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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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IN RE APPLICATION FOR EXEMPTION FROM ELECTRONIC PUBLIC  
ACCESS FEES BY PUBLIC.RESOURCE.ORG, A 501(C)(3) NONPROFIT  
ORGANIZATION

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**MOTION OF PUBLIC.RESOURCE.ORG FOR EXEMPTION FROM  
PACER FEES; DECLARATIONS OF BREWSTER KAHLE, BRIAN  
CARVER, TAMI GIERLOFF, LAURA ORR, MATTHEW SAG, DANIEL  
MARTIN KATZ, ROBERT J. ROSENTHAL, AND CARL MALAMUD  
WITH EXHIBITS A-P**

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THOMAS R. BURKE (SBN 141930)  
thomasburke@dwt.com  
DAN LAIDMAN (SBN 274482)  
danlaidman@dwt.com  
DAVIS WRIGHT TREMAINE LLP  
505 Montgomery Street, Suite 800  
San Francisco, California 94111  
Telephone: (415) 276-6500 Facsimile: (415) 276-6599

Attorneys for Applicant  
PUBLIC.RESOURCE.ORG

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Public.Resource.Org (“Public Resource”) a 501(c)(3) nonprofit organization, respectfully submits the following Motion requesting that this Court grant it an exemption from user access fees for the Public Access to Court Electronic Records system (“PACER”), which is necessary for it to carry out a non-commercial research project designed to promote public access to information. It specifically requests an exemption providing for unlimited access for 12 months to all documents within this Court, the District of Idaho, District of Nevada, District of Oregon, and the Western District of Washington, for the purpose of conducting an audit of privacy violations in public court filings, and that the Court also permit it to transfer the files it accesses pursuant to the exemption to a non-commercial Internet site where they would be freely accessible to the public.

## I. INTRODUCTION

Pursuant to 28 U.S.C. § 1913, the Electronic Public Access Fee Schedule of the Judicial Conference of the United States (“Fee Schedule”) provides this Court with the discretion to “exempt certain persons or classes of persons from payment of the user access fee” for the PACER system. *See* Fee Schedule ¶ 9, available at <http://www.uscourts.gov/FormsAndFees/Fees/ElectronicPublicAccessFee.aspx>.

“Examples of individuals and groups that a court may consider exempting include ... Section 501(c)(3) not-for-profit organizations.” *Id.* The Court must find “that an exemption is necessary in order to avoid unreasonable burdens and to

promote public access to information,” and the exemption should be granted for a non-commercial use that is limited in time and scope. *Id.*

Public Resource is a 501(c)(3) nonprofit organization dedicated to improving public access to government records and the law. It seeks an exemption that would provide it with unlimited access to PACER within this Court and four District Courts within the Ninth Circuit, for a period of 12 months, so that it can conduct a comprehensive analysis of privacy violations in court records made available to the public via the PACER system. Public Resource will submit the results of its privacy audit to this Court and notify attorneys of any violations so that they can take corrective action.

The project is designed to balance the goals of increasing public access to information about the courts and protecting individual privacy. In prior audits examining smaller subsets of court records, Public Resource has found frequent violations of the rules requiring redaction of sensitive personal information from filings and orders.<sup>1</sup> A comprehensive analysis based on all filings and orders from this Court and the selected District Courts would provide invaluable information

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<sup>1</sup> Public Resource recently learned that the results of a privacy audit that it performed of judicial filings in 2008 has been posted on the U.S. Courts web site in a manner that revealed and republished anew, hundreds of individuals’ Social Security Numbers (SSNs). In addition, Public Resource has learned that a large number of SSNs that were the subject of the 2008 audits are still live on the PACER system. *See* Declaration of Carl Malamud ¶ 27, Exhibit P.

about the scope of the problem and how it can best be addressed by policymakers, courts, attorneys, and other interested parties. Public Resource would only be able to conduct this court-wide research with an exemption from PACER user fees.

