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 UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a district court possesses discretion to deny or reduce "costs on appeal" that under Federal Rule of Appellate Procedure 39(e) "are taxable in the district court for the benefit of the party entitled to costs under [Rule 39]."

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INTEREST OF THE UNITED STATES

This case concerns the scope of a district court's authority to tax appellate costs under Federal Rule of Appellate Procedure 39(e). The United States is a frequent litigant in federal court and may have certain costs taxed both for and against it in litigation, although the waiver of sovereign immunity in 28 U.S.C. 2412(a)(1) does not permit bond premiums to be taxed against the federal government. See *FTC* v. *Kuykendall*, 466 F.3d 1149, 1154-1156 (10th Cir. 2006). The government also represents—and may indemnify—federal officials sued in their individual capacities for actions performed in the scope of their employment. 28 C.F.R. 50.15(a) and (c). If appellate costs are incurred by or taxed against such individuals, those expenses may ultimately be borne by the United States. In both contexts, the government must

litigate under the framework imposed by Rule 39. The United States therefore has a substantial interest in the Court's disposition of this case.

STATEMENT

This case raises the question whether a district court possesses discretion to deny or reduce "costs on appeal" that under Federal Rule of Appellate Procedure 39(e) "are taxable in the district court for the benefit of the party entitled to costs under [Rule 39]." Petitioner contends (Pet. Br. 13-27) that the district court had discretion to deny or reduce a cost award under Rule 39(e), including the amount that respondents sought for "premiums paid for a bond or other security to preserve rights pending appeal," Fed. R. App. P. 39(e)(3).

A. Statutory Framework And Procedural Rules

1. Costs on appeal

After a litigant files a notice of appeal, the parties incur several appeal-related costs. First, the appellant incurs a $5 notice-of-appeal filing fee "paid to the clerk of the district court." 28 U.S.C. 1917. The appellant must also pay a separate $500 appellate docketing fee "charged and collected in [the] court of appeals," 28 U.S.C. 1913, which "[t]he district clerk receives * * * on behalf of the court of appeals," Fed. R. App. P. 3(e); see U.S. Courts, *Court of Appeals Miscellaneous Fee Schedule* (effective Dec. 1, 2020), https://go.usa.gov/xsDyx.

The appellant must then "order from the reporter a transcript of such parts of the [district court] proceedings" that the appellant deems necessary for its appeal, and the appellee may designate "additional parts [of the transcript] to be ordered." Fed. R. App. P. 10(b)(1)(A), (3)(B), and (C). Each party ordering transcripts "must make satisfactory arrangements with the reporter for

paying the cost [there]of." Fed. R. App. P. 10(b)(4). Once "the record is complete, the district clerk must" then assemble and transmit it "promptly to the circuit clerk." Fed. R. App. P. 11(b)(2).

In some cases, an appellant will purchase a bond or provide other security to stay "execution on [the district court] judgment and proceedings to enforce it." Fed. R. Civ. P. 62(a) and (b). Such a "stay takes effect when the [district] court approves the bond or other security." Fed. R. Civ. P. 62(b). If the district court has granted or denied injunctive relief, it "may" also suspend, modify, restore, or grant an injunction "[w]hile an appeal [from its order] is pending" on "terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(d).[1]

Finally, litigants incur the cost of producing necessary copies of appellate briefs and the appendix to the briefs or relevant record excerpts in lieu of an appendix. See Fed. R. App. P. 30(a)(3), (b)(2), and (f), 31(b).

2. Taxation of costs

"[T]he taxation of costs was not allowed at common law." *Taniguchi* v. *Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 564 (2012) (citing *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247-248 (1975) (*Alyeska Pipeline*)); see 3 William Blackstone, *Commentaries* 399 (1768). And under the "so-called 'American Rule,'" parties to litigation "generally bear their own expenses," including "not only * * * attorney's fees but also other costs of litigation." *Kansas* v. *Colorado*, 556 U.S. 98, 102-103 (2009) (citing *Alyeska Pipeline*).

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[1] The United States is not required to post a bond or security when it pursues an appeal. 28 U.S.C. 2408; Fed. R. Civ. P. 62(e).

"[F]or centuries," however, English statutes had departed from the common law by authorizing courts to "award costs." *Alyeska Pipeline*, 421 U.S. at 247. And in this country, the Judiciary Act of 1789 implicitly contemplated cost shifting in various federal courts. Ch. 20, §§ 9, 11-12, 21-22, 1 Stat. 76-80, 83-84 (setting jurisdictional amounts in controversy "exclusive of costs"). In original actions in circuit courts, however, plaintiffs who did not recover at least $500 were prohibited from recovering costs and could "be adjudged to pay costs" "at the discretion of the court." § 20, 1 Stat. 83. Until 1799, other statutes expressly authorized federal courts to follow the cost-taxing practices of "the courts of the States in which" they were located. *Alyeska Pipeline*, 421 U.S. at 247-248 & n.19. From 1799 until 1853, the "practice of referring to state rules for the taxation of costs persisted," notwithstanding the "absence of express legislative authorization." *Taniguchi*, 566 U.S. at 565; see *In re Costs in Civil Cases*, 30 F. Cas. 1058, 1059-1060 (Nelson, Circuit Justice, C.C.S.D.N.Y. 1852) (No. 18,284) (reasoning that the Judiciary Act of 1789 and other statutes still "assumed" such costs could be taxed); Stephen D. Law, *The Jurisdiction and Powers of the United States Courts* 279 (1852).

"In 1853, Congress undertook to standardize the costs allowable in federal litigation," motivated by concerns about a "great diversity in practice" and awards of "exorbitant [attorney's] fees." *Alyeska Pipeline*, 421 U.S. at 251. The resulting legislation was a "far-reaching Act specifying in detail the nature and amount of the taxable items of cost in the federal courts." *Taniguchi*, 566 U.S. at 565 (citation omitted); see Act of Feb. 26, 1853 (1853 Act), ch. 80, 10 Stat. 161. This Court has recognized that 28 U.S.C. 1920 codifies the 1853

Act's provisions authorizing awards of particular costs, see *Alyeska Pipeline*, 421 U.S. at 255, and that Section 1920 "embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party." *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987).

In provisions that appear today in 28 U.S.C. 1920 and 1924, the 1853 Act established the procedures for seeking an award of costs. See § 3, 10 Stat. 168-169; see also 28 U.S.C. 830-831 (1946); Rev. Stat. §§ 983-984 (1874). Section 1920 provides that "[a] bill of costs shall be filed in the case." 28 U.S.C. 1920. And Section 1924 requires "the party claiming any item of cost" to include "an affidavit * * * that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed." 28 U.S.C. 1924. "[U]pon allowance," the "bill of costs shall be * * * included in the judgment or decree." 28 U.S.C. 1920.

