No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Fed. R. App. P. 39(e), four categories of "costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule." In a 1991 two-judge, unpublished disposition, the Fifth Circuit construed an outdated version of Rule 39(e) to hold that "district court[s] ha[ve] no discretion whether, when, to what extent, or to which party to award costs" under Rule 39(e), making a full award of costs "mandatory." *In re Sioux Ltd., Sec. Litig.*, No. 87-6167, 1991 WL 182578, at *1 (5th Cir. Mar. 4, 1991). Every other circuit confronting the question (both before and after Rule 39(e)'s 1998 amendment) has held the opposite: "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). Despite recognizing that "most other circuits" have adopted the "contrary position," the panel below held it was bound by its earlier precedent; the full Fifth Circuit subsequently denied rehearing en banc (over the votes of six dissenting judges), entrenching an acknowledged circuit conflict.

In so holding, the Fifth Circuit affirmed a $2 million cost award against San Antonio, despite the district court's finding of "persuasive" reasons to deny or reduce that award. This case is thus an ideal vehicle for resolving a clear, intractable, and long-standing split over the proper meaning of Rule 39(e)—as it is routinely applied to the most significant portion of a cost award following a successful appeal.

The question presented is:

Whether, as the Fifth Circuit alone has held, district courts "lack[] discretion to deny or reduce" appellate costs deemed "taxable" in district court under Fed. R. App. P. 39(e).

PARTIES TO THE PROCEEDING BELOW

Petitioner is the City of San Antonio, Texas, who served as class representative for a class of 173 Texas municipalities.

Respondents are Hotels.com, L.P.; Hotwire, Inc.; Trip Network, Inc., doing business as CheapTickets.com; Expedia, Inc.; Internetwork Publishing Corporation, doing business as Lodging.com; Orbitz, LLC.; priceline.com, Inc.; Site59.com, LLC.; Travelocity.com, L.P.; Travelweb, LLC.; and TravelNow.com, Inc.

RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

City of San Antonio, Texas v. *Hotels.com, L.P., et al.*, Civ. No. 06-381 (Apr. 11, 2016) (amended final judgment)

City of San Antonio, Texas v. *Hotels.com, L.P., et al.*, Civ. No. 06-381 (Mar. 26, 2018) (second amended final judgment on remand from the Fifth Circuit)

City of San Antonio, Texas v. *Hotels.com, L.P., et al.*, Civ. No. 06-381 (June 26, 2019) (order awarding costs and approved bill of costs)

United States Court of Appeals (5th Cir.):

City of San Antonio, Texas v. *Hotels.com, L.P., et al.*, No. 16-50479 (Nov. 29, 2017) (merits appeal)

City of San Antonio, Texas v. *Hotels.com, L.P., et al.*, No. 16-50479 (Feb. 14, 2018) (approved bill of costs)

City of San Antonio, Texas v. *Hotels.com, L.P., et al.*, No. 19-50701 (May 11, 2020) (costs appeal)

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The City of San Antonio, Texas, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 959 F.3d 159. The order of the district court regarding costs (App., *infra*, 15a-22a) and the court's approved bill of costs (App., *infra*, 23a-25a) are unreported. The judgment of the court of appeals in the prior merits appeal (App., *infra*, 26a-27a) and the court's approved bill of costs (App., *infra*, 28a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2020. A petition for rehearing was denied on July 6, 2020 (App., *infra*, 31a-32a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

Rule 39 of the Federal Rules of Appellate Procedure provides in pertinent part:

> (a) AGAINST WHOM ASSESSED. The following rules apply unless the law provides or the court orders otherwise:
>
> (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
>
> (2) if a judgment is affirmed, costs are taxed against the appellant;
>
> (3) if a judgment is reversed, costs are taxed against the appellee;
>
> (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.
>
> * * * * *
>
> (e) COSTS ON APPEAL TAXABLE IN THE DISTRICT COURT. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:
>
> (1) the preparation and transmission of the record;
>
> (2) the reporter's transcript, if needed to determine the appeal;
>
> (3) premiums paid for a bond or other security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Before its amendment in 1998, Rule 39(e) of the Federal Rules of Appellate Procedure provided in full:

> Costs incurred in the preparation and transmission of the record, the costs of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

INTRODUCTION

This case presents an important and recurring question under the Federal Rules that has squarely divided the lower courts. According to the Fifth Circuit, district courts have "'no discretion'" under Fed. R. App. P. 39(e) to reduce or deny a cost award following a successful appeal, even where, as here, there are "'persuasive'" reasons for a reduction. App., *infra*, 10a-12a (citing *In re Sioux Ltd., Sec. Litig.*, No. 87-6167, 1991 WL 182578 (5th Cir. Mar. 4, 1991)). In so holding, the Fifth Circuit rejected the "contrary" position applied by every other circuit to have confronted the question. In those circuits, unlike the Fifth Circuit, district courts have "broad discretion to deny costs to a successful [party] under Rule 39(e)." *Republic Tobacco Co.* v. *N. Atl. Trading Co.*, 481 F.3d 442, 449 (7th Cir. 2007). While the panel refused to say it agreed with "*Sioux*'s interpretation of Rule 39(e)," it declared itself bound by that prior precedent (App., *infra*, 14a)—and the full court subsequently denied rehearing by a 10-6 vote, cementing the Fifth Circuit's position.

