

Barr v. American Association of Political Consultants

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140 S. Ct. 2335 (2020)

In *Barr v. American Association of Political Consultants*,¹ the U.S. Supreme Court affirmed the Fourth Circuit's decision to invalidate a 2015 amendment to the Telephone Consumer Protection Act (TCPA), which created an exception to the prohibition against robocalls for calls made to collect a debt owed to the federal government.² The Court affirmed that the government-debt exception to the restriction against robocalls was an unconstitutional content-based restriction on speech that failed strict scrutiny.³ The Court incorporated traditional severability principles to invalidate and sever the government-debt exception amendment of the TCPA.⁴

I. BACKGROUND

In response to several million consumer complaints submitted to the federal government, Congress enacted the Telephone Consumer Protection Act of 1991 to prohibit robocalls to cell and home phones.⁵ Congress justified its prohibition against robocalls as “the only effective means of protecting telephone consumers”⁶ from the nuisance and invasion of privacy caused by incessant phone calls from automated telemarketers.⁷ In 2015, an amendment to the TCPA created an exception to allow robocalls for the purpose of “collect[ing] a debt owed to or guaranteed by the United States.”⁸

Plaintiffs are the American Association of Political Consultants and other political organizations that engage in political telemarketing.⁹ Plaintiffs operate their organizations by making calls to citizens to “discuss candidates and issues, solicit donations, conduct polls, and get out the vote.”¹⁰ Plaintiffs claimed that the prohibition against robocalls to cell phones hindered their outreach; they sought a declaratory judgment in the lower courts against the U.S. Attorney General and the FCC, citing First Amendment violations.¹¹

1. *Barr v. Am. Ass'n. of Pol. Consultants*, 140 S. Ct. 2335 (2020).

2. *Id.* at 2343–44.

3. *Id.* at 2343–45.

4. *Id.* at 2352.

5. *Id.* at 2344.

6. 47 U.S.C. § 227 (2020).

7. *Barr*, 140 S. Ct. at 2344.

8. 47 U.S.C. § 227(b).

9. *Barr*, 140 S. Ct. at 2345.

10. *Id.*

11. *Id.*

The U.S. District Court for the Eastern District of North Carolina ruled that the government-debt exception to robocall restrictions was a content-based restriction, but that it could survive strict scrutiny because of a compelling government interest to collect debt.¹² The U.S. Court of Appeals for the Fourth Circuit vacated the district court and ruled that the government-debt exception was unconstitutional and could not survive strict scrutiny.¹³ Following traditional severability principles, the Fourth Circuit further ruled that the government-debt exception is severable from the underlying robocall restriction of the TCPA.¹⁴

Because the ruling invalidated a part of a federally enacted statute, the Government petitioned for writ of certiorari and plaintiffs supported the petition, believing the Court of Appeals did not provide sufficient relief and the court should have invalidated the entire robocall restriction.¹⁵

II. ANALYSIS

A. TCPA's Government-Debt Exception is an Unconstitutional Content-Based Restriction

The initial First Amendment question presented is whether the TCPA's robocall restriction, with the government-debt exception, is a content-based restriction.¹⁶ The Court held that it was.¹⁷ A law regulating speech is a content-based restriction if it "on its face draws distinctions based on the message the speaker conveys" and "singles out specific subject matter for differential treatment."¹⁸ The Court noted that § 227(b)(1)(A)(iii), the provision outlining the government-debt exception for robocalls, conditions the legality of robocalls on whether they are made to collect debts owed to the federal government and stated that such preference for the type of permissible robocalls was a clear example of a content-based restriction.¹⁹

The Government advanced three arguments that the government-debt exception of the TCPA was content-neutral, all of which the Court found unpersuasive.²⁰ First, the Government suggested that § 227(b)(1)(A)(iii) differentiated speech based on speakers, i.e., authorized debt collectors, not based on the content of the speech.²¹ The Court rejected this argument, citing that the text of the statute singles out robocalls "made solely to collect a debt owed to or guaranteed by the United States," not *all* robocalls made from authorized debt collectors.²² The Court additionally noted that even if the statute's distinction was based on the speaker, it does not "automatically

12. *Id.*

13. *Id.* at 2345.

