PUBLIC JUSTICE
IMPACT. CHANGE.

Preserving Liability under the TCPA Post-*Barr v. AAPC*

By Public Justice Staff Attorney Ellen Noble
Last Updated: December 2, 2020

The Telephone Consumer Protection Act of 1991 prohibits robocalls to cell phones, but in 2015 Congress amended the law to create an exception for robocalls made to collect government debt. This past summer, the Supreme Court, in *Barr v. AAPC*, held that the government-debt exception to the prohibition on robocalls to cell phones "impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2343 (2020). Applying severability principles, the Court also concluded that "the entire 1991 robocall restriction should not be invalidated, but rather that the 2015 government-debt exception must be invalidated and severed from the remainder of the statute." *Id.*

Two recent district court decisions—*Lindenbaum v. Realgy, LLC* and *Creasy v. Charter Communications, Inc.*—have turned that severability conclusion on its head, holding that the entirety of the TCPA's prohibition on robocalls was unconstitutional. The courts adopted a twisted interpretation of *AAPC* that immunizes from liability any party that made a robocall after the government-debt exception was enacted in 2015, but before final judgment was entered in *AAPC*. *See Lindenbaum v. Realgy, LLC*, No. 1:19 CV 2862, 2020 WL 6361915, at *2 (N.D. Ohio Oct. 29, 2020); *Creasy v. Charter Commc'ns, Inc.*, No. CV 20-1199, 2020 WL 5761117, at *3 (E.D. La. Sept. 28, 2020).

Motions to dismiss based on this distorted interpretation of Supreme Court precedent are now popping up in TCPA cases across the country. The *Lindenbaum* and *Creasy* decisions, if applied more broadly, would do no less than eliminate liability for TCPA robocall violations that took place between 2015 and 2020. At their core, *Lindenbaum* and *Creasy* reflect a fundamental misunderstanding about the doctrine of severability that directly conflicts with the Supreme Court's decision in *Barr v. AAPC* as well as longstanding principles that govern how courts should cure statutes with constitutional defects.

This paper explains why the *Creasy* and *Lindenbaum* approach is not just wrong, but would unsettle longstanding legal doctrines.

Part I summarizes the Supreme Court's *AAPC* decision and the recent district court decisions, *Creasy* and *Lindenbaum*, that rely on *AAPC* in erecting a new barrier to holding corporations accountable for unlawful robocalls made in the last five years.

Part II explains why *Creasy* and *Lindenbaum* are in direct conflict with *AAPC*'s holding that only the government-debt exception was unconstitutional, not the entire TCPA robocall ban.

Part III contends that *Creasy* and *Lindenbaum* conflict with longstanding Supreme Court precedent that a severability determination is a controlling interpretation of law that must apply retroactively. Specifically, this Part explains that (A) all severability decisions are controlling interpretations of federal law that must be given full retroactive effect under *Harper v. Virginia Dep't of Taxation*; (B) the retroactive effect of a decision to sever is especially clear where, as here, the Supreme Court severs an unconstitutional amendment to an otherwise lawful statute; and (C) in this particular TCPA context, the Supreme Court in *AAPC*, the Ninth Circuit, and numerous other courts have held that severing the government-debt exception from the general prohibition on robocalls means that parties who made robocall violations over the last five years are still liable.

Part IV argues that, regardless of whether *AAPC* controls or how a district court wants to characterize severability, longstanding principles governing judicial remedies for constitutionally defective statutes weigh heavily against eliminating all liability under the TCPA robocall ban over the last five years.

For case specific inquiries, you may contact Public Justice staff attorney Ellen Noble at enoble@publicjustice.net.

PUBLIC JUSTICE
IMPACT. CHANGE.

Table of Contents

I. *Barr v. AAPC* and its Aftermath

In *Barr v. AAPC*, political consultants brought a declaratory judgment action against the United States Attorney General and Federal Communications Commission, claiming that the TCPA's prohibition on robocalls violated the First Amendment. "The TCPA of 1991 amended the Communications Act by adding the robocall restriction, which is codified at § 227(b)(1)(A)(iii)." *AAPC*, 140 S. Ct. at 2352. "The Bipartisan Budget Act of 2015 then amended the Communications Act by adding the government-debt exception, which is codified along with the robocall restriction at § 227(b)(1)(A)(iii)." *Id.* The plaintiffs in *AAPC* argued that the government-debt exception enacted in 2015 transformed the robocall prohibition into a content-based speech regulation in violation of the First Amendment. *Id.* at 2345.

While there is no majority opinion of the Court, six Justices concluded that Congress, in passing the government-debt exception, "impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment." *Id.* at 2343. Seven Justices, applying severability principles, concluded that "the entire 1991 robocall restriction should not be invalidated, but rather that the 2015 government-debt exception must be invalidated and severed from the remainder of the statute." *Id.*[1] "As a result, plaintiffs still may not make political robocalls to cell phones, but their speech is now treated equally with debt-collection speech." *Id.* at 2344.

Justice Kavanaugh's plurality opinion, in which he was joined by Justices Robert and Alito, provides the only significant analysis on the issue of severability. Four additional Justices concurred in the judgment with respect to severability. *See id.* at 2341. In deciding that the government-debt exception was severable from the remainder of the statute, Justice Kavanaugh relied on the Communication Act's severability clause enacted in 1934, as well as traditional principles governing severability. *Id.* at 2352. He noted 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," and that, in the past, when

[1] Justice Kavanaugh announced the judgment of the Court in a plurality opinion which Chief Justice Roberts and Justice Alito joined in whole, and which Justice Thomas joined in part. *AAPC*, 140 S. Ct. at 2343-56. Justice Sotomayor concurred in the judgment. *Id.* at 2356-57. Justice Breyer, joined by Justices Ginsburg and Kagan, concurred in the judgment with respect to severability, but dissented as to the plurality's application of strict scrutiny to § 227(b)(1)(A)(iii)'s content-based distinction. *Id.* at 2357-63. And Justice Gorsuch issued a final opinion, in which he concurred in the judgment in part and dissented on other grounds, and in which Justice Thomas joined in part. *Id.* at 2363-67.

