NO. 11-1175

IN THE
Supreme Court of the United States

OLIVEA MARX,
Petitioner,

v.

GENERAL REVENUE CORPORATION,
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The question in this case is whether § 1692k(a)(3) of the Fair Debt Collection Practices Act (FDCPA) "provides otherwise" than Federal Rule of Civil Procedure 54(d), by awarding costs to prevailing defendants only in cases brought in bad faith and for the purpose of harassment. Answering this question yes, Ms. Marx's reading of § 1692k(a)(3) gives meaning and effect to each word in the relevant sentence. In contrast, respondent General Revenue Corporation (GRC) concedes that, under its reading, the sentence would have exactly the same meaning if the words "and costs" were omitted.

As an alternative ground for affirmance, GRC asks this Court to do something extraordinary: overturn a 31-year-old precedent resolving a question about Rule 68 that was not briefed below, was not mentioned in the opposition to the petition for certiorari, and is not fairly encompassed in the question presented in the petition. This case presents no opportunity for the Court to revisit the Rule 68 question.

ARGUMENT

I. Section 1692k(a)(3) Provides Otherwise than Rule 54(d).

This Court has "restated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The FDCPA states that "upon a finding that an action 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). This provision conditions an award of costs to a prevailing defendant, like an award of fees, on a

finding of bad faith and intent to harass. "To read it otherwise is to suggest Congress passed a statute permitting a cost award conditioned upon a finding of bad faith, but intended to permit cost awards without a finding of bad faith." Pet. App. 25a (dissent).

A. GRC declares (at 14) that the "principal focus" of § 1692k(a)(3) is awarding attorney's fees, and that the "passing reference" to "costs" does no more than "confirm" that defendants can seek costs under existing law. The text itself belies GRC's claim, as each of the two sentences of § 1692k(a)(3) focuses equally on fees and on costs. And GRC fails to explain why, if Congress simply wanted to "confirm" that a prevailing defendant may always seek costs, the statutory text provides for costs *only* in cases of bad faith and harassment.

Unhappy with the text that Congress enacted, GRC tries to bolster its argument by rewriting the provision to replace "and" with "in addition to." Specifically, GRC suggests (at 15) that the clause "the court may award to the defendant attorney's fees . . . and costs" means that "the court may award to the defendant attorney's fees . . . [in addition to] costs." "And" and "in addition to" are not, however, interchangeable, as the latter conveys the idea of adding onto an existing object. *See*, *e.g.*, Dictionary.com, http://dictionary.reference.com/browse/in+addition+to (defining "in addition to" as "as well as; besides").

For example, in the Equal Access to Justice Act (EAJA), after providing that costs "may be awarded to the prevailing party" in an action by or against the United States, 28 U.S.C. § 2412(a), Congress used "in addition to" to address fee awards:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party

> other than the United States fees and other expenses, *in addition to* any costs awarded pursuant to subsection (a), incurred by that party in any civil action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Id. § 2412(d) (emphasis added). Thus, an award of EAJA fees depends on the conditions stated in the final clause ("unless . . . the position of the United States was substantially unjustified or . . ."). But as indicated by the words "in addition to," a cost award is not subject to the condition. *See*, *e.g.*, *Neal & Co., Inc. v. United States*, 121 F.3d 683, 686 (Fed. Cir. 1997) ("[S]ections 2412(a)(1) and 2412(d)(1)(A) clearly treat costs differently from fees.").

In the FDCPA, Congress could have drafted a similar provision, conditioning fees—but not costs—on the satisfaction of a condition. Congress did not do so. Instead, it crafted a sentence in which the condition applies equally to both objects, fees and costs. The sentence structure affords no other reading, and, other than by rewriting the sentence, GRC does not suggest one.

GRC argues (at 15) that Congress may have included "and costs" out of an "abundance of caution" because, otherwise, "doubt might have existed from a lack of parallelism between the first and second sentences" of § 1692k(a)(3). Such doubt would have been unwarranted, however, because "[t]he fact that a particular statute mandates costs to a prevailing plaintiff does not imply that the court's discretion to award costs to the prevailing defendant is in any way curtailed." 10 Fern Smith, *Moore's Federal Practice* ¶ 54.101[1][c] (3d ed. 1997). *See*, *e.g.*, *O'Ferral v. Trebol Motors Corp.*, 45 F.3d 561, 564 (1st Cir.

