Order

Michigan Supreme Court
Lansing, Michigan

August 10, 2022

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

ADM File No. 2020-08

Retention of the July 26, 2021 Amendments of Rules 2.002, 2.305, 2.407, 6.006, 8.110, 9.112, 9.115, and 9.221 of the Michigan Court Rules, With Further Amendments as Indicated

Rescission of the July 26, 2021 Amendments of Rules 2.506, 2.621, and 6.106 of the Michigan Court Rules

Adoption of Amendments of Rules 2.402, 3.210, 4.101, 5.140, 6.001 and Addition of Rule 2.408 of the Michigan Court Rules

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By order dated July 26, 2021, the Court adopted amendments of Rules 2.002, 2.305, 2.407, 2.506, 2.621, 6.006, 6.106, 8.110, 9.112, 9.115, and 9.221 of the Michigan Court Rules. Notice and an opportunity for public comment having been provided, effective September 9, 2022, the amendments of Rules 2.002, 2.305, 2.407, 6.006, 8.110, 9.112, 9.115, and 9.221 of the Michigan Court Rules are retained and/or further amended as indicated in underlining and strikethrough below; the July 26, 2021 amendments of Rules 2.506, 2.621, and 6.106 are rescinded as indicated in strikethrough below.

On further order of the Court, effective September 9, 2022, the Court adopts additional amendments of Rules 2.402, 3.210, 4.101, 5.140, 6.001, and adds Rule 2.408 of the Michigan Court Rules.

[Additions to the text are indicated in underlining and
deleted text is shown by strikeover.]

Rule 2.002 Waiver of Fees for Indigent Persons

(A)-(K) [Unchanged.]

(L) Notwithstanding any other provision of this rule~~, until further order of the Court~~, courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process.

Rule 2.305 Discovery Subpoena to a Non-Party

(A)-(E) [Unchanged.]

(F) Notwithstanding any other provision of this rule~~, until further order of the Court~~, a subpoena issued under this rule may require a party or witness to appear by telephone or by videoconferencing technology~~, by two-way interactive video technology, or by other remote participation tools~~. Telephonic proceedings are subject to the provisions of MCR 2.402, and videoconference proceedings are subject to the provisions of MCR 2.407.

Rule 2.402 Use of Communication Equipment

(A) Definition. "Communication equipment" means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other. It does not include use of a remote video platform through an audio-only option.

(B)-(C) [Unchanged.]

Rule 2.407 Videoconferencing

(A) Definitions. In this subchapter:

(1) [Unchanged.]

(2) "Videoconferencing" means the use of an interactive technology, including a remote digital platform, that sends video, voice, and/or data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video codecs, monitors, cameras, audio microphones, and audio speakers. It includes use of a remote video platform through an audio-only option.

(B) Application.

(1) All proceedings occurring by videoconferencing, including the manner and extent of the use of videoconferencing, are s~~S~~ubject to requirements, standards, and guidelines published by the State Court Administrative Office and the criteria set forth in subrule~~section~~ (C)~~, a court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any court-scheduled civil proceeding~~.

(2) ~~Subject to State Court Administrative Office standards,~~ Consistent with these rules and subject to subrule (4), courts may determine the manner and extent of the use of videoconferencing technology and may require participants to attend court proceedings by videoconferencing technology.

(3) [Unchanged.]

(4) Nothing in this rule shall preclude a participant from requesting to physically appear in person for any proceeding. If there is a request to appear in person, or a participant is found to be unable to adequately use the technology, to hear or understand or be heard or understood, the presiding judge and any attorney of record for said participant must appear in person with the participant for said proceeding. Subject to subrule (5), the court must allow other participants to participate using videoconferencing technology.

(5) Nothing in this rule shall prevent the court from determining that a case is not suited for videoconferencing, and may require any hearing, even a proceeding categorized as presumptively subject to videoconferencing technology, to be conducted in person.

  (a) In determining whether a particular case or proceeding should be conducted by videoconferencing technology or ruling on an objection to the use of videoconferencing technology, the court shall consider the factors listed in subrule (C).

  (b) The court shall state its decision and reasoning, either in writing or on the record, when requiring in-person proceedings in each case where there is a presumption for the use of videoconferencing technology.

(6) Courts must provide reasonable notice to participants of the time and mode of a proceeding. If a proceeding will be held using videoconferencing technology, the court must provide reasonable notice of the way(s) to access that proceeding.

(7) Courts must allow a party and their counsel to engage in confidential communication during a proceeding being conducted by videoconferencing technology.

(8) If, during the course of a videoconference proceeding, the court or a participant is unable to proceed due to failure of technology, the court must reschedule the proceeding and promptly notify the participants of the rescheduled date and time and whether the proceeding will be held using videoconferencing technology or in person.

(9) All proceedings that are held using videoconferencing technology or communication equipment must be recorded verbatim by the court with the exception of hearings that are not required to be recorded by law.

(10) Courts must provide access to a proceeding held using videoconferencing technology to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule.

(C) Criteria for Videoconferencing. In determining in a particular case ~~whether to permit~~ the use of videoconferencing technology and the manner of proceeding with videoconferencing, the court shall consider the following factors:

(1) The capabilities of the court~~'s~~ and the parties to participate in a videoconference~~videoconferencing equipment~~.

(2) Whether a specific articulable~~any undue~~ prejudice would result.

(3) The convenience of the parties and the proposed witness(es), ~~and~~ the cost of producing the witness in person in relation to the importance of the offered testimony, and the potential to increase access to courts by allowing parties and/or their counsel to appear by videoconferencing technology.

(4) [Unchanged.]

(5) Whether the court has reason to believe that the participants in this hearing will not be able to maintain the dignity, solemnity, and decorum of court while using videoconferencing technology, or that the use of videoconferencing technology will undermine the integrity, fairness, or effectiveness of the proceeding.~~Whether the dignity, solemnity, and decorum of the courtroom would tend to impress upon the witness the duty to testify truthfully.~~

(6) [Unchanged.]

(7) Whether the court ~~is satisfied that it~~ can sufficiently control the participants in this hearing or matter~~proceedings at the remote location~~ so as to effectively extend the courtroom to the remote location.

(8) [Unchanged.]

~~(9) Whether the use of videoconferencing technology diminishes or detracts from the dignity, solemnity, and formality of the proceeding and undermines the integrity, fairness, or effectiveness of the proceeding.~~

(10)-(13) [Renumbered (9)-(12) but otherwise unchanged.]

(D) Request for Videoconferencing and Participant Contact Information.

(1) [Unchanged.]

(2) A participant who will be using~~requests the use of~~ videoconferencing technology must provide the court with ~~the videoconference dialing information and~~ the participant's contact information, including mobile phone number(s) and email address(es), in advance of the court date when videoconferencing technology will be used. A court may collect the contact information using an SCAO-approved form. The contact information form used under this provision shall be confidential. An email address for an attorney must be the same address as the one on file with the State Bar of Michigan.

(3) [Unchanged.]

~~(E) Objections. The court shall rule on an objection to the use of videoconferencing under the factors set forth under subsection C.~~

~~(F) Mechanics of Videoconferencing. The use of any videoconferencing technology must be conducted in accordance with standards published by the State Court Administrative Office. All proceedings at which videoconferencing technology is used must be recorded verbatim by the court with the exception of hearings that are not required to be recorded by law.~~

(E~~G~~) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended.~~ and trial courts are required to use remote participation technology (videoconferencing under this rule or telephone conferencing under MCR 2.406) to the greatest extent possible. In doing so, courts must:~~

~~(1) Verify that participants are able to proceed remotely, and provide reasonable notice of the time and format of any such hearings for parties, other participants, and the general public in a manner most likely to be readily obtained by those interested in such proceedings.~~

~~(2) Allow some participants to participate remotely even if all participants are not able to do so. Judicial officers who wish to participate from a location other than the judge's courtroom shall do so only with the written permission of the court's chief judge. The chief judge shall grant such permission whenever the circumstances warrant, unless the court does not have and is not able to obtain any equipment or licenses necessary for the court to operate remotely.~~

~~(3) Ensure that any such proceedings are consistent with a party's Constitutional rights, and allow confidential communication between a party and the party's counsel.~~

~~(4) Provide access to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule.~~

~~(5) Ensure that the manner in which the proceeding is conducted produces a recording sufficient to enable a transcript to be produced subsequent to the proceeding.~~

~~(6) Ensure that any such remote hearings comply with any standards promulgated by the State Court Administrative Office for conducting these types of proceedings.~~

~~(7) Waive any fees currently charged to allow parties to participate remotely.~~

~~Courts may collect contact information, including mobile phone number(s) and email address(es) from any party or witness to a case to facilitate scheduling of and participation in remote hearings or to otherwise facilitate case processing. A court may collect the contact information using a SCAO-approved form. The contact information form used under this provision to collect the information shall be confidential. An email address for an attorney must be the same address as the one on file with the State Bar of Michigan.~~

[NEW] Rule 2.408 Use of Videoconferencing Technology in Civil Cases

(A) Generally.

(1) A court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any civil proceeding.

(2) Except as otherwise provided in this subrule, the use of videoconferencing technology shall not be used in bench or jury trials, or any civil proceeding

wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court after all parties have had notice and opportunity to be heard on the use of videoconferencing technology. While Administrative Order No. 2020-17 is in effect, it controls the mode of landlord-tenant proceedings.

(3) This rule does not supersede a participant's ability to participate by telephonic means under MCR 2.402.

(B) Use of Videoconferencing Technology in Circuit Court. Subject to a determination by the court that the use of videoconferencing technology is inappropriate for a particular case under an analysis as contained in MCR 2.407(C), the use of videoconferencing technology shall be presumed for:

(1) civil pretrials;

(2) early scheduling conferences under MCR 2.401(B);

(3) motions filed pursuant to MCR 2.119 regarding discovery;

(4) adjournments;

(5) modifications to scheduling orders;

(6) motions in limine;

(7) postjudgment collection or discovery matters;

(8) testimonial proofs for hearings under MCR 3.210(A)(4);

(9) motions to correct, strike, or amend pleadings; and

(10) motions pursuant to MCR 2.116.

