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' SURREPLY IN OPPOSITION TO UNITED STATES' MOTION TO DISMISS**

Plaintiffs, by and through their undersigned attorneys, respectfully submit this Surreply in Opposition to the Government's Motion to Dismiss.

I. PRELIMINARY STATEMENT

For the first time in this lawsuit, the Government addressed Plaintiffs' legal theory for Count I with a discretionary function argument, in its Reply Brief in Support of Motion to Dismiss. However, to support its argument, the Government input facts that are not in evidence and encourage a public policy that endorses any officer sued under the Federal Torts Claims Act ("FTCA") to perform unlawful and unconstitutional acts with free discretion. The record does not support the Government's theory and case law clearly indicates that the discretionary function does not apply to unlawful or unconstitutional acts.

Further, the Government attempts to assert that Plaintiffs' apparent authority argument should be ignored because *Primeaux v. United States* holds that apparent authority cannot be used to attribute liability under the FTCA. However, the Government's assertions misstate Plaintiffs' argument and *Primeaux's* holding. Plaintiffs believe that the Government empowered Officer Neuenfeldt's apparent authority through its knowledge of his complete lack of training and subsequent inaction. Plaintiffs are not using the apparent authority doctrine to attribute liability or show that Officer Neuenfeldt was acting within the scope of his employment. Rather, Plaintiffs are using the apparent authority doctrine to show the Government empowered Officer Neuenfeldt to perform searches, seize evidence, and make arrests for violations of federal law, for purposes of finding he was an investigative or law enforcement officer for purposes of the law enforcement proviso. Thus, Plaintiffs request this Court deny the Government's Motion to Dismiss.

II. DISCUSSION

a. The Discretionary Function Does Not Apply to Unlawful or Unconstitutional Actions.

The Government asserts in its Reply in Support of Motion to Dismiss that Officer Neuenfeldt's decision to jump a call for a non-tribal ambulance outside of his jurisdiction is protected by the discretionary function. (Doc. 17 at pg. 30 ¶ 2.) It further argues that "[a]llowing a police officer to determine whether he or she may respond to a call for assistance is similar in kind to other discretionary law enforcement decisions that must be left up to the good judgement of an individual officer." (*Id.* at pg. 32 ¶ 2.) The Government's

argument not only assumes facts that are not in evidence, but is encouraging this Court to endorse any officer sued under the FTCA to be given discretion to perform unlawful activities.

The discretionary function only applies where a two-prong test is satisfied:

> First, the conduct at issue must be discretionary, involving an element of judgment or choice. The second requirement is that the judgment at issue be of the kind that the discretionary function exception as designed to shield.

Hart v. United States, 630 F.3d 1085, 1088 (8th Cir. 2011). "If a federal statute, regulation, or policy mandates a particular action, the discretionary function exception will not apply." *Croyle by and through Croyle v. United States*, 908 F.3d 377, 381 (8th Cir. 2018) (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (U.S. 1988)). "If government policy allows the exercise of discretion, the court will 'presume[] that the agent's acts are grounded in policy when exercising that discretion." *Croyle by and through Croyle*, 908 F.3d at 381 (citing *Demery v. U.S. Dep't of Interior*, 357 F.3d 830, 833 (8th Cir. 2004)). However, an employee's "failure to act after notice of illegal action does not represent a choice based on plausible policy considerations." *Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995).

Similarly, the discretionary function does not apply to violations of constitutional rights. *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988) (stating that "[f]ederal officials do not possess

discretion to violate constitutional rights"). Where a plaintiff's FTCA claims are based upon a federal agent's violation of a plaintiff's constitutional rights, the discretionary function cannot shield the United States from liability. *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 286 (3d Cir. 1995); *see also Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986).

