No. 11-1175

In the Supreme Court of the United States

OLIVEA MARX, PETITIONER

v.

GENERAL REVENUE CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Federal Rule of Civil Procedure 54(d)(1), which permits cost-shifting "[u]nless a federal statute" or another rule "provides otherwise," allows taxation of costs against a plaintiff who filed suit in good faith under the Fair Debt Collection Practices Act, 15 U.S.C. 1692k, which authorizes taxation of costs against plaintiffs only when they file actions "in bad faith and for the purpose of harassment."

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INTEREST OF THE UNITED STATES

This case concerns the taxation of litigation costs in private enforcement actions under the Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692 *et seq.* The Federal Trade Commission (FTC), Consumer Financial Protection Bureau (CFPB), and other agencies share responsibility for government enforcement of the Act. 15 U.S.C. 1692*l*(a)-(b);[1] see 15 U.S.C. 1692*l*(d) (CFPB authority to prescribe rules for debt collection). Private enforcement actions under Section 813 of the FDCPA, 15 U.S.C. 1692k, supplement those governmental efforts. The United States therefore has a substan-

[1] All references to 15 U.S.C. 1692k and 1692*l* are to the 2006 edition and Supplement IV to the United States Code.

tial interest in the procedural rules governing such enforcement actions.

STATEMENT

1. The FDCPA is one of a series of consumer-protection statutes, collectively entitled the Consumer Credit Protection Act, 15 U.S.C. 1601 *et seq.*, that Congress enacted beginning in 1968. The FDCPA became law in 1977 and is Title VIII of the larger statute. Pub. L. No. 95-109, 91 Stat. 874.

Congress enacted the FDCPA 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). Congress found that those practices "contribute[d] to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Ibid.* The purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. 1692(e).

Inter alia, the Act forbids debt collectors from employing harassing, oppressive, or abusive practices, 15 U.S.C. 1692d; from making misleading or deceptive representations, 15 U.S.C. 1692e; and from using unfair or unconscionable means to collect debts, 15 U.S.C. 1692f. The Act also limits debt collectors' ability to contact consumers' employers, neighbors, and other third parties in connection with collecting a debt, 15 U.S.C. 1692c(b); guarantees consumers an opportunity to dispute debts, 15 U.S.C. 1692g(a)-(b); and generally bars attempts to collect a disputed debt until the debt is verified, *ibid.*

The Act applies primarily to consumer debt collection by third-party debt collectors; it does not apply to commercial debts or to creditors who collect their own debts in their own names. See 15 U.S.C. 1692a(3), (5) and (6)(A).

In addition to authorizing enforcement by certain federal agencies (chiefly the FTC and CFPB), 15 U.S.C. 1692*l*, the FDCPA creates a "calibrated scheme of statutory incentives to encourage self-enforcement" by affected consumers. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1624 (2010). The FDCPA's private-enforcement provision, 15 U.S.C. 1692k, generally authorizes any aggrieved person to pursue remedies against "any debt collector who fails to comply with any provision" of the Act. 15 U.S.C. 1692k(a). Any such action must be filed "within one year from the date on which the violation occurs." 15 U.S.C. 1692k(d). The Act establishes affirmative defenses for debt collectors, which preclude liability in cases where the debt collector has relied in good faith on a federal-agency advisory opinion, or in cases of "bona fide error" where the debt collector has reasonable procedures in place and the violation was unintentional. 15 U.S.C. 1692k(c) and (e).

A prevailing plaintiff in an FDCPA enforcement action is entitled to recover for "any actual damage" she suffered from the violation. 15 U.S.C. 1692k(a)(1). The court may also award statutory damages, subject to certain caps. In an individual suit, the plaintiff may recover "such additional damages as the court may allow, but not exceeding $1000." 15 U.S.C. 1692k(a)(2)(A). In determining the appropriateness or size of a statutory-damages award, the court considers, *inter alia*, the "frequency and persistence of noncompliance by the debt collector," the "nature of such noncompliance," and the

"extent to which such noncompliance was intentional." 15 U.S.C. 1692k(b).

The FDCPA's private-enforcement provision also authorizes the court to award attorney's fees and costs in specified circumstances. First, "in the case of any successful [enforcement] action," the defendant is liable for "the costs of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. 1692k(a)(3). Second, "[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." *Ibid.*

2. Petitioner is a former student who sought training as a medical assistant in the belief that her educational expenses were covered by a grant. J.A. 27-28. What she thought was a grant was in fact a relatively large student loan. *Ibid.* Respondent, a commercial debt collector, was hired to collect on that loan. Pet. App. 2a.

Petitioner subsequently filed an FDCPA enforcement action against respondent. Pet. App. 2a. Her complaint, as amended, alleged that respondent had harassed her with phone calls several times a day; had impermissibly threatened to garnish 50% of her wages and take money directly from her bank account; and had unlawfully sent a debt-collection-related fax to her employer. J.A. 16-21.

After a one-day bench trial, the district court ruled in favor of respondent. Pet. App. 2a-3a; see J.A. 26-33. Although the court did not find petitioner "untruthful," and was "sure she remember[ed]" relevant events in the way she claimed, it nevertheless declined to credit certain portions of her testimony. J.A. 29-30.

