No. 11-1175

IN THE
Supreme Court of the United States

OLIVEA MARX,
Petitioner,
v.
GENERAL REVENUE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

ERIC D. REICIN
Deputy General Counsel
SALLIE MAE, INC.
2001 Edmund Halley Drive
Reston, VA 20191
(703) 984-6528

KEVIN T. DREYER
Associate General Counsel
SALLIE MAE, INC.
11501 Northlake Drive
Cincinnati, OH 45249
(513) 605-7551

LISA S. BLATT
Counsel of Record
ROBERT J. KATERBERG
ANTHONY J. FRANZE
DIRK C. PHILLIPS
R. REEVES ANDERSON
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000
Lisa.Blatt@aporter.com

ADAM L. PLOTKIN
STEVEN J. WIENCZKOWSKI
621 17th Street
Suite 1800
Denver, CO 80211
(303) 296-3566

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The question presented in the petition is "whether a prevailing defendant in an FDCPA case may be awarded costs where the lawsuit was not 'brought in bad faith and for the purpose of harassment.'" Pet. i (quoting 15 U.S.C. § 1692k(a)(3)).

RULE 29.6 STATEMENT OF CORPORATE DISCLOSURE

General Revenue Corporation is wholly owned by Asset Performance Group, LLC, which is wholly owned by SLM Corporation, a publicly traded company commonly known as "Sallie Mae."

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 11-1175

OLIVEA MARX,
Petitioner,

v.

GENERAL REVENUE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

STATUTORY PROVISIONS AND RULES INVOLVED

Section 1692k of Title 15, U.S.C., and Federal Rules of Civil Procedure 54 and 68 are reproduced at Appendix 1a-6a, *infra*.

STATEMENT

The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p, authorizes courts to award debt collectors their attorney's fees and costs when a suit is brought for improper purposes. 15 U.S.C. § 1692k(a)(3). Petitioner construes this pro-defendant provision as an extraordinary pro-plaintiff provision that would make innocent debt collectors worse off

than virtually every other litigant in our legal system. This Court should reject that counterintuitive proposition. The statute's text, structure, history, and purpose confirm that Section 1692k(a)(3) is a sanction that does not displace a court's discretion under Federal Rule of Civil Procedure 54(d) to award costs to the prevailing party.

1. In 2007, petitioner defaulted on a federally-guaranteed student loan. After the California agency that guaranteed the debt was unable to obtain repayment, the agency in September 2008 hired respondent General Revenue Corporation (GRC). Pet. App. 2a. GRC provides collection services for public and private colleges and universities and state agencies that guarantee student loans under federal student loan programs. Trial Tr. 79.

One month after GRC began collection efforts on her federally-guaranteed loan, petitioner sued GRC for alleged violations of the FDCPA. Because defending even a meritless FDCPA suit can be costly, GRC early on offered to settle the case. Pet. App. 15a. GRC made an offer of judgment under Federal Rule of Civil Procedure 68 to pay petitioner her reasonable accrued attorney's fees and costs as well as $1,500—which is $500 more than the maximum recoverable statutory damages. JA 34-36; *see* 15 U.S.C. § 1692k(a)(2)(A). Petitioner did not respond to the offer, and the parties prepared for trial. JA 35. Petitioner deposed six GRC employees, and GRC deposed petitioner. JA 39. As is customary, GRC ordered the deposition transcripts for a cost of $2,659.05. *Id*.

On May 17, 2010, the district court held a bench trial. GRC presented four witnesses and designated deposition testimony of two other witnesses. Trial Tr. 131. GRC paid statutory attendance and subsistence fees for three GRC employee-witnesses, totaling $1,439. JA 38. GRC spent an additional $1,485.67 to fly them from Indianapolis to testify at trial. *Id*. Because petitioner's counsel refused to stipulate to the formatting of telephone records that petitioner herself had subpoenaed from Sprint, GRC spent $1,003.40 for a Sprint representative to travel from Kansas City to testify about those records. *Id*.; Trial Tr. 188-98.

2. The trial court held that GRC did not violate the FDCPA and entered judgment against petitioner. JA 26-33. The court found that GRC's limited communications with petitioner were lawful. JA 29-30, 32-33. The court also held that an employment-status inquiry that GRC sent by facsimile to petitioner's employer complied with the Act because the facsimile did not reveal petitioner's debt. JA 30-32.

Federal Rule of Civil Procedure 54(d) provides that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." As the prevailing party, GRC filed with the clerk of court a bill of costs seeking $7,779.16, which included, *inter alia*, $2,659.05 for payments to court reporters for deposition transcripts and $3,928.07 in expenses for GRC's four trial witnesses. JA 37-40; *see* 28 U.S.C. § 1920. The clerk awarded $4,543.03 in costs. JA 37.

Both parties filed post-trial motions. GRC argued that the clerk improperly disallowed several items of costs. Dkt. #81. Petitioner, in turn, did not contest the amount or ask the court to reduce the award based on her financial hardship. Dkt. #77; *see Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir. 2004). Instead, petitioner argued that the court lacked authority to award any costs under Rule 54(d) or Rule 68 by virtue of 15 U.S.C. § 1692k(a)(3). That provision states in part: "On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). Petitioner argued that because the district court made no finding of improper motive, the court had no authority to award costs.

The district court did not alter the clerk's taxation of costs and rejected petitioner's interpretation of Section 1692k(a)(3). Pet. App. 28a-29a. The court explained that "[t]he statutory language requiring a finding of bad faith and harassment is applicable only for an award of attorney fees and does not displace Rule 54(d)." *Id*. at 29a. The district court also concluded that the award of costs was warranted under Rule 68. *Id*.

3. The court of appeals affirmed. *Id.* at 1a-25a. The court held that GRC did not violate the FDCPA because the facsimile sent to petitioner's employer was not a prohibited communication with a third-party regarding a debt. *Id*. at 4a-6a. On May 29, 2012, this Court declined to review that aspect of the court's judgment. 132 S. Ct. 2688 (2012).

The court of appeals further rejected petitioner's argument that 15 U.S.C. § 1692k(a)(3) extinguishes a district court's authority to award costs under Rule 54(d). Pet. App. 6a-14a. The court observed that the "presumption that a prevailing party is entitled to costs is, in our legal system, a venerable one." *Id*. at 8a. The court found "nothing" in the text, history, or purpose of Section 1692k(a)(3) "that should prevent Rule 54(d)'s normal operation." *Id*. at 14a. The court also explained that conditioning an award of costs on a finding of a plaintiff's misconduct would unjustifiably penalize innocent debt collectors. *Id*.

The court disagreed, however, with the district court's alternative rationale under Rule 68. The court explained that under *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), "Rule 68 applies only where the district court enters judgment in favor of a plaintiff" for less than the amount of the settlement offer, and not where the plaintiff loses outright, as in this case. Pet. App. 15a.

Judge Lucero dissented. *Id*. at 19a-25a. He would have found that the facsimile violated the FDCPA, *id*. at 20a-21a, and that the Act precludes an award of costs to prevailing defendants absent a finding of bad faith and a purpose to harass, *id*. at 25a.

SUMMARY OF ARGUMENT

I. Federal Rule of Civil Procedure 54(d) states that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs . . . should be allowed to the prevailing party." The FDCPA does not "provide[] otherwise."

A. No provision of the FDCPA limits a court's authority to award costs to innocent debt collectors that successfully defend against meritless suits. Rather, Section 1692k(a)(3) states that "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees . . . and costs." That language is purely permissive, and the reference to "and costs" is best understood to confirm a court's authority to award costs in addition to attorney's fees when plaintiffs bring suit for improper purposes.

Three aspects of the statutory structure confirm that the provision does not strip courts of their discretion to award costs to prevailing parties under Rule 54(d). First, the provision as a whole exclusively addresses misconduct by parties—plaintiffs and defendants alike. Section 1692k(a)(3) does not address this situation, where neither side engages in conduct prohibited by the Act. Second, the first sentence of Section 1692k(a)(3) authorizes courts to award attorney's fees and costs to *plaintiffs*. The second sentence merely maintains that parallelism with respect to *defendants*. Had it not, the absence of "and costs" in the second sentence could have been read to preclude cost awards to defendants facing abusive suits. Third, just as the reference to *attorney's fees* in the second sentence overlaps with and does not displace a court's existing inherent authority

to award attorney's fees against a party acting in bad faith, *e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991), the words "and costs" in the second sentence likewise overlap and do not displace a court's existing authority under Rule 54(d).

Congress legislated against the backdrop that an award of attorney's fees is presumptively precluded and an award of costs is presumptively allowed. When read in light of that context, the introductory clause—"[o]n a finding that [the] action . . . was brought in bad faith and for the purpose of harassment"—does not have the same limiting application to costs as it does to attorney's fees. That conclusion comports with common parlance when a speaker refers to two objects with differing background presumptions.

B. The fact that Congress frequently limits a court's discretion to award costs in terms of an explicit prohibition strongly undercuts petitioner's theory that the FDCPA limits a court's discretion by mere implication. A plethora of statutes expressly provide that plaintiffs "shall not be liable for costs" with the manifest purpose to protect *plaintiffs*. These provisions contrast sharply with Section 1692k(a)(3), which is not phrased in terms of a prohibition and has the manifest purpose to protect *defendants*.

C. The canon against surplusage does not justify reading the provision contrary to its purpose to protect debt collectors. The provision removes any doubt as to the availability of costs in cases of abusive lawsuits. Congress also might have intended to authorize costs even if the debt collector was not a prevailing party under Rule 54(d). In the end, however, it does not matter if the reference to "and

costs" *is* superfluous. Congress frequently authorizes courts to award costs in a manner that overlaps with Rule 54(d). *E.g.*, 12 U.S.C. § 5565(b) ("the [Consumer Financial Protection] Bureau . . . may recover its costs . . . if [it] is the prevailing party in the action"). Petitioner's construction also does not rid the statute of all redundancy. The statutory authorization to award attorney's fees and costs is redundant with a court's inherent authority to redress bad faith conduct by litigants. And under both petitioner's and the government's reading of the introductory clause, either the phrase "in bad faith" or "for the purpose of harassment" is redundant.

D. The statutory history and purpose confirm that the statute does not displace Rule 54(d). Congress added the second sentence of Section 1692k(a)(3) to give debt collectors *more* protection than lenders receive under the Truth in Lending Act (TILA). Petitioner's construction would turn that purpose on its head and would inexplicably make FDCPA defendants worse off than TILA defendants, which may seek costs as prevailing parties.

