No. 15-___

In the Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO,

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case asks whether Congress, through the Fair Debt Collection Practices Act, meant to interfere with the way in which a State engages in a sovereign function—its debt collection. Ohio requires its Attorney General to collect debts owed to the State. It authorizes the Attorney General to "appoint special counsel," in addition to employees, "to represent the state in connection with" this debt collection. The law requires that the Attorney General give special counsel the office's letterhead for use in collecting tax debts, and the Attorney General has read the law as giving him discretion over whether those counsel use that letterhead for other debts owed to the State.

The Fair Debt Collection Practices Act bars "debt collectors" from "us[ing] any false, deceptive, or misleading representation or means," 15 U.S.C. § 1692e, but expressly does not apply to "any officer or employee" of a "State to the extent that collecting or attempting to collect any debt is in the performance of his official duties," *id.* § 1692a(6)(C). In this case, a divided Sixth Circuit held that special counsel do not qualify for this state exemption and that a jury could find their use of state letterhead "misleading."

The case presents two questions:

1. Are special counsel—lawyers appointed by the Attorney General to undertake his duty to collect debts owed to the State—state "officers" within the meaning of 15 U.S.C. § 1692a(6)(C)?

2. Is it materially misleading under 15 U.S.C. § 1692e for special counsel to use Attorney General letterhead to convey that they are collecting debts owed to the State on behalf of the Attorney General?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Plaintiffs-Appellants below (and Respondents here) are Pamela Gillie and Hazel Meadows.

Defendants-Appellees below (and the Petitioners joining this Petition) are Mark J. Sheriff, Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner Co., LPA. Defendant-Appellee Wiles, Boyle, Burkholder & Bringardner Co., LPA, has no parent company, and no publicly held company owns 10% or more of it.

Ohio Attorney General Michael DeWine (also a Petitioner joining this Petition) successfully moved to intervene in the district court as an Intervenor-Defendant, and was an Appellee in the Sixth Circuit.

Eric A. Jones and the Law Office of Eric A. Jones, LLC, were also Defendants-Appellees below.

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The Sixth Circuit's denial of en banc review, Pet. App. 1a-17a, is unpublished. Its decision, Pet. App. 18a-76a, is reproduced at 785 F.3d 1091. The district court's decision, Pet. App. 77a-102a, is reproduced at 37 F. Supp. 3d 928.

JURISDICTION

On May 8, 2015, the Sixth Circuit issued its decision. On July 14, 2015, over the dissent of five judges, it denied petitions for rehearing en banc. This petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Debt Collection Practices Act (the "Act"), Pub. L. No. 95-109, 91 Stat. 874 (1977), defines "debt collector" to exclude "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. § 1692a(6)(C). It prohibits debt collectors from engaging in "any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. The appendix to this petition includes relevant sections of the Act and of Ohio law.

STATEMENT OF THE CASE

A. The States' Prerogatives Regarding Debts Have Long Been Viewed As An Important Aspect Of Their Sovereignty

"From the founding, the States have taken debts—whether owed by them or to them—seriously." Pet. App. 55a (Sutton, J., dissenting). As for debts owed *by* them, sovereign immunity has

granted States "the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 324 (1934); The Federalist No. 81, at 549 (J. Cooke ed. 1961). Less well known, States have also invoked their sovereign status as the ground for many privileges regarding debts owed *to* them.

As one example, "there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown . . . ." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856). Magna Carta took this prerogative as a given, demanding only that the crown seek goods ahead of lands. Magna Carta, ch. 8, in 1 E. Coke, *The Second Part of the Institutes of the Laws of England* 18 (1797). Similar debt-collection methods were replicated "in the laws of the various American colonies and, after independence, the States." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991) (Scalia, J., concurring in judgment); *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 595 & n.5 (1931). This Court upheld such procedures as applied against a U.S. revenue receiver. *Murray's Lessee*, 59 U.S. at 276-80.

As a second example, the crown viewed it as a sovereign "prerogative" to have its "debt paid before the debt of any subject." *Sir Edward Coke's Case*, 1 Godbolt 289, 290, 78 Eng. Rep. 169, 169-70 (Exch. 1653); 3 William Blackstone, *Commentaries on the Laws of England* 420 (1768). Most States "succeeded to [this] prerogative right" of priority under their common law. *U.S. Fid. & Guar. Co. v. Bramwell*,

217 P. 332, 336 (Or. 1923); *Aetna Accident & Liab. Co. v. Miller*, 170 P. 760, 760-63 (Mont. 1918). "The Federal Government's claim to priority," by comparison, "rest[ed] as a matter of settled law only on statute." *United States v. Moore*, 423 U.S. 77, 81 (1975). This Court respected this state prerogative, finding it "enforceable against the property in the hands of a receiver appointed by a federal court." *Marshall v. New York*, 254 U.S. 380, 385 (1920).

As a third example, in perhaps the earliest use of the clear-statement rule, courts refused to interpret general bankruptcy laws as discharging debts owed to the crown. *Anon.*, 1 Atk. 262, 262, 26 Eng. Rep. 167, 167 (Ch. 1745); *Rex v. Pixley*, 1 Bun. 202, 202, 145 Eng. Rep. 647, 647 (Exch. 1726). States invoked the same rule—that the "sovereign" was not "named" and so "not bound"—when construing early bankruptcy laws as not discharging debts owed to them. *Commonwealth v. Hutchinson*, 10 Pa. 466, 468 (1849); *State v. Shelton*, 47 Conn. 400, 405-07 (1879); *Saunders v. Commonwealth*, 51 Va. 494, 496-98 (1853); *People v. Herkimer*, 4 Cow. 345, 348 (N.Y. Sup. Ct. 1825). This Court also followed that rule, noting that an intent to bind the United States must be "expressed in clear and unambiguous terms." *United States v. Herron*, 87 U.S. 251, 263 (1873). While bankruptcy laws now discharge some state debts, *Ohio v. Kovacs*, 469 U.S. 274, 278 (1985), this clear-statement rule lives on in the bankruptcy context, *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 50-51 (2008); *Kelly v. Robinson*, 479 U.S. 36, 47-49 (1986).

