SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-13336

DAVID FLORIO,
PETITIONER-APPELLEE

v.

KEEPER OF RECORDS OF WAYSIDE YOUTH AND FAMILY SUPPORT NETWORK, INC. (ERIC MASI),
RESPONDENT-APPELLANT

On Report from Worcester Superior Court

BRIEF OF AMICI CURIAE VICTIM RIGHTS LAW CENTER, JANE DOE, INC., BOSTON AREA RAPE CRISIS CENTER, THE CENTER FOR HOPE AND HEALING INC., NEW HOPE, INC., PATHWAYS FOR CHANGE, INC., THE ELIZABETH FREEMAN CENTER, INC., INDEPENDENCE HOUSE, INC., AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF THE RESPONDENT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

RULE 17 DECLARATION

Pursuant to Mass. R. App. P. 17(c)(5), amici declare that no party, party's counsel, or person or entity other than amici and their counsel, authored this brief in whole or in part, or contributed money intended to fund its preparation or submission. Neither amici nor their counsel represents or has represented one of the parties to the present appeal nor was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

CORPORATE DISCLOSURE

Pursuant to SJC Rule 1:21 and Mass. R. App. P. 17(c)(1), amici state that each is a non-profit organization, no amicus organization issues stock or has a parent corporation, and no publicly held corporation owns stock in any amicus organization.

STATEMENTS OF INTEREST

A national nonprofit organization with offices in Massachusetts and Oregon, the **Victim Rights Law Center (VRLC)** provides legal counsel to help sexual assault and stalking survivors rebuild their lives. VRLC is dedicated to seeking justice for every rape and sexual assault survivor. To this end, VRLC has provided free legal services to nearly 20,000 adult and youth victims of rape and sexual assault in Massachusetts and Oregon. VRLC also provides training, consulting, mentoring and legal resources to thousands of legal professionals across the United

States and U.S. territories each year on the use of civil laws to protect and promote the rights of sexual assault survivors. VRLC was founded in 2003 as the first non-profit agency in the country dedicated to meeting the legal needs of sexual assault survivors.

While the breadth of VRLC's work reflects the deep and reverberating impact of sexual assault throughout all aspects of a victim's life, for many of VRLC's clients and the sexual assault survivors served by organizations VRLC assists, issues of privacy, security, and autonomy are fundamental to victim recovery as well as to promoting victim healing, offender accountability, and community safety. Based on VRLC's extensive experience, VRLC offers a uniquely well-informed perspective on the importance of privacy and the patient-provider privilege to survivors of sexual assault. The U.S. Department of Justice (DOJ) has recognized VRLC's special expertise on these issues, selecting VRLC in 2004 to serve as the DOJ's national trainer and organizational consultant on the privacy rights and interests of sexual assault survivors for the Office on Violence Against Women grantees.

Jane Doe Inc., ("JDI") the Massachusetts Coalition Against Sexual Assault and Domestic Violence, is a statewide organization of 60 member programs that provide direct services to victims and survivors of sexual and domestic violence. Guided by the voices of survivors, JDI brings together organizations and people

committed to ending domestic violence and sexual assault, creating social change by addressing the root causes of this violence, and promoting justice, safety, and healing for survivors. JDI advocates for responsive public policy, promotes collaboration, raises public awareness, and supports its member organizations to provide comprehensive prevention and intervention services. Based on JDI's experience working with member programs throughout the Commonwealth, JDI knows protecting sexual and domestic violence victims' privacy rights is critical.

Established in 1973, the **Boston Area Rape Crisis Center (BARCC)** is one of the first rape crisis centers in the United States to advocate for and support survivors of sexual assault. BARCC's mission is to end sexual violence through healing and social change. Currently, nearly 50 staff and over 125 volunteers provide services, including hotline crisis counseling, medical accompaniments to local hospitals, counseling, case management, immigration legal services, legal advocacy and violence prevention education. BARCC legal advocacy services help survivors decide what steps they wish to take, with the goal of helping survivors access safety and stability to cope with the physical, social, and psychological consequences of their experiences. This case is important to BARCC, and both its legal advocacy program and counseling program, given the chilling effect this could have on survivors seeking support in the aftermath of sexual assault. There are already many barriers in place that limit survivors from

coming forward, and this case is of utmost importance to BARCC to ensure that survivors do not face additional barriers.

Founded in 1976**, The Center for Hope and Healing, Inc. ("CHH")** is a rape crisis center serving the City of Lowell and its surrounding 14 cities and towns. CHH provides trauma and resilience-informed support and safe spaces for survivors to heal through its free and confidential counseling, legal and medical advocacy, and 24-hour crisis hotline. CHH uses a social justice framework to prevent sexual violence, advance equity, educate, raise awareness, and organize in the communities it serves and beyond. CHH intentionally delivers anti-racist, innovative, culturally relevant programming designed for BIPOC, Black, Indigenous, and other People of Color – survivors and communities which include immigrants, non-English speakers, Black girls, LGBQ/T – Lesbian, Gay, Bisexual, Queer/Transgender people, youth, men, boys, and others who have historically been un- or under-served. It is through this work, that CHH recognizes the crucial aspects of privacy, confidentiality, and the rights that all survivors have in telling their stories and sharing their experiences at the risks of re-traumatization by the systems which should be protecting them.

New Hope Inc. engages survivors, stakeholders and communities to build an anti-violence movement. Using a trauma-informed practice, they work with those impacted by sexual and domestic violence, as well as those persons who use

abuse in their intimate relationships. New Hope Inc. is committed to practices that promote racial and gender equity, while also elevating persons living with disabilities, LGBTQIA+ identified persons, and immigrants. Since domestic and sexual violence are often intertwined, New Hope's clients benefit from the full spectrum of programs they offer, allowing them to receive domestic and sexual violence services in one place.

New Hope offers a wide range of services which combine crisis intervention, violence prevention, life transition, and self-sufficiency opportunities, while promoting behavioral and systemic changes to reduce violence at the individual and community levels. Because privacy is a foundation for survivor safety, trust, and healing, New Hope is deeply interested in issues that impact the privacy protections of survivor records. New Hope joins this amicus brief in hopes that the protections that counselors, clinical practitioners, and support staff have in protecting client records in Massachusetts remains a top priority—in particular, in the neighboring state of Rhode Island.

