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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

J. Alexander Kueng,

Thomas Kiernan Lane,

Tou Thao,

Defendants.

STATE'S MEMORANDUM OF LAW OPPOSING MOTIONS TO EXCLUDE AUDIO AND VIDEO RECORDING OF PROCEEDINGS

Court File No.: 27-CR-20-12953

Court File No.: 27-CR-20-12951

Court File No.: 27-CR-20-12949

TO: The Honorable Peter Cahill, Judge of District Court; counsel for Defendants, Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402; Earl Gray, 1st Bank Building, 332 Minnesota Street, Suite W1610, St. Paul, MN 55101; Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101; and counsel for Media Coalition, Leita Walker, 2000 IDS Center, 80 South 8th Street, Minneapolis, MN 55402-2119.

INTRODUCTION

The State opposes Defendants' motions to exclude the audio and video recordings of the upcoming trial. Last November, the Court authorized audio-visual coverage in large part because of the threat from COVID-19 to trial participants and spectators in potentially crowded courtrooms. Though the State originally opposed such coverage, the State now acknowledges that the Court's audio-visual order—along with the Court's other prudent measures—successfully protected jurors, witnesses, attorneys, the defendant, and court personnel in *State v. Chauvin* in the midst of a deadly pandemic. The Court's careful trial management also successfully avoided the concerns that had previously motivated the State's opposition to audio-visual coverage. In short, given the circumstances that this Court faced in March 2021, audio-visual coverage ensured

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meaningful public access to the *Chauvin* trial without compromising public health. The emergence of the more virulent Delta variant suggests that the Court may need to adopt the same prudent measures in Defendants' trial to reduce courtroom density and enable public access. Defendants' request to forgo audio-visual coverage—predicated on the notion that the risks posed by COVID-19 have passed—is therefore premature, and the Court should deny their motion.

Defendants' argument that audio-visual coverage will deny them a fair trial is also unconvincing: Defendants have provided no concrete evidence that any witness would actually testify for the defense but for the Court's order to broadcast these proceedings. Nor do Defendants explain why they cannot use compulsory process to compel a purported reluctant witness to appear. The Court should reject their conclusory and vague allegations, which come on the heels of unsupported accusations of misconduct against prosecutors. *See* State's Response to Def. Thao's Mot. for Sanctions Regarding Alleged Witness Coercion (May 20, 2021).

Indeed, if Defendants have difficulty finding expert witnesses—and there is no evidence that they cannot secure experts—that difficulty is a product of their overwhelming guilt. Defendants seek experts to advocate baseless claims—for example that George Floyd was resting comfortably on the pavement or that he died from carbon monoxide poisoning. To the extent professional scientists and scholars will not advance those claims, it is because neither facts nor science support them. Prohibiting audio-visual coverage would not change that reality. But if a witness emerges who actually will not appear because of audio-video coverage—despite a subpoena—the Court could also consider ways to limit coverage of that witness' testimony on a case-by-case basis.

State v. Chauvin highlighted the enormous benefit that came with televising those proceedings to ensure robust public access in the midst of COVID-19. Because of this Court's

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decision to broadcast *State v. Chauvin*, anyone who wanted could witness the fair administration of the criminal justice system in one of the most significant cases in this nation's history. The fact that the public observed jury selection, counsel's statements, and witness testimony allowed them to evaluate the fairness of these proceedings for themselves and fostered enormous public confidence in the process and its outcome. Acknowledging those benefits, the Minnesota Supreme Court recently ordered the Advisory Committee on the Rules of Criminal Procedure to "consider whether the requirements set forth in that rule for audio and video coverage of criminal proceedings should be modified or expanded" based on the lessons learned during the pandemic. *In re the Minnesota Supreme Court Advisory Committee on the Rules of Criminal Procedure*, No. ADM 10-8049, at 3 (Minn. June 18, 2021) (order) (Gildea, C.J.). In the absence of any concrete concerns from Defendants, and in light of the pandemic's concerning turn for the worse, the State urges the Court to maintain the current audio-visual order to ensure public access and combat the ongoing risks from COVID-19.