The aspect of sovereignty at issue in this case is more basic, but no less important, than these tradi-

tional prerogatives. The case does not ask whether a State may seize property, *Murray's Lessee*, 59 U.S. at 276-80, demand payment first, *Marshall*, 254 U.S. at 384-85, or prevent a debt's discharge, *Herron*, 87 U.S. at 263. It asks only whether a State may *notify* debtors that they owe debts to the State and that the counsel collecting the debts acts on behalf of the State's chief debt collector—its Attorney General. Treating a State's sovereign interest in its debt-collection methods as a "policy concern," a divided Sixth Circuit held that special counsel for Ohio's Attorney General could not convey that they sent letters on behalf of the Attorney General without risking massive liability. Pet. App. 38a.

B. Ohio Has Long Delegated The Duty To Collect Debts To Its Attorney General

1. *Attorney General's Office Structure*. In 1846, Ohio passed a law "[t]o create the office of Attorney General, and to prescribe his duties." 44 Ohio Laws 45, 46 (1846). From then until now, the Attorney General has routinely relied on "special" counsel to fulfill many official duties.

During the 1800s, the Attorney General had one employee, but could hire "local counsel" to assist in civil actions. Revised Statutes of Ohio § 202 (1890); 73 Ohio Laws 189, 191 (1876). By the 1900s, Ohio authorized the Attorney General to have six employees, but again gave the Attorney General broad "power to employ special counsel." 97 Ohio Laws 59, 60 (1904). Only later did the Attorney General obtain authority to "appoint such employees as he may deem necessary." 107 Ohio Laws 503, 504 (1917).

Today, Ohio broadly authorizes the Attorney General both to hire employees, Ohio Rev. Code § 109.05, and to appoint special counsel to "represent the state in civil actions, criminal prosecutions, or other proceedings in which the state is a party or directly interested," *id.* § 109.07. Specific statutes also permit the Attorney General to appoint either assistant attorneys general or special counsel for particular matters. *See, e.g.*, *id.* §§ 109.81 (antitrust); 109.84 (workers compensation); 119.10 (administrative proceedings); 2743.14 (court of claims); *see id.* § 124.11(A)(11) (noting that assistant attorneys general and special counsel are in the "unclassified service" of the State).

2. *Debt-Collection Duties.* When Ohio created the office, it gave the Attorney General the power to sue those "owing debts to the state." 44 Ohio Laws at 47. The Attorney General retains this duty today. Ohio Rev. Code § 131.02(A)-(C). State debts can range from tax debts, to educational debts owed to state colleges, to medical debts owed to state hospitals. Doc.24, Counterclaim, PageID#300.

Ohio employs a three-step process to collect these varied debts. At step one, the relevant state entity attempts to collect for 45 days. Ohio Rev. Code § 131.02(A). At step two, the entity certifies the debt to the Attorney General. *Id.* At step three, if the Attorney General concludes that the debt has become an "uncollectible" or "final overdue claim," the State may release the debt or sell it to a private party. *Id.* §§ 131.02(F)(1), 131.022(B).

At the second step, once a debt has been certified, "[t]he attorney general shall give immediate notice by mail or otherwise to the party indebted of the na-

ture and amount of the indebtedness," and "collect the claim or secure a judgment and issue an execution for its collection." *Id.* § 131.02(B)(1), (C). The Attorney General undertakes these tasks through employees in the Collections Enforcement Section and special counsel. Since 1937, the office has been permitted to "appoint special counsel to represent the state" in connection with debts "certified to the attorney general," and to pay counsel out of the funds they recover. *Id.* § 109.08; 117 Ohio Laws 304, 304-05 (1937). This debt-collection duty requires significant effort. To put it in perspective, from July 2011 to June 2012, the office collected over $466 million in debts—$191 million of which came through special counsel. Doc. 24, Answer, PageID#306.

This case concerns special counsel's use of Attorney General letterhead when communicating with debtors. In 1989, Ohio passed a tax law "popularly referred to as the Ohio Taxpayers' Bill of Rights." Anthony L. Ehler and Randall A. Osipow, *Am. Sub. S.B. 147: Ohio Taxpayers' Bill of Rights*, 3.5 Ohio Tax Review 10, 10 (Sept./Oct. 1989). The law granted taxpayers certain rights against the State. 143 Ohio Laws 877, 879-86 (1989). As relevant here, one section directed the Attorney General to "provide to the special counsel appointed to represent the state in connection with [certain tax] claims . . . the official letterhead stationery of the attorney general." *Id.* at 877 (codified at Ohio Rev. Code § 109.08). It *required* special counsel to "use the letterhead stationery, but only in connection with the collection of such claims arising out of those taxes." *Id.* The next section directed the Attorney General to appoint "problem resolution officers" to handle concerns from tax debtors about employees "or the special counsel assigned to

the case." *Id.* at 877-78 (codified at Ohio Rev. Code § 109.082).

The Attorney General has interpreted Ohio Revised Code § 109.08—that special counsel "shall" use the letterhead for tax debts, but only with respect to those debts—as requiring special counsel to use that letterhead for tax debts, and leaving it to the Attorney General to decide whether special counsel use that letterhead for other state debts. The Attorney General has likewise interpreted Ohio Revised Code § 109.082—that problem resolution officers "shall" handle tax-debt concerns—as requiring the Attorney General to appoint officers to handle tax complaints, but leaving it to the Attorney General to allow them to handle non-tax inquiries. Plaintiffs have "categorically den[ied]" challenging what the Attorney General's Office believes to be a longstanding view of state law. Doc.31, Answer, PageID#333; *cf. Cleveland State Univ. v. Mills*, No. 2007-01517, Pet. for Removal, Exh. (Ohio Ct. Cls. Jan. 19, 2007) (use of letterhead of former Attorney General Jim Petro), *available at* http://cases.ohiocourtofclaims.gov/cgi-bin/wspd_cgi.sh/streamfile.p?Serial=070119001062713&Seq=1.

3. *Contracts with Special Counsel.* During the relevant period, special counsel applied for one-year contracts with the Attorney General's Office. Doc. 48-12, Wiles Application, PageID#723-77. The contracts contained terms regarding special counsel's interactions with the Attorney General's Office and with debtors.

As for special counsel's relationship with the office, they were appointed "to provide legal services on behalf of the Attorney General to assist in the collec-

tion of past due debt." Doc. 48-8, Contract, PageID#635. They were independent contractors, not employees, and had to purchase their own insurance. *Id.*, PageID#635, 644. They also agreed to abide by public-records laws. *Id.*, PageID#637 (citing Ohio Rev. Code § 149.43). The Collections Enforcement Section assigned claims to special counsel. *Id.*, PageID#636. Before initiating litigation or settling, counsel agreed to obtain the office's approval. *Id.*, PageID#638. The office also retained the right to terminate special counsel at any time. *Id.*, PageID#642.

