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April 28, 2023

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-32-22 State of New Jersey v. Juracan-Juracan (087849)

Honorable Chief Justice and Associate Justices:

Pursuant to Rule 2:6-2(b), kindly accept this letter brief on behalf of amici curiae the National Association of Judiciary Interpreters and Translators and the American Translators Association in the above-captioned matter.

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PRELIMINARY STATEMENT

Amici curiae the National Association of Judiciary Interpreters and Translators (NAJIT) and the American Translators Association (ATA) submit this brief in support of Mr. Juracan-Juracan's position in the present appeal. In evaluating the propriety and constitutionality of the trial court's interpreting plan, *amici* urge the Court to consider the literature on remote interpreting. This literature finds that interpreting remotely leads to reduced accuracy and completeness. While remote interpreting can be useful in certain contexts, it introduces unacceptable risks of error into a criminal jury trial and compromises a defendant's ability to follow the proceedings, consult with counsel, and testify effectively. *Amici* also urge the courts to defer to the professional judgment of interpreters as to whether a proposed plan for interpreting services permits them to meet their professional standards.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the purposes of this brief, *amici* accept the statement of facts and procedural history contained in Mr. Juracan-Juracan's brief filed with this Court on April 10, 2023.

ARGUMENT

When Limited English Proficient (LEP) individuals are tried for criminal offenses in New Jersey, they rely on the expertise of professional

interpreters to allow them to participate in their own proceedings. Interpreters assume the complex and cognitively challenging duties of interpreting into a foreign language everything said by all trial participants, from the judge to attorneys to witnesses; of interpreting privileged conversations between defendant and counsel; and in some cases, of interpreting into English the testimony of LEP defendants or witnesses. Despite these challenges, accurate and precise interpreting is essential to a fair trial.

Amici agree with Mr. Juracan-Juracan that the trial court’s ruling denying his emergent motion for in-person interpreting services violated his right “to participate effectively in his own defense,” including his right to testify, his right to confront the witnesses against him, and his right to counsel. *See State v. Kounelis*, 258 N.J. Super. 420, 426-27 (App. Div. 1992) (internal citation omitted) (recognizing the right to an interpreter at a criminal trial). *Amici* also agree that this ruling violated Mr. Juracan-Juracan’s right of equal access to the courts. (DBr at 19-21).¹

Amici write separately to share the collective expertise of professional interpreters represented by NAJIT and ATA. In analyzing the constitutional rights of LEP defendants and the Judiciary’s Language Access Plan, this Court should consider the literature on remote interpreting and interpreters’ standards

¹ DBr refers to Mr. Juracan-Juracan’s brief before this Court.

of ethics and professionalism. *Cf. People v. Sanchez*, 63 Cal. 4th 411, 472-73 (2016) (considering professional standards in reviewing judge's decision to replace interpreter during trial). For the reasons set forth below, remote interpreting for an otherwise in-person criminal trial does not meet professional standards. It involves an unacceptably high risk of error, due to factors such as the interpreter's increased cognitive load and fatigue, incomplete visibility, psychological impacts of isolation from the rest of the participants in the proceeding, and technological problems that may impair audibility and delay proceedings.

Amici note with concern the trial judge's refusal to accept the Spanish-Kaqchikel interpreter's serious concerns about the complications of interpreting remotely during the trial and urge the Judiciary to follow the professional judgment of interpreters when formulating plans for interpreting services.

Judiciary interpreters' codes of ethics, including the New Jersey Supreme Court's Code of Professional Conduct for Interpreters, Translators, and Translators, require interpreters to interpret faithfully and accurately, and to inform the court when they cannot meet their professional standards under existing conditions. NAJIT's Code of Ethics and Professional Responsibilities takes the additional step of requiring interpreters to decline

assignments when circumstances make it impossible for them to comply with this code. Requiring remote interpretation for criminal trials creates ethical risks for interpreters.

I. Remote interpreting in a criminal trial does not comport with interpreters' professional standards, because the risk of error or omission is too high.

