Nos. 19-1081(L), 19-1083

# In the United States Court of Appeals for the Federal Circuit

NATIONAL VETERANS LEGAL SERVICES PROGRAM,
NATIONAL CONSUMER LAW CENTER, AND ALLIANCE FOR JUSTICE,
FOR THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

*Plaintiffs-Appellants*,

v.

UNITED STATES,

*Defendant-Cross-Appellant*.

On Appeal from the United States District Court for the District of Columbia, Case No. 1:16-745-ESH (The Hon. Ellen S. Huvelle)

## BRIEF *AMICUS CURIAE* OF SENATOR JOSEPH I. LIEBERMAN IN SUPPORT OF PLAINTIFFS-APPELLANTS

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**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

National Veterans Legal Services Program et al. **v.** United States

Case No. 19-1081 & 19-1083

**CERTIFICATE OF INTEREST**

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ■ (amicus) ☐ (name of party)

Senator Joseph I. Lieberman

certifies the following (use "None" if applicable; use extra sheets if necessary):

| 1. Full Name of Party Represented by me | 2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is: | 3. Parent corporations and publicly held companies that own 10% or more of stock in the party |
|---|---|---|
| Joseph I. Lieberman | n/a | n/a |
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4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Constitutional Accountability Center
Elizabeth B. Wydra

BakerHostetler LLP
Michael K. Farrell
Michael D. Meuti
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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None

1/28/2019
Date

/s/ Elizabeth B. Wydra
Signature of counsel

Please Note: All questions must be answered

Elizabeth B. Wydra
Printed name of counsel

cc: All counsel of record via CM/ECF

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* Senator Joseph Lieberman served as United States Senator from Connecticut from 1989 until his retirement from Congress in 2013. Senator Lieberman served as Chair of the United States Senate Committee on Homeland Security and Governmental Affairs and in that capacity was the sponsor of the E-Government Act of 2002. Senator Lieberman is thus uniquely situated to provide the Court with insight into Congress's plan in passing the E-Government Act—namely, to ensure that the government does not charge the public fees to access court documents that exceed the cost of providing access to those documents.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Under federal law, the government is permitted to charge people fees to access records on the Public Access to Court Electronic Records system, or PACER. Such fees are permissible, however, "only to the extent necessary" "to reimburse expenses incurred in providing [PACER records-access] services." 28 U.S.C. § 1913 note (Court Fees for Electronic Access to Information). Despite this unambiguous language, PACER fees today are "higher than the marginal cost of disseminating the information," S. Rep. No. 107-174, at 23 (2002), and have only increased in recent

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or his counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

years despite a dramatic decrease in the cost of storing and providing documents electronically. Indeed, the fees the government generates from PACER are now used to fund projects far removed from providing document access on PACER, including an electronic records study in Mississippi, victim notification under the Victim Crime Control Act, web-based juror services, improving courtroom technology, and more. *See* Appx3185-3187 (District Court Order).

For that reason, these fees violate federal law. Charging fees that are greater than the cost of providing electronic access to court documents violates the plain text of 28 U.S.C. § 1913 note, which permits fees "only to the extent necessary" to provide electronic access to those documents. Indeed, this limitation should be read consistent with the backdrop rule that the government may not generally impose fees greater than the cost of providing services "inuring directly to the benefit" of the person who pays the fee, unless "Congress . . . indicate[s] clearly its intention to delegate" its taxing power to the agency charging the fee. *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 224 (1989). Here, Congress has not clearly indicated an intention to delegate its taxing power; rather, it has done the exact opposite, amending the statute to permit fees "only to the extent necessary" to cover the costs of providing access to the documents.

The law's history confirms this plain reading of its text. Congress added the "only to the extent necessary" language by passing the E-Government Act of 2002,

Pub. L. No. 107-347, § 205(e), 116 Stat. 2889, 2915 (2002), and a Senate report contrasted the new language with "existing law" under which "users of PACER are charged fees that are higher than the marginal cost of disseminating the information." S. Rep. No. 107-174, at 23.

Moreover, allowing the government to charge PACER fees that are higher than the costs necessary to administer the system is at odds with Congress's plan in amending the law. As *amicus* well knows from his work in Congress to make court records broadly accessible to the American public, excessively high PACER fees impose a serious financial barrier to members of the public who wish to access court records, and these fees thereby create a system in which rich and poor do not have equal access to important government documents. Recognizing the inequity of such a system and the importance of public access to court documents, Congress amended the statute's language to "encourage 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*." *Id.* (emphasis added). Charging fees that are higher than the costs of administering the system is plainly at odds with Congress's plan of making "this information . . . freely available to the greatest extent possible." *Id.*

In short, the government's practice of charging fees to access court documents that are greater than the costs of making those documents accessible is at odds with

the text, history, and purpose of the E-Government Act of 2002. For all those reasons, this Court should affirm the judgment of the district court that the government may not charge fees greater than the cost of making the service available.

