The Ninth Circuit's "Hybrid Rights" Error: Three Losers Do Not Make a Winner in *Thomas v. Anchorage Equal Rights Commission*

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I. INTRODUCTION

On January 14, 1999, the Ninth Circuit Court of Appeals entered the debate over whether religious landlords have a constitutional right to discriminate against unmarried cohabitants in *Thomas v. Anchorage Equal Rights Commission*.[1] The plaintiffs in *Thomas* brought an action against the State of Alaska and the City of Anchorage, claiming that the inclusion of 'marital status' as a protected class in both the state law[2] and a city ordinance against discrimination[3] violated the plaintiffs' First Amendment right to the free exercise of religion.[4]

Kevin Thomas and Joyce Baker, both devout Christians, were residents of Anchorage, Alaska, and were the owners of various rental properties in the Anchorage area.[5] Thomas and Baker filed suit to enjoin the state and city from enforcing the antidiscrimination laws against them.[6] They claimed that they had, in the past, violated the laws, and would continue to do so in the future. Thomas and Baker believe that unmarried couples living together commit the sin of fornication. Thus, they believe that by allowing fornication on their rental properties, they too would commit sin.[7] They contended, therefore,

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1. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999).

2. ALASKA STAT. § 18.80.240(1) (1999) provides: "It is unlawful . . . (1) to refuse to sell, lease, or rent . . . to a person because of . . . marital status."

3. ANCHORAGE, ALASKA, MUN. CODE § 5.20.020(A) (1999) provides: "[I]t is unlawful . . . to . . . [r]efuse to sell, lease, or rent . . . to a person because of . . . marital status."

4. *Id.*

5. *Thomas*, 165 F.3d at 696.

6. *Id.*

7. *Id.*

that enforcement of the antidiscrimination laws against them violated their constitutional right to the free exercise of religion.[8]

The district court agreed with Thomas and Baker, and, acting under the Religious Freedom Reformation Act[9] (RFRA), found that enforcement of the statutes did violate the plaintiffs' First Amendment rights.[10] On appeal, the Ninth Circuit analyzed the issue under a different standard because the United States Supreme Court had, in the meantime, declared RFRA unconstitutional.[11] Therefore, the Ninth Circuit was left to determine the validity of the plaintiffs' claims under the standard set forth by the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith.*[12] Despite the change in controlling law, the Ninth Circuit still found in favor of the plaintiffs by relying on the "hybrid rights"[13] language of *Smith.*

If allowed to stand, the ramifications of this ruling will extend far beyond the scope of the religious landlord/unmarried cohabitant issue.[14] Under *Thomas*, religious objectors to *any* law can invoke strict scrutiny analysis simply by adding additional constitutional claims to their religious complaints.[15] As long as those other claims are "colorable," the state must then satisfy strict scrutiny, justifying the challenged law by showing a compelling government interest in achieving the law's effect.[16] Furthermore, the state must show that the law is narrowly tailored to achieve that government interest.[17] This rigorous

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8. U.S. CONST. amend. I.

9. The Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-1 (1993) (declared unconstitutional 1997). "RFRA" prohibit[ed] "[g]overnment" from "substantially burden[ing]" a person's exercise of religion "even if the burden results from a rule of general applicability unless," the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id. See also* City of Boerne v. Flores, 521 U.S. 507, 515-16 (1997).

10. *Thomas*, 165 F.3d at 697.

11. "Congress does not enforce a constitutional right by changing what the right is. It has been given the power to enforce, not the power to determine what constitutes a constitutional violation." *City of Boerne*, 521 U.S. at 519.

12. Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990).

13. *Id.* at 882. The notion of hybrid rights is a product of Justice Scalia's *Smith* opinion. The basic theory is that plaintiffs can combine free exercise claims with other constitutional claims such as free speech or Takings Clause rights. By implicating other constitutional rights, the plaintiffs can force the state or municipality to justify the challenged laws under a stricter standard.

14. The Ninth Circuit has withdrawn the original *Thomas* decision and reheard the case *en banc* in October 1999. Thomas v. Anchorage Equal Rights Comm'n., 192 F.3d 1208 (9th Cir. 1999). A new opinion is expected to be released in 2000.

15. Further discussion of this will follow below.

16. *Thomas*, 165 F.3d at 711-12.

17. *Id.* at 712.

standard will render many state and local laws vulnerable to attack by religious objectors. We will then live in a system in which different rules exist for different people depending on how strongly each holds to his or her religious beliefs.

