NO. 20-9422

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

LEVI JONES,

Petitioner,

v.

CHRISTOPHER SMITHERS,
in his official capacity as
Commissioner of the Federal
Communications Commission,

Respondent.

On Certiorari to the United States Supreme Court

BRIEF FOR THE RESPONDENT

Attorneys for the Respondent
Team 30

QUESTIONS PRESENTED

I. Under the Free Speech Clause of the First Amendment, is a sixty-foot no-protest buffer-zone around federal facilities distributing contact tracing devices narrowly tailored to serve a significant government interest when the government's primary objective is to protect the public by preventing the spread of a highly contagious and unpredictable disease?

II. Under the Free Exercise Clause of the First Amendment, is an act neutral and generally applicable when it requires all Americans to receive a government issued mobile phone for contact tracing purposes to track the transmission of a highly contagious disease despite religious objections to technology?

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JURISDICTION

The Court of Appeals for the Eighteenth Circuit reversed the district court's decision in its entirety and remanded the case with instructions to grant Respondent's motion for summary judgment with respect to the free exercise issue and deny Respondent's motion with respect to the free speech issue. The petition for a writ of certiorari was granted by this Court. The jurisdiction of the Court rests on 28 U.S.C. §1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> 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.

U.S. Const. amend. I.

> Each person living in the United States shall participate in a mandatory contact tracing program. The purpose of the program is to protect Americans, their families, and their communities by letting people know that they may have been exposed to Hoof and Beak Disease and should therefore monitor their health for signs of Hoof and Beak.

CHBDA § 42(a) (2020).

> Federal facilities located in each state will be used to distribute SIM cards containing contact tracing software. The SIM cards shall be installed in mobile phones. If citizens do not have a mobile phone, the centers shall distribute a mobile phone containing the contact tracing SIM card. Senior citizens over sixty-five years of age are exempt from this law. Health exemptions may be granted by the officials at each local federal facility on a case-by-case basis. No other type of exemption is permitted. Appeal authority is delegated to the FCC and must be filed within sixty days of receiving denial. Every person's name, address, birth date, social security number, and phone number if not receiving a phone from the facility, will be logged.

CHBDA § 42(b)(1) (2020).

> At federal facilities, (1) all persons must wear a mask and (2) all persons shall observe social distancing and maintain a distance of six feet apart from one another, inside and outside of the building.

CHBDA § 42(b)(2) (2020).

> Failure to comply with the Act will result in punishment of up to one year in jail and/or a fine of up to $2,000.

CHBDA § 42(c) (2020).

> Protestors are prohibited within sixty feet of the facility entrance, including public sidewalks, during operating hours. Groups of protestors are limited to no more than six persons. The zone must be clearly marked and posted.

CHBDA § 42(d) (2020).

> Enforcement is subject to discretion of local facility officials in acknowledgement of the varied location characteristics for each center.

CHBDA § 42(e) (2020).

> In an effort to allow for quick and effective implementation of the mandate, pursuant to 42 U.S.C. §2000bb–3, the Religious Freedom and Restoration Act is inapplicable to this act.

CHBDA § 42(f)(8) (2020).

STATEMENT OF THE CASE

Hoof and Beak is a novel disease that infected 70 million people in the United States and has taken the lives of 230 thousand Americans. R. 1. This highly contagious disease has sparked global lockdowns, pushed physicians and hospitals to capacity, and forced scientists to channel every ounce of their energy into developing a vaccine. R. 1.

On April 15, 2020, Congress passed the "Combat Hoof and Beak Disease Act" (the "CHBDA"), which included a contact tracing program. R. 1. The purpose of contact tracing is to "'protect Americans, their families, and their communities by letting people know that they may have been exposed to Hoof and Beak Disease and should therefore monitor their health for signs and symptoms of [the disease].'" R. 6. All contact tracing is conducted by using a government-provided SIM card for mobile phones. R. 1. Those who do not have a mobile device will be provided with one by the Government. R. 2. Individuals who are over the age of sixty-five and those with health-related conditions may be exempt from the mandate to which those exemptions will be determined on a case-by-case basis. R. 2. Every non-exempt individual must comply with the mandate by October 1, 2020 or be penalized. R. 2. The Federal Communications Commission ("FCC"), under the direction of Commissioner Christopher Smithers ("Respondent") was the agency chosen to enforce this mandate. R. 2.

