No. 10-1472

IN THE

Supreme Court of the United States

KOUICHI TANIGUCHI,

Petitioner,

v.

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

Respondent.

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

REPLY BRIEF FOR PETITIONER

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August 15, 2011

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REPLY BRIEF FOR PETITIONER

The decision below deepens a clear, existing circuit split regarding whether the term "interpreters" in 28 U.S.C. § 1920(6) includes those who translate written documents. Pet. 8-12. This issue arises with great frequency in federal litigation, and its incidence will only increase as world trade accelerates and the presence of foreign language speakers in our country increases. For those reasons, it also implicates significant issues of international relations and foreign comity. *Id.* 12-17. The decision below—and thus the position taken by a total of seven circuits—is also wrong, based on the statute's text, its legislative context and history, and longstanding and consistent patterns of congressional usage. *Id.* 17-24.

The brief in opposition urges denial of certiorari, first, because it claims the decision below is correct (Opp. 5-13); second, because it asserts that the circuit conflict, while undeniable, involves fewer circuits than alleged in the petition (*id.* 13-18); and, third, because most of the many cases that confront this question deal with awards of only a few thousand dollars or less (*id.* 19-21).

As shown below, however, respondent's merits argument is unpersuasive for numerous reasons, and ultimately depends upon reading the word "interpreters" to have two inconsistent meanings within a single congressional enactment. Its denial of a 7-1 circuit conflict is just wrong, as a reading of the cases in issue clearly demonstrates. And the issue hardly ceases to merit this Court's attention because most of its numerous applications relate to cost awards in the single-digit thousands, and

because awards in the hundreds of thousands or millions of dollars occur only periodically.

I. THE CIRCUITS ARE DIVIDED SEVEN-TO-ONE REGARDING WHETHER DOCUMENT TRANSLATORS ARE "INTERPRETERS" FOR PURPOSES OF SECTION 1920(6)

1. The courts of appeals are split 7-1 on the question presented. Pet. 8-12. Kan Pacific concedes that there is a split between the Seventh Circuit on the one hand, and the Sixth and Ninth Circuits on the other, but it denies that the other five circuits (the D.C., Federal, First, Fifth, and Eighth) have decided the issue. Opp. 13.

In fact, all five of those circuits have clearly so held, and in each case subsequent decisions have expressly recognized that the issue is conclusively resolved in the respective circuit. Kan Pacific suggests (at 14-15) that the holdings of these circuits are not binding precedent because the parties did not argue the issue. Even if this were true in some of the cases, and Kan Pacific does not cite the appellate briefing in any of them, it would be irrelevant, because any squarely decided legal principle integral to the legal analysis "constitute[s] a binding precedent," "even if the issue had not been disputed." *McKoy v. North Carolina*, 494 U.S. 433, 446 (1990).

D.C. Circuit. In *Quy v. Air America, Inc.*, 667 F.2d 1059 (D.C. Cir. 1981), the court held that "the District Court was authorized to award costs [under section 1920(6)] for the Vietnamese-to-English translations of plaintiffs' depositions," and upheld an award of those costs. *Id.* at 1065. The Ninth Circuit below cited *Quy* as "holding that a cost award for translation . . . was 'explicitly authorized by 28

U.S.C. § 1920(6).'" Pet App. 6a-7a (citing *Quy*, 667 F.2d at 1065). The United States District Court for the District of Columbia has also repeatedly recognized *Quy* as having resolved the issue. *See In re Korean Airlines Disaster of Sept. 1, 1983*, 103 F.R.D. 357, 357 (D.D.C. 1984) ("[T]his Circuit has recognized translation expenses as a pretrial discovery cost which is 'explicitly authorized' by 28 U.S.C. § 1920(6)." (citing *Quy*, 667 F.2d at 1063)); *Oetiker v. Jurid Werke, GmbH*, 104 F.R.D. 389, 393 n.2 (D.D.C. 1982) ("Fees for translation services have been found to fall within the meaning of 'interpreters.'" (citing *Quy*, 667 F.2d at 1065)).