ARGUMENT

1. This Court's audio-visual order was predicated on "the unique circumstances [then] currently prevailing in the COVID-19 pandemic." Order Allowing Audio and Visual Coverage of Trial 9 (Nov. 4, 2020). Unfortunately, due to the rise of the Delta variant, the Court once again faces a similar need to facilitate social distancing and reduce courtroom density during Defendants' upcoming trial. In short, contrary to Defendants' assertion, Minnesota has not "move[d] past COVID," and their request to forgo audio-visual coverage on that basis is premature at best. Kueng Mot. 4; Lane Mot. 5.

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Data suggests that the COVID-19 Delta variant is more transmissible and potentially more deadly than previous versions of the virus.[1] According to some metrics, the Delta variant has reduced vaccine effectiveness from 91% to 66%.[2] Over 100,000 people in the United States are currently hospitalized and over 150,000 are being infected daily—levels not seen since January 2021.[3] Minnesota's public health authorities recently recommend that even fully vaccinated people wear masks indoors in "high transmission" areas—a category that encompasses 98% of the state.[4] The U.S. Department of Health and Human Services also recently announced that individuals will now need a third "booster" dose of the COVID-19 vaccine.[5] Noted experts predict that the United States might "reclaim a 'degree of normality' by next spring," but only if "more Americans get vaccinated" and if another variant does not emerge.[6]

Particularly relevant here, the Delta variant has forced a number of courts to reevaluate plans for in person proceedings. For instance, in Texas and Alabama, some trial courts have suspended jury trials altogether.[7] Mississippi's Supreme Court likewise authorized that state's

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[1] *Delta Variant: What We Know About the Science*, Ctrs. for Disease Control & Prevention: COVID-19 (updated Aug. 26, 2021), https://tinyurl.com/p49838h6.
[2] Bruce Y. Lee, *CDC: Covid-19 Vaccine Effectiveness Fell from 91% to 66% with Delta Variant*, Forbes (Aug. 24, 2021, 10:19 PM ET), https://tinyurl.com/2xa8rnev.
[3] Madeline Holcombe & Jason Hanna, *With More Than 100,000 People in the Hospital with Covid-19 in the US, This August Is Worse Than Last, Expert Says*, CNN (updated Aug. 26, 2021, 12:52 PM ET), https://tinyurl.com/2xupx7cb.
[4] *Recommendations for Wearing Masks*, Minn. Dep't of Health: COVID-19 (updated Aug. 24, 2021), https://tinyurl.com/4d42dn8b; *COVID in Minnesota: Delta Variant 'Changing the Game' as CDC, MDH Recommend Outdoor Masks in High Transmission Areas*, CBS Minn. (Aug. 24, 2021, 4:20 PM), https://tinyurl.com/tb9szctz.
[5] *See* Press Release, Ctrs. for Disease Control & Prevention, *Joint Statement from HHS Public Health and Medical Experts on COVID-19 Booster Shots* (Aug. 18, 2021), https://tinyurl.com/amx756ce.
[6] Joe Walsh, *Fauci Says U.S. Could Return to Normal by Spring 2022 — If Vaccinations Go Up*, Forbes (Aug. 23, 2021, 9:22pm EDT), https://tinyurl.com/yruarcw9.
[7] Daniel Heiser, *Jury Trials Suspended in Mobile County Due to COVID-19 Delta Variant*, News 5 WKRG (updated Aug 16, 2021, 3:38 PM CDT), https://tinyurl.com/exz7pkm; Jackie Wang,

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courts to suspend trials until mid-September.[8] On August 9, "the chief federal district judge in San Antonio suspended jury trials and grand jury proceedings until" October.[9] The United States Court of Appeals for the Fourth Circuit recently "suspended in-person oral arguments for its September session, instead moving them to Zoom," the Eighth Circuit will similarly remain remote through September, the Ninth and D.C. Circuits will also be remote at least through October, and the First Circuit will remain virtual through November, while the Second Circuit will permit only two counsel per side at its arguments and has completely barred the public from attending proceedings.[10]

