ADDING COLOR: AN ARGUMENT FOR THE COLORABLE SHOWING APPROACH TO HYBRID RIGHTS CLAIMS UNDER *EMPLOYMENT DIVISION V. SMITH*

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INTRODUCTION

Free exercise jurisprudence has been accompanied by ambiguity ever since the Supreme Court's decision in *Employment Division v. Smith*.[1] *Smith*'s central holding was clear enough: the government need only have a legitimate interest to justify a neutral, generally applicable law that incidentally burdens the free exercise of religion.[2] Instead, it was the Court's pronouncement of an exception to this general rule, the "hybrid rights exception," that created the uncertainty. If the same law burdened free exercise rights, as well as some other constitutional right, then the government must have a compelling reason to justify the law, and the law must be the least restrictive means available.[3] Unfortunately, the Court did not explain how this exception was to be used or what standard the additional constitutional violation must meet for the exception to apply.[4]

Left without guidance, the lower appellate and district courts have adopted inconsistent approaches to dealing with the hybrid rights exception.[5] Some have dismissed it outright as dicta, while others have decided that only when a free exercise claim is combined with another constitutional claim capable of winning on its own will

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1. 494 U.S. 872 (1990).

2. *See id.* at 878-79.

3. *See id.* at 881-83.

4. William L. Esser IV, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 220 (1998).

5. Jonathan B. Hensley, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 120 (2000).

the hybrid rights exception apply.[6] Still other courts have decided the exception will apply when a plaintiff makes a "colorable" showing that another constitutional right has been violated in addition to the violation of free exercise rights.[7] This last approach, the "colorable showing" approach, does not require a plaintiff to succeed on the other constitutional claim, but rather to show a "fair probability, or a likelihood, of success" on the merits of the companion claim.[8]

This article contends the colorable showing approach to the hybrid rights exception of *Smith* is the most appropriate approach adopted by the lower courts. It is the only approach that both acknowledges that the Supreme Court did indeed carve out an exception for hybrid rights and clears up the ambiguity surrounding its application. Part I introduces the hybrid rights exception, its controversy, and the difficulties that surround its application. Part II surveys the various approaches the courts have used to try to make sense of the doctrine. Part III describes why the colorable showing approach of the Ninth and Tenth Circuits is the most appropriate. Finally, the discussion concludes by determining that the colorable showing approach is needed to clear up the ambiguity surrounding the hybrid rights exception.

I. *SMITH* AND THE HYBRID RIGHTS EXCEPTION

Since 1963, the free exercise doctrine was largely controlled by the Supreme Court's decision in *Sherbert v. Verner*.[9] Under *Sherbert*, a law infringing upon an individual's right to the free exercise of religion had to be justified by a compelling governmental interest.[10] If the law was not so justified, the government could not apply it to an

6. *Compare* Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (declining to apply a higher standard to hybrid rights), *and* Leebaert v. Harrington, 332 F.3d 134, 143-44 (2d Cir. 2003) (agreeing with the Sixth Circuit in declining to apply a higher standard to hybrid rights), *with* Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 538-39 (1st Cir. 1995) (holding that the hybrid rights exception will only apply if a free exercise claim is joined with another independently viable claim).

7. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1293-95 (10th Cir. 2004); Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 702 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (9th Cir. 2000). Although reversed for lack of ripeness, *Thomas*'s requirement of a colorable showing has been carried on in subsequent Ninth Circuit cases. *See* discussion *infra* notes 125-44 and accompanying text.

8. *Axson-Flynn*, 356 F.3d at 1295 (internal quotations omitted).

9. 374 U.S. 398 (1963).

10. *Id.* at 403.

individual claiming a burden on the free exercise of religion.[11] This understanding, however, proved to be untenable. With the ever-increasing regulation of society, and a notion of religion that included any "intensely personal convictions,"[12] it became apparent that requiring a compelling reason not to exempt an individual because of religious beliefs would "permit every citizen to become a law unto himself."[13] In 1990, the Supreme Court set out to clarify the free exercise doctrine in *Smith*.[14]

The respondents in *Smith*, two members of the Native American Church, were fired from their jobs with a private drug rehabilitation clinic for ingesting peyote, a crime under Oregon state law.[15] The respondents were subsequently denied unemployment benefits because their discharge was "for work-related 'misconduct,'" i.e., breaking the law.[16] When the case reached the Oregon Supreme Court, the court held that the prohibition against sacramental use of peyote was invalid under the Free Exercise Clause, and thus, the state could not deny the respondents unemployment benefits.[17] The United States Supreme Court, however, reversed the Oregon Supreme Court and held that the prohibition did not violate the Free Exercise Clause.[18] In so doing, the Court held that the First Amendment does not require the government to have a compelling reason to deny an individual an exemption from an otherwise "valid

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11. *Id.*

12. Welsh v. United States, 398 U.S. 333, 339 (1970) (internal quotations omitted). The Court in *Welsh* granted the petitioner a conscientious objector exemption from military service because of his religious belief that war in any form was wrong. *Id.* at 343-44. Interestingly, the petitioner himself initially characterized his beliefs as nonreligious, stating that they were "formed by reading in the fields of history and sociology." *Id.* at 341 (internal quotations omitted). The act in question denied exemptions for those whose beliefs were "essentially political, sociological, or philosophical views or a merely personal moral code." *Id.* at 336 (internal quotations omitted). Nevertheless, the Court held that petitioner's beliefs were within the "broad scope of the word 'religious' as used in [the act]." *Id.* at 341. *Welsh*, and the earlier case of *United States v. Seeger*, 380 U.S. 163 (1965), are considered to be the turning point toward a more personalized notion of religion in Supreme Court jurisprudence. *See* Steven D. Collier, *Beyond* Seeger/Welsh*: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973 (1982).

13. Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (citing Reynolds v. United States, 98 U.S. 145, 167 (1878)).

14. *Id.* at 876-77.

15. *Id.* at 874. Peyote is a hallucinogenic drug derived from a cactus plant native to the southwestern United States and Mexico.

16. *Id.*

17. *Id.* at 876.

18. *Id.* at 890.

and neutral law of general applicability" that incidentally prohibits his exercise of religion.[19] To require the compelling interest test in today's "cosmopolitan nation made up of people of almost every conceivable religious preference,"[20] the Court said, would be "courting anarchy."[21] The Court left the compelling interest test untouched for laws regulating religious belief or actions "as such."[22]

Although the move was a surprise, the Court merely considered it an explication of free exercise doctrine.[23] Clarifying the significance of prior precedent, it stated:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate . . . . Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[24]

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19. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.") (citing *Smith*, 494 U.S. 872). See Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627 (2003), for a thorough article critiquing attempts at gaining exceptions from laws that incidentally burden religious practices by proving them non-neutral.

20. *Smith*, 494 U.S. at 888 (citing Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

21. *Id.*

22. *Id.* at 877.

23. *See id.* at 892 ("The Court today extracts from our long history of free exercise precedents the single categorical rule that 'if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.'") (O'Connor, J., concurring) (quoting majority opinion at 878).

24. *Id.* at 878-79 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)). Although a meager few have held that the rule of *Smith* is limited to neutral *criminal* laws of general applicability, see Esser, *supra* note 4, at 216, Justice Scalia's concurrence in *City of Boerne v. Flores*, 521 U.S. 507, 537-44 (1997) (Scalia, J., concurring in part), and the Court's reiteration of the *Smith* rule in *Lukumi*, 508 U.S. at 531, where both cases deal with civil regulations, demonstrate that *Smith* is not limited to the criminal context only. *See* Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 252 (1993) ("Neither the substantive nor the institutional sources for *Smith* can be limited to the criminal law, however, and the Court has recently and unsurprisingly announced that no one should attempt to confine it in that way.") (citing *Lukumi*, 508 U.S. 520).

