ORIGINAL

No. 21-56

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY MUIR,

PETITIONER,

-V.-

UNITED STATES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

TIMOTH MUIR, PRO SE
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QUESTION PRESENTED 1

THE RACKETEER INFLUENCED AND CORRUPT PRACTICES ACT ("RICO") DOES NOT IMPOSE AN EXPLICIT SCIENTER REQUIREMENT BEYOND THAT OF A CORRESPONDING PREDICATE CRIME. CONSEQUENTLY, IN A RICO COLLECTION OF UNLAWFUL DEBT PROSECUTION, A PREDICATE STATE USURY STATUTE DETERMINES THE SCIENTER REQUIRED FOR A CONVICTION. THE QUESTION PRESENTED BY THIS CASE IS WHEN THAT PREDICATE STATE USURY STATUTE INCLUDES A LEGAL ELEMENT — THAT IS, "NOT BEING AUTHORIZED OR PERMITTED BY LAW TO DO SO," N.Y. PENAL LAW 190.40 — IS A DEFENDANT'S SUFFICIENT KNOWLEDGE REGARDING THAT LEGAL ELEMENT REQUIRED TO PROVE SCIENTER FOR A RICO CRIMINAL CONVICTION?

Question Presented 2

The Truth in Lending Act ("TILA") expressly defines a "creditor." 15 U.S.C. 1602(g). It then requires a "creditor" to make certain disclosures when extending consumer loans. 15 U.S.C. 1638(a). The question presented by this case is whether a criminal TILA violation under 15 U.S.C. 1611 requires proof a defendant meets the statutory definition of a "creditor"?

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PETITIONER HERE IS TIMOTHY MUIR, DEFENDANT-APPELLANT BELOW. THIS COURT PREVIOUSLY DENIED CO-DEFENDANT-APPELLANT SCOTT TUCKER'S PETITION FOR A WRIT OF CERTIORARI. No. 20-6936.

CO-DEFENDANT CRYSTAL GROTE, A/K/A CRYSTAL CRAM, A/K/A CRYSTAL CRAM-GROTE, A/K/A CRYSTAL STUBBS, PLEAD GUILTY AND HAS SOUGHT NO APPELLATE REVIEW.

INTRODUCTION

THIS CASE IS NOT A USURY CASE. NOR IS IT A TRIBAL SOVEREIGNTY CASE. TO BE SURE, THE PRIMARY FOCUS AT TRIAL WAS TRIBAL LENDING. AT THE APPELLATE STAGE, HOWEVER, THIS CASE IS ALL ABOUT SCIENTER.

WHEN INTERPRETING CRIMINAL STATUTES FOR A SCIENTER REQUIREMENT, THIS COURT HAS CONSISTENTLY ADHERED TO THE "'CENTRAL THOUGHT' * * * THAT A DEFENDANT MUST BE 'BLAMEWORTHY IN MIND' BEFORE HE CAN BE FOUND GUILTY." ELONIS V. UNITED STATES, 575 U.S. —, —, 135 S. CT. 2001, 2009 (2015) (QUOTING MORISSETTE V. UNITED STATES, 342 U.S. 246, 252 (1952)). JUST TWO TERMS AGO, IT ONCE AGAIN EXPOUNDED UPON THIS "UNIVERSAL AND PERSISTENT" UNDERSTANDING:

> WE NORMALLY CHARACTERIZE THIS INTERPRETIVE MAXIM AS A PRESUMPTION IN FAVOR OF "SCIENTER," BY WHICH WE MEAN A PRESUMPTION THAT CRIMINAL STATUTES REQUIRE THE DEGREE OF KNOWLEDGE SUFFICIENT TO "MAK[E] A PERSON LEGALLY RESPONSIBLE FOR THE CONSEQUENCES OF HIS OR HER ACT...."

REHAIF V. UNITED STATES, 588 U.S. —, —, 139 S. CT. 2191, 2196, 2195 (2019) (QUOTING BLACK'S LAW DICTIONARY 1547 (10th ed. 2014)). EVEN MORE AS IT RELATES TO THIS CASE, REHAIF MADE CLEAR THAT WHEN A CRIMINAL STATUTE INCLUDES A "'COLLATERAL' QUESTION OF LAW" — IN OTHER WORDS, WHEN IT INCLUDES A LEGAL ELEMENT — A DEFENDANT'S SUFFICIENT KNOWLEDGE REGARDING THAT "LEGAL MATTER" IS REQUIRED TO PROVE A "GUILTY STATE OF MIND." 139 S. CT., AT 2198 (DISCUSSING LIPAROTA V. UNITED STATES, 471 U.S. 419 (1985)). THIS COURT'S REVIEW IS URGENTLY NEEDED YET AGAIN

BECAUSE THE COURT OF APPEALS REFUSES TO APPLY THESE FOUNDATIONAL PRINCIPLES.

THIS CASE RESULTED IN THE FIRST-EVER TRIAL CHALLENGING ONLINE TRIBAL LENDING UNDER RICO'S COLLECTION OF UNLAWFUL DEBT PRONG. THE LENDING AT ISSUE INVOLVED FEDERALLY RECOGNIZED INDIAN TRIBES PARTNERING WITH A NON-TRIBAL, THIRD-PARTY SERVICER TO OFFER SHORT-TERM LOANS OVER THE INTERNET AT RATES SIGNIFICANTLY EXCEEDING STATE USURY CAPS. THIS LENDING MODEL WAS PREMISED UPON LOAN AGREEMENTS THAT EXPRESSLY PROVIDED FOR THE BROAD APPLICATION OF TRIBAL USURY LAWS — AND THUS TRIBAL USURY INTEREST RATES — TO THE EXCLUSION OF STATE USURY LAWS AND RATES. AT TRIAL, PETITIONER TIMOTHY MUIR'S SOLE DEFENSE WAS HIS INNOCENT STATE OF MIND THAT THE LENDING WAS LAWFUL. THIS LEGAL DEFENSE WAS NOT SURPRISING AS HE HAD BEEN A LICENSED, PRACTICING ATTORNEY HELPING TO DEFEND THE LENDING MODEL UNDER THIS LEGAL THEORY IN HIGH-PROFILE, CIVIL LITIGATION FOR A DECADE.

BUTTRESSING MUIR'S INNOCENT STATE OF MIND WAS THAT PRIOR TO THIS CASE, NOT A SINGLE BINDING DECISION — CIVIL OR CRIMINAL — HAD FOUND ONLINE TRIBAL LENDING UNLAWFUL. NOTABLY, THE ONLY SECOND CIRCUIT OPINION ADDRESSING IT ACKNOWLEDGED IT INVOLVED "NOVEL" ISSUES NEITHER IT NOR THIS COURT HAD EVER PREVIOUSLY ADDRESSED, BUT CHOSE NOT TO RESOLVE ANY OF THEM. OTOE-MISSOURIA TRIBE OF INDIANS V. N.Y. STATE DEP'T OF FIN. SERVS., 769 F.3d 105, 114 (2d CIR. 2014).

ADDITIONALLY, THAT CIVIL OPINION WAS ISSUED AFTER THE RELEVANT TIME PERIOD FOR THE CHARGED CONDUCT IN THE INDICTMENT HERE ENDED. IT IS THUS INDISPUTABLE THAT MUIR WENT TO TRIAL FACING A NOVEL THEORY OF CRIMINALITY WITHOUT ANY PRECEDENT CONTRAVENING HIS INNOCENT STATE OF MIND. PUT DIFFERENTLY, HE HAD NO KNOWLEDGE THE LENDING WAS UNLAWFUL.

THE DISTRICT COURT, HOWEVER, RENDERED MUIR'S INNOCENT STATE OF MIND AND HIS LACK OF KNOWLEDGE IRRELEVANT: IT INSTRUCTED THE JURY THE GOVERNMENT COULD SATISFY THE SCIENTER ELEMENT FOR THE RICO COUNTS MERELY BY PROVING MUIR KNEW THE ACTUAL INTEREST RATES ON THE LOANS, "NOTWITHSTANDING ANY GOOD FAITH BELIEF [THE LENDING] WAS LAWFUL." PET. APP. 49. PROVING THE JURY HAD HONED IN ON THIS INSTRUCTION, ITS VERY FIRST QUESTION (SHORTLY AFTER IT BEGAN DELIBERATING) ASKED TO SEE MUIR'S TRIAL TESTIMONY WHERE HE ADMITTED HE KNEW THE INTEREST RATES WERE "TOO HIGH." TR. 3333.[1] NOT SURPRISINGLY, IT RETURNED GUILTY VERDICTS ON ALL COUNTS SHORTLY THEREAFTER.

STILL, IN AFFIRMING THESE UNPRECEDENTED CONVICTIONS, THE DECISION BELOW RECOGNIZED THERE ARE "CONFUSING AND ARGUABLY INCOMPATIBLE PRECEDENTS REGARDING THE REQUIRED MENTAL STATE FOR A RICO

1. IN LIGHT OF THIS TESTIMONY, MUIR ARGUED ON APPEAL THIS INSTRUCTION DIRECTED A GUILTY VERDICT. LIKE EVERY SINGLE ONE OF MUIR'S ARGUMENTS, THE COURT OF APPEALS REJECTED IT AS "FRIVOLOUS." PET. APP. 4a.

OFFENSE INVOLVING UNLAWFUL DEBT." PET. APP. 28a. IT FURTHER ACKNOWLEDGED "[C]ERTAIN APPLICATIONS OF RICO IN THIS CONTEXT ARE [] IN TENSION WITH [THIS] COURT'S RECENT REAFFIRMATION OF A 'PRESUMPTION IN FAVOR OF A SCIENTER REQUIREMENT' APPLICABLE TO 'EACH OF THE STATUTORY ELEMENTS THAT CRIMINALIZE OTHERWISE INNOCENT CONDUCT.'" IBID. (CITING ELONIS, 135 S. CT., AT 2011 (QUOTING UNITED STATES V. X-CITEMENT VIDEO, INC., 513 U.S. 64, 72 (1994))). BUT RATHER THAN RESOLVE ANY OF THESE ISSUES, THE COURT OF APPEALS MERELY "DISCUSS[ED] THEM BRIEFLY IN THE HOPE OF EXPOSING SOME OF THE POTENTIAL PROBLEMS." PET. APP. 29a.[2]

THIS CASE, HOWEVER, WAS PARTICULARLY WELL-SUITED TO RESOLVE THE CONFUSION AND TENSION REGARDING THE REQUISITE SCIENTER UNDER RICO'S COLLECTION OF UNLAWFUL DEBT PRONG. AGAIN, MUIR'S SOLE DEFENSE WAS THAT HE HAD AN INNOCENT STATE OF MIND. FURTHERMORE, AND AS THE GOVERNMENT READILY AGREED BELOW, WHETHER MUIR HAD THE REQUISITE SCIENTER WAS "THE CENTRAL DISPUTED ISSUE IN THE CASE...." BRIEF OF UNITED STATES 52 (COA DOC. NO. 131). ACCORDINGLY, THE MAJORITY OF THE ARGUMENTS ON APPEAL CHALLENGED THE SCIENTER ELEMENTS FOR THE RICO COUNTS. HOW, THEN, DID THE DECISION BELOW AVOID A COMPREHENSIVE SCIENTER ANALYSIS?

FIRST, IT DISPOSED OF CO-DEFENDANT-APPELLANT SCOTT TUCKER'S PRIMARY CHALLENGE TO THE CHARGE UNDER THE PLAIN ERROR STANDARD. TUCKER HAD ARGUED THE DISTRICT COURT HAD ERRED WITH ITS INSTRUCTION THAT SCIENTER FOR THE RICO

2. CURIOUSLY, ITS DISCUSSION FAILED TO ACKNOWLEDGE THAT MUIR HAD RAISED THOSE VERY SAME "PROBLEMS" (AND MORE) IN HIS BRIEFING. REPLY BRIEF OF APPELLANT 4/9-52 (COA DOC. NO. 155).

COUNTS COULD BE SATISFIED SIMPLY BY DEFENDANTS' KNOWLEDGE OF THE INTEREST RATES, REGARDLESS OF THEIR BELIEF THE LENDING WAS LAWFUL. DEFENDANTS HAD INCESSANTLY OBJECTED TO THIS INSTRUCTION, INCLUDING TWICE SPECIFICALLY REQUESTING IT BE REMOVED AFTER RECEIVING THE THIRD AND FINAL DRAFT OF THE JURY INSTRUCTIONS. SEE PETITION FOR REHEARING OF APPELLANT 15 (COA DOC. NO. 314). DESPITE ACKNOWLEDGING DEFENDANTS "DID RAISE THE SPECIFIC ARGUMENT AT ISSUE" "JUST PRIOR TO THE CHARGE," PET. APP. 45a (EMPHASIS IN ORIGINAL), THE COURT OF APPEALS RIGIDLY APPLIED FEDERAL RULE OF CRIMINAL PROCEDURE 30(d): IT APPLIED PLAIN ERROR REVIEW BECAUSE DEFENDANTS DID NOT OBJECT AGAIN AFTER THE CHARGE WAS GIVEN. PET. APP. 21a. IT THEN STEADFASTLY REFUSED TO ADDRESS MUIR'S PRIMARY ARGUMENT, NAMELY THAT HE LACKED THE REQUISITE SCIENTER UNDER THE PREDICATE STATE USURY STATUTE BECAUSE HE DID NOT HAVE SUFFICIENT KNOWLEDGE THE LENDING WAS "NOT [] NOT AUTHORIZED OR PERMITTED BY LAW." N.Y. PENAL LAW 190.40. INSTEAD, IT SIMPLY REJECTED THIS ARGUMENT AS "FRIVOLOUS" IN ITS ORIGINAL OPINION, PET. APP. 40a, AND THEN AS "WITHOUT MERIT" IN DENYING MUIR'S PETITION FOR REHEARING. PET. APP. 45a.

