

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

MARIA HIDALGO, ANA LIRIANO, AMELIA
CAMACHO, and SERGIO DE JESUS, on behalf of
themselves and all others similarly situated, and HOUSING
COURT ANSWERS and the COALITION FOR THE
HOMELESS,

Index No. 453931/2021

**AFFIDAVIT OF
BARBARA C. GUINN**

Petitioners-Plaintiffs,

For a Judgment Pursuant to Articles 30 and 78 of
the Civil Practice Law and Rules,

-against-

NEW YORK STATE OFFICE OF TEMPORARY AND
DISABILITY ASSISTANCE,

Respondent-Defendant.

STATE OF NEW YORK)
) ss:
COUNTY OF ALBANY)

BARBARA C. GUINN, being duly sworn, deposes and says:

1. I am the Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance (“OTDA”), and I have served in that capacity since March 2017. As Executive Deputy Commissioner, I am the principal assistant to the Commissioner of OTDA, advise on matters of policy, and co-manage the operations of the agency including those relating to the administration of the State’s COVID-19 Emergency Rental Assistance Program (“ERAP”).

2. I submit this Affidavit in opposition to the Petition and in support of OTDA's application to dissolve the preliminary injunction in the above-captioned Civil Practice Law and Rules article 78 proceeding, in which Petitioners challenge as arbitrary and capricious OTDA's determination to stop accepting new ERAP applications effective November 14, 2021. Should the preliminary injunction be dissolved, as OTDA asserts that it should be, OTDA intends to close the ERAP application portal on a date no earlier than January 15, 2023. Should OTDA receive additional funding sufficient to provide rental assistance on newly submitted applications, OTDA will determine to accept new applications.

3. The information set forth in this affidavit is based on my personal knowledge and on information provided to me by members of the OTDA staff involved in the implementation and day-to-day operation of ERAP.

Background

4. OTDA initially determined to stop accepting new ERAP applications as of November 14, 2021, after it had fully committed or expended then-available federal emergency rental assistance ("ERA") funding that had been allocated to New York by the United States Department of the Treasury ("Treasury"). OTDA had planned to reopen its application portal and resume accepting ERAP applications if, and when, the State received additional ERA funding from Treasury, or if sufficient additional funding was appropriated to the ERAP program in the SFY 2022-23 New York State Budget.

5. Petitioners, including a legal services organization, a housing advocacy group, and four individuals residing in New York City, filed suit seeking to challenge OTDA's determination to stop accepting ERAP applications. By Interim Order dated January 6, 2022, this Court issued a preliminary injunction requiring OTDA to continue accepting ERAP

applications. The Court ordered this action be taken by OTDA despite acknowledging that OTDA was “overextended, with a budget shortfall of approximately \$850 million due to provisionally approved applicants in addition to other liabilities.”¹ NYSCEF Doc. No. 33, at 1. The Court effectively directed OTDA to continue accepting ERAP applications so applicants would receive the benefit of eviction protections despite uncertainty as to whether funds would ever be available to pay the applicants’ landlords. *Id.*, at 2.

6. The Court suggested that because New York remained eligible to apply for reallocation of unspent federal ERA funds, it was “anyone’s guess” as to whether additional funding would “exceed respondent’s current liabilities,” and disagreed that deference was owed to OTDA’s determination that funding would be insufficient to support the approval of new ERAP applications submitted after November 14, 2021. *Id.*

7. The Court reasoned:

Respondent has failed to show that it is in any better position to know the results of the March 2022 reallocation than petitioners, this court, or any other relevant person/entity. Respondent can only surmise that it will not receive sufficient funds, and petitioner’s counsel has explained why petitioners optimistically believe New York will obtain funds sufficient to exceed respondent’s current liabilities. At this point, \$18 billion of Congress’ prior allocation is currently unspent and may be redistributed in March. New York, a state with one of the largest populations in the county, and which has been hit very hard by the pandemic, may likely be entitled to a significant portion of funds being reallocated. Thus, the court does not find that allowing petitioners and other individuals to file applications for [ERAP] would merely give them false hope. The court notes that respondent’s shortfall includes a significant number of provisionally approved applications, and as petitioners’ counsel points out, “[p]otentially hundreds of millions of dollars may also be reallocated from the funds provisionally approved, but not yet accepted by landlords.

