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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

L.B., Plaintiff, vs. UNITED STATES OF AMERICA, BUREAU OF INDIAN AFFAIRS and DANA BULLCOMING, agent of the Bureau of Indian Affairs sued in his individual capacity, Defendants.	Cause No. CV 18-74-BLG-SPWC **PLAINTIFF'S BRIEF IN OPPOSITION TO UNITED STATES' CROSS-MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Montana Supreme Court considered the certified question "*do law enforcement officers act outside the scope of their employment, as a matter of law, when they use their authority as on-duty officers to sexually assault a person they are investigating for a crime? L.B. v. United States,* 2022 MT 166, ¶1. In its lengthy decision answering the reformulated certified question as "No," the Montana Supreme Court did everything but sign the judgment in L.B.'s favor. All that is left for this Court now is to drive home the proverbial last nail.

The government is incorrect as to the "one remaining question" left for this Court to decide. Contrary to the government's recitation, the remaining question is not "whether Bullcoming acted in the course and scope of employment *when he sexually assaulted L.B.*," but rather "whether Bullcoming acted in the course and scope of employment *when he interacted with L.B. and violated her constitutional rights*." This is a distinction with a difference based on the Montana Supreme Court's explicit holding. *L.B.,* ¶15 ("Here, the 'act' Officer Bullcoming committed was not sexual intercourse without consent … The unauthorized 'act' Officer Bullcoming committed and for which he subsequently pleaded guilty was a violation of 18 U.S.C. § 242; that is, 'under color of [] law, statute, ordinance, regulation, or custom, [Officer Bullcoming] willfully subject[ed] [L.B] . . . to the deprivation of [her] rights…'")

Officer Bullcoming's conduct satisfies Montana's post-*L.B.* "mixed motive" test as a matter of law. The Montana Supreme Court has already made findings as to the various Restatement §229 factors which now control, and the government cannot dispute. Moreover, the Montana Supreme Court did not apply any specific quantitative burden that L.B. must meet in proving mixed motive. In other words, as long as an "appreciable" amount – that is, an amount that is "capable of being perceived or measured,"[1] essentially anything more than 0% – of Bullcoming's conduct served the interests of the BIA, *see L.B.* ¶19, he was acting in the course and scope of employment as a matter of law. Again, the Montana Supreme Court has already made findings in this regard that control the resolution of this case.

The government, in a "Hail Mary" attempt to overcome the result mandated by the Montana Supreme Court's decision, elicited and injected self-serving testimony from Dana Bullcoming into the record. But, as described below, Mr. Bullcoming's subjective justification for his conduct — even if it could be believed — is but one of several factors which the Court must consider under Montana's post-*L.B.* scope of employment analysis.

It is not merely the fact that Mr. Bullcoming was charged and convicted with violation of L.B.'s rights under 42 U.S.C. §242 that dictates that Officer Bullcoming was acting within the course and scope of employment under Montana law, but

[1] *See* meriam-webster.com/dictionary/appreciable

rather the specific facts and elements which the government alleged – and Mr. Bullcoming admitted – in pleading guilty to that charge. Under the doctrine of judicial estoppel, the government is prevented from changing its position at this juncture. Those facts control the resolution of the case.

Assuming *arguendo* that the Court: (a) does not find mixed motive exists on the factual record, (b) is inclined not to hold the government to its previous stated positions, and (c) is willing to consider the new and contradictory testimony of Bullcoming, material issues of fact which preclude summary judgment would exist as to Bullcoming's credibility that must be decided by the Court at trial. Moreover, with these same caveats, pursuant to Rule 56(d), the Court should decline to rule on the government's motion until such time as Plaintiff can complete discovery as requested in Plaintiff's Motion for Emergency Hearing. Dkt#116.

LEGAL ARGUMENT

I. THE REMAINING QUESTION IS WHETHER BULLCOMING ACTED IN THE COURSE AND SCOPE OF EMPLOYMENT WHEN HE VIOLATED L.B.'S CONSTITUTIONAL RIGHTS.

