STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2024-0066

STATE OF NEW HAMPSHIRE

v.

GENE L. ZARELLA

BRIEF OF *AMICI CURIAE*
NATIONAL CRIME VICTIM LAW INSTITUTE
NH COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE
DANU CENTER'S CONFIDENTIALITY INSTITUTE
NATIONAL NETWORK TO END DOMESTIC VIOLENCE
NATIONAL ALLIANCE TO END SEXUAL VIOLENCE

IN SUPPORT OF INTERVENOR / APPELLANT K.R. a/k/a K.Z.
FILED BY CONSENT OF THE PARTIES

Interlocutory Appeal Pursuant to New Hampshire Supreme Court Rule 8
Belknap County Superior Court
Docket No. 211-2021-CR-00539

Attorney for Amici Curiae

Bernstein, Shur, Sawyer & Nelson, P.A.
Hilary H. Rheaume, Esq., Bar No. 265510
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, New Hampshire 03105
(603) 623-8700
hrheaume@bernsteinshur.com

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STATEMENT OF INTERESTS OF AMICI CURIAE

I. National Crime Victim Law Institute

The National Crime Victim Law Institute ("NCVLI") is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote victims' voices and rights in the justice system through crime victim-centered legal advocacy, education and resource sharing. NCVLI accomplishes its mission through education and training of judges, prosecutors, victims' attorneys, advocates, law students and community service providers; providing legal assistance on cases nationwide; analyzing developments in crime victim law; and advancing victims' rights policy. As part of its legal assistance, NCVLI participates as amicus curiae in select state, federal and military cases that present victims' rights issues of broad importance. This is one of those cases as it involves the fundamental right to privacy and crime victims' right to be treated with respect for their privacy.

II. New Hampshire Coalition Against Domestic and Sexual Violence

The New Hampshire Coalition Against Domestic and Sexual Violence (the "New Hampshire Coalition") is an umbrella organization for twelve independent, community-based crisis centers that provide free and confidential services to approximately 12,000 survivors of sexual assault, domestic violence, stalking and human trafficking every year. The New Hampshire Coalition and its twelve member programs have an interest in this case because they are committed to continuing to create safe and confidential spaces for survivors of sexual and domestic violence to heal from the trauma they have experienced. If their promise of confidentiality to survivors is

undermined by court rulings, their mission to help survivors heal could be irreparably harmed by the resulting breach of trust between advocates and survivors. Maintaining the privacy of the survivors they serve is of paramount importance to the New Hampshire Coalition.

The twelve member programs that comprise the New Hampshire Coalition are: Bridges: Domestic & Sexual Violence Support in Nashua; Crisis Center of Central New Hampshire (CCCNH) in Concord; HAVEN in Portsmouth; Monadnock Center for Violence Prevention in Keene; New Beginnings – Without Violence and Abuse in Laconia; Reach Crisis Services of Greater Manchester in Manchester; RESPONSE Domestic & Sexual Violence Support Center in Berlin; Sexual Harassment & Rape Prevention Program (SHARPP) in Durham; Starting Point: Services for Victims of Domestic & Sexual Violence in Conway; Turning Points Network in Claremont; Voices Against Violence in Plymouth; and WISE in Lebanon.

III. Danu Center's Confidentiality Institute

The Confidentiality Institute is a consulting project of the Danu Center for Strategic Advocacy, LLC, located in Evanston, IL that is dedicated to helping the professionals who work with violence survivors to protect the privacy of people who have been harmed by someone else's decision to use violence or abusive behavior. We pursue this work through 1) education and training, 2) technical assistance on law and best practices, and 3) recruitment, training, and support of pro bono attorneys to represent survivors and professionals when confidential information is subpoenaed. We are participating in this amicus matter because the case involves the fundamental right to privacy and privilege protections for violence survivors.

IV. National Network to End Domestic Violence

The National Network to End Domestic Violence (NNEDV) represents the 56 U.S. state and territorial coalitions against domestic violence. NNEDV is dedicated to creating a social, political, and economic environment in which domestic violence no longer exists. NNEDV works to make domestic violence a national priority, change the way society responds to domestic violence, and strengthen domestic violence advocacy at every level. NNEDV was instrumental in the passage and implementation of the Violence Against Women Act. NNEDV has a strong interest in ensuring victims' privacy rights are protected so they can safely report the crimes committed against them.

