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.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether a district court has discretion under Federal Rule of Appellate Procedure 39(e) not to award appellate costs to a party that the court of appeals has judged to be entitled to appellate costs.

CORPORATE DISCLOSURE 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.

CORPORATE DISCLOSURE STATEMENT—
Continued

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.*

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.

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

CORPORATE DISCLOSURE STATEMENT—
Continued

8. Travelocity.com LP (n/k/a TVL LP)†

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

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, a Delaware limited liability company, has Booking Holdings Inc. (f/k/a priceline.com Inc.) as its ultimate parent corporation.

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† In 2015, Expedia, Inc. acquired the brand and assets of Travelocity.com LP.

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INTRODUCTION

Federal Rule of Appellate Procedure 39 is one of several rules implementing our legal system's "venerable presumption" that prevailing parties have a right to specified litigation costs. See, *e.g.*, *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 377 (2013). Petitioner and its amici spill much ink arguing that courts have discretion not to award full costs. But that is not in dispute. The question is which court has the power to deviate from the well-established presumption when appellate costs are at issue.

The plain terms of Rule 39—as well as history, efficiency, and common sense—establish that only the appellate court deciding the merits of the appeal controls the prevailing party's right to appellate costs. True, the Rule tasks the court of appeals clerk and the district court (or its own clerk) with determining the amounts within the categories of taxable appellate costs. But neither a clerk nor a trial court may second-guess an appellate court's decision, under Rule 39(a), to fully entitle a party to appellate costs. Quite the opposite: Rule 39(e) *requires* trial courts to act "for the benefit of the party entitled to costs" under the appellate court's Rule 39(a) decision. Trial courts have no authority to decide they know better than the court that heard the appeal whether an appellate-cost award is justified or fair.

Despite its support for freewheeling district court discretion, petitioner concedes (Br. 17-19) that appellate courts' Rule 39(a) decisions constrain trial courts.

Petitioner agrees (Br. 19) that a trial court, regardless of its view of the equities, may not award costs to the party "*not* 'entitled to costs' under subsection (a)." But if a trial court cannot award any costs to a party entitled to zero costs, neither can it stray from other allocations made by the appellate court. Suppose an appellate court modifies the standard presumption and instead splits costs between the parties, 50/50. The trial court would surely have no discretion—even in petitioner's view—to give either party more than the appellate court allocated. How, then, could a trial court award less than 100% when an appellate court, like the Fifth Circuit here, decides not to modify the presumption of a full award of costs? In each scenario, the appellate court set the parties' entitlements to an appellate-cost award. That decision binds the trial court.

Petitioner and the government reach the opposite conclusion only by distorting the nature of the appellate court's Rule 39(a) determination. The government rewrites the language of Rule 39(e) in asserting that the court of appeals merely determines which party is "entitled to *seek*" costs. Br. 14, 20, 22, 28 (emphasis added). Petitioner similarly asserts that Rule 39(a) "is limited to designating 'against whom' costs *can be awarded*." Br. 18 (emphasis added). On the contrary, Rule 39(a) entitles the prevailing party to *all appellate costs*, unless the court of appeals orders a different allocation. When "a judgment is reversed," as here, Rule 39(a)(3) mandates that "costs are taxed against the appellee." The principle behind Rule 39 is that "*all cost*

items expended in the prosecution of a proceeding should be borne by the unsuccessful party." Fed. R. App. P. 39(c) advisory committee's note (1967) (emphasis added). The Rule does not authorize trial courts, any more than clerks of the courts of appeals, to decide a different award is fairer. The trial court's job, for reasons of convenience, is to determine the amounts incurred under Rule 39(e)'s four specified categories of costs and assess those amounts in the proportion the appellate court ordered.

This division of labor comports with historical practice and sound judicial policy. For over a century, courts have treated the costs of appeals as distinct from the costs of trial-court proceedings. The trial court has discretion over the latter, but not the former, even when the calculation of certain appellate costs falls to the trial court. Indeed, it was long settled even before Rule 39 that a trial court assigned to tax certain categories of appellate costs had no discretion to deviate from an appellate court's award—even when the party that prevailed and was awarded costs on appeal ultimately lost the case on remand. It should come as no surprise that appellate courts have long controlled the right to appellate costs. Appellate courts are best suited to decide whether the equities in an appeal support altering the presumptive award of full appellate costs to the prevailing party. And it would invert the usual order of things to give a trial court power to sit in judgment of an appellate court's cost award.

This case shows some of the problems with petitioner's contrary approach. Petitioner voiced no objection when the Fifth Circuit, in reversing the district court, unqualifiedly awarded appellate costs to respondents. But then when respondents claimed the appellate costs that Rule 39(e) makes available, petitioner told the district court that it should refuse to tax appellate costs because doing so would be "grossly unfair." D. Ct. Doc. 1340, at 1-2 (May 15, 2018).

There is nothing unfair about taxing the costs that respondents claimed. Petitioner aggressively litigated this lawsuit on behalf of a large class, even after intervening appellate authority ended its hope of success. In the face of that adverse authority—not to mention Rule 39(e)(3) and Fifth Circuit precedent allowing full recovery of supersedeas bond premiums—petitioner insisted that respondents obtain bonds to secure the full judgment as a condition of staying execution pending appeal. Petitioner does not claim that respondents paid more than market rates to obtain the supersedeas bonds. It instead argues that petitioner's own election to litigate on behalf of a class should relieve petitioner from bearing respondents' bond premium expenses—a small fraction of the extensive litigation expenses respondents incurred in this vigorously litigated case.

Petitioner's "unfairness" argument is simply a back-door attack on the Fifth Circuit's award of appellate costs. Nothing in Rule 39's text, history, or underlying policy supports letting petitioner pitch this argument to the district court. The Fifth Circuit was well aware petitioner's suit was a class action.

Yet petitioner never ventured its theory in the Fifth Circuit during the original appeal. There is no reason to give it a second chance in the forum that endorsed petitioner's erroneous legal theories in the first place. Besides, the class-action nature of the lawsuit provides no basis to deny costs, as multiple courts have held. Especially not here, where petitioner's contingent-fee attorneys—not the class representative—are contractually obligated to pay costs. The Court should reject petitioner's misguided arguments and affirm the judgment of the court of appeals.

STATEMENT

A. Legal Background

1. The federal system reflects "a venerable presumption that prevailing parties are entitled to costs." *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 377 (2013); see also, *e.g.*, *United States* v. *Schurz*, 102 U.S. 378, 408 (1880). Historically, "prevailing parties were entitled to costs as of right in actions at law while courts had discretion to award costs in equity proceedings." *Marx*, 568 U.S. at 377 n.3.

The federal system inherited this approach from England. See, *e.g.*, *Baez* v. *U.S. Dep't of Justice*, 684 F.2d 999, 1002 (D.C. Cir. 1982) (en banc) (per curiam); Arthur L. Goodhart, *Costs*, 38 Yale L.J. 849, 854 (1929). Over time, however, the United States abandoned aspects of the English practice—especially by limiting costs to a narrower set of categories. Goodhart, *supra*,

at 856. Most famously, the "American Rule" rejects the English practice of allowing recovery of attorney's fees. *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Today, federal courts may not award costs beyond legislatively defined categories. See, *e.g.*, *Rimini St., Inc.* v. *Oracle USA, Inc.*, 139 S. Ct. 873, 878 (2019); *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987). But within the defined categories, awards of full costs for prevailing parties remain the "presumption" and are unaffected by the American Rule against attorney's fees. *Marx*, 568 U.S. at 377, 381-382; see also *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 351 (1981).

2. This Court's decisions on costs normally involve trial-court costs under Federal Rule of Civil Procedure 54(d). See, *e.g.*, *Rimini St.*, 139 S. Ct. 873; *Marx*, 568 U.S. 371. But from the Nation's earliest days, appellate courts have also awarded costs for appellate proceedings. See, *e.g.*, *Winchester* v. *Jackson*, 7 U.S. (3 Cranch) 514, 514 (1806) (granting prevailing party's requests for costs). In 1838, this Court issued rules to standardize its approach, which incorporated the usual presumption of costs for prevailing parties. In cases of reversal, for example, then-Rule 47 said that "costs shall be allowed in this Court for the plaintiff in error, or appellant, as the case may be, unless otherwise ordered by the Court." Rules of Court, 37 U.S. (12 Peters) vii (1838); see also *Bradstreet* v. *Potter*, 41 U.S. (16 Peters) 317, 318 (1842) (awarding costs under this rule).

Before long, the Court chose to divide responsibility for fixing the actual amounts of these costs, even while this Court retained exclusive authority over whether to deviate from the pro-costs presumption. For instance, when an appellant obtained reversal, "[t]he cost of the transcript of the record from the court below shall be a part of [the allowed] costs and be taxable in that court as costs in the case." Sup. Ct. R. 24.3 (1871). At the same time, the Clerk of this Court was responsible for taxing other costs and including those amounts in the mandate sent down to the lower courts. Sup. Ct. R. 24.6 (1871). The core of this approach continues in this Court's current rules: The prevailing party recovers costs "unless the Court otherwise orders." Sup. Ct. R. 43.1-2. And the cost of "the transcript of the record from the court below * * * shall be taxable in that court," while the "Clerk's fees and the cost of printing the joint appendix" are taxable here. Sup. Ct. R. 43.3.

