

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES MURPHY,)
)
) Petitioner,)
)
) v.) No. 16-1067
)
ROBERT SMITH, ET AL.,)
)
) Respondents.)
)

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 Petitioner,)
 v.) No. 16-1067
 ROBERT SMITH, ET AL.,)
 Respondents.)

- - - - -

Washington, D.C.

Wednesday, December 6, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

STUART BANNER, Los Angeles, California; on behalf of the Petitioner.

BRETT E. LEGNER, Deputy Solicitor General, Chicago, Illinois; on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 16-1067,
5 Murphy versus Smith.

6 Mr. Banner.

7 ORAL ARGUMENT OF STUART BANNER

8 ON BEHALF OF THE PETITIONER

9 MR. BANNER: Mr. Chief Justice, and
10 may it please the Court:

11 When a prisoner wins a civil rights
12 case and he's awarded damages and he's awarded
13 attorney's fees, the prisoner himself has to
14 pay part of the fees out of the damages
15 judgment. The statute at issue in this case
16 specifies the size of the prisoner's share.
17 This is what the statute says: "A portion of
18 the judgment (not to exceed 25 percent) shall
19 be applied to satisfy the amount of attorney's
20 fees."

21 In the 20-plus years since the statute
22 was enacted, virtually all the district courts
23 have interpreted it literally. They identify
24 an appropriate portion of the judgment, not
25 exceeding 25 percent, and they deduct that

1 amount from the attorney fee award payable by
2 the defendant.

3 In our case, the Seventh Circuit read
4 the statute differently to mean that attorney's
5 fees must be taken out of the damages first, up
6 to 25 percent of the damages, so that the
7 defendant is only liable for any fees left
8 over.

9 But the statute does not say that.
10 All it says is that the portion of the judgment
11 -- is that a portion of the judgment no greater
12 than 25 percent must be allocated to fees.

13 Respondents mistakenly suggest that
14 Congress's use of the word "satisfy" indicates
15 that the plaintiff has to pay the largest
16 possible share of the fees in all cases. But
17 that can't be right because the statute itself
18 says what share the plaintiff has to pay: a
19 portion of the judgment, not exceeding
20 25 percent.

21 The rest of the attorney's fee award
22 in excess of the plaintiff's share is payable
23 by the defendant, up to the statutory cap of
24 150 percent of the damages. There's nothing in
25 the statute --

1 JUSTICE SOTOMAYOR: Your adversary
2 points to a number of statutes that use the
3 verb "to satisfy" -- or I guess not the verb,
4 but the proposition "to satisfy" -- to refer to
5 the complete fulfillment of an obligation. How
6 do you distinguish those examples?

7 MR. BANNER: The word "satisfy" often
8 means the complete fulfillment of an
9 obligation, but in this statute, it can't mean
10 that because the statute makes clear that the
11 plaintiff doesn't have to completely fulfill
12 the obligation to pay attorney's fees. The
13 statute says exactly how much.

14 JUSTICE KENNEDY: Well, it's sensible
15 to have a cap. It's just a cap.

16 MR. BANNER: Well, exactly. It's a
17 cap. It's a 25 percent cap. That's right.
18 It's -- it's -- the statute says that the
19 plaintiff's share of the attorney's fees is
20 25 percent or less of the judgment.

21 CHIEF JUSTICE ROBERTS: Well, but you
22 start with the notion of satisfaction; in other
23 words, satisfying a debt. I mean, if you owe
24 somebody \$100 and you give them 50, that person
25 isn't going to say, well, you've satisfied your

1 obligation.

2 MR. BANNER: No, that's right. And so
3 the -- the -- the word "satisfy" standing alone
4 sometimes often does mean complete payment, but
5 that would make nonsense of the text of this
6 statute. The text of this statute makes clear
7 that the plaintiff doesn't have to pay the
8 attorney's fees completely.

9 CHIEF JUSTICE ROBERTS: No, no, I
10 understand the point.

11 MR. BANNER: Yeah.

12 CHIEF JUSTICE ROBERTS: But I'm just
13 suggesting that that's not certainly a total
14 response. Yes, you have to satisfy it, but as
15 Justice Kennedy just suggested, there's also a
16 cap. And if the reason you can't satisfy it is
17 because of the cap, well, that's just the way
18 the statute has balanced the two obligations.
19 But the initial obligation is to satisfy the --
20 the fees.

21 MR. BANNER: Well, you know, there was
22 a provision like that in some of the precursor
23 bills, right, but this -- that sentence was
24 omitted from the final legislation. As this --
25 there -- there was a sentence that said exactly

1 the interpretation that -- that -- that you've
2 just been giving, that the -- that the
3 defendant is liable only for fees in excess of
4 25 percent of the judgment, but as the statute
5 was working its way through Congress, Congress
6 rejected that provision.

7 Congress kept the provision that
8 appears in the statute -- that appears in the
9 statute, which says that the plaintiff's share
10 is 25 percent or less of the judgment.

11 JUSTICE KENNEDY: Why --

12 JUSTICE SOTOMAYOR: Well --

13 JUSTICE KENNEDY: Why would the
14 Congress have required that a portion of the
15 judgment be applied to satisfy the award but
16 then given the district courts discretion to
17 award a trivial amount?

18 MR. BANNER: Yeah. So that -- that --

19 JUSTICE KENNEDY: A penny?

20 MR. BANNER: Right. That linguistic
21 structure is common in statutes and here quite
22 sensible. It's common, for example, in
23 statutes that require district courts to impose
24 fines. Those are worded in a very similar way.
25 It's -- they say -- or they often say the

1 defendant shall be fined an amount not
2 exceeding X. And so the district court shall
3 impose a fine, has to impose a fine. There's a
4 cap of X, but no floor. And so the district
5 court has the discretion to impose nominal
6 fines. And, in fact, nominal fines are not at
7 all unusual.

8 So it's a common linguistic structure
9 for a statute. Here, it's -- it's quite
10 sensible. The alternative would have been to
11 say that it's up to the district court whether
12 to make the plaintiff pay any share. And while
13 we don't have any direct evidence of Congress's
14 intent here, because the legislative history is
15 so sparse, it would have been reasonable for
16 Congress to worry that if it was optional with
17 the district judges, many district judges might
18 say, well, I just -- I just don't think it's
19 right to make the plaintiff pay any share at
20 all, ever. That, of course, had been prior
21 practice under Section 1988.

22 This -- this statute was a limitation
23 on the previous practice in Section 1988,
24 which --

25 JUSTICE SOTOMAYOR: Counsel, what do

1 you think -- I know in your brief you seem to
2 suggest that the purpose for giving district
3 court judges discretion was to ensure that the
4 district courts could balance the fault of the
5 defendant -- defendant vis-a-vis the plaintiff,
6 but I don't see anything in this statute that
7 speaks to fault.

8 I am more moved, and I don't know why
9 -- or if you have disavowed it, that since the
10 district court is intended in this judgment to
11 compensate for injury, that it should be given
12 some discretion to determine how much of that
13 injury a plaintiff should actually be forced to
14 bear --

15 MR. BANNER: Well, no -- well --

16 JUSTICE SOTOMAYOR: -- when he or she
17 was not at fault.

18 MR. BANNER: Right, exactly. No, we
19 -- we -- we certainly agree it would be too
20 strong to say that there's direct evidence that
21 Congress intended any sort of fault-based
22 system in the statute because all -- the only
23 evidence we have of Congress's intent here is
24 the words of the statute.