1995) (RICO provision for mandatory cost award to prevailing plaintiff "does not affect an award of defense costs—which RICO does not address"); *Lewis v. Pennington*, 400 F.2d 806, 819 (6th Cir. 1968) (although Clayton Act mandates cost award to prevailing plaintiff, court retains discretion to award costs in cases where plaintiff does not prevail).

In any event, maintaining "parallelism" plainly did not motivate Congress to insert the words "and costs" into the second sentence of § 1692k(a)(3) because, even with "costs" in each sentence, the first and second sentences of § 1692k(a)(3) are *not* parallel. The first sentence addresses a *mandatory* award that is *not* subject to a condition, while the second addresses a *discretionary* award that *is* subject to a condition. *See* Pet. Br. 2. The sentence structure and wording are likewise different. *Compare*, *e.g.*, "costs, together with a reasonable attorney's fee," *with* "attorney's fees reasonable in relation to the work expended and costs." In short, "parallelism" could not have been Congress's concern because in neither substance nor wording are the two sentences parallel.

B. GRC does not contest that its reading, unlike Ms. Marx's reading, fails to give effect to each word in § 1692k(a)(3). Instead, GRC argues (at 17-18) that the superfluity inherent in its reading makes sense in context. The context it offers, however, runs far afield, looking to spoken conversation between a mother and her child. Of course, spoken language is often imprecise and is not subject to an interpretative rule with respect to avoiding superfluity. *See* Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 Geo. Wash. L. Rev. 309, 347 (2001) ("The techniques of understanding natural language in ordinary conversation

cannot all be uncritically imported into the task of statutory interpretation.").

Even putting aside the critical distinction between casual speech and statutory text, GRC's examples fail to prove its point. GRC posits (at 17-18, 27) as its primary counterexample that the sentence "if you eat your dinner, you may have milk and cookies," when spoken by a mother to her child, cannot mean that if the child does not eat dinner, he cannot have milk because, GRC says, "children presumptively are expected to drink milk, before, during, and after dinner." In this way, GRC creates a presumption (that a mother will give her child milk regardless of whether he eats his dinner) from which its conclusion follows (that the mother will give her child milk regardless of whether he eats his dinner). In some households, however, the presumption is not that the child will always drink milk.[1] In such a household, GRC's hypothetical mother might be offering milk as a post-dinner treat on the condition that the child eats dinner. Thus, the meaning of the sentence depends on the background presumption.

Here, the background presumption is not that costs (GRC's milk) will always be awarded, but that costs will be awarded *unless a statute provides otherwise*. When a statute does "provide otherwise," the presumption does not apply, as Rule 54(d) plainly states. Accordingly, even if Congress legislated judicial authority as a mother speaks to a child, the "context" of this case does not support reading § 1692k(a)(3) to render "and costs" superfluous.

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[1] *See, e.g.*, U. Mich. Health System, *Feeding Your Baby and Toddler*, at http://www.med.umich.edu/yourchild/topics/feedbaby.htm (Sept. 2010) ("Preschoolers should not drink more than a maximum of 16-24 ounces (2-3 cups) of milk each day.").

GRC contends (at 24) that, because many statutes provide for a discretionary award of costs, "the canon against superfluity should . . . give way." GRC's reliance on statutes providing that a court "may" award costs to the prevailing party is misplaced. Virtually all of these statutes "provide otherwise" than Rule 54(d) by providing for an award of attorney's fees in addition to costs (sometimes stated as "part of costs"), and Congress has enacted such statutes dozens of times without specifying the reason for including "costs." Nonetheless, regardless of whether the reference to "costs" in these statutory provisions is duplicative of Rule 54(d) to the extent that the provisions do little more in regard to costs than create a statutory basis for the award provided for in Rule 54(d), GRC points to no statute that poses the conundrum that GRC faces with respect to § 1692k(a)(3): While Congress in the cited statutes essentially codified Rule 54(d)'s costs standard in its entirety, Congress did not do so in § 1692k(a)(3). Instead, it codified a *subset* of the Rule's provision for costs—a strange choice if Congress wanted Rule 54(d)'s standard to apply in *every* FDCPA case.

