THE NEED FOR *BREEDLOVE* IN NORTH CAROLINA: WHY NORTH CAROLINA COURTS SHOULD EMPLOY A STRICT SCRUTINY REVIEW FOR RELIGIOUS LIBERTY CLAIMS EVEN IN WAKE OF *SMITH*

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INTRODUCTION

A survey is distributed to teachers in a public school, asking them to identify all teachers and students who participate in any type of

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ceremony or ritual at any time.[1] A small business keeps its bathrooms segregated by gender, not providing a single-occupancy or multiple-occupancy gender-neutral option, citing religious beliefs as its reason for not doing so.[2] A magistrate seeks, and is denied, an accommodation exempting him from performing single-sex marriage ceremonies.[3] Later, these individual actions are challenged, giving rise to litigation. If these claims are pursued in court under the North Carolina Constitution, to what standard of review are they subjected? Does the Federal standard influence how North Carolina analyzes religious liberty claims? Does the North Carolina Constitution provide stronger or weaker protections for religious liberty than those provided by the United States Constitution in the context of the right to freely exercise one's own religious practices?[4]

While the federal standard for review of religious liberty claims, specifically regarding the First Amendment Free Exercise Clause, has been clearly established by *Employment Division v. Smith*,[5] North Carolina's standard for review of similar religious freedom claims remains murky at best. In fact, *Breedlove v. Warren*, argued in the North Carolina Court of Appeals in May 2016, calls for the North Carolina judiciary to address this exact issue—seeking clarification of the

[1] Though posed as a hypothetical, a similar situation occurred at a public school in Moore County, North Carolina. Teachers were given a survey asking questions such as "What was said before and after the prayer?" "What was the content of the prayer-i.e., what exactly was said?" "Describe the prayer with as much detail as possible (Was it a Christian prayer? Did people bow their heads or kneel? Did one person recite the prayer? Did students say "amen"?)." While admittedly an Establishment Clause issue to be pursued in court, this hypothetical presents an equally pressing religious liberty claim under the North Carolina Constitution.

[2] This situation is purely hypothetical in the wake of the House Bill 2 Controversy in North Carolina.

[3] While posed as a hypothetical, this is the situation presented in the case of *Breedlove v. Warren*, recently argued in the North Carolina Court of Appeals.

[4] This question is similar to one posed by Elliot Engstrom in his article, *RFRA's Judicial History Leaves Questions Unanswered in NC*. To read his discussion on this subject, *see* Civitas Staff, *RFRA's Judicial History Leaves Questions Unanswered in NC*, CIVITAS INSTITUTE (Apr. 14, 2015), https://www.nccivitas.org/2015/rfras-judicial-history-leaves-questions-unanswered-in-nc/.

[5] 494 U.S. 872, 877 (1990).

applicable standard of scrutiny to be employed.[6] Given that the above hypotheticals are either being reviewed by the courts or could be at issue in the near future, *Breedlove* provides a much needed platform to settle the issue of the religious liberty standard of scrutiny in the realm of North Carolina law, or, at a minimum, raises a crucial question that must inevitably be addressed in North Carolina case law.

First, this note identifies the existing federal standard for review of such claims established by *Smith*. Second, this note will evaluate the standard of review ambiguity brought to light through *Breedlove*. It analyzes the existing North Carolina case law addressing the applicable standard for review established by *In re Williams*[7] and affirmed in *In re Browning*.[8] It also evaluates both plaintiffs' and defendants' arguments set forth in *Breedlove*, looking at the merits of both. Finally, it argues that North Carolina should continue to recognize a standard of scrutiny for Free Exercise claims separate and apart from the lessened federal standard established in *Smith*. It proposes that these claims be subject to strict scrutiny, but a different type of strict scrutiny review: "strict scrutiny without bite." This standard provides the best protection for North Carolinians' religious liberty rights established by the North Carolina Constitution, preserves existing North Carolina precedent, and sets the stage for the most appropriate method for reviewing Free Exercise claims that will inevitably be raised in North Carolina courts.

I. A SHIFT TO RATIONAL BASIS REVIEW: THE "NEW" *SMITH* STANDARD

Under what has been deemed the "Free Exercise Clause" of the United States Constitution, "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ."[9] This provision, applicable to the states through its incorporation by way

[6] Elliot Engstrom, *Court of Appeals Selects CLF Case for Oral Argument*, CIVITAS INSTITUTE (Apr. 12, 2016), https://www.nccivitas.org/civitas-review/court-of-appeals-selects-clf-case-for-oral-argument.

