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PREVIEW; L.B. v. United States

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The Montana Supreme Court will hear oral argument in *L.B. v. United States*[1] on Friday, April 15, 2022, at 9:30 a.m. at the Dennison Theater in Missoula, Montana. Timothy M. Bechtold and John Heenan are expected to appear on behalf of Appellant L.B. Timothy A. Tatarka, Assistant U.S. Attorney, is expected to appear on behalf of Appellee the United States of America.

I. INTRODUCTION

The issue certified to the Montana Supreme Court by the United States Court of Appeals for the Ninth Circuit in *L.B. v. United States* is whether, under Montana law, a law enforcement officer acts within the course and scope of their employment when they use their authority as an on-duty police officer to sexually assault members of the public.

This certifying question provides the Court the opportunity to distinguish its opinion in *Maguire v. State*,[2] finding that a Montana Development Center employee's sexual assault of an intellectually disabled patient was outside the scope of his ordinary employment,[3] from a situation in which law enforcement officers use their power and authority to sexually assault citizens.[4]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

On October 30, 2015, L.B. and her mother left the boundaries of the Northern Cheyenne Reservation in Lame Deer, Montana, to get alcoholic beverages.[5] Northern Cheyenne Criminal Code prohibits Tribal members from possessing and consuming alcohol within the bounds of the

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[1] 8 F.4th 868, 869 (9th Cir. 2021), *certified question accepted sub nom.* 495 P.3d 424 (Mont. 2021).

[2] 835 P.2d 755, 757 (Mont. 1992).

[3] *Id.*

[4] Appellant's Reply Brief at 3, *L.B. v. United States*, No. 20-35514 (9th Cir. Dec. 4, 2020) (citing *Maguire*, 835 P.2d at 755).

[5] *L.B.*, 8 F.4th at 869.

Reservation.[6] Upon returning to the Reservation and under the influence of intoxicating beverages, L.B.'s mother decided to take the truck "for a drive."[7] L.B. reported her mother to the police, and on-duty, uniformed Bureau of Indian Affairs (BIA) Officer Dana Bullcoming responded to L.B.'s call.[8]

After locating L.B.'s mother, Bullcoming drove to L.B.'s residence.[9] L.B. asserts that Bullcoming broke into her home while she and her children slept.[10] The United States asserts that Bullcoming entered the home with L.B.'s permission.[11] L.B. volunteered to Bullcoming that she consumed "a couple drinks that evening, including a half of beer at her residence" and that "her children were asleep" after Bullcoming asked L.B. if she was alone at her residence.[12] Next, Bullcoming led L.B. to his patrol car to breathalyze her.[13] There, Bullcoming threatened L.B. that he could arrest her for child endangerment and take her children based on the results of her breathalyzer test.[14] In response to Bullcoming's threat, L.B. implored Bullcoming to show her mercy.[15] If L.B. was arrested she would lose her new job as a bus driver and her ability to support her children.[16] Bullcoming repeatedly told L.B. "something had to be done."[17] After several moments, it became clear to L.B. that Bullcoming wanted L.B. to sexually gratify him in exchange for not arresting her.[18] L.B. asked Bullcoming if "something had to be done" meant "sex."[19] Bullcoming affirmed L.B.'s suspicion.[20] Bullcoming impregnated L.B. through coercive, unprotected sex.[21] L.B. subsequently gave birth to D.B.

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[6] N. Cheyenne Crim. Code § 7-9-6(a), *available at* https://perma.cc/VZG2-2ZFB ("A person who is found under the influence of intoxicating liquor within the exterior boundaries of the Northern Cheyenne Reservation shall be charged with a violation of this section.").

[7] *L.B.*, 8 F.4th at 869.

[8] *Id.*

[9] *Id.*

[10] Appellant's Opening Brief at 1, *L.B. v. United States*, No. 20-35514 (9th Cir. Sept. 14, 2020).