Id., at 2.

¹ An ERAP application is “provisionally approved” where the tenant has completed its portion of the application, but the landlord has not yet submitted documents or information necessary to complete the application and receive payment.

8. The Court thus found that:

[P]etitioners have demonstrated a likelihood of success on the merits. While courts generally defer to agencies in the discharge of their duties, courts need not do so when an agency acts irrationally or arbitrarily. Respondent contends that it rightfully decided to stop accepting applications for rental assistance on November 15, 2021. The court disagrees. The New York legislature charged respondent with the responsibility to set up and administer [ERAP], and so long as funds may be available, respondent's decision to stop accepting [ERAP] applications is necessarily irrational. The legislature provided that the [ERAP] program was to be funded by "(a) emergency rental assistance funds received by the state from the Federal Emergency Rental Assistance Program and any other federal funds made available for that purpose; and (b) any state funds appropriated for such program." 2021 N.Y. Laws Ch. 56, part BB, § 3 para. (2). Nowhere in the relevant legislation is respondent given parameters with which to stop accepting [ERAP] applications. The legislature was aware that funding would be given in several allocations. By choosing not to set forth parameters for when respondent should stop and start accepting applications, the legislature expressed its intent that respondent not do so. As proof that respondent's decision was irrational, renters in arrears like petitioners may fall into a gap between November 15, 2021 and when respondent may feasibly open applications again. To allow such a gap to exist is irrational.

Id., at 3.

9. OTDA complied with the Court's order and reopened the ERAP application portal on January 11, 2022, and the application portal has remained open since that date.

10. Since OTDA reopened the portal, each of the named petitioners has applied for rental assistance. Petitioner Ana Liriano's ERAP application, submitted on January 12, 2022, was paid on August 16, 2022. Petitioners Amelia Camacho and Sergio de Jesus, who comprise a single household unit, applied on January 13, 2022. Their ERAP application was denied because their landlord previously had applied for and received payment for 12 months of rental arrears under New York's Landlord Rental Assistance Program ("LRAP"). *See* L.2021, ch. 418. A household may receive only up to 12 months of assistance with rental arrears irrespective of whether the assistance is paid from ERAP, LRAP, or from a combination of both programs.

11. Only Petitioner Maria Hildago's ERAP application remains pending. Petitioner Hildago is an occupant of "federal or state funded subsidized housing that limits [her] share of the rent to a set percentage of income," and can be eligible for ERAP only "to the extent that funds are remaining after serving all other eligible populations." COVID-19 Emergency Rental Assistance Program of 2021, ("CERAP") § 5(1)(a)(i).²

12. After the Court's January 6, 2022 Interim Order was issued, Treasury reallocated additional ERA funds to the State of New York. There have been a total of five such reallocations. Through these reallocations, the State has been awarded approximately \$334 million, which as detailed below, is only a small fraction of what OTDA requested.

13. In addition to the amounts reallocated to the State of New York by Treasury, \$800 million in State funding was appropriated to support ERAP in the SFY 2022-23 New York State budget.

14. OTDA projects that both the reallocated funds received by the State of New York from Treasury and funds appropriated in the SFY 2022-23 New York State budget are fully obligated. While Treasury may reallocate additional amounts to the State, OTDA does not anticipate that any additional reallocations that OTDA may receive will exceed OTDA's existing commitments and liabilities given the relatively small amounts that Treasury has reallocated to the State in each of the five allocations to date.