This did not, however, explain the times when the Court required the government to have a compelling reason for denying an exemption, such as in *Sherbert* and *Wisconsin v. Yoder*.[25] In *Sherbert*, the Court required the government to have a compelling reason to deny an exemption to a Saturday Sabbath observer from the requirement that she be available for work on Saturdays in order to receive unemployment benefits.[26] Finding the government did not have such a reason, the Court granted the exemption.[27] Similarly, in *Yoder*, the Court granted an exemption to Amish parents who refused to send their children to public schools beyond the eighth grade because they believed doing so would endanger their child's salvation and risk censure by their church community.[28]

The Court accounted for these anomalies in free exercise jurisprudence by explaining that precedent provided for two exceptions to the rule in *Smith*.[29] The first exception is for cases involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."[30] This exception accounted for *Yoder* and other similar cases, and has come to be known as the hybrid rights exception.[31] If a future case fit the hybrid mold as *Yoder* did, the Court would likewise apply the compelling interest test to its claims, although the Court did not expressly say this.[32] The second exception accounted for cases such as *Sherbert* and applies where the

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25. 406 U.S. 205 (1972).

26. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

27. *Id.* at 408-09.

28. *Yoder*, 406 U.S. at 205.

29. *See* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 138-39 (2002) (explaining the two exceptions to the *Smith* rule).

30. Employment Div. v. Smith, 494 U.S. 872, 881 (1990).

31. *See id.* at 882 ("The present case does not present such a hybrid situation . . . ."); Intercommunity Ctr. for Justice & Peace v. INS, 910 F.2d 42, 44 (2d Cir. 1990); Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 195-97 (3d Cir. 1990); Cornerstone Bible Church v. Hastings, 948 F.2d 464, 473 (8th Cir. 1991) ("Our reversal of the summary judgment orders breathes life back into the Church's 'hybrid rights' claim . . . ."); Am. Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1408 (9th Cir. 1991); United States v. Hardman, No. 99-4210, 2001 U.S. App. LEXIS 17702, at *30 (10th Cir. Aug. 8, 2001) ("[T]he *Smith* majority allowed for two exceptions to the general *Smith* rule. The first exception, the so-called 'hybrid-rights exception,' preserved the Court's holding in *Yoder* . . . ."), *aff'd in part en banc*, 297 F.3d 1116 (2002); *see also* Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the Oregon* Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 573 (2003).

32. *Smith*, 494 U.S. at 881-82.

law has a "mechanism for individualized exemptions."[33] As the Court explained, "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason."[34]

The *Smith* decision, particularly its announcement of the hybrid rights exception, brought on a storm of criticism from the legal community, including those who defended the ruling.[35] Many commentators criticized *Smith*'s use of history, precedent, and theory,[36] and even its supporters have said that "its use of precedent borders on fiction,"[37] and that the rule is "intellectually incoherent."[38] Some questioned the Court's motive behind recognizing hybrid rights, believing that they were "created for the sole purpose of distinguishing *Yoder*."[39] Still others doubted whether *Smith* really established an exception for hybrid rights,[40] one going so far as to emphatically state that "there is no such thing as a 'hybrid right.'"[41]

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33. *Id.* at 884 (internal quotations omitted).

34. *Id.* (internal quotations omitted); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993) ("[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'") (quoting *Smith*, 494 U.S. at 884).

35. William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

36. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

37. Marshall, *supra* note 35, at 309 ("The *Smith* opinion itself, however, cannot be readily defended. The decision, as written, is neither persuasive nor well-crafted. It exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction.").

38. Brownstein, *supra* note 29, at 188.

39. McConnell, *supra* note 36, at 1121; *see also* Roald Mykkeltvedt, Employment Division v. Smith*: Creating Anxiety by Relieving Tension*, 58 TENN. L. REV. 603, 623 (1991) (stating that Justice Scalia invented the hybrid rights exception); Brownstein, *supra* note 29, at 187 ("[T]he *Smith* Court's exception for hybrid rights quite obviously served a specific function. It allowed the Court to avoid overruling *Yoder*, a long accepted precedent protecting free exercise rights against a neutral law of general applicability.") (footnote omitted).

40. *See* Carol M. Kaplan, *The Devil in the Details: Neutral, Generally Applicable Laws and Exceptions From* Smith, 75 N.Y.U. L. REV 1045, 1047 (2000) ("At the same time, *Smith* offers no clear indication of whether its reference to precedents that it describes as 'hybrid situations' establishes an additional exception to *Smith*.") (internal footnote omitted).

41. Eric J. Neal, *The Ninth Circuit's "Hybrid Rights" Error: Three Losers Do Not Make a Winner in* Thomas v. Anchorage Equal Rights Commission, 24 SEATTLE U. L. REV. 169, 186 (2000).

Perhaps the most damaging criticism came from Justice Souter's concurrence in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[42] the next major free exercise case to come to the Court after *Smith*, where he described the hybrid rights exception as "ultimately untenable,"[43] and advocated for a reexamination of the *Smith* rule.[44]

Following Justice Souter's lead, the Second and Sixth Circuits declared that *Smith*'s language regarding hybrid rights is dicta and when faced with a hybrid claim, they will not apply a higher standard of scrutiny than the rational basis test, until the Supreme Court directs otherwise.[45] In declining to adopt a higher standard, the Sixth Circuit stated:

> We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the free [sic] Exercise Clause if it did not implicate other constitutional rights. . . . [T]he *Smith* court did not explain how the standards under the Free Exercise Clause would change depending on whether other constitutional rights are implicated . . . . Such an outcome is completely illogical; therefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause.[46]

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42. 508 U.S. 520 (1993).

43. *Id.* at 567 ("And the distinction *Smith* draws strikes me as ultimately untenable.") (Souter, J., concurring in part). In his concurrence, Justice Souter advocated for the reexamination of *Smith*: "I have doubts about whether the *Smith* rule merits adherence. I write separately . . . to express my view that, in a case presenting the issue, the Court should reexamine the rule *Smith* declared." *Id.* at 559. Ironically, the Court had its opportunity in *City of Boerne v. Flores*, 521 U.S. 507 (1997), a case deciding the constitutionality of the Religious Freedom Restoration Act, which was a congressional response to the *Smith* decision. The Court, however, did not reexamine *Smith*; consequently, Justice Souter dissented. *Id.* at 565 (Souter, J., dissenting).

44. *Id.* at 559.

45. *See, e.g.*, Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (declining to apply a higher standard to hybrid rights), Leebaert v. Harrington, 332 F.3d 134, 143-44 (2d Cir. 2003) (agreeing with the Sixth Circuit in declining to apply a higher standard to hybrid rights).

46. *Kissinger*, 5 F.3d at 180 (internal citations omitted).

After extensively citing the Sixth Circuit, the Second Circuit followed the same approach.[47] These two circuits are alone in refusing to recognize hybrid rights. However, the Eleventh Circuit might do so if it expands on the decision of one of its district courts.[48]

Nevertheless, hybrid rights exist. The Court has not overruled *Smith* and there is no indication it intends to do so.[49] Courts in all but the Second, Sixth, Eleventh, and Federal Circuits acknowledge *Smith* indeed includes an exception for hybrid rights that mandates a higher level of scrutiny.[50] The United States Tax Court and the National Labor Relations Board have likewise recognized hybrid rights.[51]

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47. *Leebaert*, 332 F.3d at 144.

48. *See* Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1288 n.12 (S.D. Fla. 1999) (calling *Smith*'s announcement of hybrid rights dicta).

49. *See supra* note 43.

