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STATE OF MINNESOTA
HENNEPIN COUNTY

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota

Plaintiff,

The Honorable Peter A. Cahill

vs.

Derek Michael Chauvin	Dist. Ct. File 27-CR-20-12646
Tou Thao	Dist. Ct. File 27-CR-20-12949
Thomas Kiernan Lane	Dist. Ct. File 27-CR-20-12951
J. Alexander Kueng	Dist. Ct. File 27-CR-20-12953

Defendants

MEDIA COALITION'S OPPOSITION TO STATE'S MOTION FOR RECONSIDERATION OF ORDER ALLOWING AUDIO AND VIDEO COVERAGE OF TRIAL

American Public Media Group (which owns Minnesota Public Radio); The Associated Press; Cable News Network, Inc.; CBS Broadcasting Inc. (on behalf of WCCO-TV and CBS News); Court TV Media LLC; Dow Jones & Company (which publishes *The Wall Street Journal*); Fox/UTV Holdings, LLC (which owns KMSP-TV); Hubbard Broadcasting, Inc. (on behalf of its broadcast stations, KSTP-TV, WDIO-DT, KAAL, KOB, WNYT, WHEC-TV, and WTOP-FM); Minnesota Coalition on Government Information; The New York Times Company; The Silha Center for the Study of Media Ethics and Law; TEGNA Inc. (which owns KARE-TV); and Star Tribune Media Company LLC (collectively, the "Media Coalition") by and through undersigned counsel, hereby submit this Opposition to the State's Motion for Reconsideration of Order Allowing Audio and Video Coverage of Trial.

INTRODUCTION

To frame the issue in the simplest terms: never before, in the history of this country, has there been a criminal trial like the one scheduled in these cases. While there have been big,

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important cases, few, if any, gave rise to social justice movements the size of what George Floyd inspired.[1] None of them, meanwhile, went to trial at a time when a deadly pandemic had the country in its clutches and when—simultaneously—the country had in its own clutches the technology to livestream a trial around the world. So while the State is correct that no court has recognized a First Amendment right to cameras in the courtroom, its cited precedents lose their punch when one steps back to acknowledge that no court has ever considered a situation quite like this one.

The Court's November 4 Order ("Order") does just that. It confronts a complex and novel problem head on: How to conduct an extremely high-profile jury trial involving four criminal defendants sometime in the foreseeable future, consistent with the public-trial rights of the First and Sixth Amendments, while keeping trial participants, court staff, and the public at large safe from a highly contagious, deadly virus.

It then settles on an extraordinary, perhaps unprecedented solution: This trial—of utmost public interest and concern—will be conducted in a courtroom where, due to social distancing requirements, "there will be little, *if any*, room" for the large number of spectators who wish to observe it. Order at 8. But, given the fundamental, constitutional rights such exclusion infringes, the Court will permit the trial to be recorded, broadcast, and livestreamed in audio and video so that members of the press and public can monitor the trial in real time, from the safety of their newsrooms, offices, and homes.

Defendants, who have a Sixth Amendment right to a public trial, do not challenge this approach. The Media Coalition, though wary of such severe limitations on First Amendment

[1] Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. Times (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

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rights and doubtful that any sort of televised coverage can replicate the experience of being in the courtroom itself, understands the exigencies of the situation and are cautiously willing to accept the Court's plan.[2] So who is the naysayer in this equation? The State.

The State claims that it "absolutely welcomes a public trial." State Br. at 2. It has said that "[t]he public has a *right* to know that the trial is being conducted openly and fairly," and that it "believes it is *critical* that the public is able to *witness and observe* the proceedings as they go forward in this matter of significant local, national and international interest." Ltr. from Matthew Frank to Hon. Peter A. Cahill, Nos. 27-CR-20-12646 *et al*., (Henn. Cty. Minn. July 28, 2020) (emphasis added), https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/Correspondence07282020.pdf . Yet rather than embrace the technology that could make all that possible,[3] the State shuns that technology and goes so far as to suggest that, so long as a miniscule fraction of the people who want to watch the trial are allowed to do so (from an overflow room, no less), the constitutional prerogatives are satisfied.

