No. 23-35538

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

L.B.,
PLAINTIFF- APPELLANT,

V.

UNITED STATES OF AMERICA, ET AL
DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
D.C. NO. 1:18-CV-00074-SPW
HON. SUSAN P. WATTERS

APPELLEES UNITED STATES OF AMERICA AND BUREAU OF INDIAN AFFAIRS' ANSWERING BRIEF

JESSE A. LASLOVICH
United States Attorney

MARK STEGER SMITH
TIMOTHY A. TATARKA
RANDY J. TANNER
Assistant U.S. Attorneys
District of Montana
P.O. Box 8329
Missoula, MT 59807
101 E. Front St., Suite 401
Missoula, MT 59802
Telephone: (406) 329.4268
Attorneys for Defendants-Appellees United States and Bureau of Indian Affairs

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INTRODUCTION

Dana Bullcoming acted on "self-gratification" and egregiously departed from his law enforcement responsibilities when he sexually assaulted L.B. The District Court correctly concluded Bullcoming's assault was beyond the course and scope of his employment. The United States prosecuted Bullcoming for the assault, the District Court sent him to prison, and he now faces a $1.6 million default judgment in this case. Bullcoming was not, in any manner, advancing the interests of the United States when he assaulted L.B.

Bullcoming's assault was a reprehensible abuse of authority, but the fact that Bullcoming was on duty when he assaulted L.B. does not imply he was acting in the course and scope of his employment. The Montana Supreme Court, on a certified question from this Court in the first appeal for this case, held that a law enforcement officer's abuse of authority is in the course and scope of employment only if (1) the officer's conduct "arose out of the employment" and (2) "was at least partially motivated by an intent or purpose to serve the interests of his employer." *L.B. v. United States*, 515 P.3d 818, 825 (Mont. 2022) (citations omitted). L.B. bears the burden of proving both prongs, but she can prove neither.

First, the undisputed facts show Bullcoming's assault did not arise out of his employment because his sexual assault of L.B. was not "similar or incidental to the conduct authorized" by his employer at the time, the Bureau of Indian Affairs

Office of Justice Services (BIA-OJS). *Id.* at 824. Rather than being an escalation of authorized conduct, Bullcoming's sexual assault was a clear, criminal departure from any conduct authorized by BIA-OJS.

Second, the undisputed facts show that Bullcoming was not motivated to serve any interest of BIA-OJS when he assaulted L.B. As Bullcoming told the district court during the criminal case, he was thinking "only of himself." Contrary to L.B.'s allegations, there is no evidence supporting a theory that Bullcoming assaulted L.B. to serve any purported interest in freeing up government resources or to domineer, punish, or intimidate L.B., which are not even law enforcement purposes. Bullcoming testified at his deposition that his motivation for assaulting L.B. was solely personal—his own self-gratification—an assessment confirmed by the other undisputed evidence. Bullcoming and L.B. had known each other for 30 years, and both knew Bullcoming had a "crush" on L.B. Bullcoming testified there was no law enforcement motivation for his sexual assault of L.B.

Both parties agree the facts of this case are undisputed. But L.B. does not provide any factual evidence supporting her claim against the United States. The District Court correctly granted summary judgment in favor of the United States. L.B.'s attempt to manufacture a dispute over discovery relief for which she never moved and to have the district court judge reassigned for disagreeing with her on legal grounds are unavailing. This Court should affirm.

JURISDICTION

The United States disputes subject matter jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2674, because Bullcoming was not in the course and scope of his employment when he assaulted L.B. District courts, however, have exclusive jurisdiction over FTCA claims under 28 U.S.C. §§ 1331, 1346. This Court has jurisdiction to review the District Court's judgment under 28 U.S.C. § 1291. Final judgment was entered August 8, 2023. (ER-19.) L.B. filed a timely notice of appeal on August 11, 2023. (ER-258–59.)

ISSUES FOR REVIEW

1. Did the District Court correctly conclude the United States is not vicariously liable for Bullcoming's sexual assault of L.B. because the assault was outside the course and scope of Bullcoming's employment with BIA-OJS?

2. Did the District Court abuse its discretion by denying L.B.'s motion for a hearing when L.B. never moved for the discovery relief alluded to in the motion?

3. If the Court remands this matter, should it grant the extraordinary relief of reassignment even though L.B. has provided no evidence of the District Court's alleged bias or prejudice?

STATEMENT OF THE CASE

L.B. filed her Complaint on April 23, 2018, alleging claims under 42 U.S.C. § 1983 and the FTCA against the United States and Bullcoming.[1] (CR 1.) The United States answered on July 25, 2018. (CR 5.) Default judgment was entered against Bullcoming on May 26, 2020. (CR 88.)

The parties moved for summary judgment, and the District Court granted the United States' motion on August 28, 2019. (CR 64.) L.B. appealed to this Court. (9th Cir. No. 20-35514.) This Court certified a question to the Montana Supreme Court regarding Montana's law on course and scope of employment. (9th Cir. No. 20-35514, Doc. 38.) The Montana Supreme Court answered a modified version of the certified question on August 16, 2022, holding that it could not, as a matter of law and on the facts before it, conclude that Bullcoming acted beyond the course and scope of employment. *L.B.*, 515 P.3d at 818. The Montana Supreme Court concluded additional fact development was necessary. *Id.* at 825, 828.

In light of the Montana Supreme Court's answer to the certified question, this Court remanded the matter to the District Court on September 23, 2022. (9th Cir. No. 20-35514, Doc. 49.) On remand, after further fact discovery by the United

[1] L.B. had apparently intended to assert a claim against Bullcoming under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), rather than 42 U.S.C. § 1983. (CR 85 at 6–7.)

States, the parties again moved for summary judgment. (CRs 105, 133.) The District Court granted summary judgment in favor of the United States. (ER-4–18.) L.B. now appeals that decision.

BACKGROUND

I. Bullcoming's sexual assault

The facts of this case are undisputed. On October 31, 2015, Bullcoming was on duty for BIA-OJS on the Northern Cheyenne Indian Reservation. (SER-062.) Early that morning, L.B. called BIA-OJS, reporting her mother had just left L.B.'s residence and was driving while intoxicated. (SER-063.) Both L.B. and her mother had been drinking the night of October 30, arriving at L.B.'s home around midnight. (*Id.*)

Bullcoming responded to the call and found L.B.'s mother at an apartment, not driving. (SER-063.) Bullcoming then drove to L.B.'s house. (*Id.*) L.B. was worried about being arrested because beer cans were laying around her house (the Northern Cheyenne Reservation is dry). (*Id.*) Bullcoming asked L.B. if she was home alone, and she told him her kids were in their rooms. (*Id.*) Bullcoming allegedly told L.B. "something needed to be done."[2] (SER-064.) L.B. alleges

[2] To the extent Bullcoming's statements regarding the events of October 31 differ from those made by L.B., the United States presents L.B.'s recollection of the events.

Bullcoming also suggested he might have to call social services because of the kids and that he would take her in for child endangerment because of her intoxication. (SER-063.) L.B. told Bullcoming she did not want to go to jail or lose her job. (*Id*.)

L.B. and Bullcoming continued to talk and eventually both went outside to Bullcoming's patrol car (standing outside it, not getting in) where Bullcoming administered a breathalyzer test to L.B. (SER-064.) The results were .132 or .136. (*Id*.) Both then walked toward the garage and Bullcoming allegedly stated, "Something needs to be done about this," repeating the phrase multiple times. (*Id*.) L.B. responded, "Like, what do you mean? Like sex?" (*Id*.) "Yes," Bullcoming said, and L.B. asked, "Well, uhm, let me—oh, let me guess, you've always had a crush on me since a long time ago." (*Id*.) Bullcoming agreed, confirming her suspicion. (*Id*.) L.B. and Bullcoming both acknowledge they had known each other since they were kids, and she was best friends with Bullcoming's sister when they were teenagers. (*Id*.)

L.B. and Bullcoming had unprotected sex. (SER-064.) As Bullcoming was leaving, L.B. asked, "So, you know, are you working tomorrow night?" "Yeah," he said. (*Id*.) "Well, you should stop by again," L.B. said. (*Id*.) L.B. became pregnant as a result of the encounter and had a child. (SER-065.)

Lenora Nioce, the Special Agent in Charge (SAC) for BIA-OJS, District V, in Billings, Montana, declared that Bullcoming underwent a thorough background

investigation before he was hired and that BIA-OJS monitored his conduct on an ongoing basis. (ER-92.) SAC Nioce further declared that Bullcoming's background and history never gave BIA-OJS any reason to believe he would sexually assault someone. (*Id.*) Nor did he exhibit any conduct during his employment that would have led BIA-OJS to believe he would sexually assault someone. (*Id.*) L.B. did not dispute these facts below. (CR 139.)

II. The parties' first motions for summary judgment

Both parties moved for summary judgment. The District Court concluded, as a matter of law, that Bullcoming was not in the course and scope of his employment when he assaulted L.B. (CRs 60, 64.) L.B. appealed and this Court certified the course-and-scope question to the Montana Supreme Court.[3] (9th Cir. No. 20-35514, Doc. 38.) The Montana Supreme Court held that—on the certified factual record existing at that time—it could not conclude, as a matter of law, that Bullcoming acted outside the course and scope of his employment. *L.B.*, 515 P.3d at 828. The Supreme Court held additional fact development was necessary—in

[3] This Court certified the question as "Under Montana law, do law-enforcement officers act within the course and scope of their employment when they use their authority as on-duty officers to sexually assault members of the public?" (9th Cir. No. 20-35514, Doc. 38). The Montana Supreme Court reformulated the question as, "Under Montana law, 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.*, 515 P.3d at 821.

particular, facts evidencing (1) whether the assault arose out of Bullcoming's employment and (2) Bullcoming's motive for assaulting LB (i.e., whether the assault was based on solely personal interests or whether it partially served BIA-OJS's interests). *Id.* at 825, 828. This Court then remanded the matter to the District Court. (9th Cir. No. 20-35514, Doc. 49.)

