No. 20-4252

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERTA LINDENBAUM,

Plaintiff-Appellant,

vs.

REALGY, LLC, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Ohio
Case No. 19-2862
The Honorable Patricia A. Gaughan

APPELLANT'S REPLY BRIEF

CARLSON LYNCH LLP
KATRINA CARROLL
KATHLEEN LALLY
111 W. WASHINGTON ST. SUITE 1240
CHICAGO, IL 60602
(312) 750-1265

PUBLIC JUSTICE, PC
ELLEN NOBLE
LEAH NICHOLLS
LESLIE BRUECKNER
1620 L ST. NW SUITE 630
WASHINGTON, DC 20036
(240) 620-3645
enoble@publicjustice.net

SAVETT LAW OFFICES LLC
ADAM T. SAVETT
2764 CAROLE LANE
ALLENTOWN, PA 18104
(610) 621-4550

Attorneys for Appellant Roberta Lindenbaum

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INTRODUCTION

Realgy seeks to escape liability for five years of robocall violations it knew to be unlawful. Realgy does not dispute that the robocall restriction set forth in the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1), is constitutional or that Realgy knew its conduct between 2015 and 2020 was illegal. Instead, Realgy tries to take advantage of an ill-fated amendment to the TCPA—that had nothing to do with Realgy and did not purport to govern its actions—but that happened to be enacted in 2015 and found unconstitutional in 2020. Realgy argues that the unconstitutional amendment's mere existence rendered the entire prohibition on robocalls unconstitutional and unenforceable during those five years—five years during which Realgy was making robocalls.

Realgy's argument runs headlong into *Barr v. AAPC*, 140 S. Ct. 2335 (2020), which expressly held that the 2015 amendment, which added a government-debt exception to the robocall restriction, was invalid *but severable* and thus did *not* affect the ongoing validity of the robocall restriction. And Realgy concedes that judicial determinations of law apply retroactively. Realgy Br. at 27. Nonetheless, Realgy and its amici argue that: (1) the Supreme Court's decision in *AAPC* to invalidate the government-debt exception but not the robocall restriction was not an interpretation of law, and thus need not be given retroactive effect, and (2) the Court's decision

cannot apply retroactively because that would violate constitutional principles of due process and equal protection. Both arguments fail.

As to the first argument, Realgy's efforts to cast the Supreme Court's severability determination as a prospective-only equitable remedy ignore that both black letter severability law and *AAPC* itself make clear that severability is an interpretation of law rooted in principles of statutory construction—which naturally applies retroactively. That makes sense, because if severability determinations only applied prospectively, entire statutory schemes would be rendered retroactively unenforceable every other week. The cases cited by Realgy and its amici concern the retroactive effects of *statutes*, as if *AAPC* involved a legislative amendment. But courts interpret the law, they don't make it.

There is no reason to stray from the basic principle—conceded by Realgy—that judicial determinations of law must be given their full retroactive effect in pending cases. Here, that means *AAPC*'s holding, which invalidated the government-debt exception but not the robocall restriction, left the restriction fully intact between 2015 and 2020. The overwhelming majority of courts to have confronted this issue agree.[1]

[1] *See Abramson v. Fed. Ins. Co.*, 2020 WL 7318953, at *2 (M.D. Fla. Dec. 11, 2020); *Shen v. Tricolor Cal. Auto Grp., LLC*, 2020 WL 7705888, at *5 (C.D. Cal. Dec. 17, 2020); *Trujillo v. Free Energy Sav. Co*, 2020 WL 8184336, at *5 (C.D. Cal. Dec. 21, 2020); *Rieker v. Nat'l Car Cure, LLC*, 2021 WL 210841, at *1 (N.D. Fla. Jan. 5, 2021); *Stoutt v. Travis Credit Union*, 2021 WL 99636, at *5 (E.D. Cal. Jan.

As to the second argument, Realgy and amicus ACLU misunderstand Ms. Lindenbaum to be arguing that government-debt collectors should be liable for robocalls made before the Court declared the exception unconstitutional—a result, they argue, that would violate government-debt collectors' due process rights to fair notice of the law. But from the beginning, Ms. Lindenbaum has argued that there is a "separate doctrine of fair notice that prevents government debt collectors from being punished," safeguarding due process. *See* Lindenbaum Br. at 42. ACLU's characterization of Ms. Lindenbaum's position is factually wrong.