Generally, "a police officer's authority does not extend beyond his jurisdiction." *U.S. Jackson*, 139 Fed.Appx. 83, 85 (10th Cir. 2005) (citing *Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir. 1990)). Where an officer asserts their authority outside of the officer's jurisdiction, absent exigent circumstances, an officer is acting unlawfully. *Ross*, 905 F.2d at 1353-54. Additionally, If an officer's authority and actions are not within the "bounds of the law" the discretionary function is not applicable. *Daley v. Harber*, 234 F.Supp.2d 27, 33 (D. Mass. Oct. 15, 2022) (holding under state tort claims act where an arrest is unlawful because it was effectuated outside the bounds of an officer's jurisdiction, the discretionary function does not apply).

The Government is requesting this Court hold that Officer Neuenfeldt's decision to show up at the high school party that precipitated the events that preceded this lawsuit qualifies as a decision protected by the discretionary function. However, the Government's argument requires that Officer Neuenfeldt's assistance was requested. On the night of June 17, 2017, Officer Neuenfeldt's assistance was

specifically never requested. He never had conferred jurisdiction and thus was unlawfully asserting authority he did not possess beyond his jurisdiction.

i. Officer Neuenfeldt Did Not Have Conferred Jurisdiction Outside the Flandreau Santee Sioux Reservation on June 17, 2017, Because He Only Responded to a Call for a Non-Tribal Ambulance.

The Government continually asserts that there were multiple requests for assistance on the night of June 17, 2017, that Officer Neuenfeldt responded to. (Docket 117 at pgs. 3-6.) However, contrary to the Government's assertion otherwise, the only documentary evidence on record shows there was never a *request for assistance* under the Moody County Assist Agreement. (*See e.g.* Docket 110-1.) As discussed below, Officer Neuenfeldt confirmed there was no request for assistance under the Assist Agreement throughout his deposition. Even if a call for assistance was made on another radio channel, Officer Neuenfeldt did not hear it or respond to it.

The Assist Agreement can only be triggered in a specific way:

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

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(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.

(Docket 85-8 at pgs. 1-2.) Officer Neuenfeldt testified multiple times during his deposition the *only* communication he heard and responded to was Brakke's request for a non-tribal ambulance:

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.

. . .

260:20 Q. And it states – it's Bates number 71, USA 71 – whereas to mutual advantage and benefit of the partis that each agree to render supplemental law enforcement

protection in the event of an emergency, a disaster or widespread conflagration that has developed or threatens to develop the control of either entity. There wasn't any emergency that threatened to develop the control of any entity on this evening, was there?

261:3 MS. ROCHE: Objection to the extent you're calling for a legal conclusion.

261:5 THE WITNESS: The emergency would have been the seizure and why I responded.

261:7 BY MR. STEVEN BEARDSLEY:

261:8 Q. And that went away?

261:9 A. Correct.

261:10 Q. Almost immediately, before the ambulance got there?

261:11 A. Yeah.

261:12 Q. Okay. So there wasn't any emergency at that point – after that point?

261:14 MS. ROCHE: The same objection.

261:15 THE WITNESS: Not that I'm aware of.

261:16 BY MR. STEVEN BEARDSLEY:

261:17 Q. Okay. There wasn't a disaster?

261:18 A. I don't think so.

261:19 Q. And there wasn't widespread conflagration? And don't feel badly, I had to look it up myself.

261:21 A. Okay.

261:22 Q. It's a widespread fire, okay. There wasn't any widespread conflagration/fire, correct?

261:24 A. I guess not.

261:25 Q. Okay. So as far as you know, from the law enforcement assist agreement, if they didn't meet those criteria, then there was no authority to provide assistance, correct?

262:4 MS. ROCHE: Objection to the extent it calls for a legal conclusion.

262:6 THE WITNESS: My belief was I was there under – still under the emergency of the seizure because they never told me to leave yet.

(Docket 85-4, at 132:7-132:16 and 260:20-262:6.) Such a request does not trigger the Assist Agreement. In fact, Officer Neuenfeldt testified he is not aware of any record that exhibits a specific and direct request for his assistance:

133:20 Q. Okay. So the dispatch log does not indicate that there was a general call for assistance in the log. Do you have any document that states differently than that?

