FILED
12/29/2021
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: OP 21-0395

IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. OP 21-0395

L.B.,
PLAINTIFF-APPELLANT,

V.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE.

CERTIFIED QUESTIONS FROM NINTH CIRCUIT COURT OF APPEALS
CAUSE NO. 20-35514

ANSWER BRIEF OF THE UNITED STATES

APPEARANCES:

Leif M. Johnson
U.S. Attorney
Victoria L. Francis
Assistant U.S. Attorney
James F. Battin Federal Courthouse
2601 2nd Ave. N., Suite 300
Billings, MT 59101
Phone: (406) 247-4633
victoria.francis@usdoj.gov

Attorneys for Appellee

Timothy M. Bechtold
Bechtold Law Firm PLLC
PO Box 7051
Missoula, MT 59807
Phone: (406) 721-1435

John Heenan
HEENAN & COOK
1631 Zimmerman Trail
Billings, MT 59102
Phone: (406) 839-9091
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

INTRODUCTION

As the magistrate found, despite being on duty, Dana Bullcoming "raped L.B. solely for his own personal benefit." Appendix (App.) 1 at ER 45. Under established Montana law, this criminal conduct was outside the scope of employment because it was not "at least partially motivated by the employee's intent or purpose to serve the employer's interest." *Brendan v. City of Billings*, 2020 MT 72 ¶17, 339 Mont. 352, 470 P.3d 168; *Maguire v. State*, 254 Mont. 178, 182-83, 835 P.2d 755, 758 (1992) (rape for employee's own benefit outside scope of employment). The Court has applied this rule without exception for over a hundred years, consistent with the Restatements of Agency and most states.

The certified question is phrased in terms of "law enforcement" liability, but the Federal Tort Claims Act (FTCA) "requires a court to look to the state-law liability of private entities, not to that of public entities," even when assessing liability "in the performance of activities which private persons do not perform." *United States v. Olson*, 546 U.S. 43, 46 (2005). Montana law is clear under the undisputed facts of this case: a sexual assault committed solely for personal benefit is not in the scope of employment. That decides this case.

Appellants' arguments for a law-enforcement exception to that rule are misplaced because the FTCA requires courts to look at the state-law liability for private entities. Appellants' policy concerns are better left to the legislature, which

recently acted instead to strengthen criminal law to cover coercive rape by law enforcement.

STATEMENT OF THE ISSUES

I. Under Montana law, do employees act within the course and scope of their employment when they use authority given to them by virtue of their employment to commit sexual assault?[1]

STATEMENT OF THE CASE

In April 2018, Plaintiff L.B. brought the instant action against Dana Bullcoming and the United States. *See* ER 178. L.B. and the United States both filed motions for summary judgment. ER 181. The magistrate judge recommended granting the United States' motion for summary judgment. ER 54. The district court adopted the magistrate's findings and recommendations. ER 36. L.B. proceeded against Bullcoming; the court issued a default judgment for L.B. and awarded $1,611,854.00 in damages against Bullcoming. ER 184. L.B. appealed the summary judgment decision to the Ninth Circuit, which certified the present question to this Court.

STATEMENT OF FACTS

I. Bullcoming coerces L.B. into sex despite L.B. stating she was willing to face legal consequences for her violation.

On October 31, 2015, L.B. reported to law enforcement that her mother was

[1]This Court may modify the certified question to address a determinative issue in the litigation. *See infra* Section I.A.

driving while drunk. Officer Dana Bullcoming responded, and after finding L.B.'s mother at home, went to talk to L.B. at her residence. ER 38.

Bullcoming entered L.B.'s home and asked if she was alone; she responded that her children were in another room. ER 38. Bullcoming told L.B. he would need to call social services and arrest her for child endangerment because she was intoxicated in the presence of her children. *Id.* L.B. told Bullcoming she would lose her new job if she was arrested and pleaded with him not to arrest her. *Id.*

L.B. and Bullcoming then went outside to his patrol car so L.B. could take a breathalyzer test. ER 39. The breathalyzer indicated that L.B. had a blood alcohol content greater than 0.1. *Id.* Bullcoming then repeatedly told L.B. "something had to be done." *Id.* L.B. agreed that it would be appropriate for her to be taken in for her violation. App. 1, SER 008 ("If you got to take me in for this, I guess that's my consequence for drinking. . . . I know better and I shouldn't have done it.").

Rather than performing the arrest, however, Bullcoming persisted in saying that "something needs to be done." SER 008. L.B. felt like Bullcoming did not want to arrest her and she ultimately asked if Bullcoming meant "sex." ER 39. Bullcoming answered, "Well, something," to which L.B. reported she replied that if that was what Bullcoming meant "all this time . . . if you would have just said something, that could have been easier than doing all of this." SER 008. Bullcoming said "yeah." *Id.*

Bullcoming had unprotected sex with L.B. and then left the residence. ER 39. L.B. became pregnant from the encounter and had a child. *Id.*

In 2017, the United States indicted Bullcoming for deprivation of rights under color of law and false statements to a federal officer. The Indictment stated that Bullcoming, while acting under color of law, "coerced L.B. into engaging in sexual intercourse with him under threat of arrest if she refused." ER 39. Bullcoming pleaded guilty to violating 18 U.S.C. § 242, and was sentenced to 3 years in prison followed by 3 years of supervised release. ER 159-61.

II. The district court finds Bullcoming's actions were not within the scope of his employment under Montana law.

L.B. sued Bullcoming and the United States. Both L.B. and the government defendants moved for summary judgment.

The magistrate noted that the United States' waiver of sovereign immunity under the FTCA is limited to acts or omissions of a government employee "while acting within the scope of his office or employment," 28 U.S.C. § 1346(b)(1). ER 42-43. The court articulated the test for scope of employment under Montana law: "[A]n employee's actions are in the scope of his employment when they are 'in furtherance of his employer's interest or for the benefit of his master'" but "[a]n employee's actions made 'entirely for his own benefit' are generally not within the scope of his employment." ER 44 (quoting *Kornec v. Mike Horse Mining & Milling Co.*, 120 Mont. 1, 7, 180 P.2d 252, 256 (1947)).

The court then observed that the Montana Supreme Court applied this "furtherance test" to the situation of sexual assault by a state employee in *Maguire* and concluded that "[i]t is clear this rape was outside the scope of [the employee's] employment." ER 45 (quoting *Maguire*, 254 Mont. at 183, 835 P.2d at 755). The court concluded that: "Application of the furtherance test and the *Maguire* decision to this case leads to the conclusion that Bullcoming was not acting within the scope of his employment under Montana law." ER 45.

