No. 20-334

In the Supreme Court of the United States

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

v.

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

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

BRIEF FOR THE PETITIONER

GARY CRUCIANI
STEVEN D. WOLENS
MCKOOL SMITH, P.C.
300 Crescent Court, Ste. 1500
Dallas, TX 75201

DANIEL L. GEYSER
Counsel of Record
ALEXANDER DUBOSE & JEFFERSON LLP
Walnut Glen Tower
8144 Walnut Hill Lane, Ste. 1000
Dallas, TX 75231
(214) 396-0441
dgeyser@adjtlaw.com

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 In a 1991 two-judge, unpublished disposition, the Fifth Circuit construed an outdated version of Rule 39(e) to hold that "district court[s] ha[ve] no discretion whether, when, to what extent, or to which party to award costs" under Rule 39(e),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 rejected that position: "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. In so holding, the Fifth Circuit affirmed a $2 million cost award against San Antonio, despite the district court finding "persuasive" reasons to deny or reduce that award.

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Page

Cases—continued:

Statutes and rules:

Page

Rules—continued:

Miscellaneous:

In the Supreme Court of the United States

No. 20-334

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

v.

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

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

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 959 F.3d 159. The order of the district court regarding costs (Pet. App. 15a-22a) and the court's approved bill of costs (Pet. App. 23a-25a) are unreported. The judgment of the court of appeals in the prior merits appeal (Pet. App. 26a-27a) and the court's approved bill of costs (Pet. App. 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 (Pet. App. 31a-32a). The petition for a writ of certiorari was filed on September 10, 2020, and granted on

January 8, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION AND 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:

> 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.

The full text of Fed. R. App. P. 39, Fed. R. Civ. P. 54(d)(1), and 28 U.S.C. 1920 are reproduced in an appendix to this brief (App., *infra*, 1a-4a).

INTRODUCTION

This case raises an important but straightforward question under the Federal Rules: whether district courts have discretion under Fed. R. App. P. 39(e) to deny or reduce appellate costs deemed "taxable" in district court.

According to the Fifth Circuit, Rule 39(e) categorically eliminates a district court's discretion and mandates full costs in all cases. Pet. App. 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 below declared itself bound by prior circuit precedent (Pet. App. 14a), it refused to say it agreed with the Fifth Circuit's own views—and the full court subsequently denied rehearing by a 10-6 vote.

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. Its 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 understanding would rewrite the Rule's explicit command, revoke a district court's ordinary role in fact-finding and record development, and task appellate tribunals with resolving fact-bound disputes in the first instance—after (somehow) making an evidentiary record often having nothing to do with the merits of an appeal. And, if adopted nationwide, it would upset the prevailing practice in every circuit—including, ironically, the Fifth Circuit itself.

Under a proper view of the Rule's text, structure, design, purpose, context, and history, district courts retain their traditional discretion to determine "taxable" costs under Rule 39(e), including the authority to deny or reduce costs where appropriate. Because the courts below incorrectly declared a full award "mandatory" under the Fifth Circuit's outlier approach, the judgment should be reversed.

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. Pet. App. 2a. The dispute was both extensive 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

the end-consumer. *Ibid.* The failure to calculate occupancy taxes based on each room's retail charge 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 trial court, Houston lost again on appeal before a three-judge panel of an intermediate state appellate court. Pet. App. 3a. Respondents then 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 the class $55,146,489 in unpaid taxes, interest, and penalties. *Ibid.*

Respondents immediately sought to post bonds to stay that judgment. J.A. 80-82; see also Pet. App. 3a. Respondents never sought to protect the judgment through less-expensive means; they did not offer letters of credit or propose placing the funds in the court registry. And nothing stopped respondents from asking the court to waive the bond requirement altogether, citing their financial stability and net worth. See J.A. 162-163 (respondents' declaration stating *petitioner* never took the initiative to propose alternatives, without commenting on their own inaction). Rather than pursue a cheaper form of security, respondents voluntarily posted bonds as their first and only proposal to the court. J.A. 80-82. The district court accepted the bonds and stayed the judgment pending further proceedings. C.A. ROA 15955-15956; see also Pet. App. 3a.

