No. 10-1472

IN THE

Supreme Court of the United States

KOUICHI TANIGUCHI,

Petitioner,

v.

KAN PACIFIC SAIPAN, LTD.,
doing business as Marianas Resort and Spa,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Section 1920 of 28 U.S.C. sets out the categories of costs that may be awarded to the prevailing party in a federal lawsuit. One of the listed categories is "compensation of interpreters." *Id.* § 1920(6).

The question presented is whether costs incurred in translating written documents are "compensation of interpreters" for purposes of subsection 1920(6).

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Kouichi Taniguchi and Kan Pacific Saipan, Ltd. ("Kan Pacific"), doing business as Marianas Resort and Spa.

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OPINIONS BELOW

The opinion of the court of appeals affirming the district court's award of costs is reported at 633 F.3d 1218. Pet. App. 1a-8a. In a separate, unpublished memorandum disposition, the court of appeals affirmed the district court's entry of summary judgment in favor of Kan Pacific. Pet. App. 9a-11a. The district court's decisions granting summary judgment for the defendant, Pet. App. 12a-18a, granting in part the defendant's bill of costs, Pet. App. 19a-22a, and denying plaintiff's motion objecting to costs, Pet. App. 23a-26a, are unreported.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion on March 8, 2011 and denied Mr. Taniguchi's petition for rehearing on May 11, 2011. The petition for a writ of certiorari was filed on June 3, 2011. On September 27, 2011, this Court granted the petition. This Court has jurisdiction under subsection 1254(1) of 28 U.S.C.

STATUTORY PROVISION INVOLVED

Section 1920 of 28 U.S.C. provides:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the

copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

STATEMENT

A. Statutory Background

Although taxable litigation costs were not allowed at common law, *see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975), the first Judiciary Act authorized certain costs awards in many federal lawsuits in the same manner as the courts of the respective forum States. That statute provided that "the laws of the several states" ordinarily "shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 1 Stat. 73 § 34 (1789). Section 34 was understood to "appl[y] to the rights to costs as well as to the rights connected with the merits," *Hathaway v. Roach*, 11 F. Cas. 818, 819 (D. Mass. 1846).

The regime based on State law regarding costs remained in effect for several decades, both under this general provision and under a succession of several more specific, temporally limited statutes directed toward the taxation of costs. *See, e.g.*, 1 Stat. 275 § 6 (1791) (providing that certain costs "shall be recovered in like manner as the fees of the officers of the states respectively"). Federal courts

continued to use State costs rules until the mid-nineteenth century. *See, e.g.*, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987) ("Apparently from 1799 until 1853 federal courts continued to refer to state rules governing taxable costs."); *see also* Philip M. Payne, *Costs in Common Law Actions in the Federal Courts*, 21 VA. L. REV. 397, 402-03 (1934) (collecting cases).

Over the course of these early decades, as the number of States increased and the federal courts developed experience with the diverse costs rules used by different States, certain problems became apparent. Recoverable costs, particularly attorneys' fees, had "'swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they [we]re taxed.'" *Alyeska Pipeline*, 421 U.S. at 251 n.24 (quoting Cong. Globe, 32d Cong., 2d Sess. app. 207 (1853) (remarks of Sen. Bradbury)). Moreover, the increasing diversity in the States' treatment of costs had led to unfair disparities between similarly situated litigants. *See id.* at 251 & n.24 (noting the "great diversity in practice" as an asserted concern with the State-based costs system).

In light of these concerns, in 1853, the Congress abandoned that system of taxing costs, and adopted a unitary federal costs regime. In doing so, it elected to "enumerate[] the costs that ordinarily may be taxed to a losing party" in federal cases, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 (1980), and to exclude from cost recoveries expenses incurred of types not affirmatively provided by statute, *see Crawford Fitting*, 482 U.S. at 440. Specifically, the 1853 statute provided that "[t]he bill of fees of the clerk,

marshal, and attorneys, and the amount paid printers, and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trial in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court . . . ." 10 Stat. 168 § 3 (1853).

The Congress left this cost provision of the 1853 law substantially unchanged in the Revised Statutes of 1874[1] and the Judicial Code of 1911[2]. *See Alyeska Pipeline*, 421 U.S. at 255. The text was altered in the Revised Code of 1948, which first codified 28 U.S.C. § 1920, specifying taxable costs in five subsections.[3]

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[1] "Sec. 983. The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause." 1 Rev. Stat. 184 (1875).

[2] The Judicial Code of 1911 did not affirmatively repeal the costs provision of the Revised Statutes, which consequently "remain[ed] in force with the same effect and to the same extent as if [the 1911] Act had not been passed." 36 Stat. 1169 § 297 (1911).

[3] § 1920. Taxation of costs.

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

While the 1948 statute made several "[c]hanges . . . in phraseology," 28 U.S.C. § 1920 note (1948), it did not reflect "any apparent intent to change the controlling rules." *Crawford Fitting*, 482 U.S. at 440.

The Congress first amended section 1920 in 1978, when it acted to expand the use of foreign language interpreters in federal court proceedings. The Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978), "establish[ed] a program to facilitate the use of interpreters" in certain judicial proceedings instituted by the United States. *Id.* § 2 (codifying 28 U.S.C. § 1827). The statute also "establish[ed] a program for the provision of special interpretation services" in the federal courts to "provide a capacity for simultaneous interpretation services in multidefendant criminal actions and multidefendant civil actions." *Id.* (codifying 28 U.S.C. § 1828).

The interpretation services addressed in the Court Interpreters Act were oral in nature. The statute required the appointment of an interpreter in certain judicial proceedings where a party or witness "speaks only or primarily a language other than the English language," or "suffers from a hearing impairment," and might therefore be inhibited from understanding "the proceedings or communicati[ng] with counsel or the presiding judicial officer," or from

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(continued…)

> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

62 Stat. 955 (1948).

"comprehen[ding] . . . questions and the presentation of . . . testimony." *Id.* (codifying 28 U.S.C. § 1827(d)). Accordingly, the Court Interpreters Act affirmatively specified the methods of interpretation at issue, all of which were methods of interpreting live, spoken proceedings.[4]

Complementing these primary provisions, the Court Interpreters Act amended section 1920 to add a new subparagraph (6). This new subsection

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[4] The Court Interpreters Act directed that "[t]he interpretation provided by certified interpreters pursuant to [section 1827] shall be in the consecutive mode except that the presiding judicial officer, with the approval of all interested parties, may authorize a simultaneous or summary interpretation . . . ." Pub. L. No. 95-539 § 2 (codifying 28 U.S.C. § 1827(k)). It provided that the special interpretation services under section 1828 be performed in the "simultaneous" mode. *Id.* (codifying 28 U.S.C. § 1828(a)).

