Case No. 20-4252

In the United States Court of Appeals
for the Sixth Circuit

Roberta Lindenbaum, on behalf of herself and others similarly situated,
Plaintiff-Appellant,

United States,
Intervenor-Appellant,

v.

Realgy, LLC, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio
Case No. 1:19-cv-2862
The Honorable Patricia A. Gaughan

BRIEF OF AMICUS CURIAE CREDIT UNION NATIONAL ASSOCIATION, INC. IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Credit Union National Association, Inc. (CUNA) submits this corporate disclosure statement under Federal Rule of Appellate Procedure 26.1(a). CUNA is a non-profit 501(c)(6) organization and has no corporate parent and is not owned in whole or in part by any publicly held corporation.

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INTEREST OF AMICUS CURIAE[1]

The Credit Union National Association, Inc. (CUNA) is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,300 federal and state credit unions, which collectively serve over 120 million members.

Credit unions are democratically operated, not-for-profit, financial cooperatives, established "for the purpose of promoting thrift among [their] members and creating a source of credit for provident or productive purposes." Federal Credit Union Act of 1934, Pub. L. No. 73-467, § 2, 48 Stat. 1216, 1216 (1934) (codified as amended at 12 U.S.C. § 1752(1)). Most credit unions are small local companies with limited staff and resources. Due to their structure, credit union members' deposits are at risk from litigation spawned by aggressive plaintiffs seeking to profit through actions for alleged violations of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227.

Credit unions communicate with their members on a wide range of matters such as financial relief during times of emergency, information enabling participation in governance, financial education,

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

status of loan payments, and fraud alerts. Indeed, many members expect and welcome these informational communications.

Adopting TCPA compliance practices is often insufficient to prevent litigation for these benign informational communications, given the fractured and confusing legal landscape where any misstep, such as inadvertently calling a wrong or reassigned number or misapplying one of the many FCC-created, content-based exemptions, could lead to strict liability for statutory damages ranging from $500 to $1,500 *per* call or text. TCPA class action awards reach into the tens of millions of dollars. In light of the staggering statutory damages, and absent a good-faith exception to liability, TCPA lawsuits have become ubiquitous.

To avoid potentially ruinous TCPA litigation, some credit unions have abandoned efficient calling technologies altogether, at great expense to their limited time and resources. And notifications of critical importance to members, such as notices of past due payments, overdrafts, or fraud alerts, are delayed or not made at all. As implemented, the TCPA harms credit union members, who not only forego valuable information but who, as member-owners of credit unions, also bear the burden of costly TCPA lawsuits.

CUNA has been an active participant in the U.S. Supreme Court's recent review of the scope of the TCPA, filing amicus briefs in *Facebook, Inc. v. Duguid*, No. 19-511 (U.S. argued Dec. 8, 2020). CUNA urged the

Court to grant certiorari and, on the merits, to restore an appropriate balance between protecting consumers and not unduly burdening credit unions' ability to communicate with their members.

Similarly, CUNA urges this Court to reject Plaintiff's misguided view of the Supreme Court's recent TCPA ruling in *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020). Applying the Supreme Court's severability holding retrospectively, while immunizing government-debt collectors for past calls, would perpetuate the unequal treatment the Court found unconstitutional by treating credit unions that call to collect private loans differently than companies that call to collect federally guaranteed loans.

SUMMARY OF THE ARGUMENT

Credit unions communicate with their members on a range of important topics, including financial education to help members achieve financial literacy and avoid incurring substantial debt or falling behind on their loan payments. Nevertheless, sometimes members become delinquent and credit unions must make debt-collection calls. The majority of this debt is private—rather than government-owned or guaranteed—and thus calls to collect these debts have not enjoyed the immunity conferred to government-debt collectors. Additionally, other informational, non-telemarketing calls made by credit unions to its members are subject to the restrictions in 47 U.S.C. § 227(b)(1)(A)(iii)

(the robocall restriction), when made to cell phones. The threat of litigation under this strict-liability statute, with damages per call ranging from $500 to $1500, has decidedly chilled these communications to the detriment of credit union members.

Six justices in *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), agreed that callers subject to the robocall restriction suffered unequal treatment in violation of the First Amendment because Congress adopted a content-based exception for government-debt collection calls. The government seeks to perpetuate this unequal treatment for calls made while the exception was in the statute (that is, between 2015 and 2020). The district court rejected this view and correctly concluded that the robocall restriction is unenforceable during the time the exception was in effect.

