No. 20-4252

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERTA LINDENBAUM,

Plaintiff-Appellant,

UNITED STATES,

Intervenor-Appellant,

v.

REALGY, LLC, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for Northern District of Ohio

REPLY BRIEF FOR INTERVENOR-APPELLANT

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INTRODUCTION AND SUMMARY

Defendant maintains that it should not be held liable for conduct that violates a 1991 law that undisputedly remains valid today. That view is premised on the fundamental misperception that the Supreme Court in *Barr v. American Ass'n of Political Consultants* (*AAPC*), 140 S. Ct. 2335 (2020), held unconstitutional not just the government-debt exception but the automated-call restriction itself, and that the Court then amended the statute by severing the exception and bringing the automated-call restriction back into effect. That is not what *AAPC* held, and it is not how judicial decisionmaking works.

The *AAPC* Court granted certiorari on the question "[w]hether the government-debt exception to the [Telephone Consumer Protection Act's (TCPA)] automated-call restriction violates the First Amendment," Cert. Pet. at I, *AAPC*, 140 S. Ct. 2335 (No. 19-631), and it answered that question in the affirmative, "conclud[ing] that the 2015 government-debt exception created an unconstitutional exception to the 1991 robocall restriction," 140 S. Ct. at 2348 (plurality). Two opinions joined by a total of six Justices expressly rejected the petitioners' argument for "holding the entire 1991 robocall restriction unconstitutional," *id.* at 2349, and concluded that "the government-debt exception provides no basis for undermining the general cell phone robocall restriction," *id.* at 2362 (Breyer, J., concurring in judgment with respect to severability and dissenting in part). The *AAPC* plurality further explained that "an unconstitutional statutory amendment 'is a nullity' and

'void' when enacted, and for that reason has no effect on the original statute." *Id.* at 2353 (plurality). Thus, the conclusion that the government-debt amendment was unconstitutional "does not negate the liability of parties" like defendant who are alleged to have violated the automated-call restriction prior to the *AAPC* decision, *id.* at 2335 n.12.

This view is not at odds with the conclusion that, as a matter of fair notice, "no one should be penalized or held liable for making robocalls to collect government debt after the effective date of the 2015 government-debt exception" and prior to the Court's decision in *AAPC*. 140 S. Ct. at 2355 n.12 (plurality). Although the automated-call restriction applied equally to debt-collection calls during this period, parties may not be penalized if they lacked adequate notice of the unlawfulness of their conduct. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Contrary to defendant's suggestion, this application of fair notice principles does not revive the First Amendment problem underlying the *AAPC* decision. Liability in these circumstances is assigned not based on what is being said but based on the adequacy of notice regarding the lawfulness of particular actions, and that basis for distinguishing among parties raises no equal treatment concerns. The Court should thus reject defendant's attempt to turn "[c]onstitutional litigation" into "a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute," *AAPC*, 140 S. Ct. at 2351, and thereby avoid liability for conduct that has been unlawful for three decades.

ARGUMENT

Defendant May Be Liable for Violations of the Automated-Call Restrictions Consistent with *AAPC*.

A. *AAPC* did not hold the automated-call restriction unconstitutional.

Defendant's view of liability is premised on the fundamental misconception that *AAPC* held unconstitutional the automated call restriction and not just the later-enacted government-debt exception. Like the Fourth Circuit opinion that it affirmed, the Supreme Court's opinion held only that "the debt-collection exemption contravenes the Free Speech Clause." *American Ass'n of Political Consultants v. FCC*, 923 F.3d 159, 161 (4th Cir. 2019). That was the question on which the Court granted certiorari: "Whether the government-debt exception to the TCPA's automated-call restriction violates the First Amendment." Cert. Pet. at I, *AAPC*, 140 S. Ct. 2335 (2020) (No. 19-631). The Court answered that question in the affirmative, "conclud[ing] that the 2015 government-debt exception created an unconstitutional exception to the 1991 robocall restriction." *AAPC*, 140 S. Ct. at 2348 (plurality); *see id.* at 2365 (Gorsuch, J., concurring in judgment in part and dissenting in part) (noting that the plurality opinion "declares the government-debt exception void"). Two opinions joined by a total of six Justices expressly rejected the petitioners' "broader initial argument for holding the entire 1991 robocall restriction unconstitutional," *id.* at 2349 (plurality), holding instead that "the government-debt exception provides no

basis for undermining the general cell phone robocall restriction," *id.* at 2362 (Breyer, J., concurring in judgment with respect to severability and dissenting in part).

