COMMENT

LANDLORDS' RESPONSIBILITIES UNDER THE IMPLIED WARRANTY OF HABITABILITY AND THE COVENANT OF QUIET ENJOYMENT EXTEND TO HURRICANE-CAUSED DAMAGE

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Rising global temperatures have caused hurricanes to grow in size, intensity, and frequency. For many coastal cities, hurricanes have become an expected or customary event. In 2017, Hurricane Harvey hit the Texas coast and decimated communities. A year later, Hurricane Florence made landfall in North Carolina, leaving similar damage in its wake. The list goes on: Hurricane Sandy, Hurricane Katrina, Hurricane Ivan, Hurricane Charley are other storms in recent history that have had devastating impacts on communities in New Jersey, Florida, and Louisiana. Following these catastrophic storms, it is often those who rent who are most impacted. Renters' homes have been damaged, some made inhabitable, and yet, landlords have refused to maintain or repair the properties.

In property law, there has traditionally been no tenant-oriented remedy mitigating damage caused by a natural disaster. Instead, landlords have looked to the act of God defense, a tool that eliminates obligations under a contract where a sudden and unexpected force outside the landlord's control

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makes the landlord's responsibility under the lease impossible. At stake in a lease, however, is more than just contractual obligations shared by a landlord and tenant. At stake is also a tenant's recognized property right: the right to use and enjoy a premise for temporary duration. In recent years, climate change and the increased frequency and severity of hurricanes has disheveled the landlord-tenant relationship. These changed circumstances have created an imbalance that property doctrines, once shaped to incite a more equitable transaction between landlord and tenant, have failed to address. This Comment argues that doctrines such as the implied warranty of habitability and the covenant of quiet enjoyment do, in fact, extend to damage caused by hurricanes. Further, because many communities have grown to expect hurricanes, an event to which landlords are on notice, landlords may no longer raise the act of God defense and avoid liability.

Property law best protects individuals' rights when external influences are stable. Climate change has disrupted that stability and placed many individuals' property rights at risk. By recognizing anthropogenic climate change and its impacts on communities as the new reality, property doctrines are better equipped to safeguard the carefully calibrated rights derived from a landlord-tenant relationship.

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INTRODUCTION

The law of property rests on a foundation of stability and predictability.[1] Doctrines such as the implied warranty of habitability and the covenant of quiet enjoyment ensure that property interests, specifically those arising in landlord-tenant relationships, are appropriately balanced and protected for the duration of a lease.[2] Tenancy law establishes rights and obligations that define the scope of the relationship between landlord and tenant, including a few clear-cut disclaimers of liability.[3] For example, if a non-manmade force, such as an extreme weather event, infringes upon the tenant's rights, there has traditionally been no remedy for the tenant aside from terminating the lease because "the changed condition is not the fault of the landlord."[4] A new reality, however, calls into question this traditionally clear-cut exception.[5] As a result of rising global temperatures, extreme weather-related events are battering coastlines in places like North Carolina and Texas, as well

1. *See* John A. Lovett, *Property and Radically Changed Circumstances*, 74 TENN. L. REV. 463, 474, 495–510 (2007) ("Many property law scholars define the goal of property law as creating an institution fundamentally geared toward the promotion of stability—stability in ownership, stability in markets for exchange, and stability in communities.").

2. *Id.* at 495–510.

3. *See generally* Milton R. Friedman, FRIEDMAN ON LEASES § 9:1.1, at 9-36-37 (Patrick A. Randolph, Jr. ed., 5th ed. 2005) (illustrating instances when tenants are liable for damage outside of their control because of their duty to maintain their premises).

4. *See generally* RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 5.2 cmt. f (AM. LAW INST. 1977) (explaining that a tenant may terminate his lease if his landlord fails to restore the property to a suitable condition, but the tenant does not have any additional remedies).

5. *See* Lovett, *supra* note 1, at 476 (explaining how events such as Hurricane Katrina "upset settled expectations and put large numbers of people at risk of losing control of the tangible and intangible resources that are central to their lives").

as other communities, with increased frequency and severity, and the impacts on tenancy interests are undeniable.[6]

In September 2018, Hurricane Florence ravaged North Carolina communities.[7] According to the American Red Cross, thousands of homes were damaged or destroyed by rising waters caused by Hurricane Florence.[8] In the weeks that followed the hurricane, many families remained homeless.[9] According to one local North Carolina news report, over 1900 residents remained in shelters in the weeks following the storm,[10] though the American Red Cross statistics suggest a much higher number.[11] Hurricane Florence hit single-family homes the hardest.[12] One North Carolina town reported that approximately 200 residential properties had been destroyed by flooding or tree damage resulting from the storm.[13] Likewise, the amount of aid allocated by the Federal Emergency Management Agency (FEMA) to Hurricane Florence damage illustrates the storm's expansive impact on property interest holders. As of October 10, 2018, FEMA has approved over 26,000 Individual Assistance Applications to financially support

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6. *See* MYLES ALLEN ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], GLOBAL WARMING OF 1.5°C: SUMMARY FOR POLICY MAKERS 13 (Valérie Masson-Delmotte et al. eds., 2018), http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf [https://perma.cc/YFF8-SH6E] [hereinafter IPCC CLIMATE CHANGE SUMMARY] (explaining that globally increasing temperatures have very likely contributed to the intensity and frequency of storms).

7. *Florence Gone but its Flooding a Crisis in Parts of North Carolina—Live Updates*, CBS NEWS (Sept. 19, 2018, 1:38 AM), https://www.cbsnews.com/live-news/hurricane-florence-aftermath-weather-flooding-power-outage-death-toll-fema-latest-forecast-live [https://perma.cc/5SE7-TY9Z].

8. *Hurricane Florence Response in Eastern North Carolina*, AM. RED CROSS, https://www.redcross.org/local/north-carolina/eastern-north-carolina/about-us/our-work/hurricane-florence-response.html [https://perma.cc/7XUX-CHWQ] [hereinafter *Red Cross Response to Hurricane Florence*].

9. Fred Clasen-Kelly, *Florence Damaged Thousands of Homes in the Carolinas: 'This Has Been So Stressful'*, THE CHARLOTTE OBSERVER (Sept. 28, 2018, 12:37 PM), https://www.charlotteobserver.com/news/local/article219112465.html.

10. *Id.*

11. *See Red Cross Response to Hurricane Florence*, *supra* note 8 ("[D]isaster workers helped shelter and feed tens of thousands of people forced from their homes.").

12. Clasen-Kelly, *supra* note 9.

13. Lynda Van Kuren, *Hurricane Florence: Leland Starts Picking Up the Pieces*, STARNEWS ONLINE (Sept. 29, 2018, 9:00 AM), https://www.starnewsonline.com/news/20180929/hurricane-florence-leland-starts-picking-up-pieces [https://perma.cc/HJ3X-8R95].

homeowners and renters, fixing damage Hurricane Florence caused.[14] Additionally, as of May 2019, 657 households received temporary housing and $144 million was approved for FEMA Housing Assistance.[15]

According to the Red Cross, "thousands of homes and structures were damaged during the storm," and single-family rental houses have been hit the hardest.[16] Hurricane damage typically includes water damage, from precipitation and storm surges, with potential to "saturate flooring, walls and furnishings,"[17] which suggests that many rental homes in North Carolina have likely faced similar damage. As one illustration, a renter in North Carolina following Hurricane Florence stated that she was displaced from her three-bedroom home after a tree fell on the property during the storm.[18] Months following the storm, the landlord has yet to fix the property, and the renter has no idea when she will regain access to the apartment.[19] This renter's story is only one anecdotal expression of Hurricane Florence's lasting impacts on the rental community in coastal North Carolina.

A year prior to Hurricane Florence's devastating blow to coastal North Carolina communities, Hurricane Harvey made landfall in Texas as a Category Four hurricane in August 2017.[20] Hurricane Harvey's "significant damaging winds and floods" caused "deadly flooding over Southeast Texas."[21] As "one of the worst flooding disasters in U.S. history," the American Red Cross "[p]rovided immediate financial assistance for more than 575,000 affected households" in addition to coordinating 414,800 overnight shelter

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14. *North Carolina Hurricane Florence (DR-4393)*, FED. EMERGENCY MGMT. AGENCY, https://www.fema.gov/disaster/4393 [https://perma.cc/GLK9-CS96] (last updated Oct. 11, 2018) [hereinafter *FEMA Response to Hurricane Florence*].

15. *Id.*

16. *See* Clasen-Kelly, *supra* note 9 (explaining that rental properties damage disproportionately impacted low income families).

17. Diana Olick, *Florence's First Wave Has Potential to Cause $5 Billion in Property Damage*, CNBC (Sept. 14, 2018, 9:11 AM), https://www.cnbc.com/2018/09/14/florence-has-potential-to-cause-5-billion-in-property-damage.html [https://perma.cc/67MV-4FEJ].

18. Clasen-Kelly, *supra* note 9.

19. *Id.*

20. *Category Four Hurricane Harvey: South Texas Landfall & Impacts from August 25th to 29th, 2017*, NAT'L WEATHER SERV., https://www.weather.gov/crp/hurricane_harvey [https://perma.cc/5K37-QZ3N] [hereinafter *Hurricane Harvey Landfall & Impacts*].

21. *Id.*

stays.[22] Likewise, FEMA relief amounted to over $1.6 billion in efforts to help families recover after losing their homes.[23] A year following Hurricane Harvey's wake, potential legal implications have surfaced in the landlord-tenant landscape. Notably, the Texas Attorney General has reported receiving twenty-three informal complaints on matters relating to landlords and hurricane damage.[24] The majority of landlord-tenant issues have stemmed from "difficult[y] getting out of leases on damaged properties [and] short timelines for evictions."[25] Other rising tensions have included landlords forgoing responsibility for damage: alleging that tenants must do their own repairs, demanding rent when apartments are unlivable, and threatening to withhold security deposits or spurn the renters' credit reports for failure to pay.[26] Moreover, many tenants have been without any remedy from governmental aid efforts—FEMA's response only "approved less than half the applications for assistance" in the months following Hurricane Harvey.[27] Overall, the damage caused by both Hurricane Florence and Hurricane Harvey to renters has been undeniably profuse.

In light of these changing circumstances, a new reality threatens to dishevel the carefully constructed relationship between landlord and tenant. Although the implied warranty of habitability and the covenant of quiet enjoyment may not have initially envisioned the increased

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22. *Hurricane Harvey Relief Information*, AM. RED CROSS, https://www.redcross.org/about-us/our-work/disaster-relief/hurricane-relief/hurricane-harvey-relief-information [https://perma.cc/J6HG-RJL3] [hereinafter *Red Cross Response to Hurricane Harvey*].

23. *Texas Hurricane Harvey (DR-4332)*, FED. EMERGENCY MGMT. AGENCY, https://www.fema.gov/disaster/4332 [https://perma.cc/2S4L-AHAE] [hereinafter *FEMA Response to Hurricane Harvey*].

24. Ben Popken, *First They Fought the Storm; Now, They Fight Their Landlord*, NBC NEWS (Sept. 9, 2017, 10:01 AM), https://www.nbcnews.com/storyline/hurricane-harvey/first-they-fought-storm-now-they-fight-their-landlord-n799206 [https://perma.cc/TN34-BMCN].

25. Claudia Lauer & Ariana Gomez Licon, *Renters Find Extra Hurdles to Recovery After Hurricanes*, U.S. NEWS (Oct. 13, 2017, 1:26 AM), https://www.usnews.com/news/best-states/florida/articles/2017-10-13/renters-find-extra-hurdles-to-recovery-after-hurricanes [https://perma.cc/TC6X-VERL].

26. *Id.*

27. Clasen-Kelly, *supra* note 9; *see* Mike Snyder, *Fewer than Half of FEMA Harvey Requests Approved, Data Show*, CHRON (Jan. 23, 2018, 2:12 PM), https://www.chron.com/news/houston-texas/article/Fewer-than-half-of-FEMA-Harvey-requests-approved-12515142.php [https://perma.cc/X59R-J7XM] ("895,342 Texans had registered for assistance as of Jan. 19. Forty-one percent had been approved and 31 percent deemed ineligible.").

frequency and intensity of natural catastrophes and subsequent impacts on renters,[28] hurricanes do not wash away a tenant's rights. Accordingly, under the implied warranty of habitability and the covenant of quiet enjoyment, landlords are responsible for damage caused by climate change-related weather events because increasingly accurate weather prediction models and increased access to hurricane-risk information have placed landlords on sufficient notice of both the natural disaster events and the potential damage for which they will be held responsible. Part I of this Comment provides a detailed background on traditional property doctrines like the implied warranty of habitability and the covenant of quiet enjoyment. Specifically, Part I details the obligations and remedies available to both tenants and landlords as they are presently interpreted and applied in the common law and by statutes. This Part also explores the current state of global warming, details the use of predictive weather forecast measures, and outlines how general access to hurricane-risk information has increased. Part II of this Comment applies these doctrines to a new reality: landlord-tenant relationships substantially impacted by extreme weather events attributable to climate change. Part II argues that although hurricanes cause the damage, the landlord's obligations under the warranty of habitability and the covenant of quite enjoyment are not extinguished. This Part recalibrates and balances the property interests shared by the landlord and the tenant under these doctrines.

