IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

MISSISSIPPI INSURANCE DEPARTMENT,
by and through MICHAEL J. CHANEY, COMMISSIONER
OF INSURANCE FOR THE STATE OF MISSISSIPPI **PLAINTIFF,**

VS. **CASE NO. 1:13-cv-379-LG-JMR**

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; RAND BEERS,
in his official capacity as the Secretary of the
United States Department of Homeland Security;
UNITED STATES FEDERAL EMERGENCY
MANAGEMENT AGENCY; W. CRAIG FUGATE,
in his official capacity as the Administrator of the
United States Federal Emergency Management Agency **DEFENDANTS.**

AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFF

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INTEREST OF THE AMICI CURIAE

The National Flood Insurance Program ("NFIP"), operated by the Federal Emergency Management Agency ("FEMA" or "the Agency"), insures approximately 5.6 million properties nationwide. Florida accounts for the largest share of NFIP policies, with over 2 million properties insured through the program. If FEMA acts without a full and proper review of the impact to policyholders and the affordability of flood insurance policies, it jeopardizes the stated purpose of the program – namely, to make "flood insurance coverage available on reasonable terms and conditions to persons who have need for such protection." Florida's citizens are particularly vulnerable to the harsh effects of FEMA's arbitrary implementation of Biggert-Waters Flood Insurance Reform and Modernization Act of 2012 ("BW-12" or "the Act"), in light of the large number of Florida properties insured by the NFIP. Already, the premium quotes received by Florida policyholders are so high that many homes have become unaffordable, leaving homeowners to choose between foreclosure and sale to escape the crushing financial burden imposed by the NFIP rate increases. In many instances, however, sale is not a viable option because the new exorbitant premiums render the properties unaffordable to potential buyers. This cycle has already begun to have a deleterious effect on the real estate markets and economy of the State of Florida.

Whether Alabama homeowners can afford to purchase their flood coverage, the increased flood premiums will greatly reduce the marketability of homes to future buyers, and will reduce real estate market values. This, in turn, will prevent homeowners from selling their homes, or using their home equity for retirement or medical needs. Many of the homes will simply be abandoned, causing homeowners to lose their equity entirely, creating health and safety issues in

communities, and reducing property tax revenues. The effects on the Gulf Coast economy from this predictable real estate market collapse will be far-reaching.

BACKGROUND

Currently, nearly 22,000 communities across the United States and its territories participate in the NFIP, with 5.6 million NFIP policies providing over $1.2 trillion in coverage.[1] As of October 1, 2013, many flood insurance policyholders and others seeking to purchase properties that require a flood insurance policy are required to pay exorbitant premiums for their coverage. The spike in premiums results from FEMA's flawed implementation of the NFIP, which has become the only provider of primary flood insurance in the United States. Buyers and owners of properties within a federally-designated flood zone must purchase the costly primary flood insurance policies, or risk losing access to necessary financial resources. If a prospective buyer declines the policy, federally-insured financial institutions cannot make loans to purchase such property. Likewise, if a property owner declines NFIP insurance, federal aid may not be used for the home in the event of damage caused by flooding.

When Congress re-authorized the NFIP in 2012, the program faced more than $24 billion in debt amassed since 2004 as a result of the devastation caused by Hurricanes Katrina and Sandy. Congress made several changes to the NFIP that affect flood insurance, flood hazard mapping, grants, and the management of floodplains when it enacted BW-12. However, FEMA's arbitrary implementation of the amendments to the NFIP has consequences that Congress did not intend and, in fact, attempted to avoid. For example, BW-12 requires FEMA to

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[1] *See* W. Craig Fugate, *Implementation of the Biggert-Waters Flood Insurance Reform Act of 2012*, Written Testimony to the Committee on Banking, Housing and Urban Affairs Subcommittee on Economic Policy, U.S. Senate, September 18, 2013, http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=46b52a52-4d45-4c47-8ddc-de2f32cd348e&Witness_ID=bdf843f6-112e-4009-80bb-2cc0f50d92c8 (last visited November 6, 2013) (Attached hereto as Appendix A).

complete several fact-finding studies to evaluate the impact of the amendments to the program. Instead, FEMA ignored this requirement, and adopted dramatically higher premium rates without reliance upon accurate, reliable data. The resultant rate hikes rendered many homes and businesses unaffordable for current owners and prospective buyers. Unaffordability is exactly what Congress intended to avoid with the re-authorization of the NFIP, which was established to promote widespread, affordable flood insurance coverage. However, FEMA did not consider the deleterious economic impact on Florida, Mississippi, and Alabama families, who have been targeted by FEMA's arbitrary implementation of the NFIP.

