RUTGERS LAW RECORD

VOLUME 52
ISSUE I: FALL 2024

HYBRID RIGHTS IN THE FOURTH CIRCUIT: FACT OR FICTION?

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[1] My sincerest thanks and gratitude to everyone who has helped me throughout the writing process. To my parents and sister, who listened to me as I talked out several ideas over dinner multiple times and who asked very good questions along the way. Thank you to my advisor, Professor Sarah Swan, whose suggestions and guidance were invaluable during the year I spent writing and researching. Finally, thank you to the staff of Volume 51 for their advice and guidance throughout my year as an Associate Editor.

Introduction

In 2023, the American Library Association reported a total of 695 attempts by the public to "censor library materials and services."[2] Within these 695 attempts to ban or restrict library materials, "1,915 unique titles were targeted for censorship" while "3,293 total titles were targeted for censorship."[3] States within the Fourth Circuit accounted for 55 attempts to censor materials, with 589 total titles targeted for censorship.[4] These attempts have been finding their way into school districts, where parents are requesting to opt out their children from lessons with topics like gender identity, sexuality, and race with varying degrees of success.[5] Picture books with LGBTQ characters were overwhelmingly targeted in children's book challenges with the main reason for wanting books removed that challengers found discussion of LGBTQ characters and their lives to be objectionable, and not appropriate for children.[6] Parents will voice their disagreement with school curriculum and literature choices by stating their child's exposure to

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[2] Sareen Habeshian, *Attempts to ban books at public libraries surge at record levels*, AXIOS (Sept. 22, 2023), https://www.axios.com/2023/09/22/book-bans-libraries-surge.

[3] *Book Ban Data*, BANNED AND CHALLENGED BOOKS https://www.ala.org/advocacy/bbooks/book-ban-data [https://web.archive.org/web/20240912135200/https://www.ala.org/bbooks/book-ban-data] (last visited Nov. 8, 2023).

[4] *Book Ban Data*, supra note 2 (Maryland accounted for 10 censorship attempts covering 66 titles, Virginia accounted for 14 attempts covering 356 titles, West Virginia accounted for 1 attempt covering 3 titles, North Carolina accounted for 18 attempts coveri*Book Ban Data*,

[5] See Julia Shapero, *Judge rejects Maryland parents' motion to keep kids out of lessons with LGBTQ books*, HILL (Aug. 25, 2023), https://thehill.com/homenews/education/4171618-judge-rejects-maryland-parents-motion-to-keep-kids-out-of-lessons-with-lgbtq-b*See* Julia Shapero; *see also* Hannan Adely, *Can parents opt out of New Jersey's LGBTQ curriculum law?,* NORTHJERSEY.COM, June 26, 2019), https://www.northjersey.com/story/news/education/2019/06/26/teaching-lgbtq-in-schools-can-nj-parents-opt-out/1549151001; *see also* Margaret Barthel, *Virginia Finalizing Policy Allowing Parents to Opt Out of Sexually Explicit Content in Schools*, DCIST.COM (Aug. 3, 2022), https://dcist.com/story/22/08/03/virginia-schools-explicit-content-lgbtq-books/; *see also* Destinee Patterson, *NC school districts adjust to controversial new 'Parents' Bill of Rights' law*, WRAL NEWS (Oct. 5, 2023), https://www.wral.com/story/nc-school-districts-adjust-to-controversial-new-parents-bill-of-rights-law/21083428/.

[6] Hannah Natanson, *'Racist,' 'grooming': Why parents are trying to ban so many picture books*, WASH. POST (July 12, 2023), https://www.washingtonpost.com/education/2023/07/12/grooming-racist-why-adults-are-waging-war-childrens-picture-books-or-insidHannah Natanso

"inappropriate" topics run afoul of a parent's right to decide what their child should be exposed to (parental rights) and the family's religious beliefs and practices.[7]

Parents brought a challenge against a Maryland school district for violating their parental rights and free exercise rights when the school district implemented a diverse reading curriculum containing children's books featuring LGBTQ characters without providing parents an option to opt their children out of the curriculum.[8] The combination of a parental rights and free exercise claim presents the Maryland District Court with the opportunity to analyze what is known as a hybrid rights claim. The Fourth Circuit, which contains the Maryland District Court, does not presently have a method to analyze hybrid rights claims while other circuits have developed frameworks to analyze these claims.[9] This paper will discuss (1) the emergence of a hybrid rights case in the Fourth Circuit; *Mahmoud v. McKnight*; (2) the origin of the hybrid rights theory and approaches other Circuit Courts have taken when analyzing hybrid rights cases; (3) and the best approach for the Fourth Circuit to take, seeing as the Fourth Circuit currently looks to other circuit courts for persuasive authority on hybrid rights cases. When considering how to analyze a hybrid rights claim, the current approaches pose more drawbacks than benefits. Some approaches could be combined or adapted in order to achieve a more realistic or comprehensible outcome, but the best approach is likely to eschew a hybrid rights analysis and just consider each individual claim on its own merits as the first approach does.

Part One: Background on *Mahmoud v. McKnight*

Parents are bringing suits against school districts when they believe their parental rights are being violated, specifically when schools teach curriculum parents believe violates their

[7] Mahmoud v. McKnight, 688 F. Supp. 3d 265, 276 (D. Md. 2023), aff'd, 102 F.4th 191 (4th Cir. 2024).
[8] *Id.* at 271, 301.
[9] *Id.* at 304-306.

religious beliefs.[10] The families in *Mahmoud v. McKnight* brought suit against the Montgomery County Board of Education after a new policy told parents they would no longer receive advance notice when storybooks would be read in classes, and parents would not have an option to opt their children out of lessons involving those storybooks.[11] When this policy was introduced, parents initially had an opportunity to opt their children out of reading and participating in conversations with these books, like they could with other aspects of the school's curriculum.[12] The district introduced these books in an effort to "reflect the diversity in the school community" which was in line with the School Board's policies to address implicit biases which often results in "disproportionate exclusion and underrepresentation."[13] Parents in the district filed suit against the School Board and claimed the new district policy violated "their children's free exercise and free speech rights under the First Amendment, the parents' substantive due process rights under the Fourteenth Amendment, and Maryland law."[14] The court held the plaintiffs would not succeed on the merits of their claim as the lack of an opt-out policy would likely not "result in the indoctrination of their children."[15]

Plaintiffs in this case have three main arguments to demonstrate their rights under the Free Exercise Clause have been violated.[16] The plaintiffs first argued strict scrutiny should be applied to their claim since the court is restricting their rights as parents to raise their children in religion as they see fit.[17] The plaintiff's also argued strict scrutiny was applicable because the district's opt out policy "operates as a system of discretionary exemptions and invites" a

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[10] *Id.* at 271.
[11] *Id*.
[12] *Id.*
[13] *Mahmoud*, 688 F. Supp. 3d at 271-272.
[14] *Id.* at 271.
[15] *Id.* at 296, 298.
[16] *Id.* at 287.
[17] *Id.* at 287-288; *see* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (determining parents have the right to control their children's religious upbringing).

