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STATE OF MINNESOTA HENNEPIN COUNTY	DISTRICT COURT FOURTH JUDICIAL DISTRICT
State of Minnesota Plaintiff, vs. Thomas Kiernan Lane Defendant	Dist. Ct. File 27-CR-20-12951 The Honorable Peter A. Cahill **MEMORANDUM IN SUPPORT OF MEDIA COALITION'S MOTION OBJECTING TO LIMITS ON ACCESS TO BODY-WORN CAMERA FOOTAGE PUBLICLY FILED BY DEFENDANT IN SUPPORT OF HIS DISPOSITIVE MOTION**

American Public Media Group (which owns Minnesota Public Radio); The Associated Press; Cable News Network, Inc.; CBS Broadcasting Inc. (on behalf of WCCO-TV); Court TV Media LLC; Dow Jones & Company (which publishes *The Wall Street Journal*); Fox/UTV Holdings, LLC (which owns KSMP-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; TEGNA Inc. (which owns KARE-TV); and Star Tribune Media Company LLC (collectively, the "Media Coalition") by and through undersigned counsel, hereby submit this Memorandum in Support of their Motion Objecting to Limits on Access to Body-Worn Camera Footage Publicly Filed by Defendant in Support of his Dispositive Motion.

Specifically, the Media Coalition objects to the Court's apparent decision—made without notice or an opportunity to be heard, and without findings of fact or conclusions of law—to permit only in-person, by-appointment viewing of body-worn camera footage (the "BWC footage") publicly filed with the Court by Thomas Kiernan Lane as exhibits to his Memorandum Supporting Motion to Dismiss ("MTD Mem.").

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The Media Coalition respectfully requests that the Court, consistent with its obligations under the common law, its own rules of access, and the First Amendment immediately make the BWC footage available for copying by the press and public so that it may be widely viewed not just by those who have the time and wherewithal to visit the courthouse during a global pandemic but by all members of the public concerned about the administration of justice in one of the most important, and most-watched, cases this State—perhaps this country—has ever seen.

INTRODUCTION

The death of George Floyd at the hands of police on May 25, 2020 caused an international outpouring of grief and anger over law enforcement's treatment of Black men and women in America. It resulted in arguably the greatest display of civil unrest in the history of Minnesota and led to immediate calls for action and change from the highest levels of state and national leaders, including Minnesota's Attorney General Keith Ellison, who proclaimed just one day after Floyd's death that he was "confident that the values of accountability, ***transparency***, and justice will be upheld. I will be a force for them." *Statement from Attorney General Ellison on Death of George Floyd*, May 26, 2020, *available at* https://www.ag.state.mn.us/Office/Communications/2020/05/26_GeorgeFloyd.asp (emphasis added).

The week after Floyd's death, the State of Minnesota criminally charged four Minneapolis police officers in connection with in his death. The State charged Derek Chauvin, captured on video holding his knee into Floyd's neck for several minutes while restraining Floyd, face-down, on the street, with second-degree murder. It charged the other three officers, including Lane, with aiding and abetting second-degree murder.

On July 7, Lane publicly filed a motion to dismiss the charges against him. In support of that motion, he also publicly filed video footage recorded by his own body-worn camera

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("BWC") and by the BWC of his colleague Alex Kueng during their encounter with Floyd. MTD Mem. at Ex. 3, Ex. 5.

Members of the Media Coalition immediately sought access to the BWC footage but were only able to obtain transcripts of the audio portions of the footage. They were informed by court staff that the BWC footage itself would be made available at some unspecified date for viewing only and that no recording or copying of the BWC footage would be permitted.

Court staff did not identify any motion to seal the BWC footage, nor did they identify any court order restricting access to it. And, indeed, no such motion or order appeared on the public docket until July 9 when, without notice to the press and public or an opportunity to be heard, this Court entered a "Gag Order." That order does not expressly reference Lane's public motion or the BWC footage he filed in support of it, but the Gag Order does state that "[n]on-documentary exhibits that are filed and classified as public will be made available for review at the Hennepin County Government Center through the court's media contact, Spenser Bickett."[1]

As of the date of this filing—nearly a week after Lane publicly filed the BWC footage—no member of the Coalition has been able to view it. Indeed, the Court has not even been willing to commit to a date when viewing will be permitted: an email that Bickett sent on July 9 to a *Star Tribune* reporter vaguely promised that "Court administration is putting together a plan for the