In seeking to overturn the district court's decision, Plaintiff and amici proffer a parade of policy horribles should the robocall restriction be declared unenforceable. These claims are vastly overstated and lack credibility. They effectively equate the robocall restriction with the entire TCPA, ignoring that the restriction is a small piece of the statute, a sub-sub-sub section as Defendants state.

Contrary to amici's portrayal, there are numerous other provisions both within the TCPA and outside of the statute that amply protect consumer rights, including through private rights of action. In fact, it is

these other statutes that underlay most government enforcement efforts, including the enforcement actions cited by amici. None of the cited enforcement actions were based on the robocall restriction, and there is no basis to conclude that enforcement efforts for illegal calls will suffer if the district court is affirmed.

This court need not be swayed by amici's hyperbolic claims. The district court's decision is legally sound and dictated by Supreme Court precedent that a court must look to the law as it existed at the time of the claimed injury. Plaintiff's and the government's positions to the contrary are untenable as they would either subject government-debt collectors to liability in violation of their due process rights, or continue the unequal treatment the Court found unconstitutional in *AAPC*.

ARGUMENT

I. Credit Unions Will Continue to Suffer Unequal Treatment for Having Made Important and Welcomed Calls.

A. Credit unions' relationship with their members demand a range of informational communications.

Due to their unique structure and vital role in the communities in which they serve, credit unions must provide an array of informational communications to their members. These communications range from messages regarding financial education to timely and critical account information. Regrettably, they also include calls to members when they fall behind on their loan payments.

Credit unions often seek to inform their members about financial literacy programs to help them develop skills for building savings, creating a budget, and managing debt. Significantly, due to their role as community-based institutions, credit unions often provide these educational opportunities to low-income populations, who are underserved by banks. As the former head of the Consumer Financial Protection Bureau (CFPB) noted, credit unions commonly serve "low-income, unbanked, underbanked and economically vulnerable consumers." Consumer Fin. Prot. Bureau, Mobile Financial Services at 4 (Nov. 2015), https://bit.ly/32Y6t56. Resources offered by credit unions cover the entire lifecycle of their members, from promoting early savings to combatting scams against seniors.

Beyond member education, credit unions' critical communications also include: information on opportunities to cure outstanding debt balances before incurring late fees or adverse credit reporting; account balance and overdraft alerts; possible breaches of members' information; and card usage and fraud alerts. Any delay in members receiving and acting on these notifications risks financial harm.

As the nature of these communications reveals, credit unions target their communications to existing members. There is no need or incentive for credit unions to place these types of calls or texts to anyone other than their members, nor is there any benefit to doing so.

There is, however, great harm to their 120 million members if credit unions are prevented from efficiently communicating with them.

B. Despite good-faith compliance efforts, credit unions limit important communications to their members because of ubiquitous and costly TCPA litigation.

Amici wrongly suggest that affirming the district court would be unfair to companies that are in compliance with the TCPA. But credit unions face TCPA litigation notwithstanding their best efforts at compliance. Determining whether a call is compliant with the TCPA has become a fraught exercise. Credit unions—many of which are small entities with limited staff and resources—must make a number of determinations when calling one of their members, any one of which could be determinative of TCPA liability: whether the content of the call falls within an exception; whether a telephone number is a landline or cell phone (because different exemptions apply to each); whether consent has somehow been revoked; and whether a telephone number still belongs to the account holder or has been reassigned.

This compliance puzzle is compounded by the current chaos surrounding the scope of the robocall restriction's general ban on using an automatic telephone dialing system (ATDS) to call cell phones. The Supreme Court is set to decide the circuit courts' disagreement on whether the ATDS ban applies only to calls to sequentially or randomly

generated numbers or also includes calls to lists of numbers. *See Facebook, Inc. v. Duguid*, No. 19-511 (U.S. argued Dec. 8, 2020).

There is no question that the TCPA chills credit unions' communications with their members. More than three-fourths (76%) of credit unions responding to a CUNA survey reported that it is "very difficult" (30%) or "somewhat difficult" (46%) to determine whether their communications are compliant with the TCPA. *See* Comments of the Credit Union Nat'l Ass'n, CG Docket No. 18–152, CG Docket No. 02–278, at 3 (Oct. 17, 2018), *available at* https://bit.ly/2Kvv1Ks. The same survey found that 35% of credit unions curtailed or stopped texting their members, even though texting is an efficient and often preferred method of communication. *Id.* at 3–4. And three-fourths (75%) of credit unions that had used some form of an automated voice messaging system in the past have curtailed or ceased using such communications. *Id.* at 4. Unsure of whether their calls and texts will run afoul of the TCPA, credit unions resort to manually dialing members or mailing letters rather than sending automated messages.