Petitioner's construction likewise perversely assumes that Congress, by enacting a provision designed to *protect* innocent debt collectors, made debt collectors worse off than virtually all other litigants in our legal system. Petitioner's position would prevent innocent debt collectors from recovering their costs to defend even "frivolous, unreasonable, or groundless" suits. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). And petitioner's construction would render debt collectors worse off than other credit and financial institutions under the Consumer Credit Protection Act, an umbrella statute that includes both the FDCPA and TILA. Petitioner

offers no rationale for why Congress would treat debt collectors less favorably than the CCPA-covered institutions that extend credit to consumers in the first place and that depend on the debt collection industry.

Petitioner also errs in presuming that Congress wanted to afford special treatment to losing FDCPA plaintiffs (including those who default on federally-guaranteed loans) because they are debtors. Rule 54(d) applies to all litigants who proceed *in forma pauperis*, 28 U.S.C. § 1915(f)(1), as well as to cash-strapped consumers and debtors who lose suits under the CCPA. Moreover, Rule 54(d) is not an absolute rule. Cost-shifting is discretionary. Thus, "a substantiated claim of the losing party's indigency may justify a reduction or denial of costs to the prevailing party." 10 James Wm. Moore et al., Moore's Federal Practice § 54.101[1][b], p. 54-157 (3d ed. 2012) [hereinafter Moore's]. Courts have ample authority to reduce or waive a cost award based on financial hardship. Petitioner sought no such relief in this case.

E. An exemption from the possibility of cost-shifting is not necessary to enforce the FDCPA. Congress encouraged private enforcement by awarding monetary relief to *prevailing* plaintiffs. Congress did not intend to encourage meritless suits by exempting *losing* plaintiffs from the normal incident of defeat. Empirically, the number of new FDCPA suits has not diminished even after defendants have been awarded costs. Application of Rule 54(d) would no more chill meritorious suits than application of the rule chills other suits under the CCPA.

II. Although this Court need not reach the issue because the FDCPA does not preclude the normal operation of Rule 54(d), the cost award was inde-

pendently required by Federal Rule of Civil Procedure 68(d). GRC offered petitioner $1,500 and her accrued reasonable attorney's fees and costs to settle, and petitioner obtained an adverse judgment that was less favorable than the offer she rejected. A bare majority in *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), held that Rule 68 shifts costs only when plaintiffs prevail in a lesser amount than the offer, not when plaintiffs lose altogether. That decision is illogical and contrary to the Rule's clear text and purpose to encourage settlement. But *Delta* is particularly pernicious if petitioner is correct that costs are not available under Rule 54(d). Debt collectors would face FDCPA suits with both hands tied behind their backs, *i.e.*, with neither Rule 54(d) to discourage frivolous suits nor Rule 68 to encourage settlement of such suits. This Court should overrule *Delta* if the Court concludes that Section 1692k(a)(3) bars prevailing defendants from seeking costs under Rule 54(d).

Delta creates a highly anomalous regime that the drafters of the Rule could not have intended: "a plaintiff who has refused an offer under Rule 68 and then has a 'take nothing' judgment entered against her [w]ould be in a better position than a similar plaintiff who has refused an offer under Rule 68 but obtained a judgment in her favor, although in a lesser amount than that which was offered pursuant to Rule 68." 450 U.S. at 375 (Rehnquist, J., dissenting, joined by Burger, C.J., and Stewart, J.); *accord id*. at 362 (Powell, J., concurring in the result) (noting that it is "anomalous indeed that, under the Court's view, a defendant may obtain costs under Rule 68 against a plaintiff who *prevails in part* but not against a plaintiff who *loses entirely*"). The majority in *Delta* relied on language in Rule 68 that has since changed, as

well as an erroneous and outmoded view of practice in state courts. No good reason supports retaining *Delta*'s nullification of Rule 68 in cases such as this one where the Rule's application makes the most sense.

ARGUMENT

I. THE FAIR DEBT COLLECTION PRACTICES ACT DOES NOT PROHIBIT DISTRICT COURTS FROM AWARDING COSTS TO PREVAILING DEFENDANTS

Under the "bedrock principle known as the 'American Rule' . . . [e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156-57 (2010) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983)); *accord Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health and Human Res.*, 532 U.S. 598, 602 (2001) ("the prevailing party is not entitled to collect [attorney's fees] from the loser"). Thus, although GRC prevailed at trial, the company is out of pocket for the attorney's fees it was forced to incur to defend against a meritless lawsuit.

The opposite presumption exists, however, with respect to costs. "Courts generally, and this Court in particular, . . . have a presumptive rule for costs." *Buckhannon*, 532 U.S. at 606 n.8; *see* Sup. Ct. R. 43. "[B]y long established practice . . . in actions at law, the prevailing party is entitled to recover a judgment for costs." *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 387 (1884); *see Buckhannon*, 532 U.S. at 606 n.8 (quoting same); *id*. at 611 (Scalia, J., concurring) (quoting same); *In re Peterson*, 253 U.S. 300, 316 (1920); Philip M. Payne, *Costs in Common Law*

Actions in the Federal Courts, 21 Va. L. Rev. 397 (1934-35) (tracing costs awards in England to the Statute of Gloucester in 1278); *see also* Fed. R. Civ. P. 54(d) 1937 advisory committee's note (citing *Peterson* and Payne). The Judiciary Act of 1789 incorporated this tradition through provisions "allow[ing] costs to the prevailing party, as incident to the judgment" in actions at law. *The Baltimore*, 75 U.S. 377, 390 (1869). In short, "liability for costs is a normal incident of defeat." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981).

Federal Rule of Civil Procedure 54(d) codifies a district court's discretion to award costs to a prevailing party by stating that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1). A federal statute does not "provide[] otherwise" and thereby displace a court's discretion under Rule 54(d) unless the statute is "contrary" to the rule. 10 Moore's § 54.101[1][c], at 54-159. The word "otherwise"—as petitioner and the government acknowledge—means "differently," Pet. Br. 16, "to the contrary," Merriam-Webster On-line, http://www.merriam-webster.com (cited Pet. Br. 16), or "contrarily." Roget's International Thesaurus 779.9, 780.8, 780.11 (7th ed. 2010); J.I. Rodale, The Synonym Finder 818 (1986) ("contrarily, inversely, in reverse, conversely"); *see also* U.S. Br. 11 (Rule 54(d) "yields to contrary provisions"); *id.* at 12 (Rule 54(d) does not apply "in the event of any inconsistency"). The judgment below therefore must be affirmed unless the FDCPA mandates a contrary rule that reflects congressional intent to displace a court's discretion under Rule 54(d). Normal rules of statutory construction compel the conclusion that the FDCPA evinces no such intent.

A. Section 1692k(a)(3)'s Text and Structure Preclude an Inference that the Statute Bars an Award of Costs Under Rule 54(d)

1. The second sentence of 15 U.S.C. § 1692k(a)(3) states: "On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." That text authorizes a sanction against FDCPA plaintiffs who abuse the Act's private right of action. That sanction does not limit a court's preexisting authority to award costs. The text is purely permissive and nowhere restricts a district court's discretion under Rule 54(d) to award costs to prevailing defendants. The court of appeals thus correctly held that "[n]othing in the language of the statute purports to exclude Rule 54(d) costs from being taxed and awarded in FDCPA suits." Pet. App. 8a.

The statutory structure in three respects confirms that the statute does not address, much less eliminate, a court's presumptive authority under Rule 54(d) to award costs to prevailing defendants. First, all the provisions leading up to the second sentence of Section 1692k(a)(3) impose liability for *misconduct*. Subsections (a)(1) and (a)(2) make a debt collector that violates the Act liable for actual damages sustained by the debtor and up to $1,000 in statutory damages. 15 U.S.C. § 1692k(a)(1), (a)(2). Subsection (a)(3)'s first sentence further imposes liability on such a debt collector for "the costs of the action, together with a reasonable attorney's fee as determined by the court." *Id*. § 1692k(a)(3). Likewise,

Subsection (a)(3)'s second sentence redresses misconduct—albeit by the plaintiff.

In this case, neither the plaintiff nor the defendant acted wrongfully: petitioner did not bring her lawsuit with an improper motive, and GRC did not violate the FDCPA. Neither party has engaged in misconduct that Section 1692k(a) deters or remedies. The Act is silent with respect to this situation. Indeed, the statute does not even mention prevailing defendants, the subject of Rule 54(d). And silence, as the government acknowledges (U.S. Br. 19-20), triggers the normal default rules under our legal system, with each side bearing its own attorney's fees under the American Rule, and the prevailing party entitled to seek an award of costs under Rule 54(d). As the court of appeals aptly stated, the notion "that a plaintiff's bad faith should obligate him to pay his opponent's attorney's fees hardly suggests that his good faith should relieve him of paying his opponent's *costs*." Pet. App. 9a. In other words, Congress's aim of redressing misconduct does not suggest any intent to deprive prevailing defendants of their presumptive right to seek costs as prevailing parties under Rule 54(d).

Second, Section 1692k(a)(3)'s principal focus is awarding attorney's fees. S. Rep. No. 95-382, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N 1695, 1700 (section-by-section summary of Section 1692k(a)) ("Where a court finds that a suit was brought by a consumer in bad faith and for harassment, the court may award reasonable attorney's fees to the defendant."). The statute's passing reference to "and costs" at the end of the second sentence is best read as confirming that defendants additionally may seek costs consistent with existing law. In this respect,

the word "and"—which immediately precedes "costs" in Section 1692k(a)(3)—has its commonly understood meaning of "in addition to" attorney's fees that normally are not allowed. *See* The Compact Edition of the Oxford English Dictionary 79 (1971) (defining "and" as a conjunction "[i]ntroducing a word . . . which is to be taken side by side, along with, or in addition to, that which precedes it"); The American Heritage Dictionary 66 (4th ed. 2006) ("Together with or along with; in addition to; as well as."); Oxford American Writer's Thesaurus 35 (2d ed. 2008) ("together with, along with, with, as well as, in addition to, also"); Roget's International Thesaurus 253.13 (similar). The second sentence provides for shifting of attorney's fees contrary to the usual presumption while confirming that costs are shifted in accordance with the usual permissive rule.

Congress often employs language "out of an abundance of caution" and "to remove any doubt" on an issue. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226-27 (2008) (quoting *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 646 (1990)). Without the two words "and costs," doubt might have existed from a lack of parallelism between the first and second sentences of subsection (a)(3). The first sentence authorizes *plaintiffs* who show a violation of the FDCPA to recover both attorney's fees *and costs*. The second sentence likewise authorizes *defendants* victimized by abusive lawsuits to receive attorney's fees *and costs*. Had Congress included costs in the first but not the second sentence, the omission might have led to confusion as to whether costs were available to defendants under the second sentence. By adding "and costs" to the second sentence, Congress foreclosed the argument that, under *expressio unius est exclusio alterius*, the expression of costs in the first

sentence and exclusion of the same term in the second meant that defendants could recover only attorney's fees, and not costs.