The simultaneous mode involves the act of "interpret[ing] and . . . speak[ing] contemporaneously with the individual whose communication is being translated." H.R. Rep. No. 95-1687, at 8 (1978). The consecutive mode involves "the speaker, whose communication is being translated, . . . paus[ing] to allow the interpreter to convey the testimony given." *Id.* And the summary mode "allow[s] the interpreter to condense and distill the speech of the speaker." *Id.*

In 1988, the Congress amended section 1827, modifying the specified modes of interpretation. *See* Pub. L. No. 100-702. The provision now reads: "The interpretation provided by certified or otherwise qualified interpreters pursuant to [section 1827] shall be in the simultaneous mode for any party to a judicial proceeding instituted by the United States and in the consecutive mode for witnesses," unless the district court specifies the other mode. 28 U.S.C. § 1827(k). Additionally, in 1996, the Congress amended section 1827 to add a new subsection (l), specifically providing for the appointment of "sign language interpreter[s]" for the hearing impaired. Pub. L. No. 104-317 § 306, 110 Stat. 3852, 3854.

allowed federal courts to tax as costs the "[c]ompensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." Pub. L. No. 95-539 § 7, 92 Stat. 2040, 2044.

B. Proceedings Below

Kouichi Taniguchi, a Japanese national, was visiting the Marianas Resort and Spa in the Northern Mariana Islands when he fell through a wooden deck on its premises. Pet. App. 2a. Mr. Taniguchi brought this negligence action against the owner of the resort, Kan Pacific Saipan, Ltd. *Id.* During the course of the litigation, Kan Pacific retained a document translator, Colin P.A. Jones, to translate written documents, including "portions of [an] agreement," a "[m]emorandum," and "summaries of medical records," from Japanese to English. JA 83, 85.

Both Mr. Taniguchi and Kan Pacific moved for summary judgment. Pet. App. 2a. The district court granted summary judgment for Kan Pacific, finding insufficient evidence that the resort had been negligent in maintaining the deck. *Id.* at 16a-17a. Kan Pacific then submitted a bill of costs, which requested the taxation $5,517.20 for "compensation of interpreters." JA 39-40. This amount included $260 that Kan Pacific had expended compensating Kayoko Irinaka, who served as an interpreter during Mr. Taniguchi's deposition. JA 50, 103, 107. The remaining $5,257.20 were amounts that Kan Pacific had paid Mr. Jones, who did not orally interpret any proceedings in the case, for his document translation services. JA 58-61 (Colin P.A. Jones transactions

totaling $5,257.20). The district court taxed the entire amount, $5,517.20, as "compensation of interpreters" under subsection 1920(6). Pet. App. 21a-22a.

On Mr. Taniguchi's appeal, the Ninth Circuit affirmed the costs award in a published opinion. *Id.* at 1a-8a. The panel held that, under subsection 1920(6), "the prevailing party should be awarded costs for services required to interpret either live speech or written documents into a familiar language, so long as interpretation of the items is necessary to the litigation." *Id.* at 7a.

The Ninth Circuit noted that the Seventh Circuit, in *Extra Equipamentos E Exportação Ltda. v. Case Corp.*, 541 F.3d 719 (7th Cir. 2008), had held that "'interpretation' and 'translation' have distinct meanings," reasoning that the "common understanding of an 'interpreter' [w]as one who translates the spoken word rather than the written word." Pet. App. 5a-6a (quoting *Extra Equipamentos*, 541 F.3d at 727-28). Nevertheless, the Ninth Circuit aligned itself with several other circuits, including the Sixth, which reached a contrary conclusion in *BDT Products, Inc. v. Lexmark International, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005). Pet. App. 6a-7a.

The Ninth Circuit determined that "the word 'interpreter' can reasonably encompass a 'translator,' both according to the dictionary definition and common usage of these terms, which does not always draw precise distinctions between foreign language interpretations involving live speech versus written documents." Pet. App. 7a. The court found this conclusion to be more compatible with Federal Rule

of Civil Procedure 54, which, it stated, "includes a decided preference for the award of costs to the prevailing party." *Id.* The Ninth Circuit thus found that "the district court acted within its discretion when it determined that translation services were necessary to render pertinent documents intelligible to the litigants." *Id.* at 8a.

In a separate, unpublished memorandum disposition, the Ninth Circuit affirmed the district court's entry of summary judgment for Kan Pacific. Pet. App. 9a-11a.

SUMMARY OF ARGUMENT

I. The Ninth Circuit erred in ruling that document translators are "interpreters" whose compensation may be taxed under subsection 1920(6). The word "interpreter" refers to one who facilitates the comprehension of spoken proceedings by communicating content in real time during such proceedings. That word does not extend to one who translates written documents.

A. Many authorities confirm the common-sense proposition that "[i]f a judge translated the French Code of Criminal Procedure into English, we would not say that he had 'interpreted' the French code into English." *Extra Equipamentos*, 541 F.3d at 728. Moreover, the interpreters' professional literature distinguishes between interpretation, which applies to live, oral proceedings, and translation, which is used primarily in the context of written documents. *See infra* at 16-23.

A wide variety of federal executive and administrative agencies also recognize this distinction between interpreters and translators. Most directly relevant, the Administrative Office of

the United States Courts has explained that the Court Interpreters Act does not address the translation of documents. *See infra* at 23. Other federal agencies, including the Department of Justice, recognize the same distinction in other contexts. *See infra* at 23-35.

B. The Court Interpreters Act, which codified subsection 1920(6), confirms the limited meaning of the term "interpreter" through its text and structure. The primary provision of that law promulgated two sections of United States Code addressing in-court, spoken interpretation services to be conducted in either the "simultaneous," "consecutive," or "summary" mode, all of which are means of oral interpretation inapplicable to the translation of written documents. *See infra* at 26-28. The same word "interpreter" naturally carries the same meaning in the costs provision of the same statute. This meaning is consonant with the use of the word in rules addressing interpreters that antedate subsection 1920(6). *See infra* at 29-30.

The exclusion of document translators from the word "interpreter" is also reflected in a congressional convention extending well beyond the Court Interpreters Act to a large number of statutes throughout the United States Code. These provisions demonstrate a consistent congressional practice of using the words "interpreter" and "translator" together where both the spoken and written modes are intended to be included. *See infra* at 30-33. The Ninth Circuit's construction of the word "interpreters" as including written document translators collapses this consistent statutory distinction.

II. While the foregoing textual and structural considerations conclusively resolve the issue, any ambiguity should be resolved against inclusion of written document translation.

A. The legislative history confirms that the Congress intended the statute to exclude document translation. Several provisions of the legislative history expressly indicate that the statute was understood to address oral interpretation of proceedings. And the Congress considered, but rejected, a provision requiring the translation of certain documents in the District of Puerto Rico, and providing that the costs of that translation could be imposed upon the parties. *See infra* at 33-36.

B. Even if subsection 1920(6) had been ambiguous, a narrow construction would still have been appropriate. "At common law, costs were not allowed." *Alyeska Pipeline*, 421 U.S. at 247. And the common law "ought not to be deemed to be repealed, unless the language of a statute [is] clear and explicit." *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812). *See infra* at 36-37.