As a result, important notifications are delayed or not made at all. Instead of being protected, consumers are harmed by not timely receiving notifications—such as debt payment relief options following natural disasters or late payment notices. *See Am. Airlines Fed. Credit Union Notice of Ex-Parte Presentation*, CG Docket No. 18–152, CG

Docket No. 02–278 (May 17, 2019) (AAFCU Letter), *available at* https://bit.ly/32Z1q2n; *Fed. Housing & Fin. Agency Notice of Ex-Parte Presentation*, CG Docket No. 02–278 (Apr. 27, 2019), *available at* https://bit.ly/2OsIMui (seeking exemption to notify homeowners impacted by natural emergencies of available assistance). Delinquencies that might otherwise be resolved with a timely payment reminder instead are reported to credit bureaus and loans may be unnecessarily defaulted. AAFCU Letter at 3.

The chilling effect of potential TCPA litigation has not affected one type of communication—calls to collect government-owned or guaranteed debt. But the vast majority of credit union debt is private, not government-owned or guaranteed. Thus, between 2015 and 2020, when a credit union called to collect debt that the credit union, and ultimately its members, had backed, the credit union suffered classic unequal treatment in relation to entities collecting government debt that were exempt from the robocall restriction. Plaintiff's and the government's views here would perpetuate this unequal treatment in violation of credit unions' First Amendment rights for pre-*AAPC* calls.

Credit unions' concern with the risk of litigation are, unfortunately, well-founded. The TCPA is a strict-liability statute with no good-faith defenses, *see, e.g.*, *Alea London Ltd. v. Am. Home Servs., Inc.*, 638 F.3d 768, 775–76 (11th Cir. 2011), and TCPA cases are often

filed as class actions to maximize their *in terrorem* effect and lawyers' contingency fees. TCPA litigation against non-profit credit unions is by no means uncommon. And, given the statutory damages of $500 to $1,500 per call or text, these cases are costly. For instance, Navy Federal Credit Union recently settled an autodialer class action for $9,250,000—a crippling amount to most credit unions. *See* Emilie Ruscoe, *Navy Federal Credit Union Settles Robotext Claims For $9.25M*, Law360.com (Mar. 12, 2020), https://bit.ly/3i6qFYW.

In another recent case, a consumer brought an autodialer class action against a credit union alleging the credit union called her number despite her not being a credit union member, presumably because a member's phone number had been reassigned to her. *See* First Amended Class Action Complaint, *Stoutt v. Travis Credit Union*, No. 2:20-cv-01280-WBS-AC (E.D. Cal. Jan. 15, 2021), ECF No. 21. The plaintiff seeks to certify a nationwide class of consumers who, like her, did not have an account with a credit union. Despite intending to provide critical information to its members, the credit union now faces potentially vast liability after the district court rejected its argument that the Supreme Court's severability holding does not apply retrospectively. *Stoutt v. Travis Credit Union*, No. 2:20-cv-01280 WBS AC, 2021 WL 99636, at *5 (E.D. Cal. Jan. 12, 2021).

Even the FCC recognizes that reassigned number calls have been an intractable problem for good-faith callers, and the FCC has been developing a national reassigned number database to provide a solution. When deployed, this database and its attendant TCPA-liability safe harbor will help mitigate wrong-number calling and litigation risk. But the database will provide no relief to credit unions defending TCPA suits for calls prior to its deployment—when no effective solution to identify reassigned numbers existed. In other words, despite credit unions' best compliance efforts, TCPA actions based on unconsented calls have been impossible to avoid and costly to defend.

In light of this compliance quagmire, Plaintiff's contention rings hollow that prohibiting enforcement of the TCPA for calls between 2015 and 2020, would be unfair to companies that have complied because it would excuse violations by unscrupulous actors. Lawyers routinely target legitimate businesses making good-faith efforts to comply with the TCPA's byzantine requirements, and not "illegal telemarketers, the over-the-phone-scam artists, and the foreign fraudsters" that terrorize consumers. *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7,961, 8,073 (2015) (dissenting Statement of Commissioner Ajit Pai). As former-Chairman Pai wrote, the TCPA is the "poster child for lawsuit abuse." *Id.* This lawsuit abuse would be more egregious if combined with unequal treatment.

