No. 23-35538

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

L.B.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, CASE NO. 18-74-BLG-SPW-TJC

BRIEF OF *AMICI CURIAE* THE COALITION OF LARGE TRIBES AND THE NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the Coalition of Large Tribes is an intertribal Section 17 federal corporation (a manner in which tribes may organize themselves under the Indian Reorganization Act of 1934) and the National Indigenous Women's Resource Center is a nonprofit organization, both with no parent corporation and in which no person or entity owns stock.

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STATEMENT OF IDENTITY, INTERESTS AND AUTHORITY TO FILE OF *AMICI CURIAE*[1]

The Coalition of Large Tribes ("COLT") represents the interests of the more than 50 tribal nations whose land base each exceeds 100,000 acres, encompassing more than 95% of tribal lands and approximately half the Native American population in the country. Since its creation in 2011, COLT has provided a unified advocacy base for tribes that govern large land bases—roughly the size of states like Delaware and West Virginia—and provide full service in the governing of their members and reservations. COLT's member tribes are parties to numerous binding Treaties with the United States that promise peace, protection and public safety.

Indian country, and especially Native American women, experience a maze of injustice and the highest rates of violent and sexual crimes in the United States. Having a federal officer be the perpetrator of such crimes further harms tribal communities. Violence against women is a crisis on COLT member tribes' reservations; tribal law enforcement is chronically under-resourced; and the United States is grossly derelict in its fulfillment of its Treaty and Trust obligations to

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[1] All parties have consented to the filing of this brief. *Amici* file this brief in accordance with Federal Rule of Appellate Procedure 29(a)(2). No party's counsel authored this brief in whole or in part; no party's counsel contributed money to fund preparing or submitting this brief; and no person other than Amici contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(e).

provide for public safety and law enforcement on COLT member tribes' reservations.

COLT and its member tribes rely on and work closely with the National Indigenous Women's Resource Center ("NIWRC"), which is a Native-led nonprofit organization headquartered in Lame Deer, Montana dedicated to ending violence against Native women and children.[2] The NIWRC offers culturally-grounded resources to victims and families, provides technical assistance and training to governmental and organizational allies, and supports the development of policy that strengthens tribal sovereignty. Through this work, the NIWRC has developed expertise in issues regarding the intersection of tribal sovereignty and safety for Native women, including the Missing and Murdered Indigenous Women and Girls ("MMIWG") crisis. The NIWRC is focused on uplifting the collective voices of grassroots advocates, as reflected in the composition of its Board of Directors, which is comprised entirely of Native women.

The NIWRC has worked tirelessly to close jurisdictional loopholes that facilitate violence against Native women and children. For example, the NIWRC collaborated with tribal leaders, Native women survivors, and members of Congress

[2] Pursuant to FRAP Rule 29(a)(4)(E), COLT and NIWRC state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from COLT, NIWRC, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

to advocate for the passage of the Violence Against Women Reauthorization Act of 2022 ("VAWA"), which restored tribal jurisdiction over non-Indian perpetrators who sexually assault, traffic, or stalk Native women and children on tribal lands. The NIWRC has, by providing information resources and referrals, also helped individual victims and families, like L.B. and D.B., navigate jurisdictional loopholes and failures of law enforcement to investigate crimes against Native women and girls in Montana and across Indian country.

The NIWRC's headquarters are on the same Reservation and in the same community where L.B. was assaulted, providing the NIWRC a unique perspective on how the systemic failures of BIA law enforcement perpetuate the extreme cycle of violence against Native women in Montana. And unfortunately, Officer Bullcoming's rape of L.B. is not a unique occurrence. The NIWRC has experience, again by providing information resources and referrals, working with multiple Native women and children who have been sexually assaulted by BIA law enforcement in Montana in the last two decades. The NIWRC has an interest in ensuring that Native victims of sexual assault by BIA law enforcement in Montana are able to seek the same remedies available to non-Indian victims of sexual assault perpetrated by State or local officers. Indeed, such comity and accountability is the first step to healing for L.B., the Northern Cheyenne Tribe, other Montana Native nations, and other COLT member tribes.

SUMMARY OF ARGUMENT

Native women face the highest rates of violence of any group in the United States. This crisis has been recognized by the current and former Presidents of the United States,[3] both United States Senators from Montana,[4] current and former Montana Governors,[5] tribal leaders,[6] and organizations like *Amici* that work to restore safety for Native women to tribal communities. Native people in Montana experience particularly high rates of violence, and Montana tribes rely on the federal

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[3] *See A Proclamation on Missing and Murdered Indigenous Persons Awareness Day 2021*, The White House (May 4, 2021), https://perma.cc/B9F5-WDM6; Exec. Order 13898, 84 Fed. Reg. 231 (November 26, 2019); *President Signs 2013 VAWA – Empowering Tribes to Protect Native Women*, The White House (March 7, 2013), https://perma.cc/79BS-6HF9.

[4] *See* Press Release, U.S. Senator For Montana Jon Tester, *Tester Statement on Opening of Billings Missing and Murdered Indigenous Persons Cold Case Team Office* (Aug. 6, 2020), https://perma.cc/9A3K-4YQ2; Press Release, Steve Daines U.S. Senator for Montana, *We Must Shed Light on Missing and Murdered Indigenous Women Crisis* (April 4, 2019), https://perma.cc/2VVV-SQHU.

