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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. CDV-2020-307 Hon. Kathy Seeley **PLAINTIFFS' ANSWER BRIEF OPPOSING DEFENDANTS' RULE 35(a) MOTION FOR INDEPENDENT MEDICAL EXAMINATION OR, IN THE ALTERNATIVE, MOTION TO STRIKE OPINIONS AND TESTIMONY OF DR. LISE VAN SUSTEREN**

INTRODUCTION[1]

Defendants seek to subject eight youth Plaintiffs in this case—Plaintiffs who do not seek damages of any kind—to two-hour psychological examinations from a psychiatrist of their choosing, and to intrude upon matters that are wholly irrelevant to this case, such as Plaintiffs' behavioral history, alcohol and drug use, and school performance. As detailed herein, Montana law cannot support the Rule 35 psychological examinations being demanded.

The youth Plaintiffs' claims in this case are grounded in Montana's Constitution. The remedies they seek are solely equitable in nature. Plaintiffs' general allegations, including their alleged mental health injuries, are made and are relevant for the purpose of establishing that they have been harmed by Defendants' conduct and therefore have standing to pursue the constitutional claims at issue. As the Montana Supreme Court has made clear, legitimate allegations of mental health injuries can suffice to establish a plaintiff's standing. *See, e.g., Gryczan v. State*, 283 Mont. 433, 446, 942 P.2d 112, 120 (1997) (finding "specific psychological effects" caused by the challenged statute can satisfy standing requirements). Plaintiffs have not filed tort claims with allegations of intentional or negligent infliction of emotional distress, and *they do not seek monetary damages for emotional injuries*. Thus, Defendants cannot satisfy the necessary high standard of demonstrating that the identified psychological impacts are "*really* and *genuinely* in controversy" in this case for purposes of this Court's analysis under Rule 35, Mont. R. Civ. P. *In*

[1] Defendants' Rule 35(a) Motion was filed under seal because it included material from Attachment 3 of Dr. Van Susteren's expert report, which was filed under seal, pursuant to the protective order in this case. Because this opposition brief does not quote from Attachment 3 of Dr. Van Susteren's expert report, or contain any other information subject to the protective order in this case, it is not being filed under seal.

re Marriage of Binsfield, 269 Mont. 336, 341, 888 P.2d 889, 891-92 (1995) (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964)) (emphasis added).[2]

Moreover, Montana law cannot support the required specific finding of good cause for Defendants' invasive examinations of these youth Plaintiffs, ranging in age from 14 to 21. Montana courts have consistently held any compelled exam pursuant to Rule 35, Mont. R. Civ. P., be considered as "the most intrusive and, therefore, *the most limited* discovery tool." *Simms v. Montana Eighteenth Jud. Dist. Ct.*, 2003 MT 89, ¶ 30, 315 Mont. 135, 68 P.3d 678. Constitutionally-based privacy concerns demand that Montana courts scrutinize Rule 35 requests. *Id.*, ¶¶ 32-33 (citing Mont. Const. Art. II, § 10). Therefore, "[a] defendant's need for discovery of a plaintiff's mental or physical condition under Mont. R. Civ. P. 35 must be balanced against the plaintiff's constitutional right to privacy under Montana Constitution Article II, Section 10." *Lewis v. Montana Eighth Jud. Dist. Ct.*, 2012 MT 200, ¶ 6, 366 Mont. 217, 286 P.3d 577.

The examinations that Defendants demand unquestionably present great risk of unnecessary and harmful impacts upon these eight youth. These examinations and the harm they threaten must be weighed in light of the numerous other paths available to Defendants, including less intrusive discovery tools Defendants have not availed themselves of. Accordingly, Defendants cannot make the requisite affirmative showing that these invasive psychological evaluations are justified. *See Simms*, ¶ 32 ("When a proposed examination risks unnecessary, painful or harmful procedures the scale must favor protecting the individual's rights.").