SUMMARY OF THE ARGUMENT

In its First Amended Complaint, Plaintiff identifies the most serious deficiency of FEMA's flawed implementation of BW-12 – its failure to obtain and use current and accurate data when calculating rate changes. First, in implementing BW-12, FEMA failed to complete the statutorily required fact-finding studies, which are vital to gauge the impact of the changes to the NFIP, its premium rates, and the policyholders. Second, FEMA's implementation of BW-12 is arbitrary and capricious. By failing to complete the required affordability study prior to adopting its new NFIP rates, FEMA's now-exorbitant premiums undermine the primary purpose of the program, which is to promote the acquisition of insurance coverage by property owners. Moreover, FEMA's premium rates are based on outdated and inaccurate information, and fail to reflect a price commensurate with actual risk. As a result, many communities in Florida and Alabama will suffer significant declines in property values and substantial losses of business revenue. The aggregate impact of the implementation of BW-12 will devastate Florida's and Alabama's economy at a time when it is just beginning to recover from a recent housing market collapse and national recession.

ARGUMENT

When it enacted BW-12, Congress required a number of fact-finding studies to provide invaluable data to use in reforming the NFIP. Those studies, and particularly the "Study of Participation and Affordability for Certain Policyholders,"[2] reflected Congress' intent to financially stabilize the program by removing subsidized premium rates, while still maintaining the original focus to make flood insurance affordable.[3] Unfortunately, FEMA's flawed implementation of BW-12 fails to address certain imperative provisions of the law.

I. FEMA should be compelled to complete the mandatory studies required within the Biggert-Waters Flood Insurance Reform Act of 2012 prior to establishing new flood insurance rates.

This Court, through the Administrative Procedure Act ("APA"),[4] may review FEMA's implementation of the NFIP and compel FEMA to comply with its requirements. Under the APA, an aggrieved party may seek review of agency action,[5] including the failure of the agency to act.[6] The Act requires the Administrator of FEMA to conduct or obtain several studies relevant to the implementation of the NFIP's new requirements.[7] These required studies are the

[2] 112 PL 141 § 100236.
[3] "From a policymaker's perspective, the fundamental flood management challenge facing the NFIP is finding the best mix of strategies to reduce the nation's long-term exposure to flood losses while ensuring the program's solvency and statutory mandate to provide affordable flood insurance to the general public." Rawle O. King, Congressional Research Service, *The National Flood Insurance Program: Statute and Remaining Issues for Congress*, p. 2 (February 6, 2013) (Attached as Exhibit 1 to Plaintiff's *Memorandum in Support of Motion For Stay or, in the alternative, for Preliminary Injunction, Miss. Ins. Dep't v. U.S. Dep't of Homeland Security and U.S. Fed. Emergency Mgmt. Agency*, 1:13CV379 LG-JMR (S.D.M.S. Oct. 7, 2013)).
[4] 5 U.S.C. § 500 et seq. (2013).
[5] *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof.").
[6] *See* 5 U.S.C. § 551(13) ("'[A]gency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or **failure to act**.") (Emphasis added).
[7] *See* Pub. L. No. 112-141, §§ 100221, 100231, 100233, 100235, and 100236 (2012).

first step to "finding the best mix of strategies to reduce the nation's long-term exposure to flood losses while ensuring the program's solvency and statutory mandate to provide affordable flood insurance to the general public."[8] The studies identified in BW-12 are mandatory, but to date, only one has been completed.[9] Even in that single "complete" study, however, the Government Accountability Office report notes numerous instances where FEMA relied upon outdated or incorrect information, or altogether lacked sufficient data to accurately complete the study.[10]

Reviewing courts have the authority to "compel agency action unlawfully withheld or unreasonably delayed."[11] In *Norton v. Southern Utah Wilderness Alliance*, the Supreme Court acknowledged that a claim under this provision "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take."[12] *Norton* makes clear that aggrieved parties should not ask this Court to tell FEMA *how* to perform the studies, *how* to evaluate the study reports, or *how* to set new rates.[13] However, under Section 706(1) of the APA, this Court can compel FEMA *to act* – to perform the non-discretionary acts defined within BW-12, to complete the mandatory studies, and to obtain the reports required by Congress.[14] In this case, FEMA should be compelled to perform or obtain the required studies before it can implement the rate changes that are harming NFIP policyholders.

