STATE OF MICHIGAN
IN THE 48th JUDICIAL CIRCUIT FOR THE COUNTY OF ALLEGAN

PEOPLE OF THE STATE OF MICHIGAN

v.

KATHERINE LINDSEY HENRY
_____/

Circuit Ct No. 22- -AR
District Ct No. 20-3569-SM

Hon.

MYRENE KAY KOCH (P62570)
Allegan County
113 Chestnut Street, Allegan, MI 49010
269-673-0280
prosecutor@allegancounty.org
_____/

KATHERINE L. HENRY (P71954)
Defendant In Pro Per
[redacted] Ormond Beach, FL 32175
[redacted] (redacted per MCR 1.109)
[redacted]

DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL
DISTRICT COURT'S REFUSAL TO DISMISS FOR
LACK OF SUBJECT MATTER JURISDICTION

NOTICE PER MCR 7.105(F):

THIS EMERGENCY APPEAL REQUIRES APPELLATE RELIEF

PRIOR TO THE HEARING & TRIAL DATES OF 7/7/22 &7/13/22

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STATEMENT OF JURISDICTION

Defendant (Henry) appeals the district court's refusal to dismiss this case for lack of subject matter jurisdiction, as raised by Henry in May 26, 2022 pleadings. The "safeguards of liberty . . . should receive the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty." *Ex Parte Milligan*, 71 US 2, 124 (1866). So, "it is the *duty of courts* to see that the constitutional rights of the defendant in a criminal case shall not be violated."[1] Thus, the "court has the authority, and, in appropriate cases, *the duty*, to enter *permanent* injunctive relief against a constitutional violation."[2] The original duty belongs to the trial court, but when a district court denies a constitutionally-based motion to dismiss, the accused may seek leave for an interlocutory appeal in the circuit court.[3] The circuit court also has "appellate jurisdiction" in Const 1963, art VI, § 13, as the Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people."[4]

And since subject-matter jurisdiction involves a court's power to hear a case, "defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court,"[5] thus establishing appellate jurisdiction. MCR 2.116 (J)(2)(a), MCR 7.103(B)(3), and MCL 600.8342 also bestow this court with appellate jurisdiction on interlocutory leaves to appeal.

STATEMENT OF QUESTIONS INVOLVED

1. **Did Henry have actual lawful authority to be at the town hall on election day?**

   District Court's Answer: **Unanswered**
   Prosecutor's Answer: **No**
   Henry's Answer: **Yes**

2. **Did the clerk have lawful authority to remove Henry from *public* property?**

   District Court's Answer: **Unanswered**

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[1] *People v Murray*, 89 Mich 276, 285 (1891) (emphasis added), citing *Hill v People,* 16 Mich 351, 357 (1868).
[2] *MI Coalition of State Empl Unions v Civil Serv Com'n*, 465 Mich 212, 219 (2001).
[3] *People v Wood*, ___ Mich ___ (2020) (Docket No. 159063).
[4] *Crawford v Washington,* 541 US 36, 67 (2004).
[5] *US v Cotton et al.,* 535 US 625, 630 (2002); *People v Richards*, 205 Mich App 438, 444 (1994), quoting *People v Smith*, 438 Mich 715, 724 (1991).

Prosecutor's Answer: **Yes**
Henry's Answer: **No**

3. **Do the structural errors in this case (denial of assistance of counsel, right to be present a proceedings, right to public hearings) require dismissal?**

   District Court's Answer: **No**
   Prosecutor's Answer: **No**
   Henry's Answer: **Yes**

4. **Does the district court have subject matter jurisdiction over this case?**

   District Court's Answer: **Unanswered (but implied "Yes")**
   Prosecutor's Answer: **Yes**
   Henry's Answer: **No**

STATEMENT OF FACTS[6]

Henry is a licensed attorney. In May 2020 she authored the Restore Freedom Initiative (RFI) constitutional amendment petition. Much of 2020, the state was locked down and larger events canceled, severely limiting opportunities for collecting signatures. The team decided having their thousands of circulators at the polls was the best way to secure the signatures by the November 26th deadline. An election day summary and training video were posted on the RFI website. Henry was devoted to answering questions from petition circulators on election day.

At 11am Doreen parked at the lot's far edge, pulling fully onto the grass, not using any parking spaces or impeding traffic. She set a small table (18" by 3'), four yard signs and small American flags at her tailgate. At 11:20am, the clerk said she couldn't be there due to an "ordinance."[7] Deputy Langlois came, threatening to arrest Doreen if she didn't leave because the clerk didn't want petitioners there. Langlois was talking to Doreen as a voter came to sign. Circulator Rebecca told him about RFI. Interrupting, Langlois said she must stop talking about it *and* that the guy couldn't sign. Rebecca walked the guy to his car and gave him a paper with RFI info on it so he could follow up.

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[6] These facts were already presented to the court in the original motion to dismiss that was filed in January 2021, which was appealed to this circuit court in April 2021. Signed and notarized affidavits supporting the facts were included in the motion, as well as a video of the incident, aerial views of the scene, measurements from the polling precinct door to defendants car, photographs and other relevant material. None of these facts have ever been disputed by Prosecutor, so to avoid being unduly cumulative, Henry is not including them again here, but rather realized upon the court record of those previously filed exhibits.

[7] *Public Access Resolution.* Although being called an *ordinance*, it is actually just a *resolution*.

Doreen called Henry, who spoke with Langlois. He said they violated MCL 168.931(k), but when Henry read that law aloud, Langlois insisted she hadn't read it entirely. When she asked him to ensure he viewed the most current version, he became combative, saying he wasn't going to argue with her about the law and would just arrest Doreen if she didn't leave. Henry said he didn't have the right to do that and she was on her way to discuss it in person. He said he would be waiting for her, yet he was not there as she arrived. She parked next to the circulators, backing into the grass so her car was entirely off the pavement. Henry's car was beyond the 100' line painted in the lot, at 229' away. Not planning on staying long, her 6 year old daughter Emma was in her carseat doing school work and eating snacks. With the car backed into the space, Emma could clearly see Henry only 10-15' away.

Langlois arrived, immediately combative. Henry tried to talk about the law, but he said he didn't care what it said, it was not his job and she could bring it up when she had her day in court. He said they were violating an *ordinance*. Henry asked him to read *resolution's* ℙ 4, as it said they could be there if they were past 100'. Refusing, he said the owner wanted them to leave, so if they didn't, they are trespassing. Henry asked who he thought the owner was; he said "the clerk." Henry told him *we the people* own the property. He asked her if she was the one who paid the bill to cut the grass. A voter nearby said *he* is an owner of the property, as he pays taxes to cut the grass. Langlois said it was *private* property, and the "ordinance" said they couldn't be there. He had deputies Anderson and Bussell come, and had the clerk come out. Doreen tried talking with her, but Langlois interrupted, saying *the clerk* needed to talk. The clerk said ℙ 3 prohibits being there unless for "township business," which *she* said was only *voting*. Henry pointed to ℙ 4 allowing petitions beyond 100'. The clerk said ℙ 4 had nothing to do with ℙ 3. As voters came to sign the petition, deputies told them they were not allowed to and must leave. Original Exhibit 8 at 25:05. When deputies asked Henry if she would leave, she asked for five minutes to talk with them about the law, but they refused.

One deputy violently grabbed her left arm, and the others assisted. They dragged her away with excessive force, hurting her badly, ignoring her cries of pain. None of them put a hand on her

head so it wouldn't hit the door frame while literally being thrown into Langlois' SUV. She begged to *sit down* into the SUV instead of being *thrown* in so violently; they refused. Langlois told Henry she could go to jail for trespassing, have CPS take Emma and have her car impounded, *or* leave, take Emma home and accept trespass charges. She said she'd leave with Emma. Langlois' SUV, parked diagonally, blocked the lot's Northwest corner. Bussell told him he must move it as it was impeding voter traffic, so he did. He then said the Sheriff would speak with her. He started the call telling the Sheriff he tried to peacefully resolve the situation, but she "aggressively" live streamed it and told him he didn't have authority to arrest them. Her handcuffs were unlocked, and she was handed the ticket. Her friends and husband had come; their cars impeded no traffic or pedestrians. Langlois threatened to arrest everyone, so they met at a park where Henry realized she had several injuries.

Described in more detail later in this brief, despite Prosecutor's numerous responses and filings, both in the trial court and in the appellate courts on this case, Prosecutor has never denied any of the facts as presented by Henry; nor has Prosecutor ever presented, let alone supported, any additional facts. This includes the fact *no one* ever stated Henry blocked ingress or egress to town hall, harassed or bothered any township employees or voters, impeded town hall operations, or caused any breach of the peace. It is also not disputed Henry was present at town hall solely in her capacity as lead attorney for the RFI petition. Rather, Henry and Prosecutor disagree about substantive law and trial procedures.

Langlois did not file the ticket with the court until after Henry called the court and the sheriff's office on November 12, 2020, asking for a court date for a motion to dismiss.[8] At 3:56 pm on November 12, 2020, Henry received a call from Deb in Allegan County District Court. Langlois had just filed the ticket, and she had a note from Amber at the Sheriff's office to let Henry know the ticket had been filed. Deb gave Henry a hearing date of December 3rd, but moved it to December 7th to make sure she had the full 21 days to serve Prosecutor before the Motion to Dismiss hearing

[8] Affidavit of Katherine Henry, App 159; see also, "Entry Date: 11/12/20" on Register of Actions, App 5.

date. Then, because Henry's hearing disability requires her to participate in person rather than by zoom,[9] Deb stated the soonest in person hearing her supervisor allowed her to give Henry was January 11th. She stated this date was for both the arraignment and motion to dismiss, and said because she was unfamiliar with that kind of motion, she was placing a detailed note in the court file about it.[10] Then, in December, court staff told Henry that the arraignment judge would not allow her a hearing on her motion to dismiss until some undisclosed time after the arraignment.[11]

> At the subsequent arraignment, the discussion about Henry's counsel went as follows:
>
> THE COURT: Well based on what you stated I clearly will enter a not guilty plea. Do you have the money to hire an attorney in this case?
> MS. HENRY: I'm sorry, say it again?
> THE COURT: Do you have the money to hire an attorney?
> MS. HENRY: I am an attorney your Honor.
> THE COURT: Okay. You'd like this set for trial before a judge or before a jury?
> MS. HENRY: A jury.
> THE COURT: Jury. We'll enter a not guilty plea, set this for a jury trial and I'll indicate you're waiving your right to counsel. Bail in this case was not yet set. We'll set bail on this at $200 personal recognizance, conditional bail will be not being [sic] at that residence, and I hope I have this right.

Henry had a hard time hearing the judge, and did not knowingly waive her right to counsel. She wanted standby counsel all along. When meeting with court staff to set court dates, they discussed Henry's hearing disability again and set a February 4th in-person motion hearing.[12] Court staff informed Henry that with COVID, the prosecutor's office does all pretrials by phone. Henry said it

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[9] Henry is extremely hard of hearing, especially in her right ear, and has been since she was 8 years old. It has significantly impacted her life, and she utilizes strategies like reading lips, increasing the volume of devices and her car radio to full volume, sitting so that friends and family are positioned near her left ear, asking others to move barriers away from their mouths, so she may better lip-read. She never learned sign language and has no ability to hear using hearing-assisted devices. She had tried a hearing aid to assist her in court and with clients, but it hurt both the inner and outer parts of her ear, and still left most sound quite muffled. Affidavit of Mike Henry February 2021, App 143; Affidavit of Gregory Todd, App 136; Affidavit of Bruce Reed, App 148; Affidavit of Kim Reed, App 149 Affidavit of Chad Klassen, App 150. Henry also has medical records and government documents to share with the court, if needed.

[10] Affidavit of Katherine Henry, App 158-159; Notice to Appear 1/11/21, "REQUESTED IN PERSON", App 15; Register of Actions, 11/12/20 entry "DEF. STATES WILL BE FILING A SUMMARY DISPOSITION (SHE STATED SHE CANNOT DO ZOOM AS SHE HAS A HEARING DISABILITY), App 5.

[11] Register of Actions 12/18/20 entry, App 6.

[12] Register of Actions, 1/11/21 entry "DEF TO FILE MOTION TO DISMISS FOR 2/4/21 . . . MOTION WILL BE IN PERSON - APPROVED BY JUDGE BAILLARGEON. . . . PRETRIAL WILL BE BY ZOOM AND THE PROSECUTOR AND DEFENDANT (WHO IS ALSO AN ATTORNEY) CAN USE THE VIDEO AND BREAKOUT ROOM TO FACILITATE HER ADA REQUEST FOR ACCOMODATION [SIC]," App 6.

would be hard for her to do by phone. Court staff suggested they do the Pretrial via Zoom, where the prosecutor and Henry both go into a breakout room by themselves. When Henry expressed concern about doing the Pretrial by Zoom due to her hearing disability, court staff informed her that with just the two participants in the breakout room, they wouldn't have to have the screen on gallery view, so both of their pictures would appear much larger. See, Zoom 101 Benchcard, App 182. Henry said she could try that, especially if it was quiet on the prosecutor's end, and she would be able to see the prosecutor's face much larger, which would help with lip-reading.[13]

Given how difficult it was for Henry to hear at the arraignment, and how the deputies had not let her husband or assistant in the courthouse building then, and almost kept her from getting to the arraignment herself, she wanted to ensure she had standby counsel at all future appearances. Affidavit M Henry at App 143-144; Affidavit G Todd at App 136-137. Also, the arraignment judge had not worn a mask, but several staff members had, so she wasn't sure what to expect at her motion hearing. In the event the prosecutor and judge were wearing masks, and she wouldn't be able to hear them due to her hearing impairment, she wanted to bring an attorney up to speed on the case, the motions before the court, and other issues, so if he heard something during the motion hearing that she missed, he would be able to assist in responding appropriately. Henry sent case documents over to Attorney Greg Todd, he reviewed them, then they met in person to discuss the relevant laws, Administrative Orders, and other documents. *Id.* He is a Michigan-licensed attorney and is quite familiar with criminal cases, being both a general practice attorney and former law enforcement. With Henry only wanting the *assistance* of standby counsel, and with no requirement for standby counsel to file an appearance (as they do *not appear on behalf of* the party), Henry did not file such with the court prior to the 2/4/21 motion hearing.

