

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE:
CORONAVIRUS/COVID-19 PANDEMIC

**ADMINISTRATIVE ORDER
NO. 2022-26**

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ELEVENTH AUTHORIZATION TO CONTINUE
THE USE OF VIDEOCONFERENCING OR
TELECONFERENCING IN CRIMINAL MATTERS

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MARGO K. BRODIE, Chief Judge.

On March 13, 2020, the President of the United States issued a proclamation declaring a National Emergency in response to the Coronavirus Disease-2019 (“COVID-19”) pandemic pursuant to the National Emergencies Act (50 U.S.C. § 1601, *et seq.*). On February 26, 2021, and again on February 18, 2022, the President published formal notice in the Federal Registry continuing the national emergency.¹

On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (“CARES Act”), which authorized the Judicial Conference of the United States to provide authority to Chief District Judges to permit the conduct of certain criminal proceedings by video or audio conference.² The President signed the CARES Act into law on March 27, 2020, and the CARES Act remains in effect.³

¹ *A Letter on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic*, The White House (Feb. 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/24/a-letter-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic/>; *Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic*, The White House (Feb. 18, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/02/18/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic-2/>.

² CARES Act, Pub. L. No. 116-136, § 15002(b)(1)–(2), 134 Stat. 281, 528–29.

³ *Id.* § 15002(a), 134 Stat. at 528 (“In this section, the term ‘covered emergency period’ means the period beginning on the date on which the President declared a national emergency under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) with respect to the Coronavirus Disease 2019 (COVID–19) and ending on the date that is 30 days after the date on which the national emergency declaration terminates.”); *see also* National Emergencies Act, 50 U.S.C. § 1622 (providing that “[a]ny national emergency declared by the President . . . shall terminate if

On March 29, 2020, the Judicial Conference of the United States made the appropriate findings as required under the CARES Act, finding specifically that “emergency conditions due to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. § 1601, *et seq.*) with respect to the Coronavirus Disease 2019 (COVID-19) have materially affected and will materially affect the functioning of the federal courts generally,” which finding remains in effect.⁴

On March 30, 2020, acting pursuant to § 15002(b) of the CARES Act and the authority granted by the Judicial Conference of the United States, this Court entered Administrative Order 2020-13, making certain findings and authorizing judges of this District to conduct proceedings remotely in accordance with the CARES Act.⁵

On June 25, 2020, and again on September 21, 2020, December 21, 2020, March 20, 2021, June 22, 2021, September 18, 2021, December 16, 2021, March 17, 2022, June 14, 2022, and September 13, 2022, and in light of the conditions then existing, this Court entered Administrative Orders 2020-13-1, 2020-13-2, 2020-13-3, 2021-05, 2021-05-1, 2021-05-2, 2021-05-3, 2022-05, 2022-11, and 2022-20 respectively, further authorizing judges of this District to conduct proceedings remotely in accordance with § 15002(b) of the CARES Act and the authority granted by the Judicial Conference of the United States.⁶ By law, Administrative Order 2022-20 will expire on December 12, 2022.

— (1) there is enacted into law a joint resolution terminating the emergency; or (2) the President issues a proclamation terminating the emergency”).

⁴ Memorandum from Jim Duff, Director of the Administrative Office of the Courts, Re: Update on CARES Act Provisions for Criminal Proceedings 1 (Mar. 29, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic> (“[T]he authorization will expire when the Judicial Conference finds that emergency conditions are no longer materially affecting the functioning of federal courts.”).

⁵ *Use of Videoconferencing or Telephone Conferencing in Criminal Matters*, Administrative Order No. 2020-13 (Mar. 30, 2020).

