IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-4252

ROBERTA LINDENBAUM, individually
and on behalf of all others similarly situated,
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-02862,
The Honorable Patricia A. Gaughan, Chief District Judge

BRIEF OF INDIANA, NORTH CAROLINA, 32 OTHER STATES, AND THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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The States of Indiana, North Carolina, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, and Washington and the District of Columbia submit this brief as *amici curiae* in support of the appellant. Amici States have enforcement authority under the Telephone Consumer Protection Act (TCPA), and there are several ongoing enforcement actions that could be interrupted if this Court upholds the district court's decision in this case. *See Texas v. Rising Eagle Cap. Group, LLC*, No. 4:20-cv-02021 (S.D. Tex. filed June 9, 2020); *Trujillo v. Free Energy Savings Co., LLC*, No. 5:19-cv-02072 (C.D. Cal. filed Oct. 29, 2019); *Duguid v. Facebook, Inc.*, No. 4:15-cv-00985 (N.D. Cal. filed Mar. 3, 2015); *Abramson v. Fed. Ins. Co.*, No. 8:19-cv-02523 (M.D. Fla. filed Oct. 10, 2019); *Hussain v. Sullivan Buick-Cadillac-GMC Truck, Inc.*, No. 5:20-cv-00038 (M.D. Fla. filed Jan. 30, 2020); *Toney v. Advantage Chrysler-Dodge-Jeep, Inc.*, No. 6:20-cv-00182 (M.D. Fla. filed Feb. 4, 2020); *Shen v. Tricolor California Auto Grp., LLC*, No. 2:20-cv-07419 (C.D. Cal. filed Aug. 17, 2020).

Amici States therefore have a robust law-enforcement interest in ensuring that the TCPA remains enforceable against robocall violations that occurred between

November 2, 2015, when the president signed into law the unconstitutional government debt exception and July 6, 2020, when the Court, in *Barr v. American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), invalidated that exception and severed it from the remainder of the robocall ban.

The district court's decision, which holds that the TCPA was unenforceable during that period, directly conflicts with the Supreme Court's holding in *Barr*. The plurality decision specifically states that, aside from the government debt exception, the TCPA remained enforceable during that time, and the various concurrences say nothing to contradict that position. Thus, the plurality's direction that the remainder of the statute may be enforced is the narrowest common ground in *Barr* and is, therefore, binding on this Court.

More broadly, by severing the government debt exception, the Supreme Court did not change the meaning of the TCPA either retroactively or going forward. Realgy has not cited a single case in which the Supreme Court or this Court has refused to apply a constitutional portion of a statute to conduct that predated a Supreme Court decision declaring another portion of the statute unconstitutional and severable. Moreover, courts have frequently applied statutes to conduct occurring between enactment of an unconstitutional statutory provision and a court decision severing the unconstitutional provision. Accordingly, when the Court severed the unlawful provision of the TCPA, its severability holding was retroactive.

For these reasons, Amici urge this Court to reverse the decision of the district court and confirm that the TCPA, minus the government debt exception, applied in full force during the years of 2015 through 2020.

ARGUMENT

I. The District Court's Decision Contravenes the Supreme Court's Holding in *Barr v. AAPC*

For decades, the States and the federal government have sought to protect consumers from unwanted robocalls—automated telephone calls that deliver a pre-recorded message. These calls invade consumer privacy with harassing messages that come at all hours, day and night. Indeed, robocalls are the most common source of consumer complaints at many state attorney general offices. Comment from the State Attorneys General Supporting Enactment of the Telephone Robocall Abuse Criminal Enforcement and Deterrence ("TRACED") Act 1 (Mar. 5, 2019), https://1li23g1as25g1r8so11ozniw-wpengine.netdna-ssl.com/wp-content/uploads/2020/10/NAAG-TRACED-Act-Letter-Final.pdf.

In January 2020 alone, Americans received more than 4.7 billion robocalls. YouMail Robocall Index, January 2020 Nationwide Robocall Data, https://robocall-index.com/2020/january. And technological advances have helped robocalls proliferate. Robocalls inflict "more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons." S. Rep. No. 102-178, at 4 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1972. They are notoriously cheap, which allows telemarketers

to use them to bombard consumers with vast numbers of unwanted sales pitches and survey demands. *Id.* at 2. And because robocalls cannot engage with call recipients except in preprogrammed ways, they "do not allow the caller to feel the frustration of the called party." *Id.* at 4. Moreover, these calls have become far more than just a nuisance. A 2019 report, for example, estimated that robocalls defrauded Americans of more than $10 billion over a 12-month period. Kim Fai Kok, *Phone Scams Cause Americans To Lose $10.5 Billion In Last 12 Months*, Truecaller (Apr. 17, 2019), http://bit.ly/2HCT08r.

