No. 20-9422

IN THE

Supreme Court of the United States

LEVI JONES,

Petitioner,

v.

CHRISTOPHER SMITHERS,

Respondent.

ON WRIT OF CERTIORARI FOR THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team 3
January 31, 2021
Counsel for Petitioner

QUESTIONS PRESENTED:

1. Whether an act prohibiting all protests within sixty feet of any federal facility, including public sidewalks, and limiting protesters to groups of six violates the First Amendment when its intended effect is uncertain and its enforcement disparate?
2. Whether an act that mandates contact tracing through use of mobile phones and government issued SIM cards violates the Free Exercise Clause of the First Amendment when it allows for secular exemptions but bars religious exemptions?

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STATEMENT OF JURISDICTION

The United States District Court for the District of Delmont had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2018); *See* App'x. A. The United States Court of Appeals for the Eighteenth Circuit had jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 (2012) because this is an appeal of a final judgment in a civil case. The Eighteenth Circuit entered final order, and the Writ of Certiorari was timely filed and granted pursuant to 28 U.S.C. §1254 (1) (2018).

STATEMENT OF THE CASE

The Act:

In an effort to curb the spread of the Hoof and Beak disease, Congress passed the Combat Hoof and Beak Disease Act ("the Act"), which mandated contact tracing through a government-provided and distributed SIM card for use in mobile phones. R. 1-2, 5, 29.[1] The Federal Communications Commission ("the FCC"), the Respondent, is the lead agency to execute and enforce the Act. R. 2, 5. The Act required every person living in the United States to comply with the mandate by October 1, 2020, or they would incur a penalty. *Id.* To comply with the mandate, every citizen had to pick up a SIM card at a federal facility while wearing a mask and maintaining a distance of six feet apart from one another, inside and outside of the building at all times. R. 6. The Act has two exemptions: (1) senior citizens over the age of sixty-five, and (2) health-related exemptions are granted by the officials at each local federal facility on a case-by-case basis. R. 2, 6, 18, 32, 40. Officials have granted individual exemptions for people with late-stage cancer, heart disease, and Alzheimer's disease. R.19, 22. To allow for quick implementation, the Act states that "the Religious Freedom and Restoration Act is inapplicable to this act," barring religious exemptions. R. 6, 33.

[1] Page numbers cited in this brief refer to the Record and are the page numbers designated by the court reporter. 18th Cir.

Subsequently, Congress issued an emergency amendment to the Act in response to protests at federal facilities. R. 7, 22, 30. The amendment prohibited protesters "within sixty feet of the facility entrance, including public sidewalks, during operating hours." R. 7. Local facility officials have the discretion to enforce the Act because of the considerable differences between each federal facility across the nation. R. 7, 13. The only guidance to the facility officials is that the zone "must be clearly marked and posted." *Id.*

Factual Background:

Levi Jones, the Petitioner, is the spiritual leader of the State of Delmont's Church of Luddite. R. 2, 4, 21, 24, 31. Each congregation of Luddites set its own rules, called "Community Orders." R. 4, 22, 24, 31. Luddites believe in total obedience to the Community Orders, and one of the primary orders in the Delmont Community is that Luddites shall be skeptical of all technology. *Id*. Meaning, Luddites do not own or use the internet or mobile phones, believing that they provide access to ideas that break down the family or community and serve as a distraction by eliminating the need to rely on the Luddite community. R. 5, 23, 24, 31.

Accordingly, the mandated contact tracing through SIM cards forced Luddites to choose between following their faith and following the law. R. 24, 34. The Luddites protested outside of the Delmont Federal Facility to show their disapproval for the Act's "gross intrusion into individual privacy" by explaining to those in line that they would not comply with the mandate. *Id*. As Luddites do not believe in the use of sound amplification devices, Mr. Jones spoke directly to people in line, calmly explaining how the Act was in direct conflict with his religious beliefs. R. 7, 24, 25, 34. Also protesting at the Facility was a group of mandate supporters known as the MOMs, whose matching bright pink shirts and logo was synonymous with their approval of the Act. R. 8, 27, 34.

Mr. Jones was arrested twice while protesting at the facility. R.2, 7-9, 25-28, 35. The first time, he was in a group of seven people, all wearing masks, standing six feet apart and further than necessary behind the buffer zone at seventy-five feet. *Id*. Next to the Luddites, the MOMs had five members standing inside the buffer zone at fifty-five feet. R. 3,8, 34. While the Luddites violated the mandate by having more than six people, the MOMs also violated by standing within the buffer zone line. *Id.* Yet, only Mr. Jones was arrested. *Id.* After being released from jail and paying the fine, Mr. Jones went back to the facility to continue to protest, this time in full compliance with the Act. R. 8, 26, 35. Mr. Jones was with five people, all wearing masks, standing six feet apart and outside of the buffer zone at sixty-five feet. *Id*. Again, the MOMs continued to protest within the buffer zone at fifty-five feet, this time with seven people. *Id.* An officer spotted Mr. Jones standing behind the buffer zone but still arrested him, stating, "aren't you that anti-tech preacher; you can't be here." *Id.*

Proceedings Below:

Mr. Jones brings this suit asking this Court to declare that the FCC has violated his rights to freedom of speech and free exercise of religion under the First Amendment of the United States Constitution. R. 1, 3, 30. On October 5, 2020, both parties filed cross-motions for Summary Judgment. R. 3, 30. On October 30, 2020, the United States District Court for the District of Delmont denied Mr. Jones's Motion for Summary Judgment on the free speech issue and granted Summary Judgment on the free exercise issue. R. 20. Both parties appealed. R.29. The Court of Appeals for the Eighteenth Circuit reversed the holding of the lower court in its entirety. R. 40-41. The court granted Mr. Jones's Motion for Summary Judgment with respect to the free speech issue and denied the free exercise issue. *Id.* Mr. Jones filed a petition for a Writ of Certiorari, and the Supreme Court granted the petition. R. 42.

