No. _____

In the Supreme Court of the United States

RAUL A. PELAEZ as LIMITED GUARDIAN of the Person and Property of JOHN POUL PELAEZ, ward,

Petitioner,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Jeffrey L. Gordon
Counsel of Record
Maney & Gordon, P.A.
101 E. Kennedy Blvd., Ste 1700
Tampa, Florida 33602
Tel: (813) 221-1366
j.gordon@maneygordon.com
Counsel for Petitioner

QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit, and more particularly, Circuit Judge Edward Carnes, who prepared the opinion for the court, exhibited pervasive bias and prejudice such that a reasonable person would question the court's impartiality, violating the Petitioner's Fourteenth Amendment Due Process Rights?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Raul A. Pelaez, as limited guardian of the person and property of John Poul Pelaez, ward, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1) is published at 13 F.4th 1243. The opinion of the United States District Court for the Middle District of Florida (App. 23) is published at 460 F.Supp.3d 1259.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 20, 2021. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with-out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1, cl. 2.

STATEMENT OF THE CASE

This petition arises from an appeal before the United States Court of Appeals for the Eleventh Circuit, challenging the U.S. District Court for the Middle District of Florida's order entering summary judgment in favor of the defendant, Government Employees Insurance Company ("GEICO"), in an insurance bad faith action stemming from an April 13, 2012 motor vehicle collision that resulted in catastrophic injuries to the plaintiff, John Poul Pelaez ("Pelaez"). Petitioner contends that the opinion issued by the Eleventh Circuit, affirming the District Court's order, exhibits pervasive bias, in violation of Pelaez's Fourteenth Amendment Due Process Rights.

I. Background

The underlying motor vehicle collision that gave rise to the tort suit and subsequent bad faith suit occurred on April 13, 2012, in Hillsborough County, Florida. The at-fault driver, Michael Adam Conlon, Jr. ("Conlon"), failed to yield the right of way and crashed into the motorcycle being operated by Pelaez, who sustained catastrophic permanent injuries in the collision, including head injuries, requiring Pelaez to be airlifted to the hospital from the scene.

At the time of the collision, Conlon was driving a car owned by his mother, who was insured under an automobile liability policy issued by GEICO which provided bodily injury ("BI") liability limits of $50,000 per person, and a separate $50,000 coverage limit for property damage ("PD"). Conlon was covered under the policy as an additional insured. Conlon

initially reported the incident to GEICO at the scene but did not report that any injuries at that time. GEICO assigned a claims adjuster on April 16, 2012, and proceeded to interview Conlon and investigate the crash site.

Ten days later, on April 23, 2012, GEICO received the police report, which revealed that Conlon had failed to yield the right of way, that Pelaez was not speeding according to eyewitness accounts, and that Pelaez sustained major injuries including head injuries. On that same date, GEICO received a letter of representation from Pelaez's attorney, principally requesting statutory insurance disclosures.

Because of the clear liability of its insured and the severity of the injuries sustained by Pelaez, GEICO had a duty under Florida law to promptly attempt to settle the bodily injury claim for the policy's BI limit. On April 26, 2012, GEICO tendered to Pelaez a check for the $50,000 BI coverage limit along with a release titled "RELEASE OF ALL CLAIMS," which stated in relevant part:

> RELEASE OF ALL CLAIMS FOR AND IN CONSIDERATION of Fifty Thousand Dollars and 00/100 ($50,000.00), the receipt and sufficiency of which is acknowledged, the undersigned, John Pelaez, As A Single Individual, hereby releases and forever discharges Vivian Cuberoconlon, Michael Conlon, and all officers, directors, agents or employees of the foregoing, their heirs, executors, administrators, agents, or assigns, none of whom admit any liability to the undersigned, from any and all claims, demands, damages, actions, causes of action,

> or suits of any kind or nature whatsoever, on account of all injuries and damages, known and unknown, which have resulted or may in the future develop as a consequence of a motor vehicle accident that occurred at Countryway Blvd and Oaksbury in Tampa, Florida, on or about the 13th of April, 2012.

Along with the release and a check for the policy's $50,000 BI liability limits, GEICO sent Pelaez's attorney a form letter, which stated: "A check for $50,000.00 in settlement of the above mentioned loss has been forwarded under separate cover. Attached is the release." The letter further instructs: "Prior to negotiating the check, please have your client sign the enclosed release and return this release to GEICO as soon as possible."