Third, Section 1692k(a)(3)'s authorization to award a defendant attorney's fees overlaps with a court's inherent authority to award attorney's fees based on a litigant's misconduct, including bad faith. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); *Roadway Express*, *Inc. v. Piper*, 447 U.S. 752, 765-67 (1980); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975). Thus, the statute as a whole confirms a court's inherent authority respecting fee-shifting and a court's rule-based authority respecting cost-shifting. This Court has observed that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Chambers*, 501 U.S. at 49. Analogously, Section 1692k(a)(3) should not be read to exclude the normal operation of Rule 54(d) simply because Congress authorizes a cost award as part of a sanction.

2. Petitioner argues that by listing the circumstance where a court "may" award "attorney's fees . . . and costs" (*i.e.*, "[o]n a finding . . . that an action . . . was brought in bad faith and for the purpose of harassment"), Congress made that circumstance the "only" basis for a court to award costs. Pet. Br. 8, 9; U.S. Br. i, 7, 20-21. The meaning of any text, however, depends on context. *Caraco Pharm. Labs., Ltd. v. Novo Nordisk*, 132 S. Ct. 1670, 1681 (2012). The statement that "on Veterans Day, you should thank a veteran for his service" does not imply that the speaker disapproves of expressions of appreciation to veterans on all other days of the year. Similarly, Congress's statement that fee-shifting and cost-

shifting are appropriate sanctions does not imply that Congress disapproves of cost-shifting as an ordinary incident of defeat. Congress did not frame Section 1692k(a)(3) as a prohibition or include the word "only" or "unless," as Congress has done under a myriad of other statutes. *See infra* pp. 19-21. Rather, Congress targeted a specific form of misconduct without altering the background presumption of cost-shifting to prevailing parties.

Petitioner, observing that Section 1692k(a)(3) refers to both "attorney's fees" *and* "costs," argues that the introductory clause of "bad faith and for the purpose of harassment" must apply equally to both objects or otherwise the words "and costs" become "grammatically inexplicable." Pet. Br. 7; *id*. at 9. But again, context matters, as the Veterans Day example shows. The same analysis is true when two objects are in a sentence. Whether to infer a condition depends on background presumptions associated with the object. Here, Congress legislated against the backdrop that, in our legal system, an award of attorney's fees is presumptively precluded but costs are presumptively awarded. As such, the introductory clause is best understood to limit a court's statutory authority to award attorney's fees.

Take, for instance, a parent's statement to her child that "if you eat your dinner, you may have cookies." The sentence naturally means that the child may have cookies *only* if the child eats her dinner. That inference of conditionality flows from the background understanding that cookies are an exceptional and unexpected treat. On the other hand, consider the same parent's statement to her child that "if you eat your dinner, you may have cookies and milk." The inference of conditionality

applicable to cookies is unwarranted for the words "and milk" because children presumptively are expected to drink milk before, during, and after dinner. For that reason, the introductory clause ("if you eat your dinner") does not have the same limiting application for milk as it does for cookies.

Similarly, take a parent's statement to her son that "if you tease your sister, I may give her your allowance next week." That statement implies that the parent will redirect the son's allowance to his sister *only* if he teases her. That implication is warranted because the son otherwise presumes he will get his weekly allowance. But now consider the same parent's statement "if you tease your sister, I may give her your allowance and her allowance." No one could reasonably infer that, by adding the words "and her allowance" the parent conditioned the daughter's own allowance on being teased by her brother. Rather, the parent's statement is meant to deter the son's misconduct while confirming the backdrop understanding that the daughter will also receive her presumptive weekly allowance if she is teased. Section 1692k(a)(3) is no different. The statutory reference to "and costs" is functionally equivalent to "and her allowance." The statute deters misconduct by plaintiffs while confirming that defendants may seek costs in addition to their attorney's fees.

B. Congress's Use of Explicit Language in Other Statutes to Restrict Cost Shifting Weighs Against Inferring a Limitation in Section 1692k(a)(3)

1. Section 1692k(a)(3) grants courts remedial authority to award fees and costs with the manifest purpose of protecting innocent *defendants*. That provision markedly contrasts with the plethora of

statutes that explicitly prohibit courts from awarding costs with the manifest purpose of protecting *plaintiffs*. In the limited instances when Congress has departed from the presumptive rule of cost-shifting, Congress generally provides that plaintiffs "shall not be liable for costs." *See* 7 U.S.C. § 18(d)(1) (Commodity Exchange Act) ("[t]he petitioner shall not be liable for costs in the district court"); 7 U.S.C. § 210(f) (Packers and Stockyards Act) ("the petitioner shall not be liable for costs in the district court"); 7 U.S.C. § 499g(b) (Perishable Agricultural Commodities Act) ("the petitioner shall not be liable for costs in the district court"); *id*. § 499g(c) ("[a]ppellee shall not be liable for costs in [district] court"); 33 U.S.C. § 918(a) (Longshore and Harbor Workers' Compensation Act) ("the applicant shall not be liable for costs in a proceeding for review of the judgment"); 45 U.S.C. § 153(p) (Railway Labor Act) ("the petitioner shall not be liable for costs in the district court"); 46 U.S.C. § 41309(d) (Suits in Admiralty Act) ("plaintiff is not liable for costs of the action or for costs of any subsequent stage of the proceedings unless they accrue on the plaintiff's appeal"); 47 U.S.C. § 407 (Communications Act of 1934) ("petitioner shall not be liable for costs in the district court"); 49 U.S.C. § 11704(d)(1)(C) (ICC Termination Act of 1995) ("plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff"); *cf.* Fed. R. Civ. P. 71.1(*l*) (for condemnation proceedings, "[c]osts are not subject to Rule 54(d)").

Those statutes show that Congress knows how to foreclose a court's discretion under Rule 54(d) when Congress so intends. *Small v. U.S.*, 544 U.S. 385, 399 (2005) ("Congress' explicit use of [language] in other provisions shows that it specifies such restrictions when it wants to do so."). Had Congress

wanted to condition an award of costs under the FDCPA exclusively upon a finding of misconduct, it easily could have said so. Other statutes explicitly confine the discretion of courts to award costs. *See* 28 U.S.C. § 1928 ("no costs shall be included in such judgment, *unless* the proper disclaimer has been filed in the United States Patent or Trademark Office") (emphasis added); 42 U.S.C. § 1988(b) ("in any action brought against a judicial officer . . . such officer shall not be held liable for any costs . . . *unless* such action was clearly in excess of such officer's jurisdiction") (emphasis added). By contrast, Congress phrased the second sentence of Section 1692k(a)(3) neither as a prohibition nor in terms of an exclusive condition.

2. Congress's general practice of using express terms to limit a court's discretion under Rule 54(d) comports with congressional practice at the time of Rule 54's adoption. The 1937 advisory committee notes to Rule 54(d) list 36 statutes as "unaffected" by the Rule. Those provisions overwhelmingly were contrary to Rule 54. Most statutes either explicitly *prohibited* cost-shifting[1] or explicitly *mandated* cost-

[1] 7 U.S.C. § 210(f) (1934) ("petitioner shall not be liable for costs"); 7 U.S.C. § 499g(c) (1934) ("[a]ppellee shall not be liable for costs"); 30 U.S.C. § 32 (1934) ("costs shall not be allowed to either party"); 45 U.S.C. § 153(p) (1934) ("petitioner shall not be liable for costs"); 46 U.S.C. § 829 (1934) ("petitioner shall not be liable for costs"); 49 U.S.C. § 16(2) (1934) ("petitioner shall not be liable for costs"). Some statutes provided that "no costs" would be allowed unless certain conditions occurred. 28 U.S.C. § 821 (1934) ("no costs shall be recovered, unless the proper disclaimer, as provided by the patent laws, has been entered at the Patent Office"); 35 U.S.C. § 71 (1934) ("no costs shall be recovered unless the proper disclaimer has been entered at the Patent Office"); *see also* 28 U.S.C. § 815 (1934) (plaintiff who recovers less than $500 "shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs"); 28

shifting (as opposed to the discretionary standard under the Rule).[2] The remaining statutes expressly expanded the definition of costs to include attorney's fees,[3] or did not limit cost-shifting because the statutes either overlapped with a court's discretion to award costs under Rule 54(d),[4] or had no bearing on the availability of costs to prevailing parties.[5]

As the government observes (Br. 12), the original version of Rule 54(d) before it was amended to its current form in 2007 stated that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54 (1938). Where another statute did not restrict a court's exercise of discretion under Rule 54, the statute did not displace the rule, as treatises discussing the prior version reflect. *See* 6 Moore's Federal Practice § 54.71[1], p. 54-304 (2d ed. 1996) ("[W]hen

---

U.S.C. § 825 (1934) (plaintiff "shall not recover, on all of the judgments therein which may be rendered in his favor, the costs of more than one action or process, unless special cause for said . . . is shown").

[2] 8 U.S.C. § 45 (1934); 15 U.S.C. § 15 (1934); 15 U.S.C. § 72 (1934); 19 U.S.C. § 274 (1934); 28 U.S.C. § 829 (1934); 28 U.S.C. § 830 (1934); 31 U.S.C. § 234 (1934); 35 U.S.C. § 69 (1934); 46 U.S.C. § 38 (1934); 46 U.S.C. § 941(c) (1934); 46 U.S.C. § 1227 (Supp. 1936); 47 U.S.C. § 206 (1934); *cf.* 33 U.S.C. § 926 (1934).

[3] 15 U.S.C. § 77k(e) (1934); 15 U.S.C. § 78i(e) (1934); 15 U.S.C. § 78r (Supp. 1936). Some statutes that mandated cost-shifting, *supra* note 2, also defined costs to include attorney's fees. *E.g.*, 46 U.S.C. § 1227 (Supp. 1936).

[4] 15 U.S.C. §§ 96, 99, 124 (1934); 28 U.S.C. § 836 (1934); 35 U.S.C. § 67 (1934).

[5] 28 U.S.C. §§ 832-835 (1934); 31 U.S.C. § 232 (1934).

permissive language is used [in a statute regarding costs] the district court may, pursuant to Rule 54(d), exercise a sound discretion relative to the allowance of costs."); 10 Charles A. Wright et al., Federal Practice and Procedure § 2670, p. 258 (3d ed. 1998) (Statutes that "are permissive in character . . . are not inconsistent with the discretion given the district court by Rule 54(d)."). The original version thus operated the same as the current version. The Rule's drafters modified the Rule in 2007 to say "provides otherwise" to clarify the original intent. The 2007 change was "stylistic only" and was made so the language would be "more easily understood." Fed. R. Civ. P. 54 advisory committee's note (2007).

