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IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0395

L.B.,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA, et al.
Defendants-Appellees.

PLAINTIFF-APPELLANT'S OPENING BRIEF

On Certified Question from the
United States Court of Appeals for the Ninth Circuit Cause No. 20-35514

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I. ISSUE PRESENTED FOR REVIEW

This Court accepted the following certified question as formulated by the United States Court of Appeals for the Ninth Circuit:

> Under Montana law, do 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?

L.B. v. United States, 8 F.4th 868 (9th Cir. 2021).

II. STATEMENT OF THE CASE

This claim was originally filed by Plaintiff L.B. in the United States District Court for the District of Montana, Billings Division. The claim arose when Bureau of Indian Affairs Police Officer Dana Bullcoming had nonconsensual sex with L.B. and impregnated her. After a paternity test proved he impregnated L.B., Officer Bullcoming pled guilty to 18 U.S.C. §242, deprivation of rights under color of law, and was sentenced to three years in the custody of the U.S. Bureau of Prisons.

L.B. brought this suit against the United States under the Federal Tort Claims Act ("FTCA") with separate claims against Officer Bullcoming. The federal district court ruled that the rape was not within the course and scope of Officer Bullcoming's employment, and therefore the United States is not liable. The district court further ruled that non-delegable duty liability theories do not apply because the FTCA recognizes only scope of employment liability, not other theories of liability.

Appeal from the judgment of the federal district court was timely filed with the Ninth Circuit Court of Appeals, and L.B. separately asked the Ninth Circuit Court of Appeals to certify the question regarding course and scope of employment to this Court. On August 6, 2021, the Ninth Circuit certified the question to this Court, and on August 17, 2021, this Court accepted the certified question.

III. STATEMENT OF FACTS

The certification order from the Ninth Circuit recites the following facts:

> Plaintiff-Appellant L.B., a Northern Cheyenne tribal member, lived within the Northern Cheyenne Reservation in Lame Deer, Montana. On October 30, 2015, L.B. and her mother went to a bar outside the Reservation and had a few alcoholic drinks. After they returned home, L.B.'s mother took the truck keys and said she was going for a drive. L.B. called the police and reported that her mother was driving while intoxicated.
>
> Bureau of Indian Affairs ("BIA") Officer Dana Bullcoming responded to L.B.'s call. Officer Bullcoming determined that L.B.'s mother was safe and then went to L.B.'s residence. After entering the residence, Officer Bullcoming asked L.B. whether she was there alone; L.B. responded that her children were asleep in the other room. L.B. told Officer Bullcoming that she had consumed a couple of drinks that evening, including half of a beer at her residence. Officer Bullcoming then threatened to call social services and arrest L.B. for child endangerment because she was intoxicated while in the presence of her children. *See* Northern Cheyenne Criminal Code § 7-9-6 (1998) (prohibiting intoxication within the exterior boundaries of the Northern Cheyenne Reservation). L.B. pleaded with Officer Bullcoming not to arrest her because if he did, she would lose her job as a school bus driver.
>
> Officer Bullcoming took L.B. outside to his patrol car to take a breathalyzer test, which L.B. recounts reporting a .132 or .136 blood alcohol content. Officer Bullcoming repeatedly told L.B. that "something had to be done." L.B. got the impression that Officer Bullcoming did not