government entity to assess the reasons for every opt-out request.[18] In the plaintiff's eyes, the opt-outs for the storybooks should follow the same process as opt-outs for the family life and human sexuality curriculum because to the plaintiffs, both curriculums covered the same topics.[19] Finally, the plaintiffs argued the opt-out policy "was surrounded by official expressions of hostility towards religion".[20] To plaintiff's points, the defendant district argues that the policy is subject to rational basis review because it was not adopted to indicate hostility towards any religion, and it does not allow anyone to "opt-out of instruction involving the storybooks for any reason."[21] Strict scrutiny will not be applied if the law in question is facially neutral and generally applicable but also "has the incidental effect of burdening religious exercise"; an incidental burden on religious exercise will require the court to apply rational basis review.[22]

Part Two: The Origin and Development of the Hybrid Rights Theory and How Other Courts Analyze Hybrid Rights Claims

Justice Scalia, in his majority opinion in *Employment Division v. Smith*, decided the Free Exercise Clause does not protect individuals who violate laws which do not address religious

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[18] *Mahmoud*, 688 F. Supp. 3d at 287; *see 2022-2023 Guidelines for Respecting Religious Diversity in Montgomery County Public Schools*, MONTGOMERY CNTY. P. SCH.'S (July 2022), https://www2.montgomeryschoolsmd.org/siteassets/district/students/rights/0854.22_r(Requests to be Excused from Instructional Programs for Religious Reasons: "When possible, schools should try to make reasonable and feasible adjustments to the instructional program to accommodate requests from students, or requests from parents/guardians on behalf of their students, to be excused from specific classroom discussions or activities that they believe would impose a substantial burden on their religious beliefs . . . . When a student is excused from the classroom activity, the student will be provided with an alternative to the school activity or assignment. Applying these principles, it may be feasible to accommodate objections from students or their parents/guardians to a particular reading assignment on religious grounds by providing an alternative selection that meets the same lesson objectives. However, if such requests become too frequent or burdensome, the school may refuse to accommodate the requests. Schools are not required to alter fundamentally the educational program or create a separate educational program or a separate course to accommodate a student's religious practice or belief. For example, schools are not required to excuse students from all music instruction based on a religious concern, because music is an integral part of Maryland's arts curriculum; however, schools may seek to avoid, if possible, requiring a student with a religious objection to play an instrument or sing.")

[19] *Mahmoud*, 688 F. Supp. 3d at 288.

[20] *Id.*; *see* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[21] *Mahmoud*, 688 F. Supp. 3d at 288.

[22] *Id.* at 287; *see* Alive Church of the Nazarene, Inc. v. Prince William Cnty, 59 F.4th 92, 108 (4th Cir. 2023).

beliefs or practices.[23] There was, however, an exception Justice Scalia carved out for what he labeled "hybrid rights" which is a free exercise claim combined with a second constitutional claim, often a freedom of speech or parental rights claim.[24] Hybrid rights claims have confused the courts more than they have helped the courts facing issues containing two constitutional claims.[25] Courts analyzing hybrid rights claims do not have clear guidance on how an issue should be approached.[26]

Smith was decided in 1990, and is a seminal case on the interpretation of the Free Exercise Clause.[27] In *Smith*, two respondents who consumed peyote in order to participate in a religious ceremony at the Native American Church where they were both members were fired from their positions at a "private drug rehabilitation organization" after they ingested the drug, a controlled substance in the state of Oregon.[28] Respondents brought their suit against petitioner, Employment Division, because they were unable to receive unemployment benefits since the respondents were dismissed for work-related "'misconduct'" and ingesting the drug was considered a crime under Oregon law.[29] The issue the Supreme Court had to decide was whether Oregon's prohibition on the religious use of peyote is allowed under the Free Exercise Clause.[30] Ultimately, the Supreme Court decided that since ingesting peyote is illegal under Oregon law,

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[23] Emp. Div. v. Smith, 494 U.S. 872, 876 (1990).
[24] *Id.* at 881-82 (determining free exercise claims can be brought in conjunction with freedom of speech, freedom of the press, parental rights, freedom of association, and cases involving compelled speech); *see* David L. Hudson, Jr. & Emily H. Harvey, *Dissecting the Hybrid Rights Exception: Should It Be Expanded or Rejected?*, 38 U. ARK. LITTLE ROCK L. REV. 449, 451 (2016).
[25] David L. Hudson, Jr. & Emily H. Harvey, *Dissecting the Hybrid Rights Exception: Should It Be Expanded or Rejected?*, 38 U. ARK. LITTLE ROCK L. REV. 449, 455-456 (2016).
[26] *Id*. at 455.
[27] See *Smith,* 494 U.S. at 882.
[28] *Id.* at 874-75.
[29] *Id.*
[30] *Id.* at 876-77. The Free Exercise Clause was incorporated into the Fourteenth Amendment and allows citizens of the United States to practice and believe in whatever religion or religious doctrine they choose to. Additionally, the First Amendment prevents the government from regulating religion or religious beliefs.

and the prohibition is constitutional, respondents may be denied unemployment when "their dismissal results from use of the drug."[31]

Yoder, decided in 1972, is one of the preeminent cases on parental rights in education systems where religious beliefs intersect with the decisions parents want to make on behalf of their children. Here, the parent respondents who were members of Amish communities in Wisconsin, declined to send their children to school after the ages of 14 and 15 which violated Wisconsin's compulsory-attendance law which mandated children attend school until the age of 16.[32] Respondents sued Wisconsin for violating their First and Fourteenth Amendment rights.[33] Because of respondents' sincerely held religious beliefs, they believed that sending their children to public school beyond eighth grade would expose their children to "the danger of the censure of the church community, but . . . . also endanger [respondents'] own salvation and that of their children."[34] The respondents do believe an education through eighth grade is important as it teaches children rudimentary skills and would allow their children to be productive members of society.[35] One expert supported this notion by testifying that an Amish education, in lieu of a traditional public high school education, was ideal and possibly superior to an education an

[31] *Id.* at 890.
[32] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972). "Respondents Jonas Yoder and Wallace Miller are members of the Old Order Amish religion, and respondent Adin Yutzy is a member of the Conservative Amish Mennonite Church."
[33] *Id.* at 208-09. Respondents were found to be in violation of the compulsory-attendance law after being charged, tried, and convicted. Respondents were each fined five dollars.
[34] *Id.* at 208-13. Scholars testified as expert witness on behalf of the respondents. This uncontradicted testimony included a history of the Amish, as well as a discussion on how the Amish consider school and education in comparison to religion. The scholars highlighted for the court that Old Order Amish communities can be "characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence." Additionally, another core tenet of Old Order Amish communities is a devotion to nature and the land; "Amish beliefs require members of the community to make their living by farming or closely related activities." As a result, objections to higher education by the Amish are rooted in these deeply held religious beliefs, as it is believed that members of their community receive a better education from those within their community than as part of high school.
[35] *Id.* at 211-13.

