IN THE SUPREME COURT OF THE STATE OF OREGON

JACK DOE 1, an individual proceeding under a fictitious name; JACK DOE 2, an individual proceeding under a fictitious name; JACK DOE 3, an individual proceeding under a fictitious name; JACK DOE 4, an individual proceeding under a fictitious name; JACK DOE 5, an individual proceeding under a fictitious name; JACK DOE 6, an individual proceeding under a fictitious name,

Plaintiffs,

v.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a foreign corporation sole registered to do business in the State of Oregon; CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AND SUCCESSORS, a foreign corporation sole registered to do business in the State of Oregon,

Defendants,

and

BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in Oregon; and CASCADE PACIFIC COUNCIL, BOY SCOUTS OF AMERICA, an Oregon non-profit corporation,

Supreme Court No. S058601 (Control)

Multnomah County Circuit Court No. 0710-11294

MANDAMUS PROCEEDING

BRIEF OF AMICI CURIAE NATIONAL CENTER FOR VICTIMS OF CRIME, SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS, JEWISH BOARD OF ADVOCATES FOR CHILDREN, INC., CHILD PROTECTION PROJECT, CHILD VICTIMS VOICE, CRIME VICTIMS UNITED, OREGON ABUSE ADVOCATES AND SURVIVORS IN SERVICE, OREGON ANTI-CRIME ALLIANCE, AND OREGON TRIAL LAWYERS ASSOCIATION

October 2010

Defendants-Adverse Parties,

and

THE ASSOCIATED PRESS, THE OREGONIAN, OREGON PUBLIC BROADCASTING, THE NEW YORK TIMES, KGW, and COURTHOUSE NEWS SERVICE,

Intervenors-Relators.

JACK DOE 1, an individual proceeding under a fictitious name; JACK DOE 2, an individual proceeding under a fictitious name; JACK DOE 3, an individual proceeding under a fictitious name; JACK DOE 4, an individual proceeding under a fictitious name; JACK DOE 5, an individual proceeding under a fictitious name; JACK DOE 6, an individual proceeding under a fictitious name,

Supreme Court Case No. S058634

Plaintiffs-Adverse Parties,

v.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a foreign corporation sole registered to do business in the State of Oregon;

CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AND SUCCESSORS, a foreign corporation sole registered to do business in the State of Oregon; and CASCADE PACIFIC COUNCIL, BOY SCOUTS OF AMERICA, an Oregon non-profit corporation,

Defendants,

and

BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in Oregon,

Defendant-Relator.

and

THE ASSOCIATED PRESS, THE OREGONIAN, OREGON PUBLIC BROADCASTING, THE NEW YORK TIMES, KGW, and COURTHOUSE NEWS SERVICE,

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I. INTRODUCTION

Amici, National Center for Victims of Crime, Survivors Network of those Abused by Priests, Jewish Board of Advocates for Children, Inc., Child Protection Project, Child Victims Voice, Oregon Abuse Advocates and Survivors in Service, Oregon Anti-Crime Alliance, Crime Victims United, and Oregon Trial Lawyers Association (hereinafter "Amici"), respectfully submit this brief to assist the Court in its decision in this case.

The relators to these consolidated mandamus actions—Defendant-Petitioner Boy Scouts of America ("BSA" or "Defendant BSA") and the Associated Press *et al*. ("Media Intervenors")—each view a different Oregon case as dispositive, reach mutually exclusive results, and admit no compromise. In this brief, Amici suggest to this Court that Judge Wittmayer correctly discerned the contours of Article I, Section 10's open courts provision by synthesizing and harmonizing case law and public policy in a matter of first impression, and urge this Court to uphold his decision in its entirety.

II. CONCISE HISTORY AND PROCEDURAL POSTURE

In February of this year, this Court denied BSA's petition for mandamus to prevent the Plaintiffs in this case from receiving the unredacted "Perversion" subset of BSA's "Ineligible Volunteer" files from 1965 through 1985 ("IV files"). *Jack Doe 1 et al. v. Corporation of the Presiding Bishop et al.*, S058150

(mandamus denied, February, 2010). Those same 1,247 files, of which over 1,000 involved allegations of child abuse, are at issue in this mandamus proceeding, having been admitted in their entirety, unredacted, during the course of the trial of Kerry Lewis's[1] claims against BSA.

