NO. 05-____

IN THE
Supreme Court of the United States

GARRY IOFFE,
Petitioner,

v.

SKOKIE MOTOR SALES, INC.,
doing business as Sherman Dodge,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C. § 32701, *et seq.*, a private party may recover damages from a person who violates the Act or its implementing regulations "with intent to defraud." 49 U.S.C. § 32710(a). The question presented is:

> To state a claim under the Motor Vehicle Information and Cost Savings Act, is it sufficient for a plaintiff to allege that the defendant violated the Act with intent to defraud (as the Eleventh Circuit has held), or must a plaintiff also allege intent to defraud with respect to a vehicle's mileage (as the Seventh Circuit held below)?

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The opinion of the U.S. Court of Appeals for the Seventh Circuit is reported at 414 F.3d 708, and is reproduced in the Appendix at 1a. The decision of the district court is unreported and is reproduced in the Appendix at 15a.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2005. On September 29, 2005, Justice Stevens granted an extension of the time within which to file this petition to and including December 4, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Motor Vehicle Information and Cost Savings Act, 49 U.S.C. § 32710, provides:

> **(a) Violation and amount of damages.**–A person that violates this chapter or a regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or $1,500, whichever is greater.
>
> **(b) Civil actions.**–A person may bring a civil action to enforce a claim under this section in an appropriate United States district court or in another court of competent jurisdiction . . . .

STATEMENT

Title IV of the Motor Vehicle Information and Cost Savings Act (MVICSA), 49 U.S.C. § 32701, *et seq.*, commonly known as the Odometer Act, establishes a comprehensive regulatory scheme designed to provide consumer confidence in the used auto market by preventing odometer fraud and ensuring the ability of consumers to assess the safety and reliability of motor vehicles. The Act allows an injured consumer to bring a civil action for damages against a person who violates the Act or its implementing regulations "with intent to defraud." 49 U.S.C. § 32710(a).

When petitioner Gary Ioffe purchased a car from respondent Sherman Dodge, Sherman Dodge did not show him the vehicle's title, in violation of MVICSA's implementing regulations. Instead, a Sherman Dodge employee signed Mr. Ioffe's name to the title without his permission. As a result, at the time that he made his purchase, Mr. Ioffe did not know what the title would have revealed—that the vehicle was a rebuilt wreck that was missing an airbag. After he learned the vehicle's true history, Mr. Ioffe filed suit, alleging that Sherman Dodge had violated the Act with the intent to defraud him. In the decision below, the Seventh Circuit held that Mr. Ioffe had not stated a claim under the Act. In rejecting Mr. Ioffe's claim, the court created an additional element that is nowhere to be found in the text of the statute–a requirement that the plaintiff prove intent to defraud *with respect to the vehicle's mileage*. The Eleventh Circuit, in a decision issued just two months later, rejected that approach, concluding that "the Seventh Circuit failed to apply the

statute's plain language." *Owens v. Samkle Automotive Inc.*, 425 F.3d 1318, 1321 n.4 (11th Cir. 2005).

The open disagreement between the Seventh and Eleventh Circuits brings into focus a wider disarray among the lower federal courts and state appellate courts. The split of authority is particularly acute in states such as Illinois and Georgia, where the state and federal courts have arrived at opposite answers to the question presented. Given the need for uniformity in the interstate auto market, the disruption to the national regulatory scheme engendered by the decision below is intolerable and requires this Court's immediate intervention.

A. Statutory and Regulatory Framework

In 1972, Congress enacted the MVICSA to "reduce vehicle operating costs and improve the safety of passenger motor vehicles." S. Rep. No. 92-413 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3960, 3961. Title IV of the MVICSA established "a national policy against odometer tampering." *Id.* In findings accompanying the legislation, Congress concluded that consumers rely heavily on the odometer reading "as an index of the condition and value of the vehicle" and that accurate disclosures are needed to assist buyers "in deciding on the safety and reliability of the vehicle." 49 U.S.C. § 32701(a).

