

IMPOUNDED CASE

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

SJC-13220

IN THE MATTER OF AN ADOPTION

On appeal from the Judgment of the Essex County Juvenile Court

BRIEF OF AMICI CURIAE COMMITTEE FOR PUBLIC COUNSEL SERVICES,
BOSTON BAR ASSOCIATION, CITIZENS FOR JUVENILE JUSTICE,
CHILDREN'S LAW CENTER OF MASSACHUSETTS, DISABILITY LAW
CENTER, JUVENILE RIGHTS ADVOCACY PROGRAM AT BOSTON COLLEGE
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JUSTICE, MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS, MASSACHUSETTS BAR ASSOCIATION, and MASSACHUSETTS
LAW REFORM INSTITUTE
IN SUPPORT OF NO PARTY AND NEITHER REVERSAL NOR AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Mass. R. App. P. 17(c)(1), amici curiae Committee for Public Counsel Services, Boston Bar Association, Children’s Law Center of Massachusetts, Citizens for Juvenile Justice, Disability Law Center, Juvenile Rights Advocacy Program at Boston College Law School, Massachusetts Appleseed Center for Law and Justice, Massachusetts Association of Criminal Defense Lawyers, Massachusetts Bar Association, and Massachusetts Law Reform Institute (collectively, “Amici”) are each nonprofit corporations with no parent corporations, with no stock, and therefore no publicly held company owning 10% or more of their stock.

RULE 17(c)(5) DECLARATION

No party or party’s counsel authored this brief in whole or in part; no party, party’s counsel, or other person or entity other than amici contributed money intended to fund preparing or submitting this brief; and none of the amici or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

STATEMENTS OF INTEREST

The **Committee for Public Counsel Services** (“CPCS”) is a statutorily created statewide agency established by G.L. c. 211D, §§ 1 et seq., whose responsibility is “to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services” to indigent parties in the Commonwealth. Those legal services include defendants in criminal cases; juveniles in delinquency and youthful offender proceedings; children and families in termination of parental rights proceedings; and individuals the Commonwealth seeks to deprive of their liberty (e.g., commitment to a psychiatric facility), or to administer a highly restrictive or highly intrusive treatment modality (e.g., antipsychotic medications). This Court’s decision in this case will affect the interests of CPCS’s present and future clients. See *Patton v. United States*, 281 U.S. 276, 304 (1930) (“Whatever rule is adopted affects not only the defendant, but all others similarly situated”). Aside from the appointment of counsel for the indigent parties, CPCS has no financial interest in the case.

The **Boston Bar Association** (BBA), with more than 15,000 members, traces its origins to meetings convened by John Adams, who provided pro bono representation to the British soldiers prosecuted for the Boston

Massacre and went on to become the nation's second president. The BBA's interests in this case relate most strongly to its goal of ensuring access to justice for all litigants. The BBA recognizes that part of achieving this goal must include addressing structural and institutional bias that impact those who come before the court system. More broadly, the BBA is concerned about the multi-faceted potential implications of the application of new technologies to long-established practices in the court system. The ramifications for individuals' rights have not been fully explored to date, and as such raise concern for the BBA, an organization for which facilitating access to justice and improving the administration of justice have historically been essential elements of our mission.

The **Children's Law Center of Massachusetts** ("CLCM") is a private, nonprofit legal advocacy and resource center providing direct representation to children in Eastern Massachusetts. It also provides technical assistance and training to lay and professional communities throughout the Commonwealth on issues related to child welfare, civil rights, health, education and immigration. CLCM's mission is to promote and secure equal justice and to maximize opportunity for low-income

children and youth by providing quality, culturally-sensitive advocacy and legal services.

Citizens for Juvenile Justice (“CfJJ”) is the only statewide, independent, non-profit organization working exclusively to improve the juvenile justice and other youth-serving systems in Massachusetts. CfJJ’s mission is to advocate statewide systemic reform to achieve equitable youth justice. As an antiracist organization, that commitment to equity includes addressing disparities at decision points in the court system where children and youth of color, and their families, are treated more harshly than their white counterparts. This includes advocacy to improve Massachusetts child welfare system, which has significant racial and ethnic disparities at several decision points, making Black, Latinx and Native American children 2.4, 2.6 and 2.8 times, respectively, more likely to be removed from their homes and put in out-of-home placement than their White peers.

The **Disability Law Center** (DLC) is the designated protection and advocacy system for people with disabilities in Massachusetts and is statutorily mandated pursuant to federal law to protect and advocate for the rights of individuals with disabilities. See 42 U.S.C. § 10805 (people

with mental illness); 42 U.S.C. § 15043 (people with developmental disabilities); 42 U.S.C. § 300d-53 (people with traumatic brain injury); 29 U.S.C. § 794e (people with other disabilities). DLC engages in systemic advocacy and litigation to address discrimination against persons with disabilities and to ensure that they receive access to effective communication, access to justice, and equal access to government programs and services.

The **Juvenile Rights Advocacy Program** (“JRAP”) at Boston College Law School is a curricular law clinic, based at Boston College Law School since 1995. JRAP provides civil legal representation and social work support to court-involved and system-involved youth and families in the areas of child welfare, education, and related matters. Its interest stems from this work.

The **Massachusetts Appleseed Center for Law and Justice** (“Massachusetts Appleseed”) is a non-profit organization driven by a mission to promote equal rights and opportunities for Massachusetts residents by developing and advocating for systemic solutions to social justice issues. We research and identify the ways in which the justice system, schools, and government agencies are systematically failing our

most vulnerable residents. The issues addressed in this amicus brief – around child welfare, due process in parental rights terminations, and due process within virtual hearings – all relate to Massachusetts’s Appleaseed’s ongoing “Access to Justice” work. Generally speaking, our access to justice work aims to eliminate the many systemic barriers within Massachusetts’ legal systems and various administrative agencies that deny justice to thousands of residents each year, with an emphasis on the impact these barriers have on self-represented litigants. Our access to justice work includes examining and working to eliminate language barriers in the courts and administrative agencies. Our access to justice work also includes research we are conducting to learn more about the impact of remote hearings on self-represented litigants, particularly in the context of consumer debt.