[7] 269 N.C. 68, 78, 152 S.E.2d 317, 325 (1967).

[8] 124 N.C. App. 190, 193–94, 476 S.E.2d 465, 467 (1996).

[9] U.S. CONST. amend. I (emphasis added).

of the Fourteenth Amendment,[10] guarantees "the right to believe and profess whatever religious doctrine one desires."[11]

The Supreme Court previously employed a strict scrutiny analysis for review of government laws burdening religious freedom.[12] However, in *Smith*, the Supreme Court adopted a new test for reviewing such claims.[13] The Court held that in evaluating religious liberty claims involving neutral, generally applicable laws, a court need only subject the laws to rational basis review.[14]

Smith involved an Oregon law that "prohibit[ed] the knowing or intentional possession of a 'controlled substance' unless the substance ha[d] been prescribed by a medical practitioner."[15] The plaintiffs were Native Americans who had been fired from their jobs for ingesting peyote, deemed a controlled substance in Oregon, at a religious ceremony at their Native American church.[16] Their dismissal for work-related "misconduct" also deemed them ineligible for unemployment benefits following their dismissal.[17]

While the plaintiffs argued their Free Exercise rights under the First Amendment had been violated,[18] the Court determined that subjecting neutral and generally applicable laws to strict scrutiny review would open the floodgates to challenges of numerous generally applicable laws essential to order in society.[19] Essentially, Justice Scalia reasoned that employing strict scrutiny would presume many laws invalid when subjected to review, constructing a high burden for the law to overcome, and, consequently, "open[ing] the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable

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[10] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[11] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990).

[12] Sherbert v. Verner, 374 U.S. 398, 402 (1963).

[13] *Smith*, 494 U.S. at 879.

[14] *Id.* at 879 (citation omitted). If the law is not neutral and of general applicability, the Supreme Court subjects the regulation to a strict scrutiny analysis. *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

[15] *Smith*, 494 U.S. at 874.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 888–89.

kind . . . ."[20] Justice Scalia noted that while the balancing test as set forward in *Sherbert v. Verner*, the previous precedent requiring strict scrutiny review, had rendered three state unemployment compensation statutes unconstitutional for interfering with an individual's Free Exercise rights, no government action outside the realm of unemployment compensation had been held unconstitutional when the Court had "purported" to apply the *Sherbert* test.[21]

Thus, Justice Scalia's decision in *Smith* served to narrow the field in which *Sherbert* would apply and essentially rendered it inapplicable to any realm other than unemployment compensation, such as in the context of exemption from otherwise valid and generally applicable criminal laws, like the one in *Smith*.[22]

In his opinion, Justice Scalia did note that the Court would subject a neutral and generally applicable law to a heightened level of scrutiny when the claim alleging violation of the First Amendment Free Exercise Clause was brought in conjunction with other constitutional protections, essentially creating a path to heightened scrutiny for "hybrid" claims asserting, in part, a Free Exercise Clause violation.[23] However, the ultimate outcome of *Smith* was a rejection of the strict scrutiny standard for reviewing neutral and generally applicable laws that burden religion, a decision that has been both praised and criticized.[24]

In her concurrence, Justice O'Connor asserted that the same result would emerge from applying the well-settled strict scrutiny analysis instead of departing from existing precedent to employ rational basis review.[25] Emphasizing that a law should not receive a different type of scrutiny based on whether the burden on religious practices came directly or indirectly, for example, she posited that either way, it was "beyond

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[20] *Id.* at 888.

[21] *Id.* at 883.

[22] *Id.* at 884.

[23] *Id.* at 881–82.

[24] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1304-05 (4th ed. 2011). Chemerinsky notes that *Smith*'s critics argue the standard provides "inadequate protection for religion," while its defenders note that "creating exemptions to general laws for free exercise of religion runs afoul of the establishment clause and that Smith appropriately avoids this conflict." *Id.*

[25] *Smith*, 494 U.S. at 903 (O'Connor, J., concurring in judgment).

argument that such laws implicate free exercise concerns."[26] Justice O'Connor concluded that the *Sherbert* compelling interest test should continue to apply.[27]