3. Federal Rule of Appellate Procedure 39 is the corresponding rule for the courts of appeals. Like its counterparts in the district courts and this Court, it generally entitles the prevailing party to costs "unless the law provides or the court orders otherwise." Fed. R. App. P. 39(a). The Rule thus incorporates the same presumption favoring awards of full costs for prevailing parties as the other cost rules. *Baez*, 684 F.2d at 1004. Indeed, according to the Advisory Committee, Rule 39's basic principle is that "*all cost items* expended in the prosecution of a proceeding should be

borne by the unsuccessful party." Fed. R. App. P. 39(c) advisory committee's note (1967) (emphasis added).

Rule 39 also specifies what expenses qualify as appellate "cost items" and divides responsibility for taxing those items between the appellate and trial courts. In the appellate court, a party entitled to appellate costs may obtain, at court-approved rates, "the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f)." Fed. R. App. P. 39(c). In the trial court, on the other hand, a party entitled to appellate costs may obtain costs for record preparation and transmission, necessary reporter transcripts, premiums paid for a security to preserve rights pending appeal, and the fee for filing a notice of appeal. Fed. R. App. P. 39(e). But these items remain "costs of the appeal" itself; they are not costs of the trial-court proceedings. Fed. R. App. P. 39(e) advisory committee's note (1967).[1]

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[1] Although no party raised the issue, the government suggests (Br. 19 n.4) that Rule 39(e)(3)'s half-century-old authorization for taxing supersedeas bond premiums may be invalid. The government is right to observe (Br. 19 n.4) that petitioner forfeited this argument. But the government is wrong to think the argument might have merit. The government's line of authority rests on this Court's interpretation of Federal Rule of Civil Procedure 54(d), which fails to identify any particular cost items as taxable beyond the categories listed in 28 U.S.C. 1821 and 1920. *Crawford Fitting*, 482 U.S. at 442. Rule 39, in contrast, contains "plain evidence of congressional intent to supersede" the limitations of Sections 1821 and 1920. *Crawford Fitting*, 482 U.S. at 445. Under the Rules Enabling Act, 28 U.S.C. 2071 *et seq.*, Rule 39 is an exercise of congressional authority that supersedes any conflicting statutes. See *Burlington N. R.R. Co.* v. *Woods*,

B. Procedural History

1. Petitioner filed this diversity action in federal court in 2006. J.A. 27. On behalf of a proposed class of Texas municipalities, it contended that the State's municipal ordinances required respondents, a group of online travel companies, to pay hotel occupancy taxes. See D. Ct. Doc. 74, at 1-2 (Oct. 31, 2006). From the outset, the agreement between petitioner and its contingent-fee attorneys recognized that counsel would incur litigation costs and, "[i]f there is no recovery," would "be solely responsible for payment of the Cost." J.A. 91-93.

While the case went forward in the district court, the city of Houston opted out of the class to individually litigate the issue in state court. But the Texas Court of Appeals rejected Houston's claim in 2011, and the Texas Supreme Court denied review. *City of Houston* v. *Hotels.com, L.P.*, 357 S.W.3d 706, 708 (Tex. App. 2011), pet. denied (Oct. 26, 2012). Despite that decision, however, the district court credited petitioner's theories and entered judgment awarding the class $55,146,489 in unpaid taxes, interest, and penalties. D. Ct. Doc. 1155, at 8 (Apr. 4, 2013).

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480 U.S. 1, 5 & n.3 (1987). Unsurprisingly, courts and commentators have dismissed the theory that the government now raises. *Republic Tobacco Co.* v. *N. Atl. Trading Co.*, 481 F.3d 442, 448 (2007) ("[B]ecause Rule 39(e) expressly authorizes the taxation of supersedeas bond costs, it is binding on district courts regardless of whether § 1920 authorizes an award of those costs."); *Berkley Reg'l Ins. Co. v. Phila. Indem. Ins. Co.*, 600 Fed. Appx. 230, 237 (5th Cir. 2015) (per curiam) (agreeing with *Republic Tobacco* on this point); 16AA Charles Alan Wright et al., *Federal Practice and Procedure* § 3985 (5th ed. 2020) (same).

2. At the time, the Federal Rules of Civil Procedure automatically stayed the final judgment for only fourteen days. Fed. R. Civ. P. 62(a) (2013). Respondents therefore acted quickly in securing supersedeas bonds to stay execution pending appeal. Respondents wanted petitioner's agreement to respondents' motion for bond approval, J.A. 163, because supersedeas bonds stay a judgment only if the district court approves them, see Fed. R. Civ. P. 62(d) (2013); Fed. R. Civ. P. 62(b) (2019). To that end, the parties negotiated over the amounts to be secured, the form of the bonds, the identity of the bond sureties, and the duration of the bonds. J.A. 163, 168-169, 174-175. Petitioner did not suggest any less expensive form of security, much less agree to dispense with a security altogether. J.A. 162-163. On the contrary, petitioner insisted on reviewing each bond before joining for bond approval. J.A. 163, 172. The parties initially agreed to $68.6 million in bonds, which covered the $55.1 million judgment plus taxes and interest that would continue to accrue for eighteen months after the judgment. J.A. 168. On April 12, 2013, respondents filed an agreed-upon, expedited motion to stay enforcement of the final judgment, J.A. 80-85, which the district court granted, J.A. 40.

After eighteen months, petitioner's counsel insisted that respondents increase the bond premiums to cover additional accrued damages. J.A. 163. Petitioner would not accept estimates of these amounts, but instead demanded that respondents collect and produce transactional data for review by petitioner's experts.

J.A. 163, 174-175. The supersedeas bond amounts were increased in October 2014 and November 2015. J.A. 46-48. By April 2016, the amount of the final judgment being secured had risen to $84,123,089. D. Ct. Doc. 1219, at 11 (Apr. 11, 2016). Petitioner had insisted on the bonds, and increasing their amounts, even though Texas's appellate courts had already rejected petitioner's core legal theory.

3. In line with the Texas appellate authority, the Fifth Circuit unanimously rejected petitioner's claims. See *City of San Antonio* v. *Hotels.com, L.P.*, 876 F.3d 717, 722-724 (5th Cir. 2017). Its judgment taxed appellate costs in respondents' favor. J.A. 100. Respondents filed a bill of costs seeking $905.60 for items taxable in that court under Rule 39(c), which the circuit clerk taxed without any objection from petitioner. Pet. App. 28a-30a. Petitioner filed separate petitions for panel and en banc rehearing. J.A. 23-24. But neither petition questioned the award of appellate costs. After the court of appeals denied rehearing, J.A. 26, it issued the mandate, which incorporated its judgment taxing appellate costs against petitioner, J.A. 99-100.

4. The case returned to the district court, and respondents moved for entry of a proposed judgment, which among other things awarded respondents trial and appellate costs. J.A. 109. Petitioner told the court that it did not object to respondents' proposed judgment. J.A. 110. The district court adopted the proposed judgment and respondents filed their bill of costs, including appellate costs under Rule 39(e). J.A. 72; D. Ct. Doc. 1337, at 1-3 (Apr. 9, 2018). To support

their submission, respondents included declarations and exhibits documenting the costs, including the supersedeas bond premiums. See J.A. 113-139. After negotiations with petitioner, J.A. 140-161, respondents stipulated to a $68,681.64 reduction in the bond premium amount, mostly for refunds on the bond premiums respondents had received or anticipated receiving. J.A. 144, 155, 161.

After the stipulated reduction, respondents were seeking $1,939,677.36 for the bond premiums, and petitioner objected to that amount in its entirety. D. Ct. Doc. 1340, at 1-2 (May 15, 2018). Petitioner did not argue that any portion of the claimed amount fell outside the scope of Rule 39(e)(3), or that respondents had paid unreasonably high rates for the bonds. Instead, it argued that the Fifth Circuit's mandate had not awarded supersedeas bond premiums. *Id.* at 1. And it argued that requiring petitioner to bear these costs would be "grossly unfair" because absent class members accounted for roughly two-thirds of the secured monetary judgment. *Id.* at 1-2.

The district court rejected these objections. Pet. App. 16a-18a. Although the court stated, without explanation, that petitioner had "ma[de] some persuasive arguments," *id.* at 16a, it found "no precedent in the Fifth Circuit to support" petitioner's arguments, *id.* at 17a. In fact, Fifth Circuit authority "made clear" that the court lacked discretion to decline to award proper appellate costs given the mandate's language. *Ibid.* (quoting *In re Sioux Ltd., Sec. Litig.*, No. 87-6167, 1991 WL 182578, at *1 (5th Cir. Mar. 4, 1991) (per

curiam)). In addition to certain trial-court costs, the court confirmed $1,941,087.96 in appellate costs, which covered the $1,939,677.36 in bond premiums, $505 in clerk fees, and $905.60 taxed by the Fifth Circuit clerk. See Pet. App. 18a n.4, 24a-25a.