[5] *See* Bradley Warren, *Governor Gianforte Issues Proclamation for MMIW Awareness Day*, Montana Right Now.com (May 5, 2021), https://perma.cc/R8AK-PG2V; Governor Bullock's Office, *Governor Bullock, Montana American Indian Caucus sign legislative package to address Missing and Murdered Indigenous Women*, Char-Koosta News (May 30, 2019), https://perma.cc/R8BA-L8P2.

[6] *See* Tribune Staff, *Blackfeet and Fort Belknap Tribal Leaders Urge Lawmakers to Address Missing and Murdered Indigenous People*, GREAT FALLS TRIBUNE (October 2, 2021), https://perma.cc/4UFY-RCN6.

government to prosecute the vast majority of crimes against their citizens, on their lands.

The prospect that the federal government may be immunized from suit for the torts of Bureau of Indian Affairs ("BIA") law enforcement officers is incompatible with its responsibility to provide for public safety in Indian country. Acts of sexual violence like Officer Bullcoming's rape of L.B. undermine the ability of federal law enforcement to keep Native women safe. That such acts may occur without meaningful consequence deprives Native women of necessary assurances that the federal government will carefully hire and supervise BIA officers.

As Judge Collins' opinion dissenting from the Ninth Circuit's denial of rehearing en banc in *United States v. Cooley* reflected, "Considering all of these practical difficulties and issues raised by the panel's opinion here, I am reminded of Justice Scalia's remark: 'There are many questions here, and the answers to all of them are ridiculous.' *Grady v. Corbin*, 495 U.S. 508, 542 (1990) (Scalia, J., dissenting)."[7] Judge Collins' observations there apply with equal force here: "[The decision below] threatens to seriously undermine the ability of Indian tribes to ensure public safety for the hundreds of thousands of persons who live on reservations within the Ninth Circuit."[8]

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[7] 947 F.3d 1215, 1222 (2020), *rev'd*, 593 U.S. __ (2021).

[8] *Id*.

The Ninth Circuit includes over 75 percent of the nation's 574 federally-recognized Indian tribes and encompasses more than 71 million reservation acres, roughly 80 percent of the country's total reservation lands. More than a quarter of all matters referred to federal prosecutors in Indian country originate in the Ninth Circuit.[9] The ability of Indians living on reservations to hold law enforcement accountable to both ensure the safety of citizens and to not harm those they are charged to protect in such a significant area is *prima facie* an issue of national importance. Judge Collins' analysis of the practicalities was spot-on: "The concurrence may be right that the 'practical limitations' of the panel decision are 'limited' for those of us who do not live on Indian reservations, but for the hundreds of thousands who do, it makes a great deal of difference if tribal law enforcement lacks on-the-spot authority to detain and investigate non-Indians based on the reasonable suspicion standard."[10]

So too are the profound practical implications of Judge Watters' ruling below. If the District Court decision is left undisturbed, Native women will be strongly incentivized to *not* call the police when they have been victimized or witnessed a

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[9] U.S. Gen. Accounting Office, GAO-11-167R, *Declinations of Indian Country Matters* 7 (2010), https://www.gao.gov/assets/100/97229.pdf.

[10] 947 F.3d at 1222.

crime, exacerbating chronic underreporting of violent victimization on tribal lands. Creating a legal loophole in this context will only perpetuate a cycle of violence—on a very specific population—that is already an epidemic. The rates of violence on tribal lands, the trust relationship between the United States and Indian tribes, and the predominantly federal public safety regime in Indian country render access to federal law enforcement essential and require that acts of sexual violence by those in positions of authority are effectively prevented. Indeed, the Supreme Court has "explained that 'virtually all authority over Indian commerce and Indian tribes' lies with the Federal Government."[11] Without federal accountability for public safety in Indian country, there is no accountability.

Against this backdrop, the Montana Supreme Court was clear: "law-enforcement officers do not, as a matter of law, act outside the scope of their employment when they use their authority as on-duty officers to sexually assault a person they are investigating for a crime."[12] The Montana Supreme Court did not inject any subjective motivation or intent into this analysis, and yet the District Court

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[11] *Haaland v. Brackeen*, 599 U.S. __ (2023) (Slip Op. at 11 (quoting *Seminole Tribe of Florida* v. *Florida*, 517 U. S. 44, 62 (1996)).

[12] 515 P.3d 818, 828 (Mont. 2022) (Slip Op. at ¶ 26). Application of Montana law here should not be construed as agreement that state law is the appropriate "law of the place" for Federal Tort Claims Act ("FTCA") claims arising in Indian country. Indeed, *Amici* believe a substantial question exists as to whether Northern Cheyenne law should have been applied in this case.

concluded that Officer Bullcoming acted outside of the scope of his employment because, in deposition testimony where he impeached himself, he recently claimed that his motivation was not to benefit his employer. This conclusion defies the Montana Supreme Court's instruction that "in any case evaluating whether an act falls outside the scope of employment, the inquiry must be on the nature of the employment and how the employment relates to the context in which the commission of the wrongful act arose."[13] The nature of Officer Bullcoming's employment and the context in which the rape occurred is one where his subjective intent to benefit his employer is simply irrelevant. To conclude otherwise would violate the clear instructions from the Montana Supreme Court, and ultimately, would leave Native women in Montana all the more vulnerable to the harmful, tortious actions of federal agents that the FTCA should, if interpreted properly, circumscribe.

