SUPREME COURT
OF THE UNITED STATES

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CITY OF SAN ANTONIO, TEXAS,)
ON BEHALF OF ITSELF AND ALL OTHER)
SIMILARLY SITUATED TEXAS)
MUNICIPALITIES,)
Petitioner,)
v.) No. 20-334
HOTELS.COM, L.P., ET AL.,)
Respondents.)

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Washington, D.C.

Wednesday, April 21, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

DANIEL L. GEYSER, ESQUIRE, Dallas, Texas; on behalf of the Petitioner.

DAVID B. SALMONS, ESQUIRE, Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 20-334, San Antonio versus Hotels.com.

Mr. Geyser.

ORAL ARGUMENT OF DANIEL L. GEYSER

ON BEHALF OF THE PETITIONER

MR. GEYSER: Thank you, Mr. Chief Justice, and may it please the Court:

Rule 39 authorizes district courts to exercise discretion in denying or reducing taxable costs under Rule 39(e), and the Fifth Circuit's contrary position ignores the rule's plain language, makes nonsense of its structure, invites a host of obvious practical problems, and, if adopted here, would dramatically upset settled practice in every single jurisdiction nationwide, including, ironically, in the Fifth Circuit itself. Respondents have now wisely conceded that Rule 39(e) costs are discretionary. The only question is which court has the power to exercise that discretion.

We say the district court because Rule 39(e) expressly says that Rule 39(e) costs are

taxable in the district court. That clause embodies a permissive term in making a textual assignment to the district court, not the appellate court, and it does so against the explicit backdrop of provisions like Section 1920 that delegate textual discretion over the same overlapping costs to the district court.

This straightforward design pushes down collateral fact-bound issues to the tribunal that is best equipped to take evidence, make a record, resolve factual disputes, and address these new issues in the first instance.

Now Respondents say that Rule 39 vests only the appellate court with discretion, but their only hook for that belief is Rule 39(a), which is the rule's only provision that provides any role for the appellate panel. That rule, by its express terms, dictates only against whom costs are assessed. It says nothing about what those costs should be.

Under the rule's design, the panel doesn't have access to the relevant information at the time of the subsection (a) determination. The panel doesn't have a formal cost request, it

doesn't have any relevant evidence, it doesn't have a record on costs because there is no record on costs, and it doesn't know the opposing party's objections or the reasons certain costs should be denied or reduced.

A court cannot intelligently exercise discretion without access to the relevant information, and the rule is specifically designed for the relevant information to come out after the Rule 39(a) determination is made.

CHIEF JUSTICE ROBERTS: Mr. Geyser, this is a matter that's dealt with in the local rules, and perhaps my information is -- is dated, but it seemed to me that if you practice before the court on a regular basis, you'd know what the rules and the customs were, and, if not, you would ask the clerk and he or she would tell you.

And I think what they would tell you is one of two things. First, they'd say: We deal with that problem up here -- you know, haven't you read Rule 39(a) -- and if there's a dispute, I'll go ask the writing judge what he or she wants to do, and if there's still going to be a fight, we'll send it down to the

district court.

Or the clerk is going to tell you: You go down to the district court -- haven't you read Rule 39(e) -- and if it -- there's still a fight down there, they'll bring it up here.

But it seems to me that -- that your rule would sort of standardize all those local practices, which, as far as I can tell, haven't really been a problem, because you say the court of appeals has no -- no authority over this and it has to go to the district court in the first instance. Is that right?

MR. GEYSER: Well, we -- we say it has to go to the district court, and so does the Fifth Circuit. If you look to page 10 of the Petition Appendix, this -- the appellate court in this -- in this case said that Rule 39(e) costs are properly sought before the district court.

It's totally unclear then how the appellate court can exercise discretion when the cost request for those costs under the Fifth Circuit's own practice doesn't even arise at the appellate level. They have no idea what those costs will be.

And in terms of local rules, the Federal Rules of Appellate Procedure specifically say that courts cannot adopt local rules that trump the provisions of express rules.

CHIEF JUSTICE ROBERTS: Yeah, I -- I -- I remember it does say that, but I'm not sure that that's followed as strictly as you suggest to impose -- for something as minor as costs, which is a minor thing in 90 whatever percent of the cases, I -- I -- I do think that different courts of appeals follow different practices, and I'm not sure it's caused a real problem.

MR. GEYSER: Well, again, Your Honor, I -- I think they -- the courts of appeals have generally followed the same practice of deferring all these issues down to the district court, and it works well there.

There's no reason that a district court hand -- can't handle these collateral fact-bound cost issues. But what will create a problem is bifurcating the process and trying to figure out, you know, with some -- you know, so far, I haven't heard an articulable basis for distinguishing the kinds of issues that the

appellate court should handle versus the kinds of issues that the district court should handle, making --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

Mr. Geyser, following up on the Chief Justice's question, it would seem that you knew -- that you certainly were aware of the rule in the Fifth Circuit, so why wouldn't you proactively object to the -- the costs taxation before the Fifth Circuit?

MR. GEYSER: Well, I -- I think for a few reasons, Your Honor. One is it's not clear when you would proactively make that request. I know my friends on the other side have suggested you should do this in your merits briefing.

Now, of course, Rule 28(a) specifies the required items in a merits brief as 10 different items. It doesn't say anything about costs. And it doesn't really make much sense to ask parties to raise these preemptive objections based on future predictions of what an opposing

party might request hypothetically on remand if they win and if the panel assigns costs.

So the -- the alternative then is raising it in a rehearing petition. But this isn't really the proper subject of a rehearing petition. So that's why my friends are really struggling. These are very able lawyers, and they haven't come up with any workable way to get relevant information to the appellate court.

What makes more sense is send it down to the district court. These are collateral issues. They can deal with them. They deal with them under Section 1920. They deal with them under Rule 54(d). They do a good job at it.

There's no need to create this complexity when the rule itself has a simple design that simply says, when you're dealing with these four categories of costs that are -- that are likely among all the cost issues to generate fact-bound disputes, let's send it down to the district court to handle in the first instance.

JUSTICE THOMAS: The -- the initial costs didn't seem to be out of line as I think

it was under a thousand dollars.

This is quite substantial because you're around $2 million.

Is this an outlier, and then how often do cases like this come up in the Fifth Circuit?

MR. GEYSER: I -- I think it is a bit of an outlier, especially to have a cost award of this magnitude, which is why, again, what -- what typically works best is the district court can handle, you know, quibbles about little minor cost disputes.

The appellate panel doesn't have to spend its time with that. They -- they typically address the merits of the case. They say which party is the prevailing party. That's what subsection (a) is all about. And then they send it down to the district court to handle the rest.

JUSTICE THOMAS: Can you -- other than your case, can you point to any other case recently in the Fifth Circuit where this has caused a significant problem?

MR. GEYSER: I -- I can quote -- there is a case, and we cite this in our petition. It was a case involving Ericsson, where there was

another massive supersedeas bond, and in that case, the district court said it lacked any discretion under the Fifth Circuit's outlier practice to deny or reduce a cost award.

But, again, the real problem here is the Fifth Circuit itself says don't bother us with Rule 39(e) costs. They made that clear again in this very case. They said put in that request in the district court. Yet then they tell the district court you can't exercise discretion if some of those costs are improper.

So it's -- it's really a system that doesn't work well but does work well under the federal rules and the way every other circuit applies those federal rules.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: Can we not read the rules to -- consistent with what the Chief Justice said, which I would guess is the practice in most places, you -- you look at (a), and it says, for example, if the judgment is reversed, costs are taxed against the appellee. Which costs? Well, the ones listed in (e).

So what the -- what the circuit would do is it would decide what the costs are. But, if there is a dispute, refer it to the district court. And we would assume that that is the rule unless the circuit says in a particular case or in general that there's a different rule. What's wrong with that?