The religious landlord/unmarried cohabitant debate has steadily gained momentum since the 1970s, when states began to include the term "marital status" in their antidiscrimination and fair housing laws. As of this writing, twenty-two states include "marital status" as a protected class in their antidiscrimination and fair housing laws.[18] However, Connecticut and Oregon explicitly bar protection of unmarried cohabitants in their definitions of marital status.[19] The remaining twenty states include marital status as a protected class, but none of them explicitly include unmarried cohabitants in the definition of marital status.[20] Thus, the debate materializes.[21] Are unmarried cohabitants a protected class within the meaning of the general prohibitions against marital status discrimination? The question is further complicated by the issue of whether individuals with sincerely held religious beliefs are constitutionally exempted from compliance with these laws because the laws interfere with their free exercise of religion.

Because the Ninth Circuit, in reaching its *Thomas* decision, relied on *Smith's* hybrid rights language, this Note will focus on the court's analysis of that subject. By applying the hybrid rights' dicta instead of following the actual holding in *Smith*, the Ninth Circuit reached a conclusion that is illogical and does not comport with current Supreme Court free exercise jurisprudence. This Note will discuss the *Thomas*

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18. Michael V. Hernandez, *The Rights of Religious Landlords to Exclude Unmarried Cohabitants: Debunking the Myth of the Tenants' "New Clothes,"* 77 NEB. L. REV. 494, 502 (1998).

19. CONN. GEN. STAT. ANN. § 46a-64c(b)(2) (West 1995); OR. REV. STAT. § 659.033(6) (1999).

20. Hernandez, *supra* note 18, at 502.

21. There are several issues that have been discussed as possible solutions to the religious landlord/unmarried cohabitant problem, but most are well beyond the scope of this article. For instance, some courts and commentators have narrowed the question to whether the challenged statutes proscribe religious conduct or religious belief. While the reader should be aware that other issues exist, one need not be concerned with them for the purposes of this Note. For a general discussion about the religious landlord/unmarried cohabitant debate, see Maureen E. Markey, *The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World*, 29 RUTGERS L.J. 487 (1997); Maureen E. Markey, *The Price of Landlord's "Free" Exercise of Religion: Tenant's Right to Discrimination-Free Housing and Privacy*, 22 FORDHAM URB. L.J. 699 (1995); Hernandez, *supra* note 18; John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415 (1990-1991); Melissa Fishman Cordish, Comment, *A Proposal for the Reconciliation of Free Exercise Rights and Anti-Discrimination Law*, 43 UCLA L. REV. 2113 (1996). *See generally* Smith v. Fair Employment and Housing Comm'n, 913 P.2d 909 (Cal. 1996); Mister v. A.R.K. Partnership, 553 N.E.2d 1152, 1156-59 (Ill. App. Ct. 1990); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994).

court's analysis and will propose a logical interpretation of *Smith* that more closely reflects the Supreme Court's actual position regarding the Free Exercise Clause.[22]

II. FREE EXERCISE JURISPRUDENCE

A. *Pre*-Smith

To fully understand the hybrid rights controversy, one must first gain a brief understanding of the tumultuous history of the Free Exercise Clause. The First Amendment of the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[23]

The first major case to discuss the language of the First Amendment[24] was *Reynolds v. United States*[25] in 1878. *Reynolds* involved a criminal appeal from the United States Territory of Utah on the defendant's conviction for criminal bigamy.[26] The defendant claimed an exemption from the law based on his religious beliefs as a member of the Church of Jesus Christ of Latter-Day Saints, also known as the Church of Mormon.[27] After a brief discussion of the First Amendment's applicability to a United States Territory, the Court inquired as to what the religious freedom guarantee really guarantees.[28]

Chief Justice Waite, writing for the Court, concluded that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[29] He went on to state that to allow a religious objector an exemption, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[30] The *Reynolds* rule dominated free exercise jurisprudence for over 80 years.

Reynolds controlled free exercise jurisprudence until the Supreme Court reversed field in the 1963 case *Sherbert v. Verner*.[31] *Sherbert* involved a member of the Seventh-day Adventist Church who, because

22. U.S. CONST. amend. I.

23. U.S. CONST. amend. I. States are bound by the Free Exercise Clause by virtue of its incorporation into the Fourteenth Amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

24. At least the first since its incorporation by the Fourteenth Amendment.

25. Reynolds v. United States, 98 U.S. 145 (1878).

26. *Id.* at 146.

27. *Id.* at 161.

28. *Id.* at 162.

29. *Id.* at 164.

30. *Id.* at 167.

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

of religious conviction, was unavailable for work on Saturdays, the Sabbath Day of her faith.[32] The religious objector in *Sherbert* was unable to find work because all of the mills in the area required a six-day work week.[33] She was then denied unemployment benefits by the State of South Carolina because the State determined that she was not "available" for work, a prerequisite for benefits.[34]

The Supreme Court concluded that "to condition the availability of benefits upon the appellant's willingness to violate a cardinal principal of her religious faith effectively penalizes the free exercise of her constitutional liberties."[35] Thus, the Court held that any burden on the free exercise of religion must be justified by a "compelling state interest,"[36] and that "[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation."[37] The *Sherbert* rationale set up a seemingly insurmountable burden on governmental action when that action was confronted by religious objectors.