The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, is critical consumer-protection legislation that, for three decades now, has generally prohibited the use of any "automatic telephone dialing system or an artificial or prerecorded voice" to make a call to numbers assigned to a cellular telephone service. 47 U.S.C. § 227(b)(1)(A). Since the enactment of the robocall ban, the Federal Trade Commission has brought 151 enforcement actions against telemarketers. Fed. Trade Comm'n, *Enforcement of the Do Not Call Registry*, https://www.ftc.gov/news-events/media-resources/do-not-call-registry/enforcement. And this number does not include enforcement actions brought by the States or by private parties.

In 2015, Congress created an exception to the TCPA for calls "made solely pursuant to the collection of a debt owed to or guaranteed by the United States." 47

U.S.C. § 227(b)(1)(B). Congress passed the amendment, which was entitled "debt collection improvements," as part of the Bipartisan Budget Act of 2015. Pub. L. No. 114-74, 129 Stat. 584. Congress included this amendment in the budget bill at the suggestion of the Obama administration, which believed that the amendment would allow government debt to be collected more quickly and efficiently, resulting in government "savings of $120 million over 10 years." Office of Mgmt. & Budget (OMB), Exec. Office of the President, Fiscal Year 2016: Analytical Perspectives of the U.S. Government 128 (2015), https://go.usa.gov/xUtw2.

The American Association of Political Consultants (AAPC) and three other organizations that "make calls to citizens to discuss candidates and issues, solicit donations, conduct polls, and get out the vote" challenged the TCPA, alleging that the exception for government debt rendered the Act content-based in violation of the First Amendment. *Barr v. American Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2345 (2020). The federal government argued that the government-debt exception was valid under the First Amendment and that even if the exception did violate the First Amendment, it was severable from the remainder of the statute. The district court held that the TCPA was a content-based restriction on speech but that it survived strict scrutiny. *See American Ass'n of Pol. Consultants v. Sessions*, 323 F. Supp. 3d 737 (E.D.N.C. 2018). The Fourth Circuit reversed, holding that the government-debt exception violated the First Amendment but that it was severable from

the remainder of the TCPA. *See American Ass'n of Pol. Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019). Neither the Fourth Circuit nor the district court discussed the issue of whether the TCPA would remain valid in the interim.

On review in the Supreme Court, in *Barr v. American Ass'n of Pol. Consultants, Inc.*, the Court affirmed, holding that the government debt exception to the TCPA violates the First Amendment—but that it was severable from the remainder of the robocall ban, which itself is perfectly constitutional. 140 S. Ct. at 2343. The plurality explained that "[w]ith 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. It further explained that "the remainder of the robocall restriction did function independently and fully operate as a law for 20-plus years before the government-debt exception was added in 2015." *Id.*

The same logic supports uninterrupted enforcement of TCPA violations between 2015 and 2020: because the Court held that the robocall ban *can* and *did* function independently of the government-debt exception, the unconstitutionality of the government-debt exception does not prevent enforcement of the remaining, constitutionally permissible provisions of the TCPA. In the briefing for *Barr*, the parties addressed the issue of retroactive severability only briefly, and both assumed that the TCPA without the government-debt exception would apply between 2015 and 2020. *See* Respondents' Br. 39, *Barr v. American Ass'n of Pol. Consultants, Inc.*,

140 S. Ct. 2335 (2020) (complaining that applying the TCPA in the interim would result in unequal treatment of government-debt collectors and other TCPA violators, but arguing that the only way to avoid this problem would be to invalidate the entire TCPA); Petitioners' Reply 23–24, *Barr v. American Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335 (2020) (stating that "[i]t is doubtful that a person who made automated calls to collect government-backed debts before the exception was held invalid could be said to have violated the TCPA," but not addressing interim liability for non-debt-related calls).

Yet (contrary to statements in the district court's opinion here) the Supreme Court *did* "directly address the effect of severance on currently pending cases." *Lindenbaum v. Realgy, LLC*, No. 1:19-cv-2862, 2020 WL 6361915, at *4 (N.D. Ohio Oct. 29, 2020). A plurality of the Court—Justices Kavanaugh, Roberts, and Alito—explained 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 and before the entry of final judgment by the District Court on remand in this case," but specifically stated that "our decision today does not negate the liability of parties who made robocalls covered by the robocall restriction." *Barr*, 140 S. Ct. at 2355 n.12.

