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STATE OF MINNESOTA
HENNEPIN COUNTY

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota

Plaintiff,

The Honorable Peter A. Cahill

vs.

J. Alexander Kueng
Thomas Kiernan Lane

Dist. Ct. File 27-CR-20-12953
Dist. Ct. File 27-CR-20-12951

Defendants

MEDIA COALITION'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE VIDEO AND AUDIO RECORDINGS OF PROCEEDINGS

American Public Media Group (which owns Minnesota Public Radio); The Associated Press; Cable News Network, Inc.; CBS Broadcasting Inc. (on behalf of WCCO-TV and CBS News); Court TV Media LLC; Dow Jones & Company (which publishes *The Wall Street Journal*); Fox/UTV Holdings, LLC (which owns KMSP-TV); 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; NBCUniversal Media, LLC; The New York Times Company; 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 of Law in Opposition to Defendants' Motion to Exclude Video and Audio Recordings of Proceedings.

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Introduction

The motions of Defendants Thomas Lane and Alexander Kueng ("Defendants") to prohibit audio-video coverage of their upcoming trial fail to face four simple facts:

1. the pandemic is unfortunately not over;
2. audio-video ("a-v") coverage aside, there are many reasons witnesses may not want to testify on their behalf;
3. regardless whether a-v coverage of their trial is allowed, this case and witnesses who testify at it are going to be the focus of intense press and public scrutiny; and
4. beyond the Defendants' Sixth Amendment rights, the press and the public have a First Amendment right of access to the courtroom that cannot be vindicated in this case absent a-v coverage.

For the same reasons this Court overruled the State's objections to a-v coverage at Derek Chauvin's trial, *see* Order Denying Mot. to Recons. & Amend Order Allowing Audio & Video Coverage of Trial, *State v. Chauvin*, No. 27-CR-20-12646 (Henn. Cnty. Dist. Ct. Dec. 18, 2020) (hereafter, the "Dec. 18 Order"), it should overrule Defendants' objections here.

Argument

I. A-V coverage is an illogical scapegoat for the challenges Defendants face.

Defendants begin their nearly identical briefs with a claim that, given their stated objective—to exclude a-v coverage from their trial—raises more questions than it answers: "It is the worldwide publicity from the televised coverage of the Chauvin trial that has impaired [their] right to a fair trial." Thomas Lane's Mot. to Exclude Video & Audio Recording of Proceedings ("Lane Motion") at 2 (filed Aug. 25, 2021) (emphasis added); Alexander Kueng's Mot. to Exclude Video & Audio Recording of Proceedings ("Kueng Motion") at 2 (filed Aug. 24, 2021) (emphasis added).

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Standing alone, the statement suggests that so many people followed Mr. Chauvin's trial and formed opinions regarding the culpability of those involved in George Floyd's death that it will be all but impossible to empanel an impartial jury. Even assuming that's true (and the Media Coalition takes no position), excluding a-v coverage from the Defendants' upcoming trial cannot cure the prejudice Defendants say they suffered from the coverage of Mr. Chauvin's trial. Come March, potential jurors will join the venire having seen what they saw—whether in print, online, or on television—and the livestreaming of the March trial cannot change that for better or for worse. For that reason, "[t]he appropriate course to follow when the spectre of prejudicial publicity is raised is not automatically to deny access but to rely primarily on the curative device of voir dire examination." *United States v. Criden*, 648 F.2d 814, 827 (3d Cir. 1981); *see also* 10 Minn. Prac., Jury Instr. Guides-Crim. CRIMJIG 1.02 (6th ed.).

Read in the context of their larger briefs, Defendants' argument seems to be that witnesses who testified on behalf of Mr. Chauvin had such bad experiences that they cannot be convinced to testify again now, on behalf of Defendants—and that a shortage of testimony (not an impartial jury) will seal their fate. Ironically, this is a problem of Defendants' own making, since it was their late notice to the Court regarding their need for additional legal support at counsel table that necessitated the Court's decision to separate Defendants' trial from that of Mr. Chauvin and continue Defendants' trial until a later date. *See* Order Regarding Disc., Expert Witness Deadlines, & Trial Continuance, *State v. Chauvin*, No. 27-CR-20-12646 (Henn. Cnty. Dist. Ct. Jan. 11, 2021) at ¶ 5. Regardless, neither the Defendants' motion papers nor the actual experience of all those involved in the Chauvin trial support their claim that witnesses are loathe to come forward solely or even primarily because the March trial will be subject to a-v coverage.