Applying the *Sherbert* rule in 1971, the Supreme Court held that enforcement of Wisconsin's compulsory education law violated the free exercise rights of religious objectors.[38] In *Wisconsin v. Yoder*, Old Order Amish parents objected to a Wisconsin law that required children to attend school until the age of 16.[39] The Amish faith required that children learn by "doing," and that they should avoid contact with the outside world.[40] The Court first balanced the interests of the state against the burden the law placed on the objector's free exercise rights.[41] The *Yoder* Court then held that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."[42] Recognizing that the state did have a legitimate interest in the education of its citizens, the Court still held that the state's interest was not sufficiently compelling as against the objections of the Amish parents.[43] The importance of the *Yoder* decision may seem elusive at this point, but, for reasons to be discussed below, *Yoder* is the reason 'hybrid rights' entered the lexicon of free exercise jurisprudence.

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32. *Id.* at 399.
33. *Id.* at 400.
34. *Id.*
35. *Id.* at 406.
36. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
37. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
38. Wisconsin v. Yoder, 406 U.S. 205, 234 (1971).
39. *Id.* at 207.
40. *Id.* at 211.
41. *Id.*
42. *Id.* at 215.
43. *Id.* at 215-29.

As a further illustration of the Supreme Court's use of the *Sherbert* rule, in *United States v. Lee*, the Court reached a different result.[44] In *Lee*, the Court had before it a controversy involving a member of the Old Order Amish who sued to recover his previously paid social security taxes based on his religious opposition to nationalized welfare.[45] The Court balanced the interest of the government against the burden on the religious objector and found that the government's interest in the social security system was sufficiently compelling to justify the burden on free exercise rights.[46] The Court stated that "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."[47] The *Yoder* and *Lee* decisions represent the two ways in which pre-*Smith* free exercise cases were resolved under *Sherbert's* compelling state interest test.

B. Smith

In 1990, the Supreme Court once again reversed field in its free exercise jurisprudence.[48] The claimants in *Smith* were fired from their jobs in a drug rehabilitation center after their ingestion of peyote during a Native American Church ritual.[49] They were then denied unemployment benefits because the State claimed that they had been fired for work-related "misconduct."[50] In an opinion written by Justice Scalia, the Court declared, "[w]e 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."[51] Citing *Lee*, the Court went on to claim that it had consistently held that "the right of free exercise of religion 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).'"[52] This language became the holding of the *Smith* Court.[53]

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44. United States v. Lee, 455 U.S. 252 (1982).
45. *Id.* at 254-55.
46. *Id.* at 261.
47. *Id.* at 259.
48. *Smith*, 494 U.S. 872.
49. *Id.* at 874.
50. *Id.*
51. *Id.* at 878-79.
52. *Id.* at 879 (quoting *Lee*, 455 U.S. at 263 (Stevens, J., concurring)).
53. If this holding had been applied literally to the *Thomas* case, the defendants would have certainly prevailed. The antidiscrimination laws were neutral because they did not specifically target religion and were generally applicable to every landlord in Alaska.

After announcing his rule of law, Justice Scalia was still left to deal with *Sherbert* and its progeny.[54] Between *Sherbert* in 1963, and *Smith* in 1990, seventeen free exercise cases reached the Supreme Court. Applying *Sherbert's* compelling interest test, the religious objector lost to the government in thirteen of those cases.[55] Of the four cases remaining, three involved unemployment compensation issues similar to those present in *Sherbert*.[56] Having distinguished the *Smith* facts from the previous unemployment compensation cases, Justice Scalia was left with *Yoder* as the last standing Supreme Court free exercise case invalidating enforcement of a neutral, generally applicable law against religious objectors.[57]

Justice Scalia proclaimed, "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved 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."[58] He went on to state that the *Smith* case did not present such a "hybrid situation."[59] Thus, Justice Scalia was responsible for the birth of the hybrid rights debate.

C. *Post*-Smith

In 1992, the Supreme Court applied its "neutral, generally applicable" rule in a case involving a series of city ordinances effectively outlawing the practices of members of the Santeria religion.[60] Mem-

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54. *Smith* was a sharply divided Court and, because Justice Scalia wrote for a majority of five, some commentators have suggested that he did not have the votes to overturn *Sherbert* outright, and was left to distinguish it into submission. *See generally* Peter M. Stein, Case Note, Smith v. Fair Employment and Housing Commission: *Does the Right to Exclude, Combined with Religious Freedom, Present a "Hybrid Situation" Under* Employment Division v. Smith? 4 GEO. MASON L. REV. 141 (1995); Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833 (1993).

