Dear Committee on Federal Rules of Civil Procedure —

I've submitted a proposal to amend FRCP 4(i) for more efficient summons on the Government. I note that it almost exclusively benefits those who can *initiate* a case through CM/ECF.

As the Committee may recall from my in-person testimony at the Nov. 2016 FRCP hearing, where I was the only person to speak about the proposed change to Rule 5, I strongly oppose the current Rule 5(d)(3). It acts as a total bar to CM/ECF case initiation for *pro se* litigants.

The Committee based its denial of my counter-proposal, *attached*, entirely on

1. a desire to put prior restraint on certain speech by a class that the Committee disfavors
2. to prevent harms that are implausible, remediable *post hoc*, or actually Constitutional rights
3. based on speculative hypotheticals unsupported by evidence, but rooted in a paternalistic and sometimes hostile view of *pro se* litigants as a class.

I had considered asking you to at least conduct a test run, so you'd see your fears were unfounded. Fortunately — to the sad extent that such a word can be applied to a pandemic — many courts have been forced to conduct that experiment by intervening circumstances. So instead, I now ask you to:

1. submit my counter-proposal[1], together with the full record[2], as a new suggestion;
2. survey the courts that have accepted electronic *pro se* case initiation (e.g. by email); and
3. pass my proposal based on the empirical evidence (i.e. if indeed the sky *hasn't* fallen[3]).

---

[1] Version dated Feb. 15, 2017, "Comments re proposed changes to CM/ECF filing rules for pro se litigants".
[2] *Attached*, including transcript of my testimony, and all substantive Committee discussion of the iterations.
[3] Please specifically compare to the scenarios claimed in opposition to my proposal: in *case initiation* filings, has there been an *unusually* high rate of: porn? libel? improper participation in others' cases? large filings, e.g. from *Meads* style OPCALs? bad docketing? ...? I doubt it, but if the facts are against me, I'll freely admit error. Please do likewise.

I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[4]
President, Fiat Fiendum, Inc.
sai@fiatfiendum.org
April 14, 2021

[4] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States
Standing Committee and Advisory Committees on Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure
Rebecca A. Womeldorf, Secretary
Rules_ Support@ao.uscourts.gov

Comments re proposed changes to CM/ECF filing rules for *pro se* litigants

As the proponent of 15-AP-E, 15-BK-I, 15-CR-D, 15-CV-EE, and 15-CV-GG, which are in part to be discussed at the upcoming hearings, I submit these comments on the proposed amendments, in opposition to the proposed language that would require *pro se* litigants to obtain leave of court before being allowed to use CM/ECF, and proposing alternative rules that avoid these problems while accomplishing the legitimate objectives raised by the committees.

First, however, I would like to point out a problem of representation. While attorneys and judges are very well represented on the Committee — both as commenters and members — there are few if any proponents of the rights of *pro se* litigants. This is a structural problem; among other things, *pro se* litigants are mostly unaware of the judicial rulemaking process, are not invited to contribute, and (unlike other participants, like class action lawyers) have no organization.

As far as I can tell from the committee notes and minutes on this matter, not a single *pro se* litigant, except for myself and one brief commenter[1], has been involved in this rulemaking. Comments have been from people with a quasi-adversarial relationship with *pro se* litigants, such as having to manage difficult cases — resulting in a patronizing, limiting perspective that does not adequately weigh the impacts on the affected *pro se* litigants. I urge the Committee to take serious consideration of the one-sided nature of advocacy on this matter.

While I recognize that there are difficulties with *pro se* litigants, and have had some myself, these are not sufficient reasons for a rule that would presumptively treat all *pro se* litigants as vexatious, and impair their Constitutional rights to *equal* access to the courts.

Respectfully submitted,
/s/ Sai
legal@s.ai

[1] *See* suggestion of Dr. Robert Miller, 15-AP-H / 15-CR-EE / 15-CV-JJ.

A. Summary of proposed changes

The proposed changes below alter the Committee's proposal to:

1. Remove the presumptive prohibition on *pro se* use of CM/ECF, and instead grant presumptive access. This includes CM/ECF access for case initiation filings.
2. Treat *pro se* status as a rebuttably presumed good cause for nonelectronic filing.
    a. For *pro se* prisoners, this is treated as an irrebutable presumption, in the spirit of the FRCrP Committee's notes and for conformity across all the rules.
3. Require courts to allow *pro se* CM/ECF access on par with attorney filers, prohibiting any restriction merely for being *pro se* or a non-attorney, and prohibiting registration fees.
4. Permit *individualized* prohibitions on CM/ECF access for good cause, e.g. for vexatious litigants, and (in the notes) construe pre-enactment vexatious designation as such a prohibition.
5. Change the "signature" paragraph for the reasons stated in my comment re proposed FRAP 25(a)(2)(B)(iii), USC-RULES-AP-2016-0002-0011, *posted* Feb 3, 2017.
6. Conform the signature paragraph in the FRCrP version to the location used in the other rules.

B. Proposed rules

The Committees have proposed the following parallel rule changes. On the left are the committee's proposed changes; on the right are my proposed alternatives. Differences marked in **bold**; ~~strikeout~~ is used only in the notes, so as to not conflict with strikeout of prior rule. Italics are additions to the prior rule.

I. F. R. Appellate P. — Rule 25. Filing and Service

A. …

1. …
2. Filing: Method and Timeliness.
   a) *...*
   b) ~~...~~

   Electronic Filing and Signing

   (1) By a Represented Person— Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

   (2) By an Unrepresented Person— When Allowed or Required. A person not represented by an attorney:

   (a) may file electronically only if allowed by court order or by local rule; and

   (b) may be required to file electronically only by court order, or by a local rule that includes

II. F. R. Appellate P. — Rule 25. Filing and Service

A. …

1. …
2. Filing: Method and Timeliness.
   a) *...*
   b) *...*

   Electronic Filing and Signing

   (1) ***Generally Required. Unless an exception or prohibition applies, every person must file electronically.***

   (2) Exceptions. A person may file nonelectronically if:

   *(a) nonelectronic filing is allowed by the court for good cause**,** or is allowed or required by local rule**, or***

   (b) ***the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.***

   (i) ***No court may require a prisoner not represented by an attorney***

reasonable exceptions.

