SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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RIMINI STREET, INC., ET AL.,)

Petitioners,)

v.) No. 17-1625

ORACLE USA, INC., ET AL.,)

Respondents.)

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Pages: 1 through 68

Place: Washington, D.C.

Date: January 14, 2019

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9 Washington, D.C.

10 Monday, January 14, 2019

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 11:08 a.m.

15

16 APPEARANCES:

17 MARK A. PERRY, ESQ., Washington, D.C.; on behalf

18 of the Petitioners.

19 ALLON KEDEM, Assistant to the Solicitor General,

20 Department of Justice, Washington, D.C.; for the

21 United States, as amicus curiae, supporting the

22 Petitioners.

23 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf

24 of the Respondents.

25

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

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear

4 argument next this morning in Case 17-1625,

5 Rimini Street, Incorporated versus Oracle USA.

6 Mr. Perry.

7 ORAL ARGUMENT OF MARK A. PERRY

8 ON BEHALF OF THE PETITIONERS

9 MR. PERRY: Thank you, Mr. Chief

10 Justice, and may it please the Court:

11 The term "costs" is a term of art in

12 federal law. This Court has held as much three

13 times: in Crawford Fitting, in Casey, and in

14 Murphy.

15 It is defined in Section 1920 of Title

16 28, and the Court also has held that three

17 times in those three same cases.

18 In the Taniguchi case, the Court's

19 most recent decision in this line, the Court

20 emphasized that "costs" in federal law does not

21 have its ordinary meaning but, rather, has this

22 specialized meaning.

23 CHIEF JUSTICE ROBERTS: Well, what

24 about full costs? I mean, that's the issue,

25 right?

1 MR. PERRY: Your Honor, it is.
2 Congress can, of course, override the default
3 definition, and when it does so, it must do it
4 explicitly. We have here two words, "full
5 costs."
6 We actually agree, my friend
7 Mr. Clement and I, on "full." It means all or
8 all that can be contained or complete or
9 something of that nature.
10 The dispute is on "costs" because just
11 as the full moon doesn't tell us anything about
12 Mars and Venus, "full costs," we submit,
13 doesn't tell the court anything about fees and
14 expenses.
15 And Congress has been careful in
16 separating out those concepts, and this Court
17 has been careful in separating them out.
18 Murphy, the case that involved costs under the
19 IDEA, specifically contrasted the word "costs"
20 with the word "expenses" and said "expenses" is
21 open-ended and might include travel expenses
22 and salaries and so forth, whereas costs, we
23 know, are these things under Section 1920.
24 And in Murphy, the Court told all of
25 us, the lower courts and the bar, and Congress,

1 what it takes to override that presumption.
2 The Court said, and this is a quote from page
3 301, "No statute will be construed as
4 authorizing the taxation of witness fees as
5 costs unless the statute refers explicitly to
6 witness fees."
7 So here, in Section 505, Your Honors,
8 we have a statute that does not refer
9 explicitly to witness fees and, under a plain
10 application of Murphy, cannot authorize witness
11 fees.
12 JUSTICE SOTOMAYOR: Mr. Perry, I -- I
13 understand all that case law. I think your
14 adversary would argue, number one, that full
15 costs in the Copyright Act predated -- predated
16 both the definitional inclusion of costs in the
17 federal statutes and that it had a history, a
18 meaning, independent of what happened later.
19 You haven't addressed how you get rid
20 of that independent meaning argument.
21 MR. PERRY: If I could address --
22 JUSTICE SOTOMAYOR: Number two, I
23 think your adversary pointed us to three
24 statutes of many that have the word "full
25 costs." Give me a meaning to those three

1 statutes that would give effect to the word
2 "full."
3 MR. PERRY: Justice Sotomayor, if I
4 can take those in reverse order. Full costs,
5 we submit, means all costs. And let me
6 contrast that with section --
7 JUSTICE SOTOMAYOR: But it's
8 discretionary under both the Copyright Act now
9 and under the statute.
10 MR. PERRY: Yes, Your Honor, but in
11 Crawford Fitting, the Court said the discretion
12 is the on/off switch -- the question -- under
13 54(d), whether or not to give costs. That is
14 the discretion. And let me contrast it --
15 JUSTICE SOTOMAYOR: The government
16 hasn't excepted that yet, though.
17 MR. PERRY: Well, Section 2412, which
18 this Court identified in the Baker Botts case
19 as the clearest example of a cost statute that
20 overrides the presumption, says that costs in a
21 government case can be awarded in whole or in
22 part -- Congress understands that concept --
23 whereas, in a copyright case, they're awarded
24 full costs. It means all costs.
25 And -- and we know from history that

1 that's what courts did. And we also know, to
2 go back to your first part of your question,
3 Your Honor, is that the courts did not award
4 any non-taxable expenditures. From 1831 to
5 1976, there are 858 copyright cases awarding
6 costs. Not one case has ever awarded any cost
7 not on a statutory schedule under either state
8 law or federal law.
9 That tells the Court that our
10 construction is correct historically and my
11 opponent's construction has no historical
12 support. There is not a single case that has
13 ever read the statute the way the Ninth Circuit
14 read it in the Twentieth Century Fox case. In
15 fact, that is the first case in the history of
16 the United States --
17 JUSTICE SOTOMAYOR: Could you point me
18 to where in your brief or an amici accounted
19 for those 800 cases?
20 MR. PERRY: Your Honor, we don't have
21 them all listed out. We pointed out in the
22 reply brief that my friends on the other side
23 and all of their amici had not cited a single
24 case on their point. And to confirm that we
25 were right, I went through and had my team read

1 every single one of them.

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: The -- your --

4 your argument, though, would assume there are a

5 lot of cases where, although costs were

6 awarded, they weren't all costs. How many of

7 those do you have?

8 MR. PERRY: We don't have any of those

9 either, Your Honor. It appears that costs --

10 CHIEF JUSTICE ROBERTS: Well, then why

11 would Congress be worried about saying "full

12 costs"? Nobody's ever apparently ever awarded

13 fewer than few costs or less than few costs.

14 MR. PERRY: Your Honor, we think it

15 came out of the English copyright statute,

16 which says full costs. It's a -- it's an --

17 it's a historical artifact, if you will. We

18 went back through the history, though, and part

19 of the point of the historical analysis is to

20 see whether that phrase had some specialized

21 meaning, either in England or in the States, as

22 being beyond scheduled costs or fee bill costs.

23 And the answer is no. There's absolutely no

24 authority for that.

25 And so we have this -- this language

1 that is antiquated, but it has been carried
2 through. Our interpretation does give it
3 meaning. It is all costs, full costs, every
4 cost to which you're entitled under the
5 statutes. And that's all we typically ask of
6 language.
7 My friends on the other hand --
8 JUSTICE KAGAN: If you're right, why
9 have the provision at all? Wouldn't 1920 do
10 the trick?
11 MR. PERRY: Well, Your Honor, there's
12 208 federal cost statutes; 207 of them don't
13 reference 1920 either. Congress, in other
14 words, makes cost provisions and expense
15 provisions and fee provisions and other things
16 in many, many statutes, which would all be in
17 one sense redundant of 1920.
18 This Court dealt with that in the Marx
19 case in the context of Rule 54(d) and said that
20 kind of redundancy is to be expected with
21 respect to cost statutes because Congress has
22 them here.
23 And there's a good reason for it, Your
24 Honor. When Congress wants to change what a
25 cost is -- for example, Taniguchi involved the

1 interpreters -- Congress can amend 1920 and add
2 interpreters, or it could take out e-discovery,
3 or could do whatever it wants, and then that
4 propagates out through 208 statutes
5 automatically because what is a cost in -- in
6 1920 goes out through all the cost statutes.
7 Under the alternative construction, we
8 would -- Congress would have to go through 208
9 times and amend all of them. And, of course,
10 this Court would have to go through 208 times
11 and construe all of them to figure out what's a
12 cost or not a cost.
13 JUSTICE KAGAN: Well, that's a good
14 reason for having 1920. It's not a good reason
15 for repeating yourself.
16 MR. PERRY: Well, it doesn't repeat
17 itself either, Your Honor. 1920 says a court
18 may tax as costs the following things. So it
19 defines the taxable costs and the power of a
20 federal court. 54(d) says a court should award
21 the prevailing party costs.
22 505 doesn't say either of those. 505
23 says the court may allow as a recovery costs,
24 full costs, to any party. Under 505, the court
25 can award costs to the non-prevailing party.