25 The words allow a district court to --

1 to go from 25 percent down. And in the 20-plus
2 years that the statute has existed, the
3 district courts have -- have implemented that
4 statute by focusing on the defendant's
5 culpability.

6 JUSTICE SOTOMAYOR: Let's assume --

7 JUSTICE ALITO: You don't think that
8 it's -- you don't think that it's -- it would
9 be odd to say -- I mean, this -- this language
10 can be read either way, and it's -- it's very
11 difficult. But you don't think it would be odd
12 to say that the -- the defend -- that the
13 plaintiff has to pay a nominal amount, a
14 dollar, to satisfy the amount of attorney's
15 fees? How can that be satisfaction of
16 attorney's fees, if it's a nominal amount?

17 MR. BANNER: You're -- you're never
18 going to have satisfaction of the -- of the
19 attorney's fees, the --

20 JUSTICE ALITO: But that's the --
21 that's the word that's used in the statute.

22 MR. BANNER: And what I -- what I --
23 when I say there's never going to be
24 satisfaction, the -- the -- the -- the attorney
25 -- the -- the plaintiff's share is never going

1 to literally satisfy the attorney's fee award.
2 And the -- the reason I say that is that the --
3 the typical judgment in prisoner cases is very,
4 very small.

5 I mean, it's an extraordinarily rare
6 case in which even the maximum 25 percent would
7 literally satisfy the attorney's fee award.

8 JUSTICE ALITO: Yeah, but you could
9 say that the fee -- that the award has to
10 satisfy the attorney's fees up to the cap.
11 There wouldn't be anything odd about that. It
12 just seems that -- you don't think that that's
13 an odd use of the term "satisfy"? I mean,
14 suppose --

15 MR. BANNER: I don't -- I don't --

16 JUSTICE ALITO: -- suppose a teacher
17 said to the parent: Your -- your child can't
18 -- can't function at school because the child
19 is hungry. Would you give the child a portion
20 of food for breakfast to satisfy the child's
21 hunger?

22 You wouldn't say, well, you know, if I
23 give the child a tiny crumb, that would satisfy
24 the -- the hunger.

25 MR. BANNER: Right, but -- but

1 "satisfy" is often used in other contexts where
2 it's clear that there won't be complete
3 satisfaction of the relevant obligation. So
4 the -- in ordinary speech, for example, the --
5 the example we gave in our brief is to say that
6 the credits from a math class can be applied to
7 satisfy the requirements of a chemistry major.

8 They're not going to satisfy all the
9 requirements of a chemistry major. They're
10 going to go some way towards satisfying the
11 requirements of a chemistry major. And --

12 JUSTICE GINSBURG: You know, you
13 mention that the district courts have
14 overwhelmingly understood 25 to be the most
15 that can come out of the plaintiff's recovery,
16 and you were asked a question about, well,
17 suppose, nominal, a nominal amount is taken
18 from the plaintiff.

19 Do you know what the practice has been
20 in these 20 years in the district court? Here
21 we have 10 percent. What is the spread?

22 MR. BANNER: The spread is 25 percent
23 at the top and nominal amounts at the bottom.
24 The -- the district courts have actually been
25 implementing the statute in a -- in a sensible

1 way. The district courts have been -- in
2 deciding on the appropriate share for the
3 plaintiff to pay, the district courts have been
4 considering the extent to which making the
5 defendant pay a greater share will deter future
6 misconduct by prison guards, and the extent to
7 which making the plaintiff pay a greater share
8 will deter prisoners with meritorious claims
9 from filing suit.

10 JUSTICE GINSBURG: So some district
11 courts have gone down to a minimal amount.

12 MR. BANNER: Yeah, there have been
13 some cases. There's cases where the -- the
14 plaintiff's share is nominal, like a dollar.
15 There's also plenty of cases where the
16 plaintiff's share is the full 25 percent.

17 Now, I'll tell you what the pattern of
18 cases is like over the past 20 years. It's the
19 really egregious cases where you get awards
20 nominal, plaintiff being paid, only to pay a
21 nominal share. When I say egregious cases, I
22 mean cases where, say, a prisoner is brutally
23 raped by a prison guard or where a -- a
24 prisoner is permanently maimed or disfigured by
25 a prison guard.

1 And so there's enough cases out there
2 where, you know, once you see the facts of the
3 case, you can get a pretty good sense of
4 whether this is going to be a full 25 percent
5 case or whether it's going to be something
6 less.

7 JUSTICE SOTOMAYOR: How would you
8 write this if you wanted -- if you were
9 Congress and wanted to get their --

10 MR. BANNER: Yeah.

11 JUSTICE SOTOMAYOR: -- version of the
12 bill in one sentence?

13 MR. BANNER: Yeah.

14 JUSTICE SOTOMAYOR: How would you have
15 written it?

16 MR. BANNER: We actually know that
17 because the precursor bill that --

18 JUSTICE SOTOMAYOR: No, I said in one
19 sentence.

20 MR. BANNER: Yeah, I'm going to give
21 you the one --

22 JUSTICE SOTOMAYOR: The precursor bill
23 was in two sentences.

24 MR. BANNER: The precursor -- but the
25 precursor bill included the one sentence that

1 you're -- you're looking for. And it is in the
2 -- I'll get it. I'm sorry, it's in the -- it's
3 in the yellow brief at page 12. We -- we don't
4 have to speculate about this.

5 So, in the yellow brief, page -- page
6 12, under heading C, beginning the -- with the
7 quotation that begins in the third line of that
8 paragraph, this is -- this is the sentence that
9 Congress could have written, in fact, nearly
10 did write, that would have adopted the
11 Respondents' position.

12 "If the award of attorney's fees is
13 greater than 25 percent of the judgment, the
14 excess shall be paid by the defendant."

15 That would have been it. That would
16 have adopted Respondents' view of the statute,
17 but that sentence got deleted from the final
18 legislation.

19 CHIEF JUSTICE ROBERTS: You say that
20 the -- one way that the discretion of the
21 district court would be guided would be by the
22 seriousness of the offense, and you gave a
23 couple of examples.

24 MR. BANNER: Yeah.

25 CHIEF JUSTICE ROBERTS: I think it's

1 pretty unusual to compensate for seriousness of
2 the defense, or bad faith, I guess, of the --
3 of the defendant through the -- manipulating
4 the attorney's fees.

5 MR. BANNER: Yeah.

6 CHIEF JUSTICE ROBERTS: Wouldn't it
7 normally in those cases result in a higher
8 award of damages?

9 MR. BANNER: It is unusual. And
10 that's because, so far as we know, this statute
11 is the only one of its kind. As far as we
12 know, this is the only statute in which
13 Congress has explicitly apportioned
14 responsibility for attorney's fees.

15 JUSTICE KENNEDY: Well, but
16 apportionment doesn't mean that the
17 egregiousness of the conduct should be taken
18 into account in fixing the size of the
19 attorney's fees.