III. The plain statutory language represents a sound policy judgment. Excluding document translation expenses from taxable costs avoids the danger of large costs awards that can deter meaningful access to the courts, particularly on the part of the poor. It also fosters international comity by minimizing the discovery-related expenses incurred by foreign nationals in United States litigation, which has been a longstanding concern expressed by a number of foreign sovereigns. *See infra* at 37-41.

IV. The Ninth Circuit's reasoning in support of its contrary conclusion is incorrect. The court of appeals relied principally on the view that the word "interpreters" lacks a clear and determinate meaning. Pet. App. 7a. That conclusion is inconsistent with many different authorities. The court of appeals also opined that an expansive reading of the term is more compatible with Federal Rule 54 of the Federal Rules of Civil Procedure. Pet. App. 7a. To the contrary, however, "[t]he discretion granted by Rule 54(d) is not a power to evade th[e] specific congressional" limits on cost awards. *Crawford Fitting*, 482 U.S. at 442. *See infra* at 41-43.

ARGUMENT

I. THE STATUTE'S PLAIN MEANING FORECLOSES THE TAXATION OF DOCUMENT TRANSLATION COSTS

A. The Word "Interpreters" Does Not Apply to Translators of Written Texts

The Ninth Circuit erred in ruling that document translators are "interpreters" for purposes of subsection 1920(6). Many lexical authorities make clear that those who engage in written document translation are not acting as "interpreters," so the statute's enumeration of costs for "interpreters" does not authorize the award of costs for document translation services.

1. "*Interpretation* almost universally refers to the transfer of meaning from one language into another for the purpose of *oral* communication between two persons who do not share the same language." Roseann Dueñas González, Victoria F. Vásquez, &

Holly Mikkelson, FUNDAMENTALS OF COURT INTERPRETATION 33-34 (1991) (emphases in original).

The word "translation," by contrast, most commonly refers to reading a written text and drafting a new written document using the corresponding terms of a different language. *See, e.g.*, Elena M. de Jongh, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 35 (1992) ("*Translation* generally refers to the transfer of thoughts and ideas from one language (the source language) to another (the target language) by means of the written word." (emphasis in original)). The word "translation" can also sometimes be used in a broader, generic sense that includes "transferring meaning from one language to another—whether in spoken or written form." González, Vásquez, & Mikkelson, *supra*, at 33. Under this latter, broader definition of "translation," interpreting is a proper subset limited to the spoken mode. But whether "translation" is used in its broad or narrow sense, the word "interpreter" refers to one engaged in spoken interpretation in real time.

A variety of dictionaries define the word "interpreter" to mean "[o]ne who translates orally from one language into another." WEBSTER'S II: NEW REVISED UNIVERSITY DICTIONARY 638 (1984). *See also, e.g.*, Jack P. Friedman, DICTIONARY OF BUSINESS TERMS 343 (4th ed. 2007) ("person who translates orally foreign languages for people using different languages"); WEBSTER'S COLLEGIATE DICTIONARY 654 (11th ed. 2003) ("one that interprets: as (a): one who translates orally for parties conversing in different languages"); Hadumod Bussmann, ROUTLEDGE DICTIONARY OF LANGUAGE AND LINGUISTICS 584

(1996) (defining "interpreting" as "[t]he practice of (oral) translation of one language into another"); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 943 (3d ed. 1992) ("one who translates orally from one language into another"); OXFORD AMERICAN DICTIONARY 346 (1980) ("a person whose job is to translate a speech etc. into another language, orally in the presence of the speaker"); William Morris, ed., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 685 (1978) ("One who translates orally from one language into another"); Edwin B. Williams, ed., THE SCRIBNER-BANTAM ENGLISH DICTIONARY 476 (1977) (defining "interpret" as "to translate orally"); FUNK & WAGNALLS COMPREHENSIVE STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 323 (1921) (defining "interpreter" as "one who interprets," and "interpret" as "translate orally"); THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 429 (1917) ("one whose office it is to translate orally in their presence the words of persons speaking different languages").

Several dictionaries expressly indicate that an application of the word "interpreter" to one who translates written documents is obsolete. *See, e.g.*, THE CHAMBERS DICTIONARY 841 (2006) ("a person who translates orally for the benefit of two or more parties speaking different languages," and "a translator of written texts (*obs.*)"); 7 THE OXFORD ENGLISH DICTIONARY 1132-33 (1989) ("[o]ne who translates languages," divided into two senses: "a. A translator of books or writings (obs.)," and "b. One who translates the communications of persons speaking different languages; *spec.* one whose office

it is to do so orally in the presence of the persons; a dragoman").[5]

Legal dictionaries reflect the same meaning. BLACK'S LAW DICTIONARY, in the relevant edition current when subsection 1920(6) was enacted in 1978, defines "interpreter" as "[a] person sworn at a trial to interpret the evidence of a foreigner or a deaf and dumb person to the court." Henry Campbell Black, BLACK'S LAW DICTIONARY 954 (4th ed. 1968). Other law dictionaries have long used similar definitions. *See, e.g.*, Peter Hodgson Collin, DICTIONARY OF LAW 127 (1999) ("person who translates what someone has said into another language; *my secretary will act as interpreter; the witness could not speak English and the court had to*

[5] Kan Pacific has observed that some other dictionary definitions frame the definition of "interpreter" as applying "especially" to the context of vocal utterances, thus seemingly leaving open the possibility of its application in other instances as well. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1182 (1976) (defining "interpreter" as "one that translates; *esp.*: a person who translates orally for parties conversing in different tongues"). But the abbreviation "*esp.*" in a dictionary definition is a term of art that ordinarily connotes the most common meaning of the defined term. *See* 12,000 WORDS: A SUPPLEMENT TO WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 15a (1986) ("The sense divider *esp* (for especially) is used to introduce the most common meaning subsumed in the more general preceding definition."); *accord, e.g.*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 20a (11th ed. 2004) (same); MERRIAM-WEBSTER'S DICTIONARY OF LAW xv (1996) (same). And the "most common meaning" of a statutory term ordinarily controls for purposes of statutory interpretation in the absence of affirmative evidence to the contrary. *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 301 (1989). *See, also, e.g.*, *Muscarello v. United States*, 524 U.S. 125, 128-31 (1998) (construing statutory term in keeping with its "primary meaning").

appoint an interpreter"); James A. Ballentine, A LAW DICTIONARY OF WORDS, TERMS, ABBREVIATIONS AND PHRASES WHICH ARE PECULIAR TO LAW AND OF THOSE WHICH HAVE A PECULIAR MEANING IN THE LAW 247 (1916) ("[o]ne sworn to interpret the testimony of [a] witness who testifies in a cause"); William C. Anderson, A DICTIONARY OF LAW 565 (1889) ("[o]ne who translates the testimony of witnesses speaking a foreign tongue, for the benefit of the court and jury"); 1 Benjamin Vaughan Abbott, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE 639-40 (1879) ("one who restates the testimony of a witness testifying in a foreign tongue, to the court and jury, in their language").

