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

REPLY BRIEF FOR PETITIONER

DOUGLAS F. CUSHNIE
P.O. Box 500949
Saipan, MP 96950
(670) 234-6843

DONALD B. AYER
Counsel of Record
MICHAEL S. FRIED
CHRISTOPHER J. SMITH
JANE E. HOLMAN
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
dbayer@jonesday.com
(202) 879-3939

February 3, 2012

Counsel for Petitioner

PARTIES TO THE PROCEEDING

The parties to the proceeding statement included in the Petitioner's opening brief, pursuant to Supreme Court Rule 29.6, remains accurate.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND RULES

TABLE OF AUTHORITIES
(continued)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

REPLY BRIEF FOR PETITIONER

Congress authorized taxation of the "compensation of interpreters," 28 U.S.C. § 1920(6), in the Court Interpreters Act, a piece of legislation focused on employing "interpreters" to provide simultaneous or consecutive interpretation of spoken federal court proceedings. The statute's use of the word "interpreters" to reference spoken proceedings is in keeping with the usage in the vast majority of dictionaries and extensive professional, regulatory, and statutory materials. These materials make clear that the word "interpreters" refers to those who transfer meaning in the course of spoken communication, and distinguish the role of document translators as separate from interpreters. The conclusion that subsection 1920(6) allows cost recovery for the services of interpreters of spoken proceedings, but not for those of translators of written texts, is thus required both to construe the statute in an internally consistent manner and to reflect the common understanding of the words used.

Kan Pacific places unusual emphasis on policy arguments, discussing them at length even before addressing the Court Interpreters Act as a whole. Resp. Br. 19-34. This priority of policy over text is, of course, generally inappropriate. *See, e.g.*, *Pac. Operators Offshore, LLC v. Valladolid*, __ U.S. __, slip op. at 12 (Jan. 11, 2012) (noting that "policy concerns cannot justify an interpretation of [a statute] that is inconsistent with [its] text"). But it is particularly unwarranted in this context given the Court's expressed reluctance to predicate departures from the American Rule on policy grounds because, while the rule "has been criticized," "[i]t is deeply

rooted in our history and in congressional policy." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 270-71 (1975); *accord Kansas v. Colorado*, 556 U.S. 98, 103 (2009) (adhering to policy of American Rule even where the "policy choice is debatable").

In any event, Kan Pacific's policy arguments are unpersuasive. They rest on greatly overstated line-drawing problems that cannot in any event justify wholesale rejection of the distinction between interpretation and translation, and also on the incorrect view that the importance of a particular litigation expense counts in favor of taxing it as costs. To the contrary, the ordinary policies relevant to costs questions, such as the potential size and deterrent effect of taxing those amounts, counsel in favor of construing subsection 1920(6) in conformity with its plain meaning, as do unique considerations of international comity.

I. TRANSLATORS OF WRITTEN TEXTS ARE NOT "INTERPRETERS"

A. The Text and Structure of the Court Interpreters Act Exclude Document Translation

Congress enacted the Court Interpreters Act in 1978 primarily to make foreign-language interpreters available to provide simultaneous and consecutive interpretation of spoken words in the context of certain federal judicial proceedings. Given this clear, overarching purpose and the statute's substantive provisions that implement it, there can be little doubt that the word "interpreters" as it appears in the Act's title and throughout its text refers to persons who

perform oral interpretation in the course of ongoing, spoken proceedings.

This understanding of the word "interpreters" as used in the statute is supported by a wide variety of authorities that give meaning to that term. These sources show that an interpreter's role does not encompass written translation. Opening Br. 12-25. Kan Pacific deals with these authorities through an exercise in selective perception, relying on a partial reading of one dictionary definition, wishful constructions of a few others, and by dismissing or ignoring many more.

1. As demonstrated in petitioner's opening brief, at 13-16, the overwhelming consensus view of general, legal, and specialized dictionaries is that an "interpreter" is "[o]ne who translates orally for people speaking in different languages." LONGMAN NEW UNIVERSAL DICTIONARY 517 (1982). This meaning has been clear for more than a century. *E.g.*, William C. Anderson, A DICTIONARY OF LAW 565 (1889).

