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

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STATEMENT OF REASONS FOR ORAL ARGUMENT

Oral argument is warranted because the decision below eliminates liability under the Telephone Consumer Protection Act for all unwanted robocalls made between November 2015 and July 2020—and it does so in direct contravention of the Supreme Court's instructions. Last summer, the Supreme Court held that "the entire 1991 robocall restriction should not be invalidated, but rather that the 2015 government-debt exception" it held unconstitutional was to "be invalidated and severed from the remainder of the statute." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2343 (2020). The decision below turns the Supreme Court's severability determination on its head, holding that the entirety of the robocall restriction was unconstitutional and void between November 2015 and July 2020.

Oral argument is also warranted because the decision below unsettles the longstanding doctrine of severability, what it means to invalidate an unconstitutional amendment, and the rule that interpretations of federal law must be given full retroactive effect to cases on direct review. The decision below opens the door to a legal landscape where statutory provisions can mean one thing during one time period but another during a different time period—a result that the Supreme Court has repeatedly rejected.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over the underlying action under 28 U.S.C. § 1331 because Roberta Lindenbaum brought claims under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.[1] This Court has jurisdiction over Ms. Lindenbaum's appeal because the district court's October 29, 2020 order dismissing the action, RE 27 at 458, is an appealable final decision under 28 U.S.C. § 1291.[2] The district court's October 29, 2020 memorandum opinion and order granting defendants' motion to dismiss, RE 26 at 444-457, and separate order dismissing the action, RE 27 at 458, dispose of all of plaintiff's claims. Finally, this

[1] The district court below concluded that "[b]ecause the statute at issue was unconstitutional at the time of the alleged violations, this Court lacks jurisdiction over this matter." Mem. Op., RE 26 at 457. For the reasons below, the statute was not unconstitutional.

Regardless, the district court erred in granting the motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) as opposed to failure to state a claim under Rule 12(b)(6). "A claim invoking federal-question jurisdiction under 28 U.S.C. § 1331 . . . may be dismissed for want of subject-matter jurisdiction if it is not colorable, i.e., if it is 'immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.'" *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006) (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)). Ms. Lindenbaum's run-of-the-mill TCPA claims do not belong in that category, particularly when neither the Supreme Court, nor this Court, had ever held that the entire TCPA is (or was) unconstitutional.

[2] In accordance with Sixth Circuit Rule 28(a)(1), citations to the lower court record include the record entry ("RE") number followed by the Page ID # range for the relevant portion of the document.

appeal is timely because Ms. Lindenbaum's Notice of Appeal, RE 28 at 459-461, was filed on November 25, 2020. *See* Fed. R. App. Proc. 4.

STATEMENT OF THE ISSUE PRESENTED

Although the Supreme Court held in *Barr v. AAPC* that the TCPA's "robocall restriction should not be invalidated," and instead severed the 2015 government-debt exception from the statute, was the robocall restriction nevertheless unconstitutional between 2015, when the exception was enacted, and 2020, when the Supreme Court decided *AAPC*?

INTRODUCTION

The Supreme Court's decision in *AAPC* resolves this appeal. After holding that the government-debt exception to the TCPA's robocall restriction violated the First Amendment, the Court held that "that *the entire 1991 robocall restriction should not be invalidated*, but rather that the 2015 government-debt exception must be invalidated and severed from the remainder of the statute." *AAPC*, 140 S. Ct. at 2343 (emphasis added). The robocall restriction therefore remained valid between 2015 and 2020. And because Ms. Lindenbaum sued Realgy, LLC ("Realgy") for violating that robocall restriction, the district court had jurisdiction over her case. As Justice Kavanaugh explained in *AAPC*, "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.

The district court nevertheless dismissed Ms. Lindenbaum's TCPA claims for lack of subject-matter jurisdiction on the ground that "the statute at issue was unconstitutional at the time" Realgy made the robocalls at issue in this case. Mem. Op., RE 26 at 457. That was error. The district court incorrectly construed the Supreme Court's decision to sever the government-debt exception—leaving intact the robocall restriction—as a "judicial fix" that only applies prospectively, rendering the robocall restriction unconstitutional from 2015 to 2020.

The district court's approach defeats the purpose of the severability doctrine—to "salvage rather than destroy the rest of the law passed by Congress," *AAPC*, 140 S. Ct. at 2350—and undermines the Supreme Court's explicit direction to preserve the robocall restriction. But it also contradicts the bedrock legal principle that courts do not make the law; they interpret it. Unlike legislatures, courts cannot amend the law moving forward, but instead can only explain what the law has always been. Severability determinations are not prospective judicial fixes but rather judicial holdings that necessarily apply retroactively. The Supreme Court's holding—that only the government-debt exception is unconstitutional and the robocall restriction remains valid—is therefore an interpretation of the law as it existed before July 2020 and as it exists today.

Finally, even if the Supreme Court's decision in *AAPC* did not control the validity of the robocall restriction between 2015 and 2020, and the district court was

writing on a blank state, it would still have been wrong for the court below to invalidate the robocall restriction for the past five years. The touchstone principle governing judicial remedial interpretations of constitutionally defective statutes is legislative intent. Here, legislative intent weighs heavily against eliminating all liability for TCPA violations for a five-year period. Congress included in the statute an express severability clause, stating that if any part of the statute is unconstitutional, the remainder shall not be affected. The district court's decision to invalidate, retrospectively, the entire statute frustrates the application of a longstanding statutory scheme that provides a remedy for consumers who receive annoying and unwanted robocalls. A five-year liability gap would leave many consumers without redress and put companies that swallowed the costs of complying with the law at a serious competitive disadvantage. Instead, this Court should follow the Supreme Court's direction in *AAPC* and reverse the decision below.

STATEMENT OF THE CASE

A. The Telephone Consumer Protection Act and the 2015 Amendment

The Telephone Consumer Protection Act is intended to protect consumers from receiving harassing, intrusive, unwanted, and all-too-common telemarketing calls. Enacted by Congress in 1991, the Act prohibits any party from making "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an

artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service[.]" 47 U.S.C. § 227(b)(1)(A)(iii). It also prohibits "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message." *Id.* § 227(b)(1)(B). The TCPA creates a private right of action in which a person may bring "an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater." *Id.* § 227(b)(3)(B).

The TCPA is also subject to an express severability clause. Section 227, which prohibits robocalls, is contained in Chapter 5 of Title 47. Chapter 5 states "If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." 47 U.S.C. § 608.

Congress passed the TCPA in response to "a torrent of vociferous consumer complaints about intrusive robocalls." *AAPC*, 240 S. Ct. at 2344. At the time, more than 300,000 solicitors called more than 18 million Americans every day. TCPA, Pub. L. No. 102-143, § 2, ¶3, 105 Stat. 2394, 2394 (1991). As the Act's sponsor, Senator Hollings, emphasized: "Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. 30,821 (1991). Congress found that banning

robocalls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." TCPA, § 2, ¶ 12, 105 Stat. at 2394-95.

