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Facing Emergencies with Equity: Adopting ARPA's Emergency Rental Assistance Eligibility and Documentation Standards for Undocumented Individuals as a Model for Housing Stability

Gregory Zlotnick

St. Mary's University School of Law, gzlotnick@stmarytx.edu

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Facing Emergencies with Equity: Adopting ARPA’s Emergency Rental Assistance Eligibility and Documentation Standards for Undocumented Individuals as a Model for Housing Stability

*Gregory M. Zlotnick**

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*Visiting Clinical Assistant Professor and Supervising Attorney, Housing Rights Project at the Center for Legal and Social Justice, St. Mary’s University School of Law. My thanks to Genevieve Hébert Fajardo for her generous assistance in developing this essay, and to Anika Singh Lemar and Nick Anderson for their thoughtful and patient editing. All errors are mine alone.

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Demand for federally funded housing programs vastly outpaces supply.¹ Moreover, the supply of those programs has been limited in their scope: namely, to U.S. citizens and certain legal residents. A patchwork of federal statutes and regulations, stitched together over years, made clear that undocumented individuals—a group estimated to number around 11,000,000 in 2022²—are ineligible for various kinds of federally subsidized housing.

As a result, undocumented individuals—an already-vulnerable class of residents—were even more vulnerable to housing instability when the COVID-19 pandemic reached the United States in 2020. Ineligible for short-term resources, such as unemployment benefits, as well as longer-term supports, such as housing choice vouchers, undocumented and other ineligible immigrants were poised to bear the brunt of the “eviction tsunami” that experts predicted would follow the economic disruptions of 2020.

But a funny thing happened on the way to the courthouse. Federal policy properly acknowledged housing instability as an acute crisis worthy of an expansive response inclusive of all residents, regardless of citizenship or authorization. American Rescue Plan Act of 2021 (ARPA) funding for emergency rental assistance (ERA) did not require recipients to demonstrate either U.S. citizenship or, critically, lawful presence. In this way, ARPA ERA funding mirrored other emergency funding programs, rather than flagship federal housing or income support programs.

Empowered to reach all members of their communities, states and cities conducted meaningful outreach with trusted stakeholders and facilitated streamlined assistance applications accessible to citizens, immigrants with lawful status, and undocumented residents alike. Even in jurisdictions with landlord-friendly eviction laws, public officials worked quickly and creatively to disburse ERA funds regardless of immigration status. These efforts, combined with eviction moratoria, expanded right to counsel in eviction proceedings, and undocumented individuals being overrepresented in essential workforce positions,³ contributed to a drop in evictions.⁴

1. See, e.g., Sonya Acosta & Erik Gartland, *Families Wait Years for Housing Vouchers Due to Inadequate Funding*, CTR. ON BUDGET & POL’Y PRIORITIES, (July 22, 2021), <https://www.cbpp.org/sites/default/files/7-22-21housing.pdf>.

2. *Profile of the Undocumented Population: United States*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/data/authorized-immigrant-population/state/US> (last visited Feb. 13, 2023)

3. Testimony of Tom Jawetz to the U.S. House Judiciary Subcommittee on Immigration and Citizenship (Sept. 28, 2020), <https://www.americanprogress.org/article/immigrants-essential-workers-covid-19>.

4. Yulia Panfil & David Spievack, *What Happened to the Eviction Tsunami?*, FIVETHIRTY EIGHT.COM, (Jan. 11, 2022), <https://fivethirtyeight.com/features/what-happened-to-the-eviction-tsunami>.

This equitable and inclusive approach to ERA eligibility should be a model for rental assistance programs well beyond the pandemic. As experts have noted, the eviction crisis in America predated the COVID-19 pandemic. And with the depletion of ARPA funding for ERA—as well as the expiration of eviction moratoria—evictions are rising once again across the country. The housing crisis remains a rolling, ongoing emergency for millions. Policymakers should continue to make aid available to all residents to mitigate the damage not only to individuals and families, but also to their communities.

Part I surveys eligibility requirements for federal housing and income assistance programs, establishing federal policy's baseline exclusion of undocumented residents from non-emergency programs that promote housing stability. Part II documents the shift towards expanded eligibility in COVID-19 relief programs and in ARPA, focusing on ERA's availability to non-citizens and undocumented residents. Part III highlights the city of San Antonio's effective approach to promoting, processing, and disbursing ERA funds. Part IV argues for the continued need for expansive ERA eligibility to combat housing instability beyond ARPA and the COVID-19 pandemic, as both inflation and limited housing supply impact residents regardless of immigration status.

I. Eligibility for Federal Housing and Income Assistance Programs

A. Before COVID, PRWORA

In 2020, a bipartisan consensus emerged during the COVID-19 crisis: massive—indeed, unprecedented—federal intervention in economic life was critical to mitigating the worst impacts of the economic disruption the pandemic wrought. Big Government, in other words, was back. Nearly a quarter-century earlier, an equal yet opposite bipartisan consensus had coalesced around the principle that “the era of Big Government [was] over.”⁵ Accompanying that thinking was agreement over not only the size of federal spending on social safety net programs (and, in particular, direct cash transfers), but also over who merited access to these restricted funds. This, too, would be a concept that would lose influence in the decades to come.