During the trial the IV files were discussed by the parties in open court, and the contents of the files—including the names of perpetrators—served as the basis for direct and cross examination. During the punitive damages phase of the jury, the files were the linchpin for demonstrating BSA's reprehensibility and its knowledge of the danger posed by identified Scout leaders.

In the first phase of the trial, the jury returned a compensatory damages award of $1.4 million in favor of Kerry Lewis, ascribing 60% of the fault to BSA, and found BSA liable for punitive damages. In the second phase of the trial, the jury awarded $18.5 million in punitive damages to plaintiff. In both phases of the trial, the IV files were key evidence.

This mandamus action challenges the trial court's order vacating a protective order and authorizing the post-trial release of the IV files to the public, subject to the redaction of the names of victims and those who reported the abuse.

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[1] During the course of the trial, Kerry Lewis, who had previously been identified as "Jack Doe 4" during the litigation, chose to allow himself to be publicly identified by his true name.

III. ARGUMENTS OF AMICI

A. Summary of Argument.

Amici submit that the trial court's ruling should be upheld in its entirety. The Oregon Constitution requires that evidence admitted in court be open to the public. That constitutional policy is consistent with the interests of the public in exposing the institutional secrecy that has resulted in the abuse of countless children. The trial court correctly concluded that while Article I, section 10 generally requires public access to exhibits admitted in a trial, it does not foreclose the redaction of information that is immaterial to the evidentiary purpose of the exhibits but that implicates privacy or other important interests of non-parties.

B. The Trial Court's Order Releasing the IV Files was Proper under Article I, Section 10 of the Oregon Constitution and Served the Public Interest.

1. The Trial Court's Ruling was Consistent with Article I, Section 10 of the Oregon Constitution.

Article I, section 10 provides, “No court shall be secret, but justice shall be administered, openly and without purchase[.]” Oregon courts have taken an opportunity to examine this “open court” provision in situations analogous to the one at hand, though none has addressed the precise question before the Court.

By its terms, Article I, section 10 applies to all “administration of justice” in Oregon courts. *See State ex rel. Oregonian Publishing Co. v. Deiz*, 289 Or 277, 282 (1980) (“Art. I, § 10 * * * provides flatly that no court shall be secret and

justice shall be administered openly"). In *Oregonian Publishing Co. v. O'Leary*, 303 Or 297, 302, 736 P.2d 173 (1987), this Court stated, "In order to be constitutional, a proceeding must either not be secret or not 'administer justice' within the meaning of section 10." The Court went on to hold that Article I, Section 10's guarantee actually:

> "goes far beyond the presentation of admissible evidence at trial. Open justice 'serves to assure accountability for the charge not prosecuted, the reduced plea accepted, the evidence used or not used.' *See State ex rel. Oregonian Publishing Co. v. Deiz*, 289 Or 277, 289, 613 P2d 23 (1980)] (Linde, J., concurring). There is nothing in section 10 or this court's prior decisions to suggest that public access should be limited to the presentation of admissible evidence."

Oregonian Pub. Co. v. O'Leary, 303 Or at 304.

Amici agree that a blanket exclusion of the public and press violates Article I, Section 10. *Deiz*, 289 Or at 284 (statue allowing exclusion of press from juvenile proceedings was unconstitutional). Likewise, where testimony is relevant to the adjudication of a case, the public and press may not be excluded from a show cause hearing to determine if the testimony is privileged against disclosure. *O'Leary*, 303 Or at 302. In other words, "Section 10 thus mandates not only honest and complete and timely justice, but justice that can be seen to be so during and after the event." *O'Leary*, 303 Or at 301 (citation and internal quotation marks omitted).

