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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Fair Debt Collection Practices Act (FDCPA) provides that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). Federal Rule of Civil Procedure 54(d) provides that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."

The question presented is whether a prevailing defendant in an FDCPA case may be awarded costs where the lawsuit was not "brought in bad faith and for the purpose of harassment."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Pages**

STATUTORY MATERIALS AND RULES

MISCELLANEOUS

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is reported at 668 F.3d 1174, and reproduced in the petition appendix at 1a. The judgment of the United States District Court for the District of Colorado is unreported and is reproduced in the petition appendix at 30a. The district court's order denying post-judgment motions of both parties is unreported. It is available at 2010 WL 2802550, and reproduced in the petition appendix at 28a.

JURISDICTION

The court of appeals entered its judgment on December 21, 2011. On January 30, 2012, the court denied petitioner's timely petition for rehearing or rehearing en banc. The petition for certiorari was filed on March 23, 2012, and granted on May 29, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

Section 813 of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692k, entitled "Civil liability," provides in relevant part:

> (a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damage sustained by such person as a result of such failure; [or]

> (2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; . . . and
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

Federal Rule of Civil Procedure 54(d)(1), entitled "Costs other than Attorney's Fees," provides, in relevant part:

> Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party.

STATEMENT OF THE CASE

The Fair Debt Collection Practices Act

This case arises from an action under the FDCPA brought by petitioner Olivea Marx against respondent General Revenue Corporation (GRC). Congress enacted the FDCPA in 1977 in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," 15 U.S.C. § 1692(a), which had become "a widespread and serious national problem." S. Rep. No. 95-382, at 2 (1977).

Under the FDCPA, a debt collector may not "engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collec-

tion of a debt," 15 U.S.C. § 1692d, use "any false, deceptive, or misleading representation or means in connection with the collection of any debt," *id.* § 1692e, or use "any unfair or unconscionable means to collect or attempt to collect any debt," *id.* § 1692f. These provisions prohibit, for example, threats of violence, repeated telephone calls, threats of legal action that cannot legally be taken or are not intended to be taken, and the use of deception to obtain information about a consumer. *Id.* §§ 1692d(1), (d)(5), (e)(5), (e)(10). With narrow exceptions, the statute also prohibits debt collectors from communicating with third parties such as a consumer's neighbors and employer in connection with the collection of a debt. *Id.* § 1692c(b). An exception to the prohibition allows a debt collector to communicate with third parties "for the purpose of acquiring location information about the consumer," *id.* § 1692b, and the statute defines "location information" to include only "a consumer's place of abode and his telephone number at such place, or his place of employment," *id.* § 1692a(7).

The FDCPA provides a private cause of action against "any debt collector who fails to comply with any provision of this title with respect to any person." *Id.* § 1692k(a). A debt collector is not liable, however, even for a proven violation, if the debt collector shows that the violation "was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id.* § 1692k(c); S. Rep. No. 95-382, at 5. This exception to liability is known as the bona fide error defense. *See generally Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1604 (2010).

In a successful case brought by a consumer alleging a violation of the FDCPA, the statute provides for actual damages, statutory damages of up to $1,000, and "the costs

of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1692k(a). On the other hand, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." *Id.*

Factual Background and Proceedings Below

Ms. Marx sued GRC, a large debt collection agency, alleging several violations of the FDCPA. She alleged that GRC violated § 1692d, § 1692e, and § 1692f by threatening to garnish fifty percent of her wages, threatening to take money from her bank account, and calling her several times a day to annoy and harass her. J.A. 18. She also alleged that GRC violated § 1692c(b) by seeking information other than permitted "location information" when it communicated with her employer in connection with the collection of a debt. *See id.* at 18-19.

After a bench trial, the district court found for GRC on all of Ms. Marx's claims. As to Ms. Marx's testimony that GRC threatened in a phone call to garnish fifty percent of her wages, the judge stated that he did not doubt that she remembered the call as she described it, but that he "just cannot accept" that GRC would make that threat. *Id.* at 30. As to her testimony that GRC in one call suggested that she donate blood or get another job, the court stated: "That is alarming if it were true, but I am not accepting it." *Id.* And as to the claim that GRC's fax to her employer violated the FDCPA prohibition on third-party communications, the court held that the fax did not violate the bar on communicating with third parties "in connection with the collection of a debt" because, absent testimony from the recipient that she understood the fax to be in

connection with collection of a debt, the fax was not a "communication" at all. *See id.* at 31-32. The court thus effectively held that a debt collector can contact an employer to ask for information in addition to "location information," as long as the employer does not know that the request is coming from a debt collector. The court stated, however, that the question whether the fax violated the FDCPA was "close." *Id.* at 32.

