

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES MURPHY, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 16-1067  
 )  
 ) ROBERT SMITH, ET AL., )  
 )  
 ) Respondents. )  
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Pages: 1 through 58

Place: Washington, D.C.

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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 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 that sentence was omitted  
24 from the final legislation. As this -- there  
25 -- there was a sentence that said exactly the

1 interpretation that -- that -- that you've just  
2 been giving, that the -- that the defendant is  
3 liable only for fees in excess of 25 percent of  
4 the judgment, but as the statute was working  
5 its way through Congress, Congress rejected  
6 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-à-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 certainly agree it would be too strong to  
20 say that there's direct evidence that Congress  
21 intended any sort of fault-based system in the  
22 statute because all -- the only evidence we  
23 have of Congress's intent here is the words of  
24 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 plaintiff's share is never going to

1       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: Yes, there have been some  
13 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 don't have  
4 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: I -- I was talking  
13 about the amount of the fee. Does the amount  
14 -- does the amount of the fee ever depend on  
15 the egregiousness? I -- I shouldn't think it  
16 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.

3 MR. BANNER: Right.

4 JUSTICE KENNEDY: This is a -- this is  
5 a double exercise of discretion that it seems  
6 to 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. That  
20 doesn't literally say who pays if it's under 25  
21 percent.

22 MR. BANNER: Right. But the -- the --  
23 the question is -- so Respondents' view of the  
24 statute as enacted is that defendants only have  
25 to pay attorney's fees to the extent the fees

1 exceed 25 percent of the judgment. Right?  
2 That -- that is what this sentence says. And  
3 that's the sentence that was rejected by  
4 Congress as this --

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

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

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

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

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

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

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

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

24           This provision has nothing to do with  
25  frivolous lawsuits. This provision only

1 applies when a prisoner has prevailed on the  
2 merits, been awarded damages, and been awarded  
3 attorney's fees.

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

6 MR. BANNER: Right.

7 JUSTICE SOTOMAYOR: -- of merit, some  
8 that are serious, some that are not so serious,  
9 where there can be an award.

10 So I can see Congress giving  
11 discretion based on the nature of the claim.  
12 That is more supportive of your position on the  
13 issues.

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

18 CHIEF JUSTICE ROBERTS: Well, this is  
19 -- it's -- it's a little different. I  
20 understood the objective of Congress, in order  
21 to weed out non-meritorious suits, to be to  
22 replicate, to the extent they could, the -- the  
23 situation of private parties outside prison.

24 There, if you have a serious injury,  
25 you quite often can go to a lawyer who will

1 charge you a contingent fee, say 25 percent,  
2 and whatever your recovery, you would owe him  
3 25 percent of the -- of the judgment.

4 And you wouldn't owe him only  
5 2 percent just because the -- the judge in the  
6 case thought, well, you didn't do enough work  
7 or you could have done better.

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

17 CHIEF JUSTICE ROBERTS: Yeah, but they  
18 could --

19 MR. BANNER: -- members of the general  
20 public.

21 CHIEF JUSTICE ROBERTS: But you can  
22 determine that if you're on a straight  
23 contingent basis, that that -- I mean, you have  
24 to have enough of an incentive to get lawyers  
25 to take the cases and, at the same time,



1 discourage prisoners from saying, you know, I  
2 think this is a serious case, while an  
3 objective review, which is what plaintiffs'  
4 lawyers do, would suggest that it's not.

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

12 I mean, it's not -- it's -- it's --  
13 Congress could have said --

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

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

23 CHIEF JUSTICE ROBERTS: Well, that's  
24 why I don't think --

25 MR. BANNER: Yeah.

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

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

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

16 CHIEF JUSTICE ROBERTS: Well the  
17 other --

18 JUSTICE KENNEDY: Go ahead.

19 CHIEF JUSTICE ROBERTS: I'm sorry.  
20 But your adversary is saying that's what they  
21 did under his reading of the statute, under his  
22 reading of the statute.