133:23 MS. ROCHE: Objection –
133:24 BY MR. STEVEN BEARDSLEY:
133:25 Q. A document –
134:1 MS. ROCHE: -- form, lack of –
134:2 THE WITNESS: I do not have a document.
134:3 MS. ROCHE: Can I just make my record real quick? Objection, calls for – form, lack of personal knowledge.
134:6 MR. STEVEN BEARDSLEY:
134:7 Q. And you did not keep any record of the radio traffic?
134:9 A. I guess I would not even know how to do that.
134:10 Q. Sure. So there's no record?
134:11 A. No.

(Docket 85-4, at 133:20-134:11.) Officer Neuenfeldt states testified he was never specifically requested to assist on the night of June 17, 2017:

128:21 Q. And no one called up and said to Rob Neuenfeldt, you now have jurisdiction to assist. There was no discussion like that?
128:24 MS. ROCHE: Objection, form.
128:25 THE WITNESS: Not that particular day.
129:1 BY MR. STEVEN BEARDSLEY:
129:2 Q. And we're talking the 17th and 18th –
129:3 A. Yes.
129:4 Q. -- of June, 2017?
129:5 A. Correct.
129:6 Q. Okay. In fact, there wasn't a call for jurisdiction. There was no direct call from anyone to have you come assist, was there?
129:9 A. Not specifically to me directly, no.
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.

(Docket 85-4, at 128:21-129:15.)

The Moody County Assist Agreement was never triggered on the night of June 17, 2017. The Assist Agreement exists for a specific reason and can only be triggered in a specific way. The Assist Agreement does not grant discretion

about how a call may be received and responded to. The Assist Agreement plainly states that "[a] proper request for the County *shall only* be communicated *directly*, either formally, or informally, by the Sheriff's Office . . . to the Tribal Chief of Police or the Chief's designee." (Docket 85-8 at pg. 2-3) (emphasis added).

Officer Neuenfeldt did not respond to a specific or general call for assist.[1] Rather, he responded only to a request for a non-tribal ambulance unit, which was not directed at him.[2] Thus, the Government's assertion that the discretionary function applies to Officer Neuenfeldt's response to a request for his assistance is a misstatement of the facts on record. Officer Neuenfeldt's assistance was never requested.

ii. The Discretionary Function Does Not Absolve Officer Neuenfeldt's Unlawful and Unconstitutional Actions.

Officer Neuenfeldt was never conferred jurisdiction to function as a law enforcement officer outside of the Flandreau Santee Sioux ("FSS Reservation") on the night of June 17, 2017. Thus, any seizure, search, arrest, or exercise of authority outside of the boundaries of the FSS Reservation on the night of June 17, 2017, was unlawful, unconstitutional and cannot be absolved by the jurisdictional shield known as the discretionary function.

[1] The only radio log on record clearly indicates that the request for a non-tribal ambulance was not directed at Officer Neuenfeldt or any other tribal officer. (Docket 110-1 at 11:58:34 (where Brakke stated "I need an ambulance to our location. I have an individual possibly have a seizure. It's going to be a male, approximately 18-19 years old.")).

[2] The request for an ambulance was not because the high school party was considered an emergency and Plaintiffs' discussion in their Response to the Government's Motion to Dismiss supports this position. (*See* Docket 109 at pgs. 7-8 and 42-43.)

The Government has attempted throughout this lawsuit to drag the focus of Plaintiffs' legal theory away from Officer Neuenfeldt's fundamental violation of his jurisdictional authority and focus this Court's attention *solely* on his pursuit behavior.[3] On this point, Plaintiffs ignored the Government's discretionary function arguments that muddied their legal theory, because the Government never asserted that Officer Neuenfeldt's jurisdictional authority was discretionary, until now. Regardless, the Government's maneuvering and eleventh-hour argument does not absolve Officer Neuenfeldt's unlawful behavior.