The Act contains not only a flat prohibition on odometer tampering and related activities, *id.* § 32703, but also elaborate standardized disclosure requirements and record-keeping procedures designed

to provide consumers with information about a vehicle's history and to ease the investigation and prosecution of violators. *See id.* § 32705 (establishing disclosure requirements on transfer of motor vehicles); 49 U.S.C. § 32706 (conferring authority on Secretary of Transportation to inspect, investigate, require record-keeping, and conduct civil enforcement proceedings). Enforcement under the Act is carried out chiefly through civil actions by private parties. The Act allows a private party to recover trebled actual damages or $1,500, whichever is greater, from "[a] person who violates [the Act] or a regulation prescribed under [the Act], with intent to defraud." 49 U.S.C. § 32710(a).

In 1986, Congress revisited the problem and concluded that odometer fraud remained "one of the most costly types of fraud in the United States," "cost[ing] consumers in excess of $2 billion annually." S. Rep. 99-47 (1986), at 2, *reprinted in* 1986 U.S.C.C.A.N. 5620, 5621. Despite the 1972 legislation, odometer tampering remained a "very lucrative practice," because "the process [was] very difficult to detect and the risk of getting caught [was] negligible." *Id.* Congress found that the lack of national requirements concerning the issuance and disclosure of vehicle titles played a major role in making it easier for auto wholesalers to commit fraud undetected. *Id.* at 3, *reprinted in* 1986 U.S.C.C.A.N. 5620, 5622. In order to prevent these practices and close "loopholes in State titling laws," *id.*, Congress enacted the Truth in Mileage Act, Pub. L. No. 99-579, 100 Stat. 3309 (1986). Among other things, the new legislation mandated that states print titles using secure printing processes and that auto auction companies retain records of used car

sales. *Id.* The statute also increased the civil and criminal penalties for fraud. *Id.*

In 1988, the National Highway Transportation Safety Administration (NHTSA) promulgated regulations implementing the 1986 amendments and emphasizing requirements relating to disclosure of the vehicle's title. To warn future owners about the vehicle's mileage and ownership history and prevent title laundering, the regulations require the seller of a motor vehicle to reveal the mileage to the purchaser "in writing on the title." 49 C.F.R. § 580.5(c). This requirement also "helps create a permanent record or 'paper trail' on the vehicle's title at the place where the vehicle is titled," which "can be checked by car owners and law enforcement and other State officials to track odometer fraud." *Odometer Disclosure Requirements*, 52 Fed. Reg. 27,022, 27,023 (July 17, 1987). Absent the title disclosure requirement, "[t]he integrity of the 'paper trail' intended by Congress would be in jeopardy. This would defeat the purpose of the Act . . . to 'establish certain safegaurds for the protection of purchasers.'" *Id.* at 27025 (quoting 15 U.S.C. § 1981, now codified at 49 U.S.C. § 32701(b)).

B. Factual Background

The facts are undisputed. Pet. App. 16a. On September 12, 2001, respondent Sherman Dodge, a car dealership, purchased a 1993 Toyota Tercel from one of its customers in exchange for a $500 trade-in allowance. *Id.* Sherman Dodge informed the customer that, because the car's title indicated that the car had

been "rebuilt," it would pay no more than $500 for the car. *Id.*

On October 1, 2001, Sherman Dodge sold the same car to Garry Ioffe for $2,637.11. *Id.* At the time of the sale, Sherman Dodge neither informed Mr. Ioffe that the car had been rebuilt nor showed him the car's title. *Id.* Instead, a Sherman Dodge employee signed Mr. Ioffe's name on the back of the title without Mr. Ioffe's knowledge or permission. *See* Plaintiff's Statement of Material Facts ¶ 26-28 (Dist. Ct. Doc. No. 36).