(C) Use of Videoconferencing Technology in District Court. Subject to a determination by the court that the use of videoconferencing technology is inappropriate for a particular case under an analysis as contained in MCR 2.407(C), the use of videoconferencing technology shall be presumed for:

(1) civil pretrials;

(2) early scheduling conferences under MCR 2.401(B);

(3) motions filed pursuant to MCR 2.119 regarding discovery;

(4) adjournments;

(5) postjudgment collection matters; and

(6) motions to correct, strike, or amend pleadings.

Rule 2.506 Subpoena; Order to Attend

(A)-(I) [Unchanged.]

~~(J) Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.~~

Rule 2.621 Proceedings Supplementary to Judgment

(A)-(B) [Unchanged.]

(C) Subpoenas and Orders. A subpoena or order to enjoin the transfer of assets pursuant to MCL 600.6119 must be served under MCR 2.105. The subpoena must specify the amount claimed by the judgment creditor. The court shall endorse its approval of the issuance of the subpoena on the original subpoena, which must be filed in the action. The subrule does not apply to subpoenas for ordinary witnesses. ~~Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.~~

(D)-(H) [Unchanged.]

Rule 3.210 Hearings and Trials

(A) In General.

(1)-(3) [Unchanged.]

(4) Testimony must be taken in person, except as provided in MCR 2.408(B) or when the court may otherwise ~~that the court may~~ allow testimony to be taken by telephone in extraordinary circumstances, or by videoconferencing technology under MCR 2.407 and MCR 2.408.

(B)-(E) [Unchanged.]

Rule 4.101 Civil Infraction Actions

(A) [Unchanged.]

(B) Appearances; Failure to Appear; Default Judgment.

(1) Depending on the nature of the violation and on the procedure appropriate to the violation, a defendant may appear in person, by videoconferencing technology, by representation, or by mail.

(2)-(6) [Unchanged.]

(C)-(E) [Unchanged.]

(F) Contested Actions; Notice; Defaults.

(1)-(3) [Unchanged.]

(4) For any hearing held under this subchapter and subject to~~, in accordance with~~ MCR 2.407(B)(5),~~ the court may allow~~ the use of videoconferencing technology to conduct remote proceedings is presumed~~by any participant as defined in MCR 2.407(A)(1)~~.

(G)-(H) [Unchanged.]

Rule 5.140 Use of Videoconferencing Technology

(A)-(B) [Unchanged.]

(C) In a proceeding concerning a conservatorship, guardianship, or protected individual, if the subject of the petition wants to be physically present, the court must allow the individual to be present. The right to be present for the subject of a minor guardianship applies only to a minor 14 years of age or older. Subject to this right to be present and to MCR 2.407(B)(5), the use of videoconferencing technology is presumed in all uncontested petitions or motions in guardianship, conservatorship, protected individual and decedent estates.

(D) [Unchanged.]

Rule 6.001 Scope; Applicability of Civil Rules; Superseded Rules and Statutes

(A) Felony Cases. The rules in subchapters 6.000-6.500, except MCR 6.006(C), govern matters of procedure in criminal cases cognizable in the circuit courts and in courts of equivalent criminal jurisdiction.

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006(A) and (C)-(E), 6.101, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.425(D)(3), 6.427, 6.430, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

Rule 6.006 Video and Audio Proceedings

(A) Generally.

(1) Except as otherwise provided by this rule, the use of videoconferencing technology under this rule is subject to MCR 2.407.

(2) A court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any criminal proceeding.

(3) When determining whether to utilize videoconferencing technology, the court shall consider constitutional requirements, in addition to the factors contained in MCR 2.407.

(4) This rule does not supersede a participant's ability to participate by telephonic means under MCR 2.402.

(B) Mode of Proceedings in Cases Cognizable in the Circuit Court

(1) Generally. Circuit courts may use videoconferencing technology to conduct any non-evidentiary or trial proceeding.

(2) Preferred Mode. The use of videoconferencing technology shall be preferred for the following proceedings:

(a) initial arraignments on the information;

(b) pretrial conferences;

(c) motions pursuant to MCR 2.119; and

(d) pleas.

As used in this subrule, "preferred" means scheduled to be conducted remotely subject to a request under MCR 2.407(B)(4) to appear in person by any participant, including a victim as defined by the William Van Regenmorter Crime Victim's Rights Act, MCL 780.751 *et seq*., or a determination by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5).

(3) Presumed Mode. In all other proceedings, the in-person appearance of the parties, witnesses, and other participants is presumed.

(4) Trials. Notwithstanding any other provisions of these rules, the use of videoconferencing technology shall not be used in bench or jury trials, or any proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court after all parties have had notice and an opportunity to be heard on the use of videoconferencing technology.

(5) In-Person Demand. Nothing in this rule prevents a defendant, who otherwise has the right to appear in person, from demanding to physically appear in person for any proceeding. If there is a demand to appear in person, or a participant is found to be unable to adequately use the technology, to hear or understand or be heard or understood, the presiding judge and any attorney of record for said participant must appear in person with the participant for said proceeding. Subject to MCR 2.407(B)(5), the court must allow other participants to participate using videoconferencing technology.

(C) Mode of Proceedings in Cases Cognizable in the District and Municipal Court

(1) Preferred Mode. The use of videoconferencing technology shall be the preferred mode for conducting arraignments and probable cause conferences for in custody defendants. As used in this subrule, "preferred" means scheduled to be conducted remotely subject to a request under MCR 2.407(B)(4) to appear in person by any participant, including a victim as defined by the William Van Regenmorter Crime Victim's Rights Act, MCL 780.751 *et seq*., or a determination by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5).

(2) Presumed Mode. In all other criminal proceedings, the in-person appearance of parties, witnesses, and other participants is presumed.

(3) Videoconferencing Technology Prohibited. Notwithstanding any other provision of these rules and subject to constitutional rights, the use of videoconferencing technology shall not be used in evidentiary hearings, bench trials or jury trials, or any criminal proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court.

(4) Preliminary Examination. Notwithstanding anything herein to the contrary, as long as the defendant is either present in the courtroom or has waived the right to be present, district courts may use videoconferencing to take testimony from any witness in a preliminary examination.

~~(A) Defendant in the Courtroom or at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, waivers and adjournments of preliminary examinations, and hearings on postjudgment motions to amend restitution.~~

~~(B) Defendant in the Courtroom - Preliminary Examinations. As long as the defendant is either present in the courtroom or has waived the right to be present, on motion of either party, district courts may use telephonic, voice, or video conferencing, including two-way interactive video technology, to take testimony from an expert witness or, upon a showing of good cause, any person at another location in a preliminary examination.~~

~~(C) Defendant in the Courtroom - Other Proceedings. As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use videoconferencing technology to take testimony from a person at another location in the following proceedings:~~

~~(1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;~~

~~(2) with the consent of the parties, trials. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.~~

(D) [Unchanged.]

(E) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended~~ and trial courts are required to use remote participation technology (videoconferencing under MCR 2.407 or telephone conferencing under MCR 2.406) to the greatest extent possible. Any such proceedings shall comply with the requirements set forth in MCR 2.407(G)~~.

Rule 6.106 Pretrial Release

(A) In general. At the defendant's arraignment on the complaint and/or warrant, unless an order in accordance with this rule was issued beforehand, the court must order that, pending trial, the defendant be

(1)-(3) [Unchanged.]

~~(4) Notwithstanding any other provision in this rule, until further order of the Court, in addition to giving consideration to other obligations imposed by law, trial courts are urged to take into careful consideration local public health factors in making pretrial release decisions, including determining any conditions of release, and in determining any conditions of probation.~~

(B)-(I) [Unchanged.]

Rule 8.110 Chief Judge Rule

(A)-(B) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1)-(2) [Unchanged.]

(3) As director of the administration of the court, a chief judge shall have administrative superintending power and control over the judges of the court and all court personnel with authority and responsibility to:

(a)-(h) [Unchanged.]

(i) perform any act or duty or enter any order necessarily incidental to carrying out the purposes of this rule. As part of this obligation, the court shall continue to take reasonable measures to avoid exposing participants in court proceedings, court employees, and the general public to COVID-19. Such measures include continuing to provide~~ing~~ a method or methods for filers to submit pleadings and other filings other than by personal appearance at the court. In

addition, courts may waive strict adherence to any adjournment rules or policies and administrative and procedural time requirements as necessary.

~~To evaluate the effectiveness of the practices adopted by the Supreme Court as emergency measures during the recent pandemic, and consistent with the advisement under (C)(1) to solicit input from other judges in the jurisdiction, each court's leadership team (including the chief judge(s) and court administrator(s)) shall convene a meeting to discuss the court's ability to manage operations during the pandemic and also identify potential permanent changes that might improve court processes. The State Court Administrative Office will provide guidance regarding the meetings to be held. The meeting shall include (but not be limited to) representatives from the following stakeholders:~~

~~(i) court funding unit~~

~~(ii) local bar association~~

~~(iii) local legal aid organization~~

~~(iv) regional administrator~~

~~(v) state and local government agencies active in the court (e.g., Michigan Department of Health and Human Services, law enforcement, friend of the court, etc.)~~

~~(vi) nongovernment agencies with interests in court proceedings, such as crime victim advocacy organizations, nonprofit safety net entities, including the local Housing Assessment Resource Agency, and others as reflective of the local community.~~

~~This meeting shall be held by September 17, 2021, and a summary of the discussion and proposed recommendations shall be transmitted to the regional office within two weeks after the meeting. Courts must accept written comments submitted by any of the entities listed above, and include those comments as an appendix to its summary.~~

(4)-(9) [Unchanged.]

