IN THE SUPREME COURT OF THE UNITED STATES

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OLIVEA MARX, :

Petitioner : No. 11-1175

v. :

GENERAL REVENUE CORPORATION :

- x

Washington, D.C.

Wednesday, November 7, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

ALLISON M. ZIEVE, ESQ., Washington, D.C.; on behalf of Petitioner.

ERIC J. FEIGIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

LISA S. BLATT, ESQ., Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in case 11-1175, Marx versus General Revenue Corporation.

Ms. Zieve.

ORAL ARGUMENT OF ALLISON M. ZIEVE

ON BEHALF OF THE PETITIONER

MS. ZIEVE: Mr. Chief Justice, and may it please the Court:

Rule 54(d) provides a standard for an award of costs to a prevailing party that, by the rule's express terms, does not apply where Federal statute provides otherwise. The Fair Debt Collection Practices Act provides otherwise because it states a different rule for awarding costs than does Rule 54(d). Whereas Rule 54(d) gives district courts wide discretion toward cost-prevailing defendants, the FDCPA limits courts' discretion to cases brought in bad faith and for the purpose of harassment.

The text of the Act provides that on a finding that action was brought in bad faith and for the purpose of harassment, the court may award attorneys' fees of reasonable relation to the work expended and costs. That's a matter of grammar. The unmistakable

meaning of that sentence is that an award of costs, like an award of attorney's fees, is subject to the condition that the plaintiff suit be brought --

JUSTICE SCALIA: Under -- under that provision, that's certainly true. You can't -- you can't get costs under that provision unless there has been that prerequisite. But it's -- it's ancient law that repeals by implication are not favored. And what you're arguing here is that that provision effectively repeals another provision which allows costs in all cases, whether or not there has been misbehavior.

Now, why -- why is this an exception to our general rule? I just don't -- this doesn't seem to me like the clear repealer.

MS. ZIEVE: Well, there's no need to consider repeal by implication in this case, Your Honor, because Rule 54(d) expressly states that its presumption does not apply for a Federal --

JUSTICE GINSBURG: Yes, indeed, but -- but you are assuming a conflict. You're saying either the -- the statute applies or Rule 54(d) applies, but the statute can be read to say, "We're describing one category of case. We are describing the worst case; the bad-faith harassing plaintiff," and the statute deals with that category of person and no other. So if you're

not a bad-faith harassing plaintiff, but you nonetheless lost, then you're under 54(d).

MS. ZIEVE: Your Honor, if you look at Section k(a)(3) as a whole, the two sentences together confirm that this is not a provision about bad-faith plaintiffs, but, rather, the provision is addressing both fees and costs to -- to plaintiffs and defendants. And if -- if the Congress merely wanted to state in that second sentence that fees were available and didn't mean to say anything about costs to defendants, there would have been no reason for Congress to have put costs in that sentence. If --

JUSTICE GINSBURG: Well, there are a number of reasons. One is symmetry, because they have costs in the part about defendants. And the concern that, well, if we leave out costs for the bad-faith harassing plaintiff, then it -- it may be assumed that they get only attorney's fees and not costs.

So the statute's provisions like this may be redundant, but one can see that a drafter might very well want to say, "Well, we said we're dealing with the defendant costs. We want to put the same thing in a plaintiff."

MS. ZIEVE: Well, you've made a few points, and I'll try to address each of them.

First, there would be no reason to include costs in the second sentence just because it was in the first sentence, because the first and second sentences are not parallel. The first sentence makes an award of costs mandatory, and, therefore, it does do some work beyond 54(d); it clearly has a function in that sentence. Whereas the second sentence, the award is subject to the "may;" that is, that it's not mandatory that the court award them.

If -- if Congress was -- Congress would have no need to be concerned that if it left costs out of the second sentence there would be some negative implication, because there are several statutes that mention fees without costs. And GRC has cited no instance in which a court has read a negative implication into that. We, in our reply brief, cited a couple cases that do the opposite. It's -- so, therefore, if Congress had omitted costs, left it out of the sentence, then Rule 54(d) would have continued to apply in cases where the defendants. One more example --

JUSTICE SOTOMAYOR: Didn't -- don't district courts always have the authority to award costs for sanctionable behavior like bad faith? So this provision is duplicate no matter how we read it. It's either

duplicative of a power the court already had to award costs for bad faith or it's duplicate of Rule 54.

MS. ZIEVE: Well, if you read this sentence as a misconduct provision, then it does repeat the court's inherent authority; although, as this court has mentioned in a couple cases, sometimes statutes want to reiterate authority that exists elsewhere.

If you read it our way, however, the statute -- this provision does actually do some work that it wouldn't otherwise do. That is, it limits cost awards to prevailing defendants of these circumstances.

JUSTICE SOTOMAYOR: It limits Rule 54.

MS. ZIEVE: Right.

JUSTICE SOTOMAYOR: I think your -- your answer is always that Rule 54 obligates court to give costs. And this rule, as you read it, is a permissive grant only. Even in bad faith litigations, a court could choose not to give costs.

MS. ZIEVE: Well, Rule 54 doesn't obligate a court to give costs; it establishes a presumption --

JUSTICE SOTOMAYOR: True.

MS. ZIEVE: -- and this says the presumption is limited to cases brought in bad faith and for purposes of harassment. There are other statutes that do -- similarly do what we've -- what's done here.

Congress could have omitted -- if GRC is correct, Congress could have just omitted the words "and costs," leaving the costs to be determined under Rule 54.

An example of that is 15 U.S.C. 15c(d)(2), which is actions by state attorneys general and provides that the court may award attorneys fees to a prevailing defendant upon a finding that the action was in bad faith.

JUSTICE GINSBURG: Ms. Zieve, when I look at other statutes, it seems to me we would want to look at statutes involving lenders, so we would look at the Truth in Lending Act and the -- what is it, the Credit Organizations Act --

MS. ZIEVE: Fair Credit?

JUSTICE GINSBURG: -- and those do not provide for attorney's fees. They are covered only under 54(d), which is costs, not fees. Why should we read this act in a way that -- so -- so that a defendant under this act who can get attorney's fees is worse off with respect to costs than defendants under the other lending legislation, the ones that have only 54(d)?