Twenty-four years later, in 2015, Congress enacted the Bipartisan Budget Act. Among other things, that Act amended the TCPA's restriction on robocalls, carving out an exception for robocalls "made solely to collect a debt owed to or guaranteed by the United States." Pub. L. 114-74, Title III, § 301(a), 129 Stat. 588. The Act also amended § 227(b)(1)(B)'s restriction on robocalls to landlines, inserting a similar government-debt exception. *Id.*

B. The Supreme Court's Decision in *Barr v. AAPC*

In *Barr v. AAPC*, a group of political and polling organizations challenged the government-debt exception added by the 2015 Bipartisan Budget Act as "facially unconstitutional" under the First Amendment and argued that it rendered the entire robocall restriction unconstitutional. *See Am. Ass'n of Pol. Consultants, Inc. v. Fed. Commc'ns Comm'n*, 923 F.3d 159, 161 (4th Cir. 2019), *aff'd sub nom. Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335 (2020).

The Fourth Circuit agreed that the government-debt exception was a "content-based loophole" to the restriction on robocalls that fails to satisfy strict scrutiny and therefore violates the Free Speech Clause. *Id.* at 170. The court, however, agreed with the government that the debt exception should be severed from the TCPA's general restriction on robocalls in light of Congress's direction that "if any part of

the TCPA 'is held invalid, the remainder . . . shall not be affected.'" *Id.* at 171 (quoting 47 U.S.C. § 608). The Fourth Circuit concluded that "a severance of the debt-collection exemption will not undermine the automated call ban" because "[f]or twenty-four years, from 1991 until 2015, the automated call ban was 'fully operative'" without the government-debt exception. *Id.*

The Supreme Court affirmed. While there is no single majority opinion of the Court, six Justices concluded that Congress, in passing the government-debt exception, "impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment." *AAPC*, 140 S. Ct. at 2343. Seven Justices, applying traditional severability principles, concluded that "the entire 1991 robocall restriction should not be invalidated, but rather that the 2015 government-debt exception must be invalidated and severed from the remainder of the statute." *Id.* "As a result, plaintiffs still may not make political robocalls to cell phones, but their speech is now treated equally with debt-collection speech." *Id.* at 2344.

More specifically, Justice Kavanaugh announced the judgment of the Court and delivered an opinion joined by Chief Justice Roberts and Justice Alito, and joined in part by Justice Thomas, concluding that the government-debt exception failed strict scrutiny, but could be severed from the remainder of § 227(b)(1)(A)(iii) to preserve the general ban on robocalls. *Id.* at 2346-56. Justice Sotomayor concluded that the government-debt exception failed intermediate scrutiny, agreed

that the provision was severable, and concurred in the judgment. *Id.* at 2356-57. Justices Breyer, Ginsburg, and Kagan would have concluded that the government-debt exception was constitutional but concurred in the judgment with respect to severability. *Id.* at 2362-63. Finally, Justice Gorsuch, joined in part by Justice Thomas, concurred in the judgment that the government-debt exception was unconstitutional, but for different reasons than those relied upon by Justice Kavanaugh, and dissented from Justice Kavanaugh's severability analysis and remedy. *Id.* at 2363-67.

Central to this case is the Supreme Court's decision in *AAPC* to sever the government-debt exception and not invalidate the entire 1991 robocall restriction. Justice Kavanaugh reasoned that when Congress includes a severability clause, as here, the Court should adhere to it. *Id.* at 2352. Even if there were no severability clause, he explained, the Court would apply the longstanding presumption of severability that "keep[s] courts from unnecessarily disturbing a law apart from invalidating the provision that is unconstitutional." *Id.* at 2351. "With the government-debt exception severed, the remainder of the law is capable of functioning independently and thus would be fully operative as a law." *Id.* at 2353.

Justice Kavanaugh further stated that the "Court has long applied severability principles in cases like this one, where Congress added an unconstitutional amendment to a prior law." *Id.* "In those cases," he explained, "the Court has treated

the original, pre-amendment statute as the 'valid expression of the legislative intent.'" *Id.* "The Court has severed the 'exception introduced by amendment,' so that 'the original law stands without the amendatory exception.'" *Id.* Even "[w]hen, as here, the Court confronts an equal-treatment constitutional violation, the Court generally applies the same commonsense severability principles." *Id.* at 2354. "[T]he Court typically severs the discriminatory exception or classification, and thereby extends the relevant statutory benefits or burdens to those previously exempted, rather than nullifying the benefits or burdens for all." *Id.*

At the end of the severability analysis, Justice Kavanaugh clarified that "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 but before the entry of final judgment in *AAPC*, but that "[o]n the other side of the ledger, our decision today does not negate the liability of parties who made robocalls covered by the robocall restriction." *AAPC*, 140 S. Ct. at 2355 n.12.

C. Proceedings Below

Plaintiff Roberta Lindenbaum sued energy supplier Realgy, LLC, and its vendors or subcontractors, to stop their nationwide practice of robocalling consumers' cell phones and residential landlines without consumers' consent in violation of the TCPA. First Am. Class Action Compl., RE 14 at 115. She alleged, on behalf of a putative class, that defendants made—and continue to make—

unwanted prerecorded calls to consumers' cellphones in violation of 47 U.S.C. § 227(b)(1)(A)(iii) and to consumers' residential landlines in violation of 47 U.S.C. § 227(b)(1)(B). *Id.* at 117-18.

Ms. Lindenbaum received an unsolicited, pre-recorded phone call from (or on behalf of) Realgy to her cell phone on November 26, 2019 and filed suit that December. Then, on March 3, 2020—while her lawsuit was pending—she received *another* robocall from Realgy, this time, to her residential landline. *Id.* at 122-23. She then amended her complaint to include the second landline claim. *Id.* at 117-18. Ms. Lindenbaum brings these claims on behalf of herself and two classes: (1) all cell phone subscribers who defendants called using an artificial or prerecorded voice without the subscribers' consent between December 11, 2015 to the present and (2) all landline telephone subscribers who defendants called using an artificial or prerecorded voice without the subscribers' consent between March 10, 2016 to the present. *Id.* at 128-29.

The district court stayed Ms. Lindenbaum's lawsuit while the Supreme Court decided *Barr v. AAPC*. After the Supreme Court issued its decision in *AAPC*, Realgy moved to dismiss Ms. Lindenbaum's lawsuit for lack of subject-matter jurisdiction, arguing that the Supreme Court in *AAPC* held that the TCPA's robocall restriction was unconstitutional. Mot. to Dismiss, RE 20 at 187. Realgy argued that the Supreme Court's decision to sever the unconstitutional government-debt exception

from the general robocall ban only applies moving forward, and that "the automated-call ban has been unconstitutional, and thus entirely unenforceable, from the enactment of the government debt exception in 2015 until the Court severed it in *AAPC*." *Id.* Because "Plaintiff is suing based on violations of an unconstitutional statute," Realgy argued, her entire action must be dismissed under Rule 12(b)(1). *Id.*

The district court granted the motion to dismiss. *See* Mem. Op., RE 26 at 444. The court agreed with Realgy that "severance of the government-debt exception applies only prospectively" and that "[t]he Supreme Court did not directly address the effect of severance on currently pending cases." *Id.* at 448, 450. The court concluded that "[b]ecause the statute at issue was unconstitutional at the time of the alleged violations, this Court lacks jurisdiction over this matter." *Id.* at 457.