[11] Answering Brief of the United States at 5, *L.B. v. United States*, No. 20-35514 (9th Cir. Nov. 13, 2020).

[12] *L.B.*, 8 F.4th at 869.

[13] *Id.* at 870.

[14] *Id.*; N. Cheyenne Crim. Code § 7-9-6.

[15] *L.B.*, 8 F.4th at 870.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

In 2017, Bullcoming was indicted for his sexual assault on L.B. in violation of 18 U.S.C. § 242 for depriving L.B. of her constitutional rights to bodily integrity while acting under color of law.[22] Bullcoming pleaded guilty to an offense he committed while on the United States' payroll and wearing his BIA-issued police uniform.[23]

B. Procedural Background

L.B. brought civil action pursuant to the Federal Torts Claims Act (FTCA) and 42 U.S.C. § 1983 in the Billings Division of the United States District Court for the District of Montana against the United States, BIA, and Bullcoming.[24] L.B. alleged numerous intentional torts and constitutional rights violations against Bullcoming and asserted that the United States was liable for Bullcoming's violations under the FTCA.[25]

In November of 2018, L.B. motioned the district court for partial summary judgment, arguing that the United States was "vicariously liable" for Bullcoming's actions under the FTCA and the doctrine of respondeat superior through Restatement (Second) of Agency § 214.[26] The United States cross-motioned for summary judgment, arguing that Bullcoming's sexual assault of L.B. fell outside the reach of the FTCA because Bullcoming did not act in the scope and course of his employment with the BIA.[27] United States Magistrate Judge Timothy Cavan ruled in favor of the United States, finding Bullcoming's "tortious conduct was not within the scope of his employment."[28]

L.B. appealed Magistrate Judge Cavan's decision; she argued the magistrate court misapplied law and, in the alternative, the court should certify the question to the Montana Supreme Court to determine the scope of employment.[29] United States District Court Judge Susan Watters adopted Judge Cavan's finding and recommendations in full and denied L.B.'s motion to certify the question to the Montana Supreme Court.[30] Judge Watters denied L.B.'s motion to certify for two reasons: (1) L.B. filed the motion for certification "after receiving an adverse

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[22] Answering Brief of the United States, *supra* note 11, at 7.

[23] *Id.*

[24] L.B. v. United States, No. CV 18-74-BLG-SPW-TJC, 2019 WL 5298725, at *2 (D. Mont. July 16, 2019).

[25] *Id.* at *1.

[26] *Id.* at *2.

[27] *Id.*

[28] *Id.* at *7.

[29] L.B. v. United States, No. CV-18-74-BLG-SPW, 2019 WL 4051946, at *1 (D. Mont. Aug. 28, 2019).

[30] *Id.*

recommendation," and parties "should be discouraged from seeking certification of an issue after a magistrate issues an adverse recommendation";[31] and (2) she found no question of state law unclear or unresolved as Montana "defines the scope of employment to mean 'in the furtherance of his employer's interest' or 'for the benefit of his master,'" and that "rape is outside the scope of employment under that test."[32]

L.B. appealed Judge Watters's decision to the Ninth Circuit and raised 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."[33] L.B. alternatively moved the court to certify the question to the Montana Supreme Court.[34] The Ninth Circuit determined that, because L.B.'s claim comes under the FTCA and state law applies, it was appropriate to certify the question regarding the scope of a law enforcement officer's employment to the Montana Supreme Court.[35] Montana law is applicable here as 28 U.S.C.A. § 1346(b)(1) provides that "any employee of the Government while acting within the scope of his office or employment . . . would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[36]

The Ninth Circuit certified this question because the Montana Supreme Court has not yet determined how the scope of a law enforcement officer's employment compares to other scopes of "ordinary employment," due to the greater authority law enforcement officers carry.[37] The Ninth Circuit also noted, as support for its decision to certify, that this case furnishes the Montana Supreme Court with the opportunity to provide equal legal remedy to Montana citizens who reside within Indian reservations and are policed by federal officers rather than state agents.[38] The Ninth Circuit stated its policy concerns for equal legal remedies for all Montanans as such:

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[31] *Id.* at *2.

