



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

September 23, 2020

Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
United States House
Washington, DC 20515

Dear Mr. Chairman:

I write as Secretary of the Judicial Conference of the United States (Conference), the policy making body for the Federal Judiciary, to convey the Conference's opposition to H.R. 8235, the "Open Courts Act of 2020" (OCA). The bill would result in massive filing fee increases for litigants, severely impairing their access to justice - the core tenet of our judicial system - while providing a commercial windfall to large commercial users (not litigants) who currently fund 87 percent of the costs of PACER. Moreover, even if the filing fee structure in the bill could be calculated based on "the nature of the filing" - and it is simply not possible to do so - it would fall far short of the costs of PACER and thus would require increased appropriations in the Judiciary's budget. We request that the House Judiciary Committee give further consideration to the feasibility, scope, and impact of the undertaking, as well as the enormous cost implications this bill imposes on both litigants and the Judiciary. We further request the House of Representatives suspend further consideration of the bill or similar legislation.

The Judicial Conference Opposes the OCA Based on a Number of Concerns.

The proposed legislation would hinder the Judiciary's ability to fulfill its fundamental duty - to provide access to justice. The bill would fund the operations and maintenance of the proposed case management/court records system at the expense of litigants rather than the actual users of the Public Access to Court Electronic Records (PACER) service. Increasing the financial burden on *litigants* so that *court observers* have free access to court records essentially would give large data corporations and commercial research institutions a free ride for their commercial and for-profit endeavors while raising the financial hurdle for those who seek access to the courts, many of whom already may struggle with court costs. Increasing costs to litigants to access the court to provide free access to court records is of serious concern to the Judiciary.

In addition to imposing this burden on litigants, the Conference is concerned about four other troubling aspects of the bill: (1) requiring the Judiciary to begin an unworkable practice of assessing the financial impacts of cases at time of filing; (2) mandating the Judiciary to make technical changes to its systems that would be massive, untested, disruptive and expensive; (3) increasing security risks to the system; and (4) risking privacy protections for litigants. Each of the five concerns is discussed in further detail below.

The Judicial Conference Opposes Legislation That Would Affect Access to Justice and Would Result in Massive Fee Increases.

The Conference opposes legislation that would result in an increase in filing fees to compensate for the elimination of PACER user fees. The Conference believes such legislation would improperly shift the costs of providing access to the PACER service from PACER users to litigants, which would increase barriers to filing suit for many litigants and thus unduly hinder access to justice. The Judicial Conference has long held the position that filing fees should not be increased to generate revenue for Judiciary operations. Funding the PACER service through filing fee increases would drastically shift the cost burden away from large data corporations and institutions to litigants – who may not be proportionate users of PACER’s services or may not even use PACER at all. Limiting access to the courts because of cost prohibitive filing fees is not consistent with the basic principles of access to justice.

A cost estimate prepared on an earlier version of this proposal shows that the increase in filing fees that would be necessary to cover the costs of maintaining the Judiciary’s Electronic Public Access program would be substantial. Filing fees would have to be increased by approximately \$750 per case to produce revenue equal to the Judiciary’s average annual collections under the current fee structure. This is an untenable, dramatic increase for litigants. It could mean that the current district court civil filing fee of \$350 (pursuant to 28 U.S.C. § 1914(a)) would more than triple, increasing to \$1,100. Filing fees in chapter 11 bankruptcy cases, the majority of which are filed by small business entities, already exceed \$1,000 and could double to nearly \$2,000. The current filing fees for chapter 7 bankruptcy cases of \$245 (pursuant to 28 U.S.C. § 1930) would increase to \$750. This hike would drastically increase the expense of obtaining bankruptcy relief for consumer debtors, who typically are the least able to afford such heightened expenses.

This added financial burden could deter litigants from pursuing their claims in federal court, which is a significant concern for the Judiciary. For many litigants, a filing fee in excess of \$1,000 would be an outright barrier, forcing them to forgo pursuing a potential meritorious claim in federal court. For these reasons, the Judicial Conference opposes this approach to funding PACER.

Additionally, the OCA's prescription of a fee for filing a proof of claim or interest under Rules 3002 and 3003 of the Federal Rules of Bankruptcy Procedure raises additional access to justice concerns. Creditors and interest-holders do not purposefully avail themselves of the bankruptcy system, but simply seek to be repaid on a debt already owed to them by the debtor, such as child support claimants and other owed money by a debtor for unpaid goods or services provided by a creditor. A proof of claim fee limits their access to justice and further adds to a creditor's cost of collecting debt.