SIGNIFICANTLY, HOWEVER, MUIR'S ARGUMENT RELYING UPON NEW YORK'S CRIMINAL USURY STATUTE—THE ONLY STATE USURY STATUTE EXPLICITLY INCORPORATED INTO THE JURY INSTRUCTIONS—IS DIRECTLY SUPPORTED BY UNITED STATES V. BIASUCCI, 786 F.2d 504 (2d CIR. 1986), THE COURT OF APPEALS' WELL-KNOWN RICO OPINION. THERE, LINKING SCIENTER WITH KNOWLEDGE

JUST LIKE IN REHAIF, BIASUCCI IS UNEQUIVOCAL HOW AND WHAT THE GOVERNMENT MUST PROVE TO ESTABLISH THE REQUISITE SCIENTER UNDER RICO'S COLLECTION OF UNLAWFUL DEBT PRONG:

> RICO IMPOSES NO ADDITIONAL MENS REA REQUIREMENT BEYOND THAT FOUND IN THE PREDICATE CRIMES. *** CONSEQUENTLY, WE LOOK TO THE SCIENTER ELEMENTS FOUND IN THE STATUTORY DEFINITIONS OF THE PREDICATE CRIMES TO DETERMINE THE DEGREE OF KNOWLEDGE THAT MUST BE PROVED TO ESTABLISH A RICO VIOLATION.

786 F.2d, AT 512 (CITATIONS OMITTED). WHAT'S MORE, HIS SPECIFIC ARGUMENT THAT THE JURY SHOULD HAVE BEEN INSTRUCTED ON SECTION 190.40'S "LEGAL ELEMENT"[3] BECAUSE IT IS PART OF THE STATUTE'S SCIENTER REQUIREMENT IS DIRECTLY SUPPORTED BY A "LEGION" OF THIS COURT'S CASES "EMPHASIZ[ING] SCIENTER'S IMPORTANCE IN SEPARATING WRONGFUL FROM INNOCENT ACTS." REHAIF, 139 S.CT., AT 2196 (COLLECTING CASES); SEE ALSO ELONIS, 135 S.CT., AT 2009-10 (SAME).

IN PARTICULAR, IT IS ON ALL FOURS WITH LIPAROTA, THIS COURT'S OFT-CITED OPINION INTERPRETING A CRIMINAL STATUTE STRIKINGLY SIMILAR TO 190.40 — THAT IS, A "KNOWINGLY" FACTUAL ELEMENT ALSO CONDITIONED UPON A LEGAL ELEMENT ("IN ANY MANNER NOT AUTHORIZED BY [THE STATUTE] OR THE REGULATIONS" (7 U.S.C. 2024(b)(1)) — AS REQUIRING THE GOVERNMENT TO EXPLICITLY PROVE "THE DEFENDANT KNEW

3. "NOT BEING AUTHORIZED OR PERMITTED BY LAW TO DO SO" IS KNOWN AS A "LEGAL ELEMENT" BECAUSE IT "'INVOLVE[S] MATTER OF LAW AS WELL AS FACT.'" UNITED STATES V. FREED, 401 U.S. 601, 615 (1971) (BRENNAN, J. CONCURRING) (QUOTING MODEL PENAL CODE 2.02, COMMENT 11, AT 131 (TENT. DRAFT NO. 4 (1955)); SEE ALSO REHAIF, 139 S.CT., AT 2159 ("WHAT THE COMMENTATORS REFER TO AS A 'COLLATERAL' QUESTION OF LAW."). AND AS NEW YORK'S PATTERN JURY INSTRUCTIONS MAKE CLEAR, IT IS A STAND-ALONE ELEMENT FOR WHICH THE PROSECUTION BEARS THE BURDEN OF PROOF. CJI 2d [NY] PENAL LAW 190.40 (ELEMENT 4).

HIS CONDUCT TO BE UNAUTHORIZED BY STATUTE OR REGULATIONS." 471 U.S. AT 425 n.9. MORE FUNDAMENTALLY, IT FOUND THE LEGAL ELEMENT REQUIRED PROOF "THE DEFENDANT KNEW THAT HIS [CONDUCT] WAS UNLAWFUL, EVEN THOUGH THAT WAS A QUESTION OF LAW." REHAIF, 139 S.CT., AT 2198 (ANALYZING LIPAROTA); SEE ALSO RATZLAF V. UNITED STATES, 510 U.S. 135, 154 (1994) (EXPLAINING LIPAROTA'S LEGAL ELEMENT "IMPOSED A KNOWLEDGE-OF-ILLEGALITY REQUIREMENT *** TO ENSURE THAT THE DEFENDANT ACTED WITH A WRONGFUL PURPOSE."). THAT THE COURT OF APPEALS DID NOT EVEN CITE LIPAROTA DESPITE MUIR PROMINENTLY AND EXTENSIVELY ARGUING IT IN THREE SEPARATE BRIEFS[4] EXPOSES THE JUDGMENT BELOW AS CLEARLY ERRONEOUS.

EVEN SO, CORRECTING THE ERRORS OF LOWER COURTS IS NOT THIS COURT'S PRIMARY FUNCTION. INDEED, EVEN IF A LOWER COURT MISAPPLIES A PROPERLY STATED RULE OF LAW, THAT STANDING ALONE WILL RARELY, IF EVER, WARRANT THIS COURT'S REVIEW. BUT A LOWER COURT'S FAILURE TO APPLY CONTROLLING LAW — SUCH AS AN OPINION OF THIS COURT — THAT IS REVIEWED DIFFERENTLY. SEE THOMPSON V. HEBDON, 589 U.S. —, —, 140 S. CT. 348, 350 (2019) (PER CURIAM) (SUMMARILY VACATING AND REMANDING FOR CONSIDERATION OF RANDALL V. SORRELL, 548 U.S. 230 (2006), PRECEDENT THE COURT OF APPEALS "DECLINED TO APPLY"); SEARS V. UPTON, 561 U.S. 945, 948 (2009) (PER CURIAM) (SUMMARILY VACATING AND REMANDING BECAUSE

4. SEE REPLY BRIEF 14-19; POST-ARGUMENT SUPPLEMENTAL BRIEF 8-10 (COA DOC. NO. 231); PETITION FOR REHEARING 10-11.

THE STATE COURT "FAILED TO APPLY THE CORRECT [STANDARD] WE HAVE ESTABLISHED"); SEE ALSO ARKANSAS V. SULLIVAN, 532 U.S. 769, 771 (2001) (PER CURIAM) (SUMMARILY REVERSING THE ARKANSAS SUPREME COURT BECAUSE IT "DECLINED TO FOLLOW" THE "CONTROLLING PRECEDENT" OF WHREN V. UNITED STATES, 517 U.S. 806 (1996)). CRITICALLY, THAT IS EXACTLY WHAT HAPPENED HERE: THE COURT OF APPEALS FAILED TO APPLY LIPAROTA. THAT IS MORE THAN ERROR. IT PROVES THE SECOND CIRCUIT "HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS * * * AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER." THIS COURT'S RULE 10(a).

SEPARATELY WARRANTING THIS COURT'S REVIEW IS THE COURT OF APPEALS' REFUSAL TO ADDRESS MUIR'S ARGUMENT THAT THE TRUTH IN LENDING ACT ("TILA") CONVICTIONS MUST BE REVERSED BECAUSE HE DID NOT MEET TILA'S UNAMBIGUOUS DEFINITION OF A "CREDITOR": "THE TERM 'CREDITOR' REFERS ONLY TO A PERSON WHO BOTH (1) REGULARLY EXTENDS * * * CONSUMER CREDIT." AND "(2) IS THE PERSON TO WHOM THE DEBT * * * IS INITIALLY PAYABLE ON THE FACE OF THE EVIDENCE OF INDEBTEDNESS." 15 U.S.C. 1602(g) (EMPHASIS SUPPLIED). AS AN ATTORNEY PROVIDING LEGAL SERVICES (NOT LOANS), MUIR COULD NEVER SATISFY EITHER PRONG OF THIS STATUTORY ELEMENT. DOUBTLESS EVEN THE GOVERNMENT AGREES, AS IT DID NOT CONTEST THIS POINT IN ITS BRIEF BELOW. STILL, MUIR COMES BEFORE THIS COURT YOKED WITH FIVE TILA CONVICTIONS BECAUSE THE SECOND CIRCUIT ALSO SUMMARILY

REJECTED THIS STRAIGHTFORWARD, TEXTUAL ARGUMENT AS "FRIVOLOUS." PET. APP. 40a.

IT IS, OF COURSE, A CANONICAL PRINCIPLE OF CRIMINAL LAW THAT A CONVICTION REQUIRES PROOF "OF EVERY ELEMENT OF THE CRIME...." UNITED STATES V. GAUDIN, 515 U.S. 506, 510 (1995) (CITING SULLIVAN V. LOUISIANA, 508 U.S. 275, 277-78 (1993)). AT TRIAL, HOWEVER, THE GOVERNMENT DID NOT OFFER ANY EVIDENCE AT ALL THAT MUIR SATISFIED THE "CREDITOR" ELEMENT. OBVIOUSLY, NO EVIDENCE, NO PROOF, NO CONVICTION. AND YET, THE COURT OF APPEALS DODGED THIS INESCAPABLE LOGIC WITH ITS OUTRIGHT REJECTION OF MUIR'S TILA ARGUMENTS. CEMENTING THAT AS ALSO "SO FAR DEPART[ING] FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS," RULE 10(a), THE SECOND CIRCUIT NOT ONLY IGNORED THIS COURT'S PRECEDENTS, IT SHUNNED ITS OWN CLEAR PRECEDENT. SEE VINCENT V. MONEY STORE, 736 F.3d 77 (2d CIR. 2013) (AFFIRMING THE DISMISSAL OF CIVIL TILA CLAIMS BECAUSE DEFENDANTS DID NOT MEET THE STATUTORY DEFINITION OF A "CREDITOR").

IN THE END, THE SECOND CIRCUIT'S MULTIPLE FAILURES TO APPLY CONTROLLING LAW AND FOUNDATIONAL PRINCIPLES ARE SO EGREGIOUS, ITS JUDGMENT AFFIRMING THE CONVICTIONS CANNOT STAND. THIS COURT SHOULD GRANT THIS PETITION AND RIGHT THESE FUNDAMENTAL WRONGS. IN FACT, IT SHOULD SUMMARILY DISPOSE OF BOTH QUESTIONS PRESENTED: IT SHOULD VACATE THE JUDGMENT AFFIRMING THE RICO CONVICTIONS AND REMAND WITH INSTRUCTIONS TO CONSIDER MUIR'S ARGUMENTS, AND IT SHOULD REVERSE THE TILA CONVICTIONS.

OPINIONS AND ORDERS BELOW

THE OPINION OF THE COURT OF APPEALS, UNITED STATES V. GROTE IS REPORTED AT 961 F.3d 105 (2d CIR. 2020). (PET. APP. 1a - 43a). AN ORDER OF THE COURT OF APPEALS "COMMENT[ING] BRIEFLY ON ONE CONTENTION RAISED" BY THE APPELLANTS IN THEIR SEPARATELY FILED PETITIONS FOR REHEARING IS UNREPORTED. (PET. APP. 44a - 45a).

