**IN THE SUPREME COURT OF THE STATE OF MONTANA**
**Supreme Court Cause No. _____**

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JOHN and HEATHER STENSON, individually and on behalf of minor child, R.L.S.,

*Plaintiffs/Petitioners*,

v.

MONTANA SECOND JUDICIAL DISTRICT COURT, HON. RAY J. DAYTON,

*Respondent*.

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From the Second Judicial District Court, Silver Bow County
Cause No. DV-20-252
The Honorable Ray J. Dayton, Presiding

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# PETITION FOR WRIT OF SUPERVISORY CONTROL

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*(Continued on next page)*

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## INTRODUCTION

Plaintiffs are a minor, R.L.S., and his parents. R.L.S. attended Butte Central Catholic High School ("BCCHS") where one of his teachers was Brad Kadrmas ("Brad"). Kadrmas resided with his wife, Amy Kadrmas ("Amy"), and their son, D.K., in an apartment on the fourth floor of BCCHS, with the school's permission, and the apartment allowed unsupervised access to students, visitors, or the Kadrmases' guests.

The Kadrmases invited R.L.S. to the apartment multiple times, where he was given alcohol, cigarettes, and marijuana. Amy has been charged with four felonies for providing drugs to R.L.S. and D.K. on or near a school, and she pled guilty to two felony counts in a plea agreement, where she allocuted to the charges.

R.L.S. suffered severe emotional distress arising from Amy's admitted criminal conduct, and after public exposure of the Kadrmases' illegal activity on BCCHS's campus he was branded a "narc". His life spiraled out of control; he transferred to Butte High, where the "narc" reputation followed, and he was socially outcast. He ideated suicide; he engaged in self-cutting, he was hospitalized, he made a suicide attempt, and he eventually he had to move out of Butte. He now lives away from his parents and family, living a life of isolation, despair, and the fear of suicide is ever present. Plaintiffs filed suit against BCCHS, and its supervisory hierarchy, and Amy Kadrmas for negligence.

Defendants set R.L.S.'s deposition; in response R.L.S. sought a protective order to prevent his unnecessary deposition. The trial court denied the motion and in doing so, it ignored the physical risks identified by Dr. Roy Lubit, whose opinions were uncontroverted.

## QUESTION PRESENTED

Should this Court exercise supervisory control and direct the District Court to enter a protective order to keep R.L.S. from suffering further harm by being unnecessarily deposed by Defendants?

## STATEMENT OF THE FACTS

1. BCCHS hired Brad Kadrmas as a teacher.
2. BCCHS allowed Brad and Amy Kadrmas to live in an apartment in the same building in which students attended classes.
3. Defendants all have supervisory duties over BCCHS.
4. The Defendants allowed the Kadrmases to live on campus without conducting proper background checks.
5. The Defendants did not monitor the activities of the Kadrmases in their apartment, nor the students the Kadrmases were bringing up to their apartment before, during, or after school hours.
6. R.L.S. was a student at BCCHS.

7. Amy provided alcohol, cigarettes, and marijuana to R.L.S. in her apartment at BCCHS.
8. In a law enforcement forensic interview, one of two conducted by law enforcement with R.L.S., R.L.S. reported that Brad Kadrmas also gave him (or sold for $3) alcohol while in the BCCHS apartment.
9. Plaintiffs sued Defendants for negligence-based supervision failures, as applicable based on the duties and breaches of each party.
10. The Defendants issued onerous discovery which highlights their attack-the-victim strategy: for example, what were his grades in elementary school, was he a bad kid before Amy Kadrmas provided him alcohol, cigarettes, and marijuana in her apartment at BCCHS, had he ever tried alcohol, cigarettes, and marijuana before Amy Kadrmas committed her felonies, in her apartment at BCCHS, etc.
11. Dr. Roy Lubit examined R.L.S.; he provided his report describing psychological harm R.L.S. suffered due to Amy's admitted crimes, on campus, Brad Kadrmas' conduct, and the events that were subsequently triggered by Defendants.
12. Defendants have not attempted to take Dr. Lubit's deposition.
13. Defendants took R.L.S.'s mother's deposition; she testified at length about

both her own emotional distress, as well as that of R.L.S., stemming from the events that happened under the Defendants' proverbial nose.

