No. 23-_____

In the

Supreme Court of the United States

USIC, LLC,

Petitioner,

v.

NORTHERN ILLINOIS GAS COMPANY
d/b/a NICOR GAS COMPANY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

BENJAMIN D. MOONEYHAM
GM LAW PC
1201 Walnut Street
Suite 2000
Kansas City, MO 64106
(816) 471-7700
(816) 471-2221 fax
BenM@gmlawpc.com

DAVID B. HELMS
Counsel of Record
GM LAW PC
8000 Maryland Avenue
Suite 1060
St. Louis, MO 63105
(314) 474-1750
(816) 471-2221 fax
DavidH@gmlawpc.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. If a federal court of appeals construes a filing below as a postjudgment motion tolling the time for appeal, does that court have authority to reverse a district court's decision based on an argument that was presented for the first time in the "postjudgment motion" and was not based on new evidence or a change in law?

2. Does a final order exist under 28 U.S.C. § 1291 and Federal Rule of Civil Procedure 58 where the district court grants summary judgment without an accompanying opinion and asks one of the parties to submit a proposed order?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are listed on the front cover.

Petitioner USIC, LLC is a limited liability company established under the laws of Delaware, whose sole member is USIC Holdings, Inc., which is not publicly traded. USIC, LLC does not issue stock, and, therefore, no publicly held corporation owns 10% or more of USIC, LLC's stock.

STATEMENT OF RELATED CASES

No cases are "directly related" to this proceeding as defined in Supreme Court Rule 14.1(b)(iii). For the sake of disclosure, the subject matter of the lawsuit below relates to indemnification and defense regarding separate proceedings in Illinois State Court:

- *Michael J. Smith, et al. v. Metro Fibernet, LLC, et al.*, Case No. 2017L000121, Circuit Court of the 12th Judicial Circuit, Will County, Illinois

- *Wespark Condo. Ass'n a/k/a Wespark Freedom Condos., et al. v. Metro Fibernet, LLC*, Case No. 2018L000302, Circuit Court of the 12th Judicial Circuit, Will County, Illinois

Both cases remain pending, and no final judgments have been entered.

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PETITION FOR A WRIT OF CERTIORARI

USIC, LLC 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 Eleventh Circuit (App. A) is available at 2023 WL 2977784. Its order denying USIC, LLC's petition for rehearing (App. D) is unreported. The summary judgment order of the district court (App. C) is unreported. The opinion of the district court making findings of fact and conclusions of law (App. B) is available at 2021 WL 3931863.

JURISDICTION

The Eleventh Circuit issued its opinion on April 18, 2023. The same court issued an order denying Petitioner's timely petition for panel rehearing or rehearing *en banc* on July 17, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1291:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the

> District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

INTRODUCTION

The Eleventh Circuit set a precarious standard in attempting—and failing—to avoid a jurisdictional problem. The problem concerns the intersection of the "separate document rule" with the common practice of district courts postponing a memorandum opinion following a decision. When a court issues a ruling resolving all claims but states that an opinion will follow later, does the initial ruling constitute a "final" judgment or order under Federal Rule of Civil Procedure 58? Decisions from the Second, Third, Fifth, and Seventh Circuits all agree that it does. The District Court below disagreed.

The Eleventh Circuit tried to avoid deciding the issue, but its merits decision makes sense only as a *de facto* split from the other circuits because it relies on a purported tolling mechanism that is facially inconsistent with its basis for reversing the District Court. In short, the Eleventh Circuit's decision represents either a blatant disregard for binding precedent concerning review of postjudgment motions

or a pathbreaking split over appellate jurisdiction. Either way, it merits this Court's review.

The jurisdictional issue carries significance for litigants in all federal courts because it relates to the time limits for a party to appeal a final judgment. Litigants often expect that, per Rule 58, dispositive rulings will be issued through a written opinion followed by a judgment denominated on a separate document. When the opinion explaining the decision follows long after the ruling hits the docket, neither of which is titled a "judgment," it creates confusion about which document triggers the appeal clock.