In arriving at its holding, the plurality explained that "an unconstitutional statutory amendment 'is a nullity' and 'void' *when enacted*, and for that reason has no effect on the original statute." *AAPC*, 140 S. Ct. at 2353 (plurality) (emphasis added). The underlying automated-call restriction was undisputedly valid before the amendment's enactment. Because the invalid government-debt amendment "ha[d] no effect on the original statute," the *AAPC* Court's holding "does not negate the liability of parties who made robocalls" in violation of the automated-call restriction prior to the Court's decision. *Id.* at 2353, 2355 n.12.

This conclusion accords with earlier decisions holding that an unconstitutional amendment is "powerless to work any change in the existing statute," *Frost v. Corporation Comm'n of Okla.*, 278 U.S. 515, 526-27 (1929), and allowing for liability in analogous circumstances, *see United States v. Jackson*, 390 U.S. 570, 572 (1968); *Eberle v. Michigan*, 232 U.S. 700, 705 (1914). The validity of a provision "c[an] not be impaired by the subsequent adoption of what were in form amendments, but, in legal effect, were mere nullities." *Eberle*, 232 U.S. at 705; *see Chicago, I. & L.R. Co. v. Hackett*, 228 U.S. 559, 566 (1913) ("Th[e] act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law . . . ."). It was on that basis that the Supreme Court in *Eberle* affirmed the petitioner's conviction under a Michigan law prohibiting the manufacture of alcohol even though amendments to the law enacted

prior to the alleged violation created an equal-treatment problem and were invalid for that reason. *Eberle*, 232 U.S. at 706. Consistent with these decisions, *AAPC* held that the unconstitutional government-debt amendment had no effect on the remainder of the statute. 140 S. Ct. at 2349, 2353 (plurality).

In arguing to the contrary, defendant principally relies on the plurality's framing of the question as "whether the robocall restriction, with the government debt exception, is content-based." Br. 22 (emphasis omitted) (quoting *AAPC*, 140 S. Ct. at 2346-47 (plurality)). But as the plurality opinion makes clear, the only aspect of the statute that was content-based, and thus invalid from the time of its enactment, was the government-debt exception. That unconstitutional amendment had "no effect on the original statute," *AAPC*, 140 S. Ct. at 2353 (plurality), which was valid both before and after the amendment. Defendant disregards the language and clear import of this analysis and makes no attempt to come to grips with other formulations of the Court's holding, noted above, that focus squarely on the government-debt exception. *See id.* at 2348. Nor does defendant address the scope of the question on which the Court granted certiorari. The only other passage that defendant cites—that "[s]ix Members of the Court today conclude that Congress has impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment," Br. 22 (quoting *AAPC*, 140 S. Ct. at 2343 (plurality))—likewise leaves no doubt that the sole constitutional problem identified by the Court was the

government-debt exception itself, which was invalid because it purported to provide special treatment for certain debt-collection calls.

The conclusion that *AAPC* held invalid only the government-debt exception is dispositive in this case. There is no dispute that if only "one part of a statute is unconstitutional, the others may stand," and that "overbroad statutes can be remedied by partial invalidation and the non-overbroad parts can be applied without committing First Amendment harm." Def.'s Br. 36. Defendant attempts to distinguish cases like *Robinson v. United States*, 394 F.2d 823 (6th Cir. 1968), and *United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020), which confirm this rule, but its discussion of these cases underscores the extent to which their analysis is controlling here. Defendant asserts that the distinguishing factor in *Robinson* and *Miselis* is that the substantive offense in each case fell under the valid remainder of the statute, rather than the unconstitutional provision severed by the court's decision. Br. 36. But the same is true here. The *AAPC* Court held invalid and severable only the government-debt exception, leaving in place the automated-call restrictions that defendant is alleged to have violated. Defendant may thus be liable in these circumstances consistent with its understanding of these cases.

B. Courts do not "rewrite" the law in severing unconstitutional provisions, and such decisions apply retroactively like other judicial determinations.

1. Defendant also fundamentally misunderstands the nature of a court's role in severing part of a statute, equating severance with the enactment of legislation.

Defendant and its amici posit that "severance is unlike statutory interpretation and more akin to legislation, because it *changes* the statutory law in force." Facebook Br. 10; *see* Def.'s Br. 28. Thus, in defendant's view, the automated-call restriction was unconstitutional for a period of time, from 2015-2020, before the *AAPC* Court "revise[d] the statute by eliminating the offending clause," thereby bringing the restriction back into effect. Br. 28 (quotation marks omitted).