1 That's a total departure from 1920. That --
2 that is not authorized by 1920, in fact. So
3 Section 505 has much independent work to do.
4 The second sentence of 505 also
5 authorizes attorneys' fees. This, again, is a
6 textual, structural point that gives weight to
7 our side, and not the other, because Congress
8 understood that full costs did not include
9 attorneys' fees, and when it explicitly
10 provided for it, that entire sentence is
11 rendered superfluous under Mr. Clement's
12 definition.
13 JUSTICE ALITO: Well, it says -- the
14 second sentence says that the -- the court may
15 award reasonable attorneys' fees as part of the
16 costs. So what does that do to your argument
17 that "costs" has a very narrow meaning that
18 can't include attorneys' fees?
19 MR. PERRY: It -- it confirms it,
20 Justice Alito. That was the exact same
21 formulation in Murphy and in Casey. As part of
22 the costs. So, when -- when this Court says
23 Congress can explicitly override 1920, it's by
24 adding additional things as costs.
25 To say a fee is a cost is to say it

1 wouldn't be in the absence of an express
2 congressional direction. And, here, we have in
3 the second sentence that very express
4 congressional direction that is required.
5 By calling the fees a cost for those
6 purposes, it's making clear, among other
7 things, that expert witness fees are not costs
8 because, otherwise, they would have to be
9 separately provided for as well.
10 In fact, Your Honor, there is no
11 statute in the U.S. code that provides all
12 expenses of litigation, and for good reason.
13 We have the American rule. We've had the
14 American rule since at least 1796 that says, in
15 general, each party bears its own fees, costs,
16 expenses, burdens.
17 It is -- it is -- the background
18 presumption is that costs are not shifted.
19 Fees are not shifted. Expenses are not
20 shifted. And this Court over and over again
21 has required an explicit statement, a clear
22 statement, an unmistakable statement from
23 Congress to invade that common law principle,
24 to invade the American rule, and to change the
25 background presumption.

1 We have here a phrase, full costs,
2 that is not explicit. The fact that we're here
3 today shows that it's not explicit. But it
4 does contain a word that this Court has
5 construed over and over and over again.
6 Given that approach, in other words,
7 not including fees, not including discovery,
8 not including travel, not including salaries,
9 unless Congress were to explicitly say so,
10 would be consistent with the way the Court has
11 construed every other statute.
12 JUSTICE BREYER: Is there a -- I read
13 in the briefs, and I don't fully -- I want to
14 be certain I grasped the argument, that there
15 was a period of time many, many, many years ago
16 when a court in awarding costs, federal court,
17 would look to state statutes, and the state
18 statutes provided different amounts and didn't
19 just repeat what we have today.
20 MR. PERRY: Correct.
21 JUSTICE BREYER: And then I thought
22 that you had argued that, well, the word "full
23 costs" means don't just look -- there are other
24 things they don't look to the state statutes,
25 but if state statute A awarded 33 cents and

1 state statute B awarded $4,000, it would mean
2 that you go and look to the actual cost.
3 MR. PERRY: Our argument is a little
4 different than that, Justice Breyer.
5 JUSTICE BREYER: What is that? That's
6 what I'm trying to find out.
7 MR. PERRY: In 1831, when state law
8 would have applied, many states had gradated
9 fee schedules. They had these very complicated
10 fee bills. And in New York, for example, you
11 could get half cost, double cost, costs and a
12 half, treble costs. And what full costs, we --
13 we think, one of the things it may have meant
14 -- and, again, we're interpreting here -- was
15 costs, right, full costs of the action.
16 The second thing it likely was doing,
17 and what Congress told us in 1909 it was doing,
18 was to override the statutory threshold on cost
19 recoveries in federal court, established in the
20 Judiciary Act of 1789.
21 At that time, if the prevailing party
22 didn't win $500, it didn't get its costs at
23 all.
24 And Congress said: No, in a copyright
25 case, if you win, you can get your full costs

1 pursuant to the state schedule. So those are
2 historical examples of what Congress may well
3 have been doing.
4 And, again, the English experience,
5 where full cost appears since the statute of
6 it --
7 JUSTICE SOTOMAYOR: When I read this
8 argument, the first prong by you, I thought
9 could it mean full costs, 1920, without the
10 limits of 1821?
11 MR. PERRY: Your Honor, it -- it
12 unlikely means that since 1920 and 1821 were
13 separated by the codifiers. If you look at the
14 -- you know, the enrolled bills, going back to
15 the fee bill of 1853, that was a unitary
16 schedule of the allowable costs and amounts.
17 As the -- as the statute has been
18 codified, they've been separated into different
19 sections, but I think they all perform the same
20 function.
21 Certainly, you know, in the -- in the
22 19th Century cases, applying the fee bill, The
23 Baltimore, for example, in Day versus
24 Woodworth, the Court looked at the -- at the --
25 at the fee schedule as a unitary fashion.

1 JUSTICE SOTOMAYOR: No, I -- I
2 understand that, but I still don't -- I'm still
3 trying to give meaning to full.
4 MR. PERRY: Certainly, Your Honor.
5 JUSTICE SOTOMAYOR: And -- and so 1821
6 sets certain limits. If we read full costs to
7 not invoke those limits but just to permit
8 awards of what's specified in 1920, would that
9 take care of your problem?
10 MR. PERRY: I think that would give
11 meaning to the word "full." I think 1821 would
12 remain binding. I think the easier way to look
13 at it would be, say, for example, on witness
14 fees, 1821 says $40 a day. Full cost means $40
15 a day. In a normal case, court could choose to
16 give $20 or $10 or $5, but under a full cost
17 provision, it has to give the full $40 because
18 that's the maximum Congress has specified.
19 CHIEF JUSTICE ROBERTS: But you -- you
20 haven't found a single case where that was an
21 issue?
22 MR. PERRY: Your Honor, it -- it
23 hasn't been litigated, in part because I think
24 cost bills generally are approved as a matter
25 of course. Remember, until just a few years

1 ago, they were approved on one day's notice by
2 the clerk.
3 I mean, most of us don't even litigate
4 cost bills because the cost to oppose them is
5 greater than the cost bill itself. It's only
6 in a case like this one where many tens of
7 millions of dollars have been added in for
8 non-cost expenses that would get to litigation
9 of these points.
10 So there is not -- to directly answer
11 your question, Mr. Chief Justice, there's not a
12 great deal of litigation on either side of the
13 -- of the question. We can see --
14 JUSTICE BREYER: Could you help me
15 with just a fact, which may or may not be
16 relevant, but in the SG's brief, the costs that
17 you were searching was about $5 million.
18 That's your view of what they're entitled to.
19 MR. PERRY: Three and a half million,
20 but yeah.
21 JUSTICE BREYER: Three and a half
22 million now? All right. Three and a half.
23 And what they want is 17 and a half million.
24 Does that 17 and a half million include
25 attorneys' fees?

