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IN THE SUPREME COURT OF THE UNITED STATES

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KOICHI TANIGUCHI, :  
Petitioner : No. 10-1472  
v. :  
KAN PACIFIC SAIPAN, LTD. :

- - - - - x

Washington, D.C.  
Tuesday, February 21, 2012

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 11:14 a.m.

APPEARANCES:

MICHAEL S. FRIED, ESQ., Washington, D.C.; for  
Petitioner.  
DAN HIMMELFARB, ESQ., Washington, D.C.; for Respondent.

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P R O C E E D I N G S

(11:14 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 10-1472, Kouichi Taniguchi v. Kan Pacific Saipan, Limited.

Mr. Fried.

ORAL ARGUMENT OF MICHAEL S. FRIED

ON BEHALF OF THE PETITIONER

MR. FRIED: Mr. Chief Justice, and may it please the Court:

Our brief lists six categories of authorities demonstrating that the work of an interpreter under 28 U.S.C. section 1920(6) is limited to spoken communication. Primary among these is the Court Interpreters Act itself, whose central provisions afford simultaneous or consecutive spoken interpreter services. When the --

JUSTICE SOTOMAYOR: Could I make sure that I understand the extent of your argument? Are you saying that it's interpretation, oral interpretation, just in the courtroom?

MR. FRIED: Well, Your -- Justice Sotomayor, I think that it's a -- that there is a textual ambiguity in the statute about the extent of covered spoken interpreter services. One could argue it either way,

1 and we don't -- I am happy to proceed under either  
2 assumption. But what's clear is that, however far it  
3 extends within the area of spoken interpretation,  
4 document translation is --

5 JUSTICE SOTOMAYOR: I -- I have to say that  
6 if you read it the way you do, then what you're  
7 suggesting is that for appointed experts, they only get  
8 recompensed for the time they're testifying, because  
9 that's the only time they spend in court.

10 MR. FRIED: Court-appointed experts, Your  
11 Honor?

12 JUSTICE SOTOMAYOR: Yes.

13 MR. FRIED: I think the -- the legislative  
14 history of that seems to indicate that that provision  
15 was actually inserted into 1920(6) for a separate  
16 housekeeping reason, because it paralleled Rule 706 of  
17 the Federal Rules of Evidence, which was a pre-existing  
18 rule addressing court-appointed experts, and simply put  
19 it into the enumeration.

20 JUSTICE SOTOMAYOR: But court experts get  
21 a -- get paid for their prep work.

22 MR. FRIED: Yes, Your Honor. I -- I think  
23 that -- that that may well be the case. But I -- I  
24 think that the --

25 JUSTICE SOTOMAYOR: Could I -- one further

1 question.

2 MR. FRIED: Of course.

3 JUSTICE SOTOMAYOR: I take all your  
4 arguments, but I read the common dictionary and there's  
5 no question that the primary meaning of "interpreter" is  
6 interpretation of oral languages. But the dictionary is  
7 broad enough to include translation work as well.

8 Given that the courts for 70 years have been  
9 awarding -- most of the them except for I think the  
10 Seventh here. Virtually every court over a 70-year  
11 period has been awarding translation fees as -- as  
12 authorized. Why shouldn't that be enough for us?

13 MR. FRIED: Well, I --

14 JUSTICE SOTOMAYOR: Meaning, if the  
15 dictionary term is broad enough and that's what the  
16 courts have been doing and the world hasn't crashed  
17 despite one case where a large amount was given -- your  
18 adversary points to the fact that most of the  
19 translation fees tend to be fairly reasonable. Why  
20 should we muck with what works?

21 MR. FRIED: Well, Your Honor, I think  
22 that --

23 JUSTICE SOTOMAYOR: I think I'm drawing --  
24 I'm drawing from ways that my colleague next to me  
25 usually asks a question.

1 (Laughter.)

2 MR. FRIED: Your Honor, I think that the  
3 primary reason why the Court should -- should not adopt  
4 that is because it's -- it's inconsistent with the text.

5 JUSTICE SCALIA: It's wrong is your answer,  
6 right?

7 MR. FRIED: Yes, Your Honor.

8 (Laughter.)

9 MR. FRIED: And -- and it's also worth  
10 noting that the courts -- none of the courts of appeals  
11 who have adopted this construction of 1920(6) have  
12 considered or addressed our primary arguments in this  
13 case. They haven't addressed the -- the uniform  
14 professional literature addressing this -- this topic,  
15 the dictionaries in their aggregate, the Administrative  
16 Office's interpretation of this statute, the consistent  
17 congressional distinction between written translation  
18 and spoken -- spoken interpretation that runs throughout  
19 the code. And --

20 JUSTICE KAGAN: So, just out of curiosity,  
21 why do you think that all these courts just took for  
22 granted the opposite reading?

23 MR. FRIED: Well, Your Honor, I'm -- I'm not  
24 sure that I have a -- a good answer to that. I --  
25 perhaps that they weren't presented with some of

1 these -- these arguments and didn't have the opportunity  
2 to consider them.

3 JUSTICE SCALIA: Perhaps it was  
4 Dr. Johnson's answer when a lady pointed out an error in  
5 his dictionary, and his answer was: "Stupidity, madam,  
6 sheer stupidity."

7 (Laughter.)

8 MR. FRIED: I think -- I think, Your Honor,  
9 that -- that Kan Pacific disputes very little of -- of  
10 our central argument. Their discussion of --

11 JUSTICE BREYER: There are -- there are lots  
12 of regions of the country -- Puerto Rico, for example --  
13 where there are vast numbers of documents that have to  
14 be translated if you go into Federal court, not  
15 necessarily in the Commonwealth courts. That's  
16 expensive to people. And they might have thought for a  
17 long time, while that expense won't go away, it's at  
18 least better to have it paid by the loser than to have  
19 it paid by the winner.

20 That's been the common practice. I don't  
21 think that's a foolish approach. And you can find  
22 language in this, which is to go back -- go back to  
23 Justice Sotomayor.

24 MR. FRIED: Well, Your Honor, I think  
25 that -- again, the best reason to reject that view is

1 because it doesn't make a coherent whole of the statute.  
2 These provisions operate together in a uniform set of --  
3 as a uniform set of policies for addressing a common  
4 subject.

5           And the way they -- these provisions  
6 interact in broad strokes that make perfect sense on our  
7 reading is that in the -- in the primary class of cases  
8 that motivated the passage of this statute, namely cases  
9 brought by the government where there were significant  
10 constitutional Confrontation Clause concerns about  
11 criminal defendants not understanding the spoken  
12 proceedings, in those core class of cases the Congress  
13 elected to pay for spoken interpreter services directly  
14 in the first instance.

15           Now, in the non-core class of cases, private  
16 civil litigation, the Congress elected not to pay for  
17 these services but in 1920(6) to facilitate them in the  
18 lesser manner of providing that a party that incurred  
19 these expenses could recover them at the end of the  
20 case if it wins.