Congress has added an unconstitutional amendment to a prior law, the Court "has treated the original, pre-amendment statute as the 'valid expression of the legislative intent.'" *Id.* at 2353. Most importantly, in a footnote at the end of his section on severability, Justice Kavanaugh makes it clear that "no one should be penalized or held liable for making robocalls to collect government debt" between 2015 and 2020, but "[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.* at 2355 n.12.

The Court's decision in *AAPC* was released in July 2020. This past fall, two federal district courts have managed to turn the Court's severability determination inside-out, holding that the entirety of the TCPA's prohibition on robocalls was unconstitutional between November 2015 (when Congress added the unlawful government-debt exception) and July 2020 (when the Supreme Court "severed" the government-debt exception from the statute). *See Lindenbaum*, 2020 WL 6361915, at *2; *Creasy*, 2020 WL 5761117, at *3. The two courts dismissed plaintiffs' TCPA claims based on robocalls made in the last five years, concluding that the courts have no jurisdiction to enforce unconstitutional statutes. In other words, it is as if the longstanding 1991 robocall ban simply did not exist between 2015 and 2020. The two district court decisions eliminate all liability for robocalls made in the last five years.

The district courts reasoned that "the Court's severance of the *exception* has no bearing on the constitutionality of the *rule*" because "the exception and the rule are in fact inextricably intertwined" and "an exception cannot be unconstitutionally discriminatory without reference to the broader rule in which it appears." *Creasy*, 2020 WL 5761117, at *5. The district courts decided that Justice Kavanaugh's footnote clarifying what affect *AAPC* has on TCPA liability between 2015 and 2020 was mere dicta, and concluded that the severance of the government-debt exception is only a *prospective* remedy. *See Lindenbaum*, 2020 WL 6361915, at *2; *Creasy*, 2020 WL 5761117, at *2. Both decisions appear to be motivated by Justice Gorsuch's observation that the remedy proposed by Justice Kavanaugh would shield only government-debt collection callers from past liability, furthering the content discrimination that the Court seeks to eliminate. *Id.*

II. *Creasy* and *Lindenbaum* conflict with the Supreme Court's holding in *AAPC* that only the government-debt exception, not the entire 1991 robocall ban, is unconstitutional.

The district court decisions in *Creasy* and *Lindenbaum* rest on the core assumption that the entire robocall ban was unconstitutional. But that assumption directly conflicts with the Supreme Court's holding in *AAPC* that only a *portion* of § 227(b)(1)(A)(iii)—the government debt exception—was unconstitutional.

The *Creasy* and *Lindenbaum* courts assumed that the Supreme Court in *AAPC* held that § 227(b)(1)(A)(iii) was, in its entirety, unconstitutional and invalid. *See Creasy*, 2020 WL 5761117, at *1 ("*AAPC* amounts to an adjudication that the entirety of § 227(b)(1)(A)(iii) was unconstitutional"); *Lindenbaum*, 2020 WL 6361915, at *1 ("In *AAPC*, the Supreme Court held that 47 U.S.C. § 227(b)(1)(A)(iii) violated the Constitution . . . ."). But the Supreme Court expressly rejected that argument. The Court "disagree[d] with plaintiffs' . . . argument for holding the entire 1991 robocall restriction unconstitutional" and concluded only "that *the 2015 government-debt exception* created an unconstitutional exception to the 1991 robocall restriction." *AAPC*, 140 S. Ct. at 2348-49 (emphasis added).

The subject of the Court's First Amendment analysis was the exception—not § 227(b)(1)(A)(iii)'s entire prohibition on robocalls. The Court reasoned that the "justification for the *government-debt exception* is collecting government debt" and that, while it's a "worthy goal," it does not pass strict scrutiny. *Id.* at 2347 (emphasis added). A seven-Justice majority of the Court further concluded that it could sever the unconstitutional exception from the prohibition and "that the entire 1991 robocall restriction should not be invalidated." *Id.* at 2343. Invalidation is not just a prospective remedy; it is a determination of *what* is or is not unlawful. *See id.* at 2351 n.8 ("The term 'invalidate' is a common judicial shorthand when the Court holds that a particular provision is unlawful and therefore may not be enforced against a plaintiff."). Therefore, the core assumption made in *Creasy* and *Lindenbaum*—that the Supreme Court decided that the entire robocall ban was unconstitutional—is wrong and conflicts with the Court's express determination that the entire robocall ban was *not* unlawful.

It is true that Justices Gorsuch and Thomas' separate opinion, concurring in the judgment in part and dissenting in part, took aim at the entire robocall ban. They reasoned that the justification for the robocall ban (not the government-debt exception) failed strict scrutiny and concluded that "the challenged robocall ban unconstitutionally infringes on [plaintiffs'] speech." *See id.* at 2364-65. But Justice

Kavanaugh's three-Justice plurality opinion, holding only the government-debt exception unconstitutional, is controlling because it rests on narrower grounds. Under *Marks v. United States*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. 188, 193 (1977). "[A]n opinion will be the narrowest under *Marks* if the instances in which it would reach the same result in future cases form 'a logical subset' of the instances in which the other opinion would reach the same result." *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 431 (6th Cir. 2020). Thus, Justice Kavanaugh's plurality opinion holding only a portion of the robocall ban unconstitutional is the holding of the Court.