Realgy and its amici then turn around and argue that, if government-debt collectors are shielded by the fair notice doctrine, that result would violate the First Amendment. That's wrong because the fair notice doctrine does not discriminate based on the content of speech; it discriminates based on who had actual notice that their conduct was unlawful. Put another way, letting government-debt collectors off the hook for past robocalls does not perpetuate a First-Amendment violation because

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12, 2021); *Bonkuri v. Grand Caribbean Cruises, Inc.*, 2021 WL 612212, at *3 (S.D. Fla. Jan. 19, 2021); *Less v. Quest Diagnostics Inc.*, 2021 WL 266548, at *1 (N.D. Ohio Jan. 26, 2021); *McCurley v. Royal Sea Cruises, Inc.*, 2021 WL 288164, at *4 (S.D. Cal. Jan. 28, 2021); *Johansen v. LoanDepot.com LLC*, 2021 WL 669329, at *3 (C.D. Cal. Jan. 31, 2021); *Massaro v. Beyond Meat, Inc.*, 2021 WL 948805, at *7 (S.D. Cal. Mar. 12, 2021); *Miles v. Medicredit, Inc.*, 2021 WL 1060105, at *3 (E.D. Mo. Mar. 18, 2021); *Moody v. Synchrony Bank*, 2021 WL 1153036, at *1 (M.D. Ga. Mar. 26, 2021); *Hossfeld v. Am. Fin. Sec. Life Ins. Co.*, 2021 WL 1186526, at *4 (S.D. Fla. Mar. 29, 2021).

it is grounded in constitutional due process concerns, not the content of the collectors' speech.

But even if this Court adopts Realgy's framework, ignoring *AAPC* and considering only the equities at issue, the robocall restriction must still be enforced because the equities favor Ms. Lindenbaum, not Realgy. Granting Realgy immunity for five years of unlawful robocalling would disadvantage its law-abiding competitors, deny millions of consumers their statutory rights, and undermine congressional intent. Justice should not be a game of chance, gifting windfalls of immunity for five years of lawbreaking. Because Realgy knowingly violated a valid law for five years, at the expense of its competitors and consumers, it should face liability.

ARGUMENT

I. *AAPC* merely invalidated the government-debt exception; it did *not* hold that the entire robocall restriction was unconstitutional.

As a threshold matter, Realgy mischaracterizes *AAPC* in an attempt to avoid the Court's express holding that "the entire 1991 robocall restriction *should not be invalidated*." *AAPC*, 140 S. Ct. at 2343 (emphasis added). Not once in its 58-page brief does Realgy acknowledge this crucial holding. Instead, Realgy argues that the robocall restriction effectively *was* invalidated during the relevant period because the Court's decision to invalidate and sever the government-debt exception was a "remedy" and not an interpretation of law. Realgy Br. 21-27. But the Supreme

Court—as if it saw this argument coming—included a footnote defining the term "invalidate" as "when the Court *holds that a particular provision is unlawful*." *AAPC*, 140 S. Ct. at 2351 n.8 (emphasis added). This clarified that the Court's decision to invalidate only a part of the law was a judicial holding—a legal determination of what is and is not constitutional.

AAPC's holding—that the exception is unconstitutional but the robocall restriction is not—is further confirmed by the Court's substantive First Amendment analysis. The Justices merely concluded that the *exception*—not the restriction—failed strict and intermediate scrutiny. S*ee* Lindenbaum Br. at 17-18. And, notably, the Court expressly "disagree[d] with plaintiffs'…argument for holding the entire 1991 robocall restriction unconstitutional." *AAPC*, 140 S. Ct. at 2349.

Realgy nonetheless latches on to a single sentence taken out of context to argue—contrary to the Court's express holding—that *AAPC* found the entire robocall restriction unconstitutional. Realgy argues that because Justice Kavanaugh recognized "the robocall restriction, with the government-debt exception, is content-based," *id.* at 2346, the Court necessarily found the entire restriction unconstitutional, Realgy Br. at 11. But that argument ignores the whole point of severability, which is to identify the specific source of the constitutional violation and to give "full effect" to the parts that "are not repugnant to the constitution." *Id.* at 2350. Justice Kavanaugh's sentence reflects—as he says—the "initial" question,

but he then immediately dove into a severability analysis to determine which *part* of the provision—the restriction or the exception—was unconstitutional. *Id* at 2346. This underscores that *AAPC*'s ultimate *holding* merely invalidated the exception, not the robocall restriction.

Nevertheless, Realgy reads the severability analysis out of the Court's decision, repeating its mantra that *AAPC* found the robocall restriction *with* the government-debt exception unconstitutional. But the fact that two parts of a statute, together, created a constitutional violation does not mean that both parts were unconstitutional. The Supreme Court has unanimously held that there are "two analytically distinct grounds for challenging the constitutionality" of a content-based speech regulation: "[o]ne is that the measure in effect restricts too little speech because its exemptions discriminate on the basis of [content]" and the other is that the provision "prohibit[s] too much protected speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 50-51 (1994). This means that the *source* of a First Amendment violation can be a speech restriction *or* its exception. In *AAPC*, it was the exception. *See* 140 S. Ct. at 2343.

