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OLIVEA MARX, :

Petitioner : No. 11-1175

v. :

GENERAL REVENUE CORPORATION :

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:

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Petitioner.

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

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

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 11-1175, Marx v. General Revenue  
5 Corporation.

6 Ms. Zieve.

7 ORAL ARGUMENT OF ALLISON M. ZIEVE

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

19 JUSTICE GINSBURG: Yes, indeed, but -- but  
20 you are assuming a conflict. You're saying either  
21 the -- the statute applies or Rule 54(d) applies, but  
22 the statute can be read to say, we're describing one  
23 category of case, we are describing the worst case, the  
24 bad-faith harassing plaintiff, and the statute deals  
25 with that category of person and no other.

1                   So if you're not a bad-faith harassing  
2    plaintiff, but you, nonetheless, lost, then you're under  
3    54(d).

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

14                  If --

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

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

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

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

12                  If -- if Congress was -- Congress would have  
13 no need to be concerned that if it left costs out of the  
14 second sentence there would be some negative implication  
15 because there are several statutes that mention fees  
16 without costs. And GRC has cited no instance in which a  
17 court has read a negative implication into that.

18                  We, in our reply brief, cited a couple cases  
19 that do the opposite. If -- so, therefore, if  
20 Congress had omitted costs, left it out of the sentence,  
21 then Rule 54(d) would have continued to apply in cases  
22 where the defendants.

23                  One more example --

24                  JUSTICE SOTOMAYOR: Didn't -- don't district  
25 courts always have the authority to award costs for

1 sanctionable behavior like bad faith? So this provision  
2 is duplicate, no matter how we read it. It's either  
3 duplicative of a power the court already had to award  
4 costs for bad faith, or it's duplicate of Rule 54.

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

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

14 JUSTICE SOTOMAYOR: It limits Rule 54.

15 MS. ZIEVE: Right.

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

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

23 JUSTICE SOTOMAYOR: True.

24 MS. ZIEVE: -- and this says the presumption  
25 is limited to cases brought in bad faith and for

1 purposes of harassment. There are other statutes that  
2 do -- similarly, do what we've -- what's done here.  
3 Congress could have omitted -- if GRC is correct,  
4 Congress could have just omitted the words, "and costs,"  
5 leaving the costs to be determined under Rule 54.

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

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

16 MS. ZIEVE: Fair Credit?

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

24 Congress gave defendants something more  
25 here. Why -- why would -- why should it be that 54(d)



1 would apply to the lender under the Truth in Lending  
2 Act, but not to the lender under -- under this Act?

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

14 As to the other statutes, the Truth in  
15 Lending Act, the Credit Repair Organizations Act, they  
16 were enacted at different times by different Congresses.  
17 They have different sorts of provisions, some better for  
18 plaintiffs, some better for defendants.

19 And -- but this category -- in -- in  
20 enacting this statute, Congress emphasized that the  
21 widespread and national serious problem of collection  
22 abuse that Congress said inflicts substantial suffering  
23 and anguish, and noted specifically in the Senate report  
24 this Court has cited to in the Jerman case, that  
25 consumers, the impecunious -- the people who can't even

1     afford to pay their debts, are the primary enforcers of  
2     the statute.

3                 The FTC got about 120,000 complaints from  
4     consumers about debt collectors last year, more than any  
5     other industry. So Congress may reasonably have decided  
6     that the primary enforcers of this statute weren't going  
7     to be doing that work if they were -- if they were at  
8     risk of significant cost awards in cases that have  
9     frequently small value.

10                There are other ways, if Congress wanted to  
11    preserve Rule 54(d), that it could have done it, that  
12    did not happen here. For instance, in 49 U.S.C.  
13    14707(c), Congress has a similar provision about  
14    attorney's fees to prevailing -- attorney's fees to  
15    prevailing parties, and then states expressly that fee  
16    is in addition to costs allowable under the Federal  
17    Rules of Civil Procedure. Congress didn't do that here.

18                Or Congress could have made it clear that it  
19    was not displacing Rule 54(d) as to cost awards by  
20    stating that the Court could award attorney's fees as  
21    part of the cost, therefore, distinguishing fees and  
22    costs. Congress has done that sort of thing frequently,  
23    including in a statute that provides for an award in  
24    cases of bad faith.

25                I'm looking at 28 U.S.C. 1875, that provides

1 the courts may award fees as part of costs if an action  
2 was frivolous or in bad faith.