“Interpreting is a highly complex cognitive task...and therefore, any modifications to interpreters’ working environments are likely to impact their performance and how they process information.” Jemina Napier et al., *Interpreting via Video Link: Mapping of the Field, in Here or There: Research on Interpreting via Video Link* 11, 20 (Jemina Napier et al., eds., 2018) (hereinafter “Mapping of the Field”) (Aa1²). In fact, experimental studies of legal interpreting have demonstrated that interpreters who are communicating remotely via videoconference with other participants in a legal proceeding make more “content-related errors” than in-person interpreters, even when remote interpreters received specialized training and enhanced equipment and are more experienced. Mapping of the Field at 24; Sabine Braun, “*You are just a disembodied voice really*”: *Perceptions of video remote interpreting by legal*

²“Aa” refers to *amici’s* Appendix. While the sources cited in this brief are all publicly available, they are not all easily accessible through free search engines, LexisNexis or Westlaw. Therefore, for the convenience of the Court and parties, those sources that are more difficult to obtain are appended to this brief.

interpreters and police officers, in Linking up with Video: Perspectives on Interpreting Practice and Research 47 (Heidi Saleaets & Geert Brône, eds., 2020) (hereinafter “Braun 2020”) (Aa27). Content errors included problems such as reduced accuracy and completeness, *see* Mapping of the Field at 23-24, which are constitutionally unacceptable in a criminal trial.³

Researchers have identified factors that increase such errors, even in the absence of technological problems. These include cognitive overload and limitations on visual access to the courtroom and may also include the psychological impacts of isolation from other participants. *See, e.g.*, Mapping of the Field at 20; Barbara Moser-Mercer, *Remote interpreting: Assessment of human factors and performance parameters* 14 (2003) (hereinafter “Moser-Mercer 2003”).⁴ Moreover, technological errors or improper equipment can

³ Even in situations involving collaborative encounters among interpreters and meeting participants, such as conferences, research shows significant costs to using remote video interpreting. In collaborative or low-stakes situations, however, remote video interpreting can sometimes be the best option, particularly since the inception of the COVID-19 pandemic. Therefore, ATA and other professional associations have developed guidance on best practices for remote interpreting, which also recognize the significant downsides of this approach. *See, e.g.*, *ATA Position Paper on Remote Interpreting* (Aug. 30, 2021), <https://www.atanet.org/advocacy-outreach/ata-position-paper-on-remote-interpreting/>; Int’l Ass’n of Conference Interpreters, *Reference Guide to Remote Simultaneous Interpreting* (May 2020), <https://aiic.ch/wp-content/uploads/2020/05/aiic-ch-reference-guide-to-rsi.pdf>.

⁴ https://aiic.org/document/516/AIICWebzine_Summer2003_3_MOSER-MERCER_Remote_interpreting_Assessment_of_human_factors_and_performance_parameters_Original.pdf.

result in reduced audibility for remote interpreters. Sandra Hale et al., *Does interpreter location make a difference? A study of remote vs face-to-face interpreting in simulated police interviews*, 24 *Interpreting* 221, 242 (2022), (Hereinafter “Hale 2022”) (Aa59).

A. Remote judiciary interpreting leads to cognitive overload and rapid fatigue.

First, interpreters regularly carry a high cognitive load. Even when working in person, they must attend to multiple speakers, observe body language and nonverbal cues, and transition seamlessly and repeatedly from one language to another. This load is even greater where, as in most phases of a New Jersey criminal trial, interpreting must be in simultaneous mode, meaning the interpreter is speaking virtually at the same time as they are listening to input in another language, as opposed to listening first and then interpreting consecutively.⁵

In the first controlled experiment on remote interpreting, which took place in a conference setting, Dr. Barbara Moser-Mercer found that interpreters appearing remotely via videoconference reported more psychological stress than interpreters appearing in person. This stress is