5. Petitioner appealed on three main grounds. It disputed the district court's interpretation of the Fifth Circuit's mandate, argued that respondents had missed the opportunity to obtain Rule 39(e) costs by not requesting them in the court of appeals, and insisted that the district court had discretion to reduce costs because *Sioux* was no longer good law after intervening amendments to Rule 39.

The court of appeals rejected petitioner's arguments in full. Pet. App. 6a-14a. As relevant here, the court agreed that *Sioux* was binding precedent, even though an unpublished decision, because unpublished Fifth Circuit decisions from before 1996 are binding under the court's rules. *Id.* at 11a n.3. The court of appeals also rejected petitioner's argument that the 1998 amendment to Rule 39(e) had undermined *Sioux* because petitioner "concede[d] that the 1998 amendment was not substantive in nature." *Id.* at 13a. The panel did not address whether it believed *Sioux* was correctly decided in the first place. *Id.* at 14a. It did note that some circuits had rejected *Sioux*'s conclusions, but found that petitioner "overstate[d] the out-of-circuit support for its position." *Id.* at 10a-11a & n.2.

6. Petitioner sought rehearing, asking the en banc court to repudiate *Sioux* and recognize district

court discretion over appellate costs. C.A. Pet. for Reh'g at 14-18. The Fifth Circuit denied the petition. Pet. App. 32a.

SUMMARY OF ARGUMENT

I. Under Federal Rule of Appellate Procedure 39, district courts lack authority to decline to award recoverable appellate costs when the court of appeals has awarded full appellate costs.

A. The Rule's language establishes that only the court of appeals may override the Rule's presumption in favor of costs for the prevailing party. See Fed. R. App. P. 39(a). When a court of appeals decides that a party is entitled to full appellate costs, the district court is limited to taxing the eligible cost items "for the benefit of the party entitled to costs." Fed. R. App. P. 39(e). Contrary to petitioner's and the government's assertions, the appellate court does not merely decide which party can *seek* appellate costs. Rather, the appellate court confers a right to all taxable categories of appellate costs, unless it orders a different allocation.

Nothing in Rule 39 implies that trial courts may hold that the equities do not support what the appellate court awarded. Rule 39(e)'s phrase "taxable in the district court," especially when read in context, merely establishes *where* the prevailing party must claim certain categories of appellate costs. Some categories are taxable in the court of appeals through a submission to the clerk; others are taxable in the district court.

But neither the appellate clerk nor the district court has equitable discretion to contradict the appellate court's determination about a party's entitlement to costs.

B. History confirms this conclusion. Before Rule 39, courts understood that appellate-cost entitlements are part of the appellate mandate because they are costs for the appeal itself. For over a century, trial courts have lacked authority to overrule appellate courts' judgments that a prevailing party is entitled to appellate costs. Trial courts lacked that authority even when the party that initially prevailed and was awarded costs on appeal ended up losing the case after further proceedings on remand. A trial court could not treat the party's ultimate defeat as a reason to deny appellate costs unless the appellate court had specifically granted the trial court permission to do so. Given trial courts' longstanding lack of discretion over appellate-cost awards, the Advisory Committee would have given a clear indication if it had wished to unsettle this traditional understanding of the courts' respective powers.

C. Sound policy supports the same result. The considerations that bear on appellate-cost entitlements are uniquely within an appellate court's ability to assess. Those considerations include the nature and significance of the result of the appeal, as well as the parties' litigation conduct during appellate proceedings. There is no reason appellate courts cannot reliably weigh these considerations—much less any reason to allow trial courts to overrule appellate

courts' judgments. Appellate courts need not know the precise amount of the expenses in question to determine that the equities of an appeal support awarding the prevailing party its appellate costs. Petitioner's proposal would simply generate wasteful litigation over whether trial courts permissibly exercised their discretion.

II. Even if Rule 39 were thought to permit some trial-court discretion over the appellate-cost award, the judgment below would still merit affirmance for two reasons.

A. First, as all agree, Rule 39(a) gives courts of appeals broad authority over the taxation of appellate costs within their jurisdiction. So even if the Court accepted petitioner's presumption of trial-court discretion as a background principle, Rule 39(a) would still authorize an appellate court to order otherwise—either in an order in a particular case or more generally. That is effectively what the Fifth Circuit has done, and petitioner identifies no basis for denying the Fifth Circuit the right to control its own practices in this way.

B. In all events, petitioner's "unfairness" argument falls flat. Petitioner has suggested that supersedeas bond premiums should be taxable only in limited circumstances. But Rule 39's drafters rejected that theory by making these premiums taxable by a general rule. Nor is there support for petitioner's suggestion that cost-shifting should be restricted in class-action cases. Class counsel often take such cases on contingency and agree to bear the risk of paying

litigation expenses if the class obtains no recovery; and that is what happened between petitioner and its counsel. As between the parties, as this Court observed long ago, it is reasonable to make the party responsible for the erroneous judgment responsible for the cost of staying its execution. Just so here, where petitioner demanded expensive supersedeas bonds even after controlling authority rejected petitioner's main defense of the judgment being secured. Even if the district court had some equitable discretion, it had no discretion to deny a full award of costs on the grounds petitioner urged.

ARGUMENT

I. District Courts Lack Authority To Deny Taxable Appellate Costs To A Party Entitled To Appellate Costs.

There is a "venerable presumption" in the federal court system "that prevailing parties are entitled to costs." *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 377 (2013) (discussing Federal Rule of Civil Procedure 54(d)). In this respect, the presumption for costs is the "opposite" of the federal system's approach to attorney's fees. *Id.* at 381-382.

And the presumption "is no weaker in cases involving [Rule 39] than in cases under [Rule] 54(d)." *Baez* v. *U.S. Dep't of Justice*, 684 F.2d 999, 1004 (D.C. Cir. 1982) (en banc) (per curiam). Both rules "find root in the same principle." *Ibid.* In the Advisory

Committee's words, "the principle of" Rule 39 is "that all cost items expended in the prosecution of a proceeding should be borne by the unsuccessful party." Fed. R. App. P. 39(c) advisory committee's note (1967); cf. *Hall* v. *Hall*, 138 S. Ct. 1118, 1130 (2018) ("Advisory Committee Notes are 'a reliable source of insight into the meaning of a rule.' ") (citation omitted).

Even with this presumption, of course, cost awards are not mandatory. See, *e.g.*, *Marx*, 568 U.S. at 377. The court deciding the merits of an appeal has discretion not to award costs if the equities weigh against it. But the other side's discussion on this point largely ignores the critical question. See Pet. Br. 15 & n.3; U.S. Br. 16-17. The question is not whether a court has discretion to deviate from the presumption favoring appellate-cost awards, but *which court* has that discretion.

The text, history, and underlying policies of Rule 39 all establish that the appellate court has this discretion and the trial court does not. When an appellate court decides that a party is entitled to appellate costs, its "direction about costs" is part of its mandate. Fed. R. App. P. 41(a). The trial court's job is then to tax costs within Rule 39(e)'s categories—that is, to calculate the proper amounts of the awarded costs. But the trial court may not depart from the appellate court's directions, just as it may not depart from the appellate mandate in any other way.

Petitioner's contrary position is untenable. It rests on myopic emphasis on Rule 39(e)'s use of the word

"taxable" and an unsupported assumption that trial-court discretion over trial-court costs extends to appellate costs as well. The correct view is the view followed by the court below: "A district judge has discretion under Rule 54(d) * * * with respect to trial costs, but has no discretion with respect to appellate costs" under Rule 39(e). *Lamborn* v. *Dittmer*, 726 F. Supp. 510, 520 (S.D.N.Y. 1989); see *In re Sioux Ltd., Sec. Litig.*, No. 87-6167, 1991 WL 182578, at *1 (5th Cir. Mar. 4, 1991) (per curiam) (approving *Lamborn*'s approach); Pet. App. 12a.

A. Petitioner's Position Conflicts With The Text Of Rule 39.

Both sides recognize the need to follow the Federal Rules' "plain meaning" using ordinary principles of statutory interpretation. *Pavelic & LeFlore* v. *Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989). "In ascertaining the plain meaning" of a statute, courts consider not only "the particular statutory language at issue" but also "the language and design of the statute as a whole." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). The same principle applies to the Federal Rules: a phrase may be ambiguous when "viewed in isolation" yet unambiguous when "read in the total context of all the [rule's] provisions." *Pavelic*, 493 U.S. at 123. Courts should be wary of fixating on a single word.

So it is here. Petitioner and the government maintain that trial courts have equitable discretion over

appellate costs based on a single word from the 1998 version of Rule 39(e): "taxable." But that word cannot bear the weight that petitioner and the government foist on it. And the rest of Rule 39, which petitioner and the government consider only as an afterthought, conclusively shows that equitable discretion resides with the appellate court alone.

1. Rule 39(a) Gives Appellate Courts Sole Authority To Determine Whether A Prevailing Party Is Entitled To An Award Of Full Appellate Costs.

a. Rule 39(a) governs who is entitled to appellate costs. By default, this entitlement depends on the result of the appeal: the winner receives and the loser pays. But the default rule does not apply if "the court orders otherwise." Fed. R. App. P. 39(a).