[32] *Id.* (citing Maguire v. State, 835 P.2d 755, 765 (Mont. 1992)).

[33] L.B. v. United States, 8 F.4th 868, 870 (9th Cir. 2021), *certified question accepted sub nom.* 495 P.3d 424 (Mont. 2021).

[34] *Id.*

[35] *Id.* at 872.

[36] 28 U.S.C.A. § 1346(b)(1); *see also* Wilson v. Drake, 87 F.3d 1073, 1076 (9th Cir. 1996); Pelletier v. Federal Home Loan Bank, 968 F.2d 865, 876 (9th Cir. 1992) ("FTCA scope of employment determinations are made 'according to the principles of respondeat superior of the state in which the alleged tort occurred.'").

[37] *L.B.*, 8 F.4th at 870–71.

[38] *Id.* at 871–72.

> Victims of sexual assault by federal officers do not have the benefit of the non-delegable-duty doctrine. As a result, a Montana citizen who is a victim of sexual assault by a state, county, or municipal law-enforcement officer has a potential remedy in tort against the employer, while a Montana citizen who is a victim of rape by a BIA police officer does not, simply because the BIA officer is a federal employee.[39]

The Ninth Circuit found this policy issue especially persuasive in its decision to certify the question to the Montana Supreme Court because "[t]he Montana Supreme Court might not otherwise be presented with this dichotomy, as claims considering federal officers are typically tried in federal court."[40]

III. SUMMARY OF ARGUMENTS

L.B. alleged numerous intentional torts and violations of her constitutional rights in her original complaint. However, the only issue certified to the Montana Supreme Court is whether the United States is liable for Bullcoming's actions when he, an on-duty BIA officer, sexually assaulted L.B.

A. Appellant's Argument

L.B. argues that Bullcoming acted in the scope and course of his employment when he sexually assaulted her as an on-duty BIA police officer. L.B. argues that the holding in *Maguire* is narrow and does not provide a blanket rule that "sexual assault is always in every situation solely for the self-gratification of the rapist."[41] Alternatively, L.B. argues that the "role of sexual assault while policing" is a novel issue in Montana.

Next, L.B. points to *Keller v. Safeway Stores*[42] to further support the argument that Bullcoming acted within the scope and course of his employment when he sexually assaulted her.[43] The Court in *Keller* determined that a jury could find a grocery store manager acted in the scope of his employment in a slander case when he travelled to the plaintiff's house to demand that she "make good on a no good check" because he would be personally liable for the money if the plaintiff's check

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[39] *Id.* at 871.
[40] *Id.*
[41] Appellant's Reply Brief, *supra* note 4, at 3.
[42] 108 P.2d 605 (Mont. 1940).
[43] *Id.* at 611.

did not clear.[44] The Court stated, "But even if we assume that he was not the agent acting within the express scope of employment while attempting to collect the check, we still have a question for the jury whether the slander grew out of acts incidental to the employment."[45] Like the grocery store employee in *Keller*, L.B. argues that Bullcoming's "acts were in furtherance of or incidental to the employment for which the agent was expressly or impliedly engaged."[46] L.B. points to Bullcoming's status as an "on-duty police officer in full uniform acting in a law enforcement capacity" to illustrate that Bullcoming's actions were in the furtherance of and incidental to Bullcoming's employment as a BIA officer.[47]

Lastly, L.B. points to Montana Code Annotated § 2-9-305 to support her argument that the United States should be held liable for the actions of Bullcoming. L.B. asserts that the government is held liable for unlawful assaults by police officers against citizens and should be held equally accountable for sexually assaulting citizens. Montana Code Annotated § 2-9-305(6)(b) waives immunity for governmental employees whose conduct "constitutes a criminal offense."[48]

