# SUPREME COURT
# OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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RIMINI STREET, INC., ET AL., )

Petitioners, )

v. ) No. 17-1625

ORACLE USA, INC., ET AL., )

Respondents. )

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Washington, D.C.
Monday, January 14, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:
MARK A. PERRY, ESQ., Washington, D.C.; on behalf of the Petitioners.
ALLON KEDEM, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioners.
PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 17-1625, Rimini Street, Incorporated versus Oracle USA.

Mr. Perry.

ORAL ARGUMENT OF MARK A. PERRY

ON BEHALF OF THE PETITIONERS

MR. PERRY: Thank you, Mr. Chief Justice, and may it please the Court:

The term "costs" is a term of art in federal law. This Court has held as much three times: in Crawford Fitting, in Casey, and in Murphy.

It is defined in Section 1920 of Title 28, and the Court also has held that three times in those three same cases.

In the Taniguchi case, the Court's most recent decision in this line, the Court emphasized that "costs" in federal law does not have its ordinary meaning but, rather, has this specialized meaning.

CHIEF JUSTICE ROBERTS: Well, what about full costs? I mean, that's the issue, right?

MR. PERRY: Your Honor, it is. Congress can, of course, override the default definition, and when it does so, it must do it explicitly. We have here two words, "full costs."

We actually agree, my friend Mr. Clement and I, on "full." It means all or all that can be contained or complete or something of that nature.

The dispute is on "costs" because just as the full moon doesn't tell us anything about Mars and Venus, "full costs," we submit, doesn't tell the court anything about fees and expenses.

And Congress has been careful in separating out those concepts, and this Court has been careful in separating them out. Murphy, the case that involved costs under the IDEA, specifically contrasted the word "costs" with the word "expenses" and said "expenses" is open-ended and might include travel expenses and salaries and so forth, whereas costs, we know, are these things under Section 1920.

And in Murphy, the Court told all of us, the lower courts and the bar, and Congress,

what it takes to override that presumption. The Court said, and this is a quote from page 301, "No statute will be construed as authorizing the taxation of witness fees as costs unless the statute refers explicitly to witness fees."

So here, in Section 505, Your Honors, we have a statute that does not refer explicitly to witness fees and, under a plain application of Murphy, cannot authorize witness fees.

JUSTICE SOTOMAYOR: Mr. Perry, I -- I understand all that case law. I think your adversary would argue, number one, that full costs in the Copyright Act predated -- predated both the definitional inclusion of costs in the federal statutes and that it had a history, a meaning, independent of what happened later.

You haven't addressed how you get rid of that independent meaning argument.

MR. PERRY: If I could address --

JUSTICE SOTOMAYOR: Number two, I think your adversary pointed us to three statutes of many that have the word "full costs." Give me a meaning to those three

statutes that would give effect to the word "full."

MR. PERRY: Justice Sotomayor, if I can take those in reverse order. Full costs, we submit, means all costs. And let me contrast that with section --

JUSTICE SOTOMAYOR: But it's discretionary under both the Copyright Act now and under the statute.

MR. PERRY: Yes, Your Honor, but in Crawford Fitting, the Court said the discretion is the on/off switch -- the question -- under 54(d), whether or not to give costs. That is the discretion. And let me contrast it --

JUSTICE SOTOMAYOR: The government hasn't excepted that yet, though.

MR. PERRY: Well, Section 2412, which this Court identified in the Baker Botts case as the clearest example of a cost statute that overrides the presumption, says that costs in a government case can be awarded in whole or in part -- Congress understands that concept -- whereas, in a copyright case, they're awarded full costs. It means all costs.

And -- and we know from history that

that's what courts did. And we also know, to go back to your first part of your question, Your Honor, is that the courts did not award any non-taxable expenditures. From 1831 to 1976, there are 858 copyright cases awarding costs. Not one case has ever awarded any cost not on a statutory schedule under either state law or federal law.

That tells the Court that our construction is correct historically and my opponent's construction has no historical support. There is not a single case that has ever read the statute the way the Ninth Circuit read it in the Twentieth Century Fox case. In fact, that is the first case in the history of the United States --

JUSTICE SOTOMAYOR: Could you point me to where in your brief or an amici accounted for those 800 cases?

MR. PERRY: Your Honor, we don't have them all listed out. We pointed out in the reply brief that my friends on the other side and all of their amici had not cited a single case on their point. And to confirm that we were right, I went through and had my team read

every single one of them.

(Laughter.)

CHIEF JUSTICE ROBERTS: The -- your -- your argument, though, would assume there are a lot of cases where, although costs were awarded, they weren't all costs. How many of those do you have?

MR. PERRY: We don't have any of those either, Your Honor. It appears that costs --

CHIEF JUSTICE ROBERTS: Well, then why would Congress be worried about saying "full costs"? Nobody's ever apparently ever awarded fewer than few costs or less than few costs.

MR. PERRY: Your Honor, we think it came out of the English copyright statute, which says full costs. It's a -- it's an -- it's a historical artifact, if you will. We went back through the history, though, and part of the point of the historical analysis is to see whether that phrase had some specialized meaning, either in England or in the States, as being beyond scheduled costs or fee bill costs. And the answer is no. There's absolutely no authority for that.

And so we have this -- this language

that is antiquated, but it has been carried through. Our interpretation does give it meaning. It is all costs, full costs, every cost to which you're entitled under the statutes. And that's all we typically ask of language.

My friends, on the other hand --

JUSTICE KAGAN: If you're right, why have the provision at all? Wouldn't 1920 do the trick?

MR. PERRY: Well, Your Honor, there's 208 federal cost statutes; 207 of them don't reference 1920 either. Congress, in other words, makes cost provisions and expense provisions and fee provisions and other things in many, many statutes, which would all be in one sense redundant of 1920.

This Court dealt with that in the Marx case in the context of Rule 54(d) and said that kind of redundancy is to be expected with respect to cost statutes because Congress has them here.

And there's a good reason for it, Your Honor. When Congress wants to change what a cost is -- for example, Taniguchi involved the

interpreters -- Congress can amend 1920 and add interpreters, or it could take out e-discovery, or it could do whatever it wants, and then that propagates out through 208 statutes automatically because what is a cost in -- in 1920 goes out through all the cost statutes.

Under the alternative construction, we would -- Congress would have to go through 208 times and amend all of them. And, of course, this Court would have to go through 208 times and construe all of them to figure out what's a cost or not a cost.

JUSTICE KAGAN: Well, that's a good reason for having 1920. It's not a good reason for repeating yourself.