1 MR. PERRY: No, Your Honor.
2 Attorneys' fees were dealt with. There's a 20
3 some million dollar attorneys' fees award
4 that's entirely separate from that.
5 JUSTICE BREYER: All right. So it's
6 20 million in attorneys' fees. It's three and
7 a half million in everybody concedes.
8 MR. PERRY: Taxable costs.
9 JUSTICE BREYER: Yeah, and then they
10 want an additional 17.6 million more?
11 MR. PERRY: And they were awarded 12.8
12 million because of some deductions.
13 JUSTICE BREYER: All right. So they
14 -- so it's 12.8 plus -- this is -- this is a
15 big amount here -- so it's about 32,
16 $35 million in costs. And what was the damage
17 award?
18 MR. PERRY: Thirty-five million
19 dollars, Your Honor.
20 CHIEF JUSTICE ROBERTS: So the entire
21 35 million goes to -- to cost? It cost 35
22 million to get 35 million?
23 MR. PERRY: The costs and expenses
24 asserted by Oracle in this case were greater
25 than the damages awarded by the jury, that is

1 correct.
2 JUSTICE BREYER: All right. Now I
3 don't know if that's relevant, but it does seem
4 a problem, if not in this case. But what --
5 what -- what -- what -- what is this -- somehow
6 there's something odd about this, but -- but I
7 -- but I don't know what.
8 MR. PERRY: Your Honor, I will say the
9 only thing odd about it is that this award was
10 made. If we go back to the American rule and
11 the plain statement requirement, that
12 $12.8 million should be taken off the ledger,
13 which would make the whole thing a little more
14 fair for everybody.
15 JUSTICE BREYER: Well, maybe. I mean,
16 they spent the money.
17 MR. PERRY: Your Honor, they were --
18 JUSTICE BREYER: They might have
19 gotten more.
20 MR. PERRY: They were seeking hundreds
21 and hundreds and hundreds of millions, and they
22 lost almost everything, is the answer, and then
23 they tried to externalize, to use Justice
24 Gorsuch's word, the -- the -- the -- all the
25 expenses they spent on unsuccessful claims,

1 they tried to shift that back to the party that
2 actually won. We won 25 of 26 claims asserted
3 in this case, and they're trying to make us pay
4 all the costs for all the things they lost.
5 That's what's really happening here.
6 JUSTICE BREYER: Okay.
7 MR. PERRY: Thank you, Your Honor.
8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.
10 Mr. Kedem.
11 ORAL ARGUMENT OF ALLON KEDEM FOR THE
12 UNITED STATES, AS AMICUS CURIAE,
13 SUPPORTING THE PETITIONERS
14 MR. KEDEM: Mr. Chief Justice, and may
15 it please the Court:
16 This Court has treated costs as a term
17 of art defined by the list in Section 1920.
18 That formula helps courts and litigants
19 navigate more than 200 statutes that use the
20 term. It gives Congress a clear baseline
21 against which to legislate and respects history
22 because federal law has always defined by
23 statute the costs that could be shifted between
24 parties in cases at common law.
25 Let's start with the history. Justice

1 Sotomayor, you asked a question about the
2 priority of enactment, the fact that this
3 statute was originally enacted in 1831, even
4 though the current version of Section 1920 is
5 much more recent.
6 What this Court said in Crawford
7 Fitting is that the priority of enactment does
8 not matter. Section 1920 presumptively applies
9 in all civil cases, regardless of when those
10 provisions were adopted.
11 Going back to the original history,
12 what is it that the term "full costs" was
13 enacted in order to do? We think that it does
14 a couple things.
15 Five days after setting up the federal
16 judiciary, Congress enacted the Process Act,
17 telling federal courts to look to state fee
18 bills in order to determine which costs could
19 be shifted between litigants. That was the
20 regime that prevailed at the time that this
21 provision was added to the Copyright Act in
22 1831.
23 There were two general types of state
24 fee bill provisions that would have made the
25 word "full" in full costs necessary. And we

1 give a couple examples on page 17 of our brief,
2 Footnote 1.
3 The first type of case are statutes
4 that impose some sort of limitation on costs.
5 So an example would be the first statute, a
6 Kentucky statute providing "the plaintiff shall
7 recover his full costs although the damages do
8 not exceed 40 shillings." There were a number
9 of statutes that said, if your damages were not
10 above a certain threshold, you would get no
11 more cost than damages. Forty shillings was a
12 typical amount.
13 So this provision tells you that, even
14 if your damages are below that type of
15 threshold, nevertheless, you get your full
16 costs.
17 The second type of case is a case of a
18 statutory multiplier. So the Mississippi
19 statute, for instance, provided a landlord can
20 recover "double the value of rent in arrear and
21 distrained for with full costs of the suit."
22 So you get double damages along with your full
23 costs. And that's actually the sense in which
24 we think the 1831 Copyright Act used the term
25 "full costs" because, remember, that for an

1 infringement, half of any forfeiture would go
2 to the government and the other half would go
3 to the plaintiff along with their full costs.
4 So the word "full" in that phrase
5 tells you, even though the plaintiff is only
6 getting half of the recovery, nevertheless, the
7 plaintiff gets their full costs.
8 JUSTICE ALITO: Well, in 1831,
9 according to your argument, federal law didn't
10 really care -- didn't -- didn't have its own
11 definition of what a cost would be. It --
12 costs were whatever the states regarded as
13 costs, right?
14 MR. KEDEM: It wasn't a definitional
15 provision.
16 JUSTICE ALITO: Whatever it -- was in
17 the -- and so if I looked at every single one
18 of the state fee schedules in 1831, what would
19 I find?
20 MR. KEDEM: So you would see --
21 JUSTICE ALITO: Would I find that they
22 all agree on what the concept of a cost is, or
23 would I find that some of them include maybe
24 the sort of things that were compensated here?
25 MR. KEDEM: So I think you'd find two

1 things that are significant. First of all, you
2 would not see any discovery fees and you would
3 certainly not see any expert witness fees. As
4 far as we're aware, there is no fee bill from
5 the 19th century that awarded expert witness
6 fees.
7 The other thing that you would see is
8 that they're comprehensive. They go on in
9 great detail and precisely spell out all of the
10 different rates for the various things that
11 could be taxed by the clerk of the court.
12 And that's significant because, in
13 1853, Congress passed its own federal fee bill,
14 which was also incredibly thorough. It goes on
15 for nine pages and spells out all of the
16 different compensable categories.
17 And what this Court said in Crawford
18 Fitting, the reason that it's treating
19 Section 1920 as a definitional provision, even
20 though if you look at it, it's not
21 unambiguously written as a definitional
22 provision, is that Congress's intent was
23 apparently comprehensive and exhaustive. In
24 other words, Congress did not want to leave
25 anything undefined.

1 To buy Respondents' story, you would
2 have to believe that in 1831, even though
3 Congress had never left things undefined
4 before, it created a new regime, different from
5 the one set up by the Process Act, of full
6 compensation, essentially forcing federal
7 courts to create their own copyright-specific
8 fee bills, and that it achieved that objective
9 simply by adding the word "full" in front of
10 "costs."
11 And it's not as if the term "full
12 costs" in Anglo-American law had some separate
13 understood definition. We point you to a
14 number of authorities interpreting statutes
15 under English law. Now, some of the cases are
16 before 1831, some of them are after 1831, but
17 they're all interpreting statutes that are from
18 the 1600s and the 1700s, saying what those
19 statutes has always been understood to mean,
20 including in the context of the copyright case.
21 There is a statute called -- there's a
22 case called Avery, which interprets the
23 Copyright Act of -- I think it was 1842 or
24 something like that. And it says there is no
25 understood distinction between costs that can

1 be awarded in a statute that mentions full
2 costs and one that just mentions costs.
3 And that's true in the Copyright Act
4 going back to the statute of Anne in 1709,
5 which is the predecessor to all early American
6 copyright law.
7 Now, Justice Breyer, you made the
8 point that it's very expensive in many cases to
9 litigate these issues. You're going to need
10 experts; experts cost money.
11 And that is true. To some extent, the
12 baseline rule that Congress has created and
13 this Court has observed means that you're going
14 to undercompensate people because cost is
15 almost always a fraction of your total
16 litigation expenses.
17 The same argument was made in Murphy,
18 that, for instance, a parent who wants to sue
19 under IDEA will have a lot of trouble making
20 their case unless they can hire an expert,
21 which is expensive. The same argument was made
22 in Casey about civil rights plaintiffs. If it
23 didn't carry the day in that case and in those
24 contexts, then certainly it shouldn't win here
25 in the copyright context.