Turning to the specific issue of public access to evidence, this Court has noted that "[t]he fundamental function of courts is to determine legal rights based upon a presentation of evidence and argument." *O'Leary*, 303 Or at 303. In fact, under *O'Leary*, public access to evidence is a necessary but not sufficient criterion for measuring the constitutionality of judicial proceedings. As quoted above, this Court corrected the Court of Appeals' more limited holding guaranteeing access to the presentation of evidence:

> "The Court of Appeals also based its decision on its conclusion that 'the public's right to open courts only encompass[es] the right of public access to relevant and admissible evidence.' * * * But the importance of visibility in the administration of justice goes far beyond the presentation of admissible evidence at trial. * * * There is nothing in section 10 or this court's prior decisions to suggest that public access should be limited to the presentation of admissible evidence."

O'Leary, 303 Or at 304. In so doing, this Court also rejected the use of a balancing test when determining access to the administration of justice:

> "But even assuming that the witness has a secrecy interest, it cannot limit the unqualified command of section 10 that justice shall be administered openly. The government cannot avoid a constitutional command by 'balancing' it against another of its obligations."

O'Leary, 303 Or. at 305.

The importance of public access to the judicial process is reflected in rulings in other courts as well. *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3rd. Cir. 1988) (stating that "[p]ublic access serves to promote trustworthiness of the judicial

process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness."); *U.S. v. Graham*, 257 F.3d 143 (2nd Cir. 2001) (finding a strong presumption of public access and copying to any document relied on during a judicial proceeding). These and other rulings reflect the wide acceptance of the principle that justice requires openness. *E.g.*, *National Organization for Marriage v. Mckee*, 2010 WL 3364448, *3 (D.Me. 2010) ("a party seeking to keep trial evidence secret bears the burden of showing that the material is the kind of information that courts will protect and that there is good cause for the order to issue'") quoting *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir.2006); *U.S. v. Massino*, 356 F.Supp.2d 227, 231 (E.D.N.Y. 2005) (" because materials admitted into evidence and presented to the trier of fact are presumed to bear directly on the outcome of a trial, the presumption of public access is at its strongest when courts consider whether the public should have access to trial evidence"); *Carr v. Forbes, Inc.*, 121 F.Supp.2d 485, 497 (D.S.C. 2000) (holding that "the burden of demonstrating that justice requires the denial of access to court records falls squarely on the party" that seeks denial of the common law rule).

The IV files were admitted into evidence as proper documentary exhibits. *C.f. State ex rel KOIN-TV v. Olsen*, 300 Or 392, 711 P.2d 966 (1985) (videotape of testimony played in open court at trial was not a proper exhibit, and the trial judge

did not abuse his discretion in refusing a media request for a copy of the videotape). As such, they were subject to Section 10's openness command, and the trial court was therefore correct in vacating the protective order.

2. The Trial Court's Ruling Was Consistent with Public Policy.

Even in the absence of a constitutional requirement to release the IV files, the public’s interest in their release outweighs any purported benefits from keeping them secret. There are at least four benefits from the release of the files: (1) it will help victims in their healing process; (2) it will further the public discussion and recognition of child abuse; (3) it will force BSA and institutions like BSA to cease their denial of a problem with abuse in institutions of trust; and (4) it will weaken the ability of child molesters to rely upon secrecy and society’s desire to avoid embarrassing facts by showing that their evil will come to light.

a. Release of the Files Will Allow Victims to Know They Are Not Alone and Begin the Healing Process.

First, release of the files—with the victims’ names redacted under the Court’s inherent authority to craft relief, as was ordered by the trial court—will begin the healing process for an untold number of child abuse victims. The sight of an abuser’s name in the media and the knowledge that the victim is not alone are both common triggers for abuse victims to begin processing their abuse, and in this way, to begin the healing process.

A child who is abused by a trusted adult is left in a netherworld of isolation, shame and secrecy. *See* Mike Lew, *Victims No Longer* 161 (2004) ("Secrecy is the cement that holds child abuse firmly in place"). As one author put it,

> "Childhood sexual abuse is the darkest of secrets, relegated to silence through the most vile forms of trickery, threats and abuse of trust. Since the molester frequently is a role model or other trusted figure . . . the child is reluctant to act contrary to any demands placed upon her. . . . Thus, the child's dependency and innocence are abused to prevent recognition or revelation of the abuse. For many children trapped in the netherworld of sexual abuse, revealing the secret is never an option."