21           JUSTICE BREYER: What do you think of the --  
22 I mean, the First Circuit went into this, which deals a  
23 lot with Puerto Rico, and it felt that this fell within  
24 the idea of fees for exemplification, which is  
25 certifying a document. And, in fact, to certify a



1 document that comes into the Federal court in San Juan,  
2 you have to have it translated very often. And so, the  
3 translation cost is at least consistent with the idea  
4 there of trying to -- well, you may -- you don't have  
5 to -- you may impose the cost on the loser.

6 MR. FRIED: Well, Justice Breyer, there was  
7 actually a specific provision in this bill -- in a prior  
8 version of this bill that addressed the context of  
9 Puerto Rico. And the significance of that provision is  
10 that when the Congress was addressing written  
11 translation, which was part of the -- part of that  
12 provision, it specifically used the word "translation"  
13 to refer to that.

14 And this just, again, confirms that the --  
15 that the usual congressional practice of differentiating  
16 between these terms in -- in statutes generally was  
17 fully applicable here, that the Congress knew the  
18 difference between these terms, used them appropriately.  
19 And the fact that having removed that -- that provision  
20 from the statute, the statute as passed contains only  
21 the words "interpreter" and "interpretation," and no  
22 forms of "translate," just again reaffirms that -- that  
23 the ordinary meaning of these terms should apply.  
24 And --

25 JUSTICE GINSBURG: What of the document

1 that's -- that's read out in open court and it's a  
2 document, a contract, in another language, and the  
3 interpreter -- the witness presents the document, and  
4 the interpreter interprets it?

5 MR. FRIED: Your Honor, the professional  
6 literature addresses this as sight interpretation or  
7 sight translation, and it's uniformly recognized to be a  
8 species of interpretation. It occurs -- the -- the  
9 interpreter speaks aloud in the presence of the audience  
10 being communicated to in the course of a spoken  
11 proceeding.

12 JUSTICE GINSBURG: Well, what if the -- if  
13 the interpreter, being diligent, said I'm going to  
14 have to translate this document in open court, I'd like  
15 to have it in advance so I can be sure that my  
16 translation is going to be accurate? So that in fact  
17 the interpreter looks at the document and, in -- in  
18 preparation for the trial, translates it.

19 MR. FRIED: Well, Your Honor, I think that  
20 the -- the preparatory work that occurred outside of  
21 court would not be compensable interpretation work. But  
22 when the -- when the interpreter returned to court and  
23 gave the oral interpretation of that document, that  
24 would constitute interpretation. But --

25 CHIEF JUSTICE ROBERTS: Well, that -- but

1 she's not interpreting it. She's already got the thing  
2 in whatever language they're -- English, I guess. But,  
3 I mean, she's not interpreting; she's reading the  
4 English translation.

5 MR. FRIED: That's true, Mr. Chief Justice,  
6 but the key reason why that would constitute  
7 interpretation is because the -- the interpreter is  
8 speaking aloud, communicating in the course of a spoken  
9 conversation to an audience who -- who doesn't speak  
10 English or who --

11 CHIEF JUSTICE ROBERTS: Oh, I misunderstood  
12 the hypothetical, then. I'm sorry.

13 MR. FRIED: Well, perhaps I did, Your Honor.  
14 I apologize.

15 CHIEF JUSTICE ROBERTS: I thought it was a  
16 situation where you've got a -- a document in -- in,  
17 say, French and the person translates it or interprets  
18 it -- I don't want to prejudge the issue -- and -- and  
19 then -- in English and then the person reads the English  
20 thing in -- in court. That's not interpretation at any  
21 point, is it?

22 MR. FRIED: Well, Your Honor, I think that  
23 the literature does typically class the in-court oral  
24 communication of its content as a form of  
25 interpretation. But any ambiguity on this point

1 really -- really doesn't -- doesn't affect anything in  
2 practice. I mean, any sight interpretation occurs as a  
3 brief interval in a larger proceeding.

4 JUSTICE KENNEDY: Well, is it true that as a  
5 matter of common usage, when we are talking about oral  
6 testimony in court, we often use "interpretation" and  
7 "translation" or "interpreter" and "translator" somewhat  
8 interchangeably, but when we're talking about rendering  
9 a document into -- into a different language, we  
10 generally talk about that as "translation"? This is a  
11 matter of common usage. Do you think that's correct?

12 MR. FRIED: If I understand Your Honor  
13 correctly, yes. I think that the ordinary meaning of  
14 "translate" applies to the context of -- of the  
15 communication of information in written documents. And  
16 it's discrete from "interpretation," which -- which is  
17 limited to the spoken --

18 JUSTICE SCALIA: Well, you didn't understand  
19 the question.

20 JUSTICE KENNEDY: That wasn't quite my  
21 point.

22 MR. FRIED: I'm sorry.

23 JUSTICE KENNEDY: My point was that I think  
24 we say -- in fact, in a Supreme Court case, we've said  
25 in the Hernandez case, when we're talking about oral

1 testimony in court, we tend to use "translator" or  
2 "translate" and "interpreter" or "interpret" somewhat  
3 interchangeably. Is that correct?

4 MR. FRIED: Oh, I apologize, Your Honor.  
5 Yes, there -- you can use the word "translate"  
6 generically. There's no question. Frequently in court,  
7 and I think out of court as well, that some people can  
8 use the word "translate" in a manner that doesn't  
9 differentiate between modes. Our point is that that --  
10 that double meaning doesn't apply to "interpreter,"  
11 which has a single narrow meaning limited to spoken  
12 communication.

13 And Kan Pacific's discussion of the  
14 dictionaries is limited to a single dictionary,  
15 Webster's Third. The majority of dictionaries  
16 categorically exclude document translation from the  
17 scope of --

18 JUSTICE SCALIA: Webster's Third, as I  
19 recall, is the dictionary that defines "imply" to mean  
20 "infer" --

21 MR. FRIED: It does, Your Honor.

22 JUSTICE SCALIA: -- and "infer" to mean  
23 "imply."

24 It's not a very good dictionary.

25 (Laughter.)

1           MR. FRIED: Well, the Court in the MCI -- in  
2 the MCI v. AT&T case did indicate that.

3           But in any event, the -- on its terms, that  
4 definition supports our reading over Kan Pacific's  
5 because it does indicate, even as to that dictionary  
6 definition, that the -- that the most common meaning of  
7 the term is the meaning referring to spoken  
8 communication. And this Court frequently looks to the  
9 most common meaning for purposes of statutory  
10 interpretation, as it did in Mallard in construing the  
11 word "request," and in Ramsey in construing the word  
12 "envelope."

13           JUSTICE SOTOMAYOR: Could we get back to the  
14 issue? In the legislative history of this provision, is  
15 there any indication that Congress explicitly rejected  
16 translation work from its coverage?

17           MR. FRIED: Well, I can talk -- there's a --  
18 the text does. I mean, the text --

19           JUSTICE SOTOMAYOR: Outside of the text. Is  
20 there a statement by one of the sponsors in the  
21 congressional bill or the study --

22           MR. FRIED: I'm not -- I'm sorry.

23           I'm not sure that there's an explicit  
24 statement that I'm aware of in the legislative history.  
25 There's a lot of provisions in the legislative history

1 which plainly presuppose that. And the Congress  
2 received professional literature from -- documents from  
3 the American Association of Language Specialists.

