No. 20-4252

In the
United States Court of Appeals
for the Sixth Circuit

ROBERTA LINDENBAUM,
Plaintiff-Appellant,

UNITED STATES,
Intervenor-Appellant,

v.

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

On Appeal from the United States District Court
for the Northern District of Ohio, Case No. 1:19-cv-2862-PAG
Hon. Patricia A. Gaughan, *United States District Judge*

BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES AND AFFIRMANCE

Tara S. Morrissey
Paul V. Lettow
U.S. CHAMBER LITIGATION CENTER
1615 H St. NW
Washington, DC 20062

Sam Auld
SKADDEN, ARPS, SLATE
MEAGHER & FLOM LLP
One Manhattan West
New York, NY 10001

Shay Dvoretzky
Counsel of Record
Parker A. Rider-Longmaid
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
Telephone: 1-202-371-7000
shay.dvoretzky@skadden.com

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

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: Shay Dvoretzky

Pursuant to 6th Cir. R. 26.1, The Chamber of Commerce of the United States of America
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/ Shay Dvoretzky

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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community, including in cases concerning the scope of liability under the Telephone Consumer Protection Act (TCPA). *See, e.g.*, Br. of Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Petitioner, *Facebook, Inc. v. Duguid*, No. 19-511 (U.S. Sept. 11, 2020); *see also ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (the Chamber as petitioner). Most relevant here, the Chamber participated as amicus in the case giving rise to the issue here on

* All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

appeal, *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (*AAPC*).

INTRODUCTION

This appeal raises fundamental questions about the government's obligation to treat similarly situated speech and speakers with an even hand. The only way for this Court to satisfy that obligation is to refuse to enforce the TCPA as to calls allegedly placed between the enactment of the government-debt exception and the decision on remand in *AAPC*. That is the only remedy that treats all automated calls alike, regardless of their content—consistent with six Justices' agreement in *AAPC* that the TCPA's unequal treatment of calls to collect government debt was unconstitutional. And it is the only remedy that accounts for the serious Fifth Amendment concerns arising from retroactively imposing unequal liability.

In *AAPC*, the Supreme Court concluded that the TCPA's 2015 exception for calls to collect government debt violated the First Amendment by favoring those calls over all other calls. To prospectively—and only prospectively—remedy the violation and ensure that the TCPA treats speech evenly, the Court held that the government-debt exception should be severed, applying the TCPA's automated-call restriction across the board. That remedy

comported with congressional intent expressed in a severability clause and created no constitutional problems of its own, because it treated all speech alike. *See AAPC*, 140 S. Ct. at 2355 (plurality opinion). Noting the limits of its "decision today," however, the Court left for tomorrow what to do about the statute retrospectively. *Id.* at 2355 n.12. But the plurality did warn that, given "due process" and "fair notice" concerns, "no one should be penalized or held liable for making robocalls to collect government debt" before implementation of the Court's decision on remand. *Id.* at 2354-55 & n.12.

This appeal presents the question the Court reserved for tomorrow. And under the Supreme Court's constitutional and remedial precedents, the answer is straightforward: If the automated-call provision cannot be retrospectively enforced against government-debt collectors, it should not be retrospectively enforced against anyone. Although congressional intent is the touchstone as to prospective relief, it gives way in the context of retroactive remedies to the Fifth Amendment imperatives to provide fair notice, due process, and equal treatment to parties subject to liability. Where retroactive application of a law would impose liability on persons whose rights are at stake, the law should not be enforced retroactively at all.

Here, nonenforcement is the only retroactive remedy that "does not raise any other constitutional concerns." *Id.* at 2355 (plurality opinion). For their part, government-debt collectors lacked fair notice that they could be subject to liability, so the TCPA cannot be enforced against them. *Id.* at 2354-55 & n.12. And for political speakers, marketing companies, and everyone else, retroactive enforcement would impose constitutional harm twice over. *First*, by imposing liability on all callers besides government debt-collectors, it would perpetuate by judicial decree the same First Amendment violation the Court remedied prospectively in *AAPC*. As Justice Gorsuch put it, a remedy "that shields *only* government-debt collection callers from past liability under an admittedly unconstitutional law would wind up endorsing the very same kind of content discrimination [the Court] say[s] [it is] seeking to eliminate." *AAPC*, 140 S. Ct. at 2366 (Gorsuch, J., concurring in the judgment in part and dissenting in part). *Second*, retroactive enforcement would also violate other callers' Fifth Amendment rights to due process and equal protection by unequally imposing liability where similarly situated government-debt collectors remain protected.

For these reasons, the Chamber urges this Court to decline plaintiffs' invitation to retroactively enforce the TCPA's automated-call provision.

