No. 15-338

In THE
Supreme Court of the United States

MARK J. SHERIFF, ET AL.,
Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,
Respondents.

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

BRIEF FOR THE NHS CONSUMER LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Are the collections special counsel "officers" of the State within the meaning of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692a(6)(C)?

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INTEREST OF THE *AMICUS CURIAE*[1]

The NHS Consumer Law Center was launched in 2012 by the Neighborhood Housing Services of Greater Cleveland (the "NHSGC"), a not-for-profit organization committed to helping the citizens of Ohio, in particular those with low-to-moderate incomes, achieve the dream of home ownership. The NHSGC offers consumers and families in Ohio a range of programs and services, including financial capability counseling, foreclosure assistance, pre-loan reverse mortgage counseling, and various other forms of related assistance.

To further the NHSGC's broader aim of empowering Ohio consumers, the NHS Consumer Law Center provides these consumers with the information they need to make informed and financially responsible decisions en route to home ownership. Among other measures, the NHS Consumer Law Center runs public awareness campaigns, disseminates educational materials, hosts blogs dedicated to consumer issues, and conducts seminars on the legal rights of consumers and debtors.

One of the Consumer Law Center's principal aims is to help consumers avoid predatory, abusive,

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[1] Pursuant to Supreme Court Rule 37.3, counsel of record of all parties received timely notice of *amicus* NHS Consumer Law Center's intent to file this brief and have consented to its filing. No counsel for a party authored this brief in whole or in part and no person or entity other than the *amicus* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

or fraudulent debt collection practices. The FDCPA, 15 U.S.C. § 1692 *et seq.*, has long been a bulwark against such practices. Conceived to "eliminate abusive debt collection practices by debt collectors" and "promote consistent State action to protect consumers against debt collection abuses," the FDCPA proscribes a range of deceptive and unfair practices by "debt collectors." 15 U.S.C. § 1692.

The Ohio Attorney General advances an implausible reading of the term "debt collector" that threatens to eviscerate the FDCPA and hurt consumers, including the Consumer Law Center's clients. The Attorney General hopes to exempt the collections special counsel—ordinary third-party debt collectors who have been known to engage in abusive practices—from FDCPA coverage simply because they have entered into contractual agreements with the Attorney General. If this dangerous interpretation of the FDCPA were adopted, it would threaten to perpetuate further abuse in Ohio—and potentially across the country. As part of its responsibility to its clients and in furtherance of its mission, the NHS Consumer Law Center has an interest in fighting this erosion of consumer and debtor rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the FDCPA to protect "the least sophisticated consumer" from a range of "abusive … debt collection practices by many debt collectors." *See Harvey v. Great Seneca Fin. Corp.*,

453 F.3d 324, 329 (6th Cir. 2006). This case presents an opportunity to ensure that vulnerable consumers in Ohio continue to enjoy the protections of the FDCPA, as Congress intended, and that the purpose of the statute is not undermined by a misguided interpretation of the term "officer" that bears little relation to the reality on the ground in Ohio.

The Office of the Ohio Attorney General (the "Attorney General") and other Petitioners argue that certain private debt collectors, known as the "collections special counsel," should be exempt from the FDCPA's restrictions because they are not "debt collectors" within the meaning of the statute. In so arguing, the Attorney General cites section 1692a(6)(C), which exempts from the scope of the FDCPA "any officer or employee of . . . any State to the extent collecting or attempting to collect any debt is in the performance of his official duties." This provision is inapposite, however.

Many of the collections special counsel collect debts for a host of entities, both public and private, on a regular basis. Far from being officers of the state, they are ordinary debt collectors impelled by the profit motive and engaged in the business of collections for any client with whom they have a contractual relationship. In short, they are the exact class of persons whose conduct the FDCPA is meant to regulate. *See* 15 U.S.C. § 1692a(6) (explaining that "debt collector" includes anyone "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.") The Sixth Circuit correctly recognized this fact. *See, e.g.*, Pet. App. 29, 42, 43 ("Special

counsel are, simply, as their contract with the Attorney General states, independent contractors.").

