No. 10-___

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

PETITION FOR A WRIT OF CERTIORARI

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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 section 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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PETITION FOR A WRIT OF CERTIORARI

Kouichi Taniguchi respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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. In a separate, unpublished memorandum disposition the court of appeals affirmed the district court's entry of summary judgment in favor of Kan Pacific.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. The district court's decisions granting summary judgment for the defendant, Pet. App. 12a, granting in part the defendant's bill of costs, Pet. App. 19a, and denying plaintiff's motion objecting to costs, Pet. App. 23a, are unreported.

JURISDICTION

The district court had jurisdiction over Mr. Taniguchi's complaint pursuant to 28 U.S.C. § 1332, because Mr. Taniguchi is a citizen of Japan, defendant Kan Pacific is a Northern Mariana Islands corporation, and the amount in controversy exceeded $75,000. 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 court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

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

Section 1920 of 28 U.S.C. is the latest in a series of statutes governing costs in federal civil lawsuits. These statutes were passed to "enumerate[] the costs that ordinarily may be taxed to a losing party" in federal litigation, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 (1980), and to exclude from cost recoveries expenses incurred of types not listed there, *see Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987).

The first such statute was adopted in 1853, in order to eliminate the "great diversity in practice among the courts" at the time, and to prevent "losing litigants [from] being unfairly saddled with exorbitant fees." *Alyeska Pipeline Serv. Co. v.*

Wilderness Soc'y, 421 U.S. 240, 251 (1975).[1] An important impetus to this legislation was a perception that recoverable costs "ha[d] been 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." Cong. Globe, 32d Cong., 2d Sess. app. 207 (1853) (remarks of Sen. Bradbury).

The content of the 1853 Act remained substantially unchanged in the Revised Statutes of 1874 and the Judicial Code of 1911. *Alyeska Pipeline*, 421 U.S. at 255. The text was revised and updated in the Revised Code of 1948, which enacted 28 U.S.C. § 1920. While the language of the statute differs from the original 1853 law, the intervening changes did not involve "any apparent intent to change the controlling rules." 421 U.S. at 255.

In 1978, the Congress, in enacting "The Court Interpreters Act," Public Law 95-539, amended section 1920 to add subparagraph (6).[2] The Act's primary purpose was to (1) "establish a program to facilitate the use of . . . interpreters" in judicial

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[1] The 1853 statute provided, in relevant part: "The 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 . . . ." Act of Feb. 26, 1853, 10 Stat. 168.

[2] The 1978 amendment added "the following new paragraph" to 28 U.S.C. § 1920: "(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." Court Interpreters Act, Pub. L. No. 95-539 § 7, 92 Stat. 2040 (1978).

proceedings instituted by the United States, 28 U.S.C. § 1827, and (2) further "establish 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.* § 1828. In these respects, the legislation responded to court decisions which had pointed out the importance of in-court interpreters, and required the provision of interpretation services at government expense in criminal cases. *E.g., United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970); *see* H.R. Rep. No. 95-1687 (1978). The legislation's sponsor in the Senate explained that the Act served to "insure[] that all individuals in Federal proceedings will be provided with a certified interpreter if their primary language is not English or if they have a hearing impairment." 124 Cong. Rec. S36685 (Oct. 13, 1978) (remarks of Sen. DeConcini).

The Act also provides for an interpreter in judicial proceedings, including non-criminal cases, where a party or witness "(a) speaks only or primarily a language other than the English language," or "(b) 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 "comprehen[ding] . . . questions and the presentation of . . . testimony." 28 U.S.C. § 1827(d).

Section 1827 specifies the nature of the interpretation services required to be made available:

> The interpretation provided by certified or otherwise qualified interpreters pursuant to this

> section shall be in the simultaneous mode for any party to a judicial proceeding initiated by the United States and in the consecutive mode for witnesses . . . .

Id. at § 1827(k). "Simultaneous" interpretation refers to the act of "interpret[ing] and speak[ing] contemporaneously with the individual whose communication is being translated." H.R. Rep. No. 95-1687 (1978). "Consecutive" interpretation, by contrast, involves "the speaker, whose communication is being translated, . . . paus[ing] to allow the interpreter to convey the testimony given." *Id.* The statute also provides for the appointment of "sign language interpreter[s]" for the hearing impaired. 28 U.S.C. § 1827(l).

