ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

HONORABLE ROSLYNN R. MAUSKOPF
Director

WASHINGTON, D.C. 20544

October 19, 2022

Honorable Richard J. Durbin
Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I write to provide you with an update on the Judiciary's program to modernize the Case Management/Electronic Case Files (CM/ECF) system and to improve Public Access to Court Electronic Records (PACER). Since my letter of January 11, 2022, regarding S. 2614, the "Open Courts Act of 2021" (OCA), a number of significant events have transpired, including progress on our modernization effort, the release of an estimate on the OCA by the Congressional Budget Office (CBO), the appointment of members to our Electronic Public Access (EPA) Public User Group, and the status of a settlement reached in PACER litigation.

Modernization

Our work on modernizing the CM/ECF system is well underway. A modernized system will significantly improve our cybersecurity posture and benefit not just the courts, but also litigants and the public who seek to access court records. The modernization project incorporates the fundamentals of today's IT development best practice principles: user-centered design and iterative, agile development based on testing and user feedback. The modernized CM/ECF system will be developed using DevSecOps methodologies, tools, and processes; be cloud-based, shifting storage and operations to the cloud; and will implement modern data standards with a data catalog and data governance framework.

The modernization approach is guided by recommendations from an assessment of our current CM/ECF system conducted by 18F, a technology consultancy within the General Services Administration (GSA). Additionally, we have had discussions with the National Center for State Courts (NCSC) and federal agencies that recently have implemented new enterprise systems or have performed digital transformation of their legacy enterprise systems.

One of our first steps will be to modernize the current PACER service, a public interface to the CM/ECF system, which will provide users with enhanced functionality to search court records using a modern search platform. The PACER search technology replacement will

include a unified search capability; be cloud-based and both intuitive and user-friendly; and will make possible records searches from a central repository that crosses court boundaries nationally. This will eliminate the need for users to search for records at each individual federal court. Unified search capability will also enable full text searches and searches by judges' names – features that PACER users have identified in the past as a critical search functionality. The new system will take advantage of modern search technologies and algorithms, including "fuzzy" search logic so that misspellings and similar words are discovered.

The new search technology will be both easy to use and free for non-commercial users. During its March 2022 session, the Judicial Conference of the United States (the Conference) endorsed "making all searches free of charge for all non-commercial users of any future new modernized case management, electronic filing, and public access systems implemented by the judiciary." This policy change shows the Conference's continued commitment to increase free public access to judicial records.

The Judiciary is proceeding with this modernization effort with existing funding mechanisms, on a sustainable schedule, to ensure the modernized system is secure and effective. While we are not dependent on further legislative authorization to improve our system and public access to court records, we remain concerned that the OCA may unduly constrain the effort we have underway either through funding limitations, by expanding the impact beyond CM/ECF, or by not providing the necessary flexibility. However, we acknowledge Congress's interests in the public accessibility of judicial records housed in CM/ECF and made available through PACER and legislating based on those interests. We remain available to meet and discuss specific bill language.

CBO Estimate on OCA

On September 26, 2022, the Congressional Budget Office (CBO) released its estimate on the potential and significant short and long-term costs and revenue losses of the OCA. Over a ten-year estimation period, the estimate projects direct system costs in the hundreds of millions of dollars, documents the loss to the Judiciary of approximately $1 billion from the elimination of PACER fees, attempts to quantify revenue associated with speculative new temporary PACER and filing fee increases, and identifies the need for nearly half a billion dollars in new discretionary appropriations to make up for shortfalls.

The estimate acknowledges that the costs could vary considerably based on numerous caveats, variable factors, and "areas of significant uncertainty." Variable factors include the total cost of the modernization, the number of contractors needed, the duration of the work, assumed systemwide savings and how quickly they would accrue, and theoretical revenue predictions – how much the Judiciary could raise in additional revenue pursuant to the new fees authorized by the bill.