II. Numerous Provisions in the TCPA and Other Laws Protect Consumer Privacy Interests.

Plaintiff and amici wrongly portray the robocall restriction as coextensive with the entire TCPA, and incorrectly assert that it is the primary, if not the only, statutory safeguard protecting consumer privacy. In fact, the robocall restriction is a small piece of the TCPA that Congress promulgated largely to prevent consumers from incurring the cost of incoming telemarketing calls to cell phones at a time when prices often reached $0.45 or more a minute. Numerous other TCPA provisions and related federal and state laws create a broad framework for protecting consumer privacy that would be unaffected by affirming the district court's decision that the robocall restriction is unconstitutional and hence unenforceable during the period the government-debt exception was in effect.

A. Provisions other than the robocall restriction address Congress's objective of protecting privacy.

By far, the primary concern animating Congress in passing the TCPA was unsolicited prerecorded telemarketing calls to landline phones in consumers' homes and businesses. Congress's findings demonstrate the overwhelming concern regarding unsolicited calls to the "home" or calls to "residential customers" or "residential subscribers." Pub. L. 102-243, § 2, 105 Stat. 2394 (Dec. 20, 1991), (1), (2), (6), (7), (10), (12) (Congressional Findings). At the time of

enactment, a call to the home or residential customer or subscriber meant a call to a telephone hardwired into the wall, prompting Senator Fritz Hollings, a prime TCPA sponsor, to lament that the proliferation of unsolicited telemarketing calls led homeowners to want to "rip the phone right out of the wall." 137 Cong. Rec. 30,821 (1991) (statement of Sen. Hollings). Apart from privacy of the home, the other key concern reflected in Congress's findings was calls that tied up landline business phones, especially at health and public-safety facilities. *See* Congressional Findings at (5); 137 Cong. Rec. H11313 (daily ed. Nov. 26, 1991) (statement of Rep. Roukema). No one had replaced their home phone, or their business phone, with a cell phone.

Although Congress sought to curb unwanted telemarketing calls, it never intended the TCPA "to be a barrier to the normal, expected or desired communications between businesses and their customers." *See* H.R. Rep. No. 102-317, at 17 (1991). The TCPA's sponsors and supporters expected that calls from businesses to their existing customers would not be banned and, in particular, that calls regarding late payments and similar informational calls would be allowed. *See, e.g.*, 137 Cong. Rec. 18,785 (1991) (statement of Sen. Pressler) (explaining the TCPA exempts calls by businesses to their customers); 137 Cong. Rec. 11,311 (1991) (statement of Rep. Rinoldo) (same); *id.* at 11,312 (statement of Rep. Lent) (noting the TCPA does not bar late

payment reminder calls). In fact, FCC rules have always exempted residential informational calls, including debt-collection calls, from TCPA liability. *See* 47 C.F.R. § 64.1200(a)(3)(ii)–(iii); *see also In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1,830, 1,845–48, ¶¶ 35–43 (2012). Such calls—autodialed or otherwise—do not raise the same privacy concerns as traditional telemarketing calls. *See id.* at 1,845, ¶ 36.

The structure of the TCPA and its remedies balances these considerations. Two provisions protect the privacy of the home, neither of which implicates the robocall restriction. Subsection 227(b)(1)(B) bars prerecorded calls to "any residential telephone line," absent consent. Subsection 227(c), entitled "Protection of subscriber privacy rights," directed the FCC to develop methods to "protect residential telephone subscribers' privacy rights" from receiving unsolicited marketing calls, including establishing company-specific or national do-not-call databases, or both. These subsections include private rights of action for statutory damages. 47 U.S.C. § 227(b)(3), (c)(5).

Businesses too were afforded separate protections, backed by private rights of action. Although privacy was a concern, the predominate issue for businesses related to calls using prerecorded technology that seized or tied up telephone lines, especially health or public-safety facilities. Thus, § 227(b)(1)(A)(i) bars prerecorded calls to

the emergency lines of hospitals, health care facilities, or poison-control centers, and § 227(b)(1)(A)(ii) bars calls to guest rooms of hospitals or nursing homes. Additionally, § 227(b)(1)(D) bars the use of ATDSs that tie up two or more business lines at the same time. Substantial portions of the TCPA are also directed at protecting businesses from unsolicited fax advertising. § 227(b)(1)(C).