4 JUSTICE SOTOMAYOR: Those are the other  
5 provisions that they passed with respect to --

6 MR. FRIED: Well, specifically with respect  
7 to costs, the Congress -- the House Report alludes to  
8 Rule 43(f), which is now 43(d), as a relevant  
9 pre-existing rule. And, of course, it's undisputed that  
10 Rule 43(d)'s cost provision is -- is limited to spoken  
11 communication of interpreters. So, there is that in the  
12 history as well.

13 But I think that there's no doubt that in  
14 the -- under the text of the statute, subsection (k),  
15 the modes subsection, which appears at page 5a of the  
16 red brief appendix, as it was initially passed,  
17 expressly says that the interpretation under -- under  
18 this section must be done using methods that all  
19 agree are limited to spoken communication.

20 Now, in the --

21 JUSTICE SOTOMAYOR: So, if a lawyer sits  
22 down with an interpreter now in his office and says to  
23 the interpreter I can't pay for translation work; now,  
24 you sit here and interpret what this letter says for me  
25 -- is that what we're asking lawyers to do now?

1 MR. FRIED: Not at all, Your Honor.

2 JUSTICE SOTOMAYOR: If we accept your  
3 reading?

4 MR. FRIED: No, Your Honor. That would not  
5 constitute interpreting, because it would not -- the  
6 interpreter would not be communicating between live  
7 parties in the context of a real-time proceeding.

8 JUSTICE SOTOMAYOR: But you would say that  
9 might be different in the courtroom.

10 MR. FRIED: Well --

11 JUSTICE SOTOMAYOR: Because the lawyer is  
12 communicating something live. It could be in the  
13 courtroom, but not outside.

14 MR. FRIED: That -- that's correct, Your  
15 Honor.

16 JUSTICE SOTOMAYOR: Is there something  
17 logical about this?

18 MR. FRIED: Yes, Your Honor, because in the  
19 courtroom, in the context of a live spoken proceeding,  
20 that satisfies all of the ordinary definitional elements  
21 of interpreting. But that's not the case in somebody's  
22 office in the presence of a single party and a written  
23 document.

24 And -- and there's no question, Your Honor,  
25 that to the extent there's any ambiguity with respect to



1 unusual examples, this is a distinction that's  
2 absolutely clear in the vast majority of real-world  
3 incidents.

4 JUSTICE GINSBURG: What about depositions?  
5 The -- the translation would be of the spoken word, but  
6 it wouldn't be in court.

7 MR. FRIED: Well, I do think there -- one  
8 could potentially argue that spoken interpretation at a  
9 deposition isn't covered in light of some of the  
10 dictionaries like Black's Law Dictionary, which -- which  
11 indicates that the word is restricted to people who work  
12 in trial. But I certainly think that it could be argued  
13 either way, in a case where --

14 JUSTICE KENNEDY: Well, what's -- what's  
15 your position? I -- I take a deposition at -- in my law  
16 office and I have to have an interpreter there. Is that  
17 recoverable or not?

18 MR. FRIED: I'm not sure we have a  
19 definitive -- I mean, I think you could argue it either  
20 way, Your Honor. It doesn't affect our case.

21 JUSTICE KENNEDY: Well, how do you think it  
22 affects the way you read the statute? What do you think  
23 should be the result?

24 MR. FRIED: Well, I think there's a  
25 reasonable reading that that should be covered. I think

1 that that's certainly -- we have no vested interest in  
2 opposing that. I mean, that --

3 JUSTICE KENNEDY: Let me ask you this  
4 question: In the background here, is there some concern  
5 that we're going to have minor cases but with huge  
6 translation costs, and it would be simply unfair? And  
7 if the answer to that is "yes," isn't that taken care of  
8 by the statutory direction that the court "may" give  
9 costs?

10 MR. FRIED: Well, Your Honor, that sort of  
11 discretion demonstrably does not prevent the issuance of  
12 these large awards, because there have been a number of  
13 large awards issued notwithstanding that discretion.

14 JUSTICE KENNEDY: Well, isn't that an abuse  
15 of discretion?

16 MR. FRIED: Well, not necessarily, Your  
17 Honor. The -- the district courts --

18 JUSTICE KENNEDY: Well, I mean, in other  
19 words, if the court sees that the cost of preparing  
20 documents into an English-language is quite substantial  
21 in light of what's involved in the case, and it's just  
22 not fair to -- to award them, can't that court in its  
23 discretion deny that, or is that not the way it works?

24 MR. FRIED: That's the way it works, Your  
25 Honor. But I don't think that that discretion is

1 sufficient to eliminate the deterrent effect that this  
2 Court has recognized in cases like Farmer and  
3 Fleischmann, because it occurs at the end of the case,  
4 after a litigant has already decided whether to bring  
5 suit. The deterrent effect occurs ex ante when a  
6 risk-averse litigant has to decide whether to bring the  
7 case.

8           But I would just note that these sorts of  
9 policy questions, Your Honor, arise in the context of  
10 language that by its terms extends to interpreting and  
11 not translating. And we would say that the relevant  
12 policy question is simply whether there are sensible  
13 reasons to -- that Congress may have drawn a line where  
14 it did. And, plainly, there are adequate reasons that  
15 these services, document translation services that were  
16 excluded, are potentially large and fall under the  
17 general principles that this Court has recognized are --  
18 are presumptively not frequently avoided --

19           JUSTICE SOTOMAYOR: I guess I'm -- I'm  
20 having a problem with, you know, they're "potentially  
21 large." Interpretive services are potentially large,  
22 although you claim that they -- that they don't -- they  
23 have sort of a terminus point. I've been in trials  
24 where we've had multiple languages simultaneously being  
25 translated to multiple defendants, with witnesses

1 speaking even other languages. I was in the Southern  
2 District of New York. And fees there without  
3 translation, just for the oral courtroom work, sometimes  
4 went ahead for months.

5           So, potentiality's not the question. If  
6 you're talking about disproportionality, then that goes  
7 to the word "reasonable" in the statute, doesn't it? I  
8 mean, the Ortho case you point to, the court did sizably  
9 cut the translation fees. And, more importantly, from  
10 the little I can tell, that was a huge patent case with  
11 a patent that was claimed to control 60 percent of a  
12 market.

13           So, I don't know that that was a small case  
14 by anyone's definition.

15           MR. FRIED: Certainly, Your Honor. I -- as  
16 to the difference, I mean, I'm not aware of, under this  
17 statute, an interpreter's spoken interpretation award  
18 approaching anywhere near some of the larger document  
19 translation awards that have been issued. But  
20 nonetheless, I am not denying that there could be large  
21 interpreter awards in some cases. But the fact is that  
22 adding on document translation awards is additive.

