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STATE OF MINNESOTA	DISTRICT COURT
HENNEPIN COUNTY	FOURTH JUDICIAL DISTRICT
State of Minnesota Plaintiff, vs.	The Honorable Peter A. Cahill
J. Alexander Kueng Thomas Kiernan Lane Tou Thao Defendant.	Dist. Ct. File 27-CR-20-12953 Dist. Ct. File 27-CR-20-12951 Dist. Ct. File 27-CR-20-12949

MEDIA COALITION'S MOTION FOR RECONSIDERATION OF APRIL 25, 2022 TRIAL MANAGEMENT ORDER

American Public Media Group (which owns Minnesota Public Radio); The Associated Press; Cable News Network, Inc.; CBS Broadcasting Inc. (on behalf of WCCO-TV and CBS News); Court TV Media LLC; Dow Jones & Company (which publishes *The Wall Street Journal*); Fox/UTV Holdings, LLC (which owns KMSP-TV); Hubbard Broadcasting, Inc. (on behalf of its broadcast stations, KSTP-TV, WDIO-DT, KAAL, KOB, WNYT, WHEC-TV, and WTOP-FM); Minnesota Coalition on Government Information; The New York Times Company; The Silha Center for the Study of Media Ethics and Law; 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 Motion for Reconsideration of the Court's April 25, 2022 Trial Management Order (the "April 25 Order").

The April 25 Order's restrictions on courtroom access to the "Floyd II" trial amount to an unconstitutional closure of the courtroom in violation of the press and the public's right of

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access to criminal trials under the First Amendment. The restrictions also violate the press and public's right of access under the common law, and they violate various court rules, including rules of criminal procedures and general practice.[1]

Background

The joint trial of Derek Chauvin's co-defendants, J. Alexander Kueng and Tou Thao for the murder of George Floyd (referred to herein as the "Floyd II trial") is scheduled to begin in just under a month.[2] As the court is well aware, the *Chauvin* trial was livestreamed to millions of viewers. The more recent trial of former police officer Kimberly Potter for the death of Daunte Wright was also livestreamed. And, for a time, plans were to livestream the Floyd II trial, as well. *See* Jan. 11, 2022 Order Denying Mot. to Reconsider Nov. 4, 2020 Order Allowing Audio and Video Coverage of Trial (the "Jan. 11 Order"). However, shortly after the Court issued the Jan. 11 Order, it continued the Floyd II trial until June. Then, in March 2022, it notified the parties and the Media Coalition that it was rethinking its decision to permit livestreaming, invited them to submit briefs, and held a hearing on the issue on April 11, 2022.

[1] Defendant J. Alexander Kueng has also objected to the closure of the courtroom to members of the public as a violation of his Sixth Amendment right to a public trial, *see* Defendant Kueng's May 13, 2022 Motions in Limine ¶¶ 25, 26, and both Defendant Kueng and Defendant Tou Thao have objected to the part of the April 25 Order that requires sidebar conferences be held "off the record, unless a party makes a specific request to have the conference on the record." *See id.* ¶ 19; Defendant Thao's May 13, 2022 Motions in Limine, ¶ 63. The Media Coalition also joins the Defendants' objections on this latter issue.

[2] On Wednesday, May 18, 2022, third co-defendant Thomas Kiernan Lane pleaded guilty to aiding and abetting second-degree manslaughter, and his sentencing is scheduled for September 21.

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Prior to the hearing, the undersigned inquired into the Court's plans for admitting the press and public to the courtroom if the Floyd II trial were not livestreamed. In response, Court staff stated that while it could not provide "precise information at this stage,"

> There are a few courtrooms in Government Center that appear workable for this trial, and they have existing seating galleries ranging from 42-50 seats, although some of those public galleries have extra space in the gallery section into which some portable chairs could potentially be added. It is unlikely, though, that we'd wind up with more than, say, 55 seats for public seating (including family members of the Floyd family and the Defendants, media representatives, and the general public, to be allocated in a manner yet to be determined) of whatever winds up as the trial courtroom.