(D) [Unchanged.]

Rule 9.112 Requests for Investigation

(A)-(C) [Unchanged.]

(D) Subpoenas.

(1)-(4) [Unchanged.]

(5) Notwithstanding any other provision of this rule~~, until further order of the Court~~, a subpoena issued under this rule may require a party or witness to appear by telephone or by videoconferencing technology~~, by two-way interactive video technology, or by other remote participation tools~~. Telephonic proceedings are subject to the provisions of MCR 2.402, and videoconference proceedings are subject to the provisions of MCR 2.407.

Rule 9.115 Hearing Panel Procedure

(A)-(H) [Unchanged.]

(I) Hearing; Contempt.

(1)-(3) [Unchanged.]

(4) Notwithstanding any other provision of this rule~~, until further order of the Court~~, a subpoena issued under this rule may require a party or witness to appear by telephone or by videoconferencing technology~~, by two-way interactive video technology, or by other remote participation tools~~. Telephonic proceedings are subject to the provisions of MCR 2.402, and videoconference proceedings are subject to the provisions of MCR 2.407.

(J)-(M) [Unchanged.]

Rule 9.221 Evidence

(A)-(B) [Unchanged.]

(C) Issuance of Subpoenas. The commission may issue subpoenas for the attendance of witnesses to provide statements or produce documents or other tangible evidence exclusively for consideration by the commission and its staff during the investigation. Before the filing of a complaint, the entitlement appearing on the subpoena shall not disclose the name of a respondent under investigation. Notwithstanding any other provision of this rule~~, until further order of the Court~~, a subpoena issued under this rule may require a party or witness to appear by

telephone or by videoconferencing technology~~, by two-way interactive video technology, or by other remote participation tools~~. Telephonic proceedings are subject to the provisions of MCR 2.402, and videoconference proceedings are subject to the provisions of MCR 2.407.

(D)-(E) [Unchanged.]

Staff Comment (ADM File No. 2020-08): After careful consideration of public comment at the Court's March 16, 2022 public administrative hearing, these amendments reflect a balance between providing consistent practices throughout Michigan's judiciary and retaining judicial discretion to determine what is best for each case or proceeding.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

MCCORMACK, C.J. (*concurring*).

The COVID-19 pandemic required us to think creatively about how to keep Michigan's courts running safely. In the spring of 2020, we issued an administrative order requiring judges to "make a good faith effort to conduct proceedings remotely" when possible through two-way interactive videoconferencing technology. Administrative Order No. 2020-6, 505 Mich cxxxiv, cxxxv (2020). The purpose of this administrative order, and others we issued in response to the pandemic, was to keep litigants and court employees safe. Like businesses and many other institutions, courts had to find ways to adapt to the challenges of the pandemic.

We've learned in the two years since that remote proceedings vastly improved access to the courts, and thus access to justice. These amendments will ensure that remote access to our courts is consistently available across the state moving forward. Given the overwhelmingly positive response from stakeholders who provided us with helpful comments along the way, I write to express my enthusiastic support for the improved access to justice these amendments will provide to Michiganders, especially for those who need justice most.

The amendments make remote judicial proceedings the presumptive norm in many proceedings, providing much needed consistency across courts for court users. Any participant in a lawsuit can still request to appear in person for any proceeding, however, and that request must be honored. MCR 2.407(B)(4) ("If there is a request to appear in person, . . . the presiding judge and any attorney of record for said participant *must* appear in person with the participant for said proceeding.") (emphasis added). In addition, courts will retain the discretion to decide that remote appearance is inappropriate for a particular hearing and require participants to appear in person, even if the proceeding is presumptively subject to videoconferencing technology. MCR 2.407(B)(5). That is, while these amendments ensure remote proceedings are available, they require neither courts nor

litigants to adhere to a remote option where it would be inappropriate or undesirable to a participant in the proceeding. It is therefore simply false for Justice ZAHRA to state that the amendments strip trial courts of discretion to decide when and how to conduct remote proceedings.

These amendments are the result of the most inclusive development process in decades, perhaps longer. The State Court Administrative Office created the Lessons Learned Committee in May 2020 to assess the trial court system's emergency preparedness and response, including the widespread use of remote proceedings. In June 2021, Lessons Learned released its preliminary findings to the public *with a request for comment and feedback*. Lessons Learned surveyed responses from judges, court administrators and staff, attorneys, associations, and other court users; 128 participants submitted a total of 336 comments that covered both positive and negative experiences during the pandemic and with remote proceedings. Synthesizing the information gathered from these comments, Lessons Learned concluded that remote hearings should continue. See State Court Administrative Office, Lessons Learned Committee, *Michigan Trial Courts: Lessons Learned from the Pandemic of 2020-2021* (November 19, 2021), available at <https://www.courts.michigan.gov/4afc1e/siteassets/covid/lessons-learned/final-report-lessons-learned-findings-best-practices-and-recommendations-111921.pdf> (accessed August 1, 2022) [https://perma.cc/Y8PN-4HH7].

The vast majority of those who submitted feedback throughout this process—including individuals representing 36 district courts, 17 circuit courts, 9 probate courts, 2 tribal courts, and 1 friend of the court—supported the continued use of remote proceedings in some form. *Id.* at 1, 29-30.

And, on July 26, 2021, the Court enacted interim court rules governing remote proceedings and invited public comment. We received 41 written comments and heard from 49 people at our March 16, 2022 public hearing. This alone is more public input than the Court has received for any other issue during my nine and a half years of service. Additionally, every trial court met with local stakeholders to gather local feedback. More than 2,000 people across the state participated.

Given all this input, I respectfully disagree with Justice VIVIANO that the public was unaware that the Court was considering changes or that the Court did not receive public input before adopting these rules. Rather, today's new and amended rules reflect that we have listened to and learned from the feedback we have received from court users.

As I have said many times, Michigan courts and the people they serve should be proud of what has been accomplished over the past two years. Instead of being paralyzed by the global pandemic, judges and court administrators rose to overcome the challenges that delivering justice required. And while these changes made people safer during a global pandemic and kept our judicial system running, making some of them lasting will result in undeniable, vast, and long-term benefits to the public.

Equal access to justice is the most critical problem for the fair administration of our courts. Before the pandemic, "[c]ourts were falling short in meeting their mission to provide access to justice for all, and particularly so when it [came] to addressing the needs of lower-income and minority communities." Michigan Justice for All Task Force, *Strategic Plan and Inventory Report* (December 2020), p 2, available at <https://www.courts.michigan.gov/4af54d/siteassets/committees,-boards-special-initiatves/justiceforall/final-jfa-report-121420.pdf> (accessed August 1, 2022) [https://perma.cc/2BFL-WFBK]. Indeed, surveys showed that "nearly nine in ten low-income individuals with a civil legal problem receive[d] little or no legal help" in trying to navigate the justice system. *Id.*

Remote access to court hearings during the pandemic has allowed more people to get legal representation, and it has reduced the costs—financial and otherwise—of litigation. By cutting travel time and time spent in courthouses waiting for hearings to begin, attorneys can appear in courts in multiple counties on the same day. Lawyers can serve more clients, increasing the legal community's capacity to meet the needs of the most disadvantaged litigants and communities.

The benefits are even more impactful for those who can't afford lawyers—the vast majority of litigants who need and use courts. People who would have missed a court date because they lacked access to transportation or could not afford to miss work will be spared the consequences of failing to appear—jail, fines, lost housing, separated families, and more debt. Default judgments, which data show plummeted during the pandemic, will remain lower.

These benefits, which we have seen firsthand here in Michigan, have now been well documented. Interviews with judges who oversee child welfare courts found that parents, foster parents, and kinship caregivers appeared more often at virtual proceedings than live, and they attributed that increase in part to not having to travel, find parking, or miss work. See National Center for State Courts, *Study of Virtual Child Welfare Hearings: Impressions from Judicial Interviews* (June 2021), available at <https://www.ncsc.org/__data/assets/pdf_file/0018/65520/Study-of-Virtual-Child-Welfare-Hearings-Judicial-Interviews-Brief.pdf> (accessed August 1, 2022) [https://perma.cc/EC5L-CEMG]. An analysis of the relevant data by the Michigan Supreme Court's Statistical Research Team conducted in October 2021 showed that the percentage of Michigan civil cases ending in default judgment fell by 16.9% from 2019 to 2021. See Memorandum from Laura Hutzel and Dian Gonyea to Tom Boyd (October 27, 2021) (on file with the Michigan Supreme Court), p 2. And the data showed a 38% decrease in the percentage of defaults in landlord-tenant cases during the same period. See Michigan Justice for All Commission, *Annual Report 2021*, p 5, available at <https://www.courts.michigan.gov/49c722/siteassets/reports/special-initiatives/final-2021-jfac-annual-report.pdf> (accessed August 1, 2022) [https://perma.cc/N2D7-6ZG2]; January Advisors, *Preliminary Data on LT Default Rates* (January 26, 2022), available at

<https://www.courts.michigan.gov/4a18a9/siteassets/court-administration/resources/preliminary-data-on-lt-default-rates.pdf> (accessed August 1, 2022) [https://perma.cc/44WE-JD6T]. See also Hoffman and Strezhnev, *Longer Trips to Court Cause Evictions* (U of Penn Carey Law School, Inst for Law & Econ, Research Paper No. 22-29, 2022), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4130696> (accessed August 1, 2022) [https://perma.cc/ML85-V9N4] (empirical data showing that the farther tenants lived from the courthouse, the more likely they were to be defaulted and lose their home). Data from other states also show that default rates drop with remote hearings. See Joint Technology Committee, *Judicial Perspectives on ODR and Other Virtual Court Processes* (May 18, 2020), available at <https://www.ncsc.org/__data/assets/pdf_file/0023/34871/2020-05-18-Judicial-Perspectives.pdf> (accessed August 1, 2022) [https://perma.cc/558K-YD7S].

