Nos. 11-17608 & 12-15320

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA ESCRIBA,

Plaintiff-Appellant/Cross-Appellee,

v.

FOSTER POULTRY FARMS, INC.,

Defendant-Appellee/Cross-Appellant.

On Appeal from a Final Judgment of the United States District Court for the Eastern District of California

Honorable Oliver W. Wanger, District Judge
Honorable Lawrence J. O'Neill, District Judge
Case No. 1:09-cv-1878

FOURTH STAGE BRIEF FOR FOSTER POULTRY FARMS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

STATUTES, RULES AND REGULATIONS

MISCELLANEOUS

FPF'S REPLY ON COSTS

Escriba contends that the district court properly denied costs in this case because it (1) correctly found that she has "limited financial resources," [Third-Stage Br. 41-42], even though it did not require her to provide evidence of her complete "financial status," much less prove that she is unable to pay costs; (2) properly considered FPF's financial resources, [Third-Stage Br. 45], even though four other circuits have held that it is an abuse of discretion to consider the prevailing party's ability to bear its own costs; and (3) correctly determined this is an "extraordinary" case involving close and difficult issues of landmark importance, [Third-Stage Br. 37-40], even though it was a straightforward, fact-bound lawsuit with no broader implications for anyone beyond the parties themselves.

Escriba's contentions are not persuasive. At bottom, she failed to meet her burden of proving that she cannot pay the bill of costs; the district court manifestly abused its discretion by considering FPF's financial resources, contrary to the categorical presumption in favor of taxation; and there is nothing remotely extraordinary about this run-of-the-mill employment dispute. In off-handedly dismissing as non-binding many of the authorities we cited in support of our arguments on these points, Escriba tellingly declines to engage the substance of the very serious issues raised on appeal. The order denying costs should be reversed.

A. Escriba has not proven that she is unable to pay costs.

Escriba asserts that the party seeking to avoid taxation need not show that "she was unable to pay the bill of costs" and, indeed, "does not need to provide documentary evidence of her financial status" *at all*. [Third-Stage Br. 41-42]. What is more, according to Escriba, district courts should "consider a party's limited resources" in a willy-nilly manner, without requiring documentary evidence of financial status and without situating that consideration within the broader question of whether the party can actually pay the bill. *Id*. That is incorrect.[1]

It is self evident that a losing party's financial condition may support the non-taxation of costs only when it suggests that the losing party truly cannot pay the bill of costs—or, as Escriba herself acknowledges, [Third-Stage Br. 41-42 & n.33], that the losing party would be made "indigent" if required to pay. *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1079 (9th Cir. 1999). The question cannot be whether the losing party has "limited resources," without more—as we explained in the second-stage brief (at 56),

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[1] A point of clarification at the outset: Mere inability to pay a bill of costs (when established) is not independently sufficient to avoid taxation. On the contrary, *Mexican-American Educators* makes clear that a case must also be "extraordinary," such as when it resolves issues of "exceptional public importance," is a "close" case on the merits, and involves "overwhelming costs." *Ass'n of Mexican-Am. Educators v. Cal.*, 231 F.3d 572, 592 & n.15 (9th Cir. 2000) (en banc). As we explain in subsequent sections of this brief, this case is none of those things.

no one has limitless resources. Indeed, as this Court repeatedly has made clear, not even "a plaintiff proceeding *in forma pauperis*"—who, by definition, has modest financial resources—is necessarily "protected from the taxation of costs to which a prevailing defendant is entitled." *Warren v. Guelker*, 29 F.3d 1386, 1390 (9th Cir. 1994) (per curiam).

The question, instead, is: *can the losing party pay the bill?* The reason that a losing party, to avoid taxation, must show that she cannot pay is obvious: "To provide relief" to a losing party who *can* pay costs, based on a standardless conclusion that the party simply is not wealthy, "would be inequitable" and unfair to the prevailing party, who is statutorily entitled to recover its costs. *Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 447 (4th Cir. 1999). Unless she can show that she cannot pay, the mere fact (if it is a fact) that Escriba does not have access to much money is not a proper reason to allow her to impose the costs of the trial upon FPF, who has shown that it did not harm Escriba in the first place.