This Court has never addressed this precise issue, which may be in part why so many district judges continue to engage in the practice of resolving cases (reducing their statistical tally of "unresolved" cases) while waiting to issue the formal opinion explaining the judge's reasoning. The District Court below waited *887 days* after granting summary judgment to Petitioner USIC, LLC ("USIC") until it issued its full opinion—essentially two and a half years of radio silence—even though USIC had submitted a proposed order within 24 days of the court's ruling, and the final opinion made only minimal changes to that proposed order.

For the reasons explained below, the Eleventh Circuit's response to this messy situation only confuses the issues rather than leaving the parties and other litigants with clarity. Furthermore, the Eleventh Circuit's grounds for reversal cannot be supported under any reasonable interpretation of the

rules governing postjudgment motions and timely appeals. Therefore, this Court should exercise its supervisory power to reverse the Eleventh Circuit.

STATEMENT OF THE CASE

A. The course of proceedings and disposition in the District Court.

This is a contractual indemnity and defense suit brought by Respondent Northern Illinois Gas Company ("Nicor") against USIC. Nicor contends that USIC owes both a duty to defend and a duty to indemnify Nicor in litigation currently pending in Illinois. The key contract provision at issue is Paragraph 9.1 of the Master Locating Services Agreement (the "Agreement"), which states that USIC "shall defend, indemnify, and hold harmless" Nicor in certain circumstances. App. 4.

Following full briefing and a hearing, the District Court granted summary judgment to USIC on all claims, ruling that Georgia statute O.C.G.A. § 13-8-2(b) invalidated Paragraph 9.1. This decision was reflected in both an oral ruling and a minute entry entered by the clerk on the same day. App. C (the "March 2019 Order"). The District Court asked USIC to prepare a proposed order "consistent with" its ruling that cited the applicable facts and law from USIC's briefs. App. 65; D. Ct. Dkt. #61-1 at 29:24–30:6.

USIC submitted its proposed order on April 22, 2019. App. 10. Nicor filed objections to the proposed order ("Objections"), arguing that USIC had failed to

accurately capture the scope and reasoning of the District Court's summary judgment decision. Even though the District Court had already granted summary judgment, Nicor argued for the first time in its Objections that a severability clause in the Agreement prevented O.C.G.A. § 13-8-2(b) from invalidating the entire Paragraph 9.1. (Both Nicor and the Eleventh Circuit concede that Nicor raised this argument for the first time in the Objections. App. 31 n.12.)

The District Court entered an Opinion and Order on September 2, 2021, substantially adopting USIC's proposed order. App. B (the "September 2021 Opinion"). The September 2021 Opinion does not address Nicor's severability argument. Nicor filed its notice of appeal on September 29, 2021. App. 15.

B. Nicor's appeal and the Eleventh Circuit's decisions.

Based on the 915-day gap between the March 2019 Order granting summary judgment and Nicor's appeal, and the asserted lack of a tolling postjudgment motion, USIC challenged appellate jurisdiction in the Eleventh Circuit. A motions panel of the Eleventh Circuit denied USIC's Motion to Dismiss. USIC raised the same challenges to jurisdiction in its Appellee Brief. The merits panel adopted the same reasoning as the motions panel, concluding that jurisdiction exists by construing Nicor's Objections as a Rule 59(e) motion:

> We have yet to determine whether an oral ruling coupled with a minute entry onto the civil docket counts as a judgment that triggers the 150-day clock for entry of a judgment and the 30-day appeal period. And we need not do so today. Instead, even assuming that the March 2019 oral ruling was a final order that Nicor could appeal, and the minute entry was an entry of judgment, **we construe Nicor's Objections to USIC's Proposed Order as a Rule 59(e) motion for reconsideration**.

App. 15 (emphasis added).

