

REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

REPORT ON AGENCY LITIGATION WEBPAGES

Mark Thomson
Deputy Research Director, Administrative Conference of the United States

This report was prepared for the consideration of the Administrative Conference of the United States. It does not necessarily reflect the views of the Conference (including its Council, committees, or members).

Recommended Citation

Mark Thomson, Report on Agency Litigation Webpages (Nov. 24, 2020) (report to the Admin. Conf. of the U.S.).

TABLE OF CONTENTS

Introduction	2
I. The Value of Public Access to Agency Litigation Materials	2
A. Ensuring the public can follow the law	2
B. Promoting accountable and transparent government	4
C. Access to private parties' litigation filings	6
II. Public Access to Agency Litigation Materials	7
A. Federal law regarding publication of agencies' litigation filings	7
B. Federal laws regarding publication of court decisions in agency cases	9
C. PACER	10
D. Paid legal research services	12
III. Survey of Agency Litigation Webpages	12
A. Does the agency maintain an agency litigation webpage?	14
B. How easy is it to find and use the agency's litigation webpage?	16
C. What's on the agency's litigation webpage?	18
IV. Exemplar: The FTC	19
A. The Cases and Proceedings webpage	20
B. The Amicus Briefs webpage	25
V. Potential Objections and Some Answers to Them	27
VI. Recommendations	31

Introduction

This report examines whether and how agencies should publish agency litigation materials on their websites. The report defines “agency litigation materials” to include: (1) judicial opinions in cases to which at least one agency is a party, and (2) substantive filings by agencies in federal court cases. The report concludes that, because agency litigation materials are useful for establishing, explaining, and clarifying agency policies, agencies should consider creating and maintaining webpages cataloguing and linking to copies of agency litigation materials. The report calls such webpages “agency litigation webpages.” It defines “agency litigation webpages” as webpages on agencies’ websites dedicated to systematically cataloging and linking to agency litigation materials — including pleadings, merits briefs, amicus briefs, settlements, and court opinions — from cases in which the agencies participate and which relate to the agencies’ regulatory or enforcement activities.

The report has six sections. Section I explains the value of making agency litigation materials available to the public. Section II shows that federal law does not require agencies to create anything like agency litigation webpages. Section III surveys agencies’ websites and shows that, while a handful of agencies maintain robust and helpful agency litigation webpages, most don’t. Section IV examines the FTC’s litigation webpages to highlight how specific features can make litigation webpages particularly useful. Section V addresses some likely objections to creating and maintaining agency litigation webpages. Section VI concludes by offering some recommendations for federal agencies about developing and maintaining agency litigation webpages.

I. The Value of Public Access to Agency Litigation Materials

Broadly speaking, public access to agency litigation materials is desirable for two reasons. First, because agency litigation materials often clarify how the Federal Government interprets and aims to enforce federal law, they can help people understand their legal obligations. Second, public access to agency litigation materials promotes accountable and transparent government. Those two reasons distinguish agency litigation materials from litigation filings by private parties.

A. Ensuring the public can follow the law

The rule of law depends on people knowing, or at least being able to figure out, what the law is and how the government will enforce it.¹ It's unreasonable to expect people to follow the law if they can't understand how it applies to them.² Because federal agencies make, interpret, and enforce most federal law,³ knowing what the law demands in a given situation often requires knowing what agencies say about it.

Agency litigation materials often express, in a digestible format, agencies' positions on important topics. Litigation involving federal agencies naturally involves their most

¹ See Tara Smith, *Neutrality Isn't Neutral: On the Value-Neutrality of the Rule of Law*, 4 WASH. U. JUR. REV. 49, 59 (2011).

² See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997) (describing "the trick the emperor Nero was said to engage in: posting edicts high up on the pillars so that they could not easily read").

³ See David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171, 175 (2015). In 2019, for example, the Federal Register was more than 70,000 pages. See National Archives, Federal Register Pages Published 1936–2019, <https://s3.amazonaws.com/production.uploads.wordpress.federalregister.gov/uploads/2020/04/01124109/stats2019Fedreg.pdf> (last visited May 26, 2020). The Code of Federal Regulations consists of 50 titles and, in 2018, took up more than 185,000 pages. National Archives, Code of Federal Regulations Total Pages 1938–1949, and Total Volumes and Pages 1950–2019, <https://s3.amazonaws.com/production.uploads.wordpress.federalregister.gov/uploads/2020/04/01123111/cfrTotalPages2019.pdf> (last visited May 26, 2020). And those numbers do not even include the immense amount of law made every year by agency adjudicators and the federal courts tasked with reviewing agency actions. See also Andrew Hessick, *The Future of Administrative Deference*, 41 CAMPBELL L. REV. 421, 421 (2019) ("Agencies make most laws and adjudicate most disputes.").

consequential and contested actions. Agency litigation materials thus tend to address the legal questions about which the public most wants or needs clarification. Whereas many agency publications, such as regulatory preambles and regulatory impact analyses, are dense and voluminous,⁴ agency litigation materials tend to be concise and straightforward, zeroing in quickly on key contested questions. And because most lawyers and courts draft agency litigation materials for generalist audiences — whether judges or the public at large — they tend to describe and synthesize issues in ways that avoid technical jargon.

Agency litigation materials can also help clarify the law by showing how abstruse or ambiguous legal provisions apply to real-world factual scenarios. Because many agency documents apply generally, agencies write them in general terms.⁵ Agency litigation materials, by contrast, often address concrete disputes over how the law applies to specific, real-world conduct. Agency litigation materials' clarifying role can be especially important when the applicable law comes from an array of sources, such as statutes, regulations, rules, executive orders, adjudications, and court decisions. By collecting, compiling, and synthesizing the law from those sources, agency litigation materials make it easier for the public to see the whole of the law as it applies to specific circumstances.

And, of course, agency litigation materials often *are* the law, at least for practical purposes. That is obviously true for court decisions in cases to which agencies are parties.⁶ But is also true for interpretations of federal laws set forth in certain amicus briefs that federal agencies

⁴ Notices of proposed rulemakings for major rules, for example, are often hundreds of pages long. Richard J. Pierce, Jr., *Annual Review of Administrative Law: Response*, 80 GEO. WASH. L. REV. 1493, 1497 (2012). The same is true of regulatory impact analyses. *See, e.g.*, Nat'l Ass'n for Fixed Annuities v. Perez, 217 F. Supp. 3d 1, 56 (D.D.C. 2016) (describing Department of Labor's 382-page regulatory impact analysis); Ctr. for Auto Safety v. Peck, 751 F.2d 1336, 1342 (D.C. Cir. 1985) (addressing 263-page regulatory impact analysis).

⁵ The Administrative Procedure Act, for example, defines a "rule" as "an agency statement of general applicability." 5 U.S.C. § 551(4).

⁶ *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (reiterating that judicial decisions are legally binding).

file.⁷ For those reasons, too, providing access to agency litigation materials advances the public’s interest in knowing what the law is and how to follow it.