## ARGUMENT

### I. THE PLAIN TEXT OF 28 U.S.C. § 1913 NOTE MAKES CLEAR THAT PACER FEES MAY NOT BE GREATER THAN THE COST OF PROVIDING ACCESS TO COURT RECORDS.

Statutory interpretation "begins with the language of the statute." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004)). And "when the statutory language is plain, [this Court] must enforce it according to its terms." *Strategic Hous. Fin. Corp. of Travis Cty. v. United States*, 608 F.3d 1317, 1324 (Fed. Cir. 2010) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009)); *id.* at 1323 ("The best evidence of congressional intent is the plain meaning of the statutory language at the time Congress enacted the statute." (citing *Ngiraingas v. Sanchez*, 495 U.S. 182, 187 (1990))).

Here, the statutory language plainly demonstrates that the government is violating 28 U.S.C. § 1913 note by charging PACER fees that exceed the amount necessary to provide access to information on PACER. That provision reads:

> (a) The Judicial Conference *may, only to the extent necessary, prescribe reasonable fees* . . . for collection by the courts . . . *for access to information available through automatic data processing equipment*. . . . The Director . . . under the direction of the Judicial Conference of

> the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> (b) . . . All fees hereafter collected by the Judiciary under paragraph (a) as a charge for services rendered shall be deposited as offsetting collections to the Judiciary Automation Fund . . . *to reimburse expenses incurred in providing these services*.

28 U.S.C. § 1913 note (emphases added).[2]

In other words, the government may "prescribe reasonable fees" "*only to the extent necessary*" "for access to information available through automatic data processing equipment." *Id.* (emphasis added). "[O]nly to the extent necessary" means that the Judicial Conference cannot charge *more* than necessary to provide information access through PACER. Moreover, paragraph (b) specifies that the "fees . . . under paragraph (a) as a charge for services rendered shall be deposited . . . to the Judicial Automation Fund" specifically "to reimburse expenses incurred in providing these services." *Id.* "[T]hese services" clearly refers to providing access to information through automatic data processing equipment—the only service mentioned in paragraph (a). In short, the plain text makes clear that the government may prescribe fees only as necessary to cover the costs of providing the court

[2] It makes no difference that this law was codified as a statutory note because "[t]he fact that a provision is set out as a note is merely the result of an editorial decision and has no effect on its meaning or validity." Office of the Law Revision Counsel, Detailed Guide to the United States Code Content and Features, at IV(E), http://uscode.house.gov/detailed_guide.xhtml.

documents that people are accessing, and no more. *See* Appellants' Br. 10 ("PACER fees must be limited to PACER costs.").

A contrary reading of this plain language would be particularly strange because Congress passed this law against the backdrop of Supreme Court precedent requiring Congress to clearly authorize an agency to exact fees that are greater than the cost of providing the service for which the fees are charged. As the Supreme Court has explained, if an agency charges an individual more than the cost of the services that individual is receiving, that is a tax, and "Congress . . . is the sole organ for levying taxes," *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340 (1974); *see* U.S. Const. art. I, § 8, cl. 1 (Congress has the "Power To lay and collect Taxes."). While Congress can delegate this taxing power to an agency, it "must indicate clearly its intention to delegate to [an agency] the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens . . . on those parties." *Skinner*, 490 U.S. at 224.

Here, Congress did not "indicate clearly" its "intention to delegate" its taxing power to the Judicial Conference. In fact, it did just the opposite: it permitted the imposition of fees "only to the extent necessary" to fund "access to information" through the court's electronic docketing system, 28 U.S.C. § 1913 note. Absent a clearer indication from Congress, then, 28 U.S.C. § 1913 note cannot justify

imposing PACER fees to fund projects like the Mississippi electronic records study, victim notification under the Victim Crime Control Act, web-based juror services, courtroom technology, or other uses far beyond providing the actual access-to-documents service that PACER provides. Rather, the court must presume that Congress authorized the Judicial Conference to impose a *fee* (not a *tax*), which may be imposed only "for a service that confers a specific benefit upon an identifiable beneficiary," *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1180 (D.C. Cir. 1994) (citing *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345, 349 (1974)). Indeed, that presumption is the only one consistent with the history of the law and Congress's plan in enacting it, as the next Section discusses.

## II. ALLOWING THE GOVERNMENT TO CHARGE PACER FEES THAT ARE GREATER THAN COSTS IS ALSO AT ODDS WITH CONGRESS'S PLAN IN PASSING THE E-GOVERNMENT ACT OF 2002.

