

10-1472

In The
Supreme Court of the United States

KOICHI TANIGUCHI,

Petitioner,

v.

KAN PACIFIC SAIPAN, LTD.

doing business as Marianas Resort and Spa,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

**BRIEF OF *AMICI CURIAE*
INTERPRETING AND TRANSLATION
PROFESSORS IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether costs incurred in translating written documents are “compensation of interpreters” for purposes of 28 U.S.C. § 1920(6).

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BRIEF OF *AMICI CURIAE*¹

Amici curiae Interpreting and Translation Professors respectfully request that this Court consider this Brief in Support of Petitioner.

INTEREST OF *AMICI*

Amici curiae are scholars with expertise in the language services industry. *Amici* have extensive experience with the education and training of interpreters and translators, as well as the research into the different disciplines. *Amici* believe that the finding of the Circuit Courts of Appeals that document translators are encompassed within the term “interpreters” under 28 U.S.C. § 1920(6), including the Ninth Circuit in this case, have misunderstood how the term “interpreters” is commonly understood in the language services industry. As shown in this Brief, interpreting is defined in the industry as an oral discipline involving specific oral skills that are fundamentally different from those required for written document translation. Interpreting is also considered a distinct profession from translation, as interpreters are subject to different education and training from translators. *Amici* submit this Brief in support of Petitioner’s position that the term “interpreters” in 28 U.S.C. § 1920(6), as commonly used by practitioners, trainers,

¹ The parties have consented to the filing of this brief in letters that are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, this Brief was not written in whole or in part by counsel for any party and no person or entity other than counsel for *amici* has made a monetary contribution to the preparation and submission of this Brief.

and scholars, does not include translation of written documents.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The parties disagree as to whether document translators should be considered “interpreters” within the meaning of 28 U.S.C. § 1920(6). Because there is no definition of the term “interpreters” in § 1920(6), the Court may look to how that term is commonly used in the language services industry to determine its meaning. *Amici* believe that the Court should hold that the term “interpreters” under 28 U.S.C. § 1920(6) does not include document translation services.

Amici are familiar with how the term “interpreter” is commonly used in the language services industry. Specifically, interpreting is defined in the industry as an oral skill, while translation is defined as a written one. Although interpreters and translators share the skill sub-set of proficiency in two or more languages, different language skills apply to each discipline. Interpreters must be articulate speakers and good listeners, and they require attention sharing skills and distinct processing skills that allow them to quickly grasp the meaning of a word or phrase in one language and convey the same meaning to the listener in a different language under extreme time constraints (simultaneously or with a few minutes delay, depending on the mode of interpreting). Interpreting

is generally accomplished through the reformulating of the speaker's message to convey the same meaning within the linguistic constraints of the listener's language, at times omitting minor aspects of meaning for the sake of comprehensibility and efficiency. In contrast, a translator is given a written text and tasked with determining more precisely the best word or phrase to convey what is stated in the original language for a given audience or communicative situation. Translators do not face the same time pressures as those imposed on interpreters, as they are able to research the meaning of words and phrases while they are translating, consult with colleagues, contemplate the use of different words and phrases over a long period of time, and revise their written product.

Most experts in the language services industry consider that "the two are very different, even incompatible professions." *ROUTLEDGE ENCYCLOPEDIA OF TRANSLATION STUDIES* 41 (Mona Baker, ed. 2009). As a result, interpreters' training differs significantly from that of translators. Further, federal court Spanish-language interpreters are required to pass a certification examination, which is administered over a two-year period. Importantly, this certification process is not required for translators, including those who translate documents in discovery for use in cases pending in federal court. Interpreters and translators also have separate professional groups that represent each discipline, further demonstrating the distinctions.

Accordingly, in the language services industry, interpreting is considered a distinct profession from

translation, and document translation does not fall within the scope of interpreting services. For this reason, *amici* support Petitioner's position that the Court should find that document translators do not fall within the meaning of "interpreters" under 28 U.S.C. § 1920(6).

ARGUMENT

I. INTERPRETING IS DEFINED AS AN ORAL DISCIPLINE; TRANSLATION IS A WRITTEN ONE.

This case concerns the definition of the term "interpreters" in 28 U.S.C. § 1920(6), which permits the taxing of the "compensation of interpreters" as costs in the federal courts. The parties dispute the definition of the term "interpreter" under this statute, and whether "interpreter" should be limited to oral services (as Petitioner argues), or encompass written document translation services as well (as Respondent argues). Courts reviewing this issue have generally relied on certain dictionary definitions of the term to support their positions, but little attention has been paid to the common usage in the industry. In the language services industry interpreting is plainly defined as an oral discipline, while translation is defined as a written one. Interpreting and translation services are considered distinct disciplines, with distinct skill sets, and the common usage of the term "interpreter" encompasses oral interpreting services, not document translation. *Amici* therefore support Petitioner's position that, in keeping with how the term is commonly used in the industry, "interpreters" should not encompass the

distinct and separate activity of document translation.

1. In determining the definition of the term “interpreting” under § 1920(6), the courts have generally relied on certain dictionary definitions, with little attention to the common usage in the industry. *See, e.g., Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, 541 F.3d 719, 728 (7th Cir. 2008) (citing WEBSTER’S THIRD NEW INT’L DICTIONARY 1182 (1981));² *BDT Products, Inc. v. Lexmark Int’l, Inc.*, 405 F.3d 415, 419 (6th Cir. 2005) (citing WEBSTER’S THIRD NEW INT’L DICTIONARY 1182 (1981)).³ The Ninth Circuit in this case specifically relied on the Sixth Circuit’s reasoning in *BDT Products* for its holding, which “relied on a dictionary [Webster’s Third New International Dictionary] definition of interpret ... [and] concluded that ‘translation’ services and ‘interpretation’ services are

² The Seventh Circuit also noted, without much clarification, that “[a]n interpreter as normally understood is a person who translates living speech from one language to another,” and that “the translator of a document is not referred to as an interpreter.” *Extra Equipamentos*, 541 F.3d at 727.