Realgy's argument that neither the restriction nor the exception, standing alone, would be unconstitutional (at 22-23) is irrelevant. That's often the case when the Court invalidates and severs part of a statute. If every part of a statute that

influenced a court's constitutional holding was retroactively invalid, courts would be bulldozing entire statutory schemes left and right.

The radical consequences of Realgy's argument are revealed by *United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020). There, defendants who violently participated in white supremacist protests challenged their convictions under the Anti-Riot Act, arguing that the underlying provision was unconstitutionally overbroad. The Fourth Circuit agreed in part, invalidating and severing select words like "promote" and "encourage"—words that, standing alone, certainly would not amount to a constitutional violation—but upheld the defendants' convictions because their "substantive offense conduct" (violently engaging in a riot) fell under the surviving parts of the provision. *Id.* at 530, 547.

Miselis illustrates that just because two parts of a law (here, the robocall restriction and its exception) were necessary to create a constitutional violation, does not mean that both parts were unconstitutional and unenforceable. Severability exists to ensure that one illegal provision in a statute does not spoil the entire legislative scheme. A contrary result would not just contravene legislative intent; it would also turn justice into a lottery game where offenders like the *Miselis* defendants walk free simply because a clause in a statute, entirely unrelated to their own conduct, turned out to be unconstitutional. That's exactly the result sought by Realgy here—and it should be rejected just as it was in *Miselis*.

II. Realgy cannot evade basic legal principles that require *AAPC* to apply retroactively, preserving the robocall restriction between 2015 and 2020.

Realgy and its amici also err in arguing that *AAPC* says nothing about the retroactive validity of the robocall restriction because the *AAPC* plaintiffs sought only prospective relief. *See* Realgy Br. at 10; ACLU Br. at 8. This argument ignores the Supreme Court's repeated conclusion that, in making severability determinations, "[t]he relief the complaining party requests does not circumscribe th[e] inquiry." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 n.29 (2017) (quoting *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 427 (2010)).

Indeed, the Supreme Court in *AAPC* expressly recognized that its decision to preserve the robocall restriction meant that the robocall restriction has always been valid. In announcing the decision of the Court, Justice Kavanaugh stated that "our decision today does *not* negate the liability of parties who made robocalls covered by the robocall restriction" between 2015 and 2020. *AAPC*, 140 S. Ct. at 2355 n.12 (emphasis added). That clear instruction should end the inquiry. [2]

Justice Kavanaugh's statement was not extraneous dicta; it clarified the necessary consequence of the Court's decision. Realgy and its amici forget that

[2] Realgy asserts that this footnote refers to past final judgments. Realgy Br. at 46. But the footnote is in the future continuous tense ("should be"), refers to liability rather than past judgments, and cites to the parties' briefs discussing the very issue of retroactivity presented in this appeal.

AAPC decided a question of *law*, concluding that the government-debt exception added in 2015 was unconstitutional but the robocall restriction remains valid. *Id.* at 2343. This matters because—as Realgy and its amici concede—determinations of law generally "must be given full retroactive effect." *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993); *see* Realgy Br. at 27 (recognizing "an interpretation of federal law [] applies retroactively to all pending cases"); ACLU Br. at 10 (recognizing "courts cannot selectively decide to issue prospective-only rulings"); CUNA Br. at 26; Facebook Br. at 10; ACA Int'l Br. at 15.

It cannot be overemphasized that under *Harper*, a determination of law "*must*" be applied retroactively. 509 U.S. at 97 (emphasis added). Because *AAPC* found the government-debt exception unconstitutional as a matter of law, the exception was *never* valid; it was "'a nullity' and 'void' when enacted, and for that reason has no effect on the original statute." *AAPC*, 140 S. Ct. at 2353. At the same time, the 1991 robocall restriction, which functioned *independently* of the unconstitutional exception, was *always* valid. *See* Lindenbaum Br. at 25-35.

Realgy—who, again, concedes that legal determinations generally apply retroactively—tries to evade this basic principle in two ways. First, Realgy argues that a severability determination is not an interpretation of law but a prospective equitable remedy, so it need not apply retroactively. Second, Realgy argues this case is an exception to the rule that legal determinations apply retroactively because

retroactive enforcement of *AAPC* would violate constitutional rights to free speech and due process. Neither argument withstands scrutiny.

A. Severing and invalidating a portion of a statute is an interpretation of federal law, not a prospective remedy akin to a legislative amendment.

A severability determination is not a remedy; it "is a question of interpretation and of legislative intent." *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521 n.26 (1981) (recognizing severability as a form of statutory construction); *Tilton v. Richardson*, 403 U.S. 672, 683-84 (1971) (same); *United States v. Jones*, 980 F.3d 1098, 1111 n.19 (6th Cir. 2020) ("Severability is a question of Congressional intent."). This was especially clear in *AAPC*, where the Court concluded that "[t]he text of the severability clause…requires that we sever [the unconstitutional exception]" and made the legal determination to invalidate the exception but not the restriction. *See AAPC*, 140 S. Ct. at 2351-52.