In addition to its extensive provisions defining the rights to interpreters in federal court proceedings, the Court Interpreters Act contains language which expanded the federal taxation of costs statute, 28 U.S.C. § 1920, to allow recovery as costs of "compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." 28 U.S.C. § 1920(6). The Act therefore provided that "[i]n civil actions, the costs incident to providing the services of an interpreter shall be paid by the parties in such proportion and at such time as the presiding judicial officer directs and may be taxed as costs in the action." S. Rep. No. 95-569 at 8 (1978).

B. Proceedings Below

Kouichi Taniguchi, a Japanese professional baseball player, 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 diversity lawsuit against the owner of the resort, Kan Pacific Saipan, Ltd., alleging negligence and seeking damages for losses he suffered as a result of the accident, including medical expenses and lost income. *Id.* During the course of the litigation, Kan Pacific incurred costs translating certain contracts and other documents from Japanese into English.

Following discovery, both parties moved for summary judgment. *Id.* The district court granted summary judgment for Kan Pacific in an unpublished opinion. *Id.* The district court also awarded costs to Kan Pacific. The district court's taxation of costs included Kan Pacific's document translation costs of $5,517.20, which the district court categorized as "compensation of interpreters" under section 1920(6). *Id.* at 21a-22a.

On petitioner's appeal, which addressed both the merits of the case and the award of costs, the Ninth Circuit affirmed the cost award in a published opinion. *Id.* at 1a-8a. The panel held that under section 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 "there is a circuit split concerning the statutory interpretation of § 1920(6)," and acknowledged the Seventh Circuit's decision in *Extra Equipamentos E Exportação Ltda. v. Case Corp.*, 541 F.3d 719, 727-28 (7th Cir. 2008), which "determined that 'interpretation' and 'translation' have distinct meanings" and "declined to award costs for translation services." Pet. App. 5a-

6a. But the Ninth Circuit aligned itself with the Sixth Circuit, which reached a contrary conclusion in *BTD Products, Inc. v. Lexmark Int'l, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005). The court explained that, while the "Seventh Circuit relied on what it thought to be the common understanding of an 'interpreter' as one who translates the spoken word rather than the written word," the Sixth Circuit "concluded that 'translation' services and 'interpretation' services are interchangeable." Pet. App. 6a-7a.

Following the reasoning of the Sixth Circuit, the court explained that "[i]n § 1920(6), 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.* Since "it was necessary for Kan Pacific to have Taniguchi's documents and medical records translated to adequately prepare its defense," the Ninth Circuit 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 on the merits of the action. *Id.* at 9a. The Ninth Circuit

denied Mr. Taniguchi's petition for rehearing on May 11, 2011. *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL COURTS ARE SHARPLY DIVIDED OVER WHETHER TRANSLATORS OF A WRITTEN DOCUMENT ARE "INTERPRETERS" AS THAT WORD IS USED IN 28 U.S.C § 1920(6)

There is a clear split in the courts of appeals on the question whether the term "interpreters" in 28 U.S.C. § 1920(6) encompasses document translators. While the Ninth Circuit's decision in this case joins six other circuits in finding the statute to reach translators of documents, the Seventh Circuit has reached a contrary conclusion in a carefully reasoned opinion by Judge Posner, which forcefully demonstrates that the majority view is incorrect. Moreover, the significance of this circuit split is exacerbated by a deep and persistent division in the district courts, whose rulings on this issue are frequently not appealed.

1. In *Extra Equipamentos*, 541 F.3d 719, the Seventh Circuit reasoned that the statute authorizes taxation of "compensation of interpreters," and "[a]n interpreter as normally understood is a person who translates living speech from one language to another." *Id.* at 727. Conversely, "the translator of a document is not referred to as an interpreter." *Id.* (citing *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 508-09 (1926)). The court explained that the dictionary definition of "interpreter" ordinarily applies to those who translate spoken language. *See id.* And in natural speech, "[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." *Id.* at 728.