The case then languished in district court. Respondents filed post-judgment motions in May 2013, which remained pending (without explanation) for years. Pet. App.

3a-4a. The bond premiums ran 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. Pet. App. 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." Pet. App. 27a.

b. Respondents then sought costs in the Fifth Circuit under Fed. R. App. P. 39(d). Pet. App. 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; J.A. 99-100.

3. Back on remand, respondents sought to vastly increase their cost award. Pet. App. 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. Pet. App. 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. Pet. App. 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." Pet. App. 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. Pet. App. 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.*,"

---

[1] Petitioner has already paid $287,047 to satisfy all of respondents' awarded costs incurred in district court; petitioner has not yet satisfied 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). Pet. App. 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." Pet. App. 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." Pet. App. 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)." Pet. App. 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 unique 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). Pet. App. 32a (reporting the 10-6 vote).

SUMMARY OF ARGUMENT

Rule 39 plainly authorizes district courts to exercise their usual discretion in awarding costs under Rule 39(e), which is precisely why every other court has rejected the Fifth Circuit's position. Its "mandatory" approach fails across the board, and its judgment should be reversed.

I. A. The Fifth Circuit's position is directly at odds with Rule 39(e)'s plain text. The Rule unambiguously says that costs are "taxable" in district court, which is a *permissive* term. It means costs are *eligible* for recovery, not that they inflexibly must be awarded. This Court has repeated the same usage in the past, and the term's common parlance matches its dictionary meaning. Because the Rule's language is plain, it necessarily controls—and it permits courts to award costs in their discretion.

The Fifth Circuit's contrary reading is rooted in *Sioux*, a 1991 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. And *Sioux* itself misread the old version of the Rule: while Rule 39(e) used to have seemingly mandatory language ("shall"), the directive was focused on *where* costs could be taxed ("in the district court"), not on automatically compelling a maximum award. The Rules Committee itself made this clear in its original commentary, and its

subsequent amendment—eliminating the only plausible compulsive language in Rule 39(e)—shuts the door on the Fifth Circuit's interpretation.

Nor can respondents sidestep the Fifth Circuit's obvious error by shifting the focus to Rule 39(a). That section merely designates *which party* is entitled to costs; it does not specify anything about which costs are ultimately awarded. And respondents' contrary view ignores the Rule's unmistakable structure: Rule 39(a) designations occur at the outset of the process, before any cost request is even made. The appellate court cannot possibly decide whether certain traditional factors warrant a reduction or denial of particular costs until those issues are raised, factual proffers are entered, evidentiary records are developed, and factual disputes are resolved. None of that happens until after the Rule 39(a) determination has been issued. Nor would it make any sense for Rule 39(e) to textually commit these costs to the district court if it wished the appellate court to do all the work. Appellate courts can enter their own orders; the Committee would not have included the district court merely to rubberstamp the appellate court's determination.

B. Rule 39's design and purpose confirm what its text and structure already make clear. By stripping away any discretion in district court, the Fifth Circuit would 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. And the Rule divides up its respective tasks for a reason. Cost disputes often require resolving fact-bound issues in the first instance; that role is common for district courts but ill-suited for an appellate tribunal. There is no reason to force the circuits to devise new systems of entertaining

fact-finding and record-development after the merits appeal (the work that *should* consume an appellate court's time) has been resolved.

C. Rule 39(e)'s context and history point in exactly the same direction. The Rule was enacted against the backdrop of Section 1920 and Rule 54(d)(1), both of which grant district courts broad discretion in awarding costs—including those that overlap with the costs here. There is no reason district courts are entrusted to exercise discretion for parallel costs under those provisions but have no discretion whatsoever under Rule 39(e).

