No. 19-312

In The Supreme Court of the United States

ALI EKHLASSI,

Petitioner,

v.

NATIONAL LLOYDS INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS AND THE TEXAS ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS AS *AMICI CURIAE* SUPPORTING PETITIONER

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October 7, 2019

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Public Insurance Adjusters (NAPIA) is a nationwide trade association founded in 1951 to promote ethics and professionalism in the field of public insurance adjusting. A "public insurance adjuster" is distinct from an "insurance adjuster." Whereas an "insurance adjuster" investigates or adjusts losses on behalf of an insurance company and supervises the handling of claims, a "public insurance adjuster" is hired directly by the insured and seeks to negotiate and resolve claims in the insured's favor. Public insurance adjusters are specifically licensed in forty-five of the fifty States plus the District of Columbia, coming within the ambit of comprehensive regulation by state insurance departments. And they are the only professionals specifically licensed to represent insureds in the presentation and negotiation of first-party property claims. Typically, insureds pay public insurance adjusters an hourly fee, a flat rate, or a percentage of any resulting claim settlement.

NAPIA has a substantial interest in this case. For over sixty years, NAPIA has worked with the insurance industry, insurance regulators, and

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[1] Pursuant to Rule 37.2(a), counsel for *amici* provided notice to all parties of *amici*'s intention to file this brief and did so at least ten days before its due date. All parties gave their consent. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

lawmakers to ensure that public insurance adjusters practice their trade in an ethical and accountable manner. NAPIA provides professional education, certification, scholarship, research, and legal and legislative representation. NAPIA also markets and promotes the profession itself. Members of NAPIA pay annual fees to further these goals.

Like NAPIA, the Texas Association of Public Adjusters (TAPIA) promotes the profession of public insurance adjusting, albeit within the State of Texas. TAPIA was established in 1990 and, again like NAPIA, provides professional education and legal and legislative representation. It also markets and promotes the public-insurance-adjusting profession. TAPIA funds its activities through membership dues, and it engages in fundraising for legislative or legal initiatives.

As organizations of professionals in a highly regulated industry, both NAPIA and TAPIA have a strong interest in the uniform and sensible application of laws governing the resolution of insurance claims. Because an understanding of insurance laws is essential for the effective negotiation of insurance claims, members of NAPIA and TAPIA are best able to serve their clients when statutes and regulations governing insurance disputes are interpreted uniformly.

The circuit split detailed in the petition injects grave uncertainty into the insurance industry regarding litigation requirements under the National

Flood Insurance Act (NFIA). When courts, like the Fifth Circuit below, depart from 42 U.S.C. § 4072's clear language, that atextual statutory interpretation has significant implications for the uniform and predictable interpretation of NFIA-related insurance laws. The Fifth Circuit's decision, which binds many of NAPIA's members and all of TAPIA's members, undermines these organizations' shared mission to promote fair and ethical practices in public insurance adjusting. Accordingly, NAPIA and TAPIA urge this Court to grant certiorari and establish a uniform application of § 4072 consistent with its plain text.

SUMMARY OF THE ARGUMENT

The National Flood Insurance Act specifies that "an action against the Administrator" of the Federal Emergency Management Agency must be brought in federal court, 42 U.S.C. § 4072, but the Act says no such thing about actions against private companies serving as "Write Your Own" (WYO) insurers. Nonetheless, several courts of appeals, including the Fifth Circuit below, have added an atextual exclusive-federal-jurisdiction requirement for claimants suing WYO companies. That result cannot be squared with the plain text of § 4072, the definition of "Administrator" in the Act, or Congress's use of the term elsewhere in the Act, which makes clear that the "Administrator" does not include private companies.

