1 IN THE SUPREME COURT OF THE UNITED STATES

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3 OLIVEA MARX, :

4 Petitioner : No. 11-1175

5 v. :

6 GENERAL REVENUE CORPORATION :

7 - - - - - - - - - - - - - - - - - - x

8 Washington, D.C.

9 Wednesday, November 7, 2012

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:06 a.m.

14 APPEARANCES:

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

16 Petitioner.

17 ERIC J. FEIGIN, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.; for

19 United States, as amicus curiae, supporting

20 Petitioner.

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

22 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 versus General

5 Revenue 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 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 -- it's ancient law
8 that repeals by implication are not favored. And what
9 you're arguing here is that that provision effectively
10 repeals another provision which allows costs in all
11 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 the 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. So if you're

1 not a bad-faith harassing plaintiff, but you nonetheless
2 lost, then you're under 54(d).
3 MS. ZIEVE: Your Honor, if you look at
4 Section k(a)(3) as a whole, the two sentences together
5 confirm that this is not a provision about bad-faith
6 plaintiffs, but, rather, the provision is addressing
7 both fees and costs to -- to plaintiffs and defendants.
8 And if -- if the Congress merely wanted to state in that
9 second sentence that fees were available and didn't mean
10 to say anything about costs to defendants, there would
11 have been no reason for Congress to have put costs in
12 that sentence. If --
13 JUSTICE GINSBURG: Well, there are a number
14 of reasons. One is symmetry, because they have costs in
15 the part about defendants. And the concern that, well,
16 if we leave out costs for the bad-faith harassing
17 plaintiff, then it -- it may be assumed that they get
18 only attorney's fees and not costs.
19 So the statute's provisions like this may be
20 redundant, but one can see that a drafter might very
21 well want to say, "Well, we said we're dealing with the
22 defendant costs. We want to put the same thing in a
23 plaintiff."
24 MS. ZIEVE: Well, you've made a few points,
25 and I'll try to address each of them.

1 First, there would be no reason to include
2 costs in the second sentence just because it was in the
3 first sentence, because the first and second sentences
4 are not parallel. The first sentence makes an award of
5 costs mandatory, and, therefore, it does do some work
6 beyond 54(d); it clearly has a function in that
7 sentence. Whereas the second sentence, the award is
8 subject to the "may;" that is, that it's not mandatory
9 that the court award them.
10 If -- if Congress was -- Congress would have
11 no need to be concerned that if it left costs out of the
12 second sentence there would be some negative
13 implication, because there are several statutes that
14 mention fees without costs. And GRC has cited no
15 instance in which a court has read a negative
16 implication into that. We, in our reply brief, cited a
17 couple cases that do the opposite. It's -- so,
18 therefore, if Congress had omitted costs, left it out of
19 the sentence, then Rule 54(d) would have continued to
20 apply in cases where the defendants. One more
21 example --
22 JUSTICE SOTOMAYOR: Didn't -- don't district
23 courts always have the authority to award costs for
24 sanctionable behavior like bad faith? So this provision
25 is duplicate no matter how we read it. It's either

1 duplicative of a power the court already had to award
2 costs for bad faith or it's duplicate of Rule 54.
3 MS. ZIEVE: Well, if you read this sentence
4 as a misconduct provision, then it does repeat the
5 court's inherent authority; although, as this court has
6 mentioned in a couple cases, sometimes statutes want to
7 reiterate authority that exists elsewhere.
8 If you read it our way, however, the
9 statute -- this provision does actually do some work
10 that it wouldn't otherwise do. That is, it limits cost
11 awards to prevailing defendants of these circumstances.
12 JUSTICE SOTOMAYOR: It limits Rule 54.
13 MS. ZIEVE: Right.
14 JUSTICE SOTOMAYOR: I think your -- your
15 answer is always that Rule 54 obligates court to give
16 costs. And this rule, as you read it, is a permissive
17 grant only. Even in bad faith litigations, a court
18 could choose not to give costs.
19 MS. ZIEVE: Well, Rule 54 doesn't obligate a
20 court to give costs; it establishes a presumption --
21 JUSTICE SOTOMAYOR: True.
22 MS. ZIEVE: -- and this says the presumption
23 is limited to cases brought in bad faith and for
24 purposes of harassment. There are other statutes that
25 do -- similarly do what we've -- what's done here.

1 Congress could have omitted -- if GRC is correct,
2 Congress could have just omitted the words "and costs,"
3 leaving the costs to be determined under Rule 54.
4 An example of that is 15 U.S.C. 15c(d)(2),
5 which is actions by state attorneys general and provides
6 that the court may award attorneys fees to a prevailing
7 defendant upon a finding that the action was in bad
8 faith.
9 JUSTICE GINSBURG: Ms. Zieve, when I look at
10 other statutes, it seems to me we would want to look at
11 statutes involving lenders, so we would look at the
12 Truth in Lending Act and the -- what is it, the Credit
13 Organizations Act --
14 MS. ZIEVE: Fair Credit?
15 JUSTICE GINSBURG: -- and those do not
16 provide for attorney's fees. They are covered only
17 under 54(d), which is costs, not fees. Why should we
18 read this act in a way that -- so -- so that a defendant
19 under this act who can get attorney's fees is worse off
20 with respect to costs than defendants under the other
21 lending legislation, the ones that have only 54(d)?
22 Congress gave defendants something more
23 here. Why -- why would -- why should it be that 54(d)
24 would apply to the lender under the Truth in Lending Act
25 but not to the lender under this act?

