UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

MICAH ROEMEN; TOM TEN EYCK, Guardian of Morgan Ten Eyck; and MICHELLE TEN EYCK, Guardian of Morgan Ten Eyck, Plaintiffs, v. UNITED STATES OF AMERICA, ROBERT NEUENFELDT, individually and UNKNOWN SUPERVISORY PERSONNEL OF THE UNITED STATES, individually, Defendants.	4:19-CV-04006-LLP **PLAINTIFFS' RESPONSE TO UNITED STATES OF AMERICA'S MOTION TO DISMISS**

Plaintiffs, by and through undersigned attorneys, respectfully submit their Response to United States' Motion to Dismiss.

I. PRELIMINARY STATEMENT

The evidence before the Court clearly demonstrates that Officer Robert Neuenfeldt was acting as a "federal officer" for purposes of the law enforcement proviso, which is fatal to the United States of Americas' ("Government") motion. If this Court finds that Neuenfeldt was acting as a federal officer, the remaining arguments set forth by the Government do not require consideration as they are moot.

The Government's Motion to Dismiss primarily relies on the premise that Officer Robert Neuenfeldt was not a "investigative or law enforcement

officer" for purposes of the law enforcement proviso. However, the Government cannot avoid liability under the law enforcement proviso and the Federal Tort Claims Act when it empowered Neuenfeldt to search for evidence in relation to federal violations of law, seize evidence of the same, and make arrests for violations of federal law. Neuenfeldt was authorized by the Government to enforce federal law on the Flandreau Santee Sioux Reservation ("FSS Reservation") and acted under that authority on multiple occasions, including the tragic events bringing rise to this lawsuit. Thus, the Government cannot be granted immunity for its willing enablement of Neuenfeldt's federal authority.

Next, the Government argues that it is immune from liability because Plaintiffs' negligence claims "arise out of" Neuenfeldt's assault and battery. This alternative theory must also fail. The record demonstrates that the Government and Neuenfeldt's negligence do not "arise out of" Neuenfeldt's assault and battery because his assault and battery are not essential to Plaintiffs' negligence claims. The Government had an antecedent duty related to Neuenfeldt's employment status because of his marred history as an officer and because of the federal directives found in its 638-contract with the Flandreau Santee Sioux Tribe ("Tribe").

On numerous occasions in his past, Neuenfeldt jumped calls, defied his jurisdictional limits, and negligently abused his position of authority. The Government had a duty to train and supervise Neuenfeldt appropriately and ensure the Tribe's compliance with its federally funded

contract. The record reveals that the Government completely failed to train Neuenfeldt in any respect and chose to negligently retain him as a tribal officer. Neuenfeldt was subsequently elevated to Chief of Police for an entire reservation. In that position, Neuenfeldt's recurring habits foreseeably surfaced again. Thus, Neuenfeldt's assault and battery are not essential to Plaintiff's negligence claims against the Government, because of the required duty to train, supervise, and retain Neuenfeldt, given both his history and the federal directives found in the Tribe's 638-contract.

Lastly, Neuenfeldt negligently defied his jurisdictional limits—like he had multiple times in the past. He then negligently acted as a federal law enforcement officer outside of those jurisdictional limits, and it resulted in a foreseeable catastrophic end for the Plaintiffs. But-for Officer Neuenfeldt's negligent defiance of his jurisdictional limits, his assault and battery would not have occurred. Neuenfeldt should have been sitting behind a desk, and at the very least, confined to the boundary limits of his jurisdiction: the Tribe's reservation. Thus, Neuenfeldt's assault and battery are not essential to Plaintiffs' negligence claims because the assault and battery followed Neuenfeldt's negligent defiance of his jurisdictional limits.

The premises the Government puts forth to dismiss Plaintiffs' allegations are not supported by the record, Plaintiffs' allegations, or the law governing this case. Thus, Plaintiffs respectfully request this Court

deny the Government's Motion to Dismiss and allow Plaintiffs their day in court.

II. FACTUAL BACKGROUND

a. Factual History

In attempt to avoid repetition, Plaintiffs incorporate by reference the Factual History from their Memorandum in Support of Plaintiffs' Partial Motion for Summary Judgement (Docket 84, at pgs. 8-46) and Plaintiff's Response to United States' Cross Motion for Summary Judgment and Resistance to Plaintiffs' Partial Motion for Summary Judgment. However, Plaintiffs wish to clarify the actions of Officer Robert Neuenfeldt on the night of June 17, 2017, and how he arrived at 24364 484th Avenue in Dell Rapids, South Dakota.

i. The Law Enforcement Assist Agreement Between Moody County and the Flandreau Santee Sioux Tribal Police Only Conferred Jurisdiction to Officer Neuenfeldt Outside the Reservation in Emergency Situations and Upon a Proper Request for His Assistance.

The Moody County Sheriff's Office ("Moody County") and the Tribe entered into a Law Enforcement Assist Agreement ("Assist Agreement") in September of 2015. (Docket 85-8.) Under the Assist Agreement, Neuenfeldt could only be conferred jurisdiction if a "proper request" was made:

NOW THEREFORE, it is hereby agreed by and among the parties as follows:

(1) In the event of or the threat of an emergency, disaster, or widespread conflagration which cannot be met with the facilities of one of the parties to this agreement, the other party agrees, upon proper request, to furnish law enforcement assistance to the party requesting the assistance upon either an actual or standby basis. The extent of assistance to be furnished under this agreement shall be determined solely by the party furnishing the assistance, and it is understood that the assistance furnished may be recalled at the sole discretion of the furnishing party.

LAW ENFORCEMENT ASSIST AGREEMENT
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EXHIBIT 8

(a) A proper request for the Tribe shall only be communicated directly, either formally or informally, by the Tribal President or the Chief of Police, or the Chief's designee(s), to the Sheriff's or the Sheriff's designee(s).

(b) A proper request for the County shall only be communicated directly, either formally or informally, by the Sheriff's Office or the Sheriff's designee(s), to the Tribal Chief of Police or the Chief's designee.

(*Id.*) The Assist Agreement did not contain any exceptions for a "proper request" and did not allow for a tribal officer to be conferred jurisdiction outside the reservation where there was not a specific request in compliance with the Assist Agreement. Certainly, a request for a non-tribal ambulance unit does not comply with the Assist Agreement.

ii. No Law Enforcement Entity or Law Enforcement Officer Requested Officer Neuenfeldt's Assistance on the Night of June 17, 2017.

Moody County Sheriff's Deputy Carl Brakke was in his cruiser performing a drive-by security check of a residence located in Moody County at 24364 484th Avenue, Dell Rapids, South Dakota, on the evening of June 17, 2017. (Docket 85-9, at 21:5-21:8.) Logan Baldini, a certified, but untrained

deputy, was riding along with Brakke. (*Id.* at 21:9-22:1.) The property owners of the residence notified Brakke of trespassing concerns, which prompted his drive-by security check on that night. (*Id.* at 29:8-30:5.)

On the night of June 17, 2017, at 11:50 p.m., Brakke radioed the Moody County dispatch when he came upon what looked like a high school party. (*Id.* at 32:7-34:1); (*see also* Beardsley Aff., Ex. A, at Plf.00869 at 11:58:34: Moody County Radio Log.) Brakke then radioed Flandreau City Police Officer Brent Goehring to tell him about the high school party. (*Id.* at 52:14-53:24.) Goehring responded, "10-4. We can start heading that way." (*Id.*)

Eight minutes later, Brakke radioed Moody County's dispatch to inform them that one of the high schoolers was possibly having a seizure. (*Id.* 36:16-37:8 39); (*see also* Beardsley Aff., Ex. A, at Plf.00869 at 11:58:34: Moody County Radio Log.) Brakke then made a *specific call for a non-tribal ambulance* to the Moody County dispatch to help with the possible seizure. (*Id.*) Brakke never stated that the possible seizure was an emergency. (*Id.*) Brakke never stated he needed assistance from the Flandreau Santee Sioux Tribal Police. (*Id.*) Brakke never requested that Neuenfeldt assist with the possible seizure. (*Id.*) Brakke never made a general call for assist. (*Id.*) Instead, Brakke specifically requested a "529" unit to come assist with a possible seizure. (*Id.*)

Neuenfeldt testified that he responded to the high school party when he heard Deputy Brakke request the non-tribal ambulance because of the possible seizure situation:

127:20 Q. And nobody called and asked for your assistance. Brakke didn't call, Wellman didn't call, Baldini didn't call, correct?
127:23 A. Not specifically.

. . .

129:10 Q. There wasn't any direct call to the tribal officer, was there?
129:12 A. No.
129:13 Q. There wasn't any direct call to any tribal officer that was on duty or not on duty, correct?
129:15 A. Not specifically.

. . .

