Nos. 2019-1081(L) & 2019-1083

IN THE 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.

On Appeal from the United States District Court for the District of Columbia in case no. 16-745, Judge Ellen S. Huvelle

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REPLY BRIEF FOR CROSS-APPELLANT

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INTRODUCTION

I. Plaintiffs fail to come to grips with the fundamental problems that beset their attempt to invoke the Court's Little Tucker Act jurisdiction. As an initial matter, they cannot satisfy the basic prerequisite for an illegal exaction claim. Plaintiffs acknowledge that, to maintain an illegal exaction claim, a PACER user must show that "the value sued for was improperly paid, exacted, or taken from the claimant[.]" Response Br. 21 (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)). And plaintiffs implicitly admit (by their silence) that no PACER user can make that showing. As our opening brief explained, the premise of this suit is that the fee revenue collected by the Judiciary over a period of six years was excessive in the aggregate. But even assuming that the fee revenue was excessive in the aggregate (which it was not), there would be no legal basis to treat a fee charged as excessive as to any particular PACER user. Congress gave the Judicial Conference broad latitude to distinguish among users in setting PACER fees, which the Judicial Conference exercised through a variety of fee waivers and exemptions that evolved over time. With respect to any given PACER user, there is no "correct" fee that could form the basis of an illegal exaction claim.

That is unsurprising, because Congress never intended to make the Judiciary's collection or expenditure of fee revenue the subject of second-guessing in court at the behest of a PACER user. Instead, Congress reserved to itself the responsibility to oversee the collection and expenditure of such revenue. Thus, in addition to

plaintiffs' threshold failure to show that the fee charged to any particular class member was excessive, plaintiffs also fail to identify any statute that provides, "either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (quoting *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000)). The E-Government Act has no private enforcement mechanism, and there is no basis to infer one. The proceedings conducted by the district court—which required the Judicial Conference to disclose its communications with Congress, and then declared invalid various expenditures that were made pursuant to the Judiciary's specific budget requests—are unprecedented, and fly in the face of the special solicitude that Congress has shown the Judicial Branch.

II. If this Court reaches the issue, plaintiffs are equally wrong to assert that the Judiciary, acting under Congress's oversight, has been unlawfully expending PACER fee revenue for more than a decade. All of the contested expenditures were for services that provide "access to information available through automatic data processing equipment," as specified in Section 404(a) of the Judiciary Appropriations Act, 1991, as amended by the E-Government Act. Although plaintiffs contend that the aggregate fee revenue collected was greater than "necessary" to provide such access, the extent to which fee revenue is necessary depends on the funding that Congress otherwise provides.

That is why the sponsor of the E-Government Act, Senator Lieberman, wrote to the Appropriations Committee when he had concerns about the uses of PACER fee revenue in 2010. Appx2620-2622. Senator Lieberman's letter urged that Congress should fund the vital programs at issue here through direct appropriations, and plaintiffs echo that view. Response Br. 3. But plaintiffs do not argue that Congress actually did so in the appropriations acts for the fiscal years at issue here. Plaintiffs' speculation that Congress may provide such funding "for future years" is irrelevant, *id.*, because this suit involves fees paid between April 21, 2010 and April 21, 2016, which is the period covered by the general statutes of limitations for claims against the United States. *See* Appx2354 (class certification order). Plaintiffs' challenges to the Judiciary's past expenditures are meritless.

ARGUMENT

I. The Summary Judgment Order Should Be Vacated For Lack Of Little Tucker Act Jurisdiction.

A. There Is No Legally "Correct" PACER Fee That Could Form The Basis For An Illegal Exaction Claim Under The Precedents On Which Plaintiffs Rely.

Plaintiffs correctly acknowledge that a claimant asserting an illegal exaction claim must show that "*the value sued for* was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation[.]" Response Br. 21 (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)) (emphasis added).