Congress gave defendants something more here. Why -- why would -- why should it be that 54(d) would apply to the lender under the Truth in Lending Act but not to the lender under this act?

MS. ZIEVE: Well, first, Your Honor, the Congress's purpose was not simply to -- this isn't just a defendant-friendly provision. Congress had dual purposes in enacting k(a)(3). On the one hand, Congress wanted to deter nuisance suits, but on the other hand, Congress wanted to ensure that meritorious suits by impecunious debtors were not deterred by the prospect that an award of costs would exceed the value of the damage that could be recovered in a successful suit. And the two provisions of k(a)(3) show the line Congress drew and how it balanced those two objectives.

As to the other statutes, the Truth in Lending Act, the Credit Repair Organizations Act, they were enacted at different times by different Congresses, they have different sorts of provisions, some better for plaintiffs, some better for defendants. And -- but this category -- in enacting this statute, Congress emphasized that the widespread and national serious problem of collection abuse that Congress said inflicts substantial suffering and anguish, and noted specifically in the Senate report this Court has cited to in the Jerman case that consumers, the impecunious -- the people who can't even afford to pay their debts, are the primary enforcers of the statute.

The FTC got about 120,000 complaints from

consumers about debt collectors last year, more than any other industry. So Congress may reasonably have decided that the primary enforcers of this statute weren't going to be doing that work if they were -- if they were at risk of significant cost awards in cases that have frequently small value.

There are other ways, if Congress wanted to preserve Rule 54(d), that it could have done it that did not happen here. For instance, in 49 U.S.C. 14707(c), Congress has a similar provision about attorney's fees to prevailing -- attorney's fees to prevailing parties, and then states expressly that fee is in addition to costs allowable under the Federal Rules of Civil Procedure. Congress didn't do that here.

Or Congress could have made it clear that it was not displacing Rule 54(d) as to cost awards by stating that the Court could award attorney's fees as part of the cost, therefore distinguishing fees and costs. Congress has done that sort of thing frequently, including in a statute that provides for an award in cases of bad faith. I'm looking at 28 U.S.C. 1875, that provides the courts may award fees as part of costs if an action was frivolous or in bad faith.

So -- but Congress did none of those things here. Instead, what it did was draft a sentence that

links the term "cost" to the term "attorney's fees" with the conjunction "and," and subjects both of those objects of the sentence to the same condition, the condition that the plaintiff suit was brought in bad faith and for purpose of harassment.

GRC suggests that the reading -- that the statute the Justice mentioned, benefits plaintiffs. But what Congress wanted to do here -- I mean, would benefit plaintiff -- what Congress wanted to do was to help defendants. There's actually no legislative history about why this provision was put in there.

What we have instead, for what it's worth, is a markup later where this provision is discussed in response to concerns that frivolous suits should be deterred, and this provision, which is now already in the statute, is discussed as one means of deterring frivolous suits.

But the bad faith and harassment standard is the dividing line that Congress drew between nuisance suits and other suits. This case is clearly on the non-nuisance side of the line, and cases on that side of the line are not subject to an award of costs.

If the Court has no further questions --

JUSTICE SOTOMAYOR: I would assume that if Rule 54, instead of saying what it currently does, said

something like "except as expressly repealed in another statute," would what happened here meet that express requirement of repeal? It was Justice Scalia's question to you, but reformulated in a different way.

MS. ZIEVE: If Rule 54(d) incorporated a requirement that a statute expressly referred to Rule 54(d)?

JUSTICE SOTOMAYOR: Expressly repealed 54(d).

MS. ZIEVE: That would be a very different case. But of course, Rule 54(d) doesn't do that. Instead, when Rule 54(d) was adopted, the Rules Committee actually -- the advisory committee notes list 25 statutes that it says will not be affected by the rule. Those are statutes that allow fees, forbid fees, condition fees, allow fees in a broader scope of cases than Rule 54(d) does. And of course, none of those would have mentioned Rule 54(d) because they preceded adoption of the rule.

I would reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Feigin.

ORAL ARGUMENT OF ERIC J. FEIGIN,

FOR UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

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

Rule 54(d) expressly codifies in absolute form the well-established principle that a specific provision displaces a more general one. And I think that principle is very helpful here in answering a couple of the questions that have come up.

First of all, it makes clear that no express textual conflict is necessary. This Court's never required one, and the specific governs the general cases.

Let's make even clearer, if you look at the pre-2007 version of the rule, which is meant to be substantively identical to the current version of the rule -- this is at page 12 of the government's brief -- and the original version of the rule said, "except when express provision therefore is made either in a statute of the United States or in these rules, costs should be allowed as of course to the prevailing party unless the Court otherwise directs."

I think that that makes quite clear that when, as the FDCPA does, there is a specific statutory provision that addresses an award of costs incident to the judgment, that specific statutory provision prevails over the default rule that Rule 54(d) contains.

Another point about the specific governing the general principle is it would apply here even if the Court believed that Section 1692k(a)(3) covered some type of circumstances that Rule 54(d) and other things don't.

And that's made quite clear by this Court's recent eight-Justice unanimous opinion in RadLAX Gateway Hotel v. Amalgamated Bank, in which the Court said, and I quote, "We know of no authority for the proposition that the canon," -- they're talking about the specific governance, the general canon -- "is confined to situations in which the entirety of the specific provision is a" -- quote -- "'subset' of the general one."

JUSTICE BREYER: I mean, my problem with this is I don't -- I mean, I read the whole statute, and they have a good claim until I think you read the whole statute. And I don't know what to say other than the impression -- the impression is that subsection 3, which is what's at issue, the whole thing is meant to say that the winner, when it's the plaintiff, is going to get attorney's fees.

You know, it mentions costs, but that's the background rule. And then when you get to the second sentence of that, it means, and if you're in bad faith,

the plaintiff, then the defendant gets attorney's fees. It doesn't really mention costs. That's the background rule.