Quite clearly, however, "the power of judicial review does not allow courts to revise statutes," *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2220 (2020) (Thomas, J., concurring in part and dissenting in part), and courts do not engage in "*de facto* judicial legislation in determining just how much of the remainder of a statute should be invalidated," *AAPC*, 140 S. Ct. at 2351 (plurality). The Supreme Court has repeatedly admonished that the severability inquiry "is not grounds for a court to 'devise a judicial remedy that . . . entail[s] quintessentially legislative work,'" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016) (alterations in original), nor does it permit the courts to "re-write Congress's work," *Seila Law*, 140 S. Ct. at 2211 (plurality). Instead, severability is "a question of interpretation and of legislative intent," *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924), through which a court preserves a statute's valid provisions to the extent consistent with Congress's intent, *see Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

When a court severs part of a statute, it does not legislate: it "leave[s] in place" the constitutional portion of the statute. *AAPC*, 140 S. Ct. at 2355 (plurality). Like

other interpretive decisions, a court's severability determination "explain[s] its understanding of what the statute has meant continuously since the date when it became law," and it is "not accurate to say that the Court's decision . . . 'changed' the law that previously prevailed." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994). "[P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what [the law] shall be." *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in judgment). Thus, no less than other judicial decisions, a court's severability determination "applies a rule of federal law to the parties before it," and "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the court's] announcement of the rule." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).

The Supreme Court addressed the retroactivity of severability determinations in *United States v. Booker*, 543 U.S. 220, 244, 259 (2005), in which it held unconstitutional a provision making the federal sentencing guidelines mandatory and severed that provision from the remainder of the statute. The Court explained that it "must apply [these] holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act—to all cases on direct review." *Id.* at 268. Thus, the Court's severability analysis, just like its constitutional analysis, "applied retroactively." *Id.* (quotation marks omitted). The same rule applies here, making *AAPC*'s severability

analysis, no less than its constitutional analysis, applicable to all pending cases, including this one.

That rule applies with particular force in these circumstances, where the Court severed an unconstitutional amendment to a statute that was undisputedly valid prior to the amendment's enactment. The Supreme Court has explained that, "in cases like this one, where Congress added an unconstitutional amendment to a prior law . . . , the Court has treated the original, pre-amendment statute as the 'valid expression of the legislative intent.'" *AAPC*, 140 S. Ct. at 2353 (plurality) (quoting *Frost*, 278 U.S. at 526-27). In such cases, "[t]he Court has severed the 'exception introduced by amendment,' so that 'the original law stands without the amendatory exception.'" *Id.* (quoting *Truax v. Corrigan*, 257 U.S. 312, 342 (1921)). The *AAPC* plurality repeatedly cited this enactment history, which the TCPA shares with the statutes in *Frost*, *Eberle*, and *Jackson*.

2. Defendant's misunderstanding of the severability inquiry underlies its insistence (at 34) that "it makes no difference whether the legislature or court 'cures' the statute by deleting the speech-permitting exception," as well as its assertion (at 4) that this case "present[s] an identical fact pattern" to the one in *Grayned v. City of Rockford*, 408 U.S. 104 (1972). The defendant in *Grayned* was convicted of violating a city ordinance that generally prohibited demonstrations near schools but made an exception for peaceful labor picketing. After Grayned was convicted, the City of Rockford amended its ordinance to remove the labor-picketing exception. *Id.* at 107

n.2. The Supreme Court did not consider the amendment in its analysis because that subsequent legislation did not inform the meaning or "constitutionality of the ordinance in effect when appellant was arrested and convicted." *Id.*

Defendant contends that this case is indistinguishable from *Grayned* because, in both cases, "the exception that rendered the statute content-based had been removed after the defendant violated the provision." Br. 24. But the suggested equivalence between the legislature's subsequent enactment in *Grayned* and the court's severability analysis in *AAPC* is a false one. As discussed, the severability inquiry is an interpretive one that concerns what a statute has always meant, whereas a subsequent legislative change operates only prospectively and has no bearing on the constitutionality of the statute as it existed at a prior time. It is thus not correct to state that the *AAPC* Court "removed" the content-based exception "after . . . defendant violated the provision." *Id.*

