

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. OP 21-0395

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L.B., individually and on behalf of D.B., a minor,  
Plaintiff-Appellant,

v.

United States of America; Bureau of Indian Affairs;  
Dana Bullcoming, agent of the Bureau of Indian Affairs  
sued in his individual capacity,

Defendants-Appellees.

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**BRIEF OF THE NATIONAL INDIGENOUS WOMEN'S  
RESOURCE CENTER, SOVEREIGN BODIES INSTITUTE,  
FORT BELKNAP INDIAN COMMUNITY, AND BLACKFEET NATION  
AS *AMICI CURIAE* SUPPORTING APPELLANT**

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*Certified Question, United States Court of Appeals for the Ninth Circuit, Cause  
No. 20-35514, Hon. Danny J. Boggs, Marsha S. Berzon, and Mary H. Murguia*

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## INTRODUCTION

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,<sup>1</sup> both United States Senators from Montana,<sup>2</sup> current and former Montana Governors,<sup>3</sup> Tribal Leaders,<sup>4</sup> 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 government to prosecute the majority of crimes against their citizens, on their lands.

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<sup>1</sup> 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 (Nov. 26, 2019); *President Signs 2013 VAWA – Empowering Tribes to Protect Native Women*, The White House (Mar. 7, 2013), <https://perma.cc/79BS-6HF9>.

<sup>2</sup> 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* (Apr. 4, 2019), <https://perma.cc/2VVV-SQHU>.

<sup>3</sup> 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>.

<sup>4</sup> See Tribune Staff, *Blackfeet and Fort Belknap tribal leaders urge lawmakers to address missing and murdered Indigenous people*, Great Falls Tribune (Oct. 2, 2021), <https://perma.cc/4UFY-RCN6>.

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. Native women will be strongly incentivized not to call the police when they have been victimized or have witnessed a 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. *Amici* ask this Court to hold that on-duty sexual assault falls within the scope of a law enforcement officer’s employment. Holding otherwise would visit disparate impacts on uniquely situated and highly vulnerable Native women in Montana.

## **IDENTITY AND INTEREST OF *AMICI***

The National Indigenous Women’s Resource Center (“NIWRC”) is a Native-led nonprofit organization dedicated to ending violence against Native women and children. 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 indigenous 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 to advocate for the passage of the Violence Against Women Reauthorization Act of 2013 (“VAWA”), which restored tribal jurisdiction over non-Indian perpetrators of certain domestic violence crimes. The NIWRC continues to work closely with Congress to secure a re-authorization of VAWA in 2021, this time with provisions that will restore tribal criminal jurisdiction over non-Indians who

sexually assault, traffic, or stalk Native women and children on tribal lands. The NIWRC has 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.

NIWRC's headquarters are in Lame Deer, 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 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.

The NIWRC is joined by the Sovereign Bodies Institute ("SBI"). SBI is a national non-profit that works to build on Indigenous traditions of data gathering and knowledge transfer to create, disseminate, and put into action research on gender and sexual violence against Indigenous people. SBI is a home for generating new knowledge and understandings of how Indigenous Nations and communities are impacted by gender and sexual violence, and how they may continue to work

towards healing and freedom from such violence. SBI works with many families of MMIWG victims in the State of Montana and has conducted extensive research on the high levels of violence against Indigenous Peoples in Montana. SBI has a strong interest in addressing the legal loophole that prevents Native victims of violence from obtaining justice.

The NIWRC is also joined by the Fort Belknap Indian Community and the Blackfeet Nation. These Tribal Nations are intimately familiar with the impact of gender and sexual violence on Native women and families in Montana, and the necessity of reliable federal law enforcement. Montana has one of the highest rates of violence against Native women in the country, a grim reality that is more than a statistic for these Tribal Nations. Because Tribes rely on federal law enforcement to respond to, investigate, and ultimately prosecute the majority of violent crimes committed against their citizens, Tribal Nations cannot effectively protect their citizens from sexual violence by federal officers. Montana Tribes therefore have a direct interest in measures that encourage careful selection, training and supervision of BIA law enforcement to ensure justice for Native women and girls for generations to come. These Tribal Nations also have a significant interest in ensuring that there are remedies available to their citizens when federal officers commit crimes of sexual violence against them.