1. As we explained in the second-stage brief (at 53-54), that conclusion—together with the recognition that "the losing party [bears] the burden to show why costs should not be awarded" (*Quan v. Computer Scis. Corp.*, 623 F.3d 870, 888 (9th Cir. 2010))—entails two caveats for a district court's consideration of the losing party's financial status.

First, the losing party must establish *with evidence* the extent of her ability to pay, with documents showing both personal and *marital* income and assets. The relevance of marital property in this case is beyond debate: "From the inception of its statehood, California has retained the community property law that predated its admission to the Union, and consistently has provided as a general rule that property acquired by spouses during marriage, including earnings, is community property." *In re Marriage of Bonds*, 5 P.3d 815, 821 (Cal. 2000). *Cf. United States v. Stonehill*, 702 F.2d 1288, 1297-1301 (9th Cir. 1983) (holding that marital property is available to satisfy the tax obligations of a single spouse).

Although Escriba does not disagree that marital property is relevant here, she suggests nevertheless that the district court "considered" sufficient "documentary evidence" "of plaintiff's limited resources" to support its decision. [Third-Stage Br. 43]. That is plainly wrong. Escriba offered evidence establishing only how much she personally had earned from part-time work over the previous few years, and *no more*. That is not enough: There was no evidence concerning her husband's income or their shared net worth. To allow a losing party to dodge her obligation to pay costs based simply on her own part-time income would permit every non-working spouse to overcome the presumption in favor of taxation.

Like the district court below, [SER6], Escriba glides over this point, asserting that FPF's references to her husband's income and their ownership of two houses "hardly show that [she] has significant financial resources." [Third-Stage Br. 44]. But as we noted in the second-stage brief (at 55), it was not FPF's burden to show that Escriba has *significant* resources or otherwise to demonstrate how her husband's income affects the analysis. Instead, it was *Escriba's* burden to show that—including her marital resources—she has such *insignificant* assets that she would be made indigent if made to pay costs. She simply has not met that burden.

Second, the losing party's resources must be measured against the bill of costs to determine—using a reasoned, reviewable calculus—whether or not the losing party actually cannot afford to pay the bill. Without this sort of analysis, consideration of the losing party's financial condition would be (and in this case *was*) effectively meaningless. Thus, as this Court has recognized in the related context of attorneys' fee awards, a district court abuses its discretion when it reaches a standardless conclusion, without making an "explicit calculation" or providing an "adequate explanation" sufficient for this Court to "evaluate" its reasoning on appeal. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943-45 (9th Cir. 2011). *See also Ass'n of Mexican-Am. Educators v. Cal.*, 231 F.3d 572, 593 (9th Cir. 2000) (en banc) ("[I]f a district court wishes to depart from th[e] pre-

sumption [in favor of taxation], it must explain why so that the appellate court will be able to determine whether or not the trial court abused its discretion."). That describes this case exactly: There is no way to review meaningfully the district court's conclusory comments concerning Escriba's true financial status.

2. Escriba declines to engage the substance of our arguments on these points. She does not, for example, defend the district court's remarkable conclusion that a non-bread-winning-spouse need not provide *evidence* of the income and assets at a her disposal in order to meet her burden of proving she would be rendered indigent if made to pay the bill. Instead, Escriba simply dismisses the two cases we cited in the second-stage brief (at 53-54)—the Fourth Circuit's decision in *Cherry* and the Eleventh's in *Chapman*—as "out-of-circuit" cases that, in her view, are "contrary to [this Court]'s law" and therefore "unpersuasive." [Third-Stage Br. 42].