Not only are the collections special counsel virtually indistinguishable from run-of-the-mill debt collectors in their day-to-day business, but also the methods they employ in conducting this business are similar to those of other independent contractors in the collections business. Indeed, the collections special counsel have been found to engage in FDCPA-proscribed tactics such as seeking payments from consumers who do not owe any debt, sending false debt collection notices misrepresenting the amounts and legal basis of debts owed, pursuing assets exempt from debt collection, and levying usurious fees on the basis of statutory interpretations that courts have found to be without merit.

Congress did not intend consumers confronted with such abusive practices to be without the protections afforded by the FDCPA. Indeed, ruling that the collections special counsel are "officers" of the State would risk perpetuating and worsening these types of abuses. Moreover, such a ruling could foster greater lawlessness in the debt collection arena by encouraging the expansion of Ohio's special counsel program, both nationally and to non-attorneys. The unsophisticated consumers Congress intended to protect in Ohio and beyond deserve better.

The Court should affirm the decision of the Court of Appeals.

ARGUMENT

I. The Collections Special Counsel Are Ordinary Outside Debt Collectors Subject to the FDCPA

A. The Collections Special Counsel Collect Debts on Behalf of Entities Public and Private

The FDCPA defines a "debt collector" as anyone "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). The collections special counsel fall squarely within this definition and regularly enter into contracts with private entities to collect debts on their behalf. For instance, the website for the firm of petitioner Eric A. Jones states that the firm provides "high-quality, professional legal services focused on debt collection and related legal issues." Debt Collection, Jones Law Group, LLC, http://tinyurl.com/hg8kjcp (last visited Feb. 25, 2016). Indeed, the firm touts its debt collection experience, stating "[w]e are the preferred attorney-managed debt recovery solution for a significant number of businesses and organizations in Ohio. Our firm represents business owners, entrepreneurs, debt buyers, and other clients who need to recover money owed to them through the legal process." *Id.*

Furthermore, in his Request for Qualifications for Special Counsel, the Attorney General acknowledges that the collections special counsel are involved in the general business of debt collection and finds this desirable, explaining that "[i]n

particular, the Attorney General seeks attorneys with experience in general collections, the securing of judgments, and post-judgment enforcement, along with those who have experience representing creditors in bankruptcy matters." Request for Qualifications for Collections Special Counsel, Ohio Attorney General's Office, http://tinyurl.com/zczoxdx (last visited Feb. 25, 2016); *see, e.g.*, JA 210.[2]

In short, the collections special counsel are merely lawyers who pursue debt, whether public or private. Inasmuch as they are not officers of the private companies with which they enter into contracts of fixed duration to collect debt in return

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[2] There are indications that financial concerns may modulate the preference for experience that the Request for Qualifications would suggest. The Dayton Daily News spotlighted one notable instance in which a politically connected contributor with no prior debt collection experience beat out more experienced debt collection firms. Laura A. Bischoff, *Vendors Gave Big to DeWine, GOP: Ohio AG Denies Politics Played a Role in Awarding Lucrative Collections Contracts*, DAYTON DAILY NEWS (Jul. 19, 2014, 12:00 AM), http://tinyurl.com/zs4sono. The paper reported that, in April 2012, CELCO Ltd., a debt collection firm that had been formed two days before the Attorney General issued Requests for Qualifications, edged out a number of firms that had decades of experience, national footprints, and licenses to collect outside Ohio. *Id.* The Dayton Daily News reported that the founder of CELCO Ltd. and his relatives had contributed $35,000 to the Ohio Republican Party and $23,000 to the Summit County GOP, which in turn donated $405,500 to the Attorney General's campaign between 2010 and 2014. *Id.* Significantly, Ohio law prohibits a "state elected officer" from "accept[ing] a contribution" from a "state employee" he appoints, where the term "state employee" is defined broadly to cover "any person holding a position subject to appointment . . . by an appointing officer. OHIO REV. CODE ANN. §§ 124.01, 3517.092.

for lucrative commissions, they should not be deemed officers of the state for which they render identical contract-based services.

