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.

AMICI CURIAE BRIEF OF MONTANA ASSOCIATON OF COUNTIES AND MONTANA LEAGUE OF CITIES AND TOWNS

On Certification from the Ninth Circuit Court of Appeals
Cause No. 20-35514

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INTERESTS OF AMICI

The Montana Association of Counties ("MACo") is a 501(c)6 membership organization representing all 56 Montana counties. The Montana League of Cities and Towns (the "League") is an incorporated, nonpartisan, nonprofit association of all 127 incorporated Montana municipalities. Both MACo and the League are devoted to improving the function of local government in Montana, a critical component of which is risk management. Amici are interested in this litigation because the substantial expansion of respondeat superior liability urged by Appellant would have far-reaching and potentially devastating consequences for city, town and county governments in Montana.

ARGUMENT

Appellant invites the Court to overturn long-standing and well-reasoned precedent, legislatively-established public policy, and fundamental principles of agency law, in part to remedy an inequitable "dichotomy" that is said to exist between state and federal institutional liability for criminal conduct in Montana. In reality, this dichotomy—dramatically described as a "gaping, unfair chasm"—does not exist.

Additionally, the result advocated by Appellant would deal a crippling blow to local governments in Montana, imposing what is in essence strict liability for criminal conduct whenever an employee is "on the clock," despite there being no

nexus to any government mission, goal or objective. The Court should decline to strike that blow by affecting a tumultuous sea change in Montana agency law, particularly because Appellant has not sustained her burden by showing the change would yield positive results, or that the nature and scope of the problem justifies the inevitable adverse consequences. As the Court has correctly determined in the past, the kinds of difficult public policy questions presented here are appropriately left to the processes of the legislative branch.

I. THE DICHOTOMY DESCRIBED BY APPELLANT DOES NOT EXIST.

The only question before the Court is whether "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." Appellant argues the Court should answer in the affirmative, despite more than three decades of precedent stating otherwise, because the Court applied the non-delegable duty doctrine under the unique facts of *Paull v. Park County*, 2009 MT 321, 352 Mont. 465, 218 P.3d 1198. Appellant posits that this holding created an unfair dichotomy because, "if Officer Bullcoming had been a non-federal police officer at the time of the sexual assault here, his employer could be found liable under Montana law pursuant to the non-delegable duty doctrine." (Appellant Brief at 4-5.) Although largely outside the scope of the certified question, MACo and the League write,

first, to underscore that Appellant's assumed application of the nondelegable duty exception is incorrect.

A. *Maguire* Remains Good Law.

Nearly 30 years ago, this Court followed the clear majority rule in holding sexual assault does not fall within the course and scope of employment where it has no connection to the objectives of that employment. *Maguire v. State*, 254 Mont. 178, 181, 835 P2d 755, 756 (1992). Separately, it rejected application of the non-delegable duty exception under the facts of that case, rebuffing the notion that an employer is vicariously liable for an employee's criminal conduct simply because the job provides a power imbalance or unique opportunity to commit a crime. *Id.* *Maguire* has formed an important part of Montana's jurisprudence for decades and, as this Court recently confirmed, remains good law. *Brenden v. City of Billings*, 2020 MT 72, ¶ 16 n. 4, 399 Mont. 352, 470 P.3d 168.

The power imbalance in *Maguire*, of course, could not have been more extreme, and dwarfs the power dynamics at issue in this case. The employee was responsible for the day-to-day care and protection of a non-communicative developmentally disabled woman, including all personal hygiene and bathing. *Id.*, 254 Mont. at 192, 835 P.2d at 764. The employee exploited that power to commit sexual assault. *Id.* Nonetheless, the Court declined to hold the employer vicariously liable for a crime that was untethered to the employee's caretaking

responsibilities, recognizing the important distinction between committing a crime while on the job and committing a crime as part of one's job. *Id.* (citing Restatement (Second) of Agency § 228).