The Massachusetts Association of Criminal Defense Lawyers (“MACDL”) is an incorporated association of more than 1,000 experienced members of the Massachusetts Bar who devote a substantial part of their practices to criminal defense. MACDL seeks to improve the criminal legal system by supporting policies to ensure fairness in criminal matters and devotes much of its energy to attempting to correct problems in the

criminal legal system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

The **Massachusetts Bar Association** (“MBA”) is a nonprofit organization that serves the legal profession and the public by promoting the administration of justice, legal education, professional excellence, diversity and unity in the legal profession, and respect for the law. The mission of the statewide MBA is to provide professional support and education to members, and advocacy on behalf of lawyers, legal institutions, and the public. Its governing body, the House of Delegates, has authorized the MBA to join in the filing of this amicus brief.

The **Massachusetts Law Reform Institute** (“MLRI”) is a statewide nonprofit poverty law and policy center. Its mission is to advance economic, racial, and social justice through legal action, education, and advocacy that removes barriers to opportunity and creates a path to self-sufficiency for low-income individuals and families. Through its Family and Children Law Unit, MLRI advocates for judicial, administrative, and legislative policies, in both the private child custody and child welfare arenas, that make the lives of low-income parents and their children safer and more physically, emotionally, and financially stable.

SUMMARY OF ARGUMENT

To determine whether it would be a violation of due process to hold a termination of parental rights trial virtually over a parent's objection, the Court applies the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). (pp. 13-15)

The private interests at stake are the parent's and child's fundamental liberty interests in the integrity of their relationship. The loss that is threatened is permanent. (pp. 15-17)

Most parents who are parties to these cases lack access to technology and the Internet connection they need to participate in a virtual trial. They are likely to be negatively impacted by the distortions that accompany communication via technology, which can lead to less favorable demeanor and credibility assessments. That is particularly problematic in these cases, where character is in issue and the judge's credibility assessments are afforded deference. The high risk of an erroneous deprivation of fundamental liberty interests where a parent or child is compelled to litigate such a trial virtually cannot be reduced by suggested safeguards. (pp. 17-23)

In the current circumstances, where the Commonwealth does not

limit in-person gatherings but permits thousands of people to congregate indoors for sporting and other entertainment events, the Commonwealth does not have a substantial interest in protecting the public health by requiring virtual hearings. (pp. 23-26) Balancing the *Mathews* factors shows that it would be a per se due process violation to hold a virtual termination of parental rights trial over the objection of a parent or child. (pp. 26-27)

Virtual trials exacerbate the dangers of implicit bias, implicate the digital divide (which parents in termination trials usually are on the wrong side of), and pose special challenges to vulnerable populations. The dangers of implicit racial bias are acute in these cases, which disproportionately involve Black and brown families. (pp. 28-30). Many parents who are involved in state-intervention custody cases do not have ready, or any, access to technology and Internet connection. That fact raises doubts whether there are safeguards that could protect their fundamental rights. (pp. 30-36). So, too, do problems inherent in the technology that make meaningful participation over video conferencing more difficult for persons with limited English proficiency, youth, and persons with certain disabilities to achieve. (pp. 36-41)

If the Court were to permit virtual termination of parental rights

trials over objection despite the inherent risks, the Court should adopt procedural safeguards that will guarantee that parents and children have a meaningful opportunity to be heard, fully and fairly. (pp. 41-42). Amici suggest that those safeguards might include, *inter alia*, ensuring prior to trial that a parent and participating child have access to a desktop, laptop, or tablet and understands how the process will work and how to consult with counsel upon request. (42-44). At trial, the judge should address any technological issues and ensure that all participants understand the process for addressing any that arise during trial. (pp. 45-47). If issues come to light after the trial, the court should provide appropriate “remedial” fixes. (p. 47).

ARGUMENT

- I. **Except where the Commonwealth has a substantial interest in protecting the public health, it would be a denial of due process to hold a trial on a petition to terminate parental rights by videoconference over a parent’s or child’s objection.**

In a trial on a petition to terminate parental rights, the Commonwealth seeks to permanently deprive parents and children of constitutional rights “of the highest order.” *Care and Protection of Zita*, 455 Mass. 272, 284 (2009); G. L. c. 210, § 3(c). While this Court recently held

that the public health dangers presented at the height of the COVID-19 pandemic permitted a virtual suppression hearing over a defendant's objection, the Court should not permit objected-to virtual hearings when individuals' fundamental rights are at stake and there is no substantial public health reason to avoid in-court proceedings.

In *Vazquez Diaz v. Commonwealth*, this Court held that it is not a per se violation of a criminal defendant's constitutional rights to hold a suppression hearing virtually "in the midst of the Covid-19 pandemic." 487 Mass. 336 (2021). The hearing there was scheduled to be held during the state of emergency, when the Commonwealth's interest in protecting the public health was "substantial." *Id.* at 337, 343, 350-351. The Commonwealth promoted its interest in curtailing the spread of the virus by, among other things, limiting in-person gatherings. *Id.* at 353.

This case arose from a trial on the Commonwealth's request to terminate a parent's right to parent her child.¹ In contrast to *Vazquez Diaz*,

¹ A decree terminating parental rights may result from a hearing on the merits of a G. L. c. 119, § 24 petition in a juvenile court. G. L. c. 119, § 26(b). See G. L. c. 119, § 24 (summons served on parent at commencement of case must include notice that termination of parental rights may occur); see also G. L. c. 210, § 3(c) (process in probate and family court). In this case, the trial court characterized the proceeding as a "Best Interests" trial. That term

the amicus solicitation in this case does not limit its questions regarding the constitutionality of virtual proceedings to the context of the Covid-19 pandemic.² The due process analysis in these circumstances thus differs from that in *Vazquez Diaz*. The outcome of the analysis does, too.

Due process is a “flexible concept” that varies with the circumstances. *Vazquez Diaz*, 487 Mass. at 341 (citations omitted). To determine what procedural protections are required in a given situation, this Court has employed the analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

typically is used where an earlier trial under G. L. c. 119, § 26 resulted in an adjudication that the child was in need of care and protection and a custody order, and the court is acting on a petition to terminate parental rights under § 26(c). A decree terminating parental rights may be entered only where the court concludes that it would serve the child’s best interests. G. L. c. 119, § 26(b); G. L. c. 210, § 3(c).