In refusing to consent to audio-visual coverage and in asking the Court to reconsider its Order, the State cites no clash of constitutional principles—how could it, when Defendants

[2] Though the Media Coalition does implore the Court to make every effort to ensure at least one pool reporter is allowed in the courtroom (in addition to any technician needed to operate audio-visual equipment), to observe those goings-on that cameras may not capture.

[3] Recent history suggests people will indeed watch the proceedings if they are able to do so. A silver lining of the pandemic has been courts' decision to livestream their proceedings and citizens' resulting ability to observe the work of taxpayer-funded courts. For example, this past spring, more than 130,000 people listened live to oral arguments at the U.S. Supreme Court and as of September almost 2 million people had listened to recordings of those arguments. *See Reporters Comm. urges US Sup. Ct. to continue livestreaming oral arguments*, Reporters Comm. For Freedom of the Press (Sept. 16, 2020), https://www.rcfp.org/scotus-livestream-arguments-letter/.

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consent? Instead, it expresses vague and speculative concerns regarding witnesses' perceived reluctance to testify if they know cameras are present. *See* State Br. at 3. In so arguing, the State ignores that a mere preference for privacy is never enough to close a courtroom and it overlooks that many of the witnesses to George Floyd's death—as well as many of his relatives—have already spoken to the media, including on video.

The State also relies heavily on Minn. R. Gen. Prac. 4.02, which (it says) "strike[s] a careful balance between public access to criminal trials and the rights of parties and witnesses." State Br. at 1. But in adopting Rule 4.02 as a pilot program in 2015, the Minnesota Supreme Court made clear that "[t]he media's right to be present at public court proceedings as a representative of the public *is not at issue here*." *Order Promulgating Amendments to Minn. Gen. Rules of Prac.*, No. ADM09-8009, 2015 Minn. LEXIS 639, at *6 (Minn. Aug. 12, 2015) ("2015 Order") (emphasis added). In other words, the Supreme Court was not contemplating the scenario now facing this Court: an extraordinarily important criminal prosecution where no members of the press or the public will be allowed in the courtroom. So whatever "careful balance" the Supreme Court struck in adopting Rule 4.02, the scale tips differently today, and following the letter of that rule would constitute a "true closure, in the sense of excluding all or even a significant portion of the public from the trial." *State v. Lindsey*, 632 N.W.2d 652, 660 (Minn. 2001). As such, strict adherence to that rule would violate the First Amendment, which guarantees not just a *theoretical* right of access but an *actual, meaningful* right of access.

The Court rightly held that, given the enormous public interest in this trial, the limitations imposed by the pandemic, and the options created by modern technology, meaningful access equates to remote access. It should stand by that decision.

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BACKGROUND

As the Court is well aware, George Floyd's death led to an international outpouring of grief and anger over law enforcement's treatment of Black men and women in America. It resulted in arguably the greatest display of civil unrest in the history of Minnesota and led to immediate calls for action and change. It is beyond dispute that how justice is meted out in the prosecutions of the four men involved in Floyd's death is hugely important to this community, the State of Minnesota, the country, and the world.

As the Court is also well aware, Floyd's death and the resulting unrest took place in the midst of a deadly pandemic. As of December 11, 367,218 Minnesotans have tested positive for COVID-19, and 4,198 Minnesotans have died from COVID-19—nearly 1,500 of those deaths coming in just the last several weeks since the Court issued its November 4 Order. *See Situation Update for COVID-19*, Minn. Dep't of Health (last visited Dec. 11, 2020), https://www.health.state.mn.us/diseases/coronavirus/situation.html. The situation is so dire that the Governor's most recent executive order bans not only indoor social gatherings but also spontaneous outdoor gatherings, even if people are socially distanced and even if they are masked. *See Emergency Exec. Order 20-99*, State of Minn. Exec. Dep't, Gov. Tim Walz, (Nov. 18, 2020) at 5-9, https://mn.gov/governor/assets/EO%2020-99%20Final%20%28003%29_tcm1055-454294.pdf. When people must gather indoors, social distancing is the only reliable way to limit transmission of COVID-19. As the Court explained in its Order, this means that a courtroom has been rebuilt for the joint trial in these cases and that "there will be little, *if any*, room for any spectators" including "not only family members and friends of George Floyd and the Defendants, but also members of the public and the press." Order at 8.