The Court went on to address a separate question—the nondelegable duty exception under § 214 of the Restatement. *Id.*, 254 Mont. at 183–84, 835 P.2d at 759. Under limited circumstances, this exception may allow liability to be shifted to an innocent party—the principal, with no corresponding finding of fault—because of the parties' unique relationship, the nature of the risk, the opportunity and ability to exercise care, and public policy. Rest. (Second) of Agency § 214. Whether to apply the nondelegable exception, therefore, is necessarily a fact-intensive analysis, and one the Court declines to undertake when the policy questions at issue are more appropriately left to the Legislature. *Id.*, 254 Mont. at 185, 835 P.2d at 759-60.

The Court in *Maguire* held the nondelegable duty exception in Montana is limited "to instances of safety where the subject matter is inherently dangerous." *Id.* It noted "[t]here are a number of reasons for and against extending the liability of the employer, such as here, when an intentional tort is committed only because of or by virtue of the employment situation. . . ." *Id.*, 254 Mont. at 185, 835 P.2d at 759-60. Nonetheless, "creating a major exception to the respondeat superior doctrine, by extending liability to a caretaker, would constitute a significant

extension of Montana law[,]" one that "should come from the legislature." *Id.*, 254 Mont. at 185, 835 P.2d at 759-60.

In its briefing here and in the District Court, Appellant begins with an incorrect assumption: that *Maguire* was "implicitly overruled" in *Paull* and that, "if the facts of *Maguire* were to come before this Court today, the state would be found liable for the rape of the patient under the nondelegable duty doctrine." (Appellant Brief at 19.) Nothing in *Paull*, or in subsequent decisions issued in the twelve years since, suggests *Maguire* has been overruled. Quite the opposite.[1]

B. Appellant Reads *Paull* Far Too Broadly.

This Court applied the nondelegable duty exception in *Paull* because:

- the transport of prisoners was determined to be an inherently dangerous activity,
- the State had a special protective relationship with the probationer, arising from a mandatory statutory obligation to protect probationers during transport, and
- the County had hired an independent contractor to fulfill the State's nondelegable duty.

None of these facts are present here, just as they were not present in *Maguire*.

In *Paull*, a probationer was injured while in transit from Florida to Montana, after the employee of a private transport company hired by Park County caused the vehicle to roll over. *Id.*, ¶¶ 9–12. The transportation company had no insurance

[1] Appellant's projected confidence that *Maguire* was overruled is further belied by her request to "explicitly overrule *Maguire*" in this case. (Appellant Brief at 20, n. 3.)

and dissolved after the accident. *Id.*, ¶ 13. The Court found the State could not avoid liability for failing to fulfill a statutory duty of protection by hiring an independent contractor to perform an inherently dangerous activity. *Id.*, ¶ 28.

The Court applied the nondelegable duty exception in *Paull*, first, because "the transportation of prisoners is more than just driving and is an inherently dangerous activity." *Id.*, ¶ 22. The accident occurred as "a result of the inherent risk of the enterprise of prisoner transportation." *Id.*, ¶ 28. Far from overruling *Maguire*, the Court confirmed the established parameters of the nondelegable duty. *Id.*, ¶ 22.

The Court applied the nondelegable duty exception in *Paull*, second, because the State had a continuing protective relationship with the probationer under the Interstate Compact for Adult Offender Supervision. Mont. Code Ann. § 46-23-1115. That statute explicitly makes the State "responsible for the supervision of offenders who are authorized pursuant to this compact to travel across state lines to and from the compacting states." *Id.* The Court concluded this was a mandatory duty of protection that was not delegable:

> When Paull was in Florida he was supervised on probation by Florida authorities pursuant to the Interstate Compact for Adult Offender Supervision. Section 46-23-1115, MCA. The purpose of the Compact is to promote public safety, protect rights of victims through control and regulation of interstate movement of offenders, to provide for the supervision of offenders in the member states, and "to equitably distribute the costs, benefits and obligations of the compact among the

compacting states." Section 46-23-1115, Article I(2), MCA. The Compact also provides:

> The states entering into this compact recognize that they are responsible for the supervision of offenders who are authorized pursuant to this compact to travel across state lines to and from the compacting states, and that the compacting states are responsible for tracking the location of offenders, transferring supervision authority in an orderly and efficient manner, and when necessary, returning an offender to the originating jurisdiction.