1 But, you know, Congress can respond in
2 exactly the way that it did to this Court's
3 decision in Casey. In Casey, this Court said
4 you can't get your expert fees in certain civil
5 rights cases. And so Congress passed a statute
6 adding expert fees to the list of compensable
7 expenses under Section 1988, which governs
8 those civil -- same civil rights cases.
9 The benefit of the Crawford Fitting
10 formula is that it provides clear instructions
11 to Congress to tell them if you want to include
12 something that's not already listed in
13 Section 1920, here's how you do it. And as my
14 friend pointed out, it propagates all the way
15 through if you amend Section 1920 itself, or
16 you can create a specific provision.
17 Now, you might think all of this
18 history is a bit of a muddle. Another benefit
19 of the Crawford Fitting rule is that you don't
20 have to perform a historical exegesis every
21 time you come across a new provision with
22 slightly different language. And remember that
23 cost provisions are incredibly variable. They
24 talk about costs, costs for the proceeding,
25 court costs, costs of the action, full costs,

1 all costs.

2 Justice Sotomayor, you brought up four

3 additional statutes enacted more recently than

4 this one which mentioned full costs, and you

5 asked: Why did they do that?

6 So, first of all, let's just say --

7 put the point that all of them deal with

8 intellectual property in some fashion, so

9 chances are they were just copied from

10 Section 505.

11 But they all also specifically mention

12 attorneys' fees, which is a big problem on

13 Respondents' side because if full costs already

14 meant total compensation, there would have been

15 no point in expressly adding attorneys' fees.

16 Now, Respondents' response to that is,

17 well, in 1909, when the American rule wasn't

18 well established, it was necessary to clarify

19 that attorneys' fees were included in full

20 costs. That doesn't work even in 1909 because

21 the copyright statute as it was enacted then

22 made full costs mandatory, but attorneys' fees

23 discretionary.

24 So, clearly, Congress wasn't just

25 clarifying that the latter was included in the

1 former.

2 JUSTICE ALITO: Well, Mr. Clement may

3 have a surplusage problem, but you have a

4 surplusage problem too, don't you?

5 MR. KEDEM: So we think that --

6 JUSTICE ALITO: "Full" -- it means

7 nothing.

8 MR. KEDEM: Yeah. So starting in 1976

9 when the provision was switched from

10 discretionary to mandatory, then there is some

11 redundancy with the authority that already

12 existed under Section 1920. First of all,

13 Congress generally doesn't tinker with existing

14 language unless there was some reason to think

15 that it was a problem, and as my friend said,

16 it was not until 2005 that the Copyright --

17 that anyone thought that the Copyright Act

18 included something beyond what was already

19 included in Section 1920, so there was no

20 reason at that time for Congress to think there

21 was a problem.

22 And, to be honest, had Congress taken

23 the word "full" out of the statute in 1976, no

24 doubt someone would have used that fact to

25 argue, well, clearly Congress was displeased

1 with the broad copyright cost awards and,
2 therefore, would have used it to argue for a
3 narrower rule.
4 But I think the probably most
5 unsatisfying but most adequate answer --
6 JUSTICE KAVANAUGH: How would -- how
7 would that have worked? That wouldn't have
8 worked.
9 MR. KEDEM: Well, I think you could
10 have argued in a case like this one that even
11 for the costs that are authorized in
12 Section 1920, you can't get the full amount of
13 it or you can't presumptively get the full
14 amount of it because Congress took the word
15 "full" out so, clearly, it wanted to cut back
16 on the costs that were awardable. I'm not
17 saying it would have won, but that was an
18 argument that someone might have made. But I
19 think --
20 JUSTICE SOTOMAYOR: You didn't adopt
21 your adversary's on-and-off switch for the
22 meaning of "full."
23 MR. KEDEM: That -- that's correct.
24 That's the one place, I think, that we're
25 different.

1 JUSTICE SOTOMAYOR: So explain --
2 MR. KEDEM: So -- yeah. It -- it's
3 not at issue here and it wasn't litigated, but,
4 you know, we think it is plausibly -- textually
5 plausible to adopt that reading, but probably
6 if Congress wanted to put district courts to
7 the unnatural choice of all or nothing, then it
8 would have used clearer language. But the
9 problem doesn't go away on Respondents' side.
10 It gets worse because the costs are that much
11 greater.
12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.
14 Mr. Clement.
15 ORAL ARGUMENT OF PAUL D. CLEMENT
16 ON BEHALF OF THE RESPONDENTS
17 MR. CLEMENT: Mr. Chief Justice, and
18 may it please the Court:
19 The authorization in Section 505 of
20 the Copyright Act for the recovery of full
21 costs means what it says and authorizes the
22 recovery of full costs, not just a narrow
23 subset of costs set forth in Section 1920 as
24 limited by Section 1821.
25 The contrary reading not only renders

1 the word "full" completely superfluous, but it
2 also effectively renders the first sentence of
3 Section 505 without any meaning and renders
4 three other federal statutes that authorize the
5 discretionary award of full costs meaningless
6 the day they were enacted.
7 There is no reason to adopt a
8 construction that has those kind of
9 consequences in rendering other statutory
10 provisions superfluous. The better course to
11 say that "full" means full, rather than nothing
12 at all.
13 Now, I'd like to start with a response
14 to Justice Alito's question about what we can
15 tell that would have happened between 1831 and
16 1853.
17 Neither side here has a lot of case
18 law to talk about. And that's because in the
19 vast, vast majority of these, and both sides
20 have looked for it, the courts just awarded
21 costs and didn't say another word about it.
22 And sometimes they even awarded costs as part
23 of its damages.
24 The -- probably the best case that
25 tells you something about what was going on, at

1 least between 1831 and 1853, is a case called
2 Ferret against Atwill that's cited by my
3 friends in their brief, and this is Justice
4 Nelson riding on circuit.
5 The Court here -- the -- as -- as a
6 circuit justice, he actually says something
7 about costs because you have a case where
8 essentially there are 11 works at issue and
9 there were 11 suits. And the defendant who won
10 and resisted the claim in all 11 suits
11 basically tried to get kind of 11 of
12 everything. And so that required the courts to
13 sort of sort through that.
14 Now, I think two things are telling
15 about this opinion. First, in deciding the
16 costs, and this cases arises in New York, the
17 judge, Justice Nelson, doesn't look exclusively
18 to New York law. He looks to New York law for
19 some things, but he also looks to a then extant
20 federal circuit rule to address one of the
21 other items of costs.
22 And so I think he's doing exactly what
23 you expect somebody to do when they have a
24 federal law requirement of full costs but not a
25 lot of other federal law. They look to what

1 little federal law there is, the circuit rule,
2 and then they also look to state practice.
3 But the second thing -- and this is
4 what I think is most directly responsive to
5 Justice Alito's question, and I think most
6 important -- is the last item of costs that
7 Justice Nelson awards is "attorney and counsel
8 fees on argument are taxable in each case."
9 Now I assume but I don't know for sure
10 that it may be that under the New York
11 schedule, that those attorneys and counsel's
12 fee were taxable. The opinion doesn't tell us
13 that.
14 But the one thing it tells us
15 absolutely certainly is that Petitioners are
16 dead wrong when they say that between 1831 and
17 1853, full costs would have been well
18 understood by everybody to be limited to party
19 and party costs and not cover something like
20 attorneys and counsel fee for argument.
21 JUSTICE KAGAN: Mr. Clement --
22 MR. CLEMENT: Sure.
23 JUSTICE KAGAN: -- you agree that if
24 the word "full" wasn't in the statute you would
25 lose?

