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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Derek Michael Chauvin,

J. Alexander Kueng,

Thomas Kiernan Lane,

Tou Thao,

Defendants.

STATE'S MOTION FOR RECONSIDERATION OF ORDER ALLOWING AUDIO AND VIDEO COVERAGE OF TRIAL

Court File No.: 27-CR-20-12646

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, and counsel for Defendants; Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431; 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 the Media Coalition, Leita Walker, Ballard Spahr LLP, 2000 IDS Center, 80 South 8th Street, Minneapolis, MN 55402-2119.

INTRODUCTION

The State respectfully requests that the Court reconsider its November 4, 2020 Order Allowing Audio and Video Coverage of Trial. The Minnesota General Rules of Practice strike a careful balance between public access to criminal trials and the rights of parties and witnesses. The Rules permit audio or visual recordings of criminal trials, but only if the State and Defendants have consented "in writing" or "on the record prior" to trial. Minn. Gen. R. Prac. 4.02(d). Moreover, even when the parties consent, the Rules prohibit video and audio recordings of "*any* witness who objects thereto in writing or on the record before testifying." *Id*. (emphasis added).

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The Court's Order upsets that careful balance and violates the plain language of the Rules. The Order authorizes audio and visual broadcasts of this trial, even though the State did not consent to audio or visual broadcasts. *See* Order 1 n.1. It also requires audio and visual recording of the testimony of most adult witnesses, even if they have not consented to the public broadcasting of their testimony. And it makes available a live audio feed of testimony by minor witnesses and George Floyd's family, even if they have not consented to audio broadcasting.

The Court's Order justifies this result by asserting that it is compelled by the Constitution. But the Constitution does not require audio or video coverage of the trial in this case. Indeed, the State is not aware of a *single* case—from Minnesota, or any other jurisdiction—holding that the Constitution mandates the public broadcast of an entire criminal trial, let alone that a duly enacted court rule requiring party and witness consent for a public broadcast can be superseded by such a constitutional claim. That is why Minnesota has not had publicly televised criminal trials without the consent of the parties, and why this Court's order is so extraordinary. Here, the Sixth Amendment's core purpose—transparency—can readily be achieved with overflow rooms and closed-circuit cameras. And nothing in the First Amendment's qualified guarantee of public access requires a live broadcast or audio and video recording of a criminal trial, particularly where the media and the public will have access to overflow rooms and closed-circuit television footage of the trial. Taken to its logical conclusion, the Court's Order would require live broadcasting of nearly every high-profile trial where interest exceeds courtroom capacity. The Constitution does not require that result, especially when there are other viable options that would allow public access without compromising the interests of justice. The State absolutely welcomes a public trial; it just wants that trial to proceed under the rules Minnesota has devised to protect the privacy and safety of witnesses, to

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safeguard them from undue publicity and harassment that might make them reluctant to testify, and to thereby ensure that the trial may best perform its truth-seeking function.

The Court therefore should not permit any recordings of this trial without the consent of the parties. In the alternative, and at a minimum, the State requests that the Court narrow its Order to protect the right of witnesses to object to audio and video recordings. Ordinary citizens have been thrust into these proceedings simply because they witnessed George Floyd's death. They should not be forced to sacrifice their privacy or suffer possible threats of intimidation when they perform their civic duty and testify. The risks of broadcasting witness testimony are particularly acute where, as here, live video and audio coverage may be intimidating to some witnesses and make it less likely that they will testify, potentially interfering with a fair trial. Thus, even if the Court does not fully rescind its prior Order, it should narrow its Order to address some of these concerns—for example, by permitting live broadcasting only of (i) opening and closing arguments; (ii) Defendants' testimony, should they take the stand and want their testimony broadcasted; and (iii) the testimony of any witness who does not object to live broadcasting. That would allow the public to see key aspects of this trial without undermining the administration of justice.

The State values transparency, appreciates the heightened public interest in this trial, and recognizes that the COVID-19 pandemic has affected the public's access to the justice system. The State continues to believe, however, that recording and publicly broadcasting witness testimony without consent will cause witnesses to lose their privacy and suffer possible threats of intimidation, and may make it less likely that some witnesses will come forward and testify at trial. Other available alternatives adhere more faithfully to the requirements of Rule 4.02, and strike a more appropriate balance between the need for public access and the need to protect

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witnesses. The State therefore respectfully requests that the Court reconsider its November 4, 2020 Order.