> want to arrest her, so she inquired if by "something needs to be done" he meant "sex." Officer Bullcoming replied affirmatively. L.B. believed that her choices were to go to jail or have sex with Officer Bullcoming. L.B. and Officer Bullcoming had unprotected sexual intercourse in her home and then he left the residence. L.B. became pregnant as a result of the encounter and gave birth to D.B.
>
> In April 2018, L.B. brought this Federal Tort Claims Act ("FTCA") suit against the United States, seeking to hold the United States liable for Officer Bullcoming's misconduct.[1] L.B. and the government filed cross-motions for summary judgment. The government asserted that Officer Bullcoming was not acting within the scope of his employment with the BIA when he sexually assaulted L.B.; therefore, Officer Bullcoming's actions fell outside the scope of the FTCA's limited waiver of sovereign immunity and grant of jurisdiction. The district court agreed with the government, granted the government's motion for summary judgment, and denied L.B.'s cross-motion. The district court reasoned that under Montana's respondeat superior case law, the scope of employment includes only an employee's actions made "in furtherance of his employer's interest." Relying on *Maguire v. State*, 254 Mont. 178, 835 P.2d 755 (1992)—a non-law-enforcement respondeat superior case—the district court concluded that Officer Bullcoming was not acting in furtherance of his employer's interest, and therefore was acting outside the scope of his employment, when he sexually assaulted L.B. Because the FTCA requires that the challenged conduct be within the scope of the actor's employment, the district court concluded that L.B.'s FTCA claim necessarily failed.
>
> L.B. appealed, raising a single issue: whether, under Montana law, Officer Bullcoming's sexual assault of L.B. was within the scope of his employment as a law-enforcement officer. L.B. alternatively moved this court to certify this question to the Montana Supreme Court.

L.B., 8 F.4th at 869-70.

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[1] L.B. also named Officer Bullcoming as a defendant. He failed to answer the complaint and a default judgment was entered against him [footnote in original].

IV. STANDARD OF REVIEW

Under Mont. R. App. P. 15(3), this Court may answer a question of law certified to it by another qualifying court. Review in these cases is purely an interpretation of the law applied to the set of facts presented by the certifying court. *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 2009 MT 349, ¶4.

V. SUMMARY OF THE ARGUMENT

This Court should rule that 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 FTCA provides a waiver of immunity for the tortious conduct of federal employees acting within the scope of their employment, and includes a specific law enforcement proviso for assaults by police officers acting within the scope of their employment. 28 U.S.C. §2680(h). The determination of liability under the FTCA is controlled by the law of the place where the allegedly tortious acts occurred. 28 U.S.C. §1346(b).

Because Officer Bullcoming is a federal actor, L.B. brought her claims against him under the FTCA, which requires that the tortfeasor's acts must be within the scope of his employment for employer liability to attach. Because Montana adopted Restatement (2d) of Agency §214 in 2009 in *Paull v. Park County*, 218 P.3d 1198 (Mont. 2009), if Officer Bullcoming had been a non-federal

police officer at the time of the sexual assault here, his employer could be found liable under Montana law pursuant to the non-delegable duty doctrine.

Police officers who physically assault citizens while policing them are acting in the scope of their employment since physical encounters with citizens are an expected part of policing. Police officers who sexually assault citizens are similarly acting in the scope of their employment since sexual assault is simply another form of assault. Because of the extreme power imbalance between police officers and the persons being policed, this Court should expressly adopt the standard adopted in other jurisdictions that law enforcement officers using the authority of their position as on-duty officers to sexually assault members of the public are acting in the course and scope of their employment.

Moreover, adoption of this standard would eliminate the disparity in remedies available to Montana victims of sexual assaults by non-federal law enforcement officers, who have a remedy against employers under the nondelegable duty doctrine, and Montana victims of sexual assaults by federal law enforcement officers, for whom the nondelegable duty doctrine does not apply.

VI. ARGUMENT

A. This Court should rule that 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 FTCA, 28 U.S.C. §§1346(b), 2671-2680, waives the government's sovereign immunity from tort suits and holds it responsible "in the same manner" as a private individual for certain torts committed by federal employees "while acting within the scope of [their] office or employment." *Id.* There are exceptions, however, to this general proposition that the government is subject to suit "in the same manner" as a private individual. One exception preserves sovereign immunity in claims against the government for certain intentional torts. *See* §2680(h) (sovereign immunity bars "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights"). This is known as the "intentional tort exception." *Millbrook v. United States*, 569 U.S. 50, 52 (2013).