SUMMARY OF THE ARGUMENT

Regarding the free speech issue, this Court should affirm the Court of Appeals for the Eighteenth Circuit and hold the Act is unconstitutional on its face because it does not withstand intermediate scrutiny. A content-neutral restriction satisfies intermediate scrutiny only when it is narrowly tailored to serve significant government interest and leaves open ample alternative channels for communication. The Act fails each aspect of this test. The legitimate interest of public health and safety is amply served by the restrictions in place for those picking up their SIM card from the facility. Additionally, each facility is different, meaning a sixty-foot buffer zone, while possibly necessary at some, will burden more speech than necessary at others. The FCC has provided woefully insufficient evidence to meet their burden of showing why less speech restrictive alternatives will not suffice. Therefore, the Act is not narrowly tailored. Finally, the Act does not leave open ample alternative channels for communication. As a Luddite, Mr. Jones can only speak directly to those in line at the facility. Because of his religion and the extraordinary length of the buffer zone, alternative means of communication used in other cases—signs, sound machines, screaming—are not remotely adequate substitutes.

Alternatively, the Act is unconstitutional *as applied* because the FCC granted unrestricted discretion in enforcement which led to viewpoint discrimination. The FCC engaged in viewpoint discrimination by arresting Mr. Jones, while other pro-mandate groups were allowed to speak freely, even when in clear violation of the Act. The officers discriminated solely on the basis of Mr. Jones viewpoint by arresting him when he was in full compliance with the Act.

Regarding the free exercise issue, the Court of Appeals erred in finding that the Act's mandated contact tracing through the use of mobile phones and government-issued SIM cards was generally applicable under the protections of the Free Exercise Clause, despite religious

objections to technology. The Act is not generally applicable because it allows for secular exemptions while declining to extend to religious exemptions, such as Mr. Jones's. The Act appears to be generally applicable because it applies to every person living in the United States, but the Act exempts all people over the age of sixty-five, and grants health exemptions on a case-by-case basis. By putting in place both categories and a system of individualized exemptions, the FCC has made a value judgment that secular exemptions are more important than religious ones; the law is no longer generally applicable and must withstand strict scrutiny.

Additionally, this Court must review the Act under strict scrutiny because there is a hybrid right under *Smith* when considering Mr. Jones's free exercise claim in conjunction with his colorable free speech claim. Under strict scrutiny, the Act is not narrowly tailored to serve the compelling governmental interest. The FCC has failed to produce any evidence that allowing for religious exemptions to the Act would create any more than a few isolated claims, and certainly far less than exempting every citizen over the age of sixty-five.

Because the Act cannot survive intermediate scrutiny, applicable to content-neutral regulations, and is applied in a viewpoint discriminatory manner, the Act violates the Free Speech Clause of the First Amendment. The Act further violates the Free Exercise Clause of the First Amendment because it is not generally applicable. This Court should affirm the Court of Appeals for the free speech issue and reverse for the free exercise issue.

ARGUMENT

I. The Act Violates the Free Speech Clause of the First Amendment Because It Fails Intermediate Scrutiny and Is Enforced in a Viewpoint Discriminatory Manner.

The First Amendment contains an express prohibition against laws that abridge the freedom of speech. U.S. CONST., amend I. The premise that every citizen shall have the right to engage in free expression has shaped this democracy by allowing for "public persuasion [which]

constitutes the lifeblood of a self-governing people." *Natl. Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940). This right is enshrined in the First Amendment and has historically been exercised on public streets and sidewalks, known as traditional public forums. Because public forums offer assurance that the intended message will be heard, they occupy a special position in First Amendment jurisprudence. *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) ("An individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks"); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

Accordingly, under this Court's precedent, laws that restrict speech in traditional public forums are "very limited" as they "impose an especially significant First Amendment burden." *McCullen*, 573 U.S. at 489. Specifically, content-neutral restrictions—laws that impose an incidental burden on speech—must withstand intermediate level of scrutiny. *Turner Broad. System, Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994). Intermediate scrutiny requires that a law must advance a substantial governmental interest in a way that does not substantially burden more speech than necessary. *Id.* Even if a law withstands intermediate scrutiny, this Court must find that it is unconstitutional if applied in a viewpoint discriminatory way. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("The government may not regulate speech based on the message it conveys").

Because the Act restricts speech on public sidewalks, this Court must apply intermediate scrutiny. This Court should uphold the Court of Appeals and find that the Act is *facially* unconstitutional, as it does not withstand intermediate scrutiny because it is not narrowly tailored to serve the FCC's interest, nor does it leave ample alternatives for communication.

Alternatively, even if this Court finds the Act does withstand intermediate scrutiny, the Act should be struck down *as-applied* for being enforced in a viewpoint discriminatory manner.

A. The Act Is Facially Unconstitutional Because It Fails to Withstand Intermediate Scrutiny by Not Directly Serving A Significant Government Interest nor Providing Ample Alternatives Channels for Communication.