1 MS. ZIEVE: Well, first, Your Honor, the
2 Congress's purpose was not simply to -- this isn't just
3 a defendant-friendly provision. Congress had dual
4 purposes in enacting k(a)(3). On the one hand, Congress
5 wanted to deter nuisance suits, but on the other hand,
6 Congress wanted to ensure that meritorious suits by
7 impecunious debtors were not deterred by the prospect
8 that an award of costs would exceed the value of the
9 damage that could be recovered in a successful suit.
10 And the two provisions of k(a)(3) show the line Congress
11 drew and how it balanced those two objectives.
12 As to the other statutes, the Truth in
13 Lending Act, the Credit Repair Organizations Act, they
14 were enacted at different times by different Congresses,
15 they have different sorts of provisions, some better for
16 plaintiffs, some better for defendants. And -- but this
17 category -- in enacting this statute, Congress
18 emphasized that the widespread and national serious
19 problem of collection abuse that Congress said inflicts
20 substantial suffering and anguish, and noted
21 specifically in the Senate report this Court has cited
22 to in the Jerman case that consumers, the impecunious --
23 the people who can't even afford to pay their debts, are
24 the primary enforcers of the statute.
25 The FTC got about 120,000 complaints from

1 consumers about debt collectors last year, more than any
2 other industry. So Congress may reasonably have decided
3 that the primary enforcers of this statute weren't going
4 to be doing that work if they were -- if they were at
5 risk of significant cost awards in cases that have
6 frequently small value.
7 There are other ways, if Congress wanted to
8 preserve Rule 54(d), that it could have done it that did
9 not happen here. For instance, in 49 U.S.C. 14707(c),
10 Congress has a similar provision about attorney's fees
11 to prevailing -- attorney's fees to prevailing parties,
12 and then states expressly that fee is in addition to
13 costs allowable under the Federal Rules of Civil
14 Procedure. Congress didn't do that here.
15 Or Congress could have made it clear that it
16 was not displacing Rule 54(d) as to cost awards by
17 stating that the Court could award attorney's fees as
18 part of the cost, therefore distinguishing fees and
19 costs. Congress has done that sort of thing frequently,
20 including in a statute that provides for an award in
21 cases of bad faith. I'm looking at 28 U.S.C. 1875, that
22 provides the courts may award fees as part of costs if
23 an action was frivolous or in bad faith.
24 So -- but Congress did none of those things
25 here. Instead, what it did was draft a sentence that

1 links the term "cost" to the term "attorney's fees" with
2 the conjunction "and," and subjects both of those
3 objects of the sentence to the same condition, the
4 condition that the plaintiff suit was brought in bad
5 faith and for purpose of harassment.
6 GRC suggests that the reading -- that the
7 statute the Justice mentioned, benefits plaintiffs. But
8 what Congress wanted to do here -- I mean, would benefit
9 plaintiff -- what Congress wanted to do was to help
10 defendants. There's actually no legislative history
11 about why this provision was put in there.
12 What we have instead, for what it's worth,
13 is a markup later where this provision is discussed in
14 response to concerns that frivolous suits should be
15 deterred, and this provision, which is now already in
16 the statute, is discussed as one means of deterring
17 frivolous suits.
18 But the bad faith and harassment standard is
19 the dividing line that Congress drew between nuisance
20 suits and other suits. This case is clearly on the
21 non-nuisance side of the line, and cases on that side of
22 the line are not subject to an award of costs.
23 If the Court has no further questions --
24 JUSTICE SOTOMAYOR: I would assume that if
25 Rule 54, instead of saying what it currently does, said

1 something like "except as expressly repealed in another
2 statute," would what happened here meet that express
3 requirement of repeal? It was Justice Scalia's question
4 to you, but reformulated in a different way.
5 MS. ZIEVE: If Rule 54(d) incorporated a
6 requirement that a statute expressly referred to Rule
7 54(d)?
8 JUSTICE SOTOMAYOR: Expressly repealed
9 54(d).
10 MS. ZIEVE: That would be a very different
11 case. But of course, Rule 54(d) doesn't do that.
12 Instead, when Rule 54(d) was adopted, the Rules
13 Committee actually -- the advisory committee notes list
14 25 statutes that it says will not be affected by the
15 rule. Those are statutes that allow fees, forbid fees,
16 condition fees, allow fees in a broader scope of cases
17 than Rule 54(d) does. And of course, none of those
18 would have mentioned Rule 54(d) because they preceded
19 adoption of the rule.
20 I would reserve the balance of my time.
21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Feigin.
23 ORAL ARGUMENT OF ERIC J. FEIGIN,
24 FOR UNITED STATES, AS AMICUS CURIAE,
25 SUPPORTING THE PETITIONER

1 MR. FEIGIN: Thank you, Mr. Chief Justice,
2 and may it please the Court:
3 Rule 54(d) expressly codifies in absolute
4 form the well-established principle that a specific
5 provision displaces a more general one. And I think
6 that principle is very helpful here in answering a
7 couple of the questions that have come up.
8 First of all, it makes clear that no express
9 textual conflict is necessary. This Court's never
10 required one, and the specific governs the general
11 cases.
12 Let's make even clearer, if you look at the
13 pre-2007 version of the rule, which is meant to be
14 substantively identical to the current version of the
15 rule -- this is at page 12 of the government's brief --
16 and the original version of the rule said, "except when
17 express provision therefore is made either in a statute
18 of the United States or in these rules, costs should be
19 allowed as of course to the prevailing party unless the
20 Court otherwise directs."
21 I think that that makes quite clear that
22 when, as the FDCPA does, there is a specific statutory
23 provision that addresses an award of costs incident to
24 the judgment, that specific statutory provision prevails
25 over the default rule that Rule 54(d) contains.

1 Another point about the specific governing
2 the general principle is it would apply here even if the
3 Court believed that Section 1692k(a)(3) covered some
4 type of circumstances that Rule 54(d) and other things
5 don't.
6 And that's made quite clear by this Court's
7 recent eight-Justice unanimous opinion in RadLAX Gateway
8 Hotel v. Amalgamated Bank, in which the Court said, and
9 I quote, "We know of no authority for the proposition
10 that the canon," -- they're talking about the specific
11 governance, the general canon -- "is confined to
12 situations in which the entirety of the specific
13 provision is a" -- quote -- "'subset' of the general
14 one."
15 JUSTICE BREYER: I mean, my problem with
16 this is I don't -- I mean, I read the whole statute, and
17 they have a good claim until I think you read the whole
18 statute. And I don't know what to say other than the
19 impression -- the impression is that subsection 3, which
20 is what's at issue, the whole thing is meant to say that
21 the winner, when it's the plaintiff, is going to get
22 attorney's fees.
23 You know, it mentions costs, but that's the
24 background rule. And then when you get to the second
25 sentence of that, it means, and if you're in bad faith,

