

In the  
Supreme Court of the United States

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USIC, LLC,

*Petitioner,*

v.

NORTHERN ILLINOIS GAS COMPANY,

*Respondent.*

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

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**BRIEF IN OPPOSITION**

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## **CORPORATE DISCLOSURE STATEMENT**

Northern Illinois Gas Company is a subsidiary of Southern Company, which is a publicly traded company on the New York Stock Exchange (NYSE: SO).

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## INTRODUCTION

The Petition does not satisfy any of this Court’s requirements for granting the writ of certiorari. Far from being a “depart[ure] from the accepted and usual course of judicial proceedings” necessary to justify invocation of the Court’s supervisory powers, *see* Sup. Ct. R. 10, the Eleventh Circuit’s unpublished opinion below correctly applied the law to the specific facts of this diversity case to resolve the merits. Further, the Eleventh Circuit did not create a split in the circuits. In fact, it did not even decide the finality issue on which the Petitioner USIC, LLC (“USIC”) rests its argument that a split now exists, expressly finding that it was unnecessary to decide that issue. There is no compelling reason to grant the Petition.

Specifically, in its zeal to find a procedural bar to the Eleventh Circuit making a decision on the merits, USIC distorts the law and the facts. USIC argues there is an inflexible, “firm” rule that an argument raised for the first time in a motion for reconsideration can never be considered. Numerous cases have held, however, that courts have the discretion to consider such arguments, as the district court did here, preserving the issue for appellate review. Factually, USIC gives no significance to the fact that claims relating to the duty to indemnify were stayed and that the stay was never lifted. The Eleventh Circuit recognized that Respondent Northern Illinois Gas Company (“Nicor”) did not raise the severability issue until the motion for reconsideration because the claims relating to the duty to indemnify had been stayed and were not at issue until USIC submitted a

proposed order that addressed claims relating not only the duty to defend but also to the duty to indemnify.

In short, the Eleventh Circuit’s decision does not, as USIC contends, reflect “blatant disregard” for precedent (Pet.2) or other serious error constituting a departure from the normal course of judicial proceedings. Rather, where a district judge decided to rule on an issue it had previously stayed without giving notice that the stay was going to be lifted, the Eleventh Circuit properly reviewed the arguments going to that stayed issue that were raised in a motion for reconsideration and were considered by the district court. Fairness dictated as much, and there is no “firm rule” preventing the Eleventh Circuit from doing so or split in the circuits created by its decision. The Petition should be denied.



## STATEMENT OF THE CASE

Nicor filed this action against USIC on December 13, 2017 for breach of contract, declaratory relief and attorney's fees arising from the alleged breach of, and seeking declaration of rights pursuant to, a Master Locating Services Agreement ("MSA"). [Doc. 1]. Nicor is an Illinois corporation that owns and operates natural gas distribution systems. [Doc. 87, p. 2 ¶ 1]. USIC provides utility line locating services. [Id. at p. 2 ¶ 2]. Pursuant to the MSA, USIC agreed to provide locating services on behalf of Nicor pursuant to requests from excavators or other parties performing digging operations around or near Nicor owned utilities within a designated territory. [Id. at p. 3 ¶ 6].

The MSA contained a clause that required USIC to "defend, indemnify and hold harmless" Nicor on terms specified in the MSA. Under applicable Georgia law, the duty to defend is distinct from the duty to indemnify. The MSA further provided that USIC would not be liable to indemnify Nicor for Nicor's sole negligence. It also contained a severability clause. These provisions were implicated by an incident in Illinois.

USIC moved to stay Nicor's claims pending the resolution of personal injury and property damage claims arising out of the Illinois incident, for which Nicor was seeking defense and indemnity. The district court stayed Nicor's "claim for Declaratory Relief relating to USIC's obligation to indemnify Nicor" but denied a stay as to Nicor's claims "relating to USIC's duty to defend Nicor." Doc 32 at 2. The district court

stated that the parties may “pursue litigation regarding the application of O.C.G.A. § 13-8-2, to the duty to defend and indemnify clause.” *Id.* Thereafter, USIC filed a motion for summary judgment and Nicor filed a motion for partial summary judgment relating to the duty to defend. Since claims relating to the duty to indemnify were stayed, Nicor reasonably believed that those claims were not properly before the district court on the motions for summary judgment.

The District Court conducted a hearing on the motions, at the end of which the Court stated that USIC’s motion for summary judgment was granted, directed USIC to submit a proposed order and Nicor to review the proposed order for form, and then stated that the “proposed order should then be submitted to the Court for its review and any changes that the Court determines should be made prior to entry of the order.” Doc. 61-1 at 28-30 (emphasis added).

