

# A Review of ARPA: How Some States Are Using the Funds for Political Goals, And Ways to Prevent this Misuse in the Future

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## ABSTRACT

*Access to affordable housing in the United States is a significant and growing challenge, exacerbated by recent economic trends and the COVID-19 pandemic. Issues like supply chain disruptions and rising interest rates have worsened the shortage of affordable housing for both renters and homeowners. This crisis disproportionately affects low-income individuals and communities of color, who were already grappling with housing instability and high housing costs before the pandemic. Structural racism continues to play a role in these disparities. Notably, no state or major metropolitan area has sufficient affordable housing for extremely low-income renters, particularly those from marginalized racial backgrounds. The federal government allocated \$350 billion through the American Rescue Plan Act to address economic impacts, and some localities used these funds creatively to increase affordable housing supply. However, some misused the funds, including building correctional facilities, which were later deemed ineligible. The Treasury Department has the authority to investigate and recoup misused funds to redistribute them elsewhere in the nation. This Note analyzes data on fund usage and offers recommendations for federal policymakers to ensure future funding effectively addresses affordable housing needs.*

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## I. INTRODUCTION

Access to affordable housing is a widespread challenge in the United States that has been exacerbated by recent economic trends and the COVID-19 pandemic. The shortage of affordable housing for both renters and homeowners has been compounded by issues such as supply chain disruptions and rising interest rates. This has disproportionately affected low-income individuals and communities of color, who were already struggling with housing instability<sup>1</sup> and severe housing cost burdens<sup>2</sup> prior to the pandemic. Communities of color continue to bear the brunt of the United States' long history of structural racism<sup>3</sup> that pervades the nation's housing system and drives disparities in housing outcomes.<sup>4</sup> No state or major metropolitan area currently has enough affordable housing for extremely low-income renters who are disproportionately Black, Latino, Asian, or American Indian.<sup>5</sup> Overcoming these systemic barriers requires intentional investments in equity-based housing solutions.

In response to the economic impact of the pandemic, the federal government allocated \$350 billion in flexible Coronavirus State and Local Fiscal Recovery Funds ("SLFRF") to state and local governments through the American Rescue Plan Act ("ARPA").<sup>6</sup> Both the legislation and subsequent guidance from the U.S. Department of the Treasury ("Treasury" or "the Department") made clear that several housing-related uses were permissible with the funds, providing a unique opportunity to launch largescale and innovative housing solutions.<sup>7</sup> Research indicated that many localities used a portion of these funds to increase their supply of affordable housing, enabling them to fund a variety of creative solutions to meet their residents' housing needs.<sup>8</sup> However, some localities did not and instead used these funds to build correctional facilities later deemed ineligible under SLFRF. At the time, Treasury had not yet published the Final Rule—an implementation document to clarify the intended

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1. Mary K. Cunningham & Abby Boshart, *When People Can't Pay Their Rent, What Comes Next?*, URB. INST. (May 5, 2020), <https://www.urban.org/urban-wire/when-people-cant-pay-their-rent-what-comes-next>.

2. See THE PEW CHARITABLE TR., *AMERICAN FAMILIES FACE A GROWING RENT BURDEN* (2018), [https://www.pewtrusts.org/-/media/assets/2018/04/rent-burden\\_report\\_v2.pdf](https://www.pewtrusts.org/-/media/assets/2018/04/rent-burden_report_v2.pdf).

3. See Solomon Greene et al., *HUD Ignores Evidence on Discrimination, Segregation and Concentrated Poverty in Fair Housing Proposal*, URB. INST. (Mar. 13, 2020), <https://www.urban.org/research/publication/hud-ignores-evidence-discrimination-segregation-and-concentrated-poverty-fair-housing-proposal>.

4. See Solomon Greene & Alanna McCargo, *New Data Suggest COVID-19 is Widening Housing Disparities by Race and Income*, URB. INST. (May 29, 2020), <https://www.urban.org/urban-wire/new-data-suggest-covid-19-widening-housing-disparities-race-and-income>.

5. *The Gap: A Shortage of Affordable Homes*, NAT'L LOW INCOME HOUSING COAL. (Mar. 2023), <https://nlihc.org/gap>.

6. American Rescue Plan Act of 2021, Pub. L. No. 117-2 (2021).

7. See *id.*; U.S. DEP'T TREASURY, *CORONAVIRUS STATE & LOCAL FISCAL RECOVERY FUNDS: OVERVIEW OF THE FINAL RULE* (2022) [hereinafter *OVERVIEW SLFRF*], <https://home.treasury.gov/system/files/136/SLFRF-Final-Rule-Overview.pdf>.

8. Kathryn Reynolds et al., *How Are Cities Planning to Use State and Local Fiscal Recovery Funds for Their Housing Needs?*, URB. INST. (Nov. 15, 2021), <https://www.urban.org/urban-wire/how-are-cities-planning-use-state-and-local-fiscal-recovery-funds-their-housing-needs>.

use of SLFRFs.<sup>9</sup> After publishing the Final Rule, Treasury stated it “will not take action to enforce provisions contained in the final rule” on states who already started spending the funds based on the Department’s interim provisions.<sup>10</sup> So, Alabama and seventeen other states are seemingly allowed to use federal funds to construct prisons using funds designated for affordable housing.<sup>11</sup> Treasury is empowered to investigate the misuse of ARPA funds<sup>12</sup> and recoup unlawfully-spent SLFRFs to redistribute them elsewhere in the nation.<sup>13</sup> It should use this power now.

This Note reviews the data reported by SLFRF recipients on their use of these funds and examines how localities are directing the funds to affordable housing development and other, non-eligible uses such as prison construction. The Note then discusses several implications for federal policymakers and provides recommendations for how future federal funding can be structured to ensure federal funding is used appropriately to address pandemic-related concerns, including the nation’s affordable housing needs.

## II. BACKGROUND ON ARPA AND SLFRF PROGRAM

The United States federal government enacted ARPA on March 11, 2021 to provide immediate medical assistance to the American people and economic relief in the wake of the pandemic and resulting recession.<sup>14</sup> This \$1.9 trillion COVID-19 relief package provided funding for various programs and initiatives aimed at supporting individuals, families, businesses, and communities affected by the pandemic.

### A. *The SLFRF Program Provides Some Funding Directed at Housing Relief*

ARPA included several provisions that aim to address the affordable housing crisis in the United States, including \$25 billion in emergency rental assistance to help renters who are struggling to pay their rent and utilities due to the pandemic (distributed straight to state and local governments); \$10 billion for the

9. Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 18, 4338 (Jan. 27, 2022) (to be codified at 31 C.F.R. § 35 pt. 4453) [hereinafter SLFRF Rules], <https://www.federalregister.gov/documents/2022/01/27/2022-00292/coronavirus-state-and-local-fiscal-recovery-funds>.

10. U.S. DEP’T TREASURY, STATEMENT REGARDING COMPLIANCE WITH THE CORONAVIRUS STATE AND LOCAL FISCAL RECOVERY FUNDS INTERIM FINAL RULE AND FINAL RULE 1 (2022) [hereinafter TREASURY FINAL RULE], <https://home.treasury.gov/system/files/136/SLFRF-Compliance-Statement.pdf>.

11. Morgan Simon, *Jails in Jeopardy Following New Treasury Rule: Federal Covid Relief Must Help People*, FORBES (Jan. 19, 2022), <https://www.forbes.com/sites/morgansimon/2022/01/19/jails-in-jeopardy-following-new-treasury-rule-federal-covid-relief-must-help-people/?sh=45203e7f4b9e>.

12. *Office of Investigations*, OFF. INSPECTOR GEN. [hereinafter *Office of Investigations*], <https://oig.treasury.gov/office-investigations> (last updated Feb. 7, 2023, 2:36 PM).

13. SLFRF Rules, *supra* note 9.

14. U.S. DEP’T TREASURY, FACT SHEET: THE AMERICAN RESCUE PLAN WILL DELIVER IMMEDIATE ECONOMIC RELIEF TO FAMILIES (March 18, 2021) [hereinafter TREASURY FACT SHEET: THE ARPA], <https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families#:~:text=This%20additional%20Economic%20Impact%20Payment,a%20tax%20return%20in%202022.&text=%242%2C800%20for%20married%20couples%2C%20plus%20%241%2C400%20for%20each%20dependent>.

Homeowner Assistance Fund, which provides aid to homeowners who are struggling to make mortgage payments and avoid foreclosure; \$5 billion in additional funding for the Housing Choice Voucher program, which helps low-income families afford safe and decent housing; and \$5 billion in funding for the HOME Investment Partnerships Program, which provides grants to state and local governments to build and preserve affordable housing.<sup>15</sup>

Overall, ARPA provides significant funding for affordable housing programs. Although these funds help relieve the temporary housing crisis caused by the pandemic, they can have lasting effects that help to solve the enduring affordable housing crisis, including providing homeowners with emergency aid to cover back rent—allowing them to stay in their homes long-term—and providing funding for families and individuals who are recovering from, or at risk of, homelessness. Additionally, Treasury and the IRS expanded outreach to the millions of homeless, rural poor, and other disadvantaged Americans to ensure that they receive Economic Impact Payments.<sup>16</sup> This included new and continued relationships with homeless shelters, legal aid clinics, and providing Economic Impact Payment information in more than 35 languages.<sup>17</sup>

*B. The SLFRF Program Provides Direct Funding to State Governments to Aid in Recovery from the Economic and Public Health Impacts of the COVID-19 Pandemic*

The SLFRF program, a part of ARPA, delivers \$350 billion to state, local, and tribal governments across the country to support their response to and recovery from the COVID-19 public health emergency.<sup>18</sup> SLFRF is a broad funding formula designed to provide states, local governments, and tribes with additional resources to, among other things, address the negative economic impacts of the pandemic on households, including by providing assistance with rent, utilities, and other essential expense.<sup>19</sup> The law prioritizes those homeowners that have

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15. *Id.*

16. *Id.*

17. *Id.*

18. U.S. DEP'T TREASURY, CORONAVIRUS STATE AND LOCAL FISCAL RECOVERY FUNDS, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds> (last visited Nov. 9, 2023) (stating ARPA provides \$350 billion dollars in emergency funding for state, local, territorial, and Tribal governments to remedy this mismatch between rising costs and falling revenues, including \$195 billion for states; \$130 billion for local governments; \$20 billion for tribal governments; and \$4.5 billion for territories); AMERICAN RESCUE PLAN ACT OF 2021, H.R. 1319, 117th Cong. (2021) (enacted) [hereinafter CORONAVIRUS STATE AND LOCAL FISCAL RECOVERY FUNDS], <https://www.congress.gov/bill/117th-congress/house-bill/1319/text>.

