of housing stability services to "eligible households."

For purposes of ERA1 and ERA2, housing stability services include those that enable households to maintain or obtain housing. Such services may include, among other things, eviction prevention and eviction diversion programs; mediation between landlords and tenants; housing counseling;

[8] For the definition of area median income, see FAQ 4 above.

fair housing counseling; housing navigators or *promotoras* that help households access ERA programs or find housing; case management related to housing stability; housing-related services for survivors of domestic abuse or human trafficking; legal services or attorney's fees related to eviction proceedings and maintaining housing stability; and specialized services for individuals with disabilities or seniors that support their ability to access or maintain housing. Grantees using ERA funds for housing stability services must maintain records regarding such services and the amount of funds provided to them.

24. Are grantees required to remit interest earned on ERA payments made by Treasury?

No. ERA payments made by Treasury to states, territories, and the District of Columbia are not subject to the requirement of the Cash Management Improvement Act and Treasury's implementing regulations at 31 CFR part 205 to remit interest to Treasury. ERA payments made by Treasury to local governments, Tribes, and TDHEs are not subject to the requirement of 2 CFR 200.305(b)(8)–(9) to maintain balances in an interest-bearing account and remit payments to Treasury.

25. When may Treasury recoup ERA funds from a grantee?

Treasury may recoup ERA funds from a grantee if the grantee does not comply with the applicable limitations on the use of those funds.

26. May rental assistance be provided to temporarily displaced households living in hotels or motels?

Yes. The cost of a hotel or motel room occupied by an eligible household may be covered using ERA assistance within the category of certain "other expenses related to housing" (as described in FAQ 7) provided that:

i. the household has been temporarily or permanently displaced from its primary residence or does not have a permanent residence elsewhere;

ii. the total months of assistance provided to the household do not exceed the applicable time limit described in FAQ 10; and

iii. documentation of the hotel or motel stay is provided and the other applicable requirements provided in the statute and these FAQs are met.

The cost of the hotel or motel stay would not include expenses incidental to the charge for the room.

Grantees covering the cost of such stays must develop policies and procedures detailing under what circumstances they would provide assistance to cover such stays. In doing so, grantees should consider the cost effectiveness of offering assistance for this purpose as compared to other uses. If a household is eligible for an existing program with narrower eligibility criteria that can provide similar assistance for hotel or motel stays, such as the HUD Emergency Solutions Grant program or FEMA Public Assistance, grantees should utilize such programs

prior to providing similar assistance under the ERA program.

27. May a renter subject to a "rent-to-own" agreement with a landlord be eligible for ERA assistance?

A grantee may provide financial assistance to households that are renting their residence under a "rent-to-own" agreement, under which the renter has the option (or obligation) to purchase the property at the end of the lease term, provided that a member of his or her household:

i. is not a signor or co-signor to the mortgage on the property;

ii. does not hold the deed or title to the property; and

iii. has not exercised the option to purchase.

Homeowners may be eligible for assistance under programs using funds under the Homeowner Assistance Fund, which was established by Treasury under the American Rescue Plan Act of 2021.

28. Under what circumstances may households living in manufactured housing (mobile homes) receive assistance?

Rental payments for either the manufactured home or the parcel of land the manufactured home occupies are eligible for financial assistance under ERA programs. Households renting manufactured housing or the parcel of land the manufactured home occupies may also receive assistance for utilities and other expenses related to housing, as detailed in FAQ 7 above. This principle also applies to mooring fees for water-based dwellings (houseboats).

29. What are the applicable limitations on administrative expenses?

Under ERA1, not more than 10 percent of the amount paid to a grantee may be used for administrative costs attributable to providing financial assistance and housing stability services to eligible households. Under ERA2, not more than 15 percent of the amount paid to a grantee may be used for administrative costs attributable to providing financial assistance, housing stability services, and other affordable rental housing and eviction prevention activities.

The revised award term for ERA1 issued by Treasury permits recipients to use funds provided to cover both direct and indirect costs. A grantee may permit a subrecipient to incur more than 10 or 15 percent, as applicable, of the amount of the subaward issued to that subrecipient as long as the total of all administrative costs incurred by the grantee and all subrecipients, whether as direct or indirect costs, does not exceed 10 or 15 percent, as applicable, of the total amount of the award provided to the grantee from Treasury.

Further, the revised award term for ERA1 no longer requires grantees to deduct administrative costs charged to the award from the amount available for housing stability services. Rather, any direct and indirect administrative costs in ERA1 or ERA2 must be allocated by the grantee to either the provision of financial assistance or the provision of housing stability services. As

required by the applicable statutes, not more than 10 percent of funds received by a grantee may be used to provide eligible households with housing stability services (discussed in FAQ 23). To the extent administrative costs are not readily allocable to one or the other of these categories, the grantee may assume an allocation of the relevant costs of 90 percent to financial assistance and 10 percent to housing stability services.

Grantees may apply their negotiated indirect cost rate to the award, but only to the extent that the total of the amount charged pursuant to that rate and the amount of direct costs charged to the award does not exceed 10 percent of the amount of the award.

30. Should grantees provide tenants the option to apply directly for ERA assistance, rather than only accepting applications for assistance from landlords and owners of dwellings?

For ERA1, Treasury strongly encourages grantees to provide an option for tenants to apply directly for funding, rather than only accepting applications for assistance from landlords and owners of dwellings. For ERA2, grantees are required to allow tenants to apply directly for assistance, even if the landlord or owner chooses not to participate, consistent with the statutory requirement for the funds to be used to provide financial assistance to eligible households.

See FAQ 12 for additional information on grantees providing assistance to landlords and tenants.

31. How should grantees ensure that recipients use ERA funds only for permissible purposes?

Grantees should require recipients of funds under ERA programs, including tenants and landlords, to commit in writing to use ERA assistance only for the intended purpose before issuing a payment. Grantees are not required to obtain documentation evidencing the use of ERA program funds by tenants and landlords. Grantees are expected to apply reasonable fraud- prevention procedures and to investigate and address potential instances of fraud or the misuse of funds that they become aware of.

There may be instances when a landlord refuses to accept a payment from a tenant who has received assistance directly from a grantee for the purpose of paying the landlord. In these cases, the grantee may allow the tenant to use the assistance for other eligible costs in accordance with the terms of the grantee's ERA programs.

32. Can grantees prohibit landlords from pursuing eviction for nonpayment of rent for some period after receiving ERA assistance?

With respect to landlords that receive funds under an ERA program for prospective rent or for rental arrearages, the grantee must prohibit the landlord from evicting the tenant for nonpayment of rent with respect to the period covered by the assistance.

In addition, with respect to landlords that receive funds for rental arrears, to promote the purpose of the program the grantee is encouraged to prohibit the landlord from evicting the tenant for nonpayment of rent for some period of time, consistent with applicable law.

In all cases, Treasury strongly encourages grantees to require landlords that receive funds under the ERA, as a condition of receiving the funds, not to evict tenants for nonpayment of rent for 30 to 90 days longer than the period covered by the rental assistance.

33. How can grantees work with other grantees to make their ERA programs consistent?

Treasury encourages grantees with overlapping or contiguous jurisdictions to collaborate to develop consistent or complementary terms of their ERA programs and to coordinate in their communications with the public, to minimize potential confusion among tenants and landlords regarding assistance. Treasury also encourages grantees to reduce burdens for entities seeking assistance from multiple grantees across different jurisdictions, including utility providers and landlords with properties in multiple jurisdictions.

34. Should a grantee require that a landlord initiate an eviction proceeding in order to apply for assistance under an ERA program?

No.

35. How can ERA assistance be used to support an eligible household moving to a new home?

ERA funds may be used to provide assistance to eligible households to cover prospective relocation assistance, rent, and utility or home energy costs, including after an eviction. Treasury encourages grantees to provide prospective support to help ensure housing stability. See FAQ 7 (regarding qualifying relocation expenses) and FAQ 10 (regarding time limits on assistance).

Before moving into a new residence, a tenant may not yet have a rental obligation, as required by the statutes establishing ERA1 and ERA2. In those cases, Treasury encourages grantees to provide otherwise eligible households with an official document specifying the amount of financial assistance under ERA programs that the grantee will pay a landlord on behalf of the household (such as for a security deposit or rent) if the landlord and the household enter into a qualifying lease of at least six months. Such documentation may expire after a certain period, such as 60 to 120 days after the issuance date. Treasury encourages grantees to work with providers of housing stability services to help these households identify housing that meets their needs. For purposes of reporting to Treasury, grantees may consider these commitments to be an obligation of funding until their expiration.

36. What steps can ERA grantees take to prevent evictions for nonpayment of rent?

Treasury strongly encourages grantees to develop partnerships with courts in their jurisdiction that adjudicate evictions for nonpayment of rent to help prevent evictions and develop eviction diversion programs. For example, grantees should consider: (1) providing information to judges, magistrates, court clerks, and other relevant court officials about the availability of assistance under ERA programs and housing stability services; (2) working with eviction courts to provide information about assistance under ERA programs to tenants and landlords as early in the adjudication process as possible; and (3) engaging providers of legal services and other housing stability services to assist households against which an eviction action for nonpayment of rent has

been filed.

37. How can grantees promote access to assistance for all eligible households?

Grantees should address barriers that potentially eligible households may experience in accessing ERA programs, including by providing program documents in multiple languages, by enabling persons with disabilities to access the programs, and by conducting targeted outreach to populations with disproportionately high levels of unemployment or housing instability or that are low income.

Grantees should also provide, either directly or through partner organizations, culturally and linguistically relevant outreach and housing stability services to ensure access to assistance for all eligible households.

In accordance with Title VI of the Civil Rights Act of 1964 (Title VI) ERA grantees must ensure they provide meaningful access to their limited-English-proficiency (LEP) applicants and beneficiaries of their federally assisted programs, services, and activities. Denial of an LEP person's access to federally assisted programs, services, and activities is a form of national-origin discrimination prohibited under Title VI and Treasury's Title VI implementing regulations at 31 CFR Part 22. Meaningful access for an LEP person may entail providing language assistance services, including oral interpretation and written translation where necessary, to ensure effective communication regarding the ERA grantee's programs, services, and activities. For more information regarding reasonable steps to provide meaningful access for LEP persons, please go to https://www.lep.gov and the ERA programs' Promising Practices webpage at [https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program/promising-practices/outreach]. See also Treasury's published LEP guidance at 70 FR 6067 (Feb. 4, 2005).

38. May grantees obtain information in bulk from utility providers and landlords with multiple units regarding the eligibility of multiple tenants, or bundle assistance payments for the benefit of multiple tenants in a single payment to a utility provider or landlord?

Data-sharing agreements between grantees and utility providers or landlords with multiple units may reduce administrative burdens and enhance program integrity by providing information to validate tenant-provided information. Therefore, grantees may establish prudent information-sharing arrangements with utility providers and landlords for determining household eligibility. Grantees may also establish reasonable procedures for combining the assistance provided for multiple households into a single "bulk" payment made to a utility or landlord. Grantees should ensure that any such arrangements (1) comply with applicable privacy requirements; (2) include appropriate safeguards to ensure payments are made only for eligible households; and (3) are documented in records satisfying the grantee's reporting requirements, including, for example, the amount of assistance paid for each household."

In addition, to speed the delivery of assistance, grantees may adopt policies and procedures enabling landlords and utility providers to receive assistance based on reasonable estimates of arrears owed by multiple households, before their application and documentation requirements are satisfied. Specifically, a grantee may provide for payments based on such estimates if (1) the

landlord or utility provider certifies that its estimate is reasonable based on information available to it at the time, (2) the grantee requires the landlord or utility provider to collect all required documentation from the recipient household within six months, and (3) the landlord or utility provider agrees in writing to return to the grantee any assistance the landlord or utility provider receives that the household was ineligible for or for which the required documentation is not received within six months. Grantees are encouraged to limit such payments to a portion of the landlord's or utility provider's estimate (for example, 50 or 75 percent of the estimated amount) to limit the risk of providing funds that are used for an ineligible purpose and subsequently must be returned. If an estimated payment is subsequently found to have been used for an ineligible household or an ineligible expense, or if the required documentation is not timely submitted, the payment will be considered an ineligible use of ERA funds by the grantee.

In the case of a bulk utility payment made in accordance with this FAQ, a grantee may provide a utility provider up to nine months from the time the bulk payment was made to satisfy all documentation requirements if a moratorium preventing the shut-off of utilities was in effect in the grantee's jurisdiction for at least one of the six months following the payment.

39. If ERA program funds are used for a security deposit for a lease, to whom should the landlord return the security deposit at the end of the lease?

Grantees should establish a policy with regard to the payment and disposition of security deposits, which should include a reasonable limit on the amount of a security deposit to be paid using ERA program funds. The amount of a security deposit should not exceed one month's rent, except in cases where a higher amount is reasonable and customary in the local housing market. The treatment of security deposits is generally subject to applicable law and the rental agreement. In order to mitigate risks associated with the use of ERA program funds for security deposits, grantees should establish a minimum rental period, not less than four months, before a tenant is entitled to receive a returned security deposit that was paid for with ERA funds. To the extent that the security deposit is not returned to the tenant, it should be returned to the grantee.

40. May ERA assistance be used for rental or utility arrears after the tenant no longer resides in the unit?

In order to remove barriers a household may face in accessing new housing, a grantee may, at the tenant's request, provide assistance for rental or utility arrears after an otherwise eligible tenant has vacated a unit. In addition to not engaging in further collection efforts regarding the arrears that are paid or related fees or expenses, as a condition to receiving payment, Treasury strongly encourages grantees to require the landlord or utility provider to agree not to pursue any further collection efforts against the household and ensure that any reports to credit agencies will confirm the matter's resolution. In addition, grantees may consider requiring the landlord or utility provider to notify the tenant that payment has been received and that there will be no further collection efforts.

41. May a grantee provide additional payments to landlords that enter into leases with eligible households experiencing circumstances that make it more difficult to secure rental housing?

Grantees may use ERA funds to pay for an additional rental payment required by a landlord as a

condition to entering into a lease with a "hard-to-house" household that would not qualify under the landlord's previously established, non-discriminatory, and lawful screening or occupancy policies. "Hard-to-house" applicants are those who, during the preceding 12 months, suffered an eviction; aged out of foster care or similar arrangements; were convicted of a criminal offense or released from incarceration; or experienced homelessness. The additional payment must be documented in the written lease agreement as additional rent and may not, in the aggregate, exceed one month's rent (excluding the additional payment). Grantees should establish reasonable safeguards to ensure these additional rental payments do not incentivize landlords to adopt more stringent leasing policies and are otherwise compliant with any rent or security deposit restrictions imposed by state or local law.

42. May a grantee provide ERA funds to another entity for the purpose of making payments more rapidly?

To speed the delivery of assistance, grantees may enter into a written agreement with a nonprofit organization to establish a payment fund for the sole purpose of delivering assistance using ERA funds while a household's application remains in process. A grantee may use such a process if:

- The process is reserved for situations in which an expedited payment could reasonably be viewed as necessary to prevent an eviction or loss of utility services that precludes employing the grantee's standard application and payment procedures on a timely basis.
- The nonprofit organization has the requisite financial capacity to manage the ERA funds, such as being a certified community development financial institution.
- The nonprofit organization deposits and maintains the ERA funds in a separate account that is not commingled with other funds.
- The grantee receives all required application and eligibility documentation within six months.
- The nonprofit organization agrees in writing to return to the grantee any assistance that the household was ineligible for or for which the required documentation is not received within six months.
- Any funds not used by the nonprofit organization are ultimately returned to the grantee.

If a payment made by the nonprofit organization is subsequently found to have been used for an ineligible household or an ineligible expense, or if the required application and eligibility documentation are not timely submitted, the payment will be considered an ineligible use of ERA funds by the grantee. Any administrative expenses attributable to a payment fund should be considered in accordance with FAQ 29.

43. Are landlords offered ERA payments subject to source-of-income protection laws?

A landlord's failure to accept payments made using ERA funding might violate state or local source-of-income protection laws, depending on the jurisdiction's laws.

44. May ERA grantees impose additional eligibility criteria, including employment or job-training requirements, as a condition of providing ERA assistance to households?

The statutes that authorize the ERA1 and ERA2 programs provide specific criteria for establishing a household's eligibility. These eligibility requirements include financial hardship, risk of homelessness or housing instability, qualifying income, and an obligation to pay rent. While the statutes authorizing the ERA programs and Treasury's policy guidance afford grantees discretion in structuring their programs, grantees do not have the authority to augment the ERA eligibility requirements by conditioning assistance on a tenant's employment status, compliance with work requirements, or acceptance of employment counseling, job-training, or other employment services. To the extent that grantees would impose other eligibility criteria or would require tenants to be employed, accept employment services, or comply with work requirements, such additional requirements are not permissible.

45. If two grantees learn that they both provided rental or utility assistance to a household intended to cover the same months' expenses, is one grantee required to recover its assistance payments from the household, landlord, or utility provider?

Grantees with overlapping or contiguous jurisdictions are encouraged coordinate to avoid duplicating assistance. However, there may be cases in which a grantee discovers that a household has received ERA assistance from multiple grantees intended to cover the same period of rent, utilities, rental arrears, or utility arrears. In such cases, the grantee may decline to recover its payment and instead recharacterize it as assistance covering a different period of eligible rental or utility expenses, if:

- the grantee documents, in accordance with ERA records requirements, which expenses its funds ultimately covered; and

- the grantee confirms that the household was eligible for all assistance it received, including ensuring that the total number of months of financial assistance received by the household does not exceed statutory limits, as described in FAQ 10.

For example, if a state grantee and a local grantee both provided assistance to the same household intended to cover rental arrears arising from January and February, either the state grantee or the local grantee could recharacterize its assistance as covering rental arrears arising from March and April, if such grantee documents the rental arrears ultimately covered by its payment and confirms that the household was eligible for assistance with respect to all four months of arrears.

46. What are eligible "other affordable rental housing and eviction prevention purposes" under the statute establishing ERA2?

The statute establishing ERA2 provides that a grantee may use any of its ERA2 funds that are unobligated on October 1, 2022, for "affordable rental housing and eviction prevention purposes, as defined by the Secretary, serving very low-income families (as such term is defined in section 3(b) of the United States Housing Act of 1937 (42 U.S.C. 1437a(b)))."[9] However, in accordance with

[9] As of the date of this FAQ, the definition of "very low-income families" in 42 U.S.C. 1437a(b) is "low-income families whose incomes do not exceed 50 per centum of the median family income for the area, as determined by the Secretary [of Housing and Urban Development] with adjustments for smaller and larger families, except that the

the ERA2 statute, prior to obligating any funds for such purposes, the grantee must have obligated at least 75 percent of the total ERA2 funds allocated to it for financial assistance to eligible households, eligible costs for housing stability services, and eligible administrative costs. These requirements are described below.[10]

Eligible Uses of ERA2 Funds

Eligible Affordable Rental Housing Purposes. Eligible "affordable rental housing purposes" are expenses[11] for:

- the construction, rehabilitation, or preservation of affordable rental housing projects serving very low-income families; and

- the operation of affordable rental housing projects serving very low-income families that were constructed, rehabilitated, or preserved using ERA2 funds.[12]

For purposes of the definition above, affordable rental housing projects serve very low-income families only if:

- the household income of occupants of units funded by ERA2 funds is limited to the maximum income applicable to very low-income families, as such term is defined in section 3(b) of the United States Housing Act of 1937 (42 U.S.C. 1437a(b)); and

- such income limitation is imposed through a covenant, land use restriction agreement (LURA), or other enforceable legal requirement for a period of at least 20 years.

In addition, to be considered an affordable rental housing purpose serving very low-income families, an affordable rental housing project funded, in whole or in part, with ERA2 funds must conform to and meet the program regulations and other requirements of one or more of the types of assistance listed below. In other words, uses of ERA2 funds for an affordable rental housing purpose must be aligned with at least one of the following programs and must meet the

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Secretary may establish income ceilings higher or lower than 50 per centum of the median for the area on the basis of the Secretary's findings that such variations are necessary because of unusually high or low family incomes." All references to "very low-income families" in this FAQ incorporate this definition. The Department of Housing and Urban Development annually updates its calculations relevant to the definition of "very low-income families" at https://www.huduser.gov/portal/datasets/il.html.

[10] Treasury's reporting guidance will address the specific reporting and certification requirements associated with the uses of ERA2 funds described in this FAQ.

[11] ERA2 award funds used for affordable rental housing and eviction prevention purposes will be subject to the applicable requirements set forth in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance), 2 CFR Part 200. Specifically, ERA2 grantees are required to comply with the applicable procurement standards set forth in 2 CFR §§ 200.317 through 200.327 when procuring goods and services for these eligible purposes, and the allowability of expenses related to affordable rental housing and eviction prevention purposes will be subject to the Cost Principles set forth in 2 CFR Part 200, Subpart E.

[12] Expenses for transitional housing (i.e., any dwelling that is intended to provide temporary housing to formerly homeless persons for a period up to 24 months) or emergency shelters are not considered "affordable rental housing projects" and therefore are not eligible "affordable rental housing purposes."

requirements of that program along with the other conditions specifically set forth in this FAQ:[13]

- Low-Income Housing Tax Credit (Treasury);
- HOME Investment Partnerships Program (U.S. Department of Housing and Urban Development (HUD));
- HOME-ARP Program (HUD);
- Housing Trust Fund Program (HUD);
- Public Housing Capital Fund (HUD);
- Indian Housing Block Grant Program (HUD);
- Section 202 Supportive Housing for the Elderly (HUD);
- Section 811 Supportive Housing for Persons with Disabilities (HUD);
- Farm Labor Housing Direct Loans and Grants (U.S. Department of Agriculture (USDA));
- Multifamily Preservation and Revitalization Program (USDA).

Eligible Eviction Prevention Purposes. Eligible "eviction prevention purposes" are defined in the same manner as housing stability services under FAQ 23; however, services provided with funds made available for eviction prevention purposes must serve very low-income families.

Cost Allocation. Grantees may use ERA2 funds as part of the financing for a mixed-income housing project if the total financing made up of ERA2 award funds does not exceed the total development costs attributable to affordable rental housing units serving very low-income families.[14] For example, if 25 percent of a project's units will be reserved for very low-income families and 20 percent of the total costs of all housing units in the project are attributable to such reserved units, then ERA2 funds may be used to pay for up to 20 percent of the total development costs.

Form of Provision of Funds and Time of Obligation. Grantees that use ERA2 funds for an eligible affordable rental housing purpose may provide such funds in the form of loans (including no-interest loans and deferred-payment loans), interest subsidies, grants, or other financial arrangements. ERA2 funds may not be used to establish, provide financial support to, or invest in revolving loan funds or other structured funds.

Under the ERA2 statute, grantees may obligate funds only until September 30, 2025, and all obligations must be liquidated by the closeout date of the award in accordance with the Uniform Guidance, i.e., no later than 120 calendar days after September 30, 2025.[15] ERA2 funds are

[13] For purposes of determining whether any expenses constitute affordable rental housing purposes under ERA2, in the event of a direct conflict between ERA2 requirements and requirements of a listed program to which a grantee will conform its affordable rental housing project, ERA2 requirements will prevail with respect to any portion of the project funded by ERA2 funds. A direct conflict between program requirements occurs only when it is impossible to comply with the requirements of ERA2 and of the other program. In contrast, if two sets of income or affordability-period requirements apply to the same units, there is no direct conflict; grantees must satisfy both by applying the more stringent requirements.

[14] The specific units within a mixed-income housing project subject to the applicable income limitation may vary over time depending on operational needs, provided the units subject to the income limitation at any point do not materially differ from units funded by ERA2 funds.

[15] *See* 2 CFR § 200.344.

considered to be obligated upon the grantee's approval[16] of the loan, interest subsidy, grant, or other financial arrangement, and such obligations are considered to be liquidated for the purpose of award closeout upon the grantee's disbursement of the ERA2 funds. Any proceeds or income a grantee receives after September 30, 2025, from loans, interest subsidies, or other similar financial arrangements made with ERA2 funds must be used for affordable rental housing purposes or eviction prevention purposes in accordance with this FAQ.

Obligation of 75 Percent of Allocated Funds

Treasury will calculate the 75 percent obligation threshold as (i) the total amount of ERA2 funds the grantee has obligated[17] for financial assistance to eligible households, eligible costs for housing stability services, and eligible administrative costs, divided by (ii) the grantee's total ERA2 allocation, including any amounts reallocated to and excluding any amounts recaptured from the grantee. For example, if a grantee voluntarily reallocated 50 percent of its total initial ERA2 allocation, and did not experience any other reallocation, it must obligate 75 percent of its post-reallocation amount (or 37.5 percent of its initial ERA2 allocation) to use its remaining ERA2 funds for eligible affordable rental housing and eviction prevention purposes. If a grantee reaches the 75 percent threshold after October 1, 2022, it may begin using ERA2 funds for eligible affordable rental housing and eviction prevention purposes once it reaches the threshold.

Administrative Costs Attributable to Affordable Rental Housing and Eviction Prevention Purposes

The statute establishing ERA2 permits each grantee to use up to 15 percent of the total amount of ERA2 funds paid to it for eligible administrative costs. Consistent with FAQ 29, any direct and indirect administrative costs must be allocated by the grantee to the provision of financial assistance, housing stability services, or other affordable rental housing and eviction prevention purposes. Thus, a grantee's administrative costs with respect to affordable rental housing and eviction prevention purposes may be paid with ERA2 funds only in an amount up to 15 percent of the grantee's expenditures for these purposes.

[16] Such approval occurs at the time of the execution of a written agreement or other legal instrument providing for the disbursement of ERA2 funds.

[17] To determine whether a grantee has obligated ERA2 funds, Treasury will rely on the criteria set forth in section II.A of the ERA1 Reallocation Guidance originally published on October 4, 2021 and updated on March 30, 2022, available at https://home.treasury.gov/system/files/136/Updated-ERA1-Reallocation-Guidance%203-30-%202022.pdf.

EXHIBIT M

COVID19 Emergency Rental Assistance (CERA) Rental Compliance Guidance

MSHDA's guidance on the local administration of CERA program allows for additional rules or restrictions in compliance with local codes/ordinances. The Detroit City Code requires all residential rental properties to be registered with the City, subject to periodic inspections for code compliance, and that all such properties obtain a Certificate of Compliance in order to lease the property and collect rent.

Landlords who are in compliance with this ordinance, or have an accepted Certificate of Compliance CERA Exception, will be eligible for 100% of the CERA funds. However, landlords who lack a Certificate of Compliance or an accepted Certificate of Compliance CERA Exception will initially only be eligible to receive 80% of the CERA allocation of funds. The remaining 20% of the funds will be placed into escrow until the landlord obtains a Certificate of Compliance, shows an accepted Certificate of Compliance CERA Exception, or proves that they have made repairs/improvements to the property with a total cost equal to or greater than the amount escrowed.

The following guidance provides an overview of how CERA will be implemented in Detroit relative to code compliance and health and safety concerns of rental properties.

1. **100% OF CERA FUNDS WILL BE RELEASED** if all CERA eligibility requirements are met and the property has one of the following:

    a. **Certificate of Compliance** (CoC), or

    b. **Rental Registration** and an accepted **CoC CERA Exception,** examples include:

        i. Housing Quality Standards (HQS) for Housing Choice Voucher accepting properties, or an active passing REAC score for publicly assisted housing; or

        ii. Written acknowledgement by BSEED that the property is effectively in compliance, and the lack of CoC is due to factors unrelated to the conditions of the home; or

        iii. Mutual agreement of the landlord and tenant that the condition of the home is of a high standard and that all parties wish to proceed without further intervention.

Please note, examples ii. and iii. under the accepted CoC CERA Exceptions require that the property must have a current "passed" BSEED rental inspection.

2. **80% OF THE FUNDS WILL BE DISBURSED TO THE LANDLORD, AND 20% WILL BE PAID INTO AN ESCROW ACCOUNT** if there is no CoC, or Accepted CoC CERA Exception, but the property is habitable (per MSHDA guidance relating to units with imminent threats to health and safety). The following outlines the process:

    a. A conditional dismissal or settlement agreement will be established to outline the plan for repairs to the home and/or CoC compliance within an agreed upon timeline. The timeline for these repairs will be decided between the parties, the default timeline is 3 months.

    b. The landlord becomes eligible to receive the 20% held in escrow if they complete rental registration and do either of the following:

        - Obtain a CoC or accepted CoC CERA Exception and provide proof of same; or

        - Complete the repairs/improvements to the rental property for compliance-related repairs as outlined in the conditional dismissal or settlement agreement in an amount equal to or greater to the 20% escrowed amount. Landlord will provide documentation of repairs to tenant counsel or processor, including proof of payment/ receipts and a signed Affirmation of Repairs and Costs. Inspection costs may be included in repair costs.

Please note, the release of CERA funds *does not exempt* the landlord from meeting CoC requirements under local ordinance.

3. **HEALTH AND SAFETY** If there is no CoC, or an accepted CoC CERA Exception, and the property is considered uninhabitable according to MSHDA rules, then the landlord is not eligible to receive over 50% of the CERA funds. The other 50% of funds will be placed in escrow until the habitability issue is corrected.

    - If, upon resolving the habitability issue, the property does not have a CoC or an accepted CoC CERA Exception, 30% of the full payout will be released to the landlord, the remaining 20% will be held in escrow, and the 80/20 process will be initiated.

EXHIBIT N

U.S. DEPARTMENT OF THE TREASURY

About the CARES Act and the Consolidated Appropriations Act

The Coronavirus Aid, Relief, and Economic Security (CARES) Act (2020) and the Coronavirus Response and Consolidated Appropriations Act (2021) provided fast and direct economic assistance for American workers, families, small businesses, and industries.

The CARES Act implemented a variety of programs to address issues related to the onset of the COVID-19 pandemic.
The Consolidated Appropriations Act continued many of these programs by adding new phases, new allocations, and new guidance to address issues related to the continuation of the COVID-19 pandemic.

The CARES Act was passed by Congress on March 25, 2020 and signed into law on March 27, 2020.
The Consolidated Appropriations Act (2021) was passed by Congress on December 21, 2020 and signed into law on December 27, 2020.

EXHIBIT O

CONGRESS.GOV

S.Amdt.1578 to H.R.748

116th Congress (2019-2020)

Amends Bill: H.R.748 — CARES Act
Sponsor: Sen. McConnell, Mitch [R-KY] (Submitted 03/25/2020, Proposed 03/25/2020)
Amendments to This Amendment: S.Amdt.1577
Latest Action: 03/25/2020 Amendment SA 1578 agreed to in Senate by Unanimous Consent.

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Purpose:

Providing emergency assistance and health care response for individuals, families, and businesses affected by the 2020 coronavirus pandemic.

EXHIBIT P

AMERICAN RESCUE PLAN

TWO YEARS IN:

THE AMERICAN RESCUE PLAN ACT'S HISTORIC INVESTMENTS IN A STRONGER ECONOMIC FUTURE



March 2023

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Executive Summary

The American Rescue Plan has helped to power one of the strongest and most equitable recoveries on record while making investments which position our nation for economic success in the coming decades. As Secretary Yellen has said, "[t]he Rescue Plan provided critical relief and helped drive a historic recovery. . . The strong recovery of the past two years has not only meant that Americans are better off today. It has allowed us to focus on what our economy will look like in 2030—not just 2023." American Rescue Plan investments helped make 2021 and 2022 the fastest two years of job growth and new small business formation on record and contributed to the unemployment rate reaching its lowest level in over 50 years at the start of 2023, with historically rapid recoveries in Hispanic, Black, youth, and long-term unemployment.

Following enactment of the American Rescue Plan in March of 2021, the Treasury Department oversaw an historic and unprecedented provision of assistance to struggling Americans, including delivering more than 150 million Economic Impact Payments within the first few weeks following the American Rescue Plan's passage; helping launch a national infrastructure to provide emergency rental assistance and prevent evictions across the country; issuing the first ever monthly payments of the Child Tax Credit supporting tens of millions of families; and rapidly distributing unprecedented financial support to every state, local, Tribal and territorial government to help stabilize budgets, avoid cuts, address pressing community needs, and help support a rapid, resilient, and equitable recovery.

