



SUBMITTED STATEMENT FOR THE RECORD OF

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BEFORE THE

**SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES HOUSE OF REPRESENTATIVES**

HEARING ON

**THE FEDERAL JUDICIARY IN THE 21ST CENTURY:**

**ENSURING THE PUBLIC'S RIGHT OF ACCESS TO THE COURTS**

SEPTEMBER 26, 2019

Chairman Johnson, Ranking Member Roby and Members of the Subcommittee:

Thank you for holding this important hearing focused on simple reforms that could substantially improve the transparency and accessibility of the federal judiciary.

My name is Anthony Marcum, and I am a fellow with the Governance Project at the R Street Institute. The R Street Institute is a nonprofit, nonpartisan public policy research organization whose mission is to engage in substantive policy research and legislative outreach. Much of my current work focuses on our separation-of-powers system, including policy matters that affect the federal judiciary. My background includes time as both an attorney and federal law clerk, where I gained direct familiarity with many of the issues to be discussed today.

One of the topics to be discussed is the Public Access to Court Electronic Records (PACER) system. Simply put, PACER is a barrier to federal court accessibility. PACER's current paywall model is inefficient, violates Congressional guidance and continues to stymie litigants and court observers. The bipartisan Electronic Court Records Reform Act of 2019 (H.R. 1164) would go far to address many of PACER's current flaws.

### **Congress and the Judiciary Agree: Greater Transparency and Accessibility is Needed**

I applaud the subcommittee's efforts to find simple, bipartisan ways to improve the public's access to and understanding of our federal courts. Importantly, the federal judiciary shares a similar aspiration. The Judicial Conference of the United States, in its most recent "Strategic Plan for the Federal Judiciary," identified a number of strategies and goals to address "the judiciary's mission and core values."<sup>1</sup> The strategies and goals identified by the federal judiciary include enhancing public access to the judicial process and harnessing technology to identify and meet the needs of litigants and the public.<sup>2</sup> The following proposals can be found among those laid out in the "Strategic Plan":

- "Continue to *build and maintain robust and flexible technology systems* and applications that anticipate and respond to the judiciary's requirements for efficient communications, record-keeping, electronic case filing, case management, and administrative support."<sup>3</sup>
- "Provide jurors, litigants, witnesses, and observers with *comprehensive, readily accessible information about court cases* and the work of the courts."<sup>4</sup>
- "*Ensure the integrity of funds, information, operations, and programs* through strengthened internal controls and audit programs."<sup>5</sup>

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<sup>1</sup> Judicial Conference of the United States, *Strategic Plan for the Federal Judiciary* 4 (2015), [https://www.uscourts.gov/sites/default/files/federaljudiciary\\_2015strategicplan.pdf](https://www.uscourts.gov/sites/default/files/federaljudiciary_2015strategicplan.pdf).

<sup>2</sup> *Id.* at 11, 13 (emphasis added).

<sup>3</sup> *Id.* at 12 (emphasis added).

<sup>4</sup> *Id.* at 14 (emphasis added).

<sup>5</sup> *Id.* at 17 (emphasis added).

- “Communicate and collaborate with organizations outside the judicial branch to *improve the public’s understanding* of the role and functions of the federal judiciary.”<sup>6</sup>

## **PACER Does Not Live up to the Judiciary’s Stated Goals**

PACER is an online database of U.S. federal court documents operated by the Administrative Office of the U.S. Courts. Created in 1988 and later made available on the internet, PACER is the only publicly accessible electronic collection of case and docket information from federal appellate, district and bankruptcy courts.<sup>7</sup>

PACER, though, has failed to live up to the federal judiciary’s goal of using technology to provide comprehensive, readily accessible information about the federal court system. Even worse, the public has been forced to pay over a billion dollars to access this public information.

To begin, PACER is badly outdated. In addition to an obsolete interface, PACER is unable to perform even simple online tasks such as “batch downloading or text-searching the documents themselves.”<sup>8</sup> Even searching for individual cases on PACER presents challenges. As Seamus Hughes explains:

If you were looking for a search warrant in say, the Eastern District of Virginia, you’d have to search “USA vs.” Run the same search in the District of Maryland and you would find not one warrant as they file them “In the matter.” While “United states v.” works in some districts, it gets you nothing in another. Add an “s” (vs).” [sic] and you get radically different search results.<sup>9</sup>

Moreover, with few exceptions, PACER charges 10 cents per page for any case filing, docket sheet or case-specific report.<sup>10</sup> And as online users grow, so too have PACER’s revenues.