D. All its other errors aside, accepting the Fifth Circuit's position would be profoundly disruptive. The Fifth Circuit alone strips away a district court's discretion over costs; the contrary rule is overwhelmingly applied in courts nationwide without issue or concern. And every circuit—including the Fifth Circuit—administers Rule 39(e) costs the same way: *by requiring parties to seek and litigate the issue in district court*. The Fifth Circuit's rule would senselessly shift those disputes to the appellate level, requiring a wholesale revision of every circuit's local rules, bill of costs, and longstanding practice. There is no upside to injecting that level of avoidable confusion in a system that has effectively administered cost requests for decades.

II. The district court below identified "persuasive" reasons for reducing or denying costs in this case, but it was constrained by the Fifth Circuit's standard to enter a "mandatory" award of full costs. Because an incorrect legal standard drove the decision below, this Court should remand for the district court to discharge its unambiguous duty under Rule 39(e)—exercising its usual discretion to determine an appropriate award of appellate costs "taxable" in district court.

ARGUMENT

I. UNDER EVERY ORDINARY INTERPRETIVE METRIC, DISTRICT COURTS HAVE DISCRETION TO DENY OR REDUCE COST AWARDS UNDER RULE 39(e)

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

1. a. This Court gives the Federal Rules "their plain meaning" (*Pavelic & LeFlore* v. *Marvel Entm't Group*, 493 U.S. 120, 123 (1989)), yet 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* v. *Rainbow City*, 209 F. App'x 873, 875 (11th Cir. 2006) (per curiam). It identifies *eligible* expenses, but does not compel a district court to award anything. There is no inexorable command anywhere in the Rule: it simply "provides that the enumerated costs '*are taxable*,' not that they '*must be taxed*,'" which is an obvious difference. *Ibid.* (emphases added).

Indeed, this Court, in common parlance, has adopted the same usage in its own decisions—noting certain costs are "taxable" to describe *eligible* costs, even where those costs are discretionary, not mandatory. See, *e.g.*, *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 573 (2012) (contrasting "taxable" and "nontaxable" expenses under Rule 54(d)(1) and Section 1920, both of which confer discretionary authority). The phrasing in Rule 39(e) simply matches this common usage. See *id.* at 566 (adopting the "ordinary meaning").

The Rule's language thus means exactly 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.

b. 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.'" Pet. App. 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. That ends the inquiry: "as with a statute, '[w]hen we find [a Rule's] terms * * * unambiguous, judicial inquiry is complete.'" *Pavelic*, 493 U.S. at 123.

In any event, *Sioux* was still wrong on its own terms. The decision focused on the wrong part of the operative clause: the old 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 made *taxable* in the *district court for general convenience*." Fed. R. App. P. 39(e) advisory committee's notes (1967) (emphases 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 the only plausible mandatory language ("*shall be taxed*") with a permissive term ("*taxable*") in a subsequent amendment.[3]

In response, the panel below stated the Committee's 1998 amendments were not intended as "substantive in nature" (Pet. App. 13a), but this *twice* misses the point. If the 1998 amendments were truly "'stylistic only'" (*id.* at 13a n.5), then the decision to reinforce 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.*

Moreover, the ultimate question is not what the Committee intended to do, but what it actually did—and the plain language of the revised rule vests obvious discretion

[3] While it is certainly true that the pre-1998 version did not explicitly grant discretion, the Committee had no reason to do so because *the district court's discretion already existed.* Rule 39(e) is of a piece with Fed. R. Civ. P. 54(d)(1) and 28 U.S.C. 1920. Those provisions already vested district courts with broad discretion over costs (*Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 255 n.29 (1975)), and Rule 39 was enacted against the backdrop of those provisions. Rule 39(e) simply directed certain costs to be resolved in a specific forum ("district court"), where overlapping costs were already subject to discretion. There was no reason to think that Rule 39(e) alone imposed a mandatory command. See Part I.C, *infra*.