Defendants' motion should be denied because Defendants have failed to meet their very high burdens under Rule 35, Mont. R. Civ. P., and they cannot overcome this Court's need to protect the constitutional privacy rights of these youth Plaintiffs.

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[2] Unless otherwise noted, all emphasis hereinafter is added.

LEGAL STANDARDS

The purpose and relevance of Plaintiffs' identified mental health harms in this case relates to the issue of standing. "Standing is a threshold, jurisdictional requirement" that limits whether Montana courts can decide a given case. *Cmty. Ass'n. for N. Shore Conservation, Inc. v. Flathead Cnty.*, 2019 MT 147, ¶ 19, 396 Mont. 194, 445 P.3d 1195. To establish standing:

> (1) The complaining party must clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.

Gryczan, 283 Mont. at 442-43, 942 P.2d at 118 (quoting *Helena Parents Comm'n v. Lewis & Clark Cnty. Comm'rs*, 277 Mont. 367, 371, 922 P.2d 1140, 1142-43 (1996)).

Montana litigants can obtain discovery through physical or mental examinations only by court order. Montana Rule of Civil Procedure 35(a) permits courts to order a mental or physical examination only when a party's mental or physical condition is "in controversy" *and* when the requesting party demonstrates "good cause" for the examination. Mont. R. Civ. P. 35(a). The "in controversy" and "good cause" requirements "are *not* met by mere conclusory allegations of the pleadings – nor by mere relevance to the case – but *require an affirmative showing by the movant* that each condition as to which examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." *In re Marriage of Binsfield*, 269 Mont. at 341, 888 P.2d at 891-92 (quoting *Schlagenhauf*, 379 U.S. at 118 (emphasis added)); *Lewis*, ¶ 7 (noting there is a "high standard" for the "in controversy" and "good cause" requirements of Rule 35(a)). "[I]t is well accepted that a party does not possess an absolute right to obtain an independent medical examination." *Simms*, ¶ 28. On the contrary, "a compelled medical exam is the most intrusive and, therefore, the most limited discovery tool." *Id.*, ¶ 30 (citing *Schlagenhauf*, 379 U.S. 104).

These two mandatory pre-requisites are designed to protect the "[c]onstitutionally-based privacy concerns" – secured by Article II, Section 10 of Montana's Constitution[3] – implicated by Rule 35. *Lewis,* ¶ 6. "A defendant's need for discovery of a plaintiff's mental or physical condition under M.R. Civ. P. 35 must be balanced against the plaintiff's constitutional right to privacy under Montana Constitution Article II, Section 10." *Id.* (citing *Mapes v. Dist. Ct. of the Eighth Jud. Dist.,* 250 Mont. 524, 529, 822 P.2d 91, 94 (1991)). Importantly, the substantial invasion of a plaintiff's constitutional right to privacy cannot be undone by an appeal. *See, e.g., Winslow v. Mont. Rail Link, Inc.*, 2001 MT 269, ¶ 6, 307 Mont. 269, 38 P.3d 148.

ARGUMENT

I. Youth Plaintiffs' Mental Health Injuries are Not "In Controversy"

A. Plaintiffs Appropriately Asserted Mental Health Injuries for Purposes of Standing.

Defendants challenge Plaintiffs' standing in this case. *See* Defs' Brief in Support of Motion to Dismiss at 6-16; *see also* Def. Answer at 4 (denying all allegations related to Plaintiffs' injuries in the Complaint); *id.* at 21 (presenting an affirmative defense that Plaintiffs lack standing). The matter was fully briefed and argued, and thereafter this threshold issue was decided in Plaintiffs' favor by the Court at the motion to dismiss stage. *See* Order on Motion to Dismiss.