Determining the boundaries of an officer's authority does not consider any element of judgement or choice on the part of the acting officer. Rather, those boundaries are set in stone by the United States Constitution[4] and in the case at bar, Congress.[5] Given these mandates, Officer Neuenfeldt had no discretion to act unlawfully and unconstitutionally, by choosing when and where to assert his law enforcement authority. *See U.S. Fid. & Guar. Co.*, 837 F.2d at 120; *Ross*, 905 F.2d at 1353-54. Similarly, the boundary of the

[3] The Government's assertions that all of Officer Neuenfeldt's decisions during the pursuit were discretionary can only have merit if Officer Neuenfeldt is determined to have authority to make those decisions. Even if this Court wants to analyze Officer Neuenfeldt's pursuit decisions under the scope of the discretionary function, no public policy could ever support an officer being able to assert authority in a jurisdiction he has no authorization to operate in. Every decision Officer Neuenfeldt made was outside of his jurisdiction and authority. Thus, the discretionary function would still not apply.

[4] The 4th Amendment and 5th Amendment are two examples of the limits on law enforcement authority that the United States Constitution mandates.

[5] In 1935 Congress established the Flandreau Reservation under the Indian Reorganization Act. *See* Frank Pommersheim, *Land Into Trust: An Inquiry into Law, Policy, and History*, 49 Idaho L. Rev. 519 (2013).

Flandreau Santee Sioux Reservation have been established since 1935. The boundaries and the limits the border of the reservation represent are not optional. Since Officer Neuenfeldt was not conferred jurisdiction under the Moody County Assist Agreement, the Government cannot satisfy prong one of the discretionary function test. *See Croyle by and through Croyle*, 908 F.3d at 381 (citing *Berkovitz*, 486 U.S. at 536) (discussing where federal law mandates particular actions the discretionary function does not apply.)

Further, even if this Court finds there is an element of choice in an officer unlawfully asserting their authority outside of their jurisdiction, this Court should not endorse such a policy. Officer Neuenfeldt's assistance was never requested, either formally or informally on the night of June 17, 2017. Brakke's request was for a specific non-tribal ambulance. The Plaintiffs in this case were not known or alleged criminals. The scene Officer Neuenfeldt converged upon was a high school party and was not an emergency. In fact, he had done this in the past and was disciplined for his violations.[6] *See Tonelli*, 60 F.3d at 496 (discussing where an employee is on notice of illegal behavior and the behavior continues, the employee's choice is not supported by public policy). The high-speed pursuit that Officer Neuenfeldt instigated and re-started was wholly unnecessary and ended in utter tragedy. No public policy could ever support an abuse of authority of this magnitude, especially given the

[6] Plaintiffs have briefed Officer Neuenfeldt's negligent history as an officer thoroughly in their Motion for Partial Summary Judgement on Count V and refer to those arguments by reference. (*See* Docket 84 at pgs. 42-45.)