The court then rejected L.B.'s argument that the United States could be liable under the non-delegable duty doctrine set forth in Restatement (Second) of Agency § 214, because the argument "ignores the fundamental basis for the United States' liability" which requires the employee's actions to be taken within the "scope of employment." ER 49-50.

The district court overruled L.B.'s objections to the magistrate's recommendation. ER 36. After receiving a default judgement against Bullcoming in the amount of $1,611,854.00, ER 184, L.B. appealed the summary judgment ruling. The Ninth Circuit certified to this Court the question briefed here.

STANDARD OF REVIEW

When answering a certified question from another qualifying court as permitted under Mont. R. App. 15(3), [this Court's] review is "purely an

interpretation of the law as applied to the agreed facts underlying the action." *N. Pac. Ins. Co. v. Stucky*, 2014 MT 299 ¶18, 377 Mont. 25, 338 P.3d 56.

SUMMARY OF ARGUMENT

For over a hundred years, Montana has applied the rule that an employee's tortious acts performed solely for private motives are not within the scope of his employment. Because Bullcoming "raped L.B. solely for his own personal benefit," ER 45, his actions were not "incidental to the performance of an expressly or implicitly authorized act *and at least partially motivated by the employee's intent or purpose to serve the employer's interest*," and, thus, not within the scope of employment. *Brendan* ¶16 (emphasis added). Appellants do not argue otherwise.

Instead, Appellants argue that the Court should redefine "scope of employment" expressly for law enforcement employees, extending liability even where employees act solely for their own benefit. However, the creation of an exception would not be determinative of an issue in the pending litigation. The United States' waiver of sovereign immunity extends only where there would be liability for a "private person" based on the acts of employees within their scope of employment, not liability solely for "municipal (or other state) entities." *Olson*, 546 U.S. at 46.

Moreover, a rule that employers are liable for employees misusing their authority to commit sexual assault for their own benefit would require the Court to

overturn settled precedent and create new law contrary to the vast majority of states to address the issue. As the Court already so held in *Maguire*, such a radical change should be left to the legislative branch, particularly where, as Appellants observe, the legislature has not been idle in this area, electing to deter law-enforcement rape by strengthening criminal laws.

ARGUMENT

I. Under Montana law, as well as that of most states, a sexual assault by an employee performed solely for his own benefit is not within the scope of employment.

A. Appellants put forward no argument that Bullcoming was acting within the "scope of his employment" under the existing principles of Montana tort law.

1. For over a hundred years, scope of employment under Montana law turns on whether the employee's actions are motivated, at least in part, by the intent or purpose to serve the employer's interest.

The certified question asks whether "law enforcement officers" using "their authority as on-duty officers to sexually assault members of the public" act within their scope of employment under Montana law. The determinative question in the pending litigation, however, is whether "a private person" in a similar position to the United States would be liable on a respondeat superior basis for the acts of employees within the scope of employment, not whether "a State would impose liability upon a municipal (or other state governmental) entity." *Olson*, 546 U.S. at 46. Thus, the existence or absence of unique liability for municipal or state law

enforcement is not the relevant inquiry. Instead, Montana law clearly establishes that torts committed by employees of private employers acting purely for their own benefit are not within their scope of employment, a rule specifically applied to hold that employers are not liable on a respondeat superior basis for sexual assaults committed by employees.

The FTCA provides the sole waiver of the United States' sovereign immunity for a plaintiff seeking to sue the United States in tort. 28 U.S.C. § 1346(b); *Smith v. United States*, 507 U.S. 197, 201 (1993). Under the FTCA, the United States' waiver of sovereign immunity is limited to certain injuries caused by:

> …the negligent or wrongful act or omission of any employee of the Government *while acting within the scope of his office or employment*, under circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (emphasis added). Thus, a plaintiff must be able to demonstrate the tortious act was committed by a federal employee acting "within the scope of his office or employment," under Montana law.[2] *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 423 (1995).

---

[2] Appellants observe that there is an exception to the United States' waiver of sovereign immunity for certain intentional torts under 28 U.S.C. § 2680(h). Appellants Br. at 6. As they note, however, this exception does not apply to a law enforcement officer of the United States who is "acting within the scope of his office or employment." *Id.* (quoting *Millbrook v. United States*, 569 U.S. 50, 52 (2013)). The United States has not asserted in this case that the intentional tort

The United States Supreme Court has made clear that the FTCA "requires a court to look to the state-law liability of private entities, not to that of public entities," even when assessing the Government's liability "in the performance of activities which private persons do not perform." *Olson*, 546 U.S. at 46 (quoting *Indian Towing Co. v. United States* 350 U.S. 61, 64 (1955)). Indeed, the Ninth Circuit has distinguished this situation with respect to the very case on which Appellants ask this Court to rely. In *Xue Lu v. Powell*, 621 F.3d 944, 947 (9th Cir. 2010), the court applying the FTCA to an INS Asylum officer's sexual misconduct, expressly declined to look to *Mary M. v. City of Los Angeles*, 814 P.2d 1341 (Cal. 1991), "because liability in that case depended on the unique authority vested in police officers"; the court determined it was required to "look, instead, to principles of respondeat superior liability that apply to private entities." 621 F.3d at 947 (quotation marks omitted).

Moreover, the FTCA's requirement that the United States be liable "in the same manner and to the same extent as a private individual in *like circumstances*," does not "restrict a court's inquiry to the *same circumstances*, but require it to look further afield." *Olson*, 546 U.S. at 46. (quotations marks and citation omitted). The

---

exception applies. Rather, summary judgment was granted on the ground that Bullcoming was not acting within the scope of his office or employment under Montana law as required under 28 U.S.C. § 1346(b).

Supreme Court instructed courts to look to "private person analogies for Government tasks." *Id.* at 47.

Thus, the relevant inquiry is not whether employees who misuse *uniquely governmental* authority to commit sexual assault act within the scope of employment, but whether employees of private employers who misuse their authority to commit sexual assault act within the scope of employment. *See Olson*, 546 U.S. at 47 ("Private individuals, who do not operate lighthouses, nonetheless may create a relationship with third parties that is similar to the relationship between a lighthouse operator and a ship dependent on the lighthouse's beacon.").