Soon after Mr. Ioffe bought the car, it broke down. *Id.* Mr. Ioffe brought the car to a mechanic, who told him that the car had been rebuilt and could not be repaired. *Id.* When Sherman Dodge refused to accept return of the vehicle, Mr. Ioffe traded it in to another dealership for a $500 credit against the purchase of another vehicle. *Id.*

C. Proceedings Below

1. District Court

Mr. Ioffe brought suit against Sherman Dodge in the United States District Court for the Northern District of Illinois on September 30, 2003, alleging violations of MVICSA and claims under state law. Pet. App. 2a-3a. Jurisdiction was premised on 28 U.S.C. § 1331. He alleged that Sherman Dodge intentionally concealed the fact that the car was a rebuilt wreck and, to effectuate the fraud, intentionally failed to disclose the car's title because it would reveal that the car had been branded "rebuilt." The parties each moved for summary judgment on the MVICSA claim and

Sherman Dodge moved for summary judgment on the state-law claims.

The district court found that the relevant facts were undisputed and concluded that Sherman Dodge had, as a matter of law, "violated Odometer Act regulations" because Sherman Dodge had not disclosed the mileage in writing on the title, as required by 49 C.F.R. § 580.5(c). Moreover, the evidence viewed in a light most favorable to Ioffe showed that Sherman's intent in withholding the title was fraudulent. *Id.* at 17a; *id.* at 3a. The court concluded, however, that Mr. Ioffe had not alleged the requisite "intent to defraud" to state a claim under the Act because the Odometer Act requires the plaintiff to show "intent to defraud with regard to the mileage of the vehicle." *Id.* at 19a. Accordingly, on August 2, 2004, the district court granted respondent's motion for summary judgment on Mr. Ioffe's Odometer Act claim and declined to exercise supplemental jurisdiction over the state-law claims. *Id.* at 22a.

2. Court of Appeals

The Seventh Circuit affirmed. Despite the text of the statute, which provides that "[a] person that violates [MVICSA or its regulations], with intent to defraud, is liable," 49 U.S.C. 32710(a), the court rejected the proposition that "a plaintiff has a private right of action under § 32710 if there has been a violation of the Odometer Act or any of its implementing regulations and the violator intended to defraud the plaintiff." Pet. App. 5a. Instead, the court held that the statute "requires proof that the vehicle

transferor intended to defraud a transferee *with respect to mileage*." *Id.* at 2a (emphasis added).

Although the phrase "with respect to mileage" appears in neither the Act nor its regulations, the court arrived at this result by recasting the text of the statute so that the "intent to defraud" element is construed as a "shorthand designation for specific acts or omissions" that violate the Act or its regulations. *Id.* (quoting *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 562 (1971)). The court thus read the regulation requiring the disclosure of mileage in writing on the vehicle's title, 49 C.F.R. § 580.5(c), as limiting the reach of the statute only to those cases in which the transferor has not made the required disclosure *and* it can be shown that the transferor intended to deceive the transferee as to the vehicle's mileage. The court also suggested that to the extent that NHTSA intended otherwise in adopting its implementing regulations, those regulations exceed NHTSA's authority under the Act. *Id.* at 8a-9a.

Finally, the court concluded that "a requirement that a transferor's fraudulent intent relate to the vehicle's mileage comports with the expressed purposes of the Act and regulations," because the Act is concerned only with preventing odometer fraud. *Id.* at 9a-10a. The court acknowledged Mr. Ioffe's contention that private actions for fraudulent failure to disclose the title to the prospective buyer before sale further the prevention of odometer fraud, but held that the fraudulent intent requirement was intended to foreclose such actions. *Id.* at 10a-11a. Similarly, the court dismissed Mr. Ioffe's argument that

"[t]ransferors that conceal the rebuilt status of cars often do so to defraud transferees as to mileage, and that this can be prevented" by private suits. *Id.* at 11a. "Whether or not this is true," the court held, Congress did not intend to allow such suits. *Id.*

REASONS FOR GRANTING THE PETITION

I. The Courts Are Divided Over the Scope of MVICSA's Private Right of Action.

This case squarely presents an important question of federal statutory interpretation on which the courts are divided. In the decision below, the Seventh Circuit held that to prevail under MVICSA, 49 U.S.C. § 32701, the plaintiff must prove not only that the defendant violated the Act with intent to defraud, but also that the defendant intended to defraud the plaintiff *with respect to the vehicle's mileage.* Pet App. 2a. That holding is directly at odds with the decision issued by the Eleventh Circuit two months later in *Owens v. Samkle Automotive Inc.*, 425 F.3d 1318 (11th Cir. 2005).