As coastal states, Alabama, Mississippi, and Florida have large numbers of NFIP policyholders aggrieved by FEMA's failure to complete the studies required by BW-12. Those

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[8] King, *supra* note 3.
[9] "GAO Study on Pre-FIRM Structures," required by Pub. L. No. 112-141, §100231(c).
[10] U.S. Gov't Accountability Office, *Flood Insurance – More Information Needed on Subsidized Properties*, GAO-13-607 (July 2013); *see also First Amended Compl.*, para. 24, at 17-21, *Miss. Ins. Dep't, supra* note 3 (summarizing the information gaps highlighted by the study and FEMA's lack of a plan for obtaining the information.).
[11] 5 U.S.C. § 706(1).
[12] 542 U.S. 55, 64 (2004).
[13] *See id.*
[14] *See id.*

studies are a mandatory component of BW-12, but FEMA has instead opted to arbitrarily raise the premium rates of the NFIP policyholders without completing the comprehensive reviews of the amended program's impacts, as required by Congress. In Gulf Coast States those rate increases have reached the point where policyholders[15] can no longer afford the premium payments, effectively freezing real estate markets in areas of the state now subjected to exorbitant costs of coverage. Consequently, Alabama, Mississippi, and Florida, as well as their policyholders, are aggrieved by FEMA's failure to act

The adverse effects of FEMA's arbitrary rate increases are particularly felt in Pinellas County, Florida,[16] where 33,141 single-family homes are located in designated "high-risk flood zones."[17] Homeowners there have seen their flood insurance premiums increase dramatically during FEMA's implementation of the changes to the NFIP. For example, George D. Shaeffer, a disabled retiree living in a 900-square-foot house in Redington Beach, does not live on a waterfront property, but nonetheless has seen his flood insurance rates climb from $2,171 to $15,946 per year.[18] This represents an increase of his monthly premium payment of nearly $1,150 following FEMA's implementation of BW-12, which is particularly devastating for

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[15] *See generally* Appendix B for declarations made by affected Florida policyholders.

[16] See Representative C.W. Bill Young, *Implementation of the Biggert-Waters Flood Insurance Reform Act of 2012*, Statement for the Record to the Committee on Banking, Housing and Urban Affairs Subcommittee on Economic Policy, U.S. Senate, September 18, 2013, available at http://www.pinellascounty.org/flooding/pdf/floodinsurance/BillYoungLetter3-Flood_Insurance_Testimony.pdf (last visited October 30, 2013) ("In my district, which encompasses the majority of Pinellas County, Florida, there are more than 50,000 subsidized flood policies in place, which is 35 percent of the 142,000 total subsidized NFIP policies in the county. I have been told this is the largest number of subsidized policies in a single county in the United States.").

[17] Pamela Dubov, Pinellas County Property Appraiser, *Summary of Demographic Data, Single Family Residences in High-Risk FEMA Flood Zones,* September 28, 2013 (on file). According to that report, the median just market value of those homes is $132,245, with a median living area of 1,430 square feet. *Id.*

[18] *See* Appendix B at B8.

homeowners with a fixed income. Equally distressing, however, is that Shaeffer's ability to sell his home is constrained because a potential buyer must pay the full $16,000 premium to purchase the property. With such an onerous flood insurance premium now attached to Schaeffer's home, potential buyers will be unwilling to assume such a costly burden. Schaeffer's apprehension is echoed by numerous other property owners.

The anticipated decline in property value that will likely befall Shaeffer's home is pervasive in Pinellas County, where the economic forecast for many of its small beach communities is dire. For example, in Madeira Beach, 70 percent of the 1,200 single family residences are located in high-risk FEMA flood zones. The increase in flood insurance premiums will render most residences unmarketable, which will collapse the real estate market in the area. Unable to sell their homes, many homeowners may be compelled to use their savings to pay off mortgages to avoid the exorbitant premiums and decline flood insurance coverage altogether.

But FEMA's implementation of BW-12 does not solely affect residential properties. The impacts of the rate increases are also devastating to countless family-run small businesses along Florida's Gulf Coast. In Fort Myers Beach, Jacquelyn Liszak-May owns a small inn and gift shop called the Sea Gypsy Inn.[19] Building One, which houses the lodging quarters, is insured for $135,000, with $20,000 of contents coverage, while Building Two, occupied by the gift shop, is insured for $35,000, with $20,000 of contents coverage. Following FEMA's implementation of BW-12, Liszak-May's premium for Building One rose from $1,879 to $34,672, and her premium for Building Two rose from $843 to $12,235. Combined, these new premiums represent a more than 1,700 percent increase in the cost she must pay to remain insured. Small business owners,

[19] *See* Appendix B at B6.

like Liszak-May, cannot absorb such dramatically higher expenses. Liszak-May risks losing $500,000 of her life savings invested in her business if this Court does not forestall FEMA's implementation of BW-12.

