

**REPORTING LIVE FROM ZOOM COURT: THE COVID-19  
PANDEMIC’S EFFECT ON MEDIA ACCESS TO COURT  
PROCEEDINGS**

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I. INTRODUCTION

On October 8, 2020, seven men faced state terrorism charges in connection with a plot to kidnap Michigan Governor Gretchen Whitmer and attack the state capitol building.<sup>1</sup> The alleged plot rapidly gained international media attention, and the focus turned to identifying the men

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1. Press Release, Department of Attorney General, AG Nessel Charges 7 Under Michigan’s Anti-Terrorism Act as Part of Massive Joint Law Enforcement Investigation (Oct. 8, 2020), [https://www.michigan.gov/ag/0,4534,7-359-92297\\_47203-541891--,00.html](https://www.michigan.gov/ag/0,4534,7-359-92297_47203-541891--,00.html) [[https://web.archive.org/web/20210110003224/https://www.michigan.gov/ag/0,4534,7-359-92297\\_99936-541891--,00.html](https://web.archive.org/web/20210110003224/https://www.michigan.gov/ag/0,4534,7-359-92297_99936-541891--,00.html)]. In total, thirteen men were charged in connection with the kidnapping plot; however, only seven men were charged in state court. See David Eggert & Ed White, *13 Charged in Plots Against Michigan Governor, Police*, ASSOCIATED PRESS (Oct. 8, 2020), <https://apnews.com/article/michigan-checks-and-balances-archive-gretchen-whitmer-da09ca66cd8d5f36722021d3593425ff> [<https://web.archive.org/web/20210301051554/https://apnews.com/article/michigan-checks-and-balances-archive-gretchen-whitmer-da09ca66cd8d5f36722021d3593425ff>].

and learning about their purported motives.<sup>2</sup> Absent the COVID-19 pandemic, Michigan newsrooms would have likely sent staffers to cover the group's arraignments in district court.<sup>3</sup> However, because courts remained closed, virtual hearings allowed journalists and the public to watch the full and raw proceedings without ever leaving their homes or newsrooms.<sup>4</sup> The virtual format has propelled Michigan courts into the twenty-first century and created a roadmap for other courts around the nation to follow.

While courts remain deeply tied to tradition, the COVID-19 pandemic presented challenges that forced chambers to make changes to maintain day-to-day operations while ensuring access to justice and the public's right to access court proceedings.<sup>5</sup> The pandemic forced courts to immediately implement and adjust to new processes and deploy technologies that allowed the public and press to gain access to proceedings while maintaining appropriate health protocols.<sup>6</sup> Similarly, media organizations faced challenges gathering information remotely, especially where courts placed undue restrictions on journalists' access to judicial proceedings.<sup>7</sup>

This Note examines how Michigan courts maintained media access to proceedings during the COVID-19 pandemic.<sup>8</sup> Specifically, in light of the expansive constitutional and state protections favoring public access to courts, this Note demonstrates how the COVID-19 pandemic presented an

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2. See James Clayton, *FBI Busts Militia 'Plot' to Abduct Michigan Gov Gretchen Whitmer*, BBC (Oct. 9, 2020), <https://www.bbc.com/news/world-us-canada-54470427> [<https://web.archive.org/web/20210211200858/https://www.bbc.com/news/world-us-canada-54470427>].

3. Arraignments generally offer journalists their first look at a defendant in court. See Katie Van Syckle, *Legal Savvy. Few Lunch Breaks. How Reporters Cover a Trial.*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/11/insider/court-reporters-weinstein.html> [<https://web.archive.org/web/20210301053231/https://www.nytimes.com/2020/02/11/insider/court-reporters-weinstein.html>].

4. See, e.g., WXYZ DETROIT, *Arraignment of Shawn Fix, One of 7 Men Charged in Whitmer Kidnapping Plot*, YOUTUBE (Oct. 9, 2020), <https://www.youtube.com/watch?v=fC7n9hLbqSo> [<https://web.archive.org/web/20220228015944/https://www.youtube.com/watch?v=fC7n9hLbqSo>].

5. See Janna Adelstein, *Courts Continue to Adapt to Covid-19*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19> [<http://web.archive.org/web/20210301053830/https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19>].

6. *Id.*

7. See Kevin Penton, *Court Accused of Blocking Public Access to Trials Amid Virus*, LAW360 (June 29, 2020, 11:30 AM), <https://www.law360.com/articles/1287367/court-accused-of-blocking-public-access-to-trials-amid-virus> [<http://web.archive.org/web/20200813062352/https://www.law360.com/articles/1287367/court-accused-of-blocking-public-access-to-trials-amid-virus>].

8. See *infra* Section III.B.

opportunity for courts to reinforce the public right to access proceedings, even in the strangest and most challenging of times.<sup>9</sup> Finally, this Note argues that the public and press' ability to access courtroom proceedings virtually should expand post-pandemic and serve as a blueprint for the federal court system's sluggish transition into the twenty-first century.<sup>10</sup>

## II. BACKGROUND

### *A. A Public Duty: The Roots of Press Access*

The public right to access courtrooms in the United States is deeply rooted in the nation's core democratic principles and adopted customs.<sup>11</sup> English common law traditions, which American courts inherited, abhorred secretive justice and recognized the importance of fair judicial administration.<sup>12</sup> Nearly 400 years ago, the English Parliament acknowledged that the courts' legitimacy was at stake, and abolished secretive Star Chamber proceedings without a public audience.<sup>13</sup> American courts adopted a system which inherently rejected such secrecy, and reinforced the "public" ideal of justice in the Sixth Amendment to the United States Constitution, which guarantees public trials for criminal cases.<sup>14</sup> Further, the First Amendment fortified the public principle of government by protecting members of the press to "bare the secrets of government and inform the people."<sup>15</sup> In fact, James Madison once wrote that "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."<sup>16</sup>

The American justice system reinforces its legitimacy when courtrooms are public and transparent. In 1884, Oliver Wendell Holmes, serving as a justice on the Massachusetts Supreme Judicial Court, opined that "those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy

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9. See *infra* Section III.C.

10. See *infra* Section III.D.

11. G. Michael Fenner, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 430 (1981) (providing that historically civil and criminal trials have been "presumptively open").

12. See Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 AM. J. LEGAL HIST. 326, 334 (2010).

13. *Id.* at 330 (explaining that in 1641, the English Parliament ended the notorious Court of the Star Chamber, which became a symbol for secretive and arbitrary proceedings and abuse of power).

14. U.S. CONST. amend. VI.

15. See *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971).

16. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed. 1910).

himself with his own eyes as to the mode in which a public duty is performed.”<sup>17</sup> Adopting Holmes’ view, the Supreme Court established that members of the press have a right to observe criminal trials as guaranteed by the First and Fourteenth Amendments.<sup>18</sup>

In Michigan, the Legislature in 1961 codified the principle that every state court must be open to the public except in limited circumstances.<sup>19</sup> Further, the Michigan Supreme Court has recognized that “[i]t is basic to a free and open society that public access to trials be maintained.”<sup>20</sup> Historically, members of the press enjoyed the right to access courtrooms and court records, except where records are sealed.<sup>21</sup> Although public access to courts remains generally undisputed, it is common to find disagreement nationwide as it pertains to cameras in the courtroom.<sup>22</sup> However, Michigan has long permitted cameras and recorders in the courtroom as part of “media coverage” of court proceedings.<sup>23</sup> While all fifty states allow some variation of camera presence in their courtrooms, they vary in their level of restricting coverage.<sup>24</sup>

Finally, the actions of federal and state legislators show a clear intent to fortify transparency and access in nearly all aspects of government. For example, the Federal Freedom of Information Act (FOIA) and its state “Sunshine Law” equivalent functions as deliberate passages for public access and observation of government bodies.<sup>25</sup> Such laws establish that

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17. See *Cowley v. Pulsifer*, 137 Mass. 392, 394 (Mass. 1884).

18. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

19. See MICH. COMP. LAWS § 600.1420 (1961) (providing that a courtroom shall be public except in circumstances where the court, for good cause, excludes witnesses or minors, or in cases of national security).

20. See *Detroit Free Press, Inc. v. Recorder’s Court Judge*, 409 Mich. 364, 387, 294 N.W.2d 827, 834 (1980).

21. See MICH. CT. R. 8.119(I).

22. See Ruth A. Strickland, *Cameras in the Courtroom*, THE FIRST AMEND. ENCYC. (2009), <https://www.mtsu.edu/first-amendment/article/989/cameras-in-the-courtroom> [<http://web.archive.org/web/20210228081016/https://www.mtsu.edu/first-amendment/article/989/cameras-in-the-courtroom>].

23. See *Film or Electronic Media Coverage of Court Proceedings*, Michigan Supreme Court Administrative Order No. 1989-1, <https://courts.michigan.gov/Courts/MichiganSupremeCourt/PublicInfoOffice/Documents/ADMINISTRATIVE%20ORDER%20NO%201989-1Amended.pdf> [<http://web.archive.org/web/20210116061906/https://courts.michigan.gov/Courts/MichiganSupremeCourt/PublicInfoOffice/Documents/ADMINISTRATIVE%20ORDER%20NO%201989-1Amended.pdf>] [hereinafter *Media Coverage Administrative Order*].

24. *Id.*

25. See Laura Danielson, *Giving Teeth to the Watchdog: Optimizing Open Records Appeals Processes to Facilitate the Media’s Use of FOIA Laws*, 2012 MICH. ST. L. REV. 981, 987 (2012) (highlighting that the federal government and every state have adopted “sunshine” laws to provide “the information necessary for an informed electorate”).

transparency and access have long guided America's governmental bodies and judicial systems.

*B. An 'Implicit' Right: The Statutes, Cases, Rules, and Orders Governing Public Access*

A number of administrative orders, rules, and statutory provisions govern media and camera access to courtrooms in Michigan. In general, Michigan provides a right to attend both criminal and civil proceedings; however, the right of access is not absolute.<sup>26</sup>

*1. Constitutional Authority*

Although the First Amendment does not expressly delineate press access to courtrooms, the Supreme Court has consistently held that the public right to attend criminal trials is "implicit" in the First Amendment's guarantees.<sup>27</sup> The seminal case is *Richmond Newspapers v. Virginia*, where the Court reasoned that "important aspects of freedom of speech and of the press could be eviscerated" if courts erect a metaphorical gate between the public and its access to criminal trials.<sup>28</sup> Six years later, in *Press-Enterprise v. Superior Court*, the Court extended the right of access to criminal proceedings to preliminary hearings, finding that proceedings cannot be closed "unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"<sup>29</sup>

As such, the right of court access is a qualified one, taking into account important governmental interests, such as the protection of witnesses in grand jury proceedings.<sup>30</sup> Accordingly, the Court adopted a two-pronged test which considers the "experience" and "logic" in determining whether the right of access should be granted in criminal proceedings.<sup>31</sup> Namely, courts must consider: (1) whether the proceeding has historically been open to members of the press and public; and (2) whether "public access

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26. See *Access to Michigan Court Proceedings*, DIGIT. MEDIA L. PROJECT (Sept. 10, 2021), <https://www.dmlp.org/legal-guide/michigan/access-michigan-court-proceedings> [<http://web.archive.org/web/20210228081144/https://www.dmlp.org/legal-guide/michigan/access-michigan-court-proceedings>].

27. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556–57 (1980).

28. *Id.*

29. *Press-Enter. Co. v. Superior Ct. of Cal. for Riverside Cty.*, 478 U.S. 1, 2 (1986) (citing *Press-Enter. Co. v. Superior Ct. of Cal., Riverside Cty.*, 464 U.S. 501, 502 (1984)).

30. *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979) (finding that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings").

31. *Press-Enter. Co.*, 478 U.S. at 9.

plays a significant positive role in the functioning of the particular process in question.”<sup>32</sup> Thus, the right of court access can only be overcome where the government establishes a compelling interest to contain certain information, and if its efforts are narrowly tailored to address that interest.<sup>33</sup>

In practice, the “experience” and “logic” test adopts the deep-rooted presumption that rejects secrecy and favors open courts.<sup>34</sup> Applying the test in *Press-Enterprise v. Superior Court*, the Court found that the “experience” prong was met because preliminary hearings traditionally were accessible to the public.<sup>35</sup> Further, the “logic” prong was met because such accessibility gives “assurances of fairness to both the public and the accused.”<sup>36</sup> In that case, a newspaper sought to obtain transcripts from a preliminary hearing which the trial court denied based on fears that publicity would undermine the accused’s rights to a fair trial.<sup>37</sup> Ultimately, the Court relied on traditional notions of access, going as far back as the early history of England’s open trials, which deemed public trials as “one of the essential qualities of a court of justice.”<sup>38</sup>

Notably, the Supreme Court has never recognized a right of public access to civil proceedings; however, lower courts overwhelmingly have.<sup>39</sup> Additionally, the Court has not decided whether the First Amendment right of public access extends to the use of cameras and recording devices in the courtroom, which scholars have described as “puzzling” in wake of the Court’s expansive treatment of public access to trials.<sup>40</sup> Instead, states have promulgated their own rules regarding audio

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32. *Id.* at 8 (citing *Globe Newspaper Co. v. Superior Ct. for Norfolk Cty.*, 457 U.S. 596, 606 (1982)).

33. *Press-Enter. Co.*, 478 U.S. at 2.

34. See Rory B. O’Sullivan & Catherine Connell, *Reconsidering the History of Open Courts in the Digital Age*, 39 SEATTLE U. L. REV. 1281, 1286 (2016) (reasoning that American rejection of secrecy may be attributed to public backlash of the English Court of the Star Chamber).

35. *Press-Enter. Co.*, 478 U.S. at 10.

36. *Id.* at 9.

37. *Id.*

38. *Id.* at 8.

39. See *Doe v. Sante Fe Indep. Sch. Dist.*, 933 F. Supp. 647, 650 (S.D. Tex. 1996) (finding that multiple circuits have concluded that the “right of the public to attend civil trials is grounded in the First Amendment as well as the common law”); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (holding that the First Amendment secures to the press the right to access civil proceedings).

40. See Kyu Ho Youm, *Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning from Abroad?*, 2012 B.Y.U. L. REV. 1989, 2027 (2012) (comparing the U.S. system to other nations, the author notes that the Court’s failure to promulgate a decision regarding audiovisual devices in courtrooms is “baffling” in light of strong dicta in prior cases advocating for the “open processes of justice”).

and visual recording, as is the case in Michigan.<sup>41</sup> Over the years, state courts have experimented with various policies—some more restrictive than others—regarding camera presence.<sup>42</sup> Yet, all fifty states have allowed camera presence in one form or another.<sup>43</sup>

Finally, in the context of Michigan's Constitution, the plain text of Article I recognizes a right to a public criminal trial,<sup>44</sup> and Michigan has recognized a right to access both criminal and civil proceedings.<sup>45</sup> Further, Michigan generally strongly defends the right to a public trial, noting that courts have protected that public right "whenever violation has been shown."<sup>46</sup> In fact, where public access is denied, the Michigan Court of Appeals provides that freedom of the press requires a hearing to "explore the constitutional and statutory validity of any proffered justifications for noninspection and to determine whether any alternative and less restrictive mechanisms than complete suppression exist."<sup>47</sup> Michigan courts have also applied the two-prong test in *Press-Enterprise v. Superior Court*, examining the place and process of the proceeding and whether it has historically been open to the general public, and whether public access plays a positive role in advancing the justice system.<sup>48</sup> Where both prongs are answered in the affirmative, the court applies a "qualified right of access."<sup>49</sup>

Additionally, Michigan has applied its own balancing test to consider whether a "substantial" reason can overcome the qualified right of access.<sup>50</sup> In *Detroit Free Press v. Macomb Circuit Judge*, the Michigan Supreme Court held that where a motion for closure is made, a judge should schedule a hearing where all interested parties, including members

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41. See Media Coverage Administrative Order, *supra* note 23.