Further, to read statutory language as duplicative of existing authority or superfluous given other statutory text may be warranted where the provision at issue is not reasonably susceptible of another construction. GRC offers no authority, however, to support doing so when the provision is susceptible of another reading that gives effect to every word. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (noting "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute" (citation omitted)); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (adopting reading that is "the only one that makes sense of each phrase in" statutory provision). Moreover, the question

here is not whether provisions in other statutes that merely reiterate Rule 54(d) are unnecessary. The question is whether a provision that states an alternative rule is given effect.

Trying a different approach to support superfluity, GRC suggests (at 16, 25) that the *entirety* of the second sentence of § 1692k(a)(3) is "redundant with a court's inherent authority" to award fees as a sanction for bad-faith conduct and a court's "rule-based authority respecting cost-shifting." It is unclear how that suggestion helps to discern the function of "and costs" in the sentence, and the recognition that courts' authority to award costs is "rule-based" begs the question whether § 1692k(a)(3) "provides otherwise" than the rule. GRC also fails to explain how a provision that ties an award of costs to bad faith and an intent to harass simply "confirms" a rule-based authority that is not so tied. Furthermore, to the extent that GRC is arguing that § 1692k(a)(3) is entirely superfluous with respect to an award of costs in cases brought in bad faith and to harass, that argument would apply equally to an award of fees—which all parties agree § 1692k(a)(3) authorizes in cases brought in bad faith and to harass. GRC's argument thus turns the superfluity rule on its head. Unlike GRC's reading, which renders the sentence entirely superfluous, Ms. Marx's reading gives the sentence operative effect, limiting the circumstances in which a prevailing defendant may be awarded costs.

GRC next argues (at 26) that the reading advanced by Ms. Marx and the Solicitor General would mean that § 1692k(a)(3) overrides the courts' inherent power to sanction willful disobedience of a court order. GRC is incorrect. As Ms. Marx and the Solicitor General have explained, the second sentence of § 1692k(a)(3) covers the field of awards to a defendant when the plaintiff does not

prevail. Section 1692k(a)(3) does not address costs awarded for other reasons, such as to sanction misconduct or under Rule 68.

Although GRC primarily argues that the second sentence of § 1692k(a)(3) reiterates Rule 54(d), it also floats (at 23) the idea that the sentence may broaden the courts' authority to award costs to *non-prevailing* defendants and, in this way, address a different subject altogether than does Rule 54(d). Section § 1692k(a) rebuts this theory, as it provides that a non-prevailing defendant "is liable" for the plaintiff's costs and reasonable attorney's fees. To read the provision as providing both for a non-discretionary cost award *against* a non-prevailing defendant and a discretionary cost award *for* a non-prevailing defendant would make no sense, as the latter would be meaningless in light of the former. The sole case that GRC cites (at 23) illustrates this point: In *Cohen v. American Credit Bureau, Inc.*, 2012 WL 847429 (D.N.J. 2012), the court awarded fees to the plaintiff, who had prevailed, not to the defendant.

Building on GRC's theory, amicus ACA International posits (at 6) that "and costs" in § 1692k(a)(3) may serve the independent function of providing authority for courts to award costs to a non-prevailing defendant when a plaintiff voluntarily dismisses her case. Citing cases that do not address the issue, ACA offers no reason to think that Congress had this category of cases in mind or believed costs to be unavailable under Rule 54(d) in such cases. In fact, courts have authority to award costs after voluntary dismissal. *See* 10 Charles Alan Wright, et al., *Federal Practice & Procedure* § 2667 & n.14 (3d ed. 2012); *Cantrell v. Int'l Bhd. of Elec. Workers*, 69 F.3d 456, 458 (10th Cir. 1995) (en banc) (cost award under Rule 54(d) based on voluntary dismissal with or without prejudice); *see also* Fed. R. Civ. P. 41(a)(2) (2012) (court order may impose

