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June 29, 2020

Via Electronic Mail

Chief Justice Bridget Mary McCormack
Michigan Supreme Court
Hall of Justice
925 W. Ottawa St.
Lansing, MI 48915

Hon. Thomas P. Boyd, State Court Administrator
Michigan State Court Administrative Office
Hall of Justice
925 W. Ottawa St.
Lansing, MI 48915

Re: Unconstitutionality of criminal trials with "virtual" defendants, witnesses, or jurors

Dear Chief Justice McCormack and Judge Boyd:

On June 26, the Court issued Administrative Order 2020-19, which states that courts "may proceed with jury trials upon approval from the State Court Administrative Office." We understand that, pursuant to Administrative Order 2020-10, the Supreme Court Administrative Office has established a work group and pilot project to consider the viability of convening remote criminal trials in which jurors, witnesses, and even the defendants themselves might appear virtually. We are grateful for the time, creative efforts, and open-mindedness that has gone into this project. During this time, the ACLU of Michigan has also been carefully considering the complex challenges involved in re-opening the courts. We write today to urge you not to authorize remote jury trials in criminal cases.

In short, it simply is not possible to conduct a trial in a criminal case that comports with the basic requirements of due process, the right to a fair trial by a jury of one's peers, or the right to confront witnesses. Nor is it constitutionally permissible to force detained criminal defendants to choose between waiving these sacred constitutional rights and languishing in jail. For these reasons, remote jury trials in criminal cases should not be permitted to proceed.

Protecting the rights of the criminally accused in these challenging times may mean that courts and prosecutors need to make hard decisions. Prosecutors may need to prioritize the most urgent cases with the greatest impact on public safety, and they will need to be creative in working with courts to facilitate constitutional in-person trials that are workable under the circumstances. They may also need to waive objections they would otherwise raise to releasing defendants on bail in cases that are not top priorities. For their part, courts need to take even more seriously guidance

and caselaw from the Michigan Supreme Court instructing that pre-trial release must be much more common.

We appreciate that conducting in-person jury trials presents significant logistical and practical challenges in the midst of a pandemic. However, the constitutional rights of the criminally accused demand in-person trials. And solutions do exist for conducting such even if they are not ideal. For example, in-person trials could be held in large public spaces like auditoriums where jurors could remain socially distant from each other and from other participants in the trial.[1] Courtrooms could be reconfigured to provide separation between jurors or to re-seat jurors in spaces that are more commonly reserved for the public. While this would certainly require reducing the pace and frequency of criminal trials from what happens during "normal" times, coupling such strategies with acts of prosecutorial discretion and with more expansive use of pre-trial release is the only alternative that will allow for trials that pass constitutional muster.

I. Requiring Defendants to Appear Remotely Would Be Unconstitutional.

A criminal trial that is conducted without the defendant being physically present would plainly be unconstitutional for numerous reasons.

"[A] criminal defendant's right to be present at trial is constitutional bedrock." *United States v Benabe*, F3d 753, 768 (CA 7, 2011). This "bedrock" right is embedded in the Fifth and Fourteenth amendment right to due process and in a defendant's Sixth Amendment rights to the assistance of counsel and to confront the witnesses arrayed against them. This right cannot be abrogated for reasons of judicial convenience; it can only be waived by the defendant's actual (uncoerced) consent or by their own severe misconduct at trial. See *Illinois v Allen*, 397 US 337, 346; 90 S Ct 1057; 25 L Ed 2d 353 (1970) (finding a trial in the defendant's absence to be constitutional only after the defendant engaged in "extreme and aggravated" behavior that was not resolved by "repeated[] warn[ings]" from the trial court).

Virtual appearance is not a suitable substitute for the physical presence requirement. Only "[w]hen security is a problem or a dangerous defendant or a group of defendants is involved" can "the right to be present . . . be satisfied by use of closed circuit television." *United States v Washington*, 227 US App DC 184, 192; 705 F2d 489 (1983). As the Michigan Court of Appeals recently said in *People v Heller*, 316 Mich App 314, 319; 891 NW2d 541 (2016), two-way video technology is "simply inconsistent with the intensely personal nature of the process" of a criminal trial. *Heller* held that criminal sentencing could not happen via videoconference because doing so violated "our legal tradition's centuries old recognition of a defendant's personhood" and disregarded the fact that only a "courtroom setting provides 'a dignity essential' to the process of criminal adjudication." *Id.* at 318–319.