Pathways for Change, Inc. ("Pathways") is a Massachusetts Supplier Diversity Office Certified Women's Non-Profit Organization. It is a tax-exempt charitable 501(c) (3) agency, established in 1973 and incorporated in 1981. The mission of Pathways is to address the impact of sexual assault and abuse by providing quality and multicultural services to all persons whose lives have been

impacted by sexual violence, and education geared toward the prevention of violence. Pathways provides leadership within the Central Massachusetts region that results in a coordinated and survivor-centered response to sexual violence within all its communities. Pathways' vision includes: (1) that each survivor has access to and receives services that are culturally and linguistically appropriate that helps each survivor heal from the impact of sexual violence; (2) that communities are actively engaged in prevention of sexual assault and abuse through dialogue and action throughout the community; (3) that the systems established to address various needs of survivors be well coordinated and survivor-centered; and (4) that institutional protocols and policies are based in best practices.

Pathways is proudly a leading rape crisis center in Massachusetts and serves as an example of promising practices nationally. Since opening its doors in 1973, Pathways has been committed to the development of comprehensive services to the communities within their service area, which includes 47 cities and towns in the Central Massachusetts region. These services include 24 hour crisis intervention, support groups, counseling and advocacy for survivors of sexual violence as well as prevention education, professional training and community outreach.

For almost fifty years, the **Elizabeth Freeman Center, Inc. ("EFC")** has been the domestic violence program and rape crisis center for Berkshire County, Massachusetts. EFC;s mission is to offer hope, help, and healing to all

experiencing or affected by domestic and sexual violence through free, accessible, and confidential services in Berkshire County and work to end the cycle of violence through community mobilization, advocacy, and education. Promoting social justice and working to end all forms of oppression are essential to its work. Each year, EFC serves over 4,000 adult and child survivors of violence, children who have witnessed violence and non-offending family members through a broad array of services, including its 24-hour hotline, emergency services, counseling, advocacy, court assistance, shelter, transitional housing, supervised visitation, financial independence initiatives, and youth education. Protecting the confidentiality of its communications with survivors is a bedrock for the effectiveness of its work.

Independence House, Inc. ("IH") was established as a 501(c)(3) organization in 1979. IH's mission is to address the safety, privacy, advocacy, justice, and support the needs of survivors of domestic and sexual violence. IH is the only comprehensive domestic/sexual violence community-based organization in Barnstable County, serving over 8,000 survivors annually with locations across Barnstable County, and an emergency 24/7 domestic violence shelter. IH serves the unique and individual needs of children, teen and adult survivors. The unique need for privacy and confidentiality is central to IH's work with survivors, who are sharing their most painful and emotional recollections of sexual assault and

domestic violence and abuse. Confidentiality is paramount to creating a therapeutic alliance with survivors; it is through this alliance that survivors develop a high level of comfort in sharing their experiences without fear of judgment from others. IH has been supporting sexual and domestic violence survivors for 44 years, incorporating new and emerging best practices and research, and adapting its activities to meet changing community needs. IH's work with survivors is informed by its longstanding and current understanding of sexual and domestic violence, stalking and trauma and the impact it has on the lives, functioning, wellbeing, and safety of survivors. IH's activities are informed by lived experiences of survivors and address the impact of sexual and domestic violence on survivors' lives, are trauma informed, linguistically appropriate and culturally and community informed.

Founded in 1972, **The National Women's Law Center ("NWLC")** is a 501(c)(3) organization that fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. NWLC uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us—especially women of color, LGBTQ people, and women and families with low incomes. For more than 50 years, the NWLC has been on the leading edge of every major legal and policy victory for women.

STATEMENT OF THE ISSUE

Whether the motion judge erred in granting a motion to compel the keeper of records of a Massachusetts counseling center to produce rape counseling records in a Rhode Island criminal case pursuant to the Massachusetts Uniform Act to Secure Attendance of Witnesses, G. L. c. 233, § 13A, where the requested records are subject to an absolute privilege in Massachusetts between a sexual assault survivor and a sexual assault counselor, *see* G. L. c. 233, § 20J, and Rhode Island law offers no comparable protection for the records.

SUMMARY OF THE ARGUMENT

Amici submit this brief to advocate for the continued protection of the privacy of sexual assault survivors—a population that is often overlooked, diminished, and silenced. Specifically, amici ask this Court to confirm that existing Massachusetts laws limiting the disclosure of confidential counseling records apply when a Massachusetts judge is asked to issue an order enforcing an out-of-state subpoena seeking such records from a Massachusetts counseling center.

Mental health counseling in a confidential setting is crucial to the healing of sexual assault survivors. Massachusetts law accordingly provides critical protections to survivors in the form of G.L. c. 233 § 20J (the "Privilege Statute"), which creates an absolute privilege for the confidential communications between a

survivor of sexual assault and a sexual assault counselor. Recognizing that, in limited circumstances, these sensitive records may need to be disclosed to ensure a criminal defendant's constitutional right to a fair trial, this Court developed the *Dwyer* protocol. The *Dwyer* protocol sets forth specific criteria that a criminal defendant must satisfy to obtain records subject to the protections of the Privilege Statute: disclosure of privileged sexual assault counseling records is prohibited unless a criminal defendant can establish, with specificity, the necessity and relevance of the records for the criminal proceeding. When appropriately applied, the *Dwyer* protocol provides the minimum protections to which survivors receiving sexual assault counseling in Massachusetts are entitled.

Sexual assault survivors rely on the protections of the Privilege Statute and the *Dwyer* protocol when seeking mental health care in the Commonwealth. Survivors disclose their experience to a sexual assault counselor with the understanding that what they say will remain privileged and confidential in nearly all circumstances. In their decades of experience serving survivors of sexual assault, amici understand how critical the protections of the Privilege Statute and *Dwyer* protocol are to survivors reporting their assault and seeking much needed mental health care.

In this appeal, the Court has been asked to determine whether the motion judge committed reversible error by failing to afford proper recognition to the

well-established protections in the Privilege Statute and *Dwyer* protocol when evaluating a request by a Rhode Island criminal defendant for the privileged counseling records of a minor victim of sexual assault pursuant to the Massachusetts Uniform Act to Secure Attendance of Witnesses, G. L. c. 233, § 13A (the "Uniform Act"). Amici assert that the motion judge made three critical errors, any one of which would warrant reversal.

Two of these errors arose from the motion judge's decision to ignore the privileged nature of the records when conducting his analysis under the Uniform Act. First, the motion judge abused his discretion by declining to conduct an independent assessment of the materiality, relevance, and necessity of the records. Deferring to the Rhode Island court's finding of materiality was a complete abandonment of *Dwyer* because Rhode Island law apparently does not require a finding that describes the materiality, relevance and necessity of the requested records with specificity, and the Rhode Island court did not provide one here. Second, the motion judge did not adequately consider whether his disregard of the Privilege Statute when requiring Wayside to disclose these records would impose an "undue hardship" on either the survivor or Wayside.