The 1853 Act further directed that "[t]he bill of fees" (*i.e.*, costs) "shall be taxed by a judge or clerk of the court." § 3, 10 Stat. 168. That provision continued without material change to 1948, when Congress codified it within Section 1920 and altered the statutory text by, *inter alia*, replacing "shall" with "may," 28 U.S.C. 1920 (Supp. II 1948); see 28 U.S.C. 830 (1946); Rev. Stat. § 983 (1874). That amendment confirmed courts' discretion to decline to award costs to a "prevailing party." H.R. Rep. No. 308, 80th Cong., 1st Sess. A162 (1947).

Section 1920 accordingly specifies that "[a] judge or clerk of any court of the United States may tax as costs the following:" (1) clerk and marshal fees; (2) transcript fees; (3) printing and witness fees and disbursements; (4) fees for exemplification and copying costs "where

the copies are necessarily obtained for use in the case"; (5) docket fees; and (6) compensation for interpreters and court-appointed experts and salaries, fees, expenses, and costs of special interpretation services. 28 U.S.C. 1920. Section 1920 does not list as a taxable cost the cost of obtaining a bond or other security for an appeal.

3. Federal rules of procedure

Both Federal Rule of Civil Procedure 54(d)(1) and Federal Rule of Appellate Procedure 39 build upon the statutory framework governing costs. Rule 54(d)(1) provides that "costs—other than attorney's fees—should be allowed to the prevailing party," "[u]nless a federal statute, these rules, or a court order provides otherwise." Fed. R. Civ. P. 54(d)(1).

Rule 39(a) similarly provides that costs on appeal are typically taxed for the party who prevailed on appeal: "[U]nless the law provides or the court orders otherwise," "costs are taxed against the appellant" if "a judgment is affirmed" or (absent a contrary agreement) the appeal is dismissed; "costs are taxed against the appellee" if "a judgment is reversed"; and "costs are taxed only as the court orders" if a judgment is affirmed in part, reversed in part, modified, or vacated. Fed. R. App. P. 39(a).

Under Rule 39(d) and (e), the circuit clerk and district court, respectively, have authority to tax particular types of costs on appeal. First, under Rule 39(d), "[a] party who wants costs taxed must—within 14 days after entry of [the appellate] judgment—file with the circuit clerk and serve an itemized and verified bill of costs"; any "[o]bjections must be filed within 14 days [there]after"; and "[t]he [circuit] clerk must [then] prepare and certify an itemized statement of costs for insertion in the mandate." Fed. R. App. P. 39(d)(1)-(3). Rule 39(d)

provides, however, that its 28-day-or-more process "for taxing costs" "must not * * * delay[]" the "issuance of the mandate," Fed. R. App. P. 39(d)(3), which normally "must issue" 21 days after entry of the appellate judgment, Fed. R. App. P. 41(b); see Fed. R. App. P. 35(c), 40(a)(1). Rule 39(d) accordingly provides that "[i]f 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." Fed. R. App. 39(d)(3).

Under Rule 39(e), four types of "costs on appeal are taxable in the district court for the benefit of the party entitled to costs under [Rule 39]:" "the fee for filing the notice of appeal"; the cost of "preparation and transmission of the record"; the cost of "the reporter's transcript, if needed to determine the appeal"; and the cost of "premiums paid for a bond or other security to preserve rights pending appeal." Fed. R. App. P. 39(e).

B. Factual And Procedural History

1. a. Petitioner, the City of San Antonio, brought this action on behalf of itself and a class of similarly situated Texas municipalities alleging that respondents, a group of online travel companies, failed to remit the full amount of municipal occupancy taxes owed for hotel bookings because each respondent failed to include its service fee as part of the taxable room rate. *City of San Antonio* v. *Hotels.com, L.P.*, 876 F.3d 717, 719-720 (5th Cir. 2017). After the district court certified a class of 175 municipalities, two municipalities—including the City of Houston—opted out, and the case went to trial. *Id.* at 720. In light of the jury's findings, the court determined that respondents had failed to pay the full amounts of taxes owed under the governing tax ordinances. *Id.* at 721.

Meanwhile, Houston pursued and lost its own tax claims against online booking companies in state court, including a loss on appeal to an intermediate Texas appellate court. *City of San Antonio*, 876 F.3d at 721. Respondents asked the district court in this case to reconsider its determination in light of the intervening state appellate decision. *Ibid.* The court denied the request and, in April 2013, entered a $55 million judgment for the class. *Ibid.*

Eight days later, respondents filed an agreed motion to stay enforcement of the judgment under Federal Rule of Civil Procedure 62(b). J.A. 80-85. The motion sought "an order approving [specific] amounts" for the bonds that respondents would acquire and noted the class members' agreement that those amounts were "appropriate" and "will protect their interests." J.A. 80-82. Respondents submitted no information about the bond premiums or any other bond-related costs. *Ibid.*[2] On the same day, the district court granted the agreed motion, approved the "amounts for [respondents'] supersedeas bonds," and stayed its judgment pending appeal. 4/12/13 D. Ct. Order 1-2; see Pet. App. 3a.

In 2016, after further post-judgment litigation, the district court entered an amended judgment, awarding more than $84 million to the class, including additional accrued taxes, interest, and penalties. Pet. App. 3a-4a.

b. In November 2017, the court of appeals vacated the district court's judgment and rendered judgment for respondents. *City of San Antonio*, 876 F.3d 717. The court of appeals rejected petitioner's attempts to

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[2] Respondents subsequently filed the relevant bonds and amendments thereto, none of which contained information addressing the cost of the bonds. D. Ct. Docs. 1158-1164, 1189-1193, 1197-1199 (Apr. 16, 2013 to Nov. 9, 2015).

distinguish the intermediate Texas appellate court decision in Houston's parallel case. *Id.* at 723-724. The federal court of appeals instead determined that it was required in this diversity action to follow that Texas decision interpreting state law absent convincing evidence that the Texas Supreme Court would decide the matter differently. *Id.* at 722-723.

The court of appeals' judgment, which the court entered on the same day as its opinion, ordered that "[petitioner] pay to [respondents] the costs on appeal to be taxed by the Clerk of this Court." Pet. App. 27a.