Heller's concerns about virtual sentencing apply with at least as much force in the context of the criminal trial itself—in which the jury, judge, and defendant are engaged in an "intensely personal"

[1] Indeed, the 13th Circuit Court in Grand Traverse County is on the verge of using just such an approach to restarting jury trials. See *Judges Make Adjustments as Trials Resume in Michigan*, Associated Press (June 22, 2020) <https://apnews.com/c0a5bfb4b6c1faf9fe08e4e918b0d0d2> (accessed June 29, 2020).

process of determining whether the defendant is to be convicted of violating the laws of the land in the first place. "The courtroom's formal dignity . . . reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment." *Deck v Missouri*, 544 US 622, 631; 125 S Ct 2007; 161 L Ed 2d 953 (2005). The lack of dignity common on remote video appearances is something everyone today can relate to, from strange backgrounds and unflattering camera angles to playing children or flushing toilets in the background. All these things are understandable in quarantine; none are consistent with the dignity conveyed by a formal courtroom atmosphere. As we all know from personal experience, "virtual reality is rarely a substitute for actual presence and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." *United States v Lawrence*, 248 F3d 300, 304 (CA 4, 2001).

It is, therefore, unsurprising that studies confirm that technology in the courtroom tends to dehumanize those who appear remotely and adversely affects fact-finders' credibility assessments. Salyzyn, *A New Lens: Reframing the Conversation About the Use of Video Conferencing in Civil Trials in Ontario*, 50 Osgoode Hall L J 429, 445 (2012). For example, studies show that when child witnesses testify remotely, they are found by jurors to be less credible, even when providing more factually accurate testimony. *Id.* Moreover, studies repeatedly show that in interactions with a virtually appearing defendant, courtroom actors are less sensitive to the impact of negative decisions on the defendant. See Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 Tul L Rev 1089, 1118 (2004) (collecting studies); Seidman Diamond et al, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J Crim L & Criminology 869, 892 (2010) (finding that when Cook County, Illinois began allowing video appearances at arraignment, bail amounts increased by 51%); Walsh & Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 Geo Immigration L J 259, 271 (2008) (finding that asylum applications were granted twice as often at in-person hearings as was the case for hearings conducted by videoconference).[2] And defendants appearing remotely receive harsher sentences than if they had appeared in person. *A New Lens*, 50 Osgoode Hall L J at 447.

Remote appearances would inevitably and seriously impinge on another of a defendant's most sacred rights—the right to consult with counsel.[3] A defendant who appears remotely would be doubly prejudiced in interacting with counsel. On one hand, they would be denied the ability for counsel to explain the proceedings as they occur. "The core purpose of the counsel guarantee was

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[2] This tendency appears to be a specific application of a more general, deep-seated human tendency to react more favorably to face-to-face interactions. See Okdie et al, *Getting to Know You: Face-to-Face Versus Online Interactions*, 27 Computers in Human Behavior 153, 156–157 (2011) ("Participants who interacted face-to-face reported liking their partners more than participants who interacted over the computer. . . . With respect to self-centeredness, those interacting [face-to-face] felt their partners were less self-centered than when interacting with them via [computer-mediated communication].").

[3] See *Allen*, 397 US at 338 (recognizing that right to be present at every stage of trial is necessary to realize the Sixth Amendment right to the assistance of counsel).

to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v Ash*, 413 US 300, 309; 93 S Ct 2568; 37 L Ed 2d 619 (1973). And, on the other hand, defendants would be unable to communicate *their* knowledge of the case and direct their defense by passing notes, commenting on testimony and evidence, or discussing strategy in real time. It is no substitute to say that counsel and the defendant can confer later during breaks. By that point, the time to react by questioning witnesses on specific points or raising objections will often be long gone due to the constantly evolving and often ephemeral nature of trials. See *Deck*, 544 US at 631 (recognizing that a shackled defendant is impaired in assisting counsel, even when they are still sitting next to each other).