A straightforward reading of § 4072's text is sufficient to resolve the important question presented in the petition. Nonetheless, broader concerns also counsel against the atextual approach: Interpreting § 4072 to create exclusive federal jurisdiction over suits against WYO companies is not only at odds with the statute's plain language, but also raises serious constitutional questions. Nothing in § 4072's language provides flood-insurance claimants with fair notice that only federal courts have jurisdiction over actions against private WYO companies. That lack of notice triggers core due-process concerns. Moreover, courts' judicial supplementation of § 4072 is an encroachment on legislative authority that thwarts Congress's carefully crafted national flood-insurance scheme and undermines the separation of powers.

The circuit split over the scope of exclusive federal jurisdiction under § 4072 raises an important issue with dramatic consequences for the National Flood Insurance Program, through which over 5 million flood-insurance policies were issued as of 2018—the vast majority administered by WYO companies. Claimants cannot fully exercise their rights when jurisdictional rules governing WYO disputes vary based on geography. This Court should grant the petition to resolve the conflict among the courts of appeals and restore uniformity and predictability under the NFIA.

ARGUMENT

I. INTERJECTING AN EXCLUSIVE-JURISDICTION HURDLE THAT DOES NOT EXIST IN THE NFIA'S PLAIN TEXT RAISES SERIOUS DUE-PROCESS AND SEPARATION-OF-POWERS CONCERNS.

As detailed in the petition, the courts of appeals disagree as to the meaning of 42 U.S.C. § 4072. *See* Pet. 11-22. Rejecting the plain-language interpretation of the Seventh Circuit in favor of other courts' atextual interpretation, the Fifth Circuit held that § 4072 requires insurance claimants to litigate disputes with WYO companies solely in federal court. Pet. App. 7a, 13a-14a. That departure from the plain language of the statute not only distorts the balance of rights struck in the Act, but also raises serious due-process and separation-of-powers concerns. Insureds should be able to rely on the words Congress wrote to understand how to challenge a WYO company's allegedly unlawful denial or reduction of flood-insurance claims. Structuring rights and responsibilities is a lawmaking function that belongs to Congress and should not be usurped by the judiciary. This Court should grant the petition and resolve the split to restore uniformity and the balance of rights Congress struck under the NFIA.

A. The Plain Text Of 42 U.S.C. § 4072 Does Not Require Flood-Insurance Claimants To Sue WYO Companies In Federal Court.

The plain language of § 4072 precludes the Fifth Circuit's determination that the exclusive-federal-jurisdiction requirement in the statute applies to lawsuits against WYO companies. As § 4072 clearly specifies, a flood-insurance claimant who wants to challenge a reduction or disallowance of a claim "may institute an action *against the Administrator*" in federal district court. 42 U.S.C. § 4072 (emphasis added). An action against a WYO company is not an action against the Administrator; and the plain text leaves no room for doubt. Even so, Congress reinforced that plain meaning in two critical respects: first, its definition of the term "Administrator"; and, second, its use of that term in other NFIA provisions that would be absurd if applied equally to WYO companies.

First, Congress defined the term "Administrator" in the NFIA, and that definition does not include WYO companies. Instead, "the term 'Administrator' means the Administrator of the Federal Emergency Management Agency." 42 U.S.C. § 4121(a)(6). And courts cannot disregard an explicit statutory definition. *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776-77 (2018) (concluding that a statutory definition controlled despite arguments that adherence would undermine the goals of the statutory scheme).

Moreover, "[a]s a rule, a definition which declares what a term 'means' excludes any meaning that is not stated." *Burgess v. United States*, 553 U.S. 124, 130 (2008) (internal quotation marks and alterations omitted) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392-93 n.10 (1979)). Because Congress defined "Administrator" and, in so doing, specified that the term "means" the Administrator of FEMA, courts are not free to expand that definition to include WYO companies. *See id.*; 42 U.S.C. § 4121(a)(6).