The intentional tort exception has its own exception, however, known as the "law enforcement proviso," wherein sovereign immunity *is* waived for "claims arising out of assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution" that are based on the acts or omissions of investigative or law enforcement officers. 28 U.S.C. §2680(h). The proviso defines "investigative or law enforcement officer" to mean "any officer of the United States who is

empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. §2680(h).

The United States Supreme Court has recently settled that the government is liable under the FTCA for conduct such as that committed by Officer Bullcoming here:

> The plain language of the law enforcement proviso answers when a law enforcement officer's 'acts or omissions' may give rise to an actionable tort claim under the FTCA. The proviso specifies that the conduct must arise from one of the six enumerated intentional torts and, by expressly cross-referencing §1346(b), indicates that the law enforcement officer's 'acts or omissions' must fall 'within the scope of assault, his office or employment.' Nothing in the text further qualifies the category of 'acts or omissions' that may trigger FTCA liability.
>
> …
>
> The plain text confirms that Congress intended immunity determinations to depend on a federal officer's legal authority, not on a particular exercise of that authority. …[T]he waiver effected by the law enforcement proviso extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest.

Millbrook, 569 U.S at 55-57.

Thus, under §2680 and the United States Supreme Court's *Millbrook* decision, the government is subject to suit under the FTCA for Officer Bullcoming's conduct and can be liable under the doctrine of *respondeat superior* as long as Officer Bullcoming's "acts or omissions giving rise to the claim occur

while the officer is "acting within the scope of his office or employment." *Id*. at 55 (citing §1346(b)(1)).

Since Officer Bullcoming's intentional tort is not barred by the FTCA, the determination of liability under the FTCA is controlled by the law of the place where the allegedly tortious acts occurred. 28 U.S.C. §1346(b). Therefore, Montana *respondeat superior* law controls whether Officer Bullcoming acted in the course and scope of his employment when he assaulted L.B. *See Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996).

The certified question presented to this Court is whether law-enforcement officers like Officer Bullcoming act within the course and scope of their employment under Montana law when they use their authority as on-duty officers to sexually assault members of the public. The answer must be yes.

The FTCA itself recognizes an exception to the general rule of intentional torts for law enforcement by including the law enforcement proviso. 28 U.S.C. §2680(h). This proviso recognizes that Congress was deliberately creating a remedy for the intentional torts of federal law enforcement officers. The legislative history of the proviso states that '[t]he effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: assault, battery, false imprisonment,

false arrest, malicious prosecution, or abuse of process." S. Rep. No. 93-588, 93d Cong., 2d Sess. 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791 (1974).

Here Officer Bullcoming was acting under color of law when he sexually assaulted L.B. While the Supreme Court in *Millbrook* did not address whether acting "under color of federal law" is independently sufficient to provide FTCA jurisdiction under the law enforcement proviso, as suggested by the legislative history ("Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law") the federal legislative history certainly militates that this Court recognize that law enforcement officers who use the power of their position to commit intentional torts of sexual assault are acting in the course and scope of their position as police officers.

Montana public policy militates in favor of this Court recognizing the power imbalance involved in policing. Due in part to Officer Bullcoming's sexual assault of L.B., in 2019 the Montana legislature recognized the "extreme power imbalance between" a police officer and people being policed.[2] The Montana legislature passed SB261 into law and amended MCA §45-5-501 to include a provision that a "victim is incapable of consent" when the victim is "a witness in a criminal

[2] *See* Senator Diane Sands' introduction of SB261 at the Senate Judiciary Committee hearing on SB 261, 2019 Leg., 66th Sess. (Feb. 21, 2019) http://sg001harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20190221/-1/33819 at 9:36:30. SB261 passed the House of Representatives 96-2 and the Senate 46-4 before being signed into law.

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." *See* MCA §45-5-501(1)(b)(xi).