While Minnesota's trial courts have not yet taken similar measures in light of the Delta variant, it is simply too early and the situation is too quickly evolving to take audio-visual broadcasting off of the table. Indeed, more than anything else, the Delta variant has shown that the pandemic may not take a predictable path. Throughout this case, the State has been concerned with the need to protect those associated with these proceedings from the risks of COVID-19 and to prevent any COVID-19-related disruptions in the trial. The risks of the Delta variant extend not just to jurors, witnesses, or court staff, but also to their families, including young children who currently cannot be vaccinated and may now be at an increased risk to severe disease.[11] Even for

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In-Person Jury Trials Once Again Suspended in Bexar County as COVID Case Rate Rises, San Antonio Rep. (Aug. 4, 2021), https://tinyurl.com/47ttkekn.

[8] News Release, State of Miss. Judiciary, *Chief Justice Issues Emergency Order Regarding COVID-19* (Aug. 6, 2021), https://tinyurl.com/k9myanhu.

[9] Denise Lavoie, *Federal Courts Impose New COVID-19 Restrictions Amid Surge*, Associated Press (Aug. 19, 2021), https://tinyurl.com/42va9rvv.

[10] Sara Merken, *Federal Appeals Courts Update In-Person Protocols Amid Covid-19 Surge*, Reuters (Aug. 12, 2021, 6:25 PM EDT), https://tinyurl.com/hnjer64n; Cara Salvatore, *Circuit Courts Meet Delta Variant with Grab Bag of Responses*, Law360 (Aug. 20, 2021, 7:54 PM EDT), https://tinyurl.com/jp5ct56y.

[11] *See* Ariana Eunjung Cha, *'This Is Real': Fear and Hope in an Arkansas Pediatric ICU*, Wash. Post (Aug. 13, 2021, 3:32 PM EDT), https://tinyurl.com/x98a8ypf.

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vaccinated individuals, breakthrough COVID-19 cases can cause draining symptoms that, although they do not lead to hospitalization or death, may make them unable to participate in the trial for an extended period. Given the Delta variant's increased transmissibility, there is also now an even greater possibility that, during trial, a single person in the courtroom could infect a number of participants and force still others—indeed, potentially the entire courtroom—to quarantine.[12] And because local case counts can grow quickly, the Court may have no way to effectively gauge the relative risks until shortly before the trial begins.

The State had initially opposed holding the *Chauvin* trial in March 2021, in favor of a date when case counts might have been lower. In hindsight, the Court's measures and commendable caution appear to have successfully prevented COVID-19 transmission in the courtroom. Given the unfortunate reality that COVID-19 may impact Defendants' trial, the State urges the Court to approach these proceedings with a similar concern for safety and maintain its current audio-visual order for the time being.

2. Without offering any specific or verifiable information, Defendants now assert that some witnesses may not testify because this trial is televised. This Court should not accept Defendants' unsupported and "generalized allegations of prejudice" at face value. *Chandler v. Florida*, 449 U.S. 560, 577 (1981). The Court should require concrete evidence "that there is a substantial probability that the accused will be deprived of a fair trial." *In re WLBT, Inc.*, 905 So. 2d 1196, 1199 (Miss. 2005) (internal quotation marks omitted); *cf. Press-Enter. Co. v. Super. Ct. of Cal. for Riverside Cnty.*, 478 U.S. 1, 14-15 (1986) (*Press-Enterprise II*) ("[T]he proceedings cannot be closed unless specific, on the record findings are made demonstrating that closure is essential to

[12] *See* Tracy Lam-Hine, et al., *Outbreak Associated with SARS-CoV-2 B.1.617.2 (Delta) Variant in an Elementary School — Marin County, California, May–June 2021*, 70 Morbidity & Mortality Weekly Rep. 1, 1-3 (Aug. 27, 2021), https://tinyurl.com/46txy9zp.

