No. 20-334

IN THE

Supreme Court of the United States

CITY OF SAN ANTONIO, TEXAS, ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED TEXAS MUNICIPALITIES,

Petitioner,

v.

HOTELS.COM, L.P., ET AL.

Respondents.

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

BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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MARCH 3, 2021

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are organizations representing local governments, local government officials, and lawyers who represent local governments. As explained in this brief, local governments are frequent parties to federal court litigation and as such have an interest in assuring that the rules governing appellate cost awards result in equitable decisions made efficiently.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than

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[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

30,000 people, which includes more than 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

SUMMARY OF ARGUMENT

This Court should reverse the decision of the U.S. Court of Appeals for the Fifth Circuit and hold that in taxing appellate costs district courts should exercise their sound discretion to assess costs in an equitable manner under all the relevant circumstances of the particular case, including the amount of the costs, the good faith of the losing party, the merit and importance of the legal positions unsuccessfully advanced, the reasons the costs were incurred (including any unreasonable conduct by the prevailing party that increased the costs incurred), and the financial ability of the losing party to pay.

Local governments are often parties to federal court litigation, usually as defendants but sometimes as plaintiffs. Those cases often raise important issues, including law enforcement, civil rights, First Amendment, and other constitutional issues. Just this Term, four local governments are parties to cases in this Court. There is a strong public interest in assuring that the local government's position regarding the facts and law relevant to these cases is presented to the courts.

Although one might expect appellate costs to be relatively small, premiums on appellate bonds in particular can be substantial. This case is a perfect example, as bond premiums total more than $2 million. These costs can impose a substantial financial

burden on litigants, particularly litigants frequently involved in litigation—such as local governments—or litigants with limited financial resources. To put these costs in perspective, a $70,000 premium could represent the annual salary of a teacher or firefighter.

District courts are in the best position to make the fact-intensive determination of whether appellate costs should be reduced or denied. Those determinations depend on many factors, including the amount of costs, the ability of the losing party to pay, and the reason the costs were incurred. District courts have close experience with each case's particular circumstances and litigation history. District courts also have experience exercising discretion in a vast array of contexts, whereas appellate courts are typically involved only to review whether there was an abuse of discretion.

Moreover, district courts are in the business of assessing evidence and making the kind of fact-intensive determinations required. Appellate courts are not. Our system typically assigns the task of deciding issues of fact to the district courts because that is the most effective and efficient approach. In an already expensive system, it makes no sense to depart from the most efficient approach in making determinations as to awards of appellate costs.

For reasons well-explained by Petitioner, the Fifth Circuit erred in holding that district courts have no

discretion in assessing appellate costs. By specifying that certain categories of costs are to be taxed in the district court, Federal Rule of Appellate Procedure 39(e) properly assigns responsibility to exercise discretion to the court in the best position to do so.

ARGUMENT

Local governments frequently are parties to federal court litigation, usually as defendants but sometimes as plaintiffs in important cases involving law enforcement, civil rights, and matters of local concern, many of which result in appeals. As frequent litigants, local governments, along with the taxpayers they represent, would sometimes benefit and sometimes suffer from a rule requiring district courts to tax appellate costs mechanically, with no ability to exercise their sound discretion. Amici urge the Court to reject such a mechanical rule because district courts are in the best position to assess appellate taxable costs in an equitable manner based on the circumstances of the particular case.

The Court should reverse the decision of the Fifth Circuit and hold that in taxing appellate costs, district courts should exercise their sound discretion to assess costs in an equitable manner under all the relevant circumstances. Those circumstances include the amount of the costs, the good faith of the losing party, the merit and importance of the legal positions unsuccessfully advanced, the reasons the costs were incurred (including any unreasonable conduct by the prevailing party that increased the costs incurred), and the financial ability of the losing party to pay.

