

**FLOODING THE ZONE: THE STATE OF FEDERAL FLOOD INSURANCE AT THE
BEGINNING OF TRUMP 2.0**

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The risks of flooding in the United States have never been more apparent, making all the more significant the state of flood insurance and the legal and political volatility of the National Flood Insurance Program. In this Article we discuss the details of “Risk Rating 2.0,” the most significant change to federal flood insurance in half a century, and its legal and political future in the new world of Trump 2.0. And, in addition to describing the details of this new change to federal flood insurance, we describe its advantages and disadvantages in both the newfound political environment in which it operates and its likelihood of continuing to survive its most significant legal challenge in federal court, in State of Louisiana v. Department of Homeland Security.

I. INTRODUCTION

It is difficult to capture the volatility that buffets flood insurance in 2025. During President Trump’s first term, the National Flood Insurance Program (NFIP) unveiled “Risk Rating 2.0,” described as “the biggest change in the way the NFIP calculates flood insurance premiums since the program began in 1968.”¹ The Administration, however, chose to defer its implementation to 2021, the year after the next presidential election. Politically, this was a wise choice. The politics of flooding were on full display between 2012 and 2014 when Congress sought to “right-price” flood insurance only to backtrack given the widespread opposition

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¹ See DIANE P. HORN, CONG. RSCH. SERV., IN11777, [NATIONAL FLOOD INSURANCE PROGRAM RISK RATING 2.0: FREQUENTLY ASKED QUESTIONS](#) 1 (2024).

of voters whose insurance premiums would rise.² Thus, after Joe Biden won the 2020 election, it made political sense for the Federal Emergency Management Agency (FEMA) and the NFIP to implement Risk Rating 2.0, as planned, in 2021, early in the new President’s term. Indeed, given the apparent support for Risk Rating 2.0 from both President Trump and President Biden, one might think this to be a rare instance of bipartisan agreement. Yet this was hardly the case. In 2022, the Supreme Court formalized its “major question doctrine” in *West Virginia v. EPA*,³ and, in June 2023, the Attorneys General of ten “Red” states filed suit in a New Orleans federal court, in *State of Louisiana v. Department of Homeland Security*,⁴ claiming among other things that Risk Rating 2.0 violated the doctrine.⁵ Although the trial court refused in March 2024 to enjoin Risk Rating 2.0,⁶ the court’s final judgment will ultimately be reviewed by the Court of Appeals for the Fifth Circuit, a circuit known for its anti-regulatory jurisprudence.⁷

This, of course, assumes that the NFIP’s initiative survives that long because, in 2025, Risk Rating 2.0 has met Trump 2.0. It’s not simply that FEMA-bashing was on particular display in the closing weeks of the 2024 presidential election,⁸ but conservative-leaning policy entrepreneurs such as those at the Cato Institute and the authors of Project 2025 have proposed that flood insurance be left increasingly to the private market.⁹ In January 2025, President Trump by Executive Order created a “FEMA Review Council,” to consider unknown agency changes,¹⁰ and in February 2025 the Department of Homeland Security (DHS) was said to have terminated the employment of over 200 FEMA staffers,

² See, e.g., Alexander Lemann, [Rolling Back the Tide: Toward an Individual Mandate for Flood Insurance](#), 26 FORDHAM ENV’T L. REV. 166, 168 (2015) (describing a “political backlash” against flood insurance reform).

³ *West Virginia v. EPA*, 597 U.S. 697 (2022).

⁴ See *infra* note 94.

⁵ *Id.*

⁶ *Id.*

⁷ See Tad Bartlett, [A Year of Transition at the Agenda-Setting 5th Circ.](#), LAW360 (Dec. 20, 2023, 4:33 PM) (referring to the Fifth Circuit as “aggressively conservative”).

⁸ Kelly Doty & Taylor Thomson, [Trump Criticizes FEMA Response During Helene Storm Damage Tour in North Carolina](#), NBC 15 NEWS (Oct. 22, 2024, 3:12 PM).

⁹ See *infra* notes 84–88.

¹⁰ See [Trump Establishes Council to Review Federal Disaster Response Agency](#), REUTERS (Jan. 26, 2025, 11:31 PM).

including Christopher Page who had recently accepted the position of Chief of the NFIP.¹¹

Yet, precisely because the NFIP may be on the chopping block, it has never been more important to appreciate the full range of its strengths and weaknesses. After all, despite its shortcomings, it is not difficult to imagine “solutions” that turn out to be much worse. Thus, we first summarize those aspects of the program’s history and design that should be especially salient to reformers today, including an explanation of the NFIP’s Risk Rating 2.0 program. Then, before pivoting to the legal issues in the judicial challenge to Risk Rating 2.0 currently pending in Louisiana, we consider two issues with which the NFIP and its reformers must inevitably grapple: the link between flood insurance and flood resiliency that may ultimately determine whether floods are insurable at all, and the potential capacity of the private market to insure flood risks. After that, we consider the prospects for Risk Rating 2.0 in light of the challenges brought against it in *State of Louisiana v. Department of Homeland Security*.

II. THE NFIP: HISTORY, EFFICACY, AND CRITICISMS

The NFIP was established in 1968 through the National Flood Insurance Act (NFIA) in response to escalating flood-related damages and the limited availability of private flood insurance.¹² Prior to the NFIP, flood disasters often left homeowners reliant on federal disaster relief, which was costly and inefficient.¹³ The NFIP was designed to provide affordable flood insurance while

¹¹ Brianna Sacks et al., [FEMA is Losing Scores of Employees. What Does That Mean for Disaster Recovery?](#), WASH. POST (Feb. 18, 2025).

¹² AM. INSTS. FOR RSCH. ET AL., [A CHRONOLOGY OF MAJOR EVENTS AFFECTING THE NATIONAL FLOOD INSURANCE PROGRAM](#) 1, 1-12 (2002) (providing a brief account of the policy concerns that led to the NFIP’s implementation and the political and economic pressures that have wrought significant changes in the 21st century).

¹³ Scott Gabriel Knowles & Howard C. Kunreuther, *Troubled Waters: The National Flood Insurance Program in Historical Perspective*, 26 J. OF POL’Y HIST. 327, 332 (2014) (analyzing the roles that the 1927 Mississippi floods, 1964 Alaska earthquake, and 1965 Hurricane Betsy played in catalyzing the development of the program).

encouraging communities to adopt floodplain management regulations to mitigate flood risks.¹⁴

Administered by FEMA, the NFIP operates on a three-pronged approach: (1) risk identification through flood mapping, (2) floodplain management and mitigation, and (3) insurance coverage.¹⁵ In exchange for community participation in the NFIP and adherence to floodplain management standards, residents and businesses may access federally backed flood insurance. Additionally, the Flood Disaster Protection Act of 1973 mandated flood insurance for properties in Special Flood Hazard Areas (SFHAs) with federally-backed mortgages, significantly expanding the NFIP's reach.¹⁶

Despite its goals, the NFIP faced financial instability due to repeated flooding events and subsidized insurance rates that did not reflect actual risk. By the early 2000s, mounting debt and increased claims from major disasters such as Hurricanes Katrina and Rita underscored the need for reform.¹⁷

A. Biggert-Waters Flood Insurance Reform Act of 2012

Recognizing the NFIP's financial vulnerabilities, Congress enacted the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12) to transition the program toward actuarial soundness.¹⁸ BW-12 sought to eliminate longstanding

¹⁴ *See id.* at 336-43 (adding that coverage for home and business owners was not the only major goal of the NFIP at its conception, but rather that coverage was meant to be a first step to increasing the safety and resiliency of flood-prone communities, ultimately reducing the need for the NFIP to play as substantial a role in economic resiliency in those communities).

¹⁵ *See id.* at 347 (noting that while there were three main prongs of approach for the NFIP, the first prong, flood mapping, has been neglected far more than the other two prongs).

¹⁶ *See id.* at 337-38 (citing 42 U.S.C. § 4002 and noting the prevalence of federally backed mortgages in the US real estate market and the wide-ranging implications of insurance requirements for all properties encumbered by such mortgages).

¹⁷ AM. INSTS. FOR RSCH. ET AL., *supra* note 12, at 84.

¹⁸ Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. No. 112-141, 126 Stat. 405 (2012) (codified as amended at 42 U.S.C. §§ 4001-4131). Among the first of the congressional findings and declarations of purpose is a clear concern about the "alarming" increase in both frequency of and destruction caused by floods. *Id.* at § 4002(a).

subsidies and require flood insurance premiums to reflect full flood risk based on updated FEMA flood maps.¹⁹

Key provisions of BW-12 included:

- Elimination of subsidized premiums, which phased out subsidies for many policyholders, including owners of second homes, businesses, and properties with severe or repetitive losses;
- Rate increases, which required annual rate hikes of 5-25% for policyholders until they reached full risk-based pricing;
- Flood mapping enhancements, which directed FEMA to update flood maps using improved technology and data; and
- Reserve funding requirements, which created a reserve fund to reduce reliance on federal disaster relief.²⁰

Further, BW-12 instituted a policy which required purchasers of homes subject to flood insurance requirements to immediately pay actuarially fair premiums—as opposed to the gradually increasing premiums for existing policy holders—which effectively froze real estate markets in otherwise high-demand areas.²¹

Although intended to stabilize the NFIP, BW-12 resulted in dramatic premium increases for many policyholders, particularly in coastal and high-risk flood zones.²² Homeowners who had previously relied on subsidized insurance

¹⁹ *Id.* at § 4014(g). In addition to the rapid, albeit not immediate, increase in premiums for existing policy holders, the Act also barred subsidies for any new policies. *Id.*

²⁰ *See generally id.* at §§ 4001–4131. *See also id.* at §§ 4014–4015 for most of the provisions relating to premium increases and withholding of subsidies.