Over the last year, American Rescue Plan programs administered by Treasury continued to make a significant difference in the lives of millions of Americans and contribute to a strengthening of local communities and an expansion of economic opportunities, including:

Delivering direct and flexible aid to over 30,000 state, local, Tribal, and territorial governments to respond to the pandemic and make critical investments in a strong and equitable recovery. To date, over 99% of all available State and Local Fiscal Recovery Funds have been delivered into the hands of nearly every state, local, Tribal, and territorial government to support their response to the pandemic and help avoid the consequences of the Great Recession, when state and local austerity was a drag on GDP growth for the first 14 quarters of the recovery. To date, recipients have budgeted $11.8 billion for public health projects, $15.9 billion for housing-related purposes, $10.9 billion for workforce support, $4.4 billion for small business support, and $24.3 billion for critical infrastructure investments in broadband, water, and sewer.

Investing in expanded access to high-speed internet, benefiting over 1.4 million underserved families and businesses. Through the Capital Projects Fund, Treasury has approved awards for high-speed internet infrastructure that will deliver reliable, affordable access to over 1.4 million currently underserved homes and businesses in 34 states.

Delivering rental and utility assistance to millions of hard-pressed renter households, preventing evictions and helping families remain in their homes. Through December 2022, the Emergency Rental Assistance program had delivered more than 10.3 million assistance payments to families at risk of eviction. While eviction diversion programs were uncommon before the pandemic, at least 180 jurisdictions across 36 states have launched or strengthened eviction diversion programs with ERA, programs that have significantly limited eviction rates.

Providing a lifeline to over 230,000 families at risk of losing their homes. As Homeowner Assistance Fund programs geared up across the states and territories, more than 230,000 families at-risk of foreclosure received assistance in 2022. Despite the economic disruptions caused by COVID-19, foreclosure starts are 30% below pre-pandemic levels, according to Black Knight data, even after the expiration of several emergency foreclosure protections from the height of the pandemic.

Launching small business assistance programs—with a focus on entrepreneurs and owners who have been underserved historically—that will provide equity investment or credit support to up to 100,000 small businesses over the next decade. Building off the two highest years for new small business formation on record in 2021 and 2022, Treasury approved plans for State Small Business Credit Initiative-supported programs in 51 states and territories over the past 12 months. These plans are designed to catalyze tens of billions of dollars of private investment and support up to 100,000 small businesses over the next decade. Moreover, through 2022, Treasury made $8.38 billion in investments to 170 community financial institutions through the Emergency Capital Investment Program that will increase lending to small businesses and other community development priorities.

Delivering historic tax relief for families and record reductions in child poverty. New data released in 2022 by the Census Bureau showed that the expanded Child Tax Credit provided by the American Rescue Plan was the leading driver behind a 46% decline in child poverty in 2021— cutting the annual child poverty rate to its lowest-ever recorded level including record lows in Black, Hispanic, Native American, Asian, and white child poverty. Additionally, the lifting of restrictions that prevented families with fewer than three age-eligible children from receiving the Child Tax Credit in Puerto Rico led to 200,000 more families in the archipelago receiving the credit when they filed taxes in 2022 compared to a year earlier.



State and Local Fiscal Recovery Funds

The State and Local Fiscal Recovery Funds (SLFRF) program provided $350 billion to over 30,000 state, local, Tribal, and territorial government governments across the country to support both their immediate needs in responding to the COVID-19 pandemic and their longer-term efforts to build a strong recovery. In contrast to previous downturns where state, local, and Tribal governments faced budget shortfalls that slowed recovery and resulted in cuts to needed services, SLFRF provided the resources communities needed to help drive a stronger economy, both now and over the long-run.

Swift delivery to meet needs during a crisis: In the months before the passage of the ARP, survey data found that 90% of cities were experiencing revenue declines and that half of states were imposing hiring freezes, furloughing workers, or cutting salaries or other staff costs. The first tranche of SLFRF funding was made available to recipients in 2021, only two months after ARP's enactment, with the second tranche of funding becoming available in May 2022. In addition to preventing layoffs and service cuts, swift disbursement of funds allowed governments to support public health – with recipients budgeting over $11 billion towards more than 5,300 public health projects to date. Today, more than 99% of funds are now in the hands of recipients and, according to NASBO, states have budgeted more than 90% of the funds they have received.

Flexible funding to respond to the diverse needs of different communities: With many governments of all sizes facing substantial fiscal challenges as a result of the pandemic – which both reduced revenues and increased the need for services in their communities – the SLFRF program was designed to provide flexible aid, including the ability to use funds up to the level of a government's revenue loss on the broad range of services that governments traditionally provide. Treasury's Final Rule additionally identified a wide range of eligible uses to respond to the coronavirus pandemic and its negative economic impacts. These flexibilities provided in ARP recognized that there is no one-size-fits-all approach to the challenges facing communities ranging from large states to small towns, and gave recipients the ability to take approaches that met local needs.

Catalyzing investment to support a strong recovery: Governments have used SLFRF funds not only to prevent cuts in government services and respond to the immediate health and economic consequences of the pandemic, but also to make much-needed investments to strengthen their economies and their communities over the long-run. To date, recipients have budgeted $11.8 billion for public health projects, $15.9 billion for housing-related purposes, $10.9 billion for workforce support, $4.4 billion for small business support, and $24.3 billion for critical infrastructure investments in broadband, water, and sewer.

Direct relief to local and tribal governments: SLFRF provided direct relief to local governments of every size, including smaller city, county, and town governments excluded from direct support in previous fiscal aid programs. This support has allowed rural communities, for example, to invest in areas like public health, broadband, and sewer and water infrastructure. Likewise, Tribal governments received historic funding through $20 billion in SLFRF funds allocated to them, the largest single infusion of federal funding into Indian Country in U.S. history, discussed in greater detail in Treasury's SLFRF Tribal Recovery Report. Putting relief directly in the hands of local communities and Tribal governments has allowed them to quickly respond to the unique needs of their communities and make the investments they deem most valuable.

Catalyzing an equitable recovery: The Biden Administration recognized that fully addressing the disproportionate impacts of the pandemic required addressing underlying disparities that left some people and communities more vulnerable to the pandemic, not just the incremental impacts that occurred during the pandemic. To translate this goal into action, Treasury provided a broad menu of services to enhance health and economic equity that were automatically eligible uses of funds in low-income, high-poverty communities. For example, the Final Rule made all low-income households and communities automatically eligible for services and expanded eligible uses of funds in disproportionately impacted communities to encourage more investment. Treasury's SLFRF Equity and Outcomes Resource Guide highlights the tools and processes recipients are using to incorporate equity into their SLFRF programs.

Support for innovation: The SLFRF program allows state, local, Tribal, and territorial governments to build public sector capacity by making investments in program evaluation, data analysis, and community outreach to improve the efficacy of vital public health and economic relief programs. Taken together, this approach is helping governments build their capacity to be better prepared and more resilient for future crises. Furthermore, Treasury's reporting requirements gather information about how recipients are using evidence and evaluation in their SLFRF programs. Treasury has also worked with outside groups to highlight "best practices" – both in terms of equitably deploying funds generally and in encouraging the best uses of funds in priority areas, creating a dynamic where many communities are following the lead of high performers.

Moving forward, Treasury is implementing new eligible uses for SLFRF funds in areas like infrastructure investment that will further support a strong recovery. At the same time, Treasury will continue to work with SLFRF recipients to share best practices and lift up examples of how recipients are using their funds to help recipients meet the deadline to obligate SLFRF funds by December 31, 2024, and expend them by December 31, 2026.



Addressing public health needs

1,500 governments report having budgeted nearly $12 billion for more than 5,300 projects addressing public health needs including COVID-19 testing, vaccinations, staffing, and outreach to underserved communities.

Providing state, local, Tribal, and territorial governments the resources needed to address public health needs is a core goal of SLFRF. In addition to fighting COVID-19 through vaccinations, testing, supporting hospital capacity, protecting nursing homes and congregate settings, purchasing PPE, and supporting local health departments, recipients have also invested funds in behavioral health care, such as substance use and mental health treatment, as well as preventing and responding to violence, in recognition of the broad mental and emotional health consequences of COVID-19. For local governments, the provision of COVID-19 public health services is one of the top programmatic expenditure categories, due in part to SLFRF being the first time that most local governments received direct, dedicated federal support to respond to the pandemic and its impacts. Examples[1] of how recipients are investing in public health include:

The State of Alaska budgeted $40 million to address the state's most critical COVID public health needs that were not covered by other available funding sources, including providing testing equipment and consultation services to address the ongoing needs of the pandemic.

El Paso, Texas budgeted more than $16 million for the health department's COVID-19 response teams including testing, vaccination, and the response supply center. This initiative also includes the design and construction of a new clinic which will provide COVID-19 response services to underserved communities.

Milwaukee, Wisconsin obligated over $13 million for COVID-19 public health services including testing, vaccinations, isolation, a COVID-19 hotline, and medical respite care. These services are targeted to disproportionately impacted low-income and minority communities as these were identified as the most vulnerable populations based on socioeconomic status, housing type, and transportation access.

Allegheny County, Pennsylvania budgeted $14.5 million to build the county Department of Human Services' capacity and add new services to address behavioral health issues, including regional call centers, mobile crisis teams, and receiving and stabilization facilities.

The Ninilchik Village will braid SLFRF with IHS funding to build a primary care medical clinic to serve the Homer, Alaska , community and establish a second clinic for the Anchor Point, Alaska community.

1 Data based on Project and Expenditure Reports submitted to Treasury for the reporting period ended December 31, 2022. The examples included throughout this report are based on recipient reports, and their inclusion in this document does not constitute an explicit approval of these projects by Treasury.

Supporting affordable housing

SLFRF recipients have committed nearly $16 billion on more than 2,100 projects to meet housing needs, over $5.4 billion of which have been committed to affordable housing development and preservation. Recipients have reported serving more than 3.6 million households with rent, mortgage, or utility aid.

The COVID-19 pandemic exacerbated the pre-existing housing crisis, putting millions of renters and homeowners at risk of losing their homes. Expanding access to affordable housing is a top priority for Treasury and the Administration, and the use of SLFRF funds for affordable housing is part of the Administration's broader Housing Supply Action Plan to ease housing costs over time. Treasury is playing a key role in this work by encouraging jurisdictions to consider using SLFRF for affordable housing or to supplement other ARP programs aiding renters and homeowners, such as the Emergency Rental Assistance program and the Homeowners Assistance Fund, which are discussed in detail below.

In July 2022, Treasury announced additional guidance designed to increase the affordable housing supply by expanding the list of presumptively eligible uses of funds for affordable housing and permitting recipients to use SLFRF to make long-term loans to finance certain affordable housing projects, including Low-Income Housing Tax Credit projects. Since then, SLFRF recipients have increased their investments in affordable housing projects by 20%.

Examples of how governments are investing their SLFRF to increase the supply of housing in their communities include:

The State of Idaho has budgeted $50 million for gap financing to eligible low- and moderate-income-targeted multifamily housing developments and down payment/closing cost assistance for low- and moderate-income homebuyers. This will ensure that those who were the most economically impacted by the COVID-19 pandemic and the affordable housing crisis have access to long-term, high-quality, affordable housing.

Mobile, Alabama has budgeted more than $4 million to work with housing developers and the local Public Housing Authority to revitalize neighborhoods with affordable housing for unhoused persons and first-time homebuyers.

Pensacola, Florida has allocated $3 million to improve access to stable, affordable housing for unhoused individuals as well as programs to assist the unhoused.

Rochester, New York is dedicating over $13 million focused on creating homeownership opportunities for low-income residents in neighborhoods that have faced challenges even before the COVID-19 pandemic. This includes constructing new single-family houses on previously vacant city-owned land in targeted neighborhoods and incorporating sustainability and energy efficiency in construction.

Tarrant County, Texas has budgeted more than $33 million into expanding permanent supportive housing as the COVID-19 pandemic highlighted the need for additional housing to serve its most vulnerable populations. The project includes grant awards to nonprofits that focus on housing and was facilitated through an application process run by the Tarrant County Housing Finance Corporation.

The Knik Tribe will build 32 affordable homes for its elder population. The homes incorporate accessibility floorplans and important age-in-place features that will support independence.

Affordable Rental Housing: case study

Maricopa County, Arizona invests in both the supply of affordable housing and wraparound services to assist tenants in maintaining and finding rental housing

Housing Supply

Construction and Preservation of Affordable Housing ($65.2M)
Add at least 120 affordable housing units to existing affordable housing inventory, with a focus on constructing new affordable housing on Qualified Census Tracts or renovating existing buildings in QCTs

Wrap-around Services

Payments to Landlords ($11.6M)
Direct payments to landlords and utility companies with tenants facing eviction due to nonpayment of rent with assurances the tenants will not be evicted one money is received, identified through the ERA program

Rental and Utility Assistance ($0.8M)
Rent and utility payment assistance to individuals who lost jobs or had significant income reduction due to the pandemic

Longer-Term Case Management & Self Support ($4.5M)
Provide long-term case management for clients obtaining rent and utility assistance, as well as workforce assistance and childcare / early education assistance provided by the county or other community-based services

Navigation and Application Assistance ($3.9M)
Fund navigation and application assistance for seeking rental or utility assistance and emergency / temporary housing

Eviction Prevention Legal Aid ($2.6M)
Fund expert legal counsel and county court representation for tenants facing eviction due to nonpayment of rent

Services for Unhoused Persons: case study

City of Austin, Texas* invests in eight projects totaling $95.3M in SLFRF dedicated to a comprehensive, community-wide effort to reduce levels of unsheltered homelessness across Austin. These projects are allocated under revenue loss, under expenditure category 6.1: Provision of Government Services. These projects fits within a larger three-year community initiative called Finding Home ATX, coordinating investments from public and private sources to achieve three core objectives: (1) house an additional 3,000 individuals experiencing homelessness, (2) add 1,300 new units of affordable housing for the population experiencing homelessness, and (3) build a better Homelessness Response System by ensuring program access and outcomes are equitable, investing in social service provider capacity building and developing stronger system oversight and performance mgmt. functions.

Rapid Housing Programs ($45.0M)
Fund rapid rehousing programs including case mgmt., housing location and placement services, up to 24 months of rental / utility assistance

Permanent Housing Capital Expense ($14.1M)
Fund property acquisition, renovation, and associated costs to create more deeply affordable housing units

Emergency Shelter & Crisis Services ($10.0M)
Fund temporary shelter, street outreach, and other crisis services for individuals experiencing unsheltered homelessness

Supporting Providers ($5.2M)
Fund capacity building for organizations with the Homelessness Response System, focusing on equitable outcomes and innovative solutions

Landlord Engagement and Move In ($5.0M)
Fund housing barrier reduction efforts through landlord outreach and engagement, coordination of housing inventory, and move-in supports

Targeted Prevention ($2.5M)
Fund eviction interventions, landlord mediation, financial assistance, rental subsidies, legal services, case management, etc.

Other Homeless Support Services ($9.5M)
Fund workforce / employment development, behavioral health, and benefits access services

Homeless System Support ($4.0M)
Fund oversight and performance management, community engagement, and communications of the Homelessness Response System

**Recipient accounts for funding for projects under Revenue Replacement*

Supporting the workforce

SLFRF recipients have budgeted nearly $11 billion in SLFRF funds for more than 3,500 projects to create jobs and opportunities for workers in response to the negative economic impacts of the pandemic on communities.

Many SLFRF projects are using their funds to help workers enter or re-enter the workforce and find good-paying jobs, helping to build a stronger recovery. Key areas of workforce investment include helping impacted workers enter in-demand careers, with a particular focus on assisting people that have barriers to employment and preparing for industries of the future such as those catalyzed by the Inflation Reduction Act, the Creating Helpful Incentives to Produce Semiconductors and Science Act (CHIPS), and the Bipartisan Infrastructure Law. Recipients have invested in programs including apprenticeship and pre-apprenticeship initiatives, job training developed in partnership with labor and the private sector, and supportive services to ensure parents have affordable childcare while they work.

Examples of how recipients are using SLFRF to invest in workers include:

Detroit, Michigan budgeted nearly $59 million for Detroiters for Skills for Life, a training and career readiness program for residents that continue to face economic hardships exacerbated by the COVID-19 pandemic. The program provides employment and skill and career-building activities and assists in removing barriers to employment by offering disconnected workers on-ramps so that they may earn income while building critical skills to improve long-term employment and job retention prospects.

The State of Maine budgeted $1.5 million for the Maine Apprenticeship Program that is specifically focused on building high quality pre-apprenticeship and apprenticeship programs for the clean energy sector in partnership with businesses, industry associations, unions, education and training providers, and community-based organizations.

Pima County, Arizona budgeted over $5 million for a 'Micro-Pathways' program to provide participants with financial support to access short-term programs that lead directly into in-demand jobs with family-sustaining wages. The county will also support apprenticeships and other workforce programs focused on high growth career fields.

Roanoke, Virginia obligated $3 million to the Star City Works program devoted to identifying the needs of employers in high-growth, high-potential sectors and to filling any gaps that may exist in the local workforce. The program includes training, work-based learning opportunities, and wrap-around supportive services (transportation, childcare, food assistance, utility/ mortgage assistance).

The Lovelock Paiute Tribe is assisting working parents with long-term solutions for childcare. The pandemic reduced childcare in an area that already had an ongoing lack of options. The Tribe is constructing both a daycare and a Head Start to assist families and provide comprehensive early childhood education.

Salt Lake City, Utah obligated $1.5 million to cover payroll and benefits to hire positions that were unfilled due to the negative economic impact of the pandemic on public sector employment.

Travis County, Texas budgeted more than $6 million for a workforce development program targeting the pandemic's effect on local industries by providing training aligned with industries in the community workforce development plan. The program provides supportive services including childcare, transportation assistance, laptops and mobile hotspots, educational assistance stipends, work-related payments, and subsidized employment while in work-based learning or apprenticeship programs.

Job Training: Case Study

State of Connecticut invests $70M in rolling out CareerConneCT through the Office of Workforce Strategy. The program will focus on job training programs aimed at getting unemployed inviduals or individuals significantly impacted by the pandemic back to work in high demand industries:

Achieve the following goal:

Train and place 5,500-7,000 students and job seekers into in-demand industries with a **focus on reentry for formerly incarcerated inviduals** to transition back to the workforce

Through the following levers:

- **5 Regional Workforce Development Boards** collaborate with regional training providers and companies to inform the design of each application
- **Collaboration with 26 Non-profit organizations** to support rollout and implementation
- **Creation of multiple non-degree training programs with pipeline into high-paying jobs in bioscience industry**
- Additional Resources to **support education and training to expand state's healthcare workforce**

Into the following industries:

- **Healthcare**
- **Manufacturing**
- **IT**
- **Bioscience**
- **Clean Energy**
- **Construction**

Job Training: Case Study

State of Idaho invests $50.0M in Leading Idaho, comprised of four projects that enable workforce support, training, and employment readiness initiatives:

Talent Pipeline Management (TPM)

Goal: identify / align workforce training to high quality jobs

Tactic: fund a TPM Project Manager in each of 6 regions and Project Managers in manufacturing in construction. Project managers will be employed through regional organizations (*e.g. colleges, chambers, economic development groups*).

Outcomes: 30 employer collaboratives to align training and recruiting

TPM Implementation

Goal: invest in training infrastructure, equipment, curriculum

Tactic: supplement Workforce development Training Fund over 2-years, and invest in simulators and mobile training equipment to cover acquisition costs for colleges and industry organizations

Outcomes: 3,790 ongoing "training slots" made available per year

Idaho Launch

Goal: provide financial assistance to Idahoans to access the training

Tactic: provide financial assistance to approved job trainees, as well as tech improvements to increase public access and community outreach and engagement activities

Outcomes: 6,370 trainees receiving financial assistance by December 31, 2023

Next Steps Idaho

Goal: improve technology resources that connect individuals to jobs – including work-based learning

Tactic: tech improvements to increase public access and delivery of Next Steps Idaho, including resume and cover letter builder by December 31, 2023

Outcomes: 1,000 Idahoans with Next Steps Idaho portfolios

Supporting small businesses

SLFRF recipients have budgeted $4.4 billion for over 1,100 projects to support small businesses and small business development.

The ARP and other recovery programs included decisive action to stabilize small businesses, helping them keep their doors open and staff on payroll. But beyond the immediate crisis, the ARP is supporting transformational investments in expanding access to credit and entrepreneurship support in underserved communities, including providing technical assistance and grants that provide investment capital and loans to small, minority, and women-owned businesses. These programs will expand opportunity, strengthen the economy in places underserved for far too long, and increase our resilience to the next crisis. These investments complement other Administration investments including the ARP's State Small Business Credit Initiative, which is discussed in more detail below.

Examples of how localities are investing their SLFRF into their communities' small businesses include:

Cincinnati, Ohio spent $1 million to deliver operational grants and training to new and established women-owned businesses to create job opportunities for residents and entrepreneurship opportunities for women, including women in business that have carried a disproportionately high burden in managing the social challenges of the pandemic.

McHenry County, Illinois obligated more than $1 million for the Advance McHenry County Manufacturing Initiative, which provides manufacturers with customizable technical assistance and training solutions to rebound from the pandemic, be more globally competitive, and increase resilience to future economic shocks. The program is a partnership between the county's college system and workforce network board that offers ten categories of technical assistance aligned with the U.S. Department of Commerce's Baldridge Performance Excellence Framework.

Lee County, Florida obligated $250,000 to assist small businesses disproportionately affected by COVID-19 by targeting businesses in Qualified Census Tracts and low- and moderate-income designated areas who had substantial declines in gross receipts and have less access to credit. The project will provide technical assistance, counseling, or business planning services to provide individualized and group training in business planning and improvement.

The State of Maryland budgeted $70 million to provide financial support to new or expanding businesses, including by designating funds for the Maryland Small, Minority, and Women-Owned Businesses Account, which gives grants to eligible fund managers to provide investment capital and loans to small, minority, and women-owned businesses.

Sacramento County, California budgeted nearly $3 million to provide assistance to small businesses that were negatively impacted by COVID-19 through outreach, technical assistance, training, and one-on-one consulting in various languages to engage hard-to reach businesses using culturally appropriate methods.

The Douglas Indian Association developed a Tribal Fisherman Grant to assist small business owners who have maintained a historic Tribal presence in the commercial fishing and seafood industry. Demand for fresh seafood plummeted as restaurants, hotels, and catering businesses shuttered during the pandemic. The grants intend to offset the escalating fuel costs, transportation restrictions, and a decrease in salmon catches to help Tribal citizens economically recover.

Investing in infrastructure

SLFRF is allowing state, local, Tribal, and territorial governments to make key investments in infrastructure projects that respond to needs that were highlighted by the pandemic and that will support future economic growth.

Overall, more than 2,600 governments have budgeted more than $24 billion for almost 7,500 critical infrastructure projects that support expanded access to high-speed internet and clean water. SLFRF is helping states and localities to further supercharge the additional historic federal investments in infrastructure delivered by the Biden-Harris Administration through the Bipartisan Infrastructure Law and complementing the ARP investment in expanded affordable highspeed internet access through the Capital Projects Fund, which is discussed in more detail below.

In January 2022, when Treasury issued the final rule for SLFRF, it included an expanded set of eligible lead remediation uses, including replacement of faucets and fixtures in schools and daycares, and confirmed recipients' ability to use funds for the replacement of lead services lines. Recipients have budgeted over $365 million in lead remediation projects. Recognizing that not all households and communities are served by water and sewer systems, the final rule also expanded eligible uses to include infrastructure to improve access to safe drinking water for families served by residential wells.

Examples of how governments are investing their SLFRF in infrastructure projects include:

The State of Alabama budgeted $51 million to develop a statewide middle-mile fiber network that will support, catalyze, and facilitate future last-mile projects.

American Samoa budgeted $10 million for broadband development as the pandemic made clear that remote work, distance learning, and telehealth are essential services. The territory will work with local internet service providers to support the delivery of internet service that reliably meets or exceeds symmetrical upload and download speeds of 100 mbps.

Carroll County, Maryland budgeted $15 million to make investments in broadband infrastructure in response to COVID-19 when households and businesses lacking reliable high-speed service were at a significant disadvantage in areas such as educational, economic, and health opportunities. Carroll County will increase access to the 12% of Carroll households and businesses currently unserved by a high-speed connection by providing 100/100 mbps service that will include an option for low-income customers.

Janesville, Wisconsin budgeted over $2 million in order to improve drinking water quality by replacing publicly owned lead pipes.

Rankin County, Mississippi budgeted $26 million for 45 projects that are improving water quality protection, floodplain management, environmental restoration, and wetlands restoration.

Capital Projects Fund

The American Rescue Plan's Coronavirus Capital Projects Fund (CPF) is a $10 billion down payment on the Biden-Harris Administration's goal of connecting every American household to affordable, reliable high-speed Internet. In addition to broadband infrastructure, CPF funds can also be invested in other critical capital projects that enable work, education, and health monitoring in response to the public health emergency, including laptops, public Wi-Fi, and multipurpose community centers.

To date, the CPF has awarded approximately $5 billion to 34 states that will be invested in high-speed internet infrastructure estimated by states to reach more than 1.4 million homes and businesses. To date, CPF has additionally awarded more than $38.5 million to 231 Tribal governments, and maintains an updated list of Tribal projects as they are awarded.

Putting broadband affordability front and center: CPF is designed to not only connect families to the Internet, but ensure that their connection is affordable. As a result, Treasury requires that all service providers participate in the Federal Communications Commission (FCC)'s Affordable Connectivity Program (ACP)—which provides a discount of up to $30 per month to qualifying households (or up to $75 per eligible household on Tribal lands). To further lower costs, President Biden and Vice President Harris announced the Administration has secured commitments from 20 leading internet service providers—covering more than 80% of the U.S. population—to offer all ACP-eligible households high-speed, high-quality internet plans for no more than $30 per month. As a result of this agreement and the ACP, eligible households can receive internet access at no cost and can check their eligibility and sign up at GetInternet.gov.

Laying the groundwork for future investments: In addition to the $10 billion provided by CPF, governments have reported budgeting an additional nearly $7.3 billion in SLFRF funds towards broadband. Together, these funds can be blended and braided to have a greater impact. The ARP programs and the Bipartisan Infrastructure Law are also working in tandem to close the digital divide—deploying high-speed internet to those without access and lowering costs for those who cannot afford it. Treasury additionally entered into a Memorandum of Understanding on May 12, 2022, with the FCC, the National Telecommunications and Information Administration at the Department of Commerce, and the Department of Agriculture to, among other things, develop consistent and complementary reporting processes and share information with each other about broadband projects.

Treasury continues to make progress reviewing and approving states' CPF applications, and will be announcing additional awards for states' broadband plans throughout 2023.

Examples of how states are investing their CPF awards include:

Louisiana was approved for $176.7 million (representing 100% of its available CPF funding) for the state's new Granting Unserved Municipalities Broadband Opportunities (GUMBO) program, a multi-phase, broadband infrastructure competitive grant program. Louisiana estimates that projects receiving funding from this CPF award will close the digital divide for approximately 25% of all locations lacking high-speed internet access in the state and connect nearly 88,500 homes and businesses currently lacking access to internet at speeds of 25/3 Mbps.

Virginia was approved for $219.8 million (representing 100% of its available CPF funding) and will use funds to expand last-mile broadband access to an estimated 76,873 locations, approximately 28% of locations the state estimates lack access to high-quality broadband service. Through a competitive grant-making program overseen by the Virginia Telecommunication Initiative (VATI), local governments in partnership with internet service providers apply for funds with the goal of deploying universal coverage solutions in the localities involved.

West Virginia was approved for $136.3 million (representing 100% of its available CPF funding), and estimates that projects receiving funding from this CPF award will serve 20,000 locations, or approximately 10% of locations in the state that lack access to high-speed internet. The state will use three separate grant programs that focus funding for last-mile connections to homes and businesses currently without access to internet at speeds of at least 25/3 Mbps. The Line Extension Advancement and Development Program (LEAD) will fund the extensions of last-mile broadband networks that can be constructed quickly, the Major Broadband Projects Strategies Program (MBPS) will fund larger-scale projects designed to serve large numbers of eligible addresses, and GigReady will provide local governments with the opportunity to utilize SLFRF as matching funds for broadband infrastructure projects. Each of these three programs is designed to enable funding to reach areas that are hardest to serve due to low population density, rurality, or other factors.



CPF Awards to Date

Recipient	Locations Served *(estimated by states)*	Award Amount *(Millions)*
Alabama	55,000	$191.9
Arizona	127,807	$99.4
Arkansas	35,000	$158
Colorado	18,000	$170.8
Connecticut	10,000	$41
Florida	48,400	$248
Georgia	70,000	$250
Illinois	87,163	$253.68
Indiana	55,349	$203
Iowa	18,972	$152
Kansas	21,300	$84
Kentucky	45,000	$182.8
Louisiana	88,500	$177
Maine	22,500	$110
Maryland	16,667	$95
Massachusetts	16,000	$145
Michigan	67,857	$250
Minnesota	32,917	$127
Missouri	37,979	$196.7
Nebraska	21,000	$88
Nevada	40,187	$55.2
New Hampshire	24,000	$122
New Mexico	40,611	$117
North Carolina	78,100	$177.7
North Dakota	3,965	$45
South Carolina	31,650	$185.8
Tennessee	50,000	$185
Texas	152,000	$363.8
Utah	3,080	$10
Vermont	13,818	$90
Virginia	76,873	$220
West Virgina	20,000	$136
Wisconsin	8,000	$40
Wyoming	11,700	$70.5
	1,449,395	$5,041

Emergency Rental Assistance Program

The COVID-19 pandemic put millions of renters at risk of losing their homes, aggravating a crisis in housing affordability that pre-dated the pandemic. By December 2020, nearly one in five renters reported being behind on rent, with renters of color especially likely to report being behind. One in seven renters viewed the risk of eviction within the next two months as "very likely."

The Emergency Rental Assistance (ERA) program has provided a critical lifeline to renters throughout the pandemic, while helping to build lasting eviction prevention infrastructure across the country. Despite projections of an eviction "tsunami" following the end of the CDC eviction moratorium in August 2021, eviction filings nationally in 2021 remained 26% below historic averages in the 10 months since the end of the moratorium, based on an analysis of data collected by the Eviction Lab at Princeton University, and remained at pre-pandemic levels in 2022. Matthew Desmond—the founder of Princeton University's Eviction Lab—has said that in conjunction with the federal eviction moratorium, ERA reflects the "the deepest investment in low-income renters the federal government has made since the nation launched its public housing system" and "the most important eviction prevention policy in American history." Altogether, ERA has made $46.55 billion available to promote housing stability—$25 billion under the ERA1 program, which Congress created at the end of 2020, and $21.55 billion under the ERA2 program established by the ARP.

Treasury took swift action to deliver assistance to millions of renters: The Administration worked swiftly to disburse tens of billions of dollars in ERA funds to jurisdictions around the country. At the same time, Treasury provided extensive support to hundreds of communities as they created unprecedented rental assistance and housing stability infrastructure through the ERA program. The result was that an eviction spike that might have occurred absent the moratorium never materialized. Princeton's Eviction Lab found that in 2021 alone, the ERA program, in conjunction with other Administration policies, helped to prevent 1.36 million eviction cases—a conservative estimate because the financial effects of the pandemic put at least twice as many renters as normal at risk of eviction. Through December 2022, the ERA program has made over 10.3 million rental assistance payments, and the vast majority of ERA funding has been deployed in communities across the country.

Treasury developed flexible program guidance and reallocated program funds, steps which both maximized and accelerated assistance for renters: Flexibilities in Treasury's guidance—such as fact-specific proxies and self-attestation—allowed programs to simplify documentation requirements while promoting strong program integrity, ensuring that communities could deliver assistance to renters in need quickly. In addition, Treasury has reallocated over $4.3 billion of ERA funds—maximizing the support available to renters by shifting funds that could otherwise go unspent to jurisdictions with demonstrated need for assistance and program capacity. Reallocation has incentivized best practices to facilitate assistance as well. For instance, Treasury allowed some jurisdictions to retain funds at risk of reallocation by adopting plans to improve program performance. Hundreds of communities have received additional funds through reallocation—often through voluntary reallocation processes in which grantees worked together to shift funds between one another.