⁶ *See Authorization to Continue the Use of Videoconferencing or Telephone Conferencing in Criminal Matters*, Administrative Order No. 20-13-1 (June 25, 2020); *Second Authorization to Continue the Use of Videoconferencing or Telephone Conferencing in Criminal Matters*, Administrative Order No. 20-13-2 (Sept. 21, 2020); *Third Authorization to Continue the Use of Videoconferencing or Telephone Conferencing in Criminal Matters*, Administrative Order No. 20-13-3 (Dec. 21, 2020); *Fourth Authorization to Continue the Use of Videoconferencing or Teleconferencing in Criminal Matters*, Administrative Order No. 2021-05 (Mar. 20, 2021); *Fifth Authorization to Continue the Use of Videoconferencing or Teleconferencing in Criminal Matters*, Administrative Order No. 2021-05-1 (June 22, 2021); *Sixth Authorization to Continue the Use of Videoconferencing or Teleconferencing in Criminal Matters*, Administrative Order No. 2021-05-2 (Sept. 18, 2021); *Seventh Authorization to Continue the Use of*

Pursuant to the CARES Act and Administrative Order 2022-20, I have reviewed the need to continue for a tenth time the authorization to conduct proceedings remotely. I find that since the issuance of Administrative Order 2022-20, the public health crisis has caused, is causing, and is expected to continue to cause some disruption throughout this District, and to the functioning of the courts within this District.

Vaccines are now widely available and significant portions of the populations in the counties comprising the District have received the vaccine. However, many people have not been boosted, and few have received the bivalent booster which helps protect against omicron and related subvariants.⁷ A significant percentage of vaccinated individuals now have waning immunity and are again susceptible to infection.⁸ In addition, at the Metropolitan Detention Center in Brooklyn, where most of the District's defendants are detained, operational restrictions and limitations on the movement of detainees within the facility and to and from Court remain in place and continue to constrain the Court's ability to conduct all criminal proceedings in-person.⁹ The community risk rate in Kings, Queens, Nassau, Richmond, and Suffolk Counties is "high."¹⁰ The average number of new cases per day in New York appears to be increasing, as is the

Videoconferencing or Teleconferencing in Criminal Matters, Administrative Order No. 2021-05-3 (Dec. 16, 2021); *Eighth Authorization to Continue the Use of Videoconferencing or Teleconferencing in Criminal Matters*, Administrative Order No. 2022-05 (Mar. 17, 2022); *Ninth Authorization to Continue the Use of Videoconferencing or Teleconferencing in Criminal Matters*, Administrative Order No. 2022-11 (June 14, 2022); *Tenth Authorization to Continue the Use of Videoconferencing or Teleconferencing in Criminal Matters*, Administrative Order No. 2022-20 (Sept. 13, 2022).

⁷ The latest statistics released by the CDC show that 12.7% of the population over five has received the updated bivalent booster. *See COVID-19 Vaccinations in the United States*, Ctrs. for Disease Control, https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-booster-percent-pop5 (last updated Dec. 1, 2022). The Court has adopted a policy requiring that all employees be vaccinated unless they can demonstrate a valid medical or religious exemption. The vaccine mandate became effective on January 1, 2022.

⁸ Although 76.1% of New York State's population is fully vaccinated, *see Vaccination Progress to Date*, Health.ny.gov, <https://coronavirus.health.ny.gov/vaccination-progress-date> (last visited Dec. 6, 2022), percentages of the eligible population with boosters are lower, *see id.* (reflecting that 6.9% of the population in Kings County, 9.7% of the population in Nassau County, 6.6% of the population in Queens County, 6.2% of the population in Richmond County, and 9.5% of the population in Suffolk County are up to date on their vaccines).

⁹ The MDC's website indicates that the facility is operating at the full level of COVID-19 related restrictions. *See MDC Brooklyn*, <https://www.bop.gov/locations/institutions/bro/> (last visited Dec. 6, 2022).

¹⁰ *COVID-19 Integrated County View*, Ctrs. for Disease Control (last visited Dec. 6, 2022), <https://covid.cdc.gov/covid-data-tracker/#county-view>.

number of hospitalizations.¹¹ Accordingly, continued vigilance with mitigation strategies remains important, as does continued monitoring of the effectiveness of the vaccines and booster shots against current and future variants. In addition, some judges and attorneys continue to work remotely, and some defendants, members of the public, and others continue to limit their travel or are unable to come to the courthouse because they are at higher risk for contracting COVID-19, and the CDC and other public health authorities continue to advise taking precautions to reduce the possibility of exposure to COVID-19 for people with certain medical conditions.¹²

Based on these circumstances, among others, while in-person proceedings in this District have increased significantly over the past several months, the Court still requires the flexibility to use videoconferencing and teleconferencing where necessary to ensure the safety of all who seek to come before the Court. As such, it is still necessary for the judges in this District to be able to continue to conduct proceedings remotely, by videoconference or teleconference.

