No. 20-4252

IN THE

# United States Court of Appeals for the Sixth Circuit

ROBERTA A. LINDENBAUM,
Plaintiff-Appellant,

v.

REALGY, LLC, *ET AL.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio
No. 1:19-cv-2862-PAG
Hon. Patricia A. Gaughan, U.S.D.J.

**BRIEF *AMICUS CURIAE* OF ACA INTERNATIONAL IN SUPPORT OF DEFENDANTS-APPELLEES**

Jessica L. Ellsworth
Mark W. Brennan
Arpan A. Sura
Matthew J. Higgins
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
jessica.ellsworth@hoganlovells.com

*Counsel for Amicus Curiae*

March 24, 2021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-4252 Case Name: Lindenbaum v. Realgy, LLC

Name of counsel: Jessica L. Ellsworth

Pursuant to 6th Cir. R. 26.1, ACA International
*Name of Party*
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on March 24, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jessica L. Ellsworth
Jessica L. Ellsworth

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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## BRIEF *AMICUS CURIAE* OF ACA INTERNATIONAL IN SUPPORT OF DEFENDANTS-APPELLEES

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Founded eighty years ago, ACA International is the largest trade association representing the debt-collection industry, with members located in every state. ACA brings together nearly 2,300 member organizations as well as their nearly 124,000 employees worldwide, including third-party collection agencies, asset buyers,

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund preparation or submission of this brief. No person or entity other than *amicus* contributed money intended to fund the brief's preparation or submission .

attorneys, creditors, and vendor affiliates. In the Sixth Circuit alone, ACA's 171 members employ more than 7,000 people. The ACA-member workforce is incredibly diverse, with racial and ethnic minorities accounting for approximately 40% and women making up 70% of employees. In 2018, third-party debt collectors donated $108.3 million in charitable contributions. In addition, debt-collection agencies and their employees directly contributed more than $1.1 billion in federal taxes and $105.9 million in state and local taxes in 2018 alone.

ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to large firms employing thousands of workers. These members include the very smallest of businesses operating within a limited geographic range of a single state, as well as the very largest of multinational corporations operating in every state. About fifty percent of ACA's company members are small businesses with less than $15 million in annual revenue and fewer than twenty-five employees. Nearly three quarters have fewer than nine employees. ACA members are not only small businesses themselves, but they provide an essential service for their small-business clients as well—which comprise well over half of their clientele.

ACA's members collect federal-government and private debt alike. The association participates as amicus curiae in litigation matters affecting its members, including cases like this one brought under the Telephone Consumer Protection Act

(TCPA). ACA submits this brief to assist the Court in addressing the consequences of the Supreme Court's ruling in *Barr v. American Ass'n of Political Consultants*, 140 S. Ct. 2335 (2020) ("*AAPC*"). There, the Supreme Court held that the provisions of the TCPA that regulate certain calls to cell phones violate the First Amendment by imposing a content-based restriction on speech. As a remedy, the Court severed a 2015 amendment to the Act that exempts calls made to collect debts owed to or guaranteed by the federal government. This Court's decision in the present appeal will determine whether, and to what extent, the TCPA is enforceable against calls made during the time (2015-2020) that the statute contained an unconstitutional content-based restriction.

## INTRODUCTION AND SUMMARY OF ARGUMENT

ACA submits this brief to explain first and foremost why the District Court's ruling should be affirmed. Alternatively, ACA also explains why retroactive liability should not be available against federal-debt collectors during the time the TCPA contained the government-debt exception, even if the Court concludes that some of the automatic telephone dialing system (ATDS) restrictions can be retroactively applied during that time.

In *AAPC*, a splintered Supreme Court majority held that the TCPA provisions' differential treatment of federal-debt collection was a content-based speech restriction that violated the First Amendment. As a remedy, the Court severed the

federal-debt exception, 47 U.S.C. § 227(b)(1)(A)(iii), so that moving forward all non-emergency ATDS calls to cellphones would be treated equally, regardless of who made them or for what purpose. *AAPC* addressed a pre-enforcement facial challenge that sought prospective relief only. The Court thus did not have to resolve—and did not decide—whether there could be liability for calls found to violate the now-invalid TCPA provisions that were in effect between November 2, 2015 (when the federal-debt exception was enacted) and July 6, 2020 (when the TCPA provisions were first struck down).

*First*, the District Court correctly ruled that defendants cannot be held liable for violating the TCPA provisions during the time the restrictions contained a content-based restriction and were thus unconstitutional. The legal effect of one's actions must be measured against the laws in effect when the "conduct took place." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (citation omitted). And here, the allegedly unlawful calls made by Appellee Realgy occurred between 2015 and July 2020—when the TCPA's provisions contained an unconstitutional content-based restriction. Because defendants cannot be held liable for violating an unconstitutional law, the District Court was correct to dismiss the Amended Complaint.