SUMMARY OF THE ARGUMENT

The district court's decision turns the Supreme Court's holding in *Barr v. AAPC* upside down. It invalidated the TCPA's restriction on robocalling even though a majority of the Court expressly agreed in *AAPC* that the underlying robocall restriction was valid. At its core, the district court made two, interrelated legal errors in interpreting and applying the Supreme Court's decision in *AAPC*: First, the court misread *AAPC* as holding that the entire robocall restriction was unconstitutional, when *AAPC* held only that the government-debt exception was unconstitutional. Second, the court misunderstood the Supreme Court's decision to

sever the government-debt exception as a purely prospective judicial fix, even though judicial decisions operate retrospectively. Parts I and II address these two independently sufficient reasons why, given the Supreme Court's decision *AAPC*, the TCPA's robocall restriction was not unconstitutional between 2015 and 2020. Part III explains why, irrespective of *AAPC*, the district court was wrong to invalidate the entire robocall restriction for the past five years. And Part IV contends that even under the district court's serious misinterpretation of *AAPC*, the court was at minimum wrong to dismiss Ms. Lindenbaum's landline claim.

I. The Supreme Court's First Amendment analysis and its severability determination both made it clear that the Court in *AAPC* held only that the government-debt exception, not § 227(b)(1)(A)(iii)'s entire restriction on robocalls, was unconstitutional. In fact, the Supreme Court affirmatively held that the robocall restriction was lawful. In concluding that the Supreme Court held that the entire restriction was unconstitutional, the district court misread the scope of the Court's opinion.

II. Even if the Supreme Court had held that the restriction itself was unconstitutional, the fix the Court devised for that violation—severing the exception and maintaining the restriction—necessarily applies retroactively, preserving TCPA liability during the time period at issue here. That is true for three overlapping reasons.

First, longstanding Supreme Court precedent provides that unconstitutional amendments to otherwise valid statutes are *void ab initio*, nullities when enacted that have no effect on the original statute. *See Frost v. Corp. Comm'n*, 278 U.S. 515, 526 (1929); *Eberle v. Michigan*, 232 U.S. 700, 704-05 (1914). The Supreme Court's decision in *AAPC* simply recognized that the government-debt exception never lawfully took effect, leaving the robocall restriction intact.

Second, when a court applies *any* rule of federal law, as the Supreme Court did in *AAPC*, that rule must apply retroactively to pending cases. *See Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993). Because this case was pending at the time *AAPC* was decided, the Supreme Court's decision to preserve the robocall restriction applies retroactively.

Third, the Supreme Court chose to invalidate and sever the government-debt exception, knowing its decision would apply retroactively to preserve TCPA liability. In fact, Justice Kavanaugh expressly recognized 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.

Thus, because the Supreme Court's severability determination in *AAPC* applies retroactively, the robocall restriction—independent of the government-debt exception—was not unconstitutional and unenforceable between 2015 and July 2020. The district court erred in concluding otherwise.

III. Even writing on a blank slate, it would not have been appropriate for the district court to invalidate the TCPA's robocall restriction for a five-year period because of the unconstitutional government-debt exception. The touchstone for a court's remedial interpretation of an unconstitutional statute is legislative intent. And here, just as in *AAPC*, the statute's severability clause, the thirty-year-old restriction on unwanted robocalls, and the disruptive effect of a five-year liability gap all support the conclusion that Congress would have preferred to extend the robocall ban retroactively, preserving liability for robocall violations between 2015 and 2020.

IV. For the foregoing reasons, the district court erred in holding that *AAPC* invalidated the cellphone robocall restriction for the last five years, and its decision should therefore be reversed. But it also erred in lumping together Ms. Lindenbaum's cellphone robocall claim and her landline robocall claim and dismissing both. The Supreme Court's holding in *AAPC* was expressly limited to § 227(b)(1)(A)(iii)'s restriction on robocalls to cellphones. In treating *AAPC* as applying with equal force to both sets of claims, the district court failed to analyze the distinct considerations presented by the TCPA's landline robocall restriction. At a minimum, the district court's decision should therefore be vacated and remanded for additional consideration of Ms. Lindenbaum's landline robocall claims.

STANDARD OF REVIEW

Whether the district court properly dismissed Ms. Lindenbaum's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6) is a question of law that this Court reviews de novo. *Mohlman v. Fin. Indus. Regul. Auth.*, 977 F.3d 556, 558 (6th Cir. 2020).

ARGUMENT

I. The Supreme Court held that only the government-debt exception, not the entire restriction on robocalling, was unconstitutional.

The Supreme Court in *AAPC* held that only the government-debt exception was unconstitutional and that "the entire 1991 robocall restriction should not be invalidated." *AAPC*, 140 S. Ct. at 2343. The district court held the opposite: that the entire robocall restriction was invalid between 2015 and 2020. The court misread *AAPC* as holding that "§ 227(b)(1)(A)(iii)"—the restriction on robocalling cellphones—"violated the Constitution, but that severance of part of the offending part of the statute cured the constitutional infirmity." Mem. Op., RE 26 at 445. But the Supreme Court never held that § 227(b)(1)(A)(iii)'s restriction on robocalling was the "offending part of the statute." In fact, the Court explicitly "disagree[d] with plaintiffs' . . . argument for holding the entire 1991 robocall restriction unconstitutional" and concluded only "that the 2015 government-debt exception created an unconstitutional exception to the 1991 robocall restriction." *AAPC*, 140 S. Ct. at 2348-49. The Court "sever[ed] [the statute's] problematic portion[]"—the

government-debt exception—"while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 321 (2006).

The limit of the Supreme Court's constitutional holding in *AAPC* is clear from (a) the Court's First Amendment analysis and (b) the Court's decision to sever the government-debt exception. The Court only held that the government-debt exception was unconstitutional. Because the district court wrongly assumed—in direct conflict with *AAPC*—that the entire robocall ban was unconstitutional, the court's decision to dismiss Ms. Lindenbaum's case must be reversed.

A. The First Amendment analysis in *AAPC* shows that the Court held only that the government-debt exception—not the TCPA's restriction on robocalls—was unconstitutional.

Five of the six Justices in *AAPC* that held that Congress impermissibly favored debt-collection speech in violation of the First Amendment applied strict or intermediate scrutiny only to the government-debt exception, not the robocall restriction as a whole. In Part II of Justice Kavanaugh's plurality opinion, which three other Justices joined, the subject of the First Amendment analysis was the government-debt exception—not § 227(b)(1)(A)(iii)'s restriction on robocalls. The Court reasoned that the "justification for the government-debt exception is collecting government debt" and that, while it's a "worthy goal," it does not pass strict scrutiny. *Id.* at 2347 (emphasis added). The same is true of Justice Sotomayor's concurrence, where she concluded that the government-debt exception—not § 227(b)(1)(A)(iii)—

failed intermediate scrutiny. *Id.* at 2356-57. In other words, there was no majority for the proposition that the entire robocall restriction violates the First Amendment.