Realgy nonetheless insists that *AAPC*'s severability determination was merely remedial in nature, citing a law review article fittingly entitled "Severability as Judicial Lawmaking." Realgy Br. at 28 (citing David H. Gans, *Severability As Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 642 (2008)). But that tactic backfires: The cited article describes the *author's* theory of severability—not a theory adopted by courts. Indeed, immediately preceding the paragraph quoted by Realgy, Gans concedes that "[b]oth the scholarship and much of the black-letter law

treat the severability inquiry as a form of statutory interpretation." Gans, *supra*, at 642.

Realgy also relies on cases like *Seila Law*, *Arthrex*, and *Booker* (at 34-35), but these cases do not establish, as Realgy asserts, that severability is a prospective-only remedy. Instead, they stand for the uncontroversial proposition that, after finding a constitutional violation, courts may provide remedies to redress constitutional injuries. Nothing in those cases excuses defendants from *substantive liability* incurred under a *valid* part of the statute before the invalid provision was severed.

Whether one calls severability a legal interpretation or a remedy, Realgy's approach would make the rule in *Harper*—that judicial determinations must be given full retroactive effect—meaningless. As Justice Scalia warned, "[i]f *Harper* has anything more than symbolic significance," then courts cannot avoid the retroactive application of federal law simply by characterizing judicial decisions as "'remedy' rather than 'non-retroactivity.'" *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753-54 (1995) (Scalia, J., concurring). Courts cannot "change a legal outcome that federal law…would otherwise dictate simply by calling its refusal to apply that federal law an effort to create a remedy." *Id.* at 753.

Realgy's approach to severability would also create chaos out of order. If a court's decision to invalidate and sever an unconstitutional part of a statute only cured the statute moving forward, meaning that the statute as a whole was

unconstitutional retroactively, then entire criminal and civil statutory regimes would routinely become unenforceable with respect to years of past unlawful conduct, creating "chaotic hiatus[es]" in the enforcement of the law. *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 261 (6th Cir. 1983). This is not a tenable theory of severability. Nor is it one that any court has ever adopted.

Realgy also ignores that courts have no authority to revise the law only prospectively—that's the legislature's job. "[T]hat which distinguishes a judicial from a legislative act is, that…one is a determination of what the existing law is…, while the other is a predetermination of what the law shall be." *Harper*, 509 U.S. at 107 (Scalia, J., concurring). Courts cannot act as legislatures and revise the law only moving forward. That "would be effectively stepping outside [their] role as judges and writing a new law rather than applying the one Congress adopted." *United States v. Davis*, 139 S. Ct. 2319, 2323-24 (2019).

Realgy's reliance on *Grayned v. City of Rockford* (at 31-34) only further reveals that Realgy is conflating judicial legal determinations with congressional legislative amendments. In *Grayned*, a *legislature* amended a picketing ordinance while a lawsuit challenging the constitutionality of the ordinance was pending. 408 U.S. 104, 105-08 (1972). The Court observed that it "must consider the facial constitutionality of the ordinance in effect when appellant was arrested and convicted." *Id.* at 107 n.2. That observation is irrelevant to this appeal. Courts, of

course, must assess the validity of the law as written at the time a person was convicted. But that says nothing about the retroactive effect of a *judicial holding* invalidating part of a statute.

Moreover, *Grayned* is inapposite because the Court did not sever the labor dispute exception from the picketing prohibition—it held that the entire picketing ordinance was invalid. *Id.* at 107. Realgy tries to get around this by arguing that the *Grayned* Court knew the legislature preferred severance because the legislature had recently passed a new ordinance removing the labor dispute exception. If severability is an interpretation of legislative intent, Realgy argues, then the Court would have severed the exception and upheld the picketer's conviction. Realgy Br. at 33-34. This argument fails because, as Realgy points out, *Grayned* was interpreting the law at the time the defendant was convicted. If the Court had considered severing the labor dispute exception, it would have considered the intent of the legislature that enacted the original ordinance—not the preferences of the current legislature.

Regardless, severance of the labor dispute exception wasn't on the table in *Grayned*. The Court relied on its reasoning in *Police Dep't of Chicago v. Mosley*, where it held that the speech restriction was not *under*inclusive, but rather, "far '*greater* than is essential to the furtherance of (a substantial governmental) interest.'" 408 U.S. 92, 102 (1972) (emphasis added). In other words, in *Grayned*, the Court

found the entire ordinance—the speech restriction itself—to be unlawful, whereas here, the Court only held that the exception was unlawful.

Realgy's and its amici's reliance on *Landgraf v. USI Films Products* and footnote 24 of *Sessions v. Morales-Santana* reflect the very same error—confusing judicial determinations of law for statutory amendments. Try as they might, Realgy and its amici cannot take a body of law governing the retroactive effect of *statutes* and apply it to *Supreme Court decisions*. Indeed, "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311-12 (1994).