President Bill Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) into law in 1996. Best known as “welfare reform,” PRWORA allowed President Clinton to claim a campaign promised kept: “To end welfare as we know it.”⁶

And it did. The controversy over PRWORA's passage and signing focused largely on the conversion of Aid to Families with Dependent

5. President William Jefferson Clinton, State of the Union Address (Jan. 23, 1996), <https://clintonwhitehouse4.archives.gov/WH/New/other/sotu.html>.

6. *Clinton-Gore Accomplishments: Reforming Welfare by Promoting Personal Responsibility*, CLINTON WHITE HOUSE ARCHIVES (Dec. 15, 2000), <https://clintonwhitehouse4.archives.gov/WH/Accomplishments/welfare.html>.

Children (AFDC), which had been structured as a federal entitlement program, to Temporary Assistance for Needy Families (TANF), a time-limited, block-grant-funded program. In addition, PRWORA significantly restricted noncitizen access to public benefits. Title IV of the law “established restrictive, uniform rules that would apply” across federal housing, nutritional, income support, and health care programs.⁷

At his signing ceremony, President Clinton defended the bill, describing it as “an historic chance, where Republicans and Democrats got together and said, we’re going to take this historic chance to try to re-create the Nation’s social bargain with the poor.” He minimized his disagreements with the bill’s restrictions on safety access to legal immigrants, describing it as having “nothing to do with the fundamental purpose of welfare reform.”⁸

Clinton’s signing of PRWORA triggered the resignation of multiple administration officials, including leading antipoverty advocate Peter Edelman, at the time the acting assistant secretary for planning and evaluation at the Department of Health and Human Services. Edelman, unlike Clinton, did not minimize the severe impact of the bill on noncitizens. In an article for *The Atlantic* written months after PRWORA’s adoption, Edelman emphasized the disproportionate impact eligibility changes would have on noncitizens. “Many elderly and disabled noncitizens who have been in the United States a long time,” wrote Edelman, “will be thrown out of their homes or out of nursing homes . . . that are no longer reimbursed for their care.”⁹

So broad were PRWORA’s restrictions that even Edelman’s incisive and prophetic analysis did not fully anticipate their reach. In November 2020, the Congressional Research Service outlined the framework for eligibility in a report discussing the interplay between PRWORA restrictions and eligibility for COVID response programs and policies.¹⁰ As a general matter, PRWORA states that noncitizens who are not “qualified aliens” are ineligible for public benefits. 8 U.S.C. § 1641 provides a comprehensive definition of qualified aliens. While the definition does include many noncitizens beyond legal permanent residents, it does not include aliens without authorization.¹¹ Moreover, even Deferred Action for Childhood Arrivals (DACA) recipients and Temporary Protected Status (TPS) holders—two designations with which noncitizens can obtain Social Security numbers

7. BEN HARRINGTON, CONG. RSCH. SERV., R46510, PRWORA’S RESTRICTIONS ON NONCITIZEN ELIGIBILITY FOR FEDERAL PUBLIC BENEFITS: LEGAL ISSUES 2 (2020).

8. Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, 2 PUB. PAPERS 1325, (Aug. 22, 1996).

9. Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATL. MONTHLY (Mar. 1997), <https://www.theatlantic.com/magazine/archive/1997/03/the-worst-thing-bill-clinton-has-done/376797/>.

10. See generally HARRINGTON, *supra* note 7.

11. 8 U.S.C. § 1641.

and work authorizations—are excluded from the “eligible alien” designation under PRWORA. To paraphrase Edelman’s analysis, “The immigration provisions are strong stuff.”¹²

B. Pre-existing Limitations on Immigrant Access to Housing Programs

PRWORA defines the “federal public benefits” to whom access is restricted to citizens and certain legal residents:

any retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance, unemployment benefits, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.¹³

In the context of federal housing programs, however, PRWORA reinforced pre-existing restrictions on noncitizens adopted in the Housing and Community Development Act of 1980.¹⁴ Section 214 of that Act, codified at 42 U.S.C. § 1436a, restricts eligibility for housing-related financial assistance to certain categories of noncitizens. Here, too, undocumented individuals fall outside of eligibility.

Section 214 restrictions cover public housing; Section 8 Housing Choice Vouchers; Section 8 Project-Based Housing; Section 236 Housing; Section 235 Homeownership Housing; and Section 23 Leased Housing Assistance Program.¹⁵ These categories represent the vast majority of HUD’s annual budget. For example, in HUD’s 2021 enacted budget, these programs represented over \$47 billion of the Department’s nearly \$56 Billion budget.¹⁶

C. Exempt Programs, and Exceptions to Exemptions

Many other HUD programs fall outside of Section 214’s descriptions. These programs include Community Development Block Grant (CDBG); Emergency Solutions Grant (ESG); HOME; Housing Opportunities for Persons with AIDS (HOPWA); Section 202 Housing; Section 811 Housing; Sections 221(d)(3) and (d)(5); the McKinney-Vento Act; Rental Rehabilitation; and HOPE 2.¹⁷ However, if financing is, as is often the case, layered and a program receives Section 8 or other restricted funding, then it, too, is not accessible to undocumented residents.¹⁸

12. Edelman, *supra* note 9.

13. 8 U.S.C. § 1611(c)(1).