² In *Vazquez Diaz*, this Court’s amicus solicitation focused on the constitutional considerations attending a virtual suppression hearing “in the context of the ongoing COVID-19 pandemic.” And, as the Court has recognized, the holding in that case was specific to the pandemic. See *Commonwealth v. Curran*, 488 Mass. 792 (2021) (“In *Vazquez Diaz* . . . we held that a suppression hearing conducted over an Internet-based video conferencing platform *in the midst of the COVID-19 pandemic* was not a per se violation of a defendant’s rights) (emphasis added). In this case, the Court simply asked “[w]hether . . . conducting [a termination of parental rights] trial virtually constitutes a per se violation of a parent’s due process rights or whether, with adequate safeguards, a termination trial may be held virtually, regardless whether a parent requests an in-person trial.”

Care and Protection of Robert, 408 Mass. 52, 59 (1990) (citations omitted). That requires the Court to balance three factors: the private interests at stake in the proceeding; the risk of an erroneous deprivation of those interests through the procedure used and the likely value of other safeguards; and the government's interests. *Id.*

That balancing test shows that, particularly where the government does not have a substantial interest in protecting the public health, it would be a per se violation of a parent's – or a child's – due process rights to hold a virtual termination of parental rights trial over objection.

A. Parents and children have fundamental liberty interests at stake in a proceeding to terminate their relationship.

A trial on the Commonwealth's request to terminate parental rights implicates the parent's and child's fundamental, constitutionally protected interests in the integrity of their relationship. *Santosky v. Kramer*, 455 U.S. 745, 753-754, 760 (1982); *Robert*, 408 Mass. at 59. Those interests are “commanding.” *Santosky*, 455 U.S. at 758 (citation omitted). The child's right to a safe, permanent home – whether with a parent, a guardian, or a prospective adoptive parent – also is at stake. G.L. c. 119, § § 1, 26. That

right, too, is constitutionally protected. See *Robert*, 408 Mass. at 62; *Connor B. v. Patrick*, 985 F. Supp. 2d 129, 158-159 (D. Mass. 2013).

Accordingly, this Court has held that parents and children who are parties to termination of parental rights trials must be provided the opportunity to be heard at a meaningful time and in a meaningful manner. *Dep't. of Public Welfare v. J.K.B.*, 379 Mass. 1, 3-4 (1979) (citation omitted); *Adoption of Mary*, 414 Mass. 705, 710 (1993) (citations omitted). They are also entitled to the effective assistance of counsel. *Care and Protection of Stephen*, 401 Mass. 144, 149 (2001); *Care and Protection of Georgette*, 439 Mass. 28, 33 (2003). A parent who appears for trial has a right to be present throughout the proceeding. *Adoption of William*, 38 Mass. App. Ct. 661, 666 (1995).³ A parent incarcerated in another state does not have an absolute right to be physically present for trial – especially if counsel is present – but the court must select an alternative method for participation if the parent so desires. *Adoption of Whitney*, 53 Mass. App. Ct. 832, 837-838 (2002). A

³ A trial judge has discretion to “excuse the child” before taking evidence on a petition to terminate parental rights. G. L. c. 119, § 26.

termination of parental rights trial must both be, and appear to be, fair.

Adoption of Tia, 73 Mass. App. Ct. 115, 122-123 (2008).

The “precious character” of the rights at stake for parents and children, *Robert*, 408 Mass. at 60, warrants great protection. *Santosky*, 455 U.S. at 753. Virtual termination of parental rights trials create too great a risk that those rights could be terminated erroneously.

B. A virtual trial on a petition to terminate parental rights presents a greater risk of an erroneous deprivation of fundamental rights than an in-person trial.

At a termination of parental rights trial, the government seeks not to burden, but to *extinguish*, parents’ and children’s liberty interests; “[f]ew forms of state action are both so severe and so irreversible.” *Santosky*, 455 U.S. at 759. A termination of parental rights decree extinguishes the parent’s rights ever to see, speak with, or regain custody of the child and to be heard in any proceeding regarding the child’s adoption, guardianship, or other custodial arrangement.⁴ G. L. c. 119, § 26; *Adoption of Helen*, 429

⁴ A termination decree is effective upon entry but may be reviewed on appeal. G. L. c. 119, §§ 26(b)(4), 27. While a court may enter orders for posttermination or postadoption parent-child visits with the decree, such orders confer no rights upon the parent. *Adoption of Vito*, 431 Mass. 550, 562 (2000). They may leave visitation to the discretion of DCF or the child’s proposed adoptive parents, *Adoption of Ilona*, 459 Mass. 53, 63-65 (2014),

Mass. 856, 863 (1999). The permanency of the “threatened loss” to parent and child argues strongly against a process that could increase the likelihood of an erroneous decision. *Robert*, 408 Mass. at 60.

A virtual trial is such a process. Parents in termination of parental rights trials, like the child’s mother here, often do not have access to the technology and Internet connections that are the minimum requirements for an acceptable virtual trial. See *Vazquez Diaz* at 338-340. And even a virtual trial or evidentiary hearing conducted with the safeguards identified in *Vazquez Diaz*⁵ can only “approximate” an in-person trial. *Id.*

Indeed, even if every trial participant had the same good access to and experience with technology, a virtual evidentiary hearing simply “is not the same as an in-person evidentiary proceeding.” *Id.* at 357 (Kafker, J.,

and can be vacated in an adoption proceeding. *Adoption of Vito*, 431 Mass. at 557 n.15.

⁵ The platform used for a virtual hearing must have breakout rooms and interpreter and “share screen” functions. *Vazquez Diaz*, 487 Mass. at 338-339. The court must inquire throughout the hearing to ensure that the technology is working correctly and that all participants – especially the person whose constitutional rights are at risk – can properly see and hear the proceedings. *Id.* at 355-356. The court and counsel also must ensure that the client can observe witnesses and documentary evidence and consult privately with counsel upon request. *Id.* at 342, 355-356.

concurring). “The evolving empirical evidence indicates a virtual hearing may alter [a judge’s] evaluation of demeanor evidence,” which in turn impacts the judge’s credibility determinations. *Id.* at 357-358. Virtual hearings also impact a judge’s “ability to use emotional intelligence, thereby subtly influencing [the court’s] assessment of other participants” and perceptions of witnesses. *Id.* at 357-358. “In contrast to the direct experience of participating in a court room proceeding, virtual hearings have been found to diminish the sensory impressions necessary to structure our perceptions; [w]ithout those sensory impressions ... a dehumanizing effect occurs.” *Id.* at 362, citing Connor, *Human Rights Violations in the Information Age*, 16 *Geo. Immigr. L.J.* 207, 217 (2001) (further citations omitted).