with the district court. See, *e.g.*, *Warger* v. *Shauers*, 574 U.S. 40, 44 (2014) (assigning federal rules "their plain meaning"); *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980). There is no intimation, anywhere, that the Committee (in 1998 or otherwise) was imposing an automatic, inflexible cost-shifting regime.[4]

2. Apparently unable to support the decision below under Rule 39(e), respondents instead focus on Rule 39(a). According to respondents, Rule 39(a) "unambiguously vests the appellate court with discretion to award all the costs associated with an appeal." Br. in Opp. 2, 13-14. As respondents see it, subsection (a) grants the appellate court, not the district court, discretion to award Rule 39(e) costs. If a party wishes to challenge any particular cost, it must act at the circuit level (*id.* at 19); once the case is remanded, the district court's task is purely functionary—limited to entering the "appellate court's award" without "modif[ication]." *Id.* at 2.

This is baseless on every level. First and foremost, there is no reason to direct the district court to decide these issues if the Rule intended the appellate court to do all the work. Appellate courts know how to enter a formal

---

[4] Indeed, quite the opposite: the Committee in 1967 explained that Rule 39(e) was partly necessary because some courts had deemed themselves unauthorized, without an affirmative rule, to award certain costs under Section 1920—*which were discretionary*. See Fed. R. App. P. 39(e) advisory committee's notes (1967) ("Taxation of the cost of the reporter's transcript is specifically authorized by 28 U.S.C. §1920, but in the absence of a rule some district courts have held themselves without authority to tax the cost.") (citations omitted). There was no hint that the Committee—in announcing a rule to effectively *replicate* portions of Section 1920—was trying to reverse the longstanding discretion available under that provision. See, *e.g.*, *Alyeska*, 421 U.S. at 255 n.29 (explaining that Section 1920 had overtly "discretionary" language since 1948); see also *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 441-442 (1987).

bill of costs—indeed, they do exactly that for *non*-Rule 39(e) costs. See Fed. R. App. P. 39(d)(3) (instructing the circuit clerk to "prepare and certify an itemized statement of costs for insertion in the mandate"). There is no need for a perfunctory remand for the district court to enter a ministerial order over the costs in Rule 39(e) if those costs have already been finally determined at the appellate level. The Rule, again, means what it says: the specified "costs on appeal *are taxable in the district court* for the benefit of the party entitled to costs under this rule." Fed. R. App. P. 39(e) (emphasis added). Respondents' theory makes nonsense out of that textual assignment.

Respondents further misread Rule 39(a) itself. That provision authorizes the appellate court to say *who* can receive costs; "the rest of the Rule determines what costs are available and how those costs may be taxed." *L-3 Commc'ns Corp.* v. *OSI Sys., Inc.*, 607 F.3d 24, 29 (2d Cir. 2010); see also, *e.g.*, *Muniauction, Inc.* v. *Thomson Corp.*, No. 01-1003, 2009 WL 437883, at *3 (W.D. Pa. Feb. 21, 2009). That is precisely why Rule 39(a) is entitled "AGAINST WHOM ASSESSED." The appellate court thus designates which party is entitled to costs, but the award of costs *to that party* is then determined by the remaining subsections, which assign responsibility for different costs to different tribunals. On its face, the "district court" decides "taxable" costs under Rule 39(e).

Respondents' argument also flouts the Rule's obvious structure. The decision under Rule 39(a) *happens before any specific costs are even requested*, much less awarded. Respondents simply ignore the textual progression set out in the Rule: the appellate court first designates which party shall receive costs (Rule 39(a)); that party is then required to formally request costs (Rule 39(d)(1))—with non-Rule 39(e) costs awarded on appeal and Rule 39(e) costs "taxable" *in district court*. Compare Fed. R. App. P.

39(d)(3) (requiring the "circuit clerk[]" to handle certain costs), with Fed. R. App. P. 39(e) (requiring the "district court" to handle others). The cost request must be "itemized and verified" (Fed. R. App. P. 39(d)(1); 28 U.S.C. 1924), and the opposing party is afforded at least "14 days" to object (Fed. R. App. P. 39(d)(2)). And, critically, this entire process necessarily takes place *after* Rule 39(a)'s threshold determination.