III. Fact discovery on remand

On October 7, 2022, the District Court issued its post-remand scheduling order, setting the discovery deadline for December 30, 2022, just over two-and-a-half months out. Neither party had yet deposed Bullcoming, and counsel for the United States conducted a telephonic preliminary witness interview with Bullcoming. (ER-41–42.)

A. Preliminary witness interview with Bullcoming

On the call, counsel for the United States introduced themselves as Assistant United States Attorneys representing the United States (AUSAs) in this matter. (ER-41.) They asked Bullcoming if he was represented by an attorney, and he said he was not. (*Id*.) They asked Bullcoming if he had spoken with any other attorneys in relation to this case, and he said he had not. (*Id*.) They informed Bullcoming of the current status of the case—that it had been appealed to the Ninth Circuit and remanded to the District Court. (*Id*.) They asked Bullcoming for his permission to ask him a question about his sexual encounter with L.B., and he gave permission.

(*Id*.) They then asked him a single, substantive question—Did your sexual encounter with L.B. serve any law enforcement purpose or interest of BIA-OJS, or was it solely for your personal interests? (ER-41–42.) Bullcoming stated the encounter served no law enforcement purpose or interest of BIA-OJS and that the encounter was solely personal. (ER-42.) Bullcoming then told the AUSAs he was not comfortable talking any further about the encounter, and they ended the call. (*Id.*)

B. Bullcoming's deposition

The United States elected to depose Bullcoming. Counsel for the United States emailed L.B.'s counsel on November 4, 2022—nearly two months before discovery closed—to inform them of the United States' intent to depose Bullcoming and find a mutually agreeable date. (ER-42–49.) The United States provided several available dates, including in early December. (*Id*.) L.B.'s counsel objected, suggesting the deposition was not necessary and that court approval would be required. (*Id*.)

The United States asked L.B.'s counsel to explain why Bullcoming's deposition was not necessary, but L.B.'s counsel never answered. (*Id*.) Instead, L.B.'s counsel filed their motion for summary judgment and, after doing so, told the undersigned they would be available for Bullcoming's deposition on December 14, 2022. (*Id*.) L.B.'s counsel had also hired a private investigator to go to

Bullcoming's house to try and persuade him to sign an authorization for the release of his presentence investigation report (PSR) and psychosexual evaluation. (SER-133–135, 148–150.) Bullcoming refused to sign the release. (*Id.*)

At the outset of Bullcoming's deposition, the United States explained to Bullcoming the purpose of the deposition—that it was being taken in connection with this civil case, not his prior criminal case.[4] (SER-125–126.)[5] Bullcoming then unequivocally testified that his sexual encounter with L.B. served only his personal interests and was not motivated by any law enforcement purpose or interest of BIA-OJS:

> AUSA Tanner: And your sexual encounter with [L.B.][6] did not serve any law enforcement purpose. Is that right?
>
> Bullcoming: No. No, it did not.
>
> AUSA Tanner: And were you employed with . . . Who were you employed with at the time of that encounter?

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[4] L.B. claims this explanation meant the United States was offering Bullcoming a "non-prosecution promise" or "immunity from criminal prosecution in exchange for deposition testimony." (Doc. 6 at 14, 40, n.1). Not so. The United States was transparently explaining that the deposition was being taken in connection with this civil case and not any criminal matter. (SER-125–126.) No offers of immunity of any sort were provided. (*Id.*)

[5] L.B. provided a condensed transcript of the deposition in her Excerpts of Record. The United States has provided a full version in its Supplemental Excerpts of Record for readability. The United States has likewise provided the full version of the District Court's summary judgment hearing transcript. (*See* SER-004–061.)

[6] L.B.'s full name was used in the deposition, and it has been redacted from the deposition transcript at SER 119–90.

Bullcoming:	Bureau of Indian Affairs Law Enforcement Services.
AUSA Tanner:	And your sexual encounter with [L.B.] did not serve any interest or objection—or objective of the BIA. Is that right?
Bullcoming:	That's right.
AUSA Tanner:	When you had sex with [L.B.] in October 2015, that was solely based on your personal interest. Is that right?
Bullcoming:	Yes.
AUSA Tanner:	And you had known [L.B.] for several years and a had a bit of a crush on her. Is that right?
Bullcoming:	Yeah. That was prior—prior to my being in law enforcement, yes.

(SER-130–131.)

V. L.B.'s motion for a hearing

The day after Bullcoming's deposition, L.B. filed a motion for a hearing, aimed at discrediting Bullcoming's testimony. (CRs 116, 117.) The motion alluded to several extraordinary avenues of relief, but L.B. did not actually move for the relief mentioned in her brief. (*Id*.) The District Court set a hearing date, though, before the United States responded to the motion. (CR 122.) The United States then filed its response to L.B.'s motion and asked that the motion be denied and the hearing vacated because no request for relief was properly before the Court and no relief was warranted. (CRs 123, 124.) The District Court vacated the hearing and

later denied the motion at the hearing on the parties' second motions for summary judgment (discussed below). (CR 125; SER-007–009.) The District Court explained that it denied the motion for a hearing because none of the relief mentioned in the motion was properly before the court. (*Id*.)

VI. The parties' second motions for summary judgment

The United States filed its cross-motion for summary judgment after deposing Bullcoming. (CR 133.) The District Court held a hearing on the cross-motions and later issued its written order. (ER-4–18; SER-004–061.) The District Court concluded Bullcoming's assault arose out of his employment, satisfying the first prong of the Montana Supreme Court's two-prong test. (ER-13–14.) But the Court granted summary judgment in favor of the United States because L.B. could not establish the second prong—the undisputed evidence showed Bullcoming acted solely in his personal interest when he assaulted L.B. (ER-14–17.) As the Court observed, L.B. presented no evidence to the contrary and instead offered only "speculative" arguments and "bare assertions." (ER-15.)

ARGUMENT SUMMARY

Under the FTCA, the United States is vicariously liable for Bullcoming's assault of L.B. only if the assault was in the course and scope of Bullcoming's employment with BIA-OJS. In its *L.B.* decision, the Montana Supreme Court stated a two-prong test for analyzing course and scope of employment under

Montana law. First, L.B. must establish the assault arose out of Bullcoming's employment with BIA-OJS. Second, she must show Bullcoming was motivated, at least in part, to serve some interest of BIA-OJS. The parties agree the facts in this case are undisputed. Those undisputed facts show that L.B. cannot establish either prong of the test: (1) Bullcoming's assault did not arise out of his employment with BIA-OJS and (2) Bullcoming assaulted L.B. solely for personal reasons. Since Bullcoming's assault was not in the course and scope of his employment, the United States cannot be vicariously liable under the FTCA for his assault.

Next, the District Court did not abuse its discretion when it denied L.B.'s motion for a hearing. L.B. filed the motion for a hearing despite never having moved or briefed the substantive relief she suggested should be addressed at the hearing. Nor did L.B. take any preliminary steps for the relief that might have been discussed at the hearing. L.B. never filed a motion to extend the discovery deadline, never filed motions to compel any deposition testimony or document production, and never served any subpoenas. The District Court correctly denied L.B.'s motion because L.B.'s requests for additional discovery were never properly before the Court.

Finally, the Court should deny L.B.'s extraordinary request for reassignment. Remand is not necessary in the first place because the Court should affirm summary judgment in favor of the United States. Regardless, reassignment

would still be inappropriate even if the case were remanded. None of L.B.'s arguments are legitimate grounds for reassignment. L.B. cites no evidence that illustrates any bias, prejudice, or injustice by the District Court.

STANDARDS OF REVIEW

The Court reviews de novo an order granting summary judgment and may affirm on any basis supported by the record, whether or not relied upon by the district court. *Moran v. Screening Pros, LLC*, 25 F.4th 722, 728 (9th Cir. 2022). Questions that are ordinarily fact issues for a jury may be resolved on summary judgment when the facts are undisputed. *See West v. State Farm Fire & Cas.*, 868 F.2d 348, 350 (9th Cir. 1989).

The Court reviews a district court's discovery rulings for abuse of discretion. *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1119 (9th Cir. 2020).

ARGUMENT

I. The Montana Supreme Court's two-prong test establishes that Bullcoming did not act in the course and scope of his employment when he assaulted L.B.

Under the FTCA, a plaintiff may only sue the United States for the tortious act of its employee if the employee was "acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). Whether a government employee acted in the scope of his employment is determined by state law. *See Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996). The plaintiff bears the burden of establishing this

jurisdictional requirement. *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992).

The United States does not dispute that Bullcoming sexually assaulted L.B. or that he abused his authority in doing so. The single, dispositive question in this case is whether Bullcoming acted in the course and scope of his employment. The Montana Supreme Court held this question must be answered through a two-prong test:

> [I]f an on-duty police officer obtains consent by misusing official authority, the wrongful act may be within the scope of employment if **[1]** it arose out of the employment and **[2]** was at least partially motivated by an intent or purpose to serve the interests of his employer.

L.B., 515 P.3d at 825. L.B. bears the burden of establishing both prongs, but she can establish neither. The undisputed facts show (1) Bullcoming's assault did not arise out of his employment and (2) Bullcoming was motivated solely by his personal interests, not any interest of BIA-OJS.