In *L.B.,* the Montana Supreme Court adopted the ten factors enumerated in Restatement (Second) of Agency §229. *L.B.,* ¶15. Most of these factors require consideration of "the act." The Supreme Court explained in *L.B.* that "[s]uch an inquiry mandates that the wrongful 'act' referred to in the factors is accurately identified." *Id.*

The Supreme Court then went on to explain that "the act" to be considered in L.B.'s case was not sexual intercourse without consent because L.B. did, in fact, consent. *Id.* Rather, "the act" to be considered in applying the Restatement §229 factors was Bullcoming's "act" of depriving L.B. of her constitutional rights under color of law. *Id.* The elements of the crime, as described by the government at Bullcoming's change of plea hearing, are

> First, the defendant was acting under color of law when he committed the act charged in the indictment;
> Second, the defendant deprived the victim of her right not to be deprived of liberty without due process of law, which includes the right to bodily integrity, which is a right secured by the Constitution or laws of the United States;
> Third, the defendant acted willfully, that is, the defendant acted with a bad purpose, intending to deprive the victim of that right; and
> Fourth, L.B. suffered bodily injury.

See Dkt#117-1 at 20:3-12. Both the government and Bullcoming agreed that these are the elements of the crime to which Bullcoming pleaded guilty. Dkt#117-1 at 24:13-25:5.

Contrary to the Montana Supreme Court's explicit holding, the government attempts to change "the act" to be considered by this Court from depriving L.B. of her constitutional rights to "sexual assault." The Court should reject the government's attempt to rewrite the Montana Supreme Court's decision.

II. COURSE AND SCOPE IS ESTABLISHED WHEN APPLYING THE ACT OF DEPRIVATION OF RIGHTS UNDER COLOR OF LAW TO THE RESTATEMENT §229 FACTORS AND MONTANA VICARIOUS LIABILITY PRECEDENTS.

Under Montana law, "a master is liable for the torts of his servant if committed within the scope of his employment," even if the acts are "willful and malicious." *Kornec v. Mike Horse Mining and Milling Co.*, 180 P.2d 252, 256 (Mont. 1947). "An act, although forbidden or done in a forbidden manner, may be within the scope of employment." *Id.* (quoting Restatement of Agency §230). Even though an employer might not be liable for the act of the employee if that act was considered in isolation, when the act "is so connected with and immediately grows out of another act of the servant imputable to the master, [] both acts are treated as one indivisible tort," and the employer is liable for the act of the employee. *Id.* "The fact that an agent in acting for his principal may deviate from express instructions or even act in utter disobedience thereof does not generally relieve the principal of liability if the acts were in furtherance of or incidental to the employment for which the agent was expressly or impliedly engaged." *Keller v. Safeway Stores*, 108 P.2d 605, 611 (Mont. 1940).

"[D]epending on the circumstances, an employer may be vicariously liable in respondeat superior for negligent, willful, and malicious acts of employees committed within the scope of their employment." *Brenden v. City of Billings,*

2020 MT 72, ¶16 (citing *Kornec*, 180 P.2d at 256, and *Keller*, 108 P.2d at 611). "When a servant in carrying out his assigned duties makes an assault on a third party as a result of a quarrel which arose as a consequence of his performance of the task imposed and at the time and place of performance of the duties he was employed to do, then the master is liable." *Kornec*, 180 P.2d at 157. "The test of the defendant company's liability is not whether the assault was committed in accordance with the master's instructions but whether the act complained of arose out of and was committed in prosecution of the task the servant was performing for his master," and "the employment must be one which is likely to bring a servant into conflict with others." *Id.* (citing Restatement of Agency §245).