These dictionaries reflect the common-sense proposition that, in its ordinary meaning, "[a]n interpreter as normally understood is a person who translates living speech from one language to another." *Extra Equipamentos*, 541 F.3d at 727. "Robert Fagles made famous translations into English of the ILIAD, the ODYSSEY, and the AENEID, but no one would refer to him as an English-language 'interpreter' of these works." *Id.* Using the word "interpreter" in the latter sense would, in short, be "much less natural." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). This common-sense understanding matters, because "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006); *see also Watson v. United States*, 552 U.S. 74, 78 (2007) (rejecting meaning of statutory term not consonant with "regular English").

2. Furthermore, the word "interpreter" carries a well-understood meaning among the community of

professional court interpreters, which reinforces the exclusion of written document translation. In construing a statute, "technical terms of art should be interpreted by reference to the trade or industry to which they apply." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372 (1986). Even if a word can, in some contexts, have a broader meaning, it can be limited to a narrower and more precise meaning in the context of a statute where it "has a different and much more specific meaning in the language of" the professional community at issue. *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974). In short, the relevant "technical literature" can supply more precise meanings applicable to a statutory term. *Utah v. Evans*, 536 U.S. 452, 467 (2002).

The professional literature addressing the subject of judicial interpreting draws a distinction between the vocal and written modes, applying the term "interpreter" to the former. *See, e.g.*, de Jongh, *supra*, at 35 ("The term 'translation,' therefore, refers to the processing of written language while 'interpretation' refers to the processing of spoken language."); Geoffrey Samuelsson-Brown, A PRACTICAL GUIDE FOR TRANSLATORS 6 (4th ed. 2004) ("The professions of translation and interpreting are significantly different but there are areas where the two overlap."). This differentiation is far from arbitrary; interpretation and translation involve "different skills that not everyone is capable of mastering equally; in other words, some individuals possessing the prerequisite linguistic skills are better at translating than interpreting, and vice-versa." Holly Mikkelson, INTRODUCTION TO COURT INTERPRETING 77 (2000). *See also, e.g.*, Morry Sofer, THE TRANSLATOR'S HANDBOOK 125 (7th ed. 2009)

(noting that interpreting and translating "represent two distinct ways of working with language"). The two activities "differ from each other in several ways," and "[t]he basic differences in the use of the oral versus the written mode have several ramifications." de Jongh, *supra*, at 36.

For instance, a written document "is contained in a permanent setting. This text, regardless of its quality, is static, immutable in its form and fixed in time." *Id.* (internal quotation marks omitted). "Interpreting, however, represents an entirely different operation," because "a spoken message . . . must be immediately transformed and communicated orally in the target language." *Id.* Thus, "[t]ranslators have time to reflect and craft their output, whereas interpreters must instantaneously arrive at a target language equivalent, while at the same time searching for further input." González, Vásquez, & Mikkelson, *supra*, at 295. *Accord* Samuelsson-Brown, *supra*, at 7 ("An interpreter interprets the spoken word and does not have the luxury of time nor a second chance to revise the result of the interpretation.").

Moreover, unlike a translator of written material, "the interpreter is present with both speaker and listener(s) and participates in a dialogue." de Jongh, *supra*, at 36. "Since interpreters, unlike translators, regularly interact with people under less than easy conditions, it is important for interpreters to have a gregarious and pleasing personality, a good appearance, good manners, patience, social savvy, and a good sense of humor." Sofer, *supra*, at 130.

Translation also differs from interpretation because it ordinarily occurs in a single direction, from

one language to another with respect to a document, and not both ways, as in the course of an interpreted conversation. *See, e.g.*, Nina L. Ivanichvili, *Considerations in Selecting Interpreters and Translators*, 39 COLO. LAW. 39, 41 (2010) (noting that translators, unlike interpreters, "translate documents only in one direction, most often into their native or dominant language").

The interpreter and the translator can also have different communicative purposes. "[W]hen interpreting legal terms or expressions, the court interpreter is concerned not only about the accuracy or adequacy of the interpretation, but also the comprehensibility and acceptability of the interpretation." Eva N.S. Ng, "The Tension Between Adequacy and Acceptability in Legal Interpreting and Translation," *in* Sandra Hale, Uldis Ozolins, & Ludmila Stern, eds., THE CRITICAL LINK 5: QUALITY IN INTERPRETING—A SHARED RESPONSIBILITY 37, 41 (2009). "In legal translation, however, due to the requirement to maintain terminological consistency in the statutes, such flexibility is to a large extent restricted." *Id.*

The distinction between the oral and written modes is further illustrated by the difference between the treatment of written texts presented in the course of live judicial proceedings, and those translated at leisure outside of such proceedings. If a document is presented in open court, an interpreter can engage in "[s]ight interpreting or sight translation, as it is also known," Marianne Mason, COURTROOM INTERPRETING 6 (2008), which is "the oral rendition into a target language of material written in the source language." de Jongh, *supra*, at 37.

Because this process occurs in the course of a real-time proceeding, "the same component skills that go into simultaneous interpreting, i.e., quick reflexes and mental agility, plus the ability to monitor one's own output while carefully attending to the original, are required for sight translation." Mikkelson, *supra*, at 76. In particular, the spoken language produced in sight interpreting can be significantly different in its content from a written translation of the same document. *See, e.g.*, *id.* at 76-77 (noting that "conver[sion of] a message that was originally intended to be read into one that can be understood in oral form" might involve changes such as "breaking up long, convoluted sentences into shorter, more direct statements, as well as using stress and intonation to clarify meaning"). By contrast to sight interpretation, the translation of written documents between languages is an "[a]ncillary" task, not itself properly part of interpretation. *Id.* at 77. "Unfortunately," "laypersons are often unaware of th[e] distinction" between interpreting and translating, and it is consequently "important for interpreters to candidly assess their translation ability and to turn down translation assignments if they feel they cannot perform the task adequately." *Id.*

Leading professional organizations in the areas of interpreting and translating similarly emphasize that interpreters and translators are different, and serve essentially distinct functions. The National Association of Judiciary Interpreters and Translators (the "NAJIT") explains that "[i]nterpretation is the process by which *oral* communication is rendered from one language to another," while "[t]ranslation is the process by which *written* text is rendered from

one language into another." http://www.najit.org/certification/faq.php#difference (last visited Nov. 18, 2011) (emphases in original). It emphasizes that

> [i]nterpretation and translation, while both language-related, are not identical disciplines. Each requires specific knowledge, training, and practice. Credentialing is different for each domain. Some practitioners are equally adept at both; others specialize in one discipline or the other.

Id.

One NAJIT publication explains that interpretation and translation require "[c]ompletely different skills." Bench & Bar Committee of Nat'l Ass'n of Judiciary Interpreters & Translators, "Interpreting in a Legal Setting: A Guide for the Attorney," at 3 (2011), *available at* http://www.najit.org/documents/bandb/BBpowerpoint.pdf (last visited Nov. 18, 2011). Another NAJIT publication, its "Information for Court Administrators," notes that "[t]ranslators and interpreters are not interchangeable since different skills and experience are needed for each," and warns "[n]ever [to] assume that a translator can act as an interpreter and vice versa." NAJIT Position Paper, "Information for Court Administrators," at 2 (2003), *available at* http://www.najit.org/publications/Court%20AdministratorFINAL.pdf (last visited Nov. 18, 2011).