Plaintiffs cannot even make that showing in the aggregate, much less for any specific PACER user. Plaintiffs contend that the Judiciary should not have expended fee revenue for certain purposes. But there is no basis to assume that, if some or all of the contested expenditures had not been made during the six-year period at issue here, the Judiciary would have reduced the aggregate amount of fee revenue collected by a corresponding amount. Plaintiffs do not suggest that anything in the governing statute would have required the Judicial Conference to do so. On the contrary, to facilitate long-term projects, Congress provided that fee revenue need not be expended within a particular fiscal year, and thus allowed the Judiciary to carry forward surpluses of fee revenue. *See* 28 U.S.C. § 612(a) (making moneys deposited in the Judiciary IT Fund available "without fiscal year limitation"); *see, e.g.*, Appx3096 (carrying forward surpluses of fee revenue for fiscal years 2008 and 2009); Appx3098 (same for fiscal years 2011 and 2012). Accordingly, even under plaintiffs' cramped view of the permissible uses of PACER fee revenue, the Judiciary could have used the revenue collected during the years at issue here to accelerate its enhancements to PACER. *See*, e.g.*,* Appx2349-2350 (budget request for fiscal year 2011, describing the Judiciary's plans for enhancing PACER and developing the Next Generation of CM/ECF); FY 2018 Judiciary Report Requirement on PACER 4 ("July 2018 Report") (describing the Judiciary's initiatives to improve PACER technology).[1]

[1] https://perma.cc/CP8S-XRVQ

Furthermore, even assuming that the Judiciary would have decided to collect a lower aggregate amount of fee revenue, there is no statutorily "correct" PACER fee for any given user. The substantive statute on which plaintiffs rely—Section 404(a) of the Judiciary Appropriations Act, 1991, as amended by the E-Government Act—gives the Judicial Conference broad latitude to "distinguish between classes of persons" in setting fees and to "provide for exempting persons or classes of persons" in order "to avoid unreasonable burdens and to promote public access" to information available through automatic data processing equipment. And as our opening brief explained (Br. 10-11), the Judicial Conference has exercised that discretion through a variety of fee waivers and exemptions that evolved over time.

There is no basis to assume that the Judiciary would have reduced *pro rata* the fee charged to each class member for each download, if contested expenditures had not been made. The consequence of the fee waivers and exemptions established by the Judicial Conference is that the vast majority of PACER fee revenue comes from a handful of "power users" that profit from the resale of aggregated PACER data. Gov. Br. 9; *see also* Amicus Br. of Next-Generation Legal Research Platforms and Databases 18 (identifying Westlaw, LexisNexis, and Bloomberg Law as the three largest legal database companies). By contrast, in a given year, approximately 350,000 of the 500,000 users who access PACER—or 70 percent—do so for free due to a fee waiver or exemption. July 2018 Report 3.

Plaintiffs do not suggest that the Judicial Conference would have allocated to the "power users" and other large commercial entities the vast majority of any savings that might have resulted from expenditures forgone. Nothing in the existing fee schedule indicates that the Judicial Conference would have concluded that doing so would have achieved Section 404(a)'s objective to avoid unreasonable burdens and promote public access.

Moreover, assuming that the Judicial Conference would have used savings from expenditures forgone to expand the fee waivers and exemptions, it is entirely unclear how such adjustments would have affected any particular user. For instance, the Judicial Conference might have raised the threshold dollar charge that must be incurred before a user is billed. It might have increased the number of free downloads by giving the parties in a case and attorneys of record unlimited free copies (instead of one free copy) of all documents filed electronically. It might have expanded the categories of persons and entities eligible to obtain discretionary exemptions from the courts. And it might have employed any of these approaches in combination.

Plaintiffs' response brief conspicuously fails to address any of these defects in their illegal exaction theory, although all of them were discussed in our opening brief (Br. 23-26). Their response brief is thus more notable for what it omits than for what it says. In short, Section 404(a) does not establish a "correct" fee for any particular

PACER user or download, so no class member can show that "the value sued for was improperly paid." *Eastport*, 372 F.2d at 1007.[2]

B. Plaintiffs Fail To Show That Any Statute Expressly Or By Necessary Implication Gives PACER Users A Damages Remedy.

The class members' inability to satisfy the prerequisite for an illegal exaction claim is unsurprising, because Congress did not intend to give PACER users a damages remedy. And as this Court has made clear, there is no jurisdiction under an illegal exaction theory unless a claimant can show that the "statute or provision causing the exaction itself provides, either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (quoting *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000)).