As for special counsel's dealings with debtors, the contracts required special counsel, "[i]n all pleadings, notices and/or correspondence," to make clear that the document was "prepared by the Special Counsel in its position as Special Counsel for the Attorney General." *Id.*, PageID#635. The Attorney General also "expect[ed] Special Counsel to provide services to the public in a manner that will preserve or enhance goodwill between the public and the State," and had "zero tolerance" for actions demonstrating "less than complete respect for the rights and reasonable expectations of the public." *Id.*, PageID#645-46. Special counsel had to follow "the same standards of behavior as set forth in" the Act. *Id.*, PageID#634, 646.

C. Plaintiffs Alleged That Special Counsel's Use Of State Letterhead Violated The Act, But The District Court Disagreed

1. For 2012 to 2013, the office appointed Mark Sheriff, an attorney with Wiles, Boyle, Burkholder & Bringardner Co., LPA, as one special counsel. Pet. App. 25a. In earlier years, Bruce Burkholder had been special counsel at Wiles. Doc.60-2, M. Sheriff

Aff., PageID#1080. In 2007, Burkholder filed suit against Plaintiff Hazel Meadows, a University of Akron graduate, to recover a debt owed to the university. *Id.* Meadows agreed in a judgment entry signed by her counsel to make monthly payments on this $4,500 debt. *Id.* Ex. B, PageID#1083. She made timely payments thereafter. Doc.60-1, S. Sheriff Aff., PageID#1077.

In July 2012, Sarah Sheriff, a Wiles employee, remembers fielding a call from Meadows "ask[ing] [Sheriff] for her balance." *Id.*, Page ID#1078. Sheriff sent a letter identifying the balance. Pet. App. 17a. The letterhead identified the office's Collections Enforcement Section. *Id.* The body read: "Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me . . . should you have further questions." *Id.* Sarah Sheriff signed the letter; under her name was the firm's name and address; under the address was the notation "Special Counsel to the Attorney General." *Id.* Because Sheriff was responding to Meadows, she did not think it mattered who signed the letter. Doc.60-1, S. Sheriff Aff., PageID#1078.

"Though the letter said it was in response to [Meadows's] request for information," Meadows asserted that she did not "recall ever asking anyone for any information about this matter." Doc.48-3, Meadows Aff., PageID#612. The letter allegedly "scared [her] because [she] thought that the Ohio Attorney General might charge [her] with a crime for not paying what he said [she] owed." *Id.*, PageID#613. She took the letter to her attorney, and says that she sought counseling for stress. *Id.*

2. The Attorney General appointed Defendant Eric Jones as special counsel for July 2011 to June 2012. Pet. App. 25a. On May 24, 2012, Jones sent Plaintiff Pamela Gillie a letter with Attorney General letterhead. Pet. App. 14a. The letter included a numerical "balance." Its body said: "You have chosen to ignore repeated attempts to resolving the referenced . . . medical claim. If you cannot make immediate payment call Denise Hall at Eric A. Jones, L.L.C., . . . at my office to make arrangement to pay this debt." *Id.* Jones signed the letter as "Outside Counsel for the Attorney General's Office." *Id.* His return address was listed on the bottom. *Id.*

Gillie alleged that she was confused why Jones sent a letter for the Attorney General, and thought it might be a scam because it asked to send money to a private firm. Doc.48-1, Gillie Aff., PageID#609. Having filed for bankruptcy, Gillie allegedly also feared that "the Attorney General might garnish my wages" or "somehow stop or delay my bankruptcy case." *Id.* Like Meadows, she contacted her attorney about the letter. *Id.*, PageID#610.

3. Plaintiffs brought a putative class action against Mark Sheriff, Sarah Sherriff, and Wiles, and Jones and his firm, alleging that the use of state letterhead violated 15 U.S.C. § 1692e. Doc.1, Compl., PageID#16-19. The complaint alleged that the Attorney General had assigned over $13 billion in debts to special counsel and that the class might expand to hundreds of thousands of debtors if Plaintiffs added additional counsel. *Id.*, PageID#12.

The Attorney General moved to intervene because the suit threatened his ability to retain qualified counsel. Doc.4, Mem., PageID#61. He also moved to

stay proceedings for a state case or to have initial issues immediately resolved. Doc.7, Mem., PageID#97. The district court granted the motion to intervene. Doc.23, Order, PageID#278. It bifurcated proceedings in response to the stay motion, deciding whether special counsel were "debt collectors" and whether the letterhead was misleading before all else. Doc.42, Order, PageID#480-83.

After both sides moved for summary judgment, the court ruled for Defendants. Pet. App. 78a. *First*, it found that special counsel were not debt collectors because they fell under 15 U.S.C. § 1692a(6)(C)'s exception for government "officers or employees." Pet. App. 84a-90a. The Dictionary Act defined "officer" as "'any person authorized by law to perform the duties of the office.'" Pet. App. 87a (quoting 1 U.S.C. § 1). This definition applied, the court found, because the Attorney General bore the duty to collect state debts, and a statute authorized special counsel to assist him in that duty. *Id.*

Second, the court found nothing "misleading" under 15 U.S.C. § 1692e about special counsel's use of state letterhead. Applying a "least-sophisticated consumer" test, it rejected the argument that the letterhead "misleads consumers as to the source of the debt collection letters and falsely implies that the letters are from the [Attorney General's Office] instead of special counsel and their law firms." Pet. App. 91a. The court noted that "[t]he letters accurately reflect [the] relationship" of special counsel to the Attorney General. Pet. App. 96a. It added that the letter from Sarah Sheriff required "additional analysis" because Mark Sheriff was special counsel. *Id.* Since the letter merely responded to an inquiry and was

not otherwise inaccurate, the court held, it was not "materially misleading." Pet. App. 97a.

D. A Divided Sixth Circuit Reversed

1. Rejecting the district court's two rationales, a split Sixth Circuit reversed for trial. Pet. App. 20a.

Starting with the state exemption, the majority held that special counsel met neither requirement for "officer" status under the definition requiring them to be "authorized by law" to perform "the duties of the office." Pet. App. 28a-44a. As for "authorized by law," the majority held that a contract, not a law, gave special counsel the authority to collect debts. While Ohio Revised Code § 109.08 authorized the Attorney General to appoint special counsel, the majority construed "authorized by law" to reach only laws immediately authorizing conduct without more. Pet. App. 31a. Alternatively, the court interpreted "duties of the office" to require an individual to be permitted to perform *all* duties, not just *one*. Pet. App. 35a.

