

Order

**Michigan Supreme Court
Lansing, Michigan**

January 17, 2024

Elizabeth T. Clement,
Chief Justice

ADM File No. 2024-01

Appointments to the
Commission on Diversity,
Equity, and Inclusion in the
Michigan Judiciary

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

On order of the Court, pursuant to Administrative Order No. 2022-1, the following members are reappointed to the Commission on Diversity, Equity, and Inclusion in the Michigan judiciary for first full terms beginning on January 1, 2024 and ending on December 31, 2026.

- Josh Hilgart (on behalf of the Michigan State Planning Body)
- J. Dee Brooks (on behalf of the Prosecuting Attorneys Association of Michigan)
- Erika Bryant (on behalf of the State Bar of Michigan Board of Commissioners)
- Jacqueline Freeman (on behalf of a Michigan ABA-Accredited Law School)
- Angie Martell (of behalf of an Affinity Bar Association)
- Belem Morales (on behalf of an Affinity Bar Association)

In addition, Richard Lynch (Michigan Court Administration Association) is appointed for a term beginning on January 1, 2024 and ending on December 31, 2026; Alize Asberry Payne (on behalf of Michigan Association of Counties) is appointed for the remainder of a partial term beginning immediately and ending on December 31, 2025; David W. Jones is appointed (on behalf of the Michigan Indigent Defense Commission) for the remainder of a partial term beginning immediately and ending on December 31, 2025; and Hon. Melissa L. Pope (on behalf of Michigan Tribal State-Federal Judicial Forum) is appointed for the remainder of a partial term beginning immediately and ending on December 31, 2024.

Pursuant to Administrative Order No 2022-1, the following individuals, or their designees, will serve by virtue of their role within their organization.

- Supreme Court Justice Elizabeth M. Welch
- State Bar of Michigan Executive Director Peter Cunningham
- Michigan State Bar Foundation Executive Director Jennifer Bentley

In addition, the State Court Administrator or their designee serves by virtue of their role within the State Court Administrative Office. Deputy State Court Administrator Elizabeth Rios-Jones has been designated to serve in this role.

WELCH, J. (*concurring*). The Court's order today simply appoints four new members to the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary (the DEI Commission) and reappoints several existing members to another term on the DEI Commission. Our Court routinely issues orders naming individuals to the countless committees and commissions that fall under the purview of the Michigan Supreme Court. Such appointments are not controversial and, to my knowledge, rarely—if ever—are accompanied by a dissenting statement given the robust volume of wisdom, experience, and time these volunteers provide to the judiciary. To be clear, today's order does not adopt any official plan, nor does it implement any recommendations from the DEI Commission. Justice VIVIANO has previously penned dissenting statements to the order creating the DEI Commission, the appointment of the DEI Commission's initial commissioners, and the recent appointment of the DEI Commission's new co-chair. See Administrative Order No. 2022-1, 508 Mich ___, ___ (January 5, 2022) (VIVIANO, J., dissenting); Appointments to the Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary, 509 Mich ___ (June 16, 2022) (VIVIANO, J., dissenting); Administrative Order No. 2023-1, ___ Mich ___ (November 29, 2023) (VIVIANO, J., dissenting). As I have done in the past, I once again respond to his dissent. See Administrative Order No. 2022-1, 508 Mich ___ (January 5, 2022) (WELCH, J., concurring); Administrative Order No. 2023-01, ___ Mich ___ (November 29, 2023) (WELCH, J., concurring).

The DEI Commission devoted extensive time throughout 2023 meeting monthly as both a full commission and in work groups to create a *draft* strategic plan. A strategic plan is a guiding document. Such plans outline goals and priorities for future work. On December 15, 2023, the DEI Commission hosted a public meeting to receive comment on this proposed strategic plan. The DEI Commission also received helpful written public comment in response to a publicly available survey. As the introduction to the draft plan acknowledges:

Much of the work of the Commission will require collaboration with other judicial commissions and outside stakeholders. For that reason, this plan is not a step-by-step agenda but rather a high-level vision to inspire and guide us as we move forward to advance fundamental principles of the rule of law. We urge Michigan's citizenry, especially judges and attorneys across the state, to carefully review this plan, to participate in our implementation workgroups, and to enthusiastically collaborate with us in this important work.