19. CORONAVIRUS STATE AND LOCAL FISCAL RECOVERY FUNDS, *supra* note 18 (stating the program aides in responding to workers performing essential work during the COVID-19 public health emergency by providing premium pay; responding to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers; aiding government services to the extent of the reduction in revenue due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year prior to the emergency; and making necessary investments in water, sewer, or broadband infrastructure).

experienced the greatest hardships, leveraging local and national income indicators to maximize intended impact.<sup>20</sup>

However, there are also restrictions and requirements that apply to the use of SLFRF funds. For example, the funds may not be used to offset tax cuts or pay off debt that was incurred prior to the pandemic; for deposit into any pension fund, and, for states and territories only; or to directly or indirectly offset a reduction in net tax revenue resulting from a change in law, regulation, or administrative interpretation.<sup>21</sup> States are also required to use a portion of the funds to assist communities that have been disproportionately impacted by the pandemic; some states have done so by aiding with delinquent mortgage payments to minimize foreclosures, alleviating emergency homeless shelter capacity, and mitigating potential COVID-19 infections.<sup>22</sup> While there is some flexibility in how states can use the funds, Treasury is monitoring and enforcing how states use the SLFRF to ensure they are used in accordance with the guidelines and requirement.<sup>23</sup> However, the Department is not regulating ineligible spending habits by states.

While the SLFRF program does not have a specific focus on housing, it does provide funding to address the negative economic impacts of the pandemic on households, including assistance with rent, utilities, and other essential expenses. Treasury has specifically highlighted that the SLFRF funding can be used to “invest in housing and neighborhoods, including through support for affordable housing initiatives, housing counseling services, and down payment assistance programs.”<sup>24</sup> Also, Congressional and Executive statements made both during and after the enactment detail ARPA’s commitment to homeowner and rental assistance.<sup>25</sup>

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20. TREASURY FACT SHEET: THE ARPA, *supra* note 14.

21. SLFRF RULES, *supra* note 9, at 4339.

22. U.S. DEP’T TREASURY, FACT SHEET: STATE AND LOCAL FISCAL RECOVERY FUNDS HELPING COMMUNITIES RECOVER FROM THE PANDEMIC (2023), <https://home.treasury.gov/news/press-releases/jy1272> (For example, “Snohomish County, WA allocated more than \$9 million for the identification, planning, and purchase of a multi-unit non-congregate shelter building that will include services for individuals experiencing homelessness as well as a flexible space for emergency response.”).

23. CORONAVIRUS STATE AND LOCAL FISCAL RECOVERY FUNDS, *supra* note 18.

24. U.S. DEP’T TREASURY, FACT SHEET: STATE, LOCAL, AND TRIBAL GOVERNMENTS ARE USING FISCAL RECOVERY FUNDS TO KEEP FAMILIES IN THEIR HOMES AND BUILD MORE AFFORDABLE HOUSING (June 22, 2022), <https://home.treasury.gov/system/files/136/SLFRF-Housing-Investments-Factsheet.pdf>.

25. TREASURY FACT SHEET: THE ARPA, *supra* note 14 (“As the economic fallout from the COVID-19 crisis took form, millions of Americans were faced with the pressures of having to decide between making mortgage payments and other essential obligations. This was especially true for the low-income communities and communities of color who bore the brunt of this crisis. Across the country, one in 10 homeowners with a mortgage are behind on payments. The law takes immediate steps to help Americans stay in their homes and keep a roof over their heads.”); *President Biden Announces American Rescue Plan*, THE WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/legislation/2021/01/20/president-biden-announces-american-rescue-plan/> (“The economic fallout of COVID-19 has made it more difficult for working families, especially families of color, to cover their housing expenses. Across the country, 1 in 5 renters and 1 in 10 homeowners with a mortgage are behind on payments.

While some may argue this prioritization depends on what each state considers important to spend on, Congress, the Biden administration, and Treasury provided statements encouraging states to prioritize the expansion of affordable housing.<sup>26</sup> SLFRF was designed to buttress state government coffers, but with general confines that guide states toward spending for this purpose. The funds fill in budgetary gaps left by the economic slow-downs imposed by the pandemic and are intended as a stimulus to help keep government services operating, not to be used solely at the discretion of each state. The funds are intended to address housing costs and homelessness because of the rapidly increased housing demand in a constrained housing supply. As a result of ARPA, states and localities across the country are better prepared to provide relief and assistance to those vulnerable households.

### III. SOME STATES ARE NOT USING THE FEDERAL FISCAL RECOVERY FUNDS TO CONSTRUCTIVELY OFFSET THE HEALTH, ECONOMIC, AND FISCAL IMPACTS OF THE PANDEMIC

Several organizations and national media outlets have reported on which states are and are not using the SLFRF to effectively address the health, economic, and fiscal impacts of the pandemic.<sup>27</sup> The Center on Budget and Policy Priorities (“CBPP”) discusses how the broad flexibility of the SLFRF allows states to use funds in ways not originally intended.<sup>28</sup> For example, a report by the CBPP found that some states are using SLFRFs to rebuild their unemployment insurance trust funds—rather than refilling them gradually in future years through modest employer taxes.<sup>29</sup> Other states are using SLFRF for capital projects not related to the pandemic, like the construction of highways.<sup>30</sup>

Under Treasury’s new 2022 guidance, states can use SLFRF on government services up to their revenue loss amount. These services generally include any service traditionally provided by a government, including road building and

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Congress took an important step in the right direction by securing \$25 billion in rental assistance and extending the federal eviction moratorium until January 31.”)

26. U.S. DEP’T TREASURY, LETTER FROM ADEWALE ADEYEMO, DEPUTY SEC’Y OF THE TREASURY, TO STATE, LOCAL, AND TERRITORIAL LEADERS (May 16, 2022), [https://home.treasury.gov/system/files/136/Deputy\\_Secretary\\_Adeyemo\\_Letter\\_SLFRF\\_Recipients\\_2022\\_5\\_16.pdf](https://home.treasury.gov/system/files/136/Deputy_Secretary_Adeyemo_Letter_SLFRF_Recipients_2022_5_16.pdf).

27. IRIS HINH, CTR. ON BUDGET & POL’Y PRIORITIES, HOW STATES CAN BEST USE FEDERAL FISCAL RECOVERY FUNDS: LESSONS FROM STATE CHOICES SO FAR 2–3 (Jan. 18, 2023), <https://www.cbpp.org/research/state-budget-and-tax/how-states-can-best-use-federal-fiscal-recovery-funds-lessons-from> (showing interactive maps showing what the states are using the funds for, and how much is going to addressing housing needs); THE COUNCIL OF STATE GOVERNMENTS, ARPA UTILIZATION DATA BY STATE, <https://web.csg.org/recovery/state-utilization/> (last visited Nov. 9, 2023); Thomas Franch, *Treasury Will Give States a Lot of Power to Decide How to Spend \$350 Billion in Covid Relief Funds*, CNBC (May 10, 2021), <https://www.cnbc.com/2021/05/10/states-to-decide-how-to-spend-350-billion-in-covid-relief-funds.html>.

28. HINH, *supra* note 27, at 2–3.

29. *Id.*

30. *Id.* at 3.

maintenance and other infrastructure.<sup>31</sup> This “loss revenue” category contains a broader guidance that permits the use of funds that would otherwise be generally prohibited. It is from this portion where states have discovered a loophole to support projects such as prison construction. This section explores one example of this abuse of funds, Alabama’s prison construction, and compares it to more appropriate uses by other states.

*A. Prison Construction Is Explicitly Prohibited By SLFRF, But Alabama Is Doing It Anyway*

According to the Local Government ARPA Investment Tracker,<sup>32</sup> Alabama has devoted nearly one-fifth of its recovery dollars to construct new prisons. Rather than focusing on poverty, education equity, or affordable housing specifically outlined by Treasury as encouraged use of funds, the Alabama Legislature directed \$400 million of its \$2.2 billion in COVID relief to help fund the construction of two new mega-prisons, further embracing a system of mass incarceration that for generations has disproportionately harmed communities of color and people living in poverty.<sup>33</sup>

Alabama’s prison construction plan repackages a previously-failed prison construction proposal that had nothing to do with the COVID-19 pandemic. Governor Ivey announced her proposal to build and lease private prisons in February 2019, more than a year before the first COVID case arrived in Alabama and seemingly in direct response to a series of lawsuits by the U.S. Department of Justice alleging inhumane and overcrowded living conditions for inmates within a number of Alabama state penitentiaries.<sup>34</sup> Alabama’s prison construction was

31. OVERVIEW SLFRF, *supra* note 7.

32. BROOKINGS INST., LOCAL GOVERNMENT ARPA INVESTMENT TRACKER, <https://www.brookings.edu/interactives/arpa-investment-tracker/> (last visited Nov. 14, 2023) (“The Local Government ARPA Investment Tracker is an online resource that compiles information from local governments to offer a detailed picture of how large cities and counties . . . are deploying . . . [ARPA SLFRF] dollars.”); *How States Are Spending American Rescue Plan Funds*, NAT’L ACAD. FOR STATE HEALTH POL’Y (2021), <https://nashp.org/how-states-are-spending-american-rescue-plan-funds/> (detailing interactive maps showing what the states are using the funds for, and how much is going to addressing housing needs).

33. Liz Vinson, *‘For Cruelty’s Sake’: State of Alabama Diverts \$400 Million in Covid Funds to Build Prisons, Leaving Many In Dire Straits*, SPLC (July 1, 2022), <https://www.splcenter.org/news/2022/07/01/alabama-diverts-400-million-covid-funds-to-prisons> (“Alabama is the fifth-poorest state in the country, with nearly 17% of its population living in poverty.”).

34. Brian Lyman & Melissa Brown, *Alabama to Solicit Bids for Three New Prisons, Cost Estimates at \$900 Million*, MONTGOMERY ADVERTISER (Feb. 12, 2019), <https://www.montgomeryadvertiser.com/story/news/2019/02/12/alabama-prison-plan-ivey-solicit-bids-three-new-mens-prison/2842606002/>; Letter from JaTaune Bosby, Executive Director of ACLU of Alabama, to The Honorable Maxine Waters, Chairwoman of the U.S. House of Representatives, Comm. on Fin. Servs., *Re: Alabama’s Planned Use of \$400 Million in COVID Relief Funds on Building Prisons* (Dec. 17, 2021), [https://www.aclualabama.org/sites/default/files/field\\_documents/aclu\\_of\\_alabama\\_letter\\_to\\_financial\\_services\\_committee\\_12\\_17\\_21.pdf](https://www.aclualabama.org/sites/default/files/field_documents/aclu_of_alabama_letter_to_financial_services_committee_12_17_21.pdf) (“Governor Ivey . . . announced a plan to build and lease private prisons in February 2019, more than a year before the first COVID case arrived in Alabama.[ ] When that same prison construction plan was finally defeated by grassroots activists and impact investors in May 2021,[ ] Governor Ivey immediately pivoted to this prison construction plan and called a special legislative session to advance it the next month. The plan that passed through the legislature even included carve-out exemptions from Alabama’s competitive bid laws so that the



conceived in a pre-COVID environment and was pushed through only after the state requested clarification about the legality of using SLFRF to partially fund it. The Treasury Department has clarified both in its response to Alabama and its subsequent Final Rule issuance that prison construction is not an eligible SLFRF expenditure. Further, building more prisons violates the guiding purpose of ARPA: to foster a strong and equitable recovery<sup>35</sup> that will uplift the communities most impacted by the pandemic—namely, low-income communities and communities of color.