The majority added three general points about the exemption. It cited cases holding that independent contractors were not "officers." Pet. App. 36a-38a. It rejected the dissent's reliance on the "clear-statement rule" applied in cases like *Gregory v. Ashcroft*, 501 U.S. 452 (1991), because "[t]his case is about third-party debt collectors" and "Ohio is not being regulated; nor is the structure of its government being challenged." Pet. App. 39a. And it stated that special counsel would not qualify as "officers" under various state laws. Pet. App. 39a-42a.

On the merits, the majority noted that the Act bars statements that have a "tendency to confuse the

least sophisticated consumer"—an "objective standard" with a "relatively low bar." Pet. App. 46a.

Under this standard, the majority held, a jury could conclude that special counsel's use of state letterhead was misleading. Pet. App. 48a-54a. "The presence of the authoritative symbols at the top of the letter immediately signals to the debtor that it is the State of Ohio that is threatening to take action against her." Pet. App. 49a. And while the signature clarified that the sender was an "outside" or "special" counsel to the Attorney General, "[t]he independent debt collector may have achieved his desired impact at the point when the letter is opened and the least sophisticated consumer perceives the name of the Attorney General." Pet. App. 50a.

2. Judge Sutton dissented on both grounds. The dissent noted that special counsel "fit" the "officer" definition "to a tee." Pet. App. 57a. A law authorized counsel to collect debts for the Attorney General, and debt collection was an official duty. *Id.* At the least, "officer" was ambiguous—as Plaintiffs conceded. Pet. App. 58a. That ended the matter: "When Congress purports to regulate core state functions, it must do so unambiguously." *Id.*

On the merits, the dissent found nothing misleading about special counsel's use of state letterhead. Pet. App. 63a-70a. "[S]pecial counsel are no different from assistant attorneys general paid to recover the State's money." Pet. App. 64a. Their use of Attorney General letterhead does not falsely imply that the letters came from the Attorney General because the "letters *do* come from the Attorney General." Pet. App. 65a.

3. The Sixth Circuit denied rehearing en banc. Pet. App. 1a. Judge Clay's concurrence noted that the letterhead could mislead debtors "into believing that [they were] being contacted directly by the attorney general's office rather than debt collection attorneys," which could intimidate them "into promptly paying the debt out of fear that that the attorney general might take punitive action against them." Pet. App. 3a. And because Congress meant to regulate independent debt collectors, special counsel fell outside the exemption. *Id.*

Judge Sutton—joined by Judges Boggs, Batchelder, Cook, and McKeague—made four points in dissent. Pet. App. 7a. *First*, he said that "[h]ow these letters could be misleading is beyond me" given that counsel sent the letters for the Attorney General. Pet. App. 8a. *Second*, he noted that "special counsel face potential liability coming and going" under the panel's decision because "recipients will assume that the letter does *not* concern a state debt" if counsel use private letterhead. Pet. App. 9a. *Third*, he reiterated that the "officer" exception applies because the case "implicates foundational federalism concerns." *Id.* *Fourth*, he concluded that Plaintiffs seek to have it both ways: For purposes of the exception, they find it clear that the letters do not come from the State; for purposes of liability, they "feign confusion." Pet. App. 10a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD REVIEW WHETHER SPECIAL COUNSEL QUALIFY AS STATE "OFFICERS" UNDER 15 U.S.C. § 1692A(6)(C)

The Court should review the scope of 15 U.S.C. § 1692a(6)(C), which excludes from the Act's debt-collector definition "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." The Sixth Circuit's view that this text does not reach special counsel for Ohio's Attorney General conflicts with this Court's cases and with an analogous circuit case.

A. The Decision Below Conflicts With This Court's Cases

Because the Act does not define "officer," all agree it incorporates the general statutory definition: that "officer" "includes any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. Special counsel satisfy this definition. One law gives the Attorney General the *duty* to collect debts owed to the State, Ohio Rev. Code § 131.02; another *authorizes* special counsel "to represent the state" in this duty, *id.* § 109.08. The Sixth Circuit's contrary view conflicts with two lines of this Court's cases: (1) those requiring Congress to speak clearly before intruding on state prerogatives, and (2) those interpreting 42 U.S.C. § 1983 not to draw sharp distinctions based on a defendant's employment status.

1. The decision below conflicts with this Court's clear-statement cases

a. "Among the background principles of construction that [the Court's] cases have recognized are

those grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). Given our "'dual system of government,'" the Court refuses to read a federal law as "impinging upon important state interests" unless Congress speaks clearly. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (citation omitted). By "resolv[ing] ambiguity in a federal statute" in favor of the States, *Bond*, 134 S. Ct. at 2090, this rule respects their "substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere," *Gregory*, 501 U.S. at 461.

This clear-statement rule is a mainstay of the Court's cases. The Court has invoked the rule to determine the breadth of specific federal laws, ranging from criminal laws, *Bond*, 134 S. Ct. at 2089-90, to employment laws, *Gregory*, 501 U.S. at 470, to bankruptcy laws, *BFP*, 511 U.S. at 544. It has also used the rule to create subsidiary canons cutting across the U.S. Code, including the presumption against preemption, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996), the rule that federal laws must clearly abrogate a State's sovereign immunity, *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), and the requirement that federal laws impose unambiguous conditions on a State's acceptance of federal funds, *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 16-18 (1981).

b. The Sixth Circuit's refusal to apply the clear-statement rule conflicts with these cases. It rejected the rule because "Ohio is not being regulated; nor is the structure of its government being challenged."

Pet. App. 39a. This analysis was both mistaken and irrelevant.

The analysis was mistaken for two reasons. For one thing, debt collection qualifies as a central sovereign activity. As detailed above, *supra* at 1-3, States have always viewed their debt-collection prerogatives as arising from their sovereignty. Like taxation, *Piccadilly Cafeterias*, 554 U.S. at 51, or sovereign immunity, *Mississippi*, 292 U.S. at 325, debt collection concerns the public fisc—"the life blood of the state." *Am. Bonding Co. of Baltimore v. Reynolds*, 203 F. 356, 357 (D. Mont. 1913). Unsurprisingly, then, the clear-statement rule that the majority refused to apply may have gotten its start in this *very* context. *Shelton*, 47 Conn. at 404-05 (discussing history). If the rule applies anywhere, it applies here.

