No.

In the Supreme Court of the United States

ALI EKHLASSI, PETITIONER

v.

NATIONAL LLOYDS INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a clear and acknowledged conflict over an important question of statutory construction under the National Flood Insurance Act of 1968.

Under the Act, FEMA allows private insurers to issue flood-insurance policies in their own names that are underwritten by the federal government. While these companies issue most federal flood-insurance policies, FEMA also issues its own policies directly under the program.

Section 4072 of the Act provides that federal courts have "original exclusive jurisdiction" over actions "*against the Administrator*" when the Administrator disallows a claim, but it does not likewise provide exclusive jurisdiction over suits against private insurers. The Act further defines the "Administrator" as "the Administrator of [FEMA]," not private insurers acting on FEMA's behalf, and the governing regulations confirm that private carriers defend their own lawsuits in their own capacity, and "the Federal Government is not a proper party defendant in any lawsuit arising out of such policies."

Despite this clear text, multiple circuits, including the Fifth Circuit below, have held that Section 4072 applies to suits *against private carriers* because such suits are "functionally" against FEMA, who ultimately foots the bill. In so holding, these courts expressly rejected the Seventh Circuit's contrary holding, which itself rejected an earlier Third Circuit decision reaching the opposite conclusion. In a concurrence below, Judge Haynes explained she was bound by Fifth Circuit authority, but otherwise would side with the Seventh Circuit's plain-text approach over other circuits' "counter-textual" analysis.

The question presented is:

Whether Section 4072's provision of "exclusive" federal jurisdiction applies to suits against private insurers.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Ali Ekhlassi, the appellant below and plaintiff in the district court.

Respondent is National Lloyds Insurance Company, the appellee below and defendant in the district court.

Auto Club Indemnity Company was a defendant in the district court, but was dismissed with prejudice before final judgment. It was not a party to the proceedings in the court of appeals.

RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

Ekhlassi v. *National Lloyds Ins. Co. & Auto Club Indem. Co.*, No. H-17-1257 (Nov. 27, 2017) (order granting summary judgment for Auto Club Indemnity Co.)

Ekhlassi v. *National Lloyds Ins. Co. & Auto Club Indem. Co.*, No. H-17-1257 (Jan. 9, 2018) (order granting summary judgment for National Lloyds Ins. Co.)

Ekhlassi v. *National Lloyds Ins. Co. & Auto Club Indem. Co.*, No. H-17-1257 (Mar. 14, 2018) (order denying reconsideration)

United States Court of Appeals (5th Cir.):

Ekhlassi v. *National Lloyds Ins. Co.*, No. 18-20228 (June 4, 2019)

55th District Court (Harris Cnty., Tex.):

Ekhlassi v. *National Lloyds Ins. Co. & Auto Club Indem. Co.*, No. 2017-02276 (Apr. 24, 2017) (notice removal)

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Ali Ekhlassi respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 926 F.3d 130. The district court's order and opinion granting summary judgment (App., *infra*, 19a-29a) is reported at 295 F. Supp. 3d 750. The district court's order and opinion denying reconsideration (App., *infra*, 30a-32a) is unreported but available at 2018 WL 1316742.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1341 of the National Flood Insurance Act of 1968, 42 U.S.C. 4072, provides:

> **Adjustment and payment of claims; judicial review; limitations; jurisdiction**
>
> In the event the program is carried out as provided in section 4071 of this title, the Administrator shall be authorized to adjust and make payment of any claims for proved and approved losses covered by flood insurance, and upon the disallowance by the Administrator of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance by the Administrator, may institute an action against the Administrator on such claim in the United States district court for the district in which the insured property or the major part thereof shall have been situated, and original exclusive jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in controversy.

Section 1370 of the National Flood Insurance Act of 1968, 42 U.S.C. 4121, provides in part:

> **Definitions**
>
> (a) As used in this chapter—
>
> * * * * *
>
> (6) the term "Administrator" means the Administrator of the Federal Emergency Management Agency * * * .

44 C.F.R. 62.23 provides in part:

> (g) A WYO Company shall act as a fiscal agent of the Federal Government, but not as its general agent. WYO Companies are solely responsible for their obligations to their insured under any flood insurance policies issued under agreements entered into with the Federal Insurance Administrator, such that the Federal Government is not a proper party defendant in any lawsuit arising out of such policies.

Other relevant statutory and regulatory provisions are reproduced in the appendix to this petition (App., *infra*, 33a-41a).

INTRODUCTION

This case presents an important and recurring question essential to the fair and effective administration of the National Flood Insurance Act of 1968, 42 U.S.C. 4001-4131.

The courts of appeals have expressly divided over whether Section 4072's provision of "original exclusive jurisdiction" applies to suits again private carriers. The importance of this issue is obvious: flood-insurance claimants are required to file suit within one year after a claim is disallowed, and claimants often file suit in the wrong court. If federal courts are vested with exclusive jurisdiction over these claims, insureds will often lose simply by meeting the one-year deadline in state court, only to discover that they have missed the one-year deadline in a federal forum. If state courts have concurrent jurisdiction, the claimant's suit can be removed to federal court without the penalty of forfeiting their legal rights.