That is incorrect. Escriba offers no support for the *ipse dixit* that *Cherry* and *Chapman* are inconsistent with this Court's holdings on these points (in fact, neither is), and she does not argue that either case was wrongly decided (neither was). To be sure, Escriba is right that *Cherry* and *Chapman* are irreconcilable with the *district court's approach in this case*. [Third-Stage Br. 42] (citing [SER5]). But it is the district court's reasoning that is in question here—its inconsistency with the well-reasoned holdings

of the Fourth and Eleventh Circuits is a reason to reject the *district court's* analysis—not the other way around.

And there is no question that the district court's decision *should* be rejected here. The court made no effort to undertake the necessary analysis—it did not require Escriba to produce evidence concerning her husband's income or their marital assets, and it did not determine whether requiring Escriba to pay FPF's costs would render her indigent. Instead, it observed—superficially—that Escriba's resources are "limited." [SER6]. That tautological conclusion cannot provide a basis for overcoming the "presumption for awarding costs to prevailing parties." *Save Our Valley v. Sound Transit*, 335 F.3d 932, 944 (9th Cir. 2003). On this basis alone, the decision not to tax costs should be reversed.

B. The district court erred by considering FPF's financial resources.

The district court independently erred by considering FPF's ability to bear its own costs. As the Fourth Circuit explained in *Cherry*, such consideration, if allowed, "would almost always favor an individual plaintiff . . . over her employer defendant," and "undermine [both] the presumption that Rule 54(d)(1) creates in prevailing parties' favor," and "the foundation of the legal system that justice is administered to all equally, regardless of wealth or status." 186 F.3d at 448. For this reason, as the Third Circuit

has said, "a district court may not consider the disparity in wealth between the prevailing and non-prevailing parties in imposing costs." *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 453 (3d Cir. 2000). Every other circuit to consider the issue agrees. *See Chapman v. AI Trans.*, 229 F.3d 1012, 1039 (11th Cir. 2000) ("a district court should not consider the relative wealth of the parties" in declining to tax costs) (citing *Cherry*, 186 F.3d at 448); *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 731 (6th Cir. 1986) (the prevailing party's "ability to bear its own expenses without hardship" is "an inappropriate factor in denying costs").

Escriba again declines to engage the substance of our arguments or the holdings of the Third, Fourth, Sixth, and Eleventh Circuits on this point. She does not disagree, for example, that taking consideration of a corporate defendant's financial resources is inconsistent with the presumption in favor of taxation and would create an unfair one-way ratchet in favor of individual litigants. Instead, she claims simply that each case is contrary to "controlling Ninth Circuit law." [Third-Stage Br. 45].

That, again, is incorrect. This Court's splintered decision in *Mexican-American Educators* did *not* approve consideration of the prevailing party's resources. In that case, a six-judge majority held that "district courts may consider . . . nonpunitive reasons for denying costs to a prevailing party." 231 F.3d at 592. The Court then discussed what it believed were

the appropriate reasons for denying costs in that case: (1) "This is an extraordinary, and extraordinarily important, case," presenting "issues of the gravest public importance" that "affect[] tens of thousands of Californians and the state's public school system as a whole"; (2) "Plaintiffs are a group of individuals and nonprofit organizations," and "[t]he record demonstrates that their resources are limited" while "costs in this case are extraordinarily high"; and (3) "The issues in the case are close and complex." *Id.* at 593. It was *those* "reasons that the district court gave" that the Court found "appropriate under Rule 54(d)(1)." *Id.*

The Court thus never approved consideration of the State's ability to bear its own costs. That is especially apparent because the question presented in that case was whether non-punitive factors could be considered *at all* in deciding whether or not to tax costs, and not *which* factors were appropriate to take into account if they could be. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004). On top of that, consideration of "economic disparity" would have been inconsistent with the Court's express affirmation that "Federal Rule of Civil Procedure 54(d)(1) establishes that costs are to be awarded *as a matter of course in the ordinary case*." *Id.* (emphasis added).