MR. PERRY: Well, it doesn't repeat itself either, Your Honor. 1920 says a court may tax as costs the following things. So it defines the taxable costs and the power of a federal court. 54(d) says a court should award the prevailing party costs.

505 doesn't say either of those. 505 says the court may allow as a recovery costs, full costs, to any party. Under 505, the court can award costs to the non-prevailing party.

That's a total departure from 1920. That -- that is not authorized by 1920, in fact. So Section 505 has much independent work to do.

The second sentence of 505 also authorizes attorneys' fees. This, again, is a textual, structural point that gives weight to our side and not the other, because Congress understood that full costs did not include attorneys' fees, and when it explicitly provided for it, that entire sentence is rendered superfluous under Mr. Clement's definition.

JUSTICE ALITO: Well, it says -- the second sentence says that the -- the court may award reasonable attorneys' fees as part of the costs. So what does that do to your argument that "costs" has a very narrow meaning that can't include attorneys' fees?

MR. PERRY: It -- it confirms it, Justice Alito. That was the exact same formulation in Murphy and in Casey, as part of the costs. So, when -- when this Court says Congress can explicitly override 1920, it's by adding additional things as costs.

To say a fee is a cost is to say it

wouldn't be in the absence of an express congressional direction. And, here, we have in the second sentence that very express congressional direction that is required.

By calling the fees a cost for those purposes, it's making clear, among other things, that expert witness fees are not costs because, otherwise, they would have to be separately provided for as well.

In fact, Your Honor, there is no statute in the U.S. code that provides all expenses of litigation, and for good reason. We have the American rule. We've had the American rule since at least 1796 that says, in general, each party bears its own fees, costs, expenses, burdens.

It is -- it is -- the background presumption is that costs are not shifted. Fees are not shifted. Expenses are not shifted. And this Court over and over again has required an explicit statement, a clear statement, an unmistakable statement from Congress to invade that common law principle, to invade the American rule, and to change the background presumption.

We have here a phrase, "full costs," that is not explicit. The fact that we're here today shows that it's not explicit. But it does contain a word that this Court has construed over and over and over again.

Given that approach, in other words, not including fees, not including discovery, not including travel, not including salaries, unless Congress were to explicitly say so, would be consistent with the way the Court has construed every other statute.

JUSTICE BREYER: Is there a -- I read in the briefs, and I don't fully -- I want to be certain I grasped the argument, that there was a period of time many, many, many years ago when a court in awarding costs, a federal court, would look to state statutes, and the state statutes provided different amounts and didn't just repeat what we have today.

MR. PERRY: Correct.

JUSTICE BREYER: And then I thought that you had argued that, well, the word "full costs" means don't just look -- there are other things they don't look to the state statutes, but if state statute A awarded 33 cents and

state statute B awarded $4,000, it would mean that you go and look to the actual cost.

MR. PERRY: Our argument is a little different than that, Justice Breyer.

JUSTICE BREYER: What is that? That's what I'm trying to find out.

MR. PERRY: In 1831, when state law would have applied, many states had gradated fee schedules. They had these very complicated fee bills. And in New York, for example, you could get half cost, double cost, costs and a half, treble costs. And what full costs, we -- we think, one of the things it may have meant -- and, again, this is -- we're interpreting here -- was costs, right, full costs of the action.

The second thing it likely was doing, and what Congress told us in 1909 it was doing, was to override the statutory threshold on cost recoveries in federal court, established in the Judiciary Act of 1789.

At that time, if the prevailing party didn't win $500, it didn't get its costs at all.

And Congress said: No, in a copyright

case, if you win, you can get your full costs pursuant to the state schedule. So those are historical examples of what Congress may well have been doing.

And, again, the English experience, where full cost appears since the statute of it --

JUSTICE SOTOMAYOR: When I read this argument, the first prong by you, I thought could it mean full costs, 1920, without the limits of 1821?

MR. PERRY: Your Honor, it -- it unlikely means that since 1920 and 1821 were separated by the codifiers. If you look at the -- you know, the enrolled bills, going back to the fee bill of 1853, that was a unitary schedule of the allowable costs and amounts.

As the -- as the statute has been codified, they've been separated into different sections, but I think they all perform the same function.

Certainly, you know, in the -- in the 19th Century cases, applying the fee bill, The Baltimore, for example, in Day versus Woodworth, the Court looked at the -- at the --

at the fee schedule as a unitary fashion.

JUSTICE SOTOMAYOR: No, I -- I understand that, but I still don't -- I'm still trying to give meaning to "full."

MR. PERRY: Certainly, Your Honor.

JUSTICE SOTOMAYOR: And -- and so 1821 sets certain limits. If we read "full costs" to not invoke those limits but just to permit awards of what's specified in 1920, would that take care of your problem?

MR. PERRY: I think that would give meaning to the word "full." I think 1821 would remain binding. I think the easier way to look at it would be, say, for example, on witness fees, 1821 says $40 a day. Full cost means $40 a day. In a normal case, a court could choose to give $20 or $10 or $5, but under a full cost provision, it has to give the full $40 because that's the maximum Congress has specified.

CHIEF JUSTICE ROBERTS: But you -- you haven't found a single case where that was an issue?

MR. PERRY: Your Honor, it -- it hasn't been litigated, in part because I think cost bills generally are approved as a matter

of course. Remember, until just a few years ago, they -- they were approved on one day's notice by the clerk.

I mean, most of us don't even litigate cost bills because the -- the -- the cost to oppose them is greater than the cost bill itself. It's only in a case like this one where many tens of millions of dollars have been added in for non-cost expenses that would get to litigation of these points.

So there is not -- to directly answer your question, Mr. Chief Justice, there's not a great deal of litigation on either side of the -- of the question. We can see --

JUSTICE BREYER: Could you help me with just a fact, which may or may not be relevant, but in the SG's brief, the costs that you were searching was about $5 million. That's your view of what they're entitled to.

MR. PERRY: Three and a half million, but yeah.

JUSTICE BREYER: Three and a half million now? All right. Three and a half. And what they want is 17 and a half million. Does that 17 and a half million include

attorneys' fees?

MR. PERRY: No, Your Honor. Attorneys' fees were dealt with. There's a 20 some million dollar attorneys' fees award that's entirely separate from that.

JUSTICE BREYER: All right. So it's 20 million in attorneys' fees. It's three and a half million in everybody concedes.

MR. PERRY: Taxable costs.

JUSTICE BREYER: Yeah, and then they want an additional 17.6 million more?

MR. PERRY: And they were awarded 12.8 million because of some deductions.

JUSTICE BREYER: All right. So they -- so it's 12.8 plus -- this is -- this is a big amount here -- so it's about 32, $35 million in costs. And what was the damage award?