The CBO estimate includes expectations that the Judiciary would be able to raise current PACER fees for high-volume users by 50 percent and generate $82 million over a three-year period. Additionally, the CBO produced an estimate of over $300 million in revenues based on an authorization for the Judiciary to increase filing fees on litigants by an assumed 40 percent, on average. The creation, application, and impact of these fees is highly speculative and depends on

an intervening and potential future action by the Judicial Conference as well as the future and unpredictable behavior of fee payers, who may change their practices in significant ways in order to avoid any fee increase. Further, increasing filing fees by 40 percent would create substantial access to justice issues for litigants. The uncertainty of these fee revenue estimates increases the likelihood that the Judiciary will have to seek even more additional appropriations to make up any shortfalls, beyond CBO's current estimate.

Open Courts Act Discussions

Our discussions over the past few months with congressional staff, including those with the bill's sponsors, have been productive and we hope the discussions will result in revisions to the bill that achieve the proponents' goals while alleviating the Conference's concerns. We believe these constructive discussions have addressed several important separation-of-powers concerns related to the executive branch, specified the courts for which the AO is expected to build the new system, and clarified the scope of the records that would be publicly available via the modernized system. However, our understanding is tentative as no current bill language has been shared, nor have we received further feedback for the last few months.

My staff remains available to discuss and hopefully resolve the remaining issues, chief among them identifying a stable, predictable, and sufficient source of funding for the development, implementation, and maintenance of the new system. We are very concerned that a heavy reliance on the annual appropriations process would place CM/ECF and PACER, which support some of the most critical and fundamental day-to-day functions of the courts, in direct competition for the very first time with other essential court operations. The risk of a critical funding shortfall remains unacceptably high. To mitigate this risk, we have proposed a new dedicated funding mechanism that would pay many of the costs of modernizing and operating our systems without increasing the financial burden on litigants or requiring significant new appropriations. We continue to ask for your consideration and support of this proposal, which would substantially address the branch's funding-related concerns.

We would also like to keep you apprised of developments concerning the Judiciary's Electronic Public Access program.

EPA Public User Group

On October 11, 2022, the Judiciary announced new members of the EPA Public User Group. The members represent a cross-section of PACER users, including representatives of the legal profession, commercial businesses, the media, academia, government agencies, and the public. The Public User Group as well as other internal user groups will provide feedback and test the modernization of search functions for the new PACER replacement.

Established in the summer of 2019, the Public User Group has met more than a dozen times to discuss and provide advice on a wide range of issues relating to electronic public access to court records. Meeting agendas and summaries can be found on uscourts.gov.

PACER Litigation Settlement

An October 11, 2022, court filing provides details of the settlement reached, but still under court review, in the *National Veterans Legal Services Program v. United States*, a 2016 class action civil suit against the federal government in which plaintiffs argued that charged PACER fees exceeded the costs of maintaining PACER in violation of the E-Government Act of 2002. The settlement contains no admission or finding of liability. The district and appellate courts found that the vast majority of PACER fees were appropriately allocated. The Judiciary continues to contend that it has always charged and expended PACER fees appropriately. Nevertheless, after the district court's ruling four years ago, the Judiciary immediately began funding non-covered services only through appropriated funds and will continue to do so. As such, the proposed settlement has no impact on the Judiciary's current budget structure or its funding requirements.

Thank you for your continued interest in and support of the Judiciary. If we may be of further assistance to you in this or any other matter, please do not hesitate to contact us through the Office of Legislative Affairs at 202-502-1700.

Sincerely,

Roslynn R. Mauskopf

Roslynn R. Mauskopf
Director

Enclosure

cc: Honorable Charles E. Grassley
Honorable Ron Wyden
Honorable Rob Portman

Identical letter sent to: Honorable Jerrold Nadler

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

January 11, 2022

Honorable Charles E. Schumer
Majority Leader
United States Senate
Washington, DC 20510

Dear Mr. Leader:

I write to convey the views of the Judicial Conference of the United States (Conference) regarding S. 2614, the "Open Courts Act of 2021." In November 2020, my predecessor sent letters to you and Leader McConnell expressing the Conference's opposition to the Open Courts Act of 2020. Since then, the Judiciary has taken significant additional steps toward modernizing our electronic case management system and improving public access to court records. Regrettably, despite that progress, the Senate Judiciary Committee recently voted to favorably report S. 2614.