Rebecca L. Thomas, *Note, Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 Wake Forest L Rev 1245, 1250 (1991).

As might be expected, "chronic child abuse promotes avoidance behaviors," and secrecy reinforces that desire to wall off the abuse. John Briere, *Psychological Assessment of Child Abuse Effects in Adults*, in Assessing Psychological Trauma and PTSD 540–41 (Wilson and Keane eds. 2004).[2] Secrecy

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[2] In fact, most children never tell anyone that they have been abused. This process is known in professional literature as "child sexual abuse accommodation syndrome (CSAAS), a theoretical model that posits that sexually abused children frequently display secrecy, tentative disclosures, and retractions of abuse[.]" Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell us About the Ways That Children Tell?* 11 Psychol Pub Pol'y & L 194, 195 (2005). In a review of eleven studies of child sex abuse disclosure rates, "the modal childhood disclosure rate (in 6 of the 11 studies) is just over 33%." *Id.* at

usually ends up sealing off the abuse for years, as coping mechanisms often cause a child not to realize or experience the injuries resulting from sexual abuse for many years, until the symptoms are forced into plain view by a developmental or therapy-induced "trigger." Thomas, *Adult Survivors,* at 1255.[3] Experience of victims has shown that one of these triggers is seeing the name or picture of the abuser in the media, causing a realization that the victim was not the only one. It is only when the victim breaks through that secrecy, and acknowledges that the abuse happened and had an impact on her life that the healing can begin. *See* Lew, *Victims No Longer* at 168 ("Survivors and the therapists that work with them insist that [disclosure] is the essential first step toward recovery"); Judith Herman, *Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to*

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199. That means of the adults willing to admit being abused as children, only one-third reported it at the time.

[3] In addition to adult sexual activity, things such as a job promotion or the victim's child reaching the age at which the victim was abused have been noted as triggers. Thomas, *Adult Survivors* at 1254 n78, *also citing Evans v. Eckelman*, 265 Cal. Rptr. 605 (Cal App 1990) (oldest child's psychological blocking mechanisms broke down when he was convicted of sexual assault and ordered to undergo therapy); *K.E. v. Hoffman*, 452 N.W.2d 509 (Minn.1990) (memories of sexual abuse resurfaced while adult survivor was serving in Army); *Meiers-Post v. Schafer*, 427 N.W.2d 606 (Mich Ct App 1988) (thirty year old's repression of sexual relations with high school teacher unearthed while watching television show on sexual exploitation of students by teacher); *Hammer v. Hammer*, 418 N.W.2d 23 (Wisc Ct App 1987) (victim discovered psychological damage when she realized sister was to inherit position as father's lover). *See also Jasmin v. Ross*, 177 Or App 210, 212-13, 33 P.3d 725 (2001) (recognition of injury from abuse by romantically involved step-uncle triggered by discussions with high school confidant).

Political Terror 98 (1992) (overcoming secrecy is literally the first step to obtaining any kind of remedy for sexual abuse because sexual abuse thrives on secrecy).

The IV files are, as presented in open court, full of information about confirmed and/or even convicted abusers. They are—as was seen at trial—extensive records cataloguing abusers, in some cases around the country. Given the nature of child abuse, the bonds of secrecy, and the delay in disclosure, it is likely that there are thousands of victims who remain locked in avoidance and denial -- imprisoned by the continuing veil of secrecy -- who can be helped by the publicizing of these files. Setting aside any questions of Oregon's constitutional right to evidence, the interest of victims supports public access to such evidence in a judicial proceeding . Truly, "[s]ecrecy plays into the dynamics that make the offense possible in the first place." Ross E. Cheit, *Tort Litigation, Transparency, and the Public Interest*, 13 Roger Williams U. L. Rev. 232 (2008).

b. Release of the Files Will Assist Society in Recognizing and Preventing Abuse.

Second, release of the files will allow society to continue its ongoing confrontation with the reality of child abuse, and thereby help to recognize and reduce the prevalence of child sexual abuse.

