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.; HOTWIRE, INCORPORATED; TRIP NETWORK, INCORPORATED, DOING BUSINESS AS CHEAPTICKETS.COM; EXPEDIA, INCORPORATED; INTERNETWORK PUBLISHING CORPORATION, DOING BUSINESS AS LODGING.COM; ORBITZ, L.L.C.; PRICELINE.COM, INCORPORATED; SITE59.COM, L.L.C.; TRAVELOCITY.COM, L.P.; TRAVELWEB, L.L.C.; TRAVELNOW.COM, INCORPORATED,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION RESTATED

In 1991, the Fifth Circuit held that a district court lacks discretion to modify costs awarded by the court of appeals. *In re Sioux Ltd., Sec. Litig.*, No. 87-6167, 1991 WL 182578 (5th Cir. Mar. 4, 1991). That holding accords with the text of Fed.R.App.P. 39.

The Fifth Circuit's precedent has been in force for nearly 30 years. During that time Rule 39 was amended several times but the Rules Committee has seen no need to address the alleged circuit split the petitioner claims.

Does a stale circuit split left undisturbed by the Rules Committee—and a question on which the Fifth Circuit's precedent aligns with the text of Fed.R.App.P. 39—merit the Court's resources, particularly where the arguments necessary to address the proper interpretation of Rule 39 were not fully developed below?

RULE 29.6 STATEMENT

Respondents are 11 online travel companies or entities affiliated with online travel companies. Each is listed below along with the parent corporation or any publicly held company that owns 10% or more of the corporation's stock.

1. Expedia, Inc.

   Expedia, Inc. is a Washington corporation, which is wholly owned by Expedia Group, Inc., a publicly held Delaware corporation that has no parent corporation.

   Travelscape, LLC is a Nevada limited liability corporation, which is wholly owned by Expedia, Inc., a Washington corporation.

2. TravelNow.com, Inc. has no parent or publicly held company owning 10% or more of the corporation's stock.

3. Hotels.com, L.P.

   Hotels.com, L.P. is a Texas limited liability partnership, which is wholly owned by Hotels.com GP, LLC, a Texas limited liability corporation, and HRN 99 Holdings, LLC, a New York limited liability corporation. Hotels.com GP, LLC and HRN 99 Holdings, LLC are wholly owned by Expedia, Inc., a Washington corporation.

4. Hotwire, Inc.

   Hotwire, Inc. is a Delaware corporation, which is wholly owned by Expedia, Inc., a Washington corporation.

5. Orbitz, LLC

   Orbitz, LLC is a Delaware limited liability corporation, which is wholly owned by Orbitz, Inc., a Delaware corporation. Orbitz, Inc. is wholly owned by Orbitz Worldwide, LLC, a Delaware limited liability corporation. Orbitz Worldwide, LLC, is wholly owned by Orbitz Worldwide, Inc., a Delaware corporation. Orbitz Worldwide, Inc. is wholly owned by Expedia, Inc., a Washington corporation.[1]

6. Internetwork Publishing Corp. (d/b/a Lodging.com)

   Internetwork Publishing Corp. is wholly owned by Orbitz Worldwide, LLC, a Delaware limited liability corporation. Orbitz Worldwide, LLC, is wholly owned by Orbitz Worldwide, Inc., a Delaware corporation. Orbitz Worldwide, Inc. is wholly owned by Expedia, Inc., a Washington corporation.

7. Trip Network, Inc. (d/b/a CheapTickets.com)

   Trip Network, Inc. is wholly owned by Orbitz Worldwide, LLC, a Delaware limited liability corporation. Orbitz Worldwide, LLC, is wholly owned by Orbitz Worldwide, Inc., a Delaware corporation. Orbitz Worldwide, Inc. is wholly owned by Expedia, Inc., a Washington corporation.

8. Travelocity.com LP (n/k/a TVL LP)[2]

9. Site59.com, LLC has no parent or publicly held company owning 10% or more of the corporation's stock.

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[1] In September 2015, Expedia, Inc. acquired Orbitz Worldwide, Inc., including all of its brands and assets.

[2] In 2015, Expedia, Inc. acquired the brand and assets of Travelocity.com LP.

10. priceline.com Incorporated (n/k/a Booking Holdings Inc.)

    priceline.com LLC, which, effective April 1, 2014, assumed the operations of priceline.com Incorporated as they relate to the merchant model hotel business at issue in this case.