The form letter further states "Not all release forms precisely fit the facts and circumstances of every claim. Should you have any questions about any aspect of the release terms, please call me immediately. You may also send me any suggested changes, additions or deletions with a short explanation of the basis for any changes you suggest; or if you have a release that you desire to use, please forward it to me." The "above mentioned loss," which GEICO's form letter purports to settle, simply lists the date of the accident and the names of the parties, but no details about the collision, claim or injuries. The letter concludes by asserting that the enclosed payment and release will be the "conclusion" of the "above mentioned claim."

It is undisputed that Pelaez had a property damage claim against Conlon that was covered under the GEICO policy, in addition to his BI claim, and

that GEICO was aware of this fact. Neither GEICO's form letter nor the enclosed release indicated that the proposed "settlement" was solely for the BI claim, and neither document makes any reference to the fact that Pelaez also had a covered property damage claim pending. On the contrary, the release plainly states that it encompasses "any and all claims, demands, damages, actions, causes of action, or suits of any kind or nature whatsoever" related to the April 12, 2012 collision.

Notably, the letter does not "offer" the policy limits and does not state any terms of an offer. Instead, it includes generic references to "the exact terms of our agreement," misleadingly representing that a settlement has already been reached, and purporting to simply memorialize that agreement: "We consider the enclosed proposed release a document which represents our settlement of this case on behalf of the insured party(s)." It continues: "If you feel that there is any aspect of the enclosed release which does not reflect our settlement of your claim(s), please contact me immediately so that we can see that the document is revised to reflect the exact terms of our agreement." It is undisputed, however, that there was neither a settlement, nor even settlement discussions, prior to GEICO sending this form letter, despite the letter purporting to memorialize a previously negotiated settlement.

Pelaez's attorney subsequently sent GEICO a rejection letter which emphasized that GEICO sent an "all claims" release with "no reservation for property damage" despite the enclosed check tendering only part of the coverage owed by GEICO under the policy, and noting that GEICO was fully aware of how to tailor a release to preserve other

claims, but purposefully did not do so. The letter continued by explaining that the Pelaez family felt that GEICO was trying to take advantage of them, and that the Pelaez family would have been willing to settle the BI claim for the policy limits, which would have protected the insureds, had GEICO not attempted to obtain an overbroad release.

II. The Underlying Tort Case

In or about September of 2012, Pelaez filed a tort lawsuit against Conlon in Florida state court, which proceeded all the way to a jury trial after more than four (4) years of litigation. During the trial, Pelaez's attorney and the defense attorney appointed by GEICO to represent Conlon had discussions about a potential stipulated judgment, and ultimately agreed that $14,900,000.00 was a reasonable judgment in light of the evidence. One of the attorneys representing Pelaez at trial later testified during the subsequent bad faith action that based on the evidence that had been presented, had the case gone to verdict, the damages awarded could have far exceeded the amount of the stipulated judgment.

On the fifth day of trial, an agreement for stipulated judgment in the amount of $14,900,000 was reached. During the trial, representatives for GEICO were directly involved in the consent judgment discussions, including "higher ups" in GEICO's out of state offices who had to call in their approval of the stipulated judgment. Additionally, Pelaez's attorney who tried the tort case testified in the subsequent bad faith action that he was unwilling to enter into the stipulated judgment unless GEICO both permitted its insured, Conlon, to do so, and waived any policy conditions that would

preclude Conlon from entering into the judgment. He further testified that the defense attorney appointed by GEICO to represent Conlon "confirmed that GEICO was in fact permitting Conlon to agree to the proposed consent judgment, and was waiving any applicable policy conditions," and that GEICO's authority and consent was a condition of Pelaez entering into the stipulated judgment. Conlon likewise confirmed that GEICO permitted him to enter into the agreement and that he would not have agreed to it without GEICO's consent.

On or about December 14, 2017, the stipulated final judgment in the amount of $14,900,000.00 was entered by the trial court. The agreement was also announced on the record in court by Pelaez's counsel and the defense counsel appointed by GEICO to represent Conlon. GEICO's claims file notes confirm the entry of the consent judgment on the date that it was entered, and the amount of the consent judgment.

III. The Insurance Bad Faith Case

In or about April of 2019, Pelaez and Conlon initiated a bad faith suit against GEICO in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, asserting two counts of common law insurer bad faith against GEICO under Florida law on behalf of both Pelaez (Count I) and Conlon (Count II). GEICO subsequently removed the case to the U.S. District Court for the Middle District of Florida based on diversity of citizenship, pursuant to 28 U.S.C. § 1332. The suit alleged, in pertinent part, that GEICO acted in bad faith because it knew or should have known that its use of an overreaching "all claims" release when settling only the BI portion

of a loss that included other covered claims created a risk that the claims would not settle, leaving the insureds exposed to excess judgments, and that despite this knowledge, GEICO continued to use the "all claims" release in order to save money and/or preclude claimants from obtaining additional policy benefits to which they were entitled.