Court staff also confirmed that "[a]ssuming things remain on the waning track we are on with COVID—which none of you will be surprised to learn is an important factor Judge Cahill is taking into consideration on the livestreaming issue—the Court is not currently anticipating there will be any social distancing or mask requirements during the Floyd II trial this summer." *Id.*[3]

And in fact, discussion at the April 11 hearing centered almost exclusively on how the "end" of the pandemic signaled a return to normalcy that—in the Court's view—precluded it from relying on Minn. R. Gen. Prac. 1.02 to authorize livestreaming over the Defendants' objections. Then, following the hearing, the Court issued its April 25 Order, in which it explained that it had decided to disallow "[a]udio and video recording and livestreaming of the trial," April 25 Order ¶ 13(a), because "[t]he unusual and compelling circumstances of the COVID-19 pandemic at the time of the *Chauvin* trial have substantially abated and the Supreme Court rules in force in the first half of 2021 mandating social distancing, mask wearing, and other precautionary measures due to the COVID-19 pandemic are no longer in

[3] Please advise if the Court would like a copy of this correspondence, which was sent on March 24, 2022.

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force, obviating resort to Rule 1.02," *id.* at 12. Over the following 18 pages of the Order, the Court provided what it referred to as an "extensive recounting of the history of the COVID-19 pandemic and the Minnesota judiciary's efforts to continue doing the public's judicial business while attempting to meet public health and safety concerns and objectives," *id.* at 27, before concluding that there has been a "significant waning in COVID-19 infections since the Jan. 2022 peak" and that "given these changed circumstances" the Court could not "continue to rely on Rule 1.02 as justification to ignore the plain strictures of Rule 4.02(d)," *id.* at 29-30. The April 25 Order noted "that there can of course be no certainties about what will occur in the future based on analysis of historical patterns and data over the past couple of years," *id.* at 29,[4] but it did not point to any exigency *beyond* a resurgence of the pandemic that might justify restriction of press and public access to the Floyd II trial.

Given its informal communications with Court staff and the nature of the discussion at the April 11 hearing, the Media Coalition had every reason to believe at the time of the hearing that, if the Court reversed its Jan. 11 Order, such reversal would be based on a finding that it was safe to return to "status quo." It likewise had every reason to believe that a return to status quo would mean an opening up of the courtroom such that any interested person, whether a member of the press or the general public, would be able to observe the proceedings in-person by arriving in time to choose an open seat in the gallery, attending as much or as little of the trial as they wished, and would be able to do so without having to show identification or secure

[4] Unfortunately, and contrary to the trajectory of the pandemic documented in the April 25 Order, the second Omicron variant of the SARS-CoV-2 virus has proven even more transmissible than its predecessor, and infection rates and cases requiring hospitalization are once again on the rise in Minnesota. *See* Jeremy Olson, *COVID-19 virus up 58% in Twin Cities wastewater*, Star Tribune (May 20, 2022), https://www.startribune.com/covid-19-virus-up-58-in-twin-cities-wastewater/600175077/. All signs point to this wave continuing through the start of the Floyd II trial, if not throughout its duration.

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access through a pre-approved security list. In other words, the Media Coalition envisioned access akin to that of the high-profile but pre-pandemic trial of Mohamed Noor—and every other criminal trial in the history of this State.

But that is not what the April 25 Order contemplates. Rather, pursuant to that Order, press and public access to the courtroom of the Floyd II trial will be indistinguishable from that of the *Chauvin* trial—except that this time, there will be no cameras. Specifically, the April 25 Order permits only *two* media representatives in the courtroom, prohibits attendance by members of the general public *altogether*, and requires *all* spectators (the two media representatives and up to 10 family members hand-picked by trial participants) to be credentialed. In fact, only credentialed spectators, pre-approved by court security, will even be allowed to access the *floor* on which the trial is being held. No one can attend the trial anonymously. Apr. 25 Order ¶ 7.

In addition, the Media Coalition understands the Court has more recently decided it will admit a sketch artist, but Court staff have informed the undersigned that if the sketch artist does not attend trial on a particular day, no one will be permitted to fill his chair—it will instead sit empty.[5] Given this, and the credentialing process the April 25 Order requires, the Media Coalition presumes that if Floyd's and the Defendants' family members choose not to use the seats the Court has reserved for them, those seats too will sit empty rather than be offered members of the press or public.

On behalf of the Media Coalition, the undersigned has endeavored to understand *why*, if the pandemic is really over, the restrictions on access remain so draconian. In response to her

[5] At the *Chauvin* trial, the third seat was filled not by a sketch artist but by a producer for Court TV.