The reasons for these distortions are myriad. Mediated communication, including videoconferencing,⁶ is inherently limited: body language is likely missed or misread, and true eye contact is impossible. See *Vazquez Diaz*, 487 *Mass.* at 360 (Kafker, J., concurring); Bandes & Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the*

⁶ “Mediated communication” refers to communication via technology, as compared to in-person communication.

Courtroom, 68 Buff. L. Rev. 1275, 1278-1282, 1299 (2020). Loss of the “social presence” or “co-presence” evoked by face-to-face communication “impairs the ability to empathize with remote participants.” *Vazquez Diaz*, 487 Mass. at 362-363 (Kafker, J., concurring). Videoconferencing exacerbates the “fundamental attribution error,” pursuant to which we mistakenly attribute the demeanor or actions of others to their personal character rather than their current circumstances. Wainfan & Davis, *Challenges in Virtual Collaboration: Videoconferencing, Audioconferencing, and Computer-Mediated Communications*, RAND Nat’l Defense Research Inst. at 32 (2004). Thus, “an observer might attribute fidgeting, diverted gaze, or similar behaviors to a person’s guilt, rather than acknowledging that a court proceeding mediated by videoconferencing technology could make someone feel uneasy or alienated.” Benninger, Colwell, Mukamal, & Plachinski, *Virtual Justice: A National Study Analyzing the Transition to Remote Criminal Court*, Stanford Law School Criminal Justice Center (Aug. 2021) at 18 (“Stanford Study”).

Ultimately, then, it is no surprise “multiple studies have indicated that witnesses who testify remotely may be viewed as less favorable, less credible, and less memorable than in-person witnesses.” *Vazquez Diaz*, 487

Mass. at 359. The dehumanization and the distorting effects of virtual proceedings go a long way toward explaining the evidence of negative outcomes for litigants in virtual proceedings.⁷ These effects cannot be counteracted by improved access to technology. They are inherent in the technology.

The risk that a trial judge's perception of a parent in a termination of parental rights trial could be unfairly distorted or dehumanized is reason enough to disallow the practice unless the parent and child consent. The outcome of such a trial rests heavily on the court's discretionary credibility assessments, which are accorded substantial deference on appeal. *Adoption of Quentin*, 424 Mass. 882, 886 (1997) (citation omitted). In deciding whether terminating parental rights serves a child's best interests, "much must be

⁷ See Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. Crim. L. & Criminology 869, 897 (2010) (Cook County, Illinois study found that bail amounts set following a virtual hearing were 51% greater on average than bails set after in-person hearings); Walsh & Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 Geo. Immigr. L.J. 259, 259 (2008) (study of over 500,000 asylum cases found that conducting a removal proceeding via videoconference "roughly double[d] to a statistically significant degree the likelihood that an applicant would be denied asylum."); Eagly, *Remote Adjudication in Immigration*, 109 Nw. U. L. Rev. 933, 937 (2015) (teleconferenced immigration proceedings more likely to result in deportation).

left to the trial judge's experience and judgment." *Adoption of Hugo*, 428 Mass. 219, 225 (1998) (internal quotation and citations omitted). That includes the trial judge's assessment of the parent's character, which is at issue in trial. *Care and Protection of Frank*, 409 Mass. 492, 494 (1991); see *Adoption of Carlos*, 413 Mass. 339, 348 (1992).

Moreover, a judge may well have formed an impression of a parent before a termination trial begins. The Commonwealth must present the court with a report containing its version of the facts of the case every time the matter is before the court prior to trial. Juvenile Court Rules for the Care and Protection of Children Rule 10. The rule does not permit a parent or child to refute or clarify allegations contained in those reports. See *id.* Any process that compromises the judge's ability to assess the credibility of the parent or supporting witnesses – or to relate to the parent as a human being – necessarily increases the risk of an erroneous deprivation of the parent's and child's fundamental rights. Applying the safeguards this Court set out in *Vazquez Diaz*, which are targeted only at ensuring proper functioning of technology, would be of little value in mitigating that risk.

C. Absent a state of emergency, the Commonwealth's interest in holding a virtual trial on a petition to terminate parental rights over a parent's or child's objection is de minimis.

In reaching its decision in *Vazquez Diaz*, this Court focused primarily on the governmental interest that was significant at that time: protecting the public health. *Vazquez Diaz*, 487 Mass. at 336, 342-343, 350, 351. The Commonwealth advanced its substantial public health interest in “reducing the spread of COVID-19 by limiting in-person gatherings during the pandemic.” *Id.* at 353.

The pandemic persists, but, due to strides in addressing it, the state of emergency and most related restrictions long since have been lifted. Most relevant here, rather than “limiting in-person gatherings,” *Id.*, the Commonwealth has for months permitted several thousands of people to sit shoulder-to-shoulder in TD Garden to cheer on the Bruins and Celtics. And hundreds are allowed to sit or stand closely together in bars, movie theaters, and other venues. In these circumstances, it hardly can be said that the state's interest in protecting the public health from the virus justifies requiring parents or children to submit to a virtual trial on the state's petition to terminate their fundamental constitutional rights.

Indeed, the courts themselves recognize that termination of parental rights trials and other evidentiary hearings implicating individuals' liberty interests must be held in person. Juvenile Court Standing Order 4-21, § IV(A)-(F).⁸ Such hearings may be held "in a different manner" only if the court determines – and all of the parties agree – that the alternative method is required in the circumstances of the case. *Id.*, § IV(H). A court may, "based upon the circumstances of the case, the resources of the court and the availability and needs of the parties, counsel, and witnesses," permit one or more participants to appear virtually for an in-person hearing. *Id.*, § VI(B).

The other interests the government has in a termination of parental rights case would not be advanced, and likely would be frustrated, by holding virtual trials over a parent's or child's objection. The Commonwealth has an interest in protecting the welfare and best interests

⁸ Juvenile Court Standing Order 4-21 became effective on June 15, 2021. *Id.* Due to increases in COVID-19 cases in Massachusetts, the standing order was suspended from January 3, 2022 through January 31, 2022. Trial Court Emergency Interim Administrative Order 22-1. During that time, in-person hearings were required where virtual hearings were impracticable or "inconsistent with the protection of constitutional rights." *Id.*

of the children in its custody. *Robert*, 408 Mass. at 67. And a child's welfare is best served in the custody of the child's own fit parent. *Custody of a Minor*, 377 Mass. 876, 882 (1979); *Petition of the Dep't. of Public Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 587 (1981). Accordingly, the Commonwealth's interests include properly making determinations of parental fitness and of whether terminating parental rights would serve the child's best interests. See *J.K.B.*, 379 Mass. at 4 (importance of ensuring fair and accurate resolution of termination of parental rights cases). Those interests are advanced by requiring termination of parental rights trials to be held in person unless the parent and child consent to a virtual trial.