The Conference continues to have concerns with the legislation, and we believe the bill would benefit from additional, mutual collaboration between our branches of government before it is considered on the floor of the Senate. I respectfully request the Senate defer consideration of this bill until we have had further discussions with you on a legislative approach that will meet the needs of the federal Judiciary and the public and also address the concerns of Congress. Ultimately, our goal is to deliver the best system possible for all stakeholders, both in the public and in the Judiciary.

In directing the Judiciary to make the Public Access to Court Electronic Records (PACER) system "free" to the public, the bill eliminates, with minor exceptions, the PACER fees which Congress originally established. While suggesting additional appropriations may be provided, it fails to provide for an adequate, predictable, and stable, replacement funding source, relying instead on increased filing fees as the backstop for providing this service. The Conference opposes increased filing fees because of the barriers it would create for litigants' access to justice. While the Senate Judiciary Committee attempted to address some access to justice concerns, S. 2614 continues to create barriers to the courts for some litigants and financial uncertainty for the Judicial Branch. Moreover, the Committee's new proposals may impose additional barriers and delays for litigants.

We also continue to have certain operational and implementation concerns with the provisions in the bill related to the overhaul of the Judiciary's Case Management/Electronic Case Files system, which is the backbone system the federal courts depend on for mission critical day-to-day operations. The Judiciary is presently working towards modernizing our case management system, but the proposed legislation contains prescriptive language that might create considerable delays and increased costs.

For these reasons and others that are more fully discussed in the attached document, we ask that the Senate work with us on alternatives to the bill that would support, rather than impede, our shared objectives. We stand ready to engage in discussions with the Judiciary Committee, the bill's sponsors, and Senate leadership to make the legislation workable.

If we may be of assistance to you in this or any other matter, please do not hesitate to contact us through our Office of Legislative Affairs, Administrative Office of the United States Courts, at 202-502-1700.

Sincerely,

Roslynn R. Mauskopf

Roslynn R. Mauskopf
Secretary

Enclosure

Identical letter sent to: Honorable Mitch McConnell

cc: Honorable Dick Durbin
Honorable Chuck Grassley
Honorable Ron Wyden
Honorable Rob Portman

Administrative Office of the U.S. Courts
Review of H.R. 5844 and S. 2614, the Open Courts Act of 2021 (OCA)

The OCA provisions that would increase filing fees continue to be of concern

The Judicial Conference of the United States (Conference) continues to have concerns that H.R. 5844 (as introduced) and S. 2614 (as ordered reported by the Senate Judiciary Committee) would not provide a workable mechanism to fund the modernization effort of the Judiciary's case management and electronic filing system or maintenance of its electronic public access services. The Conference opposes legislation that would necessitate an increase in filing fees to compensate for the elimination of PACER user fees. The Conference believes such legislation would increase barriers to filing suit for many litigants and thus unduly hinder access to justice. The funding structure of H.R. 5844 and S. 2614, both as introduced and amended, would drastically shift the cost burden to litigants – who may not be proportionate users of PACER's services and 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.

We appreciate that the Senate Judiciary Committee amended S. 2614 to add an additional potential funding source via authorized appropriations, but an authorization does not ensure that any such funds would be forthcoming through the annual appropriations process; indeed, S.2614 specifically contemplates that increased filing fees may be necessary to cover costs "not otherwise provided by appropriations." Without any assurance of consistent appropriations for OCA implementation, the Judiciary would likely need to charge federal litigants significant additional filing fees to continue developing, rapidly delivering, sustaining, operating, maintaining, and providing "free" public access to the new system. Although the goal of limiting filing fees for those less able to pay is laudable and consistent with the rationale underlying the Conference's position, the legislation's new requirement that the additional filing fee cannot be imposed on first-time individual litigants would drive the fees even higher for all other litigants, which could deter those litigants still subject to the fee from filing cases and thus nonetheless unduly hinder access to justice. In addition, the implementation of processes to evaluate and track new categories of litigants for fee assessment purposes will inevitably require additional resources for the Judiciary.

