

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 CITY OF SAN ANTONIO, TEXAS,)
4 ON BEHALF OF ITSELF AND ALL OTHER)
5 SIMILARLY SITUATED TEXAS)
6 MUNICIPALITIES,)
7 Petitioner,)
8 v.) No. 20-334
9 HOTELS.COM, L.P., ET AL.,)
10 Respondents.)
11 - - - - -

12
13 Washington, D.C.
14 Wednesday, April 21, 2021

15
16 The above-entitled matter came on
17 for oral argument before the Supreme Court of the
18 United States at 10:00 a.m.

19
20 APPEARANCES:
21
22 DANIEL L. GEYSER, ESQUIRE, Dallas, Texas; on behalf
23 of the Petitioner.
24 DAVID B. SALMONS, ESQUIRE, Washington, D.C.; on behalf
25 of the Respondents.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

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

6 Mr. Geyser.

7 ORAL ARGUMENT OF DANIEL L. GEYSER

8 ON BEHALF OF THE PETITIONER

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

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

24 We say the district court because Rule
25 39(e) expressly says that Rule 39(e) costs are

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

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

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

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

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

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

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

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

1 district court.

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

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

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

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

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

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

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

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

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

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas.

7 JUSTICE THOMAS: Thank you, Mr. Chief
8 Justice.

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

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

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

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

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

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

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

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

1 it was under a thousand dollars.

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

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

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

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

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

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

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

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

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

16 JUSTICE THOMAS: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Breyer.

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

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

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

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

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

23 I just repeated my question.

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

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

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

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

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

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

1 level. But, at the appellate level, when --
2 when they actually have power over the case and
3 are looking at it, you don't ask for the Rule 39
4 --

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

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

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

22 JUSTICE BREYER: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 JUSTICE ALITO: All right. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor.

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

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

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

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

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

4 Why can't you pursue that sort of
5 process?

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

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

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

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

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

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

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

11 MR. GEYSER: The bill of --

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

21 Why couldn't you have done that then?

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

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

5 JUSTICE SOTOMAYOR: All right. One --

6 MR. GEYSER: -- future cost request.

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

17 MR. GEYSER: I think that is correct.

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

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

1 says that we're the only ones that can exercise
2 discretion, but don't bother us with the Rule
3 39(e) costs; bother the district court, whose
4 then hands are bound by the Fifth Circuit's
5 unique understanding of -- of the rule.

6 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

14 MR. GEYSER: Yes.

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

17 MR. GEYSER: Correct.

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

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

22 MR. GEYSER: Yes.

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

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

4 MR. GEYSER: That -- that is right.

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

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

18 JUSTICE KAGAN: Well, maybe that --
19 39(e) is talking about something different. So,
20 if you read it against, for example, 1924, 1924
21 says that before you tax costs, somebody has to
22 figure out whether the item is -- you know, I'm
23 read -- I'm -- I'm -- I'm using the language
24 here -- correct and necessarily incurred.

25 So that's the kind of thing where you

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

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

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

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

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

1 information comes out at the district court.

2 JUSTICE KAGAN: Thank you, Mr. Geysler.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch.

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

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

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

21 MR. GEYSER: Well, Your --

22 JUSTICE GORSUCH: -- your position
23 about those?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 JUSTICE GORSUCH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Kavanaugh.

25 JUSTICE KAVANAUGH: Thank you, Mr.

1 Chief Justice.

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

7 And I guess the question is, looking
8 at the structure, the two-tiered structure of
9 this, with 39(a) and 39(e), why isn't the better
10 reading that the district court can determine
11 the amount of the particular costs listed in
12 39(e) and disputes over whether a particular
13 amount was correct or not, as Justice Kagan
14 points out, but the district court does not have
15 the authority over whether to award the costs at
16 all or to reallocate the costs from what the
17 appeals court has said? Why isn't that the
18 better reading of the structure?

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

1 to that cost and without --

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

9 Then it goes to 39(d) for the appeals
10 court costs and 39(e) for the district court
11 costs, but that allocation, whether it's
12 100 percent or some separate allocation, then
13 defines what the circuit clerk does and then
14 what the district clerk does with the particular
15 costs. And there may be disputes over the
16 amounts, but they can't -- the district court
17 can't -- clerk or judge, can't reallocate.

18 MR. GEYSER: It -- it --

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

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. GEYSER: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett.

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

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

18 MR. GEYSER: That is right.

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

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

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

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

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

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

1 under Section 1920 and Rule 54(d).

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

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

11 Did I misunderstand that?

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

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

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

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

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

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

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

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

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

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

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

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

18 JUSTICE BARRETT: Thank you, counsel.

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

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

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

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

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

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

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

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

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

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Salmons.