I. Local governments are often parties to federal court cases raising important issues of public concern.

Petitioner City of San Antonio was a civil litigant in thirty-two new cases in federal court in fiscal year 2019 and sixteen new cases in federal court in fiscal year 2020.[2]

Other local governments are also often involved in federal litigation. For example, over the last ten years, the League of Minnesota Cities' local government members (that currently number over 800 cities) have been party to 362 cases in federal court.[3] While smaller municipalities naturally tend to be less-frequent litigants, larger governments find themselves in federal court more often. Middletown, Connecticut—with a population of less than 50,000—is party to only two or three federal cases per year.[4]

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[2] *See* E-mail from Deborah Klein, Deputy City Attorney, Litigation, City of San Antonio, to Amanda Karras, Deputy Gen. Couns., Int'l Mun. Laws. Assoc. (Feb. 22, 2021, 2:46 PM) (on file with author) [hereinafter "Klein E-mail"].

[3] *See* E-mail from Patricia Beety, Gen. Couns., League of Minnesota Cities, to Amanda Karras, Deputy Gen. Couns., Int'l Mun. Laws. Assoc. (Feb. 11, 2021, 4:37 PM) (on file with author) [hereinafter "Beety E-mail"]; League of Minnesota Cities, About the League, https://www.lmc.org/about/ (last visited Mar. 1, 2021).

[4] *See* E-mail from Matthew Bacon, Claims Adm', City of Middletown, to Brig Smith, Gen. Couns. City of Middletown (Feb.

On the other hand, Colorado Springs, Colorado, a city of nearly 500,000 people,[5] was involved in twenty federal cases in 2020 alone.[6] Similarly, Montgomery County, Maryland, has been in federal court nearly sixty times over the last three years, with twenty of those cases reaching the United States Courts of Appeals.[7]

Local governments generally do not choose to be in court; they are typically defendants instead of plaintiffs. In fact, this case is "somewhat unique . . . [because] it involves affirmative litigation."[8] For instance, San Antonio was the defendant in all thirty-two of its new cases in federal court in fiscal year 2019

5, 2021, 8:47 AM) (on file with author) [hereinafter "Bacon E-mail"].

[5] The population of Colorado Springs is 478,221. *See* QuickFacts Colorado Springs city, Colorado; United States, https://www.census.gov/quickfacts/fact/table/coloradospringscitycolorado,US/PST045219 (last visited Mar. 1, 2021).

[6] *See* E-mail from Wynetta Massey, City Att'y, Colorado Springs, to Amanda Karras, Deputy Gen. Couns., Int'l Mun. Laws. Assoc. (Feb. 9, 2021, 10:30 AM) (on file with author) [hereinafter "Massey E-mail"].

[7] *See* E-mail from Marc P. Hansen, Cnty. Att'y, Montgomery County, to Amanda Karras, Deputy Gen. Couns., Int'l Mun. Laws. Assoc. (Feb. 5, 2021, 12:22 PM) (on file with author) [hereinafter "Hansen E-mail"].

[8] E-mail from Lisa Soronen, Exec. Dir., State and Loc. Legal Ctr., to Richard Simpson, Partner, Wiley Rein LLP (Feb. 3, 2021, 8:45 AM) (on file with author).

and in all but two of its sixteen new cases in federal court in fiscal year 2020.[9] Likewise, the League of Minnesota Cities' member "local government entit[ies are] almost always the Defendant."[10]

Cases against local governments often raise important issues as to which there is a substantial public interest in assuring that the government's position regarding the facts and the law is presented to the court. Many of the cases involve suits against police.[11] Other cases involve civil rights, including First Amendment rights to free speech and free exercise of religion; employment discrimination; and jail litigation.[12] San Antonio's cases include Section 1983 claims, Title VII claims, and constitutional challenges to city ordinances and actions.[13] Municipalities are also involved in litigation over

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[9] *See* Klein E-mail.

[10] *See* Beety E-mail.

[11] *See* Beety E-mail (reporting that 244 of 362 cases involved police); Hansen E-mail; Bacon E-mail; E-mail from Sheila Gall, Gen. Couns., Assoc. of Washington Cities, to Amanda Karras, Deputy Gen. Couns., Int'l Mun. Laws. Assoc. (Feb. 24, 2021, 3:32 PM) (on file with author) [hereinafter "Gall E-mail"].