The answer to that question is no. This Court has explained in some detail the test for "scope of employment" under Montana law, emphasizing that the test focused on the employee's purpose for engaging in the tortious actions. *Brendan*, ¶14. The Court's conclusion in *Maguire* that an employee's sexual assault performed solely for his own interest is outside the scope of employment is a straight forward application of this principle.[3] 254 Mont. at 183, 835 P.2d at 758; *Brendan*,

[3] This Court applies the law "to the agreed facts underlying the action." *Stucky*, ¶18. The magistrate's finding that Bullcoming "raped L.B. solely for his own personal benefit," ER 45, is not in dispute. *See also L.B. v. United States*, 8 F.4th 868 (9th Cir. 2021) ("[T]he district court concluded that Officer Bullcoming was not acting in furtherance of his employer's interest."). Appellants did not argue on summary judgment that Bullcoming's rape was motivated by anything other than personal interest. *See L.B. v. United States*, No. 1:18-cv-00074-SPW-TJC (Docs. 24 & 41).

¶13 n.2 & ¶16 n.4 (citing *Maguire* as applying Montana law in accordance with the Restatements of Agency and its finding that "criminal act (rape) outside the scope" as a circumstance where the employer was not liable for malicious acts of an employee).

As the Court explained, "a tortious act occurred within the scope of employment if the act was either expressly or implicitly authorized by the employer or was incidental to an expressly authorized act." *Brendan*, ¶14. The question is "whether the employee was at least partially motivated to serve the employer's interest 'to some extent.'" *Id.*, at ¶18; Restatement (Second) of Agency § 235 cmt. a ("It is the state of the servant's mind which is material. Its external manifestations are important only as evidence."); Restatement (Third) of Agency § 7.07 cmt. b ("The employee's intention severs the basis for treating the employee's act as that of the employer in the employee's interactions with the third party.").

In the case of expressly or implicitly authorized conduct, "the finder of fact may infer that an employee performed [the conduct] in furtherance of the interest of the employer." *Brendan*, ¶15 (quoting Restatement (Second) of Agency § 235 cmt. a)). "Expressly authorized acts include, *inter alia*, acts the employer specifically directed or authorized the employee to perform," *id.*, while "[i]mplicitly authorized acts include acts reasonably necessary or customary under the circumstances to the performance of specifically authorized acts or functions and other acts 'of the same

general nature.'" *id.*, ¶15 (quoting Restatement (Second) of Agency § 229(1) cmt. a). Importantly, however, even if the employer authorized a particular result, an employee's actions in achieving that result may be "so outrageous or whimsical" to be beyond the scope of the employment. *Id.*, ¶15 (quoting Restatement (Second) of Agency § 229(1) cmt. b)).

Even actions beyond those expressly or implicitly authorized may nonetheless be within the scope of employment, but for those actions the bar is higher. Two conditions must be independently met: "[1] the act was incidental to the performance of an expressly or implicitly authorized act, and [2] at least partially motivated by the employee's intent or purpose to serve the employer's interest." *Brendan*, ¶16. *Kornec* describes the same two prongs as "whether the act complained of [1] arose out of and [2] was committed in prosecution of the task the servant was performing for his master." 120 Mont. at 9-10, 180 P.2d at 257. Thus, depending on the circumstances, an employer may be vicariously liable on a respondeat superior basis for negligent, willful, and malicious acts of employees committed within the scope of their employment, even if those actions themselves are unauthorized or prohibited. *Id.* But the employer is only liable where both conditions are met.

Thus, under the first prong, the action must be "subordinate to or pertinent to an act which the employee was to perform." *Brendan*, ¶16 (quoting Restatement (Second) of Agency § 229 cmt. b) (alterations omitted). For example, an assault to

obtain property the employee was tasked with retrieving may be considered within the scope of employment, but one "committed with such violence that it bears no relation to the simple aggression which was reasonably foreseeable" is no longer incidental to an authorized act and not within the scope of employment. *Id.* As the Restatement explains, it is not merely that actions like a serious crime are "unexpectable," but that they are "in nature different from what servants in a lawful occupation are expected to do," and the master is "not responsible for acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized act." Restatement (Second) of Agency § 231 cmt. a ("[B]ribery of employees of the competitor, or the circulation of malicious stories, might be found to be within the scope of employment, while the murder of the competitor, although actuated solely by zeal for the master, would not be.").

Separately, the second prong reaffirms the requirement that the employee's purpose in performing the action must be to serve the interests of the employer. An employee's actions incidental to an authorized act may be within the scope of employment even if motivated in part, or even predominantly, by personal motivation, so long as the employee "was motivated by any purpose or intent to serve the employer's interest to any appreciable extent." *Brendan*, ¶17 (internal quotation marks omitted). However, an action is outside the scope of employment if the employee was engaged in "an independent course of conduct not intended to

serve *any* purpose of the employer.'" *Id.* (quoting Restatement (Third) of Agency § 7.07 cmt. b) (alterations omitted). Where it "clearly appears" from the employee's actions that "the employee could not have been directly or indirectly" acting in furtherance of the employer's interest in any regard it is not in the scope of employment. *Id.* (quoting *Keller v. Safeway Stores*, 111 Mont. 28, 37, 108 P.2d 605, 611 (1940)). Importantly, unlike authorized actions, there is no presumptive inference that such actions are taken for the employer's benefit. *See id.*, ¶15.

This Court has repeatedly made clear that in performing this analysis the question turns on the purpose or intention of the employee in engaging in the actions. "The state of mind of the employee is determinative—the issue is whether the employee was at least partially motivated to serve the employer's interest to some extent." [4] *Brendan*, ¶18 (quotation marks omitted). The Court observed that this principle is in accord with the Restatements, quoting Restatement (Second) of Agency § 235 cmt. a, and Restatement (Third) of Agency § 7.07 cmt. b ("employee's intention severs the basis for treating" an "act as that of the employer"). *Brendan*,

[4] The dissent in *Brendan* also quotes *Roberts v. Pegasus Gold Corp.*, 273 Mont. 266, 270, 903 P.2d 782, 784 (1995), for the same proposition: "In the law of respondeat superior, the harmful force is always an act of the servant. The inquiry is whether the performance of that act was in furtherance of the master's business." *Brendan*, ¶35 (Baker, J., dissenting).