*Second*, even if *non-federal-debt collectors* could be held retroactively liable, *federal-debt collectors* that reasonably relied on the statute's plain exception should

not be. At least five Justices agreed on that in *AAPC*, which amounts to binding precedent on this Court. That outcome flows from both well-established legal principles and practical policy considerations. For starters, only Congress—not courts—has the power to impose new liability for transactions or conduct that have already taken place. The Supreme Court in *AAPC* rewrote the TCPA provisions to eliminate the federal-debt exception and to create a new category of liability moving forward. Because Congress did not clearly indicate that the post-*AAPC* version of the statute should apply retroactively, this Court lacks the power to make federal-debt collectors newly liable for years-old calls they made when the exception was still on the books.

Moreover, imposing retroactivity would violate principles of fair notice and due process. Three Justices and five district courts concluded that the TCPA provisions were constitutional. Holding federal-debt collectors liable for relying on such a provision would violate "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886, 892 (6th Cir. 2016) (citation omitted). Finally, imposing retroactive liability on federal-debt collectors could cripple the government's debt-collection efforts and leave borrowers less equipped to navigate complicated debt-relief programs and legal requirements.

## ARGUMENT

### I. THE DISTRICT COURT'S RULING WAS CORRECT AND SHOULD BE AFFIRMED.

#### A. The Supreme Court Held That The TCPA Provisions Were Unconstitutional, Without Ruling On Retroactivity.

On July 6, 2020, the Supreme Court struck down the 2015-amended version of the TCPA's ATDS restrictions, holding that they violated the First Amendment. *AAPC*, 140 S. Ct. at 2346-47 (Kavanaugh, J., plurality op.). Originally passed in 1991, the relevant portion of the TCPA prohibited almost all calls placed to cell phones using an ATDS without the recipient's consent. *Id*. at 2344. Congress amended the TCPA provisions on November 2, 2015 to create an exemption for calls "made solely to collect a debt owed to or guaranteed by the United States." Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588; *see* 47 U.S.C. § 227(b)(1)(A)(iii).

In a fractured opinion, the Court invalidated the amended TCPA provisions, holding that they—as a whole—"impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment." *AAPC*, 140 S. Ct at 2343 (Kavanaugh, J., plurality op.) (noting "[s]ix Members of the Court" agreed). Justice Kavanaugh's plurality opinion explained that by "favoring debt-collection robocalls," the TCPA provisions imposed a content-based speech restriction, unconstitutionally "discriminating against political and other robocalls." *Id.* at 2354.

Next, the Court severed the 2015 government-debt-collection exemption, thereby curing the amended TCPA provision's unconstitutionality. *Id.* at 2354-55. Again under separate opinions, seven Justices agreed that the government-debt-collection exemption would be severed from the rest of the statute, while the original ATDS ban would remain in place. *Id.* at 2355; *id.* at 2357 (Sotomayor, J., concurring); *id.* at 2363 (Breyer, J., concurring in the judgment with respect to severability and dissenting in part). By removing the exemption, the TCPA provisions could continue to operate moving forward because they would no longer favor certain categories of speech over others. *See id.* at 2355 (Kavanaugh, J., plurality op.) ("[S]evering the 2015 government-debt exception cures the unequal treatment and constitutes the proper result under the Court's traditional severability principles.").

Because the *AAPC* plaintiffs requested prospective declaratory and injunctive relief only, the issue of how to treat calls placed during that intervening period was not before the Court. Gov't Reply Br. at 24, *AAPC*, 140 S. Ct. 2335 (No. 19-631), 2020 WL 2041669 ("[B]ecause no question of retroactive liability is presented here, those issues may be reserved for a future case."). Accordingly, the Court did not decide whether its severability holding applies to calls made during that intervening period between November 2, 2015 and July 6, 2020. *AAPC*, 140 S. Ct. at 2366 (Gorsuch, J., concurring in the judgment in part and dissenting in part) (Justice

Kavanaugh's three-Justice plurality opinion "*suggests* that the ban on government-debt collection calls announced today *might* be applied only prospectively" (emphases added)). The District Court below had to decide this unresolved issue—"whether severance of the government-debt exception applies retroactively to cases currently pending." *Lindenbaum v. Realgy, LLC*, No. 1:19 CV 2862, 2020 WL 6361915, at *5 (N.D. Ohio Oct. 29, 2020).