This case readily satisfies the Court's traditional criteria for granting review. The issue implicates an

acknowledged circuit conflict, with the Fifth Circuit standing on the wrong side of a lopsided split. The Fifth Circuit's earlier decision in *Sioux* was a two-judge, unpublished disposition; its construction was based on an *outdated* version of Rule 39(e), and is now irreconcilable with the operative Rule's plain text. It involves an issue that arises constantly in federal courts (potentially every time a bonded judgment is reversed on appeal), and affects what is often the most significant component of any cost award. And by stripping away any discretion in district court, the Fifth Circuit will effectively shift disputes over Rule 39(e) costs to the appellate level—thus frustrating the Rule's express allocation of responsibility between district and appellate tribunals.

This case is also a perfect vehicle for resolving the conflict. The question presented was expressly decided by each court below, and it was the sole basis of each court's decision. The costs at issue are substantial, and the district court found "persuasive" reasons for denying or reducing those costs—but declared itself "constrained" by "existing [Fifth Circuit] precedent." App., *infra*, 16a. The question presented was outcome-determinative, and there are no conceivable obstacles to deciding it here.

This pure legal question is important and recurring, and its correct disposition is essential to Rule 39's proper operation. The Fifth Circuit has made its position clear, and other circuits have maintained their contrary position for decades. The arguments have been fully vetted and further percolation would prove pointless—the conflict is obvious, acknowledged, and entrenched; this split will not dissipate on its own.

Because this case presents an ideal vehicle for resolving this significant issue of federal law, the petition should be granted.

STATEMENT

1. San Antonio (petitioner here) brought this class action on behalf of 173 Texas municipalities against a group of online-travel companies (respondents here) for failing to pay hotel-occupancy taxes. App., *infra*, 2a. The dispute was both straightforward and significant: respondents would systematically collect and remit hotel-occupancy taxes based on the wholesale rate negotiated with local hotels, rather than the actual retail price paid for each room by an end-consumer. *Ibid.* The failure to calculate occupancy taxes based on the retail charge for the room cost Texas cities millions in annual revenue. After extensive proceedings (including a month-long trial and unanimous 12-person verdict), the district court ruled for the cities. *Id.* at 2a-3a.

While these proceedings were ongoing, however, Houston (which had opted out of the class) was litigating its own case in state court. After losing in the trial court, Houston lost again on appeal before a three-judge panel of an intermediate state appellate court. App., *infra*, 3a. Respondents moved the district court to amend its decision in light of the conflicting state-court ruling, but the district court denied the motion and entered judgment for the cities—awarding $55,146,489 in unpaid taxes, interest, and penalties. *Ibid.*

Respondents voluntarily posted bonds to stay that judgment; they never asked to waive the bond requirement, and made no attempt to propose alternative, less-expensive forms of security. C.A. ROA 15948; see also App., *infra*, 3a. The district court accepted the bonds and stayed the judgment pending further proceedings. C.A. ROA 15955-15956; see also App., *infra*, 3a.

The case then languished in district court. Respondents filed post-judgment motions in May 2013, which re-

mained pending (without explanation) for years. App., *infra*, 3a-4a. The bond premiums were running the entire time, and respondents twice increased the bonded amounts to reflect accruals on the judgment during the extended delay. In January 2016, the district court finally denied respondents' remaining motions, and entered an amended final judgment in April 2016 for $84,123,089. *Ibid*. Respondents appealed to the Fifth Circuit. *Id.* at 4a.

2. a. The court of appeals reversed. *City of San Antonio* v. *Hotels.com, L.P.*, 876 F.3d 717, 718 (5th Cir. 2017) (*San Antonio I*). The panel acknowledged that the district court had rejected the intermediate state appellate ruling as "specific to the Houston ordinance" and at odds with "the larger evidentiary record in this class action." *Id.* at 721. But the panel ultimately disagreed with the district court: it reasoned that the Houston ordinance "is similar to the ordinances [the] cities use to support their claims," and it thus felt bound to follow the intermediate state court decision. *Id.* at 723. And "[a]lthough the Texas Supreme Court ha[d] not addressed the issue at hand," the panel offered reasons the Texas Supreme Court might reach the same conclusion—while still acknowledging that those reasons were hotly contested by the cities. *Id.* at 723-724. In the end, the panel declared the intermediate ruling "'control[ling]'" and thus overturned the district court—"'vacat[ing]' the district court's judgment and 'render[ing]' judgment" for respondents. App., *infra*, 4a (summarizing the decision); see also *San Antonio I*, 876 F.3d at 724.

In a separate judgment accompanying the Fifth Circuit's opinion, the panel "further ordered that [petitioner] pay to [respondents] the costs on appeal to be taxed by the Clerk of this Court." App., *infra*, 27a.

b. Respondents then sought costs in the Fifth Circuit under Fed. R. App. P. 39(d). App., *infra*, 28a-30a. Their

request was specifically limited to the docketing fee for the appeal and appellate copying costs "in the amount of $905.60"; respondents did not seek additional costs under Rule 39(e) (including their bond premiums) or request permission to seek any further relief under Rule 39(e) on remand. *Id.* at 4a; see also *id.* at 29a-30a. Their limited request was unopposed, and it was approved by the clerk. *Id.* at 30a. The Fifth Circuit's formal mandate instructed petitioner to pay those costs as "taxed by the Clerk of this Court." *Id.* at 4a.