[1] The Media Coalition is aware of this Court's Standing Order on Disclosure of Portable Recording Systems Data Provided Pursuant to Discovery in Criminal and Juvenile Delinquency Cases ("Standing Order"). That order, which limits the ability of defendants and their counsel to disclose BWC footage that the prosecuting authority provides to them under Minn. R. Crim. P. 9.01 and 9.04, does not speak to the issue now before the Court: the press and public's right to access BWC footage publicly filed with the Court in support of a dispositive motion. Moreover, the Standing Order fails to acknowledge that, under the Minnesota Government Data Practices Act, "[a]ny investigative data presented as evidence in court shall be public," Minn. Stat. § 13.82 subd. 7. The Media Coalition urges the Court to amend the Standing Order to clarify that once BWC footage is filed with the Court, any party in possession of that footage is free to disclose it to the press or public at large.

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public viewing of these video exhibits and we will follow up with additional information once it is available." No doubt the pandemic is complicating the implementation of that plan. As the Court is well aware, pursuant to Supreme Court Order ADM20-8001, members of the media (and presumably the public) "do not have access to judicial branch facilities and services, including public access terminals," and members of the Media Coalition seriously question whether the Court can timely accommodate requests to view the BWC footage by every member of the public who may wish—and has a right—to see it.

That the media have been precluded from viewing the BWC footage has not prevented it from reporting on Lane's motion, which is extremely newsworthy. However, that reporting is hamstrung by the inadequacy of the transcripts, as well as journalists' inability to view and publish the BWC footage, which could provide additional information to viewers and readers about what the BWC footage shows and the culpability of any one of the police officers involved in Floyd's death.

Obviously, a written transcript can capture only what someone *said*. A transcript does not begin to capture what someone *did*—and it is, after all, Lane's alleged lack of criminal *conduct* that is the basis for his motion to dismiss. Nor does a transcript capture *non-verbal noises*, such as labored breathing, crying, choking—or the silence of someone not breathing—or the tone of someone's voice, which may, for example, be concerned and urgent or angry and sarcastic. And as any theater-goer knows, each of those missing elements, alone, can radically alter the meaning of a text.

Here, moreover, the transcripts appear to have obvious errors. For example, one of them reflects that Kueng told Chauvin that the hobble restraint was in his "truck." Mem. MTD at Ex.

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4, 24. He had no truck. Kueng probably said "trunk," and that's probably an insignificant error. But there may be others that are very significant.

Close analysis also shows that transcripts of the footage from the two BWCs contradict one another. The transcript of the footage from Kueng's BWC states,

"You're doing a lot of talking, a lot of yelling," Chauvin said.

"They're going to kill me, they're going to kill me, man" Floyd said.

"Takes a heck of a lot of oxygen to say that," Chauvin said.

Id. at Ex. 4, 31-32. Meanwhile, the transcript of the footage from Lane's BWC is different:

"Then stop talking, stop yelling," Chauvin said.

"You're going to kill me man," Floyd said.

"Then stop talking, stop yelling. It takes a heck of a lot of oxygen to talk."

Id. at Ex. 2, 16. During this same crucial period in the encounter, the two transcripts differ a second time in that Kueng's transcript includes an exchange that is nearly entirely missing from Lane's transcript. This portion references two unidentified speakers, "Male 5" and "Male 3," who appear to be telling the officers to get off Floyd. As reflected in Kueng's transcript, immediately after Chauvin says "Takes a heck of a lot of oxygen to say that," Male 5 says "you can get off of him." *Id*. at Ex. 4, 32. In what appears to be just a moment later, Kueng's transcript includes the following exchange with Male 3:

"You can put him in the car," Male 3 said.

"We tried that for 10 minutes," Thao said.

"This some one line shit. You know that. He can't breathe, bro," Male 3 said.

"Please, sir. Please," Floyd said.

[crosstalk], Male 3.

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> "Please," Floyd said.
>
> [crosstalk], Male 3.
>
> "Okay," Thao said.
>
> "Is this your move? You trapping him, he ain't breathing right there, bro. You don't think that's what it? You don't think nobody going to see that's you right there, bro?" Male 3.

Id. at Ex. 4, 33. This exchange does not even appear in Lane's transcript. The only line that appears, which is attributed to "Speaker 8," rather than Thao, is "We tried that for 10 minutes." *Id*. at Ex. 2, 16.