The ERA program catalyzed a broad expansion in lasting eviction-prevention infrastructure and expanded affordable housing: Treasury's ERA guidance has empowered communities to leverage ERA resources to expand eviction prevention services, including eviction diversion programs,

housing counseling, and other initiatives. While eviction diversion programs were uncommon before the pandemic, at least 180 jurisdictions across 36 states have launched or strengthened eviction diversion programs with ERA, seeding initiatives that have significantly limited eviction rates. Treasury has also encouraged governments to leverage ERA2 funds to expand affordable housing, helping communities address long-term housing affordability challenges. Governments have continued to fund these programs with other sources of funding—including SLFRF—after spending through ERA allocations.

Advancing equity and reaching historically marginalized communities, including Tribal and rural communities: Throughout its work on ERA, Treasury has prioritized advancing equity and supporting renters in underserved, marginalized communities. Research has found that renters from marginalized groups and those most likely to face eviction have benefited from ERA: extremely low-income renters received close to two-thirds of ERA assistance, women received nearly 70 percent, and Black renters received almost half. Treasury has also provided extensive support to Tribal communities to ensure that Tribal ERA programs have been well-positioned to serve renters, and took significant policy steps in reallocation to maximize the ERA funding available to Tribal governments. Finally, to strengthen ERA in rural communities, Treasury engaged with ERA programs in rural areas to support both their outreach strategies and facilitate statewide coordination on housing stability issues.

Looking forward, in addition to communities using ERA 2 to promote direct assistance and longer-term needs, many communities are continuing to provide support to renters after expending their ERA funds, often leveraging SLFRF. Through December 31, 2022, communities provided rent, mortgage or utility assistance to more than 3.6 million individuals using SLFRF. Moreover, communities are working to build on the eviction prevention infrastructure that ERA has helped to grow, and Treasury continues to work with and encourage these governments to take additional steps to prevent evictions and promote housing stability in the long term.

Examples of jurisdictions' work to support renters with ERA include:

Pierce County, Washington conducted far-reaching outreach to stand up its ERA program, as the county had not previously invested in rental assistance infrastructure. Clark County conducted more than 200 outreach events at libraries, sent postcards to residents in 45 languages with information on rental assistance, and pursued targeted outreach to underserved communities. Washington State has now funded a permanent rental assistance program.

Washington, DC leveraged flexibilities in Treasury's ERA guidance—including self-attestation and fact-specific proxies—to ensure that rental assistance was timely delivered to eligible households. DC has also leveraged its own funding resources to continue a rental assistance program, and recently worked with a task force of community leaders across sectors to release a framework for further efforts to strengthen eviction prevention.

The State of Alaska, in partnership with the Municipality of Anchorage and 15 agencies representing 148 Tribes, launched a mobile-friendly ERA application that included text messaging features to facilitate applications. Due in part to the ease of applying, approximately one-third of Alaskan renters applied to the State's program.

Wichita, Kansas expanded ERA access by providing self-service ERA application kiosks around the city, with particular focus on low-income communities. In addition, the City worked to provide case management services for households facing eviction in order to address underlying causes of housing stability, including through connections to job training and other services and relocation to more affordable housing.

Homeowner Assistance Fund

The Homeowner Assistance Fund (HAF) was designed to support homeowners experiencing financial hardship, working in conjunction with a range of other foreclosure prevention initiatives implemented by the Biden-Harris Administration that has resulted in historically low foreclosure filings. HAF programs across the country are assisting homeowners both by providing nearly $10 billion in direct assistance and by helping homeowners access relief through their mortgage servicers, including loss mitigation on government-backed loans.

The Administration's swift actions to prevent foreclosures, including HAF, have resulted in historically low foreclosure rates: The Administration took a range of actions to prevent foreclosures shortly after the COVID-19 outbreak, including a foreclosure moratorium, increased options for mortgage payment forbearance, and enhanced loan modifications to resolve delinquencies, which together with HAF have helped keep mortgage delinquencies and foreclosures below pre-pandemic levels. HAF programs began to provide assistance in early 2022 to build on the progress of the earlier initiatives; as of December 2022, HAF has provided a lifeline to over 230,000 families at risk of losing their homes. Total obligations and expenditures across the program more than doubled from July through the end of September—and real-time dashboards published by many states show significant further acceleration in the months since then. Despite the economic disruptions caused by COVID-19, foreclosure starts are 30% below pre-pandemic levels, according to Black Knight data, even after the expiration of several emergency foreclosure protections from the height of the pandemic.

Treasury's implementation has lifted up best practices, helping to promote historic reach to low-income areas and underserved communities: Treasury required recipient governments to target assistance based on data-driven assessments of homeowner needs, with an emphasis on data that identifies disparate hardships across demographic groups. Moreover, Treasury required a planning process, which included local community input. This process culminated in the submission of plans to Treasury, which provided specific feedback for each of the plans submitted by state, territorial, and Tribal governments with the goal of promoting swift and equitable access to HAF funding. These efforts have helped to produce a more equitable distribution of assistance, with substantially broader reach to economically vulnerable and traditionally underserved homeowners than prior federal mortgage assistance and foreclosure prevention programs: 57% of HAF assistance was delivered to very low-income homeowners (those earning 50% of area median income and below); 35% of HAF homeowners self-identified as Black and 20% self-identified as Latino; and 64% of HAF beneficiaries were female.

Treasury has worked closely with agency partners to promote support for HAF recipients–establishing additional protections to help homeowners avoid foreclosure: Treasury has coordinated closely with the White House and other federal agencies to ensure that HAF supplements other federal assistance for homeowners and that funds are most effectively used to help homeowners in need. Secretary Yellen and several other Cabinet Secretaries joined together to urge mortgage servicers to pause all foreclosure proceedings for any homeowner applying for HAF assistance. These efforts have led to major servicers implementing foreclosure pauses for HAF

applicants, enabled by Treasury's ongoing work with servicers and states to improve communication and notification of HAF applications. Recently, the Department of Housing and Urban Development announced a policy change that will allow certain HAF applicants and recipients to much more easily access loss mitigation options, which provide additional support to homeowners who may need assistance from multiple sources to stay in their homes.

Looking forward, HAF programs continue to provide active assistance across the country. Moreover, several recipient governments have decided to use other Treasury funds—such as funds from the SLFRF program—to provide assistance to additional families in need. HAF funds are available to be spent to support homeowners until September 30, 2026. Treasury continues to lift up best practices, engage recipient governments on strategies to increase uptake and speed of program funding, and call on servicers to swiftly communicate with states to help homeowners in need.

Promising Practices include:

The State of California HAF Program has focused its outreach on underserved communities through multilingual, culturally competent assistance resources. For instance, the HAF application is available in six languages and the program's contact center—which has handled over 190,000 calls as of Jan. 1, 2023—can provide assistance in more than 200 languages. The state has also worked to keep the application as streamlined as possible; if an applicant has the necessary documents ready, the state estimates that the application can be completed in less than 15 minutes. Due to these efforts, as of Jan. 1, 2023, 88% of applicants surveyed by the program (5,676 applicants) reported that the application was easy to complete, and 91% said the documents were easy to upload.

The State of Michigan's HAF program, after conducting a systemwide assessment, realized it needed to increase the availability of customer service agents to help homeowners apply. To quickly increase staff capacity, the HAF program contracted with the state's 211 service to answer questions, fill out applications for those without internet access, provide status updates to applicants and refer homeowners to other services they need.

The State of Nevada's HAF program uses a data-driven approach to recalibrate program offerings based on the most common reasons for application denial, thereby continuously improving its application process and contacting denied applicants to inform them of other opportunities for assistance. Nevada's program also directly reached out to applicants who did not return to the website to complete their applications. These efforts, combined with increased marketing, resulted in a 300% increase in households assisted over a three-month period (July through September 2022).

State Small Business Credit Initiative

The State Small Business Credit Initiative (SSBCI), reauthorized and expanded by the American Rescue Plan, provides nearly $10 billion to states, territories, D.C., and Tribal governments for investments in small businesses to expand access to capital, to promote economic resiliency, and to create new jobs and economic opportunity—especially in underserved communities still reeling from the effects of the pandemic. Small businesses were hit especially hard by the pandemic, in urban, suburban and rural communities alike, as the economy faced a historic disruption. Building on a prior iteration of the program created in 2010, the SSBCI program provides capital to help existing small businesses expand and new small businesses start up.

Data suggests that the pandemic hit minority-owned small businesses particularly hard, exacerbating disparities that existed long before COVID-19. The SSBCI gives states and Tribes the tools to support small business lending and startup equity investments in all communities, especially in parts of the country and in marginalized communities working to develop an entrepreneurial finance ecosystem. In doing so, SSBCI is serving as part of the Biden Administration's broader small business agenda, which has helped support a record-breaking 10.5 million small business applications in 2021 and 2022, according to the Census Bureau.

SSBCI will catalyze tens of billions of dollars to expand access to capital for small businesses and underserved entrepreneurs: SSBCI provides funding that states, territories, and Tribal Governments can use to help small businesses receive loans or equity/venture capital investments to fuel their growth and job creation potential. Jurisdictions will deploy SSBCI capital to crowd in private financing in emerging venture capital markets and offer credit-enhancing debt products to help underserved small businesses address capital needs. With these programs, recipient governments will close gaps left by other state or federal programs, existing private sources of capital, or market-specific challenges. Treasury has now approved nearly all state and territorial plans representing 96% of the initial capital program funding allocated to states and territories under the program. In addition, Treasury is reviewing applications corresponding to over 200 Tribal governments and over $580 million in potential SSBCI funding. SSBCI is designed to catalyze up to $10 of private investment for every $1 of SSBCI funding and is expected to result in tens of billions of dollars in new small business financing across the country before 2030.

Supporting innovative approaches to catalyze small business growth: Recipient governments submitted innovative approaches to deploying the SSBCI in their respective jurisdictions. For example, Minnesota's Department of Employment and Economic Development (DEED) is implementing an Automation Loan Participation Program (ALPP) through SSBCI. The program offers a companion loan to private financing provided by a lender to purchase machinery, equipment, and software designed to increase manufacturing efficiencies. The program complements an existing state program that funds training for workers to operate new automation equipment. Minnesota expects the ALPP to increase the number of re-shored manufacturing operations and allow companies to move some outsourced activities in-house.

SSBCI has been implemented with an eye towards supporting the most vulnerable businesses and underserved business owners: The Federal Reserve Banks' 2021 Small Business Credit Survey reported that only 13% of Black-owned firms and 20% of Hispanic-owned firms received all of the non-emergency funding sought, relative to 40% of white-owned firms—underscoring the need to prioritize equity in the administration of the SSBCI program. SSBCI is a tool for recipient governments to support small businesses owned by people of color, women, individuals living in rural or Tribal communities, and otherwise underserved individuals, and to support the creation of wealth in households and communities. SSBCI includes $2.5 billion in funding and incentive allocations to support the provision of capital to underserved businesses and jurisdictions that succeed in reaching those businesses – with $1 billion of these funds to be awarded to jurisdictions based on their success in reaching underserved businesses. In addition, SSBCI includes over $700 million in allocations for Tribal governments, which will be used by hundreds of Tribes to support small businesses owned and operated by Tribal members or that operate on Tribal lands. The prior version of this program, which ran from 2010 to 2017, did not include these set-asides for underserved groups and Tribal governments. With an eye towards equitable administration, Treasury has also announced a historic data collection effort as part of SSBCI intended to help Treasury analyze the distribution of SSBCI funds and promote and track equity goals in the use of those funds.

SSBCI will provide small businesses with hundreds of millions of dollars in technical assistance not only to apply for SSBCI funds, but also a broader set of state and federal small business programs, building capacity for businesses to access capital in the long term: Treasury has announced the availability of $300 million in technical assistance, with $200 million available to states, territories, D.C., and Tribal governments to provide assistance to qualifying small businesses applying for SSBCI or certain other small business financing. In addition, Treasury has transferred $100 million for a program run by the Minority Business Development Agency at the Department of Commerce, which will provide funding to incubators and accelerators across the country to train underserved entrepreneurs seeking resources from SSBCI and other programs across the country. This technical assistance – along with another $200 million in technical assistance that will be made available in the future – will help ensure that SSBCI supports entrepreneurial ecosystems and creates jobs by allowing small businesses to access a range of small business assistance.

SSBCI is a part of broader Treasury initiatives that increase access to capital for small businesses and communities across the country: For example, through December 2022, Treasury made $8.38 billion in investments to dramatically scale up the work of 170 community financial institutions through the Emergency Capital Investment Program that will increase lending to small businesses, minority-owned businesses, low- and moderate-income consumers and other financially underserved communities. Additionally, the CDFI Equitable Recovery Program will make approximately $1.75 billion in grants available to provide funding to CDFIs to expand lending, grant making and investment activities in low to moderate income communities and to borrowers with significant unmet capital and financial services needs that have experienced disproportionate economic impacts from the COVID 19 pandemic. These initiatives, paired with broader Treasury and Administration support for small business, have helped support record numbers of new small businesses and strong growth in a range of critical industry sectors.

Treasury has now approved 51 out of 56 state and territory plans, representing 96% of the capital funds allocated to states and territories, while continuing to review Tribal submissions. In the coming months, SSBCI programs will continue ramping up and providing support to small businesses across the country, buttressed by technical assistance funding to help small businesses access assistance.

Illustrative examples of SSBCI programs include:

Engaging Underserved Business Owners in Utah: Utah's Governor's Office of Economic Opportunity ("Go Utah") developed SSBCI programs focused on filling capital needs for small businesses that are historically underserved. Utah operates several credit support programs, including a Capital Access Program that is anticipated to provide micro-loans to socially and economically disadvantaged small businesses that may have a limited credit history or face collateral shortfalls, while the Loan Participation Program partners with community development financial institutions to provide slightly larger loans for small businesses that may not be fully integrated into the conventional market.

Reaching Rural Businesses in Montana: The Montana Department of Commerce operates a loan participation program through the Montana Board of Investment (MBIV) with a goal of enabling businesses statewide to access the programs. MBIV developed a network of lenders across the state, including Community Development Financial Institutions and local revolving loan funds.

Growing the Innovation Ecosystem in Rural Vermont: Vermont is implementing a venture capital program to invest in start-ups across the state, with a focus on growing the innovation ecosystem outside Vermont's more populous hubs. Areas of concentration include renewable energy, innovative agriculture solutions, advanced manufacturing, and healthcare companies.

Enabling Diverse Venture Capital Managers in Pennsylvania: In October 2022, Pennsylvania announced their first commitment of SSBCI funds through their venture capital program. The program is focused on supporting venture capital investments in new funds under the management of underserved venture capital firms and on reaching underserved entrepreneurs.



Historic Tax Relief for Working Families and Record Low Child Poverty

The ARP delivered the largest ever Child Tax Credit, the largest ever Earned Income Tax Credit for workers without dependent children, and the largest ever Child and Dependent Care Tax Credit, helping families and low-income workers make ends meet. The advance monthly Child Tax Credit payments, which reached 38 million families with 62 million children, also showed that family tax relief payments could reliably be delivered monthly. Data released by the Census Bureau last year showed that the expanded Child Tax Credit was the leading driver behind a 46% decline in child poverty in 2021, cutting child poverty to its lowest-ever recorded level. The Administration is committed to rewarding work and fighting child poverty by pushing for Congress to permanently restore the expansion of the Child Tax Credit and Earned Income Tax Credit included within the ARP.

Additionally, the ARP permanently expanded access to the Child Tax Credit and Earned Income Tax Credit for working families in Puerto Rico. The ARP lifted an exclusion that kept low-income families in Puerto Rico with fewer than three eligible children from benefiting from the Child Tax Credit, leading to 200,000 more families in Puerto Rico receiving the expanded Child Tax Credit when they filed taxes in 2022 compared to the previous year. It also helped Puerto Rico to fund a dramatic expansion of the Earned Income Tax Credit, tripling available benefits for workers and bringing the credit broadly in line with the maximum benefit available to a similar family living elsewhere in the United States.

Saving the Pension Benefits of Millions of Workers, Retirees, and their Families

The ARP included historic assistance to secure the pension benefits earned by millions of union workers and retirees. Prior to the law, over 200 multiemployer pension plans were on pace to become insolvent. Thanks to the Special Financial Assistance program of the Pension Benefit Guaranty Corporation included in the ARP – the most significant effort to protect the solvency of the multiemployer pension system in almost 50 years – all multiemployer pension plans that receive assistance are positioned to remain solvent through at least 2051, with no cuts to earned benefits. This assistance will protect the retirement security of an estimated two to three million union workers, retirees, and their families. Already, Special Financial Assistance has been approved for multiemployer pension plans estimated to serve over 680,000 workers, retirees, and their families—ensuring that recipients will receive the full retirement benefits they earned over the coming decades—and harsh benefit cuts for tens of thousands of retirees have been reversed.

Conclusion

The American Rescue Plan has been a key part of the nation's recovery from the COVID-19 pandemic and the economic downturn that resulted from it. Treasury has worked to ensure that ARP funds help families, small businesses, and communities get back on their feet and emerge stronger out of this crisis.

Treasury has also committed to providing strong stewardship of ARP resources by conducting robust oversight over these funds. Over the past two years, Treasury has established policies and procedures—in partnership with oversight bodies and state and local auditors—to create appropriate safeguards over the use of taxpayer funds. Treasury has built a risk-based, data-driven accountability framework designed to ensure that funds are used for their intended purpose and have the greatest impact in supporting a strong recovery.

Looking ahead, Treasury will continue to work with recipients as they deploy funds in their communities. Treasury will support recipients as they apply best practices, working with them to rapidly deliver assistance to those in need while prioritizing areas likely to strengthen the economy over the long-run, such as affordable housing, workforce, and support for small businesses. Moreover, Treasury will use the lessons learned through the deployment of ARP funds at Treasury to support implementation of other key legislation, including the Inflation Reduction Act, CHIPS, and the Bipartisan Infrastructure Law. Building on the progress of the last two years, the American Rescue Plan will continue to support families, small businesses, and communities in the months and years ahead.




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DETROIT

Detroit landlords ignoring rental inspection rules, city says

Christine MacDonald The Detroit News

Published 10:38 p.m. ET Aug. 6, 2018

Six months after Detroit launched a campaign to inspect all rentals, city officials admit they've struggled to get landlords to follow through with the housing requirement.

Only 11 percent of registered rental properties -- 52 of 468 -- had city clearance to operate in the first targeted ZIP code as of last week's deadline. Mayor Mike Duggan kicked off the crackdown in February starting with the east side's 48215 in hopes of making rentals safe after more than a decade of little city enforcement.

Most landlords have ignored their calls to follow the rules and get their units inspected, officials said. In 48215 on the city's border with Grosse Pointe Park, landlords who haven't complied began receiving $750 tickets last week.

And now that the Aug. 1 deadline passed, tenants in unlicensed properties can put their rent in escrow with the city's help without facing eviction, a controversial part of Detroit's updated housing ordinance enacted early this year.

"We were hoping to get a better percentage than this," said David Bell, director of Buildings, Safety Engineering & Environmental Department. "We've gotten quite a few landlords who've taken a wait and see (approach). They are still in the mindset that they can get away with it ... that they are invisible."

The new enforcement effort came after a year-long investigation by The News found families facing eviction in homes that were never inspected by the city and had dangerous problems, including lack of heat in the winter, hazardous electric systems, missing windows, rodent infestations and a sewage-filled basement.

Bell pledged in February to have all Detroit rentals inspected in two years.

The city campaign, which included mailings and community meetings, hasn't found success in the second ZIP code it targeted, either. In 48224, only 6 percent -- 77 of 1,350 known rentals -- have certificates of compliance, Bell said. Landlords in that area, which includes East English Village and the Morningside neighborhoods, have until Sept. 1 to comply and after that tenants can also escrow their rent with the city.

Some landlords argue the city's regulations are oppressive and costly, resulting in landlords leaving the business. The city faces at least two federal lawsuits from landlords and property managers challenging the ordinance, arguing it violates owners' rights to unreasonable searches and seizures and that there is no way to challenge a city denial to operate.

"I think you will see a wave of properties being sold across the city, east to west," said James Abbott, a landlord attorney. "That's what I am hearing. It's like (landlords) are branded as criminals. I think the landlords are discouraged."

To rent in Detroit, landlords must register properties and get a certificate of compliance, which includes passing an inspection and getting a lead paint clearance. They also can't be delinquent on the property's taxes or have outstanding blight fines on the rental being inspected or others.

Bell said they know they've been able to register the vast majority of rentals in areas they've targeted because they've estimated the rental population using property tax and utility records.

But most of the landlords, mainly of one- and two-family homes, aren't following through by scheduling an inspection using one of several third-party contractors the city has hired to do the work, Bell said.

A common landlord complaint is the cost of the city's annual lead paint inspection, designed to limit exposure to the hazard. An initial inspection ranges between $450 and $700, not including the cost to address hazardous paint. The city requires annual follow-up inspections that average about $250 to make sure lead hazards haven’t returned.

The ordinance passed last year reduced some of the annual lead requirements, but landlords argue it's still one of the most restrictive in the nation.

Lead paint commonly used in homes before 1978, ingested from chips or dust, is considered the top culprit for lead poisoning in young children. High blood lead levels can have severe and lasting effects on children, leading to developmental problems, behavioral disorders and learning difficulties.

Detroit neighborhoods have some of the highest percentages of child lead poisoning in Michigan. And city wide the percentage of children with elevated lead levels is on the rise: 7.5 percent in 2015 to 8.8 percent in 2016, according to the latest data.

The Detroit City Council passed the updated rental regulations last fall, including adding the escrow provision, and the accounts will be administered by PNC Bank. If the landlord doesn't get a certificate within 90 days of the rent going into escrow, the money would go back to the tenant.

Landlords who fought the provision warned it would hurt small property owners and escalate tensions between landlords and renters. Observers expect it to be challenged in court.

No one has applied to put their rent in escrow yet, the city said. Bell said they will refer renters using escrow who face eviction cases to two legal aid groups familiar with the city's regulations.

It's unknown how the courts will treat the city's escrow provision, particularly with renters who come before judges without attorneys who are aware of the city ordinance, said Joon Sung, litigation director of Lakeshore Legal Aid, a nonprofit that represents tenants

But he said it could be an important tool to ensure safe housing in Detroit.

Nancy Blount, the chief judge of Detroit's 36th District Court, wouldn't comment.

“Any ruling regarding the City’s new ordinance will be made based upon the facts and arguments presented in a specific case,” Blount said in a written statement.

Bell said his office will do two rounds of landlord ticketing in 48215 and those landlords who still haven't passed inspections could face 90-day misdemeanors, Bell said.

"Landlords who believe that this is something they can ignore are going to be very, very sorry," Bell said. "We are serious."

The city only has been able to collected 21 percent -- about $530,000 of the $2.5 million -- it has assessed landlords in licensing-related fines since 2016, according to city data.

EXHIBIT R

Neutral
As of: December 2, 2024 10:23 PM Z

Softa Group, Inc. v. Taylor

United States District Court for the Northern District of Illinois, Eastern Division

June 24, 1993, Decided ; June 25, 1993, Docketed

No. 92 C 2420

Reporter
1993 U.S. Dist. LEXIS 8713 *; 1993 WL 239115

THE SOFTA GROUP, INC., Plaintiff, v. JEFF TAYLOR, et al., Defendants.

Core Terms

summary judgment motion, affirmative defense, proper motion

Case Summary

Procedural Posture
In a suit involving a copyright claim, defendants filed a motion to strike plaintiff's motion for summary judgment.

Overview

Plaintiff moved for summary judgment on "(1) Count I of its Amended Complaint for copyright infringement and (2) certain of defendants' affirmative defenses." Defendant moved to strike the motion. Finding that plaintiff conceded that it did not seek judgment on an entire claim, the court held that the motion for summary judgment was not a proper one under *Fed. R. Civ. P. 56(a)*. The court held that the motion to strike therefore had to be granted.

Outcome
The court granted the motion.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1 **Entitlement as Matter of Law, Appropriateness**

A motion for summary judgment under *Fed. R. Civ. P. 56(a)* must seek judgment on an entire claim. A judgment is an order from which an appeal will lie. It is improper to bring a motion that does not seek adjudication of an entire claim. Even *Fed. R. Civ. P. 56(d)*, which permits a court to narrow issues and facts for trial, may only be applied to a proper motion for judgment on a claim.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

HN2 **Entitlement as Matter of Law, Appropriateness**

A "partial summary judgment" is merely an order deciding one or more issues in advance of trial. In light of the doctrine that requires a motion for summary judgment to seek a judgment, entry of partial summary "judgment" is a prerogative of the court but not the basis of a proper motion for summary judgment. A motion brought under *Fed. R. Civ. P. 56(c)* seeking to establish liability alone is also referred to as a partial summary judgment.

Judges: [*1] LEFKOW

Opinion by: JOAN HUMPHREY LEFKOW

Opinion

MEMORANDUM DECISION

Joan H. Lefkow, Executive Magistrate Judge:

Defendants, Jeff Taylor, Mark Case and Timberline Software Corporation, have moved to strike plaintiff's, The Softa Group, Inc.'s, motion for summary judgment.

As is carefully explained in *Capitol Records, Inc. v. Progress Record Distributing, Inc., 106 F.R.D. 25 (N.D. Ill. 1985)*, ***HN1***[⬆] a motion for summary judgment under *Rule 56(a), Fed. R. Civ. P.*, must seek judgment on an entire claim. A judgment is an order from which an appeal will lie. It is improper to bring a motion that does not seek adjudication of an entire claim. [1] Even *Rule 56(d)*, which permits the court to narrow issues and facts for trial, may only be applied to a proper motion for judgment on a claim. The policy underlying the rule is disapproval of piecemeal litigation. *See Commonwealth Ins. Co. v. O. Henry Tent & Awning Co., 266 F.2d 200, 201 (7th Cir. 1959)* ("Fragmentation of a cause of action would be obnoxious to the orderly administration of justice."); *Capitol Records, 106 F.R.D. at 29* (Motions seeking adjudications **[*2]** of part of a claim would waste judicial resources in almost every case).

[*3] In the case before the court, in order to demonstrate entitlement to judgment as a matter of law on Count I, the copyright claim, plaintiff must not only establish no genuine issue of material fact on its case-in-chief but also defeat the affirmative defenses to that claim. [2] **[*4]** Plaintiff's motion requests summary judgment on "(1) Count I of its Amended Complaint for copyright infringement and (2) *certain of defendants' affirmative defenses."* Response at 5. (Emphasis added). Thus, Softa concedes that it does not seek judgment on an entire claim. For these reasons, it is concluded that Softa's motion for summary judgment is not a proper motion under *Rule 56(a) of the Federal Rules of Civil Procedure*. The motion of defendants to strike plaintiff's motion for summary judgment is therefore granted. [3]

ENTER:

JOAN HUMPHREY LEFKOW

United States Magistrate Judge

Dated: June 24, 1993

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[1] Softa refers to *American Nurses' Ass'n v. Illinois, 783 F.2d 716, 729 (7th Cir. 1986)*, as authority that motions for partial summary judgment are permitted. It would appear that the court's somewhat offhand comment to that effect was actually suggesting that if plaintiff's complaint were understood to be asserting two theories of liability rather than one as defendant had understood in making its motion, defendant's motion for summary judgment could stand as defeating one theory of liability (i.e., one claim). ***HN2***[⬆] A "partial summary judgment" is merely an order deciding one or more issues in advance of trial. *Deimer v. Cincinnati Sub-Zero Prods., Inc., 990 F.2d 342, 346 (7th Cir. 1993)*. In light of the doctrine that requires a motion for summary judgment to seek a judgment, entry of partial summary "judgment" is a prerogative of the court but not the basis of a proper motion for summary judgment. A motion brought under *Rule 56(c)* seeking to establish liability alone is also referred to as a partial summary judgment. Softa's motion is not a 56(c) motion.

[2] In light of numerous cases in this district and circuit in accord with *Capitol Records* and *Commonwealth Co.,* Softa's citation to *Koch Industries, Inc. v. United Gas Pipe Line Co., 700 F. Supp. 865 (M.D. La. 1988)*, which permitted the summary judgment device to be the instrument to defeat certain affirmative defenses, lacks persuasive force.

[3] It is further noted that the court has considerable doubt that, even if this defect were corrected, summary judgment procedure would be feasible in this case. Softa, by focusing on the elements of access and substantial similarity as circumstantial evidence of copying, seems to ignore that defendants' expert, applying his criteria for determining copying, came to the conclusion that defendants did not copy SITE MANAGER. Even if plaintiffs expert applies precisely identical criteria in coming to the opposite conclusion, the court must weigh the testimony of each witness in order to determine which is entitled to belief, a requirement that would seem to preclude summary disposition.

EXHIBIT S

Neutral
As of: December 2, 2024 10:26 PM Z

Am. Nat'l Prop. & Cas. Co. v. Campbell Ins., Inc.

United States District Court for the Middle District of Tennessee, Nashville Division

April 30, 2010, Filed

No. 3:08-0604

Reporter
2010 U.S. Dist. LEXIS 42476 *

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY, Plaintiff, v. CAMPBELL INSURANCE, INC., et al., Defendants.

Subsequent History: Magistrate's recommendation at *Am. Nat'l Prop. v. Campbell Ins., Inc., 2010 U.S. Dist. LEXIS 47106 (M.D. Tenn., May 13, 2010)*

Prior History: *Am. Nat'l Prop. & Cas. Co. v. Campbell Ins., Inc., 2009 U.S. Dist. LEXIS 52098 (M.D. Tenn., June 19, 2009)*

Core Terms

docket entry, Counterclaim, post-termination, termination, motion to dismiss, allegations, superseded, pleadings, breach of contract, reply

Counsel: **[*1]** For American National Property and Casualty Company, Plaintiff, Counter Defendant: Jonathan D. Rose, Thor Y. Urness, LEAD ATTORNEYS, Bradley Arant Boult Cummings LLP, Nashville, TN.

For Campbell Insurance, Inc., Tommy L. Campbell, Marsha Colleen Campbell, A 2 Z Insurance, Inc., Defendants: Steven W. Keyt, LEAD ATTORNEY, Benjamin T. Reese, Cherie D. Jewell, Leitner, Williams, Dooley & Napolitan, PLLC, Chattanooga, TN.

For Liberty Mutual Life Insurance Company, Montgomery Mutual Insurance Company, Defendants: Brian C. Neal, John R. Wingo, LEAD ATTORNEYS, Frost, Brown & Todd, LLC, Nashville, TN.

For Safeco Insurance Company of America, Defendant: John R. McCann, Melissa Ann Maravich, Taylor A. Cates, Burch, Porter & Johnson, PLLC, Memphis, TN.

For Safeco Insurance Company of Illinois, Defendant: Melissa Ann Maravich, LEAD ATTORNEY, John R. McCann, Taylor A. Cates, Burch, Porter & Johnson, PLLC, Memphis, TN.

For Tommy L. Campbell, Counter Plaintiff: Steven W. Keyt, LEAD ATTORNEY, Cherie D. Jewell, Steven W. Keyt, Leitner, Williams, Dooley & Napolitan, PLLC, Chattanooga, TN.

For Campbell Insurance, Inc., Marsha Colleen Campbell, A 2 Z Insurance, Inc., Counter Plaintiffs: Steven W. Keyt, LEAD **[*2]** ATTORNEY, Cherie D. Jewell, Leitner, Williams, Dooley & Napolitan, PLLC, Chattanooga, TN.

Judges: ALETA A. TRAUGER, UNITED STATES DISTRICT JUDGE.

Opinion by: ALETA A. TRAUGER

Opinion

MEMORANDUM and ORDER

Plaintiff American National Property And Casualty Company ("ANPAC") filed a Motion To Dismiss (Docket Entry No. 189) the counterclaim included by Tommy Campbell ("Campbell") in the Answer and Counterclaim (Docket Entry No. 176) to ANPAC's Third Amended Complaint (Docket Entry No. 160). Defendant Campbell filed a response in opposition to the motion to dismiss (Docket Entry No. 192). ANPAC then filed a motion for leave to file a reply and attached a reply brief. (Docket Entry No. 198). ANPAC's motion for leave to file the reply brief is granted.

In ruling on the motion to dismiss for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)*, the Court must accept as true Campbell's allegations as plaintiff against ANPAC as defendant and construe the allegations in Campbell's favor. See *Morgan v. Church's Fried Chicken, 829 F.2d 10, 11-12 (6th Cir. 1987)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible **[*3]** on its face.'" *Ashcroft v. Iqbal, U.S. , 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*(quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 550, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is

liable for the misconduct alleged." Id. A complaint must contain either direct or inferential allegations respecting all of the material elements to sustain a recovery under some viable legal theory. *Id. at 944*; *Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988)*.