For another, in *any* context, the Court starts with the "assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). A State's prerogative to choose between special counsel and employees is just as much a sovereign choice as is a State's prerogative to choose between state and local employees. *Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437-39 (2002). Indeed, the Attorney General has had the general authority to hire special counsel *longer* than he has had the general authority to hire employees. *Compare* 97 Ohio Laws at 60, *with* 107 Ohio Laws at 504. Because the Sixth Circuit would treat special counsel differently from employees, its view "trench[es] on

[Ohio's] arrangement[] for" carrying out its duties. *Nixon*, 541 U.S. at 140.

Regardless, the majority's analysis was irrelevant. The clear-statement rule has *never* been limited to laws "regulat[ing]" a State or "challeng[ing]" "the structure of its government." Pet. App. 39a. Many cases apply the rule to laws not regulating the States *at all*. Most recently, *Bond* relied on the rule to interpret a federal criminal law as not covering a wife's attempt "to injure her husband's lover"—a far cry from a State's structure. 134 S. Ct. at 2083.

2. The decision below conflicts with the Court's § 1983 cases

a. The Court has interpreted § 1983 as implicitly incorporating common-law immunities that government officials historically asserted. *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). When determining the type of immunity to grant, the Court "rests on functional categories, not on the status of the defendant." *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). That is, "immunity flows not from rank or title or 'location within the Government,' but from the nature of the responsibilities of the individual official." *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (citation omitted).

Given this approach, the Court has held that a lawyer may seek qualified immunity under § 1983 even though he served a local government as a private contractor, not as a public employee. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012). *Filarsky* recognized that government operations have long been accomplished by private citizens. *Id.* at 1662-65. And "examples of individuals receiving immunity for ac-

tions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself." *Id.* at 1665.

b. The Sixth Circuit's narrow reading of "officer" conflicts with *Filarsky*. As a general matter, the definition of "officer" dates to the time examined in *Filarsky*. The law that put this definition in its current home, 1 U.S.C. § 1, replaced a similar definition from 1871. Act of July 30, 1947, Pub. L. No. 80-278, § 2, 61 Stat. 633, 641; Act of Feb. 25, 1871, 41 Cong. ch. 71, § 2, 16 Stat. 431 (defining "officer" to "include any person authorized by law to perform the duties of such office"). It is unlikely that this definition excluded private contractors performing government duties given "the nature of government at the time." *Filarsky*, 132 S. Ct. at 1662. Courts recognized then that individuals appointed to temporarily undertake government duties, "for such time as in service, [were] officers of the law." *North Carolina v. Gosnell*, 74 F. 734, 738-39 (C.C.W.D.N.C. 1896).

Two historical examples that are relevant to the Act show that the Sixth Circuit's decision conflicts with *Filarsky*'s approach.

Example 1: The Act's legislative history identifies "marshals and sheriffs" as exempt officials. S. Rep. No. 95-382, at 3 (1977), 1977 U.S.C.C.A.N. 1695, 1698. But the duties of "sheriffs and constables" have long been performed by private parties. *Filarsky*, 132 S. Ct. at 1664. And it was established that private individuals who were "appointed special deputies, or officers, for the performance of a particular official duty" were "entitled to all the protection which the law affords to the regular officer." W. Murfree, *A Treatise on the Law of Sheriffs and Other*

Ministerial Officers § 83, p. 48 (1884); *Andrews v. State*, 78 Ala. 483, 485 (1885); *State v. Moore*, 39 Conn. 244, 250 (1872). Yet, under the Sixth Circuit's view, these "special" officers would nevertheless be subject to the Act. *Cf. Weiss v. Weinberger*, No. 2:04-cv-463, 2005 WL 1432190, at *4 (N.D. Ind. June 9, 2005) (holding that a court-appointed federal receiver was an "officer" under the Act).

Example 2: Since 1986, the Act has reached ordinary litigation activities of private attorneys. *See Heintz v. Jenkins*, 514 U.S. 291, 294-95 (1995). But governments have long used private attorneys for litigation. *Filarsky*, 132 S. Ct. at 1663-64. And it was established that private attorneys would be entitled to immunity when serving the government in that role. *Id.*; *White v. Polk Cnty.*, 17 Iowa 413, 414 (1864) (noting that "these necessary officers may be appointed, temporarily"). Yet, under the Sixth Circuit's view, the Congress that granted private counsel absolute immunity for alleged constitutional violations arising from litigation, *Imbler*, 424 U.S. at 427; *Cornejo v. Bell*, 592 F.3d 121, 127-28 (2d Cir. 2010), made them broadly face liability under the Act even in cases that arise from alleged "technical—but harmless—violations." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 618 (2010) (Kennedy, J., dissenting).

* * *

If anything, this case is easier than *Filarsky*. The clear-statement rule led the Court to adopt § 1983's various immunities even though the "statute on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Here, however, Congress *did* adopt a broad exception for state ac-

tors. If a statute with *no* government immunities can be read to include an implied immunity for private actors performing government duties, a statute with a *capacious* government exception should be read to extend the exception to those same parties.

Congress itself believed so. It authorized the *U.S.* Attorney General to appoint private counsel to collect debts. 31 U.S.C. § 3718. When doing so, Congress found it necessary to state *expressly* that those attorneys were debt collectors under the Act, "[n]otwithstanding the fourth sentence of section 803(6)" (the sentence in the Act containing the various exceptions). *Id.* § 3718(b)(6). No similar clear statement exists for lawyers undertaking the sovereign state function of collecting debts for *State* Attorneys General.

B. The Decision Below Conflicts With An Analogous Circuit Case

1. "[T]he only circuit to confront an analogous governmental debt-collection practice has rejected" the Sixth Circuit's view. Pet. App. 69a (Sutton, J., dissenting) (citing *Heredia v. Green*, 667 F.2d 392 (3d Cir. 1981)). In *Heredia*, Landlord and Tenant Officers of the Philadelphia Municipal Court, acting at the request of landlords, regularly sent a "Municipal Court Notice of Termination of Lease" to tenants behind on their rent. 667 F.2d at 393. The notice demanded past-due rent and threatened eviction proceedings. *Id.* Tenants brought suit against one such officer, alleging that the notice "falsely" suggested that it had been sanctioned by the court. *Id.* at 396 (Stern, J., concurring).