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preserve higher values and is narrowly tailored to serve that interest." (internal quotation marks omitted)); *Chandler*, 449 U.S. at 577 ("[A] pretrial hearing enables a defendant to advance the basis of his objection to broadcast coverage and allows the trial court to define the steps necessary to minimize or eliminate the risks of prejudice to the accused."). "Otherwise, a party, by lodging a simple, unsupported objection to open courtroom proceedings, will control the public's right of access to those proceedings." *Morris Commc'ns, LLC v. Griffin*, 620 S.E.2d 800, 802 (Ga. 2005).

Defendants fall short of offering concrete facts that demonstrate a substantial probability the Court's audio-visual order will deny them a fair trial. Defendants only state that unidentified "fact witnesses . . . will not cooperate or testify because the proceedings are being televised." Kueng Mot. 3; Lane Mot. 3. But Defendants fail to provide even rudimentary details that would begin to permit the Court to evaluate their claims: Which fact witnesses? How many such fact witnesses? To testify regarding what facts?

Perhaps most tellingly, Defendants do *not* claim that experts have refused to testify on their behalf because this case is being broadcasted. Instead, Defendants claim that some expert witnesses "do not want the notoriety that would come from this matter." Kueng Mot. 3; Lane Mot. 3. But this case will always incur public scrutiny—regardless of whether the Court televises these proceedings or not. Defendants offer nothing to suggest that an expert who today declines to testify for Defendants because of their notoriety would testify tomorrow absent audio-visual coverage.

Indeed, Defendants have already disclosed multiple use of force experts and their reports, as well as a medical report signed by over a dozen experts. Defendants have not suggested that any expert who previously committed to testifying is now unwilling to testify or seeks to terminate

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a retention arrangement. Nor have Defendants even indicated that they intend to seek new or additional experts.

If Defendants are experiencing difficulty with their existing experts, such that they need to retain new experts, that challenge is likely not a product of the public nature of this case (which the existing experts certainly knew when they first agreed to take on this matter). Rather, this challenge would be the product of advocating strained theories—a reality not impacted by the cameras in the courtroom. Experts are not advocates who repeat any opinion requested by the defense. Experts rely on "scientific, technical, or other specialized knowledge" and apply reliable principles and methods to the facts of the case. Minn. R. Evid. 702. If defendants are challenged in finding experts who can meet the requirements of Rule 702, that is because of the facts of this case and nothing more.

Defendants also complain that Dr. David Fowler has received public criticism for his testimony in *State v. Chauvin*. *See* Kueng Mot. 3; Lane Mot. 3-4. After Dr. Fowler testified, more than 450 doctors signed an open letter stating that his "cause of death opinion, particularly the portion that suggested open-air carbon monoxide exposure as contributory, was baseless, revealed obvious bias, and raised malpractice concerns."[13] The letter explains that Dr. Fowler's "unsubstantiated opinion" was "far outside" of the professional norm and was not a conclusion "reached to a reliable degree of medical certainty."[14] The letter warns that if "forensic pathologists can offer such baseless opinions without penalty, then the entire criminal justice system is at

[13] *Open Letter to Political Leadership* 1 (Apr. 20, 2021), https://tinyurl.com/szc8ntb3; *see also* Rachel Treisman, *Maryland to Probe Cases Handled by Ex-Medical Examiner Who Testified in Chauvin Trial*, NPR (April 24, 2021, 6:07 PM ET), https://tinyurl.com/pv7phkm5 (noting that 458 physicians signed the letter).
[14] *Open Letter to Political Leadership*, *supra* at 1.

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risk."[15] And the letter further explains that the signatories' disagreement with Dr. Fowler was "not a matter of opinion" but "a matter of ethics."[16] In light of Dr. Fowler's testimony and those concerns, the Maryland Attorney General's Office found it "appropriate for independent experts to review reports issued by the Office of the Chief Medical Examiner" during Dr. Fowler's tenure "regarding deaths in custody."[17]