55. *See* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1458 (1992) (provides an account of not only Supreme Court free exercise cases, but also lower court cases between *Sherbert* and *Smith*).

56. *See* Frazee v. Illinois Dep't of Employment Security, 489 U.S. 829 (1989); *see also* Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987); Thomas v. Review Bd. of the Ind. Employment Security Div., 450 U.S. 707 (1981).

57. *Yoder*, 406 U.S. at 234.

58. *Smith*, 494 U.S. at 881.

59. *Id.* at 882. In attempting to distinguish *Sherbert* and its progeny, Justice Scalia read these cases as implicating other constitutional issues. Because his reading allowed him to claim that these cases were decided on different grounds, he was free to ignore them as precedent. For instance, *Yoder* involved the constitutional right to raise children. Unfortunately, Justice Scalia stopped there. If he had explained further, the present controversy may not even exist.

60. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1992).

bers of the Church of Lukumi Babalu Aye practice the Santeria religion, which includes ritual animal sacrifice as an important aspect of its practice.[61] In response, the City of Hialeah passed several ordinances outlawing the killing of animals, calling the ordinances important to the public health.[62] The Church sued to enjoin the City from enforcing the ordinances against it, claiming that the laws violated the Free Exercise Clause.[63]

The Supreme Court, applying the *Smith* test, found that the laws were neither neutral nor generally applicable for several reasons. First, the Court determined that the laws were not facially neutral because they specifically mentioned "sacrifice" and "ritual," and because one of the ordinances claimed that the "residents and citizens of the City of Hialeah have expressed concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety."[64] The Court further found that the laws were not neutral based on their effect, declaring the laws an "impermissible attempt to target petitioners and their religious practices."[65]

Because the Court found that the ordinances were not neutral and generally applicable, and were therefore unconstitutional, it did not reach the question of the existence of "hybrid rights." However, in his concurring opinion, Justice Souter attacked the notion of hybrid rights, calling them "ultimately untenable."[66] He went on to write,

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid 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.[67]

Justice Souter recognized the fundamental flaw in the notion of hybrid rights.

Justice Souter was not the only one who did not like the new *Smith* rule. In fact, in response to *Smith*, Congress passed the Reli-

61. *Id.* at 524.
62. *Id.* at 527.
63. *Id.* at 528.
64. *Id.* at 535.
65. *Id.*
66. *Id.* at 567.
67. *Id.*

gious Freedom Restoration Act of 1993 (RFRA).[68] RFRA was enacted to overrule *Smith* and return to the rule of *Sherbert*.[69] RFRA governed free exercise jurisprudence until 1997, when the Supreme Court held the Act to be beyond the constitutional powers of Congress.[70] Holding that "[t]he stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved,"[71] the Court returned free exercise jurisprudence to *Smith's* neutral, generally applicable rule.

The stage was therefore set for the Ninth Circuit to render its interpretation of this rule.

D. Thomas v. Anchorage Equal Rights Commission

Having presented a brief history of the rather tumultuous career of the Free Exercise Clause, this Note will now turn to the Ninth Circuit's handling of the currently applicable rule defined by *Smith*. The plaintiffs in *Thomas* objected to both state and local laws prohibiting housing discrimination on the basis of marital status. Plaintiffs, Thomas and Baker, claimed they had violated, and would continue to violate the laws because of their strong religious beliefs.[72] They argued that, if the city enforced the laws against them by forcing them to rent to unmarried couples, their First Amendment right to the free exercise of religion would be violated.[73] The defendants and the State and local government contended that the laws were neutral and generally applicable and, therefore, not in violation of the First Amendment.[74]

The court began with a cursory discussion of whether the controversy was ripe for review.[75] After determining that it was,[76] the court moved on to the *Smith* rule.[77] Thomas and Baker insisted that the laws were neither neutral nor generally applicable because, as in

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68. 42 U.S.C. § 2000bb et. seq. (1990).

69. *Id.* "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.* at § 2000bb(b).

70. *City of Boerne*, 521 U.S. at 536.

71. *Id.* at 533.

72. *Thomas*, 165 F.3d at 696-97.

73. *Id.* at 697.

74. *Id.* at 700-01.

75. *Id.* at 698-700.

76. There are serious questions about the accuracy of this finding, however. While these issues are well beyond the scope of this Note, the reader may choose to examine them individually. *See Thomas*, 165 F.3d at 718-21 (Hawkins, J., Dissenting).

77. *Thomas*, 165 F.3d at 700.