23 MR. BANNER: Right, but that -- I  
24 think we're going in circles. That's an  
25 untenable reading of the statute because the

1 statute doesn't say 25 percent.

2 JUSTICE KAGAN: But I think --

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

5 MR. BANNER: The statute says a  
6 portion not exceeding 25 percent.

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

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

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

24 The background is 1988.

25 MR. BANNER: Right.

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

8 MR. BANNER: Right.

9 JUSTICE BREYER: Okay?

10 MR. BANNER: Right.

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

15 MR. BANNER: The --

16 JUSTICE BREYER: And the only answer  
17 you've given so far is -- is, well, look at --  
18 read the language.

19 MR. BANNER: I'm going to give you the  
20 second --

21 JUSTICE BREYER: I'm not sure about  
22 the language. I mean, is there anything else  
23 that supports the 1988 is the basic background?

24 MR. BANNER: Yes, indeed, there is.  
25 The -- the -- before this statute was enacted,

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

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

15 Well, if there are no further  
16 questions. I'll reserve my time.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Mr. Legner.

20 ORAL ARGUMENT OF BRETT E. LEGNER

21 ON BEHALF OF THE RESPONDENTS

22 MR. LEGNER: Mr. Chief Justice, and  
23 may it please the Court:

24 As -- as you noted, Mr. Chief Justice,  
25 the purpose that Congress had in enacting this

1 provision was to replicate a contingent fee  
2 arrangement. Our interpretation --

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

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

12 JUSTICE SOTOMAYOR: Can I -- can I ask  
13 you something about the statute?

14 MR. LEGNER: Sure.

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

20 Would that mean 25 percent absent that  
21 25 percent?

22 MR. LEGNER: Absent the parenthetical?

23 JUSTICE SOTOMAYOR: Absent the  
24 parenthetical.

25 MR. LEGNER: If the parenthetical was

1 not in there, then the -- then the provision  
2 would mean that the attorney's fees award shall  
3 be fulfilled by the judgment.

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

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

15 MR. LEGNER: No, Your Honor.

16 JUSTICE SOTOMAYOR: It's a -- no?  
17 It's a portion of the judgment.

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

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

24 MR. LEGNER: A portion is a portion,  
25 but what that does is it --

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

3 MR. LEGNER: Absolutely, Your Honor.

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

8 MR. LEGNER: The not to exceed --

9 JUSTICE SOTOMAYOR: Why does it just  
10 say a portion of the judgment, 25 percent,  
11 shall be applied to satisfy the amount?

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

14 JUSTICE SOTOMAYOR: No, no. I'm  
15 asking you --

16 MR. LEGNER: Right.

17 JUSTICE SOTOMAYOR: -- what's the  
18 difference between the two things?

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

24 In the hypothetical, without that  
25 parenthetical, it -- it provides that a portion



1 will be used but for the purpose of satisfying  
2 or fulfilling the award.

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

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

12 JUSTICE SOTOMAYOR: And the defendant  
13 pays nothing?

14 MR. LEGNER: In that circumstance,  
15 that's right, Your Honor.

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

23 MR. LEGNER: No, Your Honor, because  
24 there's circumstances in which, say, 17 percent  
25 of the judgment will be sufficient to fulfill

1 the fee award. If there's a \$100,000 judgment  
2 and a \$17,000 fee award, 17 percent of the --  
3 of the judgment will fulfill that fee award.

4 That's why Congress didn't say a  
5 portion --

6 JUSTICE SOTOMAYOR: Then you're doing  
7 away with the "shall apply." No one ever  
8 speaks of that "shall apply" as meaning that  
9 you give more than 25 percent.

10 MR. LEGNER: We --

11 JUSTICE SOTOMAYOR: You don't award  
12 him attorney's fees of 25 percent of the  
13 judgment.

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

21 JUSTICE KAGAN: Mr. -- Mr. Legner --

22 JUSTICE KENNEDY: Please correct me if  
23 I'm wrong, but my understanding is that if you  
24 talk about contingent fees and you talk about  
25 apportionment, you're talking about apples and

1 oranges. Some fees may be contingent; some  
2 fees may not be.