Furthermore, both H.R. 5844, as introduced, and S. 2614, as amended, continue to structure filing fees based on the type and estimated complexity of actions brought, notwithstanding the Conference's repeated opposition to such requirements given their administrative unworkability. Filing fees are generally paid at the outset of litigation, the point at which the complexity of the type of action is usually the least clear and when the extent to which the action will require use of the new court case records system is least predictable. Irrespective of the cause of action, claim for relief, or the amount of damages demanded, some cases are relatively straightforward or may be quickly resolved, while other seemingly simple cases turn out to be complicated and time-consuming or may even become class action suits or multi-district litigation cases. A graduated 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 at the outset of the case, and then later amending their pleadings to add other causes of action, claims for relief, or additional damages. This would make it

increasingly difficult for courts to manage their caseloads. Trying to determine the complexity of a case by the nature of the cause of action, the burden the case will impose on the new court case records system, or some other standardized method, would be speculative, burdensome to court staff, unreliable, and prone to manipulation by litigants. Unable to reliably determine or 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. Additionally, a non-standardized fee schedule will create uncertainty for potential litigants.

The OCA Must Ensure Flexible and Reliable Funding Sources

A stable, predictable, and sufficient source of funding is essential to developing and implementing a new system, especially if PACER fees are reduced or eliminated.

The Judiciary seeks a stable, predictable, and sufficient source of funding dedicated to development, operation, and maintenance of a modernized case management, electronic filing, and public access system, including the migration of data and documents from the legacy systems that courts currently use to manage millions of cases and that the public uses to access over 1.5 billion documents (a quantity that is growing rapidly). Continuous, stable funding streams will be necessary, especially for the user-centered, iterative, and agile development approach needed to make the system more publicly accessible and to do so expeditiously. To accomplish a successful IT overhaul like this, the Judiciary needs flexibility to extend authorized funding streams to complete the requirements of the OCA as a single, unified project, rather than funding that is designated to either the case management modernization and maintenance effort or the public's ability to access that data through a public access portal or search platform. These functions are likely to be even more closely intertwined in a new modernized system and the Judiciary must be able to respond to changes in the marketplace or technology to improve both the case management system and public access as circumstances allow.

The OCA eliminates user fees for high volume users

As currently drafted, two or three years following enactment, H.R. 5844 and S. 2614 will eliminate user fees for high volume users, including entities and corporations that use court records for profit as the basis of their business models, in perpetuity. While the OCA prescribes additional PACER fees for high volume users for the first two or three years of development of a new system, the OCA then would shift the burden of supplementing the business expenses of for-profit entities onto the taxpayer, or worse, court litigants. Continuing to bill high-volume users beyond the first two or three years following OCA enactment, could satisfy some of the Judiciary's concerns about long-term funding stability and still accomplish the larger goal of free access to PACER for the public at large. The Judiciary requires continued access to this funding stream or similarly reliable funding to sustain ongoing agile development, operation, and maintenance of the new system, as well as to cover the costs of migrating and reformatting the documents contained in the legacy system into the new system.

Discretionary Appropriations in S. 2614 are not a Stable, Predictable, Funding Source

As noted above, the Conference continues to have concerns with S. 2614, as amended by the Senate Judiciary Committee, that beyond two or three years, the only options for the Judiciary to fund the development, delivery, and sustainment of a new case management system are to seek discretionary appropriations, or in the absence of adequate appropriations, to raise filing fees. The Judiciary needs sufficiently stable and predictable funding to support the costs of modernizing CM/ECF and providing free public access to documents in the new system after the first two or three years of enactment. Discretionary appropriations are neither stable nor predictable Appropriations levels change significantly from year to year depending on a wide range of factors unrelated to the Judiciary's activities or needs, and the timing of appropriations is often late and difficult to predict accurately. Subjecting the costs of developing, implementing, and maintaining the case management and public access functions to the appropriations process will significantly burden the Judiciary's overall appropriation request, introduce annual uncertainty into the modernization, ongoing security enhancements, and maintenance effort, and likely force the Judiciary to resort to charging potentially exorbitant filing fees to cover unmet costs.