Creasy and *Lindenbaum* operate under the false assumption that the Court found the entire prohibition on robocalls to be unconstitutional, but then cured the defect through severance. But the whole point of the severability doctrine is to identify the precise part of a statute that is unconstitutional, and to "refrain from invalidating more of the statute than is necessary." *AAPC*, 140 S. Ct. at 2350 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652-53 (1984)); *see, e.g.*, *Koog v. United States*, 79 F.3d 452, 463 (5th Cir. 1996) (holding that "remainder of the interim provision" of the Brady Handgun Violence Protection Act "is severable from the invalidated duties *and therefore survives this constitutional attack*") (emphasis added).

For example, in *United States v. Miselis*, defendants challenged their convictions under the Anti-Riot Act on the grounds that it was facially overbroad under the Free Speech Clause of the First Amendment. The Fourth Circuit held that the statute was unconstitutionally overbroad, but that the "overbroad portions of the statute are severable from the constitutionally valid remainder." *United States v. Miselis*, 972 F.3d 518, 541 (4th Cir. 2020). The court held that the overly broad language, "the last phrase of § 2102(b)," is "easily dropped off from the rest of the clause in which it appears, much like the government-debt exception severed in *Barr*." *Id.* at 543. Defendants argued, nonetheless, that their convictions should be overturned because they were indicted for violating the whole, unconstitutional version of the law. *Id.* at 546-47. The Fourth Circuit rejected that argument, reasoning that because "defendants' substantive offense conduct falls under the statute's surviving purposes, their convictions must stand." *Id.* at 547.

So too here. If a TCPA defendant's offense conduct falls under the part of the robocall ban that is constitutional, the defendant should still be liable, no matter

when the violations took place. The purpose of severing a clause, provision, or section of a statute is to draw a line between what is unconstitutional and what is not, so that courts "salvage rather than destroy the rest of the law passed by Congress and signed by the President." *AAPC*, 140 S. Ct. at 2350; *see also Dorchy v. Kansas*, 264 U.S. 286, 289 (1924) ("A statute bad in part is not necessarily void in its entirety.").

The *Creasy* and *Lindenbaum* courts put the cart before the horse. By declaring all of § 227(b)(1)(A)(iii) unconstitutional and void, independent of any severability analysis, the courts fall into the very trap that the severability doctrine seeks to avoid. Justice Kavanaugh explains:

> If courts had broad license to invalidate more than just the offending provision, a reviewing court would have to consider what other provisions to invalidate: the whole section, the chapter, the statute, the public law, or something else altogether. Courts would be largely at sea in making that determination . . . Here, for example, would a court invalidate all or part of the Bipartisan Budget Act of 2015 rather than all or part of the 1991 TCPA? . . . That is the kind of free-wheeling policy question that the Court's presumption of severability avoids.

AAPC, 140 S. Ct. at 2351 n.7.

If courts adopted the approach in *Creasy* and *Lindenbaum* where identifying what is unconstitutional is entirely unrelated to what is severable, then there would be no limiting principle in deciding how much of a statute to declare unconstitutional and retroactively invalidate. For example, what led the district courts in *Creasy* and *Lindenbaum* to conclude that, over the last five years, § 227(b)(1)(A)(iii) was unconstitutional, but not all of the Telephone Consumer Protection Act of 1991 or all applications of the 2015 Bipartisan Budget Act? That decision should be governed by traditional severability principles—the very principles applied in *AAPC* to determine that the offending government-debt exception is severable from the rest of § 227(b)(1)(A)(iii) and that therefore the robocall ban should not be invalidated.[2]

[2] Notably, the court in *Creasy* reasoned that whole provision must be unconstitutional because the government-debt exception and the robocall ban were "inextricably intertwined" and that "[t]his is not a situation where one section of a provision being repugnant to the Constitution does not render the whole provision void." *Creasy*, 2020 Wl 5761117, at *5 (brackets and quotation marks omitted). But that's just severability analysis in disguise—severability analysis that is contrary to that of the Supreme Court's severability analysis.

III. Contrary to the decisions in *Creasy* and *Lindenbaum*, AAPC's severability determination is not just a forward-looking judicial fix, but applies retroactively as well

In *Creasy* and *Lindenbaum*, the courts claimed that their analysis was consistent with *AAPC* because the Supreme Court's severability determination only applies prospectively, and therefore "the *entirety* of the pre-severance version of § 227(b)(1)(A)(iii) *is* void because it *itself* was repugnant to the Constitution before the Supreme Court restored it to constitutional health in *AAPC*." *Creasy*, 2020 WL 5761117, at *5. But these courts misunderstand the doctrine of severability. The act of severing an unconstitutional part of a statute does not just salvage future applications of the law, but past applications as well.

As illustrated below, this argument can be made at three different levels: (A) all severability decisions are controlling interpretations of federal law that must be given full retroactive effect under Supreme Court precedent; (B) *AAPC* and longstanding Supreme Court precedent have established that severed, unconstitutional amendments—like the 2015 amendment creating the government-debt exception—are nullities when enacted and cannot invalidate the original, constitutional law; and (C) in this particular case, the Supreme Court in *AAPC*, the Ninth Circuit, and numerous other courts have held that severing the government-debt exception means that the general robocall ban can still be enforced with respect to violations that occurred between 2015 and 2020.

