No. 20-4252

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERTA A. LINDENBAUM,

Plaintiff-Appellant,

v.

REALGY, LLC, *ET AL.*,

Defendants-Appellees.

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

BRIEF FOR AMICI CURIAE PUBLIC CITIZEN AND PUBLIC CITIZEN FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amici Curiae

February 1, 2021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

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

Name of counsel: Scott L. Nelson

Pursuant to 6th Cir. R. 26.1, Public Citizen, Inc.
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 February 1, 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/Scott L. Nelson

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.

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: Scott L. Nelson

Pursuant to 6th Cir. R. 26.1, Public Citizen Foundation, Inc.
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 February 1, 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/ Scott L. Nelson

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

Cases **Page(s)**

Other

INTEREST OF AMICI CURIAE[1]

Amici curiae Public Citizen and Public Citizen Foundation (together, Public Citizen) are nonprofit consumer-advocacy organizations with a longstanding interest in First Amendment issues, particularly those posed by assertions that enforcing valid consumer-protection laws infringes freedom of speech. Public Citizen supports consumers' interests in enforcing the protections afforded by the Telephone Consumer Protection Act (TCPA) against unwanted intrusions from telemarketers who use robocalling technology to besiege consumers' phones. Public Citizen represented the consumer petitioner in *Mims v. Arrow Financial Services, LLC*, 565 U.S. 468 (2012), the Supreme Court's first TCPA decision, and are co-counsel for the consumer respondent in the currently pending case *Facebook, Inc. v. Duguid*, No. 19-511 (U.S., argued Dec. 8, 2020). In addition, Public Citizen submitted an amicus brief defending the TCPA's constitutionality and arguing for severance in *Barr v.*

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

American Ass'n of Political Consultants, 140 S. Ct. 2335 (2020) ("*AAPC*"), the decision whose implications are at issue in this case.

Public Citizen submits this brief to assist the Court in addressing the consequences of *AAPC*'s First Amendment and severability holdings for claims involving robocalls made in violation of the TCPA between 2015, when the law was amended to include an unconstitutional exception for calls made to collect government-backed debt, and 2020, when the Supreme Court held that exception unconstitutional and severable from the remainder of the statute in *AAPC*.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly thirty years, the TCPA has prohibited robocalls to both home and cell phones. In 2015, Congress amended the TCPA to create an exception to the TCPA's robocall ban for calls made solely to collect government debt. Last year, in *AAPC*, the Supreme Court held that the government-debt exception violated the First Amendment because it constituted an unjustified, content-based preference for debt-collection communications. *See* 140 S. Ct. at 2346–47 (plurality); *see also id.* at 2356–57 (Sotomayor, J., concurring in the judgment). Applying

traditional severability principles, the Court upheld the TCPA's longstanding ban on robocalls and severed the 2015 amendment.

Justice Kavanaugh's plurality opinion in *AAPC* stated that "no one should be penalized or held liable for making robocalls to collect government debt" during the interim period between the effective date of the 2015 amendment and the final judgment in *AAPC*. *Id.* at 2355 n.12 (2020). It further explained that, "[o]n the other side of the ledger, our decision today does not negate the liability of parties who made robocalls covered by the robocall restriction." *Id.* Despite this clear language, the district court in this case held that *AAPC does* negate liability for robocalls covered by the very robocall restriction that the Supreme Court upheld just last year. The district court's conclusion rests on two critical errors.

First, the court incorrectly interpreted *AAPC* as striking down the TCPA's entire robocall ban and curing the constitutional infirmity only prospectively. In fact, *AAPC upheld* the 1991 robocall ban, see *id.* at 2348–49, and struck down *only* the "unconstitutional exception" created by the 2015 amendment, *id.* at 2348. By "invalidat[ing] just the 2015 government-debt exception and sever[ing] it from the remainder of the

statute," *id.* at 2349, the Court determined that the severed 2015 amendment was a nullity with no bearing on application of the rest of the TCPA.

Second, relying on arguments raised in Justice Gorsuch's partial dissent in *AAPC*, the district court stated that complying with the rule set forth by the *AAPC* plurality would raise equal treatment concerns. The *AAPC* plurality's view that government-debt collectors may not be held liable for calls between the 2015 amendment's effective date and that of the ruling in *AAPC*, however, does not imply that it is unconstitutional to impose liability on other entities who violated the law during that period. The different treatment of the two classes of callers would survive even strict scrutiny because it is narrowly tailored to serve the compelling interest in honoring the constitutional guarantee of fair notice to potential defendants.

