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May 25, 2022

The Honorable Peter A. Cahill
Hennepin County Government Center
300 South Sixth Street
Minneapolis, MN 55487

RE: Request of the ACLU-MN for Leave to Appear as *Amicus Curiae* and File Letter Brief of *Amicus Curiae* Regarding Courtroom Closure in the Jury Trial of State v. Kueng, et al., 27-CR-20-12953, 27-CR-20-12949

Dear Judge Cahill:

The American Civil Liberties Union of Minnesota (ACLU-MN) seeks leave to participate as *amicus curiae* in *State v. Kueng et al.*, 27-CR-20-7460, 27-CR-20-12949, and to submit a letter in lieu of a brief of *amicus curiae* regarding the Media Coalition's Motion for Reconsideration of April 25, 2022, Trial Management Order.

The Minnesota Rules of Criminal Procedure do not address participation of *amicus curiae* in the district court. Courts have broad discretion, however, to grant parties leave to participate as *amicus curiae* in pending district court proceedings. *See, e.g., Metro. Sports Facilities Comm'n. v. Minnesota Twins P'ship*, 2001 WL 1511601 (Hennepin Co. Dist. Ct., Nov. 16, 2001) (permitting State of Minnesota to participate as *amicus curiae* in action between two private parties).

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

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

ACLU-MN's Identity and Interest[1]

The issues in this case affect interests extending far beyond the individual parties in this case. Not only will a decision in this case regarding access to the trial affect individuals and

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

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entities who seek to view trial proceedings throughout the State of Minnesota; this Court's decision will immediately impact how many residents of Hennepin County, the State of Minnesota, and around the globe have access to a trial of paramount public importance. The ACLU-MN is a private, nonprofit, nonpartisan organization supported by approximately 39,000 individual members and supporters in the State of Minnesota. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the Minnesota and United States Constitutions, including the rights to freedom of speech and freedom of the press, which are implicated in this matter. The ACLU-MN has an extensive background in the field of constitutional rights and a long history of participating as *amicus curiae* in important matters involving the Minnesota and United States Constitutions. The proposed submission – the instant letter – is concise and will not add any delay to the proceedings or the Court's determination on the pending motion regarding closure of the courtroom.

Statement of Party Supported and Position Taken

The ACLU-MN supports the Media Coalition's position that prohibiting A/V coverage while also holding the *Kueng* trial in a courtroom that lacks sufficient seating for members of the general public and press functionally constitutes a courtroom closure that violates the First Amendment to the United States Constitution. Indeed, during the *Chauvin* trial in courtroom 1856, only three members of the media and two family members (1 per side) were permitted inside the courtroom, which was redesigned to omit gallery seating. See Media Coalition's Memorandum in Support of Media Coalition's Motion Objecting to Closure of Trial to the Press and the Public (Media Memo) at 5, 16 (Oct. 29, 2021). *State v. Potter*, Case No. 27- cr-21-7460, Index # 95. The decision to hold the trial in courtroom 1856, which lacks sufficient spectator access, amounts to a court closure, raising serious concerns for the public's rights under the First Amendment.[2]

The United States Supreme Court has repeatedly reaffirmed that the First Amendment presumptively requires the public access to judicial proceedings. *See, e.g., Presley*, 558 U.S. at 215 ("Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials."); *Richmond Newspapers v. Va*., 448 U.S. 555, 578 (1980) ("[A] trial courtroom . . . is a public place where the people generally—and representatives of the media—have a right to be present . . . ."); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) ("Although the right of access to criminal trials is constitutional in nature, it is not

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

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absolute. But the circumstances under which the . . . public can be barred from a criminal trial are limited."); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (Press-Enterprise I) (presumption of openness extends to juror voir dire); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (presumption of openness extends to preliminary hearings).

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

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

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

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

Assuming that a physical courtroom closure is necessary due to COVID-19, as this Court now believes, banning the public total access to the trial would still violate the First Amendment because less restrictive alternatives exist: either permitting media personnel in the courtroom to provide A/V coverage so that the general public can virtually access the trial, or moving the trial to a courtroom with gallery seating sufficient to accommodate members of the general public.

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

Finally, as this Court previously found, overflow rooms feature:

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

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

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

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

Respectfully submitted,

s/Teresa Nelson
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