Just as the Montana Legislature determined that the power imbalance between law enforcement officers and members of the public required a special exemption from consent, numerous courts in other states have considered similar scenarios and found that sexual assaults by law enforcement officers required a finding of employer liability because of this power imbalance between officers and members of the public.

The seminal case in this regard is *Mary M. v. City of Los Angeles*, 814 P.2d 1341 (1991), where the California Supreme Court applied the *respondeat superior* doctrine to instances of sexual abuse by law enforcement officers. The *Mary M.* court determined that a jury could determine whether an officer was acting within the scope of his employment when sexually assaulting a citizen. *Id.* Based on *Mary M.*, California developed jury instructions that identified the elements a plaintiff needs to prove to show that police misconduct is within the scope of employment: 1) the conduct happens while the officer is on duty; 2) the conduct happens while the officer is exercising his authority as a peace officer; and 3) the conduct results from the use of the peace officer authority. *Id*. at 1207. In cases where these elements are not in dispute, such as this case, a court may determine as a matter of

law whether an officer is acting within the scope of his employment, and therefore whether the governmental agency is responsible for the officer's misconduct. *Id*.

The *Mary M.* court couched its decision in basic policy tenants of the relationship between law enforcement and the public, and opportunities for abuse of that trust:

> Police officers occupy a unique position of trust in our society. They are responsible for enforcing the law and protecting society from criminal acts. They are given the authority to detain and to arrest and, when necessary, to use deadly force. As visible symbols of that formidable power, an officer is furnished a distinctively marked car, a uniform, a badge, and a gun. Those who challenge an officer's actions do so at their peril; anyone who resists an officer's proper exercise of authority or who obstructs the performance of an officer's duties is subject to criminal prosecution.
>
> 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, by eroding the community's confidence in the integrity of its police force.
>
> . . .
>
> 'The bite of the law,' Justice Frankfurter wrote, 'is in its enforcement.' That maxim was never better served than here. Given the proper factual showing of misuse of official authority in the commission of a rape by a police officer, <u>it is fair and consistent with time-honored principles of respondeat superior to impose liability vicariously on the public entity on whose account the officer occupied a position of authority and trust, and for the folly of its hire.</u>

Id. at 1342, 1354 (emphasis added); *see also* Cara 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 (Spring 2016) ("It is likely that no other occupation or profession offers the opportunities for sexual misconduct like the police occupation. This is due, in part, to police officers often working independently without direct supervision. Such independence gives potential offenders ample opportunity to perpetrate acts of sexual deviance. Officers also work at night, where their conduct is less visible to the protective eyes of the public. Combined with officers' enormous power and authority over others, the potential for misconduct is evident."); 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) ("Aware of the power a police officer possesses, and conscious of the consequences of not complying with his orders, a victim feels powerless and often is subjugated by the officer's presence. This relationship is ripe for abuse by the officer.'); *id*. at 601 ("The gun and badge, each symbols of authority and power, induce a submissive reaction on the part of the victim."); Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 Valparaiso L. Rev. 152 (Fall 2013)(test of liability is whether "the offending employee was materially aided in his wrongdoing by having the job or position he occupied").

Numerous courts have followed the *Mary M*. line of reasoning to extend vicarious liability to employers of peace officers who commit sexual misconduct

while on duty and exercising the authority as a peace officer. *See, e.g., Doe v. City of San Diego*, 35 F.Supp.3d 1195 (S.D. Ca. 2014); *Doe v. County of Kern*, 2017 WL1383282 (E.D. Cal 2017); *Pena v. Greffet*, 110 F.Supp.3d 1103, (D.N.M. 2015).