GRC submitted a bill of costs seeking $7,779.16 in witness fees, witness travel expenses, and deposition transcript fees, *id.* at 37-40, and the court ordered Ms. Marx to pay GRC $4,543.03 in costs under Federal Rule of Civil Procedure 54(d). *Id.* at 37; Pet. App. 29a, 31a. The court rejected Ms. Marx's argument that the FDCPA, § 1692k(a)(3), limits cost awards to defendants to cases brought in bad faith and for the purpose of harassment; it held that the statutory language applies only to an award of attorney's fees. Pet. App. 28a-29a.

Ms. Marx appealed both the ruling that the fax to her employer was not a prohibited "communication" and the award of costs. The Tenth Circuit affirmed the judgment on the merits and affirmed the cost award under Rule 54(d).[1] Judge Lucero dissented on both issues.

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[1]The district court had also invoked Rule 68 as a basis for the cost award because GRC had made a Rule 68 offer of judgment before trial, which Ms. Marx had not accepted. Pet. App. 15a. The court had overlooked this Court's decision in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981), which held that Rule 68's provision for costs does not apply when a plaintiff does not prevail on her claims and thus does not "obtain" a "judgment" within the meaning of the Rule. Citing *Delta Air Lines*, the Tenth Circuit held that the district court had erred in this regard. Pet. App. 15a.

In affirming the cost award, the Tenth Circuit recognized that Rule 54(d) permits a prevailing party to recover costs "[u]nless a federal statute . . . provides otherwise," and that the FDCPA provides that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). The court read "the bad-faith-and-harassment provision of § 1692k(a)(3) to indicate two separate pecuniary awards for a defendant who prevails against a suit brought in bad faith and for the purpose of harassment: (1) 'attorney's fees reasonable in relation to the work expended' and (2) 'costs.'" Pet. App. 7a. Thus, the court of appeals rejected GRC's argument that the reference to "costs" was merely part of a standard for determining the amount of attorney's fees awarded to a defendant (that is, that fees must be reasonable in relation to "the work expended and costs"). *See id.*

Despite its recognition that § 1692k(a)(3) expressly provides for the award of both fees and costs to defendants in bad-faith cases, the court went on to state that "only" an award of attorney's fees "is linked to a finding that the action has been brought by the plaintiff in bad faith." *Id.* 18a. The court held that § 1692k(a)(3) "merely recognizes that the prevailing party is entitled to the costs of suit as a matter of course," and thus that the FDCPA does not "exclude Rule 54(d) costs from being" awarded. *Id.* 8a. That is, although initially recognizing that § 1692k(a)(3) sets forth a standard governing the award of costs—and one that differs from that of Rule 54(d)—the court ultimately held that § 1692k(a)(3) does not "provide otherwise" than Rule 54(d), and that Rule 54(d) is an

appropriate basis for awarding costs to an FDCPA defendant. *See* Pet. App. 14a.

Judge Lucero dissented. He found the FDCPA to be "clear and unambiguous" that an award of costs to the defendant is permitted only on a finding that the case was brought in bad faith and for the purpose of harassment. *Id.* 24a. Because the district court made no such finding in this case, Judge Lucero would have reversed the award of costs.

Ms. Marx filed a petition for rehearing or rehearing en banc on both the merits and costs issues. The petition was supported, as to both issues, by an amicus brief from the Consumer Financial Protection Bureau. The Tenth Circuit denied the petition.

SUMMARY OF ARGUMENT

I. The FDCPA provides that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). The plain language of this provision limits an award of costs (as well as fees) to a prevailing defendant to FDCPA cases brought in bad faith and to harass the defendant.

Under the Tenth Circuit's reading, the words "and costs" serve no function. That reading not only renders "and costs" "mere surplusage," Pet. App. 24a (Lucero, J., dissenting), but if the sentence's introductory clause did not apply to "and costs," those two words would be grammatically inexplicable. Because § 1692k(a)(3) can easily be read to give effect to each word in the sentence, the Court should hold that the provision means what it says, limiting

cost awards to prevailing defendants to cases brought in bad faith and for the purpose of harassment.