JURISDICTION

THE COURT OF APPEALS ISSUED ITS OPINION AND ENTERED JUDGMENT ON JUNE 2, 2020. IT THEREAFTER DENIED MUIR'S TIMELY PETITION FOR REHEARING ON OCTOBER 15, 2020. BY ORDER DATED MARCH 19, 2020, THIS COURT EXTENDED THE DEADLINE TO FILE PETITIONS FOR A WRIT OF CERTIORARI TO 150 DAYS FROM THE DATE OF THE APPLICABLE LOWER COURT JUDGMENT. ACCORDINGLY, MUIR'S DEADLINE TO FILE A CERT PETITION WAS MARCH 15, 2021. AS MORE FULLY DETAILED IN THE DECLARATION OF INMATE FILING (CONTEMPORANEOUSLY SUBMITTED WITH THIS PETITION), MUIR DEPOSITED A PETITION FOR A WRIT OF CERTIORARI, ALONG WITH A DECLARATION OF INMATE FILING AND A LETTER TO THE CLERK OF THE COURT, ON MARCH 15, 2021 IN THE INTERNAL MAIL SYSTEM OF THE INSTITUTION AT WHICH HE IS CURRENTLY INCARCERATED, FCI BECKLEY IN WEST VIRGINIA. MUIR HAD BEEN TRANSFERRED THERE AND WAS IN A COVID-19 QUARANTINE. THE OTHER INMATE IN THE CELL DURING THE 23-DAY QUARANTINE, MANUEL PARRADO, REG. NO. 72796-018, WITNESSED MUIR PLACE THE PETITION IN THE INSTITUTION'S INTERNAL MAIL SYSTEM. FOR REASONS UNKNOWN TO

MUIR—AND OUT OF HIS CONTROL—THE COURT APPARENTLY NEVER RECEIVED HIS PETITION OF MARCH 15.[5] THIS PETITION REPLACES HIS TIMELY SUBMITTED PETITION OF MARCH 15. THE JURISDICTION OF THIS COURT IS INVOKED PURSUANT TO 28 U.S.C. 1254(1).

PROVISIONS INVOLVED

THE RELEVANT STATUTORY PROVISIONS (18 U.S.C. 1961(6), 1962(c), (d), N.Y. PENAL LAW 190.40, 15 U.S.C. 1602(g), 1611 AND 1638(a)) BEGIN AT PET. APP. 469.

STATEMENT

THE LENDING AT ISSUE IN THIS CASE BEGAN ALMOST TWO DECADES BEFORE THE INDICTMENT WAS UNSEALED. PET. APP. 69. AT ITS ZENITH, IT EMPLOYED 1,500 PEOPLE, HAD 4.5 MILLION CUSTOMERS AND GENERATED ANNUAL REVENUES APPROACHING A BILLION DOLLARS. IBID. AT ALL TIMES RELEVANT, IT WAS CONDUCTED THROUGH LENDER-SERVICER ARRANGEMENTS. UNDER THIS COMMON LENDING PRACTICE, A REGULATED LENDER PARTNERS WITH A SERVICER TO HANDLE ALL ASPECTS OF CUSTOMER SERVICE—FROM APPLICATION ALL THE WAY THROUGH TO COLLECTION. THE LENDING HERE OPERATED UNDER TWO DIFFERENT LENDING MODELS. THE FIRST INVOLVED A NATIONALLY CHARTERED BANK; THE SECOND INVOLVED FEDERALLY RECOGNIZED INDIAN TRIBES. BOTH MODELS, AS WELL AS ALL OF THE LENDER-SERVICER RELATIONSHIPS, WERE IN PLACE PRIOR TO MUIR'S RETENTION AS LEGAL COUNSEL IN 2006. TR. 2655.

IT IS UNDENIABLE THAT UNDER BOTH MODELS TUCKER PROVIDED THE INITIAL CAPITAL AND WAS PROMINENTLY INVOLVED

5. MUIR COULD NOT CALL THE COURT BECAUSE OF SECURITY FEATURES ATTENDANT WITH THE BOP'S PHONE SYSTEM. ACCORDINGLY, HE HAD HIS WIFE, A LICENSED, PRACTICING ATTORNEY, AND ANOTHER INDIVIDUAL, LEAVE MULTIPLE MESSAGES WITH THE CLERK'S OFFICE INQUIRING ABOUT HIS PETITION. NONE OF THESE CALLS WERE RETURNED.

IN ALL FACETS OF THE SERVICING. HE ALSO RECEIVED THE VAST MAJORITY OF THE REVENUES, SET UP THE BANK ACCOUNTS AND, SUBJECT TO THE AUTHORITY GRANTED TO HIM BY THE LENDERS, HAD CONTROL OVER THE ACCOUNTS. BUT WHILE THE DECISION BELOW EMPHASIZED THESE POINTS IN AFFIRMING THE CONVICTIONS, PET. APP 129, MUIR DID NOT RUN FROM ANY OF IT AT TRIAL. IN HIS MIND, NONE OF THOSE FACTORS ALTERED THE LENDER-SERVICER RELATIONSHIPS. TR. 2932-34.

A. THE COUNTY BANK MODEL

FROM 1998 TO 2004, THE LENDING OPERATED UNDER THE COUNTY BANK MODEL, SO NAMED FOR THE LENDER, COUNTY BANK OF REHOBOTH BEACH, DELAWARE. PET. APP. 109. THE COURT OF APPEALS RECOGNIZED THAT "[A]S A NATIONALLY CHARTERED BANK, COUNTY BANK COULD LAWFULLY LEND ANYWHERE IN THE UNITED STATES AT INTEREST RATES THAT COMPLIED WITH THE LAW OF THE STATE IN WHICH IT WAS HEADQUARTERED." IBID. IN OTHER WORDS, SINCE "COUNTY BANK WAS HEADQUARTERED IN DELAWARE, WHICH DOES NOT SET A LIMIT ON CONSUMER INTEREST RATES," IBID., IT COULD LAWFULLY EXPORT WHATEVER RATE IT WANTED TO CHARGE TO RESIDENTS OF OTHER STATES, REGARDLESS OF THEIR HOME STATE USURY LAWS. THE DECISION BELOW, HOWEVER, GLOSSED OVER THE LEGAL FOUNDATION FOR A NATIONAL BANK EXPORTING ITS HOME STATE'S INTEREST RATES, WHICH DATES BACK MORE THAN 150 YEARS TO THE PASSAGE OF THE NATIONAL BANK ACT IN 1864. 12 U.S.C. 1 ET SEQ. THIS WELL-SETTLED LAW IS CLEAR: "STATES CAN EXERCISE NO CONTROL OVER [NATIONAL BANKS], NOR IN ANY WAY AFFECT THEIR OPERATION, EXCEPT SO FAR AS CONGRESS MAY SEE PROPER TO PERMIT." FARMERS' AND MECHANICS' NAT. BANK V. DEARING, 91 U.S. 29, 34 (1875).

THAT STATES ARE POWERLESS TO REGULATE SUCH LENDING ABSENT CONGRESSIONAL ACTION NOT ONLY IMPACTED MUIR'S BELIEF THAT THE COUNTY BANK MODEL WAS LAWFUL, BUT THAT THE TRIBAL MODEL WAS AS WELL. IN HIS MIND, THE SAME LEGAL PRINCIPLES APPLY. TR. 2691-92.

B. THE TRIBAL MODEL

THE TRIBAL MODEL WAS THE LENDING MODEL WITH WHICH MUIR WAS DIRECTLY INVOLVED. IT BEGAN IN 2003 WHEN TUCKER AND SEVERAL FEDERALLY RECOGNIZED INDIAN TRIBES ENTERED INTO SERVICING ARRANGEMENTS WHEREBY A TRIBALLY OWNED ENTITY WOULD BE THE LENDER. PET. APP. 129. ITS LEGAL FOUNDATION ALSO DATES BACK TO THE 19TH CENTURY WHEN THIS COURT RECOGNIZED THE INHERENT SOVEREIGNTY OF INDIAN TRIBES. SEE WORCESTER V. GEORGIA, 31 U.S. 515, 519 (1832), ABROGATED AS RECOGNIZED BY NEVADA V. HICKS, 533 U.S. 353, 361 (2001) (DECLARING TRIBES ARE "DISTINCT, INDEPENDENT POLITICAL COMMUNITIES, RETAINING THEIR ORIGINAL NATURAL RIGHTS, AS THE UNDISPUTED POSSESSORS OF THE SOIL, FROM TIME IMMEMORIAL ...."). PUT ANOTHER WAY (AND MORE POINTEDLY), TRIBAL SOVEREIGNTY "PRE-DATES EUROPEAN CONTACT, THE FORMATION OF THE UNITED STATES, THE U.S. CONSTITUTION, AND INDIVIDUAL STATEHOOD." CASH ADVANCE & PREFERRED CASH LOANS V. STATE, 242 P.3d 1099, 1107 (COLO. 2010).

LIKE ALL SOVEREIGNS, INDIAN TRIBES POSSESS THE POWER TO ENACT LAWS. EACH OF THE TRIBES HERE DID JUST THAT: THEY ENACTED LENDING LAWS THAT EXPRESSLY AUTHORIZED THE LENDING. SEE, E.G., DEFS.' EXHS. 729, 1004, 1007, 1008, 1038. INTEGRAL TO MUIR'S STATE OF MIND THAT THE LENDING WAS LAWFUL, THE LOAN AGREEMENTS CONTAINED CHOICE-OF-LAW CLAUSES THAT PROVIDED

FOR THE APPLICATION OF TRIBAL LAWS TO THE LOANS—TO THE EXCLUSION OF STATE LAWS. TR. 2692. BUTTRESSING HIS INNOCENT STATE OF MIND WAS A TRILOGY OF THIS COURT'S MODERN OPINIONS REINFORCING ITS LONG-STANDING RESPECT FOR TRIBAL SOVEREIGNTY.

FIRST, MONTANA V. UNITED STATES RECOGNIZED THE POWER OF TRIBES TO REGULATE TRANSACTIONS WITH NON-TRIBAL MEMBERS: "A TRIBE MAY REGULATE, THROUGH TAXATION, LICENSING, OR OTHER MEANS, THE ACTIVITIES OF NONMEMBERS WHO ENTER INTO CONSENSUAL RELATIONSHIPS WITH THE TRIBE OR ITS MEMBERS, THROUGH COMMERCIAL DEALINGS, CONTRACTS, LEASES, OR OTHER ARRANGEMENTS." 450 U.S. 544, 565 (1981). SIGNIFICANTLY, IN A DECISION ISSUED NEARLY A DECADE AFTER THE TRIBAL MODEL BEGAN—AND THUS NEAR THE VERY END OF THE TIME PERIOD FOR THE CHARGED CONDUCT IN THE INDICTMENT—A FEDERAL COURT FOUND THAT A TRIBAL LOAN MET MONTANA'S DEFINITION OF A "CONSENSUAL RELATIONSHIP." F.T.C. V. PAYDAY FINANCIAL, LLC, 935 F. SUPP. 2d 926, 936 (D.S.D. 2013). IT ALSO REJECTED THE CONTENTION THAT A BORROWER MUST BE PHYSICALLY PRESENT ON THE RESERVATION FOR MONTANA TO APPLY. Id., AT 937-40.

NEXT CAME CALIFORNIA V. CABAZON BAND OF MISSION INDIANS, WHICH HELD TRIBAL SOVEREIGNTY PREVENTED STATE REGULATION OF TRIBAL GAMING. 480 U.S. 202 (1987). NOT ONLY DID CABAZON IMPACT MUIR'S INNOCENT STATE OF MIND, BUT, SO TOO DID CONGRESS'S REACTION TO IT: WITHIN ONE YEAR (AT THE EXPRESS URGING OF THE STATES), IT PASSED THE INDIAN GAMING REGULATORY ACT ("IGRA"), 25 U.S.C. 2701 ET SEQ. UNQUESTIONABLY, IGRA ABROGATES TRIBAL SOVEREIGNTY. MICHIGAN V. BAY MILLS INDIAN CMTY, 572 U.S. 782, 791 (2014). STILL, IN CREATING A FEDERAL FRAMEWORK

TO REGULATE TRIBAL GAMING, CONGRESS CLEARLY REJECTED THE STATES' CRIES IT WAS UNLAWFUL IF IT DID NOT COMPLY WITH THEIR LAWS — THEREBY RECOGNIZING TRIBES' SOVEREIGN RIGHT TO ENGAGE IN COMMERCIAL ACTIVITY FOR ECONOMIC DEVELOPMENT, EVEN WHEN DOING SO DIRECTLY CONFLICTS WITH STATE LAW.

THE THIRD DECISION IS KIOWA TRIBE OF OKLA. V. MFG. TECHS., INC., WHICH HELD INDIAN TRIBES ENJOY A CORE ASPECT OF SOVEREIGNTY, SOVEREIGN IMMUNITY, WHETHER "INVOLVE[D IN] GOVERNMENTAL OR COMMERCIAL ACTIVITIES AND WHETHER *** ON OR OFF A RESERVATION." 523 U.S. 751, 760 (1998). KIOWA'S RECOGNITION OF TRIBAL SOVEREIGNTY FOR OFF-RESERVATION, COMMERCIAL CONDUCT WAS PARTICULARLY RELEVANT TO THE TRIBAL LENDING MODEL BECAUSE IT WAS THE PRIMARY BASIS OF AN OPINION LETTER TUCKER OBTAINED FROM A TRIBAL LAW FIRM WHEN HE FIRST CONSIDERED TRIBAL LENDING AS A BUSINESS MODEL. TR. 3176. AND AS A PRACTICAL MATTER, THE FORCIBLE REMOVAL OF THE TRIBES TO REMOTE, RURAL LOCATIONS MEANT IT WAS NOT FEASIBLE TO BUILD AND STAFF LARGE-SCALE SERVICING CENTERS ON THEIR RESERVATIONS. TR. 827-28; TR. 1258; TR. 1293-95.