Beyond their obvious errors and discrepancies (and their inability to show conduct and nonverbal noises), the transcripts are incomplete in that they do not provide sufficient clues as to timing, which is crucial to a full understanding of what transpired. For example, the press and public are interested in knowing when officers took which actions, including when Lane first called the ambulance, when he upgraded the call, and when exactly Kueng determined that Floyd had no pulse. For example: the two transcripts diverge as Lane appears to leave in the ambulance. In Kueng's transcript, immediately after Lane asks "You want me in here?" *Id*. at Ex. 4, 42, "Male 3" says, "You really just killed that man, bro." *Id*. In Lane's transcript, however, after he asks "Okay. Do you want me in there or no?," he then begins talking with someone identified as "Speaker 17" about what was happening at the scene, and it is only several lines later Speaker 17 appears to tell Lane to begin CPR. *Id*. at Ex. 2, 20.

Without access to the footage and a meaningful opportunity to personally transcribe it, the press and public cannot identify all the discrepancies between, and errors within, the transcripts. Nor can they compare time stamps from the BWC footage to other video footage, such as that recorded by a bystander, and begin to piece together a full story.

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Finally, as the Court is well aware, video of Floyd's arrest and death was captured by a bystander. That video surfaced on May 26, just one day after his death, and led to the immediate firing of the four police officers involved. *See 'This is the right call': Officers involved in fatal Minneapolis incident fired, mayor says*, KSTP (May 26, 2020) https://kstp.com/news/investigation-minnesota-bca-fbi-man-in-medical-distress-handcuffs-/5741256/. The bystander video is widely available on the Internet and has been viewed millions of times. The Court's July 9 Order does not explain why it is restricting access to the BWC footage and certainly does not explain why it believes broad public dissemination of the BWC footage could materially complicate whatever issues with the administration of justice the bystander footage (and commentary on it) has already created. Nor does it explain how, if its concern is ensuring a fair trial, giving ordinary people—who cannot be expected to make a viewing appointment with the court even under normal circumstances, and certainly not during a pandemic—piecemeal access (in the form of transcripts) to some of the most crucial evidence in the case accomplishes that goal. Indeed, just last year, in another high-profile murder case against another Minneapolis police officer—Mohamed Noor—the State took the position that such "piecemeal" release of evidence could jeopardize Noor's Sixth Amendment rights. *See* State's Position Regarding Copying of Trial Exhibits, *State v. Noor* ("*Noor*"), Case No. 27-CR-18-6859, at 2 (Henn. Cty. May 10, 2019).[2]

[2] The Media Coalition does not dwell here on whether Lane has a Constitutional right to have the BWC footage made widely available to the public, but notes that Noor is currently appealing his conviction, in part, on the basis that limits on press and public access to his trial violated his Sixth Amendment rights. *See* Appellant's Br. at 22-28, *Noor v. State*, Case No. A19-1089 (Minn. Ct. App. Apr. 24, 2020).

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ARGUMENT

I. The Media Coalition has standing to assert its interest in being able to copy and distribute the publicly filed BWC footage.

The Supreme Court recognizes that "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'" from criminal proceedings. *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring)). The Eighth Circuit follows this precedent. *See In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983) (When a member of the news media objects to limits on his or her access to judicial proceedings, "the court must give him or her a reasonable opportunity to state the objection.").

As the Minnesota Supreme Court has further recognized, this rule applies not just to restrictions on access to proceedings but also to restrictions on access to documents[3] filed with the court. *See, e.g.*, *Nw. Public'ns, Inc. v. Anderson*, 259 N.W.2d 254, 256 (Minn. 1977) (allowing media intervention to challenge trial court orders sealing complaints and court files in murder prosecutions; court held newspapers have standing to challenge trial court orders that have the "effect of either directly or indirectly interfering with [press] functions of collecting or disseminating the news"); *accord State v. Clifford*, Case No. 02-CR-12-4361, 2012 Minn. Dist. LEXIS 250 (Minn. Dist. Ct. Oct. 3, 2012).

Thus, just last year, in the Noor case, this Court permitted members of the media to be heard on multiple occasions, including on their right to view graphic BWC footage as it was presented to the jury, on restrictions the trial judge proposed to impose on a courtroom sketch artist, and, later, on their right to copy BWC footage and other trial exhibits. *See* Order and

[3] The Media Coalition uses the word "documents" broadly to include not only materials that can be printed on paper but all court filings, including the BWC footage.

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Memorandum Opinion Regarding: (1) Media/Public Right to Observe Body-Worn Camera Video if Such Evidence is Played to Jury During Trial, and (2) Media Sketch Artist, *Noor*, (Henn. Cty. Apr. 10, 2019) ("Noor Apr. Order"); *see also* Second Order Regarding Copy Access to Trial Exhibits, *Noor,* (Henn. Cnty. May 22, 2019) ("Noor May Order"). As The Honorable Judge Kathryn Quaintance noted in that case, the Minnesota Rules of Criminal Procedure also expressly confer standing on the news media to challenge certain orders restricting public access to records or proceedings. *See* Noor Apr. Order at 10 (citing Minn. R. Crim. P. 25.03 subds. 1, 2).