II. Federal Rule of Civil Procedure 54(d) establishes a presumption in favor of awarding costs to the prevailing party, "unless a federal statute . . . provides otherwise." By stating a basis for awarding costs that is different from the one stated in Rule 54(d), § 1692k(a)(3) "provides otherwise." This result flows cleanly from the text of both Rule 54(d) and § 1692k(a)(3). The Tenth Circuit's view that a more "clear and specific" statement is needed for a statute to displace the presumption of Rule 54(d) is at odds with the Rule's text and relevant authority.

ARGUMENT

I. Section 1692k(a)(3) Limits Cost Awards to Prevailing Defendants in FDCPA Cases to Actions Brought in "Bad Faith and for the Purpose of Harassment."

"On a finding by the court that an action under [the FDCPA] 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). As a majority of lower courts to have considered the issue recognize, a prevailing defendant may be awarded costs only if the plaintiff brought the case "in bad faith and for the purpose of harassment,"[2] just as the statute indisputably permits an

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[2] *See Rouse v. Law Offices of Rory Clark*, 603 F.3d 699, 704 (9th Cir. 2010); *Emanuel v. Am. Credit Exch.*, 870 F.2d 805, 809 (2d Cir. 1989) (dicta); *Puglisi v. Debt Recovery Solutions, LLC*, 822 F. Supp. 2d 218, 233-34 (E.D.N.Y. 2011); *Clark v. Brumbaugh & Quandahl, PC*, 731 F. Supp. 2d 915, 925-26 (D. Neb. 2010); *Bacelli* (continued...)

award of attorney's fees only in such circumstances. *See, e.g.*, *Horkey v. J.V.D.B. & Assocs., Inc.*, 333 F.3d 769, 775 (7th Cir. 2003). "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. The prevailing view follows directly from the plain language of § 1692k(a)(3). The subject of the sentence ("the court") acts through the same verb ("may award") equally on both direct objects: "attorney's fees" and "costs." The adverbial phrase, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment," applies to all the action in the sentence—that is, the award of fees and the award of costs. There is no grammatical basis to distinguish "fees" from "costs" in terms of what a court may do ("award" them) or under what circumstances a court may do it ("[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment"). *See Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) ("In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb

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[2](...continued)
v. MFP, Inc., 2010 WL 4054107, at *1 (M.D. Fla. 2010); *Nakao v. Int'l Data Servs.*, 2007 WL 295537, at *2 (D. Haw. 2007); *Pavone v. Citicorp Credit Servs.*, 60 F. Supp. 2d 1040, 1049 (S.D. Cal. 2007); *Wilson v. Transworld Sys.*, 2003 WL 21488206, at *1 (M.D. Fla. 2003); *Csugi v. Monterey Fin. Servs.*, 2001 WL 1841444, at *1 (D. Conn. 2001); *Latimer v. Transworld Sys.*, 842 F. Supp. 274, 275 (E.D. Mich. 1993). *But see Thomasson v. GC Servs. Ltd. P'ship*, 2007 WL 3203037, at *2-*3 (S.D. Cal. 2007), *overruled by Rouse*, 603 F.3d 699; *Corridean v. Restore Fin. Servs.*, 2007 WL 1989622, at *3 (D. Or. 2007), *overruled by Rouse*, 603 F.3d 699.

. . . that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.").

If the sentence's introductory clause ("on a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment") does not apply to "and costs," those two words become untethered to the rest of the sentence. When the Tenth Circuit considered the sentence structure, it seemed to agree, as it recognized that § 1692k(a)(3) "indicate[s] two separate pecuniary awards for a defendant who prevails against a suit brought in bad faith and for the purpose of harassment: (1) 'attorney's fees reasonable in relation to the work expended' and (2) 'costs.'" Pet. App. 7a. Yet later, the court construed the provision *not* to limit cost awards to cases brought in bad faith, effectively reading the words "and costs" out of the sentence. The court's conclusion that "[o]nly" an award of attorney's fees "is linked to a finding that the action has been brought by the plaintiff in bad faith," Pet. App. 18a, contradicts its own earlier reading and finds no support in the statutory text. Indeed, the Tenth Circuit itself failed to offer any explanation of how "and costs" fits into the sentence if cost awards are not limited to cases brought in bad faith and for harassment. *Cf. Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (rejecting reading that would render statutory provision "essentially without effect").