ARGUMENT

I. The Unique Factual and Legal Context Present on Tribal Lands Mandates Holding the United States Responsible for the Torts of Its Employees.

Imposing liability on an employer for a law enforcement officer's on-duty sexual assault is designed to "improve hiring and supervision, and produce a police

[13] *Id.*

force fully worthy of the public trust."[14] Maintaining the public trust is essential to "the relationship between the community and its sworn protectors," and a violation may "erod[e] the community's confidence in the integrity of its police force."[15] These concerns sound with particular force in this context, where the federal government has assumed responsibility for the safety of Native women who continue to suffer violent victimization at alarmingly high and disproportionate rates, and federal law enforcement officers are the primary guarantor of public safety on tribal lands.

A. Native Women Face an Epidemic of Violence in the United States.

Despite the federal obligation to provide for public safety on tribal lands, federal reports have for more than two decades concluded that Native women suffer the highest rates of violence in the United States.[16] The United States Supreme Court has acknowledged this trend, observing in 2016 that:

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[14] *Red Elk on Behalf of Red Elk v. United States*, 62 F.3d 1102, 1108 (8th Cir. 1995).

[15] *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1342 (Cal. 1991).

[16] The earliest report of this nature is Lawrence A. Greenfeld & Steven K. Smith, *American Indians and Crime*, Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice (1999), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=387. This report was updated in 2004. *See* Steven W. Perry, *American Indians and Crime: A BJS Statistical Profile, 1992–2002*, U.S. Dep't of Justice, Bureau of Justice Statistics, V (Dec. 2004), https://www.bjs.gov/content/pub/pdf/aic02.pdf.

> Compared to all other groups in the United States, Native American women experience the highest rates of domestic violence. . . . According to the Centers for Disease Control and Prevention, as many as 46% of American Indian and Alaska Native women have been victims of physical violence by an intimate partner. . . . American Indian and Alaska Native women are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general.[17]

That same year, a report from the National Institute of Justice determined that more than four in five Native people report having been victims of violence, and 56.1 percent of Native women report being victims of sexual violence.[18]

Rates of violence against Native women have consistently outpaced rates of violence against other groups. As to rape specifically, a 2003 survey illustrated the acute severity of the crisis, finding that:

> 34.1 percent of respondents who identified as American Indian/Alaska Native women reported being raped, compared to 17.7 percent of respondents who identified as

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[17] *United States v. Bryant*, 136 S. Ct. 1954, 1959, *as revised* (July 7, 2016) (internal quotation marks and citations omitted); *see also Brown v. Polk County, Wisconsin*, 141 S. Ct. 1304, 1307 n. 3 (2021) ("Native American women, meanwhile, experience sexual violence at higher rates than any other population in the United States") (internal quotation marks omitted); *accord United States v. Lamott*, 831 F.3d 1153, 1154 (9th Cir. 2016) ("Recent studies suggest that Native American women experience certain violent crimes at two and a half times the national average"). *See also* André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey*, Nat'l Inst. of Justice, Office of Justice Programs, U.S. Dep't of Justice 44 (May 2016), https://www.ncjrs.gov/pdffiles1/nij/249736.pdf.

[18] *Id.* at 43-44.

> white, 18.8 percent who identified as black, and 6.8 percent who identified as Asian/Pacific Islander.[19]

Thirteen years later, the *Bryant* Court observed similarly disparate rates of battery and sexual assault:

> American Indian women experience battery 'at a rate of 23.2 per 1,000, compared with 8 per 1,000 among Caucasian women,' and they 'experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women.'[20]

Further, at the time of the Violence Against Women Act's 2013 reauthorization, the majority report for the Senate Committee on the Judiciary acknowledged the crisis, stating that:

> A[] significant focus of this reauthorization of VAWA is the crisis of violence against women in tribal communities. These women face rates of domestic violence and sexual assault far higher than the national average. A regional survey conducted by University of Oklahoma researchers showed that nearly three out of five Native American women had been assaulted by their spouses or intimate partners, and a nationwide survey found that one third of all American Indian women will be raped during their lifetimes. A study funded by the National Institute of Justice found that, on some reservations, Native American

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[19] Maura Douglas, *Sufficiently Criminal Ties: Expanding VAWA Criminal Jurisdiction for Indian Tribes*, 166 U. Pa. L. Rev. 745, 764 (2018) (citing 2003 National Violence Against Women Survey Data).

[20] 136 S. Ct. at 1959 (quoting VAWA Reauthorization Act, § 901, 119 Stat. 3077).