Lukumi, the laws at issue contained exemptions for certain activities proscribed by the laws.[78] Specifically, Thomas and Baker pointed out exceptions in the housing laws that allowed the "sale, lease or rental of classes of real property commonly known as housing for 'singles' or 'married couples' only."[79] They also pointed to a provision allowing an exemption for "individual home[s] wherein the renter or lessee would share common living areas with the owner, lessor, manager, agent, or other person."[80] Because the laws allow exemptions in these circumstances and not in the circumstance of religious objection, Thomas and Baker claimed that the laws were constitutionally suspect and should be reviewed under strict scrutiny.[81]

The Ninth Circuit rejected these arguments, however, holding that the underinclusiveness of the Alaskan laws claimed by Thomas and Baker was of a "different constitutional order altogether" from that claimed in *Lukumi*.[82] While the laws drafted in *Lukumi* applied only to members of the Santeria religion, the Alaskan laws applied to all landlords.[83] The court went on to state that the underinclusiveness claimed by Thomas and Baker was not a "talisman of constitutional infirmity," but was an indication of something more sinister,[84] like the laws in *Lukumi*.[85] In *Lukumi*, the exemptions were patterned to exclude the enforcement of the laws against everyone except members of the Santeria religion. No such pattern existed in the Alaskan housing laws.[86]

The court finally held that there was no indication that the Alaskan laws were designed to target members of any religion.[87] Also, the court held that the "burden on religiously motivated conduct, even if substantial," was "incidental."[88] Thus, the Ninth Circuit endorsed the rule in *Smith* and determined that the Alaska laws were neutral and generally applicable and, as such, were enforceable against Thomas and Baker.[89] If the court had ended its inquiry at this point, it would have reached the correct outcome under *Smith*. However, in the court's apparent zeal to return to *Sherbert's* strict scrutiny test, the

78. *Id.* at 701.
79. *Id.* (citing ALASKA STAT. § 18.80.240).
80. *Id.* (citing ANCHORAGE ALASKA MUN. CODE § 5.20.020).
81. *Id.*
82. *Id.*
83. See *supra* note 2 and 3.
84. *Id.*
85. *Id.* at 701-02.
86. *Id.* at 702.
87. *Id.*
88. *Id.*
89. *Id.*

Ninth Circuit qualified its neutral, generally applicable analysis by stating that *Smith* only applies, "absent some other exception."[90]

Thomas and Baker claimed that even if the laws were neutral and generally applicable, the laws still failed to pass constitutional muster because they fit within the hybrid rights exception outlined in *Smith*.[91] They claimed that even though the free exercise claim alone did not invalidate the laws as enforced against them, the combination of effects on their free exercise rights, free speech rights,[92] and exclusion rights[93] gave rise to a constitutional hybrid.[94] Claiming that the Supreme Court had been "less than precise" in defining hybrid rights, the Ninth Circuit set out to determine of what a hybrid right really consists.[95]

E. Thomas' *Hybrid Rights Analysis*

The court stated that before it could evaluate the merits of Thomas' and Bakers' hybrid rights claim, it first needed to determine whether such a right exists, and if so, what it might entail.[96] However, the court skipped the question of whether hybrid rights exist and moved straight into an analysis of ways in which a hybrid may be accomplished.[97]

The court cited several different ways in which a court could handle a hybrid rights claim. First, it cited the First and District of Columbia Circuits, both of which have determined that companion rights[98] must be independently viable constitutional claims in order to be hybridized with the free exercise claim.[99] For contrast, the Ninth Circuit then pointed to the Tenth Circuit's interpretation, which

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90. *Id.*

91. *Id.*

92. *Id.* The plaintiffs contended that the provision in the statute prohibiting discriminatory language in rental advertisements was an unconstitutional infringement on their rights to freedom of speech.

93. Thomas and Baker also contended that enforcement of the laws would have violated their rights to exclude others from their property guaranteed by the Fifth Amendment.

94. *Thomas*, 165 F.3d at 702.

95. *Id.* at 703.

96. *Id.*

97. *Id.*

98. "Companion rights" are those additional constitutional claims that plaintiffs attempt to hybridize with a free exercise claim.

99. *See Thomas*, 165 F.3d at 703; EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1995) (holding that there was a hybrid situation because the University had proven violation of both the Free Exercise Clause and the Establishment Clause); *see also* Brown v. Hot, Sexy, and Safer Products, 68 F.3d 525, 539 (1st Cir. 1995) (holding that plaintiff's companion claim of interference with family relations and parental prerogatives was not an "independently protected constitutional protection").

