Order

Michigan Supreme Court
Lansing, Michigan

June 9, 2020

ADM File No. 2020-08

Administrative Order No. 2020-17

Priority Treatment and New Procedure for Landlord/Tenant Cases

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Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and months as a way to limit the possibility of transmission of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14, which may also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1) Each Trial Court with jurisdiction over cases filed under the Summary Proceedings Act, MCL 600.5701, *et seq*., may accept new filings and begin to schedule hearings as follows:

a. In a manner that is consistent with the Return to Full Capacity (RTFC) guidelines referenced in Administrative Order No. 2020-14,

b. In a manner that is consistent with each court's most recently-approved local administrative order regarding Return to Full Capacity.

(2) When a trial court resumes scheduling hearings for recovery of possession of premises under MCL 600.5714 and MCL 600.5775, the following operational priorities apply:

a. First priority: complaints alleging illegal activity under MCL 600.5714(1)(b) and complaints alleging extensive and continuing physical injury to the premises under MCL 600.5714(1)(d).

b. Second priority: complaints alleging nonpayment of rent for 120 days or more.

c. Third priority: complaints alleging nonpayment of rent for 90 days or more.

d. Fourth priority: complaints alleging nonpayment of rent for 60 days or more.

e. Fifth priority: complaints alleging nonpayment of rent for 30 days or more.

f. Courts should proceed to a subsequent priority when all cases in the higher priority have been scheduled for hearing.

g. Instead of setting many cases for one hearing time as has traditionally been common, each case must be scheduled for a particular date and time (whether held in-person or remotely) to allow in-person proceedings to be held safely.

h. A filer who filed a case before April 16, 2020 (the date Administrative Order No. 2020-8 entered) must update the factual allegations in the complaint and file the verification form required by Administrative Order No. 2020-8 before a hearing will be scheduled. The court shall not require an additional filing fee.

(3) Trial Courts must schedule cases filed for an alleged termination of tenancy (as opposed to cases for nonpayment of rent) pursuant to MCL 600.5714 during or after the fifth level of priority described above or after the statutorily-required notice period has elapsed, whichever comes later.

(4) Courts are authorized to proceed with these actions by way of remote participation tools, and encouraged to do so to the greatest extent possible. Administrative Order No. 2020-6 requires that the court scheduling a remote hearing must "verify that all participants are able to proceed in this manner." Therefore, the summons for each case filed under the Summary Proceedings Act must provide the date and time for remote participation in the scheduled hearing. If a remote hearing is scheduled for the first proceeding, the defendant received personal service pursuant to MCR

2.105(A), and the defendant fails to appear, a default may enter. If a remote hearing is scheduled for the first proceeding and the defendant fails to appear and has not been served under MCR 2.105(A), the court may not enter a default but must reschedule the hearing and mail notice for that rescheduled hearing as an in-person proceeding. Under these conditions, a notice of rescheduled hearing mailed by the court within 24 hours is sufficient notice of the rescheduled hearing, notwithstanding any other court rule. Other parties or participants may proceed remotely.

(5) All local administrative orders requiring a written answer pursuant to MCL 600.5735(4) are suspended.[1] Unless otherwise provided by this order, a court must comply with MCR 4.201 with regard to summary proceedings.

(6) At the initial hearing noticed by the summons, the court must conduct a pretrial hearing consistent with SCAO guidance. At the pretrial hearing the parties must be verbally informed of all of the following:

a. Defendant has the right to counsel. MCR 4.201(F)(2).

b. The Michigan Department of Health and Human Services (MDHHS), the local Coordinated Entry Agency (CEA), or the federal Help for Homeless Veterans program may be able to assist the parties with payment of some or all of the rent due.

c. Defendants DO NOT need a judgment to receive assistance from MDHHS or the local CEA. The Summons and Complaint from the court case are sufficient.[2]

d. The availability of the Michigan Community Dispute Resolution Program (CDRP) and local CDRP Office as a possible source of case resolution. The court must contact the local CDRP to coordinate resources. The CDRP may be involved in the resolution of Summary Proceedings cases to the extent that the chief judge of each court determines, including conducting the pretrial hearing.

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[1] The local administrative orders include: 1st District Court (Monroe County); 2a District Court (Lenawee County); 12th District Court (Jackson County); 18th District Court (City of Westland); 81st District Court (Alcona, Arenac, Iosco, and Oscoda Counties); 82nd District (Ogemaw County); and 95b District Court (Dickinson and Iron Counties).

[2] See State Emergency Relief Manual, Relocation Services, ERM 303, ERB 2019-005, Page 3 of 7.

e. The possibility of a Conditional Dismissal pursuant to MCR 2.602 if approved by all parties. The parties must be provided with a form to effectuate such Conditional Dismissal.

(7) The pretrial required under this subsection may be conducted by the assigned judge, a visiting judge appointed by SCAO, a magistrate (as long as that magistrate is a lawyer) or a CDRP mediator.

(8) Except as provided below, all Summary Proceeding Act cases must be adjourned for seven days after the pretrial hearing is conducted. MCL 600.5732. Any party who does not appear at the adjourned date will be defaulted. Cases need not be adjourned for seven days if: the plaintiff dismisses the complaint, with or without prejudice, without any conditions, or if defendant was personally served under MCR 2.105(A) and fails to appear.

(9) The court may require remote participation in the second, and any subsequent, proceedings, and the court must verify that participants are able to proceed in that manner under Administrative Order No. 2020-6. If a party cannot appear remotely, in-person proceedings must be scheduled that provide for the safety of all parties.

(10) MCR 4.201(F)(3) is temporarily suspended to the extent that a jury demand must be made in the first response. Instead, if the defendant wants a jury trial, he or she must demand it within seven days of the first response. The jury trial fee, if not waived by the court, must be paid when the demand is made.

This order is effective until further order of the Court.

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.

June 9, 2020

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

June 24, 2020

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

ADM File No. 2020-08

Amendment of Administrative Order No. 2020-17

Priority Treatment and New Procedure for Landlord/Tenant Cases

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On order of the Court, the following amendment of Administrative Order No. 2020-17 is adopted, effective immediately.

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

Administrative Order No. 2020-17 – Priority Treatment and New Procedure for Landlord/Tenant Cases

Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and months as a way to limit the possibility of transmission of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14, which may also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1) Each Trial Court with jurisdiction over cases filed under the Summary Proceedings Act, MCL 600.5701, *et seq*., may accept new filings and begin to schedule hearings as follows:

a. In a manner that is consistent with the Return to Full Capacity (RTFC) guidelines referenced in Administrative Order No. 2020-14,

b. In a manner that is consistent with each court's most recently-approved local administrative order regarding Return to Full Capacity.

(2) When a trial court resumes scheduling hearings for recovery of possession of premises under MCL 600.5714 and MCL 600.5775, the following operational priorities apply:

a. First priority: complaints alleging illegal activity under MCL 600.5714(1)(b), ~~and~~ complaints alleging extensive and continuing physical injury to the premises under MCL 600.5714(1)(d), complaints alleging that the tenant or someone in the tenant's household has caused or threatened physical injury to an individual while on the leased property under MCL 600.5714(1)(e), and complaints alleging that the tenant is trespassing or squatting under MCL 600.5714(1)(f).

b. Second priority: complaints alleging nonpayment of rent for 120 days or more.

c. Third priority: complaints alleging nonpayment of rent for 90 days or more.

d. Fourth priority: complaints alleging nonpayment of rent for 60 days or more.

e. Fifth priority: complaints alleging nonpayment of rent for 30 days or more.

f. Sixth Priority: All cases described in First Priority through Fifth Priority that are filed after a court has moved to the next priority designation, and any case for recovery of possession of premises where the complaint alleges nonpayment of rent of less than 30 days. Cases filed in a lower numerical priority designation (e.g., a second priority case filed during a court's priority five period) shall be given first consideration in order of priority.

g~~f~~. Courts should proceed to a subsequent priority when all cases in the higher priority have been scheduled for hearing.

hg. Instead of setting many cases for one hearing time as has traditionally been common, each case must be scheduled for a particular date and time (whether held in-person or remotely) to allow in-person proceedings to be held safely.

ih. A filer who filed a case before April 16, 2020 (the date Administrative Order No. 2020-8 entered) must update the factual allegations in the complaint and file the verification form required by Administrative Order No. 2020-8 before a hearing will be scheduled. The form will allow a filer to indicate that the case was filed before the moratorium period began and therefore, even if a covered dwelling, is not foreclosed from proceeding. If the filer must remove any fees or costs that are prohibited under the CARES Act, the filer must file an amended complaint for any action that proceeds during the moratorium period. The court shall not require an additional filing fee.

(3) Except as otherwise provided, Ttrial Ccourts must schedule cases filed for an alleged termination of tenancy (as opposed to cases for nonpayment of rent) pursuant to MCL 600.5714 during or after the fifth level of priority described above or after the statutorily-required notice period has elapsed, whichever comes later. A court may consider a termination case before the fifth level of priority upon motion by plaintiff alleging that there is good cause to consider the case earlier for reasons of public safety or other just cause, including but not limited to matters brought under MCL 600.5775.

(4) Courts are authorized to proceed with these actions by way of remote participation tools, and encouraged to do so to the greatest extent possible. Administrative Order No. 2020-6 requires that the court scheduling a remote hearing must "verify that all participants are able to proceed in this manner." Therefore, the summons for each case filed under the Summary Proceedings Act must provide the date and time for remote participation in the scheduled hearing. In addition, the summons must be accompanied by any written information about the availability of counsel and housing assistance information as provided by legal aid or local funding agencies. If a remote hearing is scheduled for the first proceeding, the defendant received personal service pursuant to MCR 2.105(A), and the defendant fails to appear, a default may enter. If a remote hearing is scheduled for the first proceeding and the defendant fails to appear and has not been served under MCR 2.105(A), the court may not enter a default but must reschedule the hearing and mail notice for that rescheduled hearing as an in-person proceeding. Under these conditions, a notice of rescheduled hearing mailed by the court within 24 hours after the initial hearing date is sufficient notice of the rescheduled hearing, notwithstanding any other court rule. Other parties or participants may proceed remotely.

(5) All local administrative orders requiring a written answer pursuant to MCL

600.5735(4) are suspended.[1] Unless otherwise provided by this order, a court must comply with MCR 4.201 with regard to summary proceedings.