A. Bullcoming assaulted L.B. solely for his personal interests, not to serve any law enforcement purpose.

The second prong of this test was central to the post-remand proceedings, so it is discussed first here. Under this prong, an employee's act is not in the course and scope of his employment if the act was committed solely for personal interests. *Id.* at 825–26; *see also Keller v. Safeway Stores*, 108 P.2d 605, 611 (Mont. 1940). L.B. bears the burden of bringing forward some facts upon which a reasonable

factfinder could conclude that Bullcoming was motivated, at least in part, by an intent to serve his employer's interest. L.B., however, asks the Court to ignore Bullcoming's state of mind and disregard entirely this prong of the test. She misunderstands Montana law. As the Montana Supreme Court held in *Brendan* (on which the *L.B.* Court relied), "[t]he state of mind of the employee is determinative" and "severs the basis for treating" an "act as that of the employer." *Brenden v. City of Billings*, 470 P.3d 168, 175 (Mont. 2020) (cleaned up).

1. Bullcoming unequivocally testified he assaulted L.B. solely for personal reasons.

Bullcoming's deposition testimony is clear; his sexual encounter with L.B. was purely personal and not motivated by any law enforcement purpose or interest of BIA-OJS:

AUSA Tanner:	And your sexual encounter with [L.B.][7] did not serve any interest or objection—or objective of the BIA. Is that right?
Bullcoming:	That's right.
AUSA Tanner:	When you had sex with [L.B.] in October 2015, that was solely based on your personal interest. Is that right?
Bullcoming:	Yes.
AUSA Tanner:	And you had known [L.B.] for several years and a had a bit of a crush on her. Is that right?

[7] L.B.'s full name was used in the deposition.

Bullcoming: Yeah. That was prior—prior to my being in law enforcement, yes.

(SER-131–132.)

The other undisputed evidence confirms Bullcoming's testimony. Both Bullcoming and L.B. confirmed Bullcoming had a longstanding romantic interest in L.B. (SER-067.) Bullcoming agreed and confirmed her suspicion. (SER-064.) L.B. stated she and Bullcoming had been neighbors, and she had known him since they were kids. (SER-067.) Bullcoming was a grade ahead of L.B. in school, and their mothers had been best friends. (*Id*.) L.B. was also best friends with Bullcoming's sister when they were teenagers. (*Id*.) This pre-existing relationship between Bullcoming and L.B. is further evidence that Bullcoming was acting purely out of self-gratification and not in pursuit of BIA-OJS's mission. Indeed, as L.B. recounted, contemporaneous with the encounter, when Bullcoming confirmed that he was seeking sex from L.B., she confronted Bullcoming about his motivation, "[L]et me guess, you've always had a crush on me since a long time ago." (SER-064.)

Bullcoming has never testified or otherwise stated—whether in this case or his criminal case—that he was motivated by anything other than his personal interests when he assaulted L.B. To the contrary, when Bullcoming allocuted at his sentencing hearing, he stated, "I put a black eye on [law enforcement], and that

was something I never even thought of. I was selfish, only thought about myself." (SER-067.) When Bullcoming was asked at his deposition to explain what he meant by that statement, he testified:

> I put a black eye on my responsibilities as a law enforcement officer, you know, keeping the integrity, honesty, sound judgment, and what I had done pretty much kind of destroyed all that, and that's what I meant by that. . . . I was only thinking of myself in the sense of that personal—I guess, what I've come to understand about myself is self-gratification, in that sense.

(SER-139–140.) Bullcoming was then asked, "So was that statement, was that a reflection that you were acting solely out of your self-interest that night and not for any law enforcement purpose?" (SER-140.) "Yes," Bullcoming responded. (*Id.*)

2. L.B. provides no evidence to support her speculative theories of motive.

The District Court correctly concluded that L.B. offered nothing in response to this evidence other than "speculative" argument and "bare assertions." (ER-15.) L.B.'s argument on appeal only highlights this deficiency. She makes three arguments, none of which are supported by any evidence related to this case: (1) Bullcoming might have assaulted L.B. to "free up government resources"—i.e., by having sex with L.B. instead of arresting her, Bullcoming was serving BIA-OJS's purported interest in reducing report writing and freeing up jail space (Doc. 6 at 24, 27, and 29); (2) Bullcoming served an alleged interest in using physical force to exercise "control, intimidation, and domination" over the public (Doc. 6 at 27, 29,

and 32); and (3) Bullcoming's statement to L.B. that "something needed to be done" suggests he was motivated to punish L.B.

First, L.B.'s freeing-up-resources argument is entirely unsupported by and at odds with Bullcoming's testimony and the factual evidence. Bullcoming never testified he assaulted L.B. to avoid writing a report or to keep L.B. out of jail. L.B. offers no evidence to support this argument. And the argument ignores a simple fact: If Bullcoming wanted L.B. to walk free without an arrest or citation, he simply could have issued her a warning or otherwise let her go without assaulting her. Bullcoming testified in other instances he has done just that—issued a warning for alcohol-related violations without assaulting suspected violators. (SER-154, 159–161, 180–181, ER-69, 71, 76.) The key inquiry under *L.B.* is what motivated the assault, not whether the surrounding circumstances also involved a lawful arrest or investigation. *L.B.*, 515 P.3d at 825; *Sherman v. State Dep't of Pub. Safety*, 190 A.3d 148, 154–55 (Del. 2018) (explaining that the Restatement's motivation test focuses on the employee's specific tortious conduct (sexual assault) rather than the fact that it grew out of a valid arrest).

In *L.B.*, the Montana Supreme Court provided an example of how an officer might give a motorist with a cracked windshield or broken tail-light a warning in order to free up resources. *L.B.*, 515 P.3d at 825–26. That example has no import here, though—Bullcoming issued no warning. Moreover, while an officer might

have discretion to issue a warning, an officer never has discretion to sexually assault a person he is investigating—issuing a warning for a broken tail-light is fundamentally different than sexually assaulting someone. (ER-91.)

Second, L.B. provides no evidence that Bullcoming assaulted L.B. to serve BIA-OJS's purported interest in physical intimidation. Physical intimidation is not a law enforcement purpose. *L.B.*, 515 P.3d at 826. Instead, officers must sometimes use physical force—within the bounds of applicable laws—to "maintain[ ] law and order in the community." *Id.*; (ER-91.) But, here, there is no evidence Bullcoming assaulted L.B. in order to maintain law and order in the community. And, even if physical intimidation were a law enforcement purpose (it is not), there is no evidence Bullcoming assaulted L.B. to intimidate her. Bullcoming testified he assaulted L.B. for purely personal reasons and acted on his own "self-gratification"; both he and L.B. acknowledge they knew each other for 30 years and that Bullcoming had a "crush" on her. (SER-064–065, 068.)

The only evidence L.B. offers to support her theoretical physical-intimidation argument is two inadmissible law review articles (Doc. 6 at 29–30.) From these articles, L.B. extrapolates that sexual assault is "within the enterprise" of law enforcement and "is not uncommon in policing." (*Id.*) L.B. takes great liberty with the articles, and they say, of course, nothing at all about the facts of this case. Even so, the articles are inadmissible expert opinion (L.B. disclosed no

experts below). *See Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1060–61 (9th Cir. 2005) (holding non-moving party could not rely on undisclosed expert testimony in responding to summary judgment motion). The Court should disregard them entirely.

Finally, both L.B. and amici argue that Bullcoming's statement to L.B., "something needed to be done," evidences a law enforcement purpose for the assault—i.e., punishment (*See* Doc. 6 at 9, Doc. 11 at 21.) It does not. First, the statement only demonstrates Bullcoming's abuse of authority—Bullcoming made the statement to coerce L.B. to have sex with him under the threat of arrest. L.B. admits she knew "something" meant sex. (Doc. 6 at 9.) There is no evidence whatsoever that Bullcoming intended to punish L.B. in any way. To the contrary, the undisputed facts show he intended to have sex with her because he had known her for 30 years and had a long-standing "crush" on her. (SER-064–065, 068.) That is why Bullcoming testified he assaulted her solely for personal reasons—he wanted "something done" for him. (ER-63–64.) Second, punishment is not a law enforcement purpose to begin with; it is an inherently judicial function that cannot be delegated to law enforcement. *See, e.g.*, *United States v. Kent*, 209 F.3d 1073, 1078 (9th Cir. 2000). Punishment, therefore, is not an interest Bullcoming could have even theoretically been motivated to serve.