So -- and I look at the legislative history, there's some staffer, at least, who's tried to find that interesting; the -- they're talking about what the point of this is, and say the whole point of this section is to help prevent frivolous suits.

Well, so there we are. That's -- that's where I am at this moment.

MR. FEIGIN: Well, Justice Breyer, I think it does expressly mention costs both in the first and the second sentence.

JUSTICE BREYER: I didn't say on some technical linguistic basis, it may do that, that's correct. But perhaps I'm unique in this, but I don't just look at the language, I look at the context, I look at the purpose, and -- and I don't see anything in the language that gets rid of the background rule, and I don't see anything in the purpose that gets rid of the background rule, and I don't see anything in the history that gets rid of the background rule.

MR. FEIGIN: Well, Your Honor --

JUSTICE BREYER: I don't see anything in the consequences that suggests that you get rid of the

background rule. I don't see anything in our traditions that says you should get rid of the background rule.

So, what do you do with some obstreperous judge who doesn't just look at the language? I mean, I know uses it, but that's not the only thing.

MR. FEIGIN: Well, Your Honor, if Congress were satisfied with the background rule, then I think it's strange that they added the words "and costs" to a sentence that is expressly --

JUSTICE BREYER: Oh, why? A person who is a drafter says, you know, you get your costs and you also get the attorney's fees. They don't -- they don't know every statute, the people who draft this. They -- they -- they just say, Senator, what are we trying to do? He says, we're trying to give them attorney's fees. They say, okay, we'll give them the costs and the attorney's fees.

MR. FEIGIN: Your Honor, I think that gets back to Justice Ginsburg's question of why weren't they just saying "and costs" here just to make clear that not only fees would be available but also costs. And I think that's an implausible hypothesis of what Congress was trying do for the following reason.

A congressperson who is concerned that a reference to fees alone in the second sentence of

section 1692k(a)(3) would preclude application of the default rule in -- in Rule 54(d), couldn't possibly have thought that the way to make clear that Rule 54(d) applies in full was to add the words "and costs" in a sentence that's expressly --

JUSTICE BREYER: And that's if you had been drafting it, perhaps. But the people who actually draft these things are a whole section over in Congress, they don't know every statute, and you give them a general instruction.

MR. FEIGIN: Well, Your Honor --

JUSTICE BREYER: And the -- the general instruction would be add attorney's fees on the plaintiffs, and add attorney -- all right. You understand the point.

JUSTICE SCALIA: We -- we have to assume ignorance of the drafter.

JUSTICE BREYER: Yes, ignorance of other laws.

JUSTICE SCALIA: As a general principle.

JUSTICE BREYER: That's right, general ignorance.

(Laughter.)

MR. FEIGIN: Your Honor, let me -- let me address that directly. If we're presume that Congress

is aware of Rule 54(d), then I think it's quite peculiar and, in fact, quite counterproductive to have added the words "and costs" to a sentence that's expressly conditioned on a finding of bad faith and purpose of harassment.

But if I accept your hypothesis that Congress was not aware of Rule 54(d), again, it's quite strange that when thinking about the cost-shifting rule that should apply in FDCPA cases, what Congress decided to do was put the words "and costs" into a sentence that's expressly --

JUSTICE BREYER: Well, then they shouldn't have put those words in. We're talking about the next sentence, and the next sentence doesn't put the words in. So you're -- you're -- you're assuming from that fact that in a pro defendant, this is a pro-defendant provision they put in, that was their whole point apparently reading it, that what they decided to do is take away from defendants costs which they normally get without saying anything about it.

I mean, that's -- you understand the problem.

MR. FEIGIN: Your Honor, the words "and costs" appear in both sentences. I agree with Ms. Zieve that the legislative history does not indicate that this

is a uniquely pro-defendant division -- provision, and that's what the Court found in Jerman.

JUSTICE BREYER: It doesn't -- where does it say that? Where was the --

MR. FEIGIN: Your Honor, first of all --

JUSTICE BREYER: -- I would like to read it.

MR. FEIGIN: -- you can look at -- there is no legislative history directly addressing the sentence we're trying to interpret today. But I think if you look at the Court's opinion in Jerman and the hearing cited at page 31 of the red brief, it reflects that Congress was trying to balance deterrence of nuisance suits and incentivizing good-faith consumer enforcement.

If I could, I would like to address the policy reasons why Congress would have found it particularly useful not to have plaintiffs pay cost rule circumstances.

CHIEF JUSTICE ROBERTS: Well, that's a pretty odd way to balance. I mean, if you're -- if you're trying to balance, then you say, well, here's an idea, let's give them attorney's fees, but let's not give them costs.

MR. FEIGIN: Well, the reason not to give --

CHIEF JUSTICE ROBERTS: That's a very curious way to dilute what was otherwise a

defendant-friendly provision.

MR. FEIGIN: Well, Your Honor, I don't think the provision is uniquely defendant friendly. I think it draws a dividing line between nuisance suits and non-nuisance suits premised on a finding of the suit being brought in bad faith and the purpose of harassment.

And the reason why Congress thought it was necessary to shield good-faith plaintiffs from costs here in order to incentivize enforcement, is, first of all, these are particularly low-value suits, especially when compared to other statutes in the CCPA. They're the kind of suits that can be incentivized by a mere $1,000 in statutory damages. And as this case demonstrates, the cost of a suit, if taxed against the plaintiff, can do much more than 1,000 --

JUSTICE BREYER: Did you look up -- did you try to do any sampling on that? Because I did, actually, and -- and I discovered something that I think is not as strong for you, but it isn't too much against you.

We just did a random sample of 28 successful cases, and I think the average recovery, except for one outlier where it was very high, it was around $4,000, 3 to 4, and the average costs on the ones that the

defendants won, I guess, was around a thousand. So you have a point --

MR. FEIGIN: Your Honor --

JUSTICE BREYER: But it isn't quite as good a point as you seem to suggest. That is, it's a not so low value and the costs are not so high --

MR. FEIGIN: Well, Your Honor, plaintiffs --

JUSTICE BREYER: -- in order to make it.