3. Back on remand, respondents sought to vastly increase their cost award. App., *infra*, 23a-25a. Respondents lodged a proposed order that "'costs shall be taxed against the Cities in favor of [respondents] pursuant to 28 U.S.C. § 1920, Fed. R. Civ. P. 54, and Fed. R. App. P. 39," and filed a bill of costs for $2,353,294.58; the bulk of that request ($2,008,359.00) reflected interest and premiums for "'supersedeas bonds'" under Fed. R. App. P. 39(e)(3). *Id.* at 4a-5a. Petitioner opposed respondents' request, outlining multiple grounds for reducing or denying the bond-related expense. *Id.* at 5a.

The district court rejected petitioner's objections. App., *infra*, 16a-18a, 22a. It recognized petitioner's "'persuasive arguments'" for reducing or denying the Rule 39(e) bond-related costs, but concluded it was "constrained" by the Fifth Circuit's "existing precedent." *Id.* at 16a (citing *In re Sioux Ltd., Sec. Litig.*, No. 87-6167, 1991 WL 182578, at *1 (5th Cir. Mar. 4, 1991)). As the district court explained, "Fifth Circuit authority seems to make clear that the district court 'has no discretion regarding whether, when, to what extent, or to which party to award costs of the appeal.'" *Id.* at 17a. Because it lacked "discretion" under *Sioux*, it declared itself "unable to further reduce the amount of bond premiums being sought." *Id.* at 17a-18a; see also *id.* at 5a ("The district court noted

that San Antonio made 'some persuasive arguments,' but, relying on [*Sioux*], the court concluded that it lacked discretion to reduce taxation of the bond premiums."). The court accordingly entered a bill of costs taxing $2,226,724.37 against petitioner. *Id.* at 22a, 25a.[1]

4. a. The court of appeals affirmed. App., *infra*, 1a-14a.

The panel initially explained that respondents were entitled to costs as the prevailing party on the prior appeal, and confirmed that respondents were not obligated to seek their bond-related costs directly in the Fifth Circuit: respondents' "failure to request Rule 39(e) appeal costs in *this* court is of no moment," because "[t]he proper place to seek Rule 39(e) appeal costs is in the district court." App., *infra*, 9a-10a. The panel thus concluded "the district court was empowered to grant [respondents'] request for appeal bond costs." *Id.* at 10a.[2]

As relevant here, however, the panel then rejected petitioner's argument that the district court (as the tribunal "empowered" to decide any Rule 39(e) issues) was vested with the normal discretion to deny or reduce Rule 39(e) costs. App., *infra*, 10a-14a. The panel candidly acknowledged that "most other circuits" have "held—or at least implied—that a district court retains discretion to deny or reduce a Rule 39(e) award." *Id.* at 10a-11a (citing, "*e.g.*,"

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[1] Petitioner has already paid $287,047 to satisfy all of respondents' awarded costs incurred in district court; petitioner solely contests the bond-related costs under Rule 39(e)(3).

[2] In so holding, the panel rejected petitioner's argument that the plain text of the Fifth Circuit's prior mandate restricted any costs to those "taxed by the Clerk of *this* Court" (emphasis added). App., *infra*, 9a (petitioner "construes the mandate language as limiting appellate costs to the docketing and printing costs taxable in this court"; "[n]othing in our mandate in the first appeal purports to preclude or otherwise limit an award of taxable Rule 39(e) appeal costs in the district court"). Petitioner is not renewing that argument before this Court.

decisions from the Seventh, Eleventh, and Fourth Circuits). But "[t]he problem for [petitioner]," the panel explained, "is that our circuit adopted the contrary position almost three decades ago in *Sioux*, which remains binding precedent." *Id.* at 11a.

As the panel found, that existing precedent foreclosed the argument that the district court "applied the wrong legal standard" in "thinking it lacked discretion to deny or reduce the [Rule 39(e)] award." App., *infra*, 10a, 12a. Its earlier decision in *Sioux*, the panel explained, declared Rule 39(e) "'mandatory'": A "'district court ha[s] no discretion whether, when, to what extent, or to which party to award costs of the appeal' and therefore err[s] by denying appellant's application for appeal bond premiums under Rule 39(e)." *Id.* at 12a (quoting *Sioux*, 1991 WL 182578, at *1).

The panel further rejected petitioner's argument that "*Sioux* is no longer good law" because it turned expressly on "language from an old version of Rule 39(e), which was amended in 1998." App., *infra*, 12a. While "[t]he old version stated appellate costs '*shall be taxed* in the district court,'" the panel recounted, "the current version states appellate costs '*are taxable* in the district court.'" *Id.* at 12a-13a. Yet the panel ultimately found the change irrelevant: because it deemed the 1998 change "no[t] substantive" in nature, it followed, "at most," that "*Sioux*'s treatment of Rule 39(e) was just as wrong *before* the amendment as it was *after*." *Id.* at 13a.

In sum, the panel concluded, "[w]e express no view on the merits of *Sioux*'s interpretation of Rule 39(e)." App., *infra*, 14a. Instead, the panel "h[e]ld only that * * * *Sioux* remains binding precedent," and "[t]herefore[] the district court correctly recognized that it lacked discretion to deny or reduce the appeal bond costs" under Rule 39(e). *Ibid.*; see also *id.* at 13a ("even assuming *arguendo* that

Sioux was wrong from the start as a matter of interpretation, its treatment of Rule 39 nevertheless remains controlling law").

b. Petitioner filed a petition for rehearing en banc, arguing that the court's precedent conflicted with the decisions of multiple circuits. The full court of appeals denied rehearing over a six-vote dissent, refusing to reconsider its outlier interpretation of Rule 39(e). App., *infra*, 32a (reporting the 10-6 vote).