The Third Circuit held that the officer fell within the exception because he was appointed by the court and "perform[ed] his duties pursuant to orders and instructions from the President Judge." *Id.* at 395. A concurring judge noted that it would be "anomalous" to expose the officer to "liability for deceptively giving the impression that he was acting as an officer of the court despite the fact that his actions . . . had indeed been authorized by that court." *Id.* at 396 (Stern, J., concurring).

Identical logic applies here. As in *Heredia*, defendants were directed to send letters by a government actor. Pet. App. 56a. And, as in *Heredia*, plaintiffs alleged that identifying the government actor on the letters falsely represented the letters' connection to that actor. Pet. App. 55a. Indeed, the Act's exception makes more sense here. The officer in *Heredia* collected debts owed to *private* landlords, 667 F.2d at 393; the special counsel here collect debts owed to the *State*, Pet. App. 55a. In *Heredia*, moreover, no law identified debt collection as one of the officer's duties, 667 F.2d at 394-95; in this case, Ohio Revised Code § 109.08 identifies debt collection as special counsel's singular duty.

Relegating *Heredia* to a footnote, the Sixth Circuit responded: "Unlike special counsel, the Landlord and Tenant Officer position was prescribed duties by statute and the holder of the position was not in an independent contractual relationship for the purpose of collecting debts." Pet. App. 38a n.10. Yet the only duties *statutorily* prescribed for the officers were those "heretofore performed by constables" under Pennsylvania's Landlord and Tenant Act. 1970 Pa. Laws 2, 2. That act did *not* grant constables a

duty to send collection letters. *Heredia*, 667 F.2d at 394. Further, nowhere did *Heredia* mention whether the officers were employees or contractors, let alone hang its holding on that state-law distinction. *Id.* at 394-96. The constables they replaced had, in fact, been independent contractors paid fees for services. *In re Act 147 of 1990*, 598 A.2d 985, 986 (Pa. 1991). And the officers collected fees under the same Constable Fee Bill. *Heredia*, 667 F.2d at 396.

At bottom, whatever § 1692a(6)(C)'s scope, under no sensible reading should it exempt an individual authorized to collect *private* debts only by a *state official's decree*, but not an individual authorized to collect *government* debts by a *state law*. *Heredia* cannot be squared with the decision below.

2. While rejecting *Heredia*, the majority relied on two far-afield circuit cases. Pet. App. 36a-37a (citing *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260 (9th Cir. 1996); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000)). In *Brannan*, a student loan was owed to a private bank. 94 F.3d at 1262. In *Pollice*, governmental entities sold claims arising out of taxes or water bills to a private entity. 225 F.3d at 385. Both thus involved debt collection for *private parties*. Here, however, all agree that the collection efforts concerned debts owed to the *State*.

II. THE COURT SHOULD REVIEW WHETHER THE USE OF ATTORNEY GENERAL LETTERHEAD WAS "MISLEADING" UNDER 15 U.S.C. § 1692E

The Court should also review whether special counsel's use of state letterhead is a "false, deceptive, or misleading representation or means." 15 U.S.C. § 1692e. Congress passed the Act almost four dec-

ades ago, but the Court has yet to review this principal provision. The lack of guidance has generated significant confusion in the circuits on a broadly recurring issue.

A. A Circuit Conflict Exists Over The General Liability Test Under § 1692e

A circuit split exists over the general test for analyzing whether a debt-collection method is "false, deceptive, or misleading." The "majority of the circuits" employ a "'least sophisticated debtor' or 'least sophisticated consumer' standard." *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1061 n.2 (9th Cir. 2011); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993); *Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 997 (3d Cir. 2011); *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 394-95 (4th Cir. 2014); Pet. App. 48a; *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174-75 (11th Cir. 1985).

This test "is 'designed to protect consumers of below average sophistication or intelligence,' or those who are 'uninformed or naive,' particularly when those individuals are targeted by debt collectors." *Arrow Fin.*, 660 F.3d at 1062 (citation omitted). It is a "relatively low bar so as to cast [the Act's] protection over all consumers, even those who are 'gullible' or 'naïve.'" Pet. App. 46a. At the same time, its objective component supposedly "protects debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices." *Clomon*, 988 F.2d at 1320.

On the split's other side, the Seventh Circuit "rejected the 'least sophisticated debtor' standard used by some other circuits." *Pettit v. Retrieval Masters*

Creditor Bureau, Inc., 211 F.3d 1057, 1060 (7th Cir. 2000). It did so because the least-sophisticated debtor is on "the very last rung on the sophistication ladder," one who "would likely not be able to read a collection notice with care (or at all), let alone interpret it in a reasonable fashion." *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1257 (7th Cir. 1994). The First and Eighth Circuits have since agreed. *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 n.4 (1st Cir. 2014); *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051, 1055 (8th Cir. 2002).

These circuits have instead opted for an "unsophisticated consumer" test. *Gammon*, 27 F.3d at 1257. This hypothetical debtor "isn't a dimwit." *Wahl v. Midland Credit Mgmt., Inc.*, 556 F.3d 643, 645 (7th Cir. 2009). Rather, the debtor has "rudimentary knowledge about the financial world," is "capable of making basic logical deductions and inferences," and "reads collection letters carefully so as to be sure of their content." *Pettit*, 211 F.3d at 1060-61.

B. This General Conflict Manifests Itself In Procedural And Substantive Splits

Some cases have called the difference between these tests "de minimis." *Peter v. GC Servs. L.P.*, 310 F.3d 344, 348 n.1 (5th Cir. 2002); *Pollard*, 766 F.3d at 104 n.4. Both procedural rules and specific facts show that view to be mistaken.

1. Starting with procedural rules, the Seventh Circuit has said that its unsophisticated-debtor test requires a plaintiff to show that "'a *significant fraction* of the population'" would be misled. *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410, 415 (7th

Cir. 2005) (emphasis added) (quoting *Pettit*, 211 F.3d at 1060)); *Williams v. OSI Educ. Servs., Inc.*, 505 F.3d 675, 678 (7th Cir. 2007). This requirement has led the court to strongly encourage plaintiffs to introduce consumer surveys that prove the misleading nature of the challenged letter—similar to the surveys used in trademark confusion cases. *McKinney v. Cadleway Props., Inc.*, 548 F.3d 496, 503 (7th Cir. 2008); *Sims v. GC Servs. L.P.*, 445 F.3d 959, 964 (7th Cir. 2006); *Durkin*, 406 F.3d at 419; *Taylor v. Cavalry Inv., L.L.C.*, 365 F.3d 572, 575 (7th Cir. 2004). In fact, "[s]uits under the [Act] have repeatedly come to grief" in the Seventh Circuit "because of flaws in the surveys conducted by the plaintiffs' experts." *DeKoven v. Plaza Assocs.*, 599 F.3d 578, 582 (7th Cir. 2010). Relatedly, the substantial-fraction requirement has led the Seventh Circuit to treat whether the challenged letter is misleading as a question of fact, not law. *Walker v. Nat'l Recovery, Inc.*, 200 F.3d 500, 503 (7th Cir. 1999).