This Court recognized that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982). Because public streets are efficient venues for these exchanges, the Court utilizes three levels of scrutiny—depending on how the law applies to the substance of the expression—to determine whether a regulation the restricts speech in a traditional public forum is constitutional. *Ward v. Rock Against Racism,* 491 U.S. 781 (1989) Both parties agree that the Act is a content-neutral restriction on speech; therefore, this Court should assess the constitutionality of the Act under intermediate scrutiny. *See Turner, 512 U.S. at 662;* R. 37.

Under intermediate scrutiny, a content-neutral restriction must be (1) narrowly tailored to serve a significant government interest; and (2) leave open ample alternative channels for communication. *Ward*, 491 U.S. at 791 (1989). The Government bears the burden of proving the constitutionality of its restriction. *McCullen,* 573 U.S. at 493. Here, the FCC has shown that there is a significant government interest, the Hoof and Beak pandemic, but has not met its burden of proving the Act is narrowly tailored to serve this interest. Nor has the FCC shown how the restriction leaves ample alternatives for communications. Accordingly, this Court should hold that the Act does not survive intermediate scrutiny and is, therefore, unconstitutional.

1. *The Act Fails Intermediate Scrutiny Because the FCC Has Not Tried Other Methods and The Buffer Zone Is Not Narrowly Tailored to Directly Serve the Purported Interest.*

The Court of Appeals correctly concluded that the Act is not narrowly tailored. R.38. The First Amendment limits speech regulations that do not serve to further the government's legitimate interest. *Ward,* 491 U.S. at 799. A regulation advances an intended interest when it is narrowly tailored, meaning, the government can prove the restriction promotes "a substantial government interest that would be achieved less effectively absent the regulation." *Id.* Further, the government must demonstrate that "alternative measures would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen,* 573 U.S. at 495. Accordingly, an argument "unsupported by the evidence will not suffice to carry the government's burden." *Reynolds v. Middleton,* 779 F.3d 222, 229 (4th Cir. 2015). This Court has explained that a law regulating speech, specifically one that includes a buffer zone, is narrowly tailored when it is has a close and substantial relationship to the asserted governmental interest by not burdening more speech than necessary, and when the government has tried less speech restrictive methods first. *McCullen* 573 U.S. 464; *Madsen v. Women's Health Ctr., Inc*., 512 U.S. 753, 762 (1994).

First, a speech-restrictive law must have a close and substantial relationship to the asserted government interest that does not burden more speech than necessary. *McCullen,* 573 U.S. 464; s*ee also Schenck v. Pro-Choice Network Of W. New York,* 519 U.S. 357, 373 (1997). In *McCullen*, a buffer zone at every clinic in the state was "hardly a narrowly tailored solution" for a problem at one specific clinic. 573 U.S. at 493. Similarly, in *Schenck,* this Court struck down a floating buffer zone that required a fifteen-foot separation between protestors and individuals. 519 U.S. 357. The Court concluded the lack of certainty on how the buffer zone

would work at each location—noting that it encompassed a public sidewalk at one clinic—heightened the risk that each buffer zone would burden more speech than necessary to serve the public safety interest. *Id*. at 378.

Here, the FCC claims the buffer zone serves the interest of preventing the spread of Hoof and Beak, but the record lacks any evidence of how a sixty-foot buffer zone advances this interest substantially. R. 3, 14. A sixty-foot buffer zone at every location is likely to burden more speech than necessary to serve the intended interest because, by the FCC's admission, every facility location has varying characteristics. R.7; *see Schneck*, 519 U.S. 357. Due to these varying characteristics, the same uncertainties that invalidated the buffer zone in *Schenck*, are present here. *Id.* For example, the sixty-foot buffer zone is not determined by the length of the line but the distance from the building. Meaning, if there is no line, the zone is burdening speech for no reason because no one is around the protesters, and if there is an unusually long line, patrons would be next to the protesters thus, not serving the FCC's interest. R. 7, 33, 36, 38. Further, similar to the untailored buffer zone struck down in *McCullen*, 573 U.S. 464, there are no indicators that protests are happening at every facility in the country. R.2. These uncertainties demonstrate that a buffer zone at every facility is not serving the FCC's interest.

Second, a law is narrowly tailored when the government has first attempted to serve its interest through less speech restrictive methods. *McCullen*, 573 U.S. 464. As this Court stated, "if the First Amendment means anything, it means that regulating speech must be a last, not first, resort." *Thompson v. W. States Med. Ctr*., 535 U.S. 357, 373 (2002). In *McCullen*, this Court struck down a buffer zone because there were less intrusive means of addressing its concerns without restricting speech. 573 U.S. at 492 (explaining generic criminal statutes, targeted injunctions, and ordinances that required crowds to disperse when ordered to do so, were

possible alternatives). Additionally, the Court struck down the zone in *McCullen* because the City did not show "that it seriously undertook to address the problem with less intrusive tools readily available." *Id.* This Court emphasized it was not enough to say that other approaches did not work, instead, the City had to *show* why other methods were not effective. *Id.*

The inadequacies of the *McCullen* are precisely the case here: the FCC has simply *said* the buffer zone supports their interest, yet it has not *shown* why less speech restrictive alternatives would not work. R. 2, 7. The FCC has a variety of approaches that appear capable of serving these interests without excluding speech in public forums. *Id.* All of the alternatives this Court suggested in *McCullen* are adequate here. The FCC could use targeted injunctions against those who do not follow mask compliances or ordinances for dispersal when the area gets crowded. R.6. Further and more indicative of the readily available alternatives, Section 42(b)(1)(A)(i) of the Act requires all person picking up SIM cards to wear a mask and stand six feet apart. R. 6. With this subsection, the Act includes the methods that are sufficient to stop the spread of Hoof and Beak. *Id*. Additional requirements on protestors, therefore, cannot be to prevent the spread of Hoof and Beak, because those measures are already included in the Act to make sure people can safely pick up their SIM cards. *Id*. For a law that restricts speech to be narrowly tailored, there can be no question as to why protesters, would need to adhere to more strict rules than the general public to prevent the spread of Hoof and Beak disease. *See McCullen,* 573 U.S. 464. The FCC has failed to produce any evidence to answer this question, therefore, the Court of Appeals correctly held that the Act was not narrowly tailored. R. 38.