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Defendants do vaguely assert that they have "been informed by fact witnesses that they will not cooperate or testify because the proceedings are being televised," Lane Motion at 3; Kueng Motion at 3; though they do not say how many witnesses, what they will testify about, why that testimony is needed, or why the subpoena power cannot be used to compel the witness' testimony.[1] They then go on to concede that other fact witnesses have not pointed to a-v coverage at all but have simply expressed concern about "being associated with the defense due to the amount of press coverage" and that certain expert witnesses just don't want "the notoriety." *Id.* In other words, these fact witnesses aren't worried about a-v coverage—they just do not want to be associated with Defendants or to face the publicity that would result. Defendants concede as much when they assert "[i]t cannot yet be known that removing cameras alone will be a sufficient prophylaxis to protect [their] right to a fair trial." Lane Motion at 5; Kueng Motion at 4.

The fact is, whether livestreamed or not, Defendants' upcoming trial will be reported upon extensively and the notion that reluctant witnesses can avoid public scrutiny and criticism—and will fall in line to testify—so long as a-v coverage is prohibited is farcical. Moreover, there simply is no support for Defendants' assumption that the "harassment" directed at Chauvin witnesses Barry Brodd and David Fowler occurred because their testimony was livestreamed. Admittedly, the sort of backlash their testimony caused does not occur in a typical case, but Mr. Chauvin's was far from typical. It seems inherently likely that his witnesses became the target of public ire not merely because the public watched their live testimony but

[1] They also do not state the age of the witnesses or acknowledge that, under the Dec. 18 Order, minor witnesses, including a witness who was a minor at the time of Mr. Floyd's death but had since turned 18, were allowed to testify off-camera and presumably would be at the March trial, as well.

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because of what they said—all of which would have been reported with or without cameras in the courtroom—and because they said it on Mr. Chauvin's behalf.[2]

Prohibiting a-v coverage of Defendants' upcoming trial isn't going to mean *less* coverage. It won't prevent the circulation of witness's names or their testimony or, frankly, even their photographs.[3] And it likely won't cause those who seek privacy and distance from a notorious criminal and those accused of aiding and abetting him to suddenly want to testify. It will, however, result in less comprehensive coverage of the trial and deprive the public of its ability to fully monitor criminal prosecutions that are of utmost public concern.

II. The unprecedented access to the Chauvin trial earned praise from all quarters.

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. Cnty. Dist. Ct. June 2, 2021).

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[2] As to Mr. Fowler specifically, the Defendants claim he is being "harass[ed] and defam[ed] for having the temerity to testify in the ex-officer's defense case." Lane Motion at 3-4; Kueng Motion at 3. In fact, Mr. Fowler is the subject of ongoing press attention primarily because of the announcement by the Maryland Attorney General and Governor Larry Hogan's Office that the State has launched "an investigation of all deaths in police custody that were overseen" by Mr. Fowler when he was the chief medical examiner in that state. *See e.g.*, Emily Davies & Ovetta Wiggins, *Maryland officials to launch review of cases handled by ex-chief medical examiner who testified in Chauvin's defense*, Wash. Post (Apr. 23, 2021), https://www.washingtonpost.com/local/public-safety/maryland-medical-examiner-investigation-chavin-testimony/2021/04/23/61951580-a2ed-11eb-85fc-06664ff4489d_story.html.

[3] Photographs will be taken outside the courthouse, and photographs of many witnesses will likely be easily found online, either on social media or as part of a professional biography. At the time of this filing, for example, Mr. Brodd's photograph was easily found on Linkedin, and Mr. Fowler was photographed in connection with news reports published (and still available online) long before Mr. Floyd's murder.