TOGETHER, THESE THREE DECISIONS HONOR THE LONG-STANDING FEDERAL POLICY OF "LEAVING INDIANS FREE FROM STATE JURISDICTION AND CONTROL [WHICH] IS DEEPLY ROOTED IN THIS NATION'S HISTORY." MCCLANAHAN V. STATE TAX COMM'N OF ARIZ., 411 U.S. 164, 168 (1973) (CITATION AND INTERNAL QUOTATION MARKS OMITTED). THEY ALSO EMBODY "JUDICIAL RESPECT FOR CONGRESS'S PRIMARY ROLE IN DEFINING THE CONTOURS OF TRIBAL SOVEREIGNTY," WHICH IS "A FUNDAMENTAL COMMITMENT OF INDIAN LAW." BAY MILLS,

527 U.S., AT 803 (COLLECTING SOURCES). THAT RESPECT IS ALL THE MORE PARAMOUNT HERE BECAUSE WHILE CONGRESS IS WELL AWARE THAT INDIAN TRIBES ARE ENGAGING IN ONLINE LENDING FOR ECONOMIC DEVELOPMENT, SEE, E.G., PROPOSED "SAFE LENDING ACT OF 2013," S.172, 113TH CONGRESS, 2d SESS., SEC. 3 (2013) (REFERENCING "APPLICABLE TRIBAL LAW" IN SECTION ENTITLED, "CONSISTENT APPLICATION OF LAW FOR SMALL-DOLLAR LENDING"), IT HAS YET TO ABROGATE TRIBAL SOVEREIGNTY IN THIS CONTEXT.

C. DEFENDING THE LENDING, PETITIONER FORMS AN INNOCENT STATE OF MIND

AS A LAWYER HELPING TO DEFEND THE TRIBAL LENDING MODEL, MUIR EXTENSIVELY RESEARCHED INDIAN LAW. TR. 2690. AS HE QUICKLY LEARNED, ITS CORNERSTONE IS THE CONSTITUTION'S INDIAN COMMERCE CLAUSE. ART. I, SECTION 8, CL. 3. IT GRANTS CONGRESS "'PLENARY AND EXCLUSIVE'" POWERS TO "LEGISLATE WITH RESPECT TO INDIAN TRIBES...." UNITED STATES V. LARA, 541 U.S. 193, 200 (2004) (COLLECTING CASES). THE TERM "'PLENARY' INDICATES THAT BREADTH OF CONGRESSIONAL POWER TO LEGISLATE IN THE AREA OF INDIAN AFFAIRS, AND THE TERM 'EXCLUSIVE' REFERS TO THE SUPREMACY OF FEDERAL OVER STATE LAW IN THIS AREA." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 5.02[2] (2005 ed.). PUT ANOTHER WAY, AS "CONSISTENTLY RECOGNIZED" BY THIS COURT, "'TRIBAL SOVEREIGNTY IS DEPENDENT ON, AND SUBORDINATE TO, ONLY THE FEDERAL GOVERNMENT, NOT THE STATES.'" CABAZON, 480 U.S., AT 207 (QUOTING WASHINGTON V. CONFEDERATED TRIBE OF COLVILLE INDIAN RESERVATION, 447 U.S. 134, 154 (1980)).

THE STATES, HOWEVER, HAVE NEVER FULLY RESPECTED TRIBAL SOVEREIGNTY, LET ALONE CONGRESS'S EXCLUSIVE POWER TO

DEFINE IT. THIS IS ESPECIALLY EVIDENT WHEN TRIBES EXERCISE THEIR SOVEREIGNTY FOR PURPOSES OF THEIR ECONOMIC DEVELOPMENT. THERE IS NO BETTER EXAMPLE OF THIS THAN THE BATTLE OVER TRIBAL GAMING - A BATTLE THAT SIGNIFICANTLY IMPACTED MUIR'S STATE OF MIND, ENDING JUST AS THE CONSTITUTION PROVIDES: WITH CONGRESSIONAL ACTION. A SIMILAR STORY WAS UNFOLDING WITH TRIBAL LENDING - ONLY IT ENDED VERY DIFFERENTLY: WITH THIS INDICTMENT.

THE BATTLE OVER TRIBAL LENDING ESSENTIALLY BEGAN AT ITS OUTSET. COLORADO FIRED THE FIRST SALVO IN 2005 - NOTABLY ELEVEN YEARS BEFORE THE INDICTMENT WAS UNSEALED - WITH A SUBPOENA ENFORCEMENT ACTION AFTER THE TRIBES HAD REPEATEDLY REFUSED TO RESPOND TO ADMINISTRATIVE SUBPOENAS ON THE GROUNDS THAT TRIBAL SOVEREIGN IMMUNITY SHIELDED THEM FROM COMPLIANCE. Colorado v. Cash Advance, Case No. 05 CV 143 (Colo. Dist. Ct. 2005). CALIFORNIA JOINED THE FIGHT NEXT - NINE YEARS BEFORE THE INDICTMENT - WITH A REGULATORY ENFORCEMENT ACTION ALLEGING VIOLATIONS OF ITS USURY LAWS. People of the State of California v. Amerilloan, Case No. BC373536 (Cal. Super. Ct. 2007). EVEN THOUGH MUIR WAS NOT COUNSEL OF RECORD IN EITHER OF THESE CASES, TR. 2682, HE ACTIVELY KEPT ABREAST OF THEM, REVIEWING ALL OF THE LEGAL ARGUMENTS MADE THEREIN AND RESEARCHING THE RELEVANT LAW. TR. 2694. IN FACT, BECAUSE BOTH OF THESE CASES LASTED MANY YEARS - EACH INVOLVING MULTIPLE APPEALS AND CONTINUING

LATE INTO THE TIME PERIOD FOR THE CHARGED CONDUCT— MUIR SPENT THOUSANDS OF HOURS RESEARCHING THE ATTENDANT LAW. TR. 2674. WHILE THIS EXTENSIVE RESEARCH FORMED THE FOUNDATION OF HIS BELIEF THE LENDING WAS LAWFUL, HIS INNOCENT STATE OF MIND RESULTED FROM MUCH MORE THAN JUST HIS REVIEW AND INTERPRETATION OF CASE LAW.

IN LIGHT OF CONGRESS'S "PLENARY AND EXCLUSIVE" POWER OVER INDIAN TRIBES, MUIR REVIEWED FEDERAL LEGISLATION INVOLVING TRIBAL COMMERCE. TR. 2675. IGRA, OF COURSE, HAD THE MOST PROFOUND IMPACT ON MUIR'S STATE OF MIND— AND NOT JUST BECAUSE IT BROADLY SANCTIONS TRIBAL COMMERCIAL ACTIVITY THAT VIOLATES STATE LAW. IT ALSO SPECIFICALLY ADDRESSES (AND THUS SANCTIONS) NON-TRIBAL, THIRD-PARTY INVESTMENT IN AND MANAGEMENT OF TRIBAL GAMING. 25 U.S.C. 2711. RELATEDLY, THE NATIVE AMERICAN BUSINESS DEVELOPMENT, TRADE PROMOTION, AND TOURISM ACT OF 2000 ENCOURAGES TRIBES TO SEEK NON-TRIBAL, THIRD-PARTY CAPITAL AND EXPERTISE IN THEIR ECONOMIC DEVELOPMENT GENERALLY. 25 U.S.C. 4301(9)(9)(A), (B) ("THE UNITED STATES HAS AN OBLIGATION TO ASSIST INDIAN TRIBES" IN THEIR ECONOMIC DEVELOPMENT BY "ENCOURAG[ING] INVESTMENT FROM OUTSIDE SOURCES" AND "FACILITAT[ING] ECONOMIC VENTURES WITH OUTSIDE ENTITIES THAT ARE NOT TRIBAL ENTITIES."). THIS EXPLICIT, CONGRESSIONAL ENCOURAGEMENT OF THIRD-PARTY PARTICIPATION IN TRIBAL ECONOMIC DEVELOPMENT IMPACTED MUIR'S STATE OF MIND THAT THERE WAS NOTHING IMPROPER ABOUT THE LENDER-SERVICER RELATIONSHIPS BETWEEN TUCKER AND

THE TRIBES SO CASTIGATED HERE BY THE GOVERNMENT.

FURTHER IMPACTING HIS INNOCENT STATE OF MIND WAS WHAT CONGRESS DID NOT DO: IT NEVER ENACTED LEGISLATION ABROGATING TRIBAL SOVEREIGNTY IN THE CONTEXT OF CONSUMER LENDING. FOR INSTANCE, IT COULD HAVE PASSED A NATIONAL USURY RATE, OR MANDATED A BORROWER'S HOME STATE USURY RATE APPLY TO A LOAN — EITHER OF WHICH WOULD RENDERED TRIBAL LOANS UNENFORCEABLE UNDER FEDERAL LAW, AND THUS VIOLATIVE OF RICO. ACCORDINGLY, IT WAS SIGNIFICANT WHEN CONGRESS FORMALLY PROPOSED SUCH LEGISLATION. SEE, E.G., PROTECTING CONSUMERS FROM UNREASONABLE CREDIT RATES ACT OF 2009, S. 500, 111th CONG., 1st SESS. (2009) (BILL WOULD HAVE ESTABLISHED A NATIONAL USURY RATE); SAFE LENDING ACT OF 2013, SUPRA (BILL WOULD HAVE REQUIRED THE APPLICATION OF THE USURY LAWS WHERE A BORROWER RESIDES).[6] AND BECAUSE MUIR ACTIVELY MONITORED SUCH PROPOSED LEGISLATION, TR. 2675, 2688, HE WAS AWARE NONE WAS EVER ENACTED.[7]

ALL THE MORE IMPACTFUL TO MUIR'S STATE OF MIND WAS FINANCIAL SERVICES LEGISLATION THAT CONGRESS DID ENACT.

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6. AT LEAST 19 BILLS INVOLVING CONSUMER CREDIT WERE PROPOSED AFTER THE TRIBAL LENDING MODEL BEGAN IN 2003. SEE REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS COUNTS 1-4 OF APPELLANT 6-7, N.5, N.6 (D.C. DOC. NO. 111) ("MTD REPLY").

7. THE JURY, HOWEVER, NEVER HEARD HOW CONGRESS'S FAILURE TO ABROGATE TRIBAL SOVEREIGNTY IN THE CONTEXT OF LENDING IMPACTED MUIR'S INNOCENT STATE OF MIND BECAUSE, HAVING DECIDED EARLY ON THAT "LAW WILL NOT BE A MATTER OF EVIDENCE IN THIS CASE," TR. 85, THE DISTRICT COURT CONSISTENTLY EXCLUDED SUCH TESTIMONY. SEE SEC. D, INFRA. CONSEQUENTLY, IT WOULD NOT ALLOW MUIR TO TESTIFY TO HIS SPECIFIC AWARENESS THAT CONGRESS HAD NEVER PASSED "ANY LAWS TAKING AWAY TRIBES' RIGHT TO MAKE THESE LOANS." TR. 3061.

IN 2010 (WHICH, AGAIN, WAS DURING THE TIME PERIOD FOR THE CHARGED CONDUCT), CONGRESS PASSED THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT ("DODD-FRANK"). 12 U.S.C. 5301 ET SEQ. MUIR WAS WELL-AWARE OF DODD-FRANK, TR. 2798, FOR AS THE MOST SWEEPING FINANCIAL SERVICES LEGISLATION PASSED IN YEARS, IF CONGRESS WANTED TO ABROGATE TRIBAL SOVEREIGNTY IN THE CONTEXT OF CONSUMER LENDING, THIS WAS THE VEHICLE TO DO IT. BUT FAR FROM ABROGATING IT, DODD-FRANK RECOGNIZED IT. SEE 12 U.S.C. 5841(27) (DEFINING "STATE" TO INCLUDE "ANY FEDERALLY RECOGNIZED INDIAN TRIBE"). THAT CONGRESS EQUATED TRIBAL SOVEREIGNTY WITH STATE SOVEREIGNTY IN THE CONTEXT OF FINANCIAL SERVICES WITH AWARENESS THAT TRIBES WERE ENGAGED IN ONLINE LENDING FURTHER SUPPORTED MUIR'S STATE OF MIND SUCH LENDING WAS LAWFUL.