2. The Act fails intermediate scrutiny because it has not left ample alternative channels for Mr. Jones to communicate.

As well as being narrowly tailored, to withstand intermediate scrutiny, a law restricting speech must leave open alternative channels of communication. *McCullen,* 573 U.S. 464. This

Court has established public streets are natural and proper places for the dissemination of opinions. *See id.*; *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 161 (1939); *Frisby*, 487 U.S. 474. Accordingly, these public forums offer the most protection for speech, and "one should not have their free speech abridged on the plea that it may be exercised in some other place." *Schneider*, 308 U.S. at 163. For a restriction to withstand intermediate scrutiny, the government must demonstrate that it "leaves open alternative channels for communication" that are "ample" and "adequate." *Ward*, 491 U.S. at 791. Whether an alternative is ample and adequate must be considered from the speaker's point of view because the "[courts] presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790-91 (1988).

An alternative mode of communication is ample and adequate only if it does not threaten the speaker's ability to communicate effectively to their intended audience. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812. (1984). Further, because "one-on-one communication" is "the most effective…avenue of political discourse," 'adequacy' is not just the ability to be seen and heard. *McCullen*, 573 U.S. at 488 ("If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message"). The ability to communicate a message at "normal conversation distance" supports a conclusion of adequate alternatives. *Schenck*, 519 U.S. 357. This Court struck down a 100-foot buffer zone because the distance made it impossible to have a normal conversation but upheld an eight-foot zone as conversations were still practical. *Schneck*, 519 U.S. 357; *Hill v. Colorado*, 530 U.S. 703, 712 (2000) ("Even though a 15–foot floating buffer might preclude protesters from expressing their views from a normal conversational distance, a lesser distance of eight feet was sufficient to protect such speech on a public

sidewalk"). This Court explained that at eight feet, a protester can still use sound amplification devices, display readable signs, or pass out literature on the sidewalk. *Hill*, 530 U.S. at 712.

In this case, the Act virtually eliminates all possibility for Mr. Jones to communicate his message effectively. Mr. Jones's lack of ample and adequate alternatives is particularly true given the restrictions of his religion. R. 24, 25. As a Luddite, Mr. Jones cannot use technology; he cannot use a sound amplification device to speak loudly or use computers to create an internet site, signs, or print literature. *Id*. Due to his beliefs, Mr. Jones and his fellow Luddites "spoke directly to people" to explain that he did not support the mandate. *Id.* As alternatives are judged by the speaker, none of the statute-saving "ample alternatives" of *Hill*, are available to Mr. Jones. *Riley*, 487 U.S at 791. Instead, Mr. Jones's situation is analogous with the 100-foot buffer zone struck down in *Schneck* where having a normal conversation was "impossible." 487 U.S. 474. Even if Mr. Jones's religion allowed him to implement any of the *Hill* alternatives, they would still not be a viable option as it is impossible to hear a message from sixty feet away. R. 6, 7. In times of uncertainty, the fundamental principles of our democracy stand strong: The First Amendment protects Mr. Jones's right to spread his message and the Act has failed to leave him the ability to do so.

The Act is facially unconstitutional because it cannot withstand intermediate scrutiny. The government's interests are not directly served by the buffer zone, and the large zone leaves no alternatives for communication; therefore, the Act should be struck down.

B. Even If This Court Were to Find the Act Satisfies Intermediate Scrutiny, The Act Is Still Unconstitutional as Applied to Mr. Jones Because the Facility Officials Enforced It in A Viewpoint Discriminatory Manner.

A fundamental principle of the First Amendment is the government may not regulate speech based on the message it conveys. *Rosenberger*, 515 U.S. at 828. Restricting speech based

on the perspective it communicates is 'viewpoint discrimination' which "threatens the continued validity of free speech." *Id.* Reprimanding this practice is vital to upholding free speech principles by preventing protection from becoming mere formalities. *Hoye v. City of Oakland,* 653 F.3d 835, 845 (9th Cir. 2011). This Court has drawn parallels to the Ninth Circuit case, *Hoye*, where the court warned against viewpoint discrimination, explaining that the government could enact content-neutral regulations to withstand intermediate scrutiny, then ignore the terms and adopt a discriminatory enforcement policy. *Id.; McCullen*, 573 U.S. at 512.

The essence of a viewpoint discrimination claim is that the government has preferred the message of one speaker over another. *Taxpayers for Vincent*, 466 U.S. at 804. Viewpoint discrimination occurs when speech is enforced in a way that "the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger,* 515 U.S. at 829. A facially neutral law will be struck down for viewpoint discrimination when there is "a pattern of unlawful favoritism" shown by unrestrained discretion in the law, and by instances where particular viewpoints were the target of unequal enforcement. *Thomas v. Chicago Park Dist*., 534 U.S. 316, 317(2002).