A. Severability determinations are interpretations of federal law that must retroactively apply to all pending cases under *Harper v. Virginia Dep't of Taxation*

The Court's decision in *AAPC* to invalidate the government-debt exception as unconstitutional but retain the robocall ban is an interpretation of federal law that must apply to all pending cases. "When [the Supreme 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." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). The Supreme Court has "prohibit[ed] the erection of selective temporal barriers to the application of federal law" because "the substantive law" should not "shift and spring according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Id.* (brackets and quotation marks omitted). The *Harper* retroactivity rule is founded in the idea that courts have no "constitutional

authority . . . to disregard current law or to treat similarly situated litigants differently." *Id.*

The Supreme Court's severability holding in *AAPC* is an interpretation of federal law and therefore must be applied retroactively. Severability is "essentially [a] question[] of statutory construction, determined according to either the will of the legislature or its manifested meaning." 2 Sutherland Statutory Construction § 44:3 (7th ed.); *see also Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1555 (D.C. Cir. 1985), *aff'd sub nom. Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987) (recognizing severability "reduces to a matter of statutory interpretation"); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76, 115 (1937) ("The decisions make it plain that whether or not a particular statute may be severed is a question of statutory construction. In determining such matters, the courts search for the intention of the legislature.").

As an act of statutory construction, the decision to sever the government-debt exception and preserve the rest of the robocall ban must apply retroactively to pending cases. *See Harper*, 509 U.S. at 97; *see also Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 n.12 (1994) (in construing a statute, courts are "explaining [their] understanding of what the statute has meant continuously since the date when it became law"). Moreover, the Court's severability holding in *AAPC* was not just a matter of statutory construction, it was also a remedy for a constitutional violation. In *Harper*, the Supreme Court stated that "both the common law and our own decisions have recognized a general rule of retrospective effect for the constitutional decisions of this Court." *Harper*, 509 U.S. at 94 (brackets and quotation marks omitted); *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760 (1995) (Scalia, J., concurring) (explaining that an unconstitutional law "is void, and is as no law").

In *Lindenbaum*, the court tried to sidestep the *Harper* rule by relying on a recent decision in the Federal Circuit, *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *cert. granted sub nom. United States v. Arthrex, Inc.*, No. 19-1434, 2020 WL 6037206 (U.S. Oct. 13, 2020). In *Arthrex*, the court ruled that a statute directed at the appointment of administrative patent judges violated the Constitution's Appointments Clause. The court severed the problematic removal provision from the statute and then remanded the case for a new administrative hearing. *Id.* at 1335. In concurring with the court's denial of a petition for rehearing *en banc* in *Arthrex*, Judge Moore recognized that courts "may not give prospective-only effect to [its] rulings, both as to the merits and as to the precise remedy," but that "judicial severance is not a 'remedy'; it is a forward-looking judicial fix." *Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760, 767 (Fed. Cir. 2020). Relying on Judge Moore's analysis, the court in *Lindenbaum* argues that severing the government-debt exception does not remedy the harm that the robocaller suffered and thus the *Harper* rule does not apply.

The *Lindenbaum* court also cites *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020), where the Supreme Court held that the Consumer Financial Protection Bureau's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers. *Id.* at 2197. In *Lindebaum*, the court explains that the Supreme Court in *Seila Law* severed the removal protection so that the agency may continue to operate, but remanded the case to address whether the agency Director's prior decisions had been validly ratified. *Id.* at 2211. The *Lindenbaum* court concluded that "[i]f severance applied retroactively, there would be no need for the past acts to be ratified." 2020 WL 6361915, at *6 n.1.

But the *Lindenbaum* court's reliance on these removal provision cases is misplaced. In neither *Arthrex* nor *Seila Law* did the court conclude that a different part of the statute was invalid while the unconstitutional removal provisions were in effect. Rather, the courts held that the *decisions* made directly by the unconstitutionally irremovable director and the unconstitutionally irremovable administrative patent judges were invalid and needed to be re-done or ratified. In fact, the Supreme Court in *Seila Law* expressly noted that related provisions that formed CFPB's structure and decision-making process *were not* retroactively unconstitutional. *See Seila Law*, 140 S. Ct. at 2209 ("The provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction. Those provisions are capable of functioning independently, and there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred no CFPB to a CFPB supervised by the President."). The aspects of *Arthex* and *Seila Law* that the court in *Lindenbaum* relies on are not about the retroactive application of a severability determination; they're about the validity of decisions made by officers acting without proper constitutional authority.

Moreover, the *Lindenbaum* court's argument assumes that the harm to the robocaller defendant is not remedied by severing the government-debt exception, and therefore—for some reason—*Harper* does not apply. This argument is based on some questionable dicta in Judge Moore's opinion concurring in the denial of a petition for rehearing *en banc* in *Arthex*.[3] Additionally, the argument fails to recognize that "the right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). In *AAPC*, the Court cured the discriminatory content-based speech restriction by the "withdrawal

[3] In dissenting from the denial of rehearing *en banc*, Judge Dyk joined by two other Judges, argued that Judge Moore's analysis is inconsistent with Supreme Court precedent requiring remedies for constitutional violations to apply retroactively to pending cases. *See Arthrex*, 953 F.3d at 777.

of benefits from the favored class," denying government debt collectors the benefit of immunity under the robocall ban. *Id.* at 740.