132:7 Q. Okay. And sometimes when there's radio traffic, such as this instance, the testimony of Officer Kurtz was he just showed up. There wasn't any – there wasn't any call for him. He just kind of heard what was going on. Is that what happened with you is you just kind of heard there was something going on?
132:13 MS. ROCHE: Objection, form.
132:14 THE WITNESS: No, Deputy Brakke called out for assistance when one of the people he was with started having a seizure
132:17 BY MR. STEVEN BEARDSLEY:
132:18 Q. Okay. So they were asking for somebody to help with the seizure. You understood the ambulance was coming then?
132:20 A. Correct.
132:21 Q. And the ambulance would be probably be suited to handle somebody with a seizure?
132:23 A. If they got there soon enough. Seizures can be deadly.
132:25 Q. Okay. So the general assistance call was for – to help with the seizure and the ambulance – you knew the ambulance was already on the way?
133:3 A. Yes.
133:4 Q. And you weren't going to take over for the people that were with the ambulance?
133:6 A. If I got there first, I would have –
133:7 Q. Okay.
133:8 A. --which I believe I did.
133:9 Q. But you didn't take over with the seizure, according to the records.
133:11 A. No, he was – had completed his seizure.
133:12 Q. And he was done, he was fine?
133:13 A. Correct.

(Docket 85-4, at 127:20-127:23, 129:10-129:15, and 132:7-133:13.)

While the Government asserts that there was a general call for assistance and inter-agency calls for "any available units" or "can you start all units to my location," no radio transmission exists to evince these assertions.[1] (*See* Docket 89-1, at pgs. 6, ¶ 2.) Brakke stated if there was a request for assistance it would have shown up in a radio log:

12:16	Q.	If assistance is requested, backup is requested, that would appear in the log, correct?
12:18	A.	I will say it should, yes. It would be – I mean, I would hope on both ends of it should be recorded, yes.
12:20	Q.	And I'm sure, Carl, you've heard of the 10-54 call.
12:21	A.	I have, yes.
12:22	Q.	What does that mean?
12:23	A.	It's an officer requesting emergency backup.
12:24	Q.	Give me some examples of when that would occur?
12:25	A.	I would say any situation that an officer felt like he was not able to maybe safely do whatever he's trying to do or in a situation where he needs more units.
13:3	Q.	A dangerous situation?
13:4	A.	It could—yeah, that would fit in that realm, yeah.
13:6	Q.	I think Sheriff Wellman indicated an instance where somebody is getting their ass kicked. Would that be a fair characterization?
13:9	A.	I would say so, yeah.
13:10	Q.	And that would certainly appear in a dispatch log if there was a 10-54 call?
13:12	A.	Yeah.

(Docket 85-9, at 12:16-13:12.)

[1] The Government asserts in their Brief in Support of Motion to Dismiss that allegedly there was a "Brookings Inter-Agency channel" that was used on the night in question and that "[t]he parties have been unable to locate recordings" from this channel. (Docket 89-1, at pg. 6 n. 4). However, it was not Plaintiffs' burden to "locate" these recordings; it was the Government's burden. *See Acosta v. La Piedad Corporation*, 894 F.3d 947, 952 (D.S.D. July 3, 2018). Todd Dravland, system engineer for the Brookings Inter-Agency Channel, reported to Plaintiffs that on the date of June 18, 2017, there was "mechanical Hard Disk Drive" failure that "wiped" the alleged recordings. (Beardsley Aff., Ex. B, Todd Dravland email, received June 23, 2020.) Regardless, any testimony from any officer involved in this case regarding phantom calls for assistance on this radio channel should be discredited, because their testimony is refuted by the only radio log that exists on record.

As a result of Neuenfeldt's conduct and resulting tragedy, BIA Internal Affairs conducted an investigation. Special Agent Brock Baker interviewed Neuenfeldt on October 25, 2017. During the interview, Baker inquired as to how Neuenfeldt arrived at the scene of the high school party outside his jurisdiction. Neuenfeldt claimed that a 10-54 call was made for everybody and anybody to respond:

14:19	Q. Did they -- was he calling for backup, or was he calling for assistance? Because there's –
14:21	A. Assistance.
14:22	Q. Okay. Because there's different ways of calling, probably need some extra units, or am I calling for -- was he calling for, I need back -- like, assistance. Like, I need --
15:1	A. He was calling for assistance.
15:2	Q. Okay. Because there's different ways of calling for backup when you -- immediate backup or --
15:4	A. Yep.
15:3	Q. -- are you just calling for a couple other offi-- units to come help me.
15:7	A. Yeah. Generally, he would say, 10-54, which means everybody and anybody that hears on the radio responds.

(Beardsley Aff. Ex. XX at 14:19-15:9: Brock Baker's interview of Officer Neuenfeldt, 10/25/2017.) Not surprisingly, Neuenfeldt's statements to the BIA Special Agent cannot be substantiated by the evidence and are entirely false. (Docket 85-9, at 12:16-13:12.) Brakke did not recall if he requested assistance and the radio log reflects he did not:

36:16	Q. Okay. And you respond, would I be able to borrow one of them? I have a car/deer and my deputies are down south at a location that is not – inaudible – or a party going on. Do you recall requesting for assistance specifically for these HP officers that's referenced here in this conversation?
36:21	A. I don't recall how I asked for the help that night.

26:22 Q. Okay. In any event, what we've just discussed here, there's not one indication of a general call for assistance, correct?
36:25 A. For what you have presented here, no.
37:1 Q. And there's also not any indication of a 10-54?
37:2 A. For what you have presented again, no.

(Docket 85-9, at 36:16-37:2.) Trooper Isaac Kurtz of the South Dakota Highway Patrol also stated there was no request for assistance:

54:14 Q. And on this command log there is no indication in any of the command log that Deputy Brakke called and made a general request; isn't that true? You can read the whole thing if you would like.
54:18 A. Correct.

(Docket 85-16, at 54:14-54:18.)

There was no knowable emergency that required the Assist Agreement to be utilized. Brakke testified that neither a high school party nor a possible seizure were considered an emergency:

38:3 Q. Sure, okay. But this wasn't an emergency?
38:4 A. I'll be honest –
38:5 MS. ROCHE: Objection. Object to the extent we're calling for a legal conclusion or speculating. You may answer.
38:8 THE WITNESS: What was your question, sir?
38:9 BY MR. STEVEN BEARDSLEY:
38:10 Q. This was not an emergency?
38:11 MS. ROCHE: The same objection.
38:12 THE WITNESS: Not—No.

. . .

39:20 Q. By the time the ambulance arrived, what was the condition of this young kid?
39:22 A. His seizure had completed or passed, if you will.
39:23 Q. So he was not taken to the hospital?
39:24 A. He was not.
39:25 Q. That wouldn't be an emergency situation either, correct?
40:2 MS. ROCHE: Again, calls for a legal conclusion. You may answer.

40:4 THE WITNESS: I honestly didn't hear what you asked me.
40:6 BY MR. MICHAEL BEARDSLEY:
40:7 Q. That would not be an emergency situation, correct?
40:8 MS. ROCHE: The same objection.
40:9 BY MR. MICHAEL BEARDSLEY:
40:10 Q. It had resolved by that time?
40:11 A. After the seizure and after he's checked by medics, I would agree, if they determined it's no longer an emergency, that that would no longer be an emergency then.

(Docket 85-9, at 36:3-38:12 and 39:20-40:13.)

Even if there was a knowable emergency that required the Assist Agreement to be utilized on the evening of June 17, 2017, Brakke would have never requested Neuenfeldt's assistance. Brakke did not trust Neuenfeldt:

19:18 Q. So based on your experience with Mr. Neuenfeldt, you didn't trust the man?
19:20 A. That's where I come from.

(Docket 85-9, at 19:18-19:20.) In fact, given Neuenfeldt's marred history as a law enforcement officer, Moody County was instructed to document the times in which Neuenfeldt jumped calls—like he did on June 17, 2017:

63:9 Q. Okay. So the dispatchers were specifically told to document instances of Mr. Neuenfeldt jumping calls? You have to –
63:12 A. Yes, sir. Sorry.
63:13 Q. And that direction was provided by Sheriff Wellman, correct?
63:15 A. And/or people being trained or the trainers, I should say, would have given that direct to the dispatchers. I don't remember where specifically it came from, but it was through his direction, yes.

. . .

66:8 Q. And Sheriff Wellman had indicated in his testimony that he advised his deputies that if this did occur, that they were to tell Neuenfeldt to leave. You would have no reason to dispute what Sheriff Wellman has testified to?

66:12 MS. ROCHE: Object to the characterization of that. You can answer.
66:14 THE WITNESS: I don't want to put words into his mouth in that realm, but in certain situations, if he wasn't needed, there was a direction that he could be 22'd. Again, another use of a 10 code, but 10-22 means to stand down or to stop.

(Docket 85-9, at 63:9-63:12 and 66:8-66:14); (Docket 85-17, at 26:3-26:9.)

Neuenfeldt's marred history included "jumping calls" where his assistance was never requested. Sheriff Troy Wellman of Moody County, Neuenfeldt's former supervisor, confirmed that Neuenfeldt had a habit of jumping calls:

25:4 Q. And so can you explain to us what it means when you're jumping calls from the tribal officer, Neuenfeldt, to Moody County?
25:7 MS. ROCHE: Objection, form.
25:8 THE WITNESS: If we were on a traffic stop outside of town, we would not request any help. The deputies that I have and had at the time are capable of doing their job. That's why I hired them. If we need help, we'll ask for it, but there was times that Rob would show up on a call or on a traffic stop that he was not requested for backup or any kind of mutual aid at that point.