First, a law that grants unrestrained discretion to enforce limitations on speech activity supports an inference of viewpoint discrimination. *See City of Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 757(1998). This Court warned against unrestrained discretion stating that "[b]road prophylactic rules in the area of free expression are suspect" because they "lend themselves to selective enforcement against unpopular causes." *Button,* 371 U.S. at 435 ("If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights"). With this understanding, the Eleventh Circuit struck down a buffer

zone with a provision allowing city officers to enforce it against anyone in the zone after signs were posted. *Bell v. City of Winter Park, Fla.,* 745 F.3d 1318 (11th Cir. 2014). The court explained that the lack of objective criteria provided an immense amount of discretion, creating a risk of targeted enforcement based on the speaker's viewpoint. *Id.* (comparing to *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948), which invalidated racially restrictive covenants because they were enforced by the state).

This case presents an example of the very "broad prophylactic rule" the Court warned against. *See Button*, 371 U.S. 415. By its language, the Act grants unbridled discretion in the local facility officers to enforce the buffer zone. R. 7. The district court highlighted such stating it is within local official discretion "to determine the best way to enforce the buffer zone based upon the needs of the particular facility." R. 13. The discretion granted by the Act is analogous with the buffer zone law struck down in *Bell,* 745 F.3d 1318. There are no objective criteria for enforcement other than the buffer zone must be "clearly marked and posted." R. 6. The worries that led to the holding in *Bell* were proven correct though enforcement of the Act; the "uncontrolled discretion" led to in viewpoint discrimination. R. 6-9.

Second, when particular viewpoints are the target of unequal enforcement of the law, there is a claim for viewpoint discrimination. *McCullen,* 573 U.S. at 512. In *McCullen*, the petitioners challenged the buffer zone, arguing that it favored one viewpoint by allowing clinic employees to escort patients into the clinic. *Id.* This Court explained a showing that those with pro-choice views were permitted to speak inside the buffer zone would be "a clear form of viewpoint discrimination." *Id.* (determining that there was no evidence that pro-choice views were permitted to speak but highlighting the fact that it would be viewpoint discrimination). This Court illustrated this standard by explaining the holding in *Hoye,* where the Ninth Circuit held a

policy of only enforcing a buffer zone against those who discouraged access to an abortion clinic and not those with a pro-life message was viewpoint discrimination. 653 F.3d 835.

Here, officers enforced the Act based on particular viewpoints. When Mr. Jones was arrested for having one extra person in their group, the MOMs group—who expressed support for the mandate—were violating the Act by standing inside the buffer zone. R. 7-9, 25-28. Yet, only Mr. Jones was arrested. *Id.* It is clear the officers knew the viewpoint of the MOMs and chose not to arrest them because they were known by their bright pink shirt and logo, which is synonymous for supporting the Act. R. 8. Further, the lack of the notorious shirt on Mr. Jones is indicative that the officer knew he did not support the mandate and arrested him accordingly. *Id.*

Mr. Jones's second arrest also indicates discriminatory enforcement because he was in full compliance with the Act when taken into custody. R. 8, 26, 35. The only thing Mr. Jones did wrong was having an opinion different from the FCC's. The officer's only reason for the second arrest was that Mr. Jones was "an anti-tech preacher." R. 9, 26, 35. Meanwhile, the MOMs, who violated the Act by standing within the buffer zone and in a group of seven, were allowed to continue protesting. R. 9, 28, 35. The very hypothetical this Court gave to illustrate viewpoint discrimination in *McCullen* is indistinguishable from the facts of this case. 573 U.S. 464. Here, pro-mandate views were permitted to speak inside the buffer zone while anti-mandate protesters were criminalized, a scenario in which this Court in *McCullen* held was a "clear form of viewpoint discrimination." *Id.* Additionally, the lack of probable cause is indistinguishable from the policy struck down in *Hoye*, 653 F.3d 835. Here, the police intentionally enforced the buffer zone only against those that discouraged compliance with the Act. Therefore, based on the reasoning adopted by this Court from *Hoye*, the evidence of Mr. Jones's arrest meets the necessary requirements for a successful viewpoint discrimination claim.

In sum, whether facially or *as applied*, the Act is unconstitutional because: (1) it is not narrowly tailored to serve a significant government interest; and, (2) it allowed officers to use discretion to enforce the buffer zone in a viewpoint discriminatory manner. Therefore, this Court should uphold the decision of the Eighteenth Circuit and find that the Act is unconstitutional.

II. The Act Violates the Free Exercise Clause Because It Fails Strict Scrutiny Under *Smith*.

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST., amend I. Though the Constitution prohibits the government from regulating religious beliefs, the right to perform or abstain from acts based on religion is not unlimited. *Reynolds v. U.S.*, 98 U.S. 145, 166–67 (1878) (explaining that unlimited rights would "permit every citizen to become a law unto himself"). When a law unduly restricts religion, courts must analyze the law under strict scrutiny. *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 881 (1990).

The ruling in *Employment Div. Dep't of Human Res. of Oregon v. Smith* produced a fundamental shift in Free Exercise Clause jurisprudence by replacing the traditional method of applying strict scrutiny to all free exercise claims with a test that presumes the constitutionality of any neutral, generally applicable law, even if it unintentionally burdens the free exercise rights of religious citizens. Carol M. Kaplan, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. Rev. 1045, 1046 (2000). This Court set out the test for free exercise in *Smith*: "The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes." 494 U.S. at 879.