The court also underscored the serious dangers of stretching section 1920 beyond its plain meaning, because "while 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." *Id.* In addition, the court noted that "[t]o include translation fees would simply complicate the process of awarding court costs." *Id.* "Was all that translation of written documents necessary? We do not think a district judge should be required to wade into such issues without a clearer directive from Congress." *Id.*

The Seventh Circuit reached this decision "mindful that the Sixth Circuit in *BDT Products, Inc. v. Lexmark Int'l, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005), [had] held that the statute allows the award of costs for translating documents." *Extra Equipamentos*, 541 F.3d at 728. Because this decision would "create[] a conflict with another circuit, [the panel] circulated the opinion . . . to the entire court," and "[n]o judge voted to hear the case en banc." *Id.*

2. The Sixth Circuit panel which had reached the opposite conclusion in *BDT Products*, reasoned that one dictionary definition of "interpret" is "to 'translate into intelligible or familiar language,'" with no reference or limitation as to the mode of communication. 405 F.3d at 419. The court also noted that there is some "case law holding that translation costs are taxable under § 1920." *Id.* (citing *Quy v. Air Am., Inc.*, 667 F.2d 1059, 1065-66

(D.C. Cir. 1981), and *Oetiker v. Jurid Werke, GmbH*, 104 F.R.D. 389, 393 (D.D.C. 1982)).

In addition to the Sixth Circuit, the First, Fifth, Eighth, D.C., and Federal Circuits have similarly held, albeit without significant analysis, that a federal court may tax translation costs under section 1920(6). *See Slagenweit v. Slagenweit*, 63 F.3d 719, 721 (8th Cir. 1995) (per curiam) (affirming award of translation costs where the appellant "ha[d] failed to demonstrate that costs for the translated documents were unnecessarily incurred"); *Chore-Time Equip., Inc. v. Cumberland Corp.*, 713 F.2d 774, 782 (Fed. Cir. 1983) ("The award of costs for translation of a German patent . . . was appropriate under 28 U.S.C. § 1920(6)."); *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 713 F.2d 128, 133 (5th Cir. 1983) (affirming award of translation expenses as taxable costs); *In re Puerto Rico Elec. Power Auth.*, 687 F.2d 501, 510 (1st Cir. 1982) ("Whichever party ultimately prevails will at the conclusion of the case be free to apply to district court for reimbursement of its translation expenses as 'costs' . . . ."); *Quy*, 667 F.2d at 1065 (holding that under § 1920(6), "the District Court was authorized to award costs for the Vietnamese-to-English translations of plaintiffs' depositions introduced at trial").

3. In *Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471 (10th Cir. 1997), the Tenth Circuit indicated skepticism that section 1920(6) permits document translation costs by its citation of *Viacao Aerea Sao Paulo, S.A. v. Int'l Lease Fin. Corp.*, 119 F.R.D. 435, 440 (C.D. Cal. 1988), which held that the word "interpreter" includes only those who translate

spoken language. *See* 115 F.3d at 1479. The Tenth Circuit declined to decide the issue, however, because it had not been adequately preserved. *See id.*

4. The disuniformity in the federal courts is substantially more pronounced than might be indicated by a circuit split of 6-1, because the issue arises frequently, is rarely appealed in the great majority of routine cases where relatively small amounts are at stake, and thus is one on which the district courts are sharply at odds in the circuits which have yet to resolve the issue.

Thirty three years after enactment of this statute, there are still five circuits—the Second, Third, Fourth, Tenth and Eleventh—where no binding circuit authority has yet been developed.

In these latter circuits, "some courts . . . have followed the Seventh Circuit and disallowed translation costs, [and] others have allowed such costs," *Delaware Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC*, No. 07-20199, 2009 WL 5127941, at *5 (S.D. Fla. Nov. 6, 2009), resulting in a real problem of unequal justice from the application of differential rules.[3] The "split in the authority [that]

[3] This problem is readily apparent from a review of district court decisions from the undecided circuits over just the last five years: *Compare* cases denying awards of translation costs: *Delaware Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC*, 2009 WL 5127937, at *1 (S.D. Fla. Dec. 17, 2009); *Galvez v. Cuevas*, No. 08-80378, 2009 WL 1024632, at *6 (S.D. Fla. Apr. 15, 2009); *Tesler v. Costa Crociere S.p.A.*, No. 08-60323, 2009 WL 1851091, at *2 (S.D. Fla. June 29, 2009); *Ricoh Corp. v. Pitney Bowes, Inc.*, No. 02-5639, 2007 WL 1852553, at *2-3 (D.N.J. June 26, 2007) *with* cases allowing awards of translation costs: *Castillo v. Teledyne Cont'l Motors, Inc.*, No. 08-21850, 2011 WL 1343051, at *5 & n.16 (S.D. Fla. Mar. 16, 2011); *Osorio v. Dole Food Co.*, No. 07-22693, 2010 WL 3212065, at *10 (S.D. Fla.

exists among the circuits that have ruled on the matter," *Osorio v. Dole Food Co.*, No. 07-22693, 2010 WL 3212065, at *9 (S.D. Fla. July 7, 2010), is thus mirrored in the larger numbers of divergent cases where the trial court has the last word.