Kan Pacific's argument proceeds by arbitrarily discounting or ignoring virtually all sources other than its single preferred dictionary, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976), from which Kan Pacific selectively excerpts a partial quote defining an "interpreter" as "one who translates." Resp. Br. 12. Kan Pacific dismisses other Webster's dictionaries as "abridged versions of" WEBSTER'S THIRD, Resp. Br. 15, ignoring the fact that the categorical exclusion of written translation in Webster's own abridgments underscores what is plain from the complete definition that appears in WEBSTER'S THIRD, that Kan Pacific's meaning is, at best, uncommon and disfavored.

Kan Pacific rejects older dictionaries as "out of date," *id.*, neglecting the fact that they establish the longstanding and settled nature of the usage. It dismisses as "obscure," *id.*, dictionaries that are in fact specialized references dedicated to particularly relevant contexts such as linguistics, business, and law. It dismisses still other dictionaries—including the fourth edition of BLACK'S LAW DICTIONARY, which was current when the statute was enacted—for using a still narrower definition restricted to "person[s] sworn at a trial" who interpret orally, *id.* at 15 & n.6 (emphasis omitted), neglecting the fact that an even more constrained definition all the more strongly reinforces the exclusion of document translation. And it entirely ignores still other dictionaries, THE AMERICAN HERITAGE DICTIONARY and THE OXFORD ENGLISH DICTIONARY, which categorically exclude document translation, or characterize it as an obsolete usage. Opening Br. 14.

At the end of the day, not even WEBSTER'S THIRD supports Kan Pacific's position, since it defines "interpreter" as "one that translates; *esp*: a person who translates orally for parties conversing in different tongues." WEBSTER'S THIRD 1182. As discussed in the opening brief at 15 n.5, the SUPPLEMENT to WEBSTER'S THIRD makes clear that dictionary's practice of using "*esp.*" to "connote[] the most common meaning subsumed in the more general preceding definition."[1] Kan Pacific argues

[1] Even if WEBSTER'S THIRD were fairly read to equate interpretation with translation, this Court has specifically warned against accepting a definition found in a single dictionary (WEBSTER'S THIRD, as it happens) when its "suggested meaning contradicts virtually all other[]"

that "'[e]specially' does not mean 'only,'" Resp. Br. 13, but this Court has made clear that the "most common meaning" of a statutory term ordinarily controls for purposes of statutory interpretation. *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 301 (1989); *accord, e.g.*, *United States v. Ramsey*, 431 U.S. 606, 612 n.8 (1977) (adopting "the most common usage of the [statutory] word"); *United States v. Van Auken*, 96 U.S. 366, 368 (1877) (adopting "the sense in which [a statutory term] is most commonly used").[2]

As a result, this Court frequently construes statutory terms coextensively with parts of definitions prefaced by "*esp.*" For instance, in *Sullivan v. Stroop*, 496 U.S. 478 (1990), the Court construed the phrase "child support" to mean "legally compulsory payments made by parents," *id.* at 482, a meaning coextensive with the "*esp.*" clause of a definition it cited in support: "money paid for the care of *one*'s minor child, *especially payments to a*

(continued…)

dictionaries. *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 226 (1994).

[2] Kan Pacific's *amici*, but not Kan Pacific itself, claim that FUNK & WAGNALLS NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (comprehensive ed. 1996), defines "interpreter" as "one who interprets or translates." Br. of Chicago Area Translators, *et al.* 12. That is not so, as the actual definition is "one who interprets or translates; *specifically, one who serves as oral translator between people speaking different languages*." FUNK & WAGNALLS at 665 (emphasis added). The *amici* also cite several dictionaries listing "the two words as synonyms," Br. 12, even though dictionaries list as "synonyms" "pairs or groups of words similar in meaning or associated in use, [which] has even been extended in some instances to include the discussion in a single article of contrasted terms." FUNK & WAGNALLS at xvii.

divorced spouse or a guardian under a decree of divorce." *Id.* (internal quotation marks omitted). *See also, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) (construing "impartiality" coextensively with "*esp.*" clause of dictionary cited in support); *Sossamon v. Texas*, 131 S. Ct. 1651, 1660 (2011) (finding "plausible," but not definitively reaching, the argument that the meaning of the word "relief" should be restricted to that in an "*esp.*" clause).