This Comment concludes that if the landlord fails to correct foreseeable conditions caused by hurricanes that materially affect the tenants' health and safety, the landlord has breached the warranty of habitability. Additionally, if the landlord fails to sufficiently weatherproof properties to withstand foreseeable hurricane damage, this failure constitutes a material act or omission on the part of the landlord and gives rise to a breach of the covenant of quiet enjoyment. Finally, landlords may no longer rely on an act of God defense to avoid liability for damage caused by hurricanes. For example, if a landlord obstructs habitability standards by failing to repair damage caused by hurricanes, the landlord may not raise an act of God defense to avoid rent abatement payments. Ultimately, if the landlord fails to properly repair or maintain the premises, thereby constructively evicting a tenant or violating habitability standards, the tenant is entitled to rent abatement, repairs, or contractual release from the tenancy.

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28. *See* discussion *infra* Sections I.C, I.D.

I. BACKGROUND

Part I will provide an overview of the lasting impacts Hurricane Harvey and Hurricane Florence have had on Texas and North Carolina communities, particularly the storms' impacts on renters.[29] Additionally, this Part will detail the current discourse around climate change in the legal and scientific community, describing recent climate change-related litigation as well as current hurricane-risk assessment models and the methods in which hurricane-risk information is predicted and disseminated to communities at large. Next, the implied warranty of habitability and the covenant of quiet enjoyment will be examined through case law. Finally, Part I will explore the act of God defense as it pertains to landlords, illustrating when the defense may and may not free a landlord from liability.

A. Climate Change in the Scientific and Legal Community

Globally increasing temperatures have contributed to the intensity and frequency of storms like Hurricane Florence in North Carolina and Hurricane Harvey in Texas.[30] In 2018, the Intergovernmental Panel on Climate Change (IPCC), a United Nations intergovernmental organization dedicated to assessing science related to climate change, observed with high confidence that "anthropogenic global warming is currently increasing at 0.2 [degrees Celsius] per decade due to past and ongoing emissions" by humans.[31] With very high confidence, the IPCC

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29. Hurricane Harvey and Hurricane Florence represent only two recent examples of increasingly frequent and severe storms making landfall in the United States. Since the late 1980s, the number and severity of hurricanes has been on the rise, including storms like Hurricane Katrina and Hurricane Irma. Sara Gibbens, *Hurricane Katrina, Explained*, NAT'L GEOGRAPHIC (Jan. 16, 2019), https://www.nationalgeographic.com/environment/natural-disasters/reference/hurricane-katrina [https://perma.cc/3M5E-WSPV] (describing the impacts of Hurricane Katrina); *see generally* JOHN P. CANGIALOSI ET AL., NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE IRMA (2018), https://www.nhc.noaa.gov/data/tcr/AL112017_Irma.pdf [https://perma.cc/GB73-37LK] (describing the impacts of Hurricane Irma).

30. *See* IPCC CLIMATE CHANGE SUMMARY, *supra* note 6 (explaining how increasing temperatures impact hurricane intensity).

31. To illustrate a weather trend's likelihood, the IPCC designates what it terms "confidence" levels to different weather trend outcomes. The confidence levels range from very low to very high. *Id.* at 6; *see also* John Cook et al., *Qualifying the Consensus on Anthropogenic Global Warming in the Scientific Literature*, 8 ENVTL. RES. LETTER 1, 2 (May 15, 2013) (defining anthropogenic global warming as global warming caused by human activity).

additionally stated that the "observed global mean surface temperature for the decade 2006–2015 was 0.87 [degrees Celsius] higher than the average over the 1850–1900 [pre-industrial] period,"[32] concluding with medium confidence that "[t]rends in intensity and frequency of some climate and weather extremes have been detected over time spans during which about 0.5 [degrees Celsius] of global warming occurred."[33] Finally, the IPCC has indicated that extreme weather events fall into one of the Panel's five reasons for concern about increasing global temperatures, finding that extreme weather events pose "severe and widespread impacts/risks" for "people, economies and ecosystems across sectors and regions."[34] The IPCC is but one organization dedicated to using science to track issues like climate change and its effect on weather trends.

Similarly, the Union of Concerned Scientists ("UCS") is a nonprofit organization dedicated to using science to mitigate the effects of climate change nationally.[35] The UCS issued a report, which concluded that although hurricanes have always threatened North America, the intensity of these threats has increased since the 1970s.[36] The article noted that scientific research has "attribute[d] individual hurricanes to global warming" like Hurricane Harvey, and further concluded that the "probability of a storm with precipitation levels like Hurricane Harvey was higher in Texas in 2017 than it was at the end of the twentieth century."[37] As a result of climate change, a storm as disastrous as Hurricane Harvey, which used to occur once a century, now is likely to occur every sixteen years.[38] The report expressly attributes these changes to "[h]uman-made global warming," which has "create[d] conditions that increase the chances of extreme weather."[39]

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32. *See* IPCC CLIMATE CHANGE SUMMARY, *supra* note 6, at 6.
33. *Id.*
34. *Id.* at 13.
35. *See About Us*, UNION OF CONCERNED SCIENTISTS, https://www.ucsusa.org/about-us [https://perma.cc/3CBJ-9JCG] (explaining that rising temperatures are scientific evidence of climate change that can be measured and using its network to broadcast the consequences of climate change and advocate for possible solutions).
36. *Hurricanes and Climate Change*, UNION OF CONCERNED SCIENTISTS, https://www.ucsusa.org/global-warming/science-and-impacts/impacts/hurricanes-and-climate-change.html [https://perma.cc/4L9D-6M6N] (last revised June 25, 2019) [hereinafter *Hurricanes & Climate Change*].
37. *Id.*
38. *Id.*
39. *Id.*

Additionally, the U.S. Global Change Research Program, a multi-federal agency endeavor, recently released its Fourth National Climate Assessment providing a comprehensive report on the potential impacts of climate change on communities in the United States.[40] In its Summary Findings, the program expressed concern regarding climate change's impact on "communities across the United States, presenting growing challenges to human health and safety, quality of life, and the rate of economic growth," in addition to explicit concerns regarding climate change's impact on the United States' infrastructure.[41] The Summary reports that increases in "heavy precipitation events" and "coastal flooding" pose a serious threat to "America's trillion-dollar coastal property market."[42]

Finally, a recent study released by Stony Brook University School of Marine and Atmospheric Sciences examined "human induced" climate change and specifically focused on analyzing its impact on the strength of Hurricane Florence.[43] According to the study, climate change directly increased Hurricane Florence's intensity, amount of rainfall, and size.[44]

Alongside advancing scientific research on climate change and concerns regarding climate change's impacts on the human landscape, weather prediction models have also advanced, offering increasingly accurate notice of extreme weather events.[45] In the last four decades,

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40. *See* Maureen Nandini Mitra, *The US Climate Change Report Trump Didn't Want You to Know About*, EARTH ISLAND JOURNAL, (Nov. 26, 2018), http://www.earthisland.org/journal/index.php/articles/entry/the-us-climate-change-report-trump-didnt-want-you-to-know-about? [https://perma.cc/UGG2-X6J4] (concluding that the increase in intense wildfires, droughts, heatwaves, and floods require urgent action to reduce greenhouse gas emissions or the most vulnerable communities will continue to suffer).

41. *See* U.S. GLOBAL CHANGE RES. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT: SUMMARY FINDINGS 25–30 (2018) [hereinafter USGCRP SUMMARY FINDINGS], https://nca2018.globalchange.gov/ downloads/NCA4_Ch01_Summary-Findings.pdf [https://perma.cc/9YUL-THKS] ("Climate change and extreme weather events are expected to increasingly disrupt our Nation's energy and transportation systems, threatening more frequent and longer-lasting power outages, fuel shortages, and service disruptions, with cascading impacts on other critical sectors.").

42. *Id.* at 30.

43. Kevin A. Reed et al., *Estimating the Potential Impact of Climate Change on Hurricane Florence*, STONY BROOK UNIV. SCH. OF MARINE AND ATMOSPHERIC SCIS. (Sept. 13, 2018), https://www.somas.stonybrook.edu/2018/09/1 [https://perma.cc/6FCA-GRR2].

44. *Id.*

45. *See* Alan Burdwick, *Our Weather-Prediction Models Keep Getting Better, and Hurricane Irma is the Proof*, NEW YORKER (Sept. 6, 2017), https://www.newyorker.com

"the accuracy of three- to ten-day forecasts [of hurricanes] has been increasing by about one day per decade."[46] For example, meteorologists predicted Hurricane Sandy days ahead of time, providing advance notice to many communities that were eventually impacted by the storm's landfall.[47] According to a recent report by the Hurricane Forecast Improvement Project, forecasting model technology is continuing to improve through the use of "several probabilistic [rapid intensification] models,"[48] and the Project has clear goals to improve forecasting accuracy to reduce human casualties, injuries, and economic damage.[49]

As the threat of storms and their potential impacts looms larger, access to hurricane-risk information provided by prediction models has also improved.[50] The public can access hurricane predictions through National Weather Service forecasters, private forecasters, various media and government agencies, and other organizations.[51] The most common information providers to the public regarding hurricane risk include "[l]ocal television and radio personnel."[52] As one example, the National Hurricane Center, a part of the National Oceanic and Atmospheric Administration, has established a Storm Surge Unit. This Unit consists of a "small group of highly trained meteorologists and oceanographers" who produce model predictions

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/tech/annals-of-technology/our-weather-prediction-models-keep-getting-better-and-hurricane-irma-is-the-proof [https://perma.cc/RPY4-Q4T6] (explaining how geostationary satellites orbit Earth to collect data that describes weather patterns on its surface).

46. *Id.* (discussing Peter Bauer et al., *The Quiet Revolution of Numerical Weather Prediction*, 525 NATURE 47, 47–55 (2015)).

47. Peter Bauer et al., *supra* note 46, at 47–55.

48. *See* S. GOPALAKRISHNAN ET AL., HURRICANE FORECAST IMPROVEMENT PROJECT, HFIP2018-1, 2017 HFIP R&D ACTIVITIES SUMMARY: RECENT RESULTS & OPERATIONAL IMPLEMENTATION 14 (2018), http://www.hfip.org/documents/HFIP_AnnualReport_FY2017.pdf [https://perma.cc/NW53-6NCK] (explaining that measuring how many rapid intensifications scientists can predict versus how many actually occur provides the accuracy of hurricane prediction methods and therefore gives scientists a percentage error that they can work to reduce).

49. *Id.* at 28.

50. *Storm Surge Unit*, NAT'L HURRICANE CTR., https://www.nhc.noaa.gov/surge/ssu.php [https://perma.cc/XM9K-2MNP] (stating that the National Hurricane Center's mission is "[t]o serve the Nation's growing need for storm surge information by providing accurate real-time surge forecasts . . . and increasing awareness through outreach and education") [hereinafter STORM SURGE UNIT].

51. Julie L. Demuth et al., *Creation and Communication of Hurricane Risk Information*, 93 BULL. AM. METEOROLOGICAL SOC'Y 1133, 1134 (2012).

52. *Id.* at 1136.

for landfalling hurricanes in addition to hypothetical storm simulations to improve storm preparation.[53] The Unit relies on a computer model called the "Sea, Lake, and Overland Surges for Hurricanes" to predict storm damage vulnerability. As soon as a "hurricane warning is issued, approximately 36 hours prior to the onset of tropical storm force winds," the team tracks the storm and continues coverage "until the threat from storm surge subsides."[54] Further, the Unit supports both a Hurricane Specialist Unit and local weather forecast offices to convey "vulnerability estimates during land-falling hurricanes" by providing "Hurricane Local Statements," which include information such as: the affected area, current watches or warnings, precautionary recommendations, storm surge information, present winds, predictions about the onset of tropical storm-force or hurricane-force winds, and the potential for tornados, floods, rip currents, and beach erosion.[55] The National Hurricane Center also provides a detailed overview of hurricane preparedness tips and potential hazards.[56] For example, the Center uses the "Saffir-Simpson Hurricane Wind Scale," which estimates property damage relating to a hurricane's wind speed.[57] The Wind Scale suggests that Category Three hurricanes create "potential for significant loss of life and damage," especially to homes.[58] Even more concerning, Category Four hurricane damage has the potential to make "[m]ost of the [affected] area . . . uninhabitable for weeks or months."[59] The National Hurricane Center also implements "RSS Feeds" to disseminate pertinent information regarding storms, which is the Center's "method of summarizing the latest news and information . . . in a lightweight form that can be easily read by a number of news readers or news

53. *Storm Surge Unit*, *supra* note 50.

54. *Id.*

55. *Local Surge Impacts Information*, NAT'L HURRICANE CTR., https://www.nhc.noaa.gov/surge/local.php [https://perma.cc/C8MR-KX8F].

56. *Hurricane Preparedness—Hazards*, NAT'L HURRICANE CTR., https://www.nhc.noaa.gov/prepare/hazards.php [https://perma.cc/NE84-PCC5].

57. *See Saffir-Simpson Hurricane Wind Scale*, NAT'L HURRICANE CTR., https://www.nhc.noaa.gov/aboutsshws.php [https://perma.cc/BB4R-FRVC] (explaining that in a Category 3 hurricane "[w]ell-built framed homes may incur major damage or removal of roof decking and gable ends. Many trees will be snapped or uprooted . . . [and] [e]lectricity and water will be unavailable for several days to weeks after the storm passes.").

58. *Id.*

59. *Id.*

aggregators."[60] Alternatively, the Center provides "Audio Briefings," which provide "the latest information regarding [a] hurricane threat and its expected impacts."[61] In sum, tools for predicting and disseminating hurricane-risk information have vastly improved access to hurricane-risk information. Because of this increased access to weather prediction information, landlords have been placed on notice of both the increased frequency and severity of these storms as well as the types of property damage caused by these storms.

