

**COME HOME OR HIGH WATER: HOW NATIONAL FLOOD  
INSURANCE REQUIREMENTS ARE CREATING REDLINING  
2.0**

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## ABSTRACT

*For those living in vulnerable areas—over 40% of the United States population—the need for reinforcing homes against sea-level rise and flooding disasters is growing. Damages are costly and often unattainable for people recovering from a prior storm. With insurance companies pulling out of disaster-prone areas at an alarming rate, residents are losing ways to protect themselves against the financial impact a single storm can have. The federal government has recognized the increasing need for climate resilient homes and has provided funding to meet this need. However, this funding is tied directly to having flood insurance—often prohibitively expensive or impossible to obtain.*

*Additionally, with this burdensome requirement, the federal government is imposing barriers to climate adaptations that further compound the effects of redlining. Consistent disenfranchisement and unsafe building practices in flood plains have left residents of color at an increasing disadvantage in the face of climate change. Relocation, while one solution to climate change, is not yet feasible or even desirable for some communities. Therefore, the federal government must address habitability in current homes. This Note concludes that habitability and resilience to flooding must be accessible to everyone, and takings claims are a tool to make climate resiliency grants more accessible.*

## PRECIS

Twenty-eight natural disasters plagued the United States in 2023, each inflicting damages of over \$1 billion and killing 492 people in total.<sup>1</sup> In 2022, “16% of [] displaced adults never returned home” and 12% were “out of their home for more than six months.”<sup>2</sup> In the next 30 years, the amount of sea-level rise will be equivalent to the rise from the entire previous century.<sup>3</sup> This rapid rise in sea level will affect an estimated 4.2 million people by 2100.<sup>4</sup> For those living in vulnerable areas—almost 40% of the United States

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1. Nat'l Ctrs. for Env't Info., *U.S. Billion-Dollar Weather and Climate Disasters*, NOAA, <https://www.ncei.noaa.gov/access/billions/> (last visited Dec. 14, 2024).

2. Thomas Frank & E&E News, *Disasters Displaced More Than 3 Million Americans in 2022*, SCI. AM. (Feb. 6, 2023), <https://www.scientificamerican.com/article/disasters-displaced-more-than-3-million-americans-in-2022/>.

3. *U.S. Coastline to See Up to a Foot of Sea Level Rise by 2050*, NOAA (Feb. 15, 2022), <https://www.noaa.gov/news-release/us-coastline-to-see-up-to-foot-of-sea-level-rise-by-2050>.

4. *Examining Sea Level Rise Expose for Future Populations*, NOAA OFF. OF COASTAL MGMT., <https://coast.noaa.gov/digitalcoast/stories/population-risk.html> (last visited Jan. 7, 2025).

population—the need for reinforcing homes against sea-level rise and flooding disasters is growing.<sup>5</sup> Individuals recovering from previous storms often cannot afford the costs associated with recovery. With insurance companies pulling out of disaster-prone areas at an alarming rate, residents are losing ways to protect themselves against the financial impact a single storm can have. The new reality of yearly flooding disasters compounds the financial impacts.<sup>6</sup>

In response to the increasing risk of sea level rise and disasters, the federal government has made climate-resilient housing a top priority.<sup>7</sup> The Department of Housing and Urban Development (HUD) has received \$1 billion to invest affordable, energy-efficient, and climate-resilient housing.<sup>8</sup> This federal initiative builds on the disaster-relief funding following Hurricane Sandy in 2012. This funding enabled HUD to award money to cities to do infrastructure work on the ground in highly vulnerable areas.<sup>9</sup>

Generally, federally-funded disaster recovery programs enable community organizations to provide aid. The federal government launched the National Disaster Resilience Competition in 2014 to help cities and states with disaster recovery. Recipients received training, tools, and funding to help recover from natural disasters and mitigate issues moving forward.<sup>10</sup> Of the thirteen recipients of this grant money, this Note will focus on the City of New Orleans. Specifically, this Note examines the programs the New Orleans Redevelopment Authority (NORA) has used to build a more climate-resilient city. NORA is a unique organization because it uses federal and state funding, and coordinates with the communities it serves to provide funding to help the community.<sup>11</sup> Analyzing a community organization that receives federal funding for disaster recovery and resiliency shows how community organizations use funding on the ground.

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5. *Economics and Demographics*, NOAA OFF. FOR COASTAL MGMT. DIGITAL COAST, <https://coast.noaa.gov/states/fast-facts/economics-and-demographics.html#> (last updated Oct. 4, 2024); Alexis Rankin, *Climate Can Affect Housing Costs, Communities*, CTR. FOR CLIMATE AND ENERGY SOLS. (Apr. 1, 2021), <https://www.c2es.org/2021/04/climate-can-affect-housing-costs-communities/>.

6. Aimee Picchi, *Homes in Parts of the U.S. Are “Essentially Uninsurable” Due to Rising Climate Change Risks*, CBS NEWS (Sep. 20, 2023), <https://www.cbsnews.com/news/insurance-policy-california-florida-uninsurable-climate-change-first-street/>.

7. *Fact Sheet: Biden-Harris Administration Hosts First-Ever White House Climate Resilience Summit and Releases National Climate Resilience Framework*, WHITE HOUSE (Sep. 28, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/28/fact-sheet-biden-harris-administration-hosts-first-ever-white-house-climate-resilience-summit-and-releases-national-climate-resilience-framework/>.

8. THE WHITE HOUSE, BUILDING A CLEAN ENERGY ECONOMY: A GUIDEBOOK TO THE INFLATION REDUCTION ACT’S INVESTMENTS IN CLEAN ENERGY AND CLIMATE ACTION 113 (2d version, 2023).

9. *National Disaster Resilience*, U.S. DEP’T OF HOUS. AND URB. DEV. (last updated Feb. 23, 2024), [https://www.hud.gov/program\\_offices/comm\\_planning/cdbg-dr/ndr](https://www.hud.gov/program_offices/comm_planning/cdbg-dr/ndr).

10. *Id.*

11. NEW ORLEANS REDEVELOPMENT AUTH., <https://noraworks.org/> (last visited Nov. 17, 2024).

This Note will discuss how overly burdensome flood insurance requirements impose barriers to climate adaptations and propose a takings action to make climate resiliency grants more accessible.<sup>12</sup> Relocation is one solution to climate change, but it is not yet feasible or even desirable for some communities, so habitability in current homes must be addressed in the meantime. Part I lays out the current state of redlining and housing in floodplains; the National Flood Insurance Program and its restrictions; and the available pathways to make climate resilience more accessible. Part II analyzes the requirements of a takings claim, connects takings claims to the work of NORA, then discusses why a takings claim would be more successful than an equal protection claim. Part III highlights how states would benefit from dropping flood insurance requirements; notes federal options to avoid takings claims in the future; and illustrates one example of a city-level response to flooding. This Note concludes that habitability and resilience to flooding must be accessible to everyone, and takings claims are a tool to get there.

#### I. REDLINING, FLOODING, & AVAILABLE FEDERAL TOOLS

Understanding the impact of climate change-exacerbated flooding on coastal communities requires discussion of the redlining practices that led the United States to this point. Redlining forced Black and brown people to live in undesirable and even unsafe parts of town, including in floodplains. On top of this practice, floodplain development created cheap—but dangerous—housing options residents could not afford to leave. The federal government created the National Flood Insurance Program to address risk in flood-prone areas, with varying degrees of success in the age of climate change. Additional legislation enabled agencies to run programs that minimize damage to these homes. However, these programs are fallible and inequitable, and this Note highlights one option to remedy problems applicants might face.