terms on voluntary dismissal). And ACA says nothing about the state of the law when the FDCPA was enacted in 1977, which Congress would have understood to allow cost awards following voluntary dismissals. *See Mobile Power Enters., Inc. v. Power Vac, Inc.*, 496 F.2d 1311, 1312 (10th Cir. 1974) (stating that defendant is entitled to costs where plaintiff voluntarily dismisses action without prejudice), *overruled on other grounds by Cantrell*, 69 F.3d at 456; *Lawrence v. Fuld*, 32 F.R.D. 329, 331 (D. Md. 1963) ("Defendants have cited a wealth of authority showing that dismissals [without prejudice] have been conditioned upon payment of costs in varying amounts[.]"); *see also* Fed. R. Civ. P. 41(a)(2) (1976) (court may impose terms and conditions on dismissal by plaintiff). As with cases dismissed on the merits, § 1692k(a)(3) restricts cost awards in voluntarily dismissed cases to those in which the court finds bad faith and an intent to harass. ACA's notion thus does not provide an alternative purpose for "and costs."[2]

Finally, the words "and costs" cannot be explained away as indicating that awardable costs under the FDCPA are not confined to taxable costs specified in 28 U.S.C. § 1920. If statutes providing for costs authorized awards of items outside of § 1920's enumeration of awardable costs, § 1920 would not apply to awards under dozens of statutes. *See*, *e.g.*, Resp. Br. 21 nn. 2-4 & 24 (listing statutes that specify cost shifting). This Court has repeatedly rejected such suggestions. *See Arlington Cent. Sch. Dist. Bd. of*

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[2] ACA International also errs in contending (at 12) that Ms. Marx's reading would dramatically increase the number of statutes that trump Rule 54(d). A statute that addresses a different matter from Rule 54(d)—for instance, to take ACA's example, one that addresses an award of costs against an attorney, rather than a party, *see* 28 U.S.C. § 1927—does not displace the Rule 54(d) presumption.

Educ. v. Murphy, 548 U.S. 291, 297-98 (2006) (in Individuals with Disabilities Education Act, "recoverable costs is obviously the list set out in 28 U.S.C. § 1920"); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 102 (1991) (costs under 42 U.S.C. § 1988 limited to costs set out in 28 U.S.C. § 1821 and § 1920); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987) (rejecting argument that "costs" in Rule 54(d) are not limited to the list set out in § 1920). Accordingly, decisions in FDCPA cases awarding expenses that are not taxable costs make such awards as part of the attorney's fee, not as "costs." *See Giovannoni v. Bidna & Keys*, 255 F. App'x 124, 126 (9th Cir. 2007); *McNall v. Credit Bureau of Josephine County, Inc.*, 2011 WL 711095, at *6 (D. Or. 2011).

C. GRC seems to concede (at 22) that applying a clear statement rule to determine whether a statute provides otherwise than Rule 54(d) is unwarranted. At the same time, GRC would impose arbitrary restrictions on the way in which a statute can provide otherwise. Based on an inapposite string cite to statutes that bar an award of costs against plaintiffs or petitioners, GRC at first argues (at 19) that "Congress knows how to foreclose a court's discretion under Rule 54(d) when Congress so intends." Here, by contrast, Congress was not foreclosing the court's discretion; it was limiting it to cases that satisfy a stated condition.

GRC later agrees that Congress can limit discretion without foreclosing it, but seems to argue (at 19-20) that Congress must phrase the limitation in a particular way. Essentially, GRC argues that a statute can condition an award of costs by stating that costs will *not* be awarded "unless" a condition occurs, but a statute cannot condition an award of costs by stating, as does § 1692k(a)(3), that costs *may* be awarded *if* a condition occurs. GRC offers no

support for this proposition, and no rule of grammar or statutory construction justifies it. Indeed, the 1937 advisory committee's note cites a statute that follows the "may . . . if" format as an example of one that will be unaffected by Rule 54(d). *See* Fed. R. Civ. P. 54 advisory committee's note (1937) (citing 15 U.S.C. § 77k(e), which provides that "costs may be assessed" in favor of a prevailing party "if the court believes the suit or the defense to have been without merit").

