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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rules:

Miscellaneous:

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ARGUMENT

For a multitude of legal and practical reasons, there is only one plausible way to read Rule 39(e): it vests district courts with clear discretion to reduce or deny a Rule 39(e) cost award. Respondents' contrary position ignores the Rule's plain language, makes nonsense of its structure, invites a host of obvious practical problems, and upsets settled practice in jurisdictions nationwide.

Respondents look to skip over these problems by focusing predominantly on Rule 39(a). But respondents never really come to grips with the actual language in Rule 39(a) or its limited function. Rule 39(a)'s express terms address solely *who* is entitled to costs ("Against Whom Assessed."). It sets default rules assigning costs to

the prevailing party, and simply authorizes panels to deviate from that default allocation. But it says nothing about *which* individual costs are appropriate—which is precisely why the party "entitled to costs" under Rule 39(a) is then required to formally seek Rule 39(e) costs in district court—where the party must file a verified bill of costs, the opposing party has a right to object, and the relevant tribunal ("the district court") resolves the dispute and exercises discretion to determine "taxable" costs.

The threshold determination under Rule 39(a) simply activates the remaining provisions in the Rule—which explicitly assign the task of determining "taxable" costs to other bodies. And that threshold determination takes place *before* the appellate panel has access to the case-specific factors that traditionally drive a discretionary cost determination.

Respondents realize that appellate courts have no obvious mechanism for exercising discretion over costs awards. So they suggest that parties preemptively address costs in their substantive briefing or raise the issue in a petition for rehearing. Br. 42. These fanciful proposals are entirely unworkable. Rule 39(e) does not even ask the prevailing party to submit its cost request until remand in the district court. At that point, the mandate may have issued—cutting off any further action at the appellate level. And respondents' alternative makes no sense: losing parties will be forced to raise preemptive objections based on future predictions of what an opposing party *might* request, hypothetically, on remand—and the appellate court must then decide the dispute before it arises in the actual tribunal textually assigned to resolve that very dispute. There is a reason that this proposal does not reflect actual practice anywhere today.

If respondents prevail, appellate courts will be tasked with evaluating a whole host of factors that have absolutely nothing to do with the merits of an appeal, and assessing issues that unavoidably require resolving fact-bound disputes on a new evidentiary record—something appellate courts are ill-suited to handle. Respondents' views are deeply flawed, and the judgment should be reversed.

A. Rule 39's Text And Structure Establish That District Courts Have Discretion In Awarding Costs Under Rule 39(e)

1. Respondents argue that Rule 39(e) "expressly binds the trial court to the appellate court's Rule 39(a) determination." Br. 23. As respondents see it, once an appellate court declares a party "entitled" to costs, that party has an absolute right to a full award, and "trial courts [must] tax costs 'for the benefit of the party entitled to costs under this rule.'" *Ibid.* (quoting Fed. R. App. P. 39(e)).

Respondents' atextual argument rests on a subtle shift away from what Rule 39(e) actually says: it does *not* say that "[t]rial courts *tax costs* 'for the benefit of the party entitled to costs under this rule,'" but that certain "costs on appeal *are taxable* in the district court for the benefit of th[at] party." Fed. R. App. P. 39(e). The cost award is not automatic; Rule 39(a) may designate the party *eligible* for Rule 39(e) costs, but the right is not established until a court determines which costs are in fact "taxable." See *Campbell* v. *Rainbow City*, 209 F. App'x 873, 875 (11th Cir. 2006) (per curiam) (the language is "permissive, not mandatory"). Nothing in Rule 39(a)—with its express limit to designating *"[a]gainst [w]hom" costs are assessed*—grants the appellate court any power to make a full cost allocation, much less to assign itself responsibility for Rule 39(e) costs *textually committed* to "the district court." Fed. R. App. P. 39(a), (e).

Respondents state the appellate court has "sole authority" whether to "deviate from the presumption in favor of awarding *full* appellate costs." Br. 30 (emphasis added). This is another sleight of hand: Rule 39(a) never says anything about "full" appellate costs. It merely permits the designation of the party *against whom costs are assessed*, while the Rule's remaining provisions delegate authority to other actors (the circuit clerk and district court) to determine the extent of "taxable" costs. If the appellate panel alone could ratchet down a cost award, one would expect Rule 39(a) to say *something* about allocating costs—as opposed to merely designating the "entitled" party who then must seek costs under the Rule's other provisions.