Contrary to Defendants' assertion, criticism of Dr. Fowler is neither actionable "harassment" nor "defamation." Kueng Mot. 3; Lane Mot. 4. Instead, the opinions in the letter—endorsed by hundreds of physicians—were clearly protected speech about a public figure and on an important matter of public concern. *See Snyder v. Phelps*, 562 U.S. 443, 453 (2011); *Chafoulias v. Peterson*, 668 N.W.2d 642, 651-652 (Minn. 2003). Nothing immunizes a defense expert from criticism when he offers testimony that his medical-community peers concluded was unsubstantiated and implicated ethical concerns for the medical community at-large. Quite the opposite. The purpose of public access is to shine light on courtroom proceedings. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979) ("Openness in court proceedings may improve the quality of testimony."); *State v. Brown*, 815 N.W.2d 609, 616 (Minn. 2012) ("The presence of an audience does have a wholesome effect on trustworthiness since witnesses are less likely to testify falsely before a public gathering." (citation omitted)). Nor is there any basis to suggest that had the *Chauvin* trial not been televised, Dr. Fowler would not have received the same professional criticism for his testimony.

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[15] *Id.* at 1-2.
[16] *Id.* at 1.
[17] Phillip Jackson & Justin Fenton, *In-Custody Death Reports Under Former Maryland Medical Examiner to Be Reviewed After He Testified Chauvin Did Not Kill George Floyd*, Balt. Sun (Apr. 23, 2021 6:06 PM), https://tinyurl.com/4cmu3zk6.

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Defendants also cite the vandalism at the former residence of Barry Brodd, Defendant Chauvin's use-of-force expert witness, as evidence that a televised trial will deprive them of their right to a fair trial. *See* Kueng Mot. 3; Lane Mot. 3. There is no disputing the awful nature of that event, but there is also no reason to think that the individuals who carried out that act did so because of the audio-visual broadcasting. Moreover, even in light of that incident, Defendants have offered no evidence that any witness will not testify because of audio-visual coverage.[18]

But even if the Court accepted all of Defendants' conclusory assertions at face value, they are still wrong: Defendants will receive a fair trial. The same constitutional provision Defendants cite as the basis of their fair trial claim—the Sixth Amendment—provides Defendants the tools to rectify the problem of reluctant witnesses: "compulsory process." U.S. Const. amend. VI; *see* Minn. Const. art. I, § 6. Defense counsel can issue subpoenas, which this Court may enforce. *See* Minn. R. Crim. P. 22.02, subd. 2 ("Alternatively, an attorney, as an officer of the court, may issue a subpoena in a case in which the attorney represents a party."); Minn. R. Crim. P. 22.05 ("Failure to obey a subpoena without adequate excuse is a contempt of court."). Reluctant witnesses are a reality in the legal system, and the law provides tools to address that possibility. Defendants have offered no reason why compulsory process will not prove effective here. And in the unlikely event

[18] The State recently opposed releasing jurors' names to protect them against potential harassment. But the two issues are distinct for four reasons. First, witnesses' names will be public regardless of whether this trial is broadcast or not. But jurors' names will not become public unless and until this Court releases them. Second, the marginal benefit of releasing jurors' names is exceedingly low—in part because the Court televised *voir dire* and permitted unparalleled public insight into jury selection. By contrast, the marginal benefit to broadcasting the proceedings is substantial, given the risks from COVID-19 and the need to maintain public access without compromising public safety. Third, once the Court releases jurors' names, it cannot un-ring that bell, but the Court may restrict names temporarily and release them at a later date. By contrast, if the Court is forced to limit public access due to COVID-19, members of the public who cannot attend will irrevocably lose the ability to witness these proceedings. Fourth, expert witnesses in particular—unlike jurors—possess additional resources and sophistication to deal with potential harassment.

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that compulsory process did not address any concerns, the Court could also craft tailored measures, such as limiting audio-visual broadcasts of certain witnesses, akin to the Court's careful efforts to protect jurors, minors, and members of the Floyd family during the *Chauvin* trial.

Defendants even hint that removing cameras might not be enough to guarantee a fair trial—suggesting that they could never receive a fair trial before this Court. *See* Kueng Mot. 4 ("It cannot yet be known that removing cameras alone will be a sufficient prophylaxis to protect Mr. Kueng's right to a fair trial."); Lane Mot. 5 (same). Tellingly, Defendants cite not a single case in which a defendant had not received a fair trial based on the theory they advance here—that the notoriety of their crime renders their trial unfair. This Court should reject the perverse suggestion that high-profile defendants can, by virtue of their notoriety, escape a fair determination of their guilt before this Court.

