No. 20-4252

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERTA LINDENBAUM,

Plaintiff-Appellant,

UNITED STATES,

Intervenor-Appellant,

v.

REALGY, LLC, et al.,

Defendants-Appellees.

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

BRIEF FOR INTERVENOR-APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is warranted to address the constitutionality of the Telephone Consumer Protection Act's automated-call restrictions.

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INTRODUCTION

Since 1991, the Telephone Consumer Protection Act (TCPA) has generally prohibited the use of certain automated technologies in making calls to cell phones and residential landlines absent the consent of the person being called. 47 U.S.C. § 227(b)(1)(A)(iii), (B). There is no dispute that these restrictions on automated calls were valid when enacted. In a 2015 amendment, Congress allowed the use of automated technologies for calls made to collect debts owed to or guaranteed by the United States without the consent of the person being called. Unlike other provisions of the statute, this exception was content-based. Accordingly, in *Barr v. American Ass'n of Political Consultants (AAPC)*, 140 S. Ct. 2335 (2020), the Supreme Court held that the exception is unconstitutional but severable from the remainder of the statute, and thus invalidated the exception while leaving the original restrictions in place. In so holding, three Justices confirmed that the decision "does not negate the liability of parties who made robocalls" prior to the Court's decision, *id.* at 2335 n.12, and neither of the opinions concurring in the judgment with respect to severability disputed that conclusion, *see id.* at 2357 (Sotomayor, J.); *id.* at 2363 (Breyer, J.).

Defendant is an energy company that allegedly violated the TCPA by directing automated calls to plaintiff's cell phone and home phone during the period after the government-debt exception was enacted but prior to the *AAPC* decision. Defendant contends that, as a result of the government-debt amendment—which the Supreme Court had not yet held invalid at the time of the alleged violations—the automated-

call restrictions were unconstitutional during the relevant period, thus precluding liability. The district court agreed and dismissed the complaint.

The district court's holding runs counter to the rule that "an unconstitutional statutory amendment 'is a nullity' and 'void' when enacted, and for that reason has no effect on the original statute." *AAPC*, 140 S. Ct. at 2353 (plurality op.) (quoting *Frost v. Corporation Comm'n of Okla.*, 278 U.S. 515, 526-27 (1929)). In circumstances like these, in which the pertinent statute was valid as originally enacted, an unconstitutional amendment is "powerless to work any change in the existing statute," and the original "statute must stand as the only valid expression of the legislative intent." *Frost*, 278 U.S. at 526-27. Applying that rule, the Supreme Court has repeatedly allowed a finding of liability under statutes that were valid when enacted but to which invalid and severable amendments were attached at the time of the alleged violation. Nothing in the *AAPC* Court's holding regarding the invalidity of the government-debt exception precludes defendant's liability for unrelated violations of the automated-call restrictions. For these reasons, the judgment of the district court should be reversed.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. RE 14, Page ID # 117. The district court entered an order granting defendant's motion to dismiss on October 29, 2020. RE 27, Page ID # 458. Plaintiff filed a

timely notice of appeal on November 25, 2020. RE 28, Page ID # 459; *see* Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether defendant may be held liable for calls made in violation of the TCPA's automated-call restrictions during the period following the enactment of the government-debt exception and prior to the Supreme Court's decision in *AAPC*, given that the restrictions were undisputedly valid both before the exception's enactment and after the ruling in *AAPC*.

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the TCPA in 1991 in response to consumer complaints about the intrusion on personal and residential privacy caused by the growing number of unwanted phone calls and by automated calls in particular. Pub. L. No. 102-243, § 2(5)-(6), 105 Stat. 2394, 2394 (1991). To protect the privacy interests implicated by these calls, Congress made it unlawful "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" to a cell phone or similar service. 47 U.S.C. § 227(b)(1)(A). The Act also prohibits "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." *Id.* § 227(b)(1)(B).

In 2015, Congress amended the TCPA to provide that these automated-call restrictions do not apply to 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), 129 Stat. 584, 588. The Communications Act of 1934, of which the TCPA is a part, contains a severability provision directing that, if one provision of the Act is held to be invalid, "the remainder of the [Act] . . . shall not be affected." 47 U.S.C. § 608.