Of course, all of the parties have an interest in the timely resolution of a termination of parental rights case. See G. L. c. 119, §§ 1, 29C (importance of ensuring permanence and stability for child); *Care and Protection of Martha*, 407 Mass. 319, 330 (1990) (delay in proceedings not attributable to parent may be due process violation). But it is not clear those interests would be implicated outside of a sustained public health emergency and consequent limitations on in-person proceedings.⁹

⁹ A short suspension of in-person trials due to increases in COVID-19 cases may implicate these interests if, for example, a parent seeks a continuance

D. Balancing the *Mathews* factors yields the conclusion that, outside of a public health emergency that necessitates limits on in-person gatherings, it would be a per se violation of a parent's or child's due process rights to hold a termination of parental rights trial over their objection.

Parents and children have “commanding” liberty interests at stake in termination of parental rights trials. *Santosky*, 455 U.S. at 758 (citation omitted). As discussed, many parents who are parties to those trials lack access to reliable technology and Internet access. Requiring a parent who cannot access the safeguards this Court deemed essential in *Vazquez Diaz* would unacceptably increase the risk of an erroneous deprivation of the parent's and child's fundamental rights. See 487 Mass. at 343 n.10. Even if the parent had high-quality devices and Internet access and the other safeguards were employed, the risk of erroneous deprivation would be unacceptably high because of the way virtual hearings impact judge's perceptions of the parties and witnesses. See *Id.* at 357-358, 362 (Kafker, J., concurring).

where a trial that was scheduled to be in person is shifted to a virtual trial. But a one-month assented-to delay in a termination of parental rights trial likely would not outweigh the individuals' liberty interests or justify the increased risk of the erroneous deprivation of them.

Where the Commonwealth is not asserting a public interest that would justify limiting in-person gatherings, and the juvenile court itself is requiring that termination of parental rights trials and other evidentiary hearings implicating fundamental rights be held in person unless the parties agree otherwise, the government's interests do not override the individuals' interests or justify the increased risks of an erroneous deprivation of them.

This Court should hold that where the Commonwealth does not have a substantial interest in protecting the public health, it would be a per se violation of due process to hold a virtual termination of parental rights trial over the objection of a parent or child.

II. Because virtual trials exacerbate the dangers of implicit bias, implicate the digital divide, and pose special challenges to vulnerable populations – thereby increasing the risk of an erroneous deprivation of fundamental rights – this Court should not permit them over the objection of a parent or child.

This Court recently acknowledged the significant differences between virtual and in-person hearings, *Vazquez Diaz*, 487 Mass. at 356, and recognized that the distorting effects of virtual hearings “alter our evaluation of demeanor evidence, diminish the solemnity of the legal

process, and affect our ability to use emotional intelligence, thereby subtly influencing our assessment of other participants.” *Id.* (Kafker, J., concurring). “[J]udges must be acutely attentive to the subtle and not so subtle distorting effects on perception and other potential problems presented by virtual evidentiary hearings.” *Id.*

A. Virtual trials exacerbate implicit racial bias and pose a significant risk for litigants of color.

Virtual trials exacerbate implicit bias in multiple ways. The distorting and dehumanizing effects of a “mediated” trial can reinforce existing, albeit unconscious, stereotypes. And the added “cognitive load” created by virtual proceedings leads to mental shortcuts that both increase implicit bias and diminish the ability to recognize it. Participants in videoconference seminars may “shift to simpler problem-solving strategies that are not consistent with their training, be unable to raise counterarguments, or be more biased in their judgments.” Wainfan & Davis, *supra*, at 17; see, e.g., van Ryn & Saha, *Exploring Unconscious Bias in Disparities Research and Medical Education*, 306 JAMA 995, 995 (2011). Such cognitive shortcuts increase the risk that implicit bias will negatively impact persons of color who are litigants in virtual trials.

That risk is especially troubling because children from Black and Latino families are overrepresented in the DCF population, at rates 1.5 and 1.7 times, respectively, their proportion of the statewide population of youth ages 0-17. More severe racial disparities are evident in the children DCF chooses to remove from their parents. Latino children make up 32.9% of children removed from their homes, despite being only 19.2% of the overall population. Black children are 14% of the children in out-of-home placement despite being only 8.9% of the 0-17 population in the Commonwealth. Department of Children and Families Annual Report FY 2021 (“DCF Annual Report”), p. 4, 9, 22 (December 2021).

Since virtual hearings exacerbate implicit racial bias that judges already struggle to recognize,¹⁰ they pose a significant risk that people of

¹⁰ In the delinquency context, Black youth are already perceived as older, more mature, and therefore more dangerous than non-Black youth of similar ages. See Blake, Epstein & Gonzalez, *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, Georgetown Law Center on Poverty and Inequality (2017), at 6-10 (summarizing results of surveys showing that Black girls are perceived as more adult-like than their white counterparts); Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psychol. 526 (2014). A judge viewing a Black youth over Zoom may – unintentionally – take a cognitive shortcut and view the child as dangerous enough to detain, when an in-person hearing may create a different perception.

color will be judged unfairly, particularly where subjective “character” assessments play a role in the outcome. *See Adoption of Carlos*, 413 Mass. at 348. Because DCF separates Black and brown families at disproportionately higher rates, Black and brown children and their parents will be disproportionately impacted by the technology’s distorting effects and exacerbated racial bias.¹¹

B. Virtual evidentiary hearings involving indigent litigants rarely have “adequate safeguards” in place.

Virtual trials rarely take place in the type of “ideal” virtual space judges and lawyers regularly experience in meetings and trainings.

1. The “digital divide” creates unequal access to justice and casts doubt on whether “adequate safeguards” are achievable in proceedings involving indigent parties.