### B. The District Court Correctly Held That A Defendant Cannot Be Held Liable For Violating An Unconstitutional Law.

The District Court ruled that defendants could not be liable for violating the unconstitutional TCPA provisions that existed before the federal-debt exception was severed. *Id*. at *7. That is correct. A defendant's actions must be assessed under the law as it existed at the time of the conduct. For that reason, severance acts prospectively; it does not create a hypothetical world where the unconstitutional statutory provisions a defendant allegedly violated were actually valid and enforceable.

The legal effect of conduct is "assessed under the law that existed *when the conduct took place*." *Landgraf*, 511 U.S. at 265 (emphasis added) (citation omitted); *see also Glover v. Johnson*, 138 F.3d 229, 250 (6th Cir. 1998) (declining to apply newly-enacted attorneys' fee requirements that did not exist when the attorneys' work was conducted). And here, the TCPA provisions were unconstitutional from 2015 to 2020—meaning they were "void," or "no law" at all for that period. *Creasy*

*v. Charter Commc'ns, Inc.*, No. 20-1199, 2020 WL 5761117, at *3 (E.D. La. Sept. 28, 2020) (quoting *Ex Parte Siebold*, 100 U.S. 371, 376 (1879)); *In re Huffman*, 408 F.3d 290, 294 (6th Cir. 2005) (determining that a law that violated the Ohio state constitution "had no force" and thus was not considered to have been in effect).

The amended-TCPA provisions, on the whole, were unconstitutional before *AAPC* and therefore inoperative. Importantly, it was not just the 2015 exemption that violated the First Amendment—as Appellants assert. *See* Appellant's Opening Br. 16-24. Standing alone, the *AAPC* plurality observed, the general ban on ATDS calls appeared to be constitutional. *See AAPC*, 140 S. Ct at 2346 (Kavanaugh, J., plurality op.) (noting this was a reasonable "time, place, and manner regulation[]"). So was permitting federal-debt-collection ATDS calls, as that is not a speech restriction at all. *See id.* at 2354-55. It was the interaction of these two otherwise valid provisions that made the TCPA scheme, on the whole, unconstitutional. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.* (*PCAOB*), 561 U.S. 477, 509 (2010) (recognizing that "a number of statutory provisions . . . working together, [can] produce a constitutional violation."); *see also AAPC*, 140 S. Ct. at 2347 (Kavanagh, J., plurality op.) (the "statute is content-based because it singles out debt-collection speech"); *id.* at 2364 (Gorsuch, J., concurring in the judgment in part and dissenting in part) (agreeing with Justice Kavanagh's opinion that "[t]he *statute* is content-based because it allows speech on a subject the government favors

(collecting its debts) while banning speech on other disfavored subjects (including political matters)" (emphasis added)). Because these provisions were unconstitutional "when the conduct took place," they are not enforceable against calls made from 2015 to 2020. *Landgraf*, 511 U.S. at 265 (citation omitted).

This Court applied that exact principle in *United States v. Flowers*, 963 F.3d 492, 500 n.6 (6th Cir. 2020). It noted that although a mandatory-sentencing provision was "later *declared* unconstitutional," it "always *was* unconstitutional," and therefore "cannot be relied on by a court." *Id.* (referring to *United States v. Booker*, 543 U.S. 220 (2005)). As the Court explained, a "legal retrospective cannot include the application of an unconstitutional statute." *Id.* The Court recognized that it was bound by Supreme Court precedent: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Id.* (quoting *Norton v. Shelby County*, 118 U.S. 425, 442 (1886)).

The Supreme Court's approach in *Grayned v. City of Rockford*, 408 U.S. 104 (1972) provides further instruction. There, the Court considered a defendant's conviction under a city anti-picketing ordinance that impermissibly distinguished between general picketing near a school (which was banned) and picketing near a school involved in a labor dispute (not banned). *Id.* at 107. After defendant's conduct but before the Court heard the case, the legislature amended the ordinance

to delete this labor picketing carveout. *Id.* at 107 n.2. But the Court held, "[n]ecessarily, we must consider the facial constitutionality of the ordinance in effect when appellant" engaged in the picketing conduct. *Id.* That picketing ordinance—like the amended TCPA provisions here—was unconstitutional during the time the defendant was alleged to have violated it. *Id.* at 107. Thus, the defendant could not be held liable under a law that rested on impermissible classifications. *Id.*

Even more specifically, *Grayned* teaches that a defendant cannot be held liable for violating an invalid statute even if its constitutional infirmity is later fixed—through severance or otherwise. In *Grayned*, the legislature amended the ordinance to delete the offending provision before the case ever reached the Supreme Court. Yet the Supreme Court held that the "amendment and deletion ha[d], of course, no effect on Appellant's personal situation." *Id.* at 107 n.2 (citation omitted). In other words, Grayned's conviction had to be reversed even though the City of Rockford later removed the offending provision from the anti-picketing ordinance, thereby bringing the challenged ordinance up to constitutional muster.