3               So -- but Congress did none of those things  
4 here. Instead, what it did was draft a sentence that  
5 links the term "cost" to the term "attorney's fees" with  
6 the conjunction "and" and subjects both of those objects  
7 of the sentence to the same condition, the condition  
8 that the plaintiff suit was brought in bad faith and for  
9 purpose of harassment.

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

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

22              But the bad faith and harassment standard is  
23 the dividing line that Congress drew between nuisance  
24 suits and other suits. This case is clearly on the  
25 non-nuisance side of the line, and cases on that side of

1 the line are not subject to an award of costs.

2 If the Court has no further questions?

3 JUSTICE SOTOMAYOR: I would assume that, if  
4 Rule 54, instead of saying what it currently does, said  
5 something like, "except as expressly repealed in another  
6 statute," would what happened here meet that express  
7 requirement of repeal? It was Justice Scalia's question  
8 to you, but reformulated in a different way.

9 MS. ZIEVE: If Rule 54(d) incorporated a  
10 requirement that a statute expressly referred to Rule  
11 54(d)?

12 JUSTICE SOTOMAYOR: Expressly repealed  
13 54(d).

14 MS. ZIEVE: That would be a very different  
15 case. But of course, Rule 54(d) doesn't do that.  
16 Instead, when Rule 54(d) was adopted, the Rules  
17 Committee actually -- the advisory committee notes list  
18 25 statutes that it says will not be affected by the  
19 rule.

20 Those are statutes that allow fees, forbid  
21 fees, condition fees, allow fees in a broader scope of  
22 cases than Rule 54(d) does. And, of course, none of  
23 those would have mentioned Rule 54(d) because they  
24 preceded adoption of the rule.

25 I would reserve the balance of my time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Mr. Feigin.

3 ORAL ARGUMENT OF ERIC J. FEIGIN,  
4 FOR UNITED STATES, AS AMICUS CURIAE,  
5 SUPPORTING THE PETITIONER

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

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

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

17 That's made even clearer, if you look at the  
18 pre-2007 version of the rule, which is meant to be  
19 substantively identical to the current version of the  
20 rule -- this is at page 12 of the government's brief --  
21 and the original version of the rule said, "Except when  
22 express provision therefore is made either in a statute  
23 of the United States or in these rules, costs shall be  
24 allowed as of course to the prevailing party, unless the  
25 Court otherwise directs."

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

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

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

20           JUSTICE BREYER: I mean, my problem with  
21   this is I don't -- I mean, I read the whole statute, and  
22   they have a good claim until I think you read the whole  
23   statute. And I don't know what to say, other than the  
24   impression -- the impression is that subsection 3, which  
25   is what's at issue, the whole thing is meant to say that

1 the winner, when it's the plaintiff, is going to get  
2 attorney's fees.

3           You know, it mentions costs, but that's the  
4 background rule. And then when you get to the second  
5 sentence of that, it means, and if you're in bad faith,  
6 the plaintiff, then the defendant gets attorney's fees.  
7 It doesn't really mention costs. That's the background  
8 rule.

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

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

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

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

1 background rule, and I don't see anything in the history  
2 that gets rid of the background rule.

3 MR. FEIGIN: Well, Your Honor --

4 JUSTICE BREYER: I don't see anything in the  
5 consequences that suggests that you get rid of the  
6 background rule. I don't see anything in our traditions  
7 that says you should get rid of the background rule.

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

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

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

24 MR. FEIGIN: Your Honor, I think that gets  
25 back to Justice Ginsburg's question of why weren't they



1 just saying "and costs" here, just to make clear that  
2 not only fees would be available, but also costs. And I  
3 think that's an implausible hypothesis of what Congress  
4 was trying do for the following reason: A  
5 congressperson who is concerned that a reference to fees  
6 alone in the second sentence of Section 1692k(a)(3)  
7 would preclude application of the default rule in -- in  
8 Rule 54(d), couldn't possibly have thought that the way  
9 to make clear that Rule 54(d) applies in full was to add  
10 the words "and costs" in a sentence that's expressly --

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

16 MR. FEIGIN: Well, Your Honor --

17 JUSTICE BREYER: And the -- the general  
18 instruction would be add attorney's fees on the  
19 plaintiffs and add attorney -- Alright. You  
20 understand the point.

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

23 JUSTICE BREYER: Yes, ignorance of other  
24 laws.

25 JUSTICE SCALIA: As a general principle.

1 JUSTICE BREYER: That's right, general  
2 ignorance.

3 (Laughter.)