3. The court of appeals at times remarked that a statute should reflect a "clear showing" of congressional intent to displace Rule 54(d). Pet. App. 8a; *id*. at 14a. Petitioner seizes on those passing statements to argue that the court applied a "clear statement rule." Pet. Br. 19; *accord* U.S. Br. 14-16. But the court throughout its opinion invoked and applied normal tools of statutory interpretation to parse Section 1692k(a)(3). Pet. App. 7a-12a. Although Congress need not use explicit language to trump Rule 54(d), the court correctly found that petitioner failed to show that the FDCPA limits a court's discretion to award costs under Rule 54. *Id*. at 14a. Moreover, the fact that Congress *does* frequently limit the operation of Rule 54(d) in explicit terms strongly undermines the notion that Congress did so here by implication.

C. The Interpretive Canons Relied on by Petitioner Do Not Support Her Reading of Section 1692k(a)(3)

1. Petitioner and the government argue that unless Section 1692k(a)(3) provides the exclusive

basis for a court to award costs, the words "and costs" would be redundant with Rule 54. Pet. Br. 7; 10-12; U.S. Br. 17-21. That "premise, however, is too strong. Statutory provisions may simply codify existing rights or powers." *Mallard v. United States District Court*, 490 U.S. 296, 307 (1989). As discussed, *supra* pp. 15-16, where Congress adds language out of an abundance of caution—here to avoid any inference that costs are not allowed to defendants who are sued wrongfully—the language is not mere surplusage. Moreover, Rule 54(d) applies only to prevailing parties, and Section 1692k(a)(3) is not so limited. Congress therefore could have meant to broaden cost-shifting to suits brought in bad faith, even though the defendant is not a prevailing party under Rule 54(d). *See Cohen v. Am. Credit Bureau, Inc.*, No. 10-5112, 2012 WL 847429, at *5 (D.N.J. Mar. 13, 2012) (Although plaintiff prevailed, "[t]his case was never about the merits. Plaintiff was offered the maximum amount she could hope to recover . . . prior to the filing of the Complaint. Even before this case was filed, the dispute disintegrated into a battle over a patently frivolous legal theory and the amount of attorney's fees that would ultimately be paid.").

In any event, "[s]ometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 176-77 (2012); *accord Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011) ("There are times when Congress enacts provisions that are superfluous.") (quoting *Corley v. United States*, 129 S. Ct. 1558, 1572-73 (2009) (Alito, J., dissenting)); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*,

548 U.S. 291, 299 n.1 (2006) ("[T]he reference may be surplusage. . . . [I]nstances of surplusage are not unknown."); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting.").

The canon against superfluity should particularly give way when "excess language" is "hardly unusual." *Microsoft*, 131 S. Ct. at 2249. A myriad of statutes overlap with Rule 54(d). *E.g.*, 12 U.S.C. § 2607(d)(5) (Real Estate Settlement Procedures Act of 1974) ("the court may award to the prevailing party the court costs of the action"); 12 U.S.C. § 5565(b) (Consumer Financial Protection Act of 2010) ("the [Consumer Financial Protection] Bureau . . . may recover its costs in connection with prosecuting such action if [it] is the prevailing party in the action"); 15 U.S.C. § 6104(d) (Telemarketing and Consumer Fraud and Abuse Prevention Act) ("[t]he court . . . may award costs of suit and reasonable fees for attorneys and expert witnesses to the prevailing party"); 15 U.S.C. § 7706(f)(4) (Controlling the Assault of Non-Solicited Pornography and Marketing Act) ("[i]n the case of any successful action . . . the court, in its discretion, may award the costs of the action"); 15 U.S.C. § 7805(b)(3) (Sports Agent Responsibility and Trust Act) ("the court may award to the prevailing party costs"); 15 U.S.C. § 8131(2) (Anti-Cybersquatting Consumer Protection Act) ("[t]he court may also, in its discretion, award costs and attorneys fees to the prevailing party"); 29 U.S.C. § 431(c) (Labor-Management Reporting and Disclosure Act) ("[t]he court . . . may, in its discretion . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action"); 42 U.S.C. § 3612(p) (Fair Housing Act) ("the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and

costs"); 42 U.S.C. § 3613(c)(2) (Fair Housing Act) ("the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs"); 47 U.S.C. § 551(f)(2) (Communications Act) ("[t]he court may award . . . other litigation costs reasonably incurred").[6]

Those examples belie petitioner's insistence that Section 1692k(a)(3) must be read to avoid a redundant authorization to award costs. "A number of statutes state simply that the court may award costs in its discretion. Such a provision is not contrary to Rule 54(d)(1) and does not displace the court's discretion under the Rule." 10 Moore's § 54.101[1][c], at 54-159. The same principle applies where the statute merely gives the court discretion to award costs in ways fully consistent with Rule 54(d). And that principle disposes of petitioner's apparent suggestion that if a statute so much as mentions the word "costs," Rule 54(d) becomes a nullity. Pet. Br. 17.

Furthermore, "the canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft*, 131 S. Ct. at 2248 (quotation omitted). Section 1692k(a)(3) is redundant with a court's inherent authority to award attorney's fees and costs as a sanction. *See supra* p. 16; *Willy v. Coastal Corp.*, 503 U.S. 131, 136

---

[6] Some statutes authorize an award of costs without limitation to prevailing parties. *See* 29 U.S.C. § 1132(g)(1) (ERISA) ("the court in its discretion may allow a reasonable attorney's fee and costs of action to either party"); *see also* 15 U.S.C. §§ 2618(d), 2619(c)(2), 2620(b)(4)(C). Although petitioner notes contrary authority (Pet. Br. 17), the majority of courts to have considered the issue have held that 29 U.S.C. § 1132(g)(1) does not displace Rule 54(d). *See, e.g.*, *Williams v. Metro. Life Ins. Co.*, 609 F.3d 622, 636 (4th Cir. 2010).

n.2 (1992). Petitioner and the government wrongly contend that to "give meaning and purpose to every word," bad faith must be the "exclusive" basis for the court to act. Pet. Br. 11; *see* U.S. Br. 21 (Congress does not enact "redundant provisions that merely confer upon district courts a subset of the authority they already possess"); *id*. at 27 (same). Their logic means that Section 1692k(a)(3) prohibits *any* fee- and cost-shifting unless the "action" was "brought" in "bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3). That would preclude a sanction even under a court's inherent powers in any other instance, such as if the plaintiff willfully disobeyed a court order, *Chambers*, 501 U.S. at 45, or "failed to pursue the litigation," *Piper*, 447 U.S. at 767; *see id*. ("The bad-faith exception . . . is not restricted to cases where the action is filed in bad faith."). Because that reading is implausible, redundancy in the statute cannot be avoided. "[T]he canon against surplusage merely favors that interpretation which *avoids* surplusage—and petitioners' interpretation no more achieves that end than ours does." *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2043 (2012) (citations omitted).

The phrase "in bad faith and for the purpose of harassment" also contains surplusage. The government reads that language to require a showing of only bad faith. U.S. Br. 7, 8, 9, 17, 27, 28. That interpretation deprives "for the purpose of harassment" of any independent meaning. Petitioner reads the language to require a conjunctive showing of bad faith *and* a purpose to harass. Pet. Br. 7-17. That interpretation presumably renders "in bad faith" surplusage. If a party sues to harass, he acts in bad faith, and the words "in bad faith" add nothing to the statute. And if petitioner maintains that the clause

requires two different improper motives (*i.e.*, to harass and yet another bad-faith motive other than harassment), her reading utterly defeats the purpose of the provision as a sanction because the standard will rarely, if ever, be met.

Petitioner's reliance on *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004), is misplaced. There the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) provided that "any person may seek contribution . . . *during or following any civil action* under [certain sections in CERCLA]." *Id*. at 162-63. Applying the canon against superfluity and other tools of statutory construction, the Court held that "[t]o assert a contribution claim under [CERCLA], a party must satisfy the conditions" prescribed in the statute. *Id*. at 168.

By contrast, Rule 54(d) independently authorizes an award of costs to the prevailing party; Congress routinely restricts in explicit terms a court's discretion to award costs when it wants to; and Congress routinely references costs in a way that overlaps with Rule 54(d). The structure of the statute in *Cooper* also included only one direct object—a contribution right—to which the "condition" applied. For instance, a parent's statement that "after you eat your dinner, you may have milk" is more likely to mean that the parent wanted the child to eat dinner before drinking milk than had the parent mentioned cookies and milk. *See supra* pp. 17-18. As discussed, Section 1692k(a)(3) involves two objects with differing background presumptions of recovery, and the condition of bad faith and harassment is naturally understood as directed to an award of attorney's fees, not costs.

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987), cited by petitioner (Br. 11) and the government (Br. 13), is even less relevant. That decision holds that Rule 54(d) does not permit a court to tax costs for expert witnesses. The Court reasoned that a contrary view would circumvent Congress's "comprehensive" itemization of taxable items under 28 U.S.C. § 1920 and the $30 per-day witness fee under 28 U.S.C. § 1821(b). *Crawford Fitting*, 482 U.S. at 440, 442. Application of Rule 54(d) here, however, does not expand the meaning of taxable costs, and Section 1692k(a)(3) is not comparable to Sections 1920 or 1821(b) in reflecting Congress's intent to confine the circumstances in which costs may be taxed. *Id*. at 440-42.

2. The government similarly errs in invoking the canon that "a precisely drawn, detailed statute preempts more general remedies." U.S. Br. 13 (quoting *Hinck v. United States*, 550 U.S. 501, 506 (2007)). Section 1692k(a)(3) does not, in the government's words, with "specificity . . . address[] cost awards to prevailing FDCPA defendants." *Id*. at 19. Section 1692k(a)(3) does not even mention prevailing defendants, but rather targets misconduct by plaintiffs. The absence of a specific reference to prevailing defendants notably contrasts with the reference to successful actions by plaintiffs in the first sentence of Subsection (a)(3).

Moreover, as discussed, specific references to a court's authority to award costs are ubiquitous in the U.S. Code, and those specific references do not override the general rule under Rule 54(d). *Supra* pp. 24-25. The specific-trumps-the-general canon ordinarily applies when two statutes conflict. Scalia & Garner, *supra*, at 183, 185; 1A Sutherland Statutory

Construction § 23:16, pp. 506-11 (7th ed. 2007); *see also Nat'l Cable & Telecomms. v. Gulf Power Co.*, 534 U.S. 327, 335-36 (2002). Here there is no conflict. By contrast, the decisions cited by the government applied the canon to conflicting limitations periods that could not both be applied in a given case. *Hinck*, 550 U.S. at 507-08; *EC Term of Years Trust v. United States*, 550 U.S. 429, 431 (2007); *Brown v. GSA*, 425 U.S. 820, 834 (1976). Those decisions also applied other tools of statutory interpretation to discern congressional intent. *Hinck*, 550 U.S. at 506; *Brown*, 425 U.S. at 829-30, 834; *EC*, 550 U.S. at 432-34.