II. THIS CIRCUIT SPLIT INVOLVES AN ISSUE OF EXCEPTIONAL IMPORTANCE THAT WARRANTS REVIEW BY THIS COURT

The Court's guidance is urgently needed to resolve the question for several reasons.

1. Not surprisingly, given the multicultural and multi-lingual nature of our society, the need for interpretation and translation services is a rapidly expanding one. Thus, the district courts around the country are required to address it with great frequency.[4]

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July 7, 2010); *Chacon v. El Milagro Care Ctr., Inc.*, No. 07-22835, 2010 WL 3023833, at *8 (S.D. Fla. July 29, 2010); *Merck Sharp & Dohme Pharms., SRL v. Teva Pharms. USA, Inc.*, No. 07-1596, 2010 WL 1381413, at *6 (D.N.J. Mar. 31, 2010); *Ortho-McNeil Pharm., Inc. v. Mylan Labs., Inc.*, No. 1:02CV32, 2008 WL 7384877, at *9-12 (N.D.W. Va. Aug. 18, 2008), *aff'd in part, vacated in part*, 569 F.3d 1353 (Fed. Cir. 2009); *Porcelanas Florencia, S.A. v. Caribbean Resort Suppliers, Inc.*, No. 06-22139, 2009 WL 1456338, at *8 (S.D. Fla. May 22, 2009); *S.R. Galves Participacao, Importacao & Exporticau Ltda. v. Natural Source Int'l Ltd.*, No. 06 Civ. 10182, 2007 WL 1484465, at *2 (S.D.N.Y. May 21, 2007).

[4] A representative sample of the large number of district court cases since 2000 confronting the issue of document translation costs include: *Castillo*, 2011 WL 1343051, at *5 & n.16; *Osorio*, 2010 WL 3212065, at *10; *Gabriel Techs. Corp. v. Qualcomm, Inc.*, No. 08CV1992, 2010 WL 3718848, at *12 (S.D. Cal. Sept. 20, 2010); *Chacon*, 2010 WL 3023833, at *8; *Maker's Mark*

The ongoing disunity in the federal courts on this costs issue is particularly problematic because it frustrates the primary purpose of the Congress in enacting the federal costs statute, which was to eliminate variability in the treatment of costs in

(continued…)

Distillery, Inc. v. Diageo N. Am., Inc., No. 3:03-CV-93-H, 2010 WL 2651186, at *3 (W.D. Ky. June 30, 2010); *Conn v. Zakharov*, No. 1:09 CV 0760, 2010 WL 2293133, at *3 (N.D. Ohio June 4, 2010); *Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, No. C06-3359JF, 2010 WL 1691869, at *7 (N.D. Cal. Apr. 23, 2010); *Hynix Semiconductor Inc. v. Rambus Inc.*, 697 F. Supp. 2d 1139, 1150 (N.D. Cal. 2010); *Merck Sharp*, 2010 WL 1381413, at *6; *Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, 750 F. Supp. 2d 962, 982-83 (N.D. Ill. 2010); *Delaware Valley Floral*, 2009 WL 5127937, at *1; *Horizon Hobby, Inc. v. Ripmax Ltd.*, No. 07-CV-2133, 2009 WL 3381163, at *6 (C.D. Ill. Oct. 15, 2009); *Porcelanas Florencia*, 2009 WL 1456338, at *8; *Galvez*, 2009 WL 1024632, at *6; *Tesler*, 2009 WL 1851091, at *2; *Gidding v. Anderson*, No. C07-04755, 2008 WL 5068524, at *1 (N.D. Cal. Nov. 24, 2008); *Ortho-McNeil*, 2008 WL 7384877, at *9-12; *Ricoh*, 2007 WL 1852553, at *2-3; *S.R. Galves*, 2007 WL 1484465, at *2; *Competitive Techs. v. Fujitsu, Ltd.*, No. C-02-1673, 2006 WL 6338914 (N.D. Cal. Aug. 23, 2006); *Zayas v. Puerto Rico*, 451 F. Supp. 2d 310, 318 (D.P.R. 2006); *Tharo Systems, Inc. v. Cab Produkttechnik*, No. 1:03CV0419, 2005 WL 1123595, at *2 (N.D. Ohio 2005); *Dattner v. Conagra Foods, Inc.*, No. 01 Civ. 11297, 2005 WL 1963937, at *2-3 (S.D.N.Y. Aug. 16, 2005); *Aerotech Res., Inc. v. Dodson Aviation, Inc.*, 237 F.R.D. 659, 665 (D. Kan. 2005); *V-Formation, Inc. v. Benetton Grp. SpA*, No. 01 Civ. 610, 2003 WL 21403326, at *3 (S.D.N.Y. June 17, 2003); *Shimek v. Michael Weinig AG,* No. Civ. 99-2015, 2003 WL 328038 (D. Minn. Feb. 10, 2003); *Arboireau v. Adidas Salomon AG*, No. CV-01-105-ST, 2002 WL 31466564, at *6 (D.Or. June 14, 2002); *Shared Medical Sys. v. Ashford Presbytarian Cmty. Hosp.*, 212 F.R.D. 50, 55 (D.P.R. 2002); *Neles-Jamesbury, Inc. v. Fisher Controls Int'l, Inc.*, 140 F. Supp. 2d 104, 107 (D. Mass. 2001); *Pan Am. Grain Mfg. Co. v. Puerto Rico Ports Authority*, 193 F.R.D. 26, 38 (D.P.R. 2000).