The textual problems with respondents' interpretation do not end there. Respondents fault petitioner and the government for suggesting that Rule 39(a) merely activates the designated party's right to "seek" costs, calling this "a major rewrite of the language": "A party *entitled to* costs has a right to them; a party *entitled to seek* costs might not." Br. 23. This argument ignores the text and structure of the entire provision. If the "entitled" party had an immediate "right" to costs, it would not have to file a verified bill of costs; the opposing party would not be allowed to object; and the district court would be instructed it must "tax costs"—not merely that costs are "taxable." The Rule 39(a) determination is a *threshold* determination; it activates a party's rights to seek costs—per the Rule's express instructions—but there is no allocation at all "before costs are finally determined." Fed. R. App. P. 39(d), (e) (describing the necessary steps for "[a] party who wants costs taxed").

Nor does this process undercut the appellate court's Rule 39(a) determination. Contra Resp. Br. 24. Once the appellate court designates a party under Rule 39(a), no

one else can seek or receive costs. But the ultimate award is still limited to the range of "taxable" items (those "capable of being taxed," Pet. Br. 13)—which may end up being all or nothing. The language, again, is "permissive, not mandatory." *Campbell*, 209 F. App'x at 875. But when an appellate court says "no costs," then no one can even *request* "taxable" costs under the Rule's other provisions. That respects the appellate court's designation, while also respecting that Rule 39(e) textually assigns certain costs to "the district court"; the appellate court cannot exercise Rule 39(e)'s authority without violating that textual assignment.[1]

Respondents finally seek to undercut the Rule's clear language by citing a small sample of extreme outliers at the fringe of ordinary practice—a handful of instances where an appellate court "might declare one party entitled to one-half or one-third of the appellate costs." Resp. Br. 24-25 & n.5. Aside from being highly unusual, this practice is not authorized by the Rule. Nothing in Rule 39(a) permits the appellate court to allocate the costs expressly designated for the district court. The panel has every right to say *who* can receive costs (party A, party B, or neither). But it does not say that the circuit has authority to divide up costs—any more than it says that Rule 39(e) costs are taxable "in the district court" *unless the circuit says otherwise*. The panel can certainly issue guidance and express its views, but it is still the district court's

[1] There accordingly is a major difference between saying "no costs" at the outset (categorically cutting off any potential award), and ultimately saying no "taxable" costs because the designated party fails to file a bill of costs or the district court makes a case-specific determination that no "taxable" costs are proper. The fact that an appropriate award may be $0 in certain cases—as a result of balancing the traditional factors going into discretionary cost awards—does not undo the appellate court's initial Rule 39(a) designation.

call under the Rule's plain text. The appellate court cannot decide on its own to supplant the district court's official role.[2]

2. According to respondents, because Rule 39(e) does not use the same discretionary language found in Rule 54(d) or Rule 39(a), it must not confer any discretion on the district court. Br. 26. Yet petitioner has already explained why this is wrong: discretion can be conferred using a variety of different formulations, and Rule 39(e)'s language does the trick—the Committee chose a permissive term ("taxable") while conspicuously omitting any compulsory language. Br. 18-19. And while respondents find it significant that the drafters did not repeat the same language found in Rule 39(a), they overlook the obvious reason: if the district court could "order otherwise," *it would have license to shift costs to a party* not *designated in Rule 39(a)*. The drafters instead chose terms that made it clear the district court would have the same discretion available under Section 1920 (the base provision undergirding the Rule), without disturbing the appellate court's threshold designation.

Respondents anyhow ignore the implication of their own argument: Rule 39 uses mandatory language in multiple provisions but *not* in Rule 39(e): "If the drafters of Rule 39(e) had intended to require that district courts tax the full amount of each item of appellate cost incurred, Rule 39(e) would have included the type of mandatory language that repeatedly occurs elsewhere in Rule 39." U.S.

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[2] Respondents' tiny collection of cases does not even cover the relevant universe—those where a panel designates Rule 39 costs in the course of deciding a *merits appeal*. At least one of their cases, for example, was itself *an appeal from a cost award*. See *Murphy* v. *L & J Press Corp.*, 577 F.2d 27, 28 (8th Cir. 1978) ("This appeal involves a dispute as to the proper taxation of appellate costs in the District Court.").