B. Appellee's Argument

The United States argues that Bullcoming did not act "in furtherance of his employer's interest" when he sexually assaulted L.B.[49] Although the United States agrees that the FTCA waives the government's sovereign immunity for torts committed by its employees within the scope and course of their employment, the United States contends that, under Montana's respondeat superior test, Bullcoming did not act within the scope of his employment when he sexually assaulted L.B.[50] The test for the scope of employment in Montana is defined in *Kornec v. Mike Horse Mining & Milling*.[51] There, the Court determined that to act within the scope of employment, the employee must be acting "in the course of his employment in the furtherance of his employers interest, or the for the benefit of his master."[52] The Court in *Kornec* clarified that a "servant who

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[44] *Id.* at 612.
[45] *Id.*
[46] Appellant's Reply Brief, *supra* note 4, at 4 (citing *Keller*, 108 P.2d at 611).
[47] *Id.*
[48] MONT. CODE ANN. § 2-9-305 (2021).
[49] Answering Brief of the United States, *supra* note 11, at 2.
[50] *Id.* at 1.
[51] 180 P.2d 252, 256 (Mont. 1947).
[52] *Id.*

acts entirely for his own benefit is generally held to be outside the scope of his employment and the master is relieved of liability."[53]

The United States next points to the Court's holding in *Maguire* to support its position. The United States argues that the Court correctly applied the *Kornec* "furtherance test" in *Maguire* when it declined to expand the exception of the non-delegable duty doctrine and determined a state hospital employee's sexual assault of a mentally disabled patient "was outside the scope" of his employment.[54] The United States admits that Bullcoming "engaged in 'abhorrent' sexual coercion entirely for his own criminal interests."[55] However, it argues that Bullcoming "was simply not acting within the course and scope of his duties under Montana law."[56]

The United States next asserts that L.B.'s argument under Restatement (Second) of Agency § 229 fails because sexual assault is not of the same general nature as that authorized by the BIA or incidental to the conduct authorized by the BIA.[57] The United States asserts that L.B. failed to show that Bullcoming's sexual assault of L.B. was either authorized or similar to conduct authorized by the BIA and points out that Bullcoming's sexual assault of L.B. was in stark contrast to the authorized duties of "enforcing the law."[58]

Lastly, the United States argues that certification to the Montana Supreme Court is improper as this is not a "close question." According to the United States, Montana law clearly resolves the issue because under established precedent of respondeat superior, Bullcoming did not act in the scope and course of his employment when he sexually assaulted L.B.[59] Moreover, the United States claims that L.B. improperly moved the district court for certification to the Montana Supreme Court after the federal magistrate issued "an adverse recommendation."[60]

IV. ANALYSIS

The culpability of the United States hinges on whether the Court determines Bullcoming acted within the scope of his employment when he sexually assaulted L.B. To determine if Bullcoming acted within the

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[53] *Id.* (citing Harrington v. H. D. Lee Mercantile Co., 33 P.2d 553, 558 (Mont. 1934)).

[54] Maguire v. State, 835 P.2d 755, 758 (Mont. 1992).

[55] Answering Brief of the United States, *supra* note 11, at 12.

[56] *Id.*

[57] *Id.* at 22.

[58] *Id.* at 23.

[59] *Id.* at 28.

[60] *Id.* at 27.

scope of his employment, the Court will likely consider: (A) the scope of employment test in *Keller*;[61] (B) the Court's findings in *Kornec* and *Brenden v. City of Billings*;[62] (C) the distinguishing facts of this case from *Maguire*; and (D) the unique policy considerations for Indian country in Montana.