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12. Other law review articles have recognized the importance of climate displacement, redlining effects without suggested solutions, criticized the notion this is an issue of public choice when considering the buy-in of politicians into climate resilience. Kelly Carson, *The Water is Coming: How Policies for Internally Displaced Persons Can Shape the U.S. Response to Sea Level Rise and the Redistribution of the American Population*, 72 HASTINGS L. J. 1279, 1281 (2021); Shelby D. Green, *The Intentional Community: Toward Inclusion and Climate-Cognizance*, 62 WASHBURN L. J. 243, 257 (2023); Donald T. Hornstein, *Public Investment in Climate Resiliency: Lessons from the Law and Economics of Natural Disasters*, 49 ECOLOGY L. Q. 137, 182–89 (2022).

*A. Redlining and Its Implications Today*

Resilient housing in the face of climate change cannot be achieved without first addressing the discriminatory history of redlining in the United States. Redlining is the practice of historic housing discrimination that leads to segregated—and often disadvantaged—communities.<sup>13</sup> Redlining persists to this day and continues to leave communities of color out to dry.<sup>14</sup> Beginning in 1921, then Secretary of Commerce Herbert Hoover created the Advisory Committee on Zoning.<sup>15</sup> The Committee—“composed of outspoken segregationists”—wrote a manual on zoning encouraging racially homogenous neighborhoods.<sup>16</sup> Various members of this committee served in other official capacities that directly influenced real estate practices.<sup>17</sup> In the late 1930s, real estate and public actors created color-coded maps indicating “riskiness” of an area for housing development and mortgages.<sup>18</sup> An area’s “riskiness” was directly proportional to the number of people of color in that location.<sup>19</sup> The higher the population, the higher the assigned “risk.”<sup>20</sup> Increased “risk” led to decreases in investment, both through mortgages and public funding.<sup>21</sup> Redlining’s origin as a federally promoted practice has had long-lasting judicial effects.

The Court has accepted the habitual use of racially neutral language with segregationist motives that became the norm in the 1930s. Advisory Committee on Zoning members promoted zoning laws throughout the nation which did not explicitly mention race.<sup>22</sup> Racially discriminatory zoning laws persisted through the end of the twentieth century.<sup>23</sup> In *Village of Arlington Heights*, despite legislative history to the contrary, the Court held that an ordinance denying multi-family housing units was not discriminatory.<sup>24</sup> A nonprofit real estate developer proposed to make more housing available for

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13. RICHARD ROTHSTEIN, *THE COLOR OF LAW* 39–57, (Liveright Publ’g Co. 2017).

14. *Id.*

15. *Id.* at 51.

16. *Id.*

17. *Id.* at 52. (referencing members of the committee who served in leadership positions on the National Association of Real Estate Boards, like Irving B. Hiatt, who helped publish a realtor code of ethics that stated a realtor should “never be instrumental” in introducing a person of a different race into a neighborhood where they are not already present).

18. *The Ghosts of Housing Discrimination Reach Beyond Redlining*, THE URB. INST. (Mar. 15, 2023), <https://www.urban.org/features/ghosts-housing-discrimination-reach-beyond-redlining>.

19. *Id.*

20. *Id.*

21. *Id.*

22. ROTHSTEIN, *supra* note 13, at 52.

23. *Id.*

24. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 (1977). The Court found that disapproving housing would increase the number of Black residents and further integrate the apartment complex because it would produce a “measurable drop in property value.” *Id.* at 257–58.

Black residents.<sup>25</sup> After a public debate, the city commission denied the proposal based on a general objection to rezoning the area from single family to multi-family units.<sup>26</sup> The Court refused to find discriminatory impact “absent a pattern as stark as” *Yick Wo v. Hopkins*, and held there was no discriminatory purpose.<sup>27</sup> The practice of redlining is legally rooted, exists to this day, and has major implications for current community capacity.<sup>28</sup>

Redlining disempowered communities of color and left homeowners unable to access external funding to make their homes more resilient and therefore more valuable. Redlined properties were subsequently undervalued, which directly affected the ability to grow generational wealth.<sup>29</sup> Inability to grow generational wealth hinders the homeowners’ ability to invest in climate-resilient housing modifications, leaving them vulnerable to increasing flooding and sea-level rise. Just one inch of flood water can cost over \$25,000 in damage so lack of access to ways to protect a home can be devastating.<sup>30</sup> Furthermore, in communities like the Lower Ninth Ward where the majority of homeowners are Black, the damage stemmed from the effects of redlining and not from a lack of financial stability.<sup>31</sup> In the context of climate change and climate resiliency, this means homeowners are less likely to financially recover after natural disasters, let alone prepare for future impacts. Racist housing practices and overzealous floodplain development have left many people deeply vulnerable to the intensifying effects of climate change.

### B. Floodplains and Housing Problems

Increased floodplain development has laid the foundation for growing climate change issues in housing. Floodplains are “level land that may be submerged by floodwaters” and are typically located near a body of water.<sup>32</sup>

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25. *Vill. of Arlington Heights*, 429 U.S. at 258.

26. *Id.* at 257–58.

27. *Id.* at 266 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886)) (referencing a landmark case where San Francisco required permits for wooden laundries—almost completely ran by Chinese laundries—and then denied permits to Chinese laundry owners, using an “evil eye and unequal hand.”); *id.* at 270-271.

28. ROTHSTEIN, *supra* note 13.

29. PBS Newshour, *See a Look at the Nation’s First Cash Reparations Program*, PBS (June 22, 2023), <https://www.pbs.org/video/reparations-1687466985/> (recognizing a cash reparations program that most recipients use to pay home costs or for home repairs to help build generational wealth through financial security).

30. *13 Fast Flood Facts to Share with Your Clients*, FEMA (Oct. 2022), <https://agents.floodsmart.gov/articles/13-fast-flood-facts>.

31. Rebekah Green et al., *Impediments to Recovery in New Orleans’ Upper and Lower Ninth Ward: One Year After Hurricane Katrina*, 31 *DISASTERS* 311, 316 (2007); Telephone Interview with Colette Pichon Battle, Vision & Initiatives Partner, Taproot Earth (Feb. 24, 2024).

32. *Floodplain*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/floodplain> (last visited Nov. 17, 2024).

Undeveloped property in a floodplain is cheaper for developers to purchase than highly desirable waterfront or water-adjacent property.<sup>33</sup> Although counterintuitive, these developments are typically permitted as long as any building is constructed above the high-water level. Developers have responded by adding fill dirt to floodplains, creating an unstable base, and destroying the natural flood mitigation in the process.<sup>34</sup> Building artificially higher homes then sends water runoff into lower-lying communities, often made up of people of color and low-income individuals.<sup>35</sup> Even if redlined communities are not living directly in the floodplain, the effects of further development can still lead to damage.

A significant portion of the population lives in low-lying floodplains with serious consequences due to a century of unquenchable thirst to build, regardless of safety. Between 2000 and 2016, there was more population growth in floodplains than outside of them.<sup>36</sup> What were 1-in-100-year floods will now occur every 50 years or less.<sup>37</sup> People cannot afford to move out of this housing to a higher elevation, and by extension, to safety. Additionally, a “significant decline” in home building has greatly restricted the available stock to move into.<sup>38</sup> Consequently, the housing shortage combined with an increased demand outside of the need for housing to escape flood-prone areas has caused home prices to skyrocket.<sup>39</sup> Unable to move out of these areas, people have no choice but to stay and buy flood insurance to access recovery funds.