MR. GEYSER: Well, I think what's wrong with that, Justice Breyer, is that when the circuit is making that subsection (a) determination, they often will have no clue what costs --

JUSTICE BREYER: Well, that's my point. You -- I -- I mean, I get these things for costs all the time. We just normally follow the rule.

I'm saying you would normally just do what (a) says and decide it here, unless there's a dispute, and then what would happen is just what I said. If there's a dispute, we'll refer it, as you correctly point out, to the district court, which knows more about it.

I just repeated my question.

MR. GEYSER: Sure. Well, I think I can --

JUSTICE BREYER: And I -- I'm saying you're right, the district court knows more about the dispute normally. So that would be the default. But we -- you wouldn't have to go to the district court. You'd go here and apply, knowing that if there's a dispute in general or in the specific case, the court of appeals refers it to the district court for resolution.

Okay? Same question. Third time. What's wrong with it?

MR. GEYSER: I'll -- I'll try to give a better answer. The -- I think what's wrong with it is that you don't know what disputes will arise under the Rule 39(e) costs specifically until you get to the district court, and at that point, the mandate's issued.

So the district court takes this up after the appellate court is done with it, and then, at that point, that's when the party puts in the request for these massive costs. That's when the objections come out.

And then the district court says: Oh, no, it turns out there might be a reason to deny or reduce costs, but, under the Fifth Circuit's rule, you needed to ask that at the appellate

level. But, at the appellate level, when -- when they actually have power over the case and are looking at it, you don't ask for the Rule 39 --

JUSTICE BREYER: I got that point. I'm just saying, if I were sitting in the First Circuit, I'd say, you go to the clerk. If this is really a problem, write our rule to be just what I said. It'll do exactly what you want because that is the rule of the First Circuit where there is a dispute.

MR. GEYSER: Again, Your Honor, I -- I think the rule makes this simpler in -- in assuming that the district courts are perfectly capable of handling these things.

The appellate court simply says this is the party that can put in the request for costs. And then they can be done with it and focus back on the merits of appeals instead of dealing with collateral cost issues that district courts can handle.

JUSTICE BREYER: Thank you.

CHIEF JUSTICE ROBERTS: Justice Alito.

JUSTICE ALITO: What happens if a court of appeals, let's say, affirms two of a

district court's holdings but reverses one? Under 39(a)(4), couldn't the court of appeals apportion the costs proportionately and -- and say that the appellant had to pay two-thirds of the costs and the appellee would have to bear the other third? And would you say that in that situation the district court would have discretion to make a different allocation?

MR. GEYSER: What -- what I'd say, Your Honor, is that it's very rare for that to happen at all. Normally, what the appellate court does is it decides in a mixed judgment like that either that neither party is entitled to costs, or it chooses the party that -- that really won more on the appeal, and then the district court can take into account the -- how successful that party was in deciding to reduce the costs.

Nothing prevents the appellate panel from saying, well, although we're awarding costs to the appellant, the district court should take into account the degree of success on the appeal.

But I think the better reading of the rule is that the -- the specific allocation

itself is done by the body that's assigned with figuring out the proper taxable costs for those designated items.

JUSTICE ALITO: Well, three of the four items in 39(e) seem to be fairly straightforward: the preparation and transmission of the record, the reporter's transcripts, the fee for filing a notice of appeal. I don't see why the district court is in a better position than the court of appeals to decide those.

Now, as to the supersedeas bond, the -- the district court had to approve the bond. And you presumably knew how much the -- the -- the amount of the bond.

Why does it make sense to have the district court review the very thing that the district court approved? Why wouldn't it be more sensible for that to be reviewed by the court of appeals?

MR. GEYSER: Well, I -- I think, Your Honor, because, when the -- the district court approves the bond, it may not know if there were other -- other alternatives that the -- that the moving party could have sought. It doesn't know

if the other side has objections to the bond or the rate obtained. And so there's really no reason to focus on it at that point.

The -- the cost issue becomes ripe when the cost request is put in under the rule's design and under, in -- in fact, the Fifth Circuit's own practice, in the district court. So I think, at that point, the district court is just as well suited as the appellate court to examine fact-bound disputes and say: Would -- would I have waived the bond requirement? Could you have obtained less expensive security? Were there -- are there reasons that you didn't do that?

JUSTICE ALITO: Did you have the opportunity at that point, when -- at the point where the district court approved the bond, to raise objections?

MR. GEYSER: We -- we could have, Your Honor, but I -- I think that the -- the Respondents are in the best position to know, based on their own net worth and their own financial situation, whether they are capable of obtaining alternative forms of security. It's not really our job to ask them what -- can we

look at your finances and peek under the hood and see if there was something better you could have pursued?

They came to us with the bond request. And as -- as the lead plaintiff on behalf of a class, the City had a -- a fiduciary obligation to make sure the judgment is protected for the class. And the other side offered to post a bond, and that was their one and only suggestion.

JUSTICE ALITO: All right. Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: Counsel, did you know how much the bond was when it was sought from -- to be placed at the district court?

MR. GEYSER: I -- I believe we -- we either knew the cost or -- or the -- a rough estimate of the cost, yes.

JUSTICE SOTOMAYOR: All right. So you know these costs -- you know -- knew this cost.

Now, going back to what you said to us from the beginning so that I understand, you knew what they were; you had an opportunity, if you chose, to tell the circuit court we know the

cost is high, we don't believe it's just; do you want to hear it or do you want to let the district court decide that?

Why can't you pursue that sort of process?

MR. GEYSER: Your Honor, I believe that the rule could be rewritten to embrace that sort of process, but, under the Fifth Circuit's own -- own precedent -- you know, again, this is on page 10 of the Petition Appendix -- the -- the other side isn't even supposed to put in the request for the bond until they get back to the district court.

JUSTICE SOTOMAYOR: Well, that's my point. Are you saying that the Fifth Circuit won't let you raise that issue at all or that it'll just say let the district -- if you did what I just said, which is what happens in some other circuits, what do you believe the Fifth Circuit would do?

MR. GEYSER: I -- I'm happy --

JUSTICE SOTOMAYOR: If you went in and said we believe this bond is unreasonable, unnecessary, whatever the -- the argument is, what would the Fifth Circuit have done?

MR. GEYSER: I'm -- I'm -- I'm actually not sure because they could say it's not ripe yet. The other side hasn't even asked for their bond premium because they're supposed to do that in the district court.

But I'm also not sure when we would have done that. We could have done it in our merits briefing, but then we're saying --

JUSTICE SOTOMAYOR: No, you could have done it when the bill of costs was put in.

MR. GEYSER: The bill of --

JUSTICE SOTOMAYOR: After the judgment is rendered, you have 14 days. The other side puts in a bill of costs for -- for the three or four items that it sought. And at that point, you could have said, we're okay with these four, but we're not okay with the -- the bond cost. Fifth Circuit, we think it was unnecessary or we think it was unreasonable or whatever your argument is.

Why couldn't you have done that then?

MR. GEYSER: The -- at that time, the -- the -- the bill of costs for the Fifth Circuit doesn't even have a listing for the bond cost. So we would have to object, saying,

although this isn't on the -- the other side's request, if they eventually ask for this in the district court, where they're supposed to, this would be our objection to that hypothetical --

JUSTICE SOTOMAYOR: All right. One --

MR. GEYSER: -- future cost request.

JUSTICE SOTOMAYOR: -- last -- I understand the -- the -- I -- I -- I think I understand what you're saying, which is the way things work, the circuit court only looks at those two or three items and tells you to go to the district court for the others, and if you go to the district court and we say they have no discretion, you believe you have no way to go back to the circuit court to look at that decision. Is that correct?