The Delmont federal facility ("Delmont") is tasked with distributing mobile devices and SIM cards. R. 2. Based on the CHBDA, anyone arriving at any federal facility must comply with the mask mandate and six-foot social distancing requirements. R. 6. Failure to adhere to such regulations could potentially result in jail time and/or a $2,000 fine. R. 6. Levi Jones ("Petitioner") and his sect of the Luddite religion oppose the mandate on religious grounds. R. 2. The Church of Luddite is decentralized, but each congregation or district has its own set of rules

called “Community Orders. R. 4. In Petitioner’s congregation, the Delmont Church of Luddite, all members are “skeptical of all technology because of the harm it could bring to the family and Luddite community.” Jones Aff. ¶ 5; R. 4. Delmont Luddites do not own mobile phones, as it interferes with their explicit religious guidelines. Jones Aff. ¶ 5; R. 5. While the Delmont Luddites believe that mobile phones and technology harms them, the neighboring Eastmont Luddites firmly believe that mobile phones are necessary tools. R. 5.

In response to Respondent’s enforcement of the mandate, Petitioner decided to organize protests around Delmont. R. 2. To address the growing concern of the protests and the further spread of Hoof and Beak, Congress amended the CHBDA to include limitations of protests. R. 2. Here, the amendment “prohibited protests of more than six people and protests that occur within sixty feet of the facility entrances, inclusive of public sidewalks” during hours of operation, which are between 8:00AM and 5:00PM. R. 2. Such buffer-zone must be “clearly marked and posted,” with which the Delmont facility complied. R. 7.

On May 1, 2020, Petitioner was arrested for violating the statute because he and six others protested outside Delmont and encroached upon the buffer-zone to speak with individuals waiting in line. R. 7. This was in direct violation of both the buffer-zone requirement and the social-distancing requirement. R. 2, 7. Since the Luddites do not believe in technology, the only way they communicated with the people in line was through direct verbal engagement. R. 7. On May 6, 2020, Petitioner was arrested again for violating the statute. R. 2. During both encounters, Petitioner was met with the Mothers for Mandates (the “MOMs”), which is “a group of mothers who lost loved ones to Hoof and Beak.” R. 2. The MOMs advocated for the distribution of the mobile devices and SIM cards by providing information on the novel disease and encouraging participation in the contact tracing program. R. 2. Unlike Petitioner and his

followers, the MOMs "remained stationary" and did not approach anyone at Delmont. R. 3. Additionally, the MOMs complied with the limitation on number of congregates, as well as the mask mandate and social distancing requirements. R. 8. However, they were assembled directly next to the buffer-zone on the public sidewalk. R. 8. The MOMs distributed literature to help educate the individuals in line of the importance of the contact tracing program. R. 8.

Both parties filed motions for summary judgment at the United States District Court for the District of Delmont. R. 3. The district court granted Respondent's motion regarding the Free Speech issue, holding that CHBDA did not violate the First Amendment. R. 20. Additionally, the district court denied Respondent's motion regarding the Free Exercise issue, holding that CHBDA was not generally applicable. R. 20. On appeal, the United States Court of Appeals for the Eighteenth Circuit reviewed the aforementioned issues *de novo.* R. 36. The Eighteenth Circuit reversed the district court's decision in its entirety and remanded the case. R. 40. The court instructed the district court to therefore grant Respondent's motion for summary judgment regarding the Free Exercise issue and deny Respondent's motion for summary judgment with respect to the Free Speech issue. R. 40. Furthermore, the court instructed the district court to grant Petitioner's motion for summary judgment on the Free Speech issue and deny Petitioner's motion for summary judgment with respect to the Free exercise issue. R. 41.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Eighteenth Circuit erred in determining that the sixty-foot no-protest buffer-zone was not narrowly tailored to achieve the significant government interest in protecting public health. Based on the intermediate scrutiny test outlined in *Ward v. Rock Against Racism*, the CHBDA is a valid time, place and manner restriction. The

three-prong test includes the evaluation of content neutrality, narrow tailoring to achieve a significant governmental interest, and the availability of alterative channels to communicate the message.

The regulation meets the first prong of the test, which is content neutrality. It is content neutral because it does not target the message being conveyed; it only regulates where it can be conveyed. Petitioner is not restricted because of his viewpoint. However, he is restricted on exactly where he can convey his message, solely for health and safety reasons.

Additionally, the CHBDA meets the second prong of the test, which is the narrowly tailored prong. Here, the regulation is neither vague, nor overbroad. A reasonable person can understand the restrictions imposed and such restrictions do not burden more speech than necessary. Also, the government has a significant, and even compelling, interest in protecting the health and general welfare of the public at large, especially when dealing with a highly contagious and deadly infectious disease.

Lastly, the CHBDA leaves alternative channels for Petitioner to convey his message. Petitioner's speech is not suppressed simply because he must not encroach upon the buffer-zone. The buffer-zone is in place to help mitigate the risk of spreading the disease. Petitioner may discuss his viewpoint with the same audience while remaining observant of the clearly marked and posted buffer-zone. Therefore, the decision of the United States Court of Appeals for the Eighteenth Circuit regarding the Free Speech issue should be reversed.