Virtual proceedings have enormous efficiency benefits for courts, too. Because of a decrease in missed court dates, judges reschedule fewer hearings, issue fewer bench warrants and contempt orders, and assess fewer fines and fees for failure to appear.

Finally, these amendments will continue the increased transparency we gained from remote proceedings. Since March 2020, judges, magistrates, and referees have presided over more than 6 million hours of online court proceedings that were broadcast so the public could witness them. The public has accessed live virtual proceedings on the State Court Administrative Office's Virtual Courtroom Directory more than 560,000 times. Local trial court YouTube channels have nearly 220,000 subscribers, and trial court videos have millions of views. Michiganders are participating in their judicial system like never before.

Public trust is the judiciary's only currency, and it is eroding. The National Center for State Courts' annual survey demonstrates that public trust in state courts has dropped by 12 percentage points since 2018, and the percentage of the public that believes the courts provide "equal justice to all" has declined steadily since 2014. See National Center for State Courts, *State of the State Courts: 2021 Poll* (2021), pp 5-6, available at <https://www.ncsc.org/__data/assets/pdf_file/0020/70580/SSC_2021_Presentation.pdf> (accessed August 1, 2022) [https://perma.cc/563F-N4SH]. Improved access to justice, consistency, and transparency are critical components for creating and maintaining public trust and confidence.

As Justice VIVIANO correctly observes, these rules make remote proceedings a "default" in many cases, but not a requirement for any case. And as noted above, baked into the amendments is the option for a litigant to request in-person proceedings. See MCR 2.407(B)(4). This should assuage Justice BERNSTEIN's fair concern that some litigants might lack the resources or skills to use videoconferencing technology. And no rule adopted today prevents a judge from determining that a proceeding should be held in

person. Compare MCR 2.407(B)(5) and (C) with MCR 2.407(B)(4) and MCR 2.408(A)(2).

But consistency from court to court, where practical, is good government. Court users should not have to navigate different rules for appearances from courtroom to courtroom and pay the costs for misnavigating hodgepodge processes. A judge-by-judge approach to remote proceedings might serve individual judges, but it does not serve the public.

Moreover, I disagree with Justice VIVIANO's and Justice BERNSTEIN's suggestion that trial judges largely oppose remote proceedings. We don't have to guess—they told us in 2021. In fact, 84% of district court judges surveyed by the Michigan District Judges Association (MDJA) believe they have found a proper balance between remote and in-person proceedings under the current rule, which requires remote proceedings to the maximum extent possible. Michigan District Judges Association, *Online Survey of Judges with District Court Dockets: Executive Summary and Demographic Analysis* (October 2021), p 12, available at <https://www.courts.michigan.gov/4a236c/contentassets/e636e8ac7b40411d98206f933c7b8257/approved/2020-08_2022-07-29_mdjasurveyreport.pdf> (accessed August 1, 2022) [https://perma.cc/SGG5-5F7S]. And 90% of district court judges said they intend to use remote proceedings going forward for certain proceedings, even in the absence of a mandate. An MDJA work group submitted proposed rules very similar to the ones we adopt today as part of the extensive comment process.

Continued remote proceedings can also be a part of the solution to trial court backlogs, because they increase capacity: visiting judges can conduct remote proceedings for matters that are suited for them, freeing up physical courtrooms for jury trials and other proceedings that are better handled in person. The efficiency with which remote proceedings are conducted will only improve over time as courts, attorneys, litigants, and other stakeholders become more familiar with new processes and new technologies.

I also respectfully disagree with Justice VIVIANO that the Court is moving faster with respect to adopting remote hearings than the rest of the country. To the contrary, some states have already developed detailed reports and are considering or have adopted similar rules for remote proceedings. Earlier this year, the Minnesota Supreme Court implemented a uniform process for determining which hearings will be held remotely and which will be held in person. See Minnesota Supreme Court, Administrative Order No. 20-8001 (2020), available at <https://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/News%20and%20Public%20Notices/Orders/Administrative-Order-Continuing-Operations-of-the-Minnesota-Judicial-Branch-Under-Emergency-Executive-Order-No-20-33.pdf> (accessed August 1, 2022) [https://perma.cc/3L8C-Z57P]; Minnesota Judicial Branch Policy and Procedures, *oneCourtMN Hearings Initiative Policy* (June 6, 2022), available at <https://www.mncourts.gov/mncourtsgov/media/Judicial_Council_Library/Policies/500/

525.pdf> (accessed August 1, 2022) [https://perma.cc/Q5US-EW9W]. In February 2022, the Arizona Supreme Court issued a report recommending the permanent implementation of remote hearings for many types of proceedings, and in April it adopted these recommendations. See Arizona Supreme Court, *Recommended Remote and In-Person Hearings in Arizona State Courts in the Post-Pandemic World* (February 22, 2022), available at <https://www.ncsc.org/__data/assets/pdf_file/0029/75809/Recommended-Remote-and-In-Person-Hearings-in-Arizona-State-Courts-in-the-Post-Pandemic-World-2222022-FINAL.pdf> (accessed August 1, 2022) [https://perma.cc/U6PQ-G8EC]; Arizona Supreme Court, Administrative Order No. 2022-46 (2022), available at <https://www.azcourts.gov/Portals/22/admorder/Orders22/2022-46.pdf?ver=f3gtG-_i2Cq8bm4KQbxo1Q%3d%3d> (accessed August 1, 2022) [https://perma.cc/C3M8-XAG8]. And both the New Jersey and Maryland Supreme Courts have authorized frameworks for approaching consistency for remote proceedings. See Supreme Court of New Jersey, *Notice to the Bar and Public: Future of Court Operations—Continuation of Both In-Person and Virtual Court Events* (November 18, 2021), available at <https://www.njcourts.gov/notices/2021/n211118a.pdf?c=A4s> (accessed August 1, 2022) [https://perma.cc/PN8G-QH2X]; Maryland Courts, *Maryland Judiciary Adopts Recommendations and Releases Report From Joint Subcommittee on Post COVID-19 Judicial Operations* (March 31, 2022), available at <https://www.courts.state.md.us/media/news/2022/pr20220331> (accessed August 1, 2022) [https://perma.cc/5QHT-RWHT]. So we are not the first to adopt remote proceedings rules, but we should not be the last. Michigan can and should lead.

That the rules we adopt today differ from the interim rules is not unusual. We seek comments to proposed rules so that we can learn from them and make changes based on what we learn. This is exactly what has happened here. The extensive feedback we received led us to these specific rules, just as comments in other administrative rule change proposals led us to adopt different rules than those we published for comment. See, e.g., ADM File No. 2020-17 (adding Rule 3.906 to the Michigan Court Rules to govern the use of restraints on juveniles offenders during court proceedings, but providing courts more discretion to decide when restraints are necessary than the proposed rule that was published for comment); ADM File No. 2018-25 (amending MCR 7.312 to codify the briefing requirements for cases to be argued on the application, while declining to adopt some amendments that had been published for comment and adopting additional amendments that had not been included when the proposed rule was published for comment). See also ADM File No. 2019-03; ADM File No. 2015-14.

As always, every rule adopted today can be amended if we learn there are better ways to approach remote proceedings or aspects of the new rule that are not working as well as they should be. The rules and processes that govern our courts' work should always be improving to better serve the public.

Access to justice for all requires expanding what the delivery of justice looks like. A modern justice-delivery system will be different than when many of our courthouses were built, but that does not mean it is the enemy of decorum. Michigan's judges have many tools at their disposal to maintain decorum in physical and virtual courtrooms. Delivering justice to the people of Michigan in 2022 requires us to use and refine every tool we have and to keep creating new ones.

The legal profession has been notoriously slow to embrace change. But it's time to keep moving forward, not back. Every other institution and industry in our country is doing exactly that—changing their practices for the better based on lessons learned these past two years. The modern workforce will never return to its February 2020 norms. More of our personal and work lives will be conducted in a virtual format. Business travel, education, and healthcare will never be the same.

Courts, too, must continue to evolve. The judiciary should not and cannot be the only institution that does not benefit from the lessons learned from the COVID-19 pandemic and the accelerated innovation it brought. More importantly, the public who have traditionally been excluded from full participation in many of our courts should not lose a valuable new tool for accessing justice. Ours is a government instituted for the *people*, after all.

ZAHRA, J. (*dissenting*).

On July 23, 2021, this Court rescinded most of the emergency orders issued in response to the COVID-19 pandemic.[1] However, some of the emergency orders were not rescinded, including those that required courts to "make a good faith effort to conduct proceedings remotely"[2] when possible through two-way interactive videoconferencing technology. The Court promulgated these emergency orders as interim court rules which were given immediate effect, with public comment only accepted after these rules were in effect. I dissented because there was no longer an emergency to justify the summary implementation of these interim court rules without public comment. I believed that these "concerns merit[ed] public attention before considering even interim court rules, which, more often than not, load the dice toward their later adoption as permanent court rules."[3]

So, it should not be a surprise that the same justices who sought to give immediate effect to emergency interim courts rules now seek to make those court rules permanent. If

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[1] Rescission of Pandemic-Related Administrative Orders, 507 Mich ___ (2021).

[2] See Administrative Order No. 2020-6, 505 Mich cxxxi (2020).

[3] Rescission of Pandemic-Related Administrative Orders, 507 Mich at ___ (ZAHRA, J., dissenting).