²¹ Alexander B. McDonnell, *The Biggert-Waters Flood Insurance Reform Act of 2012: Temporarily Curtailed by the Homeowner Flood Insurance Act of 2014—A Respite to Forge an Enduring Correction to the National Flood Insurance Program Built on Virtuous Economic and Environmental Incentives*, 49 WASH. U. J. L. & POL'Y 235, 260 (2015). The author notes that while these policies were effective for discouraging development of high-risk areas, the trade-off of pricing many other homeowners and small businesses may be too much of a negative to overcome.

²² Austin Johnson, *Biggert-Waters and Rising Tides: Searching for Enduring Reform to the National Flood Insurance Program in Today's Politics*, 57 HOUS. L. REV. 227, 234 (2019).

saw premiums rise by hundreds or even thousands of dollars annually, sparking public outcry and bipartisan pressure to scale back the reforms.²³

B. The Homeowner Flood Insurance Affordability Act of 2014

In response to the backlash against BW-12, Congress passed the Homeowner Flood Insurance Affordability Act of 2014 (Affordability Act) to mitigate the financial impact on policyholders. The Affordability Act's major provisions included:

- Limits on rate increases, which capped premium increases at 18% per year for primary residences and 25% per year for businesses and secondary homes;
- Restoration of grandfathering, which allowed properties to retain lower rates even if new flood maps indicated higher risk;
- Refunds, which required FEMA to reimburse policyholders who had already experienced steep rate increases due to BW-12;
- An affordability study and consumer protections; and
- An NFIP surcharge, which imposed a \$25 annual surcharge for primary residences and a \$250 surcharge for second homes and businesses to offset revenue losses.²⁴

The Affordability Act provided temporary relief to policyholders, but it did not resolve NFIP's structural issues, particularly its \$20+ billion debt and the challenge of accurately pricing risk while maintaining affordability.²⁵ The affordability study was intended to precede subsidies for poorer homeowners. However, those subsidies were never rolled out, which, contrary to the NFIP's

²³ *Id.* at 234-37.

²⁴ Homeowner Flood Insurance Affordability Act of 2014, Pub. L. No. 113-89, 128 Stat. 1020 (2014).

²⁵ DIANE P. HORN, CONG. RSCH. SERV., IN10784, [NATIONAL FLOOD INSURANCE PROGRAM BORROWING AUTHORITY](#) (2025).

stated goal of increasing the number of policy holders, actually resulted in many policy holders dropping their flood coverage because of its expense.²⁶

The implementation of BW-12 would have significantly altered the financial burden for many homeowners, particularly those who had long relied on subsidized rates. A 2025 report from the Congressional Research Service estimated that nearly 20% of NFIP policyholders—over 1 million properties—were receiving subsidized rates that BW-12 sought to eliminate.²⁷ This meant that homeowners in coastal and flood-prone areas faced premium increases that, in some cases, tripled their annual costs.²⁸ As a result, many property owners, particularly in Louisiana, Florida, and New Jersey, saw their housing costs skyrocket, prompting concerns over displacement and declining property values.²⁹

The Affordability Act's rollback of certain BW-12 provisions was a direct response to these affordability concerns. By reinstating grandfathering provisions and limiting annual premium hikes, the Affordability Act prevented many homeowners from experiencing immediate financial hardship. However, critics argue that the Affordability Act also weakened NFIP's financial sustainability by continuing subsidies that kept the program from reaching actuarial soundness.³⁰

Moreover, despite the Affordability Act's relief measures, some property owners continued to face higher costs, particularly those in newly mapped high-

²⁶ See *infra* note 69.

²⁷ DIANE P. HORN & BAIRD WEBEL, CONG. RSCH. SERV., [INTRODUCTION TO THE NATIONAL FLOOD INSURANCE PROGRAM](#) 18 (2025).

²⁸ See [Flood Insurance: FEMA's New Rate-Setting Methodology Improves Actuarial Soundness but Highlights Need for Broader Program Reform](#), GEN. ACCT. OFF. (July 31, 2023). The authors further consider that these states make up a disproportionate amount of NFIP policies, and thus, rapidly and drastically increased premiums disproportionately contribute to a decrease in the number of NFIP policies maintained.

²⁹ See Carolyn Kousky & Erwann Michel-Kerjan, *Examining Flood Insurance Claims in the United States: Six Key Findings*, 84 J. RISK AND INS. 819, 829 (2017).

³⁰ Melissa Tier, *Overcoming Contemporary Reform Failure of the National Flood Insurance Program to Accelerate Just Climate Transitions*, J. PUB. AND INT'L AFFS. May 5, 2021. The author makes point of the fact that the Affordability Act was a political compromise pandering to outraged constituents at the cost of the original goal of the BW-12. The author argues further that Congress must find an alternative that sufficiently accounts for public outcry while disincentivizing new development insured at actuarially unfair rates.

risk zones.³¹ A study found that while the Affordability Act prevented the most extreme premium spikes, many homeowners still faced increases of up to 18% per year,³² leading to financial strain and concerns about insurance affordability in vulnerable communities.³³ The long-term impact of these reforms remains a key issue as NFIP continues to operate under financial duress.

III. RISK RATING 2.0

In recent years, flooding has worsened in many parts of the country, and experts worry that climate change will only exacerbate this problem.³⁴ Because of an increase in need and lack of funding for flood insurance, FEMA was forced to reevaluate its method for determining flood risk in 2019. Only about 12% of homeowners carried flood insurance in 2022, a decrease from just a few years prior.³⁵ Many homeowners remain uninformed about the true risk of flooding in their homes.³⁶ The NFIP attempts to remedy this but does not always offer the type of coverage people seek.³⁷ The NFIP is of course not the only option, as homeowners have private flood insurance available as well, but FEMA's program tends to be more affordable overall.³⁸

The NFIP's new underwriting platform, Risk Rating 2.0, was first implemented in 2021 in response to an increase in losses that surpassed

³¹ DIANE P. HORN, CONG. RSCH. SERV., IN11777, [NATIONAL FLOOD INSURANCE PROGRAM RISK RATING 2.0: FREQUENTLY ASKED QUESTIONS](#) 1, 2 (2024).

³² *Id.* at 2.

³³ Tier, *supra* note 30. While not the focus of this article, the author makes an important point of the failure of both the BW-12 and the Affordability Act to implement any substantial equity-based exceptions for premium increases. While the Affordability Act did reduce the startling impact of sudden and extreme premium increases, it did so largely across the board, while most of the public outcry was instigated by the failure of the BW-12 to ease the effects on single-home owners and small businesses.

³⁴ Larry P. Atkinson et al., *Sea Level Rise and Flooding Risk in Virginia*, 5 SEA GRANT L. & POL'Y J. 3, 7–8 (2013) (discussing the correlation between sea level rise and flooding on the Virginia coast).

³⁵ Karl Susman, *Risk Rating 2.0: FEMA's New Flood Insurance Program*, 51 BRIEF 58, 60 (Winter 2022) (explaining the benefits of Risk Rating 2.0).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

premiums. The previous model was based entirely on FEMA-sourced data. It used a flood insurance rate map and zone system, basing rates on property foundation and elevation of the structure. The old program only assumed a 1% chance per year of a flood occurring on the property, and “considered only two sources of risk: river flooding and coastal flooding.”³⁹ In comparison, Risk Rating 2.0 uses “additional risk variables in its pricing models, including flood frequencies, multiple flood types . . . and even distance to a water source.”⁴⁰ In addition to FEMA data, the new program uses data from other governmental agencies as well as third-party sources, which are not disclosed, but likely include private insurance.⁴¹ The percentage increase is now a much broader range, taking the new data into account to consider individual flood risk for properties.⁴² FEMA claims that this program will more accurately determine which properties have a greater flood damage risk based on factors like construction material, occupancy type, and number of floors.⁴³ Compared to the previous model which used a roughly 1% chance of both coastal and fluvial flooding, Risk Rating 2.0 uses commercial catastrophe models to estimate damage from infrequent, severe events.⁴⁴

Early estimates of Risk Rating 2.0 premiums showed that about a quarter of policyholders would actually see their premiums decrease, as the new program takes the size of a home into account, where the previous one did not. Policyholders with smaller houses were previously paying a disproportionate amount, something Risk Rating 2.0 looks to address.⁴⁵ According to initial research, only 4% of policyholders would see an increase of twenty dollars or more per month, while the remaining policyholders would see a minimal increase.⁴⁶ Between 2015 and 2021, data show that premiums increased on

³⁹ HORN, *supra* note 31, at 1.

⁴⁰ Susman, *supra* note 35, at 61.

⁴¹ *Id.* at 62.

⁴² *Id.* (providing a broad analysis of the new system with the caveat that the article does not go into great detail about Risk Rating 2.0 methodology).

⁴³ *Id.* Additional factors include foundation and elevation of the building, prior insurance claims, and height of the lowest floor relative to ground level.

⁴⁴ DIANE P. HORN, CONG. RSCH. SERV., R45999, [NATIONAL FLOOD INSURANCE PROGRAM: THE CURRENT RATING STRUCTURE AND RISK RATING 2.0](#) 7–8 (2022).

⁴⁵ Susman, *supra* note 35, at 61.

⁴⁶ *Id.*

average between 6% and 11% per year.⁴⁷ It was implemented in phases, allowing insurers to choose between the old pricing method and the new program between October 2021 and March 2022.⁴⁸ After April of 2022, Risk Rating 2.0 was applied to all new and renewed policies. The program is still in effect today.