## ARGUMENT

### **I. L.B.’s Story Illustrates That Native Women in Montana Will Suffer Disproportionately if this Court Holds That On-Duty Sexual Assault Falls Outside the Scope of Employment**

This Court reviews a certified question in the context of the facts underlying the action. *See Murray v. BEJ Minerals, LLC*, 2020 MT 131, ¶ 11, 400 Mont. 135, 464 P.3d 80. In this instance, those facts illustrate the unique vulnerability of Native women to federal officer misconduct, and the disparate impact on Native women in Montana threatened by an extension of *Maguire v. State* (1992), 254 Mont. 178, 835 P.2d 755, to law enforcement.

Briefly, Officer Bullcoming responded to L.B.’s call to the police and threatened L.B. with arrest bearing collateral consequences involving her children and her job. Cert. Order at p. 3. Under such threat, L.B. had sexual intercourse with Officer Bullcoming. *Id.* at pp. 3-4.<sup>5</sup>

Officer Bullcoming pleaded guilty to Deprivation of Rights Under Color of Law. *United States v. Bullcoming*, No. CR 17-89-BLG-SPW (D. Mont. December 6, 2017) (Doc. 16 at 2). As a part of his guilty plea, Bullcoming acknowledged that he “was acting under color of law when he coerced L.B. into engaging in sexual

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<sup>5</sup> Montana law does not recognize an individual’s capacity to consent under such circumstances. Mont. Code Ann. § 45-5-501(b)(xi) (2019) (“a witness in a criminal investigation or a person who is under investigation in a criminal matter” is incapable of consent where “the perpetrator is a law enforcement officer who is involved with the case in which the victim is a witness or is being investigated”).

intercourse with him under threat of arrest if she refused.” (*Id.* at 3.) In preparation for sentencing, the United States recognized the serious breach of the public 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.” *United States v. Bullcoming*, No. CR 17-89-BLG-SPW (D. Mont. December 6, 2017) (Doc. 28 at 5).

Despite these facts, the United States would deny L.B. a tort remedy available to other Americans in general under the Federal Tort Claims Act (“FTCA”), to other Montanans under the non-delegable-duty doctrine, and to other Native women under the laws of other States. To illustrate: Congress has specifically included certain intentional torts committed by law enforcement in the FTCA. *See* Appellant’s Opening Br. at pp. 8-9 (discussing 28 U.S.C. § 2680(h) (the “law enforcement proviso”)), and *Millbrook v. United States*, 569 U.S. 50, 52 (2013)); *Millbrook*, 569 U.S. at 56 (“The plain text confirms that Congress intended immunity determinations to depend on a federal officer’s legal authority, not on a particular exercise of that authority.”). And, as the Ninth Circuit recognized, Montana’s adoption of the non-delegable-duty doctrine means that “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.” Cert. Order at p. 7.

Moreover, because the FTCA relies on “the law of the place where the act or omission occurred,” 28 U.S.C. § 1346(b)(1), the remedy that L.B. seeks would be available even to Native women raped by federal officers in other States that recognize that the scope of a law enforcement officer’s employment may include on-duty sexual assault. *See, e.g., Red Elk v. United States*, 62 F.3d 1102 (8th Cir. 1995) (holding that the rape of a thirteen-year-old girl was within the scope of a tribal police officer’s employment under South Dakota law sufficient to render the U.S. liable under the FTCA).

Unlike Americans availing themselves of the “law enforcement proviso,” Montanans seeking relief under the non-delegable-duty doctrine, or Native Americans encountering federal law enforcement officers in South Dakota, however, L.B. is a Native woman from Montana. When she needed help, she called BIA law enforcement. The officer who responded coerced her into sex under threat of arrest while acting under color of law. Yet L.B.’s political identity may stand between her and a remedy for the tortious conduct of a federal officer. This Court should not countenance such blatantly unequal treatment.