First, Justice O'Connor noted that Oregon's criminal prohibition on ingesting peyote would severely burden the respondents' right to freely exercise their religion.[28] However, in reviewing Oregon's interest in enforcing such laws, Justice O'Connor commented that combating drug abuse in society was a highly prevalent issue and, as such, constituted just as compelling an interest as other interests that the Supreme Court had recognized as compelling.[29]

Second, in analyzing whether the Oregon statute survived the strict scrutiny narrow tailoring requirement, she proposed that creating an exemption for this type of drug use would unduly interfere with the fulfillment of the government interest and undermine the government's ability to achieve the end it sought:[30]

> Although the question is close, I would conclude that uniform application of Oregon's criminal prohibition is "essential to accomplish[]" . . . its overriding interest in preventing the physical harm caused by the use of [peyote]. Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them . . . . Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote.[31]

Because of the incompatibility of an exemption under Oregon's law with Oregon's compelling reason for enacting the statute in the first place, Justice O'Connor found that the law would survive the strict scrutiny narrow tailoring requirement.[32]

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[26] *Id.* at 897–98.

[27] *Id.* at 898.

[28] *Id.* at 903.

[29] *Id.* at 904–05.

[30] *Id.* at 905.

[31] *Id.* (citations omitted).

[32] *Id.* at 906–07.

Despite Justice O'Connor's strong argument favoring strict scrutiny, the majority opinion in *Smith*, requiring rational basis review of neutral and generally applicable laws incidentally burdening an individual's right to exercise his religion, was the source that created the new standard for review and remains as such today.[33]

II. THE NORTH CAROLINA FREE EXERCISE CLAUSE AND STANDARD FOR REVIEWING FREE EXERCISE CLAIMS

The North Carolina Constitution provides, "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience,"[34] "nor shall any person be subjected to discrimination by the State because of . . . religion . . . ."[35]

Breedlove v. Warren is the most recent North Carolina case to question the state's standard of review for religious liberty claims.[36] In *Breedlove*, the plaintiffs are both magistrates who sought accommodations exempting them from performing same-sex marriage ceremonies.[37] After their request for accommodations was denied, the plaintiffs filed suit, alleging violations of their religious liberties under the North Carolina Constitution.[38]

In *Breedlove*, the ostensible "tennis match" between the parties' arguments seems to rest on ambiguous language in North Carolina cases addressing the federal standard of review for such claims.[39] To understand the arguments and the effect the federal standard of review has on the North Carolina standard, it is important to evaluate existing North Carolina cases that have addressed this subject.

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[33] *Id.* at 882 (majority opinion).

[34] N.C. CONST. art. I, § 13.

[35] N.C. CONST. art. I, § 19.

[36] Civitas Staff, *Breedlove v. Warren*, CIVITAS INSTITUTE (2016), https://www.nccivitas.org/clf/clf-litigation-library/breedlove-v-warren/.

[37] *Id.*

[38] *Id.*

[39] *See* Brief for Plaintiff-Appellants at 24–26, Breedlove v. Warren, No. COA 15–1381 (N.C. App. Jan. 27, 2016); Brief for Defendant-Appellees at 24–28, Breedlove v. Warren, No. COA 15–1381 (N.C. App. Mar. 21, 2016).

A. Strict Scrutiny Review and In re Williams

In 1967, the North Carolina Supreme Court decided *In re Williams*.[40] There, a Reverend was subpoenaed as a witness for the defendant and called as a witness by the State, but the Reverend refused to testify, asserting a clergyman privilege.[41] The court noted that the subject about which the state sought to elicit testimony from the pastor—conversations between the defendant's child and the Reverend—would not be privileged; however, the Reverend still refused to testify about any subject.[42] Thus, the court held the Reverend in contempt of court.[43]

On appeal to the North Carolina Supreme Court, the Reverend argued that holding him in contempt violated both his Fourteenth Amendment Due Process rights and his rights pursuant to the North Carolina Constitution's religious liberty provision.[44] The Supreme Court found that the North Carolina Constitution's religious liberty provision should be "construed in relation to the right to worship God according to the dictates of one's own conscience."[45]

The Court further noted, "[T]he freedom protected by this provision of the State Constitution is no more extensive than the freedom to exercise one's religion, which is protected by the First Amendment to the Constitution of the United States."[46] The Court cited the standard of review for free exercise of religious practices used in *Sherbert v. Verner* and employed a purported strict scrutiny analysis in the case at hand, requiring a compelling state interest justifying the state action.[47] Under this standard, the Court found that neither the defendant's First Amendment Rights nor his rights under the North Carolina Constitution had been violated.[48] Because the defendant's life was at stake, the Court recognized the compelling state interest "in doing justice between the