MR. GEYSER: I think that is correct.

JUSTICE SOTOMAYOR: Well, in fact, it is correct, because you raised your objections, and the Fifth Circuit said the district court couldn't look at it, but it didn't look at your objections either. It's really a due process problem you're talking about.

MR. GEYSER: I think that's exactly right. It's -- it's effectively a catch-22. It

says that we're the only ones that can exercise discretion, but don't bother us with the Rule 39(e) costs; bother the district court, whose then hands are bound by the Fifth Circuit's unique understanding of -- of the rule.

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: Mr. Geyser, let me talk about how you get to your argument from the text, because I'm not sure I quite understand it.

If you look at Rule 39(a), would you agree with me that what 39(a) does is it sets default rules for who pays costs? You know --

MR. GEYSER: Yes.

JUSTICE KAGAN: -- who pays costs in the ordinary case, right?

MR. GEYSER: Correct.

JUSTICE KAGAN: Now -- and then 39(a) says: Unless the court orders otherwise.

And "the court" there, you agree, is the appellate court, isn't it?

MR. GEYSER: Yes.

JUSTICE KAGAN: So the court can take these -- the appellate court can take these default rules and change them. It can say, you

know, usually the appellant pays if a judgment is affirmed, but, for whatever reason, we want to do something otherwise. Is that right?

MR. GEYSER: That -- that is right.

JUSTICE KAGAN: So that sounds like a lot of discretion. So then it would seem -- I mean, how many courts can have discretion? Isn't that just basically saying the court of appeals has the principal discretion?

MR. GEYSER: I -- I think they do but in a limited area. It's the discretion to decide against whom costs are assessed. It does not say, for example, in 39(e) that the costs are taxed in the district court unless the appellate court says otherwise. It says, full stop, the district court is responsible for these costs.

JUSTICE KAGAN: Well, maybe that -- 39(e) is talking about something different. So, if you read it against, for example, 1924, 1924 says that before you tax costs, somebody has to figure out whether the item is -- you know, I'm read -- I'm -- I'm -- I'm using the language here -- correct and necessarily incurred.

So that's the kind of thing where you

come in for -- you say I -- I -- I paid a thousand dollars for the transcript, and somebody else said -- says no, it was $2,000 or something like that.

So why isn't the -- what the district court has to do is basically just figure out whether the costs are correct and necessarily incurred?

MR. GEYSER: Your Honor, I think because it would be at odds with the rule's structure and design. The appellate court then would have to decide whether to deny or reduce costs without knowing what they are.

Say the premium was 150 percent of the market rate. No one knows that until the request has come in for the costs. And then, at that point, I'm not sure if the district court then is saying that's an improper cost or whether the appellate court should exercise discretion in reducing it even though that is the cost they, in fact, paid.

So the appellate court simply is not in a position to intelligently exercise discretion without having the relevant information. And I think everyone agrees that

information comes out at the district court.

JUSTICE KAGAN: Thank you, Mr. Geyser.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: Mr. Geyser, I'm -- I'm struggling with the due process argument as it were. What -- what -- what -- what would have prohibited your clients from raising the question about the bond cost before the court of appeals at some point?

MR. GEYSER: Your Honor, I -- I think we'd have to come up with a vehicle for doing that. And --

JUSTICE GORSUCH: Yeah, I would have thought maybe your brief or a supplemental filing, which happens in a lot of courts of appeals, or maybe your petition for rehearing. I think you filed one for the panel rehearing. Also one for en banc rehearing. How about any of those four vehicles? What was --

MR. GEYSER: Well, Your --

JUSTICE GORSUCH: -- your position about those?

MR. GEYSER: Well, Your Honor, there's nothing that -- that precludes a party from

trying to raise the cost issues at that point, but just to be very clear, when the -- the rehearing petition was filed in this case, there still wasn't a request for bond costs. In fact, the only requests were -- were the small --

JUSTICE GORSUCH: It's in the rule. You -- it's in the rule. You know it's coming or you're on notice that it's coming, this is going to be taxable against you, absent the court of appeals saying otherwise.

Now maybe you didn't get an embossed invitation, but the rule is there, and you had, I think, four opportunities by my count to -- to raise it. Why -- why -- why should we be concerned?

MR. GEYSER: Your Honor, I think -- I think, just in terms of envisioning the way the process most sensibly works, it's asking the opposing party to file an objection to something that hasn't yet been raised yet.

So it's predicting, I -- I think this is coming, I --

JUSTICE GORSUCH: Why isn't it -- why isn't it raised by FRAP 39? It says this cost is going to be taxed against you unless the

court of appeals says otherwise. I would have thought that -- again, maybe not an embossed invitation, you know, may -- maybe you don't think that's sufficient notice, but, if that's not sufficient notice, I guess I just want to understand why isn't that sufficient notice.

MR. GEYSER: Your Honor, because it's -- it's not the rule itself that -- that makes the -- that activates the right to the costs. The -- the oppose -- the party entitled to costs under the rule has to file a verified bill of costs. They have to formally seek them.

If they don't seek them, they get no costs. And if they didn't incur any costs, they get no costs. And if the costs are improper --

JUSTICE GORSUCH: But you knew that -- but you knew -- but you knew that this bond was going to be -- it did have costs attached to it. That's not a surprise to you. And you knew that under FRAP 39(a) it was going to be taxed against you. Again, just what -- what -- what piece of information was missing?

MR. GEYSER: We -- we presumably knew that the other side will likely seek the costs. But, until they actually seek it -- maybe --

maybe they decide not to. Maybe they're feeling charitable. Maybe they reduce their request knowing that --

JUSTICE GORSUCH: If you're concerned about that, maybe you ought to raise it, though. I mean, why wouldn't you raise it? If -- if you're -- if you're genuinely concerned about it, you know it's $2 million, and your client's going to take it to the United States Supreme Court over it, why -- why wouldn't it have been incumbent upon you to -- to -- to -- to -- to raise that issue at the court of appeals, which has the case before it four times?

MR. GEYSER: Because, Your Honor, under the rule itself, the -- the district court is the appropriate tribunal where we can make that -- our objections, after the other side has actually put in the formal request for costs, as opposed to hypothetically objecting to future costs that haven't yet been lodged with any court.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you, Mr.

Chief Justice.

Good morning, Mr. Geyser. My understanding of this is that the dispute is not really whether the district court has authority with respect to costs. The dispute is what the district court can do.

And I guess the question is, looking at the structure, the two-tiered structure of this, with 39(a) and 39(e), why isn't the better reading that the district court can determine the amount of the particular costs listed in 39(e) and disputes over whether a particular amount was correct or not, as Justice Kagan points out, but the district court does not have the authority over whether to award the costs at all or to reallocate the costs from what the appeals court has said? Why isn't that the better reading of the structure?

MR. GEYSER: I -- I think two reasons. The first, sir, just from a practical standpoint, that then puts the onus on the appellate court, which -- which generally has better things to do, to preemptively decide how to exercise discretion to deny or reduce a cost without having any of the particulars relevant

to that cost and without --

JUSTICE KAVANAUGH: Well, the -- the -- the appellate court just says costs are taxed against the appellant or costs are taxed against the appellee or, as Justice Alito points out, makes an allocation. And once that's done, the -- the appeals court judge, at least in my experience, doesn't get back involved.

Then it goes to 39(d) for the appeals court costs and 39(e) for the district court costs, but that allocation, whether it's 100 percent or some separate allocation, then defines what the circuit clerk does and then what the district clerk does with the particular costs. And there may be disputes over the amounts, but they can't -- the district court can't -- clerk or judge, can't reallocate.

MR. GEYSER: It -- it --

JUSTICE KAVANAUGH: Isn't that how it all fits together?