SUMMARY OF ARGUMENT

A. *AAPC* does not answer the question presented here. Since 1991, the TCPA has prohibited certain automated, artificial voice, or prerecorded calls to cell phones without prior consent, on pain of significant statutory damages. In 2015, Congress amended the TCPA to exempt calls made to collect government debt. In *AAPC*, six Justices found that that exception violated the First Amendment by favoring government debt–collection speech over other speech. And seven Justices concluded that going forward, the government-debt exception should be severed and the TCPA's restrictions should be enforceable without reference to the call's contents.

Because the plaintiffs in *AAPC* sought only prospective relief, however, the Court did not decide whether the TCPA could be enforced retroactively. Justice Kavanaugh's plurality opinion suggested that "no one should be penalized or held liable for making robocalls to collect government debt" before the Court's decision. 140 S. Ct. at 2355 n.12 (plurality opinion). On that point, at least five Justices agreed. *See also id.* at 2366 (Gorsuch, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part). But, Justice Kavanaugh's dicta continued, the Court's "decision today does not negate the liability of parties who made robocalls covered by the robocall

restriction." *Id.* at 2355 n.12 (plurality opinion). The Court thus left open the question whether a decision tomorrow might negate liability for other types of calls.

B. Courts rely on several tools to craft remedies to cure statutes that cause unconstitutional unequal treatment. Depending on the relief the plaintiff seeks, a court may look to a severability clause, hypothetical congressional intent, or constitutional considerations. As a general matter, the choice of remedy, whether prospective or retrospective, turns on an assessment of congressional intent. That intent may be expressed in a severability clause or discerned as hypothetical intent—*i.e.*, what Congress would have done had it foreseen the violation—through the statute's structure or other provisions.

The inquiry changes, however, when enforcing an unconstitutional law retroactively would impose liability on those whose constitutional rights are at stake. Congressional intent is no longer dispositive. Instead, courts must account for constitutional considerations that may prevent the imposition of a particular remedy, even one Congress may have desired had it known in advance of the constitutional infirmity.

C. Here, congressional intent is not dispositive because enforcing the TCPA retrospectively would inflict constitutional harm. Retroactively

enforcing the TCPA against all callers would injure the due process rights of government-debt collectors who made calls in reliance on the statutory carveout. And retroactively enforcing the TCPA against everyone but government-debt collectors would not only perpetuate the very same content-based feature that made the statute unconstitutional in the first place, but it would also violate all other callers' Fifth Amendment rights to due process and equal treatment.

D. The constitutional harm inflicted by enforcing the TCPA retrospectively would be amplified by the abusive tenor of TCPA litigation. Year after year, plaintiffs file innumerable meritless TCPA suits, wielding the threat of treble damages and billion-dollar judgments to secure hefty settlements. True to form, TCPA plaintiffs in many cases, including this one, have already sought to impose retroactive liability for automated calls made before the entry of judgment on remand in *AAPC*. Refusing to enforce the TCPA against automated calls allegedly made before the decision on remand is not only the proper course, but it is also one that prevents these extensive harms.

The judgment of the District Court should be affirmed.

ARGUMENT

The Court should hold that the TCPA's automated-call restriction may not be enforced between the 2015 enactment of the government-debt exception and the decision on remand in *AAPC*. The Court did not answer that question in *AAPC*, instead addressing only the prospective remedy for Congress' unconstitutional decision to favor government-debt collection over other speech. But fundamental constitutional and remedial principles chart a clear course here. Those principles provide that congressional intent is not dispositive as to the retroactive remedy, even though it may answer the remedial question prospectively. When retroactive application of an unconstitutional law would impose unequal liability, the proper retroactive remedy is nonenforcement altogether.

That rule applies with special force here. For starters, retroactive enforcement would perpetuate the same First Amendment unequal treatment that the Court remedied prospectively in *AAPC*. What's more, Fifth Amendment concerns also come into play. Government-debt collectors cannot be held liable retroactively given constitutional concerns about due process and fair notice. And if the TCPA cannot be applied to them, it cannot be applied

to anybody, because such selective enforcement would both constitute a content-based measure in and of itself and also violate all other callers' Fifth Amendment rights to due process and equal treatment.