In 2009, Congress amended the TCPA to address another significant problem, the use of fake numbers in caller ID with illicit intent, a practice called spoofing. An example of illegal spoofing is a caller pretending to be from the IRS and inserting an IRS call back number in the caller ID. Congress added a new subsection to the TCPA, § 227(e), the Truth in Caller ID Act, to combat this problem.

B. The robocall restriction is not a major source of complaints.

Amici seek to elevate the prominence of the robocall restriction by citing to the number of complaints filed by consumers. (NCLC Br. 9–10.) The robocall restriction is not the basis for the vast majority of these complaints. A recent FCC report to Congress demonstrates that most consumer complaints concern other provisions of the TCPA. Fed. Commc'ns Comm'n, Report to Congress on Robocalls and Transmission of Misleading and Inaccurate Caller Identification Information, Dec. 23, 2020, at 3–4, https://bit.ly/3902Qzn (Report to Congress). The report

found that, from January 1, 2015 through November 30, 2020, roughly the same period at issue here, the Commission received 644,495 informal consumer complaints alleging a violation of § 227(c) (which involves calls to numbers on do-not-call lists), 280,769 informal consumer complaints alleging a violation of § 227(d) (which establishes requirements that must be met whenever making a prerecorded call), and 213,818 informal consumer complaints alleging a violation of § 227(e) (which bars illegal spoofing). The FCC received 368,584 informal consumer complaints alleging a violation of § 227(b), which not only precludes autodialed calls to cell phones but also encompasses the prohibition on telemarketing calls to residential lines using a prerecorded or artificial voice. Thus, only a subset of the complaints regarding the prohibitions in § 227(b) involve calls to cell phones barred by § 227(b)(1)(A)(iii). In short, the vast majority of complaints do not involve violation of the robocall restriction.

C. Affirming the district court will not appreciably hinder enforcement or undermine compliance efforts.

Amici wrongly claim that the district court's ruling would hamper FCC enforcement efforts and cite three FCC enforcement actions as examples: *In re Dante Sciarra & D&D Global Enters.*, Citation and Order, 2019 WL 6463853 (Nov. 27, 2019); *In re Kenneth Moser*, Citation and Order, 2019 WL 6837860 (Dec. 13, 2019); and *In re Adrian*

Abramovich et al., Forfeiture Order, 33 FCC Rcd. 4663 (May 10, 2018). But these examples actually demonstrate that affirming the district court would have little, if any, effect on enforcement efforts. None of these enforcement actions rested solely on the robocall restriction. To the contrary, the first two actions were predicated on the failure of the callers to include required identifying information during prerecorded calls in violation of § 227(d)(3)(A) and for calling numbers listed on the national Do-Not-Call list. *Abramovich*, which resulted in a $120 million fine for making more than 96 million illegal spoofed calls, was "based solely on violation of Section 227(e)," the Truth in Caller ID Act. 33 FCC Rcd. at ¶ 20. The FCC routinely relies on TCPA provisions other than the robocall restriction when bringing enforcement actions for making illegal calls. *See* Report to Congress at 5–6 (identifying FCC enforcement actions all predicted on violations of § 227(e) for illegal spoofing or making calls to numbers on the Do-Not-Call list). Most recently, the FCC again relied solely on § 227(e) and issued a record $225 million fine for making roughly 1 billion robocalls. *In re John C. Spiller et al.*, Forfeiture Order, F.C.C. 21-35, ¶ 69 (Mar. 18, 2021).

These enforcement actions are in no way unique in their reliance on other provisions to enforce consumer protections from illegal calls. The FTC, which oversees the national Do-Not-Call list and enforces the Telemarketing Sales Rule, along with 46 agencies from 38 states and

the District of Columbia, recently brought an enforcement action against various defendants making 1.3 billion deceptive charitable fundraising calls relying on a host of provisions other than the robocall restriction. Complaint ¶¶ 1, 8, *FTC v. Associated Cmty. Servs., Inc.*, No. 2:21-cv-10174-DML-CI (S.D. Mich. Jan. 26, 2021), ECF No. 1 (alleging violation of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a), the Telemarketing Sales Rule, 16 C.F.R. § 310.3(a), (d), and various state statutes prohibiting unfair and deceptive trade practices). The FTC's reliance on these provisions, and the defendants' subsequent settlement of the claims, evidences that bad actors will not simply escape liability if the district court's decision is affirmed.

