

Hon. Dick Durbin
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C., 20510

Hon. Chuck Grassley
Ranking Member, Senate Judiciary Committee
135 Hart Senate Office Building
Washington, D.C., 20510

December 6, 2021

Dear Chairman Durbin and Ranking Member Grassley:

We write to support your efforts to bring the Open Courts Act (S. 2614) to a vote before the Senate Judiciary Committee on December 9. We have long appreciated your commitment to transparency in all branches of government, including the judiciary, and believe that a bill to modernize the third branch's case management system in a way that improves public access is a critical component of this commitment.

Among the many reasons to support S. 2614, we want to bring your attention first to how the current CM/ECF and PACER are tremendous liabilities for the judiciary financially and security-wise.

Two federal courts recently found that the judiciary has been using fees garnered from PACER users to fund programs that have nothing to do with case management or publicly accessing court filings. That's illegal. And though the lawsuit that prompted these rulings is nearing a settlement, a program that rakes in \$145 million annually, as PACER does, to accomplish something that costs a lot less — uploading and retrieving filings (static PDFs) and recording docket entries (static text) — will remain ripe for abuse. Taxpayers should never have been on the hook for defending the judiciary's illegal fee usage scheme in the first place and should not be expected to pay for any future litigation.

The current system is also a security risk. A modernized CM/ECF and PACER, as laid out in S. 2614, would vastly increase the privacy of parties who require it and improve the security of sensitive data found in filings. With the current paywall, there's an appearance of privacy, but too often private data is found to be unredacted in court documents. New, more responsive technology — not patchwork updates to a patchwork system — must be deployed to ensure private information remains private.

The judiciary knows of these liabilities, though they tend not to acknowledge them in public discourse. In recent weeks, the Administrative Office has sought to slow down passage of S. 2614 by pushing three feigned concerns ([pp. 3-4](#)) over implementation schedule, funding and so-called "prescriptive" language. We'll also address a fourth concern raised by the AO over registration-free access.

In the first assertion, the AO says it would prefer to be able to set its own timeframe to make improvements to CM/ECF and PACER. But Congress has every right to insist on a tighter one and has the responsibility to do so if it believes it necessary. Considering the judiciary has had decades to upgrade the system, this modernization project might never end without a clear deadline set by Congress.

Contrary to the second assertion, S. 2614 already creates a sustainable funding model. On one side of the ledger, the bill would greatly reduce costs by replacing the current, diffuse system — there's not one CM/ECF and one PACER, but myriad different software services operating in courthouses nationwide — with a single unified one, thereby saving money on upkeep. Language to regularize quality, accessibility and performance standards would also keep costs down. On the other side of the ledger, the bill permits the collection of usage fees from federal agencies, "power users" and others to fund the project.¹

¹ Although permitted by the text, it's our belief that filing fees would not need to be increased given that, again, creating a database of static documents should cost in the single- or low-two-digit millions, no more. The CBO's analysis of an earlier, yet nearly identical, version of the bill supports this assertion, and the AO has provided no comparably rigorous analysis to support its projections.

The third assertion, that certain S. 2614 language “might create delays or that could impede our ability to take advantage of emerging technology” is a red herring, as there is no such restrictive or language in the bill.²

Finally, we maintain that all content within the new filing system be publicly accessible *without* registration, and we ask you to oppose any amendment that seeks to include a registration provision. Removing *all* barriers to access is the best way to ensure Americans can engage with and understand our courts, without the government needlessly tracking who’s accessed which documents.

After all, America’s adversaries can easily create accounts in *any* system, so there’s no security benefit to requiring users to register before reading or downloading court filings. The well-documented proliferation of fake accounts on social media websites proves that bad actors can always create another account. Various kinds of legal documents have already been freely available online for decades, so we can be sure that open availability via PACER would not endanger national security.

The Open Courts Act is based on years of study on how best to modernize CM/ECF and PACER. It would end the budgetary and security liabilities in the current system. It would vastly improve access to information and access to justice. And it has regular folks in mind, people who find themselves in court and are forced to navigate a diffuse, hard-to-search system that costs far more than it should.

We thank you for moving the bill through Committee and are happy to answer any questions you may have.

Sincerely,

American Society of Magazine Editors

Data Coalition

Demand Progress

Digital Democracy Project

Electronic Frontier Foundation

Fix the Court

Free Law Project

Government Information Watch

GovTrack.us

Lincoln Network

National Freedom of Information Coalition

National Press Photographers Association

National Security Archive

National Security Counselors

National Taxpayers Union

Project On Government Oversight

Public Knowledge

R Street Institute

Radio Television Digital News Association

Society of Professional Journalists

TechFreedom

Richard Leiter, Director, Schmid Law Library,

University of Nebraska College of Law

Robert Truman, Director, Paul L. Boley Law Library,

Lewis & Clark Law School

Beth Williams, Senior Director, Robert Crown Law

Library, Stanford Law School

² A 2020 version of the Open Courts Act did explicitly say, for example, that the new system must use “Agile software development” (we prefer the more generic “iterative software development and release practices”), yet our reading of the current text is such that additional language is not necessary for GSA’s tech service agency, 18F, to carry out its iterative approach.