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Meanwhile, other trial participants (including those initially opposed to cameras) and court observers from a wide range of backgrounds and with diverse constituencies agreed that—as stated in a newspaper column by one former Hennepin County Chief Judge—"[a]llowing cameras and audio to air and record the Chauvin trial … did more than quash old arguments; it showed the public how trials really work."[4]

Attorney General Keith Ellison, whose office opposed a-v coverage in the Chauvin trial and filed an unsuccessful motion asking the Court to reconsider its decision to allow such coverage, 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, also part of the Fox 9

[4] Kevin S. Burke & Elizabeth A. Stawicki, *Chauvin case proved the value and efficacy of cameras in the courtroom. Let them in.*, TwinCities.com (June 24, 2021), https://www.twincities.com/2021/06/24/burke-stawicki-chauvin-case-proved-the-value-and-efficacy-of-cameras-in-the-courtroom-let-them-in/.

[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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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 order directing the Advisory Committee on the Rules of Criminal Procedure to consider whether

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[6] *See* https://twitter.com/PaulBlume_FOX9/status/1386784094911008768.

[7] *See* 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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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 has cited to this Court through the prosecutions of Mr. Chauvin and has codefendants. To quote that decision directly:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. "The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operat[e] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent 'urge to punish.'"

Id. at 571 (quoting Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. Pa. L. Rev. 1, 6 (1961) (citations omitted)). Perhaps more than any crime in the history of this State, the murder of George Floyd put those "natural human reactions" on display, such that it has never been more important to offer up maximum transparency as a "prophylactic" against them.

III. The Court can and should exercise its discretion to permit a-v coverage at Defendants' upcoming trial

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

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Unfortunately, the Supreme Court gave the advisory committee tasked with reviewing rules on a-v coverage more than a year—until July 1, 2022—to file a report with recommendations. June 18 Order at 3. Thus, despite broad support for cameras in courtrooms after the Chauvin trial, Rule 4 of the General Rules of Practice remains unchanged and will likely remain unchanged through the March trial of Defendants.

The Media Coalition acknowledges that parties typically do not have to justify their objection to a-v coverage under Minn. R. Gen. P. 4.02(d), but as the Court recognized in the trial of Mr. Chauvin, it is not strictly bound by that rule, either. Rather, pursuant to Minn. R. Gen. P. 1.02, this Court "may modify the application of these rules in any case to prevent manifest injustice." Dec. 18 Order at 3. As this Court then articulated, "deprivation of the constitutional rights that are the hallmarks of a public criminal trial would be a 'manifest injustice,'" and there were no "reasonable alternative to televising the trial that would vindicate the defendants' Sixth Amendment rights and the First Amendment rights of the public and the press." *Id.*

The same is true today, and the Media Coalition hereby incorporates by reference the findings of fact and conclusions of law in the Dec. 18 Order, as well as the arguments it raised in support of the Court's decision to allow a-v coverage. *See* Media Coalition's Opp'n to State's Mot. for Recons. of Order Allowing Audio & Video Coverage of Trial ("Dec. 14 Mem."), *State v. Chauvin*, No. 27-CR-20-12646 (Henn. Cnty. Dist. Ct. Dec. 14, 2020).

The pandemic remains an unfortunate fact of life—more dangerous to some than ever—and the requirements of the First Amendment likewise remain unchanged. This Court cannot open its doors to just a lucky few of the hundreds if not thousands of people who want to observe Defendant's trial. Rather, it must provide the press and public with *meaningful* access. Thus, there is no alternative under current conditions other than to permit a-v coverage and—despite

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the Defendants' arguments to the contrary—the Court need not worry that allowing such coverage will violate Defendants' Sixth Amendment rights.

A. The pandemic is not over, is not predicted to be over by March, and in all likelihood will prevent any significant portion of the interested public from attending Defendants' trial in person.

The Defendants assert not that the pandemic is over but that we are "mov[ing] past it." Lane Motion at 5; Kueng Motion at 4. Unfortunately, this optimism is not supported by available data or by the scientific community.