The motion judge also erred by deferring any ruling on Wayside's privilege objections to the Rhode Island court, concluding that the requesting court "was the

appropriate venue to litigate any applicable privilege claims," Dkt. 9 at 3.[1] The protections afforded by the Privilege Statute and *Dwyer* to Wayside, a Massachusetts counseling entity, and the Massachusetts resident victim are not limited in application to requests for records initiated by criminal defendants in Massachusetts. In the face of *any* request for privileged records—whether from a court within or outside Massachusetts—Massachusetts judges must consider the privileged nature of these records and conduct a *Dwyer* analysis before ordering production.

If allowed to stand, the motion judge's order will have broad effects. Ordering disclosure of privileged counseling records without properly considering their privileged nature simply because the request came from outside Massachusetts creates uncertainty for both survivors of sexual assault and the counselors who treat them. Such orders failing to uphold the Massachusetts privilege for sexual assault counseling records will have a chilling effect on survivors reporting assault and seeking much-needed counseling for that assault. This Court should decide this important issue to ensure the protections of the Privilege Statute and *Dwyer* protocol apply for survivors receiving care in

[1] "Dkt." refers to pleadings in *David Florio v. Keeper of Records of Arbour Counseling & Others*, Worcester Sup. Ct., No. 2285OW00002 (May 17, 2022).

Massachusetts, regardless of the location of the assault or the criminal defendant seeking the records.

ARGUMENT

I. Confidentiality is Crucial to the Therapeutic Relationship Between Sexual Assault Survivors and Their Counselors

Sexual assault violates an individual in a way that is utterly intrusive and violent to one's personhood. Survivors feel shame and guilt and face disbelief and rejection by friends and family, and/or pervasive stigmas—social, religious, and otherwise. Mental health counseling is an essential step on the road to recovery for many. The purpose of counseling is to focus on rebuilding a sense of safety and trust that was shattered by the attack.

A confidential setting is indispensable to counseling. For sexual assault survivors, the promise of confidentiality is of vital as they delve into thoughts and emotions resulting from what may be the most horrific and painful experience of their lives. Without a guarantee of confidentiality, survivors are deterred from full and free discussion, fearing this information may later be disclosed to others. This could mean delays in recovery, reluctance to seek treatment, an inability to process the aftermath of the assault, and experiencing an increased risk of other mental health consequences of the assault, such as PTSD, depression and anxiety, and/or substance abuse.

Uncertainty around the risk of disclosure of privileged counseling records creates significant barriers that are harmful and disruptive to survivors, counselors, and the general community. Reliable, well-defined privilege protections are therefore of paramount importance for sexual assault survivors who must have the opportunity to process the impact of the sexual assault in a safe and confidential setting to heal.

A. Massachusetts Law Offers Critical Protections to Sexual Assault Survivors Seeking Confidential Counseling

The Massachusetts Legislature and this Court have long recognized the paramount importance of privilege protections for conversations between sexual assault survivors and their counselors. This recognition is codified in the Privilege Statute, G.L. c. 233 § 20J, and further developed by this Court in its decisions in *Commonwealth v. Dwyer*, 448 Mass. 122, 144 (2006) and the cases developing the *Dwyer* protocol.

The Privilege Statute protects from disclosure confidential communications between a survivor of sexual assault and a sexual assault counselor.[2] The

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[2] Section 20J defines a "sexual assault counselor" as "a person who is employed by or is a volunteer in a rape crisis center, has undergone thirty-five hours of training, who reports to and is under the direct control and supervision of a licensed social worker, nurse, psychiatrist, psychologist or psychotherapist and whose primary purpose is the rendering of advice, counseling or assistance to victims of sexual assault."

legislature intended for this privilege to be absolute; the Privilege Statute states that the "confidential communications" between a sexual assault survivor and a sexual assault counselor "shall not be subject to discovery and shall be inadmissible in any criminal or civil proceeding without the prior written consent of the victim" to whom the records relate. G.L. c. 233 § 20J. As this Court has recognized, "Section 20J, like few other testimonial privilege statutes . . . is a statement of absolute privilege. Statutory privileges normally have exceptions, some of which are quite general, and, for that reason, they indicate a less firmly based legislative concern than § 20J does for the inviolability of the communication being protected." *Commonwealth v. Two Juveniles*, 397 Mass. 261, 265-66 (1986); *see also Commonwealth v. Neumyer*, 432 Mass. 23, 39 (2000) (Abrams, J. dissenting) ("The Legislature has spoken unequivocally, and its intent clearly was to make the scope of the privilege [in Section 20J] as broad as is constitutionally permissible."). This definitive language reflects the legislature's recognition of the importance of confidential counseling to implementing the Commonwealth's stated policy of assisting victims of sexual crimes to recover from injuries, both physical and psychological. *See Commonwealth v. Stockhammer*, 409 Mass. 867 (1991).

Nonetheless, this Court has recognized that even an "absolute" statutory privilege must yield in certain limited circumstances to preserve a defendant's

constitutional rights. *Two Juveniles*, 397 Mass. at 266. Therefore, this Court ruled in *Dwyer* that the absolute privilege for sexual assault counseling records may be pierced only after satisfying very specific criteria. 448 Mass. at 143.

In *Dwyer*, the Court established the protocol governing a criminal defendant's access to and use of records covered by the Privilege Statute. *See id.* The *Dwyer* requirements have been summarized as "relevance, admissibility, necessity, and specificity." *In re an Impounded Case*, 491 Mass. 109, 117 (2022) (internal quotations omitted); *Dwyer*, 448 Mass. at 145. That relevance and necessity are established "with specificity" is a critical element of *Dwyer*—this Court has repeatedly emphasized that *Dwyer's* specificity requirement curtails speculative and burdensome requests from criminal defendants for counseling records. *See, e.g.*, *Commonwealth v. Olivier*, 89 Mass. App. Ct. 836, 845 (2016) (defendant's argument that a victim-witness's therapy records might contain "an inconsistent account or meaningful silence" was too speculative to satisfy *Dwyer*); *Commonwealth v. Sealy*, 467 Mass. 617, 628 (2014) (defendant failed to establish relevance of requested records where allegations in the affidavit supporting the request "were couched in hypothetical language"); *Commonwealth v. Bourgeois*, 68 Mass. App. Ct. 433, 437 (2007) (mental health records are not relevant simply because they exist by virtue of the fact that a victim-witness was referred for

mental health or psychiatric services around the time she alleged or revealed the abuse).