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[2] In this respect, the claims alleged here are even weaker than the PACER user's claim that was recently rejected in *D'Apuzzo, P.A. v. United States*, No. 16-62769, 2019 WL 2642696 (S.D. Fla. June 27, 2019), *appeal docketed*, No. 19-2311 (Fed. Cir. Aug. 27, 2019), which plaintiffs seek to distinguish. *See* Response Br. 24 n.5. There, the plaintiff alleged that the Judicial Conference had illegally exacted specified sums (30 cents and 50 cents) for downloading two opinions that ostensibly should have been free. Quoting this Court's decisions in *Norman* and *Cyprus Amax*, the district court stressed that "[t]o invoke Tucker Act jurisdiction over an illegal exaction claim, a claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *D'Apuzzo*, 2019 WL 2642696, at *9. The court correctly found no basis for such a claim in the E-Government Act, but the claimant at least purported to identify specific sums that were improperly exacted. Here, by contrast, no class member alleged that it overpaid a specific amount for any particular download, nor could any class member make such a showing.

Plaintiffs make no serious effort to show that Congress intended to authorize PACER users to contest the Judiciary's expenditures of fee revenue through the mechanism of damages actions. The substantive statute on which they rely does not expressly authorize private enforcement, nor is there any plausible basis to infer that Congress intended to do so. Plaintiffs argue that our opening brief "conflates th[e] distinction" between collection and expenditure of fee revenue "by framing the question as being about 'expenditures' rather than fees." Response Br. 12. But plaintiffs' contentions regarding fees turn entirely on their attack on the propriety of the Judiciary's expenditures. The proceedings conducted by the district court—which directed the Judiciary to produce its communications with Congress, and deemed the Judiciary's expenditures improper even though they were made pursuant to detailed budget proposals—would be extraordinary even if conducted with respect to an Executive Branch agency. Those proceedings fly in the face of the special solicitude that Congress afforded the Judiciary by exempting its actions from review under the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 551(1)(B). Indeed, because the Freedom of Information Act ("FOIA") incorporates the APA's exemptions, there is no requirement that the Judiciary's communications even be made public. *See, e.g., Warth v. Department of Justice*, 595 F.2d 521, 522 (9th Cir. 1979).

Plaintiffs miss the point when they declare that "Congress has full confidence in the federal judiciary's impartiality." Response Br. 28 n.6. The point is that Congress did not put individual judges in the position of second-guessing the

expenditures made by the Judicial Conference, "which consists of the Chief Justice of the United States Supreme Court, the chief judges for each judicial circuit and other federal judges." *D'Apuzzo, P.A. v. United States*, No. 16-62769, 2019 WL 2642696, at *10 (S.D. Fla. June 27, 2019). Instead, through the array of statutes discussed in our opening brief (Br. 6-7), Congress reserved to itself the responsibility for overseeing the Judiciary's collection and expenditures of PACER fee revenue.

Unable to show that Congress intended to authorize private damages actions, plaintiffs urge that congressional intent does not form part of the legal inquiry. They assert that this Court did not mean what it said in *Norman*, and that this Court was wrong if it did mean what it said. *See* Response Br. 23 (arguing that this Court's decision in *Norman* "blurred the clear, longstanding distinction between illegal exaction and money-mandating claims" and "was simply being 'imprecise'") (citation omitted). This Court made quite clear, however, that when, as here, a claimant seeks damages from the United States, it is not sufficient to show that the claimant improperly paid money to a federal agency. Although such a showing might, in some circumstances, permit the claimant to sue an agency under the APA to compel the return of a specified sum, it does not by itself provide the basis for seeking damages against the United States.