### *C. Federal Government Responses to Flooding*

The United States has a long history of enacting laws aimed at minimizing future risk of flooding.<sup>40</sup> The first legislatures in both Louisiana and Mississippi created “specialized units of local government” to address flood control among counties and parishes.<sup>41</sup> The U.S. has responded to the

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33. Laurie Mazur, *Fill, Build and Flood: Dangerous Development in Flood-Prone Areas*, U.S. NEWS & WORLD REP. (Oct. 8, 2019, 12:44 PM), <https://www.usnews.com/news/healthiest-communities/articles/2019-10-08/commentary-the-danger-of-development-in-flood-prone-areas>.

34. *Id.*

35. *Id.*

36. *Id.*

37. *The 8<sup>th</sup> National Risk Assessment: The Precipitation Problem*, FIRST ST. FOUND. (June 26, 2023), <https://report.firststreet.org/8th-National-Risk-Assessment-The-Precipitation-Problem.pdf>.

38. Ryan Boykin, *The Great Recession's Impact on the Housing Market*, INVESTOPEDIA (Aug. 31, 2023), <https://www.investopedia.com/investing/great-recessions-impact-housing-market/>.

39. *Id.*

40. See Christine A. Klein & Sandra B. Zellmer, *Mississippi River Stories: Lessons from a Century of Unnatural Disasters*, 60 SMU L. REV. 1471, 1473–83 (2007) (discussing the impact of natural disasters on flood legislation).

41. *Id.* at 1479.

need for flood control in mixed ways.<sup>42</sup> Indifferent and incompetent actions led to major damage and an intentional leadership change. A hands-off approach left individuals footing the bill for these “acts of God” which, combined with unsuccessful federal flood control attempts, led to many great floods in the 1920s.<sup>43</sup> The federal government began playing a larger role in citizens’ lives during this era because it could provide the structure and support to fix persistent issues like flooding. The federal government must recognize the increased risk of flooding from climate change and adjust its programs to meet this reality.

The government created the National Flood Insurance Program (NFIP) in response to the increased flooding from building in floodplains. The NFIP underwrites flood insurance coverage only in communities that adopt and enforce floodplain regulations that meet or exceed NFIP criteria.<sup>44</sup> This stringent requirement replaces older buildings so they will experience little or no flood damage.<sup>45</sup> If a community does not fulfill its NFIP obligations and construction occurs in violation of the NFIP regulations, one or more things will happen:<sup>46</sup> the new buildings will be subject to flood damage, the insurance on these buildings may increase without NFIP subsidy, or the Federal Emergency Management Agency (FEMA) will sanction the community to incentivize compliance.<sup>47</sup> Sanctions include: reclassification under the Community Rating System, probation, or suspension from the program. If suspended from the program, buildings become ineligible for funding from federal grants or loans administered by federal agencies in flood hazard areas.<sup>48</sup> Organizations and municipalities receiving funding are thus incentivized to follow these requirements.

While intended to help, this program now harms individuals who are too financially burdened to move. The NFIP was updated in 2023 to better reflect current needs, known as Risk Rating 2.0. NFIP Risk Rating 2.0 is supposed to provide more equitable flood insurance pricing based on individual risk, eliminating the need for individuals to pay for vacation homes in the area. Risk Rating 2.0, aimed at stopping development in floodplains and moving people out who are at greater risk of damage, has caused rates to increase in

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42. See Klein & Zellmer, *supra* note 40, at 1473-1483 (discussing federal U.S. responses to flooding around the Mississippi River and the nation).

43. *Id.* at 1483.

44. NAT’L FLOOD INSURANCE PROGRAM (NFIP): FLOODPLAIN MGMT. REQUIREMENTS, FEMA 2-8 (2005).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*



some places by as much as 700%.<sup>49</sup> Importantly, the formula for calculating rates is not available anywhere. Last year, ten states joined together to sue the Department of Homeland Security for lack of transparency.<sup>50</sup> This suit is currently pending and has largely stalled.<sup>51</sup> Furthermore, congressional action has also stalled, with only Gulf Coast representatives and senators supporting subsidies for rising premiums.<sup>52</sup> Despite inaction on this front, there has been some momentum with legislative action regarding climate change.

#### *D. The Inflation Reduction Act and Its Applications*

In addition to the NFIP, major climate change legislation changes the potential scope of response from the federal government—and the potential for takings. The federal government generally responds slowly to climate change needs, but now agencies have tools to respond. Passed in 2022, the Inflation Reduction Act (IRA) is the largest piece of climate change and environmental legislation in United States history.<sup>53</sup> The IRA provides new funding and reallocates previous funding to agencies to respond to the effects of climate change.<sup>54</sup> Under the IRA’s framework, agencies disperse money at their own discretion.<sup>55</sup> Agencies must use part of their funds to aid environmental justice communities with climate change and environmental problems, in compliance with the Executive Order turned law: Justice40.<sup>56</sup>

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49. Thomas Frank, *The Fight Against Rising Flood Insurance Rates Stalled in 2023*, CLIMATEWIRE (Dec. 19, 2023, 6:14 AM), <https://subscriber.politicopro.com/article/eenews/2023/12/19/the-fight-against-rising-flood-insurance-rates-stalled-in-2023-00132346>.

50. *Louisiana v. Mayorkas*, No. 2:23-cv-01839 (E.D. La., June 1, 2023).

51. See Clark Mindock, *Louisiana Asks Court to Temporarily Block Biden Flood Insurance Rate Hike*, REUTERS (June 15, 2023), <https://www.reuters.com/legal/government/louisiana-asks-court-temporarily-block-biden-flood-insurance-rate-hike-2023-06-15/> (detailing the lack of movement in the case since the initial filing).

52. *Id.*

53. *Inflation Reduction Act Guidebook*, WHITE HOUSE, <https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/> (last visited Nov. 17, 2024).

54. *Id.*

55. *Id.*

56. *Id.*; Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Jan. 27, 2021). Environmental justice is the “just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people: are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.” *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> (last visited May 15, 2024).

Justice40 is a first-of-its-kind tool to address environmental justice issues at the agency level.<sup>57</sup> This initiative began as an executive order later bolstered by the IRA, Bipartisan Infrastructure Law, and the American Rescue Plan.<sup>58</sup> Executive Order 14008, known as Justice40, directs that “40% of overall benefits of certain Federal investments [should] flow to disadvantaged communities that are marginalized by underinvestment and overburdened by pollution.”<sup>59</sup> Agencies are now required to use the Climate and Economic Justice Screening Tool to identify communities that can benefit from their Justice40 programs.<sup>60</sup> This tool measures burdens in eight categories: climate change, energy, health, housing, legacy pollution, transportation, water and wastewater, and workforce development.<sup>61</sup> Once identified, agencies can use the data to implement their programs in these communities.

The Environmental Protection Agency (EPA) and HUD have different IRA-funded programs to address climate resilience and communities.<sup>62</sup> EPA’s Environmental and Climate Justice Block Grant is focused on flood resilience and adaptation projects benefitting disadvantaged communities.<sup>63</sup> The Community Development Block Grant (CDBG) is a program under HUD to help rebuild disaster-impacted areas and provide starter money to recover in the long-term.<sup>64</sup> CDBGs focus primarily on local infrastructure and look to ensure benefits are not replicated.<sup>65</sup> The CDBG program launched the National Disaster Resilience Competition.<sup>66</sup> This was a one-time competition to award grant money to 13 recipients to help recover from

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57. *Justice40: A Whole-of-Government Initiative*, WHITE HOUSE, <https://www.whitehouse.gov/environmentaljustice/justice40/> (last visited Nov. 17, 2024).