Although § 1692k(a)(3) states when costs "may" be awarded, not when they "may not" be awarded, "the natural meaning of 'may' in the context of the [sentence] is that it authorizes certain [awards]—ones that satisfy the subsequent condition—and no others." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004). In *Cooper Industries*, for instance, the Court considered a statute

providing that "[a]ny person may seek contribution . . . during or following any civil action under" certain other provisions of the statute. *Id.* (quoting 42 U.S.C. § 9613(f)(1)). The Court rejected the argument that "'may' should be read permissively," such that the condition ("during or after . . .") "is one, but not the exclusive, instance in which a person may seek contribution." *Id.* As the Court explained, if that argument were correct, Congress need not have included the explicit condition: "There is no reason why Congress would bother to specify the conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions." *Id.* The same analysis applies here: There is no reason why Congress would specify a condition for the award of costs, and at the same time allow an award of costs absent that condition. *See* Pet. App. 25a (dissent, making similar point).

Similarly, in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), the Court considered the argument that the list of taxable costs in 28 U.S.C. § 1920 that a court "may" award does not preclude taxation of costs under Rule 54(d) above and beyond the items listed. Rejecting the argument, the Court found that "no reasonable reading of these provisions [§ 1920 and Rule 54(d)] together can lead to this conclusion, for petitioners' view renders § 1920 superfluous." *Id.* at 441. Again, the same is true here: If § 1692k(a)(3) does not preclude cost awards in FDCPA cases that were brought in good faith, the words "and costs" in § 1692k(a)(3) are superfluous.

Because § 1692k(a)(3) can be read to give meaning and purpose to every word, the court below erred in reading "and costs" to have no substantive effect. *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); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)); *Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 112 ("[O]f course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

B. Stating that § 1692k(a)(3) "merely recognizes that the prevailing party is entitled to receive the costs of suit as a matter of course," Pet. App. 8a, the Tenth Circuit looked to the separate grant of authority to award fees and costs that is contained in the first sentence of § 1692k(a)(3). That sentence provides that a debt collector who violates the FDCPA "is liable" to a prevailing *plaintiff* for "the costs of the action, together with a reasonable attorney's fee as determined by the court." Because "Rule 54(d) already gives the prevailing party his costs," the court said that this sentence—and, by extension, the "bad faith" sentence at issue here as well—simply confirms Rule 54(d). *Id.*

The flaws in the court's chain of reasoning begin with its premise. The first sentence in § 1692k(a)(3)—providing for an award of costs and attorney's fees to a prevailing plaintiff—does *not* simply reiterate Rule 54(d). Rule 54(d) establishes only a presumption in favor of awarding costs, *see*, *e.g.*, *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1022 (9th Cir. 2003); *Whitfield v. Scully*, 241 F.3d 264, 270 (2d Cir. 2001); *Badillo v. Cent. Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983), but the presumption can be overcome by "a federal statute, the[] [federal] rules, or a court order." Given the exception for "a court

order," courts, including this Court, have recognized that district courts have discretion to deny costs to a prevailing party. *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2006 (2012) ("discretion granted by Rule 54(d)" is "a power to decline to tax, as costs, the items enumerated in § 1920" (quoting *Crawford Fitting Co.*, 482 U.S. at 442)); *Crawford Fitting Co.*, 482 U.S. at 441-42 (noting that Rule 54(d) "is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party").

In contrast, under the first sentence of § 1692k(a)(3), the prevailing plaintiff has a *nondiscretionary* entitlement to an award of costs and fees: A debt collector who loses a case under the FDCPA "is liable" for costs. *See Tolentino v. Friedman*, 46 F.3d 645, 651 (7th Cir. 1995) (stating that where plaintiff brings successful action to enforce FDCPA, "'the statute requires the award of costs'" (quoting *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989))). By making an award of costs to a prevailing plaintiff mandatory, the first sentence of § 1692k(a)(3) "provides otherwise" than Rule 54(d)(1). Thus, the Tenth Circuit's theory that the plain language of the *second* sentence can be overlooked because *different* language in the *first* sentence "merely recognizes" Rule 54(d) fails at its premise.

Further, regardless of how one reads the first sentence of § 1692k(a)(3), the different language of the second sentence cannot reasonably be read "merely" to "recognize[]" that "the prevailing party is entitled to receive the costs of suit as a matter of course" unless one ignores the introductory clause that limits awards to cases "brought in bad faith and for the purpose of harassment." "If the statute [were] merely supplementing Rule 54(d) by allowing attorney's fees, then it would not have included an

express reference to costs." *Gwin v. Am. Rover Transp. Co.*, 482 F.3d 969, 974 (7th Cir. 2007) (interpreting similar language in then-current version of 46 U.S.C. § 2114(b)).