(6) At the initial hearing noticed by the summons, the court must conduct a pretrial hearing consistent with SCAO guidance. At the pretrial hearing the parties must be verbally informed of all of the following:

a. Defendant has the right to counsel. MCR 4.201(F)(2).

b. The Michigan Department of Health and Human Services (MDHHS), the local Coordinated Entry Agency (CEA), or the federal Help for Homeless Veterans program may be able to assist the parties with payment of some or all of the rent due.

c. Defendants DO NOT need a judgment to receive assistance from MDHHS or the local CEA. The Summons and Complaint from the court case are sufficient.[2]

d. The availability of the Michigan Community Dispute Resolution Program (CDRP) and local CDRP Office as a possible source of case resolution. The court must contact the local CDRP to coordinate resources. The CDRP may be involved in the resolution of Summary Proceedings cases to the extent that the chief judge of each court determines, including conducting the pretrial hearing.

e. The possibility of a Conditional Dismissal pursuant to MCR 2.602 if approved by all parties. The parties must be provided with a form to effectuate such Conditional Dismissal.

(7) The pretrial required under this subsection may be conducted by the assigned judge, a visiting judge appointed by SCAO, a magistrate (as long as that magistrate is a lawyer) or a CDRP mediator.

(8) Except as provided below, all Summary Proceeding Act cases must be adjourned for seven days after the pretrial hearing is conducted. MCL 600.5732. Any party who does not appear at the adjourned date will be defaulted. Cases need not be

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[1] The local administrative orders include: 1st District Court (Monroe County); 2a District Court (Lenawee County); 12th District Court (Jackson County); 18th District Court (City of Westland); 81st District Court (Alcona, Arenac, Iosco, and Oscoda Counties); 82nd District (Ogemaw County); and 95b District Court (Dickinson and Iron Counties).

[2] See State Emergency Relief Manual, Relocation Services, ERM 303, ERB 2019-005, Page 3 of 7.

adjourned for seven days if: the plaintiff dismisses the complaint, with or without prejudice, and without any conditions, ~~or~~ if defendant was personally served under MCR 2.105(A) and fails to appear, or where both plaintiff and defendant are represented by counsel and a consent judgment or conditional dismissal is filed with the court. Where plaintiff and defendant are represented by counsel, the parties may submit a conditional dismissal or consent judgment in lieu of appearing personally at the second hearing.

(9) The court may require remote participation in the second, and any subsequent, proceedings, and the court must verify that participants are able to proceed in that manner under Administrative Order No. 2020-6. If a party cannot appear remotely, in-person proceedings must be scheduled that provide for the safety of all parties.

(10) MCR 4.201(F)(3) is temporarily suspended to the extent that a jury demand must be made in the first response. Instead, if the defendant wants a jury trial, he or she must demand it within seven days of the first response. The jury trial fee, if not waived by the court, must be paid when the demand is made.

(11) A court shall discontinue compliance with this order when it has proceeded through all priority phases and no longer has any landlord/tenant filings that allege a breach of contract for the time period between March 20, 2020, and June 30, 2020 (the period in which there was a statewide moratorium on evictions). At that point, the court may notify the regional administrator of its completion of the process and will not be required to return to the procedure even if a subsequent case is filed that alleges rent owing during the period of the eviction moratorium.

This order is effective until further order of the Court.

Staff Comment: The amendments in this order reflect the Court's consideration of feedback provided after the initial order entered and before the eviction moratorium expired. For the convenience of the reader, an updated version of the order reflecting the amendments is attached here.

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

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.

June 24, 2020

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

October 22, 2020

ADM File No. 2020-08

Amendment of Administrative Order No. 2020-17

Priority Treatment and New Procedure for Landlord/Tenant Cases

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On order of the Court, the following amendment of Administrative Order No. 2020-17 is adopted, effective immediately.

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

Administrative Order No. 2020-17 – Priority Treatment and New Procedure for Landlord/Tenant Cases

Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and months as a way to limit the possibility of transmission of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14, which may also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1)-(10) [Unchanged.]

(11) A court shall discontinue ~~compliance with this order~~prioritization of cases when it has proceeded through all priority phases and no longer has any landlord/tenant filings that allege a breach of contract for the time period between March 20, 2020, and ~~June 30~~July 15, 2020 (the period in which there was a statewide moratorium on evictions). At that point, the court may notify the regional administrator of its completion of the prioritization process and will not be required to return to the procedure even if a subsequent case is filed that alleges rent owing during the period of the eviction moratorium. A court must continue compliance with all other aspects of this order while the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, issued by the Centers for Disease Control and Prevention and published at 85 FR 55292, is in effect.

(12) In complying with the provisions of the CDC order referenced above and during the pendency of the order, trial courts must:

a. Require a plaintiff filing a LT case to also file a verification form indicating whether a declaration has been submitted by defendant or whether the case may proceed because it is not subject to the CDC order's moratorium. The verification shall be made on a SCAO-approved form, and a plaintiff shall have a continuing obligation to inform the court if a declaration has been submitted by defendant; in addition, a court may accept a declaration prepared pursuant to the CDC order from plaintiff or defendant.

b. Accept filings related to LT cases and proceed as follows:

(i) For cases that are not subject to the moratorium under the CDC order, the court shall proceed as provided in this order and MCR 4.201.

(ii) For cases that are subject to the moratorium under the CDC order, the court shall process the case through entry of judgment. A judgment issued in this type of case shall allow defendant to pay or move (under item 4 on DC 105 or similarly on non-SCAO forms) within the statutory period (MCL 600.5744) or by December 31, 2020, whichever date is later. MCR 4.201(L)(4)(a), which prohibits an order of eviction from being issued later than 56 days after the judgment enters unless a hearing is held, is suspended for cases subject to the CDC moratorium. The 56 day period in that rule shall commence January 1, 2021 for those cases.

This order is effective until further order of the Court.

VIVIANO, J. (*dissenting*). Today, the Court suspends the statutory rules entitling property owners to recover their premises from tenants through summary proceedings in court. See MCL 600.5701 *et seq*. Normally, the plaintiff-owner is entitled to a writ enabling him or her to obtain possession as soon as 10 days after judgment enters in the plaintiff's favor. MCL 600.5744(5). In this administrative order, however, Subsection (12)(B)(ii) allows the district court to process the case through entry of judgment but prohibits the plaintiff from obtaining possession until at least December 31, 2020.

The only basis for the extraordinary act of administratively suspending a statute is a recent order from the Centers for Disease Control and Prevention (CDC) purporting to prohibit landlords from evicting certain tenants covered by the order. CDC, *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 Fed Reg 55,292 (September 4, 2020). But that order has been challenged on a host of grounds and, I believe, rests on a shaky legal foundation. The CDC relied on a single statute and an accompanying regulation. The statute provides:

> The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary. [42 USC 264(a).]

The related regulation states:

> Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest

> extermination, and destruction of animals or articles believed to be sources of infection. [42 CFR 70.2 (2019).[1]]

The CDC order relies on dubious legal authority. The statute and regulation give a broad power to do whatever the CDC Director "deems reasonably necessary" to prevent a disease's spread. But it seems a stretch to say that they authorize the CDC to tinker with state landlord-tenant laws, a topic that neither the statute nor regulation mention. The examples of permissible orders provided in the law and regulation reflect "terms or tools traditionally associated with public-health emergencies." *In re Certified Questions from the United States Dist Court*, ___ Mich ___, ___ (2020) (Docket No. 161492) (VIVIANO, J., concurring in part and dissenting in part); slip op at 21. The regulation was, in fact, promulgated as part of a broader transfer of "regulatory authority with respect to interstate quarantine over persons" from the Food and Drug Administration to the CDC. Food and Drug Administration, *Control of Communicable Diseases; Apprehension and Detention of Persons With Specific Diseases; Transfer of Regulations*, 65 Fed Reg 49,906, 49,907 (August 16, 2000). I am unaware of any historical uses of eviction moratoriums in response to public-health crises. Cf. Witt, *American Contagions: Epidemics and the Law from Smallpox to COVID-19* (New Haven: Yale Univ Press, 2020) (describing legal frameworks for addressing past epidemics but not mentioning suspension of evictions until the COVID-19 pandemic). It appears, then, arguable that the CDC order is outside the authority granted under the statute or even the regulation.

Assuming that the statute and regulation encompass the power to put a halt to evictions nationwide, these laws run headlong into serious constitutional questions. The most obvious is the separation-of-powers problem that arises with such sweeping grants of power to executive agencies. We recently addressed that very issue and noted the present approach in federal courts that delegations to agencies are permissible if they contain intelligible principles to guide the exercise of the delegated authority. See *In re Certified Questions*, ___ Mich at___; slip op at 24 (opinion of the Court).

The CDC order here represents a vast delegation of power that might raise significant constitutional doubts. Under it, the executive could "restrict almost any type of activity. Pretty much any economic transaction or movement of people and goods could potentially spread disease in some way." Somin, The Volokh Conspiracy, *Trump's Eviction Moratorium Could Set a Dangerous Precedent [Updated]* <https://reason.com/2020/09/02/trumps-eviction-moratorium-could-set-a-dangerous-precedent/> (posted September 2, 2020) (accessed October 21, 2020) [https://perma.cc/N2RQ-3EF4]. And it does not take a pandemic with a novel disease to invoke this authority: the regulation defines "communicable diseases" to include any

[1] Although the statute mentions the Surgeon General, a subsequent administrative reorganization vested the powers in a different department, and they now fall under the CDC's purview. See generally *Reorganization Plan No. 3 of 1966*, 31 Fed Reg 8,855 (June 25, 1966).

illnesses due to "infectious agents" that can be transmitted directly or indirectly. 42 CFR 70.1 (2019). The seasonal flu and common cold fit this definition. All the Director needs to show is that he or she "deem[ed]" the order "reasonably necessary." 42 CFR 70.2 (2019). Under that line, it is questionable whether the order even needs to be reasonably necessary as long as the Director asserted it was so. See Somin, *supra*.

All of this makes me question whether the CDC order is valid under the regulation, the statute, or the federal Constitution. And I am not alone in raising these questions. To date, at least two challenges to the CDC's order have been brought in federal court and are currently pending. See *Brown v Azar* (Case No. 1:20-cv-03702) (ND Ga); *Tiger Lily LLC v US Dep't of Housing & Urban Dev* (Case No. 2:20-cv-02692) (WD Tenn).

Even if the order is valid, to rely on it as the sole basis for our administrative order today, we must further assume that it preempts our state law governing landlord-tenant evictions, MCL 600.5701 *et seq*. and MCR 4.201. This question is open to debate and, it seems to me, better resolved in an actual case than an administrative order. The statute itself disclaims any intent to preempt state laws that do not conflict with the exercise of authority under the statute. 42 USC 264(e). As noted above, nothing in 42 USC 264(a) or the regulation appears to grant power to make or enforce an eviction moratorium.