The district court concluded that petitioner had been "in a very vulnerable position" when she interacted with respondent, and that her emotional state had "affected her ability to understand and to recall the details" of those interactions. J.A. 27, 32. The court emphasized that the "stresses on [petitioner] at that time were enormous": petitioner was a single mother living with two "very young" children, was in a child-support dispute with the children's father, was working a job that "at best * * * cover[ed] her expenses," and was "behind in her rent" and therefore "subject to possible eviction." J.A. 27. The court believed that in her "panic" at discovering that she owed on a student loan, petitioner had "misinterpreted" certain communications with respondent. J.A. 28-30; see J.A. 32. The court also concluded—although it found the issue "close"—that respondent's fax to petitioner's employer had not violated the FDCPA because the employer would not have understood the fax to relate to debt collection. J.A. 30-31.

3. In addition to dismissing petitioner's suit, the district court's judgment ordered petitioner to pay respondent's costs. Pet. App. 30a-31a. Those costs totaled $4543.03, of which $2183.40 was to compensate the court reporter and $2359.63 was to compensate respondent's witnesses. J.A. 37-40.

Petitioner filed a post-judgment motion objecting to the taxation of costs against her. 1:08-cv-02243 Docket entry No. 77 (June 8, 2010) (Post-Judgment Motion). She contended that the FDCPA did not authorize such an award because the court had made no finding that she filed suit "in bad faith and for the purpose of harassment." 15 U.S.C. 1692k(a)(3); see Post-Judgment Motion 1-5.

The district court rejected petitioner's argument. Pet. App. 28a-29a. It concluded that an award of costs was warranted under Federal Rule of Civil Procedure 54(d)(1), which states 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." Fed. R. Civ. P. 54(d)(1); see Pet. App. 28a-29a. The court found that "the statutory language requiring a finding of bad faith and harassment is applicable only for an award of attorney fees and does not displace Rule 54(d)." Pet. App. 29a. The district court also concluded, in the alternative, that costs were taxable under Federal Rule of Civil Procedure 68, which requires a party to pay costs in certain circumstances when it has declined a pre-trial offer of judgment from the opposing party. *Ibid.*

4. Petitioner appealed the district court's award of costs, as well as its determination that respondent's fax to her employer had not violated the FDCPA. Pet. App. 3a. The court of appeals affirmed. *Id.* at 2a.

As relevant here, the court of appeals upheld the award of costs under Rule 54(d)(1). Pet. App. 6a-14a.[2] The court viewed Rule 54(d)(1) as reflecting a "venerable" presumption that a prevailing party may recover costs from the losing party. *Id.* at 8a. It stated that a "clear showing of legislative intent is needed" in order to "find that Rule 54(d) is displaced by a statute." *Ibid.* The court concluded that neither the text nor the history of the FDCPA's private-enforcement provision reflects a clear congressional intent to displace Rule 54(d) in prevailing-defendant suits. See *id.* at 6a-14a.

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[2] The court of appeals concluded that Rule 68 did not authorize the district court's award of costs in this case. See Pet. App. 14a-15a.

Judge Lucero dissented. Pet. App. 19a-25a. He would have read Section 1692k(a)(3) to establish the exclusive conditions under which costs may be awarded to a prevailing defendant in an FDCPA suit. See *id*. at 24a. Because the district court had not found that petitioner brought suit "in bad faith and for the purpose of harassment," Judge Lucero would have reversed the award of costs. *Id.* at 25a. He pointed out that, under the majority's view, "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." *Ibid*. "In other words," he continued, "the majority concludes * * * that a portion of the FDCPA is mere surplusage." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that Federal Rule of Civil Procedure 54(d)(1) authorizes a court to tax costs against a consumer who files a good-faith FDCPA enforcement action. The text of Rule 54(d)(1) makes clear that, if the federal statute under which suit is brought establishes a cost-shifting standard different from the one contained in the Rule, the statutory standard will control. The specific cost-shifting provision applicable to FDCPA enforcement actions, 15 U.S.C. 1692k(a)(3), allows taxation of costs against a plaintiff only when the action was filed in bad faith. By protecting good-faith plaintiffs from cost awards, the Act preserves its carefully calibrated incentives for consumers to bring the private enforcement actions that are critical to carrying out the FDCPA's deterrent and remedial purposes.

A. Rule 54(d)(1) establishes a default standard under which a district court, in its discretion, may award costs

to a prevailing party in a federal civil case. That default standard only applies, however, "[u]nless a federal statute" or another federal rule "provides otherwise." Fed. R. Civ. P. 54(d)(1). Rule 54(d)(1) thus expressly incorporates the established canon of statutory construction that "a precisely drawn, detailed statute pre-empts more general remedies." *EC Term of Years Trust* v. *United States*, 550 U.S. 429, 434 (2007).

Congress frequently displaces Rule 54(d)(1)'s general default standard by crafting different cost-shifting rules that are tailored to particular causes of action. The drafters of Rule 54(d) did not purport to require, and could not appropriately have required, that Congress employ any particular form of words in order to supersede the Rule's default standard. Instead, Rule 54(d)(1)'s default standard necessarily gives way when the circumstances of a particular case are addressed (explicitly or implicitly) by another statute or rule—as, for example, when the Rule would permit recovery of costs in circumstances where a more specific cost-shifting provision would not.