ARGUMENT

I. AAPC does not affect the liability of those who violated the TCPA's robocalling prohibitions between 2015 and 2020.

A. This case presents a question that the Supreme Court has already answered. In *AAPC*, the Supreme Court held that Congress's 2015 amendment to the TCPA, which created an exception to the existing

ban on robocalls for calls made to collect a government debt, "impermissibly favored debt-collection speech" over other speech in violation of the First Amendment. 140 S. Ct. at 2342.[2] Applying traditional severability analysis, the Court held that the "the entire 1991 robocall restriction should not be invalidated," but instead invalidated the government-debt exception and severed it "from the remainder of the statute." *Id.* at 2343.

The Court's holding means that the "unconstitutional exception" to the statute, 140 S. Ct. at 2348, was *never* valid law. As Justice Kavanaugh's plurality opinion explains, the holding "recognizes that the Constitution is a 'superior, paramount law,' and that 'a legislative act contrary to the constitution is not law' at all." *Id.* at 2351 n.8 (quoting *Marbury v. Madison*, 5 U.S. (5 Cranch) 137, 177 (1803)). By the same token, the remaining provisions of the law, which function independently of the unconstitutional exception and were intended by Congress to do so, *see id.* at 2349–54, were never unconstitutional. Put another way, "an unconstitutional statutory amendment 'is a nullity' and 'void' when

[2] Unless otherwise indicated, citations to *AAPC* are to Justice Kavanaugh's opinion.

enacted, and for that reason has no effect on the original statute." *Id.* at 2353 (quoting *Frost v. Corp. Comm'n*, 278 U.S. 515, 526 (1929)); *see also Eberle v. Michigan*, 232 U.S. 700, 704–05 (1914) (holding that two invalid amendments to an 1889 law were "mere nullities" with no effect on the underlying 1889 law). Thus, the effect of the decision in *AAPC* is that the unconstitutional part of the TCPA "may be disregarded" but "full effect will be given" to the remainder. 140 S. Ct. at 2350 (quoting *Bank of Hamilton v. Lessee of Dudley*, 27 U.S. (2 Pet.) 492, 526 (1829)).

The Court's severability holding, with which seven Justices agreed, thus squarely answers the question presented in this case. Defendant Realgy, and others who made robocalls for purposes other than government-debt collection between 2015 and 2020, may be held liable for violations of the TCPA's general robocall ban, which has been in place since 1991 and which the Supreme Court specifically upheld in *AAPC*. *AAPC* did not prospectively transform unconstitutional TCPA provisions into constitutional ones by purporting to "repeal" part of the law. 140 S. Ct. at 2351 n.8. Rather, it exercised the "negative power to disregard an unconstitutional enactment," *id.* (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)), severing the part of the law that was always

invalid, while leaving in place the provisions that were always valid. *AAPC* thus does not affect, much less "negate," existing liabilities under the valid TCPA provisions. 140 S. Ct. at 2253 n.12.

Although a majority of Justices did not expressly join the footnote in which Justice Kavanaugh made this point explicitly, Justice Breyer's partial concurrence, on behalf of three Justices, stated that he agreed with Justice Kavanaugh's "conclusion that the [government-debt-collection] provision is severable." 140 S. Ct. at 2363 (Breyer, J., concurring in the judgment with respect to severability and dissenting in part). The plurality's footnote was attached to the sentence in which Justice Kavanaugh stated that same conclusion, and it explained the *meaning* of the judgment in which Justice Breyer's opinion (and that of Justice Sotomayor) concurred. *See* 140 S. Ct. at 2355 & n.12. The consequences explained in the footnote, moreover, flow directly from the plurality's explanation of severability doctrine and its consequences.