3 All the statute does is say whatever  
4 the fee is, 25 percent of it or no more than  
5 25 percent of it -- 25 percent of it shall be  
6 paid by the -- by the defendant.

7 MR. LEGNER: That's --

8 JUSTICE KENNEDY: Am I correct?

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

11 JUSTICE KENNEDY: From -- from the  
12 award?

13 MR. LEGNER: From the award. The  
14 statute says that 20 -- no more than  
15 25 percent, but 25 percent or less, if  
16 necessary, to fulfill, in other words, to  
17 satisfy the fee award shall be applied. The  
18 statute does not give discretion to apportion  
19 that amount and, indeed --

20 JUSTICE GINSBURG: It says not to  
21 exceed. It sounds like it's imagining an award  
22 that does exceed, and it says not to exceed.

23 What happens when it does exceed?  
24 Then the defendant picks up the tab. But the  
25 not to exceed language would be a strange thing

1 for Congress to put in if it really meant the  
2 plaintiff pays 25 percent, and, if the judgment  
3 is larger, the defendant pays the rest.

4 MR. LEGNER: Well, Your Honor, the  
5 reason they use "not to exceed" is that there  
6 are cases where the plaintiff won't pay  
7 25 percent; for instance, where the fee award  
8 is equal to 17 percent of the judgment.

9 So, in that circumstance, the -- the  
10 fee award will be fulfilled, satisfied, with  
11 less than 25 percent of the judgment.

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

16 I guess the question I have is whether  
17 in this context one should think that the word  
18 "satisfy" says anything.

19 And -- and my question goes basically  
20 that in many cases, and probably in the vast  
21 majority of cases, no part of the judgment,  
22 including the full judgment, could possibly  
23 satisfy the fee award.

24 So given that we're talking about a  
25 circumstance in which in the vast majority of

1 cases the fee award is not going to be  
2 satisfied, why should we understand the word  
3 "satisfy" in the way that you think we should?

4 MR. LEGNER: Well, Justice Kagan,  
5 because, under our interpretation, there will  
6 be some circumstances in which the fee award  
7 will be completely satisfied. Additionally,  
8 under our reading of that --

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

18 MR. LEGNER: I understand, Your Honor,  
19 but -- but a couple points on -- on that.  
20 First, the fact that the fee -- that the  
21 judgment may not be sufficient to fulfill the  
22 award with the 25 percent cap or otherwise does  
23 not change the definition of the word  
24 "satisfy."

25 That, our -- under our reading, the

1 district court is required to use the judgment  
2 for the purpose of fulfilling the fee award.  
3 The district court may be stopped in  
4 circumstances, but that's by virtue of the  
5 operation of the 25 percent cap, which is a  
6 separate intervening force that impacts the --  
7 the -- the apportionment in -- in that  
8 situation.

9 But, furthermore, under -- under  
10 Petitioner's reading, which would permit a  
11 nominal amount, you know, Petitioner indicated  
12 that today, that a one dollar apportionment  
13 would be sufficient, that in no way intends to  
14 satisfy under any definition --

15 JUSTICE BREYER: Well, you're --  
16 you're using --

17 JUSTICE KAGAN: Well, I think --

18 JUSTICE BREYER: Finish. Finish.

19 JUSTICE KAGAN: I mean, I think that  
20 that's wrong. I mean, I guess what I'm  
21 suggesting is that this language should be read  
22 or could be read to say, you know, shall go  
23 towards satisfying. So a dollar would go a  
24 small way towards satisfying. Ten dollars  
25 would go a slightly larger and so forth and so

1 on.

2 MR. LEGNER: Well, Your Honor, under  
3 -- under that reading, "satisfy" need not even  
4 be in the statute. We could just lift those  
5 words out of the statute as it is right now, in  
6 which case you would have the requirement that  
7 the Court apply a portion of the judgment.

8 But Congress didn't stop there. It  
9 stated that -- it stated the purpose for the  
10 application of the judgment, which is to  
11 satisfy. And -- and our interpretation is  
12 consistent with Congress's purposes underlying  
13 this.