Kan Pacific cites *Smith v. United States*, 508 U.S. 223 (1993), which held that "use" of a gun in 18 U.S.C. § 924(c)(1) included exchanging the gun for drugs, apparently to show that broad meanings should be preferred over more common narrower ones. However, *Smith* did not announce any preference for broader over narrower meanings, but rather found that the broader meaning of "use" at issue in that case was consistent with its "ordinary or natural meaning." 508 U.S. at 228. This Court adopted the narrower of two proposed meanings of the same word in the same provision in *Watson v. United States*, 552 U.S. 74, 83 (2007). More generally, the Court routinely adopts narrower meanings over broader ones where doing so best captures the most common meaning, as it did, for instance, in *Watson*, *Sullivan*, and *Mallard*.

2. Kan Pacific does not dispute that professional literature is an important tool in construing the meaning of the word "interpreters." Opening Br. 16-17; *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372 (1986). However, it simply ignores most of the strong evidence found in these materials, which distinguishes between interpreting, as involving the

facilitation of live, oral communication, and translating, which produces a written product in a different language. Opening Br. 17-23. *But see* Resp. Br. 16 (disputing the meaning of one source). Additionally, the ABA's proposed Standards for Language Access in Courts, prepared "to assist courts in designing, implementing, and enforcing a comprehensive system of language access services," define "interpreter" as one "who is fluent in both English and another language, who listens to a communication in one language and orally converts it into another language while retaining the same meaning." Proposed Standards at 1, 7 (Feb. 2012), *available at* http://www.courts.ca.gov/documents/Stds_for_Language_Access__FINAL__12-13-2011_w_disclaimer_.pdf.

Rather than dispute the clear distinction drawn in the professional literature, Kan Pacific purports to rely on that literature in contending that such a distinction cannot practicably be applied because there are a number of tasks that cannot be placed on either side of the line. Resp. Br. 20-23. Specifically, it identifies four particular tasks that it claims are "difficult if not impossible to characterize . . . as either 'interpretation' or 'translation' under Taniguchi's strict dichotomy." *Id.* at 22.

Even if there were ambiguous cases at the margin of interpreting and translating, that would be no basis for ignoring the distinction between the two words that is indisputable and clear in the vast majority of situations. For instance, the Court in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), construing the phrase "appropriate equitable relief" in section 502(a)(3)(B) of ERISA,

held that difficulties classifying some remedies as legal or equitable did not obviate the need to make such distinctions, given that, "[l]ike it or not, . . . that classification and distinction has been specified by the statute." *Id.* at 217. *See also, e.g.*, *Hartranft v. du Pont*, 118 U.S. 223, 227 (1886) (distinguishing large from small boats under 52 Rev. Stat. 4426, which addressed certain "small craft," notwithstanding the "difficult[y of] draw[ing] th[at] line" as to some boats of intermediate size).

In any event, it is not difficult to determine whether any of the four activities count as interpretation. "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 omitted). Each of Kan Pacific's examples falls clearly inside or outside that meaning.

Kan Pacific's first example, sight interpretation, is clearly interpreting. It involves the "translat[ion] *aloud* into another language [of] a text that is physically present in [one's] hand," Alicia B. Edwards, THE PRACTICE OF COURT INTERPRETING 105 (1995) (emphasis added), and is generally "carried out in the course of formal judicial procedure and is recorded by the court reporter," Susan Berk-Seligson, THE BILINGUAL COURTROOM 39 (2002).

Kan Pacific's second purported borderline case is transcription, the production of a written transcript of a sound recording. Transcription is not interpreting, because, unlike sight interpretation, it

does *not* occur in the course of spoken communication between persons in real time. To the contrary, it is a solitary activity involving the luxury of "multiple playbacks of the tape" and the leisure to consult extrinsic linguistic sources if desired. González, Vásquez, & Mikkelson, *supra*, at 440-41.

Kan Pacific's third and fourth examples, the comparison of written documents and the translation of written documents, likewise are plainly not interpretation under the ordinary meaning involving live, spoken communication.

3. Petitioner showed that a number of government agencies have similarly defined interpreting as limited to the context of spoken communication in various contexts. Opening Br. 23-25. Kan Pacific offers no response whatsoever to this showing.

4. Instead, Kan Pacific cites several purportedly conflicting uses in newspapers and other sources. Resp. Br. 16-17. None of them are persuasive instances of a contrary usage.