Approximately one year later, in or about April of 2020, after the completion of discovery, the parties filed cross motions for summary judgment. GEICO's summary judgment motion sought, in relevant part, a determination that it did not act in bad faith as a matter of law because it promptly attempted to settle the claim; and that the claim could not have been settled because Pelaez' attorney rejected GEICO's offer instead of sending a counter proposal on the release language.

Pelaez filed a memorandum in opposition to GEICO's motion for summary judgment, accompanied by numerous evidentiary exhibits, including but not limited to the deposition of GEICO's Rule 30(b)(6) witness, the deposition of GEICO's claims manager, the deposition of Pelaez's expert on insurance claims practices, the depositions of Pelaez's father and attorney, and several documents including excerpts from GEICO's claim file. Pelaez argued that the record evidence established, at the very minimum, the existence of a genuine dispute of material fact on the issue of whether GEICO acted in bad faith under Florida law, precluding entry of summary judgment in GEICO's favor.

By way of example, Pelaez introduced the deposition testimony of GEICO's designated Rule

30(b)(6) witness, Gregory Santini, and the deposition testimony of the GEICO claims manager who oversaw the Pelaez claim, Nicole Winegeart; both of whom confirmed the following key facts: (1) GEICO was aware prior to the Pelaez claim that claimants had objected to its use of overbroad releases; (2) GEICO knew that including an "all claims" release with a tender of policy limits for BI only claims created a risk of frustrating or precluding settlements of BI claims against their insureds; and (3) GEICO not only continued to send "all claims" releases with its tenders of BI-only limits despite this knowledge, it also specifically required its adjusters to use "all claims" releases with tenders of BI-only limits, while simultaneously providing its adjusters with a form release that was limited to property damage claims for PD-only tenders. GEICO's Rule 30(b)(6) witness further testified that GEICO adjusters did not have authority to use any form of release other than the "all claims" release when adjusting BI claims, and they did not have authority to modify the "all claims" release form.

Pelaez also introduced the testimony of insurance claims expert Susan Kaufman, who testified that the use of a release that is broader than the coverage being tendered violates fair claim practices and industry standards. Ms. Kaufman testified that GEICO acted in bad faith and in violation of its duties under Florida law when it failed to provide its adjusters with a BI-only release form, and when it required adjusters to use an "all claims" release when only the BI claim was being settled. Ms. Kaufman further testified that GEICO knew that using overbroad releases could jeopardize settlements that would protect its insureds, but GEICO nevertheless maintained this custom and

practice. In addition, Ms. Kaufman testified that it was improper for GEICO to send a form letter purporting to confirm a settlement when in fact no settlement had previously been offered or agreed, and that the cover letter instructing the claimant to sign "the enclosed" release before negotiating the check was in conflict with a later recital that any issue with the release can be addressed. Ms. Kaufman concluded that GEICO failed to protect its insureds in what was known to be a multimillion-dollar exposure, and that GEICO acted in bad faith under Florida law.

Pelaez also introduced evidence that GEICO's own insurance claims expert, Joseph Kissane, had advised as early as 2009 against the use of an overbroad release in settling bodily injury claims, especially in serious injury cases, including, specifically, as follows:

> In settling serious cases the release should be carefully limited to only the bodily injury claim. Inclusion of the property damage claim in such a release could lead to a rejection. In this regard, in serious exposure cases it is prudent to develop a "short form" bodily injury release. Such a release is less likely to result in a rejection of tendered limits.

The testimony of Pelaez's father, Raul, was also introduced, who testified that he felt GEICO's actions were unfair and he believed that GEICO was trying to take advantage of his family by paying only part of what they owed while asking him to sign a blanket release: "they want to give just one thing" and "look to solve the whole thing … I can just sign and that's it." Pelaez also submitted the testimony of

his trial counsel, who testified that the Pelaez family "absolutely would have settled" and "would absolutely have accepted $50,000 in full and final satisfaction" of the BI claim and released GEICO's insured from any further liability had GEICO not tried to take advantage of them by sending an overbroad release, but they declined to do so because they were offended at GEICO's tactics and improper tender in trying to obtain a settlement of "all claims" while tendering only the BI limits through the use of an overbroad release.

Pelaez argued that the record evidence established, at the very minimum, the existence of a genuine dispute of material fact on the issue of whether GEICO acted in bad faith under Florida law, precluding entry of summary judgment in GEICO's favor.