The concurring opinions do not suggest otherwise. Justice Sotomayor concurred in the judgment, explaining that she agreed with the plurality "that the offending provision is severable." *Id.* at 2357 (Sotomayor, J. concurring). Justices Breyer, Ginsburg, and Kagan also concurred on the severability issue, explaining that they "agree[d] with Justice KAVANAUGH's conclusion that the provision is severable." *Id.* at 2363 (Breyer, J. concurring). Neither the Sotomayor nor the Breyer opinions found any fault with Justice Kavanaugh's conclusion that parties who violated the robocall restriction between 2015 and 2020 remain liable.

Moreover, the test set forth in *Marks v. United States*, 430 U.S. 188 (1977), commands that the plurality opinion controls here. Under *Marks*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]'" *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). The district court did not apply this test, even though it was raised in the briefing. *See* Realgy, LLC's Reply in Supp. of Mot. to Dismiss Am. Compl. at 6, ECF No. 24, *Lindenbaum v. Realgy, LLC*, No. 1:19-cv-2862, 2020 WL 6361915 (N.D. Ohio Oct. 29, 2020).

In the Sixth Circuit, the "'narrowest' opinion refers to the one which relies on the 'least' doctrinally 'far-reaching-common ground' among the Justices in the majority: it is the concurring opinion that offers the least change to the law." *United States v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009). Until the Court's decision in *Barr*, both federal and state governments enforced the TCPA against all violators except government-debt collectors. Halting these enforcement actions would be doctrinally far-reaching because it would disable the enforcement of federal statute and prevent the continued prosecution of constitutionally permissible enforcement actions. Therefore, even if this Court assumes that the concurring Justices in Barr disagreed with the plurality on whether the statute was enforceable between 2015 and 2020—an assumption that finds no support in the concurring opinions themselves—Justice Kavanaugh's plurality opinion represents the narrowest common ground because it prevents the least number of enforcement actions.

Furthermore, the purpose of severing the government debt exception was to "respect . . . Congress's legislative role by keeping courts from unnecessarily disturbing a law apart from invalidating the provision that is unconstitutional." *Barr*, 140 S. Ct. at 2351 (plurality). If this Court refuses to apply the Supreme Court's severability holding to conduct that occurred between 2015 and 2020, it would effectively declare the entire statute unconstitutional during that period. This Court

cannot respect Congress's role by halting five years of constitutional enforcement actions under the TCPA.

Moreover, neither the district court nor defendants cite a single case in which the Supreme Court or the Sixth Circuit has severed an unconstitutional provision but declared the entire statute inoperable in the interim, *see infra* Part II.C, which only underscores how radical this remedy would be. The dearth of severability cases creating an enforcement doughnut hole should not be surprising. Under any circumstances, "[f]acial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). That is why the Supreme Court employs a presumption of severability, which "manifests the Judiciary's respect for Congress's legislative role by keeping courts from unnecessarily disturbing a law apart from invalidating the provision that is unconstitutional." *Barr*, 140 S. Ct. at 2351. Severing an unconstitutional portion from an otherwise valid statute "allows courts to avoid judicial policymaking or *de facto* judicial legislation in determining just how much of the remainder of a statute should be invalidated." *Id.*

Yet here Realgy asks the judiciary to take a truly extraordinary step and, even while holding that severability doctrine saves a statute going forward, declare that

same statute facially invalid for a temporary look-back period. To say the least, inferring such an exercise of super-legislative judicial will from the *Barr* decision would offer a greater change to the law than permitting the robocall ban to stand uninterrupted, which is another reason Justice Kavanaugh's opinion provides the narrowest common ground for the result in *Barr*.

As the Supreme Court recognized in *Barr*, "Americans passionately disagree about many things. But they are largely united in their disdain for robocalls." *Id.* at 2343. Americans rely on the TCPA and its state counterparts to address that evil. In 2019 alone, the federal government received 3.7 million complaints concerning robocalls. *Id.* Declaring that the TCPA was invalid during that time will remove a critical enforcement tool to fight some of the most despised harassment in the country. Violators of the TCPA, on the other hand, have no equitable stake in nonenforcement. And even defendants acknowledge that the statute was valid during that time by admitting that the invalidation of the government-debt exception would not "negate or undo liability against parties that has already been adjudicated." ECF No. 24, Reply in Supp. of Mot. to Dismiss 5. Invalidating the TCPA would grant defendants a windfall by exempting them from liability simply due to the time frame in which their violations occurred.