IN ADDITION TO MONITORING LEGISLATION, MUIR CONTINUALLY MONITORED CASES INVOLVING TRIBAL LENDING. MOST IMPORTANTLY, HE WAS NOT AWARE OF ANY CRIMINAL CASES. TR. 2693.[8] AND THE FEW REGULATORY CASES HE COULD FIND REINFORCED HIS BELIEF THE LENDING WAS LAWFUL, SEE, E.G., F.T.C. V. PAYDAY FINANCIAL, SUPRA, NONE MORE SO THAN THE ONE WITH WHICH HE WAS DIRECTLY INVOLVED. IN 2012, THE FEDERAL TRADE

8. DESPITE OVERRULING A GOVERNMENT OBJECTION AND PERMITTING MUIR TO TESTIFY TO THIS, THE DISTRICT COURT DISPARAGED THIS STATE-OF-MIND TESTIMONY BY STATING IN FRONT OF THE JURY, "I DON'T KNOW WHAT THE SIGNIFICANCE OF THAT IS, BUT I'LL LET THE ANSWER STAND." TR. 2693. AT ONE POINT, IT EVEN USED THE PREJUDICIAL "HAND IN THE COOKIE JAR" ANALOGY IN FRONT OF THE JURY. TR. 2282-83.

COMMISSION FILED A CIVIL ENFORCEMENT ACTION ALLEGING CERTAIN OF THE LENDING PRACTICES AT ISSUE HERE VIOLATED THE FTC ACT AND TILA. FEDERAL TRADE COMMISSION V. AMG SERVICES, LLC, ET AL., CASE NO. 12-CV-536 (D. NEV. 2012).[9] MUIR WAS ACUTELY AWARE OF THIS CASE BECAUSE IN ADDITION TO NAMING THE TRIBES AS THE "LENDING DEFENDANTS," AS WELL AS TUCKER AND SOME OF HIS COMPANIES, THE COMPLAINT NAMED MUIR INDIVIDUALLY AND HIS LAW FIRM. WHILE MUIR WAS DISMISSED WITH PREJUDICE FAIRLY EARLY ON, THE TRIBES AND TUCKER DEFENDED THE LITIGATION THROUGHOUT THE REST OF THE TIME PERIOD FOR THE CHARGED CONDUCT HERE.

IN AN EFFORT TO REACH A COMPROMISE OVER THE CHALLENGED LENDING PRACTICES, THE FTC AND THE TRIBES AGREED TO A STIPULATED PRELIMINARY INJUNCTION. A LETTER FROM FTC COUNSEL TO THE TRIBES' COUNSEL DETAILED THE PARTIES' CORE AGREEMENT. (A COPY OF THIS LETTER IS ATTACHED AS EX. "DX D" TO APPELLANT'S MOTION TO DISMISS COUNTS 1-4 BELOW (DC DOC. NO. 44)). OF IMPORTANCE HERE, WHILE IT EVIDENCES THE TRIBES AGREED TO CHANGE THE LENDING PRACTICES, THEY DID NOT AGREE TO COMPLY WITH STATE USURY LAWS—SOMETHING THE FTC DID NOT REQUEST. IN FACT, AT NO POINT IN THE CASE DID THE FTC EVER ALLEGE THAT THE LOANS WERE UNLAWFUL BECAUSE THE INTEREST RATES EXCEEDED STATE USURY RATES. HOW COULD IT? IT'S AWARENESS THAT UNDER THE STIPULATED PRELIMINARY

9. THIS COURT JUST RECENTLY RULED 9-0 THAT THE FTC COULD NOT OBTAIN MONETARY DAMAGES UNDER SEC. 13(b) OF THE FTC ACT. NO. 19-508.

INJUNCTION THE LENDING WAS CONTINUING AT THOSE RATES CONSTITUTED ITS TACIT APPROVAL. MOREOVER, IN ULTIMATELY SETTLING WITH THE TRIBES (ALBEIT OUTSIDE THE TIME PERIOD FOR THE CHARGED CONDUCT, BUT STILL PRIOR TO THE UNSEALING OF THE INDICTMENT), THE FTC EXPLICITLY RECOGNIZED THE ENFORCEABILITY OF TRIBAL INTEREST RATES: IT PERMITTED THE TRIBES TO COLLECT "THE AMOUNT FINANCED PLUS ONE FINANCE CHARGE" FOR LOANS MADE PRIOR TO THE ENTRY OF THE PRELIMINARY INJUNCTION. STIPULATED ORDERS FOR PERMANENT INJUNCTION AND JUDGMENT, SEC. V (CASE NO. 12-CV-536, DOC. NOS. 727, 888, 889). IN OTHER WORDS, THE FTC AGREED THAT A "FINANCE CHARGE" RESULTING FROM A TRIBAL INTEREST RATE THAT SIGNIFICANTLY EXCEEDED STATE USURY CAPS WAS A LAWFUL DEBT. AND SINCE THESE SETTLEMENTS WERE STYLED AS COURT ORDERS, SO, TOO, DID THE DISTRICT COURT.

FINALLY, THAT MUIR WAS NOT ALONE IN HIS BELIEF THAT TRIBAL LENDING WAS LAWFUL ALSO IMPACTED HIS INNOCENT STATE OF MIND. FOR EXAMPLE, THERE WAS LEGAL SCHOLARSHIP. SEE, e.g., RICHARD P. ECKMAN, ET AL., UPDATE ON TRIBAL LOANS TO STATE RESIDENTS, 68 THE BUSINESS LAWYER, ABA BUSINESS LAW SECTION, 2 (FEBRUARY 2013) ("MOST AGREE THAT FEDERALLY RECOGNIZED, SOVEREIGN TRIBES HAVE THE AUTHORITY TO ENGAGE IN INTERNET LENDING TO STATE RESIDENTS WITHOUT THOSE TRIBES BEING SUBJECTED TO STATE AUTHORITY."); SEE ALSO APPELLANT'S MTD REPLY 6-7, N. 7

(COLLECTING ARTICLES). THERE WAS A TRADE ASSOCIATION: THE NATIVE AMERICAN FINANCIAL SERVICES ASSOCIATION. THERE WAS EVEN A NATIONAL CLE PUT ON BY THE ABA SPECIFICALLY ON TRIBAL LENDING THAT MUIR ATTENDED. TR. 2882-85. IN SUM, MUIR'S INNOCENT STATE OF MIND WAS INFLUENCED BY MULTIPLE SOURCES, DEVELOPED OVER THE COURSE OF YEARS AND REINFORCED TIME AND AGAIN.

D. THE INDICTMENT, THE TRIAL AND THE JURY INSTRUCTIONS

IN 2016, 18 YEARS AFTER THE LENDING BEGAN AND MILLIONS OF CUSTOMERS LATER, THE GOVERNMENT INDICTED TUCKER AND MUIR FOR VIOLATING AND CONSPIRING TO VIOLATE RICO'S COLLECTION OF UNLAWFUL DEBT PRONG (18 U.S.C. 1962(c),(d)). THE FOURTEEN-COUNT INDICTMENT ALSO INCLUDED SUBSTANTIVE AND CONSPIRACY COUNTS FOR WIRE FRAUD (18 U.S.C. 1343, 1349) AND MONEY LAUNDERING (18 U.S.C. 1956), AS WELL AS SUBSTANTIVE TILA COUNTS (15 U.S.C. 1611). STILL, THE RICO COUNTS ARE AT THE HEART OF THIS CASE. AT BOTTOM, THE GOVERNMENT'S THEORY WAS THAT THE LENDER-SERVICER RELATIONSHIPS WERE ALL SHAMS. THE INDICTMENT ALLEGED THAT TUCKER WAS THE LENDER — AND THUS THE LOANS HAD TO COMPLY WITH STATE LAW — BECAUSE, INTER ALIA, HE PROVIDED THE CAPITAL, BORE THE RISK OF NONPAYMENT AND EXERCISED SUBSTANTIAL CONTROL OVER THE DAY-TO-DAY OPERATIONS. SUPERCEDING INDICTMENT, ¶ 1 (DC DOC NO. 114). MUIR, HOWEVER DID NOT DISPUTE ANY OF THIS AT TRIAL; IN HIS MIND, NONE OF IT IMPACTED THE LENDER-SERVICER RELATIONSHIPS.

TR. 2692-93, 2932-34, 2963-64. ACCORDINGLY, MUIR BELIEVED AT ALL TIMES THE TRIBES WERE THE LENDERS, AND THUS THE LENDING WAS LAWFUL. THIS WAS HIS SOLE DEFENSE.

THE DISTRICT COURT, HOWEVER, SEVERELY LIMITED MUIR'S ABILITY TO PRESENT HIS COMPLETE DEFENSE WITH ITS OVERARCHING MINDSET THAT "LAW WILL NOT BE A MATTER OF EVIDENCE IN THE CASE." TR. 85. FOR A LAWYER TRYING TO EXPLAIN TO THE JURY HOW LEGAL PRINCIPLES AND CASES IMPACTED HIS STATE OF MIND, THIS WAS DEVASTATING. FOR EXAMPLE, WHEN MUIR TRIED TO EXPLAIN TO THE JURY HOW IGRA IMPACTED HIS BELIEF THE LENDING WAS LAWFUL, THE DISTRICT COURT QUICKLY CUT HIM OFF: "I THINK WE'RE TOO FAR AFIELD. YOU CAN ASK YOUR NEXT QUESTION." TR. 2691. IT DID THE SAME WHEN MUIR TRIED TO TESTIFY ABOUT THE TRIBAL LENDING CLE HE ATTENDED. TR. 2885 ("THE COURT: YOU HAVE ANSWERED THE QUESTION. MUIR: SORRY, YOUR HONOR. I DIDN'T THINK I DID. THE COURT: NEXT QUESTION."). THE DISTRICT COURT'S CONSTANT CIRCUMSCRIPTION OF MUIR'S STATE-OF-MIND TESTIMONY PREVENTED THE FULL PRESENTATION OF HIS DEFENSE. SEE POST-ARGUMENT SUPP. BRIEF, POINT II.

WHAT'S MORE, ITS JURY INSTRUCTIONS THEN PREVENTED THE JURY FROM FULLY CONSIDERING HIS DEFENSE. MOST SIGNIFICANTLY, THE DISTRICT COURT REFUSED TO INSTRUCT THE JURY ON NEW YORK'S CRIMINAL USURY LAW'S LEGAL ELEMENT, THE LINCHPIN OF MUIR'S DEFENSE. ADDITIONALLY, ITS INSTRUCTION THAT SCIENTER COULD BE ESTABLISHED BY MERE

"KNOWLEDGE OF THE ACTUAL RATE CHARGED," PET. APP. 49, REGARDLESS OF MUIR'S BELIEF THE LENDING WAS LAWFUL, DIRECTED A GUILTY VERDICT BECAUSE MUIR TESTIFIED HE KNEW THE INTEREST RATES FAR EXCEEDED STATE USURY CAPS. TR. 2901-02. LIKEWISE, THE "CONCLUSIVE PRESUMPTION" IN THE CHARGE DID AS WELL: "AS TO NEW YORK, THE COLLECTION OF A CONSUMER DEBT *** THAT CARRIES AN ANNUAL INTEREST RATE OF 50 PERCENT OR MORE IS THE COLLECTION OF AN UNLAWFUL DEBT." TR 3294; SEE ALSO PETITION FOR REHEARING OF APPELLANT 3. IN LIGHT OF SUCH INSTRUCTIONS, IT WAS HARDLY SURPRISING THE JURY CONVICTED ON ALL 14 COUNTS AFTER A SIX-WEEK TRIAL IN LESS TIME THAN IT TOOK FOR THE DISTRICT COURT TO READ THE JURY CHARGE.

THE DISTRICT COURT SENTENCED MUIR TO 84 MONTHS IN PRISON. AS AN AUSTRALIAN CITIZEN—MUIR HAS BEEN A LEGAL PERMANENT RESIDENT SINCE 1978—HE WILL SURELY BE DEPORTED AWAY FROM HIS WIFE AND TWO YOUNG DAUGHTERS.

REASONS FOR GRANTING THE WRIT

THIS COURT OBSERVED NEARLY 70 YEARS AGO "THE CENTRAL THOUGHT THAT WRONGDOING MUST BE CONSCIOUS TO BE CRIMINAL" "TOOK DEEP AND EARLY ROOT IN AMERICAN SOIL." MORISSETTE, 342 U.S. AT 252. MORE RECENTLY, IT NOTED "[S]CIENTER REQUIREMENTS ADVANCE THIS BASIC PRINCIPLE OF CRIMINAL LAW BY HELPING TO 'SEPARATE THOSE WHO UNDERSTAND THE WRONGFUL NATURE OF THEIR ACT FROM THOSE WHO DO NOT.'" REHAIF, 139 S.CT. AT 2196 (QUOTING X-CITEMENT VIDEO, 513 U.S. AT 72-73, N.3. MORE POINTEDLY, IT NOW "INSTRUCTS THAT THE 'PRESUMPTION IN FAVOR OF A SCIENTER

REQUIREMENT SHOULD APPLY TO EACH OF THE STATUTORY ELEMENTS THAT CRIMINALIZE OTHERWISE INNOCENT CONDUCT.'" ELONIS, 135 S.CT., AT 2011 (QUOTING X-CITEMENT VIDEO, SUPRA, AT 72) (EMPHASIS IN ELONIS).