Alongside advancing technology in the hurricane-risk information space, the legal sphere has likewise adjusted to a new landscape—one where individuals' rights are now being implicated by climate change. At this intersection of climate change and the law, litigation is on the rise.[62] For example, a case recently filed in the United States District Court for the District of Oregon addressed the impacts of climate change on private citizens. In *Juliana v. United States*,[63] the plaintiffs argued that the government's failure to effectively respond to climate change has caused injury to constitutionally guaranteed property rights.[64] One plaintiff in the action alleged that a storm that destroyed her home would usually "only happen once every 1,000 years," but instead, "is happening *now* as a result of climate change.'"[65] Although lawsuits alleging personal property damage caused by climate change-induced events raise justiciability issues, the Oregon district court held that the plaintiffs' allegations of injury and causation were sufficiently plausible to permit the case to move past the motion to dismiss stage.[66] As a recent development in the case,

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60. *NHC RSS Feeds*, NAT'L HURRICANE CTR., https://www.nhc.noaa.gov/aboutrss.shtml [https://perma.cc/CT3P-7JFU].

61. *NHC Audio Briefings (Podcasts)*, NAT'L HURRICANE CTR., https://www.nhc.noaa.gov/audio [https://perma.cc/9FB8-MHVB].

62. MICHAL NACHMANY ET AL., GLOBAL TRENDS IN CLIMATE CHANGE LEGISLATION AND LITIGATION 4, 13 (2017), http://archive.ipu.org/pdf/publications/global.pdf [https://perma.cc/NTJ2-VZS7] (using a chart to illustrate the Climate Change Litigation of the World dataset, a study of 25 jurisdictions beginning in 1994 when "cases [were] few and infrequent until the mid-2000s," but "[s]ince then there have been at least 10 court cases per year in the jurisdictions covered").

63. 217 F. Supp. 3d 1224 (D. Or. 2016).

64. *Id.* at 1242.

65. *Id.* at 1243 (emphasis added).

66. *Id.* at 1234; *see also* Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 7 (2017) (describing the district court's decision as breaking "new legal ground"). The district court in *Juliana* held that the plaintiffs had "a fundamental right to a climate system capable of sustaining human life," and therefore, the government's

the United States Supreme Court denied the Trump Administration's writ of mandamus to stay the trial in November 2018.[67] Meanwhile, the U.S. government filed an additional application for stay and a new petition for a writ of mandamus. The Ninth Circuit responded by granting a temporary stay of district court proceedings pending its consideration of the petitioner for writ of mandamus.[68] Accordingly, trial preparation continues, and the plaintiffs have since (1) filed an emergency motion to lift the stay,[69] (2) a motion to expedite review,[70] and (3) a motion for a preliminary injunction while the Ninth Circuit addresses the plaintiffs' early appeal.[71]

Like *Juliana*, other courts have analyzed justiciability issues when human-induced global warming is the alleged trigger of a particularized harm.[72] For example, in *Massachusetts v. EPA*,[73] the Supreme Court agreed that the impact of "manmade greenhouse gas emissions" on global warming was not disputed,[74] finding that "U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations" and thus, to global warming.[75] The Court held that the causation element of standing was not at issue, which allowed the petitioners to successfully argue that a "reduction in domestic emissions

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failure to adequately mitigate climate change constituted a violation of "constitutional rights to life, liberty, and property." *Id.*

67. Press Release, Our Children's Trust, United States Supreme Court Denies Trump Administration's Request for Stay—*Juliana v. United States* Moves Forward, Again (Nov. 2, 2018), https://static1.squarespace.com/static/571d109b04426270152febe0/t/5bdd0596f950b72a53011c0c [https://perma.cc/C6EE-F6LU].

68. Order, Juliana v. USDC-ORE, No. 18-73014 (9th Cir. Nov. 8, 2018).

69. Emergency Motion Under Circuit Rule 27-3 or, Alternatively, Expedite Review of Petitions for Writ of Mandamus (18-73014) & Permission for Interlocutory Appeal (18-80176) at 1, Juliana v. United States, No. 18-73014 (9th Cir. Dec. 20, 2018).

70. *Id.*

71. Press Release, Our Children's Trust, Youth Plaintiffs File Urgent Motion for an Injunction to Stop the U.S. Government from Causing Irreparable Climate Harm During Appeal Process (Feb. 8, 2019) (on file with author).

72. *See In re* Polar Bear Endangered Species Act Listing & 4(d) Rule Litig., 794 F. Supp. 2d 65, 104–05 (D.D.C. 2011) (rejecting joint plaintiffs' claims that polar bears "did not warrant listing under the ESA . . . because the administrative record shows 'tremendous uncertainty' about the nature and extent of future global climate change and the impact of any such change on the Artic ecosystem and on the polar bear").

73. 549 U.S. 497 (2007).

74. *Id.* at 523.

75. *Id.* at 525.

would slow the pace of global emissions increases" and likewise slow harmful "rise in sea levels associated with global warming."[76]

Even before *Juliana*, courts recognized claims relating to climate change's impact on individuals' rights as justiciable.[77] Moving forward, courts will look to cases like *Massachusetts v. EPA* and new precedent like *Juliana* for guidance in factual scenarios raising climate change issues. Accordingly, as plaintiffs allege claims under the implied warranty of habitability or covenant of quiet enjoyment following hurricane-caused damage, these decisions will also guide courts to permit claims under these doctrines to proceed.

B. Implied Warranty of Habitability

Under the implied warranty of habitability, a landlord has a duty to correct foreseeable conditions that materially affect the physical health and safety of a tenant.[78] In many jurisdictions, the warranty of habitability has been codified,[79] and although it varies widely by jurisdiction, the warranty of habitability generally "requires landlords to maintain safe and sanitary housing fit for human habitation."[80] The warranty, however, is not meant "to make the landlord a guarantor of every amenity customarily rendered in the landlord-tenant relationship."[81] Rather, the warranty provides protection from conditions "that materially affect the health and safety of the tenants."[82] The warranty's scope includes conditions that interfere with the health and safety of the tenants, so long as the damage was within the landlord's control. Modern application of this doctrine,

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76. *Id.* at 526.

77. *See generally id.* (holding that individuals had "standing to challenge EPA's denial of their rulemaking petition"); Juliana v. United States, 217 F. Supp. 3d 1224, 1251–52 (D. Or. 2016).

78. *See* 49 AM. JUR. 2D *Landlord and Tenant* § 444 (2019); *see also* Dean v. Hill, 615 S.E.2d 699, 700, 702 (N.C. Ct. App. 2005) (unstable and deteriorating flooring); Pierce v. Reichard, 593 S.E.2d 787, 792 (N.C. Ct. App. 2004) (rotten tree in the vicinity of the rental property); Creekside Apartments v. Poteat, 446 S.E.2d 826, 833 (N.C. Ct. App. 1994) (cockroaches); Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 757 (Tex. 1998) (criminal activity on premises).

79. *See, e.g.*, N.C. GEN. STAT. § 42-42(a)(2)–(4) (2012) (including, for example, "keep[ing] all common areas of the premises in safe condition"); TEX. PROP. CODE ANN. § 92.052(a) (West 2018) (specifying conditions that trigger the landlord's duty to make "diligent effort to repair").

80. 49 AM. JUR. 2D *Landlord and Tenant* § 444 (2019).

81. *Id.*

82. *Id.*

however, has demonstrated that a landlord may still be liable for damage caused by third parties if there were steps the landlord could have taken to remedy the breaching condition.[83]

1. Condition must be foreseeable

Before a landlord may be held liable for defects or damage materially affecting a tenant's health or safety caused by an outside source or a third party, courts engage in a threshold inquiry: whether the dangerous condition was foreseeable to the landlord.[84] A condition on the premises is foreseeable if the landlord was placed on sufficient notice of the condition, which then triggers the landlord's duty to repair or remedy the condition.[85] For example, in North Carolina, the landlord's duty under the state's codified version of the warranty does not require landlords to warn tenants preemptively about unsafe conditions, "but rather[, it creates] the duty to correct unsafe conditions," of which the landlord has knowledge or notice.[86] Moreover, the landlord's duty to repair damage or remedy a defect is

83. *Id.*

84. *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 483, 485 (D.C. Cir. 1970) (relying in part on the implied warranty of habitability in its reasoning and concluding that because the landlord "was aware of conditions, which created a likelihood of criminal" activity and because "there is implied in the contract between landlord and tenant an obligation on the landlord to provide those protective measures which are within his reasonable capacity," the landlord breached his duty to the tenant); Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 757 (Tex. 1998) ("In determining whether the occurrence of certain criminal conduct on a landlord's property should have been foreseen, courts should consider whether any criminal conduct previously occurred on or near the property, how recently it occurred, how often it occurred, how similar the conduct was to the conduct on the property, and what publicity was given the occurrences to indicate that the landowner knew or should have known about them.").

85. *See Kline*, 439 F.2d at 481 (holding that repairing physical defects as well as protecting against predictable criminal acts by third parties is part of the landlord's duty "because by his control of the areas . . . he is the only party who has the *power* to make the necessary repairs or to provide the necessary protection"); *Timberwalk Apartments*, 972 S.W.2d at 757 (considering whether the condition "previously occurred on or near the property, how recently it occurred, how often it occurred, how similar the conduct was to the conduct on the property, and what publicity was given the occurrences to indicate that the landowner knew or should have known about them"); *cf.* Lenz v. Ridgewood, 284 S.E.2d 702, 705–06 (N.C. Ct. App. 1981) (finding that a landlord was responsible for removing ice from a sidewalk because he (1) had notice of the ice accumulation and (2) by failing to remove it, he failed to exercise ordinary care).

86. Allen v. Equity & Inv'rs Mgmt. Corp., 289 S.E.2d 623, 625 (N.C. Ct. App. 1982).

triggered when there is an "imminently dangerous condition on the premises," and the landlord has either acquired knowledge or received notice of the condition.[87] Accordingly, when a court finds that a landlord has breached his duty to maintain the habitability of the premises in a reasonably safe condition, courts have ultimately decided that the landlord could have reasonably foreseen the potential danger; that the danger fell within the scope of the landlord's standard of care; and finally, that the danger constituted a condition to which the court was willing to extend the warranty of habitability.[88]

A dangerous condition is foreseeable if the landlord first had sufficient notice of the condition.[89] For example, the court in *Daitch v. Mid-America Apartment Communities*[90] found that because the plaintiff-tenant presented no evidence that he notified the landlord about water leakage and a faulty air conditioner, there was no breach of the warranty.[91] Other examples of conditions requiring notice to the landlord before a tenant may recover have included overflow of raw sewage inside the tenant's dwelling as well as flooding from broken pipes.[92] Though not directly discussing notice, a New York court found that a landlord had breached the warranty of habitability when the landlord failed to remedy damage caused by a series of eight floods.[93] In that case, the landlord asserted that he had no duty

87. N.C. GEN. STAT. § 42-42(a)(8) (2012).

88. *See Timberwalk Apartments*, 972 S.W.2d at 756 (applying foreseeability analysis to determine the scope of a landlord's duty and holding that because the landlord could not reasonably have foreseen criminal conduct on the property, they were not responsible for the dangerous condition/conduct under the duty to repair statute); *see also* Smit v. SXSW Holdings, Inc., 903 F.3d 522, 529 (5th Cir. 2018) (pointing to foreseeability analysis but ultimately holding that "Texas courts have rejected an implied warranty to make premises safe" because it would be "duplicative of ordinary premises liability"). *But see* Sec'y of Hous. & Urban Dev. v. Layfield, 152 Cal. Rptr. 342, 343 (App. Dep't Super. Ct. 1978) (finding that criminal activity on the premises was foreseeable by the landlord and thus "[a] landlord's duty to provide security measures to protect tenants against crime because of his control of the areas of common use in an apartment complex can be a part of the implied warranty of habitability").

89. *See* Daitch v. Mid-America Apartment Cmtys., 250 S.W.3d 191, 196 (Tex. App. 2008) (explaining that where the tenant failed to provide notice to the landlord, the damage could not be held within the scope of the landlord's duty).

90. 250 S.W.3d 191 (Tex. App. 2008).

91. *See id.* at 196.

92. N.C. GEN. STAT. § 42-42(a)(8)(j)–(l).

93. *See* McBride v. 218 E. 70th St. Assocs., 425 N.Y.S.2d 910, 911 (App. Term 1979) (per curiam) (rejecting the landlord's argument that the "implied warranty of

to repair the defects because they were caused by events out of his control.[94] The court rejected the landlord's defense, however, highlighting that both the frequency of the floods as well as the fact that the tenant's apartment had been flooded on two previous occasions overwhelmed the landlord's attempted evasion of responsibility.[95] Consequently, for a tenant to have a successful claim for breach of the warranty of habitability, the tenant must demonstrate that the dangerous condition was foreseeable to the landlord by showing that the landlord had actual knowledge of the condition or sufficient notice of the condition.[96]

2. Condition must materially affect the tenant's health and safety

When a condition on a rental property makes the premises unsafe for the tenant or materially affects the tenant's health, a landlord bears a duty under the implied warranty of habitability to repair the property.[97] Generally, case law has found landlords have breached the warranty when damage fell within the landlord's control—such as failure to repair unstable flooring, failure to repair poor ventilation, or failure to remedy cockroach infestations.[98] Conversely, a North Carolina court found that a landlord did not breach the warranty for

habitability cannot be so construed as to impose a duty arising from forces or occurrences outside the control of the landlord").

94. *Id.*

95. *See id.* at 911–12.

96. *See, e.g.*, N.C. GEN. STAT. § 42-42(a)(8) (2012).

