No. 20-334

In the Supreme Court of the United States

CITY OF SAN ANTONIO, TEXAS, ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED TEXAS MUNICIPALITIES, PETITIONER

v.

HOTELS.COM, L.P., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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A. There Is A Clear And Intractable Conflict

1. As the petition established, the circuit conflict is square, obvious, and entrenched. Pet. 10-16. Respondents doubt the existence of a true "'conflict'" (Opp. 12), but their argument is not remotely credible. In most circuits, "district court[s] ha[ve] broad discretion to deny costs to a successful appellee under Rule 39(e)." *Republic Tobacco Co.* v. *N. Atl. Trading Co.*, 481 F.3d 442, 449 (7th Cir. 2007). In the Fifth Circuit, by contrast, district courts have "'no discretion whether, when, to what extent, or to which party to award costs of the appeal.'" Pet. App. 12a. There is no need to read between the lines: the two standards are irreconcilable—which is why the panel candidly admitted it was rejecting the "contrary" view of "most other circuits." Pet. App. 10a-11a.[1]

Perhaps hoping to minimize the obvious conflict, respondents describe the split as somehow "stale"—which is an odd way to describe a conflict finally cemented *by the very decision below*. Before that decision, there were compelling reasons to think the Fifth Circuit would revisit its outlier approach—especially given that its prior ruling was grounded in the supplanted text of an outdated version of Rule 39(e). See Pet. 21-22. But the Fifth Circuit maintained it was "b[ound]" by its 1991 unpublished decision (Pet. App. 11a-13a), and the full court denied rehearing despite being confronted with the circuit conflict (Pet.

[1] Respondents elsewhere begrudgingly acknowledge the "circuit split," while tepidly calling it "stale" or "neither as deep nor as entrenched as petitioner claims." Opp. I, 8; see also *id.* at 20 (urging a denial "even if that results in less than complete alignment among the circuits"). Respondents would do better to follow the panel's candor: "most other circuits to have considered this issue have held—or at least implied—that a district court retains discretion to deny or reduce a Rule 39(e) award," while "our circuit adopted the contrary position." Pet. App. 10a-11a.

App. 31a-32a). That makes the split as live as it gets. Which, of course, is likely why multiple courts and commentators have already flagged the open conflict: "there is a split in authority as to whether the district court possesses discretion to deny or reduce an award of costs pursuant to [Rule] 39(e)." *Estate of Maurice* v. *Life Ins. Co. of N. Am.*, No. 16-2610, 2020 WL 6892967, at *3 (C.D. Cal. Nov. 23, 2020) (contrasting the decision below with decisions from the Seventh, Eighth, and Second Circuits; "the Fifth Circuit panel acknowledged the weight of authority from other circuits adopting the contrary approach, but explained that it was bound by its own prior precedent"); see also, *e.g.*, *Ericsson Inc.* v. *TCL Commc'n Tech. Holdings, Ltd.*, No. 15-11, 2020 WL 3469220, at *5 (E.D. Tex. June 23, 2020) ("except for this Circuit, every circuit to apply Rule 39(e) recently has held that a district court has discretion in determining appellate costs"); 16AA Wright & Miller, *Federal Practice and Procedure* § 3985.1 (5th ed. Oct. 2020 update) (flagging the conflict and (at n.17) "question[ing] the wisdom" of the Fifth Circuit's position).

As previously demonstrated (Pet. 13-15 & n.4), the issue regularly arises in courts nationwide, and the decision below is already injecting confusion into these proceedings. *E.g.*, *Maurice*, 2020 WL 6892967, at *4 (examining the Fifth Circuit's "recent[]" holding but, "[o]n balance," siding with "those decisions holding that a district court may exercise discretion to depart from [Rule 39(e)] default awards"); Wright & Miller, *supra*, § 3985.1 (updating the treatise to outline the recent division, casting doubt on the Fifth Circuit's approach). This entrenched conflict will now persist until this Court intervenes.