Consequently, the TCPA remained enforceable during the five years between the enactment of the government debt exception and the Supreme Court's decision in *Barr*, and this Court should so declare.

II. The Decision Below Conflicts with Fundamental Principles of Constitutional Adjudication

The *Barr* plurality's suggestion that invalidation of the government-debt exception "does not negate the liability of parties who made robocalls covered by the robocall restriction," 140 S. Ct. 2335, 2355 n.12 (2020), is consistent with the Supreme Court's other precedents and with principles of statutory interpretation underlying severability.

A. Severability is an issue of statutory interpretation that applies retroactively

When courts decide that one part of a statute is unlawful, the question of severability—that is, whether to sever the offending provision or to instead invalidate the entire statute—is a matter of statutory interpretation. To decide this question, courts look to the statute's text and related default rules to see which outcome Congress would have preferred. In this way, severability turns on a statute's content and meaning. And it is well-established that when a court decides what a statute means, that interpretation is retroactive to the time of the statute's enactment or relevant amendment.

To begin, it is well established that if one part of a statute violates the law, the rest of the statute may still survive. As the Supreme Court explained more than a century ago, "one section of a statute may be repugnant to the Constitution without rendering the whole act void." *Loeb v. Columbia Twp. Trs.*, 179 U.S. 472, 490 (1900); *see also Dorchy v. Kansas*, 264 U.S. 286, 289-90 (1924) ("A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad.").

In the face of an unlawful provision, courts endeavor to sustain as much of the remaining statute as possible. "'Generally speaking, when confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem', severing any 'problematic portions while leaving the remainder intact.'" *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006)). The exception to that general rule is narrow. Only if "'it is evident that the Legislature would not have enacted'" the rest of the statute "'independently of that [part of the statute] which is [invalid]'" will a court allow one unlawful provision to take an entire statute down with it. *Id.* at 509 (quoting *New York v. United States*, 505 U.S. 144, 186 (1992)).

Courts use the text of a statute to make this call. When a statute has a severability clause, courts conclude "that Congress did not intend the validity of the statute

in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). At bottom, therefore, severability is a question about what a statute means. It is "a question of interpretation and of legislative intent." *Dorchy*, 264 U.S. at 290; *see also Lester v. United States*, 921 F.3d 1306, 1314 (11th Cir. 2019) (quoting *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1486 (2018) ("As the Supreme Court and commentators have long acknowledged, severability is fundamentally 'an exercise in statutory interpretation.'"); *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1377 (Fed. Cir. 2000) ("[T]he issue of severability is a matter of statutory interpretation."); 2 Sutherland Statutory Construction § 44:3 (7th ed.) (severability is "essentially [a] question[ ] of statutory construction, determined according to either the will of the legislature or its manifested meaning.").

A court's interpretation of a statute—including its decision on severability—applies retroactively. Supreme Court precedent holds that a "controlling interpretation of federal law . . . 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 [a court's] announcement of the [interpretation]." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). This rule "prohibit[s] the erection of selective temporal barriers to the application of federal law." *Id.* It also prevents "'the substantive law [from] shift[ing] and spring[ing]' 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." *Id.* (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991)).

Indeed, "[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 Exp., Inc.*, 511 U.S. 298, 312-13 (1994). Thus, in construing a statute, courts are "explaining [their] understanding of what the statute has meant continuously since the date when it became law." *Id.* at 313 n.12.

In sum, severability goes to a statute's meaning and therefore applies to cases pending on direct review. *See Harper*, 509 U.S. at 97.

B. As an act of statutory interpretation, the Supreme Court's severability decision in *AAPC* applies retroactively

Supreme Court precedent illustrates how courts apply severability decisions retroactively. Under these principles, the Supreme Court's decision in *AAPC* to sever the government-debt exception from the TCPA means that the remaining parts of the TCPA—including the statute's robocall ban—still apply with full force here.

Consider *Eberle v. Michigan*, 232 U.S. 700 (1914). In that case, officers of a brewing company were convicted of violating a statute that prohibited alcohol manufacturing. *Id.* at 703. The defendants raised a constitutional challenge to their convictions. But the defendants did not challenge the constitutionality of the alcohol-manufacturing prohibition itself. Rather, they argued that later amendments to the

statute—amendments that added exemptions for individuals who made or sold wine and cider—violated the Equal Protection Clause. *Id.* at 703-04.