Rather than rely on variable discretionary appropriations or increased filing fees as major funding streams for S. 2614, the Judiciary suggests instead a change to the post-collection allocation of existing filing fees. Civil and bankruptcy filing fees are allocated among several different agencies/entities after collection. Allowing the Judiciary to keep the portions of those current filing fees that are now sent to the Treasury could create a dedicated funding stream to reimburse expenses incurred pursuant to the Act. Such a stream would provide substantial and consistent revenue for OCA implementation without increasing the burden on any litigant because it leaves the amount charged to each filer unchanged.

S. 2614 Conditions Some Funding Streams on Availability of Appropriations

While we urge a move away from discretionary appropriations as a funding source in S. 2614 for the reasons outlined above, we also note that the certainty and interpretation of the appropriations provisions as drafted by the Senate Judiciary Committee in S. 2614 remain unclear. The bill limits some of its newly created funding streams to cover only costs "not otherwise provided by appropriations." It is not clear how this would be workable in practice. If the intention of this provision is to require the Judiciary to seek a specific appropriation for OCA implementation costs and then to access the new funding streams only to the extent that sufficient other appropriations are not provided, the Judiciary notes its continuing concerns about the adequacy of discretionary appropriations as a funding source for this project given the inherent volatility of the appropriations process and its attendant impacts on the amount and timing of funds received. In addition, waiting for a full appropriations cycle before being able to even begin the implementation of alternative funding streams would delay the availability of any funding from that source by at least a year and likely more.

The Senate's drafting of this provision could also be read, however, as requiring the Judiciary to exhaust *all* existing available appropriations (vs. seeking a new appropriation just for this purpose) before being able to implement the new fees. This could significantly deplete the appropriation that currently provides for all information technology expenses for the district, appellate, and bankruptcy courts, as well as probation and pretrial services offices, which would

leave other critical IT needs unaddressed, while also further delaying the Judiciary's access to the new funding streams.

If an appropriations provision remains in the final Senate bill or if the House incorporates an appropriations provision in its bill, we suggest that the OCA clarify that new funding streams are available in the absence of sufficient new appropriations for OCA implementation, rather than the exhaustion of existing appropriations otherwise available. Thus, the provisions should be amended to limit the availability of new funding streams to costs not otherwise provided by appropriations to address only a subsequent appropriation provided for the specific purpose of OCA implementation.

The Judiciary Requests Budgetary Safeguards in the OCA

Given the continued uncertainty for funding OCA implementation, we request that Congress include safeguards in the OCA, to ensure that the OCA does not disrupt funding for court operations if realized costs are higher than the funding streams provided for in the OCA. Such mechanisms exist, but it is up to Congress to choose to allocate them.

We share the view that CM/ECF modernization is a critical goal. We also share the goal that PACER be provided without charge to most ordinary users, which is already the case. Moreover, the Judicial Conference has not opposed – in the abstract – to offering PACER services without charge even to high-volume users. But – unless Congress uses its power to create an alternative reliable funding stream – reducing or eliminating PACER fees for high volume users will continue to place other important public values at risk.

H.R. 5844 and S. 2614 can better address the inherent uncertainty around total costs and the adequacy of new funding streams by including language from last year's House-passed version of the OCA, H.R. 8235, that creates a budget "safety valve." The language allows the Director of the Administrative Office of the United States Courts – after appropriate consultation with Congress – to propose changes to the budget, schedule, or scope of OCA implementation in the event of a budget deficit in any given fiscal year. This critical flexibility provides a necessary counterbalance to the OCA's prescriptive requirements on milestones and capabilities and will allow the Judiciary to make any needed adjustments in its implementation plan to avoid a significant budget emergency.