Petitioner also errs in equating (Br. 18) Section 1692k(a)(3) to 49 U.S.C. § 60121(b), which provides that in suits under the Pipeline Safety Act "[t]he court may award costs to a prevailing defendant when the action is unreasonable, frivolous, or meritless." She cites no case interpreting that provision to restrict a court's discretion under Rule 54(d), and we are not aware of any. In any event, that provision refers only to costs, whereas Section 1692k(a)(3) addresses two objects with differing background presumptions. The provision also mentions "prevailing defendant[s]" and thus focuses on the same subject matter that is addressed by Rule 54(d). And the provision authorizes courts to award costs in suits that are "unreasonable, frivolous, or meritless." By contrast, the bad faith/harassment standard in Section 1692k(a)(3), if applied to limit a court's authority to award costs, would bar an award in practically every case. This Court should not infer that Congress intended such an extreme result.[7]

---

[7] Petitioner also cites inapposite cases construing other statutes. Pet. Br. 17-18; *see, e.g.*, *Gwin v. Am. River Transp. Co.*, 482 F.3d 969 (7th Cir. 2007) (46 U.S.C. § 2114(b) (2006));

D. Section 1692k(a)(3)'s Purpose and History Confirm that Prevailing Defendants May Seek Costs Under Rule 54(d)

1. The legislative history shows that Congress added the second sentence of Section 1692k(a)(3) "to protect debt collectors from nuisance lawsuits." S. Rep. No. 95-382, at 5. Congress intended this provision to afford FDCPA defendants greater protection than lenders under the Truth in Lending Act (TILA), another consumer protection statute that served as the model for parts of the FDCPA. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1615 (2010). In finalizing the bill that became the FDCPA, members of Congress raised concerns that the FDCPA would result in "thousands and thousands of nuisance suits on hypertechnical supercritical violations," a phenomenon they believed occurred under TILA. Senate Comm. on Banking, Housing & Urban Affairs, *Markup Session: S. 1130—Debt Collection Legislation* 4 (July 26, 1977); *accord id*. at 3, 5, 10 (statement of Sen. Jake Garn); *see also id*. at 54, 57-58 (statements of Sens. Harrison Schmitt and Richard Lugar).

Meyers v. Columbia/HCA Healthcare Corp., 341 F.3d 461 (6th Cir. 2003) (mandatory cost-shifting under 42 U.S.C. § 11113); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001) (applying *Christiansburg Garment* to 42 U.S.C. § 12205); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115 (7th Cir. 1989) (29 U.S. § 1132(g)(1); *see supra* n.6); *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728 (6th Cir. 1986) (mandatory cost-shifting under 15 U.S.C. § 15(a)); *Moore v. Southtrust Corp.*, 392 F. Supp. 2d 724 (E.D. Va. 2005) (not considering whether 15 U.S.C. § 1693m(f) precludes a cost award to prevailing defendants absent bad faith, *see infra* pp. 36-37); *Barrera v. Brooklyn Music, Ltd.*, 346 F. Supp. 2d 400 (S.D.N.Y. 2004) (applying 17 U.S.C. § 505, which defines costs to include attorney's fees).

The Chairman of the Senate Banking Committee, William Proxmire, and the chief sponsor of the FDCPA, Senator Donald Riegle, responded to those concerns by pointing to the provision at issue. Chairman Proxmire explained that the bill "permit[s] action against a harassing suit which is kind of unusual. You don't see that very often in legislation. And they specifically have language that goes right to it." *Id*. at 13; *see also id*. at 5-6 (staffer, at the chairman's direction, advised that provision "was intended to prevent the type of nuisance suits that Senator Garn refers to"). Senator Riegle similarly explained that "we have crafted" the language that became the second sentence of Section 1692k(a)(3) "to deal with the kind of problem that I think Senator Garn is concerned about." *Id*. at 7. When Senator Garn conceded that the FDCPA provision was "better than truth in lending with those provisions in it," Senator Riegle confirmed that this was the intent: "I appreciate it because we have tried hard to make it better [than TILA]." *Id*. at 14.

Other committee members raised concerns about the potential for abuse by plaintiffs. The FDCPA proponents responded that the second sentence of Section 1692k(a)(3) would stem such abuse. *Compare id*. at 17 (statement of Sen. Schmitt) (statutory damage provisions provided "incentive for the legal profession to find suits to file on behalf of their clients"); *id*. at 56-57 (statement of Sen. Richard Lugar raising concerns about breadth of FDCPA); *id*. at 19-20 (statement of Sen. Garn) (raising similar concerns), *with id*. at 17-18 (statement of Chairman Proxmire) ("Doesn't the language on harassment take care of that . . . where it says 'for purpose of harassment?' Doesn't that take care of that?"); *id.* at 57 (similar).

Thus, Congress enacted Section 1692k(a)(3) as a strongly pro-defendant provision to confer greater protection to debt collectors than lenders sued under TILA. As discussed below, prevailing TILA defendants are entitled to recover their taxable costs under Rule 54(d). *See infra* p. 35. Congress could not have intended that innocent FDCPA debt collectors would be *worse off* than prevailing lenders under TILA.

2. Petitioner's construction would perversely turn a pro-defendant provision into an extraordinary pro-plaintiff provision that makes innocent FDCPA defendants appreciably worse off than virtually every litigant in our legal system. Under petitioner's reading, debt collectors forced to undergo a trial to defend against a meritless suit may seek costs only if they incur additional expenses to prove that the plaintiff brought the suit "in bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3). Whether that standard requires one bad motive or two, petitioner's construction would bar prevailing debt collectors from seeking costs even for suits that are "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978) (recognizing distinction between suits brought in bad faith and suits that are frivolous, unreasonable, or without foundation); *Sanchez v. United Collection Bureau, Inc.*, 649 F. Supp. 2d 1374, 1382 (N.D. Ga. 2009) ("The standard for bad faith [under Section 1692k(a)(3)] is higher than the standard for mere frivolousness."). And under petitioner's reading of the statute to require a showing of harassment, costs could be awarded in only an infinitesimal set of cases that are more theoretical than real. *E.g.*, *Kahen-Kashani v. Nat'l Action Fin. Servs., Inc.*, No. 03-cv-828, 2004 WL 1040384, at *7 (W.D.N.Y. Apr. 12, 2004) (denying claim for attorney's fees because

defendant "has not provided evidence of plaintiff's bad faith (as opposed to allegation of plaintiff's counsel's bad faith) . . . and even if this Court wished to attribute counsel's conduct to the client, defendant has not proved the second element, that the suit was instituted for the purpose of harassment").

"A fair adversary process presupposes both a vigorous prosecution and a vigorous defense." *Christiansburg Garment*, 434 U.S. at 419. This Court should not "lightly assume[] that in enacting [the FDCPA], Congress intended to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his [costs] in resisting even a groundless action unless he can show that it was brought in bad faith." *Id*. Petitioner's reading would impose on innocent FDCPA defendants a standard for cost-shifting that is even more onerous than the standard required for defendants to recover *attorney's fees* in Title VII and civil rights litigation. *Id*.; *Hughes v. Rowe*, 449 U.S. 5, 14 (1980). The court of appeals thus correctly observed that reading the FDCPA to bar an award of costs would irrationally penalize innocent debt collectors that prevailed at trial. Pet. App. 14a. That penalty becomes all the more irrational in suits that are frivolous, unreasonable, or without foundation.

The FDCPA seeks "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Petitioner's interpretation would produce the opposite effect. As far as cost-shifting is concerned, her reading treats reputable, law-abiding debt collectors the same as debt collectors that violate the Act. *See Fair Debt Collection Practices*

Act: Hearings on S. 656, S. 918, S. 1130 and H.R. 5294 Before Subcomm. on Consumer Affairs of the S. Comm. on Banking, Housing & Urban Affairs, 95th Cong. 1 (1977) (statement of FDCPA chief sponsor Sen. Riegle) (making "emphatically clear" that he "consider[ed] the overwhelming majority of debt collectors to be honest and ethical businessmen and women"). A rule that would bar innocent debt collectors from receiving a cost award even in frivolous suits would unjustifiably disadvantage companies that petitioner's *amici* have emphasized serve an indispensable role in keeping credit flowing in our national economy:

> Consumer debt collection is critical to the functioning of the consumer credit market. By collecting delinquent debt, collectors reduce creditors' losses from non-repayment and thereby help to keep consumer credit available and potentially more affordable to consumers. Available and affordable credit is vital to millions of consumers because it makes it possible for them to purchase goods and services that they could not afford if they had to pay the entire cost at the time of purchase.

Consumer Fin. Prot. Bureau, *Fair Debt Collection Practices Act* 4 (2012); *accord* Fed. Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* i (2010) ("[B]y providing compensation to creditors when consumers do not repay their debts, the debt collection system helps keep credit prices low and helps ensure that consumer credit remains widely available.").

The debt collection industry not only ensures available credit for future borrowers but also minimizes taxpayer losses. GRC, for instance, collects

publicly-financed debt such as federally-guaranteed student loans. About 85% of the $1 trillion in outstanding student loan debt in this country is either owned outright or guaranteed by the federal government. David Hogberg, *Taxpayers on Hook for $850 Billion in Student Loan Debt*, Investor's Business Daily (May 9, 2012), http://tinyurl.com/c2m45xc. Petitioner's rule would unjustifiably penalize GRC and other similarly situated law-abiding companies that play a critical role in saving taxpayer money and maintaining the viability of the credit system.

3. Petitioner's reading conflicts with Congress's treatment of other innocent defendants under the Consumer Credit Protection Act (CCPA), ch. 41, Title 15, U.S.C. The CCPA is an umbrella statute that contains eight consumer protection statutes, including the FDCPA. *See* TILA, 15 U.S.C. §§ 1601-1665e; Fair Credit Billing Act, 15 U.S.C. §§ 1666-1666j; Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f; Credit Repair Organizations Act, 15 U.S.C. §§ 1679-1679j; Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x; Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f; Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693r; *see also Jerman*, 130 S. Ct. at 1615.

The civil liability provisions under six of the CCPA statutes do not address the issue of a prevailing defendant's costs. Thus, financial and credit institutions that successfully defend against claims under the TILA, the Fair Credit Billing Act, and the Consumer Leasing Act may under Rule 54(d) recover their costs. *See* 15 U.S.C. § 1639b(d); *id*. § 1640(a); *id*. § 1667d. Credit reporting agencies likewise may recover their costs under Rule 54(d) when they prevail under the Fair Credit Reporting Act. 15

U.S.C. § 1681n(a), (c). Creditors, too, can recover costs under Rule 54(d) under the Equal Credit Opportunity Act. 15 U.S.C. § 1691e(d). And credit repair organizations can recover costs in suits under the Credit Repair Organizations Act. 15 U.S.C. § 1679g(a)(3).