20 MR. BANNER: No, that's right, but the
21 -- the --

22 JUSTICE KENNEDY: I mean, that just
23 doesn't follow.

24 MR. BANNER: The question -- if -- if
25 the question is why is it that we see the

1 consideration of egregiousness with this
2 statute but not with other fee-shifting
3 statutes, what I'm trying to say is this is, so
4 far as we know, the only fee-shifting statute
5 in which responsibility for attorney's fees is
6 apportioned between the plaintiff and the
7 defendant.

8 Once you're going to apportion
9 responsibility for fees between the plaintiff
10 and the defendant, you need a basis for
11 apportioning those fees.

12 JUSTICE KENNEDY: But I -- I was
13 talking about the amount of the fee. Does the
14 amount -- does the amount of the fee ever
15 depend on the egregiousness? I -- I shouldn't
16 think it does.

17 MR. BANNER: No, no, the amount of the
18 fee will be calculated by the lodestar method,
19 right.

20 JUSTICE KENNEDY: But in this case, it
21 was -- it was odd that the district judge
22 remitted a substantial part and put the
23 punitive damages down almost \$93,000.

24 MR. BANNER: Right.

25 JUSTICE KENNEDY: But then, in order

1 to soften the blow, he reduces the amount of --
2 of attorney's fees. This --

3 MR. BANNER: Right.

4 JUSTICE KENNEDY: This -- this is a
5 double exercise of discretion that it seems to
6 me quite puzzling.

7 MR. BANNER: Well, but that sort of
8 discretion I have to say is -- is -- that's a
9 standard feature of fee-shifting statutes. I
10 mean, fee-shifting statutes -- I mean, Section
11 1988 is a good example. Section 1988 just says
12 a fee has to be reasonable.

13 JUSTICE ALITO: Could you -- could you
14 explain to me why the sentence you read would
15 do the trick? It says what -- what must be
16 done if the award of attorney's fees is greater
17 than 25 percent. But what if the award of
18 attorney's fees is, let's say, 20 percent?

19 How does that tell the court who pays
20 the 20 percent?

21 MR. BANNER: Okay. So the sentence,
22 again: "If the award of attorney's fees is
23 greater than 25 percent, the excess shall be
24 paid by the defendant."

25 If the award of attorney's fees is

1 less than 25 -- is less than 25 percent of the
2 judgment, then the defendant wouldn't have to
3 pay anything under that statute. Right?

4 But -- but --

5 JUSTICE KAGAN: You think it goes
6 without saying that the plaintiff would have to
7 pay the full 20 percent? Because it doesn't
8 say it. So I think --

9 MR. BANNER: All it says is the
10 defendant wouldn't have to pay it.

11 JUSTICE KAGAN: Right.

12 MR. BANNER: Right. It doesn't say
13 anything about who -- whether the plaintiff or
14 -- or what would happen.

15 JUSTICE ALITO: And that's the -- and
16 that's the point.

17 MR. BANNER: Right, right.

18 JUSTICE ALITO: So that really doesn't
19 -- you have to read something into it.

20 MR. BANNER: No, no, no.

21 JUSTICE ALITO: That doesn't literally
22 say who pays if it's under 25 percent.

23 MR. BANNER: Right. But the -- the --
24 the question is -- so Respondents' view of the
25 statute as enacted is that defendants only have

1 to pay to the -- attorney's fees to the extent
2 the fees exceed 25 percent of the judgment.
3 Right? That -- that is what this sentence
4 says. And that's the sentence that was
5 rejected by Congress as this bill was being --

6 JUSTICE KAGAN: Can I ask, Mr. Banner,
7 in -- in various kinds of ways this statute
8 tries to reduce district courts' discretion
9 over fees. I mean, if you take as the baseline
10 1988, which gives a court discretion over
11 everything, this statute tried to pull back on
12 that in various ways.

13 But you're saying that in -- in -- in
14 this particular way when it comes to
15 allocation, we should understand Congress to
16 have left the courts with the full discretion
17 that -- that you can imagine.

18 So why should we read it that way,
19 given that in various other ways the -- the
20 clear aim of Congress was to reduce the court's
21 discretion?

22 MR. BANNER: I -- I don't -- I don't
23 know that that's an accurate -- I don't think
24 that's an accurate description of the aim of
25 Congress. Certainly the statute compresses the

1 range of possible fee awards.

2 The -- the fees are capped at
3 150 percent of the judgment. That's a --
4 that's a sharp compression of the range of
5 possible awards. But within that range
6 Congress preserved virtually all of the
7 district court's discretion under Section 1988
8 because all of the limitations in -- in this
9 statute are all expressed in terms of
10 reasonableness, proportionality, and -- and so
11 on.

12 And so the -- the -- this -- this --
13 the particular provision at issue in our case
14 is just like that. It operates within a
15 compressed range, compressed by the cap on --
16 on fees of 150 percent of the damages.

17 JUSTICE SOTOMAYOR: Was -- was the
18 intent to reduce discretion, or I thought the
19 intent was to deter non-meritorious lawsuits?

20 MR. BANNER: Well, the -- if you -- if
21 you ask about the Prison Litigation Reform Act
22 as a whole, certainly the -- the intent was to
23 deter frivolous lawsuits in order to facilitate
24 the consideration of the stronger ones.

25 This provision has nothing to do with

1 frivolous lawsuits. This provision only
2 applies when a prisoner has prevailed on the
3 merits, been awarded damages, and been awarded
4 attorney's fees.

5 JUSTICE SOTOMAYOR: Well, there are
6 meritorious lawsuits on a scale --

7 MR. BANNER: Right.

8 JUSTICE SOTOMAYOR: -- of merit --

9 MR. BANNER: Right.

10 JUSTICE SOTOMAYOR: -- some that are
11 serious, some that are not so serious, where
12 there can be an award.

13 So I can see Congress giving
14 discretion based on the nature of the claim.
15 That is more supportive of your position, which
16 is --

17 MR. BANNER: Yeah, and that's -- and
18 that's exactly how the district courts have
19 been applying the statute for -- for more than
20 20 years now.

21 CHIEF JUSTICE ROBERTS: Well, this is
22 -- it's -- it's a little different. I
23 understood the objective of Congress, in order
24 to weed out non-meritorious suits, to be to
25 replicate, to the extent they could, the -- the

1 situation of private parties outside of prison.

2 There, if you have a serious injury,
3 you quite often can go to a lawyer who will
4 charge you a contingent fee, say 25 percent,
5 and whatever your recovery, you would owe him
6 25 percent of the -- of the judgment.

7 And you wouldn't owe him only
8 2 percent just because the -- the judge in the
9 case thought, well, you didn't do enough work
10 or you could have done better.

11 MR. BANNER: Yeah, that's -- that's
12 simply an incorrect view of the statute to say
13 that Congress intended to replicate anything
14 close to a contingent fee regime for prisoners.
15 That could very easily have been accomplished
16 simply by making prisoners completely
17 ineligible for fees under Section 1988. That
18 would have thrown prisoners back on a
19 contingent fee regime just like --

20 CHIEF JUSTICE ROBERTS: Yeah, but they
21 could --

22 MR. BANNER: -- members of the general
23 public.

24 CHIEF JUSTICE ROBERTS: But you can
25 determine that if you're on a straight

1 contingent basis, that that -- I mean, you have
2 to have enough of an incentive to get lawyers
3 to take the cases and, at the same time,
4 discourage prisoners from saying, you know, I
5 think this is a serious case, while an
6 objective review, which is what plaintiffs'
7 lawyers do, would suggest that it's not.