The *Smith* decision implicitly challenged the long-held presumptions about free exercise of religion in society because now courts only examine laws under strict scrutiny if there is evidence that the law is not neutral or generally applicable. *Id.* at 884. Therefore, if the law fails the *Smith* test, it must undergo strict scrutiny where it must "be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Lower courts have grappled with applying the *Smith* test because it often leads to hostile outcomes for religious freedom, a fundamental pillar of our democracy. *See Rader v. Johnston*, 924 F. Supp. 1540, 1549 (D. Neb. 1996); *E.E.O.C. v. Catholic Univ.*, 83 F.3d 455, 463 (D.C. Cir. 1996).

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA") in 1993. *See City of Boerne v. Flores,* 521 U.S. 507, 512 (1997). RFRA prohibits the government from "substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability" and applies to all federal law unless a law "explicitly excludes such application." 42 U.S.C. §§ 2000bb—3(a);1(a). Because the legislature explicitly excluded RFRA from applying to the Act to allow for quick and effective implementation, the Court must examine the Act under *Smith*, despite decades of negative treatment from various courts and the fact that RFRA was explicitly passed to protect free exercise claims at the federal level. R. 16-17; *City of Boerne,* 521 U.S. 507.

Because of his faith, Mr. Jones opposes the mandatory contact tracing by SIM card and mobile phone. R. 2, 17, 24. The Delmont Luddites are skeptical of all technology and do not own or use mobile phones. R. 4, 17, 24, 31. Requiring Mr. Jones to carry a mobile phone, which explicitly goes against his faith, raises substantial free exercise concerns. *Id.* Neither this Court nor a jury can pass judgment on the beliefs of litigants and are in no position to question the

wisdom or sincerity of their order. *United States v. Ballard*, 322 U.S. 78, 82 (1944). Further, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 714 (1981). The Free Exercise Clause mandate of neutrality toward religion prohibits the government from deciding that secular motivations are more important than religious ones. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir.1999).

Under *Smith*, this Act must be both neutral and generally applicable, or it is subject to strict scrutiny. 494 U.S. at 880; *see Lukumi*, 508 U.S. at 546. Even if this Court finds that the Act passes the *Smith* test, the Act is still subject to strict scrutiny because Mr. Jones brings his free exercise claim in conjunction with his free speech claim, creating a hybrid rights claim. *Smith*, 494 U.S. at 881. Although *Smith* changed the test for free exercise determinations, it did not overrule its free exercise precedent, distinguishing those cases brought before as hybrid rights claims. *Id.* This Court held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated when the claim involves not the Free Exercise Clause alone, but "in conjunction with" other constitutional protections, such as freedom of speech and the press. *Id.; see Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

Either because the Act fails *Smith* or because the hybrid right exception applies in this case, the Court must apply strict scrutiny to the Act to determine its constitutionality. *Lukumi*, 508 U.S. at 546. To survive strict scrutiny, the Act must serve a compelling state interest and be narrowly tailored to achieve that interest. *Id.* This Court should hold the Act is unconstitutional as it violates the Free Exercise Clause. Applying strict scrutiny, the Act is unconstitutional as it is not narrowly tailored to serve the compelling interest.

A. This Court Must Apply Strict Scrutiny Because the Act Fails Under the *Smith* Test, and Even if This Court Finds It Passes Under *Smith*, the Hybrid Rights Exception Applies, Requiring This Court to Apply Strict Scrutiny.

This Court must analyze the Act under strict scrutiny because the Act does not pass the *Smith* test, as it is not generally applicable. 494 U.S. at 880. Additionally, Mr. Jones presents a hybrid rights claim with his free speech and free exercise issue. *Id.* at 881. Under either theory presented under *Smith,* the traditional test of neutral and general applicability, or the hybrid rights exception, this Act fails strict scrutiny as it is not narrowly tailored.

1. *The Act Fails Under Smith Because the Act is Not Generally Applicable as it Permits Secular Exemptions.*

For this Court to find that the Act violates the First Amendment's Free Exercise Clause, Mr. Jones must show that the Act fails the *Smith* test of neutral and general applicability, and then that the Act does not survive strict scrutiny. S*ee Lukumi,* 508 U.S. at 532 (Holding City ordinance neither neutral nor generally applicable under the *Smith* test and failed strict scrutiny). While this Court in *Smith* did not state whether the requirements of neutrality and general applicability were separate inquiries, this Court in *Lukumi* analyzed them distinctly, noting that a valid statute must meet both requirements of neutrality and general applicability. *Id.* at 531.

The Act forces Mr. Jones to choose between practicing his Luddite faith and following the law. R. 17. However, *Smith* held that this alone is an insufficient dilemma to establish a First Amendment violation if the Act is neutral and generally applicable. *Smith,* 494 U.S. at 879. Mr. Jones concedes that the Act is a facially neutral law. R. 5. The Act does not target religion on its face, nor does it seem that the object of the law is to restrict religion. *Lukumi*, 508 U.S. at 533. Yet, laws may still fail the *Smith* test if, "while appearing neutral in their terms, they, in fact, target the practices of a particular religion for discriminatory treatment through their design, construction, or enforcement." *Id.* at 557. The Act does not survive the *Smith* test. While it

appears neutral, it is not generally applicable because it affords secular exemptions categorically and individually while rejecting any other exemptions. R. 18.