Section 46-23-1115, Article I(1), MCA. This subsection of the Compact, which is part of Montana law, recognizes the State's responsibility for its probationers, and for returning offenders when necessary. . . .

Id., ¶ 34 (emphasis added).

This statutory duty of protection created a continuing relationship between the State and the probationer because "probation is a restrictive criminal sanction that represents one point on a continuum of possible punishments" and "is a status of conditional liberty depending upon adherence to the state's special restrictions and conditions." *Id.*, ¶ 35. As such, the Court found "Paull was in a continuing relationship with the State of Montana during the time it chose to return him from Florida to face proceedings in the courts of this State." *Id.*, ¶¶ 35, 36 (emphasis added).

The nondelegable duty exception was applied in *Paull*, third, because an independent contractor was hired by the County to fulfill the State's statutory duty of protection. *Id.*, ¶ 27. In this way, the State had effectively ceded its

responsibility to hire, train, and supervise the individuals charged with a nondelegable duty. *Id.* Notably, this Court recognized the distinction from a situation involving government law enforcement employees:

> Law enforcement agencies have complex hiring processes with the goal of selecting well-qualified personnel who are then trained for activities such as prisoner transport. Law enforcement administrators understand the dangers posed to the public, to law enforcement personnel and to those in custody by inadequate hiring, training and supervision of officers. When a similar level of care is not applied to law enforcement related activities like interstate prisoner transportation, tragic events such as the crash in this case can occur.

Id.

Application of the nondelegable duty exception necessarily requires a fact-intensive analysis, and under the particular facts of *Paull*, the State was found liable for the driver's conduct:

> We hold that the State had a duty to exercise ordinary care in returning Paull to Montana to answer its probation revocation proceeding. This does not mean that the State may not use a private contractor or other means to transport prisoners like Paull. It does not mean that the State is strictly liable for any injury that results from prisoner transportation regardless of fault. It does mean, however, that if the State chooses to transport prisoners by allowing other entities to do the work, it may be held liable for the tortious acts or omissions of its agents undertaking the transportation.

Id., ¶ 38 (emphasis added). In sum, Appellant's reading of *Paull* is faulty because it largely disregards the unique facts of that case.

C. The Court's Application of Section 214 in *Paull* Was Not a Rejection of Its Own Precedent or the Clear Majority Rule Across the Country.

Appellant suggests the *Paull* Court implicitly overruled *Maguire* with the following isolated statement: "We adopt Restatement (Second) of Agency, § 214, as an appropriate statement of the law in Montana." *Id.*, ¶ 37. According to Appellant, in this way the Court declared its intent not only to apply § 214 under the facts before it—an application that, again, was entirely consistent with its prior rulings—but to completely upend prior precedent. This position is belied by *Paull* itself, subsequent decisions of the Court, and a wealth of extra-jurisdictional case law.

First, in *Paull*, the Court did not analyze prior cases, including *Maguire*, where it had expressly stated it would not expand the limited scope of the nondelegable duty exception, and that such a change should come from the Legislature. If the Court intended to enact such a change to respondeat superior liability in Montana, surely it would have analyzed its prior decisions directly on point and to the contrary. It declined to do so, presumably because its holding was not inconsistent with prior precedent.

Nor has the Court adopted Appellant's broad reading of *Paull* since the decision was issued, though it has had ample opportunity to do so. In fact, in 2020—eleven years after *Paull*—this Court confirmed *Maguire* remains good law.