8 MR. BANNER: Okay. But this statute
9 doesn't -- doesn't create anything close to a
10 contingent fee regime. All the statute does is
11 say that the plaintiff has to pay some share of
12 the attorney's fees. How large is that share?
13 A -- a portion of the judgment, not exceeding
14 25 percent.

15 I mean, it's not -- it's -- it's --
16 Congress could have said --

17 CHIEF JUSTICE ROBERTS: Well, I would
18 say that the plaintiff has to pay some share of
19 the attorney's fees does sound an awful lot
20 like a contingent fee arrangement.

21 MR. BANNER: Except that it's -- it
22 would be an unusual contingent fee arrangement
23 that would range from -- from 25 percent down
24 to nominal, which is why -- I say it's not --

25 CHIEF JUSTICE ROBERTS: Well, that's

1 why I don't think --

2 MR. BANNER: Yeah.

3 CHIEF JUSTICE ROBERTS: -- your
4 position is -- is accurate. I mean, you're the
5 one who's saying it's from 25 percent down to
6 nothing. What I'm suggesting is, as I think it
7 is in the contingent fee situation, the lawyer
8 gets his cut before -- before the plaintiff is
9 paid off.

10 MR. BANNER: Right, but that's why I'm
11 saying that what Congress did in this statute
12 doesn't even closely -- doesn't remotely
13 resemble a contingent fee regime. Congress
14 could have imposed a contingent fee regime, for
15 example, just by saying 25 percent, or by
16 doing --

17 JUSTICE KENNEDY: Well, I -- I'm --

18 CHIEF JUSTICE ROBERTS: Well, but the
19 other -- I'm sorry.

20 JUSTICE KENNEDY: Go ahead.

21 CHIEF JUSTICE ROBERTS: But your
22 adversary is saying that's what they did under
23 his reading of the statute -- under his reading
24 of the statute.

25 MR. BANNER: Right, but that -- I

1 think we're going in circles. That's an
2 untenable reading of the statute because the
3 statute doesn't say 25 percent.

4 JUSTICE KAGAN: But I think --

5 CHIEF JUSTICE ROBERTS: Well, but
6 you're just going back to saying --

7 MR. BANNER: The statute says a
8 portion not exceeding 25 percent.

9 CHIEF JUSTICE ROBERTS: That -- that
10 argument doesn't make any sense because, if you
11 read the statute the way I do, it doesn't make
12 any sense.

13 MR. BANNER: Look, the -- the -- the
14 -- the interpretation that Respondents favor
15 was in the precursor bill that got taken out.
16 What we're left with is a -- a ceiling but --
17 but no floor. We're left with not exceeding
18 25 percent.

19 JUSTICE BREYER: You have the
20 language, but -- but the -- the -- it depends,
21 I guess, a lot on the background that this is
22 being passed against. And I -- as I've read
23 this, the background -- I tend to agree with
24 what the background is, but I'm not sure what
25 the evidence is this.

1 The background is 1988.

2 MR. BANNER: Right.

3 JUSTICE BREYER: Now, you say that
4 because I knew you would agree with me on that,
5 but what's the basis for it? I see one thing
6 for the basis -- because if it's a -- 1988 is
7 the background, then normally the prevailing
8 party in an appropriate case gets all the fee.
9 He doesn't have to pay a dime.

10 MR. BANNER: Right.

11 JUSTICE BREYER: Okay?

12 MR. BANNER: Right.

13 JUSTICE BREYER: So if -- but now --
14 so it's important. Are we operating against
15 that as background or something as -- more
16 general, which is -- which was the Chief
17 Justice's question?

18 MR. BANNER: The --

19 JUSTICE BREYER: And the only answer
20 you've given so far is -- is, well, look at --
21 read the language.

22 MR. BANNER: I'm going to give you the
23 second --

24 JUSTICE BREYER: I'm not sure about
25 the language. I mean, is there anything else

1 that supports the 1988 is the basic background?

2 MR. BANNER: Yes, indeed, there is.

3 The -- the -- before this statute was enacted,
4 the fee-shifting rule governing prisoner cases
5 was Section 1988, where the prisoner received
6 the -- the prisoner was just like any other
7 litigant prevailing on a civil rights case.
8 The -- the prisoner got -- rather, the
9 defendant paid the full 100 percent of the --
10 of the attorney's fees.

11 This statute was enacted against that
12 background. This statute was -- was -- was
13 enacted evidently to give prisoners some skin
14 in the game but not a -- not a fixed 25 percent
15 skin, a -- a variable percentage that the
16 district court could adjust in the exercise of
17 its discretion.

18 Well, if there are no further
19 questions. I'll reserve my time.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Legner.

23 ORAL ARGUMENT OF BRETT E. LEGNER

24 ON BEHALF OF THE RESPONDENTS

25 MR. LEGNER: Mr. Chief Justice, and

1 may it please the Court:

2 As -- as you noted, Mr. Chief Justice,
3 the purpose that Congress had in enacting this
4 provision was to replicate a contingent fee
5 arrangement. Our interpretation --

6 JUSTICE SOTOMAYOR: Why? Where do you
7 get that from? Where in the -- anywhere is
8 that said, is that discussed, is that indicated
9 in the -- in this section at all?

10 MR. LEGNER: Sure, Your Honor. We get
11 that from a variety of sources. The first is
12 the statute's text. Congress said that the
13 district court shall apply a portion of the
14 judgment to satisfy --

15 JUSTICE SOTOMAYOR: Can I -- can I
16 just ask you something about the statute?

17 MR. LEGNER: Sure.

18 JUSTICE SOTOMAYOR: Let's assume the
19 statute read, without the parenthetical, when
20 it said a portion of the judgment shall be
21 applied to satisfy the amount of attorney's
22 fees awarded against the defendant.

23 Would that mean 25 percent absent that
24 25 percent?

25 MR. LEGNER: Absent the parenthetical?

1 JUSTICE SOTOMAYOR: Absent the
2 parenthetical.

3 MR. LEGNER: If the parenthetical was
4 not in there, then the -- then the provision
5 would mean that the attorney's fees award shall
6 be fulfilled by the judgment.

7 JUSTICE SOTOMAYOR: No, it says a
8 portion of the judgment. So it doesn't say all
9 of the judgment. It -- it doesn't say the
10 judgment shall be applied to satisfy the amount
11 of attorney's fees.

12 If all it said is "a portion of the
13 judgment shall be applied to satisfy the amount
14 of attorney's fees against the defendant," do
15 you think in that, standing alone, the district
16 court would have discretion to give a dollar?