* * *

In short, Realgy's theory of severability as a prospective remedy is wrong as a matter of law, would have disastrous practical consequences for law enforcement, and violates the separation of powers.

B. Retroactive application of the Supreme Court's severability determination would not violate constitutional principles.

Realgy and its amici argue that *AAPC*'s preservation of the robocall restriction cannot apply retroactively because that would violate constitutional principles of due process and equal protection. Not so.

i. *Giving retroactive effect to the Supreme Court's determination of law in AAPC does not violate any constitutional rights.*

As a threshold matter, the amicus ACLU misunderstands Ms. Lindenbaum to be arguing that government-debt collectors should be retroactively liable for robocall violations made between 2015 and 2020. *See* ACLU Br. at 7. In fact, Ms. Lindenbaum's Opening Brief states that "the fair notice doctrine may limit the enforcement of [*AAPC*'s holding] with respect to government-debt collectors" between 2015 and 2020 and defends Justice Kavanaugh's footnote 12 on those grounds. *See* Lindenbaum Br. at 37, 42. Application of the fair notice doctrine is a perfectly valid way of ensuring that government-debt collectors' due process rights are protected.

Contrary to Realgy's and its amici's arguments, there is nothing inconsistent about recognizing that *AAPC* left the robocall restriction intact and affording government-debt collectors a defense to past liability under the fair notice doctrine. Although new rules of law must apply retroactively to pending cases, there are "instances where that new rule, for well-established legal reasons, does not determine the outcome of the case." *Reynoldsville Casket Co.*, 514 U.S. at 758-59. There can be "a previously existing, independent legal basis (having nothing to do with retroactivity)" that precludes liability, *id.* at 758, including "due process, fair notice, or other independent constitutional barriers," *AAPC*, 140 S. Ct. at 2354. Although an unconstitutional amendment is *void ab initio*, meaning it had no *legal*

effect on the underlying statute, that does not erase the *fact* that it was on the books, and that *fact* is relevant to determining questions of fair notice. What the law was and whether someone had notice of it are different questions. Here, *AAPC*'s preservation of the robocall restriction applies retroactively, and the fair notice doctrine shields government-debt collectors from retroactive liability.

After arguing that government-debt collectors should not be liable for past robocalls because they lacked fair notice (an argument Ms. Lindenbaum *agrees* with), Realgy and its amici turn around and argue that applying the fair notice doctrine would be unconstitutional. They argue that allowing government-debt collectors, but not others, to avoid liability for their conduct between 2015 and 2020 would unconstitutionally perpetuate the First Amendment violation struck down in *AAPC*. *See* Realgy Br. at 16; ACLU Br. at 11-12. In doing so, they mistakenly equate differential treatment with a constitutional violation. Any differential treatment would be the result of the fair notice doctrine—*not* of a content-based preference for certain speech. As amicus Public Citizen explains, the fair notice doctrine is narrowly tailored to serve the government's compelling interest in providing fair notice and due process. *See* Public Citizen Br. at 15-18. To the extent the fair notice doctrine might limit Realgy's relief from the effects of past content-based speech discrimination, that does not amount to a constitutional violation. *See Lee v. Ohio Educ. Ass'n*, 951 F.3d 386, 389 (6th Cir. 2020) (holding that an independent legal

doctrine—the good-faith defense—limited retroactive relief for teacher that had paid union's "fair share" fee in violation of her First Amendment rights).

ii. ***Courts need not retroactively eliminate entire laws to redress the effects of past equal treatment violations.***

Realgy and its amici cannot persuasively argue that the enforcement of the robocall restriction is itself a constitutional violation, so they pivot to arguing that *AAPC*'s remedial interpretation of the robocall restriction did not fully erase the effects of the First Amendment violation as to companies that made robocalls between 2015 and 2020. Given that "[t]he relief the complaining party requests does not circumscribe th[e] [severability] inquiry," this argument just re-litigates *AAPC*'s severability holding. *Morales-Santana*, 137 S. Ct. at 1701, n.29. But it's also wrong on its merits.

1. Realgy and its amici ignore that the Supreme Court has long enforced valid parts of a law with respect to conduct that occurred before the invalid portion was severed, even if that meant past unequal treatment was not fully redressed. A notable example is *Eberle v. Michigan*, 232 U.S. 700, 704 (1914). There, the Court held that amendments creating wine and cider exceptions to a liquor ban violated equal protection, but still upheld the beer brewers' convictions. *Id.* at 705. Even though wine and cider makers were not held liable at the time of the beer brewers' offense, and would likely be shielded from any retroactive liability, the beer brewers were convicted. Likewise, here, Realgy should be liable for past robocall violations, even

though government-debt collectors cannot—in light of the fair notice doctrine—be liable for their violations during that time.