MR. FEIGIN: Plaintiffs here are uniquely likely to be deterred because they're the kind of people who have been pursued by debt collectors. They're going to be in debt themselves; they're not going to be able to pay costs. That's why attorneys -- and that's why the statute provides for attorneys generally to take these cases on contingency, on the hope that they'll recover fees when the plaintiff is successful.

Now, if plaintiff's looking to bring this kind of case, the only out-of-pocket expense the plaintiff is facing is the potential that if it loses the case for some reason that it can't be aware of initially, such as a bona fide good-faith defense or the law being interpreted against them in an area where the law is unclear, they're going to have to pay out of pocket against the plaintiff himself, not the plaintiff's attorney, who are the people the defendant

claims is -- are responsible for the abuses they allege in FDCPA cases. This is going to come out via judgment directly against the plaintiff.

It's difficult to believe that Congress enacted a provision specifically because it believed the debt collection industry was forcing, among other things, personal bankruptcies and wanted the kind of plaintiffs who were going to be in a position to enforce the FDCPA to have to face the risk of incurring thousands of dollars in costs if they lose a suit that they bring in good faith. And the reason --

JUSTICE SOTOMAYOR: Am I to understand your simple position to be that what Rule 54(d) says is if another provision deals with costs, you're relegated to that other provision.

MR. FEIGIN: Well, Your Honor --

JUSTICE SOTOMAYOR: Unless, and this -- you're inverting the express -- unless that provision refers you back to 54.

MR. FEIGIN: Well, no, Your Honor, I'd qualify that a little bit. I think what -- we just think it codifies an absolute form of the specific governance to general principles.

So the first question you asked is whether they're covering the same territory, and they are here.

Both 1692k(a)(3) and 54(d) cover awards of costs incident to the judgment.

The second question you asked is the scope of the displacement. So it's possible that you might have a provision, as the first sentence of 1692k(a)(3) does, that only governs in certain circumstances and mandates an award of costs in those circumstances.

We don't think a sentence like that standing alone would displace a court's discretionary authority under Rule 54(d) to award costs in other circumstances. But we don't think there's any need -- may I finish the sentence, Your Honor?

CHIEF JUSTICE ROBERTS: Finish that sentence.

MR. FEIGIN: We don't think there's any need to adopt some new special rule for Rule 54(d) that's different from how this Court normally applies specific governance to general principle.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE RESPONDENT

MS. BLATT: Thank you, Mr. Chief Justice, and may it please the Court:

Our position is that the second sentence of section 1692k(a)(3) is a pro-defendant provision that does not strip courts of their discretion under Rule 54 to award costs to prevailing defendants. We think that first because of the text and structure, and second, because of the statutory history and purpose.

As to the text, the second sentence states that a court may award an affirmative grant of power rather than the court may award attorney's fees and costs if a plaintiff files a lawsuit in bad faith. The text doesn't say that a court may not award costs in the absence of bad faith. The text doesn't say or even address a court's discretion to award costs to prevailing defendants as an ordinary incident of defeat.

JUSTICE KAGAN: Ms. Blatt, it -- it seems to me that the -- the most natural way to read this statute, and it's not -- it's not your way, it's, look, we have this Federal Rule of Civil Procedure that -- that contemplates that Congress sometimes doesn't write -- it writes statutes authorizing lawsuits without providing a cost provision. And because we know that about Congress, we provide a default rule. And the default rule is what's laid out in subsection D as to costs and then also later as to attorney's fees.

But, we know that Congress sometimes does

address costs and fees, and where Congress in a particular statute has addressed costs and fees, we look to whatever Congress has said, you know, unless Congress has otherwise provided. And here this is -- 1692k is a provision that addresses costs and fees. It addresses them comprehensively and specifically.

MS. BLATT: Yes. I disagree with everything you said for the following reasons --

JUSTICE KAGAN: I expected you might.

(Laughter.)

MS. BLATT: This is not a field preemption case.

JUSTICE KAGAN: It's not a question of field preemption.

MS. BLATT: Yes, it is. You're saying that if it addresses costs, that it trumps it. And it is a -- you would never think -- this -- Rule 54 doesn't say don't award costs if a statute can be plausibly read to address it. It says unless it provides otherwise, which means Congress actually intended to displace.

And unless you actually think that this provision intends to take away a cost authority --

JUSTICE KAGAN: Maybe I'm --

MS. BLATT: -- you don't get there.

JUSTICE KAGAN: -- not in the business of

trying to figure out what Congress's intent is. All I'm trying to figure out is whether this Federal statute provides otherwise, and this Federal statute does provide otherwise.

MS. BLATT: Okay, here's why it doesn't. It doesn't displace it. It doesn't in terms of the plain text; it just doesn't. It doesn't say any -- there's no disabling aspect about it. It's an affirmative grant to protect a defendant, and when you say to a court it has sanctioning power to award attorney's fees and costs, that doesn't say anything about what happens in the ordinary case where the defendant has prevailed at trial and been found to be completely innocent. This --

JUSTICE SCALIA: In -- in that respect, it is different from RadLAX, in which the two provisions -- where we held the specific covers the general, but we held that because the two provisions contradicted each other.

MS. BLATT: Not only do they not contradict, this is not a specific -- when you said -- the other thing I disagreed with, when you said this comprehensively addresses costs, no, this comprehensively is about attorney's fees.

JUSTICE KAGAN: It's both. You know?

MS. BLATT: It is --

JUSTICE KAGAN: And if I might say, I mean, you object to this statute; it's perfectly reasonable to say Congress should have written a separate provision about costs and attorney's fees, but for whatever bad, good or indifferent reason, Congress didn't; and so this statute basically says, here's what prevailing plaintiffs get as to both costs and fees; here is what prevailing defendants get --

MS. BLATT: That's not correct, it doesn't mention prevailing --

JUSTICE KAGAN: -- under what circumstances, as to both costs and fees, and those are the rules.

