Nos. 21-1326 and 22-111

In The

Supreme Court of the United States

UNITED STATES ex rel. TRACY SCHUTTE, et al.,
Petitioners,

v.

SUPERVALU INC., et al.,
Respondents.

UNITED STATES ex rel. THOMAS PROCTOR,
Petitioner,

v.

SAFEWAY, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Whistleblower Center ("NWC") is a nonprofit, non-partisan, tax-exempt, charitable organization dedicated to the protection of whistleblowers. Founded in 1988, the NWC is keenly aware of the issues facing employees who report fraud. *See,* NWC Website at *www.whistleblowers.org*.

Since 1990, NWC has participated before this Court as *amicus curiae* in cases that directly impact whistleblowers, including the following False Claims Act cases: *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970 (2015); and *Universal Health Servs. v. U.S. ex rel. Escobar*, 579 U.S. 176 (2016).

The False Claims Act is the government's "most important tool to uncover and punish fraud against the United States."[2] Numerous whistleblowers assisted by NWC have effectively used the False Claims Act to hold those who would defraud the government accountable.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] U.S. Chamber Institute for Legal Reform, *Fixing the False Claims Act: The Case for Compliance-Focused Reforms*, 1 (October 2013), https://instituteforlegalreform.com/wp-content/uploads/2020/10/Fixing_The_FCA_Pages_Web.pdf.

SUMMARY OF THE ARGUMENT

A review of the contracts and vouchers paid by the U.S. Congress when drafting the False Claims Act demonstrates, incontrovertibly, that liability for defrauding the government was meant to be based on subjective bad faith regardless of any ambiguities that existed in a statute, regulation, contract, or agreement.

The U.S. Court of Appeals for the Seventh Circuit incorrectly interpreted the False Claims Act's scienter requirement. If the Seventh Circuit majority's interpretation of the role of subjective intent in demonstrating that a contractor acted "knowingly" is affirmed, the plain meaning and original intent of the False Claims Act will be completely undermined and whistleblowers, who have driven the success of the False Claims Act, will be discouraged from taking the great risks they face when reporting fraud.

ARGUMENT

I. SUBJECTIVE INTENT IS AT THE HEART OF THE FALSE CLAIMS ACT'S SCIENTER REQUIREMENT

This case requires the Court to interpret the False Claims Act's definition of "knowing" or "knowingly."[3] In interpreting this requirement the U.S. Court of Appeals for the Seventh Circuit concluded that defendants cannot be held liable if

[3] 31 U.S.C. § 3729(b)(1).

they "acted under an incorrect interpretation of the relevant statute or regulation" if "the interpretation was objectively reasonable" and "no authoritative guidance cautioned defendants against it."[4] According to the Seventh Circuit's majority opinion, this is so even if "[a] defendant might suspect, believe, or intend to file a false claim."[5] Consequently, a defendant's "subjective intent" to defraud taxpayers is rendered "irrelevant."

Circuit Judge David Hamilton issued a vigorous dissent. He pointed out that under the common law of fraud "subjective bad faith" is always "central" to finding liability.[6] Judge Hamilton explained that "[t]he majority's logic takes the False Claims Act in a direction 180 degrees away from common-law fraud. It makes subjective bad faith, including deliberate ignorance, 'irrelevant.'"[7] He warned that the Seventh Circuit's interpretation "creates a safe harbor" for "fraudsters whose lawyers can concoct a *post hoc* legal rationale that can pass a laugh test."[8] These concerns are fully supported by the original history of the False Claims Act.

When passing the False Claims Act in 1863, Congress was unquestionably focused on the common law definition of fraud and ensuring that

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[4] *U.S. ex rel. Schutte v. SuperValu, Inc.*, 9 F.4th 455, 464 (7th Cir. 2021) (*citing Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007)). *See also U.S. ex rel. Proctor v. Safeway, Inc.*, 30 F.4th 649 (7th Cir. 2022).

[5] *Schutte*, 9 F.4th at 468.

[6] *Id.* at 482.

[7] *Id.* at 483.

[8] *Id.* at 473.

fraudsters who sold goods to the government with "subjective bad faith" would be held liable, regardless of any ambiguities that existed in a statute, regulation, contract, or agreement. It was obvious to Congress that when paying for goods or services for use by the Union Army the subjective intent of those profiting from such contracts was the primary issue in determining whether there was fraud.