Chief Justice MCCORMACK is correct that "[p]ublic trust is the judiciary's only currency," the Court's imprudent approach to promulgating these once-emergency orders into permanent court rules when the emergency no longer exists certainly does not bolster the Court's credibility. And far from demonstrating to the public this Court's confidence in our trial courts, the majority now makes additional changes to these court rules that undermine that confidence. The majority for all intents and purposes strips our trial courts of the discretion to decide when and how best to conduct remote proceedings.[4] In addition, the majority's changes that relate to landlord-tenant proceedings are particularly egregious in that they permanently strip trial courts of discretion that the Legislature provided them through a statutory framework in which a landlord may obtain a judgment against a defaulting tenant.[5]

As I previously wrote in terms of remote proceedings:

> A perfect solution is not at hand. Like most matters that end up in this tribunal, there are competing interests at stake, and we should not treat this as an all or nothing proposition. Remote hearings provide an opportunity to increase access to justice. This is no small matter. At the same time, remote hearings deny trial courts their full authority to maintain the dignity and proper decorum of the court. The courtroom—with the judge perched on a bench, the call of the court crier to open court and call cases, and the ceremony and ritual of live court proceedings—affords trial courts with authority that is conspicuously absent from video proceedings. It cannot be denied that there is an increased risk that litigants participating remotely will

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[4] The permanent court rule provides that "the use of videoconferencing technology shall be presumed . . . ." MCR 2.408(B) and (C).

[5] See Amended Administrative Order No. 2020-17, 507 Mich ___, ___ (2021) (ZAHRA, J., dissenting).

Chief Justice MCCORMACK's claim that I falsely state that the "amendments strip trial courts of discretion to decide when and how to conduct remote proceedings" is humorous. In the same passage, she admits that remote proceedings are now "the presumptive norm in many proceedings[.]" She then hides this presumption behind a fig leaf by mentioning that "[a]ny participant in a lawsuit can still request to appear in person . . . ." This vests discretion not with the trial court but with the litigants, who care only about their personal interest and not the interest of justice. The Chief Justice's claim of falseness rings hollow.

> make a mockery of court proceedings, with the court having little to no remedy available to sanction such disruptive conduct.[6]

I strongly disagree with Chief Justice MCCORMACK that these new rules promote "good government." As one of only two justices on the Court to have served as a trial court judge, I firmly believe that the better approach is to trust our trial courts. The trial courts of this state have the authority to implement video proceedings under our current rules. The emergency brought about by the pandemic forced trial courts to use videoconferencing technology in ways not previously utilized. Our trial courts learned when videoconferencing aids in the administration of justice, and when it does not. Good government results when trial judges elected by the people within their respective jurisdictions are vested with the discretion to decide when the use of remote proceedings best serves the interests of justice. I would therefore leave it to the discretion of our trial courts as to when and where best to use these tools. I trust our trial courts to implement these procedures as needed and where such proceedings benefit our judicial process. The Court should likewise demonstrate this confidence in our judicial system. Accordingly, I dissent.

VIVIANO, J. (*dissenting*).

Although I have disagreed with a fair amount of this Court's administrative decision-making in the past two years—including, most emphatically, its management of the COVID-19 pandemic—no single decision will cause more harm to the court system than today's reckless and irresponsible decision to make remote court hearings the default in Michigan. Today's order will ensure that the participants in court hearings are less engaged and the hearings less meaningful. As a result, the quality of justice dispensed by our courts will inevitably decline. As a former trial judge who values human interaction and knows the court system cannot function well without it, I am greatly saddened by the majority's profound error in judgment and what it portends for the future of our courts.

I. PROCEDURAL HISTORY

In March 2020, after Governor Whitmer declared a state of emergency in response to the COVID-19 pandemic, we began issuing administrative orders governing how courts should operate during the pandemic. See, e.g., Administrative Order No. 2020-1, 505 Mich xcix (2020). This included administrative orders directing that courts, to the extent possible, conduct many types of hearings remotely. See, e.g., Administrative Order No. 2020-2, 505 Mich cii (2020). On April 7, 2020, we issued Administrative Order No. 2020-6, which expanded the authority of judges to conduct proceedings remotely and required them "to make a good faith effort to conduct proceedings remotely whenever possible."

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[6] Rescission of Pandemic-Related Administrative Orders, 507 Mich at ___ (ZAHRA, J., dissenting).

Administrative Order No. 2020-6, 505 Mich cxxxi (2020). At the time, I supported those emergency administrative orders because I believed they represented our best efforts to respond to the COVID-19 pandemic and the impacts that it had on our court system.[1]

Administrative Order No. 2020-6 remained in effect until July 2021, when the Court rescinded it, and a number of our other pandemic-related administrative orders, and issued an order that gave immediate effect to a broad group of court rule amendments related to remote proceedings. Rescission of Pandemic-Related Administrative Orders, 507 Mich ___ (2021). Although the amendments made changes to the court rules, those changes were obviously intended to be of limited duration because the amendments referred to the ongoing COVID-19 pandemic and many of the changes were effective "until further order of the court." The Court concurrently published the amendments for comment and provided notice that a public hearing on the amendments would be held at a later date. Justice BERNSTEIN and I dissented in part from that order, explaining why we believed it was time for the Court to stop administering our state courts by issuing emergency orders and instead return to in-person proceedings as much and as quickly as possible. *Id.* at ___ (VIVIANO and BERNSTEIN, JJ., concurring in part and dissenting in part).

The public hearing regarding whether to retain the July 2021 amendments was held on March 16, 2022. We received 41 written comments and heard from 49 individuals at the public hearing. Although a few individuals were supportive of the amendments, the vast majority of judges who provided comments, as well as the Prosecuting Attorneys Association of Michigan, the State Appellate Defender Office, victim advocacy groups, advocacy groups for self-represented litigants, and various State Bar committees, were opposed to the proposed amendments.

After the public hearing was held, a brand new set of potential amendments materialized for the Court's consideration. Unlike the July 2021 amendments, these proposed significant and permanent expansions of mandated remote hearings. This proposal was never published for comment and was never considered at a public hearing. Indeed, the public was not even aware that the Court was considering making sweeping permanent changes to how our courts operate until Justice BERNSTEIN and I published an op-ed informing the public that the Court would be considering a set of amendments different from those published for comment. See Bernstein & Viviano, *Opinion: People Deserve Their Post-Pandemic Day in Court*, The Detroit News (March 29, 2022), available at <https://www.detroitnews.com/story/opinion/2022/03/30/michigan-courts-should-

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[1] A number of our early administrative orders also relied on Governor Whitmer's executive orders that were validly issued under the Emergency Management Act, MCL 30.401 *et seq*. But later administrative orders relied on executive orders that were issued under the Emergency Powers of the Governor Act, MCL 10.31 *et seq*., which we subsequently held were invalid and "of no continuing legal effect." *House of Representatives v Governor*, 506 Mich 934, 934 (2020).

dispense-justice-person-post-covid/7203119001> (accessed July 7, 2022) [https://perma.cc/7TUS-5DVB]. It is this new set of court rule amendments, which have been shielded from public view, that the Court is adopting today.

II. DISCUSSION

A. WHY THE CHANGES NOW BEING ADOPTED ARE A BAD IDEA

The amendments the Court adopts today will significantly change how our courts operate on a daily basis. Under the new rules, there will be a presumption that many criminal and most civil proceedings should be held remotely.[2] While some of the proceedings presumed to be held remotely are relatively inconsequential, such as scheduling conferences and adjournments, others are the most significant hearings that will be conducted in many cases, including oral argument on motions for summary disposition in circuit court civil cases and pleas in felony criminal cases. And because trial courts must state on the record or in writing the reasons for deviating from this presumption, the decision to hold an in-person hearing will now be grounds for appeal. The new rules thus promise to formalize the new regime of remote proceedings this Court has foisted upon our frontline courts and to saddle appellate courts with satellite litigation unrelated to the merits of a case.

This revolution in the daily functioning of our courts is not a good thing. It should go without saying—or, at least, it used to—that the most important interactions in people's lives have always occurred in the real world.[3] For litigants, that means appearing in the

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[2] For example, the amendments establish a "preference" that a number of criminal hearings be conducted remotely, including the initial arraignment on the information, pretrial conferences, and felony plea hearings. See MCR 6.006(B)(2). And trial judges are now specifically allowed to conduct remote civil and criminal bench or jury trials over the parties' objections. See MCR 2.408(A)(2); MCR 6.006(B)(4). In addition, MCR 2.408(B) now contains a presumption that oral argument on motions for summary disposition in civil cases be held remotely. These dispositive motions are arguably the most important proceeding in a civil case other than the trial itself, and many cases are resolved at the summary-disposition stage.

[3] See Varadarajan, *Can America's Cities Make a Post-Pandemic Comeback?* Wall Street Journal (May 27, 2022) ("Zoom and hybrid work may be here to stay, [Professor Edward Glaeser] allows. 'But for most of us the most important interactions of our lives will occur in the real world and, consequently, location remains absolutely critical.' "), available at <https://www.wsj.com/articles/big-cities-will-suffer-if-workers-stay-home-remote-labor-young-old-finance-college-11653664888> (accessed July 8, 2022) [https://perma.cc/SP92-QNYK]. See also *People v Heller*, 316 Mich App 314, 320 (2016) (" 'In the most important affairs of life, people approach each other in person, and television is no

local courthouse and in the judge's physical courtroom.[4] As Justice BERNSTEIN and I have stated previously,

> Courthouses have always had symbolic importance in our society. They are in the center of every local community, and the courthouse itself reinforces the importance of what occurs within its walls. From judges to court staff, attorneys and litigants, jurors and other members of the public—attending court is and always should be a meaningful experience. The majesty of the court and the solemnity of the proceedings are essential to this process. [*Opinion: People Deserve Their Post-Pandemic Day in Court*.]

This is not a new concept: "centuries of tradition . . . have placed courtrooms and courthouses at the center of the judicial process." Rescission of Pandemic-Related Administrative Orders, 507 Mich at ___ (2021) (VIVIANO and BERNSTEIN, JJ., concurring in part and dissenting in part). And that is undoubtedly one of the reasons that our taxpayers have provided every judge in our state with a courtroom—instead of a cubicle—to conduct court business.