(3) Signing. The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) …

to file electronically.

(3) Prohibition. A person must not file electronically if prohibited, for good cause, by court order.

(a) No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.

(4) Signing. ***Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.***

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(**iv**) …

Rule 25(a)(2)(B)(iii). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on

electronic filing. Such prohibitions may be modified by superceding order.

Rule 25(a)(2)(B)(iii)(a). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

III. F. R. Bankruptcy P. — Rule 5005. Filing and Transmittal of Papers

A. FILING.

1. …

2. *Electronic* Filing *and Signing* ~~by Electronic Means.~~

a) *By a Represented Entity—Generally Required; Exceptions.* ~~A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.~~ *An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.* ~~A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~

b) *By an Unrepresented Individual— When Allowed or Required. An individual not represented by an attorney:*

(1) may file electronically only if allowed by court order or by local rule; and

(2) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

c) *Signing. The user name*

IV. F. R. Bankruptcy P. — Rule 5005. Filing and Transmittal of Papers

A. FILING.

1. …

2. *Electronic* Filing *and Signing* ~~by Electronic Means.~~

a) ~~A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~ ***Generally Required. Unless an exception or prohibition applies, every person must file electronically.***

b) ***Exceptions. A person may file nonelectronically if:***

*(1) nonelectronic filing is allowed by the court for good cause**,** or is allowed or required by local rule**, or***

(2) the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.

(a) No court may require a prisoner not represented by an attorney to file electronically.

c) ***Prohibition. A person must not file electronically if***

and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

prohibited, for good cause, by court order.

(1) No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.

d) *Signing.* ***Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.***

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by an individual not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

A *pro se* litigant enjoys a rebuttable presumption (and for a *pro se* prisoner, an irrebuttable presumption) of having good cause not to file electronically. Unless ordered otherwise on a case by case basis, they may file either electronically or nonelectronically, including for case initiation. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate

filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.	electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission**; this rule change requires that permission be given on the same terms as any other filer**. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.
The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.	~~The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.~~

V. F. R. Civil P. — Rule 5. Serving and Filing Pleadings and Other Papers

A. …

D. Filing.

1. …

3. Electronic Filing~~,~~ *and* Signing~~,~~ ~~or Verification~~. ~~A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed.~~

a) By a Represented Person—Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

b) By an Unrepresented Person—When Allowed or Required. A person not represented by an attorney:

(1) may file electronically only if allowed by court order or by local rule; and

(2) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

c) Signing. The user name and password of an attorney of record, together with the attorney's name on

VI. F. R. Civil P. — Rule 5. Serving and Filing Pleadings and Other Papers

A. …

D. Filing.

1. …

3. Electronic Filing~~,~~ *and* Signing~~,~~ ~~or Verification~~. ~~A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed.~~

a) ***Generally Required. Unless an exception or prohibition applies, every person must file electronically.***

b) ***Exceptions. A person*** *may* ***file nonelectronically if:***

*(1) nonelectronic filing is allowed by the court for good cause****,*** *or is allowed or required by local rule****, or***

(2) ***the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.***

(a) ***No court may require a prisoner not represented by an attorney to file electronically.***

c) ***Prohibition. A person must not file electronically if prohibited, for good cause, by court order.***

a signature block, serves as the attorney's signature.

(1) ***No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.***

d) Signing. ***Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.***

Committee Note

Rule 5 is amended to reflect the widespread transition to electronic filing and service. Almost all filings by represented parties are now made with the court's electronic-filing system.

…

Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties,

Committee Note

Rule 5 is amended to reflect the widespread transition to electronic filing and service. Almost all filings by represented parties are now made with the court's electronic-filing system.

…

Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it generally mandatory in all districts ~~for a person represented by an attorney~~. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

A *pro se* litigant enjoys a rebuttable presumption (and for a *pro se* prisoner, an irrebuttable presumption) of having good cause not to file electronically. Unless ordered otherwise on a case by case basis, they may file either electronically or nonelectronically, including for case initiation. ~~Filings by a person not represented by an attorney are treated separately.~~ It is not

and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order.

yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order.

Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e- filing in collateral proceedings by pro se prisoners.

Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission**; this rule change requires that permission be given on the same terms as any other filer**. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e- filing in collateral proceedings by pro se prisoners.

The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

~~The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.~~

Rule 5(d)(3)(C). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to

prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on electronic filing. Such prohibitions may be modified by superceding order.

Rule 5(d)(3)(C)(i). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

VII. F. R. Criminal P. — Rule 49. Serving and Filing Papers

A. Service on a Party.

1. …

3. Service by Electronic Means.

a) Using the Court's Electronic Filing System. A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.

b) …

4. …

B. Filing.

1. …

2. Means of Filing.

a) Electronically. A paper is filed electronically by filing it with the court's electronic-filing system. The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature. A paper filed electronically is written or in writing under these rules.

b) …

3. Means Used by Represented and Unrepresented Parties.

VIII. F. R. Criminal P. — Rule 49. Serving and Filing Papers

A. Service on a Party.

1. …

3. Service by Electronic Means.

*a) Using the Court's Electronic Filing System. **A registered user** may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney **is not required to do so unless otherwise required** by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.*

b) …

4. …

B. Filing.

1. …

2. Means of Filing.

a) Electronically. A paper is filed electronically by filing it with the court's electronic-filing system. A paper filed electronically is written or in writing under these rules.

b) …

3. Electronic filing and signing

a) Generally Required. Unless an exception or prohibition applies, every person must file electronically.

b) Exceptions. A person may file nonelectronically if:

a) Represented Party. A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

b) Unrepresented Party. A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.