The United States Circuit Court of Appeals for the Eighteenth Circuit did not err in finding that the CHBDA's mandatory contact tracing program through the use of government issued phones and SIM cards was neutral and generally applicable. Additionally, any burden that the CHBDA places on Petitioner's religion is only incidental. Based on the rational basis test in

Smith, the CHBDA is rationally related to achieving a legitimate governmental interest and thus passes muster under the Free Exercise Clause of the First Amendment. Even if this Court decides that strict scrutiny must apply, CHBDA is the least restrictive means for achieving a compelling government interest and is a valid statute under the First Amendment.

Based on this Court's holding in *Smith*, the CHBDA is neutral and generally applicable because the act does not target the beliefs and practices of any religion and does not attempt to regulate conduct motivated by religious belief. The mere existence of exemptions to the CHBDA do not render the act not generally applicable because the exemptions to CHBDA are motivated solely by health and no other criteria.

Any burden placed on Petitioner's religion is only incidental because Petitioner can comply with the obligations of his faith and the CHBDA simultaneously without any conflict. In addition, the technology ban is not a fundamental tenant of the Luddite religion because abstention from technology is not recognized by the neighboring Eastmont Luddite Congregation and is unique to Petitioner's congregation.

Additionally, the government's interest in protecting American's by letting them know if they have been exposed to the deadly Hoof and Beak disease is a legitimate public health interest. This Court has long recognized the right, and the duty, of the State to respond to public health crises through government action. The CHBDA is rationally related to achieving the government's legitimate public health interest because contact tracing will help locate infections and slow the transmission of the disease to save countless American lives.

Finally, CHBDA meets the standard required by strict scrutiny. The CHBDA is the least restrictive means to achieving not only a legitimate governmental interest, but a compelling one, as hundreds of thousands of Americans have lost their lives to this infectious disease. The

CHBDA is the least restrictive means for achieving the compelling public health interest because the mandate does not require Petitioner to forego his religious beliefs and practices to comply with the statute. The CHBDA merely requires all Americans be issued a mobile phone by the government and does not require any affirmative use of the technology.

ARGUMENT

I. THE SIXTY-FOOT NO-PROTEST BUFFER-ZONE REGULATION DOES NOT VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT BECAUSE IT PASSES MUSTER UNDER INTERMEDIATE SCRUTINY AS A VALID TIME, PLACE, AND MANNER RESTRICTION.

The government is tasked with many different duties, including providing "safety, order, and security to its citizenry." Nate Nasrallah, Note, *Preventing Conflict or Descending an Iron Curtain? Buffer-Zone Laws and Balancing Histories of Disruption with Free Speech*, 66 Case W. Res. L. Rev. 849, 854 (2016). Generally, "at the heart of the free speech guarantee lies the power of reason." *Id.* at 856. The sixty-foot buffer-zone imposed in this case is one that was implemented for the *sole reason* of protecting the public. R. 6. In conjunction with the mask mandate and social distancing requirements, the sixty-foot buffer-zone will help slow the spread of the deadly and highly contagious Hoof and Beak disease. R. 6. Even though this regulation applies to a traditional public forum, the government has a significant, and even compelling, interest to provide for the safety of its citizens. *See* Nasrallah, *supra*, at 856. This regulation applies to all individuals, regardless of suspect classifications, including religion, race, and gender. R. 6. The regulation also does not target the message of any one speakers' speech; all people protesting and congregating must conform to the policies outlined in the Combat Hoof and Beak Disease Act (the "CHBDA"). R. 6.

The three-prong intermediate scrutiny test used to analyze a reasonable time, place, and manner restriction is outlined in *Ward v. Rock Against Racism*. 491 U.S. 781, 791 (1989) (holding that New York City's sound amplification guidelines were valid time, place and manner restrictions and passed constitutional muster under the First Amendment); *see also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (ruling that the National Park Service regulation regarding overnight sleeping in Lafayette Park was a constitutional time, place, and manner restriction under the First Amendment) and *Perry Educ. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45-46 (1983) (determining that denying plaintiffs access to an internal mail system was not violative of the First Amendment). First, the regulation must be content neutral, meaning that the regulation does not impose any restrictions purely based on the message itself. *Id.* Second, the regulation must be "narrowly tailored to serve a significant governmental interest." *Id.* Third, the regulation must "leave open ample alternative channels for communication of the information." *Id.*

It is important to note that this Court should also balance the "extent of the law's history" and "the degree to which that history impedes on the government's interest." Nasrallah, *supra*, 883. This is because a "sufficient level of urgency" may reflect a need for such regulation, which would in turn override any burden on speech. Nasrallah, *supra*, 883. When viewing the history of the regulation, this Court should consider its pervasiveness, egregiousness, timing, and specificity. Nasrallah, *supra*, 883. Further, "[i]f the government can show that, as a matter of logic, the restricted activity impedes upon the government's interest, then it can much more easily show that its buffer zone is necessary to serve that interest." Nasrallah, *supra*, 886.