In the counterclaim, Campbell alleged that he entered into an Agent Agreement with ANPAC on June 16, 1997 ("the 1997 Agreement"). He attached a copy of the 1997 Agreement to the Answer and Counterclaim as Exhibit A. Campbell further alleged that Section IV of the 1997 Agreement provided for post-termination compensation as set forth in an attached "Post-Termination Compensation Schedule." The Post-Termination Compensation Schedule provided that payments were to begin within sixty (60) days after termination. Campbell further alleged he met all requirements for eligibility under paragraph 3. (Docket Entry No. 176, **[*4]** Counterclaim PP 1-2.)

Campbell alleged that the 1997 Agreement, including the Post-Termination Compensation Schedule, was in full force and effect until Campbell was terminated by ANPAC by letter dated June 10, 2008. Campbell attached a copy of the termination letter to the Answer and Counterclaim as Exhibit B. Campbell further alleged that the termination letter, in the note at the bottom of page 2, recited language contained in the 1997 Agreement which is not contained in the Agent Agreement between ANPAC and Campbell Insurance, Inc. Campbell also alleged that the termination letter was addressed to him and sent to his home address as opposed to the business address of Campbell Insurance, Inc. (Id. P 3.)

Campbell further alleged that ANPAC failed and refused to pay post-termination compensation as provided in the 1997 Agreement, and ANPAC's failure to honor the 1997 Agreement is a breach of contract. (Id. P 4.) Finally, Campbell alleged he is entitled to post-termination compensation as provided in the 1997 Agreement, and he seeks damages for breach of contract in excess of $ 75,000.00, along with other relief. (Id. P 5 & Prayer for Relief.)

ANPAC seeks dismissal of the counterclaim **[*5]** on the ground that the 2005 Agreement signed by Campbell (attached to the Third Amended Complaint as Exhibit 1, Docket Entry No. 161) expressly superseded the 1997 Agreement. ANPAC contends that Campbell admitted within the four corners of the pleadings that he, along with Campbell Insurance, Inc., and Colleen Campbell, entered into the 2005 Agreement. In the Second Amended Complaint, ANPAC alleged:

> On January 24, 2005, American National entered into an Agent Agreement with Campbell Insurance, Tommy Campbell and Colleen Campbell (the "Agent Agreement"). A true and correct copy of the Agent Agreement is attached hereto as **Exhibit 1.**

(Docket Entry No. 66, Second Amended Complaint P 10.) In response to this averment, Campbell and the other Campbell Defendants responded, "Admitted." (Docket Entry No. 83, Answer to the Second Amended Complaint P 10.) ANPAC also points out that Campbell himself alleged, in his Second Counterclaim contained within the Second Amended Answer (Docket Entry No. 83, Counterclaim at 16 P 1), that "Campbell Insurance, Inc. and Tommy Campbell entered into the agency agreement with ANPAC on January 24, 2005." ANPAC further claims that Campbell admitted he signed the **[*6]** 2005 Agreement when he responded to PP 14 & 15 of the Third Amended Complaint. However, what Campbell and the other Campbell Defendants actually said in those paragraphs was:

> 14. It is admitted that ANPAC entered into an agreement with Campbell Insurance on or about January 24, 2005. Tommy Campbell and Colleen Campbell signed the agreement as representatives of Campbell Insurance.
>
> 15. It is admitted that Tommy Campbell and Colleen Campbell signed the agreement as representatives of Campbell Insurance.

(Docket Entry No. 176, Answer to Third Amended Complaint PP 14-15.)

Campbell contends he is not bound by any admissions he may have made prior to his Answer and Counterclaim to the Third Amended Complaint because the Third Amended Complaint and his Answer and Counterclaim to the Third Amended Complaint superseded all of the previous pleadings. Under Sixth Circuit law, a statement made in a pleading, even if the pleading is subsequently amended or superseded, can constitute an admission against interest, but the pleading containing the admission must be admitted into evidence at trial for the purpose of establishing the admission, and the better practice is for the court *not* to take judicial **[*7]** notice of the admission. *Shell v. Parrish, 448 F.2d 528, 530 (6th Cir. 1971)*; *Pennsylvania R.R. Co. v. City of Girard, 210 F.2d 437, 440 (6th Cir. 1954)*. In light of these cases and because the case is now before the Court on a *Rule 12(b)(6)* motion to dismiss, the Court will not resolve--solely on the pleadings and without competent evidence--whether Campbell's statements made in prior pleadings amount to admissions against interest.

Even assuming for present purposes that Campbell entered into the 2005 Agreement as ANPAC alleges, Campbell's signature on the 2005 document alone does not resolve the matters in dispute between the parties. ANPAC claims the 1997 Agreement was expressly superseded by the 2005 Agreement, and it is true the 2005 Agreement Campbell signed says: "This Agreement supersedes any and all previous Agreements of whatever kind between the parties." At first blush, this language would appear to render the 1997 Agreement irrelevant, and

especially its Section IV, which provided for post-termination compensation, which is the subject of Campbell's counterclaim. On further examination, however, it appears that a major difference between the 1997 and 2005 Agreements is **[*8]** the deletion of Section IV in the 2005 Agreement. As a result of the deletion of Section IV, the sections of the 2005 Agreement were renumbered accordingly. Consequently, Section VI in the 1997 Agreement, titled "RESERVED RIGHTS AND CONDITIONS OF THE COMPANY," became Section V, with the same title and nearly verbatim language, in the 2005 Agreement.

Campbell points to a footnote in the termination letter he received from ANPAC in June 2008 (Docket Entry No. 176-2) as evidence that ANPAC knew it was terminating the 1997 Agreement when it sent the termination letter addressed only to Campbell at his home address. The footnote stated in part:

> Additionally, under Section VI - RESERVED RIGHTS AND CONDITIONS OF THE COMPANY, ANPAC may deduct, from any compensation due you, for any and all debts or claims you have with the Company. Therefore, any commissions payable are being retained by the Company and applied to your Agent Advance Agreement (AAA) deficit.

(Id. at 2.) Campbell contends the letter's reference to Section VI - RESERVED RIGHTS AND CONDITIONS OF THE COMPANY could only have meant the 1997 Agreement.

ANPAC asserts that Campbell is just trying to capitalize on a typographical error in **[*9]** the footnote of the termination letter, noting that "Section VI" should have read "Section V." Whether the difference in section numbers can be attributed to typographical error requires review of evidence that is not before the Court on a *Rule 12(b)(6)* motion to dismiss. Moreover, the 2005 Agreement (in Section V), similarly to the 1997 Agreement (in Section VI), provided (emphasis added):

> F. **SOLE AGREEMENT**
>
> This Agreement, with the attached Schedules and Supplements, constitutes the sole agreement and supersedes any and all prior Agreements between you and the Company. **This Agreement shall not impair your right to monies, if any, earned under a prior Agreement or Agreements with the Company.**

(Docket Entry No. 161, Ex. 1 at 8.) [1]

Thus, while both the 1997 and the 2005 Agreements provided that a later agreement would supersede all prior agreements, both Agreements also contained the language: "This Agreement shall not impair your right to monies, if any, earned under a prior Agreement or Agreements with the Company." **[*10]** Whether the 1997 Agreement was still in force and not superseded at the time of Campbell's termination in June 2008 and whether Campbell is entitled to claim post-termination compensation under the 1997 Agreement are mixed questions of law and fact that require further factual and legal development.

At this juncture, the allegations of Campbell's counterclaim satisfy the pleading standards of Iqbal and *Twombly*. Campbell alleges the elements of a breach of contract claim and sufficient facts to support the claim. See *BancorpSouth Bank, Inc. v. Hatchel, 223 S.W.3d 223, 227 (Tenn. Ct. App. 2006)* (observing elements of breach of contract are: (1) the existence of an enforceable contract; (2) nonperformance amounting to a breach of the contract; and (3) damages caused by the breach of contract). Campbell alleges the existence of a 1997 Agreement with ANPAC which included a provision for Campbell's post-termination compensation, a breach of that agreement due to ANPAC's failure to pay Campbell any post-termination compensation, and damages resulting from the breach. Because Campbell's counterclaim pleads a claim for breach of contract under Tennessee law and Campbell has alleged sufficient **[*11]** facts to support his claim under Iqbal and *Twombly*,

(1) ANPAC's Motion To Dismiss (Docket Entry No. 189) is hereby DENIED.

(2) ANPAC's Motion For Leave To File Reply To Defendant Tommy Campbell's Response To Plaintiff's Motion To Dismiss (Docket Entry No. 198) is hereby GRANTED and the Clerk is directed to file the reply, which appears as an attachment to Docket Entry No. 198, under a separate docket entry number.

(3) The case is hereby returned to the Magistrate Judge for further case management.

It is so ORDERED.

/s/ Aleta A. Trauger

ALETA A. TRAUGER

UNITED STATES DISTRICT JUDGE

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[1] The only difference in Section F. as between the two agreements was that the 2005 Agreement added the words "any and" before "all prior Agreements between you and the Company."

EXHIBIT T

Caution
As of: December 2, 2024 10:43 PM Z

Genbiopro, Inc. v. Sorsaia

United States District Court for the Southern District of West Virginia

August 24, 2023, Decided; August 24, 2023, Filed

CIVIL ACTION NO. 3:23-0058

Reporter
2023 U.S. Dist. LEXIS 149195 *; 2023 WL 5490179

GENBIOPRO, INC., Plaintiff, v. MARK A. SORSAIA, in his official capacity as Prosecuting Attorney of Putnam County and PATRICK MORRISEY, in his official capacity as Attorney General of West Virginia, Defendants.

Subsequent History: Appeal filed, 11/15/2023

Prior History: *Genbiopro, Inc. v. Sorsaia, 2023 U.S. Dist. LEXIS 86628, 2023 WL 3451688 (S.D. W. Va., Apr. 21, 2023)*

Core Terms

mifepristone, regulation, abortion, preemption, bans, restrictions, patient, prescribed, drugs, harms, preempt, safe use, medication, dormant, licensed, state law, derivative, medicine, obstacle, pork, medical professional, promulgating, telemedicine, motion to dismiss, occupied, induce, interstate commerce, major question, determinations, prescription

Counsel: **[*1]** For GenBioPro, Inc., Plaintiff: Anthony J. Majestro, Christina L. Smith, LEAD ATTORNEYS, POWELL & MAJESTRO, Charleston, WV; Ariela M. Migdal, David C. Frederick, Eliana M. Pfeffer, Mary Charlotte Carroll, LEAD ATTORNEYS, PRO HAC VICE, KELLOGG HANSEN TODD FIGEL & FREDERICK, Washington, DC; Daphne O'Connor, John P. Elwood, Robert Katerberg, LEAD ATTORNEYS, PRO HAC VICE, ARNOLD & PORTER KAYE SCHOLER, Washington, DC; Kristen P. Miller, Skye Perryman, LEAD ATTORNEYS, PRO HAC VICE, DEMOCRACY FORWARD FOUNDATION, Washington, DC.

For Mark A. Sorsaia, in his official capacity as Prosecuting Attorney of Putnam County and, Defendant: Jennifer Scragg Karr, LEAD ATTORNEY, Putnam County Judicial Building, Winfield, WV.

For Patrick Morrisey, in his official capacity as Attorney General of West Virginia, Defendant: Curtis R. Capehart, Douglas P. Buffington, II, LEAD ATTORNEYS, WEST VIRGINIA ATTORNEY GENERAL'S OFFICE, Building 1, Room 26e, Charleston, WV; Denise M. Harle, LEAD ATTORNEY, PRO HAC VICE, ALLIANCE DEFENDING FREEDOM, Lawrenceville, GA; Erin Morrow Hawley, LEAD ATTORNEY, PRO HAC VICE, ALLIANCE DEFENDING FREEDOM, Washington, DC.

For The State of Alabama, The State of Florida, The State of Georgia, **[*2]** The State of Idaho, The State of Indiana, The State of Iowa, The State of Kansas, The State of Kentucky, The State of Louisiana, The State of Mississippi, The State of Missouri, The State of Montana, The State of Nebraska, The State of North Dakota, The State of Ohio, The State of Oklahoma, The State of South Carolina, The State of South Dakota, The State of Tennessee, and, The State of Texas, Amicus: Jeffrey A. Kimble, LEAD ATTORNEY, ROBINSON & MCELWEE, Clarksburg, WV.

For The State of Arkansas, Amicus: Asher Steinberg, Dylan L. Jacobs, Nicholas J. Bronni, LEAD ATTORNEYS, PRO HAC VICE, OFFICE OF THE ARKANSAS ATTORNEY GENERAL, Little Rock, AR; Jeffrey A. Kimble, LEAD ATTORNEY, ROBINSON & MCELWEE, Clarksburg, WV.

For David S. Cohen, JD, Greer Donley, JD, Lewis Grossman, JD, PhD, Rachel Rebouche, JD, LLM, Patricia J. Zettler, JD, I. Glenn Cohen, JD, Peter Barton Hutt, LLM, LLB, Allison Whelan, JD, MA, Amicus: Beth E. Braiterman, Denise Esposito, Julia F. Post, LEAD ATTORNEYS, PRO HAC VICE, COVINGTON & BURLING, Washington, DC; Kaixin Fan, LEAD ATTORNEY, PRO HAC VICE, COVINGTON & BURLING, San Francisco, CA; Russell D. Jessee, STEPTOE & JOHNSON, Charleston, WV.

Judges: ROBERT C. CHAMBERS, UNITED STATES **[*3]** DISTRICT JUDGE.

Opinion by: ROBERT C. CHAMBERS

Opinion

MEMORANDUM OPINION AND ORDER

Pending before the Court are Defendant Mark A. Sorsaia and Defendant Patrick Morrisey's Motions to Dismiss. ECF Nos. 17 & 19. For the following reasons, the Motions to Dismiss are **GRANTED**, in part, and **DENIED**, in part.

I. BACKGROUND

Plaintiff GenBioPro, Inc. ("GenBioPro") is the only United States manufacturer of generic mifepristone. Pl.'s Opp'n to Def. Morrisey's Mot. to Dismiss at 1, ECF No. 35. Mifepristone is a Food and Drug Administration ("FDA") approved and regulated medication which is commonly prescribed as step one in a two-step medication abortion regimen. Compl. ¶ 2, ECF No. 1. Mifepristone and misoprostol—the other medication abortion drug—are Plaintiff's "sole source of revenue." *Id.* ¶ 23. Mifepristone has been approved for nationwide use and sale by the FDA, and GenBioPro sells the drug throughout a national market. *Id.* ¶ 77.

On June 24, 2022, the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, reversing *Roe v. Wade*[1] and "return[ing] the issue of abortion to the people and their elected representatives." *597 U.S. 215, 142 S. Ct. 2228, 2279, 213 L. Ed. 2d 545 (2022)*. Following this grant of authority, West Virginia passed the *Unborn Child Protection Act* **[*4]** ("UCPA") in September 2022. *W. Va. Code § 16-2R-1 et seq.* The act of performing, inducing, or attempting to perform or induce an abortion is now illegal in the State, subject to a limited series of exceptions.[2] *W. Va. Code § 16-2R-3*. The UCPA expressly includes abortions performed or induced via "medicine" or "drug." *W. Va. Code § 16-2R-2*. The Act defines the prohibited "attempt to perform or induce an abortion" as "an act or the omission of an act that, under the circumstances as the person so acting or omitting to act believes them to be, constitutes a substantial step in a course of conduct intended to culminate in an abortion." *Id.* If a licensed medical professional "knowingly and willfully performs, induces, or attempts to perform or induce an abortion" with the intent to violate the UCPA, "the licensing board shall revoke medical professional's license." *W. Va. Code § 16-2R-7*. If a formerly licensed medical professional or any other person "knowingly and willfully performs, induces, or attempts to perform or induce an abortion," they are guilty of a felony and subject to imprisonment for "not less than three nor more than 10 years." *W. Va. Code § 61-2-8(a), (b)*.

Prior to the decision in *Dobbs* and the passage of the UCPA, West Virginia had provisions in place which Plaintiff asserts greatly limited **[*5]** the prescription and sale of mifepristone. Compl. ¶¶ 87-88. These restrictions required a waiting period and counseling before obtaining an abortion. *W. Va. Code § 16-2I-2*. The UCPA provides that this restriction has no effect while the UCPA is in force but would "become immediately effective" again should the UCPA "be judicially determined to be unconstitutional." *W. Va. Code § 16-2R-9*. Further pre-UCPA provisions continue to prohibit providers from prescribing medication abortion drugs via telemedicine. *W. Va. Code §§ 30-3-13a(g)(5)*; *30-1-26(b)(9)*.

In contrast, the FDA has continually eased restrictions on access to mifepristone. The FDA is tasked with promulgating regulations concerning the approval of prescription medications for sale under the *Food, Drug, and Cosmetic Act* ("FDCA"). *21 U.S.C. § 393(b)(1)*. Under regulations known as "Subpart H," the FDA approves drugs which treat "serious or life-threatening illnesses and that provide meaningful therapeutic benefit to patients over existing treatments" subject to "restrictions to assure safe use." *21 C.F.R. §§ 314.500*, *314.520*; Compl. ¶ 36. According to the Complaint, in 2000, Danco Laboratories, LLC's Mifeprex—name-brand mifepristone—was approved under the Subpart H regulatory scheme, which imposed certain restrictions on prescription and administration of the **[*6]** drug to assure safe use. Compl. ¶¶ 38-39. In 2007, Congress enacted the *Food and Drug Administration Amendments Act ("FDAAA")*, requiring that drugs formerly approved under Subpart H be re-approved under a new regulatory scheme, entitled the Risk Evaluation and Mitigation Strategy ("REMS"). *See 21 U.S.C. §§ 355-1(a), (g)(4)(B), (h)*; Compl. ¶ 41. If the FDA determines that a drug may cause an "adverse drug experience," then the agency must design and implement a REMS. *§ 355-1(a), (b)(1)*. However, any restrictions imposed under the regulatory scheme must "not be unduly burdensome on patient access to the drug." *§ 355-1(f)(2)(C)*. The FDA must reassess a drug's REMS periodically. *§ 355-1(d)*.

Following the passage of the FDAAA and the implementation of the REMS schema, the manufacturer of Mifeprex proposed a REMS for its product to the FDA. Compl. ¶ 55. The FDA

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[1] *410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973)*.

[2] Under the UCPA, "[a]n abortion may not be performed or induced or be attempted to be performed or induced unless in the reasonable medical judgment of a licensed medical professional: (1) The embryo or fetus is nonviable; (2) The pregnancy is ectopic; or (3) A medical emergency exists." *W. Va. Code § 16-2R-3(a)*. This prohibition does not apply "to an adult within the first 8 weeks of pregnancy if the pregnancy is the result of sexual assault . . . or incest" and the patient has taken steps to report the assault or incest to law enforcement. *W. Va. Code § 16-2R-3(b)*. Likewise, the prohibition does not apply to "a minor or an incompetent or incapacitated adult within the first 14 weeks of pregnancy if the pregnancy is the result of sexual assault ... or incest" and either the patient has taken steps to report the assault or incest to law enforcement or has received medical treatment for the same. *W. Va. Code § 16-2R-3(c)*.

approved the proposed REMS in 2011. *Id.* The 2011 REMS[3] allowed Mifeprex to be prescribed by certified physicians up to 49 days of pregnancy, dispensed in certain healthcare facilities, and taken in the provider's clinic. *Id.* ¶ 56. In 2016, the FDA revised the Mifeprex REMS,[4] increasing the gestational age through which the drug is indicated, expanding those who could be certified to prescribe Mifeprex from **[*7]** "physicians" to "healthcare providers," and reducing the number of required patient visits to their healthcare providers. *Id.* ¶ 58. In April 2019, the FDA approved GenBioPro's generic version of mifepristone, subject to the same REMS as Mifeprex.[5] *Id.* ¶¶ 60-61. In response to the COVID-19 pandemic two years later, the FDA announced it would stop enforcing the in-person dispensation requirement of the mifepristone REMS. *Id.* ¶ 62. On January 3, 2023,[6] the FDA promulgated a new REMS[7] for mifepristone which no longer limits dispensation of the drug to healthcare settings, thereby allowing patients to receive the medication either by mail or from certified pharmacies and no longer requiring in-person visits to healthcare providers.[8] *Id.* ¶ 66.

The FDA made these changes to the REMS in response to overwhelming evidence of the safety and efficacy of mifepristone. *Id.* ¶ 38, 58-59, 62-64. Decades of usage of the drug—both in the United States and abroad—as well as a rigorous agency and pharmaceutical industry review process have demonstrated that the FDA may promulgate REMS allowing for increased access without risking patient safety. *See, e.g.* ***[*8]*** , U.S. Food & Drug Admin., *Questions & Answers on Mifepristone for Med. Termination of Pregnancy Through Ten Weeks Gestation* (Jan. 4, 2023) (discussing safety and access determinations made by the agency), https://perma.cc/6TDS-F9FL (last accessed Aug. 9, 2023). As summarized by Food and Drug Law and Health Law Scholar *amici*, "mifepristone has been subject to more regulatory and congressional scrutiny than perhaps any other prescription drug." ECF No. 40-1, at 5. Each time the REMS were altered, the FDA "used an internal team of experts . . . to conduct medical, chemistry, pharmacology, statistical, clinical pharmacology, and biopharmaceutrics reviews of all data" in accordance with the FDCA and agency practice. *Id.* at 10. The result of this heightened scrutiny and extensive review is a REMS which unambiguously assures the safety of the drug without any additional safeguards from the States. Defendants have not disputed the safety of the mifepristone REMS, nor could they.

Confronted with West Virginia's additional barriers to prescribing its product, Plaintiff filed suit in this Court on January 25, 2023, alleging that the UCPA and prior restrictions violate the *Supremacy* and *Commerce Clauses* by limiting the sale **[*9]** of mifepristone in West Virginia. Prosecuting Attorney of Putnam County Mark Sorsaia and Attorney General of West Virginia Patrick Morrisey were named as defendants in their official capacities. Both Defendants have filed motions to dismiss. ECF Nos. 17 & 19. Each Defendant disputes GenBioPro's standing, as well as Plaintiff's interpretation of the *Supremacy* and *Commerce Clauses*. The Court heard oral argument on the issue of standing on April 24, 2023, and subsequently issued a Memorandum Opinion and Order finding that Plaintiff had standing on behalf of itself and on behalf of third-party vendees. ECF No. 54. On May 23, 2023, the Court heard oral argument on the remainder of the Motions to Dismiss. Accordingly, the matter is now ripe for adjudication.

II. LEGAL STANDARD

[3] U.S. Food & Drug Admin., NDA 20-687 MIFEPREX (mifepristone) Tablets, 200 mg, Risk Evaluation and Mitigation Strategy (REMS) (June 2011), https://perma.cc/3S5M-WMQ6.

[4] U.S. Food & Drug Admin., NDA 020687 MIFEPREX (mifepristone) Tablets, 200 mg, Risk Evaluation and Mitigation Strategy (REMS) (Mar. 2016), https://perma.cc/KC6Z-NQUA.

[5] U.S. Food & Drug Admin., Mifepristone Tablets, 200 mg, Risk Evaluation and Mitigation Strategy (REMS) Single Shared System for Mifepristone 200mg (Apr. 2019), https://perma.cc/2XSU-3HYT.

[6] The Court notes that while the REMS was most recently updated in March 2023 "to add space to allow for additional contact information on the forms" and "correct a typographical error," the last significant modification was in January 2023. *See Update History*, Mifepristone, Shared System REMS, U.S. Food & Drug Admin., https://perma.cc/RE9X-NUJF (last accessed Aug. 9, 2023).

[7] U.S. Food & Drug Admin., Mifepristone Tablets, 200 mg, Risk Evaluation and Mitigation Strategy (REMS) Single Shared System for Mifepristone 200mg (Mar. 2023), https://perma.cc/224Y-KFLE [hereinafter 2023 REMS].

[8] On the eve of entry of this Opinion, the Fifth Circuit issued its decision affirming a stay of the 2016 REMS and the FDA's 2021 non-enforcement decision, later codified in the 2023 REMS. *All. for Hippocratic Med. v. FDA, 78 F.4th 210, 2023 U.S. App. LEXIS 21630, 2023 WL 5266026 (5th Cir. Aug. 16, 2023)*. The Court has reviewed the Fifth Circuit decision and does not find its primary determinations to be persuasive. Nevertheless, the Court notes the direct effect of that decision on this case, as mifepristone is currently subject to the "conditions for use that existed in 2016" pending the litigation of *Alliance for Hippocratic Medicine. 2023 U.S. App. LEXIS 21630, [WL] at *1-2*. However, the Fifth Circuit noted that its "holding is subject to the prior order of the Supreme Court, which stayed the district court's order pending resolution of this appeal and disposition of any petition for writ of certiorari." *2023 U.S. App. LEXIS 21630, [WL] at * 4*. Regardless, 2023 REMS remains law, and the Court will consider Plaintiff's claims as to those restrictions.

To survive a motion to dismiss, a complaint must contain "a short and plain statement of the claim showing [the plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a)(2). While the facts alleged in the complaint need not be probable, the statement must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim has facial plausibility when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the **[*10]** defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citation omitted). In considering the plausibility of a plaintiff's claim, the Court accepts all well-pleaded factual allegations in the complaint as true. *Id.* Still, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted).

Determining whether a complaint states a plausible claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679. If the court finds from its analysis that "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (quoting, in part, Fed. R. Civ. P. 8(a)(2)). Nonetheless, a plaintiff need not show that success is probable to withstand a motion to dismiss. Twombly, 550 U.S. at 556 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.").

III. DISCUSSION

A. Major Questions Doctrine

In his Motion to Dismiss, Defendant Morrisey argues that this is a major questions case. **[*11]** Def. Morrisey's Mem. of Law in Supp. of Mot. to Dismiss at 8-10, ECF No. 20. The Supreme Court inaugurated the so-called "major questions doctrine" in West Virginia v. EPA, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022). "Under that doctrine's terms, administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance." Id. at 2616 (Gorsuch, J., concurring) (cleaned up); *see also* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." (internal quotation omitted)). Relying on a concatenation of caselaw in which agencies were found to lack the authority to regulate broadly under ambiguous delegation provisions, *West Virginia* invalidated the Environmental Protection Agency's interpretation of a broad provision in the Clean Air Act as granting the agency comprehensive authority to regulate national energy systems. 142 S. Ct. at 2610-14; *see also* Biden v. Nebraska, 600 U.S. 477, 143 S. Ct. 2355, 2374, 216 L. Ed. 2d 1063 (2023) ("[W]hile the major questions 'label' may be relatively recent, it refers to 'an identifiable body of law that has developed over a series of significant cases' spanning decades." (quoting West Virginia, 142 S. Ct. at 2609)). In doing so, **[*12]** *West Virginia* held that courts must "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." 142 S. Ct. at 2609 (internal quotation omitted). As abortion is one such major policy decision, Defendant Morrisey argues that this Court must conclude Congress did not intend to delegate the authority to the FDA to decide access issues for mifepristone. *See* Def. Morrisey's Mem. of Law in Supp. of Mot. to Dismiss at 9.

The Court does not dispute the serious social, ethical, economic, and political issues implicated by abortion. There is no doubt that "terminating a pregnancy is an issue with 'profound moral and spiritual implications even at its earliest stage.'" Def. Morrisey's Mem. of Law in Supp. of Mot. to Dismiss at 9 (quoting Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)) (cleaned up). And yet, the Court disagrees that either the FDA's promulgation of the mifepristone REMS or GenBioPro's arguments concerning those REMS implicate those major questions. The seminal major questions cases all involved novel agency interpretations of long-standing ambiguous regulatory provisions as major grants of authority to reconfigure large aspects of the economy. *See* West Virginia, 142 S. Ct. at 2602-04; Air Utility, 573 U.S. at 323-24; Biden v. Nebraska, 143 S. Ct. at 2373 (involving attempted broad student loan **[*13]** forgiveness under a limited grant of emergency loan waiver authority); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (involving attempted regulation of cigarettes as "drug delivery devices").

In contrast, here the FDA is acting narrowly pursuant to an explicit grant of authority as to a single prescription medication—the FDAAA's express command that the FDA promulgate a REMS for Subpart H-approved drugs (including mifepristone), subject to certain delineated principles, including ensuring accessibility. *FDAAA, Section 909(b)(1)*; 21 U.S.C. § 355-1(f)(2)(C). That is all; the FDA is not making any novel claims to any broader authority hidden within the FDCA or the FDAAA amendments. In other words, the FDA's mifepristone REMS simply does not "effect a fundamental revision of the statute, changing it from one sort of scheme of regulation into an entirely different kind." Biden v. Nebraska, 143 S. Ct. at 2373 (quoting West Virginia, 142 S. Ct. at 2612) (cleaned up). Instead,

the promulgation of the REMS was a routine regulatory action.

Nor is GenBioPro claiming that either the FDCA or the FDAAA amendments contain previously unstated broad abortion authority. GenBioPro's preemption argument can be characterized as: (1) the FDAAA commanded the FDA to consider access in promulgating a REMS for mifepristone; (2) pursuant to that authority, the REMS the FDA **[*14]** promulgated determined a standard of accessibility for the drug; and (3) West Virginia's abortion laws conflict with this standard. *See* Pl.'s Opp'n to Def. Morrisey's Mot. to Dismiss at 8-19. The Court will consider the cognizability of this preemption argument separately, below. But regardless of its validity, GenBioPro's argument does not allege an elephant hidden in a mousehole.

Defendant Morrisey argues that the FDCA "does not so much as mention abortion." Def. Morrisey's Mem. in Supp. of Mot. To Dismiss at 9. True—but nor does it mention any other specific procedure, device, cosmetic, or medication it instructs the FDA to regulate. *See, e.g.*, *21 U.S.C. § 321(h)(1)* (defining "medical devices" the FDA may regulate without specifying any particular device). Defendant misunderstands the purpose and scope of the statutory grants of agency authority by demanding that Congress have listed every possible medical condition and procedure when it instructed the FDA to regulate prescription medicine generally. For example—imagine if Congress were forced to list every endangered species for the Endangered Species Act ("ESA") to grant the Fish and Wildlife Service ("FWS") authority to protect any specific at-risk organism. *See 16 U.S.C. § 1531 et seq.* Calling this **[*15]** a "major questions case" and demanding the FDA refrain from treating abortion medications on par with other medications under the FDCA would make just as much sense as demanding the FWS refrain from listing the snail darter as an endangered species under the ESA. *See Tennessee Valley Auth. v. Hill, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978)*. If Defendant wishes to bring a delegation challenge, he will have to find standing to bring another suit.

But, significantly, Congress *did* specify that drugs previously approved under Subpart H would be deemed in effect to have a REMS in the 2007 FDAAA amendments.[9] *FDAAA, Section 909(b)(1)*. Shortly thereafter, the FDA issued a notice indicating that mifepristone was one of these previously approved drugs. *Dept. Health & Human Servs., Identification of Drug & Biological Prods. Deemed to Have Risk Evaluation & Mitigation Strategies for Purposes of the Food & Drug Admin. Amendments Act of 2007, 73 Fed. Reg. 16313-01, 16313 (Mar. 27, 2008)*. The fact that Congress did not specify that mifepristone is to be used for abortion when it incorporated the drug into the REMS scheme is of no more import than its lack of specification as to isotretinoin's usage as an acne medication. *See id.* Each medicine listed in the FDA's 2008 Notice was approved for an indicated use via Subpart H, and Congress stated that those approvals were to be carried over into the new REMS schema (subject to eventual FDA re-evaluation). An order to regulate an express list of prescription medicines under a second **[*16]** list of articulated criteria is about as granular a grant of authority as Congress ever gives an agency.

Accordingly, the Court finds that this is not a major questions case, and the major questions doctrine does not bar Plaintiff's arguments as to preemption and the dormant *Commerce Clause*. Whether the UCPA or prior restrictions violate either the Supremacy or *Commerce Clause* is a different question and is considered below.