Only three (3) days after briefing closed on GEICO's motion for summary judgment, and without a hearing, the District Court entered an order granting GEICO's motion for summary judgment, concluding as a matter of law that GEICO did not act in bad faith under Florida law. The District Court emphasized that GEICO acted quickly to attempt to settle the case after the accident as the principal basis for concluding that GEICO did not act in bad faith, and rejected Pelaez's argument that the record evidence regarding GEICO's use of the overbroad proposed release and the known risk of non-settlement created a jury question on the issue of bad faith. Pelaez filed a timely appeal in the Eleventh Circuit Court of Appeals, challenging the District Court's entry of summary judgment for GEICO.

IV. The Appeal of the Insurance Bad Faith Case

On appeal, the Eleventh Circuit affirmed the district court's order granting summary judgment in GEICO's favor. As explained below, the opinion, authored by Judge Edward Carnes, exhibits pervasive bias, demonstrating an unalterable closed-mindedness and an unwillingness or inability to rationally consider arguments. The opinion unequivocally exceeds the role of the judiciary in considering motions summary judgment, both invading the province of the jury, and impinging on Pelaez's Due Process Rights under the Fourteenth Amendment.

REASONS FOR GRANTING THE PETITION

This petition presents an opportunity for the Court to provide lower courts with much-needed guidance concerning the appearance of pervasive bias and prejudgment in judicial opinions, violating the due process rights of affected litigants. Equally importantly, this case presents an opportunity for the Court to reassure the public that judicial impartiality remains the linchpin of our judicial system.

I. Lower Courts Need Guidance on How to Properly Analyze Whether Due Process Warrants Judicial Disqualification

A. Principles of Due Process in Judicial Procedure

When the resolution of a state law issue by federal courts has the effect of impinging on the constitutional due process rights of the litigants, this

Court has good reason to intercede. As this Court has previously explained, "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S.Ct. 2252, 2259, 173 L.Ed.2d 1208 (2009). *See also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases").

An essential element of a "fair trial in a fair tribunal" is an unbiased and impartial decisionmaker. This Court has repeatedly emphasized that litigants have a justiciable right to an adjudicator who can be impartial in both fact and appearance. "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) (citations omitted). *See also Republican Party of Minnesota v. White,* 536 U.S. 765, 775-76, 122 S. Ct. 2528, 2535, 153 L.Ed.2d 694 (2002) ("One meaning of 'impartiality' in the judicial context—and of course its root meaning—is the lack of bias for or against either party to the proceeding … an impartial judge is essential to due process"); *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968) ("[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias"); *Peters v. Kiff*, 407 U.S. 493, 502, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) ("even if there is no showing of actual bias in the tribunal, … due process is denied by

circumstances that create the likelihood or the appearance of bias").

"This requirement of neutrality in adjudicative proceedings … preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall*, 446 U.S. at 242, 100 S.Ct. at 1613 (quoting *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The requirement of judicial neutrality is also the foundation for the codes of conduct and statutes that govern judicial disqualification, which "serve to maintain the integrity of the judiciary and the rule of law." *Caperton*, 556 U.S. at 889, 129 S.Ct. at 2266. As this Court emphasized in *Caperton*:

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

Id. at 889, 2266-67 (quoting *White,* 536 U.S. at 793, 122 S.Ct. 2528 (Kennedy, J., concurring).

This long-standing requirement of judicial neutrality "has been jealously guarded by this

Court." *Id.* And while this Court has acknowledged, on the one hand, that "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea," *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820, 106 S.Ct. 1580, 1584, 89 L.Ed.2d 823 (1986) (citations omitted), this Court has also emphasized that "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

Rather, as this Court's prior decisions illustrate, the question of whether a case involves judicial bias that crosses constitutional limits is a fact specific inquiry to be examined on a case by case basis. In some cases, the question of whether "an unconstitutional probability of bias" exists "cannot be defined with precision," and it is in these such cases, where "no administrable standard may be available to address the perceived wrong" that "this Court's intervention and formulation of objective standards" is required. *Caperton*, 556 U.S. at 887, 129 S.Ct. at 2265.

This Court's prior decisions in matters of judicial recusal jurisprudence are instructive here. This Court has explained, with regard to potential bias on the part of a trial judge, that "[a] favorable or unfavorable predisposition can [] deserve to be characterized as 'bias' or 'prejudice' because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment."

Liteky v. United States, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994). This has been described as "the 'pervasive bias' exception to the 'extrajudicial source' doctrine." *Id.* at 551, 1155.

In the context of judicial disqualification under 28 U.S.C. § 455(a), which directs that a judge or justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," this Court defined a standard which "is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings." *Id.* at 557-58, 1158 (Kennedy, J., concurring in part).