Even if an employer did not authorize the tortious conduct of the employee, or the employee was disobedient or disregarded the employer's instructions, it does not preclude a finding that the employee was acting in the employer's interest. *Brenden,* 2020 MT ¶16. Even though an employee's main motive may be self-interest, it does not preclude an employee's act from being in the scope of employment "if the employee was motivated by any purpose or intent to serve the employer's interest 'to any appreciable extent'" *Id.* ¶17 (citing Restatement (Second) of Agency §236 cmt b). "[A] dual or mixed motive does not preclude a finding that the employee was acting in furtherance of the employer's interest unless the employee was engaged in "an independent course of conduct not

intended ... to serve *any* purpose of the employer." *Id.* ¶17 (citing Restatement (Third) of Agency §7.07(2) cmt b).

In *L.B.,* after establishing what "the act" at issue is in this case, the Supreme Court went on to explain that "[t]he context in which the wrongful act arose is also informed by the nature of the employment itself." *Id.* at ¶16. The Supreme Court then explained that the job duties of law enforcement officers "include initiating nonconsensual, and at times invasive, physical contact with members of the public pursuant to law enforcement goals," and thus "the scope of a police officer's employment contemplates physical contact, whether wrongfully or appropriately exercised." *Id.*

The Supreme Court found that "the authorized task" Officer Bullcoming was performing for BIA was a criminal investigation. *Id.* at ¶17. The Court explicitly held "that Officer Bullcoming's wrongful conduct was not so disconnected from his employment." *Id.*

The Court further addressed and answered several of the Restatement (2d) of Agency §229 factors in favor of a finding of course and scope:

> Even if some of Officer Bullcoming's motive was "self-interest," he was there to investigate the interests of his employer—acting as an officer and agent of the BIA investigating a crime—when he used his employer-conferred powers to sexually assault L.B. Officers have significant police discretion to enforce certain laws and to let civilians off with a warning. This discretion benefits the law enforcement agency and ultimately the taxpayers by keeping certain violations out of the criminal justice system and freeing up government resources. When an

> officer tells a law-breaking civilian he will let her go as long as she, for example, repairs her windshield, replaces her tail-light, promises not to repeat the same unlawful conduct, or offers to give up a criminal associate, he does so, in part, to benefit his employer. Similarly, when an officer intimidates a civilian through, for example, the use-of-force or the threat of force, he provides a benefit to his employer by maintaining law and order in the community. The certified facts could lead a trier of fact to conclude that Officer Bullcoming's wrongful conduct was predicated upon and incident to his employment as a BIA officer.

Id. at ¶15.

Regarding factor (a) (whether or not the act is one commonly done by such servants), as set forth above, the Montana Supreme Court has already determined this factor weighs in favor of L.B. Indeed, as Plaintiff has briefed extensively, *only* a governmental actor like Officer Bullcoming could have deprived L.B. of her civil rights. *L.B.,* ¶16.

Regarding factor (b) (time, place, and purpose of the act), the Montana Supreme Court has again already found that this factor favors a finding of course and scope because Bullcoming was at L.B.'s residence on duty and in uniform as part of a criminal investigation. *Id.* at ¶19 ("Officer Bullcoming was only in L.B.'s home by virtue of his status as a BIA officer. L.B. was otherwise capable of consent, but for Officer Bullcoming's coercive threats. It is unlikely that the statement 'something had to be done' uttered by anyone without law enforcement or similar authority would have the same coercive weight and connotations as when Officer Bullcoming uttered those words, repeatedly, to L.B.")

Regarding factor (c) (previous relations between master and servant), Officer Bullcoming was a longtime BIA law enforcement officer who routinely was tasked with enforcing the law and investigating potential crimes by BIA. Moreover, BIA authorized Bullcoming to operate alone and unsupervised as occurred when he committed the act of deprivation of L.B.'s rights under color of law. Officer Bullcoming had discretion whether or not to arrest someone for a crime.

Regarding factor (d) (apportionment of master's business), as the Supreme Court has again already found, BIA gave Officer Bullcoming significant discretion to enforce laws, which benefitted BIA. *Id.* at ¶15 ("Officers have significant police discretion to enforce certain laws and to let civilians off with a warning. This discretion benefits the law enforcement agency and ultimately the taxpayers by keeping certain violations out of the criminal justice system and freeing up government resources.")