14. *Overview: Immigration Status and Federally Assisted Housing*, HOUSING JUSTICE (Nat’l Housing Law Project) Jan. 2010, at 1, https://nhlp.org/files/Jan%202010%20Newsletter%20FINAL_0.pdf (hereinafter *Overview*).

15. *Id.*

16. *See generally* DEPT. HOUSING & URBAN DEV., BUDGET OUTLAYS BY PROGRAM COMPARATIVE SUMMARY, FISCAL YEARS 2020–2022, https://www.hud.gov/sites/dfiles/CFO/documents/3_2022CJ_FY2022BudgetOutlayTableFinal.pdf.

17. *Overview*, *supra* note 14, at 1.

18. *Id.* at 1–2.

Further, there is uncertainty regarding PRWORA's "catch-all" applicability to these exempt programs.¹⁹ Undocumented individuals are not eligible to access these programs if decision makers (be they agency administrators or courts) determine those programs to be "similar" to the federal benefits that PRWORA defines.²⁰ Housing rights organizations such as the National Low Income Housing Coalition and the National Housing Law Project have put out guidance stating, variously, the lack of specific eligibility requirements in these and other programs or the eligibility for certain sub-programs within these projects.²¹ However, because "public or assisted housing" is specifically listed in PRWORA, a certain lack of clarity remains regarding immigrant eligibility. Even PRWORA's own exceptions do not conclusively answer the eligibility questions that often arise in everyday situations faced by low-income people and housing providers.

II. Emergency Aid, COVID, and ARPA: A Pathway to Housing Stability

A. PRWORA's Permission for Emergency Relief Availability Without Regard to Immigration Status

Despite its broad-based approach to restricting noncitizen access to federal public benefits, PRWORA nevertheless contained a critical exception, one that applied to the federal government's response to the COVID-19 pandemic. 8 U.S.C. § 1611(b)(1)(B) specifically states that PRWORA's "eligible alien" restrictions do not apply to "short-term, non-cash, in-kind emergency disaster relief." Additionally, the statute subsequently provides that programs delivering in-kind services, through either public or nonprofit agencies, that do not condition assistance on income or resources and are necessary for life and safety are also exempt from PRWORA's noncitizen restrictions.²²

Historically, this has meant that in-kind assistance from agencies, such as FEMA, following natural disasters are available to all residents, regardless of citizenship status.²³ While direct cash assistance programs provided in response to natural disasters are subject to PRWORA's citizenship restrictions,²⁴ PRWORA specifically makes available federally funded emergency and life-saving aid, such as temporary shelter, soup kitchens, and crisis counseling programs to all individuals, regardless of citizenship status.²⁵

19. See HARRINGTON, *supra* note 7, at 7, 14–15.

20. See *id.*

21. See generally *Overview*, *supra* note 14; see also *Frequently Asked Questions: Eligibility for Assistance Based on Immigration Status*, DISASTER HOUS. RECOVERY COAL. (Apr. 2022), https://nlihc.org/sites/default/files/FAQs_Eligibility-for-Assistance-Based-on-Immigration-Status.pdf (hereinafter FAQ).

22. 8 U.S.C. § 1611(b)(1)(D).

23. See HARRINGTON, *supra* note 7, at 13.

24. *Id.*

25. 8 U.S.C. § 1611(b)(1)(D).

B. Congress, CARES, and COVID: A Precursor to ARPA

In its immediate response to the COVID-19 pandemic, Congress adopted measures that further decreased restrictions on noncitizen access to emergency housing assistance. Prior to the passage of the American Rescue Plan Act, bipartisan legislation implemented measures that stabilized housing for noncitizens and citizens alike. This action created a framework for rental assistance programs available to all residents.

Perhaps the most lasting legacy of the CARES Act was the nationwide mandate that property owners receiving some form of federal subsidy or insurance must not proceed with eviction proceedings without first giving residents thirty days' notice to vacate the unit.²⁶ Undocumented individuals are ineligible to receive the benefits of many federal subsidies, including those included within the CARES Act's definition of "covered properties." However, this protection applied to private houses and apartment buildings whose mortgages are backed by federally sponsored enterprises Fannie Mae and Freddie Mac.²⁷ Given this inclusion, undocumented individuals living in private residences not receiving a direct federal subsidy still received the benefit of this regulation. Further, the CARES Act also either implemented new funding streams that did not specify eligibility restrictions, or enhanced funding to existing federal programs that did not specify restrictions based on immigration status.²⁸

New funding included \$150 billion for the Coronavirus Relief Fund (CRF), which state and local governments could use to "cover necessary expenditures incurred" in the aftermath of the COVID-19 pandemic.²⁹ Many localities used CRF to establish rental assistance programs prior to the establishment of the federal ERA program (which itself would receive funding through CRF).³⁰

Similarly, localities used enhanced CDBG funding to establish rental assistance programs.³¹ CDBG funds have been exempt from the restrictions found in Section 214 of the Housing and Community Development Act.³² These funds, along with additional money dedicated to the ESG—used widely to fund emergency shelter operations—made housing stability considerably more accessible to non-citizens than the pre-COVID baseline.