Plaintiffs assert that if the quoted statements in *Norman* and *Cyprus Amax* mean what they say, the cases would "work a sea change in the law." Response Br. 3. But *Norman* and *Cyprus Amax* reflect the established principle that the Tucker Act and its

companion statutes, the Little Tucker Act and the Indian Tucker Act, "do not themselves creat[e] substantive rights, but are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law." *United States v. Bormes*, 568 U.S. 6, 10 (2012) (quotation marks omitted). Thus, regardless of whether a claimant relies on an illegal exaction theory or urges that an agency violated a statutory mandate, the claimant must identify a substantive source of law that provides a monetary remedy, either explicitly or by necessary implication.[3]

The "touchstone" of every statutory case is congressional intent. *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1988). In the paradigmatic illegal exaction case—an action for a tax refund—it is not difficult to conclude that Congress intended to authorize a monetary remedy for taxes improperly paid, because Congress codified the procedures for seeking a tax refund. *See* 26 U.S.C. § 7422 ("Civil actions for refund"). And in the cases on which plaintiffs primarily rely—*Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967), *Clapp v. United States*, 127 Ct. Cl. 505 (1954), and *Aerolineas Argentinas v. United States*, 77 F.3d 1564 (Fed. Cir. 1996)—the Court allowed illegal exaction claims to proceed where there was a want of authority on the

[3] Although plaintiffs describe the relief sought as a "refund," Response Br. 15, the class members are not asking the Judiciary to return a portion of fees paid, nor do plaintiffs claim that the class members followed the administrative procedures for seeking a refund of fees from the PACER service center in the event of a billing error, *see* Appx293-296. Instead, as plaintiffs acknowledge, the class members are seeking damages awards against the United States, to be paid from the Judgment Fund as compensation for allegedly excessive fees. Response Br. 3.

part of the agency to charge a fee. In *Eastport* and *Clapp*, the Court of Claims ruled that the Federal Maritime Commission had no authority to charge a fee for approving the sale of surplus government ships to foreign purchasers. *See Eastport*, 372 F.2d at 1007-08 (describing the court's earlier decision in the same case); *Clapp*, 127 Ct. Cl. at 515. And in *Aerolineas Argentinas*, this Court held that the Immigration and Naturalization Service ("INS") lacked authority to impose on airlines the cost of detaining excludable aliens. Nothing in those cases suggested that an illegal exaction claim may proceed without regard to congressional intent. In *Clapp*, for example, the Court of Claims simply rejected the government's contention that the claims sounded in tort (and were thus outside the Tucker Act's jurisdiction) and ruled that they were instead founded upon an Act of Congress. *See* 127 Ct. Cl. at 509, 580-81. In *Aerolineas Argentinas*, the jurisdictional issue was whether the illegal exaction claim could proceed even though the airlines had not paid money directly to the INS. *See* 77 F.3d at 1573-74.

This suit does not bear any resemblance to the cases on which plaintiffs rely. Plaintiffs do not contend that the Judicial Conference lacked authority to charge a fee for PACER downloads. Nor is this a case like *A.H. Bull S.S. Co. v. United States*, 108 F. Supp. 95, 97 (Ct. Cl. 1952), where the Court of Claims concluded that the substantive statute "was intended to fix, by a self-operating statutory formula, the selling price of the Government's surplus ships," such that "the determination of the

price was a mere mathematical calculation."[4] On the contrary, no member of the class can show that it overpaid a specific amount for a particular PACER download.

Plaintiffs do not help themselves by asserting that the requirement articulated in *Norman* and *Cyprus Amax* would "leave citizens in future cases unprotected against even the most blatantly unlawful takings." Response Br. 3. The Supreme Court has held that the Takings Clause provides a "self-executing" right to compensation. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2171 (2019); *see also United States v. Testan*, 424 U.S. 392, 401 (1976) (noting that takings cases "are tied to the language, purpose, and self-executing aspects of that constitutional provision"). Likewise, in *Cyprus Amax*, where the claimants sought "a refund for the payment of coal excise taxes" that were allegedly imposed in violation of the Export Clause, 205 F.3d at 1371, this Court held that "the cause of action based on the Export Clause is self-executing." *Id.* at 1374. Here, however, the single-count complaint did not allege any constitutional claims. The claims of the class members are statutory. And a statutory claim for damages cannot proceed unless Congress intended to provide a damages remedy, which is not the case here.