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[40] *In re* Williams, 269 N.C. 68, 152 S.E.2d 317 (N.C. 1967).
[41] *Id.* at 69–70, 152 S.E.2d at 319–20.
[42] *Id.* at 70–72, 152 S.E.2d at 320–21.
[43] *Id.* at 72, 152 S.E.2d at 321.
[44] *Id.* at 77–78, 152 S.E.2d at 325.
[45] *Id.* at 78, 152 S.E.2d at 325.
[46] *Id.*, 152 S.E.2d at 325.
[47] *Id.* at 79, 152 S.E.2d at 326–27.
[48] *Id.* at 80–81, 152 S.E.2d at 327.

state and one charged with a serious criminal offense for which, if guilt be established, his life may be forfeited."[49]

B. Affirming Strict Scrutiny in In re Browning

Almost thirty years after deciding *Williams* and six years after *Smith*, in 1996, the North Carolina Court of Appeals cited *In re Williams* to resolve another religious liberty claim.[50] In *In re Browning*, the Department of Social Services ("DSS") attempted to conduct an abuse investigation within a North Carolina home.[51] The father refused to consent to or approve of DSS conducting a mental health evaluation of his two sons, citing religious beliefs as his ground for refusal.[52] The trial court found that the father had interfered with the DSS investigation, as his reasoning premised on his religious beliefs did not constitute a lawful excuse.[53]

The Court of Appeals cited to *Williams* for the proposition that while the liberties secured by both the United States and North Carolina Constitutions were fundamental, they were not absolute.[54] It then employed a strict scrutiny standard for reviewing the case, requiring a compelling state interest for the state action.[55] The court found that the DSS interest in investigating child abuse was undoubtedly a compelling state interest, and thus, the state's actions did not violate the father's rights.[56]

C. The Remaining Ambiguity and Breedlove v. Warren

Interestingly enough, neither *Williams* nor *Browning* mentions or analyzes whether the required "compelling state interest" was "narrowly tailored."[57] In fact, neither decision makes any reference to how the act

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[49] *Id.* at 81, 152 S.E.2d at 327.

[50] *In re* Browning, 124 N.C. App. 190, 193-94, 476 S.E.2d 465, 467 (1996).

[51] *Id*. at 191, 476 S.E.2d at 465–66.

[52] *Id.* at 191–92, 476 S.E.2d at 466.

[53] *Id.*

[54] *Id*. at 193, 476 S.E.2d at 467.

[55] *Id.*

[56] *Id.*

[57] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993), requires that for strict scrutiny analysis of Free Exercise Clause claims under the United States

should be in any way tailored or related to such interest. The cases were decided solely on whether the state action was "compelling," which, in both cases, the courts deemed it was.[58]

Other North Carolina cases have recognized the ambiguous standard for reviewing Free Exercise claims under the North Carolina Constitution,[59] finding pieces of language from *Smith* or *Williams* that support their decision without having to address the elephant in the room that is the level of scrutiny. In light of both *Williams* and *Browning*, then, *Breedlove v. Warren* arises, raising concern regarding the questionable clarity of the scrutiny required to review these Free Exercise claims. The aforementioned "tennis match" attempts to find meaning in the few cases addressing this subject.

The plaintiffs in *Breedlove* argue North Carolina is not bound by the diminished federal standard as set forth in *Smith*.[60] As federal courts previously had employed the strict scrutiny standard when *Williams* was decided by the North Carolina Supreme Court, the plaintiffs assert the standard North Carolina employs, requiring strict scrutiny, has remained the same.[61] They note that *Browning*, decided by the North Carolina Court of Appeals six years after *Smith*, still employed strict scrutiny review, maintaining this heightened scrutiny as the existing standard for analyzing such cases.[62]

In hitting the ball back across the net, the defendants' argument recognizes and admits that in simply reviewing *Williams* and *Browning*, there remains ambiguity about the required scrutiny.[63] The defendants point out that *Browning* cites to the language from *Williams*, but that it was in *Williams* the Supreme Court found the North Carolina Constitution provided "no broader protection of religious liberty than the

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Constitution, the law must be "narrowly tailored to advance [the compelling government] interest."

