

# NOTE

## The First American Climate Refugees and the Need for Proactive Relocation

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### ABSTRACT

*American disaster response under the Stafford Act currently provides only reactive responses to natural and man-made disasters, offering assistance to states under major disaster or emergency declarations once harm has occurred. In the age of climate change, where future disasters are accurately predictable and resulting harm is preventable, the United States should adopt a proactive response to disasters caused by climate change. The United States should create a framework to relocate its most vulnerable communities before recurring or future harm occurs. This Note proposes that a third category of disaster response be added to the Stafford Act for impending climate change disasters, which would trigger certain types of federal grants to assist with relocation of vulnerable communities facing the most critical effects of climate change. The addition of this new category of disaster comports with federalism requirements, preserving states' police power while capitalizing on the informational and financial benefits of a federal role in proactive adaptation to climate change. The grant of a federal impending climate change disaster declaration should be conditioned upon a cost share between states and the federal government and state adoption of climate change adaptation plans. These conditions are constitutional pursuant to the Spending Clause requirements of *South Dakota v. Dole*, and amending the Stafford Act to include impending climate change disasters does not fundamentally alter an existing conditioned receipt of federal funds such that it is a new program pursuant to *National Federation of Independent Business v. Sebelius*.*

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## INTRODUCTION

From 1932 to 2010, Louisiana lost more than 1,880 square miles of land to coastal erosion,<sup>1</sup> a landmass the size of Delaware.<sup>2</sup> Though coastal land loss has slowed since 2010, Louisiana still loses roughly a football field of land every one hundred minutes.<sup>3</sup> Despite slowing of

<sup>1</sup> BRADY R. COUVILLION ET AL., U.S. GEOLOGICAL SURVEY, LAND AREA CHANGE IN COASTAL LOUISIANA FROM 1932 TO 2010, at 4 (2011), [https://pubs.usgs.gov/sim/3164/downloads/SIM3164\\_Pamphlet.pdf](https://pubs.usgs.gov/sim/3164/downloads/SIM3164_Pamphlet.pdf) [<https://perma.cc/KY6X-6NXB>]; see Lynne M. Carter et al., *Chapter 17: Southeast and the Caribbean*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES 396, 401 (J.M. Melillo et al. eds., 2014), <http://nca2014.globalchange.gov/report/regions/southeast> [<https://perma.cc/NN36-E99X>].

<sup>2</sup> See Press Release, U.S. Geological Survey, USGS: Louisiana’s Rate of Coastal Wetland Loss Continues to Slow (July 12, 2017), <https://www.usgs.gov/news/usgs-louisiana-s-rate-coastal-wetland-loss-continues-slow> [<https://perma.cc/6HUL-88VX>].

<sup>3</sup> See *id.*

erosion, the state is projected to lose an additional 4,120 square miles in the next 50 years.<sup>4</sup> This rapidly disappearing land is not just uninhabited swampland—two million people live along Louisiana's coastline.<sup>5</sup>

Among the areas most affected by coastal land loss is the Isle de Jean Charles, a small barrier island that is home to members of the Biloxi-Chitimacha-Choctaw Tribe.<sup>6</sup> The island has lost more than 98% of its landmass in the last 60 years, with “only 320 of the island's original 22,400 acres” remaining.<sup>7</sup> Much of this rapid decline in landmass is attributed to a combination of rising seas, saltwater intrusion,<sup>8</sup> and subsidence.<sup>9</sup> Storm surge from hurricanes and continually rising seas, both of which are exacerbated by climate change, further expose Louisiana's wetlands to severe erosion.<sup>10</sup> With land rapidly disappearing into open water, Louisiana has decided it has “no choice but to resettlement communities” that cannot be fortified against coastal land loss.<sup>11</sup>

On September 17, 2014, the U.S. Department of Housing and Urban Development (“HUD”) announced the availability of funding for “disaster recovery and long-term community resilience” through the National Disaster Resilience Competition (“NDRC”).<sup>12</sup> The “NDRC was developed in response to requests from state, local, and tribal leaders seeking to build resilience and better prepare their communities for the impacts of climate change.”<sup>13</sup> The goal of the competition

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4 *A Changing Landscape*, COASTAL PROTECTION & RESTORATION AUTHORITY, <http://coastal.la.gov/whats-at-stake/a-changing-landscape> [https://perma.cc/NG43-KJLD].

5 *National Significance*, COASTAL PROTECTION & RESTORATION AUTHORITY, <http://coastal.la.gov/whats-at-stake/national-significance> [https://perma.cc/KT35-RUMT].

6 *See* ISLE DE JEAN CHARLES, LA., <http://www.isledejeancharles.com> [https://perma.cc/HRM4-HW4B].

7 ISLE DE JEAN CHARLES RESETTLEMENT PROJECT, <http://isledejeancharles.la.gov> [https://perma.cc/4EER-6VWF].

8 Saltwater intrusion is defined as “the surface movement of saltwater inland from the coast.” *Saltwater Intrusion*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/environment/energy-government-and-defense-magazines/saltwater-intrusion> [https://perma.cc/TTC2-EWJY].

9 *See The History*, COASTALRESETTLEMENT.ORG, <http://www.coastalresettlement.org/why-idjc.html> [https://perma.cc/7KBX-EWV2]. Land subsidence is defined as “a gradual settling or sudden sinking of the Earth's surface owing to subsurface movement of earth materials.” *Land Subsidence*, U.S. GEOLOGICAL SURV., <https://water.usgs.gov/ogw/subsidence.html> [https://perma.cc/XAM6-EJVM].

10 *See* Carter et al., *supra* note 1, at 398–99, 401.

11 DISASTER RECOVERY UNIT, STATE OF LA., NATIONAL DISASTER RESILIENCE COMPETITION: PHASE II APPLICATION 4 (2015), [http://www.doa.la.gov/OCDDRU/NDRC/NDRC\\_PII\\_Final\\_ExImg.pdf](http://www.doa.la.gov/OCDDRU/NDRC/NDRC_PII_Final_ExImg.pdf) [https://perma.cc/KZ3V-LTWM].

12 *National Disaster Resilience*, HUD EXCHANGE, <https://www.hudexchange.info/programs/cdbg-dr/resilient-recovery> [https://perma.cc/8HRT-4YN7].

13 Press Release, U.S. Dep't of Hous. & Urban Dev., HUD Awards \$1 Billion Through

was to help communities avoid future losses from climate change—exacerbated natural disasters.<sup>14</sup> State and local government units that had been sites of major disaster declarations in 2011, 2012, or 2013 were eligible to apply for grants from a one billion-dollar Community Development Block Grant (“CDBG”),<sup>15</sup> funded by the Disaster Relief Appropriations Act of 2013.<sup>16</sup> The competition aimed “to promote risk assessment, stakeholder engagement, and resilience planning in communities where the risks of disaster are projected to increase substantially due to climate change.”<sup>17</sup>

Louisiana applied to the NDRC, seeking resilience funding for the resettlement of the Isle de Jean Charles tribal community.<sup>18</sup> The state uniquely sought not just to resettle individual members of the community but to resettle the community as a whole to “build cultural resilience.”<sup>19</sup> Because the Biloxi-Chitimacha-Choctaw Tribe has a unique cultural identity, Louisiana was concerned that members of the tribe would be forced to move to disparate parts of the state, jeopardizing the tribe’s historical traditions.<sup>20</sup> Resettling the community as a whole would promote “cultural traditions . . . with the tribal members living in one community.”<sup>21</sup> Since there have been no community resettlements in response to climate change in the United States, Louisiana intends for this project to serve as a “pilot site for climate change relocation.”<sup>22</sup> Though Louisiana recognizes that resettlement is a controversial and complex approach to a changed coastal landscape, “not all territory can be maximized or preserved—some will be lost.”<sup>23</sup>

In 2016, HUD announced the winners of the NDRC and awarded Louisiana \$48.3 million to fund the resettlement of the Isle de Jean Charles, a community of fewer than 40 families.<sup>24</sup> Members of the

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National Disaster Resilience Competition (Jan. 21, 2016), <https://archives.hud.gov/news/2016/pr16-006.cfm> [<https://perma.cc/2TWA-DPB8>].

<sup>14</sup> See *National Disaster Resilience Competition: Phase 2 Fact Sheet*, U.S. DEP’T OF HOUSING & URB. DEV. (June 2015), <https://www.hud.gov/sites/documents/NDRCFACTSHEETFINAL.PDF> [<https://perma.cc/L6W2-7TR9>].

<sup>15</sup> *National Disaster Resilience*, *supra* note 12.

<sup>16</sup> Pub. L. No. 113-2, 127 Stat. 4, 15–18 (codified as amended in scattered sections of 7 U.S.C.); see Press Release, U.S. Dep’t of Hous. & Urban Dev., *supra* note 13.

<sup>17</sup> Press Release, U.S. Dep’t of Hous. & Urban Dev., *supra* note 13.

<sup>18</sup> DISASTER RECOVERY UNIT, *supra* note 11, at 105–09.

<sup>19</sup> *Id.* at 105.

<sup>20</sup> See *id.* at 105–06.

<sup>21</sup> *Id.* at 106–07.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 103.

<sup>24</sup> See Christopher Flavelle, *As This Town Slips into Sea, a \$48 Million Rescue Runs into*

community have since been dubbed “the First American ‘Climate Refugees.’”<sup>25</sup> However, they will not be the last. Other communities are already planning to resettle as rising seas and coastal erosion threaten their homes. Tribes in Alaska, including the Village of Newtok and the Alaska Native Village of Kivalina, have been searching for funding to assist in relocation as sea ice melts and they become exposed to more frequent flooding and rapid erosion.<sup>26</sup> The Hoh Indian Tribe, located on the Olympic Peninsula in Washington, is also attempting to relocate because flooding and storm surge have eroded nearly a third of the tribe’s reservation lands.<sup>27</sup>

Some of these communities found hope in HUD’s NDRC but are still seeking viable methods of relocation in the absence of being awarded funds. The Village of Newtok applied to the NDRC but did not receive funding for its relocation efforts.<sup>28</sup> Both Newtok and the Kivalina requested that the “mounting impacts of climate change” be declared a major disaster so that the communities can access funding to relocate.<sup>29</sup> However, both former President Obama and current President Trump declined to recognize the impacts of erosion and climate change in Alaska as a federal major disaster.<sup>30</sup> Both presidents found that a major disaster declaration was “not appropriate to ad-

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*Obstacles*, BLOOMBERG (July 3, 2017, 5:00 AM), <https://www.bloomberg.com/news/features/2017-07-03/louisiana-town-convulsed-by-relocation-as-climate-policy-shifts> [<https://perma.cc/927M-EDNV>]; Press Release, U.S. Dept. of Hous. & Urban Dev., *supra* note 13; ISLE DE JEAN CHARLES RESETTLEMENT PROJECT, *supra* note 7.

<sup>25</sup> Coral Davenport & Campbell Robertson, *Resettling the First American ‘Climate Refugees,’* N.Y. TIMES (May 2, 2016), [https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html?\\_r=0](https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html?_r=0) [<https://perma.cc/LG8P-WYHD>].