Although some policyholders have seen rate increases, the increases are limited by statute.⁴⁹ The Affordability Act of 2014 only allows for premium increases of up to 18% annually for primary residences.⁵⁰ Other types of property are able to be increased by 25% per year until they reach their fair market rates.⁵¹ Additionally, Risk Rating 2.0 policyholders may receive mitigation credits for taking steps to reduce flood risk, such as elevating machinery above the lowest floor and installing flood openings.⁵² They can also submit an elevation certificate to the NFIP to give more substantive information about the elevation of their building and potentially receive lower rates.⁵³

The NFIP's Community Rating System (CRS) also applies under Risk Rating 2.0. This program allows municipalities that participate in the NFIP to choose to adopt mitigation efforts beyond those required to receive premium discounts for all policyholders within the community.⁵⁴ Discounts for communities that take such steps range from 5 to 45%.⁵⁵ CRS uses a points-based system, and over 1,500 of about 22,000 communities that participate in the NFIP have chosen to take advantage of CRS. Many of these communities are populous, meaning over 70% of NFIP policyholders see some benefit from CRS.⁵⁶

⁴⁷ HORN, *supra* note 31, at 2–3.

⁴⁸ Susman, *supra* note 35, at 62.

⁴⁹ Homeowner Flood Insurance Affordability Act of 2014, *supra* note 24.

⁵⁰ *Id.*

⁵¹ HORN, *supra* note 31, at 2.

⁵² FED. EMERGENCY MGMT. AGENCY, [RISK RATING 2.0 FREQUENTLY ASKED QUESTIONS 2](#) (2022).

⁵³ *Id.* at 4.

⁵⁴ Brian McWalters, *Before the Deluge: Federal Policy and Flood Resiliency*, 34 GEO. ENV'T L. REV. 467, 481–82 (2022).

⁵⁵ *Id.* Communities that participate in the CRS are scored based on a points system and may obtain discounts for everyone in their population, but must comply on a large community-wide scale.

⁵⁶ *Id.* at 483.

Although the program more accurately estimates flood risk based on a variety of factors, Risk Rating 2.0 has increased rates for many policyholders. Some scholars cite equity concerns, expressing worry especially about the ability of low-income policyholders in at-risk areas to keep up with the changing rates.⁵⁷ And, although CRS is a tool that can place some of the burden on municipalities rather than policyholders, evidence suggests that it is not being taken advantage of nearly as much in less populous areas.⁵⁸ The NFIP's goal is to increase coverage, but the increased rates could ultimately prevent this from happening.

On the other side of the spectrum, some are concerned Risk Rating 2.0 is not ambitious enough to keep up with the fast pace of climate change and the NFIP's increasing debt.⁵⁹ Though the program is gradually increasing rates for many policyholders, the premiums "continu[e] to lag far below actuarially sound levels."⁶⁰ Even when flooding causes significant damage, the NFIP will usually provide subsidized coverage without requiring the policyholder to take steps to reduce risk.⁶¹ In areas prone to flooding, this can prove to be costly for the NFIP.⁶² Additionally, though CRS and other mitigation efforts are meant to prevent flooding, their positive impacts may be reduced by NFIP's facilitation of construction in floodplains due to its subsidized rates.⁶³

When Risk Rating 2.0 was implemented, it faced a considerable amount of backlash from policyholders and states alike. In September of 2021, just a week before the new program was scheduled to take effect in October, two Mississippi Senators wrote a letter to FEMA encouraging a delay in its implementation.⁶⁴ Republican Senators Roger Wicker and Cindy Hyde-Smith were joined by congressmembers from both sides of the aisle in expressing support for a more

⁵⁷ See, e.g., *id.* at 484–85.

⁵⁸ *Id.* at 483.

⁵⁹ See e.g. Albert C. Lin, *Public Insurance as a Lever for Semi-Managed Climate Retreat*, 58 GA. L. REV. 1535, 1548 (2024).

⁶⁰ *Id.*

⁶¹ *Id.* (explaining the reasons for the NFIP's "sizeable debt").

⁶² *Id.*

⁶³ *Id.* at 1547.

⁶⁴ Press Release, Sen. Roger Wicker, [Wicker, Hyde-Smith Urge FEMA to Delay Flood Insurance Changes that Would Raise Premiums](#) (Sept. 22, 2021).

accurate rating method to prevent insolvency for the NFIP.⁶⁵ They expressed concern that many policyholders would be forced to drop their coverage altogether under the new program.⁶⁶ Additionally, they criticized FEMA's handling of the process and its choice to implement the program at the beginning of hurricane season.⁶⁷

IV. THE POLITICAL AND ECONOMIC CHALLENGES FACING THE NFIP IN TRUMP 2.0

Simply framing the possible future of Risk Rating 2.0, and possibly even the NFIP itself, in early 2025 is no easy task. On the one hand, deficit hawks in Congress are increasingly hostile to the idea of perpetually bailing out an insurance program that does not charge the actuarially fair rates needed to keep it solvent.⁶⁸ Yet on the other hand, apart from the Attorneys Generals of those ten states suing to block Risk Rating 2.0 precisely because they want to maintain low rates, there is evidence that NFIP's rate increases are already playing a role in record numbers of homeowners dropping NFIP flood insurance over affordability concerns.⁶⁹ The contrast between these two data points suggest that, whatever the outcome of *State of Louisiana v. Department of Homeland Security*, a coherent national policy toward flood risks needs to confront both the increasing risks of

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* (“With NOAA predicting the rest of this hurricane season to have above-normal activity, we worry that Risk Rating 2.0 will leave flood providers overburdened by the additional responsibility of learning a new, unfamiliar and untested rating system.”)

⁶⁸ See, e.g., Zachary Warmbrodt, [House Passes Flood Insurance Renewal in Wake of Massive Storms](#), POLITICO (Nov. 14, 2017, 7:38 PM) (“‘A federal program that conceals actual risk through artificially low rates is neither compassionate nor responsible,’ Rep. Dennis Ross (R-Fla.) said.”); Jamie Dupree, [Some Republicans Grumble as House Approves \\$36.5 Billion Hurricane Aid Bill](#), PALM BEACH POST (Oct. 13, 2017, 2:53 AM) (“‘I am disappointed that Congress chose to bail out the National Flood Insurance Program (NFIP) on the backs of the American taxpayers,’ said Rep. Roger Williams (R-TX), one of six Texas Republicans who voted against the hurricane aid package.”).

⁶⁹ [Private Flood Insurance Expands After NFIP Changes](#), BURNS & WILCOX (Oct. 23, 2023) (“By August of last year, hundreds of thousands of homeowners had reportedly dropped NFIP policies.”); Thomas Frank, [Hundreds of Thousands Drop Flood Insurance as Rates Rise](#), E&E NEWS (Aug. 8, 2022, 6:25 AM) (“since October, more than 425,000 people have discontinued the coverage they had through FEMA's National Flood Insurance Program”).

flooding and the capabilities of individuals and communities to remain financially viable and safe as they confront those risks.

This raises an initial, and in some respects, overarching issue: the link between the NFIP and flood resilience. Of all the consequences of extreme weather, the risk of flooding is by far the most common and results in the most property damage and loss of life, both within the United States and worldwide.⁷⁰ In part, that explains why, after the Great Mississippi Flood of 1927, Congress budgeted funds for the federal government’s build-out of dams up and down the Mississippi River, an amount “in fiscal terms [that] was more expensive than anything else the federal government had ever undertaken except World War I.”⁷¹ But it also explains why, as flood losses continued to mount despite these structural projects—because the projects themselves encouraged people to move into the “protected” floodplains⁷²—a federal task force concluded in 1966 that a more integrated approach was required that included restrictions on floodplain development.⁷³ The result was Congress’ enactment of the NFIP itself in 1968 as a way to implement the task force’s recommendations⁷⁴ and in particular its requirement that participating communities restrict further floodplain development if they wanted their residents to qualify for NFIP coverage.⁷⁵

Thus, local governments’ failure to keep up their end of the bargain may be one possible reason for the NFIP’s financial difficulties. This makes it all the more significant that, when the United States government brought suit in Louisiana on just this theory, the Fifth Circuit rejected the attempt, holding that

⁷⁰ See [Understanding Flood Risk](#), NASA (last visited July 30, 2025).

⁷¹ See Christine A. Klein & Sandra B. Zellmer, *Mississippi River Stories: Lessons From a Century of Unnatural Disasters*, 60 SMU L. REV. 1471, 1484 (2007).

⁷² See A. Dan Tarlock, *United States Flood Control Policy: The Incomplete Transition from the Illusion of Total Protection to Risk Management*, 23 DUKE ENV’T L. & POL’Y F. 151, 166 (2012).

⁷³ See JAMES M. WRIGHT, ASS’N OF STATE FLOODPLAIN MANAGERS, *THE NATION’S RESPONSES TO FLOOD DISASTERS: A HISTORICAL ACCOUNT* 29 (Wendy L. Hessler, ed., 2000).

⁷⁴ *Id.* at 30.

⁷⁵ See 42 U.S.C. §§ 4001(a), 4001(c). Congress included in its official findings when it established the NFIP that, “a program of flood insurance can promote the public interest by . . . encouraging sound land use by minimizing exposure of property to flood losses.” *Id.* § 4001(c).

such a cause of action was not explicitly provided in the statute.⁷⁶ And the result of such a holding may explain why one author concluded that rapid land use development in Louisiana was itself responsible for what the author categorized as “land- development-induced flooding.”⁷⁷ A similar problem arises to the extent states fail to enforce the NFIP’s so-called “SI/SD” (substantial improvement/substantial damage) standards, which require those property owners who must significantly rebuild after a flood to do so guided by the local government’s currently-in-place zoning laws.⁷⁸ This can mean significantly increased rebuilding costs, such as those requiring new construction to be “elevated” above base-flood elevation. To the extent any/all of these problems exist, one obvious solution, rather than jettisoning the NFIP altogether, is to arm FEMA and the federal government with the power to enforce the “deal” that local governments undertook when they joined the program in the first place—to restrict new developments in flood zones and to ensure that homes are, in fact, built back better.