ARGUMENT

I. THIS COURT SHOULD NOT PUBLICLY BROADCAST THE TRIAL WITHOUT THE CONSENT OF THE PARTIES AND WITNESSES.

The Court correctly recognized that its Order "allows for greater audio and video coverage than that contemplated by Minn. Gen. R. Prac. 4.02(d), even if all parties had consented." Order Allowing Audio and Video Coverage of Trial at 9 ("Order"). Nonetheless, the Court concluded that "the only way to vindicate the Defendants' constitutional right to a public trial and the media's and public's constitutional right of access to criminal trials is to allow audio and video coverage of the trial, including broadcast by the media." *Id.* at 8. That holding conflicts with established precedent. The State therefore respectfully requests that the Court vacate its ruling and prohibit video and audio recording of the trial without the consent of the parties, as Rule 4.02 requires.

A. Rule 4.02 Requires the Consent of Parties and Witnesses.

Rule 4.02 establishes two basic requirements for any audio or video recording of a criminal trial: consent from the parties and the witnesses. The Rule does not give the Court discretion to deviate from these requirements, even though its drafters surely contemplated situations where members of the public would deeply desire a televised trial. *See* Minn. Gen. R. Prac. 4.01. Because the Order violates these requirements, the State requests that this Court reconsider it.

First, Rule 4.02(d) requires the Court to secure the consent of both parties. "In criminal proceedings occurring before a guilty plea has been accepted or a guilty verdict has been returned, a judge may authorize . . . visual or audio recording and reproduction," but only "with

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the consent of all parties in writing or made on the record prior to the commencement of the trial." Minn. Gen. R. Prac. 4.02(d). In other words, if either side does not consent to audio or visual recordings for any reason, the Rule does not permit the Court to depart from that choice.

The Rules also carefully delineate a narrow set of circumstances in which a district court may ignore the parties' wishes. But this case does not fall into one of those exceptions. For example, "[a] judge *may* authorize" the recording of "ceremonial or naturalization proceedings," *id.* R. 4.02(b) (emphasis added), or of "civil proceedings . . . without the consent of all parties," subject to certain limitations, *id.* R. 4.02(c). And after "a guilty plea" or "a guilty verdict" in a criminal case, "a judge *must*, absent good cause, allow visual or audio coverage." *Id.* R. 4.02(e) (emphasis added). In those situations, party consent is not required, *id.* R. 4.02(b), (c), (e), and "lack of consent is not good cause to deny coverage," *id.* R. 4.02(e). Here, by contrast, Rule 4.02(d) makes clear that consent is necessary, and no exception in the Rule suggests otherwise.

The history of Rule 4.02 confirms what the plain text shows. Prior to 2015, one party could always prevent recordings of criminal cases, no matter the stage of the proceeding. In 2015, the Minnesota Supreme Court switched course, approving a pilot project for recording certain criminal proceedings. Rather than creating a blanket right to televised criminal proceedings, however, the pilot project lifted "the consent requirement" only "in limited circumstances"—that is, only for "proceedings that do not include a jury and that occur after a guilty verdict has been returned or a guilty plea accepted." *In re Order Promulgating Amendments to Minnesota Gen. Rules of Practice*, No. ADM09-8009, 2015 WL 6467107, at *8, *10 (Minn. Aug. 12, 2015) ("*2015 Order*"). The limited parameters of the pilot project, the Court explained, reflected the Court's concern for the "profound privacy and safety interests of trial participants." *Id.* at *10. In 2018, the Court codified this pilot project in Rule 4.02,

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permitting pre-verdict criminal proceedings to be televised if—and *only if*—both sides gave their consent. Minn. Gen. R. Prac. 4.02(d). Broadcasting this trial without the State's consent upsets the careful balance the Minnesota Supreme Court struck.

Second, even if both the State and Defendants consent to audiovisual recording, Rule 4.02(d) prohibits "visual or audio coverage of any witness who objects thereto in writing or on the record before testifying." Minn. Gen. R. Prac. 4.02(d)(ii). This is a categorical rule, and it contemplates no exceptions. Indeed, even post-plea or post-verdict in a criminal case, the Rules forbid recording a "victim" or a "victim's proxy" without their express consent. *Id*. 4.02(e)(iv).