Sadly, child sexual abuse is not uncommon. *See* John E.B. Meyers, 1 *Evidence in Child Abuse and Neglect Cases* §5.2 at 414 n. 23 (3d ed. 1997) ("as

many as 10% to 15% of boys and 20% to 25% of girls experience" some abuse before age 18), quoting Friedrich, et al., *Normative Sexual Behavior in Children*, 88 *Pediatrics* 456, 462 (1991). With the publicity accompanying this case and others like it, it has become more accepted in society that child abuse claims are legitimate and represent a not-uncommon experience of many people. Of course, the key to education in this area is exposure. *See* Jan Rispens, André Aleman, Paul P. Goudena, *Prevention of Child Sexual Abuse Victimization: A Meta-analysis of School Programs*, 21 Child Abuse & Neglect 975 (1997).

The IV files are a resource for parents and others interested in protecting the welfare of children. They provide unusually valuable insights into child abuse and the behavior of molesters that is unparalleled in scope, time span, and geography. They contain, in essence, a nationwide survey of the behavior of abusers and victims, and some even follow the actions of some abusers over a long period of time. Quite simply, there is no other database as valuable as the Boy Scouts' IV files for purposes of educating the public about the pervasiveness of child sex abuse and the sad fact that children can be in danger in organizations that have earned our trust. Attention and access to this resource can only serve to improve child abuse awareness and prevention, as well as to give professionals a unique insight into better methods of preventing child abuse. For its research value alone, this Court should release the files to the general public.

c. Release of the Files Will Help to End the Boy Scouts' Ability to Deny its Child Abuse Problem.

Third, release of the files will make Scouting safer by forcing the Scouts to publicly and forthrightly admit to the problem of abuse in their ranks and to take responsibility for the damage that Scouting has caused to thousands, if not tens of thousands, of boys. This will ensure a heightened institutional awareness and, hopefully, an intolerance of abusive or potentially abusive behavior.

By its punitive damages verdict, the jury in this case found that BSA failed to take responsibility for the massive problem of molestation in Scouting. The evidence showed that even today, the Boy Scouts' training materials fail to mention anywhere the specific danger of molestation by Scout volunteers. Despite more than 1,000 files spanning a 20 year period that contain evidence to the contrary, the Boy Scouts deny that they have a problem. The thousands of abuse victims reflected in those files might beg to differ. The problem of child abuse in trusted institutions can never be remedied unless and until child service organizations accept responsibility for preventing abuse within their programs.

Case law shows similar effects of publicity on other child-serving institutions of trust. *E.g. LaShawn A. ex rel. Moore v. Fenty*, 701 F.Supp.2d 84, 89 (D.D.C. 2010) (because of the case of four sisters killed by deranged mother after reports to D.C.'s Child and Family Services Agency went unanswered, not discovered for months, the court noted that "Due to media attention resulting from

this horrific and demoralizing discovery, calls to the District's child abuse and neglect hotline increased dramatically").

d. Release of the Files Will Destroy the Aura of Secrecy That Emboldens Child Abusers.

Finally, release of the files will, in its own way, help to chip away at the idea in the public consciousness that child abuse can be kept secret at all. Secrecy emboldens abusers, and the Scout volunteers shown in the files—if aired publicly—will demonstrate that society is no longer willing to stay quiet for fear of embarrassing those who abuse and molest children. By reducing secrecy, affirmance in this case would also aid in the education of the public regarding the pervasiveness of abuse.

The release to the public of the IV files will also send a signal to child molesters and the organizations that conceal and protect them that they cannot keep these crimes hidden from the light of day forever. As noted above, and as noted by courts across the country, "Where there is child abuse, there will invariably be secrecy." *State v. Tanner*, 675 P.2d 539, 547 (Utah 1983), *superseded on other grounds*, *State v. Walker*, 743 P.2d 191 (Utah 1987). But when molesters know that instead of being quietly shuffled off away from whatever victim has been discovered "this time," they will face the harsh glare of the public eye, they will hopefully molest fewer children. Justice Brandeis' classic aphorism rings true here: "Sunlight is said to be the best of disinfectants; electric

light the most efficient policeman." Louis D. Brandeis, *Other People's Money, and How the Bankers Use It* 92 (1914). The "electric light" of press attention and the constant threat of discovery and publicity for one's crimes will inevitably have some deterrent effect.