Regarding factor (e) (if act is within the enterprise), as the Montana Supreme Court described, wrongfully exercised physical contact by police officers is within the enterprise of policing, *see L.B.*, ¶16, and sexual assault and intimidation is not uncommon in policing. *See* Hahn, *infra*.

Factor (f) (whether master had reason to expect that such act would be done), leans toward finding that Bullcomimg was acting in the course and scope. Despite

Officer Nioce's claims to the contrary, the BIA knows its officers can use their position of power to engage in acts wrongful by their nature. *See, e.g., Red Elk v. United States,* 62 F.3d 1102 (8th Cir. 1995) (describing BIA officer's sexual assault of a minor female while on duty).

Factor (g) (similarity of act done to act authorized) and (i) (extent of departure from normal method), the Montana Supreme Court already addressed and highlighted that police officers are certainly expected to use force and "invasive physical contact" when interacting with citizens. S*ee L.B*., ¶16. Given Bullcoming's deposition testimony that he had sex with about a dozen women while on duty and in uniform, it cannot be said that coercing sex from L.B. in return for not arresting her is a departure from the "normal method" of policing on the Northern Cheyenne Rservation.

For factor (h) (instrumentality of harm furnished by master to servant), again, the Supreme Court has already addressed and highlighted that BIA provided Bullcoming with the power and opportunity to sexually assault L.B, and provided the context to allow the assault to occur. *L.B.,* ¶¶16-17; ¶22 ("Officer Bullcoming was only in L.B.'s home by virtue of his status as a BIA officer. L.B. was otherwise capable of consent, but for Officer Bullcoming's coercive threats. It is unlikely that the statement 'something had to be done' uttered by anyone without law enforcement

or similar authority would have the same coercive weight and connotations as when Officer Bullcoming uttered those words, repeatedly, to L.B.")

For factor (j) (whether act is seriously criminal), again, the Montana Supreme Court has already explained the import and meaningfulness of the fact that Bullcoming was convicted of depriving L.B. of her rights, not sexual intercourse without consent.

Taken altogether, this Court should find that an analysis of the §229 factors show that Bullcoming's acts were "closely intermingled" with his employment as a BIA officer. *See L.B.*, ¶11.

This Court must find that a review of the factors discussed in *L.B.*, *Keller, Kornec,* and *Brenden* determines Officer Bullcoming's deprivation of L.B.'s rights was appreciably incidental to his authorized policing conduct and was in the course and scope of his employment, and thus the federal government is liable for Officer Bullcoming's judgment in this case.

III. A PERCEPTIBLE AMOUNT OF "MIXED MOTIVE" DICTATES A FINDING OF COURSE AND SCOPE.

The Montana Supreme Court did not ascribe either a quantity or quality to define what "at least partially" motivated means. There is no requirement, for example, that Bullcoming was aware that he was benefitting his employer by "freeing up government resources" when he decided that the appropriate course of

action was to have sex with L.B. and not arrest her, when he had the option of arresting her. *See* Dkt#126-1, 33:1-34:13; 37:16-38:24.

Now, the threshold this Court must determine is whether Bullcoming had **ANY** "appreciable" purpose to serve the interests of BIA law enforcement. The Montana Supreme Court does not require that the intent or purpose has to be "legitimate" or "legal" or "Constitutional," but only "at least partially motivated" to serve the interests of BIA law enforcement.

The government has filed the declaration of Lenora Nioce, the Special Agent in Charge of the BIA Office of Justice Services in Billings. Dkt#111-6. Ms. Nioce declares that

> Under Sections 7–9–3 and 7–9–6 of the Northern Cheyenne Criminal Code, it is a criminal offense to possess or consume alcohol within the exterior boundaries of the reservation. Officers have discretion as to whether to arrest a person for such violations, but they have the authority to make an arrest if they choose to do so. Dkt#111-6, ¶9
>
> Nor is sexual assault ever a *quid pro quo* means of keeping individuals out of the criminal justice system or freeing up government resources. Dkt#111-6, ¶11
>
> [L]aw enforcement officers may have to use force or the threat of force to ensure public safety. Officers have discretion to use such force or threats, as necessary, within the bounds of the Constitution, and applicable laws, regulations, policies, and practices. The use of force may be necessary at times to ensure public safety. Dkt#111-6, ¶13