And a forfeiture is particularly unjustified in light of Section 4072's unambiguous text. Congress could not have

spoken any more plainly in limiting the provision of "exclusive" federal jurisdiction to suits "against the Administrator." It does not take an express definition to know that private carriers are not "the Administrator," but Congress provided an express definition anyway—confirming that the "Administrator" is indeed "the Administrator [of FEMA]." There is no basis for setting aside that textual definition or reading this plain language to mean something other than what it says. And while certain circuits have reasoned that suits against private carriers are "functionally" against FEMA—since the federal government underwrites federal flood insurance—these circuits have overlooked a host of factors breaking the link, including an express regulation confirming that private carriers defend suits in their own right; they pay their own expenses, subject to possible federal reimbursement; and FEMA is not a proper party defendant in those suits—a curious directive if FEMA, "functionally," is already involved.

This case easily satisfies all the traditional criteria for granting review. The conflict is obvious, acknowledged, and entrenched. It has been repeatedly recognized by multiple courts (including the court below), and there is no prospect of the conflict dissipating on its own. The Seventh Circuit alone has read Section 4072 as limited to suits against FEMA's Administrator, openly creating a circuit conflict in the process; the full circuit refused to reconsider its position on rehearing (without a single judge requesting a vote). Other circuits have since maintained their contrary positions, some now for decades. Judge Haynes concurred below, explaining that Fifth Circuit authority is binding but wrong, and the Seventh Circuit is right. This untenable division will continue without this Court's intervention.

This case is also a perfect vehicle for resolving the conflict. The Fifth Circuit ordered supplemental briefing on this question, and it was squarely resolved as the sole basis of the Fifth Circuit's disposition. The question was outcome-determinative, and there are no conceivable obstacles to deciding it here.

The question presented raises legal and practical issues of surpassing importance, and its correct disposition is essential to the Act's proper administration. The issue has plagued lower courts now for decades, generating confusion over jurisdictional rules that require certainty and predictability. Because this case presents an optimal vehicle for resolving this substantial issue of federal law, the petition should be granted.

STATEMENT

1. Congress enacted the National Flood Insurance Act of 1968, 42 U.S.C. 4001-4131, to make flood insurance available in thousands of participating communities that adopt and enforce appropriate floodplain management ordinances. The Act was prompted by Congress's recognition of the difficulty of providing adequate flood insurance on "reasonable terms and conditions" to those who need it. 42 U.S.C. 4001(b). By subsidizing private insurance, Congress sought to ensure that businesses and families would have sufficient protection in the event of devastating flooding.

Congress authorized two options for implementing the program: Part A and Part B. Part A was known as the "Industry Program"; it allowed a pool of private insurers to underwrite flood insurance with optional financial backing from the government. See, *e.g.*, *Palmieri* v. *Allstate Ins. Co.*, 445 F.3d 179, 183 (2d Cir. 2006). In 1977, however, the Act's administrator concluded that the Industry Program was unworkable, and thus terminated it. *Ibid.*

This marked the shift to Part B—the "Government Program."

Part B authorizes the government to underwrite flood insurance with optional administrative assistance from private companies. See, *e.g.*, 42 U.S.C. 4081(a). This gave consumers the choice between buying flood-insurance policies directly from FEMA or from private companies (known as "Write Your Own" or WYO companies). These WYO companies would market, issue, administer, and defend the "WYO policy"; they would receive a fee for these services, but the federal government would retain all underwriting responsibilities. See, *e.g.*, *Palmieri*, 445 F.3d at 183-184.

The regulatory scheme deemed WYO companies "fiscal," but not "general," agents of the government. 44 C.F.R. 62.23(g). FEMA would "fix[] the terms and conditions of the flood insurance policies," which the WYO companies had to "issue[] without alternation as a Standard Flood Insurance Policy." *Van Holt* v. *Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 165-166 (3d Cir. 1998). The scheme further tasked WYO companies with the responsibility of defending against policy claims (*e.g.*, 44 C.F.R. 62.23(d)), but FEMA would generally reimburse the WYO companies for their defense costs. *Id.* at 165. In certain circumstances, however, reimbursement was unavailable, including where "an agent or broker" incurred an expense "for his or her error or omission." 42 U.S.C. 4081(c). The scheme further confirmed that suits involving WYO decisions under WYO policies were the business of the WYO carrier; "the Federal Government is not a proper party defendant in any lawsuit arising out of such policies." 44 C.F.R. 62.23(g).

As relevant here, the standard policy set out contractual requirements in claimant suits against the insurer:

"If you do sue, you must start the suit within one year after the date of the written denial of all or part of the claim, and you must file the suit in the United States District Court of the district in which the covered property was located at the time of loss." 44 C.F.R. Pt. 61, App. A(1)(R). For suits directly "against the Administrator," by contrast, Congress provided "original exclusive jurisdiction" in the same federal court and required the action to be filed within a year of the claim disallowance. 42 U.S.C. 4072.

2. Petitioner insured his house in Houston, Texas, with a WYO insurance policy issued by respondent. In May 2015, an extensive storm caused flooding that damaged petitioner's home, and he reported the loss to respondent the next day. App., *infra*, 2a-3a. Petitioner ultimately had an adjuster inspect his house, who hired contractors estimating the overall cost of repair would exceed $200,000. *Id.* at 3a. Respondent, however, conducted its own inspection, and alleged that the storm did not cause much of the claimed damage. In October 2015, respondent sent petitioner a letter stating that it would authorize a claim for $3,768.25 once petitioner submitted a proper "proof of loss." *Ibid.* This same letter declared it was "denying" payment for other items and provided information about challenging respondent's determination in court. *Id.* at 3a-4a.

Later in December 2015, petitioner submitted a proof of loss for $274,940.05. On January 11, 2016, respondent replied with another denial, rejecting the full claim above the $3,768.25 authorized in respondent's initial letter. Petitioner then submitted a proof of loss for the allowed amount, but "disagreed with the amount and stated his intent not to 'conclude this claim in any manner whatsoever.'" App., *infra*, 4a.

