

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - - x
3 MARK J. SHERIFF, ET AL., :
4 Petitioners : No. 15-338
5 v. :
6 PAMELA GILLIE, ET AL. :
7 - - - - - x
8 Washington, D.C.
9 Tuesday, March 29, 2016

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 The above-entitled matter came on for
oral argument before the Supreme Court of the United
States at 10:03 a.m.
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Columbus, Ohio; on behalf of Petitioners.
E. JOSHUA ROSENKRANZ, ESQ., New York, N.Y.; on
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curiae, supporting Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 15-338, Sheriff v.
5 Gillie.

6 Mr. Murphy.

7 ORAL ARGUMENT OF ERIC E. MURPHY

8 ON BEHALF OF THE PETITIONER

9 MR. MURPHY: Mr. Chief Justice, and may it
10 please the Court:

11 Given resource constraints, Ohio law has
12 always authorized its attorney general to appoint
13 special counsel to undertake the attorney general's
14 duty of representing the State in the courts. While
15 the attorney general may appoint general deputies
16 today, special counsel remain integral to the
17 office. For example, the office has only 15
18 assistant attorneys general dedicated to collecting
19 the billions of dollars of State debts scattered
20 across all 88 Ohio counties. The office necessarily
21 must rely on special counsel to be the frontline
22 lawyers to collect these debts, yet the Sixth
23 Circuit in this case held both that special counsel
24 are not attorney general officers and may not use
25 attorney general letterhead without risking

1 liability under the Fair Debt Collection Practices
2 Act.

3 That was mistaken for two basic reasons.

4 First, special counsel are State officers
5 under that Act. And so they fall within the
6 government exemption designed to protect government
7 operations.

8 And, second, special counsel's use of
9 attorney general letterhead accurately conveyed
10 their relationship to the office and furthered the
11 purposes of the Act by putting the credibility of
12 the office on the line and giving it a powerful
13 incentive to monitor special counsel when they
14 collect these debts.

15 So I would like to begin first with the
16 first question presented, the officer question. And
17 the briefs have gone back and forth on what officer
18 can mean historically and on what it should mean for
19 the Act. I think -- I think what it should mean for
20 the Act is -- is that the broadest conceivable
21 definition should apply, precisely because this
22 provision is designed to protect government
23 operations.

24 JUSTICE GINSBURG: May I ask you about
25 the -- the general structure of the Act seems to be

1 in-house collectors are okay, but outside
2 collectors, whether for private or for government,
3 fall under the Act.

4 But do I understand your view correctly
5 that that line doesn't exist for the State; that is,
6 whether it's an in-house or an out-house collector,
7 they're equally exempt?

8 MR. MURPHY: I agree that -- I -- yes, you
9 understand our position correctly. I do not think
10 that the in-house/out-house -- outside dichotomy
11 makes sense for purposes of the government
12 exemption.

13 And here's why: The prototypical -- in the
14 legislative history, the sheriffs and marshals, as
15 the prototypical exempt debt collectors for the
16 government, and they are always outside of the
17 private creditors who are the judgment creditors.
18 So there are a core group of outside collectors --
19 the in -- outside of the creditor, that is -- who
20 are the prototypical examples --

21 JUSTICE KAGAN: Well, why wouldn't Congress
22 have expressed that more clearly? I mean, that's a
23 big thing that you're saying, that the State debt
24 collectors really ought to be treated very
25 differently, the outside debt collectors from the

1 private.

2 And, on the face of the statute, the
3 private and the State really are treated in exactly
4 the same way. There are two provisions. They read
5 identically to each other. And surely there were
6 very clear ways of taking out the State outside debt
7 collectors. You could have just said State debts
8 aren't debts for purposes of this statute or State
9 outside debt collectors aren't debt collectors for
10 purposes of this statute, and yet Congress did none
11 of those things. Rather, Congress adopted a set of
12 provisions that seem perfectly parallel with respect
13 to State and corporate entities.

14 MR. MURPHY: So I disagree that they're
15 perfectly parallel in these ways.

16 First, I think "officer" means something
17 different in the government context than it does in
18 the private context. In the private context, as we
19 cite Black's Law Dictionary, the prototypical
20 officer is the president, the CEO, or the treasurer,
21 high-level managers.

22 But not -- that's not true for the
23 government. The prototypical Officer can be
24 ministerial officers, like police officers --

25 JUSTICE KAGAN: Well, I understand the

1 argument that you can read the same term two
2 different ways, but Congress did use the exact same
3 terms.

4 MR. MURPHY: But it -- but one is in the
5 private context and one is in the government
6 context. So I think, by definition, they have to
7 have different meanings.

8 And, number two, the inside/outside, you
9 can see that with the creditor, because when the
10 creditor collects, the creditor has to collect in
11 their own name. If you look at the creditor
12 exemption, (6) (A) -- a(6) (A), it says they're exempt
13 if they collect in their own name.

14 And, in fact, when they don't collect in
15 their own name, in-house creditors become debt
16 collectors, showing how the in-house/outside was
17 supposed to work for creditors because, when you put
18 your -- Congress has made the choice with respect to
19 creditors, when you put your name on the line, the
20 creditor will likely have a repeat relationship with
21 the relevant debtor. And so goodwill was enough to
22 exempt all inside creditors. You don't see this
23 dichotomy --

24 JUSTICE SOTOMAYOR: What other -- what
25 other position does the State call someone an

1 independent contractor but we treat them as an
2 officer nevertheless or an employee of someone? We
3 may do it for tax purposes, but we then look at a
4 series of factors to determine whether they're
5 really employees or not.

6 It's hard for you to argue these are
7 employees; correct?

8 MR. MURPHY: Yes. We don't --

9 JUSTICE SOTOMAYOR: They're totally without
10 supervision in their actual debt collection;
11 correct?

12 MR. MURPHY: Well, not totally without
13 supervision. I think that they're supervised by our
14 standards, and they have to -- that's a --

15 JUSTICE SOTOMAYOR: Okay. But you're not
16 claiming they're employees?

17 MR. MURPHY: We're not claiming they're
18 employees.

19 JUSTICE SOTOMAYOR: So what other situation
20 have we ever, in any setting, treated someone whom
21 is called an independent contractor, an officer of a
22 company, government agency, anything? This is a
23 novel sort of idea --

24 MR. MURPHY: I don't think it's a --

25 JUSTICE SOTOMAYOR: That you as the state

1 say this is an independent contractor, and now, by
2 law, we're going to deem them an officer.

3 MR. MURPHY: I just think independent
4 contractor asks -- the independent contractor
5 employee distinction asks a separate question than
6 the officer --

7 JUSTICE SOTOMAYOR: Well, the problem I
8 have is, I certainly understand officers -- like,
9 with corporations. With corporations, officers are
10 defined by their charter of incorporation. These
11 are the officers; these are their responsibilities.
12 It may set an income scale of some sort or tell you
13 which agency within the corporation is going to
14 determine that. And you have officers of State
15 agencies that are defined by law. But I don't know
16 that I've ever seen an officer defined by a
17 contract.

18 MR. MURPHY: Well, so two points: I think
19 the closest analogy would be -- be a common law
20 analogy that court referenced in *Filarsky*, which
21 were the special deputy sheriffs. *Filarsky* cited
22 treatises treating special deputy sheriffs -- those
23 are sheriffs appointed to undertake the sheriff's
24 duty for a particular task -- as officers within the
25 meaning of resisting of officer statutes.

1 Filarsky relied on that history in
2 determining why the contractors in that case should
3 be entitled to a qualified immunity. So I think
4 that's the prototypical example.

5 And we're not -- we're not arguing based on
6 the contract. So the second point would be, if we
7 were -- if all we had was the contract, we wouldn't
8 be here today.

9 For instance, we have collections
10 associations -- they're called third-party
11 vendors -- that we only contract with. There is no
12 statute. We do not assert that they are officers or
13 employees covered by this exemption. They just
14 contract with us to help us with our collection
15 activities.