federal litigation, and to achieve nationwide federal uniformity on costs issues. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 251 (discussing congressional purpose "to standardize the costs allowable in federal litigation"). This principle of uniformity has been the central governing principle of the congressional costs regime since the nineteenth century. *See Crawford Fitting Co.*, 482 U.S. at 440 ("The sweeping reforms of the 1853 Act have been carried forward to today, without any apparent intent to change the controlling rules." (internal quotation marks omitted)); *Alyeska Pipeline Serv. Co.*, 421 U.S. at 251-62. The ongoing, widespread divergence of the federal courts' treatment of translation costs thus thwarts the core purpose of the statute.

The deep divergence in the federal courts over the interpretation of section 1920(6) is most objectionable in those periodic cases in which translation gives rise to astronomical costs awards. In *Ortho-McNeil Pharmaceuticals, Inc. v. Mylan Laboratories, Inc.*, for example, the Federal Circuit affirmed the district court's award of more than $1 million in document translation costs. 569 F.3d 1353, 1356 (Fed. Cir. 2009).

The expense of translation in *Ortho-McNeil*, while not the rule, was not an isolated anomaly. In certain cases, "[t]ranslators may charge exorbitant amounts for their services," Charles F. Hollis, III, *Perpetual Mistrial: The Impropriety of Transnational Human Rights Litigation in United States Courts*, 1 Santa Clara J. Int'l L. 1 n.92 (2003), and the costs of translation can impose an "immense burden" on the parties in litigation. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 608 (D.C. Cir.

1983); *see also, e.g.*, *Dahl v. United Techs. Corp.*, 632 F.2d 1027, 1031 (3d Cir. 1980) (noting that "[t]he major practical problem in this case is the translation of documents"); *In re Top Tankers Inc., Secs. Litig.*, No. 06 Civ. 13761, 2008 WL 2944620, at *6 (S.D.N.Y. July 31, 2008) (noting, in approving a settlement, that "[t]he cost of litigating this case would have been exorbitant—the translation costs alone would have approximated the settlement amount" of $1,200,000); David P. Warner, *Bringing White Collar Criminals to Justice*, 11 U.S. Mex. L.J. 171, 176 & n.42 (2003) (noting that "scores of documents, particularly financial statements, can generate exorbitant translation fees").

The Seventh Circuit noted this danger in *Extra Equipamentos*, observing that "[a] suit of the magnitude of Extra's suit . . . can generate millions of pages of documents" whose translation would be extraordinarily costly. 541 F.3d at 728. And because an overriding purpose of the costs statute is to eliminate the danger of "oppressive" and "disproportionate" costs awards, Cong. Globe, 32d Cong., 2d Sess. app. 207 (remarks of Sen. Bradbury), the disparate application of section 1920(6) will, if left unreviewed, undermine the purposes animating the statute in this respect as well.