However, in its sentencing memorandum in Bullcoming's criminal case, contrary to Ms. Nioce's declaration testimony, the government expressly

represented to the Court that Bullcoming did present a *quid pro quo* to L.B. – have sex or go to jail:

> "Something had to be done." This is what Bureau of Indian Affairs Law Enforcement Officer Dana Michael Bullcoming told L.B. when he was at her house in the early morning hours of October 31, 2015. Officer Bullcoming told her he would need to report her to social services and arrest her for child endangerment because she was intoxicated in her own house with her children asleep in another room. Afraid of losing her new job and kids, L.B. engaged in unprotected vaginal sex with Officer Bullcoming to avoid getting in trouble.
> . . .
> Bullcoming entered L.B.'s house. He told L.B. he was going to arrest her and report her to social services because she was drunk with her children in her house. PSR ¶7. "Something had to be done" is what Officer Bullcoming told L.B. and he then told her that he was talking about sex. PSR ¶¶7-8. L.B. had just began working a new job and could not afford to lose the position, or leave her children unsupervised, so she acquiesced to Bullcoming's demand. PSR ¶9. They had unprotected vaginal sex and then Bullcoming left. *Id.* Shortly after the assault occurred, L.B. discovered she was pregnant with Bullcoming's child. *Id.* L.B. was in a position that day that no person should ever face – have sex with an officer or go to jail.

United States v. Bullcoming, CR-17-89-BLG-SPW, Dkt#28 at 2, 4-5.

BIA Special Agent Donovan Wind has explained that an officer on the Northern Cheyenne Reservation has the discretion whether to arrest person for alcohol consumption:

> If [a person on the Northern Cheyenne Reservation] admits to drinking on the reservation this admission would provide probable cause to arrest the individual. The officer does have discretion as to whether to arrest a person for the violation, but would be within their authority to arrest such a violation. If the person subject to arrest is the only adult in a household with children, family services is contacted to provide supervision of the children if the adult is removed from the home subject to an arrest.

Dkt#36-1 ¶¶5-6.

In addition to other testimony at his December 14, 2022, deposition, Bullcoming, agreed with Special Agent Wind, and testified that it was at his discretion to cite or arrest individuals who were breaking the law, or to let them off with a warning. *See* Dkt#126-1, 33:1-34:13. He testified that on the night in question, L.B. had broken the law, was at risk of being arrested for intoxication, and at risk of having her child taken away by Family Services. Dkt#126-1, 37:16-38:24. He testified that one of the consequences of breaking the law is the risk of arrest. Dkt#126-1 at 39:5-8. He testified that he gave warnings instead of arresting every person who broke the law because "it was a thing of caseload," Dkt#126-1, 40:10-14, and "It's just a thing of how much caseload you want." Dkt#126-1, 34:7-13.

Contrary to Ms. Nioce's testimony, the Montana Supreme Court has already found:

> Officers have significant police discretion to enforce certain laws and to let civilians off with a warning. This discretion benefits the law enforcement agency and ultimately the taxpayers by keeping certain violations out of the criminal justice system and freeing up government resources. When an officer tells a law-breaking civilian he will let her go as long as she, for example, repairs her windshield, replaces her tail-light, promises not to repeat the same unlawful conduct, or offers to give up a criminal associate, he does so, in part, to benefit his employer. Similarly, when an officer intimidates a civilian through, for example, the use-of-force or the threat of force, he provides a benefit to his employer by maintaining law and order in the community.

L.B., ¶ 19.

