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STATE OF MINNESOTA
HENNEPIN COUNTY

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota

Plaintiff,

The Honorable Regina M. Chu

vs.

Kimberly Ann Potter

Defendant

Dist. Ct. File 27-CR-21-7460

MEMORANDUM IN SUPPORT OF MEDIA COALITION'S MOTION OBJECTING TO CLOSURE OF TRIAL TO THE PRESS AND PUBLIC

American Public Media Group (which owns Minnesota Public Radio); Association of Minnesota Public Educational Radio Stations; The Associated Press; Cable News Network, Inc.; CBS Broadcasting Inc. (on behalf of WCCO-TV and CBS News); Court TV Media LLC; Fox/UTV Holdings, LLC (which owns KMSP-TV); Gannett Satellite Information Network, LLC (which publishes *USA Today*); 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; Minnesota Spokesman-Recorder; NBCUniversal Media, LLC; Sahan Journal; Saint Paul Pioneer Press; The Silha Center for the Study of Media Ethics and Law; Star Tribune Media Company LLC; TEGNA Inc. (which owns KARE-TV); and WP Company LLC (which publishes *The Washington Post*) (collectively, the "Media Coalition") by and through undersigned counsel, hereby submit this Memorandum in support of their Motion Objecting to Closure of Trial to the Press and Public.

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INTRODUCTION

Nearly three months ago, on August 5, 2021, this Court denied the State's motion for audio and video coverage ("A/V Coverage") of the trial in the above-captioned case, which motion Defendant Kimberly Potter had opposed.[1] In its Order (hereafter, the "August 5 Order"), the Court acknowledged that A/V Coverage was allowed at the recent trial of Derek Chauvin but noted that the circumstances in that case were "substantially different." August 5 Order at 2.

Among the differences, according to the Court, were the dangers of a still-raging pandemic during the Chauvin trial, such that "social distancing requirements were mandated" and six-feet had to be maintained "between all jurors and most trial participants." *Id.* Thus, the Court explained, there was "little room for spectators and media members" in the courtroom. *Id.* "What's more," the Court said, "Judge Cahill was tasked with the difficult job of anticipating the trajectory of the COVID-19 pandemic" and the "prognosis" was that "it would worsen such that it was reasonable to expect social distancing would continue into the scheduled trial timeframe of March 2021." *Id.* at 2-3. The Court also noted "security concerns" surrounding Mr. Chauvin's trial, *id.* at 3, driven in large part by its extremely high-profile nature. *Id.* at 3. During the Chauvin trial, the Court said, it was anticipated that "thousands would likely gather at the Hennepin County Government Center, seeking access to the trial courtroom or engaging in protests during the trial." *Id.*[2]

This case, the Court said back in August, does not present the same "extraordinary circumstances." *Id.* The pandemic is "wind[ing] down" and the "Court has relaxed its mandates

[1] In addition to the arguments raised herein, the Media Coalition incorporates by references the arguments raised in the State's motion.

[2] The Court also noted that, unlike Ms. Potter, Mr. Chauvin consented to A/V Coverage. August 5 Order at 2.

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on social distancing." *Id.* Security for this trial will not be as tight as it was for Mr. Chauvin's, and thus anyone interested in attending the proceedings can be accommodated "by way of seating in the trial courtroom, or seating in the 'overflow rooms'" (which, the Court said, can accommodate 50 people). *Id.* Finally, the Court pointed to merely "notable," rather than "overwhelming" public interest in this case. *Id.* at 4. Given these differences, the Court predicted Minnesota General Rule of Practice 4 "can be applied without concern that it will infringe upon the … public's right of access to a public trial." *Id.* at1.

Respectfully, and in light of developments over the past three months, the Media Coalition disagrees.

Whatever optimism Minnesotans had about the end of the pandemic in August, the numbers have spiked in recent weeks and courts (including the Minnesota Supreme Court) continue to treat it as a very real threat by imposing draconian limitations on press and public access to proceedings at Government Center—including, apparently, in this case. Specifically, the Media Coalition has recently learned that press and public access to this trial will be similar (perhaps identical) to that in the Chauvin trial, with the notable difference that A/V Coverage will be prohibited. Further, while the murder of George Floyd perhaps drew more national and international interest than the death of Daunte Wright, this observation is hardly grounds upon which to conclude that the Court can accommodate a significant number of those who want to attend Ms. Potter's trial, even if overflow rooms provide a reasonable substitute for being in the courtroom (which they do not).

Under the First Amendment, the press and public's right of access to criminal proceedings is a right of *reasonable* and *meaningful*—not just theoretical—access. *Presley v. Georgia*, 558 U.S. 209, 210, 215 (2010) (per curiam). Given the significant public interest in this

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case and what the Media Coalition understands may be a *total exclusion* of the general public from the courtroom (and exclusion of all but a few token members of the media), the only way to provide reasonable and meaningful access under the First Amendment is through A/V Coverage. The Media Coalition therefore urges this Court to permit such coverage, despite Ms. Potter's objection.

Background

The trial in this case will mark the third time in as many years that a former police officer has been criminally charged and tried in the Fourth Judicial District for the on-duty killing of a civilian.