Federal Circuit. In *Chore-Time Equipment, Inc. v. Cumberland Corp.*, 713 F.2d 774 (Fed. Cir. 1983), the panel similarly held that "[t]he award of costs for translation of a German patent . . . was appropriate under 28 U.S.C. § 1920(6)." *Id.* at 782. Any lingering doubt about this holding is eliminated by the subsequent decision of that circuit in *Ortho-McNeil Pharmaceutical, Inc. v. Mylan Laboratories, Inc.*, 569 F.3d 1353 (Fed. Cir. 2009), which again affirmed an award of translation costs. The district court in *Ortho-McNeil* cited *Chore-Time* as controlling Federal Circuit precedent on this point. *See Ortho-McNeil Pharm., Inc. v. Mylan Labs, Inc.*, No. 1:02CV32, 2008 WL 7384877 (N.D.W. Va. Aug. 18, 2008).

First Circuit. *In re Puerto Rico Electric Power Authority*, 687 F.2d 501 (1st Cir. 1982), also ruled that a prevailing party is "free to apply to the district court for reimbursement of its translation expenses as 'costs' under . . . . 28 U.S.C. § 1920." *Id.* at 510. Federal courts have cited this case as holding that

"translation[] costs may be taxed as costs." *In re Korean Airlines Disaster*, 103 F.R.D. at 358; *see also Cook v. Volkswagen of Am., Inc.*, 101 F.R.D. 92, 92 n.* (D.W. Va. 1984) (same).

Fifth Circuit. In *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 713 F.2d 128 (5th Cir. 1983), the panel held that "translation expenses [are] a taxable cost under . . . section 1920." *Id.* at 133. In doing so, it recognized the First Circuit as having also so held in *Puerto Rico Electric Power*. *See id.* And, once again, subsequent decisions have acknowledged this ruling as the law of the Fifth Circuit. *See In re Korean Airlines Disaster*, 103 F.R.D. at 358; *Cook*, 101 F.R.D. at 92 & n.* (same).

Eighth Circuit. Slagenweit v. Slagenweit, 63 F.3d 719 (8th Cir. 1995) (per curiam), upheld a district court's award of document translation costs, ruling that the district court did not "abuse its discretion" in awarding "costs for the translated documents" under section 1920. *Id.* at 721. Subsequent decisions have recognized that *Slagenweit* resolved this issue in the Eighth Circuit. *See Dystar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, No. 6:02-2946-WMC, 2007 WL 3020474, at *2 (D.S.C. Oct. 11, 2007) ("[I]n *Slagenweit* . . . the Eighth Circuit Court of Appeals upheld the district court's taxing of costs with respect to the translation of a deposition transcript that was not introduced at trial.").

In short, notwithstanding Kan Pacific's conclusory assertions, seven circuits have held that document translation costs are taxable under section 1920(6), in disagreement with the Seventh Circuit's contrary holding.

2. The discord on this issue in the federal courts is deeper even than the circuit split reflects on its face, as there is also widespread uncertainty among the district courts. Pet. 11-12. Contrary to Kan Pacific's claim, Opp. 16-17, the Southern District of Florida is not the only district that is internally divided on this issue. *Compare, e.g.*, *S.R. Galves Participacao, Importacao & Exportacao Ltda. v. Natural Source Int'l, Ltd.*, No. 06 Civ. 10182(LLS), 2007 WL 1484465, at *2 (S.D.N.Y. May 21, 2007) (holding that translation costs are taxable under section 1920), *with SEC v. Kaufman*, 835 F. Supp. 157, 159-60 (S.D.N.Y. 1993) (holding that translation costs are *not* taxable under section 1920). More generally, a number of district courts have expressed uncertainty in the absence of controlling precedent on this issue. *See, e.g.*, *Dystar*, 2007 WL 3020474, at *2 (surveying cases in the absence of Fourth Circuit precedent to determine the scope of section 1920(6)); *Competitive Techs. v. Fujitsu Ltd.*, No. C-02-1673, 2006 WL 6338914, at *11 (N.D. Cal. Aug. 23, 2006) (surveying cases prior to the development of Ninth Circuit precedent and noting that "[c]ourts are split" on the issue); *Viacao Aerea Sao Paulo, S.A. v. Int'l Lease Fin. Corp.*, 119 F.R.D. 435, 440 (C.D. Cal. 1988) (holding, prior to binding circuit precedent, that a prevailing party could not recover translation costs).