REASONS FOR GRANTING THE PETITION

A. The Decision Below Cements A Square, Recognized Conflict Over An Important Question Under The Federal Rules

The Fifth Circuit's decision reaffirms a square conflict over whether district courts have discretion to deny or reduce a cost award under Fed. R. App. P. 39(e). App., *infra*, 10a-11a (so conceding the conflict). Every other circuit confronting the question has recognized the district court's traditional authority to deny or reduce Rule 39(e) costs. The Fifth Circuit's "contrary" rule is grounded in a 1991 two-judge, unpublished decision premised on an outdated version of Rule 39(e)—including a textual holding rooted in language that no longer exists. App., *infra*, 12a-13a. The Fifth Circuit's outlier position is wrong, and it now stands alone on the wrong side of a lopsided split. The circuit conflict is both open and entrenched, and it should be resolved by this Court.

1. The panel's decision cements a clear, undeniable conflict between the Fifth Circuit and multiple courts of appeals. App., *infra*, 10a-11a (so acknowledging).

a. The Fifth Circuit's position, for example, directly conflicts with established law in the Seventh Circuit. In *Guse* v. *J. C. Penney Co.*, 570 F.2d 679 (7th Cir. 1978), the Seventh Circuit, as here, confronted a dispute over the

"assessment of costs against the unsuccessful parties on appeal." 570 F.2d at 680. Unlike the Fifth Circuit, the Seventh Circuit construed Rule 39(e) to grant district courts "discretionary authority" to "allow[] something less than all of the costs" and to "determin[e] * * * the amount of costs to be allowed." *Id.* at 681. As the court explained, many challenges to Rule 39(e) costs "are factual in nature," and appellate courts are "scarcely in a position either to determine what are the true facts or to evaluate them"; district courts, by contrast, are "in a better position" to determine the costs "taxed against the losing party in that court." *Ibid.* The Seventh Circuit accordingly held that "the district court shall, in its discretion, determine the allowance of any costs taxable in the district court under Rule 39(e)." *Id.* at 681-682; see also *id.* at 681 (recounting decisions "that might be read as granting discretionary authority to the district court to disallow some or all of the costs which would ordinarily be taxable notwithstanding a reversal judgment in the appellate court which as here awards 'costs on appeal'").

The Seventh Circuit has since followed that holding for decades: "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. That holding is irreconcilable with the Fifth Circuit's entrenched position. Compare App., *infra*, 12a ("'district court[s] ha[ve] no discretion whether, when, to what extent, or to which party to award costs of the appeal'") (quoting *Sioux*, *supra*), with, *e.g.*, *Republic Tobacco*, 481 F.3d at 449 ("district court[s] ha[ve] broad discretion to deny costs to a successful appellee under Rule 39(e)"); *Jentz* v. *ConAgra Foods, Inc.*, No. 10-0474, 2015 WL 2330232, at *2 (S.D. Ill. May 14, 2015) (district courts "have discretion 'not to award a party costs under' Rule

39(e), despite the appellate court's * * * directive that 'costs on appeal' were awarded to a prevailing appellant," citing *Guse* and *Republic Tobacco*); *Tribble* v. *Evangelides*, No. 08-2533, 2012 WL 2905614, at *2 (N.D. Ill. July 16, 2012) (same).

b. Likewise, the Fifth Circuit's position is contrary to settled law in the Eleventh Circuit. In *Campbell* v. *Rainbow City*, 209 F. App'x 873 (11th Cir. 2006) (per curiam), the court confronted the identical question on materially indistinguishable facts: the defendant "obtained a supersedeas bond" to stay a multimillion-dollar judgment; "[t]he appeal was successful, and the judgment was reversed"; the defendant "filed a bill of costs in the appellate court, which was granted"; "[t]hat bill did not deal with any of the costs 'taxable in the district court' under Fed. R. App. P. 39(e)"; and the parties later disputed the defendant's request in district court "to tax [the plaintiffs] with the cost of the premiums on the supersedeas bond." 209 F. App'x at 874.

Yet the Eleventh Circuit adopted the opposite position, rejecting that district courts lack "discretion to decline to tax the bond premiums." 209 F. App'x at 874-875; contra App., *infra*, 11a-12a. First and foremost, the court explained, a contrary view is inconsistent with Rule 39(e)'s plain text: "The language of 39(e) is permissive, not mandatory. It provides that the enumerated costs '*are taxable*,' not that they '*must be taxed*' * * * ." 209 F. App'x at 875 (emphases added). District courts thus retain "discretion under [Rule] 39(e) to decline to tax the enumerated costs." *Ibid.*

Moreover, the Eleventh Circuit continued, this plain-text "reading of [Rule] 39(e) is reinforced" by the district court's traditional "discretion" in this context. 209 F. App'x at 875 (citing, *e.g.*, Fed. R. Civ. P. 54(d)). Just as district courts "generally" have "discretion to award or

not award costs to prevailing parties," the court saw "no reason to adopt a different interpretation of the Rule 39(e) costs 'taxable' in the district court." *Ibid.*

The Eleventh Circuit finally noted that "other Courts of Appeals agree with our interpretation of Rule 39." 209 F. App'x at 875. It cited "seven courts" that, unlike the Fifth Circuit, did "not h[o]ld that the district court must automatically tax the Rule 39(e) costs to the losing party," but instead "reviewed a district court's decisions under [Rule] 39(e) for abuse of discretion." *Ibid.* (citing cases from the First, Second, Fourth, Sixth, Eighth, Ninth, and Federal Circuits). The Fifth Circuit alone, by contrast, is out of step with that overwhelming consensus.