The Court accordingly should take this opportunity to confirm its agreement that district courts may not consider a prevailing party's resources in ruling on costs. This Court has long "endorsed the idea that [it] will not lightly create a circuit split" and will approach a question "inclined to follow the consistent decisions of [its sister] Circuits." *United States v. Dorsey*, 677 F.3d 944, 957 (9th Cir. 2012) (citing *Sternberg v. Johnston*, 595 F.3d 937, 948 (9th Cir. 2010); *United States v. Shabazz*, 564 F.3d 280, 289 (3d Cir. 2009)). For her part, Escriba has offered *not one* reason to part ways from the Third, Fourth, Sixth, and Eleventh Circuits on this matter. For this reason, too, the costs decision should be reversed.

C. This is not an extraordinary case.

Each of the foregoing reasons is an independently adequate basis for reversing the order denying costs. But even if all that we have said were wrong—even if Escriba were not required to establish her complete financial condition with evidence, and even if the district court were correct to consider FPF's resources—the district court still would have abused its discretion in declining to tax costs in this case. That is because this case was not remotely the kind of "extraordinary" case in which the presumption in favor of taxation is overcome: It was not close or complex, it did not involve landmark issues of national importance, and it is not the kind of case in which "chilling" is an appropriate consideration.

Before explaining why, however, one point bears special emphasis. The reasons justifying the abuse of discretion standard are familiar: There are "institutional advantages enjoyed by the district court," as first-hand witness to the parties' arguments and evidence, in making certain kinds of decisions. *Buford v. United States*, 532 U.S. 59, 64 (2001). In the context of a post-trial decision like whether to tax costs, district judges ordinary will have "presided over the trial and [become] familiar with the evidence" (*United States v. Castro*, 887 F.2d 988, 1001 (9th Cir. 1989)) and are therefore able to answer the relevant questions with the benefit of their unique perspective and experience with the case. In a case like this one, the district court's "familiar[ity] with the context of the trial" thus ordinarily entitles it to a deferential standard of review (*United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)) because an appellate court is not "in as good a position as the trial court" to take account of "the demeanor of witnesses, the effect certain evidence appears to have on the jury, and other factors one would have to 'be there' to observe" (Roger C. Park, David P. Leonard, & Steven Goldberg, *Evidence Law* § 16.01 (3d ed. 2010)).

Here, those considerations do not apply. Judge *Wanger* presided over the lawsuit below, from start to finish, including the trial. The case was reassigned to Judge *O'Neill* only after Judge Wanger entered the final judgment in this case and retired from the bench; by then, the clerk al-

ready had taxed costs against Escriba. The only open issue was Escriba's motion for review of the taxation order, filed after Judge Wanger's retirement. In deciding that motion, Judge O'Neill had no more familiarity with the underlying facts than do the judges of *this* Court. Perhaps more importantly, Judge Wanger—the judge to whom deference is actually owed in this case—wrote on the final line of his final order in this matter that "*Defendant is entitled to recover their costs of suit*." [ER25] (emphasis added). That very strongly suggests that this Court should view Judge O'Neill's contrary order skeptically, and not afford it the benefit of any deference.

Escriba misses the point when she observes that "Judge Wanger's Order was not a ruling on plaintiff's Motion for Review of Taxation of costs." [Third-Stage Br. 33 n.23]. Although that technically is true, Judge Wanger (who had more than two decades of service on the federal bench) presumably was familiar with the standards governing taxation of costs and determined at the conclusion of the trial that costs *should* be taxed in this case. That conclusion deserves special respect for all of the reasons that deference ordinarily is given to district judges in appeals like this one.

1. The case was not close.

Judge Wanger was, moreover, *correct*. To begin with, the case was a not close one. In suggesting otherwise, Escriba offers almost no substantive argumentation at all. She declines, for example, to mount a substan-

tive defense of the district court's bewildering conclusion that the denial of the party's summary judgment motions means the case was a close one. [Third-Stage Br. 38]. As we explained, [Second-Stage Br. 61-62], that observation is necessarily true of *every* case that goes to trial; it cannot possibly be correct that *going to trial* is a reason to deny taxing the costs *of going to trial*. A contrary conclusion is, once again, inconsistent with the presumption in favor of taxing costs. Apart from simply parroting back the district court's words, Escriba offers no response on this point.

