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STATE OF MINNESOTA
HENNEPIN COUNTY

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota

Plaintiff,

The Honorable Peter A. Cahill

vs.

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|---|---|
| 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

**MEMORANDUM IN SUPPORT OF MEDIA COALITION'S MOTION OBJECTING TO THE COURT'S JULY 9 GAG ORDER**

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 KSMP-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 Memorandum in Support of their Motion Objecting to the Court's July 9 Gag Order (the "Order").

Specifically, the Media Coalition objects to the breadth of the Order, which the Court entered without providing notice or an opportunity to comment, and which restricts not only an

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incredibly broad array of speech by the parties and their lawyers, but also subjects a staggering number of individuals not involved in these prosecutions to the same restrictions. Such an Order cannot stand under the law, including under the First Amendment. The Media Coalition, therefore, respectfully requests that the Court clarify and limit the scope of its Order.

## INTRODUCTION

On July 9, the Court *sua sponte* entered a gag order after learning that "two or more attorneys representing parties" in the above-referenced cases spoke to the press on July 8. *See* Gag Order, Dist. Ct. File 27-CR-20-12646, *et al.* (July 9, 2020). The Court reasoned that "pretrial publicity in this case ***by the attorneys involved*** will increase the risk of tainting a potential jury pool and will impair all parties' right to a fair trial." *Id*. By its express terms, however, the Order restricts the speech and conduct of far more than just those actually involved in these prosecutions, including "all parties, attorneys, their ***employees, agents, or independent contractors*** working on their behalf." *Id*. at ¶ 2 (emphasis added). It states that these groups of people "shall not disclose, directly, indirectly or through third parties, any ***information*** [or] ***opinions*** . . . that ***relate*** to any of the above-captioned cases, either to the media or members of the general public." *Id.* at ¶ 1.

George Floyd's death catapulted Black Lives Matter into one of the largest movements in this country's history[1] and spurred important conversations on a number of topics that arguably "relate" to these prosecutions. For that reason alone, the Order is overbroad, even as to the parties and their attorneys. In addition, because the State of Minnesota is a party to these prosecutions—and because it is represented by the Attorney General, the Hennepin County

[1] *See* 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), *available at* https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

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Attorney's Office, and a number of other attorneys providing services on a *pro bono* basis—the Order can be read to restrict the speech of a breathtaking number of people. Indeed, it arguably restricts the speech of every employee of the State of Minnesota and Hennepin County—from low-level law enforcement officers to social workers to elementary school teachers to university professors to legislative employees, many of whom might wish to share "information" or "opinions" with the press or the public that "relate" to the prosecutions. *Id*. at ¶ 1. In addition, because the Court has not defined the term "agents" of the parties, friends and family of the Defendants may believe it applies to them and thus be hesitant to speak with the press and public about the Defendants and these prosecutions against them.

The Order thus threatens the right of the press and the public to engage in important dialogue with a wide range of people on a broad range of topics that could be viewed as "related" to these prosecutions. The Order could also directly (if inadvertently) delay communications, to the public, about important work government officials are doing to address critical issues of public safety, racial equality and police reform. Such issues, while carrying little to no risk of prejudicing the Defendants' right to a fair trial, are nonetheless "related" to the prosecutions.

For example, under the current Order, the following individuals might believe that they are subject to the Order and prohibited from speaking to the press or public about anything "related" to the prosecutions:

- Anyone affiliated with the Hogan Lovells,[2] Blackwell Burke, or Maslon law firms, as partners from those firms have recently joined the prosecution team on a *pro bono* basis;[3]

[2] Hogan Lovells alone has approximately 2,800 attorneys.

[3] *See Seasoned attorneys join AG Ellison's team pro bono in George Floyd Case* (July 13, 2020) https://www.ag.state.mn.us/Office/Communications/2020/07/13_FloydCaseAttorneys.asp (the "AG Press Release").