17 MR. LEGNER: No, Your Honor.

18 JUSTICE SOTOMAYOR: It's a -- no?
19 It's a portion of the judgment.

20 MR. LEGNER: It -- it is technically a
21 portion of the judgment, but it doesn't -- what
22 that does is it reads out the words "to
23 satisfy." A portion --

24 JUSTICE SOTOMAYOR: Why? A portion is
25 a portion. It's not all of it.

1 MR. LEGNER: A portion is a portion,
2 but what that does is it recognizes --

3 JUSTICE SOTOMAYOR: It doesn't say all
4 of the judgment; it says a portion.

5 MR. LEGNER: Absolutely, Your Honor.

6 JUSTICE SOTOMAYOR: So why didn't
7 Congress say a portion of the judgment,
8 25 percent, instead of not to exceed
9 25 percent?

10 MR. LEGNER: The not to exceed --

11 JUSTICE SOTOMAYOR: Why doesn't it
12 just say a portion of the judgment, 25 percent,
13 shall be applied to satisfy the amount?

14 MR. LEGNER: Your Honor, the "not to
15 exceed 25 percent" language in this --

16 JUSTICE SOTOMAYOR: No, no. That's --
17 I'm asking you --

18 MR. LEGNER: Right.

19 JUSTICE SOTOMAYOR: -- what's the
20 difference between the two things?

21 MR. LEGNER: The difference between
22 the two things is that, in the statute as
23 written, Congress recognized that there will be
24 circumstances in which the entire fee award
25 will be satisfied by less than 25 percent.

1 In the hypothetical, without that
2 parenthetical, it -- it provides that a portion
3 will be used but for the purpose of satisfying
4 or fulfilling the award.

5 JUSTICE SOTOMAYOR: I'm sorry. Is
6 your view -- let's assume, it's highly
7 unlikely, but it can happen, the -- the
8 attorney's fees are less than 25 percent of the
9 judgment. Who pays under your reading of the
10 statute as written?

11 MR. LEGNER: If the attorney's fees
12 are less than 25 percent of the judgment, the
13 prisoner plaintiff pays. And --

14 JUSTICE SOTOMAYOR: And the defendant
15 pays nothing?

16 MR. LEGNER: In that circumstance,
17 that's right, Your Honor.

18 JUSTICE SOTOMAYOR: All right. So
19 what is the difference by Congress saying a
20 portion of the judgment, not to exceed
21 25 percent -- why didn't it just say: a
22 portion of the judgment (25 percent) shall be
23 applied? Under your reading, the two mean
24 exactly the same thing.

25 MR. LEGNER: No, Your Honor, because

1 there's circumstances in which, say, 17 percent
2 of the judgment will be sufficient to fulfill
3 the fee award. If there's a \$100,000 judgment
4 and a \$17,000 fee award, 17 percent of the --
5 of the judgment will fulfill that fee award.

6 That's why --

7 JUSTICE KENNEDY: This is -- go ahead.

8 MR. LEGNER: -- Congress didn't say a
9 portion --

10 JUSTICE SOTOMAYOR: Then you're doing
11 away with the "shall apply." No one ever
12 speaks of that "shall apply" as meaning that
13 you give more than 25 percent.

14 MR. LEGNER: We --

15 JUSTICE SOTOMAYOR: You don't award
16 him attorney's fees of 25 percent of the
17 judgment.

18 MR. LEGNER: They do not apportion --
19 this statute does not apportion -- allow for
20 the apportionment of more than 25 percent of
21 the judgment to fees, but there are
22 circumstances in which the fee award is
23 25 percent or less than the judgment. And we
24 cite those in Footnote 2 of our brief.

25 JUSTICE KAGAN: Mr. -- Mr. Legner --

1 JUSTICE KENNEDY: Please -- please
2 correct me if I'm wrong, but my understanding
3 is that if you talk about contingent fees and
4 you talk about apportionment, you're talking
5 about apples and oranges. Some fees may be
6 contingent; some fees may not be.

7 All the statute does is say whatever
8 the fee is, 25 percent of it -- or no more than
9 25 percent of it -- 25 percent of it shall be
10 paid by the -- by the defendant.

11 MR. LEGNER: That's --

12 JUSTICE KENNEDY: Am I correct?

13 MR. LEGNER: You're correct, Your
14 Honor, that the statute says --

15 JUSTICE KENNEDY: From -- from the
16 award?

17 MR. LEGNER: From the award. The
18 statute says that 20 -- no more than
19 25 percent, but 25 percent or less, if
20 necessary, to fulfill, in other words, to
21 satisfy the fee award shall be applied. The
22 statute does not give discretion to apportion
23 that amount and, indeed --

24 JUSTICE GINSBURG: But it says "not to
25 exceed." It sounds like it's imagining an

1 award that does exceed, and it says "not to
2 exceed."

3 What happens when it does exceed?
4 Then the defendant picks up the tab. But the
5 "not to exceed" language would be a strange
6 thing for Congress to put in if it really meant
7 the plaintiff pays 25 percent, and, if the
8 judgment is larger, the defendant pays the
9 rest.

10 MR. LEGNER: Well, Your Honor, the
11 reason they use "not to exceed" is that there
12 are cases where the plaintiff won't pay
13 25 percent; for instance, where the fee award
14 is equal to 17 percent of the judgment.

15 So, in that circumstance, the -- the
16 fee award will be fulfilled, satisfied, with
17 less than 25 percent of the judgment.

18 JUSTICE KAGAN: Mr. Legner, you put a
19 lot of emphasis on the word "satisfy" and I
20 think in -- in most cases you're right as to
21 what "satisfy" means.

22 I guess the question I have is whether
23 in this context one should think that the word
24 "satisfy" says anything.

25 And -- and my question goes basically

1 that in many cases, and probably in the vast
2 majority of cases, no part of the judgment,
3 including the full judgment, could possibly
4 satisfy the fee award.

5 So given that we're talking about a
6 circumstance in which in the vast majority of
7 cases the fee award is not going to be
8 satisfied, why should we understand the word
9 "satisfy" in the way that you think we should?

10 MR. LEGNER: Well, Justice Kagan,
11 because, under our interpretation, there will
12 be some circumstances in which the fee award
13 will be completely satisfied. Additionally,
14 under our reading of that --

15 JUSTICE KAGAN: Well, I agree with you
16 that there might be some. But the question is,
17 you know, would Congress have used that -- the
18 word in your sense, knowing that in most cases
19 it wasn't going to be full payment? It just
20 seems as though when this statute uses the
21 word, given what actually happens in the real
22 world, it meant something more along the lines
23 of contribute to the fee award.

24 MR. LEGNER: I understand, Your Honor,
25 but -- but a couple points on -- on that.

1 First, the fact that the fee -- that the
2 judgment may not be sufficient to fulfill the
3 award, with the 25 percent cap or otherwise,
4 does not change the definition of the word
5 "satisfy."

6 That, our -- under our reading, the
7 district court is required to use the judgment
8 for the purpose of fulfilling the fee award.
9 The district court may be stopped in
10 circumstances, but that's by virtue of the
11 operation of the 25 percent cap, which is a
12 separate intervening force that impacts the --
13 the -- the apportionment in -- in that
14 situation.