A. *AAPC* did not answer whether the TCPA's automated-call provision should be applied retroactively.

Since its enactment in 1991, the TCPA has generally prohibited the use of an "automatic telephone dialing system" or an artificial or prerecorded voice to "make any call" to "any telephone number assigned to a … cellular telephone service" without the recipient's "prior express consent." 47 U.S.C. § 227(b)(1)(A)(iii). Violating the TCPA can subject the caller to liability as high as $500 per violation, and those damages can be trebled to $1500 per call or text if the violation was willful or knowing. *Id.* § 227(b)(3)(B) & (C). This outdated provision barring automated calls threatens the primary means of communication on which our modern economy relies. Today, companies of all stripes rely on ordinary equipment to communicate efficiently with their customers in real-time via ordinary calls or texts. Consumers too rely on these communications, which provide security alerts, appointment reminders, shipping notifications, and many other important notices and reminders besides. But the TCPA casts a shadow over these mainstream and

often vital communications, with statutory damages and class actions combining to threaten billion-dollar judgments that often can be avoided for certain only by forking over seven- or eight-figure payouts.

In 2015, Congress amended the TCPA's automated-call provision to exempt all calls "made solely to collect a debt owed to or guaranteed by the United States." *Id.* § 227(b)(1)(A)(iii). The result was a law singling out government-debt collection speech for special protection based on its content. *AAPC*, 140 S. Ct. at 2347 (plurality opinion). In turn, "[s]ix Members of the Court" unsurprisingly held in *AAPC* that Congress had violated the First Amendment by "impermissibly favor[ing] debt-collection speech over political and other speech." *Id.* at 2343.

The Court then turned to the question of how to remedy the First Amendment violation. Because the plaintiffs in *AAPC* wanted to make automated political calls to cellphones, all they sought was declaratory relief. *Id.* at 2343, 2345. The Court therefore needed to answer only the remedial question of what to do with the automated-call provision going forward. And on that question, "seven Members of the Court" "appl[ied] traditional severability principles" to "conclude that the entire 1991 robocall restriction should be not be invalidated, but rather that the 2015 government-debt exception

must be invalidated and severed from the remainder of the statute." *Id.* at 2343; *see id.* at 2357 (Sotomayor, J.) (concurring in judgment); *id.* at 2363 (Breyer, J.) (concurring in judgment with respect to severability and dissenting in part).

The Court didn't answer, however, what to do about automated calls that had already been made, or who (if anyone) can be held liable. Those questions, the Justices realized, may require a different analysis. Justice Kavanaugh's plurality opinion recognized that "[t]his is an equal-treatment case, and equal-treatment cases can sometimes pose complicated severability questions." *Id.* at 2354 (plurality opinion). Although "the Court generally applies the same commonsense severability principles" to decide whether to extend benefits or burdens, he explained, in such cases "there can be due process, fair notice, or other independent constitutional barriers to extension of benefits or burdens." *Id.* Thus, while the Court's "decision today does not negate the liability of parties who made robocalls covered by the robocall restriction," as Justice Kavanaugh observed in dicta in a footnote, *id.* at 2355 n.12, the question remained open. The plurality's only meaningful guidance was that "no one should be penalized or held liable for making robocalls to

collect government debt" between the 2015 amendment and entry of judgment on remand in *AAPC*. *Id.* But because the plaintiffs in *AAPC* sought only prospective relief and the TCPA contains a severability clause, the remedy going forward was straightforward, and the case did not raise those "complex questions" about the proper retroactive remedy. *Id.* at 2354-55.

In the course of disagreeing with the plurality's prospective remedy, Justice Gorsuch provided guidance on these "complex issues," reasoning that *no one* should face liability for making automated calls while the government-debt exception was in effect. *Id.* at 2366 (Gorsuch, J., concurring in the judgment in part and dissenting in part). A remedy "that shields only government-debt collection callers from past liability under an admittedly unconstitutional law," he explained, "would wind up endorsing the very same kind of content discrimination [the Court] say[s] [it is] seeking to eliminate." *Id.*

B. When retroactive application of an unconstitutional law would impose unequal liability, the proper retroactive remedy is nonenforcement.

1. To prospectively remedy unconstitutional statutes, courts begin with congressional intent. Ordinarily, in cases of unequal treatment, courts "attempt, within the bounds of their institutional competence, to implement

what the legislature would have willed had it been apprised of the unconstitutional infirmity." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017) (quoting *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010)). But constitutional concerns also must inform the analysis: "there can be due process, fair notice, or other independent constitutional barriers to extension of benefits or burdens." *AAPC*, 140 S. Ct. at 2354 (plurality opinion).

In *AAPC*, the plurality explained that "[w]hen the constitutional violation is unequal treatment … , a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all." *Id.* It remarked that "[t]he Court's precedents reflect [a] preference for extension rather than nullification" of benefits or burdens. *Id.* But it acknowledged that courts also must consider constitutional concerns. *See id.* at 2354-55.