Only Justice Gorsuch, in his separate opinion, took aim at the entire robocall ban. He argued that the government-debt exception renders the ban itself an unconstitutional restriction on speech. *See id.* at 2364-65. But the controlling "holding of the Court" is that of the other five Justices. They held only that the government-debt exception is unconstitutional, impermissibly *favoring* debt-collection speech over other speech.

The decision of Justice Kavanaugh, Chief Justice Roberts, Justice Alito, Justice Thomas, and Justice Sotomayor to limit their constitutional analysis to the government-debt exception, and not the robocall restriction, is not just a semantic preference—it reflects the scope of their constitutional holding. It is black-letter law that the controlling holding of a divided Supreme Court decision is the "position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977).

And the proper scope of the Court's constitutional analysis was a major point of contention briefed by the parties. Seventeen pages of the respondent's brief in *AAPC* were dedicated to arguing why, when there is an unconstitutional content-based speech restriction, the Supreme Court should invalidate the restriction and not the exception. *See* Resp'ts' Br., *Barr v. AAPC*, 2020 WL 1478621, at *33-50 (Mar.

25, 2020). In response, the government defended the Fourth Circuit's decision to "describe[] that exception, rather than the automated-call restriction, as the constitutionally infirm provision." Pet'r's Reply Br., *Barr v. AAPC*, 2020 WL 2041669, at *10 (Apr. 24, 2020). The government explained that there are "'two analytically distinct grounds for challenging the constitutionality' of a content-based speech regulation under the First Amendment," and "'[o]ne is that the measure in effect restricts too little speech because its exemptions discriminate on the basis of [content].'" *Id.* at *9 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 50-51 (1994)). "[A]n exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *Ladue*, 512 U.S. at 51 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978)).

Five of the six Justices that concluded there was a First Amendment violation "agree[d] with the Government" that the constitutional analysis could be limited to the government-debt exception itself. *AAPC*, 140 S Ct. at 2349; *see also id.* at 2356-57. They concluded "that the entire 1991 robocall restriction should not be invalidated, but rather that the 2015 government-debt exception must be invalidated and severed." *AAPC*, 140 S Ct. at 2343. Justice Kavanaugh's plurality opinion recognized that "the robocall restriction with the government-debt exception is content-based," *id.* at 2347, but concluded that the problematic part of the statute is

the government-debt exception that "favors speech made for collecting government debt over political and other speech." *Id.* at 2346. It is the *favoring* of certain speech, not the speech restriction itself, that violates the First Amendment.

B. The severability holding in *AAPC* shows that the Court held only that the government-debt exception—not the TCPA's restriction on robocalls—was unconstitutional.

In addition to the First Amendment analysis, it is clear that the Supreme Court in *AAPC* held that the government-debt exception was unconstitutional but the robocall restriction was not because the Justices conducted a severability analysis—if the entire robocall restriction were unconstitutional, there would be no need to determine whether the government-debt exception was severable. Severance is based on the constitutional principle that "if any part of an Act is 'unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are *not repugnant to the constitution*." *Id.* at 2350 (quoting *Bank of Hamilton v. Lessee of Dudley*, 2 Pet. 492, 526, 7 L.Ed. 496 (1829)) (emphasis added). Severability requires sorting the constitutional from the unconstitutional. The point is to "refrain from invalidating more of the statute than is necessary" so as not to disrupt the enforcement of constitutional laws. *AAPC*, 140 S. Ct. at 2350.

By severing the unconstitutional exception and holding that "the entire 1991 robocall ban should not be invalidated," the Court made the legal determination that the robocall ban was *not* unconstitutional. *Id.* at 2343. Justice Kavanaugh made this

explicit: After holding that "the entire 1991 robocall ban should not be invalidated," *id.*, he defined the term "invalidate" in a footnote as "a common judicial shorthand when the Court holds that a particular provision is unlawful and therefore may not be enforced against a plaintiff." *Id.* at 2351 n.8. By holding that the robocall ban should not be invalidated, the Court held that the robocall ban was *not* unconstitutional—only the *exception* was unconstitutional. Ms. Lindenbaum's claims therefore should not be dismissed because Realgy's allegedly unlawful conduct falls under the surviving, constitutional part of § 227's restriction on robocalls.

If an unconstitutional part of a statute is severable, and a defendant's wrongful conduct violates the surviving part of the statute, then the defendant will still be liable. *See, e.g.*, *Robinson v. United States*, 394 F.2d 823, 824 (6th Cir. 1968) (upholding defendant's conviction under the Federal Kidnapping Act because the Act's unconstitutional death penalty clause was severable from the remainder of the statute and defendant was not sentenced to death); *United States v. Ford*, 184 F.3d 566, 582-83 (6th Cir. 1999) (upholding convictions under gambling statute because even if the exception to gambling statute were unconstitutional, the exception would be severable); *United States v. Miselis*, 972 F.3d 518, 547 (4th Cir. 2020) (upholding defendants' convictions under Anti-Riot Act provision, even though last phrase of the provision is unconstitutionally overbroad, because that phrase is severable and

defendants' "substantive offense conduct falls under the statute's surviving purposes").

This approach is also consistent with the Ninth Circuit's holding in *Duguid*. There, Facebook challenged the constitutionality of the TCPA's robocall ban as an affirmative defense to a class action. *See Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019), *cert. granted in part,* No. 19-511, 141 S. Ct. 193 (July 9, 2020) (mem.).[3] The Ninth Circuit "sever[ed] the debt-collection exception as violative of the First Amendment" just as the Supreme Court did in *AAPC* shortly thereafter. *Id.* at 1157. The Ninth Circuit then "reverse[d] the dismissal of [plaintiff's] amended complaint" and "remand[ed] for further proceedings" to resolve claims based on robocalls made after the 2015 enactment of the government-debt exception because § 227's general robocall ban remained "fully operative." *Id.* at 1156-57.

Since *AAPC* was decided, numerous district courts have likewise concluded that, because the exception was severed, claims based on past violations of the surviving robocall restriction may proceed. *See, e.g.*, *Shen v. Tricolor Cal. Auto Grp., LLC*, No. CV 20-7419 PA (AGRX), 2020 WL 7705888, at *5 (C.D. Cal. Dec. 17, 2020) (concluding plaintiff's complaint "survived [the] constitutional challenge" in *AAPC* because it "is based on the parts of the TCPA that were enacted in 1991");

[3] *Duguid* is pending before the Supreme Court to resolve a separate issue involving the definition of an automated telephone dialing system.

Abramson v. Fed. Ins. Co., No. 8:19-CV-2523-T-60AAS, 2020 WL 7318953, at *2 (M.D. Fla. Dec. 11, 2020) (concluding "parties may continue to bring claims under the portions of § 227(b) unaltered by *AAPC*"); *Trujillo v. Free Energy Sav. Co.*, No. 5:19-cv-02072-MCS-SP, 2020 U.S. Dist. LEXIS 239730 (C.D. Cal. Dec. 21, 2020) (concluding "the AAPC plurality's reasoning . . . indicate[s] that the robocall statute remains enforceable, at least against nongovernment-debt collectors, as to calls made between 2015 and 2020").