Petitioner's reading implausibly assumes that Congress, by including costs to sanction misconduct by plaintiffs, denied cost-shifting in all other instances to prevailing FDCPA defendants and prevailing defendants under the Electronic Funds Transfer Act (EFTA). The EFTA imposes liability on financial institutions for certain transactions involving electronic banking, and the EFTA contains a provision that is virtually identical to Section 1693k(a)(3). *See* 15 U.S.C. § 1693m(f) ("On a finding by the court that an unsuccessful action under this section was brought in bad faith or for purposes of harassment, the court shall award to the defendant attorney's fees reasonable in relation to the work expended and costs."). It is highly dubious that Congress treated financial institutions subject to the EFTA differently than financial institutions covered by the other CCPA provisions. It is equally unlikely that Congress intended to distinguish *at all* among prevailing defendants sued under the CCPA. Indeed, because debt collection is vital to the financial health of the credit industry, Congress presumably did not single out innocent debt collectors for harsher treatment than the lenders and other institutions that debt collectors serve. The more natural inference is that

FDCPA and EFTA, like all the other CCPA statutes, coexist harmoniously with Rule 54(d).[8]

4. Petitioner and her *amici* speculate that Congress excused FDCPA plaintiffs from cost-shifting because they are likely to be "financially strapped." Pet. Br. 14-15, 22; U.S. Br. 25-26; AARP Br. 23-27. But Congress does not exempt litigants from cost-shifting based on financial hardship. To the contrary, litigants who proceed *in forma pauperis* may be required to pay costs to prevailing parties just "as in other proceedings." 28 U.S.C. § 1915(f)(1); *see Haynes v. Scott*, 116 F.3d 137, 139-40 (5th Cir. 1997); *Warren v. Guelker*, 29 F.3d 1386, 1390 (9th Cir. 1994).

Petitioner's theory raises other anomalies that undermine the policy basis for her construction. Petitioner lumps the FDCPA and the EFTA together (Br. 17-18, 23), yet electronic banking depositors who bring suits under the EFTA presumably are not destitute. It is also dubious that Congress favored defaulting debtors, who include those who default on *federally-guaranteed* student loans, over all other consumers who in good-faith sue under the CCPA. And as discussed, prevailing credit repair organizations may seek costs despite the fact that the consumers protected by the Credit Repair Organizations Act have, by definition, a poor "credit record, credit history, or credit rating." 15 U.S.C. § 1679a(3). Conversely, FDCPA plaintiffs are not necessarily impoverished and may not even owe a genuine debt. Many alleged FDCPA violations involve debts arising from

[8] Other than the EFTA, we have located no other statute containing a provision worded similarly to Section 1692k(a)(3), and petitioner and her *amici* cite none.

identity theft or fraud, problems that befall rich and poor alike. *See* AARP Br. 10-11. Similarly, a wealthy individual may make a strategic decision not to pay a particular debt—for instance, choosing to default on an "underwater" mortgage. *See*, *e.g.*, Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 Vand. L. Rev. 1547, 1559 (2011).

In all events, Rule 54(d) is not absolute; cost-shifting is discretionary. In enacting the FDCPA, Congress presumptively knew that Rule 54(d) permits the court to consider a losing party's inability to pay. "[A] substantiated claim of the losing party's indigency may justify a reduction or denial of costs to the prevailing party." 10 Moore's § 54.101[1][b], at 54-157. Although petitioner could have sought a waiver or reduction of any cost award, *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir. 2004), she never asked for such relief. *Cf.* U.S. Br. 26 (relying on petitioner's lack of income). Petitioner urges a rigid rule that would unjustifiably excuse financially capable plaintiffs from the normal cost-shifting rule that applies to *in forma pauperis* litigants, consumers, debtors, and virtually all other citizens in this country who are subject to Rule 54(d).

E. Application of Rule 54(d) Does Not Unduly Chill Enforcement of the FDCPA

1. Petitioner and her *amici* argue that applying the normal presumption for cost-shifting under Rule 54 would impermissibly "chill" meritorious suits. Pet. Br. 15, 21-22; U.S. Br. 25-26; AARP Br. 23-24. But their logic also presumes that Congress wanted to encourage "frivolous, unreasonable, [and] groundless" suits, as long as they were not brought in bad

faith and/or to harass. *Christiansburg Garment*, 434 U.S. at 422. Petitioner envisions a Congress that intended to incentivize FDCPA plaintiffs not only by providing for actual damages, statutory damages, attorney's fees and cost-shifting, but also by denying to innocent debt collectors even the modicum benefit of *seeking* cost-shifting after they undergo trial to disprove meritless suits. That scheme contains no "balance" (U.S. Br. 21, 22, 28) at all. Instead, plaintiffs would have a free pass to file frivolous lawsuits, facing only the small risk that the debt collector, after prevailing at trial, is in the position to incur even further expenses to prove that the suit "was brought in bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3). If petitioner and her *amici* believe that innocent debt collectors (and apparently innocent banks making electronic transfers) should be treated appreciably worse off than virtually all litigants that are faced with meritless suits, they should direct their policy arguments to Congress. *Jerman*, 130 S. Ct. at 1624.

The contention that FDCPA suits should be further incentivized by eliminating the normal operation of Rule 54(d) is unsound. Congress encouraged private enforcement of the FDCPA by enacting a generous civil liability provision for plaintiffs who *win* their suits. Congress incentivized FDCPA suits by mandating attorney's fee shifting for prevailing plaintiffs and statutory damages. 15 U.S.C. § 1692k(a). Given the absence of an express prohibition against cost-shifting when a plaintiff *loses* her suit, this Court should not lightly infer that Congress intended to further encourage FDCPA suits (both frivolous and non-frivolous alike) by exempting losing plaintiffs from cost-shifting.

If anything, the increasing volume of private FDCPA suits suggests no further encouragement is needed. More than a decade ago the Seventh Circuit commented that "FDCPA cases [are] flooding this circuit." *Sanders v. Jackson*, 209 F.3d 998, 1004 (7th Cir. 2000); *see also Cohen*, 2012 WL 847429, at *1 n.1 (district of New Jersey has seen "a consistent increase in the number of FDCPA filings from 2008 through 2011 . . . [with] 182 FDCPA cases filed in 2008; 238 cases filed in 2009; 364 cases filed in 2010; and 683 cases filed in 2011"); *Jacobson v. Healthcare Fin. Servs., Inc.*, 434 F. Supp. 2d 133, 138 (E.D.N.Y. 2006) ("A cursory examination of the court's docket demonstrates an exponential growth in litigation under the statute."), *rev'd on other grounds*, 516 F.3d 85 (2d Cir. 2008). The number of FDCPA lawsuits nationwide has increased every year and ballooned nearly 300% from 3,215 in 2005 to 12,018 in 2011.[9]

Application of Rule 54(d) would not impermissibly discourage suits under the FDCPA—at least any more than application of the rule does with respect to other suits under the CCPA. The threat of a cost award under Rule 54(d) apparently has not discouraged suits in the district court in Colorado, where petitioner filed this suit. That court awarded costs to prevailing defendants not only in this case, but also in at least three FDCPA cases in 2008, at least one

---

[9] Collections Recon, *2011 Litigation Statistics Revised Upward, FDCPA Suits Surpass 12,000* (Feb. 24, 2012), http://www.collectionsrecon.com/latestnews/collection_news/2011-litigation-statistics-revised-upward-fdcpa-suits-surpass-12000/(2012 FDCPA statistics); Collections Recon, *FDCPA and Other Consumer Lawsuit Statistics, Full Year 2011 Recap* (Jan. 12, 2012), http://www.collectionsrecon.com/press-releases/fdcpa-and-other-consumer-lawsuit-statistics-full-year-2011-recap/.

case in 2009, and at least one other in 2011.[10] Yet the number of FDCPA lawsuits filed in that district continues to climb. Court records on PACER show that plaintiffs filed 296 FDCPA lawsuits in 2009, 484 in 2010, and 645 suits in 2011. Petitioner's trial attorney filed 194 FDCPA lawsuits in 2009, 268 suits in 2010, and 365 suits in 2011—a lawsuit-per-day, including weekends and holidays.

Nor has the Tenth Circuit's decision below chilled private FDCPA enforcement in Colorado. Following the court of appeals' decision in December 2011, plaintiffs filed 460 new FDCPA lawsuits in the District of Colorado between January 1 and August 30, 2012, which is *ahead* of the pace in 2011, when Colorado was among the top FDCPA filing districts in the country. Petitioner's trial attorney alone has filed 242 lawsuits so far in 2012.

Courts have further observed that "FDCPA cases appear to be much more about attorney's fees than the prosecution of consumer rights." *Berther v. TSYS Total Debt Mgmt., Inc.*, No. 06-C-293, 2007 WL 1795472, at *4 (E.D. Wis. June 19, 2007). "Quite frequently, the plaintiffs are mere figureheads while the driving force[s] behind these cases are the attorneys and their quest for attorney's fees." *Id.* at *2; *accord, e.g.*, *Miller v. Javitch, Block & Rathbone*, 534 F. Supp. 2d 772, 778-79 (S.D. Ohio 2008); *Jacobson*, 434 F. Supp. 2d at 138. "The history of FDCPA litigation shows that most cases have resulted in limited

---

[10] *Dillard-Crowe v. Aurora Loan Services, LLC*, No. 07-cv-1987; *Dillard-Crowe v. Citibank N.A.*, No. 07-cv-2172; *Guarneros v. Deutsche Bank Trust Co. Americas*, No. 08-cv-1094; *Holland v. Standley and Assocs., LLC*, No. 09-cv-1474; *Kelly v. Wolpoff & Abramson, LLP*, 07-cv-91. The cost award in this case was entered on July 15, 2010. Pet. App. 28a-29a.

recoveries for plaintiffs and hefty fees for their attorneys." *Sanders*, 209 F.3d at 1004; *see also, e.g.*, *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) ("The cottage industry that has emerged does not bring suits to remedy the 'widespread and serious national problem' of abuse that the Senate observed in adopting the legislation.") (quotation omitted).

As Justices Kennedy and Alito have remarked, "[a] collateral effect of these statutes may be to create incentives to file lawsuits even where no actual harm has occurred." *Jerman*, 130 S. Ct. at 1631 (Kennedy, J., dissenting, joined by Alito, J.). The FDCPA creates a "troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." *Id*. The aggressive prosecution of meritless FDCPA claims, motivated by attorney's fees, led the Seventh Circuit to conclude that the "all-too-common abuse of the class action as a device for forcing the settlement of meritless [FDCPA] claims . . . is thus a mirror image of the abusive tactics of debt collectors at which the statute is aimed." *White v. Goodman*, 200 F.3d 1016, 1019 (7th Cir. 2000).