[12] *See* Hansen E-mail; Massey E-mail; Bacon E-mail; Beety E-mail; Gall E-mail.

[13] *See* Klein E-mail.

more local but still important issues, such as the enforcement of alcohol ordinances and land use.[14]

Illustrating the importance of local government litigation, four local governments are parties to cases in this Court this Term. In addition to San Antonio in this case, Philadelphia, Chicago, and Baltimore are all parties to pending cases before the Court.[15]

II. Taxable appellate costs can be large amounts; district courts are in the best position to determine whether they should be reduced or denied.

a. Taxable costs, in particular premiums on appellate bonds, can impose a substantial financial burden on litigants.

Federal Rule of Appellate Procedure 39(e) specifies that costs taxable in the district court consist of: (a) costs incurred for the preparation and transmission of the record; (b) the reporter's transcript; (c) premiums paid for a bond or other security to preserve rights

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[14] Beety E-mail; E-mail from Chris Balch, Att'y, Balch Law Grp., to Amanda Karras, Deputy Gen. Couns., Int'l Mun. Laws. Assoc. (Feb. 5, 2021, 11:59 AM) (on file with author).

[15] *Fulton v. City of Phila.*, 140 S. Ct. 1104 (Feb. 24, 2020) (granting petition for writ of certiorari); *City of Chi. v. Fulton*, 140 S. Ct. 680 (Dec. 18, 2019) (same); *B.P. P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 222 (Oct. 2, 2020) (same).

pending appeal; and (d) the fee for filing the notice of appeal. One might expect these costs to be insignificant in comparison to the typical total cost of litigation, but that is not always so. This case is a perfect example, as Petitioner San Antonio has been taxed over $2 million for interest and premiums on bonds that Respondents posted of their own accord.

As to appellate bonds, Federal Rule of Civil Procedure 62(a) provides that execution on a money judgment is stayed automatically only for thirty days, after which the plaintiff may execute on the judgment notwithstanding an appeal unless the district court orders a stay of execution pending appeal. The judgment debtor may obtain a stay by posting a bond or other security approved by the district court. *See* Rule 62(b), Fed. R. Civ. P. A party may voluntarily agree to post an appeal bond, or the district court may require one. *See Stevens v. Westmoreland Equity Fund, LLC*, No. CV 18-692, 2019 WL 8685841, at *4 (E.D. Pa. Feb. 13, 2019) (requiring a $15,000 appeal bond "to account for the considerable time and effort Plaintiffs anticipate will be required to prepare and transmit the record in this case"). Similarly, under Rule 62(d), the district court "may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights."

Premiums on appellate bonds can be large because the bonding company is undertaking to pay the full bonded amount if the party obtaining the bond fails to

do so. With a money judgment, an appeal bond generally must be posted for the full amount of the judgment, plus interest for the anticipated period of the appeal. *See* Marianne D. Short, David F. Herr & Thomas H. Boyd, *Special Role of Inside Counsel—Appeal and Supersedeas Bonds*, *in* SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNS. § 66:13 (Robert L. Haig ed., 2000), Westlaw (database updated April 2020). Premiums are typically due annually while the bond is in effect. *See* David M. Axelrod & Peder K. Batalden, *Staying Enforcement of a Money Judgment Pending Appeal: an Overview*, 76 DEF. COUNS. J. 140, 143 (2009). Not surprisingly, surety companies take the credit and financial position of the party posting the bond into account in determining premiums and the collateral they will require to issue the bond, sometimes even requiring full collateral. *See* Axelrod & Batalden, *supra*, at 142–43 ("Surety companies tend to be very risk averse; it is not unheard of for sureties to demand full collateral before writing a bond."). A judgment debtor with poor credit may not be able to obtain a bond at all. *See, e.g.*, Short et al., *supra* ("Sometimes, the bond will be set in an amount that makes it impossible for the appellant to post the bond.").