15. OTDA respectfully submits that it should have discretion as to when to cease accepting new ERAP applications, and that its November 14, 2021 determination to stop

² A true and correct copy of L. 2021, ch. 56 is attached as Exhibit C to the Affidavit of Barbara C. Guinn executed on December 31, 2021 (the "Dec. 31, 2021 Guinn Aff."), which is incorporated by reference herein (NYSCEF Doc Nos. 15 and 18).

accepting applications unless and until additional funding became available was neither affected by an error of law, arbitrary, capricious, nor an abuse of discretion.

16. Accordingly, the Court should dissolve its preliminary injunction and allow OTDA to close the ERAP application portal on a date no earlier than January 15, 2023.

17. Should OTDA close the portal and then receive additional funding sufficient to cover the costs of approvable ERAP applications already submitted, OTDA will reopen the portal and resume accepting ERAP applications until those new amounts are also obligated.

The Federal Emergency Rental Assistance Program

18. The Consolidated Appropriations Act, 2021, was enacted on December 27, 2020, and Division N, Title V, Subtitle A, Section 501 of the Act (hereinafter “Section 501” or “§ 501”) made available \$25 billion to provide financial assistance and housing stability services to eligible families impacted by the COVID-19 pandemic. Funding directly allocated by Treasury pursuant to § 501 is referred to as “ERA 1” funding. A true and correct copy of § 501 is attached as Exhibit A to Dec. 31, 2021 Guinn Aff. (NYSCEF Doc Nos. 15 and 16).

19. The American Rescue Plan Act of 2021 was enacted on March 11, 2021, and Title III, Subtitle B, Section 3201 of the Act (hereinafter “Section 3201” or “§ 3201”) made available \$21.55 billion to provide financial assistance and housing stability services to eligible families impacted by the COVID-19 pandemic. Funding directly allocated by Treasury pursuant to § 3201 is referred to as “ERA 2” funding. A true and correct copy of § 3201 is attached hereto as Exhibit B to the Dec. 31, 2021 Guinn Aff. (NYSCEF Doc. Nos. 15 and 17).

20. ERA funding initially was made available under § 501 and § 3201 to states and to qualifying local units of government. Under § 501, \$800.6 million was directly allocated by Treasury to New York State, \$247.3 million was directly allocated to New York City, and

\$234.3 million was directly allocated to 13 counties and 10 other municipalities in New York with populations of 200,000 or more.

21. Under § 3201, approximately \$672.6 million was directly allocated to New York State, approximately \$397.3 million was allocated to New York City, and \$241.6 million was allocated to 13 counties and 10 other municipalities in New York with populations of 200,000 or more.

22. Of the 24 localities that received direct ERA 1 and ERA 2 allocations, 17, including New York City, elected to join the State-administered ERAP program, and the State committed to spending at least the amount of each locality's direct allocation within that locality. The seven localities that declined initially to participate in the State ERAP program were the City of Rochester and Monroe County, the Town of Hempstead, the Town of Oyster Bay, the Town of Islip, Onondaga County, and the City of Yonkers.

23. In total, \$2.425 billion in federal ERA funding was made available for ERAP, of which \$303.8 million was initially allocated for administrative costs (including outreach and application assistance); \$25 million for legal services; and \$40 million for utility assistance (that set aside has since been reduced to \$3 million). The remaining \$2.056 billion of initial ERA 1 and ERA 2 allocations was made available to support rental assistance payments.

24. In addition to initial allocations, §501(d) requires Treasury to identify "excess funds" for reallocation from amounts Grantees have not obligated from their initial ERA 1 allocations. Specifically, the statute provides that beginning on September 30, 2021, Treasury must recapture excess funds, as determined by the Secretary, not obligated by a Grantee for eligible ERA 1 purposes, and Treasury must reallocate those funds to Grantees that, at the time of the reallocation, have obligated at least 65% of their initial ERA 1 allocation. The amount of

any reallocation is based on demonstrated need within a Grantee's jurisdiction, as determined by Treasury.

