IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0395

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

AMICI CURIAE BRIEF OF CIVIL RIGHTS, WOMEN'S RIGHTS, AND GOVERNMENT ACCOUNTABILITY ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT L.B.

On Certification From The Ninth Circuit Court of Appeals
Cause No. 20-35514

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INTERESTS OF *AMICI*

The Roderick and Solange MacArthur Justice Center, the National Women's Law Center, the Women's Law Project, the Institute for Constitutional Advocacy and Protection, the National Police Accountability Project, and the Institute for Justice (hereinafter "*amici*") are non-profit entities that work at the intersection of civil rights, women's rights, and government accountability. Between them, *amici* have significant experience advancing the legal rights of sexual assault survivors, advocating for best practices by law enforcement, and litigating to secure protection for individual liberties and relief for individuals who have suffered a violation of their rights by government actors.

SUMMARY OF ARGUMENT

Officer Bullcoming raped L.B., an Indigenous woman, under threat of arrest and separation from her children. As a result of the rape, L.B. became pregnant and gave birth to D.B. She brought suit against the federal government under the Federal Tort Claims Act (FTCA), and the case is now before this Court on the following certified question: "Under Montana law, do law-enforcement officers act within the course and scope of their employment when they use their authority as on-duty officers to sexually assault members of the public?" In this brief, *amici* argue that the answer is yes and that governmental liability under the FTCA must attach.

Like all law enforcement officers, Officer Bullcoming was endowed with great power and authority over the general public as well as significant discretion in how and when to enforce the law. This power and discretion all too often translates to greater opportunity to commit sexual assault, just as it did in this case. Indeed, sexual assault by police occurs very frequently—at more than double the rate of sexual assault by the general public.

Governmental liability is required to address this pervasive problem. First, as a matter of accountability, courts recognize that it is fair for employing entities to bear the burden of employee misconduct where it is foreseeable or characteristic of the employment. And because police officers who commit sexual misconduct are empowered and enabled by virtue of their status as law enforcement, it is a

foreseeable consequence of their employment. Second, governmental liability is also warranted for its preventative effect, as the Government is far better equipped than individual officers to make systemic reforms that will reduce the incidence of sexual assault by police.

Finally, doctrines that govern everyday police interaction already take into account the unavoidable power imbalance between officers and the general public. A number of states have also relied on this reasoning to enact legislation precluding a consent defense for police sexual assault; in fact, Montana was moved to pass such a statute in response to this very case. In short, institutional liability is warranted when officers exploit the inherent power of the job to commit sexual assault, and such liability aligns with prevailing legal doctrines and statutory authority governing police-public interactions.

Absent institutional liability, survivors are able to seek compensation only from the perpetrators, who may end up in jail or otherwise unable to satisfy judgments. Here, for example, where Officer Bullcoming has paid $0 toward the $1.6 million judgment against him, institutional liability is L.B.'s only avenue for meaningful compensation.

ARGUMENT

I. SEXUAL ASSAULT BY LAW ENFORCEMENT IS A SYSTEMIC PROBLEM THAT DEMANDS INSTITUTIONAL LIABILITY.

A. Police Commit Sexual Misconduct At Alarming Rates.

While it is difficult to measure the full extent of police sexual violence, the existing data paints a shocking picture—one of widespread police sexual misconduct that far exceeds the rate of such behavior by the general population.

Sexual misconduct is the second-most-frequently reported form of police misconduct, after excessive force, and indeed a police officer is reported for sexual misconduct at least every five days. Cato Inst., *National Police Misconduct Reporting Project: 2010 Annual Report*, 1 [hereinafter Cato Report][1]; Andrea Ritchie, Washington Post, *How Some Cops Use the Badge to Commit Sex Crimes* (Jan. 12, 2018).[2] One nationwide study found that 1,070 officers were actually *arrested* for sex-related crimes in a seven-year period. Philip Matthew Stinson, Sr., John Liederbach, Steven Lab, & Steven Brewer, Jr., *Police Integrity Lost: A Study of Law Enforcement Officers Arrested*, 104 (Apr. 2016).[3] Of this group, 416 were arrested for forcible rape or forcible sodomy and another 352 were arrested for

[1]https://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/JUD/AJUD338L.pdf.
[2]https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842_story.html.
[3] https://www.ojp.gov/pdffiles1/nij/grants/249850.pdf.

forcible fondling. *Id*. at 106. Consistent with this figure, an investigation by the Associated Press uncovered just under 1,000 officers who lost their law enforcement licenses in a six-year period for sex-related offenses. Matt Sedensky & Nomaan Merchant, *Hundreds Of Officers Lose Licenses Over Sex Misconduct*, Associated Press (Nov. 1, 2015).[4] Even this striking figure is likely a dramatic undercount of the actual number of officers engaging in sexual misconduct, as the investigation omitted data from the District of Columbia and nine states (including California and New York—states with several of the nation's largest law enforcement agencies). *Id*. These numbers are alarming in their own right. But even more troubling is the fact that the rate of sexual assault by law enforcement is "significantly higher"—indeed, more than double—than that of the general public. Cato Report at 3.