26. 15. U.S.C. § 9058 *et seq.*

27. *Id.*

28. See generally FAQ, *supra* note 21.

29. See *id.*

30. GRANT A. DRIESSEN, MAGGIE MCCARTHY, & LIBBY PEARL, CONG. RSCH. SERV., R46688, PANDEMIC RELIEF: THE EMERGENCY RENTAL ASSISTANCE PROGRAM 1.

31. *Id.*

32. See *supra* note 14.

C. ERA Further Expands Housing Stability Access for Undocumented Individuals

The establishment of the federal ERA program—one with federal oversight and local administration—dramatically stabilized the housing crisis feared when the COVID-19 pandemic began. It is credited for halting, in part, the “eviction tsunami” that was feared to hit renters in 2020 and 2021.³³ According to eviction expert Matthew Desmond, “Government aid in the form of rental relief was entirely responsible . . . [for] historic reductions in residential instability.”³⁴ With \$47 billion in emergency rental and utility assistance appropriated through ERA, Congress made available funds that rivaled and even surpassed its investments in historic housing affordability programs like public housing, Section 8 vouchers, and project-based rental assistance.

Moreover, Congress did so within a framework that made such funding available to undocumented individuals. Certain pandemic-era income supports, such as Pandemic Unemployment Assistance, expanded Supplemental Nutritional Assistance Program payments, and Economic Impact Payments, were subject to PRWORA restrictions on non-citizen eligibility.³⁵ However, ERA’s structure, along with its statutory silence on eligibility, enabled access for undocumented individuals. This approach—particularly as implemented in successful jurisdictions, such as San Antonio—creates a framework for expansive housing stability that merits implementation far past emergency measures.

D. ERA Funding and Eligibility

1. Funding ERA

ERA funding came in two tranches. The first \$25 billion—ERA-1—came through the Consolidated Appropriations Act of 2021.³⁶ The appropriation for this tranche came from the CRF. While state and local governments had previously used CRF funding to establish rental assistance programs,³⁷ this appropriation directed funding to the Treasury Department for subsequent obligations to state, local, tribal, and territorial governments.³⁸ A second, \$21.55 billion round of funding came through the American Rescue Plan

33. See, e.g., Francesca Mari, *What’s Between 30 Million Americans and an Eviction Tsunami?*, N.Y. TIMES, Dec. 3, 2020, at A23.

34. “*The Rent Eats First*”: *How Renters and Communities Are Impacted by Today’s Housing Market*, *Before the U.S. S. Comm. on Banking, Hous., & Urb. Affs.*, 117 Cong. 10 (Aug. 2, 2022), <https://www.banking.senate.gov/imo/media/doc/Desmond%20Testimony%208-2-22%20.pdf> (statement of Prof. Matthew Desmond, Princeton Univ.) [hereinafter Desmond Testimony].

35. See generally FAQ, *supra* note 21.

36. See DRIESSEN ET AL., *supra* note 30, at 2.

37. See *supra* Part II.B.

38. See DRIESSEN ET AL., *supra* note 30, at 2.

Act of 2021.³⁹ Known as ERA-2, ARPA again went to support state, local, and tribal governments, with certain funds set aside for high-need matters (ERA-2 High Need).⁴⁰

2. ERA Eligibility and Documentation

ERA eligibility requirements became broader between ERA-1 and ERA-2. In ERA-1, households must be renters; at or below 80% of the area median income (AMI) as determined by HUD; experiencing financial hardship resulting from the pandemic, as demonstrated by unemployment benefit receipt or written attestation; and having at least one household member at risk of homelessness or housing instability.⁴¹

ERA-2 kept the renter and 80% AMI requirement but removed two components. First, it removed the requirement that financial hardship be related to the pandemic. Rather, financial hardship during the pandemic alone would suffice. Second, ERA-2 removed details about evidence of risk of homelessness or housing instability.⁴²

The Treasury Department emphasized the need for greater eligibility flexibility in guidance revised on May 7, 2021.⁴³ This guidance, in the form of Frequently Asked Questions, strongly encouraged, in multiple places, grantees to implement flexible standards “consistent with the statutory requirement for the funds to be used to provide financial assistance to eligible households.”⁴⁴

And, throughout its guidance, as well as in the authorizing statutes themselves, ERA-1 and ERA-2 did not refer to eligibility restrictions on the basis of citizenship or immigration status. In alignment with PRWORA’s carve-out for noncitizen eligibility for non-cash emergency aid, emergency rental assistance was available to all.

