

No. 10-1472

In the Supreme Court of the United States

KOUCIHI TANIGUCHI,

Petitioner,

v.

KAN PACIFIC SAIPAN, LTD.,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF
JUDICIARY INTERPRETERS AND
TRANSLATORS AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*¹

The National Association of Judiciary Interpreters and Translators (NAJIT) was founded in 1978 to (1) build professionalism among interpreters and translators working in the courts and other judicial and law-enforcement settings; (2) advocate in support of legal interpreter and translator programs; and (3) educate the public about the need for qualified and well-trained professional judiciary interpreters and translators.

NAJIT's mission is to promote quality services in the field of legal interpreting and translating. NAJIT's members play a critical role in ensuring due process, equal protection, and equal access for non-English or limited-English-proficient individuals who interact with the judicial system. NAJIT's membership includes more than 1200 language professionals, including practicing spoken-language and American Sign Language (ASL) interpreters and translators who work in various areas of the state and federal judiciary, as well as those who interpret or translate in other settings.

An important part of NAJIT's mission is to offer the public an accurate understanding of the

¹ No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Both petitioner and respondents have filed blanket consents to amicus briefs; the consents are reflected on the Court's docket.

important differences between interpreters and translators. Misconstruction of 28 U.S.C. § 1920(6) muddles this distinction and risks that interpreters or translators may be expected to have skills outside of their specialties. In short, the distinction between translators and interpreters is well-known within the language-professional industry—and particularly among those who work in the judicial arena—and NAJIT is keenly interested in educating the public (and the Court) regarding this important issue.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In enacting the Court Interpreters Act (which included 28 U.S.C. § 1920(6)), Congress provided that the losing party in a lawsuit may be required to reimburse the winning party for “compensation for interpreters.” The Ninth Circuit erroneously held that “compensation for interpreters” included compensation for translators.

Petitioner’s brief explains how, as a matter of statutory interpretation, the Ninth Circuit incorrectly construed the meaning of “interpreters” as used in 28 U.S.C. § 1920(6). NAJIT does not seek to re-plow that ground here. Rather, this brief seeks to contribute to the Court’s understanding of the statute by explaining how the terms “interpreter” and “translator” are understood by language professionals, and by describing the real-world, practical differences between the two fields.

I. At its most basic level, the distinction between interpreters and translators is simple: Interpreters speak, while translators write. As a result,

interpreters must possess different skills from those of translators. Interpreters must have the “analytical skills, mental dexterity” and “exceptional memory” necessary to interpret spoken words from one language into another in real time. The act of translating a document from one language to another, however, is a more research-oriented, meticulous process.

These differences are recognized by linguists and the judicial system alike. They lie at the foundation of the judiciary’s certification procedures for interpreters, and explain why the Administrative Office of United States Courts recognizes that “[t]he Court Interpreters Act does not address written translation requirements.” See *Guide to Judiciary Policy*, Vol. 5: Court Interpreting, §550.20.10 (2011).

II. The difference between interpreters and translators is recognized in many other statutes beyond § 1920(6). The U.S. Code consistently uses the words “interpret” and “translate” in the same manner as language professionals. A different understanding of § 1920(6) would therefore require an exception to otherwise uniform use of these terms throughout the Code. It would also be contrary to usage by the State Department, the Department of Defense, the Bureau of Labor Statistics, and even one of this Court’s rules.

III. Translation and interpretation are not just theoretically distinct, but practically different as well. Interpretation is required only for live testimony conducted before or during trial, whereas translation may apply to any written documents used during the course of litigation. Translation

costs are therefore limited only by the number of documents in a particular case. Allowing cost-shifting for such large amounts would require still further litigation over what documents are eligible for fee shifting, and whether incurred translation costs are reasonable. The decision to extend § 1920(6) to translation fees would thus have significant policy implications, and is best left to a clear directive from Congress.

ARGUMENT

“[T]echnical terms of art should be interpreted by reference to the trade or industry to which they apply.” *Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 372 (1986); *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974). Trade organizations and the United States Government, in a variety of statutes, regulations, and one of this Court’s rules, recognize that interpreters and translators are members of two different professions engaged in different media.

Practical differences suggest different treatment of interpreting and translating as well. Unlike interpreting, translating occurs during document production and review, and occurs outside the direct view of the court and other parties. Translation costs are therefore dramatically more difficult to monitor and control.