2. a. Respondents subsequently filed with the circuit clerk a verified bill of costs for the court of appeals' docketing fee ($500) and the copying costs for their appellate briefs and appendix ($405.60). Pet. App. 28a-30a (approved bill of costs). In February 2018, the circuit clerk approved the bill of costs and taxed $905.60 in costs against petitioner. *Id.* at 30a.

b. In April 2018, after the district court amended its judgment to conform to the court of appeals' decision, respondents filed a verified bill of costs, seeking more than $2.3 million in additional costs. D. Ct. Doc. 1337, at 1 (Apr. 9, 2018). Respondents sought, *inter alia*, over $139,000 for transcript fees and over $2 million for "the premiums paid for [their] supersedeas bonds" and post-judgment interest. *Id.* at 1, 3; see Br. in Opp. 5 ("$2,008,359 in supersedeas bond premium expenses"); Pet. App. 23a-25a (approved bill of costs).

The district court partially granted and partially denied petitioner's objections to the bill of costs. Pet. App. 15a-22a. As relevant here, the court rejected petitioner's contention that respondents' $2 million bond-cost request should be denied. *Id.* at 16a-18a. The court stated that although petitioner "ma[de] some persuasive

arguments," the court lacked authority under circuit precedent to "reduce the amount of bond premiums being sought." *Id.* at 16a, 18a.

After reducing various other claimed costs as unsupported, duplicative, or unnecessary, Pet. App. 18a-21a, the district court ordered the district clerk to tax more than $2.2 million in costs against petitioner, *id.* at 22a. The clerk added those costs to the judgment. *Id.* at 25a.

3. The court of appeals affirmed. Pet. App. 1a-14a. As relevant here, the court rejected petitioner's contention that the district court had "discretion to deny or reduce" an award of "Rule 39(e) appeal costs," *id.* at 10a. See *id.* at 10a-14a. The court observed that most other courts of appeals have "held—or at least implied—that a district court retains discretion to deny or reduce a Rule 39(e) award," but it concluded that the Fifth Circuit had "adopted the contrary position" in an unpublished 1991 decision that "remain[ed] binding precedent." *Id.* at 10a-11a.

The court of appeals explained that its 1991 decision had treated a mandate that "awarded appellants 'the costs on appeal to be taxed by the Clerk of this Court,' as a determination that appellants were 'the "party entitled to costs" [under Rule 39(e)] in th[e] case.'" Pet. App. 12a (quoting *In re Sioux Ltd., Sec. Litig.*, No. 87-6167, 1991 WL 182578, at *1 (5th Cir. Mar. 4, 1991) (per curiam)). Under *Sioux*, the court continued, "[a]bsent some limiting provision in the mandate from the court of appeals, the party entitled to costs in the court of appeals is entitled to costs in the district court under Rule 39(e)." *Ibid.* (citation omitted; brackets in original). And *Sioux* had further stated that "'Rule 39(e) is mandatory,'" such that "'[t]he district court ha[d] no discretion whether, when, to what extent, or to

which party to award costs of the appeal'" and thus lacked authority to deny an "application for appeal bond premiums under Rule 39(e)." *Ibid.* (citation omitted; brackets in original).

The court of appeals rejected petitioner's contention that *Sioux* had been superseded by 1998 amendments to Rule 39. Pet. App. 12a-14a. Although the court expressed "no view on the merits of *Sioux*'s interpretation of Rule 39(e)," it applied it as "binding precedent" and held that "the district court correctly recognized that it lacked discretion to deny or reduce the appeal bond costs to which [respondents] were entitled under Rule 39." *Id.* at 14a.

SUMMARY OF ARGUMENT

Rule 39(e) of the Federal Rules of Appellate Procedure vests in the district court discretionary authority to tax particular costs on appeal, including authority to reduce or deny a litigant's claimed items of cost.

A. Rule 39(e) provides that four "costs on appeal are taxable in the district court." "Taxable" carries a permissive—not mandatory—meaning, identifying expenses that are *capable* of being taxed and that a court *may* assess. Costs "taxable in the district court" are therefore costs that the court may decide to tax against a litigant. If Rule 39(e)'s drafters had intended to require district courts to tax such costs, they would have employed the mandatory language repeatedly used elsewhere in Rule 39.

B. The discretionary nature of that Rule 39(e) authority is confirmed by 28 U.S.C. 1920. That statute provides that "a judge or clerk of any court of the United States *may tax* as costs" the expenses listed therein. *Ibid.* (emphasis added). That use of "may" is permissive and clearly connotes discretion. It also reflects the

American Rule on costs, which requires an express direction by Congress to make the taxing of costs mandatory.

Rule 39(e)'s drafters understood that Section 1920 provided statutory authority for all federal judges and clerks to tax costs. But the text they drafted reflects the judgment that the categories of costs identified in Rule 39(e) should be taxed only in district court. As initially adopted, Rule 39(e) provided that those costs "shall be taxed in the district court," Order, 389 U.S. 1065, 1110 (Dec. 4, 1967), and the Advisory Committee's explanation acknowledged the discretionary character of that cost-taxing authority. When the rule was amended in 1998, that understanding was made express in Rule 39(e)'s text, which now states that those costs are "taxable in the district court."

C. Rule 39's broader context confirms that district courts, rather than courts of appeals, have the judicial discretion to tax Rule 39(e) expenses as costs. Rule 39(a) vests in the court of appeals a limited authority to displace the rule's default choices for which party may seek costs in light of the appeal's outcome. Rule 39(d) and (e) then separately vest in the circuit clerk and the district court the authority to tax certain costs. Those processes occur after the appellate panel has entered its judgment, and they require the party seeking costs to file an "itemized and verified" bill of costs justifying each expense. Fed. R. App. P. 39(d)(1); see 28 U.S.C. 1920, 1924. After an adversary presentation of associated disputes, the circuit clerk and the district court exercise their respective discretion to tax costs.

Waiting for the appellate court to complete its task before the adjudication of cost-taxing proceedings is consistent with the traditional approach, under which

cost-taxing proceedings are collateral to the merits judgment. Rule 39 accordingly directs that the issuance of the mandate, which gives effect to the appellate judgment, "must not be delayed for taxing costs." Fed. R. App. P. 39(d)(3). The mandate normally issues in 21 days and terminates the panel's jurisdiction over the only matter before it, leaving the circuit clerk and the district court to finish their separate and collateral cost-taxing proceedings.