### 1. Treasury’s Response to Alabama’s Letter Deemed Prison Construction Ineligible Under ARPA

On May 17, 2021, Treasury released its Interim Final Rule laying out guidelines and restrictions for how SLFRFs can be used.<sup>36</sup> On July 15, 2021, the Alabama Department of Corrections (“ADOC”) submitted a letter to Treasury requesting clarification on whether ARPA dollars could be used to fund prison infrastructure projects.<sup>37</sup> In the letter, Alabama recognized the Interim Rule does not consider building of correctional systems to be an eligible use of funds. ADOC requested the use of the funds to build a prison by arguing the incarcerated population—comprised largely of those who would already be included as part of a disproportionately-impacted group—were further disadvantaged by the nature of their congregational living situation during the pandemic. Alabama argued “additional recreational or exercise space could also be enhanced to encourage both physical health as well as encourage outside recreation, thereby reducing risk of infection,” and that this new “infrastructure [would] increase the number of celled beds [to] allow for better social distancing and [] provide a less dense ‘household’; thereby lessening the risk of infection.”<sup>38</sup> In October 2021, the Alabama Legislature passed a \$1.3 billion prison construction plan and a separate bill to steer \$400 million of the state’s \$2.1 billion from the rescue funds to pay for it.<sup>39</sup>

After receiving public comment, Treasury promulgated a Final Rule governing the use of ARPA funds in January 2022,<sup>40</sup> which took effect on April 1, 2022. The COVID SLFRF: Overview of the Final Rule stated, among other things, that “Construction of new correctional facilities as a response to an increase in rate of

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contractors for the prior version of the prison construction plan would still get to build the prisons as had been planned before the deal collapsed . . .”).

35. CORONAVIRUS STATE AND LOCAL FISCAL RECOVERY FUNDS, *supra* note 18.

36. U.S. DEP’T TREASURY, Coronavirus State and Local Fiscal Recovery Funds, 31 CFR § 35.10 (May 17, 2021) [hereinafter Interim Final Rule], <https://www.govinfo.gov/content/pkg/FR-2021-05-17/pdf/2021-10283.pdf>.

37. *Comment from Alabama Department of Corrections*, REGULATIONS.GOV (July 15, 2021), <https://www.regulations.gov/comment/TREAS-DO-2021-0008-0596>.

38. *Id.* at 5.

39. Brian Lyman & Marty Roney, *Gov. Kay Ivey Signs \$1.3 Billion Prison Construction Bill*, MONTGOMERY ADVERTISER (Oct. 1, 2021), <https://www.montgomeryadvertiser.com/story/news/2021/10/01/alabama-senate-approves-1-3-billion-prison-construction-bill/5934851001/>.

40. SLFRF RULES, *supra* note 9, at 4448.

crime” are ineligible uses of funds and “construction of new congregate facilities to decrease spread of COVID-19 in the facility” are “ineligible” as capital projects.<sup>41</sup> The rule went on to state that new facilities would be a disproportionate response to prevent the spread of COVID-19 infection, which could be better addressed with “personal protective equipment, ventilation improvements, utilizing excess capacity in other facilities or wings or temporary facility capacity expansions.”<sup>42</sup>

However, the consequences of inappropriate spending remain unclear. Along with the Final Rule, Treasury issued a statement regarding compliance with SLFRF’s Interim Final Rule, stating that it “will not take action to enforce provisions contained in the final rule” on states who already started spending the funds based on the Department’s interim provisions issued in 2021.<sup>43</sup> Alabama enacted its plan via legislation signed in October 2021 and began design and preliminary construction on at least one prison site in January 2022<sup>44</sup>—the same month that Treasury issued the final rule. Because of this timing, Treasury does not appear poised to intervene. Instead, Treasury signaled to states to not use the funds inappropriately but stated it would not impose consequences. This is a problem. The purpose of the SLFRF has always been to provide resources to state and local governments to assist with recovery efforts stemming from the COVID-19 pandemic. Alabama’s prison plan predated the pandemic: it was first proposed in early 2019, following DOJ investigations into the poor living conditions in Alabama’s existing prisons.<sup>45</sup> Therefore, Alabama appropriating \$400 million from the SLFRF to construct new prisons was improper even before Treasury issued the final rule.

## 2. Alabama’s Reasoning for New Prisons is Pretextual as the State Failed to Address Safety Risks in Prisons for Years

ADOC, like many other prison systems in the U.S.,<sup>46</sup> suffers from severe overcrowding and understaffing, leading to a culture of violence that prison staff often ignore or even encourage.<sup>47</sup> Despite multiple DOJ investigations and

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41. OVERVIEW SLFRF, *supra* note 7, at 31 (stating prison construction is generally not a permitted use of funds, although no Treasury guidance points to ways the funds could be used eligibly for prison construction).

42. SLFRF RULES, *supra* note 9, at 4391.

43. TREASURY FINAL RULE, *supra* note 10, at 1.

44. John Glenn, *Work on New Prison in Elmore County Appears Idle in Recent Weeks*, ALA. POL. REP. (Jan. 27, 2023), <https://www.alreporter.com/2023/01/27/work-on-new-prison-in-elmore-county-appears-idle-in-recent-weeks-draft/>.

45. U.S. DEP’T JUSTICE, C.R. DIV., INVESTIGATION OF ALABAMA’S STATE PRISONS FOR MEN (Apr. 2, 2019) [hereinafter DOJ INVESTIGATION], <https://www.justice.gov/crt/case-document/file/1149971/download>.

46. Emily Widra, *Since You Asked: Just How Overcrowded Were Prisons Before The Pandemic, and at This Time of Social Distancing, How Overcrowded Are They Now?*, PRISON POL’Y INITIATIVE (Dec. 21, 2020), <https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/>.

47. *What You Need to Know About the Alabama Prison Crisis*, EQUAL JUST. INITIATIVE (Mar. 11, 2019), <https://eji.org/news/what-you-need-know-about-alabama-prison-crisis/>.

recommendations to improve disciplinary processes and transfer prisoners to non-ADOC facilities,<sup>48</sup> ADOC failed to implement significant changes. In the DOJ's investigation reports leading up to its lawsuit against the state of Alabama,<sup>49</sup> it made explicit that "new facilities alone will not resolve the contributing factors to the overall unconstitutional condition of ADOC prisons," citing corruption and a litany of other issues before providing a list of recommendations.<sup>50</sup> State officials have so far refused those recommendations and have pursued prison construction with single-minded focus despite the DOJ's warning, declining to pass even modest criminal justice reforms that were under consideration.<sup>51</sup> Arguably, Alabama does not see an urgency in fixing their criminal justice system. As the DOJ notes in their letter to ADOC:

While new facilities might cure some of these physical plant issues, it is important to note that new facilities alone will not resolve the contributing factors to the overall unconstitutional condition of ADOC prisons, such as understaffing, culture, management deficiencies, corruption, policies, training, non-existent investigations, violence, illicit drugs, and sexual abuse. And new facilities would quickly fall into a state of disrepair if prisoners are unsupervised and largely left to their own devices, as is currently the case.<sup>52</sup>

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48. DOJ INVESTIGATION, *supra* note 45.

49. Press Release, U.S. Dep't Justice, Justice Department Files Lawsuit Against the State of Alabama for Unconstitutional Conditions in State's Prisons for Men (Dec. 9, 2020) [hereinafter Justice Department Files Lawsuit], <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-state-alabama-unconstitutional-conditions-states>.

50. DOJ INVESTIGATION, *supra* note 45; Justice Department Files Lawsuit, *supra* note 49.

51. Brian Lyman, *As Special Session Opens, Alabama Legislative Leaders Think They Can Pass Prison Package*, MONTGOMERY ADVERTISER (Sept. 27, 2021), <https://www.montgomeryadvertiser.com/story/news/2021/09/27/alabama-legislative-leaders-think-they-can-pass-prison-package/5881700001/>.

52. Letter from U.S. Dep't Justice C. R. Div. to Kay Ivey, Governor of Ala., at 47 (Apr. 2, 2019), <https://www.justice.gov/opa/press-release/file/1150276/download>; Mike Cason, *St. Clair Prison Named As 5th Facility to Close as Part of Alabama Overhaul*, AL.COM (Sept. 28, 2021), <https://www.al.com/news/2021/09/st-clair-prison-named-as-5th-facility-to-close-as-part-of-alabama-overhaul.html>; Alabamians Who Care, *Testimony of ADOC Commissioner Jeff Dunn to the Alabama Senate Budget Committee*, YOUTUBE (July 9, 2020), [https://www.youtube.com/watch?v=pr89diJnZes&ab\\_channel=AlabamiansWhoCare](https://www.youtube.com/watch?v=pr89diJnZes&ab_channel=AlabamiansWhoCare); Kim Chandler, *Judge: Prison Staffing Levels Will Be Issue On DOJ Lawsuit*, AP NEWS (Oct. 11, 2021), <https://apnews.com/article/business-us-department-of-justice-alabama-prisons-lawsuits-59f0b1c00b0ac09ef364067c3d0a6cfc>; Ralph Chapoco, *Alabama Department of Corrections Continues to Struggle to Recruit Staff*, ALA. REFLECTOR (Feb. 7, 2023), <https://alabamareflector.com/2023/02/07/alabama-department-of-corrections-continues-to-struggle-to-recruit-staff/>; Kim Chandler, *Alabama Trying to Use COVID Relief Funds for New Prisons*, AP NEWS (Sept. 27, 2021) [hereinafter *Alabama Trying to Use COVID Funds for New Prisons*], <https://apnews.com/article/coronavirus-pandemic-business-prisons-montgomery-kay-ivey-8a7d30c43f4e61987051368a9604fda9>.

### 3. New Lawsuits Sue Treasury to Divert Funds to Eligible Uses

Two new lawsuits filed in July 2022 against the Treasury Department, both from incarcerated people in Alabama, are trying to force Treasury's hand.<sup>53</sup> In one lawsuit, over 60 inmates allege Treasury is violating ARPA by not enforcing its own guidelines on proper use of funds. As the lawsuits highlight, "Treasury inexplicably seemed to ignore its own rules for states that had already moved forward on projects that did not meet federal guidelines."<sup>54</sup> Alabama submitted a letter to Treasury requesting clarification about whether prison construction was an eligible use of ARPA funding.<sup>55</sup> However, rather than waiting for a response, Alabama hastily advanced its pre-COVID prison construction plan in order to side-step Treasury's impending Final Rule.<sup>56</sup> The quick distribution of funds before the Rule's issue was designed to allow governments to rapidly respond to COVID-related problems. Alabama's allocation of the SLFRF is not related to this goal and should not have been allocated before the Final Rule's publishing. In other words, the SLFRF was designed to support COVID recovery efforts and not prison construction.