Amish student would receive at a public or private high school since Amish children would be learning through tasks directly related to their roles as adults in the Amish community.[36]

The Court has determined previously that although a State may have a strong interest in enforcing compulsory education, that interest may not preclude other interests which may be present.[37] Additionally, the court recognized that the Old Order Amish way of life has not changed in centuries, and acknowledged that as education became compulsory beyond eighth grade, the Old Order Amish were now required to act against their religion and belief system to satisfy new legal requirements for compulsory education.[38] Ultimately, the Supreme Court held that the First and Fourteenth Amendments prevented Wisconsin from compelling the respondents to send their children to school until the age of 16, as it interfered with their religious and parental rights and upends a long history of Old Order Amish tradition.[39]

Today, courts typically take three main approaches when analyzing hybrid rights.[40] These approaches include (1) courts ignoring the hybrid rights discussion in *Smith* and just treating it as dicta; (2) some courts recognize hybrid claims but require the companion claim to be viable on its own which causes the free exercise claim to be redundant, and; (3) other courts use a "'colorable claim' standard, which requires some showing of a likelihood of success on the non-free exercise claim to trigger increased scrutiny."[41] There is a fourth, less common approach, called "cabining" which is used with claims resembling the facts in *Yoder*; a free exercise/parental rights claim is asserted, and strict scrutiny is applicable because the

[36] *Id.* at 212.
[37] *Id.* at 215.
[38] *Yoder*, 406 U.S. at216-18 (1972).
[39] *Id.* at 234.
[40] Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494, 1495 (2010).
[41] *Id.* at 1495.

government has interfered with a parent's right to direct their children's religious beliefs and practices.[42]

The Fourth Circuit does not have any binding case law on the question of whether a public school's mandatory curriculum would burden a student or parent of a student's right to exercise religion.[43] The Fourth Circuit does, however, rely on the findings of other circuit and district courts who have addressed this question and has found "the mere exposure in public school to ideas that contradict religious beliefs does not burden the religious exercise of students or parents."[44] The Maryland District Court notes that exposing students to ideas in public school which may be contrary to the ideas their parents teach them does not result in a burden on religious exercise "because (1) students were not required to behave contrary to their faiths or affirm any views contrary to their religious beliefs, and (2) parents were not prevented from discussing and contextualizing any contrary views at home."[45]

The three prominent cases the Maryland District Court used to reach the conclusion that exposure did not equate to a burden on religious exercise are *Mozert v. Hawkins*, *Fleischfresser v. Directors of Schools District 200*, and *Parker v. Hurley*.[46] All three of these cases involved books used in the education curriculum, whether they were textbooks, supplemental readings, or in-class texts.[47] *Grove v. Mead Sch. Dist.* and *Coble v. Lake Norman Charter Sch., Inc.* are Ninth Circuit cases which examined whether mandated "public school curriculum might burden the religious exercise of students or parents."[48] These suits focused on novels in the curriculum

[42] Hudson, Jr. & Harvey, supra note 24, at 468.
[43] *Mahmoud,* 688 F. Supp. 3d at 289-90.
[44] *Id*. at 289-90.
[45] *Id*. at 290.
[46] *Id.* at 290-92; *see* Mozert v. Hawkins Cnty Bd. of Educ., 827 F.2d 1058, 1065 (6th Cir. 1987); Fleischfresser v. Dir. Of Sch. Dist. 200, 15 F.3d 680, 690 (7th Cir. 1994); Parker v. Hurley, 514 F.3d 87, 107 (1st Cir. 2008).
[47] *Mahmoud*, 688 F. Supp. 3d at 290-92.
[48] *Id*. at 290.

where students or parents objected to the materials for containing themes, ideas, plots, or characters which interfered with their religious beliefs.[49]

In *Mozert*, families objected to the textbooks used to teach basic reading. A parent of three children in the school district objected to the textbooks because after discovering one of the stories involved mental telepathy in addition to other themes the parent had a religious objection to as a 'born again Christian.'[50] An alternative program was originally offered to parents who disagreed with the curriculum being used in reading education, but after the Board of Education decided to remove that option, plaintiffs filed suit against the district for violating their rights as parents to choose whether their children could read books contrary to the plaintiff parent's religious beliefs.[51] The plaintiff parents sued the district for violating their free exercise rights under the First and Fourteenth Amendments.[52] The defendant district filed a motion to dismiss which was granted by the District Court.[53] The District Court found that the textbooks, although potentially offensive to the plaintiffs' sincerely held religious beliefs, could be considered to be religiously neutral and not in violation of the plaintiffs' religious rights.[54] Ultimately, the 6th Circuit held that there was no Free Exercise violation present, because students were "not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion" when using a reading textbook chosen by a school district.[55] The plaintiffs in this case tried to argue the cabining approach should apply by asserting their facts

[49] Grove v. Mead Sch. Dist., 753 F.2d 1528 (9th Cir. 1985); Coble v. Lake Norman Charter Sch., Inc., No. 3:20-CV-00596, 2021 U.S. Dist. LEXIS 53932 (W.D.N.C. Mar. 22, 2021).
[50] *Mozert*, 827 F.2d at 1060.
[51] *Id.* at 1060-61.
[52] *Id.* at 1060.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 1070.

closely resembled the facts addressed in *Yoder*.[56] The Court asserts parents in the present case, unlike the parents in *Yoder*, have two options should they not want their children to be exposed to the public school curriculum: they can send their children to private schools or church-based schools, where the state does not interfere with education systems, or the parents can homeschool their children with a curriculum that fits their belief system.[57]

In *Fleischfresser*, parents objected to a series of books used in a supplemental reading program which had a focus on supernatural elements, which the parents alleged went directly against the Christian beliefs they held.[58] The parents filed suit against the school district claiming allegations which violated the Establishment Clause and Free Exercise Clause.[59] When courts are presented with a case involving books in a public school curriculum, it is unlikely that a First Amendment violation is present.[60] Here, the Seventh Circuit noted that a pagan religion is not being established through the use of the stories, but rather the stories are presented to foster a student's use of their imagination in an educational setting.[61] The Seventh Circuit used the Lemon Test to determine whether the school's actions violate the Establishment Clause; as a result, the court found the school's actions did not promote an entanglement of government's

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[56] *Mozert,* 827 F.2d at 1067. The Sixth Circuit determined summary judgment was not appropriate in this situation and proceeded to trial. Plaintiffs testified about the passages which they found to be in violation of their religious beliefs. The 6th Circuit notes that plaintiffs assumed the materials depicted objectionable themes as fact, when they were offered in the reader as poems or fictional stories when there is no evidence to support this assumption.
[57] *Id.*
[58] *Mahmoud*,, 688 F. Supp. 3d at 291.
[59] *Fleischfresser*,15 F.3d at683.. The parents claimed that the series of books used in school indoctrinates children against Christian beliefs while also promoting "a religious belief in the existence of superior beings" like wizards, sorcerors, and other supernatural beings. The books in question have been used in the district for several years before the suit was brought. The Supreme Court has previously found several in-school activities in violation of the Establishment Clause like inviting clergy to offer prayers at graduation ceremonies, daily Bible readings, daily in-school prayer, distributing Bibles to students, hanging posters of the Ten Commandments in classrooms, having creationism taught alongside evolution, having a prayer at the beginning of school assemblies, or offering a meditation course which included a ceremony where offerings are given to a deity.
[60] *Id.* at 687. *See Grove*, 753 F.2d; Smith v. Bd. of Sch. Comm'rs, 827 F.2d 684 (11th Cir. 1987); *Mozert*, 827 F.2d 1058; Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373 (9th Cir. 1994).
[61] *Fleischfresser*, 15 F.3d at 688. The publisher states that the purpose of the series is to "stimulate a child's senses, imagination, intellect, and emotions" which the publisher believes "is the best way to build reading skills."