The awe-inspiring nature of a visit to the courthouse is only enhanced by the presence of a black-robed judge peering out over the proceedings from a raised bench, in front of counsel's table and the public gallery, guarded by a uniformed bailiff, and surrounded by the flags, seals, and symbols of our state and nation. All of this is not just for theater: if we did not know it before, the pandemic has taught us that the physical courtroom, with all of its trappings, is essential to the decorum, gravity, and civility of the proceedings. Judge after judge has told us about the difficulties caused by widespread use of remote hearings, including "the judge's inability to control the proceedings, participants logging in while smoking, urinating or driving, difficulty communicating because of a bad internet connection and inability to assess whether court participants are under the influence of drugs or alcohol." *Opinion: People Deserve Their Post-Pandemic Day in Court*.[5] Multiple judges who spoke at the March 16, 2022 public hearing provided

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substitute for direct personal contact. Video tape is still a picture, not a life . . . .' "), quoting *Stoner v Sowders*, 997 F2d 209, 213 (CA 6, 1993).

[4] See Haldar, *In and Out of Court: On Topographies of Law and the Architecture of Court Buildings*, 7 Int'l J for Semiotics L 185, 189 (1994) ("Architecture marks off and signifies that authority-to-judge which can only be found inside a court of law and nowhere else[;] it assigns legal discourse to a proper place.").

[5] See also Wolfson, *Think a Court Cat Filter Is Weird? Try Virtual Court with Beer, Bikinis and Clients in Bed*, Louisville Courier Journal (December 18, 2020), available at <https://www.courier-journal.com/story/news/2020/12/18/amid-covid-19-pandemic-remote-court-hearings-bare-naked-truth/3932436001/> (accessed August 1, 2022)

examples from their courtrooms and the courtrooms of their colleagues. See, e.g., Michigan Supreme Court, *Public Hearing: March 16, 2022*, pp 9, 12, 16, available at <https://www.courts.michigan.gov/4961dd/siteassets/rules-instructions-administrative-orders/transcripts-of-public-administrative-hearings/public-hearing-tr_03-16-2022.pdf> (accessed July 8, 2022) [https://perma.cc/SX4V-PKGU]. Examples of inappropriate behavior included an attorney representing a client while driving, an attorney appearing while walking and running, a defendant appearing while getting her hair dyed, a defendant smoking marijuana, and a defendant urinating, just to name a few. *Id*. at 12.

The lack of decorum and technical difficulties not only detract from the solemnity of the hearings, they make it more difficult for all of the participants to stay engaged and to focus on the important court business at hand. Even aside from the challenges noted above, as most of us know by now, it is always difficult to keep the participants of a virtual meeting engaged and paying attention. It boggles my mind that we would mandate that the majority of the trial court's business be conducted in this fashion. As Justice BERNSTEIN and I observed, "[w]hen a person comes before the court, a great deal is at stake: a person's liberty, a victim's safety, the support and care of a child, a person's employment or livelihood. Litigants deserve to have the full attention of the judge, court staff, attorneys and other parties when their case is being heard and decided." *Opinion: People Deserve Their Post-Pandemic Day in Court*.[6] The quality of judicial decision-making and the public's satisfaction with the court system will inevitably decline with the overuse of virtual hearings.

The judge's inability to control the proceedings leads to other problems. Any rule mandating virtual court hearings in criminal cases was universally opposed by prosecutors and domestic violence prevention groups because it does not adequately protect the safety, privacy, and dignity of crime victims. The integrity of the proceedings is open to question because there is no way to know if parties, witnesses, or victims are being influenced by someone, or something that is occurring, behind the video camera.[7] Remote proceedings

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[https://perma.cc/X8GJ-F62G] (providing examples of parties and attorneys taking remote court appearances less seriously than warranted).

[6] The majority's indifference to the value of in-person engagement is perhaps best exemplified by its insistence on allowing even the judge to work remotely! Under the majority's ill-considered new guidelines, judges are no longer required to preside over cases from their courtrooms. This rule, too, has been adopted without any public notice or discussion of whether judges should be authorized to rule on important matters from outside the courtroom. I believe that is a recipe for disaster.

[7] This concern is not merely hypothetical. One proceeding in Michigan during which a defendant charged with domestic assault appeared via Zoom from the home of the alleged victim made national news. See Li, *Virtual Court Hearing Takes Turn After Prosecutor Spots Assault Suspect in Victim's Home* NBC News (March 11, 2021), available at

pose significant problems for criminal defendants too. The "preference" in the new rules for remote plea hearings will make it difficult for the trial court to ensure that the plea is understanding, voluntary, and accurate.[8] Court reporters are also experiencing great difficulty in preparing an accurate and reliable record of court proceedings. These problems likely explain why the vast majority of our state's trial judges who have given us input have vigorously opposed these changes.

During the pandemic, much of American life—including work, worship, and education—was conducted remotely. The negative effects of this change are increasingly apparent. As Professor Edward Glaeser has recently observed, " 'The unmitigated disaster that remote learning has been for American children—and children throughout the world—has been confirmed in study after study, and particularly for the most disadvantaged kids.' " Varadarajan, *Can America's Cities Make a Post-Pandemic Comeback?* Wall Street Journal (May 27, 2022), available at <https://www.wsj.com/articles/big-cities-will-suffer-if-workers-stay-home-remote-labor-young-old-finance-college-11653664888> (accessed July 8, 2022) [https://perma.cc/SP92-QNYK].

Professor Glaeser also mentioned the deleterious effects Zoom instruction has had on his college lectures: " 'None of the magic that comes from live lecturing and live interaction with students is there when you're doing it via Zoom.' " *Id*. As chair of the Economics Department at Harvard, he recently heralded the return to in-person instruction, stating that "[i]deas have long sparkled along the hallways and in the seminar rooms of [the Littauer Center], and I am so happy that we will be returning physically to our building after August 2. Zoom, for all of its marvels, is no substitute for face-to-face interaction." Edward Glaeser, *Message from the Chair*, Harvard University Dep't of Economics, available at <https://economics.harvard.edu/message-chair> (accessed July 8, 2022) [https://perma.cc/54ML-NZJ6]. Other leading lights in the American business community

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<https://www.nbcnews.com/news/us-news/virtual-court-hearing-takes-turn-after-prosecutor-spots-assault-suspect-n1260698> (accessed July 8, 2022) [https://perma.cc/5UDF-EMMQ].

[8] See DeRegis, *"Can You Hear Me Now?": The Implications of Virtual Proceedings on Criminal Defendants' Constitutional Rights*, 81 Md L R Online 71, 98 (2022) (arguing that "the use of virtual pleas should be subject to need, such as an emergency").

are following suit, noting the disadvantages of virtual work.[9] Empirical research bears out these concerns.[10]

Until recently, this wisdom was not lost on courts. In *People v Heller*, 316 Mich App 314 (2016), addressing whether felony sentencing should occur in person, our Court of Appeals touched on many of these same themes. After noting that "[s]entencing 'is an intensely human process,' " the Court observed as follows:

> Undoubtedly, two-way interactive video technology saves courts money and time, and it dramatically lessens security concerns. But in the

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[9] For example, Elon Musk recently announced that all of his employees at Tesla and SpaceX will be required to work in-person for a minimum of 40 hours per week, including senior executives. In his view, being physically present at work was essential to producing new and meaningful products. Kost, *Elon Musk to Tesla, SpaceX Employees: 40 Hours in the Office or Find Another Job*, San Francisco Chronicle, (June 1, 2022) available at <https://www.sfchronicle.com/tech/article/Elon-Musk-to-Tesla-SpaceX-employees-40-hours-in-17212688.php> (accessed July 8, 2022) [https://perma.cc/JC57-UFJL]. See also Lyons, *Apple CEO Tim Cook Tells Employees the Return to Offices Will Begin on April 11th*, The Verge (March 4, 2022) (quoting Tim Cook as extolling the "irreplaceable benefits of in-person collaboration"), available at <https://www.theverge.com/2022/3/4/22961592/apple-april-11-return-office-corporate-pandemic-tim-cook> (accessed July 8, 2022) [https://perma.cc/NU6J-3VLD]; Cutter, *What CEOs Really Think About Remote Work* (September 23, 2020), Wall Street Journal (noting numerous comments by CEOs, including Reed Hastings of Netflix, who stated, " 'I don't see any positives [to remote work]. Not being able to get together in person, particularly internationally, is a pure negative,' " and James Dimon of JP Morgan Chase & Co, who stated, " 'I think going back to work is a good thing. I think there are negatives to working from home . . . We've seen productivity drop in certain jobs and alienation go up in certain things.' "), available at <https://www.wsj.com/articles/what-ceos-really-think-about-remote-work-11600853405> (accessed July 8, 2022) [https://perma.cc/3V6Z-LJAW].

[10] See, e.g., Yang et al, *The Effects of Remote Work on Collaboration Among Information Workers*, 6 Nature Human Behavior 43, 43, 49-50 (2022) (finding that firm-wide remote work "caused the collaboration network of workers to become more static and siloed, with fewer bridges between disparate parts" and disrupted communications, "mak[ing] it harder for employees to acquire and share new information across the network," making it more difficult to process complex information, and potentially decreasing the quality of workers' output); Karl et al, *Virtual Work Meetings During the COVID-19 Pandemic: The Good, Bad, and Ugly*, 53 Small Group Research 343, 345-346 (2021) (noting research that shows exhaustion from videoconferencing, lower motivation to perform behaviorally and cognitively, and more disruptive multitasking).

felony sentencing context, it is simply inconsistent with the intensely personal nature of the process. After all, "[s]entencing is the point where the heart of the law—and its human face—is most clearly revealed." Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 Cardozo L Rev 1, 179 (2008). Sentencing by video dehumanizes the defendant who participates from a jail location, unable to privately communicate with his or her counsel and likely unable to visualize all the participants in the courtroom. Moreover, a courtroom "is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers[.]" *Estes v Texas*, 381 US 532, 561; 85 S Ct 1628; 14 L Ed 2d 543 (1965) (Warren, C.J., concurring). The courtroom setting provides "a dignity essential" to the process of criminal adjudication. *Id.* Isolating a defendant from that setting during what may be the most decisive moment of his or her life clashes with the judge's duty to acknowledge the humanity of even a convicted felon.