There is, of course, more than one way to skin the cat. And, in addition to playing hardball with a local jurisdiction’s promise to restrict development in floodplains, it is also possible to provide inducements for local jurisdictions to go above-and-beyond their current codes and undertake additional measures that reduce flood risks in their territories. And this is precisely what NFIP has done in its CRS program, which provides jurisdiction-wide rate reductions to those NFIP communities that agree to adopt varying types of flood-reduction programs. These can range from fairly small premium reductions (*e.g.*, 5%) for such modest undertakings as promoting general flood awareness to far greater premium

⁷⁶ See *United States v. Par. of St. Bernard*, 756 F.2d 1116, 1119, 1123 (5th Cir. 1985). Although there have been criticisms that FEMA has more enforcement power than this 5th Circuit decision suggests, see, *e.g.*, Joel Scata, [FEMA Turning Blind Eye to NFIP’s Influence on Land Use](#), NRDC (June 7, 2017). There is also evidence that FEMA views this possible constraint as hamstringing efforts to enforce local land-use violations. *Id.* (“FEMA narrowly interprets the concept of land use authority and finds the agency lacks the power to proscribe the type of development which may occur in a floodplain.”).

⁷⁷ See Madison Gaines, Comment, *The Quest for Land Development Leaves Louisiana Under Water—What the Flood? An Analysis on Land Development-Induced Flooding and How Louisiana Can Stay Above Water*, 11 *LSU J. ENERGY L. & RES.* 307, 309 (2023).

⁷⁸ See Dean Adler et al., *Changing the National Flood Insurance Program for a Changing Climate*, 49 *ENV’T L. REP.* 10320, 10324 (2019).

reductions (up to 45%) for those jurisdictions that undertake and finance ambitious (and expensive) programs that markedly reduce flood risks.⁷⁹ Needless to say, as Risk Rating 2.0 increases rates in many jurisdictions, the (political) attraction to local governments of these sorts of ambitious programs will grow.⁸⁰ Or, to put it another way, the NFIP is currently structured to increase resiliency while reducing rates, possibly squaring the circle that has to date been a longtime goal of the program.⁸¹

All that said, the NFIP alone can hardly be the sole answer to physical flood resiliency. It is imperative that state and local governments adopt measures such as land-use restrictions and ever-improving building codes to reduce the damage caused by destructive weather that is already all but locked into our atmosphere.⁸² And it is equally important that federal investments in climate resiliency continue. Such expenditures have been supported by bipartisan majorities in Congress even in some of the most politically polarized periods in recent history,⁸³ and their cost-effectiveness have been repeatedly proven.⁸⁴ That said, two recent proposals attributed to Project 2025 are worth considering. One involves a “disaster deductible,” something first proposed by the Obama Administration, which would require each State to spend a significant amount of its own funds annually on

⁷⁹ See, e.g., FED. EMERGENCY MGMT. AGENCY, COMMUNITY RATING SYSTEM DISCOUNT FREQUENTLY ASKED QUESTIONS (2024).

⁸⁰ See, e.g., Louis Llovio, [Fort Myers Flood Insurance Costs to Drop by 20%](#), BUS. OBSERVER (Jan. 15, 2025, 11:05 AM). Fort Myers, after losing its CRS rating, hired and worked with consultants on “best practice recommendations and launched several capital improvement projects,” and was rewarded with an additional 15% discount in NFIP policy premiums. *Id.*

⁸¹ See, e.g., JESSE GOUREVITCH & NICHOLAS PINTER, WHARTON RISK MGMT. AND DECISION PROCESSES CTR., ISSUE BRIEF: FEMA’S COMMUNITY RATING SERVICE: WORTH THE EFFORT? 8 (2022) (“The results here suggest the CRS pays for itself through reduced flood damages and NFIP claims.”).

⁸² See, e.g., Donald T. Hornstein, *Public Investment in Climate Resiliency: Lessons from the Law and Economics of Natural Disasters*, 49 Ecology L. Q. 137, 162 (2022) (“In 2004, when Hurricane Charley made landfall at the Punta Gorda/Port Charlotte area of Florida . . . insurance-industry researchers found that the new building codes reduced loss frequency among homeowners by 60 percent and the severity of losses of those suffering damage by 42 percent.”); J. David Cummins et al., *Federal Financial Exposure to Natural Catastrophe Risk*, in MEASURING AND MANAGING FEDERAL FINANCIAL RISK 61, 63 (Deborah Lucas ed. 2010) (estimating the net present value of the unfunded liability of the next seventy-five years’ worth of federal extreme weather expenditures to be between \$1.2 trillion and \$7.1 trillion).

⁸³ See Hornstein, *supra* note 82, at 159.

⁸⁴ See GOUREVITCH & PINTER, *supra* note 81, at 8 (alluding to benefit-cost paybacks of 5:1).

disaster preparedness before becoming eligible for federal disaster assistance grants.⁸⁵ Project 2025 also suggests a parallel reform, reducing the federal government's share of financing for smaller disasters to 25% from their current level of 75-90%,⁸⁶ something that might incentivize states to support more ex ante flood resiliency measures, and perhaps to insist more strongly that local governments oppose building in floodplains, because now a greater share of damage would be the financial responsibility of the state.

But perhaps the biggest public-policy reform endorsed by Project 2025 and such free-market-oriented organizations as the CATO Institute, is to shift flood insurance from the NFIP to the private market.⁸⁷ At a very high level of generality, the concept is not an impossible one, as significant levels of private flood insurance are currently offered in over one dozen countries.⁸⁸ And there is nothing preventing private companies right now from seeking to offer private flood insurance in the United States—and indeed there have been more than a handful of such companies that have received approval to do so by state departments of insurance.⁸⁹ But all that said, as of 2017, private carriers were said to account for only 3.5-4.5% of flood insurance policies in the United States.⁹⁰ On the other hand, as of 2023, “of the 22 percent of homeowners report[ing] that they [were] at risk of a flood [a small subset to be sure]... 78 percent purchased flood insurance—35 percent from a private insurance provider and 43 percent through

⁸⁵ See, e.g., Andrew Rumbach, [Disaster Management and Project 2025](#), PLACE & RESILIENCE (Nov. 11, 2024).

⁸⁶ *Id.*

⁸⁷ See, e.g., *id.* (“Perhaps the most significant change recommended [by Project 25] would be to wind down the National Flood Insurance Program and replace it with private insurance options ‘starting with the least risky areas currently identified by the program’”); IKE BRANNON & ARI BLASK, CATO INST., REFORMING THE NATIONAL FLOOD INSURANCE PROGRAM: TOWARD PRIVATE FLOOD INSURANCE 1 (2017).

⁸⁸ See JUSTIN R. PIDOT, GEORGETOWN ENV'T L. & POL'Y INST., COASTAL DISASTER INSURANCE IN THE ERA OF GLOBAL WARMING: THE CASE FOR RELYING ON THE PRIVATE MARKET 13 (2007) (citing SWISS RE, FLOODS AN INSURABLE RISK? A MARKET SURVEY (1998) (reporting that “Argentina, Brazil, Canada, Czech Republic, France (with national reinsurance), Germany (with storm surge excluded), Israel, Italy, Japan, Poland, Portugal, South Africa, Taiwan, and the United Kingdom” all provide flood insurance largely through private insurance companies).

⁸⁹ See, e.g., David W. Clausen, [5 Best Private Flood Insurance Companies](#), COASTAL INS. (2024).

⁹⁰ CAROLYN KOUSKY ET AL., RES. FOR THE FUTURE, [THE EMERGING PRIVATE RESIDENTIAL FLOOD INSURANCE MARKET IN THE UNITED STATES](#) (2018).

the National Flood Insurance Program.”⁹¹ This indicates a slight increase in the attractiveness of the private insurance market, a fact confirmed by an overall increase in private flood placements by 8% between 2022 and 2023.⁹²

What are we to make of this? Certainly one possibility is that, between 2017 and 2023, the pricing of private flood policies became relatively more attractive precisely because of the rate increases of NFIP policies put into place since 2021 by Risk Rating 2.0. And this, in turn, suggests that, of all the public-policy options currently open to the Administration in Trump 2.0, the last thing that should be jettisoned is Risk Rating 2.0. By “right-pricing” flood insurance to actuarially fair levels, Risk Rating 2.0 is making private flood insurance more competitive.

That said, there remains the affordability issue that Congress addressed in 2014. Then, to reprise, Congress confirmed its commitment to increasing NFIP rates albeit at a slower pace, while also requiring the completion of an affordability study to consider legislative options for making flood insurance affordable for those who could not afford it. In 2016, the Government Accountability Office reported to Congress on a variety of ways it could address the issue, including means-tested assistance programs and/or basing assistance on the cost of mitigating a home’s risk of damage.⁹³ Of course, other options are to require a state to share in the costs of any added assistance to its citizens, not only to help reduce the costs to the federal government, but also to incentivize states both to prevent further development in flood plains and to fund flood-risk-reduction projects within their jurisdictions to qualify for CRS flood-insurance discounts, which would then both reduce costs to their taxpayers and to a state’s share of any means-tested assistance program.

At this point, there are risks to being too prescriptive in light of the velocity of change currently swirling around both FEMA and the NFIP at the beginning of

⁹¹ [Facts & Statistics: Flood Insurance](#), INS. INFO. INST. (2025) (citing a Triple-I/Munich Re Consumer Survey).