II. THIS CIRCUIT SPLIT INVOLVES AN IMPORTANT AND RECURRING ISSUE

The question whether section 1920(6) authorizes the taxation of costs associated with document translation is an important issue meriting the Court's review. Pet. 12-17. Federal courts confront the issue frequently, and the ongoing conflict on this issue

undermines the central purpose of the statute to render uniform and consistent costs categories; the allowance of document translation costs creates the persistent risk of occasional large cost awards; and, by magnifying the already large burden and expense of U.S. discovery obligations, it implicates important international comity concerns. *Id.*

Kan Pacific argues that the issue is not of "exceptional" importance.[1] Opp. 19-20. Its arguments on this score are baseless.

First, Kan Pacific claims that, other than the award of more than a million dollars in *Ortho-McNeil*, "[n]o other award in th[e] cases [cited in the Petition] exceeded $100,000." Opp. 19. But Kan Pacific ignores that two cases cited in the Petition, not counting *Ortho-McNeil*, addressed translation costs in excess of $100,000. *See Gabriel Techs. Corp. v. Qualcomm, Inc.*, No. 08CV1992, 2010 WL 3718848, at *12 (S.D. Cal. Sept. 20, 2010) (awarding bond based on estimated translation costs of $182,400); *Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, 750 F. Supp. 2d 962, 983 (N.D. Ill. 2010) (acknowledging translation costs of $109,614, but declining to tax them in light of *Extra Equipamentos*). Other cases have taxed comparably large translation cost awards. *See, e.g.*, *Extra Equipamentos E Exportação Ltda. v. Case Corp.*, No. 01 CV 8591, 2007 WL 1549493, at *5 (N.D. Ill. May 24, 2007) (awarding $75,722 in translation costs), *rev'd*, 541 F.3d 719 (7th Cir. 2008).

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[1] Contrary to Kan Pacific's implication, Opp. 20-21, the case need not be "exceptionally important" to merit review—it merely must be "important," *see* Sup. Ct. R. 10, a standard that is all the more plainly satisfied here.

These numerous decisions leave no question that the danger of large awards is real and ever-present.

Second, Kan Pacific has no answer to Mr. Taniguichi's showing that 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, and that this Court has warned of the need to "take care to demonstrate due respect for" minimizing such burdens. *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.*, 482 U.S. 522, 546 (1987). The imposition of document translation awards plainly implicates these concerns. Kan Pacific's response (at 21) that there is "no evidence" that the foreign nations who have expressed concern over U.S. discovery costs would mind having them magnified in the context of translation awards exhibits a determined refusal to face the obvious implications of those nations' expressed policies. *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States § 442 Reporter's Note 1 (1987) ("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.").

III. THE DECISION BELOW IS WRONG ON THE MERITS

1. The plain meaning of "interpreters" in section 1920(6) is confined to those who interpret spoken language. Pet. 17-19. Kan Pacific offers no response to the essential point that, as the term is ordinarily used, "no one would refer to [one who translates written literature] as an English-language

'interpreter' of these works." *Extra Equipamentos*, 541 F.3d at 727. In keeping with this usage, a number of dictionaries categorically preclude such an application of the word "interpreter." For instance, one dictionary simply defines "interpreter" as "[o]ne who translates orally from one language into another." Webster's II: New Revised University Dictionary 638 (1984). Another defines the term as "one that interprets: as (a): one who translates orally for parties conversing in different languages." Webster's Colligate Dictionary 654 (11th ed. 2003). Other sources agree that "the difference between interpreting and translation is only the difference in the medium: the interpreter translates orally, while a translator interprets written text." Klaus G.E. Baumann, What Does an Interpreter Do? 1 (1997).[2]

Kan Pacific responds that some other sources implicitly leave open the possibility of non-spoken interpretation as a disfavored alternative meaning. Opp. 6 (citing, *e.g.*, Webster's Third New International Dictionary 1182 (1976) (defining "interpreter" as "one who translates; *esp.*: a person who translates orally for parties conversing in different tongues"). It offers no argument, however, why this disfavored alternative left open by some, but not all, dictionaries should be adopted as the operative definition in section 1920(6). Ordinarily, of course, it is the preferred meaning that presumptively governs in statutory interpretation, not the other way around. *See, e.g.*, *Muscarello v. United States*, 524 U.S. 125, 128 (1998).