Furthermore, appearing on video would raise the same due process concerns about depersonalizing the defendant that motivates longstanding prohibitions on the use of prison garb or visible shackles. It is well-established that requiring a defendant to appear at trial in prison garb violates a defendant's right to due process by creating significant subconscious bias: prison garb "serv[es] as the constant reminder of the accused's condition . . . [and] may affect a juror's judgement. *Estelle v Williams*, 425 US 501, 505; 96 S Ct 1691; 48 L Ed 2d 126 (1976). Similarly, shackling is permitted only in the presence of extraordinary circumstances because it is a visual indicator of a defendant's incarceration or dangerousness that "undermines the presumption of innocence and the related fairness of the factfinding process." *Deck*, 544 US at 626.

Requiring a defendant to appear virtually from jail would be at least as prejudicial as appearing in shackles or prison garb. Just as such visible demonstrations of the defendant's separateness and incarcerated status *in* the courtroom are prejudicial, a defendant who appears *from within a jail itself* would be at least as stigmatized in the minds of jurors. That is all the more true given that the prejudice would be compounded by the inherent bias discussed above that arises against anyone, in any setting, who appears virtually instead of in person.

Nor are the special circumstances that render a defendant's physical absence from their own trial (or shackling at trial) present in the context of the COVID-19 pandemic. While this public health crisis certainly presents a novel set of considerations for our courts, judicial or administrative efficiency has never been a basis for allowing prejudicial trials to occur without a defendant being physically present. The *only* circumstances in which the Constitution permits such prejudicial infringements on a defendant's trial rights have been case-by-case exceptions when the defendant's own misconduct created the necessity for their removal from the courtroom or shackling. See *Deck*, 544 US at 626 (noting that shacking is permitted only "in extreme and exceptional *cases*"), quoting 1 Bishop, New Criminal Procedure (4th ed, 1895) § 955, p 573 (emphasis added). But the inconvenience and challenges of a global pandemic—considerable though they are—apply to *all cases* that occur during the pandemic and are not the fault of any individual defendant. Thus, the defendant cannot be made to pay a constitutional toll in order to receive a fair trial. Because habitual use of videoconferencing would categorically exclude all defendants from their own trials, through no fault of their own, it cannot be constitutional.

II. Allowing Witnesses to Appear Remotely Would Be Unconstitutional.

The Confrontation Clause guarantees a defendant the opportunity to be confronted with the witnesses against them. US Const, Am VI. "[F]ace-to-face confrontation forms the core of the values furthered by the Confrontation Clause." *Maryland v Craig*, 497 US 836, 847; 110 S Ct

3157; 111 L Ed 2d 666 (1990) (internal quotation marks omitted). That is because "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution." *Coy v Iowa*, 487 US 1012, 1017; 108 S Ct 2798; 101 L Ed 857 (1988) (internal quotation marks omitted). Thus, although the Supreme Court has recognized certain exceptions to the in-person confrontation rule, *Craig*, 497 US at 850, any such finding "must of course be a case-specific one." *Id.* at 855. And in fact, the Michigan Supreme Court has just, unanimously, emphasized that the *Craig* exception to the right to in-person confrontation should be applied "only to the specific facts it decided" in light of subsequent developments in Confrontation Clause jurisprudence. *People v Jemison*, __ Mich __; __ NW2d __, 2020 WL 3421925, *7 (June 22, 2020). Thus, *Craig*'s already limited allowance of video testimony applies only when the testifying witness is both a child and the victim of the crime in question; in all other cases "the requirement [of in-person confrontation] may be dispensed with only when the witness is unavailable and the defendant had a prior chance to cross-examine the witness." *Id.*