B. Promoting accountable and transparent government

A lot of agency litigation concerns the reasonableness of the Government’s major policy decisions. Has the Government acted arbitrarily or capriciously?⁸ Is the Government’s interpretation of a statute or regulation reasonable?⁹ Because agency litigation so often turns on questions like those, agency litigation materials often say a great deal, not just about the substance of government policies, but about the processes and rationales underlying them.¹⁰

High-profile cases from the United States Supreme Court’s past two Terms show the value of agency litigation materials as windows into government decisionmaking. Last Term’s decision *Department of Homeland Security v. Regents of the University of California*¹¹ concerned the legality of executive actions respecting the Deferred Action for Childhood Arrivals (DACA) program, which allows millions of undocumented people to apply for protection from deportation.¹² The Term before that, in *Department of Commerce v. New York*,¹³ the Court addressed the legality of adding a citizenship question to the Census.¹⁴ Both cases

⁷ See, e.g., *Beck v. PACE Int’l Union*, 551 U.S. 96, 103–04 (2007) (deferring to position set out in amicus brief filed by agency); see also *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 n.6 (2019) (refusing to foreclose the practice of deferring “to agency interpretations advanced for the first time in legal briefs”); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency’s interpretation of its own ambiguous regulation is “controlling unless ‘plainly erroneous or inconsistent with the regulation’”).

⁸ See 5 U.S.C. §§ 553(c) & 706(2)(A).

⁹ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 567 U.S. 837, 842–43 (1984); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁰ See, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (explaining agency’s duty to provide a reasoned explanation for its chosen course).

¹¹ 140 S. Ct. 1891 (2020).

¹² See Amy Howe, *Argument analysis: Justices torn, hard to read in challenge to decision to end DACA*, SCOTUSBLOG (Nov. 12, 2019), <https://www.scotusblog.com/2019/11/argument-analysis-justices-torn-hard-to-read-in-challenge-to-decision-to-end-daca/>.

¹³ 139 S. Ct. 2551 (2019).

¹⁴ *Id.* at 2561.

garnered widespread public attention because of the consequential policies they involved.¹⁵ And because both cases turned on whether the contested government action was supported by reasoned decisionmaking, the materials filed by agencies and courts helped explain and clarify the reasons for the Government's policy choices.¹⁶

Those two cases are hardly outliers. Agency litigation materials routinely explain discrepancies in agency practices,¹⁷ illuminate the statistical support (or lack thereof) for an agency's decision,¹⁸ and show how agencies' actions do (or don't) square with other actions or statements by agency or governmental officials.¹⁹

By shining a light on the Government's legal and policy determinations, agency litigation materials can help inform people of what their Government's up to. Put differently, agency litigation materials serve an important transparency function, one that helps make the Government more accountable.²⁰ Transparency and accountability are particularly important for the modern administrative state, which scholars, judges, and politicians sometimes criticize as too untethered from the people it is supposed to serve.²¹ By providing another lens through which to understand and evaluate government decisions, agency litigation materials make it

¹⁵ See, e.g., Adam Liptak, *Justices Appear Inclined to Let Trump End DACA*, N.Y. TIMES A1 (Nov. 13, 2019) (reporting on oral argument in the *Regents* case); Adam Liptak, *Conservatives on Court Appear to Back New Citizenship Query*, N.Y. TIMES A1 (Apr. 24, 2019) (reporting on oral argument in the *Department of Commerce* case).

¹⁶ See, e.g., Br. of Pet'rs, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, Nos. 18-587, 18-588, & 18-589, at 32–52 (explaining why the Department's decision to rescind DACA was reasonable).

¹⁷ See, e.g., *NRDC v. EPA*, 777 F.3d 456, 466 (D.C. Cir. 2014) (addressing the “notable contrast” between agency's implementation of standards in 2008 and its implementation of the same standards in 1997).

¹⁸ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Dep't of Transp.*, 680 F.2d 206, 231 n.30 (D.C. Cir. 1982) (citing agency's brief and noting the absence of data supporting agency's action).

¹⁹ See, e.g., *Am. Meat Inst. v. USDA*, 760 F.3d 18, 25 (D.C. Cir. 2014) (explaining why agency's statements from prior rulemakings were not inconsistent with agency's litigating position).

²⁰ See Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 522 (2013).

²¹ See Louis J. Virelli III & Ellen S. Podgor, *Secret Policies*, 19 U. ILL. L. REV. 463, 468 (2019) (identifying relationship between transparency, accountability, and agency legitimacy).

easier for people to evaluate federal agencies and, if necessary, hold elected officials accountable for the agencies' actions.

C. Access to private parties' litigation filings

Litigation materials filed by private parties in cases against federal agencies do not necessarily make it easier for the public to comply with the law. And because they aren't always a reliable indicator of the Government's official position on a given subject, such private parties' litigation filings don't necessarily improve accountability or transparency — at least not to the same degree agency litigation materials do. That's not to say the public has no interest in private parties' litigation filings in cases involving federal agencies. Nor is it to say that such filings are useless for understanding disputes about law and policy. Indeed, familiarity with private parties' litigation filings is often essential to understanding the Government's own litigation filings. The point is simply that, because agency litigation materials come from the Federal Government itself, they are uniquely relevant to debates about what the Federal Government is doing and what federal law requires.

II. Public Access to Agency Litigation Materials

However helpful agency litigation materials might be, federal law does little to mandate public access to them. When it comes to agencies' own litigation filings — pleadings, briefs, declarations, settlements, and the like — only the Freedom of Information Act (FOIA) requires disclosure, and then only when members of the public specify the materials in which they are interested. The E-Government Act of 2002 requires federal courts to make their written opinions, including opinions in cases involving federal agencies, available on websites. But that requirement has not yielded “a satisfactory method of delivering usable and findable legal

information,”²² partly because most courts’ websites lack functions and features that would allow users to easily identify cases about specific topics or agencies. The most comprehensive sources of agency litigation materials are the Public Access to Court Electronic Records (PACER) service and paid legal research services like Westlaw and Lexis, but features of each of those sources might keep people from using them to find agency litigation materials.

A. Federal law regarding publication of agencies’ litigation filings.

No federal law compels agencies to publicly disclose their own litigation filings without being asked to do so. A few laws, like the Federal Records Act²³ and the Paperwork Reduction Act,²⁴ might be read as encouraging broader electronic dissemination of agencies’ litigation filings. But none of them mandates it.

FOIA comes closest by giving members of public the right to access many government records, including agency’s publicly-available court filings, upon request.²⁵ But it takes time and effort to prepare and file a FOIA request, which may deter many interested citizens from making them. Moreover, it can take months for agencies to process and respond to FOIA requests. In 2018, for example, agencies took an average of 26 days to respond to so-called “simple” requests

²² Ian Gallacher, *Cite Unseen: How Neutral Citation and America’s Law Schools Can Cure Our Strange Devotion to Bibliographical Orthodoxy and the Constriction of Open and Equal Access to the Law*, 70 Alb. L. Rev. 491, 515 (2007).

²³ 44 U.S.C. §§ 2901 *et seq.* Congress enacted the Federal Records Act “to assure efficient and effective records management.” *Id.* § 2902. To effect that purpose, the Act requires “[t]he head of each Federal agency [to] make and preserve records containing ... documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency[.]” *Id.* § 3101. The Act does not address public dissemination of federal records.