¶18. Whether or not the employer profited or benefitted from the act is not a part of the analysis. *Id.*

The *Brendan* Court traced this test back to *Kornec* and *Keller* in the 1940s, but it is important to note that the principle that scope of employment turns on the employee's purpose is consistent with an unbroken chain of Montana law dating back to the Court's earliest articulations of the test. *Ellinghouse v. Ajax Live Stock Co.*, 51 Mont 275, 152 P. 481, 485 (1915) ("A servant may abandon his master's employment for the time to accomplish some purpose of his own. If in accomplishing this purpose he does an injury to another, his master is not liable."); *accord Staff v. Mont. Petroleum Co.*, 88 Mont. 145, 291 P. 1042, 1045 (1930) (quoting *Ellinghouse* as the "well settled" Montana law). Other early articulations similarly stressed that the scope of employment was defined in terms of the employee's purpose. *Kirk v. Mont. Transfer Co.* 56 Mont. 292, 184 P. 987, 988 (1917) ("The tort of an agent is within the course of his employment where the agent, in performing it, is endeavoring to promote the principal's business."); *Hoffman v. Roehl*, 61 Mont. 290, 203 P. 349, 350 (1921) ("The employer or principal is liable for the negligent acts of his employee while acting as his representative, and *the purpose of the act* rather than its method of performance is the test of the scope of his employment." (emphasis added)); *Harrington v. H.D. Lee Mercantile Co.*, 97

Mont. 40, 33 P.2d 553, 559 (1934) (quoting *Hoffman* as the "general rule"); *Kornec*, 120 Mont. at 8, 180 P.2d at 256 (relying on *Harrington*).

The United States can find no case, and Appellants have cited none, where the Court has varied from the principle that to be acting within the scope of employment the employee must be motivated at least in part by the intent or purpose to serve the employer's interest. Nor is there anything in the cases discussing scope of employment under Montana law that a different test for "scope of employment" has been or would be applied based on the identity or business of the employer.

2. Under application of Montana law, there is no reasonable argument that Bullcoming acted within the scope of his employment when he sexually assaulted L.B. solely for his personal benefit.

As *Maguire* makes clear, applying these settled principles of Montana law to a sexual assault performed solely for the interests of the employee, is straightforward.

The critical finding in this case is that Bullcoming "raped L.B. solely for his own personal benefit." ER 45. Appellants have not argued otherwise, and the record permits no evidentiary basis upon which a rational factfinder could find that Bullcoming's sexual assault was motivated by anything but his own sexual gratification. *See Bowyer v. Loftus*, 2008 MT 332, ¶16, 346 Mont. 182, 194 P.3d 92 ("Summary judgment for the employer is proper if the employee's activity is not related to the employer's business.").

The undisputed facts make it clear that Bullcoming was not only deviating from the interests of the United States by committing a serious and unconscionable crime, he was also acting directly contrary to his law enforcement duties. He pursued his coercive sexual interests even after L.B. agreed that it would be appropriate for her to be taken in for her violation. SER 008. As stated by the magistrate, "[i]t cannot reasonably be argued that Bullcoming raped L.B. for the benefit of the BIA." ER 45.

There is no claim or evidence in the record that the United States expressly authorized Bullcoming to rape L.B. Nor can it be argued that raping L.B. was "reasonably necessary or customary under the circumstances to the performance of specifically authorized acts or functions and other actions of the same general nature."[5] *Brendan*, ¶15.

[5] As the magistrate correctly analyzed, an examination of the factors under Restatement (Second) of Agency § 229 demonstrate why Bullcoming's actions cannot be considered implicitly authorized:

> Rape is obviously not within the same general nature as the conduct BIA authorizes its agents to perform. The Court also cannot find rape to be similar or incidental to Bullcoming's authorized conduct. Law enforcement officers do not commonly rape civilians while performing their duties; the purpose of the act was not in furtherance of BIA's interests; there is no indication Bullcoming's previous relationship with BIA provided any notice that he may commit such an act; the act was outside of the enterprise of the BIA; there is no indication BIA had reason to expect the conduct from Bullcoming; there is nothing similar between Bullcoming's act to any act

Rape is not only radically contrary to any "specifically authorized acts or functions" of Bullcoming's duties, but he was expressly abnegating his law enforcement duties when refusing to enforce the law to pursue his sexual gratification.[6] *See* Restatement (Third) of Agency § 7.07 cmt. b ("An independent course of conduct represents *a departure from*, not an escalation of, conduct involved in performing assigned work or conduct that an employer permits or controls." (emphasis added)); *Brendan*, ¶ 42 (Baker, J., dissenting) (quoting the same). The actions here furthered not even a scintilla of the employer's interest and, in fact, accomplished the opposite. Not only was Bullcoming's conduct a crime, it served to reduce the public's trust in federal law enforcement.

Because Bullcoming's actions were not authorized, the only remaining question is whether the actions could be said to be "incidental to" Bullcoming's

---

> authorized by the BIA; the conduct was a gross deviation from that which was authorized; and the act was seriously criminal. ER 47.

[6] This is not changed by the fact that Bullcoming's coercive threat was premised on his authority to arrest. "The employee's intention [to further his own purposes] severs the basis for treating the employee's acts as that of the employer." Restatement (Third) of Agency § 7.07 cmt. b. Bullcoming's "departure from" his assigned work to *misuse* his arrest authority as a threat to achieve his own criminal sexual interests makes it "neither fair nor true-to-life to characterize [his] actions as that of a representative of the employer." *Id.*; *see also Sherman v. State Dep't of Pub. Safety*, 190 A.3d 148, 154-55 (Del. 2018) (explaining that the Restatement (Second) of Agency's motivation test focuses on the employee's specific tortious conduct (sexual assault) rather than the fact that it grew out of a valid arrest).

employment as a B.I.A. officer. Appellants cannot show that Bullcoming's actions were either (1) incidental to an authorized act or (2) at least partially motivated by the employee's intent or purpose to serve the employer's interest, and Appellants must show both.

With respect to the first prong, Bullcoming's actions are in direct opposition to, not in furtherance of, his assigned law enforcement duties. This is in distinct contrast with a situation such as one where an officer used excessive force in effectuating an arrest.[7] Such a situation is easily analogized to the circumstances in *Kornec*, where the employee's assault, although unauthorized, was in prosecution of duties related to a boundary dispute between the employer and a neighboring landowner, *Kornec*, 120 Mont. at 11, 180 P.2d at 257. By contrast, Bullcoming abandoned even the pretense of serving the employer's interest,

[7] Appellants' hyperbolic articulation of current law with respect to use of force is in error. It is certainly not the case that a law enforcement employer would not be liable for an officer's rape but would be liable for a subsequent murder. *See* Appellant's Br. at 21. The question would be the same in both cases: was the act "incidental to performance of an expressly or implicitly authorized act" and was it "at least partially motivated by the employee's intent or purpose to serve the employer's interest." *Brendan*, ¶16. While excessive use of force, even deadly force, could be incident to authorized actions of a law enforcement officer, a wrongful death, just like any intentional tort, would have to be shown to be motivated at least in part by an intent serve the employer. Thus, while an overzealous, even criminal, use of force in an arrest may be incidental to employment, an officer's contract killing or murder to cover up a sexual assault would not.

declining to arrest L.B. even when she was willing, and instead engaging in criminal sexual coercion. While *some* use of force is authorized and appropriate in the course of law-enforcement duties, nothing like rape is ever authorized. It is "in nature different from what servants in a lawful occupation are expected to do" and cannot be incidental to any authorized action. Restatement (Second) of Agency § 231 cmt. a.