V. National Alliance to End Sexual Violence

The National Alliance to End Sexual Violence (NAESV) is the voice in Washington for the 56 state and territorial sexual assault coalitions and over 1500 rape crisis centers working to end sexual violence and support survivors. The rape crisis centers in NAESV's network see every day the widespread and devastating impacts of sexual assault upon survivors. NAESV works to ensure the confidentiality of survivors is protected.

INTRODUCTION AND STATEMENT OF THE ISSUE

This case addresses a significant issue of first impression for this Court: how a state constitutional right to privacy—a newly enshrined right that expressly protects "private or personal information"—is to be applied when a crime victim's private, privileged records held by a recognized domestic violence and sexual assault crisis center are sought.

Over recent decades, New Hampshire has made steady progress towards increased individual privacy.[1] The apex of this progress came when the voters amended the New Hampshire Constitution in 2018 to elevate the right to privacy to constitutional status, a trajectory in line with the

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[1] *See, e.g., Hamberger v. Eastman*, 106 N.H. 107, 112–13 (1964) (establishing the tort of invasion of privacy and observing that "'no right deserves greater protection'" (quoting Ezer, *Intrusion on Solitude: Herein of Civil Rights and Civil Wrongs,* 21 Law in Transition 63, 75 (1961)); *State v. Gubitosi*, 152 N.H. 673, 686 (2005) (Broderick, C.J., concurring specially) (observing that the Court at one point "refused to recognize physician-patient and psychologist-patient privileges as protected under common law but those 'protections were subsequently added by statute in 1969 and 1957, respectively'"; and noting that after one hundred years of case law that failed to protect rape victims' privacy, the legislature enacted statutory rape shield laws); R.S.A. 173-C:2 (making communications between victims and sexual assault or domestic violence counselors privileged for the first time in 1985). The national trend is similar. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1, 2 (1996) (finding "all 50 States and the District of Columbia have enacted into law some form of the [psychotherapist-patient] privilege" and recognizing a new federal psychotherapist-patient privilege); *Summary of U.S. State and Territorial Laws Related to Advocate Confidentiality & Privilege*, Confidentiality Institute (Dec. 23, 2021), https://www.techsafety.org/s/CI_Advocate-Confidentiality-Privilege-laws_2022.pdf (showing almost all states and the District of Columbia have some type of advocate-victim privilege).

fundamental values of a State whose motto is "Live Free or Die." This promotion of privacy to a constitutional right must, at a minimum, result in the rejection of the pre-constitutional standard established in *State v. Gagne*, 136 N.H. 101 (1992).

The question to this Court, then, is: what is the appropriate standard that should be applied when a crime victim's private, privileged records held by a recognized domestic violence and sexual assault crisis center are sought during a criminal proceeding? The only standard that protects crime victims' constitutional rights, gives meaning to the constitutional provision voted for by 409,325 New Hampshire voters[2], and appropriately determines if there is a competing right to weigh is one that requires a *prima facie* showing by the person seeking the information that a constitutional due process right is at issue pretrial, and, if such a right is at issue, requires the court to apply a strict scrutiny analysis to determine whether and to what extent an invasion of the victim's constitutional right is required.

[2] The election results for the 2018 New Hampshire Ballot Question #2 was 409,325 yes votes and 96,019 no votes. Ballotpedia, https://ballotpedia.org/New_Hampshire_Question_2,_Right_to_Live_Free_from_Governmental_Intrusion_in_Private_and_Personal_Information_Amendment_(2018) (last visited July 18, 2024).

ARGUMENT

I. New Hampshire's New State Constitutional Right to Privacy Applies To Crime Victims' Private, Privileged Records Held by a Recognized Domestic Violence and Sexual Assault Crisis Center.

The New Hampshire Constitution guarantees that: "An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent." N.H. Const. Pt. 1, Art. 2-b.[3] "When interpreting a constitutional provision, '[the courts] will look to its purpose and intent'" and "'give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast.'" *In re Below*, 151 N.H. 135, 139 (2004) (quoting *Opinion of the Justices,* 126 N.H. 490, 495 (1985)). "Reviewing the history of the constitution and its amendments is often instructive. . . ." *Id.* The unambiguous terms of the constitutional amendment make clear that its purpose is to protect "private or personal information." N.H. Const. Pt. 1, Art. 2-b.