The first was *Mohamed Noor*, No. 27-CR-18-6859, who was prosecuted for killing Justine Ruszczyk Damond and tried in the spring of 2019, before the COVID-19 pandemic. There was no A/V Coverage permitted during the guilt/innocence phase of Mr. Noor's trial. Thus, the only way people could watch the proceedings was to attend them in person. Despite this—and despite Mr. Noor's trial occurring before Mr. Floyd's murder sparked the largest social justice movement in U.S. history[3]—his trial attracted enormous attention. On the days of the verdict and sentencing, for example, the courtroom and overflow rooms were filled to capacity. Members of the public literally rode the elevator up and down because there was not room to disembark and stand in the hallway outside the courtroom. Many people were turned away and were not able to watch the reading of the verdict or the sentencing. Declaration of Suki Dardarian ¶ 5.

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

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The second was *Derek Chauvin*, No. 27-CR-20-12646, convicted of the second-degree murder of Mr. Floyd in April 2021. Because of the pandemic, and perhaps also due to security concerns, no member of the general public was permitted to attend the trial in person. Instead, the Honorable Judge Peter Cahill decided to livestream the trial and opened the courtroom only to trial participants, three journalists (two pool reporters and a producer for Court TV), and one family member per side. Thus, we don't know how many people would have attended if given the option. We do know that 18 million people watched the reading of the verdict.[4]

We also know that the livestreaming of Mr. Chauvin's trial earned praise from a wide range of court participants and observers, including many previously opposed to A/V Coverage of criminal trials. For example, Attorney General Keith Ellison, whose office opposed A/V Coverage in the Chauvin trial, told WCCO-TV after the trial ended that his viewpoint had changed: "Things went better than I thought they were going to," he said. "I thought it would alter the way the lawyers handled the case and handled the evidence, but it went pretty well."[5] Ellison repeated the sentiment in an interview with Fox 9: "It worked out better than I thought. I'll say, hey, I can be wrong and I guess I was a little bit." In the same interview, prosecution team member Steve Schleicher compared the cameras to "shopping at Target. You didn't really notice. You just go in and you do your thing." He further said that he was "vaguely aware" of the cameras but "not really. You didn't notice them. I didn't really pay attention to the media afterwards … We're in trial, we have work to do." Prosecution team member Jerry Blackwell,

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[4] John Koblin, *More than 18 million tuned in for the Chauvin verdict*, NYTimes.com (Apr. 21, 2021), https://www.nytimes.com/2021/04/21/business/media/chauvin-verdict-viewers.html.

[5] Esme Murphy, *AG Keith Ellison Speaks Out After Derek Chauvin's Conviction*, Minnesota.CBSLocal.com/ (Apr. 25, 2021), https://minnesota.cbslocal.com/2021/04/25/full-interview-ag-keith-ellison-speaks-out-after-derek-chauvins-conviction/ (relevant comments at 5:17-5:27).

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also part of the Fox 9 interview, agreed. "When you're in the courtroom there's no cognizance or awareness or thought … about who's watching," he said.[6]

Minnesota defense attorneys similarly saw the value in livestreaming such a high-profile trial. Mary Moriarty, Hennepin County Public Defender for more than thirty-one years, tweeted, "I was against cameras in the courtroom at the beginning of this trial, but I may have to move off that position because this trial exposed so much of what happens that the public has no way of knowing."[7] Joe Tamburino, another long-time criminal defense attorney, put it more bluntly: "cameras in the courtroom worked."[8]

Likewise, current Hennepin County Chief Judge Toddrick Barnette—who, prior to becoming a judge, worked both as a public defender and for the Hennepin County Attorney's Office—told the Associated Press that he grew to feel "comfortable that [the media] were really interested in the integrity of the process," that they "worked very hard to make sure there were no violations of Judge Cahill's order," and that one of the biggest benefits of livestreaming the trial was the public's ability to watch and learn from the process.[9]

But perhaps the biggest, most important endorsement of this Court's decision to livestream the Chauvin trial came on June 18, when the Minnesota Supreme Court issued an

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[6] *See* Paul Blume (@PaulBlume_FOX9), Twitter (Apr. 26, 2021), https://twitter.com/PaulBlume_FOX9/status/1386784094911008768.

[7] *See* Mary Moriarty (@MaryMoriarty), Twitter (Apr. 21, 2021), https://twitter.com/MaryMoriarty/status/1385025113867702273.

[8] Joe Tamburino, *Chauvin Trial Proves Cameras Belong in Minnesota Courtrooms*, MinnLawyer.com, https://minnlawyer.com/sponsored_content/chauvin-trial-proves-cameras-belong-in-minnesota-courtrooms/.

[9] Associated Press, *Other officers' trial in Floyd death to be broadcast*, MinnLawyer.com (Apr. 30, 2021), https://minnlawyer.com/2021/04/30/other-officers-trial-in-floyd-death-to-be-broadcast/.

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order directing the Advisory Committee on the Rules of Criminal Procedure to consider whether the current requirements for audio and video coverage of criminal proceedings in Minnesota should be modified or expanded. Order, *In re: Minn. Supreme Ct. Advisory Comm. on Rule of Crim. Proc.*, No. ADM10-8049 (Minn. June 18, 2021) ("June 18 Order").[10] "Public interest in and access to judicial proceedings is vital to the fair, open, and impartial administration of justice; it promotes confidence in the basic fairness that is an essential component of our system of justice," the Order said, echoing language from *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980), that the Media Coalition had cited throughout the prosecutions of Mr. Chauvin and his codefendants.