When the Eleventh Circuit applied its construction of Rule 39(e) to the facts, the court reached the polar opposite of the decision entered in this case: the Eleventh Circuit affirmed the district court's refusal to tax bond premiums because it found a supersedeas bond was never "required." 209 F. App'x at 876. As the Eleventh Circuit explained, the defendant "procured the bond on its own, without being required to do so by the district court," and as an entity "with ample assets, insurance, and little likelihood of defaulting on the judgment, the court likely would have waived the bond requirement if it had been asked." *Ibid.*; compare, *e.g.*, C.A. Opening Br. 29-30 (asserting the identical argument as a basis for denying or reducing Rule 39(e) costs). The outcome here would have come out exactly the other way had this case arisen in the Eleventh Circuit.

c. Put simply, the Fifth Circuit's understanding of Rule 39(e)—that its "mandatory" directive eliminates a district court's traditional "discretion"—conflicts with the contrary position of every court of appeals that has confronted the question. Unlike the Fifth Circuit, these courts 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 Corp.* v. *OSI Sys., Inc.*, 607 F.3d 24, 30 (2d Cir. 2010); see also, *e.g.*, *Standard Concrete Prods. Inc.* v. *Gen. Truck Drivers Union Local 952*, 175 F. App'x 932, 933 (9th Cir. 2006) ("the district court has discretion in awarding [costs] under Rule 39(e)"); *Emmenegger* v. *Bull Moose Tube Co.*, 324 F.3d 616, 627 (8th Cir. 2003) (recognizing the district court's "discretion to shift the cost of the supersedeas bond"); *In re Bonds Distrib. Co.*, 73 F. App'x 605, 607 (4th Cir. 2003) (reviewing an order denying Rule 39(e) bond costs for abuse of discretion, and remanding for the district court to exercise that discretion); *Berthelsen* v. *Kane*, 907 F.2d 617, 623 (6th Cir. 1990) ("Pursuant to the provisions of Rule 39(e), the district court is free to determine whether the premium paid on the supersedeas bond should be taxed as costs after there has been a determination on the merits of this case."); *Johnson* v. *Pac. Lighting Land Co.*, 878 F.2d 297, 298 (9th Cir. 1989) (acknowledging the district court's Rule 39(e) discretion and reviewing for abuse of discretion); *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 806 F.2d 304, 305 (1st Cir. 1986) (per curiam) (same); *Dana Corp.* v. *IPC Ltd. P'ship*, 925 F.2d 1480, at *3 (Fed. Cir. 1991) (same); see also, *e.g.*, *Lerman* v. *Flynt Distrib. Co.*, 789 F.2d 164, 166 (2d Cir. 1986) (reviewing a Rule 39(e) cost award for abuse of discretion).

2. While the panel below quibbled with the split's depth (App., *infra*, 11a n.2), it openly acknowledged that *a circuit conflict exists*, with the Fifth Circuit standing by itself. *Id.* at 10a-11a (candidly recognizing "contrary" law in "most other circuits"). The only question is how *many* circuits have rejected the Fifth Circuit's (outlier) position. While an even deeper split would make the Fifth Circuit's position even less tenable, the open conflict is sufficient to

warrant review and restore Rule 39's uniform national interpretation.

Moreover, while the panel (in a footnote) attempted to "distinguish[]" certain cases (while still conceding the overall split),[3] it is undisputed that the Fifth Circuit alone declares Rule 39(e) "'mandatory'" and forbids the exercise of discretion. App., *infra*, 10a-11a & n.2, 12a. Every other circuit confronting the question (in *any* context) has held the opposite and uniformly found that discretion exists. See, *e.g.*, Part A.1, *supra*; *Ericsson Inc.* v. *TCL Comm'cn 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"). These cases simply cannot be squared with the Fifth Circuit's view that district courts have "'no discretion whether, when, to what extent, or to which party to award costs of the appeal.'" App. *infra*, 12a; contra, *e.g.*, *Gilmore* v. *Lockard*, No. 12-925, 2020 WL 1974205, at *2 (E.D. Cal. Apr. 24, 2020) ("It is well-recognized that district courts have broad discretion to award costs under FRAP 39(e).") (citing multiple circuits).[4]

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[3] Conspicuously, none of the cases in that footnote (App., *infra*, 11a n.2) even hinted that a district court *ordinarily* lacks discretion under Rule 39(e); if those decisions shared the Fifth Circuit's wooden view, they would read very differently.

[4] Accord, *e.g.*, *Hollowell* v. *Kaiser Found. Health Plan of the Nw.*, No. 12-2128, 2017 WL 4227951, at *1 (D. Or. Aug. 31, 2017) (district court's "discretion" in taxing costs "applies equally to costs sought under Rule 39 or Rule 54") (citing *Johnson*, 878 F.2d at 298); *Great Lakes Gas Transmission Ltd. P'ship* v. *Essar Steel Minn., LLC*, No. 09-3037, 2017 WL 2303502, at *3 (D. Minn. May 26, 2017) ("district courts have the discretion under Rule 39(e) to deny such costs") (citing *Republic Tobacco*, 481 F.3d at 449); *Plaintiffs' S'holders Corp.* v. *S. Farm Bureau Life Ins. Co.*, No. 06-637, 2013 WL 12156246, at *2

* * *

The conflict over the interpretation of Rule 39(e) is indisputable and entrenched. The Fifth Circuit expressly acknowledged the split and adhered to its outlier position; multiple courts of appeals (and countless lower courts) have endorsed the opposite position, some now for decades. The Fifth Circuit declared that its holding was dictated by "binding" circuit precedent, and it refused to reconsider its views en banc (over a six-judge dissent). Not a single circuit accepts the Fifth Circuit's (outlier) understanding of Rule 39(e), and multiple circuits squarely reject it—as the panel correctly conceded below. Further percolation would prove pointless, and there is no hope of this square conflict resolving itself. Until this Court intervenes, the meaning of an important Federal Rule will turn on the happenstance of where a dispute arises. Further review is plainly warranted.