2. Respondents next try to explain away each conflict at a granular level, but their efforts are baseless. There is a reason the conflict has been openly recognized by multiple courts, including the panel below.

a. Respondents argue there is no real split with the Seventh Circuit because (according to respondents) *the Seventh Circuit misread its own precedent*. Opp. 9 (*Republic Tobacco* "rests on [a] flawed assumption" about *Guse* v. *J. C. Penney Co.*, 570 F.2d 679 (7th Cir. 1978)); *id.* at 11 (petitioner "has a Seventh Circuit case misinterpreting prior circuit precedent"). Respondents may disagree with the Seventh Circuit's understanding of its own position, but there is no genuine debate about what that position is: "In *Guse[]*, we held that a district court has discretion not to award a party costs under [Rule] 39(e), despite an order by the appellate court awarding costs to that same party." *Republic Tobacco*, 481 F.3d at 448. And that same understanding has been reinforced, repeatedly, by multiple courts in that circuit. Pet. 11-12 (examples so holding, citing *Guse* and *Republic Tobacco*).

Respondents' contention that the Seventh Circuit was wrong thus does not eliminate the split—it simply explains why respondents believe (incorrectly) that the Seventh Circuit erred in adopting a holding that is the polar-opposite of the Fifth Circuit's. If anything, that *confirms* the need for further review.

b. Respondents next attack the Eleventh Circuit's decision in *Campbell* v. *Rainbow City*, 209 F. App'x 873 (11th Cir. 2006) (per curiam), which rejected the Fifth Circuit's approach on indistinguishable facts. See Pet. 12-13. But rather than target the conflict, respondents simply list reasons they *disagree* with the Eleventh Circuit's disposition. Opp. 10-11. Putting aside that respondents distort *Campbell*'s rationale, respondents have, at most, highlighted two conflicting ways to read Rule 39(e)'s text, purpose, and context—with the Eleventh Circuit, unlike the Fifth Circuit, refusing to "h[o]ld that the district court must automatically tax the Rule 39(e) costs to the losing party." 209 F. App'x at 875 (citing supporting cases from

"seven" circuits); contra Pet. App. 12a ("'Rule 39(e) is mandatory'"). Respondents thus merely highlight precisely why the outcome here would have come out the opposite way in the Eleventh Circuit.

Respondents also try to blunt *Campbell* because it was unpublished. Opp. 10-11. But just like the Fifth Circuit's own decision in *Sioux*, *Campbell* set the law in that circuit; it has never been doubted by any subsequent panel; and it is routinely followed by other courts, which treat it as relevant authority, published or not. *E.g.*, *Plaintiffs' S'holders Corp.* v. *S. Farm Bureau Life Ins. Co.*, No. 06-637, 2013 WL 12156246, at *2 (M.D. Fla. June 18, 2013) (affirming district court's "discretion not to tax the losing party with all costs enumerated in Rule 39(e)," citing *Campbell*); *Ray* v. *Equifax Info. Servs., LLC*, No. 04-482, 2008 WL 11322890, at *4 (N.D. Ga. Feb. 15, 2008) (citing *Campbell* as confirming the district court's "discretion" under Rule 39(e)). *Campbell* guides both litigants and courts on this important issue, and it squarely conflicts with the Fifth Circuit's "contrary" position. Pet. App. 10a-11a.

c. Respondents finally brush aside the holdings of multiple courts of appeals (Pet. 13-14) as distinguishable on their facts. Opp. 11-12. This misses the point entirely. Respondents ignore that *all* other circuits recognize the district court's discretion—not a *single* court agrees with the Fifth Circuit's inflexible rule. Pet. 15. And these other circuits take their lead from circuit-level authority (like *Republic Tobacco* and *Campbell*) that indeed recognizes discretion *in this very context*: In *L-3 Commc'ns Corp.* v. *OSI Sys., Inc.*, 607 F.3d 24 (2d Cir. 2010), for example, the Second Circuit specifically held that district courts have "'broad discretion in awarding costs'" under Rule 39(e), and it cited the Seventh and Eleventh Circuits for that proposition. 607 F.3d at 30 (citing, *e.g.*, *Republic Tobacco*

and *Campbell*). There is no indication that these circuits disagreed with those on-point holdings or felt that a district court's Rule 39(e) discretion is somehow limited. And if those circuits believed that *Republic Tobacco* and *Campbell* had gotten it wrong, they assuredly would have said so—rather than favorably citing those decisions.

Nor is this view petitioner's alone: district courts nationwide read this circuit authority exactly the same way: as confirming that district courts retain broad discretion to deny or reduce Rule 39(e) costs. *E.g.*, *Gilmore* v. *Lockard*, No. 12-925, 2020 WL 1974205, at *2 (E.D. Cal. Apr. 24, 2020); see also Pet. 15-16 n.4. Respondents never explain how those courts uniformly misread these decisions.