The *Dwyer* protocol "is designed to give the fullest possible effect to legislatively enacted privileges consistent with a defendant's right to a fair trial." *Dwyer*, 448 Mass. at 144. *Commonwealth v. Jones*, 478 Mass. 65 (2017) exemplifies this Court's well-reasoned application of *Dwyer*. In *Jones*, this Court affirmed a trial judge's decision to deny a defendant's request for presumptively privileged records from a psychiatrist and counseling center as well as counseling records from the victim's school related to accusations that the defendant had sexually abused his minor daughter. *Id.* at 67, 69. The defendant argued the records were relevant to the minor-victim's credibility regardless of whether the abuse was discussed during counseling sessions because the minor-victim had a history of behavioral issues at school and had denied the abuse at certain points. *Id.* at 69. The defendant also argued the records potentially contained unspecified exculpatory evidence.

The Court denied the defendant's request and ruled that the defendant had not demonstrated that the records were relevant with the specificity required under *Dwyer*. *Id.* at 70. The Court reasoned that "to accept the defendant's argument that the records would be relevant both because they might contain information

regarding the alleged assault and because they might not" would render statutory and common-law privileges "meaningless." *Id.* at 70-71.

This Court's decision in *Jones* showed the *Dwyer* protocol can, when properly applied, provide the intended protection to communications between sexual assault counselors and survivors while preserving a criminal defendant's constitutional rights. The *Dwyer* protocol "thus represents a careful balancing" of these interests. It recognizes "not only that a statutory privilege sometimes must yield to a defendant's need for information to mount a defense and thus obtain a fair trial, but also that, in such circumstances, the intrusion must be made with great care and pursuant to exacting procedures." *In re an Impounded Case*, 491 Mass. at 118.

Nothing in the Privilege Statute or *Dwyer* protocol suggests the location of the requesting court should inform the evaluation of privilege protections available, let alone that it should be determinative. This makes sense; to allow for variability in the protection of privileged counseling records of sexual assault survivors in Massachusetts simply based on the location of the requesting court and that court's diligence in applying the *Dwyer* protocol would be arbitrary and undermine the stated goal of the Privilege Statute—to assist victims of sexual crimes with recovery from their injuries, both physical and psychological. *See Stockhammer*, 409 Mass. 867. The Court has an opportunity here to confirm that Massachusetts

courts must uphold the protections of the Privilege Statute and apply the *Dwyer* protocol whenever they receive a request for a survivor's confidential counseling records, regardless of the location of the criminal proceeding.

B. Compelling the Production of Privileged Counseling Records Harms Survivors and Undermines the Therapeutic Relationship Between Survivors and Their Counselors.

As this Court has recognized, orders compelling the production of confidential counseling records should be the exception, not the rule. *See, e.g.*, *Dwyer*, 448 Mass. at 142 (Rule 17 "is *not* a discovery tool" and cannot be used for a "general fishing expedition" (internal quotations omitted)); *Commonwealth v. Fuller,* 423 Mass. 216, 225 (1996) (given the "demonstrated legislative concern for the inviolability of the privilege" of sexual assault counseling records, "disclosure . . . should not become the general exception to the rule of confidentiality"). This is because the threat posed by the risk of disclosure of such records is widespread. It impacts (i) vulnerable sexual assault survivors seeking assistance and guidance; (ii) counselors, who must obtain survivors' trust to offer them informed, quality care and who have an independent legal obligation to

uphold the privilege for those conversations; and (iii) the therapeutic relationship between sexual assault survivors and their counselors.

i. Impact on Sexual Assault Survivors

Disclosure of privileged counseling records without consideration of the protections of the Privilege Statute or the safeguards of the *Dwyer* protocol raises the price for survivors to break their silence and irreparably shakes their confidence in their ability to seek justice through the courts. Most sexual assaults go unreported. The Bureau of Justice Statistics (BJS) reports that the majority–79 percent—of rapes and sexual assaults in the United States in 2021 were not reported to the police, making them the most underreported violent crimes in the country.[3]

Survivors choose not to report assaults for a variety of reasons. Fundamentally, sexual assault survivors are re-traumatized and further victimized by the invasion of their privacy and autonomy resulting from disclosure of their counseling records to the criminal defendant who assaulted them. For sexual assault survivors who have already had so much taken from them, sexual assault counselors provide a safe haven and represent a way to regain control.

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[3] U.S. Department of Justice, Criminal Victimization (2021), https://bjs.ojp.gov/content/pub/pdf/cv21.pdf.

Confidentiality is vital to the relationship between counselors and survivors, a relationship that depends on establishing trust. The threat of losing confidential, trust-based access to counselors signals to survivors that their well-being is secondary to the needs and desires of those who harmed them. This continued violation of their personal autonomy deepens mistrust of the courts and reduces reporting of these assaults. The additional threat of losing the protections of the *Dwyer* protocol whenever records are sought by defendants outside the Commonwealth would only increase this concern.

The threat of disclosure of confidential counseling records has a particularly harsh impact on minor victims.[4] According to the Rape, Abuse, and Incest National Network, the majority of minor victims are assaulted by someone they know, often a friend or family member.[5] In addition, a minor victim may make the difficult decision to disclose the assault to a family member, only to have the

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[4] *See* The American College of Obstetricians and Gynecologists, Committee on Adolescent Health Care, ACOG Opinion No. 803, *Confidentiality in Adolescent Health Care*, www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2020/04/confidentiality-in-adolescent-health-care.pdf (May 2014) ("Confidential care for adolescents is important because it encourages access to care and increases discussions about sensitive topics and behaviors that may substantially affect their health and well-being.").

[5] *Sexual Assault*, RAPE, ABUSE, AND INCEST NATIONAL NETWORK, https://www.rainn.org/articles/sexual-assault (last visited Feb. 27, 2023).

family member not believe them or blame them.[6] This experience may deeply shake their sense of trust in those around them. Other minor victims may decide not to share the assault with their parents or guardians out of shame or fear of repercussions within their family.[7] A sexual assault counselor may be the only person to whom the minor victim discloses the assault.[8]

The fear of disclosure of counseling records is so strong that survivors may forego mental health treatment. Indeed, sexual assault counselors at the Beth Israel Hospital Rape Crisis Center reported the following observations prior to the Court's ruling in *Dwyer*: 30% of victims raised concerns about counseling and avoided full disclosure with their counselor; 10% refused counseling outright; and

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[6] Yamamoto, D. The Advocate's Guide: Working with Parents of Children Who Have Been Sexually Assaulted, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, April 2015, at 57, https://www.nsvrc.org/sites/default/files/2015-04/publications_nsvrc_guides_the-advocates-guide-working-with-parents-of-children-who-have-been-sexually-assaulted.pdf.