D. GRC spends several pages discussing the legislative history of the FDCPA and citing statements of various senators during a markup session on a version of the bill that became the FDCPA. *See* Resp. Br. 30-32 (citing Markup Session, S. 1130—Debt Collection Legislation (July 26, 1977)). Read in context, the markup discussion reflects Congress's effort to draft a statute that balanced "the incentive on the part of the debt collector to abide by the law" and "the incentive for the consumer to file a suit if he's been subjected to an abuse." Markup Session at 17 (statement of Sen. Taffer). Most of the discussion (including most of the pages cited by GRC) centered on statutory damages caps, proof of harassment of consumers by debt collectors, and suits over technical violations. Neither the bona fide error defense nor the provision for awarding fees and costs to defendants was debated at the markup; the provisions were mentioned by senators explaining their view that concerns articulated about meritless litigation were already addressed in the bill.

To the extent that the markup discussion says anything about § 1692k(a)(3), it reflects the statement incorporated into the Senate Report on the final version of the bill that, under § 1692k(a)(3), "to protect debt collectors from nuisance suits," a court may award fees and costs to a debt collector if the court finds that a consumer brought a case

in bad faith and for the purpose of harassment. S. Rep. No. 95-382 at 5 (1977). The markup, like the Senate Report, does not shed light on the answer to the question here—whether § 1692k(a)(3) "provides otherwise" than Rule 54(d) by conditioning an award of costs to prevailing defendants on a finding of bad faith and intent to harass. And whereas "clear evidence of congressional intent may illuminate ambiguous text," this Court does "not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language." *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1266 (2011); *see Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 n. 2 (1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning.").

As for statutory purpose, the legislative history is clear that Congress intended consumers subjected to collection abuses to be the primary enforcers of the FDCPA. *See* S. Rep. No. 95-382, at 5. Most of those consumers are people already in debt, and yet, in light of the bona fide error defense, they can lose in litigation even when they successfully prove a statutory violation. *See* 15 U.S.C. § 1692k(c). Thus, debt collectors who prevail in FDCPA cases are not necessarily "innocent," to use GRC's repeated characterization. If Rule 54(d) applied in all cases, even consumers who bring FDCPA cases based on genuine violations of the statute would risk falling deeper into debt.

Further, as the $4,543 award in this case shows, if cost awards to prevailing FDCPA defendants were presumptive, the risk to a plaintiff of bringing a case would often outweigh the potential gain, undermining enforcement of the statute. Congress provided for statutory damages to incentivize consumers to bring FDCPA suits, but capped those damages at $1,000. *See* 15 U.S.C. § 1692k(a)(2). High

cost awards would dramatically skew the incentives to bring the suits that the statutory damages awards are intended to incentivize.[3] In the context of this statute, Congress may reasonably have concluded that cost awards should, as the statutory language states, be conditioned on a finding of bad faith and intent to harass.

Citing the number of FDCPA cases filed, GRC suggests (at 40-42) that consumers are bringing the "nuisance" suits that Congress sought to deter. It is more likely, however, that the number of suits reflects the amount of debt-collection activity and the conduct of debt collectors. *See* CFPB, *Annual Report 2012: FDCPA* 4 (2012), *available at* http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf ("The collection industry continues to be a top source of complaints to the FTC.").

More importantly, the cases about which *Congress* expressed concern are those brought "in bad faith and for the purpose of harassment." If GRC's complaint is that consumers are frequently bringing such suits, courts have the power under § 1692k(a)(3) to award fees and costs in those cases. If GRC's complaint is that the statutory standard does not capture GRC's view of what should be deemed "nuisance suits," GRC may ask Congress to legislate a stronger deterrent. *Cf. Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it

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[3] *See, e.g., Shepherd v. Liberty Acquisitions, LLC*, 2012 WL 2708518, at *8 (D. Colo. 2012) ($1,000 damages award); *Reed v. Budzik & Dynia, LLC*, 2012 WL 2568140, at *1 (E.D. Mo. 2012) ($1,000 damages award); *Woods v. Sieger, Ross & Aguire, LLC*, 2012 WL 1811628, at *10 (S.D.N.Y. 2012) ($2,000 award for statutory and actual damages).

should amend the statute to conform it to its intent." (internal quotation marks and alteration omitted)).