B. The FDCPA's cost-shifting provision for private enforcement actions, 15 U.S.C. 1692k(a)(3), displaces Rule 54(d)(1)'s default standard. With respect to private suits in which the defendant ultimately prevails, the Act states that "the court may award" reasonable attorney's fees "and costs" upon "a finding by the court that [the] action * * * was brought in bad faith and for the purpose of harassment." 15 U.S.C. 1692k(a)(3). Nothing in the Act authorizes the taxation of costs against a consumer who brings an FDCPA enforcement action in good faith. If Congress had intended to permit that result, it could either have said nothing at all on the topic of costs—thereby inviting application of Rule 54(d)(1)'s

default standard—or else expressly provided for cost awards to prevailing defendants without requiring a showing of bad faith. The court of appeals' approach renders superfluous Congress's express designation of a particular category of unsuccessful FDCPA suits as to which cost-shifting is appropriate.

C. Congress had good reason not to allow district courts to tax costs against good-faith FDCPA plaintiffs. The Act's goal of deterring and remedying abusive debt-collection practices depends upon the willingness and ability of consumers affected by those practices to bring private enforcement actions. See S. Rep. No. 382, 95th Cong., 1st Sess. 5 (1977); *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1624 (2010). The expected potential recovery in such enforcement actions is often modest; potential FDCPA plaintiffs are often already in debt; and even a consumer who believes in good faith that her rights under the Act have been violated cannot be fully confident that she will ultimately prevail. A rule that authorized prevailing defendants to recover their costs as a matter of course would therefore create a significant disincentive to the prosecution of private enforcement actions.

Respondent suggests that it would be unfair to deny it a cost award that Rule 54(d)(1) would allow. In crafting standards for fee- and cost-shifting under the FDCPA, however, Congress departed significantly from the background rules that generally govern awards of fees and costs. The cost-shifting rules set forth in Section 1692k(a)(3), rather than the default standard that applies in the absence of a more specific congressional judgment, are controlling here.

ARGUMENT

RULE 54(D)(1) DOES NOT AUTHORIZE COURTS TO TAX COSTS AGAINST GOOD-FAITH FDCPA PLAINTIFFS

Congress enacted the FDCPA to curtail abusive debt-collection practices. See 15 U.S.C. 1692(a) and (e); *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1608 (2010). The primary way in which the Act deters and remedies such practices is by authorizing affected consumers to bring private enforcement actions against debt collectors who violate the Act's substantive requirements. See S. Rep. No. 382, 95th Cong., 1st Sess. 5 (1977) (Senate Report); *Jerman*, 130 S. Ct. at 1624. The Act's private-enforcement provision, 15 U.S.C. 1692k, accordingly creates "statutory incentives to encourage self-enforcement," while "expressly guard[ing] against abusive lawsuits." *Jerman*, 130 S. Ct. at 1620, 1624. As particularly relevant here, the provision encourages self-enforcement by awarding both attorney's fees and costs to a prevailing consumer, while discouraging unjustified litigation by permitting district courts to tax costs and attorney's fees against plaintiffs who sue "in bad faith and for the purpose of harassment." 15 U.S.C. 1692k(a)(3).

The court of appeals' decision, which permits the taxation of costs even against good-faith FDPCA plaintiffs, inappropriately "chill[s] private suits under the statutory right of action, undermining the FDCPA's calibrated scheme." *Jerman*, 130 S. Ct. at 1624. If potential good-faith FDCPA plaintiffs, many of whom are already in considerable debt, must face the prospect of paying thousands of dollars in costs if they do not ultimately prevail, they will be discouraged from filing potentially meritorious enforcement actions. The court of

appeals erred in believing that Federal Rule of Civil Procedure 54(d)(1) authorizes that result. Rule 54(d)(1) provides only a general default standard for awarding costs to prevailing parties. By the Rule's express terms, that standard gives way when Congress has tailored a competing cost-shifting rule to meet the needs of a specific statutory scheme, as it has in the FDCPA.

A. Under Rule 54(d)(1)'s Express Terms, The Rule's Default Cost-Shifting Standard Yields To Contrary Provisions

1. Rule 54(d)(1) provides in relevant part 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." Fed R. Civ. P. 54(d)(1). The costs awardable under the rule are enumerated in 28 U.S.C. 1920 and include certain court and witness fees. *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2001 (2012). Rule 54(d)(1) authorizes district courts to require a losing party to pay any such costs incurred by the prevailing party, and creates a presumption favoring such cost-shifting, "unless * * * some other provision for costs is made by a federal statute or the civil rules." 10 Charles Alan Wright et. al. *Federal Practice & Procedure* § 2665, at 200 (3d ed. 1998 & Supp. 2012) (Wright & Miller).