These principles guided the Court's decision in *AAPC*. As noted above, the Court held that the proper prospective remedy was to sever the government-debt exception. *Id.* Justice Kavanaugh's plurality opinion explained that "[w]hen … the Court confronts an equal-treatment constitutional violation, … the Court typically severs the discriminatory exception or classification, and thereby extends the relevant statutory benefits or burdens to those

previously exempted." *Id.* at 2354 (plurality opinion); *accord id.* at 2357 (Sotomayor, J., concurring in the judgment); *id.* at 2363 (Breyer, J., concurring in part and dissenting in part). Therefore, "[a]pplying traditional severability principles, seven Members of the Court conclude[d] that … the 2015 government-debt exception must be invalidated and severed from the remainder of the statute." *Id.* at 2343 (plurality opinion). Because they viewed the government-debt exception as "a relatively narrow exception to the broad robocall restriction," the Justices prospectively severed it to "leave in place the longstanding robocall restriction." *Id.* at 2355.

And because the plaintiff in *AAPC* sought only prospective relief, the plurality concluded that severing the government-debt exception on a forward-looking basis would not raise constitutional concerns. *See id.* at 2355. "A generally applicable robocall restriction would be permissible under the First Amendment," the plurality observed, so "[e]xtending the robocall restriction to those robocalls raises no First Amendment problem." *Id.*

2. Courts similarly look to congressional intent to determine the remedy where a law is unconstitutional because it "benefits one class … and excludes another from the benefit." *Morales-Santana*, 137 S. Ct. at 1698. "Ordinarily … , 'extension, rather than nullification, is the proper course,'" even

retroactively. *Id.* (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979)). For instance, in *Jiminez v. Weinberger*, 417 U.S. 628, 637-38 (1974), the Court extended Social Security benefits to nonmarital children of parents with disabilities to remedy a statute that provided those benefits to only marital children of parents with disabilities. And in *Westcott*, the Court explained that it "regularly has affirmed District Court judgments ordering that welfare benefits be paid to members of an unconstitutionally excluded class." 443 U.S. at 89-90; *see also, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (extending benefit of not having to prove spouses were dependents to both female and male members of the armed forces); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (extending state and D.C. welfare benefits for long-term residents to short-term residents).

Courts have ordered the payment of such benefits retroactively as well. *See, e.g.*, *Jimenez v. Weinberger*, 523 F.2d 689, 704 (7th Cir. 1975) (applying *Jimenez v. Weinberger*, 417 U.S. 628 (1974), to retroactively grant benefits); *Novak v. Harris*, 504 F. Supp. 101 (E.D.N.Y. 1980) (applying *Califano v. Goldfarb*, 430 U.S. 199 (1977), to retroactively confer benefits); *Jenkins v. U.S. Civ. Serv. Comm'n*, 460 F. Supp. 611, 613 (D.D.C. 1978) (retroactively conferring benefits because "the equities weigh in favor of retroactive application in that the

unconstitutional deprivation of benefits to the members of the class would otherwise go unremedied"). As with prospective remedies, the inquiry in these circumstances begins with what Congress would have willed had it known of the constitutional infirmity. *See, e.g.*, *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 435 (6th Cir. 2008) ("[E]xtension … is [usually] the proper course … [but] court[s] must remain conscious not to circumvent the legislature's intent.").

3. Difficult "equal-treatment cases" may present "complex questions about whether it is appropriate to extend benefits or burdens." *AAPC*, 140 S. Ct. at 2354 (plurality opinion) (citing *Morales-Santana* as an example). The Supreme Court's remedial decision in *Morales-Santana* shows how the remedial inquiry must account not only for congressional intent, but also for constitutional concerns.

In *Morales-Santana*, the Court departed from the "[o]rdinar[y]" rule that a benefit should be extended, 137 S. Ct. at 1699, instead remedying an unequal-benefit scheme by eliminating the benefit. The Court held that a federal law violated the Fifth Amendment's equal-protection guarantee where it allowed unwed citizen mothers to pass citizenship to their children

born abroad after the mothers had accrued just one year's continuous presence in the United States, whereas unwed citizen fathers needed ten years' physical presence. *Id.* at 1697-98. To determine the proper remedy, the Court first looked to congressional intent. It concluded that Congress, if "[p]ut to the choice," would have "preferr[ed] preservation of the general rule" of ten years' physical presence, which was also required for married couples, one spouse a citizen and the other an alien. *Id.* at 1695, 1698-1701. The Court therefore held that the statute's "longer physical-presence requirement" for unwed fathers (and also for couples with one spouse a citizen and the other an alien) should control. *Id.* at 1701.