²⁴ *Id.* §§ 3501 *et seq.* The Paperwork Reduction Act requires agencies to disseminate “public information in an efficient, effective, and economical manner,” *id.* § 3506(d)(1)(C), which, “nowadays, means online disclosure.” Daniel J. Sheffner, *Access to Adjudication Materials on Federal Agency Websites*, 51 AKRON L. REV. 447, 459 (2017). Despite that requirement, however, the Act does not mandate electronic disclosure of agency litigation materials. That’s because it defines “public information” as “any information ... that an agency discloses, disseminates, or makes available to the public.” *Id.* at 3502(12). Thus, the Act’s electronic dissemination requirement applies only to materials the agency already discloses; it does not independently compel electronic disclosure of materials.

²⁵ *Id.* § 552(a)(3).

— ones agencies anticipate will involve small volumes of material and which agencies believe they can process relatively quickly.²⁶ Members of the public may be unwilling to wait so long to learn what agencies are telling federal courts.

Making a FOIA request can also be expensive because agencies often charge fees for searching for, reviewing, and duplicating records. While there is usually no charge for the first two hours of search time or the first 100 pages of copying,²⁷ the charges can pile up after that. At the Department of Health and Human Services, for example, search fees usually range from about \$23 to \$83 per hour, depending on the salary levels of the personnel needed for the search.²⁸ Costs for duplication can balloon if a request covers voluminous materials.

Even if a FOIA request turns up useful information, the responding agency will normally share that information only with the requestor rather than with the entire public. An exception requires agencies to “make available for public inspection in an electronic format” records “that have been requested 3 or more times,”²⁹ but most agency litigation filings are unlikely to come within that exception. Thus, members of the public seeking to access agencies’ litigation filings are unlikely to find FOIA all that helpful.

B. Federal laws regarding publication of court decisions in agency cases

Federal law is a bit more proactive in requiring publication of federal court decisions, including those in agency cases. In particular, the E-Government Act of 2002 requires federal courts to establish and maintain “website[s] that contain[] ... [a]ccess to the substance of all

²⁶ Dep’t of Justice, Summary of Annual FOIA Reports for Fiscal Year 2018, at 12, *available at* <https://www.justice.gov/oip/page/file/1170146/download#FY18>.

²⁷ 5 U.S.C. § 552(a)(4)(A)(iv)(II).

²⁸ See U.S. Dep’t of Health & Human Servs., What is the cost for getting records under the FOIA?, *available at* <https://www.hhs.gov/foia/faqs/what-is-the-cost-for-getting-records-under-the-foia/index.html> (last visited May 26, 2020).

²⁹ 5 U.S.C. § 552(a)(2)(D)(II).

written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.”³⁰

Federal courts comply with that requirement in part by posting links to their decisions on their websites. While laudable, that approach is of limited value to members of the public interested in litigation involving agencies. One reason is that most courts’ websites link only to the courts’ decisions, not to parties’ filings.³¹ That limits the amount of information those websites provide about agencies’ views and litigating positions. Another reason is that the search functionality on courts’ websites is often imperfect, especially when one party to a case is a federal agency. Based on several tests conducted for this study, it appears most court websites’ search engines omit relevant decisions in such cases, even when the person conducting the search enters the agency’s name into the websites’ search engines. Some of that discrepancy might stem from the search engines’ designs.³² Some of it might be because courts’ case captions are inconsistent in identifying certain agencies. For example, a lawsuit against the United States Environmental Protection Agency (EPA) might name “U.S. Environmental Protection Agency,” “U.S. EPA,” or “Environmental Protection Agency” as the respondent, or it might name the current or former EPA administrator. Thus, someone who searches for case names that include “EPA” might not find all the cases involving that agency.

Even if each of the scores of federal courts throughout the country made an array of agency litigation materials publicly available on their websites, and even if each of those

³⁰ 44 U.S.C. § 3502(a)

³¹ See GovInfo, <https://www.govinfo.gov/app/collection/uscourts> (last visited May 26, 2020) (collecting all federal court opinions but no other litigation materials).

³² See Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems and Legal Malpractice?*, 26 MISS. C. L. REV. 185, 209 (2006) (observing that “[m]any court websites have relatively primitive search engines” and that many of them “do not allow Boolean searching, but rather [operate on] some unsophisticated form of key word searching”).

websites made it possible to reliably identify all the cases in a particular court involving a particular agency, checking each website regularly would take considerable time. For those reasons, among others, court websites won't always be adequate resources for members of the public looking for agency litigation materials.

C. PACER

The main way the Federal Government makes agency litigation materials — including briefs, pleadings, settlements, and court opinions — available to the public is through PACER, which lets users access and download PDFs of documents filed in federal courts across the country.³³ PACER's supporters often hail it as a massive achievement in transparency,³⁴ and in many respects they're right. But even PACER's supporters acknowledge its shortcomings,³⁵ a few of which limit its usefulness as a tool to study and monitor agency litigation materials.

There are transaction costs to using PACER. For one, people who want to use PACER must first register for an account. That requires, among other things, that they provide credit card and billing information, which not everyone is willing or able to do.³⁶ Once a person completes the registration process, he or she may use PACER to search for court filings, but only at the cost of \$.10 per page the person accesses.³⁷ Even if a search turns up no results, PACER still charges the user a dime. There are price limits, such as a maximum charge of \$3.00 per document,³⁸ and

³³ See <https://www.pacer.gov/>.

³⁴ See, e.g., Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 484 (2009) (praising PACER as “the world’s most transparent court system”).

³⁵ See Dru Stevenson & Nicholas J. Wagoner, *Bargaining in the Shadow of Big Data*, 67 FLA. L. REV. 1337, 1359–60 (2016); Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 70 (2011).

³⁶ See *id.*; see also David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1452 (2017) (noting privacy concerns associated with providing credit card information in exchange for accessing court records).

³⁷ See PACER, PACER USER MANUAL FOR ECF COURTS 4, <https://www.pacer.gov/documents/pacermanual.pdf> (last updated January 2020).

³⁸ *Id.*

fee waivers in a narrow set of circumstances, such as when a user accumulates \$30 or less in search fees in a calendar quarter.³⁹ But case filings are often split into batches, so that viewing all the documents accompanying a filing can run more than \$100. And the way filings are sorted and labeled on court dockets means it's seldom clear what information a given document contains. So users are often required to click through and pay for dozens of documents in a single filing before they find what they're looking for.

On top of that, PACER's search functionality can make it difficult to find cases involving particular agencies. As an example, a person interested in identifying ongoing cases to which the United States Fish and Wildlife Service (FWS) is a party could search for "Fish and Wildlife" in PACER's Case Locator feature, but that search would only pull up a fraction of the total cases involving FWS.⁴⁰ The same would be true if the person searched for "United States Fish and Wildlife Service"⁴¹ or "U.S. Fish and Wildlife Service."⁴² To come close to identifying all of the cases to which FWS is a party, a person would have to search for all three of those terms, plus the names of FWS's recent directors. Even after conducting those searches, moreover, the person would still have to scroll through and eliminate search results involving state fish-and-wildlife agencies and private entities with phrases like "Fish and Wildlife" in their names.