[7] Romana Alaggia, *An Ecological Analysis of Child Sexual Abuse Disclosure: Considerations for Child and Adolescent Mental Health*, J. CAN. ACAD. CHILD ADOL. PSYCHIATRY, Feb. 19, 2010, at 32, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2809444/.

[8] Anna Y. Joo, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255, 264-265 (1995) ("[W]hen sexual assault survivors were asked to identify the person who was most helpful in the recovery process, rape crisis workers were ranked the highest, even above significant others, fathers, and clergy.").

the Center observed a 20% drop in clients reporting to police. *See* The District Attorneys and the Department of Mental Health as Amici Curiae at n.6, *Commonwealth v. Rape Crisis Program of Worcester, Inc.*, 416 Mass. 1001 (1993). Thus, disclosure of these records directly threatens the healing of minor victims.[9]

As these observations show, making the promise of confidentiality contingent upon the variability of different out-of-state judges evaluating the relative importance of the survivor's interest in privacy and the evidentiary need for disclosure creates far too much uncertainty. Survivors of sexual assault are particularly vulnerable to uncertainty in whether their records will be disclosed because, in most cases, they do not have standing to challenge a subpoena issued to the keeper of their counseling records. *See In re Rhode Island Grand Jury Subpoena*, 414 Mass. 104, 111 (1993). Thus, as happened here, courts often fail to consider the burden on the victim of disclosure of the records. This uncertainty is increased by orders like the motion judge's in this case—where the protections that do exist are set aside merely because the defendant seeking the records is located outside Massachusetts.

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[9] *Id*. at 265.

ii. Impact on Sexual Assault Counselors

Uncertainty regarding the disclosure of privileged counseling records also impacts sexual assault counselors. Massachusetts counselors rely on the Privilege Statute and the safeguards of *Dwyer* when advising clients about the confidentiality of their conversations. Counselors cannot assure survivors about the confidentiality of their records if motion judges decline to apply the protections enshrined in Massachusetts law when they receive out-of-state subpoenas.

Counseling centers and rape crisis centers also often lack the resources to obtain legal advice to determine how to respond to requests for privileged records. Responding to such requests will become more difficult if the standard for disclosure depends on the location of the underlying criminal proceeding in which the records are sought. Such uncertainty creates an unacceptable risk that counseling centers may not understand whether they have a basis to object to production and may produce confidential counseling records. For example, here the criminal defendant sought records from two other Massachusetts counseling centers. *See* Dkt. No. 7 at 1, n.4. Because those centers did not appear with counsel and oppose the subpoena, the motion judge simply ordered production of the requested counseling records, without considering the privileged nature of the records. *Id.*

iii. Impact on the Therapeutic Relationship Between Sexual Assault Survivors and Their Counselors

Through the protections in the Privilege Statute, the *Dwyer* protocol, and *Dwyer's* related cases, Massachusetts has identified the sexual assault counselor and survivor relationship as one of the few societal relationships entitled to a privilege that should only be pierced in rare and necessary circumstances. *See, e.g.*, *Commonwealth v. Vega*, 449 Mass. 227, 229 (2007) (describing confidentiality rules and evidentiary privileges applicable only to communications with licensed psychologists, social workers, and sexual assault and domestic violence counselors). The list of relationships entitled to such privileges is small, emphasizing the conscious decision made by the legislature to protect this beneficial relationship. *See, e.g.*, *Two Juveniles*, 397 Mass. at 265 (Section 20J contains "a statement of absolute privilege" similar to "few other testimonial privilege statutes" like the priest-penitent privilege in G. L. c. 233, § 20A).

This Court has emphasized the importance of consistently upholding an established legal privilege and observed that "[a]n uncertain privilege is little better than no privilege at all." *Vega*, 449 Mass. at 233 n.12 (quotations and ellipsis removed); *see also Jaffee v. Redmond*, 518 U.S. 1, 17 (1996) ("Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."). It is therefore

imperative that any decision undermining the privileged nature of the sexual assault counselor-survivor relationship be well-reasoned and supported by Massachusetts law. Any order lacking such support—like the motion judge's order in this case—cannot stand.

II. The Uniform Act Allows For Consideration of Privilege And Other Factors Weighing Against Disclosure.

The Uniform Act sets out the procedures for compelling a Massachusetts entity to produce documents in response to a subpoena issued by an out-of-state court for a pending criminal case in that state. *See* G.L. C. 233 § 13A; *Application of a Grand Jury of N.Y.*, 8 Mass. App. Ct. 760, 768 (1979) (Uniform Act applies to subpoenas for both appearance of witnesses and production of documents). First, a judge of the requesting court must certify that a criminal proceeding or a grand jury investigation is pending in that state and the records from Massachusetts are "material and necessary" to that proceeding. G. L. c. 233, § 13A. After receiving the out-of-State certificate, the statute requires the Massachusetts judge to hold a hearing to determine whether (i) the records are material and necessary and (ii) compelling production of the records will cause the record holder undue hardship. *Id*. The Massachusetts judge has discretion under Section 13A to independently determine whether the records are "material and necessary" to that proceeding. *Id.* As discussed below, failure to do so in the context of presumptively privileged records constitutes an abuse of discretion. *See Commonwealth v. Gasdik*, No. 04-

1415, 2004 Mass. Super. LEXIS 652 at *4 (2004) (court has discretion to "take[] a second look and independently determine[]" whether the witness is material and necessary).

Neither the Uniform Act nor this Court's jurisprudence suggests, however, that a Massachusetts judge may defer the "undue hardship" analysis to the foreign court. *See* G.L. c. 233 § 13A (tasking Massachusetts motion judge with undue hardship determination); *see also In re Issuance of a Summons Compelling an Essential Witness to Appear & Testify in the State of Minn.*, 2018 S.D. 16, ¶¶ 23-24, 28 (2018) (finding abuse of discretion where trial court deferred to the out-of-state court and made no independent finding of undue hardship under South Dakota Uniform Act). To the contrary, many state courts "have concluded that their own state's important public policies require determining if a witness has a valid legal privilege *before* issuing a summons" for an out of state litigation.[10] *See, e.g.*, *Matter of Holmes v. Winter*, 22 N.Y. 3d 300 314-19 (N.Y. 2013) (quashing subpoena on public policy grounds where a member of the New York press sought to avoid being required to testify in another state's criminal trial because New

[10] Darrell E. White II, *Subpoenaing Out-of-State Witnesses in Criminal Proceedings: A Step-by-Step Guide*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL (May 18, 2021), https://www.naag.org/attorney-general-journal/subpoenaing-out-of-state-witnesses/#footnote_3_15863.