8 ORAL ARGUMENT OF DAVID B. SALMONS
9 ON BEHALF OF THE RESPONDENTS

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

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

18 39(d) and (e) assign the appellate
19 court clerk and the district court or its clerk
20 to calculate certain costs, but neither gets to
21 revisit a party's entitlement to them, a point
22 the rule confirms by limiting the district court
23 to taxing for the benefit of the party entitled
24 to costs under this rule.

25 Petitioner flips the rule on its head.

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

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

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

24 Permitting the recently reversed
25 district court to entertain Petitioner's

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

4 The decision below should be affirmed.

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

11 MR. SALMONS: Yes, Mr. Chief Justice.
12 There are several places where parties routinely
13 do so. We've cited a number of cases on pages
14 41 and 42 of our brief that give the examples.
15 It is actually not uncommon for parties to raise
16 it in a small way in their merits brief. It's
17 also --

18 CHIEF JUSTICE ROBERTS: Well, just to
19 stop --

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

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

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

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

7 CHIEF JUSTICE ROBERTS: Well, where --

8 MR. SALMONS: -- it's becoming kind of
9 --

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

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, I wonder

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas.

1 JUSTICE THOMAS: Thank you, Mr. Chief
2 Justice.

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

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

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

23 So how do you get around that concern?

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

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

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

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

25 Of course, it's fair and -- and

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

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

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

20 JUSTICE THOMAS: Well, but how can the
21 --

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

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

1 didn't put it before the court of appeals?

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

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

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

16 JUSTICE THOMAS: Thank you.

17 MR. SALMONS: The Fifth Circuit --

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer.

20 JUSTICE BREYER: Thank you.

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

1 until the case is sent back.

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

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

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

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

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

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

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

1 first.

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

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

9 MR. SALMONS: Yes.

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

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

15 JUSTICE BREYER: Am I right?

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

22 JUSTICE BREYER: Let me put it a
23 different way.

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

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

5 Same question. Is he right or is he
6 wrong?

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

9 JUSTICE BREYER: All right.

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

12 JUSTICE BREYER: No, what he --

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

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

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

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

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

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

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

20 CHIEF JUSTICE ROBERTS: Justice Alito.

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

25 Taxable means capable of being taxed,

1 not necessarily must be taxed.

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

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

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

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

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

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

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

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

19 MR. SALMONS: Sure, Your Honor.

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

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

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

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

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

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

25 The -- the -- the Petitioner here was

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

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

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

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor.

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

23 Is that correct?

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

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

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

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

13 That's your argument, correct?

14 MR. SALMONS: Yes, Your Honor.

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

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

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

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

11 MR. SALMONS: Yes.

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

15 What happens in that situation?

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

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

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

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

8 MR. SALMONS: -- were paid were --

9 JUSTICE SOTOMAYOR: -- let's --

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

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

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

25 MR. SALMONS: Your Honor, in the first

1 place --

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

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

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

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

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

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

3 CHIEF JUSTICE ROBERTS: Justice Kagan.
4 Justice Kagan.

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

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

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

1 within the defined categories.

2 Did I get all that right?

3 MR. SALMONS: Yes, Your Honor.

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

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

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

20 MR. SALMONS: Well, I think it
21 certainly does, Your Honor, with certain
22 categories of costs. Let's take -- for example,
23 39(e)(2) specifically says that the reporter's
24 transcript is awarded as costs if needed to
25 determine the appeal.

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

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

23 JUSTICE KAGAN: Thank you,
24 Mr. Salmons.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch.

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

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

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

1 discretion to deal with the problem.

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

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

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

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

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you, Mr.
25 Chief Justice.

1 Good morning, Mr. Salmons. On the
2 overview that Justice Gorsuch just provided,
3 which I -- I think I agree with, and you used
4 the word "entitlement," that the court of
5 appeals determines the entitlement of each party
6 to a certain percentage of the costs, it might
7 be 100/0 or it might be something -- you know,
8 50/50 or what have you.

9 Is that how you see that?

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

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

21 MR. SALMONS: Yes.

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

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

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

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

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

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

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

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

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

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

25 JUSTICE KAVANAUGH: Yeah, and at that

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

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

5 JUSTICE KAVANAUGH: Yeah. Okay.
6 Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett.

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

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

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

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

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

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

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

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

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

4 JUSTICE BARRETT: Well, is it then --

5 MR. SALMONS: -- and they fit within
6 --

7 JUSTICE BARRETT: -- is it --

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

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

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

18 MR. SALMONS: Well --

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

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

1 formulation of how 1924 works.

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

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

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

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

25 My only point was that I think, in

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

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

9 JUSTICE BARRETT: Thank you --

10 MR. SALMONS: -- some way inflated.

11 JUSTICE BARRETT: -- counsel.

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

14 MR. SALMONS: Thank you, Your Honor.

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

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

1 incurred.

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

12 The Fifth Circuit's decision should be
13 affirmed.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Rebuttal, Mr. Geysler?

17 REBUTTAL ARGUMENT OF DANIEL L. GEYSER

18 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 neighboring subsection.

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

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

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