> women are murdered at a rate more than ten times the national average.[21]

Senator Udall explained the urgency of the crisis as follows:

> Native American Women are 2 1⁄2 times more likely than other U.S. women to be victims of rape. One in three will be sexually assaulted in their lifetimes. And it is estimated that three out of every five Native women will experience domestic violence.[22]

Native women also experience an elevated risk of stalking, a crime often associated with domestic violence. A 2022 report from the Centers for Disease Control and Prevention ("CDC"), concluded that 42% of Native women have been victims of stalking at some point in their lives.[23]

The high rates of sexual assault and violence committed against Native women are inextricably linked to the crisis of Murdered and Missing Indigenous Women and Girls ("MMIWG"). On some reservations, Native women experience

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[21] S. Rep. No. 112-153, at 7-8 (2012); *see also* 159 Cong. Rec. S487 (daily ed. Feb. 7, 2013) (statement of Sen. Begich). The restoration of tribal criminal jurisdiction in VAWA 2013 was truly a bi-partisan effort. *See Violence Against Women Act Anniversary*, 160 Cong. Rec. S1374 (daily ed. Mar. 10, 2014) (statement of Sen. Patrick Leahy acknowledging his bipartisan collaboration with Senators Crapo and Murkowski, as well as Congressman Cole, to restore tribal jurisdiction over non-Indians who commit acts of domestic or dating violence).

[22] 159 Cong. Rec. S488 (daily ed. Feb. 7, 2013).

[23] Sharon Smith, et al., Nat'l Ctr. for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Stalking – Updated Release* 4 (2022), https://stacks.cdc.gov/view/cdc/124645.

homicide at a rate 10 times the national average.[24] According to the CDC, nationally, Native women are murdered at a rate of 4.3 per 100,000, while their white counterparts experience homicide at a rate of 1.5 per 100,000.[25] The crisis has garnered the attention of both Congress and the Executive Branch, including President Trump's creation in 2019 of a task force to address the crisis of Missing and Murdered Indigenous Women ("MMIW").[26]

A 2016 report based on data from the Indian Health Service showed that rates of homicide (per 100,000) were four times higher among American Indian and Alaska Natives (12.1) than white people (2.8).[27] The National Vital Statistics Report

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[24] Office on Violence Against Women, U.S. Dep't of Just., *Native women experience homicide at a rate 10 times the national average* (Nov. 29, 2019), https://www.justice.gov/archives/ovw/blog/protecting-native-american-and-alaska-native-women-violence-november-native-american.

[25] Emiko Petrosky et al., Ctrs. for Disease Control and Prevention, *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014*, 66 MMWR Morbidity and Mortality Wkly. Rep. 741, 742 (2017), https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm.

[26] *See* Exec. Order No. 13,898, 84 Fed. Reg. 66059 (Dec. 2, 2019). President Biden has taken similar action to address the crisis of MMIWG and Missing and Murdered Indigenous Persons ("MMIP"). *See* Exec. Order No. 14053, 86 Fed. Reg. 64337 (Nov. 18, 2021), *also available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/11/15/executive-order-on-improving-public-safety-and-criminal-justice-for-native-americans-and-addressing-the-crisis-of-missing-or-murdered-indigenous-people/.

[27] Moses Herne et al., *Homicide Among American Indians/Alaska Natives, 1999-2009: Implications for Public Health Interventions*, 131 Pub. Health Reps. 597, 597

for 2021 lists homicide as the third leading cause of death for Native females between ages 15-24 and the fourth leading cause of death for Native females between 25-34 years.[28]

Officer Bullcoming's on-duty rape of L.B. did not take place in a vacuum. Instead, his rape of a Native woman is linked to a larger crisis that has left Native women the most vulnerable population in the United States.

B. Rates of Violence Against Native Women in Montana are Extremely High.

While rates of violence against Native women are high across the United States, they are exceedingly high in Montana. In 2019, sexual assaults against women in Montana made up approximately 25% of all violent victimizations recorded by Montana law enforcement.[29] American Indians and Alaska Natives in Montana experience sexual assault victimization at a rate almost two times higher than their white counterparts.[30]

(2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4937122/pdf/phr131000597.pdf.

[28] Melonie Heron, Nat'l Ctr. for Health Stats., 70 Nat'l Vital Stats. Repts. 57 (2021), https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-09-508.pdf.

[29] Kimberly Martin, *Sexual Assaults Recorded by Law Enforcement, 2019*, Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice (July 29, 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/sarble/sarble19/data/pdfs/sarble19_MT.pdf.

[30] *Id.* at 12.

Included in Montana's high rates of violence are dozens of cases of Missing and Murdered Indigenous Women and Girls. The State of Montana has the fifth highest rate of MMIWG in the country.[31] United States Senator Jon Tester has acknowledged the high rates of violence against Native women, stating: "Indigenous peoples—particularly women—are far more likely to experience violence, and human trafficking rates in Indian country are exponentially higher than other parts of the United States."[32]

Native Montanans make up only 6.7 percent of the State's population, yet they are four times more likely to go missing than non- Native Montanans.[33] At the end of 2019, there were 110 active missing persons cases in Montana.[34] Thirty-three percent of those actively missing were Native American, demonstrating that "Native Americans were disproportionately represented" over a three-year period.[35] Sixty

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[31] Annita Lucchesi & Abigail Echo-Hawk, *Missing and Murdered Indigenous Women & Girls: A Snapshot of Data from 71 Urban Cities in the United States*, Urban Indian Health Institute (2018), https://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf.

[32] Press Release, U.S. Senator For Montana Jon Tester, *supra* note 4.

[33] Montana Dep't of Justice, *The Landscape in Montana: Missing Indigenous Persons* 3 (2020), https://dojmt.gov/wp-content/uploads/Missing-Indigenous-Persons-Data-Presentation.pdf.

[34] *Id.* at 9.