In *Doe v. City of San Diego*, a police officer pulled over Doe for failing to use a turn signal. Alcohol testing indicated that Doe's blood alcohol level was .09. The officer told Doe that they might be able to "work something out" to avoid a drunk driving charge. The officer suggested that Doe give him her bra and panties, and settled for Doe giving him her panties. He told Doe she could take off her panties in the car or at a nearby convenience store. Doe picked the store. The officer followed Doe into the store bathroom and blocked the exit. Doe took off her panties and gave them to the officer. The officer then told Doe he wanted to see her breasts, so Doe exposed her breasts. Doe alleged that the officer then rubbed himself against her, but the officer denied any intimate contact. Doe and the officer then left the bathroom and the officer told Doe he would let her know when she would be off the hook for the drunk driving charge. Doe reported the sexual assault, conducted several monitored calls with the officer, and the officer was eventually convicted of sexual assault. *Doe*, 35 F.Supp.3d at 1197-1203. Based on these facts, the district court found vicarious liability against the officer's employer as a matter of law:

> The undisputed facts demonstrate that the sexual encounter occurred while—and because—Plaintiff was directly subject to Officer Arevalos' improper use of authority. He controlled her throughout the encounter, consistently reiterating his ability to arrest her for a DUI. … Officer Arevalos and Doe were not simply enjoying a leisurely conversation around the kitchen table when a trip to the bedroom ensued. Rather, by taking advantage of his authority and control as a law enforcement officer, Arevalos struck a deal with Doe whereby he would receive her panties in exchange for not getting arrested.
>
> For these reasons, the Court finds that the undisputed facts demonstrate that Arevalos was acting within the scope of his employment throughout his encounter with Jane Doe, and thereby **GRANTS** Plaintiff's motion for partial summary judgment on the issue of the City's vicarious liability.

Id. at 1209.

Similarly, in *Applewhite v. City of Baton Rouge,* 380 So. 2d 119 (1979), a Louisiana Court of Appeal held the city liable for the police officer's rape of a woman whom the officer picked up in his patrol car for alleged vagrancy. That court commented that:

> A police officer is a public servant given considerable public trust and authority. Our review of the jurisprudence indicates that, almost uniformly, where excesses are committed by such officers, their employers are held to be responsible for their actions even though those actions may be somewhat removed from their usual duties. This is unquestionably the case because of the position of such officers in our society.

Id. at 121.

Finally, in *Red Elk ex rel. Red Elk v. United States,* 62 F.3d 1102 (8th Cir. 1995), tribal policemen saw a thirteen-year-old girl walking along the road at

eleven o'clock at night, and stopped her as a potential curfew violator. The girl was placed in the back of the patrol car, and one of the officers climbed in the back and raped her while the other "looked the other way." The government argued that the rape "could not possibly be within the scope of [the officer's] employment. Consequently, the government as the employer cannot be liable. It is, however, not that simple to resolve the issue in the factual circumstances of this case under the law of South Dakota." First the district court and, then the Eighth Circuit, disagreed, holding:

> As part of their employment as policemen, Claymore and Zimiga were responsible under the reservation curfew policy for the safe return to their homes of minors who were violating the curfew. These two officers on duty, in uniform, armed, and patrolling in a marked police car, picked up the victim ostensibly to return her safely home as a curfew violator. She got in the rear seat of the patrol car from which she had no way to exit without the officers' help. On the way home Claymore got in the back seat and raped her. Zimiga discreetly got out of the car and looked the other way, but made a timely return to the patrol car to inquire if it was now "his turn." It was not, so the officers finally took the victim home. The nexus is obvious. It was a blatant violation of trust, particularly when involving a minor.
>
> In our view it was also foreseeable that a male officer with authority to pick up a teenage girl out alone at night in violation of the curfew might be tempted to violate his trust. Claymore had that opportunity because of his employment, the trappings of his office, and the curfew policy he was to enforce. He and Zimiga enforced the curfew policy, but violated the minor in the process.
>
> …
>
> This type of justified liability, hopefully, may help improve hiring and supervision, and produce a police force fully worthy of the public

> trust. It cannot be otherwise. We believe this would be the enlightened view of the Supreme Court of South Dakota as we view precedents.