4 MR. FEIGIN: Let me -- Your Honor, let me --  
5 let me address that directly. If we're presume that  
6 Congress is aware of Rule 54(d), then I think it's quite  
7 peculiar and, in fact, quite counterproductive to have  
8 added the words "and costs" to a sentence that's  
9 expressly conditioned on a finding of bad faith and  
10 purpose of harassment.

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

17 JUSTICE BREYER: Well, then they shouldn't  
18 have put those words in. But we're talking about the next  
19 sentence. And the next sentence doesn't put the words  
20 in. So you're -- you're -- you're assuming from that  
21 fact that, in a pro defendant -- this is a pro-defendant  
22 provision they put in, that was their whole point  
23 apparently reading it -- that what they decided to do is  
24 take away from defendant's costs, which they normally  
25 get, without saying anything about it.

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

3                   MR. FEIGIN: Your Honor, the words "and  
4    costs" appear in both sentences. I agree with Ms.  
5    Zieve, that the legislative history does not indicate  
6    that this is a uniquely pro-defendant division --  
7    provision, and that's what the Court found in Jerman.

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

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

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

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

19                  If I could, I would like to address the  
20    policy reasons why Congress would have found it  
21    particularly useful not to have plaintiffs pay costs in  
22    these circumstances.

23                  CHIEF JUSTICE ROBERTS: Well, that's a  
24    pretty odd way to balance. I mean, if you're -- if  
25    you're trying to balance, then you say, well, here's an

1 idea, let's give them attorney's fees, but let's not  
2 give them costs.

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

4 CHIEF JUSTICE ROBERTS: That's a very  
5 curious way to dilute what was otherwise a  
6 defendant-friendly provision.

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

13 And the reason why Congress thought it was  
14 necessary to shield good-faith plaintiffs from costs  
15 here in order to incentivize enforcement, is, first of  
16 all, these are particularly low-value suits, especially  
17 when compared to other statutes in the CCPA. They're  
18 the kind of suits that can be incentivized by a mere  
19 \$1,000 in statutory damages. And as this case  
20 demonstrates, the cost of a suit, if taxed against the  
21 plaintiff, can do much more than 1,000 --

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

1     you.

2                   We just did a random sample of 28 successful  
3     cases, and I think the average recovery -- except for  
4     one outlier, where it was very high, -it was around  
5     \$4,000 -- 3 to 4, and the average costs on the ones that  
6     the defendants won, I guess, was around a thousand. So  
7     you have a point --

8                   MR. FEIGIN: Your Honor --

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

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

13                  JUSTICE BREYER: -- in order to make it.

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

22                  Now, if plaintiff's looking to bring this  
23    kind of case, the only out-of-pocket expense the  
24    plaintiff is facing is the potential that if it loses  
25    the case for some reason that it can't be aware of

1 initially, such as a bona fide good-faith defense or the  
2 law being interpreted against them in an area where the  
3 law is unclear, they're going to have to pay out of  
4 pocket against the plaintiff himself, not the  
5 plaintiff's attorney, who are the people the defendant  
6 claims is -- are responsible for the abuses they allege  
7 in FDCPA cases. This is going to come out via judgment  
8 directly against the plaintiff.

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

17           And the reason --

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

22           MR. FEIGIN: Well, Your Honor --

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

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

5                   So the first question you asked is whether  
6   they're covering the same territory, and they are here.  
7   Both 1692k(a)(3) and 54(d) cover awards of costs  
8   incident to the judgment.

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

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

19                  CHIEF JUSTICE ROBERTS: Finish that  
20  sentence.

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

25                  Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Ms. Blatt.

3 ORAL ARGUMENT OF LISA S. BLATT  
4 ON BEHALF OF THE RESPONDENT

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

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

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

21 JUSTICE KAGAN: Ms. Blatt, it -- it seems to  
22 me that the -- the most natural way to read this  
23 statute, and it's not -- it's not your way, it's, look,  
24 we have this Federal Rule of Civil Procedure that --  
25 that contemplates that Congress sometimes doesn't



1 write -- it writes statutes authorizing lawsuits without  
2 providing a cost provision.

3 And because we know that about Congress, we  
4 provide a default rule. And the default rule is what's  
5 laid out in subsection (d) as to costs and then also  
6 later as to attorney's fees.