[35] *Id.*

percent of all missing Indigenous persons in Montana over the same period were female.[36]

MMIWG are especially prevalent in Montana's reservation counties.[37] Rosebud County (Northern Cheyenne Indian Reservation) has the second highest per-capita rate of missing persons in the State of Montana.[38] This rate is nearly 1.5 times higher than its northern neighbor, Yellowstone County, the non-reservation county with the most missing persons.[39] Rosebud County's southern neighbor, Big Horn County (Crow Indian Reservation) has the highest rate of missing Indigenous persons in the state—nearly three times higher than Yellowstone County.[40] The Montana Attorney General's office has concluded that the rates of missing person reports in Rosebud, Big Horn, and other reservation counties "stand out as concerning" and merit "additional analysis."[41]

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[36] *Id*. at 5.

[37] *Id.* at 11.

[38] *Id.* at 13.

[39] *Id.*

[40] *Id.*

[41] *Id.*

To be sure, while the known rates of violence against Native women and cases of MMIWG in Montana are exceptionally high, it remains likely the rates are even more devastating than the numbers reveal. The 2019 National Crime Victimization Survey found that less than half (41%) of violent victimizations were reported to police.[42] In 2016, there were 5,712 reports of missing American Indian and Alaska Native women and girls, though only 116 cases were logged into the US Department of Justice's federal missing persons database.[43] The exceedingly high rates of violence against Native women like L.B. and cases of MMIWG in Montana leave Native women in Montana incredibly vulnerable.

Of course, law enforcement cannot address these incredibly high rates of violence against Native victims if victims do not report them. And Native victims are far less likely to report a crime if calling federal law enforcement results in a sexual assault for which there will be little to no consequence. In this case, the District Court's disregard for the correct standard under Montana law comes with a high price, especially in Montana—where Native women are exceptionally vulnerable.

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[42] Rachel E. Morgan & Jennifer L. Truman, *Criminal Victimization, 2019*, Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice (September 2020), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/sarble/sarble19/data/cv19.pdf.

[43] Lucchesi, Echo-Hawk, *supra* note 31, at 2.

C. Tribes and Individual Indians Must Rely on Federal Law Enforcement.

The ability of tribal governments to combat this crisis is limited because they lack the requisite authority to police and prosecute most of the crimes committed against their citizens due to the peculiarities of federal law. Indeed, the Department of Justice identifies the Federal Bureau of Investigation and/or the Bureau of Indian Affairs as the "lead investigating agency" for six of seven of the reservations located in Montana.[44] As a result, Native women and Montana tribal nations largely have no choice but to rely on federal law enforcement.

In 1978, the United States Supreme Court determined that tribal nations could no longer prosecute crimes committed by non-Indians because that was "inconsistent" with tribes' status as dependent nations unless Congress acted to restore such jurisdiction.[45] In so holding, *Oliphant* stripped tribal nations of the authority to prosecute the majority of violent crimes committed against Native women and children.

Data collected by the National Institute of Justice demonstrates that the majority of violent crimes committed against Native people are committed by non-

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[44] Department of Justice, District of Montana 2020 Indian Country Law Enforcement Initiative Operational Plan 11-12, https://www.justice.gov/file/1310386/download (last visited Nov. 16, 2023).

[45] *See Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 196, 212 (1978).

Indians.[46] Ninety-six percent of American Indian and Alaska Native victims of sexual violence have experienced violence by a non-Indian perpetrator, while only 21 percent have experienced violence committed by a Native partner.[47] Native women are three times more likely to experience sexual violence by an interracial partner than non-Indian women.[48] The prevalence of interracial sexual violence is made all the more likely because "well over 50 percent of all Native American women are married to non-Indian men, and thousands of others are in intimate relationships with non-Indians."[49] And in Montana, the non-Indian population on many reservations is quite high. In Rosebud County, non-Indians make up approximately sixty percent of the population.[50]

Congress has attempted to address this crisis by restoring tribal criminal jurisdiction over non-Indians who use domestic violence against their Indian

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[46] Rosay, *supra* note 17, at 46.

[47] *Research Policy Update: Violence Against American Indian and Alaska Native Women*, NCAI Policy Research Center, National Congress of American Indians 2 (Feb. 2018), https://www.ncai.org/policy-research-center/research-data/prc publications/VAWA_Data_Brief__FINAL_2_1_2018.pdf.

[48] Rosay, *supra* note 17, at 18.

[49] S. Rep. No. 112-153, at 9 (2012).

[50] *Quick Facts: Rosebud County, Montana*, United States Census Bureau (2019), https://www.census.gov/quickfacts/rosebudcountymontana.

partners, special domestic violence criminal jurisdiction ("SDVCJ"), with the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904(a)(3), 127 Stat. 54, 121 (codified at 25 U.S.C. § 1304(a)(3)), and more recently, restored tribal criminal jurisdiction over non-Indians who commit trafficking, sexual assault, child abuse, obstruction of justice, stalking, and assault on tribal law enforcement, special tribal criminal jurisdiction ("STCJ"), with the Violence Against Women Act Reauthorization Act of 2022 ("VAWA 2022").[51] However, implementation of SDVCJ and STCJ comes with additional requirements that few tribal nations have the resources or capacity to address.[52] As of May 2022, SDVJC had been implemented on only one of the seven reservations in Montana.[53]

Nor does the United States Supreme Court's *Castro-Huerta* decision, granting states concurrent jurisdiction over crimes committed by non-Indians against Indians, decrease this danger.[54] In Montana, federal law enforcement continues to exercise

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[51] Pub. L. No. 117-103, 136 Stat. 49 (2022).