This makes good sense. Live video and audio coverage may be intimidating to witnesses and make it less likely that they will come forward and testify in the first place, thereby making it more difficult to conduct a fair trial. As the Minnesota Supreme Court explained in describing some of the precursors to the current version of Rule 4.02, broadcasting witness testimony may have a "chilling effect on the testimony of victims and witnesses." *2015 Order*, 2015 WL 6467107, at *4. That is why the Court entertained only the possibility of recording "certain criminal proceedings where concerns previously expressed regarding witnesses and jurors are minimized or largely absent," and why the current version of Rule 4.02 always permits witnesses to object to any recording of their testimony. *Id.* (internal quotation marks omitted).

Witnesses who perform their civic duty and testify also should not lose their privacy outside the courtroom. An innocent bystander who saw George Floyd's murder does not deserve—absent his or her consent—to be rocketed onto the public stage. *See Estes v. Texas*, 381 U.S. 532, 547 (1965) ("[I]nquisitive strangers and 'cranks' might approach witnesses on the street with jibes, advice or demands for explanation of testimony."); *2015 Order*, 2015 WL 6467107, at *9 (noting that "the right of access to public courtrooms is not absolute," and

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"the concerns of victims and other justice system participants are serious" (internal quotation marks omitted)). Allowing witnesses to be recorded without their consent also threatens to affect their testimony. "The quality of the testimony in criminal trials will often be impaired" if the witness knows "that he is being viewed by a vast audience." *Estes*, 381 U.S. at 547. That is in no small part because witnesses know that, if their testimony is broadcast, they are more likely to face threats or other forms of harassment.[1] In short, the Rule values the need for a fair, truth-seeking trial more than other interests, and erred on the side of assuaging witnesses' fears and encouraging their testimony.

Once again, this Court's Order deviates from the Rule. For the testimony of most witnesses, the Court has authorized audio and video recording no matter whether the witness consents. And for witnesses "under the age of 18" and "members of the George Floyd family," the Court has prohibited video recording without witness consent, but has indicated that "[a]udio coverage shall be allowed" regardless of whether these witnesses consent. Order at 3. That approach, however, is irreconcilable with Rule 4.02, which affords *each* witness—even adults not related to the victim—the right to object before *any* coverage—even audio—is permitted.

The Order justified its conclusion by noting that if "all witnesses could veto coverage of their testimony," the "public would be left with nothing but the arguments of counsel." Order at 9. But the Minnesota Supreme Court was well aware of that risk when it approved the pilot program that ultimately became Rule 4.02. The Court recognized that "[t]here is no question that Minnesota's consent requirement operates to effectively bar electronic coverage of public

[1] Indeed, in its order requiring juror anonymity and sequestration, this Court identified a risk that jurors may face public harassment. Order for Juror Anonymity and Sequestration 4 (Nov. 4, 2020) ("Strong reasons exist to believe that threats to jurors' safety and impartiality exist in all four of these cases."). There is no reason to believe that those concerns will apply with any less force to witnesses who testify at trial, or that those concerns will not be amplified if the Court permits video and audio recordings of witness testimony to be publicly broadcast.

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criminal courtroom proceedings." *2015 Order*, 2015 WL 6467107, at *7. But even as it acknowledged the practical effects of consent requirements, it still decided to maintain those requirements for proceedings like the ones here because of the important countervailing interests on the other side of the scale. This Court should not countermand the Supreme Court's judgment on that score.

In short, the November 4 Order does not comply with any of Rule 4.02's consent requirements, and the General Rules of Practice expressly prohibit this Court from deviating from these requirements. *See* Minn. Gen. R. Prac. 4.01. The State respectfully requests that the Court vacate its Order and follow the requirements of Rule 4.02. It should prohibit video and audio recordings of this criminal trial absent the consent of the parties and the witnesses.

B. The Constitution Does Not Require the Court to Deviate From Rule 4.02.

Rather than adhere to Rule 4.02, the Court grounded its decision in the First and Sixth Amendments of the Constitution. The Constitution, however, does not provide a basis for deviating from Rule 4.02's requirements. There is no constitutional right to audio or video broadcasting of the proceedings in this or any other criminal case. Nor is there a constitutional need for such a capacious order here. Permitting the media and the public to view these proceedings in overflow rooms via closed-circuit television would comply with COVID-19 social distancing restrictions, sufficiently protect Defendants' Sixth Amendment right to a public trial, and adequately guarantee the public's First Amendment right of access.