11. Travelweb LLC has no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes

Rules

TABLE OF AUTHORITIES—Continued

Page(s)

Regulations

INTRODUCTION

Petitioner (City of San Antonio) asks this Court to expend its limited and valuable resources to relieve the city of the consequences of its informed and deliberate actions. Petitioner knew that an on-point Texas appellate decision foreclosed the legal arguments it aggressively pursued in federal court in this diversity case seeking the collection of hotel taxes levied by Texas municipalities. Petitioner insisted that defendants-respondents post nearly $70 million in supersedeas bonds to stay enforcement of the checkered federal court judgment petitioner obtained despite clear countervailing Texas precedent. The Fifth Circuit predictably reversed that judgment and rendered judgment for respondents, relying on that Texas precedent. Petitioner knew Fed.R.App.P. 39 awards supersedeas bond premium expenses to successful appellants as recoverable appellate costs. Petitioner also knew that Fifth Circuit precedent left discretion over appellate cost awards in the hands of the court of appeals panel that evaluates the strengths and weaknesses of the appeal it decides. So no great act of prophesy was needed for the city to see, at nearly every turn, that its hyper-aggressive litigation tactics in the face of adverse state precedent would lead the Fifth Circuit to award appellate costs to respondents, including their supersedeas bond premium expenses.

Now, petitioner asks the Court to undo the foreseeable consequences of the city's deliberate choices even though the Rule 10 standards for certiorari are not satisfied. The writ should be denied for six primary reasons.

First, petitioner overstates any circuit split, as the Fifth Circuit recognized. Op. 9 n.2. To the extent there is a split, it is a stale one that has existed for

approximately thirty years without noticeable adverse consequences.

Second, petitioner does not present an exceptional question warranting review. At issue is the interpretation of part of Rule 39 of the Federal Rules of Appellate Procedure—an interpretation the Rules Committee has not seen need to address for thirty years, despite repeated amendments to Rule 39. If any evaluation of the operation of Rule 39 were appropriate, it should be done by the Rules Committee, which can evaluate whether to propose what would amount to a revised, legislative solution.

Third, there are also serious issues of forfeiture that make this case a poor vehicle for any review. Petitioner did not argue to the Fifth Circuit panel, as it does now, that the Fifth Circuit decision addressing discretion to award as costs supersedeas bond premium expenses, *In re Sioux Ltd., Sec. Litig.*, No. 87-6167, 1991 WL 182578 (5th Cir. Mar. 4, 1991), misinterpreted Rule 39(e). Petitioner's arguments then, which they do not renew here, "missed the mark." Op. 11.

Fourth, petitioner's belatedly asserted objections to the *Sioux* decision, and whether it faithfully applied Rule 39, flounder on the fact that Rule 39 unambiguously vests the appellate court with discretion to award all the costs associated with an appeal, under subsection (a), and then provides that certain costs are taxed in the district court, under subsection (e). Fed. Rule App. P. 39(a), (e). But subsection (e) does not vest discretion in the district court to modify the appellate court's award, just as it does not transfer to the district court the appellate court's discretion over appellate costs. Thus, the Fifth Circuit's decision in *In re Sioux* is in line with a plain-text reading of the Rule in both its current and pre-amendment form.

Fifth, even if the Court were to grant the writ and decide in petitioner's favor, the outcome here would not change. There is no proper basis for the district court to exercise discretion to reduce or eliminate the award of supersedeas bond premium costs to the respondents. Petitioner brought this case as a class action and acted as the named class representative. Courts have repeatedly rejected the argument petitioner made against imposing bond expense liabilities on it, namely, that it should only be responsible for a proportional share of respondents' total bond premiums.

Sixth, petitioner mischaracterizes the genesis of the bond premium expenses incurred. Respondents did not voluntarily incur these bond expenses. Petitioner demanded the bonds and joined in the request for court approval of the bond amounts. Then, over the course of the several years leading up to the Fifth Circuit's reversal of the tax liability judgment, petitioner insisted that respondents increase the amount of the supersedeas bonds to account for the passage of time, all while knowing adverse state precedent imperiled the judgment. And while the city laments the alleged plight of local taxpayers, it neglects to inform the Court that it will not be required to pay the appellate costs awarded because the city's contingency fee attorneys agreed to pay those as part of the agreement by which they were hired to handle the case.

In short, respondents did just what Federal Rule of Civil Procedure 62 requires to stay execution of a judgment pending appeal, and they did so at petitioner's insistence. The equities favor respondents, not the petitioner and its attorneys.

The Court should deny review just as the Fifth Circuit denied rehearing en banc and refused to stay

its mandate pending resolution of the city's certiorari petition.

