

SUPREME COURT OF MISSOURI

DAVID CLOHESSY,)
)
 Relator,)
)
 v.) **Appeal No. SC92716**
)
 THE HONORABLE ANN MESLE,)
 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

CONSENT OF PARTIES TO AMICI’S PARTICIPATION

All parties before the court have consented to the filing of these Suggestions of Amici Curiae.

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. **MO Coalition Against Domestic and Sexual Violence**, Jefferson City, MO, a statewide membership coalition of individuals and more than 123 organizations working

to end violence against women and their children through direct services, social and systemic change.

2. **Missouri University Family Violence Clinic**, Columbia, MO, provides victims of violence, students and parents referred to the clinic with counsel, litigations, settlement negotiations, and courtroom representation.

3. **Community Together**, Kansas City, MO, a multidisciplinary bi-state community coming together of over 300 family/child-serving organizations and businesses, who work together to serve the needs of the community.

4. **The National Center for Victims of Crime**, Washington, DC, dedicated to serving individuals, families and communities harmed by crime and forging a national commitment to help victims of crime rebuild their lives.

5. **The National Child Protection Training Center**, Winona, MN, provides training, technical assistance and publications to child protection professionals throughout the US as well as victim assistance to hundreds of survivors.

6. **Stop Child Predators**, Washington, DC, brings together a coalition of law enforcement organizations, community groups, and victims' rights advocates to lead targeted public awareness campaigns to prevent crimes against children.

7. **(S.E.S.A.M.E.), Stop Educator Sexual Abuse Misconduct and Exploitation**, Las Vegas, NV, is a leading national voice for the prevention of sexual exploitation, abuse and harassment of students by teachers and other school staff.

8. **Child Protection Project**, Los Angeles, CA, provides support to people across the US trapped in polygamy and other religious abusive situations, through a help line.

9. **The Coalition for Children**, East Falmouth, MA, mission is to enhance the well-being of children, families, and society by providing positive, effective, multidisciplinary and culturally diverse prevention programs.

10. **Stop the Silence: Stop Child Sexual Abuse**, Glenn Dale, MD, works to raise awareness and promote prevention and healing regarding child sexual abuse across the United States.

11. **The Rutherford Institute**, Charlottesville, VA, provides legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

12. **Feminist Majority Foundation**, Washington, DC, a research and public education organization dedicated to women's equality, including non-violence. They work to reduce violence, advocate for domestic violence shelters, rape crisis and sexual assault centers and assist to empower victims, frequently providing a voice for those unable to speak.

13. **National Black Church Initiative**, Washington, DC, a coalition of African-American and Latino churches working to eradicate racial disparities and provide vulnerable children with a voice.

14. **National Organization of Women Foundation**, Washington, DC, working to further women's rights through education and litigation. NOW Foundation has long advocated for the provision of services to victims of sexual violence, as well as measures to hold predators and those who shield them accountable under the law.

15. **Jewish Board of Advocates for Children**, Long Beach, NY, working to protect children from sexual, physical, and emotional abuse in religious communities, by advocating before legislatures and courts.

16. **Association for the Rights of Catholics in the Church (ARCC)**, Florissant, MO, advocates for the rights of Catholics in the Church based on Canon and civil law.

17. **Call to Action**, Chicago, IL, educates, inspires and activates Catholics to act for justice and build inclusive communities through a lens of anti-racism and anti-oppression and is concerned that those who come to them in confidence will no longer feel safe stepping forward if information about them might be subject to disclosure.

18. **Faith Trust Institute**, Seattle, WA, provides faith communities and advocates with the tools and knowledge they need to address the faith and cultural issues related to abuse.

19. **KidSafe Foundation**, Boca Raton, FL, provides prevention education to children, parents, teachers, and counselors to decrease child abuse.

20. **The Leadership Council on Child Abuse and Interpersonal Violence** (formerly the Leadership Council on Mental Health, Justice, and the Media), Bala Cynwyd, PA, provide professionals, officers of the court, and policy makers with the latest and most accurate scientific information on issues related to interpersonal violence.

21. **Survivors For Justice**, New York, NY, provides emotional support and legal assistance to victims of sexual abuse. Works to ensure that within insular Jewish community, abuse is dealt with in a manner that complies with secular law.

22. **Texas Association Against Sexual Assault**, Austin, TX, works to reduce sexual assault and provides hope, healing and justice to victims of sexual assault.

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 24-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, spanning 24 years, approved by the Circuit Court. Notably, this discovery is a violation of the anonymity and confidentiality of SNAP members, supporters, 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, in spite of the provision allowing for names and identifying information to be redacted, would require SNAP to provide members' private information, which is plainly unconstitutional. *See NAACP v. Alabama*, 357 U.S. 449 (1958).