The Supreme Court reaffirmed *Grayned*'s approach in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017). *Morales-Santana* concerned a statute that applied more lenient criteria to mothers than fathers in determining the physical-presence requirement for unwed parents to pass citizenship to their children born abroad. The Court held that the statute's gender-based distinction violated equal protection. *Id.*

at 1686. As a result, the Court found itself left to choose between "withdrawal of benefits from the favored class" or "extension of benefits to the excluded class." *Id.* at 1698 (quoting *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)); *see also id.* at 1701 ("[T]he preferred rule in the typical case is to extend favorable treatment"). It chose the former, much like the plurality opinion in *AAPC*. *See AAPC*, 140 S. Ct. at 2354-55 (Kavanaugh, J., plurality op.). In doing so, the Court mandated that the stricter physical-presence requirement for fathers be applied identically to both genders moving forward. *Morales-Santana*, 137 S. Ct. at 1686, 1701.

The Court was careful to explain, however, that notwithstanding this prospective fix, a "defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity." *Id.* at 1699 n.24. The Court reiterated *Grayned*'s holding once more: courts must "consider the facial constitutionality of the ordinance in effect when" the defendant's conduct took place. *Id.* (quoting *Grayned*, 408 U.S. at 107 n.2).

The list goes on. In *United States v. Booker*, the Court severed portions of the Federal Sentencing Act that violated the Sixth Amendment by making certain sentencing guidelines mandatory. While severance restored the guidelines' constitutionality, the Court rejected the argument that this prospective fix somehow cured sentences that had been imposed under the unconstitutional regime. 543 U.S.

at 267-268. And in *Arthrex, Inc., v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *cert. granted sub nom. United States v. Arthrex, Inc.*, 141 S. Ct. 549 (2020) (No. 19-1434), *& cert. granted*, 141 S. Ct. 551 (2020) (Nos. 19-1452 & 19-1458), the Federal Circuit severed the statutory "removal protections" for Administrative Patent Judges after holding those protections violated the Appointments Clause. *Id.* at 1337-38. But, that remedy operated only prospectively; "final decision[s]" rendered *before* severance still had to "be vacated and remanded." *Id.* at 1340; *see also* 953 F.3d 760, 767 (Fed. Cir. 2020) (O'Malley, J., concurring in the denial of the petitions for rehearing en banc) (noting that even the "Government agrees" that "[o]ur decision that the statute can be *rendered* constitutional by severance does not remedy any past harm—it only avoids continuing harm in the future. It is only meaningful prospectively, once severance has occurred.").

Following this precedent and several other court rulings, the District Court correctly held that defendants could not be liable for violating the "invalid" TCPA provisions. *See Creasy*, 2020 WL 5761117, at *3-6 (citing *Grayned* and concluding that amended TCPA provision is unenforceable against calls made during period it was unconstitutional); *Hussain v. Sullivan Buick-Cadillac-GMC Truck, Inc.*, No. 5:20-cv-38-Oc-30PRL, 2020 WL 7346536, at *3 (M.D. Fla. Dec. 11, 2020) ("[A]t the time Defendants engaged in the speech at issue in this case, Defendants were subject to an unconstitutional content-based restriction. Because the Court is

without authority to enforce an unconstitutional statute, the Court lacks subject matter jurisdiction over this action.").

Appellants ask this Court to do the opposite. They assert that curing the amended TCPA provision's unconstitutionality somehow restores liability for those who allegedly made TCPA calls during the unconstitutional regime. Appellant's Opening Br. 28-35 (relying on *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993)). But *Harper*, unlike this case, was about a judicial declaration of the meaning of a statutory provision; judicial determinations about a statute's scope are typically retroactive and govern conduct predating issuance of the decision. *See* 509 U.S. at 97. That is because "[a] judicial construction of a statute is an authoritative statement of what the statute meant *before as well as after* the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994) (emphasis added);[2] *see also Milholland v. Sumner Cnty. Bd. of Educ.*, 569 F.3d 562, 566-567 (6th Cir. 2009) (differentiating between Supreme Court's