STATEMENT

The City of San Antonio chose to litigate this state law dispute in federal court for four years after a Texas state appellate court decision in a similar case involving the City of Houston foreclosed San Antonio's claims. It pursued the case as a class action on behalf of various Texas municipalities, claiming the defendants-respondents (Online Travel Companies ["OTCs"]) owed Texas hotel occupancy taxes that had not been paid. Similar claims to unpaid taxes were rejected in *City of Houston* v. *Hotels.com, L.P.*, 357 S.W.3d 706 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

Despite the state appellate court decision, the district court entered an amended final judgment against the OTCs in April 2016. In order to avoid execution of that judgment pending appeal, the OTCs were forced to obtain nearly $70 million in supersedes bonds, the first of which were approved by the district court in April 2013 (when the initial final judgment was entered). At that time, the city joined with the OTCs in seeking approval of the supersedeas bonds as sufficient to stay execution under Federal Rule of Civil Procedure 62. The risk to petitioners on appeal was fully apparent at that time: the Texas Supreme Court had already denied discretionary review in the *City of Houston* case.

While the parties awaited a hearing and decision in the Fifth Circuit, the city repeatedly insisted that the OTCs increase the supersedeas bond amounts and pay more premiums in order to do so. ROA.19971-72.

The OTCs prevailed on the merits appeal before the Fifth Circuit, which unanimously vacated the district court judgment and rendered judgment in the OTCs'

favor. See 876 F.3d 717 (5th Cir. 2017). Accordingly, the OTCs filed an unopposed bill of costs in the Fifth Circuit seeking their appellate printing costs pursuant to Fed.R.App.P. 39(d). When the Fifth Circuit's mandate issued, it directed that the OTCs could recover "the costs on appeal to be taxed by the Clerk of this Court." In the district court, the OTCs moved, consistent with the Fifth Circuit's mandate, to amend the final judgment. They proposed a judgment that stated "costs shall be taxed against the Cities in favor of the OTCs pursuant to 28 U.S.C. § 1920, Fed. R. Civ. P. 54, and Fed. R. App. P. 39." ROA.19345. San Antonio did not object, and the district court entered what was the second amended judgment.

When the OTCs then filed their bill of costs in the district court, they included the categories that Rule 39(e) directs are taxable in the district court, including $2,008,359 in supersedeas bond premium expenses. Only then did San Antonio object, asserting: (1) the district court lacked power to tax supersedeas bond costs; and (2) even if the district court had power to tax, San Antonio should owe no more than its pro rata share of those costs based on its share of the class judgment it secured as class representative. The OTCs countered that they followed the instructions in Rule 39 and appropriately filed their bills of costs in the respective trial and appellate courts. They also argued that the district court lacked the discretion to reduce the costs awarded under Rule 39(e) and, alternatively, even if it had discretion in a general sense, the district court could not exercise it to reduce costs to a mere pro rata share of recoverable amounts allocated to the named class representative in a class-certified case.

The district court overruled San Antonio's objections and found it lacked discretion to reduce the costs

under *Sioux*. Costs were taxed against San Antonio as requested in the bill of costs.

San Antonio appealed. The arguments on appeal focused first on which category the case fell into under Rule 39(a), which sets presumptions about the parties entitled to recover costs based on an appeal's outcome. The Fifth Circuit easily concluded that its prior merits decision was a reversal of the district court's judgment, meaning costs were taxable against San Antonio under Rule 39(a).

Second, San Antonio argued that the OTCs could not seek recovery of their supersedeas bond premiums in the district court because they did not ask the Fifth Circuit to award that specific category. The Fifth Circuit disagreed, holding that the district court is the proper place to apply for the costs authorized by Rule 39(e).

Finally, as relevant here, San Antonio argued that the district court erred in deciding it lacked discretion to reduce the costs taxed. Petitioner argued the Fifth Circuit's precedent in *Sioux* was no longer controlling law because it relied (in 1991) on a version of Rule 39(e) that was amended in 1998. The Fifth Circuit disagreed, noting San Antonio "concede[d] that the 1998 amendment was not substantive in nature," Op. 11, and its arguments otherwise "misse[d] the mark." *Ibid.* As for San Antonio's assertion that some circuits have granted district courts discretion to reduce Rule 39 costs, the Fifth Circuit recognized that the city "overstate[d] the out-of-circuit support for its position." Op. 9 n.2.

In view of the way San Antonio framed the issues on appeal, the OTCs' arguments focused on explaining that the 1998 amendments to the Federal Rules of Appellate Procedure were intended to be stylistic and that *Sioux* remained controlling law. Consequently,

nobody devoted meaningful attention to developing for the Fifth Circuit's benefit a plain-language interpretation of Rule 39.

It was only after San Antonio sought rehearing en banc that it expanded its claim of a circuit split and redirected its attention to textual arguments. For this reason, it was only in the word-limited context of opposing en banc review that the OTCs had first had occasion to explain how Fifth Circuit precedent adheres to the plain language of Rule 39. The OTCs also highlighted that, even if the *Sioux* case merited a renewed examination, this case was not a suitable vehicle for doing so. First, as the panel correctly recognized, San Antonio had not argued that *Sioux* was inconsistent with the text of Rule 39 but, instead, that *Sioux* applied an outdated, amended version of the rule. Second, revising *Sioux* would make no difference because, even if district courts were given discretion over awards of appellate costs, the district court could not have reasonably exercised its discretion in this case to reduce the amount of recoverable supersedeas bond premium expenses.