50. *See* Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d, 525, 538-39 (1st Cir. 1995) (holding that the hybrid rights exception will only apply if a free exercise claim is joined with another independently viable claim); Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 195-97 (3d Cir. 1990) (stating that the state's regulation will have to pass the compelling interest test if the plaintiffs can present evidence of their right to freely associate on remand); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 165 n.26 (3d Cir. 2002) (recognizing that strict scrutiny applies to hybrid rights, but that the plaintiffs had not asserted such a right); Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649, 663 (E.D.N.C. 1999) ("Because this court concludes that plaintiffs' claims do fall within the hybrid-rights exception . . . the defendants' uniform policy should therefore be subjected to strict scrutiny . . . ."); Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681, 706 (N.D. Tex. 2000) (adopting the reasoning of the First, Sixth, Ninth, and Tenth Circuits in applying strict scrutiny only to hybrid rights claims where the companion claim is more than implicated); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 765 (7th Cir. 2003) ("Appellants have identified no constitutionally protected interest upon which [the city ordinance] infringes, as they must in order to establish a hybrid rights claim *requiring heightened scrutiny*.") (emphasis added), *cert denied*, 541 U.S. 1096 (2004); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991) (directing the lower court to reconsider plaintiff's hybrid rights claim, because their "reversal of the summary judgment orders breathes life back into the Church's 'hybrid rights' claim"); Boone v. Boozman, 217 F. Supp. 2d 938, 953 (E.D. Ark. 2002) ("In certain cases, however, which have come to be known as 'hybrid rights' cases, the Court may apply strict scrutiny to neutral laws of general applicability . . . ."); Am. Family Ass'n v. City of San Francisco, 277 F.3d 1114, 1124 (9th Cir. 2002) (explaining that a hybrid claim of free speech with a colorable companion claim will merit strict scrutiny), *cert. denied*, 537 U.S. 886 (2002); Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 699-700 (10th Cir. 1998) (recognizing the hybrid rights exception, but declining to apply the compelling interest test to the plaintiffs' hybrid claim because they did not show a colorable infringement of the companion claim).

51. Hawkins v. Commissioner, 85 T.C.M. (CCH) 1530, 1532 n.3 (2003) (applying compelling interest/strict scrutiny as mandated by the Religious Freedom Restoration Act (RFRA), yet noting that petitioner's hybrid rights claim would require the same standard); Ukiah Adventist Hosp., 332 N.L.R.B. 602, 612-13 (2000) (recognizing the hybrid rights exception, but declining to address the issue as the employer's claims survived the "compelling state interest/strict scrutiny test" as mandated by the RFRA).

Those courts that recognize hybrid rights also recognize that strict scrutiny applies.[52] Although commentators dislike the notion of hybrid rights, many agree the Court intended that the higher standard of the compelling interest test should be applied.[53] Yet the most persuasive argument for heightened scrutiny is in *Smith* itself. As mentioned, hybrid rights were used by the *Smith* Court to distinguish certain cases that had merited heightened scrutiny, especially in light of the Court's pronouncement that free exercise claims against neutral and generally applicable laws need only be analyzed under a type of rational basis test.[54] In *Smith*, the Court refused to apply the compelling interest test and applied a much less strict standard, only *after* noting that the facts of *Smith* did "not present such a hybrid situation."[55]

No one will argue that the hybrid rights exception is straightforward,[56] or that the Court's language surrounding the exception is unambiguous.[57] The Court has offered little guidance for others to follow.[58] Plaintiffs' attempts at exerting hybrid rights have

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52. *See, e.g.*, *Swanson*, 135 F.3d at 699 ("This more-than-areasonable-relationship [sic] requirement [of *Yoder*], it could be argued, is similar to the compelling-interest test set out in *Sherbert*.") (internal citation omitted); *see also* cases cited *supra* note 50 (illustrating the application of the compelling state interest/strict scrutiny test).

53. *See, e.g.*, Bertrand Fry, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833, 841 (1993) ("In the end, although Justice Scalia does not explicitly lay out the test that courts are to use in hybrid situation cases, he undoubtedly intends that the compelling interest test be used."); Hensley, *supra* note 5, at 119 ("[I]f the burden on free exercise rights is coupled with a burden on some other right, this combination may trigger strict scrutiny of the law in question."); Esser, *supra* note 4, at 214 (agreeing with the view that strict scrutiny is the appropriate standard for hybrid rights).

54. Employment Div. v. Smith, 494 U.S. 872, 881 n.1 (1990) ("[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment.") (quoting Wisconsin v. Yoder, 406 U.S. 205, 233 (1972)).

55. *Id.* at 882.

56. Even those courts that apply hybrid rights admit its difficulties. *See Swanson*, 135 F.3d at 699 ("It is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith*.").

57. *See* Kaplan, *supra* note 40, at 1046-47; Esser, *supra* note 4, at 214.

58. *See* Esser, *supra* note 4, at 220 ("Unfortunately, since *Smith* itself, the Supreme Court has not given any further explanation or guidance regarding hybrid claims.").

been largely unsuccessful.[59] In the vast majority of cases, instead of recognizing the hybrid claim as a complete claim on its own account, the courts examine each component claim separately, so the free exercise claim rises or falls with the success of the companion claim.[60] Moreover, courts often apply strict scrutiny to a hybrid claim only when the companion claim requires it, making the hybrid rights claim meaningless.[61] Even so, these failures are no reason to ignore the hybrid rights exception. The *Sherbert-Yoder* line of cases was never overruled; these cases were merely distinguished,[62] and the hybrid rights "language of *Smith* remains."[63] In 1997, the Court reiterated the hybrid rights language in *City of Boerne v. Flores*,[64] stating:

> The only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* Court noted, were cases in which other constitutional protections were at stake. In *Wisconsin v. Yoder*, for example, we invalidated Wisconsin's mandatory school-attendance law as applied to Amish parents who refused on religious grounds to send their children to school. That case implicated not only the right to free exercise of religion but also the right of parents to control their children's education.[65]

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59. *See* Aden & Strang, *supra* note 31, at 574 ("The authors survey the doctrine's course of treatment in the courts and legal commentaries and conclude that hybrid rights claims have overwhelmingly failed to succeed.").

60. William Esser argued that:

> Analysis of hybrid claims in the lower courts leads to the unmistakable conclusion that the hybrid "calculus" or logical interpretation (i.e., two loser constitutional claims = one winner constitutional claim) simply is not being applied. Instead, these cases are being decided based solely upon the strength or weakness of the "other" constitutional provision without reference to the Free Exercise Clause. This explains two general principles which apply to virtually every hybrid case. First, when a court allows a hybrid to "win" by applying strict scrutiny to the claim, it never does so as the primary basis for the decision. Either the case had already been decided on some other basis (such as free speech), or strict scrutiny was mandated by the state constitution anyway. Second, the "success" of hybrid claims is directly tied to the constitutional strength of the right with which free exercise is combined.

Esser, *supra* note 4, at 242-43 (internal footnotes omitted).

61. *Id.*

62. *See* Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990).

63. Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649, 660-61 (E.D.N.C. 1999).

64. 521 U.S. 507 (1997).

65. *Id.* at 513-14 (internal citations omitted).

Just two days before, the Court warned:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[66]

This failure of the hybrid rights claim is due, in large part, to the lack of a consistent, workable approach to hybrid rights among the appellate and district courts. These courts have not produced a consensus on how to approach hybrid rights.[67] The Ninth and Tenth Circuits, however, are developing an approach that brings clarity to the doctrine.[68] They require the plaintiff to make a "colorable" showing of infringement of the companion right for a free exercise claim to offer protection from a neutral law of general applicability. This interpretation is most in keeping with the hybrid rights theory laid out in *Smith*[69] and, if it becomes widely adopted by the lower courts, it will make hybrid rights a stronger aid to those seeking to protect their religious liberties.

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66. Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)). *Agostini* was decided June 23, 1997, and *Boerne* was decided June 25 of the same year.

67. *See* Hensley, *supra* note 5, at 138 ("The various attempts to deal with the hybrid-rights doctrine in the lower federal courts have not produced a consensus as to how to interpret the doctrine. Only a few of these decisions have earnestly tried to make sense of the vague dicta in *Smith* about hybrid situations, but all have left significant questions unresolved.").

68. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1293-95 (10th Cir. 2004); Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 702 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (9th Cir. 2000). Although reversed for lack of ripeness, *Thomas*'s requirement of a colorable showing has been carried on in subsequent Ninth Circuit cases. *See* discussion *infra* notes 125-44 and accompanying text.

69. *See* Aden & Strang, *supra* note 31, at 608 ("[T]he colorable claim standard alleviates much of the alleged difficulty associated with hybrid claims."); Timothy J. Santoli, *A Decade After* Employment Division v. Smith*: Examining How Courts Are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649, 669-70 (2001) ("The colorable claim theory is perhaps the best interpretation of the hybrid-rights exception because it accords with *Smith* and other free exercise cases that Justice Scalia used to formulate the hybrid-rights exception."); *cf.* Brownstein, *supra* note 29, at 191 (claiming that a "coherent" understanding of hybrid rights is that only a claim worthy of intermediate scrutiny would suffice as a colorable companion claim).

II. THE APPLICATION OF THE HYBRID RIGHTS DOCTRINE IN THE LOWER COURTS

A. *Ineffective Approaches*

The circuit courts have developed various methods of dealing with hybrid rights claims. As stated above, the Second and Sixth Circuits called the hybrid rights language in *Smith* dicta.[70] They currently refuse to apply a higher standard of scrutiny to a hybrid claim than required by the individual component claims.[71] The Eleventh Circuit has not decided a case involving a hybrid rights claim at the appellate level. One of its district courts faced such a claim but rejected it, calling *Smith*'s hybrid rights language dicta.[72] The Eighth Circuit has not had sufficient cases to develop its own doctrine of how to approach hybrid rights, although it did direct a district court to reconsider a plaintiff's hybrid rights claim on remand, suggesting the claim should receive strict scrutiny.[73]

No appellate decisions in the Fourth and Fifth Circuits address hybrid rights, though a string of cases in their respective district courts found in favor of the plaintiffs' hybrid claims.[74] Interestingly, all of the cases in these circuits involved challenges against school dress codes. In the Fourth Circuit case of *Hicks v. Halifax Board of*

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70. *See supra* note 45 and accompanying text.

71. *Id.*; *see also* Prater v. City of Burnside, 289 F.3d 417, 430 (6th Cir. 2002) ("[T]his court has rejected the assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid rights claims are subject to strict scrutiny.") (internal quotations omitted).

72. Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1288 n.12 (S.D. Fla. 1999).

73. *See* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991) (directing the lower court to reconsider plaintiff's hybrid rights claim, because the court's "reversal of the summary judgment orders breathes life back into the Church's 'hybrid rights' claim," thus implying that the hybrid rights claim would receive strict scrutiny). One of the Eighth Circuit's district courts has directly acknowledged that hybrid rights receive strict scrutiny. *See Boone v. Boozman*, 217 F. Supp. 2d 953 (E.D. Ark. 2002) ("In certain cases, however, which have come to be known as 'hybrid rights' cases, the Court may apply strict scrutiny to neutral laws of general applicability . . . .").

74. In *Society of Separationists, Inc. v. Herman*, the Fifth Circuit seemed to address hybrid rights when it recognized that "*Smith* specifically excepts religion-plus-speech cases from the sweep of its holding." Soc'y of Separationists, Inc. v. Herman, 939 F.2d 1207, 1216 (5th Cir. 1991). Nevertheless, in an en banc rehearing, the Fifth Circuit withdrew the opinion on the ground that the plaintiffs lacked standing. 959 F.2d 1283, 1288 (5th Cir. 1992) (en banc).

Education,[75] the plaintiffs sought an exemption from the school's mandatory dress code because they said it was against their religion to conform in such a manner and infringed on their right to direct the upbringing of their children.[76] The plaintiffs saw the school uniform as characteristic of the Anti-Christ.[77] In denying the defendants' motion for summary judgment, the court found that there was a genuine issue of material fact because the "court conclude[d] that [the] plaintiffs' claims [did] fall within the hybrid-rights exception outlined in *Smith* and illustrated by *Yoder*, [and] the defendants' uniform policy should therefore be subjected to strict scrutiny."[78] The approach used by the court was to examine if the companion claim constituted "a genuine claim of infringement of a constitutional interest identified in *Smith*'s hybrid-rights passage," and whether there was "a record that provide[d] evidence supporting that claim."[79]

In *Alabama & Coushatta Tribes v. Trustees of the Big Sandy Independent School District*,[80] the district court granted a preliminary injunction barring the school district from prohibiting the Native American plaintiffs from wearing their hair long.[81] The plaintiffs alleged the prohibition violated their free exercise rights, as well as other First and Fourteenth Amendment rights.[82] The court recognized this hybrid claim, and "[b]ecause [the] plaintiffs [] stated a 'hybrid claim,' the dress code regulation [was] subjected to the highest level of scrutiny."[83] It appears the court allowed this allegation alone to create a hybrid rights claim, because it applied heightened scrutiny before addressing the plaintiffs other claims.[84] Even so, the court found the regulations violated the plaintiffs' free speech rights and their rights to direct their children's upbringing in addition to their free exercise rights.[85]

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75. 93 F. Supp. 2d 649 (E.D.N.C. 1999).
76. *Id.* at 652.
77. *Id.* at 653-54.
78. *Id.* at 663.
79. *Id.* at 662.
80. 817 F. Supp. 1319 (E.D. Tex. 1993).
81. *Id.* at 1336.
82. *Id.* at 1323.
83. *Id.*
84. *Id.* at 1332.
85. *Id.* at 1334.

Similarly, in the Fifth Circuit case of *Chalifoux v. New Caney Independent School District*,[86] the district court struck down a school district's prohibition on the wearing of rosaries, which the school district considered gang apparel.[87] In addition to finding the prohibition void for vagueness[88] and a violation of plaintiffs' free speech rights,[89] the court held it violated the plaintiffs' hybrid right of free exercise and free speech.[90] The court did not discuss its approach to hybrid rights, although it found a hybrid rights claim after finding a successful free speech claim.[91]

Another Fifth Circuit district court, however, found for the defendant school district in *Littlefield v. Forney Independent School District*.[92] The plaintiffs did not present the kind of free speech or religious objections present in the previous cases, but rather objected to the uniforms because they inhibited their choice and ability to convey their uniqueness.[93] After denying the plaintiffs' free speech, due process, and parental rights claims, the court examined their free exercise hybrid claim.[94] The court reviewed the approaches of other circuits, including the colorable claim approach, and decided the companion claim must be stronger than a mere allegation.[95] The court analogized the plaintiffs' free exercise claim to *Yoder*, found the plaintiffs' claim lacking, and denied it.[96] The court also denied the plaintiffs' remaining claims.[97]

These cases illustrate that development of the hybrid rights doctrine is underway within the Fourth and Fifth Circuits. Unfortunately, the various approaches are inconsistent, and it remains to be seen which doctrine these circuits will ultimately adopt.[98]

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86. 976 F. Supp. 659 (S.D. Tex. 1997).
87. *Id.* at 659-60.
88. *Id.* at 669.
89. *Id.* at 667.
90. *Id.* at 671.
91. *Id.*
92. 108 F. Supp. 2d 681 (N.D. Tex. 2000).
93. *Id.* at 689.
94. *Id.* at 704-06.
95. *Id.* at 706.
96. *Id.* at 707.
97. *Id.* at 708-09.
98. *Compare id., and* Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997), *with* Castle Hills First Baptist Church v. City of Castle Hills, No. SA-01-CA-1149-RF, 2004