PACER's search functionality can also make it difficult to find cases involving specific statutes, regulations, or types of agency action. If, for instance, someone were interested in cases about FWS's listing of species under the Endangered Species Act (ESA), PACER would not afford that person any way to filter search results to include only cases about ESA listings. The

³⁹ See U.S. Courts, Electronic Public Access Fee Schedule (Dec. 31, 2019), *available at* uscourts.gov/services-forms/fees/electronic-public-access-fee-schedule.

⁴⁰ A PACER search for "Fish and Wildlife" turns up just one result for the first five months of 2020.

⁴¹ A PACER search for "United States Fish and Wildlife Service" turns up 18 results for the first five months of 2020.

⁴² A PACER search for "U.S. Fish and Wildlife Service" turns up 17 results for the first five months of 2020.

person's only option would be to open and review potentially hundreds of documents to sort out the cases involving ESA listings. The cost and time involved in doing that make PACER an imperfect way to locate and search agency litigation materials.

D. Paid legal research services

Paid legal research services, like Westlaw⁴³ and Lexis Advance,⁴⁴ are the principal alternatives to PACER. Such services make it easy to search for cases involving specific agencies and subjects, but they cost significantly more than most private citizens can afford to spend on legal research.⁴⁵ Furthermore, paid research services often do not provide access to certain filings in agency litigation matters. Sometimes those services make available some of the parties' briefs and pleadings, but users rarely get access to the full docket.

On top of that, not all paid research services are up to date. It can be days before a newly filed brief or opinion is available on some of them.⁴⁶ Just like FOIA, federal court websites, and PACER, therefore, paid research services will not always be a practical solution for ordinary people looking to access agency litigation materials.

III. Survey of Agency Litigation Webpages

Agency litigation webpages are a convenient way for people to examine agency litigation materials. For purposes of this report, an agency litigation webpage is a webpage on an agency's website dedicated to systematically cataloging and linking to agency litigation materials from cases in which the agency has participated and which relate to the agency's regulatory or enforcement activities. The documents linked on an agency litigation webpage can include

⁴³ See www.westlaw.com.

⁴⁴ See www.advance.lexis.com.

⁴⁵ A subscription to Lexis Advance, for example, can cost up to \$200 per month. See www.lexisnexis.com/en-us/smallawecommerce/.

⁴⁶ See Thomson Reuters, Know the Difference, at 3 (2013), available at https://info.legalsolutions.thomsonreuters.com/pdf/wln2/L-373938_v5.pdf.

pleadings, merits briefs, amicus briefs, court opinions, settlements, and judgments. When agencies maintain up-to-date, search-friendly litigation webpages, people can visit them and quickly find important filings in court cases concerning matters of interest. Agency litigation webpages thus make it easier for people to learn about the law and to hold government accountable for agencies' actions.

Several federal agencies already maintain agency litigation webpages.⁴⁷ Before this report, however, there was no systematic study of them — where they can be found, what they contain, and how easy they are to use. This report changes that. It includes a survey of websites for 25 federal agencies of all stripes — big and small, executive-branch and independent, regulatory and benefit-oriented, and so forth. The goal was simply to cover a broad and at least somewhat representative swath of the federal administrative state, with a special focus on agencies that often find themselves in federal court.

The survey results suggest that most federal agencies do not maintain active agency litigation webpages. Among those that do, the quality of the litigation webpages varies appreciably. Some contain vast troves agency litigation materials, others much more limited collections. Some are updated regularly, others only sporadically. Some are easy to locate and search; others are not. In short, there appears to be no standard practice for publishing and maintaining agency litigation webpages.

This report presents the survey's results in three tables. Table 1 shows that most surveyed agencies don't maintain an agency litigation webpage. Table 2 shows that, even among agencies that maintain agency litigation webpages, there is noticeable variation in how easy it is to locate

⁴⁷ See *infra* Table 1.

and use those webpages. And Table 3 shows that existing agency litigation webpages differ in the categories of agency litigation materials they cover.

A. Does the agency maintain an agency litigation webpage?

Table 1 shows which agencies surveyed for this report maintain agency litigation webpages. It doesn't identify or evaluate the agencies' reasons for maintaining or not maintaining litigation webpages. Suffice it to say there are many reasons an agency might choose not to maintain a litigation webpage and it would be a mistake to evaluate particular agencies' choices without more information about what motivated them.

TABLE 1

Agency	Litigation Webpage?
Army Corps of Engineers	No
Bureau of Land Management	No
Bureau of Prisons	No
Consumer Finance Protection Bureau (CFPB)	Yes
Commodity Futures Trading Commission (CFTC)	Yes
Citizenship and Immigrations Services	No
Department of Commerce	No
Department of Defense	No
Department of Education	No
Department of Energy	No
Department of Health and Human Services	No
Department of the Interior	No
Department of Justice (DOJ)	Yes
Department of Labor (DOL)	Yes
Department of Transportation	No
Environmental Protection Agency (EPA)	Yes
Equal Employment Opportunity Commission (EEOC)	Yes
Federal Aviation Administration	No
Food and Drug Administration	No
Federal Trade Commission (FTC)	Yes
Immigrations and Customs Enforcement	No
Internal Revenue Service	No
National Labor Relations Board (NLRB)	Yes
Occupational Safety and Health Administration	No
Securities and Exchange Commission (SEC)	Yes

For purposes of this report, a webpage maintained by an agency is an agency litigation webpage if it provides links to at least one class of agency litigation materials — such as case summaries, pleadings, briefs, settlements, or court opinions — from at least five lawsuits filed in the last decade. Webpages that don't satisfy that criterion don't materially advance either reason

this report gives for making agency litigation materials publicly available online.⁴⁸ Thus, the report does not treat them as agency litigation webpages.

Just nine of the 25 agency websites surveyed for this report have a webpage satisfying this report’s definition of a litigation webpage. The other 16 agencies’ websites all contain *some* recent litigation materials, but nothing like a comprehensive collection of them. Litigation materials on those websites tend to be scattered, with no discernible link between them, making them difficult to catalog and search. Because the materials are not *systematically* collected or arranged on a single webpage, they do not comprise the sort of informational clearinghouse that an agency litigation webpage does.

B. How easy is it to find and use the agency’s litigation webpage?

Table 2 contains information about how easy it is to find and use the nine agency litigation webpages identified by this report.

TABLE 2

Agency	Search Engine and Litigation Keywords	Litigation Webpage Link in Menu Bar	Filtering Options on Litigation Webpage
CFPB	Yes	Yes	Yes
CFTC	No	Yes	No
DOJ	Yes	Yes	Yes
DOL	Yes	No	Yes
EPA	Yes	Yes	Yes
EEOC	Yes	Yes	Yes
FTC	Yes	Yes	Yes
NLRB	Yes	Yes	Yes
SEC	Yes	Yes	No

The first column in Table 2 shows whether the search engine on an agency’s website makes it easy to find the website’s litigation webpage. For purposes of this report, a website’s

⁴⁸ See *supra* Pt. I.

search engine makes it easy to find a litigation webpage if, when someone uses the search engine to search for “litigation,” “cases,” “lawsuit,” “briefs,” “amicus,” and “settlement,” the first 20 search results includes at least one link to a litigation webpage. The easier it is to find an agency litigation webpage, the more useful the webpage is likely to be to the public. Table 2 shows that it’s easy to find litigation webpages on eight of the nine websites the survey identified as hosting an agency litigation webpage.