14. R.L.S.'s Independent Medical Exam ("IME") is scheduled for June 10, 2022.
15. Defendants served a Notice of Deposition of R.L.S.
16. R.L.S. filed a Motion for Protective Order to prevent his deposition due to, among other things, duplicity, no new information can be obtained, and the physical/emotional injury that will result.
17. Dr. Lubit provided an affidavit explaining the actual "secondary harm" caused R.L.S. from being deposed; the Defendants provided nothing in contravention to that opinion.
18. On March 1, 2022, Judge Dayton denied R.L.S.' Motion without legal analysis nor application of the facts to the law.

## ARGUMENT

This Court must not risk the "chilling effect" the Ninth Circuit feared in *Rivera,* the only law cited in the Order, and it must prevent additional emotional and psychological harm to a juvenile. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004).

Petitioners have shown that there is an actual harm to a juvenile that will be

imposed; harm imposed on a minor who already is a crime victim; harm that cannot be undone by appeal. Only preventing the unnecessary deposition is sufficient to avoid the physical and emotional harm that will occur.

This Court has supervisory control over Montana courts and may, on a case-by-case basis, supervise another court through a writ of supervisory control. Mont. Const. art. VII, § 2(2); Mont. R. App. P. 14(3). Supervisory control is appropriate when the normal appeal process is inadequate; when the case involves purely legal questions; and when one or more of the following exists: (1) the lower court is proceeding under a mistake of law and is causing a gross injustice, (2) constitutional issues of state-wide importance are involved, or (3) the lower court has granted or denied a motion for substitution of judge in a criminal case. *Tipton v. Mont. Thirteenth Judicial Dist. Ct.*, 2018 MT 164, ¶ 9, 392 Mont. 59, 421 P.3d 780.

Supervisory control, however, should be used to immediately review an interlocutory order where **there is no remedy by appeal** or other remedial procedure and **where extraordinary circumstances are present**. *Custody of R.R.K.,* 260 Mont. 191, 202, 859 P.2d 998, 1005–06; *State ex rel. Palmer v. District Court* (1980), 190 Mont. 185, 187, 619 P.2d 1201, 1203)(emphasis added). In addition, this Court has allowed supervisory control when an appeal from a final

judgment would impose **undue hardship on an applicant** and be wholly inadequate as a remedy. *State ex rel. Great Falls Nat. Bank v. District Court* (1969), 154 Mont. 336, 340, 463 P.2d 326, 328.

## I. R.L.S. has provided ample testimony already; nothing new is gained by putting a juvenile through this injurious process.

Butte-Silver Bow Law Enforcement conducted two forensic interviews of R.L.S. as part of its investigation which led to four felony charges against Amy for providing drugs on school grounds to two minors, one of which was R.L.S. Those interviews were on video and have been transcribed.

Dr. Lubit's expert report includes R.L.S.'s description of the events which occurred on school grounds and the corollary emotional harm R.L.S. suffered. R.L.S. will be interviewed by Dr. Michael Bütz for an IME on June 10, 2022.

The Court's March 1, 2022, Order summarizes the Defendants' arguments, but does not provide any application of the law to the facts. Ex. 1, Page 2. The Defendants purported need to "assess the psychological damages. . . claimed in this case" can and will be done through the IME process. Ex. 2.

When a District Court acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice, it constitutes an abuse of discretion. *State v. Strang*, 2017 MT 217, ¶ 14, 388 Mont. 428, 432, 401 P.3d 690, 694.

