No. AMC3-33-03

FOR THE APPELLATE MOOT COURT COLLEGIATE CHALLENGE

JAMES INCANDENZA,

Appellant,

v.

ENFIELD SCHOOL DISTRICT,

Appellee.

UNITED STATE COURT OF APPELEE FOR THE SEVENTEENTH CIRCUIT

BRIEF FOR THE APPELLEE

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QUESTION PRESENTED

Is there a hybrid rights exception to the general rule that the First Amendment's Free Exercise Clause requires only rational basis review for neutral and general applicable laws that incidentally burden a particular religion?

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CASE No. AMC3-SUP 2014-37-02

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BRIEF FOR THE APPELLEE

JURISDICTION

This Honorable Court has jurisdiction pursuant to an appeal of a final decision of a district court of the United States and all other Appellate jurisdiction stipulated by 28 US Code 1295.

STATEMENT OF THE CASE

On March 3, 2008, the Enfield School District sent out a memorandum notifying all faculty and staff of a new district-wide policy. There was to be a ban of all candy consumption on school grounds. James Incandenza made a formal complaint against the Enfield School District on April 1st, 2008. The Enfield School District answered on April 14, 2008. As there was no issue to material fact in this case, Mr. Incandenza motioned for summary judgment on May 5, 2008. On the same day, the Enfield School District motioned for summary judgment to be in their favor. The Defendant's motion for summary judgment was granted, and the appellant's motion was denied on June 19, 2008. The appellant appealed to the United States Court of Appeals for the Seventeenth Circuit on July 18, 2008. Mr. Incandenza's appeal was granted on August 12, 2008.

STATEMENT OF THE FACTS

Mr. James Incandenza, a resident of the city of Enfield, has three sons who attend school in the Enfield School District. Mr. Incandenza and his three sons are devout members of the Sylvanist faith. A core Sylvanist belief is that to honor one of their deities, they must eat chocolate once an hour every hour from sunrise until sunset. The Enfield School District began enforcing a ban on candy on March 3, 2008, preventing Mr. Incandenza's sons from consuming this religious chocolate while at school. The Enfield School District, after receiving complaints from Mr. Incandenza, during March of 2008, informed him that no exceptions would be granted to the candy ban.

SUMMARY OF THE ARGUMENT

Appellees maintain there is no hybrid rights exception to the general rule that the First Amendment's Free Exercise Clause requires only rational basis review for laws which are neutral and generally applicable and incidentally burden a particular religion. First, the language in *Smith* which the appellants rely upon for their contention that hybrid rights exists, is very unclear and ill-defined. Second, the language relating to hybrid claims in *Smith* is dicta and not binding on this court. Third, no appellate court has ruled with the primary rationale being the hybrid rights exception, making it completely obsolete and further proving that it does not exist.

ARGUMENT

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" U.S. Const. amend. I. This amendment is made applicable to the states by the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S.

296, 303 (1940). Justice Scalia, in his opinion in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, wrote: "[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," *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990). However, this distinction does not create a hybrid rights exception because its illogical tendencies and unfounded basis in the case law does not support its existence.

I. THE HYBRID RIGHTS EXCEPTION DOES NOT EXIST BECAUSE IT IS ILLOGICAL AND THE PASSAGE FROM WHICH IT IS TAKEN IS DICTA.

According to *Smith*, a law that is neutral and of general applicability does not offend the First Amendment, even though it may incidentally burden a particular religious practice. *Id.* at 878. It therefore set out a new rule establishing rational basis review for laws that were neutral and generally applicable. *Id.* The Supreme Court further tried to draw a distinction between cases that were pure free exercise cases, and cases that included Free Exercise Clause claims along with another constitutional claims. *Id.* at 879. Yet, it did not take long for courts to see the inconsistency of the logic within this distinction, with Justice Souter calling it unsustainable three years after the *Smith ruling*, stating:

> "If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote

> ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993). (Souter, J., concurring).

Indeed, if a "hybrid rights" exception was adjudicated to exist it would be overbroad. The exception could be used to bypass any valid neutral, generally applicable law by combining a free exercise claim, which by itself would not pass muster under the neutral and generally applicable prongs, with an implicated constitutional claim. But this would go against everything the Supreme Court has held, as it has stated many times that "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 conduct that his religion proscribes.'" *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3, 102 S.Ct. 1051, 1058, n. 3, 71 L.Ed.2d 127 (1982). (Stevens, J., concurring in judgment). However, as Justice Souter inquired, if the constitutional claim that is paired with the free exercise claim is a valid one, then why mention free exercise at all? Justice Souter was therefore not persuaded that cases such as *Cantwell v. Connecticut* and *Wisconsin v. Yoder* were hybrid cases, declaring that neither of those cases "left any doubt that 'fundamental claims of religious freedom [were] at stake.' " *Id.* at 566. In other words, the free exercise claim, alone, in those cases was sufficient enough to cause the claimant to win. This is why Justice Souter says the *Smith* ruling has created a "free-exercise jurisprudence in tension with itself," because the hybrid rights theory is logically inconsistent. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 564.