Rule 39(e)'s assignment of cost-taxing discretion to the district court places discretion with the most appropriate decision maker. The four kinds of costs listed in Rule 39(e) arise from events that occur before the district court and, as this case reflects, often implicate factual disputes that district courts are better equipped to resolve.

D. The court of appeals erred in its contrary determination. The court viewed an appellate mandate in a merits appeal as resolving the question of costs when it identifies the party against whom costs are to be taxed. But that determination under Rule 39(a) occurs when a court of appeals normally lacks any information about what items of expense will be sought, what amounts will be claimed, and what objections may be raised to the appropriateness of taxing them. It makes little sense to require a litigant to anticipate what costs its opponents may seek and present its counter-arguments to the court of appeals in the limited window before the court's mandate issues.

Nor does the fact that Rule 39(e) provides that costs are taxable in district court "for the benefit of the party entitled to costs under this rule," Fed. R. App. P. 39(e), suggest that the court of appeals exercises discretion to determine what amounts will be taxed for specific costs.

Rule 39(a)'s method for identifying *who* is entitled to seek costs and its grant of authority to the court of appeals to decide that question does not suggest that the appellate court also resolves which, or to what degree, specific items should be taxed.

ARGUMENT

DISTRICT COURTS THAT TAX APPELLATE COSTS UNDER RULE 39(e) HAVE DISCRETION TO REDUCE OR ELIMINATE PARTICULAR ITEMS OF SUCH COSTS

Rule 39(e) of the Federal Rules of Appellate Procedure assigns to district courts the responsibility to tax particular costs that a party may incur on appeal. That authority is a discretionary one, which allows a district court to reduce or deny altogether particular items of cost in the sound exercise of its discretion. Rule 39(e)'s text, the related cost-taxing provisions in 28 U.S.C. 1920, and the broader context of Rule 39 all demonstrate that district courts possess traditional discretion with respect to the taxing of items of appellate costs. The court of appeals erred in concluding otherwise.

A. Rule 39(e)'s Text Reflects Discretionary Authority

This Court interprets federal rules of procedure according to "their plain meaning." *Pavelic & LeFlore* v. *Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989). Under Rule 39(e), four types of "costs on appeal are taxable in the district court for the benefit of the party entitled to costs under [Rule 39]": (1) the cost of preparing and transmitting the record; (2) the cost of the reporter's transcript, if needed to determine the appeal; (3) the cost of "premiums paid for a bond or other security to preserve rights pending appeal"; and (4) the cost of the fee for filing the notice of appeal. Fed. R. App. P. 39(e). That text reflects federal courts' traditional discretion

in taxing costs and contains no mandatory language requiring that every item of cost that a litigant includes in its bill of costs must be taxed in full.

Rule 39(e)'s operative text provides that certain "costs on appeal are taxable in the district court." Fed. R. App. P. 39(e). The adjective "taxable" generally means "*capable of* being taxed" and, in legal contexts, describes items "that *may* be legally charged by a court against the plaintiff or defendant in a suit <~costs>." *Webster's Third New International Dictionary* 2345 (2002) (emphases added); see *Black's Law Dictionary* 1459 (6th ed. 1990) ("As applied to costs in an action, ['taxable'] means proper to be taxed or charged up; legally chargeable or assessable."); *The Random House Dictionary* 1947 (2d ed. 1987) ("capable of being taxed"). "Taxable" therefore carries a permissive, not mandatory, meaning that conveys the "capability" of an item of expense to be taxed and therefore reflects discretionary authority under which a court "may" tax the relevant item against a litigant.

Rule 39(e) further specifies that the forum in which the costs subject to Rule 39(e) may be taxed is "the district court." Fed. R. App. P. 39(e). As a result, costs that are "taxable in the district court" under Rule 39(e) are costs that the district court *may* decide to tax against a litigant.

If the drafters of Rule 39(e) had intended to require that district courts tax the full amount of each item of appellate cost incurred, Rule 39(e) would have included the type of mandatory language that repeatedly occurs elsewhere in Rule 39. See, *e.g.*, Fed. R. App. P. 39(c) (providing that each court of appeals "must" fix the "maximum rate for taxing the cost" of producing briefs and appendices), (d)(1) (party wanting costs taxed

"must" timely file a bill of costs), (d)(2) (objections "must" be timely filed), and (d)(3) (circuit clerk "must" prepare and certify an itemized statement of costs but issuance of the mandate "must not" be delayed for taxing costs). The absence of similarly mandatory text in Rule 39(e) confirms that the provision simply recognizes the taxing discretion of district courts with respect to the expenses to which Rule 39(e) applies.

B. Section 1920's Cost-Taxing Authority, Which Rule 39(e) Incorporates, Is Discretionary

The discretionary nature of district courts' authority under Rule 39(e) is confirmed by 28 U.S.C. 1920. Section 1920 confers discretionary cost-taxing authority and, for certain costs, Rule 39(e) assigns that authority to district courts without rendering it mandatory. That was true when Rule 39 was promulgated in 1967 and is even more clear since the 1998 amendments to Rule 39.

1. Section 1920's text confers judicial discretion to determine the appropriate amount of costs to tax against a litigant. Since 1948, that text has provided that "[a] judge or clerk of any court of the United States *may tax* as costs" the expenses listed in Section 1920. 28 U.S.C. 1920 (emphasis added); see p. 5, *supra*. As in other contexts, that use of the "word 'may' clearly connotes discretion." *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016) (ultimately quoting *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994)).

Section 1920's cost-taxing context reinforces the discretionary character of that authority. "Congress legislates against the strong background of the American Rule," under which litigants generally must bear their own costs of litigation "unless Congress provides otherwise." *Fogerty*, 510 U.S. at 533; see *Kansas* v. *Colorado*, 556 U.S. 98, 102-103 (2009) (noting that "the American

Rule applies" to the "costs of litigation") (citing *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975)). As a result, significantly "more explicit statutory language" would be needed to effect a departure so dramatic as to make the taxing of costs mandatory. *Fogerty*, 510 U.S. at 533-534. Section 1920 reflects no such intent. In fact, Congress substituted "may" for "shall" in Section 1920 specifically to confirm the discretion to deny costs that courts had under provisions such as Federal Rule of Civil Procedure 54(d) to allow costs "unless the court otherwise directs." H.R. Rep. No. 308, 80th Cong., 1st Sess. A162 (1947) (reprinting Reviser's Note). As a result, the provision confers discretionary authority that includes the "power to decline to tax, as costs, the items enumerated in [Section] 1920." *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987) (interpreting Fed. R. Civ. P. 54(d)).