23           The sort of necessity review that would be  
24 necessary to police these document translation awards  
25 would be quite burdensome on the district courts. And,

1 in fact, the necessity standard is actually particularly  
2 problematic to apply to translations, Your Honor,  
3 because the fact is you don't know what a document says  
4 until it has been translated. And the exercise of  
5 trying to go back and reconstruct ex ante what a --  
6 whether a person was reasonably necessary in causing to  
7 be translated something that they didn't know what it  
8 meant is likely to lead to very subjective --

9 JUSTICE BREYER: Why haven't the -- I was  
10 interested here that the amici on your side consist of  
11 some professors and the -- I guess the trade association  
12 of interpreters or translators, but the people who would  
13 have the financial stake in it, the defense bar, the  
14 plaintiffs' bar in some circumstances, have not filed  
15 any brief. And I tend, though not putting a lot of  
16 weight on it, to take it as a sign, along with the long  
17 period of time, that there hasn't been some tremendous  
18 financial problem. What evidence is there that there  
19 has been? I -- a few cases, but in general.

20 MR. FRIED: Your Honor, I'm not at all  
21 suggesting that there has been a tremendous financial  
22 strain on the system. We're saying that this is a  
23 statute that, by its plain language, extends to --

24 JUSTICE BREYER: There's a plain language  
25 argument I got. But how many years has the great bulk

1 of the court been going the other way?

2 MR. FRIED: I'm sorry, Your Honor. I  
3 actually -- I didn't hear the end of your question.

4 JUSTICE BREYER: How many years has, would  
5 you say, the great bulk of the Federal system been  
6 deciding this differently from the way you think it  
7 should be?

8 MR. FRIED: I'm not sure that it's the great  
9 bulk. I mean, there's been a significant disagreement--

10 JUSTICE BREYER: That's the bulk.

11 MR. FRIED: Well, I think it's -- I think  
12 that it's increased over time as these --

13 JUSTICE BREYER: Well, when did all this rot  
14 set in, in your opinion? How long?

15 MR. FRIED: I'm not sure that I could  
16 pinpoint a date, Your Honor.

17 JUSTICE BREYER: What's the first one?

18 MR. FRIED: Your Honor, I'm not sure. I'll  
19 have to find out while my adversary is arguing when the  
20 first decision was.

21 JUSTICE SOTOMAYOR: I've got one going as  
22 far back as -- it was a district court. But it was as  
23 far back as the 1930s.

24 MR. FRIED: Well --

25 JUSTICE SOTOMAYOR: Some in the '40s, some

1 in the '50s.

2 MR. FRIED: Well, certainly, it wasn't  
3 construing 1920(6) at that time, Your Honor.

4 JUSTICE SOTOMAYOR: No, no. Clearly. But  
5 these awards have been common.

6 MR. FRIED: Your Honor --

7 JUSTICE BREYER: You have a case cited from  
8 1812. I take it that's it.

9 MR. FRIED: Certainly, Your Honor.  
10 Addressing --

11 JUSTICE SCALIA: I thought we're -- I  
12 thought we're addressing not whether it's a good idea to  
13 give fees, but whether fees are payable under this  
14 particular statute, right? Which was enacted when?

15 MR. FRIED: 1978, Your Honor.

16 JUSTICE SCALIA: 1978.

17 MR. FRIED: And --

18 JUSTICE SCALIA: That's not so long ago.

19 MR. FRIED: Absolutely correct, Your Honor.  
20 We agree. And -- and the structural reasons are --  
21 within the Court Interpreters Act itself are every bit  
22 as powerful as the ordinary textual indicia that support  
23 our reading.

24 And, in fact, Kan Pacific's argument that  
25 the word "interpreters" should be assigned different

1 meanings in different parts of the statute is -- is  
2 unsupported. Kan Pacific relies on what it  
3 characterizes as different language in section 2, which  
4 put in 1827 and 1828, and section 7, which put in the  
5 cost provision. And it notes that section 2 sometimes  
6 uses the broader phrase "interpreters in courts of the  
7 United States," whereas section 7 uses the word  
8 "interpreters" alone.

9           But Kan Pacific doesn't examine the context  
10 in which section 2 does and does not use that broader  
11 phrase. And those specifics really undermine any  
12 argument I might make along these lines. As originally  
13 passed in section 2, 1827 contains 26 occurrences of the  
14 word "interpreter," not counting the title. And of  
15 those 26 uses, 24 simply use the word "interpreter" by  
16 itself. So, there's certainly at the very threshold no  
17 overarching pattern of usage distinction between them.

18           More fundamentally, though, the -- the  
19 substantive provisions addressing the use of  
20 interpreters by parties in these cases in 1827 do so  
21 without using that broader phrase. Subsection (d) --

22           JUSTICE SCALIA: Do so without --

23           MR. FRIED: Without -- I'm sorry, Your  
24 Honor. Without using the broader phrase "in courts of  
25 the United States."



1            Subsection (d) is the provision that -- that  
2 governs the use of interpreters in cases brought by the  
3 government. This appears at page 2a of the red brief  
4 appendix. And it simply provides that upon a  
5 determination of need, the services of an interpreter  
6 will be used in these cases.

7            The only two provisions that use the phrase  
8 "interpreters in courts of the United States" are  
9 subsections (a) and (b), which are both at 1a of the red  
10 brief appendix, and both of these provisions simply are  
11 addressing the scope of the Administrative Office's  
12 duties under the statute. And as such, it simply makes  
13 clear that, in keeping with the office's ordinary  
14 function, it's -- it's facilitating the work of the  
15 Federal courts and making clear that the office isn't,  
16 for instance, certifying interpreters for the State  
17 courts.

18            So, nothing in this language suggests in any  
19 way that the -- that the word "interpreter" means  
20 something different in different places or that the --  
21 or that the services of an interpreter are viewed as  
22 embracing the same thing.

23            So, we think that a variety of indicia of  
24 meaning converge in this case to support the conclusion  
25 that 1920(6) is limited to spoken communication.

1           If there are no further questions, I'll  
2 reserve the balance of my time.

3           CHIEF JUSTICE ROBERTS: Thank you,  
4 Mr. Fried.

5           Mr. Himmelfarb.

6           ORAL ARGUMENT OF DAN HIMMELFARB

7           ON BEHALF OF THE RESPONDENT

8           MR. HIMMELFARB: Thank you,  
9 Mr. Chief Justice, and may it please the Court:

10           The word "interpreter" has two possible  
11 meanings that are relevant here, a broader one and a  
12 narrower one. The broader meaning is a person who  
13 translates from one language to another. Under this  
14 definition, the terms "interpreter" and "translator" are  
15 used interchangeably.

16           JUSTICE SCALIA: Have you ever seen a book,  
17 you know, translated from a foreign language, you know,  
18 "War and Peace," you know, and you're at the mercy of  
19 what we call the translator, and it says on the fly  
20 page, you know, "John Smith," comma, "Trans.," period.  
21 Does it ever say "John Smith," comma, "Int.," period?

22           MR. HIMMELFARB: It's used in the narrower  
23 sense in that context, I think, Justice Scalia. The  
24 narrower meaning of "interpreter" is member of a  
25 profession that specializes in oral translation; and in

1 that narrower sense, an interpreter is distinct from a  
2 translator, which is the sense you've just identified,  
3 which is a person who specializes in written  
4 translation.

5 Our submission is that, as the great  
6 majority of courts who've expressed a view on this  
7 question have recognized, the broader definition makes  
8 more -- more sense in the particular context at issue  
9 here. And we say that for a number of reasons.

