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Climate Risk, Insurance Retreat, and State Response

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CLIMATE RISK, INSURANCE RETREAT, AND STATE RESPONSE

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Climate change is fundamentally destabilizing the private insurance industry, with many high-profile insurance companies exiting states in the face of catastrophic, climate-induced risk. This rapid "insurance retreat" represents a major market signal in response to climate-exacerbated risks. Private businesses are making actuarial decisions, assessing that some locations are just too vulnerable to insure. At the same time, this insurance retreat also poses a policy challenge for states as they react to the mounting insurance gaps left by exiting private insurers.

This Article analyzes insurance retreat, its attendant policy challenges, and the lessons that can be drawn from state responses. It first describes the causes and effects of private insurance retreat. Then, the Article examines different potential policy responses to insurance retreat, including interventions modeled after the federal National Federal Insurance Program (NFIP) as well as state insurance programs in California, Florida, and Louisiana. Finally, the Article offers a comparative analysis of these different policy response options. It observes that existing policies differ substantially along two important dimensions: 1) extent of government intervention, and 2) prioritization of physical risk concerns versus financial transition concerns. It also explores how the different state programs show surprisingly diverse policy approaches and how—contrary to assumptions—many do not actually subsidize insurance affordability. Through these observations, the Article uncovers unexpected examples of state

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insurance policies complementing, rather than contravening, pricing signals sent by private insurance retreat.

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I. INTRODUCTION

In the face of massive, historic payouts, insurance companies are retreating from climate change-exposed areas. Climate-exacerbated disasters, such as wildfires and hurricanes, have created so much risk that several of the largest insurance companies have either limited their offerings or exited markets entirely.[1] For example, State Farm, Farmers Insurance, and AIG have all ceased issuing new policies in California, Florida, and Louisiana.[2] In addition to insurance withdrawal by private actors, the federal government's National Flood Insurance Program (NFIP)—often the only source of flood insurance for homeowners—has proposed massive rate increases to offset recent losses and to better take into account climate risk.[3] These collective public and private measures amount to "insurance retreat" from vulnerable areas. This retreat has major implications for land use, climate adaptation, and natural disaster planning.

At first blush, this insurance retreat appears like a "win-win" for climate advocates and free-market economists alike. *Finally*, the reasoning goes, the private sector is responding to climate risk thought insurance pricing and availability.[4] In this sense, the

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[1] *See* Alice C. Hill, *Climate Change and U.S. Property Insurance: A Stormy Mix*, COUNCIL ON FOREIGN RELS. (Aug. 17, 2023, 4:17 PM), https://www.cfr.org/article/climate-change-and-us-property-insurance-stormy-mix [https://perma.cc/TQC6-CHNA] ("Private companies have increasingly reduced coverage, concluding that the risks—and potential losses—threatened by climate change outweigh probable profits.").

[2] *See* Justine McDaniel, *Citing Climate Change Risks, Farmers Is Latest Insurer to Exit Florida*, WASH. POST (July 12, 2023, 1:47 PM), https://www.washingtonpost.com/climate-environment/2023/07/12/farmers-insurance-leaves-florida/ (discussing the decisions of insurers to pull out of states at risk to climate-related disasters).

[3] *See* Jason Metz & Amy Danise, *New FEMA Rates for Flood Insurance: Who Gets Hit The Hardest?*, FORBES (Aug. 23, 2023, 4:18 AM), https://www.forbes.com/advisor/homeowners-insurance/fema-flood-insurance-rate-changes/ [https://perma.cc/78DB-5BBZ] (discussing the increasing NFIP rates). These insurance increases have become a source of litigation. *See* Debbie Elliott, *10 States and Scores of Local Governments Sue FEMA Over Higher Flood Insurance Rates*, NPR (June 1, 2023, 7:08 PM), https://www.npr.org/2023/06/01/1179573166/fema-lawsuit-flood-insurance-rate-hikes [https://perma.cc/M6FW-9BK4] (discussing the effects of rate increases and the nature of the claims).

[4] *See* Elise Stefanik, *Market-Oriented Solutions to Climate Change*, CATALYST, Spring 2019, https://www.bushcenter.org/catalyst/environment/stefanik-market-solutions

private insurance market's retraction from vulnerable areas is a welcome, long overdue market signal. Without the insurance safety net, new building and investment will likely stall in climate-exposed coastal communities and wildfire zones. Long-term, this will shape where people decide to live, safeguarding people and property when disaster strikes. Many see this as sound land use policy, driven by private economic forces that are pricing climate risk. Free-marketeers may cheer that the market is just doing its work, accounting for climate-destabilized financial risk while allowing individuals to make their own choices. Climate advocates may see insurance retreat as aligned with broader climate-adaptation efforts, such as "managed retreat" from climate-exposed areas. Managed retreat is designed to save more people and property from climate-driven disasters.[5] The private sector will pay fewer insurance claims, and the federal government will pay less through Stafford Act "emergency" or "major disaster" programs.[6] Win, win.

Not so fast—the dynamics of insurance retreat are more complicated than the simple, "win-win" narrative. This is especially true when one considers how private property owners and states have reacted to insurance retreat.[7] Private property owners who hold insurance policies feel the immediate impacts: skyrocketing

[https://perma.cc/J3FQ-MK3L] (theorizing about the role the free market may play in addressing the threat of climate change).

[5] *See, e.g.*, A.R. Siders, *Managed Retreat in the United States*, 1 ONE EARTH 216, 216 (2019) (discussing managed retreat, its challenges, and its potential benefits, which include the prevention of even more expensive and difficult measures in the future). For a discussion of managed retreat via an environmental justice lens, see generally A.R. Siders & Idowu Ajibade, *Introduction: Managed Retreat and Environmental Justice in a Changing Climate*, 11 J. ENV'T STUD. & SCI. 287, 288 (2021) (discussing relocation in relation to other justice concerns, including those relating to discrimination, impacts on affected individuals and communities, and the question of "[w]ho decides whether to relocate or not?").

[6] *See* 42 U.S.C. § 5122 (providing Stafford Act classifications for "Emergency" and "Major Disaster" events, necessitating different levels of government response and aid).

[7] *See, e.g.*, Rob Wile & Jasmine Cui, *Homeowners in California and Florida Are Running Out of Options to Protect Their Homes*, NBC NEWS (June 17, 2023, 9:04 AM), https://www.nbcnews.com/business/consumer/homeowners-go-without-insurance-in-states-where-its-too-expensive-rcna88578 [https://perma.cc/NQ6B-4VJE] ("Faced with dwindling options [in the insurance market], more households are choosing to go without insurance altogether . . . .").

insurances rates and tightened eligibility requirements.[8] This is sparking an affordability crisis for existing homeowners, who will likely have trouble exiting the market because purchasing an uninsurable home is much more difficult for prospective homeowners.[9] What's more, states are responding with great fervor, filling the void left behind by private insurance retreat, imposing state-specific insurance programs that may guarantee insurance availability and in some cases even subsidize insurance affordability.[10]

With climate risks and costs poised to increase for the foreseeable future, private insurance retreat, its impact on private property owners, and state responses will have major ramifications.[11] This Article explores these dynamics in three Parts. In Part II, we explore the causes and effects of insurance retreat. We explain insurance markets and the conditions that lead to insurance retreat, as well as the impacts of insurance withdrawal on private property owners and the resulting pressure on state insurance programs to respond. In Part III we consider details of how various government insurance programs can and have responded to insurance retreat. Here, we examine five insurance response

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[8] Perhaps not surprisingly, home insurance rates are rising most rapidly in Arizona, Texas, and North Carolina—three states that have experienced extreme weather events in recent years. *See* Hill, *supra* note 1 (displaying data showing the increase in insurance premiums for each state).

[9] This is particularly true for first-time homeowners who are already facing an affordability crisis due to low housing supply and increased interest rates. *See* Anna Bahney, *First-Time Homebuyers Are Being Shut Out of the Market Like Never Before*, CNN (Nov. 3, 2022, 10:15 AM), https://www.cnn.com/2022/11/03/homes/first-time-homebuyers-hit-record-low-nar-report/index.html [https://perma.cc/FEK8-HT6R] (discussing the decrease in the number of first-time home buyers as "home prices soared," "mortgage rates rose, [and] buyers' income dropped"). As part of the mortgage underwriting process, proof of insurance is generally required to secure a mortgage. *See* Shannon Martin & Mariah Posey, *Is Home Insurance Required?*, BANKRATE (Jan. 16, 2024), https://www.bankrate.com/insurance/homeowners-insurance/home-insurance-required/ [https://perma.cc/LS5Y-C7CW] ("[M]ost states do not mandate coverage. . . . However, if you have a mortgage, your lender will most likely require that you carry a homeowners insurance policy to protect the financial interest it has in your home.").

[10] *See infra* Part III.

[11] For an outstanding discussion of this topic, see generally Sean B. Hecht, *Climate Change and the Transformation of Risk: Insurance Matters*, 55 UCLA L. REV. 1559 (2008) (exploring the role of the insurance industry in adapting to climate change and minimizing the human cost resulting from climate change).

models: (1) a hypothetical *laissez faire* response; (2) a highly interventionist government response modeled after the National Flood Insurance Program; and the actual policy responses undertaken by (3) California, (4) Florida, and (5) Louisiana. For each of these response models, we analyze the degree of government intervention, as well as the balance of attention to physical risk concerns versus financial transition concerns.

Finally, in Part IV we compare these different government insurance programs, highlighting how the diversity of approaches runs counter to prevailing assumptions about "state-subsidized" insurance. We examine how California's and Florida's respective levels of government intervention appear counterintuitive in light of those states' politics, and how Louisiana's and Florida's approaches reflect surprisingly different policy priorities regarding actuarial risk. Finally, we note how appreciating these different approaches can inform future policy responses to insurance retreat.

II. INSURANCE RETREAT: CAUSES AND EFFECTS

> *"Just as the U.S. economy was overexposed to mortgage risk in 2008, the economy today is over-exposed to climate risk."*[12]
>
> - Aon President Eric Andersen

This Part provides factual background about private insurance markets and private insurance retreat. It also frames the policy issues that arise from insurance retreat. Section II.A offers a primer on insurance basics. Section II.B discusses the interplay between insurance risks, climate change, and insurance retreat. Section II.C then explores the impacts of insurance withdrawal on property owners and the policy responses from states.

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[12] *Risky Business: How Climate Change Is Changing Insurance Markets: Hearing Before the S. Comm. on the Budget*, 118th Cong. 6 (2023) (statement of Eric Andersen, President, Aon). The financial crisis was fueled in part by instability among large insurers, such as the collapse of American International Group (AIG) in 2008. Robert McDonald & Anna Paulson, *AIG in Hindsight*, 29 J. ECON. PERSPS. 81, 81 (2015).

A. PRIVATE INSURANCE MARKET BASICS

Owners of property often protect themselves against large financial risks via private insurance.[13] A homeowner may pay for insurance to cover major property damage resulting from a storm or fire. In this arrangement, the homeowner pays a certain amount to the insurance company (a "premium") in return for the insurance company's commitment to cover the costs of certain specified hazards, such as storm or fire damage.[14]

In turn, insurance companies are able to pay for the costs of these covered hazards, as well as generate profits, by gathering premiums from a diversity of policy holders and pooling risk across geographic areas and harms.[15] Thus, disaster insurance policies are built on a chain of risk transfer, whereby individual households purchase insurance to guard against individual costs, and insurance companies aggregate funds from different policy holders and pay out insurance claims when a policy holder suffers a covered loss.[16]

Within this system, an insurance company's economic viability (and profitability) is inextricably linked to the company's ability to

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[13] For a general overview of insurance law and markets, see generally TOM BAKER, KYLE D. LOGUE & CHAIM SAIMAN, INSURANCE LAW AND POLICY: CASES AND MATERIALS (5th ed. 2021).

[14] *Understanding Your Insurance Policy*, S.C. DEP'T OF INS., https://doi.sc.gov/957/Understanding-Your-Insurance-Policy [https://perma.cc/NV8A-UM4Q].

[15] This is facilitated through reinsurance, which "helps insurers reduce volatility in losses and enables them to write more policies." Carolyn Kousky, *We're Playing Hot Potato with Insurance Risk, and Everybody Is Losing*, HILL (Oct. 6, 2023, 2:00 PM), https://thehill.com/opinion/4240295-were-playing-hot-potato-with-insurance-risk-and-everybody-is-losing/ [https://perma.cc/4ZFM-F73Y].

[16] For a discussion of this risk transfer, see *id.* (discussing the industry-enabling risk transfer between insureds, insurers, and reinsurers); Hill, *supra* note 1 ("Homeowners insurance does not reduce the physical losses caused by catastrophic events. Insurance does, however, better manage financial and economic losses, allowing large, one-off costs to be spread across smaller, annual premium payments."). The National Climate Assessment highlights that many individuals lack adequate flood insurance coverage. U.S. GLOB. CHANGE RSCH. PROGRAM, REPORT-IN BRIEF: FIFTH NATIONAL CLIMATE ASSESSMENT 109 (2023) [hereinafter NCA5], https://nca2023.globalchange.gov/downloads/NCA5_Report-In-Brief.pdf [https://perma.cc/X28K-4AYB] ("Flood insurance allows individuals and communities to recover following extreme flooding events, but many at-risk homeowners lack adequate coverage . . . .").

assess, price, and diversify risk.[17] An insurer will lose money if it charges premiums that are insufficient to cover its payment obligations. For that reason, insurers take pains to predict the likelihood and cost of covered hazards, typically through a method of "actuarial science" that attempts to forecast and quantify risks and their financial consequences.[18] Through these actuarial calculations, insurance companies set the rates for their premiums and the extent of their coverage.[19]

In addition to setting premiums in line with actuarial estimates, insurance companies also seek to diversify their risk profiles. Insurers have incentives to avoid too great a concentration of policies that have correlated risks because, if risks are correlated, an insurer may have to pay many claims arising from the same event.[20] For example, if a majority of one insurer's customers were damaged by the same hurricane, that insurer would have a difficult time covering all those correlated losses at the same time from the same hurricane.[21] That insurer would be in a much better position with a more diverse customer base, with only a few of its customers damaged by the hurricane.

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[17] *See* Julia Kagan, *What Is Underwriting Risk in Insurance and Securities?*, INVESTOPEDIA (Aug. 2, 2023), https://www.investopedia.com/terms/u/underwriting-risk.asp [https://perma.cc/8NKJ-NSAT] ("An insurer's profitability depends on how well it understands the risks it insures against and how well it can reduce the costs associated with managing claims. The amount an insurer charges for providing coverage is a critical aspect of the underwriting process.").

[18] *See* LA. DEP'T OF INS., A GENERAL DESCRIPTION OF HOMEOWNERS RATEMAKING METHODOLOGY 8 (2015), https://www.ldi.la.gov/docs/default-source/documents/propertycasualty/Forms/act-427---ratemaking-methodology.pdf [https://perma.cc/9R9K-YZET] ("Actuarial science is the quantification, analysis and management of future contingent risk and that risk's financial consequences.").

[19] *See id.* at 9 ("Ratemaking involves the estimation of the premium to be charged the policyholder to transfer risk from the policyholder to the insurer for a specified policy period. Ratemaking involves quantitative analysis of the numerous risk characteristics underlying an insurance program.").

[20] *See* GLENN G. MEYERS, FREDRICK L. KLINKER & DAVID A. LALONDE, THE AGGREGATION AND CORRELATION OF INSURANCE EXPOSURE 24 (2003) ("Natural catastrophes such as earthquakes, hurricanes, tornadoes, and floods have an impact on many insureds; and the accumulation of losses to an insurer can jeopardize the financial wellbeing of an otherwise stable, profitable company.").