4. ...

C. Service and Filing by Nonparties. A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

D. ~~...~~

*(1) nonelectronic filing is allowed by the court for good cause**,** or is allowed or required by local rule**,***

(2) the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.

(a) No court may require a prisoner not represented by an attorney to file electronically.

c) Prohibition. A person must not file electronically if prohibited, for good cause, by court order.

(1) No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.

d) Signing. Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.

4. ...

*C. Service and Filing by Nonparties. A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed **Rule 49(b)(3),** court order**,** or local rule.*

D. ~~...~~

Committee Note

Rule 49 previously required service and filing in a "manner provided" in "a civil action." The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

…

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court's electronic- filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its

Committee Note

Rule 49 previously required service and filing in a "manner provided" in "a civil action." The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

…

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court's electronic- filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its

widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

…

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic-filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer

widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic-filing system, but unrepresented parties **are not required to do so** ~~may do so only if allowed by court order or local rule~~. **A *pro se* litigant enjoys a rebuttable presumption (and for a *pro se* prisoner, an irrebuttable presumption) of having good cause not to file electronically. Unless ordered otherwise on a case by case basis, they may file either electronically or nonelectronically, including for case initiation. *See also* note re subsection (b)(3)(B)(ii)(a), below.**

…

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic-filing system ~~and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature~~. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer

necessary.

…

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court's electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

…

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights

necessary.

…

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used~~, depending upon whether the party is represented by an attorney~~. Subsection (b)(3)(A) requires represented parties to use the court's electronic-filing system, but **subsection (b)(3)(B)** provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B)**(ii)(a) prohibits restriction on pro se prisoners' right to file nonelectronically** ~~requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule~~**.** ~~This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where e~~**E**lectronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

…

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights

under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court's electronic-filing system only when permitted to do so by court order or local rule.

under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties~~, like unrepresented parties,~~ may use the court's electronic-filing system ~~only when permitted to do so by court order or local rule~~ **on the same terms as any other person**.

…

Rule 49(b)(3)(C). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on electronic filing. Such prohibitions may be modified by superceding order.

Rule 49(b)(3)(C)(i). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

C. Introduction

My name is Sai[2]. I do many things, but relevant here is my legal advocacy work[3] and, to some extent, my disabilities. I have no formal training in law.

After being the victim of a series of abuses by the Transportation Security Administration (TSA) at airport checkpoints, I filed formal Rehabilitation Act complaints and Federal Tort Claims Act (FTCA) claims. This was followed by a variety of Freedom of Information Act (FOIA) and Privacy Act requests aimed both at investigating what happened to me and exposing TSA's secret policies and procedures.

When my efforts were met only by agency stonewalling, I sued — first under FOIA / Privacy Act, then under the APA / Rehabilitation Act. After a year of litigation in the latter, I prevailed and obtained an injunction[4], and was subsequently awarded prevailing party status and costs.[5]

These cases were my introduction to litigation; I learned by doing. To paraphrase another, I am too sensible of my defects not to realize that I committed many errors. No civil procedure text is adequate preparation, when compared to experience.

I have been *pro se* not from pride or lack of attempt to get counsel, but because I am both poor and principled. I was unable to obtain counsel without submitting my IFP affidavit on public record, 149 F. Supp. 3d 99, 126-28, in violation of my rights to privacy, which I refused to do.

My cases are not frivolous, and I am not vexatious — just poor, unwilling to give up my civil rights, and unable to find *pro bono* counsel to handle my primary litigation.

Despite the Supreme Court's assumptions in *Kay v. Ehrler*, 499 US 432, 437 (1991) as to "the overriding statutory concern is the interest in obtaining independent counsel for victims of civil

---

[2] I am mononymic; Sai is my full legal name. I prefer to be addressed or referred to without any title (e.g. no "Mr.") and with gender-neutral language / pronouns (e.g. "they/their" or "Sai/Sai's").

[3] *See* https://s.ai/work/legal_resume.pdf

[4] *Sai v. DHS et al.,* 149 F. Supp. 3d 99, 110-21 (D. D.C. 2015)

[5] *Id.,* ECF No. 93 (April 15, 2016)

rights violations" — and indeed the general prejudice that equates "*pro se*" with "frivolous" — it is still true that "some civil rights claimants with meritorious cases [are] unable to obtain counsel". *Bradshaw v. Zoological Soc. of San Diego*, 662 F. 2d 1301, 1319 (9th Cir. 1981).

This category of meritorious plaintiffs unable to obtain a lawyer and forced to proceed *pro se* includes me and many others like me. Even when not facing a Hobson's choice between privacy and access to counsel, *In re Boston Herald, Inc. v John J. Connolly, Jr.*, 321 F.3d 174, 188 (1st Cir. 2003), the financial and structural barriers to obtaining counsel are often insurmountable.

These barriers are compounded by inequities in accessing the courts *pro se*. Not only do I not have the skill and training of my opponents from the Department of Justice, I do not have access to a legal research staff, Lexis, WestLaw, or a law library. Due to my disabilities, I face further difficulties dealing with non-electronic documents. CM/ECF helps, and I use it regularly.

The Committee's proposed rule would worsen this situation — creating a presumptive *de facto* sanction akin to those applied to vexatious litigants — when instead it should be improved, by allowing *pro se* litigants fully equal access to CM/ECF and the many benefits thereof.

D. Argument

1. The proposed rule[6] confuses permission with requirement

The official committee notes on the proposed rule, and the final committee comments, make clear that the intent of the rule is to protect *pro se* filers from the electronic filing mandate that the rules change would otherwise impose on represented plaintiffs.