E. ERA Documentation Requirements: Further Support for Undocumented Residents

As with eligibility, the Treasury Department “strongly encourage[d]” grantees to employ flexible, expansive standards for acceptable documentation.⁴⁵ To be clear, the Treasury Department did address the need for fraud prevention. “Grantees are expected,” the Department wrote, “to apply reasonable fraud-prevention procedures and to investigate and address potential instances of fraud.”⁴⁶ However, documentation requirements [provided]

39. *Id.* at 3.

40. *Id.*

41. *See id.* at 11.

42. *See id.*

43. *See generally* U.S. DEPT. OF TREAS., EMERGENCY RENTAL ASSISTANCE FREQUENTLY ASKED QUESTIONS (rev. May 7, 2021), <https://home.treasury.gov/system/files/136/ERA2FAQs%205-6-21.pdf> [hereinafter ERA FAQ].

44. *See id.* at 14.

45. *See id.* at 2.

46. *See id.* at 14.

for various means of documentation so that grantees may extend this emergency assistance to vulnerable populations without imposing undue documentation burdens.”⁴⁷

Read in combination with the Treasury Department’s strong encouragement for flexible eligibility standards, federal agency guidance aligned with a permissive statutory structure to serve residents facing housing instability, regardless of citizenship status. Treasury Department guidance, in naming “vulnerable populations” who may not have access to certain forms of documentation, made concrete the challenges that many undocumented residents have in obtaining identifying documents.⁴⁸ Further, the Treasury Department cautioned against documentation requirements that “are likely to be barriers for eligible households, including those with irregular incomes . . . or gig workers whose income is reported on Internal Revenue Service Form 1099.”⁴⁹

Here again, the federal government described forms of work common to undocumented individuals: day labor; cash payments; part-time, irregular employment. Explicitly and implicitly, the ARPA-funded ERA created a regime for direct housing assistance to undocumented immigrants. This system not only permitted, but also empowered, state and local governments to provide critical housing support to some of the most vulnerable, and most often overlooked, residents of their communities.

III. “If you don’t have anything... Call 210-207-5910. We can talk you through your options.” San Antonio as a Case Study for Accessible Housing Assistance

A. Roadblocks to Rental Assistance

Despite record amounts of federal funding committed to rental assistance, and despite explicit and implicit agency guidance encouraging swift dissemination of funds, challenges emerged nationwide in the implementation of ERA following ARPA. In September 2021, well after ERA-2 came online, *Politico* reported widespread state and local challenges to disbursing rental aid.⁵⁰ Despite Treasury Department directives informing grantees of the threat of recapture if funds went unspent, only seventeen percent of federal rental assistance had been spent by the time the CDC eviction moratorium was halted in August 2021.⁵¹ Whether due to

47. *See id.* at 2.

48. Cf. Gregory Zlotnick, *Picking the Lock: A Proposal for a Standard Fee Waiver in Texas for Identification Documents*, 22 *THE SCHOLAR* 345 (2020) (identifying common barriers to accessing identifying documents).

49. *See* ERA FAQ, *supra* note 43, at 2.

50. Katy O’Donnell, *Most Rental Aid Went Unspent in August, Sparking Treasury Warning*, *POLITICO* (Sept. 24, 2021, 11:06 AM), <https://www.politico.com/news/2021/09/24/august-rental-aid-unspent-514094>.

51. *Id.*

logistical challenges,⁵² onerous documentation requirements,⁵³ or austere fiscal practices,⁵⁴ many states struggled to spend grant funding received to assist with rental payments.

B. Success in the Heart of Texas

Texas, by and large, was not one of those states. Despite partisan differences between Texas and federal elected officials, the Biden administration “tried to highlight how Texas . . . used data and contracted with community nonprofits” to lead the country in rental assistance disbursed by late 2021.⁵⁵

Leading the way in Texas was San Antonio. In September 2021, the White House hosted a webinar on emergency rental assistance best practices.⁵⁶ The session featured San Antonio Mayor Ron Nirenberg, who shared how the city had spent ninety-two percent of ERA-1 funds, and was continuing to address rental assistance needs with ARPA-provided funding.⁵⁷ Months before, in July 2021, the Texas Low Income Housing Information Service (Texas Housers) issued a report that ranked San Antonio first among Texas cities in administering emergency rental assistance programming.⁵⁸

San Antonio had a critical advantage: it already had a municipal mechanism in place for rental assistance. Prior to the pandemic, the city had created a Risk Mitigation Fund to assist renters and homeowners at risk of losing their homes.⁵⁹ By the time COVID-19 arrived in the city, this fund housed \$25 million in city funding as early as April 2020,⁶⁰ and later

52. Glenn Thrush, *Treasury Shifts \$377 Million Among States as Pandemic Housing Aid Dries Up*, N.Y.TIMES, Mar. 17, 2022, at A18.