Ultimately, "[h]olding the entire robocall ban to be ineffective as to calls made between 2015 and 2020 would improperly construe *AAPC* as having invalidated the entirety of § 227(b)(1)(A)(iii), rather than just the government-debt exception, and thus would undermine the Court's central purpose in severing the statute." *Stoutt v. Travis Credit Union*, No. 2:20-CV-01280 WBS AC, 2021 WL 99636, at *4 (E.D. Cal. Jan. 12, 2021). Severing an unconstitutional provision is intended to *preserve* the remainder of the underlying statute—not to invalidate it *sub silentio*, as the district court concluded.

* * *

The Supreme Court's First Amendment analysis and severability determination in *AAPC* show that the Court held only that the government-debt exception was unconstitutional. The district court's contrary conclusion rested on a misunderstanding of the Supreme Court's decision. Because Ms. Lindenbaum's

claims arise under the part of the statute that was *not* offensive to the Constitution and was never invalidated, the decision below should be reversed.

II. The Supreme Court's decision in *AAPC* to sever the unconstitutional government-debt exception and not invalidate the restriction on robocalling applies retroactively.

Regardless of the Supreme Court's analysis prior to severing the government-debt exception in *AAPC*, the Court's severability determination applies retroactively, rendering the robocall restriction constitutional and enforceable between 2015 and July 2020. The Court's severability determination was not—and in fact *could not*—be a prospective judicial fix. It was a judicial holding—an interpretation of federal law—that necessarily applies retrospectively. Therefore, the TCPA's restriction on robocalls has remained valid, without interruption, since 1991.

The Supreme Court's severability determination applies retroactively for three reasons. First, when, as here, an amendment renders an otherwise valid statute unconstitutional, the amendment is *void ab initio*, as if Congress had never enacted it, and does not affect, even temporarily, liability under the original statute. Second, the same basic principle—that unconstitutional parts of a statute are void when enacted—also applies more generally. Any decision to sever an unconstitutional portion of a statute is an interpretation of federal law that must apply retroactively to pending cases under *Harper v. Va. Dep't of Taxation*. Finally, if there were any

remaining doubt, a majority of the Justices in *AAPC* intended to preserve the TCPA restriction on robocalling both prospectively and retroactively.

Because these principles of retroactivity require the Supreme Court's decision in *AAPC* to apply retroactively, this Court should reverse and hold that the prohibition on robocalls was valid and enforceable between 2015 and 2020.

A. The Supreme Court's severability determination applies retroactively because unconstitutional amendments are *void ab initio*.

The Supreme Court's conclusion that the government debt exception was invalid and severable preserved the underlying robocall restriction because when an amendment renders an otherwise valid statute unconstitutional, it is as if Congress had never enacted the amendment. "[A]n unconstitutional statutory amendment 'is a nullity' and 'void' when enacted, and for that reason has no effect on the original statute." *AAPC*, 240 S. Ct. at 2353 (quoting *Frost v. Corp. Comm'n*, 278 U.S. 515, 526 (1929)). The original statute "must stand as the only valid expression of the legislative intent." *Frost*, 278 U.S. at 527.

Because unconstitutional amendments are *void ab initio*, they will not affect—even temporarily—liability under the original, valid statute. For example, in *Eberle v. Michigan*, officers of a brewing company charged with making beer in violation of an 1889 prohibition on manufacturing alcohol argued that the prohibition was void because subsequent amendments in 1899 and 1903 created an exception for making wine and cider in certain counties, and that exception denied the beer

brewers equal protection under the law. 232 U.S. 700, 704 (1914). The Court agreed that the amendments violated the Equal Protection clause but sustained the beer brewers' convictions under the original 1889 prohibition on manufacturing alcohol, reasoning that a constitutional statute's validity "could not be impaired by the subsequent adoption of what were in form amendments, but, in legal effect, were mere nullities." *Id.* at 705.

The same principle applies here. Congress amended the TCPA in the Bipartisan Budget Act of 2015, adding the unconstitutional government-debt exception to the otherwise valid robocall restriction at § 227(b)(1)(A)(iii). Because the act of amendment is invalid, "the act is *void ab initio,* and it is as though Congress had not acted at all." *Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 401 (5th Cir. 2008). Therefore, just as the defendants in *Eberle* could not escape liability for selling beer despite the unconstitutional exceptions for those selling wine and cider at the time, defendants here cannot escape liability for robocalling consumers despite the unconstitutional exception for government-debt collectors at the time.

The district court's attempt to distinguish *Eberle* does not hold up. The court disregarded *Eberle* on the grounds that the case arose from a state Supreme Court decision and does not directly address the retroactive effect of severance. *See* Mem. Op., RE 26 at 454-55. But nothing in *Eberle* suggests that the Supreme Court deferred to state law in assessing severability, nor would such deference be expected.

Eberle predates the Supreme Court's elimination of federal common law in *Erie*. And *Eberle* did address the retroactive effect of severing the unconstitutional amendments. The beer brewers raised their constitutional challenge to the wine and cider amendments on direct appeal of their convictions, claiming that they could not be convicted of violating a law that was unconstitutional. *See Eberle*, 232 U.S. at 704. The Court, looking back on the law at the time of the beer brewers' offense, concluded that the amendments were nullities and the original prohibition on manufacturing alcohol still applied. *Id.* at 705.

A decade later, the Supreme Court in *Frost* reaffirmed the same underlying principle: that an unconstitutional amendment does not affect the validity and enforceability of the original, lawful statute. In *Frost*, the Supreme Court ruled that an amendment to an Oklahoma licensing statute, exempting certain corporations from making a showing of "public necessity" to obtain a cotton gin license, constituted an unconstitutional denial of equal protection. *See* 278 U.S. at 517, 526. The Court reasoned that "the amendment is void for unconstitutionality" and "'an existing statute cannot be recalled or restricted by anything short of a constitutional enactment.'" *Id.* at 526 (quoting *Davis v. Wallace*, 257 U.S. 478, 485 (1922)). When "the statute, before the amendment, was entirely valid" and "a different Legislature" passes an unconstitutional amendment, that amendment "is a nullity and, therefore, powerless to work any change in the existing statute." *Id.* at 526-27. The

preexisting statute "must stand as the only valid expression of the legislative intent." *Id.* at 527.

This longstanding principle that unconstitutional amendments are *void ab initio* also brings much needed stability to the law. As this Court explained in *White Motor Corp. v. Citibank, N.A.*, "[i]t has long been held that a statute which is unconstitutional does not repeal a prior statute on the subject when a contrary construction would create a void in the law which the legislative body did not intend." 704 F.2d 254, 261 (6th Cir. 1983). "The prior statute is 'revived' to avoid a chaotic hiatus in the law." *Id.* The district court's approach, in which the entire restriction on robocalling is unconstitutional and unenforceable for a five-year period, would create a "chaotic hiatus" in the law regulating robocalls that Congress never intended.