The Fifth Circuit denied rehearing en banc without addressing the new arguments developed for the first time at the rehearing stage—the arguments that form the basis for the petition here.

San Antonio then sought from the Fifth Circuit a stay of its mandate pending certiorari. The OTCs opposed on the grounds San Antonio had not shown it was likely that this Court would grant certiorari and reverse the Fifth Circuit's judgment. Judge Duncan (the author of the panel opinion) agreed and denied the requested stay.

REASONS TO DENY CERTIORARI

I. THE QUESTION PRESENTED DOES NOT WARRANT THIS COURT'S REVIEW.

A. Petitioner vastly overstates the existence of any circuit split and, to the extent one exists, it is stale; the cases have been in the same posture for a long time without noticeable consequences for the administration of justice.

The Fifth Circuit decided *Sioux* in 1991. Since that time, the Rules Committee has amended Rule 39 three different times: the 1998 amendment at issue in the court of appeals and then again in 2009 and 2019. Not once has the Rules Committee felt the need to address the purported circuit split or the Fifth Circuit's allegedly "atextual" (Pet. 21) reading of Rule 39 in *Sioux*.

This is perhaps because any circuit split is neither as deep nor as entrenched as petitioner claims. The city asserts a direct conflict with the Seventh Circuit, claiming "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.'" Pet. 11 (citing *Guse* v. *J.C. Penny Co.*, 570 F.2d 679, 681 (7th Cir. 1978)). But the Seventh Circuit's decision did not actually adopt that interpretation of Rule 39.

The Seventh Circuit began with the observation that "[a]s the matter now stands, with costs on appeal having been awarded to the defendant, ***there would seem to be little discretion left to the district court*** as Rule 39(e) provides that bond premiums 'shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.'" *Guse*, 570 F.2d at 681 (emphasis added). *Guse*,

however, then reasoned that a corollary of the appellate court's discretion to deny costs was that the district court also had discretion to modify costs. The court then mused "[t]here is authority ***that might be read*** as granting discretionary authority to the district court to disallow some or all the costs which would ordinarily be taxable notwithstanding a reversal judgment in the appellate court which as here awards 'costs on appeal.'" *Ibid.* (emphasis added). But this was dicta. The Seventh Circuit did not adopt this reasoning: "[w]e do not here need to decide the extent of the discretionary authority of the district court to disallow costs to a prevailing party who has been awarded costs on appeal[.]" *Ibid*. Rather, the court explicitly stated it was "***exercis[ing its] discretion***" to modify the mandate and grant the district court authority to exercise discretion in awarding costs. *Ibid.* The Seventh Circuit's musings in dicta rest on the unwarranted, extra-textual assumption that, where a rule explicitly vests the appellate court with discretion, the district court is by implication equally vested with discretion.

Republic Tobacco Co. v. *North Atlantic Trading Co.*, 481 F.3d 442 (7th Cir. 2007), which San Antonio portrays as cementing the Seventh Circuit's conflict with the Fifth Circuit, rests on the flawed assumption that "[i]n *Guse*[], [the Seventh Circuit] held that a district court has discretion not to award a party costs * * * despite an order by the appellate court awarding costs to that same party." *Id.* at 448. But, as noted, *Guse* did not actually determine the extent of district court discretion to modify costs. Instead, it reaffirms a practice consistent with the Fifth Circuit's rule: the appellate court has discretion to modify the award of costs. This position is not irreconcilable with the Fifth Circuit, as the city contends. Pet. 11. It just means that in the

Seventh Circuit a losing party on appeal might get two bites at the apple to argue for a reduction in costs, once to the appellate court and once to the district court.

Petitioner's "settled law" from the Eleventh Circuit fares no better: it is an unpublished decision that fails to place Rule 39(e)'s phrase "are taxable" in context, and so reads that language as conferring discretion on the district court, rather than instructing as to whether the appellate or district court is the tribunal to implement the appellate court's costs award. See Pet. 12 (citing *Campbell* v. *Rainbow City*, 209 F. App'x. 873, 875-76 (11th Cir. 2006)); 11th Cir. R. 36-2 ("Unpublished decisions are not considered binding precedent[.]").