"requires only a 'colorable claim of infringement.'"[100] Finally, the court alluded to the fact that the mere implication of another constitutional claim may be enough to hybridize a Free Exercise claim.[101]

However, one interpretation remained. The court next discussed the Sixth Circuit's handling of hybrid rights.[102] The Sixth Circuit held that the notion of hybrid rights was illogical and that it would not employ a test stricter than the *Smith* rule.[103] The Ninth Circuit dismissed the Sixth Circuit's analysis as ignoring the Supreme Court's ruling.[104] The *Thomas* court refused to "hypothesize about the Justices' 'true' intentions," and found that because the term "hybrid rights" appears in the Supreme Court decision, it ends the discussion about whether those rights exist.[105]

The court was left to determine which of three methods of analyzing hybrid rights was the most appropriate: the implication standard, the colorable claim standard, or the independently viable standard. Discussion of this issue began with the court quoting Justice Souter's concurring opinion from *Lukumi*.[106] Once again,

> [i]f 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.[107]

The Ninth Circuit agreed with Justice Souter that neither the implication standard nor the independently viable standard were appropriate for analyzing hybrid rights claims.[108] The court correctly

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100. *Thomas*, 165 F.3d at 703 (quoting Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998)).

101. *Id.* at 703, n.7.

102. *Id.* at 704.

103. Kissinger v. Bd. of Trustees, 5 F.3d 177, 180 (6th Cir. 1993).

104. *Thomas*, 165 F.3d at 704.

105. *Id.* at 705. "[W]e must take a judicial pronouncement at face value. We will not speculate or hypothesize about the Justices' 'true' intentions; rather, we will assume that these intentions are expressed in the words the Justices carefully chose to express *the opinion of the Court*." *Id.*

106. *Id.* at 704.

107. *Lukumi*, 508 U.S. at 567.

108. This decision creates a further split within the circuits. Here the Ninth Circuit broke from the First and District of Columbia Circuits, both of which applied the 'independently via-

dismissed the implication standard because this standard would allow a party to reach strict scrutiny on its free exercise claim merely by including another claim within its pleadings.[109] Furthermore, the court observed that previous cases, which the Supreme Court referred to as hybrid cases, involved discussion of free exercise in conjunction with other constitutional claims.[110] This indicates that the Supreme Court did not intend hybrid cases to use an independently viable standard.[111]

Having eliminated two of the three standards, the court settled on the colorable claim standard as the one most appropriate for hybrid rights analysis.[112] Although the court agreed with Justice Souter in his impressions of the other two standards, the Ninth Circuit did not join him in his conclusion that the entire notion of hybrid rights was "untenable."[113] In an apparent zeal to reach *Sherbert's* strict scrutiny rule, the court imposed a standard somewhere in the middle of the other two extremes.

The court justified its decision to apply a colorable claim standard by reasoning that this standard does not engender the problems inherent in the other two standards.[114] The court asserted that "an individual claiming to be within the hybrid rights exception may not rest upon a bald assertion . . . [n]or, however, is he required to show that the law he challenges is invalid under [another constitutional claim] alone."[115] By falling between these two problematic standards, the Ninth Circuit claimed to have avoided the problems of these extremes altogether and to have struck a balance that is neither, "too lax nor too strict, but 'just right.'"[116]

The court further justified its decision to use a colorable claim standard by stating that it followed precedent set by the Tenth Circuit.[117] Also, the Ninth Circuit referred to the use of the colorable

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ble' method. *See Catholic Univ. of Am.*, 83 F.3d at 467; *Brown*, 68 F.3d at 539.

109. *See Thomas*, 165 F.3d at 705.

110. *Id.*

111. This is a rather curious statement, because the court then pointed out that it would "not speculate or hypothesize about the Justices' 'true' intentions; rather, we will assume that those intentions are expressed in the words the Justices carefully chose to express in the opinions of the Court." *Id.* at 705. While this statement may not be tremendously curious in the discussion of the 'independently viable' standard, it certainly is strange considering the fact that the court's entire discussion of hybrid rights is speculation about the Justices' intentions.

112. *Id.*

113. *Id.*

114. "Our colorable-claim standard is therefore neither too lax nor too strict, but 'just right.'" *Id.* at 707.

115. *Id.*

116. *Id.* at 707.

117. This argument is somewhat unavailing, however, because the Tenth Circuit never

claim standard in other areas of the law, coming to the conclusion that colorable claim means 'fair probability' or 'likelihood' of success on the merits.[118]

With this standard freshly set out, the Ninth Circuit began an inquiry into whether Thomas and Baker had established a colorable claim implicating any of their companion rights. That is, was there a fair probability or likelihood of success on the merits of either of the plaintiffs' free speech rights or their exclusion rights claims?