The American Translators Association (the "ATA") similarly explains: "A *translator* works with the written word, transferring *text* from a source language into a target language," while "[a]n *interpreter* works with the spoken word, transferring

speech from a source language into a target language." http://www.atanet.org/onlinedirectories/individuals.php (last visited Oct. 7, 2011) (emphases in original). An article in the ATA Chronicle explains that, "[a]lthough some translators interpret and some interpreters translate, the two activities are distinct," and recites different skills associated with each of the two activities. Frank Johnson, "Being Bilingual is Not Enough," Featured Article from the ATA Chronicle (July 2008), *available at* http://www.atanet.org/chronicle/feature_article_july2008.php (last visited Nov. 18, 2011).

The ATA web site hosts a video inviting viewers to "[d]iscover the difference between interpreting and translating, and why this is an increasingly important profession in today's world." *A Day in the Life of a Translator/Interpreter*, *available at* http://www.atanet.org/careers/career_video.php (last visited Nov. 18, 2011). The video, in turn, explains that "[i]t's very basic—interpretation is oral, and translation is written," *id.* (video at 0:36-0:42), and illustrates the practice of the two activities, *id.* (video at 0:43-4:15). And the ATA's twin guides for consumers retaining interpreters and translators, respectively, contain identical pages explaining: "**Q: Translation, interpreting—what's the difference? A: Translators write, interpreters speak**," and reiterating that "[i]f you are working with written documents . . . you need a *translator*," while "[i]f you want to interact with people in a foreign language on the spot . . . you need an *interpreter*." American Translators Association, "Interpreting, Getting it Right: A Guide to Buying Interpreting Services," at 3, *available at* http://www.atanet.org/docs/Getting_it_right_int.pdf (last visited Nov. 18, 2011)

(bold and italics in original); American Translators Association, "Translation, Getting it Right: A Guide to Buying Translation," at 3, *available at* http://www.atanet.org/docs/Getting_it_right.pdf (last visited Nov. 18, 2011) (bold and italics in original).

3. Federal executive and administrative agencies routinely maintain the same distinction. The federal GUIDE TO JUDICIARY POLICY, promulgated by the Administrative Office of the United States Courts pursuant to authority delegated by the Court Interpreters Act itself,[6] explains that "[t]he Court Interpreters Act does not address written translation requirements, and the Federal Court Interpreter Certification Examination (FCICE) . . . does not test for translation skills." 5 GUIDE TO JUDICIARY POLICY: COURT INTERPRETING [hereinafter GUIDE TO JUDICIARY POLICY] § 550.20.10(a). It explains that "[q]ualified translators can be located through the American Translators Association or any other organization that tests translation ability," *id.* § 550.20.10(b), and reiterates that "[t]ranslations and transcriptions are not within the scope of the Court Interpreters Act, and payment for such services is not funded from the general authorization for contract court interpreting." *Id.* § 550.20.40.

The Department of Justice addresses the same distinction in its guidance regarding Title VI obligations of federal financial-assistance recipients. After notice and comment, in 2002, the Department promulgated this document, which explains that "[i]nterpretation is the act of listening to something

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[6] *See* 28 U.S.C. § 1827(b)(1) ("The Director [of the Administrative Office of the United States] shall issue regulations to carry out this paragraph . . . .").

in one language (source language) and orally translating it into another language (target language)," while "[t]ranslation is the replacement of a written text from one language (source language) into an equivalent written text in another language (target language)." Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,460-63 (June 18, 2002). The document goes on to provide separate criteria and considerations for aid recipients with respect to these two different services. *Id.* at 41,460-64.

The Federal Interagency Working Group on Limited English Proficiency includes "representatives of more than 35 federal agencies," and serves to address the needs of non-English speakers "in a consistent and effective manner across agencies," collecting "the best thinking from" a variety of different parts of government. http://www.lep.gov/iwglep.htm (last visited Nov. 18, 2011). That interagency working group also emphasizes that interpreters and translators are essentially different. Its guide specifies that "[t]he following are commonly accepted definitions of 'translation' and 'interpretation.' Translation is the process of *transferring ideas expressed in writing from one language to another language*. Interpretation is the process by which *the spoken word is used when transferring meaning between languages*." Federal Interagency Working Group on Limited English Proficiency, *On Choosing a Language Access Provider*, *available at* http://www.justice.gov/crt/lep/resources/leptatool.pdf,

at 1 (last visited Nov. 18, 2011) (emphases and underlining in original). Individual federal agencies apply the same distinction, *see, e.g.*, *Interpreters and Translators, Occupational Outlook Handbook*, *available at* http://www.bls.gov/oco/ocos175.htm (last visited Nov. 18, 2011) (Bureau of Labor Statistics document explaining that "interpreting and translation are different professions" because "[i]nterpreters deal with spoken words [and] translators with written words"), as do State judicial documents, *see, e.g.*, Michael L. Bender, Chief Justice, Supreme Court of Colorado, "Directive Concerning Language Interpreters and Access to the Courts by Persons with Limited English Proficiency," at 1-2 June 2011, *available at* http://www.justice.gov/crt/about/cor/agreements/CJD_06-03_Signed.pdf (last visited Nov. 16, 2011) (defining "[i]nterpretation" as "[t]he accurate and complete transfer of an oral message from one language to another in real time," and "[t]ranslation" as "[t]he accurate and complete transfer of a written message from one language to another that may take place over time").

B. The Structure of the Court Interpreters Act, and the United States Code as a Whole, Make Clear That Document Translators Are Not "Interpreters" For Purposes of the Statute

The structure and context of the statute confirms the plain meaning of the word "interpreters." *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (holding that "the words of a statute must be read in their context and with a view

to their place in the overall statutory scheme" (internal quotation marks omitted)).

1. The Congress enacted subsection 1920(6) as part of the Court Interpreters Act. The main substantive provision of that statute was section 2, which promulgated machinery for the certification and use of interpreters in certain cases in federal court. Section 2 did so by adding two new sections to the United States Code. The first, codified at 28 U.S.C. § 1827, established procedures for the Director of the Administrative Office of the United States Courts to "facilitate the use of interpreters" in federal courts, Pub. L. No. 95-539 § 2 (codifying § 1827(a)), through the certification and other qualification of interpreters, *id.* (codifying § 1827(b)-(c)), and for their use in certain "action[s] initiated by the United States," *id.* (codifying § 1827(d)). The second, 28 U.S.C. § 1828, provided for the establishment of "a program for the provision of special interpretation services" in certain "multidefendant . . . actions" initiated by the United States. *Id.* (codifying § 1828(a)).