58. *Id.*

59. *Id.*

60. EXEC. OFF. OF THE PRESIDENT, M-23-09, Memorandum for the Heads of Executive Departments and Agencies (2023), [https://www.whitehouse.gov/wp-content/uploads/2023/01/M-23-09\\_Signed\\_CEQ\\_CPO.pdf](https://www.whitehouse.gov/wp-content/uploads/2023/01/M-23-09_Signed_CEQ_CPO.pdf).

61. *About, CLIMATE AND ECON. JUST. SCREENING TOOL*, <https://screeningtool.geoplatform.gov/en/about#> (last visited Dec. 14, 2024). Notably, although not key to the analysis in this Note, the Climate and Economic Justice Screening Tool maps out only federally recognized Tribes, leaving non-recognized communities at a potential disadvantage. *Id.*

62. Hannah Peris, *Breaking Down the Environmental Justice Provisions in the 2022 Inflation Reduction Act*, ENV’T & ENERGY L. PROGRAM, (Aug. 12, 2022), <https://eelp.law.harvard.edu/2022/08/ira-ej-provisions/>; HUD Announces 24 Programs to Join Biden-Harris Administration Justice40 Initiative, HUD (July 15, 2022), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/hud\\_no\\_22\\_132](https://www.hud.gov/press/press_releases_media_advisories/hud_no_22_132).

63. *Inflation Reduction Act Environmental and Climate Justice Program*, EPA, <https://www.epa.gov/inflation-reduction-act/inflation-reduction-act-environmental-and-climate-justice-program> (last visited Nov. 17, 2024).

64. *Community Development Block Grant Disaster Recovery Grant Funds*, HUD, [https://www.hud.gov/program\\_offices/comm\\_planning/cdbg-dr](https://www.hud.gov/program_offices/comm_planning/cdbg-dr) (last visited Nov. 17, 2024).

65. *National Disaster Resilience*, HUD, [https://www.hud.gov/program\\_offices/comm\\_planning/cdbg-dr/ndr](https://www.hud.gov/program_offices/comm_planning/cdbg-dr/ndr) (last visited Nov. 17, 2024).

66. *Id.*

major storms in 2011, 2012, and 2013.<sup>67</sup> This program requires flood insurance to receive federal funding and includes strict repercussions on funding if the grantee does not comply.<sup>68</sup> These requirements burden funding applicants and may lead to more damage, both physically and financially. In response, applicants may bring a takings claim to remedy such damage.

### *E. Takings Jurisprudence*

When the federal government acts under statutes like the IRA and deprives a person of property without due process, a citizen may bring a takings claim. The Takings Clause of the Fifth Amendment states: “Nor shall private property be taken for public use, without just compensation.”<sup>69</sup> A Takings Clause claim requires a two-step analysis.<sup>70</sup> First, a cognizable property interest must be established.<sup>71</sup> Second, if such an interest is established, the court determines if it has been taken.<sup>72</sup> In establishing a cognizable property interest, the court looks for “crucial indicia of a property right.”<sup>73</sup> The court further determines if the use of the property was within the owner’s title as part of their property rights.<sup>74</sup> A court must decide whether there is an “essential nexus” between a legitimate state interest and the condition imposed by the government.<sup>75</sup> If so, then the requirements of the condition placed on the landowner must be roughly proportionate to the public impact.<sup>76</sup> The court will decide whether the regulation has gone “too far,” depriving an individual of their right to the property.<sup>77</sup> Furthermore, the regulation must not deny the landowner of economically viable use of their land.<sup>78</sup> Finally, to establish a taking, the government must have taken affirmative action.<sup>79</sup>

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67. *National Disaster Resilience*, HUD, [https://www.hud.gov/program\\_offices/comm\\_planning/cdbg-dr/ndr](https://www.hud.gov/program_offices/comm_planning/cdbg-dr/ndr) (last visited Nov. 17, 2024).

68. Notice of National Disaster Resilience Competition Grant Requirements, 81 Fed. Reg. 36557, 36578 (June 7, 2016).

69. U.S. CONST. amend. V, cl. 5.

70. *Acceptance Ins. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009).

71. *Id.*

72. *Id.*

73. *Placer Mining Co. v. United States*, 98 Fed. Cl. 681, 686 (2011) (quoting *Conti v. United States*, 291 F.3d 1334, 1342 (Fed. Cir. 2002)).

74. *Placer Mining Co. v. United States*, 98 Fed. Cl. 681, 686 (2011) (quoting *M & J Coal Co. v. United States*, 47 F.3d 1148 (Fed. Cir. 1995)).

75. *See Nollan v. California Coastal Comm’n*, 483 U.S. 825, 837 (1987) (applying the Takings Clause analysis to a permit condition regulating the use of a property).

76. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

77. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

78. *Id.*

79. *Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016).

The Supreme Court has held that “government-induced flooding of a limited duration may be compensable” under the Takings Clause.<sup>80</sup> The repeated, temporary flooding of a forested area by the Army Corps of Engineers was found on remand to constitute a physical taking and was therefore not exempt from a takings claim.<sup>81</sup> *Arkansas Game* added this distinction to the four factors for considering a claim for flood takings previously set out by the Court.<sup>82</sup> First, the court must consider the duration of the invasion.<sup>83</sup> Second, it must examine the degree to which the invasion was intended or foreseeable.<sup>84</sup> Third, the court must look at the character of the land at issue and the owner’s reasonable “investment-backed expectations” regarding the land’s use.<sup>85</sup> Finally, it must look at the severity of the interference.<sup>86</sup> Additionally, *St. Bernard Parish* requires plaintiffs to show the damage to their property was worse than it would have been absent any government involvement.<sup>87</sup> A takings claim is a tool to obtain compensation for government action, including in the circumstances of flooding.

## II. TAKING BACK HABITABILITY: NEW ORLEANS AS A CASE STUDY

Despite uncontrollable factors, like historic redlining and exacerbated flooding from climate change, residents can control the resiliency of their homes through a takings action. While redlined and overburdened communities might have some form of relief through the Fourteenth Amendment, claims involving property rights have a clearer path to success. Takings claims can provide coastal citizens, such as those in New Orleans, with a route to hold the government accountable for property flooding resulting in financial deprivations. *Arkansas Game & Fish Comm’n v. United States* established that “government-induced flooding of limited duration may be compensable.”<sup>88</sup> Depriving already cash-strapped individuals of a way to access HUD-funded grants restricts individuals from ensuring they have a safe home in the face of climate change. Rising sea levels plus increased flooding events guarantees increased flood damage. A takings claim provides a form of relief for these individuals, which can then lead to

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80. Ark. Game & Fish Comm’n v. United States, 568 U.S. 23 (2012); Ark. Game & Fish Comm’n v. United States, 736 F.3d 1364, 1375 (2013).

81. Ark. Game & Fish Comm’n, 568 U.S. at 38.

82. *Id.* at 38.

83. *Id.* at 38-39.

84. *Id.* at 39.