The upshot of that remedy, however, was that Luis Morales-Santana, the challenger and the son of an unwed citizen father, would see no relief, because "his father was just 20 days short" of meeting the statute's longer physical-presence requirement. *Id.* at 1686. The remedy thus put Morales-Santana's father on unequal footing with similarly situated citizen mothers who had already passed citizenship to their children.

Critical to the Court's decision, however, was that the alternatives were not any better from a constitutional perspective. *Compare AAPC*, 140 S. Ct. at 2355 (plurality opinion) ("Extending the robocall restriction to those

robocalls raises no First Amendment problem."). The other remedies not only raised constitutional concerns, but they also would have imposed even greater burdens. On the one hand, retroactively eliminating the benefit to unwed mothers would have meant stripping the citizenship they had already conferred on their children. *Morales-Santana*, 137 S. Ct. at 1701. *But see Afroyim v. Rusk*, 387 U.S. 253 (1967) (Congress cannot take away citizenship). On the other hand, extending the one-year benefit to unwed fathers threatened to cause yet *another* equal-protection violation. Married couples (one spouse each a citizen and an alien), were also subject to a ten-year physical-presence requirement. *Morales-Santana*, 137 S. Ct. at 1687; *see supra* pp. 16-17. Extending the one-year term to unwed citizen fathers would result in "[d]isadvantageous treatment of marital children in comparison to nonmarital children," a constitutional concern "subject to the same heightened scrutiny as distinctions based on gender." *Morales-Santana*, 137 S. Ct. at 1700 & n.25. The Court thus chose a remedy that both comported with congressional intent and would *not* result in additional constitutional concerns.

Even so, the Court recognized that the result would have been different had Morales-Santana been challenging criminal liability, rather than seeking to extend a statutory benefit. *See id.* at 1699 n.24 (discussing *Grayned*

v. City of Rockford, 408 U.S. 104, 107 n.2 (1972), and *Welsh v. United States*, 398 U.S. 333, 361-64 (1970) (Harlan, J., concurring in result)). In the criminal context, the Court instructed, liability could not be imposed under a statute resulting in unequal treatment, even if the legislature could have constitutionally prohibited the defendant's conduct and would have preferred severance to accomplish that result. *Id.*; *see infra* pp. 23-24. In sum, *Morales-Santana* shows that the remedy must be tailored to the unique circumstances of the case, accounting not just for congressional intent, but also for constitutional concerns.

4. Although the Court could not fashion a complete remedy in *Morales-Santana*, the rule is different where applying the remedy retroactively would impose liability on the party whose constitutional rights are at stake. In such circumstances, congressional intent is no longer the touchstone, because overriding constitutional considerations make clear that the proper course is not to enforce the law retroactively.

Such a scenario arises when the prospective remedy for unequal treatment is extension of liability rather than extension or elimination of a benefit. Just as a court cannot strip citizenship already conferred, *see supra* p. 18, a court cannot simply extend that prospective remedy—and thus liability—

retroactively. That is because persons previously exempt from liability have countervailing rights to "due process" and "fair notice." *AAPC*, 140 S. Ct. at 2354 (plurality opinion); *see id.* at 2355 n.12.

At the same time, enforcing such a statute retroactively against only those who were not previously exempt (and thus preserving the exemption from liability) creates at least two constitutional problems of its own. *First*, it perpetuates the same kind of unequal treatment that six Justices in *AAPC* held was unconstitutional. *See id.* at 2343. As Justice Gorsuch put it, a remedy "that shields only government-debt collection callers from past liability under an admittedly unconstitutional law would wind up endorsing the very same kind of content discrimination" the Court is "seeking to eliminate." *Id.* at 2366 (Gorsuch, J., concurring in the judgment in part and dissenting in part); *see also generally United States v. Virginia*, 518 U.S. 515, 547 (1996) ("A proper remedy for an unconstitutional exclusion … aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." (cleaned up)).

Second, it deprives similarly situated parties of their liberty or property—something that does not happen with decisions declining to retroactively extend a benefit, like *Morales-Santana*. Indeed, central to the Court's

conclusion that Morales-Santana was not entitled to retroactive relief was that it viewed the relief he sought (for his father and thus for himself) as "*the benefit* of the one-year physical-presence term … reserve[d] for unwed mothers." 137 S. Ct. at 1698 (emphasis added). As the Court noted, such discriminatory failure to confer a benefit is distinct from circumstances in which the law discriminatorily imposes a burden or liability, such as a criminal conviction. *Id.* at 1699 n.24; *supra* pp. 18-19 (same); *infra* pp. 23-24 (same). For these reasons, the proper remedy in such circumstances generally is to not enforce the law retroactively at all.