Legislative history shows that the constitutional provision's "private or personal" information included protection of all private or personal "information," with medical information being specifically contemplated by the legislators as they voted to submit the amendment to the voters. Specifically, Senate committee minutes included the following exchange:

> Senator Bradley- When I read this language and I see ["]information["], you may think that is digital but one's personal, medical history is also information. I think you are enshrining

[3] New Hampshire's crime victims' rights statute also protects the victims' privacy. *See* R.S.A. 21-M:8-k, II(a), (m) (providing that "crime victims are entitled to . . . [t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process").

> that right [to privacy] of your personal medical information into the constitution.
>
> Senator Avard- Would this prevent the government from seeking out that information from third parties?
>
> Dan McGuire- Yes, because it is about the individual's information, it doesn't matter where it is.

Mar. 29, 2018 Senate Rules and Enrolled Bills Committee Minutes on CACR16 at 2, http://gencourt.state.nh.us/BillHistory/SofS_Archives/2018/senate/CACR16S.pdf ; *see also id.* (reporting Representative Kurk's statement that "this would protect … medical records"). Put simply, legislative history shows that the constitutional provision was intended to protect an individual's private or personal information, including medical information. Here, the defendant seeks private and/or personal information about a crime victim, which includes information held by a recognized domestic violence and sexual assault crisis center. There is no question that such information constitutes private and/or personal information under the constitutional provision.

Further, the constitutional provision protects against "governmental intrusion" into such private or personal information. N.H. Const. Pt. 1, Art. 2-b. A court order compelling disclosure of the victim's privileged records—even for *in camera* review—constitutes government intrusion. *See, e.g., Carpenter v. U.S.*, 138 S. Ct. 2206, 2221 (2018) (finding a violation of the Fourth Amendment where the cell phone location records were acquired pursuant to court orders under the Stored Communications Act); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33–34 (1984) (recognizing a trial court order prohibiting disclosure of discovered information before trial is state action

that "implicates the First Amendment rights of the restricted party"); *Shelley v. Kraemer*, 334 U.S. 1, 14-19 (1948) (observing that "the action of the States to which the [Fourteenth] Amendment has reference, includes action of state courts and state judicial officials").[4]

In sum, the plain language and legislative history of the state constitutional right to privacy make clear that the information at issue in this case is protected by the New Hampshire Constitution.

II. This Court Must Analyze The Competing Rights At Stake And Adopt A Standard For Disclosure That Comports With The Voters' Intent to Protect an Individual's Right to Privacy from Government Intrusion.

A. *Gagne* And Its Progeny Do Not Address The Constitutional Right To Privacy At Issue In This Case.

This Court has a duty to protect the right to privacy. *See In re S. New Hampshire Med. Ctr.*, 164 N.H. 319, 330 (2012) (emphasis added) (stating "the core adjudicatory functions of the judiciary [are] to resolve cases fairly and

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[4] *See also Mobilisa, Inc. v. Doe*, 170 P.3d 712, 717 (Ariz. Ct. App. 2007) (recognizing "a court order is state action that is subject to constitutional restraint" and a discovery order "compelling disclosure of the identities of anonymous internet speakers raises First Amendment concerns"); *Barker v. Barker*, 909 So. 2d 333, 337 (Fla. Dist. Ct. App. 2005) (stating "[c]ourt orders compelling discovery of personal medical records constitute state action that may impinge on the [state] constitutional right to privacy"); *In re Maurer*, 15 S.W.3d 256, 260 (Tex. Ct. App. 2000) (stating that "a court order which compels or restricts pretrial discovery constitutes state action which is subject to constitutional limitations" (*quoting Kessell v. Bridewell*, 872 S.W.2d 837, 841 (Tex. Ct. App. 1994)); *Stenger v. Lehigh Valley Hosp. Ctr.*, 609 A.2d 796, 801 n.8 (Pa. 1992) (stating that "[i]t is acknowledged that court orders which compel, restrict or prohibit discovery constitute state action which is subject to constitutional limitations").