Canadian philosopher Marshall McLuhan's famous quote, "the medium is the message," bears relevance to this discussion. In McLuhan's words:

> [I]t is the medium that shapes and controls the scale and form of human association and action. The content or uses of such media are as diverse as they are ineffectual in shaping the form of human association. Indeed, it is only too typical that the "content" of any medium blinds us to the character of the medium. [McLuhan, *Understanding Media: The Extensions of Man* (Cambridge: MIT Press, 1994), p 9.].

The medium itself—here, videoconferencing from a jail—delivers content of its own. That content, in turn, influences the perceptions of the participants. Abundant social science research demonstrates that video conferencing "as a mediating technology" may color a viewer's assessment of a person's credibility, sincerity, and emotional depth. Salyzyn, *A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario*, 50 Osgoode Hall L J 429, 445 (2012). Some studies suggest that "individuals who appear in court via video conferencing are at risk of receiving harsher treatment from judges or other adjudicators." *Id.* at 447. Courts, too, have recognized that "virtual reality is rarely a substitute for actual presence and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." *United States v Lawrence*, 248 F3d 300, 304 (CA 4, 2001). . . .

Sentencing is more than a rote or mechanical application of numbers to a page. It involves a careful and thoughtful assessment of "the true moral

> fiber of another," *Del Piano v United States*, 575 F2d 1066, 1069 (CA 3, 1978), a task made far more complex when the defendant speaks through a microphone from a remote location. The trial judge who sentenced Heller never met or sat in the same room with him. In our view, Heller's absence from the sentencing nullified the dignity of the proceeding and its participants, rendering it fundamentally unfair. [*Heller*, 316 Mich App at 319-321 (citation omitted; alterations in original).]

The widespread opposition to the overuse of virtual court hearings is rooted in the commonsense realization that the quality of human interaction improves when it is in person. A bare majority of our Court rejects this wisdom and ignores the many benefits of face-to-face interaction that have defined courtroom practice and ordinary life experience for centuries. I fear that, like remote schooling, remote court will have a devastating impact on the quality of court services, particularly for low-income litigants.[11] Instead of lemonade, the majority's order will only leave lemons for all of those interested in a well-functioning court system. Compare Administrative Order 2020-17, 507 Mich ___ (2021) (MCCORMACK, C.J., concurring) (arguing that the benefits of remote proceedings are "lemonade").

B. THE COURT'S DECISION TO MAKE THESE MAJOR CHANGES WITHOUT RECEIVING INPUT ABOUT THEM SHOWS A LACK OF CONCERN FOR THE FUNCTIONING OF OUR TRIAL COURTS AND A LACK OF RESPECT FOR OUR TRIAL JUDGES AND OTHER STAKEHOLDERS

Like our recent decision to create a new court holiday with little advance notice, Amendment of Rule 8.110 of the Michigan Court Rules, ___ Mich ___ (June 1, 2022), the Court's administrative decision-making continues to show little concern for the impact of our decisions on the day-to-day functioning of our trial courts. As noted, we addressed the general subject of remote proceedings at our March 16, 2022 public hearing. The comments we received demonstrated that remote proceedings were controversial and were

[11] According to one survey, 70% of Detroit's school-age children have no Internet access at their home. Urban Collaboratory, *Mapping Detroit's Digital Divide*, University of Michigan, available at <https://www.urbanlab.umich.edu/project/mapping-detroits-digital-divide> (accessed July 8, 2022) [https://perma.cc/J9VM-XCVH].

resisted by many of our stakeholders—including the overwhelming majority of trial judges who have given us input.[12] This alone should give us pause.[13]

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[12] Chief Justice MCCORMACK erroneously attributes to me a "suggestion that trial judges largely oppose remote proceedings." I have made no such suggestion. Rather, I have made the uncontroverted observation that our trial judges largely oppose a broad expansion of mandated remote proceedings. It is unsurprising that most of the district judges surveyed indicated that they intend to use remote proceedings going forward even if not mandated—after all, Michigan courts have conducted arraignments via video since at least 1990. See Administrative Order No. 1990-1, 434 Mich ciii (1990). Video arraignments were expressly authorized by the Legislature in 1994, see MCL 767.37a, and in the early 2010s the state started working toward adopting Polycom technology statewide for arraignments to eliminate the need to transport inmates to courthouses. Jones, *Michigan Expands Video Conferencing in Prisons*, Government Technology (December 20, 2010) <https://www.govtech.com/public-safety/michigan-expands-video-conferencing-in-prisons.html> (accessed August 1, 2022). No one is proposing the complete elimination of remote proceedings in courts across Michigan, so general questions about continued use of remote technology largely miss the point. The relevant inquiry is what types of proceedings, if any, should be held remotely that are currently being held in person. Significantly, in the survey of district court judges, the types of proceedings that most judges felt should be always or mostly remote was quite limited. See Michigan District Judges Association, *Online Survey of Judges with District Court Dockets: Executive Summary and Demographic Analysis* (October 2021), p 16, available at <https://www.courts.michigan.gov/4a236c/contentassets/e636e8ac7b40411d98206f933c7b8257/approved/2020-08_2022-07-29_mdjasurveyreport.pdf> (accessed August 1, 2022) [https://perma.cc/MN4H-D8YH]. Chief Justice MCCORMACK fails to acknowledge that judges who wish to conduct certain proceedings remotely already possessed the ability to do so under the court rules as they existed prior to the COVID-19 pandemic.

[13] Chief Justice MCCORMACK cites the survey conducted by the State Bar of Michigan referenced in the Lessons Learned report as evidence of the "inclusive development process" of these court rule amendments and contends that the vast majority of respondents who submitted feedback during the process supported the continued use of remote proceedings. But the devil is in the details. Eighty-two percent of respondents to this survey indicated that they "want the trial courts to continue to provide remote hearings as a part of routine trial court operations[.]" SurveyMonkey, *Member Needs and Concerns Regarding Practice During Covid-19* <https://www.surveymonkey.com/results/SM-J2R39NFG7/> (accessed August 1, 2022). But when asked "which types of cases or hearings are best suited for remote hearings," out of fourteen possible categories, only "non-evidentiary hearings/motions" was selected by a majority of all survey respondents (including those who declined to respond to this question). *Id.* That is hardly full-throated support for greatly expanded remote proceedings.

But the majority is undeterred and, instead of heeding the thoughtful input of our experienced frontline workers, prosecutors, domestic-violence prevention groups, and many others, the Court has developed an elaborate new set of amendments. This time, there is no opportunity for the public and other stakeholders to see the new amendments and voice their concerns. Not only has the Court not requested comment in advance of adopting the rules, the Court does not even concurrently publish these rules for comment (as it did the last time) or provide any reason for dispensing with the notice requirements of our court rules. See MCR 1.201(D). I am aware of no precedent for the Court's stunning decision to violate our own rules by making wholesale changes to the way our trial courts operate on a daily basis without providing any opportunity for input from the public, the legal community, or other stakeholders. See MCR 1.201(E).[14]

Major changes—even good ones—are often very disruptive. That is why our rules require us to publish rule changes for comment, consider the input we receive, and then deliberate and decide whether to adopt the changes. The Prosecuting Attorneys Association of Michigan stated in their November 1, 2021 comment (asking the Court to rescind the last round of unannounced changes):

> Making changes of this magnitude without allowing for public comment is unacceptable. The changes show a complete disregard for crime victims and their constitutional and statutory rights. Had the standard procedure for changing a court rule been followed, these concerns would have been brought to the Court's attention prior to any amendments. [Prosecuting Attorneys Association of Michigan, Letter (Nov 1, 2021).]

Before making major changes to the way our state's trial courts function, the majority should have published the proposed rules, setting forth the specific changes that are now being enacted to ensure that we receive adequate input from all stakeholders, including judges, court staff, court reporters, law enforcement, attorneys, public interest groups, and members of the public. It is especially important to follow our regular process here because

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[14] Chief Justice MCCORMACK points out a number of occasions on which the Court has adopted court rule revisions different than those published for comment. I do not disagree that the Court can make modest improvements to a proposal based on comments the Court receives. Indeed, fine-tuning a change to the court rules based on public comment is one of the key benefits of the notice and comment requirements. But unlike the examples given by Chief Justice MCCORMACK, no version of the amendments adopted today has ever been published for comment. Indeed, the new rules are so significant and so vastly different from those previously published for comment that it is at best misleading to suggest that the public or our many stakeholders have ever even seen them, much less been given an opportunity to comment on them.

the proposal currently before the Court is completely different than the one adopted with immediate effect and published for comment in July 2021.[15]

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[15] In contrast to our haste, other states are proceeding with more thoughtfulness and deliberation. Most states have not permanently expanded the use of remote proceedings in the wake of the COVID-19 pandemic. Indeed, many states have not made permanent changes at all or are still in the process of determining whether and what changes should be made. For example, the Florida Supreme Court is currently considering a proposal that would expand the proceedings in which remote technology is permitted. *In re Amendments to Florida Rules of Civil Procedure, Florida Rules of General Practice and Judicial Administration, Florida Rules of Criminal Procedure, Florida Probate Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, and Florida Rules of Appellate Procedure* (Case No. SC21-990). Some states, such as Illinois, are just now beginning the process of considering whether—and to what extent—to amend their remote proceeding procedures. Niemann, *Illinois Supreme Court Creates Remote Proceedings Task Force*, Illinois State Bar Association (March 17, 2022), available at <https://www.isba.org/barnews/2022/03/illinoissupremecourtcreatesremotepr> (accessed July 8, 2022) [https://perma.cc/E5H4-VXZZ]. The Supreme Court of New Jersey has required that certain matters generally "proceed in a virtual format," but the court made its order "subject to ongoing review," and New Jersey has not made permanent changes to its court rules regarding remote proceedings. See Supreme Court of New Jersey, *Future of Court Operations—Continuation of Both In-Person and Virtual Court Events* (November 18, 2021), available at <https://www.njcourts.gov/notices/2021/n211118a.pdf?c=A4s> (accessed August 1, 2022) [https://perma.cc/8NAW-S4QQ].