MR. PERRY: Thirty-five million dollars, Your Honor.

CHIEF JUSTICE ROBERTS: So the entire 35 million goes to -- to cost? It cost 35 million to get 35 million?

MR. PERRY: The costs and -- and expenses asserted by Oracle in this case were

greater than the damages awarded by the jury, that is correct.

JUSTICE BREYER: All right. Now I don't know if that's relevant, but it does seem a problem, if not in this case. But what -- what -- what -- what -- what is this -- somehow there's something odd about this, but -- but I -- but I don't know what.

MR. PERRY: Your Honor, I will say the only thing odd about it is that this award was made. If we go back to the American rule and the plain statement requirement, that $12.8 million should be taken off the ledger, which would make the whole thing a little more fair for everybody.

JUSTICE BREYER: Well, maybe. I mean, they spent the money.

MR. PERRY: Your Honor, they were --

JUSTICE BREYER: They might have gotten more.

MR. PERRY: They were seeking hundreds and hundreds and hundreds of millions, and they lost almost everything, is the answer, and then they tried to externalize, to use Justice Gorsuch's word, the -- the -- the -- all the

expenses they spent on unsuccessful claims, they tried to shift that back to the party that actually won. We won 25 of 26 claims asserted in this case, and they're trying to make us pay all the costs for all the things they lost. That's what's really happening here.

JUSTICE BREYER: Okay.

MR. PERRY: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Kedem.

ORAL ARGUMENT OF ALLON KEDEM FOR THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

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

This Court has treated "costs" as a term of art defined by the list in Section 1920. That formula helps courts and litigants navigate more than 200 statutes that use the term. It gives Congress a clear baseline against which to legislate and respects history because federal law has always defined by statute the costs that could be shifted between parties in cases at common law.

Let's start with the history. Justice Sotomayor, you asked a question about the priority of enactment, the fact that this statute was originally enacted in 1831, even though the current version of Section 1920 is much more recent.

What this Court said in Crawford Fitting is that the priority of enactment does not matter. Section 1920 presumptively applies in all civil cases, regardless of when those provisions were adopted.

Going back to the original history, what is it that the term "full costs" was enacted in order to do? We think that it does a couple things.

Five days after setting up the federal judiciary, Congress enacted the Process Act, telling federal courts to look to state fee bills in order to determine which costs could be shifted between litigants. That was the regime that prevailed at the time that this provision was added to the Copyright Act in 1831.

There were two general types of state fee bill provisions that would have made the

word "full" in full costs necessary, and we give a couple examples on page 17 of our brief, Footnote 1.

The first type of case are statutes that impose some sort of limitation on costs. So an example would be the first statute, a Kentucky statute providing "the plaintiff shall recover his full costs although the damages do not exceed 40 shillings." There were a number of statutes that said, if your damages were not above a certain threshold, you would get no more cost than damages. Forty shillings was a typical amount.

So this provision tells you that, even if your damages are below that type of threshold, nevertheless, you get your full costs.

The second type of case is a case of a statutory multiplier. So the Mississippi statute, for instance, provided a landlord can recover "double the value of rent in arrear and distrained for with full costs of the suit." So you get double damages along with your full costs.

And that's actually the sense in which

we think the 1831 Copyright Act used the term "full costs" because, remember, that for an infringement, half of any forfeiture would go to the government and the other half would go to the plaintiff, along with their full costs.

So the word "full" in that phrase tells you, even though the plaintiff is only getting half of the recovery, nevertheless, the plaintiff gets their full costs.

JUSTICE ALITO: Well, in 1831, according to your argument, federal law didn't really care -- didn't -- didn't have its own definition of what a cost would be. It -- costs were whatever the states regarded as costs, right?

MR. KEDEM: It wasn't a definitional provision.

JUSTICE ALITO: Whatever it -- was in the -- and so, if I looked at every single one of the state fee schedules in 1831, what would I find?

MR. KEDEM: So you would see --

JUSTICE ALITO: Would I find that they all agree on what the concept of a cost is, or would I find that some of them include maybe

the sort of things that were compensated here?

MR. KEDEM: So I think you'd find two things that are significant.

First of all, you would not see any discovery fees and you would certainly not see any expert witness fees. As far as we're aware, there is no fee bill from the 19th Century that awarded expert witness fees.

The other thing that you would see is that they're comprehensive. They go on in great detail and precisely spell out all of the different rates for the various things that could be taxed by the clerk of the court.

And that's significant because, in 1853, Congress passed its own federal fee bill, which was also incredibly thorough. It goes on for nine pages and spells out all of the different compensable categories.

And what this Court said in Crawford Fitting, the reason that it's treating Section 1920 as a definitional provision, even though, if you look at it, it's not unambiguously written as a definitional provision, is that Congress's intent was apparently comprehensive and exhaustive. In

other words, Congress did not want to leave anything undefined.

To buy Respondents' story, you would have to believe that, in 1831, even though Congress had never left things undefined before, it created a new regime, different from the one set up by the Process Act, of full compensation, essentially forcing federal courts to create their own copyright-specific fee bills, and that it achieved that objective simply by adding the word "full" in front of "costs."

And it's not as if the term "full costs" in Anglo-American law had some separate understood definition. We point you to a number of authorities interpreting statutes under English law. Now some of the cases are before 1831, some of them are after 1831, but they're all interpreting statutes that are from the 1600s and the 1700s, saying what those statutes has always been understood to mean, including in the context of the copyright case.

There is a statute called -- there's a case called Avery, which interprets the Copyright Act of -- I think it was 1842 or

something like that, and it says there is no understood distinction between costs that can be awarded in a statute that mentions full costs and one that just mentions costs.

And that's true in the Copyright Act going back to the statute of Anne in 1709, which is the predecessor to all early American copyright law.

Now, Justice Breyer, you made the point that it's very expensive in many cases to litigate these issues. You're going to need experts; experts cost money.

And that is true. To some extent, the baseline rule that Congress has created and this Court has observed means that you're going to undercompensate people because cost is almost always a fraction of your total litigation expenses.

The same argument was made in Murphy, that, for instance, a parent who wants to sue under the IDEA will have a lot of trouble making their case unless they can hire an expert, which is expensive. The same argument was made in Casey about civil rights plaintiffs. If it didn't carry the day in that

case and in those contexts, then certainly it shouldn't win here in the copyright context.

But, you know, Congress can respond in exactly the way that it did to this Court's decision in Casey. In Casey, this Court said you can't get your expert fees in certain civil rights cases. And so Congress passed a statute adding expert fees to the list of compensable expenses under Section 1988, which governs those civil -- same civil rights cases.