97. *See* Dean v. Hill, 615 S.E.2d 699, 702 (N.C. Ct. App. 2005) (unstable and deteriorating flooring); Pierce v. Reichard, 593 S.E.2d 787, 789, 792 (N.C. Ct. App. 2004) (rotten tree); Creekside Apartments v. Poteat, 446 S.E.2d 826, 829, 834 (N.C. Ct. App. 1994) (cockroaches); Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 757 (Tex. 1998) (criminal activity). *See generally* N.C. GEN. STAT. § 42-42(a)(2)–(4) (2012) (demonstrating that North Carolina's codification of warranty requires landlords to take steps to make the premises and all common areas in a safe and habitable condition); TEX. PROP. CODE ANN. § 92.052 (West 2018) (showing that Texas requires a landlord to "make a diligent effort to repair or remedy a condition if" the tenant gives the landlord notice and the condition affects the tenant's health or safety).

98. *See Dean*, 615 S.E.2d at 702 (flooring); *Pierce*, 593 S.E.2d at 789, 792 (rotten tree); *Creekside Apartments*, 446 S.E.2d at 829, 834 (cockroaches); Allen v. Simmons, 394 S.E.2d 478, 481 (N.C. Ct. App. 1990) (ventilation and plumbing problems); Stines v. Carter, No. COA14-59, 2015 WL 1534002, at *4 (N.C. Ct. App. Apr. 7, 2015) (finding that the landlord violated the implied warranty of habitability because the landlord failed to repair or remedy a number of dangerous conditions, such as, for example, a broken furnace, rotten and improperly sealed doors, broken floors and walls, and exposed wiring).

failing to install or maintain window screens because the window screens comported with housing codes in that jurisdiction.[99] Additionally, if the alleged condition was a result of "normal wear and tear, the landlord does not have a duty during the lease term . . . to repair or remedy [that] condition."[100]

In Texas, the legislature codified the implied warranty of habitability and made clear that its statute applies only to conditions that "materially affect the physical health or safety of an ordinary tenant."[101] For example, the deterioration of the interior finish of a house would not violate the statute unless the deterioration rose to a level threatening public health or safety of ordinary tenants.[102] Whether a defect or deterioration meets this threshold for a violation of the statute is determined on a case-by-case basis.[103] A court will consider various factors to determine whether the condition triggers the warranty's protection, such as: whether the event had occurred in the past, whether it had occurred recently and how frequently, and whether the past event had gained any publicity.[104] Generally, however, the landlord's duty under statute-based warranties does not extend to damage caused by the tenants such as defacement or removal of property.[105] Notably, in *Secretary of Housing & Urban*

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99. *See* Mudusar v. V.G. Murray & Co., 396 S.E.2d 325, 327 (N.C. Ct. App. 1990).

100. TEX. PROP. CODE ANN. § 92.052(b).

101. § 92.052(a)(3)(A).

102. *See id.* (stating that a landlord only has a duty to repair when certain conditions are present).

103. *See* § 92.052(a)–(b) (providing a number of criteria that could require a landlord to remedy or repair a defect).

104. Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 757 (Tex. 1998). Generally, Texas courts have been hesitant to expand the scope of the implied warranty of habitability to include personal injury arising from unsafe conditions or crime; however, the courts often cite to the analysis to determine the scope of a landlord's duty. *See* Lively v. Adventist Health Sys./Sunbelt, Inc, No. 2-02-418-CV, 2004 WL 1699913, at *5 (Tex. App. 2004) (finding the breach of implied warranty claim irrelevant where the plaintiff could rely on negligence claims); *see also* Smit v. SXSW Holdings, Inc., 903 F.3d 522, 529 (5th Cir. 2018) (holding that "Texas courts have rejected an implied warranty to make premises safe" because it would be "duplicative of ordinary premises liability"). *But see* Sec'y of Hous. & Urban Dev. v. Layfield, 152 Cal. Rptr. 342, 343 (App. Dep't Super. Ct. 1978) ("A landlord's duty to provide security measures to protect tenants against crime because of his control of the areas of common use in an apartment complex can be a part of the implied warranty of habitability.").

105. *See, e.g.*, N.C. GEN. STAT. § 42-42(a)(8) (2012) (permitting the landlord to recover for repairs due to tenant's actions).

Development v. Layfield,[106] the court extended the implied warranty of habitability to cover criminal conduct that occurred on a rental property because the condition was foreseeable; it took place in an area under the landlord's control; and the condition materially affected the health and safety of the tenants.[107] While courts have found that failure to remedy unstable flooring, poor ventilation, and cockroach infestations amounts to conditions that materially affect the tenant's health and safety, failure to install a window screen or interior deterioration does not.[108] Ultimately, for a tenant to succeed on a claim for violation of the warranty of habitability, the tenant must prove that the dangerous condition would "materially affect the physical health or safety of an ordinary tenant."[109]

3. Does the warranty extend to natural disaster-caused damage?

While most jurisdictions have yet to directly address whether damage resulting from a natural disaster falls within the purview of their warranties of habitability, New York and California have both alluded to the possibility that the implied warranty of habitability extends to damage caused by natural disasters. Applying its statute-based warranty of habitability, the New York Court of Appeals has explained that because "the statute places an unqualified obligation on the landlord to keep the premises habitable, conditions occasioned by . . . natural disaster[s] are within the scope as well."[110] For example, in *Park West Management Corp. v. Mitchell*,[111] the New York Court of Appeals held that a landlord breached the warranty of habitability when his entire maintenance and janitorial staff did not report to work because of a

106. 152 Cal. Rptr. 342 (App. Dep't Super. Ct. 1978).

107. *Id.* at 343.

108. *See, e.g.*, Mudusar v. V.G. Murray & Co., 396 S.E.2d 325, 327 (N.C. Ct. App. 1990) (window screens).

109. TEX. PROP. CODE ANN. § 92.052(a)(3)(A) (West 2018).

110. Park W. Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1294 (N.Y. 1979) (citing the UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104) (explaining that while the warranty of habitability "was not legislatively engrafted into residential leases for the purpose of rendering landlords absolute insurers of services which do not affect habitability," the warranty, both in common law and statutes, was "designed to give rise to an implied promise on part of the landlord that both the demised premises and the areas within the landlord's control are fit for human occupation . . . and that they will remain so throughout the lease term"), *superseded by statute*, N.Y. Uniform City Ct. Act §§ 203(a)(8), 203(c), 209(b)(4) (McKinney 2006), *as recognized in* Tardibone v. Hopkins, 842 N.Y.S.2d 864, 865 (City Ct. 2007).

111. 391 N.E.2d 1288 (N.Y. 1979).

union strike, thus resulting in extensive service interruptions for the tenants of the property—despite the interruptions falling outside the scope of the landlord's control.[112] The work stoppage caused trash to accumulate and created noxious odors, as well as an environment where rats and cockroaches flourished. The court found that these conditions materially affected the health of the tenants.[113] Further, New York common law has explicitly stated that "[t]he fact that the cause of the deprivation [or damage] may in the first instance be rooted elsewhere" does not mean that the landlord is released from his duties under the warranty of habitability.[114] Although New York has yet to explicitly apply the warranty of habitability to damage caused by natural disasters such as hurricanes, the courts have left open the possibility that the warranty extends to natural disaster-caused damage.[115]

Alongside New York, California has also alluded to the possibility that its implied warranty of habitability covers damage caused by natural disasters. Unlike most jurisdictions, California has not explicitly codified the warranty of habitability; however, some parts of the California code govern the landlord-tenant relationship, discussed below. Under the implied warranty of habitability in California, a landlord is not required to "ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained."[116] The California Supreme Court suggested that the following conditions might breach the warranty: "(1) the periodic failure to supply heat and water, (2) the malfunctioning of an incinerator, (3) the failure in hot water supply, [and] (4) several leaks in the bathroom."[117]

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112. *See id.* at 1293 ("As a result of the strike, the tenants of Park West Village suffered extensive service interruptions which prompted some of them to withhold rent for the period encompassed by the strike.").

113. *See id.*

114. H & R Bernstein v. Barrett, 421 N.Y.S.2d 511, 512 (Civ. Ct. 1979) (holding that the landlord breached the warranty of habitability when the tenant's apartment was without water due to excessive use of fire hydrants in the surrounding areas, despite the reduction in water pressure being entirely out of the landlord's control).

115. *Park W. Mgmt. Corp*, 391 N.E.2d at 1294 (relying on the landlord's "unqualified obligation . . . to keep premises habitable").

116. *Id.* at 1182.

117. *Id.* at 1182 n.22.

Most notably, the California legislature has stated that a landlord's duty to repair property remains intact even when an earthquake causes the damage.[118] California courts have strictly applied California code to landlord-tenant disputes. For example, in *Erlach v. Sierra Asset Servicing, LLC*,[119] the court held that although the city "red tagged" an apartment due to unsafe conditions, the tenant's rights under the lease were not terminated, and the landlord still bore the responsibility of putting the property "into a condition fit for occupation and [to] repair all subsequent dilapidations."[120] Accordingly, although California has not explicitly stated that the warranty encompasses natural disasters like New York has, California courts' application of California code strongly suggests these standards apply not only to damage caused by earthquakes, but also natural disasters.[121]

4. Remedies

Remedies following a breach of the implied warranty of habitability vary by jurisdiction. Generally, when a breach is found, the tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so.[122] Courts must examine a mutuality of obligations between landlord and tenant before relief is granted.[123] When relief is granted, rent abatement tends to be the most common remedy, and it is "calculated as the difference between the fair rental value of the premises . . . and the fair rental value of the premises in their unfit condition ('as is') plus any special and consequential damages alleged and proved."[124] Moreover, a tenant who chose to withhold rent may also recover under the North Carolina's statute-based warranty, but the "damages of rent abatement can include only those

118. *See* CAL. HEALTH & SAFETY CODE § 19211(c) (2019) (stating that "[a]n owner of a residential rental property shall not evict any person on the basis that eviction is required to [repair earthquake damage]").

119. 173 Cal. Rptr. 3d 159 (Ct. App. 2014).

120. *Id.* at 164–65 ("A tenancy is not terminated when a building inspector orders the tenants to vacate the property due to unsafe conditions . . . .").

121. *See* CAL. HEALTH & SAFETY CODE § 19211(c).

122. *See* N.C. GEN. STAT. § 42–43(a)(6) (2012).

123. § 42-41 ("The tenant's obligation to pay rent under the rental agreement or assignment and to comply with G.S. 42–43 and the landlord's obligation to comply with G.S. 42–42(a) shall be mutually dependent.").

124. Stines v. Carter, No. COA14-59, 2015 WL 1534002, at *4 (N.C. Ct. App. Apr. 7, 2015).

amounts actually paid by [the tenant]."[125] In places like Texas, after establishing that a landlord bore a duty to repair an unsafe condition, the duty is limited to "diligent efforts to repair or remedy the condition."[126] The Texas statute also explains that if the landlord is liable for a breach, "the tenant may have the condition repaired or remedied and may deduct the cost from a subsequent rent payment."[127] Finally, in North Carolina, the landlord must make the required repair or remedy "within a reasonable period of time based upon the severity of the condition" to sufficiently restore the tenant's right under the warranty of habitability.[128]

C. Covenant of Quiet Enjoyment

Like the warranty of habitability, the covenant of quiet enjoyment is another mechanism through which a tenant may challenge a landlord's action or inaction that has implicated the tenant's right to enjoy her rights under a lease. An act or omission on part of the landlord constitutes a breach of the covenant of quiet enjoyment when it deprives the tenant of her beneficial enjoyment of the premises and causes the tenant to abandon the premises.[129] The covenant of quiet enjoyment protects a tenant's right to use and enjoy her premises for the duration of a lease.[130] Ultimately, a landlord may breach the covenant "if serious interference with a tenancy is a natural and probable consequence of what the landlord did, what he or she failed to do, or what he or she permitted to be done."[131]

First, the landlord's act or omission breaches the covenant of quiet enjoyment if it seriously interferes with the tenant's ability to enjoy the premises as provided by the lease.[132] If the landlord either wrongfully evicts the tenant by demanding the tenant leave, or if the landlord constructively evicts the tenant by depriving the tenant of the "beneficial enjoyment of the premises to which he is entitled under

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125. *Id.* (citing Creekside Apartments v. Poteat, 446 S.E.2d 826, 831 (N.C. Ct. App. 1994); *see also* N.C. GEN. STAT. § 42-44(c) (2012) ("[A] tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so.").

126. Angus S. McSwain, Jr. & David L. Butler, *The Landlord's Statutory Duty to Repair—Article 5236f: The Legislative Response to* Kamarath v. Bennett, 32 BAYLOR L. REV. 1, 7 (1980).

127. TEX. PROP. CODE ANN. § 92.0561(a) (West 2017).

128. N.C. GEN. STAT. § 42–42(a)(8) (2012).

129. 49 AM. JUR. 2D *Landlord and Tenant* § 478 (2019).