³ Webster’s Third New International Dictionary defines “interpreter” as “one that translates; *esp* : a person who translates orally for parties conversing in different tongues.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1182 (1976). In addition, Webster’s Collegiate Dictionary defines “interpreter” as “one who translates orally for parties conversing in different languages.” WEBSTER’S COLLEGIATE DICTIONARY 654 (11th ed. 2003). *See also* Brief of Petitioner at 13-16 (citing multiple dictionary definitions of “interpreting” as encompassing a form of oral translation).

interchangeable.” *Taniguchi v. Kan Pacific Saipan, Ltd.*, 633 F.3d 1218, 1221 (9th Cir. 2011).

The manner in which a term is commonly used in the industry can often be helpful in the Court’s determination of the proper definition of a statutory term. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331–33 (2011) (noting that where dictionary definitions differ, the “dictionary meanings, even if considered alone, do not necessarily limit the scope of the statutory phrase” to one certain meaning, and determination may be made through examination of other uses within the statute, in other statutes, in agency regulations, and in common usage); *Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010) (“When terms used in a statute are undefined, [the Court] give[s] them their ordinary meaning.”) (internal quotation marks omitted); *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 372 (1986) (“[T]echnical terms of art should be interpreted by reference to the trade or industry to which they apply.”). Specifically, the Court may look to the “technical literature” to determine the proper definition of a statutory term. *See Utah v. Evans*, 536 U.S. 452, 467 (2002) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974)) (examining texts and papers containing definitions of statutory term of art with technical meaning). Moreover, *amici curiae* from the professional industry may provide valuable guidance as to the Court’s interpretation of statutory terms. *See Parker v. Flook*, 437 U.S. 584, 587 n.7 (1978) (noting that “[t]he term ‘software’ is used in the industry to describe computer programs,” and citing to the Brief for the Computer & Business

Equipment Manufacturers Association as *Amicus Curiae*).

Because little attention in the cases has been paid to the common usage of the term “interpreters” in the language services industry, *amici* attempt to provide some clarification to the Court on this point.

2. The common meaning of the word “interpreters” in the language services industry unquestionably refers to an oral discipline, while translation refers to written work. For example, one of the world’s largest developers and publishers of voluntary consensus technical standards, the American Society for Testing and Materials (“ASTM”), recognizes that translation and interpreting are different activities requiring different technical specifications. The ASTM Main Committee F 43, Language Services and Products, maintains separate sub-committees for Interpreting and Translation, each with its own set of projects and proposed new standards. *See* ASTM International, Technical Committee F43 on Language Services and Products Fact Sheet, http://www.astm.org/COMMIT/F43_FactSheet711.pdf (last visited Dec. 3, 2011) (“The scope of the Committee shall be the development of standards (specifications, guides, test methods, classifications, practices, and terminology) for language services and products.”). The ASTM standards for interpreting define “interpretation” as “the process of understanding and analyzing a *spoken or signed* message and re-expressing that message faithfully, accurately and objectively in another language, taking the cultural and social context into account.” ASTM International, ASTM

F2089-01 STANDARD GUIDE FOR LANGUAGE INTERPRETATION SERVICES § 3.1 (2007) (emphasis added).

Likewise, a number of texts define or use the term “interpreter” to refer only to those performing oral interpreting services. *See, e.g.*, Mary Phelan, THE INTERPRETER’S RESOURCE 6 (2001) (“Interpreting takes place when one person translates *orally* what he or she hears into another language.”) (emphasis added); James Nolan, INTERPRETATION: TECHNIQUES AND EXERCISES 3 (2005) (“Interpretation can be defined in a nutshell as conveying understanding.... An interpreter listens to a spoken message in the source language and renders it *orally*, consecutively or simultaneously, in the target language.”) (emphasis added); THE INTERPRETING STUDIES READER 2-3 (Franz Pöchhacker & Miriam Shlesinger eds., 2002) (“Interpreting then can be defined most broadly as interlingual, intercultural *oral or signed* mediation, enabling communication between individuals or groups who do not share, or do not choose to use, the same language(s).”) (emphasis added); Holly Mikkelson, INTRODUCTION TO COURT INTERPRETING 67 (2000) (“[I]nterpreting is the transfer of an oral message from one language to another in real time (as opposed to translating, which is transfer of a written message from one language to another and may take place years after the original message is written ...”)); Roseann Duenas González, Victoria F. Vásquez & Holly Mikkelson, FUNDAMENTALS OF COURT INTERPRETATION: THEORY POLICY AND PRACTICE 33-34 (1991) (“*Interpretation* almost universally refers to the transfer of meaning from one language into another for the purpose of

oral communication between two persons who do not share the same language.”); *see also* David Crystal, THE CAMBRIDGE ENCYCLOPEDIA OF LANGUAGE 354 (2010) (“In specific professional contexts, however, a distinction is drawn [between interpretation and translation]”).