Supreme Court decisions reflect these principles. Take *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931). There, the Court held that banks were entitled to a tax refund where the Iowa officials had collected too little from their competitors. In his opinion for the Court, Justice Brandeis accepted that the banks could have been fully taxed under the law if their competitors had been taxed the same way. *See id.* at 241-47. Indeed, he explained, "[t]he right invoked is that to equal treatment; and such treatment will be attained if either [the banks'] competitors' taxes are increased or their own reduced." *Id.* at 247. Even so, he explained, "it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of

others in violation of federal law cannot be required himself to assume the burden of seeking an increase of the taxes which others should have paid." *Id.* Instead, the banks were entitled to protection from the liabilities its competitors had avoided. *See id.*; *see also McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 34-35 (1990) (describing an earlier Supreme Court opinion as finding prospective-only relief inadequate to remedy a discriminatory tax because that would "not cure the mischief which had been done under the earlier construction" (quoting *Mont. Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 499, 504 (1926)).

As then-Professor Ruth Bader Ginsburg later explained, *Iowa-Des Moines National Bank* stands for the proposition that where a law or its application generates discriminatory treatment, and "due process related concepts of reliance and fair notice would impede … reaching back to impose" burdens or liabilities on others, the appropriate remedy is not to enforce the statute at all. Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 Clev. St. L. Rev. 301, 307 (1979). Consequently, where some parties have avoided burdens, liability, or penalties because of an unconstitutional exception, the only way to equalize treatment retroactively is not to enforce the statute's general rule retroactively. That

conclusion follows from the more general "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (citation omitted).

Those same principles apply in the criminal context. Criminal liability may not be imposed under an unconstitutional statute, even if the law could constitutionally be written to encompass the same conduct, and even if a prospective analysis would conclude that the legislature would prefer severance to achieve that result. Instead, the Supreme Court has instructed, courts "must consider the facial constitutionality of the [law] in effect when [the defendant] was arrested and convicted." *Morales-Santana*, 137 S. Ct. at 1699 n.24 (quoting *Grayned*, 408 U.S. at 107 n.2). If the law is no good, then neither is the conviction, "without regard to the manner in which the legislature might subsequently cure the infirmity." *Id.* That is the case even where a repaired law could constitutionally proscribe the defendant's conduct. *See Grayned*, 408 U.S. at 107 n.2 (noting that new ordinance "has … no effect on Appellant's personal situation"); *see also Schacht v. United States*, 398 U.S. 58, 61-65 (1970) (conviction reversed where Congress could criminalize "wear[ing] our military uniforms without authority," but could not make

that offense turn on the content of accompanying speech); *Welsh*, 398 U.S. at 361-64 (Harlan, J., concurring in result) (reversal required even if, going forward, Congress would extend rather than invalidate criminal prosecution).

In sum, where enforcing an unconstitutional law retroactively would impose unequal liability on those whose constitutional rights are at stake, the proper course is simply to refuse to enforce the law retroactively altogether. On the one hand, fairness and notice considerations of constitutional magnitude may prohibit imposition of liability on those who were previously given preferential treatment. On the other, enforcing the law against everyone else perpetuates the same unequal treatment that violates the First Amendment and imposes liabilities implicating Fifth Amendment property, liberty, and equal-protection interests. And those concerns are especially acute when the unequal treatment continues to raise First Amendment concerns about targeting speech based on its content. *See AAPC*, 140 S. Ct. at 2354 (plurality opinion) ("The First Amendment is a kind of Equal Protection Clause for ideas." (citation omitted)). In these circumstances, although the assessment of what Congress might have wanted may hold sway going forward, paramount constitutional considerations make the proper retrospective remedy not to enforce the law.

C. Retroactively applying the severed TCPA would impose unequal liability, contrary to parties' First and Fifth Amendment rights.

Here, the proper course is to refuse to enforce the TCPA's automated-call restriction retroactively because doing so would result in unequally imposed liability—and, in some cases, potentially massive liability. While the Court in *AAPC* prospectively extended the burdens of the automated-call provision, constitutional considerations demand a different retrospective approach.

In fact, *AAPC* itself laid the groundwork for a different result as to past violations. As noted, Justice Kavanaugh's plurality opinion observed that due process concerns meant 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" on remand. *AAPC*, 140 S. Ct. at 2355 n.12 (plurality opinion). That observation is the first step in the analysis. The logical second step, for the reasons set out above, is that the retroactive remedy should not afford preferential treatment to government-debt collectors for past calls or texts.