C. Amici Encourage the Court to Uphold the Trial Court's Order to Redact the Names of Abuse Victims and Informants.

1. The Trial Court's Redaction Order Does Not Run Afoul of Article I, Section 10 of the Oregon Constitution.

The Media Intervenors have asked this Court to reverse the trial court's order redacting the names of the abuse victims and of those who reported the abuse. They argue that not only did the trial court have no authority to order the redactions, but that in doing so, the court violated Article I, section 10 of the Oregon Constitution.

This Court has never interpreted Article I, section 10 in a way that would prohibit a trial court from redacting the names of non-party victims and informants from trial exhibits before authorizing their release to the public, and the trial court's exercise of discretion to do so was within its inherent authority.

The Media Intervenors rely primarily upon *Deiz* and *O'Leary* in arguing that the trial court had no discretion to order the redaction of the IV files before releasing them to be public because the right of access afforded by Article I,

section 10 does not permit such redaction. Such a contention ignores the context in which access was sought in each case.

In *Deiz*, this Court found a trial court's exclusion of the public from a juvenile court hearing to violate Article I, section 10. Similarly, in *O'Leary*, the Court found that the exclusion of the public from a hearing at which a witness asserted a privilege against self-incrimination violated Article I, section 10. Neither case involved documentary evidence admitted at trial, and Article I, section 10 has not been applied to such evidence.

The closest case to the facts at issue in this case is *State ex rel KOIN-TV v. Olsen*, 300 Or 392, 711 P.2d 966 (1985). As noted above, in *KOIN* this Court upheld the trial court's refusal to allow KOIN-TV to make a copy of a videotape admitted into evidence in a civil trial, concluding that since the videotape had been played in open court, "There is not one iota of evidence in this proceeding to support a finding that the trial in which the videotape was used was secret.'" *Id.* at 410. Similarly, the trial in this case, in which the IV files were admitted in open court, was hardly "secret," as evidenced by the worldwide publicity it received.

In applying Article I, section 10, this Court has allowed for the possibility of exceptions to the open courts provision, including in the cases relied upon by the Media Intervenors: In *Deiz*, the Court wrote, "Our holding, however, should not be interpreted as guaranteeing the right of public access to all judicial

proceedings." 289 Or at 283. In *O'Leary*, the Court wrote that "not every proceeding involving the administration of justice, in the general sense of that term, need be open to the public." *O'Leary,* 303 Or at 303. Examples given of exceptions to the public's right of access have included jury deliberations and "judicial proceedings that were closed to the public by well-established tradition at the time of the adoption of the Oregon Constitution." *Id.*, citing *Deiz*, 289 Or at 284.

This Court has stated, “The primary limitation on the scope of section 10 is that it is directed only at adjudications.” *O’Leary*, 303 Or at 303. The “adjudication” at issue in the trial court was the trial itself, which was conducted in a courtroom that was at all times open to the public and media. A key underpinning of the constitutional right of access to the courts is the public’s interest “in the evidence actually considered by the trier of fact in arriving at a decision.” *O’Leary*, 303 at 304. As discussed above, that is why the protective order was properly vacated.

But in this case, the actual names of the victims and informants in the IV files, none of whom were parties to the case, were not “evidence actually considered” by the jury because those names were meaningless. The files were relevant to show that the Boy Scouts had notice of the scope of their problem with child-molesting Scout leaders. The redactions ordered by the trial court were not,

therefore, changes to the "evidence actually considered" by the jury because the evidence was not in the names of the informants or victims, but in the acts and reactions described in the files.

Because the public's right of access to the "adjudication" of the case remains unimpaired by the redaction of the names of victims and informants from the IV files, the trial court's order did not violate Article I, section 10.

2. The Trial Court's Redaction Order Comports with Public Policy.

The trial court's order to redact the names and identifying information of the child abuse victims and the informants is also entirely consistent with the public policy of the State of Oregon, as reflected by a long history of statutory and case law protecting their identities.