The Rule thus separates the process into two distinct phrases: the appellate court first designates the party entitled to costs (Rule 39(a)), and collateral proceedings then determine which costs are appropriate (Rule 39(c)-(e)). The appellate court makes the subsection (a) determination *before any party is even authorized to request costs* under the remainder of the Rule. And until those costs are requested, the appellate court will typically have no idea what costs are relevant, what reasons might exist for a reduction or denial of certain costs, or which issues the parties will eventually contest—much less the evidentiary foundation for each side's position or how to resolve those fact-bound disputes. See, *e.g.*, *Kirkland* v. *Legion Ins. Co.*, No. 01-317, 2003 WL 23416888, at *2 (D. Or. Dec. 8, 2003).

Respondents simply cannot explain how the appellate court is in a position to intelligently decide any of these questions at the time of Rule 39(a)'s *initial* determination. That subsection serves an important role in awarding costs, but it is limited to designating "against whom" costs can be awarded. It does not override the district court's duty to determine "taxable" costs under Rule 39(e).

3. Respondents argue that Rule 39(e) must not "confer district court discretion" because its language differs from the "permissive" language of Rule 54(d)(1) ("[u]nless * * * *a court order provides otherwise*") and Section 1920 (a court "*may* tax as costs"). Br. in Opp. 18-19.

Yet there is no magic-words requirement or a single right way to grant discretion over costs. Indeed, respondents themselves prove the point: both Rule 54(d)(1) and Section 1920 grant broad discretion over costs, and do so *using entirely different language*. The Committee here chose still another permissive term ("taxable") for Rule 39(e), and omitted any language compelling an award of maximum costs. That preserves the district court's traditional discretion on its face, and that discretion is not diminished because the Committee did not repeat the same linguistic formulation in other provisions.

In any event, respondents overlook the obvious reasons for the Rule *not* to mirror those other provisions. Rule 39(e) could not say "unless the court orders otherwise" (like Rule 54(d)(1)) without upsetting the circuit's *Rule 39(a)* determination—and granting district courts power to order costs *to any party*, including the party *not* "entitled to costs" under subsection (a). And Rule 39(e) could not say costs "may" be taxed in district court (like Section 1920) without leaving the option of seeking Rule 39(e) costs *at the appellate level*—defeating the entire purpose of channeling these issues to "the district court." Respondents' contrary view is squarely at odds with the Rule's text and structure, and it should be rejected.

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

Aside from their other shortcomings, respondents' 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 (5th ed. Oct. 2020 update) ("question[ing] the wisdom" of the Fifth Circuit's approach).

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. Many challenges to Rule 39(e) costs "are factual in nature." *Guse* v. *J. C. Penney Co.*, 570 F.2d 679, 681 (7th Cir. 1978). Courts invoke a "'wide range'" of considerations in determining costs (*Moore* v. *CITGO Ref. & Chems. Co.*, 735 F.3d 309, 315 (5th Cir. 2013)), and appellate courts will rarely be exposed to the relevant facts in deciding the merits appeal.[5] Cost disputes may require creating a new record, hearing