## **II. The Unique Factual and Legal Context Present on Tribal Lands in Montana Supports 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 force fully worthy of the public trust." *Red Elk*, 62 F.3d at 1108. 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." *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1342 (Cal. 1991). 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. The Trust Responsibility Imposes a Higher Standard on the Federal Government**

"[T]he 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." Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 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”). 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. *See generally United States v. Mitchell*, 463 U.S. 206, 226 (1983); *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 473-476 (2003). This obligation provides the backdrop against which the question presented—as applied to the underlying facts—must be considered. At a minimum, the federal government’s trust responsibility to Tribal Nations to provide for public safety and to 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 would help ensure that such preventative measures occur.

**B. 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.<sup>6</sup> The United States Supreme Court has acknowledged this trend, observing in 2016 that:

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<sup>6</sup> 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=>

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.

*United States v. Bryant*, 136 S. Ct. 1954, 1959, *as rev'd* (July 7, 2016) (internal quotation marks and citations omitted); *see also Brown v. Polk Cnty., 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.”).<sup>7</sup> That same year, a report from the National Institute of Justice determined that more than 4 in 5 Native people report having been victims of violence, and 56.1 percent of Native women report being victims of sexual violence.<sup>8</sup>

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[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>.

<sup>7</sup> *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>.

<sup>8</sup> *Id.* at 43-44.

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 white, 18.8 percent who identified as black, and 6.8 percent who identified as Asian/Pacific Islander.<sup>9</sup>

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.’

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

**C. 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

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<sup>9</sup> 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).

recorded by Montana law enforcement.<sup>10</sup> American Indians and Alaska Natives in Montana experience sexual assault victimization at a rate almost two times higher than their white counterparts.<sup>11</sup>

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.<sup>12</sup> United States Senator Jon Tester has acknowledged the high rates of violence against Indigenous 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."<sup>13</sup>

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<sup>10</sup> Kimberly Martin, *Sexual Assaults Recorded by Law Enforcement, 2019*, Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice 3 (July 29, 2021), [https://bjs.ojp.gov/sites/g/files/xyckuh236/files/sarble/sarble19/data/pdfs/sarble19\\_MT.pdf](https://bjs.ojp.gov/sites/g/files/xyckuh236/files/sarble/sarble19/data/pdfs/sarble19_MT.pdf).

<sup>11</sup> *Id.* at 12.

<sup>12</sup> 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 10 (2018), <https://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf>.

<sup>13</sup> Press Release, U.S. Senator for Montana Jon Tester, *supra* note 2.

Indigenous Montanans make up only 6.7 percent of the State’s population, yet they are four times more likely to go missing than non-Indigenous Montanans.<sup>14</sup> At the end of 2019, there were 110 active missing persons cases in Montana.<sup>15</sup> Thirty-three percent of those actively missing were Native American, demonstrating that “Native Americans were disproportionately represented” over a three-year period.<sup>16</sup> Sixty percent of all missing Indigenous persons in Montana over the same period were female.<sup>17</sup>

MMIWG are especially prevalent in Montana’s reservation counties.<sup>18</sup> Rosebud County (Northern Cheyenne Indian Reservation) has the second highest per-capita rate of missing persons in the State of Montana.<sup>19</sup> This rate is nearly 1.5 times higher than Yellowstone County, the non-reservation county with the most missing persons.<sup>20</sup> Neighboring Big Horn County (Crow Indian Reservation) has the highest rate of missing Indigenous persons in the state—nearly three times higher

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<sup>14</sup> 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>.

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.* at 11.

<sup>19</sup> *Id.* at 13.

<sup>20</sup> *Id.*

than Yellowstone County.<sup>21</sup> 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.”<sup>22</sup>

To be sure, while the known rates of violence against Indigenous 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.<sup>23</sup> In 2016, there were 5,712 reports of missing American Indian and Alaska Native women and girls, but only 116 cases were logged into the US Department of Justice’s federal missing persons database.<sup>24</sup> These exceedingly high and chronically underreported rates of violence against Native women and cases of MMIWG leave Native women in Montana incredibly vulnerable.