The "interpreters" in both of these substantive sections provide in-court, spoken services. Section 1827 provides that interpretation under that section must be conducted in either the "simultaneous" or "consecutive mode," 28 U.S.C. § 1827(k), and the special interpretation services under section 1828 must be "simultaneous," *id.* § 1828(a). As shown above, *see supra* note 4, the simultaneous, consecutive, and summary modes are all methods of interpretation that apply to live proceedings, and that are wholly inapplicable to the translation of written documents outside the courtroom. As such,

the Director of the Administrative Office of the United States Courts—who was charged with both "issu[ing] regulations" addressing who may be certified or otherwise qualified to serve as an interpreter under the statute, *id.* § 1827(b)(1), and "establish[ing]" the special interpretation services program, *id.* § 1828(a)—has confirmed that "[t]ranslations and transcriptions are not within the scope of the Court Interpreters Act." GUIDE TO JUDICIARY POLICY § 550.20.40; *accord id.* § 550.20.10(a) (explaining that "[t]he Court Interpreters Act does not address written translation requirements").

Because the primary, substantive provisions set out in section 2 of the Court Interpreters Act use the word "interpreter" in a manner limited to oral, in-court interpretation, the same word in section 7 of that statute, which created subsection 1920(6), naturally carries the same meaning. *See, e.g.*, *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)); *Roadway Express*, 447 U.S. at 760 (holding that the same word "costs" appearing in sections 1920 and 1927 of 28 U.S.C. "should be read together as part of the integrated statute approved in 1853" to carry the same meaning).

2. Kan Pacific has not disputed that sections 1827 and 1828 provide only for oral interpretation. Rather, it has urged that the word "interpreters" should be assigned a different meaning in subsection 1920(6) than in sections 1827 and 1828 because, it

says, "Section 1920(6) has a broader scope than Sections 1827 and 1828." Respondent's Br. in Opposition 9. Kan Pacific's observation that the costs provision may apply even in cases where sections 1827 and 1828 are inapplicable (*e.g.*, because they were not brought by the United States) misses the point. All three provisions address the subject of court interpreting. Even though they differ in their content and scope, the use of a common term in all three sections of the same statute naturally indicates that the common word shares the same meaning in all three provisions. Similarly, the separate inclusion of a different costs category in subsection (6), the "[c]ompensation of court appointed experts," does not support reading the word "interpreters" differently from that term's occurrence elsewhere in the same statute.

This conclusion is further confirmed by the separate occurrence of the same statutory term elsewhere within subsection 1920(6) itself. Subsection (6) enumerates both "compensation of interpreters" and, separately, "salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." As shown above, the "special interpretation services under section 1828" involve spoken, simultaneous interpreting. Because section 1920(6) includes a second occurrence of a cognate of the word "interpreters" that is unambiguously limited to spoken proceedings, Congress's use of the same term in the same section presumptively carries the same meaning. *See Sorenson*, 475 U.S. at 860. This presumption is particularly strong because the two related terms bear an "interrelationship and close proximity" in the

statutory text. *Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 250 (1996).

3. The limitation of subsection 1920(6) to oral interpretation is also confirmed by the use of the word "interpreter" in procedural rules dealing with interpreters. Rule 43(d) (previously, Rule 43(f)) of the Federal Rules of Civil Procedure antedates the Court Interpreters Act and authorizes the taxation as costs of the "compensation" of an "interpreter" in the special case where the district court itself "appoint[s] an interpreter of its choosing." Rule 604 of the Federal Rules of Evidence "implements" Rule 43(d), Fed. R. Evid. 604 Adv. Comm. note, and provides that an interpreter is subject to the expert-qualification and oath or affirmation requirements of the Rules.

For purposes of Rules 43(d) and 604, "an 'interpreter' is a person who renders intelligible a statement made in a courtroom by a person whose statement would not otherwise be intelligible to others in the courtroom without the services of the interpreter." 27 Charles Alan Wright & Victor James Gold, FEDERAL PRACTICE AND PROCEDURE § 6053, at 352 (2007). As such, interpreters under Rule 43(d) "can perform three different functions," all of which involve interpreting live proceedings in real time: first, communicating "where a speaker makes a statement in English but is unable to speak loud enough or distinctly enough to be understood"; second, communicating "where the statement is not spoken but is communicated through the use of gestures or a sign language, such as that employed by some deaf persons"; and third, "most common[ly]," communicating "where the statement to be translated is audible but is not understandable to the

listener because it is in a language foreign to the listener or is in English but employs jargon or code words with which the listener is unfamiliar." *Id.* § 6053, at 354-55.

Thus, the word "interpreter" in Rules 43 and 604 excludes translators of written documents, and the word should similarly be so read in subsection 1920(6). For this reason, too, the broader context of the statute makes clear that the word "interpreter" in subsection 1920(6) does not include one who translates written documents.

4. More generally, the limitation of the word "interpreter" to one engaging in live, oral interpretation is part of a broader congressional convention extending throughout the United States Code. Throughout the Code, the Congress adheres to the same distinction between "interpreters" and "translators" made by the Administrative Office under the statute, the Department of Justice, federal agencies, and the community of professional interpreters.

For instance, 15 U.S.C. § 649 specifically refers to the different modes connoted by the two terms, providing that the Office of International Trade shall give preference in hiring to bilingual employees who, *inter alia*, "translate documents" and "interpret conversations." 15 U.S.C. § 649(b)(4)(B). Numerous other provisions of the Code implement the same distinction by including both terms together where the Congress has elected to include both the oral and written modes in legislation. *See, e.g.*, 8 U.S.C. § 1555(b) (specifying that INS appropriations "shall be available for payment of . . . interpreters and translators who are not citizens of the United

States"); 10 U.S.C. § 1588(a)(7) (authorizing Secretary of Defense to accept "[v]oluntary translation or interpretation services offered with respect to a foreign language"); 10 U.S.C. § 1596b(e)-(f) (providing that Secretary of Defense shall designate foreign languages for which there is "a shortage of experts in translation or interpretation available" and defining "linguistic services" as "translation or interpretation of communication in a foreign language"); 22 U.S.C. § 2695a(a) (authorizing Secretary of State to charge agencies for providing "foreign language translation and interpretation services"); 28 U.S.C. § 530C(b)(1)(I) (providing that funds may be used for the "[p]ayment of interpreters and translators who are not citizens of the United States"); 42 U.S.C. § 254b(j)(1) (authorizing grants for provision of "translation, interpretation, and other such services" to health centers with substantial non-English-speaking patients); 42 U.S.C. § 300mm-4(a)(1)(E) (providing for World Trade Center Program Administrator to enter contracts "for the provision of translational and interpretative services for program participants who are not English language proficient"); 42 U.S.C. § 1396b(a)(2)(E) (including in State grant computations certain amounts "attributable to translation or interpretation services"); 42 U.S.C. § 1397ee(a)(1)(D)(iv) (including in State payment computations certain amounts "for translation or interpretation services"); 42 U.S.C. § 2991b-3(b)(2) (specifying that grants may be used for "the establishment of a project to train Native Americans to teach a Native American language to others or to enable them to serve as interpreters or translators of such language").