For reasons unknown, on the day of the motion hearing, the deputies at the entrance seemed very agitated and were openly hostile to Henry, Greg Todd, and Henry's husband Mike. When the

[13] Notice to Appear 2/09 "ZOOM HEARING (DEF READS LIPS) **NO PHONE CALL**" (all pink and yellow highlighting done by court staff, not Henry), App 16.

three of them approached the courtroom, it was locked, and there was a crowd of 6 or 7 people waiting to be let in. After a short time, the bailiff appeared and told Henry she had to check in at the District Court window. Following instructions, Henry attempted to check in, but was told by the clerk at the window that checking in was not necessary. When she told the clerk what the bailiff had said, the clerk said, "that's odd, I'll look into it." They were then directed back to the courtroom, which was still locked. The crowd had just been told that they were not allowed to enter the courtroom, which included Henry's husband Mike. The bailiff allowed Greg Todd into the courtroom with Henry after he identified himself as an attorney. Affidavit G Todd at App 136-137.

Prosecutor and Judge Baillargeon were the only people in the courtroom. The judge asked Henry who Greg Todd was, and she tried to explain who he was and why he was there, but the judge kept interrupting and would not listen to her. When she was finally able to convey that she had a hearing impairment, he offered her a hearing device. She tried to explain it would not help her, as she reads lips for communication and also relies on generally amplified sound. The judge said the hearing device was a reasonable accommodation, but Henry insisted it was not, since it would not help her to hear. The judge ignored her pleas and instructed Greg Todd to leave the courtroom, as he said he did not want any "witnesses." After Greg Todd again stated he is an attorney, the judge asked if he had filed an appearance in the matter. Greg Todd tried to offer to immediately place his appearance on the record, but was denied the opportunity to do so.[14] The judge ordered him to leave the courtroom, and then immediately began the motion hearing.[15]

Immediately following the 2/4/21 motion hearing, Henry went to the clerk's window, where she worked with them for 2 hours until her request to get a copy of the DVD from the hearing was finally approved - but under gag order.[16] At this time, Henry learned the media request that was

[14] Affidavit G Todd at App 138; Affidavit M Henry at App 144; Affidavit of Maija Hahn, App 146; Affidavit of DeAnna Huizinga, App 141; Affidavit of Orlando Estrada, App 145; Affidavit of Seth Drake, App 139; Tr Mtn Hrg February 4, 2021, App 30-31.
[15] Affidavit G Todd at App 114; Affidavit M Henry at App 121; Affidavit M Hahn at App 124; Affidavit D Huizinga at App 119; Affidavit O Estrada at App 123; Affidavit S Drake at App 117; Tr Mtn Hrg at App 30-31.
[16] Affidavit M Henry at App 121; Affidavit M Hahn at App 124; Affidavit D Huizinga at App 119; Affidavit O Estrada at App 123; Affidavit S Drake at App 117; Tr Mtn Hrg at App 53-54; Orders at App 100, 111.

submitted to record that hearing was denied,[17] as well as the request for the media to simply tap into the court's own video feed. The court provided him the DVD Request form, so he completed it and paid the $20. His request was approved as "Freedom of the Press," yet he too is restricted from sharing, releasing, publishing or posting the video with anyone in any way. Media's DVD Request & Order, App 130. Then, on 2/9/21, Henry experienced significant difficulties in being allowed to access the pretrial proceeding, and emailed the court.

> Good afternoon. I have a Notice to Appear for a Zoom Hearing for our 2/9/21 Pretrial Conference at 2:00pm. I have been waiting in the "William Baillargeon Personal Meeting Room" since 2pm. I called the Prosecutor's office and was told my the woman who answered the phone that they didn't have a pretrial conference with me today, and that I needed to call the court. I have called the district court number several times, but no one has answered the phone. I received a call back from Attorney Jeff Rhoa, stating that he was just told I had called to request a Phone pretrial. I informed him that with my disability, that is hard for me to do, that is why the court scheduled it by Zoom, so I could read lips with it being a one-on-one conversation. He said "I will wait for you in the zoom meeting room," but I am still waiting in the zoom meeting room and he (nor anyone else) has not let me in. It is now 2:23pm. Please advise.

After a brief exchange, Henry received the following message:

> On Tue, Feb 9, 2021 at 3:07 PM District Court <DistrictCourt@allegancounty.org> wrote:
>
> > They are in the middle of doing other proceedings right now. Once completed, they will let you into the Zoom meeting, then put you into a breakout room. Our apologies for our delays.

But, Judge Baillargeon did *not* allow Henry to use the Zoom breakout room, like it stated on the Notice to Appear, and humiliated Henry, refusing all disability accommodations.[18]

> **Katherine Henry** [redacted] Tue, Feb 9, 2021 at 3:22 PM
> To: District Court <DistrictCourt@allegancounty.org>
>
> Judge let me in to the main meeting to tell me that I had no choice but to talk with the prosecutor on the phone, regardless of the language of the Notice to Appear. He then kicked me out of the zoom meeting. I subsequently attempted to have a phone conversation with the prosecutor, but it was extremely hard for me to hear him (especially with the sound of the zoom meeting playing on his computer right next to him). He said that he had to keep listening to the zoom hearing while on the phone with me. I think I got all of the information I needed but with how difficult it was to hear on the phone, I am not sure that I didn't miss something. Likewise, my understanding is that I do not have to go back into the zoom meeting, but I can if that is required by the Judge at this time. So, if anything else is required from me at this time, please let me know, so that I may do so.
>
> I appreciate you trying to clarify the process for me.
>
> Have a wonderful day.

Henry later received 8 Notices to Appear for a Settlement Conference and Jury Trial, both to happen by Zoom, over Henry's vehement objections, and in utter disregard of her ADA request.

[17] Order Denying Request for Media Coverage, App 95.
[18] See, Tr Pretrial Conference, App 71-75; Emails with District Court 020921, App 160-162.

(The most recent NTA clarifies the Settlement Conference is by Zoom and the Jury Trial is in person). See, App 15-34. No court personnel has ever asked Henry for any information about her hearing disability, nor for any documentation. Henry appealed the substantive and procedural due process violations to the Court of Appeals in April and May of 2021, both of which were denied as not being necessary for immediate appellate review. The trial being moved to 7 different dates - without Henry being given notice and opportunity to be heard on the adjournments, and Prosecutor still failing to provide the court-ordered discovery, Henry moved for dismissal based on speedy trial violations and other issues presenting lack of subject matter jurisdiction. The trial court summarily adjourned not only the motion hearing, but also the jury trial - again. This appeal follows.

ARGUMENT

> **"The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[19]**

On this basis, we address whether Henry's undisputed actions constitute conduct prohibited by MCL 750.170 or 750.552. Indeed, "[i]f a defendant is given a command to stop engaging in speech that is constitutionally protected under the circumstances, the command is by definition unlawful."[20] Inasmuch, the "decision whether alleged conduct falls within the statutory scope of a criminal law involves a question of law,"[21] which receives de novo review. Trial judges *must* rule on issues of law, including misdemeanor motions to dismiss under MCL 764.9d and MCR 2.116(C). Indeed, in this case, there are several grounds for dismissal based on lack of subject matter jurisdiction. Henry was charged with trespassing on government property ***open to the general public*** in direct conflict with preemptive Election and Vehicle laws, and while responding solely as the attorney for petitioners engaged in conduct presumptively protected by the First Amendment. Prosecutor alleges no facts to argue Henry was on the township property unlawfully, let alone that

[19] *Houston v Hill*, 482 US 451, 462-463 (1987).
[20] *People v Hamlin*, unpublished per curiam opinion of the Court of Appeals, issued December 10, 2015 (Docket No. 321352), vacated in part on other grounds by *People v Hamlin*, __ Mich __, __; 894 NW2d 547 (2017), Exhibit 13, 321352_dual.pdf.
[21] *People v Noble*, 238 Mich App 647, 658 (1999).

Henry also had no good faith claim of her lawful authority to be on the property. Likewise, Prosecutor charged Henry, nearly 9 months after the incident, with disturbing the peace, alleging *no* intent to disturb the peace, nor the required element of threats or disruption of another's lawful activities, nor that Henry's actions went *beyond* the mere expression of opinions (however disagreeable to Allegan officials they may be). However, beyond the initial lack of subject matter jurisdiction, the court also committed structural errors that divested it of subject matter jurisdiction, namely, denying Henry assistance of counsel, public hearings, and a speedy trial.

In citing case precedent, MJI's Criminal Proceedings Benchbook clarifies a "trial court ***must*** dismiss an action when there is a lack of subject matter jurisdiction, and a *party cannot be estopped* from raising the issue."[22] In fact, it is preferred for a party to raise SMJ *before* an unjust trial or "the injury itself would have already been sustained." *People v Torres*, 452 Mich 43, 71 (1996). As such, with only the law, and not the facts, disputed here, Henry is entitled to a dismissal without delay. Therefore, she submits this request under MCL 764.9d; US Const, Am 1, Am 6, Am 14; MCR 2.116(C) and 6.004(A); Const 1963, art I, § 2; §3; §5; §17; §20; and Const 1963, art XII, §2.

I. Prosecutor's Facts are Insufficient; Henry's Facts Remain Undisputed

Our Constitutions guarantee us the right to "be informed of the nature and cause of the accusation" against us, and "to be confronted with the witnesses against" us, Am VI; Const 1963, art I, § 20, and that we won't be deprived of life, liberty or property without due process of law, Const 1963, art I, § 17; US Const, Am V, Am XIV. So, from the beginning of a criminal case, the prosecution is required to provide information to the accused. Despite ample opportunity, Prosecutor has failed to completely describe the nature of the alleged offense, provide affidavits or other evidence in support of Prosecutor's claims, state adequate denials of the facts stated by Henry at the trial level and interlocutory appeals level, or provide complete and unredacted responses to Henry's discovery request, despite the court order regarding the same.

MCR 6.101 requires the complaint to include "the substance of the accusation against the accused ***and*** the name ***and*** statutory citation of the offense" (emphasis added; see also, MCL 764.1d

[22] MJI, *Crim Proc Benchbook*, Vol 1, §2.2; quoting *In re Contempt of Dorsey,* 306 Mich App 571, 581 (2014).

and 257.728(1)), yet the ticket merely stated "MCL 750.552 Trespass," and "asked to leave many times," having *no descriptive words* for the alleged illegal conduct, thus containing no substance of the accusation. Likewise, the July 2021 complaint adding the Disturbing the Peace charge merely alleges Henry made a disturbance at an election place. It does *not* allege this "disturbance" was made intentionally. It also fails to allege any actions qualifying as conduct prohibited under MCL 750.170, namely: threats to public safety, threatened violence, disturbing the peace and quiet of other persons present, or interfering with persons in performing legal actions or duties. It also doesn't allege Henry intentionally engaged in conduct that went *beyond* stating her position or opinion, or the mere expression of ideas. M Crim JI 40.1. Clearly this does not *state all the facts and circumstances constituting the statutory offense,*[23] as required.

Moreover, Prosecutor's "denials" to Henry's prior MCR 2.116(C)(10) allegations did *not* "state the substance of the matters on which the pleader will rely to support the denial," MCR 2.111(D), simply stating "Deny," creating baseless denials of several uncontroverted facts. Prosecutor's responses simply stating "Neither admit nor deny" violated 2.111(C), and are treated as admissions anyway under 2.111(E), meaning Prosecutor asserted *no* appropriate denials of any material facts Henry stated. Also, 2.116(G)(4) required Prosecutor to "set forth specific facts showing that there is a genuine issue for trial" by affidavits or other evidence, but Prosecutor filed no affidavits or evidence, nor *even alleged* there is any genuine issue of material fact for trial.

Even on prior appeal, MCR 7.212(D)(3)(b) required Prosecutor to point out any alleged inaccuracies and deficiencies in Henry's statement of facts "with specific page references to the transcript, the pleadings, or other document or paper filed with the trial court, to support [Prosecutor's] assertions," yet Prosecutor did not do that. Also, MCR 7.212(C)(6)(c) (applicable through 7.212(D)(1)), requires Prosecutor's statement of facts to be a chronological narrative containing "the substance of proof in sufficient detail to make intelligible, indicating the facts that are in controversy and those that are not," but Prosecutor also failed to do this. Even in responding to Henry's appellate motion, Prosecutor failed to comply with MCR 2.111(C) and (D) requiring a

[23] *People v Husted*, 52 Mich 624 (1884).

response to each allegation, stating for each denial the substance of the matters on which Prosecutor will rely to support the denial.

Consequently, *all* allegations Henry made in *both* prior motions are admitted per MCR 2.111(C)(1) and (3), and Prosecutor is precluded from asserting any defenses that have not been properly raised, pursuant to MCR 2.111(F)(2). Likewise, Prosecutor failed to set forth *specific facts* showing that there is a genuine issue for trial, by affidavits or other admissible evidence, as required by MCR 2.116(C)(10)(G)(4). Therefore, Prosecutor has intentionally foregone all *requirements*, let alone opportunities, to demonstrate even one genuine, material disputed fact for trial.