Campbell also assumes district court discretion derives from Federal Rule of Civil Procedure 54. 209 F. App'x at 875. But there are important textual differences between Appellate Rule 39(e) and Civil Rule 54(d). Unlike Rule 39(e), Civil Rule 54(d) includes clear, discretion-conferring language. Fed.R.Civ.P. 54(d) ("Unless a federal statute, these rules, or ***a court order provides otherwise***, costs—other than attorney's fees—should be allowed to the prevailing party." (emphasis added)). Notably, Civil Rule 54(d) uses nearly identical, discretion-conferring language with regard to the district court to that Appellate Rule 39(a) applies to the appellate court. See Fed.R.App.P. 39(a) ("The following rules apply unless the law provides or ***the court orders otherwise***" (emphasis added)). So, *Campbell* improperly rests on the inapplicable text of a civil rule, rather than the appellate rule petitioner asks the Court to consider.

In sum, San Antonio's supposed "square conflict" is neither deep nor entrenched. No litigant has argued and no court, to the OTCs' knowledge, has held that

the courts are entirely without discretion to modify an award of costs on appeal; it is simply a question of whether the discretion extends beyond the appellate court that evaluates the strengths and weaknesses of the appeal that it alone decides. San Antonio has a Seventh Circuit case misinterpreting prior circuit precedent and a non-precedential Eleventh Circuit case that keys off of a rule that does not apply to appellate costs. This simply is not the sort of alignment that beckons for this Court's guidance, especially where there have been no noticeable adverse consequences resulting from any circuit variations over the past thirty years.

As for the other cases portrayed by San Antonio as lopsidedly against the Fifth Circuit, (Pet. 14-15), these are the same cases the Fifth Circuit had in mind when observing that San Antonio "overstate[d] the out-of-circuit support for its position." Op. 9, n.2. This was not "quibbl[ing]." Pet. 14. If anything, the Fifth Circuit was unduly charitable to the city when it characterized San Antonio's argument and authorities.

As the Fifth Circuit correctly observed, the Second and Ninth Circuit cases "only address a district court's discretion to *grant* Rule 39(e) costs in the absence of, or in contravention of, a specific instruction from the appellate court." Op. 9, n.2 (citing *L-3 Commc'ns Corp.* v. *OSI Sys., Inc.*, 607 F.3d 24, 28 (2d Cir. 2010); *Standard Concrete Prods. Inc.* v. *Gen. Truck Drivers Union Local 952*, 175 F. App'x 932, 933 (9th Cir. 2006)). The Sixth and Eighth Circuit cases are "not on point" because "they turn on the appellate court's manifest intention to leave the taxation decision to the discretion of the district court in Rule 39(a)(4) situations" because "it remained unclear which party would ultimately prevail on the merits." Op. 9, n.2

(citing *Emmenegger* v. *Bull Moose Tube Co.*, 324 F.3d 616, 627 (8th Cir. 2003); *Berthelsen* v. *Kane*, 907 F.2d 617, 622-23 (6th Cir. 1990)). The Federal, First, and Ninth Circuits are "distinguishable because the appeal costs at issue were above and beyond those enumerated in Rule 39(e)." Op. 9, n.2 (citing *Dana Corp.* v. *IPC Ltd. P'ship*, No. 90-1443, 1991 WL 5890, at *3 (Fed. Cir. Jan. 25, 1991); *Johnson* v. *Pac. Lighting Land Co.*, 878 F.2d 297, 298 (9th Cir. 1989); *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 806 F.2d 164, 167 (1st Cir. 1986)). *In re Bonds Distribution Co.* is distinguishable for the same reason: it addresses costs incurred to secure a "line of credit in lieu of a supersedeas bond." 73 F. App'x 606, 607 (4th Cir. 2003).

These cases do not show overwhelming recognition of district court discretion over appellate costs. Pet. 15. They establish the opposite: district courts are constrained by Rule 39's text, which vests the courts of appeals with discretion to modify appellate cost awards or to affirmatively transfer discretion so district courts may modify the way Rule 39 allocates appellate costs.

Apart from all of this, none of petitioner's cases address—let alone critique—*Sioux*. There is, simply, no "conflict" with *Sioux*.

Finally, San Antonio highlights the fact six judges dissented from the decision not to hear this case en banc. Pet. 16. But ten judges voted against rehearing, including two of the case panelists. No judge wrote respecting the denial by, for example, appealing to higher authority.

B. The Fifth Circuit's precedent is in line with Rule 39's text, meaning there is no need to consider new arguments petitioner did not properly develop.