The Alabama Department of Insurance estimates that as many as 6,000 homeowners in Alabama will receive NFIP flood rate increases in the 200 to 1,000 percent range. Approximately one-third of these homeowners are located in Mobile and Baldwin Counties, the two Alabama counties with direct coastal exposure. However, the problem is not just limited to the coastal areas. Homeowners upstate who live near rivers and creeks are also experiencing large rate increases, of up to 500 percent. A majority of these homeowners may not be able to afford these increases and will be compelled to let their flood insurance policies lapse. Since roughly half of homeowners in Mobile and Baldwin Counties are mortgage-free, these homeowners will not have a mortgage lender requiring the purchase of flood insurance and can thus choose to let their flood policies lapse and assume the risks presented by the weather. Homeowners who are subject to a mortgage requirement but choose to let their flood policies lapse to avoid the cost, will find that their mortgage lenders will force-place the flood insurance on their behalf as a requirement of the mortgage.

Congress attempted to avoid the adverse impacts of BW-12 by making each study addressed in BW-12 mandatory. For example, the affordability study provision, 112 PL 141 section 100236(a), states, "The Administrator **shall conduct a study** . . . ." The same section also states that the study "shall" be submitted to Congress "[n]ot later than 270 days after the date of enactment of this Act [BW-12]." The use of the word "shall" means FEMA has no discretion over whether to conduct the study, or when to submit the report:

> *"Shall" means shall.* The Supreme Court and this circuit have made clear that when a statute uses the word "shall," Congress has

> imposed a mandatory duty upon the subject of the command. *See United States v. Monsanto,* 491 U.S. 600, 607, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989) (by using "shall" in civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied"); *Pierce v. Underwood,* 487 U.S. 552, 569–70, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (Congress' use of "shall" in a housing subsidy statute constitutes "mandatory language"); *Barrentine v. Arkansas–Best Freight Sys., Inc.,* 450 U.S. 728, 739 n. 15, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) (same under Fair Labor Standards Act); *United States v. Myers,* 106 F.3d 936, 941 (10th Cir.) ("It is a basic canon of statutory construction that use of the word 'shall' [in 18 U.S.C. § 3553(f)] indicates mandatory intent."), *cert. denied,* 520 U.S. 1270, 117 S.Ct. 2446, 138 L.Ed.2d 205 (1997); *see also Black's Law Dictionary* 1233 (5th ed. 1979) ("As used in statutes ... [shall] is generally imperative or mandatory.").[20]

FEMA does not have the discretion to establish new premium rates without performing the requisite studies.

FEMA needs the information these studies will provide to appropriately implement its existing responsibility to make the NFIP available and affordable, while also fulfilling the mandate in BW-12 to eliminate subsidies. Recently, FEMA claimed that it lacked the time and money to complete the affordability study required by BW-12.[21] In September 2013, at a Senate subcommittee hearing on the progress of implementation of BW-12, Birny Birnbaum, Executive Director of the Center for Economic Justice, confirmed that the study could have been performed in a shorter amount of time, and with less money.[22] If such reports were unnecessary to the

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[20] *Forest Guardians v. Babbit*, 174 F.3d 1178, 1187 (10th Cir. 1999).

[21] *See generally*, Webcast recording: *Implementation of the Biggert-Waters Flood Insurance Act of 2012: One Year after Enactment*, U.S. Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on Economic Policy, September 18, 2013, available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=46b52a52-4d45-4c47-8ddc-de2f32cd348e (last visited October 24, 2013).

[22] *Id.* at approx. 2:22:05. In his written testimony, prepared for the same subcommittee meeting, FEMA's Administrator, Mr. Fugate, indicated that the agency had been told that "it will likely

viability of the NFIP or the deadlines for completion of the reports were flexible, Congress would not have mandated them, much less establish definite timelines for their completion.[23] Accordingly, FEMA should be compelled to complete all studies required by BW-12.