In 1991, Congress passed an appropriations bill that enacted the original version of 28 U.S.C. § 1913 note. Similar to the current version, that provision required the Judicial Conference to "prescribe reasonable fees . . . for collection by the courts . . . for access to information available through automatic data processing equipment." Act of Oct. 28, 1991, Pub. L. No. 102-140, § 303(a), 105 Stat. 782, 810. And just like the current version, the Act specified that "[a]ll fees hereafter collected by the Judiciary . . . as a charge for services rendered shall be . . . to reimburse expenses incurred in providing these services." *Id.* § 303(b). A Senate

Report on the 1991 appropriations bill specified that Congress "included language which authorizes the Judicial Conference to prescribe reasonable fees for public access to case information, *to reimburse the courts for automating the collection of the information* which the Director is required to maintain and make available to the public." S. Rep. No. 101-515, at 86 (1990) (emphasis added).

Despite this language, the government began charging fees that exceeded the costs of providing electronic access to court documents. *See* Appx3152-3153. Congress responded in 2002 by passing the E-Government Act, which made even clearer that Congress viewed PACER fees as appropriate only to the extent that they are necessary to provide the public with electronic access to court documents. Specifically, the Act amended the earlier language, striking the mandatory "shall prescribe" language and instead permitting the government to charge fees "*only to the extent necessary*." Pub. L. No. 107-347, § 205(e), 116 Stat. 2889, 2915 (2002) (emphasis added); *see Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) ("When Congress amends legislation, courts must 'presume it intends [the change] to have real and substantial effect.'" (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995))).

As *amicus* well knows, Congress made this change because under then-existing law, "users of PACER [were] charged fees that [were] higher than the marginal cost of disseminating the information," S. Rep. No. 107-174, at 23 (2002). That state of affairs had real implications for the "transparency" of the court system,

that is, "American citizens and others' right to know" what the courts are doing and why they are doing it. *See generally Judicial Transparency and Ethics: Hearing Before the H. Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 115th Cong. 1-2 (2017) (statement of Rep. Issa).

After all, court documents—which are currently accessible only by paying PACER fees—are often essential to understanding the workings of the court system. Moreover, they are often essential to those who may seek to go into court to vindicate their rights. *See generally Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (noting a "right of access" to and a "right to gather information" about judicial proceedings (citation omitted)). And because PACER users must pay the high fees currently charged by the government, whether an individual is able to access these critical documents will often turn on their financial circumstances. That is at odds with the principle that all Americans should have equal access to the courts and to the documents that are essential to understanding the operation of our government. *Cf. Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (holding that indigent defendants could not be required to pay a fee for transcripts needed to appeal their convictions); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (due process "prohibit[s] a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages"); *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996) (prohibiting Mississippi from requiring parent to

pay advance record preparation fees to challenge a parental termination order because access could not "turn on ability to pay").

To address that significant problem, Congress's 2002 amendment to the law limited the fees that the government may charge for accessing court documents. As the Senate Report explained, "[t]he Committee intend[ed] to encourage 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*." S. Rep. No. 107-174, at 23 (emphasis added). In short, Congress sought to ensure that PACER fees would be no greater than necessary, so as to ensure that the public's access to the documents on the PACER system would be as wide as possible.[3]

In short, the history of the law bolsters what its text makes clear: that PACER fees are permissible only to the extent necessary to cover the costs of providing

[3] Even after the Act's passage, Members of Congress expressed their view that the Judicial Conference was violating 28 U.S.C. § 1913 note. For example, in early 2009, *amicus* Senator Lieberman, sponsor of the Act and Chairman of the Committee on Homeland Security and Governmental Affairs, wrote to the Administrative Office of the U.S. Courts. He noted that although the Act was intended "to increase free public access to" judicial records by limiting fees to "'the marginal cost of disseminating the information,'" PACER revenue was "well higher than the cost of dissemination," and that PACER was not charging only "'to the extent necessary' for records using the PACER system." Appx2554-2555 (citations omitted). And again in 2010, Senator Lieberman emphasized in his annual letter to the Appropriations Committee that PACER fees had gone up, and that this violated "the mandate of the E-Government Act." *Id.* at 2549.

access to electronic court documents. The district court therefore correctly held that fees may not be charged to fund all "dissemination of information through electronic means" by the courts writ large. Appx3179. The government is violating the law when—as it admits—it uses PACER fees to fund "the entire cost of the Judiciary's public access program, including telecommunications, replication, and archiving expenses, the Case Management/Electronic Case Files system, electronic bankruptcy noticing, Violent Crime Control Act Victim Notification, on-line juror services, and courtroom technology." Appx2565.[4]

[4] *Amicus* takes no position on whether, as the district court held, PACER and CM/ECF are so inextricably connected that PACER fees may permissibly be used to support the costs of CM/ECF and Electronic Bankruptcy Noticing. *See* Appx3179.

## CONCLUSION

For all the foregoing reasons, this Court should affirm the district court's judgment that the government may not charge the public fees to access court documents that exceed the cost of providing access to those documents.

Respectfully submitted,

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Dated: January 28, 2019

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 2,766 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 28th day of January, 2019.

/s/ Elizabeth B. Wydra
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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on January 23, 2019.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 28th day of January, 2019.

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