Other courts have similarly, and repeatedly, held that video testimony violates the confrontation clause in almost all circumstances. Even two-way video feeds are not "likely to lead a witness to tell the truth to the same degree that a face-to-face confrontation does . . . ."*United States v Bordeaux*, 400 F3d 548, 554 (CA 8, 2005).; see *United States v Yates*, 438 F3d 1307, 1315 (CA 11, 2006) ("The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation. . . . The Sixth Amendment's guarantee of the right to confront one's accuser is most certainly compromised when the confrontation occurs through an electronic medium."); *United States v Carter*, 907 F3d 1199, 1210 (CA 9, 2018) (holding that dispensing with in-person confrontation must be "necessary" and that the use of two-way video merely because a witness was "temporarily unable to come to court" "depriv[ed] [the defendant] of his constitutional right to physical, face-to-face confrontation").[4] In sum, absent a *case specific* grounds for video testimony, it is clear that such testimony violates the confrontation rights of criminal defendants.

The Sixth Circuit similarly addressed these issues in the context of a petition for habeas corpus in which the court found that a state court had acted contrary to clearly established law under the Confrontation Clause by allowing video-taped testimony. See *Brumley v Wingard*, 269 F3d 629, 642 (CA 6, 2001). *Brumley* held that the characteristics of a face-to-face confrontation are critical to ensuring accurate testimony, pointing out that although a "jury may be able to gauge the witness's demeanor, second hand, on a television monitor," the fact that "the witness is not forced to stand face to face with the jury" affects the whether the witness is likely to tell the truth. *Id.*[5]

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[4] See also Helland, *Remote Testimony: A Prosecutor's Perspective*, 35 U Mich J L Reform 719, 725 (2002) (describing the Confrontation Clause's commitment to in-person interactions between the witness and defendant).

[5] See also Reynolds, *Could Zoom Jury Trials Become the Norm During the Coronavirus Pandemic?*, ABA Journal (May 11, 2020) <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic> (accessed June 29, 2020) ("A basis for conviction has always turned on a jury's ability to assess the demeanor of the witness firsthand. When you take that away, you've lost something precious.").

Simply put, a witness who appears remotely is not faced with a situation that is comparable to the gravity of a live courtroom atmosphere, where expectations of honesty and accountability are imposed upon all actors.[6] That is particularly true in the context of a trial conducted via software such as Zoom in which the witness is confronted with an array of faces and cannot be observed looking *anyone* directly in the eye while testifying. These are not truth-eliciting circumstances.

Making regular use of virtual trials in which witnesses routinely appear on camera would turn the Confrontation Clause on its head, making in-person confrontation the exception, rather than the rule, and skewing the fairness and truth-seeking function of an adversarial proceeding which relies on the sanctity of the courtroom and the intensity of person-to-person interactions to ensure honesty and accountability of both sides. Criminal trials conducted under such circumstances would be fundamentally unfair and plainly unconstitutional. The exigencies of this moment cannot and do not justify inverting centuries of constitutional law and tradition.

III. Permitting Jurors to Appear or Be Selected Remotely Would Be Unconstitutional.

A. Allowing a jury to serve remotely would present a dizzying array of due process problems.

Virtual jurors would also undermine the fairness of a criminal trial. As courts have observed, and as anyone who has ever been to a football game, political speech, concert—or a trial— knows, "watching an event on the screen remains less than the complete equivalent of actually attending it." *Lawrence*, 248 F3d at 304.

Remote jury duty would present a slew of due process issues. First, juror objectivity would be compromised by the lack of normal administrative court oversight. Virtual configurations would essentially leave jurors to their own devices to research information generally related to the trial, discuss facts of the case with their co-residents, and otherwise threaten the confidentiality of the trial. Jury deliberation would also be subject to unique constraints and vary by respective app features. Moreover, ordinary problems that predated the pandemic, such as juror apathy and limited attention span,[7] would be hugely amplified if jurors appear remotely. Remote jurors would be free to switch screens, browse the internet, send texts on their phone, play video games, or otherwise mentally check out. The nature of Zoom-type software would not make it possible for a court to monitor such distractions. During an age in which many of us are working from home and attending meetings virtually every day, most of us need look no further than our own

[6] See Gertner, *Videoconferencing: Learning Through Screens*, 12 William & Mary Bill of Rights J 769, 784 (2004) (discussing the various nuances adversely affecting the quality of virtual witness testimony).