B. The district court rejected the plurality's statement as "dicta" and instead chose to follow a far less authoritative source: a statement by a minority of Federal Circuit judges concurring in the denial of rehearing en banc in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760,

766–67 (Fed. Cir. 2020) (O'Malley, J., concurring). *See* Mem. Op. 10, RE 26 at 451–53. Relying on that concurring statement for the proposition that severance holdings are effective prospectively only, the court concluded that because "severance offers no remedy to defendants" who violated the TCPA before *AAPC*, defendants must be excused from liability for TCPA robocalling violations between the enactment of the invalid amendment in 2015 and the decision in *AAPC* in 2020. *Id.* at 10, RE 26 at 453. But neither *Arthrex* nor the Supreme Court's holding in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020)—which the district court also briefly invoked in support of the *Arthrex* dicta on which it relied, *see* Mem. Op. 10, RE 26 at 453—supports the district court's decision, or its rejection of the *AAPC* plurality's explanation of its holding. *Arthrex* and *Seila Law* do not hold or even suggest that a decision holding one provision in a statute to be invalid and severable necessarily excuses defendants from *substantive liability* incurred under a *valid* part of the statute before the invalid provision was severed. Rather, both decisions address only the scope of remedies for structural separation-of-powers violations that negated the authority of federal officers to take actions challenged by affected parties—an entirely different issue.

In *Arthrex*, the Federal Circuit held that a statutory provision providing removal protection for administrative patent judges (APJs) appointed by the Secretary of Commerce violated the Appointments Clause, because the removal protection would turn the APJs into principal officers who must be appointed by the President with the advice and consent of the Senate. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1335 (Fed. Cir. 2019), *cert. granted*, 141 S. Ct. 549, 551 (2020). The court then held that the removal provision that was the source of the constitutional problem was severable from the rest of the statute. *Id.* at 1338. The court did not require reappointment of the APJs, apparently concluding that severing the removal provision was sufficient to remedy any constitutional infirmity in their appointment, but it remanded the cases before it (which involved challenges to specific APJ decisions) for new hearings. *See id.* at 1340. When the court later denied rehearing en banc, six of the twelve Federal Circuit judges who considered the petition for rehearing debated whether the remand for new hearings was necessary under Supreme Court rulings addressing remedies for separation-of-powers violations, with three arguing that the remand was required and three that it was not. *Compare* 953 F.3d at 766–69

(O'Malley, J., concurring in denial of rehearing) *with id.* at 775–81 (Dyk, J., dissenting from denial of rehearing). Regardless of the merits of that dispute, *Arthrex* decided *only* that structural separation-of-powers concerns required the remand remedy. 941 F.3d at 1340. Thus, *Arthrex* does not address the question here: whether a defendant is excused from liability under a *valid* provision of a law after a *different* provision is held invalid and severed.[3]

Similarly, in *Seila Law*, the Supreme Court held that the Director of the Consumer Financial Protection Bureau (CFPB) could not constitutionally exercise executive authority because she was protected against removal at will by the President. *See Seila Law*, 140 S. Ct. at 2191–92. Rejecting arguments that the entire statute establishing the CFPB was therefore unconstitutional, the Supreme Court remanded the case to allow the lower court to address whether the CFPB's actions

[3] The Supreme Court subsequently granted certiorari to consider both whether the Federal Circuit erred in holding that the removal protection made the APJ's principal officers and whether it erred in addressing the Appointments Clause defect it found by severing the removal provision. *See United States v. Arthrex, Inc.*, 141 S. Ct. 549 (2020) (granting certiorari). The Supreme Court's grant of certiorari calls into question the Federal Circuit's substantive and remedial holdings, but those holdings do not support the district court's decision in this case in any event.

during the period when the Director's exercise of executive authority violated separation-of-powers principles had been validly ratified. *Id.* at 2211. As in *Arthrex*, the Court addressed a structural constitutional infirmity by severing removal protections for the federal officers in question, and then considered whether further steps were necessary to remedy agency actions that may have been tainted by the structural violations. Again, those circumstances are not presented here. The principal relevance of *Seila Law* to this case is the Supreme Court's reaffirmance of the principle that "one section of a statute" being "repugnant to the Constitution" does not "render[] the whole act void." *Seila Law*, 140 S. Ct. at 2183, 2208 (citing *Loeb v. Columbia Twp. Trustees*, 179 U.S. 472, 490 (1900)).

Moreover, *Seila Law*'s discussion of the ratification issue indicates that, even in the separation-of-powers context, judicial remedies need not always offer a remedy that alters the consequences of past actions. *Seila Law* recognized that ratification of past actions may be sufficient, suggesting that an affected party may receive no practical redress for whatever claimed "injury" it suffered before the court corrected the constitutional violation. *See Seila Law*, 140 S. Ct. at 2208 & n.12

(plurality); *see also id.* at 2221 (Thomas, J., dissenting in part) (arguing that the Court should not remand to address ratification because "the alleged ratification does not cure the constitutional injury"). The district court's concern that excusing defendants from liability under the TCPA's valid robocall ban was appropriate because "severance offers no remedy to defendants," Mem. Op. 10, RE 26 at 453, thus finds no support in *Seila Law*.

