IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. OP 21-0395

L.B., individually and on behalf of D.B., a minor,

Plaintiff and Appellant,

v.

UNITED STATES OF AMERICA; BUREAU OF INDIAN AFFAIRS; DANA BULLCOMING, agent of the Bureau of Indian Affairs sued in his individual capacity,

Defendants and Appellees.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND ACLU OF MONTANA FOUNDATION, INC. IN SUPPORT OF PLAINTIFF-APPELLANT

On Certified Question from the United States Court of Appeals for the Ninth Circuit

APPEARANCES

Alex H. Rate
ACLU OF MONTANA FOUNDATION, INC.
P.O. Box 1968
Missoula, MT 59806
ratea@aclumontana.org

Steven S. Sparling*
Jeffrey L. Braun*
Chase Mechanick*
Julia A. Quigley*
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
ssparling@kramerlevin.com

Sandra S. Park**
Linda S. Morris**
Stephen L. Pevar**
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
spark@aclu.org

Attorneys for Amici Curiae American Civil Liberties Union and ACLU of Montana Foundation, Inc.

* Admitted *pro hac vice*
** Application for admission *pro hac vice* pending

Timothy M. Bechtold
BECHTOLD LAW FIRM PLLC
P.O. Box 7051
Missoula, MT 59807

John Heenan
HEENAN & COOK, PLLC
1631 Zimmerman Trail, Suite 1
Billings, MT 59102

Attorneys for Plaintiff-Appellant

Victoria L. Francis
Mark Stegar Smith
Tim Tatarka
OFFICE OF THE UNITED STATES ATTORNEY
2601 2nd Avenue, N, Suite 3200
Billings, MT 59101-2238

Attorneys for Defendants-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") and ACLU of Montana Foundation, Inc. ("ACLU-MT") respectfully submit this brief as *amici curiae* in support of Plaintiff-Appellant L.B. The ACLU is a non-profit, nonpartisan corporation whose mission is to support and protect civil liberties. The ACLU-MT is an affiliate of the ACLU in Montana and regularly appears as *amicus* before this Court. *Amici* believe that their experience advocating for the rights of Indigenous people, people whose constitutional rights have been violated by law enforcement officers, and all victims and survivors of gender-based violence will assist the Court in reaching a just decision in this case.

II. BACKGROUND AND SUMMARY OF THE ARGUMENT

Officer Bullcoming's rape of L.B. is illustrative of longstanding patterns of law enforcement abuse on Indian reservations. L.B. contacted the police because of concern about her mother's safety. Bullcoming, a Bureau of Indian Affairs ("BIA") officer, responded to the call. While in uniform and on duty, he entered L.B.'s home on the Northern Cheyenne Reservation and found L.B. asleep. Exercising his law enforcement authority, he directed L.B. to his police cruiser, where he used his police-issued breathalyzer to test her blood alcohol content. He threatened to call social services and arrest her for intoxication in the presence of children. He then

told L.B., who was fearful of jail and losing her children and her job, that "something had to be done," quickly making clear that he meant sex. He then raped L.B.

The question certified to this Court is whether "law-enforcement officers act within the course and scope of their employment when they use their authority as on-duty officers to sexually assault members of the public." The answer should be: Yes.

That answer is critical for Native women like L.B. Sexual assault, human trafficking, and other forms of violence have reached crisis levels on Indian reservations. Federal law enforcement is often unresponsive to tribal needs, open cases languish, and offenders exploit these gaps to prey on Native women and girls. When federal officers themselves are the perpetrators, it exacerbates these vulnerabilities, makes justice for survivors even more unlikely, and discourages tribal members from reporting crimes or seeking any assistance from law enforcement. Although Bullcoming was prosecuted for his rape, that outcome is the exception, not the rule. Moreover, criminal prosecution is no substitute for the vindication of a survivor's rights that the civil justice system provides, including a judgment against the institution and the ability to collect monetary damages for the harms suffered.

Federal law places Native Americans on reservations at a potential disadvantage when they seek a civil remedy. Although Montana has joined many

other states in adopting the nondelegable duty doctrine, claims against federal agencies, which exercise primary responsibility for policing on the Northern Cheyenne Reservation, must rest on scope-of-employment liability. *See* 28 U.S.C. § 1346(b)(1). This means that the rape victim of a local sheriff's employee has a remedy in tort against the employer under the nondelegable duty doctrine, but a victim of a BIA officer may not rely on that doctrine because of the rapist's status as a federal employee. As the Ninth Circuit noted, "[t]his dichotomy . . . has a disproportionate effect on Montana's indigenous population, who are more likely to interact with federal, rather than state or local, law enforcement officers." *L.B. v. U.S.*, 8 F.4th 868, 871 (9th Cir. 2021).

By holding that police officers act within the scope of their employment when they abuse their authority to commit sexual assault, this Court can level that disproportionate impact, ensure accountability by federal law enforcement agencies, and incentivize them to effect systemic changes (e.g., better oversight of officers and improved institutional culture). Policing such violence committed by federal law enforcement would also encourage the reporting of crimes, because fear of sexual assault and other abuse by law enforcement is one reason why tribal members avoid contact with law enforcement in the first place.