The third trial will be this one, of Kimberly Potter, who fatally shot Daunte Wright. Ms. Potter killed Mr. Wright during Mr. Chauvin's trial and at what might have been the height of the social justice movement that Mr. Floyd's murder galvanized and propelled to international prominence. Ms. Potter's actions led to days of demonstrations and unrest, prompting the activation of more than 3,000 Minnesota National Guard members in the Twin Cities.[11] Three weeks after his death, Mr. Wright's family led hundreds of people on a three-mile march to the Brooklyn Center Police Department, which was still surrounded by fencing and concrete

[10] *Available at* https://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/News%20and%20Public%20Notices/Orders/ADM10-8049_Order_6-18-2021.pdf.

[11] Amir Vera, Jason Hanna, Brad Parks and Madeline Holcombe, *Protesters gather at Brooklyn Center police station hours after ex-officer is charged in the death of Daunte Wright*, CNN.com (Apr. 15, 2021), https://www.cnn.com/2021/04/14/us/daunte-wright-minnesota-shooting-wednesday/index.html.

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barriers.[12] Further demonstrations will undoubtedly materialize in the days leading up to and during Ms. Potter's trial.

Meanwhile, although the Court said in August that the pandemic is "winding down," the Media Coalition is not so sure. Minnesota courts, including the Minnesota Supreme Court, are still operating under COVID-19 protocols, revisited and renewed as recently as October 18. *See* Order Governing the Continuing Operations of the Minnesota Judicial Branch (Minn. Oct. 18, 2021) ("Supreme Court October Order") ("Since the last operations order, the COVID-19 pandemic has continued, the positivity rate and positive case numbers in Minnesota have increased significantly, and the entire State of Minnesota is currently experiencing a high level of community transmission.").[13]

Additionally, the State's positivity rate of diagnostic testing has been over the 5% caution threshold for nearly three months and, in the latest weekly report, the statewide average was 6.1%.[14] Hospital beds have been in short supply for weeks and *Star Tribune* reported on October 23 that metro hospitals have even been forced to close their emergency rooms to ambulances,

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[12] Mara Klecker and Kim Hyatt, *Hundreds follow Daunte Wright's family in a march through Brooklyn Center*, StarTribune.com (May 3, 2021), https://www.startribune.com/hundreds-follow-daunte-wright-s-family-in-a-march-through-brooklyn-center/600052861/.

[13] *Available at* https://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/COVID-19/101821-Order.pdf.

[14] Minnesota Dep't. of Health, Weekly Covid Report, at 7 (Oct. 28, 2021) *available at* https://www.health.state.mn.us/diseases/coronavirus/stats/covidweekly4321.pdf; Jeremy Olson, *COVID-19 pandemic wave continues retreat in Minnesota*, StarTribune.com (Oct. 25, 2021), https://www.startribune.com/covid-19-pandemic-wave-continues-retreat-in-minnesota/600109835/.

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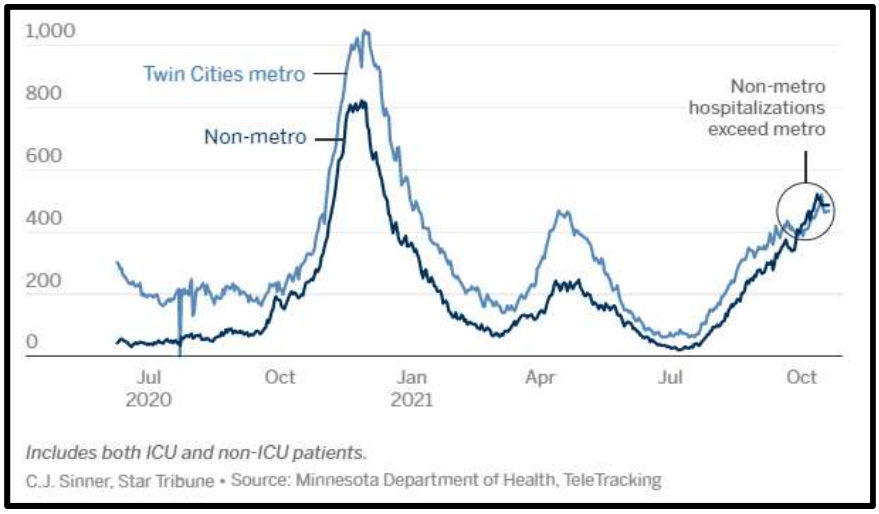
forcing them "to pingpong among them as they brought in patients for emergency care."[15] That same report included the following graph showing that hospitalizations for COVID-19 were slightly higher in October than they were in April, during Mr. Chauvin's trial:



The trend in recent days has been downward, leaving many hopeful that the virus is in retreat in Minnesota. But experts remain concerned. *Star Tribune* reported on October 19 that local "[h]ospital and public health leaders said they are planning for *sustained or worsening pressure in the coming weeks.*"[16] National experts agree, citing cold weather—which moves people indoors—and complacency surrounding mask wearing.[17] In particular, the Associated Press reported, "the University of Washington's influential COVID-19 forecasting model is

[15] Jeremy Olson, *COVID wave overwhelms rural Minnesota hospitals, leaving the sick nowhere to go*, StarTribune.com (Oct. 23, 2021), https://www.startribune.com/covid-19-wave-wiped-out-greater-minnesota-hospitals/600109397/.