For many years, this Court has adjudicated cases in which parties' names have been concealed for reasons of privacy. *E.g., G.L. v. Kaiser Foundation Hospitals, Inc.*, 306 Or 54, 757 P.2d 1347 (1988) (sexual assault); *Doe v. American Red Cross*, 322 Or 502, 910 P.2d 364 (1996) (tortious infection of communicable disease); *Doe v. Denny's, Inc.*, 327 Or 354, 963 P.2d 650 (1997) (discrimination based on communicable disease); *T.R. v. Boy Scouts of America*, 344 Or 282, 181 P.3d 758 (2008) (child sexual abuse).

In this case, it is not the names of parties to the litigation who are subject to the court's redaction order, but rather, the names of unquestionably innocent third

parties. Indeed, in contrast to those who were excluded from Scouting because of child abuse (the reason a "Perversion" file exists in the first place), many or most of the persons whose names appear as victims and informants in the IV Files likely do not know they are identified in documents that have been the subject of national news.

For even longer than "Does" and other pseudonyms have been used to identify parties to litigation, this Court has, *sua sponte*, concealed the identities of *victims* of sexual abuse in reported cases, while offering no such protection to accused or convicted abusers. *E.g., State v. Olsen*, 138 Or 666, 7 P.2d 792 (1932) (substituting "John Doe" and "Jane Doe" for victims' names in sexual assault case); *State of Oregon v. McIntyre*, 194 Or 415, 416, 242 P.2d 189 (1952) ("We shall designate the boys by the fictitious names of John Doe and Richard Roe. . ." in a case involving a "crime against nature"); *State v. Southard*, 347 Or 127, 218 P.3d 104 (2009) (substituting "[he]," "[him]," or "[the boy]" for minor sexual abuse victim's name throughout opinion). The Court of Appeals also regularly protects minors from identification in published opinions. *E.g.*, *In re C.*, 121 Or App 264, 267 n. 1, 855 P.2d 171 (1993) ("In this case, we refer to the children by their initials only. On our own motion, we have changed the caption of the case to delete the children's full names."). This principle is not unique to this Court's jurisprudence. Fed. R. Civ. P. 5.2(a); *see Winkler v. Grant*, 370 Fed. Appx. 145,

147 (2nd Cir. 2010) (reversing district court's refusal to seal the trial record due to insufficient redaction of child names); *U.S. v. Holliday*, 1 Fed. Appx. 696, 698 (9th Cir. 2001) (*sua sponte* ordering that all records and documents containing a minor victim's name be sealed); *U.S. v. Gavin*, 1992 U.S. App. LEXIS 15092 (9th Cir. 1992) (*sua sponte* ordering that all records and documents containing a minor victim's name be sealed).

This Court has also exercised its own inherent authority to order documents filed in this court to be sealed or to remain sealed to protect the interests of child abuse victims, or of others with privacy interests at stake. *E.g. State v. Burleson*, S054377, "Order Denying Motion to Inspect or Unseal the Record" (December 5, 2007, DeMunis, C.J.), attached hereto as App. 1. Taken to the extreme advocated by the Media Intervenors, this Court would have no such authority.

The Oregon Legislature has also repeatedly afforded protection to crime victims—especially minors and vulnerable victims—in crafting reporting and records legislation. For example, Oregon's public records laws permit the delay of the disclosure of criminal investigatory information where there is a "need to protect the *complaining party or the victim[,]*" but not the perpetrator—"alleged" or not. ORS 192.501(3) (emphasis added). Reports of child abuse are confidential and specifically excepted from public records disclosure requirements. ORS 419B.035. Reports of elder abuse are similarly protected. ORS 124.085. The

identities of sexual assault victims who call crisis centers are also confidential. ORS 409.273. And, under Oregon's Rape Shield Law, victims of sexual assault are protected from having their past sexual behavior revealed in open court. OEC 412; *See State ex rel Davey v. Frankel*, 312 Or 286, 823 P.2d 394 (1991) (OEC 412 requirement that rape shield hearings be held "in chambers" does not violate Article I, section 10, because it does not categorically exclude the public from attending.). None of these protections apply to those who commit abuse.