Realgy fails to distinguish *Eberle*. It argues that the Supreme Court was deferring to the state court's determination (at 38), but that's incorrect; the Court only deferred to the state regarding the validity of the elections adopting the amendments. *See Eberle*, 323 U.S. at 705. The Court did not defer to the state regarding the *legal effect* of the severability determination on the beer brewers' convictions. *Id.* Moreover, the fact that *Eberle* did not deal with discriminatory speech restrictions (at 40) is of no consequence. The robocall restriction was *underinclusive*, so it was only the differential treatment—not any restriction on speech—that was unlawful. That differential treatment is at issue in *Eberle*. Indeed, the "First Amendment is a kind of Equal Protection Clause for ideas." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 470 (2015) (Scalia, J., dissenting).

Flash forward 100 years and the same principle appears in *Morales-Santana*. There, the petitioner challenged a law that required unwed U.S. citizen fathers (and, in a separate provision, married couples) to be physically present in the United States for five years before they could transmit citizenship to a child born abroad. *Morales-Santana*, 137 S. Ct. at 1686. Petitioner challenged the law as a violation of equal protection because there was an exception for unwed U.S. mothers, whose

citizenship could be transmitted to a child born abroad after just one year of living in the United States. *Id.*

The Court agreed that this gender-based distinction violated equal protection, but in its remedial severability analysis, the Court did not follow the per se rule that Realgy and its amici argue for. *Id.* at 1700-01. Instead of fully remedying the past differential treatment by extending the shorter one-year requirement to all children of unwed fathers, the Court decided to extend the longer 5-year requirement to children of unwed mothers. *Id.* As a result, the petitioner, a son born abroad to an unwed U.S. citizen father, did not receive any relief. The rule that applied to him did not change—it was just extended to others. Similarly, the robocall restriction that applied to Realgy did not change—it was just extended to government-debt collectors.

In *Morales-Santana*, the Court's remedial interpretation of the statute did not cure the past unequal treatment that the petitioner endured because the Court could not retroactively enforce the five-year requirement against children of unwed mothers by stripping them of their U.S. citizenship—much like courts cannot retroactively enforce the robocall restriction against government-debt collectors under the fair notice doctrine. But that reality—that inequity caused by a separate intervening doctrine—did *not* dictate the Court's remedial interpretation of the statute. Instead, the Court chose "the remedial course Congress likely would have

chosen" even though it did not provide the petitioner with any relief and did not fully redress past inequities. *Id.* at 1701.

Amicus Chamber of Commerce tries to distinguish *Morales-Santana* by arguing that the Court could not extend the one-year requirement because that would disadvantage marital children who are also subject to the five-year rule. Chamber Br. at 18. That misses the point. The Court in theory could have extended the one-year requirement to marital children as well. It did not do that—indeed found that it *could* not do that—*because* it would contravene legislative intent to turn the exception into the rule. *See Morales-Santana*, 137 S. Ct. at 1700.

Thus, the Court's decision in *Morales-Santana* directly contradicts Realgy and ACLU's per se rule that remedial interpretations of statutes must completely cure all past effects of the equal protection violation. The preservation of the robocall restriction in *AAPC*—like the preservation of the five-year physical presence requirement in *Morales-Santana*—complies with the First Amendment and congressional intent, even if it does not fully redress all past inequities caused by the unconstitutional government-debt exception.

2. State courts have also refused to allow defendants to escape liability under the valid part of an under-inclusive rule before the invalid exception to the rule was severed. For example, in *Orr v. Orr*, the court remedied an unconstitutional alimony law by extending the alimony obligations to wives and not just husbands but refused

to relieve the plaintiff-husband of his outstanding alimony obligations. 374 So. 2d 895 (Ala. Civ. App. 1979). Similarly, in *State v. Theeler*, the Montana Supreme Court refused to excuse a defendant from criminal conduct incurred under a valid part of a statute, even when the law unconstitutionally favored others during that time. 385 P.3d 551, 552 (Mont. 2016). In *Theeler*, the defendant had assaulted his girlfriend but challenged his conviction on equal protection grounds, arguing the law only criminalized assaulting a partner "of the opposite sex," not the same sex. The court agreed and severed the language "of the opposite sex," but upheld the defendant's conviction. *Id.* at 554. The Court reasoned that "principles of severance…do not require that a statutory provision constitutionally defective for underinclusiveness be declared invalid as to those legitimately included." *Id.* at 555 (McKinnon, J., concurring). The same reasoning should apply here.