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This is unfortunate because "these cases continue to hold the interest of the press and the general public on an international scale," *id.*, and the Court therefore expects the demand for seats in the courthouse (even with overflow rooms) to outstrip the Court's ability to supply them. The Court's expectation is no doubt based in part on prior experience—namely, the recent trial of Mohamed Noor, a former police officer who was tried and convicted for third-degree murder in 2019. High-profile at the time, but nothing compared to these cases, that trial took place months before social distancing limited the number of people who could be crammed in the courtroom and overflow rooms. Yet even at Noor's trial, demand for seats at the courthouse far outstripped supply. The public was thus forced to jockey for access, cramming elevators and hallways, and creating a scene that is, in the era of COVID-19, an epidemiologist's worst nightmare. Decl. of Suki Dardarian ¶¶ 4-7. And indeed the same sort of chaos tends to ensue at any high-profile trial that the public can only observe via in-person attendance at the courthouse. For example, at the recent trial of Harvey Weinstein, a generous *50 seats*—much more than is anticipated here—were reserved by the court for journalists. *See* Decl. of Grace Wong ¶ 14. Yet as Wong, who covered the trial for Court TV recounted, the media would arrive as early as 4:00 a.m. to claim a place, and there was a "mad dash" for seats as soon as the courthouse opened at 8:00 a.m. *Id*. There is no reason to believe the scene will be more orderly here, if in-person attendance is required, or that any semblance of social distancing can be achieved as members of the public wait in line to exercise their First Amendment rights.

Fortunately, given modern technology, there is an alternative in the form of high-tech audio-visual equipment that can livestream the trial to a global audience without disrupting the proceedings in any material way. As Wong described, today's cameras are "silent, robotic, and unobtrusive," and the microphones "are the size of pencil erasers." *Id*. ¶ 18. Because the

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equipment is so discreet, Wong said, trial participants often report that they "'forgot' the cameras were present." *Id*. ¶ 17. In any event, neither Wong nor Dardarian—who have collectively covered or supervised the coverage of hundreds of civil and criminal trials—has ever been under the impression that the presence of audio-visual equipment changed how trial participants behaved or in any way altered the willingness of witnesses to testify and tell the truth. Wong Decl. ¶ 17; Dardarian Decl. ¶ 12.

Finally, in response to the State's concern about witness concerns for privacy and security: Several people who witnessed Floyd's death (and who presumably may be called to testify at trial) have already spoken to the press, often on camera. As Dardarian attested, *Star Tribune* reporters have interviewed at least five eyewitnesses, including the young woman whose cell-phone video of Floyd's death went viral and a young child who is now writing a book about her experience. In addition, the newspaper has published public statements from members of the Floyd family, some of whom routinely speak to the press in settings where they know they are being photographed and recorded. Dardarian Decl. ¶ 13.

ARGUMENT

This Court has inherent authority to manage its courtroom. As the Minnesota Supreme Court has explained, trial courts have a "grave responsibility . . . in overseeing and regulating courtroom conduct and procedure during trials, including criminal trials." *Lindsey*, 632 N.W.2d at 658 (citing *Minneapolis Star & Tribune v. Kammeyer*, 341 N.W.2d 550, 559 (Minn.1983)). An appellate court will not attempt to second-guess this Court's determination regarding threats to order and decorum in the courtroom. *Id.* Indeed, "the right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government." *Wood v. Georgia*, 370 U.S. 375, 383 (1962). Incidentally, the Minnesota Supreme Court implicitly recognized

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these precedents in adopting the pilot program that led to the current iteration of Rule 4.02 when it "firmly embrace[d] the judicial branch's responsibility to control the time, place, and manner of the media's access." 2015 Order at *28-29.