actions with religion.[62] Here, the Court found that by using the supplemental reading books the school did not coerce parents into doing or not doing anything of a religious nature which means that there is no violation of the parents' free exercise of religion.[63] Since the claims the parents brought involved the Establishment and Free Exercise clauses, the Seventh Circuit solely relied on the Lemon Test to determine whether there was a violation of either clause, and did not use one of the hybrid rights approaches, since none of them would have provided the best analysis. Ultimately, the Seventh Circuit held that preventing the school from using these supplemental readers would be "critically impeded by accommodation of the parents' wishes" so the school's interest outweighed any burden posed towards the parents' religious practices.[64]

In *Parker*, a suit was brought against the Lexington, Massachusetts school district by two sets of parents who felt their religious beliefs were offended by the use of diverse children's books in the school curriculum.[65] The parent plaintiffs, who were asserting violations of the Free Exercise Clause for both themselves and their children requested for prior notice and exemptions for their children when a book containing diverse families would be taught.[66] The parents wanted an exemption for their children from instruction involving diverse texts until their children were

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[62] *Id.* at 688-89. The 7th Circuit uses the Lemon Test to determine whether the school has acted improperly when assigning these books to students. The Lemon Test is no longer good law, as *Kennedy v. Bremerton* noted the proper test is to evaluate a claim through historical practices and understandings. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022). The Lemon Test asks whether (1) the law in question has a secular purpose, (2) if the primary effect is either to advance religion or inhibits religion, and (3) if the law in question creates an excessive amount of government entanglement with religion. If the law in question does not have a secular purpose, or advances or inhibits religion, or promotes excessive entanglement between the government and religion, those are violations of the Establishment Clause.

[63] *Fleischfresser*, 15 F.3d at 690.

[64] *Id.* at 690.

[65] Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008). Both sets of parents hold religious beliefs which are offended by gay marriage and homosexuality. The families to not object to the teaching of these books in a non-discrimination curriculum, but would prefer their children not be exposed to such books.

[66] *Id.* at 90. Massachusetts educational standards implemented in 1996 mandated curriculum which would help students learn to respect diversity in all forms as it exists in Massachusetts. There were guidelines set for elementary, middle, and high school. There is a specific note that parents must be notified when their children will begin learning curriculum involving human sexuality. When the parental notification statute was adopted in 1996, it was further specified that parents would be notified when students were to begin discrete units like sexual education.

in seventh grade.[67] In Massachusetts, parents are required to receive notice about curriculum primarily involving "human sexual education or human sexuality issues."[68] Parents, if they choose, may then request for their child(ren) to be exempted from any lesson or curriculum where sexual education or sexuality issues are being discussed.[69] The First Circuit analyzed the plaintiffs' claims under a *Yoder* framework.[70] The claims the plaintiffs presented were analyzed interdependently and the court determined there have been no burdens on the constitutional rights of the plaintiffs or their children to participate in the religious beliefs they hold while also participating in school lessons involving diverse texts.[71] The result of this analysis was a modified approach to *Yoder*, known as cabining, which looked at whether children were being indoctrinated through the use of texts in school which parents disagreed with for religious reasons.[72] The Court did not find any evidence of indoctrination through the reading of and exposure to diverse texts and determined the defendant school district's motion to dismiss was properly granted.[73]

The following cases are Ninth Circuit cases which investigated whether public school curriculums could infringe on a parent's religious rights. In *Grove v. Mead School District* a parent and her daughter brought suit against Mead School District for violating the Free Exercise Clause and Establishment Clause after the district refused to remove the book from the sophomore English curriculum.[74] The Ninth Circuit used a three factor test to determine whether

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[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 98. Plaintiffs originally wanted their case to be considered as a hybrid rights case under the *Smith* framework, but the 1st Circuit felt *Yoder* was a more appropriate comparison point.
[71] *Hurley,* 514 F.3d at 98-99.
[72] *Id.* at 105.
[73] *See id.* at 106-107.
[74] *See Grove*,, 753 F.2d.. The student, Cassie Grove, read *The Learning Tree* by Gordon Parks for her public-school English class. After reading part of it, she found it offended her religious beliefs. Her mother read the book and agreed.

a violation of the Free Exercise Clause had occurred.[75] This test looked at "(1) the extent of the burden upon the exercise of religion, (2) the existence of a compelling state interest justifying that burden, and (3) the extent to which accommodation of the complainant would impede the state's objectives."[76] On the first factor, there was a minimal burden to Ms. Grove because she was assigned an alternative book after her objection to the original assignment was made.[77] For factor two, the state had a strong interest in providing a well-rounded education for students within the district which would be impacted if they had to accommodate to the objection raised by the Groves.[78] As for the last factor, an accommodation for Ms. Grove would have no discernible impact on the state's objective to provide a well-rounded education.[79] The court determined there was no violation of the Free Exercise Clause.[80] Similar to *Fleischfresser*, the Ninth Circuit did not apply one of the four hybrid rights approaches since analysis only involved the Establishment and Free Exercise Clause which can be analyzed using the three factor test discussed above and the Lemon Test.[81] Under the Lemon Test, the court determined there was no religious purpose in having the students read the assigned book, the school's actions did not advance or inhibit religion, and there was no excessive entanglement between the state and religion when the book was chosen or assigned. Since the Lemon Test was not violated, the school did not violate the Establishment Clause.[82]

In *Coble v. Lake Norman Charter School, Inc.*, parents brought suit against Lake Norman Charter School in North Carolina for assigning a book which "contains several lines of poetry

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[75] *Id.* at 1533.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *See Grove*, 753 F.2d.. at 1533-34.
[80] *Id.* at 1534.
[81] *See Id.* at 1533-34.
[82] *Id.* at 1534.

that disparage religion", claiming the book violated their son's "First Amendment religious rights" because of how the text is offensive to Catholicism and Christianity.[83] To determine whether a Free Exercise Clause or Establishment Clause violation occurred, the Court first used the Lemon Test to determine whether the Establishment Clause was violated.[84] While the Cobles believed that simply teaching the book violated the Lemon Test, the Court disagreed.[85] A book's contents are not enough to satisfy the Lemon Test, since even the Bible can be used in public education if the purpose of doing so is solely for educational purposes and not for religious purposes.[86] If *The Poet X* is being used for educational purposes in this school district, like teaching about the themes it contains or its writing style, this would likely be an acceptable educational purpose which does not run counter to the Establishment Clause. For the first prong, if the government (school) has a secular purpose for including the text, the court determined the government's purpose was secular because the book was included to help students broaden their understanding of the world.[87] The second prong requires an evaluation of whether the school's action has a primary purpose of advancing or inhibiting religion.[88] Since the plaintiff's complaint did not state any allegations about how the text was used in class, the plaintiffs could not assert that the school's use of the book in the English curriculum promoted or maligned Catholicism