3. a. One year after the January denial, petitioner filed suit in Texas state court. Respondent removed the action to federal court in April 2017, and subsequently moved for summary judgment. App., *infra*, 5a. Respondent did not argue that Section 4072 applied or that petitioner missed that section's one-year deadline by suing in state court, not federal court. Instead, respondent argued that its initial October 2015 letter, not its January 2016 letter, started the clock, and petitioner's state-court suit accordingly missed the one-year deadline.

b. The district court granted summary judgment. App., *infra*, 19a-29a. The court agreed with respondent that its initial letter constituted the operative denial, and thus petitioner missed the policy's contractual one-year deadline for filing suit. *Id.* at 23a-29a.

c. Petitioner moved for reconsideration, arguing that the district court's ruling was plainly inconsistent with pertinent authority for determining the proper benchmark for the one-year contractual limitations period. In a cursory order, the district court denied reconsideration. App., *infra*, 30a-32a.

4. In a split decision, the Fifth Circuit affirmed on entirely different grounds. App., *infra*, 1a-18a.

a. Instead of deciding which letter activated petitioner's one-year deadline under his policy, the Fifth Circuit instead held that Section 4072 applied to actions against WYO carriers, and thus independently barred petitioner's suit—because his state-court action was not removed to federal court (the forum with "exclusive" jurisdiction) until after the one-year statutory deadline. App., *infra*, 7a-15a. As the majority explained, that dispositive "holding pretermits our addressing whether the first or second letter served as the operative denial triggering the limitations period." *Id.* at 7a.

The majority first noted that prior Fifth Circuit precedent had applied Section 4072 to "actions against WYO carriers." App., *infra*, 9a. The majority than surveyed out-of-circuit authority from the Second, Third, and Sixth Circuits reaching the same conclusion. *Id.* at 9a-10a. While the majority acknowledged that Section 4072 textually "only describes an action against 'the Administrator,'" it declared that the statute's "context is significant." *Id.* at 10a. It looked to that context to conclude, quoting the Third Circuit, that "a suit against a WYO company is the functional equivalent of a suit against FEMA." *Id.* at 11a-12a (quoting *Van Holt*, 163 F.3d at 166-167). It further asserted that Section 4053—the jurisdictional provision governing suits against private carriers under the defunct Part A program—likewise provided exclusive jurisdiction, suggesting that Congress intended any suit against any participant to land exclusively in federal court. *Id.* at 12a-13a.

The majority recognized that the Seventh Circuit had reached the opposite conclusion in *Downey* v. *State Farm Fire & Cas. Co.*, 266 F.3d 675 (7th Cir. 2011), but it found its text-based analysis unconvincing. App., *infra*, 10a.

Once the majority concluded that Section 4072 applied, it had little trouble disposing of petitioner's action: that section imposes a one-year deadline on filing suit in federal court, and petitioner's "action was not removed to district court until * * * well over one year" after respondent's latest letter. "That Ekhlassi may have filed this action within one year of an operative denial-letter does not save it, because he filed in state court, when 42 U.S.C. § 4072 required the action to have been filed in federal court within a year." App., *infra*, 15a. And because this holding was outcome-determinative, the majority explained it "need not reach which of the two letters triggered the limitations period." *Ibid.*

b. Judge Haynes concurred in the judgment. App., *infra*, 15a-18a. While she was "bound by precedent to apply § 4072 to a WYO carrier," she "conclude[d] that our precedent wrongly construes § 4072 in a counter-textual fashion." *Id.* at 15a.

First and foremost, Judge Haynes explained that Section 4072's "text is unambiguous; it simply does not mention WYO carriers." App., *infra*, 16a. If Congress wished to expand that section to include those private insurers, "it could have added that to the provision." *Id.* at 16a.[1]

Judge Haynes next rejected the Second Circuit's attempt to identify ambiguity in the statutory text. App., *infra*, 16a-17a. While that court suggested that an action "against the Administrator" could mean an action against the Administrator's *economic interests*, Judge Haynes found that reading implausible: "This seems to be searching for an ambiguity where one does not exist; taken at its ordinary meaning, the phrase 'the claimant * * * may institute an action against the Administrator,' seems clearly to contemplate an insured suing the FEMA Administrator." *Id.* at 17a.

Finally, Judge Haynes concluded that, ambiguity or no ambiguity, the Seventh Circuit was correct: "although WYO carriers stand in the shoes of the Administrator in many respects, that does not compel the conclusion that § 4072 applies to WYO carriers." App., *infra*, 17a. She explained the clear differences between private carriers and FEMA, including areas where they served different roles

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[1] Indeed, other provisions of the Act—such as 42 U.S.C. 4081—expressly contemplate private carriers playing a role under the Government Program, including processing claims and defending lawsuits. See, *e.g.*, 42 U.S.C. 4081(c). Congress thus was aware that claimants may sue WYO carriers for denying claims under WYO policies, but it still restricted Section 4072 to actions directly against "the Administrator."

and their interests did not align. *Id.* at 17a-18a. And she explained that courts typically ask *who* is sued, not whose interests are affected, in deciding jurisdictional questions. *Id.* at 17a.

Because Judge Haynes "disagreed that [Fifth Circuit] precedent is correct," she concurred in the judgment only. App., *infra*, 18a.