On 2/15/21, Henry served a Request for Discovery per MCR 6.201, MCR 6.610(E), MCL 763.8(5), and other authority, giving MCR 6.201(F) and (J) notice of Henry's intent to seek an order excluding all evidence not disclosed within the 21 days. The 21 days were up 3/8/21, yet Prosecutor did not fully respond to the request nor *at all* to Henry's 3/2/21 or 3/29/21 emails about the discovery; and Henry has asked the court for that order to exclude. Moreover, on 7/19/21, Prosecutor added a disturbing the peace charge. Inasmuch, MCR 6.201(F) required Prosecutor to disclose all discovery as to this new charge, under the continuing duty to disclose *without further request*, must promptly *notify the other party*." Yet, despite this new charge being added in July 2021, Prosecutor has provided no discovery of any kind since April 2021 (not even providing notice to Henry, for example, that specified documents already disclosed to Henry regarding the trespass charge also constitute all the evidence or documents Prosecutor has pertaining to the disturbing the peace charge, etc).

So, Prosecutor's failure to allege facts in the complaint (even if assumed to be true) establishing all elements of the offense, provide Henry full discovery, or make any proper objections to the facts presented by Henry in pretrial motions (or even on appeal), means the prosecution must "lose its right to raise factual issues . . . when it has failed to raise such . . . in a timely fashion during the litigation."[24]

[24] *People v Trapp,* __ Mich App __, __ (2020) (Docket No. 345239), slip op at 2, n 1, quoting *Steagald v US*, 451 US 204, 209 (1981).

II. Court Lacks SMJ; No Authority to Hear Trespass Cases Like This

Prosecutor argues this is a simple case of *Prohibited Parking*. Henry contends it's a *Constitutional Catastrophe*, as she is charged, following a violent arrest, with criminal trespass, for "violating" a *resolution* regulating township property parking on Election Day - but the court does *not* have subject matter jurisdiction over such a case. To establish guilt of MCL 750.552 criminal trespass, Prosecutor must prove, *beyond a reasonable doubt*, that Henry

- Remained on the property
- without lawful authority ***or*** a good faith claim of lawful authority,
- after someone told her to leave
- and that person had lawful authority to remove Henry

Everyone agrees that Henry remained on township property after the township clerk told her to leave. Although Prosecutor's amended complaint now says Henry did not have lawful authority to be there, and implies that the clerk *did* have lawful authority to remove Henry - the issue of lawful authority is clearly an issue of law. Moreover, Prosecutor provides no legal basis for these claims. Indeed, quite the opposite is true regarding these issues of authority.

A. Source of Authority

Henry, like everyone, received her blessings of liberty[25] from God, *not* the government. To reinforce this, the 9th Amendment to the US Constitution and article 1 section 23 of the Michigan Constitution reiterate that even those rights we do not expressly enumerate are retained by we the people. And the government still has the duty to protect and secure those rights. Government was created *by the people,*[26] acts *on behalf of the people*,"[27] and derives its authority *from the people*.[28]

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[25] "We the People" wanted to "secure the Blessings of Liberty." US Const, Preamble. "We, the people of the State of Michigan, [are] grateful to Almighty God for the blessings of freedom." Const 1963, Preamble. We are all "endowed by [our] Creator with certain unalienable Rights," like Liberty. Declaration of Independence.
[26] To "secure the Blessings of Liberty" we established the Constitution. US Const, Preamble. "[G]rateful to Almighty God for the blessings of freedom and earnestly desiring to secure these blessings undiminished to ourselves and our posterity," we the people established our state constitution. Const 1963, Preamble. We are all "endowed by [our] Creator with certain unalienable Rights" and "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." Decl. of Independence.
[27] *Upper Peninsula Power Co v L'anse,* __ Mich App __ (2020) (Docket No. 349833), n 6 (emphasis added).
[28] "A constitution is made for the people and by the people," *Citizens* at 61, "deriving its force from the . . . people who ratified it," *Id*, containing "the principles on which [the government] shall act, and by which it shall

And as We The People, through the Constitution, "defined and limited the powers of government," no government entity or government official has the authority to take any action unless it is specifically given to them in either the US or State Constitution. *Id*. Further, Government holds *public* properties in trust for use by the *public*,[29] not having its *own* source of rights, sovereignty, or property ownership. This means that as a member of the general public, Henry has the right of access to property held in the title of a government body. This right remains unless property has a special use wherein it is not open to the general public, such as prisons or military bases.[30]

On the other hand, town hall being *public* property, the clerk does not have *exclusive* possession like a homeowner would.[31] And a township's "ownership of streets and park[ing lots] is [not] as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof." *Hague v Committee for Industrial Organization,* 307 US 496, 514 (1939). A government owns property in trust for the public, *Hague* at 515, and must "preserve the property under its control *for the use* to which it is *lawfully dedicated*."[32]

So in the end, given the public nature of the property, Henry has legal authority to be on town hall property unless a lawful special use limits access of the general public. But on the other hand, due to the public nature of the property, the township clerk has no authority to exclude a member of the general public, like Henry, unless a provision of the Constitution or state law specifically grants her that authority.

B. Henry Had Lawful Authority to be on Township Property

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be bound." *Id* at n 90. "Its most basic functions are to create the form and structure of government, define and limit the powers of government, and provide for the protection of rights and liberties." *Id* at 81.

[29] *Shuttlesworth v City of Birmingham*, 394 US 147, 152 (1969) (citations omitted).

[30] And while the people own all government property, the public's access may be limited, based on the "character of the property" (public, limited public, or nonpublic). *Perry Ed. Assn. v Perry Local Ed. Assn.,* 460 US 37, 44 (1983). Thus, in criminal trespass cases, right of access hinges on the property's normal use. *Food Employees v Logan Valley Plaza,* 391 US 308, 321 (1968). It's trespassing to be right outside a prison, MCL 764.23a (1), or on specific state swampland, MCL 324.41512, being property held for legitimate nonpublic or limited public purposes (as with public hospitals, military bases, municipal airports and USPS mailboxes).

[31] *Herro v Chippewa Cty Rd Comrs*, 368 Mich 263, 269 (1962); *Giddings v Rogalewski*, 192 Mich 319, 326 (1916).

[32] *People v Harrison*, 383 Mich 585, 592 (1970) (emphasis added); *Adderly v. Florida*, 385 US 39, 48 (1966).

Again, this property is publicly owned. As such, Henry starts with an inherent authority to access it, just as other members of the general public, unless there is a lawful special use for the property that limits the public's access. Additionally, the 14th Amendment guarantees Henry equal protection of the law, expressly prohibiting unequal treatment by the town clerk for similarly situated individuals. Henry was at the town hall that day during normal business hours, and remained outside in the parking lot area. And, as this is property open to the general public, *all* "members of the public [have] an equal right of access." *Logan* at 321. Therefore, Henry cannot be treated any differently than any other citizen who was present that day. Point blank this means Henry, as a member of the general public may not be excluded from property open *to the public* "through the **use of [] trespass laws**."[33]

The "First Amendment does not guarantee access to property simply because it is owned or controlled by the government," *Postal* at 129, but it *does* "protect[] a right of access to places traditionally open to the public."[34] Although Prosecutor has argued this case is merely the trespass of a car, that ridiculous notion holds no water. This trespass charge, along with the later added disturbing the peace charge, both have intent as a required element of the offense. And clearly, inanimate objects like cars do not form intent. Rather, this is a prosecution regarding what Henry was doing and saying that day. As such, we must determine if Henry has additional first Amendment protections.

Since our first amendment guarantees us the right to free speech, peaceable assembly, petitioning the government for redress of grievances, conduct falling into one or more of those

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[33] *Logan* at 319. And, there being *no* trespassing of government property *open to the general public*, the only regulations upheld are those preventing direct interference with the public's use of the property, like banning picketing done in a manner to "unreasonably interfere with free ingress or egress" or to intentionally interfere with "the administration of justice," etc. *Id* at 320. MCL 750.552 was *not* written to apply to property open to the general public anyway. Just like in *Brown*, the "sole statutory provision invoked by the State contains not a word about . . . punish[ing] the bare refusal to obey an unexplained command to withdraw from a public street, . . . or public building." *Brown v Louisiana,* 383 US 131, 141(1966). Rather, here, like in *Brown*, the "statute was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest [at] a public facility. Interference with this right, so exercised, by state action is intolerable under our Constitution." *Id* at 142, citing *Wright* at 292.

[34] *Midland Publishing Co v District Court Judge*, 420 Mich 148, 161 (1984).

categories would obviously be considered protected by the First Amendment. The clearest example of how this obliterates subject matter jurisdiction in this kind of case is MCL 750.543z, stating Prosecutor "shall not prosecute any person . . . for conduct presumptively protected by the first amendment." The "mere fact that speech is accompanied by conduct" like using a car to circulate petitions, "does not mean that the speech can be suppressed under the guise of prohibiting the conduct." *Logan* at 323. So, speech like Henry's here must receive "the *broadest protection* in order to ensure the unfettered interchange of ideas for" effecting change, and "be uninhibited, robust, and wide open."[35] This is why speech is "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[36] But we "start from the premise that peaceful [petitioning] in a location open generally to the public"[37] is protected because "streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Id* at 315.

With parallel issues, *Edwards* sums it up well:

> it is clear . . . that in arresting [Henry, officials] infringed [her] constitutionally protected rights of free speech, free assembly, and freedom to petition. . . . The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form. [Henry and others] felt aggrieved by [government overreach, so they] peaceably assembled at [a town hall] and there peaceably expressed their grievances to the citizens. *Edwards* at 235.

Indeed, soliciting signatures for a petition and associating to achieve ballot access receive strong constitutional protection,[38] and any restriction thereto burdens these fundamental rights

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[35] *Eyde Construction v Charter Twp of Meridian*, 119 Mich App 792, 794-95 (1982) (emphasis added). See also, *Roth v US,* 354 US 476, 484 (1957); *Anderson v Celebrezze*, 460 US 780, 794 (1983).
[36] *Edwards v South Carolina*, 372 US 229, 237-238 (1963); *Terminiello v Chicago,* 337 US 1, 5 (1949).
[37] *Logan* at 313, citing *Thornhill v. Alabama*, 310 US 88 (1940); *AFL v Swing*, 312 US 321 (1941); *Bakery Drivers Local 802 v Wohl*, 315 US 769 (1942); *Teamsters Local 795 v Newell*, 356 US 341 (1958).
[38] *Meyer v Grant*, 486 US 414, n 5 (1988); see also, *Deleeuw v State Bd of Canvassers*, 263 Mich App 497, 504 (2004); *Socialist Workers Party v Sec'y of State*, 412 Mich 571,588 (1982). See also *Martin v Sec'y of State,* 280 Mich App 417, 434 (2008), (O'CONNELL, dissenting) (ratified in *Martin v Sec'y of State,* 482 Mich 956 (2008). Likewise, we find protection in Const 1963, art I, § 5 free speech.

directly. *Socialist* at 588; *Meyer* at n 5. The United States Supreme Court clearly explained that

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as core political speech. . . . [So,] solicitation of signatures for a petition [is] protected speech.[39]

Even the township's own resolution at issue here, at ℙ 4 says:

> Nothing in this resolution shall be construed to interfere with MCL 168.931(k) which allows a person to disseminate campaign literature on election day when a person is beyond 100 ft. from an entrance to a building in which a polling place is located.

Of course MCL 168.931(k) does not reference *campaign literature* (168.744 actually does). Having the same main idea of allowing politicking only past 100', though, we see 931(k)'s vote soliciting, and .744's donation soliciting, *petition signature gathering*, and campaign literature distribution, all of which appear to be covered in ℙ 4. Thus, the resolution is worded to respect *our First Amendment rights*, so long as we abide by election law in exercising those rights, yet another source recognizing Henry's authority to be at the town hall.

But the town clerk wasn't the only public official out there that day doing their official duty. In fact, while actively serving as an attorney, one can't be arrested or imprisoned for a misdemeanor offense. Henry is a licensed attorney.[40] All officers "in the actual service of the state . . . are privileged from arrest and imprisonment during the time of their actual service except for treason, felony, or breach of the peace." MCL 600.1825(3). A public officer is "a person who holds public office in this state," either elected or appointed, M Crim JI 22.19, and the "state bar of Michigan is a public body," whose members are licensed to practice law. MCL 600.901. State bar members are also "officers of the courts of this state." *Id*. Thus, by serving as an attorney (a court officer and member of a public body), Henry was in actual service as a public official. Her communication with

[39] *Meyer v Grant*, 486 US 414, 421-425 and n 5 (1988) (internal citations omitted).
[40] First admitted in MN, then MI, East. Dist. MI, West. Dist. MI, Saginaw Chippewa Tribal Ct, US Sup. Ct.

the clerk and deputies was all in her capacity as lead attorney for RFI; as such, there was no authority to arrest her for this misdemeanor, and by removing the authority of the court to sentence Henry to jail time for this misdemeanor, the legislature also divested the court of subject matter jurisdiction.

Why is this important? A "lawyer is a part of a judicial system charged with upholding the law," having a "duty, when necessary, to challenge the rectitude of official action [and] uphold legal process." MRPC 1.6, official comment.; MRPC 1.0, Preamble. Indeed, a "lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists." MRPC 8.4, official comment. So, attorneys are public officials with a duty to defend legal process and the law, and to protect and inform the public, and need not obey questionable legal obligations. This is exactly what transpired here. Henry informed the circulators of petitioning laws. With a deputy threatening to arrest them due to a grossly inaccurate reading of the law, Henry had a duty to challenge the deputy's action, and seek to uphold legal process. If deputies are allowed to violently arrest an attorney, the court and prosecutor free to continue prosecution, for such events - especially for an alleged "parking trespass" - no attorney will ever get involved to protect the public.

So, Henry had *ample* authority to be at the town hall that day doing *exactly* what she was doing. The same cannot be said for the town clerk (or the deputies, for that matter).

C. Clerk Lacked Authority to Remove Henry From Township Property

Again, the clerk had no authority to remove Henry from the town hall unless she was expressly given that authority by a lawful source. Prosecutor argues that by having "control" over the property, the town clerk had authority to remove Henry from the property. However, for a clear example of how authority to control property does *not* equal authority to shut down free speech, we turn to *Marsh v. Alabama*, 326 US 501 (1946), as described by *Logan* at 317:

Marsh v Alabama	This case
"Appellant Marsh was told that she must have a permit to distribute her literature and that a permit would not be granted to her."	Henry was told it is unlawful to park there when not voting "without the express consent of the clerk," but the clerk wanted Henry to leave.