Without a valid CDC order that preempts our law, I am unaware of any authority for this Court to suspend until December 31, 2020, a plaintiff's ability to obtain a writ of restitution under MCL 600.5744.[2] The statute, as noted above, provides a district court

[2] Our original eviction moratorium, in Administrative Order No. 2020-17, 505 Mich ___ (2020), was adopted under 1963 Const, art 6, § 4, which grants this Court with general superintending control over all courts. AO 2020-17 also relied on, among other things, Administrative Order No. 2020-6, 505 Mich ___ (2020) (Order Expanding Authority for Judicial Officers to Conduct Proceedings Remotely). That order, in turn, referenced Executive Order No. 2020-33, which was the Governor's emergency and disaster declaration, and Administrative Order No. 2020-8, 505 Mich ___ (2020), which was adopted to comply with the federal Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), PL 116-136; 134 Stat 281. This Court recently held that all of the Governor's executive orders issued under the Emergency Powers of the Governor Act, MCL 10.31 *et seq*., including EO 2020-33 "are of no continuing legal effect." *House of Representatives v Governor*, ___ Mich ___ (2020) (Docket No. 161917). Additionally, the eviction moratorium in the CARES Act lasted 120 days and ended months ago. 15 USC 9058(b). Thus, this Court's original action in adopting AO 2020-17 was based on the premise that the Governor's executive orders were valid and that there was a valid federally mandated eviction moratorium in place. One of these rationales turned out not to be true, and the other rationale is no longer valid. The lessons I take from this are that we should be much more circumspect before rushing to embrace an executive's sweeping assertion of legislative power, and that we are on much more solid ground when we tailor our rules to conform to laws duly enacted by the Legislature.

power to enter the writ of restitution 10 days after entry of judgment in favor of the plaintiff. MCL 600.5744(5). The Legislature has established that "[e]xcept as otherwise provided in [the Revised Judicature Act], the procedure in summary proceedings shall be regulated by rules adopted by the supreme court and by local court rules not inconsistent therewith." MCL 600.5708. But we do not have the power to change the substantive relief to which the prevailing party is entitled in a landlord-tenant proceeding.

I believe the CDC's order rests on questionable legal grounds and very well might be struck down. Consequently, I would not rely on it as the basis to suspend the normal workings of our statutes. And without the order, we lack any authority for our present action. For these reasons, I dissent.

Order

Michigan Supreme Court
Lansing, Michigan

December 29, 2020

ADM File No. 2020-08

Amendment of Administrative Order No. 2020-17

Priority Treatment and New Procedure for Landlord/Tenant Cases

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Administrative Order No. 2020-17 – Priority Treatment and New Procedure for Landlord/Tenant Cases

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Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1)-(5) [Unchanged.]

(6) At the initial hearing noticed by the summons, the court must conduct a pretrial hearing consistent with SCAO guidance. At the pretrial hearing the parties must be verbally informed of all of the following:

a. Defendant has the right to counsel. MCR 4.201(F)(2).

b. The Michigan Department of Health and Human Services (MDHHS), the local Coordinated Entry Agency (CEA), Housing Assessment and Resource Agency (HARA), or the federal Help for Homeless Veterans program may be able to assist the parties with payment of some or all of the rent due.

c. Defendants DO NOT need a judgment to receive assistance from MDHHS, the HARA or the local CEA. The Summons and Complaint from the court case are sufficient for MDHHS.[1]

d. The availability of the Michigan Community Dispute Resolution Program (CDRP) and local CDRP Office as a possible source of case resolution. The court must contact the local CDRP to coordinate resources. The CDRP may be involved in the resolution of Summary Proceedings cases to the extent that the chief judge of each court determines, including conducting the pretrial hearing.

e. The possibility of a Conditional Dismissal pursuant to MCR 2.602 if approved by all parties. The parties must be provided with a form to effectuate such Conditional Dismissal.

(7)-(10) [Unchanged.]

(11) A court shall discontinue prioritization of cases when it has proceeded through all priority phases and no longer has any landlord/tenant filings that allege a breach of contract for the time period between March 20, 2020, and July 15, 2020 (the period in which there was a statewide moratorium on evictions). At that point, the court may notify the regional administrator of its completion of the prioritization process and will not be required to return to the procedure even if a subsequent case is filed that alleges rent owing during the period of the eviction moratorium. A court must continue compliance with all other aspects of this order while the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, issued by the Centers for Disease Control and Prevention; and published at 85 FR 55292; and extended under the Consolidated Appropriations Act, 2021 (HR 133), Division N, §502, is in effect.

[1] See State Emergency Relief Manual, Relocation Services, ERM 303, ERB 2019-005, Page 3 of 7.

(12) In complying with the provisions of the CDC order referenced above and during the pendency of the order, trial courts must:

a. Require a plaintiff filing a LT case to also file a verification form indicating whether a declaration has been submitted by defendant or whether the case may proceed because it is not subject to the CDC order's moratorium. The verification shall be made on a SCAO-approved form, and a plaintiff shall have a continuing obligation to inform the court if a declaration has been submitted by defendant; in addition, a court may accept a declaration prepared pursuant to the CDC order from plaintiff or defendant.

b. Accept filings related to LT cases and proceed as follows:

(i) For cases that are not subject to the moratorium under the CDC order, the court shall proceed as provided in this order and MCR 4.201.

(ii) For cases that are subject to the moratorium under the CDC order, the court shall process the case through entry of judgment. A judgment issued in this type of case shall allow defendant to pay or move (under item 4 on DC 105 or similarly on non-SCAO forms) within the statutory period (MCL 600.5744) or by ~~December 31, 2020~~the first day after the expiration of the CDC order, whichever date is later. MCR 4.201(L)(4)(a), which prohibits an order of eviction from being issued later than 56 days after the judgment enters unless a hearing is held, is suspended for cases subject to the CDC moratorium. The 56 day period in that rule shall commence ~~January 1, 2021~~on the first day after the expiration of the CDC order for those cases.

(13) Each chief judge of a district court shall hold a meeting before January 31, 2021, to evaluate the efficacy of the procedures set out in this order and discuss proposed changes that might improve the process. The meeting invitation must be extended to individuals involved in the local landlord/tenant process, including the following:

- the Michigan Department of Health and Human Services
- local legal aid associations and other tenant advocacy associations
- attorneys who appear on behalf of local landlords
- the local HARA (Housing Assessment and Resource Agency)

The chief judge shall submit a summary of the discussion and proposed recommendations to the regional administrator within two weeks following the meeting.

This order is effective until further order of the Court.

VIVIANO, J. (*concurring*). I concur with the administrative order issued today, which continues to administratively suspend statutes concerning summary landlord-tenant proceedings in court. When the Court last extended this order, I dissented because the extension was premised solely on an order from the Centers for Disease Control and Prevention (CDC) that attempted to prevent landlords from evicting tenants in certain circumstances. Centers for Disease Control and Prevention, *Temporary Halt in Residential Evictions*, 85 Fed Reg 55,292 (Sept 4, 2020). At the time, I questioned whether that CDC order was authorized by regulation, statute, or the Constitution, and since the order rested on a shaky legal foundation, I believed it to be an inadequate authority on which to justify the Court's action. Administrative Order No. 2020-17, as amended by order entered October 22, 2020, 506 Mich ___ (2020) (VIVIANO, J., dissenting).

Today, however, our administrative order now rests on a statute duly enacted by Congress and signed by the President that specifically references and extends the CDC order through January 31, 2021. Consolidated Appropriations Act, 2021 (HR 133), Division N, § 502. To be sure, questions remain concerning the validity of the CDC order and whether our state law governing landlord-tenant evictions has been preempted. But the new statute manifests Congress's intent for the substance of the CDC order to apply through the end of January 2021. The legislation thus provides more substantial legal authority for our administrative order, which I continue to believe should not rely on the CDC order alone. Given this new authority, I believe we are justified in issuing the order and that any challenges to it can be resolved in the normal course of litigation. I therefore concur.

Order

Michigan Supreme Court
Lansing, Michigan

January 30, 2021

ADM File No. 2020-08

Amendment of Administrative Order No. 2020-17

Priority Treatment and New Procedure for Landlord/Tenant Cases

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Administrative Order No. 2020-17 – Priority Treatment and New Procedure for Landlord/Tenant Cases

Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and months as a way to limit the possibility of transmission of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14, which may also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1)-(10) [Unchanged.]

(11) A court shall discontinue prioritization of cases when it has proceeded through all priority phases and no longer has any landlord/tenant filings that allege a breach of contract for the time period between March 20, 2020, and July 15, 2020 (the period in which there was a statewide moratorium on evictions). At that point, the court may notify the regional administrator of its completion of the prioritization process and will not be required to return to the procedure even if a subsequent case is filed that alleges rent owing during the period of the eviction moratorium. A court must continue compliance with all other aspects of this order while the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19–issued by the Centers for Disease Control and Prevention~~;~~ and published at 85 FR 55292, and extended by order dated January 29, 2021~~; and extended under the Consolidated Appropriations Act, 2021 (HR 133), Division N, §502~~ is in effect.

(12)-(13) [Unchanged.]

This order is effective until further order of the Court.

VIVIANO, J. (*dissenting*). I dissent from the Court's decision to extend its previous order administratively suspending the operation of certain laws governing summary landlord-tenant proceedings. When the Court first suspended these laws in October 2020, I dissented because the order was premised solely on an order from the Centers for Disease Control and Prevention (CDC) that relied on dubious legal authority. Administrative Order No. 2020-17, 506 Mich ___ (October 22, 2020) (VIVIANO, J., dissenting), citing CDC, *Temporary Halt in Residential Evictions*, 85 Fed Reg 55,292 (September 4, 2020). Legislation was subsequently enacted by Congress that specifically referenced and extended the CDC order through January 31, 2021. Consolidated Appropriations Act, 2021 (HR 133), Division N, § 502. When the Court extended this order in December 2020, I concurred because the order then "rest[ed] on a statute duly enacted by Congress and signed by the President . . . ." Amendment of Administrative Order No. 2020-17, 506 Mich ___ (December 29, 2020) (VIVIANO, J., concurring). On January 29, 2021, the CDC issued an order extending its eviction moratorium through March 31, 2021. CDC, *Temporary Halt in Residential Evictions*, 86 Fed Reg 8020 (February 3, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDC-Eviction-Moratorium-01292021.pdf>. Congress, however, has not authorized such an extension. Because our order once again rests solely on the CDC order, I dissent for the reasons stated in my initial 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.

January 30, 2021

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

March 22, 2021

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

Amendment of Administrative Order No. 2020-17

Priority Treatment and New Procedure for Landlord/Tenant Cases

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Administrative Order No. 2020-17 – Priority Treatment and New Procedure for Landlord/Tenant Cases

Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and months as a way to limit the possibility of transmission of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14, which may also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1)-(9) [Unchanged.]

(10) In cases filed pursuant to MCL 600.5714(1)(a) for nonpayment of rent, a court must stay further proceedings after the pretrial hearing is conducted and not proceed to judgment if a defendant applies for COVID Emergency Rental Assistance (CERA) and notifies the court of the application. The stay is contingent upon the following events:

a. An eligibility determination is made by the appropriate HARA within 30 days of the pretrial hearing;

b. The defendant is eligible to receive rental assistance for all rent owed; and

c. The plaintiff receives full payment from the CERA program within 45 days of the pretrial hearing.