This Court has determined that it cannot safely move the trial in these cases to a larger venue outside the courthouse and that "[s]pacing requirements mean there will be little, *if any*, room for any spectators in that courtroom during the trial." *See* Order at 7-8. Having made that decision, it then reasonably and correctly concluded that "the only way to vindicate the Defendants' constitutional right to a public trial and the media's and public's constitutional right of access to criminal trials is to allow audio and video coverage of the trial, including broadcast by the media." *Id*. at 8. The Court should stand by that decision and deny the State's motion.

I. If the Court is going to close the courtroom, then the First Amendment requires expansive audio-visual coverage.

"[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980). As a result "[a]ll criminal trials held in Minnesota shall be deemed open to the public and to the press." *Kammayer*, 341 N.W.2d at 559.

The First Amendment guarantees this right of access because it "enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982); *see also State v. Brown*, 815 N.W.2d 609, 616 (Minn. 2012) (open trials hold prosecutors and judges "keenly alive to a sense of responsibility."). "[P]ublic access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Globe Newspaper*, 457 U.S. at 606; *see also Press-Enters. Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984) ("[K]nowledge that anyone is free to attend gives assurance that established procedures are being followed and that

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deviations will become known."); *Kammeyer*, 341 N.W.2d at 556 (publicity promotes public confidence). And access serves a therapeutic and "prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Richmond Newspapers*, 448 U.S. at 571. "Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help . . . .'" *Id.*[4]

Because of the important interests public access to criminal trials serves, the U.S. Supreme Court has made clear that "***[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trial***s." *Presley v. Georgia*, 558 U.S. 209, 210, 215 (2010) (per curiam) (emphasis added) (finding constitutional violation where trial court excluded defendant's uncle from voir dire on the basis that 42 potential jurors would be sitting throughout courtroom and "[t]here just isn't space for [the public] to sit in the audience."); *see also Davis v. United States*, 247 F. 394, 395, 399 (8th Cir. 1917) (per curiam) (allowing only 25 members of the public to attend a trial when the courtroom could hold 100 spectators was reversible error). Thus, the question here is not whether the Constitution *requires* the live broadcast or recording of a criminal trial—no one is arguing that it does, at least not under normal circumstances. Rather, the question is about what reasonable measures the Court must

[4] It goes without saying that all of the interests underlying the right of access loom especially large in these cases (which have already led to property destruction and violence) and in this cultural moment (when the public's trust in government, including law enforcement and the judicial system, is dangerously low). As Judge Kevin Burke recently noted "[t]rust is a precious commodity and as a result courts need to pay attention to building a reservoir of trust to withstand the tide winds that inevitably occur when an unpopular decision is issued." Hon. Kevin Burke, *Cameras in the Courtroom, An Outmoded Issue*, Hennepin Cty. Bar Ass'n (July/Aug. 2020), https://www.mnbar.org/archive/msba-news/2020/06/29/cameras-in-the-courtroom-an-outmoded-issue.

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take, given the *actual* circumstances, to preserve the public trial rights guaranteed under the First and Sixth Amendments.

What is reasonable, of course depends on the circumstances, and the circumstances here include:

(1) the extreme interest in these prosecutions, which involve issues of utmost public concern at an international (but also intensely local) scale, Order at 8;

(2) the inherent danger, during the pandemic, in requiring those interested in observing the trial to come to the courthouse to do so, as large crowds will undoubtedly assemble, Dardarian Decl. ¶ 7; Wong Decl. ¶ 15;

(3) the likelihood that social distancing requirements will limit the number of spectators in overflow rooms to a mere fraction of those who wish to attend (and no spectators will be allowed in the courtroom itself), Order at 7-8;

(4) the utter inadequacy of a closed-circuit feed, Wong Decl. ¶¶ 8-9; Dardarian Decl. ¶¶ 8-10;

(5) the existence of technology that will, without disrupting trial, Wong Decl. ¶ 17, enable anyone who wants to observe the trial to do so in real time, from the safety of their own homes via high-quality livestream; and

(6) that audio-visual coverage will occur not over the criminal Defendants' objection, but with their consent and at their request, *see* Order at 2.