Massachusetts, like the rest of the nation, faces a “digital divide,” where some residents have no access to any Internet connection – much

¹¹ The stakes could not be higher. Black and brown children whose parents’ rights are terminated are adopted at disproportionately lower rates. See DCF Annual Report, p. 37. Youth who “age out” of foster care experience higher rates of homelessness, untreated mental health issues, teenage parenthood, interaction with the criminal justice system, and unemployment. Hoffman and Klubock, *Child Welfare Practice in Massachusetts* § 2.8.1 (2012).

less one that is stable – or computers. See Forman, *Gateway Cities at the center of the digital divide in Massachusetts*, MassINC (May 5, 2020);¹² see also Gaylord, et al., *Understanding & Improving Remote Court Proceedings: Research for the Massachusetts Trial Court*, Bentley University, at 23-24 (Dec. 21, 2020) (litigants’ lack of access to necessary technology and stable Internet connections).

Parents involved in termination of parental rights cases almost invariably qualify for court-appointed counsel due to indigence. See *J.K.B.*, 379 Mass. at 2. They likely would be unsurprised by the data on the digital divide. But the numbers are eye-opening to those on the technologically advantaged side of it:

- More than 30,000 Gateway City¹³ households with school-age children do not have a desktop or laptop computer, and 23,000 of them do not have Internet. Gaylord.

¹² <https://massinc.org/2020/05/05/gateway-cities-at-the-center-of-the-digital-divide-in-massachusetts>

¹³ See G. L. c. 24A, § 3A (defining “gateway municipality” as “a municipality with a population greater than 35,000 and less than 250,000 with a median household income below the Commonwealth’s average and a rate of educational attainment of a bachelor’s degree or above that is below the Commonwealth’s average”). The 26 state-designated “Gateway Cities” are home to about one-quarter of all households in Massachusetts.

- In certain neighborhoods in Lawrence, Lowell, New Bedford, and Pittsfield, more than 40% of households lack Internet, as do between 40% and 55% of residents in five census tracts in Fall River. *Id.* ¹⁴
- In Boston, as many as one in five families do not have a computer at home.¹⁵
- “32,000 residents in 32 western towns cannot get [broadband] connection into their homes, according to the Massachusetts Broadband Institute (MBI).”¹⁶

Lack of access to technology and reliable home Internet correlates to low income, socio-economic background, and educational attainment. See Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make*

¹⁴ See Chambers, *Internet Deserts Prevent Remote Learning During COVID-19*, ACLU of Mass.: Data for Justice Project (May 13, 2020), <https://data.aclum.org/2020/05/13/Internet-deserts-prevent-remote-learning-during-covid-19>.

¹⁵ Mejia et al., *We Need to Close Digital Divide in Boston*, Commonwealth Mag. (Nov. 1, 2020), <https://commonwealthmagazine.org/opinion/we-need-to-close-digital-divide-in-boston>.

¹⁶ Hiawatha Bray, *Spotty broadband challenges Western Mass. schools*, Bos. Globe (Sept. 2, 2020), <https://www.bostonglobe.com/2020/09/02/business/spotty-broadband-challenges-western-mass-schools>.

Gains in Tech Adoption, Pew Res. Ctr. (Jun. 22, 2021).¹⁷ “Racial minorities, older adults, rural residents, and those with lower education and income levels are less likely to have broadband service at home.” *Internet/Broadband Fact Sheet*, Pew. Res. Ctr. (June 12, 2019).¹⁷ *Id.*; See Ryan, U.S. Dep’t of Commerce, U.S. Census Bureau, *American Community Survey Reports, Computer and Internet Use in the United States: 2016* at 2, 9 (2018) (“A small percentage of households have smartphones but no other type of computer. These ‘smartphone only’ households were more likely to be low income, Black or Hispanic.”).¹⁸

“Smartphone-only access” is more widespread among people of color: 25% of Hispanic Americans and 17% of Black Americans were “smartphone-only” Internet users as of 2021, while only 12% of white

¹⁷ <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/>. See also Anderson et al., *10% of Americans don’t use the Internet. Who are they?*, Pew Res. Ctr. (Apr. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-Internet-who-are-they>.

¹⁸ <https://www.pewresearch.org/Internet/fact-sheet/Internet-broadband/#who-has-home-broadband>.

Americans rely exclusively on smartphones for Internet access.¹⁹ Lower-income Americans are also more likely to only use smartphones: 27% of those earning under \$30,000 per year as compared to 6% of those earning \$75,000 or more. *Supra*, at note 15.

Significant numbers of indigent litigants attend virtual hearings by using the Zoom app on their phones, circumscribed by their data limits. “When You Use Zoom on Your Phone, You can Only See a Maximum of Four People at a Time in the Gallery View.” Wylde, *7 Differences Between Zoom On Your Phone Vs. Laptop*, Bustle (Apr. 1, 2020).²⁰ The Zoom platform has reduced functionality when accessed from a smartphone rather than a computer.²¹ The Executive Office of the Trial Court established “Zoom

<https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf>

²⁰ And some indigent parents will lack even the option to participate via smartphone, forced instead to participate by dial-up phone access.

²¹ <https://www.bustle.com/p/7-differences-between-zoom-on-your-phone-vs-laptop-22678806>. By contrast, on a computer, the Zoom gallery view supports 25 participants at a time on a single screen. *See Zoom Rooms Display Options*, Zoom Support, <https://support.zoom.us/hc/en-us/articles/115003322603-Zoom-Rooms-Display-Options>.

rooms” for litigants in “select courthouses.” Trial Court Zoom Rooms, Executive Office of the Trial Court.²² Unfortunately, these “Zoom rooms” exist in only a handful of courthouses.

Justice Cypher recently noted trials “are the most challenging to recreate in a virtual environment.” Cypher, *Problem Solving During the Pandemic: How Massachusetts Has Provided Access to the Courts and to Justice During the Covid-19 Pandemic*, 54 Suffolk U. L. Rev. 183, 188 (2021). In bench trials – which termination of parental rights trials are – “there are the complications of presenting witnesses and tangible evidence online and facilitating confidential communications between counsel and clients.” *Id.* at 188-189.²³

²² <https://www.mass.gov/lists/trial-court-zoom-rooms>.

²³ These concerns are well-founded. In the criminal context, two recent surveys found attorneys report their clients are disadvantaged by remote proceedings occasioned by the COVID-19 pandemic. A Stanford study of hundreds of attorneys around the country found an overwhelming majority reported technical difficulties (especially poor audio quality). Stanford Study at 27. A survey of hundreds of Texas judges, prosecutors, and defense attorneys tracks the Stanford Study. Turner, *Remote Criminal Justice*, 53 Tex. Tech. L. Rev. 197, 252 (2021).