In any event, the district court's suggestion that the remand in *Seila Law* somehow contradicts the plurality's footnote in *AAPC* ignores that the three Justices who joined in the statement of the reasons for a remand in *Seila Law* (Chief Justice Roberts, Justice Alito, and Justice Kavanaugh) were the same Justices who, just seven days later, joined in the explanation that the holding in *AAPC* "does not negate the liability of parties who made robocalls covered by the robocall restriction." *AAPC*, 140 S. Ct. at 2355 n.12. Whatever is required to remedy a separation-of-powers violation, those Justices obviously saw no inconsistency between their clear statement in *AAPC* and their disposition of *Seila Law*.

Indeed, immediately following the decision in *AAPC*, the Court denied certiorari in a case in a similar posture to this one, in which a

defendant argued that TCPA claims based on its conduct after 2015 had to be dismissed because of the unconstitutional debt-collection exception. *Charter Commc'ns, Inc. v. Gallion*, 141 S. Ct. 194 (2020). The petition for certiorari in *Gallion* explicitly argued that severance of the invalid exception was an insufficient remedy because it provided no retrospective remedy to TCPA defendants sued for violations committed before the exception was held invalid. Pet. for Cert. 12–15, *Charter Commc'ns, Inc. v. Gallion*, No. 19-575 (U.S. filed Nov. 1, 2019). If the Justices thought it was arguable that their holding in *AAPC* necessitated some further remedy for defendants in such circumstances, the Court would likely have either vacated and remanded *Gallion* for reconsideration in light of *AAPC* or granted the petition in *Gallion* outright. The Court's decision instead to deny certiorari is an additional signal that the district court's reasons for disregarding the *AAPC* plurality's footnote were mistaken.

II. The due-process requirement of fair notice justifies *AAPC*'s differential treatment of callers who relied on the invalid government-debt exception to the TCPA.

The district court's decision also rests on the view "raised by [Justice Gorsuch's] *AAPC* dissent" that maintaining liability for robocalls made from 2015 through June 2020 under the TCPA's *valid* provisions

"would likely raise its own set of equal treatment concerns." Mem. Op. 12, RE 26 at 455. Those "equal treatment concerns," however, are unfounded because the form of differential treatment contemplated by the Court in *AAPC*—no liability for calls made in reliance on the unconstitutional exception, but continued liability for calls made in violation of the robocall ban during that period—does not violate the First Amendment. The AAPC plurality's admonition that "no one should be penalized or held liable for making robocalls to collect government debt" between 2015 and 2020, 140 S. Ct. at 2355 n.12, does not rest on the statute's invalid content-based preference for speech on one subject over speech on another. Rather, it reflects a competing value of constitutional stature: the due-process-based prohibition against imposing liability without fair warning. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

For this reason, even if the form of differential treatment directed by the *AAPC* plurality were subject to review by lower courts for compliance with the First Amendment, it would survive even strict scrutiny because it is narrowly tailored to serve a compelling interest. Although strict scrutiny is a demanding test, the Supreme Court has

emphasized that some laws affecting speech satisfy it. *See, e.g., Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25–39 (2010); *cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'"). This case is one of them. For five years, statutory text appeared to authorize robocalls to collect government debt, and government-debt collectors acted in reliance on the statute's assurance that their calls fell outside the TCPA's robocalling prohibition. The *AAPC* plurality's recognition that imposing liability for such calls during those five years is unwarranted, even while other parties remain liable for calls that violate the TCPA's preexisting, valid robocall restriction, is narrowly tailored to promote the compelling, constitutional principle of fair notice.

A. Providing fair notice to regulated persons or entities is a compelling interest.

Courts have long recognized that "[a] fundamental principle in our legal system is that laws which regulate persons or entitles must give fair notice of conduct that is forbidden or required." *Fox Television*, 567 U.S. 239, 253 (2012). The fair notice rule stems from the due process guarantee of the Fifth Amendment. *See id.*; *Connally v. General Constr.*

Co., 269 U.S. 385, 391 (1926) (explaining that a statute that does not provide fair notice "violates the first essential of due process of law.") A penalty thus "fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited.'" *Fox Television*, 567 U.S at 253 (quoting *United States v. Williams*, 552 U.S. 285, 304 (2008)). Fair notice is especially important when laws "touch upon 'sensitive areas of basic First Amendment freedoms.'" *Id.* at 254 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