USIC submitted a proposed order that related to both the duty to defend and the duty to indemnify. Doc. 55. Nicor objected, arguing that claims relating to the duty to indemnify had been stayed and therefore should not be part of the order. Doc. 56. Nicor’s objection further argued that in any event the severability clause in the MSA should be given effect and that the claims relating to the duty to indemnify should not be dismissed because the duty to indemnify was limited by the language of the MSA not to apply to the sole negligence of Nicor. Doc. 56.

The District Court entered an order on September 2, 2021 granting USIC’s motion and denying Nicor’s motion for partial summary judgment. Doc. 87. In the Order, the district court expressly stated that the Court had “read and considered” the parties’ motions

and had “read and considered all briefs and materials submitted by the parties in connection therewith, including those filed following the conclusion of the hearing.” *Id.* at 2. The district court further denied USIC’s motion to certify the finality of the judgment, in which USIC argued that the oral ruling together with the minute entry regarding the hearing made by the clerk constituted the final judgment. *Id.* at 27. The district court wrote that “the instant Opinion and Order makes the Court’s ruling in this case final, not the oral ruling announced at the hearing.” *Id.* Thereafter, Nicor filed its Notice of Appeal on September 29, 2021.

The Eleventh Circuit affirmed in part and reversed in part. App.1. It affirmed the district court’s ruling that the duty to defend was invalid under O.C.G.A. § 13-8-2 as the limitation on liability for the sole negligence of Nicor did not apply to it, but reversed regarding the duty to indemnify as that duty did not apply to the sole negligence of Nicor and the indemnity duty was severable from the duty to defend. The court of appeals rejected USIC’s challenge to its appellate jurisdiction, ruling that it was unnecessary to reach the issue of whether the oral ruling coupled with the minute entry by the clerk amounted to a final order. App.15. The court reasoned that even assuming that the oral ruling with the minute entry constituted a final order, Nicor’s objection constituted a timely filed motion for reconsideration which tolls the time to appeal. App.17. USIC thereafter filed this Petition.



## REASONS FOR DENYING THE PETITION

### I. THE ELEVENTH CIRCUIT'S OPINION IS A CORRECT APPLICATION OF LAW TO THE UNIQUE FACTS PRESENTED AND DOES NOT MERIT INVOCATION OF THE COURT'S SUPERVISORY POWERS.

The Eleventh Circuit's resolution of this case is substantively and procedurally sound. Indeed, USIC does not even suggest that the ruling on the state law merits is erroneous. The Eleventh Circuit's treatment of the procedural issues is no different. The opinion below is fully consistent with the settled law giving courts discretion in applying Fed. R. Civ. P. 59(e).

Ignoring that authority, USIC argues that Rule 59(e) is an inflexible roadblock that prevents courts from considering new arguments in appropriate cases. USIC's argument that the Eleventh Circuit's application of Rule 59(e) is so erroneous that it meets the high bar for invoking this Court's supervisory power to summarily reverse does not withstand even modest scrutiny.

Rule 59(e) permits parties to seek to correct erroneous judgments. It does not specify the standard for applying it, but courts have held that it may be used to correct manifest errors of law or fact on which a judgment is based or otherwise to prevent manifest injustice. *E.g., GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170 (7th Cir. 2007); *Hood v. Central United Life Ins. Co.*, 664 F. Supp. 2d 672 (N.D. Miss. 2009); *see* 11 Wright, Miller and Kane, FED. PRAC. AND PRO. § 2810.1. While generally Rule 59(e) motions are not

to be vehicles for advancing arguments that could and should have been made before judgment (e.g., *U.S. v. C.E.B. Corp.*, 52 F.4th 916, 933 (11th Cir. 2022)), courts have found that in appropriate cases, they have discretion to consider arguments made for the first time in such a motion. *Continental Indemnity Co., LLC v. IPFR of New York*, 7 F.4th 713, 718-19 (8th Cir. 2021); *Gerhartz v. Richert*, 779 F.3d 682, 686 (7th Cir. 2015).