53. Sarah Whites-Koditscheck, *Alabama Losing Millions in Federal Rental Assistance Due to Delays*, AL.COM (Feb. 23, 2022, 8:39 AM), <https://www.al.com/news/2022/02/alabama-losing-millions-in-federal-rental-assistance-due-to-delays.html>.

54. Amelia Ferrell Knisely, *West Virginia Stockpiled \$110 Million in Welfare Funds Despite Pandemic, Soaring Hunger Numbers*, MOUNTAIN STATE SPOTLIGHT (Feb. 14, 2022), <https://mountainstatespotlight.org/2022/02/14/wv-stockpiled-110-million-tanf-welfare-money>.

55. Katy O'Donnell, *Why the White House Loves the Texas Renter Rescue*, POLITICO (Sept. 4, 2021 7:00 AM), www.politico.com/news/2021/09/04/white-house-texas-renter-rescue-509546.

56. Steven Santana, *White House Highlights San Antonio Rental Assistance Efforts*, CHRON.COM (Sep. 10, 2021), <https://www.chron.com/news/local/article/White-House-highlights-San-Antonio-rental-program-16448862.php>.

57. *Id.*

58. See generally Erin Hahn, *Evaluating the Effectiveness of the Emergency Rental Assistance Program in Texas*, TEX. LOW INCOME HOUSING INFO. SERV. (July 13, 2021), <https://texashousers.org/wp-content/uploads/2021/07/ERAP-Report-7-13.pdf>.

59. See Iris Dimmick, *City Ramping Up Efforts in Affordable Housing Plan*, SAN ANTONIO REP. (Dec. 12, 2018), <https://sanantonioreport.org/city-ramping-up-efforts-in-affordable-housing-plan>.

60. Sara Cline, *City Council Approves \$25 Million to Help Struggling San Antonio Residents Pay for Gas, Groceries, Utilities, and Housing*, SAN ANTONIO EXPRESS-NEWS (Apr. 23, 2020 10:31 PM), <https://www.expressnews.com/news/local/article/City-approves-25-million-to-help-San-Antonio-15221705.php>.

included federal CARES Act funding. By the time ARPA funding arrived in 2021, elected and appointed city officials were familiar with effective practices for disbursing rental assistance. As the Congressional Research Service has noted, “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 funds.⁶¹

One of San Antonio’s most effective practices was making available clear, attainable standards for required documentation. The city’s Neighborhood Housing Services Division (NHSD), which had developed and implemented the Risk Mitigation Fund prior to the pandemic, was responsible for administering ERA funds. On its website and over a dedicated hotline, NHSD published a simple, one-page, plain language grid for required documents.⁶² The chart had columns highlighting the most common, or fairly common, forms of documenting identity, income, and hardship. For identity documentation, the NHSD chart included under “common submission,” “tax return that lists everyone,” Employment Authorization Document, and Matricular Consular—a form of identification foreign consulates issue to citizens of their countries. Listing these documents, which many undocumented individuals possess, made tangible the availability of rental assistance regardless of citizenship or immigration status. San Antonio residents did not have to interpret the silence of ARPA on citizenship eligibility, or sift through Congressional Research Service analysis, to determine whether their immigration status would determine whether they could access funding to stay in their home.

Moreover, NHSD included a third and perhaps most helpful column: one titled, “If you don’t have anything” Under that title, in most boxes, the telephone number for the assistance program was given, along with a simple instruction: “Call . . . and we will walk you through your options.” Here, in text, was a municipality acknowledging that crises do not always—indeed, often do not—occur when paperwork is in order. By being accessible by telephone; by opening an online portal; by making information available in English and in Spanish, San Antonio’s methods of receiving and responding to rental assistance applications mirrored the categorical openness of federal funding to stabilize the housing of citizens and immigrants of all statuses during the pandemic.

61. See DRIESSEN ET AL., *supra* note 30, at 1.

62. City of San Antonio Neighborhood & Housing Serv. Dept, Required Docs for Assistance, <https://www.sanantonio.gov/Portals/0/Files/NHSD/Programs/FairHousing/RequiredDocsForAssistance.pdf>.

IV. The Way Forward: Pathways to Continued Undocumented Individual Eligibility for Housing Assistance

While certainly not without challenges,⁶³ San Antonio's implementation of ERA funds—befitting of a city that identifies itself as a compassionate city⁶⁴—demonstrates how culturally sensitive and responsive local government can make policy work for all stakeholders: tenants and landlords, citizens, and immigrants. Similarly, federal rental assistance policy can continue to follow the ARPA/ERA model to expand housing stability to undocumented individuals and others ineligible for traditional rental programs. Since the federal government “built, essentially from scratch,” this level of commitment to rental assistance during the COVID-19 pandemic, it is unclear whether, and how, such a commitment could continue. Separate and apart from issues of funding priorities and adequate scale, permanent rental assistance funding would likely, at some point, need to address ongoing eligibility for undocumented individuals. As noted below, several regulatory pathways could facilitate this continued eligibility.

