No. 19-312

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

REPLY BRIEF FOR THE PETITIONER

TODD LIPSCOMB
LOREE & LIPSCOMB
The Terrace at Concord Park
777 E. Sonterra Blvd., Ste. 320
San Antonio, TX 78258

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statute and regulation:

Miscellaneous:

In the Supreme Court of the United States

No. 19-312

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

REPLY BRIEF FOR THE PETITIONER

This case presents an important and recurring question that has intractably divided the circuits and directly split the panel below. The case for review is exceptionally clear: For nearly two decades now, courts nationwide have acknowledged the "circuit split" over this "significant" federal question. *McGair* v. *American Bankers Ins. Co. of Fla.*, 693 F.3d 94, 98 & n.3 (1st Cir. 2012); Pet. App. 17a (Haynes, J., concurring). It arises all the time in a context (national flood insurance) that demands uniformity, and it has substantial practical effects for businesses and individuals devastated by flood loss. The panel below resolved this pure legal issue as the sole basis for its disposition, "pretermit[ting]" the consideration of any other issue. Pet. App. 7a, 15a. And despite the issue's fiscal significance (especially in the aggregate), this is the unusual opportunity where this "important question of jurisdiction" (*Van Holt* v. *Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 163

(3d Cir. 1998)) is directly presented at this advanced stage.

Because this case easily checks off every box for review, respondent is left grasping for reasons to deny, but its efforts are transparent. Respondent says that this obvious and persistent split was somehow "mooted" by a FEMA regulation promulgated in 2000—a year *before* the split was created. See *Downey* v. *State Farm Fire & Cas. Co.*, 266 F.3d 675 (7th Cir. 2001). Indeed, that same regulation was directly acknowledged by the Seventh Circuit *when it refused to back down* from creating the circuit conflict. *Downey* v. *State Farm Fire & Cas. Co.*, 276 F.3d 243, 244-245 (7th Cir. 2001) (per curiam) (*Downey II*). This is one of the many reasons that no court, at any level, agrees with respondent that the split no longer exists.

Respondent next turns to attacking the issue's "practical significance," but does so by badly misunderstanding the issue (and misreading its own policy language). Extending Section 4072 to suits against private carriers converts two contractual defenses—a one-year limitations period and a forum-selection clause—into inflexible *jurisdictional* prerequisites. That directly affects whether suits filed in state court are timely, whether tolling is available, and whether those defenses can be forfeited or waived. That is precisely why this Court regularly grants review to decide whether parallel requirements are *jurisdictional* requirements (see Pet. 22-23), and it is precisely why courts of appeals have been carefully grappling with this "significant" (*McGair*, 693 F.3d at 98) and "important" (*Van Holt*, 163 F.3d at 163) question. Respondent cannot avoid review by stubbornly refusing to acknowledge the "considerable practical importance" of "[b]randing a rule" as "'jurisdictional.'" *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 434 (2011).

As its final shot, respondent argues that the question presented is somehow academic here, which is an odd way to describe an outcome-determinative holding that "pretermits" the need to address any other question. Pet. 7a. As the panel majority explained, it was Section 4072's "requirement of 'original exclusive jurisdiction' in federal court" that "cause[d] this action to be time-barred because it was not filed in, or removed to, federal court within one-year of the claim's denial." *Ibid.* The policy's one-year deadline could have *otherwise been satisfied in state court*. Given the high frequency of accidental filings in state court—which is understandable given that insurance disputes are *usually litigated in state court* (*Downey*, 266 F.3d at 678)—the question presented is anything but academic. Quite the contrary: as industry stakeholders have explained, it is "an important issue with dramatic consequences for the National Flood Insurance Program" and its millions of residential and commercial participants. Nat'l Ass'n of Pub. Ins. Adjusters Amicus Br. 4.

At bottom, this case presents an ideal vehicle for resolving an entrenched split over a significant question that continues to create confusion and uncertainty for hundreds of litigants nationwide. Nothing in respondent's unprompted opposition remotely undercuts the certworthiness calculus—and respondent, conspicuously, did not even attempt to defend the majority's profoundly atextual reading of Section 4072's unambiguous language. The decision below is plainly wrong, and there is an urgent need for this Court's review. The petition should be granted.

1. a. As the petition established (Pet. 11-22), the Fifth Circuit's decision cements a long-recognized, intractable conflict over a "significant" jurisdictional question:

whether Section 4072 provides "exclusive" federal jurisdiction over flood-insurance claims against private insurers. *McGair*, 693 F.3d at 98 & n.3.