1 the plaintiff, then the defendant gets attorney's fees.
2 It doesn't really mention costs. That's the background
3 rule.
4 So -- and I look at the legislative history,
5 there's some staffer, at least, who's tried to find that
6 interesting; the -- they're talking about what the point
7 of this is, and say the whole point of this section is
8 to help prevent frivolous suits.
9 Well, so there we are. That's -- that's
10 where I am at this moment.
11 MR. FEIGIN: Well, Justice Breyer, I think
12 it does expressly mention costs both in the first and
13 the second sentence.
14 JUSTICE BREYER: I didn't say on some
15 technical linguistic basis, it may do that, that's
16 correct. But perhaps I'm unique in this, but I don't
17 just look at the language, I look at the context, I look
18 at the purpose, and -- and I don't see anything in the
19 language that gets rid of the background rule, and I
20 don't see anything in the purpose that gets rid of the
21 background rule, and I don't see anything in the history
22 that gets rid of the background rule.
23 MR. FEIGIN: Well, Your Honor --
24 JUSTICE BREYER: I don't see anything in the
25 consequences that suggests that you get rid of the

1 background rule. I don't see anything in our traditions
2 that says you should get rid of the background rule.
3 So, what do you do with some obstreperous
4 judge who doesn't just look at the language? I mean, I
5 know uses it, but that's not the only thing.
6 MR. FEIGIN: Well, Your Honor, if Congress
7 were satisfied with the background rule, then I think
8 it's strange that they added the words "and costs" to a
9 sentence that is expressly --
10 JUSTICE BREYER: Oh, why? A person who is a
11 drafter says, you know, you get your costs and you also
12 get the attorney's fees. They don't -- they don't know
13 every statute, the people who draft this. They --
14 they -- they just say, Senator, what are we trying to
15 do? He says, we're trying to give them attorney's fees.
16 They say, okay, we'll give them the costs and the
17 attorney's fees.
18 MR. FEIGIN: Your Honor, I think that gets
19 back to Justice Ginsburg's question of why weren't they
20 just saying "and costs" here just to make clear that not
21 only fees would be available but also costs. And I
22 think that's an implausible hypothesis of what Congress
23 was trying do for the following reason.
24 A congressperson who is concerned that a
25 reference to fees alone in the second sentence of

1 section 1692k(a)(3) would preclude application of the
2 default rule in -- in Rule 54(d), couldn't possibly have
3 thought that the way to make clear that Rule 54(d)
4 applies in full was to add the words "and costs" in a
5 sentence that's expressly --
6 JUSTICE BREYER: And that's if you had been
7 drafting it, perhaps. But the people who actually draft
8 these things are a whole section over in Congress, they
9 don't know every statute, and you give them a general
10 instruction.
11 MR. FEIGIN: Well, Your Honor --
12 JUSTICE BREYER: And the -- the general
13 instruction would be add attorney's fees on the
14 plaintiffs, and add attorney -- all right. You
15 understand the point.
16 JUSTICE SCALIA: We -- we have to assume
17 ignorance of the drafter.
18 JUSTICE BREYER: Yes, ignorance of other
19 laws.
20 JUSTICE SCALIA: As a general principle.
21 JUSTICE BREYER: That's right, general
22 ignorance.
23 (Laughter.)
24 MR. FEIGIN: Your Honor, let me -- let me
25 address that directly. If we're presume that Congress

1 is aware of Rule 54(d), then I think it's quite peculiar
2 and, in fact, quite counterproductive to have added the
3 words "and costs" to a sentence that's expressly
4 conditioned on a finding of bad faith and purpose of
5 harassment.
6 But if I accept your hypothesis that
7 Congress was not aware of Rule 54(d), again, it's quite
8 strange that when thinking about the cost-shifting rule
9 that should apply in FDCPA cases, what Congress decided
10 to do was put the words "and costs" into a sentence
11 that's expressly --
12 JUSTICE BREYER: Well, then they shouldn't
13 have put those words in. We're talking about the next
14 sentence, and the next sentence doesn't put the words
15 in. So you're -- you're -- you're assuming from that
16 fact that in a pro defendant, this is a pro-defendant
17 provision they put in, that was their whole point
18 apparently reading it, that what they decided to do is
19 take away from defendants costs which they normally get
20 without saying anything about it.
21 I mean, that's -- you understand the
22 problem.
23 MR. FEIGIN: Your Honor, the words "and
24 costs" appear in both sentences. I agree with Ms. Zieve
25 that the legislative history does not indicate that this

1 is a uniquely pro-defendant division -- provision, and
2 that's what the Court found in Jerman.
3 JUSTICE BREYER: It doesn't -- where does it
4 say that? Where was the --
5 MR. FEIGIN: Your Honor, first of all --
6 JUSTICE BREYER: -- I would like to read it.
7 MR. FEIGIN: -- you can look at -- there is
8 no legislative history directly addressing the sentence
9 we're trying to interpret today. But I think if you
10 look at the Court's opinion in Jerman and the hearing
11 cited at page 31 of the red brief, it reflects that
12 Congress was trying to balance deterrence of nuisance
13 suits and incentivizing good-faith consumer enforcement.
14 If I could, I would like to address the
15 policy reasons why Congress would have found it
16 particularly useful not to have plaintiffs pay cost rule
17 circumstances.
18 CHIEF JUSTICE ROBERTS: Well, that's a
19 pretty odd way to balance. I mean, if you're -- if
20 you're trying to balance, then you say, well, here's an
21 idea, let's give them attorney's fees, but let's not
22 give them costs.
23 MR. FEIGIN: Well, the reason not to give --
24 CHIEF JUSTICE ROBERTS: That's a very
25 curious way to dilute what was otherwise a