impartially and to protect the constitutional rights *of all persons* who come before the courts"). Given the magnitude of the new privacy right under the New Hampshire Constitution, the Court cannot rely on the outdated standard set forth in *State v. Gagne*, 136 N.H. 101 (1992), but must instead apply a more strenuous test that aligns with the constitutional privacy right enacted by the citizens of New Hampshire more than twenty-five (25) years after *Gagne*. To allow *Gagne* to stand renders the new constitutional amendment meaningless. This Court must craft a new standard that protects the constitutional right at issue.[5]

This Court has held that when there is a conflict between the constitutional rights of a witness and defendant, "the court must engage in a delicate balancing of these conflicting interests." *See State v. Wheeler*, 128 N.H. 767, 770 (1986) (evaluating the conflict between a witness's right to remain silent and a defendant's right to present a defense under N.H. Const. Pt. 1, Art. 15.).

Since an order to produce crisis center records infringes on a victim's constitutional right to "live free from governmental intrusion in[to] [their]

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[5] R.S.A. 173-C:5, enacted in 1985, sets forth procedures for defense discovery and trial admission of records protected by the victim-counselor privilege, including a different standard for disclosure; it requires defendant to show a "substantial likelihood that favorable and admissible information would be obtained through discovery" standard for disclosure. R.S.A. 173-C:5. To the extent that this pre-constitutional amendment provision suggests such a showing, without more, warrants defeating the victim's constitutional right to privacy in this case, the Court must find that portion of R.S.A. 173-C:5 unconstitutional. *See* discussion *infra* Sections II.B.-II.D; *cf. Claremont Sch. Dist. v. Governor*, 144 N.H. 210, 217 (1999) (severing unconstitutional provision from the statute where that provision is not "so integral and essential in the general structure of the act").

private or personal information", N.H. Const. Pt. 1, Art. 2-b., the Court must deem the standard in *Gagne* inadequate. In its place, the Court should adopt a new standard. First, the Court should require a defendant to make a *prima facie* showing that their due process right is at issue during the pretrial phase. In the event the defendant makes a *prima facie* showing, the Court shall inquire into whether there is a compelling government interest in violating another person's constitutionally protected right to privacy.

B. The Court's Duty To Protect Individual Rights Includes An Obligation To Avoid Unnecessary Infringement On The Victim's Right To Privacy.

i. The proposed governmental intrusion into sexual assault victims' privacy right is substantial.

Review of a sexual assault victims' crisis center records, even *in camera*, is not a minimal intrusion. It is difficult to overstate the importance of privacy for sexual assault victims in communications with crisis center and mental health professionals. *See, e.g.*, Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 Suffolk U. L. Rev. 467, 473 (2005) ("For most sexual assault victims, privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot."); Bonnie J. Campbell, *forward* to U.S. Dep't of Justice, *Report to Congress: The Confidentiality of Communications between Sexual Assault or Domestic Violence Victims and their Counselors* (Dec. 1995), available at www.ncjrs.gov/pdffiles1/nij/grants/169588.pdf ("[V]ictims must be able to communicate freely with their counselors, secure in the knowledge that the private thoughts and feelings they reveal during counseling will not be publicized as a result of reporting the

crime. Without assurances of confidentiality, sexual assault and domestic violence victims will be reluctant to contact rape crisis centers and battered women's shelters . . . [and] may be hesitant to report crimes and aid in their prosecution."). *Cf. Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) ("Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. . . . [T]here is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment.") (quotations and citations omitted).

Ironically, in seeking emotional and psychological help following a sexual assault, these victims risk disclosing their most personal and sensitive thoughts to the very person accused of harming them. This intrusion can create a chilling effect and discourage these victims from coming forward.

ii. Pretrial discovery of records is premature and risks unnecessary harm to victims.