Montana law supports vicarious liability when police officers abuse their power to sexually assault civilians. The government treats as dispositive *Maguire*

v. State, 254 Mont. 178, 835 P.2d 755 (1992), in which the Court held that a state hospital employee's rape of an autistic and severely retarded patient was outside the scope of employment. But *Maguire* did not involve a law enforcement officer who leveraged his power to coerce a victim. Here, every step Bullcoming took to coerce L.B. was predicated upon a law enforcement function. Montana courts routinely hold other types of assaults by law enforcement officers to be within the scope of their employment, and it makes no sense to treat sexual assaults differently, particularly in light of the Montana Legislature's recent recognition—in part because of this very case—that the inherent power imbalance between law enforcement and civilians precludes valid consent in police encounters. *See* Laws 2019, ch. 133, § 1. Furthermore, to the extent, if any, that *Maguire* can be read as establishing a *per se* rule that sexual assault falls outside the scope of employment, it should be overruled.

III. ARGUMENT

A. Vicarious Liability When Police Officers Abuse Their Authority To Commit Sexual Assault Will Improve Law Enforcement Accountability On Indian Reservations

1. The federal government has neglected the rampant victimization of Native women in Montana

Native women in Montana and across the country face a crisis of sexual violence, kidnapping, and murder. More than four in five Native American women report being victims of violence, and more than half report being victims of sexual

violence.[1] Native women are 2-½ times more likely to experience violent crimes, and at least two times more likely to be raped or sexually assaulted, than women of other ethnicities.[2] There is also a crisis of missing and murdered Native women; in Montana, Native Americans comprise 6.7% of the population, but were the subjects of 26% of the state's missing persons reports between 2016 and 2018.[3]

Principally for historical and jurisdictional reasons, the Federal Bureau of Investigation ("FBI") and BIA exercise most law enforcement functions on many reservations, including the Northern Cheyenne Reservation. But federal law enforcement is frequently unresponsive and neglectful. It can take days for BIA officers to respond to a call.[4] Reports are often not taken seriously and may not even

---

[1] André B. Rosay, DOJ National Institute of Justice Research Report, *Violence Against American Indian and Alaska Native Women and Men* 43 (2016), https://www.ojp.gov/pdffiles1/nij/249736.pdf.

[2] *Reviewing the Trump Administration's Approach to the Missing and Murdered Indigenous Women* (*MMIW) Crisis* 15, H'g Before Subcomm. For Indigenous Peoples of the United States, H. Comm. On Natural Resources, 116th Cong., 1st Sess. (2019), https://www.congress.gov/116/chrg/CHRG-116hhrg37680/CHRG-116hhrg37680.pdf.

[3] Sam Wilson, *Families, Investigators Struggle to Track Down Missing Native Women*, BILLINGS GAZETTE (Feb. 25, 2019), https://billingsgazette.com/news/state-and-regional/mmiw/families-investigators-struggle-to-track-down-missing-native-women/article_3fee49c9-913a-593d-96e3-14d03a781caa.html.

[4] Kathy Dobie, *Tiny Little Laws: A Plague of Sexual Violence in Indian Country*, HARPER'S MAG. 4 (Feb. 2011), https://harpers.org/archive/2011/02/tiny-little-laws/2/; Laura Sullivan, *Rape Cases on Indian Lands Go Uninvestigated*, NPR (July 25, 2007), https://www.npr.org/templates/story/story.php?storyId=12203114.

be referred to the FBI for further investigation.[5] Indeed, L.B.'s tribe is so dissatisfied with the law enforcement provided by the BIA that it has sued the U.S. government to compel it to allow the tribe to assume its own police responsibilities.[6] Moreover, even when crimes are referred to federal prosecutors, they are often not pursued; between fiscal years 2005 and 2009, U.S. Attorney's Offices "declined to prosecute 67 percent of sexual abuse" matters in Indian country.[7] As one tribal public defender described, "rape kits never come back. They will not prosecute, yet they won't send the information down so the tribe can prosecute. We never, ever see the results of a rape kit."[8] A tribal judge described the FBI as a "black hole."[9] Moreover, sexual assault in Native communities is vastly underreported,[10] just as it is nationally.[11]

---

[5] DOJ Office on Violence Against Women, *2016 Tribal Consultation Report* 62, https://www.justice.gov/ovw/page/file/953291/download; Dobie, *supra* note 4.

[6] *Northern Cheyenne Tribe v. U.S.*, No. CV-20-183-BLG-SPW, at ¶¶ 1-4, 56-58 (D. Mont. Dec. 15, 2020) (ECF 1).

[7] U.S. Gov't Accountability Office, GAO-11-167R, *U.S. Department of Justice Declinations of Indian Country Criminal Matters* 9 (2010), https://www.gao.gov/assets/gao-11-167r.pdf.

[8] Dobie, *supra* note 4.

[9] *Id.*

[10] DOJ Office on Violence Against Women, *2017 Tribal Consultation Report* 74 (2017), https://www.justice.gov/ovw/file/1046426/download.