Brenden, ¶ 16 n. 4. In *Brenden*, the Court reiterated that *Maguire* "declin[ed] to extend the non-delegable duty doctrine" to impose vicarious liability. *Id.*, ¶ 16 n. 4. The Court made no mention of *Paull*, nor did it suggest *Maguire's* nondelegable duty holding was no longer controlling. Instead, it cited the holding as an accurate statement of current Montana law. *Id.*

This Court has also discussed *Paull* and its application of the nondelegable duty exception on multiple other occasions, yet it has never indicated its application would extend beyond the facts of *Paull*, or that *Maguire's* continued viability was under threat. To the contrary, the Court has repeatedly distinguished and limited *Paull* to its facts. *See Stricker v. Blaine Cty.*, 2019 MT 280, ¶¶ 11-12, 398 Mont. 43, 453 P.3d 897 (holding that in *Paull* "[t]his Court held the State was liable for the van driver's negligence because the transport company was acting as the State's agent when it accepted Paull as a prisoner under the allegations of the State of Montana's warrant"); *Dick Irvin, Inc. v. State*, 2013 MT 272, ¶¶ 49-50, 372 Mont. 58, 310 P.3d 524 ("In *Paull*, we held that a contractor is vicariously liable for injuries to others caused by a subcontractor's failure to take precautions to reduce the unreasonable risks associated with an inherently dangerous activity. . . . We also held that vicarious liability may attach where an agency relationship exists."); *In re J.J.*, 2018 MT 184, ¶¶ 19-21, 392 Mont. 192, 422 P.3d 699 (noting that in *Paull*, the Court relied on the State's "duty of ordinary care to prisoners in

its actual custody," and "held a county or other governmental entity that contracts to have prisoners transported may be held vicariously liable for injuries caused by an independent contractor that provides prisoner transport services").

Moreover, the idea that the application of § 214 is an all-or-nothing proposition—that it must be applied in the broadest extent possible, without limitation, or not at all—has been rejected by other jurisdictions. *E.g., Davis v. Devereaux Foundation,* 37 A.3d 469, 473 (N.J. 2012) (rejecting vicarious liability for a caregiver's sexual assault and noting "[m]ost jurisdictions that have considered the issue have declined to impose the type of 'non-delegable duty' proposed here").

For example, in *Niece v. Elmview Group Home*, 929 P.2d 420, 423 (Wash. 1997), the Washington Supreme Court considered the plaintiff's argument that the court's prior adoption of § 214 necessitated a broader application of the nondelegable duty doctrine. The case involved facts very like *Maguire*—a developmentally disabled woman was raped and impregnated by a staff member in a licensed care facility. *Id.* In discussing Washington's interpretation of § 214, the court refused to hold employers vicariously liable for the criminal acts of employees outside the scope of employment:

> Under § 214, certain voluntary relationships create a duty to see that due care is actually used by servants or agents to protect another party. . . .

> Our application of § 214 in *Carabba* does not compel a determination that group homes should be vicariously liable for sexual assaults on residents, or that any Washington employer should be vicariously liable for the intentional or criminal conduct of employees. . . .

Id. at 428 (emphasis added).

The court noted that a single outlier—the Indiana Supreme Court's decision in *Stropes v. Heritage House Childrens Center, Inc.*, 547 N.E.2d 244 (Ind. 1989)—applied the non-delegable duty exception to find vicarious liability for sexual assault, and that all other courts, including Montana, had correctly rejected its reasoning. *Id.* at 430-31. The Washington Supreme Court noted the question is "ultimately a question of public policy," which it addressed thusly:

> In support of the nondelegable duty theory, Niece and WSTLA point to the unique relationship between the most vulnerable members of society and their caregivers. . . .
>
> But the broad negligence liability that we have already recognized creates adequate incentives for the operators of group homes for developmentally disabled persons to take all reasonable precautions against sexual abuse in their facilities. The nondelegable duty theory would only impose additional liability without corresponding fault, making group homes the insurers of their employees' conduct. . . . If the studies cited by Niece are accurate, vicarious liability for such abuse would likely be extremely burdensome. It is not at all clear that the imposition of such liability would actually improve the lives of persons who are dependent upon private residential care facilities.
>
> When we are unable to determine the public policy merit of a proposed significant change in the tort law, caution dictates that we defer to the Legislature. . . .
>
> Niece's policy argument raises difficult, unanswered questions about how the cost of such liability would actually be borne. . . .