D. Numerous other federal and state laws protect against unlawful or unwanted calls.

Just as amici overstate the effect on enforcement, amici also ignore the numerous other legal protections against unlawful calls, both within and outside of the TCPA, available to consumers and government agencies.

1. Federal laws provide effective redress for illegal calls.

The Truth in Caller ID Act makes it unlawful to "cause any caller identification service" in connection with any voice or text message service "to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or

wrongfully obtain anything of value . . . .” 47 U.S.C. § 227(e)(1). Although the Truth in Caller ID Act does not include a private right of action, it is a powerful enforcement tool targeting the most harmful scammers that use spoofing to entice unwitting consumers to accept calls, as reflected in the federal enforcement actions described above. *See* § 227(e)(6)(A) (specifying that the “chief legal officer of a State . . . may bring a civil action [under this act], as *parens patriae*, on behalf of the residents of that State”).

The do-not-call rules are a similarly potent remedy that bar making calls to residential or cell phone numbers listed on national or company-specific do-not-call lists. The rules are enforced by the FTC, *see* 16 C.F.R. § 310.4(b)(iii)(B), and the FCC, *see* 47 C.F.R. § 64.1200(c)(2), (d), (e). Many states also have their own do-not-call lists with private rights of actions. *See, e.g.*, Colo. Rev. Stat. § 6-1-904; Ind. Code § 24-4.7-4-1; La. Stat. Ann. § 45:844.14; Tenn. Code Ann. § 65-4-410(a). Importantly, the national Do-Not-Call registry allows consumers to sign up with relative ease, requiring nothing more than an email address and the consumer’s phone number. *See National Do Not Call Registry*, FTC, https://www.donotcall.gov/ (last visited Mar. 18, 2021). The FTC’s and FCC’s provisions further require telemarketers to easily and automatically allow consumers to be placed on the company’s own do-not-call lists and to honor the request for at least five years. 47

C.F.R. § 64.1200(d)(6); 16 C.F.R. § 310.4(b)(iii)(A). The rules provide a private right of action, 47 U.S.C. § 227(c)(5), and have been used by consumers in individual actions and class actions, s*ee, e.g.*, *Charvat v. NMP, LLC*, 656 F.3d 440, 450 (6th Cir. 2011); *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 648 (4th Cir. 2019).

FCC rules also require robocallers to include specific information in their recorded messages, limit their calls to specific times, and provide an automated feature to allow consumers to opt out of future messages and thus be placed on a company's do-not-call list. *See, e.g.*, 47 C.F.R. § 64.1200(b)(3) (requiring opt-out process for telemarketing calls); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 35 FCC Rcd. 15,188 (2020) (extending opt-out requirement to residential informational calls and codifying requirement for certain calls to cell phones exempt from liability).

Two additional federal provisions distinct from the TCPA—the Consumer Financial Protection Act (CFPA) and the Fair Debt Collection Practices Act (FDCPA)—afford protection to consumers for illegal robocalls. Enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, the CFPA prohibits debt collectors from engaging in "unfair, deceptive, or abusive act[s] or practice[s] under federal law . . . ." 12 U.S.C. §§ 5531(a), 5481(15)(A)(x). The FDCPA similarly aims to remedy

abusive, deceptive, and unfair debt-collection practices. 15 U.S.C. § 1692(e). Among other conduct, the FDCPA proscribes debt-collection conduct likely to "harass, oppress, or abuse any person . . . ." § 1692d. The CFPB has successfully used these provisions against unlawful debt-collection schemes. *See, e.g., CFPB v. Universal Debt & Payment Sols., LLC*, No. 1:15-CV-0859-RWS, 2019 WL 1295004, at *1, *3, *4 (N.D. Ga. Mar. 21, 2019); *see also* Complaint ¶ 1, *FTC v. Nat'l Landmark Logistics, LLC*, No. 0:20-cv-02592-JMC (D.S.C. July 13, 2020), ECF No. 2 (alleging claims under the FDCPA for illegal robocalls made by various debt collectors). The CFPB also recently released comprehensive rules governing communications by debt collectors, including limiting the frequency of calls. 12 C.F.R. § 1106.