Finally, far from supporting Defendants' arguments, the Sixth Amendment partial closure doctrine they cite demonstrates why their fair trial claim fails. *See* Kueng Mot. 4; Lane Mot. 4-5. Defendants have not provided reason to believe that audio-visual coverage would "likely" "prejudice" their purported interest in facilitating witness testimony. *State v. Petersen*, 933 N.W.2d 545, 550 (Minn. App. 2019) (cleaned up). Instead, if individuals are motivated to harass witnesses, those individuals will likely do so regardless of whether the proceeding is televised. Additionally, Defendants possess "reasonable alternatives" short of limiting public access in the midst of an ongoing pandemic, including subpoenaing reluctant witnesses. *Id*. (internal quotation marks omitted). And Defendants have offered nothing that would permit this Court to make "findings adequate to support" limiting public access. *Id*. (internal quotation marks omitted); *see also Brown*, 815 N.W.2d at 616 n.3 (looking to the same factors "for determining whether the right to a public trial must give way").

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3. In November 2020, the State initially argued against live broadcasting, in large part because it had never been done in the State of Minnesota. Defendant Chauvin's trial made clear the extraordinary benefits of maintaining robust public access in these "unique and unprecedented" circumstances. Order Denying Motion to Reconsider and Amend Order Allowing Audio and Video Coverage of Trial 4 (Dec. 18, 2020). Because anyone who wanted could watch the *Chauvin* trial, the public gained confidence in the fair administration of justice. And defendant Chauvin's trial also showed that this Court could alleviate many of the concerns that had motivated the State's opposition to audio-visual broadcasting. To the extent that COVID-19 may again pose public health risks during Defendants' trial, the State urges the Court to maintain its audio-visual order to secure the same degree of meaningful public access to those upcoming proceedings.

The public's right of access promotes the legitimacy of the criminal process. At its most basic level, transparency allows the public to determine that "established procedures are being followed." *Press-Enter. Co. v. Super. Ct. of Cal., Riverside Cnty.*, 464 U.S. 501, 508 (1984) (*Press-Enterprise I*). In the typical case, the ordinary person does not attend trial. Instead, "the sure knowledge that *anyone* is free to attend" provides the necessary "assurance" that someone—such as a member of the media—will report an injustice. *Id*. But this "is not that typical case." Order Denying Motion to Reconsider 7. The level of public interest surrounding Mr. Floyd's death, across the social and political spectrum, is truly unprecedented. Had the Court not broadcasted *State v. Chauvin*, an enormous number of people would surely have sought to attend the trial—and most would have been turned away given COVID-19 restrictions. *Cf. State v. Taylor*, 869 N.W.2d 1, 11 (Minn. 2015) (noting that, for purposes of the Sixth Amendment, when "a significant portion of the public" is excluded "from the trial," the result is a partial closure of the courtroom (internal quotation marks omitted)).

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In this case, the benefits that flow from robust public access are also particularly great—as *State v. Chauvin* again revealed. As the Supreme Court has explained, "[c]riminal acts, especially violent crimes, often provoke public concern, even outrage and hostility." *Press-Enterprise I*, 464 U.S. at 508-509. The public's ability to watch the justice system in action provides a "community therapeutic value." *Id*. at 508 (internal quotation marks omitted).

> When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.

Id. at 509.