[7] See Hong, *Ladies and Gentlemen of the Jury, Please Wake Up!*, Wall Street Journal (December 8, 2017) <https://www.wsj.com/articles/ladies-and-gentlemen-of-the-jury-please-wake-up-1512750669> (accessed June 29, 2020) ("In a typical criminal trial, 12 jurors in a boxed area listen for hours at a time to testimony, with a few breaks and a lunch hour. Some trials last several months. … Jury consultants say the ennui is exacerbated by shrinking attention spans of the smartphone era.").

experience with being distracted during video meetings to understand the likelihood that jurors will behave in similar ways when given the option between paying attention for hours on end to the trial on their screen or succumbing to the temptation to work, read email, or browse the internet.

And that is assuming that the remote technology even works. But in fact, no amount of advance testing and preparation could ensure a smooth virtual juror experience. If twelve different jurors are watching testimony in twelve different locations with twelve different internet connections, it is virtually guaranteed that *some* jurors will experience disruptive technical difficulties. Inevitably, both as the result of internet disruptions and user error, jurors' screens will freeze, witness's faces and voices will be garbled, and jurors will be kicked out of the virtual trial altogether. Again, the daily experience of remote work is instructive. Who amongst us, during the current age of telework, has not experienced, at some point during almost any given day, a colleague's image freezing for several minutes, or the need to leave a virtual meeting that has become frozen? Multiply these challenges times twelve—and apply them to jurors, some of whom will certainly be unfamiliar with video conferencing technology—and the unlikelihood of jurors *actually* seeing the whole trial becomes evident. These inevitable technological failures would also exacerbate the natural tendency, described above, for jurors to succumb to distractions instead of intently monitoring the trial. Nor would it be remotely plausible to "re-do" portions of a trial that are disrupted by such regularly occurring glitches—even if the court could somehow be made aware of the need to remedy the situation each time such a glitch occurs, which is simply not possible anyhow.

In sum, the idea of having jurors appear remotely presents such an array of mutually exacerbating technological and practical problems as to virtually guarantee an inattentive jury that is neither willing nor able to afford a criminal trial the attention it demands. In addition to being an administrative nightmare, the prospect of such a judicial spectacle would also defy any reasonable sense of due process.

B. A virtually assembled jury likely would not represent a fair cross-section of the defendant's peers.

Even assembling juries virtually presents a grave concern that the jury pool will not consist of an accurate representation of the defendant's peers. It is well-established that an essential component of the Sixth Amendment right to a fair trial is that "venires, panels, [and] lists from which petit juries are drawn" must reflect a representative cross-section of the community. *Taylor v Louisiana*, 419 US 522, 527; 95 S Ct 692; 42 L Ed 2d 690 (1975); see also *Smith v Texas*, 311 US 128, 130; 61 S Ct 164; 85 L Ed 84 (1940) ("For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."). Conducting jury selection virtually will ensure that factors such as socioeconomic status—and race, which continues to be inextricably intertwined with socioeconomic status—will dictate who is able to access the technology necessary to participate in jury selection. Indeed, research overwhelmingly reflects that people who lack internet access are predominately from lower income brackets and communities of color.[8] The problem is particularly severe in

[8] See, e.g., Turner, *Digital Denied: The Impact of Systemic Racial Discrimination on Home-Internet Adoption*, Free Press (December 2016) <https://www.freepress.net/sites/default/

communities within Michigan. For example, Detroit has the lowest rate of internet connectivity in the United States, and access to the internet is disproportionately constrained for Detroit's communities of color—a reality that has been described as "digital redlining."[9] Therefore, juries assembled using virtual methods that require jury pool members to have internet access necessarily will not reflect a fair cross-section of the defendant's peers and the resulting trials would be unconstitutional for this reason as well.[10]

IV. Coercing Defendants to Waive Their Rights by Forcing Them to Choose Between an Unconstitutional Trial and Indefinite or Prolonged Detention Would Be Unconstitutional.