The court determined that Thomas and Baker had established colorable claims under the First Amendment's Freedom of Speech Clause and the Fifth Amendment's Takings Clause.[119] Having found colorable claims, the court hybridized them with the free exercise claim and determined that the case fit within *Smith's* hybrid rights exception.[120] The court then applied *Sherbert's* strict scrutiny test and found that the interest of the state and local governments in eradicating discrimination was not sufficiently compelling to outweigh the burden the laws placed on Thomas and Baker.[121] Therefore, the Ninth Circuit affirmed the district court and invalidated enforcement of the laws against religious objectors.[122]

III. HYBRID RIGHTS: FACT OR FICTION

The *Thomas* opinion can be criticized on many different fronts. For instance, there are issues involving the court's analysis of the ripeness issue, the First and Fifth Amendment issues, and even the court's strict scrutiny analysis.[123] However, this Note is concerned with the Ninth Circuit's hybrid rights analysis. The court made several errors in this analysis, and the combination of these errors led to a result that does not fit within the true holding of *Smith*. How could the Ninth Circuit realistically combine a *losing* free exercise claim with a *losing*

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actually reached this question. "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." Swanson v. Guthrie Indep. Sch. Dist. No. 1-L, 135 F.3d 694, 700 (10th Cir. 1998) (emphasis added).

118. Besides quoting from Webster's Third New International Dictionary for a definition of "colorable," the *Thomas* court mentioned areas of the law such as habeas corpus proceedings and selective prosecution claims in which the Supreme Court has established a colorable standard. *Thomas*, 165 F.3d at 705-06.

119. *Id.* at 717. There is some question as to whether the analysis by the court on these topics is correct. *See id.* at 724-26 (Hawkins, J., dissenting).

120. *Id.*

121. *Id.* at 717.

122. *Id.* at 718.

123. *Id.* at 718-27. In his dissenting opinion, Judge Hawkins covers all these areas in some detail.

takings claim and a *losing* free speech claim, and then come up with a *winning* free exercise claim? Do three losers really make a winner?

The court's first priority in adjudicating these claims should have been to conduct an independent analysis of whether or not a hybrid rights exception really exists. Instead, the court seemed content to claim that it was "not at liberty to ignore" previous hybrid rights cases such as *Yoder*.[124] While characterizing the Sixth Circuit's view that there is no logical interpretation of hybrid rights as "the path of least resistance," the Ninth Circuit itself took the easier path by simply disagreeing with the Sixth Circuit, dismissing that Circuit's conclusion, and moving on.[125] The question remains, however: does a hybrid rights exception really exist?

There are several issues regarding the existence of hybrid rights that the Ninth Circuit did not fully analyze. For instance, as Judge Hawkins pointed out in his dissent, the actual holding in *Smith* is 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).'"[126] After pointing this out, Judge Hawkins correctly concluded that the hybrid language in *Smith* was "dicta; simply an attempt to distinguish other free exercise cases from the facts in *Smith*."[127] As dicta, the hybrid rights language has never been binding on any court, while the "neutral, generally applicable" language is binding on *all* federal courts.

The *Thomas* court claimed that it would not "speculate or hypothesize about the Justices' true intentions."[128] However, the stated intention of the Justices was to establish the "neutral, generally applicable" rule as the law of the land.

The Sixth Circuit, acting in accord with Justice Souter, proclaimed hybrid rights to be "completely illogical,"[129] holding, that until the Supreme Court required otherwise, the Sixth Circuit would not apply a stricter standard than was employed in *Smith*.[130] The Sixth Circuit properly recognized that the hybrid rights language was not binding and chose instead to follow the true holding of *Smith*. For the Ninth Circuit to characterize this analysis as the Sixth Circuit's

124. *Id.* at 704.
125. *Id.*
126. *Id.* at 723 (quoting *Smith*, 494 U.S. at 879).
127. *Id.*
128. *Id.* at 705.
129. Kissinger v. Bd. of Trustees, 5 F.3d 177, 180 (6th Cir. 1993).
130. *Id.*

having thrown "up its hands in despair"[131] is "simply wrong."[132] In fact, the Sixth Circuit based its opinion of hybrid rights on the very same premise that the Ninth Circuit relied upon. That is, that the Supreme Court was vague in regard to the precise nature of hybrid rights.[133] For instance, the Supreme Court has never affirmatively stated that the *Smith* rule contains a hybrid rights exception.[134] In addition, the Supreme Court has never said what the ramifications would be if a hybrid right was found to exist. The Sixth Circuit proclaimed, "until the Supreme Court holds that the legal standards under the Free Exercise Clause vary depending upon whether other constitutional rights are implicated, we will not," vary from the actual *Smith* holding.[135]

This is a very important issue. Even if there is a hybrid rights exception, the Supreme Court has never indicated whether that automatically means that the Free Exercise hybrid claim will be tested under strict scrutiny. Furthermore, when the Supreme Court has had an opportunity to clarify itself, it has declined to do so.[136]

If the original *Thomas* court had undergone this analysis, it could not have found that a hybrid rights exception to the *Smith* rule exists. However, as lower courts are wont to do, the Ninth Circuit may have simply been anticipating what the Supreme Court might do in the same situation, regardless of what is or is not binding. As the *Thomas* court pointed out, *Smith* did not explicitly overrule *Sherbert* and its progeny; it simply distinguished them into submission.[137] This, the court might have argued, lends itself to the possibility that a hybrid rights exception *might* exist. The issue therefore becomes this: absent an affirmative holding by the Supreme Court that a hybrid rights exception really does exist, can a lower court infer that the Supreme Court meant to establish one?