MR. GEYSER: It's -- yes and no, Your Honor. The -- the -- the no part is that everyone agrees that -- that some -- someone has discretion to look at the -- well, all the relevant factors in the case, including factors

specific to why a bond was requested and the amount, and to deny or reduce it in appropriate circumstances.

So someone has to be in a position to make that determination. And I agree with you, the appellate court normally refers simply to the default rule and they move on and they're not bothered with this again. But --

JUSTICE KAVANAUGH: Well, I just want to maybe say one thing on that. To Justice Alito, I'm not sure you specifically answered his question, when the allocation's done by the court of appeals, how can the district court reallocate, and you said that doesn't really happen a lot.

Well, I -- I did that more than a few times when I was allocating costs on the court of appeals.

MR. GEYSER: Well, Your Honor, again, I think just flipping through the F.3d, it's -- it's pretty rare to see that happening. But, if it does happen --

JUSTICE KAVANAUGH: Well, it's not -- it doesn't get reported in case law, but it -- it happens.

MR. GEYSER: It -- it can, but I -- I don't think that's necessarily inconsistent with our position because someone still needs to exercise discretion in looking at each individual element of cost and saying should this be denied or reduced, and then you can apply the -- the percentage reduction to whatever that base amount is.

JUSTICE KAVANAUGH: I -- I -- I guess the point is, when the court of appeals is doing it, it's really not looking at the amount of the costs. And maybe this is a flaw in the system. It's just looking at who won and who lost, and maybe it's kind of a 70/30 or a 50/50 or 100/0, and just making that allocation, and then the amounts are determined by the circuit clerk and the district clerk.

MR. GEYSER: Exactly, Your Honor. But if -- if I can give an example I think might illustrate this. Say -- say that the bond, again, was obtained just at a grossly excessive rate for no reason whatsoever. Then someone then presumably should reduce that.

I think it's -- and I think what you do --

JUSTICE KAVANAUGH: Well, you should tell the court of appeals that before it makes the allocation. That's Justice Gorsuch's point. I'm going to let it go there, though, counsel. Thank you.

MR. GEYSER: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett.

JUSTICE BARRETT: Good morning, Mr. Geyser. I want to go back to some of the questions that Justice Kagan was asking you, specifically about 28 U.S.C. 1924.

So, as, you know, she read the text to you and it's kind of my question too, I mean, the district courts have discretion to decide whether the costs are correct and necessarily incurred in the case, is that right?

MR. GEYSER: That is right.

JUSTICE BARRETT: So why isn't this just a dispute about how broad the district court's discretion is to decide whether a particular cost, here, the bond amounts, were necessarily incurred?

Because, as I gather, you're saying here, well, these weren't necessarily incurred.

It wasn't necessary to get something that was this expensive. They could have done something different. Is -- is that another way to frame this dispute?

MR. GEYSER: I -- I -- I think it is a potential way to frame the dispute. And I think it shows that someone needs to have some mechanism when they see a cost has been incurred, even if they have a receipt for it, but that, in the circumstances of the case, should be reduced or denied in the exercise of discretion. And the simple question is, who does that? Is it the appellate court?

JUSTICE BARRETT: Okay. And then the Fifth Circuit has -- are you saying that the Fifth Circuit approach says that there's basically no one, because it falls through the cracks, so no one decides whether, you know, X or Y cost was necessarily incurred?

MR. GEYSER: I -- I think that is correct. And I think the only way around that is to manufacture workarounds to the federal rules as opposed to simply following a very clear design where district courts are perfectly capable of doing this. They do it every day

under Section 1920 and Rule 54(d).

JUSTICE BARRETT: Okay. And I want to ask you what you think this equitable discretion entails. I mean, you're focusing a lot on the cost of the bond.

But I -- I took you in your brief to also be saying things about, you know, well, the district court's in a position to know about the litigation strategy or the conduct during litigation or the strength of the arguments.

Did I misunderstand that?

MR. GEYSER: No, you didn't. District courts traditionally look at all sorts of factors, including will the -- the cost -- is a party destitute, will a -- will a cost award drive them, you know, into poverty, you know, all sorts of different factors that might not be apparent during -- during the merits briefing when the panel is simply trying to decide the merits of the appeal, which is what appellate courts traditionally do.

District courts can handle these collateral issues just as they can --

JUSTICE BARRETT: Well, I -- I mean, don't you think that the court of appeals, which

has just resolved the appeal, is in a better position to decide what the strength of the arguments were?

I mean, you know, Justice Kavanaugh is right. I mean, as a court of appeals judge, I allocated costs, and, if arguments were close, you know, then maybe I didn't give 100 percent to the -- the prevailing party. You know, it's not the district court doesn't see the merits of those arguments.

MR. GEYSER: The -- I -- I think the -- the district court can certainly take into account what -- what the appellate court has said, and the appellate court can guide the district court in doing that.

But the appellate court won't often have access to other important aspects of the cost calculus, including material specific to the nature of the bond, which, you know, again, the appellate panel I -- I don't think knows or hears about a bond until you get to the cost stage.

JUSTICE BARRETT: Well -- well, counsel, let me just ask you one last quick question. I mean, in the Respondents' brief,

they say that you negotiated -- I'm looking at pages 10 to 11 of the brief -- you negotiated for a higher amount as time went on. So, I mean, you weren't surprised?

MR. GEYSER: We -- we were not surprised that -- that there was a bond, and we wanted the bond on --

JUSTICE BARRETT: You just were surprised that they tried to recover the costs at the end?

MR. GEYSER: No -- no, Your Honor. We -- we just felt that, in light of the factors and the circumstances of this case, a full bond that ran, you know, for two-and-a-half years in the district court without any action necessarily is inequitable to tax exclusively to us, especially if alternatives were available.

JUSTICE BARRETT: Thank you, counsel.

CHIEF JUSTICE ROBERTS: A minute to wrap up, Mr. Geyser.

MR. GEYSER: Thank you, Mr. Chief Justice.

Under our view of the rule -- now we realize there certainly are other ways to -- to structure a rule and to structure a system where

you can get cost disputes, and appellate courts maybe can spend their time and their bandwidth digging into these questions and creating a record and sometimes hearing witnesses and resolving fact-bound, fact-intensive issues.

But the way the rule itself is designed and the way that it's applied in all the other circuits outside the Fifth Circuit make better sense. It pushes the question down to the district court, just as -- just as fee awards are pushed down to the district court, just as other cost questions are pushed down to the district court, to resolve these issues in the first instance.

District courts are not known for thumbing their noses at the appellate court and second-guessing the appellate court's determination.

The fact is most appellate courts make the subsection (a) determination either silently by referring to the default rule or by simply saying costs to (a), costs to (b), or no costs.

It's really -- someone needs to exercise the discretion to look and see if a certain cost is improper or inappropriate, and

the -- the body doing that needs access to the relevant information, and that relevant information best comes out at the district court level.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Salmons.

ORAL ARGUMENT OF DAVID B. SALMONS

ON BEHALF OF THE RESPONDENTS

MR. SALMONS: Thank you, Mr. Chief Justice, and may it please the Court:

Rule 39 identifies the limited costs that may be taxed on appeal and assigns the appellate court alone to decide the parties' entitlement to those costs. Unless that court orders otherwise, 39(a) directs that all those costs "are taxed" against the losing party.

39(d) and (e) assign the appellate court clerk and the district court or its clerk to calculate certain costs, but neither gets to revisit a party's entitlement to them, a point the rule confirms by limiting the district court to taxing for the benefit of the party entitled to costs under this rule.

Petitioner flips the rule on its head.

It argues that by making certain costs taxable in the district court, the rule confines the court of appeals to only deciding which party may be taxed costs, while empowering the recently reversed district court to decide the fairness of awarding all, some, or none of those appellate costs.