It's likely even worse than that: although survivors of sexual misconduct generally have many deterrents to pursuing a formal complaint, the barriers to reporting sexual violence are "intensified" when the perpetrator is a police officer. Peter B. Kraska & Victor E. Kappeler, *To Serve and Pursue: Exploring Police Sexual Violence Against Women*, 12 Justice Quarterly 85, 92 (1995) (hereinafter "Kraska, et al."). As the International Association of Chiefs of Police has recognized, survivors of sexual assault by police officers may decline to report that abuse

[4] https://apnews.com/article/oklahoma-police-archive-oklahoma-city-fd1d4d05e561462a85abe50e7eaed4ec.

because they fear "retaliation from the perpetrator or other officers" or because they have had "previous bad experiences with law enforcement." *Addressing Sexual Offenses and Misconduct by Law Enforcement: Executive Guide* 11, International Association of Chiefs of Police (June 2011) (hereinafter "Chiefs of Police").[5] And because law enforcement officers tend to "engage with vulnerable populations who lack power and are often perceived as less credible," *id*. at 4, survivors of police sexual misconduct may not report due to a more acute fear of not being believed. There is also the obvious deterrent stemming from the simple fact that "[s]urvivors of sexual assault by police are the only survivors who have to report the assault to the people that committed it," Isidoro Rodriguez, *Predators Behind the Badge: Confronting Police Sexual Misconduct*, The Crime Report (Mar. 12, 2020) (quoting Andrea Ritchie, researcher at the Barnard Center for Research on Women).[6]

On top of these increased barriers to reporting sexual violence, a "misplaced sense of loyalty" may lead police officers to "protect or provide cover" for each other when confronted with illegal behavior by their colleagues. Chiefs of Police at 5. This is colloquially termed the "blue wall of silence" and, in conjunction with the unique barriers to reporting faced by survivors of assault by police, leads to "a double bind

[5] http://www.ncdsv.org/images/IACP_AddressingSexualOffAndMisconductLE-ExGuide_6-2011.pdf.

[6] https://thecrimereport.org/2020/03/12/predators-behind-the-badge-confronting-hidden-police-sexual-misconduct/.

of secrecy" that makes it difficult to measure the full scope of police sexual violence. Kraska, et al. at 92. So, while the existing data is a cause for concern, police sexual violence is likely even more pervasive than this data reflects.

This is particularly true for women like L.B. as police officers are especially likely to target women of color, including Indigenous women, when they commit sexual assault on duty. *See* Dara E. Purvis & Melissa Blanco, *Police Sexual Violence: Police Brutality, #MeToo, and Masculinities***,** 108 Calif. L. Rev. 1487, 1497 (2020). As one researcher noted, reported cases of police sexual assault "typically" involve women of color. Andrea Ritchie, Invisible No More: Police Violence Against Black Women and Women of Color 132 (2017). When police perceive members of these communities to be using drugs or drinking alcohol, as happened in L.B.'s case, violence is even more likely. *See id.* In short, L.B.'s rape by an officer was, unfortunately, part of several predictable patterns of police misconduct.

The prevalence of police sexual misconduct generally, and against Indigenous women specifically, are important considerations here. *See* Restatement (First) of Agency § 229(2)(a) (directing courts to consider "whether or not the act is one commonly done by such servants" in determining whether conduct is within the scope of employment).

B. Police Sexual Misconduct Is Enabled By The Nature Of Police Work And The Bounds of Police Authority.

The troubling state of affairs reflected in this data is an unfortunate outgrowth of the nature of policing. Perhaps the most salient feature of policing that facilitates police sexual violence is the enormous "power and authority" that officers have over others. Chiefs of Police at 4. Police are, after all, "sovereigns of the street," Nirej Sekhon, *Police and the Limit of the Law*, 119 Colum. L. Rev. 1711, 1719 (2019), and exercise the "most awesome and dangerous power that a democratic state possesses with respect to its residents—the power to use lawful force to arrest and detain them." *Policemen's Benevolent Association of New Jersey, Local 318 v. Washington Township*, 850 F.2d 133, 141 (3d Cir. 1988). This power is sanctioned by both statutory and doctrinal law.