The First and D.C. Circuits are thought to require that the companion claim be independently viable before the law in question will be reviewed for strict scrutiny, meaning that unless the companion claim merits strict scrutiny, the hybrid rights claim will not. In *Brown v. Hot, Sexy & Safer Productions*,[99] the plaintiffs claimed their children's compelled attendance at a sexually explicit school-wide assembly for AIDS awareness violated, among other things, their free exercise rights in conjunction with their rights to direct the upbringing of their children.[100] The First Circuit, however, declined to apply heightened scrutiny to their hybrid rights claim, finding that "the plaintiffs [sic] allegations do not bring them within the sweep of *Yoder* for two distinct reasons."[101] First, because the plaintiffs' claims involving "interference with family relations and parental prerogatives" had failed, the court concluded that "[t]heir free exercise challenge [was] thus not conjoined with an independently protected constitutional protection."[102] Second, the court compared the plaintiffs' free exercise claim with that of *Yoder*, where compulsory school attendance up to the eighth grade was held to be a serious threat to the Amish way of life, and found the infringement caused by the one-time compulsory assembly to be "qualitatively distinguishable."[103] Thus, it appears the court in *Brown* limited its discussion of hybrid rights to those composed of the right of parents to direct the upbringing of their children and the right to free exercise, because *Yoder* was the "most relevant" of the hybrid rights cases listed in *Smith*.[104] So, while the Court's approach can be read as an independently viable theory, it could also be read as requiring a close analogy between the hybrid claim and the claim brought in *Yoder*.[105]

WL 546792, at *16 (W.D. Tex. Mar. 17, 2004) (declining to read *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207 (5th Cir. 1991), "as a broad Fifth Circuit affirmation of the hybrid rights claim").

99. 68 F.3d 525 (1st Cir. 1995).

100. *Id.* at 530.

101. *Id.* at 539.

102. *Id.*

103. *Id.*

104. *Id.*

105. Interestingly, one of the First Circuit's district courts interpreted the court's holding in *Brown* to be that "the exception can be invoked only if the plaintiff has joined a free exercise challenge with another independently viable constitutional claim." Gary S. v. Manchester Sch.

The D.C. Circuit is also thought to require an independently viable claim because of its holding in *Equal Employment Opportunity Commission v. Catholic University of America*.[106] In that case, the court rejected the employee's discrimination claim brought under Title VII of the 1964 Civil Rights Act[107] when the university denied her application for tenure. First, it held that because the free exercise ministerial exception to Title VII actions had survived *Smith*, the university's free exercise rights presented a defense to the employee's claim.[108] Second, it held that the university's Establishment Clause right to be free of excessive entanglement likewise barred enforcement of Title VII.[109] After this, the court noted that, even if it was wrong about the ministerial exception, the hybrid rights exception would apply because the university's free exercise right could be conjoined with its right under the Establishment Clause.[110] Finally, the court held the action was barred by the Religious Freedom Restoration Act,[111] which restored the strict scrutiny test for free exercise as applied to the federal government.[112] Since the D.C. Circuit held that the hybrid rights exception applied after finding other fully valid claims, it is thought that they also require an independently viable claim.[113]

This understanding, while not required for the holding of the case, is bolstered by the D.C. Circuit's holding in *Henderson v. Kennedy*.[114] In rejecting the plaintiffs' hybrid claim against a regulation banning the sale of T-shirts in a national park, the court rejected the idea of applying strict scrutiny to a less than viable claim: "[A]lthough the regulation does not violate the Free Exercise Clause, and although they have no viable First Amendment claim against the regulation, the combination of the two untenable claims [would equal] a tenable

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Dist., 241 F. Supp. 2d 111, 121 (D.N.H. 2003). However, this description appeared a little over seven years after the case, with no intervening cases to help direct it.

106. 83 F.3d 455 (D.C. Cir. 1996).

107. 42 U.S.C. § 2000(e) (2000).

108. *EEOC*, 83 F.3d at 460. The ministerial exception prevents courts from hearing employment discrimination suits brought by ministers against the religious institution employing them.

109. *Id.* at 465.

110. *Id.* at 467.

111. 42 U.S.C. §§ 2000bb to bb-4 (2000).

112. *EEOC*, 83 F.3d at 467.

113. *See* Hensley, *supra* note 5, at 131.

114. 253 F.3d 12 (D.C. Cir. 2001).

one. But in law as in mathematics zero plus zero equals zero."[115] However, whether the D.C. Circuit requires an independently viable claim is not certain from *Henderson* either, as the plaintiffs' free speech claim was fallacious.[116]

B. *The Development of the Colorable Showing Approach*

The Ninth and Tenth Circuits have adopted the best approach to hybrid rights claims. They require that the companion claim present a colorable showing of infringement of an additional constitutional right. By "colorable" they mean a "fair probability or likelihood, but not a certitude, of success on the merits" of the companion claim.[117] This approach has been developed by the two circuits in tandem. Since the Tenth Circuit was the first to begin developing the theory, it is best to begin there.

The colorable showing approach found its roots in *Swanson v. Guthrie Independent School District No. I-L*.[118] The plaintiffs educated their child at home for religious reasons, but wanted her to take certain classes from a public school because they thought the school's instruction was superior.[119] When the school refused to allow the girl to take classes on a part-time basis, the parents sued.[120] The plaintiffs brought a hybrid rights claim, with the companion claim based on the parent's right to direct the upbringing of their children.[121] The Tenth Circuit recognized the mere allegation of a companion claim was insufficient to invoke the hybrid rights exception and instead proceeded to "determine whether either the claimed rights or the claimed infringements are genuine."[122] The court found that the plaintiffs had "shown no colorable claim of infringement on the constitutional right to direct a child's education,"

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115. *Id.* at 19 (internal citations omitted).

116. *See id.* at 18 ("Plaintiffs also attempted to raise several First Amendment claims. We say 'attempted' because it is not clear to us what arguments plaintiffs were trying to convey. . . . The argument, to the extent it may be considered as such, goes nowhere.").

117. Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (internal quotations omitted) (quoting Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 707 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (9th Cir. 2000)); *see also* Axson-Flynn v. Johnson, 356 F.3d 1277, 1295 (10th Cir. 2004).

118. 135 F.3d 694 (10th Cir. 1998).

119. *Id.* at 696.

120. *Id.*

121. *Id.* at 699.

122. *Id.*

because precedent did not establish the right "to pick and choose which courses their children will take from the public school."[123] The court finished its discussion by stating: "Whatever the *Smith* hybrid-rights theory may ultimately mean, we believe that it *at least requires a colorable showing* of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one's child."[124] The court did not elaborate on what constituted a colorable showing of infringement.

Thereafter, the Ninth Circuit expanded upon the colorable showing approach in *Thomas v. Anchorage Equal Rights Commission*.[125] The plaintiffs were Christian landowners who refused to rent to unmarried couples because they believed that facilitating cohabitation would be "tantamount to facilitating sin."[126] This was contrary to Alaska's housing laws, which prevented discrimination in rental housing and included marital status as a protected class.[127] The plaintiffs' sole viable claim was a hybrid claim based on the right to free exercise, along with their Fifth Amendment right to exclude others from their property and their First Amendment right to free speech (based on the law's prohibition of inquiring into marital status or communicating a discriminatory preference).[128] After a thorough discussion of the proper course to take in hybrid rights claims, the court decided to apply the Tenth Circuit's colorable showing approach, defining what was meant by a colorable claim by stating: "In order to trigger strict scrutiny, a hybrid-rights plaintiff must show a 'fair probability'—a 'likelihood'—of success on the merits of his companion claim."[129]

Regarding the first companion claim, the Ninth Circuit found:

> Although the Alaska housing laws do not . . . rise to the level of a *permanent physical occupation* sufficient to trigger a per se right to

123. *Id.* at 700.

124. *Id.* (emphasis added).