The targets of the False Claims Act were contractors who had "subjective bad faith" when they sold supplies to the Union Army, regardless of ambiguities in the paperwork that surrounded the contracts. This intent is obvious when reviewing the original contracts that gave rise to the False Claims Act. Congress was looking at the "subjective bad faith" of potential fraudsters, not legal technicalities in rules, regulations or contract language that could provide *post hoc* justifications for their bad faith.

From the outset of the Civil War, stories of dishonest contractors taking advantage of the government's immense need for supplies began to emerge. As early as the First Battle of Bull Run,[9] reports trickled in from the front lines of soldiers armed with "muskets not worth shooting" sold to the government by "swindling contractors."[10]

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[9] The First Battle of Bull Run, or First Manassas, a Confederate victory, occurred on July 21, 1861. U.S. Army Center of Military History, *Civil War Timeline* (Sept. 2013), http://www.history.army.mil/html/bookshelves/resmat/civil_war/cw_timeline.html.

[10] Carl Sandburg, *Abraham Lincoln: The War Years, Vol. I*, 305 (New York: Harcourt, Brace & World, Inc., 1939).

Further complaints of shoddily made goods soon surfaced, making it abundantly clear that the war effort was being hampered by the government's inability to procure the quality and quantity of supplies necessary to fight the War.

Troops were marching on shoes made from inferior leather that lasted only twenty to thirty days before falling apart and sleeping underneath blankets made from light, flimsy fabric that failed to protect them from the elements.[11] When Congress enacted the False Claims Act, their very target was those with subjective bad faith who sold over-priced or poor quality goods, such as shoes made with inferior leather, to the army. The law centered on intent, *not* on government regulations that may have provided specifications and prices for leather shoes and/or the fact that no such specifications were required in a contract or under law.

On July 8, 1861, Congress created the Select Committee on Government Contracts ("Committee").[12] The five-member panel was tasked with investigating reports of widespread fraud in procurement contracting. The Committee gathered evidence, examined witnesses, and met

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[11] *See* Regís de Trobriand, *Four Years with the Army of the Potomac*, 63 (George K. Dauchy trans., Boston: Ticknor and Company 1889).

[12] *See* Cong. Globe, 37th Cong., 1st Sess. 23 (1861) (resolution of Rep. Van Wyck) ("*Resolved*, That a committee of five members be appointed by the Speaker to ascertain and report what contracts have been made by any of the Departments for provisions, supplies, and transportation; for materials and services; or for any articles furnished for the use of Government...").

continually from 1861 until Congress passed the False Claims Act in March of 1863.[13] The Committee issued three reports—one for each year it was active. Congress and the general public[14] were well aware of contract fraud and the Committee's findings.[15]

Counsel for *amicus* reviewed the original records compiled by the Committee during its three-year investigation, which are located in the National Archives. The records contained two files relevant to the issue before the Court. The first file contained a collection of defense procurement contracts,[16] and the second contained a collection of

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[13] *See Universal Health Servs. v. U.S. ex rel. Escobar*, 579 U.S. 176, 181-82 (2016) ("A series of sensational congressional investigations prompted hearings where witnesses painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, *charged exorbitant prices* for goods delivered, and generally robbed in purchasing the necessities of war. Congress responded by imposing civil and criminal liability for 10 types of fraud on the Government, subjecting violators to double damages, forfeiture, and up to five years' imprisonment." [internal citations omitted]) (emphasis added).

[14] *See* Cong. Globe, 37th Cong., 3d Sess. 952 (1863) (statement of Sen. Howard) ("The country, as we know, has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the government.").

[15] *Id.* at 956 (statement of Sen. Wilson) ("Investigating committees in both houses of Congress have reported the grossest frauds upon the government.").

[16] *See* National Archives File HR 37A-E21.1, 37th Congress Select Committee on Government Contracts, File Folder 7, Contracts. Examples of the contracts and vouchers are linked at https://kkc.com/original-false-claims-act-contracts-and-vouchers/.

vouchers used to obtain payments from the government.[17]

The actual contracts and vouchers contemporaneously examined by the Committee were constructed simply, and merely stated the type, quantity, and price of good(s) to be delivered. For example, one contract contained in the "voucher" file simply stated that "33 mules" were sold to the government and set forth the date of sale and the price paid.[18] Another simply noted that "90 tents" were sold, giving the date and price.[19] The contracts were similar. Each set forth the date of the sale, the price of the item, and a simple description of the item sold to the government, such as "horse shoes," "pad locks," "lanterns," and "rifles," along with a copy of the receipt for payment.[20] All the contracts and vouchers on file with the Committee were constructed with that degree of simplicity, i.e., a simple description of the item and a receipt.[21] The

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[17] *See* National Archives File HR 37A-E21.1, 37th Congress Select Committee on Government Contracts, File Folder 6, Vouchers,.