Numerous litigants challenged the government-debt exception as an impermissible content-based exception to the restriction on automated calls to cell phones. In April 2019 and July 2019, the Fourth and Ninth Circuits, respectively, held that the exception was unconstitutional but severable from the valid remainder of the statute. *See Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019); *AAPC v. FCC*, 923 F.3d 159 (4th Cir. 2019).

In a July 2020 decision, the Supreme Court agreed that the government-debt exception was content-based and inconsistent with the First Amendment. *Barr v. AAPC*, 140 S. Ct. 2335, 2352 (2020) (plurality op.); *id.* at 2364 (Gorsuch, J.) (concurring as to that conclusion). But the Court rejected the contention that the exception served to invalidate the automated-call restriction by undermining the credibility of the privacy interests that support it. *See id.* at 2348-49 (plurality op.); *id.* at 2362 (Breyer, J.) (concurring in judgment in part and dissenting in part) (agreeing that "the government-debt exception provides no basis for undermining the general cell phone robocall restriction"). The Court further held that the government-debt

exception was severable from the remainder of the statute, which the Court left in effect. *See id.* at 2349 (plurality op.); *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 plurality explained that "an unconstitutional statutory amendment 'is a nullity' and 'void' when enacted, and for that reason has no effect on the original statute." *Id.* at 2353 (quoting *Frost v. Corporation Comm'n of Okla.*, 278 U.S. 515, 526-27 (1929)).

In a footnote, the plurality opinion considered the effect that severing the exception would have on parties' liability for prior violations. The opinion explained that "our decision today does not negate the liability of parties who made robocalls covered by the robocall restriction." *AAPC*, 140 S Ct. at 2355 n.12. Neither of the separate opinions concurring with respect to severability questioned that conclusion. *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). In the same footnote, the plurality stated that, "although our decision means the end of the government-debt exception, no one should be penalized or held liable for making robocalls to collect government debt after the effective date of the 2015 government-debt exception and before the entry of final judgment by the District Court on remand in this case, or such date that the lower courts determine is appropriate." *Id.*

B. Procedural Background

Plaintiff Roberta Lindenbaum filed suit on behalf of herself and others similarly situated, alleging that defendant Realgy, LLC, an energy company, engaged another company to make calls to her cell phone and residential landline using an artificial or prerecorded voice without her consent, in violation of 47 U.S.C. § 227(b)(1)(A)(iii) and (B). RE 14, Page ID # 122-23. The calls were allegedly made in November 2019 and March 2020—after the appellate decisions in *Duguid* and *AAPC*—and did not concern the collection of a government-backed debt. *Id.*

Following the Supreme Court's decision in *AAPC*, defendant moved to dismiss, arguing that the government-debt exception was in effect when the alleged violations occurred and that, consequently, the automated-call restriction was itself invalid at that time. "According to defendant, the statute is enforceable for robocalls made from 1991-2015, *i.e.*, the time period prior to the enactment of the government-debt exception, as well as for calls made after the date of the final judgment in *AAPC*." RE 26, Page ID # 448. "But for robocalls made from 2015 through entry of final judgment in *AAPC*, the statute remains unconstitutional on its face and cannot be enforced against *any* robocaller, including defendant." *Id.*

The district court granted defendant's motion to dismiss, framing the question presented as whether "severance of the government-debt exception should be applied retroactively so as to erase the existence of the exception," or whether the exception should instead be viewed as having been in effect prior to the *AAPC* decision and as

having caused the automated-call restriction to be invalid during that period. RE 26, Page ID # 451. The district court noted the *AAPC* plurality's admonishment that "an unconstitutional statutory amendment is a 'nullity' and 'void,' and therefore has 'no effect on the original statute.'" *Id.* at Page ID # 455 (quoting *AAPC*, 140 S. Ct. at 2353). But the district court concluded that "it does not follow that the result is that the amendment never existed in the first place." *Id.*

Citing the *AAPC* plurality's statement 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 in this case," RE 26, Page ID # 455 (alterations omitted) (quoting *AAPC*, 140 S. Ct. at 2355 n.12), the court reasoned that the exception should be viewed as having been in effect during that period, and that "severance of the government-debt exception applies only prospectively," *id.* at Page ID # 448. Further concluding that the presence of the government-debt exception rendered the automated-call restriction content-based, the court held that, "at the time the robocalls at issue in this lawsuit were made, the statute could not be enforced as written." *Id.* at Page ID # 455. The court thus granted defendant's motion to dismiss on the ground that the statute "was unconstitutional at the time of the alleged violations." *Id.* at Page ID # 457.

