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PACER Charges and Publicly Charged Universal Injunctions

Hello and welcome to Short Circuit, your podcast on the Federal Courts of Appeals. I'm Anthony Sanders, director of the Center for Judicial Engagement at the Institute for justice. This week, we're going to bring the legal community together with two minutes of hate, actually more than two minutes against something federal practitioners learn to hate at a very young age: PACER. Yes, that computer program that charges you 10 cents for every page of every document from every case in the district and appellate courts. It was recently in the doc, so to speak, in the federal circuit charged with crimes against reality. But 10 cents isn't the only charge we'll be looking at. There's also the matter of a public charge and what that means. Now I'll admit when I hear the words public charge, I think a PACER, but since 1882, Congress has meant something else, at least when it comes to immigration and immigrants providing for themselves. The problem is Congress never defined the term, so it's up to the other branches to try and figure that out, which is something the fourth circuit looked at this week. And in, so doing provided some circuit, splitting dicta, if that's even a thing, about the perennial problem of nationwide injunctions. To educate us on all things that PACER publicly charges, we have two fully charged lawyers. They are IJ attorney Diana Simpson and IJ Judicial Engagement Fellow Adam Shelton. Welcome back to both of you.

And let's start with Diana. Diana, can we all get our federal documents for free now?

Diana: Not quite, but hopefully there are good, there's good news on the horizon in the world of PACER. So, I think as Anthony said, everybody loves to hate PACER. It is the GeoCities website from the nineties that everyone just really finds frustrating because each different court has a different pace or website, it's hard to get to, it's hard to shift from the Seventh Circuit to the Second Circuit, to the District of New Mexico, etc. And you have to log in all at all these separate websites and then you have to pay for every day, every time you access just about anything: the dockets they charge you for, every paper they charge you for. There are a few exceptions, but it's just one of the most frustrating aspects, particularly now that we're in 2020, and it seems everywhere else on the internet has advanced, PACER remains mired in the nineties. But that's because it's from the nineties.

So, before pacer existed, everything was on paper, all the dockets and filings. If you wanted to view a document as a member of the public, you had to actually go to the courthouse to request access. Obviously, PACER's a better than that version. But in the 1990s, Congress passed the statutory language that ended up leading to the creation of PACER. And so, there is the statutory text that I'm going to read because it's important here, but it says, quote, the judicial conference may only to the extent necessary prescribed reasonable fees for collection by the courts for access to information available through automatic data processing equipment.

So, the judicial conference is the entity that started that set up PACER and they started charging fees for it because Congress never appropriated costs to cover it. So really all of this comes back to hatred for Congress, which I think every American can get behind.

But anyway, so originally when they started charging for it or access, it was only accessible by dial-up phone connections.

So, I think perhaps even some lawyers don't understand or weren't necessarily around for that, although some of us certainly were and some of us, you know, hop on the phone and you hear the dial tone, but it's not the dial tone, it's the web access. And then, hey, I'm on the internet or, hey, I'm on the phone and it's, you know, that whole throwback Relic, I suppose.

But anyway, so fees were charged by the minute when it was used by a dial up phone connection, and then they shifted to a 7 cents per page system. And then it went up to 10 cents per page in 2012. And so, there are certain exemptions and waivers and caps, and so there are a few exemptions from Anthony's kind of broad statement.

So, for example, I know the Court of Appeals for Veterans claims everything, everything is accessible without paying either the docket or any of the motions or the briefs or the opinions themselves, which is extremely useful, and I wish all of them were like that. And then federal opinions you can get from the docket for free, but you still have to get to the docket, which you have to pay for.

So anyway, I guess it's, I'm not a hundred percent bad, just 99.9% bad. But anyway, so the judicial conference uses these fees for more than just PACER and it's essentially become a techno technology slush fund for the conference. They use it to pay for the filing system that everyone uses to get to file stuff in federal court. They use it for bankruptcy notices for parties in bankruptcy proceedings. They ran a feasibility study to see if something like pacer would work for the state of Mississippi. They use it to notify local police about federal offenders under supervised release under the Violent Crime Control Act.

They use it for eJuror, which is a system for federal jurors. And they also use it for courtroom technology which includes equipment for electronically presenting evidence to courtrooms and digital audio recording equipment. Like I said, technology slush fund for the courts. And so, people all over have been very unhappy about this. It's, it's costly for a lot of firms. And so, three nonprofits banded together in 2016 and sued to fix this problem. And so, they filed under the Little Tucker act and their argument is that the PACER fees exceeded the cost to operate PACER. And that statute that I read earlier, the statutory language that I read earlier only allows them and to charge for the costs to operate PACER.