[18] *Id.,* File Folder 6, Voucher to J. B Neill, dated August 26, 1861, https://kkc.com/original-false-claims-act-contracts-and-vouchers/ (linked as part of "Voucher 2").

[19] *Id.,* File Folder 6, Voucher to M. Molton, dated September 10, 1861, https://kkc.com/original-false-claims-act-contracts-and-vouchers/ (linked as part of "Voucher 2").

[20] *Id.,* File Folder 7, Contract with Child, Pratt, and Fox, dated September 26, 1861, https://kkc.com/original-false-claims-act-contracts-and-vouchers/, (linked as part of "Contract 2").

[21] This is not to say the government did not utilize more complex written agreements in some cases; however, the

contracts did not further define any specifications for these goods. The thought that a contractor could escape liability under these contracts because they were vague, ambiguous, and potentially subject to attack using statutory or regulatory definitions of items such as a "mule" would have been incomprehensible to the members of the 37th Congress. It was the subjective intent of those who sold these products that was the central issue in these contracts, not legal niceties.[22] For example, one of the vouchers examined by the Committee simply confirmed that the "services were rendered as therein stated and that they were necessary for the public service."[23] This voucher included payments fot "blankets," "tent poles," "shoes," "horse equipment," and "military equipment." Under the logic of the majority opinion in *Schutte*, one can only imagine how crafty lawyers could twist the ambiguous term "necessary for the public service" to avoid accountability.

The record of the Committee and the subsequent discussions in Congress demonstrate that the government expected goods of a certain

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simplicity of the contracts contained in the records compiled by the Committee reflect the type of agreements under which contractors were overcharging the government for goods and services. Furthermore, there were no complex contracts in the Committee's records.

[22] *See* National Archives File HR 37A-E21.1, 37th Congress Select Committee on Government Contracts, File Folders 6 and 7.

[23] *Id.,* File Folder 6, voucher from Joseph S. Pease, paid on Sept. 30, 1861, https://kkc.com/original-false-claims-act-contracts-and-vouchers/ (linked as part of "Voucher 1").

quality, at a fair price, even if that quality was not spelled out in a government regulation, invoice, law, or the terms of an agreement. While contractors were delivering goods that were technically compliant with the four corners of the procurement contract, their subjective intent to defraud the government was the major focal point of the Committee and, ultimately, triggered the False Claims Act's enactment. Congress drafted the False Claims Act to reach all frauds on the government without requiring express conditions of payment, regulatory clarity, or explicit terms incorporated in contracts or vouchers.[24] They passed the False Claims Act to obtain evidence of bad faith from insiders known today as whistleblowers.

The Committee diligently documented its findings. Among the frauds investigated by the Committee:

- 12,000-14,000 blankets sold to the government were found to be rotten upon arrival in St. Louis; the blankets were all deemed "unfit for issue to the troops, being of a quality inferior in strength, warmth, and durability to the blankets usually issued to soldiers."[25]

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[24] *See U.S. v. McNinch*, 356 U.S. 595, 599 (1958); *see also* Cong. Globe, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Wilson) ("Investigating committees in both Houses of Congress have reported the *grossest frauds* upon the Government.") (emphasis added).

[25] H.R. Rep. No 2-37, at 120-21 (1861).

- One million pairs of poorly made shoes that had quickly worn out, and an additional million pairs of poor-quality shoes, already purchased and in the hands of the quartermasters awaiting delivery. The government spent $1.5 million for these shoes, an expenditure that was deemed "worse than wasted."[26]
- One thousand cavalry horses deemed "utterly worthless" by an examiner who found the horses to have every disease to which horses are susceptible; the horses cost the government $58,200 before they were transported from Pennsylvania to Louisville, at which time they were "condemned and cast off."[27]
- Contractors hired to furnish artillery shells to the Army provided shells filled, not with gunpowder or other explosives, but with sawdust, thus rendering them "of no utility whatever."[28]
- Overcoats manufactured of a flimsy, unidentifiable fabric, which were deemed as being of not much "practical value" by a tailor called to testify about their quality. A deputy quartermaster questioned about the coats called them "worthless" when

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[26] Cong. Globe, 37th Cong., 2d Sess. 298 (1862) (statement of Sen. Dawes).
[27] *Id*.
[28] Cong. Globe, 37th Cong., 3rd Sess. 955 (1863) (statement of Sen. Howard).