[2] The federal government (at U.S. Intervenor Br. 8-9), cites this exact *Roadway Express* excerpt to assert that defendants may "be liable for violations of the automated-call restrictions that occurred prior to *AAPC*." That makes no sense. *Roadway Express* concerns the retroactive effect of a court's *statutory interpretation* and Congress's subsequent response to that interpretation—not the impact of a severance remedy. *See* 551 U.S. at 312-313. Nor does *Roadway Express* show that the debt exception "from its inception . . . had no effect on other portions of the statute," as the government further contends. U.S. Intervenor Br. 9. That exception created the "unequal treatment" that rendered the TCPA provisions unconstitutional. *AAPC*, 140 St. Ct at 2355 (Kavanaugh, J., plurality op.). The Court severed the exception precisely because it did impact other portions of the statute.

construction of statutes versus Congressional amendments in assessing retroactivity). The proper analogy from *Harper* is that the scope of the amended TCPA was unconstitutional from 2015-2020.

Severance, by contrast, states only what the statute will mean *after* the decision of the case challenging the statute's constitutionality. *Harper* says nothing about when a court severs, rather than interprets, an unconstitutional provision of a statute. *See Arthrex*, 953 F.3d at 766-767 (O'Malley, J., concurring in the denial of the petitions for rehearing en banc) (distinguishing *Harper* and noting that "[w]hile the principle of retroactive application requires that we afford the same remedy afforded the party before the court to all others still in the appellate pipeline, judicial severance is not a 'remedy'; it is a forward-looking judicial fix"). Neither *Harper* nor the Supreme Court's other precedents suggest severance can retroactively open defendants to liability under a statute that was unconstitutional.

Indeed, *Harper* simply prohibits "temporal barriers to the application of federal law." 509 U.S. at 97. All that means is that TCPA provisions were unconstitutional in 2015, just as they were in 2020—not that the same remedy applies. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991) (plurality op.) ("[R]etroactivity is . . . 'a choice between the principle of forward operation and that of relation backward.' . . . Once a rule is found to apply 'backward,' there may then be a further issue of remedies . . . ." (internal citation

omitted)); *see also Danforth v. Minnesota*, 552 U.S. 264, 306 (2008) (Roberts, C.J., dissenting) ("*Harper* . . . expressly treated retroactivity and remedy as separate questions" (citing *Harper*, 509 U.S. at 100-102)).

Finally, the District Court correctly dismissed Appellant's argument that *AAPC* "considered and rejected" the notion that defendants could not be held retroactively liable under an unconstitutional law. Appellant's Opening Br. 36-37. Appellants rely on a footnote in Justice Kavanaugh's plurality opinion that states that "our decision today does not negate the liability of parties who made robocalls covered by the robocall restriction." *Id.* (citing *AAPC*, 140 S. Ct. at 2355 n.12). But the issue of retroactive liability was not before the *AAPC* court. *Supra* pp. 7-8. Moreover, Justice Kavanaugh offers no reasoning to support this remark, which only two other Justices joined and is (as the District Court pointed out) dicta, not binding precedent. *See Lindenbaum*, 2020 WL 6361915, at *5; *see also Creasy*, 2020 WL 5761117, at *2 (referring to the footnote as "nonbinding dicta"). More fundamentally, though, holding defendants retroactively liable while government-debt callers face no such liability perpetuates the very unequal treatment that *AAPC* struck down. *See AAPC*, 140 S. Ct. at 2366 (Gorsuch, J., concurring in the judgment in part and dissenting in part). Rather than perpetuate content-based discrimination retroactively—discrimination that six Justices held violates the First Amendment—the District Court was correct to dismiss the Amended Complaint.

### C. The Policy Justifications Recited In *AAPC* To Support Prospectively Invalidating The Exemption Do Not Apply To Past Behavior.

By severing the government-debt-collection exemption, *AAPC* restored the TCPA provisions to constitutionality. The District Court correctly recognized that this severance does not allow retroactive liability for calls made while the amended TCPA provisions were unconstitutional. *AAPC*'s express concern about incentivizing automated calls going forward does not apply with respect to calls and texts *already placed*. Indeed, retroactively imposing liability on calls made between 2015 and 2020 would not, by definition, disincentivize future violations.

In fact, non-federal-debt callers already had ample incentive between 2015 and 2020 to seek consent for the calls they placed and were actively seeking clarity—from the FCC and the courts—around what exactly qualified as an ATDS, among other things. The incentive to avoid TCPA liability was, and remains, strong: as the *AAPC* Court notes, "[t]he TCPA imposes tough penalties for violating the robocall restriction." *AAPC*, 140 S. Ct. at 2345 (Kavanaugh, J., plurality op.). "Private parties can sue to recover up to $1,500 per violation or three times their actual monetary losses, which" especially with class actions "can add up quickly." *Id.* Indeed, ACA International members regularly sought—and continue to seek—consent for any calls that fell outside the exemption from 2015 to 2020. Thus, the

prior regime's amended TCPA provision—unconstitutional as it was—nevertheless incentivized callers to establish TCPA-compliant practices.