First, there is no Sixth Amendment guarantee of a live-streamed trial. The Sixth Amendment protects a defendant's qualified right to a "public trial." U.S. Const. amend. VI. The goal of the right to a public trial is transparency: Public access keeps prosecutors, the court, and jurors "keenly alive to a sense of their responsibility and to the importance of their

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functions." *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (internal quotation marks and citation omitted). The imperative of public access, however, does not create a constitutional right to a live broadcast. As the Order itself recognized, and as the U.S. Supreme Court has long held, the Sixth Amendment "does not include a right to 'telecast' the actual proceedings." Order at 6 (quoting *Estes*, 381 U.S. at 541-542); *Chandler v. Florida*, 449 U.S. 560, 569 (1981) ("[T]here is no constitutional right to have [live witness] testimony recorded and broadcast. . . . Nor does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public." (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978); alterations in original)).

Consistent with that principle, courts have repeatedly recognized that the Sixth Amendment does not create a right of unfettered access for every interested member of the public. As the Minnesota Supreme Court has explained, "[n]ot all courtroom restrictions implicate a defendant's right to a public trial." *State v. Taylor*, 869 N.W.2d 1, 11 (Minn. 2015) (quoting *State v. Brown*, 815 N.W.2d 609, 617 (Minn. 2012)). Instead, only those "restrictions on access to the courtroom" that "amount to a 'true closure' of the courtroom" run afoul of the Sixth Amendment. *State v. Petersen*, 933 N.W.2d 545, 551 (Minn. App. 2019); *see also, e.g.*, *State v. Silvernail*, 831 N.W.2d 594, 600 (Minn. 2013) (locking doors during closing argument but permitting spectators to remain does not constitute "true closure" in violation of the Sixth Amendment). To determine whether a "true closure" of the courtroom has occurred, courts look to: "(1) whether the courtroom was cleared of all spectators; (2) whether the trial remained open to the public and press; (3) whether there were periods where members of the public were absent; and (4) whether the defendant, defendant's family or friends, or any witnesses were excluded." *Petersen*, 933 N.W.2d at 551 (citing *Silvernail*, 831 N.W.2d at 601).

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Here, this Court can avoid a "true closure" of the courtroom—and thereby adequately protect the Sixth Amendment right to a public jury trial—by ordering that the trial be played over closed-circuit television in overflow rooms. That would allow Defendants' family and friends, a significant portion of the media, and members of the general public to observe the trial.[2]

To be sure, some spectators may be unable "to gain admittance" "because there are no available seats" in the courthouse. *Estes*, 381 U.S. at 588 (Harlan, J., concurring).[3] But that is true of many proceedings, including every single case heard in the United States Supreme Court, which has never once permitted a televised proceeding. Even when some individuals are turned away for lack of space, the constitutional guarantee of a public trial "will already have been met" when the court affords some members of the public an opportunity to observe the trial, "for the 'public' will be present in the form of those persons who did gain admission." *Id*. at 588-589; *see Chandler*, 449 U.S. at 569 ("The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." (quoting *Nixon*, 435 U.S. at 610)). It follows, then, that a court does not violate the Sixth Amendment just because social-distancing restrictions limit the number of spectators in overflow rooms. *See, e.g.*, *United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) (rejecting argument that "limited audience seating in the courtroom amounted to a '*de facto* closed courtroom' that violated" the Sixth Amendment right to a public trial); *Bucci v. United States*, 662 F.3d 18, 26 (1st Cir. 2011) ("[S]pace limitations can constitute a substantial justification for limiting the

[2] There are also other alternatives that would achieve the same objective. For example, the Court could make available a restricted livestream accessible only with an access code, with viewing limited to the number of individuals who typically would be able to watch the trial in person, and with a prohibition against recording or replaying the broadcast subject to a contempt order.

[3] As the Supreme Court later explained in *Chandler v. Florida*, 449 U.S. 560 (1981), "Justice Harlan provided the fifth vote necessary in support of the judgment" in *Estes*, and Justice Harlan's opinion is "fundamental" to "understanding" *Estes*' "ultimate holding." *Id.* at 571.

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number of spectators admitted."). The Sixth Amendment, in other words, does not require a public broadcast just because the court cannot accommodate every interested spectator.