⁵ The Administrative Office of the Courts’ Language Access Plan calls for simultaneous interpreting, except during testimony by LEP individuals, which is interpreted consecutively. *Administrative Directive #10-22*, “NJ Judiciary Language Access Plan (LAP)” (Sept. 30, 2022).

associated with the rapid decline in performance observed in this study – a decline beginning after 15 to 18 minutes, about half the time observed for interpreting in person. Remote interpreting was found “to represent not only a novel environment for interpreters in which they need to invoke more effortful problem-solving strategies,” but also to impose “more than the usual physiological and psychological strain,” insofar as “the coordination of image and sound, the piecing together of a reality far away and the concomitant feeling of lack of control all draw on mental resources already overcommitted in this highly complex skill [of interpreting].” Moser-Mercer 2003 at 14.⁶

Since the onset of the COVID-19 pandemic, with videoconferencing becoming much more popular, many people have come to experience cognitive overload even in situations less inherently stressful than interpreting for a criminal trial. Video communications are “digitally encoded and decoded, altered and adjusted, patched and synthesized” in a way that creates unexpected input for our brains: for example, “blocking, freezing, blurring, jerkiness, and out-of-sync audio.” Kate Murphy, *Why Zoom is Terrible*, N.Y. Times (Apr. 29, 2020) (hereinafter “Why Zoom is Terrible”)⁷; (see DBr 10-

⁶ https://aiic.org/document/516/AIICWebzine_Summer2003_3_MOSER-MERCER_Remote_interpreting_Assessment_of_human_factors_and_performance_parameters_Original.pdf.

⁷ <https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html?smid=url-share>.

11). “These disruptions, some below our conscious awareness, confound perception and scramble subtle social cues. Our brains strain to fill in the gaps and make sense of the disorder, which makes us feel vaguely disturbed, uneasy and tired without quite knowing why.” *Id.* (discussing research on interpreters and video psychotherapy).

In a criminal trial, where an individual’s freedom is at stake and the proceeding is adversarial in nature, interpreters experience an even higher level of stress than in a meeting or conference. Unsurprisingly, then, studies have shown that the accelerated, fatigue-related performance decline documented in the conference setting persists in the context of legal interpreting. In a major study led by linguist Sabine Braun, remote interpreters in a simulated legal context displayed an elevated rate of “paralinguistic” problems such as “hesitation, repetition, articulation, ‘false starts,’” and “self-corrections.” Dr. Braun concluded “that the cognitive effort in [remote interpreting] is high irrespective of the specific variables (here training and/or quality of equipment).” Sabine Braun, *Assessment of Video-Mediated Interpreting in the Criminal Justice System, Action 2* at 11-12⁸ (hereinafter “AVIDICUS-2”); *see also* Braun 2020 at 49 (“[T]he faster increase in

⁸ <http://wp.videoconference-interpreting.net/wp-content/uploads/2014/01/AVIDICUS2-Research-report.pdf>.

paralinguistic problems in the [video remote interpreting] condition found by Braun (2013) also suggests an earlier onset of fatigue, corroborating Moser-Mercer's (2003) findings from remote conference interpreting.”).

“Given the high cognitive load of interpreting, . . . any additional distraction . . . is likely to have negative consequences for the interpreting quality.” Sabine Braun & Katalin Balogh, *Bilingual videoconferencing in legal proceedings: Findings from the AVIDICUS projects*, in *Proceedings of the conference Electronic Protocol – a chance for transparent and fast trial*, Polish Ministry of Justice, Warsaw, May 2015, 21, 8⁹ (manuscript available at Aa92). Training, experience, and enhanced equipment do not appear to remedy the problems observed in remote interpreting. *See* AVIDICUS-2 at 12 (“[M]any of the problems identified in AVIDICUS 1 prevailed in the AVIDICUS 2 data sets suggesting that interpreting problems are still magnified by the videoconference condition despite the initial training, additional experience and the use of better equipment.”).