II. FEMA's implementation of the NFIP, as amended by BW-12, is arbitrary and capricious.

The methods FEMA used to implement the changes to the NFIP through the enactment of BW-12 do not comply with the requirements of law. FEMA's calculation of flood insurance rates, including the removal of certain subsidies, is arbitrary and capricious, and therefore, subject to judicial review under the APA,[24] because "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking."[25] Although "the arbitrary and capricious standard of review is highly deferential [to the challenged agency], it is by no means a rubber stamp."[26] This Court can find agency action arbitrary and capricious where:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[27]

Thus, when it is apparent an agency did not engage in reasoned decisionmaking, its action can be reversed by the court.[28] Here, FEMA's implementation of BW-12 is arbitrary and capricious in at least two ways.

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take at least two years to complete the study due to the need to obtain data on policy-holders and their incomes." *See supra* note 1 and Appendix A at p. 7.

[23] "We must 'give effect . . . to every clause and word' of the Act." *Setser v. U.S*, 132 S.Ct 1463, 1470 (2012).

[24] *See* 5 U.S.C. 706(2)(A).

[25] *Judulang v. Holder*, 132 S.Ct. 476, 483-84 (2011).

[26] *United States v. Garner*, 767 F.2d 104, 116 (5th Cir. 1985).

[27] *Id.* (quoting *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 43 (1983)).

[28] *Id.*

A. FEMA failed to consider affordability when setting new premium rates.

"Congress enacted the National Flood Insurance Act ["NFIA"] of 1968 in response to a growing concern that the private insurance industry was unable to offer reasonably priced flood insurance on a national basis."[29] In 2012, when Congress enacted BW-12, the NFIP was operating with a significant and growing deficit. Reauthorization of the program was essential, but the program's financial problems required key changes set out by Congress. However, FEMA has implemented those changes without regard for existing portions of the NFIA that were not amended by BW-12. Notwithstanding the amendments of BW-12, the original purpose of the NFIA remains intact, namely, to make "flood insurance coverage available on reasonable terms and conditions to persons who have need for such protection."[30] FEMA cannot implement BW-12 in a vacuum; it must continue to consider the ultimate purpose of the program as a whole, which has not been altered.

FEMA has knowingly failed to consider affordability because it makes an erroneous assumption. FEMA believes that it does not have the authority to mitigate rates on the basis of affordability. On March 20, 2013, FEMA Administrator Craig Fugate testified before the Senate Committee on Homeland Security and Governmental Affairs. When asked about the affordability of flood insurance under BW-12, Fugate responded, "[w]hat our concern is . . . there is going to be tremendous push-back on low-income people that (sic) live in flood plains . . . are not coastal . . . that are going to be faced with tremendous bills, which potentially could force them out of their homes. Knowing that there will be push-back, how do we mitigate that, if that is even possible, because currently we don't have that authority."[31] This assumption

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[29] *Flick v. Lib. Mut. Fire Ins. Co.*, 205 F.3d 386, 387 (9th Cir. 2000).
[30] 42 U.S.C. 4001(a)(4).
[31] W. Craig Fugate, Testimony, *Hurricane Sandy: Getting the Recovery Right and the Value of Mitigation,* Senate Committee on Homeland Security and Governmental Affairs, March 20,

expressed by Fugate is incorrect, and FEMA's reliance upon it has caused FEMA to implement the NFIP, as amended by BW-12, in an arbitrary and capricious manner.

Agencies are permitted discretion in implementing complex statutory schemes, which often require a delicate balancing of the goals of the subject legislation with other Acts of Congress. Statutory instruction regarding how to balance seemingly competing goals affords the agency broad discretion.[32] Here, a statutory instruction gives FEMA broad discretion in setting premium rates. FEMA should employ such discretion when considering the affordability of the NFIP. Two provisions of the NFIA are instructive. First, 42 U.S.C. section 4014(a), *Estimates of Premium Rates*, states:

> (a) Studies and investigations
>
> The Administrator is authorized to undertake and carry out such studies and investigations and receive or exchange such information as may be necessary to estimate, and shall from time to time estimate [rates], on an area, subdivision, or other appropriate basis . . . .

Second, 42 U.S.C. section 4015, *Chargeable Premium Rates*, states:

> (a) Establishment; terms and conditions
>
> On the basis of estimates made under section 4014 of this title, and such other information as may be necessary, the Administrator shall from time to time prescribe [rates], after providing notice . . .

This statutory language was intended to afford FEMA broad discretion to set rates in light of the other aims of the NFIA.