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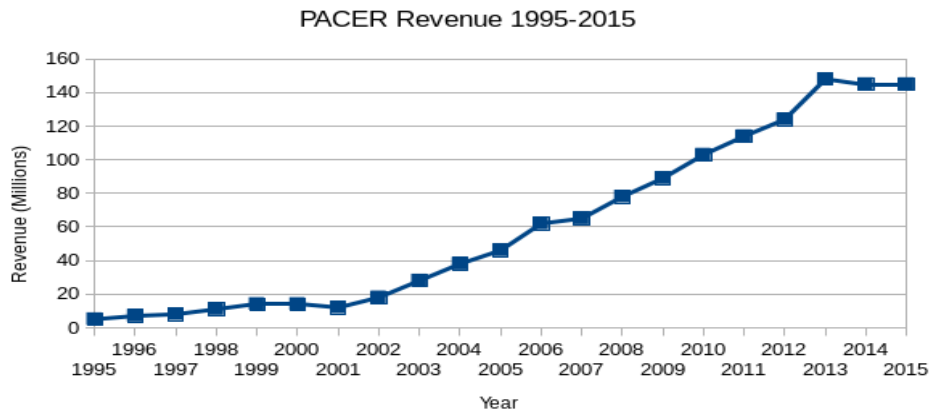
<sup>6</sup> *Id.* at 18 (emphasis added).

<sup>7</sup> See Anthony Marcum & Aubrey Neal, *R Sheet on PACER Reform* (Sept. 2019), <https://www.rstreet.org/wp-content/uploads/2019/09/PACER-Reform-R-Sheet.pdf>.

<sup>8</sup> Megan Square, *Pick up the PACER: Progress on the Horizon for an Outdated and Overpriced System*, Minn. L. Rev. De Novo Blog (March 19, 2019), <http://www.minnesotalawreview.org/2019/03/pick-up-the-pacer/>. To compare, PACER falls woefully behind commercial databases. Indeed, “While decisions in Westlaw and Lexis are finely indexed, digested, tagged, and categorized by experts, the world of court dockets is not. PACER renders dockets and the documents on them available to the public for a per-page fee or for free. But PACER is barely field searchable and cannot search across jurisdictions or years. Relative to Westlaw and Lexis, PACER remains quite raw. . . . [and] to effectively search PACER ‘one would have to know what to look for in order to find it.’” Elizabeth Y. McCuskey, *Submerged Precedent*, 16 Nev. L.J. 515, 527-28 (2016).

<sup>9</sup> Seamus Hughes, *The Federal Courts are Running an Online Scam*, Politico Magazine (March 20, 2019), <https://www.politico.com/magazine/story/2019/03/20/pacer-court-records-225821>.

<sup>10</sup> See Administrative Office of the U.S. Courts, *Electronic Public Access Fee Schedule*, <https://www.uscourts.gov/services-forms/fees/electronic-public-access-fee-schedule>. Specifically, “The \$ .10 per page charge is based on the number of pages that result from **each search and each requested report or document**. The charge is not based on printing.” Administrative Office of the U.S. Courts, *PACER, Frequently Asked Questions*, <https://www.pacer.gov/psc/faq.html> (emphasis added) (select “What are some examples of per page charges?”).



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In more recent years, PACER’s annual revenue has floated around \$145 million annually.<sup>12</sup> In total, it is estimated that PACER has brought in over *\$1 billion* in revenue from public fees.<sup>13</sup>

What is more, PACER has and continues to produce a generous surplus for the federal judiciary. As Congress recognized back in 2002, “users of PACER are charged fees that are higher than the marginal cost of disseminating” online public court records.<sup>14</sup> Recognizing this disparity, Congress passed the E-Government Act of 2002, which directed the Judicial Conference to collect fees “only to the extent necessary ... to reimburse expenses incurred” in providing access to electronic public court records.<sup>15</sup> Importantly, at the same time, Congress urged the Judicial Conference “to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible.”<sup>16</sup>

But nearly two decades later, little has changed. Today, “by one estimate, the actual cost of retrieving court documents, including secure storage, is about one half of one ten-thousandth of a penny per page.”<sup>17</sup> Yet “the federal judiciary charges a dime” to access each page.<sup>18</sup>

The discrepancy between growing PACER revenues and the limits of the E-Government Act was recently the subject of a federal lawsuit. In 2016, three nonprofit organizations sued the federal government, arguing that PACER’s fee model violated federal law from 2010 to 2016. They reasoned that while the E-Government Act of 2002 does authorize some PACER fees, it does so “only to the extent necessary ... to reimburse expenses incurred in providing [its] services.” They allege that PACER increased its fees to 10 cents a page not to cover the expenses of

<sup>11</sup> Michael Lissner, *How Much Money Does PACER Make?*, Free Law Project (Nov. 14, 2016), <https://free.law/2016/11/14/how-much-money-does-pacer-make/>.