15 But, furthermore, under -- under
16 Petitioner's reading, which would permit a
17 nominal amount, you know, Petitioner indicated
18 that today, that a one dollar apportionment
19 would be sufficient, that in no way intends to
20 satisfy under any definition --

21 JUSTICE BREYER: Well, you're --
22 you're using --

23 JUSTICE KAGAN: Well, I think --

24 JUSTICE BREYER: Finish. Finish. Go.

25 JUSTICE KAGAN: I mean, I think that

1 that's wrong. I mean, I guess what I'm
2 suggesting is that this language should be read
3 or could be read to say, you know, shall go
4 towards satisfying. So a dollar would go a
5 small way towards satisfying. Ten dollars
6 would go a slightly larger and so forth and so
7 on.

8 MR. LEGNER: Well, Your Honor, under
9 -- under that reading, "satisfy" need not even
10 be in the statute. We could just lift those
11 words out of the statute as it is right now, in
12 which case you would have the requirement that
13 the Court apply a portion of the judgment.

14 But Congress didn't stop there. It
15 stated that -- it stated the purpose for the
16 application of the -- the judgment, which is to
17 satisfy. And -- and our interpretation is
18 consistent with Congress's purposes underlying
19 this.

20 Congress had two purposes underlying
21 this provision. Congress wanted to put
22 plaintiffs in the -- prisoner plaintiffs in the
23 -- a position similar to typical civil tort
24 plaintiffs.

25 And, additionally, Congress wanted to

1 reduce the burden of prisoner litigation on the
2 government. There is discussion during the
3 legislative debates that we cite at page 27 of
4 our brief where Congress was explicitly
5 concerned with attorney's fees awards that the
6 government was being assessed in prisoner
7 cases.

8 JUSTICE ALITO: You previously started
9 to explain what evidence there is that Congress
10 wanted to put prisoners in a situation similar
11 to -- to a plaintiff in an ordinary tort case,
12 but I don't think you finished your -- your
13 explanation. What -- what evidence is there of
14 that?

15 MR. LEGNER: Well, Your Honor, in
16 terms of the discussion in -- in the Senate,
17 for instance, there were statements -- we cite
18 one of them at page 24 of our brief -- a
19 statement by Senator Dole that said that
20 prisoners need to -- prisoners do not bear the
21 same types of opportunity costs as
22 non-incarcerated prisoners. And that has
23 contributed to this flood, massive flood of
24 litigation in prison -- federal courts.

25 And we want -- one of -- one of the

1 efforts Congress then had was to put those
2 prisoners -- to require the prisoners to bear
3 some of the costs of litigation.

4 JUSTICE BREYER: Well, that's true.

5 JUSTICE SOTOMAYOR: I'm sorry, the non
6 -- the non-incarcerated plaintiffs are under
7 1988. They get all of their fees. If they
8 wanted to equalize them, they would have left
9 them alone.

10 MR. LEGNER: Your Honor, Congress made
11 a compromise. There's non-incarcerated civil
12 rights plaintiffs under 1988, absolutely, but
13 then there's civil tort plaintiffs not under --

14 JUSTICE SOTOMAYOR: But it didn't say
15 civil tort plaintiffs. He said
16 non-incarcerated plaintiffs. He didn't say
17 tort plaintiffs.

18 MR. LEGNER: That's true, Your Honor,
19 but by -- with the discretion limiting
20 provisions of Section e(d), Congress clearly
21 moved away from Section 1988's operation.

22 JUSTICE BREYER: Well, it did, you're
23 right. I have the same question that the last
24 -- actually, it was exactly what you said.

25 Now, your -- your things in your brief

1 talk -- they say limit costs and put it in the
2 same position as non-incarcerated plaintiff.

3 What non-incarcerated plaintiff? The
4 first sentence of the statute says: "In any
5 action brought by a prisoner ... in which
6 attorney's fees are authorized under Section
7 1988."

8 Now, that's fairly strong evidence
9 that they're thinking, since it's right in the
10 statute, the first line, that they're thinking
11 of 1988 plaintiffs.

12 Now, that's -- I'm just saying that I
13 can't get too much out of the language. You're
14 right, it would have been absolutely clear if
15 they had said, "to help satisfy." Then you
16 would lose. But they didn't. They said, "to
17 satisfy."

18 So we have the language up here about
19 up to, and we have the language down there
20 about satisfy. At that point, I, myself, am
21 not certain, but then I do look to the purpose,
22 which is what you're talking about.

23 And then, when I see that, the first
24 sentence is put them in the same position as
25 1988 plaintiffs. Well, that's the only

1 instance when they're going to get their
2 attorney's fees. But, but, okay? They will
3 have to pay up to 25 percent.

4 Now, up to 25 -- now we get into the
5 language. So I get into the puzzle. My
6 thought was, which I'm addressing the question
7 to, we both have the sentence that he quoted on
8 page 12 of his brief, which would have made a
9 choice. We can do this in one of two ways.

10 We can say: Prisoner, you always pay
11 25 percent, or we could say: Judge, you
12 decide, up to 25 percent.

13 Which way? Well, I suddenly had this
14 thought. If we take the former, given the
15 other provision of the statute which says you
16 have to limit the attorney fees generally to a
17 fair amount given the overall judgment, and
18 these judgments are small, the poor district
19 judge on your interpretation, facing a problem
20 where the thing is small, all the burden is
21 going to throw -- be thrown on the lawyer.
22 It's going to be thrown on the lawyer because
23 he'll have to reduce the whole attorney fee in
24 order to make this prisoner, who suffered a
25 lot, not be penniless or not really be hurt a

1 lot. See, he wants to help the prisoner.

2 Am I -- are you following what I'm
3 saying?

4 MR. LEGNER: I am, Your Honor.

5 JUSTICE BREYER: Okay. And then --
6 then the only way to help the prisoner who's
7 gotten such a small award is to reduce the
8 whole attorney's fees. But if we make it
9 discretionary, there's another way. You can
10 have a reasonable attorney fee here, a little
11 bit higher, and the prisoner doesn't pay the
12 whole 25 percent. We put some of it on the
13 prison guard, the state, that's acted so
14 abominably.

15 Now, I think, which is the choice
16 there? They're both reasonable choices.

17 Then I go to page 12 in his brief, and
18 the preceding language, and I conclude, hey,
19 Congress was on a seesaw here, and they ended
20 up on his side.

21 Now, that's a little complicated, but
22 that's where I am at the moment. What do you
23 want to say?

24 MR. LEGNER: A lot, Your Honor.

25 JUSTICE BREYER: All right.

1 (Laughter.)

2 MR. LEGNER: The -- you're right that
3 the first sentence of Section (d)(1) states
4 that in any situation in where fees would be
5 authorized under Section 1988, but it then
6 continues, that sentence continues, "such fees
7 shall not be awarded, except," and then the
8 provision goes on to restrain the court's
9 discretion in awarding a fee under Section
10 1988.

11 So, in this provision, Congress moved
12 away -- Congress started with Section 1988
13 because these are claims under Section 1988 --

14 JUSTICE BREYER: Yeah.

15 MR. LEGNER: -- but for this specific
16 class of litigant, Congress moved away from the
17 normal operation of Section 1988.

18 JUSTICE BREYER: Well, that inclusion
19 -- now -- but, remember, if you follow this
20 complicated argument --

21 MR. LEGNER: Sure.

22 JUSTICE BREYER: -- sorry to be so
23 complicated, but the -- really I've the choice
24 down in my mind. It's the -- the victim here
25 is not the government and it's not the -- the

1 victim on your interpretation, as I've been
2 through it, it is not -- it is not so much the
3 prisoner, it is not so much the government; it
4 is the lawyer, because -- because, as I said,
5 the -- the -- the prisoner who suffered some,
6 you know, pretty bad treatment and has got a
7 very small award, the judge can help him out
8 only by cutting the whole legal fee.