130. *Id.*

131. *Id.*

132. *See* K & S Enters. v. Kennedy Office Supply Co., 520 S.E.2d 122, 126 (N.C. Ct. App. 1999).

his lease," a breach has occurred.[133] Generally, acts or omissions on part of the landlord that constitute a breach of the covenant of quiet enjoyment include the following: interference with a tenant's access to the premise; failure to take security measures; and failure to correct defective conditions on the leased premise that obstruct the tenant's right to enjoy the property.[134] For instance, in *Dobbins v. Paul*,[135] a North Carolina appellate court found that the landlord breached the covenant when the landlord moved all the tenant's belongings outside the apartment for a period of three days before the end of the tenant's lease term.[136] Likewise, the North Carolina Supreme Court found a breach of the covenant when the landlord entered a rental property without authorization and dismantled walls, thereby disrupting the tenant's beneficial enjoyment of the premises.[137] Conversely, a landlord's failure to repair a leaking roof did not render the premises untenable, and the court found that there was no breach of the covenant because the tenants remained on the premises for four years, indicating that the leaking roof had not created conditions harsh enough to obstruct the tenants' rights under the lease.[138] Moreover, in *Armstrong v. Yopp Properties, LLC*,[139] mold had developed in a tenant's apartment; however, the court found that because the landlord never explicitly demanded that the tenant leave her apartment during the mold remediation process, the constructive eviction claim failed, and the landlord did not breach the covenant of quiet enjoyment.[140] Ultimately, the court explained that the tenant's claim failed because the tenant did not offer evidence sufficient to demonstrate that the landlord either forced the tenant out or explicitly told the tenant that she could not remain on the premises.[141]

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133. *Id.* (quoting Marina Food Assocs., Inc. v. Marina Rest., Inc., 394 S.E.2d 824, 830 (N.C. Ct. App. 1990)).

134. 49 AM. JUR. 2D *Landlord and Tenant* § 477.

135. 321 S.E.2d 537 (N.C. Ct. App. 1984), *overruled by* Stanley v. Moore, 454 S.E.2d 225 (N.C. 1995).

136. *See id.* at 541; *Stanley*, 454 S.E.2d at 227–29 (overruling the Court of Appeals decision for an improper damages calculation but upholding the lower court's findings regarding the breach of the covenant of quiet enjoyment).

137. See Andrews & Knowles Produce Co. v. Currin, 90 S.E.2d 228, 230 (N.C. 1955).

138. *K & S Enters.*, 520 S.E.2d at 126 (finding that without a constructive eviction there was no breach of the covenant of quiet enjoyment).

139. No. 7:13-CV-235-FL, 2015 WL 627951, at *1 (E.D.N.C. Feb. 12, 2015).

140. *See id.* at *2, *9.

141. *Id.* at *8.

Other material acts by the landlord have included a landlord locking apartment doors because such an action demonstrates the landlord's intent that the tenant "no longer enjoy the [p]remises."[142] Finally, in *Coleman v. Rotana, Inc.*,[143] a Texas appellate court held that a landlord had committed a material act when the landlord failed to provide adequate parking for the tenant's restaurant and thus breached the covenant of quiet enjoyment.[144] Although the plaintiffs did not ultimately prevail on their breach of the covenant of quiet enjoyment claim because they failed to provide sufficient evidence that they had abandoned the property within a reasonable period, this case provides an example of a landlord's omission constituting a material act.[145]

A court will only find an act or omission to breach the covenant when the landlord's act or omission affects the tenant's substantial enjoyment of the property and is more than a minor inconvenience.[146] For example, in *McNeely v. Salado Crossing Holding, L.P.*,[147] a Texas appellate court held that a landlord did not breach the covenant of quiet enjoyment even though the landlord had changed the apartment's locks and threw away some of the tenants' belongings while they were transitioning apartments and before the end of their lease.[148] In this instance, the court explained that although the landlord interfered with the tenants' right of possession, the tenants did not present sufficient evidence that the landlord's conduct "amount[ed] to a permanent deprivation of their use and enjoyment of the apartment."[149] Accordingly, the landlord's interference "must be substantial" and "so serious as to render the premises unfit for the purposes contemplated by the lease," or the interference must "substantially affect the tenant's enjoyment of a material part of the premises" to constitute a breach of the covenant.[150] Thus, minor inconveniences do not rise to an act or omission substantially

142. Lazell v. Stone, 123 S.W.3d 6, 12 (Tex. Ct. App. 2003).
143. 778 S.W.2d 867 (Tex. Ct. App. 1989).
144. *See id.* at 872.
145. *See id.*
146. *See, e.g.*, McNeely v. Salado Crossing Holding, L.P., No. 04-16-00678-CV, 2017 WL 2561551, at *4 (Tex. App. June 14, 2017) (emphasizing the warranty's requirement of a "permanent deprivation" of use and enjoyment).
147. No. 04-16-00678-CV, 2017 WL 2561551, at *1 (Tex. Ct. App. June 14, 2017).
148. *See id.* at *4.
149. *Id.* (explaining that "the record contains no evidence of the 'permanent deprivation' element").
150. JUDGE TERRY B. FRIEDMAN ET AL., CALIFORNIA PRACTICE GUIDE—LANDLORD-TENANT § 4:8 (2018).

affecting the tenant's use of the premises.[151] As another example, in *Petroleum Collections, Inc. v. Swords*,[152] a California appellate court held that the landlord's failure to repair or replace a "large modular sign," which initially came with the property, "substantially affected [the tenant's] beneficial enjoyment of the property as contemplated by the parties . . . ."[153] However, because the tenant remained in possession of the property for eleven months after the landlord removed the sign, the court precluded the tenant from recovering for the breach.[154] Moreover, another California appellate court held that a tenant was constructively evicted by a leaking roof that had gone unrepaired during rainy seasons.[155] The court explained that because the rain dripped on structural beams and walls and pooled on the floors, the leaking roof had created hazardous conditions that "interfered in a material and substantial manner with the beneficial enjoyment of the premises by plaintiffs."[156] Because the leaking roof created a hazardous environment that denied the tenants' use of the property to which they were entitled under the lease, the court held that the condition breached the covenant.[157]

Finally, to recover from a breach of the covenant of quiet enjoyment, a tenant must abandon the rental premises as a result of the landlord's act or omission.[158] If it is found that a landlord's act or omission has sufficiently interfered with the tenant's right to use the premises, the tenant may recover damages—usually release from the

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151. *See McNeely*, 2017 WL 2561551, at *23–24 (discussing the level and severity required to meet the standard for gross negligence in the housing context); *see also* Petroleum Collections, Inc. v. Swords, 122 Cal. Rptr. 114, 117 (Ct. App. 1975) (explaining that "the landlord's failure to fulfill an obligation to repair or to replace an essential structure or to provide a necessary service [c]an result in a breach of the covenant if the failure substantially affects the tenant's beneficial enjoyment of the premises").

152. 122 Cal. Rptr. 114 (Ct. App. 1975).

153. *Id.* at 118.

154. *Id.*

155. Groh v. Kover's Bull Pen, Inc., 34 Cal. Rptr. 637, 638–39 (Dist. Ct. App. 1963) (holding that "[t]here [could] be no doubt from the record that the leaky condition of the roof of the lease premises . . . constituted constructive eviction").

156. *Id.* at 638.

157. *Id.* at 639. *But see* K & S Enters. v. Kennedy Office Supply Co., 520 S.E.2d 122, 126 (N.C. Ct. App. 1999) (finding that the leaking roof in this instance did not violate the covenant because the tenant lived in the apartment for approximately four years despite the leak, which suggested that the tenant "was not prevented from the full use and enjoyment of the building").

158. *See* NYCHA Coney Island Houses v. Ramos, 971 N.Y.S.2d 422, 429 (Civ. Ct. 2013).

lease and any duty to pay—so long as the tenant immediately abandons the property.[159] Although some jurisdictions require an immediate abandonment of property to sufficiently allege wrongful eviction, other jurisdictions, like Texas, require only that the tenants "abandon[] the leased property within a reasonable time after [the landlord's] interference."[160] Texas courts, however, have not yet allotted a specific time period that is considered reasonable.[161] Accordingly, if the tenant succeeds on her breach of the covenant of quiet enjoyment claim, the lease is rescinded and the tenant's obligation to pay rent is excused.[162]

Overall, when the landlord's act or omission "merely affects the tenant's beneficial use of the premises," the tenant's obligation to pay rent is not terminated, but the tenant may seek injunctive relief from rent obligations within a reasonable time after the act or omission.[163] But, if the tenant "elects to surrender possession of the premises, a *constructive* eviction occurs," and the tenant has no further obligation to pay rent.[164] Overall, when a landlord wrongfully evicts a tenant, the tenant is entitled to "recover possession or to terminate his lease" and recover any damages caused by the removal or attempted removal of the tenant.[165]

D. Adapting to Changed Circumstances

Both the warranty of habitability and the covenant of quiet enjoyment exist to balance the relationship between landlord and tenant, ensuring that the rights of both are honored throughout the duration of a lease. Ultimately, by "creat[ing] conditions of great instability and unpredictability," extreme weather events threaten to dishevel the carefully calibrated rights and duties that interest holders

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159. *See id.* at 429–30 (holding that the tenant could not claim constructive eviction as a result of a hurricane because he never abandoned the premises); *K & S Enters.*, 520 S.E.2d at 126 (explaining that landlords have breached the covenant of quiet enjoyment when they have interrupted the tenant's right to enjoy the property).

160. Daftary v. Prestonwood Market Square, Ltd., 404 S.W.3d 807, 814 (Tex. App. 2013) (examining breach of the covenant of quiet enjoyment in a commercial lease dispute).

161. *Id.* at 815.

162. Goldman v. Alkek, 850 S.W.2d 568, 572 (Tex. App. 1993).

163. Petroleum Collections, Inc. v. Swords, 122 Cal. Rptr. 114, 117 (Ct. App. 1975).

164. *Id.*

165. N.C. GEN. STAT. § 42-25.9(a) (2013).

exercise and share in the realm of property.[166] For example, Hurricane Katrina has been characterized as producing "radically changed circumstances," with the potential to "upset settled expectations [of property holders] and put large numbers of people at risk of losing control of the tangible and intangible resources that are central to their lives."[167] In response to shifting societal values, courts and legislatures have historically tweaked the law of property when new circumstances call for change.[168] Notably, the California Supreme Court used the common law to adopt the implied warranty of habitability in an effort to rebalance tenancy rights in the wake of an increasingly urban society.[169] Legislatures have likewise responded by adopting codified versions of the implied warranty of habitability.[170] In *Green v. Superior Court*,[171] the California Supreme Court explained that "enormous factual changes in the landlord-tenant field" implicated the need for change.[172] It held that the modern urban landlord-tenant relationship and "contemporary urban" living transformed the traditional agrarian lessor-lessee transaction and called for a recalibration of tenancy rights.[173] Ultimately, the court qualified the adoption and implementation of the implied warranty of habitability doctrine based on the modernization of society, explaining that to best honor the rights of the tenant in this new reality, the landlord's obligation to maintain the habitability standards of a rental property must run through the entire duration of a lease.[174]

166. Lovett, *supra* note 1, at 476.
167. *Id.*
168. *See* Green v. Superior Court, 517 P.2d 1168, 1169–70 (Cal. 1974) (reexamining the providence of adhering to common law developed for a different century).
169. *See generally id.* (holding that an implied warranty of habitability grounded in common law exists for residential leases).
170. *See generally* N.C. GEN. STAT. § 42-42 (2012) (codifying the warranty of habitability by requiring the landlord to make necessary repairs, provide safe common areas and provide operational smoke alarms); TEX. PROP. CODE ANN. § 92.061 (West 2019) (making the landlord responsible for "maintenance, repair, security, [and] habitability" of the premises).
171. 517 P.2d 1168 (Cal. 1974).
172. *Id.* at 1174.
173. *Id.* at 1173.
174. *Id.* at 1176.

E. Act of God Defense

A landlord may only assert an act of God defense (1) if damage caused by a natural disaster is not foreseeable, and (2) if there was no human involvement that caused, attributed, or exacerbated the damage-causing event.[175] Each of these elements is "a question of fact for the jury."[176] Generally, when a non-manmade event renders a premises untenable, remedying or repairing the structural damage or defect does not fall within the scope of a landlord's responsibilities under a lease.[177] Accordingly, if a non-manmade force, such as an extreme weather event, infringes upon a tenant's rights, doctrines like the implied warranty of habitability or the covenant of quiet enjoyment provide little to no recourse for the tenant because "the changed condition [was] not the fault of the landlord . . . ."[178] Although litigants raise the act of God defense more often in the course of negligence actions, the warranty of habitability elements—particularly the duty element—intersect closely with negligence analysis despite being derived in property law.[179] Namely, the general standard of care that attaches to landlords likewise defines the scope of what a landlord will and will not be held responsible for under the warranty of habitability.[180]

First, if a landlord raises an act of God defense to damage caused by an extreme storm or event of unprecedented scale, the tenant is precluded from recovery.[181] In determining whether an act of God defense is viable, courts will consider the "scale" of the natural event

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175. Denis Binder, *Act of God? Or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law*, 15 REV. LITIG. 1, 13 (1996).

176. Friedman, *supra* note 3.

177. RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 5.2 cmt. f (AM. LAW INST. 1977).

178. *Id.*

179. *Id.*

180. *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 483, 485 (D.C. Cir. 1970) (relying in part on the implied warranty of habitability in its reasoning and concluding that because the landlord "was aware of conditions, which created a likelihood" of criminal activity and because "there is implied in the contract between landlord and tenant an obligation on the landlord to provide those protective measures which are within his reasonable capacity[,]" the landlord breached his duty to the tenant); Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 754, 756 (Tex. 1998) (finding that where the landlord breached his duty of care, the landlord likewise breached the implied warranty of habitability).