2. Both petitioner and the government observe (Pet. Br. 15; U.S. Br. 3) that FDCPA defendants sometimes prevail in litigation under the Act's *bona fide* error defense, which precludes liability for unintentional violations of the Act where the debt collector maintains "procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). But because Congress immunized such debt collectors from liability, they are entitled to seek cost-shifting under Rule 54(d) like any other prevailing defendant.

Moreover, the argument has no bearing in cases such as this one, where the debt collector prevails not because of any defense, but because the debt collector did not violate the FDCPA in the first instance.

Even where the *bona fide* error defense is dispositive, district courts may exercise their discretion under Rule 54(d) and take the nature of the victory into account in deciding whether and to what extent to award costs. Petitioner hypothesizes a case where a plaintiff "successfully prove[s] that the defendant violated the FDCPA but nonetheless lose[s] her case, based on facts known only to the defendant prior to suit." Pet. Br. 15. The mere possibility of such a case—and petitioner cites no such case—does not warrant a rule that renders district courts powerless to award costs under *any* circumstances short of bad faith and harassment, including in cases that are frivolous, unreasonable, or groundless.

II. GRC WAS ENTITLED TO COSTS UNDER FEDERAL RULE OF CIVIL PROCEDURE 68

The district court held that Federal Rule of Civil Procedure 68 independently justified the award of costs because petitioner lost on the merits after rejecting GRC's offer of judgment. Pet. App. 29a. The court of appeals, however, correctly observed (Pet. App. 14a-15a) that *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), precludes the application of Rule 68 where the defendant wins outright. The net effect of petitioner's position, then, is that debt collectors should face FDCPA suits with both hands tied behind their backs, *i.e.*, with neither Rule 54(d) nor Rule 68 serving as a backstop against frivolous suits that burden law-abiding defendants and the judicial system. Petitioner's position would

disable debt collectors from recovering costs no matter how frivolous the case or how generous a debt collector's settlement offer.

Petitioner's position would give plaintiffs a cost-free pass to press frivolous litigation and reject reasonable settlement offers (as long as the suit was not filed for improper purposes). Here, petitioner did not so much as bother to respond to GRC's settlement offer under Rule 68 for $1,500 (150% of the maximum statutory damages) *plus* petitioner's then-accrued attorney's fees and costs. Petitioner's position would allow that scenario to repeat itself without consequences even in the most frivolous of suits.

As explained above, normal rules of statutory construction dictate that the FDCPA's sanction against bad faith plaintiffs does not strip courts of their presumptive authority to award costs to prevailing defendants. But if petitioner were somehow correct, this Court should not adopt petitioner's reading without also overruling *Delta* and putting an end to a system that wastes judicial resources and unjustifiably burdens law-abiding defendants that face meritless suits under the FDCPA.[11]

---

[11] Rule 68 was pressed below in both courts, and this Court may consider Rule 68 as an alternative grounds for affirmance even though the opposition to the petition did not raise the issue. *Cf. Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 178-79 (2009). This Court may address any issue "fairly included" within the question presented. Sup. Ct. R. 14.1. Here, "[t]he question presented is whether a prevailing defendant in an FDCPA case may be awarded costs where the lawsuit was not 'brought in bad faith and for the purpose of harassment.'" Pet. Br. i. Whether costs can be awarded under Rule 68 is fairly included within that question.

A. Rule 68 Requires Petitioner to Pay GRC's Post-Offer Costs

Rule 68(d) provides that "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Rule 68 applies to all civil cases in federal court and, in contrast to Rule 54(d), does not contain any exception for statutes that "provide otherwise." *See* 12 Charles A. Wright et al., Federal Practice and Procedure § 3001.1, p. 76 (2d ed. 1997) ("Rule 68 contains no exclusions on its face that forbid its application in certain types of cases."). Thus, had petitioner prevailed and been awarded the statutory maximum of $1,000, *i.e.* $500 less than GRC's $1,500 offer of judgment, Rule 68 would have required petitioner to pay GRC's post-offer costs.

Here, petitioner lost and obtained an adverse judgment that was less favorable than GRC's unaccepted offer of $1,500. JA 34-36. Accordingly, if Rule 68 applies where the plaintiff loses, Rule 68 required petitioner to pay the costs that GRC incurred after making the offer, which include all of the costs the district court awarded. Thus, the district court relied on Rule 68 to award costs. Pet App. 29a.

B. *Delta* Should Be Overruled

1. In *Delta*, a bare majority of the Court concluded that Rule 68 was "simply inapplicable" to cases where the defendant prevails. 450 U.S. at 352. The majority reasoned that the textual condition that triggers the Rule—"the judgment obtained by the offeree is not more favorable than the offer"—would "not normally be read by a lawyer to describe a

judgment in favor of the other party." *Id*. at 351.[12] As then-Justice Rehnquist explained in dissent, however, this interpretation illogically assumes that the drafters intended to place "a plaintiff who has refused an offer under Rule 68 and then has a 'take nothing' judgment entered against her . . . in a better position than a similar plaintiff who has refused an offer under Rule 68 but obtained a judgment in her favor, although in a lesser amount than that which was offered pursuant to Rule 68." 450 U.S. at 375 (Rehnquist, J., dissenting, joined by Burger, C.J., and Stewart, J.). While Justice Powell concurred on the ground that the offer in that case did not comply with Rule 68, he "agree[d] with most of the views expressed in the dissenting opinion of Justice Rehnquist, and d[id] not agree with the Court's reading of Rule 68," calling it "anomalous indeed that, under the Court's view, a defendant may obtain costs under Rule 68 against a plaintiff who *prevails in part* but not against a plaintiff who *loses entirely*." *Id*. at 362 (Powell, J., concurring in the result).

In evaluating whether to overrule existing precedent, this Court considers "workability, . . . the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009); *cf. Pearson v. Callahan*, 555 U.S. 223, 233 (2009) ("Revisiting precedent is particularly appro-

---

[12] At the time of *Delta*, Rule 68 stated: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." 450 U.S. at 348 n.1. Rule 68(d) now provides that "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made."

priate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings."). These factors strongly support overturning *Delta*.

A plaintiff "obtain[s]" a judgment whether it favors the plaintiff or the defendant. A plaintiff initiates and prosecutes litigation, the ultimate result of which is a judgment, defined as "a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). An appealable judgment is "obtained" through those efforts regardless of whether the judgment is ultimately favorable or adverse.

Dictionaries equate the word "obtain" with "get" or "receive."[13] It would be common usage to say a student "gets," "receives," or "obtains" a grade at the end of a semester regardless of whether that grade is an A or an F. So too, a litigant "gets," "receives," or "obtains" a judgment as the end result of litigation that she has commenced and pressed, irrespective of whether that judgment is the one she wanted. A plaintiff who obtains a judgment against her can appeal that judgment, as happened here. Not surprisingly, courts commonly refer to an adverse judg-

---

[13] *See*, *e.g.*, The Compact Edition of the Oxford English Dictionary at 1968 ("[t]o come into the possession of," "to procure," "to acquire, get"); Cambridge Dictionary Online, http://dictionary.cambridge.org/dictionary/american-english/obtain?q=obtain ("to get something, esp. by a planned effort"); Roget's International Thesaurus 479.6 ("receive, get, gain, secure, have, come by, be in receipt of, be on the receiving end; obtain, acquire").

ment as having been "obtained" by the losing party, including the plaintiff.[14]

"Rule 68, when construed to include a traditional 'take nothing' judgment, see, Appendix to Fed. Rules Civ. Proc., [Forms 70 and 71], as well as a judgment in favor of the plaintiff but less than the amount of the offer, thus fits with the remaining parts of the Federal Rules of Civil Procedure pertaining to judgments and orders in a manner in which the drafters of the Rule surely must have intended." *Delta*, 450 U.S. at 371 (Rehnquist, J., dissenting). In contrast, "the language of these Rules must be twisted virtually beyond recognition, and that of Rule 68 parsed virtually out of existence, to say that the latter Rule does not apply in a situation such as this simply because the [defendant] prevailed." *Id*. at 374.

The *Delta* majority also relied on language describing an offer as one where "the defendant offer[s] to allow judgment to be *taken against him*." Fed. R. Civ. P. 68(a) (1980); *see* 450 U.S. at 351. "Because the Rule obviously contemplates that a 'judgment taken' against a defendant is one favorable

---

[14] *See, e.g.*, *Amendola v. Sec'y, Dep't of Health & Human Services*, 989 F.2d 1180, 1184 (Fed. Cir. 1993) ("upon obtaining an unfavorable judgment"); *Marcus v. Sullivan*, 926 F.2d 604, 615 (7th Cir. 1991) ("claimants who obtained final adverse judgments from the courts"); *Riley Hosp. & Benev. Ass'n v. Bowen*, 804 F.2d 302, 306 (5th Cir. 1986) ("[a]fter obtaining an adverse judgment"); *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 565 (7th Cir. 1986) (petitioner could have "obtained a final judgment, appealable if adverse, on his petition"); *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1236 (9th Cir. 2006) (Fisher, J., concurring) (criticizing majority's requirement that plaintiff "obtain a 'final' adverse judgment [overseas] before the majority will consider this case ripe").

to the plaintiff," the majority reasoned, "it follows that a judgment 'obtained' by the plaintiff is also a favorable one." *Id*. While the logic of that syllogism was dubious to begin with, the words "taken against him" are no longer in Rule 68. The absence of those words further undermines the basis for the majority's conclusion. *See* Fed. R. Civ. P. 68(a) (providing instead that a defendant may "offer to allow judgment on specified terms").

The lower courts have puzzled over *Delta*'s "utterly irrational" and "seemingly absurd" rule that "penalizes the defendant for winning the case." *Sparaco v. Lawler, Matusky & Skelly*, 201 F.R.D. 335, 336 (S.D.N.Y. 2001); *see also Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 295 n.1 (6th Cir. 1989) ("*Delta* does create the anomaly that a small judgment may be much more adverse to a plaintiff who has received a Rule 68 offer than a judgment for defendant under which the plaintiff takes nothing."); *Danese v. City of Roseville*, 757 F. Supp. 827, 831 n.4 (E.D. Mich. 1991) (agreeing with the *Delta* dissent that "the majority's construction has [a] peculiar and anomalous effect"). Commentators likewise have questioned the decision's rationality. *See*, *e.g.*, Note, Delta Air Lines, Inc. v. August: *The Agony of Victory and the Thrill of Defeat*, 35 Ark. L. Rev. 604, 636 n.169 (1982) (collecting critical scholarship and noting that "[c]riticism of the holding in *Delta* has been swift and uniform").