So contrary to Ms. Nioce's declaration testimony here, Bullcoming did use sex as a *quid pro quo* to keep L.B. out of the criminal justice system and to "free up government resources" by limiting his caseload, both motivated by the benefit conferred on his employer: As already explained by the Montana Supreme Court, the discretion exercised by Bullcoming in not arresting L.B. benefitted his employer by "keeping certain violations out of the criminal justice system and freeing up government resources." *L.B.,* ¶19. Bullcoming did not clog up the criminal justice system with a case that he could dispose of himself, and further he did not want to bog down his time writing a report, see Dkt#126-1, 40:10-14; 34:7-13, so that he could free up the government resources he provided by being on patrol. Thus, both the government's statements and Bullcoming's own testimony show that he "was at least partially motivated by an intent or purpose to serve the interests of his employer."

Even if there was overwhelming self-interest in Officer Bullcoming's conduct, the conduct still served the policing purpose of control, intimidation, and domination. Thus Bullcoming was acting in the scope of employment because he was "motivated by any purpose or intent to serve the employer's interest 'to any appreciable extent.'" *Brenden,* ¶17. *See also* Stacie Hahn, *To Protect and to Serve: Municipal Vicarious Liability for a Sexual Assault Committed by a Police Officer*, 18 Sw. U. L. Rev. 583, 595 (1989) ("Aware of the power a police officer possesses,

and conscious of the consequences of not complying with his orders, a victim feels powerless and often is subjugated by the officer's presence").

IV. IN LIGHT OF THE MONTANA SUPREME COURT'S RULING IN *L.B.*, PERSUASIVE AUTHORITY WARRANTS A FINDING OF COURSE AND SCOPE HERE.

Now that the Montana Supreme Court has pronounced the applicable law to this case, this Court should consider cases from other jurisdictions applying state law similar to Montana to facts similar to this case, especially under the foreseeability factor of policing contact with citizens. *See* Restatement (2d) of Agency §229 (f).

In *Red Elk v. United States,* 62 F.3d 1102 (8th Cir. 1995), BIA officers "on duty, in uniform, armed, and patrolling in a police care picked up the victim ostensibly to return her safely home as a curfew violator," and then raped her in the back of the patrol car. Applying South Dakota law, the federal court held:

> In our view it was also foreseeable that a male officer with authority to pick up a teenage girl out alone at night in violation of the curfew might be tempted to violate his trust. Claymore had that opportunity because of his employment, the trappings of his office, and the curfew policy he was to enforce. He and Zimiga enforced the curfew policy, but violated the minor in the process.

62 F.3d at 1107. Thus it is certainly foreseeable that BIA officers would sexually assault Native American women, since it has happened in the past.

In *Lemons v. City of Milwaukee,* 2016 U.S. Dist. LEXIS 88820, the Court, applying Wisconsin's similar law, held:

> [S]ufficient evidence exists for a reasonable jury to find to the contrary, i.e., that [Officer] Cates was acting within the scope of employment at the time of the rape. Lemons's home was [Officer] Cates's workplace—he had been sent to her home in response to her 9-1-1 call. The rape occurred during Cates's work shift while Cates wore his MPD uniform and weapon. A jury could reasonably infer that Cates used his power as a police officer and possession of a weapon to gain control over Lemons. Importantly, Cates was in the middle of his investigation and asked Lemons to show him the broken windows she had reported. As a result of that request she led him to the bathroom, where he then cornered her. … Intent to serve the city/employer did not have to be the sole cause of the Cates's actions; it is enough if Cates's conduct was partially actuated by that desire.