25. Likewise, § 3201(e) requires Treasury to reallocate amounts Grantees have not obligated from their initial ERA 2 allocations. The statute provides that beginning on March 31, 2022, the U.S. Treasury must recapture excess funds not obligated by a Grantee for eligible purposes, and the U.S. Treasury must reallocate those funds to Grantees that, at the time of the reallocation, have obligated at least 50% of their ERA 2 allocation.

The New York State COVID-19 Emergency Rental Assistance Program

26. On April 16, 2021, CERAP was enacted into law. *See* L. 2021, ch. 56 Part BB, Subpart A. On September 2, 2021, Amendments to CERAP were signed into law by Governor Kathy Hochul. *See* L. 2021, ch. 417, Part A. True and correct copies of relevant sections of L. 2021, ch. 56 and L. 2021, ch. 417 are attached respectively as Exhibits C and D to the Dec. 31, 2021 Guinn Aff. (NYSCEF Doc. Nos. 15, 18 and 19).

27. By enacting CERAP, the New York Legislature authorized and directed the Commissioner of OTDA to implement and operate a program of rental and utility assistance for those eligible, which would be funded with federal ERA funds and any state funds appropriated for such program. CERAP § 3.

28. Among other things, CERAP stays evictions of tenants who apply for ERAP assistance. Specifically, CERAP § 8, as amended, provides in relevant part that:

[e]xcept as provided in section 9-a of this act, eviction proceedings for a holdover or expired lease, or non-payment of rent or utilities that would be eligible for coverage under this program shall not be commenced against a household who has applied for this program or any local program administering federal emergency rental assistance program funds **unless or until a determination of ineligibility is made**. Except as provided in section nine-a of this act, in any pending eviction proceeding, whether filed prior to, on, or after the effective date of this act, against a household who has applied or subsequently applies for benefits under this

program or any local program administering federal emergency rental assistance program funds to cover all or part of the arrears claimed by the petitioner, all proceedings shall be stayed **pending a determination of eligibility**.

(Emphasis added). CERAP § 9-a carves out an exception to this prohibition where a tenant “intentionally causes significant damage to the property or is persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others.” *See* Dec. 31, 2021 Guinn Aff., Exs. C and D.

29. CERAP § 9 directs OTDA to make payments directly to landlords, and to undertake outreach to landlords to enlist their cooperation before final determinations of eligibility can be made with respect to their tenants who apply for ERAP. CERAP § 9(c) provides that:

[i]f a payment cannot be made directly to a landlord or owner after the outreach efforts described in paragraph (b) of this subdivision, funds in the amount approved for rental assistance to an otherwise eligible applicant shall be available for a period of 180 days; extension may be provided upon determination by the commissioner of good cause. When possible, both landlord or owner and tenant shall be notified of the provisional determination of eligibility and the landlord or owner shall have a final opportunity to participate. **If the landlord or owner does not provide necessary information or documentation to effectuate payment as directed before 180 days, the commissioner may reallocate the set aside funds to serve other rental assistance program applicants.** The tenant may use such provisional determination as an affirmative defense in any proceeding seeking a monetary judgment or eviction brought by a landlord for the non-payment of rent accrued during the same time period covered by the provisional payment for a period of twelve months from the determination of provisional eligibility. **If the landlord has not accepted such provisional payment within twelve months of the determination the landlord shall be deemed to have waived the amount of rent covered by such provisional payment, and shall be prevented from initiating a monetary action or proceeding, or collecting a judgment premised on the nonpayment of the amount of rent covered by such provisional payment.**

(Emphasis added). *See* Dec. 31, 2021 Guinn Aff., Ex. C. CERAP § 9(2)(d) then addresses the protections against eviction once a landlord accepts an ERAP payment to cover rental arrears owed by a tenant. *See* Dec. 31, 2021 Guinn Aff., Ex. D.