> All other courts that have considered this issue have prudently refused to follow *Stropes* and deferred to their state legislatures for the same reasons we have given here. The Montana Supreme Court observed that "such a major change to the respondeat superior doctrine is best left to the legislature." *Maguire v. State*, 835 P.2d at 759. . . .

Id. (emphasis added). *See also Davis*, 37 A.3d at 474 (finding "[t]he imposition of liability for unexpected criminal acts of properly screened, trained and supervised employees" was not supported after consideration of "the parties' relationship, the nature of the risk, the opportunity and ability to exercise care, and public policy").

Finally, Appellant's reliance on a non-precedential federal district court order, *Smith v. Ripley*, 446 F. Supp. 3d 683, 687, 691-92 (D. Mont. 2020), carries little weight. First, on the specific question certified to this Court, the judge in *Smith* unequivocally rejected the argument now advanced by Appellant. *Id.* True, with respect to the nondelegable duty doctrine, the judge misinterpreted *Paull* as Appellant does here, but this faulty reading fails for the same reasons discussed above. *Smith* is also distinguishable for other reasons.

As with the probationer in *Paull*, the judge in *Smith* determined the State had a continuing protective relationship with the victim which arose from a mandatory statutory duty of protection: "The Child Abuse and Neglect Chapter, along with the specific statute here, clearly recognizes the State's responsibility for the children and families that it sweeps into its jurisdiction through abuse and neglect proceedings." *Id.* at 691. (citing Mont. Code Ann. §§ 41-3-423, 41-3-101.) In this

case, Appellant does not even try to argue she is akin to the probationer in *Paull* or the mother in *Smith*. Nor could she. The government had no relationship at all with Appellant, apart from the general one it has with every other citizen.

In summary, to the extent the Court finds it necessary to its determination of the certified question, the Court should reject Appellant's false premise that *Maguire* is no longer good law, and that the nondelegable duty exception would apply under the facts of this case. It would not, and for the reasons discussed more fully below, it should not.

II. AN EXTENSION OF RESPONDEAT SUPERIOR LIABILTY WOULD BE CONTRARY TO MONTANA PUBLIC POLICY AND WOULD DRAMATICALLY IMPACT LOCAL GOVERNMENTS.

An extension of respondeat superior liability, either by expanding the course and scope analysis or the nondelegable duty exception, is not supported by Montana public policy, the parties' relationship, the nature of the risk involved, or the opportunity and ability to exercise due care. If an employer is to be held liable for its employee's sexual assault even without fault, "there must be some other sound policy reason to shift the loss created by the employee's intentional wrong from one innocent party to another." *Niece*, 929 P.2d at 430. Here, there is no such reason. It is more likely the contemplated change would have unintended adverse consequences. In any case, weighing the data and competing public policy

considerations is better left to the legislative process, as this Court correctly recognized in *Maguire*.

A. Montana Public Policy Is Clear – State and Local Governments Must Not Be Held Liable for the Criminal Conduct of Employees.