[58] *In re* Williams, 269 N.C. 68, 80–81, 152 S.E.2d 317, 327; *In re Browning*, 124 N.C. App. at 193–94, 476 S.E.2d at 467.

[59] *See* State v. Carignan, No. COA05–835, 2006 WL 1984426, at *3–4 (N.C. Ct. App. July 18, 2006).

[60] *See* Brief for Plaintiff-Appellants, *supra* note 39, at 24–26.

[61] *Id.* at 25–26.

[62] *Id.*

[63] *Id.* at 26–27.

United States Constitution."[64] Furthermore, the defendants note that *In re Appeal of Springmoor, Inc.* provides the necessary clarification.[65]

Springmoor is not a Free Exercise case, as both parties there agreed the case involved an Establishment Clause claim.[66] The case involved a Wake County tax assessor who denied real and personal property tax exemptions to Springmoor, a corporation operating a residential community for the elderly.[67] The North Carolina statute at issue required that to receive the applicable tax exemption, the residential community must have a religious or Masonic affiliation, which Springmoor argued was unconstitutional under Article 1, Section 13 of the North Carolina Constitution as well as under the First Amendment to the United States Constitution.[68]

In its decision, the North Carolina Supreme Court cited to Article 1, Section 13 and Article 1, Section 19 of the North Carolina Constitution as well as the First Amendment of the United States Constitution.[69] Subsequently, the Supreme Court noted:

> This Court has previously stated that "[t]aken together, these provisions . . . coalesce into a singular guarantee of freedom of religious profession and worship, 'as well as an equally firmly established separation of church and state.'" . . . "Stated simply, the constitutional mandate is one of secular neutrality toward religion." . . . We have recognized that while the religion clauses of the state and federal Constitutions are not identical, they secure similar rights and demand the same neutrality on the part of the State . . . Thus, we may utilize Establishment Clause jurisprudence to examine legislation for "aspects of religious partiality" prohibited by both constitutions.[70]

The Court held that because the North Carolina statute went beyond incidentally benefitting religious organizations and actually favored them, it violated protected rights under both Constitutions.[71]

In *Breedlove*, the defendants' argument is that *Springmoor* stands for the proposition that "North Carolina constitutional jurisprudence on

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[64] *Id.* at 26.

[65] *Id.* at 27–28.

[66] *In re* Appeal of Springmoor, Inc., 348 N.C. 1, 3–4, 498 S.E.2d 177, 178–79 (1998).

[67] *Id.* at 2, 498 S.E.2d at 178.

[68] *Id.* at 2–3, 498 S.E.2d at 178–79.

[69] *Id.* at 5, 498 S.E.2d at 179–80.

[70] *Id.* at 5, 498 S.E.2d at 180 (citations omitted).

[71] *Id.* at 12, 498 S.E.2d at 184.

religious freedom is congruent with federal Establishment Clause jurisprudence."[72] As such, the defendants argue *Springmoor* demonstrates how to balance North Carolina Constitution Article 1, Section 13 with Article 1, Section 19, calling for religious neutrality consistent with that required under the First Amendment of the United States Constitution and subject to the standard articulated by United States Supreme Court case law.[73] Thus, the defendants argue that the North Carolina standard of scrutiny for such claims should be, essentially, subject to any shifting winds followed by the United States Supreme Court.[74]

The interesting element in the argument raised by the defendants is that *Springmoor* is decided on Establishment Clause grounds and cites to United States Supreme Court cases dealing with the First Amendment Establishment Clause.[75] *Springmoor* does reference both provisions that are at issue in *Breedlove*, but the cases cited in *Springmoor* as well as its reference to neutrality in such context are clearly intended to be viewed as interpreting the North Carolina Constitution and the United States Constitution together to require neutrality *in the context of the Establishment Clause* set forth by both Constitutions, not the Free Exercise Clause as also set forth in both.[76] Even the case the North Carolina Supreme Court used as a platform on which to base its opinion in *Springmoor* involved the First Amendment Establishment Clause.[77]

Thus, in such a position, the case of *Breedlove v. Warren* stands for review at the North Carolina Court of Appeals.

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[72] Brief for Defendant-Appellees, *supra* note 39, at 27.

[73] *Id.*

[74] *Id.* (citation omitted).

[75] *See Springmoor,* 348 N.C. at 10, 498 S.E.2d at 183.

[76] *Id.* at 5, 498 S.E.2d at 180.