THE DECISION BELOW AFFIRMING THE JURY INSTRUCTIONS FOR THE RICO COUNTS IS IRRECONCIABLE WITH THIS "PRESUMPTION." EXPOSING THE FALLACIOUSNESS OF THE OPINION, IT QUOTES THE FULL ELONIS/X-CITEMENT VIDEO PASSAGE ABOVE TWICE, PET. APP. 28a, 30a, BUT THEN EXCISES NEW YORK PENAL LAW 190.40's LEGAL ELEMENT FROM ITS SCIENTER DISCUSSION—THE ELEMENT MUIR REPEATEDLY ARGUED WAS "'THE CRUCIAL ELEMENT SEPARATING LEGAL INNOCENCE FROM WRONGFUL CONDUCT.'" ELONIS, SUPRA, AT 2011 (QUOTING X-CITEMENT VIDEO, AT 73). WORSE, IT FAILED TO APPLY LIPAROTA, NOT JUST ONE OF THIS COURT'S "LEGION" "CASES *** EMPHASIZ[ING] SCIENTER'S IMPORTANCE IN SEPARATING WRONGFUL FROM INNOCENT ACTS," REHAIF, SUPRA, AT 2196-2197 (COLLECTING CASES), BUT THE CONTROLLING CASE.

THE SECOND CIRCUIT'S FAILURE TO APPLY CONTROLLING PRECEDENTS AND DOCTRINAL PRINCIPLES OF CRIMINA LAW— AS TO BOTH MUIR'S RICO ARGUMENT AND HIS TILA ARGUMENT— PROVES THE DECISION BELOW "HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS *** AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER." RULE 10(a). CERTIORARI SHOULD BE GRANTED.

I. THE DECISION BELOW FAILED TO APPLY THIS COURT'S PRECEDENTS.

A. THE DECISION BELOW TWICE RECOGNIZED THAT "'RICO IMPOSES NO ADDITIONAL MENS REA BEYOND THAT FOUND IN THE PREDICATE CRIMES.'"

PET. APP. 33a-34a (QUOTING BIASUCCI, 786 F.2d AT 512); PET. APP.

29a ("RICO IMPOSES NO MENTAL STATE REQUIREMENT BEYOND THAT REQUIRED BY THE PREDICATE STATE STATUTE." (CITING BIASUCCI)). SIGNIFICANTLY, HOWEVER, WHILE BIASUCCI IS THE SECOND CIRCUIT'S CONTROLLING COLLECTION OF UNLAWFUL DEBT CASE, THE OPINION BELOW FAILED TO INCLUDE THE REST OF ITS CORE HOLDING:

> CONSEQUENTLY, WE LOOK TO THE SCIENTER ELEMENTS FOUND IN THE STATUTORY DEFINITIONS OF THE PREDICATE CRIMES TO DETERMINE THE DEGREE OF KNOWLEDGE THAT MUST BE PROVED TO ESTABLISH A RICO VIOLATION.

BIASUCCI, SUPRA, AT 512. THIS WAS NOT ITS ONLY BLATANT OMISSION.

JUST LIKE IN BIASUCCI, NEW YORK'S CRIMINAL USURY LAW (PENAL LAW 190.40) WAS INCORPORATED INTO THE JURY INSTRUCTIONS FOR THE RICO COUNTS AS THE PREDICATE STATE USURY STATUTE. COA APP. 263.[10] IT DEFINES CRIMINAL USURY, IN PERTINENT PART, AS: "WHEN, NOT BEING AUTHORIZED OR PERMITTED BY LAW TO DO SO, [A PERSON] KNOWINGLY CHARGES *** INTEREST ON THE LOAN *** AT A RATE EXCEEDING TWENTY-FIVE PER CENTUM PER ANNUM ...." AGAIN, NEW YORK'S PATTERN JURY INSTRUCTIONS UNEQUIVOCALLY ESTABLISH THAT THE STATUTE'S LEGAL ELEMENT, "NOT BEING AUTHORIZED OR PERMITTED BY LAW TO DO SO," IS AN ESSENTIAL ELEMENT OF THE CRIME THAT THE PROSECUTION MUST PROVE. SEE N.3, SUPRA. THAT IS CRITICAL BECAUSE IF A SCIENTER REQUIREMENT APPLIES TO IT, THEN A FAITHFUL APPLICATION OF BIASUCCI MEANS THE LEGAL ELEMENT WAS PART

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10. UNLIKE IN BIASUCCI, THE INSTRUCTION HERE IMPROPERLY DIRECTED A GUILTY VERDICT: "SO AS TO NEW YORK, THE COLLECTION OF A CONSUMER DEBT *** THAT CARRIES AN ANNUAL INTEREST RATE OF 50 PERCENT OR MORE IS THE COLLECTION OF AN UNLAWFUL DEBT." COA APP. 264 (EMPHASIS SUPPLIED); SEE SUPPLEMENTAL BRIEF OF APPELLANT 20-22 (CITING CARELLA V. CALIFORNIA, 491 U.S. 263 (1989) (PER CURIAM) (CONCLUSIVE PRESUMPTION)).

OF "THE DEGREE OF KNOWLEDGE THAT MUST BE PROVED TO ESTABLISH" THE REQUISITE STATE OF MIND FOR THE RICO COUNTS. 786 F.2d, AT 512. MOREOVER, IT MEANS THE GOVERNMENT WAS REQUIRED TO EXPLICITLY PROVE MUIR KNEW THE LOANS WERE NOT AUTHORIZED OR PERMITTED BY LAW. ONLY IT NEVER DID BECAUSE THE DISTRICT COURT REFUSED TO INSTRUCT THE JURY AS SUCH. SEE DC DOC. NO. 250 AT 2, ¶ 7 (LETTER TO DISTRICT COURT REQUESTING JURY CHARGE INCLUDE LANGUAGE FROM SECTION 190.40's LEGAL ELEMENT).[11]

BUT DESPITE MUIR PROMINENTLY ARGUING IN THREE SEPARATE BRIEFS THAT SECTION 190.40's LEGAL ELEMENT WAS A SCIENTER ELEMENT OF THE PREDICATE CRIME, SEE N. 4, SUPRA, THE SECOND CIRCUIT WOULD NOT EVEN CONSIDER WHETHER A SCIENTER REQUIREMENT APPLIED TO IT. IN FACT, THE DECISION BELOW COMPLETELY OMITTED THE LEGAL ELEMENT WHEN IT QUOTED THE STATUTE. SEE PET. APP. 29a, N. 4. INSTEAD, IT SIMPLY ASSERTED SECTION 190.40 DOES NOT "REQUIRE THAT THE DEFENDANT KNOW *** THAT THE RATE WAS ILLEGAL." IBID. (FOOTNOTE OMITTED). INCREDIBLY, ITS ONLY SUPPORT FOR THIS CONTENTION — LAID OUT ENTIRELY IN THE FOOTNOTE — WAS A CIVIL CASE INVOLVING A CIVIL USURY STATUTE WHEREIN THE MAJORITY ONLY TOUCHED UPON SECTION 190.40 IN RESPONSE TO "THE DISSENT'S TEST." PET. APP. 29a-30a, N. 4 (CITING FREITAS V. GEDDES SAVINGS & LOAN ASS'N, 63 N.Y. 2d 254, 264 (1984)). RELYING SOLELY ON FREITAS, THE FOOTNOTE CONCLUDED:

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11. MUIR ALSO REPEATEDLY ARGUED BELOW THE JURY SHOULD HAVE BEEN INSTRUCTED ON SECTION 190.40's LEGAL ELEMENT BECAUSE IT WAS THE FOUNDATION OF HIS DEFENSE AND A DEFENDANT IS ENTITLED TO JURY INSTRUCTIONS THAT INCLUDE HIS THEORY OF DEFENSE. REPLY BRIEF 28-32; PETITION FOR REHEARING, POINT OF LAW III. DESPITE DECADES OF CIRCUIT PRECEDENT DIRECTLY SUPPORTING THIS ARGUMENT, THE DECISION BELOW YET AGAIN REJECTED IT AS "FRIVOLOUS." PET. APP. 40a.

> THUS, WHILE "KNOWINGLY" IN § 190.40 MIGHT ON ITS FACE BE READ TO REQUIRE AWARENESS OF UNLAWFULNESS, PRECEDENT MADE CLEAR THAT "KNOWINGLY" WAS SATISFIED BY KNOWLEDGE THAT THE INTEREST RATE EXCEEDED 25%, REGARDLESS OF WHETHER THE DEFENDANT WAS AWARE THAT SUCH RATE WAS UNLAWFUL.

PET. APP. 30a. THAT IS A BRIDGE TOO FAR.

FIRSTLY, IT EXPOSES A GLARING INCONSISTENCY WITHIN THE DECISION BELOW: IT EMBODIES THE EXACT "RULE" ABOUT WHICH THE PANEL EXPRESSES "SERIOUS DOUBTS" ONLY PAGES CATER BECAUSE IT CONTRADICTS ELONIS. PET. APP. 36a-37a ("WE HAVE SERIOUS DOUBTS THAT [] A RULE," "WHERE, AS IN BIASUCCI, CRIMINAL LIABILITY UNDER THE STATE'S LAW DOES NOT REQUIRE AWARENESS OF THE ILLEGALITY OF THE RATE" "APPROPRIATELY 'SEPARATE[S] WRONGFUL CONDUCT FROM OTHERWISE INNOCENT CONDUCT.'" (QUOTING ELONIS, 135 S. CT., AT 2010)).[12] AND MORE THAN THAT, THE NOTION THAT SECTION 190.40 DOES NOT REQUIRE THE DEFENDANT TO KNOW THAT THE LENDING IS UNLAWFUL DIRECTLY CONFLICTS WITH LIPAROTA, THIS COURT'S SEMINAL DECISION SPECIFICALLY ADDRESSING "KNOWLEDGE OF ILLEGALITY" WITH A CRIMINAL STATUTE CONTAINING A LEGAL ELEMENT. 471 U.S., AT 428.[13]

LIPAROTA INVOLVED A CRIMINAL FOOD STAMP STATUTE THAT, STRIKINGLY SIMILAR TO SECTION 190.40, CONTAINED A "KNOWINGLY" FACTUAL ELEMENT CONDITIONED UPON A LEGAL ELEMENT (ALBEIT

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12. FURTHER EXPOSING THE INFIRMITY OF THE DECISION, BIASUCCI NEVER DISCUSSED A DEFENDANT'S "AWARENESS OF THE ILLEGALITY OF THE RATE." PET. APP. 36a. IT ONLY ADDRESSED THE DEFENDANTS' ARGUMENT THERE THAT THE GOVERNMENT HAD TO PROVE THEY "HAD SPECIFIC KNOWLEDGE OF THE ACTUAL RATE OF INTEREST CHARGED ON A USURIOUS LOAN." 786 F.2d, AT 507.

13. IMPORTANTLY, LIPAROTA WAS DECIDED AFTER FREITAS, ALL BUT RENDERING ITS DICTA REGARDING SECTION 190.40 IRRELEVANT.

ACTUALLY MORE NARROW): "WHOEVER KNOWINGLY USES, TRANSFERS, ACQUIRES, ALTERS, OR POSSESSES [FOOD STAMPS] IN ANY MANNER NOT AUTHORIZED BY [THE STATUTE] OR THE REGULATIONS...." 7 U.S.C. 2024(b)(1) (1977)(AMENDED 1990)(EMPHASIS SUPPLIED). THE OPINION FRAMED THE ISSUE ON APPEAL AS A "CONTROVERSY BETWEEN THE PARTIES CONCERN[ING] THE MENTAL STATE, IF ANY, THAT THE GOVERNMENT MUST SHOW TO PROVE PETITIONER ACTED 'IN ANY MANNER NOT AUTHORIZED BY [THE STATUTE] OR THE REGULATIONS.'" 471 U.S., AT 423. SIMILAR TO ITS POSITION IN THIS CASE,[14] THE GOVERNMENT ARGUED THE STATUTE'S LEGAL ELEMENT REQUIRED "NO MENS REA OR 'EVIL-MEANING MIND.'" ID., AT 425 (QUOTING MORISSETTE, 342 U.S., AT 251). IT CONTENDED THE DEFENDANT COULD BE CONVICTED MERELY UPON PROOF THAT HE KNOWINGLY ACQUIRED OR POSSESSED THE FOOD STAMPS. 471 U.S., AT 423. THE DISTRICT COURT AGREED AND INSTRUCTED THE JURY ACCORDINGLY. ID., AT 422.

