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State of Minnesota
11/5/2021 2:22 PM

ACLU Minnesota

November 5, 2021

VIA E-SERVICE
The Honorable Regina M. Chu
Hennepin County Government Center
300 South Sixth Street
Minneapolis, MN 55487

RE: Request of the ACLU-MN for Leave to Appear as *Amicus Curiae* and File Letter Brief of *Amicus Curiae* Regarding Courtroom Closure in the Jury Trial of *State v. Potter*, 27-cr-21-7460

Dear Judge Chu,

The American Civil Liberties Union of Minnesota (ACLU-MN) seeks leave to participate as amicus curiae in *State v. Potter*, 27-cr-21-7460, and to submit a letter in lieu of a brief of amicus curiae regarding the Media Coalition's Motion Objecting to Closure of Trial to the Press and Public.[1]

The Minnesota Rules of Criminal Procedure do not address participation of amicus curiae in the district court. Courts have broad discretion, however, to grant parties leave to participate as amicus curiae in pending district court proceedings. *See, e.g., Metro. Sports Facilities Comm'n. v. Minnesota Twins P'ship*, 2001 WL 1511601 (Hennepin Co. Dist. Ct., Nov.

[1] The Media Coalition's Motion Objecting to Closure of Trial to the Press and the Public filed on October 29, 2021, seeks an order regarding public and media access to the trial of Kimberly Potter, which is scheduled to begin on November 30, 2021. Given the upcoming trial and the ACLU-MN's belief that the Court will soon rule on the Media Coalition's Motion, the ACLU-MN seeks leave to file a letter rather than a formal amicus brief in this matter.

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Filed in District Court
State of Minnesota
11/5/2021 2:22 PM

16, 2001) (permitting State of Minnesota to participate as amicus curiae in action between two private parties).

The General Rules of Practice for the District Courts do not contain a provision governing the filing of a memorandum of amicus curiae. Minnesota Rule of Civil Appellate Procedure 129 is therefore instructive. Under Rule 129.01(c), parties seeking to participate as amicus curiae "shall identify whether the[ir] interest is public or private in nature, identify the party supported . . . and shall state the reason why a brief of an amicus curiae is desirable." Minn. R. Civ. App. P. 129.01(c).

For the reasons set forth below, the ACLU-MN respectfully asks the Court to allow it to submit this letter as amicus curiae in this case.

ACLU-MN's Identity and Interest[2]

The ACLU-MN is a private, nonprofit, nonpartisan organization supported by approximately 39,000 individual members and supporters in the State of Minnesota. It is the statewide affiliate of the American Civil Liberties Union. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the Minnesota and United States Constitutions. Among them are the First Amendment right of the general public to attend criminal trials, its Minnesota analogue, and the attendant common-law presumption of public access to courts – issues directly implicated in the instant matter. The ACLU-MN's interest is, therefore, public.

Participation of *Amicus Curiae* is Desirable

The issues in this case affect interests extending far beyond the individual parties in this case. Not only will a decision in this case regarding access to the trial affect individuals and entities who seek to view trial proceedings throughout the State of Minnesota; this Court's decision will

[2] Although Minnesota Rule of Civil Procedure 129.03 is not directly applicable here, the ACLU-MN certifies that no counsel for a party or the Media Coalition authored this letter in whole or in part, and that no person or entity made a monetary contribution to the preparation or submission of this letter other than the ACLU-MN, its members, and counsel.

Filed in District Court
State of Minnesota
11/5/2021 2:22 PM

immediately impact how many residents of Hennepin County, the State of Minnesota, and around the globe have access to a trial of paramount public importance. The ACLU-MN has an extensive background in the field of constitutional rights and a long history of participating as *amicus curiae* in important matters involving the Minnesota and United States Constitutions. The proposed submission – the instant letter – is concise and will not add any delay to the proceedings or the Court's determination on the pending motion regarding closure of the courtroom.