2. *Delta* conflicts with Rule 68's "clear policy . . . favoring settlement of all lawsuits." *Marek v. Chesny*, 473 U.S. 1, 10 (1985). As Justice Rehnquist explained, "provisions such as Rule 68 designed to promote settlement, rather than litigation, of claims [are] bound to make a plaintiff take a look at his 'hole

card.' By the same token, the availability of such a procedure is bound to make the defendant take a look at *his* 'hole card' in order to make certain that he is using every means available to both avoid costly protracted litigation and possible loss of the case if it goes to trial." *Delta*, 450 U.S. at 380 (Rehnquist, J., dissenting). "[R]equir[ing] plaintiffs to 'think very hard' about whether continued litigation is worthwhile . . . is precisely what Rule 68 contemplates." *Marek*, 473 U.S. at 11.

That purpose is furthered by applying cost-shifting to all judgments that are not more favorable than an unaccepted offer, while it is frustrated by arbitrarily denying the benefit of the rule to the most deserving defendants, those who prevail entirely. *Delta* is unworkable because it renders Rule 68 a nullity in cases such as this one where the policies behind the Rule have their greatest force. *Delta* guts an important tool that would otherwise promote settlement and relieve crowded court dockets of cases that should be resolved short of full litigation. This Court should abandon a distinction so inimical to the manifest purpose underlying the rule.

3. The majority speculated that allowing a defense victory to trigger Rule 68 could encourage defendants to make offers of "one penny" to collect a mandatory costs award should they prevail. 450 U.S. at 353 & n.11. Such "policy considerations," however, are unavailing "when the intent of the drafters of the Rule is as plain as it is here." *Id*. at 375 (Rehnquist, J., dissenting). In any event, the majority's concern is misplaced. When a defendant makes a Rule 68 offer, the outcome of the litigation is unknown. A defendant has every incentive to make an offer that maximizes the chances of triggering cost-shifting un-

der either scenario in which Rule 68(d) can operate: a defense victory, or a judgment for a plaintiff in an amount less than the offer. A defendant offering one penny all but ensures that it will not receive its costs unless there is certainty of an outright win. In short, "there is a built-in deterrent against unreasonably low offers as such offers increase the likelihood that the offeree will do better by going to trial, rendering the offeror ineligible for costs." *Kikuchi v. Brown*, 130 P.3d 1069, 1074 (Haw. Ct. App. 2006) (construing state's version of Rule 68 to apply to defense judgments despite sham offer concerns).

In this case, GRC's offer early in the case of $1,500 (150% of the maximum statutory damages) *plus* petitioner's then-accrued attorney's fees and costs was plainly not a sham. The possibility of sham offers in other cases does not justify categorically shutting out prevailing defendants like GRC from the benefit of Rule 68. If sham offers materialize in particular cases, the lower courts are well equipped to respond. For example, some state courts require offers to be reasonable and in good faith under state counterparts to Rule 68. *See Beal v. McGuire*, 216 P.3d 1154, 1178 (Alaska 2009); *Warr v. Williamson*, 195 S.W.3d 903, 907 (Ark. 2004); *Hubbard v. Kaiser-Francis Oil Co.*, 256 P.3d 69, 75 (Okla. 2011); *cf. Delta*, 450 U.S. at 355 (noting that the court below had "resolved the problem [of sham offers] by holding that only reasonable offers trigger the operation of Rule 68").

4. Observing that Rule 68 was originally modeled after state cost-shifting statutes, the majority relied on pre-1937 practice under state counterparts to Rule 68. *See Delta*, 450 U.S. at 356-58. Even then, "the state cases cited by the Court" did not support the

result the majority reached because they "d[id] not address the situation in which a defendant has prevailed on the merits." *Id*. at 373-74 (Rehnquist, J., dissenting). Today, a survey of modern state court practice demonstrates more clearly than ever the wrong turn the majority took in *Delta*.

In at least seventeen States, a prevailing defendant is entitled to recover costs after having made an unaccepted offer of judgment. Some States have reached this result through judicial decisions interpreting language substantially similar to Federal Rule of Civil Procedure 68(d) and reaching the opposite outcome from *Delta*, sometimes with explicit criticism of that decision. *See Darragh Poultry & Livestock Equip. Co. v. Piney Creek Sales, Inc.*, 743 S.W.2d 804, 805 (Ark. 1988) (noting "flaws in the *Delta Air Lines* reasoning" and "absurd results"); *Beattie v. Thomas*, 668 P.2d 268, 274 (Nev. 1983) (rejecting *Delta* "because such reasoning leads to an anomalous result"); *see also Kikuchi*, 130 P.3d at 1074; *Divine v. Groshong*, 679 P.2d 700, 711 (Kan. 1984); *Griffis v. Lazarovich*, 595 S.E.2d 797, 802 (N.C. Ct. App. 2004); *Hubbard*, 256 P.3d at 72-73; *Estep v. Hamilton*, 201 P.3d 331, 338 (Wash. Ct. App. 2008).

In other States, the applicable statute or rule is phrased differently than federal Rule 68 in a way that definitively forecloses the illogical outcome of *Delta*. *See, e.g.*, Alaska Stat. § 09.30.065(a); Ariz. R. Civ. Proc. 68(g); Cal. Civ. Proc. Code § 998(c)(1); Colo. Rev. Stat. § 13-17-202(1)(a); Conn. Gen. Stat. § 52-195(b); Fla. Stat. § 768.79(1); Ga. Code Ann. § 9-11-68(b); Mich. Ct. R. 2.405(D); Minn. R. Civ. Proc. 68.03(b); Wis. Stat. § 807.01(1); Wyo. Stat. Ann. § 1-10-103. That so many States disagree with *Delta*'s

anomalous and counterintuitive rule is a clear signal that reexamination of that rule is warranted.

C. No Countervailing Considerations Support Retaining *Delta*

Overruling *Delta* and applying Rule 68 according to its plain terms would not "upset expectations." *See Montejo*, 556 U.S. at 793. Like any "rules governing procedures . . . in the trial courts," *Delta* "does not affect the way in which parties order their affairs." *Pearson*, 555 U.S. at 233. Plaintiffs who lose already face presumptive liability for their opponent's costs under Rule 54(d). Overruling *Delta* would simply make that liability mandatory rather than presumptive in the subset of cases where the defendant previously offered judgment under Rule 68. It is doubtful that many plaintiffs with pending civil cases based their decision to file suit on the expectation that *if* the defendant makes an offer of judgment, *if* the plaintiff rejects that offer, and *if* the plaintiff ultimately loses, the resulting costs liability will be only presumptive.

Moreover, costs recoverable under Rule 68(d) generally are limited to those taxable under 28 U.S.C. § 1920, which are "modest in scope." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2006 (2012). In particular, overruling *Delta* would not impose on losing plaintiffs any new liability for defendants' attorney's fees. To be sure, the post-offer costs that are shifted under Rule 68(d) may include attorney's fees under statutes that—unlike the FDCPA—provide for fee-shifting by making attorney's fees "properly awardable" as part of costs. *Marek*, 473 U.S. at 9-11; *cf.* 15 U.S.C. § 1692k(a)(3) (referring to costs and attorney's fees separately). Where *Marek*

applies, if a plaintiff prevails but recovers less than the defendant offered, Rule 68(d) requires the plaintiff to bear his own post-offer attorney's fees even though he would ordinarily be entitled, as a prevailing party under a fee-shifting statute, to recover those fees.

Rule 68(d) never functions as the original source of a right to recover attorney's fees; rather, such a right must be found in the underlying statute. Whatever right a prevailing defendant may have to recover its attorney's fees exists with or without *Delta*. In many instances, a prevailing defendant's recovery of attorney's fees is subject to statutory or judicially imposed limitations. *See*, *e.g.*, *Christiansburg Garment*, 434 U.S. at 422 (prevailing defendant in Title VII action cannot recover attorney's fees "unless a court finds that the claim was frivolous, unreasonable, or groundless" or the plaintiff acted in bad faith); *Hughes*, 449 U.S. at 14 (extending same standard to fee-shifting under 42 U.S.C. § 1983). Those limitations apply under Rule 68. *See*, *e.g.*, *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1031-32 (9th Cir. 2003); *Crossman v. Marcoccio*, 806 F.2d 329, 333-34 (1st Cir. 1986); *see also Le v. Univ. of Pa.*, 321 F.3d 403, 410-11 (3d Cir. 2003). If this Court overrules *Delta* and restores Rule 68 to be fully operable as the drafters of the Rule plainly intended, a defendant's entitlement to attorney's fees would remain subject to such limitations.

Accordingly, if this Court concludes that prevailing FDCPA defendants may not seek costs under Rule 54(d), the Court should overrule *Delta* and hold that Rule 68 required petitioner to pay GRC its post-offer costs.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ERIC D. REICIN
Deputy General Counsel
SALLIE MAE, INC.
2001 Edmund Halley Drive
Reston, VA 20191
(703) 984-6528

KEVIN T. DREYER
Associate General Counsel
SALLIE MAE, INC.
11501 Northlake Drive
Cincinnati, OH 45249
(513) 605-7551

LISA S. BLATT
Counsel of Record
ROBERT J. KATERBERG
ANTHONY J. FRANZE
DIRK C. PHILLIPS
R. REEVES ANDERSON
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000
Lisa.Blatt@aporter.com

ADAM L. PLOTKIN
STEVEN J. WIENCZKOWSKI
621 17th Street
Suite 1800
Denver, CO 80211
(303) 296-3566

Counsel for Respondent

September 10, 2012

APPENDIX

APPENDIX: STATUTES AND RULES INVOLVED

The civil liability provision of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k, states:

> (a) **Amount of damages.** Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damage sustained by such person as a result of such failure;
>
> (2)
>
> (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or
>
> (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) **Factors considered by court.** In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors—

(1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) **Intent.** A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) **Jurisdiction.** An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

> (e) **Advisory opinions of Bureau.** No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Federal Rule of Civil Procedure 54 ("Judgment; Costs") states:

> (a) **Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.
>
> (b) **Judgment on Multiple Claims or Involving Multiple Parties.** When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) **Demand for Judgment; Relief to Be Granted.** A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) **Costs; Attorney's Fees.**

(1) ***Costs Other Than Attorney's Fees.*** Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) ***Attorney's Fees.***

(A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) *Proceedings.* Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.* By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) *Exceptions.* Subparagraphs (A)–(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. §1927.

Federal Rule of Civil Procedure 68 ("Offer of Judgment") states:

> (a) **Making an Offer; Judgment on an Accepted Offer.** At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
>
> (b) **Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.
>
> (c) **Offer After Liability is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.
>
> (d) **Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.