York press shield laws were more protective than the press shield laws in the requesting state, and because the witness established a "substantial likelihood that an order compelling [his] appearance and testimony in the other jurisdiction would directly offend [New York public] policy"); *People v. Marcy*, 283 N.W.2d 754, 756-757 (Mich. Ct. App. 1979) (deciding Michigan polygrapher's privilege claim and refusing to issue subpoena for him to appear in out of state litigation because requiring his appearance would undermine Michigan's legislative policy of upholding Michigan's statutory privilege for communications with or provided to the polygrapher).

The Massachusetts court, not the requesting court, should conduct the undue hardship analysis so that the Massachusetts records holder can present a Massachusetts court with it concerns about producing records in an out-of-state case that are presumptively privileged under Massachusetts law.

Nothing in the Uniform Act prevents the Massachusetts court from considering the privileged nature of the records sought as part of its analysis. The Uniform Act does not define undue hardship, *see* G. L. c. 233, § 13A; *Gasdik*, 2004 Mass. Super. LEXIS 652 at *5, and Massachusetts judges have considered a range of factors when evaluating undue hardship, including cost, time, travel, and risk of significant physical or emotional harm. *See, e.g., Gasdik*, 2004 Mass. Super. LEXIS 652 at *3 ("[C]ertain circumstances such as a specific threat, the

possibility of psychological harm, or the tender age of a child witness might constitute an undue hardship. . . "); *In re Rhode Island Grand Jury Subpoena*, 414 Mass. 104, 116 (1993) (travel to another state could constitute undue hardship). In fact, in his original order denying the request for Wayside's records, the motion judge recognized that requiring production of a survivor's confidential counseling records would cause "undue hardship" to Wayside, and "by extension, the alleged minor victim" because it would undermine Wayside's obligation under the Privilege Statute to preserve the confidentiality of the records. Dkt. 7 at 3. Particularly in the case of sensitive counseling records for an already vulnerable victim, this is the precisely the type of harm that judges should consider before ordering disclosure.

This Court should find that the motion judge erred by conducting an inadequate analysis under the Uniform Act in which he failed to (i) consider the privileged nature of the records sought; (ii) recognize the undue hardship production would impose on the minor victim in this case; and (iii) evaluate all the aspects of the undue hardship production imposes on Wayside and similarly situated counseling centers. These errors, individually and together, warrant reversal.

A. The Motion Judge Erred by Ignoring the Privileged Nature of the Records When Conducting His Analysis Under the Uniform Act.

The motion judge erred when he completely disregarded the undisputedly privileged nature of the records requested throughout his analysis under the Uniform Act. That these records are privileged is a critical factor to the determination of whether these records should be disclosed; as described below, the privileged nature of the records impacts both prongs of the Uniform Act analysis and governs what procedural protections apply to disclosing the records. Therefore, the privilege question cannot be divorced from the analysis under the Uniform Act, as the motion judge here suggested (Dkt. 9 at 2-3), without a result that is contrary to Massachusetts law and public policy.

i. The Motion Judge Should Have Independently Considered Whether the Records Were Material and Necessary to the Rhode Island Proceeding

The motion judge erred by deferring to the Rhode Island court's evaluation of the materiality and necessity of the records. Although such a deferral may be permitted in some circumstances, deferral is an abuse of discretion in these circumstances because of the privilege conferred on these records by the Massachusetts legislature.

Specifically, by accepting as sufficient the Rhode Island court's finding that the counseling records would provide evidence "relating to an alibi generally as well as impeachment and exculpatory evidence," Dkt. 9 at 4, the judge ignored *Dwyer's* "specific need" requirement. It is well-established that such a general

finding of relevance is insufficient to satisfy the specificity prong of *Dwyer*. *See Jones*, 478 Mass. at 70 ("Without some basis demonstrating the relevance of the records beyond their mere existence, the defendant's [requests] lacked sufficient specificity, and were thus too speculative under *Lampron*.").

There can be no dispute that Wayside provided counseling to this survivor in Massachusetts, and the records of such counselling are kept in Massachusetts. There also can be no dispute that had the records been sought initially in a Massachusetts proceeding, an evaluation under the *Dwyer* protocol would be required before any order issued requiring their disclosure. The motion judge failed to conduct one here, instead deferring to the Rhode Island court's determination. But the Rhode Island court did not conduct a *Dwyer* analysis, and therefore, its determination cannot comport with the Massachusetts requirements. This constitutes an abuse of discretion. *See, e.g.*, *Chambers v. RDI Logistics, Inc.*, 476 Mass. 95, 110 (2016) ("An abuse of discretion occurs when the judge's decision rests upon a clear error of judgment in weighing the factors relevant to the decision . . . such that [it] falls outside the range of reasonable alternatives, or when the judge's decision constitutes a significant error of law.").

ii. The Motion Judge's "Undue Hardship" Analysis Was Flawed.

The motion judge also erred by ignoring the privileged nature of Wayside's records in his "undue hardship" analysis under the Uniform Act.

a. The Motion Judge Erred By Concluding the Minor Victim Would Not Suffer Psychological Harm Sufficient to Constitute Undue Hardship Under the Uniform Act.

Without explanation (and in direct contradiction of his earlier order), the motion judge disregarded any threat of psychological harm to the minor victim from Wayside's disclosure of her confidential counseling records. Despite recognizing that psychological harm could constitute an undue hardship under the Uniform Act, the trial judge inexplicably concluded that this case "[did] not raise any of these concerns." Dkt. 9 at 5 (citing *Gasdik*, 2004 Mass. Super. LEXIS 652, at *9). This conclusion lacks any basis in fact and is contrary to established Massachusetts law.

The minor victim in this case specifically informed Wayside's counsel that she wished for Wayside to preserve the confidentiality of her counseling records. Dkt. 8 at 2. Wayside informed the motion judge of this concern and of the potential for psychological harm to the minor victim, but there is no evidence in the record that the motion judge took this into consideration—or that the Rhode Island Court did, for that matter. The victim relied on Wayside's objections and the motion judge's proper application of Massachusetts law to protect her interests.

Unfortunately, the motion judge here declined to consider her interests, seemingly merely because she was assaulted outside Massachusetts and her records were requested by a foreign court.

Although it appears this Court has yet to confront this precise issue, courts in other jurisdictions have recognized that consideration of psychological harm to the subpoenaed witness is a necessary part of the undue hardship analysis under that state's Uniform Act. *See, e.g.*, *State ex rel. Montgomery v. Kemp*, 371 P.3d 660, 662 (Ariz. Ct. App. 2016) (describing quashing of Arizona subpoena by Montana court where the Montana court found that the sexual assault victim subpoenaed "would experience undue hardship in the form of physical and psychological harm by being forced to testify").