REASONS FOR GRANTING THE PETITION

A. There Is A Widely Acknowledged And Intractable Conflict Over This Significant Jurisdictional Question

The Fifth Circuit's decision solidifies a preexisting, recognized conflict over a "significant" jurisdictional question: whether Section 4072 provides "exclusive" federal jurisdiction over flood-insurance claims against private insurers. *McGair* v. *American Bankers Ins. Co. of Fla.*, 693 F.3d 94, 98 & n.3 (1st Cir. 2012); see also, *e.g.*, *Studio Frames Ltd.* v. *Standard Fire Ins. Co.*, 369 F.3d 376, 379 (4th Cir. 2004) (recognizing "substantial disagreement among the circuits" over this "'difficult statutory construction question'"). The "circuit split on this issue" (*McGair*, 693 F.3d at 98) is both clear and entrenched, and it should be resolved by this Court.

1. a. In *Downey* v. *State Farm Fire & Cas. Co.*, 266 F.3d 675 (7th Cir. 2001), the Seventh Circuit held that Section 4072 does not apply to suits against private insurers. 266 F.3d at 679-680. In reaching that conclusion, the court acknowledged that the Third Circuit in *Van Holt* had already taken the opposite position, but the court "decline[d] to adopt *Van Holt*'s reasoning." *Id.* at 680. That categorical holding is irreconcilable with the Fifth Circuit's decision below. See, *e.g.*, App., *infra*, 17a (Haynes, J., concurring) (siding with the Seventh Circuit, which "disagreed with the Third Circuit[]").

The plaintiff in *Downey* sued a WYO private insurer for denying a claim under his flood-insurance policy, which was issued under the National Flood Insurance Program. See 266 F.3d at 678. Because the case ostensibly involved "a contract dispute between two private parties," the Seventh Circuit probed the basis of federal jurisdiction at oral argument, and later "directed the parties to file supplemental memoranda addressing the jurisdictional issues." *Ibid.*

After receiving the parties' separate round of briefing, the Seventh Circuit squarely rejected the argument that Section 4072 authorized exclusive federal jurisdiction over the private-insurer action. *Id.* at 679-680. As the court explained, Section 4072 "allows only 'an action against the Director,'" but "Downey sued State Farm." *Id.* at 679. Under the WYO program, "private insurers" are allowed to "issue and administer flood-risk policies under the Government Program," and those "private insurers also *defend suits arising from the policies*." *Id.* at 679 (citing 44 C.F.R. 62.23(d)) (emphasis added). Yet "Section 4072 does not mention the WYOP or indicate that anyone other than the Director may be sued under this grant of jurisdiction." *Ibid.*[2]

In reaching this conclusion, the Seventh Circuit analyzed the Third Circuit's competing analysis in *Van Holt*, but rejected its views. 266 F.3d at 679-680. As the Seventh Circuit explained, *Van Holt* reasoned that "because 'a suit against a WYO company is the functional equivalent of a suit against FEMA,' we should look past the caption of this case and pretend that the Director is the defendant."

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[2] The statute was later amended to replace the term "Administrator" with "Director." See, *e.g.*, Pub. L. No. 112-141, § 100238(b)(1). This ministerial change has no substantive effect on the court's analysis.

Id. at 679. While admitting the Third Circuit's position was "not without force," the Seventh Circuit still found it unpersuasive: even if State Farm were merely a "placeholder for FEMA," courts do not "typically look to see who will be *affected* by a decision." *Id.* at 680. On the contrary, "normally the status of the named litigant governs." *Ibid.* The court found these principles dispositive: "Although a judgment against State Farm may come out of the federal treasury—creating a federal *interest*—the only *litigants* are in the private sector. Because we see no good reason to disregard not only the identity of the litigants but also the fact that § 4072 is limited to suits against the Director, we decline to adopt *Van Holt*'s reasoning." *Ibid.*[3]

b. The private insurer sought rehearing with FEMA's amicus support, but the full Seventh Circuit denied rehearing without a single judge requesting a vote. *Downey* v. *State Farm Fire & Cas. Co.*, 276 F.3d 243, 244-245 (7th Cir. 2001) (per curiam) (*Downey II*).

In seeking rehearing, FEMA argued that rejecting Section 4072's exclusive jurisdiction for private-party suits "'does great harm to the National Flood Insurance Program.'" 276 F.3d at 244. The Seventh Circuit made quick work of FEMA's assertion.

First, the court explained that "§ 4072 does *not* allow suits directly against insurers, which cannot be called 'the Director' even when they administer the program on behalf of the FEMA." 276 F.3d at 245. "Nothing in the

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[3] The Seventh Circuit separately found that jurisdiction exists under 28 U.S.C. 1331 given the "dominant" federal interest in the federal program. 266 F.3d at 680-681. While this established *federal* jurisdiction over the case (under Section 1331), it did not establish *exclusive* federal jurisdiction (under Section 4072), which is the key question here. This is why courts routinely acknowledge that the circuits are undeniably "split." *McGair*, 693 F.3d at 98.

[FEMA] *amicus* brief persuades us that we should disregard the express language of § 4072 and treat it as creating federal jurisdiction over suits against private insurers." *Ibid.* As the court noted, "[p]rivate entities often carry out governmental programs, but statutes authorizing suit against the Secretary of Defense do not create jurisdiction over litigation against defense contractors, and laws permitting suit against the Administrator of Social Security do not create jurisdiction [over] litigation against the private fiscal intermediaries in the Medicare program." *Ibid.* In short, the court concluded, "[w]e see no good reason why § 4072 should be read to mean something that it does not say." *Ibid.*

Second, the court rejected FEMA's concerns that a plain-text reading of Section 4072 would "allow insureds to sue in state court." 276 F.3d at 244. The court found this possibility "hardly a major concern," given that (i) the suits arise under federal law via Section 1331 and can always be removed under 28 U.S.C. 1441(b); and (ii) the insurance contracts separately required litigants to sue in federal court, and "[t]his forum-selection clause is enforceable.'" *Id.* at 245.