The "court" that may order otherwise is the court of appeals. See, *e.g.*, 21 James Wm. Moore et al., *Moore's Federal Practice* § 339.20 (3d ed. 2020) (Moore). When the Federal Rules of Appellate Procedure refer to "the court," that is almost always the court they mean—as is only natural for rules that "govern procedure in the United States courts of appeals." Fed. R. App. P. 1(a)(1).[2]

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[2] The Rules routinely grant the appellate court authority to change a default using a phrase like "unless the court orders otherwise." See, *e.g.*, Fed. R. App. P. 5(c), 8(a)(2)(D)-(E); 9(a)(2), 21(d), 25(a)(2)(B)(i), 26(a)(3), 26.1(e), 27(a)(1), (3)(A), (d)(3), and

And courts of appeals routinely exercise this power. One of petitioner's cited cases, for example, recognizes that while "an award of costs to a prevailing party is the norm," sometimes "equitable considerations" warrant an exception. *Moore* v. *Cnty. of Delaware*, 586 F.3d 219, 221-222 (2d Cir. 2009) (per curiam) (collecting cases).

b. Neither petitioner nor the government denies that Rule 39(a)'s reference to "the court order[ing] otherwise" is a reference to the court of appeals and *not* the district court. See Pet. Br. 17-18; U.S. Br. 21. Petitioner even concedes (Br. 17) that under Rule 39(a), "[t]he appellate court * * * designates which party is entitled to costs."

This concession, while warranted, is important. For one thing, by conceding this point petitioner rejects the reasoning of its own leading case. See Br. i, 3, 21, 23, 27 (invoking *Republic Tobacco*, 481 F.3d 442). The *Republic Tobacco* case focused on Rule 39(a)'s "'unless * * * the court orders otherwise' language." 481 F.3d at 449. In the Seventh Circuit's view, this language means "that a *district court* may, in its sound discretion, depart from the default awards set out in Rule 39(a)(1)-(3) when assessing costs under Rule 39(e)." *Ibid.* (emphasis added). The Seventh Circuit similarly viewed Rule 39(a)(4)'s reference to "the court" as giving "*district courts* broad discretion to allocate costs." *Ibid.* (emphasis added). In other words, the Seventh Circuit

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(e), 28(c), 31(a)(1) and (c), 34(d), (e), and (g), 35(e), 39(d)(2), 40(a)(3), 41(a), 45(d), 46(a)(3).

took Rule 39(a)'s references to "the court" as references to trial courts and indeed the source of trial courts' supposed discretion.

But petitioner and the government apparently agree that the Seventh Circuit's key premise was wrong. When Rule 39(a) refers to "the court" ordering something other than the presumptive award of appellate costs, it is referring to the court of appeals alone.[3]

2. Rule 39(e) Binds The District Court To The Court Of Appeals' Entitlement Determinations.

Petitioner's concession about which court may "order[] otherwise" does more than pull the rug out from its leading authority. The concession also has critical implications for Rule 39(e). For two separate reasons, Rule 39(a)'s grant of authority to the court of appeals

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[3] *Republic Tobacco* also misconstrued the two cases on which it relied. See 481 F.3d at 449 (citing *Guse* v. *J.C. Penney Co.*, 570 F.2d 679 (7th Cir. 1978), and *Emmenegger* v. *Bull Moose Tube Co.*, 324 F.3d 616 (8th Cir. 2003)). In both cases, appellate courts exercised their own Rule 39(a) discretion to permit the trial courts to decide whether and to what extent to award Rule 39(e) costs. See *Guse*, 570 F.2d at 681-682; *Emmenegger*, 324 F.3d at 626. Nothing in the Fifth Circuit's approach precludes this type of delegation of discretion to trial courts. See, *e.g.*, *Universal Amusement Co.* v. *Vance*, 587 F.2d 159, 172-173 (5th Cir. 1978) (en banc) ("Although this court has discretion to award costs and fees arising out of an appeal to this court, we think that the district court should determine the total award here[.]") (citation omitted), aff'd on other grounds, 445 U.S. 308 (1980); p. 44, *infra*. The dispute here is whether trial courts have such discretion without a delegation.

shows that petitioner's reading of Rule 39(e) is incorrect.

a. The first and most obvious problem is that Rule 39(e) expressly binds the trial court to the appellate court's Rule 39(a) determination. Trial courts tax costs "for the benefit of the party entitled to costs under this rule." Fed. R. App. P. 39(e).[4] If a party is *entitled* to costs, that party has a right to them. See, *e.g.*, *Black's Law Dictionary* 626 (4th ed. rev. 1968) (*Black's Fourth*) ("In its usual sense, to entitle is to give a right or title."); *Merriam-Webster Online Dictionary* (2021) (defining *entitled* as "having a right to certain benefits or privileges"), https://www.merriam-webster.com/dictionary/entitled.

Rule 39(e) thus confirms that appellate courts, not trial courts, determine a party's right to appellate costs. Neither petitioner nor the government has any answer to this problem. The government, for example, asserts—no fewer than five times—that Rule 39(a) determinations govern which party is "entitled *to seek*" those costs. Br. 14, 20, 22, 28 (emphasis added). That is a major rewrite of the language. A party *entitled to* costs has a right to them; a party *entitled to seek* costs might not.

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[4] This language underscores the Seventh Circuit's error in *Republic Tobacco* in concluding that Rule 39(a) empowers trial courts to "order[] otherwise." If Rule 39(a) gave trial courts broad authority over parties' entitlements to appellate costs, it would be meaningless for Rule 39(e) to limit trial courts to acting for the benefit of the party entitled to costs.

Petitioner similarly asserts that Rule 39(a) "is limited to designating 'against whom' costs *can be awarded*." Br. 18 (emphasis added). Elsewhere, however, petitioner concedes that trial courts may not "upset[] the circuit's Rule 39(a) determination." Br. 19 (emphasis omitted). Even in petitioner's view, trial courts lack the "power to order costs" in favor of a "party *not* 'entitled to costs' under subsection (a)." *Ibid.* (emphasis in original).

But that is respondents' point: appellate courts' Rule 39(a) decisions constrain trial courts' Rule 39(e) decisions. Petitioner's mistake is not carrying this point to its logical conclusion. It would indeed violate Rule 39, as petitioner admits, for a trial court to tax appellate costs in favor of Party A when the appellate court declared Party B entitled to appellate costs. It would equally violate Rule 39, however, for the trial court to require the parties to bear their own appellate costs. That too would be a decision at the expense of the party entitled to appellate costs under the appellate court's ruling.

Nor is there reason to stop there. Awarding costs is not an all-or-nothing affair, and appellate courts sometimes conclude that the equities warrant apportioning costs between the two sides. For instance, a court might declare one party entitled to one-half or one-third of the appellate costs, or even a specific fraction of a particular cost item.[5] Whether the court of

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[5] See, *e.g.*, *Mass. Eye & Ear Infirmary* v. *QLT Phototherapeutics, Inc.*, 552 F.3d 47, 75 (1st Cir. 2009) (awarding two-thirds of

appeals believes the equities warrant an award of 100%, 50%, or 0% of the appellate costs, the district court has no license to award a different percentage.

Yet that is what petitioner wanted the district court to do here. In using the decretal language from *Sioux*, the Fifth Circuit ordered respondents entitled to full appellate costs. See Pet. App. 12a, 27a. Even so, petitioner asked the district court to tax none of respondents' supersedeas bond premiums. D. Ct. Doc. 1340, at 1 (May 15, 2018). Had the district court granted that request, respondents would have received $1,410.60 in Rule 39 costs instead of $1,941,087.96—about 0.07% of the full amount. See Pet. App. 18a n.4, 24a-25a; see also D. Ct. Doc. 1342, at 2 n.1 (June 6, 2018) (noting petitioner's lack of objection to $505 in clerk fees and the $905.60 taxed by the Fifth Circuit clerk). In the alternative, petitioner asked the district court to tax only one-third of the supersedeas bond premiums—on the theory that petitioner, as class representative, was responsible for only one-third of the secured judgment. D. Ct. Doc. 1340, at 9 (May 15, 2018). Had the district court gone along with that, respondents would have received $639,642.04 or roughly one-third the full amount. See *ibid.*; Pet. App. 23a-24a.

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appellate costs); *In re New Times Sec. Servs., Inc.*, 371 F.3d 68, 88 (2d Cir. 2004) (same); *Burrell* v. *Star Nursery, Inc.*, 170 F.3d 951, 957 (9th Cir. 1999) (one-half of appellate costs); *Murphy* v. *L&J Press Corp.*, 577 F.2d 27, 30 (8th Cir. 1978) (full brief-printing costs but "only one-half of the transcript fee"); *Moten* v. *Bricklayers, Masons & Plasterers, Int'l Union of Am.*, 543 F.2d 224, 240 n.4 (D.C. Cir. 1976) (per curiam) (15% of appellate costs).