At the outset, there is a basic difference between the materials discussed above and those referenced by Kan Pacific. The materials cited by Mr. Taniguchi specifically address the meaning of the term "interpreter," and expressly provide that it does not apply to written translators. None of the various materials Kan Pacific cites as counter-examples purport to specify the meaning of the word. Rather, they are simply documents that use the word "interpreter," often in passing, in contexts unrelated to defining the term. It would hardly be surprising if Kan Pacific could find a few examples of imprecise

usages in the massive databases of Westlaw, LEXIS, and Google.

But, in fact, the newspaper articles and district court opinions cited by Kan Pacific merely recite that an interpreter translated a document, or indicate that one might. The same is true of the three State statutes it cites. *See* CAL. GOV'T CODE § 26806(a) (directing the clerk in large counties to hire interpreters who are also able to translate); FLA. STAT. ANN. § 90.606 (providing that an interpreter who translates must take an oath to do so faithfully); MICH. COMP. LAWS ANN. § 775.19 (addressing in-court sight interpretation). Some of these sources affirmatively distinguish between spoken interpretation and written translation.[3] And all of them are entirely consistent with viewing interpreting as spoken. As noted in the opening brief at 20, bilingual interpreters may, if they are able, sometimes also translate documents, but when they do so, they are not interpreting. Occasional instances documenting interpreters who translate something are therefore to be expected.

Kan Pacific's references to several decisions of this Court, Resp. Br. 18 n.9, passages of the legislative history, *id.* at 44, and three statutes, *id.* at 49 n.21, arguably using the broad meaning of the word "translate" are also unavailing. As the opening brief showed, while "interpretation" does not include

[3] *See United States v. Prado-Cervantez*, 2011 WL 4691934, at *3 (D. Kan. Oct. 6, 2011) (Resp. Br. 17 n.8) (distinguishing between "interpret[ing]" and "translat[ing] documents"); *see also* FLA. STAT. ANN. § 90.606 (Resp. Br. 18 n.10) (titled "Interpreters and translators," and providing that one "who serves in the role of interpreter or translator in any action or proceeding is subject to all the provisions of this chapter relating to witnesses").

written translation, the word "translation" may be used narrowly to reference preparation of texts in a different language, or more broadly to include any inter-language transfer of meaning. Opening Br. 18. Thus, Kan Pacific's references to a handful of generic uses of "translate" do not suggest that the word "interpreter" carries a comparably broad meaning.

Kan Pacific also cites several notices of forthcoming interpreting examinations issued by the Administrative Office during the 1980s and early 1990s. Resp. Br. 39-41. But these examination postings do not say that translation is part of interpretation. They merely note that interpreters sometimes translate. Moreover, other authority makes clear that the examinations in question were designed to ensure that interpreters could accurately "render what is *said* in the court as it was said." *Seltzer v. Foley*, 502 F. Supp. 600, 603 (S.D.N.Y. 1980) (summarizing AO official's testimony about the design of the examination) (emphasis added). Thus, at the time of these early examinations, as now, the Office's examinations "d[id] not test for translation skills." 5 GUIDE TO JUDICIARY POLICY: COURT INTERPRETING § 550.20.10(a).

In any event, these brief, ministerial documents do not purport to represent the Office's official views regarding implementation of the statute, as does its formal guidance document posted on its web site. *See* Opening Br. 23. The latter document explicitly provides that translation is excluded. *See* 5 GUIDE § 550.20.10(a) ("The Court Interpreters Act does not address written translation requirements . . . ."); *id.* § 550.20.40 ("Translations and transcriptions are not within the scope of the Court Interpreters Act . . . .").

The most recent notice cited by Kan Pacific (and we are aware of no later one) was issued in 1994. There is no dispute that the Office's current position, as set out in the GUIDE, is that written translation is excluded, and that would be the relevant source to consider even if the Office had previously held a different view. *See, e.g.*, *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (noting that an agency "is not estopped from changing a view [it] believes to have been grounded upon a mistaken legal interpretation").

Finally, Kan Pacific asserts that "no one would refer to someone who orally translates into English the speeches of foreign leaders as they are being made as 'an English-language "interpreter" of the speeches.'" Resp. Br. 18-19 (emphasis omitted). This is simply incorrect. That usage is within the core meaning of "interpreter" under any definition.