10 The first is that the basic purpose of  
11 translation in the litigation context is to make  
12 evidence intelligible to the parties and the court.  
13 Section 1920 reflects a congressional judgment that the  
14 cost of making evidence intelligible to the parties and  
15 the court can be borne by the losing party.

16 JUSTICE SCALIA: No, it doesn't. It  
17 reflects that judgment only if you're right that  
18 "interpreter" means "translator."

19 MR. HIMMELFARB: Well --

20 JUSTICE SCALIA: I mean, you're begging the  
21 question. You could say that the one should embrace the  
22 other. But whether Congress thought that or not is  
23 mostly dependent on the language Congress used, isn't  
24 it?

25 MR. HIMMELFARB: Well, let me be as clear as

1 I possibly can. I'm obviously not standing here saying  
2 we lose under the language, but it would be a good idea  
3 for the statute to cover written translation. That's  
4 not a legitimate enterprise for a court interpreting a  
5 statute.

6           What I'm saying is that the text of the  
7 statute bears two -- permissibly bears two possible  
8 meanings. That being the case, it is a legitimate  
9 enterprise for the Court to say which makes sense, which  
10 is it most likely that Congress would have intended in  
11 this particular context?

12           JUSTICE ALITO: Well, why does your-- why does your  
13 interpretation make sense? Shouldn't we view this  
14 against the backdrop of the American rule on fees, that  
15 each party generally bears its own costs and only in  
16 specific circumstances does the loser pay? Now, the  
17 taxation of costs is a very narrow concept.

18           What is the difference between a case in  
19 which a lot of documents have to be rendered from one  
20 language to another prior to the court proceeding and a  
21 case in which there's a mass of scientific evidence that  
22 has to be interpreted by a scientist or financial  
23 evidence that has to be interpreted by an accountant?  
24 In those instances, the losing party doesn't pay for the  
25 winner's expenses, does it?

1           MR. HIMMELFARB: Well, let me -- let me  
2 address the first part of your question first, which is  
3 essentially, as I understand it, isn't there a  
4 background principle that says costs don't get taxed? I  
5 actually think insofar as far as tax -- costs are  
6 concerned, as distinct from attorney's fees, the  
7 background principle actually goes the other way.

8           JUSTICE ALITO: Well, the background -- costs get  
9 taxed, but costs are very narrow. They are a very small  
10 part of the expenses of a party litigating a case.  
11 Isn't that -- isn't that true?

12           MR. HIMMELFARB: I think ordinarily that's  
13 true, but I don't think that it follows -- it follows in  
14 any way that there is some sort of tie-breaking  
15 interpretive canon that says when you're interpreting  
16 the costs statute, some version of which has been in  
17 effect since the middle of the 19th century, if you're  
18 unsure about the scope of it, that you err on the side  
19 of narrowness rather than breadth. I just don't think  
20 there's any such interpretive principle. And --

21           JUSTICE KAGAN: Well, aren't you asking for  
22 an interpretive principle that errs on the side of  
23 breadth rather than narrowness?

24           MR. HIMMELFARB: No, we don't.

25           JUSTICE KAGAN: Why don't we just ask

1 ourselves what's the most common, what's the best  
2 reading?

3 MR. HIMMELFARB: Well, I think you obviously  
4 have to start there in this case, as you do in any  
5 statutory case. And our submission is that you have two  
6 possible ordinary definitions. You have two possible  
7 common usages.

8 JUSTICE KAGAN: But the dictionaries  
9 themselves tell us that one usage is far more common  
10 than the other.

11 MR. HIMMELFARB: I mean, I guess I just have  
12 to dispute that. We have Webster's, which, you know,  
13 Justice Scalia's view notwithstanding, is viewed by many  
14 people as an authoritative dictionary of English  
15 language. We've got Black's Law Dictionary, which I  
16 think everyone agrees is the leading law dictionary,  
17 which provides as a definition of "interpreter" the  
18 broad definition that we advocate here. To be sure --

19 JUSTICE SCALIA: Well, I guess Black's Law  
20 Dictionary, which -- the editor of it is a -- is a  
21 co-author with me. So, I -- I feel obliged to spring to  
22 his defense.

23 (Laughter.)

24 JUSTICE SCALIA: Since it is a law  
25 dictionary, presumably it ought to have taken into

1 account the cases you're referring to, many of which use  
2 the word in -- in this sense, right?

3 MR. HIMMELFARB: That's true.

4 JUSTICE SCALIA: Garner.

5 MR. HIMMELFARB: That's absolutely true, and  
6 just as a dictionary, a law dictionary, will take those  
7 cases into account, I think it's ordinarily presumed  
8 that Congress is taking into account the cases, too, and  
9 it's taking into account dictionary definitions as well.

10 CHIEF JUSTICE ROBERTS: One -- one of the  
11 things that concerns me is the impact of -- of cost  
12 allowance on the normal litigation incentives. An  
13 interpreter in court is one thing. When you suddenly  
14 get a situation where the costs could be quite large,  
15 particularly in a -- in a disparate way, not necessarily  
16 shared by both sides -- somebody goes into court; they  
17 know they're going to have to -- if they lose, they'll  
18 have to pay an interpreter this. And the other side  
19 comes in and says, well, we think we need to submit this  
20 10,000 pages of -- of documents, which will have to be  
21 translated, and by the way, if you lose, you're going to  
22 pay for that.

23 In other words, it is a much more variable  
24 element of costs than the interpreter.

25 MR. HIMMELFARB: I -- I'm not sure that's

1 true. I think in large litigations where you have many,  
2 many days of trial and potentially pretrial proceedings,  
3 you could have very large oral translation costs. Where  
4 there are many depositions, you could have large oral  
5 translation costs.

6 But even if I were to accept the premise of  
7 your question, it seems to me that the way these costs  
8 get controlled is through the exercise of district  
9 courts' discretion, not to tax every -- the cost of  
10 translating every document. The Fifth Circuit, which is  
11 one of --

12 CHIEF JUSTICE ROBERTS: So, what -- so, what  
13 goes into the exercise of that discretion?

14 MR. HIMMELFARB: Well, typically the  
15 criteria for -- I should add that the criteria for  
16 taxing costs of every sort, not just interpreter costs  
17 and not just document translation costs, are essentially  
18 thought to be necessity and reasonableness. So, in  
19 connection with document translation costs, the Fifth  
20 Circuit has suggested that the way to tax them, the  
21 appropriate way to tax them, might be just to tax the  
22 cost of translating headings of foreign language  
23 documents, which should be sufficient to let the lawyer  
24 know whether this is a relevant document that might bear  
25 further translation, and then only the documents that



1 really turned out, based on the translation of the  
2 heading, to have some significance to the case. So,  
3 that's just one example of the way the discretion gets  
4 exercised.

5 JUSTICE GINSBURG: Mr. Himmelfarb, in  
6 section 1920, there are two provisions that specify  
7 costs necessarily obtained for use in the case. And the  
8 interpreter provision doesn't have that qualification,  
9 doesn't say "necessarily obtained for use in the case."