B. The Proper Construction Of Rule 39(e) Is An Important Question That Warrants Review In This Case

1. The question presented is of great legal and practical importance. It arises potentially any time a bonded judgment is reversed on appeal, and Rule 39(e) often implicates the most significant part of a cost award. See Fed.

(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*, 209 F. App'x at 875-876); *Muniauction, Inc.* v. *Thomson Corp.*, No. 01-1003, 2009 WL 437883, at *5 (W.D. Pa. Feb. 21, 2009) ("Rule 39(e)] costs are not mandatory"); *Milligan-Hitt* v. *Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2*, No. 5-17, 2009 WL 10696535, at *3 (D. Wy. Jan. 23, 2009) ("A district court also has discretion in awarding costs under Federal Rule of Appellate Procedure 39(e)."); *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)).

R. App. P. 39(e)(1)-(3) (designating as eligible costs "the preparation and transmission of the record," "the reporter's transcript, if needed to determine the appeal," and "premiums paid for a bond or other security to preserve rights pending appeal"). Bond premiums (as here) can run into the millions, and the cost of preparing the record and transcripts (especially after extended trials) can quickly reach six figures.[5] Those amounts significantly affect most parties and can even exceed the amounts-in-controversy of many suits. *E.g.*, 28 U.S.C. 1332 (providing diversity jurisdiction for matters over $75,000). In the class context—where stakes are routinely high and records are often substantial—these issues are particularly significant.

Both Congress and the Rules Committee have generally vested courts with discretion to award costs, taking into account a multitude of case-specific factors affecting the appropriateness of an award. See 28 U.S.C. 1920 (providing that "[a] judge or clerk" "*may* tax as costs" certain expenses) (emphasis added); Fed. R. Civ. P. 54(d)(1)

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[5] See, *e.g.*, *L-3 Comm'cns*, 607 F.3d at 26 (Rule 39(e) costs of "approximately $1.75 million" to supersede the judgment); *Exxon Valdez* v. *Exxon Mobil Corp.*, 568 F.3d 1077, 1081 (9th Cir. 2009) (total bond costs "approach[ing] $70 million"); *Emmenegger*, 324 F.3d at 626 ($143,432.00 in bond premiums); *Dana Corp.*, 925 F.2d 1480, at *1 ($59,607 in bond-related costs); *Ericsson*, 2020 WL 3469220, at *2 ($2,248,938.48 in bond premiums); *Jentz*, 2015 WL 2330232, at *1 (party sought $987,062.00 in bond-related costs); *Eureka Water Co.* v. *Nestle Waters N. Am. Inc.*, No. 07-988, 2013 WL 2297097, at *1 (W.D. Okla. May 24, 2013) ("appellate filing fees, transcript expenses, preparation and transmission of record costs, and * * * supersedeas bond premiums[] in the total amount of $149,299.53, pursuant to Rule 39(e)"); *Hynix Semiconductor Inc.* v. *Rambus Inc.*, No. 00-20905, 2012 WL 95417, at *1 (N.D. Cal. Jan. 11, 2012) (assessing Rule 39(e) "appellate costs in excess of $16 million," the "bulk" for a "supersedeas bond").

(allowing costs "to the prevailing party" unless "a federal statute, these rules, or a *court order provides otherwise*") (emphasis added). A decision forbidding the normal exercise of discretion over the most significant component of a Rule 39 award presents a serious question warranting further review. Cf., *e.g.*, *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 562, 564 & n.1 (2012) (granting review to decide whether "document translation" is included in costs).

The sheer number of reported decisions also confirms the issue is both important and recurring.[6] Costs awards are often meaningful to the parties but may not result in extended collateral litigation; that makes it all the more essential to set clear, uniform ground rules at the outset. And the very fact that these issues still frequently percolate to the appellate level reaffirms their legal and practical importance. The court below would have exercised discretion had these proceedings occurred in Illinois, Florida, California, Virginia, Ohio, Massachusetts, Minnesota, or New York, but it instead declared the award mandatory because this case arose in Texas. App., *infra*, 17a ("the district court 'has no discretion'"). The availability of costs under the Federal Rules should not turn on geography.

This Court regularly grants review to resolve conflicts over the meaning of the Federal Rules[7]—including in

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[6] The reported decisions vastly underrepresent the constant litigation over these questions, as cost disputes are routinely decided in unpublished decisions (see, *e.g.*, this case).

