No. 23-419

In the

Supreme Court of the United States

USIC, LLC,

Petitioner,

v.

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

Respondent.

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

REPLY BRIEF

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In its brief in opposition, Respondent Northern Illinois Gas Company ("Nicor") mischaracterizes the Eleventh Circuit's holding, as well as the status and scope of the proceedings in the District Court during summary judgment briefing. Furthermore, Nicor's proffered legal authority does not apply to the facts below nor justify the Eleventh Circuit's reasoning. Petitioner USIC, LLC ("USIC") submits this reply to address these points and clarify the nature of the errors for which it seeks review.[1]

I. The Eleventh Circuit departed from settled authority regarding review of a decision on a Rule 59(e) motion.

A. Nothing prevented Nicor from raising its severability argument sooner, and the District Court never addressed it.

Contradicting both the District Court and the Eleventh Circuit, Nicor repeats its unfounded

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[1] Contrary to Nicor's characterization, USIC does not concede the appropriateness of the Eleventh Circuit's application of Georgia contract law to the interpretation of the severability clause. Rather, USIC recognizes that, except in very rare circumstances, this Court does not grant certiorari to review the application of state law. *See* S. Ct. R. 10; *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Junior Univ.*, 489 U.S. 468, 474 (1989) ("[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review.").

assertion that the District Court's stay order prevented any proceedings or arguments related to the duty to indemnify. Although USIC had asked the District Court to stay resolution of the substantive merits of the duty to indemnify pending the outcome of the underlying litigation in Illinois, USIC also asked the District Court to apply O.C.G.A. § 13-8-2(b) to strike down the entire contract provision governing both duties. D. Ct. Dkt. #17 at 3 (arguing that if "the exculpatory clause does not encompass the duty to defend" then "the whole indemnification provision must be stricken as contrary to public policy, and this lawsuit in turn should be dismissed").

In its oral ruling at the end of the hearing on the motion to stay, the District Court framed the open issue it wanted addressed regarding O.C.G.A. § 13-8-2(b) as "whether that statute requires that the indemnification provision be stricken *in its entirety*, based on the position plaintiff [Nicor] has taken regarding the exclusion of the duty to defend from the exculpatory clause." D. Ct. Dkt. #61-2 at 38:1–5 (emphasis added).[2] And the Eleventh Circuit acknowledged 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.

Thus, Nicor's framing of the stay order and the subsequent summary judgment briefing is inaccurate because neither the District Court nor the Eleventh Circuit ever stated that the duty to indemnify was

[2] References to transcripts use the page number of the transcript itself rather than the court's electronic docket header.

somehow "off limits" during summary judgment briefing. Even if Nicor subjectively believed that the District Court could not dismiss the claim relating to the duty to indemnify, the Eleventh Circuit held that such a belief was mistaken because the District Court possessed inherent authority to lift the stay (if needed) and dismiss all claims—as it ended up doing. App. 30 n.11. And USIC's summary judgment briefing made clear, beyond any dispute, that it was *asking* the District Court to strike down the clause in its entirety, resulting in dismissal of all claims. D. Ct. Dkt. #35-8 at docket header pp. 8–9, 11, 27. Therefore, Nicor was put on notice that all claims were at stake in the summary judgment briefing.[3]

Both parties and the Eleventh Circuit agree that Nicor did not mention the partial stay or the severability clause of the contract as reasons to avoid resolving the duty to indemnify until after the District Court had granted USIC's summary judgment motion and requested a proposed order. In its September 2021 Opinion, which adopted USIC's proposed order, the

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[3] Nicor argues that it "reasonably believed that the district court would not consider arguments relating to [the duty to indemnify]" during summary judgment briefing. Opp. Br. at 7–8. But this rationalization closely resembles the "mistaken belief" arguments rejected by other courts of appeals under similar circumstances. *See, e.g., Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998) (rejecting argument that party "did not raise the issue because they never thought the district court would determine otherwise"); *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890–91 (9th Cir. 2000) (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'").

District Court did not even acknowledge either of these arguments by Nicor, let alone address them on the merits.