5. The Court Interpreters Act is an integrated statute, and Kan Pacific's effort to sever its sections into "a series of unrelated and isolated provisions," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995), is misplaced. *See* Resp. Br. 35-38. Section 2 sets out various rules addressing the certification and use of "interpreters," and section 7 provides for the taxation of their compensation. Moreover, the two sections are interrelated. Section 2 contains provisions allocating the costs of interpreter expenses within the program embodied by section 1827. Act § 2 (codifying 28 U.S.C. §§ 1827(g), (h), 1828 (c), (d), Resp. Appx. 4a-7a). Section 7, Resp. Appx. 11a, addresses the taxation of interpreter expenses more broadly in cases involving interpreters, including those occurring under section 2. There is, in short, no

textual or logical basis to assign different meanings to the central unifying term of the statute—"interpreters"—in its different provisions.

Kan Pacific's attempt to assign different meanings to the word "interpreter" in sections 2 and 7 contravenes the "normal rule of statutory construction" presuming that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson*, 513 U.S. at 570; *accord, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 221 (2002). Apart from that general governing principle, it is also illogical by its own terms.

Kan Pacific argues that a different meaning is suggested by the use in section 2 (codifying 28 U.S.C. §§ 1827-28) of the phrase "interpreters in courts of the United States," while section 7 (codifying 28 U.S.C. § 1920(6)) simply refers to "interpreters." Resp. Br. 37. But many provisions of section 2, including the one requiring the use of interpreters in cases brought by the government, simply use the word "interpreters," unaccompanied by the phrase "in courts of the United States." Act § 2 (codifying 28 U.S.C. § 1827(d)), Resp. Appx. 2a. And section 1920 is a list of costs eligible for assessment in "any court of the United States."[4]

Kan Pacific's assertion that section 2, unlike section 7, "applies only in cases 'initiated by the United States,'" is both incorrect and irrelevant.

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[4] Similarly, Congress codified section 2 in the chapter of the Code addressing witnesses because it deals primarily with the use of interpreters, and section 7 in the chapter addressing fees and costs, Resp. Br. 38, because it is a costs provision. Kan Pacific offers no explanation why this calls for a different meaning of the same word in the two sections.

Some provisions of section 2 apply in cases not initiated by the United States. *See, e.g.*, Act § 2 (codifying 28 U.S.C. § 1827(e)(2), Resp. Appx. 3a) (addressing duty of Administrative Office to facilitate the private retention of interpreters "[i]n any criminal or civil action in a United States district court"). And the fact that section 7 applies in some cases where parts of section 2 do not offers no basis to assign the word "interpreters" different meanings in the two provisions.

6. Although Kan Pacific does not contend that interpretation services under sections 1827 and 1828 include document translation, it says that it is not "clear" that they do not. Resp. Br. 39. In fact, that limitation is abundantly clear.

Section 2 of the Court Interpreters Act specifies that "[t]he interpretation provided by certified interpreters" under section 1827 must be performed in one of three modes (consecutive, simultaneous, or summary), none of which are relevant to the translation of documents.[5] Resp. Appx. 5a (codifying § 1827(k)). Section 1828 similarly specifies the "simultaneous" mode for the interpretation services it addresses. Resp. Appx. 6a (codifying § 1828(a)). Moreover, as Kan Pacific itself acknowledges, Resp. Br. 38, those sections occur in Chapter 119, which addresses "[w]itnesses," rather than Chapter 115, which addresses "[d]ocumentary" evidence.

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[5] The reference to the summary mode was removed from subsection (k) in 1988; it now requires that the interpretation be carried out in either the simultaneous or consecutive mode. Opening Br. 6 n.4.

B. The Consistent Usage of "Interpreters" Throughout the United States Code, and in Related Rules, Confirms the Limited Meaning of That Term

1. Treating "interpreters" and "translators" as synonymous would also be inconsistent with a longstanding distinction made in many other statutes. Opening Br. 32-33.

Kan Pacific puzzlingly asserts that Mr. Taniguchi and his *amici* identified "seven" such provisions of the Code, which it purports to divide into three categories and then proceeds to discount through a variety of *ipse dixit* pronouncements, concluding "[s]o much for the use of 'interpreters' in other statutes."[6] Resp. Br. 47-48. In fact, petitioner and *amici* collected more than twice as many statutes as Kan Pacific acknowledges. Opening Br. 30-32; Brief of *Amicus* NAJIT 13-14.