181. *See* So. Pac. Co. v. City of Los Angeles, 55 P.2d 847, 848 (Cal. 1936) (analyzing the affect a broken aqueduct has on the plaintiffs' claim).

and whether the event has been described as unprecedented.[182] To be unforeseeable, damage must stem from "sudden and unexpected action of fire, flood, and other causes of accidental destruction."[183] Accordingly, the defense only applies where a natural event is truly unforeseeable, meaning that its impact is unprecedented.[184] Thus, if a storm has occurred in a geographic region in the past, like rains that come every year, the storm or weather event cannot constitute an act of God because "there is in effect a presumption that it can occur again,"[185] making it foreseeable to the members of that community.[186]

Second, if a landlord asserts an act of God defense, the defense may only stand if there was no human interference that attributed to the damaging-causing event.[187] After determining whether an event is foreseeable, a fact-finder must next determine whether there was an "absence of human agency."[188] If the event—whether it is a flood, fire, or some other natural disaster—is foreseeable, and if the resulting injury could have been mitigated by "human prudence, foresight, and care reasonably expected," then a landlord may be held liable for resulting damage.[189]

Moreover, if an individual is under a heightened duty to know about possible "natural phenomena, such as flooding or hurricanes," then the human agency component of the defense is at issue because a court might find that the individual is under a heightened duty of care and should thus be held responsible.[190] The test is an "objective standard of what a reasonable person under similar circumstances knew, or reasonably should have known."[191] In the landlord-tenant context, information about "records of natural phenomena" found in

182. *See id.* at 849 (considering the "unusual volume" of natural event); Sutliff v. Sweetwater Water Co., 186 P. 766, 767 (Cal. 1920) (weighing the fact that the event was an unprecedented flood); Prashant Enters. Inc. v. New York, 614 N.Y.S.2d 653, 654 (App. Div. 1994) (noting that an act of God must be an "extraordinary and unprecedented event").

183. Friedman, *supra* note 3.

184. Binder, *supra* note 175, at 13; *see also Sutliff*, 186 P. at 767 (unprecedented flood); *Prashant Enters.*, 614 N.Y.S.2d at 654 (noting that an act of God must be an "extraordinary and unprecedented event").

185. Binder, *supra* note 175, at 14–15.

186. Gulf, Colo. & Santa Fe Ry. Co. v. Pomeroy, 3 S.W. 722, 724 (Tex. 1887) (explaining that because a river had overflowed in the past, the overflowing at a later date was foreseeable and thus not an act of God).

187. Binder, *supra* note 175, at 13.

188. *Id.*

189. *Id.* at 16.

190. *Id.* at 68–69.

191. *Id.* at 17.

weather almanacs and similar sources are "not routinely provided . . . to prospective . . . tenants," which suggests that landlords often possess more explicit access to foreseeable weather events and potential damage.[192] For example, in *Polack v. Pioche*,[193] the California Supreme Court held that an act of God defense could not stand when water had broken through a natural reservoir embankment after "persons interfered with the embankment."[194] There, the court held that the failed embankment did not constitute "ravages occasioned by forces of nature, uncontrolled and unaided by the hand of man;" but rather, the resulting damage was an accident arising from the "the fault . . . of man."[195] If the natural weather event "would not have produced the injury alone;" there was some sort of human interference;[196] or there was historical data indicating notice of climatic variations such that the landlord had "reasonable warning of them,"[197] then the act of God defense cannot stand. Accordingly, unprecedented hurricanes likely fall within the scope of an act of God; however, as soon as hurricanes and resulting damage become patterned phenomena—and thus foreseeable by a community—the defense must fail.[198]

II. ANALYSIS

As weather events amplified by climate change—like Hurricane Florence and Hurricane Harvey—batter coastline communities with increased frequency and severity, the landlord-tenant relationship faces a new reality.[199] These changed circumstances undermine tenants'

192. *Id.* at 19, 68 (arguing that "[i]nadequate design, construction, inspection, and maintenance are acts of people, and should be adjudicated as such").

193. 35 Cal. 416 (1868).

194. *Id.* at 417.

195. *Id.* at 418.

196. *Id.* at 418 (citing Turner v. Tuolumne Cty. Water Co., 25 Cal. 397, 403 (1864) (finding that although the extraordinary storms that year had been an act of God, the plaintiffs' management of a ditch is what proximately caused the damage to a neighbor's land)).

197. Binder, *supra* note 175, at 14.

198. *See* Skandia Ins. Co. v. Star Shipping AS, 173 F. Supp. 2d 1228, 1241 n.24 (S.D. Ala. 2001) (explaining that to avoid liability, the hurricane must be of "such 'catastrophic' proportions that it overcame all reasonable preparations"); Gulf, Colo. & Santa Fe Ry. Co. v. Pomeroy, 3 S.W. 722, 724 (Tex. 1887) (holding that overflowing water and resulting damage was a foreseeable event and thus the act of God defense could not stand).

199. Clasen-Kelly, *supra* note 9; *Red Cross Response to Hurricane Florence, supra* note 8; *Red Cross Response to Hurricane Harvey, supra* note 22; Reed et al., *supra* note 43; *see supra* notes 44–56 and accompanying text.

property interests.[200] Landlords' responses to hurricane-caused damage in North Carolina and Texas have left many tenants without sufficient repairs or without access to their homes entirely.[201] Moreover, some landlords have continued to demand rent payments for properties decimated by flood, wind, or tree damage.[202] With increasingly frequent storms and subsequent damage to rental properties, the equilibrium between landlord and tenant has been unsteadied. The foundational aims of stability and predictability that attach to the well-defined rights, duties, and obligations of individuals within the scope of a lease agreement must be re-examined to best honor the property interests created in the course of a tenancy.[203]

Although no court has yet to explicitly apply property doctrines such as the implied warranty of habitability or the covenant of quiet enjoyment to the reality of climate change and its impact on tenancy rights, these doctrines do, in fact, extend to damage caused by hurricanes for two reasons. First, the landlord's obligation to maintain a property's living conditions under the warranty of habitability and the tenant's rights to enjoyment of the property under the covenant of quiet enjoyment are not extinguished simply because the damage was caused by a natural disaster. Second, hurricanes like Hurricane Florence and Hurricane Harvey fail to meet the elements required for a successful act of God defense, and landlords may no longer rely on this defense to avoid liability.

A. A Landlord's Obligations Under the Warranty of Habitability Extend to Hurricane-Caused Damage Because a Landlord Has Sufficient Notice

Under the implied warranty of habitability, a landlord is responsible for damage caused by hurricanes. Based on advancing scientific research and the community's increased access to advanced weather prediction models and forecasts, the reality of climate change has expanded the universe of potential conditions to which landlords have notice and has thus redefined the scope of a landlord's standard of care.[204] A landlord's expected standard of care in a landlord-tenant relationship thus defines the scope of what a landlord will and will not

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200. *See supra* notes 44–56 and accompanying text.

201. *See supra* notes 44–56 and accompanying text.

202. Popken, *supra* note 24.

203. Lauer, *supra* note 25 ("Texas law says either the landlord or the tenant can decide that a space is unlivable because of a flood or fire, but the law doesn't clearly outline what happens if they disagree.").

204. Bauer, *supra* note 46, at 47–48; IPCC CLIMATE CHANGE SUMMARY, *supra* note 6, at 6; Reed et al., *supra* note 43.

be held responsible for under the warranty of habitability.[205] These changed circumstances have restructured the landlord's duty to correct unsafe conditions under the implied warranty of habitability.[206] Accordingly, in locations that have been affected by massive hurricanes—like North Carolina and Texas—landlords have either actual knowledge or sufficient notice of these extreme weather events and the conditions that may be caused by or aggravated by hurricanes.[207] Courts will likely hold landlords responsible for the damage, so long as the condition also fails to meet habitability standards by materially affecting the health or safety of a tenant.[208]

First, landlords are responsible for hurricane-caused damage under the implied warranty of habitability because landlords have either actual knowledge or sufficient notice of conditions that may be caused or aggravated by hurricanes, thereby making hurricane damage foreseeable for the purposes of the implied warranty of habitability. Increasingly accurate weather prediction models and recent hurricane events have established a universe of foreseeable damage caused by these weather events.[209] Additionally, the increased availability of hurricane-risk information suggests that landlords are aware of when to expect a hurricane, its potential severity, as well as the scope of potential damage likely to result from the storm.[210] Accordingly, landlords

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205. *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 483 (D.C. Cir. 1970) (concluding that because the landlord "was aware of conditions" and because there was a likelihood of the condition occurring, it was foreseeable and within the landlord's duty under the implied warranty of habitability); Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 757 (Tex. 1998) (finding that personal injury caused by criminal conduct could not be deemed foreseeable because "there must be evidence that other crimes have occurred on the property or in its immediate vicinity"); *see also* Sec'y of Hous. & Urban Dev. v. Layfield, 152 Cal. Rptr. 342, 343 (App. Dep't Super. Ct. 1978) (citing *Kline*, 439 F.2d at 483) (finding that a "landlord's duty to provide security measures to protect tenants against crime because of his control of the areas of common use in an apartment complex can be a part of the implied warranty of habitability").

206. Bauer, *supra* note 46, at 47–48; IPCC CLIMATE CHANGE SUMMARY, *supra* note 6, at 6; Reed et al., *supra* note 43.

207. *See* Binder, *supra* note 175, at 60 (noting that deed restrictions "in South Florida preclude the use of hurricane shutters" because shutters exacerbate hurricane damage).

208. *Id.* at 59–60 (describing foreseeable damage caused by hurricanes such as "broken windows [that] will expose the building's interior to the forces of high wind and rain . . . . [and] resulting moisture" that may deteriorate a building's interior structure).

209. *Id.* at 15–17; Bauer, *supra* note 46, at 47–48.

210. *See supra* notes 44–56 and accompanying text.

have been placed on sufficient notice of conditions that they will likely need to "repair or remedy" after a hurricane to comply with a state's respective warranty of habitability.[211] By concluding that landlords have been placed on sufficient notice—or bear actual knowledge—of defective conditions likely to result from hurricanes, the warranty of habitability appropriately assesses tenancy rights to account for both the anthropogenic exacerbation of climate change and the improved accuracy of weather prediction models.[212]

Courts must also turn to foreseeability analysis to effectively determine when the warranty will extend to hurricane-caused damage. The United States Court of Appeals for the District of Columbia Circuit and state courts in Texas and California have applied foreseeability analysis to flesh out the scope of a landlord's duty under the implied warranty of habitability.[213] Applying the same foreseeability analysis to the current hurricane-ridden reality in North Carolina and Texas, this Comment argues that a landlord's duty to repair under the warranty encompasses hurricane-caused damage.[214]

First, in determining whether a landlord could have foreseen hurricane damage, a court will determine (1) "whether any [hurricane

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211. *Supra* notes 44–56 and accompanying text; Bauer, *supra* note 46, at 47–48; *see* Stines v. Carter, 772 S.E.2d 264, 268 (N.C. Ct. App. 2015) (explaining that if there is an "imminently dangerous condition on the premises," and the landlord has either acquired knowledge or received notice of the condition, the landlord must "repair or remedy" the condition "within a reasonable period of time based upon the severity of the condition").

212. *See* Bauer, *supra* note 46, at 47–48 (describing increased accuracy of weather prediction models); Reed et al., *supra* note 43 (explaining that Hurricane Florence's intensity and severity was a result of globally increasing temperatures caused by humans); *Hurricanes & Climate Change*, *supra* note 36 (discussing the trends of increasingly dangerous hurricanes, which is directly attributable to global warming); *supra* notes 44–56 and accompanying text.

213. *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 483 (D.C. Cir. 1970) (concluding that because the landlord "was aware of conditions" and because there was a likelihood of the condition occurring, it was foreseeable and within the landlord's duty under the implied warranty of habitability); Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 757 (Tex. 1998) (finding that personal injury caused by criminal conduct could not be deemed foreseeable because "there must be evidence that other crimes have occurred on the property or in its immediate vicinity"); *see also* Sec'y of Hous. & Urban Dev. v. Layfield, 152 Cal. Rptr. 342, 343 (App. Dep't Super. Ct. 1978) (citing *Kline*, 439 F.2d at 483) (finding that a "landlord's duty to provide security measures to protect tenants against crime because of his control of the areas of common use in an apartment complex can be a part of the implied warranty of habitability").

214. *See supra* note 213 and accompanying text.

damage] previously occurred on or near the property, [2] how recently it occurred, [3] how often it occurred . . . [4] and what publicity was given to the occurrences to indicate that the [landlord] knew or should have known about them."[215] As extreme weather events like Hurricane Florence and Hurricane Harvey ravage coastal communities with increased frequency, damage caused by future storms with similar impacts will be considered to have "previously" and "recently" occurred on properties in these geographic regions, thereby giving weight to the first two elements of foreseeability analysis.[216] At the time it made landfall, Hurricane Harvey did not meet the "how often [the event] occurred" element because it was unprecedented. However, intensive media coverage, governmental aid response, and the use of weather prediction models and forecasting techniques have extensively publicized the event and its damage.[217] This level of publicity provides sufficient weight in favor of finding future hurricanes of this caliber and subsequent damage foreseeable.[218] Further, based on widespread hurricane-risk information dissemination, landlords, at local and national scales, are on sufficient notice.[219] Not only do forecasting stations alert a community when an extreme weather event is pending with increased accuracy and advance notice,[220] but forecasting groups also provide insight describing the type of damage that can be expected with different hurricane categories.[221] Accordingly, hurricane-caused damage is foreseeable because landlords are informed by past experiences with extreme weather events[222] and through sources which provide more information on hurricane trajectories and related risk, hurricane-caused damage is foreseeable.

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215. *Timberwalk Apartments*, 972 S.W.2d at 757.

216. *See id.*

217. *See* Burdwick, *supra* note 45 (documenting the increasingly advanced ability of weather models to predict storms like Hurricane Sandy); Popken, *supra* note 24 (describing the impact of Hurricane Harvey on tenants); FEMA Response to Hurricane Harvey, *supra* note 23 (detailing the extensive FEMA monetary relief dedicated to Hurricane Harvey recovery efforts); *see supra* notes 44–56 and accompanying text (describing the National Hurricane Center's various initiatives to disseminate hurricane-risk information as well as general hurricane forecasting).