Because Congress expressly provided for lawsuits under the FDCPA, GRC's broadside attack on such suits is misplaced. In any event, GRC's concerns about what it supposes "would" happen if the Court reads § 1692k(a)(3) to provide otherwise than Rule 54(d) are unwarranted because that reading is the majority view and, until the decision below, the only view expressed by a federal court of appeals. *See* Pet. Br. 8 n.2 (citing cases). This Court would not increase nuisance litigation by confirming the status quo.

E. The FDCPA is one of eight statutes within the Consumer Credit Protection Act. As GRC observes (at 35), six of the eight do not address cost awards to prevailing defendants. GRC argues, essentially, that because the FDCPA contains a provision that these other statutes do not, the provision should not be given its plain meaning. Yet because § 1692k(a)(3) has no counterpart in those statutes, the FDCPA necessarily does something that the others do not. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation and internal quotation marks omitted)). That the eight statutes have differences is not surprising because they were enacted in eight different years, spread over a 28-year period from 1968 to 1996, to address different problems in the consumer credit industry, with a different mix of consumer and government enforcement in each statute.

Focusing on a provision of the Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693m(f), GRC argues (at 36) that if "and costs" is given effect in § 1692k(a)(3), then not only the FDCPA but also the EFTA will provide otherwise than Rule 54(d). To begin with, GRC offers no support for its suggestion that statutory language should not be read according to its plain meaning if that language appears in two statutes. In any event, GRC's premise is incorrect: The EFTA provision is not "virtually identical" to the FDCPA provision. Section 1693m(f) provides that, on a finding that an action was brought in bad faith or for purposes of harassment, the court "shall" award to the defendant attorney's fees and costs. The EFTA states the condition under which a court is *required* to make an award, and if the condition is not met, the court is *not* required to do so—but also is not forbidden from doing so. In contrast, in the FDCPA, the condition does not address when the court is required to make an award, but when the court is *permitted* to ("may") make an award. When the condition is not met, the court is *not* so authorized. Thus, although GRC's argument would be no stronger if the EFTA and the FDCPA provisions were identical, they are not.

II. The Rule 68 Issue Briefed by GRC Does Not Present an Alternative Ground for Affirmance.

In the alternative, GRC argues that the Court should affirm the decision below by holding that the award of costs was proper under Federal Rule of Civil Procedure 68. This argument has been waived and is not fairly included in the question presented by Ms. Marx. In addition, the argument is foreclosed by this Court's decision in *Delta Air Lines v. August*, 450 U.S. 346 (1981), which squarely holds that Rule 68's cost-shifting provision does not apply where a plaintiff loses her case.

A. The Rule 68 Issue Is Not Before the Court.

1. Under this Court's Rule 15.2, non-jurisdictional arguments not called to the Court's attention in the opposition to the petition for writ of certiorari "are normally considered waived." *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2351 (2011). Here, the brief in opposition to the petition did not mention Rule 68 even once. And far from suggesting that *Delta Air Lines* might be overruled, the brief relied on that decision as support for its argument. *See* Resp. Br. in Opp. 11, 12. Not surprisingly given GRC's silence about Rule 68, neither Ms. Marx nor her *amici* discussed the issue in their briefs. *See also S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999) (Rule 15.2 "assur[es] adequate preparation time for those likely affected and wishing to participate").

Moreover, although the parties argued below about whether GRC's offer was a proper offer of judgment, neither mentioned either *Delta Air Lines* or the question whether Rule 68 applies when the plaintiff loses the case. Not until the Tenth Circuit's opinion, which held "for reasons different than those argued" that costs could not be awarded to GRC under Rule 68, Pet. App. 15a, was *Delta Air Lines* mentioned, and then only to state the established law, overlooked by both parties, that "Rule 68 applies only where the district court enters judgment in favor of a plaintiff for an amount less than the defendant's settlement offer." *Id.* (citing *Delta Air Lines*, 450 U.S. at 352 (1981)).