Id. at 1105, 1108.

The certified question before this Court asks whether *all* on-duty law enforcement officers who use the authority of their position to sexually assault members of the public are acting in the course and scope of their employment. The answer must be "yes" for the public policy reasons delineated in *Mary M.* and its progeny. The notion that sexual gratification is the only reason a law enforcement officer would abuse his position of power to commit a sexual assault is antiquated and disproved by the current understanding of why sexual assaults occur. *See, e.g.,* Trombadore, *supra;* Hahn, *supra* (law review articles examining the motives for sexual assault in the law enforcement context.)

The *Mary M.* line of cases posits the fundamental public policy that when someone is an innocent victim of sexual assault by a law enforcement officer, the employer that hired, retained, and supervised the law enforcement officer should be held responsible, not the innocent victim. *Mary M.* and similar cases hold that the employer bears responsibility, which causes the employer to actively ensure that its officers are being properly vetted and supervised.

Here, all three *Mary M.* elements are met. Officer Bullcoming was on duty, exercising his authority as a law enforcement officer, and the rape resulted from his use of his law enforcement authority. In full uniform, under color of law, with

a badge and a gun, he entered L.B.'s home, subjected her to breathalyzer testing, and presented her with the Hobson's choice either to have sex with him or be arrested and lose her job and her children. Officer Bullcoming freely acknowledged that he used his position as a BIA officer to coerce L.B. into engage in sex. None of Officer Bullcoming's conduct could have happened but for the law enforcement position he held and the law enforcement activities he was conducting.

It is universally agreed that police officers who physically assault citizens while policing them are acting in the scope of their employment, since physical encounters with citizens are a foreseeable and expected part of policing, including assaulting, tasing, shooting, and sometimes killing members of the public. *See, e.g. Thomas v. Dillard*, 818 F.3d 864 (9th Cir. 2016)(police who deployed taser for refusal to search acted in scope of employment); *Graham v. Connor*, 490 U.S. 386, 396 (1989)(law enforcement officers' right to "make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it"). Police officers who sexually assault citizens are similarly acting in the scope of their employment, since sexual assault is simply another method of assault with the same purpose of intimidating and controlling the public. *See Mary M.*, 54 Cal. 3d at 217 (neither "startling nor unexpected" that officers will misuse authority and assault members of the public). The same

arguments that sexual assault is solely for the self-gratification of the individual police officer and not for the benefit of the police department employer can be made for instances when a police officer beats a member of the public senseless, or tasers a member of public repeatedly, or shoots a member of the public – all in instances of excessive and unnecessary force – but in all those instances it is accepted that the officer is acting in the scope of employment and liability falls to the employer. Courts cannot presume that an officer assaults a citizen for self-gratification and courts cannot presume that an officer sexually assaults a citizen for self-gratification. Ultimately, this Court must rule that the conduct of the officer and the position of power that the officer occupies should govern employer liability, not the motivation or mental state of the officer. In all cases when a law-enforcement officer uses the authority of his position to sexually assault a member of the public, this Court must find that the officer acts in the course and scope of his employment.

In 1992, this Court considered a case in which an employee of the Montana Developmental Center raped an autistic and mentally disabled patient, resulting in the patient's pregnancy. *Maguire v. State*, 835 P.2d 755, 757 (Mont. 1992). The employee had primary responsibility for the patient, including bathing and dressing her. *Id.* This Court determined that, "It is clear this rape was outside the scope of [the employee's] employment" and found the employer was not liable for the

assault. *Id*. at 758.

In 2009, however, this Court adopted Restatement (Second) of Agency §214 in *Paull v. Park County*, 218 P.3d 1198, 1205 (Mont. 2009), ruling that Montana law supports liability of an employer under §214's nondelegable duty exception to the *respondeat superior* doctrine. By adopting the §214 standard in *Paull,* this Court implicitly overruled *Maguire.* That is, if the facts of *Maguire* were to come before this Court today, the state would be found liable for the rape of the patient under the nondelegable duty doctrine.