9 But if the opposite interpretation is
10 right, the judge has another tool. The other
11 tool is to make the defendants here pay more
12 than 75 percent. And so now we have two tools.
13 The judge has more discretion. He can deal
14 with the different cases differently. And
15 first they tried the one, rejected it on page
16 12, and now they tried the other.

17 Now -- now, that's where I am. And --
18 MR. LEGNER: Sure, Your Honor. And --
19 and -- and I would add that the -- the court --
20 or, I'm sorry, Congress in this provision
21 limited the court's discretion to award
22 attorney's fees in other ways. For instance,
23 the total amount of the attorney's fee is
24 capped at 150 percent of the judgment.

25 JUSTICE BREYER: Mm-hmm.

1 MR. LEGNER: So Congress took away
2 discretion and limited the amount of attorney's
3 fees --

4 JUSTICE BREYER: Yeah.

5 MR. LEGNER: -- in -- in that way.

6 JUSTICE KAGAN: Well, that seems
7 right, that -- that Congress limited discretion
8 in certain ways. The question is: Did it
9 limit discretion in this way?

10 MR. LEGNER: Yes, Your Honor, that's
11 exactly right. And when we have a provision in
12 which, if this Court is unclear whether it
13 limited discretion, it can look around to the
14 surrounding provisions and find only situations
15 where Congress did limit discretion, and it's
16 at odds with --

17 JUSTICE KAGAN: But that sounds as
18 though we're just going to interpret the
19 statute in a general direction, no matter what.

20 MR. LEGNER: Your Honor, I think that
21 that contextual argument supports our reading
22 of "satisfy." I think that, you know, first
23 and foremost, our interpretation is grounded
24 in, and gives effect to, the word "to satisfy."

25 The fact that we read it as

1 non-discretionary or not discretion-conferring
2 is supported by the surrounding provisions of
3 Section 1988.

4 JUSTICE KAGAN: Do you have -- this is
5 the same question that was asked of Mr. Banner.
6 Do you have a way that Congress could have
7 written this statute to clearly state what
8 Mr. Banner thinks it means? You know, that's
9 better than this?

10 MR. LEGNER: If Congress wanted to
11 state -- Congress could have used language that
12 it always uses in fee-shifting statutes when it
13 intends to confer discretion on district
14 courts.

15 In those fee-shifting statutes,
16 Congress uses "may" instead of "shall" and
17 states "the court, in its discretion." And so,
18 for instance, the court could have said the
19 district court -- whenever a monetary judgment
20 is entered, the court may, in its discretion,
21 apply -- apply a portion of it to the fee
22 award. That's what Petitioner's reading means.

23 JUSTICE GINSBURG: Mr. Legner, if, as
24 this discussion has gone on, we conclude that
25 this statute is ambiguous -- it could be read

1 your way, it could be read their way -- then,
2 as Justice Breyer suggested, why shouldn't we
3 take 1988 as the closest, rather than, I think
4 you suggested that, well, then look to the
5 American rule? Under the American rule, each
6 party bears his or own -- her own counsel fees.

7 MR. LEGNER: Your -- Your -- Your
8 Honor, in that situation, it's important to
9 understand that Congress explicitly moved away
10 from the operation of Section 1988. And so it
11 moved away from the broad or wide fee shifting
12 or complete fee shifting under Section 1988 to
13 something else. And in -- in so moving, it
14 moved towards the American rule.

15 Now, Congress made a compromise.
16 Congress decided that prisoner plaintiffs
17 should be allowed -- be permitted to retain at
18 least 75 percent of their -- of their judgment.
19 But the fact that Congress reached that
20 compromise doesn't mean that we're still really
21 in the background of Section 1988, especially
22 where Congress moved away from the operation of
23 Section 1988 in so many ways.

24 For instance, in Section (d)(1),
25 Congress specified that the amount of

1 attorney's fees shall be "proportionally
2 related" to the relief ordered. That is
3 completely the opposite of the rule under
4 Section 1988 --

5 JUSTICE BREYER: But here's another --
6 here's another -- I don't know, looking at the
7 dictionary here, and on "satisfy," isn't it the
8 case that the government pays the rest of the
9 reasonable fee, right?

10 MR. LEGNER: Yes, Your Honor.

11 JUSTICE BREYER: Okay. And everybody
12 knows the government pays the rest of it,
13 right?

14 MR. LEGNER: Yes, Your --

15 JUSTICE BREYER: Okay. So think of a
16 case where it's 12 percent, which you think it
17 can't be, but suppose the judge says,
18 12 percent, you pay 12 percent, okay?

19 Now, they're paying the rest from the
20 government. He's paying the 12 percent in the
21 circumstances that satisfies the debt. Think
22 of bankruptcy. Think of a settlement.

23 MR. LEGNER: You --

24 JUSTICE BREYER: Think of a
25 settlement. You pay for the settlement -- you

1 don't pay the whole thing; you pay some of it.
2 That's why -- I won't read the dictionary
3 thing. It's a little complicated. But it
4 seems to me that -- that the -- luckily he -- I
5 have a dictionary here all the time, and -- and
6 it's -- it's helpful.

7 MR. LEGNER: And I understand that. I
8 understand the argument.

9 JUSTICE BREYER: Okay. Then it
10 satisfies it.

11 MR. LEGNER: But --

12 JUSTICE BREYER: Then the whole
13 statute's --

14 MR. LEGNER: But -- but --

15 JUSTICE BREYER: -- linguistically
16 satisfied or whatever.

17 MR. LEGNER: But, no, I -- but we
18 disagree. When Congress uses the term
19 "satisfy" --

20 JUSTICE BREYER: Yeah.

21 MR. LEGNER: -- it means to fulfill
22 the obligation.

23 JUSTICE BREYER: Yeah. Right.

24 MR. LEGNER: And we --

25 JUSTICE BREYER: And the obligation is

1 to pay that portion of the debt that isn't
2 going to be paid by the defendant, and by the
3 time you're finished, the debt is satisfied.

4 MR. LEGNER: In -- in the first
5 sentence of e(d)(2), the obligation is to
6 pay -- to fulfill the fee award from the
7 judgment with a capped amount, but this is no
8 different than circumstances in which Congress
9 specifies a primary source to be used to
10 fulfill an obligation and then realizes that
11 sometimes that primary source may not be
12 sufficient to fulfill that obligation and then
13 specifies a secondary source.

14 JUSTICE ALITO: I mean, if my -- if my
15 wife gives me a carrot for dinner to satisfy my
16 hunger --

17 (Laughter.)

18 JUSTICE ALITO: -- but she knows that
19 if she does that, I will just go in the
20 refrigerator and stuff myself with lots of
21 other stuff so that I won't be hungry anymore,
22 I don't know -- does that make the carrot
23 sufficient to satisfy my hunger?

24 MR. LEGNER: No, Your Honor. In -- in
25 that --

1 (Laughter.)