A law burdening religious practices is generally applicable if it has the same effect on people and enforced uniformly. *Id.* at 543. The principle that the government cannot selectively impose burdens that only affect religious conduct, even in pursuit of legitimate interests, is essential to Free Exercise Clause protections. *Id.* The Court in *Smith* acknowledged that the "neutral, generally applicable" test will "place at a relative disadvantage those religious practices that are not widely engaged in." 494 U.S. at 890. The general applicability inquiry focuses on the actual operation and effect of the law, and a law that appears facially applicable is not enough to prove a law's general applicability. *Tenafly Eruv Ass'n Inc. v. Borough of Tenafly,* 309 F.3d 144, 167 (3d Cir. 2002) (quoting *Lukumi*, 508 U.S. at 534).

This Court held that laws are not generally applicable when they grant an exemption that undermines the purpose or has "in place a system of individual exemptions" not extended to cases of 'religious hardship' without a compelling reason. *Lukumi*, 508 U.S. at 543. This includes laws where officials use their discretion in enforcing the law against individuals. *Tenafly*, 309 F.3d at 168. Relying on this Court's ruling in *Lukumi*, the Third Circuit in *Fraternal Order* held that when the government makes a value judgment in favor of secular motivations like a medical exemption, but not religious motivations, the law is not generally applicable. *Fraternal Order*, 170 F.3d at 366.

In *Fraternal Order*, the Third Circuit held that plaintiffs were entitled to a religious exemption because the police department made secular exemptions to a law that forbid police officers from having facial hair. *Id.* at 363. The court held the policy was not generally applicable and needed to withstand strict scrutiny. *Id.; see also Olsen v. Mukasey*, 541 F.3d 827,

832 (8th Cir. 2008). Similarly, in *Olsen*, the plaintiff did not allege that the object of the law was to restrict religion but that it was not generally applicable because of the secular exemptions made. *Id.* Additionally, in *Tenafly*, the ordinance at issue did not specify any exemptions to a facially neutral and generally applicable ordinance prohibiting a person from placing signs on any public street or place. 309 F.3d at 167. The court held that when officials used discretion allowing for secular exemptions in enforcing otherwise neutral and generally applicable laws, they "contravene the neutrality requirement" if they exempt some secular conduct but not comparable religiously motivated conduct. *Id.* at 165-166. Individualized exemptions "devalued" the plaintiff's religion in *Tenafly* and violated the principles of *Smith* and *Lukumi*. *Id.*

Similar to the ordinance in *Tenafly*, the Act appears to be generally applicable at first glance, as it mandates that "each person living in the United States shall participate in the mandatory contact tracing program." R. 5, 32. Although Congress indeed passed the Act in the wake of a public health crisis of Hoof and Beak, Congress explicitly forbid the RFRA from applying so that citizens could not make religious requests for exemptions. R. 6, 16, 30, 33, 40. Yet, Congress allowed for health exemptions on a case-by-case basis and exempted all citizens over sixty-five. R. 2, 6, 19, 32. Officials at the local facilities have granted individual exemptions for people with late-stage cancer, heart disease, and Alzheimer's. R. 19-20, 22. Like in *Tenafly*, by creating an individual and discretionary exemption, Congress devalued the Luddites' right to practice their religion. *Id.* While it is fair to assume that these secular exemptions might be beneficial to some, the secular individualized exemptions make the Act not generally applicable because it undermines the Act's purpose, while restricting those with religious objections.

The Act's exemptions represent that the FCC made a value judgment that secular motivations are important enough for an exemption, while religious motivations are not. Like in

Fraternal Order, the Act at hand has a health exemption, but no religious exemption. R. 2, 6, 18, 22, 32-33, 40. Like in *Olsen*, Mr. Jones does not contend that the object of the Act is to restrict religion, but that the secular exemptions make the Act not generally applicable. This Court should hold similarly and find that the Act is not generally applicable because of the two secular exemptions set out in the Act's text.

Though the Act is facially neutral, the analysis above demonstrates that the Act fails the *Smith* test because it is not generally applicable. Accordingly, this Court must apply strict scrutiny to determine whether the Act withstands a free exercise challenge.

2. *Even if This Court Finds That the Law is Valid Under Smith, it Still Must Apply Strict Scrutiny Because the Hybrid Rights Exception Applies in This Case.*

Even if this Court finds that the Act passes under *Smith*, this Court still must analyze the Act under strict scrutiny because of the hybrid rights exception. *Smith*, 494 U.S. at 881-82. The *Smith* Court distinguished its decision from precedent by stating that the Court barred the application of neutral, generally applicable laws that incidentally burden religious conduct only when a free exercise claim was presented with another constitutional protection. *Id.*; *see also Sherbert*, 374 U.S. at 406. The *Smith* decision explicitly distinguishes cases like *Smith*, where a free exercise claim was brought alone, and those where it is brought "in conjunction with other constitutional protections," such as free speech, free press, or freedom of association. *Smith*, 494 U.S. at 881-882. When a free exercise claim is raised in conjunction with a companion right like free speech, the hybrid rights exception applies, and claims must undergo strict scrutiny. *Id.*

Accordingly, Circuit Courts have recognized that a hybrid rights free exercise claim under *Smith* exists where there is a First Amendment claim combined with another equal protection claim. *Cornerstone Bible Church*, 948 F.2d 464, 472 (8th Cir. 1991) (explaining free

speech raised along with free exercise rights triggers hybrid rights); *see also Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 207 (3d Cir. 2004); *San Jose Christian Coll. v. Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004). Mr. Jones's case mirrors those cases that courts have determined to fall under the hybrid rights exception, as he raised a free exercise claim in addition to a companion free speech claim, as discussed in the first section of this brief. R. 6, 18, 19, 20, 33, 42.