It is true that the practical effect of that remedy is limited by the doctrine of fair notice, such that government-debt collectors may still not be held liable for robocalls made in the past five years. But "as in every severability case, there may be means of remedying the defect . . . that the Court lacks the authority to provide." *Seila Law*, 140 S. Ct. at 2211. "The Court's only instrument, however, is a blunt one." *Id.* It has "the negative power to disregard an unconstitutional enactment." *Id.* (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). The whole purpose of the *Harper* rule, requiring the retroactive application of federal law to cases on direct review, is to ensure that "the substantive law" does not "shift and spring according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Harper*, 509 U.S. at 87 (brackets and quotation marks omitted). The *Harper* rule exists so that courts do not overstep and decide that they can disregard current law depending on the circumstances or treat similarly situated litigants differently; in other words, courts cannot decide that § 227(b)(1)(A)(iii) means one thing during one time period but another during a different time period.

B. *AAPC* and longstanding Supreme Court precedent make clear that severing an unconstitutional amendment has a retroactive legal effect, preserving the ongoing validity of the original law.

Creasy and *Lindenbaum*'s assumption that severance is only a forward-looking judicial fix conflicts with *AAPC* and longstanding Supreme Court precedent that make clear that if an unconstitutional amendment is severed, it is as if it never existed to begin with. Justice Kavanaugh's severability analysis in *AAPC*—which two Justices joined and four others concurred in judgment with—explains that if severed and invalidated, "an unconstitutional statutory amendment 'is a nullity' and 'void' *when enacted*, and for that reason has *no effect on the original statute*." *AAPC*, 240 S. Ct. at 2353 (citing *Frost v. Corp. Comm'n*, 278 U.S. 515, 526 (1929)) (emphasis added). If severed, it is as if the amendment was never passed by Congress; the legal effect of a severed amendment is therefore, necessarily, retroactive.

This retroactive effect of severability is well-established by Supreme Court precedent. In 1914, in *Eberle v, Michigan*, the Supreme Court held that a constitutional statute's validity "could not be impaired by the subsequent adoption of what were in form amendments, but, in legal effect, were mere nullities." 232 U.S. 700, 704-05 (1914). In *Eberele*, officers of a brewing company charged with making beer in violation of an 1889 prohibition on manufacturing alcohol argued

that the prohibition was void because subsequent amendments in 1899 and 1903 created an exception for making wine and cider in certain counties, and that exception denied the beer brewers equal protection under the law. *Id.* at 704-05. The Court agreed that the amendments violated the Equal Protection clause, but held that they were severable from the underlying 1889 prohibition on manufacturing alcohol generally, and therefore, the amendments were "mere nullities" that did not invalidate the 1889 prohibition. *Id.* Accordingly, the Court sustained the defendants' convictions. Just as the defendants in *Eberle* could not escape liability for selling beer despite the unconstitutional exceptions for those selling wine and cider at the time, defendants here cannot escape liability for robocalling consumers despite the unconstitutional exception for government-debt collectors at the time.

The district court in *Lindenbaum* tries to distinguish *Eberle* on the grounds that the case arose from a state Supreme Court decision and does not directly address the retroactive effect of severance. *See Lindenbaum*, 2020 WL 6361915, at *7. But, first, *Eberle* pre-dates *Erie*—the Supreme Court did not defer to state law in deciding the issue of severability. Second, *Eberle* directly addresses the retroactive nature of severance because the beer brewers raised the constitutional challenge to the amendments on direct appeal of their convictions, claiming that they could not be convicted of violating a law that was unconstitutional and therefore void. *See Eberle*, 232 U.S. at 704-05. The Court, looking back on the law prior to its severability determination, concluded that the amendments were nullities and the original prohibition on manufacturing alcohol still applied.

A decade later, the Supreme Court again reaffirmed that its severability holdings apply retroactively. In *Frost*, the Supreme Court held that a 1925 amendment exempting certain corporations from making a showing of "public necessity" in order to obtain a cotton gin license constituted an unconstitutional denial of equal protection. The Court held the 1925 amendment was severable from the 1915 law requiring a showing of "public necessity." *Frost*, 278 U.S. at 526. Although the case involved—as here—unequal treatment in violation of the Constitution, the Court held that because the 1925 amendment was unconstitutional, it was "a nullity" and "powerless to work any change in the existing statute," which "must stand as the only valid expression of the legislative intent." *Id.* at 526-27. The Court reasoned that "[a]n act which violates the Constitution has no power and can, of course, neither build up nor tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration without force or vitality." *Id.*at 527. Just as the 1925 unconstitutional

amendment could not—even temporarily—invalidate a constitutional law passed in 1915, the 2015 unconstitutional amendment at issue here cannot—even temporarily—invalidate the 1991 TCPA prohibition on robocalls.

C. The Supreme Court in *AAPC*, the Ninth Circuit, and numerous other courts have held, contrary to *Lindenbaum* and *Creasy*, that the severance of the government-debt exception preserves liability for TCPA robocall violations that took place between 2015 and 2020.

i. The Supreme Court in *AAPC* held that because the government-debt exception is severable, the Court's decision does not negate liability for TCPA robocall violations that took place between 2015 and 2020.

In *AAPC*, the Supreme Court clarified the retroactive effect of its severability determination. After concluding "the correct result in this case is to sever the 2015 government-debt exception and leave in place the longstanding robocall restriction," Justice Kavanaugh added a footnote, stating:

> [A]lthough 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 . . . . **On the other side of the ledger, 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 (emphasis added). Justice Kavanaugh recognized that government debt collectors could not be liable for robocalls made between 2015 and 2020 because their lacked fair notice, but clarified that all other parties who made robocalls between 2015 and 2020 in violation of the robocall restriction would still be liable.