B. Preemption

The *Supremacy Clause* provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." *U.S. Const., art. VI, cl. 2*. It follows inexorably that "Congress has the power to preempt state law." *Arizona v. United States, 567 U.S. 387, 399, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012)* (citing *Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)*; *Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 210-211, 6 L.Ed. 23 (1824)*). Accordingly, "the purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)* (internal quotation omitted). "Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose." *Altria Grp., Inc. v. Good, 555 U.S. 70, 76, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008)*. However, there is a presumption against preemption, especially in a field traditionally occupied by the States. *Wyeth v. Levine, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)*.

Generally, there are three types of preemption: (1) express preemption, (2) conflict preemption, and (3) field preemption. *Murphy v. Nat'l Collegiate Ath. Ass'n, 138 S. Ct. 1461, 1480, 200 L. Ed. 2d 854 (2018)*; *Mayor & City Council of Balt. v. BP P.L.C., 31 F.4th 178, 198 n.2 (4th Cir. 2022)*. Both "conflict" **[*17]** and "field" are considered types of implied preemption. *Kurns v. Railroad Friction Prods. Corp., 565 U.S. 625, 630-31, 132 S. Ct. 1261, 182 L. Ed. 2d 116 (2012)*. On occasion, the Supreme Court has delineated further, treating "impossibility" and "obstacle" preemption as two separate entities within "conflict"

[9] This is not a case where the regulatory agency relied upon an implied grant of authority. This list consisted of only 17 previously approved drugs and Congress undoubtedly knew that one, mifepristone, was used only for medication abortion.

preemption. *See Arizona, 567 U.S. at 399-400*. The Court has admitted that it "sometimes use[s] different labels" but that "these categories are not rigidly distinct." *Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901, 204 L. Ed. 2d 377 (2019)* (quoting *Crosby, 530 U.S. at 372, n.6*). This Opinion considers both whether the challenged state provisions "conflict" with or provide an "obstacle" to federal law, treating these as one form of "conflict" preemption, in accordance with *e.g., Murphy, 138 S. Ct. at 1480*.

The FDCA does not include an express preemption provision. *See Wyeth, 555 U.S. at 574* ("If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express preemption provision at some point during the FDCA's 70-year history.") The 1962 Amendments to the FDCA, however, include an express preemption saving clause. *See* Drug Amendments of 1962, § 202, 76 Stat. 793 ("Nothing in the amendments made by this Act to the Federal Food, Drug, and Cosmetic Act shall be construed as invalidating any provision of State law . . . unless there is a direct and positive conflict between such amendments and such provision of State law"). Of further import, regulation of **[*18]** health and safety is a field that States have traditionally occupied. *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 716, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)*. The Supreme Court has made it clear that regulating abortion is a matter of health and safety upon which States may appropriately exercise their police power. *See Dobbs, 142 S. Ct. at 2279*. Regulation of medical professionals—which the UCPA directly accomplishes—is arguably a field in which the States have an even stronger interest and history of exercising authority. *See id. at 2284* (emphasizing the States' interest in "the preservation of the integrity of the medical profession"); *Dent v. West Virginia, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889)* (holding that West Virginia has the authority to regulate medical licensure).

Keeping these principles in mind, the Court will consider the arguments as to implied preemption.

a. Conflict Preemption

As an antecedent matter, the Court cannot find any evidence of Congressional intent in the FDCA or FDAAA amendments to preempt state laws of the type challenged here. Again, "the purpose of Congress is the ultimate touchstone in every preemption case." *Wyeth, 555 U.S. at 565* (quoting *Medtronic, 518 U.S. at 485*). Congressional intent must be determined in context, as "our interpretation of [statutory] language does not occur in a contextual vacuum." *Medtronic, 518 U.S. at 485*.

In determining the purpose of the contested FDAAA "access" provisions, the **[*19]** Court "begin[s] by analyzing the statutory language" as "[w]e must enforce plain and unambiguous statutory language according to its terms." *Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010)*. The relevant portion of the statute reads as follows:

> **(f) Providing safe access for patients to drugs with known serious risks that would otherwise be unavailable**
>
> **(1) Allowing safe access to drugs with known serious risks**
>
> The Secretary, in consultation with the offices described in *subsection (c)(2)*, may require that the risk evaluation and mitigation strategy for a drug include such elements as are necessary to assure safe use of the drug, because of its inherent toxicity or potential harmfulness, if the Secretary determines that—
>
> > **(A)** the drug, which has been shown to be effective, but is associated with a serious adverse drug experience, can be approved only if, or would be withdrawn unless, such elements are required as part of such strategy to mitigate a specific serious risk listed in the labeling of the drug; and
> >
> > **(B)** for a drug initially approved without elements to assure safe use, other elements under *subsections (c)*, *(d)*, and *(e)* are not sufficient to mitigate such serious risk.
>
> **(2) *Assuring access and minimizing burden***
>
> *Such elements to assure safe use under paragraph (1) shall—*
>
> > **(A)** be commensurate **[*20]** with the specific serious risk listed in the labeling of the drug;
> >
> > **(B)** within 30 days of the date on which any element under *paragraph (1)* is imposed, be posted publicly by the Secretary with an explanation of how such elements will mitigate the observed safety risk;
> >
> > **(C)** considering such risk, *not be unduly burdensome on patient access* to the drug, considering in particular—
> >
> > > **(i)** patients with serious or life-threatening diseases or conditions;
> > >
> > > **(ii)** patients who have difficulty accessing health care (such as patients in rural or medically underserved areas); and
> > >
> > > **(iii)** patients with functional limitations; and

> **(D)** to the extent practicable, *so as to minimize the burden on the health care delivery system*—
>
> > **(i)** conform with elements to assure safe use for other drugs with similar, serious risks; and
> >
> > **(ii)** be designed to be compatible with established distribution, procurement, and dispensing systems for drugs.

21 U.S.C. § 355-1(f) (italics added, bold in original).

Plaintiff argues that this language—repeatedly emphasizing ensuring access and minimizing undue burden—shows Congressional intent to designate access determinations for drugs subject to a REMS with elements to assure safe use to the FDA, thus preempting any conflicting **[*21]** state access determinations. Admittedly, *Section 355-1(f)(2)* requires the FDA to consider patient access and burden. However, this requirement is plainly a limitation on the FDA's *own restrictions* on a drug, rather than a command that the FDA assure access for all patients: "[s]uch elements to assure safe use *under paragraph (1)* shall" not be "unduly burdensome." Accordingly, Congress's purpose in directing the FDA to consider burden and access when promulgating REMS with elements to assure safe use was to ensure that the elements *themselves* would not be unduly burdensome upon patient access.

The context in which the FDAAA was passed confirms this interpretation. At the time Congress passed the FDAAA in 2007, mifepristone was approved for usage up to 49 days of pregnancy under the Subpart H regulatory scheme. Compl. ¶¶ 39, 58. In 2007, *Planned Parenthood v. Casey*'s "undue burden" or "substantial obstacle" standard was the touchstone for assessment of the constitutionality of abortion restrictions, and the Court recognized "the right of the woman to choose to have an abortion before viability." *505 U.S. at 846*; *see Stenberg v. Carhart, 530 U.S. 914, 921, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000)* (providing that "a law designed to further the State's interest in fetal life which imposes an undue burden on the **[*22]** woman's decision before fetal viability is unconstitutional" (internal quotation marks omitted)); *Cincinnati Women's Servs., Inc. v. Taft, 468 F.3d 361, 367-69 (6th Cir. 2006)* (discussing and applying *Casey*). While debate over the ethics of abortion roiled the nation, no Congressperson in 2007 could have credibly doubted that abortion was legal up to 49 days of pregnancy, long before the point of viability. In fact, in 2006, the Sixth Circuit upheld a district court's preliminary injunction on an Ohio ban of off-label usage of mifepristone as unconstitutional under *Casey and Carhart. Planned Parenthood Cincinnati Region v. Taft, 444 F.3d 502, 508-09, 518 (6th Cir. 2006)*. Consequently, while Congress deemed mifepristone to have in effect a REMS, and included language concerning access in the REMS scheme, it is not plausible to infer an intent from this language to preclude state abortion law by granting mifepristone access decisions to the FDA. In 2007, the issue of access to abortion up to 49 days of pregnancy was conclusively determined (so we thought) by the Supreme Court, and an appellate court had applied that standard to mifepristone. Absent express language to the contrary, the Court finds it difficult to conclude that Congress intended for the FDAAA access language to preempt state abortion restrictions which would have been unconstitutional at the time **[*23]** the FDAAA was passed.

Therefore, the Court finds that the UCPA and abortion restrictions do not pose an "unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wyeth, 555 U.S. at 563-64* (internal quotation omitted); *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)* (seminal case finding obstacle preemption). As discussed above, "conflict" preemption has been variously deconstructed into "conflict," "impossibility," and "obstacle" preemption. Some Supreme Court decisions have elevated obstacle preemption to sit alongside field and conflict preemption, treating the later as synonymous with "impossibility" preemption, while others conflate "obstacle" and "conflict" preemption. *Compare, e.g., Virginia Uranium, 139 S. Ct. at 1907* (treating "conflict" and "obstacle" preemption as synonymous), *with Arizona, 567 U.S. at 399* (delineating two types of "conflict" preemption as "impossibility" and "obstacle" preemption). Regardless of taxonomies, both parties treat "conflict" or "impossibility" preemption and "obstacle" preemption as distinct pathways to an implied preemption holding, and the Court will consider those claims as they have arisen before it. *See* Def. Morrisey's Mem. of Law in Supp. of Mot. to Dismiss at 11; Pl.'s Opp'n to Def. Morrisey's Mot. to Dismiss at 14. **[*24]**

The Court finds that while the FDAAA requires the FDA to consider accessibility in making REMS determinations, the plain language of the statute indicates that "access" considerations are made with regards to the FDA's own limitations it imposes upon obtaining medications subject to a REMS, rather than broadly legislating geographical access to the entire population. The context in which the FDAAA was passed confirms this interpretation of the objectives of Congress. Any additional or incidental burden West Virginia has placed upon patients wishing to obtain mifepristone does not provide an unconstitutional "obstacle" to the FDAAA's unambiguous directive to the FDA.

Congruently, the Court rejects Plaintiff's assertion of "direct" or "impossibility" type conflict preemption. Conflict preemption may occur when "compliance with both federal and state regulations is a physical impossibility." *Arizona, 567 U.S. at 399* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132,*

142-143, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)). The Supreme Court has "long recognized that state laws that conflict with federal law are 'without effect.'" Altria Group, 555 U.S. at 76 (quoting Maryland v. Louisiana, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981)). Theoretically—regardless of the intent of the FDAAA—the mifepristone REMS could directly conflict with West Virginia's restrictions, thereby creating a system in which **[*25]** individuals regulated by both federal and state law could not comply with both mandates. *See* Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 486-87, 133 S. Ct. 2466, 186 L. Ed. 2d 607 (2013) (finding preemption due to direct conflict between state tort law and FDCA labelling requirements); PLIVA, Inc. v. Mensing, 564 U.S. 604, 624, 131 S. Ct. 2567, 180 L. Ed. 2d 580 (2011) (same).

Yet, the Court finds that GenBioPro is not subject to a catch-22, whereby it may either comply with the UCPA or the REMS regulations. In fact, GenBioPro is not regulated by the UCPA *at all*. The UCPA regulates "licensed medical professionals," defined as persons licensed under either West Virginia Code § 30-3-1 et seq. or § 30-14-1 et seq., which govern licensure of the practice of medicine, surgery, podiatry, and osteopathic medicine or surgery for physicians and physicians' assistants. W. Va. Code §§ 16-2R-2; 16-2R-3. As discussed above, the UCPA prohibits licensed medical professionals from performing, inducing, or attempting to perform or induce an abortion by any means, subject to a limited series of exceptions. W. Va. Code § 16-2R-3. The prohibited act is further defined as "an act or the omission of an act that, under the circumstances as the person so acting or omitting to act believes them to be, constitutes a substantial step in a course of conduct intended to culminate in an abortion." W. Va. Code § 16-2R-2. Whether this definition could include GenBioPro's sale of mifepristone to doctors and pharmacies **[*26]** is debatable, but the Court need not decide that question today, as GenBioPro is not a "licensed medical professional" under either West Virginia Code § 30-3-1 et seq. or § 30-14-1 et seq. Accordingly, GenBioPro is not caught between obeying state and federal law in a manner which would offend the Supremacy Clause.[10]

However, this Court has found that GenBioPro may assert the interests of its vendees, who are subject to the strictures of the UCPA. Mem. Op. & Order at 18-22, ECF No. 54. GenBioPro sells to doctors and pharmacies nationwide and would like to sell to those same vendees in West Virginia. Compl. ¶¶ 77-79. While the Court's previous opinion focused on the ability of GenBioPro to represent the interests of its vendees who fall outside the UCPA's definition of "licensed medical professional," there is no doubt that many of GenBioPro's vendees would be "licensed medical professionals" under the UCPA. *See* Mem. Op. & Order at 21-22; Compl. ¶ 71. So, the question remains: does the UCPA conflict with the REMS such that licensed medical professionals cannot lawfully comply with both?

The REMS specify the methods by which mifepristone may be prescribed. For example, the REMS indicate which providers may prescribe the drug, whether it may be prescribed **[*27]** remotely or in person, and what diagnostic criteria is appropriate for prescribing mifepristone. 2023 REMS; *see also* 21 U.S.C. § 355-1(f)(3) (indicating which elements to assure safe use may be included in a REMS). The UCPA, on the other hand, instructs licensed medical professionals in the State of West Virginia to only perform abortions when certain extrinsic criteria are present—both medical and non-medical—such as an ectopic pregnancy, or reported rape or incest. W. Va. Code § 16-2R-3(a), (b). The additional state law restrictions include an active prohibition on telemedicine prescription of mifepristone and a dormant set of restrictions mostly involving informational disclosure requirements. *See* W. Va. Code §§ 16-2I-2; 16-2R-9; 30-3-13a(g)(5); 30-1-26(b)(9). A licensed medical professional in West Virginia, therefore, must surmount several hurdles to prescribe mifepristone: first ascertaining whether a patient may obtain an abortion under the UCPA, then whether mifepristone is appropriate for that patient under the REMS, and finally, the method by which mifepristone may be prescribed to the patient in consideration of both the REMS and the West Virginia restrictions. This scheme coheres with traditional conceptions of the practice of medicine and the scope of physicians' authority **[*28]** as state matters. *See, e.g.*, Dent, 129 U.S. at 122 (describing the "time immemorial" power of the State to regulate the practice of physicians).

Accordingly, the Court finds that the UCPA is a restriction on the incidence of abortion, rather than a state directive in direct conflict with the logistical REMS regulations. The Supreme Court has repeatedly indicated that similarly broad state regulations are not preempted by intricate federal regulatory systems. For instance, in *Virginia Uranium*, mining companies and owners of uranium-rich land sued Virginia, alleging that a state law preventing uranium mining was preempted by the federal Atomic Energy Act's regulations on the practice of uranium mining. Virginia Uranium, 139 S. Ct. at 1901. As the decision to disallow uranium mining is separate from the regulations on the act of mining itself—and in an area of authority traditionally left to the States—the Court found that the Atomic Energy Act did not preempt state bans on uranium mining. Id. at 1903, 1907-08. Similarly, the Court has found that state bans on horsemeat are not preempted by the federal regulatory scheme dictating how horses are to be slaughtered.

[10] As an aside, the Court rejects Defendants' argument that GenBioPro may simply choose to stop selling mifepristone in West Virginia, and thus avoid any conflict between state and federal law. *See* Bartlett, 570 U.S. at 488 (rejecting a "stop-selling rationale").

Nat'l Meat Ass'n v. Harris, 565 U.S. 452, 467, 132 S. Ct. 965, 181 L. Ed. 2d 950 (2012).[11] Here, West Virginia's UCPA has limited *when* an abortion may be performed, without touching *how* medication abortion is to be performed. **[*29]** The mifepristone REMS only concern themselves with the latter.[12] As the Court found States may ban uranium mining despite a federal scheme of uranium mining regulation, or horsemeat in the face of a federal scheme of horse slaughter regulation, so this Court is compelled to find that federal regulation of medication abortion prescription does not conflict with severe state limitations on abortion.

b. Field Preemption

Likewise, the Court rejects Plaintiff's arguments as to field preemption.

Field preemption precludes States from "regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona, 567 U.S. at 399* (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 115, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992)* (Souter, J., dissenting)). To put it another way, field preemption "occurs when federal law occupies a 'field' of regulation 'so comprehensively that it has left no room for supplementary state legislation.'" *Murphy, 138 S. Ct. at 1480* (quoting *R.J. Reynolds Tobacco Co. v. Durham Cty., 479 U.S. 130, 140, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986)*). Where Congress has made this determination, States may not regulate in the same "field," even where those regulations might be "parallel to federal standards." *Arizona, 567 U.S. at 401*.

Plaintiff has argued that Congress occupied the field specifically as to drugs subject to **[*30]** a REMS which include "elements to assure safe use." Pl.'s Opp'n to Def. Morrisey's Mot. to Dismiss at 9.[13] A subset of REMS must contain "elements to assure safe use," if the Secretary determines that the regulated drug requires such elements "as part of [a] strategy to mitigate a specific serious risk listed in the labeling of the drug." *21 U.S.C. § 355-1(f)(1)*. These drugs, Plaintiff asserts, are subject to a more "pervasive framework" than other drugs regulated under the FDCA, utilizing the imperative "shall" when instructing the FDA to consider patient "access" in making REMS determinations. Pl.'s Opp'n to Def. Morrisey's Mot. to Dismiss at 9. Essentially, once the FDA concludes a REMS including such elements is necessary for a drug, the FDA is required to take a series of steps in promulgating a REMS including elements to assure safe use. *See 21 U.S.C. §§ 355-1(a), (c), (f), (h)*. Plaintiff believes this requirement is sufficient to demonstrate that Congress has "occupied the field" when it comes to such drugs.

In reply, Defendant Morrisey points to the FDCA's 1962 express saving clause, demonstrating Congressional intent for state law to play a complementary role in the field. Reply in Supp. of Mot. to Dismiss at 6, ECF No. 45. **[*31]** Defendant Morrisey notes that "the presence of a savings provision 'is fundamentally incompatible with complete field preemption.'" *Id.* (quoting *Farina v. Nokia Inc., 625 F.3d 97, 121 (3d Cir. 2010)*; *Aldridge v. Miss. Dept. of Corr., 990 F.3d 868, 874-75 (5th Cir. 2021)*; *In re NOS Commc'ns, 495 F.3d 1052, 1058 (9th Cir. 2007)*). Included in the 1962 Amendments to the FDCA, the saving clause has been interpretated to allow for state tort law's complementary role in shaping safety standards for products regulated under the FDCA. *See Wyeth, 555 U.S. 555*. Accordingly, the Court agrees that the 1962 saving clause has foreclosed any argument for complete field preemption. However, Plaintiff has been clear in its assertion that Congress has only occupied the field as to a subsection of drugs subject to a REMS with elements to assure safe use. *See* Pl.'s Opp'n to Def. Morrisey's Mot. to Dismiss at 9.

Nevertheless, Plaintiff's argument fails for want of Congressional intent in the FDAAA amendments, as discussed in depth above. Where Congress acts in a field traditionally occupied by the States, the presumption against preemption is strongest. *Wyeth, 555 U.S. at 565*. There is no disputing that health, medicine, and medical licensure are traditional areas of

[11] While *National Meat Association v. Harris* decided that the Federal Meat Inspection Act (FMIA) preempted a California law regulating the slaughter of non-ambulatory pigs, the Court emphasized that its holding on the pigs did not imply that state laws banning horse meat would be similarly preempted by the FMIA, stating: "A ban on butchering horses for human consumption works at a remove from the sites and activities that the FMIA most directly governs. When such a ban is in effect, no horses will be delivered to, inspected at, or handled by a slaughterhouse, because no horses will be ordered for purchase in the first instance." *565 U.S. at 467*. The Court has reiterated this dictum as to the legality of bans on horse slaughter in subsequent cases. *Virginia Uranium, 139 S. Ct. at 1914* (Ginsburg, J., concurring); *see also Nat'l Pork Prod. Council v. Ross, 598 U.S. 356, 143 S. Ct. 1142, 1163, 215 L. Ed. 2d 336 (2023)* (discussing state horsemeat bans).

[12] The Court is aware that the REMS do dictate "when" an abortion may be performed with mifepristone, in the sense of gestational limits and locations. But there are different kinds of "when." West Virginia creates pre-requisites to accessing abortion care, while the REMS delineate logistical safety standards once a patient has sought medication abortion.

[13] While Plaintiff's Opposition appears to argue that Congress occupied the field as to all drugs subject to a REMS, at oral argument GenBioPro clarified that its field preemption argument is only as to drugs subject both to a REMS and to additional elements to assure safe use. *See* Tr. of Proceedings at 34-35, ECF No. 62.

state authority. *See, e.g.,* Hillsborough, 471 U.S. at 716. Furthermore, the Supreme Court has repeatedly held that the FDCA does not preempt state action in the field of healthcare or **[*32]** medicine, absent a direct conflict. *Compare* Wyeth, 555 U.S. at 581 (not finding preemption because state tort law did not directly conflict with FDCA), *with* Bartlett, 570 U.S. at 486-87 (finding preemption due to direct conflict between state tort law and FDCA labelling requirements). While the Supreme Court has yet to address the wrinkles of the REMS provision, Plaintiff has not advanced a convincing argument that the Court would treat that statutory subsection differently than any other portion of the FDCA.

To that end, Plaintiff cites United States v. Locke, 529 U.S. 89, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000). In Locke, Washington State passed more stringent regulations on oil tankers than existed under the national regulatory scheme. *See id. at 97*. Washington's personnel qualifications for oil tanker employees were found to be preempted by federal requirements, given historical federal occupation of the field. *Id. at 112-15*. In reaching this conclusion, the Locke Court emphasized that the Coast Guard was given non-discretionary authority to ensure oil tanker personnel met the minimum federal requirements. *Id. at 115-16*. Here, Plaintiff argues that the FDA is subject to a similarly non-discretionary requirement that it ensure drugs which require both a REMS and elements to assure safe use consider access in promulgating those elements. *See* Pl.'s **[*33]** Opp'n to Def. Morrisey's Mot. to Dismiss at 9; *21 U.S.C. § 355-1(f)(1)-(3)*. Therefore, just as the Locke Coast Guard only must ensure oil tanker employees meet minimum qualification requirements, GenBioPro asserts that the FDA has been commanded to ensure mifepristone is available subject only to its REMS.

However, Locke is distinguishable for several reasons. First, the Locke Court repeatedly emphasized that regulating interstate navigation is historically an area of federal concern, dating back to the Constitutional Convention; here, the Court has found the opposite is true. *Id. at 99-100*; *see* Hillsborough, 471 U.S. at 716; Dobbs, 142 S. Ct. at 2248-55 (discussing the history of abortion laws). Second, much of Locke circled around a preemption savings clause in the Oil Pollution Act of 1990, which indicated Congress only intended to leave room for complementary state action in a specified area of discretionary federal authority. *529 U.S. at 105-06*. In contrast, the Supreme Court has found the 1962 FDCA saving clause to contain breadth, given the general language of the clause, the historical state police powers implicated, and the fact Congress included express preemption provisions in a different amendment to the FDCA. Wyeth, 555 U.S. at 567. Conversely, Locke found that a particular sub-field of an area of historical federal concern had been fully occupied by Congress, **[*34]** given the existence of a separate preemption saving clause indicating a differing sub-field would permit complementary state action. The limited language in the Locke opinion focusing on the Coast Guard command must be read in this broader context, which stands in stark contrast to the manner in which the Court has treated how traditional state authority over healthcare has been affected by the FDCA.

Accordingly, the Court finds that Congress has not expressed an intent to occupy the field of drugs subject to a REMS in a manner which would preempt West Virginia's abortion restrictions.

c. Telemedicine Restriction

There is one provision which is unambiguously preempted by the 2023 REMS: the prior restriction on prescribing mifepristone via telemedicine. *See W. Va. Code §§ 30-3-13a(g)(5)*; *30-1-26(b)(9)*. Unlike the other prior restrictions, the telemedicine provision is still in effect. *See W. Va. Code § 16-2R-9*. Accordingly, the Court's finding that the UCPA is not preempted by the REMS is irrelevant to consideration of the telemedicine restriction. The 2023 REMS reflects a determination by the FDA that when mifepristone is prescribed, it may be prescribed via telemedicine.[14]

The telemedicine restriction is not "upstream" **[*35]** from the REMS, in the manner of the UCPA. Rather than indicating what procedures are allowed in West Virginia, the telemedicine restriction dictates the manner in which mifepristone may be prescribed. This is a determination which Congress has allocated to the FDA. *21 U.S.C. § 355-1(f)(3)(C)* (stating that a REMS may include a restriction specifying that "the drug be dispensed to patients only in certain health care settings, such as hospitals."). The FDA has evaluated the criteria Congress designated and has come to the reasoned conclusion that mifepristone may be prescribed via telemedicine. 2023 REMS. This conflict between the REMS and the state statute creates the kind of impossibility preemption discussed above—a licensed medical professional prescribing mifepristone could not comply with both the access determination made by the FDA and the access determination made by West Virginia as to telehealth.

The other prior restrictions might be likewise preempted by direct conflict with the REMS, as they similarly dictate the way mifepristone may be prescribed. *See W. Va. Code § 16-2I-2*.

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[14] Again, the Court notes that the Fifth Circuit's recent decision in *Alliance for Hippocratic Medicine* stayed the 2023 REMS and the 2021 FDA decision to allow prescription of mifepristone via telemedicine. *See 2023 U.S. App. LEXIS 21630, 2023 WL 5266026, at *1-2*. Therefore, this Court's decision as to the West Virginia telemedicine restriction will not change the current Fifth Circuit injunction prohibiting telemedicine, subject to the Supreme Court's order. *See id.* at 4.

Regardless, the Court has not found that the UCPA is unconstitutional. As none of these prior restrictions are currently in effect, this Court may **[*36]** not issue an advisory opinion as to the constitutionality of a law not presently operative.

Accordingly, Defendants' Motions to Dismiss Count I are **DENIED**, as to the telemedicine restriction, and **GRANTED**, as to the UCPA and other prior restrictions.

C. Dormant *Commerce Clause*

The *Commerce Clause* grants Congress the power to regulate interstate commerce. U.S. Const. Art. I, § 8, cl. 3. The Supreme Court has long recognized that the *Commerce Clause* contains a corollary command, "effectively forbidding the enforcement of certain state economic regulations even when Congress has failed to legislate on the subject." Nat'l Pork Prod. Council v. Ross, 598 U.S. 356, 143 S. Ct. 1142, 1152, 215 L. Ed. 2d 336 (2023) (quoting Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995)) (cleaned up). Known as the "dormant *Commerce Clause*," this doctrine has previously been characterized as forbidding States from enacting laws which either discriminate against interstate commerce or regulate extraterritorially. *See, e.g.,* Ass'n for Accessible Medicines v. Frosh, 887 F.3d 664, 667-69 (4th Cir. 2018) (relying on Healy v. Beer Inst., 491 U.S. 324, 335-36, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582-83, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986); Edgar v. MITE Corp., 457 U.S. 624, 642-43, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982) (plurality opinion); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521, 55 S. Ct. 497, 79 L. Ed. 1032 (1935)). Even if a law did not discriminate or regulate extraterritorially, it could still fail the "balancing test" announced in Pike v. Bruce Church, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). Under this standard, if plaintiffs can demonstrate that the challenged law burdens interstate commerce, then the Court determines "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id. at 142* **[*37]** ; *see* Nat'l Pork, 143 S. Ct. at 1165-66 (Sotomayor, J., concurring) (discussing the threshold burden requirement for *Pike* balancing).

On May 11, 2023, the Supreme Court issued its decision in National Pork Producers Council v. Ross, 598 U.S. 356, 143 S. Ct. 1142, 215 L. Ed. 2d 336 (2023). *National Pork* affirmed a lower court decision to dismiss a pork industry plaintiff's challenge to a California law limiting the sale of certain kinds of pork in the State. The pork plaintiffs argued that the law violated the dormant *Commerce Clause* by forcing them to broadly change their business practices. *Id. at 1151*. As a preliminary matter, the Court rejected plaintiff's interpretation of *Healy, Brown-Forman, Edgar*, and *Baldwin* as engendering an "almost per se rule" against extraterritoriality.[15] *Id. at 1154-57*. Accordingly, this Court finds that to whatever extent the Fourth Circuit's dormant *Commerce Clause* jurisprudence employed a similar "principle against extraterritoriality" founded in those same cases, it has been abrogated by *National Pork*. *See* Ass'n for Accessible Med., 887 F.3d at 667-69. While Justice Gorsuch's majority opinion could not come to a consensus on the application of the *Pike* balancing test to the pork industry group's claims, in three partial concurrences a minimum of six Justices[16] upheld some form of *Pike* balancing. *See id. at 1165-72*. At least a plurality held that "derivative harms" of legislation may be considered when employing the *Pike* balancing test. *Id. at 1169* (Roberts, C.J., concurring in part); *see id. at 1165-66* (Sotomayor, J., concurring **[*38]** in part) (potentially supporting usage of derivative harms as a factor in *Pike* analysis). Throughout, the opinions emphasize that an "antidiscrimination principle lies at the 'very core' of our dormant *Commerce Clause* jurisprudence," forbidding States from enacting statutes "driven by economic protectionism." *Id. at 1153* (majority).

In its Opposition to Defendant Morrisey's Motion to Dismiss, Plaintiff argues that the challenged statutes "violate the Clause by imposing an undue burden on interstate commerce, by regulating extraterritorially, and by functionally banning an article of commerce." Pl.'s Opp'n to Def. Morrisey's Mot. to Dismiss at 23. However, following the decision in *National Pork*, this Court ordered the parties to file supplemental briefing addressing how *National Pork*'s holding applied to the instant allegations. ECF No. 55. GenBioPro's Supplemental Brief admits that *National Pork* forecloses the Complaint's argument that West Virginia has violated the dormant *Commerce Clause* by regulating extraterritorially. Pl.'s Supp. Br. at 14-15, ECF No. 58.

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[15] The Court appeared to limit dormant *Commerce Clause* extraterritoriality claims to statutes that discriminate against interstate commerce by tying in-state prices to out-of-state prices. *Id. at 1154-55* (relying on *Healy, 491 U.S. 324*).

[16] As this Court reads *National Pork*, Justices Sotomayor and Kagan upheld *Pike*'s balancing test with no further elaboration, stating only that plaintiff had failed to meet the threshold requirement for consideration under *Pike*. *Id. at 1165-66*. Chief Justice Roberts and Associate Justices Alito, Kavanaugh, and Jackson applied *Pike* to the facts of the case, further interpreting the balancing test. *Id. at 1167-72*.

Justices Gorsuch, Barrett, and Thomas's view might be interpreted as upholding *Pike* as applying only to cases in which commensurate values could be balanced. *Id. at 1159-61; 1166-67* (Barrett, J., concurring). Whether one considers that view to be upholding traditional *Pike* balancing or as partially overturning *Pike* likely depends on whether one agrees with the arguments made by those Justices. Regardless, this opinion is clearly the minority and will not be applied here.

This Brief further re-categorizes GenBioPro's argument that the Clause was violated by "functionally banning an article of commerce" as a factor of consideration under the *Pike* balancing test, rather than **[*39]** as an independent means by which West Virginia could have violated the Clause. *Compare* Pl.'s Opp'n to Def. Morrisey's Mot. to Dismiss at 27, *with* Pl. Supp. Br. at 11-12. Therefore, the Court will only consider whether the Complaint has plausibly alleged that the challenged laws fail the *Pike* balancing test, in light of any recent refinement of *Pike* by *National Pork*.

Post-*National Pork*, Plaintiff asserts that West Virginia's laws fail that test for three reasons: "(1) they intrude on an area in which Congress requires nationally uniform regulation; (2) they functionally ban a product for its indicated use; and (3) they inflict 'derivative harms' by imperiling the health and safety of pregnant West Virginians and the national market for medications." Pl.'s Supp. Br. at 7. The Court will consider each asserted ground in turn.[17] But first, the Court notes that *National Pork* made clear that *Pike* balancing is meant to "serve[] as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose." *143 S. Ct. at 1157*. While the Court recognized that "a small number of our cases have invalidated state laws that appear to have been genuinely nondiscriminatory," they referred to ferreting out discriminatory laws as the **[*40]** "heartland" of the *Pike* test. *Id.* GenBioPro's claim falls far outside of this heartland, declining to assert that West Virginia was motivated by economic protectionism or that it had a discriminatory intent in passing the UCPA. As with the pork plaintiffs, this "is not an auspicious start." *Id.*

a. Required Nationally Uniform Regulation

Plaintiff distinguishes the holding in *National Pork*, arguing that while the pork plaintiff was merely concerned with the "cost of compliance," GenBioPro is concerned about "an area where there is a compelling need for national uniformity." Pl.'s Supp. Br. at 8 (quoting *Yamaha, 401 F.3d at 572*).