C. Below, GRC argued that § 1692k(a)(3) should be read to mean that, on a finding of bad faith, "the court may award to the defendant attorney's fees," which must be "reasonable in relation to the work expended and [to] costs." Although this reading at least gives some meaning to each word in the sentence, the court below properly rejected it on the ground that it is implausible given the language and context of the provision as a whole. *See* Pet. App. 7a-8a. "Attorney's fees and costs are legally distinct categories of monetary allowances made to successful litigants." *Id.* 7a. And "[c]osts are not part of the traditional methodology of determining the reasonableness of attorneys' fees, and for good reason." *Rouse*, 603 F.3d at 704. Costs under Rule 54(d) are defined and limited by 28 U.S.C. § 1920, *Crawford Fitting Co.*, 482 U.S. at 441, and the amount of costs expended bears no relationship to the reasonable amount of attorney time needed to prevail in a case. Thus, it would be a "logical fallacy to use costs to determine the reasonableness of attorneys' fees." *Rouse*, 603 F.3d at 704. "Such an approach [would] also [be] contrary to attorneys' fees jurisprudence." *Id. See generally Perdue v. Kenny A. ex rel Winn*, 130 S. Ct. 1662, 1672-73 (2010) (discussing calculation of a reasonable attorney's fee).

D. Finally, reading § 1692k(a)(3) to make both a fee award and a cost award contingent on a finding of bad faith is consistent not only with the grammar and sentence structure of the provision, but also with the purposes of the FDCPA. The FDCPA is designed to be enforced primarily by consumers who have been subjected to collection abuses. S. Rep. No. 95-382, at 5. Thus, FDCPA plaintiffs

are, by and large, people in debt who might be deterred from challenging abusive and deceptive collection practices by the possibility of being held liable for the defendants' costs in non-frivolous cases. Although cost awards "almost always amount to less than the successful litigant's total expenses," *Taniguchi*, 132 S. Ct. at 2006 (citation omitted), the awards can be significant, particularly for a financially strapped consumer already in debt. Here, for example, GRC requested $7,779 and was awarded $4,543, J.A. 37—no small amount for an individual consumer. The risk of deterring private enforcement cases is even more acute in light of the bona fide error defense, 15 U.S.C. § 1692k(c)—under which a plaintiff may successfully prove that the defendant violated the FDCPA but nonetheless lose her case, based on facts known only to the defendant prior to suit.

This Court has itself expressed concern that "chill[ing] private suits under the statutory right of action" would "undermin[e] the FDCPA's calibrated scheme of statutory incentives to encourage self-enforcement." *Jerman*, 130 S. Ct. at 1624 (citing FTC, *Collecting Consumer Debts: The Challenge of Change* 67 (2009) ("Because the Commission receives more than 70,000 third-party debt collection complaints per year, it is not feasible for federal government law enforcement to be the exclusive or primary means of deterring all possible law violations.")). Properly construed, § 1692k(a)(3) minimizes the deterrent effect of presumptive cost awards to prevailing defendants, while "protect[ing] debt collectors from nuisance lawsuits, if the court finds that an action was brought by the consumer in bad faith and for harassment," by allowing for an award of fees and costs to the debt collector in that circumstance. S. Rep. No. 95-382, at 5; *see Rouse*, 603 F.3d at 705 (stating that § 1692k(a)'s limitation on award of costs to defendants

is "consistent with the stated intent of Congress"); *Lingis v. Motorola, Inc.*, __ F. Supp. 2d __, 2012 WL 1969332, at *4 (N.D. Ill. 2012) ("Applying Rule 54(d)'s stronger presumption in favor of awarding costs to prevailing defendants would upset the balance Congress struck between encouraging plaintiffs to bring actions that 'seemed reasonable at the outset' and deterring frivolous lawsuits." (addressing ERISA and quoting *Marquardt v. N. Am. Car Corp.*, 652 F.2d 715, 720 n.6 (7th Cir. 1981)).

Because the plain language of § 1692k(a)(3) is consistent with the purpose of the FDCPA, there is no need to go beyond the unambiguous text to discern its meaning: On a finding that an action was brought in bad faith and for the purpose of harassment, the court may award costs to the defendant. Absent such a finding, the court may not award costs to the defendant.