The undersigned, as Chief Judge of this Court, hereby concludes that it remains necessary to invoke the provisions of the CARES Act until December 31, 2022. The Court will continue to monitor COVID-19 conditions, but does not expect to extend authorization after that date unless the circumstances justify it.

Thus, pursuant to the authority granted under § 15002(b)(1) of the CARES Act, I hereby authorize judges in this District, with the consent of the defendant or the juvenile after consultation with counsel, to continue to use videoconferencing, or teleconferencing if videoconferencing is not reasonably available for use, for the following events when necessary:

- (A) Detention hearings under section 3142 of title 18, United States Code.
- (B) Initial appearances under Rule 5 of the Federal Rules of Criminal Procedure.
- (C) Preliminary hearings under Rule 5.1 of the Federal Rules of Criminal Procedure.
- (D) Waivers of indictment under Rule 7(b) of the Federal Rules of Criminal Procedure.
- (E) Arraignments under Rule 10 of the Federal Rules of Criminal Procedure.

¹¹ *Tracking Coronavirus in New York: Latest Map and Case Count*, N.Y. Times, <https://www.nytimes.com/interactive/2021/us/new-york-covid-cases.html> (last updated Nov. 9, 2022) (“An average of 6,735 cases per day were reported in New York in the last week. Cases have increased by 61 percent from the average two weeks ago.”).

¹² *See People with Certain Medical Conditions*, Ctrs. for Disease Control (last updated Nov. 22, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

- (F) Probation and supervised release revocation proceedings under Rule 32.1 of the Federal Rules of Criminal Procedure.
- (G) Pretrial release revocation proceedings under section 3148 of title 18, United States Code.
- (H) Appearances under Rule 40 of the Federal Rules of Criminal Procedure.
- (I) Misdemeanor pleas and sentencings as described in Rule 43(b)(2) of the Federal Rules of Criminal Procedure.
- (J) Proceedings under chapter 403 of title 18, United States Code (commonly known as the “Federal Juvenile Delinquency Act”), except for contested transfer hearings and juvenile delinquency adjudication or trial proceedings.

Pursuant to § 15002(b)(2) of the CARES Act, I further specifically find that while felony pleas under Rule 11 of the Federal Rules of Criminal Procedure and felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure can be conducted in person and many are being conducted in person, such proceedings can continue to be held remotely where necessary. As a result, if judges in individual cases find, for specific reasons, that felony pleas or sentencings in those cases cannot be conducted in person and cannot be further delayed without serious harm to the interests of justice, judges may, with the consent of the defendant or the juvenile after consultation with counsel, conduct those proceedings by videoconference, or by teleconference if videoconferencing is not reasonably available. This authority extends to equivalent plea, sentencing, or disposition proceedings under 18 U.S.C. § 403 (commonly referred to as the “Federal Juvenile Delinquency Act”).

This authorization is effective from December 13, 2022 to December 31, 2022, unless earlier terminated. If the emergency persists longer than this time period, I will review this authorization and determine whether to extend it pursuant to the provisions of the CARES Act. Notwithstanding the foregoing, pursuant to the provisions of the CARES Act, this authority shall terminate on the last day of the covered emergency period or the date on which the Judicial Conference of the United States finds that emergency conditions due to the national emergency

declared by the President under the National Emergencies Act with respect to the COVID-19 virus outbreak no longer materially affect the functioning of either the federal courts generally or the courts within this District.

SO ORDERED:

Dated: December 12, 2022
Brooklyn, New York

s/ MKB

MARGO K. BRODIE
Chief United States District Judge