<sup>26</sup> See MAXINE BURKETT ET AL., CTR. FOR PROGRESSIVE REFORM, REACHING HIGHER GROUND: AVENUES TO SECURE AND MANAGE NEW LAND FOR COMMUNITIES DISPLACED BY CLIMATE CHANGE 1, 14 (2017), [http://progressivereform.org/articles/ReachingHigherGround\\_1703.pdf](http://progressivereform.org/articles/ReachingHigherGround_1703.pdf) [<https://perma.cc/J8E2-9VM5>]; *Relocating Kivalina*, U.S. CLIMATE RESILIENCE TOOLKIT, <https://toolkit.climate.gov/case-studies/relocating-kivalina> [<https://perma.cc/88A5-CY3J>].

<sup>27</sup> See BURKETT ET AL., *supra* note 26, at 16.

<sup>28</sup> See Associated Press, *Alaska Seeks Federal Money to Move a Village Threatened by Climate Change*, N.Y. TIMES (Oct. 3, 2015), [https://www.nytimes.com/2015/10/04/us/alaska-seeks-federal-money-to-move-a-village-threatened-by-climate-change.html?\\_r=0](https://www.nytimes.com/2015/10/04/us/alaska-seeks-federal-money-to-move-a-village-threatened-by-climate-change.html?_r=0) [<https://perma.cc/NV8U-ZNP8>]; *National Disaster Resilience*, *supra* note 12.

<sup>29</sup> Rachel Waldholz, *Alaskan Village, Citing Climate Change, Seeks Disaster Relief in Order to Relocate*, NPR (Jan. 10, 2017, 6:08 PM), <https://www.npr.org/2017/01/10/509176361/alaskan-village-citing-climate-change-seeks-disaster-relief-in-order-to-relocate> [<https://perma.cc/5UX4-9GXD>]; see FED. EMERGENCY MGMT. AGENCY, PRELIMINARY DAMAGE ASSESSMENT REPORT 0 (2017), <https://www.fema.gov/media-library-data/1490900410178-234ca3132a530fb3147aba56e9dec400/PDAReporDenial-KivalinaVillage.pdf> [<https://perma.cc/BX77-P6Q5>].

<sup>30</sup> Zach Fansler, *Lawmakers Disappointed by Rejection of a Federal Disaster Declaration for a Western Alaska Village*, ALASKA BUS. (Jan. 20, 2017), <http://www.akbizmag.com/Government/Lawmakers-Disappointed-by-Rejection-of-a-Federal-Disaster-Declaration-for-a-Western>

dress the situation.”<sup>31</sup> Future presidents are unlikely to deviate from this interpretation because rising seas, erosion, and other slow-building but imminent climate disasters are not enumerated as qualifying major disasters in the federal disaster-response framework.<sup>32</sup> Without recognition of the impacts of climate change, communities will be forced to experience the devastating effects of full erosion before the communities can be declared disaster areas and gain access to funding to relocate through the Federal Emergency Management Agency (“FEMA”) or HUD.<sup>33</sup>

This Note argues that a new category of disaster—an impending climate change disaster—should be added to the Stafford Act,<sup>34</sup> the framework for federal disaster assistance, to trigger nonemergency relocation mechanisms within the existing disaster-response framework before a slow-building climate change disaster actually occurs. Part I of this Note examines recent scientific predictions of climate change in the United States and methods of responding to climate change. Part II discusses the existing federal disaster-response framework under the Stafford Act and the home buyout programs currently available through FEMA and HUD grants. Part II also critiques those programs from a perspective informed by climate change. Part III argues that a new category of disaster response for impending climate change disasters should be added to the Stafford Act’s existing disaster-response framework to make nonemergency relocation efforts possible before a climate change disaster occurs. This new category need not trigger all disaster responses but rather should be limited to nonemergency responses, including grants to assist in relocation of communities available through FEMA and HUD. Part IV examines the conformity of a federal response to impending climate change disasters with federalism principles under the Tenth Amendment and the conditions on grants of these funds, through the lens of the Spending

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Alaska-Village [<https://perma.cc/2DXA-Z2SZ>]; see also 42 U.S.C. § 5122(2) (2012); FED. EMERGENCY MGMT. AGENCY, *supra* note 29, at 0.

<sup>31</sup> Rachel Waldholz, *Obama Denies Newtok’s Request for Disaster Declaration*, ALASKA PUB. MEDIA (Jan. 18, 2017), <https://www.alaskapublic.org/2017/01/18/obama-denies-newtoks-request-for-disaster-declaration> [<https://perma.cc/ZX9K-3JUT>]; see FED. EMERGENCY MGMT. AGENCY, *supra* note 29, at 0.

<sup>32</sup> In fact, the only “gradual biophysical process” listed as a major disaster in the Stafford Act is drought. See 42 U.S.C. § 5122(2) (2012); Jennifer J. Marlow & Lauren E. Sancken, *Reimagining Relocation in a Regulatory Void: The Inadequacy of Existing U.S. Federal and State Regulatory Responses to Kivalina’s Climate Displacement in the Alaskan Arctic*, 7 CLIMATE L. 290, 304 n.71 (2017).

<sup>33</sup> See *infra* note 74 and accompanying text.

<sup>34</sup> 42 U.S.C. §§ 5121–5208.

Clause requirements of *South Dakota v. Dole*<sup>35</sup> and *National Federation of Independent Business (“NFIB”) v. Sebelius*.<sup>36</sup>

## I. THE IMPENDING EFFECTS OF CLIMATE CHANGE

There is a scientific consensus that temperatures are rising worldwide and the climate is irreversibly changing.<sup>37</sup> Climate change will not be uniform across the United States,<sup>38</sup> and impacts of rising seas and erosion along the coasts will affect millions of people since coastal regions are densely populated.<sup>39</sup> The United States can either adapt to climate change proactively and avoid the costs of natural disasters such as floods and hurricanes on communities, or it can adapt reactively and incur the costs of emergency response.<sup>40</sup>

Surface temperature in the United States has risen 1.8 degrees Fahrenheit over the last 115 years, and temperatures are projected to continue rising by as much as 2.5 degrees Fahrenheit over the next few decades “under all plausible future climate scenarios.”<sup>41</sup> These rising temperatures have a complex effect on the environment, and other aspects of the global climate are changing as a result, including melting glaciers, diminishing snow, melting sea ice, rising sea levels, acidifying oceans, and increasing atmospheric water vapor.<sup>42</sup> Melting ice and the expansion of water as it warms have caused sea levels to rise.<sup>43</sup> Consequently, global sea level has risen a total of seven to eight inches since 1900 and is projected to further increase by one to four feet by 2100, although “[a] rise of as much as 8 feet by 2100 cannot be ruled out.”<sup>44</sup> In the northeastern United States and the Gulf of Mexico, an

<sup>35</sup> 483 U.S. 203 (1987).

<sup>36</sup> 567 U.S. 519 (2012).

<sup>37</sup> See D.J. Wuebbles et al., *Executive Summary*, in 1 CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT 1, 1–3 (D.J. Wuebbles et al. eds., 2017), [https://science2017.globalchange.gov/downloads/CSSR\\_Executive\\_Summary.pdf](https://science2017.globalchange.gov/downloads/CSSR_Executive_Summary.pdf) [<https://perma.cc/2D6X-X4AY>].

<sup>38</sup> See generally Jessica Blunden, *International Report Confirms 2016 Was Third Consecutive Year of Record Global Warmth*, NOAA CLIMATE.GOV (Aug. 10, 2017), <https://www.climate.gov/news-features/understanding-climate/international-report-confirms-2016-was-third-consecutive-year> [<https://perma.cc/EY8Y-NHNZ>].

<sup>39</sup> See *Coastal Flood Risks: Achieving Resilience Together*, FEMA, <https://www.fema.gov/coastal-flood-risks-achieving-resilience-together> [<https://perma.cc/2UKG-MHEU>].

<sup>40</sup> See Randall S. Abate, *Corporate Responsibility and Climate Justice: A Proposal for a Polluter-Financed Relocation Fund for Federally Recognized Tribes Imperiled by Climate Change*, 25 FORDHAM ENVTL. L. REV. 10, 17, 23 (2013).

<sup>41</sup> Wuebbles et al., *supra* note 37, at 1, 2.

<sup>42</sup> *Id.* at 1.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 2.

increase in sea level is projected to be even higher than the global average.<sup>45</sup> Sea-level rise will contribute to increases in coastal flooding and coastal erosion.<sup>46</sup>

The projected rise in both temperature and sea level will bring an increase in extreme weather.<sup>47</sup> Not only are the number of hurricanes and typhoons likely to rise, but the strength of these storms is likely to intensify.<sup>48</sup> Projections show that floods will become more frequent and severe, and a combination of flooding and saltwater intrusion from sea-level rise will threaten most major coastal cities in the United States.<sup>49</sup> Despite this constantly increasing threat, the slow pace of sea-level rise and erosion creates a false impression that climate change does not present an imminent threat.<sup>50</sup>

Both individual citizens and the U.S. economy will be significantly impacted by climate change. While the land area of coastal communities is relatively small compared to the land area of the contiguous United States, more than half the country's population and housing supply are located in coastal regions.<sup>51</sup> Because so much of the nation's infrastructure and population are concentrated in coastal areas, climate change is expected to have drastic impacts on the U.S. economy.<sup>52</sup> One study predicts that a rise in global average temperature by one degree Celsius would cause a loss of approximately 1.2% in U.S. gross domestic product.<sup>53</sup> And because the impacts of climate change will not be uniform across the United States, climate change is predicted to increase "between-county inequality," with the highest impacts in low-income counties and parishes.<sup>54</sup> Additionally, increased

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<sup>45</sup> *Id.* at 21.

<sup>46</sup> See Poh Poh Wong et al., *Coastal Systems and Low-Lying Areas*, in *CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY: PART A* 361, 364, 376, 381 (C.B. Field et al. eds., 2014), [http://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap5\\_FINAL.pdf](http://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap5_FINAL.pdf) [<https://perma.cc/MT44-Z4YE>].

<sup>47</sup> See Wuebbles et al., *supra* note 37, at 1–2.

<sup>48</sup> See *id.* at 16.

<sup>49</sup> See Aris Georgakakos et al., *Chapter 3: Water Resources*, in *CLIMATE CHANGE IMPACTS IN THE UNITED STATES*, *supra* note 1, at 86, <http://nca2014.globalchange.gov/report/sectors/water> [<https://perma.cc/6WAB-2YCW>].

<sup>50</sup> See Martin M. Randall, *Coastal Development Run Amuck: A Policy of Retreat May Be the Only Hope*, 18 J. ENVTL. L. & LITIG. 145, 177 (2003).

<sup>51</sup> *Id.* at 145.

<sup>52</sup> Cf. Solomon Hsiang et al., *Estimating Economic Damage from Climate Change in the United States*, *SCI.*, June 2017, at 47 <http://science.sciencemag.org/content/356/6345/1362.full> [<https://perma.cc/JR86-6PBQ>] (estimating economic effects of climate change on gross domestic product and other economic indicators).

<sup>53</sup> *Id.* at 4–5.

<sup>54</sup> *Id.* at 5.



storm, wildfire, and natural-disaster frequency due to climate change has affected the U.S. economy already; such disasters cost the federal government a record \$306 billion in 2017 alone.<sup>55</sup> The cost of storms is a key area of fiscal exposure for the federal government, especially because disaster-relief funds are not budgeted annually but rather are appropriated supplementarily as disasters happen.<sup>56</sup>

Climate change will impact regions of the United States differently, which leaves cities and states to determine how best to adapt to climate change in their communities. Because the effects of climate change are not uniform, cities are at the forefront of determining how best to adapt to a warming climate,<sup>57</sup> and most adaptation efforts have been implemented at local and regional levels.<sup>58</sup> For instance, local residents in New York collectively sought home buyouts after Hurricane Sandy so that they could move out of the floodplain.<sup>59</sup> Both New York City and Chicago have released climate action plans that include adaptation strategies for changes in storm patterns and air quality.<sup>60</sup>

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<sup>55</sup> Jim Efstathiou Jr., *Weather Disasters Cost the U.S. a Record \$306 Billion in 2017*, BLOOMBERG (Jan. 8, 2018, 12:46 PM), <https://www.bloomberg.com/news/articles/2018-01-08/weather-disasters-cost-the-u-s-a-record-306-billion-in-2017> [<https://perma.cc/NR2F-U8CZ>].

<sup>56</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-454, CLIMATE CHANGE: SELECTED GOVERNMENTS HAVE APPROACHED ADAPTATION THROUGH LAWS AND LONG-TERM PLANS 1, 3 (2016). Notably, mitigation has already been found to save money—every dollar spent on mitigation against natural disasters reduces future costs of those natural disasters by an estimated six dollars. See Christopher Flavelle, *Disaster Mitigation Targeted by Trump Saves \$6 for Every \$1 Spent, Report Says*, BLOOMBERG (Jan. 11, 2018, 12:30 PM), <https://www.bloomberg.com/news/articles/2018-01-11/disaster-mitigation-programs-targeted-by-trump-seen-saving-money> [<https://perma.cc/QKP8-SUW4>].

<sup>57</sup> *Responding to Climate Change*, NASA GLOB. CLIMATE CHANGE: VITAL SIGNS OF THE PLANET, <https://climate.nasa.gov/solutions/adaptation-mitigation> [<https://perma.cc/65KU-H73F>]; see Rosina Bierbaum et al., *Chapter 28: Adaptation*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES, *supra* note 1, at 678, <http://nca2014.globalchange.gov/report/response-strategies/adaptation> [<https://perma.cc/U8GT-SNAQ>]; Wuebbles et al., *supra* note 37, at 17. In fact, since President Trump has rolled back many of the mitigation policies of the Obama administration, states have also banded together to mitigate carbon emissions in the absence of a uniform national policy. See Elizabeth Shogren, *As Trump Retreats, States Are Joining Forces on Climate Action*, 2 YALE ENV'T 360 (Oct. 9, 2017), <http://e360.yale.edu/features/as-trump-retreats-states-are-stepping-up-on-climate-action> [<https://perma.cc/2EEC-MXRV>]. The U.S. Climate Alliance now includes 16 states and Puerto Rico. See *About: Governors*, U.S. CLIMATE ALL., <https://www.usclimatealliance.org/governors-1> [<https://perma.cc/ZB9R-TRHW>].

<sup>58</sup> Bierbaum et al., *supra* note 57, at 678.

<sup>59</sup> CARMEN GONZALEZ ET AL., CTR. FOR PROGRESSIVE REFORM, CLIMATE CHANGE, RESILIENCE, AND FAIRNESS 14 (2016), [http://progressivereform.org/articles/Climate\\_Change\\_Resilience\\_Gulf\\_Coast\\_1603.pdf](http://progressivereform.org/articles/Climate_Change_Resilience_Gulf_Coast_1603.pdf) [<https://perma.cc/CSL5-3MZK>].

<sup>60</sup> See generally KATHARINE HAYHOE ET AL., CHI. CLIMATE TASK FORCE, CHICAGO CLIMATE ACTION PLAN (2008), [http://www.chicagoclimateaction.org/filebin/pdf/finalreport/CCAP\\_REPORTFINALv2.pdf](http://www.chicagoclimateaction.org/filebin/pdf/finalreport/CCAP_REPORTFINALv2.pdf) [<https://perma.cc/S6RF-HAT2>]; PLAN NYC, CITY OF N.Y., A STRONGER, MORE RESILIENT NEW YORK (2013), [http://s-media.nyc.gov/agencies/sirt/SIRR\\_singles\\_](http://s-media.nyc.gov/agencies/sirt/SIRR_singles_)

Additionally, in the absence of a federal initiative, states have begun preparing sites contaminated with toxic chemicals for climate change to prevent the chemicals from leaking and further contaminating soil and groundwater.<sup>61</sup>

There are two methods of responding to climate change: mitigation and adaptation. Mitigation focuses on decreasing greenhouse gas emissions to reduce their effect on the atmosphere.<sup>62</sup> U.S. climate policy has historically been framed around mitigation, aiming to reduce emissions through the Clean Air Act and other legislation.<sup>63</sup> Adaptation instead focuses on “adjusting to actual or expected future climate.”<sup>64</sup> Adaptation can be either proactive, seeking to avoid the adverse impacts of climate change before disasters occur, or reactive, responding to disasters as they occur through “emergency response, disaster recovery, and migration.”<sup>65</sup> While reactive adaptation through relocation has been used in federal home buyout programs to retreat from floodplains after recurrent flooding,<sup>66</sup> proactive relocation is controversial, and there is currently no provision for it under federal disaster or climate law.<sup>67</sup> In the United States, no institutional framework or individual agency has the authority to relocate entire communities, including both private and public infrastructure.<sup>68</sup> There is no legal framework for determining when proactive relocation in response to climate change should occur or what agency should make the determination.<sup>69</sup> A proactive relocation strategy would require a

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Lo\_res.pdf [https://perma.cc/9U2Y-PFEE]; see also CHI. CLIMATE TASK FORCE, CHICAGO CLIMATE ACTION PLAN: PROGRESS REPORT: FIRST TWO YEARS (2010), <http://www.chicagoclimateaction.org/filebin/pdf/CCAPPgressReportv3.pdf> [https://perma.cc/4EKF-YFPM].

61 Sylvia Carignan, *States Take Lead in Preparing Toxic Sites for Climate Change*, BLOOMBERG ENV'T (Jan. 18, 2018, 1:01 PM), <https://bna.com/news/bna.com/environment-and-energy/states-take-lead-in-preparing-toxic-sites-for-climate-change> [https://perma.cc/9DU9-H7F8].

62 See *Responding to Climate Change*, *supra* note 57.

63 See Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 685 (codified as amended at 42 U.S.C. § 7401-7671q (2012)); Robin Kundis Craig, “Stationarity Is Dead”—*Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENVTL. L. REV. 9, 18-19 (2010).

64 *Responding to Climate Change*, *supra* note 57.

65 J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENVTL. L. 363, 383 (2010).

66 See Alice Kaswan, *Climate Change Adaptation and Land Use: Exploring the Federal Role*, 47 J. MARSHALL L. REV. 509, 514-15 (2014).

67 See Abate, *supra* note 40, at 17.

68 See Robin Bronen & F. Stuart Chapin III, *Adaptive Governance and Institutional Strategies for Climate-Induced Community Relocations in Alaska*, 110 PNAS 9320, 9320 (2013), <http://www.pnas.org/content/110/23/9320.full.pdf> [https://perma.cc/TYU6-GWBF]; Marlow & Sancken, *supra* note 32, at 291.

69 Marlow & Sancken, *supra* note 32, at 291; see also Jason Iverson, *Funding Alaska Vil-*

lead agency to coordinate responses among several agencies, “but the lack of a lead agency and the absence of an institutional framework for agency coordination” has stalled communities seeking relocation, including the Kivalina in Alaska.<sup>70</sup>

## II. FEDERAL DISASTER RESPONSE AND RELOCATION MECHANISMS: THE CURRENT STATE OF THE LAW

Federal disaster response is currently limited to reactive responses to major disasters and emergencies under the Stafford Act,<sup>71</sup> which does not account for the anticipated slow build of climate change.<sup>72</sup> The Stafford Act’s framework requires damage to trigger either a major-disaster or emergency response,<sup>73</sup> and FEMA and HUD’s grant programs require either a current or past major disaster declaration for a community to be eligible for home buyout grant programs.<sup>74</sup> Because damage caused by aspects of climate change, such as rising seas, can be predicted before that damage actually occurs, and because it occurs slowly enough to allow for a proactive response, the requirement of current or past damage is irrational in the face of certain climate change. The current disaster framework under the Stafford Act is inadequate to protect vulnerable communities from the harms of climate change before damage occurs, even when that damage can be predicted years in advance.

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*lage Relocation Caused by Climate Change and Preserving Cultural Values During Relocation*, 12 SEATTLE J. FOR SOC. JUST. 561, 590 (2013) (noting that “there is no single federal authority in place that is set up to coordinate . . . relocation”).

<sup>70</sup> Marlow & Sancken, *supra* note 32, at 300.

<sup>71</sup> See Stafford Act, 42 U.S.C. §§ 5121–5208 (2012).

<sup>72</sup> See *id.*

<sup>73</sup> The exception to this requirement is a pre-disaster emergency declaration, where a governor may request a declaration in advance of an event anticipated to be a major disaster. See *The Disaster Declaration Process*, FEMA, <https://www.fema.gov/disaster-declaration-process> [<https://perma.cc/F6L2-5WSB>].

<sup>74</sup> See U.S. DEP’T OF HOUS. & URBAN DEV., PROGRAMS OF HUD: MAJOR MORTGAGE, GRANT, ASSISTANCE, AND REGULATORY PROGRAMS 8 (2016), <https://www.hud.gov/sites/documents/HUDPROGRAMS2016.PDF> [<https://perma.cc/Ry2Z-L7TY>] (noting that HUD’s Community Development Block Grant Disaster Recovery is intended to assist in community recovery after a major disaster declaration); *Flood Mitigation Assistance Grant Program*, FEMA, <https://www.fema.gov/flood-mitigation-assistance-grant-program> [<https://perma.cc/NY22-V8HF>] (noting that FEMA’s Flood Mitigation Assistance Grant Program is intended to adapt to repetitive-flood properties); *Hazard Mitigation Assistance*, FEMA, <https://www.fema.gov/hazard-mitigation-assistance> [<https://perma.cc/PWA8-ELYN>] (noting that FEMA’s Hazard Mitigation Grant Program is intended to prevent subsequent disasters after a major-disaster declaration).

### A. *The Stafford Act*

The Stafford Act<sup>75</sup> provides the framework for federal disaster relief to state and local governments, including both emergency and nonemergency relief and disbursement of funds to states.<sup>76</sup> The Act encourages “hazard mitigation measures to reduce losses from disasters” and provides assistance “for both public and private losses sustained in disasters.”<sup>77</sup> Relief is provided for two different types of hazards: major disasters and emergencies.<sup>78</sup> A major disaster is “any natural catastrophe,” such as a hurricane, that the President determines causes severe damage of such a magnitude to warrant federal major-disaster assistance.<sup>79</sup> “Major disaster” is interpreted narrowly to include only “imminent” disasters and does not account for the “slow-onset, long-term, and disastrous impacts of climate change.”<sup>80</sup> Because rising seas, erosion, and other slow-building climate change disasters are not enumerated as major disasters in the Stafford Act, they have not been recognized as such by the president, and major-disaster assistance is unavailable for climate change disasters.<sup>81</sup> In contrast, an emergency is “any occasion or instance” that the president determines warrants federal emergency assistance “to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe.”<sup>82</sup> While the definition of an emergency is broader than that of a major disaster,<sup>83</sup> no presidential emergency declaration has encompassed climate change.<sup>84</sup>

The Stafford Act primarily provides for reactive disaster assistance. For a state or local government to receive federal assistance post-disaster, the governor of the state must request either a major disaster or emergency declaration from the President.<sup>85</sup> Before submitting a request to the President, the state must receive a preliminary damage assessment through a local FEMA office to determine the ex-

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<sup>75</sup> 42 U.S.C. §§ 5121–5208 (2012).

<sup>76</sup> *See id.* § 5121(b).

<sup>77</sup> *Id.* § 5121(b)(5)–(6).

<sup>78</sup> *See id.* § 5122.

<sup>79</sup> *Id.* § 5122(2).

<sup>80</sup> *See* Marlow & Sancken, *supra* note 32, at 315.

<sup>81</sup> *Id.* at 304, 315.

<sup>82</sup> 42 U.S.C. § 5122(1).

<sup>83</sup> *See* Erin J. Greten & Ernest B. Abbott, *Representing States, Tribes, and Local Governments Before, During, and After a Presidentially-Declared Disaster*, 48 URB. LAW. 489, 495 (2016).

<sup>84</sup> *See* Marlow & Sancken, *supra* note 32, at 302.

<sup>85</sup> *See* 42 U.S.C. §§ 5170(a), 5191(a).

tent of the damage.<sup>86</sup> The request for a presidentially declared disaster or emergency must be “based on a finding that the disaster [or situation] is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.”<sup>87</sup> It is within the President’s discretion to either grant or deny a major disaster or emergency declaration.<sup>88</sup>

Though there are similarities between major disasters and emergencies, there are also significant differences. Both major disasters and emergencies require that federal assistance cover a minimum of 75% of the costs of the disaster or emergency, with the state covering the remaining 25%,<sup>89</sup> and both require that the state direct its own emergency plan before requesting assistance.<sup>90</sup> However, while major-disaster assistance is not capped, assistance for a single emergency is limited to a maximum of five million dollars.<sup>91</sup> Additionally, many post-disaster grant programs are not available for emergency declarations, including grants that assist individuals and communities in relocating.<sup>92</sup>

Neither major-disaster nor emergency declarations provide an adequate response to climate change. Though emergencies are interpreted more leniently than major disasters, they do not provide an adequate remedy to assist communities in relocating, either proactively or reactively, because of the funding ceiling and lack of grant programs. Because major disasters are interpreted so narrowly,<sup>93</sup> the Stafford Act currently lacks a category of disaster assistance that can provide a proactive response to climate change disasters—those that are predictable, build slowly, and can eventually cause the same catastrophic damage as narrowly construed major disasters.

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<sup>86</sup> See *The Disaster Declaration Process*, *supra* note 73. The preliminary damage assessment includes information about the nature and amount of state, local, or Indian resources available to address the disaster and an estimate of the type and amount of assistance needed. See *id.*

<sup>87</sup> 42 U.S.C. §§ 5170(a), 5191(a) (2012).

<sup>88</sup> See *id.* §§ 5170(a), 5191(a).

<sup>89</sup> *Id.* §§ 5170b(b), 5193(a). Although the Stafford Act sets a minimum for the federal cost share, it sets no maximum—the President has the discretion to increase the federal government’s share in approving the designation. See Ernest B. Abbott, *Representing Local Governments in Catastrophic Events: DHS/FEMA Response and Recovery Issues*, 37 URB. LAW. 467, 471 (2005).

<sup>90</sup> 42 U.S.C. §§ 5170(a), 5191(a) (2012).

<sup>91</sup> *Id.* § 5193(b)(1). However, this limitation can be exceeded if the President determines that “(A) continued emergency assistance is immediately required; (B) there is a continuing and immediate risk to lives, property, public health or safety; and (C) necessary assistance will not otherwise be provided on a timely basis.” *Id.* § 5193(b)(2)(A)–(C).

<sup>92</sup> See Abbott, *supra* note 89, at 471–72; *The Disaster Declaration Process*, *supra* note 73.

<sup>93</sup> See Marlow & Sancken, *supra* note 32, at 301, 304, 315.

*B. The Proactive-Relocation Potential of FEMA's Disaster-Response Programs*

Despite the lack of adequate proactive response to climate change disasters in the Stafford Act, FEMA offers three programs that currently assist with home buyouts. The Hazard Mitigation Grant Program<sup>94</sup> (“HMGP”) awards funding for home buyouts during the immediate recovery of a major disaster.<sup>95</sup> The Pre-Disaster Mitigation Grant Program awards funding for home buyouts before a major disaster.<sup>96</sup> Finally, the Flood Mitigation Assistance (“FMA”)<sup>97</sup> program awards funding for flood-prone property insured under the National Flood Insurance Program (“NFIP”).<sup>98</sup>

First, the HMGP allocates funding for voluntary home buyouts after a major-disaster declaration.<sup>99</sup> The HMGP is intended to prevent subsequent disasters after a major-disaster declaration and requires that projects provide a long-term solution to an anticipated hazard.<sup>100</sup> Funds are allocated as part of the major-disaster declaration, and thus the mitigation measures are implemented during the immediate recovery from a major disaster.<sup>101</sup> Projects must be cost-effective, with anticipated benefits equal to or exceeding anticipated costs of the project, and states must have a FEMA-approved mitigation plan in effect at the time of the major-disaster declaration.<sup>102</sup> HMGP funds are typically used to purchase properties that have been repetitively damaged.<sup>103</sup> Individuals must apply through their local governments, and local governments must apply for the funds through the state, which then applies to FEMA.<sup>104</sup> A maximum of 15% of the total disaster grants awarded by FEMA may be used for hazard-mitigation projects, and FEMA can share up to 75% of the costs of the mitigation project.<sup>105</sup> While normally funding from other federal sources cannot be

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<sup>94</sup> See 42 U.S.C. § 5170c (2012).

<sup>95</sup> *Id.*; see also *Hazard Mitigation Assistance*, *supra* note 74.

<sup>96</sup> See 42 U.S.C. § 5133(b) (2012).

<sup>97</sup> *Id.* § 4104c.

<sup>98</sup> *Flood Mitigation Assistance Grant Program*, *supra* note 74; see *The National Flood Insurance Program*, FEMA, <https://www.fema.gov/national-flood-insurance-program> [<https://perma.cc/9WN4-FTR5>].

<sup>99</sup> See *Hazard Mitigation Grant Program Frequently Asked Questions*, FEMA, <https://www.fema.gov/hmgrp-faqs> [<https://perma.cc/C694-LZZV>].

<sup>100</sup> See *Hazard Mitigation Assistance*, *supra* note 74.

<sup>101</sup> See *Hazard Mitigation Grant Program Frequently Asked Questions*, *supra* note 99.

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

used toward the nonfederal share of the costs of the mitigation projects, funds awarded through HUD's CDBG can be used for this purpose.<sup>106</sup>

FEMA's Pre-Disaster Mitigation Grant Program also appropriates funds to acquire and demolish flood-prone property, but these funds may be allocated by the President before a disaster occurs.<sup>107</sup> The program aims to reduce the risk of "future hazard events" and reliance on federal disaster assistance.<sup>108</sup> However, funding for pre-disaster mitigation is very limited—just \$90 million was allotted for the nation in 2017—and thus the funds are highly competitive.<sup>109</sup> These limited funds are apportioned in small amounts: no state, city, or tribe may receive more than \$15 million or 15% of apportioned funds.<sup>110</sup> Furthermore, because the Pre-Disaster Mitigation Grant Program funds many types of mitigation projects, those that involve property acquisition are not prioritized in awarding grants.<sup>111</sup>

Finally, the FMA program is another grant program that allocates funds specifically for acquisition of flood-prone property.<sup>112</sup> Unlike the HMGP and Pre-Disaster Mitigation Grant Program, both of which were created under the Stafford Act, the FMA is part of the NFIP.<sup>113</sup> The program aims to eliminate or reduce flood claims under the NFIP, and thus funds are only available to assist communities that currently participate in the NFIP.<sup>114</sup> Because Congress only appropriates funding for the FMA program annually, funding is limited and FEMA awards the funds to the most effective uses.<sup>115</sup>

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<sup>106</sup> *See id.*

<sup>107</sup> *See* 42 U.S.C. § 5133(b) (2012); FEMA, P-758, SUBSTANTIAL IMPROVEMENT/SUBSTANTIAL DAMAGE DESK REFERENCE, ch. 8, at 5–6 (2010), [https://www.fema.gov/media-library-data/20130726-1733-25045-0360/p758\\_ch8\\_r2.pdf](https://www.fema.gov/media-library-data/20130726-1733-25045-0360/p758_ch8_r2.pdf) [<https://perma.cc/5KEQ-NU3M>].

<sup>108</sup> *Pre-Disaster Mitigation Grant Program*, FEMA, <https://www.fema.gov/pre-disaster-mitigation-grant-program> [<https://perma.cc/MF7Q-RHKP>].

<sup>109</sup> *See* Elizaveta Barrett Ristroph, *When Climate Takes a Village: Legal Pathways Toward the Relocation of Alaska Native Villages*, 7 CLIMATE L. 259, 280 n.112 (2017).

<sup>110</sup> FED. INS. & MITIGATION ADMIN., FEMA, FACT SHEET: FY 2017 PRE-DISASTER MITIGATION (PDM) GRANT PROGRAM 1 (2017), [https://www.fema.gov/media-library-data/1499868698311-25cdc5fcfb237df56a87da7cd7cc0717/PDM\\_FactSheet-for-FY\\_2017\\_508.pdf](https://www.fema.gov/media-library-data/1499868698311-25cdc5fcfb237df56a87da7cd7cc0717/PDM_FactSheet-for-FY_2017_508.pdf) [<https://perma.cc/76V9-SFNB>].

<sup>111</sup> *See id.*

<sup>112</sup> *See Flood Mitigation Assistance Grant Program*, *supra* note 74.

<sup>113</sup> 42 U.S.C. § 4011 (2012).

<sup>114</sup> *Flood Mitigation Assistance Grant Program*, *supra* note 74.

<sup>115</sup> *Id.*

### C. *The Proactive-Relocation Potential of HUD's Block Grants*

Like FEMA, HUD offers grants to assist cities and states in recovering from presidentially declared disasters and to help relocate individuals.<sup>116</sup> CDBG Disaster Recovery (“CDBG-DR”) grants offered through HUD’s CDBG<sup>117</sup> program are appropriated by Congress to rebuild and stimulate the economy after a presidentially declared disaster.<sup>118</sup> Though the funds cannot duplicate funding offered by federal, state, or local governments,<sup>119</sup> CDBG-DR grants can supplement other disaster-recovery programs provided by FEMA.<sup>120</sup> Once they are appropriated by Congress, HUD awards these funds to state and local governments in the affected areas.<sup>121</sup> HUD has wide discretion to allocate the funds to affected areas and uses FEMA data to identify the most heavily impacted areas in need of assistance.<sup>122</sup> CDBG-DR grants are often used for optional home buyouts in floodplains,<sup>123</sup> encouraging movement “out of high-risk areas.”<sup>124</sup>

To be eligible for a CDBG-DR grant, a state must comply with several requirements. First, a state must complete environmental re-

116 See 42 U.S.C. § 5304 (2012); U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 74, at 8.

117 See 42 U.S.C. § 5304. Notably, the Trump administration seeks to eliminate all CDBG funding, citing HUD studies finding that the grants are not “well targeted to the poorest communities and ha[ve] not demonstrated a measurable impact on communities.” Press Release, U.S. Dep’t of Hous. & Urban Dev., No. 17-041, Trump Administration Proposes 2018 HUD Budget (May 23, 2017), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/2017/HUDNo\\_17-041](https://www.hud.gov/press/press_releases_media_advisories/2017/HUDNo_17-041) [<https://perma.cc/HAP3-P58T>]. The Trump Administration seeks to devolve CDBG-funded activities to state and local actors. See *id.*

118 U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 74, at 8.

119 See OFFICE OF CMTY. PLANNING & DEV., U.S. DEP’T OF HOUS. & URBAN DEV., FACT SHEET: COMMUNITY DEVELOPMENT BLOCK GRANT DISASTER RECOVERY (CDBG-DR) (2017), <https://www.hudexchange.info/resources/documents/CDBG-DR-Fact-Sheet.pdf> [<https://perma.cc/X757-9JEZ>].

120 U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 74, at 8.

121 See *id.* at 8.

122 See OFFICE OF CMTY. PLANNING & DEV., U.S. DEP’T OF HOUS. & URBAN DEV., CDBG AND CDBG-DR (2017), <https://www.hudexchange.info/resources/documents/CDBG-and-CD-BG-DR-Comparison.pdf> [<https://perma.cc/KBF6-47ZA>].

123 After Hurricane Sandy, CDBG-DR funds were used for property acquisitions. See GONZALEZ ET AL., *supra* note 59, at 61; *Funding*, N.Y. ST. GOVERNOR’S OFF. STORM RECOVERY (GOSR), <https://stormrecovery.ny.gov/funding/funding-portal> [<https://perma.cc/7SQG-RQME>]. The program was highly successful, with homeowners receiving one hundred percent of the prestorm values of their homes and additional incentives of up to 15%. See GONZALEZ ET AL., *supra* note 59, at 61. New York attributes the program’s success to the cooperation between individual homeowners and local governments and to the fact that individuals sought the buyouts as a community. See *id.* at 14, 63.

124 U.S. DEP’T OF HOUS. & URBAN DEV., CLIMATE CHANGE ADAPTATION PLAN 31 (2012), [https://www.hud.gov/sites/documents/SSP2012\\_APX\\_CCADAPTPLAN.PDF](https://www.hud.gov/sites/documents/SSP2012_APX_CCADAPTPLAN.PDF) [<https://perma.cc/66RU-NNWM>].



views.<sup>125</sup> The state must then submit a disaster-recovery action plan to HUD, and HUD must approve the plan.<sup>126</sup> Most importantly, 70% of the CDBG funds must benefit low- to moderate-income persons unless HUD reduces that requirement based on “compelling need.”<sup>127</sup> Notably, “[m]itigation or preparedness activities that are not part of rebuilding efforts are generally *ineligible* as CDBG-DR recovery activities”<sup>128</sup> because the goal of the grants is to assist communities with limited resources in recovery after a major-disaster declaration.<sup>129</sup>

#### D. *Pitfalls of FEMA’s and HUD’s Programs*

Although both FEMA and HUD provide voluntary home buyout programs, these programs are currently ineffective solutions to address the predictable negative effects of climate change. First, FEMA’s and HUD’s programs are reactive responses, rather than proactive responses. Second, home buyout programs are often ineffective in convincing residents to move, and create greater social, political, and economic tension in local communities. Finally, these programs disadvantage severely impoverished and tribal communities, those most in need of relocation assistance in the face of climate change.

##### 1. *Proactive Adaptation Is a Superior Response to Climate Change*

The first pitfall of existing programs, excluding FEMA’s Pre-Disaster Mitigation Grant, is that they operate as reactive, rather than proactive, adaptation strategies. Because the climate is changing irreversibly and because that change is slow enough to allow for a response before ecological changes reach a disastrous level, the United States should adopt a policy of proactive adaptation, rather than mitigation or reactive adaptation. Proactive adaptation is the most effective solution because the planet is already committed to a certain level

<sup>125</sup> See OFFICE OF CMTY. PLANNING & DEV., *supra* note 119.

<sup>126</sup> See *id.*

<sup>127</sup> See GONZALEZ ET AL., *supra* note 59, at 29. For home buyouts after Hurricane Sandy, the 70% requirement was reduced to 50%, though priority status was still maintained for low- to moderate-income applicants. See *id.* at 61.

<sup>128</sup> OFFICE OF CMTY. PLANNING & DEV., U.S. DEP’T OF HOUS. & URBAN DEV., COMMUNITY DEVELOPMENT BLOCK GRANT DISASTER RECOVERY 23 (2018) (emphasis added), <https://www.hudexchange.info/resources/documents/CDBG-Disaster-Recovery-Overview.pdf> [<https://perma.cc/7MGX-ABVG>].

<sup>129</sup> See *Community Development Block Grant Disaster Recovery Program*, HUD EXCHANGE, <https://www.hudexchange.info/programs/cdbg-dr> [<https://perma.cc/R2R6-2LNZ>].

of warming based on past emissions and climate change has already fundamentally altered the natural fluctuations of the environment.<sup>130</sup>

While proactive strategies anticipate the impacts of climate change and relocate communities before a slow-building climate change disaster can occur, reactive strategies rely entirely on mitigating the effects of the disaster after it has occurred.<sup>131</sup> For example, instead of relocating a community on flood-vulnerable property prior to a disaster to avoid predictable harm, FEMA's and HUD's programs merely react to a flood once it has occurred by providing a disaster response and a subsequent home buyout. A reactive adaptation strategy is an inherently costlier strategy because resources must be expended on the emergency response, such as search and rescue efforts, in addition to home buyouts.<sup>132</sup> A proactive strategy would preempt the need for emergency response by moving individuals from vulnerable property before emergency response would be necessary. Additionally, a proactive strategy is more sensible since the effects of climate change build slowly and communities have time to adapt before the impacts occur. And though FEMA's Pre-Disaster Mitigation Grant Program does provide a proactive response, funds are highly limited—each state or tribal community was only eligible to receive an award of \$575,000, or 1% of the \$90 million appropriation for the 2017 fiscal year.<sup>133</sup>

Proactive adaptation is the more effective approach to current projections of climate change because the planet is committed to a certain level of warming from past emissions, which current mitigation is unlikely to prevent.<sup>134</sup> Projections indicate that climate change caused by human carbon emissions is “irreversible on human timescales,” and thus “[t]he world is committed to some degree of irreversi-

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<sup>130</sup> See Craig, *supra* note 63, at 15–16 (quoting P.C.D. Milly et al., *Stationarity Is Dead: Whither Water Management?*, 319 *SCI.* 573, 573 (2008)); Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations*, 40 *ENVTL. L.* 1159, 1160–61 (2010) (quoting CONG. BUDGET OFFICE, *UNCERTAINTY IN ANALYZING CLIMATE CHANGE: POLICY IMPLICATIONS* 36 (2005), <https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/reports/01-24-climatechange.pdf> [<https://perma.cc/E3TF-A4JH>]).

<sup>131</sup> See Ruhl, *supra* note 65, at 383.

<sup>132</sup> See Stellina Napolitano, Note, *Proactive Natural Disaster Recovery and Resilience in the Northeast: Should Governments Exercise Buyout Programs and, If Necessary, Eminent Domain, to Prevent Disaster?*, 33 *PACE ENVTL. L. REV.* 325, 331 (2016).

<sup>133</sup> See *FED. INS. & MITIGATION ADMIN.*, *supra* note 110, at 1.

<sup>134</sup> See B. DeAngelo et al., *Chapter 14: Perspectives on Climate Change and Mitigation*, in 1 *CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT*, *supra* note 37, at 393, 394, <https://science2017.globalchange.gov/chapter/14> [<https://perma.cc/88BC-6AYR>]; Glicksman, *supra* note 130, at 1160–61.

ble warming.”<sup>135</sup> While mitigation efforts are still necessary to reduce global warming in the long term, the impacts that mitigation will have on global warming in the near term are “modest” at best.<sup>136</sup>

These irreversible changes are forcing policymakers to recognize the importance of incorporating proactive adaptation strategies into climate policy.<sup>137</sup> According to Craig Fugate, former director of FEMA, “[i]t ain’t about climate change anymore, it’s about climate adaptation.”<sup>138</sup> A Government Accountability Office report further found that “emphasis on the post-disaster environment can create a reactionary approach where disasters determine when and for what purpose the federal government invests in disaster resilience and can limit states’ ability to plan and prioritize for maximum risk reduction.”<sup>139</sup> Because both states and the federal government should be planning for maximum risk reduction in responding to climate change, a reactionary approach to disasters is ineffective, and a proactive approach should instead be implemented.

Current management of water supply and environmental resources is based on historical natural fluctuations in the environment, but climate change will render these management policies defunct.<sup>140</sup> Humans will not be able to effectively manage the impacts of climate change, and thus scholars posit that the United States is “better off treating climate change impacts as a long-term natural disaster rather than as anthropogenic disturbances, with a consequent shift in regulatory focus: we cannot prevent all of climate change’s impacts, but we

135 DeAngelo et al., *supra* note 134, at 394; see K. Hayhoe et al., *Chapter 4: Climate Models, Scenarios, and Projections*, in 1 CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT, *supra* note 37, at 133, 134, <https://science2017.globalchange.gov/chapter/4> [<https://perma.cc/R8DN-EHAD>] (“Even if existing concentrations [of carbon dioxide] could be immediately stabilized, temperature would continue to increase by an estimated 1.1°F (0.6°C) over this century . . .”).

136 DeAngelo et al., *supra* note 134, at 394.

137 See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-253, CLIMATE CHANGE: VARIOUS ADAPTATION EFFORTS ARE UNDER WAY AT KEY NATURAL RESOURCE MANAGEMENT AGENCIES 1 (2013) (“Since 2007, the Forest Service, the National Oceanic and Atmospheric Administration (NOAA), the Fish and Wildlife Service, and the National Park Service have taken steps to establish strategic directions for addressing climate change adaptation.”); see also U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 56, at 1 (“Enhancing resilience through hazard mitigation and climate change adaptation—for example, by building flood protections—may help reduce the[] costs [of climate change-related storm events].”).

138 Josh Delk, *Former FEMA Chief: It’s Not About Climate Change Anymore, It’s About Climate Adaptation*, HILL (Sept. 8, 2017, 10:30 AM), <http://thehill.com/blogs/blog-briefing-room/349785-former-fema-director-its-not-about-climate-change-its-about-climate> [<https://perma.cc/F2H2-FMP2>].

139 U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 56, at 4.

140 See Craig, *supra* note 63, at 15–16.

can certainly improve the efficiency and effectiveness of our responses to them.”<sup>141</sup> A proactive approach to climate threats as they begin to occur is the most efficient way to handle climate impacts that humans cannot manage or control.

## 2. *Community Relocation Is Superior to Home Buyout Programs*

The second pitfall of FEMA’s and HUD’s programs is that they involve voluntary home buyouts rather than relocation efforts. Community relocation is a superior adaptation method for communities with strong cultural identities. Home buyout programs are often ineffective in convincing all residents to move, leaving stragglers who remain vulnerable to the effects of climate change. Furthermore, home buyout programs create the potential for social, economic, and political problems in the affected community.

Community relocation is superior to individual home buyouts in many instances, especially for communities with unique cultural and historical ties. Members of indigenous communities, in particular, disfavor “dispersed relocation” and prefer community relocation.<sup>142</sup> Dispersed relocation threatens independent cultural communities with the loss of unique cultures and lifestyles, languages, and traditional practices.<sup>143</sup> Community relocation promotes the maintenance of traditional cultures and avoids the challenges of resettling traditional communities, who often subsist on the land, in urban communities.<sup>144</sup> Furthermore, relocating a community as a whole provides that community with the unique opportunity to address other community issues in implementing relocation, which fosters the long-term sustainability of the relocated community.<sup>145</sup> Despite the benefits of community relocation, the United States currently lacks the ability to relocate communities proactively in response to climate change.<sup>146</sup>

The administrative framework of voluntary home buyouts is also unsuccessful in convincing individuals to leave their homes and leaves

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<sup>141</sup> See *id.* at 16 (footnotes omitted).

<sup>142</sup> See Ristroph, *supra* note 109, at 264.

<sup>143</sup> See *id.* at 266.

<sup>144</sup> *Id.*

<sup>145</sup> See Bronen & Chapin, *supra* note 68, at 9324. Poor infrastructure can be remedied by community relocation, including high electricity costs from poor insulation, public-health risks from inadequate sewage treatment, and the expense of sewage treatment in remote communities. See *id.*

<sup>146</sup> See Robin Bronen, *Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine*, 35 N.Y.U. REV. L. & SOC. CHANGE 357, 366, 369–70 (2011).

stragglers.<sup>147</sup> Individuals consider a variety of factors in deciding whether to accept a home buyout, including the repetitiveness of disasters in the area, their level of control in decisionmaking about the buyout, and the adequacy of the compensation.<sup>148</sup> Individuals also consider the likelihood that their neighbors will accept a home buyout and whether they will be the first to accept a buyout, since being first is advantageous.<sup>149</sup> Those who do not initially accept buyouts but whose neighbors do could become stuck in a desolate neighborhood with significantly decreased property values.<sup>150</sup> Home buyout programs, such as the program implemented after Superstorm Sandy, are thus more successful when there is a community desire for voluntary buyouts.<sup>151</sup> And, regardless of the aforementioned influences, many property owners will still refuse to accept a home buyout.<sup>152</sup> Piecemeal acquisition of vulnerable properties defeats the purpose of the buyouts and fails to create a natural buffer in areas threatened by climate change, such as coastal property threatened by rising seas.<sup>153</sup> Failure to acquire all property in a vulnerable area is also more costly for local governments because services, such as electricity and gas, must be maintained for the few remaining residents.<sup>154</sup>

Voluntary buyouts create other social, economic, and political problems in local communities. Socially, home buyout programs “break up existing neighborhoods [and] social networks,” sacrificing community resilience in the process.<sup>155</sup> More vulnerable communities may also feel targeted by home buyout programs to “make room for new, wealthier residents.”<sup>156</sup> Studies show that more than a third of participants in home buyout programs felt coerced into participation because the government could later simply exercise eminent domain with a lower valuation of their homes.<sup>157</sup> Economically, vulnerable properties can include high-value beachfront properties, which in-

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147 See Patrick Sisson, *How Louisiana Is Relocating a Community Threatened by Climate Change*, CURBED (Sept. 29, 2016, 1:51 PM), <https://www.curbed.com/2016/9/29/13109948/climate-change-refugees-resettlement-louisiana> [<https://perma.cc/E842-VZ8P>].

148 GONZALEZ ET AL., *supra* note 59, at 65.

149 Susan S. Kuo & Benjamin Means, *Collective Coercion*, 57 B.C. L. REV. 1599, 1617 (2016).

150 *Id.*

151 GONZALEZ ET AL., *supra* note 59, at 67.

152 *Id.* at 66.

153 *Id.* at 67.

154 *Id.* at 57.

155 *Id.* at 55.

156 *Id.* at 56.

157 Kuo & Means, *supra* note 149, at 1619–20.

creases the cost of acquisition and limits the total number of properties that can be acquired.<sup>158</sup> Piecemeal retreat from voluntary home buyouts can have a greater impact on housing demand in areas unaffected by climate change, causing shortages in the absence of relocation assistance.<sup>159</sup> Politically, representatives often fear that home buyout programs will decrease the tax and voter bases.<sup>160</sup> Thus, community relocation preserves cultural identities, more effectively convinces threatened neighborhoods to move, and avoids the pitfalls of voluntary relocation.

### 3. *FEMA's and HUD's Reactionary Programs Disadvantage Impoverished Communities*

FEMA's and HUD's programs present distinct problems for impoverished and tribal communities, those most in need of relocation assistance. Communities with limited economic resources are more vulnerable to the adverse effects of climate change, especially sea-level rise.<sup>161</sup> Income is a "key indicator of climate vulnerability," and along the Gulf Coast nearly all of the most vulnerable people live in areas with a high risk of inundation due to rising seas.<sup>162</sup> "Communities of color are particularly vulnerable . . . because they are more likely to live in poor housing and be underinsured and disenfranchised."<sup>163</sup> Additionally, both Native Americans and Alaskan Natives are highly vulnerable because many were forcibly settled on tracts of coastal land that were considerably "smaller and more marginal than their original homelands."<sup>164</sup>

Even though impoverished communities are most vulnerable to the negative effects of climate change, the conditions on FEMA's and HUD's home buyout programs disadvantage these communities. The costs of home buyouts through these programs must be matched by local governments, which creates problems for impoverished communities without a significant tax base.<sup>165</sup> The funds a municipality could

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<sup>158</sup> GONZALEZ ET AL., *supra* note 59, at 56.

<sup>159</sup> See Kaswan, *supra* note 66, at 516.

<sup>160</sup> See GONZALEZ ET AL., *supra* note 59, at 65.

<sup>161</sup> Carter et al., *supra* note 1, at 398, 405.

<sup>162</sup> *Id.* at 402.

<sup>163</sup> ISLAND PRESS & THE KRESGE FOUND., *BOUNCE FORWARD: URBAN RESILIENCE IN THE ERA OF CLIMATE CHANGE* 3–4 (2015), <https://kresge.org/sites/default/files/Bounce-Forward-Urban-Resilience-in-Era-of-Climate-Change-2015.pdf> [<https://perma.cc/7KTB-YQZS>] (quoting Jacqueline Patterson, Director, National Association for the Advancement of Colored People Climate Justice Initiative).

<sup>164</sup> BURKETT ET AL., *supra* note 26, at 1.

<sup>165</sup> *Id.* at 22.

put toward home buyouts prior to a disaster are limited and would create piecemeal acquisition problems.<sup>166</sup> These programs also all require local municipal governments as subapplicants to the state, but most tribal communities are not incorporated as municipalities and are thus ineligible for these programs.<sup>167</sup>

Communities with limited economic resources lack the ability to proactively relocate independently and will be left behind without federal assistance.<sup>168</sup> Ethical considerations of climate justice suggest that those with the greatest responsibility for climate change and emissions have an obligation to assist those less responsible in adapting to the resulting climate change.<sup>169</sup> Because all Americans have benefitted from the country's industrialism, "the federal government has a responsibility to support the adaptation of America's vulnerable . . . communities."<sup>170</sup> Federal disaster policy has not yet been updated to reflect the need for funding and the ability to proactively respond to the adverse impacts of climate change and relocate communities who are most vulnerable to those impacts. Instead, federal disaster policy assists marginalized populations in rebuilding or selling their homes only after a disaster occurs.

Because current federal grant programs are primarily reactionary, assist with home buyouts rather than community relocation, and disadvantage those most in need of assistance, these programs are inadequate to address the need for proactive relocation in response to climate change.

### III. THE ADDITION OF "IMPENDING CLIMATE CHANGE DISASTERS" TO THE STAFFORD ACT

To overcome the shortcomings of the current federal framework of home buyout assistance post-major disaster, this Note proposes that the United States adopt a proactive adaptation strategy in response to climate change by adding a third disaster category to the Stafford Act: impending climate change disasters. This new category should include slow-building disasters caused by climate change, like erosion and permafrost melt, and should trigger only certain types of

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* A municipality is "a primarily urban political unit having corporate status and usually powers of self-government." *Municipality*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/municipality> [<https://perma.cc/L4AQ-UTFX>].

<sup>168</sup> See Marlow & Sancken, *supra* note 32, at 298.

<sup>169</sup> Ristroph, *supra* note 109, at 267.

<sup>170</sup> *Id.*

assistance that would aid in relocation, including HUD's CDBG-DR and FEMA's HMGP programs.

The addition of a third category for impending climate change disasters would create the opportunity for a proactive adaptive response to climate change within existing disaster-recovery frameworks.<sup>171</sup> Total aid for impending climate change disasters should not be capped, like that of emergencies, but rather should be left open to necessary supplemental appropriations like major disasters.<sup>172</sup> Aid for impending climate change disasters need not include reactive assistance, such as emergency rescue and job assistance, because a proactive strategy will negate the need for ex post remediation.<sup>173</sup> Though relocation for this new category of disaster may be costly up front, in the long run it will be more cost-effective because federal funds need not be expended on reactive assistance or mitigation efforts.<sup>174</sup>

The new category of impending climate change disasters should trigger only funding sources necessary to assist in adaptive efforts like relocation. HUD's CDBG-DR and FEMA's HMGP grants are ideal for these adaptive efforts because they can be combined to assist low-income communities that otherwise could not afford to relocate.<sup>175</sup> Additionally, CDBG-DR's requirement that 70% of funds benefit low- to moderate-income persons will not hinder relocation efforts in

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<sup>171</sup> Cf. Abate, *supra* note 40, at 17; Kaswan, *supra* note 66, at 514–15; Ruhl, *supra* note 65, at 383.

<sup>172</sup> See generally *supra* note 91 and accompanying text (describing the supplemental aid available in a major disaster).

<sup>173</sup> See Abbott, *supra* note 89, at 471.

<sup>174</sup> See JANE A. LEGGETT, CONG. RESEARCH SERV., R43915, CLIMATE CHANGE ADAPTATION BY FEDERAL AGENCIES 5 (2015).

[M]any researchers and observers believe that anticipating the wide array of likely impacts and reducing risks through adaptation measures would be more efficient than incurring damage, responding to the immediate event, and then adapting reactively. The benefits of adaptation are expected to increase as the climate system moves further and further from historical “climate normals,” and as man-made and natural systems increasingly exceed their thresholds of tolerance and resilience.

*Id.* (footnote omitted).

<sup>175</sup> See *Hazard Mitigation Grant Program Frequently Asked Questions*, *supra* note 99. The grant used to fund the relocation of the Isle de Jean Charles community is a CDBG program for national disaster resilience (CDBG-NDR), similar to CDBG-DR grants in its allocation, requiring an appropriation by Congress and a prior disaster declaration. Office of Cmty. Planning & Dev., U.S. Dep't of Hous. & Urban Dev., *CDBG National Disaster Resilience Grants*, HUD EXCHANGE, <https://www.hudexchange.info/onecpd/assets/File/CDBG-NDR-Grant-Introduction.pdf> [<https://perma.cc/4WB4-BDSN>]. However, the grant differs in that the funding block was a one-time allocation for a competition to promote resilience, and thus CDBG-NDR does not provide an ongoing source of grants for relocation and climate change resilience efforts. See *National Disaster Resilience*, *supra* note 12.



response to climate change because the people who most need assistance with proactive relocation are those with limited economic resources.<sup>176</sup> Though the program requires that funds be used as a recovery effort in response to a disaster,<sup>177</sup> this requirement would pose no problem with an impending climate change disaster declaration.