Statement of Party Supported and Position Taken

The ACLU-MN supports the Media Coalition's position that prohibiting A/V coverage while also holding the Potter trial in a courtroom that lacks sufficient seating for possibly *any* members of the general public functionally constitutes a courtroom closure that violates the First Amendment to the United States Constitution.[3]

In its Order of August 5, 2021 denying A/V coverage of the Potter trial, the Court acknowledged that courtroom 1856 had "little room" for the general public and members of the press. Order Denying Audio and Video Coverage of the Trial at 2, *State v.* Potter, 27-cr-21-7460 (Aug. 5, 2021) (Aug. 5th Order). Indeed, during the Chauvin trial in courtroom 1856, only three members of the media and two family members (1 per side) were permitted inside the courtroom, which was redesigned to omit gallery seating. *See* Media Coalition's Memorandum in Support of Media Coalition's Motion Objecting to Closure of Trial to the Press and the Public (Media Memo) at 5, 16 (Oct. 29, 2021). It is the ACLU-MN's understanding that, given Chief Justice Gildea's Order and Preparedness Plan of October 19, 2021, the Court will now hold the Potter trial in courtroom 1856, with perhaps identical COVID-19 conditions as the Chauvin trial: social distancing requirements, little or no

[3] The ACLU-MN also supports the position of the State of Minnesota, which moved for A/V coverage in June 2021 "[t]o ensure the full realization of the[] important principles" of public access to criminal trials under both the First and Sixth Amendments. *See* State's Memorandum of Law In Support of Motion for Visual and Audio Coverage of Trial (State's Memo), at 5 (June 30, 2021).

Filed in District Court
State of Minnesota
11/5/2021 2:22 PM

room for spectators, and 1-2 pool reporters. *See* Media Memo, Aff. of Leita Walker ¶ 4, Ex. B (Oct. 29, 2021). These two Court decisions—to deny A/V coverage and hold the trial in courtroom 1856, which lacks sufficient spectator access, amount to a court closure, raising serious concerns for the public's rights under the First Amendment.[4]

The United States Supreme Court has repeatedly reaffirmed that the First Amendment presumptively requires the public access to judicial proceedings. *See, e.g.*, *Presley*, 558 U.S. at 215 ("Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials."); *Richmond Newspapers v. Va.*, 448 U.S. 555, 578 (1980) ("[A] trial courtroom . . . is a public place where the people generally—and representatives of the media—have a right to be present . . . ."); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) ("Although the right of access to criminal trials is constitutional in nature, it is not absolute. But the circumstances under which the . . . public can be barred from a criminal trial are limited."); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*) (presumption of openness extends to juror voir dire); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (presumption of openness extends to preliminary hearings).

As the Supreme Court established in *Globe Newspapers Co.*, for a court closure to comply with the First Amendment, "it must be shown that the denial [of public access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." 457 U.S. at 607.

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[4] Although the Sixth Amendment guarantee to a fair and public trial is implicated here by the functional courtroom closure at issue, the ACLU-MN does not address whether the Court's decision to hold the trial in a courtroom with no gallery seating for the general public and no A/V coverage in fact amounts to structural error, such that reversal would be automatic, *see Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905 (2017) ("[T]he underlying constitutional violation—the courtroom closure—has been treated by this Court as a structural error, *i.e.*, entitling the defendant to automatic reversal without any inquiry into prejudice."), because "[t]he Sixth Amendment right . . . is the right of the accused" to invoke, *Presley v. Georgia*, 558 U.S. 209, 212 (2010).

Filed in District Court
State of Minnesota
11/5/2021 2:22 PM

The Court further emphasized in *Press-Enterprise I*:

> The presumption of openness may be overcome *only* by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

464 U.S. at 510 (emphasis added). Finally, closure is permitted only when a court finds that no less restrictive alternative will suffice. *Press-Enterprise II*, 478 U.S. at 14. Here, the Court cannot overcome the presumption of openness on the record before it.

The Court's closure of the Potter trial to the public does not appear to be based on a finding that closure is required to prevent a substantial probability of harm to public health due to COVID-19. *See* Aug. 5th Order at 2-3 (stating that the COVID-19 pandemic is "wind[ing] down."). But even assuming that a *physical* courtroom closure was necessary due to COVID-19, banning the public total access to the trial would still violate the First Amendment because less restrictive alternatives exists: either permitting media personnel in the courtroom to provide A/V coverage so that the general public can virtually access the trial, or moving the trial to a courtroom with gallery seating sufficient to accommodate members of the general public.