Many lower courts have recognized this as well, with the Sixth Circuit in *Kissinger v. Board of Trustees of Ohio State University* stating that "[w]e do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights." *Kissinger v. Board of Trustees of Ohio State University*, *College of Veterinary Medicine*, 5 F.3d 177, 180 (1993). The Court elaborated, "we did not hold that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights. Such an outcome is completely illogical;" *Id.* The Second Circuit also reached this conclusion in *Leebaert v. Harrington* stating that they "can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated." *Leebaert v. Harrington*, 332 F.3d 134, 144 (2003). Thus, the only way this court can rule that the hybrid rights exception exists is to rule that the Free Exercise Clause is superfluous because it can only be violated if a constitutional right has also been violated.

The language in *Smith* which the appellants rely upon for their hybrid rights claim is very unclear. Multiple appellate courts, the sister courts of the United States Court of Appeals for the Seventeenth Circuit, have found the language in *Smith* to be very difficult to understand and certainly difficult to apply, as they have never done so. In *Kissinger*, the Circuit Court of Appeals stated "at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exception less state regulations under the Free Exercise Clause." *Kissinger v. Board of Trustees of Ohio State University, College of Veterinary Medicine,* 5 F. 3d 177, 180 (1993). The language used by the Sixth Circuit in *Kissinger* is important because it demonstrates just how unclear

appellate courts have found the language in *Smith* to be. The *Kissinger* court failed to invoke strict scrutiny based on hybrid rights because they were not sure what the *Smith* language meant as far as scrutiny was concerned and further they found the idea of hybrid rights to be "illogical." *Id.* Not only did the Sixth Circuit have a hard time understanding the *Smith* language, but the Tenth Circuit Court of Appeals did as well. In *Swanson,* the Tenth Circuit stated of the hybrid rights exception "[it] is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith. Swanson by and Through Swanson v. Guthrie Independent School District,* 135 F. 3d 694, 699 (1998). The *Swanson* court elucidated that, "this case illustrates the difficulty of applying the *Smith* exception." *Id.* at 700. The *Swanson* court, furthermore, stated that "[w]hatever the *Smith* hybrid-rights theory may ultimately mean…" *Id.* The Tenth Circuit in *Swanson* consistently throughout its opinion made it clear just how unclear the *Smith* language is to your sister courts. Therefore, until the Supreme Court makes abundantly clear what the *Smith* language means, this court should demonstrate judicial restraint, as have your sister courts.

This court should additionally reject the so-called hybrid rights theory because there is no indication that the *Smith* passage is anything more than dicta. In *Smith,* Justice Scalia tried to distinguish free exercise cases from cases that involved free exercise in conjunction with other constitutional rights. Yet this one paragraph was not relevant to the Court's decision—the very legal definition of dicta. This has been apparent to the lower courts. The Second Circuit in *Knight*, where a government employee was reprimanded for proselytizing at her job, stated that "the language relating to hybrid claims [in *Smith*] is dicta and not binding to this court." *Knight v. Connecticut Dept. of Public Health*, 275 F.3d 156, 167 (2001). The Sixth Circuit held that the paragraph in *Smith* was dicta, stating "at least until the Supreme Court holds that the legal standards under the Free Exercise Clause vary depending on whether other constitutional rights

are implicated, we will not use a stricter legal standard than that used in *Smith*…" *Kissinger*, 5 F.3d at 180. That standard used in *Smith* was rational basis review. Therefore, this court is not bound by *Smith's* extraneous dicta, and should, based on its logical inconsistencies and lack of basis in the case law, not apply a stricter legal standard for the policy of the Enfield School District. We respectfully request that this court not be trailblazers in the law and create further confusion when it comes to free exercise cases.

The policy of the Enfield School District does not target the Sylvanist faith and applies to all students at the school. It is therefore neutral and generally applicable. The policy of the Enfield School District is also rationally-related to its objective: to curtail obesity in the school district. Even though Mr. Incandenza's free exercise may be incidentally burdened, it does not excuse him or his children from complying with a valid neutral and generally applicable law. Since the hybrid rights exception cannot be said to exist, it therefore follows that the policy deserves rational basis review.

In *Leebaert v. Harrington,* the Second Circuit Court of Appeals stated that, "as far as we are able to tell, no circuit has yet actually applied strict scrutiny based on this [hybrid rights] theory." *Leebaert v. Harrington,* 332 F. 3d 134, 143 (2d Cir. 2003). In every case in which an appellate court has had the opportunity to invoke the hybrid rights exception, they have declined to do so. Even in the *Smith* case itself, the Supreme Court failed to invoke the hybrid rights theory of which they supposedly established in that case. Justice Scalia, writing the plurality opinion of the Court in *Smith*, stated "[t]he present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872, 882 (1990). It is quite telling that even in the case in which the hybrid rights theory was hinted at by Justice

Scalia, the Supreme Court did not apply it in their ruling.

Since the *Smith* ruling, every court has declined to invoke the hybrid rights theory as the primary rationale for its decisions. This court should adhere to judicial restraint and neither break with other appellate courts nor create a non-existent hybrid right.

CONCLUSION

We therefore respectfully ask that the judgment of the District Court for the District of Infinity be upheld.

Respectfully submitted,
Team Number 242