The second column in Table 2 shows whether the menu bar⁴⁹ on an agency’s homepage contains a link pointing people toward the agency’s litigation webpage. For purposes of this report, a menu bar points people toward a litigation webpage if: (1) it includes a link that is readily identifiable as relating to litigation (for example, a link titled “Enforcement” or “Cases and Proceedings”); and (2) that link directs website users to a webpage that either is, itself, a litigation webpage, or that links directly to a litigation webpage. Table 2 shows that, of the ten agency websites that this report identifies as hosting agency litigation webpages, eight have menu bars containing links pointing people toward the agencies’ litigation webpages. By making it easier for people to find agencies’ litigation webpages, such menu bars increase the value of the agencies’ litigation webpages.

The third column in Table 2 shows whether agencies’ litigation webpages allow people to filter the websites’ contents according to characteristics besides chronology. Filters can make webpages more useful by allowing people to quickly identify materials relevant to their interests. So, for instance, one of the NLRB’s litigation webpages lets users group petitions for review and applications for enforcement according to the court in which they were filed, the type of

⁴⁹ A menu bar is usually a horizontal or vertical bar, usually found on the top or left side of a website’s homepage, typically containing drop-down menus with links to other pages on the website. Agencies often reproduce the contents of menu bars at the bottom of their websites’ homepages.

document involved, the case name, and the case number.⁵⁰ Likewise, one of FTC’s litigation webpages allows people to filter case materials according to categories such as mission,⁵¹ enforcement type,⁵² industry,⁵³ type of action,⁵⁴ competition or consumer protection topic,⁵⁵ the court in which a case is pending, and the case name or number.⁵⁶ Of the nine agencies surveyed for this report that maintain litigation webpages, seven maintain litigation webpages that include tools for filtering the webpages’ contents.

C. What’s on the agency’s litigation webpage?

Table 3 shows what types of agency litigation materials are available from each of the nine agencies surveyed for this report that maintain litigation webpages.

⁵⁰ See NLRB, Petitions for Review & Applications for Enforcement, <https://www.nlr.gov/cases-decisions/decisions/appellate-court/petitions-review-applications-enforcement> (last visited May 28, 2020).

⁵¹ Users can filter search results to show either cases involving competition or cases involving consumer protection.

⁵² Users can filter search results to show cases from any of five enforcement categories: civil penalty cases under § 7A of the Clayton Act; civil penalty cases arising out of alleged order violations; cases concerning alleged violations of Part II of an FTC consent order; cases arising out of administrative complaints; and cases involving federal injunctions.

⁵³ Users can filter search results according to categories like “Alcohol,” “Energy,” and dozens of others.

⁵⁴ Users can filter search results to show federal cases, administrative cases, or process-enforcement cases.

⁵⁵ Users can filter search results according to categories like “Merger,” “Nonmerger,” “Section 5,” “Advertising and Marketing,” “Credit and Finance,” and many others, including subcategories.

⁵⁶ See FTC, Cases and Proceedings, <https://www.ftc.gov/enforcement/cases-proceedings> (last visited May 28, 2020).

TABLE 3

Agency	Court Opinions	Pleadings	Merits Briefs (Trial)	Merits Briefs (Appellate)	Amicus Briefs	Settlements and Consent Orders
CFPB	No	Yes	No	No	No	Yes
CFTC	Yes	Yes	No	No	No	No
DOJ	Yes	Yes	Yes	Yes	Yes	Yes
DOL	No	No	Yes	Yes	Yes	No
EPA	Yes	No	No	No	No	Yes
EEOC	No	No	No	Yes	Yes	No
FTC	Yes	Yes	Yes	Yes	Yes	Yes
NLRB	Yes	No	Yes	Yes	Yes	No
SEC	Yes	Yes	No	Yes	Yes	No

The agency litigation materials most commonly available on agency litigation webpages are court opinions, appellate-court merits briefs, and amicus briefs. The agency litigation materials least commonly available on agency litigation webpages are trial briefs and settlements and consent decrees. Only the DOJ and the FTC make all six categories of agency litigation materials available on their litigation webpages.

IV. Exemplar: The FTC

The FTC maintains a pair of litigation webpages — one titled “Cases and Proceedings,”⁵⁷ the other titled “Amicus Briefs”⁵⁸ — that draw hundreds of thousands of unique page views annually. Both webpages are easy to find, easy to use, and comprehensive. Anyone interested in seeing what an especially useful agency litigation webpage looks like can find out by visiting the FTC’s two litigation webpages, which are among the Federal Government’s best.

⁵⁷ See FTC, Cases and Proceedings, <https://www.ftc.gov/enforcement/cases-proceedings> (last visited May 30, 2020).

⁵⁸ See FTC, Amicus Briefs, <https://www.ftc.gov/policy/advocacy/amicus-briefs> (last visited May 30, 2020).

A. The Cases and Proceedings webpage

The Cases and Proceedings webpage collects and organizes litigation materials from cases to which the FTC is a party. To find the Cases and Proceedings webpage, a user can either type “cases” into the FTC website’s search engine or click on the “Cases and Proceedings” link under the “Enforcement” tab in the menu atop the FTC website’s homepage. The screenshot below shows part of the FTC’s homepage, including the search engine in the top right corner and the Cases and Proceedings link immediately below the Enforcement tab.

The screenshot displays the top portion of the Federal Trade Commission's website. At the top left is the FTC logo, followed by the text "FEDERAL TRADE COMMISSION" and "PROTECTING AMERICA'S CONSUMERS". To the right is a search bar with the word "Search" and a magnifying glass icon. Below this is a navigation menu with tabs for "ABOUT THE FTC", "NEWS & EVENTS", "ENFORCEMENT", "POLICY", "TIPS & ADVICE", and "I WOULD LIKE TO...". The "ENFORCEMENT" tab is selected, and a dropdown menu is open, listing several categories: "Cases and Proceedings", "Data and Visualizations", "Premerger Notification Program", "Merger Review", "Anticompetitive Practices", "Rules", "Statutes", "Guidance Documents", "Consumer Sentinel Network", and "Criminal Liaison Unit". To the right of the dropdown is a "TAKE ACTION" section with six icons and corresponding links: "File a Consumer Complaint", "Report Identity Theft", "Get Your Free Credit Report", "Register for Do Not Call", "Get Consumer Alerts", and "Order Free Resources". Below the navigation menu is a banner for "FINAL CONTACT LENS" with the text "Enables more patients to comp". At the bottom of the page are two promotional banners: "CORONAVIRUS SCAMS" and "PREPARE FOR HURRICANE SEASON". The footer contains two sections: "LATEST NEWS" with four news items and a "More News >" link, and "COMPETITION" with four items and a "More >" link.

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Contact | Stay Connected | Privacy Policy | FTC en español

Search

ABOUT THE FTC | NEWS & EVENTS | **ENFORCEMENT** | POLICY | TIPS & ADVICE | I WOULD LIKE TO...