85. *Id.*

86. Ark. Game & Fish Comm’n, 568 U.S. at 39.

87. St. Bernard Parish Gov’t v. United States, 887 F.3d 1354, 1362-63 (Fed. Cir. 2018).

88. Ark. Game & Fish Comm’n v. United States, 568 U.S. 23, 34 (2012).

a federal-level change. But first, recovery aid must be available through an organization such as NORA.

*A. The New Orleans Redevelopment Authority and the Community Adaptation Program*

NORA is a public agency, partnered with the Office of Resilience and Sustainability within the New Orleans government, focused on mitigation and adaptation since Hurricanes Katrina and Rita.<sup>89</sup> Following Hurricanes Katrina and Rita, the state of Louisiana provided funds to hurricane victims to rebuild their homes through the Road Home Program.<sup>90</sup> The Road Home Program offered residents three options: use a grant from the state and rebuild their property; sell their property to the state and leave; or do a land swap with the state to relocate within New Orleans.<sup>91</sup> The land swap left the State of Louisiana with more properties than it could manage, so it turned to NORA to return these properties to commercial use.<sup>92</sup>

NORA then implemented programs to build green infrastructure while also creating wealth amongst its clients by helping them purchase blighted properties around them.<sup>93</sup> NORA is a recipient of the 2014 HUD National Disaster Resilience Competition grant.<sup>94</sup> This grant has funded the Community Adaptation Program, which began as the Gentilly Resilience District.<sup>95</sup> The City of New Orleans has proposed expanding this program to the entire city, dependent on funding.<sup>96</sup> Currently, the program is still confined to the Gentilly neighborhood.<sup>97</sup> The grants are for climate resiliency projects for homes but have largely been used to create more permeable driveways.<sup>98</sup> Permeable surfaces are critical in New Orleans as the city sits

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89. NEW ORLEANS REDEVELOPMENT AUTH., <https://noraworks.org/> (last visited Dec. 9, 2024).

90. David Hammer, *Behind the Key Decision That Left Many Poor Homeowners Without Enough Money to Rebuild After Katrina*, PROPUBLICA (Dec. 13, 2022), <https://www.propublica.org/article/why-louisiana-road-home-program-based-grants-on-home-values>.

91. *Recovery Snapshot: Louisiana Road Home—Homeowner Compensation and Initiatives*, HUD, [https://www.hud.gov/sites/documents/DOC\\_22578.PDF](https://www.hud.gov/sites/documents/DOC_22578.PDF) (last visited Dec. 9, 2024).

92. *About New Orleans Redevelopment Authority*, NEW ORLEANS REDEVELOPMENT AUTH., <https://noraworks.org/about#history> (last visited Dec. 9, 2024).

93. *Id.*

94. *Community Adaptation Program*, NEW ORLEANS REDEVELOPMENT AUTH., <https://noraworks.org/programs/land/community> (last visited Dec. 9, 2024).

95. *NORA/60 2024-2028 Strategic Plan*, NEW ORLEANS REDEVELOPMENT AUTH. 6 (2023), <https://noraworks.org/images/NORA-StrategicPlan-2023.pdf>.

96. *Id.*

97. *Id.*

98. Anna Staropoli, *Resilience Playbook in Gentilly Offers Model for Flood-Prone Cities*, NEW ORLEANS REDEVELOPMENT AUTH. (June 7, 2023), <https://noraworks.org/news/160-resilience-playbook-in-gentilly-offers-model-for-flood-prone-cities>.

below the water table on a normal day, let alone when there is flooding from a natural disaster or large amounts of rainfall.<sup>99</sup>

The requirements for the Community Adaptation Program grant funding are: (1) the applicant must own and reside in the property listed on the application, and (2) household income is low to moderate under the HUD definition.<sup>100</sup> Despite this seemingly low bar, NORA heavily considers whether an applicant has flood insurance.<sup>101</sup> Flood insurance protects the organization and assures NORA that the grant recipient has a strong safety net aside from the improvements under the program.<sup>102</sup> While this program has seen great success, the flood insurance requirement poses a great barrier to individuals trying to stay rooted in their homes and communities. Despite an opportunity to protect their homes, applicants are also burdened by insurance requirements they cannot meet when flood insurance is unaffordable or otherwise inaccessible.

### B. Standing as a Threshold Issue

As a preliminary matter for a takings claim against HUD, the homeowners who apply for the Community Adaptation Program must have standing. *Lujan v. Defenders of Wildlife* established three elements required to have standing to bring an action. First, the plaintiff must have suffered an “injury in fact” that invaded a “legally protected interest” of the party that is “concrete and particularized” and “actual or imminent.”<sup>103</sup> Second, there must be a causal connection between the injury and the defendant’s conduct that is “fairly . . . trace[able]” and not the result of a party’s actions outside of the court.<sup>104</sup> Third, it must be likely that court action can redress the injury.<sup>105</sup>

Applicants for the Community Adaptation Program meet all three requirements of standing. Applicants who would be denied for lack of flood

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99. See Missy Wilkinson, *Managing Water with Permeable Paving Benefits Owner and the Neighborhood*, NOLA.COM (Sept. 4, 2019), [https://www.nola.com/entertainment\\_life/home\\_garden/managing-water-with-permeable-paving-benefits-owner-and-the-neighborhood/article\\_3300f630-cb76-11e9-9567-b3e72635fd58.html](https://www.nola.com/entertainment_life/home_garden/managing-water-with-permeable-paving-benefits-owner-and-the-neighborhood/article_3300f630-cb76-11e9-9567-b3e72635fd58.html) (highlighting a resident’s approach to protecting property through permeable surfaces).

100. *Community Adaptation Program FAQs*, NEW ORLEANS REDEVELOPMENT AUTH., <https://noraworks.org/images/FAQs.pdf> (last visited Dec. 9, 2024).

101. *Community Adaptation Program Pre-Application and Additional Information*, NEW ORLEANS REDEVELOPMENT AUTH., (APR. 27, 2023) [https://noraworks.org/images/CAP\\_App\\_0427232\\_Flattendd.pdf](https://noraworks.org/images/CAP_App_0427232_Flattendd.pdf).

102. See generally Michael Smerkanich, *Floods Happen: The Importance of Flood Insurance for Homeowners*, WTW (Sep. 3, 2024), <https://www.wtwco.com/en-us/insights/2024/09/floods-happen-the-importance-of-flood-insurance-for-homeowners> (discussing the financial stability that can come with flood insurance).

103. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

104. *Id.*

105. *Id.*

insurance can prove they have suffered an “injury in fact” from HUD. Not being able to receive the grant money to install permeable pavers and other water management options will cause further water damage to their homes. Because the New Orleans area has a history of redlining that impacts home values, these applicants are unlikely to be financially secure enough to afford to retrofit their properties. Therefore, a causal connection can be established between the government action of redlining and the impact on the value of these homes. Finally, a court removing the barrier of needing cost-prohibitive flood insurance would redress the issue. Based on these elements, New Orleans residents applying for this program will have standing to bring a takings claim.

### C. Applying *Arkansas Game & Fish Standard*

The Court in *Arkansas Game & Fish* laid out an instructive standard to evaluate takings claims for temporary flooding and held that seasonally recurring flooding constitutes a taking.<sup>106</sup> A taking occurs where “superinduced additions of water [invade real estate] so as to effectually . . . impair its usefulness.”<sup>107</sup> To establish a claim for takings under the *Arkansas Game* model, a court looks to five elements: (1) the time or duration of the impact; (2) foreseeability of the result of the government’s actions; (3) severity of invasion; (4) character of the land at issue; and (5) landowner’s reasonable investment-backed expectations.<sup>108</sup> Based on the *Arkansas Game* standard, the NORA applicants who would be denied for lack of flood insurance have a strong case for a takings claim.