As described below, Plaintiffs are not pursuing *claims* for emotional injury. They seek constitutional relief, not *tort damages* on the basis of any emotional injury. Defendants' motion admits that it nonetheless seeks these 16 hours of invasive psychological evaluation to attempt to demonstrate that Plaintiffs' identified mental health injuries are either non-existent, or else caused by factors other than or in addition to climate change, including, for example, potential alcohol

[3] "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10.

and drug use or school performance. However, this Court specifically held that standing would not be defeated merely because Defendants might be able to argue that other causes also exist for Plaintiffs' alleged injuries. Order on Motion to Dismiss, pp. 8-9 (observing "Youth Plaintiffs need only show that a set of facts demonstrate that the unconstitutional State Energy Policy and MEPA Climate Change Exception were a substantial factor in causing Plaintiffs' injuries."). Moreover, these youth Plaintiffs themselves have been proffered for depositions, an offer Defendants have thus far refused to accept.

In short, Montana law requires a plaintiff merely to "allege past, present, or threatened injury," to establish standing as a threshold element of pursuing their claim. *See Montana Env't. Info. Ctr. v. Dep't of Env't. Quality,* 1999 MT 248, ¶¶ 41-45, 296 Mont. 207, 988 P.2d 1236. While Plaintiffs' assertion of mental health harms have been made to address standing, standing in this case has never hinged on that aspect of injury alone. *Cf.*, *Gryczan*, 283 Mont. at 446, 942 P.2d at 120 (finding "specific psychological effects" caused by the challenged statute are "sufficient" to convey standing). The fact that Defendants' effort involves Rule 35, Mont. R. Civ. P., "the most limited discovery tool," further serves to highlight the invasive, peripheral, and ultimately inappropriate nature of the examinations.

B. This is Not a Tort Case and Plaintiffs Do Not Seek Monetary Damages.

Courts must look to the nature of the claims and remedies to determine whether a party has placed their condition "in controversy" for purposes of Rule 35. Examinations of a party's mental condition may be permitted—at the court's discretion—in tort cases with allegations of intentional or negligent infliction of emotional distress, or in cases where plaintiffs seek monetary damages for emotional injuries. *See, e.g., Mapes*, 250 Mont. at 530 ("When a party claims damages for physical or mental injury, he or she places the extent of that physical or mental injury at issue . . .

."). However, Rule 35 examinations are not appropriate in cases involving limited allegations of "general emotional distress." *See, e.g., Lewis*, ¶ 8.

Here, Plaintiffs' mental health injuries are not "in controversy" because this case does not involve either tort claims based on allegations of emotional distress or monetary damages for emotional injuries. Youth Plaintiffs' claims are grounded in Montana's Constitution, and the only remedies they seek are equitable in nature. Plaintiffs' identification of mental health injuries have been presented for the limited purpose of establishing standing. *Supra.*

There is no legal support for the Court to order a Rule 35 examination in these circumstances. Plaintiffs are unaware of any court in Montana allowing a Rule 35 examination when psychological harms have been alleged solely for purposes of standing. The cases Defendants cite where examinations were allowed are easily distinguishable because they *all* involved *actual claims* for emotional distress *and/or monetary damages for emotional injuries*, not limited claims of injury to establish standing.

In *Winslow,* the Montana Supreme Court affirmed the district court's order allowing a Rule 35 examination because plaintiff "made a specific claim for negligent or intentional infliction of emotional distress." *Winslow*, ¶ 10; *see also* ¶ 7 (plaintiff conceded that, "in pleading an independent claim for negligent or intentional infliction of emotional distress, he has placed his mental condition in controversy."). Likewise, in *Henricksen*, the Court found a Rule 35 examination was appropriate because the plaintiff sought damages for a claim "based on emotional distress, loss of consortium, and post-traumatic stress disorder." *Henricksen v. State*, 2004 MT 20, ¶ 13, 319 Mont. 307, 84 P.3d 38. *Mapes* also involved a clear claim for monetary damages based on personal injury caused by the defendant's alleged negligence. Thus, each of the cases relied on by Defendants involved tort claims and monetary damages for physical or mental health injuries.