On the day Mr. Chauvin's trial started, March 29, 2021, 1,875 Minnesotans tested positive for Covid-19.[11] By comparison, just yesterday, on August 31, the Minnesota Department of Health listed 3,882 "newly reported cases."[12] According to a Minnesota Public Radio report summarizing the data, after a reprieve earlier this summer, we are now in an "upward grind": "The state averaged more than 1,500 new cases per day over the last seven reporting days—three times greater than the start of August and dramatically higher than the 91 daily at the start of July."[13] Meanwhile, the Centers for Disease Control has referred to this rise—seen throughout the country—as "rapid and alarming" and "more like the rate of cases we had seen before the vaccine was widely available."[14]

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[11] Minn. Dep't of Health, *Situation Update for COVID-19* (Positive cases by date specimen collected data table for 3/29/2021), https://www.health.state.mn.us/diseases/coronavirus/situation.html#cases1.

[12] *Id*. at *Daily Update*.

[13] MPR News Staff, *COVID-19 in MN: Summer wave edges higher; cases, hospital needs climb*, MPR News.org (Aug. 27, 2021), https://www.mprnews.org/story/2021/08/27/latest-on-covid19-in-minnesota.

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

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The counts have accelerated in part due to the virus' Delta variant, which is both more infectious and potentially more dangerous.[15] 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."[16] Meanwhile, 25% of Minnesotans age 18 and over are still not vaccinated,[17] and children under 12 are not eligible for vaccination at all, causing concern that they are particularly vulnerable.[18]

Presumably the Court cannot require jurors, the Defendants, their counsel, 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. On August 30, the *Star Tribune* reported that 12,559 vaccinated Minnesotans have had a breakthrough case.[19] That same date, it

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[15] *Id.*

[16] *Id.*

[17] *COVID-19 Vaccine Summary*, Minnesota Dep't of Health, https://mn.gov/covid19/vaccine/data/index.jsp, (last accessed Aug. 30, 2021).

[18] *See* Emily Anthes, *The Delta Variant Is Sending More Children to the Hospital. Are They Sicker, Too?*, NYTimes.com (Aug. 9, 2021), https://www.nytimes.com/2021/08/09/health/coronavirus-children-delta.html.

[19] Jeremy Olson, *Breakthrough COVID-19 cases accelerate in Minnesota*, StarTribune.com (Aug. 30, 2021), https://www.startribune.com/breakthrough-covid-19-cases-accelerate-in-minnesota/600092238/?utm_source=newsletter&utm_medium=email&utm_campaign=talkers.

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reported 591 COVID-19 hospitalizations in Minnesota and that "staffed bed space is in short supply."[20]

As a result of the virus' ability to mutate into more virulent strains, the reluctance of many Americans to get vaccinated, and the possibility that immunity wanes with time, the CDC recently reinstated guidance that even vaccinated individuals wear masks when indoors in public places,[21] and in the Hennepin County Government Center, masking is more than advised—it is required, as is social distancing.[22] Meanwhile, correspondence regarding attendance at the hearing on this very Motion revealed that the Court is prepared to admit only 25 people into Courtroom 857, even though it can normally accommodate 50 spectators.

There is no reason to believe the situation will significantly improve by March. In fact, Dr. Anthony Fauci recently rolled back his previous prediction that Americans would see the end of the pandemic in spring of 2022, suggesting at a White House COVID-19 press briefing that Americans should no longer focus on a specific timeline.[23] Governor Walz was likewise quoted in the *Star Tribune* saying that "[w]e've moved from pandemic to end-demic" and that "I don't like to acknowledge it, but we're going to have to live with this for years."[24] Governor Walz also

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[20] *Id.*

[21] https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html.

[22] *Gov't Center building and plaza rules*, Hennepin.us, https://www.hennepin.us/your-government/facilities/government-center-use.

[23] *Press Briefing by White House COVID-19 Response Team & Public Health Officials*, Whitehouse.gov (Aug. 24, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/08/24/press-briefing-by-white-house-covid-19-response-team-and-public-health-officials-51/.

[24] Briana Bierschbach, *Walz: Minnesotans must learn to live 'safely' amid ongoing COVID threat*, StarTribune.com (Aug. 26, 2021), https://www.startribune.com/walz-minnesotans-must-learn-to-live-safely-amid-ongoing-covid-threat/600091259/.