As both NAJIT's and ATA's members can attest, interpreting remotely requires them to field many distractions that do not occur in person. First, the “fact that remote meetings are viewed on two-dimensional screens interferes

⁹ Because the complete published volume is not locally accessible, the referenced page number is from the chapter manuscript, which the authors have designated as the final draft.

with the brain’s visual attention system and forces the interpreter to work harder to maintain concentration and re-create additional missing dimensions.” American Translators Association, *ATA Position Paper on Remote Interpreting* (Aug. 30, 2021) (hereinafter “ATA RI Position Paper”).¹⁰ Additionally, remote interpreters must attend to “continual adjustments to changes in audio levels and ambient noise” and “demands made on interpreters to perform technical troubleshooting or to juggle multiple communication devices while providing interpreting services.” *Id.*

A fairly unique aspect of interpreting for criminal trials is that the interpreter must shift attention seamlessly from interpreting everything said in the courtroom for the LEP defendant, to interpreting private, off-the-record conversations between the defendant and counsel. Both functions are of course critical to the defendant’s ability to participate in their own trial. Interpreters also need the ability to communicate with the judge or court staff. In addition, professional best practices dictate that – due to the research on fatigue – remote interpreters should be working in teams, alternating every fifteen minutes or more frequently, to minimize fatigue.¹¹ In the present case,

¹⁰ <https://www.atanet.org/advocacy-outreach/ata-position-paper-on-remote-interpreting/>.

¹¹ *See Moser-Mercer 2003 at 14* (finding performance decline after 15 to 18 minutes in a remote conference setting). A NAJIT position paper that does not address remote interpretation explains that “[t]o avoid fatigue, the *Active*

moreover, the trial court intends to use relay interpreting – that is, to have a Spanish-English interpreter working with a Spanish-Kaqchikel interpreter, since no English-Kaqchikel interpreter could be identified. To achieve any of this coordination – with counsel, defendant, the judge or court staff, and other interpreters – from a remote location requires toggling back-and-forth between chat and video or between different devices or channels, all while continuing to interpret ongoing proceedings. *See* ATA RI Position Paper. This would lead to an exceptional level of cognitive overload, as well as delays that may make it impossible for the defendant to follow the trial in real time or to meaningfully participate. *See id.*; California Federation of Interpreters, *Video Remote Interpreting Threatens Civil Liberties* (2013).¹²

*Interpreter must be relieved every 20/30 minutes by the Support Interpreter for the same duration of time.” NAJIT, Position Paper on Team Interpreting in Court-Related Proceedings 3 (2016), <https://najit.org/wp-content/uploads/2016/09/Team-Interpreting-5.2020.pdf>. For simultaneous in-person courtroom interpreting, many interpreters find it necessary to alternate every 15 to 20 minutes. *See also* ATA RI Position Paper (“All simultaneous interpreting assignments should have a team of at least two interpreters, as should all consecutive interpreting assignments lasting more than one hour. For events lasting longer than two hours, such as a conference or training session, a third interpreter should be added to each language team.”)*

¹² As the California Federation of Interpreters explains,

Inside the courtroom, the presence of onsite interpreters guarantees that LEP individuals are privy to everything that’s being said, facilitates confidential conversations between attorneys and defendants, parties or witnesses, and ensures that LEP court users are able to ask

Finally, the “requirement for interpreters to remain on camera contributes to fatigue, as interpreters may feel compelled to maintain the same posture for extended periods.” ATA RI Position Paper. In short, remote video interpreting is inappropriate for a criminal trial because it leads to cognitive overload that will result in fatigue and performance accuracy decline.

B. Limited visual access impedes interpreter performance.

Interpreters working in person will typically use information such as “physical characteristics, posture and gaze, and facial expressions to aid [their] cognitive processing,” and thus to better understand “intent and tone” and interpersonal interactions and relationships. Mapping of the Field at 20 (citations omitted). Although access to videoconferencing equipment provides some visual access,¹³ an interpreter generally will be unable to view the entire

questions and to be heard in a way that VRI [video remote interpreting] can never hope to do. Without direct access to an interpreter who is present with the parties, an LEP person's participation and understanding of the proceedings can be significantly impaired.