I. Interpreters And Translators Are Different Occupations, And The Professions Maintain A Clear Distinction Between The Two

Interpreters speak; translators write. American Translators Association, *Translation: Getting It Right: A Guide to Buying Translation 3 (Translation: Getting It Right)*.² While an outsider may conflate the two, interpreters and translators are different professions, as the professionals themselves and their associations recognize. See, e.g., *ibid.*; National Association of Judiciary Interpreters and Translators, *Frequently Asked Questions about Court and Legal Interpreting and Translating (NAJIT FAQ)*;³ The American Association of Language Specialists, *Standard of Professional Practice for Conference Interpreters and Translators*.⁴

To be sure, interpreters and translators often belong to the same organizations, but that does not eliminate the distinction between the two any more than the existence of the PTA eliminates the distinction between parents and teachers. Cf. Parent Teacher Association, *About PTA*.⁵ For example, both judiciary interpreters and judiciary translators may join NAJIT. *NAJIT FAQ*. The association, however, explicitly separates those professions, recognizing that interpreters render spoken communications into

² Available at http://www.atanet.org/docs/Getting_it_right.pdf.

³ Available at <http://www.najit.org/certification/faq.php>.

⁴ Available at <http://www.taals.net/standards.php>.

⁵ Available at http://www.pta.org/about_pta.asp.

a different language, while translators render written communications into a different language. *Ibid.*

The American Translators Association, the largest professional association of translators and interpreters in the United States, recognizes the same distinction: “Translators write, interpreters speak.” *Translation: Getting It Right* 3. International associations of interpreters and translators likewise appreciate the difference between the two professions. See, e.g., The American Association of Language Specialists, *Standard of Professional Practice for Conference Interpreters and Translators* (noting that interpreters work with oral communication while translators work with written documents);⁶ see generally International Association of Professional Translators and Interpreters, *Objectives*.⁷

Working in different media necessitates the development of distinct, specialized skills for each profession. The interpreter listens to the original spoken communication and then renders the communication orally in another language. See Minua Liu, *Working Memory and Expertise in Simultaneous Interpreting*, 6 *Interpreting* 19, 19 (2004); Heather Pantoga, *Injustice in Any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin*, 82 *Marq. L. Rev.* 601, 601–602 (1998-1999). That process, as the Bureau of Labor Statistics has observed, “requires

⁶ Available at <http://www.taals.net/standards.php>.

⁷ Available at <http://www.aipti.org/eng/objectives/>.

that one pay attention carefully, understand what is communicated in both languages, and express thoughts and ideas clearly.” United States Bureau of Labor Statistics, *Interpreters and Translators, Occupational Handbook 1* (2010-2011) (*Occupational Handbook*).⁸ Interpreters must therefore possess strong “analytical skills, mental dexterity, and an exceptional memory.” *Ibid.*

The Administrator of the United States Courts agrees, noting that interpreters must be “able to accurately and idiomatically turn the message from the source language into the receptor language without any additions, omissions or other misleading factors that alter the intended meaning of the message from the speaker.” U.S. Courts, *Federal Court Interpreters*.⁹ The court interpreter must be “adept at simultaneous interpretation” and “able to communicate orally including appropriate delivery and poise.” *Ibid.*

In addition, the ability to perform simultaneous interpretation requires specialized cognitive abilities. Liu, 6 *Interpreting* at 19–20; see generally Roseann D. Gonzalez, et al., *Fundamentals of Court Interpretation: Theory, Policy, and Practice* 315–358 (2001) (discussing psychological models of interpretation). The interpreter must express communication A, just heard in the source language, in the target language while listening to the incoming communication B. While the interpreter

⁸ Available at <http://www.bls.gov/oco/pdf/ocos175.pdf>.

⁹ Available at <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts/CourtInterpreters.aspx>.

continues to express communication A, he must temporarily hold the meaning of communication B in his memory. Liu, 6 *Interpreting* at 19–20. Such an instantaneous and continuous process requires excellent short-term memory and cognitive discipline. *Ibid.*; Daniel Gile, *Testing the Effort Models' Tightrope Hypothesis in Simultaneous Interpreting—A Contribution*, 23 *Journal of Linguistics* 153, 159 (1999). Indeed, “the interpreter is engaged in an ongoing process of problem solving and decision making.” Gonzales, et al., at 314.