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- Anyone affiliated with Medtronic,[4] where another prosecution team member works;[5]

- Lieutenant Robert J. "Bob" Kroll, rank-and-file member of the Minneapolis Police Department and president of the Police Officers Federation of Minneapolis, who may be considered an "agent" of the Defendants;

- The Minnesota Chiefs of Police Association, including the Minneapolis Chief of Police, Medaria Arradondo, who might be considered an "agent" of the prosecution even if not employed by the State or County;

- Individuals who work for the Minnesota Department of Human Rights, which, in response to the death of George Floyd, launched a civil rights investigation into the Minneapolis Police Department;[6]

- Individuals who work for The Council for Minnesotans of African Heritage, which is engaged in ongoing conversations and advocacy for People of African Heritage, including calls for reform in light of Floyd's death;[7]

- Individuals who work for the Minnesota Board of Peace Officer Standards and Training, which recently began a comprehensive review of its processes, rules and governing statutes;[8]

- Elected State officials including Governor Tim Walz and State Representative Ginny Klevorn and State Senator Paul Anderson, who represent the local district and receive a salary from the State;

- Elected City officials such as Mayor Jacob Frey, who might be considered an "agent" of the prosecution even if not employed by the State or County; and

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[4] Medtronic has approximately 100,000 employees.

[5] *See* the AG Press Release, *supra* n.3.

[6] *See Civil Rights Investigation into the Minneapolis Police Dep't.* (June 2, 2020) *https://mn.gov/mdhr/mpd/*.

[7] *See, e.g.*, Nerita Hughes, Chair, The Council for Minnesotans of African Heritage, Statement on the George Floyd Justice in Policing Act of 2020, https://mn.gov/cmah/assets/CMAH%20Statement%20on%20George%20Floyd%20Justice%20in%20Policing%20Act%20of%202020_tcm32-438355.pdf.

[8] *See A Message from the Interim Executive Director*, https://dps.mn.gov/entity/post/Pages/default.aspx.

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- Subject matter experts employed by the University of Minnesota System, including professors who are experts in race relations, police tactics, civil unrest, media law and ethics, criminal justice, and the court system.

## ARGUMENT

### I. The Media Coalition has Standing to Challenge the Court's Gag Order

The press have standing to challenge gag orders, and they are entitled to notice and an opportunity to be heard before a court enters an order prohibiting extrajudicial comments to the media. *See, e.g., Nw. Public'ns, Inc. v. Anderson*, 259 N.W.2d 254, 256 (Minn. 1977); *see also In re Knight Publ'g Co.*, 743 F.2d 231, 234 (4th Cir. 1984); *United States v. Ellis*, 90 F.3d 447, 449 (11th Cir. 1996); *Newman v. Graddick*, 696 F.2d 796, 800 (11th Cir. 1983); *CBS Inc. v. Young*, 522 F.2d 234, 237-38 (6th Cir. 1975) (the media's right to "gather the news concerning the trial is directly impaired or curtailed. The protected right to publish the news would be of little value in the absence of sources from which to obtain it.").

Given that every Defendant in these actions has filed an opposition to the Court's Order, it is also reasonable to conclude that, but for the Order, the Defendants or their representatives would be willing to speak with members of the Media Coalition. *See People v. Sledge*, 879 N.W.2d 884, 891-892 (Mich. Ct. App. 2015) (the press have standing to sue when officers oppose a gag order, suggesting they would be willing to be interviewed by the press were it not for the gag order). Indeed, at least one coalition member had to cancel an interview with a party's representative after the Court imposed the Order.

### II. The Court's July 9 Gag Order is an Invalid Restraint on Speech

Although Minnesota recognizes the right of courts to impose gag orders, the right is not absolute. *See Minneapolis Star & Tribune Co. v. Lee*, 353 N.W.2d 213 (Minn. Ct. App. 1984). Criminal trials are presumptively open to the press and the public, and the Minnesota Supreme Court generally disfavors "prior restraints on publication." *Anderson*, 259 N.W.2d at 257.

