

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DAVID CLOHESSY,)	
)	
Relator,)	
)	
v.)	Appeal No. _____
)	
THE HONORABLE ANN MESLI,)	
CIRCUIT COURT JUDGE,)	
DIVISION 7, MISSOURI CIRCUIT)	
COURT, 16TH JUDICIAL CIRCUIT,)	
JACKSON COUNTY, MISSOURI)	
)	
Respondent.)	

SUGGESTIONS OF AMICI CURIAE
IN SUPPORT OF RELATOR’S PETITION FOR WRIT OF PROHIBITION

IDENTITY AND INTERESTS OF AMICI

Amici are organizations dedicated to supporting the survivors of childhood sex abuse, protecting the freedom of the press, and protecting the freedom of speech, association, and privacy rights of victim’s advocacy groups and their members, volunteers, and clientele. Amici are as follows:

1. Kid Safe Foundation
2. Survivors for Justice
3. National Child Protection Training Center
4. National Black Church Initiative
5. Voice of the Faithful
6. Jewish Board of Advocates for Children
7. Child Protection Project
8. Foundation to Abolish Child Sexual Abuse
9. The Cardozo Advocates for Kids
10. New Hampshire Voice of the Faithful

INTRODUCTION

Amici submit the following suggestions in support of Plaintiff John Doe B.P. and David Clohessy's Writs of Prohibition. Amici endorse and incorporate the facts as outlined by David Clohessy in his Writ of Prohibition and Suggestions in Support. The issue presented is whether Missouri courts may permit discovery of confidential communications and work product of a non-party, The Survivors Network of those Abused by Priests ("SNAP"), which is a 23-year-old national nonprofit organization that advocates on behalf of sexual abuse victims. There are several important constitutional, legal, and policy principles that preclude a deposition of David Clohessy, Executive Director of SNAP, and the extensive documents requests approved by the Circuit Court. Notably, this discovery is a violation of the anonymity and confidentiality of SNAP members and volunteers and violates SNAP's and third parties' constitutional rights to freedom of speech and association and privacy. The deposition order, as it now stands, would require SNAP to provide its members' names and private information, which is plainly unconstitutional. *NAACP v. Alabama*, 357 U.S. 449 (1958).

If this deposition is permitted to go forward, SNAP will suffer irreparable damage. Its primary effort as an advocate for child sex abuse victims and as a support group to thousands of survivors of sexual abuse under strict confidentiality will be decimated. Survivors of child sex abuse will not speak to SNAP or any other survivors' organization if it means that their communications will become part of public records in litigation in which they are not involved. SNAP's ability to function as an advocacy organization would be tarnished by exposure of the records, confidential information, and communication with its members, volunteers, clients, and the media. Amici urge this Court to grant Plaintiff B.P.'s and David Clohessy's Writs of Prohibition and cease discovery of confidential information of countless non-parties to this

litigation, the vast majority of whom are survivors of childhood sexual abuse, who will be psychologically damaged and further victimized by the disclosure of information they appropriately believed to be confidential.

SUGGESTIONS IN SUPPORT OF WRITS OF PROHIBITION

Amici respectfully offer these suggestions in support of Plaintiff John Doe B.P. and David Clohessy's Writs of Prohibition concerning the Orders to depose David Clohessy/SNAP, a non-party in several pending court cases. Amici will briefly address the important issues and considerations raised by the pending Writs.

I. The Circuit Court's Discovery Order Violates the Freedom of Speech and Association Rights of SNAP's Members, Volunteers, and Third Parties.