We also ask the public to take note of this strategic plan, to support their local courts as they develop implementation plans, and to join us in working together toward building a judiciary that reflects Michigan's diversity and is trusted by all. [DEI Commission, *Draft Strategic Plan* (developed Winter 2023), p 2, available at

<https://www.courts.michigan.gov/4ae4a4/siteassets/reports/special-initiatives/dei-commission-2023-draft-strategic-plan_v10-for-final-review.pdf> (accessed January 8, 2024) [<https://perma.cc/N26T-4Y3N>].]

It is that draft strategic plan with which Justice VIVIANO takes issue.

Justice VIVIANO and I both agree that “[a]ll should be welcomed in our court system, as parties, attorneys, judges, and court staff, and all should be afforded respect and equal treatment under the law.” It is therefore difficult to understand his continued objection to the existence of the DEI Commission itself or his objection to the draft strategic plan offered for public comment by the DEI Commission. Certainly, the goal of having the judges and employees who staff Michigan’s courts reflect the communities they serve is not objectionable. If a local community has, for example, a large population that speaks a non-English language, it would be important for the court to be able to assist those individuals, and accomplishing this might best be done by employing individuals who speak the relevant language and are familiar with the unique cultural mores associated with the community. This is simply a best practice.

The same can be said for basic human resources best practices designed to cultivate the best and brightest applying for jobs within the state’s court systems. There is nothing objectionable about encouraging the development of pipelines to the judiciary, which, like the legal profession itself, often begins with exposing students to career opportunities at various points in their educational experience. While Justice VIVIANO questions how the DEI Commission will accomplish its long-term goals, nothing in the DEI Commission’s strategic plan suggests that standards must be lowered or that merit not be considered. Hiring candidates from diverse backgrounds does not mean that the best and brightest will not be hired.¹ It actually means the opposite. A diverse applicant pool ensures that more

¹ Numerous studies have in fact documented that diverse boards and leadership teams lead to better performing organizations. See, e.g., Gomez & Bernet, *Diversity Improves Performance and Outcomes*, 111 JAMA 383-392 (2019), article preview available at <<https://doi.org/10.1016/j.jnma.2019.01.006>> (accessed January 8, 2023) [<https://perma.cc/5QYF-DUKB>] (finding that patients fare better when cared for by more diverse teams in a healthcare setting; that diversity improves innovation, team communication, and risk assessment; and that performance metrics also improve with increased diversity); Bernile et al, *Board Diversity, Firm Risk, and Corporate Policies*, 127 J Fin Econ 588-612 (2018), article preview available at <<https://doi.org/10.1016/j.jfineco.2017.12.009>> (accessed January 8, 2023) [<https://perma.cc/FR8C-A2AA>] (finding that greater board diversity leads to lower volatility and better performance due in part to diverse boards being more likely to adopt more persistent and less risky financial policies and greater investment in research and development and innovation processes); Strauss, *Forbes Magazine, More Evidence That Company Diversity Leads to Better Profits* (January 25, 2018), available at

of the best and brightest are considered. Any assumption to the contrary is unfortunate and disregards the fact that the legal profession and judiciary were historically nearly homogenous in gender, race, and ethnicity. While much has improved within the judiciary since the founding of our country and Michigan’s ascension to statehood, this hardly means that further progress is not necessary or desirable.

As to the concerns raised by the dissent about including “individuals with a variety of lived experiences in judicial systems in” the DEI Commission’s “efforts to review, inform, and influence changes to judicial practices and policies,” there is little—if any—difference between the phrase “lived experience” and “life experience.” Both focus on the first-hand experiences of individuals.² Surely the first-hand, personal experiences of