MS. BLATT: Yes. Unlike -- unlike the whole statute that talks about prevailing plaintiffs, this doesn't. What is fascinating about this case is in all 50 titles of the U.S. Code, there are specific provisions that say, plaintiffs shall not be liable for costs, or a plaintiff shall not be liable for costs unless a certain condition occurs. There's only one statute -- we looked at all 50 titles -- there is one statute that says, a court may award costs if a certain condition occurs. That's the --

CHIEF JUSTICE ROBERTS: By all 50 titles, you don't mean each title, do you?

MS. BLATT: We've -- we've looked for all,

we've looked at all the cost provisions.

CHIEF JUSTICE ROBERTS: Like in Title IX --

MS. BLATT: Yes.

CHIEF JUSTICE ROBERTS: And Title XI?

MS. BLATT: Yes. That's what's so funny about this; nothing in this -- this case -- I don't mean to trivialize it, but there's only one other statute, that Electronic Fund Transfers Act that talks about the court shall award attorney's fees and costs if there is bad faith.

And there is one other statute that says for a prevailing defendant, the court may award costs if the lawsuit is frivolous. And in those three significant ways, I think it shows why we win, and that's a statute they relied on to say it's just like our statute, on page 18 of their brief, page 29 of our brief.

First, it only refers to costs. The statute is about costs. Our statute is about attorney's fees being the main event upon a finding of bad faith. Second, it mentions prevailing defendants; ours doesn't. And third, which I think is missing from the entire 30 minutes that you heard, their argument is plaintiff -- is Congress sat down and wanted to incentivize frivolous suits, and nonfrivolous -- nonfrivolous suits alike. At least in the Pipeline Safety Act, Congress said if it's

frivolous, the defendant gets its costs. Here --

JUSTICE KAGAN: This statute is very -- is very normal if it were just about fees, right? It would be just like the civil rights fees statutes, where it said prevailing plaintiffs get fees, but prevailing defendants only get fees upon some higher standard, here bad faith. What makes this statute different, and it is different, is that this statute twice says not only fees but also costs.

MS. BLATT: Right.

JUSTICE KAGAN: Now you might say that's very uncommon, but in both sentences it says, we want the same rule for costs as we do for fees.

MS. BLATT: Well, I mean, a couple things about that. It's both very common -- fee shifting provisions routinely refer to both fees and costs, just like salt and pepper, peanut butter and jelly, they go together as a set.

JUSTICE SOTOMAYOR: And with that is that there are some statutes that don't.

MS. BLATT: Yes. Yes.

JUSTICE SOTOMAYOR: So it's not always peanut butter and jelly.

MS. BLATT: Okay.

JUSTICE SOTOMAYOR: It's peanut butter and

honey sometimes.

(Laughter.)

MS. BLATT: Yes. And here --

JUSTICE SCALIA: Love and marriage.

(Laughter.)

MS. BLATT: I don't know about that one.

But here -- here I think Congress -- first of all, it's just wrong that the reference to "and costs" is grammatically inexplicable and devoid of practical function; and that is the fundamental point of the blue brief, that this is just grammatically inexplicable, and that's just not true.

What "and costs" does is it, basically the word "and" is being used to mean "in addition to." "And" means "in addition to." And so what Congress is saying is when courts fee shift, attorney's fee shift on a finding of bad faith, courts additionally may award costs in addition to and over and above the attorney's fees that were measured in relationship to the work performed.

JUSTICE BREYER: Suppose you're right. What about their policy argument here, that you're a -- you're a potential plaintiff, you've borrowed a lot of money, you don't have a lot of money. And the deal is this under your interpretation; if you win you're going

to get 2 or $3,000; if you lose it will cost you about a thousand. That's -- that's under your interpretation.

MS. BLATT: Right.

JUSTICE BREYER: And under theirs, it's if you win, you get 2 or $3,000, and if you lose, at least you don't lose anything.

MS. BLATT: Yes. I think their policy argument is -- I mean, it could not be worse. A homeless person --

JUSTICE BREYER: Oh, it could be worse.

MS. BLATT: No, it couldn't be worse, and here's why. A homeless person filing a civil rights case has to pay costs, and at last that person has to pay -- has to prove damages? This plaintiff gets $1,000 for free. Second of all, the plaintiff in this case never asks for relief. Well, 54 is discretionary. If this woman was in pain and suffering, why didn't she say, district court, I can't afford this?

It is the law in every circuit that the district courts don't have to award costs, it's discretionary. So Rule 54 has a built-in safety valve; it accommodates all the policy concerns on the other side, and every other informal paupers litigant, every consumer rights plaintiff, every civil rights plaintiff, every plaintiff in the country faces the risk of a cost

award but doesn't get $1,000 thrown in for free.

JUSTICE GINSBURG: Ms. Blatt, we do have in this case the views of the government regulators, the FTC and the Consumer Finance Protection Bureau, and we have heard the government's position on the relationship between these two provisions. Should we give any weight to the interpretation of the government administrators?

MS. BLATT: Obviously not. I don't even know where they would get a basis for deference. I'm sorry --

JUSTICE SCALIA: We have a lot of cases that say that -- that the agency's views about what courts should do are not entitled to deference. This is -- this is a matter --

MS. BLATT: But that would be Ledbetter, and I don't want to cite that to Justice Ginsburg.

(Laughter.)

MS. BLATT: So I think the better answer is what's so mystifying about their policy argument is that they enforce -- they enforce 20 consumer protection statutes, and all of them, their -- their plaintiffs have to pay costs.

JUSTICE BREYER: What about the -- how does this work, the canon? I'm very interested.

MS. BLATT: They're --

JUSTICE KAGAN: Sorry. I'm sorry.

JUSTICE BREYER: I'm very interested in canons, and I want to know on the canon, the traditional thing, which you've probably looked up, what about the specific governs the general? Is it -- how is that, that's an old canon that's been around a long time, and people are aware of it, and --

MS. BLATT: Well, I'm happy to go canon to canon.

JUSTICE BREYER: This is -- seems to be the one they feel is very important.

MS. BLATT: That's the government. The --

JUSTICE BREYER: Yes. Well, that's what I'm interested in.

MS. BLATT: Okay. Well, I don't think -- canons, you know, don't trump common sense, context, history --

JUSTICE BREYER: That -- that's a different matter.

