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January 5, 2022

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Via Email

judiciary@dcccouncil.us

Councilmember Charles Allen, Chairperson
Committee on the Judiciary and Public Safety
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

Re: Bill 24-0489, The "Expanding Fee Waivers for Low-Income Litigants Act of 2021"

Dear Chairperson Allen and members of the Committee on the Judiciary and Public Safety:

Washington Council of Lawyers, together with the organizations listed below, is pleased to submit the following testimony in support of Bill 24-0489, The Expanding Fee Waivers for Low-Income Litigants Act of 2021." This legislation eases access to the courts for low-income individuals who cannot afford court filing fees and removes a significant impediment towards achieving the goal of equal access to the courts for all D.C. residents.

Joining our testimony are these organizations/individuals:

- Amara Legal Center
- Council for Court Excellence
- D.C. Bar Pro Bono Center
- DC Jail and Prison Advocacy Project
- Legal Counsel for the Elderly
- Network for Victim Recovery of DC (NVRDC)
- Washington Bar Association
- Andrew Budzinski, in his individual capacity (for informational purposes only: Assistant Professor of Law and Co-Director of the General Practice Clinic, UDC David A. Clarke School of Law)

Thank you for the opportunity to address this important issue.

With kind regards,



Christina H. Jackson

**Testimony Before the District of Columbia Council
Committee on the Judiciary & Public Safety
On the Expanding Fee Waivers for Low-Income Litigants Act of 2021
January 6, 2022**

INTRODUCTION

The Washington Council of Lawyers, the public-interest bar association for the District of Columbia, submits this testimony in support of Bill B24-0489, the Expanding Fee Waivers for Low-Income Litigants Act of 2021. This legislation amends District of Columbia law to ease access to the courts for low-income individuals who cannot afford court filing fees. We thank Councilmember Allen for introducing this bill and the members of the Council who have co-sponsored this legislation and urge its swift enactment.

Since its founding in 1971, Washington Council of Lawyers has been the only voluntary bar association in the District of Columbia solely dedicated to promoting pro bono and public-interest law. We have over 550 dues-paying members. They are public-interest-minded lawyers, legal professionals and law students. Our members work at small and large law firms, corporate counsel offices, local and federal government agencies, law schools, legal services providers and policy organizations. They represent the private sector, including the participation of individuals from dozens of law firms, as well as the non-profit sector, including representatives from most of the legal services providers who benefit from the Access to Justice Initiative and Civil Legal Counsel Projects Program funded by the D.C. government with the support of the D.C. Council.

FILING FEES AND COMPLICATED FEE WAIVER APPLICATIONS AND PROCEDURES CONSTITUTE SIGNIFICANT BARRIERS FOR LOW-INCOME LITIGANTS SEEKING ACCESS TO OUR COURTS

Currently, to file a case without paying fees, low-income individuals filing actions in D.C. Superior Court must complete an *In Forma Pauperis* (“IFP”) application (See Superior Court Form 106A, *In Forma Pauperis*, attached). They then must wait for a court clerk or judge to approve the application. The process is unduly complicated and undoubtedly discourages many from going forward with their case. Fees in civil matters can be significant; in addition to initial filing fees, there are fees associated with numerous aspects of a civil case, such as fees for filing motions, seeking a jury demand, etc.

Although there are a few limited situations for which fee waiver applicants can “check a box” and get their application approved fairly quickly, for those applicants who do not fall into one of these categories, they must complete the lengthy Superior Court IFP form. As the attached form indicates, these litigants must estimate monthly expenses for their household in six categories, as well as listing other debts and expenses; and list all of their assets, including cash, bank accounts, cars, and homes. Completing this paperwork

– a prerequisite to filing a complaint without a fee -- creates a barrier that is overwhelming and intimidating for many litigants.

As one commentator has noted in the context of federal court fee waiver procedures:

Since these [federal court fee waiver] applications require a significant amount of information, the applications function as a tax on litigation by poor people. However, not all potential IFP litigants will be in a similar position to pay the tax. There will be some who find it easier to comply with the paperwork – whether through education, assistance from family or friends, or simply having more time. Others who lack those resources or face other obstacles (such as a language barrier) may not.

Andrew Hammond, *Pleading Poverty in Federal Court*, 128 Yale L.J. 1478, 1504 (2019).