That conclusion is reinforced by Congress's use of "the definite article 'the.'" *See Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1514 (2019). Just last term in *Cochise*, the Court reasoned that the False Claims Act's "use of the definite article 'the' suggests that Congress did not intend" a *qui tam* provision's reference to "the official of the United States charged with responsibility to act in the circumstances" to include a relator pursuing relief on behalf of the federal government. *Id.*; *see also Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (explaining that use of "the" in a federal habeas statute's proper-respondent provision limited the proper respondent to one party—in that case, the warden). In the NFIA as well, Congress's inclusion of "the" in the phrase "the Administrator" limits it to the federal officer named in the definition: the Administrator of FEMA. *See* 42 U.S.C. §§ 4072, 4121(a)(6).

Furthermore, the broader phrase "action against the Administrator" in § 4072 makes even clearer which

actions should be filed in federal court: lawsuits where the FEMA Administrator is the party being sued. In litigation against a WYO company, FEMA is not the defendant. The party "against" whom the action is brought is the WYO itself, as FEMA's own regulations confirm. *See, e.g.*, 44 C.F.R. § 62.23(g) ("WYO Companies are solely responsible for their obligations to their insured . . . such that the Federal Government is not a proper party defendant in any lawsuit arising out of [flood-insurance] policies.").[2]

Second, Congress's use of "the Administrator" elsewhere in the Act confirms that the term does not include WYO companies. For example, the Act authorizes "the Administrator" to "undertake any

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[2] This clear, textual command and litigation reality foreclose application of a judicial fiction that transforms a suit against a WYO company into an "action against the Administrator" based on the company's role as a "fiscal agent" of the federal government. *Compare Downey v. State Farm Fire & Cas. Co.*, 266 F.3d 675, 679-82 (7th Cir. 2001) (rejecting argument that FEMA's federal interest in litigation against WYO companies means those suits are "against the Administrator"), *with, e.g.*, *Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 166-67 (3d Cir. 1998) (concluding that suits against WYO companies are functionally equivalent to suits against FEMA). That atextual approach contradicts the regulatory scheme set out by Congress in the NFIA, and this Court in analogous contexts has made clear that courts cannot exalt a functional fiction over statutory text. *See Cochise*, 139 S. Ct. at 1514 (rejecting argument that because False Claims Act suits are brought "in the name of the Government," a private relator is an "official of the United States"); *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 932-33 (2009) (concluding that despite its underlying interest, the federal government is not a "party" to a False Claims Act action brought by a private relator when the government does not intervene).

necessary arrangements to carry out the program of flood insurance," including utilizing "insurance companies and other insurers . . . as fiscal agents of the United States." 42 U.S.C. § 4071(a). That provision makes clear that "the Administrator" cannot include WYO companies because WYO companies lack the authority to "undertake any necessary arrangements to carry out" the flood-insurance program, and it would be odd to delegate legislative powers to private WYO companies to make themselves and other insurers "fiscal agents of the United States." *See id.*; *cf. Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (rejecting statutory interpretation that "would produce an absurd and unjust result which Congress could not have intended") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)).

It would be improper to give "the Administrator" a WYO-inclusive meaning in § 4072 but elsewhere limit it to the Administrator of FEMA to avoid problems in other sections of the Act. This Court "does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019); *see also United States v. Davis*, 139 S. Ct. 2319, 2329 (2019) (confirming that this Court "normally presume[s] that the same language in related statutes carries a consistent meaning"). Instead, the term should be read consistently throughout the NFIA—especially since "Administrator" is statutorily defined. *See, e.g.*, *Digital Realty Tr.*, 138 S. Ct. at 776-77 (determining that statutory definition

controls). That means § 4072's requirement to file in federal district court applies only to lawsuits in which the Administrator of FEMA is the named defendant. *See* 42 U.S.C. §§ 4072, 4121(a)(6).