Decisions by district courts throughout the country confirm that premium payments on an appeal bond in particular can be quite large, often dwarfing other taxable costs. *See, e.g.*, *Olympia Exp., Inc. v. Linee Aeree Italiane S.P.A.*, No. 02 C 2858, 2008 WL 744231,

at *6 (N.D. Ill. Mar. 19, 2008) (granting bill of costs of $1,483.21 in transcript costs, $5.00 in filing fees, and $70,000.00 for bond premiums); *Comprehensive Care Corp. v. Katzman*, No. 8:09–cv–1375–T–24 TBM, 2013 WL 12204182, at *1 (M.D. Fla. June 21, 2013) (taxing $910 in filing fees, $4,135.45 for transcripts, and $71,508.69 for bond premiums); *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn., LLC*, No. 09-CV-3037 (SRN/LIB), 2017 WL 2303502, at *4 (D. Minn. May 26, 2017) (taxing $5.00 filing fee and $1,229,719.00 in bond premium payments).

These costs can impose a substantial financial burden on litigants, particularly litigants frequently involved in litigation—such as local governments—and litigants with limited financial resources.

b. District courts are best positioned to make the fact-intensive determination of whether taxable appellate costs—most notably bond premiums—should be reduced or denied.

District courts may exercise discretion in determining whether to require an appellate bond to stay execution of a judgment. As one treatise notes, courts typically consider the appellant's financial ability to post a bond, the merits of the appeal, the risk of non-payment, and whether the appellant has shown bad faith or vexatious conduct. *See* 4 Herbert

Newberg, Newberg on Class Actions § 14:15 (William B. Rubenstein, 5th ed., 2020). Many of these same factors are also relevant in deciding whether appellate costs should be reduced or denied.

Because the purpose of a bond is to assure against non-payment, the ability to pay is the most pertinent and arguably the only pertinent factor a district court considers. *Id.* District courts are loath to stay execution without a bond where the party holding the judgment objects to a stay without full security. *E.g.*, *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 760–61 (D.C. Cir. 1980) ("Because the stay operates for the appellant's benefit and deprives the appellee of the immediate benefits of his judgment, a full supersedeas bond should be the requirement in normal circumstances, such as where there is some reasonable likelihood of the judgment debtor's inability or unwillingness to satisfy the judgment in full upon ultimate disposition of the case and where posting adequate security is practicable.").

District courts have rightly recognized that why a defendant was required to post an appeal bond is a relevant consideration in determining whether to assess the bond premium as appellate costs against the plaintiff. *See Plaintiffs' S'holders' Corp. v. S. Farm Bureau Life Ins. Co.*, No. 6:06–cv–637–Orl–35KRS, 2013 WL 12156246, at *3 (M.D. Fla. June 18, 2013) (rejecting argument that litigant was not required to post appeal bond given that the appellee requested

that the court lift the stay of execution of the judgment if bond was not posted, and recommending an award of costs on the entire bond premium); *Olympia Exp., Inc.*, 2008 WL 744231, at *5 (rejecting argument that bond not required by court and awarding costs, concluding "[t]his sequence of events makes clear that the only way in which it could be said that defendant was not 'required' to post the appeal bond is if defendant was content to ignore the Court's order, to fail to secure a bond, and to allow plaintiffs to pursue collection of the $6.5 million judgment pending appeal").

As these decisions suggest, sometimes a prevailing party may unreasonably refuse to consent to a stay on terms other than a bond for the full amount of the judgment plus anticipated interest during appeal even though it knows that the financial position of the other side is so strong that there is no meaningful risk of non-payment if a judgment is affirmed. This will be true of local governments in almost all cases.[16] In that event, the district court is likely to see no reason not to assess the premium paid for the bond as an appellate cost if the judgment is reversed on appeal.

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[16] Under Rule 62(e), Fed. R. Civ. P., the United States and its officials are never required to post an appeal bond. The rationale for that rule (no question as to the government's ability to pay or its willingness to comply with court rulings) typically applies to local government parties.