USIC’s argument is flatly inconsistent with this authority. Rather, it argues that it is a “firm rule” that is subject to no exceptions and that “the reasons for failing to raise an argument before an adverse ruling are irrelevant.” (Pet.10-11). To the contrary, courts have discretion to consider new arguments in appropriate cases. E.g., *Dyson v. District of Columbia*, 710 F.3d 415, 419 (D.C. Cir 2013); *Int’l Prod. Specialists, Inc., v. Schwing Am., Inc.*, 580 F.3d 587, 600 (7th Cir. 2009); *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 341 n. 9 (D.C. Cir. 1991) (Ginsberg, J.) (because “the district court expressly stated that it had ‘carefully consider[ed]’ the matters raised in the [Rule 59(e) ] motion ... [it did not matter] whether or not the ... theory was a ‘new argument.’”) This is not a point of law about which there is serious disagreement, and the Eleventh Circuit’s opinion here does not create a split in the circuits. Rather, what USIC is actually challenging is the application of the established rule to these unique facts. Such an application of law to fact is not a question worthy of review on certiorari. *See* Sup. Ct. R. 10.

Here, the district court, at USIC’s urging, stayed the litigation of Nicor’s claim relating to USIC’s duty to indemnify. Based on that stay, Nicor reasonably

believed that the district court would not consider arguments relating to that duty, and the Eleventh Circuit so noted. However, without lifting the stay, USIC succeeded in convincing the district court to dismiss both the duty to defend as well as the duty to indemnify. At that point, when it filed its Objections to the proposed order (which the Eleventh Circuit treated as a timely Rule 59(e) motion for reconsideration), Nicor raised the correct argument that the severability clause in the MSA meant that the duty to indemnify could be enforced even though the duty to defend could not. In fact, USIC responded substantively to this argument in opposing Nicor's Objections. (Doc. 62 at 4-6). The district court in its September 2, 2021 Order expressly stated that it considered all the arguments made in the post hearing submissions, which included the Objections and USIC's response thereto. There was no prejudice or unfairness to USIC in the district court considering those arguments.

In this context, the arguments raised in the motion for reconsideration concerning the severability clause and the enforceability of the indemnity provision were considered by the district court and preserved for appellate review. *E.g., Gerhartz v. Richert*, 779 F.3d at 686. It would have been manifestly unjust for Nicor to be precluded from making arguments that it reasonably believed were not permitted during the consideration of the summary judgment motions in light of the stay. Thus, the Eleventh Circuit's opinion reaching the merits was not in "blatant disregard" of precedent as USIC contends (Pet.2), but rather was fully consistent with it.

Accordingly, there is no cause for this Court to exercise its extraordinary supervisory powers when the result below is a product of the application of established procedural law to unique facts. The Petition should be denied.

**II. THE OPINION BELOW DOES NOT DECIDE THE ISSUE IDENTIFIED IN THE SECOND QUESTION PRESENTED IN THE PETITION.**

USIC's second question presents nothing for this Court to review. The Eleventh Circuit found it unnecessary to reach the issue of whether a district judge's oral statements at a hearing, coupled with a ministerial minute entry by the clerk, is sufficient to constitute entry of an order. The phantom "split in the circuits" USIC claims is simply a reflection of what USIC speculates the Eleventh Circuit would have done had it reached the jurisdictional issue. But the Eleventh Circuit did not need to address that issue because, even assuming that the oral ruling and minute entry constituted a final order, the Eleventh Circuit construed the objection that Nicor filed as a Rule 59(e) motion for reconsideration, which tolled the running of the time to appeal. There is no question that the Eleventh Circuit was permitted to do so, and therefore plainly there was appellate jurisdiction.

Nor is there any reason for this Court to accept USIC's invitation to strain to find a jurisdictional issue to review. The district court was clear that it did not intend its oral ruling to be a final order, and indeed expressly stated that only after consideration of the post-hearing submissions of the parties would it enter an order. Thereafter, in its September 2, 2021 Order, the district court expressly ruled on the issue, stating that that Order, and not its oral ruling at the

March 29, 2019 hearing, was the court’s final order. The district court plainly had the discretion to do so.

As to the power of a district court to manage its own docket, USIC wants to have it both ways. On the one hand, USIC is adamant that as part of that power to manage the docket, the district court can rule on issues that it previously stayed without giving notice that it intends to do so. On the other hand, USIC maintains that an oral ruling coupled with a minute entry by the clerk is a final order even where the district court expressly calls for further input from the parties and that thereafter it will enter an order. Where the district court makes clear that there is more that must happen before a final order will be entered, it is the master of its own docket, and no final order exists. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (a district court decision is final when it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”)

Question Two presents a question not decided by the Eleventh Circuit and therefore not appropriate for this Court’s review on petition for certiorari. But even if the Court were to examine this additional potential basis for appellate jurisdiction, it is a question that turns on the particular facts presented here and is not a question that merits the issuance of a writ of certiorari.



## CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

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