The Supreme Court has repeatedly recognized that interests grounded squarely in constitutional values are compelling. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (identifying a compelling interest in eradicating gender discrimination, reasoning from the constitutional values embodied in the Equal Protection Act); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality) (recognizing that promoting the right to vote freely "obviously [is] compelling"); *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984) (recognizing that the right to "fairness in the jury selection process," rooted in the Sixth Amendment, "is a compelling interest."). Similarly, the fair notice requirement, which is "essential to

the protections provided by the Due Process Clause of the Fifth Amendment," *Fox Television*, 567 U.S. at 253, and a necessary part of "rule of law," *Papacristou v. Jacksonville*, 405 U.S. 156, 162 (1972), is a compelling interest.

This Court recently reaffirmed that private actors should not be held retroactively liable for conduct they committed in good faith reliance on existing law, even when that conduct infringes on First Amendment rights. In *Lee v. Ohio Education Ass'n*, 951 F.3d 386, 388 (6th Cir. 2020), this Court rejected a § 1983 claim against a teachers' union for the return of fair-share fees collected before the Supreme Court outlawed them in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). This Court recognized that, even assuming *Janus*'s First Amendment holding applied retroactively and despite the weighty First Amendment rights at stake, the union defendant had a defense to liability for conduct predating *Janus* because it "relie[d] on existing authority" that had held such fair-share fees permissible.[4] *Id.* at 390. Under those circumstances,

[4] *Lee* turned in part on a distinct statutory question: whether private parties may raise a good-faith defense to liability under § 1983. *See* 951 F.3d at 390–91. Nonetheless, *Lee* provides an "instance where the new rule, for well-established legal reasons, does not determine the outcome of the case." *Id.* at 389 (internal alterations omitted).

this Court held, private actors should have a defense to liability "for following a … law subsequently declared unconstitutional," *even when* this balance perpetuated a past infringement on First Amendment rights. *Id.* Similarly, the *AAPC* plurality recognized that the related legal principle of fair notice may require unequal treatment. even when a statutory provision requiring the same result on the basis of a content-based distinction between speakers violated the First Amendment. *See* 140 S. Ct. at 2355 n.12.

B. Precluding TCPA liability for government-debt collection calls predating *AAPC* is necessary to serve the compelling interest in fair notice.

Imposing liability on people or entities who made robocalls to collect government debt between the enactment of the 2015 amendment to the TCPA and the Supreme Court's *AAPC* decision would frustrate the compelling interest in providing potential defendants with fair notice. For nearly five years, the TCPA's text prohibited robocalls "*unless* a call is made solely to collect a government debt owed to or guaranteed by the United States." *AAPC*, 140 S. Ct. at 2344–45 (citing 47 U.S.C. § 227(b)(1)). Based on the statutory text, a "person of ordinary intelligence" acting in good-faith reliance on TCPA's text would lack "fair

notice" that robocalls to collect government-debt were actually prohibited because the exception was void. *Fox Television*, 567 U.S. at 254.

In *Fox Television*, the Supreme Court held that television broadcasters who aired live television programs at a time that "guidelines in force when the [relevant conduct] occurred" permitted fleeting expletives lacked fair notice and could not be penalized when the FCC later determined that fleeting expletives violated the Public Telecommunications Act. *Id.* Similarly here, government-debt collectors who relied on the text of the TCPA before the Supreme Court determined that the government-debt exception was invalid could not "know what [was] required of them" and therefore lacked fair notice. *Id.* at 253. Fair notice concerns apply with even more force here than in *Fox Television*, where broadcasters relied on agency guidance documents that lacked the force of law, or other cases in which courts have held that statutes were impermissibly vague because they did not provide fair notice. *See, e.g.*, *Johnson v. United States*, 576 U.S. 591, 597 (2015); *Shuti v. Lynch*, 828 F.3d 440, 441 (6th Cir. 2016). Here, not only did the TCPA fail to give robocallers attempting to collect government debt fair notice that these calls were actionable, the statute purported to authorize these calls

affirmatively.[5] Furthermore, the unconstitutionality of the government-debt exception could not have been obvious to any potential defendant. Federal statutes are presumed to be constitutional, *see United States v. Morrison*, 529 U.S. 598, 603 (2000), and the United States vigorously contested the claim that the government-debt exception was unconstitutional in lower federal courts and the Supreme Court, even after two federal courts of appeals held otherwise. *See Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1155 (9th Cir. 2019), *cert. granted*, 141 S. Ct. 193 (2020); *Am. Ass'n of Pol. Consultants v. FCC*, 923 F.3d 159, 161 (4th Cir. 2019), *aff'd*, 140 S. Ct. 2335 (2020).