10 MR. HIMMELFARB: That's -- that's true.  
11 For --

12 JUSTICE GINSBURG: You are asking to read  
13 "interpreter" to mean "translator" as well and to import  
14 into sub (6) "necessary for use in the case."

15 MR. HIMMELFARB: The necessity limitation in  
16 subsection (6), as with other subsections that don't  
17 specifically use the word "necessarily," come not from  
18 that term, but rather from the word "may" in the first  
19 sentence of the provision, which in tandem with Rule 54  
20 of the Federal Rules of Civil Procedure, essentially  
21 make this a discretionary call for the district court.  
22 Necessity has long been recognized as one of the  
23 components of that discretionary determination.

24 The reason we say it doesn't make sense to  
25 have the narrower definition of "interpreter" be the one

1 that Congress enacted is that written document  
2 translation can be and often is every bit as important  
3 as oral translation. In many cases, it could be more  
4 important, in a contract case, for example.

5 JUSTICE BREYER: What do you think on the --  
6 I guess nobody wants to defend this argument, including  
7 you, but the First Circuit and several others did look  
8 to the provision which permits the taxing of costs for  
9 the making of -- it says exemplifications or official  
10 documents, for the costs of making copies of any  
11 materials obtained for use in the case.

12 Now, if you're going to make a copy for use  
13 of the case of something in Japanese, you're going to  
14 have to turn it into English. So, they included that as  
15 part of the cost of making copies of the material - of a  
16 document for use in the case. Now -- which is  
17 discretionary as to whether you do or whether you don't.  
18 But that's how several courts did read it. I'm just  
19 wondering as that didn't strike me as so obviously  
20 wrong. Maybe it's obviously --

21 MR. HIMMELFARB: Well, I mean, I suppose it  
22 goes without saying that we'd rather win under  
23 subsection (4) than lose under subsection (6). There  
24 are --

25 JUSTICE BREYER: I'm sure you'd like to win

1 on any subsection.

2 (Laughter.)

3 MR. HIMMELFARB: That's true, absolutely  
4 true.

5 There are some courts that have suggested  
6 that document translation fits under subsection (4). I  
7 think those that have done so have tended to do it --  
8 tended to do it before section (6) was added in 1978.  
9 We haven't --

10 JUSTICE BREYER: All right. So, the history  
11 is that, prior to '78, a serious number -- some number  
12 of circuits said you can get the translation paid for  
13 under -- as -- as being necessary to create a copy  
14 that's usable in court. All right. Then Congress  
15 passes this, knowing of those cases in principle. And  
16 then there is a shift after Congress passes this, and  
17 then the majority of courts say, all right, this is the  
18 provision that permits it. Is that an accurate  
19 statement?

20 MR. HIMMELFARB: I think that is accurate.  
21 Before 1978, some of the courts that taxed document  
22 translation costs, I believe, also relied on their  
23 inherent authority, which at the time was thought to be  
24 a permissible ground for taxing costs.

25 JUSTICE BREYER: Is there anything in the

1 history of the '78 statute which suggested that Congress  
2 didn't want these taxed?

3 MR. HIMMELFARB: Absolutely not. There  
4 is -- there's frankly nothing in the legislative history  
5 of the Court Interpreters Act really that bears on this  
6 issue one way or another. There's a lot of legislative  
7 history on which Petitioner relies, but it's all  
8 addressed to section 2, which is a separate provision  
9 which deals with a separate subject, which is the  
10 appointment of interpreters in cases initiated by the  
11 United States.

12 JUSTICE SCALIA: So, if there is no  
13 legislative history, there's no legislative history on  
14 the other side either, right? Saying that we -- we mean  
15 this to include translation.

16 MR. HIMMELFARB: No, that's right. We  
17 don't -- we --

18 JUSTICE SCALIA: So, absent legislative  
19 history, I guess we have to rely on the words of the  
20 statute, right?

21 (Laughter.)

22 JUSTICE BREYER: That means you don't have  
23 to look at this.

24 MR. HIMMELFARB: I guess I'd just go back to  
25 where I started, which is that we think, under

1 dictionary definitions and under common usage, there are  
2 two permissible meanings of "interpreter."

3 CHIEF JUSTICE ROBERTS: Well, there are  
4 two -- there may be two permissible, but you don't  
5 dispute the fact that it is more natural and common to  
6 speak of someone interpreting oral communication and  
7 someone translating written, correct?

8 MR. HIMMELFARB: I don't -- I -- I think I  
9 would dispute it. I don't know whether one is more  
10 common than the other in any meaningful way. It may be  
11 slightly more common to use it in its narrower sense to  
12 refer to a member of a profession, but it's certainly  
13 common enough that you have district judges from all  
14 over the country in written opinion just sort of  
15 matter-of-factly talking about the people who translate  
16 documents as interpreters.

17 JUSTICE KAGAN: Well, how about in the U.S.  
18 Code? Is there any place in the U.S. Code where the  
19 word "interpreters" clearly encompasses written  
20 translators?

21 MR. HIMMELFARB: I'm not aware of any.  
22 There aren't -- there -- I frankly don't think there are  
23 that many places in the United States Code where the  
24 term "interpreter" is used other than in its sort of  
25 obvious, narrow sense based on the context of the

1 statute. So, for example, a number of statutes talk  
2 about funding translators and interpreters who are not  
3 citizens of the United States. It seems to us that in  
4 that context what Congress is getting at is the  
5 interpreter and translator in the narrower sense of  
6 members of a profession.

7 JUSTICE KAGAN: So, in every other case in  
8 which the U.S. Code uses the word, "interpreters" means  
9 only oral translators, and that's the obvious way to use  
10 the word, but in this case, we're supposed to reach a  
11 different conclusion.

12 MR. HIMMELFARB: Justice Kagan, I would say  
13 this: In every other provision of the United States  
14 Code in which the "interpreter" -- the word  
15 "interpreter" is used, either it's not clear whether it  
16 includes document translation or the context is such  
17 that it strongly indicates that it's limited to oral  
18 translation. And neither of those situations obtains  
19 here, in our view.

20 JUSTICE ALITO: Suppose somebody --

21 CHIEF JUSTICE ROBERTS: Well, just to phrase  
22 your answer a different way, you're -- you don't know of  
23 any situation in the U.S. Code where "translators" -- or  
24 "interpreter" means "translator"?

25 MR. HIMMELFARB: I'm not aware of any other

1 provision in the United States Code.

2 CHIEF JUSTICE ROBERTS: And you checked  
3 every one; so, there is none, right?

4 (Laughter.)

5 MR. HIMMELFARB: There -- there is none  
6 where it is clear that it covers document translation.  
7 There are -- there are State statutes which we've cited  
8 which use the term "interpreter" to -- to clearly cover  
9 document translation, and we cite them in our brief.

10 JUSTICE ALITO: Suppose somebody did a  
11 computer search in a database of, let's say, newspaper  
12 articles, magazine articles for use of the term  
13 "interpreter" in relationship to a foreign language.  
14 And let's say you look at a thousand hits.

15 How many of those do you think would use the  
16 term "interpreter" to refer to rendering a written  
17 document from one language to another?