I fully support this motivation, so far as it goes.[7] It is indeed true that many *pro se* filers may not have the skills, equipment, Internet access, electronic document creation and redaction software, etc. that are required to fully participate in CM/ECF. This is particularly acute, as the FRCrP committee points out, for *pro se* prisoners, whose institutions may severely limit their access to email, computers, Internet, and other critical resources.

The proposed rule, for represented parties, permits non-electronic filing on a showing of good cause. In effect — and in my proposed alternative — *pro se* filers should be given a rebuttable presumption of this same good cause, permitting them to file non-electronically without first seeking leave of court. *Pro se* prisoners should be given an *irrebuttable* presumption, in consideration of their much more restrictive and sometimes unpredictable situations.

However, the proposed rule goes much farther: it does not merely permit non-electronic filing by *pro se* litigants (prisoners and otherwise). Rather, it *requires* non-electronic filing — *prohibiting* electronic filing — without a first showing of good cause.

This requirement imposes a wide array of seriously prejudicial, costly, and unequal effects on those *pro se* litigants who *are* capable of using electronic filing and desire to do so.

---

[6] Because the proposed changes to the FRAP, FRBP, FRCrP, and FRCvP are essentially equivalent, I treat them as a single 'rule', noting differences only where applicable.

[7] Prior committee minutes and comments make clear that there are in fact other motivations for the proposed rule that go beyond protection to prohibition. I oppose and address those below.

2. The proposed rule is overbroad, and ignores its procedural implications.

The proposed rule requires that a litigant obtain leave of court, *in each specific case*, to file electronically. Even if they have used CM/ECF before — indeed, even if they are currently a CM/ECF filer in the *same court* — they must obtain leave in each new case. The rule as drafted would even prohibit *attorneys* who are members of the court's bar from electronic filing if they appear *pro se*, i.e. without being "represented by" someone else.

Because leave of court cannot be obtained in a case before that case even exists on the docket, the procedural implication is that *pro se* filers — even those who would easily obtain leave of court — can *never* file case initiation by CM/ECF.

An attorney filer can simply fill out a form (often online), check their consent and agreement to the terms of use, possibly go through an online CM/ECF tutorial, and proceed — initiating the case electronically and having immediate NEFs of all proceedings.

A *pro se* filer must read the local rules (and CM/ECF guidelines) in detail, draft their own motion and affidavit noting every specific requirements of each court, file it by mail, and hope for the best. The rules give no form motion for this, and courts vary in their requirements. A response might come by mail or email, perhaps weeks later (if approved at all).

3. Harms from not allowing CM/ECF by *pro se* filers

Litigants have the right to appear pro se in all court proceedings. 28 U.S. Code § 1654.[8] This right is Constitutionally backed in multiple aspects: the 6th Amendment right to refuse counsel; substantive and procedural due process rights under the 14th Amendment; Constitutional rights of action, such as 42 U.S. Code § 1983 / Bivens; and the per se right to equal access to the courts.[9]

The proposed rule impairs these rights by prohibiting pro se litigants from accessing the benefits of CM/ECF on an equal basis with represented litigants. It does so without any particularized determination that a given pro se litigant, contrary to their presumptive desire to opt in[10], should

---

[8] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

[9] I am aware of only one case that has analyzed differential CM/ECF rules for *pro se* litigants: *Greenspan v. Administrative Office of U.S. Courts*, No. 5:14-cv-02396 (N.D. CA. Dec. 4, 2014) at *13-14 (upholding CAND L.R. 5-1(b), which prohibits *pro se* electronic filing without leave of court, under rational basis review). However, Greenspan did not raise, and that court did not consider, the arguments presented here; the case was principally about whether Greenspan could represent his corporation *pro se*.

Even there, the court's reasoning ("a number of *pro se* litigants lack access to a computer … or the skills needed to maneuver through the electronic case filing system", *id*. at *14) only supports a permissive rule exempting *pro se* litigants from otherwise-mandatory electronic filing (i.e. allowing them to file either way).

It does not indicate any rational basis for going further and *forbidding* all members of the class of *pro se* litigants from using electronic filing until leave of court is obtained, merely because some members of the class may not wish to, or may not be able to, take advantage of it.

This argument is especially weak when applied to to *pro se* litigants who actively wish to opt in. If, given access, someone can file a case initiation — perhaps the most complex single docket entry in the CM/ECF system — it would surely be hard to find any rational basis to assume that they are *not* able to use CM/ECF. If they are not able to, no harm is done in allowing them to try.

[10] I assume here that the *pro se* litigant in question would, if permitted, sign up for CM/ECF online and file everything electronically — but for a rule requiring them to first obtain leave of court. If they file on paper voluntarily, these harms are still present, but are at least consented to.

The alternative rule I proposed above would protect *pro se* litigants who can be presumed to have good cause not to use CM/ECF, by allowing them to continue to file by paper unless the

be barred from CM/ECF usage.[11]

a. Total ban on pro se CM/ECF case initiation

Because a case must be initiated before a motion for CM/ECF access can even be filed and an order issued, any requirement to first obtain permission means all *pro se* case initiation must be filed on paper. No CM/ECF permission order, no matter how timely granted, can cure this.

The types of harms this causes are detailed below — but case initiation is unique.

The exact filing time can be dispositive, as when there is a statute of limitations or other jurisdictional deadline. This is especially so if the deadline is over a weekend or other time when the court is physically closed, or if the situation precludes the luxury of additional time to file.

In cases seeking PI/TRO relief — particularly an emergency *ex parte* TRO — case initiation delays can cause a winnable issue to be mooted, or exacerbate an irreparable harm. While TROs are only rarely merited, a plaintiff is no less entitled to such relief merely for being *pro se*.

Case initiation documents may be larger than other motions — particularly now, when cautious plaintiffs may feel forced to provide extensive affidavits or exhibits upfront to avoid an *Iqbal* challenge. Especially when courts require multiple duplicates of case initiation documents for service, chambers, etc., the printing and mailing costs are higher than for other filings.