As well, a number of professional organizations provide definitions for “interpreter” that indicate distinction from translators. For example, the National Association of Judiciary Interpreters and Translators (“NAJIT”), a professional organization representing both interpreters and translators, also specifically defines “interpretation” as an oral skill. NAJIT, Frequently Asked Questions About Court and Legal Interpreting and Translating, <http://www.najit.org/certification/faq.php#difference> (last visited Dec. 3, 2011) (“Interpretation is the process by which oral communication is rendered from one language to another. The original is either spoken or signed language, and the rendition is delivered either in another spoken language or in a signed language.”). In addition, the Interagency Language Roundtable (“ILR”), an organization representing multiple federal agencies in which foreign languages are used in federal government employment, has established skill level descriptions for several language tasks, including “interpretation performance.” The ILR defines “interpretation” as “involv[ing] the immediate communication of meaning from one language to another.” Further, ILR notes that “an interpreter conveys meaning orally ... [and] [a]s a result, interpretation requires skills different from those needed for translation.” Interagency Language Roundtable, ILR Skill Level Descriptions for

Interpretation Performance, <http://www.govtilr.org/skills/interpretationSLDsapproved.htm> (last visited Dec. 3, 2011).

Thus, in the language services industry, the term “interpreter” is commonly defined as encompassing an oral skill.

3. Moreover, as used in the industry, the term “interpreter” generally refers to two basic modes of interpreting services: simultaneous and consecutive. ASTM defines “simultaneous interpretation” as “a highly complex cognitive activity that requires the interpreter to listen, analyze, comprehend, convert, edit, and reproduce in real time a speaker or signer’s message while the speaker or signer continues to speak or sign, in a specific social context.” ASTM F2089-01, *supra*, § 3.2. “Consecutive interpretation” is defined as “a highly complex cognitive activity that requires the interpreter to listen, analyze, comprehend, convert, edit, and reproduce the original message after the speaker or signer pauses, in a specific social context.” *Id.* § 3.3. To perform consecutive interpreting, the interpreter generally will use a note-taking system to supplement his or her memory of the source message. *See* Nolan, *supra*, at 294 (“Note-taking is most important to the consecutive interpreter.”); *see also* Mikkelson, *supra*, at 70-72; González, Vásquez & Mikkelson, *supra*, at 387-88 (“Very few words of the original message are written down, because interpreters focus on ideas, not words.”). Both consecutive and simultaneous

interpreting are used in courtrooms. *See* Mikkelson, *surpa*, at 73.⁴

A related discipline—“sight translation”—is also considered a form of interpreting. Sight translation is a hybrid skill that involves both oral and written language, *i.e.*, the oral interpretation of a written text. Mikkelson, *surpa*, at 76. In a legal setting, a sight translator is the equivalent of an interpreter, as sight translation requires the same speaking skills and precision, and is subject to the same pressures and time constraints, as legal interpreting. *Id.* Sight translation also does not involve the extensive research and editing that translations must undergo. *Id.* Thus, despite the name, a person conducting a sight translation in the courtroom should be considered an “interpreter” under 28 U.S.C. § 1920(6). *Id.* Longer, technical documents should not be sight translated, but

⁴ Indeed, in the Court Interpreters Act, Congress acknowledged the simultaneous and consecutive modes of interpretation and specifically requires simultaneous or consecutive interpretation in certain federal court proceedings. H.R. Rep. No. 95-1687, at 8 (1978) (describing simultaneous interpretation as “interpret[ing] and ... speak[ing] contemporaneously with the individual whose communication is being translated” and consecutive interpretation as “the speaker ... paus[ing] to allow the interpreter to convey the testimony given” and “allow[ing] the interpreter to condense and distill the speech of the speaker”). Pursuant to the current version of the Court Interpreters Act, as codified at 28 U.S.C. § 1827, simultaneous interpretation is used for interpreting “for any party to a judicial proceeding instituted by the United States,” and consecutive interpretation is used for interpreting “for witnesses.” 28 U.S.C. § 1827(k).

instead should be assigned to a professional translator. *Id.*

In addition, interpreting also refers to the use of sign language. Sign language is a visual medium of communication, and therefore does not have a written form (although various methods of representing signed messages in writing have been developed). As with oral interpreting, courtroom sign language interpreting involves taking the spoken words and conveying the meaning of those words in a different language through signs, or vice versa. *See* Janice H. Humphrey & Bob J. Alcorn, *SO YOU WANT TO BE AN INTERPRETER: AN INTRODUCTION TO SIGN LANGUAGE INTERPRETING* (1995).

Whether interpreting simultaneously or consecutively, or through sign language, an interpreter listens to a speaker's words, processes the meaning of those words from one language to another, and then conveys the *meaning* of the speaker's words to the listener in another language. Mikkelson, *supra*, at 70 ("What is really meant by a 'verbatim' interpretation is that every single element of meaning in the source-language message must be accounted for in the target-language version."); González, Vásquez & Mikkelson, *supra*, at 322 ("In order for the judge and jury to hear exactly what the witness is saying, the interpreter must convey to the actors in the courtroom ... every element of the witness's message as if they were speakers of the [source language] and the interpreter were not there.... In court interpretation, conservation of meaning takes precedence over all other considerations."). Interpreting generally involves

conveying this meaning into another language through reformulation or restructuring of what was spoken. Mikkelson, *supra*, at 74 (“[I]nterpreters must ‘repackage’ the message to make it understandable in the target language.”); González, Vásquez & Mikkelson, *supra*, at 155 (“The interpreter is required ‘to transfer all of the meaning he or she hears from the source language into the target language’”) (quoting R.D. Gonzalez, FEDERAL COURT INTERPRETER CERTIFICATION EXAMINATION MANUAL 5 (1986)). It is not necessary that the interpreter provide a literal, word-for-word translation of what is said by the speaker, nor indeed is it desirable—“literal” should not be confused with accurate. THE INTERPRETING STUDIES READER at 120; González, Vásquez & Mikkelson, *supra*, at 281 (“Interpretation by language-deficient interpreters is marked by literal translation; interpreters focus not on the essential ideas but rather on the words, exchanging words between the [source language] and [the target language] without converting or conserving the crucial concept.”). The basic underlying tenet for each of these forms of interpreting is the processing of oral speech from one language into another in a short time period and the conveying of the meaning and equivalent pragmatic effect of the speaker’s words or phrases.