The South Dakota Supreme Court's decision *In re Issuance of a Summons Compelling an Essential Witness to Appear and Testify in the State of Minn.*, 2018 S.D. 16 (2018) provides a useful example. There, the South Dakota Supreme Court reversed the trial court's decision ordering a minor victim of domestic assault who was resident in South Dakota to testify in the criminal proceeding of her abuser in Minnesota. Pursuant to South Dakota's Uniform Act (which is

substantially similar to the Massachusetts Uniform Act),[11] the Minnesota court submitted certificates that the "there was no known reason that an order compelling [the minor victim] to testify would cause undue hardship." *Id*. at ¶ 3. In response, (i) the minor victim's grandfather testified about the impact testifying would have on her and (ii) her counselor submitted a letter to the court explaining that "'testifying would likely negatively impact [the victim's] mental health and cause an increase in her depressive symptomology, trauma symptomology and suicidality.'" *Id.*

Like the motion judge in this case, the South Dakota trial judge disregarded this evidence of undue hardship and instead relied upon the "procedures that [he was] sure the Minnesota court [would] employ in handling [the victim's] testimony" and made no findings "on hardship or the mental health concerns raised by [the victim's] counselor if [she] were required to testify." *Id*. (internal quotations omitted). On appeal, the South Dakota Supreme Court concluded that the trial judge abused his discretion by failing to consider the specifically identified threats testifying posed to the minor victim's mental health in his "undue hardship" analysis. *Id.*

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[11] *Compare* S.D. Codified Laws § 23A-14-16, *with* Mass. Gen. Laws ch. 233, § 13A.

The Court should find similarly here. The motion judge's decision completely disregarded any impact on the minor victim in this case, "trusting" instead that the Rhode Island court's promised *in camera* review of the records would provide sufficient protection. Dkt. 9 at 5. Failure to consider the significant risk of psychological harm to the minor victim in this case undermines the purpose of the Privilege Statute: "to assist victims of sexual crimes to recover from their injuries both physical and emotional." *Stockhammer*, 409 Mass. at 884; *see* Dkt. 7 at 2. Such a ruling cannot stand.

b. The Motion Judge Failed to Recognize the Undue Hardship of Forcing Wayside to Produce Privileged Records.

In opposing the motion to compel privileged records, Wayside argued that it would be unduly burdened by production because it intended to uphold its statutory obligation to "protect the rape crisis counseling privilege" even if Wayside had "to endure the contempt process and all that that entails" for refusing to produce the records in violation of a court order. Dkt. 6 at 6. The Court rejected this argument, citing cases where a contempt order had been stayed pending appeal for entities that refused to comply with an order to produce records they asserted were privileged. Dkt. 9 at 5. The judge did not view the threat of contempt for refusing to comply with his order as an undue hardship. This ruling oversimplified

the significant impact of ordering Wayside to break a statutory privilege without proper process.

Putting aside Wayside's ultimate compliance with any order, merely issuing an order compelling Wayside to produce privileged sexual assault counseling records without first following the *Dwyer* protocol has a waterfall of negative effects. If the protections of Massachusetts law are pushed aside in the face of an out-of-state subpoena, Wayside will have to produce confidential counseling records for some clients and not for others based on the location of the proceeding against the perpetrator of the crime. This will make it nearly impossible for Wayside to accurately advise counseling clients as to the confidentiality of their counseling records, creating uncertainty which will chill the very communications between counselor and patient that the Massachusetts privilege was meant to promote. As described above, this uncertainty could be a significant deterrent to many survivors seeking counseling or reporting their assault, which in turn will prevent Massachusetts from prosecuting assailants and preventing future assaults and prevent survivors from healing physically and emotionally from the attack.

In addition, for a Massachusetts entity like Wayside, this untenable situation could arise repeatedly: many individuals live in Massachusetts but may work in or regularly visit other states. Massachusetts is also widely known for the number of higher education institutions within the Commonwealth, meaning young adults

may be living in Massachusetts to attend school and receive counseling services in Massachusetts, but become victims of sexual assault in their home states or elsewhere. If any of these individuals seek counseling, they face significant uncertainty about whether their records will be disclosed in court and what process will be used to make that determination. Taking away Wayside's ability to assure its clients that Massachusetts protections will apply to their counseling records constitutes an undue hardship.

Beyond creating uncertainty for counseling centers and their patients, the threatened contempt process for refusal to comply with a court order to produce privileged records will become an undue burden for Wayside and similarly situated counseling centers. Facing a costly and time-consuming legal battle each time Wayside seeks to uphold its statutory obligation not to produce privileged counseling records will make refusal impractical or impossible.

III. The Motion Judge Erred By Deferring Wayside's Privilege Claims to the Rhode Island Court.

The motion judge also erred when he concluded that Massachusetts was not the appropriate forum for Wayside, a Massachusetts entity, to raise an objection to production of a Massachusetts resident's counseling records under the Massachusetts Privilege Statute, *see* Dkt 9, 2-3.

First, as described above, privilege considerations are intertwined with the Uniform Act analysis. The decision to defer any questions of privilege to the Rhode Island court effectively removed well-established protections for these records under Massachusetts law from consideration prior to production.

Second, the motion judge had no need to defer privilege objections to the Rhode Island court. As a Massachusetts entity holding records of a Massachusetts resident that are privileged under Massachusetts law, Wayside was entitled to have its privilege objections adjudicated in Massachusetts before the Massachusetts court issued an order enforcing the Rhode Island Court's subpoena. *See Matter of Holmes*, 22 N.Y.3d at 316 (finding that a reporter was entitled to have a New York court adjudicate a privilege issue protecting journalists' ability to keep sources confidential under New York law even though it related to testimony in an out-of-state court); *People v. Marcy*, 283 N.W.2d at 757 (Michigan polygrapher properly brought privilege claims under Michigan privilege statute before Michigan court, rather than the requesting Delaware court). The Privilege Statute "represents a declaration by the Legislature" that sexual assault counseling records are privileged, and Massachusetts courts have a duty to enforce the Privilege Statute. *People v. Marcy*, 283 N.W.2d at 757. It is inconsistent with the core protections of the Privilege Statute and Massachusetts public policy for a Massachusetts trial judge to allow a Rhode Island court to decide whether Wayside must appear in

Rhode Island and produce confidential counseling records of a Massachusetts resident in a criminal proceeding. *Matter of Holmes*, 22 N.Y.3d at 318; *see also People v. Marcy*, 283 N.W.2d at 757 (inconsistent with Michigan public policy to require "unwilling" Michigan polygrapher to appear in Delaware to testify about information protected by a Michigan privilege statute).