On the substantive merits, the Eleventh Circuit affirmed the District Court's judgment regarding application of O.C.G.A. § 13-8-2(b) to the duty to defend, but it reversed with respect to the duty to indemnify. The sole basis for reversal was that the District Court failed to remove specific words from sentences in the middle of Paragraph 9.1 pursuant to a severability clause that Nicor did not mention until after the District Court had granted summary judgment. App. 30–36.

Despite acknowledging that "Nicor did not raise its severability arguments during the summary-judgment proceedings," the Eleventh Circuit determined that these arguments could properly be considered in the first instance on appeal because "Nicor did raise these arguments in its Objections to USIC's Proposed Order [*i.e.*, a Rule 59(e) motion]" and

therefore "the issue was raised in the district court." App. 31 n.12. This directly conflicts with prior precedent of this Court and other circuit courts.

USIC timely filed a petition for panel rehearing or rehearing *en banc* on May 8, 2023, explaining that a reversal on the merits could not follow from the premises the court had adopted, and that an alternative basis for reversal—finding the March 2019 Order to be nonfinal—would create a circuit split. The Eleventh Circuit denied USIC's petition without explanation on July 17, 2023. App. 68.

REASONS FOR GRANTING THE PETITION

I. Summary reversal is warranted because the Eleventh Circuit ignored precedent from this Court regarding the permitted scope and function of Rule 59(e) motions, and its decision also contradicts every other circuit's precedent.

A. The Eleventh Circuit overstepped its authority by reversing the District Court on an issue that was not presented during summary judgment briefing.

This Court has defined Rule 59(e)'s specific and narrow purpose—it "gives a district court the chance to rectify its own mistakes in the period immediately following its decision." *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020) (quotation marks omitted). Within that framework, however, "courts will not address new arguments or evidence [in a Rule 59(e) motion] that

the moving party could have raised before the decision issued." *Id.* Those statements echo this Court's earlier guidance that "Rule 59(e) permits a court to alter or amend a judgment, but it may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008) (quotation marks omitted).

That boundary on the scope of Rule 59(e) motions dovetails with another judicial principle described by this Court: the "party presentation principle," which assigns to parties the obligation to frame the issues for decision, rather than expecting courts to search the facts and law for proper resolution. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579–82 (2020). In the context of this case, under the party presentation principle courts should defer to the adversarial process to properly frame the issues at summary judgment rather than allowing appellate second-guessing.

The Eleventh Circuit's opinion is difficult to pin down because its reasoning is not consistent—reminiscent of Schrödinger's cat, the Eleventh Circuit treated Nicor's Objections as both a Rule 59(e) motion and *not* a Rule 59(e) motion. Its jurisdictional analysis hinged on that construction, yet when turning to the merits, the court applied *de novo* review to its entire opinion, App. 11–12, even though the court's own precedent makes clear that the denial of a Rule 59(e) motion is reviewed for abuse of discretion and that such discretion is never abused when rejecting a new argument that could have been raised earlier.

See, e.g., United States v. F.E.B. Corp., 52 F.4th 916, 933 (11th Cir. 2022); *Grange Mut. Cas. Co. v. Slaughter*, 958 F.3d 1050, 1059 (11th Cir. 2020).

The Eleventh Circuit *and* Nicor conceded that Nicor presented its severability argument for the first time in its Objections, and the Eleventh Circuit concluded that the District Court implicitly denied Nicor's "Rule 59(e)" Objections when it issued its September 2021 Opinion. App. 17, 31 n.12. Therefore, any review of arguments first made in the Objections should have been treated as review from the denial of a Rule 59(e) motion, consistent with this Court's guidance in *Banister* and *Exxon Shipping*.