The least-sophisticated-debtor circuits, by comparison, have not held that plaintiffs must show that the challenged letter would mislead a substantial fraction of the population. *Cf. Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 135 (2d Cir. 2010) (noting that the test is "designed to protect all consumers"). Nor have they required plaintiffs to introduce consumer surveys. *Cf. Gonzalez v. Kay*, 577 F.3d 600, 611 (5th Cir. 2009) (Jolly, J., dissenting) (criticizing survey requirement); *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1063 (7th Cir. 1999) (Eschbach, J., concurring) ("I am also troubled by the majority's discussion of the use of survey evidence."). Instead, most of these circuits "disagree" with the Seventh and "think that whether a dunning letter is

confusing is always a matter of law" for the court. *Taylor*, 365 F.3d at 575; *Arrow Fin.*, 660 F.3d at 1061; *Russell*, 763 F.3d at 395. Far from a semantics game, these are real differences with real impacts.

2. A specific letterhead debate shows that the conflict has real consequences where, as here, the least-sophisticated-debtor courts *apply* that test to reach debtors with "'bizarre or idiosyncratic interpretation[s] of collection notices.'" *Lesher*, 650 F.3d at 1004 (Jordan, J., dissenting) (citation omitted). Beginning this debate, the Second Circuit held that a debt collector's use of law-firm letterhead did *not* misleadingly suggest that a lawyer had reviewed the debtor's account when the letter contained "a clear disclaimer explaining the limited extent" of lawyer involvement. *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 365 (2d Cir. 2005).

Two circuits then issued fractured decisions holding that the use of law-firm letterhead *did* misleadingly imply lawyer involvement—even though the letter's *second* page indicated that no lawyer had reviewed the debt. *Lesher*, 650 F.3d at 1003; *Gonzalez*, 577 F.3d at 606-07. Each decision led to sharp dissents asserting that the courts had transformed the test into one asking whether someone with an "idiosyncratic" understanding can seek relief. *Lesher*, 650 F.3d at 1004 (Jordan, J., dissenting); *cf. Gonzalez*, 577 F.3d at 607 (Jolly, J., dissenting) ("I can only conclude that this collection letter conforms" to the least-sophisticated-debtor test and that "the majority creates a different but amorphous standard for the Fifth Circuit, effectively creating a circuit split"). It is hard to imagine a court applying the unsophisticated-debtor test as reaching the results in *Lesher*

and *Gonzalez* given that the test presumes that the debtor "reads collection letters carefully so as to be sure of their content." *Pettit*, 211 F.3d at 1061.

This case deepens this divide because the Sixth Circuit held that letterhead could be misleading even though—as in *Greco* but not *Gonzales* or *Lesher*—the information illustrating the debt collector's connection to the letterhead was on the *first* page. While each letter accurately indicated that it was sent by outside or special counsel for the Attorney General, the Sixth Circuit said, the debt collector "may have achieved his desired impact at the point when the letter is opened and the least sophisticated consumer perceives the name of the Attorney General." Pet. App. 50a. "[A]n accurate description by special counsel of their relation to the [Attorney General's Office]," the Sixth Circuit concluded, does not "preclude[] liability under the" Act. Pet. App. 53a.

The dissent found, by contrast, that only an *idiosyncratic* reader could somehow mistake the true message the letters convey: that these are debts owed to Ohio and that a "special counsel" or "outside counsel" acting on behalf of the Attorney General is collecting the debts. Pet. App. 66a-67a (Sutton, J., dissenting). Likewise, under the Seventh Circuit's approach, an unsophisticated debtor would undoubtedly make the "logical deduction" that these letters were coming from special counsel acting for, and with the approval of, the Attorney General. *Pettit*, 211 F.3d at 1060. But those would be correct deductions, not mistaken ones.

III. THE DECISION BELOW RESOLVES THESE IMPORTANT QUESTIONS IN A FAR-REACHING WAY

The Court should grant review because the two questions are important and the decision below resolved them in a troubling manner.

A. To begin with, both questions implicate our federalist structure. The clear-statement rule does not involve a mere "policy concern." Pet. App. 38a. It involves the "constitutional balance of federal and state powers." *Gregory*, 501 U.S. at 460. It reflects that "the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people." *Printz v. United States*, 521 U.S. 898, 919-20 (1997).

This divided government "'secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (citation omitted). Each State's communities may set local priorities free from "the political processes that control a remote central power." *Id.* Accordingly, liberty (not just structure) "is always at stake when" federal courts interpret federal laws to encroach on States. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

This case proves the point. States have adopted diverse debt-collection methods. This diversity has generated studies proving the effectiveness of a centralized approach like Ohio's. Pet. App. 55a (Sutton, J., dissenting) (citing Nat'l Ass'n of State Auditors, Comptrollers, and Treasurers, *Government Debt Collection: Survey Report and Recommendations* 1-3

(2010), available at http://goo.gl/kO7GQ9). Local communities may find that approach superior in tough economic times to more and more tax increases or budget cuts.

The Sixth Circuit's resolution of these questions, however, undercuts the opportunities for experimentation. As for the first, the majority's rigid distinction between public employees and private contractors performing official duties places a thumb on the scale for bigger and bigger government. Yet States should not be discouraged to try novel methods, including private options where appropriate, to better serve constituencies. *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). As for the second, the majority's broad view of what counts as "misleading" condemns Ohio's choice to place debt-collection duties in its chief law-enforcement officer. The majority suggests that using the Attorney General to collect debts creates unlawful "leverage" under the Act, and that even assistant attorneys general escape liability *only* because they are exempt. Pet. App. 54a. Yet federal courts should not lightly critique a State's chosen division of its sovereign duties. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460.

B. In addition, the Court routinely grants review to "correct[] lower courts when they wrongly subject individual officers to liability" under § 1983. *City and Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015). This case raises the same, if not greater, concerns.