[21] *See id.* ("Hurricane Andrew, in addition to causing more than $16 billion in insured damage, left at least 11 companies insolvent in 1992. The 1994 Northridge earthquake caused more than $12 billion in insured damage in less than 60 seconds.").

The system of insurance described above is built on multiple *private* arrangements between insurers and property holders.[22] However, the broader insurance market, built on so many *private* arrangements, serves important *public* policy purposes by managing risk across a wide swath of homeowners. Indeed, insurance is essential to most homeowners because mortgage lenders typically require homeowners to carry insurance.[23] As a result, roughly 88% of homeowners have property insurance.[24] Renters also purchase insurance to protect their personal property, but they, too, are often underinsured in the face of climate risks.[25]

Given the importance of private insurance in property markets, insurance provision is treated as a public policy issue, with most state governments having insurance departments[26] and a variety of state and federal insurance regulations applying to private insurance companies.[27] Nonetheless, insurance companies operate as private business entities that largely make their own financial decisions and enjoy wide discretion in setting insurance rates and deciding whether to offer insurance coverage in different areas.[28]

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[22] *See Understanding Your Insurance Policy*, S.C. DEP'T OF INS., https://doi.sc.gov/957/Understanding-Your-Insurance-Policy [https://perma.cc/V3CR-G7EY] ("An insurance policy is a legal contract between the insurance company . . . and the person(s), business, or entity being insured . . . .").

[23] *Can I Own a Home Without Homeowners Insurance?*, INS. INFO. INST., https://www.iii.org/article/can-i-own-home-without-homeowners-insurance [https://perma.cc/Q9H5-TDEN].

[24] *See* Hill, *supra* note 1 (stating that "[m]ore than 65 percent of Americans own their home" and that "88 percent of U.S. homeowners buy property insurance"). However, many homeowners do not have flood insurance, which is not generally provided through the private market, but rather through the National Flood Insurance Program. *See infra* note 88 and accompanying text.

[25] *See, e.g.*, Cherise Threewitt, *What Does Renters Insurance Cover?*, U.S. NEWS & WORLD REP. (May 10, 2023), https://www.usnews.com/insurance/renters-insurance/what-does-renters-insurance-cover [https://perma.cc/P66F-KXGC] (discussing what renters insurance generally does and does not cover and indicating that most policies do not cover flood damage).

[26] *Insurance Departments*, NAT'L ASS'N INS. COMM'RS, https://content.naic.org/state-insurance-departments [https://perma.cc/VG33-89TN].

[27] *See* VANESSA C. FORSBERG, BERNADETTE FERNANDEZ & RYAN J. ROSSO, CONG. RSCH. SERV., R47507, PRIVATE HEALTH INSURANCE: A PRIMER 2 (2023), https://crsreports.congress.gov/product/pdf/R/R47507 (stating that insurers are subject to "overlapping" state and federal laws and regulations).

[28] *See id.* ("Insurers set the terms and conditions of their plans, subject to applicable requirements.").

B. INSURANCE, MORAL HAZARDS, CLIMATE CHANGE, AND WITHDRAWAL

Because insurance helps spread risk, it can create a "moral hazard" that leads property owners to invest in riskier areas than they might otherwise if they had to cover their losses without insurance.[29] While this moral hazard phenomenon is endemic to insurance coverage, now the worsening impacts of climate change are amplifying property risks and ultimately leading private insurers to withdraw from areas that they formerly covered.[30] This section elaborates on these phenomena.

First, as commentators have long observed, insurance can create moral hazard scenarios by spreading the cost of risks.[31] Moral hazard "refers to the risks that someone or something becomes more inclined to take because they have reason to believe that an insurer will cover the costs of any damages."[32] Though moral hazards can arise in a variety of scenarios,[33] such scenarios are closely tied to insurance. Indeed, the concept of moral hazard "has its roots in the advent of private insurance companies about 350 years ago. Soon after they began to form, it became clear that people who bought

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[29] *See* WHITE HOUSE, ECONOMIC REPORT OF THE PRESIDENT 296 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/erp-2023.pdf [https://perma.cc/H8CD-LZGV] ("'Moral hazard' refers to a phenomenon in insurance markets whereby access to insurance lowers incentives for risk-reducing or risk-avoiding behavior, increasing overall hazard costs.").

[30] *See, e.g.*, Mika Pangilinan, *Insurers Retreat from Coastal Virginia as Climate Risks Soar*, INS. BUS. (July 19, 2023), https://www.insurancebusinessmag.com/us/news/catastrophe/insurers-retreat-from-coastal-virginia-as-climate-risks-soar-453197.aspx [https://perma.cc/Z7HP-F3CX] (discussing insurance retreat in coastal Virginia).

[31] David Rowell & Luke B. Connelly, *A History of the Term "Moral Hazard*,*"* 79 J. RISK & INS. 1051, 1053 (2012) ("One of the oldest documented examples of a financial instrument being used to provide insurance against risk can be found in *The Hammurabi Code*, which was written in Babylon in 1790 B.C.").

[32] Cassandra Jones Havard, *What Does 'Moral Hazard' Mean?*, UNIV. OF S.C. (Mar. 21, 2023), https://sc.edu/uofsc/posts/2023/03/conversation_moral_hazard.php# [https://perma.cc/VBW9-L6YK].

[33] *See, e.g.*, Greg Depersio, *What Are Examples of Moral Hazard in the Business World?*, INVESTOPEDIA (Dec. 10, 2023), https://www.investopedia.com/ask/answers/040815/what-are-some-examples-moral-hazard-business-world.asp [https://perma.cc/98TZ-4Q8S] (providing examples of moral hazard during the great recession and in salesperson compensation).

insurance policies took risks they wouldn't have taken without that coverage."[34] So, for instance, the availability of insurance to cover storm or fire losses may lead property owners to invest in areas that are more vulnerable to storm and fire risks.

Nonetheless, the possibility of moral hazards leading to more vulnerable development has not historically dissuaded private insurance markets in areas such as California, Florida, or Louisiana.[35] Despite relatively higher storm and fire risks in these areas, private insurers have nonetheless offered insurance policies, presumably charging premiums calculated to appreciate the actuarial risk of development in more vulnerable areas.[36]

However, that calculus appears to have changed. Now it appears that climate change impacts have triggered a rise in natural disaster risk, extreme weather intensity, and extreme weather frequency. This has resulted in stunning human and financial costs with the largest insurance companies rethinking their risk calculus in vulnerable areas.[37]

Indeed, given the magnitude and correlation of climate risks in California, Florida, and Louisiana, insurance companies are increasingly unable to transfer risk among their various policy holders in these areas.[38] Extreme weather events and fires have

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[34] Havard, *supra* note 32 (citations omitted).

[35] *See infra* Part III (discussing practices in California, Florida, and Louisiana).

[36] *See infra* Part III (discussing common practices).

[37] *See* Hill, *supra* note 1 ("In the face of growing climate risk, private insurance companies have reassessed. Some insurers have sought to raise prices on premiums, reducing insurance affordability for homeowners."). Relatedly, we have seen advances in climate science in recent years that has showcased climate change's growing risks. *See* Michael Burger, Jessica Wentz & Radley Horton, *The Law and Science of Climate Change Attribution,* 51 ENV'T L. REP. 10646, 10646 (2021) ("Significant advances in climate detection and attribution science—the branch of science that seeks to isolate the effect of human influence on the climate and related earth systems—have continued to clarify the extent to which anthropogenic climate change causes both slow onset changes and extreme events."). For authoritative developments in the area of climate change research and in the way scientists understand the effects of climate change, see generally NCA5, *supra* note 16, at 4 ("The Fifth National Climate Assessment is the US Government's preeminent report on climate change impacts, risks, and responses. It is a congressionally mandated interagency effort that provides the scientific foundation to support informed decision-making across the United States.").

[38] *See* Michael Barry, *Triple-I: Louisiana's Insurance Crisis Grew After 2020-21 Hurricanes*, INS. INFO. INST. (Mar. 28, 2023), https://www.iii.org/press-release/triple-i-louisianas-insurance-crisis-grew-after-2020-21-hurricanes-032823 [https://perma.cc/XW5W-VP7E]

challenged actuarial models and disrupted the private insurance markets in these states.[39] For example, one actuarial firm estimates that California's wildfires in 2017 and 2018 "wiped out twenty-five years' worth of profits for insurance companies in that state."[40] At the same time, with an uptick in extreme weather events, billion-dollar disasters are becoming more common.[41] By one estimate, in 2022 extreme weather events cumulatively caused excess of $165 billion in damage.[42] Another estimate suggests the likelihood of Houston experiencing a one-in-a-hundred-year weather event has increased by 335%.[43] Moreover, in addition to the increased risk of climate-driven disasters, insurers have also observed a higher cost of rebuilding homes once destroyed.[44]

How are insurance companies reckoning with increased climate risk and impacts? Private insurance markets have begun to price climate risk into their actuarial models. Not surprisingly, more accurate actuarial projections have led to insurance premiums

(discussing the billions of dollars in damage caused by hurricanes in Louisiana and the resulting harm to the insurance industry).

[39] *Id.*

[40] Hill, *supra* note 1. For a discussion of insurance policies in the face of climate change, see Kenneth S. Abraham & Tom Baker, *What History Can Tell Us About the Future of Insurance and Litigation After COVID-19*, 71 DEPAUL L. REV. 169, 188–90 (2022) (discussing the tensions between policyholders, insurers, and regulators as each group attempts to grapple with the effects of climate change on the availability and scope of insurance coverage in areas prone to climate disasters).

[41] *See* Adam B. Smith, *2023: A Historic Year of U.S. Billion-Dollar Weather and Climate Disasters*, CLIMATE.GOV (Jan. 8, 2024), https://www.climate.gov/news-features/blogs/beyond-data/2023-historic-year-us-billion-dollar-weather-and-climate-disasters# [https://perma.cc/7UX8-QNL5] (indicating that between 2018 and 2022, there were "just 18 days on average between billion-dollar disasters compared to 82 days in the 1980s").

[42] Hill, *supra* note 1.

[43] *Id.*

[44] *See* Kate Dore, *As Climate Change Threatens More Homes, Some Properties Are Getting Too Costly to Insure*, CNBC (Aug. 9, 2022, 10:38 AM), https://www.cnbc.com/2022/08/07/climate-change-is-making-some-homes-too-costly-to-insure.html [https://perma.cc/S4NJ-7BPS] (noting that rising costs to rebuild are triggering higher homeowners insurance premiums); *cf.* WORLD METEOROLOGICAL ORG., WMO ATLAS OF MORTALITY AND ECONOMIC LOSSES FROM WEATHER, CLIMATE AND WATER EXTREMES (1970–2019), at 16 (2021) ("Economic losses due to weather, climate and water extremes have increased sevenfold from the 1970s to the 2010s." (citation omitted)).

rising as well as many companies exiting vulnerable markets.[45] Indeed, many insurance companies are raising rates to historic levels, with insurance policy increases far outpacing inflation.[46] Additionally, some insurance companies are exiting from climate-exposed areas. For example, Allstate and State Farm have chosen to stop issuing new policies in California.[47] Similarly, in Louisiana, insurance companies have halted the issuance of policies in areas prone to hurricanes.[48]

C. IMPACTS OF INSURANCE WITHDRAWAL AND STATE POLICY RESPONSES

The withdrawal of private insurers impacts not only prospective property investment but also existing property owners, many of whom may find themselves financially stranded.[49] In response, states have adopted policies that try to assure insurance availability and, in some cases, affordability.[50]

Insurance withdrawal heavily impacts property investment and home value.[51] For prospective investors or homebuyers seeking a

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[45] *See* Lorilee A. Medders & Jack E. Nicholson, *Florida's State Wind Pools* 6 (Res. for the Future, Working Paper No. 17-07, 2017) ("Insurance markets tend to respond adversely to mega-catastrophes. They respond to large events . . . by restricting the supply of insurance and raising the price of the limited coverage [that is made] available." (first alteration in original) (quoting J. David Cummins, *Should the Government Provide Insurance for Catastrophes?*, 88 FED. RSRV. BANK OF ST. LOUIS REV. 337, 338 (2006))). Such impacts have already occurred in California, Florida, and Louisiana. *Id.*; *infra* notes 46–48.

[46] *See* Hill, *supra* note 1 ("According to the California Department of Insurance . . . , climate-worsened wildfires have spurred insurers to seek rate increases amounting to $8.5 billion since 2015. Since January 2022, thirty-one states have witnessed double-digit rate increases. Six states saw increases of 20 to 30 percent.").

[47] *See* Ryan Mac, *Allstate Is No Longer Offering New Policies in California*, N.Y. TIMES (June 4, 2023), https://www.nytimes.com/2023/06/04/business/allstate-insurance-california.html (describing Allstate's and State Farm's exits from the California insurance market).

[48] *See* Hill, *supra* note 1 ("In Louisiana, insurance companies have declined to write policies in hurricane-prone areas.")

[49] *See id.* ("When property insurance becomes unavailable or too costly, some homeowners choose to go without. That means they bear the entire loss should disaster strike . . . .").

[50] *See id.* ("When private insurance companies stop offering insurance, the federal as well as state governments tend to step in to ensure insurance availability.").

[51] First Street, a leading organization that issues in-depth climate analysis, has sounded the alarm on a potential collapse of home prices, noting that as many as thirty-nine million

mortgage, insurance availability is a requirement for the mortgage underwriting process.[52] Thus, insurance withdrawal jeopardizes the availability of financing for would-be investors, impeding property purchases in areas of insurance retreat. For prospective buyers, this could be considered a beneficial market signal, with insurance availability effectively steering buyers away from excessive risk. Indeed, the White House's National Climate Resilience Framework acknowledges that property and casualty insurance is a "critical tool for protecting against climate risks."[53]

However, while property and insurance programs can act as an appropriate risk-transfer mechanism with appropriate premium rate increases, "insurance and reinsurance are becoming increasingly unattainable and unaffordable."[54] This leaves preexisting property owners in a difficult position because it exposes them to either increased risk of disaster losses or financial losses from exiting the market.

Preexisting owners who have property in areas of insurance withdrawal will suffer the greatest financial and safety impacts of the change in the insurance market.[55] Those homeowners, who are in areas of increased disaster risk, may not be able to afford higher insurance premiums or may be unable to secure insurance at any

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homes are insured at price levels that do not accurately reflect the underlying climate risk. *See* FIRST ST. FOUND., THE 9TH NATIONAL RISK ASSESSMENT: THE INSURANCE ISSUE 30 (2023), https://report.firststreet.org/9th-National-Risk-Assessment-The-Insurance-Issue.pdf [https://perma.cc/Q5HV-PXCK] ("In total, 39,007,490 properties have risk of increasing insurance prices or reduced coverage due to high climate risk across the FSF Flood Model, Wind Model, and Wildfire Model.").

[52] *See id.* at 20 ("All homes with a mortgage are required by lenders to have homeowners insurance.").

[53] WHITE HOUSE, NATIONAL CLIMATE RESILIENCE FRAMEWORK 15 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/09/National-Climate-Resilience-Framework-FINAL.pdf [https://perma.cc/LAF7-6X6H].