[16] Jeremy Olson, *Minnesota reaches milestone of 40,000 hospitalizations since start of pandemic*, StarTribune.com (Oct. 19, 2021), https://www.startribune.com/minnesota-reaches-milestone-of-40-000-hospitalizations-since-start-of-pandemic/600108017/ (emphasis added).

[17] Lindsay Whitehurst, *COVID cases falling, but trouble signs arise as winter looms*, APNews.com (Oct. 25, 2021), https://apnews.com/article/coronavirus-pandemic-health-boston-massachusetts-18b11237d09cce0b51fe0a0a0cbeddd7.

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predicting *increasing infections and hospitalizations in November*."[18] Nationally, deaths per day "have begun to creep back up again after a decline that started in late September."[19]

The recent surge—and fears of another—are attributable to the fast-spreading Delta variant, which is believed to be particularly dangerous. According to the CDC, "[s]ome data suggest the Delta variant might cause more severe illness than previous variants in unvaccinated people. In two different studies from Canada and Scotland, patients infected with the Delta variant were more likely to be hospitalized than patients infected with Alpha or the original virus that causes COVID-19."[20] Meanwhile, approximately 28 percent of Minnesotans age 18 and over are still not fully vaccinated,[21] and children under 12 are not yet eligible for vaccination at all, causing concern that they are particularly vulnerable.[22]

Presumably the Court cannot require jurors, Ms. Potter, the attorneys prosecuting and defending this case, or any member of the press or public who wants to attend the trial to be vaccinated, and even trial participants who are vaccinated may be concerned about passing the virus on to at-risk family members if the Court cannot offer adequate assurances of safety. Regardless, the Delta variant poses a serious threat of outbreaks even among the vaccinated. As

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[18] *Id.* (emphasis added).

[19] *Id.*

[20] *Delta Variant: What We Know About the Science*, CDC.gov (last visited Oct. 26, 2021), https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html.

[21] Vaccine Data, MN.gov (last visited Oct. 29, 2021) *available at* https://mn.gov/covid19/vaccine/data/index.jsp.

[22] There is hope that vaccinations will be approved for all but the youngest children within the coming days, but it is difficult to predict how many of the State's eligible children will vaccinated by the time this trial starts.

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of October 25, Minnesota had reported 51,586 breakthrough cases in fully vaccinated individuals.[23]

Thus, it would seem that this Court faces the same "difficult job of anticipating the trajectory of the COVID-19 pandemic" as the Chauvin court did. Certainly there is no reason to believe that things will significantly improve by November 30. Rather, there is every reason to believe that, when this trial begins on November 30, COVID-19 precautions at Government Center—including masking requirements and social distancing requirements—will still be in place. *See* Government Center building and plaza rules, https://www.hennepin.us/your-government/facilities/government-center-use (last visited Oct. 25, 2021); *see also* Supreme Court October Order at 1 ("[E]very person entering a court facility must wear a face covering at all times when in public areas served by the Judicial Branch or other common areas of the facility and in the courtroom during proceedings."); Minnesota Judicial Branch COVID-19 Preparedness Plan (Rev. Oct. 18, 2021) ("Measures to maintain distancing among people while in Judicial Branch facilities should be considered to the extent possible.").[24]

Ultimately, though, it doesn't matter how the Media Coalition gauges the COVID-19 risk. What matters is how the Court gauges that risk and how the Court responds. Here, actions speak louder than words and what we can observe is that the Fourth Judicial District, no doubt based on guidance from the Minnesota Supreme Court, is drastically limiting access to proceedings in Government Center. Most recently, for example, the Honorable Kathryn L. Quaintance limited the number of people who could attend the sentencing of Mohamed Noor on

[23] COVID-19 Vaccine Breakthrough Weekly Update, health.statemn.us (last visited Oct. 29, 2021) *available at* https://www.health.state.mn.us/diseases/coronavirus/stats/vbt.html.

[24] *Available at* https://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/COVID-19/MJB-COVID-19-Preparednes-Plan.pdf.

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October 21. Specifically, she capped attendance in the courtroom where the sentencing took place at 26 spectators, about 50% of what that courtroom (No. 1059) can normally accommodate. *See* Order on Conduct at Resentencing at 3, *State v. Noor*, No. 27-CR-18-6859 (Oct. 15, 2021) ("Noor Order");[25] *see also* Declaration of Leita Walker, ¶ 3 & Ex. A (email from court personnel confirming courtroom capacity for Noor resentencing).[26]

Unlike his trial and first sentencing, Mr. Noor's resentencing was livestreamed. Many people opted to watch it remotely rather than try to nab one of the first-come, first-served seats available at Government Center. Although exact numbers are unavailable, by way of example, as of October 25, nearly 2,500 people had watched Mr. Noor's sentencing on KARE 11's YouTube channel. *See* Declaration of Stacey Nogy ¶ 3. This figure does not include the number of people who watched the sentencing on KARE 11's actual website, *id.* ¶ 2, or the people who watched it on platforms belonging to other news organizations.