16 But special counsel are different. There
17 is a statute, R.C. 109.08, that clearly indicates
18 that just as, historically, sheriffs delegated to
19 special deputies, the attorney general can delegate
20 his sovereign duties to --

21 JUSTICE SOTOMAYOR: I -- I thought that
22 that was just for tax collection. This is not a tax
23 collection case, is it? I know the attorney general
24 has read it as giving him more power than what it
25 says on its face, but putting that aside, this is

1 not a tax collection. This is a student debt
2 collection, a consumer debt; correct?

3 MR. MURPHY: That's -- that's confusing two
4 points, Your Honor. The statute -- I disagree with
5 the reading of the statute that suggests we can't
6 use the letterhead elsewhere, but that's the
7 letterhead question. That's Question 2.

8 On the first question, whether he can
9 appoint special counsel to undertake his task of
10 representing the state when collecting these debts,
11 there's no distinction between tax debts and other
12 types of debts. He's -- he's -- they -- he can
13 appoint these individuals to collect any type of
14 debt that is certified to him.

15 And it's the appointment that I think is
16 key to make these individuals special counsel --

17 JUSTICE KAGAN: Mr. Murphy, can I ask,
18 when -- when you are trying to fill out what it
19 means for somebody to be an officer, are you looking
20 to the Dictionary Act? Are you looking to the
21 common law? Are you looking to our cases? Are you
22 looking to some combination of the three --

23 MR. MURPHY: I think --

24 JUSTICE KAGAN: -- or how would you
25 prioritize those?

1 MR. MURPHY: As -- as Hobby Lobby
2 suggested, I think the starting point when something
3 is undefined is the Dictionary Act. So I start
4 there, and then -- and then I -- I -- and then you
5 look -- in -- for determining what those words mean
6 in the Dictionary Act, I look to history.

7 JUSTICE KAGAN: Can I -- can I ask you,
8 then, a question about the Dictionary Act?

9 MR. MURPHY: Uh-huh.

10 JUSTICE KAGAN: Which says an officer
11 "includes any person authorized by law to perform
12 the duties of the office." And my question to you
13 is -- is just which -- what is the office there?

14 MR. MURPHY: I would -- I would call it the
15 office of special counsel.

16 JUSTICE KAGAN: The office of special
17 counsel.

18 MR. MURPHY: So just like -- there's no
19 office of -- literally no office of special counsel
20 listed in Ohio law, but there's also no office of
21 solicitor general. If you look at the Solicitor
22 General Statute for the United States, there's no
23 office --

24 JUSTICE KAGAN: But we know that office
25 exists.

1 (Laughter.)

2 JUSTICE KAGAN: So -- but -- okay. So --
3 so what does a statute have to do, then, to -- to
4 authorize the person to perform the duties of the
5 office?

6 MR. MURPHY: Usually what the statutes do
7 or what precisely R.C. 109.08 does, it says a
8 superior can appoint -- appoint an inferior officer
9 to engage in certain duties. Like the SG statute to
10 help the -- assist the attorney general engage in
11 his duties, that's exactly what this statute says.
12 R.C. 109.08 says the attorney general may appoint
13 special counsel to assist in the -- or to represent
14 the State in the collections of these debts.

15 So they say it doesn't even list the duty.
16 I think it lists the precise duty that special
17 counsel are to undertake.

18 JUSTICE KAGAN: I guess the question is
19 whether it needs to more authorize an office. You
20 know? A continuing, permanent thing as opposed to,
21 you know, these officeholders who come and go, and
22 sometimes there are more of them, and sometimes
23 there are fewer of them, and sometimes they deal
24 with X many cases, and sometimes they deal with Y
25 many cases, and it all seems very fluctuating.

1 MR. MURPHY: I don't think that matters
2 because, I think, historically, there were plenty of
3 offices that had indefinite numbers. Today, for
4 instance, assistant U.S. attorneys have indefinite
5 numbers, and they get their duties from their
6 superiors, I think, obviously in the same way.

7 And I still think that the special deputy
8 sheriffs are the best historical example. And those
9 sheriffs were considered to be officers within the
10 meaning of resisting of officer statutes precisely
11 because they were trying to protect government
12 functions. And I think that purpose analogy is
13 pretty relevant here as well.

14 The point of this exemption is to protect
15 government operations, and the attorney general has
16 been relying on special counsel to collect these
17 debts since the time of the Great Depression.
18 Special counsel have always been in the attorney
19 general's Office, but debt-collecting duty --

20 JUSTICE SOTOMAYOR: So what does your
21 contract require them to comply with the Act?

22 MR. MURPHY: Because we're also the
23 consumer protection branch office, and we want our
24 people complying with the substantive standards of
25 the Act.

1 For instance, everybody agrees that tax
2 debts are not covered by this Act, but we ask them
3 to comply with the substantive standards of the
4 FDCPA for tax debts. It's because we think that
5 those are appropriate standards.

6 What we are concerned about are the
7 remedies and --

8 JUSTICE SOTOMAYOR: Are the remedies
9 against the State?

10 MR. MURPHY: Well, the remedies against
11 special counsel.

12 I think we are concerned -- Filarsky goes
13 through various public policies --

14 JUSTICE SOTOMAYOR: No, I'm just talking
15 practical question. Are you indemnifying?

16 MR. MURPHY: No.

17 JUSTICE SOTOMAYOR: You're not
18 indemnifying. They are contractually bound to
19 follow the Act. And you're, instead, trying to give
20 them immunity for their acts, even though they may
21 have breached. We can get to that second question
22 in a moment. Let's assume they breached the Act.
23 Just an assumption. Don't go crazy.

24 (Laughter.)

25 JUSTICE SOTOMAYOR: You want to give them

1 immunity for their contractual violation.

2 MR. MURPHY: Well, it would be immunity
3 from the FDCPA. It wouldn't be immunity from other
4 laws that would apply, for instance --

5 JUSTICE SOTOMAYOR: They're State officers.
6 So what other laws?

7 MR. MURPHY: Well, for instance,
8 Section 1983. I think it's a double-edged sword.
9 By becoming State officers, they become subject to
10 1983. So that would apply. Also State law. We
11 don't give immunity even to me for reckless conduct.

12 JUSTICE SOTOMAYOR: Is there any case that
13 you can point me to where they've been charged with
14 a 1983 violation that you've indemnified them?

15 MR. MURPHY: Well, we wouldn't indemnify
16 them in any circumstances, but there is one case
17 that said they were officers within the meaning of
18 1983. It was in the Southern District of
19 Ohio -- I'm sorry. I'm blanking on the name now.
20 But the Sixth Circuit cited it in a footnote.

21 JUSTICE GINSBURG: You mentioned two
22 categories of outside debt collectors for this
23 scheme. One was this special counsel, for whom you
24 are claiming exemption. Then you said there is this
25 other category.

1 How was it determined which kind of debt
2 collector the State is going to use, the one that
3 would be subject to the Act and the special counsel
4 who would not?

5 MR. MURPHY: You have to remember that
6 these are lawyers. And how the process works is at
7 JA 124 to 130, and let me just explain it briefly.

8 It starts in-house. In-house employees of
9 the office will send letters for most debts on our
10 own letterhead in an attempt to collect in-house.
11 When that proves unsuccessful, we go to third-party
12 vendors, which are essentially collections
13 associations which were the historically reason for
14 this Act. They're not lawyers; they're collections
15 associations. They send letters and make phone
16 calls. And that's basically what they do.

17 And that's the second step. So most debts
18 will go through this entire process, and so they
19 will be contacted by both these collections
20 associations.

21 And then the third step is special counsel,
22 and the reason why special counsel are generally the
23 third step is because that's when litigation becomes
24 a distinct possibility, so you need lawyers.

25 And that's what special counsel are here to

1 do, which is continue -- they continue to send
2 letters, and that's no doubt true, but then they may
3 bring legal options on the table. They bring
4 thousands of suits, as the two special counsel that
5 are involved in this suit have done.