(Docket 85-17, at 25:4-25:15). Given the record, Neuenfeldt had no conferred jurisdiction under the Assist Agreement on the night of June 17, 2017.

b. Procedural History

On December 15, 2021, this Court signed an order allowing the Plaintiffs to Conduct Limited Jurisdictional Discovery and to Extend Briefing on Pending Motions agreed to by both parties. (Docket 104.) As such, Plaintiffs proceeded to depose Joel Chino, who was the Assistant Special Agent in Charge ("ASAC") for the Tribe's 638-contract during the time period in which Robert Neuenfeldt was the Chief of Police for the Tribe. (Beardsley Aff., Ex. C, at 6:22-7:5: Joel Chino Deposition, taken 2/4/2022.)

Chino testified that part of the Government's job under a 638-contract is to ensure compliance with federal laws:

44:12 Q. Part of that agreement is that there needs to be compliance with the laws of the federal government?
44:14 A. Yes, there needs to be compliance.
44:15 Q. Okay. And with regulations?
44:16 A. Yes.
44:17 Q. And with the terms of the 638 contract?
44:18 A. Yes.

(*Id.* at 44:12-44:18.) However, when it came to ensuring compliance,[2] all Chino did was write letters informing the Tribe of their continual failure to come into compliance with federal law, federal regulations, and their 638-contract:

149:15 Q. Okay. So I'm going to ask this again because I'm not talking about the files review. I'm just asking the question. You know from the next letters that I'm going to go into they did not comply with your request, did they?
149:20 A. To my knowledge they did not comply with my request.
149:22 Q. Thank you. And you did nothing between December 30, 2015 and the next letter, March 30, 2016 to make the tribe comply with what you're asking for, correct?
149:25 A. I did nothing to make them comply.

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[2] The BIA was mandated by 25 C.F.R Part 12.12 to ensure the Tribe's compliance with their 638-contract:

> The regulations in this part are not intended to discourage contracting of Indian country law enforcement programs under the Indian Self-determination and Education Assistance Act (Pub.L. 93–638, as amended, 25 U.S.C. 450). The Deputy Commissioner of Indian Affairs *will ensure minimum standards are maintained in high-risk activities where the Federal government retains liability and the responsibility for settling tort claims arising from contracted law enforcement programs.* It is not fair to law abiding citizens of Indian country to have anything less than a professional law enforcement program in their community. Indian country law enforcement programs that receive Federal funding and/or commissioning will be subject to a periodic inspection or evaluation to provide technical assistance, *to ensure compliance with minimum Federal standards*, and to identify necessary changes or improvements to BIA policies.

(emphasis added.)

(*Id.* at 149:15-149:25.) In fact, Chino's supervisor, Jeremiah Lone Wolf, who was the Acting Special Agent in Charge for the Tribe's 638-contract, and Yvonne LaRoche, the Awarding Official for the Tribe's 638-contract, did nothing to ensure compliance[3] either:

150:12	Q. As far as you know, Mr. Lonewolf, who was your supervisor, did nothing to ensure compliance either during that time period, correct?
150:15	A. To my knowledge, no.
150:16	Q. And no awarding official did anything to ensure compliance either, as far as you know?
150:18	A. To my knowledge, no.

(*Id.* 150:12-150:18.)

Chino testified that no one at the BIA ever told Neuenfeldt or any other tribal officers that they could not be enforcing federal law without a Special Law Enforcement Commission ("SLEC") certification:

173:20	Q. Sure. Nowhere in the March 30, 2016, Exhibit 56, did you indicate, by the way, these police officers are not federal officers?
173:23	A. No, I don't see that anywhere in the letter.
173:24	Q. And nowhere did you say in any letter ever that they're not federal officers, these police officers?
174:1	A. No, I did not.
174:2	Q. And nowhere in any letter did you say that these tribal officers are not federal officers unless they have an SLEC. You've never written that?
174:5	A. No, because that wasn't a subject.
174:6	Q. And you have no letter to Officer Neuenfeldt indicating that he's not a federal officer?
174:8	A. No, not to my knowledge.
174:9	Q. You have no letter to Officer Cottier that he's not a federal officer?
174:11	A. No, not to my knowledge.

[3] The Government continues to argue that Agent Chino sending letters was the extent of their responsibility over the Tribe and the 638-contract, however 25 C.F.R. Part 12.12 demands the Government *ensure compliance*. *Supra* n. 2.

174:12 Q. You have no letter to any Flandreau Santee Sioux Tribe officer or official of the Tribe saying that Neuenfeldt and Cottier were not federal officers?
174:15 A. There's no letter, no.
174:16 Q. There's no memo?
174:17 A. There's no memo.
174:18 Q. There is no email?
174:19 A. Not to my knowledge.
174:20 Q. And there's no indication in written form anywhere that ever states that the Flandreau Santee Sioux tribal officers were not federal employees and federal officers unless they have an SLEC, correct?
174:24 A. No. Just in the contract.
174:25 Q. Okay. So there's no letter informing anyone that they – that the tribal officers need to have an SLEC to be a federal officer, correct?
175:3 MS. ROCHE: Objection; form.
175:4 THE WITNESS: There's no letter that I'm aware of.
175:6 BY MR. S. BEARDSLEY:
175:7 Q. Okay. But you warned the tribe of a whole bunch of other things that they need to do. But you didn't warn the tribe that, by the way, they're not federal officers if they don't have an SLEC?
175:11 A. No.

(*Id.* at 173:20-175:11.)

On February 25, 2022, Plaintiffs proceeded with an additional limited deposition of Officer Neuenfeldt. Within the limited eighteen-minute deposition, Officer Neuenfeldt repeatedly affirmed that during his tenure as the Chief of Police of the Tribe, he unilaterally executed federal search warrants related to violations of federal law, seized evidence related to violations of federal law, and arrested individuals for federal law violations:

8:8 Q. And during the time that you were the chief and before that when you were a tribal officer before the elevation to chief you made arrests on the reservation?
8:12 A. Yes.
8:13 Q. Okay. And that included violations of tribal laws?
8:14 A. Yep.
8:15 Q. Included violations of federal laws?

8:16 A. Yep.
8:17 Q. Did you conduct searches, sir?
8:18 A. Yes.
8:19 Q. Okay. And so when I say that, I'm including not only searches of a person's body, but it may be their vehicle or even where they live at times?
8:22 A. Correct.
8:23 Q. Okay. And you seized evidence?
8:24 A. Yes.
8:25 Q. Okay. And can you tell me, what kinds of evidence would you seize?
9:2 A. Oh, we had counterfeit monies, drugs, drug paraphernalia, open containers, alcohol, marijuana.
9:5 Q. Okay. And you arrest people for violations of federal laws?
9:7 A. We – I did do a federal search warrant. I guess that would be – would that be a federal law?
9:9 Q. Sure.
9:10 A. Or a federal arrest warrant.
9:11 Q. Okay. And that was on the Flandreau Santee Sioux Tribe Reservation?
9:13 A. Correct.
9:14 Q. And that federal arrest warrant then included taking someone into custody, and even though it was prosecuted perhaps in the federal courts in Sioux Falls, you executed this federal arrest warrant on tribal land or Indian Country?
9:19 A. Correct.
9:21 Q. Did you arrest people for other crimes besides that federal arrest warrant?
9:22 A. Yes.
9:23 Q. And before I go on to those other crimes, Rob, that federal arrest warrant was for what, do you remember?
10:1 A. I believe it was for parole – a parole violation.
10:2 Q. Okay. And did you have the opportunity to arrest people for things like assaults?
10:4 A. Assaults, domestics, yes.
10:5 Q. Okay. Robbery?
10:6 A. I am not sure I did one of those, but we could have.

(Beardsley Aff., Ex. D, at 8:8-10:6: Robert Neuenfeldt's Second Deposition, taken 2/25/2022.) At all times during his tenure, Neuenfeldt believed he was empowered to enforce federal law:

10:8 Q. Okay. And you believe that you could do that as the Chief of Police, is arrest people for robbery if it occurred?
10:11 A. If it occurred, yes.
10:12 Q. Sure. Burglary?
10:13 A. Yes, we would have. I don't think I had one, but –
10:15 Q. But you believed you had authority to do that as a federal officer?
10:17 A. Correct.
10:18 MS. ROCHE: Objection; form.
10:19 Q. (BY MR. STEVEN BEARDSLEY) How about something like kidnapping and rape, did that occur during your time in which you had the opportunity to arrest people for those charges?
10:23 A. We did – I do believe we did have a rape when I was chief.
10:25 Q. Okay. And you arrested, and then it was prosecuted, you believe, in the federal court system there – it would be in Sioux Falls?
11:3 A. Yes, it was in Sioux Falls.
11:4 Q. Okay. And you believe that you could arrest people for violations of federal crimes on the reservation?
11:7 A. Correct.
11:8 Q. And you had authority at the time to arrest people – and I don't mean to repeat myself, but I'm going to do this kind of in order. You believe you had authority to arrest people, and you did?
11:13 A. Correct.
11:14 Q. And you believe you had authority to seize evidence, and you did that too?
11:16 A. Correct.
11:17 Q. And you believe you had authority to search, and you did that too?
11:19 A. Yes.

(Beardsley Aff., Ex. D, at 10:8-11:19: Robert Neuenfeldt's Second Deposition, taken 2/25/2022.) Neuenfeldt also testified that other tribal officers under his authority had been empowered with the same ability:

11:24 Q. And so those tribal officers also had the authority to enforce these federal laws in the same manner that you did as the chief?
12:2 Q. MS. ROCHE: Objection; form, calls for a legal conclusion.
12:5 Q. (BY MR. STEVEN BEARDSLEY) Go ahead.