1 MR. CLEMENT: Absolutely, Your Honor.
2 JUSTICE KAGAN: Okay. So we -- we
3 decided a case earlier this year on the basis
4 of the legal proposition that adjectives modify
5 nouns. Why doesn't that kill you in this case?
6 In other words, "full" can only modify costs as
7 defined in 1920.
8 MR. CLEMENT: So I think that case
9 helps us because it shows that you look at both
10 the adjective and the noun, and I think what
11 the Court didn't have to say there but is
12 absolutely true is sometimes the adjective
13 tells you how the noun is being used.
14 Just to illustrate that the adjective
15 can make a big difference, if you think about
16 the Weyerhaeuser case, and the adjective wasn't
17 critical but was potential, potential habitat,
18 I mean, habitat would still have a meaning, but
19 I think the case would be very different.
20 But I think what's more telling here
21 is I think what the dispute here is we say that
22 Congress in 1831, in 1909, in 1976 used the
23 phrase "full costs" capaciously and used the
24 word "costs" in its ordinary meaning.
25 My friends on the other side say, no,

1 cost was being used in a term of art sense. I
2 think you look to the adjective in this case to
3 tell you which of us is right.
4 And I think there are --
5 JUSTICE KAGAN: But that's a strange
6 kind of thing, because you -- we started, you
7 said, if it just said cost, we would all
8 understand that it was the term of art in 1920
9 costs.
10 And then you say that by adding the
11 word "full," rather than to say, look, it
12 really is the full amount of the 1920 costs,
13 don't try slicing and dicing the 1920 costs,
14 rather, you want to use the word "full" to
15 suggest that it's not the 1920 costs we're
16 talking about at all. It's some different kind
17 of costs.
18 MR. CLEMENT: And I don't think that's
19 strange at all, because it's not like some
20 radically different kind of cost. It's the
21 ordinary meaning of costs. And imagine if
22 Congress had used the, I would have thought
23 until I got involved in this case, narrower
24 phrase, non-taxable costs.
25 Now, if Congress had expressly

1 provided for the recovery of non-taxable costs,
2 I would think to a moral certainty that would
3 tell you that Congress is using the word
4 "costs" not in the term of art sense of taxable
5 costs, because I can't imagine Congress meant
6 to say non-taxable taxable costs.
7 It would be a strong indication that
8 Congress used "cost" in its ordinary sense.
9 I think "full" does the exact same
10 thing. And I think, think about it this way,
11 what you're really talking about here is a
12 choice between an ordinary meaning that's
13 broader and a term of art meaning that's
14 narrower.
15 When Congress uses the phrase with the
16 modifier "full," I sure would have thought
17 that's an indication that Congress means to
18 adopt the broader reading and not the narrow
19 reading that is the term of art.
20 And I think if you look at this from
21 every relevant historical standpoint, which I
22 think is 1831, 1909, and 1976, it all points
23 you in favor of the ordinary meaning
24 construction of costs.
25 So, in 1831, the one thing we ought to

1 be able to agree on is Congress was not using
2 costs in 1831 in a narrow sense to refer to
3 some other federal statute that provided a
4 schedule of fees, because there wasn't one for
5 another 20 years.
6 So I assume, consistent with this
7 Court's cases, that when Congress used the term
8 "full costs" in 1831, it was using it in its
9 ordinary meaning, which would have covered all
10 of the costs of litigation, and my friend's
11 efforts to superimpose a narrow party to party
12 costs framing on that is simply not borne out
13 by the historical practice, as that Ferrett
14 case shows, and I know it's not a lot, but it's
15 all anybody has.
16 So I think it is clear that between
17 1831 and 1853 ordinary costs was -- rather,
18 "full cost" was being construed in its ordinary
19 meaning way.
20 Then we get to 1909, a major revision
21 of the statute. Congress carries forward the
22 same term.
23 I understand this Court's basic rule
24 to be that when Congress carries forward the
25 same term, without making any change in it, it

1 still has its meaning from 1831. But Congress
2 does do something interesting in 1909.
3 It uses in the same statute the word
4 "taxable costs" and the word "full costs," or
5 the phrase "full costs." And I think it uses
6 them in contradistinction. Certainly, every
7 principle of statutory construction says that
8 when Congress uses different words in the same
9 statute, you try to find different meanings for
10 them.
11 And, here, I think that basic rule is
12 reinforced because Congress uses the phrase
13 "taxable costs" in a very narrow context for
14 the recovery of certain royalties, and then it
15 makes those taxable costs recovery
16 discretionary.
17 For every other claim under the
18 statute, tax recovery is mandatory and Congress
19 uses the term "full costs." So I think if you
20 look at it in 1909, you would also give it an
21 ordinary meaning construction. You would also
22 think that Congress was using costs not as a
23 term of art but as a broad, ordinary
24 construction phrase.
25 And then we come to 1976, where my

1 friends in the SG's office have to admit that
2 by making cost recovery discretionary, full
3 cost recovery discretionary, then Congress was
4 essentially under their view rendering the word
5 "full" completely superfluous.
6 And it seems to me, again, if you -- I
7 think the first principle would be, since
8 they're using the same phrase, you go back to
9 the 1831 original public meaning. But even if
10 you look at 1976, I think what you would see
11 there is in a choice between interpreting costs
12 in the ordinary meaning way and using costs in
13 a term of art way, it is precisely because they
14 want to use terms of -- cost in the term of art
15 sense that they render "full" superfluous,
16 where, if you continue as a constant thread to
17 say cost means the ordinary meaning of costs,
18 then "full" is not superfluous.
19 JUSTICE KAVANAUGH: They say that your
20 argument makes the second sentence of 505
21 superfluous. Your response?
22 MR. CLEMENT: So I have two basic
23 responses. One you've seen in the brief, which
24 is the argument that, given the American rule
25 and the fact that it took the kind of currency

1 it did, I think, a congressional staffer would
2 be well advised to tell their boss, I think you
3 ought to put in something specific about
4 attorneys' fees here.
5 But I have another argument which I
6 think at the end of the day for the textualists
7 ought to be more compelling, which is at no
8 time in history was the second sentence of the
9 Copyright Act fees provision, in fact,
10 superfluous.
11 So the first relevant period is 1909
12 to 1976, and as my friend from the SG's office
13 points out, in that period, full cost recovery
14 is mandatory, but attorneys' fee recovery is
15 discretionary. So there's no way for Congress
16 not to address attorneys' fees separately if
17 they want to accomplish the goal of keeping
18 attorneys' fees awards discretionary.
19 Then you come to the period 1976 to
20 the present, and then it is also true at that
21 point both awards become discretionary, but the
22 reason the second sentence still isn't
23 superfluous is the first couple of words in the
24 second sentence, "except as otherwise provided
25 by this title."

1 And those words are a signal and
2 respectfully a cross-reference to Section 412.
3 And I think last week you had a case about
4 registration of copyrights. And 412 basically
5 says that if you don't timely register your
6 copyright, you don't get certain remedies under
7 the Act, specifically statutory damages and
8 attorneys' fees, but you still get your full
9 costs.
10 So even after 1976 Congress had a very
11 good reason to treat attorneys' fees
12 differently from costs. And so, under our
13 construction of the statute, not one word of
14 the statute is superfluous.
15 JUSTICE BREYER: What do you say to,
16 is there -- is there anything that will help
17 me, and I might be unique in this, but I -- I
18 often think that Congress when it uses these
19 words doesn't really think about it.
20 (Laughter.)
21 JUSTICE BREYER: They -- they go up to
22 the drafting section, there is a drafting
23 section, and you'll get a young man or woman
24 there who has to write a very complicated
25 statute, and -- and they might use words they

1 don't really think about.

2 And so I look to a lot of other

3 things, as in Murphy. All right.

4 Now the Copyright Act of '76 has an

5 enormous history, volume after volume, and my

6 guess is you looked through that, or had

7 somebody look through it. And is there

8 anything that helps you, or that hurts you if

9 you want to say, in -- in that long, long

10 history of the '76 reform?

11 MR. CLEMENT: So, Justice Breyer, I

12 didn't see anything there that I found

13 particularly helpful. I do want to talk about

14 some of the 1984 legislative history.

15 JUSTICE BREYER: But I'm more -- I --

16 I mean, all right. The '84 year is in your

17 brief, I think.

18 MR. CLEMENT: Yeah, and it's really

19 quite terrific, I mean, for those that look at

20 that sort of thing.

21 JUSTICE BREYER: Okay. All right.

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

23 (Laughter.)