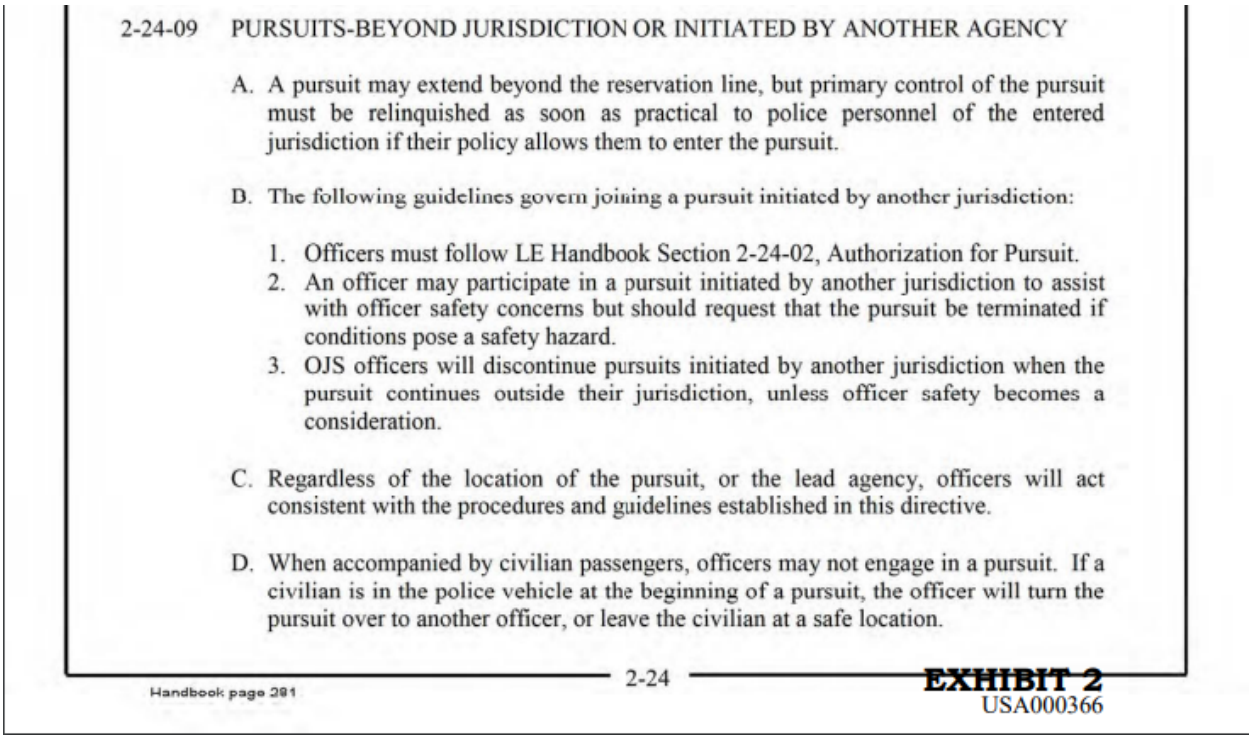
menial misconduct June 17, 2017 started with.

Officer Neuenfeldt did not respond to a request for assistance that would have triggered conferred jurisdiction of Moody County.[7] Additionally, the Government may argue Neuenfeldt had the right to perform an arrest as a private citizen. However, where an officer is outside of the jurisdiction, asserting their authority unlawfully, a citizen's arrest theory cannot absolve the officer's unlawful behavior. *See State v. Leblanc*, 540 A.2d 1037, 1040 (Vt. 1987) (discussing the use of a citizen's arrest theory cannot justify or absolve an officer's unlawful arrest outside of an officer's jurisdiction). Thus, the Government is asking this Court to accept the theory that the boundaries of the Flandreau Santee Sioux Reservation do not apply to Officer Neuenfeldt. Rather, when and where he may choose to impose his authority is protected by the discretionary function. The Government's theory is not tenable and highlights why Officer Neuenfeldt's negligence on the night of June 17, 2017 was so egregious.

1. The Sections of the BIA Manual the Government Relies On Afford No Discretion to Officer Neuenfeldt.

The Government's use of Section 2-24-09 of the BIA Handbook is irrelevant, because the pursuit in question was initiated and occurred entirely outside of the bounds of the reservation. The language the Government points to does not allow for discretion:

[7] Plaintiffs briefed this point thoroughly in their Response to Government's Cross Motion for Summary Judgement and this point is bolstered by Brad Booth's expert report. (*See e.g.* Docket 111); (Docket 113-3.)



2-24-09 PURSUITS-BEYOND JURISDICTION OR INITIATED BY ANOTHER AGENCY

A. A pursuit may extend beyond the reservation line, but primary control of the pursuit must be relinquished as soon as practical to police personnel of the entered jurisdiction if their policy allows them to enter the pursuit.

B. The following guidelines govern joining a pursuit initiated by another jurisdiction:

1. Officers must follow LE Handbook Section 2-24-02, Authorization for Pursuit.
2. An officer may participate in a pursuit initiated by another jurisdiction to assist with officer safety concerns but should request that the pursuit be terminated if conditions pose a safety hazard.
3. OJS officers will discontinue pursuits initiated by another jurisdiction when the pursuit continues outside their jurisdiction, unless officer safety becomes a consideration.