218. *See Timberwalk Apartments*, 972 S.W.2d at 757 (describing how foreseeability must not be determined in hindsight, but in light of what the owner knew or should have known).

219. *See supra* notes 44–45 and accompanying text.

220. *See supra* notes 46–47and accompanying text.

221. *See supra* notes 44–56 and accompanying text.

222. *See supra* notes 44–56 and accompanying text.

Further, the court in *Kline v. Massachusetts Avenue*, suggests that it is reasonable for the warranty of habitability to extend to actions by third parties.[223] In this case, the court held that the landlord had sufficient notice that the tenants were subjected to criminal attacks because the evidence clearly indicated that the "apartment building was undergoing a rising wave of crime."[224] The court reasoned that the warranty of habitability extended to conduct by a third party because it was foreseeable given the surrounding context.[225] It also explained that the warranty created expectations on part of the tenant that the landlord would maintain the premises "in their beginning condition during the lease term."[226] Accordingly, the court found that the tenants' expectations reasonably extended to actions by third parties on the property, meaning that third party conduct fell within the warranty's scope.[227] Similarly, a tenant in the hurricane-context may rightfully expect that under the implied warranty of habitability, a landlord will restore a premise to its "beginning condition" in wake of hurricane-caused damage.[228]

Second, if a hurricane causes foreseeable damage on a rental property and subsequently makes the premises unsafe for the tenant, the landlord's duty under the implied warranty of habitability to correct the conditions has been triggered.[229] Rental communities in North Carolina following Hurricane Florence and in Texas following Hurricane Harvey have faced significant damage to their properties.[230] It is no doubt that the damage caused by hurricanes in these scenarios falls outside the scope of the warranty's exception precluding recovery for "ordinary wear and tear" of property.[231] Rather, hurricane-caused damage is more comparable to conditions violating the warranty of habitability like the damage caused in wake of a union strike, as noted in New York, or in wake of earthquake-

223. *See supra* notes 44–56 and accompanying text.
224. Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 483 (D.C. Cir. 1970).
225. *Id.* at 485.
226. *Id.*
227. *Id.*
228. *Id.*
229. *See* Park W. Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1294 (N.Y. 1979) (describing the landlord's duty).
230. Clasen-Kelly, *supra* note 9; *see Red Cross Response to Hurricane Florence*, *supra* note 8; *Red Cross Response to Hurricane Harvey*, *supra* note 22.
231. N.C. GEN. STAT. § 42-43(a)(6) (2012).

caused damage, as noted in California.[232] For example, in *Park West Management Corp.*, the New York Court of Appeals found that a landlord had breached the warranty of habitability by allowing trash to accumulate, which then caused noxious odors and an environment where rats and cockroaches flourished.[233] Although these conditions were more directly the result of a union strike as opposed to acts within the landlord's control, the court nonetheless held the landlord liable.[234] Similarly, a hurricane—though an event mostly outside of the landlord's control—may have similar effects on property through flood or wind damage. Likewise, the California legislature decided that the warranty of habitability extended to extreme damage caused by an earthquake, a natural disaster event that frequents California communities, which is similar to hurricane events that frequent coastal communities like North Carolina and Texas.[235] Accordingly, damage caused by hurricanes that goes unrepaired violates warranty of habitability standards because the resulting damage creates conditions that materially impact the safety and health of a tenant.[236] Landlords are thus responsible for returning the premises to fit and habitable conditions, despite the damage stemming from a hurricane.

Finally, general statutory interpretation provides further support for the conclusion that the warranty of habitability extends to hurricane-caused damage. As one example, the North Carolina's Residential Rental Agreement Act[237] is comparable to New York's warranty of habitability statute and thus it is likely that the North Carolina statute can be interpreted to envision a similar approach to natural disaster-caused damage.[238] Just as the scope of the warranty of habitability in New York has been interpreted to "place an unqualified obligation on the landlord to keep the premises habitable," thus encompassing "conditions occasioned by . . . [a] natural disaster," statute-based warranties like the one North Carolina can be read to

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232. *See* CAL. HEALTH & SAFETY CODE § 19211(c) (2019) (noting that a landlord cannot evict a tenant due to conditions created by an earthquake); Park W. Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1294 (N.Y. 1979) (union strike).

233. *Park W. Mgmt. Corp.*, 391 N.E.2d at 1293.

234. *Id.* at 1295.

235. CAL. HEALTH & SAFETY CODE § 19211(c).

236. *See id.*

237. N.C. GEN. STAT. § 42-42 (2012).

238. *See Park W. Mgmt. Corp.*, 391 N.E.2d at 1289 (describing the New York warranty of habitability to place "an unqualified obligation on landlord to keep the premises habitable").

place more responsibility on landlords to maintain premises in conformance with its statute, even when that damage is caused by a hurricane.[239] Accordingly, when tenants have experienced extreme flooding, tree damage, or damage caused by high winds—as many tenants have in North Carolina and Texan communities following Hurricane Florence and Harvey[240]—landlords are responsible for remedying the defective conditions because the damage was foreseeable and materially unsafe.[241] If the landlord fails to remedy the conditions as required under either the common law or respective statutes, such as the North Carolina Residential Rental Agreements Act or the Texas Duty to Repair statute, then the tenant is entitled to rent abatement for the time period that the tenant goes without a remedy, or the tenant is entitled to recovery of rent already paid to the landlord during the course of the defect's presence on the property.[242] As a best practice to ensure their recovery, however, tenants should immediately inform their landlords of the damage caused after the hurricane.[243]

B. When a Landlord's Act or Omission Evicts a Tenant After a Hurricane, the Landlord Has Breached the Covenant of Quiet Enjoyment

Under the covenant of quiet enjoyment doctrine, generally, "[a] landlord may be liable . . . if serious interference with a tenancy is a natural and probable consequence of what the landlord did, what he or

239. *Id.*

240. Clasen-Kelly, *supra* note 9; Popken, *supra* note24; FEMA Response to Hurricane Florence, *supra* note 14; *Red Cross Response to Hurricane Florence*, *supra* note 8; *Red Cross Response to Hurricane Harvey*, *supra* note 22.

241. *See* Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 756–57 (Tex. 1998) (explaining that landlords are responsible for damage caused by foreseeable events that makes a property uninhabitable); *see also Erlach*, 173 Cal. Rptr. 3d 159, 165 (Ct. App. 2014) (holding that an event outside the landlord's control, such as the city's "red-tagging" due to unsafe conditions following an earthquake, did not terminate the tenant's rights under the lease); H&R Bernstein v. Barrett, 421 N.Y.S.2d 511, 512 (Civ. Ct. 1979) ("The fact that the cause of the deprivation [or damage] may in the first instance be rooted elsewhere does not relieve the landlord from the duty to take affirmative steps to remedy the condition.").

242. *See* Creekside Apartments v. Poteat, 446 S.E.2d 826, 830–31 (N.C. Ct. App. 1994) (rent abatement); Miller v. C.W. Myers Trading Post, 355 S.E.2d 189, 192–93 (N.C. Ct. App. 1987) (recovery of rent).

243. *See* Daitch v. Mid-America Apartment Communities, Inc., 250 S.W.3d 191, 195 (Tex. App. 2008) (explaining that under the Texas Duty to Repair statute, the landlord must repair the remedy only if they had sufficient notice of the condition).

she failed to do, or what he or she permitted to be done."[244] Both the covenant of quiet enjoyment in Texas and North Carolina give rise to protections for tenants when certain acts or omissions by the landlord cause the tenant to be constructively evicted.[245] A breach of the covenant claim arises if a tenant's apartment becomes inaccessible because of conditions like flooding. As a condition subsequent to recovery, a landlord's failure to act or repair the premises must be the reason that the tenant has been deprived of her enjoyment of the property.

Following a hurricane, if a landlord has failed to repair damage or failed to sufficiently weatherproof a property prior to a hurricane's landfall, the landlord has committed an "act," thus falling within the purview of the covenant of quiet enjoyment.[246] To breach the covenant, a landlord's "act" must sufficiently deprive the tenant of beneficial enjoyment of the premises under the lease.[247]

As demonstrated by one powerful anecdote, Hurricane Florence deprived at least one family of their rented home for months after the storm, and the landlord still did not know when the home would be ready for the tenants' return weeks later.[248] Post-storm damage statistics also suggest that many renters have been deprived of their right to enjoy their rental properties.[249] In *Coleman v. Rotana, Inc.*,[250] a Texas appellate court held that a landlord breached the covenant of quiet enjoyment when he failed to provide adequate parking for the tenant's restaurant.[251] The court found that the tenants had sufficiently alleged that the inadequate parking, a condition upon which the tenants had relied, constituted a material and intentional act of the landlord.[252]

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244. 49 AM. JUR. 2D *Landlord and Tenant* § 478 (2019) (internal quotations omitted).

245. *See* K & S Enters. v. Kennedy Office Supply Co., 520 S.E.2d 122, 126 (N.C. Ct. App. 1999) (holding that a landlord breaches the covenant of quiet enjoyment when the landlord's act or omission interferes with the tenant's right to enjoy the property); Coleman v. Rotana, Inc., 778 S.W.2d 867,872 (Tex. App. 1989) (holding that a landlord breached the covenant of quiet enjoyment by committing a material act).

246. 49 AM. JUR. 2D *Landlord and Tenant* § 477.

247. *See id.*

248. Clasen-Kelly, *supra* note 9 (tree fell on roof of rental property in Charlotte, North Carolina during Hurricane Florence).

249. *See id.* (explaining that over 1900 residents remained in shelters in the weeks following the storm); *Red Cross Response to Hurricane Florence*, *supra* note 8 (explaining that 8000 to 10,000 storms suffered damage in Hurricane Florence).

250. 778 S.W.2d 867 (Tex. App. 1989).

251. *Id.* at 872.

252. *Id.*

Like the plaintiff-tenants in that case, tenants faced with hurricane-related damage that infringes on their ability to access their apartments can argue that their landlords' inadequate preparation for and the lack of repair following storms like Hurricane Florence or Hurricane Harvey is similar to the landlord's failure to provide adequate parking in *Coleman*.[253] Accordingly, landlords' failure to either sufficiently weatherproof the property or their subsequent failure to provide adequate repairs constitutes an "intentional [material] act of the landlord"[254] that "permanently deprives the tenant of the use and enjoyment of the premises."[255] Thus, tenants, whose rights to enjoy their properties have been implicated by storm damage and their landlords' subsequent failure to fulfil an obligation to repair the structure or provide necessary services, are entitled to remedies, which would include release from any obligation to pay rent.[256]

Finally, to recover under the covenant, a tenant must have abandoned the property as a direct result of flooding or other hurricane-related damage that the landlord failed to repair.[257] If the tenant abandons the property as a result of the hurricane-caused damage, then this element of the covenant has been met, and the landlord has breached the covenant.[258] Likewise, if the tenant abandoned the property before a hurricane made landfall for safety purposes and was then unable to return to the property due to damage, the landlord has breached the covenant of quiet enjoyment.[259] In both scenarios, the lease is null, and therefore, a tenant may rescind her obligations under the lease.[260] For example, following Hurricane Harvey in Texas, many tenants were unable to access or return to their apartments due to damage.[261] Additionally, many abandoned the premises either before the storm hit and

253. *See id.*

254. *Id.*

255. Lazell v. Stone, 123 S.W.3d 6, 12 (Tex. App. 2003); Goldman v. Alkek, 850 S.W.2d 568, 572 (Tex. App. 1993); *see also* Groh v. Kover's Bull Pen, Inc., 34 Cal. Rptr. 637, 639 (Dist. Ct. App. 1963) ("There [could] be no doubt from the record that the leaky condition of the roof of the lease premises . . . constituted constructive eviction.").

256. *Goldman*, 850 S.W.2d at 572.

257. *See* K & S Enters. v. Kennedy Office Supply Co., 520 S.E.2d 122, 126 (N.C. Ct. App. 1999).

258. *See Goldman*, 850 S.W.2d at 572 (describing a tenant's remedy options under the covenant of quiet enjoyment).

259. *Id.*

260. *Id.*

261. Popken, *supra* note 24.

have been unable to return or have since abandoned the premises after the storm hit because of the unrepaired damage.[262] Sufficiently meeting the abandonment element, a tenant in this circumstance is entitled to an appropriate remedy for the landlord's breach of the covenant of quiet enjoyment. Remedies may include either release from the lease and any obligation to pay rent, or the tenant may regain possession of the property if the landlord is able to sufficiently repair the property.[263]

C. In Communities Frequented by Hurricanes, a Landlord May No Longer Rely on the Act of God Defense to Avoid Liability

Although landlords often raise an act of God defense in negligence actions, the warranty of habitability intersects closely with the duty element of a negligence claim.[264] Namely, the standard of care that attaches to landlords defines the scope of what courts will hold a landlord responsible for under the warranty.[265] In the context of hurricane damage following storms like Hurricane Florence and Hurricane Harvey, the elements of an act of God defense are no longer met. A successful defense includes both: (1) "unforeseeability" of the event by reasonable human intelligence and (2) an "absence of a human agency."[266]

First, a landlord may not raise an act of God defense if a similar hurricane or natural disaster has caused damage in the past because the weather event and subsequent damage is foreseeable. Both human experience—by living through these storms—and advanced technology that accurately predicts oncoming hurricanes and related damage rebuts

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262. Clasen-Kelly, *supra* note 9; Popken, *supra* note 24.