The Montana Legislature has overtly adopted a public policy that state, city, town, and county governments are not financially liable for the criminal actions of their agents. Montana Code Annotated § 2-9-305(6)(b) provides that a governmental entity cannot defend or indemnify an employee if "the conduct of the employee constitutes a criminal offense as defined in Title 45, chapters 4–7." The Legislature has thus determined a governmental entity cannot defend or indemnify an employee who flagrantly defies government policy by committing a criminal offense. *Id.*

Changing the law as advocated by Appellant would fly in the face of this legislatively-established public policy, not to mention the Court's own holding that such policy decisions are better left to the legislative branch. *Maguire*, 254 Mont. at 185, 835 P.2d at 759-60. *See also Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 23, 402 Mont. 277, 477 P.3d 1065 ("We defer to the Legislature's policy choices. . . ."); *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 18, 354 Mont. 133, 227 P.3d 42 (holding deference to the Legislature on matters of public policy regarding the scope of civil liability "is not fawning or groveling before the legislature, it is respect for the role of the policymaking body in our system of government.").

B. Appellant Has Not Sustained Her Burden By Showing the Proposed Policy Change Would Be Positive.

There is no evidence that contradicting Montana's established public policy would produce a positive effect, rather than an adverse one. There is certainly no evidence that shifting responsibility for the criminal conduct of law enforcement officers to state and local governments, without any corresponding finding of fault, would lead to increased safety for Montana citizens. Despite her burden, Appellant simply assumes that expanded governmental liability would equate to increased protections for the citizenry. Her assumption finds no support.

Law enforcement agencies are only empowered to address the kind of misconduct at issue in this case through hiring processes and the ongoing supervision and training of law enforcement officers. *Maguire*, ¶ 27 ("Law enforcement administrators understand the dangers posed to the public, to law enforcement personnel and to those in custody by inadequate hiring, training and supervision of officers.") If there is evidence of a failing in this regard, the law already provides a vehicle to obtain a recovery directly from the government. *E.g., Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 407-10 (1997) (setting forth standard for hiring/training/supervision claims); *Peschel v. City of Missoula,* 664 F. Supp. 2d 1149, 1168-69 (D. Mont. 2009). If there is no evidence of inadequate hiring, training or supervision, then a policy making the government strictly liable would provide no additional incentive to improve these processes. In other words,

expanded liability would provide no incentive to do anything more than what the government is already doing.

Not only would strict liability not improve matters, for a number of reasons it would more likely produce adverse consequences. First, if the governmental employer is on the hook for an employee's criminal conduct, this provides an additional degree of protection to the actual wrongdoer, effectively eliminating an existing disincentive for the employee under the current law. Mont. Code Ann. § 2-9-305(6)(b). Stated differently, where the criminal had been left to fend for himself, under the proposed change the government will be brought in to indemnify the victim and possibly defend the criminal's conduct, thereby creating a degree of cover and distraction from the person who actually committed the crime. (*See* Affidavit of Mark G. Muir, attached as Exhibit A, ¶ 41.)

Second, substantially increased liability exposure would necessarily diminish resources—resources that could be used to enhance the hiring, training and supervision of law enforcement officers. (Ex. A, ¶ 38.) Once again, these are the only measures a government can take to prevent employees from committing sexual assault. *See Niece*, 929 P.2d at 431 (noting the imposition of strict liability for sexual assault "raises difficult, unanswered questions about how the cost of such liability would actually be borne," requiring the issue be left for the legislature).

Third, if governmental liability is a foregone conclusion in cases involving criminal conduct, irrespective of any preventative measures taken by the government, the incentives currently existing under the law are diminished. Those current incentives have led to the adoption of rigorous hiring, training, and supervision processes by law enforcement agencies in Montana. These are described in some detail by law enforcement expert Mark G. Muir, in the report attached as Exhibit A. Suffice it to say Montana's law enforcement agencies employ comprehensive procedures in screening out individuals who may not hold true to their oath as officers, providing officer and supervisor training on sexual misconduct and ethics, and publishing clear police policies and regulations in collaboration with advocacy organizations. (Ex. A, ¶¶ 22, 25-28, 36.) Nothing about the imposition of strict liability would improve these policies or practices.

C. Appellant Has Not Sustained Her Burden By Showing the Nature and Scope of the Problem Supports a Special Exception to Agency Law.

