SUPREME COURT OF MISSOURI

DAVID CLOHESSY,

Relator,

Appeal No. _____

v.

**THE HONORABLE ANN MESLI,
CIRCUIT COURT JUDGE,
DIVISION 7, MISSOURI CIRCUIT
COURT, 16TH JUDICIAL CIRCUIT,
JACKSON COUNTY, MISSOURI**

Respondent.

BRIEF OF MALESURVIVOR AND CARDOZO ADVOCATES FOR KIDS IN SUPPORT OF REALTOR'S PETITION FOR WRIT OF PROHIBITION

INTEREST OF AMICI CURIAE

MaleSurvivor (National Organization on Male Sexual Victimization) has provided support to male victims of sexual abuse and their loved ones since 1995. Through our website, Weekends of Recovery program, and International Conferences we have supported the healing efforts of hundreds of thousands of survivors and the professional who work with them. We provide a confidential and safe online place for victims of sexual abuse to come for information and support as they seek options for healing from the devastating impact of sexual abuse. MaleSurvivor has an interest in this case due to the organization's support of all male survivors of sexual abuse and the organizations that work to assist and support them. A ruling against SNAP in this case

could have potentially disastrous results for our organization and others that promote healing by providing safe, and confidential spaces for survivors to communicate with one another and find support for their healing.

The Cardozo Advocates for Kids ("CAKids") was founded in 2008 at the Benjamin N. Cardozo School of Law in New York City. The student-led organization aims to facilitate social, political and institutional change in order to bring justice for victims of childhood sexual abuse. Through lobbying representatives, hosting academic events, fostering relations between scholars and the community, and initiating grassroots action, the organization hopes to bring about awareness and results. CAKids also maintains a website, sol-reform.com, which provides information and resources about reforming state statutes of limitations for victims of sexual abuse. CAKids has an interest in this case due to the organization's efforts in pursuing justice and concrete policy changes for the benefit of abuse victims, including both children and vulnerable adults.

SUMMARY OF ARGUMENT

Amicus curiae MaleSurvivor and CAKids file this brief in support of SNAP to underscore the important First Amendment rights to association that are threatened by the lower court's order to SNAP to produce confidential documents and membership information regarding child sex abuse victims. This case is not only important for SNAP and all victims' groups, but all non-profit charitable groups that labor to protect victims of crime. If the court's order forcing disclosure of SNAP's records goes forward in this case, every victim will fear speaking and fear joining together for mutual support. It will also empower those institutions like Pennsylvania State University and numerous private organizations, to use the courts to disable those who operate to cover up child sex abuse.

For these reasons, MaleSurvivor and CAKids asks this Court to grant review of this important First Amendment issue at this time.

ARGUMENT

I. Under the First Amendment, one has a right to associate with others and organizations have a right to prevent compelled disclosure of members and their activities

"It is beyond debate 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, which embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The government may not, without strong justification, demand membership information and confidential communications, particularly when those communications are intended to aid crime victims. The Survivors Network of those Abused by Priests ("SNAP") is just one of many organizations whose public service is made possible by the First Amendment's right of association. All private, non-profit organizations need such a sphere of liberty in order to protect their members and their mission, which is critical to the health of this society.

The discovery order entered in this case pursuant to the St. Louis Archdiocese's fishing expedition into SNAP is a potent threat against all non-profit charities and private organizations whose mission is to safely, and confidentially, help those who are threatened or in crisis. As in *NAACP v. Alabama***,** 357 U.S. 449, 462 (1958), compelled disclosure of membership information is likely to "induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their

beliefs shown through their associations and of the consequences of this exposure." Without the right of association, groups formed for mutual aid and comfort against a common enemy can be decimated. It was true for the NAACP in the deep South, and it is equally true for SNAP and the Catholic bishops and dioceses.

As one court has recognized, there is a vital relationship between "freedom to associate and privacy in one's associations." *Britt v. Superior Court*, 574 P.2d 766, 771 (Cal. 1978). This "vital relationship" would be torn apart should disclosure be required. Production of the names and documents desired by the Archdiocese will infringe on the First Amendment right of association by chilling speech between victims and those who use the services of SNAP and other crisis center organizations. Requiring disclosure of the fact of membership where anonymity is desperately needed directly interferes with the internal affairs of the organization and the achievement of the very purposes for which it was formed. *See Roberts v. United States Jaycees*, 468 U.S. 609, 622–23 (1984); *State v. Schnabel*, 952 A.2d 452, 462 (N.J. 2008) (noting five behavior patterns of child sex abuse victims: secrecy, helplessness, entrapment and accommodation, delayed reporting, and recantation); *Hardwicke v. Am. Boychoir Sch.*, 902 A.2d 900, 920 (N.J. 2006); *see also* Thomas D. Lyon, Nicholas Scurich, Karen Choi, Sally Handmaker & Rebecca Blank, *"How Did You Feel?": Increasing Child Sexual Abuse Witnesses' Production of Evaluative Information*, LAW & HUM. BEHAV. (Feb. 6, 2012), http://works.bepress.com/thomaslyon/80; Guy R. Holmes, *See No Evil, Hear No Evil, Speak No Evil: Why Do Relatively Few Male Victims of Childhood Sexual Abuse Receive Help for Abuse-Related Issues in Adulthood?*, 17(1) CLINICAL PSYCHOL. REV. 69, 69-88 (1997).