"When she declared that the company rule could not be utilized to prevent her from exercising her constitutional rights," she was ordered to leave.	Henry told the clerk and deputies the resolution cannot supersede constitutionally protected rights, but the deputies ordered her to leave.
She refused to leave, so she was arrested for criminal trespass.	She "refused" to leave, so she was arrested for criminal trespass.

Marsh's conviction was reversed, the Court ruling *even private* owners can't exclude members of the general public under a criminal trespass statute when the property is open to the general public. Further, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression;" rather, the forbidden conduct must be shown to be a material disruption to the general public's use of the town hall. *Grayned* at 117-18.

Also, although Prosecutor claims the township resolution gave the clerk authority to remove Henry that day, we must realize that only *ordinance*, not *resolutions*, can legally regulate the people. *See* MCL 42.20; 41.183. However, this document is a *resolution*, not an *ordinance.* It is entitled "resolution #2016-10-01, Township Property Public Access *Resolution*." Prosecutor even confirmed it's a *resolution* (versus *ordinance*) 11 times, *People's Response to Henry's original Motion to Dismiss, passim*. **Aside from the fact that resolutions cannot provide authority to remove members of the public from town hall property, which removes subject matter jurisdiction over such a scenario, several state laws also divest the court of subject matter jurisdiction over "criminal" violations of *resolutions*. See, MCL 761.1(c), MCL 761.1(o)(i), MCL 600.8311.**

Prosecutor claims Michigan Election Law (MEL) does not apply here,[41] arguing this case has *nothing* to do with Henry's petitioning election activities. Yet, Prosecutor claims the clerk had authority to remove Henry because of the township's *Election Day* resolution. As townships cannot legitimately enact regulations repugnant to the constitution[42] *or* in conflict with law,[43] this *election day* resolution must be viewed in light of MEL and Const 1963 *election* provisions. Only a *valid*

[41] See, e.g., App 67, 376.
[42] *Michigan Alliance for Retired Americans v Sec'y of State*, unpublished opinion of the Court of Appeals, issued October 16, 2020 (Docket No. 354993), at 4.
[43] *Michigan Gun Owners v Ann Arbor Public Schools*, 502 Mich 695, 701-702 (2018).

regulation gives a clerk authority, so a regulation express, conflict, or field preempted by state law is not a valid regulation, and bestows *no* authority. *Michigan Gun* at 701-02. To the extent the resolution restricts election day affairs, it is expressly preempted, conflict preempted, *and* field preempted.[44]

Similarly, it being said this case is about the trespassing of a car (*parking* of Henry's *vehicle*), we must consider our state *vehicle* and *parking* laws, and possible *express*, *conflict* or *field* preemption. *Michigan Gun* at 701-02. The Uniform *Traffic* Code (UTC), Control of Traffic in *Parking* Areas act (CTPA), and Michigan *Vehicle* Code (MVC) work together to *comprehensively regulate* the movement and *parking of vehicles*.[45] And by so doing, they expressly, conflict, and field preempt a township resolution purporting to provide the clerk authority.[46] Therefore, the preemption of the resolution by Michigan Election Law *and* Vehicle/Parking laws renders it unable to provide the clerk any authority to remove someone from the property.

Finally, Henry's conduct that day was presumptively protected by the First Amendment. There was *no* authority bestowed upon the clerk to remove Henry from the property. However, *if* there had been authority given to the clerk, it still would not have been *lawful* given the First Amendment considerations involved.[47] Namely, with Henry's conduct presumptively protected by the First Amendment, the clerk's removal of Henry must have been to further a *compelling state interest*, and the removal of Henry must have been *narrowly tailored to achieve* that compelling state

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[44] Henry's first Motion to Dismiss the Trespass charge extensively discussed the law involved with election preemption, so as to avoid being unduly cumulative, Henry simply reiterates that point here.

[45] The UTC was made "to authorize the director of the department of state police to promulgate a uniform traffic code; to authorize a city, township, or village to adopt the uniform traffic code by reference without publication in full; and to prescribe criminal penalties and civil sanctions for violation of the code." The CTPA is to "authoriz[e] local units of government to regulate and control traffic in parking areas; and to provide a penalty for a violation of this act." Further, the MVC is "to provide for the regulation and use of streets and highways; . . . to provide penalties and sanctions for a violation of this act; to provide for the enforcement of this act; . . . to repeal all other acts or parts of acts inconsistent with this act or contrary to this act."

[46] Just as with Election Law, Henry extensively covered preemption of the resolution by Michigan's vehicle and parking laws in her original Motion to Dismiss the Trespass charge. Similarly, to avoid being unduly cumulative, Henry simply reiterates that point here.

[47] In her original Motion to Dismiss the Trespass charge, Henry extensively covered the First Amendment analysis, and how those protections void any possible authority that may be considered to have been given to the clerk to remove Henry from the property. So, to avoid being unduly cumulative, Henry simply summarizes the main analysis here.

interest. But, even *if* Prosecutor had been able to reach this very high burden, the clerk's authority would still be unconstitutional as vague and overbroad.

So, Henry had *ample* authority to remain on township property that day, while the clerk had *no* authority to remove Henry. These circumstances not being unique to this case, wherein the original petition circulators at the town hall that day also had lawful authority to remain while the clerk had no authority to remove them, the court has no subject matter jurisdiction over this case.

III. Court Lacks Subject Matter Jurisdiction; No Authority to Hear DTP Cases Like This

The brief one-sentence description for the *disturbing the peace* charge leaves it impossible to ascertain whether Prosecutor claims Henry disturbed the peace *prior* to the arrest or *during* the arrest. Either way, the court lacks SMJ over this case. If disturbing the peace *during* arrest, the law is clear - Henry has the right to resist being taken into custody illegally.[48]

As for disturbing the peace *before* her arrest, that scenario leaves the court without SMJ as well. M Crim JI 40.1(3) makes this discussion straightforward. As discussed, not only has Prosecutor failed to allege Henry *intentionally* committed any acts covered by the law, but uncontroverted facts clearly show Henry did *not* intend to commit *any* of the acts covered. And there is no SMJ in a *disturbing the peace* charge where there is only an unintentional disturbance, at best. Likewise, Prosecutor failed to allege Henry *threatened public safety, threatened violence, disrupted the peace and quiet of other persons present, or interfered with the ability of other persons to perform legal actions or duties*, yet this is a *required* element. To the contrary, uncontroverted facts show Henry did *not* intentionally engage in any such conduct, rather, going to town hall as legal counsel to represent the RFI petition and those who were circulating it. Thus, there is no SMJ where there is no *threat to public safety, threatened violence, disruption of the peace and quiet of other persons present, or interference with the ability of other persons to perform legal actions or duties.* Further, Prosecutor failed to allege Henry "intentionally engaged in conduct that went beyond stating [her] position or opinion, or the mere expression of ideas." *Id* citing *People v Vandenberg*, 307 Mich App 57 (2014). Yet, uncontroverted facts *do show* Henry intentionally

[48] *People v Moreno*, 491 Mich 38 (2012).

engaged in conduct qualifying as expressing her position or opinion, or merely expressing her ideas - about the law and government's role in properly enforcing it. And, of course, there is no SMJ over a *disturbing the peace* charge where conduct fails to *intentionally go beyond* stating a position or opinion or the mere expression of ideas.

Furthermore, it's illegal to prosecute Henry for conduct presumptively protected by the first amendment, MCL 750.543z, which removes SMJ. Finally, "[d]efects in subject-matter jurisdiction cannot be waived and may be raised at any time," *People v Erwin*, 212 Mich App 55, 64 (1995); *Richards* at 444, so the court must order dismissal under 2.116 (C)(4) regardless of the timing.

IV. Speedy Trial Denial Divests Court of SMJ, Necessitates Dismissal

The US and Michigan Constitution, and the Michigan Court Rules, guarantee the right to a speedy trial for all criminal defendants. US Const, Am VI; Const 1963, art I, § 20; MCR 6.004(A). More specifically, MCL 768.1 requires that "persons charged with crime are entitled to and shall have a speedy trial and determination of all prosecutions and it is hereby made the duty of all public officers having duties to perform in any criminal case, to bring such case to a final determination without delay except as may be necessary to secure to the accused a fair and impartial trial." "Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice." MCR 6.004(A).

In deciding whether a defendant has been afforded a speedy trial, the Michigan Supreme Court adopted the four-part balancing established by the United States Supreme Court in *Barker v Wingo*, 407 US 514 (1972). *People v Collins (Harold)*, 388 Mich 680 (1972). When a defendant claims a violation of the right to a speedy trial, the trial court must consider four factors: (1) the length of delay; (2) the reasons for the delay; (3) the defendant's assertion of the right; and (4) any prejudice to the defendant. *People v McLaughlin*, 258 Mich App 635, 644 (2003).

"'The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest.'"[49] Where there has been a delay of at least six months after

[49] *People v Patton*, 285 Mich App 229, 236 (2009); *People v Williams* (Cleveland), 475 Mich 245, 261 (2006).

a defendant's arrest, further investigation into a claim of denial of the right to a speedy trial is necessary. *People v Daniel (Hank)*, 207 Mich App 47, 51 (1994). For a delay of 18 months or more, prejudice to the defendant is presumed and the burden shifts to the prosecution to rebut the presumption. *People v Collins (Harold)*, 388 Mich 680, 695 (1972); *People v Den Uyl*, 320 Mich 477 (1948); *People v Williams*, 475 Mich 245 (2006). As of the date Henry writes this motion, it has been more than 18 months since the arrest, with it being a full 19 months by the soonest motion hearing date she was able to get from the court.

Next, we examine the reasons for the delay and "each period of delay is assigned to either the prosecutor or the defendant." *People v Ross (Edward),* Mich App 483, 491 (1985). Where a delay is unexplained, it is charged to the prosecution." *Id; People v Bennett,* 84 Mich App 408 (1978); *Doggett v US*, 505 US 647 (1992); *People v Davis*, 129 Mich App 622 (1983). This case has been scheduled for 7 trial dates thus far, all of which were rescheduled merely by a Notice to Appear without an accompanying Order or Opinion, and none of those Notices stated a reason why the trial was being rescheduled. When the July 2021 trial date was adjourned, it was because the case before Henry's went to trial which we found out about the morning of trial. However, delays caused by docket congestion also count against the prosecution. *Barker v Wingo*, 407 US 517 (1972); *People v Jones*, 121 Mich App 484 (1982). Thus, all 6 times the trial has been rescheduled are charged to Prosecutor.

In looking at Henry's assertion of the right to a speedy trial, she has done so for over a year. Henry first raised the issue in the undue delay in justice when she was denied a hearing on her original motion to dismiss for three months after arrest, despite calling to get a date scheduled *before* the deputy had even bothered to file the ticket. Henry also raised the issue in her due process appeal to the Court of Appeals (which was in process as the first trial date was rescheduled). When the April 2021 trial date was adjourned, no hearing was held on the issue, and Henry was not given notice or an opportunity to be heard about the delay. When the July 2021 trial date was adjourned, it was because the case before Henry's went to trial. When the October 2021 trial date was adjourned, the email attaching a *new* Notice to Appear was sent hours after the settlement conference, with no

notice and opportunity to be heard for Henry about the delay. The January 2022, February 2022, and March 2022 trial dates were also adjourned by mere Notices to Appear, simply emailed to Henry after being issued, affording her no notice and opportunity to be heard on the issue of rescheduling.

The final inquiry into a claim of a speedy trial violation is whether the defendant experienced *any* prejudice as a result of the delay. *Collins (Harold)*, 388 Mich at 694. A defendant may experience: (1) prejudice to his or her person; and (2) prejudice to his or her defense. *Id*. "Impairment of defense is the most serious, 'because the inability of a defendant to adequately prepare his [or her] case skews the fairness of the entire system.'" *Id.,* quoting *Barker*, 407 US at 514. Indeed, where the delay following a defendant's arrest is 18 months or more, prejudice to the defendant is presumed and the **burden shifts to the prosecution** to rebut the presumption. *Collins (Harold)*, 388 Mich at 695.

Circuit Court Judge Dennis Kolenda puts it this way:

> Even criminal cases, which have preference on the docket, take time to bring to trial, and when it finally occurs, a trial is, we all know, expensive and a difficult experience, not only for the defendant, but for the victim and the witnesses, and waiting for a trial causes anxiety and concern for those same people and deprives the defendant of liberty, be it pre-trial confinement or the restrictions of bond. Many things can be done to shorten the night . . . one of them [is] the use of pre-trial motions to end criminal cases without the long wait for trial. Many a potentially dispositive pre-trial motion can be well presented within just weeks of the initiation of the prosecution. Doing so, and getting the case resolved as soon as possible, is to everyone's advantage. *Potentially Dispositive Pre-Trial Motions* (2015).

Likewise, the Michigan and US Supreme Courts have noted that:

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and friends. . . . [An efficient adjudication of the case will reduce the] substantial impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges . . . . Certainly the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life.[50]

[50] *People v Sierb*, 456 Mich 519, n 19 (1998), quoting *US v MacDonald*, 456 US 1, 8-9 (1982).