By entirely ignoring more than half of the relevant statutory authority, Kan Pacific is able, for example, to disregard 15 U.S.C. § 649, which expressly distinguishes between "translat[ing] documents" and "interpret[ing] conversations." It likewise avoids dealing with 10 U.S.C. § 1596b(f), which makes the same distinction between "translation" and "interpretation of communication in a foreign language" in defining the phrase "linguistic services."

[6] Kan Pacific's distinction between interpreters and translators as "job titles"—which it admits distinguish between the written and oral modes—and as activities, Resp. Br. 48, is entirely imagined. The same literature that distinguishes the two professions also makes abundantly clear that the associated activities are correspondingly distinct. Opening Br. 16-23; Br. of *Amici Curiae* Interpreting and Translation Professors 11-12, 18-25.

More generally, Kan Pacific thus avoids ever coming to grips with the fact, apparent even from a cursory review of the statutory language excerpted in the briefs, that numerous federal statutes reference interpretation and translation in ways that make clear they are non-redundant terms for distinct activities.

2. Rule 43(d) of the Federal Rules of Civil Procedure, like subsection 1920(6), authorizes the taxation of the "compensation" of certain "interpreter[s]" "as costs," and excludes document translation. Opening Br. 29-30. Kan Pacific begs the question by drawing the purported distinction that interpreters under Rule 43(d) act in the course of live testimony. Resp. Br. 45. That this precursor to subsection 1920(6) excluded document translators reinforces the corresponding limitation of the same word "interpreters" in subsection 1920(6).

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

A. The Legislative History Confirms the Limitation to Spoken Interpretation

The legislative history strongly reinforces the plain meaning of the word "interpreters." The original sponsor made clear that the statute was intended to address "oral translation." *The Bilingual Courts Act: Hearings Before the Subcomm. on Improvements on Judicial Machinery of the S. Comm. on the Judiciary*, 93d Cong. 17 (1973). As such, it was understood to apply to the "interpretation of proceedings." H.R. Rep. No. 95-1687, at 3 (1978). Kan Pacific responds that these and similar passages "do[] not show that the law that was ultimately enacted was meant to exclude written translation." Resp. Br. 42. But the

absence of any contrary suggestion makes it unreasonable to suppose that the essential animating purpose of the statute changed before enactment, leaving no trace in the documentary record.

The legislative history also includes a number of materials showing that the word "interpreter" was understood to refer to oral communication. Opening Br. 34. Kan Pacific's observation that these provisions did not specifically allude to "the provision of the Court Interpreters Act that amended the cost statute," Resp. Br. 42, is irrelevant. Most of the cited materials and testimony were presented to Congress not in connection with *any* particular provision of the bill, but rather to educate Congress about interpreters and their role as a general matter. These materials are therefore of general relevance throughout the statute.

A section of the bill specifically addressed document translation, but was deleted from the final statute. Opening Br. 34-35. Kan Pacific responds that "[t]he deleted provision *required* translation that would not otherwise have been undertaken," unlike the costs provision, which allocates preexisting translation costs. Resp. Br. 43. The provision is nonetheless highly relevant for several reasons. First, the deleted provision used the word "translation," a word that occurs nowhere in the Court Interpreters Act as ultimately passed, to refer to the translation of written materials. This confirms that, consistent with ordinary congressional practice, the drafters of the law used the word "translation," rather than "interpretation," when they intended to address written documents. Moreover, the legislative history relating to the provision specifically notes

both the significant costs associated with document translation and the burdens attendant to the assignment of translation expenses to parties. Opening Br. 35. Both of these concerns are also relevant in the context of costs.

Finally, Kan Pacific admits that there is not a hint in the lengthy legislative history (apart from the deleted provision discussed in the preceding paragraph) that anything in the statute was viewed as embracing the translation of written documents. Resp. Br. 43.