Instead, she again simply dismisses the case we cited, [Second-Stage Br. 62], in support of this argument—*Phillips v. Morbark, Inc.*, 519 F. Supp. 2d 598 (D.S.C. 2007)—as based on "the law of another Circuit" and thus "unhelpful." [Third-Stage Br. 39 n.31]. But this Court has acknowledged that its consideration of persuasive authority is not "limited to courts at the same or higher level, or even to courts within the same [circuit or] system of sovereignty" and that it therefore is proper to "cite decisions of district courts, even those in other circuits," "so long as they speak to a matter relevant to the issue." *Hart v. Massanari*, 266 F.3d 1155, 1169 (9th Cir. 2001). *Phillips* does speak to a relevant matter, and Escriba's refusal to engage its reasoning is telling.

Escriba also offers no explanation of why the jury's short deliberation time is irrelevant. It cannot be that the mere existence of factual dis-

putes (and the associated denial of the parties' summary judgment motions) is a reason to conclude the case is a "close" one, while the jury's quick and ready resolution of those disputes is somehow immaterial. If the fact disputes here had been difficult and close, presumably the jury would have taken time deliberating over the parties' evidence and the various ways that differing inferences and conclusions could be drawn from it. But it did not. It resolutely rejected Escriba's version of the evidence *in a matter of minutes*. That indicates an easy case, not a close one.

In response to this—and consistent with her approach to almost every issue relevant to the costs question—Escriba simply repeats back what the district court said: "The District Court rejected Foster Farms' argument about the amount of time spent in jury deliberations correctly finding that the time the jury took to decide the case was not dispositive." [Third-Stage Br. 37]. But that is nothing more than a regurgitation of the district court's own *ipse dixit*. Escriba offers no reasoned argument to support the district court's unexplained decision below.

2. The case was not complex.

Nor were the issues here complex. Quite the opposite, they were simple and straightforward. The record is clear that Escriba sought just two weeks of leave, was granted the two weeks she requested, and was informed in writing that she was expected to return to work on December

10. [SER291-292, 486]. Escriba candidly admitted that she knew she "needed to be back to work" on that date and was "aware of the three-day rule" providing that "if [she] missed three-consecutive working days without reporting, [she] would be terminated." [SER270, 297-298]. Yet the evidence shows that she did not return to work on December 10 and failed to seek an extension of her leave because she forgot. [SER293-294].

As we explained in the second-stage brief (at 24-25), Escriba's termination therefore had nothing to do with FPF's alleged violations of any FMLA procedural rules. Even assuming FPF had done everything Escriba claims it should have but did not, Escriba *still* would have forgotten to request an extension of initial two-week leave and *still* would have been terminated under FPF's three-day no-call, no-show rule.

In response, Escriba does not (and cannot) point to any evidence showing that she would have done anything differently if FPF had designated her leave or provided her with written notice of the rights and obligations. Instead, she artfully claims that, if properly informed of her rights, "she *could* have taken her full allotment of FMLA leave." [Third-Stage Br. 19] (emphasis added). But *could have* is not the same thing as *would have*—whereas the former is a hollow postulation, the latter is a verifiable fact proposition requiring *evidence*. But here, again, there is not one iota of evidence bearing on what Escriba would have done differently.

And, of course, Escriba could have taken her full allotment of leave either way—she certainly was familiar with the availability of her 12-week allowance, having take *fifteen* FMLA leaves in the prior nine years.

That is not Escriba's only obfuscation. She also claims that she "was fired as a direct result of Foster Farms' failure to recognize and designate her time off as FMLA" because her two week leave ended "well within her 12-week allotment." [Third-Stage Br. 18]. Thus, although she requested just two weeks of leave and adamantly declined more time, she now seems to suggest that she was entitled to remain on leave for ten additional weeks without seeking an extension or otherwise informing anyone at FPF, simply because her leave was for an FMLA-eligible reason.