For instance, the law allows police, with some limitations, to put their hands on someone, to sic their dogs on someone, or to shoot and kill someone. As the Supreme Court has noted, officers' right to "make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989); *see also Tennessee v. Garner*, 471 U.S. 1 (1985) (setting out test for constitutionally permissible use of deadly force).

In fact, prevailing interpretations of the Fourth Amendment make intrusive displays of physical authority a mainstay of policing. The Supreme Court's landmark

decision in *Terry v. Ohio*, 392 U.S. 1 (1968), authorized police officers to "stop and frisk" anyone on the street, as long as they meet the relatively low bar of having "reasonable suspicion." *Id.* at 30-31. Since then, *Terry* stops have become routine in urban policing, with a particularly harmful impact on communities of color. *See, e.g.*, Seattle Police Dep't, *Stops and Detentions Annual Report 2018* 5 (2019) (reporting 8,871 *Terry* stops in 2018 in Seattle, Washington);[7] New York Civil Liberties Union, *Stop-and-Frisk in the de Blasio Era* 4 (2019) (reporting a height of 685,724 stops in 2011 in New York City).[8] These "frisks" are often "deliberatively invasive." Seth W. Stoughton, Terry v. Ohio *and the (Un)Forgettable Frisk*, 15 Ohio St. Crim. L.J. 19, 28 (2017). Police, then, have the legal power to frequently stop and touch people every day.

Moreover, the breadth of conduct that is criminalized or otherwise prohibited by local, state, and federal laws conveys considerable power to the police. At any given moment, officers are entitled to stop large swaths of the population for *some* offense. *See* U.S. Dep't of Just., Nat'l Inst. of Just., *"Broken Windows" and Police Discretion* 22 (1999).[9] The Department of Justice (DOJ) has documented this phenomenon in its investigation of several large police departments. For example,

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[7] https://www.seattle.gov/Documents/Departments/Police/Reports/2017-Stops-and-Detentions-Final.pdf.

[8] https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stop frisk_singles.pdf.

[9] https://www.ojp.gov/pdffiles1/nij/178259.pdf.

in New Orleans, the DOJ found that officers in one year made "nearly 60,000 arrests, of which about 20,000 were of people with outstanding traffic or misdemeanor warrants from neighboring parishes for such infractions as unpaid tickets." U.S. Dep't of Just., Civ. Rights Div., *Investigation of the New Orleans Police Department* 29 (2011). This level of discretion translates to power on the street, especially given the onerous consequences of even an illegal arrest.

This discretion can have devastating consequences. Even the International Association of Chiefs of Police ("Chiefs of Police")[10] has admitted that the policing profession "may inadvertently create opportunities for sexual misconduct" because of the "power and authority" that officers possess over others. Chiefs of Police at 4. It has further explained that other aspects of policing also contribute to the problem; namely, the frequency with which officers "work independently," "function without direct supervision," "work late into the night when their conduct is less in the public eye," and "engage with vulnerable populations who lack power and are often perceived as less credible." *Id*.

Researchers have likewise concluded that, due to these factors, "[p]olice work is conducive to sexual misconduct." Philip Stinson, John Liederbach, Steven

[10] The IACP is the world's largest and most influential professional association for police leaders with more than 31,000 members in over 165 countries. Since 1893, it has been "speaking out on behalf of law enforcement and advancing leadership and professionalism in policing worldwide." https://www.theiacp.org/about-iacp.

Brewer, & Brooke Mathna, *Police Sexual Misconduct: A National Scale Study Oof Arrested Officers*, Crim. Just. Fac. Publ'n 2 (2014) (hereinafter "Stinson, et al.") (explaining that police have opportunity to engage in sexual violence because they routinely operate alone at night and encounter vulnerable people); *see also* Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 Val. U. L. Rev. 133, 171-72 (2013) (hereinafter "Chamallas") (explaining that "there is a special risk that the cultural norm of deference will facilitate abuse" when police deal with vulnerable populations who are expected to defer to authority figures). The DOJ has also recognized that the nature of the profession can lead to sexual misconduct, noting in its report on the Baltimore City Police Department that officers there used their special power and authority to "coerce sexual favors . . . in exchange for avoiding arrest." U.S. Dep't of Just., Civ. Rights Div., *Investigation of the Baltimore City Police Department* 149 (Aug. 10, 2016).[11]

Indeed, that is just what happened in this case. Officer Bullcoming used the arrest powers granted him by the Bureau of Indian Affairs to rape L.B. by threatening to arrest her. *L.B. v. United States*, 8 F.4th 868, 869-70 (9th Cir. 2021). The rape was facilitated by the policing authority vested in Officer Bullcoming.