Unlike *AAPC*, *Grayned* did not entail a severability inquiry, nor did *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), on which *Grayned* is based. Both cases concerned the constitutionality of provisions that generally prohibited demonstrations while excepting peaceful labor picketing. A severability analysis would have determined whether the defendants were convicted under a valid portion of the statute that could be severed from any unconstitutional portion. But the Court did not undertake such a severability analysis in either case because it concluded that the exception called into doubt the validity of the entire provision, holding that "[i]f

peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful." *Mosley*, 408 U.S. at 100; *see Grayned*, 408 U.S. at 107 (adopting *Mosley*'s holding). Thus, in those cases, the Court held that the prohibition on demonstrations was itself invalid as enacted, and convictions under the prohibition could not stand. Because the entire prohibition was unconstitutional, there was nothing for the Court to sever or preserve. By contrast, the *AAPC* Court expressly rejected the contention that the later-enacted government-debt exception rendered "the entire 1991 robocall restriction unconstitutional." 140 S. Ct. at 2349 (plurality). *AAPC* held that only the exception was unconstitutional, and its severability analysis confirmed that the exception could be disregarded while the remainder of the statute remained in effect.

3. Defendant's reliance on *Seila Law* and *Arthrex, Inc. v. Smith & Nephew, Inc.*, is likewise misplaced. The Court in *Seila Law* held that a provision limiting the President's authority to remove the director of the Consumer Financial Protection Bureau unconstitutionally insulated the director from presidential supervision, 140 S. Ct. at 2203-04, but that the provision was severable from the remainder of the statute, *id.* at 2211 (plurality). The Court then remanded for consideration of whether the agency enforcement decision at issue, which was made when it was unclear whether the director was subject to constitutionally sufficient supervision, had been validly ratified by an acting director to whom the removal provision did not apply. *Id.* Similarly, in *Arthrex*, which is currently under review by the Supreme Court, the

Federal Circuit held that the work of administrative patent judges was unconstitutionally insulated from supervision and direction by superior officers but that the provision establishing the judges' removal protections could be severed from the remainder of the statute. 941 F.3d 1320, 1338 (Fed. Cir. 2019), *cert. granted sub nom. United States v. Arthrex, Inc.*, 141 S. Ct. 549 (2020). The court then vacated the decision under review because it had been issued by a panel of administrative patent judges at a time when the statutory removal protections were presumed valid. *Id.* at 1338-39.

In each of these cases, the severability analysis proceeded as it did in *AAPC*, with the court identifying the source of the constitutional problem and severing the invalid provision while leaving the remainder of the statute in place. *Seila Law* and *Arthrex* also involved an additional question, not presented here, regarding the implications of the court's holding for official actions taken in the shadow of the unconstitutional provisions. The enforcement decision in *Seila Law* and the Patent Trial and Appeal Board decision in *Arthrex* were taken at a time when it was unclear whether the relevant officials were subject to constitutionally sufficient supervision by a superior officer, raising a remedial question with respect to those actions. There is no such question in this case. Here, the *AAPC* Court addressed the constitutionality of the government-debt exception and severed it from the remainder of the statute, leaving in place the longstanding automated-call restrictions that defendant is alleged to have violated.

C. Holding defendant potentially liable for violating a law that has been valid and in effect since 1991 works no unfairness and creates no problem of unequal treatment.

Concluding that defendant can be liable in these circumstances creates no constitutional issue. *AAPC* held unconstitutional only the government-debt exception, leaving the automated-call restriction intact. That provision does not discriminate based on the content of speech, and holding entities liable under that provision causes no First Amendment harm.

Defendant incorrectly suggests that it would be unconstitutional to hold it accountable for calls made while the government-debt exception was in place because the Supreme Court concluded that calls covered by the exception should not give rise to liability. Br. 7, 43. The Supreme Court explained that because certain entities lacked notice of the unlawfulness of their conduct as a result of the government-debt exception, principles of fair notice will generally preclude a finding of liability for government-debt calls made "after the effective date of the 2015 government-debt exception" and prior to the Court's decision in *AAPC*. 140 S. Ct. at 2355 n.12 (plurality). Although the government-debt amendment was "void when enacted," *id.* at 2353, and calls made by debt collectors could thus violate the automated-call restriction to the same extent as other calls, it would be unfair to impose liability for debt-collection calls made in reliance on the amendment because such callers lacked notice of the unlawfulness of their conduct. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (emphasizing that "[e]lementary considerations of fairness dictate that

individuals should have an opportunity to know what the law is and to conform their conduct accordingly"); *Bouie v. City of Columbia*, 378 U.S. 347, 352, 355 (1964) (overturning conviction where the defendant lacked fair notice of the proscribed conduct). Application of these principles creates no constitutional issues with respect to defendant, which was fully on notice that the statute prohibited the automated calls alleged in this case.