Either decision would have impermissibly rewritten the Fifth Circuit's Rule 39(a) entitlement.

b. The second textual problem for petitioner is what Rule 39(e) does *not* say. Other provisions in federal cost rules show that the drafters know how to confer equitable discretion on a court. Rule 39(a), for example, uses the phrase "unless * * * the court orders otherwise." And equivalent formulations appear in Rule 54(d) ("[u]nless * * * a court order provides otherwise") and Supreme Court Rule 43 ("unless the Court otherwise orders"). Rule 39(e) has no comparable language.

When the Federal Rules decline to use an available "term of art," the decision is usually deliberate. *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 934-935 (2009). This inference is even stronger when, as in Rule 39, the drafters "include[] [the] particular language" in one subdivision of a rule "but omit[] it in another" subdivision of the same rule. *Id.* at 935 (citation omitted). Given the glaring omission of any "order otherwise" language in Rule 39(e), the Court should reject petitioner's view that trial courts have the same discretion as appellate courts.

c. Petitioner has no solution to these problems. It recognizes (Br. 19) that allowing trial courts to "order[] otherwise" would give them too much discretion over appellate costs. But so too would allowing trial courts to refuse to tax proper appellate costs. Either way, trial courts would have discretion to change the appellate court's Rule 39(a) award. Instead of

receiving 100% of its appellate costs, the party entitled to costs receives a much smaller percentage, or none at all. Once petitioner admits, as it must, that appellate courts' entitlement decisions constrain trial courts, there is no room left for the latter to exercise discretion over the parties' rights to appellate costs.

3. The District Court's Responsibility Is To Determine The Amounts Within Rule 39(e)'s Four Categories.

That is not to say trial courts have no role under Rule 39. They are still responsible for taxing the four categories of appellate costs identified in Rule 39(e). That means, by definition, that trial courts, or trial court clerks, must "assess or determine judicially, the amount of" those costs. *Merriam-Webster's Online Dictionary* (2021) (defining the verb *to tax* in the context of taxing the "costs of an action in court"), https://www.merriam-webster.com/dictionary/tax; see also *Black's Fourth* 1631 (defining *Taxation of Costs* as "[t]he process of ascertaining and charging up the amount of costs in an action to which a party is legally entitled, or which are legally chargeable").

Properly understood, the trial court's role is to determine the correct amount of the entitled party's costs within the specified categories. This role includes the duty to "ensure that only proper costs are awarded." *Sioux*, 1991 WL 182578, at *1 (citing *Lamborn*, 726 F. Supp. at 520). So if a party entitled to appellate costs claims borrowing expenses beyond the premiums that Rule 39(e)(3) allows, the trial court should refuse.

See *Lamborn*, 726 F. Supp. at 521. Similarly, the trial court should not include amounts that the party entitled to costs did not actually incur. In some cases, the trial court's role may require fact-finding or an exercise of judgment. At a minimum, the court will normally have to review documentation of the prevailing party's payments, like the documentation respondents submitted here. J.A. 114, 123-124, 133-134, 138.

But it should not be surprising if in most cases the trial court's role is modest. As this Court has observed, "the assessment of costs most often is merely a clerical matter that can be done by the court clerk." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 573 (2012) (citation omitted). All the more so when the trial court is fixing the proper amount of appellate costs, where a different court sets the equitable entitlement. Perhaps for that reason, Rule 39(e) says the specified appellate costs are taxed *in* the district court, rather than *by* the district court. The task might readily be accomplished by the district court clerk, without need for the district judge's personal involvement.

The Advisory Committee notes also confirm the trial court's limited role. They do not espouse any belief that trial courts can better weigh relevant equitable considerations. The notes instead describe the four Rule 39(e) categories as "taxable in the district court for general convenience." Fed. R. App. P. 39(e) advisory committee's note (1967). It may indeed be more convenient to tax those amounts in the trial court. For over a century, courts have justified the taxation of certain appellate costs in trial courts because trial courts

have readier access to information about what certain appellate items cost. See, *e.g.*, *City of Orlando* v. *Murphy*, 94 F.2d 426, 432 (5th Cir. 1938) (noting that for certain appellate costs "the actual fixing of the amount [is] left to the District Court whose officers are the ones informed thereon"); *Berthold* v. *Burton*, 169 F. 495, 495 (C.C.S.D.N.Y. 1909) (suggesting that this Court leaves the taxation of lower court record transcripts to lower courts because "it seem[s] better to leave the details of these local disbursements, often in a distant court, to be adjusted at the place where they were incurred"); see p. 7, *supra*.

That explanation remains relevant today. Unlike the Rule 39(c) cost items taxable in the appellate court (appellate briefs and appendices), the Rule 39(e) items are linked to events in the trial court: district court staff prepare and transmit the record, Fed. R. App. P. 39(e)(1); the court reporter preparing the transcript works in the district court, Fed. R. App. P. 39(e)(2); the district court approves the supersedeas bond, Fed. R. App. P. 39(e)(3); see Fed. R. Civ. P. 62(b); and the district court collects the notice of appeal filing fee, Fed. R. App. P. 39(e)(4); see 28 U.S.C. 1917. If the drafters had envisioned an expansive equitable role for the district court, it is doubtful they would have rooted Rule 39(e) in administrative convenience.

Petitioner therefore errs in complaining (Br. 17) that this framework creates "a perfunctory remand for the district court to enter a ministerial order." There is nothing odd about the district court playing a largely "ministerial" role. And petitioner is wrong to claim

(Br. 17) that under this approach "costs have already been finally determined at the appellate level." Petitioner confuses determining a party's entitlement to costs, which the appellate court does, with determining the amounts incurred in each Rule 39(e) category, which the trial court does. No one suggests that the second job belongs to the appellate courts, and so it is irrelevant that their bill-of-costs forms do not include Rule 39(e)'s cost items. See Pet. Br. 25-26; U.S. Br. 24-25, 29.

4. Rule 39(e)'s Use Of The Word "Taxable" Does Not Expand The Trial Court's Role.

The linchpin of petitioner's contrary interpretation of Rule 39 is subdivision (e)'s use of the word "taxable." Both petitioner and the government stress that "taxable" is not a mandatory term. Pet. Br. 13-14; U.S. Br. 15. But Rule 39(e) did not need to use a mandatory term in this particular spot because there are other indications throughout the Rule showing that trial courts lack discretion. Those include, as discussed already, the appellate court's sole authority to decide whether to deviate from the presumption in favor of awarding full appellate costs; the trial court's obligation to act "for the benefit of the party entitled to costs under this rule"; and the absence in Rule 39(e) of any language like "unless the court orders otherwise." The only remaining question is whether "taxable" connotes discretion with enough clarity to overcome all the indications of the absence of trial-court discretion. It does not even come close.

Both sides largely agree what "taxable" means. See Pet. Br. 14; U.S. Br. 15. At the time of Rule 39's adoption, "taxable" meant that the four specified categories are "proper to be taxed or charged up" and "legally chargeable or assessable." *Black's Fourth* 1630. The Rule drafters sought to provide specific legal authority to make these items taxable because federal courts generally cannot tax cost items without express authorization. See *Rimini St., Inc.* v. *Oracle USA, Inc.*, 139 S. Ct. 873, 877-878 (2019).

But granting authority to tax these categories of cost items does not impliedly grant authority to alter the appellate court's Rule 39(a) decision over how to allocate appellate costs. For reasons discussed above, if the Rule drafters had envisioned such discretion, it would have been self-defeating to include the language requiring the trial court to act "for the benefit of the party" the appellate court makes "entitled" to appellate costs. Fed. R. App. P. 39(e).

Even setting aside Rule 39(e)'s reference to the "entitled" party, nothing in the phrase "taxable in the district court" establishes equitable discretion on the trial court's part. Read most naturally, the phrase designates the forum for taxing these items, as petitioner and the government agree. Pet. Br. 14-15; U.S. Br. 15.

Given this common ground, petitioner gains nothing by attacking the Fifth Circuit's interpretation of the prior version of this phrase. Br. 14-15. Until 1998, instead of making these four categories "taxable in the district court," Rule 39(e) said they "shall be taxed in

the district court." Fed. R. App. P. 39(e) (1967). Not unreasonably, the Fifth Circuit construed this use of the word "shall" as mandating taxation of these appellate costs. *Sioux*, 1991 WL 182578, at *1; see, *e.g.*, *Shapiro* v. *McManus*, 577 U.S. 39, 43 (2015) ("[T]he mandatory 'shall' normally creates an obligation impervious to judicial discretion.") (citation and ellipsis omitted).

With the benefit of hindsight, petitioner accuses *Sioux* of overreading the pre-1998 language. In doing so, petitioner overlooks the other strands of the Fifth Circuit's reasoning, like Rule 39(a)'s sole grant of discretion to the court of appeals and Rule 39(e)'s requirement that the district court act for the benefit of "the party entitled to costs" under the appellate mandate. *Sioux*, 1991 WL 182578, at *1. But even if one credited petitioner's concerns about "shall be taxed," petitioner's own reading of "taxable" would be just as much an overreading. Petitioner does not deny that the 1998 change was "stylistic only." Fed. R. App. P. 39 advisory committee's note (1998 Amendment); see Pet. Br. 15; U.S. Br. 18-19. If so, "taxable in the district court" must mean the same thing as "shall be taxed in the district court." See *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 855-856 (2008) (noting that a rule's "substance and operation * * * are unchanged" when an amendment is "stylistic only"); cf. *Marx*, 568 U.S. at 378 (accepting government's premise that stylistic changes to federal rules do not change their meaning). If, as petitioner contends (Br. 14-15), the original phrase merely "specified *where* those costs

would be addressed," the same must be true of the current phrasing.