Finally, the court explained that its holding would not "allow insureds to delay suit past the one-year period of limitations in § 4072." 276 F.3d at 244. While FEMA and the private insurers may not be able to invoke Section 4072, they could invoke the policy's *contractual* one-year deadline, which provides a defense to untimely suits. *Id.* at 245. "At all events," the Seventh Circuit concluded, "it is unnecessary for us to grant rehearing and warp the language of § 4072 in order to bring about a state of affairs that the FEMA has achieved by regulation [in setting the policy's terms] without inflicting any distress on the United States Code." *Ibid.*

c. The Seventh Circuit thus directly confronted and rejected the Third Circuit's holding and reasoning, and it expressly rejected FEMA's efforts to extend Section 4072 to private-insurer suits. Even in the face of a circuit conflict and FEMA's formal concerns (which included both fears of state-court suits and actions filed outside the one-year deadline), not a single judge requested rehearing. The Seventh Circuit's position is both clear and entrenched, and it cannot be squared with the Fifth Circuit's opposite holding below. See, *e.g.*, *Katz* v. *Simsol Ins. Servs., Inc.*, No. 3:07-CV-520, 2008 WL 762553, at *1 (N.D. Ind. Mar. 19, 2008) ("the 7th Circuit specifically indicated in *Downey*[] that 42 U.S.C. § 4072 does not grant exclusive jurisdiction * * * unless the Plaintiffs file suit against the Director of FEMA"; "[t]he 7th Circuit even recognized that other circuits have found 42 U.S.C. § 4072 grants exclusive jurisdiction if the Director is not named as a defendant, but it declined to follow that analysis").

2. This issue has also split other courts, with judges separately adopting the Seventh Circuit's position.

First, as discussed above, this issue divided the Fifth Circuit in this case. Judge Haynes explained that she "respect[s] and agree[s] that we are bound by precedent," but she "disagree[d] that our precedent is correct." App., *infra*, 18a (Haynes, J., concurring). She explained that the majority's "counter-textual" position is at odds with Section 4072's "unambiguous" language, and showed how FEMA and private carriers are not interchangeable: the private carriers are "independent" in key respects, act as "fiscal agents, but not general agents, of the United States," and are tasked with defending policy claims as the proper defendant, while "'the Federal Government is not a proper party defendant in any lawsuit arising out of such policies.'" *Id.* at 15a-18a (quoting 44 C.F.R. 62.23(g)).

Judge Haynes identified specific flaws in the rationale of the Second and Third Circuits, and instead "agree[d] with the Seventh Circuit," whose "reasoning makes the most sense in light of the text of the provision itself." App., *infra*, 16a-17a (Haynes, J., concurring). Judge Haynes thus sided with the Seventh Circuit and rejected the Second and Third Circuits, while the majority sided with the Second and Third Circuits and rejected the Seventh Circuit. The split between the circuits is both stark and untenable. Had this issue not been previously resolved in the Fifth Circuit, Judge Haynes indisputably would have voted the opposite way.

Second, district judges both inside and outside the Seventh Circuit have likewise adopted *Downey*'s plain-text reading of Section 4072 and disavowed the atextual views of other circuits. See, *e.g.*, *Dugdale* v. *Nationwide Mut. Fire Ins. Co.*, No. 4:05CV138, 2006 WL 335628, at *3-*4 (E.D. Va. Feb. 14, 2006) ("a circuit split exists concerning whether § 4072 establishes exclusive federal jurisdiction for [policy] claims against a WYO company"; "Nationwide asks this court to extend the text of § 4072 beyond suits against 'the Director,'" but "the court declines to adopt an expansive interpretation of what otherwise appears to be an unambiguous provision") (adopting *Downey* and disavowing *Van Holt*); *Katz*, 2008 WL 762553, at *1 (following *Downey* to reject Section 4072's application in a private-insurer suit).

3. As courts have widely recognized, the Seventh Circuit's decision squarely conflicts with the contrary views of multiple circuits. *E.g.*, App., *infra*, 10a, 13a-14a (adopting the "well-reasoned opinions" from the Second, Third, and Sixth Circuits, while refusing to follow *Downey*); *McCarty* v. *Southern Farm Bureau Cas. Ins. Co.*, No. 5:12-CV-148, 2013 WL 593636, at *2 & n.22 (E.D. Ark.

Feb. 15, 2013) (explaining that the "circuit courts are divided," and outlining the split between the Seventh Circuit and other circuits); *Culbertson* v. *Barr*, No. 06-0722, 2007 WL 9717793, at *3 (S.D. Ala. May 29, 2007) (the Seventh Circuit "rejected" the views of the Second, Third, and Sixth Circuits); *Nicol* v. *Auto-Owners Ins. Co.*, No. 05-1290, 2006 WL 562151, at *3 n.3 (D. Minn. Mar. 8, 2006) ("*Van Holt* was followed by the Sixth Circuit"; "[i]n *Downey*[], the Seventh Circuit rejected the holding in *Van Holt*"); *Hood* v. *Mississippi Farm Bureau Ins.*, No. 3:05CV572, 2006 WL 8197045, at *3 & n.3 (S.D. Miss. 2006) ("there is a split of authority over whether [Section 4072's] grant of jurisdiction also applies to suits against WYO companies"; contrasting the Seventh Circuit's precedent with the rule in the Third and Sixth Circuits); *Harris* v. *State Farm Fire & Cas. Co.*, No. 4:05CV5, 2006 WL 73602, at *1 n.4 (E.D. Va. Jan. 11, 2006) ("[t]he Circuit Courts of Appeals are split as to whether [Section 4072] establishes original exclusive jurisdiction over claims arising under the [policy], but that are brought against the WYO Company as opposed to the Director of FEMA directly"; citing *Downey* as "*[c]ontra*" other circuits).