GRC rightly does not suggest that this Court cannot decide the question before it—whether the FDCPA "provides otherwise" than Rule 54(d)—without reaching the Rule 68 issue. There is "no reason to sidestep" Rule 15.2 here. *Carrigan*, 131 S. Ct. at 2351.

2. This Court considers "[o]nly the questions set out in the petition, or fairly included therein." Sup. Ct. R. 14.1(a). The Rule 68 issue is not "fairly included" within the question presented here.

GRC crops the question (at i, 44 n.11) to cut its preamble, but read as a whole, the question on which the Court granted certiorari clearly asks whether the FDCPA "provides otherwise" than Rule 54(d). Indeed, even without the preamble, to answer the question presented by reference to Rule 68, one would have to add so many conditions not implied in the question that it would be apparent that the answer addressed an entirely different question, not an "included" question.

GRC's opposition to the petition again makes the point. That the opposition does not mention Rule 68 shows that the GRC itself understood exactly what this case is about: the relationship between § 1692k(a)(3) and Rule 54(d).

The Court disregards Rule 14.1(a) "only in the most exceptional cases." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (citation and internal quotation marks omitted). This case is not one of them.

B. This Court Resolved the Rule 68 Issue 31 Years Ago.

Delta Air Lines decided a straightforward question about the operation of Rule 68's cost-shifting provision. The decision—that the provision does not apply where the plaintiff declines a Rule 68 offer and then loses the case entirely—has been applied without difficulty or confusion for 31 years.

Considerations of "stability, predictability, and respect for judicial authority" require that a departure from precedent be supported by "some compelling justification."

Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991). Rehashing arguments made in 1980, GRC asks the Court to overturn its precedent because GRC disagrees with the decision, but offers no "compelling justification" for revisiting the issue. Indeed, GRC cites (at 47) *Pearson v. Callahan*, 555 U.S. 223, 233-34 (2009), but fails to explain how the circumstances here satisfy even one consideration identified in that case. For example, *Delta Air Lines* did not "establish a judge-made rule"; it construed a Federal Rule of Civil Procedure. The precedent is not "recently adopted"; it is more than 31 years old. And experience has not "pointed up the precedent's shortcomings"; the precedent operates as expected. While GRC cites a handful of opinions critical of *Delta Air Lines*, a large majority of lower court decisions have applied the decision without difficulty.[4] Similarly, GRC's claim (at 49) that "[c]ommentators" have questioned *Delta Air Lines* is overblown, supported only by citation to a student note published one year after the decision.

GRC also argues (at 48-49) that *Delta Air Lines* should be discarded because Rule 68 has been amended to eliminate the words that formed the "basis of the majority's conclusion." In fact, as the advisory committee explicitly stated, those amendments were "technical" or "stylistic only" and made no "substantive change." Fed. R. Civ. P. 68 advisory committee's note (1987 & 2007).

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[4] *See, e.g.*, *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1281 (10th Cir. 2011); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1050 (9th Cir. 2011); *Tidemann v. Nadler Golf Car Sales, Inc.*, 224 F.3d 719, 726 (7th Cir. 2000); *Gil de Rebollo v. Miami Heat Ass'ns, Inc.*, 137 F.3d 56, 67 (1st Cir. 1998); *In re Water Valley Finishing, Inc.*, 139 F.3d 326, 328 (2d Cir. 1998); *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 334 (5th Cir. 1995); *Landon v. Hunt*, 938 F.2d 450, 451 n.1 (3d Cir. 1991).

Adherence to precedent is particularly appropriate where "Congress remains free to alter" the decision in question. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). In the 1980s, both Congress and the Judicial Conference of the United States considered and rejected proposals to overturn *Delta Air Lines*. *See* S. 2038, 99th Cong. § 4 (1986); Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure*, *reprinted in* 102 F.R.D. 407, 432-33, 436 (1984); Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, *reprinted in* 98 F.R.D. 337, 362-63, 367 (1983). In these circumstances, it would be inappropriate for the Court now to supersede those bodies and, effectively, amend the Rule.

CONCLUSION

The Tenth Circuit's affirmance of the cost award should be reversed.

Respectfully submitted,

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