Moreover, even if one could argue that Bullcoming's overall actions were somehow related to some authorized result, his means of accomplishing them by rape is "so outrageous" as to no longer be "incident to" the act. *See Brendan*, ¶15. A rape is not a simple assault, but one necessarily "committed with such violence that it bears no relation to the simple aggression which was foreseeable." *Id.* at ¶16 (quoting Restatement (Second) of Agency § 229 cmt. b); *see also* Restatement (Second) of Agency § 231 cmt. a (murder of a competitor beyond the scope of employment regardless of motivation).

The second prong is the one that courts applying Montana law have used to resolve similar cases. There simply is no credible argument under these circumstances that an employee's actions in committing rape for purely personal desires was motivated, even in part, by an interest to serve the master. Appellants have not attempted, at any stage of the litigation, to argue that Bullcoming was

motivated by anything other than his sexual desire or was attempting to further some interest of the United States by the sexual assault.

This Court came to a similarly straightforward conclusion in *Maguire*. An employee assaulted and raped a patient at a mental health facility, resulting in her pregnancy.[8] 254 Mont. at 180, 835 P.2d at 757. The patient was "autistic and severely retarded." *Id.* The employee had primary responsibility for caring for the patient and was authorized to bathe and undress the patient. *Id.* The Montana Supreme Court stated: "It is clear this rape was outside the scope of Lloyd Drummond's employment."[9] *Id.* at 758. The Court reasoned the sexual assault was solely for the employee's own benefit and not in furtherance of the employer's business. *Id.*

---

[8] Importantly, although the suit was against the state of Montana as employer, the Court applied general principles of respondeat superior liability as applied to private employers. *Maguire*, 254 Mont. at 182, 835 P.2d at 758; *see Brendan*, ¶13 n.2 (citing *Maguire* as applying Montana common law of respondeat superior). This is consistent with the Montana Tort Claims Act which holds the state liable where a private person would be liable. See §§ 2-9-101(1), -102, MCA; *Gudmundsen v. State ex rel. Mont. State Hosp. Warm Springs*, 2009 MT 56, ¶¶ 24-25, 349 Mont. 297, 203 P.3d 813 (explaining that, under the Montana Tort Claims Act, "where Montana law protects private citizens from liability, it also protects the State").

[9] The dissent in *Maguire* did not dispute that holding, instead arguing for liability under an exception for certain actions by employees outside the scope of employment. 254 Mont. at 192-93, 835 P.2d at 764 (Trieweler, J., dissenting) (quoting Restatement (Second) of Agency § 219).

Similarly, in *Smith v. Ripley*, 446 F. Supp. 3d 683 (D. Mont. 2020), the federal district court applying *Maguire*, concluded that a state Child Protection Specialist, who raped a woman while at her home to collect case-related paperwork was not acting within the course and scope of his employment. The court explained that the plaintiff "cannot and does not argue that her rape furthered the State's business or advanced its interests" and thus "the rape did not arise out of the prosecution of his task to collect paperwork from her." *Id.* at 688. The court correctly applied this Court's precedent by looking at the purpose of the employee's actions: "Because the deviation here—rape—was made for the purpose of doing something which had no connection with Ripley's job, the Court finds that Ripley acted outside the scope of employment." *Id.*

In short, to find liability here the Court would have to conclude that an employee is acting within the course and scope of employment even if his actions are expressly prohibited and motivated solely by personal motives. In other words, the Court must abandon over a hundred years of precedent determining scope of employment by examining the purpose of intention of the employee and create an entirely new theory of liability applying to private Montana employers, the boundaries of which the Court would need to create out of whole cloth.

B. Appellants' arguments for a law-enforcement exception to Montana's scope-of-employment law would not change the outcome in this case, and in any event misconstrue the law of Montana and other states.

Appellants do not argue that Officer Bullcoming was acting within the scope of his employment under long-established Montana law. Instead, appellants' principal argument is that this Court should create a special law-enforcement exception to the general rule that employees do not act within the scope of their employment when they commit a sexual assault. As explained above, however, that question would not change the outcome of this case. The United States Supreme Court has made clear that the FTCA "requires a court to look to the state-law liability of *private* entities, not to that of public entities." *United States v. Olson*, 546 U.S. at 46 (emphasis added).

In any event, appellants raise two primary arguments for why the Court should create a new theory of liability for (at least) employers of law enforcement officers who commit rape even where the actions are unauthorized and motivated by solely personal interests. The first is the claim that some states operate under a broader theory of scope of employment that would cover such conduct. The second is a claim that the court should extend scope of employment liability because other theories of liability that, they contend, reach other law enforcement employers, do not reach the United States. The problem with both arguments is

that, in addition to faulty premises, they would distort Montana law and run afoul of the limited waiver of sovereign immunity in the FTCA.

1. The caselaw Appellants rely on does not support abandoning Montana tort law principles in this case.

Appellants rely extensively on the California case of *Mary M. v. City of Los Angeles*, 814 P.2d 1341 (Cal. 1991). Appellants are correct that under California law, the fact that the employee is in law enforcement is a consideration in determining the scope of employment. Appellants use this as an argument for the claim that this Court should adopt a special theory of scope of employment for law enforcement employers.

As an initial matter it is important to recognize that *Mary M.* is an outlier in concluding that rape by a police officer may be considered within the scope of employment for purposes of respondeat superior liability. Since *Mary M.* was decided, courts interpreting the laws of at least twenty-seven states have held sexual assault by a law enforcement officer is not within the scope of employment. *See infra* Appendix 2.

Even California itself has rejected efforts to apply the principles of *Mary M.* beyond its original context. *See Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 12 Cal. 4th 291, 297 (1995) (sexual molestation of pregnant woman by ultrasound technician outside scope of employment); *Z.V. v. County of Riverside*, 238 Cal. App. 4th 889, 896-902 (2015) (collecting cases). California has recognized--in retrospect-

-that "[t]he decision in *Mary M.* created special rules, purportedly applicable only to on-duty police officers, for determining whether sexual misconduct falls within the scope of employment for purposes of respondeat superior." *Farmers Ins. Group v. County of Santa Clara*, 906 P.2d 440, 461 (Cal. 1995) (Lucas, C.J., concurring); *Z.V.*, 238 Cal. App. 4th at 896 ("While *Mary M.* survived calls to overturn it outright, we are unaware of any Supreme Court case that has ever applied it beyond the 'unique' . . . context of police officer abuse of power.").