[11] Maura Douglas, Rachel E. Morgan & Grace Kena, DOJ Bulletin, *Criminal Victimization, 2016: Revised* 7 (2018) (estimating just 23.2% of rapes and sexual assaults were reported in 2016), https://bjs.ojp.gov/content/pub/pdf/cv16.pdf.

Underreporting is a product of many Natives' mistrust of government, engendered by decades of broken promises.[12]

The fact that many BIA officers are known by Native communities to be perpetrators of or complicit in violence against women, and that their crimes are seldom punished, degrades faith in law enforcement. ACLU-MT has repeatedly heard from Native advocates that tribal members avoid contact with law enforcement because every interaction presents an opportunity for officers to abuse their authority. Horrifying stories, such as the alleged 1995 rape of a Northern Cheyenne woman by a BIA officer (now the Sheriff of Big Horn County),[13] and Bullcoming's rape of L.B., reverberate widely and sow fear. Furthermore, because

[12] Abby Abinanti *et al.*, *To' Kee Skuy' Soo Ney-Wo-Chek': I Will See You Again in a Good Way* 83-84 (2020), https://www.niwrc.org/sites/default/files/images/resource/a_year_1_project_report_on_missing_and_murdered_indigenous_women_girls_and_two_spirit_people_of_northern_california.pdf; *Oregon State Police Report on Missing and Murdered Native American Women* 11 (2020), https://www.oregonlegislature.gov/citizen_engagement/Reports/2020-OSP-Report%20on%20Missing%20and%20Murdered%20Native%20American%20Women.pdf; Wyoming Survey & Analysis Center, *Missing & Murdered Indigenous People: Statewide Report* 27, https://wysac.uwyo.edu/wysac/reports/View/7713; Urban Indian Health Institute, *MMIWG: We Demand More* 24-25 (2019), https://www.uihi.org/resources/mmiwg-we-demand-more/.

[13] Becky Shay, *Big Horn Sheriff Candidates Defend Records*, BILLINGS GAZETTE (Oct. 25, 2006), https://billingsgazette.com/news/state-and-regional/montana/big-horn-sheriff-candidates-defend-records/article_ff534d1c-08a5-52b5-b298-f61786990b58.html.

there are generally very few BIA officers policing reservations—an average of fewer than six BIA officers are assigned to the Northern Cheyenne reservation[14]—survivors of sexual assault by BIA officers are concerned that they will have to interact with their abuser again in the future, further discouraging them from coming forward. Indeed, L.B. testified about the fear caused by Bullcoming's continued presence on the reservation:

> Well, like seeing tribal police to me they all—it may be off, but they have the same haircut, same build, the same skin tone. They drive the same kind of vehicles. So seeing a tribal cop I get scared that it could be him because he raped me. I didn't know if he would be upset and try to retaliate or do any harm to me or to my unborn baby. . . . I mean to me now like I feel like they can—there's no law. They can do things like that. And you're not safe from them. You have to watch out for them too now.

ER 94.

The BIA's dysfunctional culture is further laid bare by data on sexual harassment of its own employees. The BIA has one of the highest rates of sexual harassment among agencies within the U.S. Department of the Interior ("DOI"),[15] and the DOI Office of the Inspector General ("OIG") has faulted BIA management

[14] *Northern Cheyenne Tribe*, No. CV-20-183-BLG-SPW, at ¶ 57 (ECF 1).

[15] DOI, Work Place Environment Study Reports, *Topline Results*, https://www.doi.gov/sites/doi.gov/files/uploads/doi_wes_topline_results_summary.pdf.

for putting forth "little or no effort . . . to investigate the veracity of the allegations or determine the extent of the problem."[16]

The federal government is obligated to protect Native people under the federal Indian trust responsibility doctrine. The U.S. "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes, and this obligation is subject to "the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (describing these as "obligations to the fulfillment of which the national honor has been committed") (internal citation and quotation marks omitted). The BIA has fallen short of these solemn promises, and the systemic deficiencies warrant vicarious liability.

2. Allowing a cause of action against law enforcement agencies whose agents commit sexual assault will foster institutional accountability

This Court should hold that law enforcement officers act within the scope of their employment when they leverage their power to commit sexual assault, because that holding will bring much-needed accountability to the agencies that police Indian reservations.

[16] DOI, OIG, *Summary: Insufficient Actions by BIA Management and Human Resource Officials in Response to Sexual Harassment Reports* (Sept. 18, 2017), https://www.oversight.gov/sites/default/files/oig-reports/InvestigativeSummary_BIAResponseSexualHarassment.pdf.

Sexual misconduct by police does not simply occur because of a few "bad apples." Rather, a lack of direct supervision, isolated contact with the public, a male-dominated culture, and a culture of secrecy all create an atmosphere ripe for police to abuse their authority.[17] There is "a law enforcement culture of allegiance and loyalty" within the profession that can "result in situations where unprofessional and even illegal behavior is tolerated out of a misplaced sense of loyalty."[18] Underscoring the systemic scale of the problem, one study found that, over a ten-year period, a police officer was caught in an act of sexual misconduct at least every five days.[19] Another found police sexual misconduct was the second most common form of police misconduct reported through 2010, behind excessive force.[20]

---

[17] Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action In a Context Disproportionately Threatening Women of Color*, 32 HARV. J. RACIAL & ETHNIC JUST. 153, 164-65 (2016); International Association of Chiefs of Police, *Addressing Sexual Offenses and Misconduct by Law Enforcement: Executive Guide* 4 (June 2011) ["IACP"], https://www.theiacp.org/sites/default/files/all/a/AddressingSexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf; Timothy M. Maher, *Police Chiefs' Views on Police Sexual Misconduct*, 9 POLICE PRAC. & RES 239, 241 (2008).