Plaintiff appealed. After learning of the constitutional challenge to the automated-call restrictions following the district court's decision, the United States intervened to defend the constitutionality of the federal statute. *See* 28 U.S.C. § 2403.

SUMMARY OF ARGUMENT

In holding the government-debt exception invalid and severing it from the remainder of the statute, the Supreme Court in *Barr v. AAPC*, 140 S. Ct. 2335 (2020), affirmed the validity of the automated-call restrictions. The plurality explained that "an unconstitutional statutory amendment is a nullity and void when enacted, and for that reason has no effect on the original statute." *Id.* at 2353 (plurality op.) (quotation marks omitted). Because the automated-call restrictions were undisputedly valid when enacted, and because the government-debt exception is severable and "ha[d] no effect on the original statute," *id.*, the *AAPC* decision "does not negate the liability of parties who made robocalls covered by the robocall restriction," *id.* at 2355 n.12. This conclusion accords with a number of Supreme Court decisions allowing for liability in analogous circumstances. *See United States v. Jackson*, 390 U.S. 570, 572 (1968); *Eberle v. Michigan*, 232 U.S. 700, 705 (1914).

Defendant's contrary position lacks doctrinal support. Under defendant's view, the automated-call restriction was valid until the effective date of the government-debt amendment and then became invalid until judgment was entered in *AAPC.* But the enactment of an invalid provision did not render the remainder of the statute unconstitutional, *AAPC*, 140 S. Ct. at 2349 (plurality op.), and the Court's decision did not restore its vitality by effectively amending the statute to omit the offending exception. Courts do not amend statutory provisions in construing them; rather, they say "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, 312-13 (1994). Thus, the *AAPC* Court's holding that the government-debt exception was invalid and severable from the remainder of the statute means that the exception was invalid and severable from its inception and had no effect on other portions of the statute. Defendant may therefore be liable for violations of the automated-call restrictions that occurred prior to *AAPC*.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss. *Johnson v. Morales*, 946 F.3d 911, 917 (6th Cir. 2020).

ARGUMENT

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

In holding that the government-debt exception was unconstitutional and severable from the remainder of the TCPA, the Supreme Court affirmed the validity of the Act's prohibition on making automated calls to cell phones without the consent of the person being called. *See Barr v. AAPC*, 140 S. Ct. 2335, 2349, 2353 (2020) (plurality op.). The plurality further explained that the Court's opinion "does not negate the liability of parties who made robocalls" prior to the Court's decision. *Id.* at 2335 n.12. The Court's reasoning applies equally to the restriction on automated calls to residential landlines. *See* 47 U.S.C. § 227(b)(1)(B).

Consistent with *AAPC*, defendant may be liable for violations of the automated-call restrictions that occurred subsequent to the enactment of the government-debt exception and prior to the entry of final judgment in *AAPC*. The district court's contrary holding runs counter to well-established rules regarding the nature of judicial review and the effect of unconstitutional amendments to otherwise valid statutes.

1. There is no dispute that the TCPA's automated-call restrictions were valid prior to the enactment of the government-debt exception and that they are likewise valid and enforceable today. *See* RE 26, Page ID # 448. Defendant urges, however, that the provisions were, for a period of time, rendered invalid by the government-debt amendment, which drew what the Supreme Court determined in *AAPC* was an impermissibly content-based distinction.