While California is, of course, free to allow *Mary M.* to survive as a "special rule" in deviation of "the general rules governing the doctrine of respondeat superior," *Farmers*, 906 P.2d at 461 (Lucas, C.J., concurring), this case does not provide such an opportunity for this Court. As explained above, to the extent that *Mary M.* relies solely on "the unique authority vested in police officers," it is not relevant to the inquiry of whether the case falls into the United States' waiver of sovereign immunity under "principles of respondeat superior liability that apply to private entities."[10] *Xue Lu*, 621 F.3d at 947.[11]

---

[10] Similarly, liability for state government entities attaches under the Montana Tort Claims Act "only where a private person similarly would be liable." *Gudmundsen*, ¶24 (quoting *Drugge v. State*, 254 Mont. 292, 294-95, 837 P.2d 406, 406 (1992).

[11] Notably, although *Xue Lu* correctly looked to California law with respect to private entities, California courts have subsequently rejected *Xue Lu*'s conclusion that an employer could be liable sexual assault that was merely "incident to" the officer's work in evaluating candidates for asylum. *See Z.V.*, 238

It is also important to observe that *Mary M.* grows out of California law that is itself an outlier with respect to scope of employment law generally, applying a different theory than Montana, the Restatements, and most other states. *See Lisa M.*, 12 Cal. 4th at 297 (1995) ("It is clear . . . that California no longer follows the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer's interests." (distinguishing Restatement (Second) of Agency § 228(1)(c))). Even though *Mary M.* has subsequently become an deviation from generally applicable law in California, on its own terms the court purported to be applying California law that "applies to public and private employers alike." 814 P.2d at 1344.

Unlike Montana and other states which focus on the "state of mind of the employee," *Brendan*, ¶18, the test applied in *Mary M.* was whether an employee is acting outside the scope of employment "*in the context of the particular enterprise* an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business." *Mary M.*, 814 P.2d at 1347 (quoting *Perez v. Van Groningen & Sons, Inc.*, 41 Cal.

Cal. App. 4th at 896-902. As *Z.V.* put it, the *Xue Lu* decision "is not accurate either as a statement of California law or as an application of it." *Id.* at 578. Indeed, *Z.V.* went out of its way to point out that, in sexual abuse cases, all employees are part of some lawful process but abuse their power in that process, and that "this cannot be enough" to impose respondeat superior liability on an employer under California law.

3d 962, 968 (1986)) (emphasis added). Thus, Appellants ask the Court to abandon Montana's traditional test for scope of employment, adopt a new test rejected by the Restatements and most other states, and apply that test in a way from which even California has subsequently retreated.

Similarly, the other case primarily relied on by appellants, *Red Elk ex rel. Red Elk v. United States*, 62 F.3d 1102 (8th Cir. 1995), relied on a misapplication of the South Dakota law at issue. Subsequent cases have made clear that the caselaw on which *Red Elk*'s analysis relied was not addressing scope of employment liability at all, and South Dakota has subsequently clarified that employees must be acting in the interests of their employer to be within the scope of employment.

Red Elk relied on the articulation of South Dakota law from *Leafgreen v. American Family Mut. Ins. Co.*, 393 N.W.2d 275 (S.D. 1986), which adopted a test for scope of employment as extending "where a nexus sufficient to make the harm foreseeable exists between the agent's employment and the activity which actually caused the injury." *Id.* at 280-81; *see Red Elk*, 62 F.3d at 1105 (citing *Leafgreen* as "the leading South Dakota case"). *Leafgreen* further stated that "[u]nder general rules of agency law, a principal may be held liable for fraud and deceit committed by an agent within his apparent authority, even though the agent acts solely to benefit himself." 393 N.W.2d at 277. Applying this law, the Eighth Circuit in *Red Elk* concluded that even though "[t]he government argues in compelling logic that this

clearly was [the officer's] personal frolic," 62 F.3d at 1105, the actions were "not so startling or unfair as to permit the government in these circumstances to escape liability," *id.* at 1107.[12]

Both the South Dakota Supreme Court and the Eighth Circuit subsequently clarified the law at issue. An en banc panel of the Eighth Circuit explained that *Leafgreen* was not, in fact, a scope of employment case at all, but focused on the apparent authority doctrine, which is not a basis for liability under the FTCA. *Primeaux v. United States*, 181 F.3d 876, 880 (8th Cir. 1999); *id.* n.5 (explaining that "[t]he Restatement expressly lists the apparent authority provisions . . . as two of the situations 'in which a master may be liable for servants acting solely for their own purposes and hence not in the scope of employment.'" (citation omitted)). The court further explained that South Dakota has subsequently made clear that the two doctrines are intellectually distinct: South Dakota applied the apparent authority doctrine of *Leafgreen* in insurance fraud cases, but "traditional scope of employment analysis" in cases that turned on scope of employment. *Id.* at 880.

[12] *Red Elk* also addressed facts that are not present here. The officer that committed the assault was untrained, brought pornographic magazines to work and had previously made inappropriate sexual comments in his reports, a second officer failed to prevent the assault or arrest the officer committing the assault in his presence, and the officers did return her the victim to her home in enforcement of the curfew. *Id.* at 1104.

South Dakota has clarified that its scope of employment test is essentially the same as that articulated by this Court in *Brendan* and *Kornec*, requiring both (1) that the employee be motivated at least in part by the interests of the employer and (2) that the actions be foreseeable rather than unusual or startling:

> We apply a two-part test when analyzing vicarious liability claims. The fact finder must first determine whether the act was wholly motivated by the agent's personal interests or whether the act had a dual purpose, that is, to serve the master and to further personal interests. *When a servant acts with an intention to serve solely his own interests, this act is not within the scope of employment and his master may not be held liable for it*. If the act was for a dual purpose, the fact finder must then consider the case presented and the factors relevant to the act's foreseeability in order to determine whether a nexus of foreseeability existed between the agent's employment and the activity which caused the injury. If such a nexus exists, the fact finder must, finally, consider whether the conduct is so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business.

Hass v. Wentzlaff, 816 N.W.2d 96, 103 (S.D. 2012) (citations and quotation marks omitted and emphasis added).

Accordingly, whatever may remain of *Red Elk*, under South Dakota law as it stands, an officer's "personal frolic," 62 F.3d at 1105, would fail step one of the South Dakota test, and not be within the scope of employment without reaching the question of whether it was so "unusual or startling" to be unforeseeable.