* * *

Respondents have an understandable incentive to paper over the split, but the conflict is indisputable and entrenched. The Fifth Circuit declared itself bound by circuit authority, and the full court refused to reconsider its position (over a six-judge dissent). The Fifth Circuit alone declares Rule 39(e) "'mandatory'" and forbids the exercise of discretion (Pet. App. 10a-11a & n.2, 12a), whereas other circuits hold the opposite and declare that discretion exists. And for any circuit that has not squarely weighed in, litigants will be left to wonder which side of the split their circuit will pick—creating confusion and uncertainty regarding when and where to object to Rule 39(e) costs. This Court's review is urgently warranted.

B. This Important And Recurring Question Warrants Review In This Case

1. The question presented is of great legal and practical importance. Pet. 16-19 (explaining the issue, its stakes, the frequent litigation it generates, and the serious consequences of getting it wrong). The existing conflict leaves parties in an untenable position: Any prudent litigant will

now have to file protective Rule 39(e) challenges on appeal—or risk forfeiting those challenges should the district court follow the Fifth Circuit's position on remand. The law requires clarity on where parties are required to assert their rights, and the Fifth Circuit's position frustrates Rule 39(e)'s express commitment of these questions to the district court. Pet. 22-24.

The proper interpretation of Rule 39(e) cries out for this Court's review.

a. According to respondents, there is no need for this Court to resolve the open conflict because the Rules Advisory Committee can always amend the Rule. Opp. 2, 17. Respondents are misguided.

Their position first ignores that this Court routinely grants review to resolve conflicts over the meaning of Federal Rules (Pet. 18-19 & n.7); it does so in cases involving costs (*e.g.*, *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560 (2012)), and it does so in cases involving judicial discretion under various Rules (*e.g.*, *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897 (2018)). Although the petition highlighted this general practice, respondents answer with—silence.

Moreover, respondents ignore the difficulty of amending a rule through the committee process: "Their laborious drafting process requires years of effort and many layers of careful review before a proposed Rule is presented to this Court for possible submission to Congress." *Hall* v. *Hall*, 138 S. Ct. 1118, 1129 (2018). If it were always as easy as waiting for the Committee to resolve conflicts among the circuits—a task that usually falls to this Court—there would have been no point in granting certiorari in any of those other cases. The Rules Committee serves an important function, but it does not supplant this Court's role in saying what the law is.

Respondents also try the opposite tack: the Court should stay out because the Committee did not correct the Fifth Circuit's mistake with past amendments. Opp. 8. Yet the Committee is not obligated to fix every conceivable problem with every Rule during each round of amendments, nor is the Committee omniscient. The Committee's action (or inaction) does not alter the fact that the Fifth Circuit *had not yet confirmed its position* after the 1998 amendment, which it has now done (by a 10-6 vote) in this very case. That decision cements an intractable split with multiple circuits, and the time is ripe for this Court to establish a uniform interpretation of Rule 39(e).

b. Respondents also downplay the "adverse consequences" of getting this issue wrong. Yet respondents do not dispute that Rule 39(e) costs are often significant (as they were here), or that courts often exercise discretion to reduce or deny costs after accounting for a multitude of case-specific factors. Pet. 17-18. Nor do respondents explain how it makes sense for the Federal Rules to have different meanings in different circuits—or why this Court has reviewed comparable issues in the past.

But even putting aside those serious flaws, respondents still have no answer for this critical point: It is essential to the Rule's administration for parties and courts to know where and when to raise objections to Rule 39(e) costs. The Fifth Circuit's "contrary" position throws this issue into disarray. It is little use for Rule 39 to allocate responsibility between district and appellate tribunals if litigants have no idea if they will ultimately lose their rights if they challenge costs in the wrong tribunal. Nor is it a productive use of limited appellate bandwidth for parties to bog down appellate dockets with protective, fact-bound arguments over discretionary Rule 39(e) costs—especially when district courts are "in a better position" to determine costs "taxed against the losing party in that

court." *Guse*, 570 F.2d at 681 (appellate courts are "scarcely in a position" to determine typical Rule 39(e) "factual" challenges). This confusion will persist absent this Court's review.