A similar standard has been articulated by federal courts in the context of administrative decisionmakers: "Decisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments." *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (quoting *Ass'n of Nat'l Advertisers, Inc. v. FTC,* 627 F.2d 1151, 1170, 1174 (D.C. Cir. 1979)). This Court has acknowledged that the "basic due process requirement" of a "fair trial in a fair tribunal … applies to administrative agencies which adjudicate as well as to courts."

The justiciable due process right to a neutral adjudicator is violated where, as here, an opinion authored by an appellate judge "display[s] clear inability to render fair judgment," "an 'unalterably closed mind' [] 'unwilling or unable' to rationally

consider arguments," and "an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of [the] judge's rulings or findings."

That the subject opinion authored by Judge Carnes was joined by other jurists on a multimember panel is of no moment, as this Court has emphasized that "[a] multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part." *Williams v. Pennsylvania*, 579 U.S. 1, 15, 136 S. Ct. 1899, 1909, 195 L.Ed.2d 132 (2016). In quoting Justice Brennan's concurrence in *Lavoie*, this Court emphasized the following with regard to the presence of bias in the appellate decisionmaking process:

> The description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition.

Id. (quoting *Lavoie*, 475 U.S., at 831, 106 S.Ct. 1580).

This Court held that a biased judge's vote need not be the deciding factor to trigger a due process violation, explaining:

> The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party.

Id. *See also Lavoie*, 475 U.S. at 833, 106 S.Ct. at 1591 (Blackmun, J., concurring) ("The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views … would influence the votes and views of his colleagues").

B. Judge Carnes' Pervasive Bias and Predisposition Led to the Incorrect Result in This Case

Against these principles, Petitioner turns to the facts of the issue at bar, and implores this Court to intervene to correct the absence of neutrality exhibited by the judges who decided this case at the lower appellate court level. No citizen, standing in Mr. Pelaez's position, would reasonably believe his grievance had been heard and decided by a panel of neutral adjudicators. Not only did the opinion at issue ignore prior Eleventh Circuit precedent, it also ignored key decisions by Florida appellate courts on matters of Florida law, and ignored *all* evidence favorable to Pelaez.

In particular, when analyzing whether the district court erred in granting summary judgment in favor of GEICO, the Eleventh Circuit's opinion begins by reciting the de novo standard of review, acknowledging that it must "'view[] all facts and draw[] all inferences in the light most favorable to' the nonmoving party." *Pelaez v. Government Employees Insurance Company*, 13 F.4d 1243, 1249 (2021) (quoting *Eres v. Progressive Am. Ins. Co.*, 998 F.3d 1273, 1278 n.3 (11th Cir. 2021). It then observed that because this is a diversity case, it is "required to apply the substantive law of the forum state; here, Florida." *Id.* (citing *Mesa v. Clarendon Nat'l Ins. Co.*, 799 F.3d 1353, 1358 (11th Cir. 2015). The opinion goes on to summarize the following Florida law on the issue of insurer bad faith.

"It has long been the law of [Florida] that an insurer owes a duty of good faith to its insured." *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 672 (Fla. 2004). Where "liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations." *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 7 (Fla. 2018). "In such a case, where the financial exposure to the insured is a ticking financial time bomb and suit can be filed at any time, any delay in making an offer . . . even where there was no assurance that the claim could be settled could be viewed by a fact finder as evidence of bad faith." *Id.*

"In Florida, the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the 'totality of the circumstances' standard." *Berges*, 896 So. 2d at 680. "[T]he critical inquiry" in a bad faith action is

"whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment." *Harvey*, 259 So. 3d at 7.

The "focus in a bad faith case is not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured." *Berges*, 896 So. 2d at 677. In *Harvey*, the Florida Supreme Court specifically rejected the lower appellate court's reasoning that "where the *insured's own actions or inactions* result, at least in part, in an excess judgment, the insurer cannot be liable for bad faith." 259 So. 3d at 11. In emphatically dismissing any notion that such a standard comports with Florida bad faith jurisprudence, the Florida Supreme Court explained as follows:

> To take the Fourth District's reasoning to its logical conclusion, an insurer could argue that regardless of what evidence may be presented in support of the insured's bad faith claim against the insurer, so long as the insurer can put forth any evidence that the insured acted imperfectly during the claims process, the insurer could be absolved of bad faith. As Harvey argues, this would essentially create a contributory negligence defense for insurers in bad faith cases where concurring and intervening causes are not at issue. We decline to create such a defense that is so inconsistent with our well-established bad faith jurisprudence which places the focus on the actions on the insurer—not the insured.