4. In contrast, the term “translation” is commonly understood to refer to the process of comprehending a written text and transferring the meaning contained therein to a written text produced in another language. For example, ASTM International defines “translation” as the “process comprising the creation of a *written* target text base

on a source text in such a way that the content and in many cases, the form of the two texts, can be considered to be equivalent.” ASTM International, ASTM F2575-06 STANDARD GUIDE FOR QUALITY ASSURANCE IN TRANSLATION § 3.1.42 (2006) (emphasis added); *see also* Elena M. de Jongh, AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE 35 (1992) (“*Translation* generally refers to the transfer of thoughts and ideas from one language (the source language) to another (the target language) by means of the written word.”). Translation is not done in a short period of time, and may involve any combination of research, consultation, and trial-and-error contemplation of different words and phrases to arrive at the “best” translation of the original text.

Other professional organizations also define translation as synonymous with written documents. For example, NAJIT defines “[t]ranslation” as “the process by which written text is rendered from one language to another. The original is in written form, and the translation into the other language is also produced in written form.” NAJIT, Frequently Asked Questions About Court and Legal Interpreting and Translating, <http://www.najit.org/certification/faq.php#difference> (last visited December 3, 2011). And the ILR defines “translation” as “normally reserved for written renditions of written materials.” Interagency Language Roundtable, ILR Skill Level Descriptions for Translation Performance, <http://www.govtilr.org/skills/AdoptedILRTranslationGuidelines.htm> (last visited Dec. 3, 2011). Indeed, the ILR notes that “[t]ranslation is thereby distinct from interpretation,

which produces a spoken equivalent between two languages.” *Id.*

5. Accordingly, within the language services industry, the term “interpreter” is used to describe someone who performs simultaneous and consecutive interpretation of oral speech (including sign language). This term does not encompass the translation of written documents. Instead, the separate term “translator” describes this practice, which is considered a distinct practice. For these reasons, *amici* believe that the Court should find that document translation services do not fall within the scope of the term “interpreters” under 28 U.S.C. § 1920(6).

II. DIFFERENT LANGUAGE SKILLS APPLY TO INTERPRETERS AND TRANSLATORS.

Not only does the fact that the terms “interpreter” and “translator” are defined differently in the industry support a distinction between the two disciplines, but the different skills used by interpreters and translators also make clear this distinction. The skills required to perform proper interpreting services do not coincide entirely with those required for translation. Mikkelson, *supra*, at 77 (“In fact, translating and interpreting, while closely related, are different skills that not everyone is capable of mastering equally ...”). Indeed, although court interpreters may accept translation assignments, very few are trained for translation, and they tend to regard it as a sideline task in the industry performed as a courtesy to regular interpreting clients. *See id.* (“In any case, it is

important for interpreters to candidly assess their translation ability and to turn down translation assignments if they feel they cannot perform the task adequately.”).

1. When examining the distinction between interpreters and translators, it is important to emphasize the difference between messages that are conveyed in writing and those that are conveyed orally. Generally speaking, written language is static (and in the case of legal language, frozen and formal); oral language is dynamic and immediate. *See de Jongh, supra*, at 36 (“[T]ext, regardless of its quality, is static, immutable in its form and fixed in time... [A] spoken message ... must be immediately transformed and communicated orally in the target language.”); *THE INTERPRETING STUDIES READER, supra*, at 388-89; González, Vásquez & Mikkelson, *supra*, at 264. Written discourse tends to be much denser and more convoluted than extemporaneous spoken language, because the reader has more time to process the message than the recipient of oral discourse. González, Vásquez & Mikkelson, *supra*, at 295. Written language also tends to be more precise, because the lack of paralinguistic features such as voice inflection, gestures and pauses may require additional verbiage. *Id.* at 402; Kelly Wiechart, *Written vs. Oral Communication* (Aug. 2007), <http://www.uiw.edu/owc/Handouts/Written%20vs%20Oral%20Communication.doc>.

Spontaneous speech also often involves implicit messages in the form of sentence fragments that cannot be conveyed completely in another language because of different grammatical and

syntactical features. *See* González, Vásquez & Mikkelson, *supra*, at 237-251, 478 (noting that the interpreter is likely to encounter multiple different nuances, variations, and cultural meanings of speech). Generally, because of the nature of their work and the conditions in which they perform it, translators could not do the same job as interpreters, and vice versa. *See* Mikkelson, *supra*, at 77 (noting that it is “important for interpreters to candidly assess their translation ability and to turn down translation assignments if they feel they cannot perform the task adequately.”); González, Vásquez & Mikkelson, *supra*, at 407 (“If a translation of the entire document is required, interpreters should inform the court how long they think it will take to do the research. If they do not feel competent to translate the document at all, this should be made clear.”).