The benefit of the Crawford Fitting formula is that it provides clear instructions to Congress to tell them if you want to include something that's not already listed in Section 1920, here's how you do it. And as my friend pointed out, it propagates all the way through if you amend Section 1920 itself, or you can create a specific provision.

Now you might think all of this history is a bit of a muddle. Another benefit of the Crawford Fitting rule is that you don't have to perform a historical exegesis every time you come across a new provision with slightly different language. And remember that cost provisions are incredibly variable. They

talk about costs, costs for the proceeding, court costs, costs of the action, full costs, all costs.

Justice Sotomayor, you brought up four additional statutes enacted more recently than this one which mention full costs, and you asked: Why did they do that?

So, first of all, let's just say -- put the point that all of them deal with intellectual property in some fashion, so chances are they were just copied from Section 505.

But they all also specifically mention attorneys' fees, which is a big problem on Respondents' side because, if full costs already meant total compensation, there would have been no point in expressly adding attorneys' fees.

Now Respondents' response to that is, well, in 1909, when the American rule wasn't well established, it was necessary to clarify that attorneys' fees were included in full costs. That doesn't work even in 1909 because the copyright statute as it was enacted then made full costs mandatory but attorneys' fees

discretionary.

So, clearly, Congress wasn't just clarifying that the latter was included in the former.

JUSTICE ALITO: Well, Mr. Clement may have a surplusage problem, but you have a surplusage problem too, don't you?

MR. KEDEM: So we think that --

JUSTICE ALITO: "Full" -- it means nothing.

MR. KEDEM: Yeah. So starting in 1976 when the provision was switched from discretionary to mandatory, then there is some redundancy with the authority that already existed under Section 1920.

First of all, Congress generally doesn't tinker with existing language unless there was some reason to think that it was a problem, and, as my friend said, it was not until 2005 that the Copyright -- that anyone thought that the Copyright Act included something beyond what was already included in Section 1920, so there was no reason at that time for Congress to think there was a problem.

And, to be honest, had Congress taken

the word "full" out of the statute in 1976, no doubt someone would have used that fact to argue, well, clearly, Congress was displeased with the broad copyright cost awards and, therefore, would have used it to argue for a narrower rule.

But I think the probably most unsatisfying but most adequate answer --

JUSTICE KAVANAUGH: How would -- how would that have worked? That wouldn't have worked.

MR. KEDEM: Well, I think you could have argued in a case like this one that even for the costs that are authorized in Section 1920, you can't get the full amount of it or you can't presumptively get the full amount of it because Congress took the word "full" out, so, clearly, it wanted to cut back on the costs that were awardable. I'm not saying it would have won, but that was an argument that someone might have made. But I think --

JUSTICE SOTOMAYOR: You didn't adopt your adversary's on-and-off switch for the meaning of "full."

MR. KEDEM: That -- that's correct. That's the one place, I think, that we're different.

JUSTICE SOTOMAYOR: So explain --

MR. KEDEM: So -- yeah. It -- it's not at issue here and it wasn't litigated, but, you know, we think it is plausibly -- textually plausible to adopt that reading, but probably, if Congress wanted to put district courts to the unnatural choice of all or nothing, then it would have used clearer language. But the problem doesn't go away on Respondents' side. It gets worse because the costs are that much greater.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE RESPONDENTS

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

The authorization in Section 505 of the Copyright Act for the recovery of full costs means what it says and authorizes the recovery of full costs, not just a narrow

subset of costs set forth in Section 1920 as limited by Section 1821.

The contrary reading not only renders the word "full" completely superfluous, but it also effectively renders the first sentence of Section 505 without any meaning and renders three other federal statutes that authorize the discretionary award of full costs meaningless the day they were enacted.

There is no reason to adopt a construction that has those kind of consequences in rendering other statutory provisions superfluous. The better course is to say that "full" means full, rather than nothing at all.

Now I'd like to start with a response to Justice Alito's question about what we can tell that would have happened between 1831 and 1853.

Neither side here has a lot of case law to talk about, and that's because in the vast, vast majority of these, and both sides have looked for it, the courts just awarded costs and didn't say another word about it. And sometimes they even awarded costs as part

of damages.

The -- probably the best case that tells you something about what was going on, at least between 1831 and 1853, is a case called Ferrett against Atwill that's cited by my friends in their brief, and this is Justice Nelson riding on circuit.

The Court here -- the -- as -- as a circuit justice, he actually says something about costs because you have a case where, essentially, there are 11 works at issue and there were 11 suits. And the defendant who won and resisted the claim in all 11 suits basically tried to get kind of 11 of everything. And so that required the courts to sort of sort through that.

Now I think two things are telling about this opinion. First, in deciding the costs, and this cases arises in New York, the judge -- Justice Nelson doesn't look exclusively to New York law. He looks to New York law for some things, but he also looks to a then extant federal circuit rule to address one of the other items of costs.

And so I think he's doing exactly what

you expect somebody to do when they have a federal law requirement of full costs but not a lot of other federal law. They look to what little federal law there is, the circuit rule, and then they also look to state practice.

But the second thing -- and this is what I think is most directly responsive to Justice Alito's question and I think most important -- is the last item of costs that Justice Nelson awards is "attorney and counsel fees on argument are taxable in each case."

Now I assume but I don't know for sure that it may be that under the New York schedule, that those attorneys and counsel's fee were taxable. The opinion doesn't tell us that.

But the one thing it tells us absolutely certainly is that Petitioners are dead wrong when they say that between 1831 and 1853, full costs would have been well understood by everybody to be limited to party and party costs and not cover something like attorneys and counsel fee for argument.

JUSTICE KAGAN: Mr. Clement --

MR. CLEMENT: Sure.

JUSTICE KAGAN: -- you agree that if the word "full" wasn't in the statute you would lose?

MR. CLEMENT: Absolutely, Your Honor.

JUSTICE KAGAN: Okay. So we -- we decided a case earlier this year on the basis of the legal proposition that adjectives modify nouns. Why doesn't that kill you in this case? In other words, "full" can only modify costs as defined in 1920.

MR. CLEMENT: So I think that case helps us because it shows that you look at both the adjective and the noun, and I think what the Court didn't have to say there but is absolutely true is sometimes the adjective tells you how the noun is being used.

Just to illustrate that the adjective can make a big difference, if you think about the Weyerhaeuser case, and the adjective wasn't critical but was potential, potential habitat, I mean, habitat would still have a meaning, but I think the case would be very different.