All *pro se* litigants are irreparably harmed by a rule that requires post-initiation CM/ECF permission. In at least some situations, this alone can make or break a case.

b. Delays

Filing on paper imposes numerous delays.

CM/ECF access is directly linked to receiving notices of electronic filing (NEFs). Where a

---

court makes a particularized determination overcoming this presumption.

[11] For instance, a court might determine that a given litigant is vexatious; that they do not appear to receive adequate notice by email, and should be served by mail instead; or that for some reason their CM/ECF usage is so severely impaired or abusive, where their paper filings would *not* be, that they should be prohibited from using CM/ECF.

CM/ECF filer receives immediate notice of every filing by email, a non-electronic filer must wait for physical mail to arrive (and possibly to be forwarded, scanned, etc) before even being aware of the filing.[12] For litigants with disabilities, who travel frequently, or reside overseas, such as me, waiting for and accessing physical mail imposes routinely delays of weeks.

This is just to *receive* filings; one must also respond.

Whereas CM/ECF allows *immediate* filing and docketing, paper filings must first be printed, mailed, processed by the court's mailroom, processed by the court's clerk, and docketed.

Depending on the location of the litigant and court, the price paid for printing & mailing services, and other factors, this can routinely take about a week to complete.

In most situations, paper filing cannot be completed at all on weekends or after business hours. Where a CM/ECF filer might stay up late to finish a brief, realize that it won't be done in time, and timely file a motion for extension at 11:50 pm that is nearly certain to be granted, it would be impossible for a paper filer to do the same.

If a dispositive motion is pending, such as MTD or MSJ, then the court could rule on the "unopposed" motion, against the *pro se* litigant — dismissing their case before their motion for extension even has the chance to reach the courthouse.

Due to these delays, a *pro se* litigant is impaired should they seek to file a timely *amicus curiae* brief or to intervene in a case.

People who can afford lawyers are not the only ones who can or should be friends of the court. “An amicus brief should normally be allowed” when “the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Cmty. Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. WA. 1999) (citing *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903)). Presumptive CM/ECF prohibition imposes another unnecessary burden on would-be *amici* who

[12] Alternatively, they must check PACER on a daily basis, incurring fees that NEF recipients do not while also incurring a different burden on their work habits.

do not have the resources to hire a lawyer. These burdens cause the courts lose the voices of many who have "unique information or perspective" to proffer. As with so many parts of our justice system, this systemically and selectively silences people and groups with less money.[13]

Seeking leave to intervene in a case is hardly a sign of a frivolous filing. Motions to intervene as a member of the press, in order to challenge seal or protective order, is part of the "long-established legal tradition [of] the presumptive right of the public to inspect and copy judicial documents and files". *In re Knoxville News Sentinel Co.*, 723 F.2d 470, 473-74 (6th Cir. 1983), *citing* *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978).[14] In today's era of

---

[13] Recently, the Language Creation Society (a non-profit organization I founded) filed an *amicus* brief in *Paramount v. Axanar*, No. 2:15-cv-09938 (C.D. CA., *amicus filed* April 27, 2016) (re copyrightability of the Klingon language). *See* http://conlang.org/axanar.

Fortunately, we were able to obtain the services of an excellent First Amendment lawyer *pro bono*. Without his generosity, we could not have afforded counsel, and I would likely have drafted and filed the *amicus* myself. Within the LCS, I had the best combination of legal and linguistic expertise to present the court with "unique information or perspective" on an issue — whether or not languages can be copyrighted — that the parties only touched on in passing.

In an entirely different context, I have done similarly on behalf of another nonprofit I founded — opposing a poorly crafted FEC advisory opinion request on Bitcoin based campaign finance contributions. The proposal was backed by both an extremely experienced campaign finance lawyer and the Bitcoin Foundation, but I had the unique perspective on the *intersection* of law and technology needed to point out many severe loopholes in the plan. My opposition was successful (FEC deadlocked 3-3) — as was my later alternative proposal (approved 6-0). *See* https://www.makeyourlaws.org/fec/bitcoin/caf and https://www.makeyourlaws.org/fec/bitcoin/.

I recognize that this may seem like an attempt to brag, but it is not. I am perhaps unique in my particular combination of skills, but so is everyone. That is the whole point of *amici*: to encourage third parties to contribute their unique perspectives to courts' decisionmaking. This purpose is not served by discouraging *amici* who cannot afford a lawyer.

[14] The circuits are *unanimous* that third parties may permissively intervene for the specific purpose of accessing judicial records. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988); *Martindell v. International Telephone and Telegraph Corp.*, 594 F.2d 291, 294 (2nd Cir. 1979); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3rd Cir. 1994); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979); *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994); *Beckman Industries, Inc. v. International Insurance Co.*, 966 F.2d 470, 473 (9th Cir. 1992); *United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

citizen journalism, it is not only large media organizations who can afford lawyers that need to exercise this right. Independent journalists do too — and must file a *pro se* intervention to do so.

This inequity in access and delays results in two procedurally different systems. In one, a litigant can routinely work right up to the deadline, and quickly make last-minute filings if necessary. In the other, a litigant faces a *de facto* one week reduction of all their drafting times, and a total bar to last-minute filings.[15]

This inequity goes beyond mere convenience. If non-consensual, it is a substantial burden added to *every part* of litigating a case — from reducing the time one has to draft filings and access for independent journalists all the way to being dispositive of certain causes of action or barring some critical forms of relief, like last-minute extensions on dispositive motions, altogether.

c. Costs

Filing electronically, if one has the computer and Internet access needed to participate in CM/ECF, costs nothing. The entire cost of making, transferring, and serving PDFs, even hundreds of pages' worth (a few megabytes at most), amounts to not barely one *milli*-cent.[16]

By contrast, printing costs about 10-20¢ per page, and mailing an average sized motion via certified mail costs about $5. Paper filers must print and mail copies of every filing to the court and to all other parties. Court rules often require multiple copies for the court itself.[17]

This is on top of any cost or time required to get to a print shop or post office in the first place.