<<https://www.forbes.com/sites/karstenstrauss/2018/01/25/more-evidence-that-company-diversity-leads-to-better-profits/?sh=15d04fc11bc7>> (accessed January 8, 2024) [<https://perma.cc/4H53-YEP4>] (presenting data compiled by McKinsey & Company and the Peterson Institute for International Economics); Hunt et al, McKinsey & Company, *Delivering Through Diversity* (January 2018), p 1, available at <https://www.mckinsey.com/~media/mckinsey/business%20functions/people%20and%20organizational%20performance/our%20insights/delivering%20through%20diversity/delivering-through-diversity_full-report.pdf> (accessed January 8, 2024) [<https://perma.cc/2AK9-HRKM>] (finding that “[t]he statistically significant correlation between a more diverse leadership team and financial outperformance demonstrated three years ago continues to hold true on an updated, enlarged, and global data set”); Noland et al, *Is Gender Diversity Profitable? Evidence from a Global Survey* (Peterson Institute for International Economics, Working Paper No. 16-3, February 2016), p 1, available at <<https://www.piie.com/sites/default/files/documents/wp16-3.pdf>> (accessed January 8, 2024) [<https://perma.cc/GC2L-TJTJ>] (“Analysis of a global survey of 21,980 firms from 91 countries suggests that the presence of women in corporate leadership positions may improve firm performance. This correlation could reflect either the payoff to nondiscrimination or the fact that women increase a firm’s skill diversity.”). But see Creary et al, *When and Why Diversity Improves Your Board’s Performance*, Harvard Business Review (March 27, 2019), available at <<https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance>> (accessed January 8, 2024) [<https://perma.cc/BQN7-7554>] (concluding that interviews with 19 board directors suggested that “diversity doesn’t guarantee a better performing board and firm; rather, the culture of the board is what can affect how well diverse boards perform their duties and oversee their firms”).

² For example, one reputable source has described “lived experience” as “[p]ersonal knowledge about the world gained through direct, first-hand involvement in everyday events rather than through representations constructed by other people. It may also refer to knowledge of people gained from direct face-to-face interaction rather than through a technological medium.” Oxford Reference, *Lived Experience*

individuals who have interacted with the judicial system at an internal or external level are highly relevant to considering changes to how courts operate or deliver services.

No one expects decision-makers to reform the judicial system on the basis of the subjective viewpoints of a few individuals, but that does not render the subjective views and experiences of end users irrelevant when considering what can be improved. I see this as no different from our judiciary’s embracing the employee- and user-centered design models now commonly used by the private sector when recruiting employees or designing and delivering products and services. See, e.g., Apple, *Careers at Apple* <<https://www.apple.com/careers/us/life-at-apple.html>> (accessed January 8, 2024) [<https://perma.cc/AW7L-5P23>] (“Bring your lived experience to Apple and see how much more there is to do, to share, and to discover.”); IDEO, *Designing Inclusively* <<https://www.ideo.com/inclusion>> (accessed January 8, 2024) [<https://perma.cc/BZY9-ZWCH>] (“Today, we are diversifying our teams with designers who come from a range of lived experiences and backgrounds, and IDEO’s portfolio features more examples of co-design than ever before.”).

Our courts serve the public. Intentionally seeking input from actual end users and those affected by the functions and actions of Michigan’s judicial system will be helpful and will reveal to decision-makers concerns that might otherwise be missed. Additionally, many of the questions raised by my dissenting colleague are topics that should be discussed as a part of ensuring that the judiciary operates fairly and transparently. I fail to see how eliminating the DEI Commission or failing to have a body consider the challenges facing our judiciary in the first place does anything to promote progress.

I once again thank the volunteer commissioners who have devoted a year to putting together a thoughtful strategic plan that will guide the DEI Commission’s work moving forward. The commissioners are highly experienced judges, attorneys, and community members with a deep dedication to ensuring that the justice system is fair and transparent. It should go without saying that these commissioners will, of course, follow the law. At the end of the day, the DEI Commission’s task is to present recommendations to the Michigan Supreme Court for potential implementation as the Court sees fit. While there is much work to do, I am grateful to this highly skilled group of thoughtful leaders shepherding this important work into the future.