V. Denial of Assistance of Counsel Requires Dismissal with Prejudice

Henry has been denied the assistance of counsel in this criminal case as detailed above, and such a structural error requires dismissal with prejudice. Both the Sixth Amendment to the US Constitution and art I, § 20 of Const 1963 guarantee each person accused of a crime the right to have the assistance of counsel for her defense. "The right to the assistance of counsel is automatic; assuming the right is not waived, assistance must be made available at critical stages of a criminal prosecution, regardless whether the defendant has requested it."[51] This important right "guarantee[s] that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished."[52]

Moreover, the "complete denial of counsel at a critical stage of a criminal proceeding is a structural error that renders the result unreliable, thus requiring automatic reversal."[53] "The phrase 'critical stage' refers to 'a step of a criminal proceeding, such as arraignment, that [holds] significant consequences for the accused.'"[54] Indeed, this constitutional right to the assistance of counsel "is indispensable to the fair administration of our adversary system of criminal justice. Its vital need at the pretrial stage" is undeniable and has been described as "the most critical period of the proceedings[, namely,] the time of [] arraignment until the beginning of [] trial."[55]

Additionally, the US Supreme Court explained that "implicit in the Fifth Amendment's guarantee of due process of law, and implicit also in the Sixth Amendment's guarantee of a right to the assistance of counsel, is 'the right of the accused personally to manage and conduct his own defense in a criminal case.'"[56] This is because the constitutional counsel provision "speaks of the

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[51] *People v Russell,* 471 Mich 182, n 16 (2004), citing *United States v Wade*, 388 US 218, 223-227 (1967), and *Carnley v Cochran*, 369 US 506, 513 (1962).
[52] *Faretta v California*, 422 US 806, 807 (1975).
[53] *Russell* at n 29, citing *Gideon v Wainwright*, 372 US 335 (1963), and *People v Duncan,* 462 Mich 47, 51-52 (2000); *People v Buie*, 298 Mich App 50, 61-62 (2012); *Willing* at 224; *US v Gonzalez-Lopez,* 548 US 140, 150 (2006).
[54] *People v Willing*, 267 Mich App 208, 228 (2005), quoting *Bell v Cone*, 535 US 685, 69
[55] *Brewer v Williams*, 430 US 387, 398 (1977), citing *Powell v Alabama*, 287 US 45, 57 (1933).
[56] *California* at 807 (citations omitted); *US ex rel Maldonado v Denno*, 348 F 2d 12, 15 (CA2); *MacKenna v Ellis*, 263 F 2d 35, 41 (CA5); *US v Sternman*, 415 F 2d 1165, 1169-1170 (CA6); *Lowe v US*, 418 F 2d 100, 103 (CA7); *US v Warner*, 428 F 2d 730, 733 (CA8); *Haslam v US*, 431 F 2d 362, 365 (CA9).

'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant."[57] Thus, the accused "preserves actual control over the case he presents to the jury: standby counsel cannot substantially interfere with any significant tactical decision, cannot control the questioning of witnesses, and cannot speak in place of the defendant on any matter of importance. Standby 'counsel' is thus quite different from regular counsel. Standby counsel does not *represent* the defendant."[58] Also, the Court of Appeals has held an accused may "proceed pro se with standby counsel"[59] without affecting the unequivocal nature of the accused's request to proceed in pro per.[60] This very standby counsel arrangement is the preferred choice for Henry's assistance of counsel, yet she was denied not only that option, but *all* assistance of counsel.

A. Waiver of Counsel *Assumed* by Court at Arraignment

"The right to counsel is considered fundamental because it is essential to a fair trial . . . . While an accused may choose to forgo the assistance of counsel at trial, any waiver of the right to counsel must be knowing, voluntary, and intelligent."[61] This "waiver requires not merely comprehension, but relinquishment,"[62] and must also be unequivocal.[63] "In addition, it is a long-held principle that courts are to make every reasonable presumption *against* the waiver of a fundamental right, including the waiver of the right to the assistance of counsel."[64] So, the "Court cannot presume that the defendant waived his constitutional right on the basis of a silent or sketchy record."[65] And it is "incumbent upon the State to prove 'an intentional relinquishment or

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[57] *Faretta v California*, 422 US 806, 820 (1975); *Snyder v Massachusetts*, 291 US 97, 106 (1934).
[58] *Willing* at 227, quoting *US v Taylor,* 933 F2d 307 (CA5, 1991) (emphasis in original).
[59] *People v Willing*, 267 Mich App 208 (2005).
[60] *People v Hicks (Rodney)*, 259 Mich App 518, 526-528 (2003).
[61] *People v Russell,* 471 Mich 182, 187-188 (2004); *Edwards v Arizona*, 451 US 477, 482 (1981).
[62] *Brewer v Williams*, 430 US 387, 404 (1977); *Edwards v Arizona*, 451 US 477, 482 (1981).
[63] *Willing* at 227, citing *People v Anderson,* 398 Mich 361, 367-368 (1976), and *Russell* at 190.
[64] *Russell* at 188; *Brewer v Williams*, 430 US 387, 398 (1977), citing *Brookhart v. Janis,* 384 US 1, 4 (1966), and *Glasser v US*, 315 US 60, 70 (1942); *Johnson v Zerbst*, 304 US 458, 464 (1938).
[65] *People v Buie*, 298 Mich App 50, 58 (2012).

abandonment of a known right or privilege.'"[66] These strict standards apply "equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings."[67] Henry has not ever waived the assistance of counsel, nor does she wish to do so now. The arraignment judge's discussion with Henry about counsel (at 13, herein) demonstrates how Henry had a hard time hearing the judge, but did not knowingly waive her right to counsel. She has wanted standby counsel all along. It may be argued that Henry may not appeal the denial of counsel because in this exchange during the arraignment, Henry "replied that she was an attorney and did not correct the Court when it stated she waived her right to counsel." But, how would Henry do that when she was unable to hear the entire exchange that day?

It has been argued, in addressing the outright denial of counsel to Henry at the 2/4/21 hearing, that Greg Todd did not file an appearance before the hearing, and that neither he nor Henry identified him as representing her. However, this fails to acknowledge that standby counsel, by definition, is *not* representing the party. It also fails to recognize that placing an appearance on the record is a perfectly acceptable method of appearing in a case, but Greg Todd was denied the opportunity to do so, as described above. As far as Henry not saying more on the issue, we must not ignore the fact that all of this was happening immediately upon the deputy finally allowing Henry into the courtroom, her arms full with her briefcase, box of cases and statutes, and other materials. This entire exchange with Greg Todd, Henry, and the judge occurred *before* Henry was even allowed to reach the defendant's table or set down her things. In fact, the judge ordered Greg Todd out of the courtroom without even allowing him to help Henry get the items set down first. Henry will gladly share the video footage of the hearing with this court, if so requested.

B. Assistance of Counsel Outright Denied to Henry at Motion Hearing

On February 4th, the date of the hearing on Henry's motion to dismiss, the small crowd was told that they were not allowed to enter the courtroom, which included Henry's husband Mike. The

[66] *Brewer v Williams*, 430 US 387, 404 (1977), quoting *Johnson v Zerbst*, 304 US 458, 464 (1938).
[67] *Brewer* at 404, quoting *Schneckloth v Bustamonte*, 412 US 218, 238-240 (1973).

bailiff only allowed Greg Todd into the courtroom with Henry after he identified himself as an attorney. Inside the courtroom were two people, the Assistant Prosecutor and Judge William Baillargeon. The judge asked Henry who Greg Todd was, and she tried to explain who he was and why he was there, but the judge kept interrupting her and would not listen to her. When she was finally able to convey that she had a hearing impairment, he offered her a hearing device of some kind. She tried to explain that it would not help her, as she reads lips for communication and also relies on generally amplified sound. The judge said that was a reasonable accommodation, but Henry insisted that it was not, since that would not help her to hear. The judge ignored her pleas and instructed Greg Todd to leave the courtroom, as he said he did not want any "witnesses." After Greg Todd again mentioned that he is an attorney, the judge asked if he had filed an appearance in the matter. Greg Todd tried to offer to immediately place his appearance on the record, but was denied the opportunity to do so.[68] The court instructed him again to leave, which he did.

However, if a court arbitrarily refuses a party the assistance of counsel, "it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."[69] In other words, if the assistance of counsel "requirement of the Sixth Amendment is not complied with, the court *no longer has jurisdiction* to proceed. The judgment of conviction pronounced by a court without jurisdiction is void."[70] Thus, by denying Henry counsel at a critical stage of the case, this case must now be dismissed, for it lacks jurisdiction.

VI. Denial of Open and Public Hearings is Structural Error Requiring Dismissal

The US and Michigan Constitutions, as well as state law, provide Henry the right to be physically present at each stage of her case, to have the public physically present, and to have the protections that media and the publicity of cases provide. Each of these has been denied to Henry.

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[68] Affidavit G Todd at App 138; Affidavit M Henry at App 144; Affidavit M Hahn at App 146; Affidavit D Huizinga at App 141; Affidavit O Estrada at App 145; Affidavit S Drake at App 139; Tr Mtn Hrg at App 45-46.
[69] *Faretta v California*, 422 US 806, n 43 (1975); quoting *Powell v Alabama*, 287 US 45, 69 (1932).
[70] *Johnson v Zerbst*, 304 US 458, 468 (1938).

On January 11th at the arraignment, the deputies at the entrance of the courthouse refused to let Henry's husband and her assistant in, along with a supporter who had come that day. They threatened to keep Henry out of the building, too, which would have led to her missing her arraignment and having a bench warrant issued for her arrest. They finally let her in the building. When she was finally let in the courtroom, there were no members of the public allowed in. Besides court staff, she was the only other person present.

Then, on February 4th, the date of Henry's motion to dismiss hearing, the deputies guarding the entrance of the courthouse were again aggressive, but ended up allowing Henry, her husband, and attorney Greg Todd in the building. By the time they got there, there was a small crowd of around 7 people standing outside the courtroom waiting to get in. When Henry approached the door to the courtroom, the deputy guarding the door told her she had to go back to the district court window to check in. While she was heading all the way back to the district court window to check in (which the district court staff said she did *not* have to do), the crowd was told that they were not allowed to enter the courtroom. This included Henry's husband Mike. The bailiff allowed Greg Todd into the courtroom with Henry after he identified himself as an attorney. Upon Henry entering the courtroom, though, the judge promptly denied Henry any reasonable accommodations for her hearing disability, ordered her attorney out of the courtroom, and stated he did not want any "witnesses" in the courtroom, which included Henry's husband, the media present, and the few supporters that had come to attend Henry's motion hearing. Not only did the judge not entertain any objections regarding the exclusion of the public from this hearing, but he interrupted Henry to "correct" her when she stated that "the proceedings have been closed to the public." Tr Mtn Hrg at App 57. Further, although it is noted in the Register of Actions that "NO OTHER PEOPLE WILL BE ALLOWED IN CTROOM," that information was never shared with Henry, nor was there ever an evidentiary hearing held or detailed findings made by the judge to support closing the proceedings to the public in such a manner, App 7.

Then, the court mailed several sequential Notices to Appear stating Henry's Settlement Conference *and* Jury Trial will occur by Zoom, despite Henry's repeated objections and reasonable requests for disability accommodations.[71]

A. Henry Denied the Right to be Present at Essential Hearings

As indicated above, forcing this procedure (zoom proceedings) upon *any* defendant violates rights of the accused.[72] Indeed, "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."[73] This means that the accused has a right to be physically present at pretrial, settlement conference, jury selection, jury trial, etc.[74] The right to be present extends *beyond* the right of confrontation,[75] being grounded in both the Due Process Clauses[76] and common law.[77] But this right to be "personally present" is also presumed in MCL 768.3, and must be specifically waived by the accused in a misdemeanor if the accused will not be present.[78] Moreover, a "valid waiver of a defendant's presence at trial consists of a specific knowledge of the constitutional right and an intentional decision to abandon the protection of the constitutional right."[79] Henry has never waived her right to be present, nor has the court ever asked if she was willing to waive that right (a statutory right having been in place since 1846).

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[71] See Notices to Appear for SC and Jury Trial, App 15-34. The most recent NTA indicates the Settlement Conference will be by Zoom, while the Jury Trial will be in person.
[72] MJI, *Remote Proceedings During State of Emergency Benchcard,* updated July 23, 2020; SCAO, *Michigan Trial Courts Virtual Courtroom Standards and Guidelines*, Revised August 4, 2020, p 2, 7; AO 2020-6; MJI, *Public Right to Access Remote Hearings Legal Analysis,* p 1, updated July 23, 2020; SCAO, *FAQs and General Guidance Regarding Emergency Court Response to COVID-19*, p 3, updated 12/21/20.
[73] *Illinois v Allen,* 397 US 337, 338 (1970), citing *Lewis v United States,* 146 US 370 (1892).
[74] *People v Mallory,* 421 Mich 229, 247 (1985); SCAO, *Michigan Trial Courts Virtual Courtroom Standards and Guidelines*, Revised August 4, 2020, p 2; LAO D57 2021-03J, Section 2, 4; MJI, *Remote Proceedings During State of Emergency Benchcard,* updated July 23, 2020.
[75] *Mallory* at 247 (citations omitted).
[76] *Id* at n 10, citing US Const, Am XIV; Const 1963, art 1, § 17; *Snyder* at 105-106.
[77] *Mallory* at n 10, citing *Snyder* at 107.
[78] See also, SCAO, *Michigan Trial Courts Virtual Courtroom Standards and Guidelines*, Revised August 4, 2020, p 2, citing *People v Buie*, 298 Mich App 50, 57 (2012), 494 Mich 854 (2013), *People v Heller*, 316 Mich App 314 (2016), MCR 6.006, MCR 3.904; MJI, *Remote Proceedings During State of Emergency Benchcard,* n 1, updated 7/23/20; MJI, *Limiting Public Access to Criminal Proceedings Benchcard*, updated 6/12/20.
[79] *People v Buie*, 298 Mich App 50, 57 (2012), quoting *People v Woods*, 172 Mich App 476, 479 (1988), *citing People v Palmerton*, 200 Mich App 302, 303 (1993).

The Michigan Supreme Court considered what the term "personally present" means, and determined that "there can be no doubt that when a defendant is [not physically present in] the courtroom during trial, he is not personally present as required by MCL 768.3."[80] The court noted that prohibiting the accused from being physically present in the courtroom during proceedings is an "error [which] requires reversal." *Id* at 56.