In addition, this Court must recognize the importance of the government's undeniably strong interest in "ensuring the public safety and order." *Madsen v. Women's Health Ctr., Inc.*,

512 U.S. 753, 768 (1994) (holding that a thirty-six-foot buffer-zone surrounding an abortion clinic is valid under the First Amendment to ensure patient protection and safety). Further, "fixed" buffer-zones around entryways are necessary to prevent individuals from "blocking, impeding, or obstructing access" to such facilities. *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 382 (1997) (ruling that "fixed" buffer-zones are valid to ensure protection and easy access to facilities, while "floating" buffer-zones are invalid, as they burden more speech than necessary).

A. The regulation is content neutral because it applies evenhandedly to all speakers, regardless of their position or viewpoint.

Traditional public fora "occupy a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). However, the government may impose regulations on such fora when the regulation controls "features of speech unrelated to its content," meaning that it is content neutral. *Id.* at 477. To be designated as content neutral, a statute or regulation must not directly target the message that is being conveyed, nor may the government impose such regulations because of a strong disagreement with the message. *Hill v. Colorado*, 530 U.S. 703, 711 (2000) (holding that Colorado's criminal statute prohibiting any individual from knowingly approaching within eight feet of another near an abortion clinic was content neutral, narrowly tailored, not overbroad or vague, and not a prior restraint, thus rendering it constitutional). Facial neutrality is the cornerstone for all time, place, and manner restrictions. *See generally Ward*, 491 U.S. at 791.

On the other hand, content-based restrictions require strict scrutiny and are unlikely to pass constitutional muster, especially in traditional public fora. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (holding that the Town's Sign Code violated the First

Amendment, as it was content based and subject to strict scrutiny because the restriction clearly targeted the message of the speech). Similar to a facially discriminatory law, content-based regulations treat certain types of speech differently than others. *See generally id*. A regulation may be considered content-based "even if it does not discriminate among viewpoints within that subject matter." *Id.* at 169.

The present case is distinguishable from *Reed v. Town of Gilbert, Arizona* because the regulations did not target the content of Petitioner's message. In *Reed*, the Town delineated between three different types of signage and had different regulations of each category: Ideological signs, political signs, and temporary directional signs. *Id.* at 159-60. The temporary directional signs were treated much differently than the other two categories of signage. *Id.* Ideological signs and political signs had unlimited and lengthy durational periods of display, respectively. *Id.* Additionally, such signs were able to stretch between sixteen and thirty-two square feet. *Id.* However, temporary directional signage was limited to six square feet per sign and could be "displayed no more than [twelve] hours before the 'qualifying event' and no more that [one] hour afterward." *Id.* at 160. By treating the categories of signs significantly different from each other, the Town Code was clearly content-based.

In the present case, unlike the regulation in *Reed*, the CHBDA does not distinguish between which types of speech are limited in the sixty-foot buffer-zone. R. 6-7. All speech is treated equally, regardless if it is from the Luddites, the Mothers for Mandates ("MOMs"), or any other speaker. R. 6-7. However, the CHBDA leaves the enforcement of the provisions "subject to the discretion of the local facility officials in acknowledgement of the varied location characteristics for each facility." CHBDA § 42(e).

Similar to the regulations in *Hill* and *Ward*, the CHBDA does not predicate its speech restrictions on the message being convey. *See generally Hill*, 530 U.S. 703 and *Ward*, 491 U.S. 781. The facial neutrality and evenhanded application to all individuals protesting and congregating within sixty feet of the facility allows this regulation to be viewed as content neutral. Thus, the first prong of the intermediate scrutiny test is met.

B. The regulation is narrowly tailored to serve a significant governmental interest.

1. The regulation is neither vague nor overbroad, thus satisfying the narrowly tailored prong.

Key doctrines used to determine if a regulation is narrowly tailored are the vagueness doctrine and the overbreadth doctrine. *See generally Grayned v. City of Rockford*, 408 U.S. 104 (1972). Generally, "an enactment is void for vagueness if its prohibitions are not clearly defined." *Id.* at 108. A person of reasonable intelligence should be able to decipher between what is and is not permissible under the imposed regulation in order for it to not be void. *Id.* Additionally, compliance with the regulation should not be the result of guesswork as to the meaning of the plain language of the statute. *Cameron v. Johnson*, 390 U.S. 611 (1968) (finding that the Mississippi Anti-Picketing Law was neither vague nor overbroad, thus withstanding constitutional attack). Further, the overbreadth doctrine prevents statutes from being over-inclusive and sweeping beyond the allowable regulatory reach of the statute. *See generally New York v. Ferber*, 458 U.S. 747 (1982); *see also Cameron*, 390 U.S. at 616-17. However, such statute may only be invalidated if the overbreadth is substantial. *Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (holding that a "virtual 'First Amendment Free Zone' at LAX" was entirely overbroad, as it swept in too much speech to be prohibited).

