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

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NATIONAL VETERANS LEGAL SERVICES PROGRAM, ET AL.

v.

UNITED STATES

CERTIFICATE OF INTEREST

Counsel for amici curiae certifies the following:

1. The full names of all amici curiae represented by me are: **American Civil Liberties Union; American Association of Law Libraries; American Library Association; Cato Institute; and Knight First Amendment Institute at Columbia University.**
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: **N/A.**
3. All parent companies and any publicly held companies that own 10 percent or more of the stock of the amici curiae represented by me are: **None.**
4. The names of all law firms and the partners or associates that appeared for the amici curiae now represented by me in the trial court or agency, or

are expected to appear in this court are: **Relman, Dane & Colfax PLLC (by Sasha Samberg-Champion and Stephen M. Dane) for Amicus Curiae American Association of Law Libraries in the District Court for the District of Columbia.**

Date: January 23, 2019 /s/ Brett Max Kaufman

Brett Max Kaufman
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTERESTS OF AMICI CURIAE[1]

The American Civil Liberties Union (ñACLUò) is a nationwide, nonprofit, nonpartisan organization with more than two million members and supporters dedicated to the principles of

The American Library Association (ñALAò) is the foremost national organization providing resources to inspire library and information professionals to transform their communities through essential programs and services. For more than 140 years, the ALA has been the trusted voice for academic, public, school, government and special libraries, advocating for the profession and the libraryôs role in enhancing learning and ensuring access to information for all.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, [illegible]

reject the governmentôs interpretation of the statute. By arguing that it may use PACER fees for purposes entirely unrelated to the upkeep of the system, the government at least raises a substantial constitutional question. Numerous Supreme Court and appellate cases have held that the government may not impose fees that condition the free exercise of First Amendment rights unless they are reasonably related to the maintenance and administration of the platform and conditions that allow for the enjoyment of those rights. Though it would be inappropriate forhtr t

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ñindispensable attributeò of American justice. *Id.* at 569. Courts are instruments of democracy, and as such they are subordinate to, and ultimately supervised by, the public. As the Court explained: ñPeople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.ò *Id.* at 572. And the First Amendmentôs various strains ð the freedoms of speech, press, and assembly ð converged in the context of public access to the workings of the judiciary, ñgiv[ing] meaning to those explicit guarantees.ò *Id.* at 575. ñThe explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.ò *Id.* at 576ï77.

In a remarkable concurrence ð one whose approach to deciding First Amendment right-of-access questions would become the full Courtôs less than two years later ð Justice Brennan highlighted the First Amendmentôs ñspecific structural significance.ò *Id.* at 594 (Brennan, J., concurring); *see Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 605ï06 (1982). As he explained, the First Amendment ñhas a *structural* role to play in securing and fostering our republican system of self-government.ò *Richmond Newspapers*, 448 U.S. at 587. ñ[P]ublic access,ò he concluded, ñis an indispensable element of the trial process itself,ò and it ñassumes structural importance in our ógovernment of laws.ôò *Id.* at 597 (quoting *Marbury v. Madison*, 1 Cranch 137, 163 (1803)). As the full Court would soon

elucidated in Justice Brennanôs *Richmond* concurrence as the governing framework for right-of-access claims. *See Globe Newspaper*, 457 U.S. at 605ï06. Elaborated more fully in subsequent cases, the approach asks courts to apply what are commonly known as the twin tests of ñexperience and logicò to determine whether the right of access applies to a particular type of judicial proceeding ð or, critically, a proceedingôs associated records. *Snp.* *a ʕ* *eds* *sp]*

Taking cues from the rationales expounded in this trio of Supreme Court decisions, lower courts quickly began to apply the First Amendment right of access to contexts beyond the criminal trial. Within years, federal courts of appeals had applied the right to proceedings and related documents to all manner of criminal contexts, including pretrial suppression hearings,[3] bail hearings,[4] parole hearings,[5] contempt proceedings,[6] post-conviction proceedings,[7] transcripts of chambers and sidebar conferences,[8] plea and sentencing hearings,[9] pretrial motions,[10] and documents concerning judicial recusals.[11] And over time, ñthe federal courts of appeals have widely _ ' delT f er × l MM p W ebodca F

First Amendment right of access applies to a panoply of civil (and even non-judicial administrative) matters and records, as well. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014).[12]

All of these courts have taken the logic of *Richmond Newspapers* and its progeny to heart, concluding that what is true of physical access to courtrooms to observe criminal trials is also true of access to proceedings and records throughout

[12] *See, e.g.*, *N.Y.C. Transit Auth.*, 684 F.3d at 305 (administrative civil infraction hearings); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006) (documents submitted with summary-judgment motion); *Pellegrino*, 380 F.3d at 93 (docket sheets); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067ï75 (3d Cir. 1984) (transcript of preliminary-injunction hearing); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252ï54 (4th Cir. 1988) (exhibits to summarÐïR ina®

the criminal and civil justice system. *See, e.g.*, *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983). As the Third Circuit has explained:

> As with other branches of government, the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.

Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 161 (3d Cir. 1993) (quoting *Rep. of Phil. v. Westinghouse Elec. Corp.*, 949 F.2d 653, 660 (3d Cir. 1991)). Likewise, courts have recognized that not only is ñ[p]ublic oversight of courts and therefore public access to judicial operation . . . foundational to the functioning of government,ò but that ñ[w]ithout such oversight, the government can become an instrument for injustice.ò *Ibrahim v. DHS*, 62 F. Supp. 3d 909, 934ï35 (N.D. Cal. 2014).

To be sure, where the First Amendment right of access applies to create a right of access to judicial proceedings and records, that right is not absolute. Instead, it is a qualified one that grants the public and its ñsurrogates,ò the news media, *Richmond Newspapers*, 448 U.S. at 572 (plurality op.), *presumptive* access to court records and documents. That presumption, though, is a weighty one. Proceedings and records to which the First Amendment right of access attaches ñcannot be closed unless specific, on the record findings are made demonstrating that óclosure is essential to preserve higher values and is narrowly tailored to serve

that interest.ôò *Press-Enterprise II*, 478 U.S. at 13ï14 (quoting *Press-Enterprise I*, 464 U.S. at 510).

II. The First Amendment right of access attaches to PACER.

A. PACER is a digital index of and platform for obtaining more than one billion judicial records that are themselves subject to the First Amendment right of access.

roughly 500 million requests for information annually,[20] across approximately 43 million cases.[21] By 2014, PACER housed ñmore than one billion retrievable documents spread among the 13 courts of appeals, 94 district courts, 90 bankruptcy courts, and other specialized tribunals.ò[22] Using the governmentôs 2012 estimated rate of account creation, there are by now 2.5 million PACER users,[23] comprised of ñlawyers; pro se filers; government agencies; trustees; bulk collectors; researchers; educational institutions; commercial enterprises; financial institutions; the media; and the general public.ò[24] As Chief Justice Roberts recently observed, ñPACER has enabled thousands of reporters, academics, and members of the public to find court records in a way that would have been impossible before the advent ofò PACER and CM/ECF.[25] Indeed, PACER has made the right of access a meaningful one in the digital age.

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[20] *See* U.S. Courts, *Electronic Public Access Program Summary December 2012*, at 1, https://www.pacer.gov/documents/epasum2012.pdf (ñ2012 Access Summaryò).

[21] *See* Brian Browdie, *Why Pacer Should (and Should Not) Be Like Edgar*, Quartz, Nov. 24, 2014, http://qz.com/283772.

[22] Supreme Court of the U.S., *2014 Year-End Report on the Federal Judiciary*, at 6 (Dec. 2014), https://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf (ñ2014 Year-End Reportò).

[23] *See* 2012 Access Summary at 1 (estimating ñapproximately 13,000 new accounts added each monthò).

[24] *See id.* at 5.

[25] 2014 Year-End Report at 6.

B. PACER satisfies the "experience and logic" tests.

PACER is subject to the First Amendment right of access and, accordingly, restrictions this records system places on public access are subject to *A*

governmental process or record to which the public seeks access, not the past

of the publicôs and the pressôs democratic oversight functions. PACER permits the

Newspaper Co. v. Fenton, 819 F. Supp. 89 (D. Mass. 1993). *Fenton* involved an attempt by reporters from the *Boston Globe*ôs famed ñSpotlightò reporting team to utilize alphabetical indices of criminal defendants in closed criminal trials to conduct investigative reporting on judicial topics of public concern including ñbribery, ex parte dealings, and judicial or other misconduct in connection with the disposition of criminal cases.ò *See id.* at 95 (quotation marks omitted). While the underlying records were available for public inspection at state trial-court clerksô offices, a state statute aimed at protecting the privacy of criminal defendants had restricted access to the index, which had been ña convenient ð formerly public ð record which the Commonwealth ha[d] required trial court clerks to maintain since before ratification of the United States Constitution.ò *Id.*