Translators, by contrast, read written communications and then write those communications in a different language. *NAJIT FAQ*. Because they deal with written communication rather than spoken communication, translators must develop skills distinct from interpreters. Translators do not require specialized oral skills to perform their job; rather, they “must have excellent writing and analytical ability.” *Occupational Handbook* 1; see also Matthew S. Klimow, U.S. State Department, *Language Services Information for Translators* 2 (“An applicant must be able to write the target language well at an educated, native level with reasonable speed in a variety of styles.”).¹⁰

In addition, translators must have good editing and research skills. *Occupational Handbook* 1; Denis Sánchez Calderaro, *Considerations on Teaching*

¹⁰ Available at <http://languageservices.state.gov/Content/documents/LS%20information%20for%20translators.pdf>.

Translation, 2 *Translation Journal* (1998) (online).¹¹ Translators must know how to discover and convey a communication's nuance. And whereas interpreters render communications from one language to another almost instantaneously, "[t]ranslators have time to reflect and craft their output." Gonzalez, et al., at 295; see Liu, 6 *Interpreting* at 19–20. Indeed, a common saying among language professionals is that a translation is never finished, it is merely abandoned.

Beyond general research skills, translators must have computer-related skills, as "nearly all translation work is done on a computer, and most assignments are received and submitted electronically." *Occupational Handbook* 1. They have to be able to conduct Internet-based research, and while translating be able to utilize "specialized dictionaries and glossaries." *Ibid.*

In addition to different skill sets, interpreters and translators undergo different accreditation procedures. While the United States Court system certifies interpreters, there is no similar procedure for translators. This difference is not coincidental. The Court Interpreters Act (enacting 28 U.S.C. § 1920(6)), directed the Administrative Office of the United States Courts to establish a program to formally "prescribe, determine, and certify" the qualifications of "interpreters." Court Interpreters Act, Pub. L. No. 95-539 § 1827(b) (1978).

¹¹ Available at <http://translationjournal.net/journal/05educ.htm>.

However, “[t]he Court Interpreters Act does not address written translation requirements.” See, *Guide to Judiciary Policy, Vol. 5: Court Interpreting*, §550.20.10 (2011). The Administrative Office’s definition of “interpreter” for purposes of the Act is necessary for administration of the Court Interpreters system, and therefore should be given deference. Cf. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011).

Not only do different organizations accredit interpreters and translators, the accreditation exams also test different skills. As one would expect, interpreters must pass oral examinations. See, e.g., Federal Court Interpreter Certification Examination Program, *Federal Court Interpreter Certification Examination for Spanish/English: Examinee Handbook* 3 (2011) (*Court Interpreter Certification*).¹² Translators, by contrast, must pass written examinations. See, e.g., American Translators Association Certification Program, *Certification Exam*.¹³

To become a certified interpreter through the Administrative Office for the U.S. Courts, one must pass an oral examination that “measures a candidate’s ability to accurately perform simultaneous as well as consecutive interpretation and sight transla-

¹² Available at http://www.ncsconline.org/d_research/fcice_exam/2011approvedbyAO-Online.pdf.

¹³ Available at http://www.atanet.org/certification/aboutexams_overview.php.

tions¹⁴ as encountered in the federal courts.” United States Courts, *Interpreter Categories*.¹⁵ Similarly, to become a staff interpreter at the State Department, one must first pass “a mini-interpreting test over the phone.” U.S. State Dep’t Language Servs., *Applications Q&A*.¹⁶ If the candidate passes, she is invited to sit for the formal, hour-long oral interpretation test. *Ibid.* “Dictionaries and glossaries are not allowed.” *Ibid.*

Translators, on the other hand, are not subject to an interpreting test or oral interview. *State Department Q&A*. Translators applying to the State Department, for example, must submit a written application and pass a formal translation test consisting of translating several written passages. *Ibid.* Similarly, in an American Translators Association certification exam, the candidate translates writing rather than engaging in oral interpretation. American Translators Association Certification Program, *Certification Exam*.¹⁷ Additionally, unlike

¹⁴ As noted by the *Guide to Judiciary Policy*, sight translation is “a hybrid of translation and interpretation that requires the interpreter to first review the original written text, then render it orally into the other language.” *Guide to Judiciary Policy, Vol. 5: Court Interpreting* § 140(o) (2011).

¹⁵ Available at <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts/CourtInterpreters/InterpreterCategories.aspx>.

¹⁶ Available at http://languageservices.state.gov/content.asp?Content_id=174&menu_id=108.