Apart from the text, longstanding precedent before Rule 39 refutes that position. This history confirms two things: First, a general appellate award of costs means all covered costs, and, second, a district court assigned to tax appellate costs has no power to revisit the equities or award less than full costs.

This case shows the problems with Petitioner's approach. Thanks to the process required by Federal Rule of Civil Procedure 62, it is undisputed the appeal bonds here reflected reasonable market rates, the parties negotiated over their terms, and the district court approved them. The bond amounts were increased twice at Petitioner's insistence.

Permitting the recently reversed district court to entertain Petitioner's

meritless argument that it is unfair for a class representative to pay full costs will cause nothing but mischief and wasteful litigation.

The decision below should be affirmed.

CHIEF JUSTICE ROBERTS: Mr. Salmons, where is -- before the court of appeals, how is the party challenging the costs or who will challenge the costs supposed to make that clear? Where does he raise that objection before the court of appeals?

MR. SALMONS: Yes, Mr. Chief Justice. There are several places where parties routinely do so. We've cited a number of cases on pages 41 and 42 of our brief that give the examples. It is actually not uncommon for parties to raise it in a small way in their merits brief. It's also --

CHIEF JUSTICE ROBERTS: Well, just to stop --

MR. SALMONS: -- common to raise it --

CHIEF JUSTICE ROBERTS: -- just to stop -- yeah, stop there, that strikes me as awful tough. They're in their merits brief and they're making all the arguments about why they should win, and then they end with a footnote

saying, oh, by the way, if we lose, you know, we think we're going to pay too much on the bond? That -- that's asking a lot.

MR. SALMONS: Well, it -- it's -- it's not the only place they have to do it. I'm just pointing out, Your Honor, that --

CHIEF JUSTICE ROBERTS: Well, where --

MR. SALMONS: -- it's becoming kind of --

CHIEF JUSTICE ROBERTS: -- what -- I'm sorry. What -- what's the next place?

MR. SALMONS: So the next place would be in response to the bill of costs that's filed with the clerk. And the last would be in a petition for rehearing or some other supplemental brief, as Justice Gorsuch mentioned. And we cite plenty of examples of all of those. It's not --

CHIEF JUSTICE ROBERTS: Well, but the petition for rehearing is not quite clear what the court is rehearing. I mean, the -- a decision hasn't been made on that yet. So that also seems an odd -- an odd spot.

And if it's before the court of appeals, the court of appeals doesn't know

anything about the matter, whether the bond was -- was too high or -- or whatever. All those four items, it seems to me, are within the purview at least of the district court's knowledge.

MR. SALMONS: A couple of responses, Your Honor.

I'd refer the Court to the Guse case from the -- the Seventh Circuit, which is one where, in a petition for rehearing, the party raised issues related to the appeal bond costs and asked for relief, and the -- the court of appeal in that case considered it and then decided to defer to the district court on the issue.

And so these -- these issues do get raised in -- even including those that are related to 39(e) costs. The issue is about entitlement. And if a party wants to raise equitable issues as to why they should not -- the other party should not be entitled to their costs, the place to do it is in the court of appeals. And that's what the Fifth Circuit holds.

CHIEF JUSTICE ROBERTS: Well, I wonder

if the dispute between the two of you is -- is -- is not so fundamental. Your -- your friend on the other side seems to be saying you have to begin in the district court. And -- and your position, I understand, is, well, that -- you can certainly refer it to the district court because they may be better at figuring out what the facts are, but -- but you -- you just want to say you don't have to?

MR. SALMONS: Well, in fact, Your Honor, I think the rule makes clear that the place you do begin, if you want relief from the venerable presumption favoring a full award of costs, is with the court of appeals.

And, of course, the court of appeals then has discretion to either grant relief -- we cite cases that do that, where they apportion it -- or they award two-thirds, or they deny costs because of a party's ability to pay or some other, or they refer it to the district court, which is commonly done if there are fact issues that they think warrant further review.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

Counsel, just as a matter of clarification for me, is there -- other than Rule 39(e), is there a statutory basis for the bond cost?

MR. SALMONS: There's not a specific reference in -- for example, in Section 1920 with regard to supersedeas bonds, but it has been an element of and -- and a clear element of Rule 39 since its inception. And -- and it predates that as well, going back many decades in local circuit rules. So it's a -- it's an accepted form of costs, but it is not specified in the statute.

JUSTICE THOMAS: The -- going back to the line of questioning from the Chief Justice, it would seem to me if you -- if it's not raised on appeal and that you go back to district court with these substantial costs, as they were here, you could have a -- it seems ripe for sandbagging.

So how do you get around that concern?

MR. SALMONS: Well, I -- I really don't think there is one, Your Honor. Let's

take, for example, the category of supersedeas bond costs. That's the one category that can get large depending on the nature of the judgment and how much time has passed since it's reversed. But the federal rules already have an elaborate process to ensure that those costs are reasonable before they are incurred, and that's Federal Rule of Civil Procedure 62.

As this case illustrates, what Rule 62 requires is that the parties either agree to the bond terms, or, if -- if the plaintiff that holds the judgment objects, that the district court scrutinizes and then approves the bond terms.

And, here, they were agreed to and -- and all of the details about them were exchanged. Copies of the bonds were exchanged by e-mail. We put all this in the Joint Appendix. There's no surprise here that these amounts were large. They were large because the judgment was large and because it took a long time to get the judgment reversed. But these were blessed by the district court in the front end.

Of course, it's fair and -- and

appropriate for the party that incurred those costs to get rid of an invalid judgment that's entitled to them. There's not a need for a second round of discretion by the district court that's already approved the bond to second-guess the entitlement of those costs and whether or not they are fair. Its place to exercise discretion was under Rule 62.

JUSTICE THOMAS: But what you've heard from a number of my colleagues is as -- sitting as court of appeals judges, they make adjust -- they made adjustments to costs precisely because or in cases in which the decisions were quite close or, as I think they suggested, that maybe it's 60/40 or 70/30. Where would you make those kinds of adjustments in -- in your process?

MR. SALMONS: Well, it's by the court of appeals, Your Honor. And a party can raise that request --

JUSTICE THOMAS: Well, but how can the --

MR. SALMONS: -- in a couple of different places.

JUSTICE THOMAS: -- court of appeals make that adjustment when you haven't -- you

didn't put it before the court of appeals?

MR. SALMONS: Well, I think there's a problem if you don't raise equitable grounds for deviating from the presumption in the court of appeals. I think, at that point, I would argue, it's waived.

The -- the party that determines equitable entitlement to costs is the party that decides -- excuse me, is the -- is the entity, is the court that decides the merits. And that's the way the rule works under 39(a).

There are plenty of opportunities to raise that in the court of appeals, and it's simply not true that the Fifth Circuit somehow prohibits parties from raising those issues.

JUSTICE THOMAS: Thank you.

MR. SALMONS: The Fifth Circuit --

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: Thank you.

Following on from Justice Thomas, I thought that Mr. Geyser said the reason that you cannot raise this in the court of appeals in this case and similar cases is you don't know how much the winning side is going to ask for

until the case is sent back.

And when he first sees it is in the district court after the case is sent back, so, obviously, he didn't raise it in the court of appeals. He didn't know how much you were going to ask for. That's my impression.

MR. SALMONS: Well, I -- I --

JUSTICE BREYER: And -- and if I'm right about that impression, wouldn't a simple rule be, if I were in the court of appeals writing the rule, I would say we follow the rule here in (a), we tax costs accordingly, taxed, and then part 2 of the rule says, if there is a disagreement about the appropriateness of the amount -- the amount sought in these categories, the district court will resolve it. And then part (c) of the rule says: And if one of the parties wants a different system, they can ask us. So --

MR. SALMONS: Well, I -- I think I --

JUSTICE BREYER: -- those are the two questions I have. Go ahead.