12:6 A. Yes.

(*Id.* at 11:24-12:6.) Neuenfeldt was acting under the authority that the BIA empowered him with:

13:3 Q. Okay. And you acted accordingly knowing that you would have that authority, or believing you had that authority?
13:6 A. Yes, sir.
13:7 Q. Okay. And you were never told differently by anybody at the BIA saying you were not a federal officer, were you?
13:10 MS. ROCHE: Objection; form.
13:11 A. Not to my knowledge, no, I was not told that.
13:12 Q. (BY MR. STEVEN BEARDSLEY) Okay. And you wee never told to just remain at your desk by anybody at the BIA, were you?
13:15 A. No.
13:16 Q. And you were never told to stop enforcing federal laws at any time by the BIA?
13:18 A. No.
13:19 Q. And you were never told to stop arresting, searching, and seizing as we talked about earlier, were you?
13:22 A. No.
13:23 Q. And, Rob, you believed at all times you were acting under the color of federal law; is that correct?
14:1 MS. ROCHE: Objection; form, calls for a legal conclusion. You may answer.
14:4 A. That would be my belief, yes.

(*Id.* at 13:3-14:4.) No one at the BIA or the Tribe ever told Neuenfeldt to stop enforcing federal law:

14:12 Q. There have been some letters from the BIA, and they have been marked as exhibits, that came from either Chino or Lonewolf that went to the tribe. You were never given copies of those letters that indicate you weren't supposed to act in any manner outside the office?
14:18 A. I have never seen any of those, no.
14:19 Q. Okay. And you were not told by anyone at the BIA that you need an SLEC to operate as a federal law enforcement officer, were you?
14:22 A. No.

14:23 Q. And you were never warned verbally that you had to have an SLEC to operate as a federal law enforcement officer, correct?
15:1 A. Correct.
15:2 Q. It's going to sound redundant and I apologize for that, Rob, but in addition to any letter, there was no memo, no email, no indication whatsoever by the BIA that in order to operate as a federal law enforcement officer you had to have an SLEC, am I correct?
15:8 MS. ROCHE: Objection; form. You can answer.
15:10 A. To my knowledge that would be correct.
15:11 Q. (BY MR. STEVEN BEARDSLEY) And no one at the tribe ever told you that either, correct?
15:13 A. No.

(*Id.* at 14:12-15:13.)

The record of this case reflects two clear truths:

(1) Neuenfeldt searched, seized, and arrested individuals for violations of federal law, never heard of anything like an "SLEC", and was never told to stop; and

(2) Plaintiffs have centered their allegations on the Government and Neuenfeldt's negligence from the beginning of this case.

There is no dispute on record of these truths. It is for those reasons, the Government's Motion to Dismiss is unfounded and should be denied.

III. DISCUSSION

a. Neuenfeldt Was a Law Enforcement Officer Empowered by the United States to Execute Searches, Seize Evidence, and Make Arrests for Violations of Federal Law.

Neuenfeldt was a federal law enforcement officer with the power to execute searches, seize evidence, and to make arrests for violations of Federal Law. Neuenfeldt was empowered to act as a federal officer as defined by 28 U.S.C. § 2680(h). Neuenfeldt enforced federal law on the FSS Reservation on numerous occasions. The Government was aware that he lacked an SLEC and

still did nothing to stop Neuenfeldt from enforcing federal law and arresting individuals who were later prosecuted in federal court. Not only did Neuenfeldt act under his apparent authority, finding that Neuenfeldt is a federal officer for purposes of the law enforcement proviso is in-line with Supreme Court precedent and 8th Circuit authority.

i. *Millbrook v. United States* Broadened The Law Enforcement Proviso To More Closely Embody The Text Of The Exception.

The text of the intentional torts exception under the FTCA reads:

> The provisions of this chapter and § 1346(b) of this title [28 U.S.C.A. § 1346(b)] shall not apply to—
>
> . . .
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, that, with regard to acts or omissions of *investigative or law enforcement officers* of the United States government, the provisions of this chapter and § 1346(b) of this title [28 U.S.C.A. § 1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. *For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.*

28 U.S.C. § 2680(h) (emphasis added). The aforementioned, emphasized phrase, commonly referred to as the "law enforcement proviso exception," was most recently revisited by the Supreme Court in 2013 in *Millbrook v. United States*, 569 U.S. 50 (2013).

In *Millbrook*, the Supreme Court determined that the operative factor for determining whether an officer was an "investigative or law enforcement officer" for purposes of the law enforcement proviso is whether the officer was empowered to search, seize evidence, or make arrests for violations of federal Law. *Id.* at 56; *see also B.A. v. United States*, CV No. 5:21-106-DCR, 2021 WL 4768248, *4 (D. Ky. Oct. 12, 2021). There, the plaintiff brought an FTCA claim after a correctional officer sexually assaulted him while in prison. *Millbrook*, at 50. The case was dismissed by the lower court for lack of jurisdiction based on 28 U.S.C.A. § 2680(h) and specifically the law enforcement proviso. *Millbrook*, 569 U.S. at 56. The 3rd Circuit affirmed. *Id.* at 50.

On appeal to the United States Supreme Court, plaintiff argued that the law enforcement proviso within § 2680(h) waived the Government's immunity because the correctional officers accused of assault had the legal authority to search, seize evidence, and make arrests for violations federal law. *Id.* at 51. The Court agreed and reversed.[4] *Id.* at 57.

Writing for the majority of the Court, Justice Thomas discussed that if Congress "intended to *further narrow the waiver's scope*, it could have used language to that effect." *Id.* at 50-51 (emphasis added).

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[4] The Court expressed no opinion as to the correctional officer in *Millbrook* qualifying as "investigative or law enforcement officers" because of a concession made in the proceedings below and instead focused its opinion on how the unambiguous text of the law enforcement proviso should be interpreted. *Millbrook*, 569 U.S. at 55 n. 3.

However, Congress did not. *Id.*; *see also* 28 U.S.C. § 2680(h) (limiting the inquiry of who qualifies as a "investigative or law enforcement officer" to those empowered by law to execute searches, seize evidence and make arrests for federal violations of the law). Rather, Congress intended that the inquiry is to be strictly related to the authority exercisable by the law enforcement officer seeking the exception because that is what the text of the proviso provides. *Millbrook*, 569 U.S. at 57.

Congress intended only for those officers within the scope of their employment, with the power to search and seize evidence, and make arrests for violations of federal law to be held liable for their intentional acts under 28 U.S.C.A § 280(h). *Id.* at 56-57. While *Millbrook's* textual analysis did not consider the Congressional intent behind the law enforcement proviso, the Court's holding brought the proviso more in line with the intent of the law enforcement proviso.[5] *See Ten Eyck v. United States*, 463 F.Supp.3d 969, 989 (D.S.D. May 28, 2020) (this Court has already held that "Neuenfeldt was acting under color of federal law" on June 17-18, 2017); (*See* Docket 31.) The language Congress ultimately enacted indicates a broader context of who qualifies as a "investigative or law enforcement officer," and *Millbrook* confirmed that.

[5] *See* S. Rep. No. 93-588, at 8 (Nov. 29, 1973), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2791) (stating "[t]he effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: assault battery, false imprisonment, false arrest, malicious prosecution, or abuse of process").

Additionally, the Supreme Court has recognized that if Congress had intended to construe ambiguities in favor of immunity, Congress would have unequivocally expressed that preference. *See Lane v. Pena*, 518 U.S. 187, 192 (1996); *U.S. v. Williams*, 514 U.S. 527, 531 (1995). However, Congress has not expressed that preference as to the law enforcement proviso. To that effect, not even a statute's legislative history can "supply a waiver that does not appear clearly in any statutory text." *Lane*, 518 U.S. at 192. The majority's analysis in *Millbrook* relied on this very premise. *Millbrook*, 569 U.S. at 57 (stating "we, therefore, decline to read such a limitation into unambiguous text.") The Supreme Court has repeatedly insisted this premise be followed. *See e.g. Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 491–92 (2006); *Smith v. United States*, 507 U.S. 197, 203 (1993); *Kosak v. United States*, 465 U.S. 848, 853 at n.9 (1984) (warning against overextending the exceptions in section 2680); *United States v. Yellow Cab Co.*, 340 U.S. 543, 554 (1951).

ii. Post-*Millbrook* Courts, Including The Eighth Circuit, Favor Interpreting The Law Enforcement Proviso Broadly.

Following the *Millbrook* decision, lower courts have focused their analysis of the law enforcement proviso on the strict text of the waiver of immunity and the broad interpretation of what type of federal employee qualifies as an "investigative or law enforcement officer." Since *Millbrook*, multiple circuits have followed the majority's opinion and found that a

forensic scientist aiding in crime scene investigation and a transportation security officer ("TSOs") or a transportation security agent screener ("TSA") performing customary searches of flight attendees at airports were considered "investigative or law enforcement officer[s]". *Bunch v. United States*, 880 F.3d 938, 945-46 (7th Cir. 2018); *Pellegrino v. U.S. Trans. Sec. Admin.*, 937 F.3d 164, 180-81 (3d Cir. 2019); *Iverson v. U.S.*, 973 F.3d 843, 854-55 (8th Cir. 2020).