42. See Ruth A. Strickland, *Cameras in the Courtroom*, THE FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/989/cameras-in-the-courtroom> [<http://web.archive.org/web/20210228081016/https://www.mtsu.edu/first-amendment/article/989/cameras-in-the-courtroom>].

43. *Id.*

44. MICH. CONST. art. I, § 20.

45. See *In re Midland Pub. Co., Inc.*, 420 Mich. 148, 162, 362 N.W.2d 580, 588 (1984).

46. See *People v. Williams*, 3 Mich. App. 272, 274, 142 N.W.2d 43, 44 (1966).

47. See *Capital Cities Broad. Corp. v. Tenth Dist. Judge*, 91 Mich. App. 655, 657, 283 N.W.2d 779, 780 (1979).

48. *Detroit News, Inc. v. Recorder's Ct. Judge*, 202 Mich. App. 595, 600, 509 N.W.2d 894, 896 (1993) (citing *Press-Enter. Co. v. Superior Ct. of Cal. for Riverside Cty.*, 478 U.S. 1, 8–9 (1986)).

49. *Id.* at 600–01.

50. See *People v. Kline*, 197 Mich. App. 165, 170, 494 N.W.2d 756, 759 (1992) (holding that only a "substantial" reason is required, rather than a "compelling" reason, to warrant courtroom closure).

of the press, can offer testimony to dispute the closure.<sup>51</sup> Namely, the judge must “explore the constitutional and statutory validity of any proffered justifications for excluding the public and press from any portion of the trial, and determine whether any alternative and less restrictive mechanisms exist.”<sup>52</sup>

## 2. Michigan Statutes and Rules

As provided in MCL § 600.1420, every court in Michigan “shall be public” except for a few limitations.<sup>53</sup> Specifically, the statute provides that courts may, in good cause, (1) exclude “other witnesses in the case when they are not testifying,” (2) exclude all minors who are not a party or witness in actions involving “scandal or immorality,” and (3) exclude the public from matters involving national security.<sup>54</sup> Notably, the statute provides only guidance, thus empowering judges with the discretion to close proceedings as they see fit in the above described exceptions.<sup>55</sup>

Moreover, Michigan Court Rules presume that a courtroom is public, except for a few delineated exceptions.<sup>56</sup> The Michigan Supreme Court has the superintending control to establish, modify, and amend these Rules to “simplify the practice and procedure in all courts of this state.”<sup>57</sup> The promulgation of the court access rules signals the court’s apparent desire to establish a uniform set of standards to ensure adequate courtroom access without legislative interference. Legal scholars view such Rules as evidence of a “strong policy in favor of access to court proceedings by the public.”<sup>58</sup>

Foremost, Rule 8.116 expressly provides that a court “may not limit access by the public” unless (1) a party files a written motion identifying a “specific interest to be protected” or the court finds a reason to protect such interest where that interest outweighs the right of access, (2) where “denial of access is narrowly tailored” and no less restrictive means are available to effectively protect the interest, and (3) the court provides specific reasons, on the record, to limit access.<sup>59</sup> Pursuant to Rule

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51. *Detroit Free Press, Inc. v. Macomb Cir. Judge*, 405 Mich. 544, 549, 275 N.W.2d 482, 484 (1979).

52. *Id.*

53. MICH. COMP. LAWS § 600.1420 (1961).

54. *Id.*

55. *Id.*

56. See MICH. CT. R. 8.116; MICH. CT. R. 8.119.

57. MICH. CONST. art. VI, § 5.

58. See MICH. CT. R. 8.116. *Sessions of Court*, 6 MICH. CT. RULES PRAC., Text R 8.116 (7th ed.).

59. MICH. CT. R. 8.116(D).



8.116(D)(2), any person, including a member of the press, may file a motion to “set aside an order that limits access to a court proceeding,” and if such a motion is denied, the moving or objecting party may file an appeal.<sup>60</sup> While Rule 8.116 provides a clear right to public access, it also offers some room, though limited, for judicial discretion.<sup>61</sup>

Alternatively, Rule 8.119 addresses access to court records and provides that a court may not seal records unless (1) a party files a written motion identifying a “specific interest to be protected,” (2) the court makes a good cause finding in writing or on the record, and (3) there is “no less restrictive means to adequately and effectively protect the specific interest asserted.”<sup>62</sup> Again, before closing such documents, a court is required to hold a hearing to explore the constitutional validity of the closure.<sup>63</sup> Practically, the Michigan Supreme Court’s Office of Public Information provides guidance to journalists which encourage voicing an objection to the judge when a motion is made to close a proceeding or record, and to contact the media outlet’s attorney to file a motion setting aside the order to close the proceeding or record.<sup>64</sup>

### 3. Michigan Administrative Orders

Unlike federal courts, Michigan permits cameras and recorders in the courtroom as part of “film and electronic media coverage of proceedings.”<sup>65</sup> The Michigan Supreme Court has adopted Administrative Order No. 1989-1, which gives members of the press the ability to request access to record proceedings, and such a request is usually granted subject to a few limitations.<sup>66</sup> Specifically, members of the press must submit their written request “not less than three business days before the proceeding is scheduled to begin,”<sup>67</sup> though judges typically excuse the time requirement.<sup>68</sup> Further, the Order establishes that recording equipment should be unobtrusive and shall not pick up recordings of attorney-client conversations, co-counsel conversations, conferences at the judge’s bench,

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60. *Id.*

61. MICH. SUP. CT. OFF. OF PUB. INFO., A JOURNALIST’S GUIDE TO COVERING MICHIGAN STATE COURTS (2014) [hereinafter *Journalist’s Guide*].

62. MICH. CT. R. 8.119(I).

63. *See* *Capital Cities Broad. Corp. v. Tenth Dist. Judge*, 91 Mich. App. 655, 657, 283 N.W.2d 779, 780 (1979).

64. *Journalist’s Guide*, *supra* note 61.

65. *See* *Media Coverage Administrative Order*, *supra* note 23.

66. *Id.*

67. *Id.* Members of the press must complete a “Request and Notice for Film and Electronic Media Coverage of Court Proceedings Form,” provided by the State Court Administrative Office, and submit the form to the court clerk.

68. *Id.*

or any recording of the jurors or the jury selection process.<sup>69</sup> The Order also limits the number of cameras and audio systems allowed in the courtroom, making it so members of the press often make arrangements to combine their resources and establish a pool feed with one or two cameras sharing a live feed to the various press agencies.<sup>70</sup>

In addition to the above limitations, the Order empowers judges with the discretion to “terminate, suspend, limit, or exclude film or electronic media coverage” to keep order in the courtroom, and such a decision is not appealable.<sup>71</sup> The Michigan Court of Appeals has held that all Michigan courts are bound by Administrative Order No. 1989-1, and judges have a “clear legal duty” to abide by its guidelines.<sup>72</sup> However, the Order states plainly that judges maintain the ability to exercise discretion, which in one subsection is described as a “sole discretion” to exclude coverage of identified witnesses, such as sex crime victims and their families, police informants, and undercover agents.<sup>73</sup>

In wake of the COVID-19 pandemic, the Michigan Supreme Court issued a number of administrative orders which authorized judicial officers to conduct proceedings remotely.<sup>74</sup> The availability of teleconferencing technology provided an opportunity to continue

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Detroit Free Press v. Thirty Sixth Dist. Judge*, No. 170071, 1996 WL 33364376, at \*4 (Mich. Ct. App. May 14, 1996).