A. The Keller *scope of employment test and the § 229(2) factors*

The Court will likely find, using the *Keller* scope of employment test, that Bullcoming acted within the scope of his employment because his sexual assault of L.B. was incidental to his authorized BIA duties.[63] For an employee's act to be incidental to their authorized duties, an act must be (1) "subordinate to or perinate to an act which the servant is authorized,"[64] (2) "within the ultimate objective of the principal,"[65] and (3) "an act which is not unlikely that such a servant might do."[66] The Court in *Keller* used four of the § 229(2) factors to determine if a grocery store employee's acts were incidental to his authorized duties as the store's manager:

> (a) whether or not the act is one commonly done by such servants; (b) the time, place, and purpose of the act; (f) whether or not the master has reason to expect that such an act will be done; and (i) the extent of departure from the normal method of accomplishing an authorized result.[67]

Here, the Court will likely use the same factors to determine if Bullcoming's acts were incidental to his authorized BIA duties.

The Court will likely find that sexually inappropriate acts are common among BIA officers despite the United States asserting that

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[61] Keller v. Safeway Stores, 108 P.2d 605, 610 (Mont. 1940); *see also* RESTATEMENT (SECOND) OF AGENCY § 229(2) (AM. L. INST., Westlaw Edge Mar. 2022).

[62] Kornec v. Mike Horse Mining & Milling, 180 P.2d 252, 256 (Mont. 1947); Brenden v. City of Billings, 470 P.3d 168, 174 (Mont. 2020).

[63] *Keller*, 108 P.2d at 610; RESTATEMENT (SECOND) OF AGENCY § 229(2).

[64] RESTATEMENT (SECOND) OF AGENCY § 229 cmt. b.

[65] *Id.*

[66] *Id.*

[67] *Keller*, 108 P.2d at 610.

police "who elect[ ] to *not* enforce the law in exchange for sexual favors" are uncommon.[68] The ACLU brief in support of L.B. provides:

> The BIA has one of the highest rates of sexual harassment among agencies within the U.S. Department of the Interior (DOI), and the DOI Office of the Inspector General . . . has faulted the BIA management for putting forth "little or no effort . . . to investigate the veracity of the allegation or determine the extent of the problem."[69]

The ACLU brief demonstrates that sexually inappropriate behavior is a pervasive issue within the agency.[70]

Next, the Court will likely find the § 229(2)(b) factor, "time, place, and purpose of the act,"[71] could lean in favor of either L.B. or the United States. Comment e to § 229(2)(b) provides: "The fact that the act is done at an unauthorized place or time or is actuated by a purpose not to serve the master indicates that the act is not within the scope of employment."[72] Additionally, comment e states that the Court should consider whether an act is "unauthorized in more than one aspect."[73] While the Court will likely find the time and place of the sexual assault to be authorized as the BIA is authorized to effectuate policing duties within the bounds of the Northern Cheyenne Reservation,[74] the Court will likely have more difficulty finding Bullcoming actuated the sexual assault with the purpose to serve the United States.[75]

The Court will likely find factor § 229(2)(f) leans in favor of L.B. if it considers the pervasive sexual harassment within the BIA.[76] The United States should expect a continuation of such behavior when it has failed to remedy the issue.[77]

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[68] Answering Brief of the United States, *supra* note 11, at 19.

[69] Brief of Amici Curiae American Civil Liberties Union and ACLU of Montana Foundation, Inc. at 8–9, *L.B. v. United States*, No. 20-35514 (9th Cir. Dec. 4, 2020), https://perma.cc/KVF5-QMTB [hereinafter ACLU Amici Curiae Brief].

[70] RESTATEMENT (SECOND) OF AGENCY § 229 cmt. b.

[71] *Id.* § 229(2)(b).

[72] *Id.* § 229 cmt. e.

[73] *Id.*

[74] L.B. v. United States, 8 F.4th 868, 869 (9th Cir. 2021), *certified question accepted sub nom*. 495 P.3d 424 (Mont. 2021); Appellant's Reply Brief, *supra* note 4, at 4.

[75] Answering Brief of the United States, *supra* note 11, at 23.

[76] ACLU Amici Curiae Brief, *supra* note 69, at 9.