B. Subsection 1920(6) Should Be Narrowly Construed as a Statute in Derogation of the Common Law

Subsection 1920(6) should be read narrowly as an enactment in derogation of the common law, which did not authorize costs awards. Opening Br. 36-37. Kan Pacific cites *Johnson v. South Pacific Co.*, 196 U.S. 1 (1904), apparently to support its otherwise unsupported claim that that an original "statute's successor is not subject to the interpretive canon." Resp. Br. 50. *Johnson* construed a statute requiring railroad cars to be "equipped with couplers coupling [the cars together] automatically by impact," and abrogating common-law assumption-of-risk for employees injured by non-compliant cars. 196 U.S. at 13-14. The issue before the Court was whether this statute should be read narrowly so as not to apply (and thus not to abrogate the common law rule) where the cars possessed automatic couplers but they were incompatible with each other, and hence required manual coupling by railroad employees. 196 U.S. at 16-17. The Court ruled the narrow-construction canon inapplicable not because any

successor statute was involved, but because the provision departing from the common law assumption-of-risk doctrine was entirely clear and appeared in a different provision of the statute. Id. at 17. *Johnson* thus does not support Kan Pacific's argument. In any event, the provision at issue in this case allowing taxation of interpreter costs is not a successor statute either, since it is the first enactment allowing taxation of interpreter costs.

III. CONGRESS'S DECISION TO ALLOW COSTS FOR INTERPRETERS BUT NOT TRANSLATORS IS SENSIBLE AS A MATTER OF POLICY

A. Good Reasons Support Treating Interpreters Differently From Translators

1. A reasonable policymaker could determine "that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit" by the imposition upon the loser of large costs. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). Kan Pacific concedes that this consideration motivated the exclusion of attorneys fees from costs, Resp. Br. 24-25, but does not explain why this reasoning does not apply to other potentially large costs elements.

Kan Pacific disputes that document translation creates a risk of large costs awards. Resp. Br. 25. Yet translation expenses in several cases have involved hundreds of thousands, and, in one case, more than a million, dollars. *See, e.g.*, *Ortho-McNeil Pharm., Inc. v. Mylan Labs. Inc.*, 569 F.3d 1353, 1355-56 (Fed. Cir. 2009) (more than $1,000,000); *In re Puerto Rico Elec. Power Auth.*, 687 F.2d 501, 509-10 (1st Cir. 1982) (approximately $250,000); *Gabriel*

Techs. Corp. v. Qualcomm Inc., 2010 WL 3718848, at *12 (S.D. Cal. Sept. 20, 2010) (estimate of $182,400); *Trading Techs. Int'l v. eSpeed, Inc.*, 750 F. Supp. 2d 962, 983 (N.D. Ill. 2010) ($109,614). Other recent cases involve large translation expenses.[7]

Kan Pacific notes that the document translation costs in other cases can be "quite modest." Resp. Br. 27. But as globalization proceeds and transnational litigation becomes ever more commonplace, the size and frequency of large translation awards are likely to increase. *See, e.g.*, *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994) (noting that "one can expect further globalization of commerce," with attendant increases in cross-borders litigation). Major cases commonly involve millions of pages of discovery documents. *See* Lawyers for Civil Justice, *et al.*, *Litigation Cost Survey of Major Companies* 16 (2010) [hereinafter, *Litigation Cost Survey*].[8] As transnational litigation continues to grow, very large translation expenses are likely to become increasingly routine.

Moreover, the "broad scope" of discovery "presents unscrupulous litigants with the means to manipulate the process to their advantage." *Baez-Eliza v. Instituto Psicoterapeutico*, 275 F.R.D. 65, 70 (D.P.R.

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[7] *See also, e.g.*, *Extra Equipamentos E Exportação Ltda. v. Case Corp.*, 541 F.3d 719, 727 (7th Cir. 2008) ("almost $76,000"); *Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, 2010 WL 1691869, at *7 (N.D. Cal. Apr. 23, 2010) ($52,998.45); *Osorio v. Dole Food Co.*, 2010 WL 3212065, at *11 (S.D. Fla. July 7, 2010) ($25,885.39); *Hynix Semiconductor Inc. v. Rambus Inc.*, 697 F. Supp. 2d 1139, 1155 (N.D. Cal. 2010) ($24,671.57).

[8] *Available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

2011). Kan Pacific's reading of the statute would permit the strategic use of translation services, with their attendant costs, to deter limited-means immigrants or non-English speakers from vindicating rights in court.

The district court's discretion under Rule 54(d), Resp. Br. 27-29, offers little protection. Examining the necessity and reasonableness of document translation involving potentially many thousands of discovery documents would be quite difficult and, if done conscientiously, would impose substantial burdens on the district courts. The need for interpretation, by contrast, is usually quite apparent based on occurrences of events requiring an interpreter's services in order to be understood.