<sup>12</sup> Administrative Office of the U.S. Courts, *FY 2018 Judiciary Reporting Requirement on PACER* (July 2018), <https://free.law/pdf/2018-EPA-Report-House.pdf>.

<sup>13</sup> Lissner, *supra*, at 11.

<sup>14</sup> S. Rep. 107–174, at 23 (2002) (Comm. Rep.), <https://www.congress.gov/107/crpt/srpt174/CRPT-107srpt174.pdf>.

<sup>15</sup> 28 U.S.C. § 1913 note.

<sup>16</sup> S. Rep. 107–174, at 23.

<sup>17</sup> Adam Liptak, *Attacking a Pay Wall That Hides Public Court Filings*, N.Y. Times (Feb. 4, 2019), <https://www.nytimes.com/2019/02/04/us/politics/pacer-fees-lawsuit.html>.

<sup>18</sup> *Id.*

providing online court records, but to “cover the costs of unrelated projects ... at the expense of public access,” in violation of the act.<sup>19</sup>

Last year, a district court partially agreed with the nonprofit plaintiffs and found that the government improperly used PACER fees to pay for some of its services. Indeed, of the \$920 million the judiciary collected in PACER fees from 2010 to 2016, the court found that approximately \$200 million were used for unrelated services.<sup>20</sup>

In short, PACER’s current paywall model fails to live up to the judiciary’s own goals of earnestly scrutinizing how its fees are used while providing robust and readily accessible information about public court cases. Furthermore, PACER’s current functionality works against Congress’ desire to make federal court records more affordable and accessible to the public.

### **PACER Should be Free**

The most important PACER reform is also the simplest—make PACER a free service. The Supreme Court is a good model. Although lower federal court records remain hidden behind an antiquated paywall, the Supreme Court recently renovated its own electronic filing system to allow “virtually all new filings [to] be accessible without cost to the public and legal community.”<sup>21</sup> A similar service for all lower federal courts is good, commonsense policy.

As mentioned above, PACER charges 10 cents per page with few exceptions. Parties and attorneys of record in a case, for example, receive one free electronic copy.<sup>22</sup> It is also free to view documents at a federal courthouse (of course, printing any documents incurs a similar 10-cent fee).<sup>23</sup> Judicial opinions are also free to access. But searching for judicial opinions is not necessarily free, and the definition of “judicial opinion” is left to the discretion of the authoring judge.<sup>24</sup>

Another fee exemption applies if a user accrues no more than \$15 in a quarterly billing cycle.<sup>25</sup> Last week, however, the Judicial Conference announced that it would double the quarterly PACER fee waiver from \$15 to \$30.<sup>26</sup> The announcement attempts a polite misdirection away from the approximately \$145 million in fees it collects annually from the public. It notes, for

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<sup>19</sup> See Compl., *Nat'l Veterans Legal Servs. Program v. United States*, 321 F. Supp. 3d 150 (D.D.C. 2018), [https://www.courtlistener.com/recap/gov.uscourts.dcd.178502/gov.uscourts.dcd.178502.1.0\\_1.pdf](https://www.courtlistener.com/recap/gov.uscourts.dcd.178502/gov.uscourts.dcd.178502.1.0_1.pdf).

<sup>20</sup> See *Nat'l Veterans Legal Servs. Program v. United States*, 321 F. Supp. 3d 150 (D.D.C. 2018), [https://www.courtlistener.com/recap/gov.uscourts.dcd.178502/gov.uscourts.dcd.178502.89.0\\_2.pdf](https://www.courtlistener.com/recap/gov.uscourts.dcd.178502/gov.uscourts.dcd.178502.89.0_2.pdf). The government appealed the district court’s ruling, and the case is now before the United States Court of Appeals for the Federal Circuit (No. 19-1081).

<sup>21</sup> Press Release, Supreme Court of the United States, Supreme Court’s new electronic filing system (Aug. 3, 2017), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_08-03-17](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_08-03-17).