In any event, it seems safe to say that the court in Mr. Noor's case was not equipped to accommodate even a fraction of the people who cared enough about the proceedings to watch the resentencing from afar. Likewise, it seems safe to place the public interest in Ms. Potter's case somewhere on the spectrum between Mr. Noor's and Mr. Chauvin's and to assume that, if the trial is not livestreamed, the Court can expect a crowds similar to those at Mr. Noor's pre-

[25] Specifically, beyond trial participants, the order permitted three (3) observers for the State, seven (7) seats for family members of the defendant, seven (7) seats for members of the media, and nine (9) seats for the general public. No seats were reserved for the victim's family, presumably because most if not all of them live outside of Minnesota and watched or participated in the proceedings virtually.

[26] Judge Quaintance likewise limited the overflow room to 28 people, Noor Order at 3, even though it can normally accommodate 34 people, *see* Walker Decl. Ex. A. Presumably, something closer to capacity in the overflow room was permitted because members of the media and the public were permitted to sit in the jury box (but not behind the bench or in spaces reserved for the clerk, court reporter or witness). Noor Order at 3.

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pandemic, pre-George Floyd trial—crowds that *Star Tribune*'s managing editor has described as "crushing." Dardarian Decl. ¶ 5.

The Media Coalition decided to bring this motion days ago, based in part on its members' experience at the Noor re-sentencing, and on the assumption that a similar allotment of seats would be made in this case. Allowing just 16 seats in a 50-person courtroom to be used by the press and general public when hundreds (possibly thousands) of people want to observe the proceedings is unacceptable. More recently, though, the Media Coalition learned that restrictions on access to this trial will be even more drastically limited—essentially the same as in Chauvin trial, even though the pandemic is ostensibly "winding down." Walker Decl. ¶ 4 & Ex. B (email from court confirming plans for Potter trial). The primary difference? No A/V Coverage.

For the reasons discussed below, this is not only unacceptable but also unconstitutional as it constitutes a "true closure" of the courtroom. The Media Coalition asks that the Court either permit A/V Coverage at the trial of Ms. Potter or that it move the trial into the largest courtroom available, and permit that courtroom to be filled to its normal capacity.

Argument

I. The Media Coalition has standing to assert its interest in reasonable, meaningful access to Ms. Potter's Trial.

The Supreme Court recognizes that "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'" from criminal proceedings. *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring)). The Eighth Circuit follows this precedent. *See In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983) (When a member of the news media objects to limits on his or her access to judicial proceedings, "the court must give him or her a reasonable opportunity to state the objection.").

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Thus, over the past few years, courts within the Fourth Judicial District have permitted repeated intervention by members of the media to ensure press and public access to the prosecutions of Mr. Noor, Mr. Chauvin, and Mr. Chauvin's codefendants.[27] Most recently, in fact, on September 2, Judge Cahill heard arguments from the undersigned on behalf of the media in response to the motion of Mr. Chauvin's codefendants to exclude A/V Coverage from their upcoming trial.

Because the rules of criminal procedure have no analog to the civil rule governing intervention, a simple motion is the appropriate mechanism for the media to assert their interests. That said, some courts have extrapolated from civil rules and found that "a motion to intervene to assert the public's First Amendment right of access to criminal proceedings is proper." *United States v. Aref*, 533 F.3d 72, 81 (2d Cir. 2008); *accord In re Associated Press*, 162 F.3d 503, 508 & n.6 (7th Cir. 1998) (citing cases and stating that "the Press ought to have been permitted to intervene in order to present arguments against limitations on the constitutional or common law right of access."); *United States v. Preate*, 91 F.3d 10, 12 n.1 (3d Cir. 1996); *United States v. Valenti*, 987 F.2d 708, 711 (11th Cir. 1993); *In re Search Warrant for Secretarial Area Outside*

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[27] In the *Noor* case, for example, *see* Order and Memorandum Opinion Regarding: (1) Media/Public Right to Observe Body-Worn Camera Video if Such Evidence is Played to Jury During Trial, and (2) Media Sketch Artist (Henn. Cty. Apr. 10, 2019); Second Order Regarding Copy Access to Trial Exhibits (Henn. Cty. May 22, 2019); Order Regarding Prospective Juror List, Juror Profiles, Juror Questionnaires, Transcript of *In Camera* Juror *Voir Dire*, and Original Verdict Forms (Henn. Cty. July 17, 2020).

In the *Chauvin* case, see Order Vacating Gag Order (Corrected) (July 23, 2020); Order Denying Motion to Reconsider and Amend Order Allowing Audio and Video Coverage of Trial (Dec. 18, 2020); and Order and Memorandum Opinion Media Coalition Motion to Unseal Juror Names and Associated Juror Information (Oct. 25, 2021).

And in the case of Mr. Chauvin's co-defendant *Thomas Lane*, 27-CR-20-12951, see Order Granting Motion of Media Coalition to Obtain Copies of Publicly-Filed, Body-Worn Camera Video Evidence (Aug. 7, 2020).