1 defendant-friendly provision.
2 MR. FEIGIN: Well, Your Honor, I don't think
3 the provision is uniquely defendant friendly. I think
4 it draws a dividing line between nuisance suits and
5 non-nuisance suits premised on a finding of the suit
6 being brought in bad faith and the purpose of
7 harassment.
8 And the reason why Congress thought it was
9 necessary to shield good-faith plaintiffs from costs
10 here in order to incentivize enforcement, is, first of
11 all, these are particularly low-value suits, especially
12 when compared to other statutes in the CCPA. They're
13 the kind of suits that can be incentivized by a mere
14 $1,000 in statutory damages. And as this case
15 demonstrates, the cost of a suit, if taxed against the
16 plaintiff, can do much more than 1,000 --
17 JUSTICE BREYER: Did you look up -- did you
18 try to do any sampling on that? Because I did,
19 actually, and -- and I discovered something that I think
20 is not as strong for you, but it isn't too much against
21 you.
22 We just did a random sample of 28 successful
23 cases, and I think the average recovery, except for one
24 outlier where it was very high, it was around $4,000, 3
25 to 4, and the average costs on the ones that the

1 defendants won, I guess, was around a thousand. So you
2 have a point --
3 MR. FEIGIN: Your Honor --
4 JUSTICE BREYER: But it isn't quite as good
5 a point as you seem to suggest. That is, it's a not so
6 low value and the costs are not so high --
7 MR. FEIGIN: Well, Your Honor, plaintiffs --
8 JUSTICE BREYER: -- in order to make it.
9 MR. FEIGIN: Plaintiffs here are uniquely
10 likely to be deterred because they're the kind of people
11 who have been pursued by debt collectors. They're going
12 to be in debt themselves; they're not going to be able
13 to pay costs. That's why attorneys -- and that's why
14 the statute provides for attorneys generally to take
15 these cases on contingency, on the hope that they'll
16 recover fees when the plaintiff is successful.
17 Now, if plaintiff's looking to bring this
18 kind of case, the only out-of-pocket expense the
19 plaintiff is facing is the potential that if it loses
20 the case for some reason that it can't be aware of
21 initially, such as a bona fide good-faith defense or the
22 law being interpreted against them in an area where the
23 law is unclear, they're going to have to pay out of
24 pocket against the plaintiff himself, not the
25 plaintiff's attorney, who are the people the defendant

1 claims is -- are responsible for the abuses they allege
2 in FDCPA cases. This is going to come out via judgment
3 directly against the plaintiff.
4 It's difficult to believe that Congress
5 enacted a provision specifically because it believed the
6 debt collection industry was forcing, among other
7 things, personal bankruptcies and wanted the kind of
8 plaintiffs who were going to be in a position to enforce
9 the FDCPA to have to face the risk of incurring
10 thousands of dollars in costs if they lose a suit that
11 they bring in good faith. And the reason --
12 JUSTICE SOTOMAYOR: Am I to understand your
13 simple position to be that what Rule 54(d) says is if
14 another provision deals with costs, you're relegated to
15 that other provision.
16 MR. FEIGIN: Well, Your Honor --
17 JUSTICE SOTOMAYOR: Unless, and this --
18 you're inverting the express -- unless that provision
19 refers you back to 54.
20 MR. FEIGIN: Well, no, Your Honor, I'd
21 qualify that a little bit. I think what -- we just
22 think it codifies an absolute form of the
23 specific governance to general principles.
24 So the first question you asked is whether
25 they're covering the same territory, and they are here.

1 Both 1692k(a)(3) and 54(d) cover awards of costs
2 incident to the judgment.
3 The second question you asked is the scope
4 of the displacement. So it's possible that you might
5 have a provision, as the first sentence of 1692k(a)(3)
6 does, that only governs in certain circumstances and
7 mandates an award of costs in those circumstances.
8 We don't think a sentence like that standing
9 alone would displace a court's discretionary authority
10 under Rule 54(d) to award costs in other circumstances.
11 But we don't think there's any need -- may I finish the
12 sentence, Your Honor?
13 CHIEF JUSTICE ROBERTS: Finish that
14 sentence.
15 MR. FEIGIN: We don't think there's any need
16 to adopt some new special rule for Rule 54(d) that's
17 different from how this Court normally applies specific
18 governance to general principle.
19 Thank you.
20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 Ms. Blatt.
22 ORAL ARGUMENT OF LISA S. BLATT
23 ON BEHALF OF THE RESPONDENT
24 MS. BLATT: Thank you, Mr. Chief Justice,
25 and may it please the Court:

1 Our position is that the second sentence of
2 section 1692k(a)(3) is a pro-defendant provision that
3 does not strip courts of their discretion under Rule 54
4 to award costs to prevailing defendants. We think that
5 first because of the text and structure, and second,
6 because of the statutory history and purpose.
7 As to the text, the second sentence states
8 that a court may award an affirmative grant of power
9 rather than the court may award attorney's fees and
10 costs if a plaintiff files a lawsuit in bad faith. The
11 text doesn't say that a court may not award costs in the
12 absence of bad faith. The text doesn't say or even
13 address a court's discretion to award costs to
14 prevailing defendants as an ordinary incident of defeat.
15 JUSTICE KAGAN: Ms. Blatt, it -- it seems to
16 me that the -- the most natural way to read this
17 statute, and it's not -- it's not your way, it's, look,
18 we have this Federal Rule of Civil Procedure that --
19 that contemplates that Congress sometimes doesn't write
20 -- it writes statutes authorizing lawsuits without
21 providing a cost provision. And because we know that
22 about Congress, we provide a default rule. And the
23 default rule is what's laid out in subsection D as to
24 costs and then also later as to attorney's fees.
25 But, we know that Congress sometimes does

1 address costs and fees, and where Congress in a
2 particular statute has addressed costs and fees, we look
3 to whatever Congress has said, you know, unless Congress
4 has otherwise provided. And here this is -- 1692k is a
5 provision that addresses costs and fees. It addresses
6 them comprehensively and specifically.
7 MS. BLATT: Yes. I disagree with everything
8 you said for the following reasons --
9 JUSTICE KAGAN: I expected you might.
10 (Laughter.)
11 MS. BLATT: This is not a field preemption
12 case.
13 JUSTICE KAGAN: It's not a question of field
14 preemption.
15 MS. BLATT: Yes, it is. You're saying that
16 if it addresses costs, that it trumps it. And it is
17 a -- you would never think -- this -- Rule 54 doesn't
18 say don't award costs if a statute can be plausibly read
19 to address it. It says unless it provides otherwise,
20 which means Congress actually intended to displace.
21 And unless you actually think that this
22 provision intends to take away a cost authority --
23 JUSTICE KAGAN: Maybe I'm --
24 MS. BLATT: -- you don't get there.
25 JUSTICE KAGAN: -- not in the business of