24 MR. CLEMENT: No, no, because -- and

25 -- and -- and so let me say two things about

1 that. I -- I'll just explain to you, Justice
2 Breyer, why I -- I confirm that there was
3 nothing particularly helpful.
4 So the 1976 act is a soup-to-nuts
5 reform of the Copyright Act.
6 JUSTICE BREYER: Yeah.
7 MR. CLEMENT: And there's not a lot of
8 focus on what became Section 505 as to either
9 attorneys' fees or costs. And the only time
10 anybody's thinking really any deep thoughts
11 about Section 505, it's the fact that you're
12 sort of moving from mandatory fees --
13 JUSTICE BREYER: Uh-huh.
14 MR. CLEMENT: -- to discretionary
15 fees, but mostly they're talking about the
16 attorneys' fees. So there's just really very
17 little focus at all on the question of fees,
18 which is why I think, especially for the
19 textualists, you would think that what happens
20 in 1976 is they use the same terms and you
21 continue to go back to the 1831 original public
22 meaning, which couldn't possibly be a
23 cross-reference to a fee act that doesn't exist
24 for 22 years.
25 But, as to the 1984 legislative

1 history, the reason I think this is compelling
2 even to those that don't generally look at
3 legislative history is because think about what
4 the senator there is doing in expressing the
5 views of the committee.
6 The committee, if you believe
7 legislative history at all, very much wants to
8 provide for the recovery of "investigatory
9 fees," is the term he uses. Now they want to
10 make sure that those are shifted to the
11 prevailing party. And they think to
12 themselves: Are they covered by the language
13 we've used? And the language they've used is
14 "full costs." And the senator concludes, duh,
15 of course they're covered. We're using "full
16 costs." How can they possibly not be covered?
17 Now I suppose the senator could have
18 said: Well, I don't know, maybe somebody's
19 going to come up with this crazy idea that it's
20 a term of art and it doesn't provide for this.
21 So to make sure they're provided --
22 JUSTICE BREYER: Yeah.
23 MR. CLEMENT: -- I'm going to use a
24 much narrower term, "investigatory costs."
25 JUSTICE BREYER: All right. Well,

1 I'll look at that. But suppose you're right.
2 Suppose I think -- now I think -- I read that
3 and I say yeah, good point. All right.
4 I made that kind of point in Murphy,
5 and I -- I said let's look at what Congress
6 wanted. And I had a -- I thought fabulous.
7 But, unfortunately, it wasn't fabulous enough
8 because I was writing a dissent.
9 (Laughter.)
10 JUSTICE BREYER: All right? Now
11 suppose -- and, after all, Murphy involved
12 getting expert fees for the parents of
13 handicapped children when, in fact, they,
14 through the hiring of necessary experts, win.
15 But the majority said in that case: No, they
16 don't get their attorneys' fees.
17 So am I stuck with that? You say no?
18 Well, well, well, this is a general problem, go
19 back to your lengthy career. When do I say,
20 well, I lost; I lost in the consideration of
21 the -- of that, so how long do I keep -- what
22 rule do I follow? What approach do I take?
23 And how long do I keep referring to a
24 dissenting approach or view when others think
25 the contrary?

1 MR. CLEMENT: Well, Justice Breyer,
2 far be it from me to give you career advice --
3 (Laughter.)
4 MR. CLEMENT: -- but I would think --
5 JUSTICE BREYER: No, no, that's what
6 I'm asking for.
7 MR. CLEMENT: I would think that the
8 one thing you never -- you never abandon, just
9 because you're in the dissent, is your basic
10 approach to statutory construction. I mean,
11 Justice Scalia, God rest his soul, was in
12 dissent in a lot of cases, insisting on the
13 plain meaning. He never turned around and
14 said, well, I'm tired; I'm going to look at the
15 legislative history this time around.
16 So that would be my -- my sort of --
17 JUSTICE BREYER: Pity.
18 (Laughter.)
19 MR. CLEMENT: That would be -- that
20 would be my -- that would be my career advice
21 on that, but I would -- I would say I don't
22 think you're bound for at least two very
23 important reasons.
24 I mean, one is that -- and -- and
25 Justice Ginsburg separately wrote a concurrence

1 in the judgment to express her disagreement
2 with this point, but the Court in Murphy, in
3 agreement with the brief of the Solicitor
4 General, applied a clear statement rule because
5 it was a spending power case.
6 And this is not a spending power case.
7 So, if you were inclined to find a distinction
8 from Murphy, I think most of your textualist
9 colleagues would say: Legislative history is
10 never going to overcome a clear statement test,
11 ever.
12 But, you know, some of them, not all
13 of them, but some of them will take a peek at
14 the legislative history when you're not dealing
15 with a clear statement rule; you're just trying
16 to get the best meaning of the statute,
17 particularly when the legislative history
18 supports a ruling or a reading of the statute
19 that avoids rendering an important part of it
20 superfluous.
21 So I think you could distinguish
22 Murphy on that ground, but I also want to say
23 that we don't take issue with Murphy when it's
24 dealing with the word "costs" unmodified, and
25 that is a very familiar formulation. We've

1 only found five statutes that use "costs"
2 modified by "full," and we think in those
3 statutes, it would be against all your basic
4 principles of statutory construction to not at
5 least look at the word "full" long enough to
6 look at whether it tells you something about
7 whether Congress is using "costs" in a
8 term-of-art way or an ordinary meaning way.
9 JUSTICE SOTOMAYOR: Mr. Clement, I --
10 MR. CLEMENT: And we think it
11 powerfully suggests that it's using it in an
12 ordinary meaning way.
13 JUSTICE SOTOMAYOR: I look at history
14 completely, which means I look at how court of
15 appeals and district courts have been using
16 those terms now for decades.
17 So the question is, where does that go
18 into your analysis? Because it's contrary --
19 up until the Ninth Circuit, it's basically
20 contrary to your point.
21 MR. CLEMENT: Well, I -- I don't think
22 so, Justice Sotomayor. I mean, as I say, I
23 think it would be really helpful if there were
24 like an 18th Century or a 19th Century case
25 that involved an application for ye olde

1 expert's expert fees and we had a case that
2 specifically said, yes, it's in or, no, it's
3 out.
4 But we don't have that case. Nobody
5 has that case. I think the single most
6 informative case we have is Ferrett. And
7 Ferrett --
8 JUSTICE SOTOMAYOR: It's not because
9 you told me you don't know what the New York
10 statute permitted or didn't. So it's, in my
11 mind, a wash.
12 MR. CLEMENT: No, I don't think it's a
13 wash, and I think it's not a wash for two
14 reasons. It's not a wash because we do know
15 that, at bare minimum, Justice Nelson consulted
16 Circuit Rule 27, which is a federal circuit
17 rule. So it was not the case that he looked
18 only to state law.
19 And that conclusion is reinforced, of
20 course, by the fact that Congress, both before
21 1831 and after, knew how to tell federal courts
22 to look exclusively to the state law rule, and
23 it didn't use that formulation in the Copyright
24 Act.
25 But here's the second reason it's not

1 a wash --

2 JUSTICE ALITO: What did the -- what

3 did the circuit rule say?

4 MR. CLEMENT: The circuit rule said --

5 I think it was a provision that was relevant to

6 this 11 versus 1 issue. So it didn't provide

7 like a lot of guidance to this question, but --

8 so it's -- it's mostly relevant because it

9 looked to federal law.

10 But the second point that I think is

11 why it's not a wash is my friends in their

12 brief make a big deal out of the fact that --

13 that "full costs" has never meant anything more

14 than party-to-party costs.

15 JUSTICE SOTOMAYOR: Well, we know in

16 American history that attorneys' fees were

17 considered recoverable for a long time. It's a

18 modern phenomenon, the American rule now.

19 So I'm not sure what to do in that

20 in-between period, other than to look at what

21 more recent courts are doing or not doing.

22 MR. CLEMENT: Well, but -- but

23 there --

24 JUSTICE SOTOMAYOR: Was it 1976 --

25 what were the courts doing in 1976?