Br. 15-16 (citing four examples in neighboring provisions specifying what "must" happen). Respondents have no answer for this argument.

3. Respondents argue that a district court's authority under Rule 39(e) is limited to ensuring that only "proper" costs are awarded. Br. 27. But respondents fail to offer any principled, administrable basis for identifying the limits of that authority. Is it "proper," for example, to award premiums for an *unnecessary* bond? How about for a premium above market rates? Is a cost proper if the amount increased due to the party's lack of diligence? How about if a bond or transcript was ordered from a direct subsidiary who profited from the transaction? Respondents never say—and the lack of a bright line only promises to generate predictable, wasteful litigation about which tribunal should decide which disputes. See U.S. Br. 30-31; see also *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1988 (2016).

Rule 39(e)'s actual text solves this problem by declaring that certain costs are "taxable" in the district court—thereby specifying exactly where to lodge the request, where any objections will be heard and resolved, and where any discretion should be exercised. (It also avoids the scenario where a district court is considering the *same* cost under Section 1920 or Rule 54(d) that the appellate court is considering under Rule 39.) Respondents cannot explain any benefit to unnecessarily complicating this traditional analysis.

4. In response to these obvious defects, respondents offer Rule 39(a) as driving the entire show. They say that provision gives appellate courts "sole authority" to decide who is entitled to costs, which costs they can and should receive, and binds all other judicial actors to the appellate court's determination. Br. 14. This is profoundly mistaken.

Rule 39(a) is only the first step in the analysis. It *activates* the right to seek costs under the Rule's other provisions. See Pet. Br. 17-18. But those other provisions (and not Rule 39(a)) is where costs are actually determined; Rule 39(a) merely says which party may *seek* those costs. See, *e.g.*, *L-3 Commc'ns Corp.* v. *OSI Sys., Inc.*, 607 F.3d 24, 29 (2d Cir. 2010) (Rule 39(a) authorizes the appellate court to say *who* can receive costs; "the rest of the Rule determines what costs are available and how those costs may be taxed").

According to respondents, Rule 39(a) also assigns the appellate court exclusive authority to decide whether costs are reduced or denied. This is bizarre: the appellate panel does not even have access to the relevant information when the Rule 39(a) determination is made; the Rule's other provisions require formal applications for costs, which are predicated on the Rule 39(a) determination; the prevailing party does not even say which costs it seeks until *after* the Rule 39(a) determination; and the opposing party has no opportunity to object before the Rule 39(a) determination. It would take remarkably clear language to think the drafters designed a system where an appellate panel determines unknown, hypothetical costs before anyone makes a formal cost request, before the relevant factual record is developed, before any cost-related disputes are raised (much less resolved)—and where the Rule textually delegates the cost issue to *another* tribunal ("the district court").

5. Respondents cannot square their position with Rule 39's text and structure if it requires the appellate court to make a discretionary determination without having any clue what it is actually deciding. Respondents thus offer a series of proposed work-arounds (Br. 41-44), but each is meritless.

First, respondents suggest parties can simply brief the cost issues in the main appeal. See, *e.g.*, Resp. Br. 43 ("parties can easily predict the approximate amounts that would fall in Rule 39(e)'s limited set of categories"). This is puzzling. It is hard to imagine a less-productive use of appellate bandwidth than forcing parties to litigate hypothetical cost issues before having any idea which party will even win the appeal—much less be entitled to costs. Which is presumably why no ordinary party ever does this in any appellate filing.

But putting aside the practical absurdity, respondents' proposal runs headlong into Rule 39 itself. The Rule specifies an actual process for requesting costs and filing objections—and that process takes place *after* both the merits briefing *and the Rule 39(a) determination*. If the Rules Committee expected parties to preemptively litigate hypothetical, unripe, post-judgment cost questions in the main appeal, it would add such a requirement to Fed. R. App. P. 28(a) and remove the adjudicatory process set out in Rule 39(d)-(e). Respondents' position simply cannot be squared with what the Rule actually does: cost issues are adjudicated *after* the merits appeal, not before.