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[83] Coble v. Lake Norman Charter Sch., Inc., 2021 U.S. Dist. LEXIS 53932, at *3. (W.D.N.C. 2021). The book in question, *The Poet X*, by Elizabeth Acevedo, is an award-winning young adult novel told in prose which follows a teenage girl who is grappling "with questions about adolescence, family, gender, race, religion, and sexuality."
[84] *Id.* at *8.
[85] *Id.* at *8-9.
[86] *Id.* at *9. If *The Poet X* is being used for educational purposes, like teaching about the themes or writing style, this would likely be an acceptable educational purpose which does not run counter to the Establishment Clause.
[87] *Id.* at *10-11. The Cobles did not include any allegations in their complaint about the context in which the book was presented, or the curriculum where the book was included. In an attachment from the school about the purpose behind including the text, the school noted that preparation for the world after graduation includes discussions about thoughts and ideas which may be different than perspectives a student may hold.
[88] *Id.* at *13-14. The standard for the second prong of the Lemon Test in the Fourth Circuit "'asks whether, irrespective of government's actual purpose, a reasonable, informed observer would understand that the practice under review in fact conveys a message of endorsement or disapproval of a religion.'" Wood v. Arnold, 915 F.3d 308, 316 (4th Cir. 2019).

and Christianity.[89] As for the third prong, which prohibits excessive entanglement between religion and the government, the court determined the Cobles did not state a claim where entanglement could be seen, since they did not provide any information about how the text was used in class.[90] The court determined there was no violation of the Free Exercise Clause because there was never a requirement for the Cobles' son to read the book in the first place; an alternative text was offered, which indicated no burden to the son's religious practices.[91] There cannot be a violation of a person's Free Exercise rights when the potential threat is weighed against the school's ability to provide an education to all students enrolled.[92] Indoctrination may be a fear for many parents who bring cases like these, but exposure to ideas at school does not automatically mean a person's right to practice religion in the way they see fit is violated.[93] If parents disagree with what is being taught to their children at school, parents are free to educate their children on the beliefs they should hold, even if those beliefs are not taught in school or contrary beliefs are introduced.[94] While the Court does not invoke a specific hybrid rights test, since the Lemon Test provides a better framework, indoctrination in light of the *Parker* approach is briefly mentioned to demonstrate parents can still control their child's religious upbringing.[95] Since the Cobles failed to raise any factual allegations which would support an Establishment Clause claim or a free exercise claim, the Defendant's motion to dismiss the case because of plaintiff's failure to state a claim was granted.[96]

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[89] *Coble*, U.S. Dist. LEXIS 53932 at *13-16.
[90] *Id.* at *16. Again, the standard for determining entanglement comes from *Wood* where entanglement generally involves invasive monitoring of school activities by the government to prevent religious activities and speech, or the funding of religious programs, institutions, and schools. *Wood*, 915 F.3d at 318.
[91] *Id.* at *19. Once again, there is no claim for parents to allege a violation of the Free Exercise Clause due to potential exposure their son may have had to the text in question.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id*.
[96] *Id*. at 20.

The decisions made by other circuit and district courts gives the Fourth Circuit a strong precedent to decide that eliminating an opt-out policy in *Mahmoud* would not be considered unconstitutional, or a violation of the Free Exercise Clause.[97] The above-mentioned cases often did not want to discuss the cases in a hybrid rights lens, with *Parker* going so far as to state the case would not wade into the meaning of "'hybrid situations'", instead looking at the claims brought by parents as they related to each other rather than as two separate claims arising out of the same set of facts.[98]

Part Three: How the Fourth Circuit Should Approach a Hybrid Rights Claim in the Context of Other Court Decisions and the Maryland District Court's Approach

There is a rich collection of precedent the Fourth Circuit can use to decide how best to approach a hybrid rights claim. The Fourth Circuit may take the *Yoder* approach seen in *Parker*, where claims are assessed interdependently of each other.[99] Or, the Fourth Circuit could take one of the approaches currently in use in other circuit courts in the country. Each approach to hybrid rights has its benefits and drawbacks and may differ depending on the facts of the case at issue. Here, the best approach for the Fourth Circuit will be discussed in the context of *Mahmoud v. McKnight* which focused on a claim involving parental rights and a violation of the Religion Clauses of the First Amendment.[100]

The first approach, where courts just treat the *Smith* discussion of hybrid rights as dicta, would be beneficial when analyzing a hybrid rights claim as it allows each claim to stand on its own without its partner claim to overshadow it. The first approach, used by the Sixth, Second, and Third Circuits, applies the *Smith* rule "to the free exercise claim, regardless of any other

[97] *Mahmoud*, F. Supp. 3d at 271.
[98] *Parker*, 514 F.3d at 98.
[99] *Id*.
[100] *Mahmoud*, F. Supp. 3d at 271.

rights asserted" unless the facts of the case resemble *Yoder*, and the court would likely apply strict scrutiny.[101] To apply the general rule in *Smith*, a court must determine whether the statute involved is generally applicable, whether particular religious practices were targeted, and if the statute did or did not contain a "system of particularized exemptions."[102] This approach is helpful for defendants in *Mahmoud*, as *Smith* does not require the same heightened standard of review as *Yoder*. Plaintiffs in *Mahmoud* will disagree with this view because it will limit their chances to succeed. The standard of review in *Smith* requires strict scrutiny to be applied if a law is not generally neutral and applicable.[103]

In *Mahmoud*, plaintiffs were unable to argue a religious burden was placed on them and their children by not having an opt-out policy.[104] The standards set by the district to implement the story books in question meet the criteria set forward in *Smith*. The storybooks are being used as general classroom curriculum, meant to help teachers implement standards set by the district.[105] There is no indication that these books were being used to indoctrinate students. The books themselves do not appear to target religion based on the brief descriptions provided in the case and contain stories and plots which are suitable for the age groups where they will be read, taught, and discussed.[106] Individualized exemptions arose under *Sherbert v. Verner*, which

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[101] Hudson, Jr. & Harvey, *supra* note 24 at 458. The key decisions following this approach are Kissinger v. Bd. of Tr. of Ohio State Univ. 5 F.3d 177, 178-180 (6th Cir. 1993) (determining school curriculum was facially neutral and generally applicable, did not violate Kissinger's free exercise right when it did not grant her a class exemption); Leebaert v. Harrington, 332 F.3d 134, 137-39, 144 (2d Cir. 2003) (finding required participation in a health education class does not infringe a parent right/free exercise claim or closely resemble *Yoder* and does not require heightened scrutiny during court analysis); McTernan v. City of York, Pa., 564 F.3d 636, 641, 643-44 (3d Cir. 2009) (deciding the restriction preventing Mr. McTernan from distributing pro-life pamphlets at a Planned Parenthood was facially neutral, but needed a jury to decide if it was generally applicable, and the free speech claim based off of Mr. McTernan's interaction with the police officer was content neutral).
[102] *Kissinger*, 5 F.3d at 179. *Fix this*
[103] Employment Div. v. Smith, 494 U.S. 872, 886-89 (1990).
[104] *Mahmoud*, F. Supp. 3d at 296. *Fix this*
[105] *Id.* at 277-78.
[106] *Id.* at 272-273. Plaintiffs presented seven of the books they took issue with to their complaint. The books in question are: ROBIN STEVENSON & JULIE MCLAUGHLIN, PRIDE PUPPY! (2024) ("chronicles a family's visit to a 'Pride Day' parade and their search for a runaway puppy, using the letters of the alphabet to illustrate what a child

established that the government cannot deny religious accommodation claims if there is a system in place meant to provide benefits or burdens to those who take advantage of that system.[107] In *Mahmoud*, the district had an opt-out system in place for health education curriculums which discuss "'family life and human sexuality'" as required under Maryland law.[108] Besides this state-wide policy, the School Board had created and adopted a separate opt-out policy for religious objections to in-class activities so parents who may disagree with certain aspects of the curriculum could have their children participate in a different lesson.[109] The district-specific opt-out policy was in place until March 23, 2023 when the school district released information to parents stating that opt-out policies now only apply to Family Life instruction under the state guidelines.[110] The school district decided to eliminate the opt-out policy for in-class activities because teachers and principals were inundated with opt-out requests and were unable to accommodate the requests without "'causing significant disruptions to the classroom environment and undermining [Montgomery County Public Schools]'s educational mission.'"[111]