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A gag order restricting extrajudicial comments may thus be entered only when necessary to ensure a fair trial, and it must be narrowly tailored so as to only restrict as much speech as is necessary to serve a compelling state interest. *See Geske v. Marcolina*, 642 N.W.2d 62, 69-70 (Minn. Ct. App. 2002). Further, a gag order cannot be predicated on the mere threat of a vague harm, but must be based on an articulated, specific harm. *See Austin Daily Herald v. Mork*, 507 N.W.2d 854, 857 (Minn. Ct. App. 1993) ("Any restrictive order limiting access to a criminal trial must reflect proper deference to the constitutional presumption of access, and the trial court must articulate, in its findings and on the record, the compelling governmental interest served by the restriction. If the record does not include findings that closure is necessary to protect the witnesses, a restrictive order is invalid."); *see also Sledge*, 879 N.W.2d at 892-97 (gag order is *de facto* prior restraint when it is vague and applies to almost everyone with knowledge of an event). And the injunction must effectively prevent the demonstrated harm. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) (to be valid, a prior restraint must "effectively . . . prevent the threatened danger").

Neither the Eighth Circuit nor the Supreme Court of Minnesota have weighed in on the appropriate legal standard under which to review the entering of a gag order. Outside Minnesota, however, courts have articulated various standards, including the "reasonable likelihood" of harm recognized in the Fourth and Tenth Circuits, *see In re Russell*, 726 F.2d 1007 (4th Cir. 1984); *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969); the "substantial likelihood" of harm recognized in the Third and Fifth Circuits, *see United States v. Wecht*, 484 F.3d 194 (3d Cir. 2007); *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000); and the "clear and present danger" standard recognized in the Sixth, Seventh and Ninth Circuits, *see United States v. Ford*,

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830 F.2d 596 (6th Cir. 1987); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975); *Levine v. United States District Court*, 764 F.2d 590 (9th Cir. 1985).

Regardless of the standard, however, this Court's Order impermissibly restricts significantly more speech than is necessary to serve any compelling interest. Before a court can enter a gag order, it must first make sufficient findings that a compelling interest is threatened, and then determine the appropriate people, and scope of content, that must be restricted to protect that interest. *See Geske*, 642 N.W.2d at 69-70. In other words, the gag order must be narrowly tailored in terms of both (1) the content of the speech it restricts and (2) the people to which it applies. The Gag Order here fails on both fronts.

On the first issue: by prohibiting speech that merely "relates" to these prosecutions, the Order is vague and overbroad even as to case participants.[9] Given the international impact of George Floyd's death, such language restricts a significant amount of legitimate speech that would in no cognizable way threaten the integrity of the jury or the Defendants' fair trial rights. For example, the Order arguably prevents Defendants and their attorneys from publicly discussing the Black Lives Matter movement, public safety, racial equality, and police reform, as all of these topics "relate" to the death of George Floyd and the pending prosecutions, though none of them are central to determining the Defendants' culpability.

[9] Defendants, in their own objections to the Order, have argued it creates an unlevel playing field, given statements already made by the Attorney General and other public officials. The Media Coalition chooses not to wade into this debate, other than to point out that the press struggles to fully report the news when it has access to only one side of a story. *See Austin Daily Herald*, 507 N.W.2d at 857 ("By permitting some reporting while prohibiting other reporting the trial court in effect parcels out news to the press and the public. Permitting the media to report only half the news risks distorting the truth and ruining the public's ability to understand the case or the work of the courts in administering justice.").

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On the second issue: As discussed above, the Order purports to apply to thousands of people, including, but not limited to, every employee of the State and County, most of whom have nothing to do whatsoever with the prosecution of Defendants. Thus, beyond going too far in the *content* of speech it restricts, the Order completely overreaches in *who* it restricts.

Finally, concerns that general pretrial publicity may impact the ability to seat a jury or to preserve the Defendants' right to a fair trial can be addressed through other means. For example, the Court can conduct *voir dire* of prospective jury members, issue instructions to the seated jury, and propose changing the venue of the trials.

## CONCLUSION

Newsgathering is protected by the First Amendment, and a reporter's First Amendment right to publish is meaningless if it is prevented from gathering news in the first instance. The Court's Order in these cases threatens to prevent the press and the public from obtaining meaningful information related to these highly newsworthy prosecutions from a wide—and overly broad—range of interested parties. The Media Coalition therefore respectfully requests that this Court modify and limit its Order accordingly.

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