30. Pursuant to CERAP § 9(2)(c), where payment cannot be made directly to a landlord after outreach is undertaken, the funds provisionally approved for providing ERAP assistance to an eligible applicant must be set aside and available for a period of 180 days (on “180-day hold”) while the landlord is afforded a final opportunity to participate in the program. If the landlord does not provide information or documentation necessary to effectuate payment within 180 days, the commissioner may exercise his discretion to reallocate the set aside funds to serve other ERAP applications. *See* Dec. 31, 2021 Guinn Aff., Ex. C.

31. Pursuant to CERAP § 3(3)(b), as amended,

[r]esidents of a municipal corporation that chooses not to participate in the statewide program may submit an application to the statewide program if the municipal corporation has distributed or obligated all of the municipal corporation's available federal emergency rental assistance funds as certified by the chief elected official of the municipal corporation and the resident is otherwise eligible for the statewide program.

See id.

32. As of this date, only the towns of Hempstead, Islip, and Oyster Bay have not certified that they have exhausted the emergency rental assistance funds that Treasury had directly allocated to them, and only residents of those three localities remain ineligible for CERAP.

Treasury's Reallocation of ERA Funds to New York State

33. As noted above, § 501(d) and § 3201(e) require Treasury to identify “excess funds” for reallocation from amounts underperforming Grantees have not sufficiently obligated from their initial ERA 1 and ERA 2 allocations. Treasury periodically determines whether there

are sufficient funding requests from Grantees serving jurisdictions with demonstrated needs to warrant the disbursement of reallocated funds and reallocates ERA funding in tranches over time as recaptured funds become available.³

34. On November 11, 2021, OTDA submitted a request for \$996 million in reallocated ERA 1 funds from the amounts recaptured by Treasury pursuant to § 501(d) (the “ERA 1, Round 1 reallocation”). On December 30, 2021, Treasury awarded the State of New York only \$27, 219,044.18 in recaptured ERA 1 funding. This allocation amounted to less than 3% of the amount the State had requested.⁴ A true and correct copy of OTDA’s November 11, 2021 request is attached hereto as Exhibit A.

35. On January 21, 2022, OTDA requested an additional \$1.6 billion in ERA 1 funds from the amounts that had been recaptured a second time by Treasury (the “ERA 1, Round 2 reallocation”). On March 14, 2022, Treasury awarded the State of New York only \$119,204,649.68 in recaptured ERA 1 funding, which amounted to approximately 7.5% of the amount the State had requested.⁵ A true and correct copy of OTDA’s January 21, 2022 request is attached hereto as Exhibit B.

³ Treasury’s ERA 1 Guidance is available at:

<https://home.treasury.gov/system/files/136/UpdatedERA1ReallocationGuidanceSep6.pdf>;
https://home.treasury.gov/system/files/136/Deputy-Secretary-Adeyemo-ERA%20Program-Grantee-Letter_20211004.pdf; and
<https://home.treasury.gov/system/files/136/Deputy-Secretary-Adeyemo-ERA-Program-Grantee-Letter-20211025.pdf>.

Treasury’s ERA 2 Guidance is available at <https://home.treasury.gov/system/files/136/ERA2ReallocationGuidance-6-28-22.pdf>.

⁴ <https://home.treasury.gov/system/files/136/ERA-Reallocation-Round-1.pdf>.

⁵ <https://home.treasury.gov/system/files/136/ERA1-Reallocation-Round2-General-Pool.pdf>.

36. On June 2, 2022, OTDA requested nearly \$1.4 billion in ERA 1 funds from the amounts that were again recaptured by Treasury (the “ERA 1, Round 3 reallocation”). On July 18, 2022, Treasury awarded the State of New York only \$99,354,877.39 in recaptured ERA 1 funding, which amounted to approximately 7% of the amount the State had requested.⁶ A true and correct copy of OTDA’s June 2, 2022 request is attached hereto as Exhibit C.