[5] As a rough sense of all the factors that a court might look to in exercising discretion, see, *e.g.*, *Moore* v. *County of Delaware*, 586 F.3d 219, 221-222 (2d Cir. 2009) ("the public importance of the case, the difficulty of the issues presented, or [the party's] own limited financial resources"); *B. Fernandez & HNOS, Inc.* v. *Kellogg USA, Inc.*, 516 F.3d 18, 28 (1st Cir. 2008) (case "present[s] a close question that required considered balancing" or "proves 'close and difficult'"); *Bazzetta* v. *Caruso*, 183 F. App'x 514, 515 (6th Cir. 2006) (per curiam) ("the 'losing party's good faith, the difficulty of the case, the winning party's behavior, and the necessity of the costs'"; litigation that "pose[s] significant public policy concerns and present[s] difficult and close legal issues"); *Champion Produce, Inc.* v. *Ruby Robinson Co.*, 342 F.3d 1016, 1023 (9th Cir. 2003) ("listing as potential 'good reasons' for denying costs: the prevailing party took actions that unnecessarily prolonged trial or injected meritless issues; costs were excessive; the prevailing party's recovery was so small that it was victorious in name only; and the case was close and difficult") (quoting *Teague* v. *Bakker*, 35 F.3d 978, 996 (4th Cir. 1994)); *Association of Mexican-American Educators* v. *California*, 231 F.3d 572, 593 (9th Cir. 2000) (en banc) ("an extraordinary, and extraordinarily important, case," brought in part by "nonprofit organizations" with "limited" resources on issues of "the gravest public importance" for "the state's public school system"); *Guse*, 570 F.2d at 681 (considering "all of the pertinent circumstances"). Each disputed factor can require evidence and fact-finding to sort out.

testimony, reviewing evidence, and resolving fact disputes in the first instance. *Republic Tobacco*, 481 F.3d at 450-451. This is the work district courts do every day; it is not the typical work of an appellate tribunal, which is "scarcely in a position either to determine what are the true facts or to evaluate them." *Guse*, 570 F.2d at 681.

Nor do appellate courts have any special insight or expertise regarding appellate costs. Like this Court, "federal courts of appeals generally are courts of review, not first view." *Rodriguez* v. *Penrod*, 857 F.3d 902, 906 (D.C. Cir. 2017); *United States* v. *Houston*, 792 F.3d 663, 669 (6th Cir. 2015). Yet a cost dispute is collateral to the merits; it is not resolved below, and it presents new questions for a court to answer. District courts are better positioned to engage in the necessary fact-finding and record-development. 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). And district courts will often have greater knowledge of the relevant circumstances (including, for example, why appeal bonds were required or obtained). Rule 39(e) thus channels these disputes exactly where they belong—respecting the appropriate division of responsibility between district and appellate courts, the comparative advantage of district courts as fact-finders, the familiarity of district courts with discretionary cost issues (under Rule 54(d)(1) and Section 1920), and the importance of lodging discretion with the body ideally situated to balance case-specific equities. See, *e.g.*, *Newton* v. *Consol. Gas Co. of N.Y.*, 265 U.S. 78, 83 (1924); 10 Wright & Miller, *Federal Practice and Procedure* § 2668 (4th ed. Oct. 2020 update) ("the federal courts are free to pursue a case-by-case approach and to make their decisions on the basis of the circumstances and equities of each case"). There is no reason to bog down

the appellate court's docket with fact-bound arguments over discretionary costs.

But if the 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).

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

Rule 39's context and history directly reaffirm the district court's discretionary authority under subsection (e), and respondents' contrary position is incompatible 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).

Rule 39 was enacted against the backdrop of other provisions (Rule 54(d)(1) and Section 1920) where district courts already exercised broad discretion over generally the same categories of costs (*Alyeska*, 421 U.S. at 256 n.29)—and, in some instances, over *exactly* the same costs. Compare, *e.g.*, Fed. R. App. P. 39(e)(2), with 28 U.S.C. 1920(2). Indeed, the Rules Committee explained that Rule 39(e) was necessary in part because some courts were reluctant to award costs under Section 1920 without an express rule. See Fed. R. App. P. 39(e) advisory committee's notes (1967).

There is no reason to presume that the Committee intended to reaffirm existing authority under Section 1920 by eliminating the discretion it already provided. See *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 382 & n.6 (2013). And, in fact, respondents have no answer for why

the Committee would make Rule 39(e) alone mandatory when the other costs provisions are discretionary and largely cover the same items. See *id.* at 381-382.

The fact is the Committee did not say it was contemplating a different scheme because it undoubtedly was *not* contemplating a different scheme. 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 Committee intended to recalibrate the established practice in this area, it surely would have used language far clearer than this.