While one court of appeals (the Third Circuit) adopted its position before *Downey*, three courts of appeals adopted the Third Circuit's view *after* confronting the direct split with *Downey*. The remaining circuits are now simply left to pick sides. The circuit conflict on this issue is undeniable and entrenched, and it will persist until this Court intervenes.

a. In *Van Holt* v. *Liberty Mut. Fire Ins. Co.*, 163 F.3d 161 (3d Cir. 1998), the Third Circuit, unlike the Seventh Circuit, squarely "h[eld] that 42 U.S.C. § 4072 vests district courts with original exclusive jurisdiction over suits by claimants against WYO companies." 163 F.3d at 167.

While the Third Circuit rejected the Seventh Circuit's holding, it took two tries to get there. In its initial decision, the Third Circuit decided this "important question" by following Section 4072's plain language, declaring the section textually does not apply to suits against private carriers: "Section 4072 does not permit jurisdiction because it allows suit only against FEMA which is not a party to this action." *Van Holt* v. *Liberty Mut. Fire Ins. Co.*, 143 F.3d 783, 788 n.5 (3d Cir. 1998).

The Third Circuit then flipped on panel rehearing to adopt the opposite conclusion. 163 F.3d at 163. Again recognizing "an important question of jurisdiction," this time the court admitted its new approach was atextual, but it concluded that context and purpose justified its holding. *Id.* at 163, 166. Accordingly, "though the plain text appears to restrict the reach of § 4072 to suits against FEMA," the court declared that "a suit against a WYO company is the functional equivalent of a suit against FEMA." *Id.* at 166; see also *id.* at 166-167 ("a lawsuit against a WYO company is, in reality, a suit against FEMA"). The court further explained that this construction avoids "anomalous results": "Because FEMA bears the risk and financial responsibility regardless of whether the lawsuit formally names FEMA or a WYO company as the defendant, it would make little sense for Congress to have intended to create original exclusive jurisdiction for suits against FEMA but not for suits in which FEMA's fiscal agent is the nominal defendant." *Id.* at 167.

The Third Circuit has not reconsidered this decision in the two decades since resolving the issue. See, *e.g.*, *Robbins* v. *Forgash*, No. 13-624, 2014 WL 12588683, at *1 (D.N.J. July 31, 2014) ("[a]lthough the statute only refers to suits against the Administrator, the Third Circuit has held that the provision authorizes individuals to bring

suits against 'Write Your Own' companies"; granting summary judgment for the private insurer because the plaintiffs, despite filing a timely suit in state court, "failed to timely file their claim in federal court").

b. In *Gibson* v. *American Bankers Ins. Co.*, 289 F.3d 943 (6th Cir. 2002), the Sixth Circuit likewise "h[eld] that § 4072 provides exclusive subject matter jurisdiction over suits against a WYO insurance company." 289 F.3d at 947. The court briefly recounted the Third Circuit's reasoning in *Van Holt*, and acknowledged the Seventh Circuit "declin[ed] to follow the Third Circuit's reasoning." *Id.* at 947. But without engaging the Seventh Circuit's critique, the Sixth Circuit simply picked sides by "adopt[ing]" the Third Circuit's approach. *Ibid.* It thus affirmed the dismissal of an action that was timely filed in state court, but removed to federal court after the one-year deadline. *Id.* at 945-946.[4]

c. The Second Circuit reached the same conclusion in *Palmieri* v. *Allstate Ins. Co.*, 445 F.3d 179 (2d Cir. 2006) (Sotomayor, J.). The court recognized that the circuits "do not agree on whether 42 U.S.C. § 4072" applies to suits against private insurers. 445 F.3d at 184-185 (contrasting,

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[4] Judge Moore dissented in part. 289 F.3d at 950 (Moore, J.). While affirmatively agreeing with the majority that "federal courts have exclusive original jurisdiction" over private-insurer lawsuits (*ibid.*), her analysis created significant tension with the majority's holding. As Judge Moore explained, "[n]ot every lawsuit against a WYO company is really a suit against FEMA, because [42 U.S.C. 4081(c)] specifically prohibits FEMA from indemnifying an insurer 'for his or her error or omission.'" *Id.* at 952-953. She also noted that "[t]he literal language of § 4072, which applies only to claims against 'the Director,' certainly does not provide 'notice' as to where lawsuits against *private WYO insurers* must be brought." *Id.* at 957. Both points cast serious doubt on the view that Section 4072 covers suits against private insurers as the literal *or* "functional equivalent of a suit against FEMA." *Van Holt*, 163 F.3d at 166-167.

e.g., *Van Holt* and *Gibson* with *Downey*). But the Second Circuit ultimately "join[ed] the Third and Sixth Circuits in holding that § 4072 gives rise to jurisdiction over claims against WYO companies." *Id.* at 187.