2. Further, the fundamental skills that interpreters must have relate to their oral language proficiency. Interpreters must be articulate speakers, and must have an active command of two or more languages (since they interpret both into and out of English in the United States court system). González, Vásquez & Mikkelson, *supra*, at 19 (“The interpreter’s vocabulary must be of considerable depth and breadth to support the wide variety of subjects that typically arise in the judicial process.”). They must also have a great deal of mental agility in order to solve linguistic problems on their feet, in real time. *See id.* (“These cognitively complex tasks demand acute memory, concentration, and analysis skills.”). These skills require listening and analysis, speech production and short-term memory. Daniel

Gile, BASIC CONCEPTS AND MODELS FOR INTERPRETER AND TRANSLATOR TRAINING 162 (1995).

Some challenges unique to interpreting include aural comprehension of different accents and dialects, and the ability to listen to the source language, process its meaning, and speak in the target language at the same time. González, Vásquez & Mikkelson, *supra*, at 295 (“[I]nterpreters must instantaneously arrive at a target language equivalent, while at the same time searching for further input.”). The interpreter must also be highly efficient at attention sharing, as the efforts to listen and analyze the original speech and subsequently remember the content and produce the interpretation take place either in rapid succession (consecutive interpreting) or at the same time (simultaneous interpreting). Mikkelson, *supra*, at 70-76; González, Vásquez & Mikkelson, *supra*, at 19 (“[T]he interpreter must have the ability to orchestrate all of these linguistic tasks while interpreting in the simultaneous and consecutive and [sic] interpretation modes for persons speaking at rates of 200 words or more per minute.”). Interpreters must develop pragmatic strategies unique to oral language mediation, including minimizing interference in information recovery and maximizing communication impact, and they must develop and maintain cross-cultural competence as well as an understanding of role boundaries. González, Vásquez & Mikkelson, *supra*, at 322 (“Court interpreters must adhere to certain legal standards that may not apply to any other type of interpreting or translating, and thus they are subject to unique demands.”); Gile, *supra*, at 5.

Additionally, court interpreters must fully understand the standards of practice that govern their profession. The ethical codes under which interpreters operate vary significantly from those of translators, and within the interpreting profession, the code governing court interpreters has some unique features dictated by the demands of due process and legal equivalence. Mikkelson, *supra*, at 48 (“Regardless of what type of setting they work in, professional interpreters must uphold certain standards of practice, including accurate and faithful interpretation, confidentiality, and impartiality.”); González, Vásquez & Mikkelson, *supra*, at 16-17; *Model Code of Professional Responsibility for Interpreters in the Judiciary*, in COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 197 (William E. Hewitt ed. 1995). “[W]hen interpreting legal terms or expressions, the court interpreter is concerned not only about the accuracy or adequacy of the interpretation, but also the comprehensibility and acceptability of the interpretation.” Eva N.S. Ng, *The Tension Between Adequacy and Acceptability in Legal Interpreting and Translation*, in THE CRITICAL LINK 5: QUALITY IN INTERPRETING—A SHARED RESPONSIBILITY 37, 41 (Sandra Hale et al. eds., 2009). Court interpreters also should have knowledge of the basic procedures in a courtroom, as well as of diverse legal systems and comparative law and how legal terms are generally used. *See* Mikkelson, *supra*, at 34 (“As a court interpreter, it is essential ... to know how cases are processed in the courts ...”); González, Vásquez & Mikkelson, *supra*, at 95 (“[F]or court

interpreters to carry out their task competently they must be aware of how the legal system works.”).

3. In contrast, translation involves taking written text and determining the best word or phrase to use in another language. Translation is not simultaneous or even consecutive, such as interpreting, and involves research and consultation with colleagues. Nolan, *supra*, at 3 (“The translator relies mainly on thorough research with background materials and dictionaries in order to produce the most accurate and readable written translation possible.”). To properly accomplish this work, translators must be eloquent writers. Nolan, *supra*, at 3 (“The translator’s activity is more like that of a writer, while the interpreter’s performance is more like that of an actor.”); Gile, *supra*, at 5 (“Technical translators are required to be able to write *publishable* texts, that is, to have *professional writing skills* ...”). Professional translators normally translate only into their mother tongue, and they therefore must have excellent writing skills in their native language, and must also have a solid passive knowledge of the language(s) from which they are translating. Gile, *supra*, at 2-3. Professional translators also may have their work reviewed by an editor or a reviser before it is submitted to the client (which, of course, is not available in interpreting). *Id.* at 104 (“The translator also tests the target-language version ... for editorial acceptability ...”).

Further, translators generally do not need the quick mental reflexes required of interpreters, but must be adept at finding the appropriate word or expression—the *mot juste*—even if it requires

extensive research. *See* Nolan, *supra*, at 3 (indicating that “in practice, the translator is usually held to a higher standard of accuracy and completeness (including the ability to reproduce the style of the original), while the interpreter is expected to convey the essence of the message immediately” and that “[a] good translator will spend much time searching for the correct technical term or the right choice of words”). The cognitive processing demands in written translation are considered to be significantly lower than in consecutive or simultaneous interpreting. *See* Gile, *supra*, at 185 (“[P]rocessing capacity requirements are much lower in written translation than in either mode of interpretation.”). It is true that translators, especially those who specialize in legal translation, must follow strict guidelines for dealing with legal documents. *Id.* But translators may devote all of their attention alternately to either reading and analysis of a source text or to writing the translation, with few or no time constraints under most working conditions. *Id.* at 186 (“[I]n translation there are no competing Efforts, and all available capacity can be devoted alternately to the Reading and analysis component ... and to the writing component ...”). These relatively discrete component processes of comprehension, transfer, and production stand in contrast to the multitasking that is required for either simultaneous or consecutive interpreting. *Id.* at 169, 180.⁵

⁵ An illustration of the different demands facing translators and interpreters in the court environment is seen in Ng, *supra*,

4. Accordingly, the different skills that interpreters and translators employ provides further support for the distinction between these two disciplines, and indicates that translators cannot be encompassed within the meaning of the term “interpreter.”