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predicted that roughly 20% of Minnesotans will remain unvaccinated, regardless of incentives provided by the State.[25]

Thus, this Court faces the same dilemma it did during the Chauvin trial: how to conduct a public trial—required by both the First and Sixth Amendments—when it's not safe for people to closely congregate indoors. There is no courtroom in Minnesota that can accommodate the many members of the press and public who want to observe Defendants' trial, even in the absence of a deadly pandemic. Certainly there is no courtroom large enough in the age of social distancing—indeed, there will likely be even less room in the courtroom in March than during Mr. Chauvin's trial, given all three co-defendants will be tried together and each will have their own legal team.

The Defendants' motions don't confront this dilemma[26]—they simply pretend the pandemic is all but over and argue that the Court can accommodate the enormous number of people who want to observe the trial via overflow rooms. In fact, the pandemic is not over, and even if overflow rooms were acceptable under the First Amendment—which, for reasons discussed below, they're not—they aren't a solution to the risk of COVID transmission. 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 during the lower-profile trial of Mohamed Noor, to watch it in person, and they will take

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[25] *Id.*

[26] Nor do they confront the fact that a May 25, 2021 order of the Supreme Court purports to limit in-person attendance at court proceedings to the parties, their counsel, necessary court staff, and members of the media, thereby completely excluding members of the public. Order Governing the Continuing Operations of the Minn. Judicial Branch, No. ADM20-8001 (May 25, 2021), https://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/COVID-19/Order-52521.pdf.

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whatever they catch there out into the larger community. *See* Dec. 18 Order at 5 (noting that 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."). For the safety of trial participants and the general public, the Court should make remote viewing of the trial possible, and it should deny Defendants' motions.

B. The First Amendment affords a *meaningful* right of access to Defendants' trial and overflow rooms do not suffice.

Defendants' motions focus entirely on their Sixth Amendment right to a fair trial, which—as discussed below—a-v coverage does not jeopardize. They completely ignore that a public trial is also guaranteed by the First Amendment and that the First Amendment right belongs to the press and the public. *See* Dec. 14 Mem. at 8-9 (discussing First Amendment right of access to criminal proceedings).

The First Amendment guaranteed right of access to courtrooms is not a token right of access. That is, pandemic or no, the First Amendment is not satisfied if but a handful of members of the press and the public are able to observe a trial. Rather, as the Media Coalition has previously argued, the First Amendment right of access is a right of *meaningful* access, and the Court must "take *every reasonable measure* to accommodate public attendance." *Presley v. Georgia*, 558 U.S. 209, 210 (2010) (per curiam) (emphasis added) (finding constitutional violation where trial court excluded defendant's uncle from voir dire on the basis that 42 potential jurors would be sitting throughout the courtroom and "[t]here just isn't space for [the public] to sit in the audience."); *see also Davis v. United States*, 247 F. 394, 395, 398-99 (8th

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Cir. 1917) (per curiam) (allowing only 25 members of the public to attend a trial when the courtroom could hold 100 spectators was reversible error).

What Defendants are asking for in this case—that the Court relegate the press and public to overflow rooms—would thus constitute 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 (Minn. 2001). It would be a true closure (and an unconstitutional one) both because overflow rooms are no substitute for sitting in the courtroom itself and because there aren't nearly enough overflow rooms to accommodate even a small fraction (much less a reasonable one) of the people who want to observe Defendants' trial. *See* Dec. 14 Mem. at 11-12 (further discussing why relegating the press and public to overflow rooms constitutes a true closure).

The State previously made the exact same arguments that Defendants make now, and the Court firmly rejected them: Overflow rooms 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." Dec. 18 Order at 5. Moreover, we know from the Chauvin trial that literally *millions* of people are likely to want to watch Defendants' trial.[27] Thus, as the Court so eloquently stated last December, in denying the State's motion for reconsideration of its decision to allow a-v coverage:

> 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

[27] 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.

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> 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.

Dec. 18 Order at 5-6.

As the Media Coalition has previously argued, in pursuing their First Amendment obligation to take "every reasonable measure" to accommodate public attendance, courts are no longer bound by physical space. They no longer are limited to finding the largest courtroom and the narrowest chairs and cramming as many people as possible into a finite amount of square footage. Rather, as this Court well knows from the Chauvin trial, courts now have at their disposal high-tech a-v equipment that can livestream the trial to a global audience without disrupting the proceedings in any material way.