[California Federation of Interpreters, *Video Remote Interpreting Threatens Civil Liberties* (2013), https://cfi.memberclicks.net/assets/Backgrounders/1_vri-in-the-courts-threatens-civil-liberties.pdf.]

¹³ One recent study found that the use of videoconferencing equipment can enhance the accuracy of remote interpreting in a police interview setting with highly experienced interpreters. Hale 2022. However, interpreting for a police

courtroom at once while simultaneously observing more detailed visual cues such as an individual speaker’s facial expressions and body language. *See* ATA RI Position Paper; Why Zoom is Terrible (describing importance of minute facial muscle contractions in conveying emotion and how they are obscured by routine video processing alterations such as pixelation, smoothing, or freezing).

The cost of not being able to quickly and intuitively shift visual frames raises particular concern in a criminal trial, where the interpreter’s task is to interpret the ongoing proceedings alongside the defendant’s conversations with counsel and testimony from the defendant or other LEP witnesses. *See* ATA RI Position Paper (naming the “inability to change their vantage point or improve the quality of the video or audio transmission” as a reason for decreased interpreting quality in remote settings); (DBr 14) (describing interpreter’s roles at trial). For these reasons, remote video interpreting does not successfully replace the visual information available to an in-person interpreter.

interview does not require simultaneous renditions of what each speaker is saying, but rather a consecutive mode of interpreting that involves turn-taking during the exchange of information. It requires less frequent visual frame shifting than a trial, and the Hale study did not draw any conclusions about the capabilities of less experienced interpreters in a remote setting.

C. Feelings of isolation and alienation reduce interpreting quality.

When interpreters are working in a courtroom, they can connect on a human level with the defendant, counsel, and other participants, to share information on how to work effectively with interpreters and to gather any necessary background information. Interpreters located remotely often cannot take these basic steps. Research shows they are likely to “experience an overall feeling of alienation from the court process.” Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 *Northwestern Univ. L. Rev.* 933, 982 (2015) (citing Ilan Roziner & Miriam Shlesinger, *Much Ado About Something Remote: Stress and Performance in Remote Interpreting*, 12 *Interpreting* 214 (2010)).

“Authentic expressions of emotion are an intricate array of minute muscle contractions, particularly around the eyes and mouth, often subconsciously perceived, and essential to our understanding of one another. But those telling twitches all but disappear on pixelated video or, worse, are frozen, smoothed over or delayed to preserve bandwidth.” Zoom is Terrible. This sense of emotional confusion and disconnection may be one reason for the alienation observed in studies of remote interpreting. Ultimately, the sense of distance an interpreter feels from other participants “results in lack of

motivation and hence produces a decrease in interpreting quality.” Moser-Mercer 2003 at 6.

D. Audibility challenges and technical errors impact accuracy and completeness.

Anything that interferes with an interpreter’s ability to hear participants in a trial can introduce a risk of error or omission. Interpreters interviewed by Hale et al. for their 2022 experimental study named audibility as a “key reason for preferring face-to-face” interpreting over remote video interpreting. Hale 2022 at 242. As *amicus* ATA has noted previously, one frequent technological problem with remote video interpreting is “[p]oor sound quality (e.g., volume and clarity), especially while working in simultaneous mode, because interpreters must hear and understand the speaker’s voice above their own.” ATA RI Position Paper.

Technical precision and audibility will be even more critical at Mr. Juracan-Juracan’s trial because it will involve not only simultaneous interpreting, as discussed above, but also interpreting in three languages, from English to Spanish to Kaqchikel.