For litigants who are overseas or disabled, and therefore unable to access a U.S. post office in person in order to send certified mail, this creates additional costs and other barriers — requiring the use of online print and mail services, depending on friends, etc.

---

[15] *Pro se* litigants are given no special consideration for procedural standards such as filing times.
[16] *See* e.g. https://aws.amazon.com/s3/pricing/ (storage and transfer costs ~2¢ per *gigabyte*).

[17] *See e.g.* Ninth Circuit Rule 25-5(f), FRAP 27(d)(3) (ordinarily requiring no paper copies of motions for CM/ECF users — but for paper filers, requiring one 'original' plus three 'copies' for the court).

With each filing costing about $5-20, and dozens of filings per case, these costs can easily accumulate to hundreds of dollars.

This is especially harmful for *pro se* litigants proceeding *in forma pauperis* ("IFP"), 28 U.S.C. § 1915. While IFP plaintiffs are excused from court fees, they are *not* protected from such costs. A court that requires a *pro se* IFP litigant to file on paper effectively imposes unnecessary extra costs on them — costs that their represented opponents do not bear. This goes directly against the intent of the IFP statute.

Even if the *pro se* IFP litigant is successful, and has the skill and awareness to file a motion for costs, such motions can generally only be filed after final judgment. In the meantime, the litigant must incur potentially hundreds of dollars — even though a court granting IFP status has already determined that its filing fee, ~$400, is more than they can reasonably bear.

These costs also hinder equality on the merits. A *pro se* litigant without CM/ECF access may easily be deterred from filing evidence, such as exhibits or affidavits, that could make the critical difference to whether a case survives *Iqbal* (or 28 USC § 1915(e)(2)(B)) review.

d. Accessibility and presentability

Properly made electronic PDFs are dramatically more accessible than scanned paper. CM/ECF normally generates the former; a "non-electronic filing" necessarily generates the latter.

For people with disabilities such as blindness, this difference is critical. Modern optical character recognition (OCR) technology is very inaccurate; a scanned and OCR'd document is functionally inaccessible to adaptive technology such as screen readers — whereas the electronic document from which it was printed is likely to be largely accessible.[18]

Electronic documents are better for everyone than scanned paper. They are more readable on a

[18] *Full* accessibility is more complicated, and requires paying attention to preserve structural metadata such as headers, as well adding metadata for some information, such as images. *See e.g.* the U.S. Access Board's new regulations under the Rehabilitation Act § 508: https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/overview-of-the-final-rule

screen; they can be more readily printed in large print or other adaptive formats; they preserve hyperlinks; and they permit PDF structuring, such as bookmarks for sections or exhibits.

These benefits are not only for the filer. Other parties' counsel may have disabilities[19], as may the judge[20]. Even for those without disabilities, very routine operations — for instance, copying a citation into a search engine, or pasting a quote into a draft response or opinion — are far easier with electronic documents, but can pose significant barriers with scanned paper documents.

Receiving paper filings hinders the litigant's own access to court documents.

Being required to file on paper hinders *everyone's* access to the litigant's filings, making them less likely to be read as carefully or treated as seriously as they might otherwise be — and creating yet another subtle but significant bias against the *pro se* litigant.[21]

e. Tracking cases of interest

Although not a formal part of the CM/ECF rules, part of how the current CM/ECF system works is that CM/ECF filers — but not ordinary PACER users — can track "cases of interest". This allows someone to receive the same NEFs as parties do (aside from certain sealed filings), for more or less any case in a court for which the person has CM/ECF access.

This is not merely a frivolous convenience. Cases of interest may be ones in which someone may wish to file an amicus or intervention. They frequently present similar issues to those one is litigating, and thereby give awareness of arguments to crib from or prepare against, evidence found by other litigants, or even intervening authority that may justify an FRAP 28(j) letter or a

---

[19] *See e.g.* http://www.blindlawyer.org/

[20] For instance, Ninth Circuit Judge Ronald M. Gould, a widely respected and active jurist, has advanced multiple sclerosis. Although I do not know what specific tools Judge Gould uses, screen readers are a common adaptive technology for MS. *See e.g.*:
http://www.uscourts.gov/news/2013/12/16/focus-what-you-can-do-advises-judge-ms
http://www.gatfl.gatech.edu/tflwiki/images/5/59/UGA_-_AAC_DND_2014_Fall_Presentation.pdf

[21] *See* e.g. Judge Alex Kozinski, *The Wrong Stuff* (discussing ways to annoy a judge and thereby lose one's case — including through the format of briefs).

motion for reconsideration. They may be of journalistic interest, where immediate notification of developments is critical to presenting timely news to one's audience.

There is no good reason to restrict this functionality — but as is, non-attorneys cannot routinely and readily get access to this extremely useful tool unless they are first granted CM/ECF access in a particular court.

4. Concerns particular to prisoners

As the FRCrP committee correctly noted in comments on its version of the proposed rule, prisoners are often unable to obtain or maintain reliable access to the basic tools needed to use CM/ECF. Prisons may prohibit access to email, Internet, or even word processing software, and this access may vary if a prisoner is transferred or subjected to administrative punishments.

Where most *pro se* litigants should be presumed to have good cause not to use CM/ECF, a *pro se* prisoner should get an *irrebuttable* presumption of good cause. The court, and indeed the prisoner, may not always know or be able to predict when their access will be impaired. To the extent that the prisoner wants and is able to participate in CM/ECF, it should still be allowed, for all the above reasons. However, prisoners should *always* have the option of filing by paper, even if they are otherwise CM/ECF participants, without needing to seek any leave of court. The prisoner is in the best position to determine which option is best for them at any given time.