First, the increasing probability of high-tide or “sunny-day” flooding likely satisfies the time and duration requirement, as New Orleans will experience more flooding.<sup>109</sup> NOAA projected Grand Isle, Louisiana to have between four and eight high-tide flooding days in 2022.<sup>110</sup> In 2050, 200-245

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106. *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 38–40 (2012); *See also* *United States v. Cress*, 243 U.S. 316, 328 (1917) (“But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking. . . . Where the government by the construction of a dam or other public works so (sic) floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the 5th Amendment”) (quoting *United States v. Lynah*, 188 U.S. 445, 470 (1903)).

107. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1872).

108. *Ark. Game & Fish Comm’n*, 568 U.S. at 38–40.

109. *What is high tide flooding?*, NOAA, <https://oceanservice.noaa.gov/facts/high-tide-flooding.html> (last visited Nov. 17, 2024) (defining high-tide flooding, also known as sunny day flooding, as “occur[ing] when sea level rise combines with local factors to push water levels above the normal high tide mark”).

110. *Annual High Tide Flooding Outlook*, TIDES & CURRENTS, <https://tidesandcurrents.noaa.gov/high-tide-flooding/annual-outlook.html> (last visited Dec. 1, 2024) (select 2022 for the year then find Grand Isle, La.).

days are projected for high-tide flooding.<sup>111</sup> While Grand Isle is on the outer edge of New Orleans, this trend indicates the increased likelihood of sunny-day flooding in the greater New Orleans area. It is uncertain whether climate change will cause more landfall from hurricanes. However, the U.S. Global Change Research Program and the Intergovernmental Panel on Climate Change project there will be higher wind speeds and heavier rains.<sup>112</sup> Therefore, consistently higher and more frequent levels of flooding and rainfall are generally expected in all situations.

Second, considering foreseeability, the United States government is well aware of the danger of flooding for homes in New Orleans. On average, there is a single billion-dollar disaster every three weeks.<sup>113</sup> The compounding impacts from climate change—including other socioeconomic stressors like poverty and lack of adequate housing—especially affect overburdened communities.<sup>114</sup> The government already recognizes that climate change disproportionately impacts environmental justice communities. Therefore, HUD likely knows how much more prone New Orleans is to flood damage now than in the past. Even the Congressional Budget Office calculated expected increases in federal spending on hurricane damage due to climate change.<sup>115</sup> The Congressional Budget Office has estimated federal spending on hurricane damage will increase by \$6 billion by 2050.<sup>116</sup> Additionally, the costs of damage from these hurricanes will go from \$28 billion to \$39 billion.<sup>117</sup> The federal government is plainly aware of the expected cost of future flooding and damage from hurricanes.

Third, regarding the severity of invasion, the continual flooding of the applicants' properties constitutes a severe invasion. Continued invasions in "sufficient number and for a sufficient time" can prove a taking.<sup>118</sup> Repeated low-level flooding can damage infrastructure. A study by the NYC EJ

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111. *Annual High Tide Flooding Outlook*, TIDES & CURRENTS, <https://tidesandcurrents.noaa.gov/high-tide-flooding/annual-outlook.html> (last visited Dec. 1, 2024) (select 2022 for the year then find Grand Isle, La.).

112. *Climate Change Indicators: Tropical Cyclone Activity*, EPA, <https://www.epa.gov/climate-indicators/climate-change-indicators-tropical-cyclone-activity> (last updated June 27, 2024).

113. ALLISON R. CRIMMINS ET AL., U.S. GLOB. CHANGE RSCH. PROGRAM, *Overview: Understanding Risks, Impacts, and Responses*, in THE FIFTH NAT'L CLIMATE ASSESSMENT 17 (2023), [https://nca2023.globalchange.gov/downloads/NCA5\\_2023\\_FullReport.pdf](https://nca2023.globalchange.gov/downloads/NCA5_2023_FullReport.pdf) ("Between 2018 and 2022, the U.S. experienced 89 billion-dollar events ... including ... 6 floods, 52 severe storms, [and] 18 tropical cyclones[.]").

114. *Id.*

115. See *Potential Increases in Hurricane Damage in the United States: Implications for the Federal Budget*, CONG. BUDGET OFF. 1 (June 2, 2016), <https://www.cbo.gov/publication/51518> (detailing the Congressional Budget Office's estimate of "the magnitude of the increases in hurricane damage and the associated amounts of federal aid if historical patterns [of climate change] hold").

116. *Id.* at 2.

117. *Id.*

118. *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-330 (1922) ("Every successive trespass adds to the force of the evidence.").



Climate Resilience Board found building materials exposed to chronic tidal flooding “may retain moisture.”<sup>119</sup> This can cause mold, leading to respiratory diseases.<sup>120</sup> When New Orleans homes experience chronic tidal flooding on top of decades of damage from Hurricanes Katrina and Rita, residents are likely to experience continuous damage to their home and health complications arising from perpetual dampness.

Fourth, the Court has measured the character of the land-at-issue element by looking at characteristics such as the land’s elevation and location.<sup>121</sup> Despite, or perhaps because of, a 300-year period of development, New Orleans is shaped like a bowl.<sup>122</sup> The floodwalls on either side protect the city from the Mississippi River and Lake Pontchartrain.<sup>123</sup> The entire city is below the average annual highwater of the Mississippi River and roughly a third is below Lake Pontchartrain.<sup>124</sup> New Orleans is predisposed to flooding, yet filled with residential homes. Most are primary residences, not secondary residences. This composition of residences adds to the character of the land for a takings claim because individuals have a direct stake in their land.

Fifth, and finally, the analysis for the landowner’s reasonable investment-backed expectations is straightforward. The landowners *live* here. They stay in New Orleans despite extreme events, repairing their homes and trying to become more resilient to climate change. These landowners are trying to make their land more permeable by applying to NORA’s program. They are not passive homeowners but are actively trying to make their homes and land more habitable when facing increased potential for damage.

#### *D. The St. Bernard Parish Problem*

Despite the validity of a takings claim, courts have dragged their feet in recognizing the impacts of climate change flood damage in the legal field. In 1965, Congress authorized the Army Corps of Engineers to construct levees and basins along the Mississippi River-Gulf Outlet (MRGO) to control flooding resulting from hurricanes.<sup>125</sup> In 2005, Hurricane Katrina brought catastrophic flooding to St. Bernard Parish and the Lower Ninth Ward areas,

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119. *Chronic Tidal Flooding*, NYC MAYOR’S OFF. OF CLIMATE & ENV’T JUST., <https://climate.cityofnewyork.us/challenges/chronic-tidal-flooding/> (last visited Dec. 1, 2024).

120. *Id.*

121. *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 39 (2012).

122. TIM BRALOWER & DIANE MAYGARDEN, PENN. STATE UNIV., *Module 1 Lab B: City Profile of New Orleans, Louisiana, USA*, in *EARTH 107N - COASTAL PROCESSES, HAZARDS, AND SOCIETY*, <https://www.e-education.psu.edu/earth107/node/867> (last visited Nov. 17, 2024).