By ignoring this well-established rule, the Eleventh Circuit acted contrary to not only this Court's precedent but every other circuit to have addressed the issue. *See, e.g., A&C Constr. & Installation, Co. WLL v. Zurich Am. Ins. Co.*, 963 F.3d 705, 709 (7th Cir. 2020); *Quality Cleaning Prods. R.C., Inc. v. SCA Tissue N. Am., LLC*, 794 F.3d 200, 207–08 (1st Cir. 2015); *Marseilles Homeowners Condo. Ass'n, Inc. v. Fidelity Nat'l Ins. Co.*, 542 F.3d 1053, 1058 (5th Cir. 2008); *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890–91 (9th Cir. 2000); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998); *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403–04 (4th Cir. 1998) (affirming district court's conclusion that it had been "clear error" to grant prior Rule 59(e) motion based on new argument). USIC has found no decision holding that a Rule 59(e) motion raising a new but previously

available argument may be grounds for reversal of the district court's opinion.

The court offered no explanation for its flouting of this judicial boundary—not even in response to USIC's petition for rehearing, which cited more than a dozen federal decisions highlighting the panel's procedural misstep. USIC need not restate the litany of cases on point. There was and remains no legal justification for the Eleventh Circuit's refusal to apply the law correctly. The panel's neglect not only robs USIC of a correct legal outcome but also deprives the District Court of its proper deference in deciding such motions in the first instance as well as departing from the unanimous guidance of the court's sister circuits and its own prior precedent.

The rule itself is beyond dispute, and the Eleventh Circuit's mess is entirely of its own making. These circumstances perfectly embody the type of "depart[ure] from the accepted and usual course of judicial proceedings" justifying this Court's exercise of its supervisory power. *See* S. Ct. Rule 10(a).

B. No latent exception to this firm rule justifies the Eleventh Circuit's departure.

In a footnote, the Eleventh Circuit speculated that Nicor's failure to raise its severability argument during the summary judgment proceedings was "likely because it thought that claims relating to the duty to indemnify were stayed." App. 31 n.12. To the extent that the Eleventh Circuit conjured an exception

to the rule described above for when a litigant does not "anticipate" that a topic may arise in summary judgment briefing, this too represents a split with its sister circuits.

As other circuits have held, where the opportunity existed, the reasons for failing to raise an argument before an adverse ruling are irrelevant. *See, e.g., Cehovic-Dixneuf v. Wong*, 895 F.3d 927, 933 (7th Cir. 2018) ("A party seeking to defeat a motion for summary judgment is required to wheel out all its artillery to defeat it.") (quotation marks omitted); *Kona Enters.*, 229 F.3d at 890–91 (rejecting parties' argument that they "had no reason to question the choice-of-law issue until the district court actually ruled that their claims were 'in the nature of assumpsit'"); *Sault Ste. Marie Tribe*, 146 F.3d at 374 (rejecting argument that party "did not raise the issue because they never thought the district court would determine otherwise. A motion under Rule 59(e) is not an opportunity to re-argue a case.").

Nicor had every opportunity to raise the severability argument before the March 2019 Order, but it declined for strategic reasons. The Eleventh Circuit correctly recognized that the District Court had "ordered the parties to continue with litigation over the application of O.C.G.A. § 13-8-2(b) to the duty to defend *and* the duty to indemnify." App. 7–8 (emphasis added). Nicor never argued that it "could not" have raised the severability argument earlier, or that there was an intervening change of law—there was not. Instead, Nicor chose an all-or-nothing approach in the district court, arguing that the

Georgia anti-indemnity statute did not apply to the Agreement at all, rather than argue for severability of the two contractual duties and risk giving the District Court a pathway to partial enforceability without a duty to defend. Nicor abandoned its statutory-scope argument on appeal, shifting its legal strategy. App. 19 (mentioning both "prongs" of analysis under § 13-8-2(b) but discussing only the second).

In short, Nicor chose not to advance the severability argument during the briefing or hearing on summary judgment, and it "must live with that decision." *A&C Constr.*, 963 F.3d at 709.

For these reasons, the Court should summarily reverse the Eleventh Circuit and remand for an order affirming the District Court's judgment in full.

II. Alternatively, the Eleventh Circuit's decision can only be rationalized by interpreting it as having deemed the March 2019 Order to be nonfinal, which creates a circuit split in practice.