That view cannot be squared with *AAPC* and the Supreme Court's prior decisions concerning the significance of invalid amendments to constitutional statutes. The Supreme Court has long made clear that an unconstitutional amendment is "powerless to work any change in the existing statute," and that the original "statute must stand as the only valid expression of the legislative intent." *Frost v. Corporation Comm'n of Okla.*, 278 U.S. 515, 526-27 (1929). Thus, the validity of a provision "c[an] not be impaired by the subsequent adoption of what were in form amendments, but, in legal effect, were mere nullities." *Eberle v. Michigan*, 232 U.S. 700, 705 (1914).

Citing those principles, the *AAPC* Court confirmed the continuing validity of the automated-call restriction, explaining that "an unconstitutional statutory amendment" like the government-debt exception "'is a nullity' and 'void' when enacted, and for that reason has no effect on the original statute." 140 S. Ct. at 2353 (plurality op.) (quoting *Frost*, 278 U.S. at 526-27). The Court held that the impermissibly content-based government-debt amendment was severable from the remainder of the statute, *see id.* at 2349; *id.* at 2357 (Sotomayor, J.) (concurring in judgment); *id.* at 2363 (Breyer, J.) (concurring in judgment with respect to severability and dissenting in part), and its enactment did not have any effect on the concededly valid restrictions already in effect, *id.* at 2348-49 (plurality op.) (rejecting the suggestion that the amendment "betray[ed] a newfound lack of genuine congressional concern for consumer privacy" that called the automated-call restriction into doubt).

Prior Supreme Court decisions applying those principles confirm that a defendant may be liable for violating a provision notwithstanding the enactment of an unconstitutional amendment. In *Eberle*, the Court affirmed the petitioner's conviction under a Michigan law prohibiting the manufacture of alcohol even though amendments to the law enacted prior to the alleged violation were inconsistent with principles of equal protection. 232 U.S. at 706. The Court explained that the original "statute had been held to be constitutional, and prohibited, without discrimination, the manufacture of all liquors. That valid act the defendants violated, and their conviction cannot be set aside" based on the enactment of unconstitutional

amendments to the rule. *Id.* Likewise, in *United States v. Jackson*, 390 U.S. 570, 591 (1968), the Court held that the defendants could be tried under the Federal Kidnapping Act for alleged violations of its original terms, which prohibited the interstate transport of kidnapped individuals, notwithstanding the unconstitutionality of an amendment that conditioned the possibility of capital punishment on the exercise of the right to trial by jury. In holding the capital punishment clause invalid and severable from the remainder of the statute, *id.* at 583, 586, the Court confirmed that "the unconstitutionality of that clause does not require the defeat of the law as a whole," *id.* at 586. And the Court held that, notwithstanding the unconstitutional amendment, "[t]he appellees may be prosecuted for violating" the original terms of the Act. *Id.* at 591.

Defendant's position cannot be reconciled with the holdings in *Eberle* and *Jackson*. In each case, the defendant allegedly violated a law that was constitutional as originally enacted. *See AAPC*, 140 S. Ct. at 2355. And in each case, the violation of the original provision occurred after the legislature had enacted an amendment that was later held to be invalid and severable from the statute. Thus, the principles that provided for liability in *Eberle* and *Jackson* likewise allow that result here.

Defendant nevertheless argues that "[t]he insertion of the government-debt exception transformed this valid time, place, and manner restriction into an unconstitutional content-based restriction," RE 26, Page ID # 456, making it unconstitutional for a period of time before the Supreme Court effectively amended

the TCPA by invalidating the exception and restoring the validity of the automated-call restriction. This contention disregards *AAPC*'s conclusion that the government-debt exception did not render "the entire 1991 robocall restriction unconstitutional," 140 S. Ct. at 2349 (plurality op.); *see id.* at 2362 (Breyer, J.) (concurring in judgment in part and dissenting in part) (agreeing that "the government-debt exception provides no basis for undermining the general cell phone robocall restriction"), and the plurality's admonishment that its opinion "does not negate the liability of parties who made robocalls" prior to the Court's decision, *id.* at 2335 n.12.