263. N.C. GEN. STAT. § 42-25.9(a) (2013); *see Goldman*, 850 S.W.2d at 572 (lease rescinded).

264. Friedman, *supra* note 3.

265. *See* Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 756–57 (Tex. 1998) (explaining that landlords are responsible for damage caused by foreseeable events that makes a property uninhabitable); Sec'y of Hous. & Urban Dev. v. Layfield, 152 Cal. Rptr. 342, 343 (App. Dep't Super. Ct. 1978) (citing Kline v. 1500 Mass. Ave Apartment Corp., 439 F.2d 477, 483 (D.C. Cir. 1970)) (finding that a "landlord's duty to provide security measures to protect tenants against crime because of his control of the areas of common use in an apartment complex can be a part of the implied warranty of habitability"); *see also* Lenz v. Ridgewood Assocs., 284 S.E.2d 702, 704–05 (N.C. Ct. App. 1981) (explaining that a landlord's duty generally includes correcting unsafe conditions and this standard of care extends to conditions or areas under the landlord's control; for example, "if [ ] natural accumulations of ice constitute an unsafe condition, the duty is to correct those conditions").

266. Binder, *supra* note 175, at 13.

the first element of an act of God defense.[267] Relying on an act of God defense to avoid liability under either the implied warranty of habitability or the covenant of quiet enjoyment will not prevail "if a similar event has occurred before, could be anticipated using modern techniques, or w[as] otherwise reasonably foreseeable."[268] In a reality where climate change bears a direct impact on weather patterns,[269] hurricanes are sufficiently common and should thus be considered "normal climatic conditions," for which landlords may not assert the act of God defense.[270] Specifically, hurricanes like Florence and Harvey are no longer unprecedented, unlike the floods in *Sutliff*,[271] and are more akin to the foreseeable rains in *Southern Pacific Co.*[272] Moreover, landlords are on notice regarding the scope of damages following these storms, especially in places that have already been devastated by hurricanes like the coastal communities in North Carolina and Texas.[273] Although Hurricane Florence and Hurricane Harvey may have been described as unprecedented at the time the storms made landfall,[274] landlords in these communities have now been placed on notice regarding the breadth and scope of these storms and their potential impacts.[275] Additionally, landlords, as general members of the

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267. *See* Bauer et al., *supra* note 46, at 47–55 (describing increased accuracy of weather prediction models); Burdwick, *supra* note 45 (documenting the increasingly advanced ability of weather models to predict storms like Hurricane Sandy); *see also supra* notes 44–56 and accompanying text.

268. Binder, *supra* note 175, at 13.

269. *See supra* note 240 and accompanying text.

270. Binder, *supra* note 175, at 15.

271. Sutliff v. Sweetwater Water Co., 186 P. 766, 767 (Cal. 1920) (finding that the defendant could not be liable for damage caused by an "extraordinary and unprecedented flood").

272. So. Pac. Co. v. City of Los Angeles, 55 P.2d 847, 849 (Cal. 1936) (concluding that although it the natural event was "a heavy rain" perhaps establishing "a record for volume in inches in that region," the heavy rainfall "was characteristic of that region" and thus the act of God defense could not stand).

273. *See supra* note 240 and accompanying text (explaining the landlord's obligation to maintain the premises to the starting condition).

274. *See Hurricane Harvey Landfall & Impacts*, *supra* note 20 (describing Hurricane Harvey as "unique"); *Red Cross Response to Hurricane Florence*, *supra* note 8 ("Hurricane Florence dumped an estimated 10 trillion gallons of water on the Carolinas—smashing rainfall records . . . ."); *Red Cross Response to Hurricane Harvey*, *supra* note 22 (describing Hurricane Harvey as "one of the worst flooding disasters in U.S. history").

275. *See* Skandia Ins. Co. v. Star Shipping AS, 173 F. Supp. 2d 1228, 1240 (S.D. Ala. 2001) (explaining that hurricanes are only acts of God when they cause "unexpected and unforeseeable devastation"); Gulf, Colo. & Santa Fe Ry. Co. v. Pomeroy, 3 S.W.

community, have widespread access to forecasting information disseminated either by the National Weather Service or by local networks.[276] When forecasting groups predict a hurricane, they can provide both information as to the intensity of the storm as well as the damage that is likely to result.[277] Accordingly, a landlord may not rely on an act of God defense to avoid liability for damage caused by hurricanes.

Second, humans have played a significant role in the growing intensity and frequency of hurricanes, and therefore, the second element required by an act of God defense also fails. As demonstrated by scientific research and data, humans have had a direct impact on globally increasing temperatures,[278] which in turn has resulted in increased severity and frequency of storms like Hurricane Florence and Hurricane Harvey.[279] Notably, a recent study demonstrated how human influence on the climate directly caused the increased intensity of Hurricane Florence.[280] Though less tangible, human interference with climatic conditions is comparable to human interference with a natural reservoir that led to flooding in *Polack v. Pioche*, thus demonstrating the presence of human agency and precluding the act of God defense.[281] Just as human action caused the embankment in *Polack* to be unable to withstand heavy rains, causing its failure to protect against subsequent flooding,[282] greenhouse gases emitted by humans has caused global warming and further instigated the increased severity of

722, 724 (Tex. 1887) (explaining that similar events resulting from natural disaster are foreseeable and not an act of God).

276. *See supra* notes 44–56 and accompanying text (describing the accuracy of weather predicting models).

277. *See supra* notes 44–56 and accompanying text.

278. Reed et al., *supra* note 43 (explaining how human-induced climate change directly increased the intensity of Hurricane Florence); *Hurricanes & Climate Change*, *supra* note 36 (discussing factors that have added to trends of increasingly dangerous hurricanes); IPCC Climate Change Summary, *supra* note 6, at 6 (describing the anthropogenic impact on global warming); USGCRP SUMMARY FINDINGS, *supra* note 41, at 25 (summarizing the main concerns raised by global warming).

279. *See* Binder, *supra* note 175, at 59–60 (describing the effectiveness of hurricane shutters in Florida in preventing hurricane damage).

280. Reed et al., *supra* note 43.

281. *See* Polack v. Pioche, 35 Cal. 416, 417 (1868) (explaining that because a human interfered with a reservoir embankment prior to its overflowing, the act of God defense failed).

282. *Id.* at 422.

storms.[283] Accordingly, it cannot be said that the increasingly severe and frequent hurricanes like Hurricane Florence and Harvey are "unaided by the hand of man."[284] In addition to the anthropogenic impact on storms, landlords' failure to effectively weatherproof property could also be viewed as an example of human agency, further rebutting the absence of human agency claim.[285] For example, experts deem hurricane shutters as a successful preventative measure protecting against hurricane damage.[286] Courts have held that omissions on part of the landlord are the functional equivalent of a material act by the landlord.[287] Just as the landlord's failure to provide adequate parking in *Coleman* was a material act or omission, thus breaching the covenant of quiet enjoyment, failure to install hurricane shutters could also be considered a material act or omission by the landlord.[288] A landlord's decision to leave properties insufficiently weatherproofed demonstrates a failure to take agency in a situation that is predominantly under the control of a landlord.[289]

Finally, some tenants may face standing issues, specifically the causation element, when asserting breach of warranty or covenant claims or when successfully arguing that an act of God defense may not

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283. Reed et al., *supra* note 43; *Hurricanes & Climate Change*, *supra* note 36; IPCC Climate Change Summary, *supra* note 6, at 6; USGCRP SUMMARY FINDINGS, *supra* note 41, at 25.

284. *Polack*, 35 Cal. at 417.

285. *See* Binder, *supra* note 175, at 59–60.

286. *Id.* (describing the effectiveness of hurricane shutters in preventing hurricane damage).

287. *See* Coleman v. Rotana Inc., 778 S.W.2d 867, 872 (Tex. App. 1989) (describing the landlords' failure to provide adequate parking as a material act on the part of the landlord, even though the plaintiff-tenant's claim failed because they did not abandon the property within a reasonable time); 49 AM. JUR. 2D *Landlord and Tenant* § 477 (2018) (explaining that acts or omissions on part of the landlord can constitute a breach of the covenant of quiet enjoyment).

288. *Coleman*, 778 S.W.2d at 872.

289. *See* Green v. Superior Court, 517 P.2d 1168, 1173 (Cal. 1974) (en banc). The court in *Green* explained that the design of "modern apartment buildings not only renders them much more difficult and expensive to repair than the living quarters of earlier days, but also makes adequate inspection of the premises by a prospective tenant a virtual impossibility . . . and [thus] the landlord, who has had experience with the building, is certainly in a much better position to discover and to cure dilapidations in the premises." *Id.* Moreover, areas that require repair are usually in the landlord's control. *Id.*

Second, unlike the multi-skilled lessee of old, today's city dweller generally has a single, specialized skill unrelated to maintenance work. Binder, *supra* note 175, at 19.

stand. As Supreme Court precedent in *Massachusetts v. EPA* and as the recent case *Juliana v. United States*, demonstrate, causation issues arising in climate change litigation have been overcome in certain scenarios.[290] Just as the plaintiffs in *Juliana* have successfully alleged that the government's failure to effectively mitigate and plan for climate change has caused injury to constitutionally guaranteed rights such as property,[291] and just as the plaintiff in *Massachusetts v. EPA* successfully alleged that a failure to reduce greenhouse gas emissions would attribute to sea-level rise,[292] tenants can overcome standing challenges by alleging that anthropogenic exacerbation of climate change has caused hurricanes to increase in size and frequency, thus instigating damage on rental properties. Since the court found that the plaintiffs in *Juliana* had plausibly met standing requirements, including causation, tenants are likely able to argue that humans' role in climate change is substantially likely, and thus, the second element required for a successful act of God defense must fail.[293]

CONCLUSION

Under the warranty of habitability and the covenant of quiet enjoyment, landlords are responsible for damage to rental properties caused by hurricanes in coastal communities—like North Carolina and Texas—where intense hurricanes have ravaged rental communities. A landlord's obligation under the warranty of habitability to maintain a premise is not eliminated simply because a defective condition is the result of a natural disaster. Additionally, because of advancing technology in weather prediction models, forecasting abilities, and increasingly advanced studies relaying the anthropogenic role in climate change and its potential impacts on communities, landlords have been placed on sufficient notice of these storms and their potential damage.[294] Thus, a

290. *See* Massachusetts v. EPA, 549 U.S. 497, 523, 525 (2007) (concluding that reducing man-made greenhouse gas emissions would help to lessen the harmful impacts of global warming like rising sea levels); Juliana v. United States, 217 F. Supp. 3d 1224, 1248 (D. Or. 2016) (finding that the plaintiffs had plausibly alleged standing and allowing them past the motion to dismiss stage).

291. *Juliana*, 217 F. Supp. 3d at 1242.

292. *Massachusetts*, 549 U.S. at 525–26.

293. *Juliana*, 217 F. Supp. 3d at 1242, 1248 (finding that the plaintiffs' allegations that the government's failure to effectively protect against climate change has caused damage to their property plausibly met standing requirements—notably, the causation element).

294. *See* Burdwick, *supra* note 45 (documenting the increasingly advanced ability of weather models to predict storms like Hurricane Sandy); USGCRP SUMMARY

landlord is responsible for maintaining or repairing a property where damage has either been exacerbated or caused by hurricanes. If the landlord fails to do so, the tenant is entitled to rent abatement or other appropriate remedies as described in a state's respective statute.[295] Likewise, a tenant's rights under the covenant of quiet enjoyment are not eviscerated in the wake of hurricane-caused damage. Finally, the main argument running counter to this Comment's assertion rests with the act of God defense, which precludes a tenant from recovery when a non-manmade event is so extreme, unprecedented, and unpredictable that resulting damage may not be deemed foreseeable to the landlord—so long as the landlord did not contribute to the damage by an act or omission of his own.[296] Following the wide impact of storms like Hurricane Florence and Hurricane Harvey in North Carolina and Texas, respectively, the act of God defense is no longer applicable.

Extending the implied warranty of habitability and covenant of quiet enjoyment to encompass hurricane-caused damage recalibrates these age-old property doctrines to effectively balance the rights of tenants and landlords through the course of tenancy.[297] Implicit in these doctrines is the landlord's responsibility to account for damage caused by natural disasters. Hurricanes do not wash away a tenant's rights, and moving forward, landlords should be held responsible.

FINDINGS, *supra* note 41, at 25 (describing the detrimental impacts of climate change on United States communities).

295. *See* TEX. PROP. CODE ANN. § 92.0561 (West 2018) (describing a tenant's repair and deduct remedies in the event of a landlord's breach); Stines v. Carter, No. COA14-59, 2015 WL 1534002, at *4 (N.C. Ct. App. Apr. 7, 2015) (rent abatement).

296. *See* K & S Enters. v. Kennedy Office Supply Co., 520 S.E.2d 122, 126 (N.C. Ct. App. 1999) (holding that when an act or omission by the landlord interferes with the tenant's right to enjoy the property, the landlord has constructively evicted the tenant, thereby breaching the covenant of quiet enjoyment); 49 AM. JUR. 2D *Landlord and Tenant* § 478 (2019) (explaining that a landlord may be held in breach of the covenant "if serious interference with a tenancy is a natural and probable consequence of what the landlord did, what he or she failed to do, or what he or she permitted to be done").

297. *See* Lovett, *supra* note 1, at 474 (explaining that "[m]any property law scholars define the goal of property law as creating an institution fundamentally geared toward the promotion of stability—stability in ownership, stability in markets for exchange, and stability in communities").