Yet again, regulation of health, medicine, and the medical profession are areas in which the States have traditionally exercised authority. *E.g., Hillsborough, 471 U.S. at 716*. Accordingly, the Supreme Court has repeatedly found that there is a complementary role for state law, even where Congress has acted to regulate health and medicine. *E.g., Wyeth, 555 U.S. at 581*. If Congress had created a system mandating national uniformity, the Court would expect to see some evidence of intent to preempt historical complementary state action. As analyzed in depth above, here there is no such expressed intent to occupy the field. A "compelling need for national **[*41]** uniformity" could exist absent field preemption, of course, but GenBioPro has not plausibly alleged any such need.

Most importantly, it's unclear where *National Pork* or its predecessors indicate that a "compelling need for national uniformity" entails a dormant *Commerce Clause* violation pursuant to *Pike*. Plaintiff points to language in the Chief Justice's concurrence. *See Nat'l Pork, 143 S. Ct. at 1170* ("The *Pike* balance may well come out differently when it comes to interstate transportation, an area presenting a strong interest in 'national uniformity.'"). However, the majority opinion dispensed of this interpretation. *Id. at 1158 n.2*. ("[T]his Court has only rarely held that the *Commerce Clause* itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede *the flow* of interstate goods." (internal quotation marks omitted, emphasis in original)). There is no argument that the UCPA or other restrictions impede *the flow* of mifepristone nationally.

b. Banning an Article of Commerce

GenBioPro's argument that the UCPA fails the *Pike* test by functionally banning an article of commerce is misplaced. In making this argument, Plaintiff leans heavily upon an 1898 case in which the Court found that the dormant *Commerce Clause* forbids States from banning **[*42]** "oleomargarine" as an "article of commerce." Pl.'s Supp. Br. at 11 (citing *Schollenberger v. Pennsylvania, 171 U.S. 1, 18 S. Ct. 757, 43 L. Ed. 49 (1898)*). In *Schollenberger*, the Court stated that

> The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure [sic] purity of the article imported, but such police power does not include the total exclusion even of an article of food.

171 U.S. at 12. Be that as it may, the Court finds that *National Pork* put to rest any debate over whether States may enact product bans under their police power. Without acknowledging the existence of the oleomargine case, the various fractured

[17] The Court acknowledges Defendant Morrisey's analysis of the potentially conflicting concurrences in *National Pork*, and their implications to the present dispute. *See* Def.'s Supp. Br., ECF No. 59. In fact, Defendant's Supplemental Brief contains a more prudent jurisprudential approach to applying *National Pork* to Plaintiff's Complaint. However, at the Motion to Dismiss stage, the Court takes care to draw all reasonable inferences in favor of the non-moving party and therefore employs Plaintiff's proffered post-*Pork* approach in dismissing its claims. Accordingly, Defendant Morrisey's crisp application of conflicting doctrine is valued but not utilized here.

opinions in National Pork made it clear that state bans of products as diverse as horsemeat, fireworks, and plastic bags do not offend the United States Constitution. 143 S. Ct. at 1163 (plurality); 1171 (Roberts, C.J., concurring) (responding to the plurality by arguing the broader market is affected by California's economy, rather than arguing a per se rule against banning products); 1150 (majority) ("While the Constitution addresses many weighty issues, the type **[*43]** of pork chops California merchants may sell is not on that list."). Circuit Courts have upheld both partial and full bans of foie gras, horsemeat, and shark fins in the face of dormant Commerce Clause challenges. *See* Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937 (9th Cir. 2013) (foie gras); Cavel Int'l, Inc. v. Madigan, 500 F.3d 551 (7th Cir. 2007) (horsemeat); Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136 (9th Cir. 2015) (shark fins). Relevant to the instant case is the fact that many of the bans upheld by the Appellate Courts and name-checked by the Supreme Court plurality were enacted under state police power to regulate the health and morality of the community—the same authority under which the UCPA and other provisions were enacted. *See, e.g.,* Cavel Int'l, 500 F.3d at 555, 557 (finding a ban on horsemeat to be within the state's power to regulate animal welfare); Nat'l Pork, 143 S. Ct. at 1163 (plurality; citing Cavel Int'l).

Plaintiff attempts to distinguish product bans which National Pork found acceptable from the "ban" of mifepristone,[18] arguing that "(1) the products involved are not necessities," "(2) they often cause severe harms or offer little public benefit, and (3) Congress did not subject these items to an integrated, and inherently national, system . . . much less limit 'burdens' on that system." Pl.'s Supp. Br. at 11. First, the Court finds that the determination that any given product is a "necessity" invites the Court to engage in second-guessing **[*44]** of state legislatures, with no limiting principle. Second, and similarly, the conclusion that any given product causes "severe harms or offer[s] little public benefit" is surely one for the legislative body enacting any given statutory ban—not for this Court. Furthermore, at oral argument in National Pork, the plaintiff pressed the Court to distinguish bans enacted for health and safety from bans enacted solely pursuant to a State's moral authority; the Court declined. *See* Nat'l Pork, 143 S. Ct. at 1160. Finally, while Plaintiff claims "[h]orsemeat and shark fins fit those three criteria," this is incorrect; both animal products are subject to an "inherently national system," demonstrating that such products may be subject to state bans. *See, e.g.*, FMIA, 21 U.S.C. § 601 et seq. (regulating horsemeat); *Shark Conservation Act of 2010, Pub. L. 111-348; 124 Stat. 3668* (regulating shark fins).[19] More fundamentally, the Court cannot find any support in National Pork for the proposition that any of these criteria should be considered when considering state law limitations on the sale of consumer goods.

Accordingly, the Court finds that impeding the sale of an "article of commerce" is not an intrinsic violation of the dormant Commerce Clause, and that Schollenberger has been abrogated.[20] If West Virginia has "functionally banned" mifepristone, it was well **[*45]** within its rights to do so.

c. Derivative Harms

Next, Plaintiff argues that, under Pike, non-economic "derivative harms" caused by the UCPA and challenged restrictions should be weighed against the putative benefits or interests of the State in enacting the legislation. Pl.'s Supp. Br. at 12-14.

GenBioPro asserts derivative harms "to pregnant West Virginians by depriving them of essential medicine." Pl.'s Supp. Br. at 13. First, while this Court has granted Plaintiff third-party standing to pursue the interests of its vendees, it has not granted GenBioPro third-party standing as to "pregnant West Virginians." Nor has Plaintiff petitioned the Court to consider these interests prior to this Supplemental Brief. The Court does not doubt, however, that there are substantial derivative harms to pregnant West Virginians caused by a decrease in access to mifepristone.

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[18] Plaintiff characterizes the UCPA and other restrictions as a "functional ban" of mifepristone. Pl.'s Supp. Br. at 11-12. Given the exceptions enumerated within the UCPA (and the fact mifepristone is not regulated directly by any of the challenged provisions), the Court is skeptical of this claim. *See* W. Va. Code § 16-2R-3(a) & (b).

[19] The Shark Conservation Act of 2010 ("SCA") amended the High Seas Driftnet Fishing Moratorium Protection Act and the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") to require all sharks caught in the United States be brought to shore with their fins naturally attached. ***Pub. L. 111-348; 124 Stat. 3668***. The SCA is the most recent in a series of actions taken by the federal government to regulate shark finning. *See, e.g.*, ***The Shark Finning Prohibition Act of 2000, Pub. L. 106-557; 114 Stat. 2772***. The caselaw referenced by Plaintiff found that a ban on possession of shark fins—even when those fins were obtained legally pursuant to the federal finning scheme—was neither preempted by the MSA nor in violation of the dormant Commerce Clause. *See* Chinatown Neighborhood Association, 794 F.3d 1136. As might be inferred, the parallels between Chinatown and the instant case are not particularly favorable to GenBioPro.

[20] This is not the first Court to conclude that a literal interpretation of Schollenberger would be anomalous and out-of-step with modern dormant Commerce Clause jurisprudence. *See* Association des Eleveurs, 729 F.3d at 949-50 (implicitly interpreting Schollenberger to apply only where a "nationally uniform business" and national system of regulation are implicated).

Unfortunately, the Court cannot consider any such holistic derivative harms to pregnant West Virginians under *Pike* balancing. As fractured as *National Pork* is, the scant emphasis on "derivative harms" within the concurring opinion clarifies that—in the context of the dormant *Commerce Clause*—such harms are primarily economic in nature. *See 143 S. Ct. at 1169* ("Our precedents have **[*46]** long distinguished the costs of complying with a given state regulation from *other economic harms to the interstate market*." (emphasis added)). The concurrence focused on harms to interstate commerce and interstate trade generally—such as difficulties in interstate shipping and employment—rather than harms to individuals within the challenged State. *Id.* (discussing *Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959)*). Again, in discussing application of *Pike*, the Chief Justice's concurrence emphasizes that these are derivative "harms to the interstate market" which are "in no sense noneconomic." *Id.* (internal quotation marks omitted). Accordingly, this Court concludes that derivative harms to pregnant West Virginians are not the type of harm it may consider when employing the *Pike* balancing test.

Plaintiff also argues that the UCPA and restrictions "upend the national market for drugs." Pl.'s Supp. Br. at 13. A state law which spawned chaos in the national prescription drug market would likely cause the type of derivative economic and interstate harm which could be considered under the *Pike* balancing test. But the Court is not convinced that Plaintiff has plausibly pled facts to support any "upending" of the national market for mifepristone caused **[*47]** by West Virginia's legislation. Further, as alluded to above, many States restrict abortion in a manner which likely limits the sale of mifepristone. *See, e.g.*, *Miss. Code Ann. § 97-3-3(1)* (banning abortion with very limited exceptions). Plaintiff has not alleged that the national prescription drug market has been upended by the incidental restriction of mifepristone in many States.

d. *Pike* Threshold Showing

The Court appreciates the gravity of Plaintiff's claims and has taken pains to address them at length above—but even if Plaintiff were correct that national uniformity, functionally banning an article of commerce, and the various alleged derivative harms were sufficient to swing the *Pike* balance in GenBioPro's favor, the Court remains skeptical that Plaintiff could meet the threshold burden necessary to invoke *Pike*. Admittedly, it's unclear what exactly a party would need to do to meet the threshold to be considered under the *Pike* balancing test, as muddled by *National Pork*. Justice Sotomayor's concurrence in *National Pork* averred that the pork producers had failed to meet this threshold burden, without elaboration into the facts of the case. *143 S. Ct. at 1165*. This confusion is another reason the Court has considered the *Pike* claims at length above.

Regardless of **[*48]** whether it met the threshold burden, the pork producer plaintiff in *National Pork* plausibly alleged significant disruption to the national pork industry. *See id. at 1151-52*. Due to the size of the California market, the national producers of pork alleged they would be compelled to alter their national production standards in order to continue to sell within California. *Id.* And yet, it appears a majority of the Justices found this insufficient to meet the threshold "burden on interstate commerce" required under *Pike*. Here, Plaintiff has undoubtedly alleged less of a burden on interstate commerce than was alleged by the pork producers. None of West Virginia's laws require Plaintiff to alter its national production methods in order to access the State's market. Nor will compliance with the UCPA and other restrictions entail broad re-working of the entire pharmaceutical industry. At most, Plaintiff has plausibly alleged that one prescription medication will be prescribed less for one indicated purpose within one State.

Another comparison: in *Association for Accessible Medicine v. Frosh*, the Fourth Circuit found that a Maryland statute regulating pharmaceutical price-gouging burdened interstate commerce in prescription **[*49]** drugs in violation of the dormant *Commerce Clause*. *887 F.3d at 673*. There, the Court of Appeals found that the challenged statute "set[] prescription drug prices in a way that 'interfere[s] with the natural function of the interstate market' by superseding market forces that dictate the price of a good." *Id.* (quoting *McBurney v. Young, 569 U.S. 221, 235, 133 S. Ct. 1709, 185 L. Ed. 2d 758 (2013)*). Accordingly, if many States adopted laws analogous to the Maryland act, there was the potential to create "the kind of competing and interlocking local economic regulation that the *Commerce Clause* was meant to preclude." *Id. at 674* (quoting *Healy, 491 U.S. at 337*). There is no such potential here. The UCPA can hardly be characterized as an economic regulation, and even if every State adopted a differing regulation on when abortion is permissible—and, to be frank, *this has already happened*—it would not entail competition on mifepristone pricing between the States.

States enact laws pursuant to their police power to regulate public health and morality. Morality-based laws often curtail the sale of goods. The vendors of curtailed goods may lose sales opportunities. Outraged, vendors can feel the laws must somehow be unconstitutional. And yet, the Supreme Court and Courts of Appeals have repeatedly affirmed that morality-based product bans do not **[*50]** intrinsically offend the dormant *Commerce Clause*. Accordingly, Defendants' Motions to Dismiss Count II are **GRANTED**.

IV. CONCLUSION

Defendant Mark A. Sorsaia and Defendant Patrick Morrisey's Motions to Dismiss (ECF Nos. 17 & 19) are **GRANTED**, in part, and **DENIED** in part.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented parties.

ENTER: August 24, 2023

/s/ Robert C. Chambers

ROBERT C. CHAMBERS

UNITED STATES DISTRICT JUDGE

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EXHIBIT U

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As of: November 26, 2024 2:08 PM Z

Bryant v. Stein

United States District Court for the Middle District of North Carolina

April 30, 2024, Decided; April 30, 2024, Filed

1:23-CV-77

Reporter
2024 U.S. Dist. LEXIS 78176 *; __ F.Supp.3d __

AMY BRYANT, M.D., Plaintiff, v. JOSHUA H. STEIN, in his official capacity as Attorney General for the State of North Carolina, et al., Defendants.

Subsequent History: Injunction granted at, Judgment entered by, Dismissed by, in part *Bryant v. Stein, 2024 U.S. Dist. LEXIS 113926, 2024 WL 3107568 (M.D.N.C., June 3, 2024)*

Appeal filed, 07/02/2024

Core Terms

patient, mifepristone, in-person, drugs, prescribe, preempted, restrictions, dispensing, state law, preemption, regulation, pregnancy, obstacle, healthcare, risks, abortion, safe use, providers, defendant-intervenors, health and safety, informed consent, ultrasound, cleaned, appointment, follow-up, safe, provisions, healthcare provider, labeling, pharmacy

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For KODY H. KINSLEY, in his official capacity as the North Carolina Secretary of Health and Human Services, Defendant: MICHAEL T. WOOD, LEAD ATTORNEY, DEPARTMENT OF JUSTICE, RALEIGH, NC.

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For Timothy K. Moore, Intervenor Defendant: WILLIAM ELLIS BOYLE, LEAD ATTORNEY, WARD AND SMITH, P.A., RALEIGH, NC; ERIN MORROW HAWLEY, ALLIANCE DEFENDING FREEDOM, WASHINGTON, DC.

For Philip E. Berger, Intervenor Defendant: **[*3]** WILLIAM ELLIS BOYLE, LEAD ATTORNEY, WARD AND SMITH, P.A., RALEIGH, NC.

Judges: Catherine C. Eagles, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: Catherine C. Eagles

Opinion

MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, Chief District Judge.

Under the *Food, Drug, and Cosmetic Act*, the Food and Drug Administration is responsible for evaluating the safety and efficacy of prescription drugs and setting restrictions on their lawful use and distribution within the United States. Outside the terms of FDA approval, such drugs cannot be distributed legally in this country. Under the 2007 amendments to that Act, Congress increased and expanded the FDA's duties, and, as is most relevant here, imposed extensive obligations and responsibilities that the FDA must meet when it evaluates and sets restrictions on higher-risk drugs.

The State of North Carolina has imposed additional requirements beyond what the FDA requires on the distribution of one of these drugs and what must occur before such distribution. The plaintiff, a medical doctor who prescribes this medication, contends that these additional requirements are preempted by federal law. The defendant-intervenors, North Carolina state legislative leaders, contend in part **[*4]** that without the additional state requirements the drug is not safe, and as to some of the requirements, they point to other state interests supported by the state laws.

This case thus raises the question of whether and when a state can impose additional requirements on the distribution of an FDA-approved drug. While this case concerns the distribution of a drug used to terminate a pregnancy, a similar case could arise over any drug, from FDA-approved thyroid or diabetes medications, drugs for cancer treatment, vaccinations, contraceptives, or opioids for pain management.

The Court finds and concludes that to the extent North Carolina law imposes safety restrictions on the distribution of the drug that the FDA has implemented and then later affirmatively rejected and removed, those laws frustrate the congressional goal of establishing a comprehensive regulatory framework under which the FDA determines conditions for safe drug distribution that do not create unnecessary burdens on the health care system or patient access. The provisions of the North Carolina law that prohibit health care providers other than physicians from prescribing the drug, require in-person prescribing, dispensing, **[*5]** and administering, mandate the scheduling of an in-person follow-up appointment, and require non-fatal adverse event reporting to the FDA stand as obstacles to Congress' purpose and are preempted.

But to the extent North Carolina law imposes requirements that have not been expressly considered and rejected by the FDA or that focus more on the practice of medicine and a patient's informed consent, these provisions do not interfere with Congress' purpose and are not preempted. This includes the state's requirements for an in-person advance consultation, use of an ultrasound, an in-person examination, blood type testing, and adverse event reporting to state health authorities. Summary judgment will be entered accordingly.

I. Introduction

The FDA approved Mifeprex, the brand name of mifepristone, for distribution in 2000, subject to numerous restrictions and label requirements. *See generally* Doc. 82-4. Mifepristone is taken in a regimen with another drug to terminate a pregnancy. *See* Doc. 100-11 at 19. When the FDA approved Mifeprex, it included conditions on distribution to assure safe use of the drug under Subpart H of the FDA's regulations. *See* Doc. 82-4 at 7; *see also 21 C.F.R. §§ 314.500-314.560*.[1]

In 2007, **[*6]** Congress enacted the *Food and Drug Administration Amendments Act* ("FDAAA" or "the 2007 amendments"). *See Pub. L. No. 110-85, 121 Stat. 823 (2007)*. These amendments made major changes to the Food, Drug, and Cosmetic Act and to the responsibilities and duties of the FDA. One such change was the addition of a requirement that for certain categories of drugs, the FDA must create risk evaluation and mitigation strategies ("REMS") when "necessary to ensure that the benefits of [a] drug outweigh the risks of the drug." *21 U.S.C. § 355-1(a)(1)*. Congress deemed drugs already approved with safety conditions under Subpart H of the FDA's regulations to have a REMS in effect under the 2007 amendments and required those responsible for these approved drugs to submit a proposed REMS to the FDA. *See 121 Stat. at 950-51*.

At a minimum, a REMS must include a timeline for periodic reassessment of the REMS strategy. *See §§ 355-1(c)-(d)*. It can also contain two other types of requirements outlined in statute: (1) "additional potential elements of strategy," if the FDA decides that such elements mitigate a serious risk of the drug, *see § 355-1(e)*, and (2) elements to assure safe use ("ETASUs") for drugs with "inherent toxicity or potential harmfulness." *See § 355-1(f)*. If the FDA includes an ETASU, it must make sure that the **[*7]** element mitigates "a specific serious risk listed in the labeling of the drug," *§ 355-1(f)(3)*, and is not "unduly burdensome on patient access to the drug." *§ 355-1(f)(2)(C)*. To the extent possible, the FDA should also implement an ETASU

[1] The FDA approves drugs under Subpart H if it finds the drugs "can be safely used only if distribution or use is restricted." *21 C.F.R. § 314.520(a) (2023)*. Any restrictions must be "commensurate with the specific safety concerns" of the drug. *§ 314.520(b)*.

in a way that "minimize[s] the burden on the health care delivery system." § 355-1(f)(2)(D).

The manufacturers of Mifeprex submitted proposed REMS restrictions to the FDA pursuant to the FDAAA. *See* Doc. 82-9 at 2. In 2011, the FDA adopted a REMS program for the drug that incorporated the original Subpart H restrictions. *See id.* at 2, 5; Doc. 82-8 at 2-4 (2011 Mifeprex REMS).[2] The REMS included a number of ETASUs, discussed in more detail *infra* pp. 13-17.

As required by statute, *see* § 355-1(d), the FDA has reevaluated the mifepristone REMS elements periodically. Several times since 2000, it has altered and reduced the restrictions and ETASUs on Mifeprex and its generic equivalent mifepristone.

In 2023, North Carolina revised its laws governing pregnancy termination in an act entitled "Abortion Laws." *See* 2023 N.C. Sess. Laws 2023-14; N.C. Gen. Stat. §§ 90-21.80-21.99 (2023). As part of those laws, the state imposes many restrictions around the use and distribution of abortion-inducing drugs, including mifepristone. *See* § 90-21.81(1a) (naming mifepristone in the definition of "[a]bortion-inducing **[*8]** drug"); § 90-21.83A; § 90-21.83B. These restrictions include some of the same restrictions that the FDA implemented in the past and later removed. *See* discussion *infra* pp. 34-41.

The plaintiff, Dr. Amy Bryant, contends that some of the state laws that regulate the use and distribution of mifepristone stand as an obstacle to the full purpose and objectives of Congress identified in the 2007 amendments and thus are preempted. The defendant, the Attorney General, generally agrees with the plaintiff. The defendant-intervenors, state legislative leaders Timothy Moore and Philip Berger, contend that the state laws are not preempted and do not impose such an obstacle, relying primarily on a state's traditional authority to pass laws for the health and safety of its citizens. In the alternative, the defendant-intervenors contend that the major questions doctrine precludes implied preemption.

II. Procedural Background

After the plaintiff filed her amended complaint, Doc. 82, the defendant-intervenors filed a motion to dismiss. Doc. 83. All parties briefed the motion to dismiss, Doc. 84; Doc. 85; Doc. 86; Doc. 88, and the Court held a hearing on the motion on January 17, 2024. *See* Minute Entry 01/17/2024. During that **[*9]** hearing, the Court confirmed with the parties that there were no disputed questions of fact, and with the consent of all parties, converted the motion to dismiss into cross-motions for summary judgment. *See id.* The parties have since filed additional briefing on the summary judgment motions, Doc. 98; Doc. 99; Doc. 100, and the matter is ripe for resolution.

III. Preemption

The *Supremacy Clause of the Constitution* dictates that "the Laws of the United States" are "the supreme Law of the Land." U.S. CONST. art. VI. "[T]his means that federal law preempts - or bars - claims under state law that either interfere with or are contrary to federal law." *Guthrie v. PHH Mortg. Corp., 79 F.4th 328, 336 (4th Cir. 2023)*, *petition for cert. filed*, *No., 2024 U.S. LEXIS 1914*; *accord S. Blasting Servs., Inc. v. Wilkes Cnty., 288 F.3d 584, 589 (4th Cir. 2002)*.

Courts "must not presume federal law preempts state law." *Guthrie, 79 F.4th at 336*. Indeed, "in all preemption cases," courts "start with the assumption that the historic police powers of the states are not to be superseded by the federal act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)* (cleaned up); *see also S. Blasting Servs., 288 F.3d at 589-90* (stating any analysis of preemption begins "with the basic assumption that Congress did not intend to displace state law" (quoting *Maryland v. Louisiana, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981)*)). This presumption against preemption is especially strong when dealing with matters traditionally left to the states, such as **[*10]** public health and safety, the practice of medicine, and the regulation of medical professionals. *See Wyeth, 555 U.S. at 565*.[3]

Preemption can either be express or implied. *See Altria Grp., Inc.*

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[2] Doc. 82-8 is undated, but the parties do not dispute that it was the 2011 REMS.

[3] *See also Hillsborough Cnty. v. Automated Med. Lab'ys Inc., 471 U.S. 707, 719, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)* (stating "the regulation of health and safety matters is primarily, and historically, a matter of local concern"); *Watson v. Maryland, 218 U.S. 173, 176, 30 S. Ct. 644, 54 L. Ed. 987 (1910)* (holding that "[i]t is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health" and discussing licensing of medical practitioners); *Gonzales v. Carhart, 550 U.S. 124, 157, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007)* ("Under our precedents it is clear the State has a significant role to play in regulating the medical profession."); *Barsky v. Bd. of Regents, 347 U.S. 442, 451, 74 S. Ct. 650, 98 L. Ed. 829 (1954)* (indicating that the state has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine); *Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 348, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001)* (identifying "historic primacy of state regulation of matters of health and safety").

v. Good, 555 U.S. 70, 76, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008) ("Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose"). Implied preemption includes conflict preemption, *id.* at 76-77; *Guthrie*, 79 F.4th at 336-37, which can be divided further into impossibility preemption and obstacle preemption. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). Obstacle preemption exists "where state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248 (cleaned up); *accord Guthrie*, 79 F.4th at 337. While courts often categorize and subdivide the types of preemption, these categories "are not rigidly distinct." *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 139 S. Ct. 1894, 1901, 204 L. Ed. 2d 377 (2019) (quoting *Crosby*, 530 U.S. at 372 n.6).

In this case, the plaintiff contends that the challenged state laws present an obstacle to the accomplishment of Congress' objectives.[4] When courts evaluate obstacle preemption, they first examine "the clear and manifest purpose of Congress" in enacting the federal law. *Wyeth*, 555 U.S. at 565 (holding congressional purpose is "ultimate touchstone in every preemption case"). After courts identify Congress' purpose, they evaluate whether the state law or regulation will "prevent or frustrate the accomplishment **[*11]** of a federal objective." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000); *accord Guthrie*, 79 F.4th at 338. If it does, the conflicting state law is nullified by the *Supremacy Clause*. *Geier*, 529 U.S. at 873. And when a state adopts a law that imposes a requirement a federal agency deliberately rejected because it conflicts with Congress' goals, then it is preempted. *See id.* at 881 (finding conflict preemption where plaintiff sought to impose automobile safety requirement federal agency had deliberately rejected); *Bethlehem Steel Co. v. N.Y. State Lab. Rels. Bd.*, 330 U.S. 767, 774, 67 S. Ct. 1026, 91 L. Ed. 1234 (1947) (noting state regulation preempted where federal agency had determined that the regulation was not appropriate); *see also Wyeth*, 555 U.S. at 581 n.14 (declining to find preemption and distinguishing *Geier* because the FDA "did not consider and reject" additional warnings).

IV. The Food and Drug Administration and its Governing Law

Congress passed the *Federal Food and Drug Act in 1906* to prohibit "the manufacture or interstate shipment of adulterated or misbranded drugs." *Wyeth*, 555 U.S. at 566. The Act "supplemented the protection for consumers already provided by state regulation and common-law liability." *Id.* Some 30 years later, in 1938, Congress enacted the Food, Drug, and Cosmetic Act, creating the Food and Drug Administration. *See id.*; *Zogenix, Inc. v. Patrick*, No. 14-CV-11689, 2014 U.S. Dist. LEXIS 51840, 2014 WL 1454696, at *2 (D. Mass. Apr. 15, 2014). The FDCA required, among other things, that every drug manufacturer submit a new drug application ("NDA") to the FDA for pre-market approval **[*12]** of drugs and their labels. *Wyeth*, 555 U.S. at 566; *21 U.S.C. § 355(a)*. If the FDA did not act, the "application became effective 60 days after the filing." *Wyeth*, 555 U.S. at 566.

Congress amended the FDCA in 1962 to shift the burden to the manufacturer to show that a drug was safe and effective before the FDA could approve it. *Id.* at 567. With this change, a drug could not be sold until the FDA gave affirmative approval. *See id.* Congress included a savings clause as part of the amendments providing that "[n]othing in the amendments made by this Act" invalidates "any provision of State law which would be valid in the absence of such amendments unless there is a direct and positive conflict." *See Drug Amendments of 1962*, Pub. L. No. 87-781, § 202, 76 Stat. 780, 793.

Through regulation, the FDA established requirements for new drug applications submitted by manufacturers. *See* 21 C.F.R. § 314; *see generally Burroughs Wellcome Co. v. Schweiker*, 649 F.2d 221, 223 (4th Cir. 1981) (describing NDA process then in place under statute and regulation). NDAs must include relevant clinical data, the labeling proposed for the drug, and "a discussion of why the drug's benefits exceed the risks under the conditions stated in the labeling." *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 476, 133 S. Ct. 2466, 186 L. Ed. 2d 607 (2013) (cleaned up). The FDA may approve an NDA only if it finds that the drug in question is "safe for use" under "the conditions of use prescribed, recommended, or suggested in the proposed **[*13]** labeling thereof." *Id.* (quoting *21 U.S.C. § 355(d)*). For the FDA to find a drug safe, the drug's "probable therapeutic benefits must outweigh its risk of harm." *Id.* (cleaned up).

The FDA also began to evaluate some drugs with conditions of restricted use or distribution under a regulation known as Subpart H. *See 21 C.F.R. §§ 314.500-314.560*. When the FDA approved drugs under Subpart H, it could limit distribution "to certain facilities or physicians with special training or experience," or condition distribution "on the performance of specified medical procedures." *§ 314.520*. Thus, the FDA could regulate the practice of medicine to a limited extent as it related to the prescribing of these drugs.

[4] All parties and the defendant-intervenors agree that Congress has not explicitly preempted state regulation of pharmaceutical drugs. The plaintiff does not contend that there is field preemption or that it is impossible to comply with both state and federal law. *See* Doc. 85 at 32 n.8; Doc. 96 at 13.

In 2007, Congress again amended the FDCA when it enacted the FDAAA. *Pub. L. No. 110-85, 121 Stat. 823 (2007)*. Among other things, Congress gave the FDA[5] the authority to decide if a risk evaluation and mitigation strategy ("REMS") "is necessary to ensure that the benefits of [a] drug outweigh the risks of the drug." *21 U.S.C. § 355-1(a)(1)*. Congress authorized the FDA to require a REMS as part of an NDA and directed the FDA to consider certain factors when it decides whether a REMS program is necessary for a new drug. *See id.*[6] The FDA can also impose a REMS program for a drug it has already approved if it "becomes **[*14]** aware of new safety information" that makes "such a strategy necessary." *§ 355-1(a)(2)* (cleaned up).[7] If the FDA approves a drug subject to a REMS, then a person may not introduce or deliver the drug into interstate commerce if "the person fails to maintain compliance with the requirements of the approved strategy." *§ 355(p)(1)(B)*. Any holder of a drug application previously approved with Subpart H restrictions had to submit a proposed REMS so the drug could be considered by the FDA under the 2007 amendments. *See Pub. L. No. 110-85, 121 Stat. 823, 950-51 (2007)*; *see also* discussion *supra* pp. 3-4.

As part of a REMS program, Congress authorized the FDA to require additional restrictions on use called "elements to assure safe use" ("ETASUs") for **[*15]** drugs that have "inherent toxicity or potential harmfulness." *§§ 355-1(f)(1)*, *(3)*. The FDA can require ETASUs for a drug when other elements authorized by statute are not sufficient "to mitigate a specific serious risk." *§§ 355-1(f)(1)(A)*, *(B)*. These drugs "can be approved only if, or would be withdrawn unless," they have ETASUs in place. *§ 355-1(f)(1)(A)*. Any ETASUs must be "commensurate with" and promote the goal of mitigating "a specific serious risk listed in the labeling of the drug." *§§ 355-1(f)(2)(A)*, *(3)*. Congress also required that any ETASU must not be "unduly burdensome on patient access to the drug," and must be implemented "so as to minimize the burden on the health care delivery system." *§§ 355-1(f)(2)(C)*, *(D)*.

Congress authorized the FDA to require ETASUs that impose restrictions on physicians and pharmacies that dispense REMS drugs. *See, e.g.*, *§ 355-1(f)(3)(B)*. Among other things, Congress specifically said that the FDA could require that (A) health care providers who prescribe the drug have specific training, experience, or certification, (B) pharmacies that dispense the drug get special certification, (C) the drug be dispensed only in certain settings, and (D) patients receive documentation outlining safe-use conditions. *See §§ 355-1(f)(3)(A)-(D)*. Thus, Congress authorized the FDA to regulate **[*16]** the practice of medicine in connection with REMS drugs, at least to a degree.