Qualified immunity, for example, "ensur[es] that talented candidates are not deterred from public ser-

vice." *Filarsky*, 132 S. Ct. at 1665. That is the reason the Attorney General intervened here. Doc.4, Mem., PageID#61. Talented debt collectors, like talented law enforcement, lead to more professional enforcement and fairer procedure.

Similarly, private individuals often "work in close coordination with public employees, and face threatened legal action for the same conduct." *Filarsky*, 132 S. Ct. at 1666. Here, for example, the Collections Enforcement Section works closely with special counsel. Doc. 48-8, Contract, PageID#636-38. "Assistant attorneys general 'frequently' help special counsel draft pleadings, and sometimes sign on as co-counsel when a 'particularly sensitive or complex' case demands it." Pet. App. 64a (Sutton, J., dissenting) (citation omitted). Accordingly, the majority's narrow view of the exception—when combined with its broad view of liability—could leave "those working alongside" public employees "holding the bag." *Filarsky*, 132 S. Ct. at 1666.

The maxim that "[a]n uncertain immunity is little better than no immunity at all" also applies here. *Id*. Parties working for the government need "reasonably to anticipate when their conduct may give rise to liability" under the Act just as much as under § 1983. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987).

If anything, the concerns behind the Court's healthy qualified-immunity docket have heightened urgency in light of the Sixth Circuit's broad liability holding. Under § 1983, "no compensatory damages may be awarded . . . absent proof of actual injury." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). Under the Act, however, plaintiffs can recover statutory

damages and attorney's fees *without* proof of actual injury. 15 U.S.C. § 1692k(a)(2). Not only that, the Act allows for a recovery even for good-faith misinterpretations of its ambiguous scope. *Jerman*, 559 U.S. at 577. The Act thus magnifies the risks for government actors and the disincentives to public service. *Cf. id.* at 612 (Kennedy, J., dissenting) (finding it problematic to authorize "class-action suits [that] transform technical legal violations into windfalls for plaintiffs or their attorneys").

C. The Sixth Circuit's exemption and liability holdings also leave special counsel in the dark on how to avoid protracted litigation. Special counsel could "face potential liability coming and going" because their use of *private* letterhead in response to the panel's decision might lead debtors to "assume that the letter does *not* concern a state debt." Pet. App. 9a (Sutton, J., dissenting). Yet, the dissent added, the "only thing misleading in this setting would be to suggest (through a law firm letterhead alone) that this *was not a state debt*." Pet. App. 68a. So the majority tells special counsel that their use of state letterhead could generate a lawsuit; the dissent tells them that switching to private letterhead could do so as well. What are special counsel to do?

The majority rejected the dissent's concern with private letterhead on the ground that the State has no "special authority that a regular creditor does not." Pet. App. 45a. Not so. If a debt has been certified to the Attorney General, a debtor's income-tax refund "may be applied in satisfaction." Ohio Rev. Code § 5747.12. That is not true of private debts. Unlike with a private creditor, moreover, statutes of limitation do not run against the State unless they

expressly say so. *Ohio Dep't. of Transp. v. Sullivan*, 38 Ohio St. 3d 137, 140 (1988); Ohio Rev. Code § 2329.07(A) (setting longer period for executing state judgments). Debts due the State also receive priority in probate. Ohio Rev. Code § 2117.25(A)(8). And the State Lottery Commission must use a debtor's lottery prize exceeding $5,000 to pay debts certified to the Attorney General. *Id.* § 3770.073(A). While the majority noted that private creditors may garnish lottery prizes, Pet. App. 45a, Ohio law gives that right only to creditors with a *final judgment* and only for prizes over *$100,000*; it also requires a new court order and places the debts in an inferior position. Ohio Rev. Code § 3770.07(D)(2)(b); Ohio Adm. Code 3770:1-8-01(B)(7). Given these differences, any debtor—from the most sophisticated to the least—would want to know that special counsel collect state debts on behalf of the Attorney General.

Even outside the state-debt context, others have expressed concerns with opaque "misleading" standards. Judge Easterbrook noted that the least-sophisticated-debtor test "either condemns *all* debt collection efforts (because some simpleton is bound to read the most fantastic things into ordinary language) or creates a system random in operation (because courts must be applying some other rule, which they have not communicated to debt collectors)." *Gammon*, 27 F.3d at 1259 (Easterbrook, J., concurring); *see also Lesher*, 650 F.3d at 1007 (Jordan, J., dissenting) (noting that the "practical effect" of the decision is that firms take "extraordinary risk in sending a collection letter [on firm letterhead], no matter how conciliatory").

D. Finally, the Sixth Circuit's holdings may not even help unsophisticated debtors (as compared to others). As noted by one judge who voted to hear this case en banc, the combination of vague liability standards with the absence of any need to prove a defendant's bad faith or a plaintiff's injury has "'enabled'" a sophisticated "'class of professional plaintiffs.'" *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513-14 (6th Cir. 2007) (Batchelder, J.) (citation omitted). Courts should be wary of turning the Act into a tool that "aligns the judicial system with those who would use litigation to enrich themselves at the expense of attorneys who strictly follow and adhere to professional and ethical standards." *Jerman*, 559 U.S. at 612 (Kennedy, J., dissenting).

As for the unsophisticated, Attorney General letterhead *does* identify special counsel's connection to the office and signals that debtors can call the office with concerns. The majority conceded that the letterhead has led debtors to do so. Pet. App. 48a-49a. This might have been one purpose behind the tax law that *required* the Attorney General to give the letterhead to special counsel for tax debts. Ohio Rev. Code § 109.08. That law's very next section created "problem resolution officers" to review complaints about special counsel. *Id.* § 109.082.

The Attorney General, it also bears noting, wears many hats. In addition to debt collection, the office oversees Ohio's Consumer Sales Practices Act. Ohio Rev. Code §§ 1345.05-.06. The office strives to balance consumer protection and fair collection. In that respect, whether or not special counsel are *statutorily* obligated to follow the Act, they are *contractually* obligated to follow its standards. Doc.48-8, Contract,

PageID#646. The Attorney General has "zero tolerance" for communications with debtors that show "less than complete respect for [their] rights." *Id.*, PageID#645-46. But if debtors remain in the dark about special counsel's connection to the office, they might not know to report real abuse.

CONCLUSION

The petition for a writ of certiorari should be granted.

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