In addition to elevating the victims' constitutional right in the analysis, to ensure domestic violence and sexual assault victims do not experience unnecessary invasion of privacy, this Court must factor distinctions between access to information during the pretrial and trial phases. California's *People v. Hammon* is instructive on "the risk inherent in entertaining such pretrial requests" for a victim's privileged records. 938 P.2d 986, 992 (Cal. 1997). In *Hammon*, the defendant sought the victim's mental health records before trial, alleging the records would be "'necessary to prove the victim's lack of credibility, her propensity to fantasize and imagine events that never occurred.'" *Id.* at 993. The California Supreme Court noted that "defendant at trial admitted engaging in sexual conduct with [the victim], thus largely

invalidating the theory on which he had attempted to justify pretrial disclosure of privileged information." *Id.* Under these circumstances, "[p]retrial disclosure . . . would have represented not only a serious, but an unnecessary, invasion of the [victim's] statutory privilege . . . and [state] constitutional right of privacy." *Id.* (citing Cal. Const., Art. I, § 1, which guarantees that "[a]ll people . . . have inalienable rights . . . [that include] pursuing and obtaining safety, happiness, and privacy").

To avoid unnecessary infringement of the victim's right to privacy, this Court must reject any conclusion that allows the *Gagne* standard for disclosure to apply to a constitutional right to privacy. Instead, the Court must employ a standard that properly weighs any competing constitutional rights. As set forth above, the Court should adopt a standard that first requires a defendant to make a *prima facie* showing that their constitutional due process right is at issue pretrial; and only if such a showing is made does the court then determine if there is a compelling interest to infringe on the competing constitutional right of the victim such that *in camera* review of records is permissible. *Cf. Asselin v. Town of Conway*, 135 N.H. 576, 577–78 (1992) (stating that "government actions infringing on fundamental rights are subject to strict scrutiny analysis and will not be upheld unless they promote a compelling State interest"); *In re Caulk*, 125 N.H. 226, 229-230 (1984) (stating that "[t]he State may limit an individual's exercise of fundamental constitutional rights only when a compelling State interest is involved").

C. Analysis of the Rights at Stake Reveals that Defendants Generally Do Not Have a State Due Process Right at Stake Pretrial and No Other Right Can Justify Disclosure.

Criminal defendants have no general federal or state constitutional right to pretrial discovery. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general federal constitutional right to discovery in a criminal case, and *Brady* did not create one…."); *State v. Heath*, 129 N.H. 102, 109 (1986) (finding defendants do not have an "unqualified constitutional entitlement to discovery of any specific variety"). Nor do defendants have an established federal constitutional right to pretrial discovery of crime victims' privileged information that is in the possession or control of non-government record holders under the Confrontation Clause, the Compulsory Process Clause, or the Due Process Clause. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) ("If we were to adopt this broad interpretation of *Davis [v. Alaska*], the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view.") (plurality opinion); *id.* at 56-57 (majority opinion) (recognizing that the Court "has never squarely held that the Compulsory Process Clause guarantees the right to [pretrial discovery]" and declining to reach the issue; but concluding that the Due Process Clause could provide the basis for the requested discovery in that case because, inter alia, a government agency and not a third party had possession or control of the records at issue); *see also In re Hope Coalition*, 977 N.W.2d 651, 661 (Minn. 2022) (finding that "at no point" has "the [U.S.] Supreme Court ever held that a criminal defendant has any constitutional right to access privileged documents" and concluding defendant's federal constitutional rights to confrontation and due process do

not entitle him to pretrial *in camera* review of the victim's privileged records); *Vaughn v. State*, 608 S.W.3d 569, 575 (2020), *cert. denied*, 141 S. Ct. 2569 (2021) (concluding defendant's federal constitutional rights to compulsory process, confrontation and due process do not entitle him to pretrial *in camera* review of the victim's privileged records).

Consequently, all that a defendant is left with to compel discovery of a victim's privileged records is the possibility of a state constitutional due process right. And while this Court's dicta appears to leave open the possibility of such a right attaching pretrial, it would be exceedingly rare. As this Court noted, "factual and procedural peculiarities of a given case may ground a claim to some particular discovery as an element of fundamental fairness" under the State's constitution. *Heath*, 129 N.H. at 109 (rejecting defendant's due process violation claim based on trial court's denial of his motion to depose the victim).[6]

So, the starting point of any analysis is whether a defendant has made a *prima facie* showing based on the factual and procedural peculiarities of their