There are several clues that evidence against such a conclusion. First, as has been discussed above, the Supreme Court has never taken the opportunity to clarify its position on the matter. If the Court felt that hybrid rights should be the new rule for constitutional free exercise analysis, one would assume that the Justices would choose to state so affirmatively. Furthermore, Justice Souter's scathing indictment of

131. *Thomas*, 165 F.3d at 704.

132. *Id.* at 723 (Hawkins, J., dissenting).

133. *Id.* at 703.

134. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566-68 (1992) (Souter, J., concurring); *Smith*, 494 U.S. at 882.

135. *Kissinger*, 5 F.3d at 180.

136. *See* City of Boerne v. Flores, 521 U.S. 507 (1997); *Lukumi*, 508 U.S. 520.

137. *Thomas*, 165 F.3d at 704.

Smith's hybrid rights language is indicative of at least one Justice's view that hybrid rights are "ultimately untenable."[138]

Furthermore, the author of the *Smith* opinion, Justice Scalia, seems not to believe in the existence of hybrid rights. In the same year that *Smith* was handed down, Scalia wrote, "[o]ne will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions; and will find no hint that the distinctions are constitutionally relevant."[139] After all, there is no hybrid right in the Constitution. As one commentator put it,

> [w]hen one receives news that a two hundred year old Constitution has given birth to a new legal creature, it is wise to be skeptical. Even more so when the herald angels announce that the attending midwife was none other than Justice Antonin Scalia . . . It is simply incorrect to say . . . that Smith begat a heretofore unheard of legal claim.[140]

Even if the Ninth Circuit could have found a way to overlook the interpretive difficulties involved in hybrid rights, and even if it could have found that Justice Scalia really did intend to create a new constitutional bundle of rights, it would still have been left with the problem of deciding which hybrid rights standard to apply. Declaring the colorable claim standard to be "just right"[141] was a mischaracterization in that the court failed to recognize the logical problems inherent in that standard. Just as with the implication standard, the colorable claim standard allows a party to join losing free exercise claims with other losing claims to create a winning free exercise claim.

Furthermore, this standard comes down to an essentially ad hoc factual review by the lower courts. Because companion claims need not rise to the level of being independently viable under this analysis, it will be the trial court, rather than the jury, that decides some very important factual issues in a 'colorable claim' free exercise hybrid case. The Ninth Circuit skirts this issue by simply declaring that it believes that "any hybrid rule's administrability must play second fiddle to its consistency with Supreme Court precedent."[142] Evidently the court was not concerned with Supreme Court precedent involving the constitutional right to a jury trial.

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138. *Lukumi*, 508 U.S. at 567.

139. *Cf.* Hodgson v. Minnesota, 497 U.S. 417, 480 (1990) (Scalia, J., concurring in part, dissenting in part).

140. James R. Mason, III, Comment, Smith's *Free-Exercise "Hybrids" Rooted in Non-Free-Exercise Soil*, 6 REGENT U.L. REV 201, 226-27 (1995).

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

142. *Id.* at 706.

Because the Ninth Circuit did not undertake an independent analysis of whether the Supreme Court really did create a hybrid rights exception to the *Smith* rule, it had to choose between three standards, each of which entails, "certain logical and interpretive difficulties."[143] With these three to choose from, the court picked the lesser of three evils. However, it would have been far more prudent to have conducted a rigorous examination into the existence of a hybrid rights exception, rather than assuming its existence.

IV. CONCLUSION

Ever since the Supreme Court decided *Smith*, lower courts, commentators, and legislators have attempted to find ways to return to the rule of *Sherbert*. Given the tumultuous history of the Free Exercise Clause, this is hardly surprising. Nor is it surprising that the Ninth Circuit sought to avoid the *Smith* rule in *Thomas*. With the controversy between religious landlords and unmarried cohabitants continuing to be a topic of commentary and legal battles, the court did not want to declare that neutral, generally applicable housing laws do not violate the Free Exercise Clause.

It was a zeal to return to the *Sherbert* rule that led the *Thomas* court down the wrong path. If it had conducted the proper inquiry, the court would have had no choice but to stand up and loudly declare, "three losers do not make a winner: there is no such thing as a 'hybrid right.'"

When the Ninth Circuit revisits this case *en banc*, it should be wary of the pitfalls that led the original *Thomas* court down the wrong path. The court should look back at *Smith* and conduct a rigorous analysis of Justice Scalia's hybrid-rights dictum. If it does, the court will have no choice but to conclude that the original *Thomas* court simply found something that did not exist.

143. *Id.* at 704.