A REMS must include a timetable for ongoing assessments by the FDA of these risk evaluation and mitigation strategies. *See §§ 355-1(c)*, *(d)*. Congress authorized the FDA to require additional assessments beyond those statutorily required. *See § 355-1(g)*. When the FDA conducts a strategy assessment, it must review all REMS requirements, including any ETASUs, and assess whether the requirements continue to allow safe use without unduly burdening patient access or the health care system. *§§ 355-1(f)(5)(B)*, *(g)(2)(C)*; *see also* discussion *supra* p. 4. The FDA can eliminate the risk assessments after three years if it "determines that serious risks of the drug have been adequately identified and assessed and are being adequately managed." *See § 355-1(d)(4)(C)*.

Once a drug is subject to a REMS, the holder of an approved application or the FDA can initiate modification of the REMS. *See § 355-1(g)(4)*. A citizen can also ask the FDA to modify a REMS program through a citizen petition. *See 21 C.F.R. § 10.30*; *see also* Doc. 82-16 (FDA response to 2019 citizen petition). Proposed modifications do not take effect unless and until they are approved by the FDA. *See 21 U.S.C. §§ 355-1(h)(2)(A)*, *(B)*.

In the 2007 amendments, Congress did not address preemption. **[*17]**

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[5] Congress expressly delegates the authority to decide whether a REMS is necessary and what restrictions should be included in a REMS to the Secretary of Health and Human Services, "in consultation with the office responsible for reviewing the drug and the office responsible for post approval safety with respect to the drug." *See § 355-1(a)(1)* (cleaned up); *§ 355-1(c)(2)*. For simplicity and ease of reading, the Court refers to the FDA instead of individual agency members when discussing the authority to implement and manage REMS programs.

[6] For new drugs, Congress directed the FDA to consider the following in deciding whether a REMS is necessary to ensure that the benefits of the drug outweigh the risks of the drug:

> (A) The estimated size of the population likely to use the drug involved.
>
> (B) The seriousness of the disease or condition that is to be treated with the drug.
>
> (C) The expected benefit of the drug with respect to such disease or condition.
>
> (D) The expected or actual duration of treatment with the drug.
>
> (E) The seriousness of any known or potential adverse events that may be related to the drug and the background incidence of such events in the population likely to use the drug.
>
> (F) Whether the drug is a new molecular entity.

§ 355-1(a)(1).

[7] Because the FDA does not rely on a defined category of drugs or a specific risk factor to decide when a drug needs a REMS strategy, the Court will at times refer to drugs generally subject to REMS requirements as "higher-risk drugs."

V. Regulatory History of Mifepristone

In 2000, the FDA approved Mifeprex, the brand name of mifepristone, with distribution restrictions under Subpart H. Doc. 82-3 at 2. The original Subpart H restrictions required that Mifeprex could only be "provided by or under the supervision of a physician" who was qualified by the FDA and who had signed the Prescriber Agreement. *Id.* at 3; Doc. 82-6 (2000 Prescriber Agreement). Among other things, a certified physician had to (1) be able to accurately assess the duration of pregnancy and diagnose ectopic pregnancies, (2) provide surgical intervention or have plans to provide surgical intervention through others if needed, (3) give patients a Medication Guide and Patient Agreement and obtain a signed Patient Agreement, (4) fully explain the procedure, and (5) report any hospitalizations or serious adverse events. *See* Doc. 82-3 at 3. Patients had to take the medication in their provider's office and had to agree to return for a follow-up appointment. *See* Doc. 82-7 at 2 (2000 Patient Agreement).

Because the FDA approved Mifeprex with Subpart H restrictions, Mifeprex automatically had a REMS in place when the 2007 amendments became effective. *See Pub. L. No. 110-85, 121 Stat. 823, 950-51 (2007).* In **[*18]** September 2008, the manufacturer of Mifeprex submitted a proposed REMS, as required by the 2007 amendments, which the FDA adopted in 2011. *See id.*; Doc. 82-9 at 2, 5.

Because of the drug's "inherent toxicity or potential harmfulness," *21 U.S.C. § 355-1(f)(1)*, the 2011 Mifeprex REMS program included as ETASUs the same distribution restrictions that Mifeprex had in place under Subpart H before the 2007 amendments. *Compare* Doc. 82-4 at 7 (2000 approval memorandum), *with* Doc. 82-8 at 2-3, 8, 10 (2011 REMS). Physicians prescribing Mifeprex had to (1) be able to accurately assess the duration of pregnancy and diagnose ectopic pregnancies, (2) provide surgical intervention or have plans to provide surgical intervention through others if needed, (3) give patients a Medication Guide and Patient Agreement and obtain a signed Patient Agreement, (4) fully explain the procedure, and (5) report any hospitalizations or serious adverse events. *See* Doc. 82-8 at 8 (2011 Prescriber Agreement). The FDA required patients to take Mifeprex in their provider's office and attend an in-person follow-up appointment 14 days after taking the drug. *Id.* at 10. The FDA also required that Mifeprex only be dispensed "in certain health care **[*19]** settings, specifically clinics, medical offices, and hospitals." *Id.* at 3.

In 2015, the manufacturer of Mifeprex proposed modifications to the REMS. *See* Doc. 82-11 at 3. The FDA assessed the REMS to "determine whether each Mifeprex REMS element remain[ed] necessary to ensure that the drug's benefits outweigh the risks" and found that the REMS should be modified, *id.*, which happened the next year.

In those 2016 changes, the FDA decided that the limitation that only physicians could prescribe Mifeprex was not necessary and began allowing other medical professionals to prescribe the drug. *See* Doc. 82-12 at 7 (rationale for expanding prescribing to qualified health care providers); Doc. 82-14 at 6 (2016 Prescriber Agreement). The requirement that Mifeprex only be dispensed in-person "in certain health care settings, specifically clinics, medical offices, and hospitals" remained in place, Doc. 82-14 at 3 (cleaned up); in other words, the drug could not be picked up at a pharmacy. And providers still had to (1) be able to accurately assess the duration of pregnancy and diagnose ectopic pregnancies, (2) provide surgical intervention or have plans to provide surgical intervention through others **[*20]** if needed, (3) give patients a Medication Guide and Patient Agreement and obtain a signed Patient Agreement, and (4) fully explain the procedure. *Id.* at 2-3.

But the FDA removed the requirement that patients must take Mifeprex in their providers' offices and the requirement that patients must return for an in-person follow-up appointment 14 days later. *Compare* Doc. 82-8 at 10 (2011 Patient Agreement), *with* Doc. 82-14 at 8 (2016 Patient Agreement). Patients were still encouraged to follow-up with their providers seven to 14 days after taking the drug but were not required to come back to their provider's office. *See* Doc. 82-14 at 8. The FDA also removed the requirement that providers report any hospitalizations or serious adverse events; the only adverse events providers were required to report going forward were deaths. *Id.* at 3.

In 2019, the FDA approved a generic version of Mifeprex subject to the same REMS. Doc. 82-16 at 5. The shared REMS is often referred to as the mifepristone REMS program. *Id.*

Early in the COVID-19 pandemic, the American College of Obstetricians and Gynecologists ("ACOG") sued the FDA, seeking a preliminary injunction to prevent the FDA from enforcing the mifepristone **[*21]** in-person dispensing requirement. *See* Doc. 82-17 at 8. After initially resisting the injunction,[8] the FDA announced in April 2021 that it would not

[8] In July 2020, a Maryland district court granted the preliminary injunction. Doc. 82-17 at 8; *Am. Coll. of Obstetricians & Gynecologists v. United States FDA, 472 F. Supp. 3d 183, 233 (D. Md. 2020)*. In January 2021, the Supreme Court granted a stay of the injunction "pending disposition of the appeal" in the Fourth Circuit. ***FDA v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 578, 578, 208 L. Ed. 2d 575 (2021)***. On May 19, 2021, the Fourth Circuit dismissed the appeal as moot. *See sub nom. Am. College of Obstetricians & Gynecologists v. Indiana, No. 20-CV-1320, 2021 U.S. App. LEXIS 15043, 2021 WL 3276054, at*

enforce the in-person dispensing requirement, given the COVID-19 pandemic, so long as the other mifepristone REMS elements were followed. *Id.* at 8-9.

A few weeks later, on May 7, 2021, the FDA said it would review the mifepristone REMS program. *Id.* at 9. After the FDA conducted an extensive review and the manufacturers of the drug submitted multiple proposed modifications, *see* Doc. 82-20 at 4, the FDA decided the mifepristone REMS program needed revisions. Doc. 82-18 at 2.

In December 2021, the FDA removed the in-person dispensing requirement, finding that it was not needed for safety and that removal would make the REMS "less burdensome to health care providers and patients." Doc. 82-16 at 2, 7 (cleaned up). The FDA also decided that a pharmacy certification requirement and Pharmacy Agreement form should be added to the REMS, because removal of the prescriber, in-person dispensing requirement meant pharmacies could now dispense the drug. *See* Doc. 82-18 at 2-3; Doc. 82-20 at 10. The FDA found these changes were necessary "to minimize **[*22]** the burden on the health care delivery system of complying with the REMS and to ensure that the benefits of the drug outweigh the risks." Doc. 82-20 at 10; *see also id.* at 20-22 (FDA discussion of proposed modifications).

As of 2023, the mifepristone REMS allows a certified provider, who need not be a physician, to prescribe mifepristone to a patient. *See* Doc. 82-1 at 2-3 (January 2023 REMS referencing health care providers); Doc. 82-12 at 7 (reasoning for change from "physician" to "health care provider" in 2016). The provider must (1) be able to accurately assess the duration of pregnancy and diagnose ectopic pregnancies, (2) provide surgical intervention or have plans to provide surgical intervention if needed, (3) give patients a Patient Agreement and obtain a signed Patient Agreement, (4) fully explain the procedure, and (5) report any deaths. *See* Doc. 82-1 at 2-3. Patients can get the medicine either directly from a health care practitioner, someone working under the practitioner's supervision, or a certified pharmacy after being provided a prescription from a health care practitioner. *See id.* at 7-8, 11-12. The patient can then take the drug at a location of her choice, including **[*23]** her home. *See id.* at 11.

VI. The North Carolina Statutory Provisions at Issue

In North Carolina, subject to extensive regulatory, procedural, and medical requirements, it is lawful to procure or cause an abortion, including a "medical abortion"[9] using mifepristone, during the first 12 weeks of a person's pregnancy. N.C. Gen. Stat. § 90-21.81B(2); *see generally* §§ 90-21.80-21.99. Dr. Bryant contends that several of the state requirements create an obstacle to Congress' purpose in delegating to the FDA the ability to establish, monitor, and update REMS programs through the FDAAA. *See* Doc. 99 at 10-15.

In summary, Dr. Bryant challenges the North Carolina requirements (1) that only physicians can prescribe mifepristone, (2) that physicians prescribing mifepristone must dispense and administer the drug in-person, (3) that the drug can only be prescribed after an in-person examination, determination of the patient's blood type and gestational age by ultrasound, and an in-person consultation, (4) that a provider must schedule a follow-up appointment with the patient and document all efforts to get the patient to attend the appointment, and (5) that providers must report all "adverse events" and "complications," both defined broadly, to the **[*24]** state and the FDA.

Medical professionals who violate these provisions, collectively called in the statute "Abortion Laws," § 90-21.80, can face professional, civil, and criminal penalties. Possible repercussions include discipline by the appropriate licensing agency or board, *see* § 90-21.88A, or a civil action for damages and attorneys' fees if the person seeking damages can show that the physician acted in "knowing or reckless violation of [the] Article." §§ 90-21.88(a), (c). Criminal penalties can include a fine of $5,000 per violation for "any individual within the State, including a physician" who violates the in-person requirements of § 90-21.83A(b)(2)a. *See* §§ 14-44.1(a)(1), (b).[10]

North Carolina's Abortion Laws contain a severability clause. *See* § 90-21.92. If any portion of the law "is found to be unconstitutional," that portion will be declared severable from the law, and "the balance of [the] Article shall remain effective."

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*1 (4th Cir. May 19, 2021).

[9] The plaintiff uses the term medication abortion, but the statute uses the phrase "medical abortion." § 90-21.81(4e). The Court will use the term "medical abortion" to be consistent with the language of the relevant state law.

[10] There has been no challenge to Dr. Bryant's standing, and she has standing to contest the laws. Dr. Bryant personally faces civil and criminal penalties, §§ 90-21.88(a), (c); § 14-44.1, and the possibility of professional discipline, § 90-21.88A, if she provides a medical abortion to a patient in violation of these laws. The credible threat of these types of injuries can support a plaintiff's standing. *See, e.g., AICPA v. IRS, 746 Fed. Appx. 1, 6 (D.C. Cir. 2018)* (discussing injury sufficient to create standing based on potential professional discipline, including "suspension, disbarment, disqualification or monetary penalties"). And, as a doctor who provides obstetric and gynecological services, Dr. Bryant can assert third-party standing. *See June Med. Servs. L.L.C. v. Russo, 591 U.S. 299, 318, 140 S. Ct. 2103, 207 L. Ed. 2d 566 (2020)* (collecting cases), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022)*.

Id.

VII. Obstacle Preemption

As discussed previously, health and safety matters, the practice of medicine, and the regulation of medical professionals are traditionally matters of state concern. *See supra* p. 6; note 3. States have an interest in promoting maternal health and safety and may regulate **[*25]** to that end, within constitutional bounds. *See Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 300-01, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022)*. As the Supreme Court said in *Dobbs*, "a law regulating abortion, like other health and welfare laws, is entitled to a strong presumption of validity" because there are legitimate state interests in "respect for and preservation of prenatal life," "the protection of maternal health and safety," and "the preservation of the integrity of the medical profession." *Id. at 301* (cleaned up).

At the same time, Congress has delegated to the FDA the authority to regulate higher-risk drugs through a REMS program. *See 21 U.S.C. § 355-1*. For drugs with "inherent toxicity or potential harmfulness," *§ 355-1(f)(1)*, Congress has directed the FDA to implement ETASUs that impact matters of health and safety, the regulation of medical professionals, and the practice of medicine. *See § 355-1(f)(3)* (authorizing the FDA to, among other things, require health care providers prescribing a REMS drug to have specific training, experience, or certification and to limit the settings where a REMS drug can be dispensed); *see also* discussion *supra* p. 12.

Given Congress' explicit permission and requirement that the FDA regulate aspects of the practice of medicine as to REMS drugs, the mere fact that a state law regulates **[*26]** the practice of medicine as to that drug does not give the law an automatic free pass to avoid a preemption challenge. *See* Patricia J. Zettler, *Pharmaceutical Federalism*, *92 IND. L.J. 845, 862, 870-73 (2017)*. On the other hand, there is an obvious tension and overlap between state and federal regulation of prescription drugs and the providers who prescribe and distribute them. *See id. at 852* (noting "the boundary between medical practice and medical products - which is thought to serve as a dividing line between federal and state jurisdiction today - has long been blurry"). As the Supreme Court noted in a case refusing to find obstacle preemption under a previous version of the FDCA, "federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them." *Wyeth, 555 U.S. at 575* (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166-67, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989)*) (cleaned up).

Wyeth, however, dealt with a state tort lawsuit for inadequate labeling of a prescription drug, which this case does not concern, and it arose before the enactment of the 2007 amendments. *See id. at 567*. Those amendments, discussed *supra* pp. 10-13, significantly increased the FDA's regulatory **[*27]** role and responsibilities for certain prescription drugs like mifepristone. *Wyeth* also did not involve a state's imposition of requirements that a federal agency had affirmatively and clearly rejected as unnecessary or inappropriate, which the Supreme Court has held can constitute obstacle preemption. *See Geier, 529 U.S. at 881*. Thus, as the Supreme Court did in *Wyeth* and in *Geier*, it is necessary to examine "Congress' significant objectives" in passing the 2007 amendments and then to decide whether the North Carolina statutes at issue "stand as an obstacle to the accomplishment of a significant federal regulatory objective." *Va. Uranium, Inc. v. Warren, 848 F.3d 590, 599 (4th Cir. 2017)* (cleaned up), *aff'd, 587 U.S. 761, 139 S. Ct. 1894, 204 L. Ed. 2d 377 (2019)*; *accord Guthrie, 79 F.4th at 338*.

A. Congress' Significant Objectives

To determine Congress' objectives and the nature of the federal interest, courts must "examine the federal statute as a whole and identify its purpose and intended effects." *Crosby, 530 U.S. at 373* (cleaned up). The FDAAA is a detailed and complicated statute which made significant changes to many aspects of existing law. *See* Michelle L. Richards, *12 Angry Men v. The Agency: Why Preemption Should Resolve this Conflict in Drug Labeling Litigation*, *100 MARQ. L. REV. 1309, 1319 (2017)* (calling the FDAAA "the most extensive revision of the FDCA since 1962"); Lindsey K. Peterson, *Evading Preemption:* ***[*28]*** *The State's Search for Recovery for the Masses*, *9 CHARLESTON L. REV. 403, 410 (2015)* (referring to the FDAAA as an "overhaul of the FDCA").

As is most relevant here, Congress gave the FDA many more duties and responsibilities over the regulation of higher-risk drugs through the enactment of the REMS statute. *See generally 21 U.S.C. § 355-1*. But there were many other big changes as well. For example, the amendments:

- increased public access to clinical trial results for FDA-approved products, *Seife v. United States HHS, 440 F. Supp. 3d 254, 264-65 (S.D.N.Y. 2020)*,

- limited the circumstances under which the FDA can delay an abbreviated new drug application because of a citizen petition, *see Apotex, Inc. v. Acorda Therapeutics, Inc., No. 11-CV-8803, 2013 U.S. Dist. LEXIS 209277, 2013 WL 12617608, at *3 (S.D.N.Y. Feb. 7, 2013)*, *aff'd, 823 F.3d 51 (2d Cir. 2016)*,

- enacted specific legislation pertaining to television advertising of drug products, *see* Merck & Co. Inc. v. U.S. Dep't of Health and Hum. Servs., 385 F. Supp. 3d 81, 95 (D.D.C. 2019), *aff'd*, 962 F.3d 531, 447 U.S. App. D.C. 271 (D.C. Cir. 2020),

- gave the FDA "the authority to require post-approval studies and clinical trials and increase[d] the FDA's authority to require labeling changes to be made over a shorter time period in response to new safety information," Sara Lykken, *We Really Need to Talk: Adapting FDA Processes to Rapid Change*, 68 FOOD & DRUG L.J. 357, 368-69 (2013), and

- imposed "stricter conflict of interest rules on FDA advisory committees." Id. at 369.

The FDCA was traditionally known as a consumer protection statute designed in large part to protect consumers from unsafe **[*29]** drugs. *See* Wyeth, 555 U.S. at 566. In passing the 2007 amendments, Congress continued to promote consumer protection by expanding the FDA's ability to regulate the sale and distribution of prescription drugs that benefit the public and to promote the safe use of those drugs. *See Pub. L. No. 110-85, 121 Stat. 823, 823 (2007).* As codified in the REMS statute, Congress had the clear and manifest purpose of making the FDA responsible for deciding what restrictions need to be imposed on the distribution of drugs with serious risks of harm and on the providers who prescribe and distribute those drugs. *See* 21 U.S.C. § 355-1.

Congress directed the FDA to decide when a REMS program is necessary, § 355-1(a), and delegated to the FDA the authority to decide the structure of a REMS program, § 355-1(c), a decision that can be made only by a subset of people within the FDA. *See* § 355-1(a)(4) (requiring that "individuals at or above the level of individuals empowered to approve a drug" shall make REMS decisions). Congress also required the FDA to continuously monitor REMS drugs and their restrictions for at least three years. *See* § 355-1(d). The FDA must decide what if any additional, appropriate elements of strategy are needed to reduce the risks of harm from a drug and must modify or remove restrictions that are unnecessary **[*30]** to assure safe use of drugs, all without over-restricting patient access or unduly burdening the health care system. *See* §§ 355-1(e), (f), (g)(4).

For drugs with an "inherent toxicity or potential harmfulness," like mifepristone, the statute directs the FDA to impose "elements to assure safe use" or ETASUs. *See* §§ 355-1(f)(1), (3); discussion *supra* pp. 11-12. Congress required that any ETASU imposed by the FDA be no broader than necessary to address risk. *See* § 355-1(f)(2)(A) (elements must "be commensurate with the specific serious risk" of the drug). And Congress expressly mandated that the FDA, "considering such risk," impose restrictions that are not "unduly burdensome on patient access to the drug." § 355-1(f)(2)(C). Congress instructed the FDA to consider "patients who have difficulty accessing health care," § 355-1(f)(2)(C)(ii), and, "to the extent practicable," to impose restrictions that "minimize the burden on the health care delivery system." § 355-1(f)(2)(D). Congress thus had the additional clear and manifest objective of directing the FDA to regulate the safe use of drugs with inherent toxicity or potential harmfulness without unnecessarily reducing patient access or burdening the health care system.

The headings Congress used further clarify this purpose. The provision now **[*31]** codified at § 355-1(f), which covers drugs with inherent toxicity or potential harmfulness, is entitled "Providing Safe Access for Patients to Drugs with Known Serious Risks that Would Otherwise Be Unavailable." *See Pub. L. No. 110-85, 121 Stat. 823, 930 (2007).* The provision now codified at subsection (f)(1) is entitled "Allowing Safe Access to Drugs with Known Serious Risks," and subsection (f)(2) is entitled "Assuring Access and Minimizing Burden." *Id.* For these inherently toxic drugs, Congress' purpose was to make the FDA responsible for deciding upon and implementing safety restrictions to balance safety, efficacy, patient access, and burdens on the health care system.

Congress explicitly authorized and required the FDA to regulate who could prescribe these inherently toxic or potentially harmful drugs by empowering the FDA to require health care providers to "have particular training or experience or [be] specially certified." § 355-1(f)(3)(A). The FDA can also impose special certification requirements on "pharmacies, practitioners, or health care settings that dispense the drug" and limit the settings in which the drug can be dispensed. §§ 355-1(f)(3)(B), (C). And the FDA can mandate that "documentation of safe-use conditions" be included with the drug and that patients using the drug be subject to **[*32]** certain monitoring or enrolled in a registry. *See* §§ 355-1(f)(3)(D)-(F).

Congress' clear and manifest purpose was thus to create a comprehensive federal strategy under which the FDA is responsible for deciding what safety restrictions on higher-risk drugs are necessary to make the use of those drugs less risky. *See* § 355-1; *see also* Wyeth, 555 U.S. at 565 (directing courts to identify congressional purpose). For drugs with inherent toxicity or potential harmfulness, Congress had the additional manifest purpose of requiring the FDA to regulate within the medical profession for the health and safety of patients and to regulate without unduly impeding patient access or burdening the health care system. *See* §§ 355-1(f)(2), (3). A state law that stands as an obstacle to this clear and manifest purpose of Congress is preempted. *See* Guthrie, 79 F.4th at 338; *see also* Geier, 529 U.S. at 881 (finding state tort lawsuit preempted where agency

deliberately established federal regulatory scheme and specifically considered and rejected requirements that state law would impose); *Hillman v. Maretta, 569 U.S. 483, 494, 133 S. Ct. 1943, 186 L. Ed. 2d 43 (2013)* (holding state statute that interfered with congressional scheme and "frustrate[d] the deliberate purpose of Congress" was preempted).

A state law regulating the use and administration of an inherently toxic or potentially harmful drug **[*33]** like mifepristone based solely on its health and safety risks stands as an obstacle to Congress' goal of creating a comprehensive regulatory framework under which the FDA is responsible for deciding what terms are required for safe access to and use of these drugs while considering patient access and burdens on the health care system. State laws which disagree or interfere with the FDA's judgments are preempted.

But nothing in the REMS statute or the FDAAA suggests that Congress intended to preempt all state informed consent laws concerning health conditions treated by prescription medicines or to restrict state rules that otherwise are directed to regulating medical care generally. A state health and welfare law focused on the protection of prenatal life, general patient health and safety, or broad regulation of the medical profession is thus not preempted by the REMS regulations.

B. Preemption Analysis

Some of the North Carolina statutory provisions at issue here concern general patient health and welfare and informed consent unrelated to mifepristone rather than the health and safety risks of the drug. Congress did not intend to preempt state regulation of medical care provided for **[*34]** a particular health condition merely because a REMS drug treats or is directed to that condition, and thus these state statutory provisions are not preempted. But other statutory provisions impose safety-related restrictions on the distribution of abortion-inducing drugs and stand as an obstacle to the congressional objective of providing a comprehensive regulatory system for the use and distribution of higher-risk drugs under the direction and supervision of the FDA. Those provisions are preempted. *See Warren, 848 F.3d at 599*; *Guthrie, 79 F.4th at 338*.

1. North Carolina Statutory Provisions that are Not Preempted

Neither the FDAAA nor the mifepristone REMS address broader health issues associated with pregnancy or with ensuring informed consent to the termination of a pregnancy, about which the states remain free to regulate. Some of the state statutory requirements challenged here do just that.

a. In-person Advance Consultation, Use of an Ultrasound, Inperson Examination, and Blood Type Determination

State law requires physicians or qualified professionals to complete an in-person consultation with the patient at least 72 hours in advance of prescribing mifepristone. *N.C. Gen. Stat. § 90-21.83A(b)(1)*. The same requirement exists for surgical abortions. *See § 90-21.82(b)(1)*. As **[*35]** part of this consultation, the provider and the patient must review the information in the consent form. *See § 90-21.83A(b)(1)*; § 90.21-82(b)(1).[11] For medical abortions, the consent form contains "[i]nformation about Rh incompatibility," including treatment options for patients with Rh-negative blood type, *§ 90-21.83A(b)(2)*g, and "[t]he probable gestational age" of the fetus determined through the patient's medical history and an ultrasound. *§ 90-21.83A(b)(2)*b.

Providers must make patients aware of the probable gestational age of the fetus as part of the informed consent process for both surgical and medical abortions. *See § 90-21.82(b)(1a)*c; *§ 90-21.83A(b)(2)*b. They must also report probable gestational age to the North Carolina Department of Health and Human Services. *See §§ 90-21.93(a)*, *(b)(6)* (listing gestational age confirmed by ultrasound as reporting requirement for both procedures); *see also § 90-21.82(b)(1a)*c (requiring probable gestational age be provided to patients seeking surgical abortion, but not specifying use of ultrasound). The state requires the use of an ultrasound to determine gestational age before both medical and surgical abortions. *See §§ 90-21.93(a)*, *(b)(6)*.[12]

A physician must also conduct an in-person examination of a patient seeking a medical abortion. *See § 90-21.83B(a)*. As part of the in-person exam, the physician must "determine **[*36]** the woman's blood type" and "verify the probable gestational age" of the fetus. *§§ 90-21.83B(a)(2)*, *(6)*.

The state's in-person advance consultation, ultrasound, in-person exam, and blood type determination requirements implicate general patient health and safety, informed consent to the termination of a pregnancy, and regulation of the medical profession, all beyond regulating the safe use of mifepristone. The in-person advance consultation and ultrasound requirements impose standards of care for obtaining a patient's informed consent to the procedure. An ultrasound ensures that a person contemplating the termination of a pregnancy has

[11] This case does not concern mifepristone's labeling or allege any conflicts between state and federal law over what risks and safety concerns must be disclosed.

[12] There is no explicit requirement that a physician conduct the ultrasound.

access to required gestational age information obtained through a reliable method before she makes a decision. *See* § 90-21.83A (informed consent to medical abortion); § 90-21.82 (informed consent to surgical abortion).

And the in-person advance consultation requirement is not solely, or even primarily, directed to the risks of mifepristone. An in-person consultation lets patients talk with a health care provider in real time and without the distance created by telephone or video calls before deciding to terminate a pregnancy. The state statute itself offers reasons for the in-person exam requirement **[*37]** unconnected to safe use of the drug: it allows a physician to "verify that the pregnancy exists," "provide medically indicated diagnostic tests," and "screen the woman for coercion or abuse." §§ 90-2183B(a)(1), (3), (4) (cleaned up). And the blood type determination requirement exists so that a physician can "offer necessary medical services, treatment, and advice, based on the physician's reasonable medical judgment of any medical risks associated with the woman's blood type." § 90-21.83B(a)(2). It is undisputed that Rh-negative blood type can give rise to serious complications during pregnancy. *See* Doc. 82-16 at 19 (responding to a citizen petition, the FDA discusses Rh-negative patients and states that "Rh-testing is [the] standard of care in the United States").

Congress does not direct the FDA through the REMS statute to control the scope and extent of informed consent laws that address matters beyond the specific risks and benefits associated with a REMS drug. And the FDCA does not preempt state regulation designed to give a patient the information the state deems helpful to informed consent to a procedure and to a patient's long-term health. Nothing about these state laws that require medical providers to examine patients **[*38]** in person and address broader health and safety matters that can arise during pregnancy interferes with the purposes of the REMS statute. *See* Dobbs, 597 U.S. at 301 (identifying "protection of maternal health and safety" as legitimate state interest). And Congress did not intend by enacting the REMS statute to preempt all medical examinations or tests that might be beneficial for a patient seeking medical care related to a condition addressed by a REMS drug.

The presumption against preemption is especially strong as to these state law provisions because they broadly address pregnancy-related health matters. *See* Dobbs, 597 U.S. at 301. The health and safety of a state's citizens is traditionally a matter of state concern. *See supra* p. 6; note 3. And informed consent laws have long been the primary responsibility of the state, including in connection with the termination of pregnancy. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881-87, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (recognizing state interest in providing truthful information about probable gestational age as part of informed consent procedure), *overruled on other grounds by* Dobbs, 597 U.S. 215.

The state's in-person advance consultation, use of an ultrasound, in-person examination, and blood type determination requirements do not stand as obstacles to Congress' purpose of **[*39]** creating a comprehensive regulatory framework for higher-risk drugs set forth in the FDCA. These requirements are not directed solely to reducing or managing the safety risks of mifepristone, which the FDA is responsible for evaluating and deciding, but instead are directed to broader health concerns and informed consent to the termination of a pregnancy. They are not preempted.

b. Reports to the North Carolina Department of Health and Human Services

The state law also requires a treating physician or provider to send a report to the North Carolina Department of Health and Human Services if a patient experiences any adverse events or complications, as defined in statute, after taking mifepristone. *See* § 90-21.93(c) (duty to report adverse events from abortion-inducing drugs); *see also* § 90-21.93(d) (duty to report adverse events and complications from abortion procedures). This report must include the adverse event or complication, "[t]he date the woman presented for treatment of the adverse event or complication," and "the diagnosis or treatment that was provided." §§ 90-21.93(d), (e). There is nothing to indicate that Congress intended for the REMS statute or the FDCA to preempt states from collecting health and safety data **[*40]** acquired by medical professionals. This is a regulation of the practice of medicine and is not preempted.

c. The Plaintiff's Contentions

The plaintiff contends that because the FDA considered or had the authority to implement some of the practices that the state now requires, the mifepristone REMS requirements preempt these state laws. *See* Doc. 99 at 10-15. For example, in the first mifepristone REMS program, the FDA included a medication guide as a REMS element that directed patients to take mifepristone in their provider's office "[a]fter getting a physical exam." Doc. 82-8 at 6. In 2016, the FDA removed the medication guide from the REMS, effectively removing any in-person examination requirement.[13] *See* Doc. 82-13 at 3-4 (FDA recommendation to remove medication guide as a REMS

[13] The current REMS does not include a medication guide and does not state that a physical examination is required before a patient can receive the drug. *See* Doc. 82-1 at 2. A medication guide is still included in the drug's label, *see* Doc. 100-11 at 17-20, but it does not mention the need for an in-person examination before receiving the drug.

element); *compare* Doc. 82-8 at 2 (2011 REMS with medication guide), *with* Doc. 82-14 at 2 (2016 REMS without medication guide as REMS element). And in setting restrictions on the use and distribution of mifepristone, the FDA has decided that the risks of mifepristone do not need to be covered in advance or in-person. *See, e.g.*, Doc. 82-1 at 11 (2023 Patient Agreement allowing electronic signature). The FDA also **[*41]** considered but did not require an ultrasound when it initially approved mifepristone. *See* Doc. 82-4 at 6; Doc. 82-5 at 19 (stating "it was inappropriate for [the FDA] to mandate how providers clinically assess women for duration of pregnancy and for ectopic pregnancy"). Instead, the FDA left the decision of whether to perform an ultrasound up to the "medical judgment" of providers. Doc. 82-4 at 6. And the FDA has the authority to impose blood testing, *see* 21 U.S.C. § 355-1(f)(3)(D), but declined to do so when it decided the regulations necessary for safe use of the drug.