125. 165 F.3d 692 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (9th Cir. 2000). Although reversed for lack of ripeness, *Thomas*'s requirement of a colorable showing has been carried on in subsequent Ninth Circuit cases.

126. *Id.* at 696.

127. *Id.* at 697.

128. *Id.* at 702-03.

129. *Id.* at 706.

> compensation, they authorize a "physical invasion" of the landlords' property just the same. We thus conclude that [the plaintiffs] have made out a substantial argument that the Alaska laws "go[] too far," and, thus, a colorable claim that their rights under the Takings Clause of the Fifth Amendment have been infringed.[130]

The court likewise found the plaintiffs' First Amendment claim made a colorable showing of infringement of their free speech rights, because of the "presumption of unconstitutionality that attaches to content-discriminatory laws of the sort at issue."[131] Since the court found a valid hybrid claim, it applied the compelling interest test, concluding the state could not justify the substantial burden imposed by the housing laws.[132] Thus, the housing law could not be enforced against the plaintiffs or those like them.[133]

Unfortunately, *Thomas* was subsequently overturned for a lack of ripeness in an en banc rehearing, because the housing laws had never been enforced against the plaintiffs, nor was there any threat of such enforcement.[134] The approach outlined by *Thomas*, however, has survived two later Ninth Circuit cases, although none of the plaintiffs' companion claims in those cases were found to be colorable.[135] In *Miller v. Reed*,[136] which was decided before *Thomas* was withdrawn, the court upheld California's denial of a driver's license because the plaintiff refused to provide his social security number for religious reasons.[137] The plaintiff claimed this refusal violated his free exercise rights and his fundamental right to drive, based on his right to interstate travel.[138] In rejecting his hybrid claim because the alleged "right to drive" was non-existent, the court employed *Thomas*'s language that the companion claim be "colorable," meaning that it

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130. *Id.* at 709 (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

131. *Id.* at 711. The court considered the landlords' speech to be non-commercial, and not subject to the corresponding lesser scrutiny, because the landlords had no economic incentive to inquire into a renter's marital status; in fact, they had a "distinct economic *disincentive*." *Id.* at 710-11.

132. *Id.* at 717-18.

133. *Id.* at 718.

134. Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1137 (9th Cir. 2000) (en banc).

135. *See* Miller v. Reed, 176 F.3d 1202, 1207-08 (9th Cir. 1999); Am. Family Ass'n v. City of San Francisco, 277 F.3d 1114, 1124-25 (9th Cir. 2002).

136. 176 F.3d 1202 (9th Cir. 1999).

137. *Id.* at 1204.

138. *Id.*

have "a 'fair probability' or a 'likelihood,' but not a certitude, of success on the merits."[139] Since *Thomas* was overturned en banc, *Miller* remains the case standing for the proposition that a hybrid rights companion claim must make a colorable showing of infringement. In *American Family Ass'n v. City of San Francisco*,[140] decided after *Thomas* was overturned, the Ninth Circuit employed the "colorable" language from *Miller*, but not the "fair probability or likelihood" language, to reject the plaintiffs' hybrid claim.[141] The plaintiffs sponsored an advertising campaign designed to persuade homosexuals to leave their lifestyle.[142] The city responded by passing two resolutions condemning the plaintiffs' religious views and urging local broadcasters not to carry the ads.[143] The court found that the plaintiffs failed to allege a colorable companion claim, because the city's resolutions were non-compulsory, and thus, did not infringe on the plaintiffs' companion free speech rights.[144]

Even though the Ninth Circuit's colorable showing approach seemingly survived the overturning of *Thomas*, it has yet to be seen whether the Ninth Circuit will follow exactly the same approach when confronted with a hybrid rights claim with a valid colorable companion claim. In *San Jose Christian College v. City of Morgan Hill*,[145] a case involving a challenge to the defendant city's zoning requirements, the Ninth Circuit confirmed that it did indeed follow the colorable showing approach and that the approach required a plaintiff to "make out a colorable claim that a companion right has been violated—that is, a fair probability or a likelihood, but not a certitude, of success on the merits."[146] The Ninth Circuit, however, concluded that the plaintiff did not assert a viable hybrid rights claim, because the plaintiff had failed to assert a colorable claim for violation of freedom of speech and freedom of assembly rights.[147]

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139. *Id.* at 1207 (quoting Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 707 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (9th Cir. 2000)).

140. 277 F.3d 1114 (9th Cir. 2002).

141. *Id.* at 1124.

142. *Id.* at 1118-19.

143. *Id.* at 1119-20.

144. *Id.* at 1125-26.

145. 360 F.3d 1024 (9th Cir. 2004).

146. *Id.* at 1032 (quoting Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999)).

147. *Id.* at 1032-33. For further reference, see *Harper v. Poway Unified Sch. Dist.*, 345 F. Supp. 2d 1096, 1120-21 (S.D. Cal. 2004), in which the plaintiff, a student, was seeking, *inter alia*, a preliminary injunction enjoining the defendant school district from enforcing its policies

The loss of *Thomas* dealt a strong blow to hybrid rights doctrine. No other case has so perfectly fit the hybrid rights exception, nor so thoroughly illustrated the colorable showing approach. There was no confusion in *Thomas* about whether the court was deciding the case based on a separate, wholly valid claim of another constitutional rights violation—the only claim brought by the plaintiffs was a free exercise hybrid.[148] Fortunately, where the Ninth Circuit left off, the Tenth Circuit carried on.

In the recent case of *Axson-Flynn v. Johnson*,[149] the plaintiff, a member of the Church of Jesus Christ of Latter-Day Saints, was forced to leave the University of Utah's acting program after she refused to recite certain words she found religiously objectionable when performing school-assigned monologues.[150] She filed suit against various teachers and administrators of the program, claiming her free speech and free exercise rights had been violated, and the district court granted summary judgment for the defendants.[151] The court of appeals found there were genuine issues of material fact regarding the alleged infringement of the plaintiff's free speech rights and overturned the summary judgment with respect to that claim.

The Tenth Circuit then expanded on the hybrid rights doctrine begun in *Swanson*.[152] *Swanson* required the claimants to make a colorable showing on the companion claim, but did not define what was meant by the term.[153] After citing the Ninth Circuit's language in *Miller*, which was originally from *Thomas*, the Tenth Circuit settled on a definition of "colorable." It said the term meant "the plaintiff must show a fair probability or likelihood, but not a certitude, of

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prohibiting the plaintiff from wearing a T-shirt which expressed opposition to homosexual behavior. The district court acknowledged that a valid free speech companion claim would require the court to apply a heightened scrutiny to the plaintiff's free exercise claim. *Id.* at 1120. The court, however, denied the plaintiff's motion for a preliminary injunction because he failed to show a likelihood of success on the merits of his free exercise claim due to his failure to show a likelihood of success on his free speech claim. *Id.* at 1120-21. Thus, the companion free speech claim was not colorable.

148. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 702 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (9th Cir. 2000).

149. 356 F.3d 1277 (10th Cir. 2004).

150. *Id.* at 1281-83.

151. *Id.* at 1280, 1283.

152. *Id.* at 1295.

153. Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 699 (10th Cir. 1998).

success on the merits" of her companion claim.[154] The court chose this approach because it was a "middle ground between the two extremes of painting hybrid-rights claims too generously," which would make the hybrid rights exception not really an exception, "and construing them too narrowly," which would essentially require an independently viable claim, thus eliminating the exception entirely.[155] The court did not assess the plaintiff's hybrid rights claim. Instead, it found the defendants were entitled to qualified immunity on that claim because the law regarding hybrid rights was not clearly established at the time of the defendants' actions.[156] Thus, although the Tenth Circuit adopted a colorable claim approach exactly the same as the Ninth Circuit's approach in *Thomas*, it too has not had the opportunity to use it.