In urging a proposed national standard for fee waivers in federal court similar to those outlined in Bill B24-0489, Hammond reasoned that his proposal:

urges judges to take back their time by streamlining a specific, fairly ministerial function. Judges' skills are not always required to make IFP determinations. Federal law has created agencies that make poverty determinations as a matter of course. Those determinations are routine and regular. Federal practice should build on those means tests in making IFP determinations. Federal judges need not make complicated, arcane poverty determinations because such determinations do not necessarily demand adjudicatory expertise. It seems uncontroversial to assert that we should prefer that judges adjudicate disputes rather than compute a litigant's resources

A streamlined, shorter form also makes the process more sophisticated and more accurate while preserving the dignity of poor people. A truly poor movant would not need to divulge every detail of her financial situation (and other details like schooling) to receive IFP status. . . . [T]his article suggests that access to justice should include the ways in which poor litigants are treated once they enter the civil adjudicatory system. . . . IFP determinations are yet another barrier in the realm of access to justice but one that scholars have failed to see as such. *Id.* 1533-34.

This legislation will greatly expand the number of litigants who would be able to bypass the cumbersome process now in place. Although current law (D.C. Code section 15-712) creates a presumption of eligibility to proceed without payment of fees for individuals receiving a limited number of forms of public assistance, Bill B24-0489 would add several additional benefit programs to that list, including Medicaid, Supplemental Nutrition Assistance Program and Special Supplemental Nutrition Program for Women, Infants and Children. Importantly, the legislation changes the presumption of eligibility to a guarantee. A guarantee of eligibility for the recipients of these programs will make it

significantly easier for numerous individuals to have their day in court. It also eases the burden to the courts, who will be saved the task of examining applications when litigants receiving these new programs (i.e., TANF) would most certainly qualify after the financial review. This guarantee will also reduce the amount of time attorneys will need to spend drafting fee waiver requests for low-income clients, permitting these lawyers to concentrate on substantive legal issues instead.

As noted above, the exercise of discretion in granting fee waivers can at times create a humiliating experience for the litigant, especially when a judge embarks on an interrogation about how the litigant spends available limited income. Expanding the number of fee waivers that are automatically or presumptively granted will spare many litigants a potentially mortifying and intrusive inquiry into their finances, expenses, and life choices.

We have noted concerns that this bill may reduce fees received by the court. In our view, the vast majority of the litigants who will be presumptively eligible under the new law would be eligible in any event when their case is reviewed by a judge for financial hardship. And if more fee waivers are eventually granted, this may simply be because more eligible individuals will apply for the waiver, undeterred by the onerous procedure – which advances access to justice and is consistent with the court’s goals to ensure they are “open to all.”

MANY OTHER JURISDICTIONS HAVE ADOPTED EXPANDED FEE WAIVER LEGISLATION AND POLICIES

This legislation would grant a fee waiver on several new grounds, including if a litigant’s monthly income does not exceed 200% of the federal poverty guidelines issued by the United States Department of Health and Human Services or if the litigant is represented by a legal services organization. This approach has already been utilized in numerous states. According to a 2019 study, twenty-six states have adopted a means test tied to the federal poverty guidelines to their fee waiver procedures. Hammond, at 1512, 1540, Table 5. Most of them use an income threshold set at 125% of the federal poverty line or higher. Several states permit litigants who receive other means-tested public benefits (such as TANF, SSI, Medicaid and SNAP) to receive a fee waiver. And eighteen states allow litigants represented by legal aid attorneys to automatically qualify for fee waivers. Hammond at 1512-13 and Appendix A, Table 5 – In Forma Pauperis Rules in the State Courts (attached). For example, Minnesota permits any litigant represented by a civil legal services lawyer or a volunteer pro bono attorney to proceed without paying filing fees. Minn. Stat. section 563.01 (2016). Courts in South Carolina have a similar provision pursuant to a court rule. S.C.R. Civ. P. 3(b)(2).

In enacting a fee waiver policy for low-income individuals represented by a legal services organization, the Justice of the Peace Court of Delaware offered a straightforward, persuasive rationale:

Indigent service agencies . . . regularly represent civil clients through their poverty programs who are unable financially to cover court costs. Because these clients have qualified for representation under the financial guidelines set forth by the various agencies, they would also qualify for approval of an *in forma pauperis* application at the Court. As such, it is duplicative to ask that the agency prepare the additional paperwork necessary for the *in forma pauperis* filing.

State of Delaware, Justice of the Peace Court, Policy Directive 18-258 (September 19, 2018).

CONCLUSION

The Washington Council of Lawyers enthusiastically urges the enactment of this legislation. We are grateful to the many members of the Council who have indicated their support for this bill through their co-sponsorship.