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might see at a pride parade"); SARAH S. BRANNEN & LUCIA SOTO, UNCLE BOBBY'S WEDDING (2020) (a story where a girl's uncle is getting married and she is "worried that her soon-to-be-married uncle will not spend time with her anymore, but her uncle's boyfriend befriends her and wins her trust"); CHELSEA JOHNSON ET AL., INTERSECTION ALLIES: WE MAKE ROOM FOR ALL (2019) (features nine characters of various diverse backgrounds and how their story can connect to a larger story of social justice and the fight that must be undertaken to achieve that justice); DESHANNA NEAL ET AL., MY RAINBOW (2020) ("tells the story of a mother who creates a rainbow-colored wig for her transgender child"); DANIEL HAACK & STEVIE LEWIS, PRINCE & KNIGHT (2018) (a love story between a prince and a young knight who fall in love and marry after they both battle a dragon together); JODI PATTERSON & CHARNELLE PINKNEY BARLOW, BORN READY: THE TRUE STORY OF A BOY NAMED PENELOPE (2021) (tells the story of "an elementary-aged child who experiences triumphs and frustrations in convincing others what the child knows to be true – that he's a boy, not a girl").

[107] Sherbert v. Verner, 274 U.S. 398 (1963). This case concerned a woman who was a member of the Seventh-Day Adventist Church and was fired from her job because she would not work on Saturdays, which is the Sabbath Day of her religion. *See also* Richard F. Duncan, Note, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty*, 83 NEBRASKA L. REV. 1178-203 (2005).

[108] *Mahmoud*, 688 F. Supp. 3d at 273.

[109] *Id.* at 273. *See supra* n. 17.

[110] *Id.* at 280-81.

[111] *Id.* at 281. The board provided three reasons for no longer allowing the opt-outs. First, there were significantly high rates of absenteeism, to the point where parents wanted excuses for "dozens of students in a single elementary school from instruction." Second, it was becoming impossible for teachers to manage, track, and accommodate requests for students and also greatly burdened staff who had placements in multiple classrooms and now had to accommodate these opt-outs as well. Third, there were concerns that allowing students to be excused from class

The opt-out system established by the state is neutral, with no allusion to religion.[112] The district released "Guidelines for Respecting Religious Diversity" which was enacted to allow parents and students who felt that a classroom "activity would invade student privacy by calling attention to the student's religion" to be excused from that activity.[113] The policy did not state students (or parents on behalf of their students) may opt-out because an activity directly conflicts with their religion. By revoking the school-specific policy and retaining the state opt-out policy, the school district has not created a system where religious accommodations have to be granted for classroom instruction going forward. If the Fourth Circuit treats the hybrid rights analysis as dicta like the Sixth, Second, and Third Circuits, the issues parents will bring in this case will not be given the same consideration. Under this approach, it would not make sense to bring both claims in the hopes one will strengthen the other if the analysis only pertains to the free exercise claim. For the sake of an efficient judicial system, this would be a beneficial approach to apply because it would prevent plaintiffs from bringing unnecessary claims in case a companion claim could garner heightened scrutiny.

The second approach is difficult to apply because it requires the companion claim plaintiffs bring to be successful outside of the free exercise claim; this is known as the independent viability approach.[114] This approach is used in the D.C. Circuit and the Supreme Court of New Mexico.[115] Strict scrutiny is applied to the free exercise claim only if the

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when books featured LGBTQ characters were discussed or taught, opt-outs "would expose students who believe the books represent them and their families to social stigma and isolation."

[112] *Id.* at 273-74.

[113] *Id.* at 274.

[114] Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L. J 1175, 1193 (2015).

[115] Hudson, Jr. & Harvey, *supra* note 23 at 461. The key decisions following this approach are Elane Photography v. Willock, 309 P.3d 53, 75 (N.M. 2013) (determining free speech claim was not independently viable of the free exercise claim, and Elane Photography's free exercise rights not infringed due ; E.E.O.C. v. Catholic Univ. of Am., 83 F.3d at 457 (D.C. Cir. 1996) (finding although the court cannot analyze the claim due to the ministerial exception under the Free Exercise Clause, this could present a hybrid right case where the Free Exercise Clause .

companion claim requires strict scrutiny.[116] The *Mahmoud* Court was clear that the free exercise claim was not supported, and neither was the burden being asserted by the parents.[117] Ultimately, this approach is nearly identical to the first approach discussed above and would yield the same results; parent-plaintiffs would likely be unhappy with the results while defendants would welcome the results. This approach bars any attempt at analyzing a free exercise claim in conjunction with a companion claim because it requires the analysis to rest solely on the viability of the companion claim. Even if plaintiffs in a case could conceivably have a viable free exercise claim, if they unsuccessfully argue violations of a companion claim plaintiffs will be unable to seek relief. While this is beneficial to the government because it would not require a strict scrutiny analysis, it is not necessarily fair to plaintiffs if they cannot bring suit for certain claims arising out of the same set of facts.

The third approach, where the non-free exercise claim must demonstrate a chance to succeed in order to trigger increased scrutiny presents as an approach which is similar to the independent viability approach discussed above.[118] This approach is used by the Ninth and Tenth Circuits and is known as the "colorable claim approach".[119] Plaintiffs may form a hybrid claim under the colorable claim approach by combining any constitutional right which may succeed on its own merits with a free exercise claim.[120] For plaintiffs to succeed under this approach, they must establish success on the companion claim in order for strict scrutiny to apply when the

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[116] Hudson, Jr. & Harvey, *supra* at 460.
[117] *Mahmoud*, 688 F. Supp. 3d at 298-99.
[118] Hudson, Jr. & Harvey, *supra* note 23 at 464.
[119] Hudson, Jr. & Harvey, *supra* note 25, at 463. The key decisions following this approach are Axson-Flynn v. Johnson, 356 F.3d 1277, 1296-97 (10th Cir. 2004) (determining Axson-Flynn must show likelihood of success on the merits of her free speech claim to be successful on a hybrid rights claim); and Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 696-97, 709, 714 (9th Cir. 1999) (determining Anchorage Equal Rights Commission violated plaintiff's free exercise rights by discriminating against who plaintiffs may have as renters, and plaintiff's free speech rights were violated so both claims were subject to strict scrutiny).
[120] Ryan S. Rummage, *supra* note 114, at 1195.