MR. SALMONS: I -- I think I --

JUSTICE BREYER: The first one is what -- what he says -- please do the first one

first.

MR. SALMONS: I think I -- I think I agree with that basic framework. The point I would make, Your Honor, is that --

JUSTICE BREYER: That's not my first question. My first question was -- I don't want to just repeat it -- is I thought Mr. Geyser said the reason he couldn't object to your --

MR. SALMONS: Yes.

JUSTICE BREYER: -- claim for bond costs in the court of appeals is he didn't know the amount you would ask for until you got back.

MR. SALMONS: Yes, Your Honor. And I would say --

JUSTICE BREYER: Am I right?

MR. SALMONS: -- a couple things. One -- one, he's not challenging the amount. He never challenged the amount. The amount was agreed upon in advance. They negotiated it, and it was blessed. And that's almost always going to be the case --

JUSTICE BREYER: Let me put it a different way.

MR. SALMONS: -- because of the operation of Rule 62.

JUSTICE BREYER: The reason he cannot object to the appropriateness of the cost amount sought under bonds is because he didn't know what it would be. Okay?

Same question. Is he right or is he wrong?

MR. SALMONS: He's wrong, Your Honor, because --

JUSTICE BREYER: All right.

MR. SALMONS: -- what -- what's at issue in the court of appeals is not the amount.

JUSTICE BREYER: No, what he --

MR. SALMONS: It's about the entitlement to it.

JUSTICE BREYER: -- what he wants to do is say don't give them all the costs they're asking for. Adjust it, or don't do it because this is a special situation.

But he can't do that. He doesn't know in, if not this case, other cases. This is the third time, same question. Am I not being clear? He doesn't know what you're going to ask for until you ask for it, and that amount, you -- you find out what he's going to ask for when you get back.

MR. SALMONS: Your Honor, I do think the premise is mistaken.

JUSTICE BREYER: Okay. That's what I want to know.

MR. SALMONS: By operation of Rule 62, the parties know what costs are at issue if supersedeas bond costs are involved. And they can ask for it in -- in the court of appeals, but they're not asking for relief on the specific amount. They're -- they're making equitable arguments about whether it's fair to make them pay all, they should pay none, they should pay less. Those are the kinds of arguments that get raised.

And if the court of appeal wants to, it could defer it to the district court. We cite cases where that happens all the time. But the place to raise those equitable entitlement concerns is with the court of appeals.

CHIEF JUSTICE ROBERTS: Justice Alito.

JUSTICE ALITO: Putting aside the Advisory Committee notes, suppose we read 39(e) literally. What do you make of the phrase "are taxable in the district court"?

Taxable means capable of being taxed,

not necessarily must be taxed.

MR. SALMONS: Well, I think that's -- I think that's right, Your Honor. And I think, you know, keep in mind that, under our reading, the taxing is not automatic. The party has to make a -- a submission of bill of costs that's verified. It has to show that it actually incurred these costs and that they fit within the defined categories.

I think the term "taxable," "are taxable," means the same thing in 39(e) that it means in this Court's Rule 43, which says that the costs of the transcripts of record shall be taxable in the court below.

That's the same language going all the way back to the 1870s and this Court's rule, which was then the model for circuit courts and then for Rule 39 that we -- all these cases we cite in our -- in our brief, where, as a matter of history, it's clear that the term "are taxable" is just telling you where the costs are taxed, but it is not providing discretion to revisit the question of entitlement.

It's the court that decides the merits of the appeal that decides whether a party is

entitled to their costs. What's left for the lower court is to decide have the costs been properly documented and do they fit within the defined category.

JUSTICE ALITO: Well, that -- that's helpful to me.

My other question is, can you just walk me through the procedure that you think is dictated by Rule 39? And -- and I'll say I agree with the Chief Justice. The idea of raising cost issues in the merits brief is very awkward. It's also a very poor fit for a petition for rehearing.

So I think that what's left is objections to the bill of costs. So walk me through the procedure that you think has to occur, particularly with respect to an issue like this regarding the supersedeas bond.

MR. SALMONS: Sure, Your Honor.

The -- the case I might refer you to as a good example is the Moore case from the Second Circuit cited in our brief. That case, in response to the bill of costs filed with the circuit clerk, the -- the party -- the losing party raised broad equitable concerns about all

categories of costs, including those that would be taxed by the district court under 39(e).

The Second Circuit discusses its process for handling those kinds of objections, and it --

JUSTICE ALITO: Yeah. Well, just in really -- in really simple terms, tell me what's supposed to happen. And this all has to happen under a fairly compressed time schedule because you've got the problem of the issuance of the mandate.

So there's an objection to the bill of costs. And what is the court of appeals supposed to do with an issue like the one here with the supersedeas bond? That necessarily is going to have to be sent back to the district court, isn't it, for factual determinations? How could the court of appeals review that issue?

MR. SALMONS: Well, you know, again, I think a good example is the Guse case from the Seventh Circuit. What -- what happens, Your Honor, is a party can raise those concerns -- take this case.

The -- the -- the Petitioner here was

totally free to argue in response to the bill of costs that -- especially given the Fifth Circuit's rule, that they should not be taxed supersedeas bond costs because they are a class representative and it would be inequitable to do so.

I think the Fifth Circuit would not have had a difficult time rejecting that as every circuit --

JUSTICE ALITO: I -- I -- I think my -- my time is up, unfortunately. Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: Counsel, I guess the short answer to Justice Alito -- and correct me if I'm wrong -- is that you are basically saying the only practical time to raise this is at the point that a winning party files a bill of costs with the court of appeals, that the losing party has an obligation to raise to the court of appeals any equitable considerations it has to change the allocation of costs.

Is that correct?

MR. SALMONS: I think that would be the most appropriate time to do so.

JUSTICE SOTOMAYOR: All right. Now let me ask you a question.

MR. SALMONS: I -- I would just suggest that --

JUSTICE SOTOMAYOR: And I agree. And, here, you knew what the costs -- the other side -- I -- I'm trying to cut to the chase, okay? Here, the other side knew what the costs were, and, if it had any defense to those costs being inequitable or those relating to it being necessary or unnecessary, it should have raised them to the court of appeals.

That's your argument, correct?

MR. SALMONS: Yes, Your Honor.

JUSTICE SOTOMAYOR: Now you are not taking away from the district court your position that, if you had gone to a sister corporation for this bond and paid 10 times the market value, the district court still had the power to say that was unnecessary, correct?

MR. SALMONS: Well, I think it -- I think it likely would, although I would point out, Your Honor, that the place where that gets resolved is under Rule 62 before the costs are incurred.

JUSTICE SOTOMAYOR: It -- it -- it happens that way. But let's talk about a different scenario, okay, one in which a -- a person expects the record on appeal to have been, and the transcripts to have been, done at X amount, whatever it is. Okay?

But all of a sudden the bill of costs comes in and it's the only time they see that it wasn't done at market rates, that it was done in some weird process. Okay?

MR. SALMONS: Yes.

JUSTICE SOTOMAYOR: The record was put together in some weird process and it's 10 times the normal cost.

What happens in that situation?

MR. SALMONS: Your Honor, I do -- I do think there's a role for the court -- excuse me, for the district court to ensure, as the Fifth Circuit would put it, that only proper costs are being awarded.

JUSTICE SOTOMAYOR: Only necessary costs. So that would be under -- under the rules already. So there -- and, in fact, the district court adjusted some of those costs for that reason in this case, didn't it?