As noted in the background statement, the parties' arguments to the panel focused on whether *Sioux* was still controlling precedent in the light of the 1998 amendment to Rule 39. The parties did not present argument to the panel on how Rule 39(e) should be interpreted in the context of the entirety of Rule 39. Yet, such arguments are essential if the Court were to consider the question presented in the petition. San Antonio's failure to develop these arguments doomed its case before the Fifth Circuit and led the court to remark that petitioner's argument "misse[d] the mark." Op. 11. And here, the failure to develop these arguments and tee them up at the court of appeals means this Court would be addressing them in the first instance. The Court, however, is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718, n.7 (2005). As such, this Court "generally do[es] not address arguments that were not the basis for the decision below." *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 400 n.7 (1996) (quoting *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996)); see also *Illinois* v. *Gates*, 462 U.S. 213, 223-224 (1983); *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4, 109 n.10 (1991).

However, even though not developed before, or considered by the Fifth Circuit, the precedent in *Sioux* is consistent with Rule 39's text. That underscores the absence of any glaring need to address Fifth Circuit precedent at this time or in this case.

Rule 39 unambiguously vests the appellate court with discretion to award all the costs associated with

an appeal, under subsection (a), and then provides that certain of them are taxed in the district court, under subsection (e). Fed.R.App.P. 39 (a), (e). But subsection (e) does not vest discretion in the district court to modify the appellate court's award, just as it does not transfer to the district court the appellate court's discretion over appellate costs. See Fed.R.App.P. 39.

Before the Fifth Circuit, argument focused on San Antonio's contention at that time: the 1998 change to Rule 39(e) was a substantive change that gave district courts discretion to modify costs awarded by appellate courts where none previously existed. As the Fifth Circuit correctly noted, and San Antonio ultimately conceded (Ct.App.Reply.Br. 3), the changes to Rule 39 were merely stylistic. So, in the Fifth Circuit's judgment, the correct question was whether the Fifth Circuit's "treatment of Rule 39(e) was just as wrong before the amendment as it was after." Op. 11. But the city did not argue to the Fifth Circuit that *Sioux* misinterpreted the pre-amendment text of Rule 39(e). The petition tries to pursue that argument now and it has been forfeited.

Whether Rule 39(e) reads that costs "are taxable," as the current version does, or "shall be taxable," as the prior version did, is of no regard. As the Fifth Circuit acknowledged, the 1998 amendments were "intended to be stylistic only." Op. 11, n.5 (quoting Advisory Committee Notes to Rule 39). The 1998 amendments were part of a broader effort to "draft in the present tense, not in the past or future." See Guideline 2.2, GUIDELINES FOR DRAFTING AND EDITING COURT RULES, 169 F.R.D 176, 188 (1997).

Looking at the entirety of Rule 39, it is clear that any discretion to modify costs lies only with the appellate court. Subsection (a) vests the appellate court

with discretion to modify the award of costs under the Rules, explaining that "[t]he following rules apply unless the law provides or the court orders otherwise." The phrase "the court orders otherwise" is discretion-conferring language. Subsection (a) then sets forth the presumptions that apply unless the appellate court modifies them. There is no such discretion-conferring language in Rule 39(e), which reads: "The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule." Subsection (e) then sets forth categories of awarded costs that are to be taxed in the district court. These categories are all costs for an appeal that have their genesis (and records) in the district court: preparing the record, the reporter's transcript, obtaining supersedeas bonds and the fee for filing a notice of appeal. The Rules Committee knew how to confer discretion and could have added language to Rule 39(e) allowing district courts to modify the appellate court's award of costs if that was the intent. The Committee did not do so.

Even if the 1998 changes to Rule 39(e) were substantive, the language still does not vest discretion in the district court. Placed in context in the entire sentence of Rule 39(e) at issue, the words "are taxable" refer to the proper tribunal where costs are taxed, and not to district court discretion over whether costs are available at all. Fed.R.App.P. 39(e) ("The following costs on appeal ***are taxable in the district court*** for the benefit of the party entitled to costs under this rule" (emphasis added)). Subsection (e) instructs on the tribunal in which to seek particular costs enumerated in that subsection that were awarded by the appellate court.

San Antonio seeks to disturb the allocation of responsibility between the appellate and district courts. Pet. 23 (improperly claiming *Sioux* "frustrat[es] the Rule's express allocation of responsibility between district and appellate tribunals"). Under San Antonio's interpretation, a district court could disregard an appellate court's exercise of discretion to award costs on appeal; and the district court could award subsection (e) costs after the appellate court has ordered the parties to bear their own costs of appeal.

That would seriously upend things. The appellate court decides if costs on appeal are not warranted or should be reduced, despite the Rule's normal allowance of those costs to prevailing parties. Fed.R.App.P. 39(a). It evaluates the merits of the appeal and is best situated to determine whether a particular appeal's circumstances warrant a departure from the normal cost-allocation rules. A district court—particularly one that has just been reversed—is ill-suited to make such a decision.