B. The Collections Special Counsel's Debt Collection Practices Are Identical to Those of Outside Debt Collectors

The collections special counsel have been known to employ the same tactics and dishonest methods of debt collection used by run-of-the mill third-party debt collectors. Medicaid estate recovery and student loan debt claims are just two areas replete with examples of egregious behavior by the collections special counsel.

1. The Collections Special Counsel File Misleading Notices and Assert Liens Against Assets Exempt as a Matter of Law

In keeping with federal statutes, Ohio's Medicaid Estate Recovery program allows the state to seek repayment for the cost of Medicaid benefits after the Medicaid recipient is deceased. Under both the state and federal statutes authorizing liens against an estate to recoup Medicaid benefits after the recipient is deceased, the state can seek recovery only after the recipient's surviving spouse has died. Indeed, the federal statute states that "[a]ny adjustment or recovery … may be made only after the death of the individual's surviving spouse," among other restrictions. *See* 42 U.S.C. § 1396p(b)(2). Mirroring the federal statute, Ohio's statute authorizing recovery of Medicaid benefits from estates provides that, "[n]o adjustment or recovery may be made …

from a permanently institutionalized individual's estate or on the sale of property of a permanently institutionalized individual that is subject to a lien … while either of the following are alive: (a) The spouse of the permanently institutionalized individual or individual." OHIO REV. CODE ANN.§ 5162.21(C)(1)(a).

Despite this clear statutory limitation, the collections special counsel have been known to file Affidavits of Fact Relating to Title under OHIO REV. CODE ANN.§ 5301.252 against residences owned by the spouses of deceased Medicaid recipients while these spouses are still alive. *See, e.g.*, No. 15-0078598, Affidavit of Fact Relating to Title (Jul. 28, 2015). These practices occur despite the fact that Ohio law provides that Affidavits of Fact Relating to Title are appropriate only for "facts relating to the matters … that may affect the title to real estate in this state." OHIO REV. CODE ANN. § 5301.252(A). These Affidavits can have the effect of putting a cloud on the title of the residences in question. At the very least, they can induce the seniors who receive them to pay amounts they absolutely do not owe under the law. The collections special counsel have also sent notices to spouses falsely stating that the Medicaid claims are deferred until the spouses no longer reside at the residence, rather than until the spouse's death. *Id.* at 1. Some of these notices have also falsely stated that the Medicaid claims would become enforceable "upon the attempted sale or transfer of the property." *Id.* These statements have no basis in the law and are, in fact, untrue.

Furthermore, the collections special counsel seeking payment of Medicaid recovery amounts have pursued assets that are exempt from recovery as a matter of law. The Ohio Medicaid estate recovery statute provides that any applicable lien attaches only to property that the Medicaid recipient owned at the time of death. *See id.* § 5162.21(A)(1)(b) (defining "estate" as "[a]ny other real and personal property and other assets in which an individual had any legal title or interest at the time of death (to the extent of the interest)."). Nonetheless, the collections special counsel seeking to recover Medicaid benefits after recipients' deaths have been known to file Affidavits of Fact against assets owned solely by the spouses of the Medicaid recipients at the time of the recipients' death.

Apart from the fact that the collections special counsel have been known to misstate the law in these Affidavits and proceed against assets from which the state cannot seek collection, there is also a coercive element to their conduct that mirrors that of run-of-the-mill debt collectors. In some cases, the elderly spouses have learned of the Affidavits wrongly filed against their assets only shortly before closing on sales of these assets. The high pressure setting of a closing, in which there is little time to spare for a challenge and the parties are anxious, increases the likelihood that the spouses will pay in full or settle these baseless claims. Title examiners have also required claims to be paid from the proceeds of sales in order for closings to proceed. The fact that these Affidavits are accompanied by letters printed on the Attorney General's letterhead

only adds to the intimidation and further confuses people as to the veracity of debt.

These coercive and misleading practices are the exact types of tactics that outside debt collectors have long used and that the FDCPA was meant to address. *See generally* S. Rep. No. 95-382 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695.