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inquiries, Court staff have explained that they believe courtroom 1856—remodeled for use during the *Chauvin* trial in a manner that "remove[d] the public gallery *entirely*," *see* April 25 Order at 27 n.14 (emphasis added)—is simply more suitable than other available courtrooms that can accommodate many more members of the press and public. Court staff have explained that they believe courtroom 1856 is more suitable because of how counsel tables are configured, because it is equipped with better technology, and because trial participants' seats are separated by Plexiglas barriers that may be needed in the event COVID-19 infections spike again.[6] Court staff have further explained that they wish to keep spectators far away from jurors, meaning that—despite the already limited seating in courtroom 1856—no seats will be permitted to be "placed on the side of the room with jurors." The undersigned inquired of Court staff what the capacity of courtroom 1856 is, according to the Fire Marshall. Court staff have not provided an answer, but they do not dispute that the capacity significantly exceeds what the April 25 Order contemplates.[7]

Ultimately, it does not matter why the press and public are being excluded from this criminal trial. What matters is that, despite the requirements of the First Amendment, common law, and applicable rules, the obvious (if unintended) effect of the April 25 Order is that they *are* being excluded. The Media Coalition therefore asks the Court to reconsider its April 25 Order. Specifically, the Media Coalition asks the Court either (1) to open the courtroom doors

[6] That the Floyd II trial will now involve just two defendants rather than three would seem to reduce the challenge of configuring counsel tables, such that trial can be moved out of courtroom 1856 and into a courtroom with gallery seating. Moreover, seats in the courtroom reserved for Defendant Lane, his trial team, and his family members should now be made available to the press and general public.

[7] Please advise if the Court would like a copy of this correspondence, which was sent on May 6, 2022.

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to all who wish to attend until the largest available courtroom in Government Center is filled to capacity (and that it permit spectators to attend anonymously) or (2) to exercise its discretion under Rule 1.02 and articulate in a written order the exigencies (pandemic-related or otherwise) that require it to maintain the *Chauvin*-esque restrictions on access and, in lieu of facilitating in-person attendance by the press and general public, permit livestreaming of the trial.

Argument

I. The restrictions on courtroom access to the Floyd II trial violate the First Amendment and the common law.

This Court does not need yet another exposition of the press and public's right of access to criminal court records and proceedings under the First Amendment and common law. The Media Coalition has provided that many times before over the course of these prosecutions, including in July 2020, when the Media Coalition challenged limitations on access to body-worn camera footage in the Court's file; in December 2020 when the Coalition opposed the State's objection to audio-video recording of the *Chauvin* trial (not yet severed from that of his codefendants); in August 2021, when the Coalition sought access to various juror materials from the *Chauvin* trial; in September 2021, when the Coalition opposed Defendants' objection to audio-video recording of the Floyd II trial; and finally in April 2022, when the Court—having continued the Floyd II trial until June—asked for additional briefing on the issue of livestreaming. The Media Coalition incorporates its past briefing on its constitutional and common law right of access by reference.[8]

[8] To the extent not referenced in prior briefing, the law supports that the right to attend criminal proceedings encompasses a right to attend *anonymously*. *See, e.g.*, *United States v. Smith*, 426 F.3d 567, 572 (2d Cir. 2005) (finding routine security measure which required all unknown visitors to show identification at federal building's entrance to effect partial courtroom closure

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What bears emphasizing here, however, is that, in the *Chauvin* case, this Court confronted nearly identical restrictions on in-person access to the courtroom—*three* members of the media, *zero* members of the general public—and held that "[i]t would be ***farcical*** to say that this arrangement, by itself, provides meaningful access to the public or the press or vindicates the defendants' right to a public trial." Dec. 18, 2020 Order Denying Motion to Reconsider and Amend Order Allowing Audio and Video Coverage of Trial at 4 (emphasis added).[9] In that same order, this Court rejected the State's suggestion that the constitutional rights of access could be vindicated through the use of overflow courtrooms, unequivocally stating that overflow courtrooms are not "a reasonable measure to protect the constitutional rights of the defendants, the public, and the press" because "an overflow courtroom is not truly a courtroom, but merely a venue for the consumption of a televised trial. They are courtrooms in name and appearance only." *Id*. at 5-6. Indeed, the Court characterized the State's position as "an ***admission*** that cameras in the courtroom are sometimes necessary to broadcast a trial," *id.* at 6 (emphasis added), and went on to accuse the State of "merely want[ing] a limited audience," *id.* "The Court, on the other hand, [was] concerned that the more the audience is limited, especially in a trial with international interest, ***the more likely that the constitutional rights associated with a public trial are violated.***" *Id.* (emphasis added). For these reasons, the Court permitted livestreaming of *Chauvin* trial.

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requiring First and Sixth Amendment analysis under the four-part test of *Waller v. Georgia*, 467 U.S. 39 (1984)) (collecting cases).