Contrast these cases with *Lewis v. Montana Eighth Judicial District Court*, where the Montana Supreme Court held a plaintiff did not place her mental condition "in controversy" within the meaning of Rule 35(a) by filing a general claim for "'emotional pain, suffering and anxiety' associated with her physical injuries from the motor vehicle/pedestrian accident in which she was involved." *Lewis*, ¶ 9. Because the plaintiff was not seeking damages for any mental health injury, and was not pursuing a tort claim for negligent infliction of emotional distress, the Montana Supreme Court held that no psychological examination was appropriate. *Id.*, ¶¶ 9-10.[4]

Of course, the claims, remedies, and facts in the present case are unlike any of the above cases in that the instant claims involve only constitutional injury and remedies, not personal injury or monetary damages. Plaintiffs' general allegations of mental health injuries are not relevant to the questions of constitutional and statutory interpretation at issue in this case. Defendants cite no case, and Plaintiffs have found none, where a Rule 35 psychological examination was allowed by a Montana court outside the context of a tort claim for intentional or negligent infliction of emotional distress or where a plaintiff sought damages for a health-related injury. This Court should not expand the scope of Rule 35 examinations and the established bounds of whether certain conditions are "in controversy" to allow Defendants' requested examinations. Plaintiffs seek only constitutional relief, not monetary damages, and identify mental health impacts only to establish standing. Based on these clear distinctions, Defendants have not made the necessary "affirmative showing," and they cannot meet the high standard necessary to establish Plaintiffs' identified mental health impacts are "really and genuinely in controversy" for purposes of any order that this

[4] See *also Neal v. Siegel-Robert, Inc.*, 171 F.R.D. 264, 267 (E.D. Mo. 1996) (denying Rule 35 mental examination of plaintiff with basic complaints about his mental health but no formal diagnosis).

Court must enter to allow an examination pursuant to Rule 35, Mont. R. Civ. P. *In re Marriage of Binsfield*, 269 Mont. at 341, 888 P.2d at 891-92 (quoting *Schlagenhauf*, 379 U.S. at 118).

C. Neither Plaintiffs' General Mental Health Allegations in the Complaint, nor Dr. Van Susteren's Expert Disclosure, Put Plaintiffs' Mental Health "In Controversy."

Contrary to Defendants' arguments, neither Youth Plaintiffs' general allegations of mental health injuries in their Complaint, nor Dr. Van Susteren's expert disclosure, puts Plaintiffs' mental health "in controversy" within the meaning of Rule 35(a). These identified mental health impacts are relevant to the issue of standing but, as detailed above, Plaintiffs' *claims* and *requested relief* are determinative that their mental health is *not* "really and genuinely in controversy." *See, e.g., Lewis*, ¶¶ 7-8.

Relying solely on *Henricksen,* Defendants argue Plaintiffs' general allegations in the Complaint about how climate change impacts their mental health are sufficient to make their mental health "a central issue in this case." Defs' Brief in Support of Rule 35(a) Mot. at 5. But as noted above, *Henricksen* is fundamentally distinct because it involved monetary damages for an actual claim "based on emotional distress, loss of consortium, and post-traumatic stress order." ¶ 13. Again, this is not a tort case and monetary damages are not at issue. Defendants' reliance on *Henricksen* is inapposite.

Defendants also argue that, because Plaintiffs have disclosed Dr. Lise Van Susteren, a psychiatrist, as an expert, her report puts Plaintiffs' mental health "in controversy." Defs' Brief in Support of Rule 35(a) Mot. at 6. Dr. Van Susteren met with five of the youth Plaintiffs during the preparation of her expert report, but was clear that she did not meet with Plaintiffs for the purpose of diagnosing or treating them, nor did she do psychological examinations of any kind. Dr. Van Susteren's expert disclosure clearly states, "I have . . . not performed formal psychological testing

for specific disorders to make individual diagnoses pursuant to the Diagnostic and Statistical Manual of Mental Disorders (DSM–5-TR)." Dr. Van Susteren Expert Report, May 18, 2022 at 5. Dr. Van Susteren did not diagnose any of the Plaintiffs with any mental health disorders.