The judges in *Creasy* and *Lindenbaum* dismissed Justice Kavanaugh's footnote as "non-binding dicta," reasoning the analysis was only part of a three-Justice plurality opinion and is "unnecessary to the decision." *Creasy*, 2020 WL 5761117, at *4 n.4; *Lindenbaum*, 2020 WL 6361915, at *5. But four other justices concurred in the judgment with respect to severability. *See AAPC*, 140 S. Ct. at 2363 (Breyer, J., concurring in judgment with respect to severability and dissenting in part, and joined by Ginsburg, J. and Kagin, J.); *Id.* at 2357 (Sotomayor, J., concurring in judgment). This footnote defines the scope of that judgment, clarifying

what the Court's decision as to severability "means." *Id.* at 2355 n.12.[4] Furthermore, because severing and invalidating unconstitutional portions of a statute necessarily has a retroactive effect, the content of the footnote is a necessary part of the Court's severability holding.

Even if footnote twelve were dicta, Supreme Court dicta is extremely persuasive. *See Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) ("It would never occur to us to tell the Supreme Court that we would decide our cases based on our analysis of its decisions, not its own analysis of them if that analysis had been announced in a case where it was not essential to the result."); *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement.").

ii. With the exception of *Lindenbaum* and *Creasy*, all other courts have held that because the government-debt exception is severable, defendants are still liable for unwanted robobocalls made between 2015 and 2020.

The Ninth Circuit and numerous district courts have held that the government-debt exception should be severed and not affect liability for robocall violations made between 2015 and 2020. In other words, the weight of authority strongly supports the retroactive application of the Court's severability holding, ensuring parties may still be held liable for robocall violations made in the past five years.

In *Duguid v. Facebook, Inc.*, the plaintiff sought damages on behalf of a putative class for violations of the TCPA's prohibition on robocalling that occurred, in part, in 2016. *See* 926 F.3d 1146, 1153 (9th Cir. 2019), *cert. granted in part,* No. 19-511, 2020 WL 3865252 (U.S. July 9, 2020). As an affirmative defense, Facebook argued that the statute violated the First Amendment. *Id.* at 1149. The Ninth Circuit—like the Supreme Court in *AAPC*—"reject[ed] Facebook's challenge that the TCPA as a whole is facially unconstitutional," "sever[ed] the debt-collection exception as violative of the First Amendment," and "reverse[d] the dismissal of Duguid's amended complaint." *Id.* at 1157. The Ninth Circuit reversed the dismissal in its entirety, resurrecting plaintiff's claims based on robocalls made in 2016. The

[4] The fact that a statement is made in a footnote does not mean that it is dicta. *See, e.g.*, *Fla. Dep't of Labor & Emp't Sec. v. United States Dep't of Labor*, 893 F.2d 1319, 1323 n.7 (11th Cir. 1990) (noting "it is not possible to characterize this footnote in [the Supreme Court's opinion in] *West Virginia* as *obiter dictum*).

court understood that severing the unconstitutional government-debt exception from the general prohibition meant that plaintiff's TCPA claims could proceed.

Facebook sought review of the Ninth Circuit's remedy determination, raising the very arguments adopted in *Creasy* and *Lindenbaum*. *See* Petition for Writ of Cert., *Facebook, Inc. v. Duguid*, 2019 WL 5390116 (U.S. Oct. 17, 2019), at 2. But the Supreme Court denied cert as to that remedy issue while granting cert as to a second, unrelated issue. *See Facebook, Inc. v. Duguid*, No. 19-511, 2020 WL 3865252, at *1 (U.S. July 9, 2020). Thus, the decisions in *Creasy* and *Lindenbaum* conflict with the only appellate court to decide what effect severance of the government-debt exception has on TCPA claims based on robocalls made between 2015 and 2020, and the Supreme Court—despite granting cert on a separate issue in the case—denied cert as to the Ninth Circuit's remedy determination.

And the Ninth Circuit is not alone. District courts across the country have routinely denied motions to dismiss TCPA robocall claims on the grounds that the government-debt exception created an unconstitutional content-based speech restriction. The district courts reasoned that even if the government-debt exception was unconstitutional, the exception was severable from the rest of § 227(b)(1)(A)(iii), and therefore plaintiff's claims based upon robocalls unrelated to the collection of government debt could still proceed. *See Smith v. Truman Rd. Dev., LLC*, 414 F. Supp. 3d 1205, 1231 (W.D. Mo. 2019) (denying motion to dismiss TCPA robocall action due to unconstitutional government-debt exception because the exception is severable); *Perrong v. Liberty Power Corp.*, 411 F. Supp. 3d 258, 269 (D. Del. 2019) (same); *Hand v. Beach Entm't KC, LCC*, 425 F. Supp. 3d 1096, 1122 (W.D. Mo. 2019) (same); *Doohan v. CTB Inv'rs, LLC*, 427 F. Supp. 3d 1034, 1060 (W.D. Mo. 2019) (same); *Geraci v. Red Robin Int'l, Inc.*, No. 19-CV-01826-RM-KLM, 2020 WL 2309559, at *9 (D. Colo. Feb. 28, 2020), *report and recommendation adopted,* No. 1:19-CV-01826-RM-KLM, 2020 WL 1443597 (D. Colo. Mar. 25, 2020) (same); *Wijesinha v. Bluegreen Vacations Unlimited, Inc.*, No. 19-20073-CIV, 2019 WL 3409487, at *6 (S.D. Fla. Apr. 3, 2019) (same); *Katz v. Liberty Power Corp.*, No. 18-cv-10506-ADB, 2019 WL 4645524, at *8 (D. Mass. Sept. 24, 2019) (same); *Parker v. Portfolio Recovery Assocs., LLC*, No. 18-02103, 2019 WL 4149436, at *3 (C.D. Cal. July 11, 2019) (same); *Taylor v. KC VIN, LLC*, No. 4:19-CV-00110-NKL, 2019 WL 6499140, at *16 (W.D. Mo. Dec. 3, 2019) (same); *Silwa v. Bright House Networks, LLC*, No. 2:16-cv-235-FtM-29MRM, 2018 WL 1531913, at *6 (M.D. Fla. Mar. 29, 2018) (same).