In the present case, the CHBDA specifically outlines the necessary mandates in order to protect the public. R. 6. The mandates include the compulsory donning of a protective facemask, six-feet social distancing requirements, the maximum number of individuals attending a single protest, and the prohibition of protesting within sixty feet of the federal facilities that are in charge of distributing the contact tracing SIM cards and cellphones. R. 6-7. Punishments for failure to comply with the CHBDA are clearly set out in § 42(c), which provides for sanctions including "up to one year in jail and/or a fine of up to $2,000." R. 6.

None of the aforementioned regulations are considered vague. Any reasonable individual would be able to understand what is permissible and what is not permissible under the CHBDA. In fact, the Luddites understood so far as to comply with the regulations, though not simultaneously. R. 7-9. During the first encounter, Petitioner obeyed all but one regulation: the six-person limitation for protesting. R. 7. At the second encounter, Petitioner approached those in line at the facility, thus breaking the buffer-zone. R. 8-9. It is hard to believe that Petitioner was unaware of the mandates, especially when he refused to vacate the premises the second time. Petitioner admitted ". . . we're in full compliance with the mandate," even though he had clearly breached the buffer-zone, which he had not done the first time. R. 9. As such, the regulations set forth in the CHBDA are not vague.

Further, the regulations are not overbroad because the CHBDA does not limit more speech than necessary with its restrictions; it simply prohibits mass congregation of individuals to prevent the spreading of the disease. The purpose of the CHBDA was to protect the public from the undoubted harm caused by the outbreak of Hoof and Beak disease. Distancing from each other has proven effective in combatting communicable diseases, such as Hoof and Beak. Center for Disease Control and Prevention, *Social Distancing* (updated Nov. 17, 2020), Center

for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html. A sixty-foot zone does not prohibit the individuals from getting their messages across. Because of the unpredictability of the virus, the government is able to impose such regulations in order to protect the public without being identified as substantially overbroad.

The regulation in *Jews for Jesus* is entirely distinguishable from the CHBDA because it does not limit more speech than necessary. There, the regulation did not seek to protect the public in any way; it sought to severely and substantially hamper the free speech rights of travelers, arbitrarily, by imposing an absolute ban on speech. *Jews for Jesus*, 482 U.S. at 574. Jews for Jesus argued that the regulation burdened more speech than necessary, and it was not facially neutral. *Id.* at 574-75. The broad sweep of the statute, encompassing "First Amendment activities," significantly influenced this Court's decision in finding the regulation to be overbroad. *Id.* In the present case, the sixty-foot buffer-zone is only mandated to achieve maximum social distancing while at the federal facilities. There is no direct or substantial impingement on any individual's free speech rights, as they have the continued right to protest; each individual simply must adhere to the distancing regulations.

Similar to the statute imposed in *Cameron v. Johnson*, the sixty-foot buffer-zone mandate is violated only if the protesters "obstruct or reasonably interfere" with the clearly marked boundaries of the zone. *Cameron*, 390 U.S. at 617; *see also* R. 7-9. Here, "enforcement is 'subject to [the] discretion of the local facility officials'" based on the location and needs of the facility impacted. R. 7. By directly approaching the individuals in line, as Petitioner did, the mandate was violated, and thus warranted intervention by the officials. R. 9. In *Cameron*, obstruction with the ingress and egress to the courthouse yielded the same result. *Cameron*, 390

U.S. at 617. This Court held that such restriction was neither vague nor overbroad. *Id.* at 622. As such, this Court should adhere to its precedent set forth in *Cameron* to decide the present case.

2. The government has the right, and the duty, to impose regulations to protect the public from greater harm, especially during global emergencies.

It is undoubted that the government has a significant, and even compelling, interest in protecting the public. Generally, the government may use its "'police powers to protect the health and safety of [its] citizens.'" *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)). In doing so, there must not be a substantial burden on another right, like free speech, such that it does not advance its goals. *McCullen*, 573 U.S. at 486 (citing *Ward*, 491 U.S. at 799).

Hoof and Beak is plaguing the world at a rapid pace with no end in sight. As a result, the government may step in to authorize crucial orders in an attempt to mitigate the harm caused by the disease. The CHBDA did just that; it was enacted by Congress in order to aid in protecting the American people from further harm caused by Hook and Beak. Simply, the sixty-foot buffer-zone was enforced to encourage social distancing and prevent unwanted interaction while the citizens of Delmont lined up to receive their contact tracing devices. Any burden on Petitioner's right to free speech is not substantial enough to outweigh the need for such regulation.