The Second Circuit initially retraced *Van Holt*'s logic, explaining why "a suit against a WYO company" is "the 'functional equivalent of a suit against FEMA,'" and noting "the anomalous results of reading § 4072 as limited to suits against the Director." 445 F.3d at 185. While the court acknowledged that "the Seventh Circuit took a different view of whether 42 U.S.C. § 4072 creates jurisdiction over suits of this kind," it rejected the Seventh Circuit's textual analysis. *Id.* at 185-186. The court "agree[d] that § 4072 does not expressly indicate that anyone other than the Director may be sued," but it stated that "[t]he ambiguity in § 4072 lies not in the word 'Director,' however, but in the word 'against.'" *Id.* at 186. In the Second Circuit's view, the word "against" "could mean either 'having as defendant' or 'opposed to.'" *Ibid.* The court then found "this suit is 'against' the director in the colloquial sense, because it will draw down the federal financial resources he manages." *Ibid.*

Having declared the statute ambiguous, the Second Circuit looked past the text to "the statutory context and purpose," and "conclude[d] that a broader reading of the statute is appropriate" as "a suit against the Director's fiscal agent, for which the federal government bears financial responsibility, is in practical terms a suit 'against' the Director." 445 F.3d at 186. And the court bolstered its view with "[t]he general design of the Act," including Section 4053's (defunct) vesting of exclusive jurisdiction for suits "brought by an insured against a pool of private insurers." *Ibid.* According to the court, "[t]he statutory framework thus indicates not only that private insurers

are to act as fiscal agents of the government in administering the federal program, but also that all claims for benefits under an NFIA policy, whether issued as part of the Industry Program or the Government Program and whether sought from a private insurer or the government, are to be litigated exclusively in federal court." *Id.* at 186.

4. At least three other circuits have recognized the square conflict over this issue without choosing sides. See, *e.g.*, *McGair* v. *American Bankers Ins. Co. of Fla.*, 693 F.3d 94, 98-99 & n.3 (1st Cir. 2012) (outlining the "circuit split" over this "significant" jurisdictional question); *Studio Frames Ltd.* v. *Standard Fire Ins. Co.*, 369 F.3d 376, 379-380 & n.1 (4th Cir. 2004) ("declining 'to tackle the difficult statutory construction question,'" and flagging the "substantial disagreement among the circuits"); *Battle* v. *Seibels Bruce Ins. Co.*, 288 F.3d 596, 606 (4th Cir. 2002) (dodging the question but recognizing "that the literal text of § 4072 only speaks of actions 'against the Director [of FEMA]'"); *Newton* v. *Capital Assurance Co., Inc.*, 245 F.3d 1306, 1309 (11th Cir. 2001) (not formally deciding the issue, but declaring that, "[o]n its face, § 4072 provides only for suits against FEMA"; "[i]t does not discuss the WYO program, and we therefore do not read it as addressing suits against WYO companies").

* * *

The conflict over Section 4072's application to WYO insurers is indisputable, mature, and entrenched. The debate has been fully exhausted at the district and circuit level. The Seventh Circuit acknowledged and rejected contrary precedent in the Third Circuit; the full Seventh Circuit was presented with a rehearing petition (supported by FEMA) and not a single judge was willing to budge. Other circuits, by contrast, have since rejected the Seventh Circuit's approach in favor of the Third's. And

the split panel below now mirrors the same division persisting among the courts of appeals. There is no hint that any circuit is willing to reconsider its own views—especially after confronting, and rejecting, the opposing analysis.

This issue is not going away on its own. As it now stands, the outcome of these recurring cases will turn on the happenstance of where a dispute arises, and the confusion and division over this "significant" and "important" jurisdictional question will continue until this Court intervenes. The conflict is ripe for the Court's review.

B. Whether Section 4072 Applies To Actions Against Private Insurers Is A Recurring Question Of Great Importance

This case presents a clear and developed conflict on an important question of statutory construction that repeatedly arises in courts nationwide. The legal and practical stakes are significant, and the issue will continue to generate conflicts and confusion until it is resolved by this Court. Further review is plainly warranted.

1. The question presented has grave practical consequences. Extending Section 4072 to suits against WYO carriers converts two contractual defenses—a one-year limitations period and a forum-selection clause—into hard-and-fast jurisdictional prerequisites. The resulting consequences are "drastic," and this Court has repeatedly recognized the "considerable practical importance" of such issues. *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 434 (2011). The jurisdictional label converts requirements subject to waiver and forfeiture into irrevocable weapons that can be "raised by the defendant 'at any point in the litigation.'" *Fort Bend Cnty.* v. *Davis*, 139 S. Ct. 1843, 1849 (2019); see also *Hamer* v. *Neighborhood Hous. Servs. of Chic.*, 138 S. Ct. 13, 17 (2017). The results can "occasion wasted court resources and 'disturbingly

disarm litigants.'" *Fort Bend*, 139 S. Ct. at 1849; *Henderson*, 562 U.S. at 434 ("Jurisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants.").

As a result, this Court regularly grants review to decide whether similar requirements are jurisdictional. See, *e.g.*, *Fort Bend*, 139 S. Ct. at 1848; *Hamer*, 138 S. Ct. at 17-18; *Henderson*, 562 U.S. at 431. As it now stands, multiple circuits are applying Section 4072 (and its exclusive jurisdictional command) to suits that, textually, fall unambiguously outside the statute. This Court should resolve the conflict before subjecting countless litigants to a jurisdictional rule where it so plainly does not belong.