6 So that's generally how the process works,
7 though -- and we've never -- we've never contested
8 that the collectors associations are officers within
9 the meaning of the Act.

10 And I think that gets back to the point
11 that our position is not -- our position is not that
12 all people collecting debts on behalf of the
13 government are exempt. Our position is officers
14 are. And so what does "officers" mean?

15 And there I think you should interpret that
16 broadly because the purpose of that is not to
17 interfere with government operations. And I think
18 this would interfere with our operations in the way
19 the office has long collected the billions of
20 dollars of State debts that it is required via
21 statute to collect.

22 And getting back to the substantive
23 standards, I do think Filarsky has full application
24 here for why it decided qualified immunity was
25 appropriate in the 1983 context. I think the

1 special counsel and the attorney general staff work
2 closely together, but then special counsel would be
3 the ones left holding the bag because there is no
4 dispute that the attorney general staff are exempt.
5 And so that would pull in the Filarsky point about
6 maybe it will deter the talented individuals from
7 collecting. Everybody agrees that these are vital
8 government operations. They are vital to the fiscal
9 health of the State. And that was a factor that
10 Filarsky relied on.

11 And then I think the third factor that
12 Filarsky relied on was just the distracting nature
13 of damages suits against the States. And I think
14 this, again, is Exhibit A, because imagine what will
15 happen if this case goes to trial. It's not just
16 going to involve special counsel. It will involve
17 our staff who have to respond to discovery and will
18 likely have to testify about how the operations
19 work.

20 So when they're so closely connected in
21 that way, I do think that it makes sense for the
22 exemption to be interpreted with its purposes in
23 mind. And when you look at the purposes and look at
24 what will happen if this case proceeds, I think
25 that's a good indication that these people are

1 officers, and I think they easily fall within the
2 historical definition of "officers."

3 The special deputy sheriffs, I think, is
4 the most analogous example, and there's plenty of
5 cases that have treated them as officers.

6 JUSTICE SOTOMAYOR: Could you tell me what
7 the definition is of "officer." Give me the
8 definition.

9 MR. MURPHY: I'm sorry.

10 JUSTICE SOTOMAYOR: What's your definition?

11 MR. MURPHY: Oh, my definition.

12 JUSTICE SOTOMAYOR: Your definition seems
13 to be tailored to this category. But tell me how --
14 what your general definition is.

15 MR. MURPHY: So the Dictionary Act,
16 authorized by law to perform the duties of the
17 office. And unlike collections associations, where
18 there is no authorization for the attorney general
19 to appoint collections associations, there is a law
20 that specifically authorizes us to appoint special
21 counsel --

22 JUSTICE SOTOMAYOR: Does the law not
23 authorize you to hire special --

24 MR. MURPHY: Well, just our general ability
25 to contract to perform our services.

1 JUSTICE SOTOMAYOR: So how is this
2 different from that?

3 MR. MURPHY: Because there is a specific
4 statute that express the -- delegates the attorney
5 generals' duty of debt collection to special
6 counsel. It's analogous to many laws that suggest
7 the way an office position is created is a superior
8 appointing an inferior.

9 The law in Hartwell that created -- there
10 was no office of clerk that -- called the clerk and
11 officer, just said assistant treasurers can appoint
12 the clerk.

13 JUSTICE KAGAN: How do you distinguish
14 Germaine, Mr. Murphy? Because that seems a very
15 similar kind of setup to your own. There is a
16 statute that allows a superior to appoint some
17 people, but those -- those contractors are --
18 sometimes there are more, sometimes there are fewer.
19 The duties aren't precisely defined, and the court
20 there says that's not an officer notwithstanding the
21 statute.

22 MR. MURPHY: So I would distinguish
23 Germaine and several other cases both legally and
24 factually. So start legally.

25 There is no dispute that Germaine was a

1 constitutional case. It was interpreted in the
2 meaning of the Appointments Clause, and this Court
3 said that when Congress uses the word "officer," it
4 can easily use it in a broader sense than in the
5 narrower constitutional meaning.

6 The Court said this in Steele when it said
7 that prohibition agents were officers within the
8 meaning of a statute that only allowed officers to
9 execute search warrants. And it said this in Lamar
10 when it said Congress were officers. So the Court
11 has repeatedly said that Congress can use the word
12 "officer" in a way --

13 JUSTICE KAGAN: So that's to say that we
14 take these cases, whether it's Germaine or, or your
15 side, Hartwell, and we put them in a different box?

16 MR. MURPHY: Exactly. We always caveated
17 Hartwell by saying it was a constitutional officer
18 basis. But, if they are a constitutional officer, I
19 think by definition you should think that they are a
20 statutory Officer.

21 And, factually, I do think that the surgeon
22 in Germaine was much more like the -- the surgeon in
23 Germaine was more like the collection association
24 than the special counsel themselves, and let me
25 explain why.

1 In Germaine the relevant office was the
2 office of pension commissioners, and his job was to
3 dole out pensions to appropriate parties. And so
4 that was the official duty. And the surgeon, all he
5 did was assist in helping with the duty.

6 But when somebody else has actually
7 delegated that duty, like a tax collector delegates
8 to a deputy collector of customs, the delegation of
9 the duty, it makes all the distinction in the world.

10 And Auffmordt is on the same basis. It was
11 a merchant appraiser. And the merchant appraiser
12 was held not to be an officer in the customs office
13 because they weren't actually going out and
14 collecting the relevant customs; they were just
15 helping the collector of customs.

16 But Steele also makes quite clear that
17 deputy collectors of customs would be officers
18 because that's a situation where the superior
19 officer is actually delegating his authority to the
20 inferior officer there, the deputy. And I think
21 that's the symmetry that matters here.

22 JUSTICE KAGAN: That seems -- if I
23 understood you correctly, that seems an odd line to
24 draw. It's the difference between delegating all of
25 your authority and delegating part of your

1 authority?

2 MR. MURPHY: No. What is the authority?

3 The authority of the attorney general's office and
4 the authority of the tax collector is to represent
5 the State in the court and to bind the State and to
6 bind the third party in the court. Collections
7 associations cannot do that. Special counsel
8 absolutely do that. That's their main job.

9 So just as -- for instance, assistant U.S.
10 attorneys would be consider officers because when
11 they stand up in court, they are representing the
12 United States because the statute allows the AG to
13 delegate those official duties to the deputy.

14 JUSTICE KENNEDY: Could you, Mr. Murphy,
15 address the point, whether this is misleading?

16 MR. MURPHY: Sure. I'll start at a high
17 level and then get into the specifics.

18 JUSTICE KENNEDY: In the course of that,
19 the statute says that you cannot falsely represent a
20 document to be issued by. And if you could address
21 that part of it.

22 MR. MURPHY: Sure. I will start there.

23 We think this is issued by the attorney
24 general's office when special counsel send a letter.
25 The official meaning of "issue" is to distribute in

1 an official capacity. When they send these letters,
2 they are distributing them in their official
3 capacity as special counsel to the attorney general.
4 So it's fully appropriate for the office to be
5 listed at the top in those circumstances.

6 I would draw, I guess, the analogy to
7 clerk -- or courts. Courts issue subpoenas all the
8 time through private attorneys nowadays, that the
9 clerk of the court doesn't actually sign the
10 subpoena anymore, but it has the name of the court
11 at the top, and a private attorney is authorized to
12 issue that subpoena.

13 So I think that analogy is -- this case is
14 an easier case, it seems to me, because special
15 counsel have a strong relationship to the attorney
16 general's office. But the very fact that a private
17 attorney can issue a contract subpoena suggests that
18 entities can issue things through people other than
19 independent contract -- or other than employees.

20 JUSTICE GINSBURG: What about the other
21 provision that is allegedly violated, the one that
22 proscribes use of any business or organization's
23 name other than the true name of the debt
24 collector's business or organization?