Second, respondents suggest that parties can raise their Rule 39(e) objections in a circuit-level rehearing petition. This is perplexing. The entire point of a *rehearing* petition is to revisit a *decided* question—not to object to a cost issue that has never even been *considered*. Nor is there anything in Rule 39 or the appellate rules generally suggesting that the rehearing stage is where cost disputes should be resolved in the first instance. Rule 39 itself disproves that suggestion; it did not specify a process for requesting and objecting to costs only to dislodge that process in favor of panel rehearing. And respondents never even try to square this odd suggestion with Rule 39(e)'s plain text: how are Rule 39(e) costs "taxable in the district

court" if respondents would instead have those costs determined at the appellate level?

Finally, respondents argue that "nothing precludes" a party "from convincing the appellate court to delegate its Rule 39(a) discretion to the trial court." Br. 44. Yet the Rule already does this in advance and decides the matter for all cases—which is precisely what rules in general are designed to do. It sets a clear path for resolving cost disputes. It avoids the need to make "predictions" about what a party might request. It tasks the appropriate tribunal with deciding matters appropriate to that tribunal's skill set and expertise. There is no reason to waste everyone's time by asking appellate courts to assign items to the district court that so obviously belong in the district court in the first place.

6. Respondents suggest that the prevailing approach is a "recipe for wasteful litigation" that will "all-but-guarantee an additional round of appellate proceedings." Br. 41. This is an odd argument coming from defendants who have suggested parties preemptively litigate cost issues by guessing what the opposing party *might* raise if they win. But the argument also overstates any theoretical problems: most parties will not take an independent appeal over costs questions; the standard of review (abuse of discretion) will make those appeals relatively easy to resolve—and most parties will not appeal for that reason; and the sky has not fallen in the many jurisdictions nationwide that have recognized a district court's discretion for decades.

7. In short, respondents' entire theory rests on the false presumption that Rule 39(a) tasks appellate courts with *allocating all costs under the Rule.* But the Rule expressly divides responsibility over costs into two stages:

Rule 39(a) determines *who* is entitled to costs; and the remaining provisions dictate *which* "taxable" costs that party (not anyone else) can actually recover.

There accordingly is no conflict whatsoever with the district court exercising discretion to deny or reduce costs *to the "entitled" party*. But there *is* an obvious conflict if the appellate court decides to step into the district court's shoes and assign itself the responsibility of deciding certain costs that are expressly delegated to the district court for resolution.

B. Rule 39's Design And Purpose Confirm The District Court's Discretionary Authority Under Rule 39(e)

According to respondents, "[t]he considerations that bear on appellate-cost entitlements are uniquely within an appellate court's ability to assess." Br. 15.

The appellate court may be best situated to decide "against whom" costs should be awarded—a question generally dictated (as a default matter) by which party prevailed on appeal. But it is unquestionably wrong to think that appellate courts are even remotely capable of efficiently deciding all the factual and legal questions that typically arise in traditional cost disputes. Appellate courts are not accustomed to creating evidentiary records, hearing witness testimony, reviewing evidence, and resolving fact-disputes in the first instance. See Pet. Br. 20-22 (so explaining). There is no reason that the body responsible for making the Rule 39(e) determination should also be the body in the worst possible position to decide what the answer should be.

Respondents say that permitting district courts to decide Rule 39(e) costs would "invert the usual order of things"—as lower courts "sit in judgment of an appellate court's cost award." Br. 3. This is backwards. The "usual order" is that appellate courts are courts *of review*. When

the Rule 39(a) determination is made, no court has determined the appropriate Rule 39(e) costs at any prior point in the case. Someone has to entertain the filings, make a record, entertain objections, resolve factual disputes, and decide the question in the first instance. Those are quintessential tasks for district courts. And standard practice is to send issues to the district court to resolve before seeking a decision on appeal. Respondents' position is the only one inviting any inversion here.[3]

C. Rule 39's History And Common Practice Further Confirm The District Court's Discretionary Authority Under Rule 39(e)

1. Respondents say that "history" is on their side (Br. 15), but that is plainly wrong. Rule 39 was enacted against the backdrop of Rule 54(d) and Section 1920—both of which vested district courts with broad discretion and even *overlap* with certain costs in Rule 39(e) itself. See Pet. Br. 22 (so explaining). The Rules Committee specifically referenced Section 1920 as "statutory authority" for