14 Congress had two purposes underlying  
15 this provision. Congress wanted to put  
16 plaintiffs in the -- prisoner plaintiffs in a  
17 position similar to typical civil tort  
18 plaintiffs.

19 And, additionally, Congress wanted to  
20 reduce the burden of prisoner litigation on the  
21 government. There is discussion during the  
22 legislative debates that we cite at page 27 of  
23 our brief where Congress was explicitly  
24 concerned with attorney's fees awards that the  
25 government was being assessed in prisoner

1 cases.

2 JUSTICE ALITO: You previously started  
3 to explain what evidence there is that Congress  
4 wanted to put prisoners in a situation similar  
5 to -- to a plaintiff in an ordinary tort case,  
6 but I don't think you finished your -- your  
7 explanation. What -- what evidence is there of  
8 that?

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

19 And we want -- one of -- one of the  
20 efforts Congress then had was to put those  
21 prisoners -- to require the prisoners to bear  
22 some of the costs of litigation.

23 JUSTICE BREYER: Well, that's true.

24 JUSTICE SOTOMAYOR: I'm sorry, the non  
25 -- the non-incarcerated plaintiffs are under



1 1988. They get all of their fees. If they  
2 wanted to equalize them, they would have left  
3 them alone.

4 MR. LEGNER: Your Honor, Congress made  
5 a compromise. There's non-incarcerated civil  
6 rights plaintiffs under 1988, absolutely, but  
7 then there's civil tort plaintiffs not under --

8 JUSTICE SOTOMAYOR: But it didn't say  
9 civil tort plaintiffs. He said  
10 non-incarcerated plaintiffs. He didn't say  
11 tort plaintiffs.

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

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

19 Now, your -- your things in your brief  
20 talk -- they say limit costs and put it in the  
21 same position as non-incarcerated plaintiff.

22 What non-incarcerated plaintiff? The  
23 first sentence of the statute says: "In any  
24 action brought by a prisoner in which  
25 attorney's fees are authorized under Section

1 1988."

2 Now, that's fairly strong evidence  
3 that they're thinking, since it's right in the  
4 statute, the first line, that they're thinking  
5 of 1988 plaintiffs.

6 Now, that's I'm just saying that I  
7 can't get too much out of the language. You're  
8 right, it would have been absolutely clear if  
9 they had said to help satisfy. Then you would  
10 lose. But they didn't. They said to satisfy.

11 So we have the language up here about  
12 up to, and we have the language down there  
13 about satisfy. At that point, I, myself, am  
14 not certain, but then I do look to the purpose,  
15 which is what you're talking about.

16 And then, when I see that, the first  
17 sentence is put them in the same position as  
18 1988 plaintiffs. Well, that's the only  
19 instance when they're going to get their  
20 attorney's fees. But, but, okay, they will  
21 have to pay up to 25 percent.

22 Now, up to 25, now we get into the  
23 language. So I get into the puzzle. My  
24 thought was, which I'm addressing the question  
25 to, we both have the sentence that he quoted on

1 page 12 of his brief, which would have made a  
2 choice. We can do this in one of two ways.

3 We can say: Prisoner, you always pay  
4 25 percent, or we could say: Judge, you  
5 decide, up to 25 percent.

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

20 Am I -- are you following what I'm  
21 saying?

22 MR. LEGNER: I am, Your Honor.

23 JUSTICE BREYER: Okay. And then --  
24 then the only way to help the prisoner who's  
25 gotten such a small award is to reduce the

1 whole attorney's fees. But if we make it  
2 discretionary, there's another way. You can  
3 have a reasonable attorney fee here, a little  
4 bit higher, and the prisoner doesn't pay the  
5 whole 25 percent. We put some of it on the  
6 prison guard, the state, that's acted so  
7 abominably.

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

10 Then I go to page 12 in his brief, and  
11 the preceding language, and I conclude, hey,  
12 Congress was on a seesaw here, and they ended  
13 up on his side.