Since the Supreme Court's decision in *AAPC*, district courts have continued to find that severance of the unconstitutional government-debt exception means that parties may still be liable under the TCPA for robocalls made after 2015. For example, in *Burton v. Fundmerica, Inc.*, the court granted a motion for default

judgment for a violation of § 227(b)(1)(A)(iii), noting "[t]he Supreme Court held last month in *Barr* that one of the exceptions to this general prohibition, for calls made solely to collect a government debt, violated the First Amendment, but that it was severable from the TCPA as a whole—so, the provision on which the plaintiff's claim relies survived." No. 8:19-CV-119, 2020 WL 4504303, at *1 n.2 (D. Neb. Aug. 5, 2020); *see also Lacy v. Comcast Cable Commc'ns, LLC*, No. 3:19-CV-05007-RBL, 2020 WL 4698646, at *1 (W.D. Wash. Aug. 13, 2020) (lifting stay pending *AAPC*, a "case with a potentially dispositive impact on [plaintiff's] TCPA claims," because "while the Supreme Court invalidated the debt-collection exception, it severed the provision rather than striking down the TCPA's entire robocall restriction").

IV. Longstanding principles governing judicial remedies for constitutionally defective statutes weigh heavily against eliminating all liability for TCPA robocall violations made in the last five years.

Regardless of *AAPC* or how a district court wants to characterize severability, there are longstanding principles that govern how to remedy an unconstitutional statute. Upon identifying an unconstitutional law, judges don't just throw up their hands, assert that they have no jurisdiction, and dismiss the claims. Instead, they identify the source of the constitutional violation and decide what the proper remedy is, pursuant to longstanding legal principles.

In *Creasy* and *Lindenbaum*, the courts skipped this step; they never applied the relevant doctrines. In applying the framework that governs judicial remedies for constitutionally defective statutes, congressional intent and equitable considerations weigh heavily in favor of extending the burden—the prohibition on robocalls—to everyone, not nullifying it for everyone. This is true both prospectively and for the 2015-2020 time period. Any inequity in liability during the 2015-2020 timeframe is due to the fair notice doctrine, not content-based speech discrimination, and that inequity cannot overcome the overwhelming evidence of Congress' intent to restrict robocalling.

A. Legislative intent and other equitable factors require courts to preserve liability for robocall violations made in the last five years.

"[T]he touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006). "After finding an application or portion of a statute unconstitutional, [the Court] must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Id.* (citing cases). "[W]hen confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem . . . enjoin[ing] only the unconstitutional applications of a statute while leaving other applications in

force." *Id.* at 328-29. The Court tries "not to nullify more of a legislature's work than is necessary." *Id.* at 329.

When there is a constitutional violation in the form of unequal treatment, as here, a court can cure that unequal treatment by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all. *See Heckler*, 465 U.S. at 740. In fact, on a number of occasions, the Supreme Court has "recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others." *Id.* at 740 n.8 (citing cases).

In choosing between nullification or extension of a benefit or burden, "a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole." *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part). "It should not use its remedial powers to circumvent the intent of the legislature." *Id.* Courts must "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Welsh v. United States*, 398 U.S. 333, 365 (1970) (Harlan, J., concurring in the result). Courts may also take into account "equitable considerations" that support a particular remedial choice. *Califano*, 443 U.S. at 90; *cf. Cort v. Ash*, 422 U.S. 66, 78 (1975) (identifying four factors as criteria for discerning Congress' intent to create private statutory rights of action).[5]

Applying these principles, the proper remedy for the unconstitutional content-based discrimination caused by the government-debt exception is to nullify the exception and extend application of the robocall ban, regardless of when the robocall violations took place. Even if we assume, for the sake of argument, that the Supreme Court in *AAPC* only nullified the government-debt exception prospectively, all of the Supreme Court's arguments for doing so would also apply and support the retroactive nullification of the government-debt exception and the retroactive extension of the robocall ban.

For example, it is clear that Congress would have preferred a robocall ban, rather than total elimination of the law, for the past five years because Congress

[5] For example, courts have considered "the relative size of the class originally included compared to that originally excluded; the cost of extension of benefits to the government or private provider; whether the statute allocates a benefit or a burden; and whether a burden is criminal or civil in nature." Evan H. Caminker, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 Yale L.J. 1185, 1189 (1986); *see also* Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 Clev. St. L. Rev. 301, 318-21 (1979) ("Among more particular decision-including factors, a prominent consideration is the size of the class extension would encompass, in comparison to the size of the class the legislature included.").

included a severability clause stating "[i]f any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." 47 U.S.C. § 608. Moreover, it is clear that Congress would have preferred to extend the robocall ban—not eliminate it for five years—because in 1991 Congress *did* prohibit all robocalls to cellphones. That law "function[ed] independently . . . . for 20-plus years before the government-debt exception was added in 2015." *AAPC*, 140 S. Ct. at 2353.