As discussed above, the Eleventh Circuit's decision cannot be reconciled with its stated reasoning. The court declared Nicor's Objections to be a Rule 59(e) motion, but that is *not* how it treated the arguments in its analysis on the merits. In practice, the court acted as though the District Court's March 2019 Order was not a final decision and had no procedural impact on appellate analysis of the correctness of the judgment. This *de facto* treatment could have significant consequences for future determinations of the time to appeal an adverse

decision because it resurrects the question of what kinds of decisions are final.

A. The March 2019 Order disposed of all substantive issues but did not include the court's reasoning.

Assessing whether the March 2019 Order was final requires first a distinction between different senses of the word "final." "[F]inality, appealability of a judgment, and the separate document requirement are different concepts, but are often confused." *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 336 (5th Cir. 2004). Under 28 U.S.C. § 1291, which grants appellate jurisdiction over "final decisions of the district courts," a "final decision" means one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Hall v. Hall*, 138 S. Ct. 1118, 1123–24 (2018) (quotation marks omitted). This contrasts with a decision that is merely interlocutory and does not dispose of all the pending claims or substantive issues. *Cf.* Fed. R. Civ. P. 54(b).

Additionally, "finality" under § 1291 should not be confused with "entry of judgment." Federal Rule of Civil Procedure 58 and Federal Rule of Appellate Procedure 4, as amended in 2002, establish that a "judgment or order" (with inapplicable exceptions) is deemed entered—triggering the 30-day appeal clock—on the *earlier* date when either (1) the judgment is issued in a separate document, or (2) 150 days have run from the entry in the civil docket. *See* Fed. R. Civ. P. 58(c)(2)(B); Fed. R. App. P. 4(a)(7)(A)(ii). The term

"judgment," in turn, "includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). "In other words, ['judgment' means] a final order or decision [under § 1291]." *Orr v. Plumb*, 884 F.3d 923, 928 (9th Cir. 2018).

Thus, under the 2002 federal rule amendments, a "final" judgment under § 1291 (meaning any decree or order from which an appeal lies) triggers the 150-day clock, and the judgment is "deemed entered" (starting the 30-day appeal clock) when *either* the 150 days run out *or* the judgment is entered in a separate document. In this case, more than 150 days had passed before the District Court entered its judgment on a separate document. Hence, whether the March 2019 Order (App. C) was the type of docket entry that triggers the running of the 150-day period depends on whether it was "final" under § 1291.

Nicor and the District Court appear to take the view that a ruling without an opinion can never be one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Hall*, 138 S. Ct. at 1123–24 (quotation marks omitted). Nicor alleged that during the 887 days between the ruling and the opinion, it was unsure about the scope of the District Court's ruling. And the District Court itself stated that its decision was not "final" until the September 2021 Opinion. App. 64. Yet that is a legal question subject to de novo review.

The focus should be on the result, not the reasoning. An absence of *explanation* did not change the outcome that was announced and entered on the

docket in March 2019. The March 2019 Order granted USIC's summary judgment motion—it did not state that the District Court had "provisionally" granted the motion or that the court was "considering" granting the motion. App. 66. USIC's summary judgment briefing had made clear that USIC sought relief on *all* claims, governing both the duty to defend and the duty to indemnify, and the Eleventh Circuit recognized that both duties were at issue in the summary judgment proceedings. App. 7–8. The September 2021 Opinion made no substantive changes to its decision about summary judgment and largely adopted the April 2019 proposed order. App. B. Thus, there can be no question that when the district court granted USIC's motion for summary judgment, it disposed of Nicor's claims in their entirety.