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[6] In addition, even in cases where this Court's opinions seem to assume a due process right pretrial, this Court has repeatedly held that even where there is a presumed due process violation because of evidence withheld pretrial, defendant must show that the information withheld was essential and necessary to prepare an adequate defense. *See, e.g., State v. Bassett*, No. 2017-0088, 2018 WL 1724914, at *1 (N.H. Mar. 8, 2018) (non-precedential order) (finding no due process violation because the portion of withheld records following *in camera* review did not contain any material that was essential and reasonably necessary to the defense); *State v. Adams*, 133 N.H. 818, 825, 585 A.2d 853, 857 (1991) (finding no violation of defendant's State or federal constitutional right to due process because the defendant did not show that he was unable to adequately prepare for trial without the requested video tape deposition).

case that their state due process right is at issue *pretrial*. Only following such a showing, is a court in a position to weigh competing constitutional rights. In such a situation, courts must then employ a strict scrutiny analysis of whether an *in camera* review of the victim's records is justified. This requires courts to find a compelling government interest exists in order to permissibly infringe the victim's constitutional right. If this Court does not adopt this analysis, courts will continue to ignore the new constitutional privacy right in complete disregard of voters' intent and the New Hampshire Constitution.

D. *Gagne* And Its Progeny Are Distinguishable Even In A Pre-Constitutional Privacy Assessment.

Even if the victim's state constitutional right to privacy were not at stake, the standard for disclosure set forth in *Gagne* and its progeny would be inapposite for several reasons. First, *Gagne* adopted the Supreme Court's due process analysis in *Ritchie*—a case that involved confidential records held by a state agency—to require *in camera* review and possible disclosure of records held by a similar state agency upon meeting certain standards. *See Gagne,* 136 N.H. at 105-06. In contrast, this case does not involve records in a state agency's control.

Close examination of *Ritchie*'s due process analysis illustrates it should be limited to cases where a state agency holds the records. *See, e.g., Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 61 (2009) (recognizing, in a § 1983 action brought by a state prisoner, that *Ritchie* addressed "the prosecutorial duty to disclose exculpatory evidence" under the Due Process Clause); *In re Hope Coalition*, 977 N.W.2d at 662 (rejecting defendant's argument that *Ritchie* requires a pretrial *in camera* review of the victim's counseling records on the ground that due process analysis does not apply

where the record holder is not a state agency, and the records are protected by an absolute sexual assault counselor-victim privilege); *Vaughn v. State*, 608 S.W.3d at 574-75 (same but applying an absolute psychotherapist-patient privilege); *In re Crisis Connection, Inc.*, 949 N.E.2d 789, 799 (Ind. 2011) (same but applying an absolute victim-advocate privilege); *People v. Turner*, 109 P.3d 639 (Colo. 2005) (same but applying an absolute victim-advocate privilege); *State v. Famiglietti*, 817 So. 2d 901, 907 (Fla. Dist. Ct. App. 2002) (same but applying the psychotherapist-patient privilege); *Goldsmith v. State*, 651 A.2d 866, 872 (Md. 1995) (same); *People v. Hammon*, 938 P.2d 986, 991 n.3 (Cal. 1997) (same); *see also Bradley v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 405 P.3d 668, 670 (Nev. 2017) (rejecting defendant's argument that *Maryland v. Brady* requires a pretrial *in camera* review of the victim's counseling records where the victim was ordered by the court to complete counseling with a private psychiatrist, and no exception to the psychologist-patient privilege applies); *Commonwealth v. Wilson*, 602 A.2d 1290, 1297 (Pa. 1992) (rejecting, without mentioning the fact that the record holder is not a state agency, defendant's argument that due process requires a pretrial *in camera* review of the victim's counseling records where an absolute sexual assault counselor-victim privilege applies); *United States v. Hach*, 162 F.3d 937, 947 (7th Cir.1998) (rejecting, without analyzing the applicable privileges, defendant's argument that *Ritchie* requires an *in camera* review of the victim's counseling records, on the ground that due process analysis does not apply where the record holder is not a state agency).