The Montana Supreme Court's *L.B.* decision required L.B. to identify facts that show Bullcoming was motivated in part by a law enforcement purpose when he assaulted L.B. *L.B.*, 515 P.3d at 823, 825–26; *see also id.* at 826 ("What evidence L.B. chooses to present to prove her allegations will be up to her . . . ."). That L.B. has been unable to marshal these facts comes as no surprise. Courts across the country have routinely observed that an officer's sexual assault does not benefit the employer and is, instead, simply an act of personal self-gratification. *See, e.g.*, *Greene v. United States*, 2023 WL 309320, at *2–*3 (E.D. Ky. Jan. 18, 2023) (corrections officer's sexual assault was not in course and scope because "there is no conceivable way that intentionally committing sexual assault can be motivated by a desire to serve the employer"); *Martin v. Tovar*, 991 N.W.2d 760, 764 (Iowa 2023) (police officer's sexual assault "was not intended to further any purpose or interest of the City"); *Powell v. City of Chicago*, 197 N.E.3d 219, 226 (Ill. Ct. App. 2021) (plaintiff failed to show "how the sexual assault is the type of conduct that a police officer is employed to perform and how sexual assault furthers an employer's business"); *Peteet v. Hawkins*, 2018 WL 4039375, at *3–*4 (S.D. Tex. July 17, 2018) (rejecting FTCA sexual-assault claim because plaintiff "alleged no fact that would support a conclusion that [corrections officer] was acting with any other purpose than his own gratification"); *Bate v. Bd. of Cnty. Commrs. of Mayes Cnty.*, 674 Fed. Appx. 830, 834–35 (10th Cir. Jan. 5, 2017)

("Obviously, sexually assaulting an inmate furthers no legitimate correctional purpose."); *Casey v. City of Miami Beach*, 789 F. Supp. 2d 1318, 1320–21 (S.D. Fla. 2011) ("The sexual battery was not activated by any purpose to serve the City. Plaintiff's conclusory allegations with regard to [police officer's] actions being within his course and scope of employment do not change this fact.") *Shirley v. United States*, 232 F. App'x 419, 420 (5th Cir. 2007) (affirming district court's conclusion that correction officer's actions were not within the scope of employment because the "sexual assault did not advance the United States's work . . . and instead constituted a wholly personal action"); *Adorno v. Corr. Servs. Corp.*, 312 F. Supp. 2d 505, 517 (S.D.N.Y. 2004) ("Sexual misconduct and related tortious behavior arise from personal motives and do not further an employer's business, even when committed within the employment context.") *Doe v. South Carolina State Budget & Control Bd.*, 494 S.E.2d 469, 472 (S.C. Ct. 1997) (police officer did not act in course and scope of employment when officer had sex with women in exchange for not arresting them because "no cogent argument can be made that [the officer] was furthering the business of his employer at the time he sexually assaulted [the plaintiffs]"); *Doe v. Purity Supreme, Inc.*, 664 N.E.2d 815, 820 (Mass. 1996) ("[R]ape and sexual assault of an employee do not serve the interests of the employer.").

While the Montana Supreme Court left open the possibility that a plaintiff could, in theory, put forward evidence that an assault was motivated by some employer interest, L.B. simply has not done so.

3. The District Court correctly relied on Bullcoming's testimony.

The District Court explained that Bullcoming maintained his position—that he assaulted L.B. solely for personal reasons—even though it was against his interest and even when told by L.B.'s counsel that "unless there's a policing purpose to your interaction with [L.B.], ... you'll be left holding the bag." (ER-14.) Bullcoming had no reason to falsify his testimony.

Nevertheless, L.B. attacks the District Court for accepting Bullcoming's "contradictory" and "perjured" testimony. (Doc. 6 at 37–39.) L.B. does not describe the substance of this purported testimony in her opening brief. But, based on her argument below, L.B. appears to take issue with Bullcoming's testimony on whether his encounter with L.B. was consensual or coercive.

At his change of plea hearing, Bullcoming testified he coerced L.B. to have sex. (ER-224.) At his deposition, Bullcoming testified this was not accurate, suggesting he did not coerce L.B., that she consented. (SER-165–171.) Bullcoming testified he did not agree with the allegations made against him but that he agreed to the plea deal with the hope that he would get less prison time. (*Id*.) Bullcoming

testified his change of plea hearing is the only time he has not been truthful in relation to his encounter with L.B. (SER-183.)

Two points are worth noting at the outset regarding the issue of coercion. First, it has no bearing at all on the relevant issues in this case. Regardless of whether Bullcoming believed he coerced L.B., he made clear, contrary to his economic interest, that his encounter with L.B. was motivated entirely by personal interests and did not arise out of his employment, consistent with L.B.'s conclusion that he was acting on a crush. Whether Bullcoming believed L.B. consented voluntarily simply does not figure into the analysis at any point for this case. The District Court did not consider the issue of coercion in its analysis; nor should this Court.[8] *See Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975) (relying on deposition testimony to affirm summary judgment and noting, "The very object of summary judgment is to separate real and genuine issues from those that are formal or pretended . . . .").

[8] Thus, even if the Court were to strike this portion of Bullcoming's deposition testimony, as *L.B.* urges, that would have no bearing on the merits of this case. Moreover, none of the cases L.B. cites stand for the proposition that an entire deposition should be stricken based on a portion that is purportedly inconsistent. In *Pacific Ins. Co. v. Kent*, for instance, on which L.B. relies, the district court struck only "those portions of [the] deposition that contradict his prior sworn testimony." 120 F. Supp. 2d 1205, 1214 (C.D. Cal. 2000).

Second, contrary to L.B.'s suggestion, the terms "coercion" and "consent" are ambiguous. (Doc. 6 at 38.) The distinction is nuanced, and the legal meaning of these terms might differ from their conventional understanding. As the Montana Supreme Court observed, legally, one can coerce another into consent. *L.B.*, 515 P.3d at 824 & n.3; (*see also* ER-56). Here, the Court explained, L.B. consented to having sex with Bullcoming under threat of arrest. *Id.* It is not clear Bullcoming, years removed from his discussions with counsel related to the change of plea, understood this distinction. (SER-165-167.); *see L.B.*, 515 P.3d at 824 ("Here, the 'act' Officer Bullcoming committed was not sexual intercourse without consent—L.B. agreed to have sexual intercourse with Officer Bullcoming in return for not being charged.")

These points aside, the relevant fact is this: Bullcoming never testified at his change of plea hearing—or at any other time—that he assaulted L.B. in order to serve some law enforcement purpose or interest of BIA-OJS. And Bullcoming had no reason to falsify his testimony regarding his personal motivation for the assault. In fact, as the District Court explained, Bullcoming maintained his position even though it was against his interest. (ER-14.)

4. Bullcoming's assessment of his state of mind cannot be ignored.

Finally, L.B. and amici argue the Court should simply ignore Bullcoming's "subjective" assessment of his state of mind when he assaulted L.B. because, "[I]t

is unlikely that a police officer like Officer Bullcoming would subjectively believe that, by engaging in sex with a person under his authority, he was furthering his employer's interests." (Doc. 6 at 20, 33.) That is absolutely true—an officer who sexually assaults someone would not likely believe the assault furthers his employer's interest. But that is not a result of the officer's inability to accurately assess his state of mind; it is because sexual assault does not advance any law enforcement purpose in the first place.[9]

Defying logic (and the law), L.B. argues Bullcoming's individual motivation should be determined without regard to his own awareness. (Doc. 6 at 24.) In other words, ignore the direct evidence. According to L.B., Bullcoming did not need to be aware of his own state of mind—he could have assaulted L.B. to serve BIA-OJS's interests without knowing he was doing so. (Doc. 6 at 24.) L.B.'s argument is contrary to Montana law. The *L.B.* decision makes clear that the course-and-scope test involves an assessment of whether the officer was "motivated by an intent or purpose to serve the interests of his employer." 515 P.3d at 825. An individual's assessment of his state of mind is direct evidence of the individual's

[9] In *Brenden*, the Montana Supreme Court explained that even if an employee proffers the notion that he was serving his employer's interest, conduct might be "so outrageous or whimsical" to be beyond the course and scope of employment, regardless of the employee's motivation. *Brenden*, 470 P.3d at 173 (quoting *Restatement* § 229 cmt. b).

motivation, and the "external manifestations" are only circumstantial evidence. *Brendan*, 470 P.3d at 175. Together, this evidence constitutes the totality of the circumstances that must be considered when assessing an individual's state of mind. *Id.*

Here, the circumstantial evidence confirms Bullcoming's self-assessment: Both Bullcoming and L.B. acknowledged they knew each other for 30 years and that Bullcoming had a "crush" on her. (SER-065–066, 068.) That is why Bullcoming stated and testified he "was only thinking of [himself]" and that he acted only on "self-gratification" and not some interest of BIA-OJS. (SER-068, 139–140.)

While L.B. and amici urge the Court to consider only circumstantial evidence (and not Bullcoming's testimony), their argument is smoke and mirrors. They never point to any factual, circumstantial evidence related to this case that purportedly shows Bullcoming assaulted L.B. to serve BIA-OJS's interest in any "appreciable" way. *L.B.*, 515 P.3d at 825. There is, for instance, no factual evidence that Bullcoming assaulted L.B. to "free up resources," to "domineer" L.B., or to punish her. L.B.'s arguments are, as the District Court concluded, "speculative" and "bald assertions." (ER-15.)

L.B. has not met her burden to come forward with "specific evidence," supporting her claims. *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1409 (9th Cir.

1991). She admits the facts are undisputed and then fails to identify any facts that support her claims. L.B.'s speculation and her argument that Bullcoming need not be aware of his own state of mind is nothing more than the kind of "metaphysical doubt" this Court has held incapable of defeating summary judgment. *See Orr v. Bank of America, NT & SA*, 285 F.3d 764, 783 (9th Cir. 2002). The direct and circumstantial evidence shows Bullcoming assaulted L.B. solely to serve his personal interests, not some concocted law enforcement purpose.

B. Bullcoming's assault did not "arise out of" his employment.

The first prong of the Montana Supreme Court's course-and-scope test requires L.B. to show Bullcoming's assault "arose out of the employment." *L.B.* 515 P.3d at 825. The District Court concluded this prong was satisfied, but its analysis was mistaken.[10] Even though Bullcoming was on duty at the time and abused his authority, his assault did not arise out of his employment.