Cases and Proceedings
Data and Visualizations
Premerger Notification Program
Merger Review
Anticompetitive Practices
Rules
Statutes
Guidance Documents
Consumer Sentinel Network
Criminal Liaison Unit

TAKE ACTION

- File a Consumer Complaint
- Report Identity Theft
- Get Your Free Credit Report
- Register for Do Not Call
- Get Consumer Alerts
- Order Free Resources

FINAL CONTACT LENS
Enables more patients to comp

CORONAVIRUS SCAMS | **PREPARE FOR HURRICANE SEASON**

LATEST NEWS [More News >](#)

- [FTC Releases Agenda for Safeguards Rule Virtual Workshop](#)
Jul 1, 2020
- [FTC, Partners Kick Off Military Consumer Month 2020](#)
Jul 1, 2020
- [FTC Data Shows Record Surge in Online Shopping Complaints During Pandemic](#)
Jul 1, 2020
- [FTC Sends Refunds to People who lost Money to Work-From-Home Scheme](#)
Jun 30, 2020

COMPETITION [More >](#)

- File an Antitrust Complaint
- File a Tech Antitrust Complaint
- See Early Termination Notices
- Submit a Public Comment

The FTC's Cases and Proceedings webpage contains links to materials from all the FTC's cases, including those at the agency level and in federal court. To distinguish court cases from agency proceedings, the Cases and Proceedings webpage identifies each matter as either Federal (for court cases) or Administrative (for agency-level proceedings).

The Cases and Proceedings webpage also contains several filtering options so users can find the content that most interests them. Users can, for example, limit their search results to merits briefs by clicking the link to the webpage titled "Merits Briefs." Or they can limit their search results to federal court cases involving "Process Enforcement" by clicking the link to the webpage titled "Process Enforcement." They can also use the Cases and Proceedings webpage's advanced filters option to identify cases based on characteristics like the mission, industry, topic, enforcement type, or type of action at issue; the court in which a case is pending; and the case name or number. The screenshot below shows part of the Cases and Proceedings webpage, with several filtering options visible in the bottom left corner.



Home » Enforcement » Cases and Proceedings

Enforcement

CASES AND PROCEEDINGS

- Case Document Search
- Merits Briefs
- Refunds
- Commission Decision Volumes
- Letters and Statements
- Petitions to Quash
- Process Enforcement
- Companies and People Banned From Debt Relief
- Adjudicative Proceedings
- Banned Debt Collectors
- DATA AND VISUALIZATIONS
- PREMERGER NOTIFICATION PROGRAM
- MERGER REVIEW
- ANTICOMPETITIVE PRACTICES
- RULES
- STATUTES
- GUIDANCE DOCUMENTS
- CONSUMER SENTINEL NETWORK
- CRIMINAL LIAISON UNIT

Cases and Proceedings

All FTC cases & proceedings can be filtered by name and date, but some older actions may not be filtered by other attributes (industry, topic, enforcement type, etc.).

Show: 20 | 50 | 100 Displaying 20 results Displaying 1 - 20 of 3091

1 2 3 4 5 6 7 8 9 ... next » last »

UPDATED	TITLE	FTC MATTER / FILE NO.
June 30, 2020	RagingWire Data Centers, Inc., In the Matter of (Administrative)	182 3189
June 26, 2020	Eldorado Resorts and Caesars Entertainment, In the Matter of (Administrative)	191 0158
June 25, 2020	Physician's Technology, LLC (Federal)	172 3129
June 24, 2020	Tri Star Energy, Hollingsworth Oil Company, C & H Properties, Mr. Ronald L. Hollingsworth, In the Matter of (Administrative)	201 0074
June 22, 2020	Triangle Media Corporation (Federal)	172 3108
June 17, 2020	Traffic Jam Events, LLC (Federal)	202 3127
June 16, 2020	Axon Enterprise and Safariland, In the Matter of (Administrative)	1810162
June 10, 2020	Kohl's Department Stores, Inc. (Federal)	182 3200
June 10, 2020	RCG Advances, LLC (Federal)	192 3252
June 9, 2020	Madera Merchant Services, LLC (Federal)	192 3020
June 4, 2020	HyperBeard, Inc. (Federal)	192 3109
June 3, 2020	Altria Group/JUUL Labs, In the Matter of (Administrative)	191 0075
June 3, 2020	Thomas Jefferson University, In the Matter of (Administrative)	181 0128
June 1, 2020	Qualpay, Inc. (Federal)	192 3103
June 1, 2020	Quantum Wellness Botanical Institute, LLC (Federal)	172 3131
May 29, 2020	Danaher Corporation, In the Matter of (Administrative)	191 0082
May 28, 2020	Marc Ching, In the Matter of (Administrative)	202 3110
May 28, 2020	Össur Hf. and College Park Industries, In the Matter of (Administrative)	191 0177
May 28, 2020	LendEDU, et al., In the Matter of (Administrative)	182 3180
May 27, 2020	Bronx Honda (Federal)	162 3238

1 2 3 4 5 6 7 8 9 ... next » last »

FILTERS

Search Cases

Mission
- Any - ▾

Type of Action
- Any - ▾

Enforcement Type
- Any - ▾
For competition cases only.

Date Range
- Select - ▾

Items per page
20 ▾

APPLY

RESET

[Advanced Search »](#)

If users are interested in cases on a topic that isn't covered by the available filtering options, they can often plug the topic into the webpage's search function and find whatever materials are available on that topic. Thus, users interested in the FTC's actions to enforce "Do Not Call" requirements can find all cases relating to that topic by typing "Do Not Call" in the website's search function, then using the website's "Filter by content type" function to show only court cases. Likewise, users interested in a particular type of documents can search for cases involving that type of document. If, for example, users want information on settlements, they can simply click the webpage's "Case Document Search" link, enter "Settlement" in the box marked "Document title," and thereby find links to all documents with "settlement" in the title, along with links to the cases in which those documents were filed.⁵⁹

Users interested in learning more about a specific case need only click on the case's name, at which point the webpage will direct them to the case's webpage. The webpage for each case contains an impressive range of documents related to the case, including all the agency's filings in the case, a timeline, a summary of the litigation, and a note on the case's status. Sometimes it even includes FTC documents relevant to the dispute.⁶⁰ The webpage for each case also contains other information for identifying the case, including the civil action number, the court where the case is pending, and the FTC matter and file number. A representative case webpage is below.

⁵⁹ See FTC, Case Document Search, *Settlement*, https://www.ftc.gov/enforcement/cases-proceedings/case-document-search?title=&field_document_description=settlement (last visited June 2, 2020).

⁶⁰ See, e.g., FTC, Soundboard Association, <https://www.ftc.gov/enforcement/cases-proceedings/p172100/soundboard-association> (last visited May 30, 2020) (including a link to the letter at issue in the litigation).



[Home](#) » [Enforcement](#) » [Cases and Proceedings](#) » [Soundboard Association](#)

Soundboard Association

TAGS: [Consumer Protection](#) | [Advertising and Marketing](#) | [Telemarketing](#)

LAST UPDATED: FEBRUARY 7, 2019

Soundboard Association, Plaintiff, v. U.S. Federal Trade Commission, Defendant.