2. The question whether costs may be imposed for translating documents also implicates important issues of international relations and foreign comity that have been the subject of ongoing and vigorous concern in the international community. "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 subjecting their citizens to the expense and burden of complying with expansive U.S. document 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, *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 526 n.6 (1987)).

In the face of such international disagreement, this Court has emphasized that "the demands of comity" require that "American courts should . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." *Societe Nationale*, 482 U.S. at 546. In particular, this Court counseled "special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position," and instructed that United States courts "should always seek to minimize [the] costs and inconvenience" associated with such discovery. *Id.*

The Ninth Circuit's allowance of document translation expenses as costs threatens further to magnify the already extensive discovery expenses of foreign nationals that trigger such "special vigilance." *Id.* Under the costs rule endorsed by the Ninth Circuit and the other circuits it joined, foreign

litigants involved in litigation in United States courts would not only be subjected to extensive U.S. discovery obligations, but could then be liable for potentially exorbitant costs associated with translating the numerous foreign-language documents that are involved—many of which are those they had been required to produce in the first place. Such large additional expenses are precisely the sort of "burdensome" obligation requiring "due respect" for the interest of foreign sovereigns who have objected to having their nationals subjected to expansive and costly U.S. discovery obligations.

III. THE DECISION BELOW IS WRONG ON THE MERITS

A. The Text and Structure of Section 1920(6) Foreclose Application to Document Translators

1. Section 1920(6) provides that a court may tax costs, including "compensation for interpreters." An "interpreter" is "one who translates orally for parties conversing in different languages." Webster's Collegiate Dictionary 11th ed. (2003). This limitation to spoken communication is no mere definitional subtlety; it goes to the heart of the word's ordinary meaning. "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." *Extra Equipamentos*, 541 F.3d at 727.

The other provisions of the Court Interpreters Act, which created section 1920(6), make clear that the textual limitation to "interpreters" comports with the congressional purpose. The Congress enacted this provision as a small part of legislation focused on

providing in-court interpretation services. *See* 28 U.S.C. §§ 1827, 1828. This cost-shifting provision addressed the same subject and thus did not encompass compensation for document translation. It would be particularly unwarranted to adopt an expansive, atextual reading of section 1920(6) as encompassing document translators when document translation plainly had no role in the substantive provisions of the statute for which subsection (6) was created as a costs analogue.

This meaning is further confirmed by the separate occurrence of another cognate of the word "interpreter" within section 1920(6). In addition to listing "compensation of interpreters," section 1920(6) enumerates "special interpretation services under section 1828 of this title." Yet there can be no question that the "special interpretation services" in question are limited to the translation of spoken proceedings. Section 1828 makes this unmistakably clear, as it expressly provides for "*simultaneous* interpretation services in multidefendant criminal actions and multidefendant civil actions." 28 U.S.C. § 1828(a) (emphasis added). Because section 1920(6) includes a second use of "interpretation" that is unambiguously limited to spoken proceedings, Congress's use of the same term in the same section presumptively 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)). 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)

2. The restriction of "interpreters" to those who translate spoken language is also part of a broader congressional convention applied throughout the United States Code. Throughout the Code, the Congress has drawn distinctions between "interpreters" and "translators," and has used both terms together where it chooses to include both spoken and written translation. Such consistent patterns of congressional usage are particularly strong evidence of meaning. *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 of a term, that meaning is presumptively applicable); *W. Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88-92 (1991) (consistent "statutory usage shows beyond question" the meaning of a statutory term).

For example, several provisions of the United States Code explain that "interpreters" are understood to serve the function of "mak[ing] aurally delivered materials available to individuals with hearing impairments." 26 U.S.C. § 44(c)(2)(B); 42 U.S.C. § 12103 (defining "auxiliary aids and service" to include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments"). This definition obviously excludes document translation, which does not involve "aurally delivered" content and has nothing to do with assisting the "hearing impair[ed]."

Further, Congress routinely includes an affirmative reference to "translators" where it legislates regarding the translation of written documents, a formulation that would be surplusage if "interpreters" alone included the translation of written materials. *See, e.g.*, 8 U.S.C. § 1555(b) (specifying that INS appropriations "shall be available for payment of . . . interpreters or translators who are not citizens of the United States"); 28 U.S.C. § 530C(b)(1)(I) (providing that funds may be used for the "[p]ayment of interpreters or translators who are not citizens of the United States"); 42 U.S.C. § 2991b-3 (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"). The Ninth Circuit's construction of "interpreters" as encompassing "translators" collapses this consistent congressional distinction.