In *Owens*, the Eleventh Circuit rejected the Seventh Circuit's reading of the statute on nearly identical facts. The complaint in *Owens* alleged that the defendant, Samkle, had sold the plaintiff a used car without disclosing the car's title "because it sought to conceal what the title would have revealed"—the car's history as a short-term rental vehicle. *Id.* at 1320. Samkle, like the defendant here, argued "that although it may have acted 'with intent to defraud' Ms. Owens when it concealed the title from her, the complaint still fails to state a cause of action because the fraud

referenced in the statute can only relate to the vehicle's mileage." *Id.* at 1321. The Eleventh Circuit, however, found that argument irreconcilable with MVICSA's plain text. *Id.* In the court's view, the statute's meaning was "direct, clear, and unambiguous" and contained no language limiting the meaning of the phrase "intent to defraud." *Id.* The court explicitly criticized the Seventh Circuit's decision in this case for "fail[ing] to apply the statute's plain language." *Id.* at 1321 n.4. The court also explained at length why a plain-language reading is consistent with the Act's purposes, which go beyond prohibiting straightforward odometer tampering to establish a comprehensive regulatory system that seeks to deter sophisticated fraud in the interstate auto market. *Id.* at 1322-25.

The open disagreement between the Seventh and Eleventh Circuits brings into focus a broad, persistent conflict on the question presented among lower federal courts across the country. Federal courts in the Second, Fourth, and Sixth Circuits are in line with the Seventh Circuit in holding that the Act requires a showing of intent to defraud with respect to mileage. Despite the plain language of section 32701, these courts have generally limited the scope of the Act's private right of action based on a narrow understanding of the Act's purpose.[1] By contrast,

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[1] *See, e.g., Locascio v. Imports Unlimited, Inc.*, 309 F. Supp. 2d 267, 270 (D. Conn. 2004) ("It is most in keeping with Congressional intent . . . to read the 'intent to defraud' requirement of the Odometer Act as requiring an intent to defraud with respect to the

courts in the Tenth and Eleventh Circuits have rejected that approach and have adhered to the plain language of the statute.[2]

The split in the federal courts is compounded by confusion in the state courts, which have concurrent

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vehicle's mileage."); *Mayberry v. Ememessay, Inc.*, 201 F. Supp. 2d 687, 695 (W.D. Va. 2002) ("[E]ven if there is a technical violation of the Act, Plaintiff cannot maintain a cause of action without evidence of intent to defraud as it relates to the purposes of the Act . . . . Because Plaintiff concedes that she was not defrauded as to the mileage of the car, her claim under the Odometer Act must fail."); *Compton v. Altavista Motors, Inc.,* 121 F. Supp. 2d 932 (W.D. Va. 2000); *Michael v. Ferris Auto Sales*, 650 F. Supp. 975 (D. Del. 1987); *Hunter v. Riverside Ford Sales, Inc.*, 2005 WL 1529541 (E.D. Mich. 2005).

[2] *See, e.g., Tuckish v. Pompano Motor Co.*, 337 F. Supp. 2d 1313 (S.D. Fla. 2004); *Salmeron v. Highlands Ford Sales, Inc.*, 223 F. Supp. 2d 1238, 1244 (D.N.M. 2002) ("[T]he fact that the actual mileage of a vehicle has been disclosed is not determinative of whether the transferor acted with an intent to defraud. Rather the relevant issue is whether the transferor knew or should have known the law and recklessly disregarded what the law required."), *reconsideration denied*, 248 F. Supp. 2d 1035 (D.N.M. 2003); *Yazzie v. Amigo Chevrolet, Inc.*, 198 F. Supp. 2d 1245 (D.N.M 2001); *cf. Leslie v. George Thompson Ford, Inc.*, 484 F. Supp. 954 (N.D. Ga. 1979).