MS. BLATT: But let's go to canons. Let's go to canons, specific versus the general. It's all word games. It turns on what you think "specific" means. This is not specific to the question presented about prevailing parties and costs. This is about attorney's fees. That -- and costs are on top of

attorney's fees, is essentially how --

JUSTICE KAGAN: Well, you say that, but it says to both. It says the costs together with the reasonable attorney's fees, and then the next sentence it says fees and costs. So you might wish that they were a different statute, and it might be good policy to have a different statute --

MS. BLATT: I don't wish for a different statute. I think what you're saying is that Congress passed a firewall; Congress said, we need to encourage frivolous suits and nonfrivolous, but let's put a firewall in and give them fees and costs, that God forbid there is bad faith and harassment.

JUSTICE KAGAN: I'm not in the business -- I'm not in the business of trying to figure out exactly what Congress is doing. I'm in the business of just reading what Congress did; and what Congress did is it created a set of rules that applies to attorney's fees and costs at the same time.

MS. BLATT: It -- it affirmatively gives district courts emboldening power to sanction. So --

JUSTICE KAGAN: That sounds very terrible.

MS. BLATT: But not if you file a lawsuit in bad faith and for purposes of harassment. So I mean -- I think even -- I think the history is obvious; this was

trying to make defendants better off than the defendant's suit under the Truth in Lending Act which is part of the same umbrella Consumer Credit Protection Act, and they're -- inexplicably, somehow, by trying to make them better off made them worse than every other creditor that they serve, and immunized these plaintiffs from the universal risk of cost shifting that every other litigant has to face, and so -- and you don't get there from -- all they have is a negative inference.

JUSTICE KAGAN: Well, Ms. Blatt, you say it -- it's supposed to make defendants better off by focusing on just part of the provision, but the provision is -- as a whole, it does a set of things. It treats plaintiffs and prevailing plaintiffs in a certain set of ways, and it treats prevailing defendants in a certain set of ways.

MS. BLATT: It doesn't speak to prevailing defendants.

JUSTICE KAGAN: Prevailing defendants, but when -- prevailing defendants are treated worse than prevailing plaintiffs, because they have to show that there is a bad faith lawsuit.

MS. BLATT: Yeah, I'm going -- I'm going to keep repeating it because it's my position. This doesn't -- does the fact that this doesn't refer to

prevailing defendants speaks volumes that what was not on Congress's mind was Rule 54. What was on Congress's mind is victimized debt collectors who were sued in bad faith.

Now, I understand this is a pro-plaintiff statute, but this would be extraordinary to think that they gave them attorney's fees when they -- but it's basically saying -- this is a -- this is a defendant who went to trial and won, was law abiding, didn't do anything wrong, and Congress in that situation said not only might -- might not the suit be -- be -- have merit or good faith, it might have even been frivolous.

When under Rule 54 -- again, this is what I find so mystifying about this case. If the petitioner thought, oh, I had a really hard case in the law or oh, I'm really poor, she could have asked for discretionary relief. Instead, the lawyer went into court and said, I have a recent Ninth Circuit decision and I don't have to pay costs at all.

JUSTICE KAGAN: Ms. Blatt, let me try it a different way.

MS. BLATT: Okay.

JUSTICE KAGAN: Let's just suppose that 54(k) didn't exist at all.

MS. BLATT: 54(d)?

JUSTICE KAGAN: 54(d) didn't exist.
MS. BLATT: Okay.
JUSTICE KAGAN: And all you had was this provision, okay?
MS. BLATT: Uh-huh.
JUSTICE KAGAN: So this provision says on a finding by the court that it's brought in bad faith, the court may award to the defendant attorney's fees and costs. So suppose a defendant wins, but there's not a finding that it was made in bad faith, would then the person be entitled to either attorney's fees or costs?
MS. BLATT: Well, we wouldn't -- certainly, we sought costs here under Rule 54.
JUSTICE KAGAN: I'm saying that --
MS. BLATT: I know. Okay. And you've took it up. So that takes out my route seeking for costs under Rule 54, it doesn't exist in your world.
JUSTICE KAGAN: In my world, you would not get fees or costs.
MS. BLATT: I'm imagining then the world in 1936, and we rely on 1920 or 1919 or the long-standing practice of courts awarding costs. Now, a court might --
JUSTICE KAGAN: I'm just asking you a simple question.

MS. BLATT: We would not get costs under this provision, you're correct.

JUSTICE KAGAN: You would not get costs under that provision.

MS. BLATT: Because this -- in that sense, I think this was a question that another justice asked. If you just look at this provision, the only basis for costs and fees in this provision is the bad faith finding of harassment.

JUSTICE KAGAN: Okay. So if you would not get costs under that provision --

MS. BLATT: Under 1692.

JUSTICE KAGAN: -- under 1692, a provision that talks about fees and costs generally as to both plaintiffs and defendants, then how does a rule that says what -- where you would get costs unless a Federal statute provides otherwise change matters?

MS. BLATT: Because -- because, again, Rule 54 is not preemption, a field preemption. It's saying if Congress intended to displace, the proviso, unless otherwise provided, it was recognition that other statutes might displace Rule 54. And if you look at all the statutes that we cite on pages 19 and 20, they actually do prohibit costs. And then if you look at the statutes on pages 24 and 25, where time and time again

Congress has said a prevailing party may recover attorney's fees and costs, well, the "and costs" in their view, I guess those statutes are inexplicable. I mean, it's clearly they're redundant and they overlap with Rule 54. They don't displace it. And even the practice guides that we cite on page 22, which is basically Wright and Miller and Moore, say something that merely overlaps with Rule 54 doesn't displace the court's discretion.

And again, I think you have to ask yourself, what was Congress doing? To me, this is -- this is a -- the attorney's fees are the main show, it goes with bad faith, Congress was not thinking about Rule 54, and I think you can be quite confident Congress was not thinking, we want plaintiff lawyers to go around saying not only Congress, but the government wanted us to file frivolous suits.