The Court appreciates that the defendant-intervenors have relied in part on safety-related reasons in support of the in-person exam and ultrasound requirements. *See, e.g.*, Doc. 84 at 17; Doc. 100 at 21. If the only reasons for the in-person exam or the ultrasound were to reduce or manage safety issues related to mifepristone, the plaintiff's argument would have more force. *See* discussion *infra* pp. 34-40. But they are not the only reasons, as the state statute itself reflects and as discussed *supra*. The fact that the FDA removed a practice or deemed it unnecessary as a REMS element related to the safe use of a REMS drug does not mean that **[*42]** the states are prohibited from imposing the practice to address broader health and safety concerns, such as care for a person with the medical condition treated by the REMS drug or informed consent to the chosen method of treatment. The FDA's REMS choices were focused on the regulation of mifepristone, not on broader health issues related to medical care for pregnant persons or the information patients should have before deciding to terminate a pregnancy. State laws regulating these broader issues are not preempted.

The plaintiff also contends that the state requirements will interfere with access to mifepristone. *See* Doc. 99 at 6-8; 10. Congress does require the FDA to consider access and possible impacts on access when it implements and evaluates REMS elements for a drug. *See* 21 U.S.C. § 355-1(f)(2)(C). But nothing in the 2007 amendments makes the FDA responsible for generally ensuring access to all REMS drugs. State laws that might affect ease of access to mifepristone are not preempted merely because of that potential effect, especially when Congress did not intend to prevent the state from requiring standards of medical practice to address other health concerns or informed consent procedures designed to **[*43]** better inform the patient's decision-making process.

d. Conclusion

The REMS provisions of the 2007 amendments and the mifepristone REMS program enacted by the FDA under those amendments do not preempt a state from regulating or addressing potential health issues arising out of pregnancy. The North Carolina provisions that require an in-person 72-hour advance consultation, use of an ultrasound, an in-person examination, blood type determination, and reporting non-fatal adverse events to the state are not preempted.

2. North Carolina Statutory Provisions that are Preempted

Other statutory requirements of the state's Abortion Laws stand as obstacles to Congress' clear and manifest purpose of providing a comprehensive regulatory framework for safe use and distribution of higher-risk drugs run by the FDA. When a state imposes a restriction on the sale or distribution of an FDA-approved drug that is designed to reduce the risks associated with the drug even though the FDA explicitly considered and rejected that restriction as unnecessary for safe use under the statutory regime imposed and required by Congress, then that state law is preempted. *See* Geier, 529 U.S. at 881 (finding state tort suit preempted as it stood **[*44]** as obstacle to federal objective and would create requirements federal agency deliberately rejected); Bethlehem Steel, 330 U.S. at 774; *see also* Wyeth, 555 U.S. at 581 n.14 (declining to find preemption and acknowledging holding different from Geier because FDA "did not consider and reject" drug label changes). This is especially true when the state's restrictions will also interfere with Congress' goal that any drug-related restrictions should take into account burdens on the health care system and on patient access.

a. Physician Only, In-Person Prescribing, Dispensing, and Administering

State law requires that only physicians prescribe mifepristone. *See* N.C. Gen. Stat. § 90-21.83B(a) (stating "[a] physician" will prescribe the drug); § 90-21.83A(b)(2)a (referencing "name of the physician" who will provide drug, and similar references). The "physician prescribing, dispensing, or otherwise providing" the drug must also be "physically present in the same room as the woman" when she takes the drug. § 90-21.83A(b)(2)a. And implicit in that requirement is that the physician must dispense the drug, rather than a pharmacy. These restrictions, which the defendant-intervenors say are necessary to reduce risks from the drug,[14] are an obstacle to meeting congressional objectives.

[14] The defendant-intervenors have not offered any other reason for these requirements beyond reducing the risks associated with

Congress has directed the FDA to consider **[*45]** and implement as part of a REMS program restrictions around who, where, and how a REMS drug can be prescribed, dispensed, and administered. *See* 21 U.S.C. §§ 355-1(f)(3)(A)-(C). In these elements to assure safe use ("ETASUs"), the FDA can require "health care providers who prescribe" REMS drugs to "have particular training or experience" or be "specially certified." § 355-1(f)(3)(A). The FDA can also require special certifications for "pharmacies, practitioners, or health care settings that dispense the drug," § 355-1(f)(3)(B), and it can limit dispensing to "certain health care settings, such as hospitals." § 355-1(f)(3)(C).

Thus, the FDA has explicit statutory authorization to require that a REMS drug be administered in-person and prescribed and dispensed only by physicians. And the FDA did include such requirements when it first created the drug's REMS program. *See* Doc. 82-8 at 8 (2011 Prescriber Agreement requiring drug to be provided "by or under the supervision of a physician" who meets REMS qualifications); *see id.* at 3, 10 (2011 REMS limiting dispensing to certain health care settings and requiring patients to take drug in provider's office). But the FDA has decided these requirements are no longer necessary for safe use of mifepristone, and it no longer **[*46]** limits the use and distribution of the drug in these ways.

In 2016, the FDA updated the REMS elements to remove the requirements that the drug be prescribed by a physician and be taken in the presence of a physician. *See* Doc. 82-11 at 3 (adopting change from "licensed physician" to "licensed health care providers who prescribe" (cleaned up)); Doc. 82-14 at 8 (2016 Patient Agreement without requirement that mifepristone be taken in provider's office). In 2021, the FDA removed the in-person dispensing requirement because it no longer promoted the goals of Congress. *See* Doc. 82-16 at 7 (the FDA's statement that an "in-person dispensing requirement is no longer necessary" for safe use and removal is less burdensome for health care providers and patients); Doc. 82-18 at 2 (2021 notification of REMS modifications stating removal of in-person dispensing "minimizes the burden on the health care delivery system of complying with the REMS" (cleaned up)). Because removal of in-person dispensing meant patients could now get the drug directly from a pharmacy, the FDA added a pharmacy certification requirement and Pharmacy Agreement form. *See* Doc. 82-18 at 2-3; Doc. 82-20 at 10. The FDA concluded **[*47]** that pharmacy certification was needed to "ensure[] that mifepristone is only dispensed pursuant to prescriptions that are written by certified prescribers." Doc. 82-20 at 14 (2023 REMS review).

Representatives of the American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") and the American College of Pediatricians ("ACPeds") have directly asked the FDA to reimpose these exact requirements, *see* Doc. 82-16 at 2-3, but the FDA has declined to do so. When the representatives asked about the physician-only prescribing limitation, the FDA stated that it would not reinstate this requirement because mifepristone is "safe and effective when prescribed by midlevel providers." *See id.* at 10. In response to the request for in-person dispensing, the FDA said that "[c]ertified prescribers do not have to be physically present with the patient" when the drug is dispensed, *id.* at 13, and "mifepristone will remain safe and efficacy will be maintained" without in-person dispensing. *Id.* at 29. And in response to the request for in-person administration, the FDA cited clinical data that shows the drug regimen is safe and effective when "self-administered at home" and said that removal **[*48]** of in-person administration maximizes the possibility that patients will be in a safe place when they start to experience the effects of the drug. *See id.* at 17. As of 2023, the FDA does not require any in-person appointments to prescribe, dispense, or administer the drug.[15]

Congress directed the FDA to impose a REMS element only if it mitigates a drug's risks, *see* 21 U.S.C. § 355-1(f)(1), and to reevaluate these requirements periodically. *See* §§ 355-1(d), (g). Through its reevaluation of the mifepristone REMS program, the FDA found that non-physician providers can safely prescribe the drug and that allowing non-physician providers to prescribe the drug better aligned the mifepristone elements with the REMS elements defined by Congress in statute. *See* Doc. 82-16 at 10; Doc. 82-11 at 3 (stating that allowing non-physician health care providers to prescribe better aligned with REMS statutory language). The FDA decided that in-person administration was not necessary to assure safe access to the drug, *see, e.g.*, Doc. 82-13 at 3, 7 (approving removal of language from Patient Agreement that stated location where drug should be taken and concluding change was necessary to ensure benefits outweigh risks), and that **[*49]** in-person dispensing imposed burdens on the health care system unnecessary for drug safety. *See, e.g.*, Doc. 82-18 at 2 (finding in-person dispensing was "no longer necessary" to ensure benefits of drug outweigh risks and removal would minimize burden on health care system). As Congress directed it to do under the REMS statute, the FDA has assessed the risks associated with

mifepristone, nor have they pointed to any evidence in the record showing another reason.

[15] *Compare* Doc. 82-7 at 2 (2000 Patient Agreement requiring in-person counseling and administration), *and* Doc. 82-8 at 6, 10 (2011 REMS stating drug should be taken in provider's office), *with* Doc. 82-1 at 11 (2023 Patient Agreement containing no specification of in-person requirements and allowing electronic signature), *and* Doc. 82-20 at 10 (2023 review memo stating removal of in-person dispensing was needed).

mifepristone, imposed REMS elements that adequately address those risks without unduly burdening the health care system or patient access, and removed those elements once they no longer served their congressional purpose.

North Carolina's requirements that only physicians can prescribe, dispense, and administer the drug, *see, e.g.*, N.C. Gen. Stat. § 90-21.83B(a), and that the physician "shall be physically present in the same room as the woman when the first drug . . . is administered" are directed solely to risks associated with mifepristone and other abortion-inducing drugs. § 90-21.83A(b)(2)a. Indeed, drug safety is the only basis of the defendant-intervenors' arguments that the state can impose these restrictions. *See* Doc. 100 at 15, 21 (referring to the state laws as "additional safeguards" and stating there is "no question that the challenged [state] provisions **[*50]** make abortion drugs safer"). Although a state can set standards of conduct or certification requirements for health care providers who prescribe drugs generally, Congress has made the FDA responsible for evaluating whether a restriction is necessary to address the safety risks of REMS drugs. As part of that, Congress has authorized the FDA to limit who can prescribe these drugs if necessary for safety, taking into account burdens on the health care system and patient access. North Carolina cannot second-guess the FDA's explicit judgment on how to manage risks from and safely prescribe, dispense, and administer REMS drugs, including mifepristone.

The state here is imposing restrictions on who can prescribe a REMS drug and how that drug can be prescribed, dispensed, and administered. Those exact restrictions have been explicitly rejected by the FDA as unnecessary for safe administration and as unnecessary burdens on the health care system and patient access. They conflict with the clearly stated congressional goals of (1) having the FDA in charge of managing risks associated with REMS drugs, (2) limiting restrictions on REMS drugs to those necessary for safety purposes, and (3) avoiding **[*51]** restrictions that impose unnecessary burdens on the health care system and patient access. The state requirements that limit prescribing of mifepristone to only physicians and that require in-person prescribing, dispensing, and administering are obstacles to these goals and are preempted. *See* Warren, 848 F.3d at 599; Guthrie, 79 F.4th at 338; *see also* Geier, 529 U.S. at 881.

b. In-person Follow-up Appointments

State law requires physicians who provide abortion-inducing drugs, or their agents, to schedule a follow-up visit with patients and to "make all reasonable efforts to ensure" that patients attend these appointments. N.C. Gen. Stat. § 90-21.83B(b). During these appointments, physicians should "confirm that the pregnancy is completely terminated" and "assess the degree of bleeding" the patient experienced. *Id.*

Under the REMS statute, the FDA can require as an ETASU that patients who use a REMS drug "be subject to certain monitoring." 21 U.S.C. § 355-1(f)(3)(E). When the FDA first implemented the mifepristone REMS program, it required patients to return for a follow-up appointment after taking the drug. *See* Doc. 82-8 at 10 (2011 Patient Agreement stating "I must return to my provider's office in about 2 weeks . . . to be sure that my pregnancy has ended and that I am well"). In 2016, the FDA removed the **[*52]** requirement that patients return in-person to their providers' offices but kept the direction that patients should follow-up with their providers to confirm the pregnancy has ended and the patient is well. *See* Doc. 82-14 at 8. When asked to reinstate the in-person follow-up appointment, the FDA declined and said that "[t]he safe use of mifepristone . . . is not contingent on a specific number of office visits." Doc. 82-16 at 14.

The stated purpose of North Carolina's in-person follow-up requirement is directly focused on drug safety and efficacy; it exists so that providers can "confirm that the pregnancy is completely terminated and [] assess the degree of bleeding." *See* N.C. Gen. Stat. § 90-21.83B(b). The defendant-intervenors contend that the requirement is reasonable given that mifepristone is a "high-risk drug" and suggest no other purpose. *See* Doc. 100 at 21-22. But Congress has placed the FDA in charge of imposing safety restrictions on the use and distribution of mifepristone, and the FDA has found that an in-person follow-up appointment is unnecessary for the safe use of the drug. *See* Doc. 82-16 at 14. North Carolina's effort to reimpose this unnecessary safety restriction creates an obstacle to Congress' **[*53]** purpose. *See* discussion *supra* pp. 38-39. The required scheduling and encouragement of an in-person follow-up appointment is preempted.

c. Reporting to the FDA

Lastly, state law requires physicians to report any adverse events from the use of mifepristone to the FDA. *See* N.C. Gen. Stat. § 90-21.93(c). No one disputes that the FDA has the authority to require similar adverse event reporting, and it initially did so. *See* Doc. 82-6 at 3 (2000 Prescriber Agreement requiring prescribers to report "any hospitalization, transfusion or other serious event" to drug manufacturer).

But in 2016, after years of experience with mifepristone, the FDA removed this requirement in favor of a narrower rule. *See* Doc. 82-14 at 3. Providers are only obligated to report deaths to the drug manufacturers,[16] and the manufacturers must report

[16] The current mifepristone REMS refer to the "Mifepristone Sponsor."

deaths to the FDA. *Id.* at 3, 5; Doc. 82-1 at 3, 6. The FDA removed the non-fatal adverse event reporting because it was no longer needed to ensure safe use of the drug. *See* Doc. 82-16 at 21 (justifying removal of non-fatal adverse event reporting based on a safety profile of mifepristone developed over 15 years that was "well-characterized" and "essentially unchanged").

The 2007 Amendments made significant **[*54]** changes to the FDCA, including to the FDA's responsibilities to re-evaluate drug safety. Allowing a state to override the FDA's decision that the FDA does not need providers of mifepristone to report information about all adverse events is an obstacle to the congressional purpose placing such decisions in the FDA's hands. The state is preempted from imposing an FDA reporting requirement when the FDA itself rejects that requirement. *See Geier, 529 U.S. at 881*; *see also Hillman, 569 U.S. at 494* (finding state law that displaced clear congressional scheme was preempted); *Arizona v. United States, 567 U.S. 387, 406, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012)* (finding preemption when Congress engaged in reasoned decision-making and did not impose certain penalties the state sought to enact). This provision is preempted.

d. The Defendant-Intervenors' Contentions

The defendant-intervenors contend that these state laws are not preempted because Congress did not intend to give the FDA power to "set national abortion policy" through the FDCA. *See* Doc. 84 at 22. The Court agrees; indeed, it has upheld some provisions in the Abortion Laws because they are more directed to "abortion policy" and pregnancy-related concerns than to the risks and distribution of mifepristone. *See* discussion *supra* pp. 27-31.

But the REMS statute governs **[*55]** many drugs, not just mifepristone, and nothing in the 2007 amendments indicates that Congress gave the FDA less authority to regulate the use and distribution of mifepristone compared to any other REMS drug. It is the FDA's job to evaluate the risks and safety of mifepristone and other REMS drugs and to impose - or remove - restrictions according to its evaluation under the statutory guidelines. The defendant-intervenors justify North Carolina's additional restrictions on safety grounds, *see, e.g.*, Doc. 84 at 19; Doc. 100 at 8, 15, but states are preempted from overriding the FDA's judgment about whether specific restrictions are necessary for safe use.

The defendant-intervenors also cite the 1962 amendments to the FDCA, Doc. 100 at 12, which included an express savings clause providing that state laws remained valid unless there was a direct and positive conflict between the federal and state law. *Drug Amendments of 1962, Pub. L. No. 87-781, § 202, 76 Stat. 780, 793*. But that savings clause applied by its terms only to the 1962 amendments, and the defendant-intervenors have not pointed to any such savings clause in the 2007 amendments. *See id.* (stating "[n]othing in the amendments made by *this Act*" invalidates "any provision of State law which would **[*56]** be valid in the absence of such amendments unless there is a direct and positive conflict" (emphasis added)); *see also* discussion *supra* p. 9.

Even if the 1962 provision did apply here, "the existence of a separate preemption provision does not bar the ordinary working of conflict preemption principles." *Hillman, 569 U.S. at 498* (cleaned up); *see also Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 352, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001)* (holding "neither an express preemption provision nor a savings clause bars the ordinary working of conflict preemption principles" (cleaned up)). The 2007 amendments worked a substantial change in the FDCA and, as previously discussed, the congressional intent is clear. The conflict between the 2007 amendments as implemented by the FDA and these provisions of state law is direct and positive.

Finally, the defendant-intervenors rely on the Supreme Court's decision in *Wyeth*, in which the Court held that a state tort action based on a drug label's failure to warn was not preempted by obstacle preemption. *See, e.g.*, Doc. 84 at 18, 25-26; Doc. 100 at 15. They contend that the FDA's regulations set a floor from which states can further regulate. *See* Doc. 84 at 18; Doc. 100 at 15. There may be ways in which that can be true, but not here.

In *Wyeth*, the Supreme Court was dealing **[*57]** with a state personal injury lawsuit over drug labeling, and the applicable law was the 1962 amendments, not the 2007 amendments; the Supreme Court only mentioned the 2007 amendments in passing. *See 555 U.S. at 567-68*. The 2007 amendments created a statute that is, as to REMS drugs like mifepristone, "substantially different" from the statute that was analyzed in *Wyeth*. *See Arizona, 567 U.S. at 404-06* (finding state law preempted under current federal law which was "substantially different" from earlier federal law). The *Wyeth* Court did not assess any REMS restrictions, the congressional purpose of the 2007 amendments, or the preemptory effect of the REMS statutory provisions. *See 555 U.S. at 567-68*. And in *Wyeth*, the FDA had not considered and rejected the exact requirements the state now seeks to impose, a factor the Supreme Court deemed important enough to mention explicitly. *See id. at 580, 581 n.14*.

The defendant-intervenors' argument that the FDA sets a floor for drug regulation from which a state can impose any

See, e.g., Doc. 82-1 at 3. Here, the sponsors are the drug's manufacturers and for simplicity and clarity, the Court will use the term manufacturers.

additional health and safety requirements would mean, if accepted, that a state could prohibit the prescription of a REMS drug within its borders absent additional clinical trials or absent a showing that side effects occurred less frequently than demonstrated **[*58]** in studies provided to the FDA. Such rules would almost certainly be preempted as inconsistent with the overall regulatory system for sale and distribution of prescription medicines on a nationwide basis. *See* Zettler, supra p. 20, at 872-75 (discussing Massachusetts Zohydro cases and the FDA's ability to regulate through REMS); *see also* id. at 885-87.

e. Conclusion

Without a doubt there are tensions between the federal system established by the 2007 amendments and the state's historical responsibility to regulate health and safety matters. In the absence of express or field preemption, these tensions are tolerated when possible. *See* Wyeth, 555 U.S. at 575.

But when state laws undermine the national regulatory system established by Congress for evaluating and managing safe use and distribution of higher-risk drugs, they are obstacles to the purpose of Congress. Based on a disagreement with the FDA over what safety restrictions on the use of mifepristone are necessary, North Carolina has enacted laws requiring physician-only prescribing of mifepristone, in-person prescribing, dispensing, and administering of the drug, scheduling of an in-person follow-up appointment, and non-fatal adverse event reporting to the FDA; these parts of the Abortion **[*59]** Laws conflict with decisions made by the FDA explicitly finding such requirements to be unnecessary for safe use. Because these provisions are obstacles to congressional purpose, they are preempted. These state safety rules must yield to the safety decisions made by the federal agency in whose hands Congress placed decisionmaking authority about safety.

VIII. The Major Questions Doctrine

As an alternative argument, the defendant-intervenors contend that the major questions doctrine precludes implied preemption. *See* Doc. 84 at 18. The major questions doctrine addresses "a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." West Virginia v. EPA, 597 U.S. 697, 724, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022).

Under this doctrine, courts "presume that Congress intends to make major policy decisions itself" and must not assume that Congress intends to leave such weighty decisions to federal agencies in the absence of clear congressional instruction. Id. at 723, 142 S. Ct. 2587, 2613, 213 L. Ed. 2d 896 (cleaned up). "[W]hile the major questions label may be relatively recent, it refers to an identifiable body of law that has developed over a series of significant cases spanning decades." Biden v. Nebraska, 600 U.S. 477, 143 S. Ct. 2355, 2374, 216 L. Ed. 2d 1063 (2023) (internal quotation marks omitted). Each **[*60]** of those cases "involved novel agency interpretations of long-standing ambiguous regulatory provisions as major grants of authority to reconfigure large aspects of the economy." Genbiopro, Inc. v. Sorsaia, No. 23-CV-58, 2023 U.S. Dist. LEXIS 149195, 2023 WL 5490179, at *4 (S.D.W. Va. Aug. 24, 2023) (citing West Virginia, 597 U.S. at 711-15, 142 S. Ct. 2587, 213 L. Ed. 2d 896; Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 323-24, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014); Biden, 143 S. Ct. 2373; FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000)), *appeal docketed sub nom., GenBioPro, Inc. v. Raynes*, No. 23-2194 (4th Cir. Nov. 15, 2023).

The major questions doctrine does not apply here because the problem it seeks to solve, "agencies asserting highly consequential power" beyond what reasonably could be understood to have been granted by Congress, is absent. West Virginia, 597 U.S. at 724, 142 S. Ct. 2587, 2609, 213 L. Ed. 2d 896. There is no ambiguous regulatory provision at issue, and neither the FDA nor Dr. Bryant offer any novel interpretation of the FDCA or its 2007 amendments to broaden the agency's authority. No one disputes that in 2007, Congress granted the FDA the authority to adopt a REMS program for higher-risk drugs or that mifepristone was one of a number of prescription drugs requiring a REMS because the FDA approved it under Subpart H of the FDA's regulations. Nor does anyone dispute that the 2007 amendments authorize and indeed require the FDA to review, modify, and update a REMS program periodically. The defendant-intervenors do not point to any effort by the FDA to expand its authority without congressional authorization. Here, the FDA acts in accordance **[*61]** with Congress' command: it has implemented a REMS for a variety of drugs, including mifepristone, imposing requirements to reduce risks to patients while declining to impose requirements which in the agency's judgment do not effectively reduce risks and ensure safe access. *See generally* 21 U.S.C. § 355-1.

The defendant-intervenors contend that "nothing in the text of the FDCA suggests that Congress accorded the FDA any power, much less exclusive power, to set national abortion policy." Doc. 84 at 22 (cleaned up). That is true, as discussed *supra* p. 42. But the statutory mandate authorizing the FDA to implement REMS programs applies to drugs without regard to their purpose; it does not impose different tests or rules for drugs that treat thyroid conditions or diabetes or any other conditions. The defendant-intervenors do not point to anything to indicate that the FDA is applying or interpreting the FDCA or its 2007 amendments to give the agency any greater authority over mifepristone than it has over any other REMS medications.

Because no party says the FDA is applying the FDCA in a way that expands its authority beyond the congressional directive to implement REMS, the major questions doctrine is not **[*62]** relevant here.

IX. Conclusion

North Carolina's police powers traditionally extend to areas of health, safety, and the medical profession, and, generally speaking, it can legislate in those fields. But when the FDA has created a REMS program for a higher-risk drug and expressly imposed and removed a REMS element, the state cannot reimpose that restriction based on drug safety concerns. Allowing it to do so would frustrate Congress' purpose.

The portions of North Carolina's Abortion Laws that require an in-person 72-hour advance consultation, use of an ultrasound, an in-person examination, blood testing, and reporting non-fatal adverse events to the state deal with informed consent and broader health and safety matters and are not preempted. But the provisions that require physician-only prescribing, in-person prescribing, dispensing, and administering, the scheduling of an in-person follow-up appointment, and non-fatal adverse event reporting to the FDA stand as obstacles to Congress' purpose in creating a comprehensive federal regulatory scheme for higher-risk drugs run by the FDA and are preempted.

In the complaint, the plaintiff asks for declaratory and injunctive relief. The parties **[*63]** shall meet and confer on the form of a proposed judgment and injunction, attempt to narrow areas of disagreement, and thereafter make appropriate submissions.

It is **ORDERED** that:

1. The defendant-intervenors' motion for summary judgment is **GRANTED in part**. The provisions of North Carolina's Abortion Laws that require an in-person 72-hour advance consultation, use of an ultrasound, an in-person examination, blood testing, and reporting non-fatal adverse events to the state deal with informed consent to the termination of pregnancy and broader health and safety matters and are not preempted. The defendant-intervenors' motion for summary judgment is otherwise **DENIED**.

2. The plaintiff's motion for summary judgment is **GRANTED in part**. The provisions of North Carolina's Abortion Laws requiring physician only prescribing, in-person prescribing, dispensing, and administering, scheduling of an in-person follow-up appointment, and non-fatal adverse event reporting to the FDA violate the *Supremacy Clause* and are declared unconstitutional. The plaintiff's motion for summary judgment is otherwise **DENIED**.

3. The parties shall exchange proposed judgments and injunctions, meet and confer to narrow areas of disagreement, **[*64]** and thereafter file a joint submission with proposed judgments and injunctions attached no later than May 21, 2024. The joint submission is limited to identifying and briefly addressing points of disagreement as to form and may not exceed 3000 words. No additional briefing is otherwise authorized.

This the 30th day of April, 2024.

/s/ Catherine C. Eagles

UNITED STATES DISTRICT JUDGE

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EXHIBIT V

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAURENCE WOLF, d/b/a
LAURENCE WOLF PROPERTIES,
individually, and on behalf of a class of similarly-situated persons and entities,

Plaintiff,

-vs-

CITY OF DETROIT,
a municipal corporation,

Defendant.

Case No. 2:23-cv-11645
Hon. Brandy R. McMillion
Mag. Kimberly G. Altman

CITY OF DETROIT'S RESPONSE TO PLAINTIFF'S AMENDED FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSIONS AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Defendant, City of Detroit ("City") for its response to Plaintiff's Amended First Set of Interrogatories, Requests for Admissions, and Requests for Production of Documents states as follows:

CITY'S PRELIMINARY STATEMENT AND GENERAL OBJECTIONS

The City of Detroit objects to each of Plaintiff's Discovery Requests set forth herein and incorporates these general objections in each discovery request on the grounds that the individual requests are overly broad, vague and ambiguous. Specifically, the requests are stated in a manner under the assumption that the City of Detroit received and was in control of all funds disbursed from various sources to assist Detroit residents under the CERA program, which is inaccurate.

- **Marcia Quainton**

Interrogatory No. 6:

If your response to any of the Requests for Admission stated herein is anything but an unqualified admission, for each denial or qualified admission, state the facts and circumstances that support your denial of, or qualified admission to, that Request for Admission. In your response, please identify the document(s) upon which you rely to support your response.

Response:

See responses to individual requests for admission. The City objects to Plaintiff's request for all facts and documents supporting its responses on the ground that discovery has not been completed and the City has not yet completed its investigation of all of the facts, information and documents relating to the issues in this case, many of which are in the possession of third parties, such as MSHDA, Wayne Metro, UCHC, the 36th District Court and others.

REQUESTS FOR ADMISSION

Request for Admission No 1:

Admit that as part of the City's CERA program, a conditional dismissal, settlement statement, and/or consent judgment was required to be executed by an

~~**Whenever there are practical difficulties involved in carrying out the provisions of this article, the Building Official shall have the authority to issue a Temporary Certificate of Compliance or grant modifications for individual cases, provided, that the Building Official shall first find a specific reason that:**~~

~~**(1) Would make the strict letter of this article impractical;**~~

~~**(2)The modification from the requirement is in compliance with the intent and purpose of this article; or**~~

~~**(3)Such modification does not lessen any health and safety requirements of any provision of state law, of this article, or of the 2019 Detroit City Code as determined by the appropriate City official.**~~

Request for Admission No 4:

Admit that if the City had issued a temporary CoC to Approved Landlords, then (a) this would have been a proper exception to the requirement of obtaining a CoC under the City's CERA program and (b) would have entitled Approved Landlords (as defined in the FAC at ¶ 2) to full payment of the CERA Funds awarded.

Response:

The City objects to Plaintiff's use of the term "Approved Landlords," because this term is not contained in the Relief Acts or any of the Treasury Department's guidelines regarding the CERA program and the CERA program does not contain any eligibility requirements for landlords; the program is designed to benefit tenants, not landlords, and for this reason all of the eligibility requirements of the program apply to Eligible Households, not to landlords.

The City also objects to this Request for Admission on the ground that it suggests that if rental properties did not have either a Certificate of Compliance

or a temporary Certificate of Compliance, landlords would be paid less than "the CERA Funds awarded." This is improper and inaccurate, because the amount of "the CERA Funds awarded" would only be determined after applying the City's certificate of compliance requirement, not before.

The City also objects to this Request for Admission on the ground that any landlords were "entitled to" CERA funds for the reasons set forth in the City's Answer and Affirmative Defenses to Plaintiff's First Amended Complaint (ECF No. 21), Defendant City of Detroit's Motion to Dismiss or for Judgment on the Pleadings or, in the Alternative, for Summary Judgment and Brief in Support of Motion (ECF No. 28), and Defendant City of Detroit's Reply Brief in Support of Motion to Dismiss or for Judgment on the Pleadings or, in the Alternative, for Summary Judgment (ECF No. 32) and the attachments to such pleadings.

The City also objects on the grounds that this Request for Admission is vague, overly broad, and ambiguous as it does not specify whether it refers to ERA-1 funds or ERA-2 funds, or whether it refers to ERA-2 funds for which the City was a grantee or other ERA-2 funds the City did not control. The City further objects to this Request as it improperly assumes that relief funds were "awarded" to eligible households. The City further incorporates the objections stated in Interrogatory 1(a). Subject to and without waiving any and all objections:

The City admits that if it issued a temporary CoC to landlords seeking CERA funds on behalf of a tenant where the tenant was eligible for CERA funds, this would have been a proper exception to the requirement of obtaining a CoC under the City's CERA program and that said landlords would be eligible for 100% of the CERA funds calculated as the tenant rental assistance eligibility.

Request for Admission No 5:

Admit that the City did not issue any temporary Certificates of Compliance to Approved Landlords (as defined in the FAC at ¶ 2) to facilitate full payment of CERA funding.

Response:

The City objects to Plaintiff's use of the term "Approved Landlords," because this term is not contained in the Relief Acts or any of the Treasury Department's guidelines regarding the CERA program and the CERA program does not contain any eligibility requirements for landlords; the program is designed to benefit tenants, not landlords, and for this reason all of the eligibility requirements of the program apply to Eligible Households, not to landlords.

The City also objects to this Request as vague, overly broad and ambiguous, as it does not state any facts to suggest that any landlords applied for or otherwise requested a temporary CoC and further objects on the ground that the phrase "to facilitate full payment of CERA funding" is unreasonably vague and ambiguous. Subject to and without waiving said objections:

On information and belief, the City admits that it did not issue a Temporary Certificate of Compliance to any landlords during the time period the City's CERA program has been in effect.

~~**Request for Admission No 6:**~~

~~Admit that since 2018, when the City initially implemented the Certificate of Compliance requirement, only approximately 10% of residential rental properties have actually obtained a Certificate of Compliance from the City.~~

~~**Response:**~~

~~**The City objects to Request for Admission No. 6 on ground that the City did not initially implement its Certificate of compliance requirement in 2018, because this went into effect as early as 2003, as can be confirmed by reviewing past versions of the Detroit City Code.**~~

~~**The City also objects to this Request for Admission on the ground that it is vague and ambiguous because it does not explain what is meant by the term "residential rental properties." Some third parties have attempted to estimate the total number of properties in the City of Detroit which are rented, but there is no way to confirm an exact number, because most or many of the owners**~~