Finally, to the extent a choice of law question exists in this case, the motion judge failed to properly apply Massachusetts law here. Massachusetts has adopted a "functional choice-of-law approach that responds to the interests of the parties, the States involved, and the interstate system as a whole." *Bushkin Assocs., Inc. v. Raytheon Co.*, 393 Mass. 622, 631 (1985). *Bushkin* "reject[ed] artificial constructions," and looked to the Restatement (Second) of Conflicts of Laws to guide its choice-of-law analysis.[12] *See also In re Pelvic Mesh Gynecare Litig.*, No. MICV2013-04903, 2014 Mass. Super. LEXIS 130 (Mass. Sup. Ct. Apr. 9, 2014) (finding that under *Bushkin*'s functional "most significant relationship" test Massachusetts had the more significant relationship because of the location of the protected material—the content at issue was received, reviewed, and discussed in Massachusetts).

[12] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6.

Massachusetts choice-of-law principles dictate that, where Massachusetts has an interest in the case, Massachusetts courts must consider relevant Massachusetts policies—here, the Privilege Statute and the *Dwyer* protocol—even when Massachusetts is not the location of the trial. *See Restatement (Second) of Choice of Law* § 6(2)(b) cmt. e (noting that courts should regard the purpose of a state's laws in determining whether to apply its own rule or the rule of another state and "if the purposes sought to be achieved by a local statute [] would be furthered by its application to out-of-state facts, this is a weighty reason why such application should be made."). Here, the Massachusetts court should have conducted a *Dwyer* analysis before ordering disclosure of records protected by the Privilege Statute. That the criminal proceeding is occurring in Rhode Island and the assault allegedly took place there is not relevant to the question of which law governs the counselor-patient relationship in Massachusetts. Both the minor victim and Wayside are in Massachusetts. The therapeutic relationship between the minor victim and her sexual assault counselor was formed and developed within Massachusetts. A Massachusetts judge therefore should apply the Massachusetts Privilege Statute because it is necessary to effectuate the law's purpose—to protect the confidential relationship between a survivor of sexual assault and their counselor formed in Massachusetts.

Additionally, application of the *Dwyer* protocol protects the justified expectations of both the providers of therapeutic services in Massachusetts and those who confide in such providers to recover and rehabilitate. *See Restatement (Second) of Choice of Law* § 6(2)(d) (noting the protection of justified expectations).

Finally, the *Dwyer* protocol fully considers the interests of the criminal defendant in receiving a fair trial, and appropriately balances the interest of both relevant states—Massachusetts in protecting the legislatively prioritized privilege and Rhode Island in administering its system of justice. *See Restatement (Second) of Choice of Law* § 6(2)(c).

The motion judge's failure to conduct the required analyses under *Dwyer* and the Uniform Act undermines choice-of-law principles meant to provide certainty and predictability. Such failure also places an inappropriate burden on a victim of sexual assault, as it did for the victim here, by requiring them to consider where a perpetrator may bring a records request before determining whether they will disclose confidential information to a sexual assault counselor. Accordingly, the motion judge's decision to defer questions of privilege to the Rhode Island Court violates Massachusetts law and choice of law principles.

IV. The Court Should Decide This Question of Public Importance.

Amici understand that the appellee has not submitted a brief in this appeal. The Court should issue a decision nonetheless. This case is not moot. The trial court's order remains in place, and the appellee has neither dismissed his underlying Massachusetts action nor withdrawn his pending request in the Rhode Island trial court for the privileged counseling records in Wayside's possession. *See David Florio v. Keeper of Records of Arbour Counseling & Others*, Worcester Sup. Ct., No. 2285OW00002; *State of Rhode Island v. David Florio,* P1-2021-1038A. Accordingly, an actual controversy still exists to be resolved by the Court. *See, e.g.*, *In re Sturtz*, 410 Mass. 58, 59 (1991).

Moreover, this is an issue of public importance that is capable of repetition yet evading review. *See, e.g.*, *Commonwealth v. Teixeira*, 475 Mass. 482, 488, (2016) ("[I]t is within the discretion of this court to answer questions that, due to circumstances, no longer may have direct significance to the parties but raise issues of public importance and, because of their nature, may be 'capable of repetition, yet evading review.'"). As noted by the motion judge in this case, "[Massachusetts] appellate courts have provided little to no guidance" as to whether records subject to privilege protections in Massachusetts should be produced in response to out-of-state requests. Dkt. 9 at 5. This difficult question will certainly resurface as sexual assault counseling centers in Massachusetts,

including Wayside, will inevitably be faced with more requests from foreign courts for counseling records that are subject to the protections of the Privilege Statute and the *Dwyer* protocol.

CONCLUSION

The motion judge erred by ignoring the privileged nature of the records in his analysis under the Uniform Act and concluding that only the Rhode Island court could rule on Wayside's privilege claims. The motion judge's errors stripped both Wayside and the survivor of the protections afforded them by the Privilege Statute and *Dwyer*. For the reasons herein, amici respectfully request that the Court grant Appellant's request for relief, rule that the Reported Decision is invalid and erroneous and that the criminal defendant's motions should have been denied, and vacate the Reported Decision and remand for further review consistent with *Dwyer*.

Respectfully submitted,

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Date: April 18, 2023

CERTIFICATION PURSUANT TO MASS. R. APP. P. 17(C)(9)

I, Laura Gradel, certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Rules 17 and 20. This brief contains 7,491 non-excluded words, which I ascertained using Microsoft Word's word count function. The brief uses Time New Roman 14-point font and was composed in Microsoft Word.

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CERTIFICATE OF SERVICE PURSUANT TO MASS. R. APP. P. 13(E)

I, Laura Gradel, certify that on April 18, 2023 I filed the foregoing Brief of Amicus Curiae the Victim Rights Law Center, Jane Doe, Inc. and Others in Support of Respondent-Appellant in *David Florio v. Keeper of Records of Wayside Youth and Family Support Network, Inc*., SJC-13336 with the Supreme Judicial Court by electronic service. This brief was served via U.S. mail and electronic mail on all counsel of record, and the petitioner-appellee David Florio at daf2269@gmail.com, and First Class Mail to 914 Mendon Road, Cumberland, RI 02864, as represented to be Petitioner-Appellee's current email address and last known physical address by former counsel for Petitioner Appellee in his Motion to Withdraw.

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