Surely, *all* participants, including the accused, "shall be able to see, hear, and communicate with each other . . . and otherwise observe any physical evidence or exhibits presented during the proceeding.[81] In fact, "[v]ideo and sound quality must be sufficient to allow participants to observe the demeanor and nonverbal communications of other participants." *Id* at 34. All those accused, even when in custody and physically restrained for the safety of others, "should be seated where he or she can effectively consult with counsel and can *see and hear* the proceedings."[82] This is why, even in the midst of COVID-19, the Michigan Supreme Court has consistently reiterated the absolute necessity of courts, as they "expand their use of remote technology tools, [in continuing] to *verify that participants are able* to proceed remotely."[83] The trial court not only did *not* take proactive steps to verify that Henry could participate remotely, but Henry gave them ample notice that she, in fact, could *not*.

B. Henry Denied the Right to Proceedings Open to the Public

The accused has the right to be physically present in the courtroom, and have the witnesses and jury present in the courtroom, but there is an additional right of the accused to be considered:

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[80] *People v Krueger*, 466 Mich 50, 53-54 (2002).
[81] SCAO, *Michigan Trial Court Standards for Courtroom Technology*, April 2020, p 26.
[82] *People v Dunn*, 446 Mich 409, n 28 (1994) (emphasis added); SCAO, *Michigan Trial Court Standards for Courtroom Technology*, April 2020, p 26, 34; LAO D57 2021-03J, Section 2 (f).
[83] AO 2020-1; AO 2020-6; AO 2020-19 (emphasis added); LAO D57 2021-02J (C)(1); SCAO *Guidance on Conducting Remote Hearings with Self-Represented Litigants*, accessed February 13, 2021, available at https://courts.michigan.gov/News-Events/covid19-resources/COVID19/GuidanceForCourts_SRLremote.pdf (stating "allow multiple means for litigants to communicate their inability to participate [remotely], and prepare alternative participation options, such as appearing in person in the courtroom," and "Match each proceeding with the remote appearance medium that (1) works for the SRL"); SCAO, *Michigan Trial Courts Virtual Courtroom Standards and Guidelines*, Revised August 4, 2020, p 2; SCAO, *AO 2020-13, Collection of Contact Information, and Notice of Remote Hearings*, April 29, 2020; Michigan Judicial Institute, *Remote Proceedings During State of Emergency Benchcard,* updated July 23, 2020; SCAO, *Michigan Trial Court Standards for Courtroom Technology*, April 2020, p 26.

the right to a speedy and *public* trial.[84] Indeed, "the requirement of a public trial is for the benefit of the accused, that the public may see he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triors keenly alive to a sense of their responsibility and to the importance of their functions."[85] Further, "under the First and Fourteenth Amendments, the public and the press have a right to access court proceedings. Th[is] right of public access includes access to jury selection, preliminary hearings, and the trial."[86] Indeed, the public has an interest "in seeing that justice is administered openly and publicly":

> It is important that our citizens be free to observe court proceedings to insure a sense of confidence in the judicial process [that can avoid] apprehension and distrust of the legal system . . . . Additionally, because a criminal prosecution is brought in the very name of the people, the public has a substantial interest in seeing that its concerns are adequately presented.[87]
>
> Indeed, the public is a party to all criminal proceedings. The proceeding is prosecuted in the name of the public. [T]here is nothing that better protects the rights of the public than their presence in proceedings where these rights are on trial. *Id at 386.*
>
> In addition, the public's concern extends to the actions of its legal officers, the judge and prosecutor. In Michigan these officials are elected, which adds a dimension to the societal interests involved. The performance of essential responsibilities by these officials during criminal trials should be open to public evaluation. *Id.*
>
> [In sum, the] very public itself has a substantial interest in assuring that justice is openly and fairly meted out in its name. The public must also be confident that its judicial representatives do not abuse the power which the public confers upon them. *Id* at 389.

Moreover, MCL 600.1420 *mandates* that all "sittings of every court within this state shall be public, except that a court may, for good cause shown, exclude" people for one of three extremely limited exceptions.[88] In other words, in this case, as in *Detroit Free Press*, "[n]one of the statutory

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[84] US Const, Am VI; Const 1963, art 1, § 20.
[85] *People v Murray,* 89 Mich 276, 291 (1891).
[86] MJI, *Limiting Public Access to Criminal Proceedings Benchcard*, updated June 12, 2020, citing *Richmond Newspapers, Inc v Virginia,* 448 US 555, 580 (1980); *People v Vaughn,* 491 Mich 642, 652 (2012); *Midland* at 160-161, 167.
[87] *Detroit Free Press v Recorder's Court Judge,* 409 Mich 364, 379-380, 385 (1980) (superseded on other grounds).
[88] "**witnesses** in the case when they are not testifying and may, in actions involving scandal or immorality, exclude all **minors** from the courtroom unless the minor is a party or witness. This section shall not apply to cases involving **national security**." While it is possible an individual witness may need to be sequestered

exceptions permits closing this trial; national security was not involved and excluding the public went beyond the authority to exclude witnesses or minors." *Id* at 549. And here, just like in *Murray*,

> The order of the court stationing the [deputy] at the door, with directions to admit none but [the parties], was not only a violation of the constitution, but it was a direct violation of [MCL 600.1420]. . . . This statute has been in force since 1846. It voices the sentiment of the people at the time the constitution of 1850 was adopted. It gives expression to what is there meant by a public trial. Courts have no dispensing power when the legislature has spoken. The judge who presided at the trial of this case was as much bound by this provision of law as the humblest citizen. The trial may [be] an impartial one; the respondent may [end up being] justly convicted; but it still remains that it was accomplished in violation of his constitutional and statutory right to a public trial." *Murray* at 285-286; see also, *Midland Publishing Co* at n 11.

Further, although our US Supreme court[89] and Michigan courts[90] acknowledge we've seen no shortage of government overreach, especially since the start of COVID-19, no government body or official may legally act without the express permission to do so[91] - permission that must be found in the constitution, possibly being further limited by statute. This is because "there is no law for the [regulation] of the citizens . . . which is not contained in or derived from the Constitution."[92] Consequently, the only other reasons a court may exclude the public from court proceedings must

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during Henry's trial, that does not justify exclusion of *anyone* else. Further, this case is not involving scandal or immorality such as a CSC case, and does not involve national security.

[89] Throughout 2020, our US Supreme Court has acknowledged the constitutional overreach of governments state and federal, including agencies such as law enforcement, Department of Homeland Security, and executive boards and commissions. See, e.g., *Hernandes v Mesa,* 589 US __ (2020); *Moore v Circosta,* __ US __(2020); *Dept. of Homeland Sec. v Regents of Univ of Cal.*, 591 US __ (2020); *County of Maui, Hawaii v Hawaii Wildlife Fund*, 590 US __ (2020).

[90] *Michigan Alliance for Retired Americans v Secretary of State, et. al.,* __ Mich App __, __ (2020) (Docket No. 354993), slip op at 2 ("The tensions between the branches of government have existed since our nation's founding . . . . Sometimes it is the executive branch that engages in governmental overreach." See, e.g., *Slis v State of Michigan*, __ Mich App __ (2020) (Docket Nos. 351211, 351212) (lead opinion), slip op at 23 (affirming preliminary injunction of emergency rules) and __, slip op at 32 (BOONSTRA, J., concurring) ("As the adage goes, 'give them an inch and they'll take a mile.' Amidst the COVID-19 pandemic, that adage has new meaning."). And sometimes the legislature is perhaps unwittingly complicit in executive overreach. See *In re Certified Questions*, __ Mich __, __(2020) (Docket No. 161492) (MCL 10.31 et seq., "is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution").

[91] "That to secure these rights, governments are instituted among Men, deriving their just powers from the consent of the governed." Declaration of Indep. "Our Constitution is clear that all political power is inherent in the people. . . . A constitution is made for the people and by the people. . . . [and] does not derive its force from the convention which framed, but from the people who ratified it." *Citizens Protecting Michigan's Constitution v Sec'y of State*, 503 Mich 42, 59-60 (2018) (cleaned up) (citations omitted). "It's most basic functions are to create the form and structure of government, define and limit the powers of government, and provide for the protection of rights and liberties." *Id* at 80. Further, our "Constitution is the bulwark and foundation of our laws." *Id* at n 74 (citations omitted).

[92] *Ex Parte Milligan*, 71 US 2, 141 (1866).

be found in the text of the constitution itself. Indeed, the "'necessities of trial and the adversary process' are irrelevant here, since they cannot alter the constitutional text."[93] After all, if there is a defect or insufficiency in the Constitution, it

> should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to "widespread belief" and thus null and void. For good or bad, the Sixth Amendment requires confrontation [and a public trial], and we are not at liberty to ignore it. . . . The Court [cannot apply] "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then adjust their meaning to comport with our findings.[94]

With this in mind, the court may inhibit the public's statutory and First Amendment right of access to criminal proceedings *if it is necessary* to uphold the Due Process Clause's *fair trial guarantee* to an accused.[95] However, the public's right to an open trial coincides with Henry's right to a fair trial in this case. So, the public's statutory and First Amendment right of access does not need to yield to the protection found in the constitution for the benefit of Henry.

Our state constitution provides another potentially competing interest. In order to be eligible to override the accused's *and* public's right to a publicly accessible trial, an interest must be found in the constitution itself, but it must also be compelling.[96] In administering justice, our courts are concerned for maintaining a safe environment for the public. On this point, in identifying *permissible* ways to handle COVID-19, courts must remember Const 1963, art IV, § 51 requires our *legislature* to pass "suitable laws for the protection and promotion of the public health." However, the legislature has passed *no* laws declaring the closure of public access to court proceedings necessary - or even preferable - for the public health. Indeed, the Michigan Department of Health

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[93] *Maryland v Craig*, 497 US 836, 864 (1990) (Scalia, J., with whom Brennan, J., Marshall., and Stevens, J., join, dissenting, discussing the constitutional requirement of witnesses to testify in person in front of the defendant and jury).
[94] *Id* at 870.
[95] See *Detroit Free Press* at 549, n 5; *Midland* at 160-161, 167, citing *Richmond* 448 US 555 (1980).
[96] MJI, *Limiting Public Access to Criminal Proceedings Benchcard*, updated 6/12/2020 (stating "A compelling reason is required for a total closure; a substantial reason is required for a partial closure"). Even the US Supreme Court explained that a "closure [is] full rather than partial [when] all members of the public, rather than only some of them, ha[ve] been excluded from the courtroom." MJI, *Public Right to Access Remote Hearings Legal Analysis,* p 5, 12, updated 7/23/20, citing *Weaver v Massachusetts,* 582 US __ (2017).

and Human Services (MDHHS) is utilizing one of these laws passed for public health that allows certain Emergency Orders to be written. However, these Emergency Orders "do not prohibit in-person jury trials,"[97] or other court proceedings.

Further, this potentially competing "important state interest" must be "necessary to further an important public policy."[98] The US Supreme Court reminds us that public policy is established by the *legislature,* generally through enacting statutes. *Id* at 853. Likewise, the Michigan Supreme Court reminds us that we, the "people, through the constitution or the Legislature, formulate the guiding principles of Michigan - not [the] Court. . . . In other words, the function of this Court is not to create policy, but to enforce it as embodied in law."[99] The legislature has passed many bills related to public health in the context of COVID-19, but *none* have indicated the need, or even desire, to close court proceedings to the public. In fact, the will of the people - or *public policy*, as shown through legislative action - maintains a strong emphasis on keeping *all* court proceedings (absent one of the express statutory exemptions) open to the public. This public policy can be seen not only in the longstanding *constitutional* guarantees to a public trial,[100] but also in our longstanding *statutory* guarantee in MCL 600.1420 which "has been in force since 1846."[101]

To the extent a public policy *may* be found by this court to exist favoring closing public trials in the new age of COVID-19, we must remember "the Constitution is meant to protect against, rather than conform to, current 'widespread belief.'"[102] Indeed, the "purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right . . . ." *Id.* Consequently, Henry's

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[97] MDHHS, *FAQs for the May 6, 2021 Gatherings and Face Mask Order,* accessed May 10, 2021, at https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455_98456_103043-558724--,00.html.
[98] *Maryland* at 850, 852.
[99] *Charles Reinhart Co v Winiemko*, 444 Mich 579, n 38 (1994) (citations omitted).
[100] Our Supreme Court has pointed out this "guarantee has appeared in every one of our state's constitutions. See, Const 1835, art 1, Sec 10; Const 1850, art 6, Sec 28; Const 1908, art 2, Sec 19; Cont 1963, art 1, Sec 20." *Midland Publishing Co v District Court Judge,* 420 Mich 148, n 20 (1985).
[101] *Murray* at 285-286; see also, *Midland Publishing Co v District Court Judge,* 420 Mich 148, n 11 (1985).
[102] *Maryland* at 861 (Scalia, J., with whom Brennan, J., Marshall., and Stevens, J., join, dissenting, discussing the constitutional requirement of witnesses to testify in person in front of the defendant and jury).

aforementioned rights to be physically present, face-to-face with all witnesses, where the jury and other trial participants are also physically present in a proceeding physically open to the general public must not be overridden in the name of COVID-19 protocols. Our country has known famine, disease, war, terrorism, death, natural disaster, and much more. No matter however pressing the exigency of the time may appear, the "Constitution of the United States is a law for rulers and people . . . at all times, and under all circumstances."[103] For it is by "the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people." *Ex Parte Milligan* at 119.