37. On July 22, 2022, OTDA requested nearly \$1.3 billion in ERA 2 funds from the amounts recaptured by Treasury pursuant to § 3201(e) (the “ERA 2, Round 1 reallocation”). On October 14, 2022, Treasury awarded the State of New York only \$36,418,135.44 in recaptured ERA 2 funding, which amounted to less than 3% of the amount the State had requested.⁷ A true and correct copy of OTDA’s July 22, 2022 request is attached hereto as Exhibit D.

38. On September 26, 2022, OTDA requested nearly \$973 million in ERA 1 funds from the amounts recaptured by Treasury (the “ERA 1, Round 4 reallocation”). On October 28, 2022, Treasury awarded the State of New York only \$52,288,526.01 in recaptured ERA 1 funding, which amounted to approximately 5% of the amount the State had requested. A true and correct copy of OTDA’s September 26, 2022 request is attached hereto as Exhibit E.

39. On November 4, 2022, OTDA requested \$1.02 billion in ERA 2 funds from the amounts recaptured by Treasury pursuant to § 3201(e) (the “ERA 2, Round 2 reallocation”). While New York’s application remains pending, in prior reallocation rounds OTDA received an award in the range of 2.7% - 7.5% of the amount requested. Assuming New York received 5.1% of the amount requested – that is, the average percentage of requested funds that have been allocated to the State across all previous ERA 1 and ERA 2 allocations – that would yield approximately \$52

⁶ https://home.treasury.gov/system/files/136/ERA_1-Reallocation-Round-3-General-Pool.pdf.

⁷ https://home.treasury.gov/system/files/136/ERA_2Reallocation-GeneralPool.pdf.

million in funding. Assuming optimistically that New York received 7.5% of the amount requested – that is, the highest percentage of requested funds that have been allocated to the State across all previous ERA 1 and ERA 2 allocations – that would yield approximately \$77 million. A true and correct copy of OTDA’s November 4, 2022 request is attached hereto as Exhibit F.

40. While there likely will be subsequent rounds of federal reallocations, based upon the program administrator’s experience with prior reallocations, OTDA does not believe that it will receive sufficient federal funds to pay existing applications and future applications if required to keep the portal open. Additionally, while the SFY 2023-24 State budget could potentially include additional State funding for ERAP, OTDA has no reason to believe that additional state funds are forthcoming, and, in any event, those funds are not currently available.

Additional ERAP funding appropriated in the SFY 2022-23 State Budget

41. As noted above, an additional \$800 million was appropriated in the SFY 2022-23 New York State budget to support ERAP. However, the funding received from the State budget now has been fully obligated.

Projected Shortfall in ERAP Funding

42. As detailed below, as of November 2, 2022, OTDA has received 502,085 ERAP applications; has spent an average of \$12,609 on each approved application; and, based on the available funding compared with commitments associated with the applications it already has received, projects a funding shortfall in excess of \$200 million.

43. As of November 2, 2022, OTDA has received 502,085 ERAP applications from tenants across New York:

- 141,058 applications in June 2021;
- 54,090 applications in July 2021;
- 45,954 applications in August 2021;
- 49,117 applications in September 2021;
- 47,025 applications in October 2021;
- 23,726 applications in November 2021;
- 3,832 applications in December 2021;
- 20,010 applications in January 2022;
- 15,018 applications in February 2022;
- 10,796 applications in March 2022;
- 8,422 applications in April 2022;
- 9,991 applications in May 2022;
- 9,995 applications in June 2022;
- 11,574 applications in July 2022;
- 17,718 applications in August 2022;
- 16,695 applications in September 2022; and
- 16,388 applications in October 2022.

44. As of November 2, 2022, the average ERAP payment made for each approved ERAP application has been \$12,609.

45. Of the 502,085 ERAP applications received, 208,435 were approved and paid utilizing \$2.63 billion of the total funding that was made available for rental assistance.