Because fair notice was lacking, no one who made robocalls to collect government debt before the Supreme Court's decision in *AAPC* can "be penalized or held liable for making robocalls to collect government debt" without raising due process concerns. *AAPC*, 140 S. Ct. at 2355 n.12. By contrast, robocallers who were not even arguably covered by the

[5] In *Libertarian Party of Ohio v. Husted*, 741 F.3d 403 (6th Cir. 2014), this Court found that a statute requiring people circulating ballot petitions to disclose "employer[s]" provided fair notice that this term could encompass independent contractors. *Id.* at 422. This case, by contrast, does not present a dispute about how an ordinary person would understand a statute: It concerns conduct for which the statute *unambiguously* foreclosed liability.

government-debt collection exception had fair notice that they would be held liable for violating the TCPA's robocalling prohibitions. Thus, protecting government-debt collectors from liability for reobocalls that predated *AAPC*, while allowing TCPA actions to proceed against those who violated the law's valid provisions in the same time period, is a precisely targeted response to the fair notice problem. By contrast, eliminating *all* liability for illegal robocalls made between 2015 and 2020 would prevent imposition of unfair liability on government-debt-collection callers, but also grant a broad windfall to hosts of violators who have no fair-notice interests. The most narrowly tailored approach to advancing the compelling interest in fair notice in the wake of *AAPC* is thus to follow the approach outlined in the *AAPC* plurality's footnote.

That approach, moreover, avoids underinclusiveness as well as overinclusiveness. Although "the First Amendment imposes no freestanding 'underinclusiveness limitation,'" "underinclusiveness … raise[s] 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Williams-Yulee*, 575 U.S. at 448 (quoting *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011)). No such doubts are raised by

the rule laid out in the *AAPC* plurality's footnote. The *AAPC* plurality's warning—that the decision neither negates liability for past violations nor allows it for government-debt-collection calls made between 2015 and 2020—does not reflect a legislature's bias for a particular message. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545 (1993) (holding that the underinclusiveness of a city ordinance banning ritual animal sacrifice revealed that the ordinance was motivated by hostility to a particular religion); *Brown*, 564 U.S. at 802 (holding that a law's underinclusiveness revealed that the state had impermissibly "singled out the purveyors of video games" as disfavored speakers). Rather, the TCPA's general robocall restriction is a valid time, place, and manner restriction on speech, *see AAPC*, 140 S. Ct. at 2346, and the temporary, unequal treatment of robocalls to collect government debt "aim[s] squarely at" protecting the compelling interest in fair notice, *Williams-Yulee*, 522 U.S. at 449. That the different treatment affects only calls made before "entry of final judgment" in *AAPC* leaves no doubt that it is genuinely directed at providing fair notice to government-debt collectors. *AAPC*, 140 S. Ct. at 2355 n.12. The plurality's approach shields entities from liability if, and only if, they did not have fair notice that the

robocalls violated the TCPA—distinguishing between calls made for debt-collection and other purposes only when and to the extent that such a distinction is narrowly tailored to serve a compelling interest.

The result of applying of these principles is that the persons *truly* harmed by the statute's unconstitutional preference for government-debt-collection calls—the consumers who received debt-collection robocalls that, absent the void exception, fell within the TCPA's otherwise valid robocall prohibition—can receive no remedy for receiving calls that should have been recognized as illegal all along. That result is necessary to give effect to other constitutional values, as the *AAPC* plurality's footnote recognized. This Court should not, however, exponentially increase the number of victims who are denied a remedy for unlawfully inflicted harms by granting entities like the defendants here, who allegedly violated the TCPA's valid prohibitions during the period from 2015 to 2020, the windfall of immunity for conduct that has been illegal since 1991.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand for further proceedings.

Respectfully submitted,

/s/ Scott L. Nelson

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amici Curiae
Public Citizen

February 1, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word for Microsoft 365), contains 4,704 words. The electronic version of the foregoing brief has been scanned for viruses and is virus-free according to the anti-virus program used (Windows Defender).

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on February 1, 2021.

/s/ Scott L. Nelson
Scott L. Nelson