The government, on the other hand, argues that the judiciary can use the pacer funds to fund the dissemination of information through electronic means. That seems to have no logical end point, whereas the plaintiffs argue it can cover PACER costs and nothing else. So of course, courts like to take the Solomonic approach and come somewhere in between. That's what the district court here did and then that's also what the federal circuit did. So, this opinion, the court goes through jurisdiction, all government defendants, it seems like to first to say that this court doesn't have jurisdiction to issue a ruling on the merits. The court quickly disposes of that, says that the Little Tucker Act does provide jurisdiction for claims against the United States like this.

And then the court gets to the merits. And like I said, they, they provide this kind of middle ground where they say that it is okay for them to use PACER fees to cover PACER and other services providing public access to federal court, electronic docketing information. So, this includes both the filing system and one other element, but in any event, it can't cover this Mississippi study, it can't cover these federal notifications for police officers, it can't do what it has been used to do for a long time. And so, hopefully there will be a result in the near future of decreased PACER costs. I don't know. I can't see into the future. I hope that that is the upshot.

Anthony [7:31]: And did we get a sense, Diana, from the opinion of how much of the of the 10 cents is okay and how much isn't?

Diana: No, I don't, I don't think I saw those numbers. But basically the, the kind of upshot of this is that the government is liable for the amount of fees used to cover that Mississippi study that I said the violent criminal notifications, the eJuror costs, courtroom technology expenses. So, the pacer fees can be used for filing and for the bankruptcy notices, but not the rest of it.

Adam: Yeah, and what really struck me about this case, is like so many other issues in federal court right now, is that if Congress just passed a statute and was specific about what it wanted and what it meant, none of these issues would be there. This is there because Congress wanted the federal government or one of the federal courts to do something but didn't provide them an actual means to do it. And if they have, we wouldn't have this case at all. Another interesting aspect of this case is just the rabbit hole that looking into legislative history will take you down, especially with the courts. I, I think the most interesting part of this is that, they use committee reports and they use committee history to determine what Congress actually intended, but on one of the Amicus briefs was the Senator that, that sponsored the actual, most recent amendment to this bill saying, no, this is not what I meant when I sponsored this bill and Congress, in the court was like, well, yes, but what you meant by being the sponsor doesn't mean isn't necessarily what Congress meant in enacting it, which seems a little hard to kind of split that there.

Diana: Well, and also, you know, reminds readers I think of the recent SCOTUS decision coming with, with Justice Gorsuch that he wrote talking about whether sex in the Civil Rights Act it covers gay and lesbian issues, as well as transgendered people. Because if you talk about what the authors intended in the 1960s, perhaps it would have been a different result than what the actual text discusses. And so, you know, Adam's certainly right, there were a lot of Amicus briefs in this case. I, I didn't get to all of them, but there were certainly quite a few, quite a few more than I think the federal circuit is probably used to in these kinds of cases.

Anthony: And, and the, the, if I understand, right, I will admit I had a very hard time following, this, this opinion. So, so bless you Diana for being the one to really take the plunge on it.

The statutory text was not actually a statute, it was the explainer to a statute?

Diana: Right.

Anthony: Tell me how that works.

Diana: Right. So, it was the note to section 28, USC 1913, which is, which is what follows the statutory text. You know, and, and notes are always useful. I mean, they are kind of contemporaneous information that can be extremely useful for litigators and for, you know, people trying to use the law. But it's not typical, at least I've not seen a case before that only talks about the note rather than statutory term.

Anthony: And the note is part of the public law that Congress passes. It's not written by some bureaucrat putting together the US code afterward?

Diana: Correct. And here's a footnote that says that the text, even though the text appears as a statutory note, rather than the, the text of the section itself, doesn't matter, it's still treated the same way.

Anthony: Yeah. Something that, that, us lawyers sometimes forget and, and, and it always really shocks me when I remember it is that the US code itself is not actually law. It is an approximation of law written by some very patient lawyers who go through the public acts of Congress and put it all together. And that this is actually technically about this public act that Congress has.