A clamor of an excited people, indeed. "Much has changed since the RTFC guidance was published, including a better understanding of COVID-19 [and] the increased likelihood of a prolonged pandemic."[104] COVID-19 or not, in-person court proceedings play an indispensable role in our justice system. That is why "[n]o matter however pressing the exigency of the time may appear," cases where the accused are denied their rights to be physically present, where the jury and other trial participants are also physically present in a proceeding physically open to the general public must be only on "rare occasion," "under extraordinary circumstances," "in certain narrow circumstances," where courtroom closure in general is to be avoided.[105] Moreover, even as far back as September 2020, SCAO was reminding all judges that they must "assess safety *as part of* the decision-making process for determining whether to conduct *each particular*"[106] court proceeding. COVID-19 provides no excuse for setting aside the myriad of constitutional guarantees involved in an accused's public hearings, so in considering the "specific unusual circumstance that allegedly endangers,"[107] the court must remember that the *person requesting closure* of any court proceeding

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[103] *Ex Parte Milligan,* 71 US 2, 120 (1866); *Twitchell v Blodgett,* 13 Mich 127, 149-50 (1865).
[104] SCAO, *Memorandum: Recommended Metrics for Jury Trials*, September 25, 2020, referenced in the *Return to Full Capacity* updated February 2021.
[105] *Detroit Free Press* at 379-380, 390 (superseded on other grounds); *Maryland* at 848; MJI, *Public Right to Access Remote Hearings Legal Analysis,* p 5, 12, updated July 23, 2020, citing *Weaver* (2017).
[106] SCAO, *Memorandum: Recommended Metrics for Jury Trials*, September 25, 2020, referenced in the *Return to Full Capacity* updated February 2021.
[107] *Detroit Free Press* at 379-380, 390 (superseded on other grounds).

carries a "heavy burden" of establishing the closure is necessary to protect a compelling public policy interest (as identified by the legislature, not the courts).[108] To simply exercise her constitutionally-guaranteed rights, Henry bears no burden of proof.

Further, the "requisite finding of necessity must, of course, be a case-specific one: the trial court must hear evidence and determine whether [denying any of these aforementioned rights] is necessary to protect" the compelling interest.[109] "It is particularly important to make detailed factual findings in support of a decision to limit public access to court proceedings because a Sixth Amendment violation 'can occur . . . simply because the trial court omits to make the proper findings before closing the courtroom, even if those findings might have been fully supported by the evidence.'"[110] Indeed, a defendant's conviction was reversed where "the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial," just like what the judge did in this case. The court must make findings adequate to support the closure of the proceedings.[111] So, *even if* the court had identified a specific interest that provided a compelling justification for denying Henry's and the public's right to open court proceedings, *and* had made a determination that the specific interest outweighs the right of open proceedings, the court would still have to use the least restrictive means of effectively protecting the compelling interest, which includes considering reasonable alternatives to closing the proceeding, even if alternatives are not offered by the parties.[112] Thus, in order for the findings to be adequate, they must consider the legal requirements *and* logistics involved.

For any criminal case,

> [A] trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities are not

[108] *Midland* at 172, citing *Detroit Free Press* at 379-380, 390 (superseded on other grounds).
[109] *Maryland* at 855-856 (even the compelling interest of protecting child rape victims does not justify a presumptive trial closure rule); see also, *Id* at 852, 857-858, 860; *Midland* at 168.
[110] MJI, *Public Right to Access Remote Hearings Legal Analysis,* p 5, 12, updated 7/23/20, citing *Weaver*.
[111] *Vaughn* at 653, citing *Waller v Georgia,* 467 US 39, 48 (1984); MCR 8.116(D)(1); *Midland* at 169.
[112] *Midland* at 169; *Maryland* at 855-856; *Detroit Free Press* at 379-380, 390 (superseded on other grounds); MJI, *Limiting Public Access to Criminal Proceedings Benchcard*, updated June 12, 2020.

> so small as to render the openness negligible . . . , when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings.[113]

Simply put, "the court has a duty to provide facilities for a reasonable number of the public."[114] Of course, "Constitutional, statutory, and court rule requirements for court proceedings to be public all remain in effect during the state of emergency," SCAO reminds us.[115] Further, Henry has the right to see and hear the proceedings, including all participants involved. As discussed earlier, state and federal disability laws require the court to make reasonable accommodations in order to allow Henry to effectively participate in that manner. It is in this context that we must evaluate Henry's request to simply hold court as usual, the way the Constitution requires: to have all participants in-person, with the proceedings open to the general public, where everyone can see and hear all participants.

So, whether it means moving the proceedings to another courtroom or even another building (or similar types of measures that fully allow public access), there are options available besides just outright refusing the public access to the proceedings. For even *if* "[a]ll of the alternatives admittedly present difficulties for trial courts, . . . none [are] beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[116]

C. Henry Denied the Protections that Media and the Publicity of Hearings Provide

The "First Amendment guarantees of freedom of speech and of the press protect[] a right of access to places traditionally open to the public, such as trials."[117] Yet, Henry was denied the assistance of counsel, a reasonable ADA accommodation, and a public access for the motion

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[113] *Estes v Texas,* 381 US 532, 584 (1965), (concurring opinion, Warren, C.J.), cited by *Midland Publishing.*
[114] *Detroit Free Press* at 386 (superseded on other grounds).
[115] SCAO, *FAQs Regarding Expansion of Remote Proceedings*, p 2, updated April 30, 2020.
[116] MJI, *Public Right to Access Remote Hearings Legal Analysis,* p 5, 12, updated July 23, 2020, citing *Richmond Newspapers, Inc v Virginia*, 488 US 555, 580-581 (1980). Also, since generally, "expense is not a justification for a constitutional shortcut," *People v Jemison*, __ Mich __ (2020) (Docket No. 157812), certainly "expense is not a sufficient reason for sacrificing face-to-face testimony." *Id* at n 6, citing *State v Rogerson*, 855 NW2d 495 (Iowa, 2014).
[117] *Midland Publishing Co v District Court Judge*, 420 Mich 148, 161 (1985).

hearing on February 4, 2021. Given that, and the manner in which Henry's husband and assistant were kept entirely out of the court building on January 11, 2021, Henry wanted to ensure she could review the court proceedings in some manner (to be able to review what she missed). The court does provide Live Streaming of its public hearings, but as written on its website, all "[r]ecordings are deleted at the conclusion of the live event."[118] Therefore, during the hearing, Henry stated

> MS. HENRY: I would also ask, especially within [sic] the proceedings have been closed to the public that . . . nobody is allowed in here. That I would be able to have a request for immediate consideration pursuant to the local administrative order D57-2020-01J, to have a copy of the proceedings from the arraignment as well as today's motion hearing, and I can provide that as well.[119]

However, despite this being a "public hearing" and despite Henry specifically requesting the video "for my defense and for educating the public,"[120] the trial judge approved the request on several unreasonable conditions:

ORDER APPROVING/DENYING REQUEST

FILED
IN DISTRICT COURT
ALLEGANY COUNTY
2021 FEB -4 AM 10:2

☒ Granted

The copies approved herein SHALL NOT be:

☒ Copied or Reproduced in any form

☒ Released to anyone other than the requesting individual

☒ Published/Posted on any form of electronic/social media including, but not limited to intranet and internet forums, logs, web logs, photo blogs, online web communities, list serves, internet diaries, instant messaging, test messaging, podcasts, amateur video sites, and all web postings, such as those in chat rooms, on bulletin boards, websites, or web pages. Wikis, public/shared email, online compilations of photographs or videos, and links to any of the foregoing items are also prohibited.

☐ Denied

Judicial Signature Date

I declare that this Court Record/Copy Request has been examined by me and that its contents are true to the best of my information, knowledge and belief. I further acknowledge that by signing this form I agree to ensure all restrictions set forth above by the presiding judge will be maintained and further acknowledge that I may be found in contempt of court should I fail to abide by all restrictions ordered by the Court.

Signature: K Henry Date: 2/4/21

So Henry is now subject to a contempt of court charge (circled by the judge on the order) for sharing the video of the proceedings with others for the purposes of preparing for her defense, for

[118] *District Court*, at http://cms.allegancounty.org/sites/Office/DC/SitePages/Home.aspx, viewed 5/31/22..
[119] Tr Mtn Hrg at App 57.
[120] See District Court Receipts with Record Request And Order, App 113-114.

educating the public, or any other purpose. It should be noted the order for the media's request was signed by the same judge on the same day to receive a copy of the same proceeding has the same restrictions checked, but does *not* have "contempt of court" circled.[121]

However, a judicially imposed gag order is a prior restraint and is, therefore, subject to the strictest scrutiny. Publicity of trials (the "open forum" of public trials) plays a very important role in insuring and preventing abuse, serving as a "natural check" on unjust prosecution and abuse of judicial power.[122] Moreover, as "*prior restraints on publication* are the most serious and *least tolerable infringement* on First Amendment rights, the party seeking to justify a prior restraint *must overcome a heavy presumption of unconstitutionality*."[123] This is especially applicable in cases where the district court judge would have taken steps to determine if a party is in contempt of court for sharing the information. *Id.* Further, considering this is the very same judge who denied the public access into the courtroom during Henry's motion hearing, and required several other proceedings to occur by Zoom despite her vehement objections, he should be more open to methods that allow the public to stay informed without having to be physically present. With the

> practical limitations on the ability of large numbers of the public to attend a trial, . . . the public must depend upon a vigorous press to keep it advised. . . . With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. Thus, the press, as a segment of the public, acts to assist the whole public in guaranteeing the openness and integrity of the trial process.[124]

Gag orders in criminal proceedings come up in the context of a potential conflict between the right to publish and the accused's right to a fair trial. However, Henry in this case acknowledges the "right to [a fair and open] hearing is one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement,"[125] and is, therefore, aligned with the

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[121] Media's Record Request and Order, App 116-117.
[122] *Detroit Free Press* at 379-380, 388-389 (superseded on other grounds); *Murray* at 286; *Vaughn* at n 25, citing *In re Oliver,* 333 US 257, 270 (1948).
[123] *Midland* at 156, citing *Near v Minnesota ex rel Olson,* 283 US 697 (1931), *Nebraska Press Ass'n v Stuart*, 427 US 539 (1976).
[124] *Detroit Free Press* at 386 (superseded on other grounds), citing *Cox Broadcasting Corp v Cohn*, 420 US 469, 491-492 (1975).
[125] *Ohio Bell Telephone Co v Public Utilities Com'n of Ohio,* 301 US 292, 304-305 (1937) (citations omitted).

interests of the media. The *Nebraska Press* case explains that at a minimum, the trial court is required to make specific findings that there are no less intrusive means for protecting the integrity of the trial process. Yet not only were *no* such findings made, but *no* alternatives were even considered, and *no* parties were even arguing *for* the restrictions. The form provided to Henry, and included above, reveals that this is unfortunately a regular occurrence. There is no mention on this form, like with a typical order where findings are required, that a hearing was held, or that motions were considered, etc. This type of carte blanche use of judicially imposed prior restraints strongly suggests this trial court has forgotten that a "trial court is a public event. What transpires in the courtroom is public property. . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."[126]

Henry has a double interest in having this prior restraint on publication invalidated. First, as the accused in a completely baseless prosecution whose only hope in having justice and the law prevail is for the public to be given full access to the proceedings. Second, as a member of the media, an attorney being followed by thousands worldwide, committed to educating the public on the law and the constitution and empowering citizens to participate in the government process.[127] After all, an attorney has a "duty to protect and *inform the public*."[128]

On any of these due process constitutional catastrophes, waivers by Henry must be on the record. In fact, the Michigan Judicial Institute explains to courts statewide in conducting proceedings remotely, constitutional rights are likely to be implicated, including an accused's right to a speedy and public trial, and the assistance of counsel, and any waivers of these rights must be "on the record."[129] However, the trial court has *never* even attempted to secure waivers from Henry before running roughshod on her various constitutionally protected liberties. Certainly, most of it

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[126] *Craig v Harney*, 331 US 367, 374 (1947), cited by *State v Marshall,* 166 Conn 593, 598 (1974), and *Detroit Free Press* at 386 (superseded on other grounds).
[127] Attorney Katherine Henry's Video Views, App 215-216.
[128] MCL 600.901 Compiler's Note, citing *Falk v State Bar*, 418 Mich 270 (1983).
[129] MJI, *Remote Proceedings During State of Emergency Benchcard,* updated July 23, 2020.

happened without any prior notice to Henry. "As there was no warning of such a course, so also there was no consent to it. We do not presume acquiescence in the loss of fundamental rights."[130]

Conclusion

Allegan County officials argue this is just a simple case of *Prohibited Parking*, but it is nothing short of a *Constitutional Catastrophe*. Here, multiple grounds create the basis for a dismissal with prejudice of this trespass charge. Therefore, Henry is simply asking for the dismissal to serve as "the refusal to permit the trial that the Constitution bars." *Robinson v Neil*, 409 US 505, 510 (1973).

The trial court lacks subject matter jurisdiction over the underlying charges because Henry is charged with trespassing on government property open to the general public, which is blatantly unconstitutional and is not, nor can it ever be, a crime. *Food Employees v Logan Valley Plaza,* 391 US 308, 321 (1968); *Brown v Louisiana*, 383 US 131, 141 (1966). But in addition to equal protection prohibiting Henry from being removed from the property in such a manner, her First Amendment protections to free speech, assembly and petitioning the government bolster her authority to remain on the property. Given this involved the circulation of a constitutional amendment petition, the additional protections for ballot access further strengthen Henry's authority to remain on the property. Resolution ℙ 4 expressly protected Henry's authority to remain on the property, while MCL 750.543z *and* MCL 600.1825(3) each protect Henry *from* prosecution. *People v Hartwick*, 498 Mich 192, 213 (2015). The trial court has *no* subject matter jurisdiction over "violations" of mere *resolutions.* Nor would it have subject matter jurisdiction over an *ordinance* purporting to regulate the parking lots of public property on Election Day, as *Michigan Election Law* and *vehicle/parking* laws expressly, conflict and field preempt such local regulations.