These factors are unique to this case and thus it is of no moment that the State is "not aware of a single case—from Minnesota, or any other jurisdiction—holding that the Constitution mandates the public broadcast of an entire criminal trial." State Br. at 2. No court has ever faced the challenges this Court is facing and no court has ever tried to address those challenges as this Court proposes. Given the circumstances,[5] the Court's accommodation is what the Constitution requires.

[5] Because the circumstances of this case are so unique, the State steps beyond the bounds of reason in claiming that allowing audio-visual coverage of this trial will require courts to allow similar accommodations in all future high-profile cases. *See* State Br. at 14. This is hyperbolic. Presumably there will be equally high-profile criminal cases in the future, though likely not

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Rather than grapple with the "reasonable measure" standard, the State's brief instead focuses on "avoid[ing] a 'true closure' of the courtroom . . . by ordering that the trial be played over closed-circuit television in overflow rooms." State Br. at 10. As explained in *State v. Petersen*, whether there is a "true closure" depends on several factors, including (1) whether the courtroom was cleared of all spectators; (2) whether the trial remained open to the public and press; (3) whether there were periods where members of the public were absent; and (4) whether the defendant's family or friends, or any witnesses were excluded. 933 N.W.2d 545, 551 (Minn. Ct. App. 2019).

Although the State tries to pretend that limited access in an overflow room with a poor audio-visual feed is the same as access to the courtroom itself, that's just not true. *See, e.g.*, *Morris Publ'g Grp., LLC v. State*, 136 So. 3d 770, 780 (Fla. 1st DCA 2014) ("Even if the audio feed was working properly in the overflow room, the trial court's decision to exclude the public from physical access to the courtroom during jury selection was a sufficient constitutional infringement to trigger application of the *Press-Enterprise I* test."). As such, each of the factors from *Peterson* is present here: according to the Court's Order, the courtroom will exclude virtually *all* spectators, the courtroom will *not* remain open to the public or the press, members of the public will be absent from the courtroom *for the entire trial*, and the defendants' family and friends (or surely all but few) will also be excluded. Order at 7, 8.

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against the backdrop of a raging, global pandemic. Should the question arise, those courts in the future can consider whether the factual circumstances of those trials warrant audio-visual coverage.

In any event, increased camera coverage is no reason for alarm. As Judge Burke also noted when urging greater acceptance of audio-visual coverage by the courts of this State, "Yes, the media may focus on more sensational proceedings that have widespread public interest, but that has historically been true and has nothing to do with quill pens of yesterday or cameras and audio recordings today." Burke, *supra* note 4.

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Indeed, unlike *all* of the cases cited in the State's brief, the situation here does not merely involve "*some* individuals [being] turned away for lack of space." State Br. at 10 (emphasis added).[6] Rather, it involves turning virtually *everyone* away from the courtroom, and relegating a precious few (far fewer than the number who want to attend) to an overflow room where the State proposes they watch the trial on a closed-circuit feed that is known to be utterly inadequate. *See* Wong Decl. ¶¶ 8-9; Dardarian Decl. ¶¶ 8-10.[7] This is a "true closure," and to put it bluntly: The Media Coalition is not willing to accept such closure or otherwise forfeit its First Amendment rights in exchange for the poor facsimile of access the State proposes—or for

[6] The State's brief cites to various court opinions that are entirely unpersuasive and practically irrelevant on this question given the degree to which their facts differ from those at hand. *See, e.g.*, *State v. Taylor*, 869 N.W. 2d 1, 11-12 (Minn. 2015) (holding that requiring members of the public to show photo identification before entering the courtroom did not violate defendant's Sixth Amendment right to a public trial, but cautioning courts not to impose such a requirement absent good cause and "no reasonable alternative under the *Waller* test"); *Brown*, 815 N.W.2d at 618 (holding that locking the doors to the courtroom during jury instructions but allowing all spectators to stay did not violate the defendant's Sixth Amendment right to a public trial, but cautioning that courts should "commit such acts carefully and sparingly," given the "appearance that Minnesota's courtrooms are closed or inaccessible to the public"); *State v. Silvernail*, 831 N.W.2d 594, 600-01 (Minn. 2013) (same).