Sioux is entirely consistent with both the current and prior version of Rule 39(e). *Sioux* holds: "The district court has no discretion regarding whether, when, to what extent, or to which party to award costs of the appeal. In taxing the costs on appeal, its sole responsibility is to ensure that only proper costs are awarded." 1991 WL 182578, at *1. San Antonio quibbles with *Sioux*'s reasoning and focus on the mandatory nature of the "shall be taxed" language. Pet. 15. But *Sioux*'s holding—that a district court lacks discretion to modify costs awarded by the appellate court—is faithful to the Rule's text. Even when San Antonio does argue for the first time in its petition that *Sioux* was incorrect, it merely confirms subsection (e) only speaks to the proper tribunal in

which to seek certain costs. And reading subsection (e) to include discretion-conferring language is only possible by ignoring the Rule's entire text and improperly assuming a district court always has discretion even where none is provided by the text. These are reasons to deny review. Even if *Sioux*'s reasoning is flawed, its outcome is entirely consistent with the plain language of Rule 39 as a whole.

If there is any reason to revisit Rule 39's allocation of discretion to appellate courts (and there is not), then that is a task for the Rules Committee, not this Court. See, e.g., *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 569 n.14 (2007) (the only way to broaden the rules is "by the process of amending the Federal Rules, and not by judicial interpretation"). There is no reason for the Court to intervene when the Committee has not done so and is best situated to evaluate and craft any change. Consideration of the policy reasons for amending the operation of Rule 39 is more appropriately done in the quasi-legislative context of rule-drafting, not judicial interpretation.

C. The petition mischaracterizes the applicable background principles.

There is no question presented of "great legal and practical importance," as the facts of this case demonstrate. All parties benefited from the risks and tradeoffs underlying the bond premium expenses that are at issue. Under *Sioux*, each knew Rule 39(e) provided for respondents' likely recovery of those premiums as costs in the event the district court judgment was reversed. San Antonio is a sophisticated party with able counsel; reversal on appeal was a likely outcome and, nevertheless, San Antonio insisted that the OTCs obtain sizeable bonds at significant cost.

San Antonio claims this issue needs the Court's attention because of its potential to arise whenever there is a bonded judgment on appeal. If that it is true, it speaks volumes that the Fifth Circuit has been in its current posture for nearly thirty years without detectable adverse consequences. If this issue did recur as frequently as San Antonio contends, then surely, given how long the purported circuit split has existed, the Court would have been presented an opportunity to consider it long before now. Instead, the Seventh and Fifth Circuits' precedents have remained and survived for nearly thirty years in total—and for twenty years since the 1999 amendment of Rule 39.

San Antonio claims Rule 39(e) implicates the "most significant part" of a cost award because "bond premiums * * * can run into the millions" and in diversity cases "[t]hose amounts * * * can outweigh the amounts-in-controversy of many suits." Pet. 17. But San Antonio assumed this risk, despite knowing directly adverse Texas precedent made its district court judgment highly vulnerable on appeal. San Antonio joined the OTCs' motion to supersede that judgment with more than $68 million in bonds (ROA.15948-49)—a total *more than 30 times greater* than the costs awarded to the OTCs pursuant to Rule 39(e). San Antonio's argument is more an attack on what the Rules clearly contemplate: recovery—as costs on a successful appeal—of supersedeas bond premiums.

San Antonio asserts a background principle that "Congress and the Rules Committee have generally vested district courts with discretion to award costs" dependent upon the facts presented in a particular case. Pet. 17-18 (citing 28 U.S.C. § 1920; Fed.R.Civ.P. 54(d)(1)). But this argument supports the OTCs because the plain language of Rule 39(e) *does not* confer district

court discretion. *Supra*, Sect.I.B. By contrast, the language of section 1920 and Civil Rule 54(d)(1) is *expressly* permissive. See 28 U.S.C. § 1920 ("[a] judge or clerk of any court of the United States ***may*** tax as costs" certain enumerated expenses (emphasis added)); Fed.R.Civ.P. 54(d)(1) ("[u]nless a federal statute, these rules, or ***a court order provides otherwise***, costs * * * should be allowed to the prevailing party" (emphasis added)).

Finally, San Antonio makes a fairness plea, arguing "the availability of costs under the Federal Rules should not turn on geography." Pet. 12. But availability "turns" on the text of Rule 39(a) and (e), which supports the Fifth Circuit's position. It is not as though San Antonio had no opportunity to contest the award of costs. It could have raised the issues it presented to the district court at the proper, earlier time—to the appellate court when that court was deciding on the cost award. San Antonio could have asked for a modification of the appellate court mandate. The city could not credibly claim surprise by the fact the OTCs sought to recover their bond premium expenses given the size of the amounts involved. And, the fact that San Antonio had no complaints about bearing full costs when they were awarded at the appellate level (and as to those taxed in the appellate court) undermines its argument to the district court that as the class representative it should only bear a pro rata share of appellate costs. That San Antonio failed to act at the appropriate time, before the appellate court, or raise its argument for a reduction of costs at that time, is no fault of the OTCs.