[54] *Id.* "Appropriately structured [property and casualty] insurance can also speed post-disaster recovery by providing greater financial relief and stability than typical emergency assistance." *Id.*

[55] *See* Bryan McKenzie, *Mother Nature, Insurers Make It More Expensive to Live in Harm's Way*, UNIV. OF VA. (Sept. 5, 2023), https://news.virginia.edu/content/mother-nature-insurers-make-it-more-expensive-live-harms-way [https://perma.cc/ZY48-G7QR] (discussing the financial effects of insurance withdrawal on those who live in the areas from which insurance companies are retreating).

price.[56] As a result, they no longer have financial security against previously covered losses. Homeowners in this position are left with two potentially unappealing options: (1) they may try to sell their property at a depressed price due to the unavailability of insurance; or (2) they may self-insure and personally bear the costs of any disasters. These options, discussed below, place existing homeowners in a financial bind and leave them in highly vulnerable positions.

If preexisting homeowners wish to sell their properties and exit an area of insurance retreat, they will likely face depressed resale value and financial loss, making it difficult if not impossible to leave.[57] Recall that insurance retreat will dissuade prospective property purchasers and limit financing options in certain geographic areas.[58] As a result, demand for properties in those areas diminishes and value decreases. This creates the potential for cascading impacts as communities that are unable to secure insurance see property values drop.[59] Accordingly, many property owners in areas of insurance withdrawal will either be unable to find a new buyer for their properties or, if they can find a buyer, will have to absorb a financial loss in the property sale. This scenario can render leaving effectively impossible for preexisting owners, many of whom count their homes as their largest financial investments.[60] Some will not be able to find buyers at all, and others will not be able to bear a major financial loss—not to mention the costs of moving. As a result, insurance withdrawal can strand property owners in vulnerable areas.

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[56] *See* FIRST ST. FOUND., *supra* note 51, at 30 (explaining how "the insurance industry has already responded to high risk by requiring higher deductibles, raising rates, or withdrawing from the area").

[57] *See id.* at 5 (describing the financial consequences of insurance withdrawal and stating that, because of withdrawal, the value of some homeowners' properties "will effectively become lower than the financing they took out to purchase it.").

[58] *See supra* note 9 and accompanying text.

[59] *See* FIRST ST. FOUND., *supra* note 51, at 5 ("Without the ability to insure properties in high risk areas with relatively affordable policies, homeowners will not be able to afford the cost of ownership associated with homes in those areas and property values will deflate, leading to a realization of the current climate-driven overvaluation in the market.").

[60] *See You're Probably Ignoring the Biggest Investment of Your Life*, DONNELLY+CO., https://donnellyandco.com/ignoring-the-biggest-investment-of-your-life/ [https://perma.cc/C9FU-M96H] ("[A] home is the largest single investment of most people's lives.").

For preexisting property owners that cannot leave, there is little option but to self-insure and personally bear any losses they experience. This, too, is an unsatisfactory position for most property owners. It represents a difficult and regressive financial burden, and an amplification of vulnerability. Those most likely to be stranded—people without the financial wherewithal to leave—are the least likely to have the resources to self-insure. At the same time, they are exposed to higher risks (the reason for the insurance retreat in the first place). Thus, the resulting likelihood is that the most severe disaster losses will fall on those who are financially trapped in harm's way.

These impacts of insurance retreat have caught the attention of lawmakers, who have expressed a variety of concerns ranging from general economic worries to more specific attention to stranded homeowners. For example, Senator Sheldon Whitehouse of Rhode Island, Chair of the Senate Budget Committee, has asked insurance companies to explain where major private insurers plan to drop customers next.[61] In addition, he has expressed concern that the withdrawal of home insurance could create a 2008-style housing crash.

In addition to merely expressing concern, some lawmakers have taken action. Most notably, some states have enacted programs to fill the void left by private insurance withdrawal and to forestall the impacts on property investment and preexisting homeowners.[62] Such government insurance programs are not new and did not arise

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[61] *See* Christopher Flavelle, *As Climate Shocks Grow, Lawmakers Investigate Insurers Fleeing Risky Areas*, N.Y. TIMES (Nov. 1, 2023), https://www.nytimes.com/2023/11/01/climate/climate-insurance-disasters-senate.html (reporting that Senate Democrats are investigating where major insurance companies are considering withdrawing next). Dr. Carolyn Kousky, an economist at the Environmental Defense Fund, stated that "[s]ome areas are going to become so risky that it's no longer economical to continue to have structures on them." *Id.* Senator Whitehouse represents the "Ocean State," a state vulnerable to climate coastal impacts. *See About Sheldon*, SHELDON WHITEHOUSE: U.S. SENATOR FOR RHODE ISLAND, https://www.whitehouse.senate.gov/about/biography [https://perma.cc/LEW3-XWKA] (describing Senator Whitehouse's role in representing the Ocean State).

[62] *See* FIRST ST. FOUND., *supra* note 51, at 4 (highlighting the creation of state-mandated "insurer[s] of last resort" programs to fill the "void left behind" by insurance company withdrawals).

solely in response to recent insurance retreat.[63] Rather, these programs, including plans in California, Florida, and Louisiana, have been around for decades as "insurers of last resort."[64]

However, the current scope of state insurance programs is poised to far outstrip historic levels. State insurance plan enrollments have more than doubled in recent years,[65] and by one estimate, Florida's state insurance program has recently underwritten 1.2 million policies—almost triple the number from 2019.[66] As a result, the current moment of insurance retreat represents an inflection point, where state policies around insurance availability and cost are rising in importance and coming under increased pressure.[67] The direction of these state policies will have major implications for land use and climate adaptation going forward. Accordingly, in the next Part we take stock of these policies and highlight their most important features.

III. EXAMINING STATE INSURANCE POLICIES

This Part considers potential state insurance policy choices regarding insurance availability and cost. In section III.A we propose two important considerations for this evaluation: (1) the

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[63] *See id.* at 5 (highlighting the increases in pre-existing state insurance programs, but not creation of the programs result of the insurance retreat).

[64] *See id.* at 7, 24, 26 (describing the implications of growing risk on existing "insurers of last resort" in California, Florida, and Louisiana). But the growth of these state-run insurers has increased significantly in recent years, due in large part to increases in insurance rates and insurance retreat by Allstate, State Farm, AAA insurance and others. *See id.* at 24 ("The increase in costs of insurance, and the retreat of many insurance companies from areas with significant risk, will continue to drive more property owners to these types of insurers of last resort"). In the most impacted areas of California, there has been an 800% increase in insurance-initiated non-renewals. *Id.* at 5. And Florida has witnessed a 168% increase in Citizens policies being issued from 2016–23. *Id.* at 6.

[65] *See* Hill, *supra* note 1 ("According to the Insurance Information Institute, the aggregate value of all insurance in force in FAIR plans—state-created property insurance plans focused on providing coverage to high-risk homes—almost doubled between 2013 and 2022.").

[66] *See* Thomas Frank & E&E News, *Climate Change Is Destabilizing Insurance Industry*, SCI. AM. (Mar. 23, 2023), https://www.scientificamerican.com/article/climate-change-is-destabilizing-insurance-industry/ [https://perma.cc/N46G-GKT3] ("Florida's state-run Citizens Property Insurance Corp. now has 1.2 million policies, nearly triple the number it had in 2019.").

[67] *See id.* (describing the dichotomy between increased state insurance policies and private insurance withdrawals as a "spiral" that could "collapse quickly").

amount of government intervention into private insurance markets; and (2) the balance of attention to physical risk versus financial transition concerns. In section III.B we apply these considerations to analyze a hypothetical *laissez faire* policy, the federal NFIP policy, and the current policies effective in California, Florida, and Louisiana.

A. TWO CONSIDERATIONS FOR EXAMINING STATE POLICIES

As government entities consider policy responses to insurance withdrawal, two important considerations can foundationally frame these policies: (1) the amount of government intervention into private insurance markets and (2) the balance of attention to physical risk versus financial transition concerns.

1. The Level of State Government Intervention. First, a threshold question for state policies around insurance availability and cost is that of *government intervention*; that is, how much do these policies intervene in private insurance markets or let them be? In the face of insurance retreat, lawmakers could conceivably adopt a *laissez faire* approach, and let burdens fall where they may.[68] However, this is not the present reality,[69] nor is it a likely future path (and we do not argue that it should be). Rather, lawmakers have intervened in response to insurance retreat—and it is likely that they will continue to do so.[70] However, the amount of governmental intervention can vary significantly. Government intervention ranges from regulation of the private insurance industry to state-sponsored insurance programs that complement or supplement private insurers, to entirely government provided insurance programs that exist in the absence of private insurers.[71]

To be sure, some amount of government intervention is inevitable as a political matter and may even be necessary as a temporary measure to protect the most vulnerable communities

[68] *See infra* section III.B (discussing a "hypothetical" laissez faire strategy).

[69] *See* FIRST ST. FOUND., *supra* note 51, at 5 (describing states' current involvement in private insurance issues).

[70] *See* Flavelle, *supra* note 61 (stating that lawmakers have been gathering data on the insurance market to inform policy decisions and legislation going forward).

[71] *See* FIRST ST. FOUND., *supra* note 51, at 4, 6 (describing different state regulations and various state-sponsored insurance programs).

from financial and environmental ruin. State policymakers have already reacted to insurance retreat, and will almost certainly continue to do so.[72] Moreover, there is good reason to call for government intervention in the case of insurance retreat: government inaction (simply leaving the consequences of insurance retreat to the market) would likely prolong vulnerabilities and exacerbate suffering, especially among the most physically and financially vulnerable.[73] However, a key policy variable is what form the government intervention takes: a minimalist regulatory intervention, a full government insurance program in the absence of private markets, or something falling along the spectrum.

2. Balancing Physical and Financial Risks. Second, after policymakers have determined how much or little to intervene in private markets, policies then strike a balance of how much to prioritize *physical risk* concerns versus *financial transition* concerns. These concerns end up as competing tradeoffs in the current insurance environment. Private insurance retreat represents an appreciation of (and reaction to) *physical risk*.[74] Climate impacts are worsening, and this will impose increased risk and rising costs for the foreseeable future.[75] Private insurance withdrawal represents a rational business response to this reality. Insurers, who have financial incentives to attune to changing risk profiles, are updating their insurance offerings to reflect the realities of physical risk.[76] Further, this insurance retreat sends a broader market signal about physical risk that encourages private precaution and seemingly desirable disinvestment from risky

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[72] *See id.* (mentioning several different approaches used by states in response to insurance retreat).

[73] *But see* Michael Pappas & Victor B. Flatt, *Climate Changes Property: Disasters, Decommodification, and Retreat,* 82 OHIO ST. L.J. 331, 331 (2020) (stating that government policies prevent real estate markets from adjusting to disaster risk by "subsidizing hazardous redevelopment").

[74] *See* Hill, *supra* note 1 (listing increased physical risks that have led insurers to pull out of certain markets).

[75] NCA5, *supra* note 16, at 36 (describing an increase in the "number and cost of weather-related disasters" as the climate has changed).

[76] *See* Flavelle, *supra* note 61 (describing a "shift" as major insurance companies pull out of states faced with increased risk).

areas.[77] The more state policies wish to prioritize physical risk concerns, the more they may wish to preserve these private market signals and make it more expensive to secure insurance in vulnerable areas.

However, even as insurance retreat represents a rational—even somewhat understandable and desirable—reaction to physical risk, it disrupts a formerly stable set of reliance interests held by preexisting property owners.[78] Accordingly, these property owners can become caught in a *financial transition* wherein they experience acute burdens. These property owners face increased risk, but they may be financially marooned and stuck in climate-exposed properties. Absent some intervention, homeowners will experience losses from selling property at depressed prices, self-insuring vulnerable properties, suffering from more frequent disasters, and possibly all of the above. Further, these burdens are likely to have regressive distributional impacts, hitting the most vulnerable people the hardest.[79] The more a government wishes to attend to these financial transition concerns, the more it may wish to keep insurance broadly available and suppress insurance prices as much as possible.

Thus, government insurance policies face the challenge of balancing physical risk concerns, which can be signaled through higher insurance prices or insurance withdrawal, with financial transition concerns, which aim to protect property owners' reliance interests by providing stable and possibly affordable insurance.

The two considerations discussed above—(1) the amount of government intervention into private insurance markets and (2) the balance of attention to physical risk versus financial transition concerns—reflect core policy choices that shape state responses to insurance retreat. In the following section, we apply these

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[77] *See* Frank & E&E News, *supra* note 66 (describing how climate change "is destabilizing the insurance industry, driving up prices and pushing insurers out of high-risk markets").

[78] *See* C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 744–55 (1986) (describing the various reliance interests people have in property, including homes, such as the use value and the allocative function).

[79] *See* Flavelle, *supra* note 61 ("Banks typically require insurance when writing a mortgage. If insurance becomes unavailable in a particular community, it becomes hard for most potential buyers to purchase a home, leading to a drop in real estate values.").

considerations to examine a range of potential and actual state policies.

First, we consider two seemingly opposite approaches to serve as extremes on the policy spectrum: (1) a hypothetical *laissez faire* regime and (2) a maximalist government intervention regime, exemplified by the National Flood Insurance Program.[80] Having established these two ends of the policy spectrum, we then consider the actual policies in place in California, Florida, and Louisiana. We describe all of these policies in general and then analyze how they approach choices regarding the amount of government intervention and the balance between physical risk and financial transition concerns.

B. MAXIMALIST *LAISSEZ FAIRE* REGIME: NO GOVERNMENTAL INTERVENTION

Private insurers may make business decisions to withdraw from certain geographic areas, including entire states.[81] Though full-scale withdrawals have almost always triggered government intervention,[82] we nonetheless describe the hypothetical scenario of a state policy that accepts all private insurance decisions (including full-scale insurance retreat) without government intervention. Though no state currently uses such a complete *laissez faire* approach, this hypothetical represents one end of the potential policy spectrum regarding insurance availability and cost. Accordingly, it offers a point of comparison for assessing actual insurance policies in California, Florida, and Louisiana.

1. Level of Government Intervention: Laissez Faire. In this hypothetical scenario where a state allows private insurers complete latitude and does not act in response, definitionally there

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[80] *See generally* National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001–4131 (amended 2012) (providing for the interventionist National Flood Insurance Program).

[81] *See* Flavelle, *supra* note 61 ("Faced with growing losses from hurricanes, floods and wildfires, major insurance companies are pulling out of California, Florida and Louisiana—a shift that threatens to undermine the economies of those states.").

[82] *See* Michael R. Blood, *California Insurance Market Rattled by Withdrawal of Major Companies*, AP NEWS (June 5, 2023), https://apnews.com/article/california-wildfire-insurance-e31bef0ed7eeddcde096a5b8f2c1768f [https://perma.cc/6FA5-QMLG] (discussing insurance withdrawal in California and the resulting increase in state-issued insurance policies following the withdrawal of private insurers).

is no government intervention. Under such assumptions, the provision and terms of insurance are completely left to the private market decisions of insurance companies who will, presumably, act in their business interests.

2. Balancing Financial Transition with Physical Risk. In the scenario where the state does not intervene in insurance decisions, the likely outcome is that insurance pricing and availability will primarily reflect physical risk and will ignore financial transition concerns. In theory, "Well-functioning insurance markets . . . ideally use risk as the basis for setting the price charged for each individual risk and do not offer subsidies."[83] Since insurers' profitability and viability are related to estimating and pricing physical risk,[84] then actuarial pricing of physical risk is likely to be the primary driver of insurance terms and provisions. Absent governmental intervention, insurers will send market signals about the physical risks of an area and indicate elevated risks through high prices or even insurance withdrawal.[85] If there is market competition, the theory goes, then these price signals will be based on risk-modeling that has a financial incentive to be as accurate as possible. Thus, there is a reason to have confidence that these signals will be reasonably well informed and serve as reliable risk indicators. Further, given the assumption that the government will not intervene, there is no reason to expect that these pricing signals will be distorted or muted.[86] Rather, we can expect insurance prices and availability to reflect a reasonably accurate reflection of actual, physical risk.