[9]At the time of that decision, the Floyd II trial had not yet been severed from the *Chauvin* trial and the Court was writing under the assumption that there was room in the courtroom for only one spectator. Importantly, however, the Court did not reverse course and find the rights of access were somehow vindicated and livestreaming was unnecessary when it decided that Chauvin would be tried alone such that room could be made for three representatives of the press, instead of just one.

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Now, though, the Court has prohibited livestreaming and all other audio-video coverage in the Floyd II trial while imposing *identical* restrictions on in-person attendance by the press and general public as existed in *Chauvin*—restrictions this Court has previously concluded do not pass constitutional muster—and without articulating any reason for those restrictions. These extreme limitations on the press and the public's access to a criminal trial, which amount to a courtroom closure, do not pass constitutional scrutiny, as a matter of both form and substance.

Procedurally, courts are required to make specific findings of fact and conclusions of law on the record, either in writing or orally, before excluding the press and public from a criminal trial, and those findings must demonstrate that a compelling or overriding interest justifies exclusion, that no reasonable alternative to exclusion exists, and that the exclusion is narrowly tailored. *See, e.g.*, *Press-Enter. Co. v. Super. Ct.* ("*Press-Enterprise II*"), 478 U.S. 1, 13-14 (1986); *Waller v. Georgia*, 467 U.S. 39, 45, 48 (1984); *Press-Enter. Co. v. Super. Ct.* ("*Press-Enterprise I*"), 464 U.S. 501, 510 (1984); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580-81 (1980); *Nw. Publ'ns, Inc. v. Anderson*, 259 N.W.2d 254, 257 (Minn. 1977); *see also United States v. Thunder*, 438 F.3d 866, 867 (8th Cir. 2006). No such findings or conclusions were made here—either at the April 11 hearing or in the Court's April 25 Order—to justify excluding the general public entirely and all but two members of the media and a sketch artist from the courtroom in the Floyd II trial.

Substantively, "[t]rial courts are obligated to take *every reasonable measure* to accommodate public attendance at criminal trials." *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (emphasis added). Conducting a high-profile, high-interest trial in a courtroom *deliberately designed to eliminate gallery seating* merely because its configuration and

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technological capabilities are convenient is not taking "every reasonable measure." This is *especially* true when courtrooms that can easily accommodate many more spectators (including because they actually have gallery seating) are available in the same building. Likewise, further limiting access to courtroom 1856 based on a desire to keep spectators far away from jurors is not permitted under the Constitution. *Id.* at 210 (finding constitutional violation where trial court excluded defendant's uncle from voir dire on the basis that 42 potential jurors would be sitting throughout courtroom and "[t]here just isn't space for [the public] to sit in the audience").

Nor can the Court justify its total exclusion of the general public from the courtroom by pointing to its accommodation of up to 10 family members of the Defendants and Floyd. In *Davis v. United States*, 247 F. 394 (8th Cir. 1917), for example, the district court cleared the courtroom "of all spectators except relatives of the defendants, members of the bar, and newspaper reporters." *Id*. at 394. The appellate court found it pertinent that the court bailiff had been "instructed to admit none but those excepted classes," and, although he "admitted a few others," it was "by way of favor [*i.e.*, at the discretion] of the court officers." *Id*. at 394-95. Ultimately, only about 25 members of the public were admitted where the courtroom could have accommodated upwards of 100 spectators, and the Eighth Circuit found this to be reversible error, stating that relatives of the accused attorneys, witnesses and reporters for the press cannot "be taken as the exclusive representatives of the public." *Id*. at 395, 398-99.[10]

[10] "[V]iolation of the right to a public trial is a structural error" entitled to automatic reversal. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908, 1910 (2017); *see also State v. Bobo*, 770 N.W.2d 129, 129 (Minn. 2009).

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For all of these reasons, and given the Court's decision to not permit livestreaming, the restrictions on the press and the public's access contained in the April 25 Order violate the First Amendment and common law.

II. The restrictions on courtroom access to the Floyd II trial also violate numerous court rules.

As it argued in its supplemental brief filed April 8, 2022 and at the April 11, 2022 hearing, the Media Coalition believes that various factors beyond the pandemic empower the Court to exerise its authority under Minn. R. Gen. Prac. 1.02 and permit livestreaming of the Floyd II trial over the Defendants' objection. That said, the Court's commitment to following rules promulgated by the Supreme Court, including Minn. R. Gen. Prac. 4, is commendable, and the Coalition understands why, if the COVID-19 pandemic is truly "on the wane," *see* April 25 Order at 27, the Court may feel its calculus has changed, *id.* at 30.