FTC MATTER/FILE NUMBER: P172100

CIVIL ACTION NUMBER: Case No. 17-cv-00150 (APM)

FEDERAL COURT: District of Columbia

CASE SUMMARY

Soundboard Association sued the Federal Trade Commission alleging that the agency violated the APA by not issuing the regulation following notice-and-comment rulemaking, and that it was infringing on telemarketing companies' First Amendment rights.

CASE TIMELINE

February 6, 2019

[Soundboard Association v. Federal Trade Commission \(S. Ct.\), Federal Trade Commission Brief in Opposition, 18-722 \(436.62 KB\)](#)

July 16, 2018

[Soundboard Association v. Federal Trade Commission \(D.C. Cir.\), Opposition of the Federal Trade Commission to Petition for Rehearing En Banc, 17-5093 \(214.29 KB\)](#)

April 27, 2018

[Opinion and Order Issued by the United States Court of Appeals for the District of Columbia Circuit Vacating the Judgment of the District Court and Dismissing the Complaint for Failure to State a Claim Under the Administrative Procedures Act \(469.43 KB\)](#)

August 24, 2017

[Soundboard Association v. Federal Trade Commission \(D.C. Cir.\), Final Brief of the Federal Trade Commission, 17-5093 \(566.65 KB\)](#)

July 28, 2017

[Soundboard Association v. Federal Trade Commission \(D.C. Cir.\), Brief of the Federal Trade Commission, 17-5093 \(836.78 KB\)](#)

May 10, 2017

[Memorandum Opinion and Order of the United States District Court Denying Plaintiffs Motion For An Injunction Pending Appeal \(263.29 KB\)](#)

April 27, 2017

[Notice of Appeal Filed by Soundboard Association From the Final Order and Judgment of the United States District Court In Favor of the Federal Trade Commission and Against Soundboard Association \(109.13 KB\)](#)

April 24, 2017

[Memorandum Opinion of the United States District Court Denying Plaintiff Soundboard Association's Motion For Summary Judgment, and Granting Defendant Federal Trade Commission's Motion For Summary Judgment \(357.63 KB\)](#)

November 10, 2016

[Letter From Lois Greisman, Associate Director, Division of Marketing Practices, Advising That Outbound Telemarketing Calls That Utilize Soundboard Technology Are Subject to the Prerecorded Call Provisions of the Telemarketing Sales Rule Section 310.4\(b\)\(1\)\(v\) of the Telemarketing Sales Rule](#)

B. The Amicus Briefs webpage

Users can easily find the FTC's amicus briefs, too. A visitor to the FTC's website can either type "amicus" into the website's search feature or click on the "Policy" tab at the top of the site and then click on the link for amicus briefs on the resulting webpage. Either way, the visitor will end up at the FTC's "Amicus Briefs" webpage, which collects and chronologically organizes all the FTC's amicus briefs. Each brief comes with a summary of its contents, the name and number of the case in which the brief was filed, the court where it was filed, and the date it was filed. A screenshot of the Amicus Briefs webpage is below.



Home » Policy » Advocacy » Amicus Briefs

Advocacy

AMICUS BRIEFS

ADVOCACY FILINGS

OTHER APPLICATIONS,
PETITIONS, AND REQUESTS

ECONOMIC LIBERTY

MILITARY TASK FORCE

Amicus Briefs

When a court considers a case whose outcome may affect consumers or competition, the FTC may file a "friend of the court" brief to provide information that can help the court make its decision in a way that protects consumers or promotes competition. To find a specific FTC brief, use the filters on this page.

Displaying 1 - 20 of 141

1 2 3 4 5 6 7 8 next › last »

FILTERS

Keyword

Federal Court

- Any -

Date

Start date

E.g., July 1, 2020

End date

E.g., July 1, 2020

APPLY

Staley v. Gilead Sciences

CITATION NUMBER: 19-2573

FEDERAL COURT: Northern District of California

DATE: October 28, 2019

Brief of the Federal Trade Commission in support of neither party, stating the proposition that market definition is a tool to help assess the likelihood of anticompetitive harm from the particular challenged conduct at issue.

[Brief of the Federal Trade Commission Supporting Neither Party \(96.45 KB\)](#)

SmileDirectClub, LLC v. Battle, et al.

CITATION NUMBER: 19-12227

FEDERAL COURT: U.S. Circuit Court of Appeals for the Eleventh Circuit

DATE: September 25, 2019

Brief of the United States Department of Justice and the Federal Trade Commission supporting the district court's ruling to dismiss plaintiff's antitrust complaint on state-action grounds. Brief states that, if the Court addresses the active supervision component of the Georgia Board of Dentistry members' state-action defense, the Court should affirm the district court's holding that the Board members did not meet their burden to show active state supervision of its challenged regulation.

[Brief for the United States and the Federal Trade Commission as Amicus Curiae Supporting Plaintiff-Appellee \(273.44 KB\)](#)

D. Blaine Leeds and SmileDirectClub, LLC v. Jackson, et al.

CITATION NUMBER: 19-11502

FEDERAL COURT: U.S. Circuit Court of Appeals for the Eleventh Circuit

DATE: September 11, 2019

Brief of the United States Department of Justice and the Federal Trade Commission supporting the district court's state-action ruling. Brief states that, if the Court addresses the active supervision component of the state-action defense, the Court should affirm the district court's holding that the members of the Board of Dental Examiners of Alabama did not meet their burden to show active state supervision.

[Brief for the United States and the Federal Trade Commission as Amicus Curiae Supporting Plaintiffs-Appellees \(420.04 KB\)](#)

People who visit the Amicus Briefs webpage can filter results by searching for keywords, or cases in specific federal courts, or cases that were filed in specific time periods. Together with the Cases and Proceedings webpage, the FTC's Amicus Briefs webpage gives visitors access to an impressive array of materials, all presented in a useful and easily searchable manner.

V. Potential Objections and Some Answers to Them

Just because some agencies maintain robust agency litigation webpages doesn't necessarily mean all agencies can or should. But it does invite questions about why more agencies don't make more of their litigation materials available on their websites. The two most intuitive responses to such questions are: (1) some agencies' litigation materials are already available on DOJ's website; and (2) the time, money, and effort required to maintain agency litigation webpages isn't worth it.

Neither response is entirely satisfactory on its own. The first assumes people know enough about the Federal Government's structure to recognize that DOJ often litigates on behalf of other agencies. That assumption might be unwarranted given how little most people know about the Federal Government.⁶¹ Indeed, it's unlikely most trained lawyers can accurately identify which agencies possess independent litigating authority.⁶² And besides, just because some agencies' litigation materials are available on DOJ's website is no reason those agencies' websites should not also provide access to the materials. If anything, DOJ's efforts at archiving

⁶¹ See Annenberg Pub. Pol'y Ctr., *Americans Are Poorly Informed About Basic Constitutional Provisions 2*, <https://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/2017/09/Civics-survey-Sept-2017-complete.pdf> (last visited June 3, 2020) (survey showing that most Americans know little about the Federal Government's structure).