Public Resource also requests that once the audit is complete, the Court permit it to transfer the files that it accesses pursuant to the exemption to the Internet Archive, a non-profit organization, where the information would be available to the general public and could be used by other nonprofit groups, academics, and journalists to conduct research about the federal court system. Public Resource would monitor how these files are accessed and would report back to the Court about the usage of this public repository. It would also encourage the Administrative Office of the Courts to monitor and report on trends in PACER access over the same period of time to determine what effect, if any, the posting of Public Resource's source materials to a public archive has on the public's use of PACER.

This aspect of Public Resource's request is designed to broaden access to PACER for non-commercial research purposes while at the same time helping the Court to collect valuable data about the effect of such free public access. The privacy audit proposed by Public Resource is emblematic of the type of large-scale research that requires broad access to electronic court records. As described in more detail below and in the attached affidavits, other nonprofit groups,

academics, and journalists have done commendable work documenting and analyzing trends and patterns in the courts by using electronic filings and orders as source material. However, PACER user fees are preventing these public interest researchers from conducting comprehensive (e.g., access to all case files), long-term analyses of information across entire court systems.

Public Resource understands that some courts have been reluctant to permit broad fee exemptions for such purposes because of concerns about the potential financial effect allowing such broad access may have on the revenue that supports the operation of the PACER system. Therefore, a key component of this project is that it would provide the Court with information to help determine the actual effects of providing broader public access to PACER for such non-commercial purposes.

Public Resource currently has the capability to carry out this project using the records of this Court and as many as four District Courts. Having access to the records of multiple courts would be helpful for purposes of comparing compliance with privacy restrictions across jurisdictions, and it would also provide for a larger pool of resource materials for academics, journalists, and the general public to use. Therefore, Public Resource requests that this Court authorize as much access as possible. But in the spirit of innovation and experimentation that underlies this request, Public Resource would also welcome the opportunity to work with this



Court to adjust the scope of the proposal, including the number of courts involved and the particular districts.

Courts have always had substantial discretion to experiment with different ways to achieve policy goals favoring public access to information, and the Judicial Conference has specifically recognized that the “innovations of individual courts are essential to the success of the Judiciary’s IT program.”<sup>2</sup> This proposal would enable such innovation while reasonably balancing the public’s interest in broader access to information about the courts, the privacy interests of individuals involved in federal litigation, and practical considerations about the funding and operation of the PACER system. Therefore, Public Resource respectfully requests that the Court grant its Motion and provide the requested fee exemption.

## **II. PUBLIC RESOURCE IS A QUALIFIED NONPROFIT CONDUCTING PUBLIC INTEREST RESEARCH.**

Public Resource is a 501(c)(3) nonprofit organization that was granted tax exempt status in 2007, and which operates solely for educational and charitable purposes. *See* Declaration of Carl Malamud ¶ 1. It works to facilitate greater

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<sup>2</sup> *See* Long Range Plan for Information Technology in the Federal Judiciary, Fiscal Year 2014 Update at p. 8, *available at* <http://www.uscourts.gov/uscourts/FederalCourts/Publications/2014-IT-long-range-plan.pdf>.

public access to government information, including information about the courts, while also ensuring that individual privacy is protected. *Id.* ¶¶ 2-12.<sup>3</sup>

Public Resource has a long history of working collaboratively with the different branches of government to find innovative ways of broadening public access to information. Among other activities, the group has worked with the Speaker of the House to make available a complete archive of video from select committees of the House of Representative, *id.* ¶ 2; posted online a complete historical archive of opinions of the U.S. Courts of Appeals, *id.* ¶¶ 4-5; and assembled and posted an archive of over 6,000 government videos and made them available online, *id.* ¶ 2. Public Resource's president, Carl Malamud, previously headed the nonprofit Internet Multicasting Service, where he was responsible for placing the U.S. Securities & Exchange Commission's EDGAR database and the U.S. Patent Database online. *Id.* ¶ 3.

More recently, Public Resource has focused its efforts on ensuring that individual privacy is protected as more information becomes available to the public online. To this end, Public Resource has performed audits of privacy violations in the PACER system and in court opinions, a service that received gratitude from the Judicial Conference and from several judges. *Id.* ¶¶ 6-12. Public Resource has

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<sup>3</sup> Information about Public Resource's nonprofit status, including its Articles of Incorporation, Bylaws, IRS Determination, and Financial Statements, are available on the organization's website at <https://public.resource.org/about/>.

also conducted privacy audits of the Internal Revenue Service's Exempt Organizations database which have found extensive evidence of privacy breaches in publicly-released tax records. *Id.* ¶ 16. These efforts led more than 40 members of Congress to request an explanation from the IRS, which took corrective action in response. *Id.* ¶¶ 18-21.