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Office of Gunn, 855 F.2d 569, 572-73 (8th Cir. 1988). Should the court choose to engage in such analysis, the requirements of Minn. R. Civ. P. 24.01,[28] governing intervention as of right, are also easily satisfied here.

Accordingly, there is no doubt that the Media Coalition's request for access to the trial in this case is properly before the Court.

II. The Court can and should exercise its discretion to permit A/V Coverage at Defendant's upcoming trial.

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." *State v. Lindsey*, 632 N.W.2d 652, 658 (Minn. 2001) (citing, *inter alia*, *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 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." *Order Promulgating Amendments to Minn. Gen. Rules of Prac.*, No. ADM09-

[28] Rule 24.01 states:

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

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8009, 2015 Minn. LEXIS 639, at *28-29 (Minn. Aug. 12, 2015). And as Judge Cahill recognized in permitting A/V Coverage at Mr. Chauvin's trial over the State's objection, Minn. R. Gen. Pract. 1.02(d) gives courts discretion to modify application of the General Rules of Practice—including Rule 4, which governs A/V Coverage—to "prevent manifest injustice." Order Denying Motion to Reconsider and Amend Order Allowing Audio and Video Coverage of Trial ("Dec. 18 Order") at 3, *State v. Chauvin*, No. 27-CR-20-12646 (Henn. Cty. Dist. Ct. Dec. 18, 2020).

Judge Cahill went on to find that the "deprivation of the constitutional rights that are the hallmarks of a public criminal trial would be a 'manifest injustice,'" and that there were no 'reasonable alternative to televising the trial that would vindicate the … First Amendment rights of the public and the press." *Id.* This Court should do the same.

III. Prohibiting A/V Coverage while imposing draconian limits on the number of people who can attend this trial violates the First Amendment.

The Media Coalition has not yet been officially told how many members of the press and public will be allowed into the courtroom for this trial. However, they understand that the trial will take place in courtroom No. 1856, which is the same courtroom where Mr. Chauvin was tried and which, due to remodeling for that trial, no longer has a gallery for spectators. They further understand that they should expect media access to the courtroom to be similar to that at Mr. Chauvin's trial—that is, they should expect spots for just two or three pool reporters—and it's not clear whether *any* member of the general public will be admitted.

In other words, the press and the public are facing the *exact same situation* they faced in the Chauvin trial, with the only difference being that this Court has prohibited A/V Coverage on the theory that the pandemic is over. If the pandemic is over, then this trial should be held in whichever courtroom in Government Center (or, arguably, in the Fourth Judicial District) has the largest gallery for spectators, and the Court should permit that gallery to be filled to its normal

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capacity. If the pandemic is not over—if the Court is going to continue to mandate social distancing to the point that *not a single member* of the general public and only *two or three members* of the media are permitted into the courtroom—then it needs to permit livestreaming, just as the Chauvin court did. To hold otherwise is to close the courtroom in violation of the First Amendment, just as the Chauvin court recognized.

"[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment." *Richmond Newspapers*, 448 U.S. at 580. 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*, 457 U.S. at 606; *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-Enter. 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 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

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outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help' . . . ." *Id.*[29]

Moreover, the right of access is not a merely a "token" or "theoretical' right. That is, pandemic or no, the First Amendment is not satisfied if but a few members of the press and the public are able to observe a trial. Rather, the First Amendment right of access is a right of meaningful access, and "***[t]rial courts are obligated to take every reasonable measure to accommodate public attendance***." *Presley*, 558 U.S. at 210, 215 (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 the courtroom and "[t]here just isn't space for [the public] to sit in the audience.").

Thus, for example, in *Davis v. United States*, the Eighth Circuit concluded that allowing only 25 members of the public to attend a trial when the courtroom could hold 100 spectators was reversible error. 247 F. 394, 395, 398-99 (8th Cir. 1917) (per curiam). Here, the Media Coalition anticipates something even more drastic: admission of just *two or three* journalists and *zero* members of the general public when courtrooms that can accommodate 50 or more people are just down the hall. This is a "true closure" of the courtroom, "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

[29] It goes without saying that all of the interests underlying the right of access loom especially large in this case, which has already led to unrest, 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-thecourtroom-an-outmoded-issue.

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(Minn. 2001), and under normal circumstances there is no doubt it would be unconstitutional.[30] Indeed, as Judge Cahill wrote, "It would be farcical to say that this arrangement, by itself, provides meaningful access to the public or the press or vindicates the defendants' right to a public trial." Dec. 18 Order at 4.

But, perhaps we are not operating under normal circumstances. Perhaps the pandemic—if it is not actually "winding down"—gives the court some leeway. The Media Coalition is willing to acknowledge the challenges of conducting a high-profile trial in the age of a deadly pandemic and the need for social distancing, just as it did in the Chauvin prosecution. But then the question is what are the "reasonable measures" the Court must take, *given the circumstances*, to preserve the press and public's First Amendment rights? The circumstances here are virtually the same as what they were in Chauvin:

(1) The tremendous public interest in this prosecution, which involve issues of utmost public concern;

(2) The risk of viral spread if people do not socially distance indoors and the reality that social distancing requirements will severely limit the number of spectators in the courtroom (and overflow rooms) to a mere fraction of those who wish to attend; and

(3) The existence of technology that will, without disrupting trial, 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. Declaration of Grace Wong ¶¶ 4-7.