The Seventh Circuit Court of Appeals found a reasonable juror could find that a forensic chemist qualified as a "investigative or law enforcement officer" and declined to dismiss an FTCA suit on the basis of jurisdiction. *Bunch*, 880 F.3d at 945-46. In *Bunch,* the Seventh Circuit reversed the lower court's grant of summary judgment in favor of the Government because plaintiff satisfied their burden in rebutting the affirmative defense known as the law enforcement proviso. *Id.* at 945-46. The plaintiff showed that the forensic chemist was involved in crime-scene investigations where he identified relevant evidence for colleagues. *Id.* at 945 (discussing "we note that section 2680(h) does not require [the forensic chemist] to have had authority to seek and execute search warrants; it speaks only of executing searches"). On the basis of this evidence, the court determined the plaintiff had satisfied their burden in showing there was an issue of fact regarding the forensic chemist's status as a federal officer for purposes of the law enforcement proviso. *Id.* at 946.

The Third Circuit Court of Appeals found a reasonable juror could find that a transportation security officer ("TSO") qualified as a "investigative or law enforcement officer." *Pellegrino*, 937 F.3d at 180-81. The court's interpretation of the law enforcement proviso in *Pellegrino* stayed in line with the *Millbrook* and *Bunch* decisions. *Id.* at 172 (stating "[o]ur decision today that TSOs are 'officer[s] of the United States' is consistent with the broad constructions announced in *Millbrook* and *Bunch*"). Their holding couched the TSO's status as a federal officer in the TSO's ability to search, seize evidence, and make arrests of individuals proceeding through airport security. *Id.* at 180-81.

Likewise, the Eighth Circuit Court of Appeals found that TSA screeners do qualify as "investigative or law enforcement officers" for purposes of the law enforcement proviso. *Iverson*, 973 F.3d at 854-55. The court, in-line with *Millbrook* and it's progeny, analyzed the broad unambiguous text of the proviso and the actions of the TSA screener in question. *Id.* at 846. Similar to *Bunch*, the Eighth Circuit reversed the lower court's dismissal on the basis of the law enforcement proviso because of the "highly intrusive search techniques" a TSA screener was able to perform at an airport. *Id.* at 855.

In *Bunch*, *Pellegrino*, and *Iverson*, the analysis of the issue focused on the three federal employees' ability to search, seize, and make arrests for violations of federal law. *Millbrook* and its progeny cannot be ignored and require a finding that Neuenfeldt was a "investigative or law enforcement officer." As such, the Government's motion should be denied.

ii. Officer Neuenfeldt was Empowered by the Government to Search, Seize, and Make Arrests for Violations of Federal Law.

In the case at bar, the Government argues that Neuenfeldt, the Chief of Police for the entire Flandreau Santee Sioux Reservation, is not an "investigative or law enforcement officer" for the purpose of the law enforcement proviso because he never received SLEC training. (Docket 89-1, at pg. 24 ¶¶ 1-2.) However, given *Millbrook's* interpretation of the issue, the fact that the Government refused to train him cannot be used as a shield. Additionally, there is no expressed preference by Congress or the Supreme Court to construe the unambiguous text of the law enforcement proviso in favor of immunity. *See Lane*, 518 U.S. at 192; *Williams*, 514 U.S. at 531. Further, the federal employees in *Bunch, Pellegrino*, and *Iverson* did not have SLECs.

The text of the law enforcement proviso does not support dismissal on the basis that the Government chose not to train Neuenfeldt. *See Millbrook*, 569 U.S. at 50-51 (holding if Congress had intended to further narrow the waiver's scope, to include something like an SLEC certification or specific training, "it could have used language to that effect"). This issue must be analyzed under *Millbrook* and its progeny. Under those cases, if Neuenfeldt was empowered to search, seize, or make arrests for violations of federal law, he is considered an "investigative or law enforcement officer" for purposes of the law enforcement proviso.

Officer Neuenfeldt had the ability to execute searches in relation to violations of federal law:

8:17	Q.	Did you conduct searches, sir?
8:18	A.	Yes.
8:19	Q.	Okay. And so when I say that, I'm including not only searches of a person's body, but it may be their vehicle or even where they live at times?
8:22	A.	Correct.

(Beardsley Aff., Ex. D, at 8:17-8:22: Robert Neuenfeldt's Second Deposition, taken 2/25/2022.) In fact, on numerous occasions Neuenfeldt searched for evidence connected to violations of federal law while he was the Chief of Police for the Tribe. (*Id.*) This is exactly in-line with the Eighth Circuit's rationale for reversing the Government's Motion to Dismiss in *Iverson*. *See Iverson*, 973 F.3d at 851 (discussing the plain meaning of "empower" to mean "to delegate legal power to" and determining TSO's are empowered to search because of their *ability* to screen passengers and property at airports). Neuenfeldt had the ability to execute searches and did.

Further, Neuenfeldt's searches were certainly more active than the forensic chemist in *Bunch*, where the Seventh Circuit found a jury was permitted to decide whether they were an "investigative or law enforcement officer" by simply identifying evidence at a crime scene. *Bunch*, 880 F.3d at 946-945 (discerning that the forensic chemist in question was an "investigative or law enforcement officer" because he identified "relevant evidence for colleagues during crime-scene investigations" and played an "active" role at crime scenes). Neuenfeldt's ability to unilaterally execute

searches in connection with federal violations makes him a "investigative or law enforcement officer."

Officer Neuenfeldt had the ability to seize evidence in connection with violations of federal law.

8:23 Q. Okay. And you seized evidence?
8:24 A. Yes.
8:25 Q. Okay. And can you tell me, what kinds of evidence would you seize?
9:2 A. Oh, we had counterfeit monies, drugs, drug paraphernalia, open containers, alcohol, marijuana.
9:5 Q. Okay. And you arrest people for violations of federal laws?
9:7 A. We – I did do a federal search warrant. I guess that would be – would that be a federal law?

(Beardsley Aff., Ex. D, at 8:23-9:7: Robert Neuenfeldt's Second Deposition, taken 2/25/2022.) Again, on numerous occasions Neuenfeldt seized evidence in connection with violations of federal law while he was the Chief of Police for the Tribe. (*Id.*) In *Iverson*, the Government asserted that 28 U.S.C. § 2680(h) only applied to "traditional law enforcement officers" and that a TSO could not be covered by the law enforcement proviso. *See Iverson*, 973 F.3d at 852. However, the Eighth Circuit, following *Millbrook* and its progeny, determined that because "execute searches is followed by seize evidence or make arrest" within the law enforcement proviso, the meaning of the text is limited only by those terms. *Id.* Thus, Neuenfeldt seizing evidence in connection with violation of federal law on multiple occasions qualifies him under the law enforcement proviso as an "investigative or law enforcement officer" just as it qualified the forensic scientist in *Iverson*.

Officer Neuenfeldt had the ability to make arrests for violations of federal law. It is imperative for this Court to understand that Neuenfeldt executed federal arrest warrants during his time as Chief of Police for the Tribe and those arrestees were prosecuted in federal court:

9:14	Q.	And that federal arrest warrant then included taking someone into custody, and even though it was prosecuted perhaps in the federal courts in Sioux Falls, you executed this federal arrest warrant on tribal land or Indian Country?
9:19	A.	Correct.
9:21	Q.	Did you arrest people for other crimes besides that federal arrest warrant?
9:22	A.	Yes.

(Beardsley Aff., Ex. D, at 9:14-9:22: Robert Neuenfeldt's Second Deposition, taken 2/25/2022.) Not only did Neuenfeldt have the ability to make arrests, and believed he had the ability, he said that all tribal officers on the FSS Reservation had these powers. (*Id.* at 11:20-12:6.)

Additionally, while the 638-contract did include the qualified section regarding SLEC certification, which the Government relies on in its Motion to Dismiss, the contract also contains multiple sections empowering tribal officers to enforce federal law. (Docket 84, at pgs. 8-9.) If post-*Millbrook* opinions have found that a forensic scientist is an "investigative or law enforcement officer" for identifying evidence at a crime scene and TSOs or TSA screeners are the same given their ability to search bags at an airport, Neuenfeldt must be considered an "investigative or law enforcement officer." Neuenfeldt's ability to execute searches, seize evidence, and make arrests for violations of federal law on the FSS Reservation makes him an "investigative or

law enforcement officer." Individuals arrested by Neuenfeldt for federal offenses were prosecuted because of his empowered authority.

A. The Government Empowered Neuenfeldt's Apparent Authority as a Federal Law Enforcement Officer.

Under South Dakota law, the Government empowered Neuenfeldt to execute searches, seize evidence, and make arrest for violations of federal law because it enabled him to operate from a position of federal authority. "Under general rules of agency law, a principal may be held liable for [the tort] committed by an agent within his apparent authority, even though the agent acts solely to benefit himself." *See Leafgreen v. American Family Mut. Ins. Co.*, 393 N.W.2d 275, 277 (S.D. 1986) (citing *American Soc. Of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 566 (1982)) (stating "[a] principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a [tort] upon third persons is subject to liability to such third persons for the [tort]"). The Government cannot avoid liability for what they knowingly failed to stop.