jurisdiction under MVICSA. Because the Seventh Circuit and the Illinois courts have reached opposite conclusions on the question presented, Mr. Ioffe's case might have proceeded to trial if it had been litigated in state court.[3] Similarly, the outcome of an identical case in Georgia will now turn on whether the case is litigated in the federal courthouse or in the state courthouse just across the street.[4] Such a conflict is intolerable and should not be permitted to continue.

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[3] *Compare Krogull v. Woodfield Chevrolet*, 2004 WL 1429963, at *5 (Ill. Cir. 2004) (plaintiff need *not* show intent to defraud with respect to the vehicle's mileage) *with* Pet. App. 2a (plaintff must show intent to defraud with respect to the vehicle's mileage).

[4] *Compare Preiser v. Jim Letts Oldsmobile, Inc.*, 288 S.E.2d 219 (Ga. Ct. App. 1981) ("We fail to see how an intent to defraud can be inferred solely from a knowing failure to comply with the informational requirements of the Odometer Act"), *and Oden & Sims Used Cars, Inc. v. McMullen*, 264 S.E.2d 580, 582 (Ga. Ct. App. 1980) (holding that plaintiff must prove that "a change in the odometer reading has occurred and that the seller has failed to disclose the change" and expressly rejecting Georgia federal district court decisions to the contrary), *with Owens*, 425 F.3d at 1325 ("[The district court erred when it required Owens to 'allege and prove intent to defraud with respect to a vehicle's mileage.' Owens has alleged violations of the Odometer Act committed with intent to defraud, and is enough to state a claim under § 32710(a).").

Deferring review at this time would only prolong the confusion among the courts.

II. Given the Need for Uniformity in the Interstate Auto Market, the Question Presented Is Exceptionally Important.

When it passed MVICSA in 1972, Congress recognized that only a uniform federal regulatory system could adequately curb fraud in the interstate auto market. Although some states had enacted legislation to address the problem, other states found fraud to be "on the increase, especially when a neighboring State has an odometer law." S. Rep. 92-413 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3960, 3962. The inevitable inconsistency in the states' laws created an incentive for perpetrators of fraud to tamper with vehicles' odometers in states with minimal regulation and then sell those vehicles at inflated prices in states with laws prohibiting fraud. *Id.* As a result, Congress concluded, "State odometer laws are easily circumvented." *Id.* To prevent unscrupulous businesses from taking advantage of the patchwork of state law, Congress sought "to establish a national policy against odometer tampering and prevent consumers from being victimized by such abuses." *Id.*

Similarly, in the 1986 amendments to the Act, Congress added uniform federal requirements to fix the inconsistencies in state requirements concerning the issuance and disclosure of vehicle titles, which were routinely exploited to perpetrate fraud. S. Rep. 99-47, at 2 (1985), *reprinted in* 1986 U.S.C.C.A.N. 5620, 5621; *see* Truth in Mileage Act, Pub. L. No. 99-579, 100 Stat. 3309 (1986). In adopting these amendments, Congress

recognized the special danger of fraud "[a]mong some categories of used cars." S. Rep. 99-47, at 2, *reprinted in* 1986 U.S.C.C.A.N. 5620, 5621 These vehicles, such as leased cars, short-term rental cars, rebuilt wrecks, and flood-damaged vehicles, carry a particularly high risk of fraud because, absent a reliable paper trail, the consumer has no way of learning the vehicle's true history. Sales of rebuilt vehicles, such as the car Mr. Ioffe purchased, are likely to involve fraud because parts of different vehicles with different odometer readings are used in the reconstruction.[5] Similarly, leased or rental cars, like the vehicle in *Owens*, "are attractive targets because they are recent models with higher than average mileage." *Id.* Absent a secure paper trail, fraud involving such vehicles is difficult to detect. *See* Barbara Whitaker, *Safety: Things to Think About If You're Thinking 'Used',* N.Y. Times, Oct. 26,