The OCA Excessively Interferes with the Judiciary's Ability to Manage Its Own Core Day-to-Day Operations

The Judiciary must have the flexibility to design, develop, and deploy a modernized and secure case management and public access system that most effectively accommodates our constitutional role in the American system of justice. When modernizing our case management system, the Judiciary is committed to developing a solution that meets the goals and objectives envisioned by the legislation. We are concerned that this legislation provides an unreasonably short time for implementation, delineates system components and increases the number of required external parties (GSA and the Archivist) involved in many stages of system

development. This will unduly constrain the Branch's ability to use modern systems development techniques to transition to a modern technology architecture as well as increase project costs and delay schedules. We would prefer to pursue the iterative and agile development process as 18F recommends and that Congress provide reasonable time to transition to a new solution to minimize the risk of adversely impacting day-to-day court operations. We believe Congress agrees with GSA's recommendation and would want to further amend the OCA accordingly.

H.R. 5844 and S. 2614's requirement of "coordination" with GSA at multiple stages of the development process is unnecessary but, in any event, must not be interpreted to mean that GSA must approve the Judiciary's actions. Indeed, the Judiciary already has been and plans to continue to *consult* with GSA and other government experts on how we might best achieve the OCA's objectives for modernization. However, we would have serious concerns if the OCA were interpreted to authorize the Executive Branch to have a "coordination role" that entailed control, access, and approval authority. Such an interpretation would raise serious separation of powers concerns, increase project costs, and cause unnecessary delays.

Similarly, we are concerned that the current cybersecurity language in S. 2614 may be interpreted to require the Judiciary to comply in detail with all Executive Branch requirements such as Executive Orders that would otherwise not apply to the Judicial Branch, into which the Judiciary had no input, and were not crafted with any special characteristics of the Judicial Branch in mind. Moreover, some of those Executive Branch requirements, such as software agents that could be required to run in our environment and network traffic routing requirements, may infringe separation of powers (by giving the Executive Branch – often a party to judicial proceedings – inappropriate and potentially unfettered access to Judicial Branch records)) and increase Judiciary implementation costs. The Executive Branch, frequently a party to judicial proceedings, must not have inappropriate and potentially unfettered access to Judicial Branch records. We agree with Congress that strong, modern cybersecurity safeguards are imperative for such a critical system. We believe we can accomplish the spirit of the legislation by making credible risk-based decisions informed by annual security assessments of a modernized case management and public access system, consistent with relevant cybersecurity standards that are practiced by Executive Branch agencies.

The OCA Should More Clearly Specify Which Courts and Records It Covers

H.R. 5844 and S. 2614 do not explicitly define the scope of federal courts or federal records to which the legislation would apply. The definitions of these terms may not be self-evident. While the AO is prepared to replace the current CM/ECF system (under appropriate circumstances as we have described in this and other correspondence), we lack the resources, expertise, and authority to build a system to manage case records for courts other than those that currently participate in CM/ECF. Thus, if the definition of "federal court" were interpreted to include administrative tribunals (such as immigration courts) or the Supreme Court, it would pose serious problems for this project.

Likewise, the OCA might be interpreted to require the new case record-keeping system to include and make available to the public certain records that would in fact be inappropriate to so

release, such as case records under seal or records that are not normally included in the docket (such as confidential internal deliberations among judges or schedule planning materials). Even with regard to case documents filed with the courts, the Judiciary requires flexibility to determine when they can be made available to the public. For example, most court documents filed by prisoners or self-represented litigants are filed with the court on paper, and there may be a brief delay in entering these documents into the system in an electronic format (especially a machine-readable and searchable format). Furthermore, case documents may contain sensitive, confidential, or even classified information mistakenly filed by litigants without proper notice. Time to conduct quality assurance and quality control is needed to prevent these types of inadvertent disclosures from becoming publicly available..

The Judiciary proposes defining "Federal court" to include only courts that currently access CM/ECF. These courts include district courts, courts of appeals, bankruptcy courts, and the Court of Federal Claims. We further propose defining "Public federal court case documents" to clarify the documents in a modernized and secure case filing system that may appropriately be publicly accessible. Such language would ensure that a bill to grant public access to case records without charge to users would not impinge on Judicial discretion or unintentionally expand the scope of public court records in contravention of existing federal law, rules, and practice.

The Administrative Office of the U.S. Courts welcomes the opportunity to further discuss any of the foregoing matters with Congress, and to work collaboratively on language to address concerns outlined above.