2. State laws also provide enforcement mechanisms.

Often broader than the FDCPA, state unfair and deceptive practices (UDAP) laws, debt-collection laws, and telemarketing and autodialing laws generally provide consumers with fee-shifting mechanisms, and can equally be used to hold illegal robocallers accountable. By way of example, the Illinois Consumer Fraud Act protects consumers from unfair or deceptive business practices and has been used by consumers to curb illegal robocalls. *See* 815 Ill. Comp. Stat. 505/2; *Dolemba v. Ill. Farmers Ins. Co.*, 213 F. Supp. 3d 988, 998 (N.D. Ill. 2016). And, unlike the TCPA, the Illinois law authorizes

attorney fees to prevailing consumers, making the provision attractive to hold bad actors accountable. *See* 815 Ill. Comp. Stat. 505/10a(c).

Likewise, state "mini-TCPA" provisions serve as additional enforcement mechanisms. For instance, Texas has enacted strict limitations on the use of autodialiers to place calls to mobile telephones for "the purposes of making a sale" without the consumer's consent. Tex. Bus. & Com. Code § 305.001. The Texas statute provides a private right of action and criminal penalty. §§ 305.053(a), 305.052.

North Carolina has a similar autodialer prohibition. The law prohibits the use of "an automatic dialing and recorded message player to make an unsolicited telephone call." N.C. Gen. Stat. § 75-104(a). The law further provides statutory remedies of $500 for the first violation, $1,000 for the second, and $5,000 for the third and any subsequent violations occurring within two years of the first, as well as a fee-shifting provision for prevailing plaintiffs. § 75.105(b), (d).

Additionally, laws and regulations in Michigan provide enforcement mechanisms against illegal robocalls apart from the TCPA. The Michigan Penal Code makes it a misdemeanor offense for a telemarketer to make "an unsolicited commercial telephone call" between the hours of 9:00 p.m. and 9:00 a.m. Mich. Comp. Laws § 750.540e(1)(f). The Michigan Home Solicitation Sales Act prohibits the use of recorded messages to engage in telephonic solicitation and

establishes a state do-not-call list. Mich. Comp. Laws § 445.111a(1), (2), (6). These provisions have been used to bring suit against robocallers in the same manner as the TCPA. *See Visser v. Caribbean Cruise Line, Inc.*, No. 1:13-CV-1029, 2020 WL 415845, at *1–2 (W.D. Mich. Jan. 27, 2020) (bringing action under both the robocall restriction and section 445.111a(1) of the Michigan Home Solicitation Sales Act).

In the debt-collection context, Massachusetts has enacted strict limits on how often and when collection calls can be made. 940 Mass. Code Regs. 7.04(1)(f), (g). In addition, the regulations broadly prohibit collectors from making "false, deceptive, or misleading" statements when attempting to collect a debt. 7.07(8).

Texas, North Carolina, Michigan, and Massachusetts are a few examples out of the overwhelming majority of states that regulate telemarketing or collection calls. *See 50 State Statutory Surveys: Financial Services: Banking Operations: Telephone Solicitations*, Westlaw, October 2020, 0090 SURVEYS 11. And numerous states have enacted telemarketer registration requirements, such as Texas and South Dakota. *See, e.g.*, Tex. Bus. & Com. Code § 302.101(a); S.D. Codified Laws § 37-30-3. Unlike many of the laws described above, these telemarketer registration requirements have no federal counterpart, thereby making them unique to state enforcement efforts. These state provisions provide wholly separate mechanisms to hold

illegal robocallers accountable apart from the TCPA, just like the various other federal laws detailed above.

III. The District Court Correctly Held the Robocall Restriction Is Unenforceable Between 2015 and 2020.

A. The pre-*AAPC* version of the robocall restriction is an unconstitutional content-based restriction.

The Supreme Court in *AAPC* plainly held the robocall restriction, inclusive of the government-debt exception, is an unconstitutional content-based restriction on speech. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) ("The initial First Amendment question is whether the robocall restriction, with the government-debt exception, is content-based. The answer is yes."); *id.* at 2356–57 (Sotomayor, J.); *id.* at 2363–67 (Gorsuch, J.); *see also id.* at 2343, 2347 (Kavanaugh, J.) ("Six Members of the Court today conclude that Congress has impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment."). Contrary to Plaintiff's claim, this constitutional holding was not limited to the government-debt exception. (*See* Opening Br. 17–20.)