73. Media Coverage Administrative Order, *supra* note 23.

74. *See* Order Expanding Authority for Judicial Officers to Conduct Proceedings Remotely, Michigan Supreme Court Administrative Order No. 2020-6, [https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08\\_2020-04-07\\_FormattedOrder\\_AO2020-6.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-04-07_FormattedOrder_AO2020-6.pdf) [hereinafter Order No. 2020-6] [[http://web.archive.org/web/20201201003702/https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08\\_2020-04-07\\_FormattedOrder\\_AO2020-6.pdf](http://web.archive.org/web/20201201003702/https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-04-07_FormattedOrder_AO2020-6.pdf)]; Continued Status Quo Court Operations and Phased Return to Full Court Operations, Michigan Supreme Court Administrative Order No. 2020-14, [https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08\\_2020-05-06\\_FormattedOrder\\_AO2020-14.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-05-06_FormattedOrder_AO2020-14.pdf) [hereinafter Order No. 2020-14] [[http://web.archive.org/web/20201017195805/https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08\\_2020-05-06\\_FormattedOrder\\_AO2020-14.pdf](http://web.archive.org/web/20201017195805/https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-05-06_FormattedOrder_AO2020-14.pdf)]; *and* Continuing Order Regarding Court Operations, Michigan Supreme Court Administrative Order No. 2020-19, [https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08\\_2020-06-26\\_FormattedOrder\\_AO2020-19.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-06-26_FormattedOrder_AO2020-19.pdf) [hereinafter Order No. 2020-19] [[http://web.archive.org/web/20210203172037/https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08\\_2020-06-26\\_FormattedOrder\\_AO2020-19.pdf](http://web.archive.org/web/20210203172037/https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-06-26_FormattedOrder_AO2020-19.pdf)].

administering court business consistent with parties' constitutional rights.<sup>75</sup> During the 1918 Flu Pandemic, judges around the United States reduced their caseloads, held outdoor sessions, or closed the courts for the duration of the pandemic.<sup>76</sup> However, the widespread availability of technology in 2020 allowed courtrooms to proceed with day-to-day business without full blanket closures.<sup>77</sup>

The Michigan Constitution empowers the Michigan Supreme Court with the superintending control over all state courts, and the ability to disseminate administrative orders pursuant to its control.<sup>78</sup> The first Order, No. 2020-1, issued March 15, 2020, encouraged trial courts to “maximize the use of technology to enable and/or require parties to participate remotely.”<sup>79</sup> However, the Order did not mention how members of the press or public could gain access to the remote proceedings.<sup>80</sup> Less than one month later, on April 7, 2020, the court issued Order No. 2020-6, which required Michigan judges to make a “good faith effort to conduct proceedings remotely whenever possible,” so long as the proceeding was made available to the public via live-stream or via access to a video recording, “unless the proceeding is closed or access would otherwise be limited by statute or rule.”<sup>81</sup> During this transition, the Michigan Judicial Institute, the education office of the Michigan Supreme Court, provided training materials for judges to adjust to remote proceedings.<sup>82</sup>

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75. See *Public Right to Access Remote Hearings*, MICH. JUD. INST. (July 23, 2020), <https://mjieducation.mi.gov/documents/administrative-qrms/1224-background-legal-stds/file> [<http://web.archive.org/web/20210228081420/https://mjieducation.mi.gov/documents/administrative-qrms/1224-background-legal-stds/file>].

76. See Julian A. Navarro, *Influenza in 1918: An Epidemic in Images*, 125 PUB. HEALTH REP. 9, 12 (2010).

77. Most courts still experienced backlogs due to the in-person closures. Oralandar Brand-Williams, *Michigan Courts Officials Prepare to Reopen — Gradually*, DETROIT NEWS (May 4, 2020, 12:19 PM), <https://www.detroitnews.com/story/news/local/michigan/2020/05/04/michigan-courts-officials-prepare-reopen-gradually/3039995001/> [<http://web.archive.org/web/20200919223620/https://www.detroitnews.com/story/news/local/michigan/2020/05/04/michigan-courts-officials-prepare-reopen-gradually/3039995001/>].

78. MICH. CONST. art. VI, § 4.

79. MICH. SUP. CT., IN RE EMERGENCY PROCEDURES IN COURT FACILITIES 1 (2020) [hereinafter Order No. 2020-1], [https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08\\_2020-03-15\\_FormattedOrder\\_AO2020-1.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-03-15_FormattedOrder_AO2020-1.pdf) [[http://web.archive.org/web/20201125210839/https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08\\_2020-03-15\\_FormattedOrder\\_AO2020-1.pdf](http://web.archive.org/web/20201125210839/https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-03-15_FormattedOrder_AO2020-1.pdf)].

80. See *id.* at 2 (recognizing only that Michigan courts maintained a duty to “remain accessible to the public”).

81. Order No. 2020-6, *supra* note 74.

82. See *id.*

On the same date that the court released Order No. 2020-6, the State Court Administrative Office also offered guidance to judges regarding public and press access.<sup>83</sup> The court convened the Virtual Courtroom Task Force, a group of twenty-eight judges, clerks, administrators, and a prosecuting attorney, to prepare a set of “standards, guidelines, and best practices.”<sup>84</sup> Pertaining to press access, the Task Force reiterated the Order No. 2020-6, providing that video access must be provided before or after a proceeding, unless it is closed, or a statute or court rule permits closure of access.<sup>85</sup> However, the Task Force recommended that courts create a YouTube channel for livestreaming its proceedings, and members of the press could “contact the court to receive the Zoom meeting information to watch proceedings.”<sup>86</sup> Further, the Task Force provided that courts should post daily dockets on its website and indicate which hearings are virtual pursuant to the Order.<sup>87</sup> The court and the Virtual Courtroom Task Force clearly attempted to push Michigan courts toward providing additional opportunities for remote public access.

Since the start of the COVID–19 pandemic, Michigan courts have developed administrative guidance which sets a nationwide example for how courts should establish expansive access to proceedings to members of the public and the press. While there are opportunities to expand and improve the technicalities of access, federal courts can use Michigan as a blueprint to enter the twenty-first century and lift the veil of archaic tradition and overreaching sensitivity.

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83. See MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES, STATE CT. ADMIN. OFFICE (2020), [https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR\\_stds.pdf](https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stds.pdf) [[http://web.archive.org/web/20210101182932/https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR\\_stds.pdf](http://web.archive.org/web/20210101182932/https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stds.pdf)] [hereinafter Virtual Courtroom Task Force Report].

84. *Id.* at 1.

85. *Id.* at 4.

86. *Id.*

87. *Id.* at 3 (noting that “Zoom meeting ID(s) should not be provided to the public or press” to keep courtrooms “secure” and avoid disruption). “Zoom” is owned by Zoom Video Communications, Inc. and refers to a video teleconferencing platform that courts around the United States have used in wake of the COVID–19 pandemic. See Matt Torman, *Zoom Court Is Now in Session: How the Legal World Has Pivoted to Virtual During COVID–19*, ZOOM BLOG (July 23, 2020), <https://blog.zoom.us/zoom-virtual-law-firm-virtual-courtroom-during-covid-19/> [<http://web.archive.org/web/20201227083728/https://blog.zoom.us/zoom-virtual-law-firm-virtual-courtroom-during-covid-19/>].

## III. ANALYSIS

*A. State Supreme Court's Authority to Impose Access Rules*

The Michigan Supreme Court derives its ability to promulgate binding administrative orders under the Michigan Constitution.<sup>88</sup> Specifically, the constitution grants the highest court the “general superintending control over all [state] courts.”<sup>89</sup> While the enormity of the control is unclear, the Michigan Emergency Management Act appears to grant substantial authority to the court during emergency situations.<sup>90</sup> Namely, Section 30.408(2) provides that upon the governor’s declaration of a state of emergency, state agencies “shall cooperate to the fullest possible extent” in the prevention, mitigation, response, and recovery process following an emergency.<sup>91</sup> The Act considers the state’s highest court as a department of state government and compels its cooperation.<sup>92</sup>

Following Governor Gretchen Whitmer’s declaration of a state of emergency on March 10, 2020, the state supreme court issued its first administrative order five days later, which directed trial courts to maximize its uses of technology to administer remote proceedings.<sup>93</sup> The court has rarely exercised its superintending control to the extent the COVID-19 pandemic required.<sup>94</sup> However, in its three key administrative orders governing remote proceedings, the court has never used obligatory language to compel the trial courts to hold proceedings solely remotely.<sup>95</sup> Rather, the court offered mere descriptive guidelines to authorize or encourage courts to develop independent local systems for remote

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88. MICH. CONST. art VI, § 4.