As Justice Kavanaugh recognized, "[t]his is an equal-treatment case, and equal-treatment cases can sometimes pose complicated severability

questions." *Id.* at 2354. And here, unlike in many severability cases (including *Morales-Santana*), retroactive application of the severed statute would not simply fail to confer a benefit. Instead, it would impose liability, and it would do so arbitrarily by treating everyone but government-debt collectors less favorably. That result not only does nothing "to cure the unequal treatment in this case" as a First Amendment matter, *id.* at 2355; *accord id.* at 2366 (Gorsuch, J., concurring in part and dissenting in part), but it also threatens parties' Fifth Amendment due process and equal-protection rights not to be deprived of liberty or property where similarly situated parties remain protected. It is one thing to find no way to cure unequal extension of a benefit, as in *Morales-Santana*. It is yet another thing to insist on judicial imposition of unequal liability. After all, the First Amendment and the equal-protection guarantee apply to courts just as they do to other government actors. *See, e.g.*, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (First Amendment); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (equal protection); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 623-24 (1991) (same); *Morales-Santana*, 137 S. Ct. at 1686 n.1 (approaches to Fourteenth Amendment and Fifth Amendment equal-protection guarantees are "precisely the same"). And TCPA plaintiffs invoke the judicial process to impose liability for automated calls.

The Communications Act's severability clause (47 U.S.C. § 608), which the Court relied on in *AAPC* to determine the prospective remedy, does not suggest a different result, because it lacks the same force in the retroactive analysis. As an initial matter, the constitutional concerns about unequally burdening certain parties' speech based on its content override anything Congress could provide in a severability clause. But the Court need not address that question anyway, for two reasons.

First, the Supreme Court has long "declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent." *Landgraf*, 511 U.S. at 270. Whatever may be said of Congress' intent to prospectively sever the ATDS exception for government-debt collectors, the Communications Act's severability clause does not speak unequivocally as to imposing retroactive liability that would result in unequal treatment. Absent such "'clear, strong, and imperative' language requiring retroactive application," the statute should be applied going forward only. *Id.*

It is no answer, contrary to the conclusion of at least one court, that these principles do not apply because "[s]everance of the government-debt collection provision does not attach 'new legal consequences'" to alleged automated calls. *Doohan v. CTB Invs., LLC*, 427 F. Supp. 3d 1034, 1059 n.10 (W.D.

Mo. 2019). Unlike prospectively severing an unconstitutional exception and thus ridding the statutory regime of constitutional concerns, enforcing an unconstitutionally discriminatory regime against past conduct would in effect require the Court to assume that Congress would have wanted the statute enforced retroactively despite those very constitutional concerns. Such congressional intent cannot be so lightly assumed. For example, when assessing whether Congress has ratified unlawful agency action, courts require Congress to be aware of the problem and address it with "clear and unequivocal language." *EEOC v. CBS, Inc.*, 743 F.2d 969, 974 (2d Cir. 1984) (citing cases). That clarity is especially important where the proposed reading—as here—would be "of doubtful constitutionality." *Greene v. McElroy*, 360 U.S. 474, 507 (1959). And here, the Communications Act's severability clause provides no such clarity as to retroactive enforcement.

Second, and in any event, the Court's prospective remedy in *AAPC* gives effect to the Communications Act's severability clause. There is thus no incompatibility here between the severability clause and the proper retroactive remedy of nonenforcement.

D. Permitting liability under an unequal TCPA scheme would impose significant burdens on businesses.

Retrospectively enforcing the severed TCPA has grave consequences indeed: Beyond harming the First Amendment rights of companies like Realgy to equal treatment of their speech, it would impose onerous and unequal liabilities and penalties harming their Fifth Amendment rights. Under the TCPA, Realgy and other businesses face the threat of aggregated and uncapped statutory damages set at $500 per violation—damages that can be trebled to $1500 per call or text if the violation was willful or knowing. 47 U.S.C. § 227(b)(3)(B) & (C). Those sums can add up quickly. Companies have been hit with TCPA judgments cresting towards $1 billion. *See Wakefield v. ViSalus, Inc.*, No. 3:15-cv-1857, 2020 WL 4728878, at *2, *6 (D. Or. Aug. 14, 2020) ($925 million judgment); *see also Perez v. Rash Curtis & Assocs.*, No. 4:16-cv-03396, 2020 WL 1904533, at *8 (N.D. Cal. Apr. 17, 2020) ($267 million). Some courts have even found such TCPA judgments so "shockingly large" and "oppressive" that they violated due process. *See, e.g., Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019) (affirming reduction of $1.6 billion award to $32.4 million).