Second, the First Amendment also does not require this Court to provide access to every member of the media or the public. Like Defendants' Sixth Amendment rights, the public's First Amendment right of access is "qualified," "not absolute." *Press-Enter. Co. v. Superior Court of Cal. for Riverside Cty.*, 478 U.S. 1, 9 (1986); *see 2015 Order*, 2015 WL 6467107, at *9 (noting that the First Amendment right of access is not absolute and that the judiciary may "control the time, place, and manner of the media's access"). And like the Sixth Amendment, this qualified First Amendment right of access is designed to ensure both transparency and fairness. *See Press-Enter. Co. v. Superior Court of Cal. for Riverside Cty.*, 464 U.S. 501, 508 (1984) ("Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."); *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 606 (1982) (explaining that "[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process," "fosters an appearance of fairness," and "permits the public to participate in and serve as a check upon the judicial process").

Although the precise "extent to which the First and Sixth Amendment public trial rights are coextensive is an open question," "there is no legitimate reason" in this case "to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has." *Presley v. Georgia*, 558 U.S. 209, 213 (2010). The First Amendment's core purpose in ensuring "[p]ublic scrutiny" of this criminal trial can readily be met without live audio and video recording and broadcasting. *Globe Newspaper*, 457 U.S. at 606. Even without a public broadcast, reporters will be able to observe the proceedings via closed-circuit television,

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and will be able to report in extensive detail to the interested public on what takes place during the trial. Members of the public will also be able to observe the proceedings in overflow rooms equipped with closed-circuit television. As a result, the public will be able to "participate in and serve as a check upon the judicial process." *Id.* That is true even if attendance will be limited by social-distancing requirements and space constraints. Requiring social distancing and limiting attendance on a first-come-first-served basis is just a classic "time, place, and manner" regulation a court may reasonably impose on public access to courtrooms. *2015 Order*, 2015 WL 6467107, at *9.

Against the clear weight of authority, however, the Order held that the First and Sixth Amendments require the Court to make available a live public video and audio broadcast of the trial in this case. That holding is unprecedented. Indeed, the State is not aware of a single case—from Minnesota, or any other jurisdiction—holding that the Constitution mandates a live, public broadcast of a criminal trial. And case after case holds the opposite. *See, e.g.*, *Courtroom Television Network LLC v. New York*, 833 N.E.2d 1197, 1201 (N.Y. 2005) ("[T]he Supreme Court has . . . never deviated from its holding that 'there is no constitutional right to have [live witness] testimony recorded and broadcast'" (quoting *Chandler*, 449 U.S. at 569); *id*. at 1201 n.3 (concluding that "after *Chandler*, no Federal Circuit Court has opined that the Federal Constitution guarantees the media a right to televise trials," and citing cases from nine federal Circuits); *Comm. v. Winfield*, 985 N.E.2d 86, 91 (Mass. 2013) ("There is no constitutional right to bring cameras into or to make audio or video recordings of court room proceedings." (internal quotation marks and alterations omitted)); *In re WMUR Channel 9*, 813 A.2d 455, 458 (N.H. 2002) ("[W]e reject the petitioners' State and federal constitutional arguments because there is neither a constitutional prohibition against nor a constitutional presumption in favor of

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allowing cameras and electronic media in our courtrooms."); *In re Extension of Media Coverage for a Further Experimental Period*, 472 A.2d 1232, 1234 (R.I. 1984) ("We begin with the recognition that the electronic media have no First Amendment right to photograph or broadcast judicial proceedings.").

The Order's reasoning also does not justify its anomalous constitutional holding. The Order asserts that Rule 4.02's "limitations" are "so extensive" that the Rule "is hardly a basis for the public 'to participate in and serve as a check upon the judicial process.'" Order at 9. But the public is no less able to "participate in and serve as a check upon the judicial process" just because some interested members of the public may not be able to watch the trial in real time. Even if some members of the public cannot "gain admittance" "because there are no available seats" in the courthouse, the constitutional requirement of a public trial is met so long as some members of the public can observe the trial, "for the 'public' will be present in the form of those persons who did gain admission." *Estes*, 381 U.S. at 588-589 (Harlan, J., concurring). Thus, so long as the Court permits closed-circuit broadcasts of the trial into overflow rooms where media and interested members of the public can view the trial, the public and the press will have the "opportunity . . . to attend the trial and to report what they have observed," and so to "serve as a check upon the judicial process." *Chandler*, 449 U.S. at 569 (quoting *Nixon*, 435 U.S. at 610); Order at 9.