As with the Eighth Circuit, the Third Circuit has not solidified its own approach to hybrid rights, though it has stated in dicta that it would apply strict scrutiny to a hybrid rights claim.[157] Despite this lack of guidance at the appellate level, there exist two notable district court cases in the Third Circuit, both of which appear to adopt the colorable showing approach, but not as conspicuously as one would hope. In the unpublished case of *Green v. City of Philadelphia*,[158] the plaintiff asserted a hybrid rights claim based on a companion Second Amendment claim.[159] After analyzing the various approaches among the circuits, the court admitted that the Third Circuit had indeed indicated in dicta that they would permit a hybrid rights claim.[160] In an effort to determine which approach to use, the court "[e]xtrapolat[ed] from First, Ninth, and Tenth Circuit caselaw on point," and concluded that a plaintiff must either show an independently viable claim, or, "at a minimum, the plaintiff must make out a 'colorable' claim that a companion right has been infringed."[161] Whether the court would have required the

154. *Axson-Flynn*, 356 F.3d at 1297.

155. *Id.* at 1295-96.

156. *Id.* at 1301.

157. *See* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 165 n.26 (3d Cir. 2002) (recognizing that strict scrutiny applies to hybrid rights, but that the plaintiffs had not asserted such a right).

158. No. Civ.A. 03-1476, 2004 WL 1170531 (E.D. Pa. May 26, 2004).

159. *Id.* at *1.

160. *Id.* at *6.

161. *Id.* at *7.

independently viable approach or the less stringent colorable showing approach remains unknown. Because the court concluded that the plaintiff failed to meet even the lesser of the two standards, it was not necessary to choose between them.[162]

Less than a month later, a different Third Circuit district court took one step closer to the colorable showing approach. In *Grove v. City of York*,[163] the plaintiffs, a group of abortion protesters opposed to abortion on religious grounds, sued the city of York, Pennsylvania and certain city police officers for both confiscating plaintiffs' signs while the group was demonstrating to a crowd gathered for a Halloween parade and for the subsequent arrest and trial of the group's religious leader.[164] Citing *Smith*, the court stated that heightened scrutiny applies "where a free exercise claim is combined with 'a colorable showing of infringement of recognized and specific constitutional rights.'"[165] The court found the plaintiffs' free exercise claim to be "a hybrid situation in which heightened scrutiny applies" and granted summary judgment on the plaintiffs' free exercise claim.[166] Still, although the court clearly stated that it was using the colorable showing approach, the case is not the exemplar of this approach because its use was not necessary for the decision. Unlike *Thomas*, where the court determined only whether the companion claim was colorable,[167] the court in *Grove* had already granted summary judgment on the plaintiffs' free speech companion claim.[168] In other words, the court could have just as easily used the independently viable approach.

Finally, in 2003, the Seventh Circuit faced a hybrid rights question.[169] It acknowledged that a valid hybrid rights claim required heightened scrutiny, but it found that the plaintiffs' companion claims lacked merit.[170] The Seventh Circuit set out a standard for approaching hybrid claims, but only went so far as to agree with the

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162. *Id.*.

163. 342 F. Supp. 2d 291 (M.D. Pa. 2004).

164. *Id.* at 295-99.

165. *Id.* at 307.

166. *Id.* at 307-08.

167. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 709, 711 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (9th Cir. 2000).

168. *Grove*, 342 F. Supp. 2d at 301-06.

169. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003).

170. *Id.* at 766.

Ninth Circuit that the mere allegation of a companion claim is insufficient to warrant heightened scrutiny.[171] The court cited *Miller* and the Tenth Circuit case, *Swanson*, but also cited the First Circuit case of *Brown*, so it is unclear if the Seventh Circuit will adopt the colorable showing approach or the independently viable approach.[172] However, one of the Seventh Circuit's district courts decided to follow the colorable claim approach of the Ninth and Tenth Circuits in a case involving a city zoning ordinance that barred a church from using its property as a place for worship.[173] The district court found the plaintiffs had made a colorable showing of infringement in their companion claim, yet it did not apply strict scrutiny because the plaintiffs' equal protection claim already required it.[174]

As the foregoing survey shows, the circuits' approaches to hybrid rights are varied and inconsistent. The Second and Sixth Circuits deny hybrid rights as dicta and the Eleventh Circuit might decide to do the same. The Eighth Circuit has yet to adopt a specific approach, though it appears to favor acceptance of hybrid rights. The Fourth and Fifth Circuits may accept a heightened scrutiny test for hybrid rights claims if they follow the lead of their district courts, but it remains to be seen which approach they will ultimately adopt. The First and D.C. Circuits, however, have effectively denied hybrid rights by requiring the companion claim to be independently viable. Finally, the Ninth and Tenth Circuits have accepted the hybrid rights doctrine and developed a workable approach—an approach which the Third Circuit appears to be following and the Seventh Circuit might follow as well.

III. THE APPROPRIATENESS OF THE COLORABLE SHOWING APPROACH

The difficulty with the hybrid rights exception is one of degree; how strong does the companion claim have to be to trigger the

171. *Id.* at 765.

172. *Id.*

173. Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 989 (N.D. Ill. 2003) ("This court therefore will follow the logic of the Ninth and Tenth Circuits, which require that in order for strict scrutiny to apply, a plaintiff must make a showing of a colorable infringement of one of the other constitutional rights involved in the hybrid claim.").

174. *Id.*

exception? Justice Souter aptly recognized this in his concurrence in *Lukumi*:

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[175]

In other words, if courts allowed any companion claim, no matter how weak, the exception would be too broad and would cease to be an "exception" to *Smith*'s general rule. On the other hand, if the courts only allowed a companion claim that could succeed on its own, there would be no need for such an exception for free exercise claims. This problem of breadth is not unique to hybrid rights; it is present in every rule that has an exception. The difficulty with the hybrid rights exception is that the Court has never explained just how strong the companion claim must be to trigger the exception.[176]

Requiring that the companion right merely be implicated, or alleged, would make the exception broader than the rule, as other constitutional rights are almost always implicated in a free exercise claim.[177] If implication of another right was all that was necessary, every plaintiff would be expected to allege the violation of such a constitutional right and *Smith*'s central holding, that a neutral law of general applicability only merits rational basis review, would never again be invoked.[178] Rightfully so, no court has taken this approach. Going one step further and requiring that the plaintiff bring a "non-frivolous" companion claim would not alleviate the problem either.[179]

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175. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring).

176. *See* Esser, *supra* note 4, at 220.

177. *See Lukumi*, 508 U.S. at 567 (Souter, J., concurring).

178. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 705 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (9th Cir. 2000).

179. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1295 (10th Cir. 2004).

Adopting the other extreme is equally flawed. The First and D.C. Circuits' approach of requiring an independently viable claim is essentially the same as the Second and Sixth Circuits' outright rejection of the hybrid rights exception, because "such a test would make the free exercise claim unnecessary."[180] Yet, the *Yoder* Court invalidated the mandatory school attendance law as applied to the Amish explicitly because it burdened their right to direct the upbringing of their children *and* violated the Free Exercise Clause.[181] The Supreme Court must be taken seriously: "When the Court said 'Free Exercise Clause,' it meant it."[182] For the hybrid rights exception to be truly treated as an exception to *Smith*'s central holding, a plaintiff must be able to win without recourse to an independently viable claim.[183]

Rather, the colorable showing approach of requiring a plaintiff to show a fair probability or likelihood of success on the merits of the companion claim provides the perfect "middle ground."[184] It allows free exercise claimants to make use of the exception without having to prove a completely separate violation. Yet, by requiring the plaintiff to show a likelihood of success on the merits, it does not allow them a free pass without making a substantial showing. In addition, "neither the central holding of *Smith* nor the Free Exercise Clause is rendered without substantive bite."[185]

Finally, this is the only approach that can be harmonized with *Smith*. As the Ninth Circuit pointed out in *Thomas*, it preserves the hybrid rights exception, without rendering the plaintiffs' claims in *Smith* applicable to the exception:

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180. *Id.* at 1297.

181. Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972).

182. *Thomas*, 165 F.3d at 705.

183. William Esser argued that:

> "Scalia's use of 'hybrid rights' as an unartful tool to distinguish troubling precedent simply does not weaken the force of the Court's institutional argument. The fact that the Court draws its boundaries illogically does not mean that its power to establish those boundaries is suspect . . . ." However illogical, the hybrid exception is a boundary which must be applied.

Esser, *supra* note 4, at 243 (internal footnotes omitted) (quoting Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 30 (1995)).

184. *Axson-Flynn*, 356 F.3d at 1295.

185. *Thomas*, 165 F.3d at 707.

> The plaintiffs in *Smith* could not have made out a "colorable claim of infringement" with respect to their free speech rights. Ingesting peyote is certainly not "speech" in the traditional sense; at best, it is "expressive conduct." And the only cases in which the Supreme Court has invalidated laws regulating expressive conduct are those in which it has concluded that the government has prohibited such conduct "precisely because of its communicative attributes." . . . Consequently, among the potential approaches to hybrid rights, only a colorable-claim standard accounts *both* for *Smith* (which an implication standard cannot) *and* for the original hybrid cases (which an independently-viable-rights standard cannot).[186]

The colorable showing approach is not without its share of criticism. One complaint is that the colorable showing approach infringes on the constitutional right to a jury trial.[187] The approach, in effect, places the assessment of the companion claim in the hands of the judge instead of the jury.[188] This stems from the fact that the colorable showing approach is essentially a threshold issue, though, unlike procedural questions or preliminary injunctions, the colorable showing approach is used to determine the standard of review used in final judgment.[189] Those who make this argument, however, forget that "*Smith* does not offer the hybrid situation as a way to bolster sickly . . . [companion] claims, but rather as a way to bolster otherwise unwinnable free exercise claims."[190] The jury will hear the free exercise claim, and the companion claim, for that matter. The only difference is that, if the judge finds the plaintiff has a fair probability of success on the companion claim, he will instruct the jury that the state must have a compelling, rather than just legitimate, interest to justify its burden on the plaintiff's free exercise rights.

Another complaint, and perhaps the most prevalent one, is that the colorable showing approach allows two losing claims to combine to create one winning claim.[191] Closely associated with this is the complaint that the colorable showing approach does not explain why a free exercise claim needs to be coupled with another constitutional

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186. *Id.* at 706-07 (internal quotations and citations omitted) (emphasis removed).
187. *See* Neal, *supra* note 41, at 185.
188. *Id.*
189. *See* Brownstein, *supra* note 29, at 190-91.
190. Fry, *supra* note 53, at 848.
191. *See* Neal, *supra* note 41, at 185.

claim, or why infringement of that other constitutional right should merit strict scrutiny because it is so combined.[192] Furthermore, to strengthen the protection of another constitutional right because it is infringed upon alongside a free exercise right could be seen as an attempt to favor those who object to the law for religious reasons.[193] This raises Establishment Clause concerns. However, these complaints are not with the colorable showing approach, but rather with the hybrid rights exception itself.

Nonetheless, not only is the hybrid rights exception the law, it also makes sense. We cannot offer the religious objector the protection of "deeming *presumptively invalid*" a regulation that infringes on his right of free exercise, but we can offer that protection when the regulation is so intrusive as to infringe upon more than just his free exercise rights.[194] It is not so much that the hybrid rights exception is offering *extra protection* to the religious objector; rather, it is offering protection to those who suffer the *extra burden* upon their right of free exercise. As one commentator put it,

> the state is unable to prohibit individuals from holding *beliefs* at odds with the morality animating the state's actions; the state is within its traditional power, however, to bar *conduct* in these areas. Where the state has acted in this jurisdiction, but has also offended a "constitutional norm" in Justice Scalia's sense, then it has prima facie exceeded its power and should be subject to strict scrutiny.[195]

Put another way, the religious objector should be expected to bear some burden upon his free exercise rights, but not bear that same burden in addition to others. The hybrid rights exception eliminates the straw that broke the camel's back.

It is not illogical to say that free exercise jurisprudence was applying a sort of hybrid claim balancing act in a few *exceptional* cases all along. The compelling interest test in free exercise jurisprudence never really required a "compelling" interest on the

192. *See* Hensley, *supra* note 5, at 139.

193. *Id.*

194. Employment Div. v. Smith, 494 U.S. 872, 888 (1990).

195. Fry, *supra* note 53, at 862.

part of the government.[196] According to commentators Stephen H. Aden and Lee J. Strang, "the Court had settled into a balancing of interests when government regulation arguably impaired religiously motivated actions."[197] In *Yoder*, the balancing of the Amish's free exercise interest *together with* their parental rights interest resulted in the Court applying a true compelling interest test.[198] *Smith* explained that the balance was only found in favor of the truly "compelling" interest test when a companion constitutional right was also burdened. Now, determining whether to apply a true compelling interest test is not left to a balancing test as in *Yoder*, but to a rule: when the claim involves "the Free Exercise Clause in conjunction with other constitutional protections."[199] What is more, *Yoder* also used the colorable showing approach:

> The quintessential example of a hybrid claim that logically mandated heightened review is *Wisconsin v. Yoder*. . . . The Court thoroughly reviewed the claim advanced by the Amish that public schooling beyond the eighth grade threatened the ability of the community to perpetuate itself. The Court wanted to ensure that the "Amish religious faith and their mode of life are, as they claim, inseparable and interdependent." *This requirement is much like the colorable claim standard whereby a companion claim advanced by a hybrid claim plaintiff will be scrutinized to determine its viability*.[200]

CONCLUSION

Smith's hybrid rights exception presents difficulties, but many of these difficulties are a consequence of the lack of a consistent,

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196. *See* McConnell, *supra* note 36, at 1127 (describing the compelling interest test in free exercise jurisprudence as a "misnomer," and arguing that the real test was "much more relaxed").

197. Aden & Strang, *supra* note 31, at 601.

198. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

199. *Smith*, 494 U.S. at 881. It should be no surprise that *Smith* replaced *Yoder*'s balancing test with a rule. Justice Scalia, writing for the majority in *Smith*, dislikes balancing tests and advocates instead for judicial rules. *See generally* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).

200. Aden & Strang, *supra* note 31, at 601 (internal footnotes omitted) (emphasis added) (quoting *Yoder*, 406 U.S. at 215).

workable approach. Rejecting hybrid rights as "an exercise in descriptive legal history," or waiting until the Court offers further direction ignores that *Smith* and the hybrid rights exception are the law.[201] What is more, to ignore the exception also denies the fact that *Yoder*, and those cases distinguished along with it, are still valid law. Courts "are not at liberty to ignore them" and plaintiffs deserve the benefit of their holdings.[202] Thankfully, those courts that have not ignored the exception have made substantial progress in supplying the direction that the Supreme Court has not; chief among them are the Ninth and Tenth Circuits. Their requirement that the plaintiff make a colorable showing of a companion claim provides a workable approach to the hybrid rights exception. It neither allows the exception to "swallow the *Smith* rule," nor makes the exception meaningless and the free exercise claim unnecessary.[203]

True, successful hybrid rights claims have been hard to come by and the doctrine has, for the most part, been somewhat of a failure. Yet, this is mainly due to the uncertainty on the part of plaintiffs in how to advance them, and the unwillingness of courts to apply the exception in the absence of a workable approach. If other circuits adopt the colorable showing approach, it will bring clarity to the hybrid rights exception. With this clarity, the hybrid rights exception will become the viable doctrine the Supreme Court intended it to be.

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201. *Id.* at 605.

202. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (9th Cir. 2000).

203. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring).