

## A WISE MOVE: EXPEDITING THE INEVITABLE BY EMBRACING MANAGED RETREAT IN NEW JERSEY

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### ABSTRACT

*Sea level rise—one of the most consequential effects of climate change—will have an outsized impact on New Jersey. Increased flooding will permanently alter the state by causing devastating damage that leaves many homes uninhabitable, precipitating a need to relocate residents before that happens. Due to its voluntary nature, the state’s current property acquisition program can only do so much to respond to this looming crisis. Accordingly, New Jersey should use eminent domain in a fair and equitable manner to compel homeowners to move before disaster strikes. Given its distinct coastal geography, environmentally progressive policies, and effective, established buyout scheme, the Garden State is an ideal place to enact a groundbreaking buyout program backed by eminent domain that can be used to proactively protect residents from the impending threat presented by rising sea levels.*

### TABLE OF CONTENTS

I.	INTRODUCTION.....	836
II.	FLOOD-MITIGATING BUYOUT PROGRAMS .....	841
	A. <i>Blue Acres</i> .....	841
	B. <i>Other States’ Buyout Stories</i> .....	843
	C. <i>Downsides to Buyouts</i> .....	845
III.	LEGAL MEANS TO PROACTIVELY RESPOND TO SEA LEVEL RISE... ..	848
	A. <i>The Takings Doctrine</i> .....	848
	B. <i>New Jersey’s Eminent Domain Law and Environmental Policies</i> .....	852
IV.	USING EMINENT DOMAIN TO FAIRLY FACILITATE MANAGED RETREAT .....	856

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A.	<i>Emboldening Blue Acres with Eminent Domain</i> .....	856
B.	<i>Properly Valuing Taken Property</i> .....	860
C.	<i>Armstrong, Equity, and Just Compensation</i> .....	863
V.	CONCLUSION .....	866

## I. INTRODUCTION

Climate change is one of the most complex and urgent issues of our time. Largely due to human activities that result in the emission of greenhouse gases, global temperatures have consistently risen throughout the past century.<sup>1</sup> Since the pre-industrial era, average global surface temperatures have increased more than 1.1°C.<sup>2</sup> The warmest year in recorded history was 2024, surpassing the previous record set in 2023,<sup>3</sup> a worrying trend that shows no sign of abating. No matter how much is done to try to cut emissions and mitigate the changes, the warming is going to continue, with temperatures expected to rise another 1.5°C by 2050.<sup>4</sup> Though these may sound like modest increases, a global temperature rise of just one or two degrees could have catastrophic impacts on the planet<sup>5</sup> given that nearly half of the global population already lives in areas “highly susceptible to” floods, fires, heatwaves, and other storms which are exacerbated by warming.<sup>6</sup>

Other than loss of life, one of the most profound consequences of major climate-related events is the displacement that occurs when homes are destroyed. Within the past five years alone, various communities struck by major disasters have become uninhabitable or barren. In 2019,

1. Rebecca Lindsey & Luann Dahlman, *Climate Change: Global Temperature*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. CLIMATE.GOV (May 29, 2025), <https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature>.

2. *Id.*

3. David Sharrock, *A Year of Heat and Havoc: Why 2024 Must Be a Wake-Up Call*, GLOB. CTR. ON ADAPTATION (Jan. 8, 2025), <https://gca.org/a-year-of-heat-and-havoc-why-2024-must-be-a-wake-up-call>.

4. See *The Science of Climate Change*, WIS. DEPT OF NAT. RES., <https://dnr.wisconsin.gov/climatechange/science> (last visited Jan. 18, 2025); see also Brad Plumer & Henry Fountain, *A Hotter Future Is Certain, Climate Panel Warns. But How Hot Is Up to Us.*, N.Y. TIMES (Sept. 13, 2023), <https://www.nytimes.com/2021/08/09/climate/climate-change-report-ipcc-un.html>.

5. DAVID WALLACE-WELLS, *THE UNINHABITABLE EARTH: LIFE AFTER WARMING* 12–14 (2019).

6. See *Climate Change*, WORLD HEALTH ORG. (Oct. 12, 2023), <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>; *Population*, UNITED NATIONS, <https://www.un.org/en/global-issues/population> (last visited Jan. 18, 2025).

Tropical Cyclone Idai claimed more than 1,000 lives when it hit southern Africa.<sup>7</sup> In Mozambique, Idai destroyed more than 100,000 homes, demolished over \$1 billion worth of infrastructure, and displaced 146,000 people, making it the worst storm in the country's history.<sup>8</sup> Because monsoon rains and extreme drought in Southeast Asia has made farming much more difficult, more than eight million people in the region have migrated elsewhere, including North America, Europe, and the Middle East.<sup>9</sup> This trend is unfortunately not expected to slow down. The U.N. International Organization for Migration projects that changing climate conditions will force approximately 200 million people to relocate by 2050.<sup>10</sup>

Although some seek refuge in other countries, most climate migrants relocate within their own borders.<sup>11</sup> In the United States, such migration will likely be spurred on by increasingly frequent wildfires in Western states, hurricanes and tropical storms in Eastern and Southern states, and droughts and floods that will impact people all over the country.<sup>12</sup> In 2022, more than three million Americans lost their homes in climate-related disasters, many of whom will never return to their property.<sup>13</sup> By 2100, up to thirteen million Americans are at risk of having to migrate due to sea level rise alone.<sup>14</sup>

Recognizing the exigencies presented by climate change and the widespread impact it will continue to have on the world's citizens, 194 countries and the European Union have joined the Paris Agreement, an international commitment that seeks to reduce greenhouse gas emissions

7. *Cyclone Idai's Death Toll Over 1,000, Hundreds of Thousands Displaced*, REUTERS (Apr. 15, 2019, 9:06 AM), <https://www.reuters.com/article/business/environment/cyclone-idais-death-toll-over-1000-hundreds-of-thousands-displaced-idUSKCN1RR0NA/>.

8. JOHN PODESTA, BROOKINGS, *THE CLIMATE CRISIS, MIGRATION, AND REFUGEES* 1 (2019), [https://www.brookings.edu/wp-content/uploads/2019/07/Brookings\\_Blum\\_2019\\_climate.pdf](https://www.brookings.edu/wp-content/uploads/2019/07/Brookings_Blum_2019_climate.pdf).

9. Abrahm Lustgarten, *The Great Climate Migration*, N.Y. TIMES MAG. (July 23, 2020), <https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html>.

10. WALLACE-WELLS, *supra* note 5, at 133.

11. JONATHAN S. BLAKE ET AL., RAND CORP., *ADDRESSING CLIMATE MIGRATION: A REVIEW OF NATIONAL POLICY APPROACHES* 2 (2021), [https://www.rand.org/content/dam/rand/pubs/perspectives/PEA1000/PEA1085-1/RAND\\_PEA1085-1.pdf](https://www.rand.org/content/dam/rand/pubs/perspectives/PEA1000/PEA1085-1/RAND_PEA1085-1.pdf).

12. Abrahm Lustgarten, *Climate Change Will Force a New American Migration*, PROPUBLICA (Sept. 15, 2020, 5:00 AM), <https://www.propublica.org/article/climate-change-will-force-a-new-american-migration>.

13. Jake Bittle, *The American Climate Migration Has Already Begun*, GUARDIAN (Feb. 23, 2023, 6:11 AM), <https://www.theguardian.com/commentisfree/2023/feb/23/us-climate-crisis-housing-migration-natural-disasters>.

14. Mathew E. Hauer, *Migration Induced by Sea-Level Rise Could Reshape the US Population Landscape*, 7 NATURE CLIMATE CHANGE 321, 321 (2017).

and ensure that global temperatures do not rise by more than 2°C.<sup>15</sup> The world inhabited by future generations will be vastly improved if the Paris Agreement's lofty goals are met.<sup>16</sup> However, most countries party to the Agreement are not presently on track to meet their targets.<sup>17</sup> In the unlikely event that each country actually meets its goal, the Earth is projected to warm by 2.7°C to 3.0°C by 2100 regardless.<sup>18</sup>

As global temperatures rise, the oceans will absorb the increased heat, causing waters to expand and sea levels to rise at a faster rate than ever before.<sup>19</sup> Residents living along the U.S. coastline will be particularly vulnerable to sea level rise. In New Jersey, rising temperatures have contributed to an annual precipitation increase of 5% to 10% during the last century,<sup>20</sup> and the state projects that precipitation will increase by another 4% to 11% by 2050.<sup>21</sup> Ongoing warming will result in greater precipitation, shifts in terrestrial water storage

15. *The Paris Agreement*, UNITED NATIONS, <https://www.un.org/en/climatechange/paris-agreement> (last visited Nov. 26, 2025).

16. See Evelin Toth & Fatimah Alyas, *Six Ways That Meeting the Goals of the Paris Agreement Will Drive Economic Growth*, UNITED NATIONS FOUND. (Feb. 18, 2021), <https://unfoundation.org/blog/post/six-ways-that-meeting-the-goals-of-the-paris-agreement-will-drive-economic-growth/> (explaining that meeting the Paris Agreement's targets will result in fewer climate-related disasters, an air pollution reduction, energy savings, and wide-ranging economic benefits).

17. See Chelsea Harvey & E&E News, *Global Carbon Removal Efforts Are Off Track for Meeting Climate Goals*, SCI. AM. (Jan. 19, 2023), <https://www.scientificamerican.com/article/global-carbon-removal-efforts-are-off-track-for-meeting-climate-goals/>. President Donald Trump again announced the United States' withdrawal from the Agreement, just as he did in 2017 during his first term in office. Nate Perez & Rachel Waldholz, *Trump Is Withdrawing from the Paris Agreement (Again), Reversing U.S. Climate Policy*, NPR (Jan. 21, 2025, 5:00 AM), <https://www.npr.org/2025/01/21/nx-s1-5266207/trump-paris-agreement-biden-climate-change>.

18. ROBERT E. KOPP ET AL., NEW JERSEY'S RISING SEAS AND CHANGING COASTAL STORMS: REPORT OF THE 2019 SCIENCE AND TECHNICAL ADVISORY PANEL 13 (2019), <https://www.nj.gov/dep/climatechange/pdf/nj-rising-seas-changing-coastal-storms-stap-report.pdf>.

19. *Rising Sea Level*, UNIV. CORP. FOR ATMOSPHERIC RSCH., <https://scied.ucar.edu/learning-zone/climate-change-impacts/rising-sea-level> (last visited Jan. 18, 2025) (explaining that global sea levels have risen by about eight to twelve inches since 1800 but that by 2100, global sea levels could rise up to forty-three inches above pre-industrial levels).

20. U.S. EPA, EPA 430-F-16-032, WHAT CLIMATE CHANGE MEANS FOR NEW JERSEY 1 (2016), <https://www.epa.gov/sites/default/files/2016-09/documents/climate-change-nj.pdf>.

21. NICHOLAS ANGARONE ET AL., INTERAGENCY COUNCIL ON CLIMATE RESILIENCE, STATE OF NEW JERSEY CLIMATE CHANGE RESILIENCE STRATEGY 11 (2021), <https://dep.nj.gov/wp-content/uploads/climatechange/docs/nj-climate-resilience-strategy-2021.pdf>. The *Climate Change Resilience Strategy* was drafted in response to an Executive Order issued by Governor Murphy which directed the statewide initiative to be developed and implemented. N.J. Exec. Order No. 89 (Oct. 29, 2019), <https://nj.gov/infobank/eo/056murphy/pdf/EO-89.pdf>.

capacity, increased thermal expansion of ocean water, and the melting of Arctic ice sheets, all of which cause sea level rise.<sup>22</sup> The N.J. Interagency Council on Climate Resilience projects that sea levels could rise by as much as one to two feet by 2050, and two to five feet by 2100, but only time will tell exactly how high the water will swell.<sup>23</sup>

In light of this challenge, the New Jersey Climate Change Alliance's Science and Technical Advisory Panel released a report with projections for how high sea levels will rise in New Jersey by 2100 under low, moderate, and high-emissions scenarios.<sup>24</sup> Assuming that countries generally abide by their current national emissions policies, the moderate-emissions scenario predicts that, by 2100, global temperatures will increase between 3.1°C and 3.5°C.<sup>25</sup> Under this scenario, sea levels along New Jersey's coastline are projected to experience a median rise of 3.3 feet by 2100.<sup>26</sup>

Such a dramatic rise in sea level would have a detrimental impact on New Jersey and the cities along its coastline. Within the next thirty years, approximately 62,000 New Jersey homes are at risk of chronic flooding, 15% to 20% of which were constructed after the year 2000.<sup>27</sup> By the end of the decade, Atlantic City, which is the Jersey Shore's poorest and largest municipality, is likely to spend more than \$300 million annually to address damage caused by flooding.<sup>28</sup> By 2100, three feet of sea level rise could put entire Atlantic City neighborhoods below tide level.<sup>29</sup> It is also "extremely likely" that by then, the city will endure high-tide flooding for about one quarter of the year and "likely" that there will be high-tide flooding on 355 days each year.<sup>30</sup> Nearly 1,300 Atlantic City

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22. KOPP ET AL., *supra* note 18, at 6–7.

23. ANGARONE ET AL., *supra* note 21, at 11, 78.

24. KOPP ET AL., *supra* note 18, at 1. The low-emission scenario projections are based on 2°C of warming while the high-emission scenario is based on 5°C of warming. *Id.* at 12.

25. *Id.* at 13.

26. *Id.* at 17.

27. ANGARONE ET AL., *supra* note 21, at 78.

28. Andrew S. Lewis, *The Long, Slow Drowning of the New Jersey Shore*, N.Y. TIMES MAG. (Aug. 12, 2021), <https://www.nytimes.com/2021/08/12/magazine/new-jersey-shore.html>.

29. Brandon Goldner, *Why Is Atlantic City's Sea Level Rising Much Faster Than the Rest of the World?*, CBS NEWS PHILA. (July 14, 2023, 1:58 PM), <https://www.cbsnews.com/philadelphia/news/rising-sea-levels-map-atlantic-city-nj-climate-change>.

30. See N.J. DEP'T OF ENV'T PROT., 2020 NEW JERSEY SCIENTIFIC REPORT ON CLIMATE CHANGE 45 (Rebecca Hill et al. eds., 2020), <https://dep.nj.gov/wp-content/uploads/climatechange/docs/nj-scientific-report-2020.pdf>. The New Jersey Department of Environmental Protection's Scientific Report on Climate Change defines an "extremely likely" scenario as one that has a greater than 95% chance of occurring while a "likely" scenario has a 50% chance of occurring. *Id.*

properties are already at risk of experiencing repeated tidal flooding<sup>31</sup> and more than 95% of the city's homes have a greater than 25% chance of experiencing severe flooding within the next thirty years.<sup>32</sup>

Coastal flooding caused by sea level rise already affects millions of people living in the Gulf of Mexico, Pacific Islands, and Mid-Atlantic, and these projections make clear that conditions will not improve.<sup>33</sup> Slowly but surely, the profound consequences of sea level rise will impact many Americans by reshaping the communities they call home. Naturally, a great deal of scholarship has been written about the legal issues associated with addressing sea level rise, including by my Rutgers Law School colleague, Daniel Boucot, whose article in the previous volume of this Law Review, *The Fork in the Road*, outlined various adaptive measures that the government could take to help protect people.<sup>34</sup> Acknowledging that safeguarding the public from encroaching oceans may require infringing on property rights, Mr. Boucot advocated for the government to take decisive action to transform localities by invoking the Fifth Amendment's Takings Clause, fully accepting the financial liability it would face.<sup>35</sup> The grim alternative, he explains, is for the government to do nothing and rely on the Doctrine of Public Necessity as a defense after the damage is done.<sup>36</sup>

This Note is in conversation with Mr. Boucot's insightful work, building on many of his ideas while focusing solely on how New Jersey can and should deal with its steadily vanishing coast. Sooner or later, rising sea levels will radically alter the state's cherished seaside communities, many of which have recently been ravaged by a spate of storms. New Jersey currently uses its Blue Acres program to offer buyouts to residents whose homes have been, or are likely to be, damaged by floods.<sup>37</sup> Rather than wait until after the tide washes in, New Jersey should expand upon its effective yet limited buyout program's framework and proactively engage in strategic managed retreat, backed by eminent domain. By pioneering widespread planned relocation, the Garden State could set an example for how to move residents out of harm's way while

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31. *New Jersey's Sea Level Is Rising*, SEA LEVEL RISE, <https://sealevelrise.org/states/new-jersey/> (last visited Jan. 18, 2025).

32. *Atlantic City Flooding Risk*, FIRST STREET, [https://firststreet.org/city/atlantic-city-nj/3402080\\_fsid/flood](https://firststreet.org/city/atlantic-city-nj/3402080_fsid/flood) (last visited Apr. 21, 2025).

33. See Rebecca Hersher, *Coastal Flooding Is Getting More Common, Even on Sunny Days*, NPR (Sept. 3, 2024, 7:37 PM), <https://www.npr.org/2024/08/06/nx-s1-5057482/high-tide-floods-get-worse>.

34. Daniel Boucot, *The Fork in the Road: How Rising Sea Levels Impose a Crossroads for Property Rights*, 76 RUTGERS U. L. REV. 767, 784–87 (2024).

35. *Id.* at 791–95.

36. See *id.* at 788–91.

37. See *infra* Section II.A.

ensuring that they receive fair compensation in accordance with the Takings Clause.

## II. FLOOD-MITIGATING BUYOUT PROGRAMS

When storms cause significant damage to American homes, it is easy to see why most people's preferred solution is to repair their property. After severe flooding events, some homes are raised on stilts and flood barriers are constructed nearby in an attempt to maintain the status quo.<sup>38</sup> But in the most extreme cases, buyouts are used as a last resort among those whose homes have been damaged beyond repair. Buyouts are a form of property acquisition the government uses to purchase land that someone's home is (or once was) located on in order to permanently relocate the homeowners.<sup>39</sup>

Buyouts can be an effective way to extract people out of floodplains, but they are almost exclusively utilized *after* major disasters and floods hit.<sup>40</sup> While this certainly aids the recovery process, such a whack-a-mole-style ad hoc approach is an inefficient and insufficient solution to a problem that needs a more forward-looking, long-term fix.

### A. *Blue Acres*

Established by the New Jersey Department of Environmental Protection ("NJDEP") in 1995, the Blue Acres program is designed to protect public safety by purchasing homes from residents whose properties have been damaged by storms or are vulnerable to flooding.<sup>41</sup> After acquiring properties, the state repurposes the land by building community green space, parks, and natural flood storage in their place.<sup>42</sup> Replacing demolished homes with open space permanently preserves the

38. Jake Bittle, *Louisiana's Landmark Climate Adaptation Program Is Running Out of Time*, GRIST (May 26, 2023), <https://grist.org/extreme-weather/louisiana-coastal-master-plan-cpra-adaptation/>.

39. *Buyouts Bring Relief to a Pennsylvania Community*, FED. EMERGENCY MGMT. AGENCY, (Feb. 11, 2021), <https://www.fema.gov/case-study/buyouts-bring-relief-pennsylvania-community>.

40. DIANE P. HORN, CONG. RSCH. SERV., IN11911, FLOODPLAIN BUYOUTS: FEDERAL FUNDING FOR PROPERTY ACQUISITION 2 (2024), [https://www.congress.gov/crs\\_external\\_products/IN/PDF/IN11911/IN11911.5.pdf](https://www.congress.gov/crs_external_products/IN/PDF/IN11911/IN11911.5.pdf).

41. *Blue Acres*, N.J. DEP'T OF ENV'T PROT., <https://dep.nj.gov/blueacres> (last visited Apr. 21, 2025).

42. S.B. 3401, 220th Leg., Reg. Sess. (N.J. 2022).

land and protects against future floods by functioning as a natural storm buffer.<sup>43</sup>

In the wake of Superstorm Sandy, which made landfall in New Jersey on October 29, 2012,<sup>44</sup> the initiative was expansively utilized by then-Governor Chris Christie, who redubbed it the Superstorm Sandy Blue Acres Buyout Program on May 16, 2013.<sup>45</sup> Of the 346,000 homes damaged or destroyed by the storm,<sup>46</sup> Governor Christie offered to purchase at least 806 across 14 state municipalities.<sup>47</sup> Nearly four years after the storm hit, 618 of those offers to purchase property had been accepted, 503 closings had been completed, and 371 had been demolished.<sup>48</sup> These offers were made possible by \$273 million in federal disaster recovery funds allocated to Blue Acres by three federal agencies.<sup>49</sup>

When Tropical Storm Ida made landfall in September 2021, 27 people were killed in flooded parts of central and northern New Jersey.<sup>50</sup> After initially receiving \$50 million to fund buyouts for victims of Ida-related damage,<sup>51</sup> the Blue Acres program has since been allocated an additional \$44 million.<sup>52</sup> In Manville, NJ, 79 homeowners applied for assistance

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43. *3 Years Long, 3 Years Strong: New Jersey's Successful Approach to Purchasing Homes Along Sandy's Flooded Path*, FED. EMERGENCY MGMT. AGENCY (FEB. 11, 2021), <https://www.fema.gov/case-study/3-years-long-3-years-strong-new-jerseys-successful-approach-purchasing-homes-along>.

44. *Remembering Superstorm Sandy*, N.J. DEP'T OF ENV'T PROT. (OCT. 26, 2022), <https://dep.nj.gov/sandy-10/>.

45. John Lovett, *Moving to Higher Ground: Protecting and Relocating Communities in Response to Climate Change*, 42 VT. L. REV. 25, 45 (2017).

46. *Remembering Superstorm Sandy*, *supra* note 44.

47. Press Release, N.J. Dep't of Env't Prot., Christie Administration's Blue Acres Buyout Program Surpasses 500 Property Acquisitions in Flood-Prone Areas Across New Jersey (Aug. 4, 2016), [https://dep.nj.gov/newsrel/16\\_0073/](https://dep.nj.gov/newsrel/16_0073/).

48. *Id.*

49. *3 Years Long, 3 Years Strong*, *supra* note 43. The Federal Emergency Management Agency (FEMA)'s Hazard Mitigation Grant Program provided \$169 million, the U.S. Department of Housing and Urban Development (HUD) Community Development Block Grant Disaster Recovery program provided \$100 million, and the U.S. Department of Agriculture granted \$4 million. *Id.*

50. Gov. Murphy Reports 2 Additional Ida-Related Deaths in New Jersey, Bringing the Total to 27, 6ABC PHILA. (Sept. 4, 2021), <https://6abc.com/flooding-nj-passaic-newark-airport/10994768/>.

51. Morgan Sweeney, *New Jerseyans Aided by Another \$60 Million in Ida Recovery Strategy*, CTR. SQUARE (May 5, 2022), [https://www.thecentersquare.com/new\\_jersey/article\\_1719326e-ccba-11ec-bdf7-cf2e10aa6660.html](https://www.thecentersquare.com/new_jersey/article_1719326e-ccba-11ec-bdf7-cf2e10aa6660.html); see also *Blue Acres Receives Approval for a Third Batch of FEMA Flood Buyout Funding*, N.J. DEP'T OF ENV'T PROT. (May 31, 2024, 11:59 AM), <https://dep.nj.gov/blueacres/blue-acres-receives-approval-for-a-third-batch-of-fema-flood-buyout-funding/>.

52. See Jon Hurdle, *NJ Switches to Blue Acres Buyouts in Flood-Prone Manville*, NJ SPOTLIGHT NEWS (Aug. 30, 2023), <https://www.njspotlightnews.org/2023/08/nj-says->



from the Department of Community Affairs and the NJDEP to repair homes damaged by Ida or to elevate homes to prevent against future storm damage.<sup>53</sup> After attempting to restore or raise the homes, the state changed course and offered to purchase the properties instead, recognizing that elevations would not adequately protect at-risk residences and that buyouts are the best way to spend their limited funds.<sup>54</sup> In a letter sent to homeowners, the NJDEP suggested that “buyouts are the most permanent” solution to keep people and their property safe from “inevitable future flood events.”<sup>55</sup>

The state’s choice to purchase properties rather than rebuild them is an acknowledgment of the futility of fighting Mother Earth. By using Blue Acres to prioritize buyouts and relocation, New Jersey is utilizing nonstructural adaptation approaches to flooding caused by climate change.<sup>56</sup> While some Manville residents were frustrated by the state’s about-face and might prefer to repair or rebuild their properties,<sup>57</sup> other states’ initiatives have demonstrated that elevations and flood barriers are stopgap solutions, at best.

### B. Other States’ Buyout Stories

Due to the ongoing deterioration of the Gulf Coast’s shoreline, Louisiana is facing a land loss crisis.<sup>58</sup> Accordingly, the state’s Coastal Protection and Restoration Authority (“CPRA”) established a comprehensive coastal protection plan<sup>59</sup> which includes restoring land, elevating properties onto stilts out of the path of floodplains, and building flood barriers such as pumps and levees.<sup>60</sup> In September 2023, the CPRA

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buyouts-best-for-storm-damaged-homes-manville/. The amount of funding is current as of the article’s publication on August 30, 2023. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. See 1 WATERS AND WATER RIGHTS § 4A.02(e)(2) (Amy K. Kelley & Jesse J. Richardson, Jr., eds., 3d ed. 2025). Nonstructural adaptation strategies are used in contrast to structural adaptation approaches, which protect against floods by building hard infrastructure such as levees and dams. *Id.*

57. Hurdle, *supra* note 52.

58. A *Changing Landscape*, COASTAL PROT. & RESTORATION AUTH., <https://coastal.la.gov/whats-at-stake/a-changing-landscape/> (last visited Jan. 18, 2025). The National Oceanic and Atmospheric Administration projects that the state’s coastal sea level is projected to rise by 1.5 to 2 feet by 2050. *Sea Level Rise and Coastal Flooding Impacts*, NOAA OFF. FOR COASTAL MGMT., <https://coast.noaa.gov/slr/#/layer/sce/0/-10300009.557981098/3564353.464559216/7/satellite/none/0.8/2050/interHigh/midAccretion> (last visited Jan. 18, 2025).

59. *About CPRA*, COASTAL PROT. & RESTORATION AUTH., <https://coastal.la.gov/about/> (last visited Jan. 18, 2025).

60. Bittle, *supra* note 38.

declared that Louisiana must spend more than \$11 billion throughout the next 50 years on nonstructural adaptation programs such as elevations, flood-proofing, and voluntary buyouts.<sup>61</sup> But such funding is far from guaranteed, and even if it is allocated, coastal management projects take a long time to complete and are subject to frequent delays and price increases.<sup>62</sup> Though it is a politically unpopular choice, Louisianans may soon be forced to embrace managed retreat<sup>63</sup> and move out of the riskiest areas most impacted by floodwater.<sup>64</sup>

A similar series of events previously played out in North Carolina following Hurricane Matthew in 2016. The storm dealt approximately \$1.5 billion in damages to the state.<sup>65</sup> Floods destroyed 450 homes in Princeville, a town of 2,200 whose residents had previously rejected buyouts following Hurricane Floyd.<sup>66</sup> As the first town to be chartered by freed Black Americans, Princeville holds immense cultural significance, and efforts commensurate with its importance have been made to rebuild it.<sup>67</sup>

But after being hit by two hundred-year storms just 17 years apart,<sup>68</sup> the town seems stuck in an “indefinite limbo” due to the differing strategies that state and federal agencies alike have used to restore it.<sup>69</sup> While Congress granted funding to the Army Corps of Engineers to build a levee to protect the town and FEMA provided grants to rebuild homes, the agency is simultaneously funding buyouts to help people move.<sup>70</sup> Though the political will to save Princeville undoubtedly exists, there is

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61. Mike Smith, *Louisiana 2050: Rising Seas Will Upend Life. Time Is Running Out to Limit the Impact.*, NOLA (Sept. 14, 2023), [https://www.nola.com/news/environment/louisiana-2050-the-states-perilous-future-as-seas-rise/article\\_af75ba34-4dae-11ee-94cc-c7fe71b2b51d.html](https://www.nola.com/news/environment/louisiana-2050-the-states-perilous-future-as-seas-rise/article_af75ba34-4dae-11ee-94cc-c7fe71b2b51d.html).

62. See, e.g., *id.* (noting that a levee system designed to protect the Gulf Coast was initially projected to cost \$760 million but is now being priced at \$3.7 billion, a major spending increase that could delay the project).

63. See Maye C. Emlein, *Rising to the Challenge: Managed Retreat and the Takings Clause in Maine's Climate Change Era*, 73 ME. L. REV. 169, 182 (2020) (“Managed retreat is the movement of ‘people and assets away from risk . . . in a preplanned, coordinated way.’” (alteration in original) (quoting Sophia Schmidt, *Considering ‘Managed Retreat’ as a Response to Sea Level Rise*, DEL. PUB. MEDIA (Sept. 6, 2019, 3:43 PM), <https://www.delawarepublic.org/science-health-tech/2019-09-06/considering-managed-retreat-as-a-response-to-sea-level-rise>)).

64. Bittle, *supra* note 38.

65. Lovett, *supra* note 45, at 26.

66. Karrigan Börk et al., *Adapting to a 4°C World*, 52 ENV'T L. REP. 10211, 10222 (2022).

67. *Id.*

68. *Id.*

69. See Jake Bittle, *Higher Ground*, GRIST (Sept. 20, 2022), <https://grist.org/housing/princeville-north-carolina-flood-black-history-managed-retreat>.

70. *Id.*

no telling when another major storm might further jeopardize the town and efforts to rebuild will ultimately prove fruitless. Rather than repeat this reactive routine, a proactive, anticipatory approach that aims to preserve the identities of communities like this while appropriately responding to changing conditions could be employed instead.<sup>71</sup>

In some parts of the United States, it is unfortunately not a matter of whether, but *when*, the seas will rise to levels that leave coastal communities uninhabitable. Many flood-proofing efforts are just delaying the inevitable, which is that in many parts of the country people will eventually have to move.<sup>72</sup> As sea levels steadily rise along the New Jersey coast,<sup>73</sup> several towns vulnerable to flooding have had Blue Acres offer buyouts to residents whose homes are damaged or at risk.<sup>74</sup> But buyouts are far from perfect solutions.

### C. Downsides to Buyouts

Although there is no telling when another major storm might hit, the most dramatic effects of consistent sea level rise will likely take at least another decade or two to come to pass.<sup>75</sup> So for now, residents of Manville and other New Jersey towns can take solace in the fact that their homes cannot be purchased without permission. The New Jersey Blue Acres Fund statute stipulates that the state “shall not use the power of eminent domain in any manner for the acquisition of lands.”<sup>76</sup> But residents who choose not to sell their property might end up staying in communities that no longer resemble the ones they know. Manville already contains many empty lots, courtesy of buyouts conducted following hurricanes

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71. Bork et al., *supra* note 66 (arguing that although the geographic landscape will assuredly change over time, proactively anticipating these changes is the best way to ensure that the historical ties and cultural artifacts that a given place produces are preserved).

72. Rakiah Bonjour, *Flooding the Cities: How Land Use Policies Contribute to Climate Gentrification*, 44 SETON HALL LEGIS. J. 91, 101 (2020) (“[T]hese protectionist policies are only delaying the inevitable, because eventually the water will become impossible to hold back.”).

73. See *supra* notes 26–32 and accompanying text.

74. *Climate and Flood Resilience*, N.J. DEPT OF ENV'T PROT. (OCT. 26, 2022), <https://dep.nj.gov/sandy-10/climate-flood-resilience/#blueacres>.

75. See N.J. DEPT OF ENV'T PROT., *supra* note 30, at vii–xv.

76. N.J. STAT. ANN. § 13:8C-49(d) (West, Westlaw through L. 2025, c. 20 and J.R. No. 1). However, the statute authorizes the use of eminent domain when necessary to establish the value of land being purchased from a *willing* seller. *Id.* The application submitted by homeowners who are interested in selling their property to the state further confirms that New Jersey will not use eminent domain if sale negotiations fail. *Application for Blue Acres Acquisition*, N.J. DEPT OF ENV'T PROT., <https://dep.nj.gov/blueacres/application-for-blue-acres-acquisition/> (last visited Jan. 18, 2025).

Irene and Floyd.<sup>77</sup> Because such a “patchwork pattern of open space” can be considered as a waste, holdouts impede Blue Acres’ goal of creating parks, community space, and flood barriers on flood-prone land.<sup>78</sup>

Plus, when several members of flood-inundated communities *do* accept buyouts, the remaining holdouts tend to suffer since they are essentially left to fend for themselves. For example, residents of Staten Island’s Oakwood Beach neighborhood were left with poorly maintained streets and unreliable trash collection services after many of their neighbors fled following the destruction caused by Superstorm Sandy.<sup>79</sup> And in a small community sixty miles outside of Houston, Texas in Liberty County, flooding caused by Hurricane Harvey reduced the number of occupied homes by nearly 90%, leaving the remaining residents without water service or reliable access to emergency services.<sup>80</sup> Those who stay behind often experience a “loss of community, sense of place, and social capital” within their altered neighborhood.<sup>81</sup>

While the best course of action would be to provide equitable solutions for those who want to stay as well as those who do not, the reality is that sea levels rise at the same rate for everyone. Accordingly, Blue Acres offers buyouts to “clusters of homes,” a strategy that is not completely successful unless every neighbor agrees to leave at once.<sup>82</sup> When this occurs, as it did in New Jersey’s Woodbridge Township,<sup>83</sup> Blue Acres is a prime example of a nonstructural adaptation strategy that benefits the state and its residents alike.<sup>84</sup> But coaxing collective agreement among neighbors to abandon their land is understandably difficult, so Blue Acres can be “hampered by [its] ‘strictly voluntary’ nature.”<sup>85</sup>

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77. Brenda Flanagan, *Ida Flood Victims Shocked by Sudden Buyout Offer*, NJ SPOTLIGHT NEWS (Aug. 10, 2023), <https://www.njspotlightnews.org/video/ida-flood-victims-shocked-by-sudden-buyout-offer/>.

78. See Caroline M. Kraan et al., *Promoting Equity in Retreat Through Voluntary Property Buyout Programs*, 11 J. ENV’T STUD. & SCI. 481, 484 (2021).

79. Joaquim Salles, *Left Behind*, GRIST (Sept. 21, 2022), <https://grist.org/equity/oakwood-beach-staten-island-buyouts-superstorm-sandy>.

80. Erin Douglas, *No Water, Roads or Emergency Services: How Climate Change Left a Rural Neighborhood Nearly Uninhabitable*, TEX. TRIB. (Sept. 29, 2023, 5:00 AM), <https://www.texastribune.org/2023/09/29/texas-climate-managed-retreat-buyouts-liberty-county-flood/>.

81. Kraan et al., *supra* note 78, at 484.

82. See Lovett, *supra* note 45, at 46–47.

83. Vanessa Murdock, *Experts Tout Success of Transforming Suburban New Jersey Neighborhood Back to Natural State for Flood Resiliency Initiative*, CBS NEWS N.Y. (Nov. 2, 2022, 6:51 PM), <https://www.cbsnews.com/newyork/news/woodbridge-township-flood-resilience-initiative/>.

84. Lovett, *supra* note 45, at 46.

85. *Id.* at 46–47.

Additionally, buyouts tend to be slow, drawn-out undertakings by nature. Because of the substantial administrative burden involved, the entire process can last three to four years, which has led to buyout acceptance among only 10% to 15% of homeowners in flood-impacted areas.<sup>86</sup> In the two years since Hurricane Ida devastated New Jersey, citizens have regularly expressed frustration over how long the recovery process has taken.<sup>87</sup> The New Jersey Organizing Project argues that in Manville, the Blue Acres buyout process has been “slow-moving, complicated, and dysfunctional.”<sup>88</sup> Unfortunately, these experiences are not unique. Flood recovery efforts are often protracted and laborious, and buyouts rarely expedite the process.<sup>89</sup>

Rising sea levels will fundamentally alter the landscape of American coastlines forever.<sup>90</sup> Because they provide victims of major floods with a way to recover that helps them relocate rather than rebuild, buyouts are undoubtedly an effective tool. But there are also many practical problems associated with them, including the significant administrative burden

86. Alexander S. Mendelson, *Taking Away the Tighrope: Fixing the National Flood Insurance Program Circus via Eminent Domain*, 83 BROOK. L. REV. 1519, 1532 n.106 (2018) (citing Becky Hayat & Robert Moore, *Addressing Affordability and Long-Term Resiliency Through the National Flood Insurance Program*, 45 ENV'T L. REP. 10338, 10343 (2015)) (discussing low participation in buyouts among qualifying New York homeowners impacted by Superstorm Sandy).

87. Brenda Flanagan, *Ida Victims Slam State Officials over Slow Aid, Recovery Process*, N.J. SPOTLIGHT NEWS (Sept. 9, 2022), <https://www.njspotlightnews.org/video/ida-victims-slam-state-officials-over-slow-aid-recovery-process/> (discussing a public hearing where NJ residents expressed anger and exasperation with the lack of aid they received more than a year after the storm); Flanagan, *supra* note 77 (explaining that residents and officials in Manville, New Jersey felt shocked and blindsided when the state offered to buyout homes rather than elevate them).

88. *The State Is Changing the Rules on Manville's Ida Survivors. This Is Not Ok.*, N.J. ORG. PROJECT (AUG. 4, 2023), <https://newjerseyop.org/the-state-is-changing-the-rules-on-manvilles-ida-survivors-this-is-not-ok/>. The organization's stated mission is to “get a fair recovery” for survivors of Superstorm Sandy and Hurricane Ida. N.J. ORG. PROJECT, <https://newjerseyop.org/> (last visited Jan. 18, 2025).

89. See Michelle Meyer, *Recovery from A Disaster Like Hurricane Ian Takes Years*, TEX. A&M U. (Oct. 4, 2022), <https://today.tamu.edu/2022/10/04/recovery-from-a-disaster-like-hurricane-ian-takes-years/> (explaining the many complex steps involved with recovering from major storms including relief applications and insurance claims submitted to agencies that might not respond to victims for a long duration); see also Stephanie M. Stern, *Climate Transition Relief: Federal Buyouts for Underwater Homes*, 72 DUKE L.J. 161, 210 (2022) (“[B]uyouts typically take more than five years to complete.”); Rob Moore, *Congress Wants to Know Why FEMA Buyouts Take So Long*, NAT. RES. DEF. COUNCIL (June 26, 2018), <https://www.nrdc.org/bio/rob-moore/congress-wants-know-why-fema-buyouts-take-long> (explaining that most FEMA-backed buyouts take years to complete).

90. KOPP ET AL., *supra* note 18, at 17; cf. Hauer, *supra* note 14, at 324 (explaining the impact that the mass migration of millions of people fleeing flooded coastal communities will have on landlocked areas).

required, the prolonged amount of time they take to complete, and the loss of community identity among holdouts who remain in places with limited civil services available after their neighbors accept buyouts. Relocation facilitated by buyout programs like Blue Acres is the kind of managed retreat that must be embraced to adequately address how much the landscape will change.<sup>91</sup> But to be as effective as possible, it may be necessary to start mandating buyouts in certain situations.

### III. LEGAL MEANS TO PROACTIVELY RESPOND TO SEA LEVEL RISE

Because participation is limited and the buyout process moves at a glacial pace, a more aggressive nonstructural adaptation technique must be pursued to address the problems that rising sea levels present. Although it is notoriously difficult to pass climate-related legislation,<sup>92</sup> the consistent and intense flooding that is very likely to occur in New Jersey calls for drastic measures to be taken.<sup>93</sup> Although widespread federal action is unlikely, New Jersey may be uniquely receptive to employing a creative and controversial approach to address this issue due in part to its progressive politics and distinct geographic characteristics.

#### A. *The Takings Doctrine*

The U.S. Constitution's Fifth Amendment dictates that "private property [cannot] be taken for public use, without just compensation."<sup>94</sup> Known as the Takings Clause, it grants the government eminent domain power to take private property as long as it is "intended for future use by

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91. Cf. *Buyout Programs Leave Homeowners and Renters at a Loss*, R.I. SEA GRANT (Mar. 23, 2020), <https://seagrant.gso.uri.edu/buyout-programs-leave-homeowners-and-renters-at-a-loss/> (detailing the challenges involved with buyouts that are only offered after major storm events and quoting a researcher who claims that developing a process that relocates homeowners before disasters strike would provide better relief to Rhode Islanders).

92. See Coral Davenport & Lisa Friedman, *Five Decades in the Making: Why It Took Congress So Long to Act on Climate*, N.Y. TIMES (Aug. 7, 2022), <https://www.nytimes.com/2022/08/07/climate/senate-climate-law.html> (explaining that although President Nixon was made aware of the dangers caused by the continued burning of oil, gas, and coal more than 50 years ago, the country's first major climate bill—which aims to reduce greenhouse gas pollution and shift America toward solar, wind, and other renewable energy sources—was not passed until 2022 due in large part to an ongoing campaign led by the deep-pocketed oil, gas, and coal industry to instill doubt about climate change).

93. See *supra* notes 27–30 and accompanying text.

94. U.S. CONST. amend. V.

the public.”<sup>95</sup> In exchange, the owner must receive “just compensation,” which courts traditionally determine to be the property’s fair market value.<sup>96</sup>

The Supreme Court’s definition of what constitutes a “public use” is exceedingly broad.<sup>97</sup> In *Hawaii Housing Authority v. Midkiff*, the Court considered whether the Hawaii Legislature could utilize the Land Reform Act of 1967 to acquire property owned by seventy-two landowners who controlled 47% of the state’s land and redistribute it to other state residents.<sup>98</sup> The Court found that the legislature’s stated goal of redistributing land ownership was “rationally related to a conceivable public purpose” and was therefore a valid exercise of its eminent domain power.<sup>99</sup> In a more recent decision which led to “widespread public outrage,”<sup>100</sup> the Court held in *Kelo v. City of New London* that land taken in furtherance of economic development satisfies the public use requirement.<sup>101</sup> Through its jurisprudence, the Court has made clear that as long as a legislature’s asserted public purpose is related to “any marginal improvement in public welfare,” then a taking of private property will likely be justified.<sup>102</sup> Therefore, the Court has held that when the asserted public use for taken land is consistent with government authority to “protect ‘public safety [and] public health,’” eminent domain exercises are valid.<sup>103</sup>

95. Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177, 179–180 (2007).

96. See Kevin J. Lynch, *A Fracking Mess: Just Compensation for Regulatory Takings of Oil and Gas Property Rights*, 43 COLUM. J. ENV’T L. 335, 341 (2018). However, because homeowners might subjectively overvalue their property due to personal attachment and sentimentality, the “fair market value” standard has been subject to criticism that many are undercompensated for the land that is taken from them. See, e.g., Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 595 (2013).

97. Indeed, even though citizens may suffer due to the passage of a given land regulation policy, the government has vast authority to utilize eminent domain for public use as long as it can articulate “some legitimating public benefit,” even if the proffered justification may be weak or relatively unimportant. See Micah Elazar, Comment, “*Public Use*” and the Justification of Takings, 7 U. PA. J. CONST. L. 249, 261–62 (2004).

98. 467 U.S. 229, 232–33 (1984).

99. *Id.* at 241–43.

100. Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 241 (2007).

101. 545 U.S. 469, 489–90 (2005).

102. See Elazar, *supra* note 97, at 265–66.

103. Emlein, *supra* note 63, at 191 (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)) (explaining that the Supreme Court tends to equate the standard for satisfying public use under eminent domain with exercises of state police power, even though they are not the same); see also *infra* notes 109–12 and accompanying text.

In *Lucas v. South Carolina Coastal Council*, the Supreme Court held that a government action which strips a landowner of all economically beneficial use of their property constitutes a “total taking” for which compensation is owed.<sup>104</sup> *Lucas* carved out an exception to the compensation requirement when a state’s “background principles” of property law “inhere in” one’s land title.<sup>105</sup> Several scholars have argued that one such qualifying background principle is the public trust doctrine, which dictates that state-owned land—such as “navigable and tidal waters and the lands under them”—must be protected and preserved for the public’s use and enjoyment.<sup>106</sup> However, despite the Court’s explanation that “the property owner necessarily expects the uses of his property to be restricted” by state police powers, *Lucas* confirmed that compensation must be paid when the government permanently occupies a homeowner’s land.<sup>107</sup> Therefore, under this standard, any coordinated managed retreat plan that addresses the threat of rising sea levels by demanding a homeowner’s property be destroyed would qualify as a total taking because it would amount to a “permanent physical occupation of real property.”<sup>108</sup>

However, *Lucas* also highlighted a centuries-old exception to the requirement that owners of taken property be compensated. The exception can be invoked when there is an actual necessity to prevent “grave threats to the lives and property of others.”<sup>109</sup> An emergency like a raging fire that can only be quelled by acting in a way that violates property rights or outright destroys one’s private property is one such necessity.<sup>110</sup> This exception exists to ensure that government officials do not refrain from taking whatever measures are required to respond to

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104. 505 U.S. 1003, 1030–31 (1992).

105. *Id.* at 1029.

106. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 702, 740–41 (2006); see also Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENV’T AFFS. L. REV. 421, 432–37 (2005) (detailing how the public trust doctrine specifically qualifies as one of the background principles that *Lucas* contemplated); David M. Carboni, *Rising Tides: Reaching the High-Water Mark of New Jersey’s Public Trust Doctrine*, 43 RUTGERS L.J. 95, 118–20 (2011).

107. *Lucas*, 505 U.S. at 1027–28.

108. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982); see also *Lucas*, 505 U.S. at 1028.

109. See *Lucas*, 505 U.S. at 1029 n.16.

110. Note, *Necessity Takings in the Era of Climate Change*, 136 HARV. L. REV. 952, 957 (2023); see also *Bowditch v. City of Boston*, 101 U.S. 16, 17–18 (1879) (explaining that first responders are permitted to demolish structures in order to stop an active fire but “when such building is that in which the fire first broke out, the owner shall receive no compensation” (internal quotation marks omitted)).



emergencies because they are worried about being held liable for the damage they cause.<sup>111</sup>

Beyond the exception underscored in *Lucas*, courts have frequently held that government exercises of its police power do not qualify as compensable takings.<sup>112</sup> When acting to protect or aid “public health, safety, morals, and general welfare,” the government is not required to pay property owners whose land may be interfered with due to those regulations.<sup>113</sup> While private property regulations which go “too far” will likely be considered takings that require compensation,<sup>114</sup> most common land use regulations are overseen by city and county governments and are generally accepted as applications of police power.<sup>115</sup> Rising sea levels and the flooding that will follow may one day justify a government invocation of police power that requires intruding onto private property to protect public health and safety. But just because a necessity that requires taking property is present does not mean that the government should go out of its way to avoid compensating landowners.<sup>116</sup>

The foregoing is an exceedingly brief overview of the takings doctrine and of when private property regulations require compensation. It demonstrates that when state legislatures have been motivated to utilize eminent domain, the Supreme Court has authorized such exercises in many instances and for a variety of stated public uses.<sup>117</sup> Perhaps New

111. Note, *supra* note 110, at 959.

112. Derek T. Muller, Note, “As Much upon Tradition as upon Principle”: A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment, 82 NOTRE DAME L. REV. 481, 516 (2006).

113. See Shelley Ross Saxer, *Necessity Exceptions to Takings*, 44 U. HAW. L. REV. 60, 65 (2022); see also Christopher Supino, *The Police Power and “Public Use”: Balancing the Public Interest Against Private Rights Through Principled Constitutional Distinctions*, 110 W. VA. L. REV. 711, 723 (2008) (explaining that even at its most narrow interpretation, the government’s police power encompasses protecting the public against threats to health and safety).

114. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

115. Gregory M. Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking*, 70 WASH. L. REV. 953, 955 n.3 (1995). Some of the most common land use regulations include zoning, subdividing, developing ecological areas, preserving historic structures, and maintaining public facilities. 12 POWELL ON REAL PROPERTY § 79B.01[1] (Michael Allan Wolf ed., 2025).

116. See discussion *infra* Section IV.C. But see Boucot, *supra* note 34, at 782–83 (discussing a 2022 Federal Circuit Court decision which ruled that the public necessity defense could be invoked to absolve the government from liability for flood-related damages to property triggered by weather events out of its control).

117. See *supra* notes 101–103 and accompanying text; see also Elazar, *supra* note 97, at 261 (explaining that the Supreme Court’s modern takings jurisprudence has made clear that asserted public uses rarely need to be compelling or exceptional to force property

Jersey should consider responding to the looming environmental threat by doing just that.

*B. New Jersey's Eminent Domain Law and Environmental Policies*

While the Takings Clause of the Fifth Amendment is enforceable against the states via the Fourteenth Amendment,<sup>118</sup> New Jersey also has its own robust eminent domain doctrine. The state's constitution dictates that private property cannot be taken for public use by individuals, private corporations, or the government without first providing owners with just compensation.<sup>119</sup> New Jersey's interpretation of "public use" and "just compensation" under its eminent domain power tracks closely with that of the U.S. Supreme Court. New Jersey courts have generally deferred to whatever public purpose the legislature specifies the taken land will be used for.<sup>120</sup> And in *Borough of Harvey Cedars v. Karan*, the New Jersey Supreme Court stated clearly that when a landowner's entire property is taken by a state exercise of eminent domain, they are owed just compensation "measured by the fair market value of the property as of the date of the taking."<sup>121</sup>

In addition to reiterating New Jersey's just compensation framework for total takings, *Karan* also serves as an example of broad sympathy for environmental concerns from the state's highest court. When a beach restoration project in Long Beach Island required the construction of sand dunes along the coast to protect against storms and erosion, a family sued the municipality because a dune blocked their ocean view.<sup>122</sup> The trial court found in favor of the family, but the New Jersey Supreme Court took issue with its failure to allow the municipality to introduce evidence that the dunes enhanced the value of the family's property by protecting it from damage caused by future major storms and ocean surges.<sup>123</sup> In reversing the trial court jury's award of \$375,000 in

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owners into forfeiting their land). See generally 13 POWELL ON REAL PROPERTY § 79F.03 (Michael Allan Wolf ed., 2025) (outlining the evolution of the Supreme Court's interpretation of "public use" throughout its history, explaining that it has been viewed narrowly in the past but is now understood rather broadly).

118. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 122 (1978).

119. N.J. CONST. art. 1, ¶ 20.

120. See Richard Buck, Note, *Thou Art Condemned: How New Jersey Courts Are Sacrificing Private Landowners on the Altar of Eminent Domain*, 2 RUTGERS J. L. & URB. POL'Y 330, 345–349 (2005) (concluding New Jersey courts have "sacrificed private property rights on the altar of legislative deference" in light of decisions finding the development of casinos and sports complexes constitute public use).

121. 70 A.3d 524, 535 (N.J. 2013) (internal quotation marks omitted) (quoting *State v. Silver*, 457 A.2d 463, 466 (N.J. 1983)).

122. *Id.* at 527–28.

123. *Id.* at 526.

damages to the family for the loss of their view, the New Jersey Supreme Court noted that any calculation of just compensation for partial takings requires an assessment of all relevant factors.<sup>124</sup> In this case, that meant that any loss in value caused by the obstructed view must be weighed against the increase in value attributable to the dunes' storm protection qualities.<sup>125</sup> The Supreme Court's heavy consideration of the storm-shielding effect of the project led one scholar to conclude that this may signal a willingness among state courts to rule in favor of "development that is sustainable and ecologically responsible."<sup>126</sup> While *Karan* was decided more than a decade ago, it may signal recognition of the value of unique environmental protection schemes.

Despite—or perhaps, because of—its foregone reputation as “the Garbage State,”<sup>127</sup> New Jersey lawmakers are particularly attuned to environmental concerns. In service of meeting the state's lofty goal of reducing its overall greenhouse gas emissions by 80% before 2050, New Jersey recently introduced requirements for limiting carbon dioxide released during fossil fuel combustion.<sup>128</sup> Given its advantageous position astride the Atlantic Ocean, New Jersey also prioritizes the protection of its coastline. The state's conservation statute acknowledges that coastal towns suffer from adverse environmental effects that interrupt the state's enjoyment of its “long-term, social, economic, aesthetic and recreational interests,” and pledges that such land should be preserved for “uses which promote the public health, safety and welfare.”<sup>129</sup> In a recently passed inland flood protection statute designed

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124. *Id.* at 543–44.

125. *Id.* at 544.

126. Matthew Knoblauch, *You Probably Shouldn't Build There: Watershed-Based Land Use Strategies for Mitigating Global Climate Change in New Jersey's Freshwater Systems*, SUSTAINABLE DEV. L. & POL'Y, Fall 2015, at 4, 10. Others have similarly argued that the environmental calamities New Jersey experienced just prior to the decision were relevant to the court's reasoning in *Karan*. See, e.g., Brittany Harrison, *The Compensation Conundrum in Partial Takings Cases and the Consequences of Borough of Harvey Cedars*, 2015 CARDOZO L. REV. DE-NOVO 31, 36 n.37 (arguing that although the *Karan* decision does not mention Superstorm Sandy, the case was decided less than one year after it made landfall and the family's property might not have been impacted “because of the protection provided by the sand dune”).

127. Iver Peterson, *New Jersey Is the Garbage State No More*, N.Y. TIMES, Aug. 29, 1992 (§ 1), at 21.

128. N.J. ADMIN. CODE § 7:27F-1.1 (2023). Acknowledging the risk to the state's economy and public health, New Jersey's comprehensive greenhouse gas emission reduction plan calls for coordinated efforts from state actors and industry leaders to achieve their objective. N.J. DEP'T OF ENV'T PROT., NEW JERSEY'S GLOBAL WARMING RESPONSE ACT 80X50 REPORT, at v (2020), <https://dep.nj.gov/wp-content/uploads/climatechange/nj-gwra-80x50-report-2020.pdf>.

129. N.J. STAT. ANN. § 13:19-2 (West, Westlaw through L.2024, c. 109 and J.R. No. 6).

to reduce the harm flooding can cause to people and property, the state recognized that the problem is “exacerbated by the effects of climate change.”<sup>130</sup>

In 2020, Governor Murphy signed an Executive Order which acknowledged the risks to property, public health, and the economy presented by sea level rise and ordered the NJDEP to adopt regulations that incorporate sea level rise considerations into its regulatory policies.<sup>131</sup> Furthermore, in April 2023, New Jersey became the first state to adopt what is colloquially known as an “Environmental Justice Law,” which forces state regulators to evaluate and consider whether granting a permit to new and existing facilities which generate substantial pollution will have a disproportionate public health impact on overburdened communities.<sup>132</sup>

Therefore, it is evident that not only are New Jersey lawmakers willing to enact environmentally progressive policies, but that they have increasingly done so based on an appreciation for the harms that can befall its citizens, their property, and the economy if environmental problems (which are worsening due to climate change)<sup>133</sup> are not adequately addressed. In areas where sea levels are projected to rise the most, dramatic action should be taken within the next thirty years to rethink where residents can safely reside and ensure they are not left flatfooted when the next major storm makes landfall.

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130. N.J. ADMIN. CODE § 7:13-1.1(c) (2025).

131. N.J. Exec. Order No. 100 (Jan. 27, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-100.pdf>.

132. N.J. STAT. ANN. § 13:1D-157 (West, Westlaw through L.2025, c. 20 and J.R. No. 1); *Governor Murphy Announces Nation’s First Environmental Justice Rules to Reduce Pollution in Vulnerable Communities*, OFF. OF THE GOVERNOR (Apr. 17, 2023), <https://www.nj.gov/governor/news/news/562023/approved/20230417a.shtml>. The law defines “overburdened communities” as census areas in which either 35% of families qualify as low-income, 40% of residents identify as minority, or 40% of households are not proficient English speakers. N.J. STAT. ANN. § 13:1D-157 (West, Westlaw through L.2025, c. 20 and J.R. No. 1).

133. See *supra* notes 20–30 and accompanying text.

Implementing major environmental overhauls on a widespread scale has been a costly<sup>134</sup> and politically divisive endeavor.<sup>135</sup> But if any state might be galvanized to take action like this, it would be New Jersey.<sup>136</sup> As New Jersey municipalities consider how to confront the flooding on the horizon, they must acknowledge that residents are facing such serious danger that they may have to force the hands of property owners who are disinclined to accept a buyout.

134. See, e.g., Douglas Broom, *What's the Price of a Green Economy? An Extra \$3.5 Trillion a Year*, WORLD ECON. F. (Jan. 28, 2022), <https://www.weforum.org/agenda/2022/01/net-zero-cost-3-5-trillion-a-year> (explaining that achieving net-zero emissions by 2050 requires a 60% spending increase on energy and land-use programs, necessitating “a fundamental transformation of the global economy” (internal quotation marks omitted)); James P. Morris, *Who Controls the Waters? Incorporating Environmental and Social Values in Water Resources Planning*, 6 HASTINGS W.-NW. J. ENV'T L. & POL'Y 117, 122 (2000) (discussing the historic costliness of implementing water resource policies in the U.S.). See generally J.B. Ruhl & Robin Kundis Craig, 4°C, 106 MINN. L. REV. 191, 249, 259–65 (2021) (discussing the breadth of capital needed to finance extensive adaptation across the United States in the event global temperatures increase by 4°C); NADRA RAHMAN & JESSICA A. WENTZ, SABIN CTR. FOR CLIMATE CHANGE LAW, THE PRICE OF CLIMATE DEREGULATION: ADDING UP THE COSTS AND BENEFITS OF FEDERAL GREENHOUSE GAS EMISSION STANDARDS 2 (2017), [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1091&context=sabin\\_climate\\_change](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1091&context=sabin_climate_change) (suggesting that despite the tremendous price of implanting emission standards in the U.S., the benefits outweigh the costs).

135. Michael P. Vandenbergh, *Environmental Law in a Polarized Era*, 38 J. LAND USE & ENV'T L. 51, 62–63 (2022) (“[C]limate change is one of the most polarized issues in the United States.”); see also Elaine Kamarck, *The Challenging Politics of Climate Change*, BROOKINGS (Sept. 23, 2019), <https://www.brookings.edu/articles/the-challenging-politics-of-climate-change/> (“[C]limate change remains the toughest, most intractable political issue we, as a society, have ever faced.”); Joshua A. Basseches et al., *Climate Policy Conflict in the U.S. States: A Critical Review and Way Forward*, CLIMATIC CHANGE, Feb. 16, 2022, at 1, 4–11 (explaining that partisan disagreement, opposition from industry group lobbyists, and even division among pro-climate activists makes it difficult for adaptation regulations to be enacted).

136. See Katie Sobko, *NJ, D.C. Lawmakers Press for Solutions for Flood-Prone Parts of North Jersey*, NORTHJERSEY.COM (Jan. 15, 2024, 4:31 AM), <https://www.northjersey.com/story/news/new-jersey/2024/01/15/nj-flooding-lawmakers-press-solutions-north-jersey-weather/72205012007/> (explaining that New Jersey's efforts to address long-term flooding issues include requests from lawmakers to increase federal funding and suggestions from scientists to restrict land development in flood-prone areas); see also Christine Eidt, *California's Rising Sea Levels Relating to Disadvantaged Communities: A Possible Solution*, 15 GOLDEN GATE U. ENV'T L.J. 93, 106–08 (2023) (discussing that although flooding is often addressed at the community level, New Jersey's particular vulnerability to rising sea levels make it ripe for responding with larger organized action).

## IV. USING EMINENT DOMAIN TO FAIRLY FACILITATE MANAGED RETREAT

As sea levels continue to rise, American municipalities will be forced to consider using more aggressive nonstructural adaptation measures to move citizens out of harm's way.<sup>137</sup> To proactively safeguard residents from the dangers of flooding in areas where the impact of rising sea levels is likely to be devastating,<sup>138</sup> New Jersey's Blue Acres program should lead the charge by utilizing eminent domain when buyouts are refused.<sup>139</sup> However, the state must be careful to implement a policy like this as equitably as possible. The Fifth Amendment and the New Jersey State Constitution both prescribe that when the government takes private property, its owners must be provided "just compensation."<sup>140</sup> Although there are several conceivable ways for lawmakers to approach the compensation requirement, it is crucial that any policy requiring people to move in order to keep them safe does not ultimately leave them undercompensated or in a worse position than if they had simply stayed put.

A. *Emboldening Blue Acres with Eminent Domain*

Due to their voluntary nature, buyouts are a politically palatable way to incentivize relocation since they are seen as having no connection to eminent domain, which many people are averse to.<sup>141</sup> But if New Jersey waits to intervene until the majority of residents living in floodplains accept buyouts or until disasters completely destroy their homes, people will have to endure great hardship caused by surging waters, yet still end

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137. Presently, however, it is certainly not universally accepted that climate adaptation programs that relocate residents are either necessary or valuable, which is a pernicious barrier to their enactment. *See generally* Matthew J. Hornsey & Kelly S. Fielding, *Understanding (and Reducing) Inaction on Climate Change*, 14 SOC. ISSUES & POL'Y REV. 3, 3 (2019) ("Progress on mitigating climate change is slowed by the stubborn persistence of climate skepticism."); Edward L. Rubin, *Rejecting Climate Change: Not Science Denial, but Regulation Phobia*, 32 J. LAND USE & ENV'T L. 103, 105 (2016) (clarifying that although most people generally trust and "do not harbor any particular hostility toward science," climate change deniers are broadly skeptical of the regulations used to address it).

138. *See supra* notes 27–30 and accompanying text.

139. Although eminent domain is not the only adaptation strategy that New Jersey could embrace, it should become one of the go-to tools in its kit. Other adaptation techniques the state could use include regulatory takings that create buffer zones and the construction of physical barriers to protect against major storm surge. Boucot, *supra* note 34, at 784–85.

140. U.S. CONST. amend. V; N.J. CONST. art. 1, ¶ 20.

141. Travis Brandon, *Sea Level Rise Planning for Socially Vulnerable Communities: A More Equitable Approach to Federal Buyout Programs*, 97 U. DET. MERCY L. REV. 435, 443 (2020); *see also* Lovett, *supra* note 45, at 31–33 (explaining that because of the "public disapproval of eminent domain," the government may hesitate to address climate change issues by taking properties).

up having to move anyway.<sup>142</sup> Accordingly, augmenting the Blue Acres program with the power of eminent domain and forcing certain residents to relocate would more effectively guarantee the safety of New Jersey residents while limiting delays and solving issues created by holdouts.

Satisfying the public use prong of the Fifth Amendment would be straightforward since the Supreme Court broadened this requirement such that taken land no longer even needs to be accessible to members of the public.<sup>143</sup> Regardless, NJDEP would be able to utilize eminent domain in concert with Blue Acres' existing buyout principles by continuing to build "natural flood storage, parks, and community open space" on property that the state purchases from homeowners.<sup>144</sup> A state response to rising sea levels that protects public safety by replacing coastal homes with flood barriers and preserving seaside ecology serves a broad public purpose<sup>145</sup> that various courts have confirmed can be a valid justification for using eminent domain.<sup>146</sup> So if the state is sufficiently motivated to use eminent domain to take property endangered by flooding, it has a good chance of standing up to judicial scrutiny.

Additionally, when water begins regularly encroaching onto land, taking property in its path and repurposing it into open space would constitute an application of the state's expansive public trust doctrine, which prioritizes the state's coastline and waterways for the public's enjoyment and benefit.<sup>147</sup> Such enjoyment requires that access to the

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142. See Steven Rodas, *Flood Risks Keep Rising in N.J. Will More Homeowners Be Paid to Leave?*, NJ.COM (Jan. 30, 2024, 11:38 AM), <https://www.nj.com/data/2024/01/flood-risks-keep-rising-in-nj-will-more-homeowners-be-paid-to-leave.html> (explaining that few homeowners have accepted buyouts in more than half of the towns where they have been offered, that much of Blue Acres' funding has been spent on purchasing homes following major storms, and that some homeowners are not offered buyouts until the level of damage to their homes is sufficiently appreciable).

143. Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307, 326 (2007).

144. See *Blue Acres*, N.J. DEPT OF ENV'T PROT., <https://dep.nj.gov/blueacres/> (last visited Feb. 21, 2025); see also Lovett, *supra* note 45, at 31–32 (explaining that acquiring land through eminent domain and repurposing it as a park, shore, or floodplain would be considered a public use).

145. See *supra* notes 97, 102–03 and accompanying text.

146. Emlein, *supra* note 63, at 192 (explaining that building buffers that protect against rising sea levels on land where private property once serves the public, and that several courts have concluded that ecological land preservation is an acceptable public use).

147. Sarah Weiss Rozalis, *New Jersey's Legal Duty to Manage Its Coastline in Preparation for the Wrath of Climate Change*, 29 *VILL. ENV'T L.J.* 205, 208 (2018) (noting how New Jersey's public trust doctrine provides the public access to certain privately-owned spaces to reach the ocean for various recreational activities).

state's beaches and waters remain open to residents.<sup>148</sup> Though not all homes threatened by flooding sit directly on the coast, the state must at least consider the public trust doctrine when making regulatory decisions, especially since its duty to protect the public's shoreline access is codified.<sup>149</sup> Also, the New Jersey Supreme Court has explained that the public trust doctrine is purposely flexible so that it can meet the "changing conditions and needs of the public it was created to benefit."<sup>150</sup> Accordingly, if sea levels rise so much that coastal properties become inundated with floodwater, the state must abide by its public trust doctrine to guarantee citizens access to the shoreline.

Utilizing eminent domain will help to more efficiently relocate New Jersey residents living in flood-prone areas. When municipalities like Manville become so vulnerable to flooding that buyouts are offered to many but not accepted by all, the communities left behind are often severely fragmented.<sup>151</sup> Forcing entire neighborhoods to migrate altogether would result in a comparatively expeditious relocation process,<sup>152</sup> fewer splintered localities,<sup>153</sup> and the start of a much needed long-term redevelopment project that moves people to areas less likely to suffer the adverse impacts of rising sea levels.<sup>154</sup> Telling homeowners

148. *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972).

149. N.J. STAT. ANN. § 13:1D-150(e) (West, Westlaw through L.2025, c. 20 and J.R. No. 1) ("The [DEP] has the authority and the duty to protect the public's right of access to tidally flowed waters and their adjacent shorelines under the public trust doctrine and statutory law.").

150. *Borough of Neptune City*, 294 A.2d at 54.

151. See Flanagan, *supra* note 77 (explaining that Manville is "pocked with empty lots" due to scattershot buyouts); see also *supra* notes 78–81 and accompanying text.

152. See Mendelson, *supra* note 86, at 1532 ("Typically lasting three to four years, the buyout process requires property owners to overcome numerous and time-consuming administrative hurdles . . .").

153. See Douglas, *supra* note 80 (explaining that because buyouts often take several years to complete and whole communities rarely relocate altogether, the process can leave behind "hollowed-out neighborhoods" with inadequate access to resources).

154. 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 ENV'T L. REV. 325, 346–47 (2016) (arguing that although some have abused eminent domain in the name of urban redevelopment by building luxury hotels on property taken from low-income residents, it can be an effective tool for reshaping neighborhoods while also increasing resiliency against storms, particularly in disaster-prone waterfront areas like those in the Northeast). Policymakers must also consider the impact that climate migrants will have on the areas that they flee to. See Justin H. Vassallo, *The Bold Idea to Move Millions to Climate Havens*, NOEMA (Sept. 29, 2023), <https://www.noemamag.com/the-bold-idea-to-move-millions-to-climate-havens/> (discussing the need to create sweeping redevelopment policies to facilitate the relocation of the projected 13 million Americans who may have to migrate due to worsening climate conditions); see also Lawrence Huang, *Climate Migration 101: An Explainer*, MIGRATION



that they must move would be painful, but in areas that will inevitably become uninhabitable, using eminent domain takes the difficult decision to relocate away from residents and shifts the burden to protect people onto the government, whose actions can help preserve overall community identity despite the changes to geographic boundaries.<sup>155</sup>

As it is currently codified, Blue Acres cannot use eminent domain to acquire property.<sup>156</sup> But an enhancement that enables the state to use its buyout program to take private property would not be the first of its kind. In addition to funding a voluntary buyout program that purchased more than 3,000 properties during the last 50 years, Harris County, Texas has relied on eminent domain “to acquire properties for structural flood control projects” for more than a century.<sup>157</sup> “Involuntary buyouts” that replace homes at risk of repeated flooding with open space and flood barriers would protect homeowners *and* the community at large, a significant public benefit which arguably outweighs the government’s intrusion on private property.<sup>158</sup>

Since it can be quite unpopular, deciding to use eminent domain is not easy.<sup>159</sup> In Atlantic City, residents and city leaders have already

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POL’Y INST. (Nov. 16, 2023), <https://www.migrationpolicy.org/article/climate-migration-101-explainer> (explaining that most people forced to move due to a climate disaster “will travel relatively short distances”); Jon Hurdle, *As Climate Fears Mount, Some in U.S. Are Deciding to Relocate*, YALE ENV’T 360 (Mar. 24, 2022), <https://e360.yale.edu/features/as-climate-fears-mount-some-in-u.s.-are-deciding-to-relocate> (discussing a small group of people who had recently moved to Vermont due, in part, to climate change and stating that although the state initially welcomed the migrants, “its housing market doesn’t have the capacity to absorb many more people”).

155. See Börk et al., *supra* note 66, at 10222 (arguing that although there is a risk of losing community identity when landscapes change, the U.S. can best preserve a place’s culture by anticipating that climate change will permanently alter entire neighborhoods and thus moving residents out of them before a major disaster destroys the rich history residing in one’s precious possessions and mementos). *But see* James J. Kelly Jr., “We Shall Not Be Moved”: *Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN’S L. REV. 923, 958–60 (2006) (arguing homeowners would benefit from having more autonomy when eminent domain is exercised because fair market value compensation fails to account for the negative psychological effects that unanticipated relocation and the loss of community connection can have, even among residents living in neighborhoods experiencing social decline).

156. N.J. STAT. ANN. § 13:8C-49 (West, Westlaw through L. 2024, c. 109 and J.R. No. 6).

157. Elyse Zavar et al., *Using the Past to Understand Future Property Acquisitions: An Examination of Historic Voluntary and Mandatory Household Relocations*, 116 NAT. HAZARDS 1973, 1975 (2023).

158. Mendelson, *supra* note 86, at 1538–39.

159. Lovett, *supra* note 45, at 32–33 (detailing the overwhelming public objection to a U.S. Army Corps of Engineers proposal to use eminent domain to acquire homes in Louisiana following Hurricane Rita); see John M. Zuck, *Kelo v. City of New London: Despite the Outcry, the Decision Is Firmly Supported by Precedent—However, Eminent Domain Critics Still Have Gained Ground*, 38 U. MEM. L. REV. 187, 227 (2007) (outlining the

made clear their general disinterest in retreating from the area, even if offered optional buyouts.<sup>160</sup> But the increasing dangers imposed by rising sea levels beget difficult property law questions whose solutions may be instinctively opposed by some residents, especially since the complexities of climate change require creative responses that continuously evolve, just as weather conditions do.<sup>161</sup> Indeed, because Blue Acres offers to buy property from those whose homes are “vulnerable to flooding”<sup>162</sup> or within an area with “flood potential,”<sup>163</sup> New Jersey is already engaging in a subtle form of managed retreat.<sup>164</sup> If the program was bolstered by the power of eminent domain, it could become a more effective residential protection mechanism that thoughtfully and durably reshapes neighborhoods before the rising seas do.

### B. Properly Valuing Taken Property

If eminent domain were used to acquire property that is at risk of repeated flooding, the state could approach its obligation to provide owners with just compensation in several ways.

First, New Jersey could try to invoke its general police power and argue that *no* compensation is owed. Since the impetus for acquiring homes using eminent domain would be to protect citizens against flooding, the state could assert their statutorily granted police power to

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general unpopularity and public disapproval toward eminent domain, explaining that it reached “an all-time high” following the Supreme Court’s controversial decision in *Kelo v. City of New London*).

160. Ted Shaffrey, *Amid Rising Seas, Atlantic City Has No Plans for Retreat*, HILL (Oct. 12, 2022, 9:55 AM), <https://thehill.com/homenews/ap/ap-business/ap-amid-rising-seas-atlantic-city-has-no-plans-for-retreat/> (explaining that city officials have no intention of accepting buyouts and that for many residents, it is “unbearable to contemplate a future without the city”). *But cf.* Elizabeth Weise, *USA Today, Ipsos Poll: 20% of Americans Fear Climate Change Could Force Them to Move*, USA TODAY (Sept. 6, 2023, 1:25 PM), <https://www.usatoday.com/story/news/nation/2023/09/06/climate-change-divides-america-usa-today-ipsos-poll-data-shows/70533243007/> (explaining that 1 in 5 Americans recognize that extreme weather events caused by climate change may make their area so unsafe that they will be forced to relocate).

161. *See* A.S. Flynn, *Climate Change, Takings, and Armstrong*, 46 *ECOLOGY L.Q.* 671, 671 & n.1 (2019).

162. *Blue Acres: Homeowners*, N.J. DEPT OF ENV’T PROT., <https://dep.nj.gov/blueacres/homeowners/> (last visited Apr. 25, 2025x).

163. *See generally* *New Jersey Flood Indicator Tool*, N.J. DEPT OF ENV’T PROT., <https://experience.arcgis.com/experience/d2ea7b4d29614d3ba3acf082b750bee5> (last visited Jan. 17, 2025).

164. *See* Kathryn Balitsos & Garin Bulger, *New Jersey State Policy Lab: Blue Acres, Buyouts, and Managed Retreat*, RUTGERS-NEW BRUNSWICK EDWARD J. BLOUSTEIN SCH. OF PLAN. & PUB. POL’Y (July 14, 2022), <https://bloustein.rutgers.edu/new-jersey-state-policy-lab-blue-acres-buyouts-and-managed-retreat/>.

preserve “the public health, safety and welfare of the municipality and its inhabitants.”<sup>165</sup> Exercises of police power in New Jersey cannot be unreasonable, arbitrary, or capricious, and must be done in a manner that is related to the goals they intend to achieve.<sup>166</sup> So if the state determined that taking property was “necessary for the protection of [its] people,” it could attempt to invoke its police power to do so.<sup>167</sup> But such an action would likely be considered an excessive use of police power that goes “too far,” exposing the state to considerable litigation.<sup>168</sup> Because the Supreme Court has warned that private property could disappear entirely if police power is extensively used to regulate land, this would not be a prudent route for New Jersey to take.<sup>169</sup>

Alternatively, the state could argue that it is not required to compensate owners because flood risks caused by rising sea levels present a necessity to prevent “grave threats to the lives and property” of residents.<sup>170</sup> But this would be similarly unconvincing: the necessity exception is applied narrowly since it essentially only allows for the uncompensated destruction of private property when there is an immediate, impending danger such as an ongoing fire.<sup>171</sup> Even if the most severe sea level rise projections were guaranteed, it would be difficult to use the necessity exception until water actually surged into people’s homes.

Clearly then, at least *some* compensation must be paid to those whose land is taken. But because the state would only target properties in areas at risk of flooding, the value of those homes identified for acquisition will

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165. N.J. STAT. ANN. § 40:48-2 (West, Westlaw through L.2024, c. 109 and J.R. No. 6).

166. N.J. Shore Builders Ass’n v. Twp. of Jackson, 970 A.2d 992, 1002 (N.J. 2009).

167. Bonnieview Homeowners Ass’n v. Woodmont Builders, L.L.C., 655 F. Supp. 2d 473, 513 (D.N.J. 2009).

168. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see also* Saxer, *supra* note 113, at 81. However, there would be a heavy burden on any parties challenging municipal ordinances enacted via police power since they are “presumptively valid” in New Jersey. *N.J. Shore Builders Ass’n*, 970 A.2d at 1003.

169. Saxer, *supra* note 113, at 80 (citing *Mahon*, 260 U.S. at 415) (explaining that the Justices who wrote the opinion in *Mahon* “recognized that unconstrained use of the police power to regulate private property could eventually lead to the disappearance of all private property”).

170. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992).

171. Jeremy Patashnik, Note, *The Trolley Problem of Climate Change: Should Governments Face Takings Liability If Adaptive Strategies Cause Property Damage?*, 119 COLUM. L. REV. 1273, 1286–87 (2019). *But see* Boucot, *supra* note 34, at 785–87 (explaining that if the government took a “wait and see” approach to sea level rise, it could invoke the necessity doctrine as a complete defense to liability after a flood or hurricane hits, knowing that the rising seas were the underlying cause of the crisis).

likely only diminish as time passes.<sup>172</sup> Even as currently constructed, buyout programs like Blue Acres contribute to market value diminution: there is a financial advantage to being the first homeowner to sell since the value of neighboring properties steadily declines as more vacant lots surround them.<sup>173</sup> This collective game of chicken might result in the final holdout whose property is acquired via eminent domain receiving a relatively paltry sum because their home's value sunk as neighborhood conditions deteriorated.<sup>174</sup> Ultimately, their payout would likely be lower than what it could have been had they accepted in the first place, an outcome that both lowers New Jersey's overall costs and encourages homeowners to take the initial buyout offer.<sup>175</sup>

Mostly sourced from FEMA and HUD, funding for Blue Acres buyouts is generally limited to begin with, so New Jersey would certainly benefit from providing as little compensation as possible if it were to acquire additional properties by using eminent domain.<sup>176</sup> But since eminent domain is quite unpopular to begin with,<sup>177</sup> finding ways to avoid adequately compensating residents who are forced to move would make a delicate political situation even dicier.<sup>178</sup> More importantly, such action

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172. See Jesse D. Gourevitch et al., *Unpriced Climate Risk and the Potential Consequences of Overvaluation in US Housing Markets*, 13 NATURE CLIMATE CHANGE 250, 252 (2023) (discussing statistical findings which estimate that American properties in flood-prone areas are overvalued by approximately \$187 billion, and that overvaluation is at its highest along the Gulf, Pacific, and Atlantic coasts).

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

174. See *id.* at 1619–20.

175. *Id.* (explaining that while state intervention may be necessary when areas become dangerous to live in, buyout programs can be coercive for residents who feel they have no choice but to accept the government's terms).

176. See New Jersey Department of Environmental Protection Superstorm Sandy Blue Acres Buyout Program Frequently Asked Questions, MANVILLE BOROUGH, NJ (Sept. 16, 2015), <https://www.manvillenj.org/DocumentCenter/View/2960/Blue-Acres-Frequently-Asked-Questions-PDF> (“[T]here is a limited pool of funds available . . . for buyouts.”). Finite funding for buyout programs is not unique to New Jersey. See Stern, *supra* note 89, at 208; see also Kelsey Peterson et al., *A Review of Funding Mechanisms for US Floodplain Buyouts*, SUSTAINABILITY, Dec. 3, 2020, at 1, 1 (“[B]uyout use is frequently limited by the availability of funds.”).