The Order also asserts that it "expand[s] audio and video coverage only as necessary to vindicate the Defendants' constitutional right to a public trial and the public's and press rights of access." Order at 9. But there is a narrower option: overflow rooms and closed-circuit cameras.[4]

[4] There are other narrower options, as well. For example, as already noted, the Court could utilize a restricted livestream, with viewing limited only to the number of individuals who

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That route would provide transparency by allowing a significant portion of the media and members of the interested public to view the trial in real time, while still complying with Rule 4.02.

Ultimately, notwithstanding the Court's assertion that the "instant situation" of COVID-19 is "quite unique," the Court's holding risks creating a precedent with far-reaching consequences. Order at 7. By the Court's logic, courts would always need to broadcast the criminal trial in any high-profile case where interested spectators will outnumber available seats. That precedent would persist long after COVID-19 passes, undermining the careful balance the Minnesota Supreme Court struck in Rule 4.02. It is sometimes the case that remote viewing locations will be unavailable, otherwise occupied, or in repair, or the public demand for seats at the trial will far outstrip the supply. But those situations should not be converted into constitutional violations. This Court should therefore reconsider its Order and prohibit any audio or video recordings of the trial in this case absent the consent of the parties and the witnesses.

II. AT A MINIMUM, THIS COURT SHOULD MODIFY ITS NOVEMBER 4 ORDER TO PROTECT THE RIGHTS OF WITNESSES.

Because the State does not consent to the audiovisual recording or broadcasting of this trial, the Court should prohibit any such public broadcasting of the trial. At a minimum, however, even if the Court decides to ignore the absence of consent from the State, the Court should revise the Order to require the consent of testifying witnesses before their testimony is recorded in any format, as Rule 4.02 requires for the soundest of reasons.

As noted, Rule 4.02 grants witnesses an absolute right to object to "visual or audio coverage" of their testimony. Minn. Gen. R. Prac. 4.02(d)(ii). For good reason. Ordinary

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typically would be able to watch the trial in person, and with a prohibition against recording or replaying the broadcast subject to a contempt order. *See supra* p. 10 n.2.

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citizens who witness a murder should not be unnecessarily stripped of their privacy, thrust onto the world stage, and subject to additional public scrutiny and harassment. *See supra* pp. 6-7. Broadcasting witness testimony may also interfere with the administration of a fair trial, as it could intimidate witnesses and make it less likely that they will testify. *See id.*

Moreover, because the right of witnesses to object to video or audio coverage of their testimony is absolute, the limited exception in the Order allowing minors and George Floyd's family members to object only to video—but not audio—coverage also does not adequately protect their rights. Allowing audio recordings of that testimony is particularly concerning, as these witnesses are especially likely to be affected by the fear of unwanted notoriety or trauma from the broadcasting of their testimony in any form. *Cf. State v. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005) (deeming these witnesses "vulnerable"). That is why Rule 4.02 allows them—indeed, all witnesses—to *always* object to *any* recordings. *See* Minn. Gen. R. Prac. 4.02(c)(ii), (d)(ii); *see also id.* R. 4.02(e)(iv) (prohibiting coverage of victims in post-verdict proceedings); *id.* R. 4.03(c).

Thus, at a minimum, even if this Court declines to fully rescind its November 4 Order, it should enter a modified order permitting the media to broadcast only the following portions of this trial: (i) both sides' opening and closing arguments; (ii) the testimony of any Defendants who wish to take the stand and do not object to the public broadcast of their testimony; and (iii) the testimony of any witnesses who do not object to the public broadcast of their testimony. This modified order, while still inconsistent with the requirements of Rule 4.02, would permit widespread public access, and would provide more than ample opportunities for "[p]ublic scrutiny" of the trial. *Globe Newspaper*, 457 U.S. at 606. It would also avoid setting a

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worrisome constitutional precedent, and ensure the privacy and safety of ordinary citizens who testify at trial.

CONCLUSION

For the foregoing reasons, this Court should reconsider its Order permitting audiovisual recordings of the trial. The Constitution does not mandate an unrestricted audio and video broadcast of the trial in this case, and it does not require the Court to deviate from the requirements of Rule 4.02. The Court can meet the requirements of Rule 4.02—while still providing public access to the trial—by allowing public viewing of the trial via overflow rooms and closed-circuit television. That approach better serves the interests of justice without running afoul of Defendants' Sixth Amendment right to a public trial or the public's First Amendment right of access.

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Respectfully submitted,

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