THE DEFENDANT, HOWEVER, ARGUED "THE STATUTE SHOULD BE CONSTRUED INSTEAD TO REACH ONLY 'PEOPLE WHO KNEW THAT THEY WERE ACTING UNLAWFULLY.'" ID., 422-23. THIS COURT AGREED WITH THE DEFENDANT; IT HELD A SCIENTER REQUIREMENT APPLIED TO THE STATUTE'S LEGAL ELEMENT, AND THUS "THE GOVERNMENT MUST PROVE THAT THE DEFENDANT KNEW THAT HIS ACQUISITION OR POSSESSION OF FOOD STAMPS WAS IN A MANNER UNAUTHORIZED BY STATUTE OR REGULATIONS." ID., AT 433. STATED ANOTHER WAY, IT HELD THE LEGAL ELEMENT REQUIRED PROOF

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14. SEE BRIEF OF UNITED STATES 48 (ARGUING SECTION 190.40's LEGAL ELEMENT "IS NOT PART OF THE MENS REA REQUIREMENT").

"THE DEFENDANT KNEW THAT HIS [CONDUCT] WAS UNLAWFUL, EVEN THOUGH THAT WAS A QUESTION OF LAW." REHAIF, 139 S. CT., AT 2198 (ANALYZING LIPAROTA); SEE ALSO RATZLAF V. UNITED STATES, 510 U.S. 135, 154 (1994) (BLACKMUN, J., DISSENTING) (EXPLAINING LIPAROTA'S LEGAL ELEMENT "IMPOSED A KNOWLEDGE-OF-ILLEGALITY REQUIREMENT *** TO ENSURE THAT THE DEFENDANT ACTED WITH A WRONGFUL PURPOSE.").

OF FURTHER SIGNIFICANCE HERE, THE LIPAROTA MAJORITY REFUTED THE DISSENT'S CONCERN THAT IT WAS CREATING A "MISTAKE OF LAW" DEFENSE FOR STATUTES WITH LEGAL ELEMENTS: "OUR HOLDING TODAY NO MORE CREATES A 'MISTAKE OF LAW' DEFENSE THAN DOES A STATUTE MAKING KNOWING RECEIPT OF STOLEN GOODS UNLAWFUL." 471 U.S., AT 425, N.9. NOTING BOTH HAVE A "LEGAL ELEMENT IN THE DEFINITION OF THE OFFENSE," THE MAJORITY EXPLAINED IT IS "A DEFENSE TO A CHARGE OF KNOWING RECEIPT OF STOLEN GOODS THAT ONE DID NOT KNOW THAT THE GOODS WERE STOLEN, JUST AS IT IS A DEFENSE TO A CHARGE OF [THE FOOD STAMP STATUTE] THAT ONE DID NOT KNOW THAT ONE'S POSSESSION WAS UNAUTHORIZED." IBID. (CITING ALI, MODEL PENAL CODE § 2.02, COMMENT 11, P. 131 (TENT. DRAFT NO. 4, 1955); UNITED STATES V. FREED, 401 U.S. 601, 614-15 (1971) (BRENNAN, J., CONCURRING)). MUCH THE SAME IN THIS CASE, MUIR'S DEFENSE WAS THAT HE DID NOT KNOW TRIBAL LENDING WAS NOT AUTHORIZED OR PERMITTED BY LAW.

MAKING LIPAROTA'S REASONING ALL THE MORE CONTROLLING HERE IS THAT UNLIKE THE NARROW LEGAL ELEMENT AT ISSUE THERE, SECTION 190.40'S USE OF THE ALL-ENCOMPASSING TERM "LAW" CANNOT BE READ TO LIMIT ITS LEGAL ELEMENT TO A SPECIFIC STATUTORY SCHEME (OR EVEN A PARTICULAR JURISDICTION) IN ANY WAY. CONSEQUENTLY,

IT CAN INCLUDE THE "LAW" OF FEDERALLY RECOGNIZED INDIAN TRIBES, WHICH WAS PRECISELY WHAT MUIR BELIEVED. THAT PRIOR TO TRIAL NOT A SINGLE, BINDING DECISION HAD FOUND TRIBAL LENDING UNLAWFUL CLEARLY LEGITIMIZED HIS DEFENSE. SEE McFADDEN V. UNITED STATES, 576 U.S. 186, 199 (2015) (ROBERTS, C.J., CONCURRING IN PART AND CONCURRING IN JUDGMENT) ("WHEN 'THERE IS A LEGAL ELEMENT IN THE DEFINITION OF THE DEFENSE,' A PERSON'S LACK OF KNOWLEDGE REGARDING THAT ELEMENT CAN BE A DEFENSE." (QUOTING LIPAROTA, SUPRA, AT 425, N. 9) (EMPHASIS IN ORIGINAL)).[15]

IN LIGHT OF THE FOREGOING—TOGETHER WITH THE FACT THAT MUIR CONSISTENTLY AND EXTENSIVELY ARGUED LIPAROTA'S APPLICABILITY IN HIS BRIEFING—IT IS INEXPLICABLE THAT THE SECOND CIRCUIT NEVER CITED IT. MORE POINTEDLY, THAT NEARLY EVERY ONE OF THIS COURT'S SIGNIFICANT SCIENTER OPINIONS OVER THE LAST THREE DECADES HAS DISCUSSED IT, SEE RATZLAF, 510 U.S., AT 154; STAPLES V. UNITED STATES, 511 U.S. 600, 604 (1994); X-CITEMENT VIDEO, 513 U.S., AT 70-71; FLORES-FIGUERA V. UNITED STATES, 556 U.S. 646, 652 (2009); ELONIS, 135 S. CT., AT 2009-10; REHAIF, 139 S. CT., AT 2198, CEMENTS THE DECISION BELOW'S FAILURE TO APPLY LIPAROTA AS "SO FAR DEPART[ING] FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS...." RULE 10(a). CERTIORARI SHOULD BE GRANTED.

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15. THE CHIEF JUSTICE'S CITATION TO LIPAROTA WAS MADE IN RESPONSE TO McFADDEN NOTING THAT "IGNORANCE OF THE LAW IS TYPICALLY NO DEFENSE TO CRIMINAL PROSECUTION." 576 U.S., AT 192. FURTHER ESTABLISHING LIPAROTA'S APPLICABILITY HERE, THE DISTRICT COURT BELOW CHARGED THE JURY—OVER DEFENDANTS' OBJECTION—WITH JUST SUCH AN INSTRUCTION: "IN THIS CASE, IGNORANCE OF THE SPECIFIC TERMS OF ANY LAW IS NO EXCUSE TO THE CHARGED CONDUCT." COA APP. 265. BUT AS COMMENT 11 TO SECTION 2.02 OF THE MPC PROVIDES (AND AGAIN, LIPAROTA FAVORABLY CITED COMMENT 11), THAT PRINCIPLE "HAS NO APPLICATION WHEN THE CIRCUMSTANCES MADE MATERIAL BY THE DEFINITION OF THE OFFENSE INCLUDES A LEGAL ELEMENT."

B. FURTHER EXPOSING THE SECOND CIRCUIT'S DECISION BELOW AS VIOLATIVE OF RULE 10(a) WAS ITS FAILURE TO APPLY FUNDAMENTAL PRINCIPLES OF CRIMINAL LAW TO MUIR'S PRIMARY TILA ARGUMENT. "THE CONSTITUTION GIVES A CRIMINAL DEFENDANT THE RIGHT TO DEMAND THAT A JURY FIND HIM GUILTY OF ALL THE ELEMENTS OF THE CRIME WITH WHICH HE IS CHARGED." GAUDIN, 515 U.S., AT 511; SEE ALSO SULLIVAN, 508 U.S., AT 277-78; IN RE WINSHIP, 397 U.S. 358, 364 (1970) ("[T]HE DUE PROCESS CLAUSE PROTECTS THE ACCUSED AGAINST CONVICTION EXCEPT UPON PROOF BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE THE CRIME WITH WHICH HE IS CHARGED."). TO THAT END, "A JUDGE'S FAILURE TO INSTRUCT THE JURY ON EVERY ELEMENT OF AN OFFENSE VIOLATES A 'BEDROCK,' 'AXIOMATIC AND ELEMENTARY' [CONSTITUTIONAL] PRINCIPLE.'" OSBORNE V. OHIO, 495 U.S. 103, 147 (1990) (BRENNAN, J., DISSENTING) (QUOTING FRANCIS V. FRANKLIN, 471 U.S. 307, 313 (1985) (QUOTING WINSHIP, SUPRA, AT 363)) (BRACKETS IN OSBORNE). THAT WAS EXACTLY WHAT HAPPENED IN THIS CASE — AND THUS "THE QUESTION BEFORE [THE COURT] SEEMS SIMPLE" YET AGAIN. GAUDIN, SUPRA, AT 511.

THE DISTRICT COURT'S INSTRUCTION FOR THE TILA COUNTS SUCCINCTLY CHARGED THE JURY THAT "TILA REQUIRES A CREDITOR TO MAKE CERTAIN DISCLOSURES ...." COA APP. 292. WHILE THIS WAS NOT AN "ELEMENTS" FORMULATION,[16] WHETHER A DEFENDANT IS A "CREDITOR" IS UNQUESTIONABLY AN ELEMENT OF THE OFFENSE. SEE MATHIS V. UNITED STATES, 136 S. CT. 2243, 2248 (2016) ("'ELEMENTS' ARE THE 'CONSTITUENT PARTS' OF A CRIME'S LEGAL DEFINITION — THE

16. NOTABLY, THE DISTRICT COURT USED THE TRADITIONAL "ELEMENTS" FORMULATION FOR ALL OF THE OTHER COUNTS.

THINGS THE 'PROSECUTION MUST PROVE TO SUSTAIN A CONVICTION'" (QUOTING BLACK'S LAW DICTIONARY 634 (10th ed. 2014))). BUT THE DISTRICT COURT DID NOT INSTRUCT THE JURY THAT IT HAD TO FIND MUIR WAS A CREDITOR TO FIND HIM GUILTY. IT ONLY ELABORATED ON THE "REQUIRED DISCLOSURES" ELEMENT: "TO FIND [MUIR] GUILTY OF THIS CRIME, YOU MUST FIND THAT THE GOVERNMENT PROVED BEYOND A REASONABLE DOUBT THAT [HE] WILLFULLY AND KNOWINGLY GAVE FALSE AND INACCURATE [DISCLOSURES THAT ARE REQUIRED] UNDER THE TRUTH IN LENDING ACT."; "I INSTRUCT YOU AS A MATTER OF LAW THAT FINANCE CHARGES AND TOTAL PAYMENTS DUE UNDER A LOAN ARE DISCLOSURES REQUIRED UNDER THE TRUTH IN LENDING ACT." COA APP. 292. IN STARK CONTRAST TO THAT, THE DISTRICT COURT ONLY MENTIONED "CREDITOR" ONCE (IN THE PASSAGE FIRST QUOTED ABOVE). SEE COA APP. 291-93.

CRITICALLY, HOWEVER, TILA EXPLICITLY DEFINES A "CREDITOR": "THE TERM 'CREDITOR' REFERS ONLY TO A PERSON WHO BOTH (1) REGULARLY EXTENDS *** CONSUMER CREDIT *** AND (2) IS THE PERSON TO WHOM THE DEBT *** IS INITIALLY PAYABLE...." 15 U.S.C. 1602(g). FURTHERMORE, AS MUIR REPEATEDLY ARGUED BELOW,[17] THE SECOND CIRCUIT HAD PREVIOUSLY ACKNOWLEDGED "THIS DEFINITION 'IS RESTRICTIVE AND PRECISE, REFERRING ONLY TO A PERSON WHO SATISFIES BOTH REQUIREMENTS' OF THE STATUTE." VINCENT V. MONEY STORE, 736 F.3d 88, 105 (2d CIR. 2013)(QUOTING CETTO V. LASALLE BANK NAT'L ASS'N, 518 F.3d 263, 270 (4th CIR. 2008)) (EMPHASIS IN VINCENT). FURTHER STILL, AS A LAWYER PROVIDING LEGAL SERVICES (NOT LOANS), MUIR COULD NEVER SATISFY EITHER

17. SEE SUPPLEMENTAL BRIEF OF APPELLANT 29 (COA DOC. NO. 110); POST-ARGUMENT SUPP. BRIEF 4; REPLY BRIEF 37.

ELEMENT. IN FACT, THE GOVERNMENT DID NOT OFFER ANY EVIDENCE AT TRIAL THAT HE WAS A "CREDITOR." THAT SHOULD HAVE BEEN FATAL TO THE TILA COUNTS BECAUSE NO EVIDENCE, NO PROOF, NO CONVICTION.