II. Section 1692k(a)(3) "Provides Otherwise" Than Rule 54(d).

Rule 54(d) is straightforward: "Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Discerning the meaning of "provides otherwise" is not a complicated endeavor: To "provide otherwise" is "[t]o set down as a stipulation or requirement" "[i]n another way; differently; [u]nder other circumstances." *American Heritage Dictionary Online*, http://ahdictionary.com/ (2011); *see Merriam-Webster Online*, http://www.merriam-webster.com (2012) (giving similar definitions); *Illustrated Oxford Dictionary* 577, 656 (revised ed. 2003) (giving similar definitions). It should be beyond question that § 1692k(a)(3) sets down a requirement or condition for an award of costs that is different from, or states other circumstances than, Rule 54(d). As

compared to the Rule's broad grant of discretion to award costs, the FDCPA provides a much more circumscribed discretion, limited to cases brought in bad faith and to harass.

A. A statute's text determines whether the statute "provides otherwise" than Rule 54(d). Thus, cases in which courts have recognized that a particular statute displaces Rule 54(d) do not undertake a special analysis to make that determination. They simply read the text of the statute at issue. "When the federal statute forming the basis for the action has an express provision governing costs, . . . that provision controls over the federal rules." *Brown v. Lucky Stores*, 246 F.3d 1182, 1190 (9th Cir. 2001) (citing Rule 54(d)(1)); *see*, *e.g.*, *Gwin*, 482 F.2d at 974 (holding that 46 U.S.C. § 2114(b), which provided for costs and fees to a prevailing defendant in cases found to be frivolous or brought in bad faith, superseded Rule 54(d)); *Nichol v. Pullman-Standard, Inc.*, 889 F.2d 115, 121 (7th Cir. 1989) (holding that Rule 54(d) does not apply in ERISA cases, in light of 29 U.S.C. § 1132(g)(1), which provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party"); *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 731 (6th Cir. 1986) (recognizing that § 4 of Clayton Act, which provides that a person injured by an antitrust violation "shall recover" costs, 15 U.S.C. § 15(a), "supercedes a district court's discretion under Rule 54(d) to deny costs to a prevailing plaintiff in an antitrust suit"); *Moore v. Southtrust Corp.*, 392 F. Supp. 2d 724, 731, 735 (E.D. Va. 2005) (stating that Rule 54(d) does not apply in case under Electronic Fund Transfer Act, 15 U.S.C. § 1693m(f), which provides for award of fees and costs if suit was brought in bad faith or for purpose of harassment); *Barrera v. Brooklyn Music, Ltd.*, 346 F. Supp. 2d 400, 404-05 (S.D.N.Y. 2004) (stating

that "court's award of costs in [copyright] action is to be rendered under the auspices of [Copyright Act] rather than that of the more general cost shifting provisions," Rule 54(d) and 28 U.S.C. § 1920); *see also Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 472-73 (6th Cir. 2003) (affirming denial of costs where applicable statute, 42 U.S.C. § 11113, which states that court shall award substantially prevailing defendant costs, including fees, "if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith," was not satisfied).

A statute could "provide otherwise" in several ways. "A statute that established a presumption against an award of costs, but without forbidding one, would provide 'otherwise' than the rule." *Loomis v. Exelon Corp.*, 658 F.3d 667, 674 (7th Cir. 2011). Likewise, "a statute establishing a presumption that the winner pays the loser's costs would provide 'otherwise' than Rule 54(d), even though it did not forbid an award to the winner." *Id.* A statute that defined costs to include attorney's fees would also provide otherwise. *E.g.*, 42 U.S.C. § 1988 (providing for an award to the prevailing party of "a reasonable attorney's fee as part of the costs"). And a statute that conditioned an award of costs on satisfaction of some condition would provide otherwise. *E.g.*, 49 U.S.C. § 60121(b) ("The court may award costs to a prevailing defendant when the action is unreasonable, frivolous, or meritless."). Section 1692k(a)(3) is an example of the last category.

B. Below, the Tenth Circuit stated that a "clear showing of legislative intent" is needed for a statute to provide otherwise than Rule 54(d). Pet. App. 8a; *id.* 14a (stating that statute cannot provide otherwise than Rule 54(d) without "clear and specific statutory command"). By "clear showing," the court evidently meant something more

than that the text of the statute must make a provision for costs that is different from that in Rule 54(d) because, as the court itself first parsed the text, *see id.* 7a, § 1692k(a)(3) would satisfy that standard. The court apparently meant that, to "provide otherwise" than Rule 54(d), a statute must not only make a different provision than the Rule for an award of costs, but must also expressly state that it displaces the Rule 54(d) presumption.

Applying a clear statement rule that requires more than statutory language that provides for cost awards in a different way than Rule 54(d) would be unjustified. "The clear statement rule was developed principally as a method for courts to ensure that Congress adequately deliberated before abrogating the states' Eleventh Amendment immunity from suit in federal court." Michael Lee, *How Clear Is "Clear"?: A Lenient Interpretation of the* Gregory v. Ashcroft *Clear Statement Rule*, 65 U. Chi. L. Rev. 255, 255 (1998). Typically applied "to protect constitutional values through statutory interpretation," the rule protects, for example, the federalism values that underlie state sovereign immunity and the due process concerns that underlie the rule of lenity. *See* Matthew Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 Yale L.J. 2, 37 (2008) (footnotes omitted); *e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 461, 463 (1991) (applying clear statement rule to statutes that address matters "at the heart of representative government," such as authority of states to determine qualifications of state officials).

Rule 54(d) is not based on a constitutional principle, and displacement of the presumption that it establishes implicates no "weighty and constant" values that would justify a clear statement rule. *See Astoria Sav. & Loan*,

501 U.S. at 108 (clear statement rules "prevail[] only to the protection of weighty and constant values, be they constitutional . . . or otherwise" (citations omitted)). Not surprisingly, a search for cases that mention a "clear statement" rule in connection with Rule 54(d), or any special burden applied to show that a statute "provides otherwise," turned up zero decisions. *Moore's Federal Practice* notes only one prerequisite for a statute to provide otherwise: "[F]or [a] statute to be considered contrary to Rule 54(d)(1), the statute must specifically mention 'costs.'" 10 Fern Smith, *Moore's Federal Practice* ¶ 54.101 (3d ed. 1997); *cf. U.S. ex rel. Costner v. United States*, 317 F.3d 889, 890-91 (8th Cir. 2003) (holding that False Claims Act, 31 U.S.C. § 3730(d)(4), which allows for award of "attorney's fees and expenses" to prevailing defendant if "claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment" does not provide otherwise than Rule 54(d) because it does not mention "costs").

As the leading civil procedure treatises agree, "Congress frequently provides for the award of costs when it creates specific statutory rights," but "[t]hese enactments are so numerous and their treatment of costs is so variant that it would serve no useful purpose to collect them[.]" 10 Charles Alan Wright, et al., *Federal Practice & Procedure* § 2670 (3d ed. 2012); *accord Moore's Federal Practice* ¶ 54.101 ("statutes preempting the court's discretion under Rule 54(d)(1) are far too numerous to list comprehensively"). The routine provision for cost awards on terms that vary from those of Rule 54(d) belies the notion that a special showing beyond the plain text of the statute is needed to displace the Rule.

The Tenth Circuit offered little basis for applying a clear statement rule. It stated that, although Congress has

the power to enact statutes that supersede the Rules, "subsequently enacted statutes ought to be construed to harmonize with the Rules, if feasible." Pet. App. 8a. (citation and internal quotation marks omitted). This observation, however, adds nothing to the analysis. Because Rule 54(d) expressly contemplates that a statute may "provide otherwise" and, in that way, displace operation of the Rule in a given case, a statute that provides otherwise does not conflict with or impliedly repeal the Rule. That is, like a court order that "provides otherwise" by denying costs to a prevailing party in a particular case, a statute that "provides otherwise" by imposing conditions on cost awards in particular cases is consistent with, and, indeed, contemplated by, the express terms of Rule 54(d). No limiting construction is needed to "harmonize" such a statute with Rule 54(d).[3]

Not only does the limitation on cost awards under § 1692k(a)(3) pose no conflict with the plain language of Rule 54(d), but it poses no threat to the policies behind the Rule. For example, courts have recognized that denial of a Rule 54(d) cost award may be appropriate where the losing party has limited financial resources. *See*, *e.g.*, *Champion Produce*, 342 F.3d at 1022; *Whitfield*, 241 F.3d at 270; *Badillo*, 717 F.2d at 1165. And courts have recognized that, in some circumstances, the chilling effect that imposing costs would have on future litigants in similar cases or the public importance of the issues involved in a case may counsel against awarding costs under Rule 54(d). *See*, *e.g.*,

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[3]Conversely, as discussed in part I, a Rule 54(d) award to a prevailing defendant in an FDCPA case absent a finding of bad faith cannot be "harmonized" with § 1692k(a)(3). *See Crawford Fitting Co.*, 482 U.S. at 442 ("We cannot accept an interpretation of Rule 54(d) that would render any of these specific statutory provisions entirely without meaning.").