1 MR. CLEMENT: Well, 1976 -- you know,
2 it's -- it's really a couple years after the
3 '70 -- I don't think we have any good history
4 in 1974 and 1975. Like I said, we don't have a
5 case where they said definitely expert fees or
6 e-discovery, which they didn't have in 1974.
7 JUSTICE SOTOMAYOR: Then let me -- let
8 me --
9 MR. CLEMENT: But they don't have the
10 other case.
11 JUSTICE SOTOMAYOR: -- get to my
12 problem with your interpretation. It's
13 open-ended, so open-ended that I don't have a
14 way for judges to exercise their discretion in
15 a reasonable manner because, under your
16 definition of "full costs," I'm assuming the
17 babysitter for the witness who has to come to
18 court is covered. I'm assuming experts, which
19 could include experts like a body language
20 reader.
21 What -- what would limit -- there's
22 nothing statutorily or otherwise that would
23 limit a judge's discretion of awarding costs.
24 If they were caused by the suit, then,
25 presumably, they're recoverable. But that's

1 not how we generally deal with costs.
2 MR. CLEMENT: Well, Justice Sotomayor,
3 that's not a problem that's unique to my
4 construction. And I think courts have been
5 able to deal with that problem under statutory
6 provisions. There are statutory provisions,
7 for example, that provide for all expenses of
8 the litigation. So the courts are going to
9 have to, in interpreting "all expenses," make a
10 determination about whether you need receipts
11 and things like that in order to get your
12 expenses recovered.
13 Rule 23(h) of the Federal Rules of
14 Civil Procedure expressly provides for the
15 recovery of non-taxable costs in the class
16 action context. And courts have had to come up
17 with rules about what counts as a non-taxable
18 cost. And in that context, they have been able
19 to come up with workable rules, and it hasn't
20 proven too much of a problem. And --
21 CHIEF JUSTICE ROBERTS: Well, what if
22 the -- what if the objection is that the
23 attorneys' fees were outrageous considering how
24 much was at stake in the case? Can the judge,
25 when he's dealing with a provision about full

1 costs, say, well, but that's just -- these fees
2 are outrageous; I'm only going to give you half
3 of your attorneys' fees?
4 MR. CLEMENT: Absolutely, Your Honor,
5 and that's where discretion comes in. So that
6 may have not have been a possibility before
7 1976, but now that you have discretionary
8 awards for full costs, the judge's discretion
9 can take care of all of those things, and they
10 can make that judgment either based on the fact
11 that I think this was too expensive in the
12 context of this case, I don't think that was
13 really necessary, I don't think you've
14 documented that enough.
15 And in this case in particular, you
16 see that in action where the district court
17 judge -- although I think he was quite
18 sympathetic for the fact that the litigation
19 conduct on the other side had caused our
20 expenses to balloon, nonetheless, the district
21 court judge said, well, I'm going to give you
22 75 percent of your non-taxable costs.
23 So I think that discretion is another
24 part of this administrability answer, but I
25 also think it's important to recognize that

1 there are statutes that say things like all
2 expenses or non-taxable costs, so courts are
3 going to have to figure out rules to deal with
4 that.
5 There's, in fact --
6 CHIEF JUSTICE ROBERTS: I guess I'm
7 not following. So "full costs" doesn't really
8 mean "full costs?"
9 MR. CLEMENT: No, I think that the --
10 that what I would say is I think the district
11 court judge starts with the universe of full
12 costs, and then can use their discretion to
13 sort of carve that back if they think that
14 that's appropriate.
15 I also think that even in the ordinary
16 meaning of costs, I think it would be perfectly
17 appropriate for a court to say: Look, if you
18 can't even document this thing, I'm not going
19 to treat that as a cost for purposes of this.
20 Whether they do it under a definition of costs
21 under its ordinary meaning or as an exercise of
22 discretion, I don't think it makes a great deal
23 of difference.
24 Now, there's another provision out
25 there I alluded to that involves all expenses

1 and it says all expenses of the proceedings can
2 be recovered. Interestingly enough, the United
3 States Government is filing a cert petition in
4 a case involving that statute called NantKwest.
5 And in that cert petition here is what
6 they have to say about the modifier "all."
7 They say, "The modifier "all" in Section 145
8 refutes any inference that Congress intended
9 Section 145 plaintiffs to be liable only for a
10 subset of the agency's expenses."
11 Now, I couldn't agree more. I don't
12 know why they are not on our side of this case.
13 But I couldn't agree more that a word like
14 "all" or a word like "full" is a clear textual
15 indicator that Congress does not want you to
16 look to a subset of costs or expenses, whatever
17 the case may be.
18 And I think in an odd way, the fact
19 that we all understand the taxable costs are
20 just a subset of the ordinary meaning of costs,
21 actually helps reinforce the idea that full
22 costs means something more than the subset.
23 I mean, I think if you think of a word
24 like full membership, well, full membership
25 probably means full membership, but if it is

1 used in contradistinction to observer status or
2 provisional membership, you absolutely know you
3 mean the whole thing.
4 In the same way, the reference to full
5 cost precisely because there is a universe of
6 taxable costs out there, it is a reference to
7 both taxable and non-taxable costs.
8 I mean, another way of thinking about
9 this is we all refer to 1920 as taxable costs,
10 but we could equally and accurately refer to it
11 as partial costs. Nobody thinks as a normal
12 matter, a default matter under 1920 you get
13 your full costs.
14 But when Congress in its particular
15 context, and then in four subsequent statutes
16 says "full costs" you think, ahh, you get more
17 than your partial costs under Section 1920.
18 Seems like a logical way to interpret the
19 statute that renders no word in the statute
20 superfluous.
21 And I do think the superfluidity
22 problem here is really quite extraordinary.
23 I'm not sure I've come across one where the
24 contrary interpretation would render more
25 things superfluous. It's not just the word

1 "full." It really is the whole first sentence
2 of Section 505.
3 It would have -- you would have the
4 same cost recovery rule if the first sentence
5 of Section 505 weren't there, with the only
6 possible exception, ironically being enough,
7 that you might -- if Section 505 was not there,
8 you might be able to get costs against the
9 government, which you can't get under the terms
10 of Section 505.
11 JUSTICE KAGAN: Haven't we said we
12 expect redundancy in these kind of statutes?
13 MR. CLEMENT: I -- I don't think that
14 you have said that. I think what you have said
15 is that, you know, that when there is a variety
16 of formulations, and we expect a certain amount
17 of sort of, we're going to kind of construe
18 them to be more or less the same.
19 But I don't think you've ever
20 confronted a statute like this where "cost" was
21 modified by something like "full" and the
22 consequence would be that you would render that
23 term absolutely superfluous. And I think the
24 costs for the basic process of statutory
25 interpretation and what Congress is supposed to

1 do in light of these court's cases would really
2 suffer as a result.
3 I mean, you go back to the plight of
4 Congress in 1984. They're trying to provide
5 for the recovery of investigatory costs. They
6 look at the ordinary meaning of the English
7 language and they say, have we done it with
8 "full costs"?
9 I don't think anybody would tell them,
10 unless they really had this embedded term of
11 art meaning that overcame everything, including
12 words that are superfluous, would say: No, you
13 know, I don't think full costs does it for
14 investigatory costs.
15 And, of course, the oddity would be
16 that if the committee in 1984 instead of using
17 the term "full costs" had used the term
18 "investigatory costs," then the investigatory
19 costs would be recoverable, even though they
20 wouldn't be recoverable under full.
21 In other words, you'd be telling
22 Congress: If you use a narrower term, you can
23 authorize broader cost recovery. But if you
24 use a --
25 JUSTICE KAVANAUGH: You still have --

1 -- you still have the superfluidity in the
2 second sentence. And you've -- and you said
3 that, well, maybe a staffer would say let's put
4 that in there just to be sure.
5 But that's still redundant under your
6 interpretation, right, the second sentence, in
7 part?
8 MR. CLEMENT: No, it's not, Your
9 Honor, because I don't see how you don't have
10 that second sentence if you want -- if what you
11 want to do is indicate that the authorization
12 for discretionary attorneys' fees in the second
13 sentence doesn't trump Section 412's provision
14 that says if you don't timely register, then
15 you don't get your attorneys' fees.
16 And, of course, 412 treats costs
17 differently, so they needed two sentences. And
18 so I don't think under our view anything is
19 rendered superfluous, but in their view, it's
20 the word "full," it's the first full sentence
21 of Section 505, and it's three of the four
22 statutes that use "full cost" and use it in a
23 discretionary sense.
24 That's a lot of wreckage and carnage
25 for ignoring the plain meaning of a statute.