Moreover, Defendants do not cite a single case where an expert report is dispositive, let alone a factor considered by courts, when determining whether to allow a Rule 35 examination.[5] For the reasons stated above, these conditions are not "really and genuinely in controversy," and elements of one expert report cannot change that. In short, Defendants have failed to carry their high burden related to Plaintiffs' mental health being "in controversy." Defendants have simply failed to make the affirmative showing necessary to compel this Court to order the eight mental examinations being demanded pursuant to Rule 35, Mont. R. Civ. P., and consequently Defendants' motion should be denied.

II. Defendants Have Failed to Establish "Good Cause" to Justify Rule 35 Examinations

Defendants also fail to meet their high burden to show "good cause" exists for the examinations. *See* Mont. R. Civ. P., 35(a)(2)(A); *Mapes*, 250 Mont. at 532. This separate good cause requirement "is not to be taken lightly." *Simms*, ¶ 33. Rather, every proposed examination must be "scrutinize[d] . . . on a case-by-case basis." *Id.* Good cause "requires a greater demonstration of need than the traditional relevancy standard in the discovery process." *Id.*, ¶ 30 (citing *Schlagenhauf*, 379 U.S. at 118-19); *see also Malloy v. Montana Eighteenth Jud. Dist. Ct.*, Montana Supreme Court Order, *5, OP-11-0038 (Mar. 31, 2011) (same). Whether the "defendant

[5] In *Lewis,* the Montana Supreme Court did cite to a federal district court case and note that if a "plaintiff intends to offer expert testimony in support of [a] *claim for emotional distress damages*," a mental exam may be warranted. ¶ 8. But, again, Plaintiffs here have not brought a "claim for emotional distress damages."

can obtain the information necessary to an informed defense" through other means must also be considered by the court. *Simms*, ¶ 33.

Whatever need Defendants might still have, they have other means to "mount an informed defense." Defs' Brief in Support of Rule 35(a) Mot. at 10. Defendants can depose these eight Plaintiffs and ask about their mental health injuries without the force, formality, and threatened harm of Court-ordered psychiatric examination, and indeed, Defendants have made clear their intent to take such depositions.[6] Additionally, Defendants can depose Dr. Van Susteren to address and seek to rebut her expert disclosure, which Defendants have made clear they intend to do.[7] Defendants have not presented any reasons whatsoever, let alone a compelling reason, why these alternative, less intrusive means of "mount[ing] an informed defense" are inadequate. *See, e.g., Malloy*, *11-12 (denying a medical examination when there were less intrusive means available to obtain the desired information). As the Montana Supreme Court has made clear, "[w]hen a proposed examination risks unnecessary, painful or harmful procedures the scale must favor protecting the individual's rights." *Simms*, ¶ 32. This is especially true here where the State seeks to put eight youth, between the ages of 14 and 21, through two-hour mental health examinations and compel testimony regarding, for example, irrelevant alcohol and drug use.

Defendants' admitted effort to use these Rule 35 examinations to find another possible cause for Plaintiffs' mental health injuries also plainly exposes that Defendants cannot satisfy the

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[6] Even though Defendants have long professed a desire to depose each of the Plaintiffs, Defendants have consistently delayed scheduling any Plaintiff depositions. Over three weeks passed since July 6, 2022 when Plaintiffs supplied Defendants with a *second* set of dates when Plaintiffs are available for depositions in August, but Defendants did not confirm any of these dates despite repeated requests to do so.

[7] Defendants also can disclose an expert to rebut Dr. Van Susteren's testimony—which is of course confined to her report—and/or the scientific evidence that documents the mental health impacts that children experience as a result of climate change.

"good cause" standard. Defs' Brief in Support of Rule 35(a) Mot. at 8. Montana's case law is unambiguous: Rule 35 "does not contemplate [examinations] as vehicles for conducting unnecessary fishing expeditions in hopes of finding any other possible cause for an alleged injury." *Malloy*, *5. Accordingly, Defendants' far-ranging examination can only be characterized as the exact, hopeful search to find any other possible cause of Plaintiffs' mental health injuries that Montana law specifically forbids, and that even if found are in no way mutually exclusive of Plaintiffs' climate-caused emotional injuries.