Repeal of Immigration Restrictions in the Housing and Community Development Act and PRWORA. Perhaps the most elegant way to expand pathways to housing stability would be—to borrow from President Clinton—to end Section 214 and PRWORA as we know them. Rather than creating restrictive housing policies that functionally discriminate on the basis of national origin, repealing the “eligible alien” sections of these fundamental social safety net laws would ensure that one of the most basic needs of all residents could be more readily met. Further, it would relieve the possibility of statutory ambiguity that has arisen since the COVID-19 pandemic.⁶⁵ With their repeal, a presumption of eligibility would replace the presumption of immigrant ineligibility for public benefits.

Continued Emergency Funding. Absent PRWORA's repeal, its exemption for short-term, non-cash emergency disaster relief provides a sound basis for continued emergency rental assistance funding. Matthew Desmond, in August 2022 testimony before the Senate Committee on Banking, Housing, and Urban Affairs, stated that “we should not use our softer voices in times of emergency” in urging the Senate to expand rental assistance. As he testified, “[S]ince 1985, rent prices have outpaced income gains by 325 percent.”⁶⁶ Further, in a January 2023 white paper titled, *Blueprint for a Renter Bill of Rights*, the Biden administration identified housing insecurity as a long-standing problem exacerbated, from 2021–2022, in a stunning

63. See, e.g., Matthew Desmond, *The Rent Eats First, Even During a Pandemic*, N.Y. TIMES, Aug. 30, 2020, at SR6. (describing a San Antonio's resident's difficulties accessing rental assistance in the face of eviction).

64. See, e.g., CITY OF SAN ANTONIO, COMPASSION IN SA (2023), <https://www.sanantonio.gov/humanservices/FaithBased/compassionSA>.

65. See generally HARRINGTON, *supra* note 7.

66. See Desmond Testimony, *supra* note 34, at 13.

17.2% increase in average rents.⁶⁷ Such conditions constitute emergency measures; rental assistance funding could operate under this exemption.

Lest this be considered an undue expansion of emergency powers, the federal government construed the ongoing COVID-19 pandemic as such an emergency through May 11, 2023—a period lasting over three years.⁶⁸ Moreover, many states and localities, including conservative-led Texas, are operating under emergency conditions as well, whether citing COVID-19⁶⁹ or high levels of homelessness.⁷⁰ Indeed, on May 15, 2023—just four days after the federal state of emergency ended—Texas Governor Greg Abbott renewed his COVID-19 disaster proclamation.⁷¹ While the Proclamation concerns itself largely with preventing local governments from taking public health-related measures such as vaccine mandates, masking requirements, and/or business closures, it also “[authorizes] the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster.”⁷² Such broad approaches to emergency response from across the partisan spectrum suggest an openness to revisiting long-held understandings of these procedures.

Modifications to Eviction Procedures to Encourage Obtaining Rental Assistance. One branch of Texas state government has continued to use its rulemaking power in creative ways to attempt to cope with the ongoing eviction crisis: the Texas Supreme Court. In so doing, it models a pathway for incorporating rental assistance into the rules and regulations governing eviction proceedings. In May 2023, the state’s court of last resort for civil matters issued an emergency order regarding the Texas eviction diversion program.⁷³ Similar to its gubernatorial counterpart, the TEXAS Supreme Court used this order to renew a prior emergency order addressing evictions. Citing Governor Abbott’s COVID-19 emergency declaration, the court modified portions of Texas Rule of Civil Procedure 510, the rule governing eviction proceedings in Texas justice courts.⁷⁴

Certain modifications require changes to the citation the justice court issues to defendants upon commencement of the lawsuit in both English

67. DOMESTIC POL’Y COUNCIL & NAT’L ECON. COUNCIL, THE WHITE HOUSE BLUEPRINT FOR A RENTERS BILL OF RIGHTS 4 (Jan. 2023).

68. E.g., Zeke Miller & Amanda Seitz, *President Biden to End COVID Emergencies on May 11*, ASSOC. PRESS (Jan. 30, 2023), <https://apnews.com/article/biden-united-states-government-district-of-columbia-covid-public-health-2a80b547f6d55706a6986debc343b9fe>.

69. E.g., Emer. Order Regarding the Texas Eviction Diversion Program, Misc. Docket No. 23-9024 (Tex. Apr. 28, 2023).

70. E.g., Proclamation of Existence of a Local Emergency for Homelessness by the Los Angeles County Board of Supervisors (Jan. 10, 2023).

71. Proclamation by the Governor of the State of Texas (May 15, 2023).

72. *Id.*

73. Emer. Order Regarding the Texas Eviction Diversion Program, Misc. Docket No. 23-9024 (Tex. Apr. 28, 2023).

74. *Id.*

and Spanish, itself an acknowledgment of the language and national-origin diversity of parties to eviction lawsuits.⁷⁵ Other modifications require judges to permit legal aid representatives to be present in court to assist eligible parties.⁷⁶ And one modification deals specifically with rental assistance funding: an explicit procedural mechanism to abate cases for all parties seeking rental assistance.⁷⁷

Under the emergency order, judges at eviction trials are required to ask whether landlords are themselves seeking rental assistance for the tenant they are seeking to evict, or have provided “any information or documentation to a rental assistance provider involving the defendant-tenant.”⁷⁸ That mandatory measure is one most frequently honored in the breach, based on the observations of tenant attorneys.⁷⁹ However, the emergency order goes beyond that requirement, stating that judges “should” affirmatively inquire about landlords’ and tenants’ willingness to seek rental assistance.