While it is true that the 6th Amendment *per se* only protects the right to participate *pro se* in criminal proceedings. However, prisoners have just as much right to participate *pro se* in other matters as anyone else, including under 28 U.S.C. § 1654.

The Supreme Court has explicitly "reject[ed] the … claim that inmates are ill-equipped to use the tools of the trade of the legal profession", *Bounds v. Smith*, 430 US 817, 826 (1977) (internal quotations omitted). CM/ECF is the modern "tool of the trade", and denying access to it would impair prisoners' "fundamental constitutional right of access to the courts", *id.* at 828, just as much in matters such as civil rights complaints as in criminal proceedings.

Filing accommodations that protect prisoners' rights to access the courts must therefore be made across *all* the rules of procedure, not just the criminal rules. My proposed alternative does so.

Further, not all *pro se* participants in criminal proceedings are prisoners. Some will be out on bail pending trial, or participating due to some post-release criminal proceeding. These *pro se* participants must have their 6th Amendment rights protected, and will often face the similar barriers to *pro se* IFP litigants, but do not have the concerns specific to the prison context.

5. Concerns raised in committee minutes not expressed in the final proposed note

The minutes of the committees discussing *pro se* access to CM/ECF demonstrate a range of concerns about possible abuse of the system. I believe it is clear that these concerns are the real reason — unexpressed in the final proposed note — for why the proposed rule goes beyond merely not requiring *pro se* CM/ECF use, to prohibiting it unless permission is first obtained.

As an initial matter, the Administrative Procedure Act, which applies to this rulemaking proceeding, does not permit such covert purposes. The official notes and comments simply do not support the extra step of a presumptive prohibition on *pro se* CM/ECF use; they only justify an exception from the CM/ECF requirement otherwise imposed on attorney filers.

If the Committee does wish to go this extra step, it must plainly justify its reasons, on the record.

I do not believe that any of the previously expressed concerns justify the proposed rule. In essence, it constitutes a presumptive sanction — equating "*pro se*" with "presumed vexatious".

Like all forms of prior restraint, this is anathema in our legal system.

The expressed concerns do not justify impairing the entire class of *pro se* litigants for the sins of a few; those sins are in some cases imaginary, or are even protected rights; and even for those few people who may abuse the system, a presumptive limitation on CM/ECF use *per se* either would not cure the issue or is not the appropriate remedy.

By analogy, suppose that an executive agency undergoing public APA notice & comment had a rule allowing lawyers to submit comments electronically immediately visible to everyone — but requiring that all others submit comments on paper, citing a concern that some citizens might file abusive content. That rule would surely be struck down on court challenge, as a clear example of First Amendment prior restraint.

This proposed rule is not exempt from the same inquiry, and the Committee should apply the same scrutiny it would apply to any other attempt at a prior restraint on speech.

With that said, let us examine the specific concerns raised.[22]

a. Not having the capability to use CM/ECF

Certainly many *pro se* litigants, particularly prisoners, will not have the ability to use CM/ECF — either due to lack of skill or comfort with the CM/ECF system itself, or lack of Internet and computer access, or some other such impediment.

First off, this concern only justifies an exemption, not a prohibition. Each individual litigant is the person who should decide their own capabilities and comfort, and opt in or out of CM/ECF as they see fit.

I hope that the Committee does not believe that *pro se* litigants are presumptively so incapable of judging for themselves whether or not they can use CM/ECF, receive email dependably enough, satisfactorily complete whatever CM/ECF training is available, etc. — even where they can be required, like any registrant, to fill out online forms and agreements stating otherwise — that courts should paternalistically take this decision away from the entire *class* of *pro se* litigants.

This of course in no way prevents a court from making an *individualized* determination about a specific *pro se* litigant, based on good cause — either that they are sophisticated enough that they should be required to file electronically like an attorney, or that they are so bad at using CM/ECF that they should be ordered to only file on paper. Such orders can be contingent (e.g. on completing some training), limited to a given case, or applied presumptively for *all* future filings (as with vexatious litigant orders prohibiting filing in general without permission, but particular to electronic filing).

My proposed alternative rule permits courts to make such determinations. It simply requires that they be made on a case by case basis, giving the *pro se* litigant the benefit of an initial presumption of good cause.

---

[22] I have not cited specific sources for each, as I do not wish to embarrass any individual Committee member. All can be found in the minutes and reports of committees' consideration of the proposed CM/ECF rules, except for one which was raised to me in person by a member of the FRCP committee following my testimony at the December 2016 hearing.

b. Filing pornographic or defamatory content

It is possible, though surely more apocryphal[23] than descriptive, that a *pro se* litigant may file pornographic or otherwise inappropriate material on the record.[24] But courts have wide powers to issue orders to show cause and create tailored sanctions for inappropriate behavior in court, including for abusive filings.[25]

When used as a direct part of litigation filings, e.g. as a legal tactic, what would otherwise be defamation is protected by absolute litigation privilege.[26] It may be unwise or uncouth, but courts routinely permit *pro se* litigants to attempt all kinds of unwise arguments. Should it stray outside the bounds of what is privileged, the defamed party has their usual remedies.

It is improper for courts to filter filings because they will publicly appear on PACER and *might* contain inappropriate content. A document merely being filed and available on PACER does not imply any imprimatur of approval by the court. Even so, courts are free to strike or seal filings, or to sanction litigants, if there is cause to do so.

Curtailing individual CM/ECF access does not even prevent this issue. Litigants can trivially post anything they would post in a filing in a blog or other website, outside the court's control.

In short, this concern is nearly a textbook definition of prior restraint, with the textbook response: apply tailored sanctions only afterwards, when and if they are appropriate punishment.