123. *Id.*

124. *Id.*

125. *St. Bernard Parish Gov’t v. United States*, 887 F.3d 1354, 1358 (Fed. Cir. 2018).

exacerbated by “the largest storm surge elevations” in U.S. history.<sup>126</sup> The Federal Claims Court found a causal link between the increased storm surge in the area and the construction and subsequent lack of maintenance to the MRGO.<sup>127</sup> In fact, the court in the 2015 proceeding found the environmental effects of the Corps action and inaction foreseeable at least by 2004.<sup>128</sup> However, the 2018 court, when faced with a clear connection between government action and deprivation of a property right, decided “the failure of the government to properly maintain the channel” could not be the basis of a takings claim when it should have been made in torts.<sup>129</sup> Now, plaintiffs must show the damage to the property was worse than the damage that would have occurred absent any government involvement.<sup>130</sup>

The NFIP requirement is a direct government action—unlike in *St. Bernard Parish* where the court found a distinct *lack* of action—which therefore meets the action component of takings. According to *St. Bernard Parish*, a property loss is only compensable as a taking where the invasion is the “direct, natural, or probable result of authorized government action.”<sup>131</sup> Rather than taking affirmative action, the Army Corps of Engineers failed to repair the erosion around the banks, which caused the channel to widen.<sup>132</sup> The court maintained this view on takings from the 1920s requiring direct action from the government for liability.<sup>133</sup> However, such an argument no longer stands in the time of climate change.

Recent litigation following Hurricane Harvey in Houston recognized cognizable property interests in the face of climate change.<sup>134</sup> Following a rainfall of 50 inches in three days, substantial flooding affected residents upstream of a dam.<sup>135</sup> The Army Corps of Engineers released the dam to relieve this flooding.<sup>136</sup> This action by the Corps to relieve upstream residents caused flooding to downstream parties as well.<sup>137</sup> Despite this action, the court still chose not to consider the takings claim.<sup>138</sup> The United States government has published information expecting flooding and extreme events to increase. Applicants’ homes that were denied supportive funding

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126. *St. Bernard Parish*, 887 F.3d at 1358 (quoting *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d 644, 678 (E.D. La. 2009)).

127. *St. Bernard Parish Gov’t v. United States*, 121 Fed. Cl. 687, 741 (2015).

128. *Id.* at 723.

129. *St. Bernard Parish*, 887 F.3d at 1358–59.

130. *Id.*

131. *Id.* at 1360.

132. *Id.*

133. *Sanguinetti v. United States*, 264 U.S. 146, 147–49 (1924).

134. *Milton v. United States*, 36 F.4th 1154 (Fed. Cir. 2022).

135. Jake Bittle, *THE GREAT DISPLACEMENT* 156 (Simon & Schuster 2023).

136. *Milton v. United States*, 36 F.4th 1154, 1158 (Fed. Cir. 2022).

137. *Id.*

138. *Id.* at 1162–63.

will almost certainly flood in the future. It is undeniable that increasing exposure to floodwater is inevitable.

Depriving aid because of these flood insurance requirements will only exacerbate the consequences from climate-driven extreme flooding. While individuals could predict the seasonally recurring flooding prior to the CDBG-funded program, individuals could not have predicted the increasing severity of climate-driven flooding when they chose to live in their homes. The government's direct actions have exacerbated the issue. Although not an explicit right, depriving people of funding opportunities greatly impacts homeowners' ability to keep their homes in the face of increased flooding. It is not acceptable to argue that holding the government responsible for this taking will stop them from taking action to protect the public interests in the future.<sup>139</sup> The *St. Bernard Parish* ruling was therefore incorrect and may mislead rulings on government takings claims for flooding in the future.

#### *E. An Equal Protection Claim Would Fail*

Relying on a 14th Amendment discrimination claim to correct how the government awards funding would only lead to failure because the Supreme Court rarely finds a law discriminatory.<sup>140</sup> To successfully bring a claim that a law is discriminatory, the Court requires a showing of both clear discriminatory intent and discriminatory impact.<sup>141</sup> The Court will uphold facially neutral laws with a discriminatory impact if the decision to discriminate was made in spite of, not because of, its impacts.<sup>142</sup> The Court established three ways of demonstrating discriminatory purpose: (1) if there is extreme enough discriminatory impact, a court may infer purpose; (2) the historical background of the government act or statute or general history of the states; and (3) the legislative or administrative history.<sup>143</sup> If the plaintiff cannot prove a discriminatory purpose, then the government does not need to offer a facially neutral explanation for the disparate impact. Rather, the government simply needs to show that the action is rationally related to a legitimate government purpose.<sup>144</sup>

Proving discriminatory impact, even when apparent, is difficult in practice. The Court requires proof of discriminatory intent by those who

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139. J. Scott Pippin & Mandi Moroz, *But Flooding Is Different: Takings Liability for Flooding in the Era of Climate Change*, 50 ELR 10920, 10921 (2020).

140. *Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court*, CONST. ANNOTATED, <https://constitution.congress.gov/resources/unconstitutional-laws/> (last visited Dec. 2, 2024).

141. *Washington v. Davis*, 426 U.S. 229, 238 (1976).

142. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

143. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977).

144. *See Palmer v. Thompson*, 403 U.S. 217, 227 (1971) (holding even if the government meets rational basis, they still must provide a reason).

implemented the facially neutral law.<sup>145</sup> When faced with a statistically backed pattern of structural racism showing Black men were more likely to be sentenced to death than white men, the Court found no discrimination, despite clear discriminatory impact.<sup>146</sup> The Court recognized a discriminatory pattern that directly impacted Black men and disregarded the discriminatory impact.

Here, the regulation is facially neutral as the statute states that a grant recipient “must obtain and maintain” flood insurance to receive funding.<sup>147</sup> And Congress surely meant to protect people and everyone’s financial interests with this requirement. Although the impact from home loss may seem extreme enough to find discriminatory intent, the Court has rarely held a law discriminatory under this method. Based on the well-documented history of redlining and the federal government’s active role in discriminatory housing practices, an Equal Protection Claim holds some degree of possibility. However, even when the federal government recognizes discriminatory practices by agencies, white individuals who believe they are now on uneven footing often challenge the corrective legislation.<sup>148</sup>

Here, the discriminatory impact can potentially cost people their lives and homes. People who are systematically discriminated against through other laws are now losing their homes because they cannot afford the sky-high premiums required to receive federal assistance. This is a facially neutral law with a discriminatory impact, but the courts will likely not recognize this. So, an equal protection claim would almost surely fail. Therefore, applicants should instead consider a takings claim.

### III. A CHANCE TO FIX CLIMATE REDLINING NOW

#### *A. Impacts on States and Individuals*

While the NFIP Risk Rating 2.0 program more accurately reflects flood risk, it indirectly burdens homes and communities of color in areas at greater risk. Addressing the federal government’s liability under the IRA and Justice40 initiatives to not require flood insurance is important to minimize

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145. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

146. *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987).

147. Notice of National Disaster Resilience Competition Grant Requirements, 81 Fed. Reg. 36558, 36578.

148. *See Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999) (using the word “disadvantaged” allowed white farmers to challenge corrective legislation meant to fix a well-established practice of denying farm loans to Black farmers). The IRA similarly uses the word “disadvantaged” to identify environmental justice communities with only one definition for disadvantaged community, stating the Secretary of Energy determines if a community is “economically, socially, or environmentally disadvantaged.” 42 U.S.C. § 18795(d)(1).

the strain on federal and state spending. Over the past 30 years, FEMA spent \$347 billion in disaster relief funding.<sup>149</sup> This equates to “roughly \$12 billion” per year.<sup>150</sup> Supplemental disaster recovery spending increased since Hurricane Katrina in 2005.<sup>151</sup> Congress struggles to resolve if and how it will increase FEMA’s budget in the face of increasing disasters. Dropping the flood insurance requirement that stops individuals from strengthening their homes will help minimize the effects of a disaster by allowing individual homeowners to adapt and prepare rather than merely react and recover after each storm.