D. The Fifth Circuit's Contrary Approach Would Dramatically Upset Longstanding Norms And Settled Practice In Appellate Courts Nationwide

The Fifth Circuit's position, if adopted here, would profoundly disrupt judicial practice across the country. The Fifth Circuit alone has held that district courts "lack[] discretion" to deny or reduce a cost award under Rule 39(e). Pet. App. 10a-12a (so admitting). Every other appellate court confronting the question has adopted the opposite conclusion. Unlike the Fifth Circuit, these other courts overwhelmingly endorse a district court's "'broad discretion in awarding costs,'" "includ[ing] costs taxable in the district court under Rule 39(e)." *L-3 Commc'ns*, 607 F.3d at 30; see *Republic Tobacco*, 481 F.3d at 449 (district courts have "broad discretion to deny costs to a successful [party] under Rule 39(e)"); *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").[6] That consistent view has been widely accepted at the district and appellate level, and it has effectively governed costs questions for decades.[7]

---

[6] 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).

[7] See also, *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); *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 (M.D. Fla. June 18, 2013) (affirming district court's

Indeed, this consistent practice has promoted the effective administration of cost awards in every circuit—including (ironically) the Fifth Circuit. Every court of appeals currently follows the same approach in administering Rule 39(e) costs: while the circuits themselves process *non*-Rule 39(e) costs at the appellate level, Rule 39(e) costs are delegated for resolution in district court. Not a single circuit with a form bill of costs invites the submission of Rule 39(e) costs, and multiple circuits expressly forbid parties from seeking Rule 39(e) costs outside district court. See, *e.g.*, 4th Cir. R. 39(c) ("[v]arious costs incidental to an appeal must be settled at the district court level"; listing the four items in Rule 39(e)); *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit* 211 (2020 ed.) (same); 9th Cir. Instructions for Bill of Costs <https://tinyurl.com/ca9-bill-of-costs-instructions> ("The filing fee for an appeal *cannot* be requested on Form 10. You must request the filing fee for an appeal in the district court."); *Practitioner's Guide to the United States Court of Appeals for the Tenth Circuit* 62 (11th ed. Jan. 2021) ("Some costs are taxable only by the district court. Fed. R. App. P. 39(e)."); see also 6th Cir. I.O.P. 39(a) (limiting "[a]llow-

---

"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)).

able [c]osts" to "the court of appeals docket fee (where applicable) and production of the briefs and appendix").[8] There is no obvious mechanism in any circuit for claiming Rule 39(e) costs at the circuit level—and thus no obvious means of objecting to unwarranted or inequitable costs, and no obvious means for the circuit to resolve (at-that-point-still-unknown) Rule 39(e) cost disputes. See, *e.g.*, *Metso Minerals Inc.* v. *Terex Corp.*, 594 F. App'x 649, 651 n.2 (Fed. Cir. 2014).[9]

Petitioner is unaware of any resource suggesting this division of authority has generated any problems, much less any support for reassigning this traditional district-court function to the appellate level. Yet if respondents prevail here, it will mark an inexplicable sea change in this area. All circuits will have to revise their forms, amend their local rules, and devise systems for entertaining prospective (or actual?) Rule 39(e) challenges on appeal. Rule 39(e)'s express commitment of these questions to the district court would become meaningless, and responsibility for Rule 39(e) costs would shift to the appellate level—

---

[8] Some circuits invite parties to seek the $500 appellate docketing fee (authorized by 28 U.S.C. 1913); this, notably, is *not* "the fee for filing the notice of appeal" covered in Rule 39(e). See 28 U.S.C. 1917 (separately authorizing that $5 charge for "filing" any "separate or joint notice of appeal"). The Fourth Circuit's bill of costs, for example, explains this distinction. See 4th Cir. Bill of Costs <https://tinyurl.com/ca4-bill-of-costs> ("[t]he fee for docketing a case in the court of appeals is $500"; "[t]he $5 fee for filing a notice of appeal is recoverable as a cost in the district court").