AND YET, DESPITE MUIR EXPRESSLY FRAMING THIS ARGUMENT BELOW AS A "QUESTION PRESENTED" (AS WELL AS NOTING IT WAS A MATTER OF FIRST IMPRESSION), SUPPLEMENTAL BRIEF OF APPELLANT 9, THE SECOND CIRCUIT COMPLETEDLY IGNORED IT. JUST LIKE WITH ALL OF HIS PRO SE ARGUMENTS, IT CONTENDED IT WAS "FRIVOLOUS." PET. APP. 40a. PUT SIMPLY, THAT IS ASTOUNDING. TO BEGIN, THIS ARGUMENT WAS SQUARELY SUPPORTED BY VINCENT, THE SECOND CIRCUIT'S OWN PRECEDENT AFFIRMING THE DISMISSAL OF CIVIL TILA CLAIMS BECAUSE THE DEFENDANT DID NOT MEET THE STATUTORY DEFINITION OF A "CREDITOR." 736 F.3d, AT 109. EVEN WORSE, IT IGNORES THAT MUIR'S ARGUMENT WAS WRAPPED IN HIS CONSTITUTIONAL RIGHT TO A JURY DETERMINATION ON EVERY ELEMENT OF THE OFFENSE. GAUDIN, 515 U.S., AT 511.

IN SHORT, THE COURT OF APPEALS' JUDGMENT AFFIRMING THE TILA CONVICTIONS BLATANTLY CONTRADICTS CIRCUIT PRECEDENT, A HOST OF THIS COURT'S PRECEDENTS AND FUNDAMENTAL TENETS OF CRIMINAL LAW AS PROTECTED BY THE CONSTITUTION. THAT PROVES IT "HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS," RULE 10(a); THAT WARRANTS CERTIORARI; THAT WARRANTS SUMMARY REVERSAL.

II. The Decision Below Failed to Provide Meaningful Review.

Unlike this Court's discretionary review, a defendant is entitled to review of his conviction by a court of appeal "as a matter of right." Coppedge v. United States, 369 U.S. 438, 441 (1962) (citing 28 U.S.C. 1291). As a statutory guarantee, that review must be meaningful. See Salve Regina College v. Russell, 499 U.S. 225, 234 (1991) (recognizing "the duty of appellate courts to provide meaningful review"). Still, that is a nebulous standard. And other than its opinions involving death penalty cases and habeas proceedings, this Court has never announced guiding principles for meaningful appellate review. Obviously, due process requires it, but saying that only leads to perfect circularity: "The fundamental requirement of due process is the opportunity to be heard * * * 'in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); see also Kent v. United States, 383 U.S. 541, 561 (1966) ("Meaningful review requires that the reviewing court should review."). Nevertheless, this case is not the vehicle to decide this issue because under any standard of due process, the Second Circuit failed to meet its "duty * * * to provide meaningful review" of Muir's arguments. Salve Regina College, supra, at 234.

To be clear, Muir is not suggesting that every argument made by an appellant is entitled to a written opinion, for undeniably the courts of appeals are flooded with meritless and frivolous arguments on a daily basis—

AND ALL THE MORE SO WITH APPEALS BY PRO SE INMATES. NONETHELESS, "AN APPELLATE COURT [DOES NOT] FULFILL ITS OBLIGATIONS OF MEANINGFUL REVIEW BY SIMPLY RECITING THE FORMULA FOR HARMLESS ERROR," SOCHOR V. CALIFORNIA, 504 U.S. 527, 541 (1992) (O'CONNOR, J., CONCURRING), ANY MORE THAN IT DOES WITH A ROTE RECITATION AT THE END OF AN OPINION STATING IT "REJECT[S] THE DEFENDANTS' FURTHER CONTENTIONS AS FRIVOLOUS"— WHICH IS EXACTLY WHAT THE SECOND CIRCUIT DID HERE. PET. APP. 40a. FAR FROM FRIVOLOUS, MUIR'S ARGUMENTS WERE DIRECTLY SUPPORTED BY BEDROCK PRINCIPLES OF CRIMINAL LAW, "LEGION" PRECEDENTS OF THIS COURT, AS WELL AS CONTROLLING CIRCUIT PRECEDENTS.

IRONICALLY, THE TEN-PAGE DISCUSSION IN THE DECISION BELOW "EXPOSING SOME OF THE POTENTIAL PROBLEMS" "REGARDING THE REQUIRED MENTAL STATE FOR A RICO OFFENSE INVOLVING UNLAWFUL DEBT," PET. APP. 28a, UNDERMINES THE NOTION THAT MUIR'S PRIMARY RICO ARGUMENT WAS FRIVOLOUS. NOT ONLY DOES IT INCLUDE SOME OF THE VERY SAME PROBLEMS MUIR IDENTIFIED IN HIS BRIEFING BELOW,[18] BUT IT REPEATEDLY RECOGNIZES THE GRAVAMEN OF MUIR'S ARGUMENT, NAMELY, THIS COURT'S "INSISTENCE IN X-CITEMENT VIDEO AND ELONIS ON A 'PRESUMPTION [IN THE INTERPRETATION OF CRIMINAL STATUTES] IN FAVOR OF A SCIENTER REQUIREMENT,' APPLICABLE TO 'EACH OF THE STATUTORY ELEMENTS THAT CRIMINALIZE OTHERWISE INNOCENT CONDUCT.'" PET. APP. 30a (QUOTING ELONIS, 135 S. CT., AT 2011); PET. APP. 28a (SAME). REGARDING MUIR'S PRIMARY TILA ARGUMENT, THE SECOND CIRCUIT'S HOLDING IN VINCENT STANDING ALONE UNDERCUTS THE CONTENTION THAT ARGUMENT WAS FRIVOLOUS.

18. SEE REPLY BRIEF 48-52; PETITION FOR REHEARING 1-2.

WHAT'S MORE, DECADES OF SECOND CIRCUIT PRECEDENT DIRECTLY SUPPORTS MUIR'S ARGUMENT THAT HE WAS ENTITLED TO A JURY INSTRUCTION EXPLAINING HIS THEORY OF DEFENSE FOR THE RICO COUNTS. SEE N.11, SUPRA. IN THE END, THE ASSERTION THAT EVERY SINGLE ONE OF MUIR'S PRO SE ARGUMENTS WERE FRIVOLOUS IS UNSUPPORTABLE.

FINALLY, IN OPPOSING THIS PETITION, THE GOVERNMENT WILL SURELY BEAT THE "OVERWHELMING EVIDENCE" DRUM, JUST AS THE COURT OF APPEALS DID IN JUSTIFYING ITS REJECTION OF TUCKER'S PRIMARY CHALLENGE TO THE JURY INSTRUCTIONS FOR THE RICO COUNTS UNDER THE PLAIN ERROR STANDARD. PET. APP. 269-279. OF COURSE, THAT IGNORES THE IRRELEVANCE OF A CLAIM OF OVERWHELMING EVIDENCE WHEN A JURY IS PREVENTED OR DETERRED FROM CONSIDERING A DEFENDANT'S LACK OF CRIMINAL INTENT:

> IF THE JURY MAY HAVE FAILED TO CONSIDER EVIDENCE OF INTENT, A REVIEWING COURT CANNOT HOLD THAT ERROR DID NOT CONTRIBUTE TO THE VERDICT. THE FACT THAT THE REVIEWING COURT MAY VIEW THE EVIDENCE OF INTENT AS OVERWHELMING IS THEN SIMPLY IRRELEVANT.

CARELLA, 491 U.S., AT 270 (SCALIA, J., CONCURRING) (QUOTING CONNECTICUT V. JOHNSON, 460 U.S. 73, 85-86 (1983) (PLURALITY OPINION)). DOUBTLESS, THE JURY INSTRUCTIONS BELOW DETERRED THE JURY ON THE CRITICAL ISSUE OF INTENT, AND THUS ANY NOTION OF OVERWHELMING EVIDENCE IS LIKEWISE IRRELEVANT.

III. QUESTION PRESENTED 1 RAISES AN IMPORTANT ISSUE.

THE DECISION BELOW READILY ACKNOWLEDGED THERE ARE "CONFUSING AND ARGUABLY INCOMPATIBLE PRECEDENTS REGARDING THE REQUIRED MENTAL STATE FOR A RICO OFFENSE INVOLVING UNLAWFUL DEBT." PET. APP. 28a. AGAIN, RATHER THAN CONFRONT ANY OF MUIR'S ARGUMENTS AND RESOLVE THIS ISSUE, THE SECOND CIRCUIT CHOSE TO "DISCUSS

[IT] BRIEFLY IN THE HOPE OF EXPOSING SOME OF THE POTENTIAL PROBLEMS." IBID. BUT THE DUTY OF A COURT OF APPEALS IS NOT TO MERELY EXPOSE PROBLEMATIC ISSUES—IT IS TO RESOLVE THEM. AND WHEN IT FAILS TO FULFILL ITS DUTY IN THE CRIMINAL CONTEXT, IT NOT ONLY VIOLATES THE DUE PROCESS RIGHTS OF A DEFENDANT, SEE SECTION II, SUPRA, IT LEAVES IN ITS WAKE UNCERTAINTY AND UNPREDICTABILITY, WHICH THE GOVERNMENT IS ALL TOO EAGER TO EXPLOIT.

ARMED WITH ESSENTIALLY THE STRICT LIABILITY THEORY OF CRIMINALITY THAT AROSE OUT OF THE RICO CONVICTIONS IN THIS CASE, THE GOVERNMENT TARGETED ANOTHER LAWYER WHO HAD REPRESENTED THE TRIBES IN THE LENDING (AS WELL AS TUCKER EARLY ON). ONLY SCHULTE WAS COUNSEL OF RECORD FOR THE TRIBES IN ALL OF THEIR CIVIL LITIGATION GOING BACK TO 2005; HE ALSO TESTIFIED FOR THE DEFENSE BELOW. INSTEAD OF GOING TO TRIAL AND FACING THE SAME JURY INSTRUCTIONS THAT HAD DOOMED MUIR, SCHULTE PLEAD GUILTY TO CONSPIRING TO VIOLATE RICO'S COLLECTION OF UNLAWFUL DEBT PRONG (16 YEARS AFTER THE TRIBAL LENDING BEGAN), ENTERED INTO A NON-PROSECUTION AGREEMENT AND FORFEITED $423,000. UNITED STATES V. SCHULTE, CASE NO. 19-CR-456 (SDNY). THE GOVERNMENT ALSO EXTRACTED A NON-PROSECUTION AGREEMENT AND A WHOPPING $613,000,000 IN FORFEITURE AND FINES FROM TUCKER'S LONG-TIME BANKING PARTNER, UNITED STATES V. U.S. BANCORP, CASE NO. 18-CR-150 (SDNY) (WILLFUL FAILURE TO FILE SUSPICIOUS ACTIVITY REPORTS), AS WELL AS AN ADDITIONAL NON-PROSECUTION AGREEMENT (AND A $400,000 FINE) FROM A SMALL FINANCIAL SERVICES FIRM THAT HAD MANAGED SOME OF TUCKER'S MONEY. UNITED STATES V. CENTRAL STATES CAPITAL MARKETS, LLC, CASE NO. 18-CR-911 (SDNY) (SAME).

TWO CRIMINAL CONVICTIONS, THREE NON-PROSECUTION AGREEMENTS AND OVER $4.1 BILLION IN MONEY JUDGMENTS (THE AMOUNTS ABOVE PLUS THE $3.5 BILLION JUDGMENT IMPOSED AGAINST TUCKER AS PART OF HIS SENTENCE) MORE THAN AMPLY ESTABLISH THAT THE QUESTION OF WHAT IS THE REQUIRED MENTAL STATE FOR A RICO OFFENSE INVOLVING UNLAWFUL DEBT IS IMPORTANT. CONCLUSIVELY PROVING THIS QUESTION NEEDS TO BE RESOLVED, THE FIGHT OVER THE LEGALITY OF TRIBAL LENDING ACTIVELY CONTINUES TODAY. SEE GINGRAS V. THINK FINANCE, INC., 922 F.3d 112 (2d CIR. 2019); WILLIAMS V. MEDLEY OPPORTUNITY FUND II, LP, 965 F.3d 229 (3d CIR. 2020); GIBBS V. HAYNES INVS., LLC, 967 F.3d 332 (4th CIR. 2020); SWIGER V. ROSETTE, 989 F.3d 501 (6th CIR. 2021); BRICE V. 7HBF NO. 2 LTD, APPEAL PENDING, CASE NO. 21-80047 (9th CIR.); EASLEY V. HUMMINGBIRD FUNDS, APPEAL PENDING, CASE NO. 20-13644 (11th CIR.); GREAT PLAINS LENDING, LLC V. DEP'T OF BANKING, 2021 WL 2021823 (CONN. MAY 20, 2021). AND BECAUSE WHETHER MUIR HAD THE REQUISITE SCIENTER WAS "THE CENTRAL DISPUTED ISSUE" BELOW, BRIEF OF UNITED STATES 52, THIS CASE IS THE PERFECT VEHICLE TO DECIDE THIS IMPORTANT QUESTION. CERTIORARI SHOULD BE GRANTED AND THIS CASE SUMMARILY REMANDED BACK TO THE SECOND CIRCUIT SO IT CAN FULFILL ITS DUTY AND RESOLVE THIS CRITICAL ISSUE.

CONCLUSION

THE PETITION SHOULD BE GRANTED.

JUNE , 2021

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