Given these circumstances—and assuming the Court is not willing or not able to move the trial to a different courtroom and fill it to capacity—a livestreamed trial is the only viable

[30] Indeed, even if the Court packed the largest courtroom in the District to capacity, the number of people able to watch the proceedings would still constitute a vanishingly small percentage of the number of people interested in this proceedings. In an age when the Court can easily and economically livestream the proceedings to a global audience, query whether it has an "obligation" to do so, so as not to "exclud[]… a significant portion of the public from the trial." *Lindsey*, 632 N.W.2d at 660; *see also Presley*, 558 U.S. 210. Certainly ignoring the availability of such technology is not consistent with the spirit of the First Amendment, nor is it conducive to building trust in the judicial system, as the community steels itself for the coming trial.

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option. As the Court held in the *Chauvin* case: "[T]elevising the trial is the only reasonable and meaningful method to safeguard the Sixth and First Amendment rights implicated in these cases." Dec. 18 Order at 3.

As the Court also held in the *Chauvin* case, overflow rooms are not, standing alone, a remedy for the closure of the courtroom the Court is proposing. They feature "bad video, bad audio, limited seating, jostling for position by members of the media and the public" and are not a "reasonable measure to protect the constitutional rights of the defendants, the public, and the press." *Id.* at 5; *see also 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."); Dardarian Decl. ¶¶ 11-13 (summarizing historical experience with utter inadequacy of closed-circuit feed in overflow room); Wong Decl. ¶¶ 11-12 (same).

Indeed, nothing compares to being in the courtroom itself, not even a livestream produced by sophisticated technicians using state-of-the art equipment. That is why it is vital that, even if A/V Coverage is permitted, the Court still makes room for a small number of journalists in the courtroom to observe what the cameras don't capture, including reactions of the jurors and family members. But the sort of A/V Coverage provided by Court TV (which provided the live feed in the Chauvin trial) is vastly superior to the single-angle, eye-in-the-sky camera footage typically provided in overflow rooms.[31]

[31] To further illustrate, and on information and belief: The video provided in the overflow room during Mr. Noor's resentencing came from a single camera that simultaneously—and thus, necessarily at some distance—showed the bench, the lectern, and both counsel tables. It did not show individuals who gave witness impact statements via Zoom, such as Ms. Damond's fiance. By contrast, the live feed at the Chauvin trial involved three cameras trained on different trial

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Moreover, the Court's plan to use overflow rooms is, as Judge Cahill put it, "an admission that cameras in the courtroom are sometimes necessary to broadcast a trial contrary to Rule 4.02(d)," and restricting the feed's distribution to rooms inside Government Center is just an attempt to "limit[the] audience." Dec. 18 Order at 5-6. One way or another, the trial in this case will be "livestreamed"—either to overflow rooms or, hopefully, to the world. And once the Court accepts that A/V Coverage is necessary, as it seems to have done, the feed should be available to *everyone*, not just those individuals who are lucky enough to have the flexibility, resources, and wherewithal to miss work, find childcare, drive downtown, pay to park, and spend the day in an overflow room. As Judge Cahill further opined,

> Even if the technology were improved such that the broadcast of the trial to the overflow courtrooms was of sufficient quality to substitute for the experience of actually being in the courtroom, it begs the question of how many overflow courtrooms would suffice. Keeping in mind that overflow courtrooms would also be subject to social distancing requirements, how many would be enough? Two? Three? Twenty? Should the Fourth Judicial District pause all courtroom activity for the months of March and April 2021 to allow every courtroom in the Hennepin County Government Center to be used as overflow courtrooms for this trial? ***At what point does this become televising the trial, but just to a select and limited group***. . . .
>
> [A]n overflow courtroom is not truly a courtroom, but merely a venue for the consumption of a televised trial. . . .

Dec. 18 Order at 5-6 (emphases added).[32]

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participants so that their facial features and body language could be discerned. The live feed at the Chauvin trial also included all video evidence. Wong Decl. ¶ 6.

[32] Additionally, overflow rooms are hardly a solution to pandemic-related concerns, if those concerns are what's driving restrictions on courtroom attendance. As Judge Cahill has noted, overflow rooms were no answer to the problem of "having hundreds (if not thousands) of members of the public and press assembling at the Hennepin County Government Center every day … seeking access to an overflow courtroom … [and] running afoul of and complicating Court administrative and law enforcement efforts to enforce social distancing requirements." Dec. 18 Order at 5.

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This Court has at its disposal technology that can stream the trial in this case to people around the world without disrupting or delaying the proceedings in any way—indeed, if the Chauvin case is an example, A/V Coverage will *simplify* the proceedings and *ensure* their solemnity by *drastically* reducing the number of people who come to Government Center. The Court should embrace that technology, rather than opening its doors to just the privileged few. It *should* do that in every case, but it *must* do it here, because that's the only way to avoid an unconstitutional closure of the courtroom.