Unlike the therapeutic and social utility of keeping the perpetrators' names in these documents upon release, there is no countervailing benefit to including the names of minor victims in the release of the IV files. Victims of child sexual abuse absolutely stand on higher moral ground than those who victimize them. Minors cannot, as a matter of law, consent to sexual contact. ORS 163.315; *Wilson v. Tobiassen*, 97 Or App 527, 534, 777 P.2d 1379, *rev. denied*, 308 Or 500 (1989). Protecting the unquestionably innocent is a most worthwhile basis for the exercise of a court's inherent authority to craft relief. As noted by a Massachusetts court:

> "[F]or many victims of sexual abuse, especially child sexual abuse, public revelation of the abuse, if not sought by them, victimizes them yet again. It stigmatizes them as victims of such abuse, generates conversations that may re-open emotional wounds that had only begun to heal, and causes others, even those who mean well, to treat them differently. If the identity of these victims are not protected by the courts, then their access to the courts will be severely diminished, because they will not be able to turn to the courts for relief from or compensation of their emotional injuries without aggravating those same injuries."

Globe Newspaper Co., Inc. v. Clerk of Suffolk County Superior Court, 14 Mass L Rptr 315, 2002 WL 202464, *6 (Mass Super 2002).

This Court should affirm the trial court's order redacting the victims' names[4] from the IV files before releasing them, because the trial court was well within its authority in entering the order. *See, e.g., State v. Kuznetsov*, 345 Or 479, 487, 199 P.3d 311 (2008) ("absent some legislative or constitutional impediment, courts possess inherent authority to issue those rulings necessary to decide the issues before them.").

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[4] The trial court also ordered that the names of "those who reported alleged abuse" be redacted from the IV files before their release to the public. Because that order was also within the trial court's authority, and because persons might be discouraged from reporting abuse if their identities were disclosed, Amici support the trial court's redaction order as to informants' identities as well. Indeed, the legislature and the courts have afforded protection to informants in some of the same statutes as contain protection for victims. For example, ORS 419B.035 (mandatory child abuse reporting law) protects from public disclosure the reports and records of child abuse, including both the identity of the reporter and the identity of the alleged victim. Additionally, ORS 192.502(4) exempts from public disclosure: " Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure."

IV. CONCLUSION

For the foregoing reasons, Amici encourage this Court to affirm the decision below to release to the public the Boy Scouts' IV files, with the names of the victims and informants redacted, and to dismiss the writ.

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APP-1

IN THE SUPREME COURT OF THE STATE OF OREGON

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STATE OF OREGON,
Plaintiff-Relator,

v.

DAVID O. BURLESON,
Defendant,

and

ADVERSE PARTY.

Multnomah County Circuit Court
060432571

Supreme Court
S054377

ORDER DENYING MOTION TO INSPECT, OR IN THE ALTERNATIVE TO UNSEAL THE RECORD

Upon consideration by the court.

The motion to inspect, or to unseal the record is denied.

December 5, 2007
DATE

CHIEF JUSTICE

Durham, J., not participating.

c: Paul L Smith
Marc D Blackman
Kendra M Matthews
Charles F Hinkle
Douglas E Beloof
Margaret Garvin
Gregory A Rios
Kathryn H Clarke
Mary H Williams
James N Westwood
Erin K Olson
Ronald E Cinniger

gar

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORSP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a) is 5,593 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes, as required by ORAP 5.05(4)(f).

____
Erin K. Olson, OSB 934776

CERTIFICATE OF SERVICE

I certify that on October 12, 2010, I filed one original and 15 copies of the foregoing **BRIEF OF AMICI CURIAE NATIONAL CENTER FOR VICTIMS OF CRIME, SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS, JEWISH BOARD OF ADVOCATES FOR CHILDREN, INC., CHILD PROTECTION PROJECT, CHILD VICTIMS VOICE, CRIME VICTIMS UNITED, OREGON ABUSE ADVOCATES AND SURVIVORS IN SERVICE, OREGON ANTI-CRIME ALLIANCE, AND OREGON TRIAL LAWYERS ASSOCIATION** with the State Court Administrator, Records Section, 1163 State Street, Salem, OR 97301.

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