25 MR. MURPHY: It's essentially the same

1 logic. This strikes me as their true name when they
2 are special counsel to the attorney general. The
3 attorney general is their true name. It's their
4 true name because it distinguishes them when they're
5 acting as special counsel for the attorney general
6 and when they're acting as private counsel for some
7 private creditor.

8 JUSTICE KENNEDY: When they signed their
9 name at the bottom and gave their law firm name, was
10 that necessary?

11 MR. MURPHY: It was. As a technical
12 matter, it's necessary because the money gets sent
13 to them, so they have to --

14 JUSTICE KENNEDY: Necessary for compliance
15 with the Act?

16 MR. MURPHY: Oh. I mean, it clarifies the
17 relationship even more. It might be perhaps a
18 closer question if they hadn't, but if they had just
19 said special counsel, I would say, as a technical
20 matter, it's necessary because how it works is when
21 special counsel are assigned cases and individuals
22 send them checks, they send them to their address.
23 So we kind of have to.

24 JUSTICE BREYER: What about only -- the
25 recipient would think, at the least, the letter was

1 authorized by the attorney general? What the
2 statute says is special counsel can use the
3 letterhead stationery only in connection with tax
4 collection. Doesn't it? It says -- here it says,
5 "The special counsels use the letterhead stationery,
6 but only in connection with such claims arising out
7 of those taxes."

8 This isn't a tax. So he gets the letter,
9 and he thinks, maybe at least the letter is an
10 authorized letter. But it isn't an authorized
11 letter because the statute says you can't authorize
12 him to do it.

13 MR. MURPHY: We disagree with that view of
14 the statute. We think the statute says -- the first
15 part of the statute says they shall use this
16 letterhead, and the second says "but only in."

17 We interpret that statute -- not just this
18 attorney general but several other attorney generals
19 have interpreted this statute only to require it in
20 those tax contexts and to leave it to the attorney
21 general in other context. And they haven't
22 challenged that. At JA 114 to 115, they
23 categorically deny it.

24 And I think this turns a virtue into a
25 vice, by the way. When they put our letterhead on

1 there, it shows to consumers that they can actually
2 call with concerns if they have concerns with
3 special counsel or if they have concern with the
4 debts.

5 But if there is no further questions, I'd
6 like to reserve the remainder of my time for
7 rebuttal.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Rosencranz.

10 ORAL ARGUMENT OF E. JOSHUA ROSENCRANZ

11 ON BEHALF OF THE RESPONDENTS

12 MR. ROSENCRANZ: Thank you, Mr. Chief
13 Justice, and may it please the Court:

14 Your Honors, both questions presented
15 really revolve around a single point: Private
16 debt collectors retained as independent counsel for
17 or by a State attorney general are not State
18 officers. They are not the attorney general. They
19 are not from his office. And they cannot legally
20 hold themselves as being from his office.

21 When the consumer sees letterhead that says
22 "Office of the Attorney General," she thinks the
23 letter comes from within that office, not from a
24 professional debt collector with a personal
25 financial stake in the outcome of the ensuing

1 conversation.

2 Congress saw the distinction. And as two
3 of the questions from the Court suggested from
4 Justice Ginsburg and Justice Kagan, the Act is
5 actually built around this fundamental distinction.
6 It's in the overarching definition of "debt
7 collector," which defines the Act's coverage as "any
8 person who regularly collects debts owed another."
9 And then it's in each of the two provisions that
10 have gotten a lot of focus from General Murfree's
11 argument this morning, the two provisions that
12 provide carve-outs. One says that the Act does not
13 cover any officer or employee of a private business;
14 the other says the Act doesn't cover any officer or
15 employee of a State.

16 CHIEF JUSTICE ROBERTS: If I could clarify,
17 there may be two separate questions that may be part
18 of your answer. But are these officers under State
19 law -- whether they are under the debt collection
20 Act or not is a separate question. Is it right that
21 they're properly considered officers under State law
22 because that is how the attorney general has
23 designated them and views them?

24 MR. ROSENCRANZ: Absolutely not, Your
25 Honor. Ohio law is the same as the law that's

1 codified in the Dictionary Act. It's the same law
2 that this Court has adopted in Metcalf. There has
3 to be a permanent and continuing position. It has
4 to be duties that are created by law, not --

5 CHIEF JUSTICE ROBERTS: That's not true
6 with respect to qualified immunity. There doesn't
7 have to be a permanent -- I'm sorry. What was the
8 other adjective? Permanent and what?

9 MR. ROSENCRANZ: Permanent and continuing
10 office.

11 Yes, Your Honor, you are exactly right.
12 Filarsky is a qualified immunity case. Filarsky did
13 not conclude that the person who got qualified
14 immunity were officers. It concluded that they got
15 qualified immunity even though they were not
16 officers, just like in common law.

17 Common law provided the posse comitatus --
18 you know, the posses who were deputized -- qualified
19 immunity even though they were not officers. And
20 this goes back to whether we're talking about the
21 Dictionary Act definition or the definition of
22 common law.

23 Collections special counsel are simply not
24 Officers even by designation of the attorney
25 general. I mean, the attorney general has done

1 everything humanly possible to divorce these
2 individuals from the State.

3 CHIEF JUSTICE ROBERTS: But they authorized
4 it --

5 I'm sorry. Go ahead.

6 JUSTICE GINSBURG: I think you have
7 recognized -- tell me if I'm wrong about this --
8 that the special counsel could send out a dunning
9 letter, and the first sentence says, in boldface,
10 "We write to you as special counsel to the attorney
11 general who has authorized us to collect a debt you
12 owe to X government agency."

13 That would be perfectly all right. No
14 attorney general letterhead, but that opening
15 sentence would be okay. "We have been authorized by
16 the attorney general to collect a debt you owe to a
17 State agency." No problem with that.

18 MR. ROSENCRANZ: That's correct, Your
19 Honor.

20 So just to be clear, we're shifting ground
21 now to point 2 which is about whether it's a
22 violation of the statute. And it is a violation of
23 the statute because -- but I think in your
24 hypothetical, Your Honor, the letterhead is the law
25 firm's own letterhead. So it's a violation of the

1 statute in this context because they are using the
2 true name of the attorney general as their own true
3 name. And, in the context that you just described,
4 Your Honor, they are simply referring to who the
5 client is or who it is that has hired them.

6 JUSTICE ALITO: I don't really see the
7 difference between those two situations. But even
8 to push the point a little bit further, suppose the
9 State created a special seal for the special debt
10 collections program of the State of Ohio or
11 something like that, and they put that at the top of
12 the letterhead.

13 Would that be a violation of the statute?

14 MR. ROSENCRANZ: Again, so now we're
15 talking about the substantive provisions. And that
16 I'm happy to shift there. I think it probably would
17 not be. I would have to know a little bit more
18 about what the seal says and whether it conveys
19 to --

20 JUSTICE ALITO: It's the seal of the State
21 of Ohio, and it says "The Program of Special Debt
22 Collection."

23 MR. ROSENCRANZ: Oh, Your Honor, I think
24 that would be highly misleading. It would violate
25 the same provisions that we're talking about.

1 JUSTICE ALITO: Why would it be misleading?
2 What would the recipient of that letter think that
3 the recipient of the letter would not think if that
4 recipient received the letter from the actual office
5 of the attorney general?

6 MR. ROSENCRANZ: So I think the recipient
7 of the letter would think the same thing that the
8 recipient of this letter thinks. Let me just turn
9 to what the recipient of this letter thinks.

10 Just common, everyday experience, when you
11 receive a letter that says at the letterhead "Office
12 of the Attorney General," you think that the source
13 of the letter is coming from someone within the
14 attorney general's office.

15 JUSTICE KAGAN: I'm not sure what
16 difference it makes. I mean, it seems to me that a
17 letter like this gives you two kinds of information.
18 One is it says "You owe some sum of money to the
19 State," and that's perfectly true. And the other is
20 that the person signing the letter is acting as an
21 agent of the State, to collect that sum of money.
22 And that seems perfectly true too.