Judge Douglas P. Woodlock held that, based on both experience and logic, the First Amendment access right applied to the case indices, and that the stateôs denial of access could not be sustained. *See id.* at 91. Judge Woodlockôs great insight was that the Constitution requires public access to be not just literal but meaningful, workable, and efficient. In *Fenton*, there was no dispute that the records that were the ultimate object of the Spotlight teamôs investigations were themselves subject to the First Amendment right of access. *See id.* at 93ï94. Therefore, conditioning or restricting access to the case index was, directly or indirectly, a limitation on that constitutionally guaranteed access. The state statute

at issue ñden[ied] *effective* access to the records of closed criminal proceedings,ò the court wrote. *Id.* at 93 (emphasis added); *id.* at 98 (describing the statute as barring ñmeaningful access to the underlying recordsò).

Critically, the *Fenton* court explained that in order for public access to be meaningful, the Constitution requires a system of organization that enables efficient searching through court records:

> It is not misleading to think of courthouse papers as comprising a vast library of volumes for which docket sheets are the tables of contents. Without the card catalogue provided by alphabetical indices, a reader is left without a meaningful mechanism by which to find the documents necessary to learn what actually transpired in M[m]d d ẋ- ar{

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Any governmental regulation of public access to PACER, including the imposition of fees, constitutes a restriction that must meet this test. In the district court, the government argued that it is ñmisguidedò to contend ñthat PACER fees create a barrier to access.ò Def.ôs Mem. in Supp. of Cross-Mot. for S.J. & in Opp. to Pls.ô Mot. for S.J. at 23, *Nat'l Veterans Legal Servs. Program v. United States*, No. 16-cv-745 (D.D.C. Nov. 17, 2017), ECF No. 74-1 (ñGovôt DDC Br.ò). Astoundingly, the governmentôs argument is that the First Amendment has no bearing on the charging of fees to access PACER because Plaintiffs and the public ñare able to view all electronically filed records free of charge through terminals available at the courthouse.ò *Id.* But this argument ignores reality, and its stilted logic proves far too much.

Although some measure of free public access to PACER (and the documents that reside on the platform) is available to those with means and time to travel to federal courthouses during business hours, that fact does not end the inquiry.[27] It can hardly be disputed that higher PACER fees diminish public access to judicial

[27] In the past, even the judiciary has ®e× e× d - tThe Si] i [illegible] iddT fe

records subject to the right of access.[28] The governmentôs burden is not to show that some alternatives to paying fees exist, but rather that the current level of fees is narrowly tailored to protect a compelling interest. Far from meeting this burden, the government has hardly engaged it.[29]

The Supreme Court has repeatedly explained how courts must analyze the governmentôs imposition of fees as a condition of exercising First Amendment rights. As Plaintiffs argued here and below, *see* Opening Br. of Pls.ïAppellants at 30ï32, ECF No. 20 (ñPls.ô Fed. Cir. Br.ò); Pls.ô Mot. for S.J. as to Liability at 14ï15, *Nat'l Veterans Legal Servs. Program v. United States*, No. 16-cv-745 (D.D.C. Aug. 28, 2017), ECF No. 52, ñ[t]he Supreme Court has held that a government cannot profit from imposingò a fee ñon the exercise of a First Amendment right,ò *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007) (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 113ï14 (1943)), and that the general rule is that ñfees

[28] *See, e.g.*, Erika Wayne, *PACER Spending Survey*, Legal Research Plus Blog (Aug. 28, 2009), http://legalresearchplus.com/2009/08/28/pacer-spending-survey (ñThe unknown/potential costs of using PACER hold back most law school libraries from letting their patrons fully utilize PACER.ò); *see also* RCFP Br. Ä II.

used to defray administrative expenses are permissible, but only to the extent necessary for that purpose,ò *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983); *see Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981) (citing cases invalidating fees ñin excess of costs of administrationò). Those are not stray cases. In *Cox v. New Hampshire*, 312 U.S. 569 (1941), the Supreme Court approved a fee to obtain a license to march only because it was ñnot a revenue tax, but one to meet the expense incident to the administration of [the licensing statute at issue] and to the maintenance of public order in the matter licensed.ò *lit er io1εu3 s1 ne" eeens b ase oito see ' toumlòmlls laethieu'*

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rights. The government has not provided any justification why its current PACER fee structure even arguably meets the narrow tailoring the First Amendment requires of restrictions on public access ð nor could it.

CONCLUSION

For the above reasons, the Court should reject the governmentôs interpretation of the E-Government Act.

Date: January 23, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type-volume limitation of Fed. Cir. R. 28.1(b) and Fed. R. App. P. 32(e) because it contains 6,999 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

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