Going forward, *AAPC* continues to incentivize callers to maintain compliant practices. Under *AAPC*, nearly *all* unconsented ATDS calls to wireless numbers are now potentially subject to TCPA liability. The tough penalties for violating the restored general ATDS call ban remain untouched. Therefore, *AAPC* already addresses any potential issue of incentivizing future automated or prerecorded calls without appropriate consent.

## II. FEDERAL-DEBT CALLERS CANNOT BE RETROACTIVELY SUBJECT TO THE TCPA'S CONSENT REQUIREMENTS FOR THE PERIOD THAT THE EXEMPTION WAS IN EFFECT.

Even if this Court concludes that non-federal-debt collectors can be held liable for violating an unconstitutional law, *federal-debt collectors* should not face liability for calls placed when the government-debt exception was in effect. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . ." *Landgraf*, 511 U.S. at 265. Consistent with that principle, at least five Justices agree that callers who relied on the then-valid "government debt-exception" should not face retroactive liability. *See AAPC*, 140 S. Ct. at 2366-67 (Gorsuch, J., concurring in the judgment in part and dissenting in part) (stating that federal-debt collectors should not face liability either prospectively and retroactively); *id.* at 2355 n.12

(Kavanaugh, J., plurality op.) ("[N]o 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 . . . ."). Because at least a "majority of the Justices agree" federal-debt collectors cannot be held liable for relying on then-extant statutory exception, that "holding" is "binding" on this Court. *United States v. Copeland*, 321 F.3d 582, 602 n.5 (6th Cir. 2003).

A contrary decision would violate bedrock principles of both separation of powers and fair notice, while also massively disrupting federal-debt collection efforts. *First*, Congress alone—not the judiciary—has the power to re-write the TCPA to create retroactive liability for federal-debt collectors. The constitution allocates to Congress "responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." *Landgraf*, 511 U.S. at 272-273; *see also Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) ("[R]etroactive application of a statute . . . remain[s] within the exclusive province of the legislative and executive branches . . . ."). Accordingly, *Congress*—not a court—must decide that the "benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268. And, importantly, because the "presumption against retroactive legislation" is "deeply rooted," that presumption is overcome only if Congress "made clear its intent." *Id.* at 265, 270. Here, however,

Congress intended the exact opposite: It expressly authorized ATDS calls to cell phones to collect government-backed debts. *See* 47 U.S.C. 277(b)(1)(A)(iii).

It was the Supreme Court that "rewr[ote]" the TCPA to create prospective liability for federal debt collectors. *See AAPC*, 140 S. Ct. at 2365 (Gorsuch, J., concurring in the judgment in part and dissenting in part). Such forward-looking judicial action already "rais[es] serious separation of powers questions" by "render[ing] unlawful conduct that Congress has explicitly made lawful." *Id.* at 2366. For *retroactive* liability, those separation of powers problems become insurmountable. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990) (because "[r]etroactivity is not favored in the law," statutes will not be given "retroactive effect unless their language requires this result" (citation omitted)); *see also Siding & Insulation Co.*, 822 F.3d at 892 ("[C]ourts should not construe congressional enactments and administrative rules to have retroactive effect unless their language requires this result." (citation omitted)). Because Congress was far from "clear" that the TCPA should retroactively "burden[] private rights," *AAPC*'s severability ruling cannot be applied to punish federal-debt collectors' past conduct. *Landgraf*, 511 U.S. at 270.

*Second*, "fair notice" requirements embedded in the Due Process clause prevent retroactive liability for federal-debt collectors. *Id.* at 265-266 (because "settled expectations should not be lightly disrupted . . . [i]t is therefore not surprising

that the antiretroactivity principle finds expression in several provisions of our Constitution."). On this point, the United States agrees, observing that "[h]olding debt collectors liable for calls made when the government-debt exception may have appeared to be good law would likely violate the 'fundamental principle . . . that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.' " U.S. Intervenor Br. 16-17 (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)).