¹⁷ Available at http://www.atanet.org/certification/aboutexams_overview.php.

in interpretation exams, candidates may use dictionaries and other materials. *Ibid.*

II. Congress, The Executive, And The Courts Consistently Distinguish Between Interpreters And Translators

All three branches of the federal government consistently distinguish between interpreters and translators. Throughout the U.S. Code, Congress uses interpreter when referring to oral interpretation and translator when referring to written translation. Likewise, the Executive branch consistently uses the terms interpreter and translator in the same way. In particular, the State Department, the Department of Defense, and the Bureau of Labor Statistics all distinguish between the roles of interpreters and translators when defining the professions. Even this Court in its own rules uses the term translator to refer to written translation.

1. Throughout the U.S. Code, Congress uses interpreters and translators, individually and together, in a manner that consistently recognizes the crucial distinction between the two roles.

Congress consistently uses the term interpreter to refer to spoken interpretation. For example, other parts of the Court Interpreters Act codified in Title 28 specifically contemplate an interpreter conducting real-time, spoken interpretation in the courtroom. The Code states that “[t]he presiding judicial officer * * * shall utilize the services of the most available certified interpreter * * * [when a party or witness] speaks only or primarily a language other than the English language.” 28 U.S.C. § 1827(d)(1); see also,

28 U.S.C. § 1827(d)(2) (“[The judge] shall determine whether to require the electronic sound recording of a judicial proceeding in which an interpreter is used.”); 28 U.S.C. § 1827(*J*) (“[T]he [judge] may appoint a certified * * * sign language interpreter to provide services.”). These statutory provisions clearly contemplate in-court oral interpretation of a real-time hearing rather than the out-of-court translation of written documents. It is particularly telling that Congress uses the term interpreter when referring to sign language interpretation. Sign language is an example of an interpretation that can only occur in a real-time, oral proceeding.

Likewise, the term interpreter is consistently used elsewhere in the Code to refer to real-time, oral interpretation. In Title 10, for example, the term repeatedly appears in reference to real-time, oral interpretation. 10 U.S.C. § 828 (“[T]he convening authority of a court-martial * * * may detail or employ interpreters who shall interpret for the court.”); 10 U.S.C. § 948(*b*) (referring to “interpreters who shall interpret for the military commission, and * * * for trial counsel and defense counsel”). Here, as in 28 U.S.C. § 1827, Congress is plainly referring to oral interpretation, confirming that Congress knows the difference between interpreters and translators.

The terms translation and translator, by contrast, are used consistently in the Code to refer to out-of-court, written translation. 7 U.S.C. § 2242b (“[F]unds * * * may be used for translation of publications * * * into foreign languages.”); 8 U.S.C. § 1375b (“[T]he Secretary of State shall translate the information pamphlet * * * into all relevant foreign

languages.”); 22 U.S.C. § 8222 (“The Secretary shall continue to expand the timely translation of the applicable parts of the Country Reports on Human Rights Practices.”).

In addition, when Congress uses the terms “interpreter and translator” together, it is clear that Congress understands the difference between the two. *E.g.*, 8 U.S.C. § 1555 (“Appropriations * * * provided for the Immigration and Naturalization Service shall be available for payment of * * * interpreters and translators who are not citizens of the United States.”); 10 U.S.C. § 1596b (providing for the designation of “any foreign language for which there is a shortage of experts in translation or interpretation”); 22 U.S.C. § 2695a (a) (“[T]he Secretary of State is authorized to require the payment of an appropriate fee * * * for providing other Federal agencies with foreign language translation and interpretation services.”); 28 U.S.C. § 530(I) (providing for the “payment of interpreters and translators who are not citizens of the United States”). In each instance, a definition of interpreter (or interpretation) that is inclusive of translator (or translation) would render the term translator (or translation) superfluous. This Court generally interprets terms in statutes to avoid the creation of superfluties. *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (“It is, however, a cardinal principle of statutory construction that we must ‘give effect, if possible, to every clause and word of a statute.’”) (quoting *United States v. Menasche*, 348 U.S. 529, 538-539 (1955)).

2. The Executive Branch also consistently distinguishes between interpreters and translators on precisely the same grounds.