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[5]Recognizing this problem, NHTSA has interpreted the Act to require that the mileage associated with the vehicle's chassis be disclosed to the purchaser. *See, e.g.*, NHTSA Opinion Letter, *available at* http://www.nhtsa.dot.gov/cars/rules/interps/aiam/aiam3360.html ("If a vehicle is reconstructed with an older chassis and a new body, then it is the opinion of the National Highway Traffic Safety Administration that the odometer should reflect the mileage traveled by the chassis. Purchasers rely on the odometer as an indication of the safety, reliability, and value of a vehicle. If the mileage which the chassis has been driven is not provided to the purchaser, he could be led into a false sense of security, neglecting needed repairs or inspections.").

2005, at G38 (quoting expert's observation that "The real problem is having someone tell you something is a one-owner, low-mileage cherry, and finding out later it's a rebuilt wreck."). By establishing nationally uniform requirements concerning title issuance and disclosure, MVICSA and its regulations ensure the integrity of the chain of title and make fraud involving such vehicles more difficult. *See Odometer Disclosure Requirements*, 52 Fed. Reg. at 27,023 ("These provisions will provide purchasers and law enforcement investigators with a better means to track a vehicle's course from seller to consumer.").

The conflict among the courts on the question presented disrupts that Congressional interest in uniformity. As a result of the decision below, automobile dealers in the Seventh Circuit are now free to flout federal regulations by withholding the vehicle's title—even when their intent in doing so is to defraud the consumer by concealing what the title would reveal—without having to fear the threat of private actions for civil damages under the Act. Because of the integrated nature of the interstate market for used automobiles and the tendency of violators to seek out jurisdictions with the most lax regulations, the decision is likely to transform the Seventh Circuit into a nationwide magnet for fraud involving violations of MVICSA's regulatory scheme. Indeed, NHTSA has recognized that much of the odometer fraud across the nation stems from particular geographical areas that are known or suspected to be "hotbeds" for such practices. NHTSA, *Incidence of Odometer Fraud* (2002) at 67, *available at* http://www.nhtsa.dot.gov/cars/rules/

regrev/evaluate/pdf/809441.pdf; *see also* Daniel Walsh, *Bridgeton: Home Office of Auto Fraud, Officials Say*, Atlantic City Press, July 31, 2005, at A1 (describing a single warehouse complex in New Jersey that state officials characterize as "a major conduit of car-sale fraud throughout the Northeast," including "title scams, washing salvaged cars, large-scale odometer fraud.").

Although MVICSA authorizes the federal government to investigate violations of the Act and its regulations and bring criminal and civil enforcement actions against violators, the regulatory scheme relies overwhelmingly on civil suits by private parties to ensure compliance. "NHTSA's prime weapon to deter odometer fraud is its power to investigate cases and refer them to the DOJ for prosecution." NHTSA, *Incidence of Odometer Fraud*, *supra*, at 67. Because of limited resources and the difficulty of detecting fraud, however, extremely few cases are actually investigated or prosecuted by the federal government. NHTSA has a staff of only eight employees, including a total of only four investigators, responsible for tracking all Odometer Act violations nationwide. *Id.* at 67. In 2001, the last year for which such statistics are available, NHTSA opened only five investigations, completed only three, and referred only two cases for prosecution to the Justice Department. With respect to prosecutions, there has been even less activity in the last two years for which figures are available. NHTSA prosecuted only one case each year, resulting in the conviction of

one defendant in 2000 and two defendants in 2001. *Id.* at 68.[6]