18 MR. HIMMELFARB: I think it -- I would not  
19 be at all surprised if it was more than 50 percent of  
20 the hits that used it in its narrower sense.

21 JUSTICE KAGAN: You're, like, daring Justice  
22 Alito to go do this now.

23 (Laughter.)

24 MR. HIMMELFARB: However --

25 JUSTICE ALITO: How much would you bet?

1 (Laughter.)

2 JUSTICE ALITO: If you bet me enough, I'll  
3 look at a thousand. I'd be surprised if it's 2 percent.

4 MR. HIMMELFARB: I couldn't venture a guess,  
5 and I would rather not bet you.

6 (Laughter.)

7 MR. HIMMELFARB: I do want to say something  
8 about the concept of sight translation, which is  
9 something that my friend Mr. Fried adverted to. Sight  
10 translation is a hybrid endeavor. It is the oral  
11 translation of written documents.

12 One of the reasons we think that the broader  
13 meaning of "interpreter" makes more sense in section  
14 1920 is that it can't really account in any sensible way  
15 for sight translation. In this case, for example, our  
16 counsel, Kan Pacific's counsel, took Taniguchi's  
17 deposition, and to prepare for the deposition, he  
18 reviewed -- he had to review some contracts which were  
19 written in Japanese and some medical records which were  
20 written in Japanese.

21 Now, under our view, having those documents  
22 translated in writing to prepare for the deposition  
23 would result in a potentially taxable cost. Under  
24 Taniguchi's view, they wouldn't. But it sounds like  
25 under either party's view, if instead of handing those



1 documents off to a document translator to have them  
2 translated in writing, he had sat down in his law office  
3 with a member of the interpreter profession and said  
4 here's a box of documents; please, tell me what they  
5 say, that would potentially be a taxable cost. That  
6 seems to me to be a very odd result and one that's --

7 CHIEF JUSTICE ROBERTS: It's an odd result  
8 because nobody's going to do it, because at that point  
9 you don't know who is going to get saddled with the  
10 costs. So, it wouldn't be likely that you would do  
11 something that would increase the costs, would it?

12 MR. HIMMELFARB: Well, I don't know that it  
13 would increase the costs. It may be cheaper to use an  
14 oral translator -- an oral translator as opposed to a  
15 written document translator. And there might be a  
16 variety of reasons why you would choose to use one or  
17 another: time constraints, the importance of the  
18 particular document, what have you. But I don't think  
19 that it's likely that Congress would have thought that  
20 the potential taxability of the translation --

21 JUSTICE SCALIA: Is it -- is it clear? Does  
22 anybody contend, does the other side contend, that the  
23 use of a viva voce translation outside of court is  
24 covered by the meaning of "interpreter" here? I assume  
25 that "interpretation" here meant interpretation in the

1 oral proceeding that is the trial.

2 And you're saying that if we hold against  
3 you, interpretation will still include all oral  
4 translations outside of the trial.

5 MR. HIMMELFARB: Well, I think every court  
6 that's ever thought about this has found that  
7 deposition -- oral translation at deposition --

8 JUSTICE SCALIA: Oh, at deposition, which I  
9 consider part of the -- part of the trial process, but  
10 not -- not in the lawyer's office where he asks somebody  
11 to sit down and -- and read this document to me.

12 MR. HIMMELFARB: Well, there's -- I don't  
13 see any basis in the statute or, frankly, in the  
14 practice of translators or interpreters for drawing that  
15 line in that particular place.

16 And as far as the question where Taniguchi  
17 would have the Court draw it is concerned, I think  
18 that's a very hard question to answer, because he has  
19 moved back and forth so many times on that. His briefs  
20 offer several different -- several different narrow  
21 definitions of "interpreter," sometimes saying it's the  
22 oral translation of oral speech, sometimes saying it's  
23 the oral translation of any language, whether it's oral  
24 or written, sometimes saying it's limited to in-court  
25 interpretation; sometimes it's saying it's not.

1           That, it seems to us, is a very good reason  
2 for adopting the broader interpretation. It seems very  
3 unlikely that Congress would want courts to get into  
4 these extremely complicated and, frankly, unprincipled  
5 line-drawing exercises.

6           JUSTICE KAGAN: I don't know,  
7 Mr. Himmelfarb. I mean, why is this any -- any  
8 different from any case in which we draw a line and we  
9 find that the result of drawing a line is that we've  
10 created some close cases, cases that are near the line.

11           So, you know, just to give you an obvious  
12 example, the fact that there are some few minutes in  
13 every 24-hour period where's it's hard to say that  
14 something is night or day does not mean that there's not  
15 night and that there's not day. And that seems to me  
16 what the question is here. Yes, you can think up some  
17 hard cases, but they're just that; they're marginal  
18 cases.

19           MR. HIMMELFARB: Well, I think -- I think  
20 line drawing is sometimes a necessary exercise because  
21 the text of the statute compels you to do it. Our  
22 submission is that the text of this statute doesn't  
23 compel it, because you've got a readily available  
24 alternative interpretation which doesn't require any  
25 sorts of these line drawings.

1           And as far as whether this is sort of a --  
2 an outlying -- the examples I give are outlying oddball  
3 circumstances goes, I don't think they are. Sight  
4 translation, for example, is a core function of  
5 interpreters and translators alike.

6           And I guess the only other point I would  
7 say -- make about sight translation, my friend Mr. Fried  
8 suggested that that -- that is something that could only  
9 be covered if it takes place during the course of live  
10 proceedings, which I think is -- is yet another  
11 narrowing of the word "interpreter." But as far as I'm  
12 aware, most sight translation -- little, if any, sight  
13 translation actually occurs during the course --

14           JUSTICE BREYER: I accept -- I accept the  
15 following, that there was a history basically giving --  
16 doing what you want before the statute, but the  
17 statute -- nobody thought what it was going to do that  
18 history. That statute is capable of being translated,  
19 but it isn't the most natural thing.

20           And so, the question is, do we take -- go  
21 with the smaller capability, saying leave -- leave well  
22 enough alone, or do we say, gee, that's just too hard to  
23 translate it that -- to interpret the statute that way?

24           Have you got any other example in the law?  
25 I mean, can you think of an example in the law which

1 I've been trying to think of where there was a history  
2 of doing something? A statute comes along that makes it  
3 a little tougher for the judges to do it, and then the  
4 Court says either, sorry, too tough now, or it says let  
5 sleeping dogs lie.

6 MR. HIMMELFARB: Well, I think -- I mean, I  
7 think it's an important point. And this goes to the  
8 question of, you know, whether it's difficult for  
9 district courts to make a determination of whether a  
10 particular document translation should be taxed, which  
11 is one of the arguments on the other side. I think the  
12 history of this is strong evidence that it's not  
13 difficult.

14 Courts have been doing this, certainly,  
15 since 1978 when this provision was added and even before  
16 then. And they haven't had any evident difficulty in  
17 deciding whether to tax documents in its document  
18 translation, and if so, how much. So, I think the --  
19 the history certainly bears on the case in that respect.