[10] The District Court, for instance, wrote, "It is beyond dispute that the assault arose out of Bullcoming's employment with the BIA. He showed up to L.B.'s house in response to a dispatch call and it was through his authority under the BIA that he coerced L.B. into sex." (ER-13.) This reasoning illustrates how Bullcoming abused his authority while on the job, but it does not show the assault arose out of his authority. This distinction is critical—an officer can wrongfully use his authority to commit acts that do not arise out of his employment. As discussed below, the first-prong factors show Bullcoming's assault did not arise out of his employment.

L.B. and amici ask the Court to adopt a universal rule: Any time an on-duty officer commits a wrongful act, that act necessarily arises out of the officer's employment. The Montana Supreme Court rejected this argument, though, and held the wrongful act must be "similar or incidental to the conduct authorized" by the employer in order to arise out of the employment. *L.B.*, 515 P.3d at 824.

1. Bullcoming's assault was a departure from any employer-authorized conduct.

Action that "represents a departure from, not an escalation of" authorized conduct constitutes an "independent course of conduct" and is not incidental to authorized actions. *Restatement (Third) of Agency* § 7.07 cmt. b; *see also Brendan*, 470 P.3d at 175 (discussing cmt. b). For instance, a law enforcement officer's excessive use of force during an arrest might be an "escalation" of authorized conduct—i.e., use of physical force to restrain the arrestee. *See L.B.*, 515 P.3d at 824. But an officer's sexual assault is a clear departure from any authorized conduct because "it bears no relation to the simple aggression which was reasonably foreseeable." *See Brendan*, 470 P.3d at 174; *see also Anderson v. United States,* 2015 WL 9918406, at *22 (D.S.C. Oct. 9, 2015) (police officer who elects to not enforce the law in exchange for sexual favors is not furthering employer's objectives but is, "if anything . . . at odds with the government"); *Baltimore City Police Dept. v. Potts*, 227 A.3d 186, 210 (Md. Ct. App. 2020) ("[I]t is evident that where an officer sexually assaults a suspect in custody, the officer

does not act within the scope of employment, and where an officer uses excessive force, the officer may be acting within the scope of employment.")

Here, unlike with excessive use of force, there is no connection between the wrongful act (sexual assault) and the authorized act (investigating a potential alcohol violation). While an officer might use excessive force to effectuate an arrest, Bullcoming did not assault L.B. to effectuate his investigation of any alcohol violations. As the *Restatement* explains, it is not merely that actions like a serious crime are "unexpectable" but that they are "in nature different from what servants in a lawful occupation are expected to do." *Restatement (Second) of Agency* § 231 cmt. a. *See, e.g.*, *Martin*, 991 N.W.2d at 764–65 (holding officer's sexual assault of intoxicated citizen was an "egregious departure from the authorized duties" and therefore did not arise out of employment); *Adorno*, 312 F. Supp. at 517 (corrections officer's sexual assault of inmate was "entirely divorced from the nature of an employment position"); *Mason v. Fla. Sheriff's Self-Ins. Fund*, 699 So. 2d 268, 270 (Fla. Dist. Ct. App. 1997) (sexual assault by deputy was not in course and scope of employment because there was no "causal relationship" between deputy's law enforcement duties and sexual assault); *Desotelle v. Cont. Cas. Co.*, 400 N.W.2d 524, 530 (Wis. Ct. App. 1986) (police officer's sexual assault while on duty was outside course and scope of employment because the

assault was "so extraordinary and disconnected" from officer's job duties), *overruled on other grounds*, *Kruckenberg v. Harvey*, 694 N.W.2d 879 (Wis. 2005).

2. The Section 229 factors further show Bullcoming's assault did not arise out of his employment.

The Montana Supreme Court adopted the factors in *Restatement (Second) of Agency* § 229 to assist in determining whether conduct arises out of an individual's employment:

> (a) whether or not the act is one commonly done by such servants;
>
> (b) the time, place and purpose of the act;
>
> (c) the previous relations between the master and the servant;
>
> (d) the extent to which the business of the master is apportioned between different servants;
>
> (e) whether the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
>
> (f) whether or not the master has reason to expect that such an act will be done;
>
> (g) the similarity in quality of the act done to the act authorized;
>
> (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
>
> (i) the extent of departure from the normal method of accomplishing an authorized result; and
>
> (j) whether or not the act is seriously criminal.

The Montana Supreme Court did not apply these factors to this case on a factor-by-factor basis. *See L.B.*, 515 P.3d at 824–25. It left that task for remand and further development of the evidence. *Id.* at 824–26.

On remand, the United States gathered additional facts—through the declaration of BIA-OJS Special Agent in Charge (SAC) Lenora Nioce—that speaks directly to these factors. L.B., in contrast, did not marshal any additional facts—no discovery, depositions, or any other evidence addressing these factors. Instead, L.B.'s counsel acknowledged at the summary judgment hearing that these factors do not weigh in her favor: "[I]f we had to prove seven of the nine *Brendan* factors, that might be a problem . . . ."[11] (ER-23.)

SAC Nioce has 25 years of law enforcement experience and oversees BIA-OJS operations in the same district Bullcoming served in. (ER-87–88.) In her declaration, SAC Nioce addressed the function of law enforcement and each of the Section 229 factors:

Factor (a): "When law enforcement officers investigate individuals for alcohol use, they do not commonly coerce them to have sex in exchange for leniency, to let them go without an arrest or citation, or for any other reason. Law enforcement officers do not commonly sexually assault individuals as part of any

[11] L.B.'s counsel appears to have referred to the Section 229 factors as the "*Brendan* factors" because the *Brendan* Court referenced Section 229.

investigative or law enforcement function." (ER-90.) SAC Nioce is not aware of any previous instances where a BIA-OJS officer sexually assaulted a person he or she was investigating. In fact, sexual assault is expressly prohibited by the BIA-OJS Law Enforcement Handbook. (*Id*.) Under those policies, "[A]ny personnel found guilty of sexual misconduct will be severely disciplined, to include termination of employment, and prosecuted to the full extent of the law." (*Id*.)

L.B. claims the Montana Supreme Court already concluded this factor weighs in her favor because "[o]nly a governmental actor like Officer Bullcoming could have deprived L.B. of her civil rights." (Doc. 6 at 28.) That is both inaccurate and illogical. The Supreme Court did not decide this factor in L.B.'s favor, and the fact that Bullcoming criminally deprived L.B. of her civil rights under 18 U.S.C. § 242 does not imply law enforcement officers commonly sexually assault individuals they are investigating.

Factor (b): "Bullcoming's sexual assault did not serve any law enforcement purpose. There is no evidence or reason to believe the sexual assault deterred or prevented L.B. from engaging in any potentially criminal conduct. Nor is sexual assault ever a quid pro quo means of keeping individuals out of the criminal justice system or freeing up government resources. In fact, as evidenced in this case, Bullcoming's sexual assault resulted in an individual being thrust into the criminal

justice system—namely, Bullcoming himself."[12] (ER-90–91.) As discussed above, Bullcoming's assault served no law enforcement purpose whatsoever.

L.B. again incorrectly claims the Supreme Court decided this factor in her favor because Bullcoming was in uniform and on duty. (Doc. 6 at 28.) Simply being on duty, though, does not imply Bullcoming was carrying out a legitimate law enforcement purpose.

Factors (c) and (f): SAC Nioce explains BIA-OJS had no reason to believe Bullcoming would sexually assault L.B. The Office conducted a thorough background check of Bullcoming when he applied for employment, and nothing in his background suggested he would ever sexually assault someone he was investigating. (ER-92.) Nor was BIA-OJS aware of any conduct during his term of employment that would have led to that suspicion. (*Id*.)

L.B. argues generally that BIA-OJS is aware an officer might abuse his or her position to engage in wrongful acts because, in one instance decades ago in

[12] L.B. twists SAC Nioce's declaration to suggest the United States has taken contradictory positions as to whether Bullcoming engaged in *quid pro quo* conduct. (Doc. 6 at 36–37.) The United States has never disputed that Bullcoming engaged in unlawful *quid pro quo* conduct. That is why the United States prosecuted him. SAC Nioce's declaration makes clear that sexual assault is not a legitimate *quid pro quo* law enforcement function. *See also* ER-89 (declaring that sexual assault is never "legitimately committed incidentally to or in furtherance of any law enforcement interest or purpose").

South Dakota, a BIA officer sexually assaulted a minor female while on duty.[13] (Doc. 6 at 30.) That isolated, prior incident, though, says nothing about the facts of this case. L.B. does not dispute that BIA-OJS had no reason to believe Bullcoming himself would assault L.B. or any other individual.

Factor (d): This factor has no applicability to this case because it pertains to how an employer apportions different job responsibilities to different employees. This case does not involve any distinctions between the job responsibilities of

[13] That assault is addressed in the Eighth Circuit's *Red Elk v. United States* decision, which is distinguishable from this case in critical ways, both factually and legally. 62 F.3d 1102 (8th Cir. 1995). The officer in *Red Elk* picked up a minor after curfew and raped her in his patrol car. *Id.* The officer had a history of inappropriate sexual conduct, and he had no background check before being hired. *Id.* Here, Bullcoming had no history of any misconduct, BIA-OJS conducted a background check on him, and BIA-OJS monitored his conduct. Bullcoming's background check and history undisputedly gave BIA-OJS no reason to believe he would sexually assault L.B. (ER-92.)