The State Department's Language Services, which dates back to the Washington administration, has separate divisions for interpreting and translating. Matthew S. Klimow, *Language Services Information for Translators* 1.¹⁸ The Interpreting Division of Language Services provides interpreters who provide "an equivalent oral communication between two or more different languages" for the Executive Branch. U.S. State Dep't Language Servs., *Interpreting*.¹⁹ In comparison, the Translating Division of the Office of Language Services renders written communication from one language to another to those same entities. U.S. State Dep't Language Servs., *Translating*.²⁰

Similarly, the Department of Defense distinguishes between the interpreter and translator functions. In describing the two roles, the United States Army explains that conducting interpretation involves "oral" conversions, while "preparing translations" requires "written" transcription

¹⁸ Available at <http://languageservices.state.gov/Content/documents/LS%20information%20for%20translators.pdf>.

¹⁹ Available at http://languageservices.state.gov/content.asp?content_id=178&menu_id=110.

²⁰ Available at http://languageservices.state.gov/content.asp?content_id=177&menu_id=110.

“between English and a foreign language.” U.S. Army, *Careers & Jobs*.²¹

The Bureau of Labor Statistics draws the same distinction, defining an interpreter as one who “convert[s] one spoken language into another—or, in the case of sign-language interpreters, between spoken communication and sign language.” U.S. Bureau of Labor Statistics, *Interpreters and Translators*, Occupational Handbook 1 (2010-2011).²² Translators, by contrast, “convert written materials from one language into another.” *Ibid.*

3. Finally, this Court, in its own Rules, uses the term translation to refer to the translation of written documents. U.S. Sup. Ct. R. 31 (“Whenever any record to be transmitted to this Court contains material written in a foreign language without a translation * * * the clerk of the court transmitting the record shall advise the Clerk of this Court immediately so that this Court may order that a translation be supplied.”).

²¹ Available at <http://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/intelligence-and-combat-support/interpreter-translator.html>.

²² Available at <http://www.bls.gov/oco/pdf/ocos175.pdf>.

III. Translation Costs Are Disproportionately Greater, More Uncertain, And More Difficult To Administer Than Interpretation Costs

A. Including Translation Fees With “Interpreter” Fees Would Substantially Increase Awardable Court Costs Under 28 U.S.C. § 1920

Reading 28 U.S.C. § 1920 to include translator fees not only errs as a matter of statutory interpretation, but would also inflict significant practical costs on the legal system. Since translation expenses are unpredictable and outside the reach of judicial supervision, granting translator fees under § 1920 would seriously affect federal litigation in a wide variety of cases.

Furthermore, there is evidence that awarding translation fees would significantly increase the awardable court costs under § 1920. In the district courts that have conferred translator fees to the prevailing party, translation expenses have often been substantial. In one case alone, for example, a federal district court awarded over \$1 million in translator fees. See *Ortho-McNeil Pharm., Inc. v. Mylan Laboratories Inc.*, No. 1:02CV32, 2008 WL 7384877, at *10-*12 (N.D. W.Va. Aug. 18, 2008), aff’d in part, vacated in part, 569 F.3d 1353 (Fed. Cir. 2009). In other cases, translation expenses have totaled over \$100,000. See, e.g., *Gabriel Technologies Corp. v. Qualcomm, Inc.*, No. CV-08-1992, 2010 WL 3718848, at *10 (S.D. Cal. Sept. 20, 2010) (defendant asserted \$220,800 in translation costs); *Trading Technologies Int’l v. ESpeed, Inc.*, 750

F.Supp.2d 962, 983 (N.D. Ill. 2010) (plaintiff accrued \$109,614 in translation expenses).

In contrast to translation costs, interpreter fees are more finite—restricted to the amount of live oral testimony conducted during or before trial. Whether in the forum of a deposition, evidentiary hearing, or live trial witness testimony, interpreter services are necessarily limited by duration and, in the case of courtroom interpretation, by direct judicial oversight. But “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.” *Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, 541 F.3d 719, 728 (7th Cir. 2008). This is reflected in the fact that translating costs can vary widely. *Rodriguez-Garcia v. Municipality of Caguas*, 787 F.Supp.2d 135, 148 (D.P.R. 2011) (translation costs of \$2,000.00); *Conn v. Zakharov*, No. CV-1:09-0760, 2010 WL 2293133 (N.D. Ohio June 4, 2010) (translation costs of \$15,106.20); *Qualcomm*, 2010 WL 3718848, at *12 (translation costs of \$220,800); *Ortho-McNeil Pharm., Inc.*, 2008 WL 7384877, at *10-*12 (translation costs of \$1,011,712.00).