[52] Nat'l Congress of American Indians, VAWA 2013's Special Domestic Violence Criminal Jurisdiction (SDVCJ) Five-Year Report (2018), https://archive.ncai.org/attachments/PolicyPaper_KqnfveNPuemtKOGfGzQxnwJSNVlYXuLzFhsrhXIGxSSeJSRPXMr_SDVCJ%205%20Year%20Report_Final.pdf (last visited Nov. 16, 2023) (hereinafter, "NCAI Report").

[53] Currently Implementing Tribes, National Congress of American Indians, https://archive.ncai.org/tribal-vawa/get-started/currently-implementing-tribes (last visited Nov. 16, 2023).

[54] *Oklahoma v. Castro-Huerta*, 597 U.S. __ (2022).

its traditional criminal jurisdiction on all reservations,[55] except the Flathead Reservation. As a result, despite *Castro-Huerta*, almost every time a Native woman or child is the victim of violence in Montana, a federal law enforcement officer will be involved in the case, whether as a first responder or investigator.

In sum, although Congress has continuously expressed a commitment to restoring tribal jurisdiction over violent crimes committed by non-Indians on tribal lands, unless and until Congress passes a full *Oliphant* fix, the safety of Native women and children remains in the hands of the federal government. In contrast to non-Native women who are able to seek the protection of the local government closest to their homes, Native women like L.B. are left to rely on the protections offered by federal law enforcement, often through BIA law enforcement stationed on their tribe's reservation. For Native women, the ability to trust that BIA law officers will protect—and not harass, threaten, or rape them—is paramount.

II. BIA Officer Sexual Assaults of Native Women Occur on Many Large Land Base Reservations.

This crisis of violence against Native women is further compounded by the fact that the agency imbued with the duty and authority to protect Native women,

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[55] Greg Gianforte, Letter re Veto of HB 479 at 1 (May 17, 2023) https://montanafreepress.org/wp-content/uploads/2023/05/Gianforte-2023-HB-479-Veto-Letter.pdf (last visited Nov. 17, 2023).

disappointingly often, is the one to hurt them. BIA officer-perpetrated violence against Native women is far too common, a reality that directly perpetuates the cycle of violence against Native women. The District Court's conclusion that the BIA cannot be held accountable for Officer Bullcoming's rape of L.B. is based, in part, on the incorrect conclusion that Officer Bullcoming's tortious conduct is "not an act commonly done by BIA officers."[56] That is, in addition to injecting a requirement into its analysis that does not exist under Montana law—specifically, that the offending officer subjectively believe his act of rape will further his employer's interests—the District Court also erroneously based its summary judgment decision on the conclusion that "[s]exual assault is not an act commonly done by BIA officers."[57]

As an initial matter, the District Court's decision ignores the Montana Supreme Court's holdings that (1) Officer Bullcoming's wrongful act was willfully depriving L.B. of her rights under the color of law, and (2) employment as law enforcement "contemplates physical contact, whether wrongfully or appropriately exercised" and comes with "an inherent risk of abuse."[58] This resulted in the District

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[56] ER-15.

[57] *Id*.

[58] *L.B. v. United States*, 515 P.3d at 823-26 (¶¶ 15-17).

Court failing to correctly apply the factors of the Restatement (Second) of Agency § 229, factors the Montana Supreme Court has previously used to determine the scope of employment.[59]

One of the District Court's more egregious errors is conflating two factors—(1) "whether or not the act is one commonly done by such servants," and (2) "whether or not the master has reason to expect that such an act will be done," Restatement (Second) of Agency § 229(a)(f)—to reach the conclusion that because sexual assault is "a large departure from the normal course of investigating a DUI," the BIA has no reason to foresee that its officers could commit sexual assault against Native women.[60] It is difficult to imagine a conclusion more out of sync with the law.

In this case, Officer Bullcoming used the threat of arrest to coerce L.B. to have sex with him.[61] This is a power that ordinary citizens do not have, s*ee St. John v. United States*, 240 F.3d 671, 678 (8th Cir. 2001) ("No ordinary citizen possesses the ability to carry out a threat to arrest"), and it is entirely foreseeable that law

[59] *L.B. v. United States*, 515 P.3d at 823-24 (¶ 15).

[60] ER-15.

[61] ER-233. Worryingly, Officer Bullcoming testified to having sex with "a dozen or so" women while he was on duty, although he posited that those interactions were not "law enforcement related." ER-71 at 43:3-6, 16-22.

enforcement officers will abuse this power.[62] "For sexual misconduct on occasion by some officers not to be sufficiently foreseeable to impose vicarious liability would suggest that those in charge are blind to modern reality."[63] Indeed, "[i]t is neither so startling nor so unfair as to permit the government in these circumstances to escape liability."[64]

And it cannot be startling when it happens so frequently: *see, e.g., Red Elk*, 62 F.3d 1102 (concluding BIA is liable under FTCA for officer's rape of a minor child on the Pine Ridge Indian Reservation); *Primeaux v. United States*, 181 F.3d 876, 877 (8th Cir. 1999) (considering case where BIA officer raped a Native woman on the Rosebud Reservation); *St. John v. United States*, 240 F.3d 671, 678 (8th Cir. 2001) (considering case where BIA officer raped Native woman on the Crow Creek Reservation).[65] Most recently, in *Bird-Chase v. United States*, BIA officers sexually

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[62] *See id.* at 677 ("[S]exual misconduct by police officers is a known risk of law enforcement."); *L.B.*, 515 P.3d at 518 (¶ 17) ("With these considerable and intimidating powers comes an inherent risk of abuse . . . .").