States specifically suffer without federal funding for individuals as the state ends up footing the bill when FEMA does not fully meet the needs of an impacted community. Ten states and multiple counties and municipalities are suing the Department of Homeland Security for FEMA’s new methodology to determine NFIP rates: Risk Rating 2.0 – Equity in Action. Plaintiffs claim FEMA did not follow “substantive and procedural requirement[s],” leaving applicants and local governing bodies to wonder how the steep increases in coverage came to be.<sup>152</sup> Under the new Risk Rating 2.0, one zip code in New Orleans will see an increase in policies from \$797 per year to \$1,368 per year.<sup>153</sup> Gentilly, New Orleans—the location of the Gentilly Resilience District—will see a hike in coverage from \$797 per year to \$1,429 per year.<sup>154</sup> Just in the last two years, more than 20 insurance companies have left Louisiana.<sup>155</sup> Insurance is becoming increasingly difficult to find in the private sector, let alone NFIP-backed companies.

### *B. Takings Claims in the Face of Climate Change*

Homeowners bringing successful takings claims against HUD’s requirements could lead to further takings claims where government action condemns homeowners to stay in homes that cannot be made more resilient. Then the federal government would either face further litigation or have to change the bar for aid. To prevent this, communities could use Justice40 and IRA legislation as a baseline to get funding out to community-based

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149. *FEMA’s Disaster Relief Fund: Budgetary History and Projections*, CONG. BUDGET OFF. (Nov. 2022), <https://www.cbo.gov/publication/58840>.

150. *Id.*

151. *Id.*

152. Complaint at 7, *Louisiana v. Mayorkas*, 2:23-cv-01839 (E.D. La. June 1, 2023).

153. *Cost of Flood Insurance for Single-Family Homes under NFIP’s Pricing Approach*, FEMA, <https://www.fema.gov/flood-insurance/work-with-nfip/risk-rating/single-family-home> (last visited Nov. 17, 2024) (download Example 2, 3, and 4 data, then look at zip code 70117 under the Exhibit 3 tab).

154. *Id.* (look at zip code 70122 under Exhibit 3 tab).

155. *At Least 20 Insurance Companies Leave Louisiana in Past 2 Years Due to ‘High Climate Risk’*, ABC13 (July 18, 2023), <https://abc13.com/farmers-insurance-companies-leaving-states-aaa-what-are-high-climate-risk/13518796/>.

organizations. Homeowners can then use funding to retrofit homes for increased sunny-day flooding and sea level rise until communities can relocate.

Rather than relying on one federal program to address this issue, the government should adopt an intersectional approach, since climate change is an intersectional issue.<sup>156</sup> If HUD removes the flood insurance requirement, HUD could instead combine with the available EPA programs to build up the resiliency of the community. For example, HUD could use the Environmental and Climate Justice Community Change Grants to directly target communities that have been subject to “historical disinvestments.” However, this program will not be available to communities in incorporated areas. It would provide aid for tribes in Alaska, tribes elsewhere, territories, disadvantaged unincorporated communities, and U.S.-Southern border communities.

A better option, which has already awarded a similar group with a similar purpose, would be the Environmental Justice Government-to-Government Program. This program encourages government agencies to work with organizations on the ground. One of the recipients, 2CMississippi, is converting abandoned, blighted properties into parks for flood mitigation through green infrastructure.<sup>157</sup> This is extremely similar to NORA’s work. Additionally, it is one of the tenants of good practice in the environmental justice field for practitioners to work with the organizations on the ground to better understand the aid they need.

### *C. Alternative Responses: New York City*

Rather than taking a litigation route, cities can instead make climate justice plans. For example, New York City created the Mayor’s Office of Climate and Environmental Justice to respond to the major effects of climate change specific to coastal cities.<sup>158</sup> This office created a map of the city based on the social vulnerabilities of communities.<sup>159</sup> Beginning from this granular level allows the city to respond to issues rooted in systemic racism that require a more nuanced approach.

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156. Skyler Jackson & Cam Humphrey, *Yale Experts Explain Intersectionality and Climate Change*, YALE SUSTAINABILITY (July 28, 2022), <https://sustainability.yale.edu/explainers/yale-experts-explain-intersectionality-and-climate-change>.

157. *2021 Environmental Justice Small Grants Program: Project Summaries by EPA Region*, EPA (2021), [https://www.epa.gov/system/files/documents/2021-12/2021-selected-ejsg-project-descriptions\\_0.pdf](https://www.epa.gov/system/files/documents/2021-12/2021-selected-ejsg-project-descriptions_0.pdf).

158. NYC MAYOR’S OFF. OF CLIMATE & ENV’T JUST., <https://climate.cityofnewyork.us/> (last visited Nov. 17, 2024).

159. EJNYC Full Data Explorer, NYC MAYOR’S OFF. OF CLIMATE & ENV’T JUST., <https://experience.arcgis.com/experience/6a3da7b920f248af961554bdf01d668b/page/Data-Explorer/> (last visited Nov. 17, 2024).

In addition to this map, the Office of Climate and Environmental Justice created an interactive platform that provides transparent information on the increased risk of flooding in redlined and yellow-lined neighborhoods.<sup>160</sup> This platform lists solutions for residents to adopt or invest to help reduce the likelihood of flood damage to their homes.<sup>161</sup> Each section explains how some options will lower flood insurance or home insurance premiums.<sup>162</sup> However, one suggestion that stands out as unlikely to be useful on a larger scale is abandoning the first floor of a multi-floor home.<sup>163</sup> This suggestion is offered as an example of how a family could take steps to make their home more flood resilient without extra funding; however, this suggestion would place strain on most families because they would lose property value and sustain damage to the structure overall. While not every option is feasible for all families, having one spot that provides pathways forward to climate resilience is an excellent step towards protecting coastal populations.

#### CONCLUSION

The government's requirement that homeowners purchase flood insurance, though the options are scarce or exorbitantly priced, makes it incredibly difficult for many to live in coastal residences. Takings claims can combat this barrier and make habitability and climate resilience a reality for more people. Communities are already working to remain where they live, so funding should be more accessible. It has yet to be seen how the insurance industry will respond to the increased risks of climate change. Until then, the federal programs meant to help at-risk communities should not rely on the availability of this unstable industry.

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160. *Understanding Redlining*, CONSUMER FIN. PROT. BUREAU, [https://files.consumerfinance.gov/f/documents/cfpb\\_building\\_block\\_activities\\_understanding-redlining\\_handout.pdf](https://files.consumerfinance.gov/f/documents/cfpb_building_block_activities_understanding-redlining_handout.pdf) (last visited Jan. 13, 2025) “Yellow-lined” refers to an area that was considered “in decline.” *Id.*

161. *Flood Retrofits: Protect Your Property*, FLOODHELPNY, <https://floodhelpny.org/en/flood-retrofits> (last visited Nov. 17, 2024).

162. *Id.*

163. *Id.* (select “Abandon your first floor—Learn More” option).