7 But, we know that Congress sometimes does  
8 address costs and fees, and where Congress in a  
9 particular statute has addressed costs and fees, we look  
10 to whatever Congress has said -- you know, unless  
11 Congress has otherwise provided. And here, this is --  
12 1692k is a provision that addresses costs and fees. It  
13 addresses them comprehensively and specifically.

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

16 JUSTICE KAGAN: I expected you might.

17 (Laughter.)

18 MS. BLATT: This is not a field preemption  
19 case. Rule --

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

22 MS. BLATT: Yes, it is. You're saying that  
23 if it addresses costs, that it trumps it. And it is  
24 a -- you would never think -- this -- Rule 54 doesn't  
25 say, don't award costs if a statute can be plausibly

1 read to address it. It says, unless it provides  
2 otherwise, which means Congress actually intended to  
3 displace.

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

6 JUSTICE KAGAN: Maybe I'm --

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

8 JUSTICE KAGAN: -- not in the business of  
9 trying to figure out what Congress's intent is. All I'm  
10 trying to figure out is whether this Federal statute  
11 provides otherwise, and this Federal statute does  
12 provide otherwise.

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

23 There --

24 JUSTICE SCALIA: In -- in that respect, it  
25 is different from RadLAX, in which the two provisions --

1 where we held the specific covers the general -- but we  
2 held that because the two provisions contradicted each  
3 other.

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

9 JUSTICE KAGAN: It's both, you know?

10 MS. BLATT: It is --

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

19 MS. BLATT: That's not correct. It doesn't  
20 mention prevailing --

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

23 MS. BLATT: Yes. Unlike -- unlike the whole  
24 statute that talks about prevailing plaintiffs, this  
25 doesn't. What is fascinating about this case is, in all

1 50 titles of the U.S. Code, there are specific  
2 provisions that say, plaintiffs shall not be liable for  
3 costs, or a plaintiff shall not be liable for costs  
4 unless a certain condition occurs.

5           There's only one statute -- we looked at all  
6 50 titles -- there is one statute that says, a court may  
7 award costs if a certain condition occurs. That's  
8 the --

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

11           MS. BLATT: We've -- we've looked for all,  
12 we've looked at all the cost provisions.

13           CHIEF JUSTICE ROBERTS: You mean, like in  
14 Title IX --

15           MS. BLATT: Yes.

16           CHIEF JUSTICE ROBERTS: And Title XI?

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

23           And there is one other statute that says,  
24 for a prevailing defendant, the court may award costs if  
25 the lawsuit is frivolous. And in those three

1 significant ways, I think it shows why we win, and  
2 that's a statute they relied on to say it's just like  
3 our statute, on page 18 of their brief, page 29 of our  
4 brief.

5 First, it only refers to costs. The statute  
6 is about costs. Our statute is about attorney's fees  
7 being the main event upon a finding of bad faith.

8 Second, it mentions prevailing defendants;  
9 ours doesn't.

10 And, third, which I think is missing from  
11 the entire 30 minutes that you heard, their argument is  
12 plaintiff -- Congress sat down and wanted to incentivize  
13 frivolous suits and nonfrivolous -- nonfrivolous suits  
14 alike. At least in the Pipeline Safety Act, Congress  
15 said, if it's frivolous, the defendant gets its costs.

16 Here --

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

25 MS. BLATT: Right.

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

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

9 JUSTICE SOTOMAYOR: And with that, is that  
10 there are some statutes that don't?

11 MS. BLATT: Yes. Yes.

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

14 MS. BLATT: Okay.

15 JUSTICE SOTOMAYOR: It's peanut butter and  
16 honey sometimes.

17 (Laughter.)

18 MS. BLATT: Yes. And here --

19 JUSTICE SCALIA: Love and marriage.

20 (Laughter.)

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

22 But here -- here, I think Congress -- first  
23 of all, it's just wrong that the reference to "and  
24 costs" is grammatically inexplicable and devoid of  
25 practical function; and that is the fundamental point of

1 the blue brief, that this is just grammatically  
2 inexplicable, and that's just not true.

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

11 JUSTICE BREYER: Suppose you're right. What  
12 about their policy argument here, that you're a --  
13 you're a potential plaintiff, you've borrowed a lot of  
14 money, you don't have a lot of money, and the deal is  
15 this, under your interpretation, if you win, you're  
16 going to get 2 or \$3,000; if you lose, it will cost you  
17 about a thousand.