14. *Id.*

15. *Barr*, 140 S. Ct. at 2346.

16. *See id.*

17. *Id.*

18. *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155 (2015)).

19. *Id.* at 2347.

20. *See id.* at 2346–47.

21. *Barr*, 140 S. Ct. at 2346–47.

22. *Id.* at 2347 (emphasis added).

render the distinction content neutral.”²³ Second, the Government argued that the legality of a robocall does not depend on the content of the speech, but instead on whether the caller engages in a particular economic activity.²⁴ The Court, again, was unpersuaded because the statute in this case focuses on whether the caller *speaks* about a particular topic.²⁵ Lastly, the Court rejected the Government’s claim that deeming the government-debt exception as an unconstitutional content-based restriction would lead to a slippery slope invalidating most forms of economic regulation.²⁶ The Court dismissed this concern stating that “the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.”²⁷ And the Court assured that the judiciary can distinguish between impermissible content based restrictions and ordinary regulations of commercial activity that impose only incidental burdens on speech.²⁸

The Court concluded that the government-debt exception was content-based and therefore subject to strict scrutiny review.²⁹ The Government itself conceded that it could not satisfy strict scrutiny because it could not fully justify the distinction between government debt collection speech and other modes of robocall speech.³⁰ The Court, therefore, held that the government-debt was an unconstitutional content-based restriction on speech.³¹

B. Severability

Next, the Court turned to the question of whether to strike down the entirety of the 1991 robocall restriction or to only sever the government-debt exception instead. The Court recognized that Congress’s competing interests in debt collection as well as consumer privacy can concurrently exist: “Congress’s addition of the government-debt exception in 2015 does not cause [the Court] to doubt the credibility of Congress’s continuing interest in protecting consumer privacy.”³² So the Court applied traditional principles of severability and only struck the unconstitutional 2015 amendment.³³

Where a federal statute contains an express severability or non-severability clause, the Court will adhere to the text of the clause.³⁴ Where Congress does not include such clauses, courts may often presume that an unconstitutional provision is severable from the remainder of the statute.³⁵ The Court’s preference for partial invalidation in its tendency to presume severability stems from its efforts to avoid “judicial policy making or de facto

23. *Id.* (quoting *Reed*, 576 U.S. at 170).

24. *Id.*

25. *Id.* at 2347.

26. *Id.*

27. *Barr*, 140 S. Ct. at 2347 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011)).

28. *Id.*

29. *Id.* (quoting *Reed*, 576 U.S. at 165).

30. *Id.*

31. *Id.* at 2347.

32. *Id.* at 2348.

33. *See Barr*, 140 S. Ct. at 2349.

34. *Id.* at 2349.

35. *Id.* at 2350.

judicial legislation in determining just how much of the remainder of a statute should be invalidated.”³⁶ In this case, however, the presumption of severability was unnecessary because the severability clause in the Communications Act covered the TCPA’s robocall restriction and its subsequent government-debt exception.³⁷

The Court also considered the equal protection principles implicated by the First Amendment violations—in this case, Congress favoring government-debt collection robocalls and discriminating against other robocalls.³⁸ The Court weighed the possible cures for this unequal treatment and considered either “extending the benefits or burdens to the exempted class” or “nullifying the benefits or burdens for all.”³⁹ The Court chose the latter and severed the government-debt exception to cure unequal treatment and left the longstanding general robocall restriction in place.⁴⁰

III. CONCLUSION

The Court upheld the Fourth Circuit’s judgment that the government-debt exception to the TCPA’s restrictions against robocalls was unconstitutional and cured the violation by invalidating and severing it from the remainder of the statute.⁴¹

36. *Id.* at 2352.

37. *Id.*

38. *Barr*, 140 S. Ct. at 2354.

39. *Id.*

40. *Id.* at 2355.

41. *Id.* at 2356.