But Rule 4 is not the only rule that governs press and public access to the Floyd II trial. The following rules must also be taken into account:

Minn. R. Crim. P. 26.02 subd. 4(1). This rule states unequivocally that *voir dire* "***must be open to the public*** unless otherwise ordered under subdivision 4(4)." Minn. R. Crim. P. 26.02 subd. 4(1) (emphasis added). Subdivision 4(4), in turn, allows exclusion of the public from *voir dire* only "[i]n those rare cases where it is necessary"—i.e., "[w]hen it appears prospective jurors may be asked sensitive or embarrassing questions." *Id.* subd. 4(4) and subd. 4(4)(a). Even then, the Court must balance the juror's privacy interests, the defendant's right to a fair and public trial, and the public's interest in access to the courts and "may order *voir dire* closed only if it finds a substantial likelihood that conducting *voir dire* in open court would interfere with an overriding interest." *Id.* subd. 4(4)(c). "The court must consider alternatives to closure" and the closure "must be no broader than necessary to protect the overriding interest."

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Id. Any order excluding the public "must be issued in writing or on the record." *Id.* subd. 4(4)(f). The April 25 Order does not acknowledge this rule or attempt to comply with it in closing the entire Floyd II trial, including *voir dire*, to the public. Further, there is no reason to believe that closure of *voir dire* in its *entirety* could be justified under this Rule.

Minn. R. Crim. P. 26.03 subd. 6. This rule governs exclusion of the public from hearings or arguments conducted outside the presence of the jury. Like Rule 26.02 subd. 4(1), it holds that the public can be excluded ***only*** in extreme situations—i.e., "if the court finds that public dissemination of evidence or argument at the hearing would likely interfere with an overriding interest, including the right to a fair trial." Minn. R. Crim. P. 26.03 subd. 6(1)(a) (emphasis added). The court must first consider reasonable alternatives to restricting public access and must narrowly tailor the closure. *Id.* subd. 6(1)(b). The Court must issue its closure order in writing and the order must including findings of fact that support the restriction on public access. *Id.* subd. 6((5). Again, the April 25 Order does not consider this rule and there is no reason to believe its requirements could be met.

Minn. R. Gen. Prac. 2.01(e). This rule states that "[c]ourt personnel shall maintain order as litigants, witnesses and the public assemble in the courtroom, during trial and during recesses. Court personnel shall direct them to seats and refuse admittance to the courtroom in such trials ***where the courtroom is occupied to its full seating capacity***." In other words, the rule contemplates that people should not be turned away from a courtroom until it is "full." The rule does not define that term, but common sense dictates that a "full" courtroom is one where people are sitting shoulder-to-shoulder, in rows, in the portion of the courtroom typically reserved for spectators. To suggest that courtroom 1856, which presumably can safely hold dozens of people despite the deliberate removal of the gallery is "filled' by three media

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representatives and just 10 family members ignores both the spirit and the letter of the rule.

In considering these rules alongside the restriction on audio-video recording embodied by Minn R. Gen. Prac. 4, the Court may wonder how it is supposed to jointly try two defendants in a high-profile trial at a time when the trajectory of a deadly pandemic is less than predictable. Perhaps this is, after all, a case in which the Court can exercise its inherent powers under Minn. R. Gen. Prac. 1.02 to prevent "manifest injustice." Notably, however closing the trial to the press and public is not an option—there is no rule for that because it is not supposed to happen. Rather, as discussed above, the rules that permit closure apply to only discrete proceedings—*voir dire* and proceedings conducted outside the presence of the jury—and only in very extreme situations.

Conclusion

The Media Coalition does not purport to know whether the pandemic is over or what living in an endemic means for crowding people into courtrooms. But, if the Court believes the COVID-19 infection risks have abated such that it can no longer point to the pandemic as reason to order livestreaming of the Floyd II trial over Defendants' objections, then it must provide robust in-person access to that trial to the press and the public. The Court cannot achieve other objectives—whether they are related to security, technology, or the general comfort and convenience of trial participants—at the expense of the press and public's constitutional, common law, and rule-based rights of access. Nor can the Court do so without on-the-record explanation. Instead, pandemic or no, the Court must open the doors of the courtroom and welcome inside the press and the public. That, to use the Court's phrase, is the "normal order of things in the courts of this State." April 25 Order at 32.

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For the reasons state above, the Media Coalition respectfully requests that the Court reconsider and vacate the April 25 Order and issue an amended trial management order that recognizes the press and public's right of access to the Floyd II trial and facilitates their exercise of that right.

Dated: May 23, 2022

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s/ Leita Walker

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