[4] *See also, e.g.*, *Sprague S.S. Co. v. United States*, 172 F. Supp. 674, 675 (Ct. Cl. 1959) (concluding that the sales of surplus ships were subject to a statutory price formula "comparable to a statutory schedule of public utility rates").

II. The Judiciary Did Not Unlawfully Expend PACER Fee Revenue.

A. All Of The Expenditures At Issue Here Were "Necessary" To "Provide Access To Information Available Through Automatic Data Processing Equipment."

If the Court finds that there is Little Tucker Act jurisdiction and reaches the issue, the Court should reject plaintiffs' contention that the Judicial Conference has been unlawfully expending PACER fee revenue for more than a decade. As our opening brief explained (Br. 27-28), all of the contested expenditures were "necessary" to provide "access to information available through automatic data processing equipment," as specified in Section 404(a) of the Judiciary Appropriations Act, 1991, as amended by the E-Government Act.

Plaintiffs do not seriously dispute that the contested expenditures were for services that provide "access to information available through automatic data processing equipment." Although plaintiffs intimate—in a footnote—that the CM/ECF system is merely "an e-filing service and internal case-management system" that does not provide "access to information," Response Br. 13 n.2, they cannot plausibly deny that the CM/ECF system "provides access to filed documents online," "offers expanded search and reporting capabilities," and "offers the ability to immediately update dockets and download documents and print them directly from the court system."[5] As the district court explained, "PACER cannot be divorced

[5] PACER, *Case Management/Electronic Case Files*, https://www.pacer.gov/cmecf

from CM/ECF, since PACER is merely the portal to the millions of electronically-filed documents that are housed by the judiciary on CM/ECF and are available to the public via the Internet only because of CM/ECF." Appx39-40. It is thus unsurprising that the E-Government Act's sponsor does not defend plaintiffs' contention that the Act prohibited the use of PACER fee revenue to support the costs of CM/ECF and Electronic Bankruptcy Noticing. *See* Amicus Br. of Sen. Lieberman 11 n.4.[6]

Plaintiffs retreat to the suggestion that this Court adopt "a middle-ground interpretation akin to the conclusion reached by the district court," which approved the Judiciary's expenditures for CM/ECF and Electronic Bankruptcy Noticing but deemed certain other categories of expenditures impermissible. Response Br. 9 n.1. Plaintiffs argue that, in quoting the text of Section 404(a), our opening brief "leaves out an important modifier: the word 'public.'" Response Br. 13.

That argument is doubly mistaken. As an initial matter, the word "public" does not appear in the sentence of Section 404(a) on which plaintiffs' claims rest. As

[6] Plaintiffs mistakenly rely on Section 404(b) in arguing that the sole permissible use of fee revenue is to reimburse the marginal cost of providing access to documents through PACER. *See* Response Br. 12. Section 404(b), which predates the E-Government Act, provides that fees charged for services rendered are deposited as offsetting collections to the Judiciary Information Technology Fund. Reimbursing the cost of providing access to documents through PACER is a proper use of fee revenue, but it is not the only permissible use. Expenditures from the Fund are governed by appropriation in 28 U.S.C. § 612, and plaintiffs do not dispute that the expenditures at issue here are authorized by that appropriation. *See* Response Br. 12.

amended by the E-Government Act, the first sentence of Section 404(a) provides: "The Judicial Conference may, only to the extent necessary, prescribe reasonable fees . . . for collection by the courts . . . for access to information available through automatic data processing equipment." (The second sentence of Section 404(a) authorizes the Judicial Conference to differentiate among users in setting fees and provide exemptions "to avoid unreasonable burdens and promote public access"—as the Judicial Conference in fact has done.)

In any event, plaintiffs are also wrong to assert that the expenditures at issue here did not provide "public" access to information available through automatic data processing equipment. The services at issue here all formed part of the Judiciary's Electronic Public Access ("EPA") program, as shown in the budget proposals that the Judiciary submitted to Congress each year. *See*, *e.g.*, Appx2348-2351 (excerpt from the Judiciary's budget request for fiscal year 2011, describing the Judiciary's proposed expenditures for the EPA program); Appx2011-2014 (same for fiscal year 2012); *see also* Gov. Br. 28-29 (citing excerpts from other budget requests).