Indeed, there is no genuine dispute about the "substantial disagreement among the circuits." *Studio Frames Ltd.* v. *Standard Fire Ins. Co.*, 369 F.3d 376, 379 (4th Cir. 2004). On excellent authority, the Second Circuit said there was a conflict. *Palmieri* v. *Allstate Ins. Co.*, 445 F.3d 179, 184-185 (2d Cir. 2006) (Sotomayor, J.). The Sixth Circuit said there was a conflict. *Gibson* v. *American Bankers Ins. Co.*, 289 F.3d 943, 947 (6th Cir. 2002). The First, Fourth, and Eleventh Circuits have acknowledged the obvious conflict. *McGair*, 693 F.3d at 98 & n.3; *Studio Frames*, 369 F.3d at 379-380 & n.1; *Newton* v. *Capital Assurance Co., Inc.*, 245 F.3d 1306, 1309 (11th Cir. 2001). And the Seventh Circuit admitted (twice) that it was *creating* a conflict. *Downey*, 266 F.3d at 680; *Downey II*, 276 F.3d 243 at 244-245.

b. Left with little choice, respondent effectively admits that a square conflict exists. Instead, respondent argues that this entrenched conflict was somehow "mooted" by a FEMA regulation in 2000—one that *pre-existed* the conflict itself. Br. in Opp. 9-10. According to respondent, because this regulation imposed *contractual* requirements similar to Section 4072's *jurisdictional* requirements, the question presented is now "virtually irrelevant." *Id.* at 10. Respondent is wrong.

There is a reason that respondent could not identify a single judge, court, expert, or academic explaining away the conflict on this ground. The entire question is whether *the requirements are jurisdictional.* FEMA's regulation required that all polices contain two independent conditions: (i) a "forum-selection clause," and (ii) a one-year deadline for filing suit. *Downey II*, 276 F.3d at 245. It did

not purport to *render those requirements "jurisdictional,"* nor could it. And the resulting difference is obvious and stark: If those requirements are jurisdictional (per Section 4072), a state-court filing is a nullity, tolling is unavailable, the deadline cannot be waived or forfeited, and a suit will be barred if it is refiled or removed to federal court after the one-year statutory deadline. See Pet. App. 15a (so holding). None of that is true if those requirements are merely contractual in nature. See, *e.g.*, *McGair*, 693 F.3d at 98; *Gibson*, 289 F.3d at 946; see also *Woodson* v. *Allstate Ins. Co.*, 855 F.3d 628, 634 (4th Cir. 2017) ("because the state court lacked jurisdiction, the fact that the action was subsequently removed to federal court, rather than dismissed has no impact on the running of the statute of limitations"). There is every difference in the world if Section 4072 applies (and thus converts two contractual obligations into *jurisdictional requirements*), and nothing in FEMA's regulation "moots" the obvious significance of the undeniable conflict over that question.

c. In addition, respondent simply ignores that, on its face, the regulation imposes *two independent conditions*, not one: "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) (emphasis added). This directive includes two independent clauses (separated by the conjunctive "and"), and nothing in its plain text links the two together. A party can meet the first condition by timely filing in state court, even if the insurer can then *remove* the action under the second clause. That is not true, again, under Section 4072: if the state court lacks jurisdiction, then any attempt to satisfy the federal deadline in state court is wiped out. *E.g.*, *Gibson*, 289 F.3d at 946; Pet. App. 15a.

* * *

There is a reason that this "significant" question continues to consume substantial judicial and party time and resources, and courts are not simply grappling with these "difficult" statutory questions for sport (*Studio Frames*, 369 F.3d at 379). The proper scope of Section 4072 is dispositive in countless of suits under the National Flood Insurance Act, just as it was dispositive below. See Pet. 22-26; Nat'l Ass'n of Pub. Ins. Adjusters Amicus Br. 15-22. Respondent cannot explain away the conflict because a regulation that *predated* the conflict inserted similar contractual obligations in every policy.

It takes only a quick glance at the exhaustive analyses on each side of the split to understand that the issue arrives fully ventilated from every conceivable angle, and further percolation will not sharpen the issue or produce any practical or theoretical benefit—aside from creating intolerable uncertainty when the next major storm produces hundreds (or thousands) of additional claims. The Court often grants review to settle conflicts over whether analogous requirements are jurisdictional, and it should do the same here.