1 trying to figure out what Congress's intent is. All I'm
2 trying to figure out is whether this Federal statute
3 provides otherwise, and this Federal statute does
4 provide otherwise.
5 MS. BLATT: Okay, here's why it doesn't. It
6 doesn't displace it. It doesn't in terms of the plain
7 text; it just doesn't. It doesn't say any -- there's no
8 disabling aspect about it. It's an affirmative grant to
9 protect a defendant, and when you say to a court it has
10 sanctioning power to award attorney's fees and costs,
11 that doesn't say anything about what happens in the
12 ordinary case where the defendant has prevailed at trial
13 and been found to be completely innocent. This --
14 JUSTICE SCALIA: In -- in that respect, it
15 is different from RadLAX, in which the two provisions --
16 where we held the specific covers the general, but we
17 held that because the two provisions contradicted each
18 other.
19 MS. BLATT: Not only do they not contradict,
20 this is not a specific -- when you said -- the other
21 thing I disagreed with, when you said this
22 comprehensively addresses costs, no, this
23 comprehensively is about attorney's fees.
24 JUSTICE KAGAN: It's both. You know?
25 MS. BLATT: It is --

1 JUSTICE KAGAN: And if I might say, I mean,
2 you object to this statute; it's perfectly reasonable to
3 say Congress should have written a separate provision
4 about costs and attorney's fees, but for whatever bad,
5 good or indifferent reason, Congress didn't; and so this
6 statute basically says, here's what prevailing
7 plaintiffs get as to both costs and fees; here is what
8 prevailing defendants get --
9 MS. BLATT: That's not correct, it doesn't
10 mention prevailing --
11 JUSTICE KAGAN: -- under what circumstances,
12 as to both costs and fees, and those are the rules.
13 MS. BLATT: Yes. Unlike -- unlike the whole
14 statute that talks about prevailing plaintiffs, this
15 doesn't. What is fascinating about this case is in all
16 50 titles of the U.S. Code, there are specific
17 provisions that say, plaintiffs shall not be liable for
18 costs, or a plaintiff shall not be liable for costs
19 unless a certain condition occurs. There's only one
20 statute -- we looked at all 50 titles -- there is one
21 statute that says, a court may award costs if a certain
22 condition occurs. That's the --
23 CHIEF JUSTICE ROBERTS: By all 50 titles,
24 you don't mean each title, do you?
25 MS. BLATT: We've -- we've looked for all,

1 we've looked at all the cost provisions.
2 CHIEF JUSTICE ROBERTS: Like in Title IX --
3 MS. BLATT: Yes.
4 CHIEF JUSTICE ROBERTS: And Title XI?
5 MS. BLATT: Yes. That's what's so funny
6 about this; nothing in this -- this case -- I don't mean
7 to trivialize it, but there's only one other statute,
8 that Electronic Fund Transfers Act that talks about the
9 court shall award attorney's fees and costs if there is
10 bad faith.
11 And there is one other statute that says for
12 a prevailing defendant, the court may award costs if the
13 lawsuit is frivolous. And in those three significant
14 ways, I think it shows why we win, and that's a statute
15 they relied on to say it's just like our statute, on
16 page 18 of their brief, page 29 of our brief.
17 First, it only refers to costs. The statute
18 is about costs. Our statute is about attorney's fees
19 being the main event upon a finding of bad faith.
20 Second, it mentions prevailing defendants; ours doesn't.
21 And third, which I think is missing from the entire 30
22 minutes that you heard, their argument is plaintiff --
23 is Congress sat down and wanted to incentivize frivolous
24 suits, and nonfrivolous -- nonfrivolous suits alike. At
25 least in the Pipeline Safety Act, Congress said if it's

1 frivolous, the defendant gets its costs. Here --
2 JUSTICE KAGAN: This statute is very -- is
3 very normal if it were just about fees, right? It would
4 be just like the civil rights fees statutes, where it
5 said prevailing plaintiffs get fees, but prevailing
6 defendants only get fees upon some higher standard, here
7 bad faith. What makes this statute different, and it is
8 different, is that this statute twice says not only fees
9 but also costs.
10 MS. BLATT: Right.
11 JUSTICE KAGAN: Now you might say that's
12 very uncommon, but in both sentences it says, we want
13 the same rule for costs as we do for fees.
14 MS. BLATT: Well, I mean, a couple things
15 about that. It's both very common -- fee shifting
16 provisions routinely refer to both fees and costs, just
17 like salt and pepper, peanut butter and jelly, they go
18 together as a set.
19 JUSTICE SOTOMAYOR: And with that is that
20 there are some statutes that don't.
21 MS. BLATT: Yes. Yes.
22 JUSTICE SOTOMAYOR: So it's not always
23 peanut butter and jelly.
24 MS. BLATT: Okay.
25 JUSTICE SOTOMAYOR: It's peanut butter and

1 honey sometimes.

2 (Laughter.)

3 MS. BLATT: Yes. And here --

4 JUSTICE SCALIA: Love and marriage.

5 (Laughter.)

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

7 But here -- here I think Congress -- first

8 of all, it's just wrong that the reference to "and

9 costs" is grammatically inexplicable and devoid of

10 practical function; and that is the fundamental point of

11 the blue brief, that this is just grammatically

12 inexplicable, and that's just not true.

13 What "and costs" does is it, basically the

14 word "and" is being used to mean "in addition to."

15 "And" means "in addition to." And so what Congress is

16 saying is when courts fee shift, attorney's fee shift on

17 a finding of bad faith, courts additionally may award

18 costs in addition to and over and above the attorney's

19 fees that were measured in relationship to the work

20 performed.