The discovery requested by Defendant Father Michael Tierney violates the Freedom of Speech and Association of SNAP's members and volunteers. The deposition and subpoena of documents is essentially asking for correspondence regarding the highly personal and private matter of sexual abuse. SNAP, as a victim's advocacy organization which, is run almost exclusively by individuals who were abused themselves, is an expressive association founded for the purpose of supporting childhood sexual abuse survivors that is protected under the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. It is black letter constitutional law that the government may not force a private advocacy organization to divulge its membership. *NAACP v. State of Alabama*, 357 U.S. 449, 460 (1958) ("freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) ("The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties."). The right to associate with others in pursuit of common

goals, whether they be political, social, economic, or educational, is protected by the First Amendment. See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Roberts v.*, 468 U.S. at 622; *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). The U.S Supreme Court has held that, “[a]n individual’s freedom to speak . . . could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.” *Roberts*, 468 U.S. at 622.

The strictest scrutiny must be applied to any judicial decision to interfere with the membership of a private organization that engages in expressive association, as does SNAP. In order for the Circuit Court of Jackson County to infringe upon the constitutionally protected free speech rights of SNAP, its Executive Director, its membership, its volunteers, and numerous other third parties associating privately with SNAP, the Court must show a “compelling state interest” in the deposition of David Clohessy and the discovery requested of SNAP and that this discovery is “the least restrictive means” of achieving the interest. See *Roberts*, 468 U.S. at 623. Here, the interest asserted in subpoenaing documents and deposing Clohessy is plainly whether Plaintiff’s counsel contravened an Aug. 2, 2011 Order regarding pre-trial publicity.

It is, no doubt, a stretch for the court to claim a “compelling interest” in reaching out to a third party and bringing it into on-going litigation for the purposes of determining whether counsel of a party to the case violated a court order. Moreover, the production of thousands of documents over a 23-year period and the deposition of SNAP’s executive director is not the “least restrictive means” of determining whether Plaintiff’s counsel contravened a pre-trial order in a particular case. There are other avenues, less restrictive to the constitutional rights of SNAP, that must be pursued. For instance, only limited written discovery has been served on John Doe B.P., none which seeks the information relating to the issues relating to the subpoena at issue. It

is unfathomable that this Court would allow Fr. Tierney to circumvent normal discovery rules and instead require SNAP to bear the burden of discovery in this matter, but particularly so where SNAP's interest in quashing this subpoena is so compelling and there are other less restrictive means available. This burdensome and harmful discovery will violate the privacy of childhood sexual abuse survivors associated with SNAP and, as a result, will forever chill speech by SNAP and its membership.

Survivors and volunteers associated with SNAP have a right to communicate and act confidentially. *See NAACP*, 357 U.S. at 466 (“immunity from state scrutiny of membership lists . . . is here so related to the rights of the members to pursue their lawful private interests privately and to associate freely with others in so doing”). The Circuit Court's order threatens to disclose their association with SNAP in violation of SNAP's and their freedom of association. There is a “vital relationship between freedom to associate and privacy in one's associations.” *NAACP*, 357 U.S. at 462. Accordingly, “inviolability of privacy in group association,” such as membership or cooperation with SNAP is “indispensable to preservation of freedom of association.” *Id.* The “compelled disclosure of membership can ‘seriously infringe on privacy of association and belief guaranteed by the First Amendment.’” *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 119 (3rd Cir. 1987) (citing *Buckley v. Valeo*, 424 U.S.1, 64 (1976)). This freedom of association “protects confidentiality in one's private, civic, and political associations, particularly where government intrusion may result in a chilling effect on collective action.” *Local 491, International Brotherhood of Police Officers v. Gwinnett County, Ga.*, 510 F.Supp.2d 1271, 1289 (N.D. Ga. 2007).

In *NAACP v. State of Alabama*, the Court noted that public identification of NAACP members, “exposed these members to economic reprisal, loss of employment, threat of physical

coercion, and other manifestations of public hostility.” 357 U.S. at 462. Similarly, if the discovery is permitted, survivors and witnesses of sexual abuse will no longer feel comfortable approaching SNAP in confidence. SNAP is routinely approached by concerned Catholics, victims, witnesses, current church employees; people whose employment and relationships might be jeopardized should their identity be disclosed. If it were to go forward, this discovery would have a negative impact, beyond SNAP, on other direct service groups who counsel victims of crime, abuse, neglect, or addiction. The harm would be irreparable.