[18] IACP, *supra* note 17, at 4.

[19] Matthew Spina, *When a Protector Becomes a Predator*, BUFFALO NEWS (Nov. 22, 2015), https://s3.amazonaws.com/bncore/projects/abusing-the-law/index.html.

[20] The Cato Institute National Police Misconduct Statistics and Reporting Project, *2010 Police Misconduct Statistical Report* 1-2, *available at* https://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/JUD/AJUD338L.pdf.

To incentivize institutional change, civil liability should be assessed at the governmental level. Vicarious liability "recognizes . . . that the ability to exercise control over employees' work-related conduct enables, and provides incentive for, the employer to take measures that reduce the incidence of tortious conduct." *Brenden v. City of Billings*, 2020 MT 72, ¶ 13, 399 Mont. 352, 470 P.3d 168 (internal citation, quotation marks and alterations omitted). The prospect of liability can encourage valuable steps: adopting more rigorous hiring criteria, improving training and education, collecting and analyzing data on individual officers, implementing reporting systems, and swiftly investigating allegations of misconduct.[21] Hence, imposing vicarious liability on a police agency not only vindicates an individual plaintiff's rights, but also deters future misconduct on an agency-wide level and safeguards the rights of others.

Law enforcement considers potential civil liability when making policy decisions. In Texas, for example, 62% of police chiefs reported that the possibility of a lawsuit was a "moderate or major consideration when making decisions affecting the general public," 93% stated that their officers received training on legal liabilities, 13% identified a policy affecting the public that they changed because of litigation or fear of litigation, and 14% identified a policy affecting their officers that

[21] IACP, *supra* note 17 (recommending such measures to reduce police sexual misconduct).

changed from a lawsuit or fear of being sued.[22] In Chicago, the city has responded to an "expensive pattern" of payouts for police misconduct by "concentrating on implementing police reforms" and "look[ing] at the deep seated issues within the department to start rooting out those problems."[23] In New York City, where the police department is the city's leading source of liability payouts, the city government "launched a program to track legal claims" so that it can "use the data to identify underlying problems and make changes to prevent future suits" "[i]nstead of accepting rising claims and settlements as the cost of doing business."[24] In Los Angeles, the sheriff's department is required to "submit a corrective-action plan for each case ending in a settlement or judgment of more than $20,000."[25] Similarly, the federal government, "with inherently scarce resources, obviously want[s] to

[22] Michael Vaughn, et al., *Assessing Legal Liabilities in Law Enforcement: Police Chiefs' Views*, 47 CRIME & DELINQUENCY 3, 18-19 (2001).

[23] Cheryl Corley, *Police Settlements: How the Cost of Misconduct Impacts Cities and Taxpayers*, NPR (Sept. 19, 2020), https://www.npr.org/2020/09/19/914170214/police-settlements-how-the-cost-of-misconduct-impacts-cities-and-taxpayers.

[24] Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, WALL STREET JOURNAL (July 15, 2015), https://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834.

[25] Joanna C. Schwartz, *What Police Learn From Lawsuits*, 33 CARDOZO L. REV. 841, 859 (2012).

minimize the amount of [its] budget that is lost to paying damages."[26] Indeed, large FTCA payments are reported annually to Congress,[27] inviting both congressional and public scrutiny of agencies whose misconduct becomes a burden on the public fisc.

Exposure to civil lawsuits incentivizes institutional change in other ways, including a "desire to avoid adverse publicity, the cost and burden of litigation, and the sting of a determination of liability."[28] Suing a governmental entity "facilitate[s] the development of systemic evidence of deliberate indifference" and "'repeater' officers" by "permit[ting] wider discovery" and "broaden[ing] the scope of admissibility at trial."[29] "Departments mine lawsuits for data about misconduct allegations and the details of those allegations," and "evidence developed in

---

[26] Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 796 (1999).

[27] U.S. Department of the Treasury, Bureau of the Fiscal Service, Judgment Fund, *Annual Report to Congress*, https://fiscal.treasury.gov/judgment-fund/annual-report-congress.html.

[28] Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 860 (2001).