companion claim is combined with the free exercise claim.[121] The prevailing cases for this approach, *Axson-Flynn v. Johnson* and *Thomas v. Anchorage Equal Rights Commission* demonstrate how this approach can be challenging to apply since courts essentially analyze the companion claim as an independent claim rather than a hybrid claim.[122] In *Axson-Flynn v. Johnson*, Plaintiff Christina Axson-Flynn claimed the University of Utah's Actor Training Program (ATP) violated her free speech and free exercise rights after telling her to "'get over'" her refusal to say words she deemed to be offensive under her religious beliefs.[123] Both claims were analyzed separately. The 10th Circuit determined the ATP was able to compel Axson-Flynn's speech since it aligned with their pedagogical interests.[124] The 10th Circuit ultimately reversed and remanded the District Court's ruling on this specific issue because there were genuine issues of material fact and would mean that the Defendant ATP should not have been granted summary judgment.[125] On the free exercise claim, the 10th Circuit decided they could not "discern whether Axson-Flynn has a fair probability or likelihood of success on her pretext argument in her free speech claim" which means there can be no final decision on the free exercise claim since the companion claim it is attached to may not be 'colorable', or able to succeed on the merits.[126] This section of the argument was also reversed and remanded as to the District Court's conclusion that the Defendant ATP should be granted summary judgement since there were genuine issues of material fact relating to whether or not there is a violation of her Free Exercise rights in the context of her Free Speech rights.[127]

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[121] Note, *supra* note 40, at 1506.
[122] Hudson, Jr. & Harvey, *supra* note 25, at 464.
[123] *Axson-Flynn*, 356 F.3d at 1280.
[124] *Id.* at 1290.
[125] *Id.*
[126] *Id.* at 1296-97.
[127] *Id.*

Axson-Flynn v. Johnson is an example of a case where a plaintiff needs to rely on a companion claim before a free exercise claim can be addressed. It is important to note now that the case likely would not have been reversed and remanded if there had not been an issue to determine whether Axson-Flynn's speech was being compelled in a classroom setting.[128] In order for the free exercise claim to be further considered, there needed to be an analysis on whether Axson-Smith's requirement to present monologues as written in order to participate in her theatre program was neutral and generally applicable. Depending on the outcome of this free speech analysis the free exercise claim could be considered.[129]

In *Thomas v. Anchorage Equal Rights Commission*, the landlords of rental properties sued the Anchorage Equal Rights Commission for a perceived violation of their free exercise and free speech rights.[130] The Plaintiffs, due to their religious beliefs, refused to rent their properties to cohabitating, unmarried, couples and stated their intention "to continue to do so in the future."[131] In response to the passage of laws in both Alaska and the City of Anchorage which would prohibit "certain forms of discrimination in rental housing and prohibit the refusal to rent on the basis of marital status" the Plaintiffs brought suit to preemptively protect their free speech and free exercise rights.[132]. The Court's reasoning highlighted the impossibility of an adequate legal remedy since there were no instances where the laws, as applied, would infringe on the plaintiffs free speech and free exercise rights.[133] Ultimately, the 9th Circuit held this case was not yet ripe for review and remanded it to the district court to dismiss the action.[134]

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[128] Axson-Flynn v. Johnson, 356 F.3d 1277, 1293 (10th Cir. 2004).
[129] *Id.* at 1293-94.
[130] Thomas v. Anchorage Equal Rts. Comm'n, 220 F.3d 1134, 1138 (9th Cir., 2004).
[131] *Id.* at 1137.
[132] *Id.* at 1137-38.
[133] *See id.* at 1141.
[134] *See id.* at 1142.

When considering this approach in light of the facts presented in *Mahmoud*, this approach makes it easier for both issues to be presented and analyzed concurrently as compared to the second approach, though it is still not the best approach. Since the parent plaintiffs in *Mahmoud* present their parental rights and free exercise claims concurrently, separating the claims will produce another result where they will be unable to establish a constitutional violation.[135] This approach would make it easier for the school district to obtain a ruling in their favor should the Fourth Circuit hear the case, because the parental rights claim needs to be colorable on its own. Since the Maryland District Court has determined children will not be indoctrinated if they are exposed to these texts, and that the use of these texts in school does not undermine what parents can teach their children at home, it is unlikely the parental rights claim the Plaintiffs make will be colorable enough to succeed so a free exercise claim may be considered as well.[136] Outside of the facts of *Mahmoud*, this approach is the most promising of the approaches discussed. Instead of dismissing the free exercise claim if the companion claim is unsuccessful, there only needs to be a chance for the companion claim to succeed for strict scrutiny to apply to the free exercise claim. If the companion claim is analyzed on its own, this approach can provide plaintiffs with an opportunity for relief, even if the free exercise claim is unsuccessful or strict scrutiny is inapplicable.

The fourth approach, only used in cases where facts resemble those in *Yoder*, will not be useful when evaluating *Mahmoud v. McKnight* because the facts between both cases do not align. This approach is only followed by the First Circuit, though the First Circuit does not embrace it in its entirety.[137] *Parker v. Hurley* established that in order for a free exercise claim to be

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[135] *See Mahmoud*, 688 F.Supp. 3d at 287.
[136] *See id.* at 298-99.
[137] Hudson Jr. & Harvey, supra footnote 24 at 468. The key cases for the cabining approach are Parker v. Hurley, 514 F.3d 87, 99 (1st Cir. 2008) (determining parents' claim their free exercise rights were violated because a teacher read

successful, a person's entire way of life must be challenged, like the way of life for the children of the plaintiffs in *Yoder* for the claim to be successful.[138] In the present case, parents are objecting to the school district's approval of diverse literature which would be used in school curriculum from pre-kindergarten through fifth grade.[139] Plaintiffs submitted declarations where they reiterated the importance of religion in the lives of themselves and their children, and how using these texts undermines their ability to parent their children as they see proper if their children are exposed to ideas at school contrary to what they are being taught at home.[140] Curriculum guidelines for the district did not provide any specific guidance for how the books should be used, and only suggested that teachers utilize the books "like any other book" by displaying them, recommending them to students, using them during class story time, or including them in book clubs.[141] The School Board did not intend for the books to be used for an explicit unit or lesson on gender and sexuality studies, but as another tool in the English curriculum for students to develop basic literacy and language skills.[142]

The facts of *Mahmoud* do not align with the facts presented in *Yoder* because the parents in *Mahmoud* do not share in religious practices which are as unique as the beliefs and practices held by the Amish in *Yoder*.[143] Declarations submitted by the parent-plaintiffs in *Mahmoud* detailed how they have "a sacred obligation to teach their children their faiths and their religious views on family structure, gender, and human sexuality" without interference through

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a book which depicted same-sex couples in a positive light did not rise to the level of *Yoder*) and *Hicks v. Halifax Bd. of Educ.*, 93 F.Supp.2d 649 (N.D.N.C. 1999) (finding Ms. Hicks claim of parental rights and free exercise warrants strict scrutiny as it is aligned with the facts of *Yoder*).

[138] *Parker*, 514 F.3d at 100; *see The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494, 1495 (2010).

[139] *Mahmoud*, 688 F. Supp. 3d at 271-73.

[140] *Id.* at 274-76.

[141] *Id.* at 277.