⁹² [Spotlight on Flood Insurance](#), INS. INFO. INST. (June 5, 2025).

⁹³ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-190, [NATIONAL FLOOD INSURANCE PROGRAM OPTIONS FOR PROVIDING AFFORDABILITY ASSISTANCE](#) (2016).

Trump 2.0. Accordingly, we turn instead to discuss the current state of the litigation challenging Risk Rating 2.0 in Louisiana.

V. LOUISIANA V. DEPARTMENT OF HOMELAND SECURITY

A recent case from the Eastern District of Louisiana has created challenges for Risk Rating 2.0.⁹⁴ Ten states, including Louisiana, as well as an array of local governmental entities, sued the Department of Homeland Security (DHS) and FEMA over the new Risk Rating 2.0 initiative.⁹⁵ In this case, Louisiana, along with the other plaintiffs, filed a motion for preliminary injunction, while DHS and other defendants responded with a motion to dismiss.⁹⁶ The plaintiffs' motion was denied by the court, while the defendant's motion was granted in part and denied in part.⁹⁷

Plaintiffs raised a range of issues, including the claims that the NFIP is: (1) contrary to law in four different ways; (2) arbitrary and capricious for failing to account for important aspects of the problem and considering other inappropriate factors; (3) arbitrary and capricious for failure to consider reliance interests; (4) arbitrary and capricious for departing from prior policy without sufficient justification; (5) arbitrary and capricious because it rests on pretextual bases; (6) in violation of the APA's notice-and-comment requirement; (7) in excess of FEMA's statutory authority; (8) contrary to a constitutional right; and (9) in violation of the National Environmental Policy Act (NEPA).⁹⁸

Plaintiff states assert that they will suffer direct harm because of Risk Rating 2.0, including infringement on the role of the states' mitigation efforts, loss of state tax revenues, decreased property values and resources to mitigate flood risks, and increased costs.⁹⁹

⁹⁴ Louisiana v. Dep't of Homeland Sec., 726 F. Supp. 3d 653 (E.D. La. 2024).

⁹⁵ *Id.*

⁹⁶ *Id.* at 666.

⁹⁷ *Id.* at 664.

⁹⁸ *Id.* at 666.

⁹⁹ *Id.* at 673.

In its ruling, the Eastern District of Louisiana first addressed Article III standing, which DHS had challenged, and determined that the states and policyholders, as well as three parishes, have standing, having plausibly alleged that they have experienced or will experience direct harm as a result of Risk Rating 2.0.¹⁰⁰ The remaining plaintiffs' claims were dismissed.¹⁰¹ The court also dismissed the plaintiffs' NEPA claims for lack of standing, leaving only the first eight claims detailed above.¹⁰² Four of the eight claims have to do with arbitrary and capricious review, leaving the court to decide if FEMA has exceeded its statutory authority by implementing Risk Rating 2.0.¹⁰³

Lastly, the court chose not to impose a preliminary injunction on DHS as it is an "extraordinary and drastic remedy," used only in cases where plaintiffs can show a substantial likelihood of irreparable injury.¹⁰⁴ The court determined that plaintiffs' situation failed to meet these requirements, but the remaining claims from plaintiffs were allowed to proceed.¹⁰⁵ Thus, there are eight remaining claims: four pertaining to allegations that Risk Rating 2.0 is not in accordance with law, and four related to questions of fact requiring arbitrary and capricious review.¹⁰⁶

A. Plaintiffs' "Not in Accordance With Law" and "Major Question Doctrine" Challenges

Apart from the arbitrary and capricious claims, four of the five other claims remain.¹⁰⁷ One asserts that Risk Rating 2.0 violates the major questions doctrine.¹⁰⁸ Count IX of the complaint, alleging a violation of NEPA, was

¹⁰⁰ *Id.* at 686.

¹⁰¹ *Id.*

¹⁰² *Id.* at 695.

¹⁰³ *Id.* at 666.

¹⁰⁴ *Id.* at 688–89.

¹⁰⁵ *Id.* at 695.

¹⁰⁶ *Id.* at 666.

¹⁰⁷ *Id.*

¹⁰⁸ Complaint at 121–39, *Louisiana v. Dep't of Homeland Sec.*, 726 F. Supp. 3d 653 (E.D. La. 2024) (No. 2:23-cv-01839).

dismissed in Judge Papillon's original ruling.¹⁰⁹ The remaining four claims address other aspects of Risk Rating 2.0 that plaintiffs allege are contrary to law.

- i. Plaintiffs claim Risk Rating 2.0 exceeds FEMA's statutory authority.

The plaintiffs cite 5 U.S.C. § 706(2)(A) and (C), which provide that courts must reverse agency actions which are not in accordance with law or exceed statutory authority.¹¹⁰ The statute referenced is the NFIP which permits FEMA to make flood insurance available at reasonable rates "insofar as practicable."¹¹¹ Plaintiffs allege that Risk Rating 2.0 does not meet this standard as the new rates make "flood insurance functionally unavailable in many communities."¹¹²

Although it is questionable whether Risk Rating 2.0 even violates the requirement for reasonable prices under the 1968 statute, plaintiffs fail to mention the 2012 Biggert-Waters Act and the 2014 Affordability Act. In both 2012 and 2014, Congress demanded that flood insurance rates go up to adapt to changing conditions.¹¹³ As previously discussed, BW-12 sought to reassess rates to make them actuarially fair.¹¹⁴ The 2014 Affordability Act sought to keep rates somewhat more manageable for homeowners by instituting price caps.¹¹⁵ Risk Rating 2.0 does not contradict either of these statutes, and plaintiffs' claim simply cites FEMA's concession that rates will rise, resting on the further assumption that the increase is both unfair and excessive.¹¹⁶

¹⁰⁹ *Id.* at 140–41.

¹¹⁰ *Id.* at 122.

¹¹¹ *Id.* (quoting 42 U.S.C. §§ 4011(a), 4015(b)(2)).

¹¹² *Id.*

¹¹³ Biggert-Waters Flood Insurance Reform Act of 2012, *supra* note 18; Homeowner Flood Insurance Affordability Act of 2014, *supra* note 24.

¹¹⁴ 42 U.S.C. §§ 4001–131.

¹¹⁵ Homeowner Flood Insurance Affordability Act of 2014, *supra* note 24.

¹¹⁶ Complaint, *supra* note 108, at 122.

ii. Alleged Violation of the Administrative Procedure Act
Notice-and-Comment Requirements

Plaintiffs allege that FEMA violated the notice-and-comment rulemaking provision outlined in 5 U.S.C. § 553(c).¹¹⁷ They assert that per the Administrative Procedure Act (APA), the agency can make a more informed decision on rulemaking by allowing interested persons to participate through sharing written data or views.¹¹⁸ The plaintiffs concede that there are exceptions to this requirement, such as emergency situations, delaying a result of serious harm, or rules related to internal practice or procedure.¹¹⁹ Defendants deny this allegation in their answer but do not respond with any substantive arguments.¹²⁰ However, it is likely that the agency will ultimately argue one of these exceptions or argue that notice was properly provided. Because of the delay in implementation of the program and the information that was provided throughout, it is likely the court will find notice was given.

iii. Plaintiffs claim that Risk Rating 2.0 contradicts a
constitutional right

Plaintiffs' third legal claim is based on the Spending Clause of the Constitution, which has been interpreted to mean that when the federal government provides conditional funding, the recipient must "voluntarily and knowingly" accept the terms or give the recipient no choice but to accept.¹²¹ Plaintiffs argue states participating in the NFIP do not voluntarily and knowingly participate in the program, but are instead required to in order to receive federal funding.¹²² Plaintiffs argue that the only way to return to voluntary participation would be to go back to the prior insurance rates.¹²³

¹¹⁷ *Id.* at 133–34.

¹¹⁸ *Id.* at 134.

¹¹⁹ *Id.*

¹²⁰ Defendants' Answer to Complaint at 83, *Louisiana v. Dep't of Homeland Sec.*, 726 F. Supp. 3d 653 (E.D. La. 2024) (No. 2:23-cv-01839).

¹²¹ Complaint, *supra* note 108, at 138.

¹²² *Id.*

¹²³ *Id.* at 139.

The NFIP and CRS are voluntary programs, where at no point are the states required to participate.¹²⁴ The states are arguing in a way that they were promised affordable insurance, but BW-12 and the Affordability Act authorized Congress to set new rates. Whether the states view these rates to be fair is a separate question. Although it may be burdensome to be excluded from receiving federal funding, all states have the option to comply with the NFIP requirements and receive that funding at any time. In no way is participation forced, nor is flood insurance a constitutional right of which plaintiffs are being deprived.

iv. Count VII: The Major Questions Doctrine

Although the major questions doctrine had previously been used as a tool to interpret the scope of the *Chevron* doctrine in cases such as *FDA v. Brown and Williamson Tobacco Corp.*,¹²⁵ it was first recognized as an independent doctrine in *West Virginia v. EPA*.¹²⁶ This case first arose in 2015, when the U.S. Environmental Protection Agency (EPA) proposed the Clean Power Plan to reduce emissions at coal plants, in part by shifting to electrical generation by alternative sources of energy.¹²⁷ The agency implemented this plan under Section 111 of the Clean Air Act, which authorized regulation of existing sources of pollution.¹²⁸ But when the Clean Power Plan finally reached the Supreme Court, the Court determined that Section 111 was too slender a reed on which to base EPA authority to dramatically regulate a fundamental sector of the economy—a public-policy determination which the Court termed a “major question” requiring explicit legislative approval, a jurisdictional approach that the Court had not used quite this way before.¹²⁹ The Court reasoned that Congress likely never intended

¹²⁴ Defendants’ Answer to Complaint, *supra* note 120, at 86–87.