[29] G. Flint Taylor, *A Litigator's View of Discovery and Proof Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747, 748-49 (1999); *see also* Gilles, *supra* note 28, at 859.

discovery and trial . . . can help identify personnel and policy failures."[30] Further, "media coverage of abuses or administrative failures" can trigger "firings" and "resignations."[31]

Institutional accountability will also motivate the BIA to investigate sexual assault reports and take them seriously, and thereby begin to provide some basis for tribal communities to have confidence in the BIA and its officers and encourage reporting of sexual assaults on Indian reservations. As the Department of Justice ("DOJ") has recognized, "[i]f a law enforcement agency does not fully investigate reports of sexual assault, sexual misconduct and domestic violence perpetrated by its own officers, or fails to appropriately discipline officers when those allegations are substantiated, the legitimacy of that law enforcement agency may be called into question."[32] "This, in turn, may make victims more reluctant to report crimes of sexual assault and domestic violence, which undermines public safety by increasing

[30] Schwartz, *supra* note 25, at 846, 887.

[31] Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1681 (2003); *see also* Gilles, *supra* note 28, at 860.

[32] DOJ, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence* 21 (2015), https://www.justice.gov/opa/file/799366/download.

the risk of future harm from offenders who are not held accountable by the criminal justice system."[33]

The need for vicarious liability is also heightened by the skewed power dynamics in federal-tribal relations. When offending officers are state or local law enforcement, reform can be sought through political pressure. But because law enforcement on many Indian reservations is largely provided by federal agencies, reform efforts must be directed toward a distant Washington, D.C. bureaucracy rather than more accountable tribal authorities. The U.S. Commission on Civil Rights has found the federal government responsible for "longstanding and continuing disregard for tribes' infrastructure, self-governance, housing, education, health, and economic development."[34] Respondeat superior liability would cut through the indifference of a remote legislature and provide a direct avenue for redress where the misconduct occurred.

---

[33] *Id.*

[34] U.S. Commission on Civil Rights, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* 6 (Dec. 2018), https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf.

B. Under Montana Law, Law Enforcement Officers Act Within The Scope Of Their Employment When They Abuse Their Authority To Commit Sexual Violence

The government contends that the imposition of respondeat superior liability is foreclosed by Montana law—specifically, by *Maguire v. State,* 254 Mont. 178, 835 P.2d 755 (1992). The government is wrong.

The law of vicarious liability has been essentially unchanged in Montana for over eight decades. *See generally Keller v. Safeway Stores*, 111 Mont. 28, 108 P.2d 605 (1940); *Kornec v. Mike Horse Mining & Milling Co.*, 120 Mont. 1, 180 P.2d 252 (1947); *Brenden,* 2020 MT 72. Conduct may fall within the scope of employment, even if it is "not authorized," where it is "of the same general nature as that authorized *or* incidental to the conduct authorized." *Keller*, 111 Mont. at 36 (emphasis added) (citation and internal quotation marks omitted). "Thus, the fact that the employer did not authorize the tortious conduct, the employee was disobedient, or the employee disregarded the employer's instruction or rule does not necessarily preclude a finding that the employee was acting in furtherance of the employer's interest." *Brenden*, 2020 MT 72, ¶ 16. An act may be within the scope of one's employment, even if the "employee's predominant motive was self-interest" and "the employer [did not] actually profit[] or benefit[] from the act," if the "employee was motivated by any purpose or intent to serve the employer's

interest to any appreciable extent." *Id.* ¶¶ 17-18 (citations and internal quotation marks omitted).

The government argues that Bullcoming raped L.B. for his own purposes and not those of the BIA. *See* Appellees' Br. in *L.B. v. U.S.*, No. 20-35514, at 12 (9th Cir. Nov. 13, 2020) (Dkt No. 20). But Bullcoming's tort consisted of official law enforcement actions that were essential to and cannot be separated from his rape of L.B. He entered her home after responding to a police call, took her to his patrol car, administered a breathalyzer test, accused her of criminality, threatened her with arrest, and threatened to contact social services and remove her children. Each of these actions was an exercise of a law enforcement power and taken for a law enforcement purpose. Even if Bullcoming's "predominant motive was self-interest," he was, "to an[] appreciable extent," serving the interests of his employer—acting as a BIA agent and responding to an incident report—when he used those very law enforcement actions and powers to rape L.B. *Brenden*, 2020 MT 72, ¶ 17. Bullcoming's rape of L.B. was therefore "incidental to"—indeed, entirely predicated upon—his employment as a BIA officer.

Moreover, Montana has followed other jurisdictions which hold that respondeat superior applies when the injury is "one of the risks inherent in the enterprise," *Perez v. Van Groningen & Sons, Inc.*, 719 P.2d 676, 680 (Cal. 1986), or could "properly be considered a cost of the employer's enterprise." *Taber v. Maine*,

67 F.3d 1029, 1036 (2d Cir. 1995); *see also Brenden*, 2020 MT 72, ¶ 18 (citing *Perez* and *Taber*); *Kornec*, 120 Mont. at 10 (holding an employer could be liable for "battery" where the employment is "one which is likely to bring a servant into conflict with others").