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[2] *Available at* http://icdept.cgaux.org/pdf_files/What-does-an-Interpreter-do-IC-Promo-AUG-03.pdf (last visited Aug. 12, 2011).

2. The applicability of the primary meaning of "interpreter" in section 1920(6) is strongly reinforced by several other considerations.

First, the broader statutory context of the Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978), requires this meaning. The substantive provisions of that statute established programs for the spoken interpretation of federal court proceedings. Pet. 3-5. Kan Pacific dismisses the relevance of this context, contending that section 1920(6) does not address the "same subject" as the other parts of the statute. Opp. 8. Yet these code sections were part of a single act of Congress. To construe, as Kan Pacific urges, the same word "interpreters" differently in different provisions contravenes the most elementary principles of construction. Kan Pacific's observation (at 8) that section 1920(6) also includes an *additional* term, "court appointed experts," does nothing to support a reading of "interpreters" at odds with the other provisions of the statute addressing interpreters.

Second, Congress consistently distinguishes between interpreters and translators throughout the United States Code. Pet. 19-20. Kan Pacific argues that this congressional usage is mere "excess language." Opp. 10.[3] To the contrary, it is a consistent and repeated pattern of usage, the precise opposite of an inadvertency. The Court, in any event,

[3] The case Kan Pacific cites, *Microsoft Corp. v. i4i Ltd. Partnership*, holds only that courts may disregard "excess" statutory language when "no interpretation [of the statute] avoids excess language." 131 S. Ct. 2238, 2248 (2011). Here, Mr. Taniguchi's construction of the statutory provisions *does* avoid the conclusion that the language in question is surplussage.

"give[s] effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Third, the legislative history further confirms the ordinary meaning of "interpreters." Congress enacted the precursor to section 1920, Act of Feb. 26, 1853, 10 Stat. 168, 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." Pet. 2 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 251 (1975)).

Kan Pacific objects that *Alyeska Pipeline* centered on the attorney fee provisions of the 1853 Act, suggesting that these congressional goals did not apply to the costs statute. Opp. 11. But in fact, this Court has recognized that these principles animate the costs provisions of the statute. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987) (reciting same quotation from *Alyeska Pipeline* in case addressing costs provisions).

Kan Pacific also has no meaningful response to the more recent legislative history of the Court Interpreters Act. Opp. 11-12. It does not dispute that there is no hint of congressional intent to shift document translation expenses. Instead, it repeats its effort to sever section 1920 from the rest of the statute, suggesting that "interpreter" should be given two entirely different meanings within the same Act. There is simply no basis to suppose that Congress intended entirely separate meanings of the word in the same statute, particularly in the absence of any legislative history even mentioning such a disjunction.

3. Three canons counsel the limitation of "interpreters" in section 1920(6) to the spoken word even if there were any ambiguity. Pet. 22-24.

First, Kan Pacific dismisses the canon requiring strict construction of waivers of sovereign immunity, asserting that a strict construction of section 1920 is inappropriate because Congress has unambiguously waived sovereign immunity. Opp. 12 (quoting *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008)). But the entire issue here is whether 28 U.S.C. § 2412(a)(1) unequivocally waives immunity for document translation costs.

Second, Kan Pacific urges disregard for the canon of strict construction of statutes in derogation of the common law, arguing that this rule is only "a recognition of a presumption against an intention to change existing law." Opp. 12 (citing *Johnson v. S. Pac. Co.*, 296 U.S. 1, 17 (1904)). There is, however, a "well-established principle of statutory construction that the common law ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35 (1983).

Third, Kan Pacific dismisses the canon against unreasonable interference with the sovereign authority of other nations, suggesting that it is limited to "the unreasonable exercise of prescriptive jurisdiction." *See* Opp. 12 (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004)). The very case Kan Pacific cites, however makes clear that the canon is not so limited, and that it requires courts "ordinarily [to] construe ambiguous

statutes to avoid unreasonable interference with the sovereign authority of other nations." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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