20 A word --

21 JUSTICE SOTOMAYOR: Justice Breyer is  
22 asking, can you think of an example where words are not  
23 on their face plain, and the Court has looked to the  
24 practices that have been imbued into that word and said  
25 -- and we've decided that they will be accepted in the

1 way that practice has given them meaning?

2 MR. HIMMELFARB: I can't think of any case  
3 off the top of my head, and I think it's true that this  
4 case is a little bit different because, insofar as  
5 courts were taxing document translation costs before  
6 1978, they were relying on something other than the word  
7 "interpreter." So, it may be a stretch to say that when  
8 Congress chose to use the word "interpreter," it was  
9 necessarily incorporating what courts had previously  
10 done.

11 But I don't think it's entirely irrelevant  
12 that this has been done for a long time, and I think  
13 it's not unfair to presume that Congress would have been  
14 aware of that.

15 The Court Interpreters Act has two main  
16 provisions as relevant here. There's section 2, which  
17 is really the more -- the main provision, and then  
18 section 7, which became 1920(6) in Title 28, which is  
19 the provision at issue here.

20 An important part of Taniguchi's submission  
21 is that section 2 is limited to oral translators, and,  
22 therefore, it should follow that section 7, the  
23 provision at issue here, is likewise limited to oral  
24 translators.

25 And our main submission on that -- on that

1 question is that Congress actually used different  
2 language in section 2 and section 7. Section 2 added  
3 two provisions to Title 28: section 1827 and section  
4 1828, which are titled, and which address, respectively,  
5 "Interpreters in courts of the United States" and  
6 "Special interpretation services."

7 In section 7, which added subsection (6) to  
8 1920, Congress does not use those two phrases. Instead,  
9 it uses the phrase "interpreters" simply, not  
10 "interpreters in courts of the United States," and then  
11 "special interpretation services."

12 So, to the extent that there is any  
13 appropriate canon about the use of similar or different  
14 language in different provisions of a statute, it seems  
15 to us that the appropriate canon is that one should  
16 presume that when Congress uses different language, it  
17 intends different meanings.

18 I do want to respond to Mr. Fried's point  
19 about the number of times the word "interpreter" is used  
20 in section 2. And as I understand his point, is that --  
21 it's that it's much more frequently used by itself than  
22 it is with the -- with the words "in courts of the  
23 United States."

24 What the statute actually does is add -- say  
25 that it's adding section 1827, which it calls

1 "Interpreters in courts of the United States." It then  
2 has a subsection that says that the Administrative  
3 Office of the United States Courts has to establish a  
4 program to facilitate the use of interpreters in courts  
5 of the United States.

6 CHIEF JUSTICE ROBERTS: Where are you  
7 reading from?

8 MR. HIMMELFARB: I'm sorry. This is the red  
9 brief, 1a of the appendix, which is the very beginning  
10 of the Court Interpreters Act. And then there's  
11 subsection (c), flipping over to the next page -- I'm  
12 sorry -- subsection (b), which says that the director  
13 has to certify interpreters in courts of the United  
14 States.

15 So, what it does at the beginning of the  
16 statute is establish this thing called a certified  
17 interpreter in courts of the United States. When it  
18 thereafter speaks of "interpreter" simply, that's just a  
19 shorthand for a certified interpreter in courts of the  
20 United States. So, it seems to us that as far as the  
21 Court Interpreters Act is concerned, even if it's true  
22 that section 2 uses the term in the narrower sense, it  
23 doesn't necessarily follow that it's used in the  
24 narrower sense in section 7.

25 And the only point I would add about that,



1 as we set -- point out in our brief, it's really not  
2 clear that section 2 is limited to oral translators.

3           Soon after the Court Interpreters Act was  
4 enacted and for approximately 16 years thereafter, the  
5 Administrative Office would publish these notices in the  
6 Federal Register notifying the public that there were  
7 going to be certification exams for interpreters under  
8 section 2 of the Court Interpreters Act. These were  
9 pretty streamlined notices, not long at all.

10           And one of the main aspects, the main  
11 sections, of the notice, was a list of what the director  
12 of the Administrative Office said were the -- were the  
13 duties of interpreters in courts of the United States.  
14 And to be sure, it listed simultaneous and consecutive  
15 interpreting, but it -- it listed sight translation, and  
16 it listed document translation.

17           So, at a minimum, section 2 is not  
18 sufficiently clearly limited to oral translators, that  
19 the director of the Administrative Office couldn't issue  
20 these notices saying otherwise.

21           I guess the -- the last point I would -- I  
22 want to make about other statutes, some of which use the  
23 term "interpreter" and "translator" together, I've  
24 already addressed that in part by saying that in many of  
25 those statutes, it really is pretty clearly used in the

1 narrower sense because you're talking about members of a  
2 profession.

3           The -- the only other thing I would say  
4 about that is that the premise of Taniguchi's reliance  
5 on those statutes seems to be that it would be strangely  
6 redundant for Congress to speak in other statutes about  
7 interpreters and translators together, if, in fact, the  
8 two terms could be used interchangeably, and that  
9 redundancy should be avoided.

10           But subsection (6) of 1920 itself has a  
11 redundancy in it because it covers both interpreters and  
12 special interpretation services. And I don't think  
13 anybody could dispute that anyone who carries out a  
14 special interpretation service is an interpreter.

15           So, it's not at all odd to have redundancy  
16 when Congress is addressing the subject of translation.

17           CHIEF JUSTICE ROBERTS: Thank you, counsel.

18           Mr. Fried, you have 5 minutes remaining.

19           REBUTTAL ARGUMENT OF MICHAEL S. FRIED

20           ON BEHALF OF THE PETITIONER

21           MR. FRIED: Very briefly, Your Honor, three  
22 points.

23           In the first place, Justice Breyer, I just  
24 wanted to let you know that the first decision -- the  
25 first appellate decision construing 1920(6) to encompass

1 document translation was the D.C. Circuit's decision in  
2 Quy in 1981.

3           Second, Mr. Himmelfarb noted that Black's  
4 Law Dictionary takes a definition that arguably could  
5 encompass document translation, but he didn't mention  
6 that the -- that the operative version of Black's in  
7 1978 when this statute was passed did not -- was a  
8 different definition that excluded document translation.

9           And this change in the definition occurred  
10 in 1999, in the seventh edition, after a number of these  
11 judicial decisions construing 1920(6) had already come  
12 down, which supports Your Honor's observation that it  
13 could very well merely reflect a recognition of these  
14 decisions, rather than independent support for them.

15           Finally, Your Honors, Mr. Himmelfarb cited  
16 certain notices issued by the Administrative Office from  
17 many years ago. These brief notices were ministerial  
18 documents that simply announced a forthcoming  
19 examination. The office has issued the Guide to  
20 Judiciary Policy, which is the -- which is the fully  
21 expressed views on this issue and is posted on the  
22 office's Web site. It's current as of June 9th, 2011,  
23 and expressly provides that document translation is not  
24 a part of the statutory services of an interpreter.

25           If there are further questions, I'd be happy

1 to address them.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

4 (Whereupon, at 12:11 p.m., the case in the  
5 above-entitled matter was submitted.)

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