2. Even with “ideal” technological conditions, virtual trials may deny meaningful participation to vulnerable populations.

Virtual termination trials may deny meaningful participation to vulnerable populations, including those with limited English proficiency, youth, and individuals with certain disabilities,²⁴ regardless of the quality of the technology. While more research on these issues is needed, individuals in these groups may be negatively and disproportionately impacted in terms of their comprehension and engagement in virtual proceedings. As to all litigants in virtual trials, “the participant who is simultaneously an observer cannot feel as engaged in a videoconferenced proceeding as she would when her consciousness is not thus divided.” Bandes and Feigenson, *supra*, at 1318. “This detached feeling associated with virtual hearings also appears to have sped up the courtroom experience, with many participants, not just litigants, commenting on the speed of hearings, of feeling rushed, or of having a difficult time keeping

²⁴ Examples include language processing disorders, behavioral health conditions, and hearing impairments.

up with the proceedings in general and conversations between other stakeholders.” Gaylord, *supra*, at 27.

Indigent persons with limited English proficiency may face multiple layers that interfere with comprehension: lack of familiarity with lay English, with the language of Zoom and other platforms, and with legal terminology and procedures. Even with an interpreter present, virtual proceedings “involve added challenges for high quality interpretation – especially if the persons needing interpretation are not on video.” *Remote Hearings and Access to Justice, During Covid-19 and Beyond*, National Center for State Courts at p. 9.²⁵ In addition, the limited-English speaker participating virtually lacks the ability to access the same adjunctive supports that would be available to increase understanding in a traditional courtroom, including the opportunity for prompt, spontaneous or non-verbal interactions with attorneys, interpreters, court staff or even other litigants who may be able to help explain what is happening.

²⁵https://www.ncsc.org/_data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf.

Closely related to comprehension problems, negative outcomes also may arise from “depressed engagement” of those participating remotely. See Eagly, *Remote Adjudication in Immigration*, 109 NW.U. L. Rev. 933, 938 (2015) (remote litigants less likely to access attorneys and other resources available in courtrooms, leading to conclusion that “[t]elevideo must therefore be understood as having an indirect relationship to overall substantive case outcomes – one linked to the disengagement of respondents who are separated from traditional courtroom settings.”).

Similar concerns about comprehension and disengagement exist for youth. In a March 2021 report, “Due Process in the Time of COVID,” the National Juvenile Defender Center (now known as the Gault Center) observed, “[d]ue to young people’s still-developing cognition and socioemotional maturity, the lack of physical presence at hearings makes it more likely that a fair and just hearing would be thwarted by [the young person’s] absence.”²⁶ First, “[e]ffective representation of young clients requires meaningful and effective communication during” court proceedings. *Id.* at 16. A youth at home, using a smartphone, data, and the

²⁶ <https://njdc.info/wp-content/uploads/Due-Process-in-the-Time-of-COVID-19.pdf#page=9&zoom=auto,-14,613>

Zoom app, will have neither the developmental ability to interrupt a “room” full of adults nor the technological capability to see counsel in a breakout room. Second, “[t]he lack of direct physical proximity to the client ma[kes] it difficult [for counsel] to effectively de-escalate sensitive situations or mitigate client behaviors as effectively as they would be able to in the courtroom.” *Id.*²⁷

Some individuals with disabilities also may be less able to meaningfully participate in virtual hearings, due to communication and comprehension issues and disengagement that arises when virtual proceedings feel “rushed” or “unreal.” Gaylord, *supra*, at 27. Individuals with certain disabilities may have difficulty comprehending virtual proceedings and may be less likely to avail themselves of a system that requires them to initiate a break in the proceedings to consult with counsel

²⁷ These concerns are not new. In 2001, the Florida Supreme Court repealed an interim rule that for two years had authorized remote proceedings in juvenile detention hearings. The Court stated that “at the conclusion of far too many hearings, the child had no comprehension as to what had occurred and was forced to ask the public defender whether he or she was being released or detained.” Amendment to Florida Rule of Juvenile Procedure 8.100(A), 796 So.2d 470, 473 (Fla. 2001) (Note however, that COVID-19 led to the limited reintroduction of some remote juvenile proceedings.)

or state that they are not understanding the proceedings. The Equality and Human Rights Commission in the United Kingdom was compelled to issue an “interim evidence report” due to its conclusion that “video hearings can significantly impede communication and understanding for disabled people with certain impairments, such as learning disability, autism spectrum disorders and mental health conditions.” Equality and Human Rights Commission, *Inclusive justice: a system designed for all*, Interim Evidence Report on Video Hearings and their Impact on Effective participation. (United Kingdom 2020).²⁸

Importantly, virtual proceedings may allow for integration of assistive technology, such as a screen reader or closed captioning, and thus benefit some individuals with disabilities. They also may reduce access barriers to traditional courtrooms, whether based on architectural features or environmental factors that impair access to effective communication or present health risks to certain individuals. The court has a distinct legal obligation to provide reasonable accommodations to allow equal access and participation, regardless of whether the proceeding is virtual or in

²⁸https://www.equalityhumanrights.com/sites/default/files/ehrc_inclusive_justice_a_system_designed_for_all_june_2020.pdf

person. See, e.g., Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.; section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 et seq.; art. 114 of the Amendments to the Massachusetts Constitution; Massachusetts Equal Rights, G.L. c. 93, § 103; G.L. c. 221, § 92A. Risks to comprehension and meaningful participation that may arise from virtual hearings are particularly acute for those with disabilities who *do not* request a reasonable accommodation or do not have an apparent disability that would trigger an inquiry into the need for accommodation.

III. If this Court were to permit virtual trials over objection despite the inherent risks, “adequate safeguards” must be in place.

As discussed, not all litigants – or even their attorneys – have access to stable and reliable Internet, have Zoom-ready devices, or have enough familiarity with Zoom to have an opportunity to fully participate in a virtual trial. It is against this backdrop that indigent litigants are forced to contend with the trauma and grave stakes of a termination of parental rights trial.