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[3] Respondents argue that the prevailing approach nationwide wrongly permits district courts to "negate" an appellate court's disposition of certain equitable factors (a case's complexity, closeness of the issues, degree of success, etc.) bearing on the Rule 39(a) analysis. Br. 40. This is wrong. It is rare for an appellate court to spell out its reasoning behind a Rule 39(a) cost designation. But if an appellate court actually does resolve any relevant issues bearing on the traditional Rule 39(e) discretionary inquiry, those determinations would bind later tribunals in the same action under law of the case. See, *e.g.*, *Pepper* v. *United States*, 562 U.S. 476, 506-507 (2011). A district court would still be free to weigh those (decided) factors together with all other relevant considerations, but it would not revisit a determination squarely resolved at the appellate level. (And, of course, if the appellate court's determination was based on an incomplete record—as will often be the case when a Rule 39(a) determination is made—the district court can revisit the issue without "negating" the appellate court's judgment in any meaningful way.)

the Rule, and it explained that Rule 39(e) was necessary, in part, because district courts were reluctant to *exercise their Section 1920 authority* without an express rule. Fed. R. App. P. 39(e) advisory committee's notes (1967). It is implausible that the Committee adopted a Rule to *reinforce* Section 1920 by eliminating a key feature of that provision (its grant of discretion), much less that it did so without saying a word about it. Respondents have no real answer for this.[4]

Instead, respondents say that petitioner focuses on the wrong history, and that "discretion over trial-court costs does not carry over when trial courts tax appellate costs." Br. 33. Respondents are mistaken. For one, as noted above, Rule 39(e) was designed partly to *replicate* trial courts' authority under Section 1920; it thus was designed exactly to "carry over" traditional rules "when trial courts tax appellate costs."[5]

For another, the prevailing practice in jurisdictions nationwide is directly at odds with respondents' position. See Pet. Br. 23-27 & nn.6-7 (citing cases). The rule is clear: courts overwhelmingly endorse a district court's "'broad discretion in awarding costs,'" "'includ[ing] costs taxable in the district court under Rule 39(e).'" *L-3 Commc'ns*, 607

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[4] Respondents themselves admit that Rule 54(d) and Rule 39 both "'find root in the same principle.'" Br. 17 (quoting *Baez* v. *U.S. Dep't of Justice*, 684 F.2d 999, 1004 (D.C. Cir. 1982) (en banc) (per curiam)). There is no question that Rule 54(d) vests district courts with discretion; it is unclear why respondents believe Rule 39 envisions the opposite result.

[5] Respondents say that trial courts were bound by appellate cost determinations even when the prevailing party "ended up losing the case * * * on remand." Br. 15, 35-36. That very different question says nothing about the question here. The relevant determination is whether Rule 39(e)'s "taxable" costs are discretionary, not whether a *discretionary* (or non-discretionary) award can be wiped out by subsequent proceedings.

F.3d at 30. Respondents' meager authority cannot counteract the clear trend among these courts over the past several decades.

2. Nor can respondents square their views with the way courts today actually function. The standard practice is, again, clear: appellate panels exercise Rule 39(a) authority by simply saying "costs to A," "costs to B," or "no costs"; the designated party then seeks Rule 39(d) costs at the appellate level and Rule 39(e) costs in district court; each request (all taking place *after* the Rule 39(a) determination) is supported by a verified bill of costs, and followed by any objections; and district courts entertain evidence, resolve factual disputes, and exercise broad discretion in awarding Rule 39(e) costs on remand. Pet. Br. 25-27.

This is why every single court of appeals—*including the Fifth Circuit*—limits any form bill of costs to those categories *not* found in Rule 39(e), and instructs parties to litigate in district court over those costs. Pet. Br. 25-26. Indeed, the Fifth Circuit *in this very case* noted that respondents were not obligated to seek Rule 39(e) costs on appeal because "*[t]he proper place to seek Rule 39(e) appeal costs is in the district court*." Pet. App. 10a (emphasis added). There is no obvious mechanism in any circuit for claiming Rule 39(e) costs at the circuit level—and thus no obvious means of objecting to unwarranted or unfair costs, and no obvious vehicle for the circuit to resolve these hypothetical, unknown, future Rule 39(e) cost disputes. See, *e.g.*, *Metso Minerals Inc.* v. *Terex Corp.*, 594 F. App'x 649, 651 n.2 (Fed. Cir. 2014).