It is implausible to say that the District Court exercised "conscientious judgment" or acted within "the bounds of reason" because the Order lacks any acknowledgment of the actual emotional harm Dr. Lubit described, nor was any factual or legal basis stated that justified ignoring Dr. Lubit and disregarding the fact that Dr. Lubit's affidavit was uncontroverted. The Order summarizes each parties' arguments and holds, in a conclusory manner only, that Plaintiffs failed to meet their burden and citing *Rivera*, 364 F.3d at 1063. Ex. 1, Pg. 2. *Rivera,* however, held that if "particularized harm will result" then the court must balance the public and private interests to decide whether a protective order is necessary. *Id.*

The District Court did not conduct any interest balancing. Ex. 1, Pg. 2. Importantly, in *Rivera,* the Ninth Circuit upheld the protective order simply because allowing the Defendant to inquire into the immigration status of the immigrant Plaintiffs would "have a chilling effect" only – no actual, tangible injury. *Id.; see also, Morales v. Allied Bldg. Crafts, Inc.*, 2006 WL 8441791 (D. Nev. Feb. 21, 2006).

Here, the District Court, in addition to not conducting the balancing test, completely ignored the actual, tangible injury testimony from Dr. Lubit and misapplied the law. In *Rivera,* the Ninth Circuit held that "a chilling effect" was a

sufficiently protectable interest; certainly, then, preventing an actual injury to a juvenile rises to the same level of protection. *Id.*

The District Court did not weigh the M.R.Civ.P. 26(c) undue burden nor the "harm or prejudice" caused by the deposition against the Defendants' need for information that is already obtained in video and written form – three times. The Court did not properly balance the concerns.

Abuse of discretion is a question of law subject to *de novo* review. *Farmers Union Cent. Exch., Inc. v. Mont. Dep't of Revenue*, 272 Mont. 471, 474, 901 P.2d 561, 563 (1995). Whether a district court correctly interpreted or applied the law to pertinent facts is a question of law. *BNSF Ry. Co. v. Cringle*, 2012 MT 143, ¶ 16, 365 Mont. 304, 281 P.3d 203.

This Court holds "[w]e will assume supervisory control over a district court to direct the course of litigation if the court is proceeding based on a mistake of law, which if uncorrected, would cause significant injustice for which appeal is an inadequate remedy." *Simms v. Mont. Eighteenth Jud. Dist. Ct.,* 2003 MT 89, ¶ 18, 315 Mont. 135, 68 P.3d 678). No more injustice exists in this world than the injury of a child; no more protectible interest exists than to protect a child from harm. *See, e.g., In re C.P.*, 2001 MT 187, ¶ 19, 306 Mont. 238, 242, 32 P.3d 754, 757.

Included with this Petition are the two law enforcement interview transcripts of R.L.S. that Defendants have already. Exhibits 3 and 4. Also attached are the reports from Dr. Lubit of both the initial emotional harm to R.L.S. stemming from Amy Kadrmas' admitted felonies and Defendants' negligence, as well as the supplemental report/affidavit which describes the secondary harm to R.L.S. if he is forced to testify. Exhibits 5 and 6.

> After suffering emotional trauma people are in a weakened and vulnerable state and are very sensitive to comments made that may be experienced as invalidating. Invalidating statements include things such as:
>
> > was it really that bad,
> > did it really happen,
> > why didn't you walk away,
> > why didn't you shout,
> > why didn't you speak up sooner,
> > were you sexually stimulated by this, and
> > what is your past history of sexual activity.
>
> These statements are shame inducing. Research has shown that the shame that people experience after an emotionally traumatic event, significantly affects the duration and severity of the problems.

*See Exhibit 6, Dr. Lubit Affidavit.*

Most important to this process, and the deposition that the Defendants seek, is this conclusion from Dr. Lubit:

> Asking invalidating questions as to why a victim did not do these things has little probative value, may well produce a false explanation, **and is likely to cause enduring psychological harm**.