At the same time, we can expect that insurance prices and availability will not take financial transitions into account. After all, insurance companies' business interests are not necessarily

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[83] Medders & Nicholson, *supra* note 45, at 21.

[84] *See supra* notes 17–18 and accompanying text (discussing the business models and methods that insurance companies use to ensure profitability).

[85] *The Quiet Retreat: Identifying and Addressing Insurance Deserts*, SIAA (Feb. 15, 2024), https://www.siaa.com/the-quiet-retreat-identifying-and-addressing-insurance-deserts/# (discussing the early signs of insurance retreat which include "reduction in policy renewals, significant premium hikes, and an increase in coverage restrictions or requirements").

[86] *See* Daniel Hall, *What Goes Wrong When Government Interferes with Prices*, HOOVER INST. (Jan. 12, 2021), https://www.hoover.org/research/what-goes-wrong-when-government-interferes-prices (arguing that government action and regulations distort market signals and "result in less prosperity").

influenced by such considerations. Insurance companies are rational actors: they can be expected to react to actuarial risk, and they can be expected to either raise prices or withdraw insurance coverage when risk profiles increase. If not otherwise compelled by regulation, there is little business incentive for insurance companies to care that these price increases or withdrawals will leave formerly insured property owners financially burdened or uninsured.[87] While companies might care to some degree about the impact that rate increases and withdrawals will have on brand image and customer goodwill, the fact that actuarial risk serves as a primary financial motivator suggests that any physical risk will be the primary decision-making criterion for insurance provision and price. Indeed, actual behavior by insurance companies seems to reinforce this account, as private insurers have, in fact, raised prices or withdrawn from areas based on physical risk with little regard for the financial transition burdens this has caused to property owners.

In sum, in the absence of government intervention, market incentives suggest that insurance prices and availability will primarily reflect physical risk and will not attend to financial transitions.

C. MAXIMALIST GOVERNMENTAL INTERVENTION: THE NATIONAL FLOOD INSURANCE PROGRAM AND FLOOD HAZARDS

At the opposite end of the policy spectrum lies the scenario where no private insurers will provide coverage and the government intervenes so maximally that it is effectively the only insurance provider. The National Flood Insurance Program provides an example of such a policy approach, serving as a useful comparator for state-level insurance policies.[88]

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[87] *See* FIRST ST. FOUND., *supra* note 51, at 6 ("As a result [of California's heavy-handed regulatory approach], the insurance industry is limiting and withdrawing coverage in high-risk wildfire areas due to state regulatory policies, increasing risk from climate change, and recent economic shifts.")

[88] *See* DIANE P. HORN & BAIRD WEBEL, CONG. RSCH. SERV., R44593, INTRODUCTION TO THE NATIONAL FLOOD INSURANCE PROGRAM (NFIP), at summary (2024), https://sgp.fas.org/crs/homesec/R44593.pdf [https://perma.cc/5T5Y-R4NR] ("The general purpose of the NFIP is both to offer primary flood insurance to properties with significant flood risk, and to reduce flood risk through the adoption of floodplain management

NFIP arose as a policy response to private insurers completely withdrawing from provision of flood insurance.[89] Following the 1927 Mississippi flood, major insurance companies stopped issuing flood insurance policies along the coast and in parts of the nation that routinely flooded.[90] Essentially, the entire private insurance market found it financially unattractive to cover flood losses for areas of the country that were exposed to frequent and correlated flood risk.[91] As this insurance void persisted, the federal government ultimately created NFIP in 1968 and became the nation's primary, and effectively only, provider of residential flood insurance.[92] Through NFIP, the federal government has offered flood insurance for over fifty years, with enormous subsidies and pricing well below actuarial rates for most of that time.[93]

For much of its history, NFIP has been roundly criticized for creating extraordinary moral hazards and increasing vulnerability,

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standards."). For an outstanding summary of the role that NFIP plays in skewing federal flood policy and its associated risks, see Christine A. Klein, *The National Flood Insurance Program at Fifty: How the Fifth Amendment Takings Doctrine Skews Federal Flood Policy,* 31 GEO. ENV'T L. REV. 285, 313 (2019) (describing a "de facto system of floodplain management that departs significantly from the vision of the 1968 Congress that enacted the National Flood Insurance Act").

[89] *See* DIANE P. HORN & BAIRD WEBEL, CONG. RSCH. SERV., R45242, PRIVATE FLOOD INSURANCE AND THE NATIONAL FLOOD INSURANCE PROGRAM 10 (2023), https://sgp.fas.org/crs/homesec/R45242.pdf [https://perma.cc/S26G-2LD4] (explaining the primary reasons that spurred the creation of the NFIP).

[90] *See id.* (explaining the general unavailability of flood insurance from private insurers after the 1927 Mississippi River floods).

[91] *See id.* ("Private flood insurance companies largely concluded that flood peril was uninsurable because of the catastrophic nature of flooding, the difficulty of determining accurate rates, the risk of adverse selection, and the concern that they could not profitably provide risk-based flood coverage at a price that consumers felt they could afford.").

[92] Hill, *supra* note 1. There are some private insurers that will offer additional flood insurance, but such insurance is typically available only as an addition to NFIP coverage, with NFIP being the primary flood insurer and the private options covering losses beyond what NFIP would cover. Such private additional insurance offerings tend to be very expensive. *See* HORN & WEBEL, *supra* note 89, at 6–17 (discussing the roles that private insurers can play in the flood insurance market such as administration, reinsurance, or by acting as a primary insurer, and discussing the challenges that private insurers face when acting as primary insurers).

[93] *See* HORN & WEBEL, *supra* note 89, at 13–14 (discussing the subsidized rates that the NFIP offers and that such rates are below what the private sector would be likely to offer).

as well as for being financially unstable.[94] For instance, NFIP helped spark development and growth in flood-exposed areas, inducing investment and rebuilding in places that repeatedly flooded.[95] Additionally, because the NFIP policies have, for much of their history, been priced well below the actuarial rate that would correspond to physical risk,[96] NFIP has suffered from constant financial pressure, especially given its massive payouts in recent years.[97] In fact, the financial structure of NFIP exposes it to recurrent bankruptcy, and it requires periodic injections of congressional funding to keep it afloat.[98] As of 2019, NFIP encompassed 5.1 million flood insurance policies, covering 22,000 communities and providing $1.3 trillion in coverage.[99] Following enormous payouts of claims from Hurricanes Sandy and Katrina, NFIP has been operating with massive debt and has been forced to borrow $16 billion from the treasury to cover all these payouts.[100]

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[94] *See* Klein, *supra* note 88, at 313 ("The [NFIP] creates 'moral hazard,' whereby people take more risks than they otherwise would if they had to bear the full costs of their actions. Under this skewed system, many floodplain occupants have been lured into the path of dangerous waters."); *id.* at 338 ("[T]he National Flood Insurance Program has drifted from its original moorings and has evolved into an unwieldy and financially unsustainable behemoth.").

[95] *See id.* at 335 (describing dangerous floodplain practices, which include simply "allow[ing] development activity").

[96] *See* HORN & WEBEL, *supra* note 89, at 13–14 (discussing the subsidized rates that are below what private companies are able to profitably offer).

[97] *See* Matt Sedlar, *The National Flood Insurance Program Is Running Out of Time and Money*, CTR. FOR ECON. & POL'Y RSCH. (Oct. 11, 2023), https://www.cepr.net/the-national-flood-insurance-program-is-running-out-of-time-and-money/# [https://perma.cc/GFS2-8BH3] ("At the end of 2022, the NFIP owed the Treasury $20.5 billion, with interest totaling $300 million for the year.").

[98] *See* Hill, *supra* note 1 ("From the beginning, the [NFIP] has struggled, racking up billions of dollars in debt because payouts for flood damage have exceeded what the program brought in through premiums.").

[99] Dena Adler, Michael Burger, Rob Moore & Joel Scata, Comment, *Changing the National Flood Insurance Program for a Changing Climate,* 49 ENV'T L. REP. 10320, 10320–21 (2019).

[100] *See* SAMANTHA MONTANO, DISASTEROLOGY*:* DISPATCHES FROM THE FRONTLINES OF THE CLIMATE CRISIS 56 (2021); *see also Rising Interest Expenses*, FED. EMERGENCY MGMT. AGENCY (Mar. 6, 2023), https://www.fema.gov/case-study/rising-interest-expenses [https://perma.cc/ZUW4-Q4VB] ("[C]atastrophic losses in 2005 led to more than $16 billion in debt . . . ."). NFIP later had $16 billion of debt forgiven—but still owed over $20 billion thereafter. *National Flood Insurance Program: Fiscal Exposure Persists Despite Property Acquisitions*, U.S. GOV'T ACCOUNTABILITY OFF. (June 25, 2020), https://www.gao.gov/products/gao-20-508 [https://perma.cc/6SD8-5V3N].

1. Government Intervention. NFIP offers an example of maximalist government intervention in insurance pricing and availability. For all practical purposes, there is no private market for flood insurance; rather, the government, via NFIP, is effectively the sole provider of flood insurance.[101] Given this, the pricing and availability of NFIP policies do not necessarily follow market forces or financial incentives. Rather, they reflect political decisions. Indeed, the continued existence of NFIP seems to be a result of bipartisan political pressure from constituencies in flood-threatened communities that enjoy subsidized flood insurance, that this has long been criticized as an example of interest-group rent seeking.[102]

2. Balancing Financial Transition with Physical Risk. NFIP offers an example of insurance pricing and availability that, through most of its history, has been untethered from climate impacts and physical risk.[103] It has, to some degree, been more focused on financial transition concerns. In addressing transition concerns, NFIP presents a more complicated picture because it has not only eased financial burdens but also contributed to some financial concerns by inducing vulnerable development.

NFIP significantly distorted price signals about physical risk from flooding, and as a result it encouraged people to continually invest and rebuild in highly vulnerable areas. Private insurance markets had assessed the actuarial risk of providing flood insurance and concluded that providing such policies was financially unjustifiable.[104] This complete withdrawal from the flood insurance

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[101] *See supra* note 88 and accompanying text.

[102] *See* Gary William Boulware, Public Policy Evaluation of the National Flood Insurance Program 53 (2009) (Ph.D. dissertation, University of Florida) (defining rent seeking and listing many interest groups lobbying for increased funding to the NFIP, including the National Association of Realtors, the National Association of Homebuilders, and the Mortgage Bankers Association).

[103] *See NFIP's Pricing Approach*, FED. EMERGENCY MGMT. AGENCY (Nov. 28, 2023), https://www.fema.gov/flood-insurance/risk-rating [https://perma.cc/4ZTY-R26T] ("Since the 1970s, rates have been predominantly based on relatively static measurements, emphasizing a property's elevation within a zone on a Flood Insurance Rate Map . . . .").

[104] *See supra* section II.B (discussing insurance withdraw from at risk areas).

market sent a strong signal and significantly dampened investment in flood-prone areas.[105]

NFIP, however, worked in the opposite direction, obscuring physical risk and inviting—even subsidizing—investment in known flood prone areas.[106] Not only did NFIP provide forms of insurance that financial markets found financially untenable, but NFIP also set its prices well below the actuarial rate.[107] Moreover, NFIP encouraged not only the initial investment in these areas but also subsequent rebuilding,[108] such that some properties have suffered dozens of floods, been rebuilt each time, and received successive insurance payouts that total many multiples of their market value.[109] It is an understatement to say that NFIP has distorted signals about physical risk. NFIP has, in fact, offered insurance that is plainly contrary to physical risk indicators.

Given that the availability and pricing of NFIP coverage has been demonstrably detached from physical risk, it is tempting to say that the program was primarily focused on financial transition. That is partly true, but it is more complicated because NFIP seems to have induced vulnerable development that may not have otherwise occurred. So NFIP did not just respond to existing reliance interests by property owners; it created new reliance interests and thus new

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[105] *Cf.* Kristian S. Blickle & João A.C. Santos, UNINTENDED CONSEQUENCES OF "MANDATORY" FLOOD INSURANCE 1 (2022) ("[I]nsurance may lower the residual risks to which lenders are exposed and thereby lower the riskiness of investing in an area.").

[106] NFIP has provisions to reduce flood risk through the adoption of floodplain management standards as a condition to participate in NFIP. Nevertheless, enforcement of these standards is left to the participating NFIP community. By one estimate, between 58% and 70% of buildings are built in full compliance of floodplain management standards. MARGARET L. MATHIS & SUZANNE NICHOLSON, DEWBERRY, AN EVALUATION OF COMPLIANCE WITH THE NATIONAL FLOOD INSURANCE PROGRAM PART B: ARE MINIMUM BUILDING REQUIREMENTS BEING MET?, at viii, 2 (2006).

[107] *See* HORN & WEBEL, *supra* note 89, at 13–14 (discussing the subsidized rates that the NFIP offers and that such rates are below what the private sector would be likely to offer).

[108] *See* Abigail Peralta & Jonathan B. Scott, *Does the National Flood Insurance Program Drive Migration to Higher Risk Areas?*, 11 J. ASS'N ENV'T & RES. ECONOMISTS 287, 314 (2024) ("Maintaining inefficiently low rates for flood insurance provides consistent incentives to rebuild and reside in areas with high risk.").

[109] *See* Ruth Simon, *One House, 22 Floods: Repeated Claims Drain Federal Insurance Program*, WALL ST. J. (Sept. 15, 2017, 6:43 AM), https://www.wsj.com/articles/one-house-22-floods-repeated-claims-drain-federal-insurance-program-1505467830 ("[The house] has flooded 22 times since 1979 . . . . [T]he [NFIP] paid out more than $1.8 million to rebuild the house—a property . . . worth $600,000 to $800,000 . . . .").

financial transition concerns. But once development existed in flood-prone areas (whether independent of or spurred by NFIP), the continuation of NFIP, with its subsidized flood insurance, did attend to financial transition concerns. It honored the reliance interests of flood-prone property owners by providing continued, affordable flood insurance coverage, even when actuarial considerations would have sharply increased prices or led to insurance withdrawal.[110]

However, this approach may have simply delayed financial transition shocks rather than avoided them. Currently, the financial unsustainability of NFIP has led to reform efforts that would see the insurance program continue, but sharply increase its prices to reflect actuarial risk.[111] These reform efforts are ongoing and their legality has been challenged in pending lawsuits.[112] But assuming these reform efforts do progress, NFIP itself may be imposing steep price hikes that would subject property owners to sudden financial strain that disrupts the stability of their expectations.[113]

To summarize, NFIP represents a full governmental provision of insurance in the absence of private markets. The resulting program

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[110] *See* Baker, *supra* note 78, at 744–55 (describing the various reliance interests people have in property, including homes, such as the use value and the allocative function).

[111] *See* Michael Phillis, *FEMA Report: Flood Insurance Hikes Will Drive 1M from Market*, AP NEWS (July 22, 2022, 9:04 AM), https://apnews.com/article/floods-entertainment-federal-emergency-management-agency-congress-climate-and-environment-2f8fac768c73e52090eaa59f742ff48d [https://perma.cc/E3CM-E27F] (discussing increased rates resulting from a changed model that reflects the level of risk a home faces). For an in-depth discussion of such a revised model, see generally GOV'T ACCOUNTABILITY OFF., GAO-23-105977, FEMA'S NEW RATE-SETTING METHODOLOGY IMPROVES ACTUARIAL SOUNDNESS BUT HIGHLIGHTS NEED FOR BROADER PROGRAM REFORM, at intro. (2023), https://www.gao.gov/assets/gao-23-105977.pdf [https://perma.cc/A4XJ-A6XC] (discussing a new actuarial model which aligns "premiums with the flood risk of individual properties" but also entails "affordability concerns [that] accompany the premium increases").