There is no merit to defendant's contention that this application of fair notice principles revives the First Amendment problem underlying *AAPC*. Br. 7, 43. Liability in these circumstances is assigned not based on what is being said but based on the adequacy of a party's notice that its conduct was unlawful. Under the view advanced by the government and plaintiff, the Court's holding imposes no unequal treatment based on the content of anyone's speech. It applies the TCPA as it was written in 1991—a concededly valid, content-neutral restriction on the use of certain automated calling technologies without the consent of the person being called. And it equally applies the fair-notice rule to all callers: Those who had notice of the unlawfulness of their actions may be held liable under the restriction, and those who lacked fair notice as a result of the 2015 amendment may not. The First Amendment is not offended by a scheme that assigns liability only to those who should have known of the unlawfulness of their conduct.

The cases that defendant and its amici cite are inapposite and do not support their view that allowing liability in these circumstances would create a constitutional

issue. In *United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016), the government sought to try the defendant as an adult under a statute with a penalty provision that could not constitutionally be applied to juveniles, and the court held that the provision could not constitutionally be severed from the remainder of the statute because doing so would leave the offense without an operative penalty. *Id.* at 723. The court also rejected the government's proposed solution of applying the penalty for a separate offense because doing so would have deprived the defendant in that case of fair notice. *Id.* at 726. Similarly, in *Smith v. Cahoon*, 283 U.S. 553, 564-67 (1931), the Court concluded that the offending portion of the statute could not be severed because doing so would render the remainder of the statute unenforceable. Thus, both cases entailed a decision that part of a statute could not be severed from the remainder. Here, by contrast, the *AAPC* Court has already resolved the severability of the government-debt exception, and applying the automated-call restriction in these circumstances raises no issues of fair notice for defendant given that the conduct in which it allegedly engaged has been prohibited since 1991.

Applying the principles discussed here, the vast majority of district courts to consider the question have concluded that defendants like Realgy should not be able to engage in "a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional

statute." *AAPC*, 140 S. Ct. at 2351 (plurality).[1] There is no suggestion that Realgy engaged in debt-collection calls of any type, yet it seeks avoid liability for conduct that has been proscribed for decades and is undisputedly prohibited today. Only a single district court, other than the court in this case, has adopted defendant's view. *See Creasy v. Charter Commc'ns, Inc.*, No. 20-1199, 2020 WL 5761117, *2 (E.D. La. Sept. 28, 2020).[2] The weight of authority favoring liability in these circumstances underscores the extent to which the ruling here is at odds with the Court's decision in *AAPC* and its holdings in cases like *Eberle* and *Jackson*.

[1] *See, e.g.*, *Miles v. Medicredit, Inc.*, No. 20-1186, 2021 WL 1060105 (E.D. Mont. Mar. 18, 2021); Order, *Boisvert v. Carnival Corp.*, No. 20-2076 (M.D. Fla. Mar. 12, 2021); Order, *Massaro v. Beyond Meat, Inc.*, No. 20-510 (S.D. Cal. Mar. 12, 2021); Order, *Talin v. Rite Aid Corp.*, No. 20-5601 (C.D. Cal. Feb. 2, 2021); *McCurley v. Royal Sea Cruises, Inc.*, No. 17-986, 2021 WL 288164 (S.D. Cal. Jan. 28, 2021); *Less v. Quest Diagnostics Inc.*, No. 20-2546, 2021 WL 266548 (N.D. Ohio Jan. 26, 2021); *Bonkuri v. Grand Caribbean Cruises, Inc.*, No. 20-60638, 2021 WL 612212 (S.D. Fla. Jan. 19, 2021); *Stoutt v. Travis Credit Union*, No. 20-1280, 2021 WL 99636 (E.D. Cal. Jan. 12, 2021); *Rieker v. National Car Cure, LLC*, No. 20-901, 2021 WL 210841 (N.D. Fla. Jan. 5, 2021); *Trujillo v. Free Energy Sav. Co.*, No. 19-2072, 2020 WL 8184336 (C.D. Cal. Dec. 21, 2020); *Shen v. Tricolor Cal. Auto Grp., LLC*, No. 20-7419, 2020 WL 7705888 (C.D. Cal. Dec. 17, 2020); *Abramson v. Federal Ins. Co.*, No. 19-2523, 2020 WL 7318953 (M.D. Fla. Dec. 11, 2020).

[2] A second district court initially agreed with this view but has since reversed course. *See* Order at 4, *Boisvert*, No. 20-2076.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 4,139 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using a proportionally spaced, 14-point font.

s/ Lindsey Powell
Lindsey Powell

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2021, I electronically filed the foregoing 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. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Lindsey Powell
Lindsey Powell