[77] *See* Heritage Vill. Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980). *Heritage Village* involved review of North Carolina's Solicitation of Charitable Funds Act, which exempted religious organizations from compliance with its terms. *Id*. at 400–01, 263 S.E.2d at 727. As such, it constituted the North Carolina state action that could be viewed as "endorsing" religion and was reviewed under Establishment Clause jurisprudence. *Id.* at 405–06, 263 S.E.2d at 729–30.

III. THE NECESSITY OF *BREEDLOVE* AND STRICT SCRUTINY WITHOUT BITE

In reviewing both arguments, it is evident the standard of review for religious liberty claims in North Carolina remains unclear. As such, an opinion by the North Carolina courts addressing this murky issue is imperative for future cases involving North Carolina religious liberty claims inhibiting the free exercise of one's religion.

In wake of the issue brought to light through *Breedlove*, North Carolina should retain a form of strict scrutiny review, though requiring a lesser standard for tailoring, to review claims of state action infringing the Free Exercise Clause of the North Carolina Constitution.

A. The Need for Strict Scrutiny in North Carolina Religious Liberty Claims

North Carolina should continue to uphold a type of strict scrutiny review, as established by *In re Williams*, for claims alleging violations of North Carolina Constitutional Free Exercise rights. However, North Carolina should employ a "strict scrutiny without bite" standard instead of a traditional strict scrutiny. This is the best standard for Free Exercise Claims under the North Carolina Constitution for two reasons: (1) the context of the statements in the *Williams* decision and the time period in which it was rendered, showing an intent to exercise heightened scrutiny, and (2) the importance of using United States Supreme Court precedent interpreting the United States Constitution as informative, but not controlling because of the need for the North Carolina Supreme Court to evaluate different standards to identify the best protection for the guarantees of the North Carolina Constitution. To account for the tension between interests in either a heightened or lessened scrutiny, this note proposes that the courts should consider subjecting Free Exercise claims under the North Carolina Constitution to such "strict scrutiny without bite" level of review.

First, in *Breedlove*, the defendants' brief for the North Carolina Court of Appeals correctly recognizes that the *Williams* court analogized the protection of religious liberty under the North Carolina Constitution to the protection guaranteed by the First Amendment of the United States Constitution, saying:

> We think it clear that the term 'rights of conscience' as used in Article I, [Section] 26, of the Constitution of North Carolina, must be construed in

> relation to the right to worship God according to the dictates of one's own conscience. Consequently, the freedom protected by this provision of the State Constitution is no more extensive than the freedom to exercise one's religion, which is protected by the First Amendment to the Constitution of the United States.[78]

However, the Court recognized that the North Carolina Free Exercise Clause conferred rights no more extensive than the Free Exercise Clause of the First Amendment at a time when the federal standard for reviewing these claims was strict scrutiny.[79] This is affirmed by the fact that a few paragraphs later, the North Carolina Supreme Court cited three U.S. Supreme Court cases employing this rigorous scrutiny.[80] To suggest that the statement comparing the United States Constitution with the North Carolina Constitution binds the North Carolina Supreme Court to any decision that the U.S. Supreme Court renders analyzing the First Amendment Free Exercise Clause would not only discount the fact that *Williams* was written at a time when the Free Exercise Clause standard of scrutiny for federal courts was seemingly well-established, but would assume that the North Carolina Supreme Court considered the fact that the standard could change and blindly assented to any decision departing from such standard path.

Justice O'Connor's concurrence in *Smith* further recognizes that *Smith*, decided more than twenty years after the North Carolina decision in *Williams*, also supports the fact that when *Williams* was decided, the standard of review for First Amendment Free Exercise claims was well settled.[81] Regarding Justice Scalia's majority opinion in *Smith*, Justice O'Connor noted,

> The Court today extracts from our long history of free exercise precedents the single categorical rule that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." . . . To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.[82]

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[78] *In re* Williams, 269 N.C. 68, 78, 152 S.E.2d 317, 325 (1967).

[79] *Id*. at 79, 152 S.E.2d at 326.

[80] *Id.*

[81] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 893 (1990) (O'Connor, J., concurring in judgment).

[82] *Id.* at 892 (citations omitted).