Although plaintiffs object to those expenditures, the sole paragraph of their response brief that addresses the expenditures with any specificity (Response Br. 13) does not explain why the expenditures did not provide "public" access to information available through automatic data processing equipment. For example, although plaintiffs object to expenditures for a web-based juror notification system, they do not explain why it was impermissible to regard prospective jurors as members of the

public. Likewise, they never explain why electronic notices that gave law enforcement officials the information they needed to protect crime victims' rights did not provide public access to information that is available electronically. *See id.* They never explain why courtroom technology that enabled the Judiciary "to share case evidence with the public in the courtroom during proceedings," Appx15, was not a means of enhancing public access to information that is available electronically. And they never explain why the pilot study that allowed Mississippi to provide the public with electronic access to court records, *see* Appx20, did not provide such public access.

Instead, plaintiffs argue that fee revenue was not "necessary" to provide public access to that information. Response Br. 4 (urging that fees may be charged "only to the extent necessary" to "reimburse [the] expenses incurred in providing" access to information available through automatic data processing equipment). But as the E-Government Act's sponsor recognized in his communications with Congress, the extent to which fee revenue is "necessary" depends on the funding that Congress otherwise provides for the Electronic Public Access programs. That is why Senator Lieberman wrote *to the Appropriations Committee* when he had concerns about the uses of PACER fee revenue in 2010. Appx2620, Appx2622 (urging in a 2010 letter that "[t]he *Appropriations Committee* should review the Judiciary Information Technology Fund Report provided each year to ensure the funds generated from PACER are only going to pay for the direct costs of disseminating documents via PACER," and "not

for additional items which I believe should be funded through direct appropriations") (emphasis added).

That understanding of the E-Government Act does not render the Act's amendment to Section 404(a) "meaningless," as plaintiffs suggest. Response Br. 5. It reflects the unremarkable proposition that the determination as to which expenditures are "necessary" to provide access to information that is available electronically is not made in a vacuum; it is made in light of the funding that Congress otherwise provides through its annual appropriations acts for the Judiciary. That "appropriations process" is not merely "a guide to statutory meaning." Response Br. 11. It is part and parcel of the determination as to which expenditures of fee revenue are necessary.

Echoing Senator Lieberman's letter, plaintiffs argue that funding for the Electronic Public Access programs should "come through the appropriations process." Response Br. 3. But plaintiffs do not contend that Congress in fact provided such funding in the appropriations acts for the fiscal years at issue here. As our opening brief explained (Br. 28-29), the Judiciary's annual budget requests enumerated each of the expenditures of PACER fee revenue at issue here. Congress was free to reject or modify the proposed spending, or to appropriate tax dollars for any or all of these programs, but Congress did not choose to do so. In its annual appropriations legislation, Congress thus made the proposed expenditures of PACER fee revenue "necessary" to fund the Electronic Public Access programs. Those annual appropriations acts were not, as plaintiffs suggest, merely the "actions of the

Appropriations Committees." Response Br. 11. Appropriations acts—like any other legislation—must be enacted by Congress itself.

Plaintiffs concede that Congress did not intend to "starve" the "vital programs" at issue here of funding. Response Br. 3. Indeed, they emphasize that "[e]veryone in this litigation agrees that these programs warrant funding." *Id.* Plaintiffs' speculation that Congress may "for future years" provide direct appropriations for these programs, *id.*, is beside the point. This suit purports to challenge the Judiciary's expenditures of fee revenue between April 21, 2010, and April 21, 2016. *See* Appx2354. Regardless of what Congress may choose to do in the future, there is no doubt that the Judicial Conference dutifully complied with the statutes that governed its expenditures during the fiscal years at issue here, and there is no basis to declare *post hoc* that the expenditures were unlawful.