This Court held in *Clark v. Community. for Creative Non-Violence* that protecting and maintaining the charm and condition of public parks was a substantial governmental interest. 468 U.S. at 296. If this Court was willing to recognize that the maintenance of public parks was substantial enough to pass muster under the First Amendment, then it is clear that protecting the health and safety of the citizens is even more substantial. The regulation in *Clark* was a prophylactic approach to "protect" the park. *Id.* Comparatively, the CHBDA imposes a similar methodology of protection, however this involves protecting the people. Safeguarding human

life and the general welfare of the public is far more substantial, significant, and compelling than protecting a park. As such, the government has a significant, and again, compelling, interest in protecting the people from highly communicable and deadly diseases during global emergencies.

C. There are ample alternative opportunities for the Petitioner to communicate his objections to the CHBDA outside of the buffer zone, while still directing the message to the same audience.

The availability of alternative opportunities for the party to be heard regarding the specific issue being protested is a cornerstone in the analysis of whether a regulation is permissible under the First Amendment. *Ward*, 491 U.S. at 791. "An alternative is not ample if the speaker is not permitted to reach the intended audience." *Berger v. City of Seattle*, 569 F.3d 1029, 1049 (9th Cir. 2009) (holding that a regulation requiring street performers to obtain a permit prior to performing in public parks was not narrowly tailored and thus, could not suffice as a valid time, place, and manner restriction). Additionally, "[a]lternative channels of communication have historically related 'to the availability of different media of expression for substantially the same costs.'" *Lewis v. Colorado Rockies Baseball Club, Ltd*., 941 P.2d 266, 277 (Colo. 1997) (ruling that a regulation prohibiting a "publisher of baseball programs and scorecards" from selling and distributing such materials around the stadium was not narrowly tailored, nor "did it allow for ample alternative channels of communication"). The channels of communication must be functionally equivalent to the prohibited channel. *Id.* at 278. So long as the speaker can "'reach the minds of willing listeners . . .'" with the "'. . . opportunity to win their attention,'" then there are clear alternatives to communicate the intended message. *Hill*, 530 U.S. at 727.

Similar to the petitioner in *Phelps-Roper v. Strickland*, Petitioner "'is free to express [the] message outside of the times and places set forth in the statute, and the statute does not create a

barrier to the use of other means to deliver [such] message to the public.'" *Phelps-Roper v. Strickland,* 539 F.3d 356, 372 (6th Cir. 2008) (holding that an Ohio statute prohibiting protesting at military funerals during specified times met all prongs of the *Ward* test and was thus, constitutional). In *Phelps-Roper*, the Sixth Circuit noted that there was no "blanket ban" on the petitioner's ability to protest the funerals, as the limitations on protesting were of "limited temporal duration." *Id.* Further, the petitioner was able to "engage in 'targeted' protests of the funeral site *at all times* outside of the 300-foot buffer zone." *Id.* Comparatively, the buffer-zone regulation in our case is only active between the hours of 8:00AM and 5:00PM. R. 7. Additionally, the buffer-zone is nowhere near as large as the one in *Phelps-Roper*, proving that Petitioner has a greater availability of opportunities to communicate his message.

Furthermore, similar to *Frisby v. Schultz*, Petitioner has the ability to convey his message by possibly going door-to-door to the residents of Delmont. *See Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (holding that a regulation for targeted picketing of abortion in front of particular residences is not a blanket ban on protesting and thus, is valid under the First Amendment). Petitioner has the ability to communicate his message in any way desired, so long as he complies with the health and safety regulations imposed. While at Delmont, Petitioner may still speak with the individuals in line, however he must stay out of the buffer-zone, and at least six-feet apart from any individual during the course of communication. This would allow Petitioner to do exactly what he is trying to accomplish: state his objections to those at the facility. Respondent is in no way restricting how Petitioner can convey his message; Respondent is solely putting the proper safety precautions in place to mitigate the spread of Hoof and Beak.

II. THE CHBDA DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT BECAUSE IT PASSES MUSTER UNDER THE RATIONAL BASIS TEST.

Respondent did not violate Petitioners First Amendment Free Exercise right by enforcing the contact tracing protocols required by the CHBDA. CHBDA § 42(b)(1) (2020). The CHBDA is a neutral and generally applicable statute that has, at most, only an incidental burden on Petitioner's faith because it does not target the practice of religion and does not attempt to regulate conduct motivated by religious beliefs. *Emp. Div., Dep't of Hum. Res. Or. v. Smith*, 494 U.S. 872 (1990). The exemptions to the CHBDA are motivated solely by health and no other factor. As such, a religious exemption to the statute would be unreasonable because it would destroy the purpose of the statute. Further, the CHBDA is rationally related to achieving the legitimate governmental interest in preventing the spread of Hoof and Beak Disease.

A. The CHBDA is a neutral and generally applicable statute because it does not target the practice of religion and regulates both religious and secular conduct evenhandedly.

The CHBDA requires all Americans, regardless of race, religion, or occupation, to enroll in a mandatory contact tracing program that functions to protect American lives by letting them know that they may have been exposed to Hoof and Beak. § 42(a) (2020). The CHBDA is neutral and generally applicable because it does not target the practice of religion or conduct motivated by religious beliefs. Additionally, the exemptions to the act are motivated solely by health, so the mere existence of exemptions does not automatically render the act not generally applicable. § 42(b)(1) (2020).