18 That's -- that's under your interpretation.

19 MS. BLATT: Right.

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

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

1 JUSTICE BREYER: Oh, it could be worse.

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

10 It is the law in every circuit that the  
11 district courts don't have to award costs. It's just  
12 discretionary. So Rule 54 has a built-in safety valve;  
13 it accommodates all the policy concerns on the other  
14 side, and every other informal paupers litigant, every other  
15 consumer protection plaintiff, every civil rights plaintiff,  
16 every plaintiff in the country faces the risk of a cost  
17 award, but doesn't get \$1,000 thrown in for free.

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

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



1     sorry --

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

6                   MS. BLATT:  Yeah, but that would be  
7     Ledbetter, and I don't want to cite that to Justice  
8     Ginsburg.

9                   (Laughter.)

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

15                  JUSTICE BREYER:  Now, what about the -- how  
16     does this work, the canon?  I'm very interested.

17                  MS. BLATT:  They're --

18                  JUSTICE KAGAN:  Sorry.  I'm sorry.

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

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

1 canon.

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

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

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

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

10 JUSTICE BREYER: Well, that -- that's a  
11 different matter.

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

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

25 MS. BLATT: I don't wish for a different

1 statute. I think what you're saying is that Congress  
2 passed a firewall. Congress said, we need to encourage  
3 frivolous suits and nonfrivolous, but let's put a  
4 firewall in and give them fees and costs, that, God  
5 forbid, there is bad faith and harassment.

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

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

14 JUSTICE KAGAN: Well, that sounds very  
15 terrible.

16 MS. BLATT: But not if you file a lawsuit in  
17 bad faith and for purposes of harassment. So, I mean --  
18 I think even -- I think the history is obvious; this was  
19 trying to make defendants better off than the  
20 defendant's suit under the Truth in Lending Act, which  
21 is part of the same umbrella Consumer Credit Protection  
22 Act.

23 And they're -- inexplicably, somehow, by  
24 trying to make them better off, made them worse than  
25 every other creditor that they serve and immunized these

1 plaintiffs from the universal risk of cost shifting that  
2 every other litigant has to face. And so -- and you  
3 don't get there from -- all they have is a negative  
4 inference.

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

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

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

18 MS. BLATT: Yeah, I'm going -- I'm going to  
19 keep repeating it because it's my position. This  
20 doesn't -- the fact that this doesn't refer to  
21 prevailing defendants speaks volumes that what was not  
22 on Congress' mind, was Rule 54. What was on Congress'  
23 mind is victimized debt collectors who were sued in bad  
24 faith.

25 Now, I understand this is a pro-plaintiff

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

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

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

17           MS. BLATT: Okay.

18           JUSTICE KAGAN: Let's just suppose that  
19 54(k) didn't exist at all. Okay?

20           MS. BLATT: 54(d)?

21           JUSTICE KAGAN: 54(d) didn't exist.

22           MS. BLATT: Okay.

23           JUSTICE KAGAN: And all you had was this  
24 provision. Okay?

25           MS. BLATT: Uh-huh.

1 JUSTICE KAGAN: So this provision says, on a  
2 finding by the court that it's brought in bad faith, the  
3 court may award to the defendant attorney's fees and  
4 costs. So suppose a defendant wins, but there's not a  
5 finding that it was made in bad faith, would then the  
6 person be entitled to either attorney's fees or costs?

7 MS. BLATT: Well, we wouldn't -- certainly,  
8 we sought costs here under Rule 54.

9 JUSTICE KAGAN: So I'm saying that --

10 MS. BLATT: I know. Okay. And you've took  
11 it up. So that takes out my route seeking for costs  
12 under Rule 54, it doesn't exist in your world.

13 JUSTICE KAGAN: In my world, you would not  
14 get fees or costs.

15 MS. BLATT: Now, we would -- I'm imagining  
16 then the world in 1936, and we rely on 1920 or 1919 or  
17 the long-standing practice of courts awarding costs.  
18 Now, a court might --

19 JUSTICE KAGAN: I'm just asking you a simple  
20 question.

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

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

25 MS. BLATT: Because this -- in that sense, I

1 think this was a question that another Justice asked.  
2 If you just look at this provision, the only basis for  
3 costs and fees in this provision is the bad faith and  
4 finding of harassment.

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

7 MS. BLATT: Under 1692.

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

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

20 And then if you look at the statutes on  
21 pages 24 and 25, where, time and time again, Congress  
22 has said, a prevailing party may recover attorney's fees  
23 and costs. Well, the "and costs," in their view, I  
24 guess those statutes are inexplicable. I mean, it's  
25 clearly they're redundant, and they overlap with Rule

1 54. They don't displace it.