[77] *Id.*

Lastly, § 229(2)(i) requires the Court to analyze "the extent of departure from the normal method of accomplishing an authorized result."[78] The Court will likely conclude this factor leans in favor of the United States as sexual assault greatly departed from Bullcoming's authorized police authority, such as writing L.B. a warning or citation for being intoxicated.[79]

B. The Court's findings in Kornec *and* Brenden

The Court will likely find Bullcoming to have acted within the scope of his employment due to its recent precedent in *Brenden*[80] and its previous findings in *Kornec*.[81]

The Court's findings in *Brenden* undermine the United States's interpretation that under *Kornec*, Bullcoming did not act in the scope of his employment when he sexually assaulted L.B. The United States interpreted *Kornec* as a bright-line rule: "If an employee acts from 'purely personal motives . . . in no way connected to the employer's interest'. . . then the master is not liable."[82] However, the Court in *Brenden* found that "self-interest does not preclude an act from the scope of employment if the employee was motivated by any purpose or intent to serve the employer's interest 'to any appreciable extent.'"[83] Further, the Court in *Kornec* determined that "when a servant carrying out his assigned duties makes an assault as result of a quarrel which arose as a consequence of his performance of the task imposed and at the time and place of performance of the duties he was employed to do, then the master is liable."[84] Bullcoming's motivation for engaging with L.B. was explicitly related to his job as a BIA officer because he responded to her 911 call and conducted several authorized police activities such as subjecting L.B. to the breathalyzer.[85] The Court in *Brenden* next moved to a discussion of Restatement (Second) § 230 comment c: "conduct is within the scope of employment even if it has no connection with the act which the employee is required to perform."[86] Bullcoming went to L.B.'s home as a BIA officer in response to her 911 call, connecting Bullcoming's sexual assault of L.B.

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[78] RESTATEMENT (SECOND) OF AGENCY § 229(2)(i).

[79] Answering Brief of the United States, *supra* note 11, at 22.

[80] Brenden v. City of Billings, 470 P.3d 168, 174 (Mont. 2020).

[81] Kornec v. Mike Horse Mining & Milling, 180 P.2d 252, 257 (Mont. 1947).

[82] Answering Brief of the United States, *supra* note 11, at 18–19.

[83] *Brenden*, 470 P.3d at 174.

[84] *Kornec*, 180 P.2d at 257.

[85] L.B. v. United States, 8 F.4th 868, 870 (9th Cir. 2021), *certified question accepted sub nom.* 495 P.3d 424 (Mont. 2021).

[86] *Brenden*, 470 P.3d at 174.

to his required BIA officer duties.[87] The Court in *Brenden* found that imposing vicarious liability on employers provides incentive to "reduce tortious conduct."[88]

C. Distinguishing L.B. *from* Maguire

Next, the Court will likely find the United States's interpretation of the Court's holding in *Maguire* to be improperly broad. The United States properly asserts that the Court in *Maguire* limited the non-delegable-duty-doctrine to "instances of safety where the subject matter is inherently dangerous"[89] and found sexual assault to be out of the scope of a state hospital employee's employment.[90] However, the United States improperly asserts *Maguire* created a bright-line rule, excluding all sexual assault from the scope of employment, and that the lower courts correctly denied certification to the Montana Supreme Court on the basis that L.B. did not present "a novel argument."[91] L.B effectively distinguishes her case from *Maguire* by asserting that *Maguire* "did not involve a law enforcement officer who leveraged his power to coerce a victim."[92] The United States "apportions" BIA officers with the responsibility of protecting and serving its citizens.[93] Bullcoming strategically calculated his coercion of L.B. by utilizing these apportioned authorized police powers to entrap L.B. in a horrific situation. For example, Bullcoming responded to L.B.'s 911 call, he administered a breathalyzer exam, and he threatened to arrest L.B. and to take her children away.[94] Bullcoming acted as a BIA agent during his entire interaction with L.B. The United States argues that "Bullcoming's policing suddenly stopped when he sexually assaulted L.B."[95] The *Maguire* decision does not discuss facts "resembling Bullcoming's leveraging his police power to rape L.B."[96] As such, the United States improperly construes the *Maguire* holding as creating an absolute bar to the United States being liable to victims of sexual assault in Montana.