The lack of good cause is even more apparent when Defendants have made no effort to exercise other less intrusive means to obtain the information desired, such as the above-described depositions. Rule 35 demands more to establish "good cause." *See Malloy*, *5; *see also, Simms*, ¶ 30. Defendants have not met that high burden.

III. Youth Plaintiffs' Constitutional Right to Privacy Protects Them from Unwarranted Intrusions

Rule 35 stands singularly apart from, and carries the highest burden of, other potential modes of discovery because a compelled mental or physical examination fundamentally intrudes upon "the individual's personal sanctity . . . [and] plaintiff's inalienable rights." *Simms*, ¶ 33. As the Montana Supreme Court has recognized, psychiatric examinations are "particularly invasive of an individual's right to privacy." *Mapes*, 250 Mont. at 532. Defendants' right to discover a plaintiff's mental or physical condition through Rule 35 is "predicated on fairness in a proceeding where the plaintiff puts that condition at issue," but that right of discovery is still "not unlimited" and does not permit the defendant to "unnecessarily invade plaintiff's privacy by exploring totally unrelated or irrelevant matters." *Simms*, ¶ 31.

Defendants concede that a primary purpose of their psychiatric examinations is to explore totally unrelated matters such as Plaintiffs' behavioral history, use of drugs and alcohol, and

performance at school. Exposed in part by the fact that these matters are not in controversy based upon the narrowly defined constitutional claims being made in this case, and the fact that Defendants seek to forbid these youth Plaintiffs from having their parents present for the proposed psychiatric examinations, the constitutional offense generated by Defendants' examinations related to Plaintiffs' rights of privacy, personal autonomy and sanctity, is even greater.

Ordered psychiatric examinations of youth Plaintiffs in this case are unnecessary and, if held, would violate youth Plaintiffs' right to privacy under Article II, Section 10 of the Montana Constitution. The Montana Supreme Court has repeatedly recognized that Rule 35 mental examinations firmly implicate the potential examinee's constitutional right to privacy. *See e.g., Simms*, ¶ 19; *Winslow*, ¶ 5. The eight Plaintiffs whom Defendants demand to submit to examinations are youth between the ages of 14 and 21. There can be no question that subjecting them to compulsory and unnecessary mental examinations by a psychiatrist of Defendants' choosing would cause significant stress, annoyance, anxiety, embarrassment, and undue burden. *See* Mont. R. Civ. P. 26(c)(1).

Montana law demands that before a Rule 35 examination can be ordered, "a defendant's need for discovery of a plaintiff's mental or physical condition under M.R. Civ. P. 35 must be balanced against the plaintiff's constitutional right to privacy under Montana Constitution Article II, Section 10." *Lewis*, ¶ 6. The undisputed nature of the constitutional claims and relief at issue do not include damages based on proving (or defending against) emotional injury. Accordingly, Defendants' claimed "need" for these examinations is minimal at best and disingenuous and harassing at worst. Conversely, especially given the young age of the Plaintiffs and the admittedly wide-ranging and intrusive nature of the examinations that Defendants demand, the threat to Plaintiffs' underlying constitutional rights of privacy and personal sanctity is great. There is no

authority in Montana law that would support the kind of constitutional invasion that Defendants seek. This Court should deny the Defendants' motion. *See Simms*, ¶ 32 ("When a proposed examination risks unnecessary, painful or harmful procedures the scale must favor protecting the individual's rights.").

IV. Defendants' Proposed Time, Place, Manner, Conditions, and Scope of the Rule 35(a) Examination Further Underscore Why Such Examinations are Not Appropriate

Defendants failed to meet their affirmative burdens to show both that youth Plaintiffs' mental health is "in controversy," *and* that "good cause" exists for their proposed examinations. Accordingly, the details of Defendants' proposed examinations need not be evaluated by the Court. That said, Defendants' proposed time, place, manner, conditions, scope of the examinations, as well as their proposed examiner, further underscore why these examinations are inappropriate.