Moreover, those provisions of the United States Code that describe the role of an "interpreter" for particular purposes limit its meaning to the interpretation of live testimony. *See, e.g.*, 26 U.S.C. § 44(c)(2)(B) (specifying that "interpreters" "mak[e] aurally delivered materials available to individuals with hearing impairments"); 42 U.S.C. § 12103(1)(A) (defining "auxiliary aids and service" to include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments"). By contrast to the sections cited in the previous paragraph, these latter provisions do *not* include the word "translators" in referring to such non-written interpretation services. And the Code is wholly devoid of any corresponding definition of "interpreter" extending to the translation of written documents.

The Congress's consistent distinction between "interpreters" and "translators" would be obliterated by construing "interpreters" to include translators. Accordingly, the pattern of congressional usage throughout the United States Code gives further reason to conclude that the word "interpreters" in section 1920 carries its usual meaning, excluding those who engage in written translation. *See, e.g.*, *Director OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129-30 (1995) (where "the United States Code displays throughout" a consistent meaning, that meaning is presumptively applicable). The Court has applied this principle in the context of costs. In *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), the Court held that a consistent distinction between two statutory terms embodied in "[a]t least 34 statutes in 10 different

titles of the United States Code," *id.* at 89, demonstrated "beyond question" that the occurrence of one of the distinguished terms in 42 U.S.C. § 1988 does not include the other, *id.* at 88-92.

II. ANY AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF MR. TANIGUCHI'S POSITION

A. The Legislative History Confirms the Limitation to Spoken Interpretation

Because the text and structure of the statute leave no doubt about the meaning of the word "interpreters" in subsection (6), there is no need even to consider the legislative history. But to the extent it has any role to play, the legislative history further confirms that plain meaning.

First, the Congress passed the Court Interpreters Act in response to several judicial decisions indicating that "the sixth amendment to the Constitution requires that non-English speaking defendants be informed of their right to *simultaneous* interpretation of *proceedings* at government expense." H.R. Rep. No. 95-1687, at 3 (1978) (emphases added). The statute was thus directed toward ensuring parties' comprehension of "the language used in the courtroom." S. Rep. No. 95-569, at 3 (1977). The legislation's original sponsor in the Senate, John Tunney, explained that the original bill was designed to provide "oral translation of all Federal courtroom proceedings," *The Bilingual Courts Act: Hearings Before the Subcomm. on Improvements on Judicial Machinery of the S. Comm. on the Judiciary*, 93d Cong. 17 (1973), "in a manner very similar to the method used by the United Nations," 119 Cong. Rec. 14,449 (May 7, 1973).

Second, documents and testimony received by the Congress recognized the oral character of interpretation. For instance, the subcommittee considering the bill received a document produced by the American Association of Language Specialists separately specifying the "WORKING CONDITIONS FOR INTERPRETERS" and the "WORKING CONDITIONS FOR TRANSLATORS," providing that interpreters should "[s]atisfy themselves that they can see and hear properly," while translators' materials "shall be typewritten or typeset and legible in all respects." *Court Interpreters Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 150-51 (1978) [hereinafter "Hearing Record"]. It heard testimony of the President of the Court Interpreters Association of New York emphasizing that "[t]he interpreter must become a mimic and an actor so as to convey to the court the emotion, mood, and attitude of a defendant or witness, as well as to correctly interpret his responses." *Id.* at 80 (testimony of Paulette Harary). And it heard testimony explaining that "[i]nterpreters in simultaneous translations have difficulties and are under pressure to get on with the proceedings. Translators working in the unhurried environment of their privacy can produce better translations." *Id.* at 369 (statement of Miguel E. Herrero Frank).

Third, the Congress considered a draft of the legislation that included a provision addressing limited document translation, but deleted that provision after receiving testimony expressing concern about the cost of such written translation. A version of the bill contained a provision (a) authorizing Spanish-language proceedings in the

District of Puerto Rico, (b) requiring that Spanish-language portions of the record in such cases "be translated into the English language" for appeal, and (c) providing that the "[t]he cost of the translation shall be paid by the district court or by the parties, as the judge may direct." H.R. 10228 § 3, 95th Cong. (1st Sess. 1977). This provision unambiguously referred to translation of written materials, used the word "translation," rather than "interpretation," to do so, and expressly authorized the allocation of such costs to the parties.

The House Subcommittee of Civil and Constitutional Rights heard testimony addressing this provision from Frank Coffin, the Chief Judge of the First Circuit, who warned that such a translation obligation would, among other problems, entail "ominous" increases in the "costs of preparing a record on appeal." Hearing Record at 92. Chief Judge Coffin discussed this "prospect of increased costs," noting that the cost of translating a single page of a transcript was "over four times the cost" of transcribing the material in the first instance, and warning that "an appeal involving a thousand page transcript would cost either a party or the United States $6,000 to $7,000 in addition to ordinary costs." *Id.* at 93. Shortly after hearing this testimony, the subcommittee deleted these provisions from the bill. H.R. Rep. No. 95-1687 at 2. Having considered and rejected a far more cabined proposal specifically permitting the assignment of certain translation costs to parties in only a single district, the Congress cannot reasonably be imagined to have adopted a far more expansive provision permitting taxation of translation costs to parties in subsection 1920(6).

Fourth, by contrast, no statement in the legislative history indicates that subsection 1920(6) was to apply to the translation of written materials. Accordingly, the legislative history confirms that the Congress had no atextual understanding of this provision.

B. Cost-Shifting Statutes Are in Derogation of the Common Law and Must Be Narrowly Construed

Even if subsection (6) were ambiguous, it should be construed narrowly as a statute in derogation of the common law.

"At common law, costs were not allowed." *Alyeska Pipeline*, 421 U.S. at 247. *Accord, e.g.*, *Lowe v. Kansas*, 163 U.S. 81, 85 (1896); *Antoni v. Greenhow*, 107 U.S. 769, 781 (1883); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 372 (1851). *See also* Philip M. Payne, *Costs in Common Law Actions in the Federal Courts*, 21 VA. L. REV. 397, 397 (1934) ("By the common law, no costs were awarded to either party, *eo nomine*, in any action."). While the taxation of costs has long been permitted by statute, such enactments are in derogation of the common law.

"The common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 623. Thus, Congress must "'speak directly' to the question addressed by the common law" in order to effect a change in it. *United States v. Texas,* 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), and *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981)).

While the language and structure of the Court Interpreters Act make abundantly clear that the

word "interpreters" does not include translators of written documents, it is all the more clear that the Congress has not "sp[oken] directly" so as to countermand the common law rule with regard to the costs of written translation.