In addition to defects in audio quality, remote video interpreting can introduce errors or omissions to criminal trials as the result of internet service disruptions or major equipment failures. Indeed, at Mr. Juracan-Juracan’s prior hearing, which was much shorter than his trial is likely to be, “[t]he

proceedings had to be interrupted several times due to technical issues.” (1T4:18; 1T6:10; 1T7:6). During a jury trial, as explored in greater detail in Mr. Juracan-Juracan’s brief, repeated technical delays could shape the jury’s view of the defendant, who is the only person who needs a Kaqchikel interpreter. (DBr 10-12).

II. The trial court judge should have accepted the professional judgment of the interpreter in this case.

Amici note with particular concern the trial court judge’s decision in this hearing to override the professional judgment of an interpreter who was assisting the court, who indicated on the record he would only be comfortable interpreting for a jury trial if he was permitted to appear in person, due to specific problems with remote interpreting. (1T22:23-23:9). Because remote interpreting interferes with the ability to interpret fully and accurately, using this approach for criminal trials can raise serious ethical dilemmas for interpreters and may deter their participation.

This Court’s Code of Professional Conduct for Interpreters, Translators, and Translators provides that “[i]nterpreters . . . should faithfully and accurately reproduce in the target language the closest natural equivalent of the source-language message without embellishment, omission,

or explanation.” Canon 2¹⁴; *see also* ATA Code of Ethics and Professional Responsibility ¶ 6¹⁵; NAJIT Code of Ethics and Professional Responsibilities, Canon 8.¹⁶ New Jersey’s Code of Professional Conduct also imposes on judiciary interpreters a duty to inform their employer or the court if the interpreter “discovers anything that would impede full compliance with this code,” and a duty to immediately inform the court or presiding officer when the interpreter “has any reservation about his or her ability to satisfy an assignment competently.” *Id.* Canon 10. NAJIT’s Code of Ethics and Professional Responsibilities imposes a similar duty to report circumstances impeding compliance with the Code and enumerates several examples of circumstances that impede full compliance with that Code, noting two of the primary problems arising from remote interpreting: “interpreter fatigue” and the “inability to hear.” NAJIT Code of Ethics and Professional Responsibilities, Canon 10.

A court’s reliance on remote video interpreting during a criminal trial compromises accuracy, as discussed above, and thereby imperils the interpreter’s ability to meet professional standards. At a pretrial hearing in Mr.

¹⁴ <https://www.njcourts.gov/sites/default/files/public/language-services/codeconduct.pdf>.

¹⁵ <https://www.atanet.org/about-us/code-of-ethics/>.

¹⁶ <https://najit.org/wp-content/uploads/2016/09/NAJITCodeofEthicsFINAL.pdf>.

Juracan-Juracan's case, the Spanish-Kaqchikel interpreter expressed on the record strong concern about his ability to meet professional standards while interpreting remotely at trial:

Your Honor, as I have said previously, that it is very complicated to do it in such a way to interpret at a distance. It would be the first case for me to do it this way because for me it is complicated, not just because of the nature of the case, but the nature of the language. And sometimes you don't hear very well and it is simply not the same. And it is interpretation to be interpreted in this claim -- in this case to the client here. So that is the additional challenge that it presents. The complication that we have here would be the first case that I would -- that -- to work in such a fashion at the trial stage.

(1T22:23-23:9). In rejecting the interpreter's professional judgment, the trial court judge accorded insufficient weight to the interpreter's expertise, to the detriment of Mr. Juracan-Juracan's constitutional rights.

NAJIT's Code of Ethics and Professional Responsibilities notably calls upon judiciary interpreters to "decline assignments under conditions that make such compliance patently impossible." *Id.* Thus, should the Court permit remote interpreting in criminal trials, this ruling may deter interpreters from accepting assignments. Instead, the courts should look to judiciary interpreters as the authorities on their own professional competencies and ethical obligations, and work together to ensure a professional level of interpreting for all criminal trials.

CONCLUSION

In light of the professional standards and literature discussed above, in addition to the reasons set forth in Mr. Juracan-Juracan's brief, the Court should reverse the Appellate Division decision and require in-person interpretation for Mr. Juracan-Juracan's trial.

Respectfully Submitted,



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