The companion right presented does not have to be proven, but rather a plaintiff need only raise a "colorable claim that a companion right has been violated." *San Jose Christian Coll.*, 360 F.3d at 1032. Courts view a colorable claim as "a fair probability or likelihood...of success on the merits." *Id.* As has been established above regarding the free speech claim, and by the Court of Appeals decision, Mr. Jones has a colorable claim. R. 30, 36, 41. Because Mr. Jones has brought forth both a free exercise and colorable free speech companion claim, this Court must analyze the Act under strict scrutiny. *Smith*, 494 U.S. at 881-82.

B. Applying Strict Scrutiny, the Act Fails Because it is Affords Secular Exemptions that Undermine the Purpose of the Act, and Therefore Is Not Narrowly Tailored.

Under the First Amendment, a law restrictive of religious practice must advance "interests in the highest order" and "must be narrowly tailored in pursuit of those interests." *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). Before *Smith* and under the current state of the law, if a statute fails the *Smith* test, courts must analyze free exercise claims by applying strict scrutiny to the statute in question. *See Sherbert*, 374 U.S. at 406; *Yoder*, 406 U.S. at 215; *Thomas v. Review Bd.* 450 U.S. at 718. For the Act to survive strict scrutiny, this Court must find a compelling government interest in creating the Act and that the Act is narrowly tailored to that interest. Much of the strict scrutiny analysis parallels the earlier discussion of why the Act was not generally applicable. *Tenafly*, 309 F.3d at 172. As this Court explained in *Lukumi*, an Act

that fails *Smith* will likely not survive strict scrutiny. *See Lukumi*, 508 U.S. at 546 (stating a law that fails *Smith* eviscerates the contention that the restriction is narrowly tailored).

Under strict scrutiny, the government has the burden to demonstrate that the law serves a compelling state interest. *See Sherbert*, 374 U.S. at 406. It is conceivable that this Court will find that the governmental interest of "promoting public health and safety by preventing the spread of Hoof and Beak" is compelling. R. 13, 37. Courts have traditionally given significant deference to the government when a public health crisis emerges; however, the rise of Hoof and Beak is not a blank check for the FCC to infringe on religious liberties. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2614 (2020).

Even if this Court finds that the Act has a compelling interest, the Act is not narrowly tailored to achieve that interest because it allows for exemptions that undermine the purpose of stopping the spread of Hoof and Beak. Under strict scrutiny, the government must show that the law is tailored in the least restrictive means possible to achieve the compelling secular state interest. *Sherbert*, 374 U.S. at 406. For example, this Court in *Sherbert* held that it was incumbent on the appellee to demonstrate that denying unemployment benefits to those seeking a religious exemption would serve the government interest of avoiding fraudulent claims without infringing on free exercise protections. *Id.* at 407. A SIM card in a cell phone is not narrowly tailored to stopping the spread of Hoof and Beak because it is not the least restrictive means available. Here, the Act only exempts individuals over sixty-five and those with health concerns and disqualifies any other exemption to allow for quick implementation. R. 2, 6, 18, 22, 32-33, 40. Further, in *Fraternal Order*, the court held that while safety is "undoubtedly an interest of the greatest importance," the policy against religious facial hair was not tailored to serve that interest, and the court was "at a loss to understand why religious exemptions threaten important

city interests by medical exemptions do not." 170 F.3d at 366. Here, the FCC has not shown why religious exemptions detract from health and safety, while secular exemptions do not.

Further, the appellee in *Sherbert* suggested no more than a possibility that people would file fraudulent claims for unemployment compensation if there were a religious exemption. 374 U.S. at 407. The FCC might contend that granting religious exemptions would lessen the mandate's effectiveness because many people would claim an exemption. But this apprehension about a flood of other religious claims is purely speculative, and there has been no meaningful attempt to demonstrate why the need to avoid religious exemptions is narrowly tailored to the prevention of Hoof and Beak. See *Tenafly*, 309 F.3d 144. There is no evidence that more than a few citizens would object to technology that most people in the United States already have and use. Arguably, the Delmont Luddites are among the very few people left in the nation that do not own or use mobile phones of any kind. R. 5, 23, 24, 31. The FCC has not offered any evidence that accommodating religious exemptions would harm the legitimate goal of stopping the spread of Hoof and Beak in the overall community, therefore, the Act is not narrowly tailored.

This Court should reverse the Court of Appeals free exercise decision. This Court must apply strict scrutiny under either theory presented under *Smith*: the traditional test of neutral and general applicability or the hybrid rights exception. Either way, this Act is unconstitutional.

CONCLUSION

For all the foregoing reasons, Petitioner Levi Jones requests this Court to affirm in part and reverse in part the Eighteenth Circuit's Opinion and Order.

Dated: January 31, 2021

Respectfully submitted,

/s/ Team 3

CERTIFICATE OF COMPLIANCE

Pursuant to the Seigenthaler-Sutherland Official Rules, we, the under-signed counsel, certify that (i) this brief is entirely the work product of competition team members, (ii) the team has complied fully with its school's governing honor code; and (iii) the team has complied with all Rules of the Competition.

Dated: January 31, 2021 /s/ Team 3

Appendix A

Relevant Constitutional and Statutory Provisions

1. Amendment I to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 28 U.S.C §1254 provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
2. By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

3. 28 U.S.C. § 1291 provides:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

4. 28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.