[112] *See, e.g.*, Kevin McGill, *Louisiana, 9 Other States Ask Federal Judge to Block Changes in National Flood Insurance Program,* AP NEWS (Sept. 14, 2023, 4:29 PM), https://apnews.com/article/louisiana-flood-insurance-lawsuit-4bb2307431db2ea4781959c99f5a0e61 [https://perma.cc/Z447-FXUJ] (reporting lawsuits by ten states seeking to block sharp rate increases that may result in an increase in premiums at a rate in excess of 700%).

[113] *See* Phillis, *supra* note 111 (discussing the rate increases resulting from the NFIP's new model and providing an example of one homeowner whose annual premiums increased from $446 to $1,893).

is the result of political choices rather than actuarial ones.[114] Throughout most of its history, it has muted signals about physical risk and buffered against financial transition concerns for property owners. However, recent reform efforts show signs of adjusting pricing to be more in line with physical risk but to impose financial transition pressures on property owners.

D. CALIFORNIA'S FAIR PLAN

California statutes regarding insurance availability and price were established to address equality concerns in the 1960s,[115] but presently they appear to be reacting primarily to physical risks associated with wildfire.[116] Currently, some California statutes take the form of regulating insurance practices, such as when an insurer may cancel a policy.[117] Alternatively, other California insurance interventions simply involve state agencies disseminating information to the public.[118] Additionally, and most important to this Article, California has also sought to ease financial transition concerns by establishing California FAIR (CA FAIR), the state's insurer of last resort for fire risk.[119] To date, CA FAIR has largely been a publicly mandated but privately run enterprise, with the California government playing a limited role in the actual administration and function of CA FAIR.[120] In recent years, the

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[114] *See NFIP's Pricing Approach*, *supra* note 103 (describing the NFIP's earlier rate setting methodology which incorporated few variables and may have resulted in homeowners paying more or less than what their actuarial risk would have suggested).

[115] *See* CAL. INS. CODE § 10090 (1969) (providing that the purposes of the FAIR plan include stabilizing the property market, ensuring the availability of insurance, and ensuring that insurance is available even where it is not available on the normal market).

[116] *See* CAL. DEP'T INS., CALIFORNIA PROGRESS REPORT ON WILDFIRES AND INSURANCE 1 (2023) (stating that one of the goals of the California Department of Insurance is to "drive down the cost of insurance").

[117] *See, e.g.*, CAL. INS. CODE § 673 (2023) (limiting insurers' ability to cancel policies and providing procedures to which insurers must adhere to do so).

[118] *See, e.g.*, *infra* note 124.

[119] *See California Fair Plan,* CAL. DEP'T OF INS. [hereinafter *CA Fair Plan*], https://www.insurance.ca.gov/01-consumers/200-wrr/California-FAIR-Plan.cfm [https://perma.cc/3TJC-W99L] (describing the FAIR plan generally and stating that one of the goals is ensuring that homeowners "have options for coverage that meet their needs").

[120] See CAL. DEP'T. INS., *supra* note 116 ("[T]he FAIR Plan is a private association whose day-to-day operations are controlled by insurance companies . . . .").

California Insurance Commissioner has sought to amend and expand the CA FAIR program, but it remains essentially privately run.[121] As a result, details about CA FAIR are more difficult to find, but information to date indicates that enrollment in CA FAIR has been expanding due to its relative financial affordability.

1. Government Intervention. California's government intervention in insurance availability and price is a comparatively light touch. California regulates insurers regarding some aspects of wildfire policy availability.[122] For example, a recently enacted California law prohibits insurance companies from refusing to renew policies in recently burned wildfire zones.[123]

Beyond that, the State of California disseminates information about private insurance availability. This informational function leaves considerable room for private insurers to make decisions based on their risk calculations and tolerances. For example, the California Department of Insurance has been actively informing residents about insurance retreat. In May 2023, the California Department of Insurance issued a consumer alert that "State Farm General Insurance Company announced it will temporarily stop writing new homeowners' and certain commercial insurance policies in California."[124]

This announcement offered an overview of California's relatively modest intervention into private insurance markets. It noted that the department "cannot legally control a company's business

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[121] *See Court Delivers Win for Homeowners in Expanding FAIR Plan Coverage*, CAL. DEP'T INS. (Nov. 29, 2023), https://www.insurance.ca.gov/0400-news/0100-press-releases/2023/statement065-2023.cfm [https://perma.cc/9UM3-VS33] (detailing a recent court win for the Commissioner relating to his authority to expand FAIR coverage and close coverage gaps).

[122] *Commissioner Lara Enforces Nation's First Wildfire Safety Regulation to Help Drive Down Cost of Insurance*, CAL. DEP'T OF INS. (Oct. 17, 2022), https://www.insurance.ca.gov/0400-news/0100-press-releases/2022/release076-2022.cfm [https://perma.cc/U7KT-WQE6].

[123] *See* CAL. INS. CODE. § 675.1(b)(1) (2019) (prohibiting insurers from cancelling or refusing to renew policies for properties located near the fire perimeter "based solely on the fact that the insured structure is located in an area in which a wildfire has occurred").

[124] *Consumer Alert on State Farm's Decision,* CAL. DEP'T OF INS. (May 30, 2023) [hereinafter *Consumer Alert*] (emphases omitted), https://www.insurance.ca.gov/0400-news/0102-alerts/2023/Consumer-Alert-on-State-Farm%27s-Decision.cfm [https://perma.cc/ZXV4-AZ78].

decision,"[125] nor can it control the myriad factors—from climate change to global inflation—that went into the decision.[126] Despite these admissions that it has little control over the situation, the department reassured current homeowners that this moratorium on new policies did not affect existing policies and that there were plenty of options for insurance still on the market—such as the "approximately 115 insurance companies continuing to write residential policies throughout the state—[including for developments in the "wildland urban interface" (WUI), which can be a particularly risky area for wildfires]."[127]

Finally, and most central to this analysis, California has established CA FAIR, an insurer of last resort that is run collectively by the private insurers in the state.[128] The California Legislature established CA FAIR in 1968.[129] According to the California Insurance Commissioner, the program was enacted because, "[f]ollowing civil unrest and fires in the 1960s, homeowners could not obtain insurance due to some insurers' discriminatory practices of not writing basic property insurance in high risk urban areas."[130] State law thus required all insurers doing business in California to participate in CA FAIR, which would provide basic property insurance to those who could not otherwise obtain it through the insurance market.[131] As a result, "[a]ll licensed property/casualty insurers [that] write basic property insurance

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[125] *Id.*

[126] *See id.* ("The factors driving State Farm's decision are beyond our control—climate change challenges, higher reinsurance costs affecting the entire insurance industry, and global inflation.").

[127] *Id.*

[128] *See id.* ("[T]he FAIR Plan . . . is available to residents and businesses . . . Who cannot obtain insurance through a regular insurance company.").

[129] *About FAIR Plan*, CAL. FAIR PLAN, https://www.cfpnet.com/about-fair-plan/ [https://perma.cc/K3DT-EV59].

[130] Ricardo Lara, *Welcome to the Investigatory Hearing of the California FAIR Plan Association*, CAL. DEP'T INS. [hereinafter *FAIR Presentation*], https://www.insurance.ca.gov/01-consumers/200-wrr/upload/FAIR-Plan-Investigatory-Hearing-Presentation-Final-Public.pdf [https://perma.cc/QMT9-QBYW].

[131] *Id.* The scope of the insurance provided by CA FAIR is limited only to fire, lightning, internal explosions, and smoke damage. Hilda Flores, *California FAIR Plan Wildfire Insurance: What Is It, and How Can I Get It?*, KCRA 3 (July 12, 2022, 11:30 AM), https://www.kcra.com/article/california-fair-plan-wildfire-insurance-what-is-it-how-can-i-get-it/40574517.

required by Insurance Code sections 10091(a) and 10095(a) are members of the FAIR Plan."[132] The CA FAIR Plan is, then, a consortium of its member companies, and "[e]ach member company participates in the profits, losses[,] and expenses of the Plan in direct proportion to its market share of business written in the state."[133]

Though CA FAIR was not necessarily established in response to natural disaster risk, over the last few years the CA FAIR plan enrollment for wildfire holders has grown considerably.[134] In short:

> With most admitted carriers exiting the market as a result of increasing risk and rising construction costs, more and more property owners are unable to purchase fire insurance. Policies under the FAIR Plan have more than doubled since 2018 and rates are increasing as the risk pool skews further toward higher risk.[135]

2. Balance of Financial Transition and Physical Risk. Given that CA FAIR is administered by a syndicate of private insurers, one might assume that the plan would primarily attend to physical risk and provide only minimal attention to financial transition concerns.[136] However, though information is difficult to uncover, it appears that trends are moving in the opposite direction; enrollment in CA FAIR appears to be growing, suggesting that it may be easing financial transition concerns more than one might expect from a primarily private-run enterprise.[137] But the relative affordability of CA FAIR suggests that either physical risks are actuarially lower than what individual private insurers perceive,

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[132] *About FAIR Plan, supra* note 129.

[133] *Id.*

[134] *FAIR Presentation*, *supra* note 130.

[135] Renee K. Belgarde, *Changes to California's FAIR Plan Complicate an Already Troubled Market,* AMWINS (July 24, 2023), https://www.amwins.com/resources-insights/article/changes-to-california-s-fair-plan-complicate-an-already-troubled-market [https://perma.cc/Y4M6-U663].

[136] *See supra* section III.B (discussing the motives of private insurers with respect to the balance of financial transition and physical risk).

[137] *Fair Presentation*, *supra* note 130, at 8.

such that CA FAIR is price competitive, or that risks are not being fully priced.

CA FAIR further seeks to attend to financial transitional concerns by providing continuity of coverage for properties that would otherwise not be able to secure private fire insurance. The plan expressly says as much: "In the last decade, more Californians have turned to the FAIR Plan as wildfires have devastated California and some insurers have pulled back from these markets. . . . [W]e will support homeowners regardless of a property's fire risk . . . ."[138] However, the California FAIR plan is meant to be temporary and transitional—a stopgap rather than an ongoing alternative to private insurance.[139]

CA FAIR has been expanding its coverage and enrollment, and the California Insurance Commissioner has announced an intention for further expansion.[140] CA FAIR has already increased coverage limits and expanded to include farm building, making it available to more and more valuable properties.[141] Current coverage includes "up to $3 million coverage for homeowners and . . . up to $20 million commercial insurance coverage."[142] This represents a 25% increase in homeowners coverage and a doubling of commercial coverage since 2021.[143] Further, the California Insurance Commissioner has ordered more comprehensive policy coverage as well as expanded residential and commercial coverage.[144]

Despite these signals, assessing how CA FAIR responds to financial transition and physical risk is complicated because pricing signals surrounding the plan are currently counterintuitive. In

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[138] *About Fair Plan, supra* note 129.

[139] *See id.* ("[U]nlike traditional insurers, our goal is attrition. For most homeowners, the FAIR Plan is a temporary safety net—here to support them until coverage offered by a traditional carrier becomes available.").

[140] *See Court Delivers Win for Homeowners in Expanding FAIR Plan Coverage*, CAL. DEP'T OF INS. (Nov. 29, 2023), https://www.insurance.ca.gov/0400-news/0100-press-releases/2023/statement065-2023.cfm [https://perma.cc/5535-TR9K] (reporting on a ruling that upheld efforts to expand CA FAIR coverage and policy options).

[141] *See CA Fair Plan*, *supra* note 119 (indicating the higher coverage limits available for residential and commercial policies beginning in 2019).

[142] *Consumer Alert*, *supra* note 124.

[143] Belgarde, *supra* note 135.

[144] *See FAIR Presentation, supra* note 130, at 12 (stating that these coverage expansions included expansions to cover "water damage, theft, and additional living expenses").

terms of cost, "[t]ypically, the FAIR Plan is much more expensive than regular wildfire insurance" because it covers higher risk properties.[145] However, there is some unexpected indication that CA FAIR has actually become *more* affordable.[146] Indeed, the increased participation in CA FAIR along with falling prices has led some analysts to question the role that the program is playing amidst other private insurance options. As one commentator has observed:

> Experts agree that funneling more participants into the plan is not in keeping with the "insurer of last resort" mentality on which it was founded. Still, with recent regulatory changes and an ongoing hard property market, the FAIR Plan can be the *least expensive option available*, even though most Californians have access to the same coverage through the traditional, competitive market.[147]

With these unexpected pricing signals, it is hard to assess exactly how CA FAIR is balancing financial transitions with physical risk, and even more so because pricing information does not appear to be publicly available. While there is some evidence of price aligning with physical risk (or risk abatement), such as a policy that "[r]esidential and commercial policyholders can obtain a discount of up to 20 percent on the wildfire portion of their FAIR Plan premium for hardening their properties,"[148] it remains difficult to closely analyze the relationship.

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[145] Flores, *supra* note 131, at 3 (describing the FAIR Plan's use as a "last resort" option for properties in "higher risk areas").

[146] Belgarde, *supra* note 135.

[147] *Id.* (emphasis added).

[148] *CA Fair Plan*, *supra* note 119.

E. FLORIDA'S CITIZENS PROPERTY INSURANCE CORPORATION

> *Humans are not that rational. So there's a lot of people that just want to live in Florida because it's beautiful and it's by the ocean and it has the sunshine.*[149]
>
> - First Street Foundation CEO Matthew Eby

Florida is a state highly vulnerable to climate impacts, and it has suffered from an uptick in major hurricanes and extreme events in recent years.[150] Indeed, Florida "is the state with the most vulnerability to the wind peril from tropical storms and hurricanes, given the combined loss frequency and severity Florida faces from such events."[151] Moreover, the National Climate Assessment estimates that these impacts will grow, causing displacement within Florida.[152] Florida already has the highest insurance premiums of any state in the United States, with one estimate stating that Floridians are paying on average $6,000 a year.[153]

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[149] Aimee Picchi, *Homes in Parts of the U.S. Are "Essentially Uninsurable" Due to Rising Climate Change Risks*, CBS NEWS (Sept. 20, 2023, 12:01 AM), https://www.cbsnews.com/news/insurance-policy-california-florida-uninsurable-climate-change-first-street/ [https://perma.cc/ARF5-F7UR].

[150] NCA5, *supra* note 16, at 37 (highlighting that, during the period of this study, Florida suffered the most damage overall, approximately $140 billion, and the "highest damages from a single event"—totaling $113 billion—caused by Hurricane Ian).

[151] Medders & Nicholson, *supra* note 45, at 3.

[152] *See* NCA5, *supra* note 16, at 45 ("Over the next three decades, the number of flooding days along all coastlines of the US is expected to increase.").

[153] *See* Chris Isidore, *Florida's Homeowner Insurance Rates Are Four Times the National Average. That's Not Getting Better Any Time Soon*, CNN (June 1, 2023, 8:08 AM), https://edition.cnn.com/2023/06/01/business/florida-homeowner-insurance-rates/index.html [https://perma.cc/4P92-B37J] ("Homeowners in [Florida] pay private insurers about $6,000 a year, compared to a national average of $1,700."). Additionally, insurance costs have been increasing, with one study projecting that premiums in Florida would increase by 40% or more in 2023 alone. *See Trends and Insights: Addressing Florida's Property/Casualty Insurance Crisis*, TRIPLE-I ISSUES BRIEFS (Ins. Info. Inst., New York, N.Y.), Feb. 15, 2023, at 2 (predicting a rate increase of 40% or more in 2023); *see also* Giulia Carbonaro, *Florida Considers Socialist Model to Combat Soaring Insurance Costs,* NEWSWEEK (Jan. 9, 2024, 4:23 AM), https://www.newsweek.com/florida-considers-socialist-model-insurance-costs-1858612# [https://perma.cc/76JK-MKJ7] (stating that Florida is suffering from an insurance crisis with insurance costs growing by 102% in just the past three years).