If any of these events do not occur, excluding delays attributable to the plaintiff, the court must lift the stay and continue with proceedings.

(10)-(13) [Renumbered (11)-(14) but otherwise unchanged.]

The chief judge shall submit a summary of the discussion and proposed recommendations to the regional administrator within two weeks following the meeting.

This order is effective until further order of the Court.

ZAHRA, J. (*dissenting*). In response to the backlog of landlord-tenant cases likely to be caused by the federal Coronavirus Aid, Relief, and Economic Security Act, 15 USC 116 *et seq*.—which imposed a moratorium on evictions from March 27, 2020, when the act was enacted, through July 25, 2020 for certain rental properties whose dwellings are supported by federal programs—and several executive orders imposing a moratorium on evictions for all renters issued by Governor Whitmer (e.g., Executive Order No. 2020-118), this Court on June 9, 2020, issued this administrative order setting forth procedures for courts to follow in actions filed under the summary proceedings act, MCL 600.5701 *et seq*. Further, noting that the Legislature approved 2020 SB 690 (now 2020 PA 123), which earmarked $50 million for direct payments to landlords for rent arrearages and $10 million to support legal services and administration to reduce the number of evictions, this administrative order required a one-week adjournment to allow litigants the opportunity to access any resources that might help defray the rent due or to enter into agreements to resolve the dispute privately. This one-week adjournment was consistent with the one-week adjournment already provided for at the court's discretion under MCR 4.201(F)(4)(c), and arguably did not represent a new, unreasonable delay, even though it is a procedure that is not commonly exercised by the courts.

This administrative order has since been amended four times and extended three times. In amending this order today for a fifth time, this Court *requires* all actions for nonpayment of rent to be stayed for at least 30 days after a pretrial hearing is conducted if the tenant applies for COVID Emergency Rental Assistance (CERA) relief. The stay may be extended an additional 15 days if the tenant becomes eligible for such relief and is awaiting payment, and it may be extended further if any "delays attributable to the [landlord]" occur. I conclude it is an abuse of this Court's authority to exercise general superintending control over all state courts under Const 1963, art 6, § 4 to modify the statutory framework in which a landlord may obtain a judgment against a defaulting tenant. Preliminarily, it should not be lost on anyone that if landlords and tenants wish to delay summary proceedings in actions for nonpayment of rent pending CERA eligibility determinations and payment, they may do so on their own accord; there is no need for a Court mandate to accomplish this. Why must—and on what authority may—this Court strip litigants of their ability to resolve their disputes privately and force these delays in the process where none exist by statute? Indeed, there is no guarantee that every tenant who applies for CERA relief will obtain it. Yet by requiring the stay of all proceedings for at least 30 days, this Court shelters tenants, many of whom ultimately will not qualify for these funds, at the expense of *all* landlords, whose own financial struggles appear to be lost on this Court. Moreover, why does this Court only extend the stay for delays caused by the landlord? Is it not conceivable a tenant may cause delays in the process to extend the life of the stay? Do delays caused by the tenant not warrant an immediate lift of the stay and a continuation of the proceedings?

This raw exercise of judicial power violates a fundamental tenet of our democracy: the separation of powers.[1] The Legislature, not the judiciary, possesses the exclusive power to make laws. "Our task, under the Constitution, is the important, but yet limited, duty to read and interpret what the Legislature has actually made the law."[2] "In accordance with the constitution's separation of powers, this Court cannot revise, amend, deconstruct, or ignore the Legislature's product and still be true to our responsibilities that give our branch only the judicial power."[3] Because I would not abuse this Court's general superintending authority over all state courts to judicially modify the framework governing

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[1] Const 1963, art 3, § 2 ("The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.").

[2] *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 161 (2004).

[3] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 98 (2008) (quotation marks, citation, and brackets omitted).

actions for nonpayment of rent, a framework enacted by this state's sole legislative body, I dissent from this Court's order.

VIVIANO, J. (*dissenting*). I dissent from the Court's decision to further administratively suspend the operation of certain laws governing summary landlord-tenant proceedings.[4] Today's amendments impose an automatic stay on all cases filed pursuant to MCL 600.5714(1)(a) for nonpayment of rent if the tenant has applied for COVID Emergency Rental Assistance (CERA) and notifies the court of the application. The changes, although perhaps well-intentioned, upend the statutory scheme the Legislature created for landlord-tenant proceedings and deprive district court judges of discretion that they have been granted by the Legislature and this Court. I believe that changes to our state's laws should be made by the Legislature, not this Court, and that amendments to the court rules and administrative orders governing the procedural aspects of landlord-tenant proceedings should be made through our regular and public amendment process rather than by emergency orders.

As noted above, this amendment to Administrative Order No. 2020-17 provides for a stay in all cases in which a tenant has applied for the CERA program and notified the court of the application. The stay is supposedly subject to a number of conditions; it is "contingent upon": (1) an eligibility determination being made by the appropriate agency within 30 days of the pretrial hearing, (2) the tenant being eligible for rental assistance for all rent owed, and (3) the landlord receiving full payment within 45 days of the pretrial hearing. However, there is no mechanism for the district court to determine the tenant's eligibility; rather, the eligibility determination is made by the Housing Assessment and Resource Agency. Thus, although the maximum duration of the stay absent delays attributable to the landlord will be 45 days, it appears as a practical matter that today's amendment will result in an automatic 30-day stay since the stay must be entered even before these determinations by an outside agency are made, and the district court will have no power over how long they take to be made.

The Legislature established a scheme for summary proceedings to recover possession of premises. MCL 600.5701 *et seq*. When a tenant fails to pay rent, a landlord

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[4] To the extent that this administrative order continues to rely on the eviction moratorium order issued by the Centers for Disease Control and Prevention (CDC), I continue to object for the reasons I have stated previously. Administrative Order No. 2020-17, 506 Mich ___ (October 22, 2020) (VIVIANO, J., dissenting) (questioning the constitutionality of the CDC's order and criticizing the Court's reliance on it as a basis to suspend the operation of certain laws governing summary landlord-tenant proceedings), citing CDC, *Temporary Halt in Residential Evictions*, 85 Fed Reg 55,292 (September 4, 2020); Amendment of Administrative Order 2020-17, ___ Mich ___ (January 30, 2021) (VIVIANO, J., dissenting) (same), citing CDC, *Temporary Halt in Residential Evictions*, 86 Fed Reg 8,020 (February 3, 2021).

may recover possession of the premises by summary proceedings if the tenant fails to move out or pay the rent due under the lease within seven days of being served with a written demand for possession for nonpayment of rent. MCL 600.5714(1)(a). This seven-day time frame between when notice is given and when summary proceedings can commence is shorter than other notice timeframes that govern landlord-tenant relationships, such as the 30-day notice to quit required when a landlord wishes to evict a holdover tenant. MCL 554.134(1). There are also shorter time frames, such as the 24-hour notice required for tenants involved in illegal drug activity. MCL 554.134(4). Thus, the Legislature established different notice periods in landlord-tenant proceedings depending on why the landlord is seeking to recover possession. The automatic-stay requirement imposed by this Court does not respect these legislative choices. Landlords who wish to exercise their statutory right to recover possession of their premises are now forced to wait until the stay is lifted if a tenant applies for the CERA program.[5]

Today's amendments to the administrative order further strip district court judges of their discretion to adjourn landlord-tenant proceedings, enter a default, or proceed immediately to trial. MCL 600.5732 states, in relevant part, "Pursuant to applicable court rules, a court having jurisdiction over summary proceedings *may* . . . order adjournments and continuances . . . ." (Emphasis added.) Under MCR 4.201, the district court "*may* adjourn" proceedings for up to seven days if a party fails to appear or up to 56 days if the tenant appears. MCR 4.201(F)(4)(c), (J)(1) (emphasis added). Use of the word "may" indicates that the district court has discretion to adjourn the proceedings. See *People v Grant*, 445 Mich 535, 542 (1994); *Mull v Equitable Life Assurance Society of the US*, 444 Mich 508, 519 (1994). The court also has discretion to enter a default if the tenant does not appear, MCR 4.201(F)(4)(a), or proceed to trial if the tenant appears, MCR 4.201(J)(1). The Court previously divested district court judges of their discretion to enter a default or proceed to trial at the initial court date, requiring that all landlord-tenant proceedings be adjourned for seven days, with a limited number of exceptions. Administrative Order No. 2020-17(8). Today's amendments go even further. Not only must district court judges

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[5] The Court's continued interference with the statutes and rules governing summary proceedings appears to be based on the assumption that landlords and tenants alike will enthusiastically embrace the CERA program because both parties will immediately benefit from the large influx of federal aid. However, as with most government programs, not every potential recipient is interested in accepting federal dollars with all the inevitable strings attached. See Parker, *Why Some Landlords Don't Want Any of the $50 Billion in Rent Assistance*, Wall Street Journal (March 19, 2021) <https://www.wsj.com/articles/why-some-landlords-dont-want-any-of-the-50-billion-in-rent-assistance-11616155203> [https://perma.cc/YA3X-DZZ9] (noting that Congress has appropriated $50 billion for rental assistance, "[b]ut thousands of building owners across the country are rejecting the government offer . . . [because] the aid often has too many strings attached").

adjourn all cases for seven days; they must also stay proceedings in all nonpayment of rent cases in which the tenant has applied for CERA.[6] I agree with Justice ZAHRA that this raises yet another significant question about today's order: where does this Court derive its authority to dictate in advance how a trial court must exercise its discretion in a particular case?[7]

We are now over a year into the COVID-19 pandemic, and the Court has made numerous changes to landlord-tenant proceedings without providing stakeholders any opportunity for public comment. We have the power to "establish, modify, amend and simplify the practice and procedure in all courts of this state" through our court rules. Const 1963, art 6, § 5. But we are not permitted to "establish, abrogate, or modify the substantive law." *McDougall v Schanz*, 461 Mich 15, 27 (1999). Additionally, to amend the Michigan Court Rules or other sets of rules, we have established procedures that generally require notice and administrative public hearings unless the Court "determines that there is a need for immediate action or if the proposed amendment would not significantly affect the delivery of justice." MCR 1.201(D). Rather than continue to adopt emergency orders, changes to our landlord-tenant laws should be made by the Legislature and changes to the related court procedures should be made utilizing our normal, transparent amendment processes.

To the extent the Court today is attempting to facilitate voluntary participation by landlords and tenants in the CERA program, our current statutes and court rules already allow them to do so. In cases in which an adjournment is necessary to provide additional time to pursue rental assistance, the parties can request an adjournment and the district court has discretion to grant such requests in appropriate cases. I do not believe that we should circumvent our laws and court rule amendment processes in order to coerce landlords to participate in the program. In my opinion, district court judges are in the best position to decide, on a case-by-case basis, when adjournments in landlord-tenant proceedings are necessary or appropriate.