[9] The Fifth Circuit's bill of costs is limited to non-Rule 39(e) items, and its local rules say nothing about raising Rule 39(e) issues at the appellate level. See 5th Cir. R. 39; 5th Cir. Bill of Costs <https://tinyurl.com/ca5-bill-of-costs>. The (outlier) decision below thus makes little sense even measured against the Fifth Circuit's own practice in this area. See Pet. App. 9a-10a (confirming that respondents were required to seek Rule 39(e) costs in district court, not on appeal).

wasting appellate time and bandwidth that otherwise could be devoted to the merits of an appeal.

Respondents' atextual reading of Rule 39(e) is scant justification for jettisoning longstanding practice and introducing needless confusion in courts nationwide.

II. THE COURT SHOULD REVERSE THE JUDGMENT AND REMAND FOR THE DISTRICT COURT TO EXERCISE ITS DISCRETION UNDER RULE 39(e)

Under Rule 39(e)'s proper construction, the district court was tasked with determining Rule 39(e) costs, and it had "broad discretion" to deny or reduce the Rule 39(e) award in this case. *Republic Tobacco*, 481 F.3d at 449. Yet petitioner was hit with a "tremendous" cost award because the district court was bound by the Fifth Circuit's "mandatory" standard. Pet. App. 16a-18a.

That decision was incorrect. This case was litigated by government entities pursuing matters in the public interest—serious allegations of unpaid municipal taxes. Petitioner was acting on behalf of 172 Texas municipalities, and it had a fiduciary obligation to protect the class. Pet. App. 16a-17a. Respondents sought to stay the judgment with a full bond; they did not explore less-expensive alternatives or seek permission to waive the bond requirement (Fed. R. Civ. P. 62(b); C.A. Opening Br. 29-30). Compare *Campbell*, 209 F. App'x at 876 (refusing to award bond costs for similar reasons); *Bose*, 806 F.2d at 305 (suggesting costs may be denied where a party "made no attempt to mitigate its expenses"). Those bonds ran for an extended period through no fault of petitioner: respondents' (unsuccessful) post-judgment filings were left pending for over *2.5 years* while the premiums steadily accrued. Pet. App. 3a-4a.

Petitioner proffered a compelling basis for reducing or denying costs that the district court found "persuasive."

Pet. App. 5a, 16a. Yet the court was powerless to act because it was "constrained" by the Fifth Circuit's "existing precedent" (*id.* at 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. *Id.* at 12a, 14a.

Because this case was decided under the wrong legal standard, the Court should now remand for the district court to discharge its express authority under Rule 39(e) and exercise its discretion in the first instance.

CONCLUSION

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

Respectfully submitted.

GARY CRUCIANI
STEVEN D. WOLENS
MCKOOL SMITH, P.C.
300 Crescent Court, Ste. 1500
Dallas, TX 75201

DANIEL L. GEYSER
Counsel of Record
ALEXANDER DUBOSE &
JEFFERSON LLP
Walnut Glen Tower
8144 Walnut Hill Lane, Ste. 1000
Dallas, TX 75231
(214) 396-0441
dgeyser@adjtlaw.com

FEBRUARY 2021

APPENDIX

APPENDIX

1. Rule 39 of the Federal Rules of Appellate Procedure provides:

Costs

(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.

(b) COSTS FOR AND AGAINST THE UNITED STATES. Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) COSTS OF COPIES. Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) BILL OF COSTS: OBJECTIONS; INSERTION IN MANDATE.

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk and serve an itemized and verified bill of costs.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must—upon the circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate.

(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.

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

> 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.

3. Rule 54(d)(1) of the Federal Rules of Civil Procedure provides:

> *Costs Other Than Attorney's Fees.* 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. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

4. Section 1920 of Title 28 of the United States Code provides:

> **Taxation of costs**
>
> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.