<sup>22</sup> *Electronic Public Access Fee Schedule*, *supra*, at 10.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*; see also Administrative Office of the U.S. Courts, *PACER Service Center, Free Written Opinion* (Oct. 2005), <https://www.pacer.gov/announcements/quarterly/qa200510.pdf>.

<sup>25</sup> *Electronic Public Access Fee Schedule*, *supra*, at 10.

<sup>26</sup> Press Release, Administrative Office of the U.S. Courts, Judiciary Adopts New Model EDR Plan, Doubles Fee Waiver for PACER (Sept. 17, 2019), [https://www.uscourts.gov/news/2019/09/17/judiciary-adopts-new-model-edr-plan-doubles-fee-waiver-pacer?utm\\_campaign=usc-news&utm\\_medium=email&utm\\_source=govdelivery](https://www.uscourts.gov/news/2019/09/17/judiciary-adopts-new-model-edr-plan-doubles-fee-waiver-pacer?utm_campaign=usc-news&utm_medium=email&utm_source=govdelivery).

instance, that the increased fee waiver would now exempt “more than 75 percent of the system’s users” and emphasizes that “approximately 87 percent of all PACER revenue is attributable to just 2 percent of users—large financial institutions and major commercial enterprises that aggregate massive amounts of data for analysis and resale.”<sup>27</sup>

It is undisputed that a large percentage of PACER’s revenue comes from commercial enterprises that can afford it. But it is also certain that too large a number comes from pro se litigants, reporters, researchers and interested members of the public who cannot afford it. The Judicial Conference’s recent announcement suggests that—without Congressional intervention—an increased quarterly fee waiver is as far as the judiciary is willing to go to make PACER more affordable for the public. This is not good enough.

Consider pro se litigants. In the complex and overwhelming world of federal litigation, pro se litigants are often at a disadvantage. Add a government paywall that blocks access to millions of potentially useful templates, persuasive arguments and opportunities for sophisticated legal research, and the disadvantage is even worse.

Even indigent pro se litigants are not guaranteed free access to PACER. Under current policy, courts have the discretion to exempt or not exempt indigent litigants.<sup>28</sup> Even proceeding *in forma pauperis* may not be enough to be exempt from paying costly fees. According to PACER’s website, IFP status “does not automatically entitle [litigants] to free access,” and those litigants “must petition the court separately to request free access to PACER.”<sup>29</sup>

Free access to PACER would greatly help both pro se litigants and prisoners to conduct research and make successful legal arguments. Access to judicial opinions only goes so far. After all, the winning briefs that secured those good opinions remain blocked behind PACER’s paywall. Attorneys often use templates and previous briefs to save time, research and expense. Pro se litigants should be allowed the same advantage.

The media are similarly denied opportunities. Although most fee exemptions are discretionary, the judiciary specifically identifies media as an entity not entitled to free access to PACER.<sup>30</sup> This disadvantages both the reporting media and the public. Most Americans have never set foot inside a congressional committee room or federal courthouse. In both venues, the public relies on the media to understand the news of the day. But for legal reporting, the media often rely on materials hidden behind PACER’s paywall to timely and accurately report the news.<sup>31</sup>

Researchers also face disadvantages. As summarized in a recent amicus brief by a number of legal research platforms, “High PACER fees stifle competition in the legal research market, limit the development of tools that would improve the practice of law, and hinder the improvement of

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<sup>27</sup> *Id.*

<sup>28</sup> *Electronic Public Access Fee Schedule, supra*, at 10.

<sup>29</sup> Administrative Office of the U.S. Courts, *PACER, Frequently Asked Questions*, <https://qa.pacer.gov/psc/faq.html> (select “I was granted *in forma pauperis* status in my case. Will I receive free PACER access?”).

<sup>30</sup> *Electronic Public Access Fee Schedule, supra*, at 10.

<sup>31</sup> See, e.g., Brief of *Amici Curiae* The Reporters Committee for the Freedom of the Press and 27 Media Organizations in Support of Plaintiffs-Appellants, No. 19-1081 (Fed. Cir.), <https://www.rcfp.org/wp-content/uploads/2019/01/2019-01-24-NVLS-P-v-US.pdf>.

services to provide equal access to justice.”<sup>32</sup> Furthermore, when data are largely hidden behind a paywall, there is less opportunity for outside researchers to analyze and scrutinize the workings of our federal courts.