### 4. New Prisons Will Increase Amount Incarcerated, Leading to Further Housing Insecurities

ADOC plans to close four older, overcrowded correctional facilities and shift the inmates and staff to the two new mega prisons.<sup>57</sup> After this shift, "Alabama will wind up with *more* prison space overall."<sup>58</sup> The four prisons that will be closed were designed to hold approximately 2,500 inmates total,<sup>59</sup> and the two new prisons will be designed to hold around 4,000 inmates each.<sup>60</sup> Therefore, the

53. John Glenn, *Lawsuits Filed Against Treasury Department Over Alabama Prison Construction Plan*, ALA. POL. REP. (July 12, 2022), <https://www.alreporter.com/2022/07/12/lawsuits-filed-against-treasury-department-over-alabama-prison-construction-plan/>.

54. Complaint at 41, Kincaid et al. vs. United States Dep't of the Treasury, No. 2:22-cv-00409-RAH-JTA (M.D. Ala. filed July 13, 2022); Jordan Uhl, *Alabama Wants to Use \$400 Million in COVID Funds to Build New Prisons*, SUBSTACK (July 17, 2022), <https://neverleave.substack.com/p/alabama-wants-to-use-400-million>.

55. Kincaid, *supra* note 54, at 41–42.

56. *Id.* at 42; Uhl, *supra* note 54; Rebekah Riess & Devon M. Sayers, *Alabama GOP Governor Signs Bills to Use Covid-19 Relief Funds To Build Prisons Into Law*, CNN (Oct. 1, 2021), <https://www.cnn.com/2021/10/01/politics/alabama-covid-relief-prison-bills-signed-governor-kay-ivey/index.html>.

57. Ivana Hryniw & Ramsey Archibald, *Alabama's Billion-Dollar Prison Plan Does Not End the Overcrowding*, AL.COM (Apr. 7, 2023), <https://www.al.com/news/2023/04/alabamas-billion-dollar-prison-plan-does-not-end-the-overcrowding.html>.

58. *Id.*

59. *Id.*

60. *Id.*; see also JOHN HAMM, ALABAMA DEPARTMENT OF CORRECTIONS MONTHLY STATISTICS REPORT FOR FEBRUARY 2023 (Feb. 2023) [hereinafter COMM'R HAMM REPORT], <https://doc.alabama.gov/docs/MonthlyRpts/February%202023.pdf>; Hryniw & Archibald, *supra* note 57; Anya Slepian, *Alabama's Solution to Its Prison Problem Is More Prisons*, DAILY YONDER (May 19, 2021), <https://dailyyonder.com/alabamas-solution-to-its-prison-problem-is-more-prisons/2021/05/19/>.

prison plan will result in an increase of approximately 5,500 inmate capacity for Alabama.<sup>61</sup> With the increase in capacity, Alabama may create more space to incarcerate more of its citizens, adding to a prison population that is predominantly Black and Hispanic.<sup>62</sup>

Research suggests that incarceration increases an individual's risk of homelessness and can create a pervasive cycle.<sup>63</sup> "With few financial resources, poor job training, housing restrictions for convicted felons, and the stigma associated with incarceration, many individuals rapidly become homeless following their release."<sup>64</sup>

Studies have also shown that, when children have parents serving time in local jails or involved in community corrections through probation or parole, their risk of homelessness increases.<sup>65</sup> Research shows that when parents are incarcerated, they may leave behind families who relied on their income prior to their arrest.<sup>66</sup> For example, the Bureau of Justice Statistics reported that 54% of incarcerated fathers in state prison provided primary financial support of their minor children prior to their incarceration.<sup>67</sup> High rates of incarceration among parents with low incomes can worsen economic instability and risk subsequent homelessness.<sup>68</sup>

### *B. Alabama's Need for Affordable Housing Cannot Be Ignored*

Alabama is facing an affordable housing crisis.<sup>69</sup> According to the National Low Income Housing Coalition (NLIHC), "Alabama lacks over 90,000 affordable and available housing units for low-wage-earning families."<sup>70</sup> The NLIHC reported a statewide "shortage of rental homes affordable and available to extremely low-income households, whose incomes are at or below the poverty

61. Hrynkiw & Archibald, *supra* note 57.

62. COMM'R HAMM REPORT, *supra* note 60, at 11 (stating Alabama monthly report as of February 2023 indicates that 53.6% of all prisoners are non-white, 52.6% are Black).

63. Erin Casey et al., *Parental Incarceration as a Risk Factor for Children in Homeless Families*, FAM. REL. (Oct. 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4606874/>; Margot B. Kushel et al., *Revolving Doors: Imprisonment Among the Homeless and Marginally Housed Population*, AM. J. PUB. HEALTH (2005); see also Joan Petersilia, *Prisoner Reentry: Public Safety and Reintegration Challenges*, PRISON J. (2001), <https://journals.sagepub.com/doi/abs/10.1177/0032885501081003004>.

64. Casey et al., *supra* note 63.

65. Kathi J. Kemper & Frederick P. Rivara, *Parents in Jail*, PEDIATRICS (Aug. 1, 1993), [https://www.academia.edu/48387014/Parents\\_in\\_jail](https://www.academia.edu/48387014/Parents_in_jail); Bruce Wester & Christopher Wildeman, *The Black Family and Mass Incarceration*, ANNALS AM. ACAD. POL. & SOC. SCI. 365 (Jan. 2009).

66. Casey et al., *supra* note 63.

67. LAUREN GLAZE & LAURA MARUSCHAK, U.S. DEP'T JUSTICE: BUREAU JUST. STATS., PARENTS IN PRISON AND THEIR MINOR CHILDREN 5 (2010), <https://bjs.ojp.gov/content/pub/pdf/pptmc.pdf>.

68. Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. OF SOCIO. 88, 121 (2012).

69. Vinson, *supra* note 33.

70. *About the Low Income Housing Coalition of Alabama*, LIHCA, <https://lihca.org/about> (last visited Nov. 9, 2023).

guideline, or 30% of their area median income.”<sup>71</sup> Local Alabama organizations have urged Governor Ivey to reappropriate the funds being used for prison construction, outlining better ways to use these funds that address local concerns, including addressing affordable housing and infrastructure concerns.<sup>72</sup>

### 1. SLFRFs Should Be Used to Fund Housing and Infrastructure Needs of the State

Many groups, including the ACLU of Alabama, penned letters to the Governor requesting that the flexible SLFRF be applied to a broad variety of housing activities, such as Section 8 housing and other housing insecurities within the state.<sup>73</sup> Alabama can use ARPA and SLFRFs to provide grants, loans, and other financial assistance to developers who are building affordable housing units in the state, helping to reduce the cost of construction and making it easier for developers to build more units; “stabilize families and communities and reduce homelessness by seeding the Affordable Housing Trust Fund with \$25 million and providing grants for eligible new construction, renovation, and maintenance”;<sup>74</sup> improve infrastructure such as roads, water, and sewer systems that are necessary for affordable housing developments; and/or acquire land, so the state can ensure that affordable housing is developed in the appropriate locations and can also help reduce the cost of construction.<sup>75</sup> There are many, desperately needed uses for ARPA funds that will go unfunded if the State of Alabama is permitted to spend 20% of its funds on building prisons. Providing these funds would reduce Alabama’s shortage of more than 76,000 affordable homes for people with low incomes (just short of the roughly 90,000 required).<sup>76</sup> The Alabama Housing Finance Authority (“AHFA”) even created a plan outlining their proposed implementation of ARPA funds, including funding for tenant-based rental assistance, supportive housing, and affordable housing development.<sup>77</sup>

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71. *Housing Needs by State: Alabama*, NLIHC, <https://nlihc.org/housing-needs-by-state/alabama> (last visited Nov. 9, 2023).

72. Press Release, Final Rules Issued on COVID Funds Prove Alabama’s Plan to Build Prisons is Inappropriate, ACLU (Jan. 6, 2022) [hereinafter ACLU Press Release], <https://www.aclualabama.org/en/press-releases/final-rules-issued-covid-funds-prove-alabamas-plan-build-prisons-inappropriate>.

73. *Alabama Shouldn’t Make Housing Insecurity a Crime: Vote ‘No’ on HB 24*, ALA. ARISE (May 1, 2023), <https://www.alarise.org/resources/alabama-shouldnt-make-housing-insecurity-a-crime-vote-no-on-hb-24-and-sb-170/>.

74. *To Strengthen the Common Good: Six Principles for Allocating Alabama’s ARPA Funding*, ALA. ARISE (July 7, 2021), <https://www.alarise.org/resources/to-strengthen-the-common-good-six-principles-for-allocating-alabamas-arpa-funding/>.

75. CORONAVIRUS STATE AND LOCAL FISCAL RECOVERY FUNDS, *supra* note 18; OVERVIEW SLFRF, *supra* note 7.

76. *ARPA 101: How the American Rescue Plan Act Can Build a More Equitable Alabama*, ALA. ARISE (June 28, 2022), <https://www.alarise.org/blog-posts/arpa-101-how-the-american-rescue-plan-act-can-build-a-more-equitable-alabama/>; *Housing Needs by State: supra* note 71.

77. ALA. HOUS. FIN. AUTH., A SUBSTANTIAL AMENDMENT TO ALABAMA HOUSING FINANCE AUTHORITY’S 2021 HOME ACTION PLAN: HOME-ARP ALLOCATION PLAN 1 (2021), [https://www.ahfa.com/Content/Uploads/ahfa.com/files/MF%20Allocation/2023%20docs/HOME-ARP%20Plan\\_Addendum%20to%202021%20HOME%20Action%20Plan\\_Revised%202-22-2023.pdf](https://www.ahfa.com/Content/Uploads/ahfa.com/files/MF%20Allocation/2023%20docs/HOME-ARP%20Plan_Addendum%20to%202021%20HOME%20Action%20Plan_Revised%202-22-2023.pdf) (“AHFA contacted representative

*C. Other States Used the Funds as Intended—to Improve Housing and Health Issues Left by the Pandemic*

Following ARPA’s enactment, the National Council of State Housing Agencies (“NCSHA”) conducted a survey of Housing Finance Agencies (HFAs) on “how states expect[ed] to use recovery funds for affordable housing, total dollars committed to affordable housing, the HFA’s role in administration, proposed affordable housing activities, and anticipated leveraging resources.”<sup>78</sup> As of December 2022, nearly 31 states had individually dedicated anywhere between \$13.9 million to \$4.75 billion of their fiscal recovery dollars to affordable housing activities.<sup>79</sup> Of these spending programs, the most frequently mentioned use was as a capital resource to help finance Housing Credit properties<sup>80</sup> (54%), followed by a capital resource to finance other affordable rental housing construction or preservation (41%), permanent supportive housing (33%), a capital resource to build for-sale housing (30%), and workforce housing development (28%).<sup>81</sup>

As an example of the intended use of the SLFRF program, California spent in 2021 over \$5 billion to support housing and homelessness initiatives, including rental assistance programs and efforts to create more affordable housing options, as well as billions on infrastructure projects that support economic recovery, reduce greenhouse gas emissions, and expand broadband access.<sup>82</sup> Overall, California has taken a comprehensive approach to the use of ARPA funds, with a focus on addressing both the immediate and long-term impacts of the COVID-19 pandemic (which was the intended focus of ARPA funds).