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[87] *Id.*

[88] ACLU Amici Curiae Brief, *supra* note 69, at 12.

[89] Maguire v. State, 835 P.2d 755, 759 (Mont. 1992); *see also* RESTATEMENT (SECOND) OF AGENCY § 214 cmt. c ("Highly Dangerous Activities").

[90] *Maguire*, 835 P.2d at 759.

[91] Answering Brief of the United States, *supra* note 11, at 30–31.

[92] ACLU Amici Curiae Brief, *supra* note 69, at 17.

[93] RESTATEMENT (SECOND) OF AGENCY § 229(d).

[94] ACLU Amici Curiae Brief, *supra* note 69, at 17.

[95] Appellant's Reply Brief, *supra* note 4, at 4.

[96] ACLU Amici Curiae Brief, *supra* note 69, at 19.

D. Policy considerations for Indian country in Montana

Lastly, this case presents the Court a chance to elevate the protection of its vulnerable citizens in the aftermath of *Maguire*. In his dissent in *Maguire*, Justice Trieweiler categorized the majority's opinion as a "tragic and misguided decision which once again demonstrates that, given the choice, the majority would protect the State rather than its citizens."[97] Likewise, failing to hold the United States accountable for Bullcoming's actions conveys a "tragic and misguided" message to the Indigenous peoples of Montana that their lives are not worth protecting.[98] The ACLU succinctly illustrates the conundrum of unequal and inadequate legal protection for Montana's indigenous population residing within reservations: "[t]his dichotomy . . . has a disproportionate effect on Montana's Indigenous population, who are more likely to interact with federal, rather than state or local, law enforcement officers."[99] While the United States points to this Court's previous finding that an extension of Montana law absent "prior judicial decisions" should come from the legislature,[100] the Court has also stated it "has an obligation to act" when the "legislature has not acted to regulate the affairs of people."[101] One "tribal judge described the FBI's handling of sexual assault on Indian reservations as a 'black hole'" as "rape kits never come back."[102] Moreover, the United States Federal Prosecutor's office failed to prosecute 67% of sex crimes in Indian country but did not provide adequate information to tribes to engage in their own prosecution.[103] Montana's Indigenous population represents "6.7% of the population, but were the subjects of 26% of the state's missing persons reports between 2016-2018."[104] The United States has failed to regulate sex crimes in Indian country through the legislature; *L.B. v. United States* provides the Court

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[97] Maguire v. State, 835 P.2d 755, 764 (Mont. 1992) (Trieweiler, J., dissenting).

[98] ACLU Amici Curiae Brief, *supra* note 69, at 2.

[99] *Id.* at 3 (citing L.B. v. United States, 8 F.4th 868, 871 (9th Cir. 2021)).

[100] *Maguire*, 835 P.2d at 759.

[101] *Id.* at 766 (Trieweiler, J., dissenting) (citing Haker v. Southwestern Ry. Co., 578 P.2d 724, 727 (Mont. 1978).

[102] ACLU Amici Curiae Brief, *supra* note 69, at 4.

[103] *Id.* at 6.

[104] *Id.* at 5.

the opportunity to act in the face of legislative failure to protect Montana's Indigenous populations.

V. CONCLUSION

The Court will likely conclude Bullcoming acted in his official capacity as a BIA officer when he sexually assaulted L.B., thus finding the United States government liable to L.B. for damages. The Court's consideration of the established scope of employment test, the distinguishing factors from *Maguire*, the policy considerations for Indian country in Montana, and the Court's holding in *Brenden* will likely support this conclusion. With this conclusion, the Court will not only appropriately clarify its holding in *Maguire*, but also acknowledge the legislature's failure to adequately protect people residing within reservation boundaries.