Red Elk is also legally distinguishable in critical ways. The *Red Elk* court noted "'foreseeability' is central to the analysis under the South Dakota rule." 62 F.3d at 1107. The court disregarded numerous cases from other jurisdictions because it held the unique facts of the case had to be analyzed under South Dakota's foreseeability test. Importantly, both the South Dakota Supreme Court and the Eighth Circuit later explained that the *Red Elk* court had applied the wrong legal standard in evaluating course and scope. *See Primeaux v. United States*, 181 F.3d 876, 880, n.5 (8th Cir. 1999) (en banc); *Hass v. Wentzlaff*, 816 N.W.2d 96, 103 (S.D. 2012). Instead of a pure "foreseeability" test, South Dakota also applies an employer-interest requirement. There was no analysis in *Red Elk* of whether the officer's assault was motivated to serve any interest of his employer or whether the assault arose out of his employment. Both of these analyses are required under Montana law, and *Red Elk* therefore has no utility in this case.

different types of employees. Nevertheless, L.B. argues the *L.B.* Court "found" that BIA-OJS gave Bullcoming significant discretion to enforce laws which benefitted BIA. (Doc. 6 at 29.) The *L.B.* Court made no such finding, and L.B.'s argument is a non-sequitur. L.B.'s argument does not relate at all to factor (d). Regardless, her argument misses the point entirely when it comes to an action benefitting an employer. The question is not whether an employee's action benefitted an employee but is, instead, whether the employee was "motivated by an intent or purpose to serve the interests of the employer." *L.B.* 515 P.3d at 825; *id.* at 823 ("[W]hether the employee was acting at least partially in furtherance of the employer's interest does not depend on whether the employer actually profited or benefitted from the act." (cleaned up)).

Factor (e): SAC Nioce declared that Bullcoming's sexual assault of L.B. was undisputedly "outside the enterprise of the master." "An officer's sexual assault of a person he is investigating never serves BIA-OJS's mission or function. In fact, BIA-OJS policies expressly forbid it." (ER-92.)

As noted above, L.B relies on two law review articles to make a sweeping claim that "sexual assault and intimidation is not uncommon in policing" and is "within the enterprise of policing." (Doc. 6 at 29–30.) L.B. grossly mischaracterizes the articles and what it means for conduct to be "within the

enterprise of policing." Sexual assault is not part of BIA-OJS's mission or enterprise.

Factor (g): "Bullcoming's sexual assault bore no similarity or relationship to the investigation he was authorized to conduct. While Bullcoming was permitted to investigate L.B.'s and her mother's use of alcohol, that investigation did not require Bullcoming to sexually assault L.B. or otherwise coerce her into having sex with him. If Bullcoming had chosen to not take any law enforcement action against L.B., he should have done so without engaging in sexual activity with L.B. In fact, he was required to do so without engaging in sexual activity with L.B. because sexual assault cannot serve any law enforcement purpose." (ER-92–93.)

As noted above, action that "represents a departure from, not an escalation of, conduct involved in performing assigned work or conduct that an employer permits or controls" is not incidental to authorized actions. *Restatement (Third) of Agency* § 7.07 cmt. b (emphasis added). This is a key distinction between cases involving excessive use of force in pursuit of a law enforcement purpose, and sexual assaults that bear no similarity to any authorized conduct. The Montana Supreme Court, for instance, observed, "Undisputedly, governments do not authorize their police officers to sexually assault people when performing these authorized acts." *L.B.*, 515 P.3d at 822.

Factor (h): BIA-OJS did not furnish Bullcoming with the instrumentality to sexually assault L.B. "BIA-OJS did not facilitate Bullcoming's sexual assault; nor did it provide him with any express or implied authority to sexually assault L.B. In fact, it strictly forbade such conduct under threat of prosecution and termination of employment." (ER-93.)

Factor (i): "Bullcoming's sexual assault of L.B. is a clear and gaping departure from the normal and accepted means of conducting an investigation. Sexual assault is never an acceptable component of an investigation or means of accomplishing an investigation." (*Id*.) The Montana Supreme Court explained that, even if the employer authorized a particular result, an employee's actions in achieving that result may be "so outrageous or whimsical" to be beyond the scope of the employment. *Brenden*, 470 P.3d at 173 (quoting *Restatement (Second) of Agency* § 229(1) cmt. b)).

Factor (j): "Bullcoming's sexual assault of L.B. was seriously criminal in nature, as evidenced by his indictment, guilty plea, and three-years' imprisonment for the assault." (ER-93.) Comment (f) to the restatement explains, "The fact that the act done is a serious crime is a factor indicating that it is not in the scope of employment" (emphasis added). Comment (a) to *Restatement (Second) of Agency* § 231 further explains, "[S]erious crimes are not only unexpectable but in general

are in nature different from what servants in a lawful occupation are expected to do."

All these factors show that Bullcoming's assault did not arise out of his employment. Despite the Montana Supreme Court's directive to L.B. to gather evidence on remand, *see L.B.*, 515 P.3d at 826, she has not presented any factual evidence from this case that shows these factors weigh in her favor. She points only to the same facts the Montana Supreme Court found insufficient.

Lack of evidentiary support aside, the fundamental mistake L.B. and amici make in their argument is to conflate Bullcoming's abuse of authority with the question of whether his assault arose out of his employment. Contrary to L.B. and amici's arguments, the former does not imply the latter. Bullcoming undisputedly abused his authority by using his position to sexually assault L.B. But that does not mean the assault arose out of his employment—the assault was not "similar or incidental" to any conduct authorized by BIA-OJS. Instead, it was a criminal departure from his employment.

The Court should hold that Bullcoming's assault did not arise out of his employment. This conclusion provides a separate, independent basis for granting summary judgment in the United States' favor.

II. Bullcoming's criminal guilty plea does not establish he acted in the course and scope of his employment.

L.B.'s main argument on appeal is that Bullcoming's assault must have been in the course and scope of his employment because he "was a federal actor who was convicted of depriving L.B.'s rights under color of law." (Doc. 6 at 21.) L.B.'s argument is entirely divorced from the Montana Supreme Court's test from this very case. She does not point to any authority suggesting a person convicted of depriving another of her rights under color of law, in violation of 18 U.S.C. § 242, was necessarily acting in the course and scope of his employment. L.B.'s argument defies logic, and the Court should reject it.

A. Abuse of authority does not imply course and scope.

The United States prosecuted Bullcoming under 18 U.S.C. § 242—"Deprivation of Rights under Color of Law"— and he pleaded guilty to that offense. (SER-065.) The United States Supreme Court explained that a government employee unlawfully acts under the color of law when he abuses the position given to him by the government. *See, e.g.*, *West v. Atkins*, 487 U.S. 42, 50 (1988) (citation omitted).[14] But courts have also explained that unlawfully acting under

[14] In *West*, the Supreme Court addressed the meaning of "under color of state law" in the context of 42 U.S.C. § 1983, but courts have held the meaning of the phrase under § 1983 and 18 U.S.C. § 242 are the same. *See Collins v. Womancare*, 878 F.2d 1145, 1149 (9th Cir. 1989).

the color of law does not establish the employee was within the course and scope of his employment. *See, e.g.*, *Martin v. Milwaukee Cnty.*, 904 F.3d 544, 552 (7th Cir. 2018) (noting, "Color is broader than scope."); *Daniels v. United States*, 470 F. Supp. 64, 66–68 (E.D.N.C. 1979) (rejecting argument that an officer acting "under color of law" is necessarily acting in the course and scope of employment).

"Acting under color of law" and "course and scope of employment" are distinct legal concepts, as evidenced by their tests. While the color-of-law analysis focuses on an employee's abuse of authority, course-and-scope is determined by the Montana Supreme Court's two-prong test in *L.B.*:

> [I]f an on duty police officer obtains consent by misusing official authority, the wrongful act may be within the scope of employment if it **[1]** arose out of the employment and **[2]** was at least partially motivated by an intent or purpose to serve the interests of his employer.

L.B., 515 P.3d at 825. This test makes clear that "misusing . . . official authority" is only a prefatory consideration. A plaintiff alleging course and scope must go farther by proving the two prongs. L.B., on the other hand, asks the Court to stop reading this test after the preface.[15]

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[15] L.B. also suggested below that the operative act in this case was Bullcoming's deprivation of her civil rights, not the sexual assault. (CR 138 at 4–5.) L.B. alludes to the same argument on appeal, arguing: "Similarly, the United States is civilly liable for the elemental acts of Officer Bullcoming in depriving L.B. of her civil rights because those same acts were necessarily in the course and scope of his employment." (Doc. 6 at 22.) ACLU makes a similar argument. (Doc. 11 at 23, n.6.) The United States, however, cannot be vicariously liable for Bullcoming's deprivation of civil rights because that would amount to a *Bivens*

If, as L.B. argues, abuse of authority implies course and scope, then the Montana Supreme Court would have readily concluded as a matter of law that Bullcoming acted in the course and scope of his employment because no one disputes that he abused his authority. But the Montana Supreme Court did not reach that conclusion. Instead, it held further fact development was necessary to address the two-prong test. Below, L.B. acknowledged the Montana Supreme Court rejected the very argument she now makes on appeal:

> 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 . . . .

(CR 138 at 23.) L.B. provides no explanation for why this Court should adopt a rule expressly rejected by the Montana Supreme Court. It cannot; the FTCA requires the Court to apply state law. 28 U.S.C. § 1346(b)(1). Nor does L.B. explain why she advances an argument on appeal that she admits has already been rejected.

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claim, and the United States cannot be vicariously liable under *Bivens*. *See DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1127 (9th Cir. 2019); *Bivens*, 403 U.S. 388.

Adopting L.B.'s argument would require courts to hold an employer liable regardless of how heinous the employee's conduct, whether the act was purely personal in nature, or whether the act had any relationship at all to the employee's job function or employer's mission. That is not the law in Montana. Instead of supporting L.B.'s claim, Bullcoming's criminal conduct and guilty plea is one of the many reasons her claim should be denied. *Restatement* § 229 cmt. f ("The fact that the act done is a serious crime is a factor indicating that it is not in the scope of employment.").

