

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

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