2. Respondent's next makeweight against review is the specious claim that this issue has no "practical significance." Br. in Opp. 10-11. This would again come as a surprise to all the courts devoting studied attention to this question. And aside from its own ipse dixit, respondent fails to substantiate how there is somehow no effect (legally or practically) by supplanting the policy's contractual requirements with Section 4072's jurisdictional prerequisites.

Indeed, respondent's only real attempt to support its argument proves *petitioner's* point. Respondent invokes the Sixth Circuit's decision in *Gibson* to say that timely

filings in state courts are barred (and tolling is unavailable) even if Section 4072 does not apply. Br. in Opp. 13. But *Gibson* held exactly the *opposite*. It first explained that "[t]he filing in a *state court of competent jurisdiction* tolls the statute of limitations during the pendency of the state action." 289 F.3d at 946 (emphasis added; citing *Burnett* v. *N.Y. Cent. R.R. Co.*, 380 U.S. 424 (1965)). But given its conclusion that Section 4072 applied, it held that tolling was unavailable: "We agree with the district court that plaintiffs' claims * * * were within the *exclusive jurisdiction of the federal district court*, and, therefore, *the filing in state court did not toll the statute of limitations*." *Ibid.* (emphases added). Far from undermining the question's "practical significance," this shows exactly why it is outcome-determinative on a fact-pattern that arises all the time in flood-insurance cases.[1]

And respondent also suggests, wrongly, that the concurrence below found that petitioner's suit would be barred even if Section 4072 did not apply. Br. in Opp. 11 (arguing, without reproducing any language or even providing a pincite, that this "explains why the concurrence below, questioning which statute controlled, was a concurrence and not a dissent"). This is simply false: As Judge Haynes unequivocally explained, her concurrence was a concurrence "[b]ecause we are bound by precedent

---

[1] Indeed, mistaken filings in state court are so common that FEMA *anticipates* state-court filings (despite the policy's forum-selection clause) and expressly instructs private insurers to *remove those cases to federal court*. See FEMA | OCC, *National Flood Insurance Program Litigation Manual*, at 8 (2018) (noting "the required removal of NFIP-related lawsuits to federal court") <https://tinyurl.com/FEMA-manual>; *id.* at 12 ("Please remember that all NFIP-related Litigation should be removed to Federal Court in the District where the property is located.").

to apply § 4072 to a WYO carrier." Pet. App. 15a. She "disagree[d] that our precedent is correct," and concurred "in the judgment but not in the reasoning beyond citing precedent." *Id.* at 18a. Had this issue arrived on a blank slate, Judge Haynes would have "agree[d] with the Seventh Circuit" that Section 4072 does not apply to private carriers. *Id.* at 15a-18a.

Respondent has an obvious incentive to escape review, but this Court frequently grants certiorari to decide whether like-requirements are jurisdictional, recognizing the critical importance of the issue to the proper and fair operation of federal programs. See Pet. 22-23 (so explaining and providing a small handful of examples). It is telling that respondent cannot muster any response to this critical point.

3. Respondent finally argues that the question presented is somehow "academic" or "advisory" on these facts. Br. in Opp. 12-13. If respondent means to suggest that it may ultimately prevail on *other* issues on remand, its point is both wrong and irrelevant. The Fifth Circuit did not decide any issue besides this sole "question of law," while stressing the lack of "disputed facts" and avoiding any analysis of any other issue. Pet. App. 14a-15a. That only reaffirms that this is an ideal vehicle and the question below is outcome-determinative, with no conceivable procedural or factual hurdles standing in the way. See also Pet. 25-26 & n.6 (explaining how this Court routinely grants review over the contention that the respondent may ultimately prevail on undecided, contested issues on remand).

As is self-evident on a quick skim of the Fifth Circuit's decision, petitioner lost because the court held that Section 4072 applied to claims against private carriers, rendering his state-court action irrelevant to meeting Section 4072's statutory deadline. If that section does not apply—

as it does not in the Seventh Circuit, other district courts, and the concurrence's rationale—petitioner could have won. The panel went out of its way to stress that it was deciding the question presented alone, and the concurrence underscored the existence of a square circuit conflict—and its obvious importance to litigants under this important federal program.

This case easily satisfies the Court's traditional criteria for review, and this case is the perfect opportunity to resolve this longstanding, significant conflict over the meaning of a key provision of federal law.

CONCLUSION

The petition should be granted.

Respectfully submitted.

TODD LIPSCOMB
LOREE & LIPSCOMB
The Terrace at Concord Park
777 E. Sonterra Blvd., Ste. 320
San Antonio, TX 78258

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

DECEMBER 2019