VIVIANO, J. (*dissenting*). Today the Court makes more appointments to the Commission on Diversity, Equity, and Inclusion (DEI). I have no objection to the individual appointees, but I continue to object to the existence of the Commission itself. When it was formed, its aims and views were unclear. See Administrative Order No. 2022-1, 508 Mich ___, ___ (January 5, 2022) (VIVIANO, J., dissenting). Those positions have

<<https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100109997>> (accessed January 7, 2024).

come into focus, however, with the Commission’s recently published draft strategic plan.³ In it, the Commission appears to have taken sides in the political debate roiling institutions across the country. Nothing good will come of this.⁴

At its best, the draft strategic plan speaks in gauzy generalities common in bureaucracies. What does it mean, for example, to have an office “responsible for convening relevant coordinators from the local courts and managing the implementation of initiatives to advance representation across the justice system”?⁵ And what new actions should be undertaken to ensure that “[t]hose served by the justice system are heard, valued and respected”?⁶ How are we to “[e]xplicitly include individuals with a variety of lived experiences in judicial systems in this Commission’s efforts to review, inform, and influence changes to judicial practices and policies”?⁷ “Lived experience” strikes me as exactly the sort of word George Orwell described in *Politics and the English Language*: one for which there is no agreed-upon definition and is “used in a consciously dishonest way. That is, the person who uses [the word] has his own private definition, but allows his hearer to think he means something quite different.” Orwell, *Politics and the English Language* (April 1946), in 4 *The Collected Essays, Journalism and Letters of George Orwell* (Orwell & Angus eds) (New York: Harcourt, Brace & World, 1968), p 133.

³ Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary, *Draft Strategic Plan* (developed Winter 2023), available at <https://www.courts.michigan.gov/4ae4a4/siteassets/reports/special-initiatives/dei-commission-2023-draft-strategic-plan_v10-for-final-review.pdf> (accessed January 2, 2024) [<https://perma.cc/N26T-4Y3N>].

⁴ Other states, recognizing that the proliferation of DEI programs sows racial and political division, have begun to pare them back. See The Editorial Board, *The DEI Rollback of 2023*, Wall Street Journal (December 26, 2023) <<https://www.wsj.com/articles/dei-wisconsin-oklahoma-state-universities-88ecc684>> (accessed January 2, 2024); Fink, *A Look at New Texas Laws Taking Effect Jan. 1 and How They Impact You*, CBS News Texas (December 28, 2023) <<https://www.cbsnews.com/texas/news/look-new-texas-laws-taking-effect-january-1st-how-they-impact-you/>> (accessed January 2, 2024) [<https://perma.cc/RPS6-3JZY>]; Diaz, *Florida Gov. Ron DeSantis Signs a Bill Banning DEI Initiatives in Public Colleges*, NPR (May 15, 2023) <<https://www.npr.org/2023/05/15/1176210007/florida-ron-desantis-dei-ban-diversity>> (accessed January 2, 2024) [<https://perma.cc/ZY2D-ULLS>].

⁵ *Draft Strategic Plan*, p 21.

⁶ *Id.* at 8.

⁷ *Id.* at 9 (boldface omitted).

Perhaps by “lived experience” the Commission means the purely subjective experience of individuals navigating the courts. This might be why the Commission discusses “lived experience” in the same breath as “user feedback” and “public satisfaction and workforce excellence initiatives.”⁸ Yet this poses a dilemma, for under this view of “lived experience,” the individual’s subjective experiences are “not subject to dispute . . . , with no allowance for the way the narrative may be self-serving or just plain wrong.” Karson, *The Problem with Claims of “Lived Experience”*, *Psychology Today* (July 20, 2021) <<https://www.psychologytoday.com/us/blog/feeling-our-way/202107/the-problem-claims-lived-experience>> (accessed January 2, 2024). Does the Commission wish to cede the development of judicial policies to complaints or perceptions that are self-serving or have no basis in reality? And how can, as the Commission hopes, our hiring practices be deployed to “validate lived experience”? Does this mean that competency at the job is no longer the overriding consideration in employment? If so, how will it increase the morale of judicial employees who, up until now, believed they were being hired, evaluated, and promoted based upon merit and job performance?