III. INTERPRETERS AND TRANSLATORS ARE SUBJECT TO DISTINCT PREPARATION AND ARE CONSIDERED DIFFERENT PROFESSIONS.

Further demonstrating the distinctions between the two disciplines, the training and education that interpreters and translators are likely to receive vary significantly. Among other things,

at 37-54. As illustrated therein, court interpreters in Hong Kong had been interpreting between English and Cantonese for decades when English was the official language of the colony. When Hong Kong reverted to Chinese sovereignty, English and Cantonese were adopted as dual official languages, and all laws were required to be published bilingually. The legal translators responsible for translating laws into Cantonese came up with very different solutions than those the interpreters had adopted previously. An example of one of the legal terms cited in the study is “burglary,” which involves a number of different elements and requires an entire phrase in the Cantonese translation. However, because of the constraints on interpreting, interpreters had used a term that was much more concise than the phrase used by translators, as determined after extensive research, to convey the entire legal concept. This demonstrates that interpreters and translators use different methodologies and fundamental skills to accomplish their tasks of conveying the meaning of a word or phrase and should not be viewed interchangeably.

interpreters undergo different training from translators, and in the case of court interpreters, generally must pass a rigorous certification examination. Translators are not subject to the same training or qualifications in the United States. In addition, different associations generally represent the different professions, also demonstrating the distinction and providing further evidence that document translators should not be encompassed within the definition of “interpreters.”

A. Interpreters and Translators Generally Have Separate Training Programs.

1. First, because interpreting and translating are different skills, many universities divide them into separate degree programs. For example, the Monterey Institute of International Studies offers M.A. degrees in conference interpreting,⁶ translation and interpreting,⁷ translation alone,⁸ and translation

⁶Monterey Institute of Int’l Studies, MA In Conference Interpretation, <http://www.miis.edu/academics/programs/conferenceinterpretation> (last visited Dec. 3, 2011) (“Conference interpretation enables participants in a multinational meeting to communicate with one another in a seamless fashion ...”).

⁷ Monterey Institute of Int’l Studies, MA In Translation & Interpretation, <http://www.miis.edu/academics/programs/translationinterpretation> (last visited Dec. 3, 2011) (“Although interpretation and translation have much in common, the practice of each profession differs in the same way that written language differs from spoken.... Interpreters must be good public speakers who are adept at grasping meaning and solving complex linguistic problems quickly, whereas translators must be able to conduct thorough and meticulous research and produce accurate, camera-ready documents while adhering to

and localization management.⁹ Other schools offer one but not the other, as in the case of Kent State University, which has graduate degree programs only in translation.¹⁰

2. In addition, interpreter and translator training programs differ significantly in the skills that they teach. The major steps in interpreting training include courses in: public speaking; accent reduction; consecutive and simultaneous interpreting; scientific and technical interpreting; political and economic interpreting; sight translation; and court interpreting, as well as a practicum in interpreting, oral exit examinations, and interpreting internship opportunities. *See, e.g.*, Monterey Institute of International Studies, Courses, <http://www.miis.edu/academics/programs/translation/interpretation/courses> (last visited Dec. 3, 2011). In contrast, translator training generally involves

tight deadlines.”).

⁸ Monterey Institute of International Studies, MA in Translation, <http://www.miis.edu/academics/programs/translation> (last visited Dec. 3, 2011) (“[A]nything that is written is a potential translation assignment.”).

⁹ Monterey Institute of International Studies, MA in Translation & Localization Management, <http://www.miis.edu/academics/programs/translationlocalization> (last visited Dec. 3, 2011) (combining translation and computer training).

¹⁰ Kent State University, Dept. of Modern and Classical Language Studies, M.A. in Translation, http://www.kent.edu/mcls/graduate/ma_translation.cfm (last visited Dec. 3, 2011); Kent State University, Dept. of Modern and Classical Language Studies, PhD in Translation, <http://appling.kent.edu/graduate/phd.cfm> (last visited Dec. 3, 2011).

course in: literary translation; legal-commercial translation; scientific and technical translation; computer assisted and machine translation; desktop publishing; terminology management; and translation as a profession, as well as a translation thesis project, specialized translation depending on language combination and market, a practicum in translation, written exit exams, and translation internship opportunities. *See, e.g.*, Kent State University, Dept. of Modern and Classical Languages, M.A. in Translation, http://www.kent.edu/mcls/graduate/ma_translation.cfm (last visited Dec. 3, 2011) (listing program requirements for Master of Arts Specializing in Translation). The different courses of training demonstrate that interpreter training focuses on developing oral skills, as opposed to the development of written translation skills for translating training.

B. United States Court Interpreters Must Be Certified Through A Rigorous Examination.

Moreover, further demonstrating the distinction between interpreters and translators in the language services industry, especially in the legal context, United States court interpreters generally must be certified at either the federal or the state levels. Translators are not legally required to be certified, or to pass any sort of certification or proficiency test.¹¹

1. The federal certification exam is generally required before anyone may be certified as an interpreter in the United States federal courts. 28 U.S.C. § 1827; Gonzalez, Vasquez & Mikkelson at 20, 523-25; Federal Court Interpreter Certification Examination (“FCICE”) Information, Frequently Asked Questions, http://www.ncsconline.org/d_research/fcice_exam/faq.htm (last visited Dec. 3, 2011) (“Is it possible to become federally certified without taking this examination? No. There are no alternative examinations or qualifications for becoming federally certified.”). “Only in a case in which no certified interpreter is reasonably available ... may the services of otherwise qualified interpreters be used.” 28 U.S.C. § 1827(b)(2).