B. Courts' Atextual Interpretation Of § 4072 Raises Serious Due-Process And Separation-Of-Powers Concerns.

While the Seventh Circuit has given § 4072 its plain meaning and held that exclusive federal jurisdiction does not apply to actions against WYO companies, *Downey v. State Farm Fire & Cas. Co.*, 266 F.3d 675, 680 (7th Cir. 2001), the contrary, atextual interpretation of other courts, *see*, *e.g.*, *Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 166-67 (3d Cir. 1998), too often prevents insureds from fairly litigating disputes with WYO companies over flood-insurance claims. As the petition explains, claimants in those jurisdictions who timely file within a year of a WYO company's adverse determination nonetheless "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." Pet. 3. By contrast, if, as in the Seventh Circuit, there is concurrent state-court jurisdiction, the litigation proceeds; and even if a WYO company removes a case to federal court, the timely state-court filing preserves the claimant's rights. *See id*.

The conflicting interpretations of § 4072 do not affect whether a WYO company will have access to a

federal forum when it is sued. Removal can accomplish that objective even in courts where § 4072's exclusive-federal-jurisdiction requirement applies only to actions against the Administrator of FEMA. Instead, the disparate impact of the conflict falls on claimants, some of whom forfeit access to any kind of judicial review because they live in circuits where the atextual interpretation renders timely state-court filings futile.

That stark result is troubling not only in terms of fairness, but also constitutionally. If a statute fails to give claimants fair notice of the required procedures to litigate their rights, that raises due-process concerns. And if courts begin rewriting statutes to effectuate objectives they think Congress would want, even when Congress spelled out contrary procedures, that judicial usurpation of legislative authority defeats the separation of powers.

Under the Fifth Amendment's Due Process Clause, individuals are entitled to notice prior to any governmental deprivation of their property. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). Whether the government seeks to deprive individuals of property by statute or by judicial proceeding, the requirement of fair notice is the same. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982) (holding that plaintiffs had a constitutionally protected property interest in a statutorily created right to adjudicatory procedures). Further, this Court has frequently held that the right to pursue a cause

of action in court is itself a constitutionally protected property interest. *E.g.*, *Logan*, 455 U.S. at 429-30 (citing cases). Section 4072's exclusive-federal-jurisdiction requirement, if applied to suits against WYO companies, raises due-process concerns because claimants lack adequate notice from the statute's text that a failure to file in *federal* court within the limitations period will forfeit their right to challenge a WYO company's denial or reduction of flood-insurance claims.[3]

A deprivation of property for failure to comply with requirements that claimants would not discern from the text of governing legislation flouts "the most basic of due process's customary protections." *See Dimaya*, 138 S. Ct. at 1225 (Gorsuch, J., concurring). Due process requires that individuals of ordinary intelligence be able to understand what the law demands of them. *Davis*, 139 S. Ct. at 2325. But the atextual interpretation of § 4072 obscures those demands, injecting inconsistency and uncertainty into what Congress designed as a uniform, *national*, flood-insurance scheme. The growing potential for unpredictable deprivations of insureds' flood-insurance rights smacks of the evils the Due Process Clause was designed to prevent. *Cf. Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015) (holding

[3] As discussed in the petition, the forum-selection clause in WYO contracts affords a waiveable contract defense, not a basis for exclusive federal *jurisdiction*. *See* Pet. 6-7, 22. Exclusive federal jurisdiction is prescribed by § 4072 only in "action[s] against the Administrator" of FEMA. 42 U.S.C. § 4072.

unconstitutional the residual clause of the Armed Career Criminal Act because it "produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates").

Moreover, the interpretation of § 4072 adopted by some circuits, divorced from the statute's text, undermines another constitutional pillar—the separation of powers. The separation of powers requires courts to give effect to the "ordinary, contemporary, common meaning" of Congress's chosen words. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *see also Murphy v. Smith*, 138 S. Ct. 784, 788 (2018) ("[R]espect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own."). In § 4072, Congress chose to confer exclusive federal jurisdiction only on "an action against the Administrator"—a term that "means the Administrator of the Federal Emergency Management Agency." *See* 42 U.S.C. §§ 4072, 4121(a)(6).