II. THIS CASE IS A POOR VEHICLE TO CONSIDER THE RULE 39 STANDARD.

Even if the Court were inclined to consider the Rule 39(e) standard, this case is a poor vehicle in which to do so.

First, as discussed above, because of the way the city framed the issue in its court of appeals merits briefing, arguments relevant to the proper interpretation of Rule 39 were not fully presented to the Fifth Circuit or passed upon by that court. Whether couched as forfeiture or an underdeveloped record, this factor counsels against certiorari lest the Court be dragged into conducting a first view. San Antonio's argument that *Sioux* was wrong at inception (Pet. 22) was never raised to the Fifth Circuit during briefing to the panel.

Second, even if the Court were to grant review and adopt petitioner's interpretation of Rule 39, it would not change the outcome: the district court would have no basis to exercise any discretion it might have. That underscores why the Fifth Circuit's textually appropriate interpretation of procedures that rule drafters have left undisturbed should be left undisturbed in this case, as well, even if that results in less than complete alignment among the circuits.

This case was brought as a class action. San Antonio claims it has been "saddled with the full brunt of bond premiums securing a judgment for 172 other cities," and that "'taxpayers' will bear this 'tremendous cost'" without consideration of whether San Antonio should be "solely responsible for the full bond amounts." Pet. 17. Courts have repeatedly rejected the argument that the named plaintiff/class representative in a class action should only be responsible for a proportional amount of defendants' bill of costs. See, e.g., *White* v.

Sundstrand Corp., 256 F.3d 580, 586 (7th Cir. 2001) (stating it had "not found any case holding that responsibility for costs must be parceled out so that no member of a class pays more than *pro rata* share."). Even if the district court thought there may have been a "persuasive" basis to reduce appellate costs awarded on account of supersedeas bond premium expenses, there was more than a fair prospect of reversal on appeal if it had done so on the basis that San Antonio should only pay its pro rata share.

Third, San Antonio's "taxpayers" will not pay the costs awarded. Pet. 20. The city is far less than candid in so contending. Pursuant to the city's agreement with its contingency counsel, class counsel is responsible for all costs unless there is a class recovery. ROA.16923-25. The city, therefore, protected itself from risk by passing that risk on, via contract, to its attorneys. See, e.g., *White*, 256 F.3d at 586 (moving the risk from the representative plaintiff to class counsel "can eliminate the financial disincentive that costs awards otherwise would create."). This leaves one wondering why San Antonio's status as a municipal entity has any relevance. Pet. 19. And apart from steps the city has already taken to shift any cost to its lawyers, the city initiated this civil action, stepped into the courtroom just like any other plaintiff, and over-aggressively pursued diversity claims even after the Texas state courts had effectively eviscerated them. San Antonio's municipal status grants it no special exoneration. And looking at the situation from the opposite perspective, the OTCs endured the enormous costs, uncertainties and disruptions resulting from San Antonio's overly-aggressive litigation tactics in the light of state court authority squarely against the city. There is nothing inequitable in allowing them a

small measure of reimbursement for expenses they should not have had to incur.

Fourth, San Antonio paints this as a review-worthy case by contending the OTCs "voluntarily sought" supersedeas bonds without "exploring less-expensive alternatives" to stay enforcement of the judgment pending appeal. Pet. 19. But, the record demonstrates the opposite of that assertion, further showing why this case is not a suitable vehicle for this Court's review.

San Antonio *joined* the OTCs' request for supersedeas bonds—which were only obtained at San Antonio's insistence—and then *required* the OTCs to increase bond amounts on numerous occasions over several years while the merits appeal was pending. ROA.19971-72. That the bonds had to be maintained for several years because of the pace of court proceedings is "through no fault of the [respondents]," either. Pet. 19. Indeed, "it is hardly obvious that [the respondents] should bear the cost" (*ibid.*) of any bond premium expense given that, more than four years before the district court's amended final judgment, Texas law established that the OTCs did not owe the hotel taxes San Antonio has so tenaciously pursued. See *City of Houston*, 357 S.W.3d at 706. Under these circumstances, where the OTCs did just what was required of them under Civil Rule 62 to stay execution, the district court and the Fifth Circuit appropriately awarded the OTCs costs as contemplated and authorized by Rule 39(e). See, e.g., *Enserch Corp.* v. *Shand Morahan*, 918 F.2d 462, 463-64 (5th Cir. 1990) (Rule 62 establishes that losing parties "can obtain a stay pending appeal only by giving a supersedeas bond").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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