Thus, the *Williams* opinion was written in the prime era of this considered "well settled" jurisprudence. As evidenced by its decision to apply the highest standard of scrutiny, the North Carolina Supreme Court's language in *Williams* that the freedoms in the North Carolina Constitution were "no more extensive" than those provided by the First Amendment of the United States Constitution merely recognizes that the claim did not exceed the strict scrutiny analysis employed; it did not stand for the proposition that the standard employed in North Carolina courts would ebb and flow with any subsequent decisions rendered by the U.S. Supreme Court.[83]

Further, the mere dicta recommending the rights conferred by both Constitutions is essentially the same cannot overcome the expressly articulated requirement that "one may not be compelled by governmental action to do that which is contrary to his religious belief in the absence of a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"[84] In looking to the plain language of the opinion, it is clear that the intent of this decision, currently remaining uncontested in existing North Carolina case law, was to subject Free Exercise claims under the North Carolina Constitution to strict scrutiny review.

Adhering to the precedent set by *Williams* will not only observe the principles of *stare decisis* and honor a high level scrutiny for Free Exercise claims under the North Carolina Constitution, but it will also allow North Carolina to make decisions independently of the steps taken by the U.S. Supreme Court. To retain its ability to govern its people according to the intent and ideals of the North Carolina Constitution's framers, the North Carolina courts should be untethered to federal cases, recognizing the differences between the Constitutions and the particularity in the rights conferred by each document individually.

B. "Strict Scrutiny Without Bite"—The Best Balance for Religious Liberty Claims

One way North Carolina could both protect religious freedoms and not automatically invalidate every state action potentially interfering with the North Carolina Constitution's Free Exercise Clause is to employ a

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[83] *Williams*, 269 N.C. at 78, 152 S.E.2d at 325.

[84] *Id.* at 79, 152 S.E.2d at 326 (quoting Sherbert v. Verner, 374 U.S. 398, 403 (1963)).

standard of what this note calls "strict scrutiny without bite," similar to the standard suggested in Justice O'Connor's concurring opinion in *Smith*.[85] This standard would still require a compelling state interest justifying actions or legislation infringing the free exercise of one's own religion, but would not have such a strong initial presumption that the challenged laws are invalid by requiring a little more flexibility in tailoring than that normally employed in strict scrutiny analysis.

Essentially, strict scrutiny without bite would serve as the inverse of what has been deemed by some as "rational basis review with a bite," employed by the United States Supreme Court in various contexts,[86] and would mimic the intermediate scrutiny employed under First Amendment Freedom of Speech cases.[87] Cases like *City of Cleburne, Texas v. Cleburne Living Center, Inc.*[88] show the Supreme Court purportedly applying rational basis review,[89] but looking behind the government's actual interests instead of any interest that could have justified the state action at issue,[90] i.e. creating a rational basis review with a bite. In almost all contexts, traditional rational basis review gives great deference to the legislature, simply looking at whether a statute is reasonable in light of its purpose.[91] Under this typical rational basis review, the statute is presumptively valid unless it is clearly wrong and lacking judgment by the state actor.[92] However, the Supreme Court has,

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[85] *Smith*, 494 U.S. at 891–907 (O'Connor, J., concurring in judgment).

[86] *See* CHEMERINSKY, *supra* note 24, at 705.

[87] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976). While the "narrowly tailored" language is often used for content-neutral intermediate scrutiny cases, like intermediate scrutiny in the context of Equal Protection, some over-inclusivity or under-inclusivity will not automatically invalidate the restriction if ample alternative channels remain for the communication. This concept, the "lesser tailoring requirement" demonstrated by speech cases, provides a good example of how the tailoring requirement for Free Exercise claims under the North Carolina Constitution could be reviewed.

[88] *See*, *e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

[89] Although this is in the context of Equal Protection, the fact that scrutiny levels are similar across multiple fields shows this is informative in the realm of religious freedom claims as well. *See*, *e.g.*, Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (First Amendment Free Exercise Clause); Loving v. Virginia, 388 U.S. 1 (1967) (Substantive Due Process).

[90] *See City of Cleburne*, 473 U.S. at 446.

[91] *See* CHEMERINSKY, *supra* note 24, at 702.