MR. SALMONS: Well, it -- it -- it did -- it did, Your Honor, and -- and it -- including with regard to the bonds, to the extent it later came out that some of the premiums that --

JUSTICE SOTOMAYOR: All right. So now let's --

MR. SALMONS: -- were paid were --

JUSTICE SOTOMAYOR: -- let's --

MR. SALMONS: -- after the Fifth Circuit's decision.

JUSTICE SOTOMAYOR: -- let's assume that a -- that a person is prepared to pay what they expect to be the normal cost. It turns out, unbeknownst to them, that the costs turned out to be astronomical and they simply can't afford it.

Who do they take that equitable argument to, if they were unaware of how astronomical the costs would be, not this case, not your case -- I'm posing a hypothetical, okay -- on the record for trans -- on the record reproduction, how can they get back to the Fifth Circuit --

MR. SALMONS: Your Honor, in the first

place --

JUSTICE SOTOMAYOR: -- to reconsider that decision? Mandate has issued. The district court doesn't have discretion. How do they ever get to put that before somebody?

MR. SALMONS: Your Honor, the -- the place where that is appropriately raised is in the same place as before as -- is in the --

JUSTICE SOTOMAYOR: No, if you don't know it -- if you don't know it, counsel. You don't know it until you see it. A bond situation, you know it ahead of time. You know what the costs are. I'm talking about preparing the record or doing something else, and all of a sudden you see something and realize it's past my ability to afford, number one; it will bankrupt me, number two; and, number three, my claims were substantial enough so I shouldn't have to undergo that.

If I didn't know, how do I get that corrected?

MR. SALMONS: Your Honor, I -- I do think those are -- are -- are often and appropriately raised in the court of appeals, and if the mandate's issued, they could always

seek to recall the mandate if they want to adjust the entitlement determination. And I --

CHIEF JUSTICE ROBERTS: Justice Kagan. Justice Kagan.

JUSTICE KAGAN: Mr. Salmons, let's suppose that, on one level of discretion, I agree with you, which is the question about who can change these default rules of 39(a), that only the court of appeals can change the default rules. Only the court of appeals, for example, can say, you know, the appellant doesn't get all its costs; it only gets 80 percent of its costs.

But then there seems as though there's a second level of discretion, and this is what you were talking with Justice Alito about. He said, you know, (e), 39(e) says taxable. That suggests some kind of discretion. What is that discretion that's taking place in the district court?

And you said the district court is doing two things: the district court is deciding whether the costs were actually incurred, you know, properly documented, where are your receipts, all that, and is making sure that the costs that are being submitted fall

within the defined categories.

Did I get all that right?

MR. SALMONS: Yes, Your Honor.

JUSTICE KAGAN: Okay. So -- but then, if you turn to 1924, 1924 suggests that the district court really has two functions, and -- and there is discretion in these functions. One is to decide whether the costs are correct, and the other is to decide whether they've been necessarily incurred.

And I take that language to be kind of you're giving us this bill and it's true you paid it, but you didn't have to pay it. There was no reason for you to pay it. And it's just not fair to impose that bill on the other party when it's coming out of nowhere and you didn't need to pay it.

Wouldn't you say that the district court has discretion to do something about that?

MR. SALMONS: Well, I think it certainly does, Your Honor, with certain categories of costs. Let's take -- for example, 39(e)(2) specifically says that the reporter's transcript is awarded as costs if needed to determine the appeal.

The point I would make with regard to supersedeas bond costs is that, effectively, that determination should have already been made under Rule 62 before the costs are incurred. That's the whole reason for Rule 62's process, is this one category that can get quite large. Before those costs are incurred, the parties get together and they either agree upon those bond terms or the district court overrules any objections and determines that they are appropriate. At that point, there really should not be much, if any, of an issue with regard to whether those costs were needed.

And there's no exhaustion requirement that Petitioner seems to suggest with regard to supersedeas bond costs. The -- the -- the drafters of Rule 39 were very clear in rejecting any arguments that supersedeas bonds were not always necessary and elected instead to treat them as an ordinary and appropriate type of appellate cost entitled to the same presumption of recovery as the other categories of costs.

JUSTICE KAGAN: Thank you, Mr. Salmons.

CHIEF JUSTICE ROBERTS: Justice

Gorsuch.

JUSTICE GORSUCH: Counsel, let me see if I -- if I understand, putting it all together with supersedeas bonds. So, first, the district court has to, under Rule 62, make -- make a ruling approving your bond proposal. And, presumably, there, the other side can make any objections they want as to the inequitable -- inequitable nature of the bond. That -- that itself can be part of the appeal too.

Then we have the appeal, and they could -- maybe they don't want to raise it in their -- in their brief. Often, parties do argue, well, if I lose, then -- then at least give me this. But -- but let's say we excuse them from that.

Then they have a rehearing petition where they have lost. They could raise it there knowing now that they're potentially on the hook. Then they get the bill of costs. They -- they could raise it there for the court of appeals, and the court of appeals could either make some judgment then, or, as I understand it, some courts of appeals will refer the matter to the district court expressly delegating their

discretion to deal with the problem.

And then, in any event, when we get back down to the district court on -- on taxability, the -- the court must -- the district court must find the costs necessary.

Is that a fair summary of -- of your understanding of how the law works here?

MR. SALMONS: It -- it is, Your Honor. I would -- I would add just one small additional point, which is that, as the rules are structured, if the party that has the judgment below is concerned about the potential costs related to an appeal bond -- and, of course, it's on notice that it may have to bear those costs, so it has skin in the game too -- it can agree to either a reduced bond or to no bond to avoid those costs.

So the -- the -- the risk of surprise is -- is really not here. And this Court -- this case is a great example of that.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you, Mr. Chief Justice.

Good morning, Mr. Salmons. On the overview that Justice Gorsuch just provided, which I -- I think I agree with, and you used the word "entitlement," that the court of appeals determines the entitlement of each party to a certain percentage of the costs, it might be 100/0 or it might be something -- you know, 50/50 or what have you.

Is that how you see that?

MR. SALMONS: Yes, but, of course, the court of appeals also has the discretion to say as determined by the district court. But, most typically, it -- it actually does the allocating, and that's what the rule envisions.

JUSTICE KAVANAUGH: Okay. So that's kind of the allocation of the pie. How big the pie is, in other words, how much is with -- how much the costs are, is then determined by the circuit clerk for the 39(d) costs and the district clerk for the 39(e) costs, correct?

MR. SALMONS: Yes.

JUSTICE KAVANAUGH: Okay. And I think -- maybe I'm wrong about this, but I think the concern might be that when the court of appeals is making the allocation, it's not aware of how

large the costs might be, and if it knew, it might make a different allocation.

I don't know if that's the concern, but, if -- if that is the concern, what's your response?

MR. SALMONS: Well, my response, Your Honor, is that we're dealing with very defined categories of costs. The costs here are limited by Rule 39. Most of them, there's very little risk that they will be too large. The -- the -- the copy rate, for example, is set by circuit rule.

The -- the one potential exception would be supersedeas bond costs, but there you already have a process that's intended to interact with Rule 39 that ensures that the costs related to supersedeas bonds are reasonable, that the parties have full notice of them, and that the district court has already exercised discretion with regard to their terms.

JUSTICE KAVANAUGH: And to the extent you want to bring it to the attention of the court of appeals, hey, you should think about the size of the costs here, this just isn't printing costs and the usual kind of costs that

are in the thousands, not in the tens of thousands, hundreds of thousands, or millions, the time to bring that to the court of appeals' attention, you could -- you can do that in the bill of costs -- in the objection to the bill of costs or the bill of costs, correct?

MR. SALMONS: Yes, Your Honor, among other places. And it's -- it's just not the case that it's that hard to do. We have cited a -- a large number of cases where parties have done just that.