> compared to regular coats used by the army.[29]

While the Committee examined several different types of fraud, the examples above clearly demonstrate that the frauds the False Claims Act sought to eliminate were substantially similar to accusations of contracting fraud that would arise in modern False Claims Act cases where contractors could argue that there were ambiguities in laws or regulations defining the specifications for a proper "blanket," "leather," "shoe," "fabric," "shell," or in the modern context, the cost of a drug.

Much like the gunsmith who entered into an agreement to provide artillery shells or the cobbler who contracts to provide one million pairs of shoes to the army, a pharmacy that agrees to sell drugs under a government-sponsored program would also be prohibited from engaging in "subjective bad faith" when scheming to defraud taxpayers.

When Senator Jacob Howard presented the final version of the False Claims Act on the floor of the Senate, the entire premise of the law was predicated on obtaining evidence of bad faith from informants.[30] There were no proposals to clarify

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[29] *See* Testimony of Wm. T. Duvall, H.R. Rep. No. 49-37, at 136-40 (1863).

[30] *See* Cong. Globe, 37th Cong., 3rd Sess., at 952-58 (1863) (Senator Jacob Howard explaining "the bill offers … a reward to the informant who comes into court and betrays his co-conspirator, if he be such, but it is not confined to that class … I have based [the False Claims Act] upon the old-fashioned idea of holding out a temptation and 'setting a rogue to catch

the terms of the contracts, to implement regulations that contractors would have to comply with, or to enact statutory safeguards as part of the False Claims Act to clear up ambiguities that may exist in contracting arrangements. Instead, the entire focus of the law was premised on inducing insiders to turn in their compatriots or fellow conspirators. The fact that the contracts, ambiguities and all, were problematic was not in dispute. It was the evidence of bad faith that was needed to demonstrate knowledge and prove there was fraud. Additionally, it was the evidence of bad faith that would prevent a contractor from arguing that the agreements were somehow ambiguous in order to escape liability.

II. THE LOWER COURT'S DEFINITION OF "KNOWING" WOULD UNDERMINE THE PUBLIC INTEREST.

The Department of Justice's ("DOJ") current head of the Civil Division, Principal Deputy Assistant Attorney General Brian M. Boynton, recently praised the False Claims Act as "one of the most important tools for ensuring that public funds are spent properly."[31] His predecessors and other prominent DOJ officials throughout different

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a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.").

[31] Press Release, Dep't of Just. Off. of Pub. Affs., False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022 (Feb. 7, 2023), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022.

administrations have echoed this sentiment.[32] These statements go beyond mere rhetoric as statistics support their veracity.

From October 1, 1986 to September 30, 2022, *qui tam* and non *qui tam* actions under the False Claims Act resulted in a total of $72,578,696,300 in settlements and judgments.[33] Of this total, 69% was recovered in *qui tam* actions.[34] These statistics paint a clear picture that whistleblowers drive the success of the False Claims Act. The law is working as intended by its Civil War drafters. The DOJ recently acknowledged that it is "grateful for the hard work and courage of those private citizens who bring evidence of fraud to the Department's

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[32] *See* Press Release, Dep't of Just. Off. of Pub. Affs., Deputy Associate Attorney General Stephen Cox Delivers Remarks at the Federal Bar Association Qui Tam Conference (Feb. 28, 2018), https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-delivers-remarks-federal-bar-association. ("The False Claims Act is our most important civil enforcement tool to protect the taxpayer from fraud.") and Press Release, Dep't of Just. Off. of Pub. Affs., Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016 (Dec. 14, 2016), https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016.
("Americans across the country are healthier, enjoy a better quality of life, and are safer because of our continuing success in protecting taxpayer funds from misuse.").

[33] *See* Civ. Div., U.S. Dep't of Just., *FCA FY2022 Statistics*, at 3, Attach. to Press Release, Dep't of Just. Off. of Pub. Affs., False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022 (Feb. 7, 2023), https://www.justice.gov/opa/press-release/file/1567691/download.

[34] *Id*. (*Qui tam* actions accounted for $50,385,673,173 in settlements and judgments since 1986).

attention, often putting at risk their careers and reputations" and noted that the DOJ's "ability to protect citizens and taxpayer funds continues to benefit greatly from their actions."[35] In fact, every DOJ administration in the past twenty years, regardless of political party, has praised whistleblowers for the significance of their contributions.[36]

While discussing the success of the False Claims Act in fiscal year 2022, the DOJ

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[35] *See* U.S. Dep't of Just., *supra* note 31.