¹²⁵ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

¹²⁶ *West Virginia v. EPA*, 597 U.S. 697 (2022).

¹²⁷ *Id.*

¹²⁸ *Id.* Under Section 111, EPA determines the “best system of emission reduction” for existing sources. For coal and natural gas plants, this meant requiring undertaking practices to burn coal in a cleaner way, as well as a “generation shift,” which shifted production of electricity to lower-emitting producers.

¹²⁹ *Id.* at 700. The Supreme Court stayed the Clean Power Plan in 2016 with the change in presidential administration, and in 2019 the EPA determined the original Plan exceeded its power under Section 111 of the Clean Air Act. *Id.* at 698.

to delegate such a politically and economically significant decision to a single agency in so obscure a manner.¹³⁰

The interpretation of the new and sometimes unclear major questions doctrine can be vastly different by the lower courts. The Fifth Circuit has generally determined the major questions doctrine to arise in cases “concern[ing] ‘questions of deep economic and political significance.’”¹³¹ This phrase was originally used in *Texas v. United States*, which dealt with a challenge to the Deferred Action for Childhood Arrivals (DACA) program in Texas, which was determined to be a major question.¹³² The opinion dismissed how significantly more people would be eligible for a similar program, the Deferred Action for Parents of Americans (DAPA), and instead focused on the potentially severe economic effects of the rescission of DACA.¹³³

The Fifth Circuit also applied the major questions doctrine in *Louisiana v. Biden*, a case that challenged President Biden’s Contractor Vaccine Mandate, which required federal contractors to be vaccinated for COVID-19.¹³⁴ The order was implemented under the Property and Administrative Services Act, and Judge Kurt D. Engelhardt determined that the vaccine mandate fell under the major questions doctrine.¹³⁵ Judge Engelhardt used the same economic and political significance test to justify his ruling against Biden, but relied mostly on regulatory history in making his decision.¹³⁶ The judge concluded that Biden’s action “constituted ‘an enormous and transformative expression in’ the President’s power under the Act”.¹³⁷ The Fifth Circuit was the only circuit facing the vaccine mandate issue that gave a direct reason for applying the doctrine: “that the President should be treated the same as an agency” because Article II of the

¹³⁰ *Id.* at 749. This eliminated the generation shifting component of the plan but kept the first part, which sought to improve cleaner burning of coal.

¹³¹ Natasha Brunstein, *Major Questions in Lower Courts*, 75 ADMIN. L. REV. 661, 674 (2023) (discussing the similarities of the three Fifth Circuit opinions regarding the major questions doctrine as of 2023).

¹³² *Id.* (citing *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022)).

¹³³ *Id.* at 674–75.

¹³⁴ *Id.* at 675 (citing *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022)).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

Constitution confers upon the President the responsibility for the actions of the Executive Branch.¹³⁸

In August 2023, the Fifth Circuit applied the major questions doctrine in *Texas v. Nuclear Regulatory Commission*, which involved prohibiting licensing of nuclear storage facilities by the Nuclear Regulatory Commission.¹³⁹ Judge James C. Ho focused mostly on political significance rather than economic, arguing that nuclear waste was a matter of public concern and has been long contested.¹⁴⁰ The Fifth Circuit held an exception to a jurisdictional requirement in the Hobbs Act, which requires the plaintiff to be a party in the underlying agency proceeding, pushing the boundaries of earlier decisions.¹⁴¹ The Fifth Circuit made an exception to this for Texas under dicta from prior cases, which created a circuit split.¹⁴² This decision is now being appealed to the Supreme Court,¹⁴³ which will give the Court the chance to set a clearer precedent for interpretation of the major questions doctrine.¹⁴⁴

The economic and political significance test has been used in at least three District Court cases within the Fifth Circuit.¹⁴⁵ In *United States v. Empire Bulkers Ltd.*, the doctrine was defined as applying to “issues of major national significance.”¹⁴⁶ This case dealt with a ship owned by Empire Bulkers, which failed to meet recordkeeping standards implemented to reduce pollution.¹⁴⁷ The

¹³⁸ Ling Ritter, Note, *Elephants in Mouseholes: The Major Questions Doctrine in the Lower Courts*, 76 STAN. L. REV. 1381, 1404 (2024) (explaining the variation in reasoning of the lower courts to applying the major questions doctrine to presidential actions).

¹³⁹ Brunstein, *supra* note 131, at 675.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ This article was written before the U.S. Supreme Court decided this case. For more information, see *NRC v. Texas*, No. 23-1300, slip op. (U.S. June 18, 2025).

¹⁴⁴ Jack Jones, [The Fifth Circuit's Nuclear Decision Presents an Opportunity to Resolve Major Confusion About Major Questions](#), YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 2, 2024). The decision will likely offer some “much-needed clarity on the boundaries of the doctrine.”

¹⁴⁵ Brunstein, *supra* note 131, at 675–76.

¹⁴⁶ *Id.* at 676 (citing *United States v. Empire Bulkers Ltd.*, No. CR 21-126, 2022 WL 3646069 (E.D. La. Aug. 24, 2022)).

¹⁴⁷ *United States v. Empire Bulkers Ltd.*, No. CR 21-126, 2022 WL 3646069 1, 2 (E.D. La. Aug. 24, 2022).

court determined that this enforcement shift was not significant enough to implicate the major questions doctrine.¹⁴⁸ Some courts have determined relevant factors in addition to this test, such as “whether the agency action would ‘bring about an enormous and transformative expansion in its regulatory authority,’” a test used by Judge Terry A. Doughty in *Louisiana v. Becerra*.¹⁴⁹ The case dealt with a vaccine mandate by the Department of Health and Human Services that was challenged by 24 states. The court found that the mandate triggered the major questions doctrine, though the decision was later vacated and remanded.¹⁵⁰

A common theme among use of the major question doctrine, at least in the Fifth Circuit district courts, seems to be reliance on Justice Gorsuch’s concurrence in *West Virginia v. EPA*.¹⁵¹ It is worth noting that all three district court opinions in the Fifth Circuit relying on this concurrence were written by Republican appointees. Justice Gorsuch’s opinion provides a three-part test to determine if an agency action triggers the doctrine: “the agency ‘(1) ‘claims the power to resolve a matter of great ‘political significance,’ (2) ‘seeks to regulate ‘a significant portion of the American economy,’ or (3) ‘seeks to intrud[e] into an area that is the particular domain of state law.’”¹⁵² The test then uses four factors to determine if there is clear congressional authorization.¹⁵³ The three Republican appointees in the Fifth Circuit that elected to use this test all combined the first two factors, building upon the economic and political significance test, an interpretation which differs from that of the majority in *West Virginia v. EPA*.¹⁵⁴

¹⁴⁸ *Id.*

¹⁴⁹ Brunstein, *supra* note 131, at 676 (citing *Louisiana v. Becerra*, 629 F. Supp. 3d 477 (W.D. La. 2022)).

¹⁵⁰ Brunstein, *supra* note 131, at 676 (citing *Louisiana v. Becerra*, 629 F. Supp. 3d 477 (W.D. La. 2022)). This decision was later vacated and remanded after the Supreme Court decided *Biden v. Missouri*, but gives us insight into how the Fifth Circuit has chosen to interpret the doctrine.

¹⁵¹ Natasha Brunstein, *The Major Questions Doctrine Applied: Evidence From the Lower Courts*, 48-SUM ADMIN. & REG. L. NEWS 13, 14. (quoting *West Virginia v. EPA*, 597 U.S. 697 (2022)).

¹⁵² *Id.*

¹⁵³ *Id.* (consolidating the *West Virginia v. EPA* test into a numbered list as follows: (1) the legislative provisions on which it relies, (2) the focus of the statute in relation to the problem, (3) past interpretations by the agency, and (4) any mismatch with agency expertise).

¹⁵⁴ *Id.*

Some judges tweaked the Gorsuch factors or added additional factors to their test. Justice Gorsuch's opinion characterized the major questions doctrine as a "necessary safeguard for federalism" in addition to the protections already afforded by the Tenth Amendment.¹⁵⁵ Compared to the majority decision, Gorsuch seems to characterize this as more of a constitutional issue, claiming that the case involved "basic questions about self-government, equality, fair notice, federalism, and the separation of powers."¹⁵⁶ He opined that the major questions doctrine serves to protect unintentional or unexpected intrusions on these interests.¹⁵⁷ The result reached by the court in the appeal of *Texas v. Nuclear Regulatory Commission*, discussed further below, will be telling as to which justices follow the Roberts majority and which follow Gorsuch's concurrence.

Similar to other circuits, the economic and political significance test seems entrenched in Fifth Circuit litigation; however, the Fifth Circuit still differs drastically in how broadly it is willing to apply the doctrine, such as the "enormous and transformative expression" test found in *Louisiana v. Biden*.¹⁵⁸ Given the continued application of the economic and political significance test, it seems likely that the court will at least rest on that piece as a framework for the current *Louisiana v. Department of Homeland Security* litigation. Because the plaintiffs have already asserted the economic impact of the program as a primary issue, it is likely economics will play a major role if the court determines this to be a major question.

The Supreme Court's decision in the appeal of *Texas v. Nuclear Regulatory Commission* in March could also have an impact on the present litigation. It will be an opportunity for the Court to clarify the meaning of the major questions doctrine under *West Virginia v. EPA*, and may provide some guidance as to whether the Fifth Circuit should continue to rely on their current economic and political significance test or turn to the Gorsuch concurrence.