Federal-debt collectors lacked fair notice that the amended TCPA provisions would be struck down. Three Supreme Court Justices believed that the law is constitutional. *See AAPC*, 140 S. Ct. at 2357 (Breyer, J., concurring in the judgment with respect to severability and dissenting in part). And the District Court in *AAPC* joined *five* other United States District Courts that have held that the TCPA provisions, with the federal-debt exception included, did "not violate the First Amendment." *AAPC v. Sessions*, 323 F. Supp. 3d 737, 739 (E.D.N.C. 2018) (citing *Gallion v. Charter Commc'ns Inc.*, 287 F. Supp. 3d 920, 926-931 (C.D. Cal. 2018); *Greenley v. Laborers' Int'l Union of N. Am.*, 271 F. Supp. 3d 1128, 1145-51 (D. Minn. 2017); *Mejia v. Time Warner Cable Inc.*, 15-CV-6445 (JPO), 15-CV-6518 (JPO), 2017 WL 3278926, at *12-17 (S.D.N.Y. Aug. 1, 2017); *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021, 1032-34 (N.D. Cal. 2017); *Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036, 1043-49 (N.D. Cal. 2017)).

Retroactively applying *AAPC*'s new speech restrictions thus violates the "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Siding & Insulation Co.*, 922 F.3d at 892 (quoting *BellSouth Telecomms. Inc. v. Se. Tel., Inc.*, 462 F.3d 650, 658 (6th Cir. 2006); *see also* Aaron Tang & Fred O. Smith Jr., *Can Unions Be Sued for Following the Law?*, 132 Harv. L. Rev. F. 24, 28 (2018) ("legal principles" of fair notice and good faith "cut off" liability when private actors "followed prevailing law at Time One without predicting that the Supreme Court would later change the law at Time Two"). Indeed, Congress *intended* for federal-debt collectors to rely on this exception, and to penalize them for doing so would create the type of "unfair surprise" that courts have long warned against. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (citation omitted).

In *Siding & Insulation Co.*, this Court reiterated that retroactive application of a new statute or rule is "impermissible" if it "attaches new legal consequences," such as "impairing rights a party possessed when he acted, increasing a party's liability for past conduct, or imposing new duties with respect to transactions already completed." 822 F.3d at 892 (citation omitted). There, the recipient of an unwanted fax sought to hold the sender liable under the "retroactive application of the definition of 'sender'" in 47 C.F.R. § 64.1200. *Id.* In part because the sender had reasonably relied on the FCC's previous definition, the Court held that imposing

liability was "exactly the sort of change in the law that ought not be applied retroactively." *Id.* at 894.

The same is true here. Retroactively applying *AAPC*'s severability analysis would impose massive amounts of new liability on federal-debt collectors for actions they took years ago in good faith. Private parties could "sue to recover up to $1,500 per violation or three times their actual monetary loss," which, as noted, "can add up quickly in a class action." *AAPC*, 140 S. Ct. at 2345 (Kavanagh, J., plurality, op.) (citing 47 U.S.C. § 227(b)(3)). And with the TCPA's four-year statute of limitations, the majority of federal-debt collection calls placed since the 2015 enactment would be fair game. 28 U.S.C. § 1658(a); *see e.g.*, *Miller v. I.C. Sys., Inc.*, No. 1:19-CV-00102-GNS-HBB, 2021 WL 395759, at *2 (W.D. Ky. Feb. 4, 2021) ("Since the TCPA does not contain an express limitations period, [the] [plaintiff]'s claims fall under the federal four-year 'catch-all' statutes of limitations found at 28 U.S.C. § 1658." (citation omitted)). Holding federal-debt collectors retroactively liable for violating the post-*AAPC* version of the TCPA provisions would both increase their "liability for past conduct" and "impos[e] new duties with respect to transactions already completed"—all for reasonably relying on an exception Congress explicitly crafted and encouraged them to invoke. *Siding & Insulation Co.*, 822 F.3d at 892 (citation omitted). That type of retroactive liability is not permitted under this Court's precedents. *Id.*

*Third*, imposing retroactive liability on federal-debt collectors would penalize efforts made in good faith to collect on loans issued or guaranteed by the United States and to assist the indebted with alternative means for repaying those loans. Timely and efficient collection of federal debts is necessary to "help[] fund government operations, maintain key programs, and reduce the Federal deficit." U.S. Dep't of Treasury, *Fiscal Year 2018 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies* i (Aug. 2019).[3] In the 2018 fiscal year, the federal government held or guaranteed more than $1.6 trillion in non-tax receivables, of which $203 billion worth was delinquent—an increase of $18 billion from the 2017 fiscal year. *Id.* at 1. The Department of Education was the largest creditor agency, holding $1.28 trillion (nearly 80%) of all non-tax receivables and $166.5 billion (or 82%) of the non-tax delinquent debt. *Id.* at 4, 8. At the end of fiscal year 2019, nearly 20 million borrowers were "in repayment" of federally-managed student loans and over 7 million borrowers were in default. U.S. Dep't of Educ., Office of Fed. Student Aid, *Portfolio by Loan Status*.[4] The total value of federal student loans in default grew to $161.3 billion. *Id.*

[3] *Available at* https://fiscal.treasury.gov/files/dms/debt18.pdf.