III. THE CONGRESSIONAL DECISION TO ALLOW TAXATION OF COSTS OF INTERPRETERS BUT NOT TRANSLATORS IS SENSIBLE AS A MATTER OF POLICY

The plain statutory language results in a perfectly reasonable and sound policy regime. Like spoken interpretation, the translation of documents can play an important role in litigation. Nonetheless, there are significant differences between the interpretation of spoken proceedings and the translation of written documents outside court that warrant differential treatment with respect to the taxation of costs.

First, allowing document translation expenses to be taxed as costs would create the risk of large costs awards. The congressional costs regime represents "a decision to depart only slightly from the so-called 'American Rule,' under which parties generally bear their own expenses." *Kansas v. Colorado*, 129 S. Ct. 1294, 1298 (2009). Moreover, it has long been a primary policy of the American costs regime to avoid the possibility of large costs awards, because the risk of such liability can "discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be." *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964). Reasonable policy considerations support the judgment "that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit" by being required to pay for

the other side's attorneys' fees or, for the same reason, other large expenses. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). These concerns are particularly important to the extent that they fall on the poor, or other disadvantaged groups. *See, e.g.*, *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters & Joiners of Am.*, 456 U.S. 717, 725 (1982) (noting "the possible deterrent effect that fee shifting would have on poor litigants with meritorious claims," which, among other considerations, "persuade us not to infer that Congress intended to authorize" such a regime); *Fleischmann Distilling Corp.*, 386 U.S. at 718 (noting "that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel").

These policy considerations are squarely implicated by the decision whether to authorize the taxation of document translation costs. The universe of discovery documents in civil litigation can be very large. "[W]hile there is a natural limit to the expense of interpreters—the amount of time that witnesses (including deponents) undergo live examination—there is no natural limit on the number of documents that can be translated in aid of a claim or defense." *Extra Equipamentos*, 541 F.3d at 728.

In a case where a party possesses foreign-language documents, the broad latitude to conduct discovery can permit the other side wide discretion to decide how many documents to discover and translate. Because a party of limited means can often minimize its own translation expenses, but cannot control the other side's translation expenses, the taxation of such

costs can lead to uncertain and potentially large exposure to costs liability. Thus, for example, in one case, the Federal Circuit affirmed the taxation of more than $1 million in document translation expenses under subsection 1920(6). *See Ortho-McNeil Pharm., Inc. v. Mylan Labs. Inc.*, 569 F.3d 1353, 1356 (Fed. Cir. 2009). Even the prospect of much more modest translation awards, however, can deter individuals from seeking to vindicate rights in the federal courts.

The potential for large and chilling costs liability is of particular concern in the context of document translation, because the potential costs exposure would be born disproportionately by immigrants and non-English speakers, who may be particularly likely to have non-English documents. The statute's exclusion of translation expenses from recoverable costs thus tends to further the salutary end of protecting meaningful access to the courts against chilling costs burdens that might otherwise disproportionately impact potentially disadvantaged groups. *See, e.g.*, *Fleischmann Distilling Corp.*, 386 U.S. at 718 (discussing policy against avoiding regime under which "the poor might be unjustly discouraged from instituting actions to vindicate their rights").

The text of section 1920 reflects a recognition of this risk. Where costs provisions might otherwise be excessive, section 1920 provides an express limitation on their amount, permitting taxation only if the expenses were "necessar[]y" to the case. *See* 28 U.S.C. § 1920(2) ("Fees for printed or electronically recorded transcripts necessarily obtained for use in the case"); *id.* at § 1920(4) ("Fees for exemplification

and the costs of making copies of any materials where the copies are necessarily obtained for use in the case"). Subsection (6), by contrast is not cabined by any corresponding necessity limitation. It would thus be particularly unwarranted to read that subsection to include a wide-ranging authority to tax the costs associated with document translation. *See, e.g.*, *Crawford Fitting Co.*, 482 U.S. at 444 (noting that in the costs statute, "Congress meant to impose rigid controls on cost-shifting in federal courts").

Second, permitting the taxation of the compensation of interpreters but not document translators represents a reasonable accommodation of foreign nations that have expressed concerns about the impact of United States discovery obligations upon foreign nationals. "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 Reporter's Note 1 (1987). A number of foreign nations have expressed concern about having their citizens subjected to the expense and burden of complying with expansive United States discovery, sometimes even implementing "blocking statutes" designed to restrict or prohibit compliance with such discovery obligations within their borders. *See, e.g.*, French Penal Code Law No. 80-538 (quoted in translation, *Société Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 526 n.6 (1987)). The French blocking statute, for instance, generally "prohibit[s] . . . any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial,

industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith." *Société Nationale*, 482 U.S. at 526 n.6.

In the face of such international controversy over discovery burdens and expenses, the Congress's decision to exclude the costs of written document translation from the scope of subsection (6) serves to foster comity with foreign nations. If the Congress had chosen to include document translation expenses within the scope of section 1920, foreign nationals involved in litigation in United States courts would not only be subject to the expansive document discovery objected to by some other nations, but could additionally be required to pay the potentially large cost of translating those same documents into English. It is no less reasonable for the Congress than for the courts to "seek to minimize [the] costs and inconvenience" of federal court discovery upon foreign nationals. *Id.* at 546. Indeed, Congress is presumed to have done so. *See, e.g.*, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (holding that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations," reflecting principles of customary international law "that (we must assume) Congress ordinarily seeks to follow").

IV. THE ARGUMENTS ADDUCED BY THE NINTH CIRCUIT IN SUPPORT OF ITS CONTRARY RULING ARE INCORRECT

The Ninth Circuit's reasoning in support of its conclusion that the word "interpreters" in subsection 1920(6) includes document translators is incorrect.

That court's first ground was its conclusion that ordinary usage "does not always draw precise distinctions" between interpretation and translation. Pet. App. 7a. To the contrary, however, as shown above, *see supra* at 12-25, the common usage, the usage of the relevant professional community, and numerous other authorities recognize that "interpreters" work in the context of spoken language. Moreover, a variety of statutory and contextual considerations make clear that—whatever the linguistic outer bounds of the word "interpreters"—it plainly did not extend to document translators in the context of the Court Interpreters Act. *See supra* at 25-33.

The Ninth Circuit's assertion that expanding the scope of the term "interpreters" is "more compatible with Rule 54 of the Federal Rules of Civil Procedure, which includes a decided preference for the award of costs to the prevailing party," is also misguided. Rule 54 presumptively favors the taxation of costs that are enumerated by statute. But that rule does not create a presumption that particular costs are, in fact, included within the enumeration. To the contrary, this Court has explained that "§ 1920 defines the term 'costs' as used in Rule 54(d)." *Crawford Fitting Co.*, 482 U.S. at 441. As such, "[t]he discretion granted by Rule 54(d) is not a power to evade th[e] specific congressional" limits on costs awards. *Id.* at

442. Rather, "it is solely a power to decline to tax, as costs, the items enumerated in § 1920." *Id.*; *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 301 (2006) (noting that "the term 'costs' in Rule 54(d) is defined by the list set out in § 1920"). In short, Rule 54(d) does not support an expansive reading of the word "interpreters" in subsection 1920(6).

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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