*Id.* (emphasis added)

This Court's should also note the initial report of Dr. Lubit, who has examined R.L.S and provided an opinion on the emotional distress and harm suffered by R.L.S.. Exhibit 5.

> To a reasonable degree of medical certainty, [R.L.S.'s] psychological well-being was seriously adversely affected by the mistreatment perpetrated by Mr. and Ms. Kadrmas (getting him involved with M, marijuana and alcohol), asking him to keep secrets from his parents, saddling him with guilt if he told people what had occurred and the aftermath in which he lost friends, suffered bullying, and had to change schools.
>
> . . .
>
> [R.L.S.]'s psychological state became worse when people found out what was happening and [R.L.S.] feared that his speaking about what happened could destroy the Kadrmas family. He felt great stress, and felt caught between his own family and the Kadrmas family. His relationship with his parents became very strained.
>
> . . .
>
> The emotional stress leads to changes in the neuroendocrine system and psychological make up decreasing resilience and leaving him far more vulnerable to stress, anxiety and depression in the future. Moreover, it can increase the individual's vulnerability to control by others.

Exhibit 5.

A District Court's objective in controlling and regulating discovery is to ensure a fair trial for all concerned, neither according one party an unfair advantage nor placing the other at a disadvantage. *Id.*

However, discovery is not a weapon; it is a means to determine facts. The facts R.L.S. knows have been developed; this injurious inquiry of a juvenile is designed only as a harassment tool. We need not drive R.L.S. to a successful teen suicide to recognize that reality.

R.L.S.'s mental health and emotional recovery is a protectible interest. *Rivera*, 364 F.3d at 1063. The "chilling effect" of ignoring the impact of this unnecessary deposition is substantial, and it is worthy of protection. *Id.* The lack of any contravention of Dr. Lubit cannot be ignored; the District Court must establish some basis for not acknowledging this medical expert's uncontroverted testimony. The District Court's order must have some basis to explain the ruling, otherwise it is merely conclusory.

Supervisory control for interlocutory discovery orders must be exercised in the appropriate case. *See, e.g., State ex rel. Burlington Northern v. Dist. Ct.* (Mont.1989), 779 P.2d 885, 46 St.Rep. 1625; *Kuiper v. Dist. Court* (Mont.1981), 632 P.2d 694, 38 St.Rep. 1288 (writ issued to determine whether district court properly granted a protective order). A case-by-case analysis must be employed in

determining whether supervisory control should be accepted. *State ex rel. Deere and Co. v. Dist. Court* (1986), 224 Mont. 384, 730 P.2d 396.

Perhaps the District Court considered R.L.S.'s Motion for a Protective Order to be analogous to a very recent case where this Court declined to exercise supervisory control over Judge Dayton. *Henderson v. Montana Third Jud. Dist., Granite Cty.*, No. OP 22-0069, 2022 WL 483957 (Mont. Feb. 15, 2022). In that case, Mr. Henderson sat through an entire deposition as part of a family squabble with his son and daughter-in-law. *Id.* Then Mr. Henderson suffered a panic attack partway through a second deposition, after which he requested the deposition be terminated because of his stress and anxiety which led to the panic attack. *Id.*

Whatever the subject matter of the *Henderson* lawsuit, it did not involve deposing a juvenile crime victim suffering extreme emotional distress. Unlike the *Henderson case*, this is not an issue of "litigation is stressful", but rather a diagnosed, and uncontroverted, secondary harm that comes from a minor victim of a crime reliving the illegal acts of the Kadrmases while they were living in the school building – all of which is unnecessary because (i) two videotaped forensic interviews already exist, (ii) Dr. Lubit's comprehensive review of the events with R.L.S. exists, (iii) R.L.S. is already scheduled for an IME, and (iv) Amy Kadrmas

has already allocuted to the felonies occurring on BCCHS's campus involving R.L.S.