Because the Constitution separates legislative and judicial power, courts may not attempt to advance a perceived statutory objective at the expense of the statute's plain text. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725-26 (2017). Yet that is precisely what lower courts have done in applying § 4072's exclusive federal jurisdiction to actions against WYO companies. The Third Circuit's analysis in *Van Holt*, which has been adopted by the Fifth Circuit and

other courts of appeals, acknowledged that its interpretation relied on "the design of the statute as a whole *and its objectives and policies*." *See* 163 F.3d at 166-67 (emphasis added) (noting that "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").

The Second Circuit's decision in *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179 (2d Cir. 2006), on which the Fifth Circuit also relied, reasoned that "[t]he general design of the [National Flood Insurance] Act also evidences an intent to ensure that claims involving the programs it creates are heard in the federal courts." *Id*. at 186. But dictating how a statute should operate to achieve its policy goals is a constitutional prerogative reserved for Congress. And Congress often stops short of pursuing its goals "at all costs." *Henson*, 137 S. Ct. at 1725. Courts thus have no authority to adjust a statute's plain terms to effectuate a regulatory scheme's perceived, overall objectives; the judiciary's role, instead, is to apply Congress's laws as written. *See id.* Thus, the separation of powers enshrined in the Constitution precludes courts from rewriting § 4072 to confer exclusive federal jurisdiction not only on "actions against the Administrator," but also on actions against WYO companies.

II. COURTS' ATEXTUAL INTERPRETATION OF § 4072 UNDERMINES THE NATIONAL FLOOD INSURANCE PROGRAM'S PURPOSE.

Courts that have interpreted "action against the Administrator" to include lawsuits against WYO companies have attempted to justify their departure from the text as furthering the scheme in the Act. *See*, *e.g.*, *Palmieri*, 445 F.3d at 186; *Van Holt*, 163 F.3d at 166-67. But that is not the judiciary's job. *See* Part I.B, *supra*. Moreover, the atextual interpretation of § 4072 does not even achieve those courts' purported rationale.

Far from advancing Congress's goals, the atextual interpretation of § 4072 instead undermines the National Flood Insurance Program's fundamental purpose: to provide insurance coverage for flood losses to property owners in a market that previously did not meaningfully exist. *See* 42 U.S.C. § 4001. That coverage is illusory without an effective way for insureds to enforce their rights. And inserting an atextual, exclusive-federal-jurisdiction requirement for actions against WYO companies greatly reduces the effectiveness of the Act's enforcement mechanism.

Additionally, inconsistent application of jurisdictional requirements across circuits further undermines Congress's goal of creating a consistent, functional, national program of flood insurance. No

speculation is required to discern the damaging consequences of courts' tinkering with the Act's text, as numerous decisions document property owners' loss of even the opportunity to challenge WYO companies' denials or reductions of flood-insurance claims.

A. Congress Enacted The NFIA To Create A Market For Flood Insurance And Protect Flood Survivors.

Congress's express purpose in enacting the National Flood Insurance Act of 1968 included creating a "nationwide" flood insurance program that "distribut[ed] burdens equitably." National Flood Insurance Act of 1968, Pub. L. No. 90-448, § 1302(d), 82 Stat. 476, 572-73 (codified at 42 U.S.C. § 4001(d) (2012)). By 1968, it was clear to Congress that flooding regularly caused great damages to property owners—including more than $870 million in losses caused by flooding in 1951 and over $500 million caused by hurricanes and flooding from 1955 to 1956. JAMES M. WRIGHT, THE NATION'S RESPONSES TO FLOOD DISASTERS: A HISTORICAL ACCOUNT 30 (2000); *see also* GEORGE D. HADDOW ET AL., INTRODUCTION TO EMERGENCY MANAGEMENT 4 (4th ed. 2011) (discussing a series of hurricanes in the 1960s that caused hundreds of millions of dollars in damage, killed hundreds of people, and spurred Congress to enact the NFIA). Congress recognized that property owners did not have access to effective coverage for such losses: "[M]any factors have made it uneconomic for the private insurance industry alone to make flood insurance

available to those in need of such protection on reasonable terms and conditions." National Flood Insurance Act § 1302(b), 82 Stat. at 573 (codified at 42 U.S.C. § 4001(b)). The Act sought to remedy that problem.