ARPA’s two-year anniversary provides an opportune moment to examine how local governments (i.e., cities, consolidated city-counties, and counties) have utilized their \$130 billion share of SLFRF dollars, and to what extent the

stakeholders from 19 different organizations in Alabama from the following types of organizations/entities: Continuum of Care . . . homeless and domestic violence service providers, veterans’ groups, public housing agencies . . . and public private organizations that address fair housing, civil rights, and the needs of persons with disabilities.”)

78. *States Are Using Fiscal Recovery Funds for Affordable Housing*, NCSHA, <https://www.ncsha.org/advocacy-issues/coronavirus-state-and-local-fiscal-recovery-funds/> (last visited Nov. 9, 2023).

79. *Id.*

80. *Housing Credit*, NCSHA, <https://www.ncsha.org/advocacy-issues/housing-credit/> (last visited Nov. 9, 2023) (“The Housing Credit offers a dollar-for-dollar reduction in a taxpayer’s income tax liability in return for making a long-term investment in affordable rental housing. State agencies award Housing Credits to developers, who then sell the Credits to private investors in exchange for funding for the construction and rehabilitation of affordable housing.”).

81. *States Are Using Fiscal Recovery Funds for Affordable Housing*, *supra* note 78.

82. *Id.*; *How States Are Spending American Rescue Plan Funds*, NASHP (Oct. 8, 2021), <https://nashp.org/how-states-are-spending-american-rescue-plan-funds/>; ARPA UTILIZATION DATA BY STATE, *supra* note 27 (“CSG analysts have worked with the National Association of State Budget Officers to collect information through December 2021. This page only includes state allocations of funds from the Coronavirus State and Local Fiscal Recovery Fund.”); HIGHLIGHTS OF GOVERNOR’S PROPOSED 2021–22 MAY REVISION, CAL. STATE ASSEMBLY (May 14, 2021), <https://abgt.assembly.ca.gov/sites/abgt.assembly.ca.gov/files/Highlights%20of%20Governors%202021-22%20Budget.pdf>.

legislation has enabled the kinds of large-scale investments that can realistically alter the economic trajectory of cities and counties.

*D. Massachusetts Creates Long-Term Mixed-Income Rental and Homeownership Units*

In August of 2022, MassHousing provided \$10.4 million in financing to transform a former light industrial site into 62 new mixed-income rental and homeownership units. The developers will create six new homeownership units, which will house affordable to moderate-income first-time homebuyers under MassHousing's Commonwealth Builder Program.<sup>83</sup> In 2022, the Massachusetts Secretary of Housing and Economic Development stated COVID-19 highlighted the importance of having a quality, affordable home, and the new rental and six homeownership units will add housing stability and economic opportunity to that neighborhood for many years to come.<sup>84</sup> Although these projects seem small in comparison to the need, they provide an example of both short- and long-term solutions to affordable housing concerns.

*E. Spending SLFRF on Correctional Facilities Will Not Save State Funding as Much as Solving Chronic Homelessness*

On the cost side, building affordable housing can be expensive, and the costs may vary depending on the location, size, design, and quality of the housing. However, not building affordable housing may have its own costs, such as increased homelessness, housing insecurity, and displacement, which can lead to negative social and economic impacts, like decreased health and well-being, increased crime, and reduced economic productivity.<sup>85</sup> In addition, not building affordable housing may result in a lack of workforce housing, which can make it more difficult for employers to attract and retain workers.<sup>86</sup> If money were

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83. *MassHousing Closes on \$10.4 Million in Financing to Create New Affordable and Workforce Housing at 25 Sixth Street in Chelsea*, MASSHOUSING (Aug. 25, 2022), [https://www.masshousing.com/en/press/2022-08-25\\_25-sixth-street](https://www.masshousing.com/en/press/2022-08-25_25-sixth-street); *Massachusetts Development to Bring a Mix of Housing Opportunities*, AFFORDABLE HOUS. FIN. (Aug. 31, 2022), [https://www.housingfinance.com/developments/massachusetts-development-to-bring-a-mix-of-housing-opportunities\\_o](https://www.housingfinance.com/developments/massachusetts-development-to-bring-a-mix-of-housing-opportunities_o) ("The Legislature committed \$115 million in federal funds from ARPA to scale up the Commonwealth Builder program, and 25 Sixth Street is the first homeownership project in Massachusetts to utilize ARPA funding . . ."); Press Release, Charlie Baker, Governor of Mass. & Karyn Polito, Lieutenant Governor of Mass., Governor Baker Signs \$4 Billion Federal COVID-19 Relief Funding Spending Bill 2 (Dec. 13, 2021), <https://archives.lib.state.ma.us/bitstream/handle/2452/851561/ocn795183245-2021-12-13.pdf>.

84. *Massachusetts Development to Bring a Mix of Housing Opportunities*, *supra* note 83.

85. David A. Sleet & Louis Hugo Francescutti, *Homelessness and Public Health: A Focus on Strategies and Solutions*, 18 INT'L J. ENV'T RSCH. & PUB. HEALTH 11660 (2021) (discussing decreased health quality for homeless individuals); *New Research on Homelessness Reveals Long-term Economic Hardship, Relatively Little Interstate Mobility*, NLIHC (June 14, 2021), <https://nlihc.org/resource/new-research-homelessness-reveals-long-term-economic-hardship-relatively-little-interstate> (discussing reduced economic opportunity for homeless individuals).

86. See Aaron Shroyer & Veronica Gaitán, *Four Reasons Why Employers Should Care about Housing*, URB. INST. (Sept. 11, 2019), <https://housingmatters.urban.org/articles/four-reasons-why-employers-should-care-about-housing>.



diverted from prison construction to state programs providing a path out of a cycle of poverty, formerly-incarcerated individuals would be less of a tax burden to the state while creating wealth for themselves and their family.<sup>87</sup>

Apart from the obvious impacts of the housing shortage, the insufficiency of affordable and adequate housing can have additional consequences that may not be immediately apparent. These effects include decreased health standards, reduced educational attainment, heightened involvement with the criminal justice system leading to imprisonment, and lower rates of productivity.<sup>88</sup> The deficiency of affordable housing incurs a cost on society, and the expenditure related to addressing these effects through Medicaid and Medicare, the courts, law enforcement, correctional officers, and correctional facilities, in conjunction with the missed educational prospects and productivity, “are borne by society as a whole.”<sup>89</sup>

According to the National Alliance to End Homelessness, a person experiencing chronic homelessness costs the taxpayer an average \$35,578 per year (based on chronic homelessness and permanent supportive housing from 2007–2014).<sup>90</sup> When the person is placed in supportive housing, costs are reduced by 49.5% on average. Supportive housing costs on average \$12,800 annually, making the net savings roughly \$4,800 per year.<sup>91</sup> In another study of 4,679 people experiencing mental illness and homelessness in New York City, the average annual cost of service use was approximately \$40,500 per person.<sup>92</sup> Another study prepared for the California Endowment and the California HealthCare Foundation found that providing a home to people experiencing homelessness who are frequent users of public services reduced their number of emergency department visits by close to 61% after two years of housing.<sup>93</sup> Healthcare costs were reduced by 59% and hospitalizations decreased by 77%.<sup>94</sup> Every homeless person on the street costs the state more in medical and temporary housing than building permanent, affordable housing or rental vouchers.<sup>95</sup>

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87. THE COUNCIL OF ECON. ADVISERS, RETURNS ON INVESTMENTS IN RECIDIVISM-REDUCING PROGRAMS 3–4 (May 2018) [hereinafter RETURNS ON INVESTMENTS], <https://trumpwhitehouse.archives.gov/wp-content/uploads/2018/05/Returns-on-Investments-in-Recidivism-Reducing-Programs.pdf>.

88. *Id.*

89. Michael R. Diamond, *The Costs and Benefits of Affordable Housing: A Partial Solution to the Conflict of Competing Goods*, 27 GEO. J. ON POVERTY L. & POL’Y 231, 236–39 (2020).

90. *Ending Chronic Homelessness Saves Taxpayers Money*, NAT. ALL. TO END HOMELESSNESS (Feb. 17, 2017), <https://endhomelessness.org/resource/ending-chronic-homelessness-saves-taxpayers-money-2>.

91. *Id.*

92. Dennis P. Culhane et al., *The Impact of Supportive Housing for Homeless People with Severe Mental Illness on the Utilization of the Public Health, Corrections, and Emergency Shelter Systems: The New York-New York Initiative*, 13 HOUS. POL’Y DEBATE 1, 4 (2002).

93. KAREN W. LINKINS ET AL., THE LEWIN GROUP, FREQUENT USERS OF HEALTH SERVICES INITIATIVE: FINAL EVALUATION REPORT 47 (Aug. 2008), <https://www.chcf.org/wp-content/uploads/2017/12/PDF-FUHSIEvaluationReport.pdf>.

94. *Id.* at 47–49.

95. Diamond, *supra* note 89, at 247–49.

However, the precise amount depends on the individual. In a case made famous by an article by Malcolm Gladwell, “Million Dollar Murray,” one man experiencing homelessness and alcohol use disorder in Reno, Nevada, racked up an approximate one million dollars in service use costs over his 10 years of homelessness (\$100,000 per year).<sup>96</sup> The U.S. Department of Housing and Urban Development (“HUD”) recently released its 2022 Annual Homeless Assessment Report to Congress.<sup>97</sup> The report found 582,462 people were experiencing homelessness on a single night in January 2022.<sup>98</sup> COVID-19 and its economic impacts could have led to significant increases in homelessness.<sup>99</sup> This equates to a potential cost of billions of dollars through the use of hospitals, social services, and jails.

SLFRF’s loose language was designed by Congress to assist states with various needs, including employment-related concerns.<sup>100</sup> Although it is up to each state to determine its own needs, Congress limited the use of SLFRF to support those impacted by the pandemic, including by addressing housing instability. Congress referenced housing instability in the text of the legislation itself,<sup>101</sup> and the Speaker of the House highlighted housing insecurity in press statements supporting the enacted legislation.<sup>102</sup>

Alabama could have argued that the construction of large infrastructure projects would significantly increase employment and, therefore, income to meet pandemic-related economic hardships. However, this argument is not unique to prisons and can apply to affordable housing design and construction as well. Large-scale infrastructure projects that include the design and construction of affordable housing units can result in a boon to employment, often using the same contractors and workers. This could be the political whims of elected officials trumping the needs of Alabama residents and the intentions of Congress who appropriated funds to help those suffering from rising housing costs due to the pandemic. The economic needs of Alabama’s poorest residents (such as the need

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96. Malcolm Gladwell, *Million-Dollar Murray*, *NEW YORKER* (Feb. 13, 2006), <https://www.newyorker.com/magazine/2006/02/13/million-dollar-murray>.