If landlords are seeking rental assistance funding; have provided information to rental assistance providers; or along with the tenant express an interest in seeking available rental assistance, then the emergency order requires something remarkable for a summary eviction proceeding: the court must abate the action for at least sixty days.⁸⁰ Further, the emergency order requires the immediate sealing of all records, files, and information related to the eviction action.⁸¹ And, if the landlord does not file and serve a motion to reinstate the eviction suit, then the judge must dismiss the suit with prejudice on the day after the abatement period’s expiration, leaving all records sealed.⁸²

These changes to the rules governing eviction procedures do not distinguish between citizen and non-citizen landlords and tenants. Rather, they encourage and invite all litigants to seek out available rental assistance funds, and do so in a positive-sum manner: making landlords whole, allowing tenants the chance to avoid eviction, while limiting burdens on busy court dockets. Inclusive court proceedings, paired with inclusive approaches to rental assistance, can provide a holistic response to tenants facing eviction: not only during the proceeding itself, but well afterward through mandatory record-sealing and dismissals. And this relief, with its integration of both procedural and substantive support for both landlords

75. *Id.* at 3(a).

76. *See id.* at 3(b).

77. *See id.* at 3–9.

78. *Id.* at 3(b)(ii).

79. As the supervisor for our Center’s Housing Rights Project, I regularly attend hearings in justice courts in Bexar County. While many justices of the peace do ask whether landlords and tenants would like to seek rental assistance, they typically do not, as a formal matter, ask landlords the questions as prescribed in 3(b)(ii) of the emergency order.

80. *See id.* at 3(b)(iv), 4.

81. *Id.*

82. *Id.* at 6.

and tenants, could be explicitly adopted in the permanent rules of procedure governing eviction proceedings in jurisdictions nationwide.

Flexible Documentation Standards. Regardless of the statutory or regulatory framework under which undocumented eligibility for rental assistance continues, implementation must continue to rely upon expansive documentation standards such as those the Treasury Department encouraged. Permitting various forms of identifying personal documents, as well as proof of lost income or risk of homelessness, must become the norm, rather than the exception, for any housing stability program committed to equity. After all, while “undocumented” may be most commonly applied to immigrants unable to prove their lawful presence, plenty of American-born residents also have difficulty documenting their identity.⁸³ By widening the scope of acceptable documentation, federal housing policy can eliminate bottlenecks and meet residents where they are, alleviating the threat of displacement while making property owners whole on back rent.

Conclusion: Strength in Inclusive Policymaking

Matthew Desmond’s 2020 call for a nationwide eviction moratorium bore the memorable title, “The Rent Eats First, Even in a Pandemic.”⁸⁴ With the support of expansive funding, and similarly expansive approaches to eligibility and documentation, Americans regardless of immigration status were able to feed that “greediest of bills,” if only for a few additional months, and stave off displacement and despair.⁸⁵

That precedent—one of a federal government actively and inclusively attempting to meet its residents’ most basic needs—is, to paraphrase Peter Edelman, the “strong stuff” that is needed to make a more equitable society. Rather than cuts to immigrant eligibility that “are just mean, with no good policy justification,”⁸⁶ policymakers have, in ARPA and ERA, a model that is both compassionate *and* has sound policy justifications. As inflationary pressures compound an already restricted affordable housing market, permanent establishment of federal rental assistance available, regardless of immigration status, will make an immediate impact in blunting the rolling eviction crisis. As Desmond testified:

We need to increase the supply of affordable housing by deepening investments in development and expanding public housing offerings. But we can’t build our way out of this because families need relief now—not three years from now, when developers finally break ground after clearing all the red tape, not seven years from now when the doors finally open—but today.⁸⁷

83. See Zlotnick, *supra* note 48, at 347 (noting that approximately eleven percent of Americans do not have identifying documents).

84. See Desmond, *supra* note 63.

85. *Id.*

86. See Edelman, *supra* note 9.

87. Desmond Testimony, *supra* note 34, at 10.

Those families in need of relief are American citizens and undocumented individuals; legal permanent residents and asylum seekers. ARPA and the ERA met the needs of those families. If one legacy of the COVID-19 pandemic is worth continuing, surely it is this: a policy response worthy of the Statue of Liberty's inscription to "send these, the homeless, tempest-tost to me,"⁸⁸ and secure for them their homes in this nation.

88. Emma Lazarus, *The New Colossus*, NAT'L PARK SERV. (Nov. 2, 1883), <https://www.nps.gov/stli/learn/historyculture/colossus.htm>.