¹¹ Notably, the best translators do pass rigorous certification exams conducted by the American Translators Association, which are fundamentally different from exams administered for the certification of court interpreters. *See infra* at 32-33.

The United States Courts generally recognize three categories of “Interpreters”: (1) Certified Interpreters; (2) Professionally Qualified Interpreters; and (3) Language Skilled/Ad Hoc Interpreters. *See* United States Federal Courts, Three Categories of Interpreters, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts/CourtInterpreters/InterpreterCategories.aspx> (last visited Dec. 3, 2011). “Certified interpreters have passed the Administrative Office certification examination.” *Id.* “In languages other than Spanish, Navajo and Haitian-Creole, interpreters are designated as: professionally qualified [;] and language skilled.” *Id.* Professionally qualified interpreters must meet sufficient documentation and authentication requirements, and must have passed the United States Department of State conference or seminar interpreter test, passed the United Nations interpreter test, or be a member of the Association Internationale des Interpretes de Conference (“AIIC”) or The American Association of Language Specialists (“TAALS”). *Id.* “An interpreter who does not qualify as a professionally qualified interpreter, but who can demonstrate to the satisfaction of the court the ability to interpret court proceedings from English to a designated language and from that language into English, will be classified as a language skilled/ad hoc interpreter.” *Id.*

Passing the federal exam is an arduous process administered over a two-year period. FCICE Examinee Handbook, at 3, § 1.6 (2011), *available at* http://www.ncsconline.org/d_research/fcice_exam/2011approvedbyAO-Online.pdf (“The FCICE is a two-

phase examination of language proficiency and interpretation performance ... administered in alternate years.”).¹² The exam involves a written component as a screening device to qualify promising candidates for the oral exam, but the only translation involved in the exams is a multiple-choice section in which candidates choose the best translation of a term or phrase from four different choices. *Id.* at 17, § 3.1. The oral component then consists of sight translation both into and out of English, consecutive interpreting of testimony (questions in English, answers in the foreign language), and simultaneous interpreting (English into the foreign language) of typical courtroom discourse. *Id.* at 35, § 4.1.

In addition, many states also require certification of interpreters.¹³ The National Center for State Courts has developed a test bank for certifying court interpreters in many different languages. Certain state exams involve written translation, but generally only for the Spanish examination, and even then only involving the

¹² The federal exam is currently available only in the Spanish-English combination.

¹³ At least 40 states, as well as the District of Columbia, have some form of Court Interpreter Program. *See* National Center for State Courts, Contact Persons for State and Federal Interpreter Programs, http://www.ncsconline.org/D_Research/CIConsortContactspage.html (last visited Dec. 3, 2011). Twenty-three states are members of the Consortium for State Court Interpreter Certification, which designs tests for interpreters and makes them available to member states, and which is administered by the National Center for State Courts. *See* Mary Phelan, THE INTERPRETER’S RESOURCE 31 (2001).

translation of a short paragraph. Consortium for State Court Interpreter Certification, Overview of the Written Examination for Candidates, (Jan. 2005), *available at* http://www.ncsconline.org/D_Research/CourtInterp/Web%2010%20Overview%20of%20the%20Written%20Exam.pdf. The state exams place heavy emphasis on the oral component, generally requiring sight translation both into and out of English, consecutive interpreting of testimony (questions in English, answers in the foreign language), and simultaneous interpreting (English into a foreign language) of typical courtroom discourse, similar to the federal exam. Consortium for State Court Interpreter Certification, Overview of the Oral Performance Examination for Prospective Court Interpreters (July 2005), *available at* http://www.csconline.org/D_Research/CourtInterp/Web%207%20Overview%20of%20the%20Oral%20Exam.pdf.

2. By contrast, there is no certification examination requirement for legal translators in the United States. However, there are non-governmental certification and proficiency examinations offered for translation. For example, a certification exam for translators is administered by the American Translators Association (“ATA”). American Translators Association, ATA Certification Program, Certification Exam, http://www.atanet.org/certification/aboutexams_overview.php (last visited Dec. 3, 2011). Candidates for certification take a standardized exam consisting of three short texts: one on a general subject that is required for everyone; one on a medical or technical subject; and one on a legal, business, or financial topic. *Id.* Candidates

choose only one of the latter two to translate. *Id.* While certification is required for active ATA membership (provided there is an exam in the translator's language combination), it is not legally mandated to work as a translator. In other words, a translator's membership in the ATA is not a prerequisite to becoming a "translator" for a court at either the state or federal level.

3. Finally, other sectors of the language services professions have proficiency exams and qualifications for working as employees or contractors of a given institution. Examples include the United States Department of State,¹⁴ the European Parliament,¹⁵ and the United Nations.¹⁶ In addition, ILR, as noted *supra* at 12-13, 17, is an

¹⁴ U.S. Department of State Office of Language Services, Interpreting Division, <http://languageservices.state.gov/Content/documents/LS%20information%20for%20interpreters.doc> (last visited Dec. 3, 2011) (listing requirements for U.S. State Department interpreters examination); U.S. Department of State Office of Language Services, Translating Division, http://languageservices.state.gov/content.asp?content_id=270&menu_id=108 (last visited Dec. 3, 2011) (describing process for becoming a language translator).