Defendant's view is also at odds with longstanding principles of judicial review insofar as it posits that the *AAPC* decision altered the law. When the "Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law," and it is therefore "not accurate to say that the Court's decision . . . 'changed' the law that previously prevailed." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 323 n.12 (1994). An interpretation of a statute in a judicial opinion is a statement of "what the law is," not "what it is today *changed to*, or what it will *tomorrow* be." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in judgment). Accordingly, when the Supreme Court holds that part of a statute is inconsistent with the Constitution, it is holding that the provision was unconstitutional from the outset, not that it is newly invalid upon the entry of final judgment. *See Chicago, I. & L.R. Co. v. Hackett*, 228 U.S. 559, 566 (1913) ("Th[e] act was therefore as inoperative as if it had never been passed, for an

unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."); *see also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (confirming that when the Court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule").[1]

AAPC's holding that the government-debt exception was invalid and thus "as inoperative as if it had never been passed," *Hackett*, 228 U.S. at 566, means that the exception was always invalid and was therefore "powerless to work any change in the existing statute," even for a period of time, *Frost*, 278 U.S. at 526-27. The Court's holding that the exception was severable from the remainder of the statute likewise "is a question of interpretation and of legislative intent." *Dorchy v. Kansas*, 264 U.S. 286,

[1] While the district court acknowledged that the "rule in *Harper* is well-settled," it asserted that "a recent concurring opinion concluded that the rule does not apply when a court severs an unconstitutional provision of a statute," citing a Federal Circuit opinion concurring in the denial of rehearing en banc in a case in which the Supreme Court has since granted *certioriari*. RE 26, Page ID # 452 (citing *Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760 (Fed. Cir.), *cert. granted sub nom. United States v. Arthrex, Inc.*, 141 S. Ct. 549 (2020). The *Arthrex* concurrence of course cannot displace the Supreme Court precedent discussed above showing that the *Harper* rule of retroactivity applies in constitutional cases of this type. And *Arthrex* is in any event inapposite as it concerns the relief warranted when a party challenges an agency decision issued by improperly appointed officers. There is no analogous agency decision in this case, in which the only question is whether defendant can be liable for allegedly violating a statutory provision that was valid when enacted.

290 (1924); *see United States v. Jones*, 980 F.3d 1098, 1111 (6th Cir. 2020) ("Severability is a question of Congressional intent."). The *AAPC* plurality explained that the Communications Act's severability clause "squarely covers the unconstitutional government-debt exception and requires that we sever it," 140 S. Ct. at 2352, and observed 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.* at 2353. *See also id.* at 2357 (Sotomayor, J.) (concurring in judgment); *id.* at 2363 (Breyer, J.) (concurring in judgment with respect to severability and dissenting in part).

In concluding that the exception was severable from the remainder of the statute, the Court said what the TCPA has always meant, not what it meant as of the date of the Court's decision. *See Rivers*, 511 U.S. at 312-13 & n.12. Accordingly, there was never a time when the exception was invalid but not severed; by operation of law, the exception has been both invalid and severed since the date of its enactment, and defendant may be held liable under the valid remainder of the statute. *Cf. United States v. Miselis*, 972 F.3d 518, 547 (4th Cir. 2020) (holding that defendants could be convicted for violating portions of the Anti-Riot Act that the court held were valid and severable from provisions found to violate the First Amendment).

2. In concluding otherwise, RE 26, Page ID # 455, the district court relied heavily on the *AAPC* plurality's statement 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." 140 S. Ct. at 2355 n.12. The district court read this statement to direct that "the statute *as amended* should be enforced with respect to government-debt collector robocalls made during this period," meaning that the government-debt exception should be treated as having been valid and in effect from 2015 through 2020. RE 26, Page ID #455.

