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March 29, 2019

The Honorable Ivy S. Bernhardson
Hennepin County Government Center
300 South Sixth Street
Minneapolis, MN 55487

Re: State of Minnesota v. Noor

Dear Chief Judge Bernhardson:

We write on behalf of a coalition of media organizations that so far includes Star Tribune Media Company LLC, CBS Broadcasting Inc., Minnesota Public Radio, TEGNA Inc., and Fox/UTV Holdings, LLC (the "Coalition"). The Coalition is extremely concerned about what it anticipates to be woefully inadequate press and public access to the trial in *State of Minnesota v. Noor*, which begins Monday, April 1, 2019. We have addressed this letter to you not only because you are the Chief Judge of the Fourth Judicial District but also because we assume that Judge Quaintance is understandably focused on other trial-related issues.

The enclosed letter to Star Tribune states that "[t]he Court engaged in months of logistical planning for this trial." Unfortunately, the Court did not consult during those months of planning with the press corps that will be covering the trial. If it had, the press and the Court could have reached some better understanding about the sort of access that the Constitution requires and that journalists need to accurately and thoroughly report on trial proceedings.

Instead, this high-profile criminal trial, which is plainly of the utmost public interest and concern, is set to be held in a courtroom that apparently can accommodate only 28 spectators. Twenty of those seats have been set aside for members of the public, the families of Mohamed Noor and Justine Damond, and a sketch artist. The remaining eight seats were apparently assigned to local and national news organizations based on whomever responded

first to an email, the arrival of which was unpredictable.[1] As a result, although Star Tribune, KARE-TV, Minnesota Public Radio, and KSTP-TV successfully reserved a seat in the courtroom, other local news organizations, including WCCO and KMSP-TV did not. These organizations will either have to hope for admission as a member of the public or resign themselves to covering the trial from a small over-flow room where audio and video feeds will be sub-optimal.

This situation could have been avoided, as demonstrated by the way our sister state of Wisconsin is currently handling media access to proceedings in the criminal case against Jake Thomas Patterson. The Coalition is dismayed that, on the eve of trial, uncertainties remain about whether the press and public will be able to adequately monitor one of the highest profile trials the State of Minnesota has ever seen. As you are no doubt aware, the First Amendment and common law guarantee press and public access to criminal proceedings. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606–07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); *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."). Even if the courtroom doors remain technically open, if access is not *meaningful*, then the Court risks violating the spirit and possibly the letter of our Constitution.

Fortunately, there is still time to remedy the situation created by the prior logistical planning that did not include key stakeholders. Jury selection, which is expected to take several days, will take place in the Hennepin County Commissioners Board Room, a relatively large room. When it concludes, there is no reason the trial itself must be held in Courtroom C1953. It could be held in a larger courtroom, which would potentially eliminate altogether the need for an overflow room. Alternatively, if the trial must be held in Courtroom C1953 the Coalition requests that the Court designate a second, media-only overflow room where audio- and video-feeds of the trial are available. The Coalition further requests that if such a media-only overflow room is established, members of the media be allowed to keep their electronic devices in this second overflow room, eliminating the need for Court staff to keep them and distribute them during recesses.

Finally, the Coalition is particularly concerned by paragraph 24 of the Amended Order on Conduct at Trial, issued March 28, which states that the media must "respect[]" the limitations placed on attorneys, witnesses, and jurors involved in the case. This is a vague and ambiguous statement that, coupled with the specter of sanctions in the order, threatens to

[1] Certain news organizations signed up to receive an email from the Court about assignment of seats and understood that they would need to reply to receive an assignment. However, other news organizations were not even made aware of this protocol.

chill the exercise of the Coalition's free speech rights under the First Amendment. If trial participants choose of their own volition to speak to the media about this case, even before trial concludes, then the Court *may* be able to sanction them.[2] However, it may *not* sanction the media. The media is free to communicate with trial participants and to report what trial participants say.

To hold otherwise would constitute an unconstitutional prior restraint. Prior restraints "are the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), and, as the Supreme Court recognized in that decision, such restraints have historically been viewed as "presumptively unconstitutional." *Id.* at 558–59. "It has been generally, if not universally, considered that it is the chief purpose of the guaranty [of freedom of the press] to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

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[2] *But see Gentile v. State Bar*, 501 U.S. 1030 (1991). In that case the Supreme Court left open the *possibility* for restraints on trial participants (as opposed to the media) upon a finding of a "substantial likelihood of material prejudice." However, because many proposed gag orders on lawyers and witnesses fail to meet this standard, courts often reject them even when imposed only on trial participants. *See, e.g.*, *United States v. Scarfo*, 263 F.3d 80 (3d Cir. 2001) (finding that the gag order was erroneously issued because the attorney's comments did not pose a threat to the fairness of the trial or to the jury pool); *United States v. Salameh*, 992 F.2d 445 (2d Cir. 1993) (holding that the trial court had improperly issued a blanket prohibition without first establishing that less restrictive alternatives would be inadequate to protect the defendants' Sixth Amendment right to a fair trial).

The Coalition wholeheartedly believes that this Court wants to fulfill the guarantees of both the First and Sixth Amendments. This objective can best be achieved through communication and collaboration with not only trial participants but also the journalists who will serve as the public's proxy by attending, monitoring, and reporting on what transpires at trial. Therefore, the Coalition respectfully requests a meeting with Your Honor as soon as possible next week to discuss how meaningful access to the trial can be provided. Moreover, we believe that maintaining an open line of communication between a representative of the Coalition and your chambers throughout the trial will be helpful in dealing effectively and efficiently with access issues that will inevitably arise.[3]

Very truly yours,

Leita Walker

LW/ds

cc: The Honorable Kathryn L. Quaintance

[3] On this last point, the Coalition learned just today that the Court may prohibit the sketch artist from depicting certain trial participants. This is an unconstitutional prior restraint. *See KPNX Broadcasting v. Superior Court*, 678 P. 2d 431 (Ariz. 1984). The Coalition also just learned today that the Court plans to turn video screens away from the gallery when certain graphic evidence (such as dash and/or body camera video and autopsy photographs) is shown to the jury. This is a de facto closing of the courtroom and it should not occur before the media is given a meaningful opportunity to be heard. *See* cases cited *supra*.