IV. Allowing cameras does not violate the Defendant's Sixth Amendment rights.

The Media Coalition acknowledges that, unlike Mr. Chauvin, Ms. Potter has objected to A/V Coverage of her trial on due process grounds. Opp. to State's Mot. for A/V Coverage of Trial at 3 (July 13, 2021). Presumably, her Opposition was filed before she and her counsel knew that access for the press and public would be similar to that in the Chauvin trial, because even Ms. Potter argues against a "closure of the courtroom doors, which would be structural error." *Id.* at 5. Regardless, her objection to A/V Coverage does not give rise to some clash of constitutional principles because there is nothing inherent about A/V Coverage that jeopardizes her Sixth Amendment rights.[33]

A review of each state's applicable rules and statutes suggests that today 35 states presumptively allow cameras in courtrooms during the guilt-innocence phase of criminal trials, putting Minnesota solidly in the minority.[34] In these states, A/V Coverage is routine, yet there is

[33] Indeed, in his 53-page brief supporting his post-trial motions, Mr. Chauvin made many arguments about why his trial was unfair, but the fact that it was livestreamed was not one of them. See Mem. of Law in Supp. of Def.'s Post-Verdict Mots., *State v. Chauvin*, No. 27-CR-20-12646 (Henn. Cty. Dist. Ct. June 2, 2021).

[34] *See Cameras in the Courts, State by State Guide*, RTDNA.org, https://www.rtdna.org/content/cameras_in_court.

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no indication that the appellate courts in these states face rampant Sixth Amendment challenges based on the theory that cameras make fair trials impossible. Ms. Potter did not cite any such case in objecting to A/V Coverage, and courts routinely reject more generic Sixth Amendment challenges that the presence of cameras somehow violated a defendant's due process rights. *See, e.g.*, *Chandler v. Florida*, 449 U.S. 560, 574 (1981) (rejecting *per se* rule prohibiting cameras and the argument that "all photographic or broadcast coverage of criminal trials is inherently a denial of due process"); *People v. Spring*, 153 Cal. App. 3d 1199, 1207-08 (1984) (holding defendant's "Sixth Amendment argument [was] similarly meritless" because defendant failed "to show with any specificity that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them or that his trial was affected adversely by the impact on any of the participants of the presence of cameras and the prospect of broadcast." (quoting *Chandler*, 559 U.S. at 581)); *People v. Wieghard*, 727 P.2d 383, 386 (Colo. Ct. App. 1986) ("The mere presence of a camera in the courtroom does not in itself deny a defendant due process."); *State v. Smart*, 136 N.H. 639, 657 (1993) ("[T]he trial was conducted not in a carnival-like manner, but in the calm, dignified manner to which the defendant was entitled. Witnesses and counsel were plainly audible, no media representatives were inside the bar, and there was no commotion. We might add that the videotapes have given us an unusual near-first-hand glimpse of the trial judge at work. His commanding presence throughout, shown by his demeanor with counsel and with the jury, was apparent. The defendant's trial took place in a courtroom dominated not by the media but by the presiding judge."); *People v. Nance*, 2 A.D.3d 1473, 1474 (N.Y. App. Div. 2003) ("Although County Court was without authority to allow two television stations to videotape or broadcast the trial, we cannot conclude that defendant was thereby deprived of a fair trial absent a showing of actual prejudice." (citations omitted)); *State v.*

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Morrow, 1996 Tenn. Crim. App. LEXIS 222, at *15 (Apr. 12, 1996) ("There is no evidence to substantiate the fears expressed concerning the safety of witnesses in the case, nor is there any proof that television cameras would result in unacceptable distractions. It therefore appears that the trial court abused its discretion in excluding television cameras from the criminal trial in this matter.").

In any event, any concerns Ms. Potter has about A/V Coverage can and should be dealt with on a more targeted basis. For example, as happened in the Chauvin trial, the Court can permit certain witnesses to testify off camera. However, it should require that the witness first make an affirmative request to do so and identify a compelling reason why he or she should get to testify away from the eyes and ears of the press and public, *see Globe Newspaper*, 457 U.S. at 596, 606-07, and it should give the Media Coalition an opportunity to be heard on the issue.

Conclusion

This Court and the Minnesota Supreme Court apparently believe it's still not safe for people to closely congregate indoors. Social distancing remains a requirement in Government Center and will for the foreseeable future. And so the Court is apparently planning trial in this case in a courtroom where only a few members of the press and perhaps *zero* members of the general public will be admitted.

In other words, the Court is planning a closed trial. Overflow rooms are no solution: there's not enough of them, they're not adequate under the First Amendment, and they're not germ free spaces anyway. COVID doesn't care if spectators are in the courtroom or an overflow room or, for that matter, if they are crowded into a hallway, elevator, security line, or restroom. If people cannot watch this trial remotely, they will flood the Government Center, as they did

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during the trial of Mohamed Noor, to watch it in person, and they will take whatever they catch there out into the larger community.

If the Court is concerned about the safety of trial participants and the general public, the Court should make remote viewing of the trial possible, despite the objection of Ms. Potter to A/V Coverage. If it won't permit livestreaming of this trial, then it needs to open the courtroom up to substantially more members of the press and public than it is prepared to accommodate. To proceed in any other manner violates the First Amendment.

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