Pursuant to Rule 54(d)(1)'s subordination clause, many federal statutes displace its default cost-shifting standard. See 10 Wright & Miller § 2670, at 257-261; 10 James Wm. Moore, *Moore's Federal Practice* § 54.101[1][c], at 54-160 (3d ed. 2012) (Moore). "Congress frequently provides for the award of costs when it creates specific statutory rights," resulting in "numerous" specific provisions with "variant" treatment of costs

depending upon the particular federal statute under which a given claim arises. 10 Wright & Miller § 2670, at 259; see 10 Moore § 54.101[1][c], at 54-160 ("The statutes preempting the court's discretion under Rule 54(d)(1) are far too numerous to list comprehensively.").

The drafters of Rule 54(d) made clear that they intended that result. The original 1937 version of Rule 54(d) provided, in pertinent part, that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Rule 54(d) in its original form thus contemplated that an "express provision" for "costs" in the U.S. Code or the civil rules would supersede the Rule's default cost-shifting standard in the event of any inconsistency. The original advisory committee notes contained a non-exhaustive list of 25 "statutes as to costs" that would be "unaffected" by the new rule. Fed. R. Civ. P. 54 advisory committee's note (1937). That list included statutes mandating cost awards in certain circumstances, see 15 U.S.C. 15 (1934); forbidding cost awards in certain circumstances, see 35 U.S.C. 71 (1934); giving district courts full discretion to award costs to either party, see 15 U.S.C. 78i(e) (1934); and giving district courts only the limited discretion to award costs to a prevailing party when certain preconditions were satisfied, 15 U.S.C. 77k(e) (1934). Fed. R. Civ. P. 54 advisory committee's note (1937). Although the Rules Committee updated the language of the subordination clause in 2007 "as part of the general restyling of the Civil Rules," that change was "stylistic only" and thus did not substantively alter the clause's scope. Fed. R. Civ. P. 54 advisory committee's note (2007).

2. Rule 54(d)(1)'s subordination clause thus codifies, in the context of cost-shifting, "the well-established principle" that "'a precisely drawn, detailed statute preempts more general remedies.'" *Hinck* v. *United States*, 550 U.S. 501, 506 (2007) (quoting *EC Term of Years Trust* v. *United States*, 550 U.S. 429, 433 (2007)). The first edition of *Moore's Federal Practice*, published shortly after Rule 54(d)'s adoption, explained that while "the prevailing party is normally entitled to costs as of course" under the Rule, "an express provision in a federal statute * * * prevails over the generality of the normal rule." 3 James Wm. Moore et al., *Moore's Federal Practice* § 54.04, at 3159-3160 (1938). And this Court has itself relied on a version of the specific-governs-the-general canon to reject an interpretation of the term "costs" that would have allowed parties to recover under Rule 54(d) certain types of expenses (*e.g.*, expert witness fees) beyond those specifically permitted by statute. *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[W]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one.") (citation, brackets and quotation marks omitted).

In applying the specific-governs-the-general canon, this Court has not required any express textual conflict as a prerequisite to displacement. See *e.g.*, *Hinck*, 550 U.S. at 506 (finding Tax Court jurisdiction to be exclusive notwithstanding "Congress's failure explicitly to define the Tax Court's jurisdiction as exclusive"); see also *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 834 (1976) (surveying previous cases). The question instead is whether the matter at hand, either expressly or by implication, falls within the ambit of the more specific provision. The Court will find that the specific provision

displaces the more general one if, for example, the specific provision reflects a "strong policy" that application of the more general provision would "undermine," *ibid.* (internal quotation marks omitted), or if the specific provision reflects a limitation that application of the more general provision would "effortlessly evade," *EC Term of Years Trust*, 550 U.S. at 434. Such a limitation may include the specific provision's omission of a particular remedy that the more general provision would allow. See, *e.g.*, *United States* v. *Fausto*, 484 U.S. 439, 454 (1988); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

3. In contrast to this Court's usual approach in specific-governs-the-general cases, the court below required a "clear showing of legislative intent" as a precondition to "find[ing] that Rule 54(d) is displaced by a statute." Pet. App. 8a. The court concluded that, because "[n]othing in the language of the [FDCPA] purports to exclude Rule 54(d) costs from being taxed and awarded in FDCPA suits," the Rule continues to govern awards of costs to prevailing FDCPA defendants. *Ibid.* The court further suggested that, in order "[t]o 'provide otherwise' than Rule 54(d)(1), [a] statute or rule would have to bar an award of costs to a prevailing party." *Id.* at 13a (quoting *Quan* v. *Computer Sciences Corp.*, 623 F.3d 870, 888 (9th Cir. 2010)). Respondent has similarly suggested that "express intent to negate Rule 54(d)" is required for displacement. Br. in Opp. 16. That approach is misguided for several reasons.

First, while Rule 54(d)(1) establishes a default rule that costs should presumptively be awarded to prevailing parties, the Rule specifically contemplates the prospect that other laws may "provide[] otherwise." A statute such as the FDCPA "provides otherwise" if it estab-

lishes a more demanding standard for awards of costs against unsuccessful plaintiffs. See 15 U.S.C. 1692k(a)(3). It would be anomalous to interpret Rule 54(d)'s explicit subordination clause to impose a *more* exacting specific-governs-the-general test than would normally apply even without such a clause.[3]

Second, as explained above, the drafters of the original Rule 54(d) identified 25 "statutes as to costs" that would be "unaffected" by the new rule. See p. 12, *supra*. The pre-existing laws to which the 1937 advisory committee's note referred took a number of different forms—including, like current Section 1692k(a)(3), the imposition of preconditions on awards of costs to prevailing parties—and obviously did not contain express references to Rule 54(d). See *ibid.* The Rule's drafters thus clearly contemplated that the new rule's broad authorization to award costs could be limited or superseded in a variety of ways, including by statutes that did not refer to the Rule itself.