[11] https://www.justice.gov/crt/file/883296/download.

C. Institutional Liability For Systemic Sexual Misconduct Is Required As A Matter Of Both Accountability And Prevention.

The systemic nature of the problem demands institutional liability. Indeed, "channel[ing] liability away from individual employees and toward the United States," which is "one of the FTCA's purposes," *Simmons v. Himmelreich*, 578 U.S. 1162 (2016), is particularly warranted in the context of police sexual misconduct because federal law enforcement agencies can foresee such misconduct and have the means to prevent it.

i. Institutional liability is particularly appropriate where sexual misconduct is foreseeable.

Courts have assigned employing entities the burden of liability when employee misconduct is either foreseeable or characteristic of the employment. *See also* Chamallas at 152 (observing that an employing entity should face liability if "the offending employee was materially aided in his wrongdoing by having the job or position he occupied").

In a case about workplace sexual harassment, for instance, the Supreme Court explained that because sexual harassment is a "persistent problem in the workplace," an employer can "reasonably anticipate the possibility of such conduct occurring" and "one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business." *Faragher v. City of Boca Raton*, 524 U.S. 775, 798 (1998); *see also id*. at 800 (discussing "the fairness of requiring

the employer to bear the burden of foreseeable social behavior"). The eminent Judge Friendly espoused a similar principle in holding that the United States could be financially liable where an intoxicated seaman damaged a private vessel while returning to his ship. *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171-72 (2d Cir. 1968). It was "foreseeable," he explained, that seamen might do damage to private property given their "proclivity" to "find solace for solitude by copious resort to the bottle while ashore." *Id.* at 172. This risk was "enough to make it fair that the enterprise bear the loss." *Id.*; *see also id.* at 171 ("[A] business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.").

Applying these principles to police sexual violence is straightforward. Not only does the evidence show that police sexual misconduct is foreseeable and characteristic of policing, *see generally supra* Section I.B, but courts across the country have recognized as much in cases markedly similar to the one at hand. For example, after an officer raped a woman that he had pulled over while driving, the Supreme Court of California explained that the "great power and control" police officers have over criminal suspects makes it "neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct." *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 217 (1991). It went on to observe that "the risk of such tortious conduct is broadly incidental to the enterprise of law

enforcement, and thus liability for such acts may appropriately be imposed on the employing public entity." *Id*. at 218. Other courts have reached similar conclusions. *See, e.g.*, *Red Elk v. United States*, 62 F.3d 1102, 1107-08 (8th Cir. 1995) (holding that tribal law enforcement officer's rape of thirteen-year old girl was a reasonably foreseeable "blatant violation of trust").

Again, the facts of this case illustrate the point well. Officer Bullcoming was at L.B.'s house in his capacity as a law enforcement officer and would have had no occasion to be there otherwise. *L.B.*, 8 F.4th at 869. And he raped her under threat of arrest, which is a power he had only because of his position in law enforcement. *Id*. at 869-70. There is no question that Officer Bullcoming "was materially aided in his wrongdoing by having the job or position he occupied." Chamallas at 152. This is a crucial consideration in determining whether he acted within the scope of employment so as to justify governmental liability. Restatement (First) of Agency § 229(2)(f) (explaining that "whether or not the master has reason to expect that such an act will be done" and "whether or not the instrumentality by which the harm is done has been furnished by the master to the servant" are two important factors). Applying those principles here, the Government must "bear the burden" of Officer Bullcoming's foreseeable misconduct. *Faragher*, 524 U.S. at 800; *see also* Chamallas at 152.

ii. Institutional liability incentivizes federal law enforcement agencies to reduce the incidence of sexual assault by federal officers.

One of the "most commonly mentioned aims of tort law" is "deterrence of undesirable behavior." Dobbs' Law of Torts § 10. And in the context of harms committed by government agents, imposing this liability on the governmental entity serves this aim because "the governmental entity will often be in a far better position than any individual officer to restructure official conduct in a way that avoids future violation of rights." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1488 (1987).