23 So, you know, the letterhead is just a way
24 of saying, "I'm acting as an agent of the State to
25 collect a sum of money owed to the State. And, yes,

1 if you don't pay this sum of money, the State is not
2 going to feel all that good about you." So it's all
3 true.

4 MR. ROSENCRANZ: Your Honor, so let's go to
5 the text of the statute, and Congress was very clear
6 about that. The letters use a name other than the
7 "true name" of the debt collectors --

8 JUSTICE KAGAN: Well, you can't really be
9 very serious about that, because in Justice
10 Ginsburg's hypothetical, they were using the name of
11 the attorney general too.

12 MR. ROSENCRANZ: No, Your Honor --

13 JUSTICE KAGAN: One uses name in the text;
14 one uses the name in the letterhead, but both are
15 designed to do the exact same thing, which is to
16 say, "I'm acting as agent of the Ohio Attorney
17 General in order to collect a sum of money owed to
18 the State."

19 MR. ROSENCRANZ: Your Honor, they are doing
20 two different things. The statute talks about using
21 your own true name, and then what you can't do is
22 use someone else's true name as your own. The
23 statute doesn't prohibit referring to your client or
24 referring to the person who hired you in the text of
25 the letter. That's not using someone else's name.

1 That is correctly conveying information.

2 JUSTICE ALITO: I thought Justice Kagan
3 asked you a functional question, and you are
4 responding with a formal answer. And you may win on
5 formal grounds, but if we could go back to the
6 functional point.

7 Let's suppose that I received two letters.
8 One is the letter, and I owe a debt to the State of
9 Ohio. And one is the letter that was sent in this
10 case; the other is a letter that's identical except
11 that it is signed by an assistant attorney general
12 of the State of Ohio.

13 Why do I have a different reaction to the
14 former letter as opposed to the latter?

15 MR. ROSENCRANZ: Well, Your Honor, my
16 answer is the attorney general's answer on pages 416
17 to 17 and page 334. The attorney general explains
18 why he and the various debt collectors want to use
19 attorney general's letterhead. And they say it's
20 because, quote, they want -- they want to "get the
21 debtor to prefer the debt with the State over and
22 above these other debts."

23 The attorney general believes that this
24 letterhead communicates something that letterhead of
25 Wiles, Boyle does not.

1 JUSTICE ALITO: No, you're not answering my
2 question. I wasn't asking you to compare the letter
3 that was sent with a letter that makes no reference
4 to the Attorney General of Ohio.

5 I'm asking you to compare a letter that is
6 sent by an assistant attorney general, identical in
7 all other respects to the letter that was sent in
8 this case with the type of letter that was sent
9 here.

10 What -- is there a difference in the
11 reaction of the average consumer, the least
12 sophisticated consumer, to those two letters?

13 MR. ROSENCRANZ: Yes, Your Honor. I would
14 have a different reaction to those two letters.
15 When I hear from someone who is in the attorney
16 general's office, I think I am communicating with
17 someone who is a public servant, who is doing his
18 earnest --

19 JUSTICE BREYER: You know, they all the
20 time hire people to do different things who aren't
21 public servants. I mean, why would you think that?
22 I don't know. I think he's a public servant. Do I
23 think he's an officer or a contractor or a -- no
24 average person has any idea what we're talking
25 about.

1 MR. ROSENCRANZ: Your Honor, people react
2 differently and I would react differently --

3 JUSTICE BREYER: Well, you might. But what
4 the statute says, it says the -- here's what it says
5 literally: "The use -- it is wrong to use any
6 business, company or organization's name other than
7 the true name." Right?

8 MR. ROSENCRANZ: Yes.

9 JUSTICE BREYER: So if Filene's Basement
10 hires Mr. Smith, who is an independent collector,
11 and Mr. Smith writes a letter -- just what Justice
12 Ginsburg said. It says, Filene's Basement has asked
13 me to write to you to say will you please pay their
14 debt. Okay? There. They've used a name other than
15 their own name. The statute doesn't cover that,
16 does it?

17 MR. ROSENCRANZ: Of course not. And
18 that's --

19 JUSTICE BREYER: Of course not.

20 Now, in other words, it has to be taken as
21 modified by the first part of this. There has to be
22 something that's false, deceptive, or misleading
23 about it.

24 MR. ROSENCRANZ: No, Your Honor --

25 JUSTICE BREYER: If you don't interpret it

1 that way, I don't see what it can mean, unless it
2 picks up the -- Justice Ginsburg's hypothetical.

3 MR. ROSENCRANZ: Your Honor, the reason I
4 said "of course not" is because referring to someone
5 in the body of the letter is not the same as using
6 their -- their --

7 JUSTICE BREYER: It isn't? I have just
8 used their name.

9 MR. ROSENCRANZ: Your Honor --

10 JUSTICE BREYER: I said they hired me.
11 Isn't that using their name?

12 MR. ROSENCRANZ: It is -- no. If that's
13 what the statute --

14 JUSTICE BREYER: In English. I'm not
15 talking about in statutes.

16 MR. ROSENCRANZ: No, Your Honor. If that's
17 what the statute meant, then it would mean that you
18 couldn't use the signatory's name either or --

19 JUSTICE BREYER: Of course. It would be
20 ridiculous. And, therefore, it isn't to be taken
21 literally to refer to any use. And I guess in
22 context it could be taken to mean a misleading use.
23 And if it means a misleading use, I see nothing here
24 misleading. What is it?

25 MR. ROSENCRANZ: Well, so, Your Honor --

1 JUSTICE BREYER: And if there is nothing
2 here misleading, and it doesn't mean misleading use
3 and it doesn't mean ordinary English use, what does
4 it mean?

5 MR. ROSENCRANZ: Your Honor, the -- a
6 central premise of this statute, as I said at the
7 outset, is to distinguish in-house creditors from
8 outside creditors. Why? Because outside creditors
9 were the ones who were guilty of the worst abuses.
10 Outside creditors were the ones who misled, and
11 Congress was trying to make sure that when the
12 consumer is talking to a debt collector, they knew
13 who they were precisely because the reputational
14 interests of the attorney general's office are
15 guarded by people within the attorney general's
16 office in a way that debt collectors don't
17 necessarily guard the interests of the attorney
18 general's office. And an in-house --

19 JUSTICE KAGAN: Well, I think -- I would
20 think that that would be a reason for using the --
21 the heading, because now the -- the Ohio Attorney
22 General is responsible for all the actions that this
23 debt collector is going to take. And the Ohio
24 Attorney General is going to be more vigilant in
25 policing the actions of that debt collector. You

1 should want that.

2 MR. ROSENCRANZ: Well, Your Honor, that
3 may -- in some world, that may be conceivably true.
4 But it's not necessarily true. I mean, the -- the
5 Petitioners have conceded that when a debt collector
6 does this with IBM's letterhead, it would be a
7 violation precisely because --

8 JUSTICE BREYER: Why? Why? Why? Filene's
9 Basement hires a service, and they say, here are 500
10 letters, and they all say "Filene's Basement." Now,
11 we want you to send out on these letters --
12 letterhead so they'll know it's us -- you say -- and
13 you say you're a special representative hired by us
14 to pay the debt.

15 Now, what's wrong with that? I would think
16 it would be -- I mean, what worries me is when you
17 don't have the letterhead. Then it it could be some
18 scam. You see? But when you do have the
19 letterhead, they're really getting themselves into
20 trouble if it's a scam. And this isn't a scam.

21 MR. ROSENCRANZ: Well, Justice Breyer,
22 the -- it gets back to the -- the question you had
23 when you made originally when General Murfree was up
24 here. I mean, the -- it can't be that just because
25 you are referring to someone's name in the

1 letterhead, you used their name, because Section G
2 talks about the requirement that you actually have
3 to identify the creditor.