The other cases cited by Appellants are no more compelling. The New Mexico District Court case, *Pena v. Greffet*, 110 F. Supp. 3d 1103 (D.N.M. 2015), is not a scope of employment case. *Pena* discusses an "aided-in-agency" theory of

liability, which, like the apparent authority cases discussed above, expressly address liability for the torts of servants "acting outside the scope of their employment." *Id.* at 117 (quoting Restatement (Second) of Agency § 219(2)); *id.* at 1122. The Louisiana case, *Applewhite v. City of Baton Rouge*, 380 So. 2d 119 (1979), does not articulate what test for liability was being applied and appears to rely on the "excellent analysis" of a district court case finding liability for an abuse of apparent authority, and thus finding the employer responsible for actions "somewhat removed from [officer's] usual duties." *Id.* at 122; *c.f. Powell v. City of Chicago*, 2021 Il. App (1st) 192145, ¶29 (Ill. App. 1st Dist. 2021) (finding *Appewhite* unpersuasive, with respect to Illinois law, because it lacked analysis that the assault was the kind of conduct the officer was employed to perform or whether the assault furthered the employer's business).

The cases cited by the Appellants address either jurisdictions that apply different tests of scope of employment or other doctrines of agency liability outside of the scope of employment. On the other hand, courts applying similar scope of employment tests like Montana have likewise found sexual assaults, including those of law enforcement officers, are not within the scope of employment. In *Martin v. Milwaukee County*, 904 F.3d 544, 555 (7th Cir. 2018), the court addressed whether a corrections officer's rape of a prisoner was within the scope of his employment. The court stated:

> . . . we hold no reasonable jury could find the sexual assaults were in the scope of his employment. No reasonable jury could conclude the sexual assaults were natural, connected, ordinary parts or incidents of contemplated services; were of the same or similar kind of conduct as that Thicklen was employed to perform; *or were actuated even to a slight degree by a purpose to serve the County*. No reasonable jury could conclude the sexual assaults were connected with the employment objectives (much less closely connected) or incidental to them in any way. . . .

Id. at 555 (emphasis added). The court further noted that rape is distinguishable from cases involving excessive force by police officers wherein the use of force shades into what is permissible for a police officer. *Id*. at 556 ("Inmate rape by a guard usually involves no gray areas.").

Since *Mary M.*, at least twenty-seven jurisdictions have reached the conclusion that sexual assault conducted by a law enforcement officer motivated solely by personal interests is not within the scope of employment. See Appendix 2. In *J.H. v. W. Valley City*, 840 P.2d 115, 118-19 (Utah 1992), for example, the city was not liable under *respondeat superior* for a police officer's sexual molestations because the officer "was obviously not hired to perform" sexual molestations.

Indeed, a police officer who elects to <u>not</u> enforce the law in exchange for sexual favors is not furthering his master's objectives but is, "if anything . . . at odds with the government." *See Anderson v. United States,* No. 8:12-3203-TMC-KDW, 2015 WL 9918406, at *22 (D.S.C. Oct. 9, 2015). In *Anderson*, the court held a U.S. Secret Service agent was not acting within the scope of his

employment when he promised to "compromise Plaintiff's prosecution in exchange for sexual favors." *Id*. Accordingly, the court summarily adjudicated plaintiff's FTCA claims in favor of the United States. *Id*.

2. Appellants' reliance on theories of liability outside the scope of employment do not assist this court's scope of employment analysis.

Appellants second argument for abandoning the motivation test for law enforcement employers comes from the claim that state law enforcement employers would be subject to liability for sexual assaults of officers under a theory of the employer's non-delegable duty.[13] This argument suffers from several flaws.

First, it's premise is flawed. Appellants' bare assertion that "[i]f 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," Appellant's Br. at 20, is without citation or analysis. There are no cases in Montana law in which the employer of a law enforcement officer has been held

[13] As Appellants concede, Appellants' Br. at 4, whether a private person in the government's position would be liable under some other theory of liability is not at issue in this case. The United States' waiver of sovereign immunity is limited to solely those action taken by employees within their scope of employment under state law. 28 U.S.C. § 1346(b)(1); *Primeaux*, 181 F.3d at 878 ("[E]ven if state law extends vicarious liability to employee conduct not within the scope of employment, the government's FTCA liability remains limited to employee conduct within the scope of employment, as defined by state law.").

liable for an officer's sexual assault, nor any case in which a court has found a non-delegable "special relationship" between a law enforcement employer and a member of the public.[14] Nor do Appellants explain what pre-existing special relationship the United States had with L.B. prior to her encounter with Bullcoming creating a duty to protect. *C.f. Smith*, 446 F. Supp. 3d at 689 (explaining that "under the nondelegable duty exception, an employer who *enters into certain relations with others* may become responsible for harm caused to them by conduct of its agents or servants *not* within the scope of employment" (first emphasis added)). Appellants, thus, ask this Court to overturn settled scope of employment doctrine based on an incomplete hypothetical from another area of law. The argument must be rejected on that ground alone.

The Court need not delve down any such rabbit hole, however, because nondelegable duty doctrine *is* another area of law, based on different principles and covering different conduct. Both Montana law and the Restatements make clear

[14] Appellants vastly overread *Paull v. Park County*, 2009 MT 321, 352 Mont. 465, 218 P.3d 1198, which addressed the long-distance transportation of prisoners, concluded that the state had a special relationship with prisoners pursuant to the Interstate Compact for Adult Offender Supervision and thus owed them a duty that was not delegable to a private contractor for the inherently dangerous activity of prisoner transport. *Paull*'s application of the non-delegable duty doctrine in the context of contractors engaged in inherently dangerous activities, exceptions recognized in *Maguire*, 835 P.2d at 759, did not purport to overturn *Maguire*.

the doctrines are distinct. *Smith*, as noted above, followed *Maguire* in concluding that rape conducted for the employee's own benefit was not within the scope of employment, then proceeded to discuss liability where "an employer may be held liable for its employee's tortious acts *outside* the scope of employment." 446 F. Supp. 3d at 688 (emphasis added). The court explained that the nondelegable duty doctrine involves separate analysis: "the inquiry focuses not on the scope or nature of the principal's relationship to its *agent*, but rather the relationship to *another* that the principal has a duty to protect." *Id.* at 689 (alterations omitted). As noted above with respect to the apparent authority and "aided-in-agency" doctrines, the Restatement (Second) of Agency § 219 expressly identifies nondelegable duty doctrine as distinct from scope of employment. This Court has recognized nondelegable duty doctrine and scope of employment as separate theories of liability dating all the way back to the 1903. *Taillon v. Mears*, 29 Mont. 161, 74 P. 421 (1903).

Finally, as the United States Supreme Court has made clear, the United States' waiver of sovereign immunity is based on different principles than state law liability for municipal and state entities. The FTCA's waiver of sovereign immunity limits the United States' liability to that of a private person within the scope of employment. *Primeaux*, 181 F.3d at 878.