¹⁵ European Personnel Selection Office, Ongoing Competitions – Translators/Interpreters, http://europa.eu/epso/apply/on_going_compet/tra/index_en.htm#chapter10 (last visited Dec. 3, 2011).

¹⁶ United Nations, Notice – 2011 Competitive Examinations for English-Language Interpreters, at ¶ 7 (2011), *available at* <http://www.un.org/Depts/OHRM/examin/11einot.doc>; United Nations, Notice – 2010 Competitive Examination for French-Language Translators/Précis-Writers, at ¶ 9 (2010), *available at* <http://www.un.org/Depts/OHRM/examin/10ftrnote.doc>.

organization representing multiple federal agencies in which foreign languages are used in federal government employment.¹⁷ The translation and interpreting proficiency exams administered by these institutions are independent from each other, and different administrative divisions and career tracks have been established for the provision of translation and interpreting services in these institutions.

In the private sector as well, certain language service companies have internal tests to qualify the interpreters and translators who work as contractors for them. *See, e.g.*, Language Line Services, Our Company, http://www.language.com/page/our_company (last visited Dec. 3, 2011); Lion-Bridge Technologies, Inc., Legal and Court Interpretation, <http://en-us.lionbridge.com/Interpretation.aspx?pageid=1334&LangType=1033> (last visited Dec. 3, 2011); CyraCom, LLC, Interpreter Skills Assessment, <http://www.cyracom.com/Training/ISA> (last visited Dec. 3, 2011).

However, it is important to clarify that even if a person is certified as an interpreter through one of these various government methods, this will not qualify that person as a certified interpreter in the federal courts. Even certification as an interpreter or translator by a federal agency will not exempt that person from the two-year qualification examination as a federal court interpreter. It is only through the federal court exam that one can become properly

¹⁷ Interagency Language Roundtable, <http://www.govtilr.org/index.htm> (last visited Dec. 3, 2011).

certified as a court interpreter. FCICE Examination Information, Frequently Asked Questions, http://www.ncsconline.org/d_research/fcice_exam/faq.htm (last visited Dec. 3, 2011). This critical fact—that only by passing the federal exam can a person be certified as an interpreter in federal court—demonstrates even further the notion that an “interpreter” under federal law is not the equivalent of a person performing document translation services.

C. Different Professional Associations Generally Represent Interpreters and Translators.

In addition to the education and certification processes distinguishing between interpreters and translators, there are a number of professional associations that distinguish between the two disciplines and represent either interpreters or translators exclusively (or at least primarily).

For example, the AIIC represents only conference interpreters.¹⁸ The International Medical Interpreters Association (IMIA) encompasses only medical interpreters.¹⁹ In California, interpreters are represented by the California Federation of Interpreters (CFI),²⁰ while translators are primarily

¹⁸ AIIC – Professional Conference Interpreters Worldwide, <http://aiic.net> (last visited Dec. 3, 2011).

¹⁹ Int’l Medical Interpreters Ass’n, <http://imiaweb.org> (last visited Dec. 3, 2011).

²⁰ CFI – California Federation of Interpreters, <http://www.calinterpreters.org> (last visited Dec. 3, 2011).

represented by the Northern California Translators Association (NCTA).²¹

Further, while there are other organizations that represent both types of practitioners, even these organizations are usually weighted towards one or the other. Both NAJIT and TAALS focus mainly on interpreters while occasionally addressing the needs of translators. Likewise, the ATA and the International Federation of Translators (FIT) deal primarily with the translation profession, though their respective memberships include interpreters and their conferences may feature certain papers on interpreting. But regardless of whether there is some overlapping professional representation, it is generally accepted in the language services industry that interpreting and translation are two separate professions.

D. Interpreting and Translation Research Also Demonstrates the Distinctions.

Finally, research that has been done on interpreting and translation also demonstrates the distinctions between the two disciplines. The discipline of interpreting studies focuses on many aspects unique to interpreting, such as simultaneity, split attention, anticipation, pauses and synchrony, and time lag, and has its own journals. *See* Franz Pöchhacker, *INTRODUCING INTERPRETING STUDIES* (2004). Indeed, the approaches to research on

²¹ Northern California Translators Ass'n, <http://ncta.org> (last visited Dec. 3, 2011).

translation and interpreting are so different that it is unusual for a single researcher to conduct research on both.

Empirical literature in cognitive and linguistic sciences demonstrates that interpreting and translation are accomplished by different cognitive processes. For example, the compendium *COGNITIVE PROCESSES IN TRANSLATION AND INTERPRETING* (Joseph Danks, et al. eds., 1997) has separate chapters reporting research on translation processes and other chapters reporting research on interpreting. These studies indicate different cognitive information processing models of translation and interpreting, with very different mental components and separate connections among the components. *Compare* J. Danks & J. Griffin, “Reading and Translation: A Psycholinguistic Perspective,” *id.* at 161-75 (study of cognitive processes in translation), *with* B. Moser-Mercer, “Beyond Curiosity: Can Interpreting Research Meet the Challenge?,” *id.* at 176-95 (study of cognitive processes in interpretation). *See also* *TRANSLATION AND COGNITION* (Gregory Shreve & Erik Anoleone eds., 2010) (compiling research, including neuro-imaging data, and indicating a dichotomy between the cognitive process models of translation and interpreting).

Thus, along with the different training methods and professional representations of interpreters and translators, the empirical research literature also indicates a distinction between the translation of written text and the interpretation of oral language, which are performed by different sets

of cognitive processes to very different behavioral tasks.

CONCLUSION

For the foregoing reasons, the term “interpreter” in 28 U.S.C. § 1920(6) should be held to not encompass document translators.

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December 5, 2011