An overflow room is neither an alternative less restrictive means, nor, as Judge Cahill found, a "reasonable measure to protect the constitutional rights of defendant[], the public, and the press." Order Denying Motion to Reconsider and Amend Order Allowing Audio and Video Coverage of Trial at 5, *State v. Chauvin*, 27-cr-20-12646 (Dec. 18, 2020) (Cahill J., Order). As the First Amendment requires the implementation of the least restrictive alternative, overflow rooms cannot satisfy this exacting requirement, where the Court has at its disposal the ability to either livestream the trial or to change to a courtroom that has gallery seating.

Furthermore, the Court underestimates the public's interest in this *trial*. *See* Aug. 5th Order at 4 (indicating that because fewer than 80 people attended the virtual omnibus hearing, 80 spots in overflow rooms at the trial

would be sufficient). There will be more than 80 people seeking to watch this trial. The State detailed how protests related to Mr. Wright's killing lasted 11 nights and continued for nearly a month. State's Memo at 1 (citing news reports). Indeed, even three weeks after Mr. Wright was killed "hundreds" of people joined his family in a three-mile march. Media Memo at 7 (citing news reports). And the Chauvin trial drew more than 18 million viewers in the U.S. alone, with more than 23 million viewers tuning in for the return of the verdict. John Klobin, *More than 18 million tuned in for the Chauvin verdict*, THE NEW YORK TIMES (April 21, 2021), https://www.nytimes.com/2021/04/21/business/media/chauvin-verdict-viewers.html. Given those numbers, it is too restrictive to presume that fewer than 100 people would be interested in this case. This is especially true given that the trials of Kyle Rittenhouse in Wisconsin and the defendants accused of killing Ahmaud Arbery are also ongoing, all of which are attracting considerable public attention.

That there is substantial public interest in the Potter trial is further demonstrated by the fact that, last week, a federal district court judge cited the start of this trial and the inevitable protests that will surround it as grounds to issue a preliminary injunction to stop law enforcement from targeting members of the press during protests. *Goyette v. City of Minneapolis*, 20-cv-1302, Order Granting Plaintiffs' Motion for a Preliminary Injunction at 20 (D. Minn. Oct. 28, 2021), *available at* https://casetext.com/case/goyette-v-city-of-minneapolis-3 (holding that journalists' First Amendment rights will be irreparably harmed if law enforcement prohibits them from covering protests around the trial of Potter in November, and Chauvin's co-defendants in March 2022). While this trial may not receive as much attention as the Chauvin trial, there will be more than 80 people interested in viewing it.

Finally, as Judge Cahill found, overflow rooms feature:

> bad video, bad audio, limited seating, [and] jostling for position by members of the media and the public, as well as the likelihood of having hundreds (if not thousand) of members of the public and press assembling at the Hennepin County Government Center daily . . . running afoul of . . . efforts to enforce social distancing requirements ordered by Chief Justice Gildea.

Filed in District Court
State of Minnesota
11/5/2021 2:22 PM

Cahill, J. Order at 5. Overflow rooms are simply not large enough to accommodate the many members of the public interested in this trial. Presumably, the same COVID-19 concerns that would justify a courtroom closure would also require the Court to severely limit the capacity of any overflow rooms, hindering access to a trial that will generate significant public interest. Accordingly, such circumstance are simply insufficient to guarantee the public the reasonable and meaningful access to the trial that the First Amendment requires. *See Presley*, 558 U.S. at 215.

Given the Court's decision to hold the trial in courtroom 1856 *and* deny A/V coverage, the Court is effectively closing the courtroom doors, in violation of the First Amendment.

The ACLU-MN urges that Court to act expeditiously to protect the First Amendment rights at issue here and allow A/V coverage of the trial in courtroom 1856 or, in the alternative, to move the trial to a courtroom that can accommodate members of the general public and the press.

Respectfully submitted,

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