2. Rule 39's drafters understood that the "[s]tatutory authorization for taxation of costs is found in 28 U.S.C. § 1920." Fed. R. App. P. 39(a) advisory committee's note (1967). Section 1920 identifies as taxable costs both "[f]ees of the clerk" and fees for "transcripts." 28 U.S.C. 1920(1) and (2). It therefore authorizes the taxing of appellate costs under Rule 39(e) for the $5 notice-of-appeal filing fee and the cost of transcripts obtained for an appeal. See Fed. R. App. P. 39(e)(2) and (4). If the district clerk were authorized to charge a fee for assembling and forwarding the record for an appeal, see Fed. R. App. P. 11(b)(2), Section 1920 would also authorize taxation of that cost for the "preparation and transmission of the record," Fed. R. App. P. 39(e)(1).[3]

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[3] The district clerk may collect fees set by statute, 28 U.S.C. 1914(a), 1917, and "such additional fees only as are prescribed by

Although Section 1920 generally vests cost-taxing authority in every "judge or clerk of any court of the United States," 28 U.S.C. 1920, Rule 39(e) reflects the judgment that the four categories of appellate costs it specifies should be taxed "in the district court for general convenience." Fed. R. App. P. 39(e) advisory committee's note (1967). The original 1967 version of Rule 39(e) therefore provided that those costs "shall be taxed in the district court as costs of the appeal." See Order, 389 U.S. 1065, 1110 (Dec. 4, 1967) (adopting rules). The mandatory phrase "shall be taxed in the district court" directed that the taxing of those costs occur "in the district court" (*ibid.*), rather than in the court of appeals. Cf. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 844 (2018) ("[T]he word 'shall' usually connotes a requirement.") (citation omitted).

Nothing in Rule 39(e)'s allocation of cost-taxing responsibility, however, modified the traditional discretion of the cost-taxing tribunal. Nor did the rule contain language separately requiring items of expense to be taxed in full. As a result, as the Advisory Committee explained in 1967, costs under Rule 39(e) were simply "made *taxable* in the district court." Fed. R. App. P. 39(e) advisory committee's note (1967) (emphasis added).

Rule 39 was amended in 1998 "to make the rule more easily understood" with changes designed to be "stylistic only." Fed. R. App. P. 39 advisory committee's note (1998 Amendment). The Advisory Committee's 1967

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the Judicial Conference of the United States," 28 U.S.C. 1914(b). The Judicial Conference does not currently authorize fees specifically for the district clerk's preparation and transmission of the record. See U.S. Courts, *District Court Miscellaneous Fee Schedule* (effective Dec. 1, 2020), https://go.usa.gov/xsB9x.

explanation was made express in the revised text. Rule 39(e) now provides that the costs it describes "are taxable in the district court." Order, 523 U.S. 1149, 1207 (Apr. 24, 1998) (amending rule).

Although Section 1920 does not itself authorize the taxing of bond-premium costs, Rule 39(e) provides the same treatment for all of its categories of costs: all four "are taxable in the district court." Fed. R. App. P. 39(e).[4] No textual basis therefore exists in the rule for distinguishing bond-premium costs from the others. A district court's authority under Rule 39(e) to tax all such costs is, like the authority granted by Section 1920, discretionary.

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[4] The parties and the courts below have apparently assumed, in light of Rule 39(e)(3), that the costs of appeal-bond premiums are taxable, despite the absence of express authorization in Section 1920. A procedural rule promulgated under the Rules Enabling Act, 28 U.S.C. 2071 *et seq.*, is "presumptive[ly] valid[]." *Burlington N. R.R.* v. *Woods*, 480 U.S. 1, 6 (1987); see *Business Guides, Inc.* v. *Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 552 (1991). This Court, however, has stated that Section 1920—as supplemented by a separate statute setting witness fees (28 U.S.C. 1821)—"define[s] the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further." *Rimini St., Inc.* v. *Oracle USA, Inc.*, 139 S. Ct. 873, 878 (2019) (quoting *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 86 (1991)). Even if courts lacked statutory authority to tax the costs of appeal-bond premiums, that would not affect the outcome of this case or this Court's ability to resolve the question presented, which refers (Pet. I) to all of the costs in Rule 39(e). Petitioner has forfeited an independent ground on which it might have contested the bulk of the costs awarded against it. But the Court's resolution of the question presented will govern all expenses that district courts may properly tax as appellate costs under Rule 39(e).

C. Rule 39's Broader Context Confirms That The District Court, Not The Court Of Appeals, Has Discretion To Tax Rule 39(e) Expenses As Costs

Rule 39's broader context further illuminates the district court's discretionary authority to tax Rule 39(e) costs. Rule 39's structure reflects a division of responsibility that gives the court of appeals a discrete authority (under Rule 39(a)) to designate which party is entitled to costs but then assigns to the circuit clerk and district court (in Rule 39(d) and (e)) the discretionary authority to tax particular items of cost that the designated party later seeks. That allocation of authority reflects the collateral nature of cost proceedings, which necessarily begin after an appellate panel's role is complete. The rule logically assigns the district court—the body best equipped to resolve disputes over Rule 39(e)'s items of appellate cost—the discretionary authority to tax those costs.

1. The court of appeals does not tax costs under Rule 39

Rule 39 allocates the responsibility to tax costs to the circuit clerk and the district court, not the court of appeals. The court of appeals' role under Rule 39(a) is limited to the threshold determination of which party is entitled to seek those costs in light of the disposition of the appeal.

a. As its title suggests, Rule 39(a) simply identifies "against whom [to] assess[]" appellate costs. Fed. R. App. P. 39(a) (capitalization and emphasis omitted). It does so by establishing a set of default choices based on which party prevailed on appeal: "costs are taxed against the appellant" if the district court's judgment is affirmed or if the appeal is dismissed (and the parties have not agreed otherwise); "costs are taxed against the appellee" if the judgment is reversed; and "costs are

taxed only as the court orders" if the judgment is partially affirmed or reversed, modified, or vacated. *Ibid.*; cf. Fed. R. App. P. 42(b) (allowing voluntary dismissal with the parties' agreement on costs).