At no point did the Government attempt to stop Neuenfeldt from enforcing federal law. (Beardsley Aff., Ex. XX at 13:7-14:4 and 14:12-15:8: Robert Neuenfeldt's Second Deposition, taken 2/25/2022); (Beardsley Aff., Ex. XX at 55:2-55:5 and 60:24-62:18: Joel Chino Deposition, taken 2/4/2022.) The Government knew he was not properly trained. It was their job to ensure Neuenfeldt was acting in accordance with federal law and the Government failed.

The Government enabled Neuenfeldt to enforce federal law and cannot benefit from its utter negligence by way of the law enforcement proviso exception. Neuenfeldt was the Government's agent. He was acting for the benefit of his principal, the Government, by enforcing federal law. *See Leafgreen*, 393 N.W. at 278 (stating "If . . . the principal benefits from the agent's act, his liability to the extent of the benefits received is clear"). Arrestees of Neuenfeldt sit in federal prison because of his apparent authority. Neuenfeldt's apparent authority was primed by the Government's willing enablement. Under that apparent authority, Neuenfeldt executed searches, seized evidence, and made arrests for violations of federal law, qualifying him as an "investigative or law enforcement officer."

iv. The Government's Failure to Recognize *Millbrook* and Its Progeny is Fatal to the Government's Motion.

The Government fails to mention *Millbrook* and its progeny in its brief and relies on cases that were decided prior to *Millbrook*. In addition, the Government uses *Gatling* and an affidavit from Agent Chino to support its assertion that Neuenfeldt, the Chief of Police for an entire reservation, is not a "investigative or law enforcement officer." However, the Government's argument is stale and distinguishable.

In *Buxton*, the plaintiff's argued that Public Law No. 101-512 overrode the effect of the law enforcement proviso, thus empowering all tribal officers with the ability to enforce federal law. *Buxton v. United States*, No. CIV. 09-5057-JLV, 2011 WL 4528329, *4 (D.S.D. Sept. 28, 2011). Contrary to *Buxton*,

Plaintiffs in the case at bar do not rely on Public Law No. 101-512 overriding the law enforcement proviso effect. *Id.* at *4-5. In *Buxton*, the Honorable Jeffrey Viken's opinion pivoted on the plaintiff's argument that the Indian Self-Determination Education Assistance Act, as amended by Public Law No. 101-512, overrode the law enforcement proviso exception and empowered tribal officers with the ability to execute searches and arrests for violations of federal law. *Id.* at *4. However, Judge Viken disagreed and upheld the magistrate's report and recommendation that the tribal officers in question did not qualify as a "investigative or law enforcement officer[s]." *Id.* at *5.

Here, Plaintiffs are not arguing Public Law No. 101-512 overrides the effect of the law enforcement proviso. In addition, Plaintiffs in the case at bar have presented evidence to dispute the notion that Neuenfeldt does not qualify as a "investigative or law enforcement officer." *See Id.* at *4 (stating that plaintiff in *Buxton* failed to present any evidence to the magistrate judge to dispute the conclusion that the tribal officers in question were not federal officers for the purpose of the law enforcement proviso).

In *Bob* and *Locke*, both pre-*Millbrook* opinions, the Government provided unchallenged affidavits and declarations where the officer in question did not hold an SLEC and never enforced federal law. *See Bob v. United States*, No. Civ. 07-5068-RHB, 2008 WL 818499, *2-3 (D.S.D. March 26, 2008); *Locke v. United States*, 215 F.Supp.2d 1033, 1038 (D.S.D. July 29, 2012). Unlike in *Bob* and *Locke*, Plaintiffs have rebutted the declaration of the Government regarding Neuenfeldt's ability to enforce federal law on the reservation without

an SLEC. (Beardsley Aff., Ex. D, at 8:8-11:19, 13:4-14:4, and 14:12-15:3: Robert Neuenfeldt's Second Deposition, taken 2/25/2012.) The Honorable Richard Battey's opinion in *Bob* relied on the fact that the Government provided an unchallenged affidavit stating that none of the officers involved in the incident had an SLEC. *Bob*, at *2. The plaintiff failed to rebut the affidavit and requested additional discovery because he asserted more discovery would show that the officers in questions were "*assisting* in the enforcement of federal law." *Id.* at *3 (emphasis added). However, Judge Battey held the unchallenged affidavit showed the tribal officers were not federal "investigative or law enforcement officers" and merely assisting in the enforcement of federal law does not make a tribal officer a federal officer for purposes of the law enforcement proviso. *Id.*

Similarly in *Locke*, also pre-*Millbrook* opinion, the Honorable Charles Kornmann primarily relied on an unchallenged affidavit of the officer in question, which stated the officer was not a federal law enforcement officer, did not believe he was a federal law enforcement officer and only enforced tribal law. *See Locke*, 215 F.Supp.2d at 1038. Upon these unchallenged assertions, Judge Kornmann held, "[t]herefore, the federal government is not liable as a matter of law for certain intentional torts by [the officer], including assault." *Id.*

In the case at bar, Plaintiffs have rebutted the Government's declarations regarding Neuenfeldt's status as a "investigative or law enforcement officer." Neuenfeldt stated in his deposition at length that he not

only believed he was a federal officer who could enforce federal law, but he in fact enforced federal law *unilaterally*. He was not *assisting* the BIA in enforcing federal law. He was enforcing federal law all on his own. He also stated all tribal officers on the FSS Reservation enforced federal law in this manner. These distinctions from the Government's supportive cases are highly relevant, and Plaintiffs have carried their burden in rebutting the Government's affirmative defense.

The primary authority for the Government is distinguishable and must be disregarded.[6] All of the opinions from the District Court of South Dakota are pre-*Millbrook* and fail to uphold the intent of the law enforcement proviso and read-in immunity to the unambiguous text of the law enforcement proviso.

b. The Assault and Battery Alleged Arose Out of the Government's Failure to Train, Supervise, and Decision to Retain Neuenfeldt, which Fortified Neuenfeldt's Inept Capacity to Breach the Law Enforcement Assist Agreement.

If this Court finds that Neuenfeldt qualifies as a "investigative or law enforcement officer", it need not address the Government's "arising out of" arguments because they are moot. In the event this Court reaches the merits

[6] The Government also cites *Gatling v. United States* as persuasive authority for their position. (Docket 89-1, at pgs. 23-24.) However, *Gatling* fails to mention or analyze *Millbrook* at all. *See e.g.* No. CV-15-08070-PCT-SMM, 2016 WL 147920 (D. Ariz. Jan. 13, 2016). Additionally, Plaintiffs have rebutted the Government's declaration regarding Neuenfeldt's lack of SLEC. *Id.* at *4. Lastly, the officers at issue in *Millbrook* were correctional officers in a jail, as opposed to the Chief of Police for an entire reservation who was unilaterally enforcing federal law. *Id.* at *1.

of the Government's alternative argument, its argument should fail for the reasons set forth below.

The Government states in their Motion to Dismiss, "[a]t bottom, Plaintiffs allege that Neuenfeldt intentionally and maliciously used force during an attempted stop or arrest."[7] (*See* Docket 89-1, at 26, ¶ 3.) The Government's reframing of Plaintiffs' own pleadings and arguments is incorrect because Plaintiffs allegations center on the Government and Neuenfeldt's negligence.[8]

If the Government had not been negligent in its training, supervision, and retention of Neuenfeldt, he would have been behind a desk or terminated before the evening of June 17, 2017. (*See* Docket 84, at pgs. 19-26.) If Neuenfeldt would not have breached the Law Enforcement Assist Agreement on the evening of June 17, 2017, he would not have been on scene that night, pulling his gun on innocent high schoolers, lying about an assault on law enforcement, and re-starting a pursuit terminated by another law enforcement agency. Without the Government and Neuenfeldt's negligence the alleged assault and battery are not even conceivable as allegations.

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[7] The Government's supportive cases for their alternative "arising out of" argument sound in clear intentional torts, rather than negligence. *See e.g. U.S. v. Shearer*, 473 U.S. 52, 53 (1985) (where officer was kidnapped and murdered by another servicemen while off duty); *U.S. v. Neustadt*, 366 U.S. 696, 702-03 (1961) (dealt with intentional misrepresentation claim); *Larson v. U.S.*, 3:20-CV-03019-RAL, 2021 WL 3634149, *4 (D.S.D. Aug. 17, 2021) (dealing with clear intentional tort of interfering with an economic benefit under a contract); *Westcott v. City of Omaha*, 901 F.2d 1486, 1487 (8th Cir. 1990) (dealing with individual shooting a fleeing felon).

[8] Nowhere in Count I or Count V of Plaintiffs' Complaint is the word "intentional" used. (*See* Docket 76.)

i. Assault and Battery are not Essential to Plaintiffs' Negligence Claims; Thus, Plaintiffs' Negligence Claims do not Arise Out Of the Assault And Battery.

The assault and battery alleged are not essential to Plaintiffs' negligence claims because the horrific injuries that Plaintiffs suffered can solely be attributed to the Government and Neuenfeldt's reckless behavior. *See Locke*, 215 F.Supp.2d at 1040 (citing *Metz*, 788 F.2d at 1534) (stating under § 2680(h) an allegation "will nevertheless be deemed to 'arise out of' an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is 'essential' to plaintiff's claim.") In order for this Court to find that the Government and Neuenfeldt's negligence arose out of the assault and battery that followed their negligence, it must determine that the alleged assault and battery are essential to Plaintiffs' negligence claims against the same. *See Locke*, 215 F.Supp.2d at 1040.