2. This case is an optimal vehicle for resolving this important question. Pet. 19-20. The issue is a pure question of law; it was squarely raised and resolved in both courts below; and it was outcome-determinative at each stage. There are no conceivable obstacles to resolving it here.

Respondents nevertheless argue this is an imperfect vehicle for two reasons. Each is meritless.

First, respondents insist petitioner somehow "forfeit[ed]" the question presented. Opp. 2, 13, 20. This is perplexing. Initially, petitioner squarely raised *exactly* this issue below: "Even if the district court had power to tax bond costs, it had broad discretion to deny or reduce them. Because the district court wrongly thought it lacked discretion, this Court should remand for the court to consider a reduction." Pet. C.A. Br. 8. It argued that Rule 39(e)'s operative language is "permissive," not "mandatory"; that "[e]very other court to address the issue has held that a district court always has discretion to deny or reduce Rule 39(e) appellate costs"; that a "discretionary standard squares with the principles governing costs generally, as under Fed. R. Civ. P. 54(d)"; and that Rule 39(e)'s amendment "clarifies that the phrase 'shall be taxed in the district court' was meant only to identify in which court the listed costs *could be taxed*, not to convey that those costs *must be taxed* to a party entitled to any appellate costs." *Id.* at 8, 19; see Pet. C.A. Reply Br. 2, 6, 15-16. And, of course, petitioner raised the same arguments on rehearing after the panel declared itself bound by circuit precedent.

That aside, respondents ignore this Court's "traditional" rules regarding forfeiture: "'[o]nce a federal claim

is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). And even had the relevant arguments not been pressed, they assuredly were "'passed upon'"—which itself preserves the issue for review. *Ibid.* Respondents' contrary position is inexplicable.[2]

Second, as a last-ditch effort, respondents argue that review should be denied because they might ultimately prevail once the district court properly exercises discretion on remand. Yet this Court "routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason." Reply Br., *Kisor* v. *Wilkie*, No. 18-15, at 2 (filed Nov. 19, 2018). Respondents cannot avoid review *of the predicate legal issue* by predicting how the district court *might* rule under the correct legal standard.

Respondents' predictions, anyway, are wrong. Suffice it to say the district court identified "persuasive" reasons for reducing or denying costs. Pet. App. 5a, 16a. Respondents may prefer to litigate the discretionary factors now,

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[2] Respondents also cite an "underdeveloped record" (Opp. 20), which is puzzling: this is a pure legal question about the proper construction of Rule 39(e). That construction has absolutely nothing to do with any aspect of the record except this undisputed fact: the district court was bound to award full costs under the Fifth Circuit's approach and never had any opportunity to exercise discretion to deny or reduce that award. That frames the legal question perfectly.

but there will be every opportunity to argue those points on remand should this Court grant and reverse.[3]

C. The Decision Below Is Incorrect

While respondents defend the decision below, their arguments only confirm the fundamental disagreement over this important question, underscoring this case's certworthiness. The proper time for a merits debate is plenary review, but for now: respondents cannot justify the Fifth Circuit's profoundly atextual construction of Rule 39(e).[4] They concede their view would shift responsibility for Rule 39(e) costs to the appellate level (Opp. 19), frustrating the Rule's express allocation of authority between tribunals. And they fail to explain why the Rule would direct the inquiry to the district court if it really wished the appellate tribunal to do all the work.

This case easily checks off every box for review, and respondents' scattershot attempt to muddy the waters falls short. The petition should be granted.

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[3] Petitioner will postpone a full rebuttal of respondents' factual and legal misstatements, including that (i) it was hardly clear that the intermediate state appellate decision "foreclosed" petitioner's case (Opp. 1)—which is why the district court rejected that very argument (Pet. 6); (ii) respondents never explain why they failed to seek alternative forms of security or ask the court to waive the bond requirement (Opp. 22); and (iii) the record does not establish whether petitioner or its counsel will cover the Rule 39(e) costs (Opp. 21)—and those costs are presently taxed against petitioner itself.

[4] Respondents, for example, lean on Rule 39(a) to excuse their misreading of Rule 39(e). But subsection (a) merely says *who* can receive costs; "the rest of the Rule determines what costs are available and how those costs may be taxed." *L-3 Commc'ns*, 607 F.3d at 29.

Respectfully submitted.

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