[7] Also inadequate is the State's "narrower" proposal, set forth in footnote 4 of its brief, to send a password-protected livestream of the trial "to the number of individuals who typically would be able to watch the trial in person … with a prohibition against recording or replaying the broadcast subject to a contempt order." State Br. at 13-14. First, this is arbitrary—when the number of people who can watch a livestream is all but infinite, there is no basis for restricting it to the number who could fit in in the courtroom. *Cf. Davis*, 247 F. 394 at 399 (limiting gallery to 25 when it would hold 100). Second, it treads dangerously close to a prior restraint, which would be unconstitutional. *See Okla. Publ'g Co. v. Dist. Ct.*, 430 U.S. 308, 310 (1977) (holding that a court may not "prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public"). And third, the State presumably means to suggest that the Court give access to mainstream media organizations, which it might attempt to control, and not the public at large. But this runs headlong into the established rule that the press and public have *equal* rights of access. *See Nixon v. Warner Commc'ns*, 435 U.S. 589, 609 (1978). It is one thing to give priority to those who own tools of mass communication when choosing who gets one of a limited number of seats. It is quite another to choose the press over the public when publishing over the Internet.

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anything short of the expansive audio-visual coverage that the Court's November 4 order contemplates.[8]

II. Arguments regarding witness concerns for privacy and safety are speculative; regardless, such concerns must be addressed on an individualized basis.

As an alternative to barring audio-visual coverage entirely, the State proposes the Court at least "require the consent of testifying witnesses before their testimony is recorded in any format." State Br. at 14. The State claims that Rule 4.02 requires such consent "for the soundest of reasons." *Id.*

However, the State largely misreads the purpose behind Rule 4.02's limitations on audio-visual coverage when it argues those limitations were imposed to prevent the "chilling effect on the testimony of victims and witnesses." State Br. at 6 (quoting 2015 Order at *12). To the contrary, the Court was focused on the issue of whether such coverage could prejudice a defendant's right to a fair trial. 2015 Order at *19-28; *see also Order Promulgating Amendments to the Gen. Rules of Prac. For the Dist. Cts.*, No. ADM09-8009, 2018 Minn. LEXIS 376, at *5 (Minn. July 2, 2018) ("2018 Order") (making permanent the pilot program, the court "conclude[d] that the conditions that govern the coverage of these public proceedings provide the appropriate balance between the *fundamental right of a defendant to a fair trial* and the judicial branch's commitment to the fair, open, and impartial administration of justice." (emphasis added)).

Here the Defendants themselves want audio-visual coverage of their trial, and they believe it is necessary to ensure compliance with the Sixth Amendment. Thus the "soundest of

[8] Thus, with all due respect to the Court, the Media Coalition reserves its right to challenge closure of the courtroom on First Amendment grounds if the Court does not stand by its November 4 order.

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reasons" suggest the Court should permit it. *See* 2015 Order at *28 ("It bears repeating that the concerns of victims and other justice system participants are serious. *No less important are the concerns of a defendant* who, even after a guilty verdict has been returned or a guilty plea accepted, *expects and deserves* the fair administration of justice." (emphasis added)). As this Court itself has recognized, limiting the ability of the press and the public to see witnesses' testimony "is hardly a basis for the public 'to participate in and serve as a check upon the judicial process.'" Order at 9.