Like major disasters and emergencies, impending climate change disasters should require cost-sharing between the federal government and the state, with the federal government sharing 75% of the costs.<sup>178</sup> Assistance for impending climate change disasters should also require that states have FEMA-approved climate change adaptation plans in place prior to requesting assistance, similar to the requirement that states adopt a FEMA-approved mitigation plan prior to requesting HMGP assistance.<sup>179</sup>

The declaration process for an impending climate change disaster should be similar to that of a major disaster, requiring preliminary damage assessments and certifications that the disaster will overwhelm state and local resources.<sup>180</sup> However, an impending climate change disaster should require more concrete assessments of the impacts of climate change on the affected locale, such as sea-level rise or erosion projections, to ensure that FEMA and HUD are authorizing funding to the areas most immediately in need of relocation assistance. Monitoring local ecological and social stability is key to determining when relocation will become necessary.<sup>181</sup> The disbursement of funds to states, and subsequently to subapplicant cities and individuals, should remain the same for impending climate change disasters to maintain the federal disaster-response framework.<sup>182</sup> The president's power to grant or deny a state's request for an impending climate change disaster declaration should also remain discretionary.

Although merely expanding the definition of "major disaster" to include erosion and other slow-onset climate change disasters could create a funding source for proactive relocation, an expanded defini-

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176 See Carter et al., *supra* note 1.

177 See *supra* notes 128–29 and accompanying text.

178 See *supra* note 99 and accompanying text.

179 See *supra* note 102 and accompanying text.

180 See 42 U.S.C. § 5191(a) (2012); *The Disaster Declaration Process*, *supra* note 73.

181 See Bronen & Chapin, *supra* note 68, at 9323.

182 See generally OFFICE OF CMTY. PLANNING & DEV., *supra* note 119; *Hazard Mitigation Grant Program*, FEMA, <https://www.fema.gov/hazard-mitigation-grant-program> [<https://perma.cc/SG44-PL2S>].

tion would create other problems.<sup>183</sup> FEMA is unlikely to support an expanded definition of major disasters because it could “open the floodgates” for requests for disaster declarations, and Congress would likely need to raise the eligibility requirements for disaster declarations to accommodate a massive increase in requests.<sup>184</sup> This would require significantly restructuring all programs available in response to major-disaster declarations—lawmakers would need to redesign the Stafford Act to separately link disasters like hurricanes with reactive emergency response and slow-onset disasters like erosion with more appropriate proactive solutions. These problems could be avoided by creating a new category for slow-onset disasters and only authorizing the programs necessary to respond to them proactively. Instead of redesigning the administrative framework, this solution streamlines an addition to that framework.

#### IV. IMPENDING CLIMATE CHANGE DISASTER DECLARATIONS PASS CONSTITUTIONAL MUSTER

The addition of impending climate change disasters to the Stafford Act requires conditioned spending by Congress, implicating two constitutional concerns: infringement upon states’ police powers and upon the federal government’s ability to dictate conditions for federal funds. However, the proposed amendment avoids running afoul of the constitution on both issues. First, the structure of federal assistance in response to an impending climate change disaster preserves states’ independence while leveraging the federal government’s advantages in financial and informational resources. Second, the proposed amendment adheres to the principles limiting conditions on federal funds articulated in *South Dakota v. Dole* and *NFIB v. Sebelius*.<sup>185</sup>

##### A. *Broad Federalism Concerns for the Federal Role in Relocation Responding to Climate Change*

Federal disaster response is limited by the Tenth Amendment, which reserves police power to the states.<sup>186</sup> Though the police power would justify leaving climate change adaptation to the states, states lack sufficient resources to implement relocation without federal assis-

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<sup>183</sup> See generally Bronen & Chapin, *supra* note 68, at 9320 (recommending amendment of the Stafford Act’s definition of major disasters “to include gradual geophysical processes, such as erosion”); Ristroph, *supra* note 109, at 288 (referencing the same solution).

<sup>184</sup> See Ristroph, *supra* note 109, at 288.

<sup>185</sup> See *supra* notes 35–36 and accompanying text.

<sup>186</sup> See U.S. CONST. amend. X.

tance.<sup>187</sup> The addition of impending climate change disasters to the Stafford Act preserves states' police power and role as first responders to the impacts of climate change, while providing both superior funding and informational resources through the federal government.

The Tenth Amendment limits federal disaster response, providing that “[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively,” including provision for the “health and welfare” of their citizens.<sup>188</sup> This police power grants states legal authority to respond to disasters without federal assistance.<sup>189</sup> States' authority under the police power is at its height during disasters, when states have “extraordinary powers” to suspend laws and commandeer resources to “reduce imminent threats to life, property, and public health and safety.”<sup>190</sup> State police power during disasters is particularly important because the effects of a disaster are initially experienced locally, and thus states are first responders.<sup>191</sup>

States are sovereigns, and thus they retain their police power even when federal disaster assistance has been requested.<sup>192</sup> Because “the federal government has no inherent police power,” it is limited in its ability to respond to disasters.<sup>193</sup> For Congress to respond to a disaster without a request for assistance from a state, it must exercise its authority under the Commerce Clause, the taxing or spending power, or the national-defense power.<sup>194</sup> Through conditioned funding, the federal government has leveraged its spending power to incentivize states to adopt disaster preparedness plans in compliance with federal policy.<sup>195</sup> However, federal disaster relief through FEMA is not intended to operate as a first response to disasters.<sup>196</sup>

Several theories support a strong state response to impending climate change disasters. First, the preservation of states' police power

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187 See Glicksman, *supra* note 130, at 1165.

188 U.S. CONST. amend. X; see ABA STANDING COMM. ON LAW & NAT'L SEC. ET AL., HURRICANE KATRINA TASK FORCE SUBCOMMITTEE REPORT 1, 2 (2006) [hereinafter ABA REPORT], [https://www.americanbar.org/content/dam/aba/migrated/natsecurity/publications/hurricane\\_katrina\\_report\\_2006\\_2.pdf](https://www.americanbar.org/content/dam/aba/migrated/natsecurity/publications/hurricane_katrina_report_2006_2.pdf) [<https://perma.cc/38QE-GB9M>].

189 See *id.* at 13.

190 *Id.* at 14.

191 *Id.* at 2.

192 *Id.* at 14.

193 Elizabeth F. Kent, “Where’s the Cavalry?” *Federal Response to 21st Century Disasters*, 40 SUFFOLK U. L. REV. 181, 186 (2006).

194 See ABA REPORT, *supra* note 188, at 2; Kent, *supra* note 193, at 186. See generally U.S. CONST., art. I, § 8, cl. 1, 3, 11–16 (granting Congress power to regulate interstate commerce, tax and spend for public welfare, and provide for national defense).

195 ABA REPORT, *supra* note 188, at 14.

196 Kent, *supra* note 193, at 187.

and their primary role preserving the health and welfare of citizens is appropriate for the localized nature of impending climate change disasters. The impacts of climate change will not be uniform across the United States,<sup>197</sup> thus it is logical for state and local authorities to retain control over implementation of site-specific adaptation strategies.<sup>198</sup> Second, democratic theory, positing that states should determine the ideal amount of adaptation for themselves, supports decentralized state adaptation efforts.<sup>199</sup> Decentralized decisionmaking at the state and local levels fosters self-determination because some citizens are more likely to “participate meaningfully” at state or local levels of government.<sup>200</sup> Further, federalism allows states to operate as “laboratories of invention,” permitting experimentation with different approaches—particularly useful with the localized effects of climate change—that can be shared across borders.<sup>201</sup>

Despite the benefits of a state approach to adapting to climate change disasters, a federal role (even if not a primary role) is still necessary because states lack the resources to formulate policy and implement relocation alone and because the federal government has greater financial and informational resources.<sup>202</sup> States, especially those with small populations, often lack financial resources to implement relocation without federal assistance, and the federal government has the capacity to supplement states’ financial commitment to proactive relocation.<sup>203</sup> Additionally, the federal government has better informational resources and could more effectively coordinate policies across jurisdictions to ensure relocation is effective and efficient on a national scale.<sup>204</sup> The federal government is better positioned to prioritize adaptation efforts that are most critical.<sup>205</sup> Furthermore, the federal government could streamline research and development of relocation policy, preventing duplicative research and development efforts in each of the 50 states.<sup>206</sup>

The federalist system of disaster response created by the Stafford Act provides a perfect tool for successful climate change relocation

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197 See Blunden, *supra* note 38.

198 See Glicksman, *supra* note 130, at 1162, 1164.

199 Alice Kaswan, *The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?*, 42 U.S.F. L. REV. 39, 61 (2007).

200 *Id.*

201 *See id.* at 62.

202 Glicksman, *supra* note 130, at 1165.

203 *See id.*

204 *See id.*

205 *See id.* at 1182.

206 *See Kaswan, supra* note 199, at 64.

efforts because it includes overlapping state and federal resources but respects the roles and strengths of both the federal and state governments. The Stafford Act implements a tag-team strategy, requiring that states first address a disaster and certify that the disaster either will overwhelm or has overwhelmed the state's resources before requesting federal assistance.<sup>207</sup> Even once federal assistance is granted through a presidentially declared disaster and congressional appropriations, the state and federal governments work together to remediate the disaster.<sup>208</sup> This federal assistance does not negate the state's role because the state must use the federal grants and implement the response.<sup>209</sup> Additional examples of states' significant roles in federal disaster response include the requirement that a state request a disaster declaration and the Stafford Act's cost-share requirement.<sup>210</sup>

Creating a new category of disaster under the Stafford Act for impending climate change disasters will utilize the strengths of the federalist interplay in federal disaster response. Impending climate change disaster declarations will still rely upon states' roles as first responders to the effects of climate change.<sup>211</sup> Because states must request assistance for impending climate change disasters, including the type and amount of assistance for the individual community, site-specific adaptation and relocation are promoted even with a federal role.<sup>212</sup> Furthermore, the governor of the state must request an impending climate change disaster declaration, and thus citizens have participated meaningfully at the state level in electing that representative.<sup>213</sup> Impending climate change disaster declarations also do not run the risk of creating a uniform national standard because the site-specific relocation response will depend upon geological surveys, climate change projections, and other data for that particular location.<sup>214</sup> Finally, requests for impending climate change disaster assistance can still provide opportunities for states to serve as laboratories of innova-

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207 See 42 U.S.C. § 5191(a) (2012); see also Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 170 (2006) ("Yet another aspect of real-world environmental federalism is the existence of interaction and dialogue between federal and state regulators. In some instances, this interaction may appear much like runners on a relay team passing a baton; states (or the federal government) may take the initial lead on an issue, only to have the issue taken up by the federal government (or the states).").

208 See Kent, *supra* note 193, at 187.

209 See *id.*

210 42 U.S.C. §§ 5170(a), 5170b(b) (2012).

211 See ABA REPORT, *supra* note 189, at 2.

212 See *id.*; Glicksman, *supra* note 130, at 1172.

213 See Glicksman, *supra* note 130, at 1172.

214 See Kaswan, *supra* note 199 at 61–62.

tion if the states request that experimental assistance in their applications.<sup>215</sup>

The impending climate change disaster category also capitalizes on the federal government's strengths as a financial and informational resource. The cost distribution between the federal government and the states can assist states that could otherwise not afford to relocate vulnerable communities.<sup>216</sup> The federal government can share best practices from successful relocations between jurisdictions and prioritize the most critical impending climate change disasters on a national scale so that federal funds are used in the order in which they are most needed.<sup>217</sup> Furthermore, the federal government has the resources to conduct extensive research on climate change that can be used by states in requesting an impending climate change disaster declaration and by the President in determining whether to grant an impending climate change disaster designation.<sup>218</sup>

Thus, because the addition of an impending climate change disaster to the Stafford Act would maintain states' police power and their significant roles in disaster response, this new category respects the reservation of powers to the states in the Tenth Amendment while incorporating the financial and informational strengths of the federal government into the proactive adaptation process. The framework is an ideal combination of federal and state strengths. Because one of the key features of federalism used by the impending climate change disaster category is conditional spending by the federal government, this Note will next examine the conditions on the receipt of federal impending climate change disaster funds through the spending clause requirements of *South Dakota v. Dole* and *NFIB v. Sebelius*.<sup>219</sup>

### *B. Congress's Spending Power and Conditional Receipt of Funds by the States*

Disbursement of federal funds for impending climate change disaster assistance to states will be conditioned on states implementing adaptation plans and sharing costs. The Supreme Court has ruled that conditions on funds granted to states by Congress are constitutional but not without limit.<sup>220</sup> In *Dole*, the Court outlined five factors for

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<sup>215</sup> See *id.* at 62.