3. Abandoning settled Montana law with respect to scope of employment in order to adopt different theories of liability for different employers is unwise, any extension of liability to address the policy concerns is better addressed legislatively.

Appellants' arguments are, in essence, that the Court should, on policy grounds, create a law redefining scope of employment for law enforcement employees that extends to all actions taken while on duty, even if prohibited, criminal, and motivated solely by personal interest. As explained above, the creation of a limited exception would not determine the issue in this case because the FTCA premises its waiver of sovereign immunity on private person liability, not uniquely governmental liability. Similarly, although it need not and should not reach the issue here, the Court is not free to create such an exception with respect to state law enforcement officers. Montana law defines "claims" under the Montana Tort Claims Act as occurring "under circumstances where the governmental entity, if a private person, would be liable to the claimant for the damages under the laws of the state." § 2-9-101(1); *see Gudmundsen*, ¶24 ("Under § 2–9–101(1), MCA, state liability attaches under the Tort Claims Act only where a private person similarly would be liable." (citation omitted)). As the Court has recognized, it is not free to change common law to conflict with a statute. *See, e.g.*, *Maryland Cas. Co. v. Asbestos Claim Ct.*, 2020 MT 70 ¶30 n.23, 399 Mont. 279, 460 P.3d 882 (citing § 1-1-108, MCA).

Even where it is free to act, however, this Court has rightly been reticent to make "drastic departures from existing state law" as a matter of judicial fiat, "because the Legislature is capable of making exceptions to general tort principles when public policy so counsels." *Folsom v. Mont. Pub. Emp.'s Assoc.*, 388 Mont. 307, 337, 400 P.3d 706, 728 (2017) (Sandefur, J., concurring) (quoting *Akins v. U.S.W., Local 187*, 148 N.M. 442 (2010)); *see also Maguire*, 254 Mont. at 185, 835 P.2d at 759 ("[A] major change to the respondeat superior doctrine is best left to the legislature.").

There are several reasons why deference to the legislative branch is particularly appropriate here.

First, with respect to the policy concerns articulated by Appellants and amici, the legislature has not been idle. As Appellants observe, the Montana legislature recently acted precisely in the area of sexual assault by law enforcement officers, electing to do so not by adjusting employer liability but by strengthening the criminal deterrent for such actions. Appellants' Br. at 9 (citing MCA § 45-5-501). There is no reason to believe that the legislature is incapable of acting in this area and it is the branch of government best positioned to balance the interests of the various stakeholders—which include state, local, and tribal governments, as well as taxpayers, in addition to the groups represented by the amici—and consider the various arguments about how best to deter the actual wrongdoers.

Second, Appellants are arguing for a complete departure from the basic premise of Montana law, the Restatements, and most states, that scope of employment is limited by the purpose of the employee's actions, but propose no rule for the Court to adopt that would guide when to apply these new principles and when to apply traditional Montana law. As noted above, the *Mary M.* decision provides no limiting principle because, on its own terms it was applying general California law, which has abandoned the motive-test entirely. It does not appear that even Appellants are arguing that the Court abandon a hundred years of precedent applying that principle generally.

While Appellants focus on the unique powers of law enforcement officers, they appear to acknowledge that this does not provide a limiting principle when they ask the Court to overrule *Maguire* based on the same reasoning. Moreover, as explained above, an exception based on the "unique authority vested in police officers" would not determine the issue under the FTCA, *Xue Lu*, 621 F.3d at 947, and thus would be nothing more than an advisory opinion. Again, what Appellants seek is really the legislative act of creating an exception to existing tort law, something properly left to the legislature to create appropriate boundaries.

Third, to the extent that the genesis of Appellants' concern is the result of the fact that the United States elected to limit the waiver of sovereign immunity in the FTCA to actions taken within the scope of employment rather than an actions

for which an employer might be liable under some other theory of liability, the proper forum to address those concerns is Congress. *See Proud v. United States*, 723 F.2d 705, 706 (9th Cir. 1984) ("[I]n enacting the FTCA, Congress—not the Hawaii legislature—determined the tort liability of the United States. . . . [T]he United States' liability under the FTCA is that of a private individual, regardless of what a state intends that liability to be.").

Fourth, and relatedly, it is not appropriate to distort Montana scope of employment law because there are other forms of liability that are better crafted to achieve the policy objectives of deterrence for actual wrongdoing. For one, there is the criminal law, which not only promotes deterrence through punishment, but provides, with respect to federal law, for restitution of victims under the Mandatory Victim Restitution Act.[15] There is also civil liability against the actual perpetrator, which in this case resulted in a judgment in excess of $1.5 million. Importantly, where employers are, in fact, negligent, either in hiring or supervision, there may be direct liability as identified in *Maguire*. 254 Mont. at 182-83, 835 P.2d at 758 ("A party . . . may be held directly liable on the theory of negligent hiring and/or supervision"). Appellants have made no such claims in this case, however, and the record does not support any such allegations. *See* ER 47

[15] L.B. did not seek restitution in this case.

("[T]here is no indication from Bullcoming's previous relationship with BIA provided any notice that he may commit such an act."). Other causes of action could also be appropriate based the actions of other employees who may have acquiesced to, failed to report, or covered up such actions. Again, there are no such claims in this case, where the wrongdoing was investigated and prosecuted.

CONCLUSION

The certified question should be answered in the negative. Montana law is clear that sexual assault motivated entirely by the employee's personal benefit is not within the scope of employment. There is no law enforcement exception to that rule, and the creation of one for state entities, even if it were not precluded by statute, would not determine the result under the FTCA.

DATED this 29th day of December, 2021.

Respectfully submitted,

Leif M. Johnson
United States Attorney

/s/ Victoria L. Francis
Victoria L. Francis
Assistant U.S. Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(e), I certify that the attached Answer Brief is proportionately spaced, has a Times New Roman typeface of 14 points, is double spaced, and the body of the argument contained at pages 1-39 does not exceed 10,000 words.

DATED: December 29, 2021

/s/ Victoria L. Francis
Victoria L. Francis
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I, Victoria Laeder Francis, hereby certify that I have served true and accurate copies of the foregoing Brief - Certified Question to the following on 12-29-2021:

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

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: ACLU of Montana Foundation, Inc., American Civil Liberties Union
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: Conventional

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: Conventional

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: Conventional

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

Stephen L. Pevar (Attorney)
765 Asylum Avenue
Hartford CT 06105
Representing: American Civil Liberties Union
Service Method: Conventional

Electronically Signed By: Victoria Laeder Francis
Dated: 12-29-2021