Beyond the history underpinning the Rule, the State principally relies on the generalized hypothesis that allowing audio-visual coverage of these prosecutions "might make [witnesses] reluctant to testify." State Br. at 2-3. This speculation is at odds with the thinking of the U.S. Supreme Court, which has held that "a public trial *encourages* witnesses to come forward and *discourages* perjury." *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (emphasis added). It is also at odds with courts' experience during the pilot program made permanent by Rule 4.02: based on 53 cases where audio-visual coverage occurred, "a majority of the committee concluded that the overall impact . . . ranged from neutral to positive. There was, in other words, minimal disruption of the proceedings and no instances of coverage outside the conditions established for the pilot project." 2018 Order at *4.[9]

Meanwhile, the State does not identify a *single* witness who has expressed *any* concern about testifying in front of a camera, much less articulated the *nature* of that concern or how it

[9] Similarly, courts in Florida have routinely allowed robust use of audio-visual equipment since 1977, and as the Florida Supreme Court noted: "on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage. The prime motivating consideration prompting our conclusion is this state's commitment to open government." *In re Post-Newsweek Stations*, 370 So. 2d 764, 780 (Fla. 1979).

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could possibly trump the public-trial guarantee of the First and Sixth Amendments. Rather, the State provides only the sort of vague and generalized arguments that courts routinely reject when considering whether to close the courtroom. *Id*. at 48. The *Waller* Court explained that "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id*. Here, as in *Waller*, the State's arguments are "not specific as to whose privacy interests might be infringed, how they would be infringed, . . . and what portions of [the testimony] might infringe them." *Id*.[10]

Related, the State ignores that categorical treatment of the sort it proposes is verboten. Rather, courts must "determine on a case-by-case basis whether closure is necessary to protect" a witness' privacy interests. *Globe Newspaper*, 457 U.S. at 608-09 (noting that the names of several minor witnesses were already public, and at least some "may have been willing to testify despite the presence of the press."); *cf. Chandler*, 449 U.S. at 575 (rejecting the notion that "the mere presence of photographic and recording equipment and the knowledge that the event would

[10] The State also relies on cases such as *Estes v. Texas*, 381 U.S. 532 (1965), which are of very little instructional or precedential value here. First, the technology that was available in 1965 versus that available in 2020 are of entirely different species; second, the public's awareness and acceptance of life being captured by film is entirely different; and finally, the broadcast coverage contemplated by this Court in its Order is of an entirely different, and unobtrusive nature, as compared to that in *Estes*. In *Estes*, the coverage was overwhelming: "at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table." 381 U.S. at 536; *see also Chandler v. Florida*, 449 U.S. 560, 576 (1981) (noting how extensively technology had changed between the 1962 decision in *Estes* and 1981, "many of the negative factors found in *Estes*—cumbersome equipment, cables, distracting lighting, numerous camera technicians—are less substantial factors today than they were at that time.").

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be broadcast invariably and uniformly affected the conduct of participants so as to impair fundamental fairness").

The Media Coalition has no objection to the Court taking up witnesses' privacy and safety concerns as they arise and on an individualized basis. But it should not change the presumption set forth in its Order that witness testimony is subject to audio-visual coverage. Rather, it should require any witness who objects to such coverage to make an affirmative request[11] and to show, consistent with the First Amendment, a compelling reason why he or she should get to testify away from the eyes and ears of the press and public. *Globe Newspaper*, 457 U.S. at 606-07.

In the event a witness does ask to testify off camera (or off audio), the Court should first give the Media Coalition an opportunity to be heard and should also remember that neither mere preference for privacy nor vague concerns about safety are sufficient to permit witnesses to avoid the public scrutiny provided by audio-visual coverage. *See Minneapolis Star & Tribune v. Schumacher*, 392 N.W.2d 197, 205-06 (Minn. 1986) (stating that, even under common law, "[i]n order to overcome the presumption in favor of access, a party must show *strong countervailing reasons* why access should be restricted." (emphasis added)); *see also* Order Unsealing Court File, *In re Ellison*, No. 27-FA-11-7451, slip op. at 6-7 (Henn. Cty. Minn. Oct. 12, 2018) (dismissing privacy and security concerns in a divorce proceeding as "vague" and "speculative," noting that the "privacy concerns" articulated were not "any different than 'privacy concerns' in

[11] This approach is consistent with the Supreme Court's approach to juror *voir dire*: "[b]y requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure." *Press Enters. Co. v. Super. Ct.*, 464 U.S. 501, 512 (1984).