97. TANYA DE SOUSA ET AL., U.S. DEP’T HOUS. & URB. DEV., *THE 2022 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS: PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS (2022)*, <https://www.huduser.gov/portal/datasets/ahar/2022-ahar-part-1-pit-estimates-of-homelessness-in-the-us.html>.

98. *Id.* at 11.

99. Press Release, U.S. Dept. Hous. & Urb. Dev., HUD Releases 2022 Annual Homeless Assessment Report (Dec. 19, 2022), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_22\\_253](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_22_253).

100. *American Rescue Plan Spending: Recommended Guiding Principles*, GOV’T FIN. OFFICERS ASSOC., <https://www.foia.org/american-rescue-plan-spending-guiding-principles> (last visited Nov. 9, 2023).

101. CORONAVIRUS STATE AND LOCAL FISCAL RECOVERY FUNDS, *supra* note 18.

102. Press Release, Nancy Pelosi, Speaker of the House of Representatives, Pelosi Statement on One-Year Anniversary of the American Rescue Plan (Mar. 11, 2022), <https://pelosi.house.gov/news/press-releases/pelosi-statement-on-one-year-anniversary-of-the-american-rescue-plan> (“[P]ut[ting] Americans back on the road to financial security, including through direct payments, assistance to help families stay in their homes . . .”).

for adequate affordable housing) may not be addressed through this system of political spending priorities.<sup>103</sup>

### 1. By Supporting Diversion Programs and Reducing Incarceration Rates, Alabama Would Save Money

In October of 2021, the Alabama Legislature approved a bill allocating the State's SLFRF allocation to a variety of services.<sup>104</sup> Contained in the bill was provision earmarking \$400 million of those funds into a series of replacement prisons.<sup>105</sup> During the signing ceremony, Governor Ivey stated that putting \$400 million in SLFRF funds toward a \$1.3 billion prison construction plan would appropriately address the "challenges" the state is experiencing.<sup>106</sup> She also stated it was the "legal and fiscally sound thing for us to do."<sup>107</sup> Several legislators have stated various reasons for supporting the allocation toward construction of new prisons. State Senator Del Marsh stated that the use of COVID funds was appropriate in this situation, as he "would rather use the one-time money on something that solves a problem and is a one-time ask."<sup>108</sup> This is flawed logic. Incarceration will continue to cost the state through the homelessness and other ensuing issues. A variety of affordable housing and shelter construction options can also qualify as one-time costs.

Incarceration creates obstacles to economic security and often funnels individuals into poverty.<sup>109</sup> As the Brennan Center for Justice notes, "reducing those barriers and providing economic opportunities to people already ensnared in the

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103. ARPA UTILIZATION DATA BY STATE, *supra* note 27; see, e.g. Emily Le Coz et al., *Jackson Water Crisis Flows from Century of Poverty, Neglect and Racism*, MISS. TODAY (Nov. 7, 2022), <https://mississippitoday.org/2022/11/07/jackson-water-crisis-poverty-neglect-racism/>; Lauren-Brooke Eisen, *Alabama Using Covid Funds to Build New Prisons*, BRENNAN CTR. FOR JUST. (Oct. 23, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/alabama-using-covid-funds-build-new-prisons>; Alan Berube et al., *How Cities And Counties Are Putting American Rescue Plan Dollars to Work*, BROOKINGS INST. (July 12, 2022), <https://www.brookings.edu/blog/the-avenue/2022/07/12/how-cities-and-counties-are-putting-american-rescue-plan-dollars-to-work/> (stating that beyond government operations, large cities and counties spread their budgeted ARPA and SLFRF dollars evenly across other priorities, including "14% to public health, 12% to infrastructure, 9% to economic and workforce development, [and] 9% to housing . . ." utilizing the flexible ARPA resources to address a range of locally determined needs).

104. Jordan Williams, *Alabama Clears Plan to Use COVID-19 Relief Funds to Build Prisons*, THE HILL (Oct. 2, 2021), <https://thehill.com/homenews/state-watch/575005-alabama-clears-plan-use-covid-19-relief-funds-to-build-prisons/>.

105. *Cost of Building a Super-Size Alabama Prison Rises to More Than \$1 Billion*, AP NEWS, <https://apnews.com/article/alabama-prison-cost-rises-7246b6afc68bd21e4a0c5249adcf7875/> (last updated Sep. 28, 2023).

106. *Alabama Moving Forward with Prison Plan*, ALA. PUB. RADIO (Oct. 8, 2021), <https://www.apr.org/news/2021-10-08/alabama-moving-forward-with-prison-plan>.

107. *Id.*

108. Caroline Beck, *Ivey Signs \$1.3B Prison Construction Plan*, ALA. DAILY NEWS (Oct. 1, 2021), <https://aldailynews.com/alabama-senate-passes-1-3b-prison-construction-plan/>.

109. AMES C. GRAWERT ET AL., BRENNAN CTR. FOR JUST., *POVERTY AND MASS INCARCERATION IN NEW YORK: AN AGENDA FOR CHANGE* 5 (Feb. 23, 2021), <https://www.brennancenter.org/our-work/policy-solutions/poverty-and-mass-incarceration-new-york-agenda-change>.

criminal justice system will help more people achieve financial independence, stability, and, ideally, prosperity.”<sup>110</sup> By reducing Alabama’s prison population, either by diversion or parole programs, the state would assist its residents by providing a path out of poverty, leading previously-incarcerated individuals to become productive members of society.<sup>111</sup> State officials would rather keep individuals incarcerated, at a higher burden to the taxpayer, than release low-risk offenders and create affordable housing for them to access economic security.<sup>112</sup> Contrary to what Alabama’s governor says, this is not rooted in sound fiscal policy.

#### IV. ARPA’S BROAD LANGUAGE ALLOWS FOR SPENDING ON DISCRETIONARY STATE PRIORITIES

The SLFRF’s Eligible Uses of Funds section includes four categories of eligible uses: 1) responding to public health and economic impacts, 2) providing premium pay for essential workers, 3) providing revenue loss compensation, and 4) providing necessary infrastructure investments.<sup>113</sup>

The third category, “providing government services to the extent of revenue loss due to the pandemic,” contains broader guidance that permits the use of funds that would otherwise be generally prohibited.<sup>114</sup> The rule broadly defines government services, including transportation infrastructure projects and other essential services such as cybersecurity, education, and public safety.<sup>115</sup> A state can calculate their tax-base loss resulting from the pandemic and associated lockdowns and apply the lost amount to a “government service.” Alabama, using this formula, calculated \$536 million in lost revenue.<sup>116</sup> Of that, the state applied \$400 million toward partially constructing a new prison.<sup>117</sup> The “lost revenue” rule

110. AMES C. GRAWERT ET AL., BRENNAN CTR. FOR JUST., *POVERTY AND MASS INCARCERATION IN NEW YORK: AN AGENDA FOR CHANGE* 5 (Feb. 23, 2021), <https://www.brennancenter.org/our-work/policy-solutions/poverty-and-mass-incarceration-new-york-agenda-change>.

111. *Id.* (“Conviction and imprisonment present serious obstacles to economic well-being, in some cases even marking the difference between escapable and inescapable poverty. Reducing those barriers and providing economic opportunities to people already ensnared in the criminal justice system will help more people achieve financial independence, stability, and ideally, prosperity.”); RETURNS ON INVESTMENTS, *supra* note 87, at 17–18.

112. *POVERTY AND MASS INCARCERATION IN NEW YORK: AN AGENDA FOR CHANGE*, *supra* note 110, at 10 (stating in New York, “it costs as much as \$19,000 annually for the state to imprison an individual for a year. Parole supervision, by comparison, costs around \$2,000 annually”).

113. SLFRF RULES, *supra* note 9, at 4339.

114. *Id.*

115. *Id.* at 4408 (“[G]enerally speaking, services provided by the recipient governments are ‘government services’ under the interim final rule and final rule, unless Treasury has stated otherwise. Government services include, but are not limited to, maintenance or pay-go funded building of infrastructure, including roads; modernization of cybersecurity, including hardware, software, and protection of critical infrastructure; health services; environmental remediation; school or educational services; and the provision of police, fire, and other public safety services.”).

116. Mike Cason, *Alabam Says Final Federal Rule Allows Use of Rescue Plan Funds for Prisons*, AL.COM (Jan. 7, 2022), <https://www.al.com/news/2022/01/alabama-says-final-federal-rule-allows-use-of-rescue-plan-funds-for-prisons.html>.

117. *Id.*; *Alabama Trying to Use COVID Funds for New Prisons*, *supra* note 52.

allowed for broad spending on numerous projects that Treasury later deemed ineligible.<sup>118</sup> The funds available for prison construction are limited only to those reimbursed from lost revenue.<sup>119</sup> These states cannot apply for additional funds outside of that pot for anything other than COVID-related work. Further, even if Treasury intends to limit the funds provided under this category to projects outside of prison construction, they have indicated they will generally “not take action to enforce” provisions contained in the final rule if a government had begun spending those funds consistent with an earlier, broader rule on how to use them.<sup>120</sup>

In addition to Alabama, at least 17 other states are also attempting to use their ARPA SLFRFs to build new jails and prisons.<sup>121</sup> The ACLU cited subsequent misappropriation of ARPA funds in Alabama, Arizona, Arkansas, Iowa, Indiana, Louisiana, Minnesota, Missouri, and Oklahoma to illegally build, rehabilitate, and expand prisons and jails.<sup>122</sup> Although Treasury can recoup SLFRFs unlawfully spent,<sup>123</sup> the Department has elected not to enforce provisions of the SLFRF that predate its Final Rule.

Alabama’s contention for using the funds to support prison construction stems from the flexibility of the SLFRF. They contend that the pot of money from which they are drawing from “has . . . fewer restrictions”<sup>124</sup> than others within the SLFRF. The state relies on the provision that allows the funds to fill in budgetary gaps from lost tax revenue. This provision was intended to address state and local attempts at addressing issues exacerbated by the pandemic, but not directly covered under the other specified categories; however, Alabama and other states are using these funds to fill in “budgetary gaps” to build or improve correctional facilities. This is an inappropriate use of funds allocated through a COVID-

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118. SLFRF RULES, *supra* note 9, at 4339, 4442–43.

119. *Id.* at 4339.

120. TREASURY FINAL RULE, *supra* note 10, at 2.

121. Morgan Simon, *Jails in Jeopardy Following New Treasury Rule: Federal Covid Relief Must Help People*, FORBES (Jan. 19, 2022), <https://www.forbes.com/sites/morgansimon/2022/01/19/jails-in-jeopardy-following-new-treasury-rule-federal-covid-relief-must-help-people/>.

122. Press Releases, *ACLU Urges U.S. Treasury to Investigate State Use of ARPA Funds to Illegally Build, Expand Prisons and Jails*, ACLU (Jan. 18, 2023), <https://www.aclu.org/letter/american-rescue-plan-act-arpa-covid-19-letter> (noting the example of Penobscot County, Maine: “With only about 150,000 people spread over roughly 3,500 square miles, it is highly rural and suffers many of the problems that often plague rural America—lack of access to healthcare, a severe opioid epidemic, and a lack of affordable housing . . . . In mid-2021, Penobscot received \$29.5 million in ARPA funding, more than Penobscot’s annual budget. Then, in December of 2021, after having failed to secure funding for jail expansion for nearly five years, Penobscot announced that it would use ARPA funds to finance the expansion of the jail by more than 100 beds. This received immediate pushback, with local advocates identifying numerous areas where the money could be better spent, including housing and mental health treatment, and identifying ways in which the population of the jail could be decreased.”).