Fifty years after the passage of the NFIA, flood insurance continues to be important. "Among natural disasters, size and frequency make floods *the major source* of financial stress to governments and individuals in the United States." Camilo Sarmiento & Ted R. Miller, *Costs and Consequences of Flooding and the Impact of the National Flood Insurance Program* 5 (2006), https://www.fema.gov/media-library-data/20130726-1602-20490-4555/nfip_eval_costs_and_consequences.pdf (emphasis added). Today, millions of homeowners receive flood insurance through the modernized version of the nationwide program that FEMA administers, the NFIP. As of 2018, the program underwrote 5.1 million flood-insurance policies. FEMA, *Total Policies in Force by Calendar Year*, https://www.fema.gov/total-policies-force-calendar-year (last updated Aug. 14, 2019). The program's policies represent over 98% of flood-insurance policies nationwide, with the private flood-insurance industry issuing only 50,000 to 75,000 policies. *See* Stephen G. Fier et al., *The State of the National Flood Insurance Program: Treading Water or Sinking Fast?*, 33 J. INS. REG. 115, 131 n.24 (2014). And within the program, over 87% of the policies are issued and administered by WYO companies. DIANE P. HORN & BAIRD WEBEL, CONG. RESEARCH SERV., R44593, INTRODUCTION TO THE

NATIONAL FLOOD INSURANCE PROGRAM (NFIP) 13 (2019), https://crsreports.congress.gov/product/pdf/R/R44593. Indeed, historically, WYO companies have been responsible for as much as 97% of the program's policies. *Id*.

Congress was deliberate in its design of a functional flood-insurance market that provides effective coverage for flood losses while doing so "equitably." National Flood Insurance Act § 1302(d), 82 Stat. at 573 (codified at 42 U.S.C. § 4001(d)). Far from advancing Congress's objectives, courts' atextual reading of § 4072 creates pitfalls for homeowners attempting to enforce their flood-insurance rights, and that inequitable consequence undermines Congress's purpose and the careful crafting of its equitable scheme.

B. The Atextual Interpretation Of § 4072 Wrongfully Deprives Too Many Property Owners Of Even The Opportunity To Litigate Valid Insurance Claims.

Even though FEMA ultimately funds the Act's nationwide program, "the bulk of the day-to-day operations of the [National Flood Insurance Program], including the marketing, sale, writing, and claims management of policies is handled by private companies." HORN & WEBEL, *supra*, at 13. In fact, purchasers may not be aware that their policies are underwritten by FEMA. *Id.* at 13-14. Given those facts, insureds are unlikely to conclude that § 4072's

exclusive-federal-jurisdiction provision applies to their suits against a private company refusing to pay flood-insurance claims. And insureds therefore are frequently wholly unprepared when the WYO companies with whom they do business invoke § 4072 to deprive those insureds of the opportunity for judicial review.

That is not merely a theoretical problem: Homeowners and companies alike, even when represented by counsel, fall prey to the atextual-interpretation trap. For example, Gary and Rebecca Woodson's North Carolina house was damaged by Hurricane Irene. *Woodson v. Allstate Ins. Co.*, 855 F.3d 628, 630 (4th Cir. 2017). Although an engineering firm estimated the damage at over $272,000, the Woodsons' WYO company, Allstate, denied all but $1,200 of the claim. *Id.* at 632.