The default choices prescribed by Rule 39(a) "apply unless the law provides or the court orders otherwise." Fed. R. App. P. 39(a). A court of appeals therefore has authority to determine which party should bear an award of appellate costs and, conversely, which party may seek such an award. The court of appeals—which enters its judgment after considering the merits of the parties' appellate contentions—is best positioned to determine efficiently in light of the parties' relative success whether to deviate from Rule 39(a)'s default choices, which themselves turn on the nature of the appellate judgment. Just as a district court may conclude that a prevailing party that is technically eligible to obtain an award of reasonable attorney's fees nevertheless should obtain "no fee at all" in light of its limited "'degree of success,'" *Farrar* v. *Hobby*, 506 U.S. 103, 114-115 (1992) (citation omitted), Rule 39(a) enables a court of appeals to determine whether a prevailing litigant has achieved enough in the appeal to allow it to seek appellate costs. The appellate panel therefore will normally provide any direction about costs at the same time it issues its opinion. See, *e.g.*, *Barbosa* v. *Midland Credit Mgmt., Inc.*, 981 F.3d 82, 94 (1st Cir. 2020) (affirming and directing that "[e]ach party to bear its own costs"); *Ashker* v. *Newsom*, 968 F.3d 939, 946 (9th Cir. 2020) (reversing judgment, vacating remedial orders, and directing each party to bear its own costs); *Intellisoft, Ltd.* v. *Acer Am. Corp.*, 955 F.3d 927, 936 (Fed. Cir.) (vacating and reversing and directing costs to appellants), cert. denied, 141 S. Ct. 559 (2020).

Courts of appeals, however, frequently have no need to provide any express Rule 39(a) direction about costs upon rendering judgment in an appeal, because Rule 39(a)'s default choices apply without any action by the court. See Fed. R. App. P. 39(a)(1)-(3). The court of appeals' limited role under Rule 39(a) thus reflects that its identification of which party is entitled to seek costs is separate from, and antecedent to, the process of taxing specific costs, which is governed by Rule 39(d) and (e).

b. In order to seek the taxation of costs, a litigant must follow an established process. Rule 39 provides that "[a] party who wants costs taxed" must, "*after* entry of judgment," take the requisite actions to seek a cost award before the circuit clerk and, for certain costs, must seek an award from the district court. Fed. R. App. P. 39(d) and (e) (emphasis added).

More specifically, Rule 39(d) provides that "[a] party who wants costs taxed must * * * file with the circuit clerk and serve an *itemized and verified* bill of costs" "within 14 days after entry of [the appellate] judgment." Fed. R. App. P. 39(d)(1) (emphasis added). That provision follows the statutory requirements for initiating the taxation of costs: filing a "bill of costs," 28 U.S.C. 1920, along with an "affidavit" justifying each "item" of expense that is "claim[ed]," 28 U.S.C. 1924; see *Black's Law Dictionary* at 1561 (defining *verify* to mean "[t]o confirm or substantiate by oath or affidavit"). Any "[o]bjections must be filed within 14 days after service of the bill of costs," unless the time is extended. Fed. R. App. P. 39(d)(2). And after that 28-day-or-more period for claiming and identifying disputes about potentially taxable items of expense, "[t]he [circuit] clerk

must prepare and certify an itemized statement of costs for insertion in the mandate." Fed. R. App. P. 39(d)(3).[5]

Rule 39(e) reflects a parallel cost-taxing process in district court. Rule 39(e)'s four categories of "costs on appeal" are "taxable in the district court," Fed. R. App. P. 39(e), where Sections 1920 and 1924 directly require the party seeking costs to file an itemized and verified bill of costs, as respondents did in this case. See Pet. App. 23a-25a (bill of costs); J.A. 113-139 (declarations accompanying bill). And as Section 1920 reflects, the discretion to tax costs lies with the "judge or clerk" who "may tax as costs" the items of expense reflected in a verified "bill of costs." 28 U.S.C. 1920; see pp. 16-19, *supra*.

2. Rule 39's cost-taxing proceedings begin after the appellate panel's role under Rule 39(a) is complete

Waiting for the appellate court to complete its task under Rule 39(a) before initiating the actual cost-taxing proceedings is consistent with the traditional approach to the taxing of costs. A litigant's "request for costs raises issues wholly collateral to the judgment in the main cause of action." *Buchanan* v. *Stanships, Inc.*, 485 U.S. 265, 268 (1988) (per curiam). In fact, a litigant's

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[5] A court of appeals may review the cost-taxing decision that Rule 39(d) assigns to the circuit clerk and could potentially make that Rule 39(d) determination in the first instance. Cf. *In re Marin*, 956 F.2d 339, 340 (D.C. Cir.) (per curiam) (explaining that a federal court "has inherent supervisory authority over its Clerk"), cert. denied, 506 U.S. 844 (1992); *Borntrager* v. *Stevas*, 772 F.2d 419, 420 (8th Cir.) (stating that a court's "power over its clerks is inherent in the nature of the relationship between the two"), cert. denied, 474 U.S. 1008 (1985). But just as the circuit clerk would not exercise cost-taxing discretion for the district court, neither would a court of appeals that assumed the circuit clerk's Rule 39(d) responsibilities.

claim for compensation in its bill of costs necessarily postdates the judgment because the bill seeks to obtain "only what [i]s due because of the judgment." *Ibid.* (emphasis omitted).

The "sharp distinction between [a court of appeals'] judgment on the merits and an award of costs under Rule [39]" is "evident in Rule [39(d)(3)]'s instruction" that the issuance of the court of appeals' mandate—which gives effect to its appellate judgment—must "'not be delayed for the taxing of costs.'" *Buchanan*, 485 U.S. at 268 (addressing similar no-delay provision in Fed. R. Civ. P. 58(e)); cf. *West* v. *Brashear*, 39 U.S. (14 Pet.) 51, 54 (1840) ("[T]he mandate * * * is the judgment of this Court transmitted to the Circuit Court."). That mandate—which, if issued informally, "consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs"—"must issue 7 days after" the deadline for filing a rehearing petition if, as is normally the case, the losing party does not seek rehearing or further review. Fed. R. App. P. 41(a) and (b). And because a rehearing petition must normally be filed "14 days after entry of judgment," Fed. R. App. P. 40(a)(1); see Fed. R. App. P. 35(c), the court of appeals' mandate must normally issue 21 days after the court enters judgment.