2. The Collections Special Counsel Levy Extremely High Fees with Questionable Statutory Authorization

The collections special counsel have been known to charge extremely high fees on top of the principal of the debts being collected. For instance, in *Client Security Fund of Ohio v. Broschak*, the collection fees assessed were almost equal to the principal—$22,433.90 on a principal of $28,500.00. *See* No. 12CVH-09-11545, Magistrate's Decision on Damages (Franklin Cty. C.P. Ohio Civ. Div. Nov. 15, 2013), *aff'd* No. 12CVH-09-11545, Judgment Entry (Franklin Cty. C.P. Ohio Civ. Div. Feb. 4, 2014). There was no attempt to relate the fees to any costs of collection and the fees were assessed as an arbitrary percentage of the principal. *See id.* at 2; *see also Bradley v. Franklin Collection Serv., Inc.*, 739 F.3d 606, 609 (11th Cir. 2014) (holding that debt collectors may not under the FDCPA "charge[ ] the debtor a collection fee based on a percentage of the principal balance of the debt due rather than the actual cost of collection.").

Section 131.02(A) of the Ohio Revised Code provides generally for the collection of amounts due

to the state. Among other things, the statute authorizes the state to certify to the Attorney General the amounts outstanding so that the Attorney General can collect the debts. *Id.* In addition, the statute permits the Attorney General to "assess the collection cost to the amount certified in such manner and amount as prescribed by the attorney general." *Id.* It is noteworthy that "collection costs," i.e., the amounts the Attorney General spends to collect the debt, are what is authorized. This provision is meant to compensate for actual costs incurred and there is no authorization of punitive or usurious fees. Another provision that the collections special counsel tend to cite in support of their extraordinary fees is section 109.081 of the Ohio Revised Code, which provides that "[u]p to eleven per cent of all amounts collected by the attorney general, whether by employees or agents of the attorney general or by special counsel … shall be paid into the state treasury to the credit of the attorney general claims fund[.]" The plain language of this section makes clear that what is authorized is for a portion of the amounts collected to be deposited into the fund created. The percentage authorized is not meant to be added on top of the principal. Nonetheless, the collections special counsel have seized upon both sections 109.08 and 131.02(A) as justification for their fees, despite the fact that courts have ruled those fees excessive and not authorized by these sections.

In *Broschak*, the court denied the collections special counsel's attempt to levy what would have amounted to an almost 80 percent fee as "collection costs" and attorneys' fees. Rejecting the collections

special counsel's attempt to rely on section 109.08, the court explained that "[t]here is nothing in R.C. 109.08 that entitles Plaintiff or the Attorney General to an award from this Court of attorneys' fees against Defendant or collection costs representing the fees to be paid to special counsel." 12CVH-09-11545, Magistrate's Decision at 14. The court further explained that the percentage authorized by section 109.08 was to come *out of*, not *on top of*, the principal of the debt: "Instead special counsel, pursuant to R.C. 109.08, is to be paid from the funds collected by them from the claims that are certified, which in this case amount to $28,500.00 in compensatory damages." *Id.* The court also rejected the collections special counsel's reliance on section 131.02, again pointing out that the collection costs authorized by that section were to come out of the principal, not to be added on top of the principal. *Id.* at 15. Accordingly, the court denied almost all of the fees that the collections special counsel had sought and allowed only $2,850.00 to be taken out of the $28,500.00 owed and paid to the Attorney General, not the special counsel. *Id.* at 15-16.

Similarly, in *Columbus City School District v. Hunter*, the court denied the collection special counsel's attempt to unilaterally levy attorneys' fees disguised as collection costs. No. 14CVH-8323, Magistrate's Decision (Franklin Cty. C.P. Ohio Civ. Div. Jan. 28), *aff'd* No. 14CVH-8323, Judgment Entry & Notice of Final, Appealable Order (Franklin Cty. C.P. Ohio Civ. Div. Mar. 5, 2015). The court ruled that "R.C. 109.08 does not provide any support for Plaintiff's claim for collection costs that are, in fact, as Plaintiff admits on pages 2 and 3 of its brief,

the attorney's fees of special counsel…" Rejecting the collections special counsel's invocation of Section 109.08 and implicit reliance on section 131.02, the court ruled that "R.C. 109.08 makes clear that special counsel is to be paid for their services from the funds collected by them on behalf of their client, not as part of a separate award by the Court or collection costs sought under another provision of the revised code." Magistrate's Decision at 6.