A. Time

Defendants inexplicably propose the week of August 22 for these examinations, even though Plaintiffs on July 6, 2022, proposed that week for Plaintiff depositions. Defendants continue to refuse that offer, which in conjunction with their present motion, can only be seen as further and intentional discovery delay. Additionally, Defendants demand eight 120-minute examinations, which exceed the approximately 90 minutes that Dr. Van Susteren met with each of the five Plaintiffs she met. *See* Dr. Van Susteren Expert Report, May 18, 2022 at 4 (explaining Dr. Van Susteren met with five Plaintiffs for a *maximum* of 90 minutes each).

B. Place

Defendants demand these examinations take place in Helena, even though not one of the Plaintiffs involved lives in Helena. The Montana Supreme Court has plainly rejected Rule 35 attempts to force a party to travel for a health examination. *See, e.g., Simms*, ¶ 38 (requiring plaintiffs to travel for examination is "overly burdensome").

C. Manner

Defendants' proposed examinations of these eight youth go well beyond the manner in which Dr. Van Susteren met with only five of the Plaintiffs. Defendants intend to have Dr. Stratford formally conduct "psychiatric interviews," perform "standard testing, under the DSM-5-TR," and administer "checklists" or "assessment tools." Defs' Brief in Support of Rule 35(a) Mot. at 4. Again, Plaintiffs will not offer any testimony at trial based on *any* of these formal "psychiatric" measures, and the opinions of Dr. Van Susteren that Defendants allege warrants their own Rule 35 examinations did not rely upon any of these diagnostic tools. *See* Dr. Van Susteren Expert Report, May 18, 2022 at 5 ("I have . . . not performed formal psychological testing for specific disorders to make individual diagnoses pursuant to the Diagnostic and Statistical Manual of Mental Disorders (DSM–5-TR).").

D. Scope

The scope of Defendants' examinations goes well beyond the conversations Dr. Van Susteren had with the five Plaintiffs with whom she met. Defendants intend to employ Dr. Stratford to probe Plaintiffs' "psychological and behavioral history, alcohol and drug use, school performance, and exposure to trauma." Defs' Brief in Support of Rule 35(a) Mot. at 5. For all the above-described reasons, including most prominently this Court's own rulings, these matters are simply not relevant in this case. In addition to the obvious attack against Plaintiffs' protected privacy interests, they also reflect an element of intimidation against these youth Plaintiffs. There is absolutely no support in Montana law for a defendant to be able to employ Rule 35 in such an irrelevant and aggressive manner.

E. Provider

Finally, in stark contrast to Dr. Van Susteren, Dr. Stratford's resume indicates no familiarity whatsoever with the issues—climate change, young people, and Montana's constitutional provisions—that are "really and genuinely in controversy" in this case. On the contrary, Dr. Stratford appears to have devoted significant time to providing his opinions for hire. *See Simms*, ¶ 41 (noting it was clear why defense counsel was so eager for their proposed examiner's involvement because he "has devoted much of his professional career to providing that opinion for hire"). Psychological injury is not "in controversy" for purposes of Rule 35. Thus, whatever expertise Dr. Stratford might have in cases that allege claims for or monetary damages from emotional injury in adults, Defendants have not and cannot demonstrate that Dr. Stratford has any expertise in matters related to this case. This includes, in addition, no particular expertise to engage with youth on the sensitive and invasive topics that Defendants demand occur without Plaintiffs' parents present, or even basic familiarity with the scientific literature which overwhelmingly documents how climate change is harming the mental health of young people. Plaintiffs strongly object to Dr. Stratford's involvement in this case as Defendants seek to use him here.

F. Conclusion

Montana law requires that courts scrutinize any desired examination "on a case-by-case basis," prior to allowing and ordering any Rule 35 examination. *Simms*, ¶ 33. This includes the defendants' choice of examiners. *See generally Simms*. Defendants have fundamentally failed to carry their high burden to make an affirmative showing that *any* Rule 35 examination is allowable under Montana law in this case. The blatantly inappropriate nature of the examinations that Defendants demand further exposes that this Court should not, and indeed lacks grounds to, order any such that would be within the lawful bounds of Rule 35 and Montana law.