Thus, longstanding constitutional principles, as well as the need to avoid a five-year gap in robocaller liability that Congress never intended, requires that the unconstitutional amendment to the TCPA in the Bipartisan Budget Act of 2015, creating the government-debt exception, be treated as *void ab initio*, preserving without interruption liability under the TCPA of 1991.

B. The Supreme Court's severability determination applies retroactively under *Harper v. Virginia Department of Taxation.*

1. Contrary to the district court's characterization of severance as only a forward-looking judicial fix, the Supreme Court's decision to sever the government-

debt exception is an interpretation of federal law that applies retroactively to all pending cases. "When [the Supreme Court] applies a rule of federal law to the parties before it, 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. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) (emphasis added); *see also Deja Vu v. Metro. Gov't of Nashville & Davidson Cty.*, 421 F.3d 417, 420 (6th Cir. 2005) (same).

The Supreme Court announced a new rule in *AAPC* that must apply retroactively under *Harper*. Specifically, the Supreme Court announced a rule that the government-debt exception in § 227(b)(1)(A)(iii) is invalid, but that the restriction on robocalling is not. It was a "constitutional decision[] of [the] Court," *Harper*, 509 U.S.. at 94, and an interpretation of § 227(b)(1)(A)(iii), *see* 2 Norman J. Singer, *Sutherland Statutory Construction* § 44:3 (7th ed. 2020) (severability is "essentially [a] question[] of statutory construction"). Therefore, the Court's severability determination applies retroactively here, regardless of whether Realgy's robocall violations "predate or postdate [the Court's] announcement of the rule." *Harper*, 509 U.S. at 97.

Although new rules of law 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. v. Hyde*, 514 U.S. 749, 758-59 (1995). Specifically, "a court may find (1) an alternative way of curing the constitutional violation, or (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or (3) as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications, or (4) a principle of law, such as that of 'finality' . . . that limits the principle of retroactivity itself." *Id.* at 759.

None of these circumstances apply here to prevent the retroactive enforcement of the robocall restriction against Realgy, and the district court did not cite any. The district court was concerned that the robocall restriction may not be enforced equally against all robocall violations in light of potential due process concerns that could arise in enforcing the robocall restriction against government debt-collectors. *See* Mem. Op., RE 26 at 455.

But courts cannot declare different portions of a statute valid or invalid based on equitable concerns that might arise during a particular timeframe. The Supreme Court has "prohibit[ed] the erection of selective temporal barriers to the application of federal law" because "the substantive law" should not "shift and spring according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Harper*, 509 U.S.

at 97 (brackets and quotation marks omitted). The *Harper* retroactivity rule is founded in the idea that courts have no "constitutional authority . . . to disregard current law or to treat similarly situated litigants differently." *Id.* Therefore, under *Harper*, the district court was wrong to disregard the law as interpreted in *AAPC* just because Realgy's robocall violations took place before *AAPC*.

Because there is no reason to deviate from the "strict rule requiring retroactive application of new decisions to all cases still subject to direct review," the decision below should be reversed. *Michael v. Federated Dep't Stores, Inc.*, 44 F.3d 1310, 1317 (6th Cir. 1995).

2. Moreover, courts do not "prospectively fix" the law akin to a legislative amendment. The district court held that *AAPC*'s severability determination does not apply retroactively because "a later amendment to a statute cannot be retroactively applied," and "[i]t would be an odd result to say the least if the judiciary could accomplish by severance that which Congress could not accomplish by way of the amendment." Mem. Op., RE 26 at 455-56 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 107 n.2 (1972)). The district court's reasoning, however, overlooks a key distinction between the role of the courts and the role of the legislature.

Courts cannot act as legislatures and make "judicial fixes" to a statute that only apply moving forward. The *Harper* rule is based upon the "'basic norm[] of constitutional adjudication' . . . that 'the nature of judicial review' strips [courts] of

the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as [they] see fit." *Harper*, 509 U.S. at 95 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)). "The 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) (quoting *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982)). "[T]hat which distinguishes a judicial from a legislative act is, that [] one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases." *Harper*, 509 U.S. at 107 (Scalia, J., concurring); *see also Griffith*, 479 U.S. at 322-23 ("Unlike a legislature, [courts] do not promulgate new rules.").

3. The district court also incorrectly relied on inapposite removal power cases in an attempt to distinguish *Harper*. *See* Mem. Op., RE 26 at 452-54. The district court relied primarily on *Arthrex* where the Federal Circuit held that Administrative Patent Judges ("APJs") qualified as "principal officers" that must be, but were not, appointed by the President with the advice and consent of the senate in violation of the Appointments Clause. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1327 (Fed. Cir. 2019), *cert. granted sub nom. United States v. Arthrex, Inc.*, 141 S. Ct. 549 (Oct. 13, 2020) (mem.). The court then applied severability principles and invalidated certain removal protections, rendering the APJs "inferior officers" that

need not be appointed. *Id.* at 1336. Nonetheless, because unconstitutionally appointed APJs had presided over Arthrex's patentability hearing, the Federal Circuit required that, on remand to the agency, "a new panel of APJs must be designated and a new hearing granted." *Id.* at 1340.

The court also relied on *Seila Law* where the Supreme Court held that "the structure of the CFPB violates the separation of powers" because the statute contains a removal protection that insulates the CFPB's single Director from being removed by the President without cause. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191-92 (2020). The Supreme Court went "on to hold that the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority." *Id.* at 2192. The Supreme Court remanded the case for consideration of whether the CFPB Director's prior decisions had been validly ratified. *Id.* at 2211.

The court below misconstrued the remands in these cases as evidence that severability only applies prospectively. The court reasoned that the harm in *Arthrex* and *Seila Law*—the adjudication of patent rights or CFPB decisions made "under an unconstitutional scheme"—could not be remedied by severing the removal protections moving forward. *See* Mem. Op., RE 26 at 453-454. According to the court, if severance of the removal protections applied retroactively, there would have

been no need for a new patentability hearing in *Arthrex* or for the new CFPB Director to ratify past acts in *Seila Law*. *Id.* 454.

Arthrex and *Seila Law* are, however, entirely consistent with the *Harper* principle that invalidation of part of a statute means the remainder of the statute *was* and *is* valid. *Arthrex* and *Seila Law* are about the retroactive effect of a court's holding on the validity of past *administrative decisions* made by an unconstitutionally appointed decision maker. By contrast, here, the court below held that a *different part of the statute* was invalid before the Supreme Court severed the unconstitutional government-debt exception. In fact, the district court's analysis directly conflicts with the Supreme Court's analysis on severability in *Seila Law* where the Court explained that "provisions of the Dodd Frank Act bearing on the CFPB's structure and duties *remain* fully operative without the offending tenure restriction." *Seila Law*, 140 S. Ct. at 2209 (emphasis added). The Court reasoned that "[t]hose provisions are capable of functioning independently, and there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred no CFPB to a CFPB supervised by the President." *Id.* The Court then remanded the case for a determination as to only whether the decisions *made directly by the unconstitutionally appointed CFPB Director* were ratified and did not invalidate everything the CFPB had ever done.