In *Cox v. Evansville Police Dep't,* 107 N.E.3d 453 (Sup. Ct. Ind. 2018), the Indiana Supreme Court held:

> Here, the undisputed facts show that Officer Rogers abused his employer-conferred power and authority in sexually assaulting Beyer. Fort Wayne assigned Officer Rogers to operating-while-intoxicated enforcement and patrol, and—as part of this assignment—dispatched Officer Rogers to Beyer's stopped vehicle. There, he and another officer placed Beyer into Officer Rogers's car, and Officer Rogers took over the investigation. As part of his employment duties, Officer Rogers was alone with Beyer, handcuffed her, and took her to the lock-up facility and to the hospital. During those times and as part of his employment activities, Officer Rogers exercised physical control and official authority over Beyer. That physical control continued as he again placed her in handcuffs, loosened them, fondled her breast, took her from the hospital to a dark wooded area, walked her to a bench, raped her, placed her in a crime scene van, and took her home. The whole time, he was on duty, wearing his police uniform, and exhibiting the coercive power and authority that accompany his official duties.
>
> In sum, Officer Rogers sexually assaulted Beyer by exploiting unique institutional prerogatives of his police employment. Because of this connection, Fort Wayne is not entitled to summary judgment on the issue of liability under the doctrine of respondeat superior.

107 N.E.3d at 464.

Lastly, in *Mary M. v. City of Los Angeles,* 54 Cal. 3d 202 (Sup. Ct. Cal. 1991), applying California law, the California Supreme Court held:

> Sergeant Schroyer was acting within the scope of his employment when he detained plaintiff for erratic driving, when he ordered her to get out of her car and to perform a field sobriety test, and when he ordered her to get in his police car. Then, misusing his authority as a law enforcement officer, he drove her to her home, where he raped her. When plaintiff attempted to resist Sergeant Schroyer's criminal conduct, he continued to assert his authority by threatening to take her to jail. Viewing the transaction as a whole, it cannot be said that, as a matter of law, Sergeant Schroyer was acting outside the scope of his employment when he raped plaintiff.

54 Cal. 3d at 219.

These cases show that the police conduct at issue in this case is foreseeable, and militates for a finding that Bullcoming's actions were in the course and scope of his employment.

V. JUDICIAL ESTOPPEL PRECLUDES THE GOVERNMENT TAKING NEW POSITIONS AT THIS STAGE.

This Court should apply judicial estoppel to preclude the government from flip-flopping its position on whether Bullcoming acted in the course and scope of his employment. *See State Farm Fire & Cas. Co. v. Hansen,* 2022 WL 832593, *7-*8 (D. Mont. March 21, 2022) ("The purpose of judicial estoppel is to protect the integrity of the judicial process and prevent litigants from deliberately changing positions according to the exigencies of the moment" (citations omitted)). The

government cannot prosecute Bullcoming in his criminal case as a governmental actor under color of law and in the course and scope of his employment, then turn around and argue now that Bullcoming was not a governmental actor under color of law and in the course and scope of his employment in the subsequent civil case.

The act that violated L.B.'s constitutional rights was Bullcoming's sexual assault of L.B. *See* Dkt#111-3 at 2 ("the defendant, DANA MICHAEL BULLCOMING, then a law enforcement officer for the Bureau of Indian Affairs, while acting under color of law, did willfully deprive L.B., of a right secured and protected by the Constitution and laws of the United States; that is, the, right not to be deprived of liberty without due process of law, which includes the right to bodily integrity; specifically, the defendant, DANA MICHAEL BULLCOMING, coerced L.B. into engaging in sexual intercourse with him under threat of arrest if she refused, and such coerced sexual activity resulted in bodily injury to L.B., in violation of 18 U.S.C. § 242"). The sexual assault necessarily must have happened in the course and scope of Bullcoming's employment as a governmental actor in order for the government to prosecute Bullcoming for violating the Constitution.

The government argues that "L.B. made this same argument to the Montana Supreme Court—that Bullcoming's guilty plea to 18 U.S.C. §242 establishes course-and-scope. The Court plainly did not agree with L.B., though. If the Court had agreed with L.B., it simply could have held that Bullcoming's guilty plea establishes he was

in the course and scope of his employment." Dkt#134 at 27. The government offers no citation for the assertion that L.B. made this argument to the Montana Supreme Court, which is telling, because L.B. did not make this argument to the Supreme Court. L.B. asked the Montana Supreme Court to adopt the standard that law enforcement officers using the authority of their position as on-duty officers to sexually assault members of the public are acting in the course and scope of their employment. The Montana Supreme Court decided not to adopt this general standard urged by L.B., and instead ruled that a factual scope of employment analysis for each instance was the better approach to determining vicarious liability, and also ruled that there is no state law bar to L.B.'s claim, as this Court had previously found and as the government argued. *L.B.*, ¶12; ¶19; Dkt#64. L.B. is now asking this Court to rule that Bullcoming acted in the course and scope of his employment when he deprived L.B. of her constitutional rights because of his admissions in his criminal trial.