V. Defendants' Alternate Request for this Court to Strike Dr. Van Susteren's Expert Disclosure Should Also be Denied

Defendants' request, in the alternative, to strike Dr. Van Susteren's disclosure is premature and overbroad. Pursuant to the June 15, 2022 Scheduling Order, Plaintiffs have until September 30, 2022 to submit expert disclosures. Therefore, Plaintiffs have the right to modify any previously submitted expert reports, including the report of Dr. Van Susteren. Should Defendants wish to object to Dr. Van Susteren's qualifications or components of her final expert disclosure, they can pursue appropriate motions for relief *after* September 30, 2022. Moreover, even if the Court were to agree with Defendants in the context of the present Rule 35 motion, striking Dr. Van Susteren's entire expert disclosure, as Defendants argue, is an unnecessary and overbroad remedy (as well as preemptively erroneous). Her profiles of five individual Plaintiffs are contained in one separate and confidential exhibit (filed under seal) distinct from her overall expert disclosure.

Plaintiffs do not challenge that the State has a right to defend itself, including with regard to testimony that Dr. Van Susteren might offer. As demonstrated above, the State has failed to meet its high burden under Rule 35(a) to demonstrate "good cause" for the psychological examinations it seeks to impose on Plaintiffs. Montana law regarding Rule 35 discovery does not control the *separate* standards that might apply if the State wishes to challenge Dr. Van Susteren's future expert testimony. Those standards—by contrast—fall under the Montana Rules of Evidence. Defendants' argument exposes their fundamental failure to appreciate the difference between their unlawful invasion of youth Plaintiffs' rights through compelled Rule 35 examinations, and the wholly separate, ongoing rights of all parties to respond to and, if necessary challenge, *all* components of future expert testimony.

Ultimately, if Defendants have concerns with Dr. Van Susteren's expert disclosure, they can address those issues in the normal course of the litigation process, such as in Dr. Van

Susteren's deposition, a rebuttal expert report, *appropriate* and independent motion(s), or cross-examination of Dr. Van Susteren at trial. The separate, non-invasive discovery process affords the State numerous opportunities to "independently test" Dr. Van Susteren's expert opinions, Defs' Brief in Support of Rule 35(a) Mot. at 11, and such opportunities are forthcoming pursuant to this Court's modified Scheduling Order. Defendants' current, inappropriate motion to strike all of Dr. Van Susteren's opinions and testimony is another delay tactic, a blatant attempt to sidestep the pre-trial process, and an ill-timed attempt to strike an expert disclosure *two months before* the deadline for such disclosure. Defendants cannot leverage these two unrelated issues—(1) youth Plaintiffs' rights to preserve their rights of privacy, etc. under Rule 35, Mont. R. Civ. P., and (2) litigants' rights to rely upon and/or contest expert testimony pursuant to Rules 702 and 703, Mont. R. Evid.—against the Court and Plaintiffs, especially at this stage of this case.[8] This Court should deny Defendants' motion in the alternative to strike Dr. Van Susteren's expert opinions and testimony.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court deny Defendants' request to subject these eight youth to invasive psychiatric examinations under Rule 35, Mont. R. Civ. P., and deny Defendants' alternate request to strike Dr. Van Susteren's expert disclosure.

DATED this 2nd day of August, 2022.

/s/ Barbara Chillcott
Barbara Chillcott

[8] The potential relevancy of Dr. Van Susteren's opinions and expert testimony does not magically disappear – as Defendants argue – if this Court finds that Plaintiffs' mental health is not *really and genuinely* "in controversy" as part of the appropriate and limited, present Rule 35 analysis. Defs' Brief in Support of Rule 35(a) Mot. at 11.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered by email to the following on August 2nd, 2022:

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