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[6] Under MCR 4.201(H)(2) and (J)(1), the trial court may order the defendant to pay rent into escrow if the trial is adjourned more than seven days. Although not mentioned in the administrative order, the conditional-stay provision would presumably prevent such an escrow order from being enforced—effectively divesting district court judges of another act of discretion provided for in the court rules.

[7] The Court's order claims the power to require adjournments and stays as part of our "general superintending control over all courts" established in Const 1963, art 6, § 4. But if the Court has the power to broadly stay an entire class of cases for at least 30 days, what is the extent of this power? Does the Court have the power to indefinitely stay all landlord-tenant cases?

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In my view, we should return our trial courts to regular order and stop micromanaging them to coerce participation in governmental programs and directives that are of questionable constitutional validity.

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.

March 22, 2021

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

April 9, 2021

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

Amendment of Administrative Order No. 2020-17

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Since the early days of the pandemic, state and national authorities have imposed restrictions on the filing of many landlord/tenant cases. As those restrictions are lifted and courts return to full capacity and reopen facilities to the public, many will experience a large influx of landlord/tenant case filings. Traditionally, the way most courts processed these types of cases relied heavily on many cases being called at the same time in the same place, resulting in large congregations of individuals in enclosed spaces. That procedure is inconsistent with the restrictions that will be in place in many courts over the coming weeks and months as a way to limit the possibility of transmission of COVID-19. In addition, courts are required to comply with a phased expansion of operations as provided under Administrative Order No. 2020-14, which may also impose limits on the number of individuals that may congregate in public court spaces.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases using a prioritization approach. This approach will help limit the possibility of further infection while ensuring that landlord/tenant cases are able to be filed and adjudicated efficiently. All courts having jurisdiction over landlord/tenant cases must follow policy guidelines established by the State Court Administrative Office. Courts should be mindful of the limitations imposed by federal law (under the CARES Act) as these cases are filed and processed, and follow the guidance in Administrative Order No. 2020-8 in determining the appropriate timing for beginning to consider these cases.

For courts that are able to begin conducting proceedings, the following provisions apply to landlord/tenant actions.

(1)-(11) [Unchanged.]

(12) A court shall discontinue prioritization of cases when it has proceeded through all priority phases and no longer has any landlord/tenant filings that allege a breach of contract for the time period between March 20, 2020, and July 15, 2020 (the period in which there was a statewide moratorium on evictions). At that point, the court may notify the regional administrator of its completion of the prioritization process and will not be required to return to the procedure even if a subsequent case is filed that alleges rent owing during the period of the eviction moratorium. A court must continue compliance with all other aspects of this order while the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19–issued by the Centers for Disease Control and Prevention and published at 85 FR 55292, and extended by order dated March 28~~January 29~~, 2021–is in effect.

(13)-(14) [Unchanged.]

The chief judge shall submit a summary of the discussion and proposed recommendations to the regional administrator within two weeks following the meeting.

This order is effective until further order of the Court.

VIVIANO, J. (*dissenting*). I dissent from the Court's decision to quietly extend our previous order administratively suspending our state's laws governing landlord-tenant proceedings. The Court has no authority to dispense with duly enacted laws by administrative veto. That we are doing so, at least in part, to enforce a constitutionally suspect eviction moratorium order issued by the Centers for Disease Control and Prevention (CDC) only makes matters worse.[1] And that we continue to issue such directives—this is our seventh order on this topic in the last 12 months—without utilizing our normal and transparent court rule amendment process only serves to further undermine the public's confidence in the institutions of our government.

I have discussed my objections to the Court's staggering assertion of power to suspend duly enacted laws at some length in my prior dissenting statements. I incorporate those objections here for the sake of brevity.[2] Suffice it to say that I continue to find it alarming that a Court whose job is to interpret our state's laws and apply them faithfully to the cases that come before it can so easily switch gears and become a Court that dispenses with laws on the basis of administrative convenience. That power is not available (or should not be) to the judiciary in a system of separated powers.

One would think that recent legal developments might give the Court pause. Several lower federal courts, including the United States Court of Appeals for the Sixth Circuit, have now weighed in on the constitutionality of the CDC's eviction moratorium. A federal eviction moratorium has now been in effect, in one form or another, for most of the time since March 27, 2020—meaning that, during that time, landlords have not been able to recover possession of their property for nonpayment of rent by tenants who have met the various moratorium requirements.[3] A number of federal district court judges have recently

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[1] See CDC, *Temporary Halt in Residential Evictions*, 85 Fed Reg 55,292 (September 4, 2020); CDC, *Temporary Halt in Residential Evictions*, 86 Fed Reg 16,731 (March 31, 2021).

[2] See Administrative Order No. 2020-17, 506 Mich ___ (October 22, 2020) (VIVIANO, J., dissenting); Administrative Order No. 2020-17, ___ Mich ___ (January 30, 2021) (VIVIANO, J., dissenting); Administrative Order No. 2020-17, ___ Mich ___ (March 22, 2021) (VIVIANO, J., dissenting).

[3] Less than half of the period of the moratorium has been authorized by Congress. See Coronavirus Aid, Relief, and Economic Security Act, 15 USC 9058(b) (establishing a 120-day moratorium from March 27 to July 24, 2020); Consolidated Appropriations Act, 2021, PL 116-260, Title V, § 502 (extending the CDC's unilateral moratorium order from December 31, 2020 to January 31, 2021).

As I noted in a previous concurring statement, when the eviction moratorium was authorized by Congress, I believed our administrative order was justified and that any challenges to it could be resolved in the normal course of litigation. Administrative Order No. 2020-17, 506 Mich ___ (December 29, 2020) (VIVIANO, J., concurring). It is one thing

held that the CDC's eviction moratorium is unconstitutional on various grounds.[4] The first federal circuit court to opine on the merits of the matter has rejected the CDC's defenses of the order, recognizing that the statute does not appear to give such sweeping power and that, if it did, the statute would be vulnerable on separation-of-powers grounds. See *Tiger Lily, LLC v US Dep't of Housing & Urban Dev*, order of the United States Court of Appeals for the Sixth Circuit, entered March 29, 2021 (Case No. 21-5256), p 7 (denying the government's motion for a stay pending appeal of the district court's declaratory judgment that the CDC's eviction moratorium is unenforceable on the ground that "the government is unlikely to succeed on the merits"). As the court noted, the CDC's interpretation of its statutory authority could be used to justify "any number of regulatory actions . . . ." *Id*. at 6.

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to defer in this manner to a law duly enacted by the Congress and signed by the President. However, it is quite another to continue blind adherence to an administrative agency's directive that (1) on its face, raises serious questions about its constitutional validity; (2) has been subject to numerous court challenges; and (3) has been ruled unconstitutional by numerous courts, including a well-reasoned finding by a federal appellate court that the government is unlikely to succeed on the merits of its appeal because of these constitutional infirmities.

[4] See *Tiger Lily, LLC v US Dep't of Housing & Urban Dev*, ___ F Supp 3d ___, ___ (WD Tenn, 2021) (Case No. 2:20-cv-02692) (concluding that the CDC's eviction moratorium "exceeds the statutory authority of the Public Health Act, 42 USC § 264" and is "unenforceable"); *Skyworks, LTD v Ctrs for Disease Control & Prevention*, opinion and order of the United States District Court for the Northern District of Ohio, issued March 10, 2021 (Case No. 5:20-cv-2407) (determining that the CDC's orders establishing and extending the eviction moratorium "exceed the agency's statutory authority provided in Section 361 of the Public Health Service Act, 42 USC § 264(a), and the regulation at 42 CFR § 70.2 promulgated pursuant to the statute, and are, therefore, invalid"); *Terkel v Ctrs for Disease Control & Prevention*, ___ F Supp 3d ___, ___ (ED Tex, 2021) (Case No. 6:20-cv-00564) (determining that the CDC's eviction moratorium "exceeds the power granted to the federal government to 'regulate Commerce . . . among the several States' and to 'make all Laws which shall be necessary and proper for carrying into Execution' that power" and holding that it is "unlawful as 'contrary to constitutional . . . power' "), quoting US Const, art I, § 8, and 5 USC 706(2)(B). But see *Chambless Enterprises, LLC v Redfield*, ___ F Supp 3d ___ (ED La, 2020) (Case No. 3:20-cv-01455) (denying the landlord-plaintiffs' motion for a preliminary injunction after finding that the plaintiffs had not satisfied any of the four prerequisites for a preliminary injunction, including substantial likelihood of success on the merits); *Brown v Azar*, ___ F Supp 3d ___ (ND Ga, 2020) (Case No. 1:20-cv-03702) (same).

Unfazed by these federal court rulings, our Court presses forward with its administrative suspension of statutory law. And it does so outside the normal procedures for promulgating rules, thus shielding the order from any public input. See Administrative Order No. 2020-17, ___ Mich ___ (March 22, 2021) (VIVIANO, J., dissenting). At an earlier stage of the COVID-19 pandemic, I wondered whether the rule of law would itself become yet another casualty of this dreadful disease. See *Dep't of Health & Human Servs v Manke*, 505 Mich 1110 (2020) (VIVIANO, J., concurring). Some courts have stood firm. See *South Bay United Pentecostal Church v Newsom*, 592 US ___, ___; 141 S Ct 716, 718 (2021) (statement of Gorsuch, J.) ("Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution."). Unfortunately, this Court continues to choose a different path.

For these reasons, 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.

April 9, 2021

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

July 2, 2021

ADM File No. 2020-08

Amendment of Administrative Order No. 2020-17

Continuation of Alternative Procedures for Landlord/Tenant Cases

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On order of the Court, Administrative Order No. 2020-17 is hereby amended and replaced with the following new language, effective immediately.

The number of new COVID-19 cases in Michigan has dropped dramatically in recent weeks and many people believe that our state is finally at the end of the pandemic. Still, the court system will long be dealing with the effects brought about by the greatest health crisis in our generation. One of those effects is a prolonged period of housing insecurity experienced by those most affected by the pandemic's nearly instantaneous and extensive job reductions – the 30 to 40 million people nationally who rent their housing.

Federal response to this problem has taken two forms: eviction moratoria and direct state aid. Several eviction moratoria have been imposed, both by Congress (Pub L. 116-136) and by the CDC (published at 85 FR 55292 and extended by Order dated March 28, 2021), prohibiting evictions for tenants in certain types of government-supported housing or who meet certain income restrictions. The most recently-extended CDC order is slated to expire July 31, 2021 unless extended further. In addition, challenges to these CDC orders have been working their way through the courts, with conflicting opinions as a result.