The Supreme Court has likewise emphasized deterrence in the municipal liability context: "the threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates" and "may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood" of violations. *Owen v. City of Independence*, 445 U.S. 622, 652 & n.36 (1980). It follows, then, that the federal government would be incentivized to reduce the incidence of police sexual violence if it were held liable for the misconduct of its officers. *See* Chamallas at 155 ("Once exposed to liability, their employers will likely discipline the offending employees through firing, denial of promotions, and other actions.").

If properly incentivized, there are many steps that law enforcement agencies can and should take to lower rates of police sexual misconduct. The Chiefs of Police have set out a detailed menu of such reforms, including:

- Early intervention systems to identify troubling patterns of behavior and suspicious trends (*i.e.*, periodic audits of traffic stops and random checks of department-issued phones);[12]
- Rigorous hiring procedures that include interviews, background checks, and references so that problematic officers in one department cannot simply move to another;
- Requiring fitness-for-duty examinations when officers engage in behavior that may fall short of termination or criminal conduct;
- Recording or videotaping traffic stops and requiring that officers provide dispatch with start and finish times when transporting an arrestee;
- Training supervisors to identify indicators of sexual misconduct and to effectively oversee officer conduct;
- Imposing appropriate sanctions on officers who commit sexual misconduct *and* on those who fail to report misconduct by their peers;
- Monitoring for signs of retaliation against complainants.

Chiefs of Police at 6-15.

But without adequate incentive to actually implement these reforms, these proposals will likely remain just that—and the pervasive, entirely foreseeable sexual crimes committed by officers will continue. Holding the government accountable

[12] In one department, for instance, early intervention systems enabled a department to discipline and train an officer after a review of his traffic stops revealed that 89 percent over a four-month period were of female drivers. Chiefs of Police at 9.

for Officer Bullcoming's reprehensible, yet all too common acts in this case will provide that necessary incentive.

II. INSTITUTIONAL LIABILITY IS CONSISTENT WITH EXISTING LEGAL DOCTRINES THAT RECOGNIZE THE IMBALANCE OF POWER IN POLICE-PUBLIC INTERACTIONS.

Imposing liability on the Government for its role in facilitating and benefitting from the vast discretion, power, and authority that its officers wield is consistent with well-established legal doctrines that recognize the power imbalance between officers and civilians.

One such doctrine where courts acknowledge the power imbalance between police and civilians is in assessing whether or not a seizure has taken place. A seizure occurs for Fourth Amendment purposes when, given the totality of circumstances, a reasonable person would not feel free to leave police presence. *See United States v. Mendenhall*, 446 U.S. 544, 557 (1980). A police officer can effectuate a seizure either through the application of physical force *or* a show of authority. *See Torres v. Madrid*, 141 S. Ct. 989, 995 (2021). Baked into this doctrine is the idea that a police officer's known authority, on its own, can stop a reasonable person in her tracks. For example, in *Brendlin v. California*, 551 U.S. 249 (2007), the Court canvassed its past decisions giving officers extensive power in the context of a vehicle stop before concluding: "What we have said in these past decisions probably reflects a societal

expectation of 'unquestioned [police] command' at odds with any notion that a passenger would feel free to leave." *Id.* at 258.

Indeed, courts recognize that the more an encounter explicitly implicates the power imbalance between an officer and the communities they police, the less likely a reasonable person would feel free to leave. For example, factors that go to the seizure inquiry include whether an officer is uniformed or in plain clothes, whether an officer is displaying his or her weapon, and whether the stop takes place in a public or private place. *See, e.g.*, *United States v. Washington*, 490 F.3d 765, 771-72 (9th Cir. 2007); *United States v. Hernandez*, 847 F.3d 1257, 1263-64 (10th Cir. 2017). These indicia of authority—a uniform, badge, and weapon; all hallmarks of law enforcement—may be all it takes to communicate to a reasonable person that they are not free to leave.

Consent doctrine in the Fourth Amendment search context implicates similar ideas. There, if the government wants to rely on consent to justify the legality of a search, it has to prove that consent was freely and voluntarily given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). When analyzing whether this test was met, courts consider the realities of power and coercion that define the police-civilian relationship. For example, the Court held that a 66-year-old Black widow, "who lived in a house located in a rural area at the end of an isolated mile-long dirt road, [and] allowed four white law enforcement officials to search her home after they

asserted they had a warrant" did not truly "consent" to the search. *Id*. at 234 (describing the facts of *Bumper v. North Carolina*, 391 U.S. 543 (1968)). Indeed, the difficulty of refusing consent has led some states to abandon consent searches or limit them to cases involving individualized suspicion. Roseanna Sommers & Vanessa Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L.J. 1962, 2012 (2019).