Plaintiffs have asserted from the beginning of this lawsuit that Neuenfeldt was negligent by jumping a call outside of his jurisdiction of the reservation and recklessly asserting himself on a scene he had no authority to be at. (Docket 1, at pgs. 5-6.) Outside of his jurisdiction, he asserted himself into a pursuit on the fabricated and false basis that Tahlen Bourassa, a non-Indian, struck him with his truck. (Docket 63-5, Ex. 8.) Outside of his jurisdiction, Neuenfeldt re-started a pursuit that had been terminated and that he had no authority to even join to begin with. (Docket 63-4, Ex. 7, at pg. 2.) The alleged assault that took place prior to this pursuit, and during this pursuit, was only possible because of Neuenfeldt's insistence to negligently

disregard his jurisdictional limits and the authority granted with that jurisdiction.

The Government attempts to reframe Plaintiff's argument for them by continually focusing on Neuenfeldt's numerous failures of the BIA Manual in regards to pursuit. (Docket 89-1, at pgs. 28-30 and 32-40.) While Neuenfeldt was clearly in defiance of every pursuit standard and consideration under the BIA Manual, Plaintiffs only identify those failures as circumstantial evidence of Neuenfeldt's negligent decision to assert his authority outside of his jurisdiction. *See Steven v. Wood Sawmill, Inc.*, 426 N.W.2d 13, 15 (S.D. 1988); *Smith v. Gilbert Yards et al.*, 16 N.W.2d 912, 913 (S.D. 1944) (discussing how negligence can be proved by circumstantial evidence).

Certainly, the Government pleads that this Court follow its attempted clarification of Plaintiffs' arguments, but the Plaintiff is the master of their own allegations. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987); *see also Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809, n. 6 (1986). In addition, the Government's rationale supports Plaintiffs' negligence claims because the BIA Manual sections the Government highlights pertain only to an officer *within their jurisdiction.*[9]

[9] All of the Government's argument regarding reframing Plaintiff's argument to focus this Court's attention to the Neuenfeldt's actions during the pursuit and how the discretionary function might apply to his actions must be ignored because an officer's authority to even exercise the ability to engage in a pursuit is subject to the unambiguous qualification of "[i]n all areas of jurisdiction." (Docket 60, Ex. 2c, at pg. 276, otherwise marked 2-24-04 (stating "[i]n all areas of the jurisdiction, officers are expected to end their involvement in a pursuit whenever the risk to their own safety or the safety of others outweigh the danger to the community if the suspect is not apprehended. These considerations, include, but are not limited to:" and then goes on to state the considerations the Government uses to support their position on page 35-36 of their Brief in Support of Motion to Dismiss).)

As to the Government's negligence, in order for this Court to find that the assault and battery arose out of its negligence, this Court must determine that the Government had no independent or antecedent duty to train, supervise, and retain Neuenfeldt. *Billingsley v. U.S.*, 251 F.3d 696, 697 (8th Cir. 2001). Neuenfeldt was hired as a tribal officer and subsequently promoted to Chief of Police for the Tribe with the understanding that he lacked necessary training, had a history of high-speed pursuits outside of his jurisdiction, and had a history of negligent law enforcement behavior. (Docket 85-7, Ex. 7); (Docket 85-4, at 75:6-76:8, 84:18-85:2, 85:19-88:2, 96:1-96:24, 136:13-137:6, 233:1-233:4, and 234:19-235:24.)

In *Billingsley*, the Eighth Circuit held that the Government has a "duty to prevent a foreseeably dangerous individual from wandering about unattended." *Billingsley,* 251 F.3d at 697 (citing *Sheridan v. U.S.*, 487 U.S. 392, 403 (1988)) (discussing Government's negligent supervision stemming from an off-duty servicemen shooting into plaintiff's car after Government was aware of servicemen's propensity for negligent behavior and holding "the negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent of [the intentional tortfeasor's] employment status"). It further elaborated:

> [T]he government would be liable for [negligent supervision] if Billingsley can show that 'the negligence arose out of an independent, antecedent duty unrelated to the employment relationship between the tortfeasor and the United States. For example, the government would be liable if the Jobs Corps

> employee responsible for the enrollees knew that [the employee] acted violently *in public prior to his commission* of the battery.

Id. at 698 (emphasis added.)

The Government's negligence is what started the tragic chain of events that gave rise to this case. The 638-contract and the BIA mandated that the Tribe run background checks on all of its officers. (Docket 85-2, at USA001324, 1330-31); (Beardsley Aff., Ex. C, at 220:14-220:20: Joel Chino Deposition, taken 2/4/2022.) Yet, the Tribe never acquiesced and the Government continued to provide federal monies without ever ensuring compliance. (Beardsley Aff., Ex. C, at 86:1-87:4, 149:24-149:25, and 150:12-150:18: Joel Chino Deposition, taken 2/4/2022.) Neuenfeldt's lacked necessary training and had a history of negligent behavior. (Docket 85-7, Ex. 7); (Docket 85-4, at 75:6-76:8, 84:18-85:2, 85:19-88:2, 96:1-96:24, 136:13-137:6, 233:1-233:4, and 234:19-235:24.) Yet, the Government still decided to retain Neuenfeldt and allow him to operate as a rogue officer with a federal badge, federal gun, and a federal cruiser without training or supervision. The Eighth Circuit's hypothetical in *Billingsley* of the Government owing an antecedent duty where it knows of an employee's problems prior to hiring fits the case at bar. Clearly, an independent duty beyond Neuenfeldt's employment status was breached on the part of the Government that was independent of his employment status.[10] Neuenfeldt's actions on June 17-18, 2017, were foreseeable from the moment he was hired.

[10] The Government breached their duties of reasonable care in regard to supervision, training, retention, and to prevent the misconduct of a third party, which Plaintiffs address in their

Neuenfeldt lacked federally mandated background checks and training.[11] The Government was aware of these problems. Yet, the Government did nothing. Thus, it cannot be said Plaintiffs' allegations wholly relate to Neuenfeldt's employment status and that the duty owed by the Government arises out of his subsequent assault and battery. Plaintiffs' negligence claims against the Government relate to its failure to address Neuenfeldt's material issues with jurisdictional training and history of negligent behavior. Plaintiff's assault and battery allegations are not essential to their negligence claim against the Government.

ii. The United States' and Robert Neuenfeldt's Negligence is, and has been, the Focal Point of Plaintiff's Case.

Regardless of this Court's interpretation of Officer Neuenfeldt's status as an "investigative or law enforcement officer," the Government and Officer Neuenfeldt's negligence do not "arise out of" his assault and battery, and the Government cannot subvert Plaintiff's ability to plead in the alternative. From the beginning of this lawsuit, Plaintiffs have contended that Neuenfeldt's negligence led to the horrific injuries sustained on the night of June 17-18, 2017. (Docket 1, at pgs. 5-6.) After finally deposing Officer Neuenfeldt in

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Response to United States' Cross Motion for Summary Judgment and Resistance to Plaintiffs' Partial Motion for Summary Judgment.

[11] The Government has consistently asserted Neuenfeldt's training was adequate because he spent 13 weeks in Pierre, South Dakota, learning his responsibilities under South Dakota Law. (Docket 89-1, at pg. 5); (Docket 99, at pg. 22). However, the Government continually ignores the fact that Neuenfeldt's South Dakota training is not what is at issue in this case: the issue is the lack of mandatory IPA, Bridge, and in-service training. The only way for State law enforcement training to be considered adequate for tribal officers is to request a waiver under 25 C.F.R. 12.36, which Neuenfeldt did not do. (Beardsley Aff., Ex. D, at 14:9-14:11: Robert Neuenfeldt's Second Deposition, taken 2/25/2022).

February 24, 2021, it became readily apparent that the Government played a large part in the wanton and reckless behavior that Neuenfeldt exhibited on the fateful night in question.[12] (*See* Doc. 85-4 at 16:16-16:23.) Any contention otherwise ignores the stream of this lawsuit, Plaintiffs' briefing, and is an attempt to mislead this Court.

The sequence of events that have given rise to this tragedy began with the Government's absolute failure to train and supervise Neuenfeldt, and the decision to retain him, that facilitated his wanton and reckless breach of the Assist Agreement. The Government knew of the Tribe's continual failure to train its officers. The Government failed supervision came in the form of letters without consequence when its actual duty was to enforce the Tribe's compliance with the 638-contract. Still, the Government chose to retain Neuenfeldt and allowed him to operate as the rogue officer that he was. The Government's negligence primed Neuenfeldt's reckless behavior. The Government had to ensure the Tribe's compliance and Agent Chino wishes the Government would have:

192:7	Q. And as you sit here today, you too wish that some teeth had been used to ensure compliance of the law?
192:9	MS. ROCHE: Objection; form. Improper opinion evidence and calls for a legal conclusion.
192:11	MR. S. BEARDSLEY:
192:12	Q. Don't you, sir?
192:13	A. Can you repeat that question, please?