2 And even the practice guides that we cite on  
3 page 22, which is basically Wright and Miller and Moore,  
4 say something that merely overlaps with Rule 54 doesn't  
5 displace the court's discretion.

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

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

21 MS. BLATT: Yes, if you -- right. And so  
22 there's like that Oncale case, with same-sex harassment,  
23 Congress can write a very -- can write a plain language  
24 provision, and regardless of what Congress intended, if  
25 the language covers it, that's tough, we're going to



1     construe it. That's your law.

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

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

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

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

20                  MS. BLATT: Yeah.

21                  JUSTICE SOTOMAYOR: It says you get fees or  
22     you can get fees and costs.

23                  MS. BLATT: Right.

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

1 the natural reading?

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

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

17 MS. BLATT: Yeah.

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

20 MS. BLATT: Yeah. And I think --

21 JUSTICE KAGAN: -- and then they get costs  
22 and fees.

23 MS. BLATT: Right. But I think you have to  
24 keep this in mind, that there are completely  
25 diametrically opposed background presumptions in our

1 legal system. It's an extraordinary event to get  
2 attorney's fees, and it's an extraordinary event not to  
3 get costs.

4 And so the court -- the Congress has to use  
5 explicit language to over -- overturn the American rule.  
6 And so what Congress did here, that is the most natural,  
7 even if I drew you to a tie --

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

14 MS. BLATT: Right. And --

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

17 MS. BLATT: And I think you can look -- the  
18 Petitioner did -- did a valiant job of trying to drudge  
19 up as many statutes as they can. All the statutes on  
20 point are explicit. Now, there's one statute that might  
21 not be, the pipeline safety one.

22 And so the question is: Do we think that  
23 Congress actually tried to displace a court's authority  
24 under that statute? And that's a statute that just says  
25 a court may award costs if a lawsuit is frivolous. This

1 one just doesn't say that.

2           You at least -- even if you don't think of  
3 it as magic language or an explicit statement, the fact  
4 that Congress repeatedly has used explicit language  
5 casts considerable doubt that this was done by mere  
6 implication.

7           And then you look at the fact that it  
8 doesn't mention prevailing parties. It's talking about  
9 bad faith, it has attorney's fees, what was Congress  
10 doing, you look at the legislative history. It shows  
11 that it was -- it was trying to make them, better, off  
12 than a class of defendants, but their view inexplicably  
13 makes them worse off.

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

18           JUSTICE SCALIA: I guess, in the first  
19 sentence of 3, the phrase "the costs of the action" is  
20 really superfluous in light of 54(d)(1). You really  
21 don't know that. I mean, that would have been the case  
22 anyway.

23           So there's no reason to think that it isn't  
24 frivolous in the second sentence -- or superfluous in  
25 the second sentence, right? Why did they have to say

1 the costs of the action in the case of a successful  
2 action?

3 MS. BLATT: Successful action to enforce it.

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

7 MS. BLATT: Why isn't --

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

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

12 JUSTICE SCALIA: I'm trying to help you.

13 (Laughter.)

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

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

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

24 JUSTICE SOTOMAYOR: So it's a command.

25 54(d) is permissive, according to your earlier argument?

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

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

4 JUSTICE SCALIA: Gotcha.

5 MS. BLATT: That's true.

6 JUSTICE SCALIA: Well-taken.

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

17 If you look at Rule 54 -- let me just say  
18 one other thing, Justice Kagan -- if you look at Rule  
19 54, it also says, "unless the statute provides  
20 otherwise, costs other than attorney's fees." So why --  
21 they didn't have to say that because, in the next  
22 provision, it talks about attorney's fees. They just --  
23 they wanted to make clear for whatever reason or maybe  
24 they just wrote some really excess, redundant, silly  
25 language, but they said costs, meaning anything that's

1 not costs -- it's just that Congress sometimes uses  
2 these.

3 And I guess this was the honey and peanut  
4 butter thing, is that a lot of fee-shifting statutes  
5 talk about both attorney's fees and costs. And so they  
6 went together and -- they also mentioned it. Obviously,  
7 it's different. I agree that there's a verb in the  
8 first sentence that's mandatory, so it trumps Rule 54.

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

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

23 If there are no further questions --

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Ms. Zieve, you have six minutes remaining.