⁶² See JENNIFER L. SELIN & DAVID E. LEWIS, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 106 n.401 (2d ed. 2018) (identifying 31 agencies that have at least some independent litigating authority).

and providing access to its litigation materials should make it easier for other agencies to compile and organize their own litigation materials.

That answer informs part of the second response to the second objection — that maintaining an agency litigation webpage might be too costly, time consuming, and labor intensive. In interviews for this report, representatives from several agencies explained that creating their agencies' litigation webpages was not too difficult; that maintaining them is relatively easy; and that the value their agencies derive from the webpages greatly exceeds their costs.

The NLRB's litigation webpages operate on a content management system the NLRB designed more than a decade ago. The system allows NLRB staff to create and maintain litigation webpages simply by checking certain boxes and entering basic information on the electronic forms they already fill out as part of the NLRB's routine document filing protocols. Nothing in that process requires that NLRB staff be proficient in creating or maintaining webpages; the content management system automatically ensures that links to new documents are available on the appropriate webpages. In interviews for this report, NLRB staff remarked that, thanks to the content management system, creating and updating the NLRB's litigation webpages takes just seconds.

The FTC's agency litigation webpages are created and maintained in much the same way, although the FTC uses a different content management system for its website. When Commission staff receive a new document in a litigation matter, they enter basic information on the FTC's standard document-intake form. The FTC's content management system then uses that information to create links to the document in the appropriate places on the FTC's website, including its agency litigation page. The content management system organizes the links

systematically, which minimizes the time FTC employees spend updating the Commission's litigation webpage. Here, again, creating and maintaining litigation webpages requires essentially no technological expertise on behalf of the agency personnel responsible for publishing litigation materials. The hardest part of the process, according to FTC staff, is generating and refining the list of keywords and categories by which the content management system arranges agency litigation materials.

This anecdotal evidence does not prove that creating and maintaining an agency litigation webpage is always easy or cost-effective. An answer to that question will invariably depend on circumstances unique to each agency. Among other considerations, it will depend on things like the internal benefits of maintaining an agency litigation webpage; the public's interest in having ready access to certain categories of the agency's litigation materials; the availability and cost of alternative means of accessing the agency's litigation materials; the extent to which creating and maintaining an agency litigation webpage will advance the agency's mission; the costs to the agency of creating and maintaining an agency litigation webpage; the nature of the agency's litigation portfolio, including the quantity of litigation materials the agency generates each year and the public's interest in them; the degree to which an agency's existing technological capacity can accommodate the creation and maintenance of an agency litigation webpage; and the risk that confidential or sensitive information about private litigants will be inadvertently disclosed on the agency's litigation webpage.

What the anecdotal evidence shows, though, is that creating and maintaining an agency litigation webpage is not always difficult or unduly expensive. In at least some cases, creating and maintaining a litigation webpage involves no more than that agency staff keep filling out the document intake forms they already use. And the public benefits of an agency litigation webpage

can be considerable. Every agency official interviewed for this report emphasized that agency litigation webpages enhance transparency, improve public understanding of agency activities, help disseminate important information to people, and do so efficiently and in ways that don't divert resources from other agency activities. For those reasons, among others, every agency official interviewed for this report recommended that agencies create and maintain agency litigation webpages.

There are also ways to limit the amount of work that goes into an agency litigation webpage. For instance, agencies can and should be deliberate in deciding which litigation materials to publish. If laws or legitimate policy concerns make it difficult or risky to publish litigation materials from certain categories of cases, agencies should feel free to exclude those types of cases from their litigation webpages. And other categories of cases — like intra-agency employment disputes and FOIA litigation — often have so little to do with the agency's regulatory and enforcement activities that agencies might reasonably omit them from their litigation webpages. After all, including them will seldom advance the core purposes of a litigation webpage and might even clutter the webpage in a way that detracts from its usefulness.

Similarly, there are whole categories of filings that agencies don't need to include in their litigation webpages because their contents are unlikely to be of interest to the public. Most notices of attorney appearances fit in this category. So do most motions to compel, subpoenas, and motions for continuances. Because those types of litigation filings tend not to concern agencies' regulatory or enforcement activities, there's no need to include them on agencies' litigation webpages. Indeed, including them on litigation webpages could overpopulate the webpage and thereby make it harder for people to find the agency litigation materials most relevant to their interests.

The bottom line is that creating and maintaining an agency litigation webpage need not be a herculean endeavor. Agencies can and should tailor the process to their own unique circumstances so that the public gets useful information without stretching the agencies' resources to their breaking point.

VI. Recommendations

Based on the findings in this report, here are some recommendations about agency litigation webpages.

Recommendation 1: Where resources permit, agencies should maintain webpages compiling and organizing links to all merits briefs, amicus briefs, judicial opinions, judgments, settlements, and consent decrees filed in court cases in which the agencies participate and which pertain to the agencies' regulatory and enforcement functions.

This recommendation reflects the essence of this report: Agency litigation pages can be a valuable way to share useful information with the public. Interviews conducted for this report suggest that it's possible to create robust, comprehensive litigation webpages without imposing excessive costs or other burdens on agency personnel. To better inform people, agencies should strive to publish as many litigation materials as they can. If agencies are reluctant to post all the litigation materials they generate, however, they can adopt principled policies limiting the types of litigation materials they post to their litigation webpages. What matters most is that agencies create and maintain webpages providing people with access to the litigation materials most germane to the agencies' regulatory and enforcement missions.

Recommendation 2: Agencies should display links to their litigation webpages on the menus and indexes on their websites' homepages. The links should have labels making clear that they relate to litigation.

Litigation materials are easiest to access on websites that display visible, descriptively titled links to litigation webpages in their menus or site indexes. Links labeled “Litigation,” “Advocacy,” or “Cases and Proceedings” often allude to litigation and thereby notify people that clicking on them will probably lead them to agency litigation materials.

Recommendation 3: Agencies should assign litigation-focused keywords to their litigation webpages to make the webpages easier to find using the agencies’ websites’ search functions.

Search engines can also be useful tools for locating agency litigation webpages. That is especially true if agencies program the search engines to turn up litigation webpages when users enter litigation-focused search terms like “lawsuits,” “cases,” “briefs,” and “settlement.” Agencies that create or maintain litigation webpages should ensure that their search engines make those webpages easy to find by tagging them with litigation-focused keywords.

Recommendation 4: Agency litigation webpages should offer filtering and advanced search options so that users can identify with greater precision the records or types of records for which they are looking.

To simplify users’ searches for litigation materials and give advanced users more options for narrowing and refining their searches, agency litigation webpages should offer filtering and advanced search options related to litigation. Most agency litigation webpages already allow people to search by specific words or phrases or by date. Litigation-specific options, however, allow for more efficient and productive searches. Agencies should, for instance, consider allowing users to filter search results according to the subject matter of the litigation, the court in which a case was filed, and the type of document the user wants to review.

Agencies' programmatic and litigation idiosyncrasies would likely dictate the varied litigation-specific search and filtering options the agency makes available. For example, agencies that litigate a wide array of subjects should employ a more robust set of litigation-specific search and filtering options than should agencies that seldom litigate or that litigate only a narrow range of case types. As with all recommendations in this report, agencies can and should tailor their approaches to their unique circumstances.