The Montana federal district court has also applied the nondelegable duty doctrine to find rapist's employers liable for the employee's sexual assaults. *Smith v. Ripley*, 446 F.Supp.3d. 683 (D. Mont. 2020), for example, involved a child protection specialist hired by the state who raped a person while in her home to collect case-related paperwork. *Id*. at 685. Judge Christensen, citing *Maguire*, ruled that, "Rape is outside the scope of employment, even if it occurs in the workplace and under conditions conducive to predatory conduct," and "*Maguire* stands for the general rule that, in Montana, rape falls outside the scope of employment." *Id*. at 687. The judge thus ruled that because the rape was outside the scope of employment, *respondeat superior* did not apply. Judge Christensen then went on to find that, under Montana law as set forth in *Paull*, the nondelegable duty exception of §214 applied, and found the state liable for the employee's rape. *Id*. at 691-92.

If Officer Bullcoming had been a state or county police officer when he assaulted L.B., his employer would be held liable under Montana law pursuant to the nondelegable duty doctrine. But, as discussed above, the nondelegable duty doctrine does not apply to claims under the FTCA, so in answering the certified question, this Court can either: (1) allow a gaping, unfair chasm to exist in Montana law that shields federal law enforcement officers from liability, or (2) find that *all* law enforcement officers who use their authority as on-duty officers to sexually assault members of the public are acting in the course and scope of their employment in order for federal government employer liability to attach.[3]

The federal district court's ruling in this case, based on *Maguire*, was that sexual assault cannot be in the course and scope of a federal officer's employment, therefore the federal government is not liable when an on-duty federal officer uses the power of his police authority to sexually assault a member of the public. *See L.B.,* 8 F.4th at 870. The federal district court's ruling in this case has created a dichotomy in Montana wherein a Montana citizen who is sexually assaulted by a state, county, or municipal law enforcement officer has a remedy in tort against the officer's employer, while a Montana citizen who is a victim of sexual assault by a

[3] Though the certified question now before this Court does not address *Maguire* specifically, Appellant requests that this Court explicitly overrule *Maguire* so that future federal courts cannot find that "*Maguire* stands for the general rule that, in Montana, rape falls outside the scope of employment." *See Smith v. Ripley,* 446 F.Supp.3d at 687.

federal officer does not have a remedy in tort against that officer's employer, simply because the officer is a federal employee.

Similarly, the federal district court's ruling has created a dichotomy where a member of the public who is physically assaulted, tasered, shot, or even killed by a federal police officer can have a remedy in tort against the employer – since those are acknowledged aspects of policing, regardless of whether the acts are intentional or negligent – while a victim of sexual assault by a federal police officer does not. Under this reasoning, if a federal officer beats or shoots a Montana citizen after raping her, there would be a possible remedy in tort against the federal government for the federal officer's use of excessive force in beating and shooting the victim, but not for the preceding rape.

These disparities – the remedies available to Montana citizens depending on the employer of the officer and the remedies available depending on the type of assault – place a disproportionate burden on Montana's Native American people, who are much more likely to be policed by federal officers. This Court must not countenance such disparities in remedies available to Montana citizens based simply upon the law enforcement officer's employer, and should eliminate these disparities by ruling that all 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.

VII. CONCLUSION

This Court should answer the Ninth Circuit's certified question in the affirmative and rule that law enforcement officers who use the power of their position as police officers to sexually assault members of the public are acting in the course and scope of their employment under Montana law so that all victims of police violence in Montana have the same remedy.

Respectfully submitted this 14th day of October, 2021.

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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 Time New Roman typeface in 14 point font, is double spaced, and the word count calculated by the word processing software is 5560 words, excluding tables and certificates.

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