But I think what's more telling here is I think what the dispute here is we say that Congress in 1831, in 1909, in 1976 used the

phrase "full costs" capaciously and used the word "costs" in its ordinary meaning.

My friends on the other side say, no, "cost" was being used in a term of art sense. I think you look to the adjective in this case to tell you which of us is right.

And I think there are --

JUSTICE KAGAN: But that's a strange kind of thing, because you -- we started, you said, if it just said cost, we would all understand that it was the term of art in 1920 costs.

And then you say that by adding the word "full," rather than to say, look, it really is the full amount of the 1920 costs, don't try slicing and dicing the 1920 costs, rather, you want to use the word "full" to suggest that it's not the 1920 costs we're talking about at all. It's some different kind of costs.

MR. CLEMENT: And I don't think that's strange at all, because it's not like some radically different kind of cost. It's the ordinary meaning of costs. And imagine if Congress had used the, I would have thought

until I got involved in this case, narrower phrase, non-taxable costs.

Now, if Congress had expressly provided for the recovery of non-taxable costs, I would think to a moral certainty that would tell you that Congress is using the word "costs" not in the term of art sense of taxable costs, because I can't imagine Congress meant to say non-taxable taxable costs.

It would be a strong indication that Congress used "cost" in its ordinary sense.

I think "full" does the exact same thing. And I think, think about it this way: what you're really talking about here is a choice between an ordinary meaning that's broader and a term of art meaning that's narrower.

When Congress uses the phrase with the modifier "full," I sure would have thought that's an indication that Congress means to adopt the broader reading and not the narrow reading that is the term of art.

And I think if you look at this from every relevant historical standpoint, which I think is 1831, 1909, and 1976, it all points

you in favor of the ordinary meaning construction of costs.

So, in 1831, the one thing we ought to be able to agree on is Congress was not using costs in 1831 in a narrow sense to refer to some other federal statute that provided a schedule of fees, because there wasn't one for another 20 years.

So I assume, consistent with this Court's cases, that when Congress used the term "full costs" in 1831, it was using it in its ordinary meaning, which would have covered all of the costs of litigation, and my friend's efforts to superimpose a narrow party-to-party costs framing on that is simply not borne out by the historical practice, as that Ferrett case shows, and I know it's not a lot, but it's all anybody has.

So I think it is clear that, between 1831 and 1853, ordinary costs was -- rather, "full cost" was being construed in its ordinary meaning way.

Then we get to 1909, a major revision of the statute. Congress carries forward the same term.

I understand this Court's basic rule to be that when Congress carries forward the same term, without making any change in it, it still has its meaning from 1831. But Congress does do something interesting in 1909.

It uses in the same statute the word "taxable costs" and the word "full costs," or the phrase "full costs." And I think it uses them in contradistinction. Certainly, every principle of statutory construction says that when Congress uses different words in the same statute, you try to find different meanings for them.

And, here, I think that basic rule is reinforced because Congress uses the phrase "taxable costs" in a very narrow context for the recovery of certain royalties, and then it makes those taxable costs recovery discretionary.

For every other claim under the statute, tax recovery is mandatory and Congress uses the term "full costs." So I think, if you look at it in 1909, you would also give it an ordinary meaning construction. You would also think that Congress was using costs not as a

term of art but as a broad, ordinary construction phrase.

And then we come to 1976, where my friends in the SG's office have to admit that by making cost recovery discretionary, full cost recovery discretionary, then Congress was essentially under their view rendering the word "full" completely superfluous.

And it seems to me, again, if you -- I think the first principle would be, since they're using the same phrase, you go back to the 1831 original public meaning. But even if you look at 1976, I think what you would see there is, in a choice between interpreting costs in the ordinary meaning way and using costs in a term of art way, it is precisely because they want to use terms of -- cost in the term of art sense that they render "full" superfluous, where, if you continue as a constant thread to say "cost" means the ordinary meaning of costs, then "full" is not superfluous.

JUSTICE KAVANAUGH: They say that your argument makes the second sentence of 505 superfluous. Your response?

MR. CLEMENT: So I have two basic responses. One you've seen in the brief, which is the argument that, given the American rule and the fact that it took the kind of currency it did, I think, a congressional staffer would be well advised to tell their boss, I think you ought to put in something specific about attorneys' fees here.

But I have another argument which I think at the end of the day for the textualists ought to be more compelling, which is at no time in history was the second sentence of the Copyright Act fees provision, in fact, superfluous.

So the first relevant period is 1909 to 1976, and as my friend from the SG's office points out, in that period, full cost recovery is mandatory, but attorneys' fee recovery is discretionary. So there's no way for Congress not to address attorneys' fees separately if they want to accomplish the goal of keeping attorneys' fees awards discretionary.

Then you come to the period 1976 to the present, and then it is also true at that point both awards become discretionary, but the

reason the second sentence still isn't superfluous is the first couple of words in the second sentence, "except as otherwise provided by this title."

And those words are a signal and respectfully a cross-reference to Section 412. And I think last week you had a case about registration of copyrights. And 412 basically says that if you don't timely register your copyright, you don't get certain remedies under the Act, specifically statutory damages and attorneys' fees, but you still get your full costs.

So, even after 1976, Congress had a very good reason to treat attorneys' fees differently from costs. And so, under our construction of the statute, not one word of the statute is superfluous.

JUSTICE BREYER: What do you say to, is there -- is there anything that will help me, and I might be unique in this, but I -- I often think that Congress when it uses these words doesn't really think about it.

(Laughter.)

JUSTICE BREYER: They -- they go up to

the drafting section, there is a drafting section, and you'll get a young man or woman there who has to write a very complicated statute, and -- and they might use words they don't really think about.

And so I look to a lot of other things, as in Murphy. All right.

Now the Copyright Act of '76 has an enormous history, volume after volume, and my guess is you looked through that, or you had somebody look through it. And is there anything that helps you, or that hurts you if you want to say, in -- in that long, long history of the '76 reform?

MR. CLEMENT: So, Justice Breyer, I didn't see anything there that I found particularly helpful. I do want to talk about some of the 1984 legislative history.

JUSTICE BREYER: But I'm more -- I -- I mean, all right. The '84 year is in your brief, I think.

MR. CLEMENT: Yeah, and it's really quite terrific, I think, for those that look at that sort of thing.

JUSTICE BREYER: Okay. All right.

I'll look at that. I'll look at that.

(Laughter.)

MR. CLEMENT: No, no, because -- and -- and -- and so let me say two things about that.

JUSTICE BREYER: Yeah.

MR. CLEMENT: I -- I'll just explain to you, Justice Breyer, why I -- I confirm that there was nothing particularly helpful.