These low numbers do not reflect a decrease in the incidence of fraud. On the contrary, in 2002 NHTSA conducted an extensive study, which conservatively estimated that there are approximately 452,000 instances of odometer fraud per year in the United States. *Id.* at vi. The study estimates that the cost to consumers, measured by the difference between the inflated prices consumers actually pay and the prices they would have been willing to pay if they had known the vehicle's true mileage, amounts to $2,336 in the average case of fraud, or over $1 billion nationally per year—more than the annual cost of both shoplifting and arson *combined*. *Id.* at viii (citing Department of Justice statistics on crimes against property). That sum, moreover, "does not include inflated financing, insurance and tax costs; additional amounts consumers pay for vehicle repairs; other consequential damages; the decreased resale value due to the vehicles having an altered odometer; or the many indirect and

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[6]In lieu of direct enforcement action, NHTSA's staff attempts to help consumers who have been defrauded to help themselves. Under this program, "consumers are provided with instructions as to what evidence is necessary" to prove their claims, "how to obtain evidence, what action to take to recover their losses, and how to determine the losses." NHTSA, *Incidence of Odometer Fraud*, *supra*, at 72. Unless consumers have the ability to resort to meaningful civil remedies under MVICSA, such assistance is useless.

intangible costs of odometer fraud," including the costs of government programs to deter fraud. *Id.*

Since NHTSA's 2002 study, the incidence of fraud, particularly fraud involving title-related violations, has only increased. *See* James Bernstein, *Odometer Fraud: A crime that's spinning out of control, Feds say mileage is rolled back on 450,000 cars a year*, Newsday, June 7, 2005, at D13 ("Federal officials say odometer fraud is on the rise nationwide . . . [W]hat makes federal investigators' jobs more difficult is that some odometer criminals are experts at 'washing' titles."). The specific type of fraud at issue here—the failure of a dealer to disclose a vehicle's title to conceal the vehicle's damage history—is likely to increase dramatically in the wake of widespread flooding from recent hurricanes, including Hurricane Katrina. *See* Michelle Singletary, *Flood damaged cars wash up in used-car lots*, Miami Herald, Oct. 2, 2005, at E3; Marcia Biederman, *A Used Car or A Katrina Biohazard?*, N.Y. Times, Oct. 17, 2005, at D10 (describing "unprecedented potential for fraud–and peril–in the resale of cars damaged by the storm" and citing estimates that 570,000 cars were damaged by Katrina); Whitaker, *supra* at G38 (noting that "[s]electing safe and reliable used cars will become more challenging as some of the estimated half-million cars damaged in Hurricane Katrina are repaired and resold" and quoting expert predictions that these cars will be bought "at below-market prices and move[d] to places like New York, Washington, Los Angeles, Chicago"). Undoubtedly, many of those flood-damaged cars will make their way to dealers and wholesalers within the Seventh Circuit, who are now free to conceal

the vehicles' histories and sell them to unsuspecting consumers without fear of federal civil liability.

III. The Seventh Circuit's Decision Misconstrues the Act.

This Court should also grant certiorari because the Seventh Circuit's decision is wrong. The decisions of the Eleventh Circuit and other courts provide several compelling reasons for this Court to reject the Seventh Circuit's reasoning.

First, and most importantly, the Seventh Circuit's decision departs from the first rule of statutory interpretation: When the language of the statute is plain, there is no need for further inquiry. *Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469, 475 (1992); *see Owens*, 425 F.3d at 1321 ("To augment the statutory language with an additional element, never mentioned by Congress, that the fraud must be 'with respect to the vehicle's mileage' violates the cardinal rule of statutory construction."). MVICSA provides: "A person that violates this chapter or a regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or $1,500, whichever is greater." 49 U.S.C. § 32710(a). This language is unambiguous. Nothing in the statutory text limits the meaning of "intent to defraud" to fraud with respect to a vehicle's mileage. Notably, the Seventh Circuit itself *did not identify any ambiguity* in the language, nor any absurd result that would flow from a plain-language interpretation. Nevertheless, it immediately looked beyond the statutory text and invented an additional requirement—that the plaintiff prove intent to defraud

with respect to mileage—for establishing liability under the Act.