14 Now, that's a little complicated, but  
15 that's where I am at the moment. What do you  
16 want to say?

17 MR. LEGNER: A lot, Your Honor.

18 (Laughter.)

19 MR. LEGNER: You're right that the  
20 first sentence of Section (d)(1) states that in  
21 any situation where fees would be authorized  
22 under Section 1988, but it then continues, that  
23 sentence continues, "such fees shall not be  
24 awarded, except," and then the provision goes  
25 on to restrain the court's discretion in

1       awarding a fee under Section 1988.

2               So in this provision, Congress moved  
3       away -- Congress started with Section 1988  
4       because these are claims under Section 1988 --

5               JUSTICE BREYER:   Yeah.

6               MR. LEGNER:   -- but for this specific  
7       class of litigant, Congress moved away from the  
8       normal operation of Section 1988.

9               JUSTICE BREYER:   Well, that inclusion  
10       -- now -- but, remember, if you follow this  
11       complicated argument --

12              MR. LEGNER:   Sure.

13              JUSTICE BREYER:   -- sorry to be so  
14       complicated, but the -- really I've the choice  
15       down in my mind.   It's the -- the victim here  
16       is not the government and it's not the victim  
17       on your interpretation.   As I've been through  
18       it, it's not -- it's not so much the prisoner,  
19       it's not so much the government; it is the  
20       lawyer, because -- because, as I said, the --  
21       the -- the prisoner who suffered some, you  
22       know, pretty bad treatment and has got a very  
23       small award, the judge can help him out only by  
24       cutting the whole legal fee.

25              But if the opposite interpretation is

1 right, the judge has another tool. The other  
2 tool is to make the defendants here pay more  
3 than 75 percent. And so now we have two tools.  
4 The judge has more discretion. He can deal  
5 with the different cases differently. And  
6 first they tried the one, rejected it on page  
7 12, and now they tried the other.

8 Now -- now, that's where I am. And --  
9 MR. LEGNER: Sure, Your Honor. And --  
10 and -- and I would add that the -- the court,  
11 or I'm sorry, Congress in this provision  
12 limited the court's discretion to award  
13 attorney's fees in other ways. For instance,  
14 the total amount of the attorney's fee is  
15 capped at 150 percent of the judgment.

16 JUSTICE BREYER: Mm-hmm.

17 MR. LEGNER: So Congress took away  
18 discretion and limited the amount of attorney's  
19 fees --

20 JUSTICE BREYER: Yeah.

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

22 JUSTICE KAGAN: Well, that seems  
23 right, that -- that Congress limited discretion  
24 in certain ways. The question is: Did it  
25 limit discretion in this way?

1           MR. LEGNER: Yes, Your Honor, that's  
2 exactly right. And when we have a provision in  
3 which, if this Court is unclear whether it  
4 limited discretion, it can look around to the  
5 surrounding provisions and find only situations  
6 where Congress did limit discretion, and it's  
7 at odds with --

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

11          MR. LEGNER: Your Honor, I think that  
12 contextual argument supports our reading of  
13 "satisfy." I think that, you know, first and  
14 foremost, our interpretation is grounded in and  
15 gives effect to the word "to satisfy."

16          The fact that we read it as  
17 non-discretionary or not discretion-conferring  
18 is supported by the surrounding provisions of  
19 Section 1988.

20          JUSTICE KAGAN: Do you have -- this is  
21 the same question that was asked of Mr. Banner.  
22 Do you have a way that Congress could have  
23 written this statute to clearly state what  
24 Mr. Banner thinks it means? You know, that's  
25 better than this?

1           MR. LEGNER:  If Congress wanted to  
2     state -- Congress could have used language that  
3     it always uses in fee-shifting statutes when it  
4     intends to confer discretion on district  
5     courts.

6           In those fee-shifting statutes,  
7     Congress uses "may" instead of "shall" and  
8     states "the court in its discretion."  And so,  
9     for instance, the court could have said the  
10    district court -- whenever a monetary judgment  
11    is entered, the court may, in its discretion,  
12    apply -- apply a portion of it to the fee  
13    award.  That's what Petitioner's reading means.