21 JUSTICE BREYER: Suppose you're right. What

22 about their policy argument here, that you're a --

23 you're a potential plaintiff, you've borrowed a lot of

24 money, you don't have a lot of money. And the deal is

25 this under your interpretation; if you win you're going

1 to get 2 or $3,000; if you lose it will cost you about a
2 thousand. That's -- that's under your interpretation.
3 MS. BLATT: Right.
4 JUSTICE BREYER: And under theirs, it's if
5 you win, you get 2 or $3,000, and if you lose, at least
6 you don't lose anything.
7 MS. BLATT: Yes. I think their policy
8 argument is -- I mean, it could not be worse. A
9 homeless person --
10 JUSTICE BREYER: Oh, it could be worse.
11 MS. BLATT: No, it couldn't be worse, and
12 here's why. A homeless person filing a civil rights
13 case has to pay costs, and at last that person has to
14 pay -- has to prove damages? This plaintiff gets $1,000
15 for free. Second of all, the plaintiff in this case
16 never asks for relief. Well, 54 is discretionary. If
17 this woman was in pain and suffering, why didn't she
18 say, district court, I can't afford this?
19 It is the law in every circuit that the
20 district courts don't have to award costs, it's
21 discretionary. So Rule 54 has a built-in safety valve;
22 it accommodates all the policy concerns on the other
23 side, and every other informal paupers litigant, every
24 consumer rights plaintiff, every civil rights plaintiff,
25 every plaintiff in the country faces the risk of a cost

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

2 JUSTICE GINSBURG: Ms. Blatt, we do have in

3 this case the views of the government regulators, the

4 FTC and the Consumer Finance Protection Bureau, and we

5 have heard the government's position on the relationship

6 between these two provisions. Should we give any weight

7 to the interpretation of the government administrators?

8 MS. BLATT: Obviously not. I don't even

9 know where they would get a basis for deference. I'm

10 sorry --

11 JUSTICE SCALIA: We have a lot of cases that

12 say that -- that the agency's views about what courts

13 should do are not entitled to deference. This is --

14 this is a matter --

15 MS. BLATT: But that would be Ledbetter, and

16 I don't want to cite that to Justice Ginsburg.

17 (Laughter.)

18 MS. BLATT: So I think the better answer is

19 what's so mystifying about their policy argument is that

20 they enforce -- they enforce 20 consumer protection

21 statutes, and all of them, their -- their plaintiffs

22 have to pay costs.

23 JUSTICE BREYER: What about the -- how does

24 this work, the canon? I'm very interested.

25 MS. BLATT: They're --

1 JUSTICE KAGAN: Sorry. I'm sorry.

2 JUSTICE BREYER: I'm very interested in

3 canons, and I want to know on the canon, the traditional

4 thing, which you've probably looked up, what about the

5 specific governs the general? Is it -- how is that,

6 that's an old canon that's been around a long time, and

7 people are aware of it, and --

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

9 canon.

10 JUSTICE BREYER: This is -- seems to be the

11 one they feel is very important.

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

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

14 interested in.

15 MS. BLATT: Okay. Well, I don't think --

16 canons, you know, don't trump common sense, context,

17 history --

18 JUSTICE BREYER: That -- that's a different

19 matter.

20 MS. BLATT: But let's go to canons. Let's

21 go to canons, specific versus the general. It's all

22 word games. It turns on what you think "specific"

23 means. This is not specific to the question presented

24 about prevailing parties and costs. This is about

25 attorney's fees. That -- and costs are on top of

1 attorney's fees, is essentially how --
2 JUSTICE KAGAN: Well, you say that, but it
3 says to both. It says the costs together with the
4 reasonable attorney's fees, and then the next sentence
5 it says fees and costs. So you might wish that they
6 were a different statute, and it might be good policy to
7 have a different statute --
8 MS. BLATT: I don't wish for a different
9 statute. I think what you're saying is that Congress
10 passed a firewall; Congress said, we need to encourage
11 frivolous suits and nonfrivolous, but let's put a
12 firewall in and give them fees and costs, that God
13 forbid there is bad faith and harassment.
14 JUSTICE KAGAN: I'm not in the business --
15 I'm not in the business of trying to figure out exactly
16 what Congress is doing. I'm in the business of just
17 reading what Congress did; and what Congress did is it
18 created a set of rules that applies to attorney's fees
19 and costs at the same time.
20 MS. BLATT: It -- it affirmatively gives
21 district courts emboldening power to sanction. So --
22 JUSTICE KAGAN: That sounds very terrible.
23 MS. BLATT: But not if you file a lawsuit in
24 bad faith and for purposes of harassment. So I mean --
25 I think even -- I think the history is obvious; this was

1 trying to make defendants better off than the
2 defendant's suit under the Truth in Lending Act which is
3 part of the same umbrella Consumer Credit Protection
4 Act, and they're -- inexplicably, somehow, by trying to
5 make them better off made them worse than every other
6 creditor that they serve, and immunized these plaintiffs
7 from the universal risk of cost shifting that every
8 other litigant has to face, and so -- and you don't get
9 there from -- all they have is a negative inference.
10 JUSTICE KAGAN: Well, Ms. Blatt, you say
11 it -- it's supposed to make defendants better off by
12 focusing on just part of the provision, but the
13 provision is -- as a whole, it does a set of things. It
14 treats plaintiffs and prevailing plaintiffs in a certain
15 set of ways, and it treats prevailing defendants in a
16 certain set of ways.
17 MS. BLATT: It doesn't speak to prevailing
18 defendants.
19 JUSTICE KAGAN: Prevailing defendants, but
20 when -- prevailing defendants are treated worse than
21 prevailing plaintiffs, because they have to show that
22 there is a bad faith lawsuit.
23 MS. BLATT: Yeah, I'm going -- I'm going to
24 keep repeating it because it's my position. This
25 doesn't -- does the fact that this doesn't refer to

1 prevailing defendants speaks volumes that what was not
2 on Congress's mind was Rule 54. What was on Congress's
3 mind is victimized debt collectors who were sued in bad
4 faith.
5 Now, I understand this is a pro-plaintiff
6 statute, but this would be extraordinary to think that
7 they gave them attorney's fees when they -- but it's
8 basically saying -- this is a -- this is a defendant who
9 went to trial and won, was law abiding, didn't do
10 anything wrong, and Congress in that situation said not
11 only might -- might not the suit be -- be -- have merit
12 or good faith, it might have even been frivolous.
13 When under Rule 54 -- again, this is what I
14 find so mystifying about this case. If the petitioner
15 thought, oh, I had a really hard case in the law or oh,
16 I'm really poor, she could have asked for discretionary
17 relief. Instead, the lawyer went into court and said, I
18 have a recent Ninth Circuit decision and I don't have to
19 pay costs at all.
20 JUSTICE KAGAN: Ms. Blatt, let me try it a
21 different way.
22 MS. BLATT: Okay.
23 JUSTICE KAGAN: Let's just suppose that
24 54(k) didn't exist at all.
25 MS. BLATT: 54(d)?