Rule 39's process for considering a bill of costs, by contrast, contemplates a 28-day-or-more period "after entry of judgment" in which the "itemized" and verified bill is filed with the circuit clerk and objections are submitted. Fed. R. App. P. 39(d)(1) and (2). That process for initiating the taxation of costs and identifying disputes over particular items of expense therefore will normally continue *after* the mandate's issuance has "formally mark[ed] the end of appellate jurisdiction"

and returned the case "to the tribunal to which the mandate is directed." *Johnson* v. *Bechtel Assocs. Prof'l Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986) (per curiam); see 21 James Wm. Moore, *Moore's Federal Practice* § 341.02, at 341-4, § 341.12, at 341-6 (3d ed. 2020). As a result, the appellate panel will have terminated jurisdiction over the only matter before it, leaving only a separate and collateral proceeding for costs before the circuit clerk under Rule 39(d) and another collateral cost proceeding that may be filed in the district court under Rule 39(e). Neither Rule 39(d) or (e) assigns judges of the court of appeals the decision-making responsibility for taxing those costs.

3. The district court is best equipped to tax Rule 39(e) costs

The circuit clerk's and district court's respective cost-taxing authorities under Rule 39(d) and (e) place discretionary cost-taxing decisions with the most appropriate decision makers. The costs on appeal that are typically sought from the circuit clerk, for instance, involve (1) the $500 appellate docketing fee and (2) a per-page cost for appellate briefs and the accompanying appendix or record excerpts that is mathematically determined based on the number of copies filed and the number of pages in each document. See Pet. App. 29a-30a (bill of cost form); see also Fed. R. App. P. 39(c). In a typical case, the circuit clerk can readily determine the appropriate amount to tax because the relevant expenses involve matters reflected in appellate records and are not normally amenable to good-faith factual disputes.

Similarly, the four kinds of costs that Rule 39(e) entrusts to the district court are most effectively resolved there. The corresponding events—the payment of the

notice-of-appeal filing fee, the acquisition of transcripts for appeal, and the preparation and transmission of the record—are ones that occur in district court. And the district court will have "approve[d] [any] bond or other security" necessary to stay its judgment pending appeal. Fed. R. Civ. P. 62(b). Although the court may not have information about bond premiums before they are disclosed in a verified bill of costs, it may possess contextual insight from its management of the litigation relevant to resolving cost disputes. See *Pierce* v. *Underwood*, 487 U.S. 552, 560 (1988) (explaining that "the district court may have insights not conveyed by the record" that bear on an award of attorney's fees).

Moreover, unlike an appellate body, a district court regularly engages in fact-finding, making it particularly well suited to resolve any factual disputes that arise about the propriety of taxing costs for matters that unfolded during the district-court litigation—as did the disputes at issue here.[6] See *Guse* v. *J.C. Penney Co.*, 570 F.2d 679, 681-682 (7th Cir. 1978) (explaining that arguments against taxing bond costs were "factual in nature" and a "court [of appeals] is scarcely in a position either to determine what are the true facts or to evaluate them as would be the district court"); see also *Republic Tobacco Co.* v. *North Atl. Trading Co.*, 481 F.3d 442, 450 (7th Cir. 2007) (upholding district court's determination regarding reasonableness of cost of security in lieu of a bond, which rested on a "credibility

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[6] Compare Pet. Br. 5, 27 (contending that petitioner should not be taxed the full cost of the bond premiums in part because respondents "voluntarily" incurred that cost without "explor[ing] less-expensive alternatives"), with Br. in Opp. 21-22 (disputing which side required the bond costs to be incurred and whether petitioner's counsel or petitioner must pay taxed costs).

determination"). The district court is therefore "better positioned than [the court of appeals] to decide the issue[s]" that inform the proper exercise of discretion in taxing costs. *Underwood*, 487 U.S. at 560 (citation omitted) (providing for abuse-of-discretion review of the district court's decision whether the government's unsuccessful position was substantially justified for purposes of an award of attorney's fees); *Acosta* v. *Cathedral Buffet, Inc.*, 892 F.3d 819, 821-822 (6th Cir. 2018) (finding that "the district court has more extensive knowledge than do[es] [the court of appeals] regarding how the litigation unfolded below" and is "certainly better-equipped to determine" the amount of attorney's fees incurred there).

D. The Court Of Appeals' Contrary Analysis Is Incorrect

The court of appeals' contrary determination rests largely on two points. First, the court determined that, under its Rule 39(e) precedent, a court of appeals' mandate in a merits appeal determines which party is entitled to costs under Rule 39(e) and, "absent some limiting provision in the mandate," "the district court ha[s] no discretion whether, when, [or] to what extent * * * to award costs of the appeal." Pet. App. 12a (citation and brackets omitted). Respondents accordingly contend (Br. in Opp. 19) that the losing litigant on appeal—against whom costs might later be taxed in district court—must seek "modification of the appellate court mandate" if it desires to avoid taxation of full costs under Rule 39(e). Second, the court of appeals appears to have viewed Rule 39(e)'s instruction that costs are taxable in district court for "the party entitled to costs under this rule," Fed. R. App. P 39(e), as favoring its mandate-focused theory. See Pet. App. 12a. Neither ground provides sound support for the court's decision.

1. A court of appeals' mandate in a merits appeal does not address whether particular items of expense under Rule 39(e) should be taxed and does not deprive the district court of its discretion to decide such matters in the first instance. The mandate may include the court of appeals' "direction about costs" if the court has determined (as contemplated by Rule 39(a)) the litigant against which appellate costs should be taxed. See Fed. R. App. P. 41(a). But as explained above, that direction merely determines which party is entitled to an award of costs, not what particular items of costs should be taxed in full or in part.

Nor is there a sound reason to conclude that the court of appeals' mandate would resolve such matters. If the court of appeals identifies the party against which costs are taxed—instead of relying on the Rule 39(a) default choices for resolving that question—the court will normally make its determination at the same time that it renders its opinion and judgment resolving the appeal, as occurred in this case. See Pet. App. 27a; see pp. 21, *supra*. But at that point, the court of appeals generally lacks information about what items of expense (if any) may be sought by the party entitled to costs. Nor does the court normally have any information about the amounts of such expenses or the appropriateness of taxing them. That is because the party entitled to seek costs files its "itemized" and verified bill of costs with the circuit clerk "*after* entry of [the appellate] judgment, Fed. R. App. P. 39(d)(1) (emphasis added), and because adversarial briefing about objections usually will not be complete until after the mandate has issued. See pp. 24-25, *supra*. Similarly, the party entitled to seek costs must as a practical matter wait to file its bill of appellate costs in district court until after the court

sends its mandate to the district court.[7] Given the absence of information about costs before the court of appeals when its issues its judgment and mandate, there is no reason to interpret the mandate as resolving such yet-to-be-litigated disputes.

