

that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment.”) *Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp. 2d 1186, 1204 (D. Wyo. 2002) (“the Supreme Court has long understood that implicit in the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”)

This Court may impose on SNAP’s expressive association rights only if it can be shown that the reason for doing so satisfies a “compelling state interest” and is the least restrictive means of achieving that compelling interest. *Dale*, 530 U.S. 648; *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (“The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”); *American Constitutional Law Found. v. Meyer*, 120 F.3d 1092, 1100 (10th Cir. 1997) (“Under an equal protection analysis, classifications that impinge upon the exercise of a fundamental right are subject to the most exacting scrutiny.”); *National Commodity & Barter Ass’n*, 31 F.3d at 1528 (“To overcome the deterrent effect on association rights resulting from compelled disclosure of membership lists, the government must demonstrate a compelling interest, . . . and a substantial relationship between the material sought and legitimate governmental goals. . . .”) (internal citations omitted).

As Fr. Tierney’s filings in this matter admit, his chief reason for serving this broad subpoena upon Clohessy is to determine whether extrajudicial statements were made by Plaintiff’s counsel in contravention to the August 2, 2011 Order. Even assuming, *arguendo*, that there is a compelling interest in requiring SNAP to produce voluminous documentation regarding its contact with victims and/or submitting to a deposition, there are certainly less

restrictive means possible for Fr. Tierney to determine whether the August 2, 2011 Order was violated by Plaintiff's counsel—particularly where neither SNAP nor Clohessy is a party to this lawsuit. Because this is Fr. Tierney's stated reason for his overbroad subpoena, Clohessy requests this Court reconsider its November 29, 2011 Order altogether.

5. The Court observes that “[t]here are . . . legitimate concerns raised about possible violations of RSMo § 455.003,” and seeks to remedy Fr. Tierney's sought violation of RSMo § 455.003 by providing that a privilege log be provided to Hon. Judge Mesli, but that the records themselves not be provided so as not to violate § 455.003's prohibition of disclosure of confidential information.

6. Further, however, the Court's Order provides that “either party may request that deposition, or portions thereof, be taken under seal.”

7. RSMo § 455.003 states as follows, in its entirety, with emphasis added:

1. A rape crisis center shall:
 - (1) Require persons employed by . . . the rape crisis center to maintain confidentiality of any information that would identify individuals served by the center and any information or records that are directly related to the advocacy services provided to such individuals; and
 - (2) Prior to providing advocacy services, inform individuals served by the rape crisis center of the nature and scope of the confidentiality requirements of subdivision (1) of this subsection.
2. Any person employed by or volunteering services to a rape crisis center for victims of sexual assault shall be incompetent to testify concerning any confidential information in subsection 1 of this section, unless the confidentiality requirements are waived in writing by the individual serving the center.
3. As used in this section, the term “rape crisis center” shall mean any public or private agency that offers assistance to victims of sexual assault . . .

8. Because of RSMo § 455.003's strict prohibition on disclosure of any information

that would reveal the identity or in any way violate the confidentiality of victims who have chosen to bring their struggles to SNAP's doors, Clohessy requests that this Court clarify its protective order to the effect that any subject that would require Clohessy to violate RSMo § 455.003's restrictions is strictly prohibited from discovery in any deposition that eventually takes place. The clear language of RSMo § 455.003 supports such an Order, as it states that Clohessy "shall be incompetent to testify concerning any confidential information." RSMo § 455.003.2. Allowing a deposition on matters that reveal confidential information violates the privacy interests of the victims RSMo § 455.003 is designed to protect, whether the deposition is taken under seal or not. This request is in the event this Court does not reconsider and quash Fr. Tierney's subpoena altogether.

9. Further, Clohessy requests in the alternative that this Court order that any deposition be postponed until responsive documents and their corresponding privilege log are produced to this Court for review. As this Court is aware, numerous lawsuits have been filed against clergymen by victims who have sought SNAP's assistance. Requiring a representative of SNAP to submit to lengthy deposition questioning threatens SNAP's very existence in that SNAP is a not-for-profit organization with limited resources and staff. Specifically, SNAP has only three professional staff members that might testify in response to such a subpoena. A separate reason this threatens SNAP's existence is that survivors may lose trust in the confidentiality of information they provide to SNAP if this Court fails to quash or appropriately limit Fr. Tierney's subpoena. Providing documents in compliance with this Court's Order for Hon. Judge Mesli's review *in camera* already imposes an enormous burden on SNAP. It behooves this Court to reconsider the implications of allowing such a deposition to go forward in light of the burden this would impose on this non-party organization, and to allow SNAP to provide the parties with any discoverable information in the least restrictive means possible.