Id. at 12.

In the opinion below, the Eleventh Circuit correctly noted that the above principle announced in *Harvey* is "equally applicable to the actions of a third-party claimant," such that "the claimant and the insured are interchangeable for purposes of the principle that the focus in a Florida bad faith action is on the insurer, not on the insured or claimant." *Pelaez*, 13 F.4th at 1250, n.6 (noting that *Harvey* was building off the following language in *Berges*: "[T]he focus in a bad faith case is not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured.") (quoting *Berges*, 896 So. 2d at 677)).

Despite its acknowledgment that it was bound to view all evidence and all reasonable inferences in the light most favorable to the nonmoving party (Pelaez), and that it was bound by the aforementioned controlling principle articulated in *Harvey*, the Eleventh Circuit's opinion inexplicably goes on to ignore material evidence favorable to Pelaez, draw all inferences in the light most favorable to GEICO, and focus primarily on the actions of Pelaez's counsel to support its conclusion that the district court did not err in finding that GEICO did not act in bad faith as a matter of law.

By way of example, in addressing the rejection by Pelaez's attorney of GEICO's $50,000 BI limits tender, the opinion states "the attorney *claims* he and the family believed that GEICO had tried to take advantage of them by not excluding the motorcycle property damage claim from the proposed release that was in the settlement package." *Pelaez*, 13 F.4th at 1252 (emphasis added). The opinion goes on to state:

> He took that position despite the fact that the letter and proposed release language were addressed not to pro se parties but to an attorney with more than 20 years of legal experience.
>
> And despite the fact that the settlement package emphasized that the language of the release was simply proposed, not insisted on, and told Pelaez's attorney to feel free to send the company 'any suggested changes, additions or deletions' he wanted or, if he preferred, to draft an entirely new release himself.
>
> After receiving the attorney's rejection of its tender of the full bodily injury policy amount, purportedly because of the overbroad language of the release, GEICO immediately responded that the proposed language was only a starting point and once again invited Pelaez's attorney to send 'additional language or changes' for the release. He never did so. Nor did he ever make any kind of counter-offer to settle the claims against Conlon before filing the negligence lawsuit. By contrast, GEICO earnestly attempted to settle all of the claims.

Id.

In summarizing the evidence in such a way as to conclude that GEICO "earnestly attempted to settle all of the claims," the opinion entirely disregards material evidence submitted by Pelaez and impermissibly characterizes the evidence in the light most favorable to GEICO. In particular, the opinion ignored testimonial evidence on the part of GEICO's

Rule 30(b)(6) witness and its claim supervisor that GEICO knew when it tendered the BI-only limits with an "all claims" release that doing so created a risk of frustrating settlement of BI claims against its insureds, that despite this knowledge GEICO required its adjusters to adhere to this practice as a general business practice in adjusting BI claims, and that GEICO adjusters did not have authority to modify the "all claims" release form or use any other form of release when adjusting BI claims. All of which could have led a reasonable jury to conclude that GEICO did not actually intend to accept theoretical edits to its "all claims" release or an entirely different release altogether. The opinion's apparent conclusion that GEICO did intend to do so was entirely inferential, as neither the letter itself, nor any other evidence, corroborates that conclusion.

The opinion also creates an entirely new standard in Florida bad faith cases by imposing a burden on an injured party's attorney to comb through unsolicited settlement documents to identify potential waivers of rights that are not expressly set forth in the release, but which are known by the insurer when the documents are sent. Not only is there no precedent for such a standard in any decisional authority from the Florida Supreme Court or Florida's intermediate courts of appeal, but the Eleventh Circuit's imposition of such a burden runs directly contrary to the principle so emphatically underscored by the Florida Supreme Court in *Harvey,* rejecting the very notion that an insurer can be absolved of bad faith by putting forth "evidence that the [claimant] acted imperfectly during the claims process." *Harvey*, 259 So.3d at 12. The Eleventh Circuit's departure from this controlling principle of law continues throughout its opinion,

exhibiting not only a singular focus on the actions of Pelaez's counsel, but also openly challenging the veracity of the cited testimony by Pelaez's counsel and drawing extreme inferences from such testimony that are plainly unfavorable to Pelaez. By way of example, the opinion goes on to state:

> In this case GEICO not only offered to change any problematic language but to let Pelaez's attorney re-draft the release if he preferred. It would have been a simple thing for the attorney to do, *but it is also the last thing he wanted to do.*
>
> Pelaez's attorney declined the offer to cure any problem with the release because he had higher goals to pursue. …
>
> In later deposition testimony, Pelaez's attorney described what he saw as GEICO's 'taking advantage of people' using overbroad releases as 'just wrong' and said his decision not to tell GEICO what he wanted in the release came from the Pelaez family's desire 'to effectuate change, do the right thing.' 'And the right thing was not taking $50,000 and turning their back on folks [who] might otherwise become prey for the insurance company' — it was to 'help' people by 'prevent[ing] this type of bold improper predatory insurance practice [from] continu[ing].' Choosing to 'take $50,000' and either sign an 'unfair, overbroad release' or explain to GEICO what was wrong with the release 'would not have fulfilled [his] fiduciary

> obligations as an advocate and as a human being' because, in his and the Pelaez family's opinion, doing the right thing 'can't be just about the money ever.' *He and his clients kept the insurance claims from settling out of a noble desire to further the wellbeing of humankind, not merely because a $14,900,000 judgment is bigger than a $50,000 settlement. To hear the attorney tell it, the prospect of fourteen million, eight hundred and fifty thousand additional dollars had nothing to do with it*. The wellbeing of humankind was the reason he and his clients rejected GEICO's efforts to settle. Okay, but that does not establish that GEICO acted in bad faith.

Pelaez, 13 F.4th at 1253 (emphasis added).

The above quoted language overtly exhibits incredulity and even contempt for the sworn testimony of Pelaez's attorney, impermissibly inferring an undisclosed ulterior motive for rejecting GEICO's tender, rather than crediting the reason specifically provided by Pelaez's attorney in the testimony itself. The Eleventh Circuit's opinion then attempts to reconcile its heavy emphasis on the testimony of Pelaez's counsel—from which it draws impermissible inferences and makes impermissible credibility determinations—with the Florida Supreme Court's mandate in *Harvey*, stating:

> But we don't understand that principle to mean the actions of a claimant—or a claimant's attorney—are irrelevant. In bad faith actions there's a difference between

> focusing on a claimant's actions, which would be improper, and factoring a claimant's actions into the totality of the circumstances analysis, which is not improper.

Id. at 1254. The opinion continues:

> But we aren't absolving GEICO of liability by *faulting Pelaez's attorney's conduct* or *questioning their motives*. …
>
> We aren't allowing GEICO to 'escape liability merely because' Pelaez and his attorney's actions 'could have contributed' to the failure to settle. *Harvey*, 259 So. 3d at 11. *As they clearly did*. Instead, we have discussed Pelaez and his attorney's actions because they show how, in the totality of these circumstances, GEICO did fulfill its good faith duty to Conlon and his mother. They show how the failure to settle the lawsuit against the insureds did not result from bad faith of the insurer.

Id. (emphasis added).

As the above emphasized language illustrates, the Eleventh Circuit's opinion completely disregards the Florida Supreme Court's controlling decision in *Harvey*, going so far as to openly acknowledge that it questioned the motives of Pelaez's counsel and deemed Pelaez and his attorney responsible for the failure to settle.

Moreover, in stating that the actions of Pelaez and his attorney "show how, in the totality of the circumstances, GEICO did fulfill its good faith duty to Conlon and his mother," the opinion not only

disregards the aforementioned testimony of GEICO's Rule 30(b)(6) witness and claims supervisor, it also completely ignores the testimony of Pelaez's insurance claims expert, Susan Kaufman, who testified that GEICO's actions deviated from industry standards in several ways, including by its practice of requiring adjusters to use an "all claims" release with tenders of BI-only coverage limits despite its knowledge that doing so could jeopardize settlements, its failure to provide adjusters with a BI only release, and its tender of the BI limits in with a form letter representing that a settlement had already been agreed. She specifically testified that GEICO acted in bad faith, and that tendering the BI limits quickly and reciting that changes to the release form were possible were not sufficient to cure the bad faith.

In ignoring this testimony, the opinion below disregarded prior Eleventh Circuit precedent in *Moore v. GEICO General Insurance Company*, 633 Fed. Appx. 924 (11th Cir. 2016), in contravention of the Eleventh Circuit's "prior panel precedent rule." *See United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir.1993) ("[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court"); *see also United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong"); *Smith v. GTE Corp.,* 236 F.3d 1292, 1303 (11th Cir.2001) ("[W]e categorically reject any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's

reasoning or analysis as it relates to the law in existence at that time.").