2013, at approx. 01:57:59, available at http://www.hsgac.senate.gov/hearings/hurricane-sandy-getting-the-recovery-right-and-the-value-of-mitigation (last visited October 24, 2013).

[32] *See Florida Key Deer v. Paulison*, 522 F.3d 1133, 1141-42 (11 Cir. 2008).

The fundamental purpose of the NFIA, to make flood insurance available and affordable, is axiomatic, and BW-12 did nothing to alter Congress' original intent.[33] The first section of the NFIA, as amended by BW-12, *Necessity and Reasons for Flood Insurance Program*, states it will "eventually mak[e] flood insurance coverage available on reasonable terms and conditions to persons who have need for such protection."[34] Similarly, the *Chargeable Premium Rates* section declares rates should be "consistent with the objective of making flood insurance available where necessary at reasonable rates so as to encourage prospective insureds to purchase such insurance and with the purposes of this chapter."[35] Thus, it is apparent that FEMA not only has the discretion to factor affordability into its rate-making determinations, but it also has a responsibility to keep the NFIP consistent with the original purpose of the program. The "Study of Participation and Affordability for Certain Policyholders," and other studies addressing affordability, required by BW-12 will provide FEMA with the necessary data to accomplish that end. By failing to consider affordability, FEMA's establishment of rates was arbitrary and capricious.

FEMA also has a responsibility to align the resultant NFIP with Congressional intent to ensure flood insurance remains available and affordable. As FEMA's arbitrary October 1,

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[33] Congress enacted the NFIA and created the NFIP to make "flood insurance coverage available on reasonable terms and conditions to persons who have the need for such protection." 42 U.S.C. §4001(a-b); *see Audler v. CBC Innovis, Inc.*, 519 F.3d 239, 245 (5th Cir. 2008); *Campo v. Allstate Ins., Co.*, 562 F.3d 751, 754, (5th Cir. 2009). *See also McGair v. American Bankers Ins., Co. of Florida*, 693 F.3d 94, 95, (1st Cir. 2012); *C.E.R. 1988, Inc. v. Aetna Casualty and Surety Co.*, 386 F.3d 263, 265, (3rd Cir. 2004) (concluding that "the overarching purpose of [NFIP is] to provide affordable flood insurance in high-risk areas in order to reduce pressures on the federal fisc..."); *Battle v. Seibels Bruce Ins., Co., et. al.*, 288 F.3d 596, 598, (4th Cir. 2002); *Flick v. Liberty Mutual Fire Ins. Co.*, 205 F.3d 386, 399 (9th Cir. 1999) (Schroeder, *in dissent*), *cert. denied*, 531 U.S. 927 (2000); *Wright v. Dir., Federal Emergency Management Agency*, 913 F.2d 1566, 1568 (11th Cir. 1990).

[34] 42 U.S.C. 4001(a).

[35] 42 U.S.C. 4015(b)(2).

2013, deadline[36] was looming, many members of Congress, including a primary sponsor of BW-12, raised serious concerns about the impact many of their constituents were experiencing in light of FEMA's exorbitant flood insurance rate increases. In a July 1, 2013, letter, Congresswoman Maxine Waters, co-sponsor of BW-12, and 26 other members of Congress wrote to Administrator Fugate urging him to exercise FEMA's discretion to avoid the exorbitant rates:

> We are writing today to express deep concern about impending rate increases and affordability issues under the National Flood Insurance Program (NFIP). . . . While Congress has shown it is willing to act to address these issues, **we believe that FEMA has the authority to administratively address some of the affordability issues arising from Biggert-Waters**. We urge you to use whatever discretion you have in order to address these affordability concerns.[37]

In addition, on September 27, 2013, Congresswoman Waters said:

> I am outraged by the increased costs of flood insurance premiums that have resulted from the Biggert-Waters Act. I certainly did not intend for these types of outrageous premiums to occur for any homeowner. . . . Since the law was enacted, we have seen a slew of confusion in FEMA mapping. In addition, many families now face increased costs that will make homeownership so expensive that many would be forced from their homes or find it impossible to sell. This is unacceptable.[38]

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[36] Following the enactment of BW-12 on July 6, 2012, subsidies on certain policies and properties were to be removed within 90 days. However, FEMA issued bulletins to Write Your Own Companies and NFIP Servicing Agents on December 4, 2012, and again on March 5, 2013, twice delaying the implementation of those provisions without any apparent authority. The December 4 bulletin also declared FEMA was delaying implementation of section 100207 of BW-12 until August 2014 "due to the complexity involved."