10. In the event this Court does not reconsider altogether and quash Fr. Tierney's subpoena, Clohessy requests this Court to clarify its position with respect to communication with the media. As this Court reiterated in its November 29, 2011 Order with regard to its August 2, 2011 Order, "Nothing in that order prevented SNAP from speaking on issues pertaining to the litigation or the parties." Now, though, SNAP finds itself arguably ordered to produce any correspondence to or from members of the press on this very issue. Clohessy reiterates that this speech is clearly protected by the First Amendment, and production of all communication with members of the press chills SNAP's ability to effectively advocate for victims who have requested its assistance. In the alternative, if the Court is in fact ordering communication between SNAP and the media, Clohessy requests such discovery be limited to the timeframe during which this Court's August 2, 2011 Order could have possibly been violated—only from August 2, 2011 until the present. As Fr. Tierney's responsive suggestions plainly state, Fr. Tierney seeks these records in an attempt to determine whether Plaintiff's counsel had contact with the media that might violate this Court's August 2, 2011 Order. Leaving aside that this burden should not be borne by SNAP, it is clear that the Court's Order could not have possibly been violated prior to its issuance, so it is patently unreasonable to require SNAP to produce such communications prior to August 2, 2011—requiring such production contradicts the August 2, 2011 Order itself.

11. In the event this Court does not reconsider altogether and quash Fr. Tierney's subpoena, Clohessy also requests this Court to reconsider on the basis of the overbreadth of the subpoena. A review of the eight categories Clohessy would be required to produce for this deposition reveals no temporal limitations whatsoever. In addition, the eighth request regarding "[a]ny correspondence, including but not limited to electronic mail, to or from members of the public that discusses or relates to repressed memory," is so vague and overbroad, it seemingly

has no temporal or geographic limitations. Clohessy requests that this Court reconsider its denial of Clohessy's motion to quash Fr. Tierney's subpoena, and specifically asks this Court to consider imposing two limitations on the materials to be provided: (1) this Court should impose a temporal limitation to all eight of Fr. Tierney's requests of not more than five years prior to issuance of the subpoena; and (2) this Court should impose a geographical limitation of only documents on Clohessy's possession pertaining to the Diocese of Kansas City-St. Joseph.

12. Counsel for Clohessy has contacted counsel for Fr. Tierney, and by consent the deposition previously scheduled for December 8, 2011 has been postponed until on or about January 2, 2011. Clohessy further requests this Court for an Order that instead of submit to deposition, Clohessy provide the privilege log and documents previously ordered by this Court by this date, January 2, 2011. Once the Court has made its determination with respect to these documents, the Court will be better situated to rule with respect to Clohessy's request that deposition not be had in this matter.

13. Clohessy requests an oral argument on this matter.

WHEREFORE, David Clohessy requests the Court Reconsider and Clarify its Protective Order in this matter and grant Clohessy the aforementioned relief.

Respectfully Submitted,

JENSEN, BARTLETT & SCHELP, LLC

By: _____


Jeffrey B. Jensen, #46745
Matthew P. Diehr, #61999
Attorneys for David Clohessy
222 S. Central Ave, Suite 110
St. Louis, MO 63105
314-725-3939
314-725-5595 Facsimile
JJensen@jbslawyers.com
MDiehr@jbslawyers.com

CERTIFICATE OF SERVICE

I hereby certify that this 6th day of December, 2011, a true and correct copy of the above and foregoing was served by First Class Mail, postage prepaid, to:

Rebecca M. Randles
Dan Curry
Randles, Mata & Brown, LLC
406 W. 34th Street, Suite 623
Kansas City, MO 64111
Attorneys for Plaintiff

Jonathan R. Haden
Mara H. Cohara
Chad Blomberg
Lathrop & Gage, L.C.
2345 Grand Blvd., Suite 2200
Kansas City, Mo. 64108
Attorneys for Defendant Catholic Diocese of Kansas City-St. Joseph

Brian J. Madden
Diane K. Watkins
Adam S. Davis
Wagstaff & Cartmell, LLP
4740 Grand Ave., Suite 300
Kansas City, MO 64112
Attorneys for Defendant Father Michael Tierney



Matthew P. Diehr, #61999