1 JUSTICE KAGAN: 54(d) didn't exist.
2 MS. BLATT: Okay.
3 JUSTICE KAGAN: And all you had was this
4 provision, okay?
5 MS. BLATT: Uh-huh.
6 JUSTICE KAGAN: So this provision says on a
7 finding by the court that it's brought in bad faith, the
8 court may award to the defendant attorney's fees and
9 costs. So suppose a defendant wins, but there's not a
10 finding that it was made in bad faith, would then the
11 person be entitled to either attorney's fees or costs?
12 MS. BLATT: Well, we wouldn't -- certainly,
13 we sought costs here under Rule 54.
14 JUSTICE KAGAN: I'm saying that --
15 MS. BLATT: I know. Okay. And you've took
16 it up. So that takes out my route seeking for costs
17 under Rule 54, it doesn't exist in your world.
18 JUSTICE KAGAN: In my world, you would not
19 get fees or costs.
20 MS. BLATT: I'm imagining then the world in
21 1936, and we rely on 1920 or 1919 or the long-standing
22 practice of courts awarding costs. Now, a court
23 might --
24 JUSTICE KAGAN: I'm just asking you a simple
25 question.

1 MS. BLATT: We would not get costs under
2 this provision, you're correct.
3 JUSTICE KAGAN: You would not get costs
4 under that provision.
5 MS. BLATT: Because this -- in that sense, I
6 think this was a question that another justice asked.
7 If you just look at this provision, the only basis for
8 costs and fees in this provision is the bad faith
9 finding of harassment.
10 JUSTICE KAGAN: Okay. So if you would not
11 get costs under that provision --
12 MS. BLATT: Under 1692.
13 JUSTICE KAGAN: -- under 1692, a provision
14 that talks about fees and costs generally as to both
15 plaintiffs and defendants, then how does a rule that
16 says what -- where you would get costs unless a Federal
17 statute provides otherwise change matters?
18 MS. BLATT: Because -- because, again,
19 Rule 54 is not preemption, a field preemption. It's
20 saying if Congress intended to displace, the proviso,
21 unless otherwise provided, it was recognition that other
22 statutes might displace Rule 54. And if you look at all
23 the statutes that we cite on pages 19 and 20, they
24 actually do prohibit costs. And then if you look at the
25 statutes on pages 24 and 25, where time and time again

1 Congress has said a prevailing party may recover
2 attorney's fees and costs, well, the "and costs" in
3 their view, I guess those statutes are inexplicable. I
4 mean, it's clearly they're redundant and they overlap
5 with Rule 54. They don't displace it. And even the
6 practice guides that we cite on page 22, which is
7 basically Wright and Miller and Moore, say something
8 that merely overlaps with Rule 54 doesn't displace the
9 court's discretion.
10 And again, I think you have to ask yourself,
11 what was Congress doing? To me, this is -- this is a --
12 the attorney's fees are the main show, it goes with bad
13 faith, Congress was not thinking about Rule 54, and I
14 think you can be quite confident Congress was not
15 thinking, we want plaintiff lawyers to go around saying
16 not only Congress, but the government wanted us to file
17 frivolous suits.
18 JUSTICE KAGAN: You might be right, but
19 suppose Congress wasn't thinking about Rule 54. Suppose
20 it didn't occur to the drafters what Rule 54 said or
21 what the default provision was. They just wrote a
22 statute about fees and costs. And then -- it doesn't
23 really matter whether they were thinking about Rule 54
24 or not.
25 MS. BLATT: Yes, if you -- right. And so

1 there's like that Oncale case with same sex harassment,
2 Congress can write a very -- can write a plain language
3 provision and regardless of what Congress intended, if
4 the language covers it, that's tough, we're going to
5 construe it. That's your law.
6 This is not that. This -- this doesn't say
7 anything about prevailing parties. This is talking
8 about bad faith and attorney's fees. It doesn't say a
9 court can't act in the absence of bad faith, it doesn't
10 say anything about prevailing parties, it doesn't reveal
11 any intent to displace it, especially when you compare
12 it with all the other statutes, you look at the history.
13 Sorry.
14 JUSTICE SOTOMAYOR: Counsel, it was thinking
15 about prevailing parties because the predecessor
16 sentence --
17 MS. BLATT: Prevailing defendants -- I
18 agree, sorry.
19 JUSTICE SOTOMAYOR: But it was talking --
20 no, prevailing parties. The provision is geared towards
21 prevailing parties in some form. The first sentence
22 says a prevailing plaintiff, not whether it's on a
23 substantial basis or any exception.
24 MS. BLATT: Yeah.
25 JUSTICE SOTOMAYOR: It says you get fees or

1 you can get fees and costs.

2 MS. BLATT: Right.

3 JUSTICE SOTOMAYOR: So it then decides to

4 limit what a prevailing defendant can do. Isn't that a

5 natural reading?

6 MS. BLATT: No, because it says expressly in

7 a case of successful action, it talks about prevailing

8 plaintiffs, and then it says if there's -- to me, it's

9 just -- it's natural when you just read it in light of

10 sort of common sense in context in what Congress was

11 doing. If a plaintiff files in bad faith, the court is

12 empowered and emboldened -- it's like a neon light --

13 courts, you have authority to award attorney's fees and

14 costs.