So the 1976 act is a soup-to-nuts reform of the Copyright Act.

JUSTICE BREYER: Yeah.

MR. CLEMENT: And there's not a lot of focus on what became Section 505 as to either attorneys' fees or costs. And the only time anybody's thinking really any deep thoughts about Section 505, it's the fact that you're sort of moving from mandatory fees --

JUSTICE BREYER: Uh-huh.

MR. CLEMENT: -- to discretionary fees, but mostly they're talking about the attorneys' fees. So there's just really very little focus at all on the question of fees, which is why I think, especially for the textualists, you would think that what happens

in 1976 is they use the same terms and you continue to go back to the 1831 original public meaning, which couldn't possibly be a cross-reference to a fee act that doesn't exist for 22 years.

But, as to the 1984 legislative history, the reason I think this is compelling even to those that don't generally look at legislative history is because think about what the senator there is doing in expressing the views of the committee.

The committee, if you believe legislative history at all, very much wants to provide for the recovery of "investigatory fees," is the term he uses. Now they want to make sure that those are shifted to the prevailing party, and they think to themselves: Are they covered by the language we've used? And the language they've used is "full costs." And the senator concludes, duh, of course they're covered. We're using "full costs." How can they possibly not be covered?

Now I suppose the senator could have said: Well, I don't know, maybe somebody's going to come up with this crazy idea that it's

a term of art and it doesn't provide for this. So to make sure they're provided --

JUSTICE BREYER: Yeah.

MR. CLEMENT: -- I'm going to use a much narrower term, "investigatory costs."

JUSTICE BREYER: All right. Well, I'll look at that. But suppose you're right. Suppose I think -- now I think -- I read that and I say yeah, good point. All right.

I made that kind of point in Murphy, and I -- I said let's look at what Congress wanted. And I had a -- I thought fabulous. But, unfortunately, it wasn't fabulous enough because I was writing a dissent.

(Laughter.)

JUSTICE BREYER: All right? Now suppose -- and, after all, Murphy involved getting expert fees for the parents of handicapped children when, in fact, they, through the hiring of necessary experts, win. But the majority said in that case: No, they don't get their attorneys' fees.

So am I stuck with that? You say no? Well, well, well, this is a general problem, go back to your lengthy career. When do I say,

well, I lost; I lost in the consideration of the -- of that, so how long do I keep -- what rule do I follow? What approach do I take? And how long do I keep referring to a dissenting approach or view when others think the contrary?

MR. CLEMENT: Well, Justice Breyer, far be it from me to give you career advice --

(Laughter.)

MR. CLEMENT: -- but I would think --

JUSTICE BREYER: No, no, that's what I'm asking for.

MR. CLEMENT: I would think that the one thing you never -- you never abandon, just because you're in the dissent, is your basic approach to statutory construction. I mean, Justice Scalia, God rest his soul, was in dissent in a lot of cases, insisting on the plain meaning. He never turned around and said, well, I'm tired; I'm going to look at the legislative history this time around.

So that would be my -- my sort of --

JUSTICE BREYER: Pity.

(Laughter.)

MR. CLEMENT: And that would be --

that would be my -- that would be my career advice on that, but I would -- I would say I don't think you're bound for at least two very important reasons.

I mean, one is that -- and -- and Justice Ginsburg separately wrote a concurrence in the judgment to express her disagreement with this point, but the Court in Murphy, in agreement with the brief of the Solicitor General, applied a clear statement rule because it was a spending power case.

And this is not a spending power case. So, if you were inclined to find a distinction from Murphy, I think most of your textualist colleagues would say: Legislative history is never going to overcome a clear statement test, ever.

But, you know, some of them, not all of them, but some of them will take a peek at the legislative history when you're not dealing with a clear statement rule; you're just trying to get the best meaning of the statute, particularly when the legislative history supports a ruling or a reading of the statute that avoids rendering an important part of it

superfluous.

So I think you could distinguish Murphy on that ground, but I also want to say that we don't take issue with Murphy when it's dealing with the word "costs" unmodified, and that is a very familiar formulation. We've only found five statutes that use "costs" modified by "full," and we think, in those statutes, it would be against all your basic principles of statutory construction to not at least look at the word "full" long enough to look at whether it tells you something about whether Congress is using "costs" in a term-of-art way or an ordinary meaning way.

JUSTICE SOTOMAYOR: Mr. Clement, I --

MR. CLEMENT: And we think it powerfully suggests that it's using it in an ordinary meaning way.

JUSTICE SOTOMAYOR: I look at history completely, which means I look at how court of appeals and district courts have been using those terms now for decades.

So the question is, where does that go into your analysis? Because it's contrary -- up until the Ninth Circuit, it's basically

contrary to your point.

MR. CLEMENT: Well, I -- I don't think so, Justice Sotomayor. I mean, as I say, I think it would be really helpful if there were like an 18th Century or a 19th Century case that involved an application for ye olde expert's expert fees and we had a case that specifically said, yes, it's in or, no, it's out.

But we don't have that case. Nobody has that case. I think the single most informative case we have is Ferrett. And Ferrett --

JUSTICE SOTOMAYOR: It's not because you told me you don't know what the New York statute permitted or didn't. So it's, in my mind, a wash.

MR. CLEMENT: No, I don't think it's a wash, and I think it's not a wash for two reasons. It's not a wash because we do know that, at bare minimum, Justice Nelson consulted Circuit Rule 27, which is a federal circuit rule. So it was not the case that he looked only to state law.

And that conclusion is reinforced, of

course, by the fact that Congress, both before 1831 and after, knew how to tell federal courts to look exclusively to the state law rule, and it didn't use that formulation in the Copyright Act.

But here's the second reason it's not a wash --

JUSTICE ALITO: What did the -- what did the circuit rule say?

MR. CLEMENT: The circuit rule said -- I think it was a provision that was relevant to this 11 versus 1 issue. So it didn't provide like a lot of guidance to this question, but -- so it's -- it's mostly relevant because it looked to federal law.

But the second point that I think is why it's not a wash is my friends in their brief make a big deal out of the fact that -- that "full costs" has never meant anything more than party-to-party costs.

JUSTICE SOTOMAYOR: Well, we know in American history that attorneys' fees were considered recoverable for a long time. It's a modern phenomenon, the American rule now.

So I'm not sure what to do in that

in-between period, other than to look at what more recent courts are doing or not doing.

MR. CLEMENT: Well, but -- but there --

JUSTICE SOTOMAYOR: Was it 1976 -- what were the courts doing in 1976?