B. Plaintiffs' Constitutional Avoidance Arguments Are Baseless.

Plaintiffs' constitutional avoidance arguments do not alter the conclusion that the Judicial Conference dutifully abided by Congress's directives during the fiscal years at issue here. Even if there were a substantial constitutional issue to be avoided (which there is not), plaintiffs' interpretation of Section 404(a) is foreclosed by the plain language of that provision.

Plaintiffs contend that "a user fee may not exceed the cost of providing services 'inuring directly to the benefit' of the person who pays the user fee, unless Congress has 'indicate[d] clearly its intention to delegate' its taxing power." Pl. Br. 3

(quoting *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 224 (1989)). As our opening brief explained, assuming *arguendo* that *Skinner*'s clear statement requirement applies to PACER fees, the clear statement requirement is satisfied. The text of Section 404(a) leaves no doubt that some PACER users may be charged a fee that "exceed[s] the cost of providing services 'inuring directly to the benefit' of the person who pays the user fee." Pl. Br. 3. Section 404(a) explicitly authorizes the Judicial Conference to differentiate among PACER users in setting fees and to provide exemptions to avoid unreasonable burdens and promote public access. As a consequence, the "power users" that account for the vast majority of PACER fee revenue have long subsidized the free access that is enjoyed by the vast majority of PACER users. And plaintiffs explicitly "do not challenge" that cross-subsidization. Response Br. 8.

In any event, plaintiffs are also mistaken in assuming that *Skinner*'s clear statement rule applies to PACER fees. *Skinner* and the other cases on which plaintiffs rely involved assessments coercively imposed on "regulated parties" such as pipeline facilities. *Skinner*, 490 U.S. at 224; *see also*, *e.g.*, *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 338 (1974) (noting that the "Federal Communications Commission is authorized to regulate these CATV outlets"); *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 346 (1974) (involving assessments levied against electric utilities and natural gas companies). Plaintiffs do not address *Skinner*'s qualifying language or argue that PACER users are regulated parties against which assessments were levied.

Plaintiffs' attempt to reframe the same statutory argument in First Amendment terms is equally unpersuasive. The cases on which they rely (Br. 30; Response Br. 2) are inapposite on their face. In *Sullivan v. City of Augusta*, 511 F.3d 16 (1st Cir. 2007), for example, the plaintiff was denied a parade permit because he could not pay the $2,000 fee and the city refused his request for a waiver. And in *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943), the Supreme Court overturned the criminal conviction of Jehovah's Witnesses for distributing religious literature without paying a state canvassing fee. In both cases, the plaintiffs sought to express themselves on "streets and parks" that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). Likewise, in *Eastern Connecticut Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1052 (2d Cir. 1983), the state had imposed "a prohibitive financial burden on its First Amendment rights"—the ability "to use a particular piece of state property as a forum for political expression."

Here, by contrast, plaintiffs do not claim that PACER fees abridge the freedom of speech or assembly. Nor do they identify any PACER user that was denied "access to public case files," Response Br. 10, much less contend that all class members were denied such access. As we have already explained, the vast majority of PACER users obtain electronic court records for free, as a result of waivers and exemptions. Any user can obtain free PACER access to public case files at any courthouse terminal.

Electronic Public Access Fee Schedule (2013).[7] Moreover, the parties in a case (including pro se litigants) and attorneys of record automatically receive a free electronic copy of all documents filed electronically. *Id.* No fee is charged for access to documents that the authoring judge designates as a judicial opinion. *Id.* And courts have discretion to grant a fee exemption for various categories of persons. *Id.* Plaintiffs do not suggest that these fee waivers and exemptions implicate the First Amendment. And they sensibly decline to argue that the "power users" that profit from the resale of aggregated PACER data have a constitutional right to acquire such data at its marginal cost.

[7] https://www.pacer.gov/documents/epa_feesched.pdf.

CONCLUSION

The summary judgment order should be vacated for lack of Little Tucker Act jurisdiction. Alternatively, if the Court reaches the merits of the issue decided in the summary judgment order, the Court should hold that the Judiciary's expenditures of PACER fee revenue were permissible.

Respectfully submitted,

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September 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 28.1(e)(2)(B) because it contains 5,356 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Alisa B. Klein
Alisa B. Klein