Moreover, *Arthrex* and *Seila Law* are distinguishable because, in those cases, the unconstitutional part of the statute (the removal provisions) directly applied to and tainted Arthrex's patentability hearing and the former CFPB Director's decisions. By contrast, here, the unconstitutional government-debt exception never applied to Realgy. Realgy is being sued under a different part of the statute—the robocalling ban—that was not invalidated, operates independently, and is entirely unaffected by the government-debt exception. There is no doubt that Realgy would be treated exactly the same for violations of the robocall ban that occurred before *AAPC* and that occurred after *AAPC*. The district court states that Realgy seeks the "right to be free from punishment for speaking," Mem. Op., RE 26 at 453, but *AAPC* held that, even under the proper, constitutional interpretation of § 227(b)(1)(A)(iii), Realgy does not have that right. Realgy only has the right to eliminate the government-debt exception's *favoring* of government-debt collectors' speech.

C. The Supreme Court in *AAPC* intended its severability determination to apply retroactively, preserving TCPA liability between 2015 and 2020.

If there were any doubt that unconstitutional amendments are *void ab initio* or that *Harper* applies, this Court should consider that a majority of the Justices clearly intended to preserve TCPA liability between 2015 and 2020. Because the Court's interpretation of federal law necessarily applies retroactively, *see supra* at Part II.B, the Supreme Court was required to consider—and did consider—the retroactive effect of its severability determination.

Respondents repeatedly raised the very argument that defendants raise here: that invalidating only the government-debt exception, but not the entire restriction on robocalling, would "raise[] thorny questions of retroactive liability for any collector of government-backed debt who made automated calls before the Fourth Circuit's decision." Resp'ts' Br., *Barr v. AAPC*, 2020 WL 1478621, at *39. Respondents further argued that penalizing government debt collectors who made robocalls, relying on the government-debt exception, "would violate principles of fair notice," but that "exempting [them] (and only them) from liability would resurrect the content-based distinction that the Government's misguided remedial analysis seeks to eliminate." *Id.* Thus, respondents argued, the only proper remedial solution is to invalidate the entire restriction on robocalls. *Id.*

The Supreme Court considered and rejected respondents' argument that these retroactive liability concerns warrant invalidating the entire robocall restriction. A majority of the Justices held that only the government-debt exception should be invalidated, *see AAPC*, 140 S. Ct. at 2343, and, in footnote twelve, Justice Kavanaugh expressly accepted the consequences that the Court's decision would have on TCPA liability between 2015 and 2020, *id.* at 2355 n.12. After concluding that "the correct result in this case is to sever the 2015 government-debt exception and leave in place the longstanding robocall restriction," Justice Kavanaugh stated:

> [A]lthough our decision means the end of the government-debt exception, 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 before the entry of final judgment by the District Court on remand in this case . . . . *On the other side of the ledger, our decision today does not negate the liability of parties who made robocalls covered by the robocall restriction.*

Id. (emphasis added).

The footnote's first sentence is based on the assumption—made by both parties in their briefing—that the fair notice doctrine is "a previously existing, independent legal basis (having nothing to do with retroactivity)" that may limit government-debt collectors' liability for robocall violations made over the last five years. *Reynoldsville Casket Co.*, 514 U.S. at 758-59. The footnote's second sentence—that the Court's decision does not negate liability of parties who made robocalls covered by the restriction—is simply an application of the well-established rule that the Court's interpretations of federal law apply retroactively, even though the fair notice doctrine may limit the enforcement of that law with respect to government-debt collectors. *See AAPC*, 140 S. Ct. at 2355 n.12.

The footnote does what it proclaims to do: It clarifies what the Court's "decision means." *Id.* Although Justice Kavanaugh only wrote for three Justices, four other Justices concurred in the judgment with respect to severability and did not dispute Justice Kavanaugh's characterization of the effect of their decision. Justice Kavanaugh's description should therefore be considered the type of guidance on the effects of a decision that the Supreme Court regularly provides. *See, e.g.*, *United*

States v. Booker, 543 U.S. 220, 268 (2005) (explaining courts "must apply today's holdings . . . to all cases on direct review" and identifying prudential doctrines that may affect whether courts will need to hold new sentencing hearings).

Even if Justice Kavanaugh's description of the effect of the Court's decision is not binding, it remains persuasive authority. "Where there is no clear precedent to the contrary, [this Court] will not simply ignore the [Supreme] Court's dicta." *Wright v. Morris*, 111 F.3d 414, 419 (6th Cir. 1997). "[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement." *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991).

In sum, because the Supreme Court's decision to sever the government-debt exception but preserve the robocall restriction necessarily applies retroactively, the Court should reverse the district court below.

III. Independent of *AAPC*, the district court's decision to invalidate the robocall restriction between 2015 and 2020 contravenes longstanding principles that govern judicial remedies for constitutionally defective statutes.

Even if the Supreme Court's constitutional holding and severability determination in *AAPC* were not controlling, longstanding principles that govern how to remedy an unconstitutional statute weigh heavily against eliminating all liability for TCPA robocall violations made between 2015 and 2020. The restriction

on robocalling should not be retroactively invalidated as unconstitutional—or otherwise rendered unenforceable—for the past five years.

The remedy a court devises for an unconstitutional statute must be governed, first and foremost, by legislative intent. "[T]he touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Ayotte*, 546 U.S. at 330. "After finding an application or portion of a statute unconstitutional, [the Court] must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Id.* (citing cases).

That is no less true where, as here, the constitutional violation involves unequal treatment. Constitutional violations caused by differential treatment can be eliminated by extending the benefits or burdens to the exempted class or by nullifying the benefits or burdens for all. *See Heckler v. Mathews*, 465 U.S. 728, 740 (1984). But in choosing between nullification or extension of a benefit or burden, "a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole." *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part). "It should not use its remedial powers to circumvent the intent of the legislature." *Id.* Courts must "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as

opposed to abrogation." *Welsh v. United States*, 398 U.S. 333, 365 (1970) (Harlan, J., concurring in judgment).

Here, just as in *AAPC*, legislative intent strongly favors invalidating only the government-debt exception and preserving liability for robocall violations between 2015 and 2020. Congress included in the statute a severability clause stating, "If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances *shall not be affected* thereby." 47 U.S.C. § 608 (emphasis added). The district court's decision effectively erases the entire TCPA restriction on robocalling for the last five years and directly contradicts Congress's explicit statutory direction.

Moreover, Congress would have preferred to extend the longstanding robocall ban retroactively, rather than to eliminate it for five years. That restriction "function[ed] independently . . . for 20-plus years before the government-debt exception was added in 2015," illustrating the strength of Congress's commitment to the robocall restriction. *AAPC*, 140 S. Ct. at 2353. To ignore Congress's policy objective, even just retroactively, "disrespect[s] the democratic process, through which the people's representatives have made crystal clear that robocalls must be restricted." *Id.* at 2356.