Structuring Filing Fees Based on Guesses Regarding the Burden Imposed by the Party, "Extent of Use" or "Nature of the Filing" Is Not Feasible and Administratively Unworkable.

The Conference opposes attempts to require the Judiciary to structure filing fees commensurate with the burden imposed on the court by the party, as the OCA would do, because any requirement for filing fees to be "commensurate with the burden imposed by the party" would be administratively unworkable.

The OCA requires the Judiciary to structure filing fees commensurate with a guess about the extent of use of the court by the party or an administrative assessment of the nature of the filing. This proposal is not realistic and would harm the courts and litigants. Filing fees are generally paid at the outset of litigation, the point at which it is usually least clear how much of a burden will be imposed on the court by a party. Irrespective of the cause of action, some cases are relatively straightforward or may be quickly resolved, while other seemingly simple cases turn out to be complicated and time-consuming to resolve or may even become class action suits or multi-district litigation cases. A sliding-scale fee based on initial filings could incentivize plaintiffs (and possibly cross-claimants) to avoid a higher filing fee by not being forthright about the true nature and complexity of their lawsuits, and then later filing amended pleadings to add other causes of action. This would make it increasingly difficult for courts to manage their dockets. It is simply not feasible to predict accurately the size, nature, or potential complexity of any given case at the time it is filed.

Prescribing a filing fee that purports to correspond to the complexity of a case at the time of filing would not only be unworkable but would also conflict with the Federal Rules of Civil Procedure. Under Federal Rule of Civil Procedure 8, a party must provide a short and plain statement of a claim showing that the party is entitled to relief. Only after discovery and a full understanding of the facts and legal theories can the complexity of a case be assessed – not at the time of filing. Trying to determine the burden on the court by the type of case filed, or some other standardized method, would be speculative, burdensome to court staff, and likely inaccurate. Without a way to predict the complexity of cases filed during a fiscal year in advance, the Judiciary will have no way to estimate revenue for that particular fiscal year. This means there would be no way to balance the

costs effectively with revenues in providing PACER services. The entire premise of the OCA – that expenses can be covered with an equivalent amount of filing fee revenue – is flawed because there is no way to project this revenue.

A Single Case Management System is Unnecessary and Contrary to the Longstanding Organization of a Decentralized Third Branch.

Overhauling the Case Management/Electronic Case Files System (CM/ECF) would take an enormous amount of time and money. It is very difficult to provide a reliable cost estimate to replace the Judiciary's current system as directed by the bill. It would be prudent, before mandating a massive, untested, disruptive and costly overhaul, first to conduct a study to assess the feasibility, scope, costs, and impact of the undertaking.

CM/ECF allows litigants to file and access case documents electronically, such as pleadings, motions, and petitions. The OCA would require the Judiciary to create a new consolidated case management system and achieve other required technical specifications. The Judiciary has serious reservations regarding these proposed requirements. Each court's CM/ECF system is not only the backbone case management and electronic case filing system for the court and its litigants but is also the source of the documents accessed via the PACER portal. PACER is not a stand-alone service or database, and it would not function without the dockets and filings housed within CM/ECF. The district, bankruptcy, and appellate CM/ECF products supported by the Administrative Office of the U.S. Courts (AO) provide courts enhanced and updated docket management, allow courts to maintain case documents in electronic form, and provide the ability for local customization in accordance with local rules.

Under federal statute, the Federal Rules of Appellate, Civil, Criminal, and Bankruptcy Procedure, and long-standing Judiciary policy, each court is responsible for maintaining its own civil and criminal dockets through its Clerk of Court. Courts accomplish this through individually tailored CM/ECF systems. The Judiciary's current CM/ECF products would need to be completely overhauled to meet the requirements of the OCA.

The OCA Would Increase Security Risks to the CM/ECF System.

The elimination of the PACER fee would not only have a detrimental effect on the Judiciary's Electronic Public Access Program, but it could also have a negative and severe impact on the security, speed and reliability of the system. The current fee-based system requires users to register. This provides identification of users, allows traffic volume to be monitored, and prevents users from downloading unlimited and voluminous content – unless they are willing to pay for that access or have received an applicable fee

exemption. Completely unfettered access – the ability to attempt to download as much content as desired with no user cost constraints – for anyone in the world (including foreign scammers, hostile governments, and other bad actors) could dangerously strain the system’s capacity and performance and create significant security concerns.

The OCA Raises Significant Privacy Concerns.