George Floyd's murder invoked extraordinary public concern—here in Minnesota and around the country. This Court's decision to broadcast *State v. Chauvin* "vindicate[d]" "the community['s]" interest in knowing that Defendant Chauvin was convicted through a fair and honest process. *Id*. In fact, the *Chauvin* trial led to relatively little unrest in Minneapolis. Some of that comparative calm was no doubt due to the fact that the community's ability to observe these proceedings provided a productive outlet for the passions surrounding this case. As a result of that same access, Americans of all persuasions accepted the legitimacy of the *Chauvin* jury's verdict and gained renewed confidence in the criminal justice system.[19]

It is important that the Court maintain that same degree of meaningful public access for these three Defendants, which, given the current course of the pandemic, will require audio-visual

[19] This conclusion is borne out by empirical evidence. For instance, shortly after the trial, a majority of Americans said that the jury's "verdict gave them more confidence in the courts, and similar shares said the same of the criminal justice system." Eli Yokley, *Most Americans Approve of Derek Chauvin's Conviction, but Fewer See Justice for George Floyd*, Morning Consult (Apr. 22, 2021, 3:00 PM ET), https://tinyurl.com/3xfxsjrx. No doubt some of that confidence was due, not just to the outcome itself, but to the transparency of the process.

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broadcasting. "[A]n unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980). "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id*. at 572. By ensuring that ordinary people who want can once again observe the coming proceedings for themselves, the Court will help ensure that whatever verdict the jury returns will be accepted as just. Indeed, it would potentially send a worrisome message if the Court rescinded its existing order and—because of the need to reimpose COVID-19 restrictions—reduced the overall public access to these proceedings. The public might receive the message that they had no right to observe proceedings—or worse might worry that a fundamental injustice was hidden behind closed doors.

The State is not alone in recently recognizing the positive lessons learned in *State v. Chauvin*. Just a few months after the trial, the Minnesota Supreme Court ordered the Advisory Committee on the Rules of Criminal Procedure to "consider whether the requirements set forth in that rule for audio and video coverage of criminal proceedings should be modified or expanded" based on the lessons learned during the pandemic. *In re the Minnesota Supreme Court Advisory Committee* 3. According to the Minnesota Supreme Court, "audio and video coverage of all court proceedings, including some criminal proceedings, has been a critical component of public access during the COVID-19 pandemic." *Id*. at 2. In particular, the Court noted that "livestream technologies" "fulfilled the public interest in the fair administration of justice." *Id*. And the Court suggested that "[a]part from the pandemic," "the constitutional right to a public trial may in some circumstances require expanded media access to or coverage of some proceedings even without party consent." *Id*. (citations omitted). In an official press release, Chief Justice Gildea similarly praised technology for "keep[ing] a window to our courts open during the pandemic, and

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provid[ing] us with the opportunity to ensure accessibility and transparency of our public proceedings." Press Release, Minn. Jud. Branch, *Minnesota Supreme Court Orders Evaluation of Audio and Video Coverage of Criminal Proceedings* (June 24, 2021), https://tinyurl.com/yfurfrdk. This Court should ensure that "window" exists for Defendants' trial.

Finally, *State v. Chauvin* also showed that the Court could avoid concerns that had motivated the State's initial opposition to audio-visual broadcasting. The public's First Amendment access is not "absolute," and this Court successfully balanced public access to the *Chauvin* trial with competing interests. *Press-Enterprise II*, 478 U.S. at 9. For instance, by permitting audio coverage of *voir dire* but not video of the jurors' faces, the Court balanced the public's right to observe the jury's selection with the need to protect ordinary citizens who answered the call to serve. *See generally* State's Mem. of Law Opposing Mot. to Unseal Juror Identities (Aug. 16, 2021). During the trial, the Court likewise protected minor witnesses' privacy and the privacy of Mr. Floyd's family members by shielding their faces. More generally, the Court prevented any hint of a media-dominated atmosphere that could undermine the integrity of the proceedings. *See, e.g.*, *Estes v. Texas*, 381 U.S. 532, 550 (1965) ("[T]he courtroom was a mass of wires, television cameras, microphones and photographers.").

Put simply, the *Chauvin* trial proved that the Court's order worked—and the Court should employ similar measures again, as COVID-19 continues to pose a risk to participants and the public at Defendants' trial. In light of Defendants' otherwise vague allegations, and in light of the concerning Delta variant, the Court should deny Defendants' motions on the merits. In the alternative, the motion should be denied as premature.

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CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny the motions on the merits or alternatively deny the motions as premature.

Dated: September 1, 2021

Respectfully submitted,

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