Defendants faced with aggregated damages asserted on behalf of large putative classes are often "pressured into settling" even "questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). Given the billions in the balance, the consequences are especially severe in the TCPA context. *See, e.g.*, *Brodsky v. HumanaDental Ins. Co.*, 910 F.3d 285, 291 (7th Cir. 2018) ("The consequences for a firm that violates the TCPA can be dire when it is facing not just a single aggrieved person, but a class."). Those settlements have extracted huge sums from companies in all types of industries. For instance, Capital One settled TCPA claims for $75 million; J.P. Morgan Chase for $34 million; AT&T for $45 million; MetLife for $23 million; Bank of America for $32 million; and Walgreen's Pharmacy for $11 million. Adonis Hoffman, *Sorry Wrong Number, Now Pay Up* (Wall Street Journal, June 15, 2015). According to one report, TCPA settlements submitted for approval in 2018 alone topped $170 million. *See* JDSupra, *Happy Halloween TCPALand!: More Ghoulish TCPA Statistics to Freak You Out*, https://www.jdsupra.com/legalnews/happy-halloween-tcpaland-more-ghoulish-85348/ (Nov. 1, 2018).

The TCPA's exorbitant liability scheme and the allure of quick payouts has turned it into a multi-billion-dollar "poster child for lawsuit abuse." *In re Rules & Regulations Implementing the TCPA*, 30 FCC Rcd. 7,961, 8073 (2015)

(Pai, Comm'r, dissenting); *see also Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) (observing that TCPA litigation "has blossomed into a national cash cow for plaintiff's attorneys" (citation omitted)). Indeed, there were more than 12,000 TCPA lawsuits filed between 2016 and 2018. *See* WebRecon LLC, *WebRecon Stats for Dec 2018: 2018 Ends With A Whimper*, https://webrecon.com/webrecon-stats-for-dec-2018-2018-ends-with-a-whimper.

Given the way plaintiffs have abused the TCPA in the past, there is little doubt that they will continue suing over calls made and texts sent before the Supreme Court's decision in *AAPC*. Indeed, they already have. *See McCurley v. Royal Sea Cruises, Inc.*, No. 17-cv-00986, 2021 WL 288164, at *3 (S.D. Cal. Jan. 28, 2021); *Trujillo v. Free Energy Sav. Co., LLC*, No. 5:19-cv-02072, 2020 WL 8184336, at *2 (C.D. Cal. Dec. 21, 2020); *Hussain v. Sullivan Buick-Cadillac-GMC Truck, Inc.*, No. 5:20-cv-38, 2020 WL 7346536, at *2 (M.D. Fla. Dec. 11, 2020); *Creasy v. Charter Commc'ns, Inc.*, No. 20-cv-1199, 2020 WL 5761117, at *5 (E.D. La. Sept. 28, 2020); *Canady v. Bridgecrest Acceptance Corp.*, No. 19-cv-04738, 2020 WL 5249263, at *2 (D. Ariz. Sept. 3, 2020); *Komaiko v. Baker Techs., Inc.*, No. 19-cv-03795, 2020 WL 5104041, at *2 (N.D. Cal. Aug. 11,

2020). Retroactive nonenforcement avoids exposing companies to enormous judgments, in violation of their constitutional rights.

* * *

The proper retrospective remedy here is straightforward. Nonenforcement avoids perpetuating First Amendment content-based unequal treatment and infringing parties' Fifth Amendment due process and equal-protection rights. It does not unduly frustrate congressional intent, because the statute may be fully enforced going forward, in the absence of constitutional concerns. And, like the Court's prospective remedy in *AAPC*, it "does not raise any other constitutional problems," 140 S. Ct at 2355 (plurality opinion), such as the alternative constitutional violations in *Morales-Santana*, *see supra* pp. 17-18.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

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Respectfully submitted,

Tara S. Morrissey
Paul V. Lettow
U.S. CHAMBER LITIGATION CENTER
1615 H St. NW
Washington, DC 20062

Sam Auld
SKADDEN, ARPS, SLATE
MEAGHER & FLOM LLP
One Manhattan West
New York, NY 10001

/s/ Shay Dvoretzky
Shay Dvoretzky
Counsel of Record
Parker A. Rider-Longmaid
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
Telephone: 1-202-371-7000
shay.dvoretzky@skadden.com

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus brief complies with (1) the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, as calculated by Microsoft Word 2016, it contains 6394 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f); and (2) the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in a 14-point Book Antiqua font.

Dated: March 24, 2021

/s/ Shay Dvoretzky
Shay Dvoretzky

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2021, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by 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.

Dated: March 24, 2021

/s/ Shay Dvoretzky
Shay Dvoretzky