123. SLFRF RULES, *supra* note 9, at 4340.

124. Kim Chandler, *Alabama Lawmakers Weigh Using Virus Funds to Build Prisons*, AP NEWS (Sept. 26, 2021), <https://apnews.com/article/coronavirus-pandemic-business-health-prisons-alabama-4eb1ebe3327247a923284e0105992bdd>.

recovery package, and future legislation should consider removing the calculation of loss revenue that allows for such a broad reading.<sup>125</sup>

## V. HOW DO WE SOLVE THIS ISSUE?

Treasury must investigate and recoup misused funds, as demonstrated, for example, by Florida's use of ARPA funds for migrant transportation.<sup>126</sup> Additionally, Treasury should enforce rules governing ARPA funding to redirect resources towards community-supportive projects. Future legislation may address ARPA's shortcomings, eliminating sections like the "lost revenue" provision, changing fund allocation formulas, and imposing stricter spending restrictions. HUD can facilitate direct spend-programs managed by regional offices, similar to the U.S. Army Corps of Engineers ("USACE") model, to ensure funds reach affected communities efficiently. Another approach is to allocate funds based on need, similar to Medicaid and Medicare assistance programs, with non-federal cost-sharing to incentivize states to expand affordable housing solutions. To address housing insecurity, the federal government should establish a robust tracking system, akin to the monthly unemployment census, to monitor housing loss at the local level. More federal funding is needed for housing programs such as the Low-Income Housing Tax Credit to meet national affordable housing needs, support economic growth, and enhance resilience.

### *A. Treasury Ought to Recoup Ineligibly Used Funds and Reappropriate Them to Other States*

Using ARPA COVID-19 relief funds to build or expand jails and prisons is prohibited by the Treasury Department. Allowing these plans to continue, in effect, diverts hundreds of millions of dollars away from their intended purpose of rebuilding communities and local economies affected by COVID-19. This improper use of recovery funds delays our nation's recovery. Treasury is empowered to investigate the misuse of ARPA funds.<sup>127</sup> In the event that the Department determines funds have been misused, the Department can recoup SLFRFs unlawfully spent and redistribute them elsewhere in the nation.<sup>128</sup> This process is seldom used but does exist. In October 2022, Treasury's Deputy Inspector General confirmed that his office conducts planned audits of fund recipients to ensure no ineligible spending occurs.<sup>129</sup> In this instance, the investigation was launched into

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125. OVERVIEW SLFRF, *supra* note 7, at 9.

126. Fatima Hussein, *Treasury Probing Florida Gov. DeSantis' Migrant Flights*, AP NEWS (Oct. 12, 2022), <https://apnews.com/article/health-florida-immigration-covid-19-desantis-d7a42ee2c4823d74b2d1139394579f42>.

127. *Office of Investigations*, *supra* note 12.

128. SLFRF RULES, *supra* note 9, at 4453.

129. Letter from Richard Delmar, Deputy Inspector General, U.S. Dep't of the Treasury, to Senators and Representatives (Oct. 7, 2022), [https://www.markey.senate.gov/imo/media/doc/treasury\\_ig\\_response\\_to\\_mass\\_lawmakers\\_october\\_2022.pdf](https://www.markey.senate.gov/imo/media/doc/treasury_ig_response_to_mass_lawmakers_october_2022.pdf).

whether the State of Florida violated the eligible uses of SLFRF when it transported migrants from the southern border to Martha's Vineyard, Massachusetts.<sup>130</sup>

Another option is for Treasury to exercise its ability to enforce the rules governing ARPA funding. The Department should require all state and local governments to redirect funds currently designated for jail and prison construction to the community-supportive resources that are permitted by ARPA and are so badly needed by communities impacted by the pandemic. The federal government (namely, the DOJ) has taken on the tremendous task of parsing through and investigating potential fraudulent misuse of COVID funds perpetrated by individuals nationwide.<sup>131</sup> This type of enforcement should happen in the context of ARPA relief funds issued to state and local governments as well.

If Alabama were forced to return the funds to Treasury, there would be more funds available to reappropriate to other states to be used within the confines of the regulations, which could include solving affordable housing concerns. If Treasury went after these bad actors, this would deter other states (like Arizona, Arkansas, Indiana, Iowa, Louisiana, Maine, Missouri, and Oklahoma) from using these funds to build or expand their correctional facilities. More money would be available for affordable housing solutions. Forcing states to choose between forfeiting the funds or acting in accordance with the statute and regulations—which could be used to create jobs and economic prosperity in these states—is meaningful enforcement.

This reallocation of resources is not without precedent. In 2011, Florida Governor Rick Scott rejected about \$2.4 billion from U.S. Department of Transportation (“DOT”) for a \$2.6 billion high-speed train line from Tampa to Orlando, declaring that the money should go back to taxpayers or be used for deficit reduction.<sup>132</sup> Instead, Florida's allocation was returned to DOT and awarded to other states' projects.<sup>133</sup> About \$214 million of that rejected money went to California as part of a \$928 million DOT grant for the state's high-speed rail project.<sup>134</sup> And it was not the first time California profited from a Republican governor's decision to reject rail funding. “After Wisconsin Gov[ernor] Scott Walker and Ohio Gov[ernor] John Kasich tossed back a combined \$1.2 billion in 2010,

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130. *Id.*

131. David A. Fahrenthold, *Justice Dept. Charges 48 in Brazen Pandemic Aid Fraud in Minnesota*, N.Y. TIMES (Sept. 20, 2022), <https://www.nytimes.com/2022/09/20/us/politics/pandemic-aid-fraud-minnesota.html>; Matthew D. Lee & Marissa Koblit Kingman, *DOJ Announces First Criminal Prosecution for Misuse of COVID-19 Relief Funds Dedicated to Health Care Providers*, FOX ROTHSCHILD LLP (Feb. 26, 2021), <https://www.foxrothschild.com/publications/doj-announces-first-criminal-prosecution-for-misuse-of-covid-19-relief-funds-dedicated-to-health-care-providers>.

132. Burgess Everett, *Rejected Fla. Funds go to California*, POLITICO (Nov. 22, 2011), <https://www.politico.com/story/2011/11/rejected-fla-funds-go-to-california-068973>; Timothy Williams, *Florida's Governor Rejects High-Speed Rail Line, Fearing Cost to Taxpayers*, N.Y. TIMES (Feb. 16, 2011), <https://www.nytimes.com/2011/02/17/us/17rail.html> (quoting Rep. John Mica that the federal government agreed to put up 90% of the rail link's financing and that it “defies logic that [Governor] Scott would cancel the rail line”).

133. Everett, *supra* note 132.

134. *Id.*

more than \$610 million of that money was redirected to California's high-speed rail.<sup>135</sup> If states refuse to use the funds for permitted purposes, Treasury should, similar to DOT, retrieve the funds and re-designate them for an appropriate purpose as defined by statute and Treasury guidelines.

*B. Congress Can Create Limiting Provisions for Future Legislation*

The broad enacting language and limited restrictions outlined on ARPA, and as interpreted by Treasury, have enabled States to fund political priorities over the economic priorities intended by the legislation. The resulting spending by the states reveals a substantial divide between resources available to the residents of some regions over others as a direct result of the political powers over their State.<sup>136</sup> This is clearly contrary to the intent of both Congress and the administration executing ARPA. However, creating limiting provisions for the funds would slow their release, causing a further drag on the economy.<sup>137</sup> SLFRF was designed to rush money into the economy and reduce the downfall from reduced economic output.

Having led the recovery efforts by the federal government in 2009, President Biden was keen to realize the lessons he learned while he was Vice President.<sup>138</sup> President Biden insisted that language in the statute and the Treasury rule limited encumbrances on state and local governments in order to provide more efficient fiscal relief.<sup>139</sup> He concluded that immediate access to fiscal relief would stave off austerity measures similar to that of the 2007–2009 recession.<sup>140</sup> In other words, leadership recognized that that the more limiting language in the American Recovery Act (“ARA”) of 2009 produced a drag on the economy, citing economic research that was later embedded in the Final Rule.<sup>141</sup>

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135. *Id.*

136. Amanda Kass & Phillip Rocco, *Are ARPA Funds for States and Localities Being Spent Successfully?*, U. ILL. CHI. GOV'T FIN. RSCH. CTR. (Dec. 14, 2021), <https://gfric.uic.edu/the-government-finance-research-blog/are-arpa-funds-for-states/> (“In addition to ways in which the program’s design and regulations may shape spending, how the SLFRF plays out is also subject to the decisions by state and local officials and what they see as the pressing needs of their communities and political priorities. There’s also sharp partisan politics surrounding the program with some elected officials questioning the very premise of its necessity. Further, in some instances, elected and appointed officials have chosen to use the aid for purposes that are explicitly prohibited by ARPA. Thirteen Republican Attorneys General, for example, won a lawsuit to strike down a provision that prohibited using the APRA aid to pay for tax cuts.”).

137. Interim Final Rule, *supra* note 36, at 26799.

138. *Remarks by President Biden on the State of the Economy and the Need for the American Rescue Plan*, THE WHITE HOUSE (Feb. 5, 2021) [hereinafter *Remarks by President Biden*], <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/05/remarks-by-president-biden-on-the-state-of-the-economy-and-the-need-for-the-american-rescue-plan/>.

139. *See id.*

140. *Id.*

141. Interim Final Rule, *supra* note 36, at 26816 (“Economic research has demonstrated that state fiscal relief is an efficient and effective way to mitigate declines in jobs and output during an economic downturn.”), citing Gabriel Chodorow-Reich et al., *Does State Fiscal Relief During Recessions Increase Employment? Evidence from the American Recovery and Reinvestment Act*, 4 AM. ECON. J. 118 (2012).



ARPA is currently set to expire in 2024, so changes at this point may be difficult. Coupled with the GOP majority in the U.S. House of Representatives, ARPA is not likely to change before the funds are completely drawn. However, twice in the last 15 years the global economy has faced large economic uncertainty stemming from a global crisis. It is likely that it will happen again.<sup>142</sup> Future legislation can be narrowly drafted to remove some of the issues we saw in ARPA, such as eliminating the large “lost revenue” section of the bill; changing the formula for lost revenue to reduce funds available in this way, making more available for other parts of ARPA; requiring ARPA funds, for example, to be drawn in each state contingent on HUD’s homeless count in each state (i.e., 40% of funds must go toward affordable housing if you have greater than 10,000 homeless people); and lastly, requiring Treasury to enforce new spending restrictions on funds, such as those that were approved under the interim rule. Treasury’s Rule only clarifies what the legislation intended to cover. The prison construction provision was always unlawful under ARPA, and the funds were clearly designed to support COVID-related stresses. Alabama took advantage of a loophole, which can be avoided in the future through stricter recoupment procedures and limited spending formulas.