B. Judicial estoppel does not apply.

L.B. similarly argues the doctrine of judicial estoppel bars the United States from asserting that Bullcoming did not act in the course and scope of his employment when he assaulted L.B. (Doc. 6 at 34–37.) L.B. contends the United States has taken inconsistent positions because it prosecuted Bullcoming as a government actor but now denies he acted in the course and scope of his employment. As discussed above, L.B. fails to appreciate the legal and factual distinction between being a government actor who abuses his authority in violation of 18 U.S.C. § 242 and acting in the course and scope of employment. The United States has not taken inconsistent positions. *See, e.g.*, *Shirley*, 232 Fed. Appx. at 421 (holding United States' successful criminal prosecution of correctional officer

related to sexual assault did not estop United States from arguing officer acted outside course and scope of employment).

In making her judicial estoppel argument, L.B. argues:

> The government prosecuted Officer Bullcoming in his criminal case as a governmental actor under color of law acting in the course and scope of his employment. . . . 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.

(Doc. 6 at 34.)[16] L.B. is mistaken—the United States never prosecuted Bullcoming for "acting in the course and scope of his authority." Nor could it have. Course and scope is not an element of 18 U.S.C. § 242.

Moreover, it is simply not true that Bullcoming must have acted in the course and scope of his employment in order for the government to prosecute him. Instead, the question under Section 242 was whether Bullcoming abused his authority to deprive L.B. of her civil rights regardless of whether he acted in the course and scope of his employment. Requiring the United States to prove course and scope for Section 242 offenses would have the absurd effect of adding a prima

[16] L.B. also contends that, "in defending L.B.'s civil case, the government took the contrary position, and argued Bullcoming was not a governmental actor . . . ." (Doc. 6 at 36.) L.B. offers no citation for this claim, and it is false. The United States does not dispute that Bullcoming was a government employee when he assaulted L.B. But that does not imply he acted in the course and scope of his employment when he assaulted L.B.

facie element with no bearing on culpability: Bullcoming's assault was criminal regardless of whether he believed it served his master (he did not). L.B.'s construction would make it more difficult to prove violations that involve serious offenses, without any corresponding utility or benefit.

L.B.'s judicial estoppel argument has no merit. The United States has not taken inconsistent positions by prosecuting Bullcoming for his abuse of authority and then showing in this case that he acted beyond the course and scope of his employment. Indeed, the more abusive and egregious a government actor's conduct, the more likely the conduct is beyond the course and scope of employment.

III. The District Court did not abuse its discretion by denying L.B.'s motion for a hearing.

On appeal, L.B.'s counsel claims the District Court "never addressed" the reason it denied L.B.'s motion for a hearing. (Doc. 6 at 41.) Not so. The District Court explained that the requests L.B. alluded to in her motion were "not properly before the Court" because L.B. never moved for and briefed the relief alluded to in the motion for a hearing—L.B. never filed motions to extend discovery, to compel depositions or document production, or took any other steps to properly place the requested relief before the court. (SER-007–009.) The District Court's denial of L.B.'s motion was a discretionary decision, and the District Court did not abuse its

discretion by denying relief that L.B. never requested. *IMDb.com Inc.*, 962 F.3d at 1119 (holding that discovery rulings are reviewed for abuse of discretion).

Through their motion for a hearing, L.B.'s counsel sought to discredit Bullcoming's testimony by impugning the United States. L.B.'s counsel, for instance, has argued the United States "tactically" scheduled Bullcoming's deposition at the end of the discovery period to strategically foreclose any additional discovery. (Doc. 6 at 39.) She makes this claim despite the fact that (1) the United States approached L.B.'s counsel about the deposition two months before the close of discovery,[17] (2) L.B.'s counsel objected to the deposition and argued it was not necessary, and (3) L.B.'s counsel were the ones who later selected the deposition date, even though the United States offered earlier dates. (ER-42–49.) L.B.'s counsel also argued in her motion and continues, without support, to claim that the United States must have made secret promises of immunity to Bullcoming in exchange for false or perjured testimony. (Doc. 6 at 14, 40; ER-42; CR 117, 126.) The United States did no such thing. (ER-42; CR 123.)

L.B.'s motion for a hearing alluded to a laundry list of extraordinary and unjustified requests, including deposing the undersigned, deposing other AUSAs (one of whom had no connection to this or the criminal case), compelling

[17] The District Court allowed the parties just over two-and-a-half months of discovery on remand. (CR 99.)

production of Bullcoming's confidential and privileged psychosexual evaluation, compelling deposition testimony of Bullcoming's psychotherapists, and piercing the attorney-client privilege to compel deposition testimony of Bullcoming's criminal defense counsel. (CR 117, 126.)

Notwithstanding the request for a hearing, L.B. never filed a motion that actually asked for the relief alluded to in her motion. Nor did L.B. take any preliminary steps for the relief that might have been discussed at the hearing. L.B. never filed a motion to extend the discovery deadline, never filed motions to compel any deposition testimony or document production, and never served any subpoenas. She requested only a hearing to discuss "potential ramifications" of Bullcoming's deposition testimony. (CR 116 at 3–4.) The United States raised these deficiencies in its response to L.B.'s motion (CR 123 at 5), yet L.B. still did not file the appropriate motions or serve any subpoenas.

Moreover, even if properly before the court, the relief L.B. alluded to in her motion was improper. First, there is no basis for allowing L.B.'s counsel to depose the undersigned. (Doc. 6 at 40.) Other circuits have held that a party may depose opposing counsel only if "(1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and non-privileged, and (3) the information is crucial to the preparation of the case." *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (citation

omitted).[18] None of these conditions are satisfied. L.B.'s counsel was able to question Bullcoming at his deposition about his call with the undersigned and, if they wished, could have asked him about any promises of immunity. The undersigned also provided a written declaration making clear that no promises were made or deals offered to Bullcoming in exchange for his testimony. (ER-42.) Moreover, the undersigned's testimony is not relevant to either of the two issues in this case or otherwise "crucial" to the preparation of L.B.'s case—whether Bullcoming's assault arose out of his employment and whether Bullcoming assaulted L.B. solely for personal reasons.

Second, L.B. provides no authority supporting the disclosure of Bullcoming's PSR or psychosexual evaluation. L.B.'s counsel first sought this information by hiring a private investigator to go to Bullcoming's house and convince him to sign an authorization to release the PSR and psychosexual evaluation. (SER-133–135, 148–150.) Bullcoming declined to sign the waiver. (SER-148–150.) L.B.'s counsel has never provided any legal authority that would permit disclosure of the PSR or psychosexual evaluations. Those documents are confidential, privileged, and not discoverable. *See U.S. Dep't of J. v. Julian*, 486

[18] The Ninth Circuit has not adopted a test, but the Court did address these factors in an unpublished decision. *See Willer v. Las Vegas Valley Water Dist.*, 176 F.3d 486 (9th Cir. April 19, 1999) (unpublished).

U.S. 1, 12 (1988) (PSRs not available to third parties); *Jaffee v Redmond*, 518 U.S. 1, 10, 17 (1996) (observing the federal psychotherapist privilege is an absolute bar to disclosure); Mont. Code Ann. § 26–1–807 (barring disclosure of psychotherapy information). In failing to properly move for relief on this ground, L.B. failed to address these obstacles.

Finally, there is no need to re-open Bullcoming's deposition. (Doc. 6 at 39–40.) L.B.'s counsel argues the deposition should be opened so that Bullcoming can be compelled to name the "dozen or so" women he had an intimate relationship with while working for BIA-OJS. (*Id*.) Contrary to L.B.'s allegations, Bullcoming did not testify that he slept with a dozen or so women while on duty. Instead, he testified he had sex with about a dozen women, with whom he had personal relationships, over the span of his employment with BIA-OJS. (SER-160–162.) Some of those encounters were while he was on duty and some were not. (SER-160–162, 179–181.) Bullcoming testified he had personal relationships with each of the women, all sexual encounters were consensual, they had no relationship to his law enforcement job, and no favors or lenience were offered to any of them in exchange for sex. (SER-179–181.) Stated simply, Bullcoming's consensual, personal relationships with other women have nothing to do with the dispositive issues in this case—i.e., whether Bullcoming assaulted L.B. solely for personal reasons and whether the assault arose out of Bullcoming's employment. And,

while L.B.'s counsel argues the names of these other women are needed for impeachment purposes, L.B.'s counsel does not explain how Bullcoming's encounters with other women would actually impeach any other relevant testimony. Moreover, L.B. moved for summary judgment and admitted there were no disputed issues of material fact, having lost that motion she is in no position to seek further discovery.

The District Court did not abuse its discretion by denying L.B.'s motion for a hearing because she never actually moved for the relief she alluded to or took any necessary preliminary steps (e.g., serving subpoenas). Even if she had, the requests would have been improper and denied on the merits. The Court should affirm the District Court's denial of L.B.'s motion for a hearing.

IV. The Court should reject L.B.'s request for reassignment.

The Court should affirm summary judgment for the United States. But if the Court remands, it should reject L.B.'s request for reassignment. L.B. asks for reassignment primarily because the District Court Judge did not award enough money on Bullcoming's default judgment, adopting the Magistrate Judge's recommendation of $1.6 million instead of L.B.'s $10 million request. (Doc. 6 at 42.) L.B. also claims the District Court's three-year prison sentence for Bullcoming was "extremely lenient" and that the District Court has twice ruled against her on summary judgment. (*Id*.) The Court is again left with innuendo and

no evidentiary or legal support. None of L.B.'s claims are grounds for reassignment.