The Woodsons timely filed suit in North Carolina state court after Allstate's denial, and Allstate removed the suit to federal court. *Id.* After a bench trial, the federal district court held for the Woodsons, crediting their engineers over Allstate's and finding that Allstate had engaged in "'the worst kind of misconduct' and . . . that Allstate had used [its engineer's] report to 'thwart' the Woodsons' claim." *Id.* at 632-33. Allstate appealed, arguing, among other things, that the Woodsons' claims were time barred because they did not reach federal court within a year of Allstate's adverse determination. *Id.* at 633. The Fourth Circuit agreed with Allstate, *id.* at 633-34,

overturning awards for breach of contract, bad faith, and attorneys' fees. *Id.* at 630-31, 638.

Similarly, Leslie and Edgar Gibson were denied coverage of their flood losses by their WYO company, American Bankers Insurance, due to the atextual interpretation of § 4072. *Gibson v. Am. Bankers Ins. Co.*, 91 F. Supp. 2d 1037, 1039, 1042 (E.D. Ky. 2000). The Gibsons timely brought suit in Kentucky state court after American Bankers denied coverage, and the insurer removed the case to federal court. *See id.* at 1039. The federal district court then granted American Bankers's motion to dismiss the suit as untimely because "Plaintiffs' claim under the policy of insurance was not filed in this federal court" until after a year had passed from the initial denial of coverage. *Id.* at 1042. The Sixth Circuit affirmed, *Gibson v. Am. Bankers Ins. Co.*, 289 F.3d 943, 950 (2002), but Judge Moore dissented in part, asserting that "the one-year statute of limitations was tolled by the Gibsons' filing in state court and thus . . . the district court erred in holding that their claims were time-barred." *Id.* at 958 (Moore, J., concurring in part and dissenting in part).

Homeowners are not alone in falling victim to the atextual reading of § 4072. Corporate insureds also file claims against their WYO companies in state court, only to later face dismissal on statute-of-limitations grounds. For example, Parsons Footware held a policy written by a WYO company, Omaha Property & Casualty (Omaha). *Parsons Footware, Inc. v. Omaha Prop. & Cas. Co.*, 19 F. Supp. 2d 588, 589 (N.D. W. Va. 1998). When Omaha denied Parsons Footware's claim

for flood damage, Parsons Footware sued Omaha in West Virginia state court. *Id.* Omaha subsequently removed the case to federal court and then moved to dismiss the case as time-barred. *Id.* The district court applied the atextual interpretation of § 4072 and dismissed the suit, leaving Parsons Footware with no remedy. *Id.* at 591-92.

The Woodsons, the Gibsons, and Parsons Footware are only a few examples of how the atextual interpretation of § 4072 acts as a "gotcha" to throw otherwise timely, potentially meritorious claims out of court. And for homeowners pursuing claims *pro se*, the "gotcha" no doubt poses an even greater threat.

That insureds continue to file claims arising from a dispute with a WYO company in state court should come as no surprise. Most civil suits in the United States are brought in state courts. Take Texas for example. Texas alone saw over 1.5 million new civil cases filed across all of its state courts in 2018. OFF. OF CT. ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY 2 (2018), https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf. In contrast, the entire federal judiciary saw only 18% of the new-civil-case filings that Texas saw in that same period. *See* U.S. CTS., *Federal Judicial Caseload Statistics* (last visited Sept. 7, 2019), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018.[4]

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[4] The comparison is even starker nationwide. One source estimates that over 30 million new cases are filed across state courts nationwide each year. *Federal vs. State Courts—Key Differences*, FINDLAW (last visited Sept. 7, 2019), https://litigation.findlaw.com/legal-system/federal-vs-state-courts-key-differences.html.

Given the absence of any indication in the text of § 4072 that state courts lack jurisdiction over flood-insurance disputes with WYO companies, it seems likely that insureds will continue to file claims in state court. And, as long as the split in authority continues, some of those actions will be dismissed for lack of jurisdiction while others are not—based solely on the geographical location of the filing. That inequitable result warrants this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 7, 2019