Just requiring SNAP to produce the stories of victims and information it has obtained from victims, whistleblowers, witnesses, police, prosecutors, journalists, and others is in itself a violation of the right to freely associate. From SNAP's earliest beginnings in 1988, members made a sacred commitment to each other to maintain anonymity. Everything shared within, to, and between SNAP members is confidential. SNAP is a self-help support group with basic ground rules that everyone commits to. The first ground rule of the organization is that everything is confidential. Because the issues which bring the group together are related to sexual violence, assault, and abuse, the commitment to confidentiality is paramount. Almost no one would contact, share with, or join SNAP if privacy was not guaranteed. The deposition order along with the discovery order, if permitted to stand, could essentially destroy SNAP. There has already been significant harm done because many members have quit SNAP for fear that their private information might be turned over to church officials, or that others might

learn of their association with SNAP. The same harm has befallen whistleblowers, witnesses, police, prosecutors, journalists and others. Further, it has spread fear, preventing others from joining and seeking SNAP's help with their suffering and sharing information with SNAP that might help prevent future clergy sex crimes and cover ups.

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 other 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, even if names and identifying information is redacted. 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, volunteers, whistleblowers, witnesses, police, prosecutors, journalists and others. The deposition and subpoena of documents is essentially asking for correspondence regarding the highly personal and private matter of sexual abuse. In addition to their often-horrific experiences of abuse by clergy and betrayal and deceit by church officials, victims also often tell SNAP about the hurtful ways they responded to and tried to cope with their victimization – among them suicide attempts, eating disorders, drug and alcohol abuse, self-mutilation, difficulties in intimate relationships. Like the abuse itself, these painful experiences should be private. 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) (“[F]reedom 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*, 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. Even though Judge Mesle amended her order to redact names and identifying information, it does not change the fact that the information and communication that members, volunteers, whistleblowers, family members, witnesses, police, prosecutors, journalists and third-parties share with SNAP was assumed to be confidential, and that that promise will be violated if SNAP complies with the Judge’s order. Redacting the names from these communications does not remove the harm or make it less of a violation of the privacy and rights of individuals to communicate and associate with SNAP, or for the organization to obtain and keep information.

The strictest scrutiny must be applied to any judicial decision to interfere with the membership of a private organization, like SNAP, that engages in expressive association. 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, whistleblowers, family members, witnesses, police, prosecutors, journalists and numerous other third-parties associating privately with SNAP, the Court must show (1) a “compelling state interest” in the deposition of David Clohessy and the discovery requested of SNAP, and (2) 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 ongoing 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 24-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., only a set of interrogatories in which four questions dealt with SNAP, 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 victims, whistleblowers, family members, witnesses, police, prosecutors, journalists and others associated with SNAP and, as a result, will forever chill speech by SNAP and its membership.

Survivors and volunteers, whistleblowers, family members, witnesses, police, prosecutors, journalists and others 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.* This “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 proposed discovery in this case 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, whistleblowers, family members, witnesses, police, prosecutors, journalists and current church employees, all people whose employment and relationships might be jeopardized should their identities be disclosed. If the Circuit Court’s proposed discovery were to go forward, it 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 chilling of 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, and provided support, counseling, and a voice for countless survivors for 24 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 also 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, whistleblowers, family members, witnesses, police, prosecutors, journalists and others 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 Advocate on Matters of Sexual Abuse in the Press.

Sometimes, SNAP helps victims involved in the civil or criminal processes who want to warn others about child molesters. SNAP's ability to respond to and help the media in child sex cases is a core part of the group's mission to "protect the vulnerable" by educating the public about abuse, and the group's mission to "heal the wounded" by exposing long-secret and unhealthy cover ups. It is a public service and public safety role that is founded on free speech principles. The court's April 23, 2012 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, whistleblowers, family members, witnesses, police, prosecutors, journalists and others. 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. The Circuit Court's proposed discovery would reveal the identity of thousands of sexual abuse victims, volunteers, whistleblowers, family members, witnesses, police, prosecutors, journalists and witnesses from all over the nation. It would violate their privacy rights and, in many cases, jeopardize their jobs, relationships, and 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 families 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. Removing the names of victims or other identifying information does not lessen the violation of rights; even if the names of individuals are removed, other information included in documents will be sufficient for some church officials, family members, and others to determine an individual’s identity.

The ruling in this case not only impacts SNAP and its members, whistleblowers, family members, witnesses, police, prosecutors, journalists and others but all groups who provide advocacy, information, support, and friendship to victims of sexual violence. Privacy is paramount for all the other groups, as well as others similarly situated, who provide services to victims of sex crimes. If the privacy rights of victims, family members, supporters, and whistle-blowers who contact SNAP are compromised, the same could happen to other groups too.

CONCLUSION

All of the foregoing are arguments of significant constitutional importance. If the Deposition of David Clohessy goes forward, 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 rights of thousands of family members, whistleblowers, concerned Catholics, reporters, researchers, law enforcement officials, advocates, and others would also be violated and/or compromised. 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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