That is nonsense. It is settled that "employers are 'entitled to the sort of notice that will inform them not only that the FMLA may apply *but also when a given employee will return to work*.'" *Righi v. SMC Corp.*, 632 F.3d 404, 410 (7th Cir. 2011) (quoting *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1008 (7th Cir. 2001)); *see also* 29 C.F.R. § 825.302(c) (employees must give notice of "the anticipated . . . duration of the leave"). Here, it is undisputed that Escriba notified FPF of her need for just two weeks of leave and acknowledged that she would return to work on December 10. After that date, she was no longer on leave of any kind and was terminated simply for failing to appear for duty as scheduled.

Escriba does not disagree with our recitation of the prevailing legal rules—indeed, she ignores *Righi* and 29 C.F.R. § 825.302(c) altogether. Instead, she responds by claiming that "if Ms. Escriba's absence had been properly designated as FMLA leave, the Company would not, and could not, have fired her under its three-day rule." [Third-Stage Br. 20]. But that is a blatant misrepresentation of the testimony, which must be viewed in the light most favorable to the verdict. The record is clear that the rule applies regardless of whether an employee is returning from vacation or from FMLA leave. *See* [Second-Stage Br. 10]. And Escriba herself testified that she was aware of the rule. [SER298]. True, Escriba would not have been terminated under the rule had she *remained* "on an approved leave of absence" after December 10. [Third-Stage Br. 20] (quoting [SER415]). But it is precisely our point that Escriba was *not* on an approved leave after December 10, when her two weeks of requested leave came to an end. Why? Because she forgot to seek an extension. [SER293-294].

And all of this is to say nothing of the independent timeliness issue, which provided an alternative basis for the jury to conclude that Escriba's notice, such as it was, was not legally sufficient. [Second-Stage Br. 31-36]. The evidence, again viewed in the light most favorable to the verdict, shows that Escriba failed to give timely notice, if she gave notice at all.

In the end, the jury was not fooled by Escriba's repeated attempts to muddle the facts. It rejected each of Escriba's contentions in an unbroken series of seven unanimous answers of "no," in a verdict that it reached in under ninety minutes. The jury evidently did not find this case close or complex, and neither should this Court.[2]

3. This case did not involve landmark issues of national importance.

This case also was not a matter of surpassing national importance. Addressing this prong of the analysis, Escriba repeatedly claims that this case is a matter of "public interest," "public importance," and general "significan[ce]," [Third-Stage Br. 34-36]—limp characterizations that arguably describe a wide range of civil rights litigation. Unsurprisingly, that is not the standard. This Court has repeatedly stated that it weighs in favor of declining to tax costs that a "case present[s] a *landmark issue* of *national importance*." *Quan*, 623 F.3d at 889 (emphasis added) (quoting *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1022 (9th Cir. 2003)). *That* standard does not remotely describe this case.

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[2] Judge Wanger's statement that the fact issues presented were "very close" merely reflected his observation that the case boiled down to "huge credibility disputes." [SER104]. But whether those credibility disputes were *themselves* a close call is another matter, and one reserved to the jury alone.

This Court and the district courts have found the importance prong of the costs analysis satisfied only in the narrowest of circumstances. Thus this Court found the importance criterion satisfied in *Mexican-American Educators*, where the case involved allegations of systematic racial discrimination in California public schools that "affect[ed] tens of thousands of Californians and the state's public school system as a whole." 231 F.3d at 593. Similarly, in *Rivera v. NIBCO, Inc.*, 701 F. Supp. 2d 1135 (E.D. Cal. 2010) (Wanger, J.), the district court found that the case presented nationally significant issues because the plaintiffs had alleged intentional and systemic discrimination against non-English speakers. *Id*. at 1142. The relevant distinction in those cases was not that they involved class-wide as opposed to "single plaintiff" allegations—*Rivera*, for example, was not a class action—but instead whether the suit had the potential to achieve a broad and extraordinary result with far-ranging implications beyond the narrow interests of the parties litigating the case.