In fact, respondents, again, cannot answer these simple questions: If parties are not required or expected even to *seek* Rule 39(e) costs on appeal, how should the appellate panel exercise case-specific discretion in reducing or denying hypothetical Rule 39(e) cost requests? And why

would Rule 39(e) assign this task to the district court if the drafters actually intended parties to litigate these issues at the appellate level? The consequences are predictable: if the circuit is the only game in town, parties will be required to press these issues on appeal to avoid forfeiting the issue entirely. This would directly frustrate the Rule's express design—and its textual commitment of these issues to "the district court." Fed. R. App. P. 39(e).[6]

3. Respondents invoke the Rules Committee's original commentary to Rule 39(c) in arguing that "[t]he principle behind Rule 39 is that '*all cost items* expended in the prosecution of a proceeding should be borne by the unsuccessful party.'" Br. 2-3, 7, 17-18 (quoting Fed. R. App. P. 39(c) advisory committee's note (1967)).

Respondents read this comment out of context: the quoted language is preceded by this introductory clause, which respondents omit: "*While only five circuits * * * presently tax the cost of printing briefs, the proposed rule makes the cost taxable* in keeping with the principle of this rule that all cost items expended in the prosecution

[6] Respondents repeatedly emphasize the "'venerable presumption' that prevailing parties" are entitled to costs. Br. 1, 6, 17 (citing *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 377 (2013)). Yet the principle is just that—a *presumption*. It is not even a *uniform* presumption, as respondents barely acknowledge: it was limited to "actions at law," and the contrary rule applied in "equity proceedings"—vesting courts with "discretion" in awarding costs. *Marx*, 568 U.S. at 377 & n.3. Critically here, Rule 54(d) and Section 1920 codified that discretionary approach following the merger of law and equity. See *ibid.* (explaining the old division existed "[p]rior to the adoption of the federal rules"); see also *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 444 (1987); *Baez*, 684 F.2d at 1004. The prevailing practice now is unmistakable: district courts have broad discretion over costs unless a statute or rule provides otherwise. Nothing in Rule 39(e)'s directive—declaring costs merely "taxable" in district court—withdraws that discretion.

of a proceeding should be borne by the unsuccessful party" (emphasis added). In other words, while some circuits *categorically excluded* printing costs, Rule 39(c) was designed to "*make[] th[ose] costs taxable*"—*i.e.*, eligible for taxation. Nothing in Rule 39(c) or the Committee's commentary suggests that a party designated as *eligible* for costs under Rule 39(a) automatically receives *all* costs, no matter how patently unreasonable or inequitable a full award might be in a given case.

Respondents further overlook the very first sentence of the Committee's original note: "Statutory authorization for taxation of costs is found in 28 U.S.C. §1920." Fed. R. App. P. 39(c) advisory committee's note (1967). Section 1920 indisputably vests district courts with *discretion* to award costs. There is no reason to believe the Committee intended to override that discretion in providing Rule 39(e)'s rule-based authority to replicate Section 1920. Fed. R. App. P. 39(e) advisory committee's note (1967) (explaining that certain Rule 39(e) costs are "specifically authorized by 28 U.S.C. §1920, but in the absence of a rule some district courts have held themselves without authority to tax the cost").

D. The Court Should Reverse The Judgment And Remand For The District Court To Exercise Its Discretion Under Rule 39(e)

Respondents offer two reasons that the Court can affirm even if it concludes that district courts retain their traditional discretion over Rule 39(e) costs. Each is baseless.

1. Respondents argue that Rule 39(a) somehow vests appellate courts with "broad authority" to countermand the express terms of Rule 39(e)—and dictate that all cost allocations will always be made at the appellate level. Br. 16. This is wrong. Nothing in the Rules Enabling Act suggests that a formal rule can be amended on the fly by an

appellate panel—much less in order to rewrite the Rule going forward for all cases in that circuit. The Committee adopted the Rule to provide a clear framework for awarding costs; its careful deliberation should not be so easily swept aside by an unpublished two-judge decision.

In any event, respondents overlook that their novel theory only works *if this Court accepts their reading of Rule 39(a)*. Contrary to respondents' view, Rule 39(a) does *not* "give courts of appeals broad authority over the taxation of appellate costs within their jurisdiction." Br. 16. It provides the limited authority to designate the party "entitled" to an award of costs; it does *not* authorize the appellate court to decide *which* costs are awarded. That job expressly falls to the circuit clerk (for Rule 39(d) costs) and the district court (for Rule 39(e) costs). The appellate court thus may "order" otherwise in deciding which party is "entitled" to seek costs, but it cannot "order" a full rewrite of Rule 39(e) to redesignate "the appellate court" as the tribunal for seeking "taxable" costs.