---

[23] The legal humor site Lowering the Bar provides at least a couple examples, e.g.:
https://loweringthebar.net/2015/04/to-f-this-court.html
https://loweringthebar.net/2011/12/note-catholic-beast-is-not-a-legal-term-of-art.html

However, considering the huge number of *pro se* filings and tiny number of examples found even by such dedicated collectors as Kevin Underhill, this seems to be a case of the exception proving the rule.

[24] This assumes that the material is in fact inappropriate. There are surely some equally rare cases for which such material is entirely appropriate and necessary evidence.

[25] Lowering the Bar's case law hall of fame helpfully provides a florid example: *Washington v. Alaimo*, 934 F.Supp. 1395 (S.D. Ga. 1996).

[26] *See e.g.* http://www.abi.org/abi-journal/the-boundaries-of-litigation-privilege (collecting cases and noting several exceptions).

c. Improper docketing

Novice CM/ECF users may docket filings improperly — e.g. listing the wrong action or relief, joining separate motion documents in a single filing, misusing the 'emergency' label, failing to upload exhibits, etc. Some amount of this is simply part of learning the system.[27] Even in cases between giant corporations with very experienced counsel, one regularly sees docket clerk annotations of filing deficiencies or correcting docketing errors.

In non-electronic filing, the clerk must scan incoming documents, decide which sections are separate documents, exhibits, etc., and do all the docketing. Sometimes they too can get this wrong, e.g. attaching an affidavit as an exhibit to the wrong motion.

Even if someone is a somewhat inept CM/ECF user, docket clerks routinely screen incoming filings and will correct clear deficiencies or errors. Doing so based on at least the litigant's first pass attempt at classifying their own filing is surely easier than doing it whole cloth — and over time, *pro se* litigants will learn to avoid making the same mistakes.

If the litigant is truly so grossly incompetent and unable to improve that their use of CM/ECF filing is a serious burden to the court's clerks where their paper filings would not be, the court can of course determine that there is good cause to forbid CM/ECF use — presumably after first taking less drastic remedial measures, such as providing the litigant with learning materials, or ordering them to certify that they have completed online CM/ECF training.

This concern is inappropriately paternalistic, and does not justify the harms caused by lacking access to CM/ECF.

---

[27] As a personal example: recently, when attempting to file a large number of exhibits for an MSJ opposition, I received a strange ECF error. I was stumped — as was the court's ECF help desk.

After discussion with the ECF coordinator, it turned out that ECF fails if attachments take more than 20 minutes to upload. The solution: split the filing into two separate docket events to limit the upload time per event, and tag the second using the special 'additional large files' event.

To my knowledge, this is not covered by the court's CM/ECF guidance. As I discovered when I first started to use it, the same is true for many other aspects of the system.

d. Improper participation in others' cases

Pro se litigants might make filings in others' cases. But as discussed above re *amicus* briefs and interventions, this is not presumptively improper. The CM/ECF system already has the functionality to limit users to certain types of filings or certain cases.

Pro se litigants — and indeed all CM/ECF users — could properly be limited to initiatory actions (e.g. motions for leave to file and replies thereto) in cases for which they are not participants. Improper filings can be summarily denied or, if necessary, sanctioned.

e. Filing large documents

Pro se litigants, like any other, may occasionally make voluminous filings.

Some judges have their chambers automatically print all documents filed in their cases, but this is their own choice. They could instead choose not to print documents over a certain size, and either deal with them electronically or order the filer to mail a chambers copy where necessary.

Preventing *pro se* litigants from accessing CM/ECF does not prevent them from making voluminous filings, nor is it presumptively appropriate to do so. Sometimes relevant exhibits simply are voluminous. Cross-motions in a copyright dispute can easily be a thousand pages in total. Again, this should be dealt with on a case by case basis — not by a presumptive bar to accessing CM/ECF.

f. Sharing access credentials with others

If a litigant shares their access credentials with someone else, the other person can file for them. They are just as responsible for this — and might have the same needs — as in the situation where an attorney shares access credentials with their paralegal.[28]

[28] I believe this is an inappropriate practice for security reasons, yet it is currently the mandated approach. *See* comment re proposed FRAP 25(a)(2)(B)(iii), USC-RULES-AP-2016-0002-0011, *posted* Feb 3, 2017.

6. Conclusion

Electronic filing comes with many benefits both to the filer and to all other participants. By the same token, any *prohibition* on electronic filing — including a requirement to first obtain leave of court — comes with many harms.

Pro se litigants should be allowed to make their own choice between paper and electronic filing, without having to seek any leave of court. In particular, they should be allowed full access to CM/ECF case initiation and case tracking. To do otherwise is to impose an unjustified, presumptive sanction on the entire class of *pro se* litigants, putting them at an unfair and unconstitutional disadvantage in exercising their rights to equal access to the courts.

Where a court makes an *individualized* determination of good cause, it should be permitted to require or prohibit a *pro se* litigant's use of CM/ECF — with the exception of prisoners, whose special situation requires protecting their absolute right to access the court, by paper if necessary.

My proposed alternative rule does all of the above. The proposed rule does not, and for the reasons detailed above, I oppose it.

I again urge the Committee to bear in mind both the standards that it would apply to any other governmental prior restraint on such fundamental rights as participation in the legal system, and the one-sided and unrepresentative nature of its own makeup and deliberation. There is an ironic dearth of zealous advocates of the rights of *pro se* litigants — and the Committee has its own biases, from habitually viewing *pro se* litigants as opponents or as problems to manage.

Pro se litigants' participation in the legal system presents many special challenges. From my own perspective as a flawed but successful *pro se* litigant, one of the biggest is in obtaining some semblance of equality with represented parties. At every step, we face numerous and systemic obstacles to the right of equality, yet are expected to keep pace with our represented opponents.

Before the law sit many gatekeepers. Let this not be one of them.

Respectfully submitted,
/s/ Sai