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the thousands of other [similar] proceedings"), attached as Ex. A. And the Court should consider how, if at all, allowing a witness's testimony to be livestreamed constitutes any greater invasion of privacy or threat to safety than does compelling their testimony in their first place, when both their name and testimony will be part of the public record regardless whether they are depicted using audio-visual equipment.

The Court should also consider whether the witness has already spoken publicly, either to the press or directly to the public through social media. As Suki Dardarian detailed in her declaration, the *Star Tribune* has published multiple interviews with witnesses to Floyd's death—including a nine-year-old witness who is now writing a book—and it has covered several public press conferences held by Floyd's family members. Dardarian Decl. ¶ 13. And at least two additional potential witnesses have also sat for public interviews with other media outlets. *See, He was in the car when Floyd was arrested. Now, he's sharing his story*, CNN.com (June 5, 2020), https://www.cnn.com/videos/us/2020/06/05/george-floyd-friend-witness-maurice-lester-hall-cpt-vpx.cnn (interview with Maurice Lester Hall); *Witness describes George Floyd's final moments*, NBCNews.com (June 4, 2020), https://www.nbcnews.com/now/video/witness-describes-george-floyd-s-final-moments-84427333880 (interview with Donald Williams). It hardly seems that such witnesses, who have already told their story to the public, should be permitted to testify in secret.

CONCLUSION

Save for a technician to operate audio-visual equipment, this Court does not expect that any member of the press or general public will be admitted to the courtroom during the Trial of these important cases. Unless circumstances change, that means virtually no one other than the trial participants will hear every sigh or every sob or see every raised eyebrow or subtle cock of

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the head. No member of the press or general public will ever lay eyes on the assembled jurors to see how they respond to what is said—or to what goes unsaid. No spectator will be able to make an in-person assessment of witness credibility.

This is all incredibly unfortunate, to say the least: According to the Attorney General himself,

> The issue of police-community relations has been a point of controversy and pain for the whole of American history. It involves centuries of trauma. In the past several years alone, almost every part of Minnesota has lived through a fatal encounter with law enforcement. George Floyd's death raises that trauma yet again for so many people. It is legitimate for community members to be outraged by George Floyd's death.

Statement of Atty. Gen. Ellison (May 26, 2020), https://www.ag.state.mn.us/Office/Communications/2020/05/26_GeorgeFloyd.asp. And as the Supreme Court has recognized, the public always "has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny." *Waller*, 467 U.S. at 47.

Thus, under different circumstances, members of the Media Coalition would undoubtedly challenge the courtroom's closure. Its members, however, recognize the challenges of the COVID-19 pandemic, and they realize that everyone must be realistic about what is not only possible but also safe. The Coalition appreciates the efforts of this Court to uphold the constitutionally guaranteed right of access to criminal prosecutions as best it is able given these uniquely challenging circumstances.

Contrary to the State's argument, the Media Coalition is not arguing that the First Amendment *always* requires a court "to provide access to *every* member of the media or the public," State Br. at 11 (emphasis added). Nor does it argue that under normal circumstances, the First Amendment requires that the press be allowed to use audio-visual equipment to cover trials.

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Rather, it argues that the First Amendment right of access is a right of *meaningful* access and the Court must "take *every reasonable measure* to accommodate public attendance." *Presley,* 558 U.S. at 215 (emphasis added).

For all the reasons stated above, the State's proposal is not reasonable. The Court's plan, set forth in its November 4 Order, is. It should continue to implement that plan and it should deny the State's motion for reconsideration.

Dated: December 14, 2020

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