The Supreme Court assumed that the wine-and-cider amendments violated equal protection. *Id*. But the Court went on to hold that the amendments were severable from the original prohibition on manufacturing alcohol—the prohibition that the defendants had violated. *Id.* at 705. Importantly here, that holding of severability applied retroactively. That is, even though the defendants were convicted under the statute when it contained unconstitutional amendments, the Court severed amendments and applied the rest of the statute to the defendants' conduct. *Id*. The Court therefore affirmed the defendants' convictions. *Id.*

The Supreme Court has applied this same reasoning in other cases as well. For example, in *Frost v. Corporation Commission*, the Court held that an unconstitutional amendment to an otherwise valid statute was severable, but nevertheless applied the remainder of the statute retroactively. 278 U.S. 515, 526–27 (1929). Similarly, in *United States v. Jackson*, the Court held that several defendants' convictions under a valid statute could survive even though the statute contained an unconstitutional provision when the defendants were charged. 390 U.S. 570, 591 (1968). Severing that unconstitutional provision, the Court explained, allowed the rest of the statute to remain "an operative whole." *Id.*

These principles control this case. As discussed above, under the Supreme Court's decision in *AAPC*, the government-debt exception violates the First Amendment. Under the Supreme Court's decision in *AAPC*, the government-debt exception is also severable from the rest of the TCPA. In other words, the Supreme Court interpreted the TCPA to have always operated independently of the government-debt exception. That unconstitutional amendment, like the amendments in *Eberle*, *Frost*, and *Jackson*, had no effect on the rest of the original statute. As a result, the defendants here cannot escape liability for their illegal robocalls merely because a different part of the statute once suffered from a constitutional flaw. That flaw was severed from the TCPA and thus lacks any legal force or effect.

Consistent with this analysis, district courts across the country have applied the TCPA to robocallers who broke the law before the Supreme Court's decision in *Barr*. *See, e.g.*, *Burton v. Fundmerica, Inc.*, No. 8:19-CV-119, 2020 WL 4504303, at *1 n.2 (D. Neb. Aug. 5, 2020) ("The Supreme Court held . . . in *Barr* that one of the exceptions to [the TCPA] . . . violated the First Amendment, but that it was severable from the TCPA as a whole—so, the provision on which the plaintiff's claim relies survived.").[1]

[1] *See also, e.g.*, *McCurley v. Royal Sea Cruises, Inc.*, No. 17-cv-00986, 2021 WL 288164, at *3 (S.D. Cal. Jan. 28, 2021); *Stoutt v. Travis Credit Union*, No. 2:20-CV01280, 2021 WL 99636, at *5 (E.D. Cal. Jan. 12, 2021); *Trujillo v. Free Energy Savings Co.*, No. 5:19-cv-02072-MCS-SP, 2020 WL 8184336, at *5 (C.D. Cal. Dec.

In sum, under Supreme Court precedent, severance of the government-debt exception had no effect on the rest of the TCPA. The district court therefore erred when it held that the law cannot be enforced against defendants here.

C. The district court's contrary analysis is unpersuasive

The district court in this case committed a fundamental error when, citing an out-of-circuit concurring opinion, it characterized severability as a "forward-looking judicial fix" that failed to un-taint the robocall ban during the life of the government-debt exception. *Lindenbaum v. Realgy, LLC*, No. 1:19-cv-2862, 2020 WL 6361915, at *5 (N.D. Ohio Oct. 29, 2020) (quoting *Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760, 767 (Fed. Cir. 2020) (O'Malley, J., concurring in the denial of rehearing en banc)).

Courts, however, cannot "fix" statutes. Rather, "a legislative act contrary to the Constitution is not law." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