C. Regardless of the location of the pursuit, or the lead agency, officers will act consistent with the procedures and guidelines established in this directive.

D. When accompanied by civilian passengers, officers may not engage in a pursuit. If a civilian is in the police vehicle at the beginning of a pursuit, the officer will turn the pursuit over to another officer, or leave the civilian at a safe location.

Handbook page 281 2-24 EXHIBIT 2 USA000366

(Docket 60 Ex. 2c at 281.) The above language contemplates pursuits "beyond jurisdiction" or a pursuit that "may extend beyond the reservation line." This section does not apply to the case at bar. This was not a pursuit that "extended" beyond the reservation line. Rather, the pursuit *began* miles from the reservation and never came close to the boundaries of the reservation. Section 2-24-09 does not apply to Officer Neuenfeldt's negligent behavior and even if it did, he should have discontinued the pursuit for safety considerations pursuant subsection (D)(3).

The Government's use of Section 2-24-04 is also irrelevant, because the factors are qualified by the unequivocal phrase "in all areas of jurisdiction." Plaintiffs addressed this in their Response to the Government's Motion to Dismiss. (*See* Docket 109 at pg. 37.) There is no discretionary language qualifying this section of the BIA Manual.

2. The Government's Reliance on *Uses Many* and *Deuser* is Misplaced.

The Government's reliance on *Uses Many* and *Deuser* are irrelevant because the pursuits in both cases began and ended within the reservations in question. *See Uses Many v. United States*, 3:15-CV-03004-RAL, 2017 WL 2937596, at *1-2 (D.S.D. July 7, 2017); *Deuser v. Vecera*, 139 F.3d 1190, 1191-92 (8th Cir. 1998). Neither case contemplates whether the discretionary function applies to an officer's decision to assert their authority outside of the jurisdiction of their reservation, without conferred authority. Thus, Plaintiffs' request this Court recognize the discrepancies between *Uses Many* and *Deuser* and the case at bar.

b. Officer Neuenfeldt's Apparent Authority to Enforce Federal Law was Empowered by the Government.

The Government's assertion that the apparent authority doctrine cannot be used to assess whether the Government empowered Officer Neuenfeldt to execute searches, seize evidence, and make arrests for federal law is a misstatement of what *Primeaux* holds. In *Primeaux*, the Eighth Circuit determined whether, under South Dakota law, there was a distinction between two theories of vicarious liability, scope of employment and apparent authority, for purposes of finding liability under the FTCA. *Primeaux v. United States*, 181 F.3d 876, 881 (8th Cir. 1999). The Eighth Circuit held that under the FTCA the apparent authority doctrine cannot be utilized to determine whether the federal agent in question was acting within the scope of their employment. *Id.* at 881.

However, the opinion did not consider whether the apparent authority doctrine can be utilized under the FTCA to prove aspects other than scope of employment, like whether the government empowered an agent to enforce federal law.

Plaintiffs plead that this Court find the Government empowered Officer Neuenfeldt to execute searches, seize evidence, and make arrests for violations of federal law because they granted him apparent authority to do so. Plaintiffs are not using the agency principles associated with the apparent authority doctrine to attribute liability to the Government or to prove that Neuenfeldt was acting within the scope of his employment.[8] He was on duty and he converged upon the scene of the high school party to assert his authority. Officer Neuenfeldt was within the scope of his employment for the United States Government and Plaintiffs are not asserting apparent authority proves this fact.

Rather, Plaintiffs request this Court acknowledge that Officer Neuenfeldt's apparent authority emanated from the Government's knowledge and inaction.[9] The Government was aware Officer Neuenfeldt enforcing law without mandatory proper training and had a duty to fix those deficiencies. The

[8] Officer Neuenfeldt was within the scope of his employment on the night and morning of June 17-18, 2017 and this Court has already held he was acting under the color of federal law. Under *Leafgreen* and *Primeaux*, Officer Neuenfeldt's actions were not "conduct so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the [government's] business." *Leafgreen v. American Family Mut. Ins. Co.*, 393 N.W.2d 275, 285 (S.D. 1986); *Primeaux*, 181 F.3d at 882. Officer Neuenfeldt's misuse of authority on the night of June 17, 2017, was entirely foreseeable by the Government.