As the D.C. Court of Appeals has stated, the District's fee waiver statute "effectuates the fundamental principle that every litigant should be provided equal access to the courts without regard to financial ability." *Green v. Green*, 562 A.2d 1214, 1215 (D.C. 1989). This legislation enhances this concept by creating an equitable, streamlined process to effectuate this important goal and turn this principle into a reality.



SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
500 Indiana Ave, NW, Washington, DC 20001
(202) 879-1010 www.dccourts.gov

<i>Case Caption</i>	<i>Case Number</i>

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS, FEES, OR SECURITY
 (Form 106A *In Forma Pauperis*)

I, _____ am the

- | | |
|---|---|
| <input type="checkbox"/> Plaintiff/Petitioner | <input type="checkbox"/> Movant |
| <input type="checkbox"/> Defendant/Respondent | <input type="checkbox"/> Intervenor/Proposed Intervenor |
| <input type="checkbox"/> Guardian | <input type="checkbox"/> Other: _____ |

I respectfully ask that I not be required to prepay court fees in this case. I cannot do so without substantial financial hardship to me or my family for the following reason(s):

INCOME

1. I receive the following public benefits:
- Temporary Assistance for Needy Families (TANF)
 - General Assistance for Children (GAC)
 - Program on Work, Employment and Responsibility (POWER)
 - Supplemental Security Income (SSI)

If you checked any of the boxes in question 1, you do not need to answer any more questions and may skip to the "Declaration" on page 3. Otherwise, go to the next question.

For Clerk's Use Only

This Application has been reviewed and approved by:		
<i>Signature</i>	<i>Printed Name</i>	<i>Date</i>



SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
500 Indiana Ave, NW, Washington, DC 20001
(202) 879-1010 www.dccourts.gov

OTHER CIRCUMSTANCES

8. Explain any special circumstances that you want the judge to consider in support of your request, including any child support orders, large monthly expenses, debts, wage or bank account garnishments, and/or judgments.

DECLARATION

I solemnly swear or affirm under criminal penalties for the making of a false statement, which includes 180 days in jail or a \$1,000 fine or both, that I have read this Application and that the factual statements made in it are true to the best of my personal knowledge, information and belief.

 Signature

 Address Line 1

 Address Line 2

 Phone Number

 Date

POINTS AND AUTHORITIES

1. D.C. Code § 15-712.
2. D.C. Code § 22-2405.
3. Civil Rule 54-II, Domestic Relations Proceedings Rule 54-II, and Family Rule R.
4. *Adkins v. E.I. Du Pont de Nemours & Co., Inc.*, 335 U.S. 331 (1948).
5. *Harris v. Harris*, 137 U.S. App. D.C. 318, 322, 424 F.2d 806 (1970), *cert. denied*, 400 U.S. 826 (1970) (“*in forma pauperis* relief not limited to those who are public charges or absolutely destitute”).
6. *Green v. Green*, 562 A.2d 1214 (D.C. 1989) (statute “effectuates the fundamental principle that every litigant should be provided equal access to the courts without regard to financial ability”).
7. *Cabillo v. Cabillo*, 317 A.2d 866, 866 (D.C. 1974) (per curiam)(reversing denial of *in forma pauperis* status and mandating granting of petition where litigant’s income “only slightly above the welfare standard”).



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<i>Case Caption</i>	<i>Case Number</i>

ORDER

Upon consideration of the Application to Proceed Without Prepayment of Costs, Fees, or Security filed by _____, it is hereby ordered that the Application is:

- GRANTED** in this Family Court case, and, pursuant to Domestic Relations Rule 54-II(i), witnesses will be subpoenaed without prepayment of witness fees.
- GRANTED** in this Civil Division case, and pursuant to Civil Rule 54-II(i), the clerk will attempt to serve by mail the materials listed in Civil Rule 4(c)(1). Plaintiff/Petitioner is responsible for service and proof of service if the clerk's efforts are unsuccessful.
- GRANTED** in this Probate Division case.
- GRANTED** in this Tax Division case.
- GRANTED** in this Criminal Division case.
- GRANTED** _____

DENIED, for the reasons stated on the record in open court and in the presence of the applicant or applicant's counsel.