89. *Id.*

90. MICH. COMP. LAWS §§ 30.401–421 (1990).

91. MICH. COMP. LAWS § 30.408(2) (1990).

92. *See id.*

93. *See* Order No. 2020-1, *supra* note 79 (providing that protecting “the public is more important than strict adherence to normal operating procedures or time guidelines standards”).

94. A review of Michigan Supreme Court Administrative Orders dating back to 1968 showed only one other time where the court compelled trial courts to develop an emergency services plan. *See* MICH. SUP. CT., ADMIN. ORD. at 100 (1968–2020) (Admin. Ord. No. 1994–6–Reductions in Trial Court Budgets by Funding Units), <https://courts.michigan.gov/courts/michigansupremecourt/rules/documents/administrative%20orders.pdf> [<http://web.archive.org/web/20210112164137/https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/Documents/Administrative%20Orders.pdf>] (using the term “shall” to compel trial courts to develop an “emergency services plan which outlines what services are essential and must be provided by the court”).

95. *See* Order No. 2020-6, *supra* note 74; Order No. 2020-14, *supra* note 74; Order No. 2020-19, *supra* note 74 (using the word “authorize” to describe the Supreme Court’s role in pushing courts to implement remote proceedings).

proceedings.<sup>96</sup> The broad language suggests that the court intended to preserve local control over the use of remote technology where some jurisdictions may face greater accessibility issues than others. However, to date, there are no known trial court challenges to the state supreme court's authority to create and impose rules governing technology and access.<sup>97</sup>

Notably, the official guidance from the State Court Administrative Office further suggests that employing remote systems are merely suggestive.<sup>98</sup> In its report, the Virtual Courtroom Task Force reiterated that the administrative orders only “authorize” courts to conduct remote proceedings, and the guidance provided in the report is limited to sharing best practices “to assist each court and judicial officer to develop their own procedures.”<sup>99</sup> Such language grants trial courts significant discretion to determine whether remote proceedings are necessary in the first place.<sup>100</sup> The language also permits a trial court to choose its own technology and remote procedures.<sup>101</sup> Importantly, the report notes the minimum legal standards that trial courts must follow to comply with courtroom parties' substantive rights, including parties to individual cases, attorneys, the public, and the press.<sup>102</sup>

### *B. Court Access During a Global Pandemic*

The COVID-19 pandemic created a scenario unlike any other for Michigan Supreme Court Chief Justice Bridget Mary McCormack, who assumed her chief justice role in January 2019.<sup>103</sup> In a telephone interview

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96. *See id.*

97. Every county in Michigan developed independent policies and parameters in accordance with the Michigan Supreme Court administrative orders, and a review of local orders showed no clear push back or conflict with the recommendations provided in the state orders. *See Returning to Full Capacity*, MICH. CTS., <https://courts.michigan.gov/News-Events/covid19-resources/Pages/LAOs-ReturnToFullCapacity.aspx> [<http://web.archive.org/web/20210228081736/https://courts.michigan.gov/News-Events/covid19-resources/Pages/LAOs-ReturnToFullCapacity.aspx>] (last visited Feb. 16, 2022).

98. *See* Virtual Courtroom Task Force Report, *supra* note 83, at 1.

99. *Id.* at 2.

100. *See* DON LEDUC, EFFECT OF INTERPRETATIVE RULES AND GUIDELINES, MICHIGAN ADMIN. L. § 4:23 (2020) (“A guideline cannot have the same effect as a substantive rule, if it attempts to say what the law means, because it does not stand in the same position as a substantive rule; it cannot have the force and effect of law or bind the public and the courts”).

101. *Id.*

102. *See* Virtual Courtroom Task Force Report, *supra* note 83.

103. *See Biography of Chief Justice Bridget Mary McCormack*, MICH. COURTS, <https://courts.michigan.gov/Courts/MichiganSupremeCourt/justices/Pages/Chief-Justice-Bridget-Mary-McCormack.aspx> [<http://web.archive.org/web/20210227113212/https://>

for this Note, Chief Justice McCormack explained that the March 2020 surge in COVID-19 cases made it clear that Michigan courtrooms required temporary closure.<sup>104</sup> Immediately, Chief Justice McCormack notes that her staff was “scrambling” in mid-March to develop a response plan, which included collaborating with county clerks and county commissions to confirm the trial courts had the necessary tech support to make a quick transition to remote proceedings.<sup>105</sup> Interestingly, the state supreme court secured Zoom licenses one year before the start of the pandemic; however, few courts had the proper training on how to use the platform.<sup>106</sup>

Even with the infrastructure in place and the resources to quickly conduct training sessions, Chief Justice McCormack noted a second challenge: overcoming some judges’ hesitancy to hold remote proceedings.<sup>107</sup> The hesitancy came from a number of directions. First, some judges struggled to understand how the court system—deeply rooted in tradition—could effectively function on a remote platform.<sup>108</sup> Second, other judges had early doubts about the seriousness of the COVID-19 pandemic, noting that most proceedings could simply be postponed for a few weeks until courts could reopen.<sup>109</sup> Finally, some judges had practical concerns about the security and reliability of remote proceedings where, for example, third parties could gain access to hearings on YouTube and access sensitive information not meant for widespread public consumption.<sup>110</sup> Despite the pushback, the circumstances of the COVID-19 pandemic required upending a justice system surely not known for its speediness or efficiency.<sup>111</sup>

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[courts.michigan.gov/Courts/MichiganSupremeCourt/justices/Pages/Chief-Justice-Bridget-Mary-McCormack.aspx](https://courts.michigan.gov/Courts/MichiganSupremeCourt/justices/Pages/Chief-Justice-Bridget-Mary-McCormack.aspx) (last visited Feb. 16, 2021).

104. Telephone Interview with Bridget Mary McCormack, Chief Just., Mich. Sup. Ct. (Jan. 19, 2021) [hereinafter Chief Justice McCormack Interview].

105. *Id.*

106. *Id.* Chief Justice McCormack noted that she introduced Zoom to the Michigan Supreme Court prior to the pandemic because in light of Michigan’s size, she thought it would be beneficial to allow some court functions to be done on a remote platform. *Id.*

107. *Id.*

108. *Id.*

109. *See id.*

110. *See id.*

111. *See* Chief Justice Bridget Mary McCormack, *Leveraging Technology for Long-Term Change in the Face of COVID-19*, THE HILL (June 22, 2020, 4:00 PM), <https://thehill.com/opinion/technology/503919-leveraging-technology-for-long-term-change-in-the-face-of-covid-19> [<http://web.archive.org/web/20210116190655/https://thehill.com/opinion/technology/503919-leveraging-technology-for-long-term-change-in-the-face-of-covid-19>] (noting that the necessity to protect public health has pushed leaders to find “creative ways” to adapt to the pandemic).