The First Amendment states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The Free Exercise Clause grants every person the absolute right to believe and profess whatever

religion one desires. *Smith*, 494 U.S. at 877. The freedom to engage in, or abstain from, physical acts that are motivated by religious belief are not absolutely protected by the Free Exercise Clause. *Id.* at 878. A statute is facially neutral if it does not target the practice of religion and refers only to secular conduct. *Church Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (holding that city ordinances prohibiting animal sacrifice, a practice central to the Santeria religion, were neither neutral or generally applicable because the ordinances overtly targeted conduct motivated by religious beliefs). A statute is generally applicable if it regulates all conduct evenhandedly. *Id*. at 543.

Just as in *Smith,* where this Court did not sustain the free exercise challenge because the Oregon statute was neutral and generally applicable, the CHBDA is also a neutral and generally applicable statute. The CHBDA does not target the practice of religion because it requires every person to obtain a SIM card or mobile phone issued by the government for contact tracing purposes and makes no distinction based on religious people, practices, or ideas. R. 1. Nothing in the CHBDA's legislative history indicates an intent to discriminate against Luddite people and beliefs, nor were there any anti-Luddite statements made by officials to indicate that the CHBDA was intended to target the Luddites. R. 39.

Additionally, although Congress allowed for health-based exemptions to the CHBDA, but not a religious exemption, it is still generally applicable. Congress granted an exemption for people over the age of sixty-five, individuals with late-stage cancer, Ischemic heart disease, Alzheimer's, and people with severe physical disabilities that render them unable to operate a mobile phone. Stip. ¶ 9. Unlike *Church Lukumi Babalu Aye, Inc.*, where exemptions were clearly unavailable to a religious group engaging in animal sacrifice but available to entities engaging in similar secular conduct, such as meat butchering, these exemptions are motivated solely by

health and no other factor. *See Church Lukumi Babalu Aye, Inc.*, 508 U.S. at 533. Hoof and Beak Disease targets health, not suspect classifications, such as religion. The health exemptions to the CHBDA do not burden *only* conduct motivated by religion; a Luddite may qualify for an exemption as a matter of a health concern. Thus, the Luddites, or any religious sect, are not completed prevented from obtaining an exemption.

Further, this Court should consider the detrimental policy implications of holding that the lack of a religious exemption to the CHBDA renders the statute a violation of the Free Exercise Clause. Just because a religious exemption to a neutral and generally applicable statute is desirable by a group does not automatically make an exemption constitutionally required. *Smith*, 494 U.S. at 890. This court has long recognized that "as a fundamental principle that persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State…" *Jacobson v. Massachusetts.* 197 U.S. 11, 26 (1905) (holding that a mandatory vaccination law was not a violation of a person's individual liberty); *Reynolds v. United States,* 98 U.S. 145 (1878) (holding that laws prohibiting bigamy were not a violation of the Free Exercise Clause because allowing such exemption would render religious belief superior to the law itself). Also, the government can show a compelling interest in uniform application of a program by offering evidence that granting the requested religious exemption would "seriously compromise [the government's] ability to administer the program." *Gonzales v. O Centro Espírita Beneficente União Do Vegetal,* 546 U.S. 418, 435 (2006). To allow the Luddites to be exempt from the contact tracing mandate would destroy the very purpose of the mandate in itself because an entire population would not be accounted for in contact tracing measures rendering the program dangerously ineffective.

B. Any burden that may exist on the Luddite faith is only incidental because the respondent can comply with both the CHBDA and his religious obligations.

The CHBDA only requires that each American have a government-issued mobile phone or installed SIM card so that they can be notified in case of infection, and does not require regular use of the mobile phone. CHBDA § 42(b)(1). Thus, the mandate does not substantially conflict with Petitioner's beliefs. Additionally, the mandate does not require Petitioner to perform acts at odds with the fundamental tenants of their religion. The technology ban is unique to Petitioner's congregation and not shared among the Church of Luddite as a whole, so the burden on Petitioner's religion, if any, is only incidental.

If a neutral and generally applicable statute only *incidentally* burdens religion, this Court will apply rational basis review to determine whether the statute is constitutional. *Smith*, 494 U.S. at 884-85. A statute *substantially* burdens religion when the law compels a person to engage in acts at odds with the "fundamental tenants of his religious beliefs." *Korte v. Sebelius,* 735 F.3d 654, 682 (7th Cir. 2013) (holding that the Affordable Care Act's mandate for employers to provide birth control to employees substantially burdened the employer's religious practices because using contraceptives was at odds with the fundamentals of the petitioner's beliefs).