Respondents have suggested (Br. in Opp. 19) that the litigant against whom costs may be taxed must preemptively "ask[] for a modification of the appellate court mandate." But requiring the cost-paying party to anticipate the type and amount of expenses that its opponent will seek in a future bill of costs is not a sensible solution. Such anticipatory litigation would unfairly require the party opposing costs to guess the type and amount of expenses to challenge before they are even sought. It would result in unnecessary proceedings in the courts of appeals over potential disputes that might never come to fruition. And it would preempt the procedure that already exists for identifying particular "item[s] of cost" in a verified "bill of costs" justifying such expenses, 28 U.S.C. 1924; see Fed. R. App. P. 39(d) and (e), with adversary presentation of any disputes.

2. Rule 39(e) provides that costs are "taxable" in the district court "for the benefit of the party entitled to costs under this rule," Fed. R. App. P. 39(e). But that does not suggest that the court of appeals itself should exercise discretion to determine the taxable amounts for particular items of costs. The "party entitled to costs under [Rule 39]" (*ibid.*) is identified either (1) by operation of Rule 39(a)'s rules identifying which party costs are taxed against or (2) by a court of appeals that

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[7] A "court [of appeals] retains control over an appeal" and therefore "the power to alter or modify [its] judgment" until it "issue[s] a mandate." *Comer* v. *Murphy Oil USA, Inc.*, 718 F.3d 460, 467-468 (5th Cir. 2013) (citations omitted).

"orders otherwise," Fed. R. App. P. 39(a). That method of identifying *who* is entitled to costs does not suggest that the same method resolves which, or to what degree, specific items of cost should be taxed.

If the phrase "the party entitled to costs under this rule" meant that the designated party must recover the full amounts claimed in its subsequent bill of costs, then no entity would ever exercise discretion about any specific costs. Rule 39(e)'s reference to the "the party entitled to costs" under Rule 39 thus refers, at most, to the party that is *generally* entitled to costs under the rule, not to subsidiary determinations about whether it is entitled to recover *specific* items of its claimed costs. The discretion to tax such specific items is vested in the district court as the body charged by Rule 39(e) with considering them.

Moreover, if the court of appeals' interpretation of Rule 39 were read as allowing the district court *some* discretion to determine whether the specific amounts requested for particular expenses are valid and reasonable, bifurcating those determinations from disputes about "entitle[ment]" would only create additional difficulties. But cf. Pet. App. 12a (stating that a district court has "no discretion" to decide "to what extent * * * to award costs of the appeal") (citation omitted). First, if the district court retains that form of discretion, it makes little sense to deprive it of discretion to consider the full scope of arguments for reducing or denying particular costs. Second, neither the court of appeals nor respondents have offered a bright line that distinguishes challenges that implicate a party's "entitle[ment]" to particular costs from challenges that go to the reasonableness of taxing those costs. Uncertainty about which kind of cost dispute is at issue would only

spawn satellite litigation about *which court* should exercise discretion over different types of challenges to the same items of cost, flouting this Court's "oft-stated" admonition that collateral requests for litigation expenses "'should not result in a second major litigation.'" *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1988 (2016) (citation omitted).

Finally, the court of appeals also misapprehended Rule 39(e)'s original 1967 text, which provided that the rule's costs "*shall be taxed* in the district court." Pet. App. 12a-13a (citation omitted). That language specified *in what forum* Rule 39(e) costs must be taxed and—as the Advisory Committee's 1967 notes show—it did not eliminate the traditional discretion of the cost-taxing tribunal. See pp. 18-19, *supra*. The current rule's expressly permissive text ("taxable") confirms as much. See pp. 15-16, 18-19, *supra*. Notably, the decision below did not disagree. The court of appeals "express[ed] no view on the merits of [its prior] interpretation" and recognized that its precedent may have been "just as wrong *before* the amendment as it was *after*." Pet. App. 13a-14a.

In light of the rule's text, the longstanding tradition of judicial discretion in taxing costs, and the broader context of the procedures that statutes and other procedural rules prescribe for taxing costs, this Court should confirm that the court of appeals has indeed been wrong in holding that district courts may not reduce costs under Rule 39(e).

CONCLUSION

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

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1920 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.

2. 28 U.S.C. 1924 provides:

Verification of bill of costs

Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred

in the case and that the services for which fees have been charged were actually and necessarily performed.

3. 28 U.S.C. 2072 provides:

Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

4. Rule 35 of the Federal Rules of Appellate Procedure provides in pertinent part:

En Banc Determination

* * * * *

(c) **Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

* * * * *

5. 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.

6. Rule 39 of the Federal Rules of Appellate Procedure (1968) provided in pertinent part:

Costs

* * * * *

(e) COSTS ON APPEAL TAXABLE IN THE DISTRICT COURTS.—Costs incurred in the preparation and transmission of the record, the cost 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.

7. Rule 40 of the Federal Rules of Appellate Procedure provides in pertinent part:

Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

* * * * *

8. Rule 41 of the Federal Rules of Appellate Procedure provides:

Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate Pending a Petition for Certiorari.

(1) **Motion to Stay**. A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must

be served on all parties and must show that the petition would present a substantial question and that there is good cause for a stay.

(2) **Duration of Stay; Extensions**. The stay must not exceed 90 days, unless:

(A) the period is extended for good cause; or

(B) the party who obtained the stay notifies the circuit clerk in writing within the period of the stay:

(i) that the time for filing a petition has been extended, in which case the stay continues for the extended period; or

(ii) that the petition has been filed, in which case the stay continues until the Supreme Court's final disposition.

(3) **Security**. The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(4) **Issuance of Mandate**. The court of appeals must issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition, unless extraordinary circumstances exist.

9. Rule 42 of the Federal Rules of Appellate Procedure provides:

Voluntary Dismissal

(a) Dismissal in the District Court. Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) Dismissal in the Court of Appeals. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

10. Rule 54 of the Federal Rules of Civil Procedure provides in pertinent part:

Judgment; Costs

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(d) COSTS; ATTORNEY'S FEES.

(1) *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.

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11. Rule 58 of the Federal Rules of Civil Procedure provides in pertinent part:

Entering Judgment

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(e) COSTS OR FEE AWARDS. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal

extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

12. Rule 62 of the Federal Rules of Civil Procedure provides in pertinent part:

Stay of Proceedings to Enforce a Judgment

(a) AUTOMATIC STAY. Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) STAY BY BOND OR OTHER SECURITY. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

* * * * *

(d) INJUNCTION PENDING AN APPEAL. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

(e) STAY WITHOUT BOND ON AN APPEAL BY THE UNITED STATES, ITS OFFICERS, OR ITS AGENCIES. The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.

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