The "very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of

[130] *Ohio Bell Telephone Co v Public Utilities Com'n of Ohio,* 301 US 292, 307 (1937) (citations omitted).

grievances."[131] Ergo assembly and discussing public questions are traditional uses of "public places"[132] like libraries, parks, streets and facilities government bodies meet.[133] The 1st Amendment doesn't guarantee access to property simply because it is owned by the government, but it *does* "protect[] a right of access to places traditionally open to the public."[134] It is undisputed that Doreen and Rebecca, the petitioners circulating the RFI, were not impeding normal town hall operations nor the rights of others. Thus, they were not disturbing the peace. Further, because they were on property open to the general public, they were not trespassing. Therefore, not only did they had a right to remain there circulating the petitions, but they also had the right to try to discuss the law with the deputy, and to resist the threatened illegal arrest. This certainly included their right to seek assistance from counsel upon being threatened with an illegal arrest if they did not depart. And it has never been disputed Henry was there as the lead attorney for the RFI petition, with the sole purpose of discussing the law with the deputy in hopes he would then understand their right to remain there circulating the petition. Since Henry was *not* impeding normal town hall operations *or* the rights of others, she was not disturbing the peace; being on property open to the general public, she was *not* trespassing, nor may her exclusion be pursued through trespass charges; her mere presence then was "unquestionably lawful." *Brown* at 136-44.

As the "constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial," *Cox* at 574 (1965), structural errors in the proceedings divest the court of subject matter jurisdiction, as well. So, if the accused is explicitly denied assistance of counsel, "the Sixth Amendment stands as a jurisdictional bar." *People v Carpentier*, 446 Mich 19, 28 (1994) (citations omitted). The same holds true for speedy trial denials, as in this case now nearing 20 months post arrest. But yet another aspect implicated by the court's actions is that of Henry's "constitutional and statutory right

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[131] *Hague v Committee for Industrial Organization,* 307 US 496, 513 (1939). See also, Const 1963, art 1, § 3.
[132] *Shuttlesworth* 394 US at 152; *Cornelius v NAACP*, at 802 (1985); *Up & Out v State,* 210 Mich App at 172.
[133] *Shuttlesworth* 394 US at 172; *Cox v Louisiana*, 379 US 536 (1965); *Cox v Louisiana*, 379 US 559 (1965); *Edwards v South Carolina*, 372 US 229 (1963); *Cornelius* at 802-03.
[134] *Midland Publishing Co v District Court Judge*, 420 Mich 148, 161 (1984).

to a public trial." *Murray* at 285. At motion hearing, the court insinuated allowing the public to watch the livestream on their own devices, or paying for a DVD of the hearing that (under penalty of contempt of court) cannot be shared with anyone satisfied constitutional and statutory rights to a public hearing. However, *Murray* provides an apt analogy here:

> It is also urged that in this case the prisoner was accorded a public trial, for the reason that there were several other ways of obtaining ingress to the court-room than that in which the public generally entered. . . . But this is a mere subterfuge. There was a public entrance, at which the public applied for admission and were refused, as is shown by the affidavits. *People v Murray,* 89 Mich 276, 291 (1891).

After all, a public trial is a "trial that anyone may attend or observe." Black's Law Dictionary (8th ed), p 1543.

Indeed, procedural due process requires the accused be given notice, an opportunity to defend herself, as well as the assurance that the matter will be conducted in a fair manner. *Hannah v Larche*, 363 US 420 (1960), reh den 364 US 855 (1960). Denying Henry assistance of counsel, *public* hearings, and the right to be physically present at court proceedings is far from conducting the case in a fair manner. Since "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense,"[135] denying Henry these rights robs her of this fundamental constitutional guarantee. No matter how you look at it, "the state never had the power to proceed against her in the first place,"[136] so the "very initiation of the proceedings against [Henry] thus operated to deny [her] due process of law." *Blackledge v Perry*, 417 US 21, 30-31 (1974).

"Defects in subject-matter jurisdiction cannot be waived and may be raised at any time," so the court must order dismissal under MCR 2.116 (C)(4) regardless of the timing. *Erwin* at 64; *Richards* at 444.

I. Requests for Relief

Henry seeks dismissal of this case *with prejudice*, and an order for "the arrest record [to] be

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[135] *Holmes* at 324, citing *Crane* at 690; *Unger* at 300, citing *Kurr* at 326.
[136] *People v Beckner*, 92 Mich App 166, 169 (1979), *People v Johnson*, 396 Mich 424, 439-444 (1976), *People v Parney*, 74 Mich App 173 (1977), *Blackledge*.

removed from the internet criminal history access tool (ICHAT)," pursuant to MCL 764.26a(1)(a). Further, Henry asks this court to order that 60 days from the order of dismissal the "arrest record, all biometric data, and fingerprints shall be expunged or destroyed, or both, as appropriate," and "any entry concerning the charge shall be removed from LEIN," pursuant to MCL 764.26a(1)(b).

II. Substantial Harm to Henry without Immediate Appellate Relief [137]

Failure to grant immediate appellate relief will cause significant harm to our state's judicial integrity and the public's confidence in our judicial system, but also substantial and irreparable harm to Henry, from significant detrimental impacts on her personal life, legal work, and political efforts. **As "it is the *duty of courts* to see that the constitutional rights of the defendant in a criminal case shall not be violated,"[138] this court *must* step in now to stop these violations of Henry's rights.** After all, "a judge must remember above all else that it is the Constitution which he swore to support and defend." *Citizens* at n 63 (citations omitted), and "courts must indulge every reasonable presumption against the loss of constitutional rights." *Illinois* at 338, citing *Johnson v Zerbst,* 304 US 458, 464 (1938); *Mallory* at n 13. In other words, even *if* Henry had actually committed a misdemeanor here, the Constitution does *not* permit her to be tried in the manner this case has been run.

To "deprive a citizen of his only effective remedy," which at this point is an interlocutory appeal, "would not only be contrary to the rudimentary demands of justice, but destructive of a constitutional guaranty specifically designed to prevent injustice." *Zerbst* at 467 (citations omitted). Fortunately, "the availability of an interlocutory appeal affords protection in those cases where an innocent accused should have been screened out."[139] Screened out from what? From the emotional and financial cost of defending a charge that cannot properly be brought. ICLE, Michigan Criminal Procedure, § 2.3. Circuit Court Judge Dennis Kolenda puts it this way:

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[137] "Moreover, justice requires that a court decide the issues of law in the instant case. If the plaintiff's position is accepted, then errant juries may find a defendant liable on the basis of an incorrect interpretation of the law, and that finding may become immune from effective judicial review." *Charles* at 593-594.
[138] *Murray* at 285 (emphasis added), citing *Hill v People,* 16 Mich 351, 357 (1868).
[139] *People v Torres,* 452 Mich 43, 61 (1996), quoting *People v Hall*, 435 Mich 599, 615 (1990).

> Even criminal cases, which have preference on the docket, take time to bring to trial, and when it finally occurs, a trial is, we all know, expensive and a difficult experience, not only for the defendant, but for the victim and the witnesses, and waiting for a trial causes anxiety and concern for those same people and deprives the defendant of liberty, be it pre-trial confinement or the restrictions of bond. Many things can be done to shorten the night . . . one of them [is] the use of pre-trial motions to end criminal cases without the long wait for trial. Many a potentially dispositive pre-trial motion can be well presented within just weeks of the initiation of the prosecution. Doing so, and getting the case resolved as soon as possible, is to everyone's advantage. *Potentially Dispositive Pre-Trial Motions* (2015), App. 279-84.

Likewise, the Michigan and US Supreme Courts have noted that:

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and friends. . . . [An efficient adjudication of the case will reduce the] substantial impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges . . . . Certainly the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life.[140]

The state has no interest in punishing Henry,[141] and the court has *no* authority to continue presiding over this case,[142] so Henry suffers substantial harm the longer it drags on. That is why our Supreme Court prefers the accused ask "that leave be granted to ensure that the issue" is resolved before the accused is required to endure a needless trial. *Torres* at 70. So, she must not be forced "to endure the personal strain, public embarrassment, and expense of a criminal trial"[143] when the "practical result" of a successful challenge to subject matter jurisdiction "is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial."[144]

In addition to Henry's personal life, there's substantial harm to her legal work, too. Henry, as "an officer of the legal system . . . having special responsibility for the quality of justice," MRPC

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[140] *People v Sierb*, 456 Mich 519, n 19 (1998), quoting *US v MacDonald*, 456 US 1, 8-9 (1982).
[141] *Johnson* at 444; The government has an interest in convicting those guilty of crime, but also of ensuring the innocent are not wrongfully accused. Where Henry is charged with something that is not a crime, the state has no interest in obtaining a conviction. *People v New,* 427 Mich 482, 490 (1986); see also, *People v Hall*, 97 Mich App 143, 146 (1980); *People v Cook*, 323 Mich App 435, 443-444 (2018).
[142] *People v Lown*, 488 Mich 242, 268 (2011); *People v Washington,* 944 NW2d 142, 146 (Mich App 2019) (Subject matter jurisdiction is an absolute requirement for court.); see also, *People v Clement*, 254 Mich App 387, 394 (2002); *Zerbst* at 468.
[143] *Torres* at 61, quoting *Abney v US,* 431 US 651, 661 (1977).
[144] *Johnson* at 442; *Blackledge* at 30; *New* at 490; see also, *Hall* at 146; *Cook* at 443-444.

1.0 Preamble, who must "be mindful of deficiencies in the administration of justice," *id,* takes these responsibilities seriously and fights hard everyday to remedy such deficiencies. Many attorneys make such claims, but Henry has done more than most in this regard. For 20 years (as of this June), Henry has fought justice deficiencies by serving in two states as: a public defender in misdemeanors, abuse/neglect cases, and juvenile delinquencies; a lawyer (MN), guardian at litem (MN & MI), and LGAL (MI) for children in abuse/neglect and divorce/custody cases; a restorative justice facilitator in schools and juvenile courts; a mediator in child protection, special education, adult guardianship. Having to research and write on the substantive and procedural due process issues in *this* case, she is cheated of the time to fight in these cases "for the quality of justice" all citizens deserve. MRPC 1.0, Preamble.

All communication with the clerk and deputies was in Henry's capacity as lead attorney for RFI. As such, she is a public official, with a duty to defend legal process and the law, and need not obey questionable legal "obligations," and MCL 600.1825(3) and 600.901 prohibit misdemeanor charges against her, also divesting the court of jurisdiction. Yet here we are 19 months later, the case still not dismissed. If law enforcement officers are allowed to violently arrest an attorney like this - especially for an alleged *parking trespass* - how is Henry supposed to feel safe to fulfill her duties as an attorney, including the duty to protect and *inform the public*, and to challenge the rectitude of official action? So it makes sense where the accused is protected "*from* prosecution," such as here with a lack of subject matter jurisdiction, the issue must be raised and the decision must be made before trial. By its very nature, protection under MCL 600.1825 must be decided by the court as a matter of law, in pretrial proceedings, in order to establish the protection *from* trial. *Hartwick* at 213.

As if the harm to Henry's personal life and legal work wasn't substantial enough, the harm to her political efforts is, too. The circulation of a petition involves core political speech, with the strongest constitutional protections available, and entails "liberty to discuss *publicly* and truthfully all matter of public concern without previous restraint or fear of subsequent punishment." *Meyer* at

421-22. The First Amendment surely prohibits the clerk from removing Henry as she did. Further, "a prosecuting agency shall not prosecute any person . . . for conduct presumptively protected by the first amendment to the constitution." MCL 750.543z. So it makes sense that where the accused is protected "*from* prosecution," such as here, the issue must be raised and decision made before trial. By its very nature, protection under MCL 750.543z must be decided by the court as a matter of law, in pretrial proceedings, in order to establish the protection *from* trial. *Hartwick* at 213.

Although unconstitutionally vague and overbroad regulations like this resolution effectively chill free speech, this directly impacts Henry's political efforts the longer this case continues. On election day, RFI circulators across the state heard of the violent arrest of Henry, and grew nervous in continuing their own petition efforts. After election day, the residual effects were far reaching, with circulators fearful they might be similarly arrested, even if following all laws. RFI terminated its petitioning efforts within the month, but many freedom projects are ongoing. Henry still leads Restore Freedom political efforts including a constitution social media platform, educational presentations, bill watching, legislative advocacy, a newsletter, calls to action, a constitution mobile app, etc. Before election day, Restore Freedom had thousands of volunteers across the state. But volunteering has nearly come to a grinding halt because people are afraid of government retribution as they watch Henry's case unfold, seeing what she's endured. If she doesn't receive immediate appellate relief, her statewide volunteers will likely remain too afraid of the violence and other unconstitutional government action to which their own efforts will fall prey.

Henry surely suffers substantial harm if denied this dismissal/appeal, and forced to stand trial for an act constituting no crime. Her liberty interests are *already* implicated though "constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial." *Cox* at 574 (1965). The constitution does *not* permit this case to continue, lacking such jurisdiction, so the reviewing court must act now, where it's dismissal will serve as "the refusal to permit the trial that the Constitution bars." *Robinson*

v Neil, 409 US 505, 510 (1973). Indeed, this court must reverse the denial of a motion to dismiss where it's an issue of law and the facts necessary for resolution are before it. *Paul v Wayne Cty Dep't of Pub Serv,* 271 Mich App 617, *supra* (2006).

Henry can raise subject matter jurisdiction any time, surely *before* an unjust trial, or, "the injury itself would have already been sustained." *Torres* at 71. The "embarrassment, expense, and ordeal of living in a continued state of anxiety created by the [] trial" can't be erased afterward on appeal, so she can only avoid these substantial harms to her personal life, legal work, and political efforts "by seeking an immediate appeal." *Id.* For the "court has the authority, and, in appropriate cases, *the duty*, to enter *permanent* injunctive relief against a constitutional violation."[145] So, Henry asks this court to look past the fiction of *Prohibited Parking* and issue immediate appellate relief for this *Constitutional Catastrophe.*

Respectfully Submitted: June 6, 2022

/s/ Katherine L. Henry
Katherine L. Henry (P71954)

[145] *MI Coalition of State Empl Unions v Civil Serv Com'n*, 465 Mich 212, 219 (2001).