21, 2020); *Shen v. Tricolor California Auto Grp.*, LLC, No. CV 20-7419, 2020 WL 7705888, at *5 (C.D. Cal. Dec. 17, 2020); *Abramson v. Federal Ins. Co.*, No. 8:19-CV-2523, 2020 WL 7318953, at *2 (M.D. Fla. Dec. 11, 2020); *Buchanan v. Sullivan*, No. 8:20-CV-301, 2020 WL 6381563, at *3 (D. Neb. Oct. 30, 2020); *Rogers v. Interstate Nat'l Dealer Servs. Inc.*, No. 1:20 CV 00554, 2020 WL 4582689, at *1–5 (N.D. Ohio Aug. 10, 2020); *Schick v. Caliber Home Loans, Inc.*, No. 20-CV-00617-VC, 2020 WL 4013224, at *1 (N.D. Cal. July 16, 2020); *Shields v. Dick*, No. 3:20-CV-00018, 2020 WL 5522991, at *1 (S.D. Tex. July 9, 2020); *Rieker, v. National Car Cure, LLC*, No. 3:20-CV-5901, 2021 WL 210841 at *1 (N.D. Fla. Jan. 5, 2021); *Schmidt v. AmerAssist A/R Sols. Inc.*, No. CV-20-00230, 2020 WL 6135181 at *4 n. 2 (D. Ariz. Oct. 19, 2020); *Lacy v. Comcast Cable Commc'ns*, LLC, No. 3:19-CV-05007, 2020 WL 4698646 at *1 (W.D. Wash. Aug. 13, 2020); *Komaiko v. Baker Techs., Inc.*, No. 19-CV-03795, 2020 WL 5104041 at *2 (N.D. Cal. Aug. 11, 2020).

Accordingly, when a court severs an unconstitutional statutory provision, it does not "fix" the statute to cure the constitutional deficiency. Instead, "[i]n those applications, the statutory provision was *always* unconstitutional; it was always 'void, and . . . as no law.'" *Lester*, 921 F.3d at 1314 (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1879)). In other words, "[a] court that has found part of a statute unconstitutional . . . must decide what the statute means in light of its partial unconstitutionality, which is a question of interpretation." John Harrison, *Severability, Remedies, and Constitutional Adjudication,* 83 Geo. Wash. L. Rev. 56, 89 (2014). As a result, "[c]onstitutional invalidity of federal statutes . . . is produced by the Constitution itself, not by the order of a court." *Id.* at 87.

This distinction matters here because it shows that severability is not, as the district court assumed, about what a statute should mean in the future. Like any issue of statutory interpretation, severability is about what a statute has always meant. *Lester*, 921 F.3d at 1314. And when a court holds that a statutory provision is unconstitutional yet severable, it is interpreting the remainder of the statute to have always operated unencumbered by the invalid statutory provision. Or as the Court in *Eberle* put it, a statute's validity cannot not "be impaired by the subsequent adoption of what were in form amendments, but, in legal effect, were mere nullities." 232 U.S. at 705.

Applying these principles here means that the government-debt exception violated the First Amendment and was therefore "not law" from the minute it was enacted. *Marbury*, 5 U.S. (1 Cranch) at 177. When the Supreme Court held that the exception could be severed, it did not make a "forward-looking fix" to the statute, as the district court assumed. Instead, the Court interpreted the TCPA—a law first passed in 1991—as if the 2015 amendment had never existed. That is, the Court did not change the meaning of the TCPA going forward; it interpreted what the statute has always meant.

The district court's reliance on *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020), is also misplaced. There, the Court invalidated the agency's leadership structure on separation-of-powers grounds but severed the removal protection. The district court here emphasized, however, that the Supreme Court also remanded that case for determination of whether the agency's official acts had been ratified by a properly accountable leader. The district court reasoned that the remand negated the severability ruling's retroactivity, on the theory that "[i]f severance applied retroactively, there would be no need for the past acts to be ratified." *Lindenbaum*, 2020 WL 6361915, at *6 n.1. But this interpretation misconstrues the Supreme Court's decision. If severance did not apply retroactively, then the *entire* Dodd-Frank Act was unconstitutional until June 29, 2020—when the Court severed the unconstitutional removal provision. If that were so, then the agency's acts would

have been invalid regardless of whether the new director chose to ratify those acts. Thus, the need for remand in *Seila Law* stemmed not from the conclusion that severance was not retroactive, but instead from the fact that the challenged agency action was taken by a director who had been unconstitutionally insulated from removal. In contrast, the illegal calls made by Realgy in this case were wholly unrelated to the unconstitutional government-debt exception.

Because the district court viewed severability as applying only prospectively, it erroneously held that the entire TCPA became invalid when Congress added a single unconstitutional provision. But as shown above, the Supreme Court has long held that severability applies retroactively as well. Correcting for this error shows that the constitutional parts of the TCPA have always applied with full force, even when it included the unconstitutional government-debt exception.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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I verify that this brief, including footnotes and issues presented, but excluding certificates, contains 4,890 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

By: *s/ Thomas M. Fisher*
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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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