



SECOND CIRCUIT REVIEW

Expert Analysis

First Amendment Heightened Scrutiny Analysis

In *Cornelio v. Connecticut*, — F.4th —, 2022 WL 1217394 (2d Cir. April 26, 2022), the U.S. Court of Appeals for the Second Circuit considered a First Amendment challenge to a state statute requiring individuals convicted of certain criminal sexual offenses and offenses against minors to disclose all “internet communication identifiers” to law enforcement (the Disclosure Requirement). See Conn. Gen. Stat. §54-250 et seq.

In an opinion authored by Circuit Judge Steven Menashi, the unanimous panel, which included Circuit Judge Dennis Jacobs and District Judge John P. Cronan, reversed the district court’s dismissal of the case and found that the plaintiff had stated a plausi-



By
Martin
Flumenbaum



And
Brad S.
Karp

ble First Amendment claim. The court refused to credit the government’s assertions that the Disclosure Requirement advanced important governmental interests, such as deterrence, without any supporting record evidence. The court emphasized that it is the government’s burden to demonstrate that a challenged law furthers important governmental interests, that it is narrowly tailored, and warned district courts not to supply a justification that the government fails to provide.

District Court Proceedings In ‘Cornelio’

Pursuant to Conn. Gen. Stat. §54-251(a) or the Disclosure

Requirement, specific offenders must provide all of their Internet communication identifiers, including all electronic mail addresses, instant message addresses, and other similar Internet communication identifiers, to law enforcement on an ongoing basis. *Cornelio*, 2022 WL 1217394 at *1. Failure to comply with the Disclosure Requirement constitutes a felony. Conn. Gen. Stat. §54-253(e). Plaintiff James P. Cornelio, a Connecticut resident and convicted sex offender, was arrested for breaching the Disclosure Requirement by failing to provide one of his email addresses to state authorities. Id. at *7-*8. Though the criminal case against Cornelio was dismissed shortly after his arrest, he brought an action in federal district court challenging the Disclosure Requirement on First Amendment grounds, contending that it violated his right to free speech. Id. at *8. Cornelio sought

MARTIN FLUMENBAUM and BRAD S. KARP are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison, specializing in complex commercial and white-collar defense litigation. Brad is the Chairman of Paul, Weiss. SHERRY MARIA TANIOUS, a litigation associate at the firm, assisted in the preparation of this column.

injunctive relief to prevent the state from further enforcing the Disclosure Requirement against him. Id.

The district court dismissed the case for failure to state a claim. *Cornelio v. Connecticut*, No. 19-CV-01240, 2020 WL 7043268 (D. Conn. Nov. 30, 2020), as amended (Dec. 9, 2020). The court held that, even though the Disclosure Requirement burdened registrants' right to engage in anonymous speech online and thus triggered heightened judicial scrutiny, the statute nonetheless passed constitutional muster. Id. at *1, *10. The district court first recognized the state's important interest in deterring convicted sex offenders from using the Internet to communicate with potential or actual sex abuse victims or distribute prohibited sexual images. Id. at *9. The Disclosure Requirement, the court reasoned, served this governmental interest in facilitating the creation of a database of online identifiers that law enforcement authorities could use to determine the identity of individuals engaged in unlawful conduct, which would deter offenders from committing crimes. Id. The court also held that the Disclosure Requirement was narrowly tailored since it applied only to Internet identifiers used for communicating with

others, and because registrants' identifiers were disclosed only to law enforcement, rather than the general public. Id. at *10. The court thus concluded that Cornelio had failed to plausibly state a First Amendment claim.

The Second Circuit's Decision

On appeal, the Second Circuit found that the Disclosure Provision plausibly failed inter-

The court emphasized that it is the government's burden to demonstrate that a challenged law furthers important governmental interests, that it is narrowly tailored, and warned district courts not to supply a justification that the government fails to provide.

mediate scrutiny and therefore Cornelio had plausibly stated a First Amendment claim. *Cornelio*, 2022 WL 1217394 at *5. (The Second Circuit affirmed the dismissal of Cornelio's Ex Post Facto clause and malicious prosecution claims.)

As an initial matter, the Second Circuit agreed with the district court that the Disclosure Provision burdened protected speech and was therefore subject to heightened scrutiny. But unlike the district court—which pointed only to the Disclosure Require-

ment's limitation on registrants' rights to anonymous speech—the Second Circuit held that the requirement also burdened a registrant's ability and willingness to speak on the Internet and potentially "chilled" a registrant's online speech by imposing criminal penalties for violations. Id. at *4-5 The Second Circuit declined to decide whether strict or intermediate scrutiny properly applied because it held that, even if intermediate scrutiny applied, Cornelio had stated a plausible claim. Id.

Assuming that intermediate scrutiny applied, the Second Circuit considered whether the government had discharged its burden to show that the challenged law "advances important governmental interests unrelated to the suppression of free speech," and is "narrowly tailored" to serve the relevant interest. Id. at *5-6. The court held that the government had failed to discharge its burden. Id. at *7. The government had argued that the Disclosure Requirement advanced important government interests in "deterring registrants from using the Internet (1) to recruit, groom, entice, or otherwise engage in communications with potential or actual sex abuse victims and (2) to engage in the distribution of or

exchange of prohibited sexual images.” Id. (internal quotation marks omitted). But the court held that “nothing in the record demonstrates that the [Disclosure Requirement] advance[d] these interests in a direct and material way … or provide[d] more than ineffective or remote support for these objectives.” Id. (internal quotation marks omitted). The court specifically pointed to Supreme Court precedent and decisions in other circuits questioning whether registration requirements have any deterrent effect. Id. The Second Circuit also held that the Disclosure Requirement was not narrowly tailored. It reasoned that “[m]any platforms that allow communications between users do not present a vehicle by which a sex offender can communicate with minors or exchange prohibited sexual materials” and that the Disclosure Requirement “applies to all persons subject to sex offender registration law,” even those who never engaged in the illicit activity the government seeks to deter. Id. at *9.

The Second Circuit concluded its analysis of the First Amendment claim by addressing the district court’s approach. It observed that “[t]he district court purported to apply intermediate scrutiny, but its analysis more

closely resembled rational basis review.” Id. at 11. It noted that the government did not argue before the district court that the Disclosure Requirement advanced any governmental interest or was narrowly tailored. Instead, the district court “supplied the reasons for why it thought the disclosure requirement survived intermediate scrutiny.” Id. The Second Circuit warned against this approach, reiterating that “the government cannot be excused from the obligation to identify evidence that supports its restriction of a constitutional right.” Id.

Turning to whether the Disclosure Requirement was narrowly tailored, the Second Circuit found that the government failed to show that the disclosure requirement did not burden substantially more speech than necessary to further its deterrence interests. Id. at *8. The Second Circuit held that the “government cannot normally justify a speech restriction by reference to its interest in deterring crime.” Id.

Conclusion

In *Cornelio v. Connecticut*, the Second Circuit unanimously held that the plaintiff had plausibly stated a claim that the Disclosure Requirement violates the First Amendment. The Second Circuit

reached that conclusion in part on the basis that the government had failed to discharge its burden of producing evidence showing that the Disclosure Requirement advanced an important governmental interest and was narrowly tailored to serve that interest. The Second Circuit’s conclusions echo a concurrence by Judge Menashi in *United States v. Perez*, 6 F.4th 448 (2d Cir. 2021), in which he emphasized the need for the government to produce evidence in support of the relevant governmental interests. It will be interesting to see whether other Second Circuit panels apply a similarly stringent approach to intermediate scrutiny.