Second, the state versus non-state record holder distinction has not been fully litigated before the New Hampshire Supreme Court. *See Petition of State of N.H. (State v. MacDonald)*, 162 N.H. 64, 65-66 (2011) (stating that "[t]he

State did not object to the documents being provided to the court for *in camera* review" and addressing only a dispute over the process by which the produced documents must be reviewed); *State v. King*, 162 N.H. 629, 630-32 (2011) (making no reference to any objection to the initial production of records for *in camera* review and no reference to any argument that *Gagne* should not apply because a non-state record holder was at issue; and addressing only a dispute over whether the defendant had made the requisite showing under *Gagne* to gain access to additional documents); *State v. Girard*, 173 N.H. 619, 626-29 (2020) (making no reference to any objection to the initial production of records for *in camera* review and no reference to any argument that *Gagne* should not apply because a non-state record holder was at issue; and addressing only a dispute over whether the trial court properly applied *Gagne*'s "essential and reasonably necessary" standard); *see also State v. Cressey*, 137 N.H. 402, 413 (1993) (implying that the trial court, not the prosecution, raised the state versus non-state distinction to rebut *Gagne's in camera* review practice).

Any language in *Cressey* appearing to support access is dicta and not binding. *See Cressey*, 137 N.H. at 412 (stating that it reverses the convictions on defendant's first claim of error regarding the trial court's admission of the State's expert witness, and electing to "address his other claims"—including whether the trial court erred in failing to conduct an *in camera* review of a psychologist's notes—"to the extent they are likely to arise again in a second trial"); *see also State v. Leroux*, 175 N.H. 204, 208 n.1 (2022) (stating that it "decline[s] to extend [its] dicta from [*State v. Cheney*]—where *Cheney*'s "determination [on an issue] was unnecessary to [the] holding [in that case]); *Appeal of Town of Lincoln*, 172 N.H. 244, 253 (2019) (stating that "[t]he broader proposition relied on by the dissent was not essential to the outcome in [the

cited case], [and] is therefore dicta, and it does not control the outcome here"); *In re Search Warrant for Recs. from AT & T*, 170 N.H. 111, 114–15 (2017) (explaining that comments "unnecessary to the [earlier] decision" is "dicta and is not controlling here").[7]

CONCLUSION

A victim's assertion of the right to privacy is consistent with fundamental societal values. *See, e.g.*, Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 San Diego L. Rev. 745, 763 (2007) ("Privacy . . . is not the trumpeting of the individual against society's interests, but the protection of the individual based on society's own norms and values."). New Hampshire voters made clear that they prioritize this societal value when they amended the state constitution. The victim's assertion of the constitutional right to keep private her privileged crisis center and mental health information must be given the significance it deserves. Where there is no factual or procedural peculiarity that implicates a state due process right

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[7] Moreover, *Cressey* suggests that the issue of whether *Gagne* should extend to a case involving a private, non-state record holder was not actually litigated. *Compare Cressey*, 137 N.H. at 407 (addressing "the State's assertions" about the first claim of error regarding the expert testimony), *with id.* at 413 (making no reference to the State's position on the *in camera* review issue; but finding that "[t]he trial court explained [its] departure from its previous practice of conducting an *in camera* review of confidential records from the New Hampshire Division for Child and Youth Services (DCYS) on the ground that DCYS records are under the control of a State agency, whereas the psychologist, whose notes were in question, was employed by a private mental health facility"). Under these circumstances, *Cressey* should not control. *See Cent. Virginia Cmty. Coll. v. Katz,* 546 U.S. 356, 363 (2006) (stating that the Court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated").

pretrial, and no compelling interest to justify an infringement of a victim's constitutional right to privacy, the request for records must be denied. For the reasons articulated above, the Court must reverse the appellate court and grant the victim's motion to quash the defendant's subpoena.

Respectfully submitted,
National Crime Victim Law Institute, New Hampshire Coalition Against Domestic and Sexual Violence, Danu Center's Confidentiality Institute, National Network to End Domestic Violence, and National Alliance to End Sexual Violence

By their counsel,
Bernstein, Shur, Sawyer & Nelson, P.A.

August 5, 2024

/s/ Hilary Holmes Rheaume, Esq.
Hilary Holmes Rheaume, Esq., Bar No. 265510
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, New Hampshire 03105
(603) 623-8700
hrheaume@bernsteinshur.com

STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5,111 words, which is fewer than the 9,500-word limit permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ Hilary Holmes Rheaume, Esq.
Hilary Holmes Rheaume, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 5th day of August, 2024 through the Court's electronic filing system on all counsel of record.

/s/ Hilary Holmes Rheaume, Esq.
Hilary Holmes Rheaume, Esq.