Second, the Seventh Circuit's rewriting of the statute is based on a misapplication of one of this Court's precedents. Relying on *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 562 (1971), the Seventh Circuit construed the Odometer Act's "general statements of prohibited conduct" as a "shorthand designation for the specific acts or omissions" that violate the Act or its regulations, and thus imported into the statute a requirement that fraud be committed only with respect to the vehicle's mileage. Pet. App. 7a-8a. The "sole and narrow question" presented in *International Minerals*, however, was whether knowledge of a regulation that made it a crime for a shipper to "knowingly" violate a regulation concerning the transportation of hazardous materials was a required element of the offense. 402 U.S. 560 ("It is in that narrow zone that the issue of 'mens rea' is raised."). In light of the strong presumption in criminal law that ignorance of the law is no excuse, which served as a backdrop for promulgation of the regulation, the Court held that the regulation should be construed to apply not to the knowledge of the regulation but to knowledge of the facts that gave rise to the violation of the regulation. 402 U.S. at 564-65 ("The Act, so viewed, does not signal exception to the rule that ignorance of the law is no excuse."). Neither the "narrow" *mens rea* issue presented in *International Minerals* nor the criminal law presumption that formed the grounds for the Court's decision are present here. To the contrary, here, no presumption or other canon of statutory

construction warrants abandonment of the statute's plain text.

Third, the Seventh Circuit's decision narrows the scope of MVICSA's private right of action based on an incorrect understanding of the Act's purposes. In the Seventh Circuit's view, Congress intended the Act to permit suit only where fraud is specifically related to a vehicle's mileage because the Act was aimed primarily at preventing fraud with respect to mileage. Pet. App. 11a. As the Eleventh Circuit explained in considerable detail, the text of the statute, its legislative history, and the nature of the regulatory scheme, all undermine that unduly narrow view of the Act's purposes. *Owens*, 425 F.3d at 1322-25.

In enacting the Odometer Act, Congress expressly sought to go beyond mere prohibition of odometer tampering and create comprehensive "safeguards to protect purchasers" and deter odometer fraud. 49 U.S.C. § 32701(b). In its 1986 amendments, Congress went further still. Recognizing that odometer fraud had become an enormous national problem and that "the process is very difficult to detect," Congress sought to "close[ ] the current loopholes in State titling law" to prevent sophisticated types of fraud, including title laundering. S. Rep. 99-47 (1985), at 2-3, reprinted in 1986 U.S.C.C.A.N. 5620, 5621-22. Accordingly, the current regulatory scheme requires that consumers like Mr. Ioffe be permitted to inspect a securely printed title before purchasing a vehicle. 49 C.F.R. §§ 580.4, 580.5. NHTSA's goal in promulgating these regulations, which is consistent with Congressional intent and goes well beyond concerns about the vehicle's mileage alone, was to make it more difficult

for sellers to conceal the vehicle's true history and to establish a "paper trial" for consumers and law enforcement to deter potential violators. *See Odometer Disclosure Requirements*, 52 Fed. Reg. at 27,022-23.

Given the inadequacy of criminal enforcement alone to combat the problems that the statute is designed to address, the ability to bring private suits for fraudulent violations of these important requirements is essential to the success of the overall regulatory scheme. Indeed, Congress provided a civil remedy to punish violations of the Act and its regulations so that the statute would be "largely self-enforcing." H.R. Rep. No. 92-1033, at 20 (1972); *see also Nieto v. Pence*, 578 F.2d 640, 643 (5th Cir. 1978) (recognizing that "unless a violation of the Act can lead to [private] civil liability, the Act is toothless.").

At bottom, what the Seventh Circuit has done is to elevate its own views about what Congress might have or should have intended above the intent that Congress *actually expressed* in the text of the statute. That is a step the courts are forbidden to take. *See Pavelic & LeFlore v. Marvel Entertainment Group,* 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it"); *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result."). Because the Seventh Circuit's erroneous interpretation has sown confusion among the state and federal courts, upset the uniformity of an important federal regulatory scheme, and created incentives for increased fraud, this Court should grant certiorari to resolve the split and restore

certainty to the interstate auto market for sellers and buyers alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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