1 REBUTTAL ARGUMENT OF ALLISON M. ZIEVE

2 ON BEHALF OF THE PETITIONER

3 MS. ZIEVE: Thank you.

4 First, the FDCPA doesn't just encourage  
5 frivolous suits. Ms. Blatt repeatedly referred to  
6 plaintiffs getting a free \$1,000. If the -- if the  
7 plaintiffs win their suits, that means both that they're  
8 not frivolous and they're not in bad faith.

9 In cases that are frivolous, but a court  
10 makes a finding that it's not in bad faith, defendants  
11 have other means of recovering fees and costs using  
12 Rule 11 or Section 1927. And there are cases in which  
13 courts have denied fees and costs under the FDCPA and  
14 granted them under Rule 11 or 1927.

15 Ms. Blatt suggested that --

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

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



1 Justice Kagan suggested, that's what Congress was doing.  
2 It was carefully calibrating the allocation of fees and  
3 costs at the end of the case. And, in fact, in  
4 instances in which -- which defendants have asked for  
5 fees and costs in FDCPA cases based on bad faith, they  
6 do always come at the end of the case, which also shows  
7 this is not a misconduct provision.

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

15 The main --

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

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

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

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

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

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

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

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

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

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

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

12                  JUSTICE SCALIA:   But you're saying "negative  
13   implication."   If it -- if it says only "attorney's fees  
14   in reasonable relation to the work expended," the  
15   implication would be you --

16                  MS. ZIEVE:   Justice Scalia, other --

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

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

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

1 MS. ZIEVE: No, because --

2 JUSTICE SCALIA: Because it seems the two  
3 are parallel.

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

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

12 I mean, there are a lot of instances --

13 MS. ZIEVE: Well --

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

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

21 (Laughter.)

22 JUSTICE BREYER: Well, I doubt that it does.  
23 I'm sorry. I mean, they're human beings over there;  
24 they're not necessarily all --