Accordingly, it is common for translation fees to significantly exceed the costs of interpreter services. In *E & J Gallo Winery v. Andina Licores S.A.*, No. CV-F-05-0101 AWI LJO, 2007 WL 1589546, at *2 (E.D. Cal. June 1, 2007), accumulated translation expenses (\$47,571.86) were more than ten times that of interpreter fees (\$3,900). Moreover, when the Seventh Circuit recognized that § 1920 court costs do not encompass translation fees, the court

acknowledged that it was “ominous that 65 percent of the costs awarded in this case were for translation.” *Extra Equipamentos E Exportacao Ltda*, 541 F.3d at 728. See also *Lopez Quinones v. Puerto Rico National Guard*, 715 F.Supp.2d 233 (D.P.R. 2010) (\$5,791.11 in translation costs exceeded \$1,434.70 in interpreter fees.); *Osorio v. Dole Food Co.*, No. 07-22693-CIV, 2010 WL 3212065 (S.D. Fla. July 7, 2010) (translation fees of \$38,446.55 in comparison to interpreter costs of \$4,359.49), report and recommendation adopted *sub nom.*, *Osorio v. Dole Food Co., Inc.*, No. 07-22693-CIV, 2010 WL 3212062 (S.D. Fla. Aug. 12, 2010).

Exorbitant translation expenses arise most commonly in multi-national patent infringement litigation. For example, *Ortho-McNeil Pharmaceutical, Inc.*, 2008 WL 7384877, which involved over \$1 million in translator fees, was a patent infringement suit. Patent litigation frequently requires the translation of voluminous foreign patent materials. See, e.g., *Espeed*, 750 F.Supp.2d at 982. In *Qualcomm*, 2010 WL 3718848 at *12, the defendant had to translate over “76 patents, * * * [with] 10,000 words per patent.” Given the expanse of patent infringement disputes, often spanning several years and numerous foreign patent claims, litigation of this scale “can generate millions of pages of documents” requiring translation. *Extra Equipamentos E Exportacao Ltda*, 541 F.3d at 728; *Ortho-McNeil Pharmaceutical, Inc.*, 2008 WL 7384877, at *11

(involving approximately 20,000 pages of translated written documents).²³

B. Awarding Translation Costs Would Impose A Substantial Burden On District Courts

Including translation fees in cost awards would also impose a substantial administrative burden on trial courts. For example, courts that—contrary to the plain language of § 1920—award translation costs typically require proof that the translations fees were “necessarily incurred.” See, *e.g.*,

²³ For litigants, the impact of shifting translation fees remains uncertain. The looming threat of having to indemnify their opponent could deter the poor and risk-averse from beginning litigation needed to vindicate their rights. Cf. John F. Fargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567, 1635-1636 (concluding in the context of attorneys' fees that “[i]n general, the English Rule operates as a greater impediment to access to justice than does the American Rule”). The award of court costs under § 1920 covers many important federal rights, ranging from 42 U.S.C. § 1983 civil rights claims to 20 U.S.C. § 1400 et seq. education disability suits. See, *e.g.*, *Williams v. R.W. Cannon, Inc.*, 657 F.Supp.2d 1302 (S.D. Fla. 2009) (suit involving Fair Labor Standards Act); *Cuadrado-Ramos v. Commonwealth of Puerto Rico*, No. CV-09-1369, 2010 WL 1416016 (D. Puerto Rico Mar. 31, 2010) (suit under Individual with Disabilities Education Act); *Melendez-Benitez v. United States*, 498 F.Supp.2d 460 (D.P.R. 2007) (challenging I.R.S. assessment of tax liability under 26 U.S.C. § 6672); *Rodriguez-Garcia v. Municipality of Caguas*, 787 F.Supp.2d 135 (D.P.R. 2011) (raising § 1983 claim alleging retaliation for political activities). Because legislators are in a better position to evaluate the implications attending additional cost-shifting in federal litigation, courts should require a clear directive from Congress before shifting costs for translation.

Slagenweit v. Slagenweit, 63 F.3d 719, 721 (8th Cir. 1995); *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 713 F.2d 128, 133 (5th Cir. 1983); see also *Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471, 1479 (10th Cir. 1997) (requiring party to prove translation “necessary”). Even though § 1920(6) does not on its face limit costs, courts that (wrongly) have awarded translation fees under that statute have naturally been reluctant to shift to the losing party all of an opponent’s translation fees, given the open-ended nature of translation expenses.²⁴ As a result, these courts have had to resolve subsidiary disputes about the volume and cost of translations.