14          JUSTICE GINSBURG:  Mr. Legner, if, as  
15    this discussion has gone on, we conclude that  
16    this statute is ambiguous -- it could be read  
17    your way, it could be read their way -- then as  
18    Justice Breyer suggested, why shouldn't we take  
19    1988 as the closest, rather than, I think you  
20    suggested that, well, then look to the American  
21    rule?  Under the American rule, each party  
22    bears his or own -- her own counsel fees.

23          MR. LEGNER:  Your -- Your -- Your  
24    Honor, in that situation, it's important to  
25    understand that Congress explicitly moved away



1 from the operation of Section 1988. And so it  
2 moved away from the broad or wide fee shifting  
3 or complete fee shifting under Section 1988 to  
4 something else. And in -- in -- in so moving,  
5 it moved towards the American rule.

6 Now, Congress made a compromise.  
7 Congress decided that prisoner plaintiffs  
8 should be allowed -- be permitted to retain at  
9 least 75 percent of their -- of their judgment.  
10 But the fact that Congress reached that  
11 compromise doesn't mean that we're still really  
12 in the background of Section 1988, especially  
13 where Congress moved away from the operation of  
14 Section of 1988 in so many ways.

15 For instance, in Section (d)(1),  
16 Congress specified that the amount of  
17 attorney's fees shall be proportionally related  
18 to the relief ordered. That is completely the  
19 opposite of the rule under Section 1988 --

20 JUSTICE BREYER: Here's another --  
21 here's another -- I don't know, I was looking  
22 at the dictionary here, and on "satisfy," isn't  
23 it the case that the government pays the rest  
24 of the reasonable fee; right?

25 MR. LEGNER: Yes, Your Honor.

1 JUSTICE BREYER: And everybody knows  
2 the government pays the rest of it, right?

3 MR. LEGNER: Yes, Your Honor.

4 JUSTICE BREYER: Okay. So think of a  
5 case where it's 12 percent, which you think it  
6 can't be, but suppose the judge says,  
7 12 percent, you pay 12 percent, okay?

8 Now, they're paying the rest from the  
9 government. He's paying the 12 percent in the  
10 circumstances that satisfies the debt. Think  
11 of bankruptcy. Think of a settlement.

12 MR. LEGNER: You --

13 JUSTICE BREYER: Think of a  
14 settlement. You pay for the settlement -- you  
15 don't pay the whole thing; you pay some of it.  
16 That's why -- I won't read the dictionary  
17 thing. It's a little complicated. But it  
18 seems to me that the -- that the -- luckily I  
19 have a dictionary here all the time, and -- and  
20 it's -- it's helpful.

21 MR. LEGNER: And I understand that. I  
22 understand the argument.

23 JUSTICE BREYER: Okay. Then it  
24 satisfies it.

25 MR. LEGNER: But --

1 JUSTICE BREYER: Then the whole  
2 statute's --

3 MR. LEGNER: Right.

4 JUSTICE BREYER: -- linguistically  
5 satisfied or whatever.

6 MR. LEGNER: But, no, I disagree.  
7 When Congress uses the term "satisfy" --

8 JUSTICE BREYER: Yeah.

9 MR. LEGNER: -- it means to fulfill  
10 the obligation.

11 JUSTICE BREYER: Yeah. Right.

12 MR. LEGNER: And --

13 JUSTICE BREYER: And the obligation is  
14 to pay that portion of the debt that isn't  
15 going to be paid by the defendant, and by the  
16 time you're finished, the debt is satisfied.

17 MR. LEGNER: In -- in the first  
18 sentence of e(d)(2), the obligation is to  
19 pay -- to fulfill the fee award from the  
20 judgment with a capped amount. Well, this is  
21 no different than circumstances in which  
22 Congress specifies a primary source to be used  
23 to fulfill an obligation and then realizes that  
24 sometimes that primary source may not be  
25 sufficient to fulfill that obligation and then

1 specifies a secondary source.