Here, there was no such potential. This suit was never about vindicating the rights of low wage workers, whether at FPF or elsewhere. It was only about Escriba's quest for reinstatement and monetary damages; and the only issues that were in dispute were (1) who (2) said and did (3) what, around the time Escriba was terminated in December 2007. There are no landmark issues of national importance here. *Cf. Mohamed*

v. Potter, 2007 WL 3245384, at *1 (N.D. Cal. 2007) (in an employment discrimination case, holding that "the case does not present a landmark issue of national importance"); *Rodriguez v. Napolitano*, 2009 WL 981906, *9 (D. Ariz. 2009) (same).

Chief Judge Gonzalez of the Southern District of California has explained why cases like this one do not warrant setting aside the presumption in favor of taxation. In *Martin v. County of San Diego*, 2010 WL 3910484 (S.D. Cal. 2010), a Section 1983 civil rights case, she explained: "Although [individual civil rights] claims are important" in a general sense, they are not ordinarily the "type which will have [the kind of] wide-ranging impact" that might warrant the non-taxation of costs. *Id.* at *5. To conclude otherwise "would result in costs being denied to a prevailing defendant in nearly every civil rights case." *Id.* Thus even when there is reason to be "[]sympathetic to the financial burden an award of costs may place" on civil rights plaintiffs, costs are properly awarded under 28 U.S.C. § 1920 and Rule 54 as a matter of course in such cases. *Id.* As this Court put it succinctly in *Mexican-American Educators*, "the presumption in favor of awarding costs . . . appl[ies] to defendants in civil rights actions." 231 F.3d at 593.

For these reasons, the two documents submitted by government lawyers on Escriba's behalf, including the Department of Labor letter, are

entirely irrelevant.[3] Both go on at length about why the FMLA is an important statute and why it would be unfortunate if plaintiffs were chilled from pursuing meritorious claims under the FMLA. But the question, for purposes of declining to tax costs, is not whether the *statute* that Escriba has invoked is an important one—it is, instead, whether her *lawsuit* involves matters of cross-cutting and path-breaking importance. This one does not. On the contrary, it is a fact-specific dispute concerning Escriba's failure to give timely notice of her intent to take leave or to seek an extension of her two-week leave at its conclusion. No other interests were at stake here.

To be sure, the Department of Labor letter claims that this case implicated the "extremely important gatekeeping function that the employee notice provision plays" and helped "establish the parameters of what con-

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[3] Escriba's suggestion that we improperly omitted from the SER certain documents concerning the costs order, [Third-Stage Br. 33-34 & n.25], is puzzling. The vast majority of the materials she submitted in her "ESER" are rough drafts of the trial transcript, which are entirely duplicative of the complete, official transcript provided in FPF's SER; and voluminous records showing how much Escriba personally earned over the past several years, which is not anything that FPF disputes. And as long as Escriba is going to make an issue of it, it is hard to see how she is on any better footing invoking Local Rules 30-1.4(c) and 30-2 than we are: She submitted an opening ER that included less than *one quarter* of the trial transcript in an appeal raising a post-trial sufficiency-of-the-evidence argument. The large swaths of the record conveniently omitted from her opening ER were, unsurprisingly, not favorable to her arguments on appeal.

stitutes sufficient employee notice," which the letter claims to be a matter "particularly important to the public interest." [ESER163]. But that characterization of this case (made by a distant government lawyer with no first-hand familiarity with the lawsuit) is dubious at best; despite Escriba's many suggestions to the contrary, this case has never involved more than the unremarkable application of settled law to fact. And even if that were not so—even supposing this case involved some novel question of FMLA law, the proper resolution of which were "important to the public interest" (*id.*)—that *still* would not have been enough to make this a landmark case of national importance. Courts resolve questions of first impression all the time; that does not license them to decline the taxation of costs in every such case.