<sup>216</sup> See Glicksman, *supra* note 130, at 1165.

<sup>217</sup> See *id.* at 1182.

<sup>218</sup> See Kaswan, *supra* note 199, at 64.

<sup>219</sup> See *supra* notes 35–36 and accompanying text.

<sup>220</sup> See *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987); see also *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 577–78 (2012) ("Congress may use its spending power

determining the constitutionality of a congressional conditional grant of funds to a state.<sup>221</sup> The Supreme Court further clarified its conditional receipt of funds doctrine in *NFIB*, finding that states must have a “legitimate” choice over whether to accept the funds and that an existing federal program involving conditional receipt of funds cannot be so drastically modified that it becomes an entirely new program.<sup>222</sup>

In *Dole*, the Supreme Court held that under the Spending Clause Congress may attach conditions to the receipt of federal funds “to further broad policy objectives.”<sup>223</sup> However, the power to condition the receipt of federal funds is not unbridled. To comport with Congress’s power under the Spending Clause, conditions on the receipt of federal funds must comply with five factors: (1) the conditions must be in pursuit of the general welfare, (2) the conditions must be unambiguous, (3) the conditions must be germane to the national interest or program, (4) there must be no independent constitutional bar, and (5) the conditions must not be so coercive that they become compulsion.<sup>224</sup>

The *Dole* Court provided some guidance on how each of the factors should be weighed. When determining general welfare, courts should “defer substantially to the judgment of Congress” that the spending serves the general public because Congress has the ability to define welfare.<sup>225</sup> Unambiguous conditions are such that states can decide whether to accept the funds “knowingly, cognizant of the consequences of their participation.”<sup>226</sup> In considering germaneness, conditions on federal funding may be illegitimate “if they are unrelated ‘to the federal interest in particular national projects or programs.’”<sup>227</sup> An independent constitutional bar is not “a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly,” but rather it is a requirement that the conditions not be used to coerce states into engaging in unconstitutional activities.<sup>228</sup>

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to create incentives for States to act in accordance with federal policies. But when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism.” (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

221 *See Dole*, 483 U.S. at 207–11.

222 *See NFIB*, 567 U.S. at 578, 583.

223 *Dole*, 483 U.S. at 206 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

224 *Id.* at 207, 210, 211.

225 *Id.* at 207, 208.

226 *Id.* at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

227 *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

228 *Id.* at 210.

In examining the fifth prong, a conditional grant of federal funds is not coercive merely because it successfully achieves its objectives.<sup>229</sup> Mild encouragement alone, such as the potential for federal withholding of five percent of federal highway funds in *Dole*, is not coercive.<sup>230</sup> The Court's decision in *NFIB*, the first case in which the Supreme Court declared a congressional spending program unconstitutional,<sup>231</sup> further clarified that the coerciveness prong requires that states have a legitimate choice over whether to accept the terms attached to federal funds and thus "voluntarily and knowingly accept[] the terms of the 'contract.'"<sup>232</sup> Because the states in *NFIB* stood to lose all Medicaid funding, which accounted for more than 20% of an average state's budget, states did not have a legitimate choice over whether to accept the new conditions and the provision was "a gun to the head."<sup>233</sup> Though funding can always be revoked, Congress is not permitted to revoke funding to force states to accept new conditions.<sup>234</sup>

The Court also clarified that amendments to existing conditional grants of funds cannot amount to a new program that Congress forces states to accept by threatening to withdraw existing funds.<sup>235</sup> Congress cannot surprise states participating in a federal program with "retroactive" conditions.<sup>236</sup> Because a state could not anticipate that Congress would alter an existing program as dramatically as in *NFIB* through its reservation of the right to amend the program, this drastic modification was ambiguous, as proscribed by *Dole*.<sup>237</sup> Although the Court found the expansion coercive, it did not define the line where incentives cross into coercion, finding that "wherever that line may be, this statute is surely beyond it."<sup>238</sup>

The addition of impending climate change disasters to the Stafford Act, and the corresponding conditional disbursement of funds to states, satisfies all five *Dole* factors and the heightened coerciveness

<sup>229</sup> *Id.* at 211.

<sup>230</sup> *Id.*

<sup>231</sup> Eric Turner, *Protecting from Endless Harm: A Roadmap for Coercion Challenges After N.F.I.B. v. Sebelius*, 89 CHL-KENT L. REV. 503, 503 (2014) ("Though the coercion argument has existed for decades, *NFIB* marks the first time the Court has declared a congressional spending power program coercive." (footnotes omitted)).

<sup>232</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius ("*NFIB*"), 567 U.S. 519, 542, 577 (2012) (citation omitted).

<sup>233</sup> *Id.* at 581.

<sup>234</sup> *Id.* at 581; see Turner, *supra* note 231, at 508–09.

<sup>235</sup> *Id.* at 582.

<sup>236</sup> *Id.* at 584.

<sup>237</sup> *Id.*; see South Dakota v. Dole, 483 U.S. 203, 207 (1987).

<sup>238</sup> *NFIB*, 567 U.S. at 585.



requirements of *NFIB*. First, aid for impending climate change disasters is disbursed in pursuit of the general welfare.<sup>239</sup> A court would likely defer to congressional judgment that proactive relocation is in pursuit of the general welfare, especially since funds disbursed through FEMA and HUD for relocation will primarily benefit low- to moderate-income persons.<sup>240</sup> Courts would also likely to defer to congressional judgment that the requirements of cost-sharing between the state and federal government and fully implemented adaptation plans are in pursuit of the general welfare because these requirements mirror those of existing cost-share requirements for major disasters and existing mitigation plan requirements for FEMA grant programs.

A court would likely find that the second *Dole* factor requiring unambiguous conditions is met.<sup>241</sup> Though this Note does not propose specific language for the amendment to the Stafford Act, the proposed conditions—that states share the cost of impending climate change disasters with the federal government and have FEMA-approved adaptation plans in place prior to requesting an impending climate change disaster declaration—can easily meet the second *Dole* factor with clear drafting.

The third requirement, that conditions be germane to the national interest, is satisfied for impending climate change disasters.<sup>242</sup> The cost-share requirement is germane to the national interest in disaster relief because it allows the federal government to assist when a state is overwhelmed but simultaneously restrains the federal government from encroaching on states' police power. The requirement that a state adopt an adaptation plan prior to requesting an impending climate change disaster declaration is also germane to the national interest in disaster relief and is analogous to other disaster relief eligibility requirements.<sup>243</sup> Furthermore, responding to climate change disasters proactively is germane to both the primary purpose of the Stafford Act to "alleviate the suffering and damage which result from . . . disasters" and the secondary purpose of "encouraging hazard mitigation measures to reduce losses from disasters."<sup>244</sup>

The *Dole* prohibition on independent constitutional bars, the fourth factor, is also met here.<sup>245</sup> The structure of the proposed

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<sup>239</sup> See *Dole*, 483 U.S. at 207.

<sup>240</sup> Cf. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 74, at 8.

<sup>241</sup> See *Dole*, 483 U.S. at 207.

<sup>242</sup> See *id.*

<sup>243</sup> See, e.g., *Hazard Mitigation Grant Program Frequently Asked Questions*, *supra* note 99.

<sup>244</sup> 42 U.S.C. § 5121(b) (2012).

<sup>245</sup> See *Dole*, 483 U.S. at 210.

amendment of the Stafford Act does not directly force states to adopt adaptation programs to primarily relocate low- or moderate-income persons due to impending climate change disasters or to implement mitigation plans to be eligible for FEMA HMGP funding. Instead, Congress would encourage it through the use of conditions on funds provided to the states, spending that is entirely under Congress's discretion.

Finally, the fifth factor, requiring that the conditions not be so coercive that they become compulsion, is met with this new provision.<sup>246</sup> A state will not be denied funds to which it was already entitled if it chooses not to share costs or adopt an adaptation plan—rather it will simply be ineligible for impending climate change disaster funds in the future. Unlike in *Dole*, in which South Dakota would have lost five percent of otherwise-allocated highway funds, a state that chooses not to adopt an adaptation plan or submit environmental studies will lose no funding to which it is entitled since supplemental appropriations are provided after an impending climate change disaster declaration is granted.<sup>247</sup> States have a legitimate choice over whether to accept the conditions on the new grants of funds since, unlike the states in *NFIB*, they are not already entitled to the funds.<sup>248</sup> Furthermore, a state will not be denied reactive post-disaster assistance for its failure to adopt an adaptation plan. The fact that a state must affirmatively request an impending climate change disaster declaration from the president operates as a knowing acceptance of the terms of this new contract.<sup>249</sup>

Importantly, the expansion does not fundamentally transform the Stafford Act or current disaster-assistance programs. Though the creation of a new category of proactive disaster assistance is an expansion of existing reactive disaster assistance, it continues to serve the purpose of the Stafford Act to alleviate suffering and damage from disasters.<sup>250</sup> Furthermore, the creation of conditional assistance for impending climate change disasters is not an amendment to an existing conditional grant of funds since the conditions on receipt of impending climate change disaster assistance do not affect assistance for major disaster declarations.<sup>251</sup> Though a state may not have antici-

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<sup>246</sup> See *id.* at 211.

<sup>247</sup> See *id.*

<sup>248</sup> See Nat'l Fed'n of Indep. Bus. v. Sebelius ("*NFIB*"), 567 U.S. 519, 542, 577–78 (2012).

<sup>249</sup> See *id.* at 542, 577.

<sup>250</sup> See 42 U.S.C. § 5121(b) (2012).

<sup>251</sup> See *NFIB*, 567 U.S. at 582.

pated that Congress would amend the Stafford Act to include proactive disaster assistance in response to climate change—likely because the full effects of climate change are only more recently understood—the modification here is unambiguous because it does not fundamentally transform the federal program of disaster assistance but, rather, offers an additional source of funding for proactive disaster assistance.<sup>252</sup>

Because the creation of impending climate change disaster assistance with its own conditions complies with the five factors outlined in *Dole* and the legitimate-choice requirements of *NFIB*, the conditions on the receipt of those funds is constitutional.

#### CONCLUSION

Federal disaster response in the United States currently lacks the ability to proactively respond to predictable disasters induced by climate change and relocate the communities most at risk before harm actually occurs. The addition of a new category of disaster response for impending climate change disasters to the Stafford Act would create the opportunity for states to request federal assistance to respond to predictable and certain climate change disasters proactively and would allow states to share costs with the federal government to move vulnerable communities to safety. Without it, communities must request reactive disaster assistance only after a climate change disaster has occurred, despite the predictability and preventability of harm caused by climate change.

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<sup>252</sup> See *id.* at 582–83.