However, the second type of federal response continues to be relevant regardless of the status of the CDC order—direct aid to states to provide for rental assistance programs. In 2021 PA 2, the Michigan Legislature appropriated $220 million (of the total of $600 million in federal money designated for Michigan) to provide rental assistance to tenants and landlords. Section 301(2) states that "[t]he department of labor and economic opportunity shall collaborate with the department of health and human services, the judiciary, local community action agencies, local nonprofit agencies, and legal aid organizations to create a rental and utility assistance program." This Court has done so in previous iterations of Administrative Order No. 2020-17 by working with those agencies to establish a procedure that ensures landlords and tenants are able to

benefit from those dollars. The need for that programming continues, even assuming the health risks associated with the typical manner of processing eviction proceedings has eased.

In addition, the mandate for courts to continue to use remote technology to the greatest extent possible is as fully in place today as it was a year ago. We anticipate this fall will be the appropriate time to consider what changes in procedure, adopted with as much speed and thought as possible in the midst of a pandemic, should be retained or changed before becoming permanent practices in our state courts. This effort will be based on input from state court stakeholders, but early data shows that expanded use of technology has improved rates of participation and been a boon to issues related to access to justice. We do not intend to squander the gains hard-won when all judges, court staff, attorneys, and individuals were forced to change their practices with little advance notice and training and in doing so, created a footprint for a new way to work that serves the needs of court users in novel and innovative ways.

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases following the procedures outlined in this order. Courts are expected to proceed with guidelines referenced in Administrative Order No. 2020-14 (Return to Full Capacity).

(A) All local administrative orders requiring a written answer pursuant to MCL 600.5735(4) are temporarily suspended.[1] Unless otherwise provided by this order, a court must comply with MCR 4.201 with regard to summary proceedings.

(B) At the initial hearing noticed by the summons, the court must conduct a pretrial hearing consistent with SCAO guidance. At the pretrial hearing the parties must be verbally informed of all of the following:

(1) Defendant has the right to counsel. MCR 4.201(F)(2).

(2) The Michigan Department of Health and Human Services (MDHHS), the local Coordinated Entry Agency (CEA), Housing Assessment and Resource Agency (HARA), or the federal Help for Homeless Veterans program may be able to assist the parties with payment of some or all of the rent due.

[1] The local administrative orders include: 1st District Court (Monroe County); 2A District Court (Lenawee County); 12th District Court (Jackson County); 18th District Court (City of Westland); 81st District Court (Alcona, Arenac, Iosco, and Oscoda Counties); 82nd District (Ogemaw County); and 95B District Court (Dickinson and Iron Counties).

(3) Defendants DO NOT need a judgment to receive assistance from MDHHS, the HARA, or the local CEA. The Summons and Complaint from the court case are sufficient for MDHHS.

(4) The availability of the Michigan Community Dispute Resolution Program (CDRP) and local CDRP Office as a possible source of case resolution. The court must contact the local CDRP to coordinate resources. The CDRP may be involved in the resolution of Summary Proceedings cases to the extent that the chief judge of each court determines, including conducting the pretrial hearing.

(5) The possibility of a Conditional Dismissal pursuant to MCR 2.602 if approved by all parties. The parties must be provided with a form to effectuate such Conditional Dismissal.

(C) The pretrial required under subsection (B) may be conducted by the assigned judge, a visiting judge appointed by SCAO, a magistrate (as long as that magistrate is a lawyer), or a CDRP mediator.

(D) Courts are authorized to proceed with these actions by way of remote participation tools, and encouraged to do so to the greatest extent possible. Administrative Order No. 2020-6 requires that the court scheduling a remote hearing must "verify that all participants are able to proceed in this manner." Therefore, the summons for each case filed under the Summary Proceedings Act must provide the date and time for remote participation in the scheduled hearing. In addition, the summons must be accompanied by any written information about the availability of counsel and housing assistance information as provided by legal aid or local funding agencies. If a remote hearing is scheduled for the first proceeding, the defendant received personal service pursuant to MCR 2.105(A), and the defendant fails to appear, a default may enter. If a remote hearing is scheduled for the first proceeding and the defendant fails to appear and has not been served under MCR 2.105(A), the court may not enter a default but must reschedule the hearing and mail notice for that rescheduled hearing as an in-person proceeding. Under these conditions, a notice of rescheduled hearing mailed by the court within 24 hours after the initial hearing date is sufficient notice of the rescheduled hearing, notwithstanding any other court rule. Other parties or participants may proceed remotely.

(E) Except as provided below, all Summary Proceeding Act cases must be adjourned for seven days after the pretrial hearing in subsection (B) is conducted. Nothing in this order limits the statutory authority of a judge to adjourn for a longer period. MCL 600.5732. Any party who does not appear at the hearing scheduled for the adjourned date will be defaulted. Cases need not be adjourned for seven days if:

the plaintiff dismisses the complaint, with or without prejudice, and without any conditions, if defendant was personally served under MCR 2.105(A) and fails to appear, or where both plaintiff and defendant are represented by counsel and a consent judgment or conditional dismissal is filed with the court. Where plaintiff and defendant are represented by counsel, the parties may submit a conditional dismissal or consent judgment in lieu of appearing personally at the second hearing.

(F) The court may require remote participation in the second, and any subsequent, proceedings, and the court must verify that participants are able to proceed in that manner under Administrative Order No. 2020-6.

(G) In cases filed pursuant to MCL 600.5714(1)(a) for nonpayment of rent, a court must stay further proceedings after the pretrial hearing is conducted and not proceed to judgment if a defendant applies for COVID Emergency Rental Assistance (CERA) and notifies the court of the application. The stay is contingent upon the following events:

(1) An eligibility determination is made by the appropriate HARA within 30 days of the pretrial hearing;

(2) The defendant is eligible to receive rental assistance for all rent owed; and

(3) The plaintiff receives full payment from the CERA program within 45 days of the pretrial hearing.

If any of these events do not occur, excluding delays attributable to the plaintiff, the court must lift the stay and continue with proceedings. Nothing in this order limits the statutory authority of a judge to adjourn a Summary Proceedings case. MCL 600.5732.

(H) In cases filed before this administrative order was amended to include procedure related to the CERA program (i.e., before March 22, 2021), if a party notifies the court that it has applied for CERA at any point prior to issuance of a writ, the court shall stay the proceeding as provided under subsection (G) of this order.

(I) For cases that are subject to the moratorium under the CDC order, the court shall process the case through entry of judgment. A judgment issued in this type of case shall allow defendant to pay or move (under item 4 on DC 105 or similarly on non-SCAO forms) within the statutory period (MCL 600.5744) or after the expiration of the CDC order, whichever date is later. MCL 600.5744(5), which provides a 10 day minimum statutory period to pay or move, is tolled until expiration of the CDC order. MCR 4.201(L)(4)(a), which prohibits an order of

eviction from being issued later than 56 days after the judgment enters unless a hearing is held, is suspended for cases subject to the CDC moratorium. The 56 day period in that rule shall commence on the first day after the expiration of the CDC order for those cases.

This order is effective immediately until further order of the Court.

ZAHRA, J. (*dissenting*). I dissent from this Court's amended order that extends the mandatory stay of all actions for nonpayment of rent if a tenant applies for COVID Emergency Rental Assistance relief. For the reasons stated in my prior dissenting statement, I disagree that this Court's authority to exercise general superintending control over all state courts under Const 1963, art 6, § 4 permits it to modify the statutory framework set forth in the summary proceedings act, MCL 600.5701 *et seq*., in which a landlord may obtain a judgment against a defaulting tenant. See Amended Administrative Order No. 2020-17, 507 Mich ___ (March 22, 2021) (ZAHRA, J., dissenting). That this Court extends these provisions despite the impending expiration of the eviction moratorium order issued by the Centers for Disease Control and Prevention, which itself was grounded on dubious constitutional authority, exacerbates this Court's abuse of authority and the separation-of-powers violation apparent in taking such action. While the majority no doubt has good intentions in extending this mandatory stay order, I would not further encroach on the Legislature's exclusive authority to enact laws that modify the statutory framework governing actions for nonpayment of rent. This is particularly true where the parties are perfectly capable of resolving their disputes without the need for mandatory judicial intervention. See *id*. at ___ ("Why must—and on what authority may—this Court strip litigants of their ability to resolve their disputes privately and force these delays in the process where none exist by statute?"). Because this Court continues to do so, I dissent.

VIVIANO, J. (*dissenting*). I dissent from the Court's decision to amend our previous order administratively suspending our state's laws governing landlord-tenant proceedings.[1] Today's amendments take some steps in the right direction, such as removing the prioritization of landlord-tenant cases. However, I would return all landlord-tenant cases to the procedures established by our statutes and court rules. Today's order continues to impose stay and adjournment requirements on many landlord-tenant cases. In doing so, the order continues to upend the statutory scheme that the Legislature created for summary landlord-tenant proceedings and deprives district court judges of discretion that they have been granted by the Legislature and this Court. As I have indicated previously, I believe that changes to our state's laws should be made by the Legislature, not this Court, and that amendments to the court rules and administrative

orders governing the procedural aspects of landlord/tenant proceedings should be made through our regular and public amendment process rather than by emergency orders.[2] For these reasons, I dissent.

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[1] To the extent that this administrative order continues to rely on the eviction moratorium order issued by the Centers for Disease Control and Prevention (CDC), I continue to object for the reasons I have stated previously. Administrative Order No. 2020-17, 506 Mich ___ (October 22, 2020) (VIVIANO, J., dissenting) (questioning the constitutionality of the CDC's order and criticizing the Court's reliance on it as a basis to suspend the operation of certain laws governing summary landlord-tenant proceedings); Amendment of Administrative Order No. 2020-17, 507 Mich ___ (January 30, 2021) (VIVIANO, J., dissenting) (same); Amendment of Administrative Order No. 2020-17, 507 Mich ___ (March 22, 2021) (VIVIANO, J., dissenting); Amendment of Administrative Order No. 2020-17, 507 Mich ___ (April 9, 2021) (VIVIANO, J., dissenting).

[2] Amendment of Administrative Order No. 2020-17, 507 Mich ___ (March 22, 2021) (VIVIANO, J., dissenting).

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.

July 2, 2021

Clerk

Order

Michigan Supreme Court
Lansing, Michigan

July 26, 2021

ADM File No. 2020-08

Rescission of Administrative Order Nos. 2020-1, 2020-6, 2020-9, 2020-13, 2020-14, 2020-19, and 2020-21 and Amendments of Rules 2.002, 2.107, 2.305, 2.407, 2.506, 2.621, 3.904, 6.006, 6.106, 6.425, 8.110, 9.112, 9.115, and 9.221 of the Michigan Court Rules and Administrative Order No. 2020-17

_____

On order of the Court, the following administrative orders are rescinded, effective immediately: AO No. 2020-1, AO No. 2020-6, AO No. 2020-9, AO No. 2020-13, AO No. 2020-14, AO No. 2020-19, and AO No. 2020-21.