Appellant and her supporting amici argue heavily that the unique nature of law enforcement duties requires a special carve-out to existing law: "Montana public policy militates in favor of this Court recognizing the power imbalance involved in policing." (Appellant Brief at 9.) This argument ignores the fact that power dynamics are present in a wide array of other contexts that can and have led to sexual misconduct. *Maguire* is a prime example. The power the caretaker

wielded over the victim in that case was far greater than any power exercised by Bullcoming. The power exercised by many supervisors in an employment context would be yet another example of power dynamics that are on par with the authority exercised by law enforcement officers. There is no reasonable policy rationale for creating a special exception for law enforcement.

Similarly, Appellant's argument about the prevalence of sexual assault by law enforcement officers is suspect, at best. There is no evidence sexual assault in the law enforcement arena is any more prevalent than in other areas where power imbalances are inherent in a job, and there is likewise no evidence supporting Appellant's portrayal of a rampant epidemic of sexual assault by police officers in Montana.

Law enforcement expert Mark Muir reviewed and analyzed data from the Montana Board of Crime Control and Montana Public Safety Officers Standards and Training Counsel from the last eight years, finding that "[o]n an annual average basis, less than ¼ of 1% of Montana's state and local law enforcement officers engaged in reported sexual assault both on and off-duty." (Ex. A, ¶ 14.) There were just 16 instances of identifiable on-duty sexual misconduct during this eight-year period (an average of two per year), and this number, which includes a broad range of sexual misconduct such as sexual harassment of colleagues and

viewing pornography on duty, becomes even smaller if limited to sexual assaults against members of the public. (Ex. A, ¶ 15.)

MACo and the League recognize, of course, that not all sexual assaults are reported, and that the nature of sexual assaults by law enforcement officers may discourage reporting in particular. That said, the paucity of substantiated parallel incidents in Montana over the course of an eight-year period, with approximately 2,000 law enforcement officers working across the state, undermines the arguments by Appellant and amici about the nature and scope of the problem.

The data also undermines Appellant's argument that sexual assault is the essential equivalent of an assault resulting from an excessive use of force. (Appellant Brief at 17, 18.) Whereas "[a]n arresting officer may use such force as is reasonably necessary to effect a lawful arrest," officers are never authorized to commit any form of sexual assault. *Smith v. Roosevelt Cnty.*, 242 Mont. 27, 35, 788 P.2d 895, 900 (1990). Whether law enforcement officers use excessive force in an arrest, investigatory stop, or seizure, is analyzed under the Fourth Amendment and its "reasonableness" standard. *Scott v. Henrich*, 283 Mont. 97, 938 P.2d 1363 (1997) (citing *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). No such standard exists for sexual assault, however, because no kind of sexual assault is ever reasonable in the performance of law

enforcement duties. Sexual assault has no relation to any authorized law enforcement activity.

In sum, it is Appellant's burden to demonstrate a sound policy reason that supports the radical change in Montana law that she requests, but she offers little more than assumption and speculation about the nature and scope of the problem, and the consequences the proposed change would actually entail.

CONCLUSION

The result sought be Appellant runs counter to Montana's legislatively-established public policy, this Court's prior precedent, and the majority rule in courts across the country. At the very least, this Court has not been presented sufficient information to impose a dramatic shift in respondeat superior liability in Montana—a shift that would strike a major blow to the functions of counties and municipalities in this State—and should thus defer to the Legislature as it did in *Maguire*.

Dated this 29th day of December 2021.

BOONE KARLBERG P.C.

\s\ Thomas J. Leonard
Thomas J. Leonard

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is proportionately spaced, printed with the typeface Times New Roman, 14-point font, is double-spaced, and contains approximately 5,000 words, excluding the caption, Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

Dated this 29th day of December 2021.

BOONE KARLBERG P.C.

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I, Thomas J. Leonard, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 12-29-2021:

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Electronically signed by Shannon Holdsambeck on behalf of Thomas J. Leonard
Dated: 12-29-2021