Because the rules of criminal procedure have no analog to the civil rule governing intervention, a simple motion is the appropriate mechanism for the media to assert their interests. That said, some courts have extrapolated from civil rules and found that "a motion to intervene to assert the public's First Amendment right of access to criminal proceedings is proper." *United States v. Aref*, 533 F.3d 72, 81 (2d Cir. 2008); *accord In re Associated Press*, 162 F.3d 503, 508 & n.6 (7th Cir. 1998) (citing cases and stating that "the Press ought to have been permitted to intervene in order to present arguments against limitations on the constitutional or common law right of access."); *United States v. Preate,* 91 F.3d 10, 12 n.1 (3d Cir. 1996); *United States v. Valenti*, 987 F.2d 708, 711 (11th Cir. 1993); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 572-73 (8th Cir. 1988). Should the court choose to engage in such analysis, the requirements of Minn. R. Civ. P. 24.01,[4] governing intervention as of right, are also easily satisfied here.

[4] Rule 24.01 states:

Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or

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Accordingly, there is no doubt that the Media Coalition's objections regarding restrictions on access to the BWC footage are properly before the Court.

II. Limiting access to BWC footage to in-person, by-appointment viewing—with no right to copy or distribute it to the public at large—violates the common law, this Court's own rules, and the First Amendment.

Common law, this Court's own rules, and the First Amendment provide for robust access to criminal court proceedings and records by the press and the public. This access ensures that the public has faith that judicial proceedings are conducted fairly:

> The purpose of the public trial guarantee is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

State v. Brown, 815 N.W.2d 609, 612 (Minn. 2012) (internal marks and citations omitted).

Access is important even for members of the public who cannot attend a trial in person—or in this case, schedule an appointment, perhaps take time off work or find childcare, travel to the courthouse, don a facemask, and potentially expose themselves to a deadly virus in their effort to monitor the administration of justice. As the Supreme Court stated:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enter. Co. v. Super. Ct., 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"); *see also Gannett*, 443 U.S. at 429 ("Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the

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impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

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public, *with the record supporting the court's decision sealed from public view*." (Blackmun, J., concurring in part and dissenting in part) (emphasis added) (citation omitted)).

Courts therefore necessarily rely on the efforts of journalists to produce complete, accurate accounts of what transpires in criminal proceedings for those members of the public who are not personally able either to attend the proceedings or to visit the courthouse to view documents. And to accomplish that task here, in this case of *utmost* public interest and concern, members of the Media Coalition must be permitted not only to watch the BWC camera footage at an appointed time in an appointed room at the courthouse (where presumably no electronic devices will be permitted), but also to take a copy of that footage back to their desks, where they can watch it again (and again, if necessary), transcribe it, analyze it, compare it to other footage of the incident, and possibly even publish it so that the public can see it for themselves.[5]

As this Court intuitively knows, a transcript of a video is no substitute for the video itself. If it was, there would have been no reason for Lane to submit the BWC footage at all. Yet he did, suggesting it is what transpires on the screen, as much as what comes through the speakers that matters——not just the verbal statements that can be transcribed onto paper. As multiple federal courts have held:

> "Though the transcripts of the videotapes have already provided the public with an opportunity to know what words were spoken, there remains a legitimate and important interest in affording members of the public their own opportunity to see and hear evidence that records the activities of [government officials]. … And there is a significant public interest in affording that opportunity

[5] Even the most diligent journalist who views the BWC footage at the courthouse will inevitably return to her newsroom only to misremember something she saw or doubt the accuracy of something in her notes, and she would have to schedule *another* appointment to review the footage and take *another* trip to the courthouse. So too any time a new story idea emerged that required a fresh review of the footage.

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> contemporaneously with the introduction of the tapes into evidence in the courtroom, when public attention is alerted to the ongoing trial."

United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981) (quoting *In re NBC*, 635 F.2d 945, 952 (2d Cir. 1980)).

This case is being prosecuted at a time when people are being urged to stay off planes and out of buildings—to stay *home*. *See, e.g.*, *Frequently Asked Questions about Stay Safe MN*, Minnesota Covid-19 Response, *available at* https://mn.gov/covid19/for-minnesotans/stay-safe-mn/faq.jsp (last accessed July 9, 2020) (residents "are **strongly urged to stay home** except for necessary activities and work.") (emphasis added). Under such circumstances, in-person, by-appointment, view-only access is, for most of the public, no access at all and constitutes a *de facto* sealing of the BWC footage.