The *Henderson* case provided instruction as to this Court's treatment of discovery disputes by citing to its decision in *USAA Cas. Inc. Co. v Eighth Judicial Dist. Court*, No. OP 19-0139, 396 Mont. 547, 449 P.3d 793 (Apr. 23, 2019), which also concerned a petition for writ of supervisory control filed after the district court denied its motion for a protective order under M.R.Civ.P. 30. In that case, USAA argued that the requested deposition of a corporate representative on certain proposed items would be an undue burden because the topics were not relevant to a determination of the case. *Id.*

This Court highlighted two areas of concern. First, "[t]he purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. *Id.* Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation." *Massaro v. Dunham*, 184 Mont. 400, 405, 603 P.2d 249, 252 (1979). The truth and relevant facts are set forth at length in law enforcement interviews from the same month – November 2019 – as the illegal acts in BCCHS's premises. Exhibits 3 and 4. Defendants cannot plausibly argue that R.L.S.'s recollection of the events that took place in November 2019 will be

more accurate, thorough, or illuminating now, 27 months later, than his description of the events to law enforcement contemporaneous to the events occurring.

Second, discovery rules are to be "liberally construed to make all *relevant facts* available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage." *Cox v. Magers*, 2018 MT 21, ¶ 15, 390 Mont. 224, 411 P.3d 1271. Amy Kadrmas has admitted her felonious conduct in her allocution. She will be called as a witness; other witnesses will testify to the crimes committed on BCCHS's campus as well. R.L.S.'s additional testimony, and the associated risks, is unnecessary for Plaintiffs to prove that Defendants were negligent, as alleged in the Complaint.

The significant distinction between *Henderson* and the instant case is the person being deposed. The deposition in a civil case of a juvenile victim of abuse is not absolute; the Court is the child's protector as expressed in the doctrine of *parens patriae. See In re G.T.M.*, 2009 MT 443, ¶ 12, 354 Mont. 197, 201, 222 P.3d 626, 629; *Matter of C.S.*, 210 Mont. 144, 147, 687 P.2d 57, 59 (1984). Adults and kids are different, and so are the court systems that recognize those differences, and the use of discovery should be no different. *In re G.T.M. at* ¶ 15, 222 and 629. The doctrine of *parens patriae* must be applied consistently with

Article II, Section 15 of the Montana Constitution which provides safeguards of juveniles. *Matter of S.L.M.*, 287 Mont. 23, 39, 951 P.2d 1365, 1375 (1997).

Juvenile depositions are, and rightly so, more scrutinized by the courts. For example, in *Williams ex rel Williams v. Greenlee,* the federal court held that there are always competing interests in allowing a juvenile deposition and the need to protect the juvenile from further psychological harm. *See Williams ex rel. Williams v. Greenlee*, 210 F.R.D. 577, 579 (N.D. Tex. 2002). In exercising its discretion, the Court must protect juveniles instead of allowing duplicative discovery of ancillary issues that will cause harm. *Id.*

In sensitive cases "courts must consider the relevance of the information sought." *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 208 (N.D. Cal. 1983). If the information sought does not go to the heart of the matter, it must be balanced by the Court whether to release sensitive information or order an injurious deposition. *See id.* In ruling on an anti-trust discovery request, the District Court, from the Ninth Circuit gave the Magistrate this sage advice:

> The [discovery proponent] should bear the burden of showing that no alternative sources (*i.e.,* Wallace) exist, by which it could obtain the relevant information in a less chilling manner.

*Id. at* 210.

"Less chilling manner" can certainly be equated to "without causing life-long emotional harm" or "without driving the deponent to suicide" *See Rivera*, 364 F.3d at 1063. Again, the information to be provided by R.L.S. is not determinative to the claims and causes of action in this case – essentially the negligence of Defendants; thus, the deposition is a mere harassment device. Amy Kadrmas has already admitted the felonies on BCCHS's campus and R.L.S. has been interviewed extensively. Interrogating him – again – is not the least intrusive means to get the same information. *See RTG Furniture Corp. v. Indus. Risk Insurers*, 2008 WL 11331985, at *2 (S.D. Fla. Jan. 24, 2008).