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[3] Notwithstanding Rule 54(d)(1)'s express subordination clause, the court of appeals considered the "presumption that a prevailing party is entitled to costs" to be "a venerable one" that would warrant a clear-statement requirement. Pet. App. 8a. A court, however, lacks authority to substitute its own value judgment in place of the text of a federal rule. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988) (observing that a federal criminal rule was, "in every pertinent respect, as binding as any statute duly enacted by Congress"). Federal cost-shifting has long been the province of statutes and rules, rather than judge-made law. See *Taniguchi*, 132 S. Ct. at 2001 ("[T]he taxation of costs was not allowed at common law."); see generally *ibid.* (summarizing history of cost-shifting); *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247-257 (1975) (same). Whatever the historical practice might have been under previous statutes and rules, Rule 54(d) has provided the controlling law for the past 75 years and remains controlling now.

Third, even if Rule 54(d)(1) did not expressly contemplate the prospect of superseding cost-shifting provisions, the court of appeals' approach would be contrary to the background principles that govern the harmonization of general and specific legal directives. The specific-governs-the-general canon has never depended on the use of express language in the specific statute declaring the general rule to be inapplicable. Indeed, the canon would do no work if it were limited in that manner, since express language explaining how two existing statutes are to be harmonized always controls, regardless of the relative specificity of the two laws. The point of the specific-controls-the-general canon is that the specificity of a particular statute may *by itself* imply exclusivity, thus displacing the general rule.

Fourth, even if the drafters of the Federal Rules had purported to require Congress to use a particular form of words in order to supersede Rule 54(d)(1)'s default standard, such a requirement would be ineffective. "[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified. And Congress remains free to express any such intention either expressly or by implication as it chooses." *Dorsey* v. *United States*, 132 S. Ct. 2321, 2331 (2012) (citation omitted); see *id.* at 2331-2332 (explaining that the "necessary implication," "clear implication," or "fair implication" of a later-enacted law will control, even when an earlier statute on its face establishes a more demanding standard for amendment). That principle applies *a fortiori* when the earlier-adopted law is a federal rule rather than an Act of Congress.

B. The FDCPA Does Not Permit Taxation Of Costs Against Plaintiffs Who File Suit In Good Faith, Even If The Defendant Ultimately Prevails

1. The private-enforcement provision of the FDCPA, 15 U.S.C. 1692k, establishes explicit cost-shifting standards that displace Rule 54(d)(1)'s more general default standard. The first sentence of Section 1692k(a)(3) states that, "in the case of any successful action," the consumer's recovery will include "the costs of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. 1692k(a)(3). That sentence supersedes Rule 54(d)(1) by making an award of costs to a prevailing FDCPA plaintiff mandatory rather than discretionary. See 10 Moore § 54.101[1][c], at 54-160 (observing that some federal statutes "mandate * * * an award of costs in particular circumstances, removing the court's discretion under Rule 54(d)(1)").

The second sentence of Section 1692k(a)(3) states 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." That sentence supersedes Rule 54(d)(1) by narrowing the set of circumstances in which a prevailing defendant may receive a discretionary cost award. See 10 Moore § 54.101[1][c], at 54-160 (observing that some federal statutes "prohibit * * * an award of costs in particular circumstances, removing the court's discretion under Rule 54(d)(1)"). The district court in this case exceeded that narrowed authority by taxing costs against petitioner without finding that she had brought her suit in bad faith.

2. The court of appeals correctly recognized that the second sentence of Section 1692k(a)(3) contains both a fee-shifting and a cost-shifting rule. That sentence, the court explained, specifies "two separate pecuniary awards for a defendant who prevails against a suit brought in bad faith and for the purposes of harassment: (1) 'attorney's fees reasonable in relation to the work expended' and (2) 'costs.'" Pet. App. 7a; see *id.* at 7a-8a (rejecting respondent's argument that "costs" should be treated simply as a factor in determining "reasonable attorney's fees"); *Rouse* v. *Law Offices of Rory Clark*, 603 F.3d 699, 703-705 (9th Cir. 2010) (rejecting similar argument); see also Senate Report 5 (stating that in bad-faith cases, "the court may award the debt collector reasonable attorney's fees and costs").

Section 1692k(a)(3) thus does not authorize cost awards in all cases where the defendant prevails. Instead, it provides that "the court may award * * * costs" on "a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment." That narrow authorization, contingent on satisfaction of a specified condition, is properly understood to state the exclusive ground on which costs may be awarded to prevailing FDCPA defendants.