On further order of the Court, finding that immediate effect is necessary, the following amendments of Rules 2.002, 2.107, 2.305, 2.407, 2.506, 2.621, 3.904, 6.006, 6.106, 6.425, 8.110, 9.112, 9.115, and 9.221 of the Michigan Court Rules and Administrative Order No. 2020-17 are adopted, effective immediately. Concurrently, individuals are invited to comment on the form or the merits of the amendments during the usual comment period. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted at Administrative Matters & Court Rules page.

[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 2.107 Service and Filing of Pleadings and Other Documents

(A)-(F) [Unchanged.]

(G) Notwithstanding any other provision of this rule, until further order of the Court, all service of process except for case initiation must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions of subsection (C)(4).

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, by two-way interactive video technology, or by other remote participation tools.

Rule 2.407 Videoconferencing

(A)-(F) [Unchanged.]

(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.

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 3.904 Use of Videoconferencing Technology

(A) Delinquency, Designated, and Personal Protection Violation Proceedings. Court may use videoconferencing technology in delinquency, designated, and personal protection violations proceedings as follows:

(1)-(2) [Unchanged.]

(3) Notwithstanding any other provision of this rule, until further order of the Court, courts may use two-way videoconferencing technology or other remote participation tools where the court orders a more restrictive placement or more restrictive treatment.

(B)-(C) [Unchanged.]

Rule 6.006 Video and Audio Proceedings

(A)-(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 6.425 Sentencing; Appointment of Appellate Counsel

(A)-(G) [Unchanged.]

(H) Notwithstanding any other provision in this rule, until further order of the Court, if the defendant is indigent, a request for the appointment of appellate counsel under MCR 6.425(F)(3) must be granted if it is received by the trial court or the Michigan Appellate Assigned Counsel System (MAACS) within six months after sentencing. This provision applies to all cases in which sentencing took place between March 24, 2020 and June 15, 2021.

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 providing 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, by two-way interactive video technology, or by other remote participation tools.

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, by two-way interactive video technology, or by other remote participation tools.

(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, by two-way interactive video technology, or by other remote participation tools.

(D)-(E) [Unchanged.]

Administrative Order No. 2020-17 is amended as follows:

[First five paragraphs: unchanged.]

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state

courts, directing courts to process landlord/tenant cases following the procedures outlined in this order. ~~Courts are expected to proceed with guidelines referenced in Administrative Order No. 2020-14 (Return to Full Capacity).~~

(A)-(C) [Unchanged.]

(D) Courts are authorized to proceed with these actions by way of remote participation tools, and encouraged to do so to the greatest extent possible. ~~Administrative Order No. 2020-6 requires that t~~The court scheduling a remote hearing must "verify that all participants are able to proceed in this manner." Therefore, the summons for each case filed under the Summary Proceedings Act must provide the date and time for remote participation in the scheduled hearing, if applicable. In addition, the summons must be accompanied by any written information about the availability of counsel and housing assistance information as provided by legal aid or local funding agencies. If a remote hearing is scheduled for the first proceeding, the defendant received personal service pursuant to MCR 2.105(A), and the defendant fails to appear, a default may enter. If a remote hearing is scheduled for the first proceeding and the defendant fails to appear and has not been served under MCR 2.105(A), the court may not enter a default but must reschedule the hearing and mail notice for that rescheduled hearing as an in-person proceeding. Under these conditions, a notice of rescheduled hearing mailed by the court within 24 hours after the initial hearing date is sufficient notice of the rescheduled hearing, notwithstanding any other court rule. Other parties or participants may proceed remotely.

(E) [Unchanged.]

(F) The court may require remote participation in the second, and any subsequent, proceedings, and the court must verify that participants are able to proceed in that manner ~~under Administrative Order No. 2020-6~~.

(G)-(I) [Unchanged.]

Staff Comment: These amendments largely reflect the substantive provisions of the remaining administrative orders adopted by the Court during the COVID-19 pandemic. Many of the orders have been rescinded or expired by their own terms. In this order, the Court rescinds all remaining active administrative orders entered during the pandemic except for the order regarding procedures specific to landlord/tenant actions (AO No. 2020-17, which is slightly modified as shown above to reflect the rescissions) and the order establishing a wholly online procedure for those taking the Michigan Bar Examination in July 2021 (AO No. 2021-2). Moving the substance of these provisions

into a court rule amendment format returns the Court's procedure to the typical court rule revision procedure. The intent of these amendments is to retain the existing practices courts have been operating under for an interim period while inviting public comment. The Court also anticipates comments in response to the reports of two groups of volunteers organized by the State Court Administrative Office (the Lessons Learned Committee and the Task Force on Open Courts, Media, and Privacy). Within the next several months, it is anticipated that the Court will consider further proposals for refinements of these and other new proposals to guide courts going forward.

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.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-08. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

MCCORMACK, C.J. (*concurring*). Michigan courts and the people they serve have a lot to be proud of in the lessons they have learned and what has been accomplished over the past 16 months. Instead of being paralyzed by the global pandemic, judges and court administrators rose to overcome the challenges that delivering justice required. Judges, magistrates, and referees have presided over more than 3.5 million hours of online court proceedings, which were broadcast so the public had access. The State Court Administrative Office's Virtual Courtroom Directory has been used by the public to access live virtual proceedings more than 325,000 times. Local trial court YouTube channels have nearly 135,000 subscribers and trial court videos have millions of views.

The benefits of these changes are vast and undeniable. First and foremost, they have made people safer during the global pandemic. But the improvements in transparency and access to justice are also staggering; remote access has greatly increased court visibility, allowed more people to get legal representation, and reduced the number of cases defaulted because litigants couldn't make it to court. People who would have missed a court date because they didn't have bus fare or couldn't afford to miss work have been spared the consequences of failing to appear (time in jail and accumulated debt).

Equal access to justice is an ongoing concern for the fair administration of our courts. Pre-pandemic, "[c]ourts were falling short in meeting their mission to provide

access to justice for all, and particularly so when it comes 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://courts.michigan.gov/News-Events/JusticeForAll/Final%20JFA%20Report%20121420.pdf> (accessed July 23, 2021) [https://perma.cc/74UE-V9WN]. Indeed, surveys showed that "nearly nine in ten low-income individuals with a civil legal problem receive little or no legal help" in trying to navigate the justice system. *Id*. Unequal access to justice has worrisome consequences for the public's confidence in our courts, and therefore in the rule of law.

The benefits of remote options for people who have historically been excluded from our justice system is lemonade. Interviews of judges who oversee child welfare courts conducted by the National Center for State 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 July 23, 2021) [https://perma.cc/AVX8-WCNZ]. Other sources have shown that participation in eviction cases skyrocketed after virtual proceedings began, resulting in lower default rates. 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 July 23, 2021) [https://perma.cc/T2MY-6DTZ].

Virtual proceedings have had enormous efficiency benefits too. By reducing travel time and time spent in the courthouse waiting for hearings to begin, attorneys can appear in courts in multiple counties on the same day. And lawyers benefit too when courts around the state have the same processes for appearing. Having to negotiate vastly different rules from court to court around the state is a cost lawyers and their clients would bear.

Of course there are proceedings that cannot be conducted remotely unless the parties consent. *People v Jemison*, 505 Mich 352 (2020). And there are others that are simply better suited for physical courtrooms. This interim order will allow us to hear from the bench, the bar, and the public about all of this, so that we can take advantage of all the benefits we have gained and make informed decisions about how to best use remote platforms going forward. And in the meantime, we won't lose ground. Our choice is not between smartphones and barristers' wigs.

Justices VIVIANO and BERNSTEIN would disregard all this progress for the people most historically excluded from our justice system in the name of "we should go back to the way we've always done it." That approach would needlessly hurt the many litigants

who have gained the most from our new pandemic practices, as well as the many lawyers (and their clients) who have seen efficiencies otherwise not possible. Litigants who might have failed to appear because they will lose their job if they miss work, or who have no access to transportation or no one to care for their children or physical difficulty getting to court, are the ones who would pay the cost if the ability to participate virtually is not an option anymore and instead put off until some future unspecified time when we get around to considering it.[1] Today's interim step avoids asking those least positioned to bear those costs to do so—it continues robust remote access while we take in the lessons we have all learned.

It's time to move forward, not back. We should look at what we have learned from our collective experiences during the pandemic and continue to use practices that have worked while discarding practices that have not. Every other institution and industry is doing exactly that—changing their practices for the better based on lessons learned this past 16 months. The modern workforce will never return to its February 2020 norms. Business travel, education and healthcare will never be the same.

Why should courts be the one institution that doesn't benefit from the lessons learned from the accelerated innovation that COVID-19 brought?[2] More importantly, the public traditionally excluded from those courts should not lose a valuable new tool for access and transparency. Today's order makes certain they won't, and I am therefore pleased to support it.

ZAHRA, J. (*concurring in part and dissenting in part*).

Faced with the COVID-19 pandemic, this Court used its equitable powers to employ emergency measures we hoped would respond to a health crisis not seen by this state in more than one hundred years. We could only surmise whether these procedures would adequately address the emergency we faced, and we exercised our best effort to respond appropriately. Today, it appears that the health crisis we faced is now behind us, and the Court lifts most of its emergency orders. I concur in the portion of today's order that rescinds most of these emergency orders. I, however, dissent from the implementation of these emergency procedures through court rules that are given

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[1] I am not sure I understand what my colleagues believe regular process should require here—we have given rule changes immediate effect while taking public comment before. And we don't have a regular process for a global pandemic that forced us to quickly change our processes and then serendipitously learn that our new approach boosted access to justice and transparency.

[2] Continued remote hearings are part of the solution to 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 not suited for them.

immediate effect, a process that is imprudent and wholly inconsistent with the traditional process of this Court.

The Court, no doubt, has good intentions in implementing these emergency measures through court rules having immediate effect. But summary implementation of new court rules is rarely employed and occurs only when immediate action is required, such as when an immediate response is needed to address legislative changes in the law or our caselaw renders a rule obsolete. No such circumstances are present here.

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 make a mockery of court proceedings, with the court having little to no remedy available to sanction such disruptive conduct. These concerns merit public attention before considering even interim court rules, which, more often than not, load the dice toward their later adoption as permanent court rules.

Video court served its purpose during the state of emergency, but this emergency has, for the most part, passed. It is simply not appropriate for this Court to administer the Michigan court system as though this emergency continues. The better approach, in my view, is to trust our trial courts. The trial courts of this state have the authority to implement video proceedings under our current rules. I would leave it to the discretion of our trial courts to determine 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. I would not implement these rules with immediate effect. The Court should instead publish these proposed changes for public comment and conduct a public hearing before imposing on our trial courts a process that was put in place on an emergency basis. In short, we should follow our standard process and promulgate changes to our court rules in due course based on the lessons learned from this crisis, not by imposing procedures that represented our best efforts in responding to it.