JUSTICE KAGAN: You might be right, but suppose Congress wasn't thinking about Rule 54. Suppose it didn't occur to the drafters what Rule 54 said or what the default provision was. They just wrote a statute about fees and costs. And then -- it doesn't really matter whether they were thinking about Rule 54 or not.

MS. BLATT: Yes, if you -- right. And so

there's like that Oncale case with same sex harassment, Congress can write a very -- can write a plain language provision and regardless of what Congress intended, if the language covers it, that's tough, we're going to construe it. That's your law.

This is not that. This -- this doesn't say anything about prevailing parties. This is talking about bad faith and attorney's fees. It doesn't say a court can't act in the absence of bad faith, it doesn't say anything about prevailing parties, it doesn't reveal any intent to displace it, especially when you compare it with all the other statutes, you look at the history. Sorry.

JUSTICE SOTOMAYOR: Counsel, it was thinking about prevailing parties because the predecessor sentence --

MS. BLATT: Prevailing defendants -- I agree, sorry.

JUSTICE SOTOMAYOR: But it was talking -- no, prevailing parties. The provision is geared towards prevailing parties in some form. The first sentence says a prevailing plaintiff, not whether it's on a substantial basis or any exception.

MS. BLATT: Yeah.

JUSTICE SOTOMAYOR: It says you get fees or

you can get fees and costs.

MS. BLATT: Right.

JUSTICE SOTOMAYOR: So it then decides to limit what a prevailing defendant can do. Isn't that a natural reading?

MS. BLATT: No, because it says expressly in a case of successful action, it talks about prevailing plaintiffs, and then it says if there's -- to me, it's just -- it's natural when you just read it in light of sort of common sense in context in what Congress was doing. If a plaintiff files in bad faith, the court is empowered and emboldened -- it's like a neon light -- courts, you have authority to award attorney's fees and costs.

JUSTICE KAGAN: Well, that's -- that's just a different way of saying the following: The first sentence says, when you're a prevailing plaintiff, you get costs and fees. How about defendants? Well, prevailing is not enough for defendants. Defendants have to show --

MS. BLATT: Yeah.

JUSTICE KAGAN: -- that the suit was filed in bad faith --

MS. BLATT: Yeah, and I think --

JUSTICE KAGAN: -- and then they get costs

and fees.

MS. BLATT: Right. And I think you have to keep this in mind that there are completely diametrically opposed background presumptions in our legal system. It's an extraordinary event to get attorney's fees, and it's an extraordinary event not to get costs. And so the court -- the Congress has to use explicit language to over -- overturn the American rule. And so what Congress did here, that is the most natural, even if I drew you to a tie --

JUSTICE KAGAN: I completely agree with that. But that's what it comes down to, that if you think that Congress has to use super extraordinary language to over -- to -- to get out of 54(d), then you're right. But 54(d) doesn't say that. It just says --

MS. BLATT: Right, and --

JUSTICE KAGAN: -- unless the Federal statute provides otherwise.

MS. BLATT: And I think you can look -- the Petitioner did -- did a valiant job of trying to drudge up as many statutes as they can. All the statutes on point are explicit. Now, there's one statute that might not be, the pipeline safety one. And so the question is: Do we think that Congress actually tried to

displace a court's authority under that statute, and that's a statute that just says a court may award costs if a lawsuit is frivolous. This one just doesn't say that.

You at least -- even if you don't think of it as magic language or an explicit statement, the fact that Congress repeatedly has used explicit language casts considerable doubt that this was done by mere implication, and then you look at the fact that it doesn't mention prevailing parties, it's talking about bad faith, it has attorney's fees, what was Congress doing, you look at the legislative history, it shows that it was -- it was trying to make them better off than a class of defendants, but their view inexplicably makes them worse off.

And then you look at the result that they're actually advocating that the government thinks it's a good idea that plaintiffs can file lawsuits cost free that are frivolous. I mean --

JUSTICE SCALIA: I guess in the first sentence of 3, the phrase "the costs of the action" is really superfluous in light of 54(d)(1). You really don't know that. I mean, that would have been the case anyway. So there's no reason to think that it isn't frivolous in the second sentence -- or superfluous in

the second sentence, right? Why did they have to say the costs of the action in the case of a successful action?

MS. BLATT: Successful action to enforce it.

JUSTICE SCALIA: The costs of the action, together with a reasonable -- as determined by the court.

MS. BLATT: Why isn't --

JUSTICE SCALIA: They -- they have the costs anyway, if Congress didn't write anything, right?

MS. BLATT: I mean, I think that -- again -- I mean --

JUSTICE SCALIA: I'm trying to help you.

(Laughter.)

MS. BLATT: Yeah, I know. And I was going to say there's so much is superfluity in here, I don't know where to begin. It's all over the place. The whole thing obviously overlaps with the court's inherent authority.

JUSTICE SOTOMAYOR: You don't think that there's a serious argument that the first sentence does away with the discretionary nature?

MS. BLATT: No, it's clear "shall." It's clear "shall" obviously. The first sentence does --

JUSTICE SOTOMAYOR: So it's a command.

54(d) is permissive according to your earlier argument.

MS. BLATT: Oh, yes, that's right. Yes.

JUSTICE SOTOMAYOR: And so this does -- it's not superfluous because it went to mandatory.

JUSTICE SCALIA: Gotcha.

MS. BLATT: That's true.

JUSTICE SCALIA: Well taken.

MS. BLATT: Yeah. The question, though, was in the case of any successful action when, obviously, they prevailed to begin with, so the question is whether that's superfluous. But the whole provision overlaps with the court's inherent authority. And I know it hasn't come up, but I just think it's strange that it says for the purposes of bad faith and harassment, Congress was obviously using belt and suspenders there, so it's not surprising that Congress added "and costs" here.

If you look at Rule 54 -- let me just say one other thing, Justice Kagan -- if you look at Rule 54, it also says "unless the statute provides otherwise, costs other than attorney's fees." So why -- they didn't have to say that, because in the next provision it talks about attorney's fees. They just -- they wanted to make clear for whatever reason or maybe they just wrote some really excess, redundant, silly

language, but they said costs, meaning anything that's not costs. It's just that Congress sometimes uses these, and I guess this was the honey and peanut butter thing, that a lot of fee-shifting statutes talk about both attorney's fees and costs, and so they went together and -- they also mentioned it. Obviously, it's different. I agree that there's a verb in the first sentence that's mandatory, so it trumps Rule 54.