[92] *Id.*

on occasion, deemed that some laws at issue are so arbitrary, they still cannot and do not survive rational basis review.[93]

Alternatively, strict scrutiny without bite would still require a compelling government interest and look behind the interests the government actually had at the time the action was taken, but like Justice O'Connor's concurrence in *Smith*, it would recognize that there are Free Exercise type challenges under the North Carolina Constitution that can overcome the high-level scrutiny review to which it is subjected under such a standard.[94]

As Justice O'Connor recognized in her *Smith* concurrence, there are state actions burdening the Free Exercise Clause that are both premised on compelling government interests and do meet the narrow tailoring requirement to survive such review.[95] Her argument represents the position that state actions infringing these rights should not be deemed presumptively invalid, but, alternatively, that the courts should recognize while such claims are deserving of the most searching review, they can actually overcome this high bar and survive judicial scrutiny. The key is that although the regulation does in fact have the ability to survive, it should be subjected to strict scrutiny review in order to analyze the regulation to the extent needed to ensure protection of individuals' recognized rights regarding religious liberty. While her argument was in the context of the United States Constitution, it provides a persuasive and informative position that North Carolina courts could adopt as the standard for reviewing claims brought under the similar, but not identical, religious liberty provisions enacted in the North Carolina Constitution.

Narrow tailoring in this context, then, would be evaluated by determining whether the motivated conduct would "unduly interfere" or "seriously impair" the state interest at issue.[96] It would not require the least restrictive means to be used in employing the state action, but would call for a tailoring analysis slightly more lenient to carry out the state action taken for the purpose of ensuring the articulated interest. Whether in *Breedlove* or a subsequent North Carolina case dealing with

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[93] *See City of Cleburne*, 473 U.S. at 450.

[94] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 891–907 (1990) (O'Connor, J., concurring in judgment).

[95] *Id.*

[96] *Id.* at 906–07.

the Free Exercise Clause under the North Carolina Constitution, it is imperative that the North Carolina Judiciary establish a rule expressly stating the narrow tailoring required for such cases, but employing the "unduly interfere" or "seriously impair" language to create more room for flexibility than such narrow tailoring rules requiring the least restrictive means. Unlike the opinions in *Williams* and *Browning*, this second prong analysis required for each claim will ensure that the state actions are not simply given a "pass" solely because the interests behind them are deemed sufficient on their own.

While the inevitable argument against employing such scrutiny in Free Exercise claims under the North Carolina Constitution will likely be that doing so floods the courts with cases requiring intensive review, the expressly stated protection of religious ideals in multiple places in the North Carolina Constitution[97] lends itself to the notion that its framers viewed religious liberty as an essential right belonging to North Carolinians. Employing strict scrutiny without bite provides heightened protection for such claims while also understanding the need for state action in some areas that incidentally infringe religious liberties for the purpose of regulating society, observed through the lower "narrow tailoring" standard and by not assuming such state actions presumptively invalid. It allows these conflicting views the ability to "meet in the middle" by both receiving this rigorous review and analyzing the state action from all sides, while simultaneously preserving the ability for states to act in a manner best for society's needs and without fear that every action even incidentally burdening one's Free Exercise rights will be invalidated.

CONCLUSION

Breedlove calls into question an ambiguous and unclear standard governing Free Exercise type claims under the North Carolina Constitution, as no decisions have spoken directly to whether North Carolina will choose to follow *Smith*'s precedent. Whether the North Carolina Court of Appeals addresses this elephant in the room or not, in light of current events and actions taken by North Carolina officials, the North Carolina judiciary will almost inevitably have to face *Smith* head-on at some point to determine whether to abandon *Williams* or continue to uphold the rigorous standard of strict scrutiny analysis. Addressing

[97] *See, e.g.*, N.C. CONST. pmbl.; N.C. CONST. art. I, §§ 13, 19.

this issue and resolving the ambiguity will provide a clear path for pursuing Free Exercise claims in the North Carolina courts and serve as a needed and important step for the protection of religious liberties under the North Carolina Constitution.

AFTERWORD: AUTHOR'S NOTE

After this article was selected for publication but prior to the printing of *The Elon Law Review Volume 9, Issue 1*, the North Carolina Court of Appeals issued *Breedlove v. Warren*, No. COA15–1381, 2016 WL 5030387 (N.C. Ct. App. Sept. 20, 2016). The court held that plaintiffs lacked standing to bring the suit, thus not reaching the merits of the parties' arguments. While *Breedlove* will not provide the judicial clarification for the standard of review for Free Exercise claims under the North Carolina Constitution, the argument advanced within the paper—the need for the North Carolina judiciary to articulate a standard of review for such claims post-*Smith*—remains a current and outstanding issue. Even with its outcome, *Breedlove* brings to light an important concern, which can be remedied by a court employing a "strict scrutiny without bite" review in future cases implicating religious liberty claims under the North Carolina Constitution.