Given its nonprofit status and established record in carrying out large-scale projects that have furthered the public's access to information, Public Resource falls easily within the categories of organizations which may properly be considered for a discretionary exemption from the PACER user fees. *See* Fee Schedule ¶ 9.

### **III. PUBLIC RESOURCE SEEKS A FEE EXEMPTION FOR A NON-COMMERCIAL PUBLIC INTEREST RESEARCH PROJECT.**

Public Resource requests a PACER user fee exemption for a 12-month period that would provide unlimited access to all documents publicly filed using PACER in this Court, the District of Idaho, District of Nevada, District of Oregon, and Western District of Washington.<sup>4</sup> Public Resource would use this access to

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<sup>4</sup> Public Resource will agree that all information, reports, documents and other data obtained using a fee-exempt PACER account will not be sold for profit or otherwise exchanged for value. It further agrees to establish a separate fee-based PACER account for activities which are not exemption related. Public Resource is also willing to agree to any other reasonable terms necessary to carry out this project.

perform a comprehensive privacy audit, along the lines of the prior audits that it has conducted based on court opinions and a smaller subset of PACER filings.

The federal rules generally require that certain information be redacted in court filings, including “an individual’s social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number.” Federal Rule of Civil Procedure 5.2(a). *See also* Federal Rule of Criminal Procedure 49.1 (same); Federal Rule of Appellate Procedure 25(a)(5) (same privacy rules applicable on appeal). Many district courts have local rules expressly incorporating and elaborating on these privacy protections. *See, e.g.*, D. Idaho Local Civil Rule 5.5; D. Oregon Local Rule 5.2; W.D. Wash. Local Civil Rule 5.2(a).

Public Resource’s prior audits suggest that these privacy restrictions are being routinely violated. In 2008, Public Resource examined more than 19 million pages of materials available through the PACER system, and found 1,669 documents containing un-redacted Social Security numbers and other privacy issues, such as individuals’ birth dates, driver license numbers, Alien IDs, and bank account numbers. *See* Malamud Decl. ¶ 8. That same year, Public Resource audited federal appellate decisions and found a large number of Social Security Numbers included in the opinions. *Id.* ¶ 6.

Public Resource shared its findings with the Administrative Office of the Courts and representatives of the Judicial Conference, and Judge Lee Rosenthal, then Chair of the Committee on Rules of Practice and Procedure of the Judicial Conference, thanked Public Resource for its “commitment to improving the court system” and urged it to keep the judiciary informed of its ongoing work. *Id.* ¶ 7. Chief Judge Royce Lamberth of the United States District Court for the District of Columbia thanked Public Resource for bringing the issue to the court’s attention, and indicated that corrective action had been taken in response. *Id.* ¶ 9. The Chairman of the Senate Committee on Governmental Affairs and Homeland Security cited Public Resource’s work in calling on the Judicial Conference to do more to make PACER records freely available to the public while ensuring that individual privacy protections are enforced. *Id.* ¶ 10.

Public Resource proposes conducting a similar audit to search for Social Security Numbers and other protected personal information that has been included in public court filings and orders in violation of the applicable rules. *Id.* ¶¶ 22-27. However, in contrast to its earlier analyses which have examined smaller subsets of court records, the proposed audit would involve a comprehensive analysis of all PACER filings in this Court, and/or one or more District Courts, which would provide invaluable insight into the actual scope of the privacy problem. *Id.* An all-inclusive, court-wide audit would assist this Court and other policymakers in

determining how best to address the privacy issue, whether through new regulations, stepped up enforcement of existing rules, or other measures. Without a fee exemption, it would be prohibitively expensive and unreasonably burdensome for Public Resource, a nonprofit organization with limited resources, to obtain access to the large pool of records necessary for such an exhaustive study.