[142] *Id.*

[143] *Id.* at 293-94.

supposedly conflicting conversations at school.[144] The Court viewed these arguments as indoctrination claims, which have been unsuccessful in the judicial system thus far.[145] In the current case, the plaintiffs did not indicate how the lack of an opt-out policy would lead to the indoctrination of their children.[146] Since the plaintiffs have not demonstrated a set of facts consistent with the facts presented in *Yoder*, the *Yoder* approach will not be helpful in determining whether a hybrid rights violation is present. This approach, generally, is not a useful approach for hybrid rights claims. Since the requirements for success are based on a set of facts which are so specific, it is nearly impossible to find a claim where plaintiffs will be able to succeed. It should remain as an option in the event claims arise with nearly identical facts to *Yoder*, but in a world where there are fewer and fewer isolated societies with deep-rooted traditions this approach will almost always be inapplicable.

The Maryland District Court's approach eschews the use of a hybrid rights claim analysis since the Fourth Circuit has not adopted a hybrid rights analysis.[147] The issue in the *Mahmoud* case was narrow and presented a novel question for the Fourth Circuit.[148] Consistently, the District Court found *Yoder* provided a through-line to determine whether a parent's right to control their child's religious upbringing was affected by public education or curriculum requirements.[149] It is understood that *Yoder* presented a specific set of facts that will usually not

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[144] *Mahmoud*, 688 F. Supp. 3d. at 294-95.
[145] *Id.* at 295-97. *See also Parker*, 514 F.3d at 106 (where the Court determined there was no systematic indoctrination occurring when one of the student's parents objected to the children's book *King and King* because of its promotion of tolerance and affirmation of gay marriage). Reading a book in class is not demonstrative of a plan to violate a child's free-exercise rights, or to promote indoctrination in a set of beliefs. It is normally done to introduce new viewpoints or teach empathy. *But see* Tatel v. Mt. Lebanon School District 637 F. Supp. 3d 295 (W.D. Penn. 2022) (determining a first-grade teacher was attempting to indoctrinate students into believing her ideas about gender identity by discussing how parents may have guessed wrong a
[146] *Mahmoud*, 688 F.Supp. 3d. at 296.
[147] *Id.* at 305-06.
[148] Id. at 290. The Mahmoud Court writes "this case involves objections to a public-school curriculum. The Fourth Circuit has not addressed the question of when a mandatory public-school curriculum might burden the religious exercise of students or parents. *Id.*
[149] *Id.* at 293.

be applicable, but it is still the seminal case for determining whether a public school's education requirements "violates parents' religious beliefs."[150] Additionally, the *Mahmoud* opinion emphasized the Supreme Court has never required nor interpreted the First Amendment to compel public schools, by way of government action, to act in "ways that the individual believes will further his or her spiritual development or that of his or her family."[151] The plaintiffs want *Yoder* to apply, and try to make the fourth approach fit their argument.[152] A modified approach like the one used in the First Circuit could be beneficial to plaintiffs, but ultimately it would likely fail since the requirement of proving a religious burden would be extremely high. If the District Court used this analysis, it would likely be unsuccessful since there are no glaringly obvious scenarios where a parent's influence would be impacted like the parents in *Yoder*.[153] The analysis the Court would have to conduct would likely be moot since there will be very few instances where a claim could successfully be brought.

Plaintiffs addressed their parental rights claim as fundamental yet blurred the line between secular and religious arguments during their "reply brief and oral argument" which required the Court to address argument separately.[154] This required the Court to analyze *Mahmoud's* argument against the current precedent regarding a parent's right to a child's education when addressing a "secular liberty interest" in their due process claims.[155] The prevailing authority is *Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.* which "stands for the proposition that the parental right to direct a child's education is not fundamental

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[150] *Id.* at 294.
[151] Bowen v. Roy, 476 U.S. 693 (1986). This case was a challenge to the use and assignment of Social Security numbers. Appellees received benefits from the Aid to Families with Dependent Children program and the Food Stamp program but did not comply with the Bo
[152] Mahmoud, 688 F. Supp. 3d 265 at 300-01.
[153] *Id.* at 301-02.
[154] *Id.* at 302-03.
[155] *Id.* at 303-4.

unless it includes a religious element.[156] Plaintiffs tried to use *Herndon* to their advantage by emphasizing the religious nature of the claim and how strict scrutiny should apply, but in doing so the plaintiffs wrongfully applied a hybrid-rights theory.[157] Since the Fourth Circuit does not have a stance on hybrid-rights theory, strict scrutiny cannot be applied.[158]

By not adopting a hybrid-rights approach and strict scrutiny review, the Maryland District Court takes an approach which is similar to the first approach, treating hybrid rights as dicta.[159] Approaches two and three discussed above require the initial claim to succeed on its own before a free exercise claim is brought. The fourth approach should be considered inapplicable in a majority of cases brought today, seeing as there is very little chance a case with a similar fact pattern to *Yoder* would appear. Here, by examining the free exercise claim's success prior to the substantive due process claim regarding parental rights, the Maryland District Court is examining the issue which is arguably more consequential in a hybrid-rights case. This approach is more deferential to the government since it requires rational basis review rather than strict scrutiny. By requiring a lower threshold of review, this approach could help ensure frivolous challenges involving a hybrid rights claim are dismissed early in their lifespan since the government would only need to demonstrate an action which is rationally related to a governmental purpose, rather than a compelling interest seen in a few of the above hybrid rights cases.

Part Four: Conclusion

While each of the four approaches may have their place throughout the United States legal system, if the Fourth Circuit were to adopt a hybrid rights approach, the best one for them

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[156] *Id.* at 304. *See* Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (1996).
[157] *Mahmoud*, 688 F. Supp. 3d at 304.
[158] *Id.* at 305-6.
[159] *Id*.

to apply is the first approach. By treating *Smith*'s approach to hybrid rights as dicta, the Fourth Circuit can continue to analyze claims in a similar manner to the way they currently do. Additionally, treating hybrid rights claims as dicta will prevent these companion claims from triggering heightened scrutiny for the free exercise claims when if brought individually, heightened scrutiny would not apply. This approach can increase judicial efficiency, as it would allow courts to dismiss cases if the claims are unsuccessful on their own merits, rather than trying to determine how the claims may interact to create a stronger case which requires more time and analysis.

Postscript

On May 15, 2024, the Fourth Circuit Court of Appeals released their decision for the appeal, affirming the decision of the lower court.[160] In an opinion by Judge Agee of the Fourth Circuit, the Court found that the Parents did not meet the burden required to satisfy the requirements for a preliminary injunction.[161] The Parents tried to assert that strict scrutiny applied to both the free exercise and the due process claim, but this was unsuccessful because the District Court did not find that the Parents presented evidence which would indicate a burden placed on them by the school's actions to include the books.[162] Since the District Court did not find the plaintiff's claims to be colorable, the Fourth Circuit did not find the claim colorable.[163] It is acknowledged that the Fourth Circuit does not have a hybrid rights approach, and had the plaintiff's claim been successful, it is possible that an approach would have been discussed and applied with implications for future cases. For now, at least, it appears that hybrid rights in the Fourth Circuit will remain fiction.

[160] Mahmoud v. McKnight, 102 F.4th 191 (4th Cir. 2024).
[161] *Id*. at 197.
[162] *Id*. at 202-3.
[163] *Id*.