MR. CLEMENT: Well, 1976 -- you know, it's -- it's really a couple years after the '70 -- I don't think we have any good history in 1974 and 1975. Like I said, we don't have a case where they said definitely expert fees or e-discovery, which they didn't have in 1974.

JUSTICE SOTOMAYOR: Then let me -- let me --

MR. CLEMENT: But they don't have the other case.

JUSTICE SOTOMAYOR: -- get to my problem with your interpretation. It's open-ended, so open-ended that I don't have a way for judges to exercise their discretion in a reasonable manner because, under your definition of "full costs," I'm assuming the babysitter for the witness who has to come to court is covered. I'm assuming experts, which could include experts like a body language

reader.

What -- what would limit -- there's nothing statutorily or otherwise that would limit a judge's discretion of awarding costs. If they were caused by the suit, then, presumably, they're recoverable. But that's not how we generally deal with costs.

MR. CLEMENT: Well, Justice Sotomayor, that's not a problem that's unique to my construction. And I think courts have been able to deal with that problem under statutory provisions. There are statutory provisions, for example, that provide for all expenses of the litigation. So the courts are going to have to, in interpreting "all expenses," make a determination about whether you need receipts and things like that in order to get your expenses recovered.

Rule 23(h) of the Federal Rules of Civil Procedure expressly provides for the recovery of non-taxable costs in the class action context. And courts have had to come up with rules about what counts as a non-taxable cost. And in that context, they have been able to come up with workable rules, and it hasn't

proven too much of a problem. And --

CHIEF JUSTICE ROBERTS: Well, what if the -- what if the objection is that the attorneys' fees were outrageous considering how much was at stake in the case? Can the judge, when he's dealing with a provision about full costs, say, well, but that's just -- these fees are outrageous; I'm only going to give you half of your attorneys' fees?

MR. CLEMENT: Absolutely, Your Honor, and that's where discretion comes in. So that may have not have been a possibility before 1976, but now that you have discretionary awards for full costs, the judge's discretion can take care of all of those things, and they can make that judgment either based on the fact that I think this was too expensive in the context of this case, I don't think that was really necessary, I don't think you've documented that enough.

And in this case in particular, you see that in action where the district court judge -- although I think he was quite sympathetic for the fact that the litigation conduct on the other side had caused our

expenses to balloon, nonetheless, the district court judge said, well, I'm going to give you 75 percent of your non-taxable costs.

So I think that discretion is another part of this administrability answer, but I also think it's important to recognize that there are statutes that say things like all expenses or non-taxable costs, so courts are going to have to figure out rules to deal with that.

There's, in fact --

CHIEF JUSTICE ROBERTS: Well, I guess I'm not following. So "full costs" doesn't really mean "full costs"?

MR. CLEMENT: No, I think that the -- that what I would say is I think the district court judge starts with the universe of full costs, and then can use their discretion to sort of carve that back if they think that that's appropriate.

I also think that even in the ordinary meaning of costs, I think it would be perfectly appropriate for a court to say: Look, if you can't even document this thing, I'm not going to treat that as a cost for purposes of this.

Whether they do it under a definition of costs under its ordinary meaning or as an exercise of discretion, I don't think it makes a great deal of difference.

Now there's another provision out there I alluded to that involves all expenses and it says all expenses of the proceedings can be recovered. Interestingly enough, the United States Government is filing a cert petition in a case involving that statute called NantKwest.

And in that cert petition, here's what they have to say about the modifier "all." They say, "The modifier "all" in Section 145 refutes any inference that Congress intended Section 145 plaintiffs to be liable only for a subset of the agency's expenses."

Now I couldn't agree more. I don't know why they're not on our side of this case. But I couldn't agree more that a word like "all" or a word like "full" is a clear textual indicator that Congress does not want you to look to a subset of costs or expenses, whatever the case may be.

And I think, in an odd way, the fact that we all understand that taxable costs are

just a subset of the ordinary meaning of costs actually helps reinforce the idea that full costs means something more than the subset.

I mean, I think if you think of a word like full membership, well, full membership probably means full membership, but if it's used in contradistinction to observer status or provisional membership, you absolutely know you mean the whole thing.

In the same way, the reference to "full cost," precisely because there is a universe of taxable costs out there, is a reference to both taxable and non-taxable costs.

I mean, another way of thinking about this is we all refer to 1920 as taxable costs, but we could equally and accurately refer to it as partial costs. Nobody thinks, as a normal matter, a default matter under 1920 you get your full costs.

But, when Congress in its particular context and then in four subsequent statutes says "full costs," you think, ahh, you get more than your partial costs under Section 1920. Seems like a logical way to interpret the

statute that renders no word in the statute superfluous.

And I do think the superfluity problem here is really quite extraordinary. I'm not sure I've come across one where the contrary interpretation would render more things superfluous. It's not just the word "full." It really is the whole first sentence of Section 505.

It would have -- you'd have the same cost recovery rule if the first sentence of Section 505 weren't there, with the only possible exception, ironically being enough, that you might -- if Section 505 was not there, you might be able to get costs against the government, which you can't get under the terms of Section 505.

JUSTICE KAGAN: Well, haven't we said we expect redundancy in these kind of statutes?

MR. CLEMENT: I -- I don't think that you have said that. I think what you have said is that, you know, that when there's a variety of formulations, and we expect a certain amount of sort of, we're going to kind of construe them to be more or less the same.

But I don't think you've ever confronted a statute like this where "cost" was modified by something like "full" and the consequence would be that you would render that term absolutely superfluous.

And I think the costs for the basic process of statutory interpretation and what Congress is supposed to do in light of these courts' cases would really suffer as a result.

I mean, you go back to the plight of Congress in 1984. They're trying to provide for the recovery of investigatory costs. They look at the ordinary meaning of the English language and they say, have we done it with "full costs"?

I don't think anybody would tell them, unless they really had this embedded term of art meaning that overcame everything, including words that are superfluous, would say: No, you know, I don't think full costs does it for investigatory costs.

And, of course, the oddity would be that if the committee in 1984 instead of using the term "full costs" had used the term "investigatory costs," then the investigatory

costs would be recoverable, even though they wouldn't be recoverable under full.

In other words, you'd be telling Congress: If you use a narrower term, you can authorize broader cost recovery. But if you use a --

JUSTICE KAVANAUGH: You still have -- -- you still have the superfluity in the second sentence. And you -- and you said that, well, maybe a staffer would say let's put that in there just to be sure.

But that's still redundant under your interpretation, right, the second sentence, in part?