[4] *Available at* https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfoliobyLoanStatus.xls (last visited Mar. 24, 2021).

Imposing massive liability, and related litigation expenses, on the companies for their past attempts to collect that debt would divert from these companies' *current* collection efforts, potentially undermining revenue goals and impacting future funding of government operations and programs. Moreover, these calls were made on behalf of the government, which means the government might face indemnification obligations for debt collectors who were calling on its behalf. Making the debt collectors liable will serve only to further strain the government's limited resources.

Creating nearly boundless retroactive liability on federal-debt servicers will also harm borrowers, particularly for student loans. Once a borrower of federal debt defaults, the remedies far surpass those available to private creditors. The balance of the loan often becomes immediately due in full. *E.g.*, U.S. Dep't of Educ., Office of Fed. Student Aid, *Collections*.[5] Moreover, upon default, there could be an offset of federal tax refunds, 31 U.S.C. § 3720A, and loss of eligibility for federal financial assistance, *id.* § 3720B. Further, bankruptcy relief from federal student loan debt, in particular, can be extremely difficult to obtain. 11 U.S.C. § 523(a)(8) (prohibiting discharge of student loans unless the debt "would impose an undue hardship on the debtor and the debtor's dependents"). Although the default penalties are severe,

[5] *Available at* https://studentaid.gov/manage-loans/default/collections (last visited Mar. 24, 2021).

federal loan holders have access to "more than 55 repayment options," including "forbearances, deferments, and 5 different flavors of income-based repayment." *An Examination of State Efforts to Oversee the $1.5 Trillion Student Loan Servicing Market: Hearing Before the H. Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 116th Cong. 17-18 (2019) (statement of Scott Buchanan, Exec. Dir., Student Loan Servicing All.).[6]

But navigating these options often requires assistance. Many consumers "benefit from calls" made by loan servicers to "prevent them from falling into potentially devastating debt." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd. 9074, 9075 (2016). Indeed, loan servicers provide invaluable help by describing the options that the government makes available to student-loan, and other federal debt, borrowers.[7] One servicer reports, for instance, that more than half of its borrowers required assistance signing up for

[6] *Available at* https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=403828.

[7] Comments submitted to the FCC in various proceedings document as much. *See, e.g.*, Consolidated Reply of Great Lakes Higher Education Corp. et al., at Exhibit 1, 3, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, No. CG 02-278 (F.C.C. Feb. 13, 2017), *available at* https://www.fcc.gov/ecfs/filing/102140178630457 (quoting borrower's statement that she was "crying from relief and joy thanks to the lovely @Navient rep that just helped [her] get on the correct repayment plan" and another borrower's statements that Great Lakes "is an incredibly helpful and cooperative loan servicer" and that she is "always grateful after dealing with them, no matter the medium").

income-driven repayment, and one in five required support to renew that option.[8] Indeed, the Consumer Financial Protection Bureau has recognized that servicing calls help borrowers, creditors, and the broader U.S. economy, and on that basis, has expressly allowed responsible telephonic collections outreach. *See Debt Collection Practices (Regulation F)*, 85 Fed. Reg. 76,734, 76,734-35 (2020). Here, again, imposing burdensome (and unforeseen) lawsuits, not to mention billions of dollars of potential liability, on these loan servicers will draw their attention away from providing quick and effective debt-management assistance to the borrowers who need it most.

Legal precedent thus aligns with the best policy outcome. Imposing retroactive liability on federal-debt collectors that relied on a plain statutory exception would violate separation of powers and principles of fair notice. And, as a policy matter, it would needlessly divert resources from the very organizations that are collecting government debt and helping borrowers understand and enroll in alternative payment plans.

[8] Reply Comments of Navient Corporation at 17, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, No. CG 02-278 (F.C.C. June 21, 2016), *available at* https://www.fcc.gov/ecfs/filing/106220194929186.

## CONCLUSION

For the foregoing reasons, and those offered in Appellees' brief, this Court should affirm the District Court's order and opinion.

March 24, 2021

Respectfully submitted,

/s/ Jessica L. Ellsworth
Jessica L. Ellsworth
Mark W. Brennan
Arpan A. Sura
Matthew J. Higgins
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
jessica.ellsworth@hoganlovells.com
*Counsel for Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

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/s/ Jessica L. Ellsworth
Jessica L. Ellsworth

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I certify that on March 24, 2021, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Jessica L. Ellsworth
Jessica L. Ellsworth