The Court's refusal to make the BWC footage publicly available for copying and distribution violates the common law, the Rules of Public Access to Records of the Judicial Branch, and the First Amendment to the U.S. Constitution.

A. The media have a common law right to copy and distribute the BWC footage.

Under the common law right of access, "[o]nce the court receives or collects records from parties, the broad rule of [a presumption of] access attaches." *In re GlaxoSmithKline PLC*, 732 N.W.2d 257, 272 (Minn. 2007). And even in the civil context, it is well-established that the presumption of access includes a right to copy court records. *See, e.g.*, *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 202 (Minn. 1986) ("It is undisputed that a common law right to inspect ***and copy*** … court records exists." (emphasis added)). In fact, as numerous courts around the country have recognized:

> [T]here is a presumption in favor of public inspection ***and copying*** of any item entered into evidence at a public session of a trial. Once the evidence has become known to the members of the public, including representatives of the press, through

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> their attendance at a public session of court, it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction.

In re NBC, 635 F.2d at 952 (emphasis added); *see also In re CBS*, 828 F.2d 958, 959 (2d Cir. 1987) ("common law right to inspect ***and copy*** judicial records applies to videotaped depositions of witnesses" (emphasis added)); *Valley Broad. Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1293–97 (9th Cir. 1986) (granting request by the press to make ***copies*** of audio and video tapes introduced into evidence at the close of each day of trial); *United States v. Guzzino*, 766 F.2d 302, 303–04 (7th Cir. 1985) (stating that "the common law right of the public to inspect ***and copy*** judicial records . . . includes the right of the media to copy audio or video tapes which have been admitted into evidence in a criminal trial" (emphasis added)); *United States v. Martin*, 746 F.2d 964, 967–69 (3d Cir. 1984) (discussing "common law right of the public to inspect ***and copy*** judicial records" (emphasis added)).

Judge Quaintance recognized this "presumption in favor of copying exhibits received in the course of a criminal trial," *see* Noor May Order at 2, when she allowed copying of all trial exhibits, including extremely graphic BWC footage. She noted that this common law right was recognized by the Supreme Court in *Nixon v. Warner Communications, Inc*., which states that, although the right is not absolute, "[i]t is clear that the courts of this country recognize a general right to inspect ***and copy*** … judicial records and documents." 435 U.S. 589, 597 (1987), *cited in* Noor May Order at 2. "At the end of the day," Judge Quaintance said, "the common-law standard is all that is required" to permit copying of trial exhibits. Noor May Order at 4.

While the common law right is not absolute, the "most extraordinary circumstances" have typically been limited to those involving intimate privacy rights of living victims where no public officials or servants were involved, and the copying could impact the ability to conduct a

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fair and impartial trial. *See, e.g.*, *In re KSTP Television*, 504 F. Supp. 360, 363 (D. Minn. 1980) (limiting copying of video tape showing rape victim bound immediately prior to rape because it would constitute "an unconscionable invasion of [the living victim's] privacy," there was no involvement by a public servant or official, and the release "would run the risk of impinging upon [the defendant's] right to a fair trial"); *see also Schumacher*, 392 N.W.2d at 205-06 (Minn. 1986) (weighing disclosure in a civil context, and finding that "[i]n order to overcome the presumption in favor of access, a party must show *strong countervailing reasons*, why access should be restricted." (emphasis added)).

No one has attempted to identify such extraordinary circumstances here—and none exist. The Media Coalition anticipates that the State or the Court may attempt to cast Judge Quaintance's order as inapposite because it issued after Noor's trial was over. Nothing in it, however, suggests her decision turned on that fact—indeed, the order acknowledges that it was only after trial concluded that the media first intervened to assert their right to copy exhibits. Noor May Order at 6. Moreover, Noor's appeal remained pending at the time Judge Quaintance made the exhibits available for copying (it is pending to this day), and she expressly rejected the State's "hypothetical" concern that allowing copying of exhibits might jeopardize the fairness of future proceedings. *Id.* at 4-5. She stated that, even in the event of remand, she did "not anticipate significant difficulty in selecting a new jury. There was extensive press coverage prior to trial, and it turned out that the Court did not need to draw a larger pool than usual to seat a panel." *Id.* at 5; *see also United States v. Massino*, 356 F. Supp. 2d 227, 232 (E.D.N.Y. 2005) ("[S]peculation is insufficient to justify restricting access to materials that have been entered into evidence in a public trial").