Supreme Court treatment also reveals the use of depositions of juveniles in criminal matters prioritizes juvenile protection over in-person testimony; it is rooted in the Court's protectionary obligations owed to juveniles. *See, United States v. Mann,* 590 F.2d 361 (1st Cir.1978); *United States v. Eufracio-Torres*, 890 F.2d 266, 271 (10th Cir. 1989).

By contrast, no case was found that supported the proposition that in a civil suit brought on behalf of a juvenile that the court should permit the deposition of a juvenile crime victim to go forward in the face of a medical affidavit outlining the additional harm that the deposition would cause coupled with two prior forensic interviews.

There simply is no legitimate purpose for Defendants to depose R.L.S.; the only thing to be gained is him suffering the kind of mental break and secondary emotional distress that makes him want to drop the case, or commit suicide, which is really the Defendants' goal. As this Court held in an event of prior supervisory control, un-ringing the bell is impossible on appeal. *Sweeney v. Dayton*, 2018 MT 95, 391 Mont. 224, 416 P.3d 187. Similarly, once R.L.S. has suffered the secondary harm of being aggressively interrogated when information is more easily obtained (and has already been obtained – four times counting the upcoming IME) from other less intrusive sources, the damage cannot be undone on appeal.

## CONCLUSION

If the *Rivera* "chilling effect" of asking an immigrant about immigration status is a protectible interest, we must certainly ask why is a child's physical and emotional wellbeing less important? Imagine the "chilling effect" of driving a juvenile into emotional despair, or God-forbid a suicide, when balanced against the public interest in kids being able to report bad people to parents, schools, or police.

If children fear this type of post-reporting inquisition into every juvenile indiscretion of their lives, which they've already revealed to law enforcement, Mom and Dad, doctors, and soon an IME psychiatrist, how many child victims will come forward knowing that an aggressive defense attorney can attack them in a

deposition too? Much like how rape victims of the past were driven into silence lest they expose themselves to embarrassing cross examination and attack of their personal lives at trial, we cannot risk driving kids into silence about criminal acts committed (and here admitted) by adults.

Based on the foregoing, Petitioners respectfully requested that this Court exercise supervisory control over the district court and direct it to enter a protective order to keep R.L.S. from suffering further harm by being deposed by Defendants.

RESPECTFULLY SUBMITTED this 16th day of March, 2022.

/s/ *Lawrence E. Henke*
Lawrence E. Henke
Attorney for Petitioners

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate procedure, I certify that this brief is printed with a proportionately spaced Times New Roman non-script text typeface of 14 points; is double spaced except for quoted and indented material; and the word count calculated by Microsoft Word totals 3,764 words, excluding table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 16th day of March, 2022.

/s/ *Lawrence E. Henke*
Lawrence E. Henke
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of March, 2022, the foregoing Petition for Writ of Supervisory Control was e-served on all interested parties by the Montana Supreme Court's ePass MT to the following:

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# TABLE OF EXHIBITS

**EXHIBIT 1**

District Court's March 1, 2022 Order Denying Motion for Protective Order

**EXHIBIT 2**

Email from Brad Luck to Larry Henke, February 2, 2022

**EXHIBIT 3**

Transcript from first law enforcement interview with R.L.S., dated November 26, 2019

**EXHIBIT 4**

Transcript from second law enforcement interview with R.L.S., dated November 27, 2019

**EXHIBIT 5**

Report of Dr. Roy Lubit, dated April 30, 2021

**EXHIBIT 6**

Affidavit of Dr. Roy Lubit, dated August 26, 2021

## CERTIFICATE OF SERVICE

I, Lawrence Henke, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 03-16-2022:

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