[12] The Government asserts, as they did in their Response to Plaintiffs' Motion to Amend, (Docket 65, at pg. 4, n. 2), that this Court does not have jurisdiction over Plaintiffs' negligent retention claim, because Plaintiffs failed to present it specifically in their administrative claim. (Docket 89-1, at pg. 42.) However, Plaintiffs lacked a factual basis for their negligent retention claim at the inception of this lawsuit. After Neuenfeldt's deposition, a factual basis for such a claim arose and ongoing discovery has made that claim viable. As such, the Government's argument regarding Plaintiffs' administrative claim must be ignored.

192:14 Q. Sure.
192:15 MR. GALBRAITH: Do you want her to repeat the question?
192:17 MR. S. BEARDSLEY: Yeah. Yes, I'm sorry. Would you read it back, please. I'm sorry.
192:19 (The last question was read back.)
192:20 THE WITNESS: Yes.

(Beardsley Aff., Ex. C, at 192:7-192:20: Joel Chino Deposition, taken 2/4/2022.)

Neuenfeldt's foreseeable defiance and ineptitude led to his breach of the Assist Agreement that caused Plaintiffs' catastrophic injuries. Neuenfeldt's breach of duty under the Assist Agreement is, and has been, the focal point of Plaintiffs' case. It is undisputed Neuenfeldt did not have law enforcement authority outside of the reservation on the night of June 17, 2017.

There was never a threat of an emergency, disaster, or widespread conflagration on the night of June 17, 2017. (*See* Docket 85-9, at 37:13-38:12.) Sheriff Wellman said kids at a high school party was not an emergency. (*See* Docket 85-17, at 33:18-34:8.) Deputy Baldini said kids at a high school party was not an emergency. (*See* Docket 85-15, at 12:16-12:20 and 33:14-33:20.) Neuenfeldt even said a kid's high school party was not an emergency. (*See* Docket 85-4, at 261:12-261:24.)

A high school party outside the reservation does not fit the type of emergency the Assist Agreement applies to. (*See* Docket 85-8, at pg. 2 stating "[i]n the event of or the threat of an emergency, disaster, or widespread conflagration *which cannot be met with the facilities of one of the parties* to this agreement").) In fact, Sheriff Wellman and Deputy Brakke both testified that a

request for backup under the Assist Agreement typically happened when a law enforcement officer was "getting their ass kicked." (*See* Docket 85-17, at 60:22-62:2 and Docket 85-9, at 13:6-13:9.)

The high school party the night of June 17, 2017, was not an emergency and no law enforcement officer was getting their "ass kicked." Rather, it was a high school party that would not have constituted an emergency requiring assistance from any tribal officer. (*See* Docket 85-9, at 37:3-37:8.) Thus, no emergency would have required Neuenfeldt's assistance outside of the reservation that night.

In addition, even if there was a knowable emergency on that fateful night that required Neuenfeldt's assistance, Deputy Brakke never requested Neuenfeldt's assistance—either formally or informally. (*See* Docket 85-9, at 62:1-62:9 and 71:15-71:25.) Neuenfeldt testified Brakke never requested his assistance, but he responded to a call for an ambulance anyway. (*See* Docket 85-4, at 132:7-133:13; *see also* Moody County Log at 11:58.) During the BIA Internal Affairs Investigations, Neuenfeldt told Special Agent Brock Baker that there was a 10-54 call for assistance. The dispatch log shows no 10-54 call for assistance was ever made. (*See* Docket 85-11.) In fact, the Government has admitted Brakke never requested Neuenfeldt's assistance. (*See* Docket 89-1, at 7, ¶ 3.) No informal requesting practice amongst the involved law

enforcement parties existed or was used that evening.[13] No radio transcript evinces that a general call for assistance was made.

Rather, the only call Neuenfeldt heard was a call for an ambulance or "529" unit. (*See* Docket 85-4, at 132:7-133:13.) There was never a "proper request," either informal or formal, made to confer jurisdiction to Neuenfeldt outside of the reservation. Neither the Assist Agreement nor informal practice amongst the responding law enforcement officers conferred jurisdiction to Neuenfeldt on the night of June 17, 2017. Responding to a call for a specific non-tribal ambulance unit outside the jurisdiction of the reservation cannot possibly confer jurisdiction to any officer bound to the boundaries of the reservation.

c. Neuenfeldt did not Ever Have Jurisdiction to be on the Scene the Night of June 17, 2017.

The Government must be estopped from arguing Neuenfeldt had authority to be outside of his jurisdiction operating with law enforcement authority on the night and morning of June 17-18, 2017. Not only has the Government and all law enforcement officers involved admitted that the Assist Agreement did not confer jurisdiction to Neuenfeldt that night because there was no request for his assistance, the Government now asserts Neuenfeldt is not a federal officer for purposes of dismissing this lawsuit pursuant to the law enforcement proviso exception to the FTCA. (*See* Docket 89-1, at 20.)

[13] (Docket 85-9, at 36:16-37:8); (Docket 85-16, at 54:14-55:9); (Docket 85-17, at 32:9-32:15 and 35:2-35:18.)

Under the Government's theory of the case, Neuenfeldt had no jurisdiction or authority under the Assist agreement to enforce law, join/re-start a pursuit, or anything otherwise outside his jurisdiction, which was strictly the reservation. *F.T.C. v. Payday Financial, LLC*, 935 F.Supp.2d 926, 932-33 (D.S.D. March 28, 2013) (discussing how tribal police entities "retain a sovereignty of 'a unique and limited character, including, but not limited to, self-governance over tribal members within the boundaries of the tribes' reservation lands'"). Further, if Neuenfeldt is not a federal officer, he has no jurisdiction to enforce federal law *anywhere*. All this taken as true, the Government asks this Court to endorse Neuenfeldt as a rogue citizen,[14] who has the ability to pull a federally funded gun and recklessly pursue innocent young adults at high speeds, in a federally funded cruiser with a federal badge of authority on his shoulder, all while enjoying protection from liability.[15]

d. The Government's Creative Briefing Cannot Subvert Plaintiffs' Ability to Plead in the Alternative.

The Government's inverse timeline of the actual sequence of events that governs this case is not only incorrect, but it cannot subvert the purpose of

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[14] In fact, Neuenfeldt testified even if he had no authority as an officer of any kind on the night of June 17, 2017, Neuenfeldt believed he had the power, as a citizen, to pull his gun and engage in a high-speed pursuit. (Docket 85-4, at 177:22-178:4.)

[15] Even though Neuenfeldt was a rogue officer without authority under the Assist Agreement and federal law, he is still considered a federal employee for purposes of the 638-contract at issue and the FTCA. *See Shirk v. United States*, 773 F.3d 999, 1006 (9th Cir. 2014) (holding that for scope of employment analysis under § 314 the proper consideration is whether the employee is acting within the scope of his employment pursuant to state law). Contrary to the Government's argument (Docket 89-1, at pgs. 44-45), Neuenfeldt was wholly within the scope of his employment under South Dakota law. *See Leafgreen v. American Family Mut. Ins. Co.*, 393 N.W.2d 275, 281 (S.D. 1986) (stating South Dakota's test for scope of employment).

alternative pleading. *See Broin and Associates, Inc. v. Genencor Intern., Inc.*, 232 F.R.D. 335, 340 (D.S.D. July 26, 2005) (where this Court held Plaintiffs are entitled to plead in the alternative). At the onset of this lawsuit, there was information and belief that Neuenfeldt had assaulted the Plaintiffs' intentionally. Pleading assault and battery alternatively to the negligence alleged recognized Plaintiffs' plausible beliefs and is well within the parameters of FRCP 8(d)(2)-(3).[16]

Regardless of what this Court determines on Plaintiffs' assault and battery allegations, it should recognize the inverse logic the Government is seeking this Court to accept. Sequentially, this case began with the Government's negligence, which empowered Neuenfeldt's reckless disregard of the Assist Agreement that foreseeably led to Plaintiffs' injuries. While the alleged assault and battery that followed the negligent acts involve the same tragic end, the heart of Plaintiffs' claims lie in the wanton and reckless negligence of the Government and its federal officer, Neuenfeldt. The acrobatic approach the Government is requesting that this Court endorse finds no basis in the nucleus of Plaintiffs' case and undercuts Plaintiffs' freedom to plead all plausible claims.

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[16] *See* FRCP 8"(d)(2): *Alternative Statements of a claim or Defense.* A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. . . . (d)(3): *Inconsistent Claims or Defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency."

IV. CONCLUSION

The Government's Motion to Dismiss fails because Officer Neuenfeldt was a "investigative or law enforcement officer" and Plaintiffs' negligence claims do not "arise out of" Neuenfeldt's assault and battery. Neuenfeldt executed federal search warrants, seized evidence in connection with federal violations, and arrested individuals for federal violations during his time with the Tribe. If the Government was not negligent in their training, supervision, and retention of Neuenfeldt, he would have been behind a desk before the night of June 17, 2017. Instead, he was in his federally funded cruiser empowered to assert his authority, which he did. Neuenfeldt's night started with negligently jumping a call outside of his jurisdiction, like he always had, and ended with Plaintiffs' catastrophic injuries.

For these and the aforementioned reasons, Plaintiffs' causes of action should be allowed to proceed, and the Government's Motion to Dismiss should be denied.

Respectfully submitted this 15th day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2022, a true and correct copy of the foregoing has been served on the following by the following means:

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