In its opposition, Nicor seizes upon the statement by the District Court that it had "read and considered all briefs and materials submitted by the parties . . . including those that have been filed following the conclusion of the hearing." App. 38. But Nicor misconstrues this statement. Reading and "considering" an argument are not the same as ruling on its merits. The District Court acknowledged Nicor's Objections only one time in the September 2021 Opinion, when overruling an objection to the adoption of a material fact. App. 42 n.2. This means the District Court *chose* not to address Nicor's arguments regarding the scope of the partial stay and the interpretation of the severability clause.

This factual framework is crucial to understanding the inapplicability of Nicor's cited authority in its opposition brief to this Court.

B. Nicor offers no case law on Rule 59(e) that matches the facts here or justifies the Eleventh Circuit's judgment.

Nicor never addresses the application of this Court's rulings in *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020), and *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008), which set the framework regarding the function of a Rule 59(e) motion. The cases cited by Nicor, far from justifying the Eleventh

Circuit's decision, instead reinforce the general rule of *Banister* and *Exxon Shipping* and illustrate limited exceptions that do not apply here.

For example, *Continental Indemnity Company v. IPFS of New York, LLC*, 7 F.4th 713 (8th Cir. 2021), involved a request for prejudgment interest made for the first time in a Rule 59(e) motion. The Eighth Circuit explained that although ordinarily "arguments presented for the first time in a Rule 59(e) motion are deemed forfeited," a narrow exception exists for requests for prejudgment interest, whereby a district court may properly address them for the first time in response to a postjudgment motion. *Id.* at 717–18. Nevertheless, district courts maintain discretion to disregard such a request as untimely if not made sooner. *Id.* Because the severability argument at issue here has nothing to do with prejudgment interest *and* because the District Court did not address Nicor's belated argument, this narrow exception does not apply.

The rest of Nicor's cases are similarly distinguishable. In *Connors v. Hallmark & Son Coal Company*, 935 F.2d 336 (D.C. Cir. 1991), the D.C. Circuit explained that when a district court "expressly stated" that it had carefully considered the argument in a postjudgment motion *and decided it on the merits*, the court of appeals would review that merits decision

de novo rather than for abuse of discretion.[4] The court also noted that the purportedly new argument bore a "close resemblance" to an argument made earlier and did not resolve whether it was in fact a "new" argument under Rule 59(e). *Id.* at 341 n.9.

In this case, by contrast, the District Court never addressed the severability argument first raised by Nicor in (what was construed as) its Rule 59(e) motion. Rather than following the *Connors* court's directive to apply abuse-of-discretion review to the decision "whether to consider a new theory raised on motion for reconsideration," *id.*, the Eleventh Circuit gave zero deference to the District Court's decision not to address that argument and proceeded to apply de novo review, substituting its own reasoning in place of the District Court's. This creates an irreconcilable conflict.

Nicor's other cases fall in this same category. In *Dyson v. District of Columbia*, 710 F.3d 415 (D.C. Cir.

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[4] The scope of a district court's discretion to consider "new" arguments that could have been raised earlier is not as broad as Nicor or the *Connors* court suggests. *See, e.g., United States EEOC v. St. Joseph's Hosp.*, 842 F.3d 1333, 1349–50 (11th Cir. 2016) (holding that district court abused its discretion granting Rule 59(e) motion based on new argument); *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). Additionally, the D.C. Circuit has not addressed whether *Connors* remains good law after *Banister* and *Exxon Shipping*. Either way, the exception discussed in *Connors* does not apply on the facts of this case. And if that did somehow guide the Eleventh Circuit's analysis, granting this petition would afford the Court an opportunity to clarify the viability of *Connors* as well.

2013), the D.C. Circuit acknowledged that "the District Court might have rejected Appellant's equitable tolling argument as untimely; had it done so we would have reviewed that decision only for abuse of discretion." *Id.* at 419. Yet because the district court chose to address the merits of the tolling argument in the Rule 59(e) motion, the court of appeals would review that decision on the merits as well. *Id.* at 419–20. The same factual posture appeared in *Gerhartz v. Richert*, 779 F.3d 682 (7th Cir. 2015), which relied on *Dyson* as authority to address a "new" postjudgment argument that the district court chose to address on the merits. *Id.* at 686. And in *International Production Specialists, Inc. v. Schwing America, Inc.*, 580 F.3d 587 (7th Cir. 2009), the Seventh Circuit affirmed the district court's rejection of an argument raised in a "post-trial brief," noting that both parties "had the opportunity to present evidence" on the issue at trial. *Id.* at 600–01. This was another case in which the court of appeals addressed an issue that the district court had considered on the merits in reaching its holding, in contrast to this case.