Although the individuals targeted in *Broschak* and *Hunter* were able to challenge and overturn these excessive fees, it is not difficult to imagine that many more individuals in their position merely suffer the injury and pay instead of undertaking the expense and difficulty of litigation. Even when challenged in court, the collections special counsel have been known to appear in court relying on false or misleading affidavits. For instance, the *Broschak* court noted that "[n]either the complaint nor any of its attachments, however, provide any explanation as to how or why Plaintiff is entitled to the claimed collection costs or how such costs were calculated or incurred. Moreover, the affidavit provided in support of the motion for default does not provide any basis for Plaintiff's claimed entitlement to the collection costs." *See* 12CVH-09-11545, Magistrate's Decision at 2. In *Hunter*, the court pointed out that "[n]o explanation was given by Mr. Yono or by Plaintiff in its brief, exhibits and affidavits as to how the claimed collection costs of $3,218.81 was calculated…." No. 14CVH-8323,Magistrate's Decision at 5. The collections special counsel even attempted to assess statutory interest with no basis. *Id.* at 4 (noting that "no explanation was given by

Mr. Yono [the assistant attorney general] at the hearing or by Plaintiff in its brief, exhibits and affidavits as to how the $2,192.08 in claimed statutory interest was calculated." Neither the collections special counsel nor the assistant attorney general were able to explain the fees when called to testify in court. *Id.* If the collections special counsel are engaging in such tactics in court before counsel and learned judges, one can only imagine the antics they employ outside the courts to induce laypeople to pay egregious fees.[3]

In keeping with their status as common debt collectors, the collections special counsel have been found to misrepresent debts, inflate debts with dubious fees, waylay unsuspecting people who do not even owe debts, and even time the individuals' discovery of the debt in such a way as to create pressure and limit the opportunity to challenge these amounts. Their use of the Attorney General's letterhead should not insulate their actions or distract from the fact that they are merely hired hands for whom the state is a client like any other. They are not officers.

[3] Considering the sharp rebuke that the collections special counsel's fees have drawn and the Attorney General's stance that they are his officers, one might expect the Attorney General to rein them in on this matter. We have not found any evidence that this has occurred, however.

II. Construing the Collections Special Counsel as "Officers" of the State Would Create Perverse Incentives and Facilitate Other Harms

As the FDCPA acknowledges, "[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692. The FDCPA was enacted to "eliminate abusive debt collection practices by debt collectors" and combat those harms. *Id.* To exempt the collections special counsel from the obligations imposed on "debt collectors" would be to risk undercutting the FDCPA's core objectives.

Specifically, finding that the collections special counsel are officers would risk giving them carte blanche to continue to engage in the abusive practices outlined above and proscribed by the FDCPA. Already, even with the possibility of liability under the FDCPA looming over them, the collections special counsel have been found to utilize dishonest tactics. Removing the FDCPA as a check on their actions could prove disastrous and incentivize worse behavior. Indeed, construing special counsel as "officers" would allow them to engage in a litany of proscribed practices when collecting debts on behalf of the state that they must refrain from when collecting debts on behalf of their private clients. There is no principled reason special counsel should, for example, be permitted to make false representations to debtors about the character,

amount, or legal status of their debts merely because the debt in question is owed to a public entity.

Of equal concern is that exempting the collections special counsel from the FDCPA would encourage the expansion of the program to non-attorney debt collectors. Until now, the Attorney General has relied on licensed attorneys only to serve as special counsel. *See* Pet. App. 24. Qualified attorneys are bound by Ohio's Rules of Professional Conduct, rules enforced by the Supreme Court of Ohio. *See* Ohio State Bar Association, Lawyer Ethics and Discipline, http://tinyurl.com/z5tu49m (last visited Feb. 25, 2016). The Rules "prohibit lawyers from engaging in conduct involving moral turpitude, fraud, deceit, dishonesty or misrepresentation," conduct "prejudicial to the administration of justice," or "any other conduct that adversely reflects on the lawyer's fitness to practice law." *Id.*; Rule 8.4 of Ohio Rules of Professional Conduct, http://tinyurl.com/ltw3y9p (last visited Feb. 25, 2016). While reason exists to doubt that the collections special counsel heed these restrictions, non-attorney debt collectors are not subject to any of these ethical constraints.