[37] Maxine Waters, Letter to Craig Fugate, July 1, 2013, available at http://democrats.financialservices.house.gov/FinancialSvcsDemMedia/file/001%20Maxine%20Waters%20letters/2013_07_03%20CMW%20Leads%20Ltr%202%20FEMA%20Rates%20Affordable.pdf (last visited November 6, 2013).

[38] Statement of Congresswoman Maxine Waters, September 27, 2013, available at http://democrats.financialservices.house.gov/press/PRArticle.aspx?NewsID=1585 (last visited November 6, 2013).

FEMA's arbitrary implementation of the rate increases is unacceptable. FEMA not only has the discretion and authority, but the responsibility to consider affordability; however, it is nonetheless proceeding without first obtaining all the requisite studies and information, contrary to Congressional intent. Any other interpretation defies the overwhelming evidence and is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. This Court should demand that FEMA consider affordability.

B. Even if FEMA had no discretion to consider affordability when setting new premium rates, FEMA failed to utilize accepted actuarial principles and consider actual risk when calculating new rates.

When setting premium rates, FEMA is required to follow certain guidelines, as set forth in *Estimates of Premium Rates,* 42 U.S.C. 4104(a)(1)(A), which provides that:

> The Administrator is authorized to undertake and carry out such studies and investigations and receive or exchange such information as may be necessary to estimate, and shall from time to time estimate, on an area, subdivision, or other appropriate basis--
>
> **(1)** the risk premium rates for flood insurance which--
>
> **(A) based on consideration of the risk involved and accepted actuarial principles.**

(Emphasis added). However, the rates calculated by FEMA fail to follow this directive. Florida's Office of Insurance Regulation ("OIR") reviewed the October 1, 2013, Flood Insurance Manual (FIM), [39] the October 2013 Specific Rate Guidelines,[40] and the Technical Documentation

[39] Available at http://www.fema.gov/media-library/assets/documents/34745 (last visited October 16, 2013).
[40] Available at http://www.fema.gov/media-library/assets/documents/34620 (last visited October 16, 2013).

of NFIP Actuarial Assumptions and Methods, Supporting Rates Effective October 1, 2013,[41] ("2013 Technical Documentation") and determined that it would not approve the actuarial rates set by FEMA if they had been proposed by a private insurer in Florida. The rates do not account for actual risk and do not follow accepted actuarial principles as required by law.

FEMA has failed to base rates upon actual risk as required by the NFIA. Under Florida law, the OIR reviews rate filings, using "generally acceptable and reasonable actuarial techniques," to "determine if the rate is excessive, inadequate, or unfairly discriminatory." [42] In making that determination, OIR actuaries are guided by a principle of the Casualty Actuarial Society[43] that, "[a] rate is reasonable and not excessive, inadequate, or unfairly discriminatory if it is an actuarially sound estimate of the expected value of all future costs associated with an individual risk transfer." [44] FEMA's rates are not specific to any state, location, or even zone, but rather are based upon broad zone groupings.[45] For example, NFIP's rates for zone "AE" are based on an average of the rates for the 30 subzones, A01-A30, within the broad "AE" zone category. This practice means that lower-risk zones will ultimately subsidize higher-risk areas within the "AE" zone category. As a result, policyholders within the same zone category will pay the same rate regardless of actual risk. By law, the rates must be based upon "the risk

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[41] Available at http://www.fema.gov/media-library-data/c6ffd503e17685376705c64588e84973/Actuarial+Methods+and+Assumptions+2013-09-04_508.pdf (last visited October 29, 2013).
[42] Section 627.062(2)(b), Fla. Stat.
[43] "The Casualty Actuarial Society (CAS) is the professional society for actuaries who work in the property and casualty insurance industry. An aspiring actuary must pass seven certification exams to become an Associate of the CAS and nine certification exams to become a Fellow of the CAS (FCAS)." *See Acuity v. Comm'r of Int. Rev.*, T.C. Memo 2013-209, 2013 WL 4746629 (U.S. Tax Court 2013).
[44] *See* Appendix C, Casualty Actuarial Society, *Statement of Principles Regarding Property and Casualty Insurance Ratemaking* (1988) (also available at http://www.casact.org/professionalism/standards/princip/sppcrate.pdf) (last visited November 6, 2013).
[45] *See* 2013 Technical Documentation, *supra* note 39, at pp.15-16.

involved." Accepted actuarial principles require that the premiums be based upon "individual risk transfer," but FEMA's rates do not comply with either requirement.