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

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

5 Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

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

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<b>able</b> 21:17 <b>above-entitled</b> 1:11 53:9 <b>absence</b> 24:18 41:5 <b>absolute</b> 13:8 23:3 <b>abuse</b> 9:22 <b>abuses</b> 22:6 <b>accept</b> 18:11 <b>accommodates</b> 32:13 <b>act</b> 3:15,21 8:14,15 8:20,21 9:2,2,15 9:15 28:20 29:14 35:20,22 41:5 48:21 49:10 <b>acted</b> 50:13 <b>action</b> 3:22 8:9 11:1 42:3 44:19 45:1,2 45:3,4 46:8 49:9 51:6,18 <b>actions</b> 8:7 <b>add</b> 17:9,18,19 <b>added</b> 16:14 18:8 46:16 50:23 <b>addition</b> 10:16 31:4 31:5,8 47:12,17,22 50:24 <b>additionally</b> 31:7 <b>address</b> 6:2 18:5 19:19 24:19 25:8 26:1 <b>addressed</b> 25:9 <b>addresses</b> 14:3 25:12,13,23 27:7 <b>addressing</b> 5:7 19:13 <b>administrators</b> 32:23 <b>adopt</b> 23:22 <b>adopted</b> 12:16 <b>adoption</b> 12:24 <b>advisory</b> 12:17 <b>advocating</b> 44:15	<b>affirmative</b> 24:14 26:17 <b>affirmatively</b> 35:12 <b>afford</b> 10:1 32:9 <b>agency's</b> 33:3 <b>agree</b> 19:4 41:14 43:8 47:7 50:7,11 <b>alike</b> 29:14 <b>allege</b> 22:6 <b>ALLISON</b> 1:15 2:3 2:13 3:7 48:1 <b>allocation</b> 48:23 49:2 <b>allow</b> 12:20,21 <b>allowable</b> 10:16 <b>allowance</b> 52:9,9,10 53:2 <b>allowed</b> 13:24 <b>allows</b> 4:10 <b>Alright</b> 17:19 <b>Amalgamated</b> 14:13 <b>American</b> 43:5 <b>amicus</b> 1:19 2:7 13:4 <b>ancient</b> 4:8 <b>anguish</b> 9:23 <b>answer</b> 7:17 33:10 <b>answering</b> 13:11 <b>anyway</b> 44:22 45:9 47:11 <b>apparently</b> 18:23 <b>appeal</b> 49:17 <b>appear</b> 19:4 <b>APPEARANCES</b> 1:14 <b>application</b> 17:7 <b>applies</b> 4:21,21 17:9 23:23 35:10 <b>apply</b> 3:13 4:18 6:21 9:1 14:7 18:14 53:3 <b>area</b> 22:2 <b>arguing</b> 4:9 <b>argument</b> 1:12 2:2,5 2:9,12 3:4,7 13:3	24:3 29:11 31:12 31:24 33:11 45:20 45:25 48:1 51:5,7 51:21,25 <b>aside</b> 50:7 52:18 <b>asked</b> 23:5,9 37:11 39:1 49:4 50:16 <b>asking</b> 38:19 <b>asks</b> 32:7 <b>aspect</b> 26:16 <b>Assistant</b> 1:17 <b>assume</b> 12:3 17:21 <b>assumed</b> 5:19 <b>assuming</b> 4:20 18:20 <b>attorney</b> 17:19 22:5 <b>attorneys</b> 3:23 8:7 21:18,19 <b>attorney's</b> 4:2 5:20 8:8,18,21 10:14,14 10:20 11:5 15:2,6 16:18,21,23 17:18 20:1 24:15 25:6 26:19 27:8,14 28:21 29:6 31:6,8 34:17,18,21 35:10 37:2 38:3,6 39:22 40:8 41:4 42:10 43:2 44:9 46:20,22 47:5,10,12,13 51:13 <b>authority</b> 6:25 7:7,9 14:14 23:16 26:5 42:9 43:23 45:18 46:11 <b>authorizing</b> 25:1 50:4 <b>available</b> 5:10 17:2 <b>average</b> 21:3,5 <b>award</b> 3:11,23 4:1,2 6:7,10,11,25 7:3 8:8 9:10 10:20,23 11:1 12:1 14:3 23:13,16 24:10,14	24:15,17,19 25:25 26:18 28:7,21,24 31:7 32:11,17 38:3 42:9 43:25 49:22 50:24 51:5,18 <b>awarded</b> 50:13 <b>awarding</b> 3:16 38:17 <b>awards</b> 7:13 10:8,19 23:7 51:10 <b>aware</b> 18:6,12 21:25 33:24 <b>a.m</b> 1:13 3:2 53:8 <hr/> <b>B</b> <hr/> <b>back</b> 16:25 22:25 <b>background</b> 15:4,7 15:24 16:1,2,6,7 16:13 42:25 <b>bad</b> 3:19,22 7:1,4,19 7:25 8:9 10:24 11:2,8,22 15:5 18:9 20:11 24:16 24:18 27:14 28:22 29:7,22 31:7 35:5 35:17 36:23 38:2,5 39:3 40:8 41:4,5 42:7,19 44:9 46:13 47:13 48:8,10 49:5 49:9,13 50:14 51:6 <b>bad-faith</b> 4:24 5:1,6 5:18 36:17 <b>balance</b> 12:25 19:17 19:24,25 <b>balanced</b> 9:13 <b>Bank</b> 14:13 <b>bankruptcies</b> 22:12 <b>based</b> 48:24 49:5 <b>basically</b> 27:16 31:3 37:3 40:3 <b>basis</b> 15:20 32:25 39:2 41:19 <b>behalf</b> 1:15,21 2:4 2:11,14 3:8 24:4 48:2	<b>behavior</b> 7:1 <b>beings</b> 52:23 <b>believe</b> 22:9 <b>believed</b> 14:8 22:10 <b>belt</b> 46:14 <b>benefit</b> 11:13 <b>benefits</b> 11:11 <b>better</b> 9:17,18 33:10 35:19,24 36:6 44:11 <b>beyond</b> 6:8 <b>bit</b> 23:2 <b>Blatt</b> 1:21 2:10 24:2 24:3,5,21 25:14,18 25:22 26:7,13 27:4 27:10,19,23 28:11 28:15,17 29:25 30:4,11,14,18,21 31:19,23 32:2,18 32:24 33:6,10,17 33:25 34:4,7,12,25 35:12,16 36:5,12 36:18 37:15,17,20 37:22,25 38:7,10 38:15,21,25 39:7 39:13 40:21 41:13 41:20,23 42:2,17 42:20,23 43:14,17 45:3,7,10,14,22 46:1,5,7 48:5,15 50:6,16 <b>blue</b> 31:1 <b>bona</b> 22:1 <b>borrowed</b> 31:13 <b>Breyer</b> 14:20 15:16 15:19 16:4,16 17:11,17,23 18:1 18:17 19:8,11 20:22 21:9,13 31:11,20 32:1 33:15,19 34:2,5,10 52:7,14,22 <b>brief</b> 6:18 13:20 19:16 29:3,4 31:1

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