Diana: There you go. One of the interesting kind of tidbits that I found in this case, see, I found it interesting, but I was fueled mostly by my rage for hatred or my rage and hatred for PACER than my real intellectual interest in section 1913. In 2002, when Congress passed this act to require the use of internet-based technology to enhance access to the government info. Before they passed that only 11 days district courts and 40 bankruptcy courts were using the ECF filing system that we're aware of. And it seems hard to imagine a time, at least for, you know, I think of a modern litigator, it seems hard to imagine a time when so few courts were using e-filing and everyone else was using just standard paper filing. And you know, now when I, when I litigate and I file things everything's done online, it’s quick, like

you don't have to worry about couriers, you don't have to worry about like physically running the paper down to the courthouse. And you just hear these stories from your, you know, from, from people more senior to you at the firm about perhaps running to the court pass and falling and handing it to someone else to keep running off to, to get it filed in time. Now it's just, you know, you're sitting in your office and your heart's beating a million miles an hour as you, as you click through. You know, but it's a different time and it wasn't even that long ago. And so, you know, PACER is certainly better than the alternative, but it would be much better to improve PACER. And I think perhaps the, the upshot is that Congress should just give them money to fix the problem.

Anthony [13:00]: That's one thing that, that Congress has for, so I'm told. Instead of having slush funds, such as PACER and civil forfeiture for the executive branch and judicial branches, to, to use.

Diana: I mean, I hear they do have a lot of money that they, that they go through, so one would think they could throw a little bit at this problem and make it so that people actually have access to the court documents that control their lives.

Anthony: Well, let's turn to other people who sometimes need money and that's a people who want to come to this country for a better life. But we apparently don't want them to come if they have to become a public charge. Adam, tell us what that means and, and what that has to do with nationwide injunctions.

Adam: Right. So, Congress has long prohibited people who may become a public charge sometime in the future from being admissible for immigration purposes. But Congress has never, in the long history of that prohibition defined what it actually means to be a public charge. Meaning that it's within the purview of the executive branch to kind of determine what it means.

Most recently in 2018, the Trump administration through the Department of Homeland security, decided to adopt a new definition for what it meant for someone to be a public charge. This definition includes a whole host of additional benefits that will now be counted towards the determination of

whether someone will be a public charge. It was challenged across the country and multiple circuits by organizations and individual plaintiffs, and one of those cases was it in the Fourth Circuit Court of Appeals. So, the District Court in the Fourth Circuit actually found that the new definition was prohibited by statute and was arbitrary and capricious under the APA.

In doing so they then issued a nationwide universal injunction--meaning that the federal government was prohibited from implementing the law with respect to everyone in the country, not just with respect to the organization that challenged the law and the plaintiffs that challenged law in that case.

The government appealed to the Fourth Circuit. The Fourth Circuit determined that the law was totally lawful that it wasn't prohibited by statute because the statute didn't actually define what a public charge meant and that there was no clear, acceptable definition for what a public charge meant and the long history of the executive branch and the judicial branch. And then turning to the remedy of, they decided that well, since the, since the law's fine, the definition is fine, an injunction shouldn't have been issued and the Fourth Circuit really could have stopped there. If no injunction was issued, should have been issued, there's no need to talk about that the scope. But the Fourth Circuit took this opportunity to add its voice to the course, of course, talking about nationwide universal injunctions right now.

So just for kind of a brief refresher, a universal injunction is essentially an injunction which prevents any government entity from enforcing a law or a calculation against anyone in the country or anyone within their jurisdiction, not just with respect to the people who have challenged the law. So, the Fourth Circuit here decided to, to take some time to explain why lower courts and courts in general, don't have this power under the US Constitution. And coming to this decision, they didn't look to any of the academic literature defending nationwide injunctions or universal injunctions. They didn't look to any of the court decisions, especially recent court decisions which have upheld such injunctions. They looked only to two recent concurrences from Justice Thomas and Justice Gorsuch casting doubt on these injunctions and on, a very important article by Sam Bray also casting doubt on the propriety of such injunctions. Now, one of the issues, yeah, with these injunctions, so, with this whole issue right now is all about terminology. People frequently termed these nationwide injunctions because the most controversial programs that they're issued against the ones that most people care about are federal government programs, I mean that they exist nation, the injunctions exist nationwide because the federal government by definition exists nationwide.

But the asserted legal problem with these injunctions is that they protect non-parties and parties alike in a non-class action lawsuit. Meaning that it's the same legal device, whether the injunction is issued against the federal government and exists nationwide, or whether it's issued against a state, city, county, government and exist statewide, countywide or citywide.