B. The Legislative History Confirms The Limitation to Spoken Interpretation

The text and structure of the statute leave no doubt that the term "interpreters" means only those who engage in the interpretation of spoken proceedings. Were the Court nonetheless to consider the legislative history relevant, it reinforces this conclusion.

In 1977, the legislation that would become the Court Interpreters Act was introduced "to provide more effectively for bilingual proceedings in all district courts of the United States." 123 Cong. Rec. S37213 (Nov. 4, 1977). The House and Senate both passed the Senate version of the Act in October 1978.

During the legislative process, the House Judiciary Committee compiled a detailed report on the Act. That report states that the legislation meant to authorize the appointment of an "interpreter" in some circumstances when an individual "speaks" a language other than English or "suffers from a hearing impairment." H.R. Rep. No. 95-1687. The congressional understanding that the statute would involve only the interpretation of spoken proceedings is further confirmed by the fact that the legislators expressed concern for accommodating the hearing impaired through interpretation services, but not the visually impaired, through, *e.g.*, provision for Braille rendition of documents. This disparity between the hearing impaired and the vision impaired makes perfect sense if the Congress understood the statute to apply to spoken proceedings (which the blind can hear and understand) but not to written documents.

In addition, the House Report specifies that "[i]t is the committee's intent that all interpretations are to be made in the consecutive mode," which refers to "the speaker whose communication is being translated" pausing "to allow the interpreter to convey the testimony given." *Id.* The other two modes of interpretation discussed in the report—"simultaneous" and "summary"—require the interpreter, respectively, to either "speak contemporaneously" with the translated speech or to "condense and distill the speech" of the speaker. All of these three methods exclusively involve the live translation of vocalized speech. By contrast, there is no hint in the legislative history that the use of the word "interpreters" in section 1920(6) would have a different meaning than in the substantive provisions of the statute.

Accordingly, the legislative history amply confirms what is already clear from the plain meaning of the statutory text: Section 1920(6) has no application to the translation of written documents.

C. Any Ambiguity Should Be Resolved Against Extending The Term "Interpreters" To Include One Who Translates Written Documents

Were there any ambiguity on the issue of the provision's applicability to document translation—and petitioner submits that there is none—it would necessarily be resolved against such inclusion. This is so for three reasons.

First, the Ninth Circuit's reading expansively construes a waiver of sovereign immunity. Section 2412(a)(1) of 28 U.S.C. provides that, as a general matter, "costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action." Thus, if document-translation costs are allowed under section 1920, they may be assessed against the government. *See, e.g.*, *Flores-Torres v. Holder*, Nos. C08-01037, C09-03569, 2010 WL 1910011, at *2-3 (N.D. Cal. May 11, 2010) (awarding document translation costs against the United States). Such cost-shifting, like fee-shifting, "amounts to a partial waiver of sovereign immunity" and "must be strictly construed in favor of the United States." *Ardestani v. I.N.S.*, 502 U.S. 129, 137 (1991).

Second, the Ninth Circuit's reading is disfavored because it expansively construes a statute in derogation of the common law. The "American Rule" requiring that each party in a civil action bear its own costs and fees finds its roots in the common law. "[C]osts were not allowed" at common law. *Alyeska Pipeline*, 421 U.S. at 247. As such, cost and fee-shifting statutes are in derogation of the common law and must be narrowly construed. *See, e.g.*, *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35 (1983) ("It is a well-established principle of statutory construction that the common law ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose." (internal quotation marks, brackets, and ellipsis omitted)); *Lockett v. Hellenic Sea Transports, Ltd.*, 60 F.R.D. 469, 473 (E.D. Pa. 1973) (construing section 1920 narrowly as a statute in derogation of the common law).

Third, as shown above, *see supra* at 15-17, the Ninth Circuit's expansive reading of section 1920(6) raises significant issues of international comity that should be avoided in the event of statutory ambiguity. "[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). "This rule of construction reflects principles of customary international law — law that (we must assume) Congress ordinarily seeks to follow." *Id.* For the reasons shown above, construing section 1920(6) to authorize costs awards of document translation expenses would substantially aggravate longstanding concerns over the burden and scope of United States

discovery obligations in transnational litigation. As such, that interpretation should be avoided in the event of ambiguity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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