In *Moore*, the Eleventh Circuit reversed a district court's order granting summary judgment in favor of GEICO in an insurer bad faith case. Like this case, the *Moore* case arose from a motor vehicle collision in which GEICO's insured was at-fault, resulting in catastrophic injuries to the claimant. 633 Fed.Appx. 926. As it did in this case, GEICO quickly tendered a check for the policy limits to the claimant's attorney, but the release GEICO provided did not comply with the attorney's demands. *Id*. at 926-27. The claimant's attorney then rejected GEICO's settlement offer. *Id*. at 927. GEICO continued to convey that it was open to settlement, but the claimant's attorney instead filed a tort suit against GEICO's insured, resulting in a $4 million verdict. *Id*. at 927, 929. The claimant then proceeded to file a bad faith suit against GEICO, alleging it acted in bad faith by failing to settle the claim within the policy limits when it had the opportunity to do so. *Id.* at 927. In its order granting summary judgment in GEICO's favor, the district court extensively discussed the conduct of the claimant's attorney, and concluded that the failure to settle was attributable to the attorney's attempt to set up an artificial bad faith claim. *Id.*

On appeal, the Eleventh Circuit observed that under Florida law, the issue of bad faith is generally a jury question, and "[i]n most cases, [] the inherently flexible nature of the 'totality of the circumstances' standard renders a bad-faith claim unsuitable for summary disposition." *Id.* at 928. It concluded that under the "totality of the circumstances," "the record contains factors both contradicting and supporting [the] allegation that

GEICO acted in bad faith," and "therefore presents a genuine dispute that requires resolution by a jury." *Id.* It noted that there was "a substantial amount of conduct supporting the proposition that [GEICO] acted in good faith in attempting to settle the claims." *Id.* at 929.

Importantly, however, the court held that "the district court also improperly weighed the value of other evidence." *Id.* at 930. Specifically, the court noted that in opposing GEICO's summary judgment motion, the claimant submitted testimony of an expert, who testified that "GEICO's handling of the claims [] deviated from industry standards in several key respects and that GEICO had indeed acted in bad faith." *Id.* The court noted that the district court "made no mention whatsoever of the expert's testimony or [] ultimate conclusion," meaning the "the court either (1) ignored the testimony altogether, or (2) implicitly determined that the testimony was not credible." *Id.* "In either case," the court continued, "the [district] court erred." *Id*. The court also rejected GEICO's argument that "the failure to credit the expert's testimony was irrelevant because the expert provided nothing but opinions, which, according to GEICO, cannot create a genuine dispute of material fact." *Id*. The court characterized GEICO's proposition as "simply incorrect." *Id*. (citing *Newmann v. United States*, 938 F.2d 1258, 1262 (11th Cir.1991) (holding expert testimony represented evidence that raised a genuine issue of material fact); *Childers v. Morgan Cnty. Bd. of Educ.*, 817 F.2d 1556, 1559 (11th Cir. 1987) (same); *Allison v. W. Union Tel. Co.*, 680 F.2d 1318, 1322 (11th Cir.1982) (same)).

In his Initial Brief to the Eleventh Circuit, Pelaez specifically addressed the *Moore* decision as standing for the proposition that it was error for the district court to ignore the expert testimony submitted by Pelaez on the issue of bad faith. The Eleventh Circuit panel below was therefore fully apprised of the prior panel precedent on this issue in *Moore*, involving nearly identical facts, in addition to the prior Eleventh Circuit decisions cited by *Moore* in support of its holding. The panel's decision to completely ignore *Moore*, as well as the other Eleventh Circuit cases cited by *Moore*, and to disregard the prior panel precedent rule, is yet further evidence that the opinion was tainted by pervasive bias and predisposition.

In sum, the opinion below is accurately characterized as "display[ing] a clear inability to render fair judgment," *Liteky*, 510 U.S. at 555, 114 S.Ct. at 1157, and "an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of [the] judge's rulings or findings." 510 U.S. at 557-58, 114 S.Ct. at 1158 (Kennedy, J., concurring in part). It is entirely apparent that the judges who participated in the opinion below exhibited "an 'unalterably closed mind' and [were] 'unwilling or unable' to rationally consider arguments." *Air Transp. Ass'n of Am.*, 663 F.3d at 487. The pervasive bias exhibited in the opinion below demonstrates the impact of the failure of partial adjudicators to disqualify themselves where it is clear that their ability to be impartial might reasonably be questioned. Surely, this is not the neutral adjudicatory process to which the citizens of this country are entitled. This Court should find

that Pelaez is entitled to reconsideration of his appeal before a panel of neutral judges.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/*Jeffrey L. Gordon*
Jeffrey L. Gordon
Counsel of Record
Maney & Gordon, P.A.
101 E. Kennedy Blvd., Suite 1700
Tampa, Florida 33602
(813) 221-1366
j.gordon@maneygordon.com
Counsel for Petitioner