In addition to failing to account for actual risk, FEMA sets NFIP premium rates based upon outdated flood models. According to the 2013 Technical Documentation, FEMA uses two probability curves to predict if flood waters will reach or exceed a given depth relative to the base flood elevation ("BFE").[46] Specifically:

> The first set, the "PELV" curves, was developed by the Army Corps of Engineers in **the early years of the NFIP** and is **revised infrequently**. However, **during the mid to late 1980's**, additional curves, the "PELV500" curves, were developed to reflect the fact that for some communities, the flood data available was very limited, and as a result, there is a downward bias in the flood height estimates.[47]

FEMA fails to comply with the requirement that rates must be based upon "accepted actuarial principles" by using a judgmental weighting that favors the Probability of Elevation ("PELV") curve instead of the more recent PELV500 curve, and by relying on both outdated curves for reference.

Moreover, FEMA's decision to drastically raise rates for Florida policyholders ignores the historical evidence of premiums and claims from Florida's insurance policies. Insuring against loss inevitably requires predictions of future events, the accuracy of which depends upon the quality of information used. However, the most effective way to test a prediction is by comparison to actual outcomes. Thus, when establishing premium rates, FEMA should evaluate the historical loss ratio of the geographic areas covered by NFIP policies.

"Loss ratio is the ratio of net earned premium to incurred losses. A loss ratio under 100 [percent] indicates a profitable [policy]; a loss ratio greater than 100 [percent] indicates that more

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[46] *See* 2013 Technical Documentation, *supra* note 39, at pp.15-16.
[47] *Id.* at p.5 (Emphasis supplied).

money is being paid to satisfy claims than is being made in the form of premiums."[48] According to data from FEMA, from 1978 to 2012, Florida had an average loss ratio of 57.9 percent.[49] This means for every dollar Floridians paid in premiums, FEMA has paid only 57.9 cents for losses in Florida. This historical evidence spanning more than three decades demonstrates that, even when subsidized to make flood insurance policies affordable for Florida property owners, the premiums were more than sufficient to cover predicted and actual losses incurred. Based upon that compelling data, the dramatically increased premiums levied against Florida policyholders cannot be justified as necessary to make the NFIP actuarially sound. By failing to account for such historical claims evidence, FEMA's establishment of premium rates is arbitrary and capricious, and the Agency should be required to reevaluate its ratemaking.

The failure to appropriately evaluate actual risk runs afoul of the stated purpose of the NFIP to "provide flexibility in the program so that such flood insurance may be based on workable methods of pooling risks, minimizing costs, and distributing burdens equitably among those who will be protected by flood insurance and the general public."[50] Over the course of 45 years, FEMA has been unable to accomplish the ultimate goal of the NFIA. It has based rates upon inappropriate average risk, relied on outdated models, and failed to account for historical claims data when implementing BW-12. The rate increases have rendered premiums for Florida policyholders excessive and unfairly discriminatory contrary to accepted actuarial principles.

CONCLUSION

FEMA, under the guise of expediency, may not ignore the express mandate of Congress,

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[48] *Compagnie De Reassurance D'Ile de France v. New England Reinsurance Corp.*, 57 F.3d 56, 67 n.13 (1st Cir. 1995).
[49] *See* Appendix D (spreadsheet listing Florida loss and premium information 1978 through 2012).
[50] 42 U.S.C. 4001(d).

which requires the completion of the requisite studies and consideration of affordability. FEMA may only act within their statutory authority; to do otherwise ignores the separation of powers, a cornerstone of our democracy.

FEMA's failure to delay implementation of the rate increases is unacceptable. FEMA is proceeding arbitrarily without first obtaining all the requisite studies and information, contrary to Congressional intent and the best interest of the citizens of the Florida, Alabama, and Mississippi who have been harmed by onerous rate increases. This Court should compel FEMA to take the economic impact to families and homeowners seriously, as so many Members of Congress have pleaded in the weeks leading up to the implementation of the premium rate increases.

This, the 12th day of November, 2013.

Respectfully submitted,

*/s/ James H. Heidelberg*_________
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CERTIFICATE OF SERVICE

I, James Heidelberg, do hereby certify that on November 12, 2013, I electronically filed the foregoing *Amici Curiae Brief in Support of Plaintiff* with the Clerk of the Court using the ECF system to:

All counsel of record registered with the ECF system.

This 12th day of November, 2013

/s/ James H. Heidelberg
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