**D. Tribes and Individual Indians Must Rely on Federal Law Enforcement**

The ability of Tribal governments to combat this epidemic of violence is limited because they lack the requisite authority to police and prosecute the majority

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Rachel E. Morgan & Jennifer L. Truman, *Criminal Victimization, 2019*, Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep’t of Justice (Sept. 2020), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/sarble/sarble19/data/cv19.pdf>.

<sup>24</sup> Lucchesi, Echo-Hawk, *supra* note 12, at 2.

of crimes committed against their citizens. Native women and Montana Tribal Nations 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 unless and until Congress restores their jurisdiction to do so. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). *Oliphant* “leaves the Federal Government”—not Tribal Nations themselves—with the authority to prosecute the majority of violent crimes committed against Native women and children. *Bryant*, 136 S. Ct. at 1960.

Federal legislation also complicates the investigation and prosecution of interracial crimes. The Major Crimes Act brings under “the exclusive jurisdiction of the United States” offenses including murder, manslaughter, kidnapping, maiming, sexual abuse, incest, assault, felony child abuse or neglect that are committed by and against Indians. 18 U.S.C. § 1153(a). The Indian Country Crimes Act and the Assimilative Crimes Act further extend federal jurisdiction over violent crimes committed by non-Indians against Indians. 18 U.S.C. §§ 1152, 13. And, while Congress restored tribal criminal jurisdiction over non-Indians who use domestic violence against their Indian partners 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)), many gaps in tribal criminal jurisdiction remain, including interracial crimes of stranger sexual assault, child abuse, elder



abuse, human trafficking, and assaults on tribal law enforcement. As a result, 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.

Data collected by the National Institute of Justice confirms that the majority of violent crimes committed against Native people are committed by non-Indians,<sup>25</sup> and therefore require federal intervention. 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.<sup>26</sup> Native women are three times more likely to experience sexual violence by an interracial partner than non-Indian women.<sup>27</sup> 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.” S. Rep. No. 112-153, at 9 (2012). And in

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<sup>25</sup> Rosay, *supra* note 7, at 46.

<sup>26</sup> *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](https://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief_FINAL_2_1_2018.pdf).

<sup>27</sup> Rosay, *supra* note 7, at 18.

Montana, the non-Indian population on many reservations is quite high. In Rosebud County, non-Indians make up approximately sixty percent of the population.<sup>28</sup>

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.

### **CONCLUSION**

As the Ninth Circuit observed, a determination that sexual assault falls outside the scope of a law enforcement officer’s employment would bear “a disproportionate effect on Montana’s indigenous population, who are more likely to interact with federal, rather than state or local, law-enforcement officers.” Cert. Order at p. 7. Such a determination would deprive Native women in Montana of the same remedy available to countless other individuals by virtue of their political identity.

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<sup>28</sup> *Quick Facts: Rosebud County, Montana*, United States Census Bureau (2019), <https://www.census.gov/quickfacts/rosebudcountymontana>.

The real world impacts of this disparity cannot be overstated. Other women in L.B.'s position will decide not to seek help from law enforcement out of fear of victimization, amplifying public safety risks to Native women on Montana reservations. A chilling effect on reporting will exacerbate the already severe underreporting of violent crimes on tribal lands. Further erosion of trust in law enforcement and yet another disincentive to report can only generate impunity for those who commit violence against Native women, and a resulting increase in violence against a population whose suffering is already at epidemic proportions.

Allowing the federal government to avoid responsibility for the sexual violence of on-duty law enforcement officers would remove incentive for federal agencies in Montana to implement preventive measures. Immunizing the federal government under such circumstances runs contrary to Congressional intent, and benefits no Montanan. This Court should not allow federal law enforcement to violate the public trust or the federal government to shirk its trust responsibilities.

*Amici* respectfully request that this Court answer the certified question in the affirmative, and hold that law enforcement officers act within the course and scope of their employment when they use their authority as on-duty officers to sexually assault members of the public.

DATED: October 15, 2021

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word is 4,273 words, excluding the Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

DATED: October 15, 2021

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