In sum, Realgy and its amici's per se rule against remedial interpretations that do not fully erase all effects of an equal treatment violation has no basis in legal precedent. Courts do not always remedy the effects of differential treatment under the law by retroactively invalidating the entire law. Instead, they balance equitable remedial interests with other factors like the rule of law and effects on third parties, and—most of all—the touchstone principle of congressional intent. That is exactly what the Supreme Court did when it severed the government-debt exception in *AAPC*. There is nothing unconstitutional about giving full retroactive effect to

AAPC's decision to preserve the robocall restriction. To the contrary, the *Harper* rule and the longstanding principle that unconstitutional amendments are *void ab initio* require that *AAPC*'s legal determination apply retroactively.

3. ACLU also argues that giving retroactive effect to *AAPC*'s context-specific determination regarding the validity of the robocall restriction will have concerning consequences in civil rights cases. ACLU Br. at 12-15. In fact, the legal issue in this appeal would not affect a single case ACLU cites.

ACLU discusses the Supreme Court's picketing ban cases and a recent state court case to illustrate its concerns. *Id.* at 13-15. However, in all three cases, the courts did not sever any part of the law—they all struck down the entire speech restriction and, rightfully, vacated the defendants' convictions. *See Mosley*, 408 U.S. at 102; *Carey v. Brown*, 447 U.S. 455, 459 n.2 (1980); Hearing Transcript, Decision, *City of Chelsea v. King*, (Feb. 22, 2021) [ECF No. 47-3] at 13 ("Ultimately, this Court finds that severance is not appropriate in this case.").

ACLU claims that "*Mosley* and *Carey* avoided the present case's conundrum only by happenstance." ACLU Br. at 14. But that couldn't be further from the truth. In both cases, the Court found the entire picketing ban unconstitutional because it was a "restriction on expressive conduct *far greater* than is essential," *Mosley*, 408 U.S. at 102 (emphasis added) and "[t]he apparent overinclusiveness and underinclusiveness of the statute's restriction …undermine[d]" the justification for

the ban, *Carey*, 447 U.S. at 465. In other words, the Court's substantive First Amendment analysis dictated that the *entire* restriction was unconstitutional—not just the exception for labor unions.

The outcome would likely be the same for Realgy's hypothetical of a protest restriction with an exception for pro-life protests, *see* Realgy Br. at 51, or Facebook's hypothetical of a robocall restriction that only applies to Democrats and not Republicans, *see* Facebook Br. at 21. In those cases, a court would likely conclude that the exception undermines the stated justification for the rule and that the restriction had become an unjustified tool for speech suppression as opposed to a valid regulation with an unconstitutional exception. *See City of Ladue*, 512 U.S. at 50-51 (explaining speech restrictions can be under or over inclusive). This was an argument made—and rejected—in *AAPC*. *See* 140 S. Ct. at 2348 ("Congress's addition of the government-debt exception…does not cause us to doubt the credibility of Congress's continuing interest in protecting consumer privacy.").

In the one case ACLU cites where the Supreme Court *did* sever part of an unconstitutional speech restriction—*Schacht v. United States*, 398 U.S. 58 (1970)—the Court retroactively applied its severability determination precisely as Ms. Lindenbaum is asking this Court to do here. In *Schacht*, there was a theatrical performance exception to the prohibition of the wearing of military uniforms, but the exception only applied if the actor did not criticize the army during the

performance. The Court invalidated and severed the "no criticizing" part, leaving in place an exception for all theatrical productions. *Id.* at 63. The Court then reversed Schacht's conviction because his skit was a 'theatrical production.'" *Id.*

The Court in *Schacht*, when identifying the law that should apply to the defendant for his past conduct, did not—as the ACLU argues for here—simply throw out the entire prohibition on wearing military uniforms as "unconstitutional at the time." Instead, it applied the Court's new, lawful interpretation the statute—the statute minus the severed language—to determine whether Schacht's conviction should stand or not. Thus, ACLU's *Schacht* example only proves Ms. Lindenbaum's point: that severability determinations apply retroactively and defendants cannot escape substantive liability under valid portions of a statute.

Finally, this case is wholly distinguishable from civil rights cases because Realgy—a for-profit company—suffered no stigmatizing or "expressive" harm from the unconstitutional government-debt exception. Realgy asserts that it suffered an "expressive harm" without further explanation. Realgy Br. at 26, 31, 32, 40, 51. That term emerged out of jurisprudence on racial gerrymandering and refers to a harmful "message—often a message of racial, gender, or religious inferiority--expressed by governmental action." B. Jessie Hill, Note, *Expressive Harms and Standing*, 112 Harv. L. Rev. 1313, 1314 (1999). But Realgy never identifies a harmful social

message advanced by unconstitutionally favoring government-debt collection speech that will be remedied by granting Realgy immunity.

Realgy shamelessly cites civil rights cases as if they would apply equally here. For example, Realgy cites *Heckler v. Mathews* for the proposition that discrimination can stigmatize members of the disfavored group as "innately inferior," causing serious noneconomic injuries. Realgy Br. at 26. Needless to say, that principle does not apply to an energy services company held liable for unlawfully harassing people with robocalls.