MR. CLEMENT: No, it's not, Your Honor, because I don't see how you don't have that second sentence if you want -- if what you want to do is indicate that the authorization for discretionary attorneys' fees in the second sentence doesn't trump Section 412's provision that says if you don't timely register, then you don't get your attorneys' fees.

And, of course, 412 treats costs differently, so they needed two sentences. And so I don't think under our view anything is

rendered superfluous, but in their view, it's the word "full," it's the first full sentence of Section 505, and it's three of the four statutes that use "full cost" and use it in a discretionary sense.

That's a lot of wreckage and carnage for ignoring the plain meaning of a statute. And I think the far better course is --

JUSTICE KAVANAUGH: There's a lot of redundancy, as you well know, in the U.S. Code, though. And when Congress -- to Justice Breyer's point, when Congress is drafting statutes, there is a lot of redundancy because people speak redundantly or sometimes because Congress just wants to make doubly sure.

MR. CLEMENT: Yeah, but, Justice Kavanaugh, there's a difference. When Congress uses --

JUSTICE KAVANAUGH: So I don't know that it's carnage. It's just --

MR. CLEMENT: But, no, but here's where there is --

JUSTICE KAVANAUGH: Yeah.

MR. CLEMENT: This is the difference. And this is what makes it carnage. When --

when Congress uses -- you know, the common place for redundancy is when Congress uses a phrase like a series of phrases and they're covering things that are clearly duplicative.

And I suppose in an ordinary meaning way, costs and expenses might be an example of that. Now I think, when you run across a phrase like costs and expenses, you'd still want to struggle against rendering them completely superfluous. And one of the things you do is you'd say, oh, the neighboring word "expenses" tells me that "cost" there is being used as a term of art.

But I think it's very different. And Justice Scalia makes exactly this point in his book on reading law about the rule against superfluity where it's really -- there really is carnage is when there's an important word that's in the statute that is a modifier that's just inconvenient for the judges.

And they just ignore that word, even though it's there. And that's what I think is carnage. And you see this again in real -- in real life when a Senate committee is confronting a very specific question about

whether they have to do anything more to authorize the shifting of investigatory costs, and they look at the English language, they look at the word "full costs," and they think we have this covered.

And, again, I think sending the message that the only way they could have gotten broader cost recovery is by using a narrower term is really to put us way down the rabbit hole and to confuse Congress and give them the wrong lessons.

Last thing I want to say before I sit down, if I may, is my friends on the other side at various points said, you know, Murphy was a clear signal to Congress that you have to use magic words. I think it's pretty tough luck to tell Congress in 1831 that they had to anticipate the Murphy decision.

And I do think at the end of the day the original public meaning of "full costs" is consistent with its ordinary meaning. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Four minutes, Mr. Perry.

REBUTTAL ARGUMENT OF MARK A. PERRY
ON BEHALF OF THE PETITIONERS

MR. PERRY: Thank you, Your Honor. Three points.

Under the construction just proposed, expert witness fees were mandatory in every copyright case from 1831 to 1976. Expert witness fees were actually awarded in zero copyright cases from 1831 to 1976. I will leave the Court to draw its own conclusion from that fact.

Second, when we get to 1976, Justice Breyer, you asked about the legislative history of this statute. My friend talked a lot about some other statute, but this statute, there is legislative history.

It's quoted in the government's brief at page 27. It's from the registrar of copyrights submission on costs, which said costs in copyright cases are relatively small because, of course, they don't include expert witness fees or e-discovery costs or anything else.

And the court -- and the Congress accepted the copyright registrar's

recommendation to make them discretionary rather than mandatory.

And that date, 1976, is critical because 1975 was a watershed moment in the -- in the area we're talking about. That was the Alyeska decision, Your Honor, where this Court dealt with fees and costs and expenses and said we, the Supreme Court, are going to get out of the business of -- of rewriting the rules in every case.

We're going to get out of the business of tinkering around, and we're going to adopt a clear statement rule and make Congress do it in case after case. And that was 1975 in Alyeska.

And in 1976, the same day that Section 505 was enacted, Congress enacted four other statutes that expressly authorized expert witness fees. So it knows how to put them in.

And that's cited, by the way, in the Casey case at page 88, goes through all of that history. And -- and Casey and Murphy and -- and Crawford Fitting, my friend said it's a crazy idea to have a -- have a -- have a term of art. Well, this Court has said it's a term of art.

If it's a crazy idea, it's the majority opinion.

What we just heard is a full half hour -- and I use that word advisedly --

(Laughter.)

MR. PERRY: -- of -- of -- of a dramatic reading of the dissents from Justice Marshall in Alyeska, from Justice Marshall in Crawford Fitting, from Justice Stevens in Casey, and with all respect to Justice Breyer's career aspirations, Justice Breyer in -- in Murphy.

But the majority in every one of those cases said cost is a term of art, and there is a clear statement rule. And Congress can override it by stating explicitly.

JUSTICE ALITO: Mr. -- Mr. Clement gave us a -- a fuller reading of the Ferrett case. And do you have -- do you have an explanation --

MR. PERRY: I do.

JUSTICE ALITO: -- for how Justice Nelson awarded attorneys' fees there?

MR. PERRY: I do -- I do, Your Honor. The Ferrett case was decided under New York

law, and certain attorneys' fees were on the New York fee schedule, as we point out in our brief. I believe it's Section 25 of the revised statute, but we cite that in our brief.

And our point has not been that attorneys' fees were never awarded. It's that non-scheduled fees were never included in full costs. Full costs included during the state period those scheduled fees under state fee bills, which occasionally awarded small attorneys' fees, for example, $2.50 for a deposition.

And that's what the Ferrett case involved, was New York scheduled attorneys' fees.

What no schedule, as Mr. Kedem pointed out --

JUSTICE SOTOMAYOR: Why did they use -- why did they use the federal rule?

MR. PERRY: Your Honor, I don't know either. I -- I -- I think it had -- did have something to do with this 11 versus 1 and whether it was a multiplicity thing. It had nothing to do, I don't believe, with the question in this case, which is the measure of

the costs was made by the New York fee bill.

And then, in 1853, of course, we had the U.S. fee bill. It wiped out all of that. It said the courts of the United States are only authorized to award the federal schedule.

So we had a reset in 1853. Then we had another reset in 1976, or '75, with -- with Alyeska. And I will leave the Court, if I may, with a quote from Alyeska because it speaks to this case dramatically.

421 U.S. at 271. "It is not for this Court to invade the legislature's province by redistributing litigation costs in the manner suggested by Respondents and followed by the court of appeals."

This judgment should be reversed, and we can move on. Thank you, Your Honors.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 12:09 p.m., the case was submitted.)

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