[63] *Red Elk*, 62 F.3d at 1108.

[64] *Id.*

[65] *See also*, Department of Justice, *Man from Mescalero accused of sexually abusing a child in Indian Country* (Apr. 15, 2022) https://www.justice.gov/usao-nm/pr/man-mescalero-accused-sexually-abusing-child-indian-country (BIA officer raped child on Mescalero Apache Reservation); Mike Smith, *Former police officer on Mescalero Apache reservation charged with sexual abuse*, Almagordo Daily News (Apr. 19, 2022) https://www.alamogordonews.com/story/news/2022/04/19/former-mescalero-police-officer-charged-sexual-abuse-minor/7361268001/ (officer pleads

assaulted a Native woman they arrested following a routine traffic stop near the Standing Rock Reservation.[66] Bird-Chase was rescuing a Native woman from trafficking when BIA officers pulled her over, arrested her, brought her to the Standing Rock Detention Center, stole her money, forced her to take her clothing off, and then sexually assaulted her.[67] She is currently litigating her FTCA claims against the BIA.

And these are examples of cases where the victim elects to pursue legal action. More often than not, victims of BIA officer perpetrated rape and sexual assault do *not* report the assault since reporting puts the victim in greater danger and the BIA officer is not likely to be charged, nor is the BIA likely to accept responsibility. For instance, in Montana, in 1995, BIA officer Laurence Big Hair was accused of raping

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guilty); Zach Benoit and Laura Tode, Big Horn County Sheriff Charged, Billings Gazette, (Jun. 22, 2008), https://billingsgazette.com/news/state-and-regional/montana/big-horn-county-sheriff-charged/article_5ed3d2ad-226f-59bd-b6f9-9959165d7ec7.html (discussing settlement of civil suit regarding alleged rape of a Northern Cheyenne woman by then-BIA officer).

[66] *Bird-Chase v. United States*, Case No. 22-cv-00156-DMT-CRH (D. N.D., filed Sept. 28, 2022), https://www.nka.com/documents/lissa-yellow-bird-chase-complaint.pdf.

[67] *Bird-Chase v. United States*, Case No. 22-cv-00156-DMT-CRH (D. N.D., filed Sept. 28, 2022), https://www.nka.com/documents/lissa-yellow-bird-chase-complaint.pdf.

a Northern Cheyenne woman.[68] However, he was not criminally charged and the BIA did not accept responsibility. Counsel for *Amici* know of numerous cases where Native women have been raped by BIA officers in Montana.

The point of holding the federal government accountable for the actions of its law officers under the FTCA is that through the imposition of "justified liability," the federal government will be incentivized to "improve hiring and supervision and produce a police force fully worthy of the public trust."[69] Unfortunately, the United States' response to L.B.'s claim in this case only substantiates the fears of other Native women victims and perpetuates the distrust of BIA law enforcement that permeates all of Indian country. Indeed, in preparation for sentencing in Officer Bullcoming's criminal case, the United States recognized the serious breach of trust inherent in Bullcoming's conduct, urging the United States District Court that citizens "likely keep these sorts of incidents in the back of their mind for their next interaction with law enforcement."[70]

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[68] https://www.kulr8.com/news/big-horn-county-sheriff-arrested/article_c38486d7-0c0b-5651-bafd-28f20b277c24.html.

[69] *Red Elk*, 62 F.3d at 1108.

[70] *United States v. Bullcoming*, No. CR 17-89-BLG-SPW (D. Mont. December 6, 2017) (Doc. 28 at 5).

The District Court's conclusion that Officer Bullcoming's rape of L.B. is "not an act commonly done by BIA officers," ER-15, therefore, is factually and legally erroneous and warrants reversal. At the very least, the case should be remanded and L.B. should be permitted to take discovery and present evidence regarding the high levels of rape and sexual assault among BIA officers in Montana. If left to stand, the District Court's incorrect assessment of the commonality of rape and sexual assault at the BIA threatens to silence other Native victims, leaving them with the knowledge that calling BIA law enforcement to stop the commission of one crime could likely lead to them becoming a victim of another crime, for which there will be no resolution, justice, or recompence.

III. The United States' Treaty and Trust Obligations Impose a Higher Standard on the Federal Government.

The District Court's denial of federal liability in this case violates not only the intent and policy purpose behind the FTCA, but also, the federal Treaty and Trust duties and obligations that the federal government owes to the Northern Cheyenne Tribe and to other tribal nations and their citizens, including L.B.

First, the promises made by the United States to the Northern Cheyenne Tribe by Treaty are the "supreme Law of the Land."[71]

The 1868 Treaty provides:

[71] U.S. CONST. Art. VI, cl. 2; *see also* Art. I, §8; Art. VI, cl. 2.