3. In *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), the Court considered a statute providing that "[a]ny person *may* seek contribution . . . *during or following* any civil action under section 9606 of this title or under section 9607(a) of this title." *Id.* at 166 (quoting 42 U.S.C. 9613(f)(1)) (emphasis added by Court). The Court determined that the "natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action." *Ibid.*; see, *e.g.*,

Bruesewitz v. *Wyeth LLC*, 131 S. Ct. 1068, 1076 (2011) ("*Expressio unius, exclusio alterius*."). The Court explained that "the natural meaning of 'may' in the context of the enabling clause is that it authorizes certain contribution actions—ones that satisfy the subsequent specified condition—and no others." *Cooper Industries*, 543 U.S. at 166. The Court additionally reasoned that interpreting the provision in a nonexclusive fashion would render the provision's conditional language "entirely superfluous," *ibid.*, thereby "violat[ing] the settled rule that we must, if possible, construe a statute to give every word some operative effect," *id.* at 167 (citing *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 35-36 (1992)). The Court saw "no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions." *Id.* at 166.

The same reasoning applies with full force to Section 1692k(a)(3). The court of appeals suggested that, in order to supersede Rule 54(d)(1)'s default standard, Congress was required to state expressly that costs may *not* be awarded against FDCPA plaintiffs who brought suit in good faith. See Pet. App. 13a ("To 'provide otherwise' than Rule 54(d)(1), [a] statute or rule would have to bar an award of costs to a prevailing party.") (quoting *Quan*, 623 F.3d at 888). But given the specificity with which Congress addressed cost awards to prevailing FDCPA defendants, that prohibition is clearly implicit in the language Congress enacted.

4. If Congress had wanted all prevailing FDCPA defendants to be eligible for cost awards, it could have achieved that objective in either of two ways. First, Congress could have stayed silent on the issue of prevailing-defendant cost awards in FDCPA cases and

specified only the circumstances in which courts in such cases could award prevailing defendants attorney's fees. That approach would have left intact Rule 54(d)(1)'s default cost-shifting standard. Alternatively, Congress could have drafted Section 1692k(a)(3) in such a way that the authorization to award costs to prevailing defendants was not contingent on a finding of bad faith. That approach would have ensured that cost awards to prevailing FDCPA defendants remained available, regardless of any amendments to the Federal Rules. Congress has taken both of those approaches in other statutes.[4] See, *e.g.*, 15 U.S.C. 15c(d)(2) (allowing discretionary bad-faith attorney-fee awards without mentioning costs); 15 U.S.C. 3608(d) (same); 42 U.S.C. 11046(f) (allowing discretionary awards of both costs and fees to a prevailing party); 42 U.S.C. 12205 (same).

Congress took neither approach in Section 1692k(a)(3). Rather, it mandated cost awards in all FDCPA cases where the plaintiff prevails, while making awards of costs to prevailing defendants available only

[4] Indeed, other provisions of the Consumer Credit Protection Act itself authorize attorney's-fee awards against bad-faith litigants without mentioning costs. The Fair Credit Reporting Act, which is Title VI of the Consumer Credit Protection Act (see Pub. L. No. 91-508, § 601, 84 Stat. 1127-1128 (1970)), includes two provisions requiring an award of reasonable attorney's fees "to the prevailing party" when a court finds "that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment." 15 U.S.C. 1681n(c); 15 U.S.C. 1681*o*(b); see Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2412, 110 Stat. 3009-446 to 3009-447. The contrast between the omission of "costs" in those provisions, and the inclusion of "costs" in Section 1692k(a)(3), "supports that Congress intended" the FDCPA "to condition an award of costs to a prevailing defendant upon a finding of bad faith and harassment on plaintiff's part." *Rouse*, 603 F.3d at 706.

in narrow circumstances. The natural inference is that Congress intended Section 1692k(a)(3) to provide the exclusive standard for cost awards in FDCPA cases. See, *e.g.*, *Erika, Inc.*, 456 U.S. at 208 (concluding that Congress's "omission" of a particular remedy from a statute's "precisely drawn provisions" was "persuasive evidence that "Congress deliberately intended to foreclose" seeking that remedy through a more general statute).

The court of appeals, by contrast, imputed to Congress an intent specifically to authorize awards of costs to prevailing defendants in suits brought in bad faith, while leaving intact Rule 54(d)(1)'s pre-existing authorization to award costs to *all* prevailing FDCPA defendants. Congress had "no reason," however, to "bother" enacting selectively redundant provisions that merely confer upon district courts a subset of the authority they already possess. *Cooper Industries*, 542 U.S. at 166. The court of appeals' analysis is thus inconsistent with "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys* v. *United States*, 485 U.S. 759, 778 (1988).

C. Allowing Courts To Tax Costs Against Good-Faith FDCPA Plaintiffs Would Subvert The Balance Struck By Congress Between Encouraging Private Enforcement And Deterring Abusive Suits

Although the FDCPA provides for federal-agency enforcement, 15 U.S.C. 1692*l*, Congress understood and intended that the law would be "primarily self-enforcing" through suits by "consumers who have been subjected to collection abuses." Senate Report 5; see *Jerman*, 130 S. Ct. at 1624. Section 1692k(a)(3) reflects Congress's FDCPA-specific effort to strike an appropriate balance between encouraging private enforcement

and deterring abusive suits. Applying Rule 54(d)(1)'s default standard would upset that balance, inhibit private enforcement, and frustrate the Act's goal of discouraging and remedying abusive debt-collection practices.