Exacerbating matters, major insurance companies have fled Florida in recent years. For over a decade, large insurers have been steadily withdrawing from Florida,[154] and this trend has continued, with major insurers abandoning the Florida market on the basis of increased risk related to climate change.[155] As a result, the private insurance market in Florida has "become dominated by small, non-diversified, domestic insurers (often undercapitalized and heavily reliant on reinsurance) as large insurers reduce capacity and exposure."[156] Accordingly, the insurance market in Florida has become largely dependent on these small, independent insurers.[157]

Further, even among the private insurers that remain in Florida, coverage can be limited. For example, some private insurers will not ensure certain residential properties at all, based on the risk profile.[158] In other cases, particularly along the Florida coast, private insurers may issue policies but will exclude coverage for wind-related losses.[159]

Responding to these conditions in the private insurance market, the state of Florida has intervened with a few different strategies. One of the most important and impactful interventions has been the creation of Citizens Property Insurance Corporation (Citizens), a government entity that provides property insurance policies.[160]

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[154] *See* Medders & Nicholson, *supra* note 45, at 5–7 (noting that large insurers have reduced capacity and exposure in catastrophe-prone areas, especially Florida, and that small, non-diversified insurers tend to fill the gaps).

[155] For example, AAA just announced that they will not renew insurance policies in Florida, marking the fourth insurer in 2023 to withdraw from Florida. Khristopher J. Brooks, *AAA Pulls Back from Renewing Insurance Policies in Florida,* CBS NEWS (Jul. 18, 2023, 4:58 PM), https://www.cbsnews.com/news/aaa-insurance-policies-florida-nonrenewal/ [https://perma.cc/8S8P-T46K].

[156] Medders & Nicholson, *supra* note 45, at 7.

[157] *Id.*

[158] *See* Kenneth Araullo, *Coastal Properties at Risk of Becoming Uninsurable*, INS. BUS. (Oct. 26, 2023), https://www.insurancebusinessmag.com/us/news/catastrophe/coastal-properties-at-risk-of-becoming-uninsurable--report-464532.aspx [https://perma.cc/83YW-K7RJ] (discussing the refusal of some insurers to offer policies for properties that "are susceptible to natural disasters and high reconstruction costs").

[159] *See* FLA. OFF. OF INS. REGUL., TERRITORIAL BOUNDARIES FOR RESIDENTIAL COVERAGES IN FLORIDA § 3, at 6 (2006) ("[M]any insurers specifically exclude wind coverage in areas of the state that are eligible for wind-only coverage from Citizens.").

[160] *See Who We Are*, CITIZENS PROP. INS. CORP., https://www.citizensfla.com/who-we-are [https://perma.cc/ML39-MV7X] ("Citizens was created by the Florida Legislature in August

Additionally, Florida has government programs to reimburse property owners for losses above those covered by insurance and to provide funding to protect residents from insolvent insurers.[161] Florida also acts proactively through programs whereby individuals can lower their insurance premiums by mitigating against wind risk.[162] Finally, Florida has a government commission that reviews computer models for hurricane risk and loss, and requires that all insurers providing homeowner's policies use a commission-approved model in setting their rates.[163]

Among all of Florida's governmental interventions in the insurance market, Citizens stands out regarding its major influence on insurance availability and pricing. Citizens was created to provide an "orderly market for property insurance for residents and businesses of [the] state."[164] The Florida legislature found that the "absence of affordable property insurance threatens the public health, safety, and welfare and likewise threatens the economic health of the state."[165] Thus, the Florida legislature found that there is a "compelling public interest and . . . public purpose" to issue affordable property insurance to "facilitate the remediation, reconstruction, and replacement of damaged or destroyed property."[166] Florida law empowers Citizens to do so "as long as necessary."[167] Indeed, the governing legislation describes Citizens as "an integral part of the state."[168]

To perform this integral function, Citizens provides two types of policies, both responding to coverage limitations in the private insurance market. First, Citizens provides multi-peril property

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2002 as a not-for-profit, tax-exempt, government entity to provide property insurance to eligible Florida property owners unable to find insurance coverage in the private market.").

[161] Medders & Nicholson, *supra* note 45, at 11–12 (discussing other protective measures present in Florida, such as measures to protect insureds against an insurer's insolvency and to reimburse damages beyond insurance coverage).

[162] *See id.* at 16–18 (describing "Related Risk-Reduction Programs").

[163] *See id.* at 18–19 (discussing the creation of the Florida Commission on Hurricane Loss Projection Methodology and the requirements that insurance companies in Florida use the commission's rate filings).

[164] FLA. STAT. § 627.351(6)(a) (2023).

[165] *Id.* § 627.351(6)(a)(1).

[166] *Id.*

[167] *Id.*

[168] *Id.*

insurance policies that are equivalent to private property insurance.[169] Like their private insurance equivalents, these policies may exclude wind coverage in coastal areas.[170] To be eligible for a Citizens multi-peril policy, an applicant must not be able to acquire private insurance at or below the prescribed statutory thresholds.[171]

Second, Citizens provides wind-only insurance policies through its "Coastal Account."[172] The Coastal Account is available to personal and commercial residential properties located in "Eligible Areas," comprised of twenty-nine coastal counties.[173] Within those counties, Coastal Accounts are available to those who cannot otherwise obtain wind coverage.[174]

Florida law caps the amount of insurance coverage Citizens can provide, limiting its "dwelling replacement cost" coverage to $700,000 throughout most of the state and $1 million in Miami-Dade and Monroe Counties.[175] However, state lawmakers are calling for increases to this cap.[176]

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[169] *See* FLA. OFF. OF INS. REGUL., MARKET CONDUCT EXAMINATION REPORT: CITIZENS PROPERTY INSURANCE CORPORATION 4 (2023) [hereinafter MARKET CONDUCT EXAMINATION REPORT] (outlining policy information); CITIZENS PROP. INS. CORP., PLAN OF OPERATION 20–21 (2002) (amended 2013) [hereinafter PLAN OF OPERATION] (describing different property policy forms available).

[170] MARKET CONDUCT EXAMINATION REPORT, *supra* note 169, at 5 (describing Personal and Commercial Lines Accounts).

[171] *See* PLAN OF OPERATION, *supra* note 169, at 17 ("[A]n applicant . . . is not eligible for coverage . . . if they are provided an offer of coverage from an authorized insurer . . . [by statute]."); FLA. STAT. § 627.351(6)(c)5.a (2023) (providing eligibility thresholds).

[172] MARKET CONDUCT EXAMINATION REPORT, *supra* note 169, at 5 ("Citizens' coastal insurance coverage consists of personal and commercial residential coverage and wind-only insurance for personal and commercial risks located within the eligible areas that are unable to obtain such coverage from authorized insurers.").

[173] PLAN OF OPERATION, supra note 169, at 5, 6, 21 (providing that wind-only insurance is only available in "Eligible Areas" that were formerly covered by the Florida Windstorm Underwriting Association (FWUA)); Medders & Nicholson, *supra* note 45, at 9 (stating that the FWUA covered twenty-nine coastal counties).

[174] MARKET CONDUCT EXAMINATION REPORT*, supra* note 169, at 5.

[175] Jim Saunders, *Florida Lawmakers Look at Raising Citizens' Coverage Cap,* WUSF (Jan. 16, 2024, 4:38 PM), https://www.wusf.org/politics-issues/2024-01-16/florida-legislature-bill-raising-citizens-property-insurance-coverage-cap# [https://perma.cc/V7HA-TYHU].

[176] *See id.* (reporting on SB 1106, legislation that seeks to raise Citizens' coverage caps).

Even with its current coverage caps, Citizens is the largest property insurer in the state.[177] In fact, it "is the largest residual market insurer in the nation, and [in] 2006–2015 was more than 10 times the size of any other coastal state insurance plan."[178] It has issued 1.3 million policies to Florida homeowners,[179] and it provides the bulk of the riskiest wind insurance in places like Monroe County, in the southernmost part of Florida, and the Florida Keys."[180]

Even though Citizens has a large market share, its aim has not been to supplant private insurance. Rather, Citizens has a "depopulation program" aimed at helping Citizens customers find private insurance.[181] In fact, when Citizens enrollment reached a high point in 2011, Citizens "vigorous[ly]" and "aggressively" pursued this depopulation policy, and its policy shares fell after 2012.[182] However, its coverage was still significant. Even after significant depopulation, Florida Citizens was the largest state insurer in the United States in 2016, with 8.5% of the Florida property insurance market.[183] Citizens' enrollment is once again increasing, more than doubling in the last few years.[184] Its role in the Florida insurance market is growing in the face of private

[177] *Id.*

[178] Medders & Nicholson, *supra* note 45, at 10.

[179] Carbonaro, *supra* note 153.

[180] *See Wind Insurance - Citizens,* MONROE COUNTY FLORIDA, https://www.monroecounty-fl.gov/1137/Wind-Insurance---Citizens [https://perma.cc/VM7F-YD4B] ("The vast majority of properties in Monroe County have wind insurance coverage through Citizens Property Insurance Company." (emphasis omitted)).

[181] *See, e.g.*, *Depopulation*, CITIZENS PROP. INS. CORP., https://www.citizensfla.com/depopulation [https://perma.cc/LW9F-JABK] ("Citizens is committed to helping its policyholders find coverage in the private market.").

[182] *See* Medders & Nicholson, *supra* note 45, at 13 & n.32 ("[A] vigorous Citizens depopulation program intentionally reduced Citizens' market share.").

[183] *Id.* at 19; *see also* FIRST ST. FOUND., *supra* note 51, at 26 (noting in the publication from 2023 that Citizens "has become the largest home insurance agency in the state of Florida").

[184] MARKET CONDUCT EXAMINATION REPORT, *supra* note 169, at 5 ("[C]reated as Florida's insurer of last resort, the number of policies in force for . . . Citizens accounts has steadily increased from 474,630 as of June 30, 2020, to 931,357 as of June 30, 2022 . . . . As of November 30, 2022, Citizens reported the number of policies in force as 1,126,319.").

insurers fleeing Florida, and many Florida state legislators are seeking to further expand Citizens' reach.[185]

Given that Citizens insures so many properties within the state and that it covers some of the riskiest properties, its pricing and funding policies are very important to the state's insurance market.[186] Citizens is funded primarily through premiums and supplemented by statewide assessments if additional funding is necessary.[187] Though in the past these premiums were subsidized below actuarial rates,[188] current state law requires Citizens rates to be "actuarially sound"[189] and calls for annual rate increases to move them toward actuarial levels.[190] To make up for subsidized, artificially low rates, Citizens has proposed substantial increases in recent years.[191] For example, in 2023 Citizens requested a statewide average rate increase of 13.1% for its multi-peril policies, and current Florida law would allow an additional 13% increase in 2024.[192] Even with these rate increases, "Citizens' rates, on average, are still 58.6% below actuarially sound levels, but the inadequacy

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[185] *See* Carbonaro, *supra* note 153 ("Florida lawmakers looking to tackle the insurance crisis in the state are considering allowing state-backed Citizen Property Insurance to cover more homes following the exodus of some 15 major insurers in the past couple of years.").

[186] *See* Medders & Nicholson, *supra* note 45, at 8–9 (noting the "size of the catastrophe risk" in the Florida insurance market and the state's "cho[ice] to develop quite a large system of public markets for property insurance and reinsurance" which includes FL Citizens).

[187] *See Who We Are*, CITIZENS PROP. INS. CORP., https://www.citizensfla.com/who-we-are [https://perma.cc/T6W4-4JDJ] (noting how Citizens Insurance gains its funding through premiums and assessments when if it experiences a deficit).

[188] *See* Medders &Nicholson, *supra* note 45, at 21 (summarizing the Florida bill from around 2006 that allowed Citizen Insurance to "formally roll[] back Citizen rates").

[189] PLAN OF OPERATION, *supra* note 169, at 19.

[190] *See id.* at 20 ("[T]he Corporation shall annually implement a rate increase which . . . does not exceed 10 percent for any single policy issued by the Corporation . . . .").

[191] *See Citizens Presents 2023 Rate Recommendations to the Office of Insurance Regulation (OIR)*, Citizens Prop. Ins. Co. (June 8, 2023), https://www.citizensfla.com/-/20230608-citizens-presents-2023-rate-recommendations-to-oir# (summarizing the previously artificial rates and the plan to increase them).

[192] *See 2024 Personal Lines Rate Cap Change*, CITIZENS PROP. INS. CORP., https://www.citizensfla.com/-/20231127-2024-personal-lines-rate-cap-change [https://perma.cc/KB29-EB8Q] (stating that rate increases are limited by the "glide path" to 13% in 2024).

would have been 88.3% without [recent legislative and rate] reforms."[193]

Given the large discrepancy between actuarial levels and Citizens rates, there is a real possibility that, in the event of a disaster, Citizens' premiums would be insufficient to cover the insured losses.[194] However, as previously mentioned, when operating in a deficit, Citizens is empowered to levy assessments on many Florida insureds to cover the deficit.[195] In that event, it is mandated to impose emergency assessments on a broad swath of policyholders across the state, even those with private insurance.[196] But given the likely political difficulty around imposing such an emergency assessment, observers suggest that state leaders may seek assistance from the federal government prior to imposing an emergency assessment.[197]

1. Government Intervention. Florida demonstrates heavy government intervention in the availability and pricing of insurance.[198] Commentators have observed that Florida's insurance market is highly influenced by state action:

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[193] Press Release, Citizens Prop. Ins. Corp., Citizens Presents 2023 Rate Recommendations to OIR (Jun. 8, 2023), https://www.citizensfla.com/-/20230608-citizens-presents-2023-rate-recommendations-to-oir [https://perma.cc/5JJX-MNKY].

[194] *See* Letter from Sen. Sheldon Whitehouse, Chairman, Sen. Comm. on the Budget, to Ron DeSantis, Governor, State of Fla., Michael Yaworsky, Ins. Comm'r, State of Fla. & Tim Cerio, President, CEO & Executive Director, Citizens Prop. Ins. Corp. (Nov. 30. 2023), https://www.budget.senate.gov/imo/media/doc/letter_to_citizens.pdf [https://perma.cc/SD98-S72C] (detailing the risks associated with FL Citizen's insurance and estimating FL Citizen's ability to fully "pay out claims" if a natural disaster were to occur).

[195] *See Who We Are*, *supra* note 187 ("Florida law . . . requires that Citizens levy assessments on most Florida policyholders if it experiences a deficit in the wake of a particularly devastating storm or series of storms.").

[196] *See* FLA. STAT. § 627.351(2)(d) (2023) (providing the emergency assessments requirement, which allows Citizens to recover the deficit from insurers).

[197] *See* Letter from Sen. Sheldon Whitehouse to Gov. Ron DeSantis et al., *supra* note 194 ("If Citizens were unable to cover its losses, it is entirely possible that state leaders might ask the federal government for a bailout. Given the potential magnitude of Citizens' losses, such a request would put the federal government (and by extension, all American taxpayers) at substantial risk.").

[198] *See Who We Are*, *supra* note 187 ("Citizens was created by the Florida Legislature in August 2002 as a not-for-profit, tax-exempt, government entity to provide property insurance to eligible Florida property owners unable to find insurance coverage in the private market.").