[7] See, *e.g.*, *Nutraceutical Corp.* v. *Lambert*, 139 S. Ct. 710, 713-714 (2019); *Hall* v. *Hall*, 138 S. Ct. 1118, 1122 (2018); *Animal Sci. Prods., Inc.* v. *Hebei Welcome Pharm. Co., Ltd.*, 138 S. Ct. 1865, 1872 (2018); *Warger* v. *Shauers*, 574 U.S. 40, 42, 44 (2014); *Henderson* v. *United States*, 568 U.S. 266, 270 (2013); *Irizarry* v. *United States*, 553 U.S. 708, 713 (2008); see also *Davis* v. *United States*, 140 S. Ct. 1060, 1061-

cases involving the availability of costs (*e.g.*, *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 373-374, 376 (2013); *Taniguchi*, 566 U.S. at 562, 564 & n.1) and cases involving the scope of judicial discretion under various Rules (*e.g.*, *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1903 (2018); *Chen* v. *Mayor & City Council of Baltimore*, 574 U.S. 988 (2014) (mem.)). The significant issue here has been fully ventilated, and there is no realistic prospect that the Fifth Circuit (or the contrary majority consensus) will back down. The interpretation of Rule 39(e) will continue to vary nationwide until this Court resolves the issue.

2. This case is also an ideal vehicle for resolving this important question. The amounts at issue are substantial, and the case was litigated by government entities pursuing matters of core public importance—allegations of unpaid municipal taxes. Petitioner was saddled with the full brunt of bond premiums securing a judgment for 172 other cities, despite its individual stake representing only a fraction of the total award. App., *infra*, 16a-17a. Respondents voluntarily sought a full bond without exploring less-expensive alternatives or seeking the court's permission to stay enforcement with less or no security (Fed. R. Civ. P. 62(b); C.A. Opening Br. 29-30)—a fair prospect given respondents' net worth and the judgment's (comparatively) minor effect on their bottom line. *Campbell*, 209 F. App'x at 876 (refusing to award bond costs for similar reasons). And the bonds ran for an extended period through absolutely no fault of petitioner: respondents' post-judgment motions were left pending for over *2.5 years* while the premiums steadily accrued. App., *infra*, 3a-4a. When neither party causes such a delay, it is hardly

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1062 (2020) (summarily reversing the Fifth Circuit for its "outlier" understanding of Fed. R. Crim. P. 52(b)).

obvious that one side alone should bear the entire cost of respondents' (unsuccessful) post-judgment filings.

The issue here is outcome-determinative. Petitioner proffered a compelling basis for reducing or denying costs that the district court found "persuasive." App., *infra*, 5a, 16a. Yet the court was powerless to act because it was "constrained" by the Fifth Circuit's "existing precedent"—a two-judge, unpublished decision construing a supplanted version of Rule 39. App., *infra*, 16a-18a. And the Fifth Circuit affirmed on that ground alone: it did not doubt that petitioner had a legitimate basis for attacking the cost award, but concluded, categorically, that the award was "'mandatory'" and the district court indeed "lacked discretion to deny or reduce" it. App., *infra*, 12a, 14a. The Fifth Circuit's outlier "interpretation of Rule 39(e)" was dispositive (*id.* at 14a)—and the end result is that "this tremendous cost * * * will be borne by the taxpayers" (*id.* at 16a) without any judicial determination of the reasonableness or propriety of "hold[ing] San Antonio solely responsible for the full bond amounts" (*id.* at 17a).

In short, the dispute turns on a pure question of law; it was squarely raised and resolved at each stage below, and both courts thoroughly addressed the question and treated it as dispositive. The issue is binary: Rule 39(e) either permits discretion or it does not; one view of the legal standard is correct and the other is wrong. The Fifth Circuit acknowledged the circuit conflict and refused to reconsider its position (over the dissenting votes of six judges). Petitioner would have prevailed under the established majority rule (applied in multiple circuits and lower courts nationwide), but instead lost because the case arose in the Fifth Circuit. The stark division over this fundamental legal question drives the decision, and this clean presentation is the perfect backdrop for resolving the entrenched conflict.

C. The Decision Below Is Incorrect

Review is also warranted because the Fifth Circuit's position is wrong. It conflicts with Rule 39(e)'s plain text, frustrates its express design, and is incompatible with bedrock norms involving costs—including the traditional discretion vested in district courts in every analogous context. The Fifth Circuit's wooden views are rooted in a misreading of a supplanted version of Rule 39(e)'s old language—which is likely why the Fifth Circuit stands alone on this issue. Its outlier position is deeply flawed, and further review is warranted to correct the court's mistake.

1. The Fifth Circuit's interpretation of Rule 39(e) is profoundly atextual. The Rule says that certain "costs on appeal *are taxable* in the district court." Fed. R. App. P. 39(e) (emphasis added). To be "taxable" means "capable of being taxed" or "subject to tax." Dictionary.com, *taxable* (Random House Unabridged Dictionary) <https://www.dictionary.com/browse/taxable>. The language is "permissive, not mandatory." *Campbell*, 209 F. App'x at 875. It identifies *eligible* expenses, but does not compel a district court to award anything. The Rule's language thus means what it says: the enumerated costs are "taxable" in district court, and nothing in that plain text eliminates the court's default discretion to reduce or deny those costs. See also Merriam-Webster Online Dictionary, *taxable* ("Legal Definition of *taxable*": "(2): that *may* be properly charged by the court against the plaintiff or defendant in a suit") (emphasis added) <https://www.merriam-webster.com/legal/taxable>. If the Rules Committee intended to impose an inflexible command ("district courts *must* tax"), it assuredly knew how to do it.