1. Federal agencies cannot, as a practical matter, police the debt-collection industry by themselves. Debt collectors contact millions of consumers each year. CFPB, *Annual Report 2012: Fair Debt Collection Practices Act* 7 (2012), http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf (*2012 Report*); see *id.* at 4 ("In 2011, approximately 30 million individuals, or 14 percent of American adults, had debt that was subject to the collections process (averaging approximately $1,400)."). In recent years, consumers have lodged more complaints with the FTC about debt collectors than about any other industry. *Id.* at 6. In 2011 alone, the FTC received a total of 117,374 complaints about third-party debt collectors (who are subject to the FDCPA), representing 22.3% of the total complaints the FTC received about all industries combined. *Ibid.*; see *id.* at 7 and App. C (breaking down complaints by type of misconduct alleged).

Although that figure is only a rough proxy for FDCPA violations (since not all complaints reflect actual violations and not all violations generate complaints), *2012 Report* 5-6, it demonstrates that the potential need for enforcement exceeds federal-agency capacity by several orders of magnitude. Most agencies have authority to enforce the FDCPA only in very limited circumstances. 15 U.S.C. 1692*l*(b)(1)-(5). The FTC and CFPB have broader authority, 15 U.S.C. 1692*l*(a) and (b)(6), but they lack the resources to investigate any substantial percentage of the complaints they receive, let alone

to pursue litigation to remedy all of the FDCPA violations such investigations might uncover. See *Jerman*, 130 S. Ct. at 1624 (citing FTC study concluding that, "[b]ecause 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"). The agencies therefore typically focus on "egregious" cases, or those in which consumer enforcement actions will be inadequate. *2012 Report* App. A at 2.

The FTC has been increasing its enforcement efforts in recent years, bringing more cases and obtaining stronger monetary and injunctive remedies against debt collectors who violate the Act. *2012 Report* 14. Nevertheless, the number of FDCPA cases it can pursue —seven were brought or resolved in 2011, *ibid.*—is not enough by itself to protect consumers adequately. The CFPB received authority to enforce the Act in July 2011, and its enforcement program therefore is still in its nascent stage. *Id.* at 3, 17. And many debt collectors have attempted to hamper federal investigations by conditioning private settlement agreements on the inclusion of "gag clauses," which purport to bar the settling consumers from cooperating with federal authorities. *Id.* at App. A at 10.

2. Because federal-agency enforcement efforts cannot realistically address the full scope of the problem, the FDCPA provides "statutory incentives to encourage self-enforcement" through private enforcement actions that do not require government intervention. *Jerman*, 130 S. Ct. at 1624. The Act's private-enforcement provision, 15 U.S.C. 1692k, reflects Congress's effort to make consumer enforcement economically feasible by autho-

rizing statutory damages as well as actual damages, and by compensating prevailing consumers for their attorney's fees and costs. See 15 U.S.C. 1692k(a); see also *Jerman*, 130 S. Ct. at 1620 n.15. At the same time, Congress recognized that some FDCPA plaintiffs might be motivated by an improper purpose, and it sought to deter abusive lawsuits as well as to facilitate well-founded ones. Congress struck what it viewed as the appropriate balance between those objectives, however, not by authorizing awards of fees and costs in all cases where an FDCPA plaintiff is unsuccessful, but by conditioning awards against plaintiffs on a judicial finding that the suit "was brought in bad faith and for the purpose of harassment." 15 U.S.C. 1692k(a)(3).

Application of Rule 54(d)(1)'s default cost-shifting standard, rather than Section 1692k(a)(3)'s FDCPA-specific one, would significantly alter the mix of incentives fashioned by Congress and could deter many meritorious private suits. Cf. Wright & Miller § 2665, at 202 (noting the "significant effect that a revision of the cost structure could have on the patterns of litigation and the willingness of individuals and organizations to institute and defend legal proceedings"). Consider, for example, a consumer who has been harassed by repeated telephone calls from a debt collector, see 15 U.S.C. 1692d(5), but whose provable "actual damage," 15 U.S.C. 1692k(a), is relatively slight. The FDCPA's authorization for statutory damages, 15 U.S.C. 1692k(a), would provide an additional incentive to bring an enforcement action. But those statutory damages are capped at $1000, *ibid.*, while a defendant's costs for a one-day trial can be greater than $4500, see Pet. App. 2a; see also, *e.g.*, *Rouse*, 603 F.3d at 702 (costs of more than $6500 following longer FDCPA trial). Under Rule 54(d)(1)'s default

standard, those costs could be assessed personally against the consumer (not against her attorney) if the defendant prevailed, whether or not the district court found that the suit had been brought in bad faith. See Wright & Miller § 2670, at 263.