> The Florida system for the financing of disaster losses is a fragile ecosystem wherein the public entities are large and unlike most markets of last resort. Their large size and the state's dependence on them for disaster financing has made them subject to political risk, with the state legislature repeatedly intervening in these programs over the years.[199]

Indeed, decades of political volatility around Florida insurance policy has led to significant course changes between legislative sessions, and that volatility still exists today. At times, the legislature has heavily subsidized Citizens.[200] For instance, a 2007 Florida law required Citizens policies to drastically depart from actuarial risk by lowering Citizens' rates, freezing those rates at the low level, and allowing policyholders to purchase Citizens policies even when private insurance options would be available.[201] This legislation expanded the number of Citizens policies and displaced some private market insurers.[202] However, the more recent approach of the legislature has been to move towards actuarially sound rates, despite some legislative efforts to expand and further subsidize Citizens.[203]

Thus, Florida demonstrates not only a high level of government intervention in insurance markets, but also a history of policy swings from one government policy to another.

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[199] Medders & Nicholson, *supra* note 45, at abstract; *see also id.* at 2 ("[T]hese public insurers trade in . . . multi-millions of premium dollars and are exposed to . . . multi-billions of potential losses, more than in any other US state. Their size and the state's dependence for disaster financing exposes them inherently to a high level of political risk. Economic and political pressures can alter the use of the entities in one Legislative Session, then change them in a different direction the next.").

[200] For an example of the Florida government subsidizing FL Citizens, see *infra* notes 219–220.

[201] Medders & Nicholson, *supra* note 45, at 21.

[202] *See id.* ("The adverse results to the private market were quick and devastating, leading many large, well-capitalized insurers to leave the marketplace and market surplus to plummet." (citation omitted)).

[203] *See* Mahsa Saeidi, *Florida Lawmaker Promises New Bill Would Drop Insurance Rates Like a Rock,* WFLA NEWS CHANNEL 8 (Jan. 12, 2024, 3:31 PM), https://www.wfla.com/8-on-your-side/florida-lawmaker-promises-new-bill-would-drop-insurance-rates-like-a-rock/ [https://perma.cc/82VE-J6KM] (reporting on a proposed bill to expand coverage for Citizens customers with state funding).

2. Balance of Financial Transition and Physical Risk. Florida's insurance laws have most frequently been attuned to financial transition concerns, particularly insurance affordability for property owners, often at the expense of accounting for both physical risk and financial stability.[204] While there have been periodic efforts to incorporate attention to physical risk and seek actuarial stability, Citizens' focus on financial transition (in the form of affordability) has been a mainstay.[205] Further, current policy proposals in Florida suggest that the political pendulum may once again be poised to expand Citizens enrollment and coverage, cut insurance rates, distort price signals about physical risk, and undermine financial stability.[206]

As discussed above, Citizens insures a significant portion of the Florida market[207] and for much of its history it has not charged actuarial rates.[208] Indeed, experts have commented that the Florida insurance market "is structured such that economic pressures easily translate to the distorted use of public entities such as Citizens . . . to ease affordability issues rather than simply address availability challenges."[209] Further, because funding for Citizens comes from not only premiums but also statewide assessments, it is not truly risk-based. Rather, Citizens uses the state as a whole to subsidize the cost of insuring vulnerable properties, blunting price

[204] *See supra* notes 171–176 (discussing Citizens' statutorily prescribed role of providing affordable insurance); *supra* notes 188–193 (discussing Citizens' premiums, which are below actuarially sound rates, and potential issues with its financial stability due to potential overexposure to risk).

[205] *See* FLA. STAT. § 627.351(6)(a) (2023) (establishing Citizens in light of the "absence of affordable property insurance", which "threatens the public health, safety, . . . welfare[,] and . . . economic health of the state").

[206] *See supra* note 203 and accompanying text for a recent policy proposal that would cut insurance rates.

[207] *See* Saunders, *supra* note 175 ("Citizens has grown in the past three years to become the state's largest property insurer . . . .").

[208] Ryan Smith, *DeSantis: Florida Insurer of Last Resort is "Not Solvent,"* INS. BUS. MAG. https://www.insurancebusinessmag.com/us/news/catastrophe/desantis-florida-insurer-of-last-resort-is-not-solvent-479270.aspx [https://perma.cc/7SV2-B88Q] (stating that Citizens has "$4.5 billion cash on hand").

[209] Medders & Nicholson, *supra* note 45, at 20.

signals about physical risk.[210] Experts have posited that these state interventions in the Florida insurance markets have dramatically "suppressed property insurance prices," placing a fiscal burden on future policyholders.[211]

That said, there have been some Florida policy efforts to better appreciate physical risk. For example, Florida requires all property insurers to set rates using certified simulation-based hurricane modeling.[212] Moreover, there have been times, such as the present, when Florida law has pushed Citizens to move its rates toward actuarial levels.[213]

However, those efforts appear to be the exception rather than the rule in Florida, and they have done relatively little to shift Florida insurance policy toward meaningfully incorporating physical risk. Indeed, even with ongoing increases in Citizens rates, the program remains extremely exposed and fiscally precarious. Even Governor Ron DeSantis has acknowledged as much, stating that "Citizens has not been solvent. If [Florida] did have a major hurricane hit with a lot of Citizens property holders, it would not have a lot to pay out."[214] Blunt though it is, this comment may even be an understatement. The insurance company Munich Re estimates that a major hurricane hitting the Miami metropolitan area and the Florida panhandle could cause $1.35 trillion in damages,[215] and Citizens purports to cover a significant share of that loss.

These risks and solvency issues with Citizens, as well as the exodus of private insurance markets from Florida, have caught the

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[210] *See id.* at 21–22 (describing the risk structure of state funded insurance companies such as Citizens); *supra* notes 187, 195 and accompanying text (discussing Citizens' sources of funding).

[211] Medders & Nicholson, *supra* note 45, at 4.

[212] *Id.*

[213] *See supra* notes 189–193 (discussing Florida's statutory requirement that Citizens' rates be actuarially sound and recent rate increases).

[214] William Rabb, *DeSantis Turns Heads with Comment that Citizens Insurance 'Not Solvent;' Board Approves Cat Bond*, INS. J. (March 20, 2023), https://www.insurancejournal.com/news/southeast/2023/03/20/712840.htm [https://perma.cc/M7EK-F5DA].

[215] *See* CAMBRIDGE CTR. FOR RISK STUD., IMPACTS OF SEVERE NATURAL CATASTROPHES ON FINANCIAL MARKETS 5, 23–25 (2018) (discussing the ramifications of a hypothetical scenario in which a category four hurricane impacted Miami).

attention of Florida legislators.[216] But the reaction has thus far been to double down on Citizens, focusing on affordability at the further expense of risk appreciation and long-term stability.[217] For example, bipartisan groups of state legislators are championing legislation *expanding* the scope of Citizens' coverage. In one instance, two South Florida lawmakers are proposing to increase Citizens' property insurance cap from $1 million to $1.5 million in Monroe and Miami-Dade Counties.[218] Another set of legislators has proposed to expand the wind coverage of Citizens and to model it after NFIP, apparently relying on a subsidy system to provide cheaper wind coverage across the state.[219]

Summing up Florida's approach, some observers have commented that Florida

> encourage[s] people to continue to live and work in certain geographic areas where there are high risks, however infrequent the losses may be. Consistent with short-term economic development interests and contrary to insurance principles, the state has chosen to develop quite a large system of public markets for property insurance and reinsurance, with implications for the private insurance industry and the state's citizens.[220]

F. LOUISIANA CITIZENS PROPERTY INSURANCE CORPORATION

Louisiana attends to insurance availability and cost both through insurance regulations, particularly regarding insurance cancellation, and through providing Louisiana Citizens as an insurer of last resort.

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[216] *See, e.g.*, Rabb, *supra* note 214 ("Board members, industry executives[,] and lawmakers have expressed concern that Citizens' explosive growth in recent years will lead to an assessment on policyholders if the state is hit with two or more major hurricanes . . . .").

[217] *See* Saeidi, *supra* note 203 (discussing proposals to reduce Citizens rates).

[218] Carbonaro, *supra* note 153.

[219] Saeidi, *supra* note 203 ("If this bill becomes law, . . . Citizens would only provide windstorm coverage. Next, no longer the insurer of last resort, Citizens would be an option for all of us providing cheap rates for everybody.").

[220] Medders & Nicholson, *supra* note 45, at 8.

1. Government Intervention. The Louisiana Commissioner of Insurance has authority to regulate private insurance rates and other aspects of the insurance industry in the state.[221] In response to insurance incentives to withdraw from vulnerable areas prone to natural disasters, Louisiana has limited the ability for private insurers to withdraw or cancel policies based on natural disasters. For example, Louisiana prohibits insurers from "cancel[ing], refus[ing] to renew[,] or increas[ing] the amount of the premium on [a] homeowners policy based solely on a loss caused by an 'Act of God.'"[222] This provision seems aimed at protecting insurance availability for individual properties or discrete areas that are prone to natural disasters, such as storm risk, because the Louisiana Department of Insurance defines "Act of God" as "an incident due directly to natural causes and exclusively without human intervention."[223] An Act of God does, in some cases, allow an insurer to amend a policy.[224] However, for policies that have been in effect for more than three years, more stringent rules apply.[225]

In addition to regulating private insurers, Louisiana also provides an insurer of last resort: the Louisiana Citizens Property Insurance Corporation (LA Citizens). This program was created by the legislature to insure high-risk properties for residents who are unable to find coverage through private insurers.[226] LA Citizens is

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[221] *See* OFF. OF PROP. & CASUALTY, LA. DEP'T OF INS., RATE AND RULE FILING HANDBOOK 1 (2023) (outlining the statutory authority of the Commissioner of Insurance).

[222] TIM TEMPLE, LA. DEP'T OF INS., CONSUMER'S GUIDE TO HOMEOWNERS INSURANCE 9 (2024).

[223] *Id.*

[224] *See id.* (providing that an insurer may make changes that are generally prohibited if it "makes the changes on a statewide rating basis at the beginning of a new policy period").

[225] *See id.* ("Your insurance company cannot, however, cancel, refuse to issue, fail to renew or increase the deductible of your homeowners policy if it has been in effect and renewed for more than three years, unless certain conditions apply."). Such changes can only be made for certain conditions related to nonpayment, fraud, and other non-disaster based criteria. *See id.* (allowing for such changes due to "nonpayment of premium, insurance fraud" among other criteria not relating to disaster).

[226] *Id.* at 5.

funded by a combination of premiums, a premium tax,[227] and assessments on insureds.[228]

Because LA Citizens offers insurance to those who are not able to find it on the private market, it exists in parallel with the private insurance market. In fact, one of its stated goals is to shift property owners back to private insurance.[229]

2. Balance of Financial Transition and Physical Risk. Louisiana's regulation of existing insurance policies seems heavily influenced by attending to financial transitions, even at the expense of accounting for physical risk. However, LA Citizens, while providing some financial transition relief, seems to account for physical risk in its pricing structure such that it sends market signals (via expensive policies) that account for increased risk.[230]

Louisiana's regulation of insurance cancellation, particularly its limitations on insurance withdrawal for natural disasters, seems squarely aimed at providing continuity of insurance for preexisting insured property owners. It is premised on providing continuity of insurance and honoring reliance interests on preexisting insurance, and it does not allow insurers to target policy decisions based on physical risk of natural disaster.[231] It also effectively locks in certain insurance terms if they have been in place for three years. Thus, the balance here seems to be struck in favor of providing continuity and easing financial transitions while muting market signals about physical risk.

Contrasting with its regulations of private insurers, LA Citizens strikes a different balance between financial transition and physical

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[227] *See* LA. STAT. ANN. § 22:831 (2023) (setting forth an annual tax based on gross annual premiums); LA. CITIZENS PROP. INS. CORP., PLAN OF OPERATION § 13.E (2015) [hereinafter LA CITIZENS PLAN] (providing that LA Citizens receives funding from § 22:831).

[228] *See* LA CITIZENS PLAN, *supra* note 227, § 9 (discussing assessable insurers and insureds).

[229] *Company Overview*, LA. CITIZENS PROP. INS. CORP., https://www.lacitizens.com/AboutUs/CompanyOverview [https://perma.cc/GES9-YX6U] ("Louisiana Citizens Property Insurance Company will . . . [f]acilitate the ability of policyholders to obtain property insurance from private insurers and encourage the depopulation of the company.").

[230] *See id.* (stating that LA Citizens offers policies that are "not competitive with rates charged in the voluntary market", thus reducing the availability of insurance in riskier areas).

[231] *See supra* notes 221–225 (discussing Louisiana's restrictions on an insurer's ability to cancel or not renew a policy).

risk. Though it provides some financial transition relief by extending an insurance option broadly to existing and new property owners that would otherwise be unable to secure private insurance, the rate structure of LA Citizens seems attuned to physical risk, even if it makes policies very expensive for property holders.[232]

LA Citizens attends to financial transitions to some degree. After all, it provides insurance to property owners whom the private market deems financially unattractive to insure.[233] In fact, LA Citizens is effectively available to all property holders, regardless of their risk profile.[234] However, LA Citizens tempers its attention to financial transitions by incorporating some significant responsiveness to physical risk through different pricing mechanisms and rate structures.[235]

Through a variety of programs, LA Citizens prices in physical risk and sends financial signals that indicate the relative vulnerability of certain property developments. First, Louisiana Citizens divides its coverages between the "Coastal Plan" that applies to designated coastal areas[236] and the "FAIR Plan" that applies to all other areas of the state.[237] Reflecting the elevated risks along the Louisiana coast, LA Citizens' Coastal Plan policies tend to be more expensive than the FAIR Plan policies.[238]

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[232] *See* LA CITIZENS PLAN, *supra* note 227, §§ 13.A, 25 (discussing LA Citizens' policy of not offering competitive prices and its commitment to depopulation of its customer base).

[233] *See id.* § 2 (describing its aim "to operate certain insurance programs which shall function exclusively as residual market mechanisms to provide essential property insurance" to applicants who are unable "to procure insurance through the voluntary market").

[234] *See id.* § 8 (providing that coverage is available so long as the applicant has "any lawful and substantial economic interest in the safety and preservation of property from loss, destruction, and pecuniary damage").

[235] *See Property Insurers in the State of Louisiana Survey*, LA. CITIZENS PROP. INS. CORP., https://www.lacitizens.com/AboutUs/property-insurers-in-the-state-of-louisiana-survey (last visited Mar. 19, 2024) ("[LA Citizens] is required to annually collect data from property insurers as part of its ratemaking process.").

[236] *See* LA CITIZENS PLAN, *supra* note 227, § 4 (defining "Coastal Area", the area in which Coastal Accounts are available).

[237] *See id.* (defining the FAIR Plan and the areas in which it is available).

[238] *See* David Hammer, *Louisiana's Insurance Crisis: Homeowners' Policy Rates by ZIP Code*, 4WWL (Feb. 2, 2023, 10:39 PM), https://www.wwltv.com/article/news/investigations/david-hammer/louisianas-insurance-crisis-map/289-3255aa74-2cd9-4995-9576-9924a6d84bf4 [https://perma.cc/LP2D-ZZCX] (presenting data showing that coastal counties are often subject to higher rates for policies offered by LA Citizens).

Second, for both the FAIR and Coastal Plans, LA Citizens is statutorily mandated to charge rates at least 10% above voluntary market rates, and rates are updated yearly to assure that they remain more expensive than their private insurance counterparts.[239] For instance, when LA Citizens updated its personal insurance line rates effective January 1, 2023, it raised FAIR Plan rates by 62.9% and Coastal Plan rates by 65.6%.[240] This significant rate increase in one year reflects a primary focus on pricing physical risk over easing financial transition. While rates do not necessarily rise as drastically every year,[241] the continued upward adjustment of rates offers a continual signal about the risks associated with otherwise uninsurable properties.

