

United States Court of Appeals for the Federal Circuit

**NATIONAL VETERANS LEGAL SERVICES
PROGRAM, NATIONAL CONSUMER LAW
CENTER, ALLIANCE FOR JUSTICE,**
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Cross-Appellant

2019-1081, 2019-1083

Appeals from the United States District Court for the District of Columbia in No. 1:16-cv-00745-ESH, Judge Ellen S. Huvelle.

Decided: August 6, 2020

DEEPAK GUPTA, Gupta Wessler PLLC, Washington, DC, argued for plaintiffs-appellants. Also represented by JONATHAN TAYLOR; WILLIAM H. NARWOLD, Motley Rice LLC, Hartford, CT; MEGHAN OLIVER, Mt. Pleasant, SC.

ALISA BETH KLEIN, Appellate Staff, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-cross-appellant. Also represented by MARK B. STERN, ETHAN P. DAVIS.

SEAN MAROTTA, Hogan Lovells US LLP, Washington, DC, for amici curiae W. Royal Furgeson, Jr., Nancy Gertner, Brian L. Owsley, Viktor V. Pohorelsky, Shira Ann Scheindlin, Stephen W. Smith, Richard A. Posner. Also represented by STEPHEN SCHULTZE, CLAUDIA PARE.

PHILLIP R. MALONE, Juelsgaard Intellectual Property and Innovation Clinic, Mills Legal Clinic, Stanford Law School, Stanford, CA, for amici curiae Casetext, Docket Alarm, Fastcase, Free Law Project, Internet Archive, Judicata, Mark A. Lemley, Ravel, Syntexys, UniCourt.

BRUCE D. BROWN, The Reporters Committee for Freedom of the Press, Arlington, VA, for amici curiae The Reporters Committee for Freedom of the Press, American Society of Newspaper Editors, Associated Press Media Editors, Association of Alternative News Media, First Amendment Coalition, First Look Media Works, Inc., International Documentary Association, Investigative Reporting Workshop, MPA, National Press Photographers Association, Online News Association, Radio Television Digital News Association, Reporters Without Borders, Seattle Times Company, Society of Professional Journalists, Tully Center for Free Speech, Bay Area News Group, BuzzFeed, California News Publishers Association, Freedom of the Press Foundation, The Media Institute, The National Press Club, National Press Club Journalism Institute, New York Times Company, PEN America, POLITICO LLC, Reveal from the Center for Investigative Reporting, Sinclair Broadcast Group, Inc.

ELIZABETH WYDRA, Constitutional Accountability Center, Washington, DC, for amicus curiae Joseph I. Lieberman.

BRETT MAX KAUFMAN, Center for Democracy, American Civil Liberties Union Foundation, New York, NY, for amici curiae American Association of Law Libraries, American

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Civil Liberties Union, American Library Association, Cato Institute, Knight First Amendment Institute at Columbia University.

Before LOURIE, CLEVINGER, and HUGHES, *Circuit Judges*.
HUGHES, *Circuit Judge*.

These interlocutory cross-appeals challenge the district court's interpretation of a statutory note to 28 U.S.C. § 1913 permitting the federal judiciary to charge "reasonable fees" for "access to information available through automatic data processing equipment." Plaintiffs contend that under this provision unlawfully excessive fees have been charged for accessing federal court records through the Public Access to Court Electronic Records (PACER) system and that the district court identifies too little unlawful excess. The government argues that the district court identifies too much (and also that the district court lacked jurisdiction). We conclude that the district court got it just right. We therefore affirm and remand for further proceedings.

I

The statutory note at issue follows the section text of 28 U.S.C. § 1913 and provides in relevant part:

COURT FEES FOR ELECTRONIC ACCESS TO
INFORMATION

....

"(a) The Judicial Conference may, only to the extent necessary, prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code, for collection by the courts under those sections for access to information available through automatic data processing equipment. These fees may distinguish

between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director of the Administrative Office of the United States Courts, 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) The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. 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 pursuant to 28 U.S.C. [§] 612(c)(1)(A) to reimburse expenses incurred in providing these services.”

28 U.S.C. § 1913 note (2012) (§ 1913 Note).¹

To briefly introduce the players referenced, the Administrative Office of the United States Courts (AO) is an agency within the judicial branch that provides a broad range of support services to federal courts; and the Judicial Conference is the national policymaking body for the federal courts, made up of the Chief Justice and certain federal judges from each judicial circuit, *see* 28 U.S.C. § 331. These two bodies act in concert, with the AO advising and supporting the Judicial Conference, and developing the

¹ That this text appears as a statutory note, rather than as section text, is “of no moment.” *Conyers v. Merit Sys. Prot. Bd.*, 388 F.3d 1380, 1382 n.2 (Fed. Cir. 2004).

annual judiciary budget for congressional approval, with input from the Judicial Conference.

Congress passed the original version of § 1913 Note in the early 1990s soon after the Judicial Conference, in 1988, first authorized an “experimental program of electronic access for the public to court information.” REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 83 (Sept. 14, 1988) (1988 JUD. CONF. REP.)²; J.A. 2903. This “experimental program” eventually grew into the PACER system used today for online access to federal court dockets and case records. See Judiciary Appropriations Act, 1991, Pub. L. No. 101-515, § 404, 104 Stat. 2101, 2132–33 (1990); Judiciary Appropriations Act, 1992, Pub. L. No. 102-140, § 303, 105 Stat. 782, 810 (1991). Section 1913 Note was last amended by the E-Government Act of 2002, Pub. L. No. 107-347, § 205(e), 116 Stat. 2899, 2915 (2002). Before PACER’s advent, federal court dockets and filings were all on paper. If members of the public wanted to view those records, they had to travel to the courthouse to request access. PACER revolutionized public access to federal courts by making dockets and electronic case records viewable from any web-connected computer.

Since PACER’s inception, the Judicial Conference has charged fees for its use because Congress has never appropriated funds to cover the cost of PACER operations. J.A. 2589, 2632. Although the federal judiciary is an independent branch of government, it depends largely on appropriations of taxpayer dollars from Congress in order to function. See, e.g., J.A. 455–2351 (excerpts of Financial Services and General Government Appropriations budget requests to the House Committee on Appropriations).

² This and other Reports of Proceedings for the Judicial Conference are available online at <https://www.uscourts.gov/about-federal-courts/reports-proceedings-judicial-conference-us>.

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