Particularly relevant here, courts have found consent invalid where it was obtained based on threats to the family unit. *See, e.g.*, *U.S. v. Tibbs*, 49 F. Supp.2d 47, 53 (D. Mass. 1999) ("Here was a woman focused on her sleeping child . . . . Once they threatened her child, there was no question that she would succumb"); *U.S. v. Eggers*, 21 F. Supp.2d 261, 269-70 (S.D.N.Y. 1998) (holding consent not voluntarily given where agents took advantage of parents' "overtly manifested concern for the ability of their children to reenter the family home"); *U.S. v. Ivy*, 165 F.3d 397, 403 (6th Cir. 1998) (same, where officer "explicitly stated that if Ivy did not sign the form, he would arrest Ivy's girlfriend and take away their small child"). Here, Officer Bullcoming threatened to arrest L.B. for child endangerment, specifically invoking his power as an agent of the state to interfere with her family. *L. B.*, 8 F.4th at 869.

Threats like this would likely be especially salient to an Indigenous mother like L.B., given the devastating history of U.S. government interference with

Indigenous children. *See* Christie Renick, *The Nation's First Child Separation Policy*, The Imprint (Oct. 9, 2018) (describing how child welfare workers systematically removed Indigenous children from their homes such that between twenty-five and thirty-five percent of all Indigenous children were in adoptive homes, foster care, or other institutions by 1970); Ranjani Chakraborty, *How the U.S. Stole Thousands of Native American Children*, Vox (Oct. 14, 2019) (explaining that "the US took thousands of Native American children and enrolled them in off-reservation boarding schools" where they were "systematically stripped of their languages, customs, and culture" and subjected to "neglect, abuse, and death").[13] Again, these threats are given force because Officer Bullcoming had the power, as an on-duty officer, to make good on them.

Finally, perhaps the clearest doctrinal endorsement of the power imbalance between police officers and members of the public is that both statutes and case law resist the notion that sexual consent can be valid when given to an on-duty police officer by the object of his investigation. In 2019, the Montana state legislature passed language to exclude any consent given by "a witness in a criminal investigation or a person who is under investigation in a criminal matter" from the Montana criminal code's definition of consent if "the perpetrator is a law

[13]https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431; https://www.vox.com/2019/10/14/20913408/us-stole-thousands-of-native-american-children.

enforcement officer who is involved with the case in which the victim is a witness or is being investigated." Section 45-5-501(1)(a)(xi), MCA. The law's sponsors drafted this exception directly in response to L.B.'s case. On the floor of the Montana House Judiciary Committee, one of those sponsors explained that the bill was meant to address situations like "a BIA officer threatening to arrest you and take away your child." *Hearing on S.B. 261 Before the H. Comm. on the Judiciary*, 2019 Leg., 66th Sess. (Mont. 2019) (statement of Sen. Diane Sands). The Montana Legislature was thus moved by this incident to codify that the trappings of police authority vitiate the ability to meaningfully consent to sex.

Other jurisdictions likewise preclude a consent defense for police sexual assault. *See, e.g.*, Alaska Stat. § 11.41.470; Colo. Rev. Stat. Ann. § 18-3-402(1)(f); HRS §§ 707-731; 707-732; 17-A Me. Rev. Stat. Ann. 253, 254. Congress is considering abolishing a consent defense for federal officers who "engage in a sexual act with anyone in [their] custody or while exercising their authority under color of law." *Speier and Joyce Bipartisan Closing the Law Enforcement Consent Loophole Act Passes the House*, Congresswoman Jackie Speier (Mar. 4, 2021).[14] The provision's House sponsor explains that the "inherent imbalance of power and

[14] https://speier.house.gov/press-releases?id=DDF837CC-B3E2-4488-B116-646E2C4B31C4encourage.

authority between an officer and detainee" makes consent between the two an illusion. *Speier press release, supra.*

* * *

Ultimately, since governments choose to benefit from the vast discretion and authority they award officers, they must also bear the burdens.

CONCLUSION

For the foregoing reasons, the Court should find that Officer Bullcoming acted within the scope of his employment when he used his authority as an on-duty officer to rape L.B.

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Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I hereby certify that the foregoing brief is printed with proportionately-spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes, and contains 4,723 words.

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