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Whatever arguments the State or the Court might raise here against copying of exhibits fail for the same reason they failed in Noor. This is a high-profile case, certainly, but so was Noor. Meanwhile, trial has not yet begun, which means that requests to copy exhibits will not interfere with the trial proceedings. It also means that the Court has ample time to determine whether a fair trial can be held in this venue, whether a larger pool of potential jurors need to be called, and what sort of voir dire should be conducted (and what juror instructions delivered) to guard against unfairness arising from jurors' out-of-court viewing of the BWC footage (or the already circulating bystander video).

Finally, because of the procedural posture of this case, it is no answer to tell the Media Coalition to wait until after the trial is over. The whole point of Lane's motion is to avoid trial and to have the charges against him dismissed. If his motion succeeds, there will be no trial. The press and public are entitled to see now, as the Court adjudicates Lane's motion, the evidence upon which the motion is based. *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 592 (1980) (Brennan, J., concurring) (noting importance of "contemporaneous review in the forum of public opinion" as "an effective restraint on the possible abuse of judicial power" (citations omitted)); *see also ABC v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004) ("[t]he ability to see and hear a proceeding as it unfolds is a vital component of the First Amendment right of access—not . . . an incremental benefit."); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710-11 (6th Cir. 2002) ("no subsequent measures [after closures] can cure" the loss of contemporaneous access).

B. Court rules also recognize the media's right to copy and distribute the BWC footage.

Consistent with the common law, the Minnesota Rules of Public Access to Records of the Judicial Branch also establish a presumption that the press and public may copy court records. Those rules state,

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> Records of all courts and court administrators in the state of Minnesota are presumed to be open to any member of the public for inspection ***or copying*** at all times during the regular office hours of the custodian of the records. Some records, however, are not accessible to the public, at least in the absence of a court order, and these exceptions to the general policy are set out in Rules 4, 5, 6, and 8.[6]

Access Rule No. 2 (emphasis added); *see also* Access Rule. No. 8, subd. 1 ("Upon request to a custodian, a person shall be allowed to inspect ***or to obtain copies*** of original versions of records that are accessible to the public in the place where such records are normally kept, during regular working hours." (emphasis added)).

Access Rule No. 4 addresses restrictions on access to case records, and cross references Minn. R. Crim. P. 25, which states that a restrictive order may issue only if "(a) Access to public records will present a substantial likelihood of interfering with the fair and impartial administration of justice. (b) All reasonable alternatives to a restrictive order are inadequate." Minn. R. Crim. P. 25.03, subd. 4. The Rule goes on to state that "A restrictive order must be no broader than necessary to protect against the potential interference with the fair and impartial administration of justice." *Id.*

Again, no one has made any attempt to satisfy the joint requirements of the Access Rules and the Minnesota Rules of Criminal Procedure and for the reasons discussed above they could not satisfy these requirements. Moreover, in refusing to allow the press and public to copy and distribute the BWC footage, this Court has violated the procedural requirements of Rule 25.03, which include the requirement that the Court hold a hearing before limiting access to or copying of trial exhibits, that the media have an opportunity to be heard at that hearing, and that any

[6] Rules 4 and 8 are addressed herein; Rules 5 and 6 address administrative and vital statistics records and are not relevant here.

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restriction must be made in a written order that includes "facts and reasons" supporting the restriction and "address possible alternatives" and "explain why the alternatives are inadequate."

C. The media have a First Amendment right to copy and distribute the BWC footage.

Finally, the First Amendment provides a separate, affirmative, enforceable right of public access to criminal trials. *See Richmond Newspapers*, 448 U.S. at 580 ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment. . . ."); *see also Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property"). As the Eighth Circuit has stated, "We have an open government, and secret trials are inimical to the spirit of a republic, especially when a citizen's liberty is at stake. The public, in a way, is necessarily a party to every criminal case." *United States v. Thunder*, 438 F.3d 866, 867 (8th Cir. 2006).

The Minnesota Supreme Court has recognized that this First Amendment right extends not only to trials but also to judicial records, even in civil cases. *See Schumacher*, 392 N.W.2d at 203 ("Several jurisdictions have established a constitutional right of access to civil court files and records. . . . As under the common law standard, a presumption in favor of access exists under the First Amendment."); *accord Star Tribune v. Minn. Twins P'ship*, 659 N.W.2d 287, 296 (Minn. App. 2003) ("a presumption of access to judicial records exists under the First Amendment").