Champion Produce, 342 F.3d at 1022 (citing *Ass'n of Mexican-Am. Educators v. California*, 231 F.3d 572, 592 (9th Cir. 2000) (civil rights case)); *White & White*, 786 F.2d at 731 (antitrust case brought by small business); *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 2011 WL 4375039, at *8 (S.D. Fla. 2011) (Clean Water Act case). These considerations also come into play in the FDCPA context, where Congress placed primary responsibility for statutory enforcement on individuals in debt and provided defendants a bona fide error defense that can enable them to avoid liability even in cases where the plaintiff's claim is meritorious. *See* 15 U.S.C. § 1692k(c); S. Rep. No. 95-382, at 5. By permitting cost awards only against plaintiffs who sue in bad faith, the FDCPA substituted a more protective rule that codifies the same concern about the resources of financially disadvantaged litigants that courts, as a matter of policy, accept as a permissible basis for overcoming the Rule 54(d) presumption.

C. By superimposing a clear statement rule onto Rule 54(d)'s "provides otherwise" language, the court below transformed the presumption in favor of an award of costs *where* Rule 54(d) applies into a presumption *that* Rule 54(d) applies. In support of this approach, the court cited four other provisions in Title 15 of the U.S. Code that address cost awards. The court suggested that these provisions show a "long and consistent judicial interpretation" of other laws under Title 15 that provide for an award of costs: "No circuit has found that any of these provisions displaced Rule 54(d)," the court stated. Pet. App. 12a. That statement is quite misleading.

None of the four provisions cited by the court below is the subject of a "long and consistent judicial interpretation." In fact, a Westlaw search shows that no court of appeals has ever addressed the relationship between any

of the four provisions and Rule 54(d), and only one district court decision has done so. In that case, *Moore v. Southtrust Corp.*, the district court considered 15 U.S.C. § 1693m(f), a provision of the Electronic Fund Transfer Act (EFTA) that is similar to § 1692k(a)(3).[4] The court held that the statute—not Rule 54(d)—applies. *See* 392 F. Supp. 2d at 731 (assessing evidence of bad faith "to determine if the defendant is entitled to reasonable attorney's fees and costs" and stating that "the entitlement to costs in this case is set forth by statute"); *see also Bonarrigo v. Prosperity Bank*, 2012 WL 2864496, at *2 (N.D. Tex. 2012) (awarding costs to prevailing defendant in EFTA case "brought in bad faith and/or for the purposes of harassment"); *Puglisi*, 822 F. Supp. 2d at 233-34 (denying costs to prevailing defendant in case under EFTA and FDCPA because it was not brought in bad faith and for purpose of harassment).

As to the other three provisions cited in the opinion below, one, 15 U.S.C. § 15c(d)(2), provides for attorney's fees but does not mention costs at all. Thus, it is not surprising that no reported opinion addresses the relationship between § 15c(d)(2) and the availability of costs under Rule 54(d). And the remaining two provisions cited by the court below—15 U.S.C. § 78u(h)(8) and 15 U.S.C. § 4304(a)(1)—"provide otherwise" by, among other things, using the word "shall" to eliminate the court's discretion with respect to costs in certain cases.

In addition, because it listed only four selected provisions of Title 15, the court overlooked *White & White*, in

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[4]Section 1693m provides: "On a finding by the court that an unsuccessful action under this section was brought in bad faith or for purposes of harassment, the court shall award to the defendant attorney's fees reasonable in relation to the work expended and costs."

which the Sixth Circuit recognized that the Clayton Act, 15 U.S.C. § 15(a), which provides that an injured person "shall recover" costs, "supercede[s] a district court's discretion under Rule 54(d) to deny costs to a prevailing plaintiff." 786 F.2d at 731 n.1.

In short, aside from the Tenth Circuit here, courts considering whether a statutory provision "provides otherwise" than Rule 54(d) have not looked for a special statement, such as "Rule 54(d) does not apply." Rather, a statute "provides otherwise" than Rule 54(d) if it states a different basis for a cost award than the basis stated in Rule 54(d). That is the case here. By its express terms, Rule 54(d) does not apply.

CONCLUSION

The Tenth Circuit's decision affirming an award of costs to GRC should be reversed.

Respectfully submitted,

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