### 1. *Virtual Hearings*

To its credit, Michigan's court system handled "well over 50,000 Zoom hearings" from April 2020 to June 2020.<sup>112</sup> While there were no major issues, Chief Justice McCormack concedes that more study is needed to determine whether some proceedings are not appropriate for live-streaming, such as cases involving children or domestic violence.<sup>113</sup> Furthermore, while virtual hearings are generally less formal than in-person hearings, parties do not waive their rights simply because they are in front of a camera rather than behind a podium.<sup>114</sup> This has compelled courts to give special attention to protecting remote parties' constitutional rights. Specifically, Michigan law confers a number of rights for criminal defendants and victims to access and attend proceedings,<sup>115</sup> whereas in civil matters, the Virtual Courtroom Task Force opined that courts must verify that participants are able to join proceedings remotely.<sup>116</sup> Additionally, the Task Force notes that most virtual hearings must be recorded and that this recording must be sufficient to act as a verbatim transcript.<sup>117</sup>

Practically, to comply with these standards, the Task Force suggested that courts advise parties on the record that they are waiving "any right they may have to be present in the courtroom."<sup>118</sup> For example, Judge Roberta Archer of the 36th District Court in Wayne County expressly asks defendants whether they give up their right to have a live preliminary

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112. See House Committee on the Judiciary, *Federal Courts During the COVID-19 Pandemic*, YOUTUBE (June 25, 2020) <https://youtu.be/Xs2WqmTbQmk> [hereinafter McCormack, C.J. Testimony] [<http://web.archive.org/web/20220124214609/https://www.youtube.com/watch?v=Xs2WqmTbQmk&feature=youtu.be>] (testimony of Mich. Sup. Ct. C.J. Bridget M. McCormack).

113. Chief Justice McCormack said that she has established a task force that includes domestic violence survivors, members of the media, and other stakeholders to provide advice on how to best handle live-streaming procedures for sensitive cases. See Chief Justice McCormack Interview, *supra* note 104.

114. See *People v. Jemison*, 505 Mich. 352, 356, 952 N.W.2d 394, 396 (2020) (finding that a witness's video testimony violated the defendant's constitutional right to confrontation).

115. See *People v. Mallory*, 421 Mich. 229, 247, 365 N.W.2d 673, 682 (1984) (holding that criminal defendants are entitled to be present during his or her trial); MICH. COMP. LAWS § 780.761 (2001) (providing that victim(s) have a right "to be present throughout the entire trial of the defendant, unless the victim is going to be called as a witness").

116. See Virtual Courtroom Task Force Report, *supra* note 83, at 2, 8.

117. *Id.* at 2. See also MICH. COMP. LAWS § 600.8719(1) (1994) (providing that informal hearings do not require a verbatim record).

118. See Virtual Courtroom Task Force Report, *supra* note 83, at 2.



examination before moving forward with such proceedings.<sup>119</sup> The proceedings are also live streamed on YouTube and accessible to the general public.<sup>120</sup> Importantly, the compliance with the aforementioned standards points to the court's sensitivity with the handling of involved parties' constitutional rights. The law requires similar sensitivity with the constitutional and statutory rights of the public and press to access and view such proceedings.<sup>121</sup>

Generally, Michigan has positioned itself as a leader in virtual courtroom access, marked by its interactive courtroom directory, which allows any internet user the ability to view remote proceedings in seventy-six out of eighty-three of Michigan's counties.<sup>122</sup> Other states have adopted a similar directory to allow expansive public access to their courts.<sup>123</sup> Greater public access naturally has benefited members of the press, allowing widespread access to some of Michigan's most newsworthy stories of the year.

## 2. Press Access

On May 15, 2020, the Michigan Court of Claims heard oral arguments in a lawsuit filed by the Michigan Legislature challenging Governor Gretchen Whitmer's emergency powers in response to the COVID-19

119. See 36th Dist. Ct., *WC CR233 - Judge Archer's Personal Meeting Room*, YOUTUBE (Jan. 22, 2021), <https://youtu.be/GY739N6vrjo> [<https://web.archive.org/web/20220425214532/https://www.youtube.com/watch?v=GY739N6vrjo&feature=youtu.be>] (noting video has since been removed from website).

120. See *CTRM 233 36<sup>th</sup> Dist. Court*, YOUTUBE, <https://www.youtube.com/channel/UCAb1No3FeZupEKhEyeKh-Wg/videos> [<http://web.archive.org/web/20220206184604/https://www.youtube.com/channel/UCAb1No3FeZupEKhEyeKh-Wg/videos>] (last visited Jan. 30, 2021) (noting video has since been removed from website).

121. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980); MICH. COMP. LAWS § 600.1420 (1961).

122. Charlevoix, Mackinac, Luce, Alger, Delta, Baraga, and Keweenaw counties do not have virtual courtrooms available in the directory. See *MiCOURT Virtual Courtroom Directory*, MICH. CTS., <https://micourt.courts.michigan.gov/virtualcourtroomdirectory/> [<http://web.archive.org/web/20210216032210/https://micourt.courts.michigan.gov/virtualcourtroomdirectory/>] (last visited Jan. 31, 2021).

123. See *Virtual Court Proceedings*, WASH. CTS., <https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.virtualcourtproceedings> [<http://web.archive.org/web/20210228082039/https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.virtualcourtproceedings>] (last visited Jan. 31, 2021) (linking to the YouTube channels or websites to 21 out of 39 counties); Csaba Sukosd, *Virtual Public Access Path Created for Local Courts*, CT. NEWS OHIO (Sept. 10, 2020), [http://courtnewsohio.gov/bench/2020/virtualCourtDirectory\\_091020.asp#.YBZaB5NKiF0](http://courtnewsohio.gov/bench/2020/virtualCourtDirectory_091020.asp#.YBZaB5NKiF0) [[http://web.archive.org/web/20210228082057if\\_/http://courtnewsohio.gov/bench/2020/virtualCourtDirectory\\_091020.asp#.YDtSbZP7Q5s](http://web.archive.org/web/20210228082057if_/http://courtnewsohio.gov/bench/2020/virtualCourtDirectory_091020.asp#.YDtSbZP7Q5s)] (following Michigan in creating a virtual directory for Ohio).

pandemic.<sup>124</sup> The arguments were held via Zoom and live-streamed on the Michigan Court of Claims' YouTube channel.<sup>125</sup> Chief Justice McCormack said the oral arguments were among the most-watched hearing since Michigan courts launched live-streaming capabilities, adding that more than 8,000 viewers viewed the live hearing at one point.<sup>126</sup> This widespread public access improves transparency by empowering the average citizen to go beyond media coverage and educate themselves about matters of public interest—a position Chief Justice McCormack has also pushed.<sup>127</sup>

With or without a global pandemic, providing the public and press with access to remote proceedings not only advances transparency—it is the law.<sup>128</sup> As such, if courts are closed to in-person hearings, the Virtual Courtroom Task Force specifies that where a live-stream link is not posted, a video recording should be made available “immediately after” the proceeding.<sup>129</sup> This standard applies unless the proceeding would be otherwise restricted to public consumption under a Michigan statute or court rule.<sup>130</sup> The Task Force points to the 41B District Court in Clinton Township as an example of a “best practice” of how to use YouTube to live-stream court proceedings; however, the court's stream is only available if it is in session.<sup>131</sup> Alternatively, the 36th District Court offers

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124. Ken Haddad, *WATCH: Michigan Court of Claims Hearing on Legislature Suit vs. Whitmer's Emergency Orders*, CLICKONDETROIT (May 15, 2020, 11:28 AM), <https://www.clickondetroit.com/news/michigan/2020/05/15/watch-michigan-court-of-claims-hearing-on-legislature-suit-vs-whitmers-emergency-orders/> [<http://web.archive.org/web/20200923112752/https://www.clickondetroit.com/news/michigan/2020/05/15/watch-michigan-court-of-claims-hearing-on-legislature-suit-vs-whitmers-emergency-orders/>].

125. Michigan Court of Claims, *Michigan Legislature vs. Governor No. 20-000079-MZ*, YOUTUBE (May 15, 2020), <https://youtu.be/o0IVrwU8ki0> [<http://web.archive.org/web/20220206191537/https://www.youtube.com/watch?v=o0IVrwU8ki0&feature=youtu.be>].