The Fifth Circuit in *Sioux* reached the opposite conclusion, but its holding turned on language in an old version of Rule 39(e) that no longer exists. This was the irreducible core of *Sioux*'s (scant) rationale: "Rule 39(e) is

mandatory: 'Costs incurred [on appeal] *shall be taxed* in the district court as costs of the appeal in favor of the party entitled to costs under this rule.'" 1991 WL 182578, at *1 (quoting the pre-1998 version of Rule 39(e)). Yet the Rule's 1998 amendment removed the very phrase that drove *Sioux*'s analysis: "The old version stated appellate costs '*shall be taxed* in the district court' whereas the current version states appellate costs '*are taxable* in the district court.'" App., *infra*, 12a-13a & n.4. That modification eliminates the only plausible textual hook for *Sioux*'s holding—there is no tenable basis now for reading Rule 39(e)'s permissive language as a "mandatory" command. See, *e.g.*, *Warger*, 574 U.S. at 44 (giving federal rules "their plain meaning"); *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980).

Anyhow, *Sioux* was wrong on its own terms. The decision focused on the wrong part of the operative clause: the Rule's point was not to specify that costs "*shall be taxed*," but that costs "shall be taxed *in the district court*." The Rule thus specified *where* those costs would be addressed (in district court, not the appellate court), not that all awards were suddenly "'mandatory.'" Contra *Sioux*, 1991 WL 182578, at *1. The Rules Committee itself made this clear: "The costs described in this subdivision are costs of the appeal, and, as such, are within the undertaking of the appeal bond. They are made *taxable in the district court for general convenience*." Fed. R. App. P. 39(e) advisory committee's notes (1967) (emphasis added).

If the Rules Committee intended to *mandate* those costs, it would not have described the costs as merely "taxable" and focused on *where* they are taxed—let alone

substituted "*shall be taxed*" with a permissive term ("taxable") in a subsequent amendment.[8]

2. The Fifth Circuit's position also frustrates the Rule's express allocation of responsibility between district and appellate courts. A holding eliminating discretion below necessarily shifts all disputes to the appellate level: If only appellate courts can reduce or deny Rule 39(e) costs, all parties will be forced to litigate these issues on appeal—despite the Rule's express commitment of these questions to the district court. *E.g.*, 16AA Wright & Miller, *Federal Practice and Procedure* § 3985.1 (4th ed. Apr. 2020 update).

The Rule assigns its respective roles for a reason. Disputes over costs often generate fact-intensive questions that appellate litigation is ill-suited to handle. District courts are better positioned to develop records and determine "true facts." *Guse*, 570 F.2d at 681; see *Republic Tobacco*, 481 F.3d at 450; *Rawson* v. *Sears, Roebuck & Co.*, 678 F. Supp. 820, 822 (D. Colo. 1988); *Sudouest Import Sales Corp.* v. *Union Carbide Corp.*, 102 F.R.D. 264, 264 (D.P.R. 1984); see also *Moore* v. *CITGO Ref. & Chems. Co.*, 735 F.3d 309, 315 (5th Cir. 2013) (noting the "'wide range of reasons'" courts have "'invoked to justify withholding costs'"). And district courts will often have greater knowledge of the relevant circumstances (including why appeal bonds were required or obtained); there is no reason to bog down the appellate court's docket with fact-bound arguments over discretionary costs. But if the

[8] The panel below stated that the 1998 amendments were not "substantive in nature" (App., *infra*, 13a), but this supports *petitioner's* reading: reinforcing Rule 39(e) with *permissive* language merely confirms that these costs were *never* mandatory. Thus, if anything, "*Sioux*'s treatment of Rule 39(e) was just as wrong *before* the amendment as it was *after*." *Ibid.*

circuit is the only game in town, any party seeking to reduce or deny Rule 39(e) costs will have to press its case on appeal or forfeit the issue entirely. That will inevitably reallocate these questions to appellate courts contrary to Rule 39(e)'s express design. *E.g.*, *L-3 Commc'ns*, 607 F.3d at 30 ("costs under Rule 39(e) are to be taxed in the *district*, not appellate court") (emphasis in original).

3. Finally, the Fifth Circuit's position is inconsistent with the district court's traditional discretion in awarding costs. See, *e.g.*, *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). In analogous areas, district courts routinely exercise discretion in deciding whether prevailing parties are entitled to costs. *E.g.*, 28 U.S.C. 1920; Fed. R. Civ. P. 54(d); see also *Marx*, 568 U.S. at 377. There is no reason the same costs allowed under those provisions are trusted to the district court's discretion but the parallel costs allowed under Rule 39(e) are not. *Campbell*, 209 F. App'x at 875; *Friends of Everglades* v. *S. Fla. Water Mgmt. Dist.*, 865 F. Supp. 2d 1159, 1165 (S.D. Fla. 2011) ("equa[ting]" the "district court's discretion to decline to tax enumerated costs" under Rule 54(d) and Rule 39(e)); see also *Moore* v. *County of Del.*, 586 F.3d 219, 221 (2d Cir. 2009). If the Rules Committee intended to recalibrate the established practice in this area, it surely would have used language far clearer than this.

There is thus little surprise that every other circuit confronting the question has squarely rejected the Fifth Circuit's position, and instead recognized the district court's "broad discretion to deny costs to a successful appellee under Rule 39(e)." *Republic Tobacco*, 481 F.3d at 449. The Fifth Circuit's contrary views are wrong and unsupported, and the full court has now confirmed (by a 10-6 vote) that it will not correct this mistake on its own. The conflict over this important issue will persist until this Court intervenes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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