

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

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees,

**UNOPPOSED MOTION OF THE NATIONAL INDIGENOUS WOMEN'S
RESOURCE CENTER AND SOVEREIGN BODIES INSTITUTE
TO APPEAR AS *AMICUS CURIAE***

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

APPEARANCES:

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**Pro hac vice application forthcoming*

The National Indigenous Women’s Resource Center (“NIWRC”) and the Sovereign Bodies Institute (“SBI”)¹ (collectively, the “NIWRC *Amici*”) respectfully request leave to submit a brief as *amicus curiae* in support of Plaintiff-Appellant, L.B., pursuant to Montana Rule of Appellate Procedure 12(7).

I. Interest of *Amici*

The NIWRC is a Native-led nonprofit organization headquartered in Lame Deer, Montana dedicated to ending violence against Native women and children. The NIWRC offers culturally-grounded resources to victims and families, provides technical assistance and training to governmental and organizational allies, and supports the development of policy that strengthens tribal sovereignty. Through this work, the NIWRC has developed expertise in the intersection of tribal sovereignty and safety for Native women. The NIWRC has worked tirelessly to close jurisdictional loopholes that encourage predation against Native women and children, including by collaborating with tribal leaders, Native women survivors, and Members of Congress to reauthorize and expand the Violence Against Women Act (“VAWA”) in 2013 and in 2021. The NIWRC has also helped individual

¹ Although they have not yet finalized their individual authorizations, NIWRC and SBI expect that several of the Tribal Nations in Montana may also join the brief as *amici*. These Tribal Nations possess the predominate interest in addressing the question presented because application of *Maguire* in this context will prevent their citizens who experience sexual assault by a federal officer from obtaining the same relief available to other Montanans who experience sexual assault by State or local officers. See part II., *infra*.

victims and families navigate jurisdictional loopholes and failures of law enforcement to investigate crimes against Native women and girls, like L.B.

NIWRC's headquarters are in Lama Deer, on the same Reservation and in the same community where L.B. was assaulted, providing the NIWRC a unique perspective on how the systemic failures of BIA law enforcement perpetuate the cycle of violence against Native women in Montana. The NIWRC has experience working with multiple Native women and children who have been either raped or beaten by BIA law enforcement in Montana in the last two decades. The NIWRC has an interest in ensuring that Native victims of sexual assault by BIA law enforcement in Montana are able to seek the same remedies available to victims of sexual assault perpetrated by State or local officers.

The NIWRC is joined by the SBI, a national non-profit that works to build on Indigenous traditions of data gathering and knowledge transfer to create, disseminate, and put into action research on gender and sexual violence against Indigenous people. SBI generates new knowledge and understandings of how Indigenous Nations and communities are impacted by gender and sexual violence, and how they may continue to work towards healing and freedom from such violence. SBI works with many families of Missing and Murdered Indigenous Women and Girls ("MMIWG") in Montana and has conducted extensive research on the high levels of violence against Indigenous Peoples in Montana. The SBI has

a strong interest in addressing the question presented, which threatens to prevent Native victims of violence from obtaining justice.

The NIWRC *Amici* are interested in this matter because it directly affects the safety of Native women and children in Montana as well as their ability to seek remedies under the law to ensure that federal law officers are not permitted to rape or assault Native women and children without consequence.

II. The Reason an *Amicus* Brief is Desirable

Amici are national leaders in the fight to end gender-based violence in tribal communities who also possesses unique local expertise which will aid this Court in deciding the certified question. For context, Native women nationwide “are 2.5 times more likely to be raped and assaulted than women in the United States in general.” *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016), *as rev’d* (July 7, 2016). More than 4 in 5 Native people report having been victims of violence, and over half (56.1%) of Native women report being victims of sexual violence.² Rates of violence against Native women are especially high in Montana. According to a recent study by the Montana Department of Justice, Native men and women in Montana are four times more likely to go missing than non-Indians.³ And 60% of

² André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey*, Nat’l Inst. of Justice, Office of Justice Programs, U.S. Dep’t of Justice, 43-44 (May 2016), <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf>.

³ *The Landscape in Montana: Missing Indigenous Persons*, Montana Dep’t

the Native persons listed in the Montana Missing Persons Clearinghouse were women.⁴

Data collected by the National Institute of Justice further demonstrates that over 90% of violent crimes committed against Native people are committed by non-Indians.⁵ The prevalence of non-Indian perpetrators means that Tribal Nations are unable to prosecute the majority of the violent crimes committed against their women and children, as Tribes have been divested of criminal jurisdiction over crimes committed by non-Indians. *See Oliphant v. Suquamish*, 435 U.S. 191, 212 (1978). *Oliphant* instead “leaves the Federal Government” with authority to prosecute, *Bryant*, 136 S. Ct. at 1960, placing the safety of Native women and children squarely in the hands of the federal government.

The conduct of the BIA officer in this case significantly jeopardizes the federal government’s ability to protect Native women and children from sexual assault, domestic violence, and homicide. The Federal government cannot meet its obligation to provide for the safety of Native women and children when BIA officers are engaged in criminal conduct—especially if it is immunized from the consequences that misconduct.

of Justice, 3 (2020), <https://dojmt.gov/wp-content/uploads/Missing-Indigenous-Persons-Data-Presentation.pdf>.

⁴ *Id.*

⁵ Rosay, *supra* note 3, at 46.

The application of this Court’s decision in *Maguire v. State* (1992), 254 Mont. 178, 835 P.2d 755, in this context moreover would create a separate standard for federal law enforcement that would prevent Native women in Montana from obtaining justice. As the Ninth Circuit Court of Appeals observed:

In Maguire v. State, the Montana Supreme Court suggested that sexual assault falls outside the scope of ordinary employment. . . . Because the FTCA waives sovereign immunity in this context only for actions taken within the scope of a law-enforcement officer’s employment, victims of sexual assault by federal officers do not have the benefit of the non-delegable-duty doctrine. As a result, a Montana citizen who is a victim of sexual assault by a state, county, or municipal law-enforcement officer has a potential remedy in tort against the employer, while a Montana citizen who is a victim of rape by a BIA police officer does not, simply because the BIA officer is a federal employee. This dichotomy likely has a disproportionate effect on Montana’s indigenous population, who are more likely to interact with federal, rather than state or local, law-enforcement officers.

Cert. Order, p. 7 (emphasis added). That potential effect cannot be fully addressed without the aid of organizations run by Native women working to end gender-based violence in tribal communities, as well as the Tribal Nations who seek to protect all Native women and children living within their sovereign borders. The NIWRC *Amici* are thus uniquely qualified to assist the Court’s consideration of this question.

III. The Parties’ Positions Regarding Participation

Counsel for both parties have consented to the filing of this brief.

IV. Filing Date

The NIWRC Amici are prepared to file their proposed brief on October 15, 2021 (concurrently with Plaintiff-Appellant's opening brief), or as directed by the Court.

DATED: September 24, 2021 Respectfully submitted,

By: /s/ April D. Youpee-Roll
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*Attorney for Prospective Amici the National
Indigenous Women's Resource Center and
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 1,236 words, excluding certificate of service and certificate of compliance.

DATED: September 24, 2021

By: /s/ April D. Youpee-Roll
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CERTIFICATE OF SERVICE

I, April D. Youpee-Roll, hereby certify that I have served true and accurate copies of the foregoing Motion - Unopposed to the following on 09-24-2021:

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