The Fourth Circuit came to this conclusion and seemed to understand that this was the actual asserted legal problem, but they didn't then take it to the next logical step, which would be to look for cases where courts have issued injunctions, protecting non-parties not against the federal government.

They only looked to when nationwide injunctions protecting on parties had been issued. Nationwide injunctions, which protect non-parties, it's really only been issued as the 1950s and the court kind of looked at that and included that, hey, these are new terms that this is a new device that courts have created. But if you looked at injunctions, which protect non-parties against the state law, you would find examples of them in the early 1900s including in *Pierce v. Society of Sisters*, fundamental educational choice case. And if you're looking for injunctions, which protected nonparties against city or County laws, you would see injunctions in the 1800s against city and County taxes, which protected all, all people that would have to pay those taxes, not just the particular plaintiffs that, that challenge the law. So, they seem to understand what the actual asserted legal issue was, they just didn't take it to the next logical conclusion. This is more than what the Second Circuit had done in a case the day beforehand also, also concerning the public charge rule.

The Second Circuit limited a nationwide injunction that had been issued by the lower courts, in that case, but they limited it only to the Second Circuit. This seemed like an easy decision because the Second Circuit only includes three states. All three states have challenged the law as a violation of the APA and that's prohibited by congressional statute.

The issue is that, plaintiffs in organizations also challenged the law and those organizations did not limit their activities to only the second circuit, meaning that those organizations were left unprotected by this injunction, in the court admitted as much, saying in their opinion that the plaintiff organizations are mostly protected.

So, they seem to have misunderstood what the actual issue is and in their attempts to limit criticism, limited on a geographic level, as opposed to on a party level.

Diana [19:50]: It seems to me that a nationwide injunction or a universal injunction, you know, perhaps universal injunction is the phrase you'd prefer me to use.

It seems to me that it kind of combines into just one form of relief facial and as applied challenges. And so, this is, this is something we litigate at IJ quite a bit. You know, when we challenge a law, we're challenging it on behalf of our plaintiffs. Their, their facts often highlight the unconstitutional effect of a particular law, but it's, it's not necessarily limited to those circumstances. And so, we ended up having this kind of tug of war between whether we're seeking facial or as applied relief in many of our lawsuits. And I wonder if this nationwide injunction kind of finishes that conversation to the extent that if we do have these, these kinds of broad injunctions that every case now will be seen as a facial challenge rather than an as applied one.

Adam: Right. And that certainly is an aspect to the, to the universal injunction debate going on, especially when the race facial challenges, especially in cases where they are challenging the law as a, as, as facially unconstitutional. Without, without universal injunctions, it would make facial, facial challenges kind of superfluous especially on a lower court level. Now, once you get up to the Supreme Court, injunctions don't really matter because the Supreme Court speaks for the whole country and looks out of the law for the whole country. But on the lower court level, if you don't have a universal injunction or if a court doesn't even have the option to issue a universal injunction, then bringing a facial challenge becomes kind of pointless almost because an as applied challenge would settle, the case just as, just as much as far as the remedy goes.

Diana: Is this going to lead to like gamesmanship though where people, I mean, litigators, I think are already engaging in this kind of issue with, right. Like there are particular courts in Texas where a lot of people file their patent challenges because of that, you know, the Fifth Circuit case law, but also that particular courts approach. You know, I think, historically people have understood certain courts to be more conservative and certain to be more liberal. However you want you to find that, you know, and I, I think these are always kind of changing a little bit, but that lead people to, to try to do these kinds of cases is in particular districts and then bind everybody before, you know, a different court has, it has a chance to rule on the issue?

Adam: It certainly will. And that's one of the, one of the main practical issues with these injunctions. One of the things that, that I wish courts did more of was kind of separating those, those practical issues from the constitutional issues of whether courts have the power to issue these injunctions, as opposed to whether should issue these injunctions. The Fourth Circuit did a little bit of that. So, the Fourth Circuit in its opinion basically said, these injunctions, most likely aren't constitutional. They are most likely beyond the power of the court, but even if they were in the power of the court, it would be inappropriate to you shoot an injunction in this case.

And that, and that is the direction the Second Circuit took as well. Consider the Second Circuit in its opinion basically explained that multiple other cases are pending in the circuits and that for those reasons, they shouldn't, a nationwide injunction shouldn't have an issue just kind of for judicial respect and let other courts hear, hear the case.