Rule 39 did not give trial courts equitable discretion before 1998, and it does not do so now. All along, the Rule has obligated trial courts to follow appellate-court decisions about a party's rights to appellate costs.

B. Petitioner's Position Conflicts With The History Of Rule 39 And Appellate-Cost Practices.

Beyond the Rule's text, petitioner and the government misapprehend the relevant history. Rather than analyze the traditional approach to *appellate* costs, they lean on trial courts' Rule 54(d) discretion over costs for trial-court proceedings. Pet. Br. 22-23; U.S. Br. 16-19, 31. But the history shows that discretion over trial-court costs does not carry over when trial courts tax appellate costs.

When Rule 39 was adopted, courts widely recognized that appellate costs are costs for the appeal itself, not the case as a whole. So the entitlement to appellate costs was within the appellate court's domain and something the trial court could not change. That was true even though, as today, certain appellate costs were taxable in the district court for convenience. See, *e.g.*, *City of Orlando*, 94 F.2d at 432 ("This then is the practice; the costs of appeal to this court are imposed by order of this court, those due or already paid to or through its officers are here taxed and included in the mandate, the costs of the transcript and any other

properly taxable appeal costs are to be ascertained and 'taxed' in the District Court on the coming down of the mandate."); pp. 28-29, *supra*.

Even appellate costs taxed in the trial court "follow[ed] the judgment on appeal" and were "imposed by order of [the appellate] court." *City of Orlando*, 94 F.2d at 432. Trial courts therefore had no discretion to refuse to tax them. *Id.* at 433 (reversing trial court that had refused to adhere to the appellate court's original appellate-costs entitlement); see also, *e.g.*, *Globe Life & Accident Ins. Co.* v. *Still*, 402 F.2d 295, 296 (5th Cir. 1968) (per curiam) (reversing district court that awarded a percentage of appellate costs that "departed from the mandate of this court").

For instance, in *Seeley* v. *Hunt*, 109 F.2d 595, 597 (5th Cir. 1940), the appellate court had required a losing party "to pay the costs of the appeal." And, like Rule 39(e) today, the governing appellate rule provided that "[t]he cost of the transcript of the record from the court below shall be *taxable in that court*." *Ibid.* (emphasis added). The district court believed itself free to tax only one-half the cost of that transcript. *Ibid.* But the court of appeals reversed because its original "mandate" had made the losing party "liable for all costs of the appeal." *Ibid.* The rule's use of the phrase "taxable in [the trial] court" did not deter the court of appeals from treating the costs as beyond the trial court's discretion. In this way, the practice for costs was in keeping with the usual rule about an appellate mandate: a trial court "could not vary it or give any further relief." *Kan. City S. Ry. Co.* v. *Guardian Tr. Co.*,

281 U.S. 1, 11 (1930) (holding that a trial court had no discretion to award costs on remand that the appellate mandate had not authorized).

Many cases illustrate this dynamic in situations (unlike this case) where the party's appellate victory did not resolve the whole case. Even when an appellate court vacated and remanded for a new trial, the trial court had no leeway to depart from the appellate court's award of appellate costs. The appellate court's judgment that the appellate victor was entitled to costs "was beyond the control of the court below, regardless of the final result of the case." *Scatcherd* v. *Love*, 166 F. 53, 57 (6th Cir. 1908) (Lurton, J.).

As a result, a trial court could not even wait to see which party ultimately won at trial before taxing appellate costs—unless the appellate court had specifically authorized doing so, using the term-of-art instruction, "costs to abide the event." See, *e.g.*, *Berthold*, 169 F. at 495-496; *Black's Fourth* 416 (defining *costs to abide the event*). Without such an instruction, trial courts had no "power, in carrying out [the] mandate, to overrule the appellate court and direct that some part of the costs of appeal shall abide the event." *Berthold*, 169 F. at 496.

Trial courts could not even reduce an appellate-cost entitlement when the party who won the appeal did end up losing the case. Courts recognized that "to allow reimbursement" in such circumstances "would practically be to annul [the appellate court's costs] decision" about the original appeal. *Jennings* v. *Burton*,

177 F. 603, 603 (C.C.S.D.N.Y. 1910); see also *Miller* v. *C.C. Hartwell Co.*, 271 F. 385, 389-390 (5th Cir. 1921) (reversing trial court that annulled an appellate costs award in this way); *Md. Cas. Co.* v. *Jacobson*, 37 F.R.D. 427, 430-431 (W.D. Mo. 1965) (observing, just a few years before Rule 39's adoption, that "[t]he Federal cases are clear and consistent" on this point).[6]

The same principle applied to supersedeas bond premiums in the courts that permitted taxation of such premiums. For instance, in *Land Oberoesterreich* v. *Gude*, 93 F.2d 292, 293 (2d Cir. 1937), one of the cases cited in the Advisory Committee notes, the court held that these premiums are proper appellate costs and "do not abide the event like other costs unconnected with the appeal." Instead, these premiums "are presently taxable and payable after the order of reversal." *Ibid.* So, just two years later, a trial court found it lacked discretion to refuse to award supersedeas bond premiums because the appellate court had awarded "costs of appeal." *Jenkins Petroleum Process Co.* v. *Sinclair Ref. Co.*, 26 F. Supp. 845, 845 (D. Me. 1939). It

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[6] This principle still holds. In *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U.S. 138 (2015), this Court awarded appellate costs to B&B Hardware, the party that prevailed here. On remand, B&B Hardware lost. *B&B Hardware, Inc.* v. *Hargis Indus., Inc.*, No. 06-cv-1654, 2017 WL 10309308, at *4 (E.D. Ark. Mar. 21, 2017), aff'd, 912 F.3d 445 (8th Cir. 2018), cert. denied, 149 S. Ct. 218 (2019). At that point, its opponent sought to recover the appellate costs taxed for proceedings in this Court, pointing out that B&B Hardware had lost the case. *Ibid.* But the trial court rightly refused: to shift those costs back onto B&B Hardware would have made this Court's costs award "a nullity." *Ibid.*

made no difference that under local practice supersedeas bond premiums were "taxable in the District Court":

> If the amount of the premium of the supersedeas and appeal bond in this case is taxable as costs it must now be taxed by this court, because the bill of costs made up in the Circuit Court of Appeals by the Clerk of that court does not include it, and I feel obliged to hold that such expense is properly included in the costs of appeal, directed by the mandate to be taxed by this court.

Id. at 849.

Trial courts thus lacked discretion to do anything other than promptly award appellate costs to the party entitled to them. Unless the appellate court directed "costs to abide the event," trial courts could not even base their appellate-cost decisions on the seemingly salient consideration of who ultimately won the case. If trial courts traditionally lacked even that humble amount of latitude, there is no support for petitioner's much freer brand of discretion.

Nothing in the text of Rule 39 or the Advisory Committee notes suggests that the drafters of Rule 39(e) meant to deviate from this "existing scheme." *Hall*, 138 S. Ct. at 1129. The lack of any such indication "is significant because when the Committee intended a new rule to change existing federal practice,

it typically explained the departure." *Id.* at 1130.[7] Petitioner's whole case rests on language making certain costs "taxable in the district court" for the sake of convenience. But that was already the practice long before 1968, and yet trial courts had no authority to change appellate-cost entitlements. The same holds true today.

C. Petitioner's Position Conflicts With Sound Judicial Practice.

Petitioner and the government are also incorrect in contending that their approach is more practical. Pet. Br. 19-22; U.S. Br. 25-29. In fact, it is far less so. Only one court should be deciding whether the equities warrant an award of appellate costs. And given the relevant range of considerations, that court is the court of appeals.

1. Although petitioner insists (Br. 20-21) that appellate courts are poorly positioned to assess arguments over appellate costs, petitioner says very little about the considerations that inform that assessment. By its terms, Rule 39(a) "dictates that the disposition of the appeal is the deciding factor in the assessment of appellate costs." *Studiengesellschaft Kohle mbH* v. *Eastman Kodak Co.*, 713 F.2d 128, 131 (5th Cir. 1983).

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[7] See, *e.g.*, Fed. R. App. P. 5 advisory committee's note (1967) (departing from the practice of "a majority of the circuits"); Fed. R. App. P. 8(a) advisory committee's note (1967) ("[T]he proposed rule would work a minor change in present practice."); Fed. R. App. P. 13(a) advisory committee's note (1967) ("This subdivision effects two changes in practice[.]").

Appellate courts consider what the parties accomplished in the appeal both when deciding whether to award costs in Rule 39(a)(4) mixed-result cases, and also when deciding whether to depart from the other Rule 39(a) default entitlements. As the government admits (Br. 21), the court of appeals "is best positioned to determine [this question] efficiently in light of the parties' relative success." This point alone shows why the appellate court is better positioned than the trial court to exercise equitable discretion over entitlement to all categories of appellate costs.