Notably, the position of Minnesota courts is in line with every federal Circuit Court of Appeal that has directly addressed the issue. *See, e.g., In re Providence Journal Co.*, 293 F.3d 1, 10 (lst Cir. 2002) (right applies to "documents and kindred materials submitted in connection with the prosecution and defense of criminal proceedings"); *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (records of plea hearing); *United States v. Smith*, 123 F.3d 140, 146 (3d Cir.

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1997) (records of criminal proceeding); *In re Associated Press*, 172 F. App'x 1, 4 (4th Cir. 2006) records filed "in connection with criminal proceedings"); *United States v. Edwards*, 823 F.2d 111, 112—13 (5th Cir. 1987) (transcript of midtrial questioning of jurors); *In re Storer Commc'ns, Inc*, 828 F.2d 330, 336 (6th Cir. 1987) (records pertaining to recusal of judge); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (trial exhibits); *In re Search Warrant for Secretarial Area*, 855 F.2d at 573 (documents filed in support of search warrant applications); *CBS, Inc. v. U.S. Dist. Ct.*, 765 F.2d 823, 825-26 (9th Cir. 1985) (documents filed in pretrial proceedings and post-trial sentencing records); *United States v. Ignasiak*, 667 F.3d 1217, 1237-39 (11th Cir. 2012) (post-trial pleading revealing impeachment information); *Washington Post v. Robinson*, 935 F.2d 282, 287—88 (D.C. Cir. 1991) (plea agreement).

With regard to criminal exhibits specifically, they "have historically been open to the press and general public, these types of documents are presumed to be public as result," and "because the process in question is criminal trial, public access plays significant role in its functioning." *United States v. Loera*, No. 09-cr-0466 (BMC), 2018 U.S. Dist. LEXIS 192614, at *13 (E.D.N.Y. Nov. 11, 2018). This is especially true where the exhibits depict a death and serve as key evidence in criminal proceeding. *See, e.g.*, *Angilau v. United States*, N0. 2:16-00992-JED, 2017 U.S. Dist. LEXIS 197135, at *8 (D. Utah Nov. 29, 2017) (when a video of shooting served as "the key document for the Court to use in deciding the merits of th[e] case [t]here can be no serious question that the courtroom video at issue is judicial document" to which the First Amendment right of access applies).

Finally, the First Amendment right to access judicial records necessarily includes the right to copy those records. *See, e.g.*, *United States v. Loughner*, 769 F. Supp. 2d 1188, 1191 (D. Ariz. 2011) ("increased openness in criminal proceedings also encompasses a qualified First

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Amendment right to inspect *and copy* public records and documents, including judicial documents and records") (emphasis added); *United States v. Lexin*, 434 F. Supp. 2d 836, 849 (S.D. Cal. 2006) (same).

As this court recognized in the Noor case, the constitutional presumption that judicial proceedings and records are open to the press and public may be overcome only if: (1) "failure to restrict access creates a substantial probability of prejudice to a compelling or overriding interest"; (2) "[n]o reasonable alternatives exist to adequately protect the threatened compelling or overriding interest"; (3) "[a]ny restrictions on access are narrowly tailored to serve the threatened interest"; (4) "[a]ny restrictions must be effective in protecting the threatened compelling or overriding interest"; and (5) the court provides prior notice and either "issue[s] written findings of fact or makes detailed findings of fact on the record demonstrating that these standards have been met." Noor Apr. Order at 16-17; *see also Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) ("*Press-Enterprise II*"); *Waller v. Georgia*, 467 U.S. 39, 45, 48 (1984); *Press-Enterprise I*, 464 U.S. at 510; *Richmond Newspapers*, 448 U.S. at 580-81; *Nw. Publ'ns, Inc. v. Anderson*, 259 N.W.2d 254, 257 (Minn. 1977); *see also Thunder*, 438 F.3d at 867.

The party seeking closure bears the burden to show the compelling legal interests and factual support that allegedly justify closure, and the trial court must articulate with specificity the basis for closure. *Press Enterprise I*, 464 U.S. at 512-13; *see also Lamberton v. Lamberton*, 229 Minn. 29, 38 N.W.2d 72 (1949) (if the record does not contain evidence to support the district court's findings, a reviewing court will reverse the district court's decision outright as an abuse of discretion).