Although, until now, the Office of the Attorney General has entered into retention agreements with attorneys only, there is no reason the Office could not enter into comparable contractual arrangements with non-attorney debt collectors. The latter may not be positioned to sue debtors on behalf of the state, but they are equipped to perform the other debt collection functions assumed by special counsel. If the Attorney General's expansive interpretation of

the term "officer" is adopted, non-attorneys in contractual relationships with the Attorney General would be similarly shielded from liability under the FDCPA—and simultaneously unencumbered by the ethical obligations of attorney debt collectors.[4]

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[4] News reports have suggested that the Office of the Attorney General may not be a meaningful source of regulation of the collections special counsel's conduct.

In 2014, certain news organizations began exploring the Attorney General's selection process for the collections special counsel and relationship with those selected. After an extensive investigation, the Dayton Daily News concluded that "[i]n doling out lucrative collections contracts, Ohio Attorney General Mike DeWine passed over more experienced vendors in favor of a friend's new collections agency" and that "[h]is campaign and the state Republican Party received hundreds of thousands of dollars in campaign donations from collectors as they sought work from the state." Laura A. Bischoff, *Vendors Gave Big to DeWine, GOP: Ohio AG Denies Politics Played a Role in Awarding Lucrative Collections Contracts*, DAYTON DAILY NEWS (Jul. 19, 2014, 12:00 AM), http://tinyurl.com/zs4sono. The Associated Press also reached some disturbing conclusions about the selection process, finding that the Attorney General's "selection process for hiring outside law firms has gone essentially undocumented" and that a "public records request by the AP turned up no judges' notes, scoring sheets, email exchanges on firms' qualifications or recommendations made to" the Attorney General. Julie Carr Smyth, *Ohio Attorney General Mike DeWine's Vetting of Law Firms Undocumented*, ASSOCIATED PRESS (Jun. 26, 2014), http://tinyurl.com/jk3cb9b.

The news reports also indicated that, even after selection, the lack of transparency persisted and money continued to change hands. The Dayton Daily News noted an apparent "nexus between how much debt collectors earn and the size of their contributions." Laura A. Bischoff, *Vendors Gave Big to*

Finally, as the brief submitted by no less than seven other states' attorneys general as *amici curiae* indicates, this case may have implications for consumers and debtors nationwide. If this Court exempts the Ohio special counsel program from the anti-deception provisions of the FDCPA, there is every reason to believe that states across the country would move to adopt comparable debt collection programs. The national expansion of such programs would risk profoundly undermining the purposes of the FDCPA, potentially triggering a proliferation of abusive practices by debt collectors with the imprimatur and protection of states' attorneys general, thereby compromising consumer and debtor rights throughout the country.

DeWine, GOP: Ohio AG Denies Politics Played a Role in Awarding Lucrative Collections Contracts, DAYTON DAILY NEWS (Jul. 19, 2014, 12:00 AM), http://tinyurl.com/zs4sono. The newspaper also reported that, between 2010 and when it published its findings, the collections special counsel who contributed in excess of $10,000 received an average of $796,500 in debt collection income between 2011 and 2013, while those contributing under $10,000 received an average of $192,000 during that period. *Id.* In total, the newspaper found that the Attorney General's 119 collections special counsel—including their law firms and family members—contributed $1.38 million to the campaigns of the Attorney General, his son, and the Ohio Republican Party. *Id.*

At a minimum, these allegations raise questions about the nature of the Attorney General's relationship with the collections special counsel and the rationale behind the Attorney General's preferred interpretation of the FDCPA.

CONCLUSION

For the foregoing reasons, *amicus* NHS Consumer Law Center urges the Court to affirm the judgment of the Court of Appeals and hold that the collections special counsel are "debt collectors" under the FDCPA.

Respectfully submitted,

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Date: March 2, 2016