Finally, a further harm is the inevitable chilled speech by SNAP and other advocacy organizations that will result from this violation of privacy and confidentiality. SNAP is a nationwide advocate for victims of sexual abuse. It has brought awareness to the issue of clergy sexual abuse, provided support, counseling, and a voice for countless survivors for 23 years. The exposure of confidential information or even the perception of exposure, required by the subpoena of documents and the deposition of David Clohessy, will discourage victims of sexual abuse from coming forward or reaching out to SNAP. It would discourage whistleblowers and witnesses to come forward to SNAP because the threat of public exposure could mean the potential loss of employment, threat of violence, and public hostility, as described above.

The identification of members and volunteers would adversely affect SNAP and its members’ ability to “pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that they may induce members to withdraw” from the Network and “dissuade other from joining it because of fear of exposure of their beliefs shown through their associations and the consequences of this exposure.” *NAACP*, 357 U.S. at 463.

II. The Circuit Court’s Discovery Order Violates the Freedom to Publicize and Advocates on Matters of Sexual Abuse in the Press.

SNAP has a high-profile presence with regard to the publication of lawsuits involving clergy sexual abuse. SNAP's ability to engage the media, publicize their events, and raise awareness for the child sex abuse survivor movement is at the core of their advocacy. The court's Nov. 29, 2011 order requires the production of all communication with the press/press releases that mention the Diocese of Kansas City-St. Joseph and any communication that mentions any priests currently or formerly associated with the Diocese. If it is left standing, this order would have a devastating impact on the right of the media seeking information from SNAP, and other similar organizations, on matters of sexual abuse. It would have a severe chilling effect on the entire community of child sex abuse survivors. The media's ability to adequately and effectively report on the issue of clergy sexual abuse would be compromised if it does not have access to confidential information received through SNAP. The production of information, including communication with the media, would "undercut the public policy favoring the free flow of information to the public that is the foundation" of the free market place in ideas. *State ex. Rel. Classic III, Inc. v. Ely*, 954 S.W.2d 650, 656 (Mo. Ct. App. 1997) (internal citations omitted); *see also New York Times v. Sullivan*, 376 U.S. 254 (1964).

III. The Discovery Order Violates the Right to Privacy of SNAP Members, Volunteers, and Numerous Third Party Sexual Abuse Survivors

The subpoena of documents is rife with confidentiality issues. This discovery would reveal the identity of thousands of sexual abuse victims, volunteers, and witnesses from all over the nation. It would violate their privacy rights and, in many cases, jeopardize their jobs, their relationships, and their individual healing processes. People have a particularly strong right to privacy in sexual matters. *See, e.g., Y.G. v. Jewish Hospital of St. Louis*, 795 S.W.2d 488, 500 (Mo. Ct. App. 1990). *See also Fraternal Order of Police, Lodge No. 5*, 812 F.2d at 113 ("The more intimate or personal the information, the more justified is the expectation that it will not be

subject to public scrutiny.”). This privacy violation of third-party survivors, whose family in many cases may not know of the abuse, is too high a price to pay to determine whether a pre-trial order on publicity was violated by plaintiff’s counsel. It also shows how the existing order is not tailored to be the least restrictive means.

CONCLUSION

All the foregoing are arguments of significant constitutional importance. If the Deposition of David Clohessy goes forward prior to an Appellate Court reviewing the merits and necessity of the discovery, the rights of SNAP, its membership, and numerous third parties will be trampled. The Courts will not be able to unring that bell and thousands of survivors would be re-victimized and subject to embarrassment, intimidation, and harassment. The chilling effect of such an order would not be limited to SNAP, but would also chill the exchange of information between survivors and other nonprofits as well. This order has the capacity to set the survivor community back a minimum of 10, if not 20, years, and to empower those who benefit the most when survivors are silent—child abusers, predators, and the institutions that protect them. For all of the above reasons, Amici respectfully suggest that this Court grant Relators’ Writs of Prohibition.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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