And as a quick kind of side note for the Second Circuit and their injunction limiting it to only the circuit leaving some of the plaintiffs on protected. The Second Circuit may not have thought it was super important the language that they were using or whether or not the plaintiffs were actually protected by the injunction because this preliminary instruction was actually already stayed by the Supreme Court in an emergency application back in January.

So they're really fighting over a preliminary injunction that, while it exists, it has been stayed and the rules gone into effect all across the country, except I think for, for Illinois, which had their own injunction against the law just in Illinois and Supreme court left that one in place.

Anthony: And I should add that Adam has written extensively it's as some of you probably know about the, the universal injunction issue and so we'll put a link up to the Center for Judicial Engagement blog, where he's written a number of articles and you can check out his, his latest post and his previous posts.

Adam, one thing that I thought was just odd about the opinion is that you pointed out that it, it, the court, after saying there shouldn't have been an injunction, went on to say, well, there shouldn't have been this type of injunction. So, is this purely dicta that the court said, or was it in some way necessary to, to on, on remand, what w what the court would do? So, do we have, you know, like, a fundamental circuit split here? Cause I know the Eighth Circuit recently went the other way on this issue and, and this,

this will mean the Supreme Court will have to figure out whether we can have nationwide injunctions, or, or does it not matter?

Adam: You know, I don't, I don't know. It definitely seems like dicta. I do think it is a bit ironic that the court used this opportunity to, to explain that court shouldn't go beyond the case in controversy before them in issuing universal injunctions, which necessarily go beyond the specific case or controversy in some cases, at least, they, they, they explained that in the case where they went beyond the live issues, here, because whether or not the scope of the, the scope of the injunction was not a live issue once the court determined that the injunction should have been issued at all. Now there is, there is something to be for the court using this time to kind of, at least give a, a little bit of advice to the lower courts in their, in their circuit, kind of saying here's what the court, or at least two, two justices on the court or two judges on the court think about these types of injunctions. But I do think as the descent pointed out that it is mainly dicta, but we may have a circuit split somewhat soon, due to a case now out of Puerto Rico, which was issued, which was issued on Monday. So, Monday, Tuesday, and Wednesday, three different cases, all dealing with universal injunctions. So, this the case in Puerto Rico is a true universal injunction, as opposed to a nationwide injunction. They're a nine Puerto Rican residents challenged the categorical prohibition on, on receipt of certain benefits, including some stuff, security, income, um, snap benefits, challenging that it was a violation of the Equal Protection Clause. The Court agreed and then turned to the remedy instead of just saying that the court, or that the government had to lift the category, Oracle prohibition with respect to these nine plaintiffs, the court said that the covenant had to lift the categorical prohibition with respect to everyone in Puerto Rico or everyone that is a Puerto Rican residents. So they issued a universal territory wide injunction, which means that when it goes on appeal, which it most likely will, the court won't have, the first circuit court won't have a lot of the practical concerns about kind of this, the nationwide aspect of the injunctions that gamesmanship with district courts. The fact that, you know, there are, over, you know, almost a hundred district courts in the country that, yeah.

Anthony [27:15]: 92, 92 I believe if I remember right.

Adam: Right. There's that argument that a 92, any of the 92 courts can issue an injunction enjoining the federal government, you won't have those kinds of practical concerns and PR and perception concerns with this injunction. It'll strictly be about the legal issue of whether courts are empowered to protect nonparties and parties alike in a non-class action lawsuit. The interesting thing about this case, which does signal that it will be appealed is the court stayed the injunction with respect to everyone but the nine plaintiffs. So, the injunction goes into effect with respect to the nine plaintiffs that challenged the law, but everyone else who challenged everyone else, who's a resident of Puerto Rico who is categorically barred from receiving these benefits, the injunction has stayed for 60 days. I haven't looked it up, but I'm assuming the 60-day limit has something to do with the time in which the federal government would have to appeal this issue to the first circuit, most likely on two, two grounds, which is that 1) the district court was just wrong and that the categorical prohibition is fine. And 2) that even if it is fine, even that if it is, yeah, the court didn't have the power to issue a nationwide or not nationwide, a universal territory wide injunction here. And it has been, I mean, long standing DOJ practice that any universal injunction gets issued gets appealed.

Anthony: Well, stay tuned for that injunction. And if you want to dig even more into the universal injunctions debate, we interviewed former Texas solicitor general Scott Keller, back in January, back when we did things in person on Short Circuit. So, you can put, you can check out our archives for that interview and in the future, we'll have a lot more universality about injunctions here on short circuit, but in the meantime, I implore you to all stay engaged.