Thus, even in the absence of a pandemic, permitting a-v coverage might be the only way to abide by the First Amendment's directive to take "every reasonable measure" to accommodate the many members of the press and public who want to watch justice unfold in this extremely high-profile case. 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.

But the Court does not have to make such a far-reaching decision. Social distancing requirements are likely to severely limit the number of people who can attend the trial in-person, in the courtroom (and even in overflow rooms) and the combined First Amendment and public health concerns thus require the livestreaming of the trial in March, just as they required the livestreaming of the Chauvin trial. The Court should therefore stand by its decision to permit a-v coverage, knowing that—in the words of former Chief Judge Kevin Burke—it will also be

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"building a reservoir of trust to withstand the tide winds that inevitably occur when an unpopular decision is issued."[28]

C. Allowing a-v coverage will not violate the Defendants' Sixth Amendment rights.

Defendants argue that permitting a-v coverage of their trial will impair their Sixth Amendment rights to a fair trial because they will be unable to marshal the testimony of witnesses "deterred from testifying for the defense because they fear the wrath of the crowd." Lane Motion at 4; Kueng Motion at 4. This argument pits Mr. Lane's and Mr. Kueng's fair trial rights against not only the First Amendment's guarantee of press and public access but also against their co-defendant Tou Thao's Sixth Amendment public trial right: Mr. Thao requested a-v coverage of his trial, and the Media Coalition is not aware that he has withdrawn that request. *See* Order Allowing Audio & Video Coverage of Trial, Nos. 27-CR-20-12646, *et al.* (Nov. 4, 2020) at 2.[29] Should the Court grant Defendants' motions, it may face a separate Sixth Amendment challenge from Mr. Thao on the basis that the Court disallowed a-v coverage over his stated request for such coverage. Regardless, Defendants' arguments are overwrought and can be addressed with more moderate, targeted measures.

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,

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[28] Hon. Kevin Burke, *Cameras in the Courtroom, An Outmoded Issue*, Henn. Cnty. Bar Ass'n (July/Aug. 2020), https://www.mnbar.org/archive/msba-news/2020/06/29/cameras-in-the-courtroom-an-outmoded-issue.

[29] The public trial rights of defendants under the Sixth Amendment are discussed at some length in Mr. Chauvin's opposition to the State's motion for reconsideration of the Court's decision to allow a-v coverage at his trial. *See* Def.'s Mem. of Law Opposing the State's Mot. for Recons., *State v. Chauvin*, No. 27-CR-20-12646 (Henn. Cnty. Dist. Ct. Dec. 14, 2020).

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putting Minnesota solidly in the minority.[30] In these states, a-v coverage is routine, yet there is no indication that the appellate courts in these states face rampant Sixth Amendment challenges based on the theory that cameras scare witnesses away, making it impossible to mount a defense. Indeed, Defendants do not cite any such cases, 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

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

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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. 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, Defendants' concerns can, and should, be dealt with on a more targeted basis. For example, as it did 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 Co. v. Superior Court*, 457 U.S. at 596, 606-07 (1982), and it should give the Media Coalition an opportunity to be heard on the issue. *See also* Dec. 14 Mem. at 16 (outlining parameters for permitting off-camera testimony).

Conclusion

The "grave responsibility . . . in overseeing and regulating courtroom conduct and procedure during trials" falls to this Court. *Lindsey*, 632 N.W.2d at 658 (citing *Minneapolis Star & Tribune v. Kammeyer*, 341 N.W.2d 550, 559 (Minn. 1983)). And as the trial of Chauvin made clear, this Court is more than capable of overseeing and regulating the conduct of the courtroom in a manner that will afford these Defendants the full benefit of their Sixth Amendment rights. Indeed, Chauvin's trial demonstrates that the livestreaming of criminal proceedings is not antithetical to the Defendants' right to a fair trial but that cameras served a crucial role in

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vindicating the press' and the public's First Amendment rights and ensuring that all could see that Chauvin was "fairly dealt with and not unjustly condemned." *State v. Brown*, 815 N.W.2d 609, 616 (Minn. 2012). The same will be true in Defendants' trial.

The Media Coalition therefore respectfully requests that this Court deny Defendants' motions and affirm its decision to allow a-v coverage of their trials.

Dated: September 1, 2021

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