Appellate courts are also well situated to evaluate factors beyond degree of success. One of petitioner's own citations proves the point. See Pet. Br. 20 n.5 (citing *Moore*, 586 F.3d at 221-222). In *Moore*, the Second Circuit explained that "denial of costs may be appropriate where a losing party can demonstrate misconduct by a prevailing party, the public importance of the case, the difficulty of the issues presented, or its own limited financial resources." 586 F.3d at 221. The court then exercised its own "equitable" discretion and decided not to award appellate costs because of the losing party's "meager financial resources." *Id.* at 222. There is no reason to think the appellate court is ill-positioned to weigh any of the factors *Moore* identified, or any of the factors identified in petitioner's other cited cases. See Pet. Br. 20 n.5.[8]

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[8] In addition, appellate courts already have sole responsibility to assess these sorts of considerations under Rule 38 and 28 U.S.C. 1912, which permit appellate courts alone to award damages or double costs where an appeal is frivolous or undertaken

The same holds for the specific arguments petitioner advanced in this case. For instance, petitioner told the district court that it would be "grossly unfair" for petitioner, as class representative, to bear the full appellate costs. D. Ct. Dkt. 1340, at 7 (May 15, 2018). Setting aside for the moment the lack of support for any "class action" exception to cost-shifting—and setting aside as well petitioner's counsel's agreement to bear the litigation costs if petitioner obtained no recovery—there is no reason why petitioner could not have pitched this argument to the Fifth Circuit during the first appeal. The Fifth Circuit knew this case was a class action. See *City of San Antonio* v. *Hotels.com, L.P.*, 876 F.3d 717, 719 (5th Cir. 2017) (noting class-action nature of suit).

Serious problems would arise, however, if the Court accepted petitioner's proposal to divvy up equitable questions between the appellate and trial courts. Under petitioner's theory, even when the appellate court has just decided that the outcome of the appeal, conduct of the litigants, and other relevant factors justify an award of full appellate costs, the trial court should be free to negate that conclusion.

The potential for mischief is great, as this case illustrates. Petitioner persuaded the district court to enter judgment in its favor despite controlling appellate authority, lost resoundingly on appeal, and then

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for delay. See, *e.g.*, *Natasha, Inc.* v. *Evita Marine Charters, Inc.*, 763 F.2d 468, 472-473 (1st Cir. 1985) (Breyer, J.) (awarding double costs and counsel fees under Rule 38 based on frivolity of appeal).

appealed to the district court's sense of fairness in asking for leniency on appellate costs. It is not hard to imagine that a district court in this setting might view some of the equitable factors—like the "difficulty of the issues presented," *Moore*, 586 F.3d at 221—very differently than the Fifth Circuit viewed them when it decided not to depart from Rule 39's presumption. There is no justification for having both courts assess the same equitable factors, much less giving a trial court that was just reversed the final say.

Of course, petitioner's proposal does not truly give trial courts *final* say. If a trial court wrongfully denied costs in these circumstances, the aggrieved party could appeal the denial. But that just underscores the absurdity of this arrangement. Respondents agree with the government (Br. 31) that costs rules should not be set up to foster protracted litigation of their own. The problem for the government and petitioner is that their proposal to split equitable discretion between two courts is a recipe for wasteful litigation. Their approach would all-but-guarantee an additional round of appellate proceedings centered on the propriety of the trial court's exercise of discretion. It would be far better to have a clear rule confining equitable discretion to the court that resolved the merits of the appeal, rather than the trial court whose judgment was just reversed.

2. Petitioner and the government suggest there is no practical mechanism for litigating appellate-cost disputes in the appellate court. See Pet. Br. 20-21, 26; U.S. Br. 28. But that is not true. Parties can and do

make arguments to the court of appeals for or against Rule 39 costs—often in separate motions or bill-of-costs submissions,[9] but sometimes also in substantive briefing[10] or even petitions for rehearing.[11] A party with something to say to the appellate court on this topic can easily find a way to say it.

Nor is there merit to the suggestion that parties cannot anticipate their objections to cost awards until the prevailing party claims the specific amount of each item. See Pet. Br. 18; U.S. Br. 28-29; cf. 16AA Charles Alan Wright et al., *Federal Practice and Procedure*

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[9] *E.g.*, *Osborne* v. *Univ. of Del.*, 815 Fed. Appx. 682, 686 & n.5 (3d Cir. 2020); *Moore*, 586 F.3d at 220; *Bazzetta* v. *Caruso*, 183 Fed. Appx. 514, 515 (6th Cir. 2006); *Ocean Conservancy, Inc.* v. *Nat'l Marine Fisheries Serv.*, 382 F.3d 1159, 1160 (9th Cir. 2004) (per curiam); *Phansalkar* v. *Andersen, Weinroth & Co., L.P.*, 356 F.3d 188, 189 (2d Cir. 2004) (per curiam); *DLC Mgmt. Corp.* v. *Town of Hyde Park*, 179 F.3d 63, 64 (2d Cir. 1999) (per curiam); *Maida* v. *Callahan*, 148 F.3d 190, 191-192 (2d Cir. 1998) (per curiam); *Tropicana Prods., Inc.* v. *Vero Beach Groves, Inc.*, 989 F.2d 484 (1st Cir. 1993) (Tbl.); *Furman* v. *Cirrito*, 782 F.2d 353, 354 (2d Cir. 1986); *CTS Corp.* v. *Piher Int'l Corp.*, 754 F.2d 972, 972-973 (Fed. Cir. 1984); *Nelson* v. *James*, 722 F.2d 207, 208 (5th Cir. 1984) (per curiam); *In re Penn Cent. Transp. Co.*, 630 F.2d 183, 186 (3d Cir. 1980); *Am. Pub. Gas Ass'n* v. *FERC*, 587 F.2d 1089, 1098 (D.C. Cir. 1978) (per curiam); *Delta Air Lines, Inc.* v. *C.A.B.*, 505 F.2d 386, 387 (D.C. Cir. 1974) (per curiam).

[10] *E.g.*, *Swenson* v. *Selene Fin. LP*, No. 20-1152, 2020 WL 8620155, at *1 (1st Cir. Sept. 16, 2020); *Gokool* v. *Okla. City Univ.*, 770 Fed. Appx. 894, 899 (10th Cir. 2019); *In re The Exxon Valdez*, 568 F.3d 1077, 1079 (9th Cir. 2009); *Spielman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 130 (2d Cir. 2003).

[11] *E.g.*, *Guse* v. *J.C. Penney Co.*, 570 F.2d 679, 680 (7th Cir. 1978); *Baez*, 684 F.2d at 1001.

§ 3985.1 n.17 (5th ed. 2020) (speculating, about this case, that the Fifth Circuit had no way to consider petitioner's objections to appellate costs). This concern proceeds from the premise that appellate courts need to know the costs' amount before deciding that a prevailing party deserves a full award. As discussed above, the text of Rule 39 and relevant history prove this premise false.

Besides, parties can easily predict the approximate amounts that would fall in Rule 39(e)'s limited set of categories, including supersedeas bond premiums. As this case shows, trial courts approve the amount of a supersedeas bond and parties that win at trial are intimately involved in negotiating that amount. See J.A. 80-82.

It is therefore difficult to see how a party in petitioner's position could be caught off-guard. If the concern is that a prevailing party might eventually claim amounts beyond the amounts that Rule 39 allows, that is no objection at all. As noted above, see pp. 27-28, *supra*, the trial court must include only proper Rule 39 costs. If the concern instead is that the party that prevailed on appeal might prove to have missed an opportunity to secure the judgment at a lower rate, the concern is at best overblown. Parties seeking to secure a judgment have every incentive to do so at the lowest feasible rate because they bear the risk of losing the appeal and absorbing the full cost of the bond premiums. Cf. *Anderson* v. *Griffin*, 397 F.3d 515, 522 (7th Cir. 2005) (explaining that a party's natural incentive to avoid "excessive costs" is "a better check on

extravagance than would be a court's effort to decide after the fact whether a particular expenditure was sensible").

In any event, even if some scenario could theoretically arise where unknown factual details or the trial courts' unique insights might prove important, nothing precludes someone in petitioner's position from convincing the appellate court to delegate its Rule 39(a) discretion to the trial court. That is exactly what the appellate court did in *Guse* v. *J.C. Penney Co.*, 570 F.2d 679, 681-682 (7th Cir. 1978), a case on which petitioner heavily relies. And even the Fifth Circuit has shown a willingness to defer to the district court's decision-making if the costs calculation is complicated. See *Universal Amusement Co.* v. *Vance*, 587 F.2d 159, 172-173 (5th Cir. 1978) (en banc), aff'd on other grounds, 445 U.S. 308 (1980).

3. Finally, petitioner is wrong to claim (Br. 23-24) that affirming the Fifth Circuit's interpretation of Rule 39 would upset settled norms and practices. As it did below and in seeking certiorari, petitioner "overstates the out-of-circuit support for its position." Pet. App. 11a n.2. The only precedential decision holding that district courts may decide the equities of appellate costs for themselves is *Republic Tobacco*, the Seventh Circuit case whose reasoning petitioner and the government reject. See pp. 21-22, *supra*.