By including eligibility for uses such as affordable housing development and preservation in ARPA, Congress acknowledged that some emergency response measures must not only meet the needs of the moment but also build the capacity of communities to respond to future emergencies. In the future, Congress should be more explicit about which emergency relief funds are intended to be deployed quickly and which funds should be used to support longer-term projects that build future resiliency. Such a distinction would help agencies design appropriate guidance and avoid funding long-term and ineligible projects, such as building correctional facilities.

### *C. HUD Can Facilitate Direct Spend-Programs That Are Managed by Regional Offices*

The SLFRF is a component of ARPA designed to assist local governments in their response to the COVID-19 pandemic, including plugging budget shortfalls emanating from the consequential economic slow-down. It is designed as a block grant with very few restrictions in order to facilitate quick transfers of federal dollars to assist states and people. The flexibility of the program comes from the experience of many politicians, including President Biden, during the 2009 ARA response to the Great Recession.<sup>143</sup> In 2009, economic recovery was slower than

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142. Press Release, The World Bank, New Fund for Pandemic Prevention, Preparedness and Response Formally Established (Sept. 9, 2022), <https://www.worldbank.org/en/news/press-release/2022/09/09/new-fund-for-pandemic-prevention-preparedness-and-response-formally-established> (quoting WHO Director-General Dr. Tedros Adhanom Ghebreyesus that “the next pandemic is a matter of when, not if”).

143. *Remarks by President Biden*, *supra* note 138.

expected. Economists generally agree that Rescue Act funds were too slow to filter down quickly, delaying the recovery and unnecessarily extending the recession.<sup>144</sup>

However, a more targeted approach can effectively accomplish greater benefits without the lag time. If Treasury does not want to use recoupment procedures against bad actors, then perhaps a fully-federal plan that directly engages the affected communities through regional federal staff and local housing agencies could work. The federal government does not have many of these currently; however, the USACE Civil Works program may provide one such example.

The Civil Works program receives funding through Energy and Water Appropriations, separate from the rest of the Army. Each year, Congress appropriates a specific funding allocation to accomplish various missions previously approved by Congress through the Water Resources Development Act of a certain year.<sup>145</sup> The Civil Works program then spends the funds directly, first by developing a work plan and then through either direct construction or by contracting through a private operator under direct supervision by USACE.<sup>146</sup> The Civil Works program may also outsource development of its work plan in certain “design-build” contracts, however, these also require direct oversight by the USACE.<sup>147</sup> In addition to annual appropriations, the USACE also receives emergency supplemental funding on a sporadic basis.<sup>148</sup>

A similar system could be placed within HUD to facilitate direct spend-programs that are managed by regional offices. This approach preserves the flexibility afforded through block grants while keeping the funds narrowly applied to the housing mission. Projects would require congressional approval before becoming eligible to receive funding. States that demonstrate an interest in working with HUD can even become non-federal sponsors to projects that expand their scope

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144. See, e.g., Nora Fitzpatrick et al., *Fiscal Drag from the State and Local Sector?*, FED. RESRV. BANK OF N.Y.: LIBERTY ST. ECON. BLOG (June 27, 2012), <https://libertystreeteconomics.newyorkfed.org/2012/06/fiscaldrag-from-the-state-and-local-sector.html>; Jiri Jonas, *Great Recession and Fiscal Squeeze at U.S. Subnational Government Level* Working Paper No. 184, International Monetary Fund (2012), <https://www.imf.org/external/pubs/ft/wp/2012/wp12184.pdf>; Interim Final Rule, *supra* note 36, at 26816 (“Treasury believes [the direct spending to state, local and Tribal governments for fiscal relief] will generate substantial additional economic activity . . . . Economic research has demonstrated that state fiscal relief is an efficient and effective way to mitigate declines in jobs and output during an economic downturn. Absent such fiscal relief, fiscal austerity among state, local, and Tribal governments could exert a prolonged drag on the overall economic recovery, as occurred following the 2007–2009 recession.”).

145. NICOLE CARTER & ANNA NORMAND, CONG. RSCH. SERV., WATER RESOURCES DEVELOPMENT ACTS: PRIMER (2023) [hereinafter WATER RESOURCES DEVELOPMENT ACTS], <https://crsreports.congress.gov/product/pdf/IF/IF11322>.

146. *Id.*

147. U.S. ARMY CORPS ENG’RS, DEP’T ARMY, NO. 1180-1-9, DESIGN-BUILD CONTRACTING (2012), [https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER\\_1180-1-9.pdf](https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1180-1-9.pdf).

148. NICOLE CARTER & ANNA NORMAND, CONG. RSCH. SERV., U.S. ARMY CORPS OF ENGINEERS: FY2023 APPROPRIATIONS (2023), <https://crsreports.congress.gov/product/pdf/IF/IF12090> [hereinafter FY2023 APPROPRIATIONS].

with a reduced cost-share, just as the USACE does.<sup>149</sup> A system like that of the USACE enables the federal government to target its intended beneficiaries regardless of the state while preserving the flexibility to expand projects with willing non-federal partners. HUD is an obvious candidate for this type of program. HUD's current use of block grants presents a significant hurdle to supporting underserved communities in states like Alabama because block grants give unfettered discretion to states on how to use the funds, like build prisons, instead of supporting underserved communities. The USACE model exemplifies how a federal agency can resolve that problem.

Another solution is to move toward a modified "as needed" program whereby funds are allotted to states based on a need, similar to the Medicaid and Medicare assistance programs. The allotment would still go through states, however, the additional incentive to provide housing assistance would likely attract reluctant states to expand their programs. Some may not expand affordable housing solutions, but the incentive would likely draw additional interest. The program could come with a non-federal cost-share where HUD assumes a majority of the cost and each state absorbs a smaller percentage. To address financial concerns, the program could enforce a cap based on a given state's need as a percentage of the whole, funded through reimbursements to the states. This process would ensure that funds are distributed fairly to states with greater needs (i.e., California versus Rhode Island). This program would provide stronger federal funding guidelines pointing local governments toward a path of justice, driven by community input and equitable outcomes across race, ethnicity, and socioeconomic status. Because the modified "as needed" program would be provided through HUD with laws in place to limit uses of the funds, this would result in beneficial outcomes like investments in affordable housing programs or expanded shelter support.

#### *D. ARPA Is Not the Only Fix to Housing Concerns*

The federal government ought to track the rate of housing insecurity in a far more robust way than it already does. A model based upon the monthly unemployment census conducted by the Bureau of Labor Statistics is a good idea and one that already exists in a small part. The American Housing Survey polls a select group of Americans each year on their eviction and foreclosure status.<sup>150</sup> This program is already sponsored by HUD and conducted by the U.S. Census Bureau. Similarly, the U.S. Census Bureau conducts a pulse survey each week that asks tens of thousands of Americans how confident they are in their ability to pay their rent or mortgage the following month.<sup>151</sup> Finally, the Environmental Protection Agency hosts a tracking system that indexes every geographic area in

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149. WATER RESOURCES DEVELOPMENT ACTS, *supra* note 145, at 2; FY2023 APPROPRIATIONS, *supra* note 148, at 1.

150. *American Housing Survey (AHS)*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/ahs.html> (last visited Nov. 9, 2023).

151. *Household Pulse Survey*, U.S. CENSUS BUREAU, <https://www.census.gov/data-tools/demo/hhp/#/> (last visited Nov. 9, 2023).

the United States by demographic and environmental indicators. The Environmental Justice Screen Tool is widely used by federal agencies to identify disadvantaged communities that can benefit from direct federal resource assistance, regardless of the state.<sup>152</sup> Therefore, a robust tracking system that traces housing loss down to a local level is not only possible but almost a reality in the present. HUD should develop a federal tool to track housing loss, measurable down to a local level, to better grasp the need of federal housing support resources.

Many localities rely on additional sources of funding for ongoing operational and maintenance needs, such as rental subsidies and the provision of supportive services.<sup>153</sup> These sources of funding are provided by the state or funded through local taxes or other measures. Affordable housing is difficult to support at a local level, and there is a need for more robust federal funding for housing programs.<sup>154</sup>

Although the Low-Income Housing Tax Credit is one of the largest sources<sup>155</sup> of subsidies for affordable housing, insufficient funding prevents the tax credit from meeting national affordable housing needs.<sup>156</sup> By including affordable housing and development as a use for recovery dollars, Congress signaled the importance of stable and affordable housing in economic recovery. The allocation of recovery funds for affordable housing shows the urgency of the need to increase the housing supply in every community. Housing stability for all income levels is essential for economic growth and ongoing resilience. Increasing federal funding for housing programs can ensure that all residents have a safe, stable, and affordable place to live.

## VI. CONCLUSION

Access to affordable housing in the United States is a significant and growing challenge, exacerbated by recent economic trends and the COVID-19 pandemic. This crisis—just as so many others—disproportionately affects low-income individuals and communities of color, who were already grappling with housing instability and high housing costs before the pandemic. No state or major metropolitan area has sufficient affordable housing for extremely low-income renters, particularly those from marginalized racial backgrounds. ARPA provided \$350 billion in direct relief to address economic impacts, and some localities used these funds creatively to increase affordable housing supply. However, states

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152. *EJScreen: Environmental Justice Screening and Mapping Tool*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/ejscreen/what-ejscreen> (last visited Nov. 9, 2023).

153. SAMANTHA FU ET AL., URB. INST., USING ARPA FUNDS TO ADDRESS AFFORDABLE HOUSING NEEDS 11 (Mar. 2023), <https://www.urban.org/sites/default/files/2023-03/Using%20ARPA%20Funds%20to%20Address%20Affordable%20Housing%20Needs.pdf>.

154. *Id.* at 7, 10–11.

155. *Policy Basics: The Housing Choice Voucher Program*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 12, 2021), <https://www.cbpp.org/research/housing/the-housing-choice-voucher-program> (stating the “Housing Choice Voucher Program is the nation’s largest source of rental assistance”).

156. Will Fischer, *Low-Income Housing Tax Credit Could Do More to Expand Opportunity for Poor Families*, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 28, 2018), <https://www.cbpp.org/research/housing/low-income-housing-tax-credit-could-do-more-to-expand-opportunity-for-poor>.

like Alabama misused the funds and took advantage of a loophole in Treasury guidance designed to rapidly distribute relief. The Treasury Department is authorized and empowered to investigate this misuse and to recoup these ARPA funds to be redistributed elsewhere. Allowing these plans to continue would, in effect, divert hundreds of millions of dollars away from their intended purpose of rebuilding communities and local economies affected by COVID-19. This improper use of recovery funds delays our nation's recovery and hurts our most vulnerable communities. Alabama's misuse highlights a fault line in our rulemaking, and further proves the need to create a fully-federal plan to resolve COVID-19 issues, like lack of affordable housing, that directly engages affected communities through regional federal staff and local housing agencies.