The nature of much police work creates inherent "opportunities for sexual misconduct."[35] It is therefore proper for law enforcement agencies to shoulder liability for police sexual misconduct. Indeed, courts across the country have held that, because of the power placed in law enforcement agencies, and the importance that the public trust those agencies, such agencies must be held accountable when officers use their power to sexually assault civilians. *See Mary M. v. City of Los Angeles*, 814 P.2d 1341 (Cal. 1991) (holding police officer was acting within the scope of his employment when he raped a woman while on duty); *id.* at 1342 ("When law enforcement officers abuse their authority by committing crimes against members of the community, they violate the public trust. This may seriously damage the relationship between the community and its sworn protectors[.]"); *id.* at 1349 ("In view of the considerable power and authority that police officers possess, . . . [t]he risk of [sexual assaults by officers] is broadly incidental to the enterprise of law enforcement, and thus liability for such acts may appropriately be imposed on the

[35] IACP, *supra* note 17, at 4; *see supra* nn. 17-20 and accompanying text.

employing public entity."); *Red Elk v. U.S.*, 62 F.3d 1102, 1108 (8th Cir. 1995) (holding that a tribal police officer's rape of a 13-year-old girl was within the scope of his employment, and "[f]or sexual misconduct on occasion by some officers not to be sufficiently foreseeable to impose vicarious liability would suggest that those in charge are blind to modern reality") (applying South Dakota law); *Applewhite v. City of Baton Rouge*, 380 So. 2d 119, 121 (La. App. 1979) (rape by a police officer was within the scope of his employment because of his "considerable public trust and authority").

Maguire does not hold otherwise. That decision did not concern law enforcement officers using their authority to rape a civilian. In *Maguire*, an autistic and disabled patient was raped by her caretaker at a facility for the mentally disabled. *See* 254 Mont. at 181. *Maguire* addressed the question of whether the employee acted within the scope of his employment, summarily stating only that "[i]t is clear" that he did not. *Id.* at 183. The decision is bereft of any facts resembling Bullcoming's leveraging his police authority to rape L.B.[36]

Furthermore, the *Maguire* majority conceded that "a major change to the respondeat superior doctrine" could be accomplished by "the legislature." *Id.* at 185.

[36] To the extent *Maguire* can be read to create a *per se* bar on respondeat superior liability or to bar such liability in the law enforcement context, it should be overruled. *See* Appellant's Br. at 20 n.3.

The Legislature recently recognized the connection between Bullcoming's law enforcement actions and his rape of L.B., further illustrating that respondeat superior liability should apply. Since 2019, § 45-5-501, MCA precludes a finding of consent in certain law enforcement contexts. *See* Laws 2019, ch. 133, § 1. The statute provides that a victim of sexual assault "is incapable of consent" if the victim is "a witness in a criminal investigation or a person who is under investigation in a criminal matter and the perpetrator is a law enforcement officer who is involved with the case in which the victim is a witness or is being investigated[.]"§ 45-5-501(1)(b)(xi), MCA. As the bill's sponsor explained, § 45-5-501(1)(b)(xi) was introduced, in part, *in response to this very case*: "[a] BIA worker [who] coerced a woman into having sex with him by threatening to arrest her if she refused."[37] The purpose of the bill was to "close the loophole in those cases where the person has a position of authority . . . from being able to use that authority . . . to threaten and coerce a person who is vulnerable to their authority[.]"[38]

By clarifying that police officers can never obtain consent from a subject or witness in their investigation, the Legislature has sent a clear message about how the

[37] H'g on S.B. 261 Before Senate Judiciary Committee (Feb. 21, 2019) (Statement of Sen. Sands), http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20190221/-1/33819, at 9:36:21.

[38] *Id.*

law should be construed in Montana when it comes to police officers using their authority to commit sexual assault. The law should not tolerate "loophole[s]," and should be grounded in a practical understanding of the power dynamics between police officers and civilians. It is the officer's government-issued law enforcement power—i.e., not only "physical power," but also "psychological power" stemming from the victim's awareness of the "consequences of not complying"[39]—that makes any sexual encounter inherently non-consensual and, therefore, inherently tortious. Indeed, power is the point: sexual assault is an act of violence committed to assert power and control over a victim.[40] This contemporary understanding of the role that power and authority play in police sexual misconduct supports vicarious liability.

Construing *Maguire* to immunize law enforcement agencies would also lead to incongruous results. Courts applying Montana law routinely, and often by concession of the defendant employer, deem law enforcement officers to be acting

---

[39] Stacie Hahn, *To Protect and to Serve: Municipal Vicarious Liability for a Sexual Assault Committed by a Police Officer*, 18 SW. U. L. REV. 583, 595 (1989).

[40] William F. Merrill, *The Art of Interrogating Rapists*, DOJ, FBI LAW ENFORCEMENT BULLETIN 8-12 (Jan. 1995), https://www.ojp.gov/pdffiles1/Digitization/153162NCJRS.pdf; Ohio Alliance to End Sexual Violence, *Rape Crisis Volunteer Training Manual* 17, https://oaesv.org/wp-content/uploads/2021/08/Volunteer-Training-Manual_FINAL.pdf; Jennifer Gentile Long, *Prosecuting Intimate Partner Sexual Assault*, THE PROSECUTOR (June 2008), http://ndaa.org/wp-content/uploads/prosecut092008_feat_intimateassault.pdf.

within the scope of their employment when they commit other kinds of torts, such as shootings,[41] excessive force,[42] and making false reports.[43] There is no reason why sexual assaults should be treated differently. As this Court has noted, the touchstone of respondeat superior "depends on [the] employer's power and duty of control over the employee," because its purpose is to "provide[] incentive[s] for[] the employer to take measures to reduce the incidence of tortious conduct." *Brenden*, 2020 MT 72, ¶ 13 (internal citations and quotation marks omitted). The need to ensure that law enforcement agencies are properly controlling, training, and supervising their officers is no less salient with respect to sexual assault than other kinds of assault. *See Red Elk*, 62 F.3d at 1108 ("This type of justified liability, hopefully, may help improve hiring and supervision, and produce a police force fully worthy of the public trust.").