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent, and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, **and also reimburse the injured person for the loss sustained**.[72]

The 1868 Treaty's plain text is unavoidable, and the Court's task is to ascertain and follow the original meaning of the law.[73] Generally, treaties must be interpreted as the Indians would have understood them.[74] In addition, any ambiguities should be "resolved from the standpoint of the Indians."[75]

Several treaties executed during this era included an identical or very similar provision, colloquially referred to as the 'Bad Men' clause.[76] The Federal Circuit,

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[72] Treaty of Fort Laramie between the United States and the Northern Cheyenne and Northern Arapahoe Tribes of Indians, executed on May 10, 1868, 15 Stat. 655 ("1868 Treaty") (Emphasis supplied).

[73] *New Prime, Inc. v. Oliviera*, 586 U.S. __, __ (2019) (Slip Op., at 6).

[74] *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019).

[75] *Winters v. United States*, 207 U.S. 546, 576-77 (1908).

[76] *See* A Bad Man is Hard to Find, 125 Harv. L. Rev. 2521, 2525-27 (Jun. 20, 2014) (describing nine treaties with substantially identical 'Bad Men' clauses between the United States and the Northern Cheyenne, Northern Arapaho, Crow, Eastern Band of Shoshone, Bannock, Navajo, Sioux, Comanche and Kiowa, Cheyenne and Arapaho, Apache, and Ute Tribes).

in one of the few cases making up 'Bad Men'-clause jurisprudence, held that "any 'white' can be a 'bad man'" for purposes of 'Bad Men' clause interpretation, *Richard v. United States*, 677 F.3d 1141, 1152-53 (Fed. Cir. 2012), and it follows that any "other people subject to the authority of the United States" can also be "bad men," such as a federal officer.[77]

Officer Bullcoming qualifies as a "bad man" under the 1868 Treaty, and the United States is obligated to reimburse L.B. for the injuries he caused her, as the Northern Cheyenne Tribe and others specifically reserved in their Treaties with the United States.[78]

Amici underscore that in exchange for the Northern Cheyenne Tribe's cession of millions acres of land and peace, the 1868 Treaty provides the Northern Cheyenne Tribe with the promise of an enduring Treaty right to the United States' mandatory

[77] Indeed, "Today, there is no greater offender of Tribal rights than the U.S. Department of Justice, which repeatedly fails to protect our Tribal communities in egregious violation of the government's Treaty and Trust duties, and in violation of Articles 7, 8, 10, 11, 12, and 37 of the Declaration [on the Rights of Indigenous Peoples]." Intervention of Hon. Marvin Weatherwax, Blackfeet Tribe and Coalition of Large Tribes, United Nations Permanent Forum on Indigenous Issues, Twenty-Second Session, New York, NY, April 18, 2023. *See* (4th meeting) Permanent Forum on Indigenous Issues, 22nd session | UN Web TV at 2:03:20.

[78] *United States v. Winans*, 198 U.S. 371, 381 (1905) ("the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted").

reimbursement for crime victims injured by Bad Men. This Court should "hold the government to its word."[79]

Second, as Congress recognized in the reauthorization of VAWA, "the unique legal relationship of the United States to Indian tribes creates a federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women."[80]

The specific commitment made to safeguard the lives of Indian women is the type of "specific, applicable, trust-creating statute or regulation" that the United States Supreme Court has found creates an enforceable fiduciary obligation on the part of the United States.[81] This obligation provides the backdrop against which the District Court's conclusion that the BIA cannot be held accountable under the FTCA must be considered. As Justice Barrett recently explained, the federal government has "'"charged itself with moral obligations of the highest responsibility and trust'""

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[79] *McGirt v. Oklahoma*, 591 U.S. __ (2020) (Slip Op., at 1).

[80] Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. 109-162, tit. IX, § 901, 119 Stat. 3077; *see also* S. Rep. No. 111-93, at 4 (2009) (observing that "along with the authority that the United States imposed over Indian [T]ribes, it incurred significant legal and moral obligations to provide for public safety on Indian lands").

[81] *See generally United States v. Mitchell*, 463 U.S. 206, 226 (1983); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473-476 (2003).

toward Indian tribes."[82] At a minimum, the federal government's Trust responsibility to tribal nations to provide for public safety and safeguard the lives of Indian women requires careful hiring, training and supervision of federal officers. Allowing victims to recover from the federal government for sexual assault by on-duty law enforcement officers would help ensure that such preventative measures occur.

CONCLUSION

Amici support L.B.'s request that this Court reverse the District Court's grant of summary judgment to the government, and direct that summary judgment be entered in favor of L.B. Alternatively, this Court should reverse the District Court's grant of summary judgment to the government and grant Appellant all other relief she seeks. The asymmetry in access to justice for Native women on reservations and all other women in Montana created by the District Court's decision is intolerable.

Respectfully submitted this 26th day of November 2023.

s/ Jennifer H. Weddle
Jennifer H. Weddle

[82] *Brackeen*, 599 U.S. __ (Slip Op. at 12) (quoting *United States* v. *Jicarilla Apache Nation*, 564 U. S. 162, 176 (2011) and citing *Seminole Nation* v. *United States*, 316 U. S. 286, 296 (1942) ("[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people")).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 26, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Jennifer H. Weddle