DENIED, for the following reasons:

_____ Date

_____ Judge

THE YALE LAW JOURNAL

ANDREW HAMMOND

Pleading Poverty in Federal Court

ABSTRACT. What must a poor person plead to gain access to the federal courts? How do courts decide when a poor litigant is poor enough? This Article answers those questions with the first comprehensive study of how district courts determine when a litigant may proceed in forma pauperis in a civil lawsuit. It shows that district courts lack standards to determine a litigant's poverty and often require litigants to answer an array of questions to little effect. As a result, discrepancies in federal practice abound—across and within district courts—and produce a pleading system that is arbitrary, inefficient, and invasive.

The Article makes four contributions. First, it codes all the poverty pleadings currently used by the ninety-four federal district courts. Second, it shows that the flaws of these procedures are neither inevitable nor characteristic of poverty determinations. By comparing federal practice to other federal means tests and state-court practices, the Article demonstrates that a more streamlined, yet rights-respecting approach is possible. Third, the Article proposes a coherent in forma pauperis standard—one that would align federal practice with federal law, promote reasoned judicial administration, and protect the dignity of litigants. Such a solution proves that judges need not choose between extending access to justice and preserving court resources. In this instance and perhaps others, judges can serve both commitments of the federal system. Fourth, the Article illustrates how to study procedure from the bottom up. Given the persistent and widening levels of inequality in American society, no account of civil procedure is complete without an understanding of how poor people litigate today.



AUTHOR. Senior Lecturer in Law, Letters, and Society in the College and Lecturer in Law, University of Chicago Law School. I am grateful for comments from Emily Buss, Zach Clopton, Justin Driver, Ben Eidelson, Bonnie Ernst, Lee Fennell, Amanda Frost, Maggie Gardner, Abbe Gluck, Daniel Hemel, Scott Hemphill, William Hubbard, Aziz Huq, Emma Kaufman, Ariel Jurow Kleiman, Liz McCuskey, Lou Mulligan, David Noll, Richard Re, Judith Resnik, Ezra Rosser, Shayak Sarkar, Margo Schlanger, Liz Schneider, Brian Soucek, Ben Spencer, Adam Steinman, and Charles Tyler. Katherine Blankinship provided steadfast research assistance. Thanks also to the organizers and participants of the American University Washington College of Law's Poverty States conference, the annual Law & Society meeting, the Civil Procedure Workshop at the University of Arizona James E. Rogers College of Law, and the Liman Colloquium at Yale Law School as well as the law faculties at the University of California-Davis, the University of Chicago, the University of Florida, George Washington University, Indiana University, the University of Maryland, the University of Michigan, Northwestern University, the University of Richmond, and the University of San Diego for allowing me to workshop earlier versions. Finally, I thank Hannah Schoen and the other editors of the *Yale Law Journal*.



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APPENDIX A: IN FORMA PAUPERIS PRACTICE IN U.S. DISTRICT COURTS AND STATE COURTS

This Article analyzes all in forma pauperis forms used in the U.S. district courts. To conduct this analysis, I first visited each of the ninety-four federal district courts' websites to determine if the court provided an online form. I collected every form that was available and created a database of the forms. I noted whether the district court referred litigants to the Administrative Office of the U.S. Courts, which provides both a long form (AO 239) and a short form (AO 240) to file in forma pauperis. With the help of a research assistant, I contacted each of the ninety-four district courts' clerks' offices to determine whether they also accept the AO 239 and/or AO 240. We also asked the clerks' offices to confirm whether the information and form listed on the courts' websites were accurate. We then refined the list of district courts that use the AO 239, the AO 240, and/or their own district-specific form. The results of that research are reflected in Table 1. My research assistant and I then independently coded each of the district-specific forms and reconciled the coding. We coded each of the forms across the following categories:

1) Sources of Income:

- Employment/Self-employment
- Real property
- Retirement (social security, pensions, annuities, insurance)
- Disability/Workers' comp/Unemployment payments
- Public assistance
- Interest/Dividends
- Stocks/Bonds/Notes
- Money owed to the movant
- Inheritance/Trust funds/Gifts

2) Expenses:

- Rent/Mortgage
- Utilities
- Food
- Medical
- Transportation
- Money owed by the movant
- Insurance (specific categories)
- Maintenance on home

3) Other:

- Schooling
- Consulted with/Paid an Attorney
- Children/Dependents
- Taxes
- Complaint filed raises claims in other lawsuits
- Filed case in same district
- Cash on hand
- Make and model of car

The results of the coding on sources of income, expenses, and other questions are included in Tables 2, 3, and 4 respectively. These tables only list districts that use their own forms.