163,750 ERAP applications were denied (including duplicate applications), 9,070 have passed from the 180-day hold, and therefore do not have any associated costs, and 58,197 remain on

hold because they were submitted by households occupying subsidized housing. Pursuant to CERAP § 5(1)(a)(i), occupants of subsidized housing cannot be eligible to receive ERAP assistance until all other eligible populations are served. An additional 15,749 are pending denial or on hold for other reasons, including that the ERAP application is from outside the jurisdiction, is a duplicate application, was submitted by an applicant without arrears, or was submitted by an applicant not meeting other eligibility criteria. The remaining 46,884 applications submitted by persons not residing in subsidized housing are being processed in the order received.

46. As of November 2, 2022, OTDA projects a program shortfall of \$217 million. OTDA projects the cost of payable applications that have been received from tenants in non-subsidized housing, but have not yet paid, to total \$351 million; and the cost for tenants who reside in federal or State funded subsidized housing to be approximately \$365 million. As of November 2, 2022, OTDA had \$422 million available for rental assistance and anticipates receiving no more than \$77 million in the upcoming ERA 2, round 2 reallocation. This leaves a program deficit in excess of roughly \$217 million, and if trends continue as expected, that deficit will continue to grow. OTDA notes these projections are based on applications received through November 2, 2022, and since OTDA continues to accept and process ERAP applications, the estimated projected shortfall and anticipated cost of payable applications fluctuates on a day-to-day basis (*see infra*, ¶ 49).

47. To ascertain the cost of payable applications from occupants of non-subsidized housing, OTDA conservatively estimates that roughly 45% of all ERAP applications submitted after October 1, 2021, have been or will need to be paid. OTDA arrived at this estimated payment rate by reviewing ERAP payment rates for applications submitted during the first four

months of the program, for which final eligibility determinations have been made for virtually all applications received. Applying a 45% payment rate against the 204,268 ERAP applications submitted after October 1, 2021 equates to 91,921 payments. Of that total, 64,038 have already been paid, leaving a projected balance of 27,833 payments remaining to be made. As the average ERAP payment made by OTDA has been \$12,609, OTDA projects that it will expend an additional \$351 million to service these as-of-yet unpaid ERAP applications.

48. OTDA also projects that it would need approximately \$365 million were it to reach eligible applicants residing in federal or State funded subsidized housing assuming all other eligible populations are served. OTDA arrived at this figure based on the estimated approvable applications submitted by residents of subsidized housing, and an estimated average payment for those applications. Combining this liability with the cost of payable applications of tenants residing in unsubsidized housing, the total amount of ERAP funding that OTDA could be obligated to spend on applications already received would exceed \$716 million.

49. As noted above, OTDA had \$422 million in ERAP funding available as of November 2, 2022, and estimates that it could receive an additional \$77 million from Treasury through the ERA 2 Round 2 reallocation. Taking into account the \$716 million in existing program commitments, the combined \$499 million in available and anticipated funding, OTDA conservatively estimates that the program will face a deficit of approximately \$217 million.

50. OTDA also estimates that it will continue to receive approximately 15,000 new ERAP applications each month going forward, and this will result in additional program liabilities of \$85 million per month.

Conclusion

51. In light of the foregoing, OTDA respectfully submits that it should be afforded discretion as to when it should be able to close the ERAP application portal and cease accepting new ERAP applications. This discretion was explicitly conferred to OTDA by the Legislature in CERAP § 3.

52. Accordingly, the Petition should be denied, and the preliminary injunction issued in this proceeding should be dissolved.

53. Upon dissolution of the preliminary injunction, OTDA intends to close the ERAP application portal on a date no earlier than January 15, 2023. Should OTDA receive additional funding sufficient to provide rental assistance on newly submitted applications, OTDA will determine to accept new applications.

DAWN M. MAGUIRE
Notary Public, State of New York
Qualified in Albany Co., No. 01MA6211514
Commission Expires Sept. 21, 2025

Barbara C. Guinn
BARBARA C. GUINN
EXECUTIVE DEPUTY COMMISSIONER

Sworn before me this 22nd
day of November, 2022

Dawn M. Maguire
Notary Public