4 And in the --

5 JUSTICE BREYER: So identifying the
6 creditor.

7 My point is, if it's the AG's letterhead or
8 Filene's Basement's letterhead or Macy's letterhead,
9 if they still exist, in -- in -- if -- if it's the
10 official letterhead of the company, the recipient is
11 more likely, not less likely, to understand what's
12 happening. That's -- as long as -- yes. You see my
13 point?

14 MR. ROSENCRANZ: I see your point.

15 JUSTICE BREYER: Okay. Then what's the
16 answer to my question?

17 MR. ROSENCRANZ: And -- and the answer is,
18 Congress made the decision. I know -- I know that
19 embedded in your question is the assumption that
20 there is a -- a materiality requirement built into
21 the first provision; that is, the first sentence.
22 But Congress articulated a statute that said it is a
23 violation to do any of the following things. And
24 when Congress said it's a violation to do any of the
25 following things, it's not up to the courts to -- to

1 override Congress that --

2 JUSTICE KAGAN: I don't think that this is
3 a materiality question. I actually do think that
4 this is just a question of is it false or not. Is
5 there anything false about using the attorney
6 general's letterhead when you're an agent of the
7 attorney general? That's the question.

8 MR. ROSENCRANZ: Well, so, first, just a
9 point of clarification. The attorney general's
10 contract with these individuals says that they are
11 not an agent.

12 But the direct answer to the question is --

13 JUSTICE KAGAN: Well, they obviously are an
14 agent in all the usual uses of that term. They're
15 acting for the Attorney General in collecting a
16 debt. And the question is, is there anything false
17 about saying, by way of the letterhead, I'm acting
18 for the attorney general?

19 MR. ROSENCRANZ: Your Honor, it's totally
20 fine to say I am acting for the attorney general.
21 You can't do it using the --

22 JUSTICE KAGAN: Well, why? If you -- if I
23 use my own letterhead, somebody is likely to throw
24 it out before they get to the text because they've
25 never seen this organization before. You know, the

1 letterhead is a good way of really making the point,
2 I am acting for the attorney general.

3 MR. ROSENCRANZ: Your Honor, the Congress
4 wanted individuals who are unsophisticated to know
5 who they were dealing with, especially when they
6 were dealing with a professional debt collector who
7 gets a cut of the proceeds.

8 JUSTICE KAGAN: But they're dealing with
9 somebody who is acting for the attorney general.

10 MR. ROSENCRANZ: They are -- yes, they are,
11 but they are dealing with someone who is acting for
12 the attorney general in a context in which Congress
13 was deeply concerned about how those individuals
14 have the wrong incentive structures and will do
15 anything to get their third of the proceeds.

16 JUSTICE KENNEDY: But -- but you're making
17 the argument somewhat the -- like the argument that
18 you made in the brief. The -- the debtor gets the
19 letter from the attorney general, says, oh, the
20 attorney general, I'm really concerned. They ought
21 to be concerned because the State of Ohio can
22 garnish their tax for the unpaid debt. It -- it's
23 different. They -- they ought to know that it's the
24 State. And you -- you say they don't -- for some
25 reason you don't want them to be intimidated because

1 they know it's the State.

2 MR. ROSENCRANZ: Your Honor, my --

3 JUSTICE KENNEDY: The State has a very
4 strong interest in letting the debtor know that it's
5 the -- that it's its debt.

6 MR. ROSENCRANZ: Your Honor, my main point
7 is that Congress wanted people to know -- that is,
8 consumers to know who they're dealing with.

9 But to answer the question, it is simply
10 not true that every debtor is better off paying the
11 State's debt than some other debt. The Attorney
12 General of Ohio does not have many more powers than
13 anyone else has. And if you're choosing between
14 paying --

15 JUSTICE KENNEDY: That's -- that's for the
16 debtor's decision to make. That's the debtor's
17 decision.

18 MR. ROSENCRANZ: Exactly. But the debtor
19 needs to --

20 JUSTICE KENNEDY: But you -- it -- it seems
21 to me that you -- your -- your solution is almost
22 misleading in -- in another direction.

23 MR. ROSENCRANZ: Your Honor, there is
24 nothing wrong with the debt collectors saying
25 everything that you've just described as -- as to

1 what could happen just because the State is
2 involved. The truth is, the State has very few
3 powers -- I mean, they have the power to take your
4 lottery winnings. They have -- I mean -- and most
5 debtors actually don't have a lot of lottery
6 winnings. They have the power to -- to take your
7 income tax refund. Most debtors do not expect an
8 income tax refund anytime soon. That's it. The
9 State has no additional power.

10 And it is actually misleading to try to
11 convey to these individuals why it is that -- excuse
12 me. It's misleading to convey to these individuals
13 that the debt collectors are from within the office.

14 JUSTICE SOTOMAYOR: Basically, this
15 argument, as I understand it -- maybe you can
16 correct me -- is that even a private collector could
17 use the name of Filene's Basement because it's not
18 misleading. It's telling the person, assuming they
19 say, "I have been hired by Filene's Basement to
20 collect your debt on Filene's Basement's letterhead
21 and sign it "debt collector X, Y, and Z." Under
22 this argument, that would be okay because it's not
23 misleading?

24 MR. ROSENCRANZ: I -- I got confused on the
25 question, but under the -- under --

1 JUSTICE SOTOMAYOR: Well, the questions
2 have been asked of you. That would be the import.

3 MR. ROSENCRANZ: Yes. Yes. That is
4 correct.

5 CHIEF JUSTICE ROBERTS: No. Wait, wait --

6 JUSTICE SOTOMAYOR: And if I understand you
7 correctly, you're saying we make a different
8 judgment than Congress is about the relative weight
9 of how misleading this is, but Congress made this
10 judgment?

11 MR. ROSENCRANZ: Congress -- that is
12 exactly correct, Your Honor. Congress made this
13 judgment on the very specific -- on the very
14 specific terms, the enumerated violations, Congress
15 said it's misleading to do this.

16 And Congress wanted to --

17 CHIEF JUSTICE ROBERTS: I'm sorry. I don't
18 want to interrupt, but I'm confused about your
19 answer and maybe the question, or maybe both.

20 Did you say -- as I understood the
21 question, you have letterhead that says "Filene's
22 Basement," and it's a private collector who's acting
23 on behalf of Filene's Basement. Is that misleading?

24 MR. ROSENCRANZ: Yes, for exactly the
25 reason that the attorney general conceded below.

1 The concession was about IBM. But it's the same
2 exact point.

3 Debt collectors are different from the --
4 from the creditors, and Congress wanted people to
5 know with whom they were communicating.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 MR. ROSENCRANZ: Thank you, Your Honor.

8 ORAL ARGUMENT OF SARAH E. HARRINGTON

9 ON BEHALF OF THE UNITED STATES

10 CHIEF JUSTICE ROBERTS: Ms. Harrington?

11 MS. HARRINGTON: Thank you, Mr. Chief
12 Justice, and may it please the Court:

13 I'd like to make a couple of points on the
14 first question presented and then try to answer some
15 questions on the second question presented.

16 The FDCPA applies to Ohio's debt collection
17 special counsel because outside the context of this
18 litigation, Ohio has chosen not to treat them as
19 officers or employees of the State. There has been
20 some discussion in the top half about Ohio Code
21 Section 109.08. Excuse me. General Murfree has
22 conceded that that does not create an office of
23 special counsel.

24 Just as a side note, the Office of U.S.
25 Solicitor General is described and duties are given

1 in the Code of Federal Regulation. There is no
2 similar set of regulations that would create an
3 office of special counsel here.

4 But even if you were to assume, for the
5 sake of argument, that the statute -- I'm sorry --
6 authorized the attorney general to create an office
7 of special counsel and to treat the people that
8 hired as special counsel as officers, that is not
9 done so here.