Eliminating liability for all TCPA robocall violations made in the last five years would substantially "disrupt[] the statutory scheme." *Welsh*, 398 U.S. at 365. The estimated national volume of robocalls was over 29 billion in 2016, 30 billion in 2017, and over 47 billion in 2018. *See* Federal Communications Commission, Report on Robocalls, 6 (2019).[4] There were over 3,000 TCPA lawsuits filed in 2019 alone. *See* Eversheds Sutherland, *Redial: 2019 TCPA Year-in-Review* (2019).[5] Prohibiting enforcement of the TCPA's restriction on unwanted robocalling for the last five years creates a massive liability gap—one that will frustrate compliance moving forward, given that violators often change their practices in response to a costly lawsuit or FCC enforcement action.

Eliminating five years of TCPA claims also harms third-party actors who have relied on the statutory scheme. Consumers who have experienced annoying and incessant robocalls will be denied their right to damages and relief under the TCPA. Consumers with pending lawsuits that have already dedicated significant time and resources in an effort to hold robocallers accountable will be blocked at the courthouse door. And the many corporations that *did* comply with the law, undertaking additional costs and finding other, more burdensome ways to reach

[4] https://docs.fcc.gov/public/attachments/DOC-356196A1.pdf.

[5] https://us.eversheds-sutherland.com/NewsCommentary/Articles/228719/REDIAL-2019-TCPA-Year-in-Review-Analysis-of-Critical-Issues-and-Trends-in-TCPA-Compliance-and-Litigation.

consumers, will be unfairly disadvantaged as their robocalling competitors face no consequences for years of violations.

The district court's equitable argument in favor of eliminating all robocalling liability between 2015 and July 2020 is misplaced. The district court, relying on Justice Gorsuch's dissent in *AAPC*, reasoned that equal treatment concerns would arise if the government-debt exception were *void ab initio* but due process concerns protected government-debt collectors from past liability. *See* Mem. Op., RE 26 at 455.

But this equitable concern with retroactively applying the Court's severability determination holds little weight. Any differential treatment of government-debt collectors would be based, not on speech, but on the fact that government debt collectors actually lacked fair notice of the law while other robocallers did not. Any differential treatment would be caused, not by the ongoing enforcement of a law that unconstitutionally favors certain speech, but by an entirely separate doctrine of fair notice that prevents government debt collectors from being punished for unlawful conduct when they had no notice that such conduct was unlawful. *See AAPC*, 140 S. Ct. at 2354 (recognizing that there are "independent constitutional barriers" to extension of benefits or burdens like due process and fair notice).

The court's equitable concern may have been relevant to the initial severability determination in *AAPC*, but it cannot justify "selective temporal barriers

to the application of federal law." *Harper*, 509 U.S. at 97. The potential for unequal enforcement of the TCPA against government-debt collectors in the past five years cannot dictate the retroactive validity of § 227(b)(1)(A)(iii) because the Court cannot "permit the substantive law to shift and spring" depending on how separate doctrines may or may not be enforced to protect certain defendants, resulting in some differential outcomes. *Id.* (alteration omitted). Courts are not tasked with predicting how other cases will turn out and then adjusting the substantive law in their own case to safeguard against any potential inequitable enforcement.

Finally, any inequity caused by the fair notice doctrine is dwarfed by the inequity to consumers and law-abiding corporate competitors if robocallers are not held liable for five years' worth of TCPA violations. The need to preserve the statutory scheme enacted by Congress must remain paramount: "there is no magic solution to severability that solves every conundrum, especially in equal-treatment cases, but the Court's current approach . . . is constitutional, stable, predictable, and commonsensical." *AAPC*, 140 S. Ct. at 2356.

IV. At minimum, the restriction on robocalls to landlines under 47 U.S.C. § 227(b)(1)(B) was not unconstitutional.

Even if the district court was right that § 227(b)(1)(A)(iii)'s restriction on robocalls to cellphones was unconstitutional, it was wrong to conclude that § 227(b)(1)(B)'s restriction on robocalls to landlines was also unconstitutional. The district court concluded that "[b]ecause the statute at issue was unconstitutional at

the time of the alleged violations, this Court lacks jurisdiction over this matter" and dismissed Ms. Lindenbaum's amended complaint in its entirety. Mem. Op., RE 26 at 457. The amended complaint included both a claim under § 227(b)(1)(A)(iii), which prohibits robocalls to cellphones, and a claim under § 227(b)(1)(B), which prohibits robocalls to landlines. But even under the district court's serious misinterpretation of *AAPC*, the Supreme Court never addressed the constitutionality of § 227(b)(1)(B).

The Supreme Court's analysis in *AAPC* was limited to § 227(b)(1)(A)(iii). The Court noted that "Plaintiffs have not challenged the TCPA's separate restriction on robocalls to home phones" and that "[t]he issue before us concerns only robocalls to cell phones." 140 S. Ct. at 2345 n.3, 2347; *see also id.* at 2363 (Gorsuch, J., concurring in part and dissenting in part). Even the district court itself noted that "*AAPC* addressed the constitutionality of 47 U.S.C. § 227(b)(1)(A)(iii)." Mem. Op., RE 36 at 445. While a similar government-debt exception exists in § 227(b)(1)(B), the restriction on robocalls to landlines serves unique privacy interests that would have to be considered in any constitutional analysis. Indeed, Justice Gorsuch's and Justice Thomas' reasoning in *AAPC* was specific to cellphone payment schemes. *AAPC*, 140 S. Ct. at 2363.

Even though § 227(b)(1)(B) was not at issue in *AAPC*, the district court dismissed Ms. Lindenbaum's § 227(b)(1)(B) landline robocall claim. The district

court never conducted any independent constitutional analysis of § 227(b)(1)(B). Thus, even if this Court adopted the district court's reading of *AAPC* and concluded that the cellphone robocall restriction was unconstitutional and unenforceable for the past five years, this Court should still vacate the decision below with respect to Ms. Lindenbaum's landline claim and remand for the district court to consider the effect of *AAPC* on the landline robocall restriction in the first instance.

CONCLUSION

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

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Respectfully submitted,

/s/ Ellen Noble

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(b) because this brief contains 10,216 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: January 25, 2021

/s/ Ellen Noble

CERTIFICATE OF FILING AND SERVICE

1. I hereby certify that I electronically filed the foregoing 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 January 25, 2021.

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Dated: January 25, 2021

/s/ Ellen Noble

DESIGNATION OF LOWER COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28(a) and 30(g), this addendum includes the relevant documents from the district court record:

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14	First Amended Class Action Complaint ("First Am. Class Action Compl.")	115-138
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17	Pl.'s Motion to Lift Stay	173-176
18	Defs.' Opposition to Motion to Lift Stay	177-181
20	Defs.' Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Mot. to Dismiss")	185-200
23	Pl.'s Opposition to Motion to Dismiss	246-399
24	Defs.' Reply in Support of Motion to Dismiss	400-417
25	Defs.' Notice of Supplemental Authority	418-443
26	Memorandum of Opinion and Order ("Mem. Op.")	444-457
27	Order of Dismissal	458
28	Notice of Appeal	459-461