But with respect to the two objects, Congress was already thinking about attorney's fees and costs anyway and so there's nothing wrong with them saying, in addition to the attorney's fees that you can get in bad faith, once you calculate the attorney's fees reasonable in relation to the work performed, you also get costs.

And the only thing I would say, when we define "and" as in addition to, they seem to think that that was an extraordinary reading of the word "and," citing something from something called dictionary.com, and if you just went to dictionary.com, which I had not done before, and you type in "and," the first definition is "in addition to."

If there are no further questions --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Zieve, you have six minutes remaining.

REBUTTAL ARGUMENT OF ALLISON M. ZIEVE

ON BEHALF OF THE PETITIONER

MS. ZIEVE: Thank you.

First, the FDCPA doesn't just encourage frivolous suits. Ms. Blatt repeatedly referred to plaintiffs getting a free $1,000. If the -- if the plaintiffs win their suits, that means both that they're not frivolous and they're not in bad faith. In cases that are frivolous but a court makes a finding that it's not in bad faith, defendants have other means of recovering fees and costs using Rule 11 or Section 1927; and there are cases in which courts have denied fees and costs under the FDCPA and granted them under Rule 11 or 1927.

Ms. Blatt suggested that --

JUSTICE GINSBERG: Would you explain why we would look to other rules? You wouldn't look at the Rule 54(d), and we might look at Rule 11 and we might look at something else? I thought your -- your position was that this statute governs all requests for fees and costs under this particular Act.

MS. ZIEVE: Our position is that this provision, k(a)(3), discusses the allocation of fees and costs that come at the end of the case based on who won and who lost. And if you read it as a whole, as I think

Justice Kagan suggested, that's what Congress was doing. It was carefully calibrating the allocation of fees and costs at the end of the case. And, in fact, in instances in which -- which defendants have asked for fees and costs in FDCPA cases based on bad faith, they do always come at the end of the case.

Which also shows this is not a misconduct provision. If it were a misconduct provision, it wouldn't just be about bad faith in bringing the action. The Fair Credit Reporting Act, for example, has a provision that provides for fees but not costs that speaks to conduct throughout the case, but with respect to bad faith filings of pleadings, motions, or other papers. That's a misconduct provision; this one isn't.

The main --

JUSTICE SCALIA: Isn't it -- isn't it the case that, in order to appeal to the proposition that the specific governs the general, you -- you have to read the second sentence of 3 as containing a negative -- a negative implication? As saying --

MS. ZIEVE: Yeah. We do read the "court may award" to mean "and, in other circumstances, it may not."

JUSTICE SCALIA: It may not. So you are reading in a negative --

MS. ZIEVE: Just as this Court -- just as this Court read "may" in Cooper Industries or Crawford Fittings and said, "If you don't read 'may' to define the scope of what Congress is authorizing the court to do, then that provision has no meaning."

JUSTICE KAGAN: I understood Ms. Blatt to actually agree with that, that if you put Rule 54 aside, this does say, "You may, under a certain set of conditions," which implies you may not, under -- if those conditions are not met.

MS. ZIEVE: Right, she did agree that without Rule 54 this provision -- that -- that no costs could be awarded to a defendant unless they had acted in bad faith.

I mean, I think at some points GRC and Ms. Blatt here today asked you to just ignore that "and costs" exists in the sentence at all. Although the fact that this sentence is not replicated numerous times throughout the U.S. Code doesn't seem to me reason for ignoring it, but, rather, for giving effect to it.

Congress obviously thought it was doing something when it enacted this sentence and when it added these words to the statute. It does not say, "The court may award fees in addition to costs" or "as part of costs" or "together with costs." Again,

grammatically, it treats the two terms, "fees and costs," on a par --

JUSTICE SCALIA: Suppose -- suppose the words "and costs" were left out in the second sentence. Would not the argument be made that you cannot award costs even in an action brought in bad faith? Wouldn't -- that this sum argument you're making --

MS. ZIEVE: No, I don't think so. There are -- no. There are statutes that provide for fee awards and don't -- don't say anything about costs, and these cases are --

JUSTICE SCALIA: But you're saying "negative implication." If it -- if it says only "attorneys fees in reasonable relation to the work expended" the implication would be you --

MS. ZIEVE: Justice Scalia, other --

JUSTICE SCALIA: -- you cannot -- you cannot, even in the case of a frivolous action, award costs. Wouldn't that be the reading of it?

MS. ZIEVE: In other cases under other statutes, that argument has been made occasionally and rejected. It's also rejected in the treatises that we cite that if you don't mention costs --

JUSTICE SCALIA: Yes. But I'm suggesting if that argument is rejected, so should yours be.

MS. ZIEVE: No. Because --

JUSTICE SCALIA: Because it seems the two are parallel.

MS. ZIEVE: If the -- if the statute does not mention costs, then it doesn't provide otherwise with respect to costs.

JUSTICE BREYER: So she says if I -- if I tease -- if you tease your sister, I'm going to give you -- give her your allowance and her allowance, that that doesn't mean that the sister loses her allowance if you don't tease her.

I mean, there are a lot of instances --

MS. ZIEVE: Well --

JUSTICE BREYER: -- where you put the "and" in and it doesn't mean that that's the exclusive place for giving it. Sometimes, it does; sometimes, it doesn't. That's her point.

MS. ZIEVE: Well, putting aside that I hope that Congress drafts a little more carefully than a mother may threaten her child --

(Laughter.)

JUSTICE BREYER: I doubt that it does. I mean, they're human beings over there; they're not necessarily all --

MS. ZIEVE: But they're -- the presumption

behind that hypothetical is that the one child is going to get their allowance no matter what. The presumption here is that Rule 54(d) will apply unless a statute provides otherwise. This statute doesn't.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)