[41] *Kingfisher v. City of Forsyth*, 132 Mont. 39, 40-42, 43, 314 P.2d 876 (1957), *superseded on other grounds by statute*; *Estate of O'Brien v. City of Livingston*, No. 18-cv-106-BLG-SPW-TJC, 2020 WL 4487312, at *2 (D. Mont. May 12, 2020); *Estate of Ramirez by and Through Ramirez v. City of Billings*, No. 17-cv-52-BLG-DWM, 2019 WL 366894, at *9, *10, *12 (D. Mont. Jan. 30, 2019).

[42] *Hardesty v. Barcus*, No. 11-cv-103-M-DWM-JCL, 2012 WL 705862, at *6 (D. Mont. Jan. 20, 2012); *Peschel v. City of Missoula*, 664 F.Supp.2d 1149, 1174 (D. Mont. 2009); *Rivera v. Bell*, No. 05-cv-165M-DWM-JCL, 2007 WL 1692456, at *4 (D. Mont. Jun. 8, 2007).

[43] *Rivera*, 2007 WL 1692456, at *4.

IV. CONCLUSION

The Court should answer the certified question in the affirmative and hold that officers act within the scope of their employment when they use their power to rape their victim.

Respectfully submitted this 15th day of October, 2021

By: /s/ *Alex H. Rate*
Alex H. Rate
ACLU OF MONTANA FOUNDATION, INC.
P.O. Box 1968
Missoula, MT 59806
ratea@aclumontana.org

By: /s/ *Steven S. Sparling*
Steven S. Sparling*
Jeffrey L. Braun*
Chase Mechanick*
Julia A. Quigley*
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
ssparling@kramerlevin.com

By: /s/ *Sandra S. Park*
Sandra S. Park**
Linda S. Morris**
Stephen L. Pevar**
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
spark@aclu.org

Attorneys for Amici Curiae American Civil Liberties Union and ACLU of Montana Foundation, Inc.

* Admitted *pro hac vice*
** Application for admission *pro hac vice* pending

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify this Opening Brief is printed with a proportionately spaced Times New Roman typeface in 14 point font, is double spaced, and the word count calculated by the word processing software does not exceed 4,983 words, excluding the cover page, tables, and certificates.

/s/ *Alex H. Rate*
ACLU of Montana Foundation, Inc.

CERTIFICATE OF SERVICE

I, Krystel Pickens on behalf of Alex H. Rate, hereby certify that I have served true and accurate copies of the foregoing Amicus Brief of the American Civil Liberties Union and ACLU of Montana Foundation, Inc. to the following on 10-15-2021:

Victoria Laeder Francis (Attorney)
Office of the U.S. Attorney, 2601 2nd Ave. N. Suite 3200
Billings MT 59101
Representing: United States of America, United States Bureau of Indian Affairs, Dana Bullcoming
Service Method: eService

Timothy M. Bechtold (Attorney)
Bechtold Law Firm PLLC
PO Box 7051
Representing: L. B., D. B.
Service Method: eService

John C. Heenan (Attorney)
1631 Zimmerman Trail, Suite 1
Billings MT 59102
Representing: L. B., D. B.
Service Method: eService

April D. Youpee-Roll (Attorney)
350 S. Grand Ave.
50th Floor
Los Angeles CA 90071
Representing: National Indigenous Women's Resource Center, Sovereign Bodies Institute
Service Method: eService

Caitlin Boland Aarab (Attorney)
11 5th Street North, Suite 207
Great Falls MT 59401
Representing: The Roderick and Solange MacArthur Justice Center, National Women's Law Center, Women's Law Project, Institute for Constitutional Advocacy and Protection, National Policy Accountability Project, Institute for Justice

Service Method: eService

Natasha Prinzing Jones (Attorney)
PO Box 9199
Missoula MT 59807
Representing: Montana Association of Counties (MACo), Montana League of Cities and Towns
Service Method: eService

Tracey Neighbor Johnson (Attorney)
Boone Karlberg P.C.
201 West Main, Suite 300
P.O. Box 9199
Missoula MT 59802
Representing: Montana Association of Counties (MACo), Montana League of Cities and Towns
Service Method: eService

Thomas J. Leonard (Attorney)
Boone Karlberg P.C.
P. O. Box 9199
Missoula MT 59807
Representing: Montana Association of Counties (MACo), Montana League of Cities and Towns
Service Method: eService

Mark S. Smith (Attorney)
2601 2nd Avenue North, Suite 3200
Billings MT 59101
Representing: United States of America, United States Bureau of Indian Affairs, Dana Bullcoming
Service Method: E-mail Delivery