They have cited none for the proposition that parties can't do that. And the Fifth Circuit itself in Sioux -- the whole point of the Fifth Circuit's position here is that it says "absent some limiting provision in the mandate of the court of appeals, the district court has no discretion," which is a notice to the parties that if you want some -- some other allocation other than 100 to zero or whatever else we provided, you have to ask us for it, not the district court.

It's not saying you can't ask anyone for it.

JUSTICE KAVANAUGH: Yeah, and at that

point, you already know the costs may be large in this kind of case, right?

MR. SALMONS: It -- it -- supersedeas bond costs surprise no one, Your Honor.

JUSTICE KAVANAUGH: Yeah. Okay. Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett.

JUSTICE BARRETT: Mr. Salmons, I want to go back to Section 1924 and the district court's authority to determine that costs are correct and necessarily incurred in the case.

So the question presented asks in part whether the district court has the discretion to reduce appellate costs. But I'm wondering -- and, you know, it seems to me like this came up potentially in your interchange with Justice Kagan -- you said that the supersedeas bond costs were -- you -- you treated them as a bit exceptional because they'd already been approved by the district court under the Federal Rules of Civil Procedure.

So I gather that you're not really denying that the district court, through 1924, has some authority to reduce when it reviews the

costs for excessive copying, et cetera, but just that in this particular case of the supersedeas bond, that it doesn't have the authority to reduce it because the time for that particular cost has come and gone.

So you see what I'm saying, that this is maybe a dispute about supersedeas bonds and not more generally about the district court's authority to take into account whether costs are necessarily incurred? Do I understand that correctly?

MR. SALMONS: Well, Your Honor, what I would say is that if you look at the terms of Rule 39(e), for example, that with regard to, you know, some costs, the reporter's transcript, for example, there's a requirement to determine if they're needed for the appeal.

The language for supersedeas bonds is a bit different under (e)(3). It -- it -- it provides for costs to preserve rights pending appeal.

And I think that the process under Rule 62, certainly, in -- in the mine-run of cases with -- with -- it's hard for me to imagine an -- an exception to that, already

resolves that these were costs that were incurred to preserve rights pending appeal. And that means they're appropriately awarded --

JUSTICE BARRETT: Well, is it then --

MR. SALMONS: -- and they fit within --

JUSTICE BARRETT: -- is it --

MR. SALMONS: -- even the requirements of 1924.

JUSTICE BARRETT: But then you're not disagreeing with me, right? You're just saying that when it comes -- that the district court may have authority pursuant to 1924 to adjust costs because it judges that they were not necessarily incurred.

But you're just saying that supersedeas costs are different --

MR. SALMONS: Well --

JUSTICE BARRETT: -- because they've already been judged to be necessarily incurred, and that was part of the process in the district court back before the case went up on appeal?

MR. SALMONS: I -- I -- I do think that that's a difference, Your Honor. And I don't think I'm disagreeing with your basic

formulation of how 1924 works.

JUSTICE BARRETT: Okay. And so let -- let me just -- we've -- we've talked about different kinds of equitable considerations that can come into account.

One is the challenge that, listen, these costs are just too high because you could have gotten -- you know, you could have done your copying or gotten the bond rates more cheaply than you did.

And then the other kind of concern is the one that Justice Sotomayor was raising, like a party's inability to pay, for example. And you're saying that perhaps the kinds of concerns about a party's ability to pay should be directed to the court of appeals, but equitable considerations that go to the necessity of the cost, you agree, are properly decided in the district court?

MR. SALMONS: I -- I think, generally, they are as part of the -- the district court's requirement to ensure that only proper costs are awarded, and that's the Fifth Circuit's rule, and we -- and we agree with that.

My only point was that I think, in

practice, these -- these issues do not come up very often, that they're -- in fact, they're exceedingly rare.

And if you look at the arguments that are being made here, the sort of equitable arguments being made here, they have nothing to do with whether these are appropriate categories of costs at all or whether they were in --

JUSTICE BARRETT: Thank you --

MR. SALMONS: -- some way inflated.

JUSTICE BARRETT: -- counsel.

CHIEF JUSTICE ROBERTS: A minute to wrap up, Mr. Salmons.

MR. SALMONS: Thank you, Your Honor.

The drafters of Rule 39 rightly concluded that supersedeas bond premiums are an ordinary and appropriate category of appellate costs equally entitled to the venerable presumption, favor full recover -- favoring full recovery as other specified costs.

Rule 62 already provides a process that ensures the reasonableness of bond terms, adequate notice to all parties, and ample discretion to the district court to review and approve bond terms before these costs are

incurred.

Plaintiffs that are concerned about potentially bearing these costs can always agree to reduce or for a bill a bond. Given this framework, there is no reason to distort the clear terms in history of Rule 39 to provide the district court another round of discretion to ignore the appellate court's entitlement determination and decide for itself whether it is fair for the losing party on appeal to bear these costs.

The Fifth Circuit's decision should be affirmed.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. Geyser?

REBUTTAL ARGUMENT OF DANIEL L. GEYSER
ON BEHALF OF THE PETITIONER

MR. GEYSER: Thank you, Mr. Chief Justice.

My friend's position is introducing unnecessary complexity into Rule 39's simple and workable design. Why would the rule delegate these costs to the district court to raise after the mandate has issued if it really wanted

parties to raise these issues before the appellate panel? And the -- the alternatives my friend has proposed are just simply poor workarounds.

It is, indeed, asking a lot to preemptively brief these hypothetical issues in the parties' merits briefs. Rule 28 doesn't require that. Rehearing is certainly an odd fit. It's rehearing an issue that no one has ever decided.

Objections to bill of costs when the bill of costs are limited to non-Rule 39(e) costs really are, again, ill-suited for deciding these issues.

My friend cited the Second Circuit's Moore case. That actually proves our point.

That was a dispute over Rule 39(d) costs, not Rule 39(e) costs. And there is a compressed timetable under 39(d) for objecting to a -- a bill of costs, and there's no obvious mechanism for taking evidence, hearing witnesses, or developing a record, which, regardless of whether that's necessary in this case or not, and I think it probably is, certainly will be necessary in certain cases.

If a cost is improper or unfair, there's simply no obvious way to get back to the circuit after the mandate has issued without engaging in burdensome motions to withdraw the mandate, which are exceedingly rare and are generally a waste of time when district courts can resolve these disputes perfectly well in the first instance.

There's simply no reason to shoehorn cost issues into other appellate procedures that just simply are not obviously designed to handle them.

Even if the appellate court can make adjustments to the overall percentage, like saying in this case we'll award two-thirds of a party's costs, which I do think is still unusual, a district court still has to exercise discretion over those taxable costs.

I agree that Section 1924 gives that same type of authority to the district court that we see in Rule 39(e) itself. Under my friend's reading, there's really no clear administrable line between what a proper cost is and what a discretionary reduction to a cost request would be.

There's no reason to invite disputes about which court should have to decide those issues and to put both the parties and the appellate courts to the task of wasting their time and resources briefing these issues when the rule itself textually assigns all of these disputes to the district court.

Justice Thomas asked about sandbagging. My friend really had no answer. Rule 62 doesn't address whether the cost is relevant or appropriate, and it doesn't apply to this type of review.

And his answer proves far too much. It would say that no bond costs should ever be disallowed for any reason because, in fact, the court accepted the bond. But approving a bond is simply not the same question as whether there's an alternative form of security that would be appropriate for securing a judgment.

The final point I'll make is that "taxable" does mean capable of being taxed. Rule 39(e) has no compulsory language. It doesn't say that the district court must tax these -- these costs, even though the rule uses that directive term "must" four times in the

neighboring subsection.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:11 a.m., the case was submitted.)