Under this proposal, Public Resource would submit to this Court (and any District Courts involved in the project) an interim report mid-way through the exemption period and a final report after the period is complete with the results of the privacy audit. *Id.* ¶ 27. It would also undertake to notify attorneys responsible for any privacy violations so that they could take corrective actions. *Id.* ¶ 26.

Public Resource also requests that after redactions are performed, the Court permit it to transfer the files that it accesses pursuant to the exemption to the Internet Archive (with any restricted personal information redacted), so that the documents could be freely accessible to the public through that organization's non-commercial online collection. *Id.* ¶ 28. The Internet Archive is a 501(c)(3) nonprofit that oversees a free Internet library offering access for researchers, academics, and the general public to historical collections in digital format. *See* Declaration of Brewster Kahle at ¶¶ 1-7. It maintains a collection of federal court records in partnership with RECAP, a joint project of the Center for Information Technology Policy at Princeton University and the Free Law Project, which

facilitates the uploading of documents purchased through PACER to a free and open online repository. *Id.* at ¶¶ 8-14; Declaration of Brian W. Carver at ¶¶ 8-13.

Once the documents have been uploaded to the Internet Archive, Public Resource will keep track of which types of documents are accessed and how often, and it will prepare a follow-up report to this Court. *See* Malamud Decl. ¶ 32; Kahle Decl. ¶ 15. Public Resource will also encourage other nonprofit organizations, academics, and journalists to work with the records for non-commercial research purposes, and will provide a report to this Court about any such projects. *See* Malamud Decl. ¶¶ 30-32.

Considerable beneficial public interest research has already been done using these sorts of court records as source material, albeit on smaller scales. For example, Professor Matthew James Sag of the Loyola University Chicago School of Law has conducted several empirical studies of trends in copyright litigation using databases that he created from federal court records. *See* Declaration of Matthew James Sag at ¶¶ 4-9. Professor Daniel Martin Katz of Michigan State University College of Law has also conducted numerous empirical studies of federal court records, focusing on subjects such as the Tax Code, judicial decision-making, and the evolution over time of different fields of law and the use of legal terms of art. *See* Declaration of Daniel Martin Katz at ¶¶ 2-11.

Similarly, the Center for Investigative Reporting, a nonprofit journalism organization, used large numbers of federal court records for an investigative series about judicial conflicts of interest. *See* Declaration of Robert J. Rosenthal at ¶ 4. The organization has also relied on records from PACER for its reporting on subjects such as problems at the Department of Veterans Affairs, health effects of chemical plants, farmworker sexual abuse, and the abuse of developmentally disabled adults in the care of the state. *Id* at ¶¶ 5-11.

Unfortunately, PACER's fee structure prevents researchers like these from conducting more ambitious empirical projects examining patterns and trends across entire courts over longer periods of time. *See, e.g.*, Sag Decl. at ¶¶ 13-14; Katz Decl. at ¶¶ 12-14; Rosenthal Decl. at ¶¶ 13-14; Declaration of Tami Gierloff at ¶¶ 5-7; Declaration of Laura Orr at ¶ 7. Public Resource's proposal would enable them to embark on some these worthwhile projects by using the same materials accessed by Public Resource for its privacy audit. Not only would this help to produce important academic scholarship, policy research, and journalism, but Public Resource's follow-up analysis on how the public repository is used (and hopefully the Judicial Conference's reciprocal analysis of any changes in PACER usage) would provide the Court and policymakers with important data to use in



evaluating future fee exemption requests, as well as the broader policies governing PACER access and fees.<sup>5</sup>

#### **IV. GRANTING PUBLIC RESOURCE'S REQUEST WOULD BENEFIT THE PUBLIC AND THE COURT SYSTEM.**

Public access to court records is an issue with profound constitutional implications. “Under the first amendment, the press and the public have a presumed right of access to court proceedings and documents.” *Oregonian Publishing Co. v. United States Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990). The Supreme Court has recognized “the beneficial effects of public scrutiny upon the administration of justice,” *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975), and this Court has recently reaffirmed that “access to public proceedings and records is an indispensable predicate to free expression about the workings of government,” *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014).