15 JUSTICE KAGAN: Well, that's -- that's just

16 a different way of saying the following: The first

17 sentence says, when you're a prevailing plaintiff, you

18 get costs and fees. How about defendants? Well,

19 prevailing is not enough for defendants. Defendants

20 have to show --

21 MS. BLATT: Yeah.

22 JUSTICE KAGAN: -- that the suit was filed

23 in bad faith --

24 MS. BLATT: Yeah, and I think --

25 JUSTICE KAGAN: -- and then they get costs

1 and fees.

2 MS. BLATT: Right. And I think you have to

3 keep this in mind that there are completely

4 diametrically opposed background presumptions in our

5 legal system. It's an extraordinary event to get

6 attorney's fees, and it's an extraordinary event not to

7 get costs. And so the court -- the Congress has to use

8 explicit language to over -- overturn the American rule.

9 And so what Congress did here, that is the most natural,

10 even if I drew you to a tie --

11 JUSTICE KAGAN: I completely agree with

12 that. But that's what it comes down to, that if you

13 think that Congress has to use super extraordinary

14 language to over -- to -- to get out of 54(d), then

15 you're right. But 54(d) doesn't say that. It just

16 says --

17 MS. BLATT: Right, and --

18 JUSTICE KAGAN: -- unless the Federal

19 statute provides otherwise.

20 MS. BLATT: And I think you can look -- the

21 Petitioner did -- did a valiant job of trying to drudge

22 up as many statutes as they can. All the statutes on

23 point are explicit. Now, there's one statute that might

24 not be, the pipeline safety one. And so the question

25 is: Do we think that Congress actually tried to

1 displace a court's authority under that statute, and
2 that's a statute that just says a court may award costs
3 if a lawsuit is frivolous. This one just doesn't say
4 that.
5 You at least -- even if you don't think of
6 it as magic language or an explicit statement, the fact
7 that Congress repeatedly has used explicit language
8 casts considerable doubt that this was done by mere
9 implication, and then you look at the fact that it
10 doesn't mention prevailing parties, it's talking about
11 bad faith, it has attorney's fees, what was Congress
12 doing, you look at the legislative history, it shows
13 that it was -- it was trying to make them better off
14 than a class of defendants, but their view inexplicably
15 makes them worse off.
16 And then you look at the result that they're
17 actually advocating that the government thinks it's a
18 good idea that plaintiffs can file lawsuits cost free
19 that are frivolous. I mean --
20 JUSTICE SCALIA: I guess in the first
21 sentence of 3, the phrase "the costs of the action" is
22 really superfluous in light of 54(d)(1). You really
23 don't know that. I mean, that would have been the case
24 anyway. So there's no reason to think that it isn't
25 frivolous in the second sentence -- or superfluous in

1 the second sentence, right? Why did they have to say
2 the costs of the action in the case of a successful
3 action?
4 MS. BLATT: Successful action to enforce it.
5 JUSTICE SCALIA: The costs of the action,
6 together with a reasonable -- as determined by the
7 court.
8 MS. BLATT: Why isn't --
9 JUSTICE SCALIA: They -- they have the costs
10 anyway, if Congress didn't write anything, right?
11 MS. BLATT: I mean, I think that -- again --
12 I mean --
13 JUSTICE SCALIA: I'm trying to help you.
14 (Laughter.)
15 MS. BLATT: Yeah, I know. And I was going
16 to say there's so much is superfluity in here, I don't
17 know where to begin. It's all over the place. The
18 whole thing obviously overlaps with the court's inherent
19 authority.
20 JUSTICE SOTOMAYOR: You don't think that
21 there's a serious argument that the first sentence does
22 away with the discretionary nature?
23 MS. BLATT: No, it's clear "shall." It's
24 clear "shall" obviously. The first sentence does --
25 JUSTICE SOTOMAYOR: So it's a command.

1 54(d) is permissive according to your earlier argument.
2 MS. BLATT: Oh, yes, that's right. Yes.
3 JUSTICE SOTOMAYOR: And so this does -- it's
4 not superfluous because it went to mandatory.
5 JUSTICE SCALIA: Gotcha.
6 MS. BLATT: That's true.
7 JUSTICE SCALIA: Well taken.
8 MS. BLATT: Yeah. The question, though, was
9 in the case of any successful action when, obviously,
10 they prevailed to begin with, so the question is whether
11 that's superfluous. But the whole provision overlaps
12 with the court's inherent authority. And I know it
13 hasn't come up, but I just think it's strange that it
14 says for the purposes of bad faith and harassment,
15 Congress was obviously using belt and suspenders there,
16 so it's not surprising that Congress added "and costs"
17 here.
18 If you look at Rule 54 -- let me just say
19 one other thing, Justice Kagan -- if you look at Rule
20 54, it also says "unless the statute provides otherwise,
21 costs other than attorney's fees." So why -- they
22 didn't have to say that, because in the next provision
23 it talks about attorney's fees. They just -- they
24 wanted to make clear for whatever reason or maybe they
25 just wrote some really excess, redundant, silly

1 language, but they said costs, meaning anything that's
2 not costs. It's just that Congress sometimes uses
3 these, and I guess this was the honey and peanut butter
4 thing, that a lot of fee-shifting statutes talk about
5 both attorney's fees and costs, and so they went
6 together and -- they also mentioned it. Obviously, it's
7 different. I agree that there's a verb in the first
8 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, 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 dictionary.com,
20 and if you just went to dictionary.com, which I had not
21 done before, and you type in "and," the first definition
22 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. In cases
9 that are frivolous but a court makes a finding that it's
10 not in bad faith, defendants have other means of
11 recovering fees and costs using Rule 11 or Section 1927;
12 and there are cases in which courts have denied fees and
13 costs under the FDCPA and granted them under Rule 11 or
14 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), and 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.
7 Which also shows this is not a misconduct
8 provision. 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
10 those 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 in
14 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." Again,

1 grammatically, it treats the two terms, "fees and
2 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 "attorneys 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, putting aside that I hope

19 that Congress drafts a little more carefully than a

20 mother may threaten her child --

21 (Laughter.)

22 JUSTICE BREYER: I doubt that it does. I

23 mean, they're human beings over there; they're not

24 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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