Because constitutional rights are implicated when critical stages of criminal proceedings are conducted virtually, “adequate safeguards” must be in place in those cases. *Vazquez Diaz*, 487 Mass. at 341, 347; *Curran*, 488

Mass. 792, 2021 WL 6139247, *5. If the Court holds that virtual termination trials can be held over the objection of a parent or child, due process likewise mandates “adequate safeguards.” See *Id.* Where those safeguards are clearly inadequate, as with the dropped calls, spotty Internet service, and lack of meaningful screen displays on small screens in this case, constitutional rights, including the due process right to a fundamentally fair trial, are violated. At minimum, amici urge the Court to set standards that guarantee that parents and participating children can see and be seen and hear and be heard, without interruption, throughout the entirety of a trial that threatens to extinguish their rights. To seek to ensure parents’ and children’s meaningful opportunity to be heard, given the inherent problems with virtual hearings, amici suggest that this Court adopt procedures that might include the following.

A. Before trial begins

Courts should confirm in advance that a parent or a child has access to a desktop, laptop, or tablet and sufficient Internet to participate in a virtual evidentiary hearing. See State Court Administrative Office, Lessons Learned Committee, *Michigan Trial Courts: Lessons Learned from the Pandemic of 2020-2021: Findings, Best Practices and Recommendations*, (Nov. 19, 2021) at

p. 28. Courts should consider establishing programs to provide laptops and access to reliable Internet connections to indigent parents who do not have these resources. Because termination of parental rights cases are impounded, such programs would have to ensure that parents are able to access the resources privately.

Prior to the hearing, the court should ask if the litigant has any unmet needs related to accommodations for persons with disabilities or needs an interpreter. *Remote Hearings and Access to Justice, During Covid-19 and Beyond*, National Center for State Courts, at p. 16.²⁹ This requires ensuring the compatibility of online platforms with screen-reading software, confirming that web pages can be easily magnified, and using video technology that integrates closed captioning. *Guiding Principles for Post-Pandemic Court Technology: A Pandemic Resource from CCJ/COSCA*, National Center for State Courts, (July 16, 2020), at p. 3.³⁰

²⁹ https://www.ncsc.org/_data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf

³⁰ https://www.ncsc.org/_data/assets/pdf_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf

Once litigants have been provided with the means to meaningfully participate in a virtual trial, at a minimum, the procedures announced in *Curran* should be followed. Specifically, courts should be required to explain to the parent or child the procedure to be followed during the trial, including how to communicate and consult privately with counsel whenever necessary, and the arrangements made for witness testimony. *Curran*, at *5. Courts might employ “technical bailiffs” to help litigants log on and troubleshoot on technical problems. *Conducting Fair and Just Remote Hearings: A Bench Guide for Judges*, CCJ/COSCA, National Center for State Courts.³¹

B. During the trial

At the outset, courts should practice leniency when litigants do not show up remotely. Additional effective notice should be given before punitive action is taken due to non-appearance (e.g., notice by mail of a new hearing date with a description of where to find the instructions for appearing virtually for the continued hearing).

³¹ https://www.ncsc.org/_data/assets/pdf_file/0025/51784/Remote-Hearing-Bench-Guide.pdf

At the beginning of any virtual hearing, courts should proactively address any technical difficulties and provide litigants with a clear process for dealing with any impediments, such as what to do if their connection drops. State Court Administrative Office, *Michigan Trial Courts Virtual Courtroom Standards and Guidelines* (Apr. 17, 2020).³² That should include frequent check-ins by the court with all parties and counsel to ensure connectivity, and a plan to suspend any hearing if there are connectivity problems. The court should also reassure litigants that the hearing will be suspended – without prejudice – at the request of counsel or any party to address connectivity issues, and will resume after the issue is resolved to all persons’ satisfaction. *Vazquez Diaz*, 487 Mass. at 342.

Courts should also ask litigants about the location from which they are participating. Not all litigants have a private, quiet place in which to participate in the hearing. If they must participate from a public area, they may not have the ability to provide candid information. *Conducting Fair and Just Remote Hearings: A Bench Guide for Judges*, CCJ/COSCA, National

³²https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_std.pdf

Center for State Courts.³³ In addition, background conversations or activities, including some that should be private, may be audible during the trial and may even be captured on the videoconference recording. If this occurs, courts should be required to alert the litigant that the background conversations can be heard and ask them to move to a more private location, if possible, or to tell the other group that they can be overheard. *Conducting Fair and Just Remote Hearings: A Bench Guide for Judges*, CCJ/COSCA, National Center for State Courts.³⁴ The court should periodically encourage litigants to use breakout rooms to confer with counsel, instead of expecting litigants to interrupt the proceedings. *Vazquez Diaz*, 487 Mass. at 366, n.14 (Kafker, J. concurring).

The court should confer with counsel and litigants regarding the logistics of sharing documents and ensure everyone can see them. If a litigant is using a smartphone rather than a computer, alternative methods of sharing should be devised. The judge should proactively take additional

³³ https://www.ncsc.org/_data/assets/pdf_file/0025/51784/Remote-Hearing-Bench-Guide.pdf

³⁴ https://www.ncsc.org/_data/assets/pdf_file/0025/51784/Remote-Hearing-Bench-Guide.pdf

steps to pay closer attention to documents shared by being held up to a smartphone screen. *Vazquez Diaz* at 339, n4.

Finally, judges should proactively check implicit biases and remind themselves to be acutely aware of the cognitive distortions inherent in virtual hearings that may impact their assessments of witnesses and parties.

C. Post-Trial

If connectivity issues come to light following trial, the court should provide appropriate “remedial” fixes, including making transcripts available to the parent and counsel at no cost, convening another hearing, and/or reopening the evidence.

CONCLUSION

The myriad negative impacts of virtual hearings – in termination of parental rights cases and other legal proceedings – far outweigh any expediency they may offer. They should not be held over objection unless there is an ongoing state of emergency, though even then the distorting effects of virtual hearings cannot be mitigated. If the Court were to allow virtual trials to proceed in spite of the risks to individuals’ fundamental

rights, additional safeguards would be required to reduce the risk of due process violations.

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CERTIFICATE OF SERVICE

I, Sarah LoPresti, do hereby certify that on this date I have served the BRIEF OF AMICI CURIAE COMMITTEE FOR PUBLIC COUNSEL SERVICES ET AL. through the Electronic Filing Service Provider (Tyler E-file MA) for electronic service on all parties.

Dated: February 15, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, I, Sarah LoPresti, hereby certify that the brief in this matter complies with the rules of court that pertain to the filing of briefs, including but not limited to: Rule 16(e) (references to the record), Rule 17 (amicus briefs), Rule 20 (form and length of briefs, appendices, and other documents). The brief was prepared using Microsoft Word and size 14 Book Antiqua font. The word count for the relevant sections under Rules 16 and 20 is: 7,490.

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