Ultimately, Nicor offers no federal decision in which the court of appeals reversed a district court based on an argument that was first raised in a postjudgment motion and was not addressed on the merits by the district court. Its citations reveal how it has misconstrued USIC's basis for seeking certiorari—the issue for this Court is not whether the District Court *could have* addressed Nicor's severability argument on the merits (though arguably to do so would have been erroneous), nor whether Nicor could "present" its severability argument to the Eleventh

Circuit on appeal. Rather, the question is by what standard a court of appeals must review an argument first made in a Rule 59(e) motion, which could have been made earlier, and which the district court declined to address on the merits. As stated in the petition, federal authority holds unanimously (prior to the judgment below) that a district court properly exercises its substantial discretion in such circumstances. Thus, the panel's decision below flouts a uniform body of precedent and creates a new conflict warranting this Court's supervisory authority.

In short, Nicor had no excuse for choosing not to raise its severability argument until after the District Court ruled on the summary judgment motions, and the Eleventh Circuit had no lawful basis to reverse the District Court on the severability argument after it chose to construe the Objections as a Rule 59(e) motion.

II. Regarding jurisdiction, the Eleventh Circuit's actions tell a different story than its words.

Nicor's opposition brief ignores the entire thrust of USIC's argument regarding the second Question Presented. The Eleventh Circuit attempted to avoid deciding the finality issue under Rule 58, but that issue could not be avoided because it has an inextricable link to the appropriate standard of review. By choosing to rule on the merits of the severability argument and not treat it as an argument made *after* a dispositive decision, the panel acted as though the March 2019 Order was not final.

Therefore, its holding reflects either an indisputable disregard for precedent about Rule 59(e) motions (Question 1), or a split from other circuits regarding finality of dispositive decisions (Question 2).

Sound logic and judicial policy preclude an appellate court from construing a filing as a postjudgment motion for one portion of the opinion (jurisdiction) but not another (analysis of the merits). It is this internal inconsistency that warrants resolution of the finality question.

Nicor's only arguments regarding finality depend on the District Court's statement about its intention to "enter an order" at a later date after reviewing the proposed order, and on its characterization of its March 2019 Order as nonfinal. Nicor contends that the "district court plainly had the discretion to" declare whether its own decision was final, Opp. Br. at 10, but finality is a legal question not subject to a court's "discretion." The District Court had discretion to rule or not rule at the summary judgment hearing, but after having *granted USIC's motion*, which resolved all pending claims, the court did not have "discretion" to retroactively declare whether or

not the minute entry documenting the judge's ruling qualified as final under 28 U.S.C. § 1291.[5]

Nor did the District Court ask for "further input from the parties," as Nicor asserts. Opp. Br. at 10. Rather, the court asked USIC to prepare a proposed order and then "allow counsel for Nicor to review the proposed order for agreement to form." D. Ct. Dkt. #61-1 at 30:2–3. It had already "decided to rule in a certain way," *id.* at 28:16–17, and it gave no indication that it planned to change its decision. In the end, it adopted USIC's proposed order without substantial changes and without addressing the substantive arguments made in Nicor's Objections.

As explained in USIC's petition, other circuits have held that this posture—a dispositive decision without a written opinion explaining it—satisfies § 1291. The Eleventh Circuit, through its treatment of the merits, forged a different path. The confusion and lack of uniformity created by that decision warrants this Court's review.

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[5] That the District Court did not "enter" its judgment until more than two years later does not matter for this discussion because Federal Rule of Civil Procedure 58 provides that a judgment is "deemed entered" when a district court fails to enter it on a separate document within 150 days. Establishing an objective basis for finality and appealability, rather than leaving an appeal period open indefinitely, was the primary purpose of the 2002 amendments to Rule 58. *See* Fed. R. Civ. P. 58, advisory committee notes, 2002 amendments.

CONCLUSION

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

Respectfully submitted,

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