If losing FDCPA plaintiffs were regularly held liable for costs much greater than the recoveries they could reasonably expect if their suits had been successful,[5] the filing of private FDCPA enforcement actions would be economically rational only if the perceived likelihood of success was very high. Many consumers who believed in good faith that their FDCPA rights had been violated would reasonably conclude, after performing that cost-benefit analysis, that the uncertainties associated with litigation rendered the pursuit of legal remedies unwise. Cf. *Christianburg Garment Co.* v. *EEOC*, 434 U.S. 412, 422 (1978) ("No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable."). Thus, if Rule 54(d)(1)'s default cost-shifting standard applied to FDCPA enforcement actions, many consumers would likely be deterred from filing actions that they otherwise would have brought and won.

The risk-reward analysis would be particularly daunting for the consumers who are most frequently in a position to enforce the FDCPA. Persons who have been pursued by debt collectors are often in precarious

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[5] Some FDCPA plaintiffs allege fairly large actual damages. But even those plaintiffs will likely recognize that any ultimate damages award could well be smaller than the amount sought. And in any event, Congress's provision for modest statutory damages (capped at $1000) demonstrates its intent to create adequate incentives for private enforcement actions, even in the absence of sizable actual damages.

financial circumstances. Petitioner, for example, was at the time of trial a single mother, with a job that barely covered her expenses, at risk of eviction for falling behind on her rent. J.A. 27. For individuals in that situation, the prospect of owing thousands of dollars of costs if the suit is unsuccessful will likely operate as a particularly strong deterrent. And while several circuits permit at least some consideration of a party's indigence in considering whether to tax costs under Rule 54(d)(1), see, *e.g.*, *Rivera* v. *City of Chi.*, 469 F.3d 631, 635 (7th Cir. 2006), that possibility provides no assurance that a good-faith FDCPA plaintiff will avoid cost liability, as the rulings below in the present case make clear.

Within the context of the FDCPA, where even successful suits may produce recoveries that are small in relation to the defendants' costs, Rule 54(d)(1)'s default cost-shifting standard would have far greater potential to deter meritorious claims than under the typical federal statute. By narrowing the circumstances under which costs may be awarded against unsuccessful plaintiffs, Congress alleviated that risk, thereby safeguarding the interests not only of consumers, but of law-abiding debt collectors as well. See 15 U.S.C. 1692(e) (FDCPA serves in part "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged"); *Jerman*, 130 S. Ct. at 1623. To the extent that private enforcement actions are perceived to be unlikely, abusive debt collectors will have greater incentives to violate, or at least "press the boundaries of," the Act's substantive provisions—a result this Court has found "difficult to square" with the Act's goals. *Ibid.* And law-abiding debt collectors could suffer from the lowered operating

costs that their abusive competitors might enjoy in the absence of robust good-faith enforcement.

3. Respondent contends that "[t]o deny a debt collector defendant the right to recover what is presumptively recoverable for a prevailing party under Rule 54(d)(1) would unfairly disadvantage an FDCPA defendant." Br. in Opp. 17. But precisely because Rule 54(d)(1) establishes a default cost-shifting standard, there would have been no need for the FDCPA to address cost awards at all if Congress had been content with the default rule. By enacting Section 1692k(a)(3), Congress expressed its intent that awards of fees and costs in FDCPA cases would be governed by distinctive rules different from the background legal norms that would otherwise apply.

With respect to attorney's fees, Congress displaced the "American Rule," see, *e.g.*, *Alyeska Pipeline Service Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 (1975), by making all losing FDCPA defendants liable for their opponents' reasonable fees. With respect to costs, Congress departed from the default standard set forth in Rule 54(d)(1), both by making cost-shifting mandatory in prevailing-plaintiff cases (see p. 17, *supra*), and by limiting cost awards in prevailing-defendant cases to suits that were brought in bad faith. Thus, while petitioner's proposed approach would deny respondent a cost award to which it might have been entitled under the default standard, there is no reason to suppose that Congress would have viewed that result as unfair.

It is clear that Congress, presumably to encourage the filing of private FDCPA enforcement suits, chose to enact fee- and cost-shifting rules that are more favorable to plaintiffs than to defendants. Under Section 1692k(a)(3), every losing FDCPA defendant is liable for

its opponent's fees and costs, while prevailing defendants may recover fees and costs only if the court finds that the suit was brought in bad faith. That asymmetry reflects an evident (and presumably advertent) departure from Rule 54(d)(1)'s default standard, which applies equally to prevailing plaintiffs and defendants alike.

Like other features of the FDCPA, see, *e.g.*, *Jerman*, 130 S. Ct. at 1611-1624 (holding that "bona fide error" defense conferred by 15 U.S.C. 1692k(c) covers clerical and factual errors but not mistakes of law), Section 1692k(a)(3) reflects Congress's effort to balance competing objectives. The provision avoids the undue deterrent to private enforcement actions that Rule 54(d)(1)'s default standard might create in this context, while authorizing compensation of defendants who incur fees and costs in bad-faith suits. "To the extent Congress is persuaded that the policy concerns identified by [respondent] require a recalibration of the FDCPA's liability scheme, it is, of course, free to amend the statute accordingly." *Jerman*, 130 S. Ct. at 1624. Under the existing statutory scheme, however, an FDCPA plaintiff who brings an enforcement action in good faith is not liable for her opponent's costs, even if the action is ultimately unsuccessful.

CONCLUSION

The judgment of the court of appeals affirming the district court's award of costs should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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