Among the few states that have made permanent changes, I am aware of no state that has made changes as significant as those the majority makes today. In March 2022, the Maryland Judicial Council adopted a recommendation to treat certain types of proceedings "as presumptively appropriate for remote proceedings under normal operating conditions," but it did not make any changes to its court rules. Maryland Judiciary, *Report of Joint Subcommittee on Post-COVID Judicial Operations* (March 9, 2022), p 20, available at <https://online.flippingbook.com/view/545032313/> (accessed August 1, 2022) [https://perma.cc/TEC5-PNG3]; Maryland Courts, *Maryland Judiciary Adopts Recommendations and Releases Report from Joint Subcommittee on Post COVID-19 Judicial Operations* (March 31, 2022), available at <https://www.courts.state.md.us/media/news/2022/pr20220331> (accessed August 1, 2022) [https://perma.cc/5QHT-RWHT]. In April 2022, the Arizona Supreme Court adopted a recommendation from its remote proceedings workgroup that local courts decide which types of hearings should be heard remotely, allowing individual courts to adapt a set of presumptive standards as necessary. COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup, *Recommended Remote and In-Person Hearings in Arizona State Courts in the Post-Pandemic World* (February 22, 2022), Arizona

Each of our trial courts is locally funded and has different resources (and, consequently, different limitations) when it comes to staffing, training, and technology. To conduct their business, the trial courts must work with many other state and local agencies, such as local police departments, county sheriff's departments, and the Michigan Department of Corrections. Each of these has its own resource limitations and many are subject to collective bargaining agreements. In addition, litigants have their own resource limitations and, as noted above, Internet connectivity varies in different regions of the state. Our courts across the state face vastly different challenges, depending on their size, population served, caseloads, and many other factors. Imposing these very specific changes on a statewide basis without giving individual trial courts a chance to comment on how they will impact their current workflows risks causing major disruptions to the administration of justice in our trial courts at a time when many are already experiencing massive case backlogs.[16]

Although I have mentioned the topic frequently, the caseflow problems in many of our trial courts appear to have received scant attention from this Court despite the dramatically negative impact it is having on public safety across our state. The backlog consists of criminal and civil cases that require in-person hearings, such as jury trials and preliminary examinations. The Court's insistence on requiring even more remote hearings, which studies have shown take longer to conduct on average than in-person hearings, will not alleviate the docket crisis in our courts.[17] Indeed, many commenters at our March 2022

Supreme Court, available at <https://www.ncsc.org/__data/assets/pdf_file/0029/75809/Recommended-Remote-and-In-Person-Hearings-in-Arizona-State-Courts-in-the-Post-Pandemic-World-2222022-FINAL.pdf> (accessed July 8, 2022) [https://perma.cc/AQ7W-FCDM]; *In re Adoption and Implementation of Plan B Workgroup Recommendations as Presumptive Standards for Remote and In-Person Hearings*, Arizona Supreme Court, Administrative Order No. 2022-46 (2022). Finally, effective June 2022, Minnesota adopted a presumption for remote hearings, but the presumption does not apply to criminal cases. Minnesota Judicial Council, *oneCourtMN Hearings Initiative Policy*, available at <https://www.mncourts.gov/mncourtsgov/media/Judicial_Council_Library/Policies/500/525.pdf> (accessed July 8, 2022) [https://perma.cc/EM7D-D4PB].

[16] Brand-Williams, *Michigan Courts Face Massive Backlog of Felony Cases Awaiting Trial*, The Detroit News (July 4, 2021) <https://www.detroitnews.com/story/news/local/michigan/2021/07/04/michigan-courts-face-massive-backlog-felony-cases-awaiting-trial/7787034002/> (accessed July 20, 2021) [https://perma.cc/P8PB-UXE3].

[17] For example, a study in Texas trial courts found that, on average, remote hearings take about one-third longer than in-person hearings. National Center for State Courts, *The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload*, pp ii, 5-7,

public hearing described how expanding the use of remote hearings has increased the time, expense, and difficulty of their work.

After our judges, court staff, and attorneys have made significant sacrifices to keep our court system up and running through the pandemic, the least we could do is ask them how these major changes would affect court operations before implementing them.

III. CONCLUSION

I have long supported and advocated for the use of new and innovative technologies when it improves the administration of justice. And I have always supported giving our trial judges the discretion to use videoconferencing for a wide variety of matters. Thus, I agree with some of the amendments the Court adopts today. But I strongly believe our trial judges are best positioned to decide whether to conduct hearings remotely on individual cases. Rather than create a statewide presumption that certain proceedings be held remotely, I would return to the status quo ante, which allowed wide latitude for judges to conduct any proceeding remotely upon the request of a party or sua sponte within the discretion of the court. In addition, I would give our trial courts the flexibility to determine whether remote proceedings should be required for certain types of proceedings in their jurisdiction.[18] Today's decision to take this traditional discretion away from trial judges and impose a one-size-fits-all rule is a profound mistake.

As noted, during the COVID-19 pandemic, we gave trial courts the authority to conduct many additional types of hearings remotely. I initially supported these efforts as necessary to allow our courts to continue to function. Now I see that was a mistake. What initially appeared to be a temporary expedient has become, for a majority of this Court, a pretext to make virtual courts the new normal in our state. Forcing massive changes on a bare majority vote through such an irregular process is an affront to justice that will only sow more confusion, frustration, delays, and distrust in the court system.

I fear and believe that the Court's decision today to deprive people of their day in court will usher in a new period of mediocrity, continued case backlogs, and subpar service in our court system. I have no choice but to dissent.

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available at <https://www.ncsc.org/_media/_imported-ncsc/files/pdf/newsroom/TX-Remote-Hearing-Assesment-Report.pdf> (accessed July 8, 2022) [https://perma.cc/3YZL-GFFL].

[18] To do this, I would adopt an administrative order directing our chief judges to determine whether it will improve the efficient and effective administration of justice in their locality to adopt a policy, local administrative order, or local court rule requiring that certain types of proceedings be conducted remotely, and providing clear and uniform rules for the conduct of those proceedings.

BERNSTEIN, J. (*dissenting*). A majority of this Court has decided to permanently adopt amendments to our court rules that were first put into place during the onset of the COVID-19 pandemic. Although I believe these amendments made sense in the context in which they were first adopted, I have continuously expressed concerns about expanding these amendments beyond that specific scope. See Rescission of Pandemic-Related Administrative Orders, 507 Mich ___ (2021) (VIVIANO and BERNSTEIN, JJ., concurring in part and dissenting in part); Bernstein & Viviano, *Opinion: People Deserve Their Post-Pandemic Day in Court*, The Detroit News (March 29, 2022), available at <https://www.detroitnews.com/story/opinion/2022/03/30/michigan-courts-should-dispense-justice-person-post-covid/7203119001> (accessed July 21, 2022) [https://perma.cc/7TUS-5DVB]. While I recognize that videoconferencing technology can be useful for some, especially in terms of physical accessibility, it can also present *additional* barriers to access for others, such as those who simply lack the resources to use videoconferencing technology. I also have security concerns about whether the use of this technology, especially when an individual is detained in a county jail or a state correctional facility, can be used to facilitate truly confidential exchanges between an attorney and their client.[25] Moreover, when we held public comments concerning these proposed amendments, the near-universal feedback from trial court judges was that videoconferencing was disruptive and produced worse outcomes. It is notable that members of the criminal bar specifically levied meaningful criticism against the expanded use of these practices.

I acknowledge that the amendments this Court has adopted allow for the possibility of in-person hearings, but the language of these amendments makes clear that a thumb has been put on the scale, and the default preference going forward is for videoconference hearings. I fear that we have not fully considered the implications of these new amendments and what they may mean for some of the most vulnerable members of our community.

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[25] See Bond, *A Must for Millions, Zoom Has a Dark Side—And an FBI Warning*, National Public Radio (April 3, 2020), available at <https://www.npr.org/2020/04/03/826129520/a-must-for-millions-zoom-has-a-dark-side-and-an-fbi-warning> (accessed July 21, 2022) [https://perma.cc/LXG5-YGLM]; Whelan, *Zoom Agrees to Settle a Privacy Lawsuit for $85 Million*, National Public Radio, available at <https://www.npr.org/2021/08/01/1023468165/zoom-agrees-to-settle-a-privacy-lawsuit-for-85-million> (accessed July 21, 2022) [https://perma.cc/RR65-MBJG]. Although it appears that many of these security concerns have been addressed in some fashion, new problems can and will arise as technology advances. I question whether it is unduly burdensome to place the responsibility for learning about concepts such as end-to-end encryption and data harvesting on the trial court judges and administrators who already bear the brunt of dealing with the backlog of cases created by the pandemic.

I would not adopt these amendments under the timeframe we have been given to consider them, bearing in mind the negative feedback we've received from important stakeholders. Accordingly, I dissent.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 10, 2022

Clerk