10 In the retention agreement, the attorney
11 general has been careful to say that these people
12 are not to be considered employees of the State for
13 any purpose. The agreement not only does not
14 indemnify the special counsel; it requires the
15 special counsel to indemnify the State. It doesn't
16 give them any rights to collect any debts. It gives
17 the attorney general complete discretion over what
18 debts the special counsel may collect.

19 CHIEF JUSTICE ROBERTS: If you have a
20 special -- I don't know what you call them --
21 prosecutor, special counsel who's appointed from
22 U.S. Attorney's Office, say, because the
23 other -- the office is recused from a particular
24 matter, just for that one case, does he use -- maybe
25 as factual matter, does he use the letterhead of the

1 U.S. Attorney's office?

2 MS. HARRINGTON: I don't know in
3 prosecuting cases. When the Federal government
4 hires outside debt collectors to collect debts owed
5 to the Federal government, they do not use -- those
6 people do not use Federal government letterhead.

7 JUSTICE BREYER: What about -- the states
8 often do this. They hire a special lawyer to
9 prosecute a special case -- it could be from a
10 firm -- or it could be a set of cases. Could last a
11 year.

12 Now, are all of the people who do that, who
13 fulfill that job -- it's not normally done
14 federally, could be, I guess -- are they officers or
15 not?

16 MS. HARRINGTON: Well, I think -- you know,
17 this Court, all the time, sees private lawyers who
18 are here representing States, and I don't think that
19 they would be considered officers of the State
20 merely because --

21 JUSTICE BREYER: So if Mississippi hires a
22 person to prosecute a murder case and it's called
23 "special counsel" for the purpose of prosecuting
24 murder cases for the next year, whatever, they're
25 not officers?

1 MS. HARRINGTON: Well, I guess my real
2 answer is it's really up to the State. And so you
3 would look at how the State treats those people.

4 Here, if you look at how the State has
5 treated the special -- the debt collection special
6 counsel, outside the context of this litigation, it
7 does not treat them as officers or employees. In
8 the retention agreement, the attorney general has
9 done everything possible to disclaim any inference
10 that these people are part of the State government.

11 JUSTICE BREYER: That's true.

12 CHIEF JUSTICE ROBERTS: But he authorizes
13 use of the seal.

14 MS. HARRINGTON: He authorizes the use of
15 the letterhead, but --

16 CHIEF JUSTICE ROBERTS: Well, that's -- you
17 said they've done everything possible to separate
18 them from the attorney general. That seems to be a
19 pretty good effort to connect them to the attorney
20 general.

21 MS. HARRINGTON: But as you can --

22 CHIEF JUSTICE ROBERTS: "Here, use our
23 stationery and our letterhead."

24 MS. HARRINGTON: But that -- the use of the
25 letterhead doesn't -- isn't giving them any sort of

1 sovereign authority, doesn't give them any
2 discretion to bind the States. It doesn't create an
3 office.

4 You know, if you have nine special counsel
5 one day and then eight special counsel the next day,
6 you don't think of there being a vacancy in the
7 office of -- office of special counsel. Generally
8 when you have an office, you either have an officer
9 or a vacancy. But here there's just -- the attorney
10 general can hire any number of special counsel --

11 CHIEF JUSTICE ROBERTS: I guess my point is
12 simply that authorizing use of the seal does suggest
13 a connection with the individual doing the debt
14 collection work and the attorney general. And you
15 said there's no way -- or they've done everything
16 possible to show there's no connection.

17 MS. HARRINGTON: Well --

18 CHIEF JUSTICE ROBERTS: I can't imagine
19 anything they could do more dramatically to -- to
20 show that there is a connection than say, "Here, use
21 my letterhead."

22 MS. HARRINGTON: Well, I think if you look
23 at retention agreement, what I meant is they've done
24 everything possible in structuring the relationship
25 between the special counsel and the office of

1 attorney general to make clear that they are not a
2 part of the office.

3 Now, with respect to using the letterhead,
4 I think that's intended to sort of convey a sense of
5 seriousness to debtors who receive the letters.
6 That's the point that -- that the State has made.

7 CHIEF JUSTICE ROBERTS: Well, I expect it's
8 meant to convey that this person is working for us.
9 This person, I, the attorney general, think this is
10 somebody who's acting on my behalf.

11 MS. HARRINGTON: Well, it's true that
12 outside debt collectors are acting on behalf of the
13 creditors who hire them, but that does not make them
14 part of the creditor organization.

15 You know, I think if you look at the
16 definition of "debt collector" and the exemptions
17 whether, with respect to private creditors or -- or
18 public creditors, it's clear that Congress intended
19 this statute to apply to independent contractors.

20 But it also intended to allow creditors,
21 whether private or public, to use their own in-house
22 people without being subject to the requirements of
23 the Act.

24 And so it's really totally up to the State.
25 If it's going to use its inside people, then it

1 doesn't have to comply with the FD CPA. But when it
2 hires outside third-party contractors, it does.

3 If I could just address what Justice Breyer
4 was asking about, the use of your true name, I think
5 if you filled out a form that asked for your name
6 and then said, "Have you used any other name?" you
7 would take that to mean as your own name. And so I
8 think that's the sense in which the statute means
9 the use of another name.

10 There's generally --

11 JUSTICE BREYER: Well, this isn't that.
12 Nobody thinks this person is the attorney general of
13 the State.

14 MS. HARRINGTON: Well, I think --

15 JUSTICE BREYER: The reason that's
16 underlying disturbing me is there is a pretty
17 well-known scam where people get phone calls from a
18 person who identifies himself as somehow connected
19 with the IRS, and you better send them \$300 or
20 \$3,000 immediately to a certain post office box or
21 you might find yourself in jail. Okay? Now, that's
22 a scam.

23 MS. HARRINGTON: Right.

24 JUSTICE BREYER: And if you get a letter
25 out of the blue by somebody purporting to be an

1 official person and there is nothing on the
2 letterhead that suggests that you are such, you
3 might well think, if you've at least had the
4 experience I'm talking about, that this is a scam.

5 And so what the purpose of this letterhead
6 does is it is some indication to the recipient that
7 it's not a scam, and the rest of the letter makes
8 clear precisely what it is.

9 So what I fail to see is anything at all
10 misleading -- indeed, to the contrary -- in respect
11 to using a letterhead. And if there is nothing
12 misleading at all about it, I think I could
13 interpret this statute that requires the contrary
14 requirement in some form or other.

15 MS. HARRINGTON: Well, sir, I disagree that
16 there's nothing misleading about it. I think it
17 gives the impression that the letter was issued by
18 the office of the attorney general, because there is
19 a convention that, when you use the letterhead,
20 that's signaling who the sender of the letter is. A
21 law firm would never send a letter using its
22 client's letterhead because that would give the
23 wrong impression about who's sending the letter.

24 JUSTICE BREYER: Why is it not sent by the
25 attorney general in the sense that Filene's Basement

1 gives 500 pieces of stationery to a debt collector
2 and says, "Send them on this stationery. I want
3 people to know it comes from us"?

4 MS. HARRINGTON: Well, that would be a
5 violation of the Act, too, if the debt collectors
6 were outside the independent contractor --

7 JUSTICE BREYER: My goodness, then what
8 we're going to have is all -- in other words,
9 it's -- in your interpretation of this law, a piece
10 of stationery that tends to indicate that the debt
11 is -- the debt collector is indeed speaking for whom
12 he purports to speak for, anything that indicates
13 that in the view of the government violates this
14 statute. I'd worry about it just as a practical
15 matter because I think that might lead to more scams
16 rather than fewer.

17 MS. HARRINGTON: I don't believe that's our
18 view of the statute. I think the -- you know,
19 the -- the FDCPA is premised on separating the
20 creditor from outside third-party debt collectors.
21 And so a debt collector has to be clear that he is
22 not the creditor. And so when they use the
23 creditor's letterhead, that gives a false
24 impression. If they're worried that they're not
25 going to be taken seriously, they can include with

1 the letter, a separate letter from their -- from the
2 creditor, from the attorney general, saying we
3 authorized this person.