B. The weight of authority from other circuits holds that an intent to issue a later opinion does not affect finality.

Every other federal court of appeals to address a similar situation has held that a later opinion explaining a decision does not affect the finality of the earlier decision. For example, in *Walker v. Weatherspoon*, 900 F.3d 354 (7th Cir. 2018), the district court clerk had entered an order granting summary judgment in favor of the defendants "[f]or the reasons stated in the Memorandum Opinion and Order to follow." *Id.* at 356. The memorandum opinion did not come for another 16 months (a brisk pace compared to this case), and the plaintiff waited to file its appeal until after that opinion. The Seventh

Circuit, however, ruled that the time for appeal started 150 days after the original docket entry, not when the memorandum opinion was filed, because "a plan to provide an explanation does not delay the date of decision." *Id.* Therefore, the appeal was untimely under the federal rules.[1] *Id.*; *see also Vergara v. City of Chicago*, 939 F.3d 882, 884 (7th Cir. 2019) (holding that "entry of judgment for appeal purposes occurred 150 days after the judge's minute order" even though the order stated that the judge "would later file an opinion explaining her reasons"); *cf. Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties*, 15 F.4th 831, 835 (7th Cir. 2021) ("We have condemned this practice in the past [delaying an opinion after a dispositive decision] and do so again today. This approach may have the benefit of ticking a case off a list of outstanding motions, but it risks catastrophe for litigants.").

Similarly, in *United States v. Bradley*, 882 F.3d 390 (2d Cir. 2018), the Second Circuit held that "[t]he fact that the district court reserved the right to explain its August 20th decision until later . . . does nothing to prevent the clock from running." *Id.* at 394. And in *Cumberland Mut. Fire Ins. Co. v. Express Prods., Inc.*, 529 F. App'x 245 (3d Cir. 2013), the Third Circuit ruled that the district court's order granting summary

[1] The Seventh Circuit went on to rule that the appellee had forfeited the issue of untimeliness because it had failed to properly raise it on appeal. Nonetheless, the court reaffirmed that the time limitations on appeal are mandatory when properly raised. *Id.* at 356–57; *see Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017) ("If properly invoked, mandatory claim-processing rules must be enforced.").

judgment was final, despite stating that a "supporting memorandum is forthcoming." *Id.* at 250. The court held that the later opinion describing the reasoning of the prior decision "is not a further action undermining the finality of the order"; rather, it is merely "an explanatory and subsidiary document explicating and elaborating upon the order." *Id.*

Several other circuits have reached the same conclusion under similar circumstances. *See, e.g., Ludgood v. Apex Marine Corp. Ship Mgmt.*, 311 F.3d 364, 369 (5th Cir. 2002) (holding that appeal clock runs from judgment designating decision, not from later-filed memorandum opinion explaining decision); *Center for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n*, 781 F.2d 935, 938–39 (D.C. Cir. 1986) (final order that precedes the opinion explaining it nonetheless starts the time for appeal); *Johnson v. Wilson*, 118 F.2d 557, 558 (9th Cir. 1941) ("The reserved right to file an opinion is not inconsistent with the finality of the judgment.").

C. A clerk's entry or minute order, as in this case, triggers the 150-day period under Rule 58 and Appellate Rule 4.

Although the District Court's oral ruling from the summary judgment hearing should be considered in tandem with its March 2019 docket entry memorializing that ruling, it is the latter that constitutes the appealable decision. For unknown reasons, the District Court ignored its minute entry when declaring in the September 2021 Opinion that

"the instant Opinion and Order makes the Court's ruling in this case final, not the oral ruling announced at the hearing." App. 64. Similarly, in briefing below, Nicor mischaracterized the March 2019 decision as merely an "oral" ruling and advocated a rule that a clerk's docket entry (unsigned by the judge) can never qualify as a "final" order under § 1291. Yet this suggestion finds no support in the federal rules or case law.

Excluding clerks' docket entries from consideration as final orders would be "diametrically contrary to the text, purpose and design of the integrated system established by FRCP 58 and 79 and FRAP 4" and would conflate § 1291 finality with the separate document requirement of Rule 58. *See Burnley v. City of San Antonio*, 470 F.3d 189, 196 (5th Cir. 2006) (holding that clerk's docket entry of general verdict with interrogatories triggered running of 150-day period); *see also Orr*, 884 F.3d at 930 (adopting reasoning of *Burnley*). Rule 58(b)(1) not only allows but *requires* a district court clerk, "without awaiting the court's direction," to "promptly prepare, sign, and enter the judgment when . . . the court denies all relief." Fed. R. Civ. P. 58(b)(1). Relatedly, Rule 79(a) gives clerks an "independent authority and duty . . . to promptly make the appropriate entry in the civil docket." *Burnley*, 470 F.3d at 196.