The disclosure order in this case foments fear and intimidation of victims, which in turn threatens all private organizations dedicated to serving victims of crime. Fear is a weapon that censors speech and shuts down organizations. *See Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) ("[F]ear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organizations and induced former members to withdraw. . .the threat of substantial government encroachment upon important and traditional aspects of individual freedom is neither speculative nor remote."). Fear of *public identification* itself is the reason children and witnesses confide in organizations like SNAP. SNAP and similar organizations provide a safe forum for them to seek help.

Discussions between counselors and victims, including pertinent information such as names, addresses, employers, and relatives, promote victim crisis management during a victim's most emotional times. Without extending First Amendment protection to these crucial interactions, victims will be silenced and their freedom to associate with any type of charity or support group will be curtailed. We are at a moment in history when child sex abuse victims are finally being heard and treated with respect. For the courts to enable organizations that have much to lose if the truth is revealed is an affront to the most important public purposes.

Here, the risk of deterring victims from coming forward and confiding in SNAP and similar organizations is great. Harassment and retaliation against children and witnesses who speak out against priests and Church officials is a serious and well-documented threat. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 969 (9th Cir. 2004); *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947-48 (9th

Cir. 1999); *McKelvey v. Pierce*, 800 A.2d 840, 857-58 (N.J. 2002); *see* Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225 (2007).

The Supreme Court has found that when disclosure of membership lists results in "reprisals against and hostility to members, disclosure is not required." *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961). The Archdiocese in this case cannot satisfy the First Amendment standard mandated to compel such information.

II. The Court Order Compelling Discovery Cannot Survive the Required Strict Scrutiny Analysis and Therefore Violates the First Amendment

Although the First Amendment does not normally restrict the actions of purely private individuals, it is applicable in the context of discovery orders, even if all of the litigants are private entities. In this case, for example, the Circuit Court's decision compelling discovery provides the requisite state action that invokes First Amendment scrutiny. *See NAACP v. Alabama*, 357 U.S. 449, 463 (1958); *see also Shelley v. Kraemer*, 334 U.S. 1, 14-15 (1948). This discovery request may have "the effect of curtailing the freedom to associate" and thus "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. at 460-461. That means that the court's order compelling SNAP to produce internal communications and membership information must serve a compelling state interest and be narrowly tailored. *See Roberts*, 468 U.S. at 623 ("'the right to expressive association" may be "overridden '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.'"); *Brown v. Socialist Workers '74*

Campaign Committee, 459 U.S. 87 (1982) (explaining "the right to privacy in one's political associations and beliefs will yield only to a 'subordinating interest of the State [that is] compelling,' and then only if there is a 'substantial relation between the information sought and [an] overriding and compelling state interest.'").

The government cannot establish a compelling government interest in this case. SNAP is not a litigant in the case, and is not the object of the court's concern below, whether counsel to the victim violated a court-ordered gag order. There are certain instances where government interests trump the private associational freedoms of individuals and organizations. *See Marshall v. Bramer*, 828 F.2d 355 (6th Cir. 1987) (upholding a subpoena to produce a Ku Klux Klan membership list and noting the Klan's history of racially motivated violence and the close connection of the context of the subpoena, which was the investigation of an arson in which Klan emblems were found on the lawn of a burned home, to the membership disclosure.) This is not one of them. Rather, the documents sought will reveal no crime, no hidden agenda, nor any relevant fact to the litigation at bar. The request was a fishing expedition intended to intimidate and the government has no interest, let alone a compelling interest, in following the desires of the Archdiocese in this case.

Furthermore, compelling thousands of documents spanning a 24-year period is in no way the least restrictive means to satisfy this patently erroneous issue. *See generally Shelton v. Tucker*, 364 U.S. 479 (1960) (striking down a requirement that teachers list every organization to which they had belonged within the preceding five years, noting that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the

end can be more narrowly achieved."); *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (noting as to least restrictive means under strict scrutiny analysis that even where compelling governmental interest exists "[i]n the past, this 'means' test has been virtually impossible to satisfy").

In order to survive strict scrutiny, "[t]he gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights." *Elrod v. Burns,* 427 U.S. 347, 363 (1976); *see also Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507, 519 (1950) (compulsion must "not significantly add to burdening of free speech"). The harm that will be inflicted on all potential and current victims and victim crisis organizations if this discovery motion is upheld far outweigh any benefits that could be derived from it.

CONCLUSION

This Court should grant the petition for review in this case to address the serious First Amendment issues raised by the court's order below.

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