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April 5, 2021

Ms. AnnMarie S. O'Neill
Clerk of the Appellate Courts
Room 305, Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-6102

Re: In re: Mail Media, Inc., et al., Petitioners, State of Minnesota, Respondent, vs. Derek Michael Chauvin, Respondent
Case No.: A21-0400

Dear Ms. O'Neill,

The American Civil Liberties Union of Minnesota ("ACLU-MN") submits this request, pursuant to Rule 129 of the Minnesota Rules of Civil Appellate Procedure, for leave to participate as amicus curiae and as a letter in lieu of a brief of amicus curiae in the above-entitled matter. The Petition for Writ of Prohibition filed by Mail Media, Inc., et al. seeks an order regarding media access to the ongoing trial of Derek Chauvin. The deadline for the responsive filings was April 2, 2021, and the Petitioners have requested expedited review in light of the fact that the trial is ongoing and a delay in ruling on the Petition would effectively operate to deny it. Given the short time frame for briefing, and the likelihood that the Court of Appeals will rule on the Petition for Writ of Prohibition expeditiously, we do not seek leave to file a formal amicus brief in this matter.

Identity and Interest of Applicant[1]

The ACLU-MN is a private, nonprofit, nonpartisan organization supported by approximately 39,000 individual members and supporters in the State of Minnesota. It is the

[1] The ACLU-MN certifies under Minn. R. Civ. App. P. 129.03 that no counsel for a party authored this letter in whole or in part, and that no person or entity made a monetary contribution to the preparation or submission of this letter other than the ACLU-MN, its members, and counsel.

statewide affiliate of the American Civil Liberties Union. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the Minnesota and United States Constitutions. Among them are the rights under the federal and state constitutions to freedom of speech and freedom of the press – issues directly implicated in the instant matter. The ACLU-MN's interest is, therefore, public.

Participation of *Amicus Curiae* Is Desirable

The issues in this case affect interests extending far beyond the individual parties in this case. A decision in this case will affect other individuals and entities who seek to cover trial proceedings throughout the State of Minnesota. The ACLU-MN and undersigned counsel for ACLU-MN have an extensive background in thorough and objective research in the field of constitutional rights and a long history of participating as *amicus curiae* in important matters involving the Minnesota and United States Constitutions. The proposed submission – the instant letter – is concise and will not add any delay to the proceedings.

Statement of Party Supported and Position Taken

The ACLU-MN supports the Petitioners' argument that Judge Barnette's March 24, 2021, order denying media credentials to the Daily Mail for the Chauvin trial, and denying the Daily Mail's staff and reporters access to all trial exhibits, to the media center, and to all media updates related to the trial, violates the First Amendment to the United States Constitution.

As Petitioners detail in their Petition for Writ of Prohibition and supporting documents, Presiding Judge Cahill entered an order on July 9, 2020, directing that police body camera footage submitted to the court in connection with a pre-trial motion would be available at the Hennepin County Government Center for viewing by the press and public by appointment, but that those viewing the video were not allowed to record or re-transmit any portions of the video.

Affidavit of Mark R. Anfinson ("Anfinson Affidavit"), ¶3. On August 7, 2020, Judge Cahill lifted that restriction, acknowledging that the video should be accessible to the public and news media and rescinding the ban on copying or publicly distributing the footage. *Id.*, ¶4. Shortly before Judge Cahill lifted the restriction, a third-party source leaked the footage to the Daily Mail, which published an article that included the video on August 3, 2020. *Id.*

Regardless of whether the Daily Mail's source or any other person violated Judge Cahill's July 9 order by copying the video from the Hennepin County Government Center, Judge Barnette acknowledged that there was no evidence that even if *someone* copied the video, *Petitioners* played any role in that copying. March 24, 2021, Order Denying Media Credentials ("March 24 Order"), *included in* Petitioners' Addendum to Petition Writ of Prohibition, 3 ("It has not been proven to the Court whether the Daily Mail did or did not play a role in the theft of the footage.").

Indeed, the undisputed evidence before this Court establishes that Petitioners "played absolutely no role in the copying of the video." Anfinson Affidavit, ¶10. Nor is there any evidence that Petitioners violated any law or court order in obtaining or publishing the footage.

The United States Supreme Court has repeatedly reaffirmed that the First Amendment presumptively requires press and public access to judicial proceedings in criminal cases. *E.g.*, *Richmond Newspapers v. Va.*, 448 U.S. 555, 578 (1980) ("a trial courtroom . . . is a public place here the people generally – and representatives of the media – have a right to be present"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (presumption of openness extends to rape trial where the victims are minors); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*") (presumption of openness extends to juror voir dire); *Press-*

Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) ("*Press-Enterprise II*") (presumption of openness extends to preliminary hearings).

As the *Press-Enterprise I* Court stressed:

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

Press-Enterprise I, 464 U.S. at 510. Closure is permitted only with a trial court's specific findings that the closure is necessary to prevent a substantial probability of harm to the compelling interests at stake and that no less restrictive alternative will adequately protect those interests. *Press-Enterprise II*, 478 U.S. at 14.

The interest that Judge Barnette cited to justify barring Petitioners' trial access was in imposing an "equitable consequence" on Petitioners for having published video footage that an unidentified third party allegedly copied in violation of Judge Cahill's subsequently-rescinded order against such reproduction and transmission. March 24 Order, 3.

However, even assuming *arguendo* that a third party copied the footage in violation of Judge Cahill's order, Judge Barnette had no compelling, overriding interest in barring Petitioners' access to trial exhibits nor in stripping them of their media credentials, given that there is no evidence that *Petitioners* played any role in duplicating the video.

The United States Supreme Court considered a similar claim in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *Bartnicki* concerned a media outlet's intentional disclosure of an illegally-intercepted cell phone conversation about a matter of public concern. The media outlet that broadcast the conversation "did not participate in the interception, but . . . did know – or at least had reason to know – that the interception was unlawful." *Id.* at 517-18. The *Bartnicki* Court

affirmed that, pursuant to the First Amendment, "'if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.'" *Id.* at 528 (citations omitted).

Thus, even though the state had an interest in deterring the unlawful conduct of the person(s) who illegally recorded the conversation, the Court found that "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Id.* at 529-30. The Court concluded that a desire to deter the third party's unlawful conduct – conduct in which the publisher played no part – "f[e]ll far short of a showing that there [was] a 'need of the highest order'" to sanction the publisher. *Id.* at 531-32.

Per *Press-Enterprise I* and *II*, then, a bar on press access to the proceedings and records in the Chauvin trial – a matter of intense and worldwide public concern – must be justified by an "overriding" interest that cannot be achieved in any less-rights-restrictive way. Per *Bartnicki*, there is no sufficiently compelling interest in sanctioning the publication of truthful information that Petitioners obtained lawfully, even were there evidence that Petitioners knew, or had reason to know, that their source secured the video in contravention of Judge Cahill's order. The required "need of the highest order" is simply absent where, as here, there is no evidence that Petitioners played any role in conduct that may have violated Judge Cahill's order.

The constitutional rights implicated by the decision of the District Court should not be taken lightly and we urge the Court of Appeals to act expeditiously to protect those rights.

Respectfully submitted,

s/Raleigh Levine
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