Even if this understanding were not mistaken, it would not demonstrate that the statutory restrictions that were undisputedly valid prior to the government-debt amendment temporarily lost their vitality upon its enactment. Indeed, that is clear from the *AAPC* plurality's unequivocal statement that its decision "does not negate the liability of parties who made robocalls covered by the robocall restriction." 140 S. Ct. at 2355 n.12. That unambiguous declaration is not in tension with the prior statement that debt collectors should not be penalized for making automated calls to collect government-backed debts during the relevant period, *see id.*—a conclusion that follows from principles of due process rather than rules of statutory construction. *See* RE 26, Page ID # 455 (acknowledging that, "[p]resumably, the plurality was rightly concerned with due process issues that would arise if courts treated the amendment as void *ab initio*"). Holding 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." *FCC v. Fox Television Stations, Inc.*,

567 U.S. 239, 253 (2012); *cf.* Model Penal Code § 2.04(3)(b)(i) (providing a defense to criminal liability when a defendant "acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in . . . a statute or other enactment"). Thus, even though the government-debt exception was invalid from its inception and never had effect, it does not follow that debt collectors should be penalized for reasonably relying on its enactment.

The district court expressed concern that allowing debt collectors to avoid liability for calls made between 2015 and 2020 while continuing to apply the TCPA's automated-call restrictions to defendants like Realgy "would likely raise its own set of equal treatment concerns." RE 26, Page ID # 455. But the treatment endorsed by the plurality's footnote—providing liability for parties like Realgy while declining to penalize calls to collect government-backed debts—does not entail unequal treatment. Under that approach, the statute would even-handedly prohibit automated calls throughout the period in question without providing a content-based exception for calls to collect government-backed debts. Such a statute provides no unequal treatment. *See AAPC*, 140 S. Ct. at 2355. And declining to penalize calls to collect government debts based on principles of fair notice likewise does not discriminate among regulated parties but rather accounts for the different position of debt collectors—who might reasonably have relied on the government-debt exception prior to *AAPC*—and entities like Realgy, that had ample notice of the unlawfulness of their conduct. Indeed, Realgy's alleged violations occurred after the courts of appeals

held in *Duguid* and *AAPC* that the government-debt exception was invalid and severable from the remainder of the statute.[2] The fact that some entities may be held liable while others are not does not itself signal any unfairness.

The district court also erred in relying on *Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972), in which the petitioner was convicted of violating a content-based anti-picketing ordinance. Following his conviction, the ordinance was amended to omit the exception that had rendered the law content-based. In a footnote, the *Grayned* Court noted that the amendment "has, of course, no effect" on the validity of the petitioner's conviction because the Court "must consider the facial constitutionality of the ordinance in effect when appellant was arrested and convicted." *Id.* at 107 n.2. Unlike in *AAPC*, there was no suggestion in *Grayned* that the statute's content-based exception was severable from the remainder of the statute. The provision contained no severability clause like the one found in the Communications Act, and nothing in the provision's history indicated that the legislature would have enacted the general prohibition on picketing without the

[2] These appellate decisions also illuminate the logistical difficulties of defendant's position. Presumably, under Realgy's theory, a defendant could be liable for violating the automated-call restrictions within the Fourth and Ninth Circuits following the appellate decisions but could not have been liable for alleged violations in other circuits until the Supreme Court's decision in *AAPC*, notwithstanding the interstate nature of the regulated activity. That inadministrable result underscores the problems inherent in defendant's position and illustrates why "prospective decisionmaking has never been easy to square with the judicial power." *AAPC*, 140 S. Ct. at 2366 (Gorsuch, J.) (concurring in judgment in part and dissenting in part).

offending exception. Accordingly, the anti-picketing provision as a whole was invalid as enacted, and the Court held that Grayned could not be convicted under that unconstitutional provision. By contrast, *AAPC* confirms that the automated-call restrictions were valid when enacted and that the government-debt exception was severable and did not undermine the validity of the restrictions. 140 S. Ct. at 2349, 2353 (plurality op.). *Grayned* therefore provides no basis for allowing defendant to avoid liability in these circumstances, in which the alleged misconduct violated a valid restriction. *See Miselis*, 972 F.3d at 547.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,844 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using a proportionally spaced, 14-point font.

s/ Lindsey Powell
Lindsey Powell

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Lindsey Powell
Lindsey Powell

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

Record Entry	Description	Page ID # Range
RE 14	First Amended Complaint	115-138
RE 26	Memorandum Opinion and Order	444-457
RE 27	Order of Dismissal	458
RE 28	Notice of Appeal	459-461