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<sup>5</sup> The Fee Schedule directs courts to find that “individual researchers requesting an exemption have shown that the defined research project is intended for scholarly research, that it is limited in scope, and that it is not intended for redistribution on the internet or for commercial purposes.” Fee Schedule ¶ 9. By its plain language, this limitation only applies to “individual researchers,” not Section 501(c)(3) not-for-profit organizations, which are listed separately where the Fee Schedule identifies the types of individuals and entities that may be considered for fee exemptions. *Id.* Public Resource’s request illustrates why a nonprofit organization could warrant different treatment. While its proposal does involve redistributing records obtained with the fee exemption on the Internet (via a non-commercial website), Public Resource will use its proven institutional resources to monitor and analyze how this publicly accessible archive is used, and report the results to the Court.

Consistent with these principles, Congress has expressed an intention to broaden public access to federal court records through the PACER system. While it has provided that the “Judicial Conference may, only to the extent necessary, prescribe reasonable fees” for accessing court records electronically, Congress has directed that the courts provide exemptions from these user fees “to promote public access to such information.” 28 U.S.C. § 1913, Notes on Court Fees for Electronic Access to Information; *see also* Judiciary Appropriations Act of 1992, Public Law 102–140, Title III, § 303(a) (Oct. 28, 1991). And in enacting the E-Government Act of 2001, the Senate Committee on Governmental Affairs stated that it “intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible.” Senate Report No. 174 (June 24, 2002), S. REP. 107-174, 2002 WL 1425816, at \*23.

Public Resource’s proposal gives this Court an opportunity to conduct a controlled experiment in expanding public access while also protecting individual privacy and collecting important empirical information about usage patterns that could help shape future policy with respect to PACER access and fees. It is a long-held principle that each court has considerable discretion in framing local rules and orders, subject to the requirements of Judicial Conference policy and federal law. As Senator Thomas Walsh of Montana said during the debates over the Rules

Enabling Act of 1934 (which established the modern system of uniform federal court rules), “it is beyond human ingenuity or talent to frame statutes or rules suited to every contingency.” Stephen Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. Pa. L. Rev. 1999, 2008 (1989).

In a related area of public access, the Judicial Conference has a long history of embarking on successful pilot programs allowing cameras in courtrooms. *See* History of Cameras in the Federal Courts, <http://www.uscourts.gov/Multimedia/Cameras/history.aspx>. This Court in particular has been a leader in adopting such innovative programs that have provided greater public access to proceedings before the Court. *See, e.g.*, John Schwartz, Rule Invites Cameras Into Federal Civil Cases, N.Y. Times (Dec. 18, 2009) (quoting Judge Kozinski describing a pilot program to allow cameras in certain civil proceedings as an “experiment ... designed to help us find the right balance between the public’s right to access to the courts and the parties’ right to a fair and dignified proceeding”).

Public Resource has previously worked with the Court of Appeals to digitize historical Ninth Circuit opinions and briefs and make them available online for the first time. *See* Malamud Decl. ¶ 4. The Ninth Circuit has invited Public Resource’s president, Mr. Malamud, to speak on access to the courts and privacy issues. *Id.* ¶ 12. And the organization’s large-scale work in promoting public

access to court records and protecting individual privacy has drawn recognition from judges and members of congress and helped guide courts and agencies in changing their policies and practices. *Id.* ¶¶ 6-21. Given its track record in this area, Public Resource believes that it would be a productive partner for the Court in carrying out an important experiment in promoting public access to information while also balancing individual privacy concerns and the practical considerations of the court system.

## V. CONCLUSION

For all of these reasons, Public Resource respectfully requests that this Court grant it an exemption from user access fees for the PACER system for a period of 12 months that would provide for unlimited access to all documents within this Court, the District of Idaho, District of Nevada, District of Oregon, and the Western District of Washington, and that the Court also permit Public Resource to transfer the files it accesses pursuant to the exemption to a non-commercial Internet site where they would be freely accessible to the public.

RESPECTFULLY SUBMITTED this 2nd day of April, 2015.

DAVIS WRIGHT TREMAINE LLP  
THOMAS R. BURKE  
DAN LAIDMAN

By

  
Thomas R. Burke

Attorneys for Applicant  
PUBLIC.RESOURCE.ORG