But even if petitioner's description of current law were accurate, it is hard to see what problems would result from respondents' approach. Petitioner does not

suggest that affirming here would upset any litigant's reliance interests. Nor does petitioner identify any real-world problem from the Fifth Circuit's three decades of experience under *Sioux*. At bottom, petitioner simply wants the chance to persuade the district court to let it escape responsibility for the small fraction of respondents' overall litigation expenses that should come to them as the prevailing parties on appeal. That is no reason to distort the text, history, and purposes of Rule 39.

II. Even If The Court Disagrees With The Fifth Circuit's Reading Of Rule 39, There Is No Need To Remand.

For the reasons discussed above, Rule 39 is best read as conferring equitable discretion on appellate courts alone. But even if respondents are wrong about that, the Court should still affirm for two independent reasons.

1. The first reason relates to a point already mentioned: Rule 39 provides a set of default rules that appellate courts are free to modify. As a result, nothing in the Rule precludes an appellate court from deciding in a particular case that the trial court must fully tax each cost item within Rule 39(e)'s categories. See 21 Moore § 339.21 (explaining that even under *Republic Tobacco*, "the district court has discretion to allocate costs between the parties *unless the circuit court has ordered otherwise*") (emphasis added). But if that is

true, it is hard to see why the appellate court could not permissibly exercise such powers at a wholesale level.

That is essentially what the Fifth Circuit has done: it declared in *Sioux*, and reaffirmed below, that trial courts lack discretion to make their own judgments about whether it is equitable to award appellate costs. See Pet. App. 12a. Petitioner offers no justification for denying the Fifth Circuit that authority.

2. The second reason to affirm is that petitioner's particular arguments against appellate costs are without merit. That may be why, in arguing for remand (Br. 27-28), petitioner declines even to articulate the grounds on which it seeks to avoid responsibility for the supersedeas bond premiums in this case—preferring to highlight the district court's cryptic statement that petitioner "ma[de] some persuasive arguments." Pet. App. 16a. In no event should this Court send this case back to the lower courts for further litigation without providing guidance on the sorts of considerations that could justify denying appellate costs to a prevailing party. After all, "[d]iscretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin* v. *Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005); see also *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016) ("[U]tterly freewheeling inquiries often deprive litigants of 'the basic principle of justice that like cases should be decided alike.'") (citation omitted); *Lonchar* v. *Thomas*, 517 U.S. 314, 323 (1996) ("[C]ourts of equity must be governed by rules and precedents no less than

the courts of law.") (quoting *Missouri* v. *Jenkins*, 515 U.S. 70, 127 (1995) (Thomas, J., concurring)). Petitioner's theories for denying costs lack any basis in the law.

a. One of petitioner's theories rests on speculation that the district court might have been willing to waive the bond requirement or allow a cheaper security. Pet. C.A. Br. 29; Pet. C.A. Br. 21-22. But petitioner has never said it would have agreed to waive the bond requirement. J.A. 163. On the contrary, petitioner insisted on reviewing the bond terms and demanded that respondents post larger bond amounts to account for additional damages and interest that accrued until the resolution of the appeal. J.A. 163-165.

In any event, nothing in Rule 39(e)(3) limits supersedeas bond premium costs to circumstances in which the defendant exhausted every avenue for obtaining the lowest-cost security possible. Unlike Rule 39(e)(2), which limits transcript costs to transcripts "needed to determine the appeal," there is no necessity requirement in Rule 39(e)(3). All that Rule 39(e)(3) requires is that the security be "paid * * * to preserve rights pending appeal," as the bonds here undisputedly were.

That is no accident. Before Rule 39's adoption, courts faced similar arguments that supersedeas bond premiums "should not have been taxed as appeal costs because they were not necessary items of the costs of appeal." *Land Oberoesterreich*, 93 F.2d at 293. But these arguments failed because such premiums cannot sensibly "be regarded as 'optional rather than

necessary.'" *Ibid.* (citation omitted). Courts that allowed taxation of supersedeas bond premiums ruled that they "ought to be regarded as a reasonably necessary expense of the appeal" because "the erroneous judgment obtained by the plaintiff * * * made it necessary for the defendants to obtain a supersedeas or run the risk of having the judgment collected by the plaintiff." *Ibid.*

This Court made a similar point about a similar bond in *Newton* v. *Consolidated Gas Co. of New York*, 265 U.S. 78 (1924). There, the Court upheld a lower court's view that litigants "who have conducted the litigation and lost should pay the costs of an arrangement made in their interest." *Id.* at 85. The Court rejected any suggestion that courts should not reimburse such costs unless they were obtained at the lowest possible rates. It was appropriate to encourage "the safe use of surety companies" rather than less conventional sources:

> Acceptance of the service of such companies is, of course, upon the basis of a regular rate of compensation, and where a party litigant has, because of the claim of the opposing party, been compelled to furnish such security, and it turns out that it was wrongly required, a rule of court or usage which imposes the expense of the security on the defeated party is not unreasonable.

Id. at 86.

The reasoning of these cases remains as forceful as ever. By creating Rule 39(e)(3), the Advisory Committee resolved that "the cost of a supersedeas or other bond given in connection with an appeal [should] be made an allowable item by general rule." See Advisory Comm. on Appellate Rules, *Minutes of the May 1962 Meeting of the Advisory Committee on Appellate Rules* 15 (May 21, 1962).[12] Petitioner has never claimed that respondents paid above-market or otherwise inappropriate premiums for these bonds, which petitioner had a large role in requiring. At its core, then, petitioner's objection is a quarrel with Rule 39(e)(3) itself, based on some vague concern that allowing recovery of supersedeas bond premiums is unwise as a general matter.

But the drafters of Rule 39 opted to make these costs generally available. Once they did, "the channel of discretion" on this subject "narrowed." *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016) (quoting Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 772 (1982)). Parties should not be able to avoid Rule 39 costs by attacking the policy that the Rule embodies.

b. Petitioner's other argument below rested on its decision to bring this case as a class action on behalf of all Texas municipalities. Petitioner argued that it was "'unjust' and 'inequitable' to saddle [petitioner] with [respondents'] full bond costs" because those

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[12] https://www.uscourts.gov/sites/default/files/fr_import/AP05-1962-min.pdf.

bonds were partly used to secure other class members' recovery. Pet. C.A. Br. 27.

There is no support for this argument. Rule 39 "says that the prevailing party recovers costs, and nothing in Rule 23 suggests that cost-shifting is inapplicable to class actions." *White* v. *Sundstrand Corp.*, 256 F.3d 580, 585-586 (7th Cir. 2001) (applying Rule 54(d)). In class actions, like any lawsuit, the named plaintiff "caused this litigation to be brought, caused the costs to be incurred, and should make the prevailing party whole" within the already strict limits of the cost-shifting rules. *Id.* at 586; see also *In re Williams Sec. Litig.—WCG Subclass*, 558 F.3d 1144, 1151 (10th Cir. 2009) (applying Rule 54(d)).

Indeed, petitioner's arguments are particularly misguided in the class-action setting, where Rule 23 offers class-action plaintiffs special access to "attorney's fees and nontaxable costs." Fed. R. Civ. P. 23(h). Because of the potentially large attorney's fees, attorneys often "compete for the opportunity to represent the class" on a contingency basis. *White*, 256 F.3d at 586. In doing so, class counsel can "agree to bear the risk of a costs award," and they can then "spread that risk across many cases." *Ibid.* That is what happened here. Petitioner and its contingency counsel had an extensive agreement covering responsibility for costs (and entitlement to attorney's fees), under which counsel agreed to incur litigation costs and, "[i]f there is no recovery," to "be solely responsible for payment of the Cost." J.A. 91-93.

For this reason, the concerns voiced by petitioner and amici on behalf of municipal taxpayers ring hollow. By all appearances, taxpayers will not pay these litigation costs. Nor, for that matter, is this a typical case for a municipality. Local governments "are typically defendants instead of plaintiffs," Nat'l Ass'n of Counties Amicus Br. 8, and so they should welcome the ability to recover supersedeas bond premiums in baseless litigation.

But even if taxpayers were responsible for these costs, this Court long ago rejected the idea that non-federal government litigants deserve special treatment on this issue. Courts are justified "in treating the state just as any other litigant, and in imposing costs upon it as such." *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70, 77 (1927). If that is true for States, it follows with even greater force for municipalities, which, "unlike States, do not enjoy a constitutionally protected immunity from suit." *Jinks* v. *Richland Cnty.*, 538 U.S. 456, 466 (2003).

* * *

Petitioner launched this litigation fifteen years ago seeking to impose massive liability on respondents under a meritless legal theory. Over a decade and a half, respondents defended against these claims at great expense, and continue to do so now. Yet petitioner would have the litigation continue, for who knows how much longer, to deny respondents the small fraction of their legal expenses that the law lets them

recover. The Court should end this case once and for all and uphold the Fifth Circuit's ruling.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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MARCH 2021