126. See Chief Justice McCormack Interview, *supra* note 104.

127. When asked whether she could point to any disadvantages with having 8,000 viewers watching a live proceeding, Chief Justice McCormack replied, “I think the opposite. I think there are only advantages. The more the public can see what its government is up to, the more you build trust in government.” *Id.*

128. See MICH. COMP. LAWS § 600.1420 (1961); MICH. CT. R. 8.116 (1985).

129. See Virtual Courtroom Task Force Report, *supra* note 83, at 4.

130. *Id.*

131. *Id.* at 3; See *41B District Court*, YOUTUBE, [https://www.youtube.com/channel/UCewHaS-e-8iD5kQ\\_L205atQ/featured](https://www.youtube.com/channel/UCewHaS-e-8iD5kQ_L205atQ/featured) [[http://web.archive.org/web/20220206193407/https://www.youtube.com/channel/UCewHaS-e-8iD5kQ\\_L205atQ/featured](http://web.archive.org/web/20220206193407/https://www.youtube.com/channel/UCewHaS-e-8iD5kQ_L205atQ/featured)] (last visited Jan. 31, 2021) (noting that “[t]his channel doesn't have any content” where there is no active live stream).

a more transparent system where, in addition to live-streaming, the public and press can access and view on-demand proceedings at any time.<sup>132</sup>

Interestingly, Chief Justice McCormack has spoken to members of the press about accessibility during the COVID-19 pandemic, and she notes that the journalists she spoke to are “desperate to make sure we keep it even after COVID is over.”<sup>133</sup> She said journalists believe it is more convenient to watch proceedings from their desks—likely a sign of dwindling newsroom budgets that have made it nearly impossible for most local journalists to manage spending a full day covering a single court hearing.<sup>134</sup> The accessibility also improves accuracy where journalists can rewind court proceedings to confirm information and technicalities.<sup>135</sup>

Michigan’s long protection of press access to courtrooms did not change during the COVID-19 pandemic, and the procedures established under Administrative Order No. 1989-1 continued to apply for remote proceedings.<sup>136</sup> For example, the Wayne County Circuit Court prohibited the recording of any court hearing without first seeking the judge’s permission.<sup>137</sup> However, under Order No. 1989-1, members of the media can fill out a form to request permission to record, broadcast, or photograph proceedings at the trial judge’s discretion.<sup>138</sup> Even for live-streamed proceedings, courts require that members of the media complete and submit the request—an arguably archaic model considering that

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132. See Virtual Courtroom, 36TH DIST. CT., <https://www.36thdistrictcourt.org/online-services/virtual-court-room> [<http://web.archive.org/web/20201101123136/https://www.36thdistrictcourt.org/online-services/virtual-court-room>] (last visited Jan. 31, 2021).

133. See Chief Justice McCormack Interview, *supra* note 104.

134. *Id.*

135. *Id.*

136. See Media Coverage Administrative Order, *supra* note 23; see also *Oakland County Circuit Court Video*, OAKLAND CNTY., <https://www.oakgov.com/courts/circuit/Pages/Video.aspx> [<http://web.archive.org/web/20210131182012/https://www.oakgov.com/courts/circuit/Pages/Video.aspx>] (last visited Jan. 31, 2021) (providing that members of the media must submit a “Film or Electronic Media Coverage of Court Proceedings” request form three days before a hearing).

137. See *Video Courtroom Meeting*, THIRD JUD. CIR. CT. OF MICH., <https://www.3rdcc.org/divisions/criminal/virtual-courtroom-meeting> [<http://web.archive.org/web/20201030130441/https://www.3rdcc.org/divisions/criminal/virtual-courtroom-meeting>] (last visited Jan. 31, 2021) (providing that “[t]here shall be no recording or photographing of people in the courthouse, which includes the virtual court hearing, without their consent”).

138. See *Request and Notice for Film and Electronic Media Coverage of Court Proceedings*, STATE CT. ADMIN. OFF., <https://courts.michigan.gov/Administration/SCAO/Forms/courtforms/mc27> [<http://web.archive.org/web/20201023122307/https://courts.michigan.gov/Administration/SCAO/Forms/courtforms/mc27.pdf>] (last visited Jan. 31, 2021); Media Coverage Administrative Order, *supra* note 23.

proceedings can be accessed to the general public without such approval.<sup>139</sup>

### C. A Needed Disruption?

Chief Justice McCormack has called the COVID–19 pandemic a “needed disruption” to “transform our judiciary into a more accessible, transparent, efficient, and customer-friendly branch of government.”<sup>140</sup> Notably, although Michigan has 242 courts, 160 funding units, nearly two dozen case management systems, and 560 elected judges, the state still successfully created virtual courtroom options during the height of the COVID–19 pandemic.<sup>141</sup> As such, it is certainly possible to change the ways of even the most antiquated and traditional functions of government. Michigan’s swift actions to produce virtual options and enhance public and media access has served the public interest during a public health emergency marked by controversy over government emergency orders and a nontraditional presidential election.<sup>142</sup> More eyes on the justice

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139. See C.J. ERIC R. JANES ET. AL., ISABELLA CNTY. TRIAL CT., TRIAL COURT CELL PHONE AND OTHER PORTABLE ELECTRONIC DEVICES POLICY ¶ 3 (2020), <https://www.isabellacounty.org/wp-content/uploads/2020/04/Access-to-Records.pdf> [<http://web.archive.org/web/20210228082451/https://www.isabellacounty.org/wp-content/uploads/2020/04/Access-to-Records.pdf>] (providing that “[n]o one may use a portable electronic device to take photographs or for audio or video recording, broadcasting, or live streaming unless that use is specifically allowed by the judge presiding over the courtroom”).

140. See McCormack, C.J. Testimony, *supra* note 112.

141. See *id.*

142. Chief Justice McCormack has noted that courts have responded to the COVID–19 pandemic by “opening the virtual doors of our courthouses wide,” adding that the virtual platform has expanded access and strengthened democracy. See Lauren Gibbons, *Michigan Residents Can Watch Court Proceedings Across the State from Home with New Virtual Directory*, MLIVE (May 19, 2020, 12:34 PM), <https://www.mlive.com/public-interest/2020/05/michigan-residents-can-watch-court-proceedings-across-the-state-from-home-with-new-virtual-directory.html> [<http://web.archive.org/web/20210204172754/https://www.mlive.com/public-interest/2020/05/michigan-residents-can-watch-court-proceedings-across-the-state-from-home-with-new-virtual-directory.html>]. Governor Gretchen Whitmer’s pandemic-related orders, the 2020 presidential elections, and subsequent related legal challenges were among the most newsworthy stories of the year. See *Looking Back at The Year in Michigan News*, WDET (Dec. 21, 2020), <https://wdet.org/posts/2020/12/21/90431-looking-back-at-the-year-in-michigan-news/> [<http://web.archive.org/web/20201222150337/https://wdet.org/posts/2020/12/21/90431-looking-back-at-the-year-in-michigan-news/>].

system served as an “extralegal check” that demanded the accountability of judges, attorneys, and other stakeholders.<sup>143</sup>

On November 5, 2020, two days after the 2020 presidential election, the Michigan Court of Claims held a motion hearing in the matter involving President Donald Trump’s re-election lawsuit to stop counting ballots in Michigan.<sup>144</sup> The live-streamed hearing was embedded on local television station websites, allowing the public to watch the nearly forty-eight-minute hearing in its entirety.<sup>145</sup> Chief Justice McCormack noted that she welcomed the high viewership at this hearing because voters could see that persons objecting to the election results had a “full and fair opportunity to present their complaints and the judge patiently listened to them.”<sup>146</sup> While offering public access to proceedings is a welcome step, average citizens do not have the time to watch a forty-eight-minute proceeding and educate themselves about the law. For a majority of citizens, the media plays an important role in staying informed about the news of the day, and when proceedings are captured and recorded on video, viewers can assess the legitimacy of the justice process firsthand.<sup>147</sup>

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143. See Audrey Maness, *Does the First Amendment’s “Right of Access” Require Court Proceedings to Be Televised? A Constitutional and Practical Discussion*, 34 PEPP. L. REV. 123, 160 (2006) (finding that the press has been recognized as a “extralegal check” since the beginning of the eighteenth century).