This can create a battleground for parties to squabble over which documents “appear to be relevant” or necessary to the litigation. See, e.g., *Studiengesellschaft*, 713 F.2d at 133; *Ricoh Corp. v. Pitney Bowes Inc.*, Civ. No. 02-5639 (GEB), 2007 WL 1852553, at *3 (D.N.J. June 26, 2007) (finding translation costs not “necessarily incurred”). Resolving these disputes requires that a court somehow distinguish between the thousands of pages of translated documents produced by the parties to determine which translation costs should be awarded. See *Extra Equipmentos E Exportacao Ltda. v. Case Corp.*, 541 F.3d 719, 728 (7th Cir.

²⁴ Notably, the absence of any limit in the text of the statute is further proof that Congress did not intend to include translation fees in § 1920. Other costs awarded by § 1920 that a party could run-up—such as transcripts and copies—include the “necessarily incurred” limitation in the text of the statute, whereas those a party is unlikely or unable to run-up—such as docket fees, court costs, fees and disbursements for printing and witnesses, and interpreter fees—do not.

2008). Some courts limit the scope of their examination by considering only translated documents a party submitted to the court during the litigation. See, *e.g.*, *E. & J. Gallo Winery v. Andina Licores S.A.*, No. CV F-05-0101 AWI LJO 2007 WL 1589546, at *2 (E.D. Cal. June 1, 2007). But other courts will consider awarding costs for any translated document. See, *e.g.*, *Hynix Semiconductor Inc. v. Rambus Inc.*, 697 F.Supp. 2d 1139, 1153 (N.D. Cal. 2010) (awarding costs for translations made to check accuracy of opponent's translations). That courts disagree on even this threshold issue demonstrates the complexities involved in this inquiry. Compare, *e.g.*, *ibid.* (allowing costs to check accuracy of opponent's certified translations), with *Ricoh Corp.*, 2007 WL 1852553, at *3 (denying costs because party "could reasonably have relied on the translation provided under oath" by opponent's translator).

Courts must also determine a reasonable rate that they can use to compute the cost of translation. Although the rates of interpreters are generally set by government agencies, see, *e.g.*, United States Courts, *Current Fees for Contract Interpreters*,²⁵ "[t]ranslators usually can set their own rates." Judith Kenigson Kristy, *Translators and Interpreters: Cut From The Same Cloth?*, Vol. XVI, No. 1 Proteus: The Newsletter of the National

²⁵ Available at <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts/CourtInterpreters/ContractInterpretersFees.aspx>.

Association of Judiciary Interpreters 1, 7 (2007).²⁶ Rarely can courts rely without scrutiny on the rate paid by the party that incurred the translation expenses. Courts instead need to analyze invoices so they can exclude the cost of special services such as rush translation and delivery. See, e.g., *Osorio v. Dole Food Co.*, No. 07-22693-CIV, 2010 WL 3212065, at *11 (S.D. Fla. July 7, 2010), report and recommendation adopted *sub nom.*, *Osorio v. Dole Food Co., Inc.*, No. 07-22693-CIV, 2010 WL 3212062 (S.D. Fla. Aug. 12, 2010).

Cases involving multiple translators—all charging different rates—add further complication. A prevailing party will not want the court simply to apply a flat rate across all documents. Rather, they will request that courts assess higher rates for certain translations, forcing courts to examine invoices even more closely. See, e.g., *Ortho-McNeil Pharm., Inc. v. Mylan Laboratories, Inc.*, No. 1:02CV32, 2008 WL 7384877, at *11 (N.D. W. Va. Aug. 18, 2008) (suggesting court would consider party’s actual costs if party could match invoices to specific translated documents), *aff’d in part, vacated in part*, 569 F.3d 1353 (Fed. Cir. 2009).

As translation fees can dwarf other costs, parties will have substantial incentives to fully litigate these disputes, consuming scarce judicial resources. “Without a clearer directive from Congress,” courts should not “be required to wade into such issues.” *Extra Equipmentos*, 541 F.3d at 728.

²⁶ Available at <http://languageaccess.us/Documents%20and%20Links/Translators%20&%20Interpreters.pdf>

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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