2. The real-world stakes are especially high in this context. The National Flood Insurance Program is a major federal undertaking. "As of October 2018, the NFIP had more than 5.1 million flood insurance policies providing over $1.3 trillion in coverage." Congressional Research Service, *Introduction to the National Flood Insurance Program (NFIP)* at 1 (Apr. 1, 2019) (*NFIP Intro*). Major floods often result in thousands of claims, which are vitally important to homeowners but often involve relatively low amounts in controversy. Such low-value filings are more prone to errors and mistakes, and those mistakes are indeed frequent—with both sophisticated and unsophisticated litigants accidentally filing in the wrong forum. Compare, *e.g.*, *Apatow* v. *American Bankers Ins. Co. of Fla.*, No. 16-198, 2016 WL 7422288, at *1 (C.D. Cal. Dec. 21, 2016) (famous Hollywood director files suit in state court challenging claim disallowance for Malibu home), with, *e.g.*, *Robbins* v. *Forgash*, No. 13-624, 2014 WL 12588683, at *3-*4 & n.4 (D.N.J. July 31, 2014) (plaintiff with a ninth-grade education, chronic health issues, and

unable to "read or write" filed suit in state court over a $26,235.49 loss).[5]

The majority rule needlessly impairs judicial access and judicial review. It invites gamesmanship and sandbagging, and creates an obvious incentive for private insurers to wait out the clock and then object that a suit was filed in the wrong location. This predictably insulates bad claim decisions from correction, and does so without producing any offsetting gain: a timely filing in state court still puts the private insurer on notice of the challenge, and it takes little effort or expense to remove those filings to federal court, invoking the forum-selection clause in the standard flood-insurance policy.

Congress did not enact a major flood-insurance program with the hope that insureds would not receive the benefits provided by the policies. And private insurers are indeed often prone to mistakes: Following Hurricane Sandy, for example, FEMA authorized a process to reevaluate claim denials in response to concerns "regarding the possible systematic underpayment of claims." *NFIP Intro* at 14. "As of January 29, 2018, approximately 85% of policyholders who requested a review had received additional payments, resulting in approximately $258.6 million in additional claims payments." *Id.* at 14-15. It is hardly obvious that Congress intended to bar potentially

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[5] See also Thomas Parry, *Flood Insurance: Judd Apatow Missed Deadline To Sue Flood Insurer, Judge Says*, 27 No. 16 Westlaw J. Ins. Coverage 7, at *1 (Jan. 26, 2017) ("Filmmaker Judd Apatow waited too long to file a lawsuit against American Bankers Insurance Co. of Florida for refusing to cover flood damage to his beachfront home, a Los Angeles federal judge has ruled. * * * The judge acknowledged that Apatow had filed his state court complaint within a year, but he said the suit did not reach the District Court until after the one-year limitations period had expired.").

valid suits on a technicality—especially where private insurers are more than capable and accustomed of defending themselves, if ever so briefly, in state court.

3. Claimants should not prevail (or not) under a uniform federal program based on the region in which a suit is filed. The arguments on each side have been ventilated and additional percolation would prove pointless. The split over this important question is entrenched: one interpretation is correct and the other is wrong, and neither side will back down. A statute providing exclusive federal jurisdiction for suits against "the Administrator"—a federal officeholder—either means what it says or it silently sweeps in private insurers that no one thinks qualify as the Administrator of FEMA. Only this Court can resolve the conflict, and its review is plainly warranted.

C. This Case Is An Ideal Vehicle For Deciding The Question Presented

This case is an optimal vehicle for deciding this important question. The dispute turns on a pure question of law: the proper construction of a jurisdictional statute. That question was identified expressly by the panel below and subject to its own special round of briefing. See C.A. Order, No. 18-20228 (5th Cir. Mar. 4, 2019). It was then squarely decided as the sole basis for the panel's disposition, "pretermit[ting]" the consideration of any other issue (a point the panel stressed twice). App., *infra*, 7a, 15a. The question was outcome-determinative: If Section 4072 applies here, jurisdiction vests exclusively in federal court and petitioner's suit was time-barred; otherwise, petitioner could satisfy his policy's one-year contractual deadline by filing in state court. *Id.* at 15a. There is no obstacle

to deciding the proper construction of Section 4072 in this case.[6]

Nor are there any factual or procedural obstacles to resolving the question presented. Petitioner filed suit in state court before his policy's one-year deadline, but the case was removed outside the one-year period. Those facts perfectly set up the issue. And given the low-dollar value of many flood-insurance claims (despite their staggering value in the aggregate), not all disputes will percolate up to the courts of appeals or this Court. Even though the issue recurs frequently, this case presents the unusual opportunity where the question is directly presented at this advanced stage.

Petitioner would have prevailed below under the established law in the Seventh Circuit (or the views of the concurring judge below and multiple district courts); he instead lost because the case arose in the Fifth Circuit. The courts of appeals have set up competing constructions of the same statute, and further percolation is pointless. This clean presentation is the perfect backdrop for deciding this "significant" jurisdictional question. *McGair*, 693 F.3d at 98; see also *Van Holt*, 163 F.3d at 163 (characterizing this an "important question of jurisdiction").

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[6] The Fifth Circuit did not address any other grounds for affirmance, including whether petitioner's state-court action was timely; this Court can do the same. Indeed, this Court routinely grants review even where a respondent may attempt to prevail for different reasons on remand. See, *e.g.*, Reply Br., *Taggart* v. *Lorenzen*, No. 18-489, at 9 (filed Dec. 20, 2018); Reply Br., *Kisor* v. *Wilkie*, No. 18-15, at 2 (filed Nov. 19, 2018).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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