Finally, LA Citizens does not cover certain physical risks from natural disasters such as wind and hail damage.[242] This does not mean that LA Citizens broadly declines to cover natural disaster risk; in fact, LA Citizens coverage seems broadly designed to cover natural disaster risks,[243] and the limited criteria for cancelling policies do not include natural disaster reasons.[244] Still, LA Citizens can suspend writing new policies because of the immediate threat of hurricanes.[245]

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[239] *Property Insurers in the State of Louisiana Survey,* LA. CITIZENS PROP. INS. CORP., https://www.lacitizens.com/AboutUs/property-insurers-in-the-state-of-louisiana-survey [https://perma.cc/X9PH-JTXG] ("Louisiana Citizens Property Insurance Corporation is required to ensure its rates are at least 10% above voluntary market rates in accordance with Louisiana R.S. 22:2303.").

[240] LA. CITIZENS PROP. INS. CORP., RATE LEVEL CHANGES: PERSONAL LINES POLICIES (2022).

[241] *See, e.g.*, LA. CITIZENS PROP. INS. CORP., RATE LEVEL CHANGES: PERSONAL LINES POLICIES (2023) (increasing the FAIR Plan rates by 3.5% and Coastal Plan rates by 8.4% effective January 1, 2024).

[242] *See* TEMPLE, *supra* note 222, at 5 ("Some homeowners policies, especially for property along the coast, exclude coverage for wind and hail damage.").

[243] LA CITIZENS PLAN, *supra* note 227, § 12.D ("*[A]ny environmental hazard beyond the control of the property owner* shall not be deemed to be acceptable criteria for declining a risk." (emphasis added)).

[244] *See id.* § 13 (providing allowable ground for policy cancellation, which do not include environmental risk).

[245] *See id.* § 13.I ("The Corporation will develop hurricane underwriting restrictions that will allow the suspension of binding new or increases in coverage when any part of the state is threatened, or potentially threatened, by the presence of a tropical depression or hurricane.").

In sum, the LA Citizens program, by its very nature as a broadly available insurer of last resort, attends to financial transition issues that arise from insurance retreat. Nonetheless, it shows a significant appreciation for physical risk and sends monetary signals more consistent with pricing risk than with merely providing financial transition relief.

IV. ANALYZING STATE REACTIONS TO INSURANCE RETREAT

Building on Part III's examination of different policies regarding insurance availability and cost, this Part compares the various policies adopted by California, Florida, and Louisiana. It offers the major observation that California, Florida, and Louisiana policies differ materially from each other. Moreover, each of the state policies also differs from the hypothetical maximalist *laissez faire* approach as well as from the maximalist government intervention approach exemplified by NFIP.

Detailing and analyzing these differences is important because it challenges prevailing narratives and assumptions regarding state responses to insurance retreat. For example, some commentators have suggested that state insurance programs either take the form of *laissez faire* deference to private markets or "state-subsidized" insurance giveaways akin to NFIP.[246] This framing suggests that state insurance interventions typically entail subsidized insurance policies that mute financial risk signals and encourage continued investment in vulnerable locations.[247] Indeed, Professor Al Lin's thoughtful contribution to this very symposium notes a similar concern that state insurance programs risk retrenching development in climate-vulnerable areas and impeding managed retreat efforts.[248]

While we share the concerns noted by Professor Lin and others, and while we are sensitive to the distortive and often perverse

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[246] *See, e.g.*, Omri Ben-Shahar & Kyle D. Logue, *The Perverse Effects of Subsidized Weather Insurance*, 68 STAN. L. REV. 571, 577 (2016) (criticizing "government-subsidized weather insurance" programs as muting price signals, resembling NFIP, and causing similar distortions);

[247] *Id.*

[248] Albert C. Lin, *Public Insurance as a Lever for Semi-Managed Climate Retreat*, 58 GA. L. REV. 1535 (2024).

incentives that arise from muted risk signals, we were surprised and encouraged by our findings that the state policies we examined do not necessarily reflect such pathologies. Indeed, as the preceding sections document, some state programs actually show a far higher appreciation of physical risk than one might expect. In fact, rather than subsidize insurance in the name of affordability, the California and Louisiana state-mandated insurance programs seem to embrace actuarial risk analysis and price insurance policies at or above market rates.

These observations lead to a few important conclusions. First, state response to insurance retreat may share some common elements, but they adopt diverse, nuanced approaches that do not merely fall along the polar binary of *laissez faire* or "state-subsidized" programs. Indeed, not only were the California, Florida, and Louisiana policies distinct from the hypothetical *laissez faire* scenario and the NFIP model, but they were also quite different from each other. Even though the various policies had elements in common such as insurers of last resort, the states' approaches diverged significantly across the degree of government intervention and the balance of physical risk and financial transition concerns.[249]

Second, and relatedly, our examination of state insurance programs shows the degree of state intervention in insurance markets does not necessarily correlate with whether a state prioritizes financial transition concerns over physical risk concerns. While previous commentators have seemed to embrace the intuitive hypothesis that greater state intervention in insurance markets correlates with more state-subsidized insurance in the name of affordability,[250] our study of Florida and Louisiana suggested otherwise. The Florida program has consistently featured a high degree of state intervention, and while it seemed to prioritize affordability for significant periods of its history, in recent years it has featured the same degree of state intervention but shifted toward a policy of accounting for actuarial risk. Moreover, Louisiana's program also features heavy state intervention, but its policy seems to prioritize actuarial risk and mandates that state

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[249] *See supra* sections III.D.*2*, E.*3*, F.*2* (discussing the balance of physical risk and financial transition for California, Louisiana, and Florida policies).

[250] *See supra* notes 245–247.

policies be *less* (rather than *more*) affordable than private market options.

Finally, in addition to these comparative conclusions, we believe the examination of the California, Florida, and Louisiana insurance programs provides valuable insights for structuring state insurance programs going forward. As states shape or amend their insurance policies in reaction to insurance retreat, these detailed examinations of California, Florida, and Louisiana can serve as models (or cautionary tales) showcasing the specifics of different state approaches. Consistent with how we have framed our discussion in earlier sections, we posit that the most important structural features of a state's response to insurance retreat are (1) the degree of government intervention, and (2) the balance of financial transition and physical risk concerns. As states or commentators consider insurance programs, we suggest that these are critical dimensions that make for salient differences in shaping responses to insurance retreat.

With these points in mind, and to help explicate the important differences among the insurance programs considered in this article, the remainder of this Part compares the different approaches to insurance retreat both graphically and narratively.

To begin, the following table offers a comparative summary of the different policies.

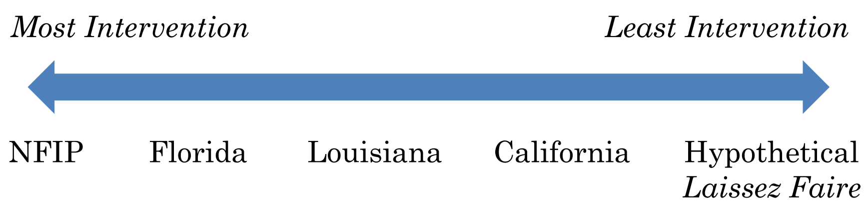
Table A: Comparative Summary of Insurance Programs

Program	Government Intervention	Balance of Financial Transition and Physical Risk
Hypothetical *Laissez Faire*	None	Almost entirely weighted toward physical risk; Little, if any, attention to financial transition
NFIP	Maximal	Historically almost entirely weighted toward financial transition; Historically little attention to physical risk; Recent reforms may be moving toward actuarial rates.
California	Relatively Low; Some political pressure to expand	Little information available, and pricing signals are difficult to parse; Private administration seems attendant to physical risk, but prices are becoming competitive with private insurance
Florida	Extremely high; Some political pressure to expand	Strongly weighted toward financial transition; Some instances of attention to physical risk, but political pressure toward expansion and affordability
Louisiana	Moderate; no indication of expansion pressure	Weighted toward physical risk in rate setting; Some attention to financial transition in regulation of private markets

As the comparative table demonstrates, the examined programs show marked differences in regard to both government intervention and balance of financial transition and physical risk.

Beginning with government intervention, the examined policies fall along different points on a spectrum, as illustrated in the following graphic.

Figure A: Spectrum of Insurance Policies based on Degree of Government Intervention



Considering the programs in this way highlights some surprising alignments: both California's and Florida's respective programs contravene the typical perceptions of those states' respective policy preferences.[251] For instance, California, though not as extreme as a hypothetical *laissez faire* regime, showed remarkably little government intervention. This is unexpected given California's reputation as a highly regulated state with robust government involvement.[252] Florida also occupied a surprising position. Its program involves such a high degree of government intervention that Florida very nearly resembles the maximalist government intervention displayed by NFIP. Again, this cuts against typical

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[251] *See, e.g.*, Nicole Narea, *How Florida Became the Center of the Republican Universe*, VOX (Sept. 18, 2023, 6:00 AM), https://www.vox.com/politics/23848897/florida-red-trump-desantis-republican-2024-election [https://perma.cc/5J5P-9NV4] (discussing the dominance of the Republican party in Florida and the conservative policies the party has enacted); Charles R. Kessler, *California Has Become the Far Left Coast*, WALL ST. J. (Mar. 6, 2019, 7:04 PM), https://www.wsj.com/articles/california-has-become-the-far-left-coast-11551917067 (criticizing California's "descent into a one -party state" and the policies the state enacts).

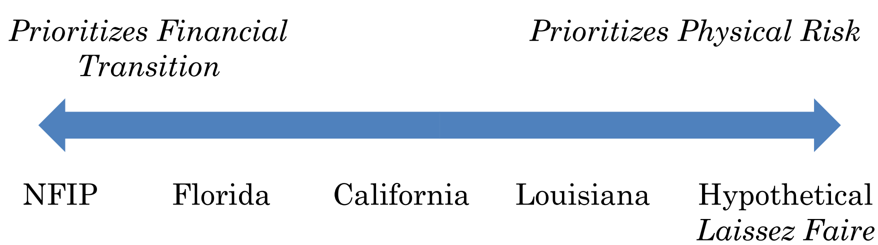
[252] *See, e.g.*, Kessler, *supra* note 251 ("The Democrats' crushing dominance allows them to use California as a progressive policy laboratory.").

perceptions, with Florida often regarded as a state averse to extensive government involvement.[253]

The respective counterintuitive positions of California and Florida may be explained by numerous factors, including the differing extent of risk and insurance retreat that the two states face. This divergence sets the stage for a more probing analysis, which we will leave for future work.

Moving now to consider how different programs balance physical risk and financial transition concerns, once again a graphic helps demonstrate how the policies compare to each other. Consider the following:

Figure B: Spectrum of Insurance Policies Based on Prioritization of Financial Transition versus Physical Risk



Aligning the programs in this way makes for interesting comparisons between the Louisiana and Florida programs as well as between the Louisiana and California programs.

Comparing Louisiana and Florida in terms of balancing physical risk and financial transition, Louisiana's program was much closer to a *laissez faire* system in prioritizing physical risk, and Florida's was closest to NFIP in prioritizing financial transition.[254] Again, these results are interesting because they show two states with

[253] *See, e.g.*, WILLIAM P. RUGER & JASON SORENS, CATO INST., FREEDOM IN THE 50 STATES: AN INDEX OF PERSONAL AND ECONOMIC FREEDOM 37 tbl. 5 (7th ed., 2023) (ranking Florida second for "Overall Freedom Score" in a fifty state survey).

[254] *Compare supra* section III.B (discussing a hypothetical approach in which a state government does not intervene in the domestic insurance market and the resulting focus on physical risk), *with supra* section III.F (discussing Louisiana's approach, which primarily focuses on protecting against physical risk due to its high prices and lack of availability if private market alternatives are available).

similar hurricane risk exposures and conservative political leanings taking very different policy approaches.

Louisiana's LA Citizens program incorporates physical risk to a surprising, even financially painful, degree. In particular, its raising rates over 60% in the single year of 2023 and its statutory requirement that rates be 10% more expensive than private insurance show a strong commitment to risk-based pricing, even to the exclusion of financial transition concerns.[255] By contrast, Florida's Citizens program has consistently aimed to make insurance not only available, but often affordable, even if that requires subsidies that mask physical risk, risk financial insolvency, and impact private insurance offerings.[256]

This difference between Louisiana and Florida suggests that the degree of government intervention in insurance markets is not an indicator of how states will balance financial transition concerns with physical risk concerns. Both Louisiana and Florida have insurance programs with a high degree of government intervention, but Louisiana's is much more attuned to physical risk whereas Florida's has focused more consistently on affordability, even if that risks "induc[ing] homeowners to place themselves in harm's way."[257]

Now moving to compare the Louisiana and California programs, another interesting phenomenon emerges around pricing. CA FAIR is administered by private entities,[258] and while their rate-setting process is opaque, they presumably price the CA FAIR policies according to risk. However, CA FAIR's prices, at least recently, appear to be financially attractive when compared with private insurance offerings.[259] Louisiana's LA Citizens, on the other hand,

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[255] *See supra* notes 240–241 (discussing Louisiana's rate increases).

[256] *See supra* section III.E (discussing Florida's state insurance laws and regulations and the focus on not only filling a gap where insurance is unavailable, but also addressing high prices).

[257] Medders & Nicholson, supra note 45, at 8.

[258] *See supra* note 119 and accompanying text (discussing the structure of CA FAIR).

[259] *See* Belgarde, *supra* note 135 (discussing that CA FAIR plans have become more affordable over time and that, for some homeowners, CA FAIR may actually be cheaper than private insurance). *But see* Natalie Todoroff, Maggie Kempken & Mark Friedlander, *California FAIR Plan Insurance: What It Is and How It Works*, BANKRATE (Mar. 25, 2024), https://www.bankrate.com/insurance/homeowners-insurance/california-fair-plan/#who-is-eligible-for-california-s-fair-plan [https://perma.cc/AY67-JGRJ] ("FAIR Plans are typically more expensive than standard home insurance policies.").

has greater public intervention in its pricing, including statutory requirements and annual rate reviews.[260] However, LA Citizens policies are less financially attractive than private market offerings.[261] Again, this state of affairs warrants further study, which we reserve for future work. Still, we note the surprising outcome that Louisiana's insurance program, which again relies heavily on government intervention, sends pricing signals about risk that actually exceed those that the private market would send. This Louisiana example starkly defies many prior assumptions that state insurance programs with heavy government intervention will undercut market signals about risk. To the contrary, aspects of the Louisiana program amplify market pricing signals and show a potential role for state governments as partners, rather than adversaries, in actuarial risk pricing.

V. CONCLUSION

While California, Florida, and Louisiana are all experiencing insurance retreat, their policy responses differ significantly.[262] This is, in part, attributable to differences in the risks faced by the states and the extent of their private insurance withdrawals. But this is also attributable to cognizable policy choices and structures. Appreciating these different state approaches, individually and comparatively, helps demonstrate the nuanced landscape of insurance retreat and informs future policy directions.

[260] *See supra* notes 222–228 (discussing the role of the Louisiana government in setting rates and the statutory requirements that LA Citizens increase its rates and maintain rates above those in the private market).

[261] Press Release, La. Dep't Ins., La. Dep't of Ins. Approves Citizens Rate Increase and Offers Tips for Policyholders (Oct. 10, 2022) (on file with author).

[262] *See supra* sections III.D–F (discussing the state insurance policies of each respective state).