2 JUSTICE ALITO: I mean, if my -- if my  
3 wife gives me a carrot for dinner to satisfy my  
4 hunger --

5 (Laughter.)

6 JUSTICE ALITO: -- but she knows that  
7 if she does that, I will just go in the  
8 refrigerator and stuff myself with lots of  
9 other stuff so that I won't be hungry anymore,  
10 I don't know -- does that make the carrot  
11 sufficient to satisfy my hunger?

12 MR. LEGNER: No, Your Honor. In -- in  
13 that --

14 (Laughter.)

15 MR. LEGNER: In that situation --

16 JUSTICE ALITO: Suppose --

17 MR. LEGNER: -- it would probably, you  
18 know, be a case of discretion to --

19 JUSTICE BREYER: Suppose she knows --  
20 suppose she knows that he is going to eat that  
21 delicious turkey sandwich in the refrigerator.

22 (Laughter.)

23 JUSTICE BREYER: Now -- now the  
24 carrots are just enough to fill up that little  
25 hole that will remain.

1 (Laughter.)

2 MR. LEGNER: But -- but -- true, but  
3 in that circumstance --

4 (Laughter.)

5 MR. LEGNER: -- if -- if the first  
6 source of satisfying Justice Alito's hunger was  
7 what his wife provides him, then, you know, if  
8 that is ultimately not sufficient --

9 JUSTICE SOTOMAYOR: But that's not.  
10 It's up to 25 percent. They didn't say  
11 25 percent.

12 MR. LEGNER: Well, for instance --

13 JUSTICE SOTOMAYOR: 25 percent of what  
14 she cooks.

15 (Laughter.)

16 MR. LEGNER: That -- that recognizes  
17 that when Justice Alito's wife makes a  
18 casserole, 17 percent of that casserole may  
19 satisfy his hunger. There will be  
20 circumstances in which not the entire  
21 25 percent will be needed to fulfill the  
22 obligation or the requirement.

23 JUSTICE SOTOMAYOR: Can I ask about  
24 something else, which is we've made the  
25 American rule the presumption, but I come at

1 it, why aren't we looking at the discretionary  
2 rule of 1988?

3 In fee-shifting -- fee-shifting  
4 statutes that are clear -- and this is clear,  
5 they're shifting some fees -- we tend to give  
6 district courts maximum discretion. We don't  
7 look to tie their hands.

8 Why do you think that given the fact  
9 that some plaintiffs are seriously injured by  
10 state defendants, that Congress would have  
11 wanted to take away from the district court  
12 absolute discretion to ensure that a plaintiff  
13 is adequately compensated for the severity of  
14 their injury?

15 MR. LEGNER: Because, Your Honor, in  
16 those circumstances where the Congress does  
17 confer on the district court absolute or broad  
18 discretion, it uses discretion-conferring  
19 language such as "may" and "in its discretion."

20 Section 1988(b) itself uses the words  
21 "in its discretion" and there's other examples  
22 under Section 505 of the Copyright Act or  
23 Section 1132(g)(1) of ERISA. Those -- in those  
24 provisions Congress provided that the Court may  
25 in its discretion award fees. Congress didn't

1 use those words here.

2           What Congress did was it made a  
3 choice. Congress said that there is a lot of  
4 prisoner litigation out there, and the  
5 government is bearing a huge burden of this.  
6 And we are, in particular, concerned about  
7 attorney's fees awards.

8           So Congress made a compromise.  
9 Congress reached an agreement that will  
10 decrease or limit the government's exposure to  
11 fee awards, at the same time as treating a -- a  
12 prisoner plaintiff more like a civil tort  
13 plaintiff.