1 And I think the far better course --
2 JUSTICE KAVANAUGH: There's a lot of
3 redundancy, as you well know, in the U.S. Code,
4 though. And when Congress -- to Justice
5 Breyer's point, when Congress is drafting
6 statutes, there is a lot of redundancy because
7 people speak redundantly or sometimes because
8 Congress just wants to make doubly sure.
9 MR. CLEMENT: Yeah, but, Justice
10 Kavanaugh, there's a difference. When Congress
11 uses --
12 JUSTICE KAVANAUGH: So I don't know
13 that it's carnage. It's just --
14 MR. CLEMENT: But, no, but here's
15 where there is --
16 JUSTICE KAVANAUGH: Yeah.
17 MR. CLEMENT: This is the difference.
18 And this is what makes it carnage. When
19 Congress uses, you know, the common place for
20 redundancy is when Congress uses a phrase like
21 a series of phrases and they're covering things
22 that are clearly duplicative.
23 And I suppose in an ordinary meaning
24 way, costs and expenses might be an example of
25 that. Now I think when you run across a phrase

1 like costs and expenses, you'd still want to
2 struggle against rendering them completely
3 superfluous. And one of the things you do is
4 you'd say, oh, the neighboring word "expenses"
5 tells me that "cost" there is being used as a
6 term of art.
7 But I think it's very different. And
8 Justice Scalia makes exactly this point in his
9 book on reading law about the rule against
10 superfluidity where it's really -- there really
11 is carnage is when there's an important word
12 that's in the statute that is a modifier that's
13 just inconvenient for the judges.
14 And they just ignore that word, even
15 though it's there. And that's what I think is
16 carnage. And you see this again in real -- in
17 real life when a Senate committee is
18 confronting a very specific question about
19 whether they have to do anything more to
20 authorize the shifting of investigatory costs,
21 and they look at the English language, they
22 look at the word "full costs," and they think
23 we have this covered.
24 And, again, I think sending the
25 message that the only way they could have

1 gotten broader cost recovery is by using a
2 narrower term is really to put us way down the
3 rabbit hole and to confuse Congress and give
4 them the wrong lessons.
5 Last thing I want to say before I sit
6 down, if I may, is my friends on the other side
7 at various points said, you know, Murphy was a
8 clear signal to Congress that you have to use
9 magic words. I think it's pretty tough luck to
10 tell Congress in 1831 that they had to
11 anticipate the Murphy decision.
12 And I do think at the end of the day
13 the original public meaning of "full costs" is
14 consistent with its ordinary meaning. Thank
15 you.
16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.
18 Four minutes, Mr. Perry.
19 REBUTTAL ARGUMENT OF MARK A. PERRY
20 ON BEHALF OF THE PETITIONERS
21 MR. PERRY: Thank you, Your Honor,
22 three points.
23 Under the construction just proposed,
24 expert witness fees were mandatory in every
25 copyright case from 1831 to 1976. Expert

1 witness fees were actually awarded in zero
2 copyright cases from 1831 to 1976. I will
3 leave the Court to draw its own conclusion from
4 that fact.
5 Second, when we get to 1976, Justice
6 Breyer, you asked about the legislative history
7 of this statute. My friend talked a lot about
8 some other statute, but this statute, there is
9 legislative history.
10 It's quoted in the government's brief
11 at page 27. It is from the registrar of
12 copyrights submission on costs, which said
13 costs in copyright cases are relatively small
14 because, of course, they don't include expert
15 witness fees or rediscovery costs or anything
16 else.
17 And the court -- and the Congress
18 accepted the copyright registrar's
19 recommendation to make them discretionary
20 rather than mandatory.
21 And that date, 1976, is critical
22 because 1975 was a watershed moment in the --
23 in the area we're talking about. That was the
24 Alyeska decision, Your Honor, where this Court
25 dealt with fees and costs and expenses and said

1 we, the Supreme Court, are going to get out of
2 the business of -- of rewriting the rules in
3 every case.
4 We're going to get out of the business
5 of tinkering around, and we're going to adopt a
6 clear statement rule and make Congress do it in
7 case after case. And that was 1975 in Alyeska.
8 And in 1976, the same day that
9 Section 505 was enacted, Congress enacted four
10 other statutes that expressly authorized expert
11 witness fees. So it knows how to put them in.
12 And that's cited, by the way, in the
13 Casey case at page 88, goes through all of that
14 history. And -- and Casey and Murphy and
15 Crawford Fitting, my friend said it's a crazy
16 idea to have a -- have a term of art. Well,
17 this Court has said it's a term of art.
18 If it is a crazy idea, it's the
19 majority opinion.
20 What we just heard is a full half
21 hour -- and I use that word advisedly --
22 (Laughter.)
23 MR. PERRY: -- of -- of -- of a
24 dramatic reading of the dissents from Justice
25 Marshall and Alyeska, from Justice Marshall in

1 Crawford Fitting, from Justice Stevens in
2 Casey. And with all respect to Justice
3 Breyer's career aspirations, Justice Breyer in
4 Murphy.
5 But the majority in every one of those
6 cases said cost is a term of art, and there is
7 a clear statement rule. And Congress can
8 override it by stating explicitly.
9 JUSTICE ALITO: Mr. -- Mr. Clement
10 gave us a -- a fuller reading of the Ferrett
11 case. And do you have -- do you have an
12 explanation --
13 MR. PERRY: I do.
14 JUSTICE ALITO: -- for how Justice
15 Nelson awarded attorneys' fees there?
16 MR. PERRY: I do -- I do, Your Honor.
17 The Ferrett case was decided under New York
18 law. And certain attorneys' fees were on the
19 New York fee schedule, as we point out in our
20 brief. I believe it is Section 25 of the
21 revised statute, but we cite that in our brief.
22 And our point has not been that
23 attorneys' fees were never awarded. It's that
24 non-scheduled fees were never included in full
25 costs. Full costs included during the state

1 period those scheduled fees under state fee
2 bills, which occasionally awarded small
3 attorneys' fees, for example, $2.50 for a
4 deposition.
5 And that's what the Ferrett case
6 involved was New York scheduled attorneys'
7 fees.
8 What no schedule, as Mr. Kedem pointed
9 out --
10 JUSTICE SOTOMAYOR: Why did they use
11 -- why did they use the federal rule?
12 MR. PERRY: Your Honor, I don't know
13 either. I -- I-- I think it had -- did have
14 something to do with this 11 versus one and
15 whether it was a multiplicity thing. It had
16 nothing to do, I don't believe, with the
17 question in this case, which is the measure of
18 the costs was made by the New York fee bill.
19 And then in 1853, of course, we had
20 the U.S. fee bill. It wiped out all of that.
21 It said the courts of the United States are
22 only authorized to award the federal schedule.
23 So we had a reset in 1853. Then we
24 had another reset in 1976, or '75, with
25 Alyeska. And I will leave the Court, if I may,

1 with a quote from Alyeska because it speaks to
2 this case dramatically.
3 421 U.S. at 271. "It is not for this
4 Court to invade the legislature's province by
5 redistributing litigation costs in the manner
6 suggested by Respondents and followed by the
7 court of appeals."
8 This judgment should be reversed, and
9 we can move on. Thank you, Your Honors.
10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. The case is submitted.
12 (Whereupon, at 12:09 p.m., the case
13 was submitted.)
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