177. See *supra* notes 141, 159 and accompanying text.

178. Insurance is another potential complication for any buyout, voluntary or otherwise. The National Flood Insurance Program (NFIP) helps subsidize flood insurance rates for residents living in flood-prone areas, many of whom may also have private flood insurance policies. See Becky Hayat & Robert Moore, *Addressing Affordability and Long-Term Resiliency Through the National Flood Insurance Program*, 45 ENV'T L. REP. 10338, 10340 (2015). Despite the NFIP's ability to help Americans in a crisis, the program is rife with problems that will only be exacerbated by sea level rise, an issue that many scholars have published a great deal of excellent scholarship about. *E.g., id.*; Mendelson, *supra* note 86, at 1520; Dena Adler et al., *Changing the National Flood Insurance Program for a Changing*

would directly conflict with the goals of a program principally designed to protect New Jersey citizens.

### C. Armstrong, Equity, and Just Compensation

Derived from a landmark 1960 Supreme Court decision that gave it its name,<sup>179</sup> the *Armstrong* principle dictates that the government is prevented from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>180</sup> The principle has been relied on for decades by Justices advocating for both broad and narrow readings of the Takings Clause.<sup>181</sup> Whether brought on by wildfires, hurricanes, or unpredictable temperature changes, the burdens of climate change will unfortunately be borne by the entire U.S. population. For our present purposes, the *Armstrong* principle demands that the social cost of rising sea levels must be borne by all New Jerseyans as equally and fairly as possible.<sup>182</sup> Fairness, of course, is in the eye of the beholder and is both context- and situation-dependent.<sup>183</sup> But if the government knows an area is particularly flood-

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*Climate*, 49 ENV'T L. REP. 10320, 10320 (2019); Louis Masi, Note, *The National Flood Insurance Program: Why Government-Backed Flood Insurance Is Drowning in Debt*, 33 VILL. ENV'T L.J. 63, 69 (2022). The NFIP is not the only insurance scheme implicated when climate-related weather events occur, but many of those currently available are quite expensive or limited. See generally CONG. BUDGET OFF., CLIMATE CHANGE, DISASTER RISK, AND HOMEOWNER'S INSURANCE 1–2 (2024), <https://www.cbo.gov/system/files/2024-08/59918-Climate-Change-Insurance.pdf> (detailing the types of insurance policies homeowners can use to recover from climate-related disasters and outlining possible approaches to make them more affordable and widely available); Harrison Munday, *An Insurance Model for Financing Climate Displacement*, FORCED MIGRATION REV., Nov. 2024, at 66, 68–69 (proposing the establishment of a “climate displacement insurance fund” used to minimize the financial harms borne by climate migrants).

179. *Armstrong v. United States*, 364 U.S. 40 (1960).

180. *Id.* at 49.

181. William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153–54, 1153 n.19 (1997) (noting that Chief Justice Rehnquist and Justice Scalia both cited to the *Armstrong* adage several times in opinions they penned throughout the 1970s, '80s, and '90s in which they advocated for the Takings Clause to be used broadly, while Justices Brennan, Blackmun, Marshall, and Stevens relied on *Armstrong* during the same period to argue for it to be narrowly construed).

182. See Flynn, *supra* note 161, at 677–80 (explaining that since climate disasters can devastate entire communities comprised of people from various socioeconomic backgrounds, the “fairness rationale” which *Armstrong* stands for requires that an individual homeowner who has lost everything in a storm should not be responsible for paying for the entire recovery).

183. See Treanor, *supra* note 181, at 1169 (“Fairness is contextual.”). In the spirit of fairness, those creating climate mitigation plans should account for their impact on different racial groups. See Alique G. Berberian et al., *Racial Disparities in Climate Change-Related Health Effects in the United States*, 9 CURRENT ENV'T HEALTH REPS. 451

prone, it has an obligation to protect everyone in that area, not just those who choose to accept a buyout.

If New Jersey announced its intention to acquire at-risk properties via buyout or eminent domain years in advance, it could incentivize voluntary buyout acceptance by explaining that the value of homes in floodplains will likely decrease with every passing day.<sup>184</sup> Though state law dictates that just compensation is based on a property's fair market value on the day it is taken,<sup>185</sup> when New Jersey sought to replace hundreds of coastal homes with flood barriers following Superstorm Sandy, Blue Acres presented property owners with buyout offers at "pre-storm market value" which coaxed many into willingly selling.<sup>186</sup> The state could similarly guarantee owners of flood-prone homes a fair market value payout based on the date the offer was made while still giving them time to move. Knowing that they could later lose their home to eminent domain anyway, those disinclined to take a voluntary buyout might have a harder time refusing, especially as they watch their neighbors vacate.<sup>187</sup> Persuading people to desert homes they have spent generations raising families and building legacies in may sound like a heartless gambit, but it is better to leave too early than too late.<sup>188</sup>

But the state should try to go even further. Fairly distributing burdens among residents forced to move requires that all of them are restored to the financial positions they were in prior to the taking.<sup>189</sup> While the preceding section outlined several strategies New Jersey lawmakers could utilize to avoid sufficiently compensating residents

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(2022) (suggesting that because climate-related weather events have had a disproportionately negative impact on the health of people of color and their children, climate adaptation strategies that prioritize resilience within these populations are critical). Equity and justice, however, are often inadequately considered in climate adaptation assessments due to a dearth of research in the area. *See generally* Shaugn Coggins et al., *Empirical Assessment of Equity and Justice in Climate Adaptation Literature: A Systematic Map*, ENV'T RSCH. LETTERS, June 23, 2021, at 1, 19.

184. *See* Gourevitch et al., *supra* note 172, at 250 (explaining that homes in flood-prone areas may be overvalued between \$121 and \$237 billion due to the average losses they are expected to incur throughout the next thirty years).

185. *Borough of Harvey Cedars v. Karan*, 70 A.3d 524, 535 (N.J. 2013) (citing *State v. Silver*, 457 A.2d 463, 466 (N.J. 1983)).

186. Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391, 400 (2015).

187. *See* Kuo & Means, *supra* note 173, at 1617–18 (arguing that even when eminent domain cannot be used, voluntary buyout programs can be coercive exploitations of collective action issues since people do not want to be the last neighbor to sell their home when areas are severely disrupted by sudden flight).

188. Also, the burden on coastal landowners is "less severe if the government acts on [sea level rise] now and accepts the takings liability that follows" than it would be if the government chose to wait until after more homes were damaged or destroyed. Boucot, *supra* note 34, at 788.

189. *See* Wyman, *supra* note 100, at 249–50.

whose land they acquire, it is imperative that such actions not be taken. The *Armstrong* principle suggests that just compensation should not only be based on fair market value but that other factors should also be considered, including the government's role in diminishing property value, the individual attachments people have to their homes, and the significant cost of relocation.<sup>190</sup>

These financial problems would require some creative solutions. To ensure that there is adequate funding to compensate those forced to move and guarantee that all members of society—not just those living in flood-prone areas—bear these burdens, taxes may have to be increased.<sup>191</sup> Though this would likely be unpopular, it would help the government ensure that those who lost a home just because their ancestors settled there generations before are paid. Indeed, because low-income communities are some of the most uniquely vulnerable to climate-related dangers,<sup>192</sup> the state must ensure that those whose homes are taken are not left in a worse position than they began. Also, since those compensated via eminent domain are property *owners*, renters suddenly stripped of their homes are often left looking for a new place to live without any payment to assist in the process.<sup>193</sup> Creating a special compensation fund or setting aside an allotment to help renters recoup money for their loss would be an equitable measure aligned with the goals that the *Armstrong* principle contemplated.<sup>194</sup>

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190. Flynn, *supra* note 161, at 680. Although it is not feasible to value every home at the exact same rate, the state could attempt to provide neighbors whose homes are taken via eminent domain with similar monetary compensation since they would each be shouldering the same burden of forced relocation. See Lee, *supra* note 96, at 638–39 (arguing that the *Armstrong* principle requires that the compensation received by every homeowner forced to move must be the same because otherwise, their collective loss of autonomy would be fundamentally disrespected).

191. See Patashnik, *supra* note 171, at 1307–08 (suggesting that a tax hike would not only help offset the financial strain on the government but also make the entire population responsible for contributing to individual relocation efforts).

192. A.R. Siders, *Social Justice Implications of US Managed Retreat Buyout Programs*, 152 CLIMATIC CHANGE 239, 240 (2019). But see Patashnik, *supra* note 171, at 1308–09 (noting that there are many wealthy homeowners with beachfront property whose need for financial assistance would not be as dire as other residents with lower incomes, and that some climate-related property takings could lead to payouts that would further exacerbate wealth inequality).

193. Emlein, *supra* note 63, at 196.

194. See Patashnik, *supra* note 171, at 1308 (demonstrating that precedent exists for establishing an emergency fund that could compensate people whose homes are taken by the government because of climate change events by comparing the concept to a fund created after the September 11 attacks that disbursed financial assistance to families of the victims).

While some New Jersey residents are ready to accept a buyout,<sup>195</sup> others may hold out until they are compelled to relocate. Although funding issues would invariably arise if the state implemented this kind of proactive scheme, climate change is an expensive problem<sup>196</sup> with costly consequences<sup>197</sup> that must be appropriately addressed. If New Jersey enacted a program like this, it must adhere to the *Armstrong* principle by guaranteeing that those who relocate are made whole.<sup>198</sup> Any other approach would further imperil residents, resulting in outcomes detrimentally at odds with the goals of a forward-looking redevelopment program designed to prioritize public safety and long-term stability.

## V. CONCLUSION

To appropriately address the problems that sea level rise leads to, it must be recognized that it is not a matter of whether, but *when* flooding will make parts of New Jersey uninhabitable. Instead of waiting until after the next major storm destroys property or claims lives, the state should embrace managed retreat and enhance Blue Acres with eminent domain power, thereby taking the inevitable yet agonizing decision to relocate out of homeowners' hands.

In addition to the myriad legal complications that would come with effectuating this kind of mass relocation program, New Jersey would be forced to contend with political and social resistance, strain on financial resources, stacks of insurance claims, equality concerns, climate skepticism, and community disruption (both in vacated areas and localities that subsume migrants who have left their homes). These problems do not have easy answers. But we know the seas are rising and storms will only get worse, so it would be immoral not to try and prevent coastal residents from losing their homes or lives. While implementation would certainly be complex, this Note offers a path forward for a state that sorely needs to adapt.

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195. Christine Sloan, *Some New Jersey Flood Victims Looking to Be Bought Out by Government*, CBS NEW YORK (Feb. 8, 2024, 6:31 PM), <https://www.cbsnews.com/newyork/news/new-jersey-flood-victims-blue-acres-government-buy-out/> (explaining that many residents are ready to take buyouts, though there are differing views regarding the amount of payment they should receive).

196. See *supra* note 134.

197. See *supra* notes 7–10 and accompanying text.

198. Flynn, *supra* note 161, at 679–80 (explaining that abiding by the *Armstrong* principle can help “mitigate the harm of the combination of climate change and government action” that not only takes residents’ property but sometimes also reduces its value in the process).



2025]

*EMBRACING MANAGED RETREAT*

867

Any exercise of eminent domain must be carried out carefully. Properties must only be taken when it is highly likely that impending flooding will inflict great harm on residents. Those required to vacate must receive ample notice and be fairly compensated for their property. With these principles in mind, it is imperative that the state consider using eminent domain in addition to its current buyout scheme to protect New Jerseyans living in flood-prone areas. Doing so would allow residents to leave on their own terms before it is too late.