The government cites the case of *Daniels v. United States,* 470 F.Supp. 64 (E.D.N.C. 1979) for the proposition that an officer acting under color of law is not necessarily acting in the course and scope of employment. The *Daniels* case is inapposite to this case as there the plaintiff sweepingly argued that the government was vicariously liable for an air force security guard's conduct "irrespective of whether he was acting within the scope of employment" or as a law enforcement

officer under the FTCA. Those are certainly not the facts here. First, the federal government did not prosecute and convict Harry Hunter, the federal officer in *Daniels*, for his alleged acts. Here Officer Bullcoming was indisputably charged and convicted, and indisputably was a law enforcement officer under the FTCA. And, as has now been briefed exhaustively, Officer Bullcoming was acting within the course and scope of employment when he committed the act of depriving L.B. of her constitutional rights.

It is not the mere fact of Bullcoming's conviction for violation of 18 U.S.C. §242 that proves course and scope, but rather the specific facts as alleged by the government and admitted to by Bullcoming in the criminal proceeding that confirm course and scope.

> At the change of plea hearing, Bullcoming told the Court:
>
> THE DEFENDANT: Well, at the time of this incident, I was a BIA police officer. And using that position, I did coerce the individual to engage in sex.
>
> THE COURT: All right. So you coerced L.B. to engage in sex with you under the threat of arrest?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And you deprived her of liberty without due process, which includes the right to bodily integrity?
>
> THE DEFENDANT: Yes, I did, Your Honor.

Dkt#117-1, 24:13-25:5.

At Bullcoming's sentencing, the Court stated:

> THE COURT: And what you did, Mr. Bullcoming, was so very wrong on so many levels. I mean, it's wrong for someone -- for a man to do that to a woman, regardless, **but in this case you took advantage of your position of authority on that night and then used that to take advantage of [L.B.]**.

Dkt#117-2, 26:9-13 (emphasis added).

Thus, it is not the mere conviction under 18 U.S.C. §242 that establishes course and scope, but the facts as admitted by Bullcoming in his allocution.

VI. THE COURT SHOULD NOT CONSIDER BULLCOMING'S TESTIMONY IN DECIDING THE GOVERNMENT'S MOTION; IF IT DOES, PLAINTIFF SHOULD BE ABLE TO CONDUCT ROBUST IMPEACHMENT DISCOVERY.

It is truly shameful that, even though the record is clear that Bullcoming lied under oath and likely committed criminal perjury, the government has nevertheless attempted to inject and rely upon Bullcoming's testimony to argue it should prevail. For the reasons set forth in previous briefing, and incorporated here, the Court cannot consider the proffered testimony as to Bullcoming's subjective intent and reasons for committing the act at issue. Assuming *arguendo* the Court is inclined to accept this evidence, pursuant to Rule 56(d), Plaintiff should be allowed to conduct robust impeachment discovery as requested in her Motion for Emergency Hearing.

CONCLUSION

This Court should apply the Montana Supreme Court's *L.B.* decision to the undisputed facts, and rule as a matter of law that Bullcoming's conduct was to some degree within the course and scope of employment, therefore the government is liable under Montana vicarious liability law for the judgment against Bullcoming in this matter.

DATED this 26th day of January, 2023.

/s/ John Heenan
HEENAN & COOK

/s/Timothy M. Bechtold
BECHTOLD LAW FIRM

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1, I certify that the foregoing document contains 5708 words, and that a table of contents and table of authorities are included here.

/s/Timothy M. Bechtold