Devi Rao (Attorney)
501 H Street NE, Suite 275
Washington DC 20002
Representing: The Roderick and Solange MacArthur Justice Center, National Women's Law Center, Women's Law Project, Institute for Constitutional Advocacy and Protection, National Policy Accountability Project, Institute for Justice

Service Method: E-mail Delivery

Megha Ram (Attorney)
501 H Street NE, Suite 275
Washington DC 20002
Representing: The Roderick and Solange MacArthur Justice Center, National Women's Law Center, Women's Law Project, Institute for Constitutional Advocacy and Protection, National Policy Accountability Project, Institute for Justice
Service Method: E-mail Delivery

Electronically signed by Krystel Pickens on behalf of Alex Rate.
Dated: 10-15-2021

CERTIFICATE OF SERVICE

I, Alexander H. Rate, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 10-15-2021:

Victoria Laeder Francis (Attorney)
Office of the U.S. Attorney, 2601 2nd Ave. N. Suite 3200
Billings MT 59101
Representing: United States of America, United States Bureau of Indian Affairs, Dana Bullcoming
Service Method: eService

Timothy M. Bechtold (Attorney)
PO Box 7051
317 East Spruce Street
Missoula MT 59807
Representing: L. B., D. B.
Service Method: eService

John C. Heenan (Attorney)
1631 Zimmerman Trail, Suite 1
Billings MT 59102
Representing: L. B., D. B.
Service Method: eService

April D. Youpee-Roll (Attorney)
350 S. Grand Ave.
50th Floor
Los Angeles CA 90071
Representing: National Indigenous Women's Resource Center, Sovereign Bodies Institute
Service Method: eService

Caitlin Boland Aarab (Attorney)
11 5th Street North, Suite 207
Great Falls MT 59401
Representing: The Roderick and Solange MacArthur Justice Center, National Women's Law Center, Women's Law Project, Institute for Constitutional Advocacy and Protection, National Police Accountability Project, Institute for Justice
Service Method: eService

Natasha Prinzing Jones (Attorney)
PO Box 9199

Missoula MT 59807
Representing: Montana Association of Counties (MACo), Montana League of Cities and Towns
Service Method: eService

Tracey Neighbor Johnson (Attorney)
Boone Karlberg P.C.
201 West Main, Suite 300
P.O. Box 9199
Missoula MT 59802
Representing: Montana Association of Counties (MACo), Montana League of Cities and Towns
Service Method: eService

Thomas J. Leonard (Attorney)
Boone Karlberg P.C.
P. O. Box 9199
Missoula MT 59807
Representing: Montana Association of Counties (MACo), Montana League of Cities and Towns
Service Method: eService

Mark S. Smith (Attorney)
2601 2nd Avenue North, Suite 3200
Billings MT 59101
Representing: United States of America, United States Bureau of Indian Affairs, Dana Bullcoming
Service Method: E-mail Delivery

Devi Rao (Attorney)
501 H Street NE, Suite 275
Washington DC 20002
Representing: The Roderick and Solange MacArthur Justice Center, National Women's Law Center, Women's Law Project, Institute for Constitutional Advocacy and Protection, National Police Accountability Project, Institute for Justice
Service Method: E-mail Delivery

Megha Ram (Attorney)
501 H Street NE, Suite 275
Washington DC 20002
Representing: The Roderick and Solange MacArthur Justice Center, National Women's Law Center, Women's Law Project, Institute for Constitutional Advocacy and Protection, National Police Accountability Project, Institute for Justice
Service Method: E-mail Delivery

Jeffrey L. Braun (Attorney)
1177 Avenue of the Americas
New York NY 10036
Representing: ACLU of Montana Foundation, Inc., American Civil Liberties Union
Service Method: Conventional

Steven S. Sparling (Attorney)
1177 Avenue of the Americas

New York NY 10036
Representing: ACLU of Montana Foundation, Inc., American Civil Liberties Union
Service Method: Conventional

Julia A. Quigley (Attorney)
1177 Avenue of the Americas
New York NY 10036
Representing: ACLU of Montana Foundation, Inc., American Civil Liberties Union
Service Method: Conventional

Chase Henry Mechanick (Attorney)
1177 Avenue of the Americas
New York NY 10036
Representing: ACLU of Montana Foundation, Inc., American Civil Liberties Union
Service Method: Conventional

Sandra Park (Attorney)
125 Broad Street, 18th Floor
New York NY 10004
Representing: National Indigenous Women's Resource Center, Sovereign Bodies Institute
Service Method: Conventional

Mary Kathryn Nagle (Attorney)
401 S. Boston Ave., #2200
Tulsa OK 74103
Representing: National Indigenous Women's Resource Center, Sovereign Bodies Institute
Service Method: Conventional

Linda Morris (Attorney)
125 Broad Street, 18th Floor
New York NY 10004
Representing: National Indigenous Women's Resource Center, Sovereign Bodies Institute
Service Method: Conventional

Electronically signed by Krystel Pickens on behalf of Alexander H. Rate
Dated: 10-15-2021