On the opposite side of the financial spectrum, a judgment debtor of limited means might offer in lieu of a bond to make full financial disclosure, agree not to engage in financial transactions outside the ordinary course that might impair the debtor's ability to pay, and to provide updated financials to the judgment creditor during the course of the appeal. If the judgment creditor rejects a stay on such conditions and instead insists on a bond, the district court might well require the bond because that is the default rule. But in assessing appellate costs, the district court likely would reject any plea by the judgment creditor that it should not be assessed the premiums for the bond and other appellate costs, even if paying the costs would be a substantial hardship.

The relative financial resources of the parties or public policy considerations unique to the litigation may also impact the district court's decision to award costs. In a recent case, for example, a district court exercised its discretion to award appellate costs given the litigant's "limited financial resources, the significant economic disparities between the parties, and the risk that an award of costs in this matter might chill insureds from bringing future meritorious lawsuits" for accidental death and disability benefits. *See Estate of Maurice v. Life Ins. Co. of N. Am.*, No. 5:16-cv-02610-CAS-SPx, 2020 WL 6892967, at *4 (C.D. Cal. Nov. 23, 2020). In another case, a district court, relying on its discretion to award costs under Seventh Circuit precedent, considered the litigants'

indigency in deciding whether to award Rule 39 costs. *See Jentz v. ConAgra Foods, Inc.*, No. 10-CV-0474-MJR-PMF, 2015 WL 2330232, at *3 (S.D. Ill. May 14, 2015). The district court observed that the jury "heard extensive evidence of Plaintiffs' physical and financial hardships" and that the evidentiary record provided some basis for finding that the litigants would be incapable of paying costs, including employment history and ability to work, before ultimately concluding that it needed "more information" regarding the litigants' "current and future financial situations." *See id.*

In short, there are multiple considerations relevant to whether a district court, in its exercise of sound discretion to reach a fair and equitable result, should decline to tax some or all appellate costs against the losing party.[17] A non-exhaustive list of those considerations include the amount of the costs, the good faith of the losing party, the merit and importance of the legal positions unsuccessfully advanced, the reasons the costs were incurred (including any unreasonable conduct by the prevailing

[17] District courts consider similar factors in assessing costs under Federal Rule of Civil Procedure 54. *See Estate of Maurice*, 2020 WL 6892967, at *3-*4 (analogizing Fed. R. App. P. 39(e) cost analysis to analysis under Fed. R. Civ. P. 54).

party that increased the costs incurred), and the financial ability of the losing party to pay.

The district court is in a much better position than the appellate court to exercise discretion in determining whether to reduce or deny appellate costs. As an initial matter, the district court has first-hand experience with the entire litigation process leading up to the judgment and appeal, including the circumstances by which the appellate bond was approved and posted. District courts have experience exercising discretion in a vast array of contexts, whereas appellate courts are typically involved only to review whether there was an abuse of discretion. Moreover, of course, district courts are in the business of assessing evidence and making the kind of fact-intensive determinations required. Appellate courts are not. Our system typically assigns the task of deciding issues of fact to the district courts because that is the most effective and efficient approach. In an already expensive system, it makes no sense to depart from the most efficient approach in making determinations as to awards of appellate costs.

Yet, departing from every other circuit to consider the issue, the Fifth Circuit held below that the district court has no discretion to deny or reduce appellate costs, interpreting Rule 39(e) to require a purely mechanical computation of costs that could be performed by a machine. For the reasons well-explained by Petitioner, the Fifth Circuit erred in

reaching this conclusion. By specifying that certain categories of costs are to be taxed in the district court, Rule 39(e) properly assigns responsibility to exercise discretion to the court in the best position to do so.

CONCLUSION

The decision of the Fifth Circuit should be reversed. This Court should hold that in taxing appellate costs the district courts should exercise their sound discretion to assess costs in an equitable manner under all the relevant circumstances. Those circumstances are many of the same as those the district court already considers when deciding whether to require an appellate bond. They include the amount of the costs, the good faith of the losing party, the merit and importance of the legal positions unsuccessfully advanced, the reasons the costs were incurred (including any unreasonable conduct by the prevailing party that increased the costs incurred), and the financial ability of the losing party to pay.

Respectfully submitted,

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