2 MR. LEGNER: In that situation --

3 JUSTICE BREYER: Suppose --

4 MR. LEGNER: -- it would probably, you
5 know, be an instance of discretion to --

6 JUSTICE BREYER: Suppose she knows --
7 suppose she knows that he is going to eat that
8 delicious turkey sandwich in the refrigerator.

9 (Laughter.)

10 JUSTICE BREYER: Now -- now the
11 carrots are just enough to fill up that little
12 hole that will remain.

13 (Laughter.)

14 MR. LEGNER: But -- but -- true, but
15 in that circumstance --

16 (Laughter.)

17 MR. LEGNER: -- if -- if the first
18 source of satisfying Justice Alito's hunger was
19 what his wife provides him, then, you know, if
20 that is ultimately not sufficient, they can --

21 JUSTICE SOTOMAYOR: But that's not.
22 It's up to 25 percent. They didn't say
23 25 percent.

24 MR. LEGNER: Well, for instance --

25 JUSTICE SOTOMAYOR:

1 Twenty-five percent of what she cooks.

2 (Laughter.)

3 MR. LEGNER: Because that -- that
4 recognizes that when Justice Alito's wife makes
5 a casserole, 17 percent of that casserole may
6 satisfy his hunger. There will be
7 circumstances in which not the entire
8 25 percent will be needed to fulfill the
9 obligation or the requirement.

10 JUSTICE SOTOMAYOR: Can I ask about
11 something else, which is we've made the
12 American rule the presumption, but I come at
13 it, why aren't we looking at the discretionary
14 rule of 1988?

15 In fee-shifting statutes that are
16 clear -- and this is clear, they're shifting
17 some fees -- we tend to give district courts
18 maximum discretion. We don't look to tie their
19 hands.

20 Why do you think that given the fact
21 that some plaintiffs are seriously injured by
22 state defendants, that Congress would have
23 wanted to take away from the district court
24 absolute discretion to ensure that a plaintiff
25 is adequately compensated for the severity of

1 their injury?

2 MR. LEGNER: Because, Your Honor, in
3 those circumstances where the Congress does
4 confer on the district court absolute or broad
5 discretion, it uses discretion-conferring
6 language such as "may" and "in its discretion."

7 Section 1988(b) itself uses the words
8 "in its discretion" and there's other examples
9 under Section 505 of the Copyright Act or
10 Section 1132(g)(1) of ERISA. Those -- in those
11 provisions, Congress provided that the Court
12 may in its discretion award fees. Congress
13 didn't use those words here.

14 What Congress did was it made a
15 choice. Congress said that there is a lot of
16 prisoner litigation out there, and the
17 government is bearing a huge burden of this.
18 And we are, in particular, concerned about
19 attorney's fees awards.

20 So Congress made a compromise.
21 Congress reached an agreement that will
22 decrease or limit the government's exposure to
23 fee awards, at the same time as treating a -- a
24 prisoner plaintiff more like a civil tort
25 plaintiff.

1 Civil tort plaintiffs may have
2 meritorious claims and get compensatory damages
3 and large punitive damages awards. But the
4 general rule is that those plaintiffs --

5 JUSTICE SOTOMAYOR: But that's exactly
6 right. They don't get punitive awards under
7 1988.

8 MR. LEGNER: Not under 1988, you know,
9 that --

10 JUSTICE SOTOMAYOR: But that's the
11 point, isn't it?

12 MR. LEGNER: Well, Your -- Your Honor,
13 the point is that Congress meant to -- Congress
14 clearly departed from the operation of
15 Section 1988 in the other provisions of (d)(1),
16 for instance, when it capped the reasonable
17 hourly rate, put in the requirement -- capped
18 the overall amount of the fee award, and put in
19 the requirement that the fees be proportionally
20 related, Congress signaled -- signaled its
21 intent that the wide discretion under 1988 is
22 not at play here anymore. We've moved away
23 from that.

24 JUSTICE SOTOMAYOR: Well, these
25 plaintiffs cannot receive punitive damages

1 against the state, correct?

2 MR. LEGNER: These plaintiffs did
3 receive punitive damages.

4 JUSTICE SOTOMAYOR: They did. And it
5 was put down -- and it was reduced.

6 MR. LEGNER: It was -- it was
7 remitted, some of it, but they -- these
8 plaintiffs still received over \$270,000 in
9 punitive damage award in this case.

10 Your Honors, our interpretation best
11 serves the plain language of -- that Congress
12 used and best serves the statute's context, as
13 well as serves the purposes underlying the
14 PLRA.

15 Thank you very much, Your Honors.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Seven minutes, Mr. Banner.

19 REBUTTAL ARGUMENT OF STUART BANNER

20 ON BEHALF OF THE PETITIONER

21 MR. BANNER: Well, the crux of this is
22 the word "satisfy." The question is whether
23 the word "satisfy" can bear the weight that
24 Respondents put on it.

25 And so all I want to do is emphasize

1 how common it is to use the phrase "applied to
2 satisfy" in the way that Justice Kagan
3 suggested to mean not -- not -- not applied to
4 pay completely, but applied in that direction,
5 applied toward satisfying.

6 So, for example, the rental payments
7 on a violin can be applied to satisfy the
8 purchase price if the -- if the student
9 persists in taking lessons. Obviously, the
10 rental payments aren't going to completely
11 fulfill the purchase price. They're going to
12 be applied in that direction.

13 Work an attorney does on a pro bono
14 matter can be applied -- the hours can be
15 applied to satisfy the attorney's pro bono
16 obligation, even if it's an hour -- just a
17 couple of hours. In ordinary English, we say
18 those hours are applied to satisfy the pro bono
19 obligation.

20 Congress uses "applied to satisfy" in
21 this same sense in statutes. We give an
22 example at page 8 of the -- of the yellow brief
23 involving extra pay for Navy personnel who
24 spend more than 48 hours on a submarine in a
25 month, but the relevant provision in the

1 statute is hours in excess of 48 in a given
2 month may be applied to satisfy the 48-hour
3 requirement in subsequent months, even if they
4 don't completely fulfill the 48-hour
5 requirement in subsequent months.

6 So, in this statute, when Congress
7 used the phrase "applied to satisfy," the most
8 plausible interpretation of it is applied in
9 the direction of satisfying, not applied to --
10 to pay completely.

11 JUSTICE KAGAN: Do you have any sense
12 of how many cases up to 25 percent of the
13 judgment actually will be able to satisfy?

14 MR. BANNER: How often it is that the
15 attorney's fees are less than -- than
16 25 percent?

17 JUSTICE KAGAN: No, how -- how often
18 it is that the amount, you know, whether it's
19 25 percent of the judgment or some lesser
20 amount, will actually satisfy the amount of
21 fees awarded?

22 MR. BANNER: Oh, it's extraordinarily
23 rare because -- because, you know, these cases
24 might take hundreds of hours to litigate and
25 the average monetary award is a bit more than

1 \$4,000. So there's an enormous mismatch here.

2 It's a very, very rare prisoner case
3 in which 25 percent of the judgment would even
4 come close to fully, completely paying the --
5 the obligations for attorney's fees, that's
6 right.

7 Thank you.

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

10 (Whereupon, at 10:57 a.m., the case
11 was submitted.)

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