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This Court does not need to decide whether there is a First Amendment right to copy and distribute the BWC footage. As Judge Quaintance said in the Noor case, "the common-law standard is all that is required" to permit copying of trial exhibits. Noor May Order at 4.[7] However, if it does entertain the question, it is clear that no one has made any showing at all to justifying restrictions on copying and distributing BWC footage, much less a showing that access to the footage will jeopardize a compelling interest or that limiting access to the BWC footage could possibly protect that interest when other video of Floyd's death is already publicly available.

CONCLUSION

There is no indication in the public record that the Court has engaged in any analysis under the common law, its own rules, or the First Amendment to justify placing limitations on the press and public's ability to copy and distribute the BWC footage. And in fact, such limitations cannot be justified.

Keeping the BWC footage under seal—and in-person, by-appointment, view-only access is tantamount to having it under seal—is neither necessary nor an effective way to ensure the fair administration of justice. Video of Floyd's death has been circulating around the world for nearly

[7] Given this conclusion, Judge Quaintance's commentary on whether a First Amendment right exists is *dicta* and is not binding on this Court. Regardless, her conclusion that there is no First Amendment right to copy trial exhibits is flawed in its reliance on *Nixon*. *See* Noor May 22 Order at 3. *Nixon* addresses only the common law right of access and pre-dates the First Amendment right of access canon, which began in 1980 with the Supreme Court's decision in *Richmond Newspapers*, 448 U.S. 555. Courts have subsequently made clear that *Nixon* did not hold *against* the existence of a First Amendment right. *See United States v. McVeigh*, 119 F.3d 806, 810, 812 (10th Cir. 1997) ("Of course, *Nixon* did not hold that there was no First Amendment right to access court documents. . . . [T]hat case did not address whether there was a First Amendment right to access court documents when access to those documents is an important factor in understanding the nature of proceedings themselves and when access to the documents is supported by both experience and logic.").

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seven weeks and is readily viewable on any number of websites. Now, too, there are transcripts of the BWC footage in circulation. There is no reason to believe that making the BWC footage itself easily accessible to the press and public would materially impact the fairness of trial. Indeed, releasing the transcripts without the accompanying footage is the sort of piecemeal disclosure that threatens not only to mislead the public, including potential jurors, but also to destroy the public's trust in the judicial system. *See Richmond Newspapers*, 448 U.S. at 571-72 ("where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.").

Further, if the Court is worried about a fair trial, there are many alternatives to hiding evidence from the public. It is a standard practice to question prospective jurors about their knowledge of the case and to instruct jurors not to listen to or read news reports on the case they are considering, *see Criden*, 648 F.2d at 827 ("the 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"); *see also* 10 Minn. Prac., Jury Inst. Guides-Criminal CRIMJIG 1.02 (6th ed.). Conducting a thorough voir dire of prospective jurors and delivering such an instruction here (in the event this action reaches a trial) is adequate to prevent whatever harm the Court thinks might arise from broad public access to the BWC footage.

As the days of unrest in the Twin Cities showed, it is vitally important that the public have full confidence in the process and outcome of this criminal prosecution. As courts have recognized, this "helps obviate an otherwise potential community urge to retaliate and also can work to minimize community outrage and hostility in the face of violent crimes." Noor Apr. Order at 15; *see also Richmond Newspapers*, 448 U.S. at 592-93; *Globe Newspaper*, 457 U.S. at 604-05 (1982); *Press-Enterprise I*, 464 U.S. at 508-09.

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Secrecy serves no useful purpose. Conspiracy theories claiming that Floyd is not even dead, that billionaire George Soros funded the nationwide protests, and that Floyd's death was filmed before Covid-19 because no one was wearing a mask (to name just a few theories),[8] are already running rampant on the internet, and limiting access to the BWC footage and providing instead facially inaccurate and incomplete transcripts will do little to quell such theories. In short, anything short of public distribution of the BWC footage will greatly diminish the breadth, quality, and usefulness of the news reporting on one of the most important issues of our time—allegations of systemic police brutality against unarmed Black men and women.

For these reasons, the Media Coalition respectfully requests that the Court make available a public copy of the BWC footage that Lane publicly filed in connection with his dispositive motion so that the press and public can review the footage in the safety of their newsrooms and homes.

[8] *See* Davey Alba, "Misinformation About George Floyd Protests Surges on Social Media," NYTimes.com (June 1, 2020), https://www.nytimes.com/2020/06/01/technology/george-floyd-misinformation-online.html; Angelo Fichera, "Conspiracy Theory on Floyd's Death Disproved by Footage," FactCheck.org (June 17, 2020), https://www.factcheck.org/2020/06/conspiracy-theory-on-floyds-death-disproved-by-footage/.

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