Contrary to Kan Pacific's assurance that there has not been "any evident difficulty" making such necessity determinations, Resp. Br. 30, translation necessity determinations sometimes "do[] not appear possible . . . within a reasonable time and by expenditure of a reasonable amount of judicial resources," due to volume, lack of clear standards, and difficulties with parties' documentation. *E. & J. Gallo Winery v. Andina Licores S.A.*, 2007 WL 1589546, at *2 (E.D. Cal. June 1, 2007).

Moreover, because the statute supplies no uniform textual basis to set the scope of such a limitation, such review has given rise to inconsistent standards and disparate treatment. *Compare, e.g.*, *Hynix Semiconductor Inc.*, 697 F. Supp. 2d at 1153 (finding translation costs incurred to test accuracy of adversary's translation necessary), *with Oetiker v. Jurid Werke GmbH*, 104 F.R.D. 389, 393 (D.D.C. 1982) (finding such costs unnecessary). The federal

costs regime was designed to eliminate precisely such divergent results in costs awards. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761 (1980) ("Above all, Congress sought to standardize the treatment of costs in federal courts, to make them uniform—make the law explicit and definite." (internal quotes omitted)). And the reasonable necessity standard does not consider the resources available to the losing party and hence provides little protection to limited-means litigants.

Kan Pacific also claims that excluding document translation from subsection 1920(6) will not "inevitably disadvantage" immigrants and non-English speakers because they would lose the ability to recover their own document translation costs, which they might incur preparing their foreign-language documents for submission to the court. Resp. Br. 31-32. But an adverse impact need not "inevitably" occur in every case to warrant policy consideration. And Kan Pacific does not dispute that these groups would be harmed *disproportionately* by the rule it advocates. In major cases that go to trial, the ratio of admitted exhibits (which those possessing non-English documents might translate) to documents produced in discovery (which their adversaries would translate) is extremely small, perhaps less than one in a thousand. *See Litigation Cost Survey* at 16. Thus, the initial expenses of document translation fall disproportionately on the party who receives foreign-language documents in discovery and the burden of their taxation disadvantages the party who produces them. Moreover, a party of limited means has substantial control over its own translation expenses, but it has no control over the translation expenses incurred by

a wealthier adversary. The regime advocated by Kan Pacific thus exposes limited-means parties to substantially greater potential costs liability than it offers in return if they prevail.

2. A number of foreign sovereigns have expressed serious concern regarding the costs and burdens associated with imposing United States document discovery upon their nationals. Adding a potential obligation to pay the costs of translating produced discovery documents increases that burden, and directly implicates concerns that a reasonable policymaker could choose to allay. Opening Br. 40-41.

Kan Pacific objects that there is "no evidence in the legislative record" that Congress was motivated by this concern. Resp. Br. 33. But there is no evidence that Congress was motivated by *any* of Kan Pacific's own policy considerations. Congress had no occasion to address these policy issues because there was never any thought or suggestion of including document translation in subsection 1920(6).

Kan Pacific observes that the French blocking statute applies to spoken as well as written discovery. Resp. Br. 33. But it does not dispute that document discovery is the core concern expressed by foreign nations, Opening Br. 40, and thus warrants greater comity consideration. Its claim that comity concerns in this area are limited to "prescriptive jurisdiction" is just wrong, as the very case it cites shows. *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (listing prescriptive jurisdiction as but one example of the generally applicable rule). And it claims that translation awards "hardly rise[] to the level of unreasonable

interference." Resp. Br. 34. But they are additive upon preexisting discovery expenses, as to which these nations have *already* expressed concern.

B. Kan Pacific's Contrary Policy Arguments Are Baseless

Other than its mistaken supposition that there are vague, borderline cases between interpreting and translation, Kan Pacific merely argues that translation "is no less important" than interpretation. Resp. Br. 20. While that may sometimes be true, importance is not the determinant for inclusion in the costs statute. Many extremely important litigation expenses are not taxable under section 1920. *See, e.g.*, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 438-45 (1987) (costs of expert witnesses); *Alyeska Pipeline*, 421 U.S. at 270-71 (attorneys fees).

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

DOUGLAS F. CUSHNIE
P.O. Box 500949
Saipan, MP 96950
(670) 234-6843

DONALD B. AYER
Counsel of Record
MICHAEL S. FRIED
CHRISTOPHER J. SMITH
JANE E. HOLMAN
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
dbayer@jonesday.com
(202) 879-3939

Counsel for Petitioner

February 3, 2012