More troubling still, the Commission’s view of the still-undefined terms of “diversity,” “equity,” and “inclusion” appears to be a narrow and divisive one. The draft plan recommends “[i]mprove[d] efforts to confidentially and effectively identify, collect, and publish data regarding,” among other things, “[t]he demographic makeup of all internal court staff.”⁹ The focus, therefore, does not seem to be on diversity of viewpoints and professional experience but rather on diversity of protected characteristics such as race, gender, and ethnicity. The data collection appears to be a prelude to another objective that may be laudable in the abstract: to have a “workforce that reflects the[] community.”¹⁰ And, indeed, some of the report’s proposals on this point are not objectionable. For example, it is always a good practice to make sure internships and job postings are available to a broad job-seeking audience. But, like other objectives in the report, its true meaning is obscure and its implementation in practical terms will be fraught. Does it mean that the racial, gender, and ethnic composition of the workforce must be made to approximate that of the state as a whole, or certain local communities? Would this not require decision-making based on these characteristics? If so, what is the ultimate objective here: to obtain an equality of outcomes or to eliminate decision-making on the basis of protected characteristics? If the latter, I do not understand how the Commission’s plan can work. It would be truly Orwellian logic to imply that we can banish considerations of race, for example, by explicitly making race a motivating factor in our hiring practices. And, as any first-year law student should know, considering race or other protected characteristics in hiring decisions runs into constitutional and other legal problems. Administrative Order

⁸ *Draft Strategic Plan*, p 9.

⁹ *Draft Strategic Plan*, p 10 (boldface omitted).

¹⁰ *Id.* at 11.

No. 2023-1, ___ Mich ___, ___ (November 29, 2023) (VIVIANO, J., dissenting) (“The United States Supreme Court recently reaffirmed the need for neutral decision-making, striking down the use of race in college admissions programs. *Students for Fair Admissions, Inc v President & Fellows of Harvard College*, 600 US 181, 230 (2023). The Court’s reasoning has potential ramifications far outside the educational setting. See *id.* at 287-291 (Gorsuch, J., concurring) (explaining that the schools’ actions would be unlawful under terms in the Civil Rights Act that apply broadly to various types of entities).”).

The ideology at the heart of this program also extends to efforts to reshape the judiciary itself. It is not enough, now, for courts to neutrally apply the law. We must also “[e]stablish a robust pipeline of potential judges and leaders in the justice system,” with special emphasis on “underrepresented groups.”¹¹ But it is for the people to elect, and the Governor to appoint, judges. It is highly questionable that this Court should be endorsing or affiliated with any entity that is looking to develop candidates for the judiciary based on our own criteria. Will we now open a judicial academy only for people of certain preferred races, ethnicities, genders, or sexual preferences? Straying far outside our judicial lane into such legally and ethically questionable territory will not improve public opinion of the judiciary as impartial arbiters of the disputes that come before us.

Strikingly, the Commission’s objective of “judicial vitality” includes the line that “[j]udges are fairly held accountable for their responsibilities and actions.”¹² I have no idea what this ominous assertion means in practice, but the report offers some clues. In discussing “judicial vitality,” the report recommends ways that judicial leadership can “reflect[] Michigan’s communities.”¹³ One, which has already apparently been implemented, is changing the standards for chief judge applications and appointments. Specifically, the applicants now must explain how they will support the DEI mission. See AO 2022-1, 508 Mich at ___ (VIVIANO, J., dissenting). The result is nothing short of an ideological purity test for chief judge appointments. In this context, the references to judicial accountability are stark. Will judges now be “held accountable” if their political views differ from the members of this Court? Will they be subject to discipline if they adhere to their oaths of office and promote equality of opportunity instead of equal outcomes?

¹¹ *Id.* at 16 (boldface omitted).

¹² *Id.*

¹³ *Id.* at 18.

All should be welcomed in our court system, as parties, attorneys, judges, and court staff, and all should be afforded respect and equal treatment under the law. As I have stated before, I strongly believe that we should “lift obstacles that prevent full and equal participation in our courts.” *Id.* at _____. To this end, our courts should embrace a diversity of viewpoints and background experiences in hiring practices. What we should not do, however, is continue the dangerous game of classifying and valuing individuals based on collective identities and demographics. This can only sow division and conflict. I fear that the DEI Commission is committed to such a path, and I therefore 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 17, 2024

A handwritten signature in black ink, appearing to read "Larry S. Royster", written over a horizontal line.

Clerk