4 JUSTICE BREYER: It's not being taken
5 seriously. It's the false impression that -- we
6 want the true impression that this comes from the
7 person to whom you owe the debt.

8 MS. HARRINGTON: So you could include a
9 separate piece of paper that verifies that, if
10 you're concerned about that.

11 JUSTICE BREYER: Oh, my goodness. The
12 simple way to do that is send it on the stationery
13 of that purpose.

14 MS. HARRINGTON: But Congress has made a
15 determination that --

16 JUSTICE BREYER: I don't see anything here
17 that says you cannot send it on a letterhead of the
18 person for whom you owe the debt. I just don't see
19 that written here.

20 MS. HARRINGTON: Well, what Congress said
21 is you can't give a misimpression as to who has
22 issued the letter --

23 JUSTICE BREYER: Misimpression. And the
24 misimpression?

25 MS. HARRINGTON: The misimpression is that

1 the attorney general's office has issued the letter.
2 Now, remember, the only reason we're getting to the
3 second question presented is if the special counsel,
4 our officers, are not --

5 JUSTICE ALITO: Suppose --

6 MS. HARRINGTON: -- officers --

7 JUSTICE ALITO: Suppose that the special
8 counsel prepares a letter just like the letter
9 that's -- that was issued in this -- letters issued
10 in this case. But before they send it, they take it
11 to the attorney's office -- attorney general's
12 office. They show it to somebody there. And they
13 say, do you authorize me to send this? And the
14 person says, yes, you're authorized to send it.
15 Would it be misleading under those circumstances?

16 MS. HARRINGTON: It would, because it would
17 still give the impression that it was issued by the
18 office of the attorney general. And if it's sent by
19 the third-party outside debt collector, then it's
20 not issued by the office of the attorney --

21 JUSTICE ALITO: Even though it's
22 approved -- suppose that they -- they take it to
23 General DeWine, and they say, General, I would like
24 to send this. Am I authorized to send it? He says,
25 yes, that's fine. That's still misleading?

1 MS. HARRINGTON: Yes, because in section --
2 Section 9, it talks about authorized, issued, or
3 approved by a State agency. And so if you give the
4 misimpression as to any one of those things, then
5 it's a per se violation of the statute.

6 JUSTICE KENNEDY: It's your -- it's your
7 position -- it's the position of the government of
8 the United States that the Attorney General of Ohio
9 is in violation of this law?

10 MS. HARRINGTON: No, that the special
11 counsel are in violation --

12 JUSTICE KENNEDY: No. But he's approved
13 it.

14 MS. HARRINGTON: He's -- he has sanctioned
15 a violation of the law. But I --

16 JUSTICE SOTOMAYOR: But under your
17 position, the -- the attorney general of the State
18 of Ohio is in violation of the law. That's the
19 position of the United States that you're arguing in
20 this court?

21 MS. HARRINGTON: No, sir. Our -- may I
22 answer?

23 JUSTICE KENNEDY: Sure.

24 MS. HARRINGTON: Our view is that the
25 attorney general has authorized the special counsel

1 to do something that is a violation of the law. He
2 has not himself -- he is not subject to the law, so
3 he has not himself violated the law.

4 JUSTICE KENNEDY: Well, the next time you
5 come here in a criminal or a civil case and someone
6 has authorized something, I will remind you of your
7 answer.

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Murphy, you have four minutes
11 remaining.

12 REBUTTAL ARGUMENT OF ERIC E. MURPHY

13 ON BEHALF OF THE PETITIONERS

14 MR. MURPHY: Thank you, Mr. Chief Justice.
15 Just a few points.

16 First, going to Justice Kagan's question, I
17 really think they are turning a virtue into a vice
18 here. They're flipping the Act on its head. If
19 you -- if you look at the tax statute that requires
20 the AG to give this letterhead to special counsel
21 for tax debts, the very next provision -- the very
22 next provision of that Act, which was known as the
23 Taxpayer Bill of Rights, the very next provision of
24 that Act requires the AG to appoint problem
25 resolution officers to handle complaints by debtors

1 about special counsel or the employee assigned to
2 the case.

3 JUSTICE SOTOMAYOR: How do they know who to
4 call?

5 MR. MURPHY: Precisely because the AG's
6 letterhead --

7 JUSTICE SOTOMAYOR: Does the Act say that
8 the special debt collector has to give them the AG's
9 problem-solving --

10 MR. MURPHY: No. But I think that -- that
11 was the point of the law, was to put the letterhead,
12 so they know to call the office. And then we have
13 the regular customer service hotline that they can
14 call and they'll -- they'll get --

15 JUSTICE SOTOMAYOR: But that's quite
16 interesting, because the only number that's in these
17 letters is the net -- number of the debt collector.

18 MR. MURPHY: Well, that's right. But by
19 putting the letterhead on the -- on --

20 JUSTICE SOTOMAYOR: Is there any obligation
21 in the contract for the debt collector, when he
22 receives a customer complaint, to give them the
23 number of the AG's customer service --

24 MR. MURPHY: There's not an obligation in
25 the contract, but there certainly is an obligation

1 in the contract for them to report that complaint to
2 the AG.

3 And I -- I -- I think that the AG has
4 interpreted these problem resolution officers more
5 broadly to allow it to handle all sorts of
6 complaints. But I think the reputational idea is
7 also significant, because when the AG authorizes
8 these individuals to use the letterhead, that's a
9 powerful incentive on the AG or the AG's office --

10 JUSTICE BREYER: It also uses the word
11 "issued." And so what about "issued"?

12 MR. MURPHY: Well, I think that -- just
13 look at the -- we're the only party that has
14 actually cited the dictionary definition of "issue."
15 And the dictionary definition of "issue" is to
16 distribute in their official capacity.

17 So when special counsel send these letters,
18 they are distributing it in their official capacity
19 as special counsel to the attorney general, not as
20 private lawyers with their private law firms. I
21 think that's an easy interpretation of "issue" that
22 would authorize the --

23 JUSTICE KAGAN: But if we get to the second
24 question, we've already decided that these people
25 are not officers. They're independent contractors.

1 They might be agents in a casual sense of the word,
2 but they're not officers.

3 MR. MURPHY: That's absolutely correct.
4 Our first-level answer would be that they are --
5 should be --

6 JUSTICE KAGAN: Right. So if we assume
7 that they're not officers, then I think Justice
8 Breyer's question holds: What does it mean for that
9 person to issue something as opposed to the Ohio --

10 MR. MURPHY: I do think that you -- I do
11 think that they're distributing it in their official
12 capacity as special counsel. Whether they're
13 independent contractors, officers, or employees, I
14 think that's a separate question.

15 And then I think it goes to the clear
16 statement rule with respect to Justice Kennedy's
17 comment. I think it's just a fundamental breach of
18 etiquette, or of federalism, to suggest that private
19 parties are the ones who get to decide who gets to
20 use an attorney general's letterhead.

21 JUSTICE KAGAN: May I ask you --

22 CHIEF JUSTICE ROBERTS: I think that
23 question should be with the attorney general.

24 JUSTICE SOTOMAYOR: That's fine. But as
25 far as I see it, isn't there one of these two cases

1 where someone who wasn't the special counsel signed
2 the letter?

3 MR. MURPHY: That's absolutely true. But
4 they've waived that argument because their theory of
5 the case is that it's just the letterhead that's
6 misleading. And I can easily -- I can get into the
7 facts of that issue.

8 That issue was this person got a call from
9 the person -- from the Plaintiff, the Plaintiff
10 asked for her balance. She sent the balance on the
11 letter. It says, per your request, here is your
12 balance, and then the Plaintiff turned around and
13 sued the individual after they requested for the
14 letter.

15 So I think they've largely abandoned that
16 idea that the letterhead was misleading.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

20 (Whereupon, at 11:05 a.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

25

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