AAPC was a declaratory-judgment action brought by entities engaged in political speech that wanted to use robocalls calls to promote their political views. That is, the plaintiffs in *AAPC* "believe[d] that their political outreach would be more effective and efficient if they could make robocalls to cell phones." 140 S. Ct. at 2345. But, because

the "plaintiffs [we]re not in the business of collecting government debt," the robocall restriction was an obstacle to their desired speech. *Id.* For this reason, the plaintiffs argued that *all* of the robocall restriction violated the First Amendment—indeed, invalidation of only the government-debt exception would have left the plaintiffs no better off—and they requested an injunction against the enforcement of the robocall restriction. *Id.* It is against this framing that the Supreme Court ultimately held that "the robocall restriction with the government-debt exception" is an unconstitutional content-based law. *Id.* at 2347; *id.* at 2356–57 (Sotomayor, J.); *id.* at 2363–67 (Gorsuch, J.). Thus, the robocall restriction is unconstitutional as long as it includes the government-debt exception. And Plaintiff's post hoc refocusing of the Supreme Court's decision ignores the claims that were before the Court—and the Court's actual constitutional holding.

B. Applying *AAPC*'s severability holding retrospectively would be inconsistent with Supreme Court precedent.

Having determined that the robocall restriction, inclusive of the government-debt exception, is unconstitutional, the Supreme Court looked to remedy the constitutional defect. The Supreme Court rejected the plaintiffs' proffered remedy to completely invalidate the robocall restriction and instead elected to sever the government-debt exception. *Id.* at 2353–54; *id.* at 2357 (Sotomayor, J.); *id.* at 2363 (Breyer, J.). In

the Court's view, "severing the government-debt exception fully addresse[d] th[e] First Amendment injury," and cured the unequal treatment by applying the robocall restriction to all callers. *Id.* at 2355. Because *AAPC* concerned a request for only prospective declaratory and injunctive relief, the Court had no occasion to address whether its severability holding applied retrospectively to all robocalls made while the government-debt exception was in effect.

CUNA agrees with Defendant (and the district court) that the Supreme Court's constitutional holding in *AAPC* bars enforcement of the TCPA's robocall restriction for calls made between 2015 and 2020, before the Supreme Court severed the government-debt exception. Although a judicial decision stating what a statute means is generally retroactive in its application, *see Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993), the act of judicial severance (that is, fixing a constitutional defect in a statute) is different than simply declaring what the law has always meant. Rather, when a court elects to sever a statutory provision, it is predicting how Congress would want the statute to operate going forward, as amended, in response to a finding that the statute is in part unconstitutional. In that way, severance is less about divining what the statute meant at its enactment and more akin to the act of legislating, which ordinarily applies only prospectively. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311

(1994) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively . . . .").

This is the teaching of *Grayned v. City of Rockford*, 408 U.S. 104 (1972). That case involved a municipal ordinance that banned picketing near schools. *Id.* at 107. But the ordinance contained a favorable exception for labor picketing. *Id.* After Grayned, who picketed in response to racial disparities at a local high school, was arrested and convicted under the ordinance, he challenged the ordinance's speech restriction on equal-treatment grounds. *Id.* at 106. The Supreme Court agreed with Grayned and held the ordinance was unconstitutional because it unequally favored labor picketing over other picketing. *Id.* Most relevant here, while on appeal, the City of Rockford amended the ordinance to legislatively strike the labor-picketing exception. *Id.* at 107 n.2. Despite this legislative cure to the equal-treatment problem in the ordinance, the Court discarded the prospective fix and firmly stated "we must consider the facial constitutionality of the ordinance in effect when appellant was arrested and convicted." *Id.* In other words, the Court held that courts should apply the law in effect at the time of the alleged violation with the favorable exception otherwise intact. The Court has since cited *Grayned* with approval in *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 n.24 (2017).

A similar result should apply here. As the Supreme Court did in *Grayned*, this Court must "consider the facial constitutionality of the [robocall restriction] in effect when" the subject robocalls were made. *See Grayned*, 408 U.S. at 107 n.2. For calls between 2015 and 2020, the Supreme Court has already held the robocall restriction is an unconstitutional content-based law. The Court should affirm the district court's enforcement of the constitutional equal-treatment mandate by treating all robocallers the same regardless of the content of the call.

CONCLUSION

CUNA respectfully asks the Court to AFFIRM the district court.

Dated: March 24, 2021

Respectfully submitted,

s/Michael H. Pryor

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Dated: March 24, 2021.

s/Michael H. Pryor
Michael H. Pryor

CERTIFICATE OF SERVICE

I certify that on March 24, 2021, I electronically filed Brief of Amicus Curiae Credit Union National Association, Inc. in Support Appellee with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: March 24, 2021.

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