¹⁵⁵ Ritter, *supra* note 138, at 1412.

¹⁵⁶ *West Virginia v. EPA*, 597 U.S. 697, 742 (2022).

¹⁵⁷ Amy Howe, [Supreme Court Curtails EPA's Authority to Fight Climate Change](#), SCOTUSBLOG (June 30, 2022, 2:48 PM), .

¹⁵⁸ *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022).

The Plaintiffs in *Louisiana v. Department of Homeland Security* suggest that the court should be skeptical of FEMA's statutory authority and must point to "clear congressional authorization" to regulate in [such a] manner."¹⁵⁹ They touch on the economic and political significance test, emphasizing the alleged ambiguity of FEMA's statutory authority to implement Risk Rating 2.0 and suggesting that the power prescribed to FEMA is modest, but not this broad.¹⁶⁰ Citing to *West Virginia v. EPA* among other associated cases, plaintiffs allege political and economic significance because of alleged threats to the population in coastal communities, as well as the economic industries they contain.¹⁶¹ Defendants deny the assertion that they lack authority to implement the program.¹⁶²

Judge Darrell James Papillon is a Biden appointee. Although political leanings and appointments are not always an indicator of how a doctrine will be applied, it does seem Republican appointees are more often relying on the major questions doctrine in this Circuit, so we could see Judge Papillon go a different direction.¹⁶³ The Fifth Circuit's general willingness to broadly apply the major questions doctrine to presidents and the executive branch as a whole may be an indicator that it will take a broad reading here, but it is more likely that as a Biden appointee, if Judge Papillon chooses to adopt a major questions approach, he will focus more on the economic and political significance test, as that will likely be sufficient here and stays consistent with most lower court decisions. Due to the broad range of application of this doctrine in the Fifth Circuit, it would not be at all surprising if the district court decided to apply it here, as well as if the case goes up to the Fifth Circuit Court of Appeals. On the other hand, the relatively recent introduction of this doctrine and other issues may persuade the court to lean more on questions of fact if they choose to strike the program down.

Although the Fifth Circuit may be the most easily persuaded to strike down Risk Rating 2.0 in *Louisiana v. Department of Homeland Security*, the plaintiffs

¹⁵⁹ Complaint, *supra* note 108, at 136. (quoting *West Virginia v. EPA*, 597 U.S. at 700).

¹⁶⁰ *Id.* at 135–37.

¹⁶¹ *Id.* at 136.

¹⁶² Defendants' Answer to Complaint, *supra* note 120, at 85.

¹⁶³ See *e.g.*, Brunstein, *supra* note 131, at 677.

face an uphill battle on questions of law. As discussed above, there is a strong reason to consider the merits of a major questions analysis in the Fifth Circuit, especially due to its generally more muscular interpretation of the doctrine. However, there are strong arguments for FEMA's authority to adjust rates as they see fit, even if on a broad scale, such as they did with BW-12. Much of the impact of Risk Rating 2.0 is yet to be seen due to the relatively new development of the program, and the plaintiffs have a heavy burden to prove this decision is economically and politically significant enough to outweigh FEMA's interest in creating actuarially fair rates, especially when they are still regulated by the Affordability Act. The court was right not to sustain defendants' motion to dismiss this case, but it will still be difficult for plaintiffs to prevail.

B. Plaintiffs' "Arbitrary and Capricious" Claims

The plaintiffs allege four separate manners by which the defendants, the Department of Homeland Security, and others, violated the arbitrary and capricious doctrine: (1) "failing to account for important aspects of the problem and considering other inappropriate factors;" (2) "failure to consider reliance interests;" (3) "departing from prior policy without sufficient justification;" and (4) "rests on pretextual bases."¹⁶⁴ The questions presented for plaintiffs and defendants alike in this case are: how has the Fifth Circuit developed the arbitrary and capricious doctrine, and how will that doctrine interplay with the plaintiffs' claims? In this section, we will endeavor to elucidate the Fifth Circuit's unique brand of arbitrary and capricious review, if it can in fact be called unique at all, and analyze how each of the above alleged violations may be analyzed through that lens.

¹⁶⁴ Louisiana v. Dept. of Homeland Sec., No. 2:23-cv-01839 – Mar. 28, 2024 Order (Document 100) at 4 (E.D. La. 2024) (granting Defendants' motions to dismiss in part, dismissing Defendants' motions to dismiss in part, dismissing most Plaintiff parishes' claims and all Plaintiff municipalities without prejudice, dismissing Plaintiffs' NEPA claim without prejudice, and denying Plaintiffs' motion for preliminary injunction).

i. The Fifth Circuit's Approach to Arbitrary and Capricious Review

The arbitrary and capricious standard, codified in 5 U.S.C. § 706(2)(A), requires that courts set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁶⁵ Traditionally, this has been understood to mean that an agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”¹⁶⁶

However, the Fifth Circuit has at times applied this standard with a more exacting level of scrutiny, particularly in cases where regulatory action is perceived to be overreaching or where states challenge federal authority.¹⁶⁷ The Supreme Court has applied a more deferential approach to arbitrary and capricious review, emphasizing that courts should not second-guess agency policymaking so long as the agency provides a rational explanation supported by the record.¹⁶⁸ Unsurprisingly, many of the cases considered below as evidence of the Fifth Circuit's particular flavor of arbitrary and capricious review are cited throughout the plaintiffs' complaint.¹⁶⁹

In *Texas v. United States*, the Fifth Circuit struck down the Biden administration's immigration enforcement priorities in part because DHS failed to

¹⁶⁵ 5 U.S.C. § 706(2)(A).

¹⁶⁶ *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

¹⁶⁷ See discussion *supra* pp. 25–28.

¹⁶⁸ This is evident in *DOC v. New York*, 588 U.S. 752 (2019), where the Court upheld the general principle of deference but found the agency's justification for adding a citizenship question to the census to be pretextual. The Supreme Court's more deferential standard of review appears to be at odds with the Fifth Circuit's application of the doctrine. This will be an important dynamic to consider moving forward, especially as the Supreme Court considers upcoming challenges to President Trump's decisions, e.g., his decision to rescind the EPA's “endangerment finding.” Matthew Daly, [EPA Head Urges Trump to Reconsider Scientific Finding that Underpins Climate Action, AP Sources Say](#), ASSOCIATED PRESS (Feb. 26, 2025, 4:45 PM). The endangerment finding was upheld a few years ago by a D.C. Circuit panel, and its rescission will likely be staunchly opposed by environmental organizations nationwide. [D.C. Circuit Dismisses Attacks on EPA's Finding that Greenhouse Gases Endanger People's Health and Well-Being](#), ENV'T DEF. FUND (May 25, 2023).

¹⁶⁹ Complaint, *supra* note 108 at 125–133.

consider the financial burdens the policy shift would impose on states.¹⁷⁰ Under *State Farm* arbitrary and capricious review, an agency must consider “important aspect[s] of the problem” before issuing a rule or policy.¹⁷¹ The Fifth Circuit has repeatedly held that state financial burdens constitute such an important aspect. In *Texas v. United States*, the court found that DHS had ignored the economic costs imposed on Texas by the new enforcement guidance, particularly in areas such as public healthcare, education, and law enforcement expenses related to undocumented immigrants.¹⁷² The court emphasized that states bear substantial costs when the federal government alters immigration policy, and failing to assess these costs was enough of an injury to give the Plaintiffs standing.¹⁷³ This reasoning aligns with other Fifth Circuit decisions where courts have invalidated agency actions for disregarding state financial impacts, such as *Louisiana v. Biden*, which struck down an executive order pausing oil and gas leasing due to its economic consequences for energy-producing states.¹⁷⁴

In *Texas v. Biden*, the Fifth Circuit Court of Appeals held that DHS failed to provide a reasoned justification for terminating the Migrant Protection Protocols (MPP), commonly known as the “Remain in Mexico” policy.¹⁷⁵ The Fifth Circuit emphasized that DHS’s June 1, 2021, memorandum terminating the MPP did not consider several critical factors, including the states’ reliance interests, the benefits provided by the MPP, potential alternatives to termination, and the implications of Section 1225 of the Immigration and Nationality Act (INA).¹⁷⁶ Furthermore, the court criticized DHS for not adequately addressing the benefits that the MPP had provided in managing border security and immigration

¹⁷⁰ *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022). The reasoning in this case closely mirrors an argument advanced by the plaintiffs in the present case. See below for a more thorough examination of how the Fifth Circuit may apply that same logic to Risk Rating 2.0.

¹⁷¹ *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

¹⁷² *Texas v. United States*, 50 F.4th at 517-19.

¹⁷³ *Id.* at 518.

¹⁷⁴ *State of Louisiana v. Biden*, 45 F.4th 841 (5th Cir. 2022).

¹⁷⁵ *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021). This case was later reversed and remanded by the Supreme Court on the grounds that the states lacked legal standing to bring their challenge. See *Biden v. Texas*, 597 U.S. 785 (2022).