[9] Plaintiffs' have pleaded this point thoroughly in their Motion for Partial Summary Judgement. (*See* Docket 84 at pgs. 19-26.)

Government chose to write letters without consequence, when it was required to ensure the Tribe and Officer Neuenfeldt were in compliance with the federal directives and statutes.

John Long, a former Assistant Special Agent for the BIA, opined at length in his expert opinion letter that the BIA and Agent Chino were mandated to ensure Tribe's compliance with federal law. (Beardsley Aff., Ex. 1: John M. Long Expert Opinion Letter.) Those same directives and statutes required proper training and, according to the Government's own arguments, an SLEC certification to enforce federal law. However, Officer Neuenfeldt had none of these prerequisites and enforced federal law under his apparent authority. Below are relevant excerpts from Mr. Long's letter attached to this brief, that support finding that the Government empowered Officer Neuenfeldt to enforce federal law:

- Mr. Chino's deposition indicating that his position through the BIA is only to provide technical assistance is false. The BIA has a contract monitoring responsibility to ensure contract compliance, which would include onsite program inspections, background investigations, ensuring training completion per the model scope of work and CFR Part 900 and its subsections on training.

- In order to ensure compliance with the Contract dictates, the BIA OJS has the ability to reassume a tribal law enforcement program. The BIA OJS can also withhold future funding as current year funding is awarded on October 1st.

- In 2015 the BIA OJS created CAST (Corrective Action Support Team) duties of his team were to conduct program reviews of tribal and BIA law enforcement programs to ensure policy standards were being met. The BIA OJS had a duty to conduct onsite inspection of the FSST and if correctable issues were found onsite, the team should have worked with

> tribal or BIA program to correct the deficiencies. It is my opinion that as the funding agency for PL93-638 law enforcement programs it is the BIA OJS's responsibility to ensure compliance with the contract, not just provide technical assistance.
>
> - The training completed by Officer Neuenfeldt at the South Dakota State Academy does not constitute sufficient IPA training on criminal jurisdiction in Indian Country. Additionally, a waiver was never presented to the BIA, therefore, Officer Neuenfeldt should not have been acting as a police officer during the time in question. If the BIA OJS had resumed the tribal law enforcement program, which should have occurred, the law enforcement for the tribe would be provided by the BIA. The BIA officers would have been properly trained. It is my opinion that Officer Neuenfeldt should not have been conducting any law enforcement activities on the day in question until the 638 Contract deficiencies were addressed and a background investigation was completed.

(Beardsley Aff., Ex. 1: John M. Long Expert Opinion Letter.)

Unlike in *Primeaux*, Plaintiffs are not asserting this Court must find the Government liable under the doctrine of apparent authority. The Government is liable for Officer Neuenfeldt's negligence because he was within the scope of his employment when he committed his negligence. Rather, Plaintiffs are pleading this Court find the Government empowered Officer Neuenfeldt to enforce federal law through the agency doctrine known as apparent authority.

III. CONCLUSION

Based upon the foregoing and in conjunction with Plaintiffs' Response to United States of America's Motion to Dismiss, Plaintiffs respectfully request this Court deny the Government's Motion to Dismiss. The discretionary function cannot absolve Officer Neuenfeldt's unlawful and unconstitutional

actions. Further, Plaintiffs request this Court find that the Government empowered Officer Neuenfeldt to perform searches, seize evidence, and enforce federal law, thus qualifying him as a federal investigative or law enforcement officer for purposes of the law enforcement proviso. For these and the aforementioned reasons, Plaintiffs' respectfully request its' lawsuit be able to proceed to the merits.

Dated this 20th day of May, 2022.

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