Because of Michigan's broken bail system, over half of all people detained in our state jails are awaiting trial because they cannot afford to pay bail.[11] In turn, those detained pre-trial are disproportionately defendants of color. Forcing such defendants, who are already severely disadvantaged in our criminal legal system, to "choose" between a virtual trial lacking in the basic constitutional protections described above and remaining incarcerated indefinitely in the midst of a pandemic would be unacceptable.

Foisting such a "choice" on defendants would be a textbook example of an unconstitutional condition. Under the doctrine of unconstitutional conditions, it is an independent constitutional violation for the government to condition the receipt of a benefit on the forfeiture of a constitutional right. *Koontz v St Johns River Water Mgt Dist*, 570 US 595, 604; 133 S Ct 2586; 186 L Ed 2d 697 (2013).[12] For example, in *United States v Scott*, 450 F3d 863 (CA 9, 2006), the court held that it was unconstitutional for the government to condition pretrial release on a defendant's consent to suspicionless and warrantless searches. Making a defendant's ability to secure a jury trial *at all*

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files/legacy-policy/digital_denied_free_press_report_december_2016.pdf> (accessed June 29, 2020) (finding that nearly half of all people in the country without home-internet access were people of color).

[9] See Peñarroyo, Lindquist & Miller, *Mapping Detroit's Digital Divide*, University of Michigan Urban Collaboratory <https://www.urbanlab.umich.edu/project/mapping-detroits-digital-divide/> (accessed June 29, 2020).

[10] At the same time, in re-opening for in-person trial, courts must be conscientious to take proper precautions to provide adequate social distancing and other protective measures for in-person jurors. Otherwise, the need to dismiss medically vulnerable jurors for cause might also create a fair cross-section problem.

[11] See Michigan Joint Task Force on Jail and Pretrial Incarceration, *Report and Recommendations*, p 8 (January 10, 2020) <https://courts.michigan.gov/News-Events/Documents/final/Jails%20Task%20Force%20Final%20Report%20and%20Recommendations.pdf> (accessed June 29, 2020).

[12] See also *RSWW, Inc v Keego Harbor*, 397 F3d 427, 434 (CA 6, 2005) (recognizing that the doctrine of unconstitutional conditions, while originally grounded in First Amendment jurisprudence, extends to other contexts).

contingent upon waiving an entire panoply of rights such as those discussed above is an even more obvious example of such a violation than was at issue in *Scott.*

In the event that Michigan were to condone virtual criminal trials—even with the defendant's "consent"—this would be disguising an ultimatum as a choice. At least for pre-trial detainees, providing unconstitutional virtual trials as the only way to escape indefinite or prolonged detention—at a time when jails are life-threatening places due to the risks of COVID-19, no less—presents an unconstitutional choice. Undoubtedly, some defendants forced to choose between these two so-called options would waive their constitutional rights, but any such waiver would be constitutionally invalid. Or to put it another way, a defendant's consent to trial under such circumstances could not be characterized as knowing and voluntary. However one phrases it, a virtual trial conducted with the "consent" of a detained defendant is not constitutional and cannot be made so when the alternative is sitting in jail until the pandemic ends.

Conclusion

The pandemic currently sweeping our planet presents challenges to countless facets of our daily lives. Solving these challenges requires flexibility, technology, and creativity. Approaches are available to deal with the problems presented by convening trials in the era of COVID, but neither sacrificing the constitutional rights of criminal defendants, nor hiding behind a fig leaf of consent, are acceptable solutions. Instead, courts and prosecutors must exercise discretion and prioritize urgent cases, hold in-person trials in large spaces where social distancing is possible, and expand pretrial release or dismiss charges without prejudice when in-person facilities are unavailable. We urge you not to move forward with remote jury trials in criminal cases in our state.

Sincerely,

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Phil Mayor, Senior Staff Attorney
Bayan Jaber, Legal Intern
ACLU of Michigan