¹⁷⁶ *Texas v. Biden*, 20 F.4th at 989. Specifically, the court highlighted that DHS failed to account for the financial and administrative burdens that states like Texas and Missouri would face due to increased numbers of noncitizens released into their territories. *Id.* at 970.

processing. By overlooking these positive aspects and not exploring viable alternatives to a complete termination of the program, DHS's decision-making process was deemed deficient.¹⁷⁷

All that to say, the Fifth Circuit appears more than willing to rigorously review factual assertions and historical treatment of statutory language by agencies.¹⁷⁸ By emphasizing statutory constraints, the Fifth Circuit effectively curtails agencies' ability to interpret statutes dynamically. It is clear that the Fifth Circuit is laboring under fairly distinct notions of the arbitrary and capricious doctrine. What remains to be discussed is how each of the below allegations by Louisiana and other plaintiffs interact with these recent precedents.

ii. Failure to Account for Important Aspects of the Problem and Consideration of Inappropriate Factors

The first allegation—that the agency failed to consider important aspects of the problem while considering inappropriate factors—aligns with one of the central inquiries under arbitrary and capricious review.¹⁷⁹ Under *State Farm*, agency action is unlawful if the agency “entirely failed to consider an important aspect of the problem.”¹⁸⁰

The Fifth Circuit has often applied this standard stringently, particularly where state plaintiffs argue that the federal government has disregarded economic impacts or state regulatory interests.¹⁸¹ For example, in *Texas v. United States*, the court faulted the agency for failing to adequately assess how its policy would impact state expenditures.¹⁸² In the case of Risk Rating 2.0, Louisiana and the

¹⁷⁷ *Id.* at 1004. Furthermore, the court criticized DHS for not adequately addressing the benefits that MPP had provided in managing border security and immigration processing. By overlooking these positive aspects and not exploring viable alternatives to a complete termination of the program, DHS's decision-making process was deemed deficient.

¹⁷⁸ *See generally id.*

¹⁷⁹ *Michigan v. EPA*, 576 U.S. 743, 750, 752 (2015).

¹⁸⁰ *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

¹⁸¹ *See e.g.*, *Louisiana v. Biden*, 45 F.4th 841 (5th Cir. 2022); *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021); *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130 (5th Cir. 2021); and accompanying discussion on pages 25–27.

¹⁸² *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022).

other plaintiffs argue that DHS and FEMA failed to fully account for the economic consequences on homeowners and state insurance markets.¹⁸³ Specifically, the Complaint claims that DHS and FEMA failed to account for the mitigating effects of levees on flood damages. Given the Fifth Circuit’s past willingness to strike down agency actions for failure to consider state interests, this argument may be particularly persuasive.¹⁸⁴ The defendants, for their part, deny all the allegations under this section.

iii. Failure to Consider Reliance Interests

The second allegation—the agency’s failure to consider reliance interests—is a particularly potent challenge under recent precedent.¹⁸⁵ In *Department of Homeland Security v. Regents of the University of California*, the Supreme Court reinforced that when an agency’s action upends settled expectations, it must consider reliance interests.¹⁸⁶ The Fifth Circuit has embraced this principle, often holding agencies to a high standard when policies disrupt regulated entities or state interests.¹⁸⁷ For example, in *Wages and White Lion Investments*, the Fifth Circuit invalidated an FDA decision in part because it failed to adequately account for the reliance interests of regulated entities.¹⁸⁸

In the context of Risk Rating 2.0, Louisiana and other plaintiffs argue that FEMA failed to account for the expectations of homeowners who structured financial decisions around prior flood insurance pricing models.¹⁸⁹ Given the Fifth Circuit’s emphasis on reliance interests, this argument may receive significant attention and could form a key basis for invalidating Risk Rating 2.0.¹⁹⁰

¹⁸³ Complaint, *supra* note 108 at 125–128.

¹⁸⁴ See *e.g.*, *Louisiana v. Biden*, 45 F.4th 841 (5th Cir. 2022); *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021); *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130 (5th Cir. 2021); and accompanying discussion on pages 25–27.

¹⁸⁵ Complaint, *supra* note 108 at 128–130.

¹⁸⁶ *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1 (2020).

¹⁸⁷ *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130 (2021).

¹⁸⁸ *Id.* at 1139.

¹⁸⁹ Complaint, *supra* note 108 at 129.

¹⁹⁰ See *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021); *supra* note 121; and accompanying discussion.

iv. Departure from Prior Policy Without Sufficient Justification

The third allegation—that the agency unlawfully departed from prior policy without sufficient justification¹⁹¹—has frequently been a point of contention in the Fifth Circuit.¹⁹² In particular, the Fifth Circuit has taken a strong stance against abrupt policy changes that lack detailed explanation, especially when prior policies were long standing and well established.¹⁹³

In *Biden v. Texas*, the Fifth Circuit initially ruled that the Biden administration’s termination of the Migrant Protection Protocols was unlawful due to a failure to justify the policy shift adequately.¹⁹⁴

In the case of Risk Rating 2.0, the plaintiffs argue that FEMA’s new methodology represents a radical departure from the prior insurance rating system without sufficient explanation.¹⁹⁵ Given the Fifth Circuit’s track record, this claim may have substantial traction if the court finds FEMA’s justifications lacking.¹⁹⁶

v. Pretextual Basis for the Rule

The final allegation—that the rule rests on a pretextual basis—presents a more challenging but still significant claim.¹⁹⁷ In *Department of Commerce v. New York*, the Supreme Court held that agency action is unlawful if it is based on

¹⁹¹ Complaint, *supra* note 108 at 130–131.

¹⁹² See e.g., *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022); *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021); *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130 (5th Cir. 2021); and accompanying discussion on pages 25–27.

¹⁹³ *Rest. L. Ctr. v. United States Dep’t Lab.*, 120 F.4th 163, 174 (5th Cir. 2024).

¹⁹⁴ *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021).

¹⁹⁵ Complaint at 125–133, *Louisiana v. Dep’t of Homeland Sec.*, No. 2:23-CV-01839 (5th Cir. June 1, 2023).

¹⁹⁶ See Shane Pennington, [Fifth Circuit Review—Reviewed: The Agency Losing Streak Under Loper Bright Continues](#), YALE J. ON REGUL.: NOTICE & COMMENT (Sept. 9, 2024). Here, the author considers a recent Fifth Circuit case decided on the basis of arbitrary and capricious review. The author points out the Court’s attention to the fact that longstanding agency policies have some persuasive capacities, but fully lacks the power to control.

¹⁹⁷ Complaint, *supra* note 108 at 125–133.

pretext.¹⁹⁸ While courts are generally hesitant to delve into agency motives, the Fifth Circuit has shown some willingness to entertain pretext arguments, particularly where there is evidence that an agency’s stated rationale does not align with the administrative record.¹⁹⁹ For example, in *Louisiana v. Biden*, the court scrutinized an executive order on oil leasing, suggesting that the agency’s stated reasoning may have been pretextual.²⁰⁰ Similarly, in *Texas v. Biden*, the Fifth Circuit examined whether DHS’s stated rationale for its immigration policy was genuine.²⁰¹

In the Risk Rating 2.0 litigation, plaintiffs argue that FEMA’s justification for the new rating system—ostensibly based on actuarial soundness—masks other motivations, such as political pressure or an effort to reduce federal expenditures.²⁰² If the Fifth Circuit finds inconsistencies in FEMA’s rationale, it may be inclined to view the policy as pretextual, thereby strengthening the plaintiffs’ case.²⁰³

Overall, the Fifth Circuit’s approach to arbitrary and capricious review has increasingly emphasized rigorous scrutiny of agency action, particularly where state plaintiffs argue that the federal government has ignored economic impacts, reliance interests, or prior policy justifications.²⁰⁴ In *Louisiana v. Department of Homeland Security*, the plaintiffs’ allegations align closely with previous cases where the Fifth Circuit has struck down agency rules. While the ultimate outcome

¹⁹⁸ Dep’t of Com. v. New York, 588 U.S. 752, 785 (2019).

¹⁹⁹ *Texas v. Biden*, 20 F.4th 928, 963 (5th Cir. 2021).

²⁰⁰ *State of Louisiana v. Biden*, 45 F.4th 841 (5th Cir. 2022).

²⁰¹ *Texas v. Biden*, 20 F.4th 928, 993 (5th Cir. 2021).

²⁰² Complaint at 12–5133, *Louisiana v. Dep’t of Homeland Sec.*, No. 2:23-CV-01839 (5th Cir. June 1, 2023).

²⁰³ *Louisiana v. Biden*, 45 F.4th 841 (5th Cir. 2022).

²⁰⁴ In *Restaurant Law Center v. United States Department of Labor*, 120 F.4th 163 (5th Cir. 2024), the Fifth Circuit opted to outright dismiss the Department of Labor’s (DOL) interpretation of the Fair Labor Standards Act, reasoning that Congress could not “have intended the tip credit to turn on such a fine distinction.” *Id.* at 176. Rather than defer to the DOL’s expertise, the Court engaged in an analysis of whether Congress had intended to delegate any “line-drawing” or policy decisions to the Department, and secondly whether the Department had drawn a reasonable line. *Id.* at 166. The Fifth Circuit opted to consider this as an arbitrary and capricious judgement, but it could better be framed as a ‘not in accordance with law’ issue. *Id.*

remains uncertain, the circuit's recent jurisprudence suggests that these claims will receive a thorough and potentially critical review.

VI. CONCLUSION

Both the NFIP and Risk Rating 2.0 face legal and political challenges to a greater extent in 2025 than ever before in recent years. Generally speaking though, whatever its temporary fate is in the Fifth Circuit, Risk Rating 2.0 should ultimately prevail when all judicial avenues are exhausted. Moreover, Risk Rating 2.0 is consistent with President Trump's longstanding commitment to actuarially fair rates and, to that extent, increasingly may allow room in the market for private flood insurance to compete—a priority for some free-market-oriented reformers. Of course, the political future of FEMA and even the NFIP may be in flux. Most likely, however, the NFIP will be seen as too important a program to eliminate quickly given its importance to policyholders and local real estate markets. Far less clear, however, given congressional support for federal budget reductions, is the possibility of creating a much-needed subsidy program for those low-income and moderate-income households for which rising flood insurance rates are especially salient. In the end, it is not an overstatement to conclude that the United States is at an inflection point in its federal approaches to flood risks—risks that are only increasing.