14           Civil tort plaintiffs may have  
15 meritorious claims and get compensatory damages  
16 and large punitive damages awards. But the  
17 general rule is that those plaintiffs --

18           JUSTICE SOTOMAYOR: But that's exactly  
19 right. They don't get punitive awards under  
20 1988.

21           MR. LEGNER: Not under 1988, you know,  
22 that --

23           JUSTICE SOTOMAYOR: But that's the  
24 point, isn't it?

25           MR. LEGNER: Well, Your Honor, the

1 point is that Congress meant to -- Congress  
2 clearly departed from the operation of  
3 Section 1988 in the other provisions of (d)(1),  
4 for instance, when it capped the reasonable  
5 hourly rate, put in the requirement -- capped  
6 the overall amount of the fee award, and put in  
7 the requirement that the fees be proportionally  
8 related, Congress signaled, signaled its intent  
9 that the wide discretion under 1988 is not at  
10 play here anymore. We've moved away from that.

11 JUSTICE SOTOMAYOR: Well, these  
12 plaintiffs cannot receive punitive damages  
13 against the state, correct?

14 MR. LEGNER: These plaintiffs did  
15 receive punitive damages.

16 JUSTICE SOTOMAYOR: They did. And it  
17 was put down -- and it was reduced.

18 MR. LEGNER: It was -- it was  
19 remitted, some of it, but these plaintiffs  
20 still received over \$270,000 in punitive damage  
21 award in this case.

22 Your Honors, our interpretation best  
23 serves the plain language of -- that Congress  
24 used and best serves the statute's context, as  
25 well as serves the purposes underlying the



1 PLRA.

2 Thank you very much, Your Honors.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Seven minutes, Mr. Banner.

6 REBUTTAL ARGUMENT OF STUART BANNER

7 ON BEHALF OF THE PETITIONER

8 MR. BANNER: Well, the crux of this is  
9 the word "satisfy." The question is whether  
10 the word "satisfy" can bear the weight that  
11 Respondents put on it.

12 And so all I want to do is emphasize  
13 how common it is to use the phrase "applied to  
14 satisfy" in the way that Justice Kagan  
15 suggested to mean not -- not -- not applied to  
16 pay completely but applied in that direction,  
17 applied toward satisfying.

18 So, for example, the rental payments  
19 on a violin can be applied to satisfy the  
20 purchase price if the -- if the student  
21 persists in taking lessons. Obviously, the  
22 rental payments aren't going to completely  
23 fulfill the purchase price. They're going to  
24 be applied in that direction.

25 Work an attorney does on a pro bono

1 matter can be applied -- the hours can be  
2 applied to satisfy the attorney's pro bono  
3 obligation, even if it's just a couple of  
4 hours. In ordinary English, we say those hours  
5 are applied to satisfy the pro bono obligation.

6 Congress uses "applied to satisfy" in  
7 this same sense in statutes. We give an  
8 example at page 8 of the -- of the yellow brief  
9 involving extra pay for Navy personnel who  
10 spend more than 48 hours on a submarine in a  
11 month, but the relevant provision in the  
12 statute is hours in excess of 48 in a given  
13 month may be applied to satisfy the 48-hour  
14 requirement in subsequent months, even if they  
15 don't completely fulfill the 48-hour  
16 requirement in subsequent months.

17 So, in this statute, when Congress  
18 used the phrase "applied to satisfy," the most  
19 plausible interpretation of it is applied in  
20 the direction of satisfying, not applied to --  
21 to pay completely.

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

25 MR. BANNER: How often it is that the

1 attorney's fees are less than -- than  
2 25 percent?

3 JUSTICE KAGAN: No, how -- how often  
4 it is that the amount, you know, whether it's  
5 25 percent of the judgment or some lesser  
6 amount will actually satisfy the amount of fees  
7 awarded?

8 MR. BANNER: Oh, it's extraordinarily  
9 rare because -- because, you know, these cases  
10 might take hundreds of hours to litigate and  
11 the average monetary award is a bit more than  
12 \$4,000. So there's an enormous mismatch here.

13 It's a very, very rare prisoner case  
14 in which 25 percent of the judgment would even  
15 come close to fully, completely paying the --  
16 the obligations for attorney's fees, that's  
17 right.

18 Thank you.

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

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

23

24

25

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<b>\$</b>	<b>8</b>	<b>8</b>	<b>8</b>
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