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.