VIVIANO and BERNSTEIN, JJ. (*concurring in part and dissenting in part*). We write this joint statement because we strongly believe it is time for this Court to stop administering the state courts by issuing emergency orders and we share a deeply held conviction that our state courts should return to in-person proceedings as much and as quickly as possible. We recognize that there are continued public health challenges due to the COVID-19 pandemic, but we have practiced law and managed courts long enough to know that our chief judges in Michigan are up to the task of managing their own court

facilities in a safe, responsible, and efficient manner. We also have great confidence in the ability of our trial judges to manage their dockets and their courtrooms, keeping a keen eye on the safety of their staff, attorneys, litigants, and the public.

We agree with the Court's order today to the extent it rescinds many of our COVID-19-related administrative orders, but we dissent to the extent that the Court continues to require expanded use of remote proceedings.[3] The administrative orders that we issued since the start of the COVID-19 pandemic represented our best efforts to address a complex problem that affected numerous facets of our court system. But they, along with the return to full capacity directives issued by the State Court Administrative Office, have prevented large-scale, in-person judicial proceedings across most of the state for the past 18 months. This has contributed to a massive backlog of in-person proceedings that simply cannot be alleviated by the use of more remote proceedings.[4] We believe, however, that the time has come to end these emergency measures and restore normal operating procedures.[5]

Those procedures reflect centuries of tradition that have placed courtrooms and courthouses at the center of the judicial process. There is a reason that our taxpayers

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[3] We agree with the Court's rescission of Administrative Order Nos. 2020-1, 2020-6, 2020-9, 2020-13, 2020-14, and 2020-19 and the retention of Administrative Order No. 2021-2. We also agree with imposing the conditions previously found in AO 2020-6 on any remote hearings that are conducted. But, for the reasons discussed in this statement, we strongly disagree with the requirement that courts use remote participation technology "to the greatest extent possible," MCR 2.407(G); MCR 6.006(E); and with the court rule amendment permitting judges to preside over cases from a location other than the judge's courtroom by suspending Administrative Order No. 2012-7.

[4] See Brand-Williams, The Detroit News, *Michigan Courts Face Massive Backlog of Felony Cases Awaiting Trial* (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/68GH-VW2Y]. The backlog consists of jury trials, preliminary examinations, and other hearings that must be conducted in person. To answer this docket crisis with a renewed emphasis on remote hearings seems to us at best misguided.

[5] In making these court rule changes, the Court again deviates from our general practice of first providing notice and an opportunity to comment, and conducting a public hearing on proposed rule changes prior to adopting them, see MCR 1.201(A) through (C), (E). Although we have the ability to dispense with the notice requirements if "there is a need for immediate action or if the proposed amendment would not significantly affect the delivery of justice," MCR 1.201(D), neither of these conditions is met here. Nor are these changes of the sort that would typically be placed in permanent court rules, since the language is vague and aspirational.

have provided each judge in Michigan with a separate courtroom. They represent more than just physical structures.[6] Courthouses hold "symbolic importance" in our society, and their presence "affirm[s] the presence of a community, of a society, by reflecting its values back to itself."[7] The courthouse itself reinforces the importance of what occurs within its walls.[8] Suffice it to say that this symbolism can be lost during remote hearings.[9]

The overemphasis on remote hearings reflected in today's court rule amendments risks—in a very real way—depriving people of their day in court. Even prior to the COVID-19 pandemic, research revealed concerns about the impacts caused by holding proceedings remotely.[10] Remote proceedings may "make it more difficult for the judge

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[6] We emphasize the importance of the courthouse and courtroom to acknowledge the authority and significance that these spaces have persistently held in our society. Despite that, we continue to acknowledge that courthouses may present accessibility concerns for certain populations. See Pant, McAnnany, and Belluscio, New York Lawyers for the Public Interest, *Accessible Justice: Ensuring Equal Access to Courthouses for People with Disabilities* (March 2015) <https://www.nylpi.org/wp-content/uploads/2015/03/Accessible-Justice-NYLPI-3-23-15.pdf> (accessed July 20, 2021) [https://perma.cc/8H4F-7DJX].

[7] Rowden & Wallace, *Remote Judging: The Impact of Video Links on the Image and the Role of the Judge*, 14 Int'l J L Context 504, 518 (2018).

[8] 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 (June 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.").

[9] See Wolfson, Louisville Courier Journal, *Think a Court Cat Filter Is Weird? Try Virtual Court with Beer, Bikinis and Clients in Bed* (December 18, 2020) <https://www.courier-journal.com/story/news/2020/12/18/amid-covid-19-pandemic-remote-court-hearings-bare-naked-truth/3932436001/> (accessed July 20, 2021) [https://perma.cc/X8GJ-F62G] (providing examples of parties and attorneys taking remote court appearances less seriously than warranted).

[10] "Video hearings are now a common feature in immigration court, and have been used regularly since the 1990s. The use of videoconferencing, even without the petitioner's consent, is specifically authorized by statute." Bannon & Adelstein, Brennan Center for Justice, *The Impact of Video Proceedings on Fairness and Access to Justice in Court* (September 10, 2020) <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>, p 4 (accessed July 17, 2021) [https://perma.cc/68JE-5TPV]. The American Bar Association has previously recommended that the use of video hearings "be limited to procedural (as opposed to substantive) hearings and that respondents should be entitled to knowing and voluntary

to both embody and maintain the authority of the court," and appearance via video may not "adequately convey the authority of the court," which can affect the solemnity of the proceedings.[11] Well-settled caselaw holds that, in the context of criminal trials, in-person testimony can be essential to a defendant's constitutional rights.[12] Even commentators who support expansion of videoconferencing technologies in judicial proceedings advise proceeding with caution before adopting radical changes that risk impinging on litigants'

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consent to proceeding" via video, given the due process concerns that were raised by the use of such technology. American Bar Association Commission on Immigration, *2019 Update Report: Reforming the Immigration System* (March 2019) <https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf>, p 18 (accessed July 21, 2021) [https://perma.cc/W3TW-RRL3]. See also Eagly, *Remote Adjudication in Immigration*, 109 Nw U L Rev 933, 941 (2015) ("Detainees and their attorneys are frequently discouraged by the numerous logistical and technical difficulties associated with litigating televideo cases, such as unpredictable interruptions in the video feed, challenges in communicating with interpreters not physically present in the same room, and the impossibility of confidential attorney-client communication over a public courtroom screen. Detainees removed from the courtroom by the video procedure may be less likely to understand their rights in the removal process, less likely to request a court continuance to find a lawyer, and, especially for those who cannot find or afford an attorney, less equipped to assert their claims and file the required paperwork.").

[11] *Remote Judging*, 14 Int'l J L Context at 515-516.

[12] The Sixth Amendment of the United States Constitution states, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" See also Const 1963, art 1, § 20. In *People v Jemison*, 505 Mich 352, 356 (2020), we unanimously adopted the Supreme Court's position in *Crawford v Washington*, 541 US 36, 68 (2004), that the Confrontation Clause requires face-to-face in-person cross-examination of witnesses providing testimonial evidence in criminal matters unless a witness is unavailable and the defendant had a prior opportunity for cross-examination.

"The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' *Pointer* v. *Texas*, 380 U.S. 400, 404 (1965)." *Coy v Iowa*, 487 US 1012, 1017 (1988). Noting the differences between face-to-face testimony versus even two-way video testimony, the Ninth Circuit has held that "the use of a remote video procedure must be reserved for rare cases in which it is 'necessary.' " *United States v Carter*, 907 F3d 1199, 1206 (2018), quoting *Maryland v Craig*, 497 US 836, 850 (1990).

rights and access to justice more broadly.[13] Indeed, the benefits of remote proceedings are often more apparent than their costs, but there is a risk that judges and judicial policymakers may "face pressure to overemphasize values such as speed, cost savings, and reduced workloads at the cost of fair proceedings."[14]

Michigan trial judges already have the authority and discretion to allow videoconferencing and other means of remote participation when appropriate.[15] We, of course, should carefully consider any lessons learned during the pandemic and whether any new remote participation or other procedures should be formally adopted in the future.[16] However, any changes we might make should be considered through our

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[13] *Impact of Video Proceedings*, p 2 (noting that the expanded use of remote technology "raises critical questions about how litigants' rights and their access to justice may be impacted").

[14] Bannon & Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 Nw U L Rev 1875, 1909 (2021).

[15] See, e.g., MCR 2.004; MCR 2.407; MCR 3.904; MCR 6.006.

[16] In 2001, the Florida Supreme Court repealed a rule that had been adopted on an interim basis in 1999, which allowed for juvenile detention hearings to be conducted by video. *Amendment to Florida Rule of Juvenile Procedure 8.100(A)*, 796 So 2d 470 (2001). In lieu of adopting a permanent rule change, a pilot program had been initiated and later adopted on an interim basis. *Id.* at 472. More studies were conducted, and the Florida Supreme Court revisited the proposed amendment upon the expiration of a 90-day period. *Id*. at 473. The Florida Supreme Court found that, although the proposed amendment allowed for the exercise of judicial discretion, "[i]n practical operation, the electronic proceeding became mandatory, and not merely an option to be implemented as appropriate." *Id*. at 472. The Florida Supreme Court highlighted the concerns raised by the Florida Public Defender Association: "Specifically, many observed that there was no proper opportunity for meaningful, private communications between the child and the parents or guardians, between the parents or guardians and the public defender at the detention center, and between a public defender at the detention center and a public defender in the courtroom." *Id*. at 473. Although the Florida Supreme Court noted that the proposed amendment had some benefits, "our youth must never take a second position to institutional convenience and economy." *Id*. at 474. We find it particularly noteworthy both that the Florida Supreme Court utilized a process that allowed it to collect data and input from key stakeholders *before* committing to a permanent rule change and that, upon further reflection, the Florida Supreme Court decided *against* adopting a rule change expanding the use of video for these hearings.

normal administrative process, after giving notice to the public and an opportunity for all stakeholders to comment on any changes that we are considering. Instead, the Court converts its emergency orders into permanent modifications to the court rules and gives them immediate effect—a process that may result in more confusion, delays, and distrust in the court system.

To have any legitimacy, emergency orders should come to an end once the emergency has subsided. We believe it is imperative for this Court to return to our prepandemic practices and procedures, bearing in mind that any permanent changes to the court rules could and should first be considered through the normal administrative process. Access to the courts is vital, and we believe we should offer an opportunity to hear from anyone who may be affected by sweeping changes to courtroom procedures before making them permanent. It is also important for us to allow our chief judges and other trial court judges the discretion they have always had to manage their facilities, courtrooms, and dockets. They have their work cut out for them in confronting the massive backlog caused by the pandemic. We should get out of their way and let them go to work. We have confidence that our trial judges and their staffers will get the job done. We respectfully 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.

July 26, 2021

Clerk