In the midst of this research, I decided to survey in forma pauperis rules in state courts as well. I had known that I would research state court systems for potential proposals to improve federal in forma pauperis practice. However, once I began this research, I thought it better to systematically code the state court rules, albeit on more limited grounds. To conduct this analysis, my research assistant and I collected any state in forma pauperis statutes and the relevant state court rules. We replicated our procedures for the federal courts. We coded each state's rules in four categories: (1) means tests; (2) adjunctive eligibility based on public benefits; (3) eligibility based on representation by a legal aid attorney; and (4) some discretionary category such as "substantial hardship." The results of the coding of the state court systems are included in Table 5.

PLEADING POVERTY IN FEDERAL COURT

TABLE 5.
IN FORMA PAUPERIS RULES IN THE STATE COURTS

State	Means-test (FPL%)	Legal aid waiver	Adjunctive eligibility (public benefits)	Discretionary standard
Alabama				*
Alaska		*		*
Arizona	*	*	*	*
	(150%)		(TANF, SNAP)	
Arkansas	*			*
California	*		*	*
	(125%)		(Medicaid, SNAP, TANF, General Assis- tance, SSI, State Supple- mentary Payment, Tribal TANF, In-Home Sup- portive Services, or Cash Assistance Program for Immigrants)	
Colorado	*	*		*
	(125%)			
Connecticut	*		*	*
	(125%)		(“Public assistance” in- cluding, but not limited to General Assistance, TANF, AABD, SNAP, or SSI)	
Delaware				*
District of Columbia			*	
			(SSI, SNAP, TANF, and Medicaid)	
Florida	*		*	*
	(200%)		(TANF, poverty-related veterans’ benefits, or SSI)	
Georgia				*
Hawaii				*
Idaho		*		*
Illinois	*		*	*
	(125%)		(SSI, AABD, TANF, SNAP, General Assistance, Transitional Assistance, or Family As- sistance)	
Indiana		*		*

State	Means-test (FPL%)	Legal aid waiver	Adjunctive eligibility (public benefits)	Discretionary standard
Iowa	*			*
Kansas				*
Kentucky	* (determined by Kentucky Supreme Court)			*
Louisiana	* (125%)		* ("Public assistance benefits" but does not specify)	*
Maine			* (specifies "poverty- based" public benefits)	*
Maryland	*	*		*
Massachusetts	* (125%)		* (Medicaid, TANF, AABD, SSI, or Veterans' Benefits)	*
Michigan	* (125%)		* (SSI, TANF)	*
Minnesota	* (125%)	*	* (TANF, SSI, Medicaid, MinnesotaCare, Medi- care Part B or Part D, Low Income Home Energy Assistance Program, or SNAP)	*
Mississippi				*
Missouri	* (125%)	*		*
Montana	* (133%)			*
Nebraska	* (125%)		* (TANF, AABD, poverty- related veterans' benefits, SNAP, refugee benefits, Medicaid, SSI, or Gen- eral Assistance)	*
Nevada		*		*

PLEADING POVERTY IN FEDERAL COURT

State	Means-test (FPL%)	Legal aid waiver	Adjunctive eligibility (public benefits)	Discretionary standard
New Hampshire		*		*
New Jersey	*	*		*
New Mexico	*		(TANF, General Assistance, SSI, SSDI, Veterans' disability benefits if sole source of income, SNAP, Medicaid, public-assisted housing, or Department of Health, Case Management Services)	*
New York		*		*
North Carolina			(TANF, SSI, SNAP)	*
North Dakota	*		*	
Ohio	(125%)		(TANF, SSI, Medicaid)	*
Oklahoma				*
Oregon				*
Pennsylvania		*		*
Rhode Island				*
South Carolina		*		*
South Dakota ²³⁴				
Tennessee	*			
Texas	(125%)	*	*	*
Utah	*		(“Government entitlement program”)	*
Vermont	(150%)	*	*	*
	(150%)		(Benefit “must be significant to income”)	

²³⁴. I could not find any in forma pauperis application or standard in South Dakota law or in the state's court rules.

State	Means-test (FPL%)	Legal aid waiver	Adjunctive eligibility (public benefits)	Discretionary standard
Virginia	*		*	
	(125%)			
Washington	*	*	*	*
	(125%)		(TANF, Housing and Essential Needs, SSI, Federal poverty-related veterans' benefits, SNAP)	
West Virginia	*			*
Wisconsin	*	*	*	*
	(125%)		("Means-tested public assistance" such as TANF, General Assis- tance, Medicaid, SSI, SNAP, and veterans' benefits)	
Wyoming				*