In insisting nevertheless that this was a nationally important case, Escriba once again merely repeats back the district court's *ipse dixit* without engaging our arguments on their merits. She claims, for example, that because this case "was brought by a low-wage worker" and "Foster Farms employ[s] approximately 10,000 people," this case "had the potential to impact thousands of workers," and indeed "an entire class of [low-wage workers] nationwide." [Third-Stage Br. 35-36]. But she offers no explanation to support that fanciful contention, nor is any apparent. A narrow, fact-bound lawsuit does not take on any broader importance merely be-

cause the plaintiff is paid on an hourly basis and the defendant employs a number of people. A "gotcha!" style snippet from a promotional news release, [Third-Stage Br. 35 n.26], provides no reason for thinking otherwise.

4. "Chilling" is not a proper factor in cases like this one.

Finally, the prospect of chilling provides no basis for upholding the district court's costs decision. As we explained in the second-stage brief (at 63-64), to allow the prospect of chilling to justify, as a stand-alone consideration, the non-taxation of costs in *this* case would be allow it to justify non-taxation in *any* civil rights case; and that would be inconsistent with this Court's clear holding that "the presumption in favor of awarding costs to prevailing parties . . . appl[ies] to defendants in civil rights actions." *Mexican-Am. Educators*, 231 F.3d at 593.

True enough, taxation of costs may discourage some plaintiffs (including FMLA plaintiffs) from bringing actions in the first place. *See* [Third-Stage Br. 39-40]. But as we observed in the second-stage brief (at 63), Congress surely understood as much when it enacted Section 1920 and approved Rule 54. It would be improper for the courts to second-guess that policy judgment by invoking "chilling" as a blanket justification for not taxing costs at all.

That is not to say chilling is *never* an appropriate consideration. On the contrary, when other factors indicate that a case is extraordinary, and

the presumption in favor of taxation already is surmounted, a district court may properly take account of the effect taxation may have on individuals' willingness to bring future lawsuits. But even then, the question is whether "imposing [particularly] *high* costs" in a truly *extraordinary* case will risk discouraging future civil rights litigation. *Quan*, 623 F.3d at 888-889 (emphasis added). Thus, in *Mexican-American Educators*, this Court approved the district court's decision not to tax more than $200,000 in costs, explaining:

> *Federal Rule of Civil Procedure 54(d)(1) establishes that costs are to be awarded as a matter of course in the ordinary case.* Our requirement that a district court give reasons for denying costs is, in essence, a requirement that the court explain why a case is not "ordinary" and why, in the circumstances, it would be inappropriate or inequitable to award costs. . . . [W]e note that divesting district courts of discretion to limit or refuse such *overwhelming* costs in *important, close,* but ultimately unsuccessful civil rights cases like this one might have the regrettable effect of discouraging potential plaintiffs from bringing such cases at all.

231 F.3d at 593 (emphasis added). By contrast, this Court has suggested that "relatively small sum[s]" (*Save Our Valley*, 335 F.3d at 946) and otherwise "modest costs" (*Arakaki v. Lingle*, 477 F.3d 1048, 1069 (9th Cir. 2007)) generally will *not* support the non-taxation of costs on the basis of chilling, even if a case otherwise meets the criteria for extraordinariness.

Because the bill of costs here is perfectly average, *see* [Second-Stage Br. 56 & n.15], and because there is nothing extraordinary about this case

in any event, chilling is simply not an appropriate consideration supporting the district court's decision not to tax costs.

CONCLUSION

For the foregoing reasons, the district court's order declining to tax costs should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Foster Poultry Farms certifies that this brief:

(i) complies with the type-volume limitation of Rule 28.1(e)(2)(C) because it contains 5,914 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

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CERTIFICATE OF SERVICE

The undersigned counsel for Foster Poultry Farms certifies that on October 15, 2012, the foregoing brief was served upon counsel of record for Maria Escriba via the Court's CM/ECF system.

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