144. See Paul Egan, *Judge Throws Out Trump Lawsuit Over Counting of Michigan Ballots*, DETROIT FREE PRESS (Nov. 5, 2020, 2:17 PM), <https://www.freep.com/story/news/politics/elections/2020/11/05/trump-michigan-lawsuit-ballot-counting-case-dismissed/6173871002/> [http://web.archive.org/web/20210125180903/https://www.freep.com/story/news/politics/elections/2020/11/05/trump-michigan-lawsuit-ballot-counting-case-dismissed/6173871002/].

145. See *Judge Dismisses Trump Campaign Lawsuit Over Michigan Votes*, WXYZ DETROIT (Nov. 5, 2020, 11:23 AM), <https://www.wxyz.com/news/court-hearing-scheduled-in-trump-campaign-lawsuit-over-michigan-votes> [http://web.archive.org/web/20201105165900/https://www.wxyz.com/news/court-hearing-scheduled-in-trump-campaign-lawsuit-over-michigan-votes]; *Trump vs. Michigan Election Lawsuit: Motion Hearing Set for Today - Watch Live*, CLICKONDETROIT (Nov. 5, 2020, 11:36 AM), <https://www.clickondetroit.com/news/politics/2020/11/05/trump-vs-michigan-election-lawsuit-motion-hearing-set-for-today/> [http://web.archive.org/web/20210107132913/https://www.clickondetroit.com/news/politics/2020/11/05/trump-vs-michigan-election-lawsuit-motion-hearing-set-for-today/].

146. See Chief Justice McCormack Interview, *supra* note 104.

147. See Paul Coppock, *Doors to Remain Open During Business Hours: Maintaining the Media’s (and Public’s) First Amendment Right of Access in the Face of Changing Technology*, 58 S.D. L. REV. 319, 341–42 (2013) (noting that “[t]he easiest way for the public to educate themselves about the law is through the news media and what is captured on video”).

D. “*The Genie is Out of the Bottle*”

When asked whether virtual court is here to stay, Chief Justice McCormack replied, “Absolutely. The genie is out of the bottle.”<sup>148</sup> The Chief Justice could not say expressly whether hearings will continue to be live-streamed even when they are in-person, though she acknowledged that it would allow an “extra level of transparency.”<sup>149</sup> Alternatively, some legal scholars have argued that virtual courts shield from the press the “offstage behaviors” that can play influential roles in the “emotional dynamics of the physical courtroom.”<sup>150</sup> However, those same scholars acknowledge that proceedings conducted on Zoom or similar systems can permit viewers to access information unmediated by the press’ decisions on where to aim the camera, how to edit the footage, or what precisely to air.<sup>151</sup> In light of the fast-moving changes in technology, and the public’s widespread use of remote videoconferencing technology, such an argument is unavailing. Court systems should be prepared to adapt to the technology most used by the public and the press.

To better improve public and press access, the Michigan judiciary system should reform its administrative orders to tighten the language from merely authorizing the live-streaming of proceedings to requiring, or least incentivizing, the establishment of a consistent live-stream. Courts should also introduce an on-demand system where the public and press can access archival proceedings at any time, for which Chief Justice McCormack has expressed support.<sup>152</sup> Furthermore, trial courts should seek to welcome the input and objections of the media, including objections when a proceeding is in progress. For example, if a trial judge chooses to exercise his or her discretion to close press access to a courtroom during a live-stream, members of the media should have the capability to speak up and express an objection, the same way they could do so in a traditional courtroom.<sup>153</sup> The United States Supreme Court has

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148. See Chief Justice McCormack Interview, *supra* note 104.

149. *Id.*

150. See Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1347 (2020) (adding that “these phenomena limit the ability of public trials to serve the goals of transparency and accountability”).

151. *Id.* at 1349.

152. When asked whether she would be receptive to an on-demand program, Chief Justice McCormack replied, “I personally think that’s actually a good idea, and it’s one of the things we’re looking at.” See Chief Justice McCormack Interview, *supra* note 104.

153. See Journalist’s Guide, *supra* note 61, at 23 (providing that journalists may “[v]oice your objection to the judge when the motion is made to close; ask for a hearing and time to call your attorney. But if the judge overrules your objection, you must leave the courtroom if the proceeding is closed”).

long recognized the principle that press may object to courtroom closures.<sup>154</sup>

Notably, Chief Justice McCormack has focused much attention on expanding access to virtual hearings, including offering praise to the Ann Arbor Police Department for starting a “Mobile Arraignments” program for defendants to meet with officers and attend a Zoom hearing with a judge.<sup>155</sup> Interestingly, she has included members of the media in a task force meant to address the challenges associated with live-streaming.<sup>156</sup> Other state supreme courts and the federal system can learn from Michigan’s example where such access has proven largely successful and without issue. The United States Supreme Court continues to move at a sluggish pace to adapt to modern technology and access expectations, marked by its decision in April 2020 to offer a live broadcast of an oral argument for the first time in its 230-year history.<sup>157</sup> It is time to make Michigan’s success a blueprint for the federal system—a position Chief Justice McCormack agrees with, adding that the hesitancy often comes from judges tied to tradition.

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154. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring) (“[i]f the constitutional right of the press and public to access [the hearings] is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion”).

155. See C.J. Bridget M. McCormack (@BridgetMaryMc) TWITTER (Nov. 10, 2020, 5:15 AM), <https://twitter.com/BridgetMaryMc/status/1326106231908528133> [<http://web.archive.org/web/20201110101621/https://twitter.com/BridgetMaryMc/status/1326106231908528133>] (posting “[t]hank you @A2Police for increasing access to justice. We are going to come out of this with a more transparent, efficient and accessible justice system”). The Mobile Arraignments program allows non-violent defendants to handle court matters from Liberty Plaza in Downtown Ann Arbor. See Nathan Clark, *Police Doing Mobile Arraignments, Court Hearings for Some Defendants in Ann Arbor Park*, MLIVE.COM (Nov. 16, 2020, 1:07 PM), <https://www.mlive.com/news/ann-arbor/2020/11/police-doing-mobile-arraignments-court-hearings-for-some-defendants-in-ann-arbor-park.html> [<http://web.archive.org/web/20201203110043/https://www.mlive.com/news/ann-arbor/2020/11/police-doing-mobile-arraignments-court-hearings-for-some-defendants-in-ann-arbor-park.html>].

156. See Chief Justice McCormack Interview, *supra* note 104.

157. See Creede Newton, *For First Time, US Supreme Court Arguments Broadcast Live*, ALJAZEERA (May 4, 2020), <https://www.aljazeera.com/news/2020/05/time-supreme-court-arguments-broadcast-live-200501150004914.html> [<http://web.archive.org/web/20201118113527/https://www.aljazeera.com/news/2020/05/04/for-first-time-us-supreme-court-arguments-broadcast-live/>]; Press Release, Supreme Court, Regarding May Teleconference Arguments Order of Business (Apr. 28, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_04-28-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-28-20) [[http://web.archive.org/web/20201206005536/https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_04-28-20](http://web.archive.org/web/20201206005536/https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-28-20)].

## IV. CONCLUSION

The Michigan judiciary has acted as a national leader in providing the public and press access to court proceedings during the COVID-19 pandemic. While the pandemic offered Michigan an opportunity to improve access, there remains much room for improvement and expansion. Namely, Michigan courts should provide on-demand recordings, not merely live-streaming options, on their websites and YouTube channels. Further, courts should allow participants on virtual platforms an opportunity to object to any planned video disruptions or limitations to the proceedings. Finally, Michigan's success in swiftly producing virtual options and enhancing courtroom access during a global pandemic serves as an example for the federal court system and other state courts around the nation.