Rule 58 and Appellate Rule 4 both expressly contemplate that a clerk's docket entry under Rule 79(a) is the type of action that will trigger either the 30-day window for appeal or the 150-day period where a separate document is required. "Under the [2002]

amendments, a judgment or order is generally treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a)," *except* when Rule 58(a) requires that the judgment be set forth on a separate document. *See* Fed. R. App. P. 4, advisory committee notes, 2002 amendments. When a separate document is required but has not been entered, "that judgment or order is not treated as entered until it is set forth on a separate document (in addition to being entered in the civil docket), *or until the expiration of the 150 days after its entry in the civil docket*, whichever occurs first." *Id.* (emphasis added). Thus, the 150-day period begins "when the judgment is entered in the civil docket under Rule 79(a)" and there is no separate document. Fed. R. Civ. P. 58(c)(2). If a clerk's docket entry could never trigger the 150-day period without a judge's signature or express approval, "the [150-day] cap could never begin to run in the very cases in which it was intended to apply." *Burnley*, 470 F.3d at 196.

Furthermore, several other courts have explicitly recognized minute entries as final under § 1291, including under circumstances almost identical to the present case. *See Walker*, 900 F.3d at 356 (minute entry "made by the Clerk" granting summary judgment and stating that opinion would follow); *Vergara*, 939 F.3d at 884 (text-only minute entry granting motion to dismiss); *Agrawal v. Bd. of Regents of the Univ. of Okla.*, 336 F. App'x 765, 767 n.1 (10th Cir. 2009) ("When considering whether a decision is final, our analysis is governed by the substance of the district court's decision, not its label or form.") (quotation marks omitted); *Luginbyhl v.*

Corr. Corp. of Am., 216 F. App'x 721, 722–23 (10th Cir. 2007) (text-only minute order granting summary judgment initiated 150-day period under Rule 58); *Barnhardt Marine Ins., Inc. v. New England Int'l Sur. of Am., Inc.*, 961 F.2d 529, 531 (5th Cir. 1992); *Rajkovic v. Fed. Bureau of Investigation*, 949 F. Supp. 2d 139, 141 (D.D.C. 2013) (text-only minute order), *aff'd by unpublished order*, Appeal No. 13-5166 (D.C. Cir. Nov. 14, 2014) (per curiam).

To the extent that the Eleventh Circuit's opinion represents a departure from these other circuits' decisions regarding the finality of minute entries preceding opinions, this Court should clarify the issue to prevent further confusion. The number of cases in which district courts have entered a minute order followed by a much-delayed opinion—leading the Seventh Circuit to "condemn[ ] this practice"—illustrates the degree to which it causes uncertainty among parties and turns the attention of courts away from the merits of appeals. Litigants risk forfeiting their right to appeal the merits of an adverse judgment due to circumstances outside their control—namely, the district court's style and sequencing of orders relating to dispositive rulings.

The orderly functioning of the federal court system warrants a deeper look at this issue, and this Court should exercise its supervisory authority to clarify the application of the federal rules to such circumstances.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

BENJAMIN D. MOONEYHAM
GM LAW PC
1201 Walnut Street
Suite 2000
Kansas City, MO 64106
(816) 471-7700
(816) 471-2221 fax
BenM@gmlawpc.com

DAVID B. HELMS
Counsel of Record
GM LAW PC
8000 Maryland Avenue
Suite 1060
St. Louis, MO 63105
(314) 474-1750
(816) 471-2221 fax
DavidH@gmlawpc.com

Counsel for Petitioner USIC, LLC

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