By contrast, the approach adopted in *Creasy* and *Lindenbaum*—to eliminate all liability for robocalls to cell phones over the last five years "notwithstanding Congress's decisive choice to prohibit most robocalls to cell phones"—"disrespect[s] the democratic process, through which the people's representatives have made crystal clear that robocalls must be restricted." *Id.* at 2356. "That is not a judicially modest approach." *Id.* "[S]everability is a doctrine borne out of constitutional-avoidance principles, respect for the separation of powers, and judicial circumspection when confronting legislation duly enacted by the co-equal branches of government. Parties cannot, by litigation tactics or oversight, compel the courts to strike down more of a law than the Constitution or statutory construction principles demand." *Ass'n of Am. Railroads v. United States Dep't of Transp.*, 896 F.3d 539, 550 (D.C. Cir. 2018), *cert. denied sub nom. Ass'n of Am. Railroads v. Dep't of Transp.*, 139 S. Ct. 2665 (2019).

Finally, not only is Congress's intent clear, but there is a major equitable consideration that favors the retroactive extension—as opposed to nullification—of the robocall ban: consumers' interests in holding robocallers accountable and securing compensation for violations of their privacy interests that Congress sought to protect. Unlike some laws where only the government bears the cost of nullification, the robocall ban serves the interests of third-parties. Granting corporations immunity for all robocalls made in the past five years is not just antithetical to legislative intent, but actively harms consumers that are seeking to vindicate their rights under the TCPA and impose costs on companies in an effort to deter them from engaging in unlawful robocalling in the future.

B. The fact that government-debt collection callers may be shielded from past liability for lack of fair notice does not justify stripping all parties of past liability.

In *Creasy* and *Lindenbaum*, the district courts' primary argument is not that Congress would not have wanted the TCPA robocall ban to apply over the last five years. Instead, it's an equitable argument. The district courts were concerned that, under the remedial scheme established by Justice Kavanaugh in footnote twelve,

there would be no liability for robocalls made to collect government debt over the past five years, but there would be liability for all other robocalls made over the past five years. *See Lindenbaum*, 2020 WL 6361915, at *7; *Creasy*, 2020 WL 5761117, at *2.

But first, that inequality is not caused by the ongoing enforcement of a law that unconstitutionally favors certain speech; it is caused by an entirely separate doctrine of fair notice that prevents government debt-collectors from being punished for unlawful conduct when they had no notice that such conduct was unlawful. *See AAPC*, 140 S. Ct. at 2354 (recognizing that there are "independent constitutional barriers" to extension of benefits or burdens like due process and fair notice). While there may be some unequal outcomes, there is no ongoing enforcement of a discriminatory, unconstitutional law.

Second, as explained in Part III.A, the decision to invalidate only the government-debt exception or the entire robocall ban is an interpretation of federal law, and the Supreme Court has "prohibit[ed] the erection of selective temporal barriers to the application of federal law." *Harper*, 509 U.S. at 97. The Court cannot "permit the substantive law to shift and spring according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from retroactive application of the new rule." *Id.* at 97. (brackets and quotations omitted). Thus, the Court's constitutional version of the law that applies today (the robocall ban with the government-debt exception severed and invalidated) should also apply to robocalls made in the last five years, even if the fair notice requirement will limit that law's application.

Third, "as in every severability case, there may be means of remedying the defect . . . that the Court lacks the authority to provide." *Seila Law*, 140 S. Ct. at 2211. "[T]here is no magic solution to severability that solves every conundrum, especially in equal-treatment cases, but the Court's current approach . . . is constitutional, stable, predictable, and commonsensical." *AAPC*, 140 S. Ct. at 2356. There are always tradeoffs and competing interests—not every judicial remedy will fix every inequity, but that's why courts have adopted principles to govern how to construct judicial remedies for constitutionally defective statutes, and those principles require courts to ask what Congress would have preferred. *See Ayotte*, 546 U.S. at 321.

For example, in *State v. Theeler*, the defendant was found guilty of assaulting his partner of the opposite sex. He argued that he was convicted under an unconstitutional law because the law criminalized the assault of a partner of the

opposite sex, but not the assault of a same sex partner. Therefore, he argued, he was denied equal protection under the law because he was not treated as similarly-situated individuals. *See State v. Theeler*, 385 P.3d 551, 552 (Mont. 2016). The Montana Supreme Court, however, upheld his conviction on the grounds that it could sever the unconstitutional phrase "with a person of the opposite sex" from the statute without frustrating the clear purpose or integrity of the underlying law. *See id.* at 554.

In a concurrence, one judge explained: "Principles of severance . . . do not require that a statutory provision constitutionally defective for underinclusiveness be declared invalid as to those legitimately included within the class on the basis that others have escaped accountability." *Id.* at 555. "[B]y choosing a remedy which expands the definition of 'partner,' [the defendant] cannot claim that he was convicted pursuant to a constitutionally defective provision because the statute under which he is being convicted has not been struck down." *Id.* at 556.

The fair notice doctrine will likely bar any person who assaulted a same-sex partner prior to *Theeler* from being convicted under that particular law, just as it bars government-debt collectors from being held liable for robocalls made before *AAPC*. Nonetheless, the *Theeler* court "look[ed] to the importance of the statute and the significance of the exemption within the overall statutory scheme," as well as the victims of domestic violence that the law intended to benefit, and decided that the proper remedy was to sever the unconstitutional language and uphold the defendant's conviction, preserving the general prohibition both prospectively and retrospectively. *Id.* at 555-56. And while the importance of the statute in *Theeler* is unique, the U.S. Supreme Court has adopted the same approach in cases involving statutes of far less importance. *See, e.g.*, *Eberle*, 232 U.S. at 704-05 (upholding conviction for manufacturing beer after severing unconstitutional exception to the ban).

Thus, principles governing judicial remedies for constitutionally defective statutes support the continuous application of the robocall ban both prospectively and with respect to the past five years.