But even if Rule 39(a) somehow did grant that authority, the Fifth Circuit did not "effectively" announce such a categorical revision here. Respondents' contrary review is counterfactual. By its own terms, *In re Sioux Ltd., Sec. Litig.*, No. 87-6167, 1991 WL 182578 (5th Cir. Mar. 4, 1991), reflected the Fifth Circuit's attempt to *construe* Rule 39, not to override it. And the panel below reinforced that understanding: it said it was bound by *Sioux*'s construction of Rule 39(e). Pet. App. 13a-14a. It did not say that the Fifth Circuit was aware its practice contravened the Rule but it was announcing its own circuit-specific version. The Fifth Circuit simply misread the Rule itself, and its error was dispositive below.

2. Respondents next argue that this Court should affirm based on its own case-specific discretionary analysis. This is exceptionally weak. If Rule 39(e) means what it

says in assigning the district court authority to decide this issue, *then the district court (and not any other tribunal) should exercise that authority to decide this issue*. There is no basis for asking this Court to arrogate the district court's authority to itself—much less in the first instance to wade into case-specific, fact-bound questions that no lower court has yet resolved. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is "a court of review, not of first view").[7]

In any event, respondents' one-sided picture is wrong and misleading.

Respondents fault petitioner for litigating the case after "intervening appellate authority ended its hope of success." Br. 4. Yet this "intervening" authority was a single decision by one of Texas's *fourteen* intermediate appellate courts; those courts often disagree over legal issues, and the Texas Supreme Court declined to review that single court's first pass at these important questions. Contra Resp. Br. 11 (wrongly suggesting that "Texas's appellate courts"—in the plural—rejected petitioner's theory). That is hardly a definitive statement of Texas law. Indeed, the district court squarely rejected respondents' view, explaining that the Houston ordinance was distinguishable, the cases were decided on different evidentiary records, and the class's judgment should stand. The Fifth Circuit

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[7] Respondents say that "[i]n no event" should the Court remand "without providing guidance on the sorts of considerations that could justify denying appellate costs to a prevailing party." Br. 46. Not so. The question presented is not which factors are relevant to a discretionary analysis—it is *whether there is a discretionary analysis* in the first place. Courts routinely apply a case-specific, totality analysis in deciding whether to exercise discretion in denying or reducing costs. See Nat'l Ass'n of Counties Amicus Br. 3. If respondents are unhappy with the district court's resolution of this question, it can always appeal to the Fifth Circuit in the ordinary course.

may have ultimately disagreed, but it did so in a published opinion—with an analysis reflecting that the issue was hardly one-sided. Respondents cannot seriously maintain that petitioner ought to have abandoned the class's judgment for unpaid taxes in this posture—or that any responsible litigant would have pursued that course.

Respondents also blame petitioner for accepting *respondents' own proposal* to supersede the judgment with a bond. Br. 4, 10 (admitting respondents "acted quickly in securing supersedeas bonds" and "wanted petitioner's agreement to respondents' motion for bond approval"). Yet respondents made no apparent attempt to pursue less-expensive forms of security; they did not ask the district court for permission to waive the bond requirement (which that court may well have accepted); and they put the burden on petitioner for failing to suggest the very alternatives that respondents themselves neglected to explore. Where one side was in every position to avoid the high cost of a bond, it is highly obvious that the other side should automatically be on the hook for the full expense—especially in public-interest litigation pursued to achieve important policy objectives.

Respondents do not explain why petitioner alone should bear the full cost of the long delay in district court (while that court considered respondents' unsuccessful post-judgment filings). And while they insist that they have a better understanding of petitioner's fee agreement with its own counsel, suffice it to say that there are two sides to that issue, and the present cost award runs directly against petitioner itself—not its counsel. Compare, *e.g.*, Resp. Br. 5, 9 (suggesting that "petitioner's contingent-fee attorneys—not the class representative—are contractually obligated to pay costs"), with J.A. 91-92 (describing obligations for costs *incurred by petitioner's*

counsel, not costs incurred by the opposing party and awarded during litigation).

These are only some of the case-specific questions necessary to assess the propriety of a full cost award. The district court is in the best position to explore these issues; an appellate court (acting without any definitive record) is not.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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