The standard for reassignment is "demanding." *United States v. Alahmedalabdaloklah*, 76 F.4th 1183, 1247 (9th Cir. 2023). To determine whether reassignment is appropriate, the Court considers:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving appearance of fairness.

United States v. Walker River Irrigation Dist., 890 F.3d 1161, 1173 (9th Cir. 2018).

None of these factors support reassignment. First, there is no evidence or reason to believe the District Court has refused or will refuse to follow the law. When it ruled on the United States' first motion for summary judgment, the District Court provided a thorough, well-reasoned decision. On certification, the Montana Supreme Court explained it was providing "an understandably needed clarification" of Montana law. *L.B.*, 515 P.3d at 522. This is not an instance where the District Court flagrantly ignored controlling law and granted summary judgment in the United States' favor because it had bias or animus against L.B.

On remand, the District Court repeatedly made clear it was following the Montana Supreme Court's *L.B.* decision. (Doc. 149 at 10–14.) The District Court applied the Montana Supreme Court's two-prong test, discussed above, as well as the *Restatement* § 229 factors. (*Id*.) The District Court correctly concluded the facts were undisputed (to which both parties agreed) and determined the United States was entitled to summary judgment, despite ruling against the United States on the first prong of the test. L.B. chose to do no fact discovery on remand, failed to produce any admissible evidence to support her claims, admitted the United States' statement of the facts was undisputed, and argued trial is unnecessary. (*See* CR 139; *see also* ER-25 (L.B.'s counsel explaining, "I don't really believe a trial is necessary. I think the Court has all the facts it needs to rule on summary judgment.")).

There is no indication that the District Court is unwilling to follow the law. In fact, as discussed throughout this brief, the Court should affirm the District Court's order on the United States' motion for summary judgment precisely because it accords with governing law.

As to the second factor, reassignment is not necessary to "preserve the appearance of justice." *Walker River*, 890 F.3d at 1173. There is no appearance of injustice to begin with. Unlike cases where this Court has made a reassignment, the

District Court has not "harbored animus toward" L.B. or exhibited any "bias and prejudgment." *See id.* at 1173–74.

Despite her allegation of judicial bias, L.B. fails to appreciate that some of the very decisions she now chides were first decided separately and independently by a different judge, the Magistrate Judge. The Magistrate Judge recommended the $1.6 million default judgment against Bullcoming, rather than L.B.'s request for $10 million, after conducting an hours long hearing, complete with expert testimony and documentary evidence (Doc. 76.) And the Magistrate Judge recommended granting the United States' first motion for summary judgment. Accepting L.B.'s argument would require the Court to conclude that both the Magistrate Judge and the District Court Judge are harboring some conspiratorial bias or prejudice against L.B. They are not.

Bullcoming's criminal case also provides no evidence of bias or prejudice. First, there is no impropriety with the District Court presiding over Bullcoming's criminal case and this case. *See United States v. Johnson*, 610 F.3d 1138, 1147–48 (9th Cir. 2010) (holding district court judge permitted to preside over civil and criminal cases involving the same party). Second, L.B. does not explain how Bullcoming's three-year prison sentence demonstrates bias or prejudice. She does not, for instance, provide any evidence showing the Court deliberately misapplied

the 18 U.S.C. § 3553(a) factors, which gave the Court broad discretion to craft an appropriate sentence based on numerous individualized factors.

L.B. does not provide any evidence showing bias, prejudice, or an unwillingness to decide this case on the law. L.B. simply asks the Court to assume the District Court must be biased because the District Court disagreed with her. That is not enough to justify reassignment. *Johnson*, 610 F.3d at 1148 ("Adverse findings do not equate to bias"). L.B. must come forward with actual evidence supporting reassignment. *See Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1043–44 (9th Cir. 2010) (rejecting reassignment request in the absence of any evidence supporting reassignment). She has none, and there is none.

V. The Court should disregard amici's irrelevant and extra-records arguments.

To the extent amici have made arguments related to the facts of this case, the United States has responded above. The bulk of amici's briefing, however, advances irrelevant, extra-record claims the Court should disregard.

The Coalition of Large Tribes and the National Indigenous Women's Resource Center (COLT) and ACLU write at length on the violence Native women face in the United States. (Docs. 11, 17.) The United States takes these concerns very seriously and has committed substantial resources to addressing the persistent violence endured by Native American families and communities across the

country.[19] But these broad concerns—valid as they are—do not address the facts of this case. They do not change the fact that: (1) Bullcoming's assault did not arise out of his employment and (2) Bullcoming assaulted L.B. solely for personal reasons. Consequently, amici's broad policy arguments do not inform the disposition of this case.

Procedurally, amici's policy arguments were not put before the District Court, and none of the data or reports amici discuss were introduced below. The Court should disregard amici's arguments and material on this basis alone. *See, e.g.*, *Chaker v. Crogan*, 428 F.3d 1215, 1220 (9th Cir. 2005) (holding the Court will not consider matters raised for the first time on appeal by amicus). What is more, much of amici's discussion of various data and analyses calls for expert testimony, which was not disclosed below (L.B. disclosed no experts), and their arguments should alternatively be disregarded on this basis. *See Wong*, 410 F.3d at 1060–61 (holding non-moving party could not rely on undisclosed expert testimony in responding to summary judgment motion).

[19] *See, e.g.*, "Missing or Murdered Indigenous Persons," U.S. Dept. of Justice, https://www.justice.gov/tribal/mmip#:~:text=The%20Department%20is%20committed%20to,murdered%20indigenous%20persons%20(MMIP).&text=The%20Department%20strongly%20supports%20the,crime%2C%20particularly%20MMIP%20and%20trafficking, (Accessed December 16, 2023).

Moreover, the amici's arguments suffer an evidentiary disconnect from this case. Amici's chief claim is that imposing vicarious liability on the United States will incentivize more careful hiring practices for its law enforcement officers. Amici, though, ignore the undisputed facts of this case. BIA-OJS undisputedly conducted a thorough background check of Bullcoming and monitored his conduct on an ongoing basis. (ER-92.) Bullcoming's background and history never gave BIA-OJS any reason to believe he would sexually assault a person he was investigating. (*Id*.) Nor did Bullcoming exhibit any conduct during his employment that would have led BIA-OJS to believe he would ever sexually assault an individual. (*Id*.)

Neither L.B. nor amici find any fault with BIA-OJS's hiring or supervision of Bullcoming. They present no evidence that BIA-OJS should have done anything different in that regard. Thus, amici cannot use this case to argue that vicarious liability will incentivize more careful hiring practices when the undisputed facts show that BIA-OJS was doing everything it should have been doing to screen and monitor Bullcoming. Amici's broad policy argument finds no support in the facts of this case.

Finally, amici argue the United States' treaty and trust obligations impose a "higher standard" on the federal government. (Doc. 11 at 30–31; Doc. 17 at 36–40.) COLT, for instance, points specifically to the "bad men" provision from the

1868 Treaty.[20] (*Id.*) COLT claims this provision requires the United States to compensate L.B. for any injuries perpetrated by "bad men," including Bullcoming. Amici's argument fails procedurally and on the merits.

First, like many of amici's other arguments, this argument was not made below and should therefore be disregarded at the outset. *Chaker*, 428 F.3d at 1220. L.B. does not allege the United States breached any treaty obligations. L.B. asserts only a FTCA claim against the United States. The United States' tort duty is set forth in the Montana Supreme Court's two-prong test from *L.B.*, not the 1868 Treaty or any other treaty.

Second, amici do not identify any waiver of sovereign immunity that would allow L.B. to sue the United States for a purported breach of trust or treaty duty. There is no such waiver because the FTCA—not a treaty—is the "exclusive" remedy for any "personal injury" claim against "any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). To the extent COLT alleges L.B. has a treaty claim (she does not), jurisdiction—if any—would lie with the Court of Federal Claims. 24 U.S.C. § 1491(a)(1).

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[20] ACLU argues the United States has a trust duty without pointing to any specific treaty language. ACLU's argument therefore fails because it does not identify any "specific rights-creating or duty-imposing language" from any treaty, statute, or regulation. *See, e.g.*, *Arizona v. Navajo Nation*, 599 U.S. 555, 564 (2023).

Fundamentally, though, COLT's argument fails because it assumes L.B. is making a claim—a treaty claim—that she is simply not making. She has only a FTCA claim. COLT provides no argument explaining why any purported treaty obligation would be relevant to L.B.'s FTCA claim because it is not.

CONCLUSION

The Court should affirm the District Court's order granting the United States' Motion for Summary Judgment.

DATED this 19th day of January 2024.

JESSE A. LASLOVICH
United States Attorney

/s/ Randy J. Tanner
Assistant U.S. Attorney
Attorney for Defendants-Appellees United States of America, Bureau of Indian Affairs

STATEMENT OF RELATED CASES

The government is not aware of any related cases.

DATED: January 19, 2024

/s/ Randy J. Tanner
RANDY J. TANNER
Assistant United States Attorney
Attorney for Defendants-Appellees United States of America, Bureau of Indian Affairs

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and the body of the argument contains 13,912 words.

DATED: January 19, 2024

/s/ Randy J. Tanner
RANDY J. TANNER
Assistant United States Attorney
Attorney for Defendants-Appellees United States of America and Bureau of Indian Affairs

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2024, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: January 19, 2024

/s/ Randy J. Tanner
RANDY J. TANNER
Assistant United States Attorney
Attorney for Defendants-Appellees United States of America and Bureau of Indian Affairs