[36] *See* Press Release, Dep't of Just. Off. of Pub. Affs., Justice Department Recovers Over $3.7 Billion From False Claims Act Cases in Fiscal Year 2017 (Dec. 21, 2017), https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017 ("Because those who defraud the government often hide their misconduct from public view, whistleblowers are often essential to uncovering the truth," and "[t]he Department's recoveries [in 2017] continue[d] to reflect the valuable role that private parties can play in the government's effort to combat false claims concerning government contracts and programs."); Press Release, Dep't of Just. Off. of Pub. Affs., Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013 (Dec. 20, 2013), https://www.justice.gov/opa/pr/justice-department-recovers-38-billion-false-claims-act-cases-fiscal-year-2013. ("These recoveries would not have been possible without the brave contributions made by ordinary men and women who made extraordinary sacrifices to expose fraud and corruption in government programs."); and Press Release, Dep't of Just., Justice Department Recovers $2 Billion for Fraud Against the Government in FY 2007; More Than $20 Billion Since 1986 (Nov. 1, 2007), https://www.justice.gov/archive/opa/pr/2007/November/07_civ_873.html. ("This year's outstanding recoveries in civil fraud cases … attests to the fortitude of whistleblowers who report fraud.").

emphasized that it had "continued its commitment to use the False Claims Act to deter and redress fraud by individuals as well as corporations," and that "[s]uch efforts deter future fraud, incentivize changes in both corporate and individual behaviors, ensure that the proper parties are held responsible, and promote the public's confidence in our justice system."[37] As health care economist Jack Meyer noted, "[w]e don't know exactly how much fraud is being ***deterred*** by the False Claims Act, but the number is almost certainly many billions of dollars a year than is simply being recovered."[38] Numerous academic studies have confirmed the deterrent effect of *qui tam* laws.[39]

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[37] *See* U.S. Dep't of Just., *supra* note 31.

[38] Taxpayers Against Fraud, *The Return on Investment from False Claims Act Partnerships* (Oct. 2013) (emphasis added), https://www.taf.org/resources/roi-from-fca-partnerships/.

[39] Dennis J. Ventry Jr., *Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States*, 59 VILL. L. REV. 425 (2014) (deterrent effect of tax *qui tam* law). Numerous studies fully support Professor Ventry's conclusions. *See* Philip G. Berger and Heemin Lee, *Did the Dodd-Frank Whistleblower Provision Deter Accounting Fraud?*, 60 J. OF ACCT. RSCH. 1337 (2022); Tim Stolper and Niels Johannesen, *The Deterrence Effect of Whistleblowing: Evidence From Offshore Banking*, 64 J. OF L. & ECON. 821 (2021); Christine I. Wiedman and Chunmei Zhu, *Whistleblower Provisions of Dodd-Frank Deter Aggressive Financial Reporting*, THE CLS BLUE SKY BLOG (March 5, 2018), https://clsbluesky.law.columbia.edu/2018/03/05/whistleblower-provisions-of-dodd-frank-deter-aggressive-financial-reporting/; Jaron H. Wilde, *The Deterrent Effect of Employee Whistleblowing on Firms' Financial Misreporting and Tax Aggressiveness*, 92 AM. ACCT. ASS'N 247 (2017); and Jetson Leder-Luis, *Whistleblowers, The False Claims Act, and the*

Following the common law definition of fraud that emphasizes subjective bad faith is what makes the False Claims Act work. The majority's interpretation that subjective intent is irrelevant[40] under the False Claims Act's scienter requirement will radically undermine the Act's powerful *qui tam* incentives, which would subsequently stymie the law's significant deterrent effect. Whistleblowers will be discouraged if they risk their livelihood to provide clear evidence of a company's subjective bad faith, only for that company to evade liability with *post hoc* arguments. Letting such fraudsters profit from their deceit will undermine the faith of the public in the rule of law. Judge Hamilton correctly stated that "[i]f and to the extent the federal courts tolerate such deception, we enable more fraud in the present and the future. We also place at a competitive disadvantage the other businesses that resisted the temptation to cheat the government."[41]

Behavior of Healthcare Providers, JOB MARKET PAPERS (2019) https://ideas.repec.org/jmp/2019/ple1069.pdf.

[40] *See Schutte*, 9 F.4th at 466.

[41] *See Proctor*, 30 F.4th at 665 (Hamilton, J. dissenting).

CONCLUSION

The decisions below should be reversed.

Respectfully submitted,

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