The OCA weakens the existing protections for redaction of personal information and raises significant privacy concerns. Clerks of Court (or their designees) serve as principal records custodians and are responsible for the care, security, timely transfer, and disposal of the records in their custody, pursuant to federal law and Judicial Conference policy. Each court has adopted local rules and policies that require parties to be responsible for redacting personal identifiers and/or seeking court approval to remove sensitive information from documents. To the extent the bill transfers the responsibility for the redaction of records from the parties to the AO and the General Services Administration (GSA), the privacy protections of court records would be significantly compromised. The AO and GSA lack personnel, experience and expertise in redacting such sensitive information from court documents and litigant filings. Our experience has shown that litigants and their attorneys are in the best position to identify and request appropriate redactions. Shifting the role to the AO and GSA would also necessitate significant new resources be provided to each agency to ensure compliance for millions of documents in hundreds of thousands of cases.

PACER is Already Free to Most Users and the Judiciary Is Improving It.

While the OCA has the ostensible purpose of seeking to make the Judiciary’s PACER service “free to the public,” the legislation would impose substantial new costs on litigants, severely hindering access to justice, and establish technical requirements that are unlikely to be achievable.

The PACER service provides courts, litigants, and the public with access to court dockets, case reports, and the more than one billion documents filed with the courts through CM/ECF. PACER is a portal to CM/ECF; both are integral to effective public access. PACER currently provides *free* access to most users, through fee waivers and exemptions. The Conference recently expanded free access to PACER by doubling the amount of user fees automatically waived per calendar year quarter from \$15 to \$30, effective January 1, 2020. This increase – which allows users potentially to access 1200 pages of documents per year at no charge – results in no fees being charged to approximately 77 percent of active users (based on 2018 data). Of the remaining users who do incur fees, most are large commercial entities, many of whom use data accessed from PACER as the foundation for their own for-profit business enterprises. Their utilization of the PACER service far exceeds that of the typical user. Approximately 87

percent of total PACER revenue comes from less than three percent of the active accounts.

The Judiciary shares Congress's commitment to openness and accessibility to the courts and ensuring that the work of the courts is as transparent as possible. Furthermore, the Judiciary is creating a better PACER user-experience. We recently updated the PACER website and are in the process of updating the PACER Case Locator to allow for more efficient, more consistent search-functionality across jurisdictions. The Judiciary convened an Electronic Public Access Public User Group, with members representing various types of PACER users, to conduct outreach and identify user needs. The AO is currently working to implement some of the Public User Group's suggestions and is working with the Department of Justice to create additional resources for pro se users' access to PACER. Other recent initiatives we have implemented include: access to free telephonic case information in English and Spanish; posting court opinions on the Government Publishing Office's website; and making available digital audio recordings of hearings available on PACER. These efforts demonstrate our ongoing commitment to promoting efficient electronic public access without placing unreasonable burdens on the public or on access to justice.

The Judicial Conference Has Never Insisted that PACER be Funded with User Fees.

While user fees have been a workable and equitable funding mechanism for PACER for decades there may well be other workable alternatives. For example, the Conference does not oppose taxpayer funding of PACER through additional appropriations (but not at the expense of other current Judiciary operations). The funding mechanism proposed in the OCA is not feasible, responsible, fair, or workable.

This Letter Corrects the Record in the Committee's Markup.

Lastly, we must correct the record regarding the process by which this bill was developed. Statements were made during the Committee's markup of the OCA on Tuesday, September 15, 2020, that "this bill has been crafted to be responsive to the needs and concerns of the Judicial Conference," and "the language in H.R. 8235 was drafted to reflect [the Judicial Conference's] input." The Judicial Conference has consistently opposed previous iterations of this legislation that also raised filing fees to compensate for the elimination of PACER service fees and has repeatedly communicated those concerns to the Committee. The Judiciary did not provide input on the current draft of H.R. 8235, nor does OCA reflect the needs and concerns of the Judiciary or resolve the Conference's access to justice concerns previously expressed and repeated herein.

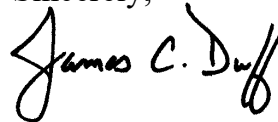
Honorable Jerrold Nadler

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Based on the concerns discussed above, the Judiciary adamantly opposes H.R. 8235, the "Open Courts Act of 2020" as structured and urges Congress to withdraw its consideration of the OCA or any similar legislation.

If we may be of additional assistance to you, please do not hesitate to contact me or the Office of Legislative Affairs, Administrative Office of the United States Courts, at (202) 502-1700.

Sincerely,

A handwritten signature in black ink that reads "James C. Duff". The signature is written in a cursive, flowing style.

James C. Duff
Secretary

cc: Honorable Jim Jordan