These are not speculative concerns, and public consensus against PACER’s paywall continues to grow. Just this year, PACER’s growing and disproportionate fees have garnered national attention<sup>33</sup> and criticism from nonprofit legal groups,<sup>34</sup> media organizations,<sup>35</sup> researchers<sup>36</sup> and even a former member of Congress.<sup>37</sup> Perhaps most notably, earlier this year an amicus brief was filed by seven former federal judges who persuasively argued that “[t]he best policy is to make PACER free.”<sup>38</sup>

But if the Judicial Conference is unable to make PACER free, Congress has several tools to do so, including legislation and appropriation.

### **Electronic Court Records Reform Act of 2019**

The bipartisan Electronic Court Records Reform Act (ECRRA) of 2019 (H.R. 1164)—sponsored by Rep. Doug Collins (R-GA) and Rep. Mike Quigley (D-IL), and co-sponsored by Rep. David Roe (R-TN), Rep. Hank Johnson (D-GA) and Rep. Brian Higgins (D-NY)—would go far to address many of PACER’s current problems.<sup>39</sup>

Most importantly, ECRRA would make PACER free.<sup>40</sup> ECRRA establishes other commonsense changes, including making all documents “text-searchable and machine-readable,” allowing external websites “to link to documents on the [PACER] system,” having all available “audio and visual files of court recording” easy to access and providing simple “search functions for public use.”<sup>41</sup> These modest changes would significantly modernize and improve the accessibility of federal court records.

In addition to improving PACER, ECCRRA also improves the federal courts’ Case Management/Electronic Case Files (CM/ECF) system. In short, CM/ECF is the federal courts’

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<sup>32</sup> Brief of Next-Generation Legal Research Platforms and Databases and *Amici Curiae* in Support of Plaintiffs-Appellants 17, No. 19-1081 (Fed. Cir.), <https://www-cdn.law.stanford.edu/wp-content/uploads/2016/03/PACER-Amicus-Brief-NextGen-FILED-1.pdf>.

<sup>33</sup> See e.g., Editorial Board, *Public Records Belong to the Public*, N.Y. Times (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/opinion/pacer-court-records.html>.

<sup>34</sup> Brief of the American Civil Liberties Union, et al. in Support of Cross-Appellees National Veterans Legal Services Program, et al., No. 19-1081 (Fed. Cir.), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pacer-fed-cir.pdf>.

<sup>35</sup> Brief, Reporters Committee for the Freedom of the Press, *supra*, at 31.

<sup>36</sup> Brief, Next-Generation Legal Research Platforms and Databases, *supra* at 32.

<sup>37</sup> Brief *Amicus Curiae* of Senator Joseph I. Lieberman in Support of Plaintiffs-Appellants, No. 19-1081 (Fed. Cir.), <https://www.theconstitution.org/wp-content/uploads/2019/01/PACER-Brief-FINAL-3.pdf>.

<sup>38</sup> Brief of Retired Federal Judges as *Amici Curiae* in Support of Neither Party 4, No. 19-1081 (Fed. Cir.), <http://cyberlaw.stanford.edu/files/publication/files/PACER%20fee%20-%20appeal%20-%20retired%20MJ%20amicus.pdf>.

<sup>39</sup> In July, U.S. Senators Rob Portman (R-OH), Ron Wyden (D-OR), Ted Cruz (R-TX), and Mazie Hirono (D-HI) introduced similar bipartisan legislation in the Senate. See S. 2064, 116th Cong. (2019).

<sup>40</sup> H.R. 1164, 116th Cong. (2019).

<sup>41</sup> *Id.*

online court filing system and is used by courts to manage their dockets. Today, CM/ECF is a scattered and compartmentalized system. Because of varied local rules or other protocols, many districts use CM/ECF differently, often to the frustration of attorneys, researchers and court watchers. To harmonize the CM/ECF system nationwide, ECRRA simply directs the Administrative Office of the U.S. Courts to consolidate the CM/ECF system and “develop one system for all filings” in federal court.<sup>42</sup>

In sum, ECCRA is a commonsense, bipartisan solution to modernize the federal judiciary’s online court records system and increase public access and transparency of our federal courts.

## **Conclusion**

Both Congress and the Judiciary agree on the importance of improving court technologies, ensuring public funds are carefully used, promoting transparency and improving the public’s understanding of the federal judiciary. The successful passage of ECRRA is a step closer to meeting these goals.

I thank the subcommittee for its prioritization of improving transparency and accessibility in the federal courts. If I can be of any assistance to members of the subcommittee, please feel free to contact me or my colleagues at the R Street Institute.

Respectfully submitted,

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<sup>42</sup> *Id.*