In short, not all First Amendment violations inflict the same type of harm—and not all remedial interpretations of statutes must be the same. Thus, ACLU's equitable concerns are not presented by the legal question or facts in this appeal.

* * *

Ultimately, the alleged "constitutional violations" that would be caused by the retroactive enforcement of the robocall restriction are just dressed up equitable concerns. Differential treatment caused by a pre-existing legal doctrine like fair notice is precisely the type of equitable concern that courts cannot temporally alter the law to accommodate under *Harper*.

III. Equitable considerations prohibit immunizing Realgy for five years of robocall violations.

If anything, it is Realgy's position that would lead to an inequitable result. Realgy says that it would be wrong to hold it liable during the time the government-

debt collection exception was in effect. But if Realgy is immunized for its robocall violations, it would enjoy unequal treatment under the law compared to its law-abiding competitors—it would, in effect, be *rewarded* for its misconduct. Between 2015 and 2020, most corporations, including many that directly compete with Realgy in the sale of energy services, undoubtedly undertook costly measures to reach potential customers without making unlawful robocalls. Realgy, however, chose to make robocalls in violation of the law, skirting costs and edging out competition. Letting Realgy off the hook for its misconduct would be unfair to Realgy's competitors and disrupt market forces.[3]

And Realgy is not alone: Robocallers across the country—many of whom may have already cornered various markets through unlawful robocalling tactics—will likewise receive a windfall if the robocall restriction is declared unenforceable between 2015 and 2020.

Granting Realgy immunity would also strip consumers of the protection the robocall restriction was supposed to provide. In enacting the TCPA, Congress gave consumers a statutory right to damages and injunctive relief for robocalls. *See* 47 U.S.C. § 227(b). Despite that, there were over 47 *billion* robocalls made in 2018. *See*

[3] This unequal treatment cannot be compared to the unequal treatment between Realgy and government-debt collectors caused by the fair notice doctrine. Realgy was not in competition with government-debt collectors and suffered no actual harm from the differential treatment.

Federal Communications Commission, Report on Robocalls, 6 (2019). Retroactively invalidating the robocall restriction would deprive millions of consumers of their statutory right to hold companies like Realgy liable for conduct they *knew* to be illegal. That result rewards wrongdoing and undermines Congress's purposes in enacting the TCPA.

To avoid the obvious unfairness of its position, Realgy claims there are alternative avenues for redress, citing the TCPA's Do Not Call (DNC) rules and state laws. But the TCPA's DNC rules only protect those whose numbers are in the DNC registry, and even then, the regulation includes a robust safe harbor provision. *See* 47 C.F.R. § 64.1200(c)(2)(i). Similarly, state laws are often far weaker than the federal statute. Ohio law, for example, unlike the TCPA, does not provide a per se ban on robocalling and excludes companies, like Realgy, that outsource robocalls. *Compare, e.g.*, Ohio Rev. Code Ann. §§ 4719.08, 4719.15 (West 2018) (providing no per se ban and authorizing action only against solicitors "who committed the violation"), *with* 47 U.S.C. § 227(b)(1)(A)(iii) and *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 168 (2016) (recognizing vicarious liability under TCPA).

Finally, Realgy's approach does not just harm Realgy's law-abiding competitors and the millions of consumers subjected to robocalls; it also undermines congressional intent. Immunizing Realgy for five *years* of its illegal misconduct "disrespect[s] the democratic process, through which the people's representatives

have made crystal clear that robocalls must be restricted." *AAPC*, 140 S. Ct. at 2356. Respecting Congress's dictates must take priority over all other concerns.

CONCLUSION

For the foregoing reasons, Ms. Lindenbaum respectfully requests that this Court reverse the decision below and hold that the TCPA's robocall restrictions remained valid from 2015 to 2020.

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Respectfully submitted,

/s/ Ellen Noble

CARLSON LYNCH LLP
KATRINA CARROLL
KATHLEEN LALLY
111 W. WASHINGTON ST. SUITE 1240
CHICAGO, IL 60602
(312) 750-1265

PUBLIC JUSTICE, PC
ELLEN NOBLE
LEAH NICHOLLS
LESLIE BRUECKNER
1620 L ST. NW SUITE 630
WASHINGTON, DC 20036
enoble@publicjustice.net
(240) 620-3645

SAVETT LAW OFFICES LLC
ADAM T. SAVETT
2764 CAROLE LANE
ALLENTOWN, PA 18104
(610) 621-4550

Attorneys for Appellant Roberta Lindenbaum

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(b) because this brief contains 6,434 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 2016 in Times New Roman 14 point font.

Dated: April 7, 2021

/s/ Ellen Noble

CERTIFICATE OF FILING AND SERVICE

1. I hereby certify that I electronically filed the foregoing reply brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on April 7, 2021.

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/s/ Ellen Noble