The Church of Luddite is decentralized, and each congregation has its own set of rules called "Community Orders." R. 22. Petitioner's congregation believes that using technology will provide access to ideas beyond the Luddite teachings, which will break down their community and family systems. R. 24-25. While Respondent do not at all contest the sincerity of Petitioner's objections to having a mobile phone, Petitioner can still freely observe this belief while complying with the CHBDA in full, simultaneously. Petitioner is not required to actively use the phone for any reason, but is only required to be issued one from the government so that they may be notified of a possible infection. R. 1. Petitioner could easily store his government-

issued phones with the community landline phone in the wooden shed and not be burdened by the CHBDA whatsoever.

Additionally, the CHBDA cannot possibly be a substantial burden because forbidding mobile phones is not a fundamental tenant to the Luddite religion; not all Luddites follow this practice and only select groups decide to follow this belief. R. 25. A neighboring congregation, the Eastmont Luddites, do not recognize the technology ban and embrace mobile phones as necessary for everyday life. R. 25. Here, the technology ban recognized by the Delmont Luddites is only a part of Luddite religious observance and not fundamental to the collective beliefs of the Church of Luddite. As such, the CHBDA only incidentally burdens Petitioner's religious practice.

The instant case is akin to this Court's holding in *Smith* because both consider neutral and generally applicable statutes that, at most, only incidentally burden religion. In *Smith,* the respondents were denied unemployment benefits because they were terminated from their jobs for work related misconduct, specifically smoking peyote – a hallucinogenic drug prohibited by Oregon criminal statutes – *as part* of their religious practices. *Smith*, 494 U.S. at 874. This Court held that the Free Exercise Clause permitted the state to prohibit sacramental peyote use because the criminal prohibition was neutral and generally applicable and only incidentally burdened the practice of religion; peyote use was just one facet of the respondents' religion. *Id.* at 885. The CHBDA is even less burdensome on Petitioner's religious beliefs than the peyote ban in *Smith* because the Oregon criminal law that prohibited peyote use in *Smith* prevented the respondents from using peyote at all. On the other hand, the CHBDA does not require Petitioner to use technology in conflict with his beliefs but only be issued the mobile phone. Petitioner can

successfully practice his religious beliefs while simultaneously complying with the CHBDA § 42(a) without a burden on the practice of religion.

C. The CHBDA meets rational basis review because the government has a legitimate interest in preserving public health and the CHBDA is a rationally related means to achieve that interest.

When a law is neutral and generally applicable and only incidentally burdens a particular religious practice, the government need only demonstrate a rational basis for its enforcement. *Smith*, 494 U.S. at 884-85. Under rational basis review, the court will uphold a statute if it is rationally related to a legitimate government purpose. *Bowen v. Roy,* 476 U.S. 693, 707-08 (1986) (holding that statutory requirement that a state agency use a social security number in administering government programs does not violate the Free Exercise Clause).

Hoof and Beak is a disease that has infected 70 million people and caused 230 thousand deaths in the United States alone. R. 1. Congress enacted the CHBDA to "protect Americans . . . by letting [them] know they may have been exposed to Hoof and Beak and should . . . monitor their health for signs and symptoms of Hoof and Beak." CHBDA §42(a). The CHBDA's purpose is so profoundly significant that it is hard to imagine how this act could be construed as anything but undoubtably legitimate. The CHBDA's requirement that all Americans have a government-issued mobile phone is rationally related to the legitimate interest in saving American lives. The CHBDA ensures that every American is a participant in a unified contact tracing program. This program facilitates early detection of infections and prevents further unimaginable loss of human life.

3. EVEN IF STRICT SCRUTINY APPLIES, THE CHBDA PASSES MUSTER UNDER THE FIRST AMENDMENT BECAUSE IT IS THE LEAST RESTRICTIVE MEANS TO CARRY OUT A COMPELLING PUBLIC HEALTH INTEREST.

Even if this Court decides that strict scrutiny must apply, the purpose of the statute is not only a *legitimate* government interest, but a *compelling* government interest. The CHBDA is also the least restrictive means to achieve that interest because there is no other effective way to conduct contact tracing to prevent the spread of the disease, absent a government-issued SIM card or mobile phone.

This Court in *Sherbert v. Verner* required strict scrutiny review for government actions that substantially burden a religious practice. 374 U.S. 398, 402-03 (1963). Strict scrutiny requires statutes that burden the practice of religion to be the least restrictive means necessary to further a compelling government interest. *Id. Sherbert* considered a person whose religion prevented her from working on Saturday's, the religion's Sabbath. 374 U.S at 399. This Court held that the government is free to regulate conduct motivated by religion if they pose a substantial threat to public safety, peace, or order. *Id*. at 402. Absent a substantial threat to public safety, this Court shall apply strict scrutiny. 374 U.S. at 406. This Court has never invalidated any government action pursuant to the *Sherbert* test, except in the limited area of denial of unemployment compensation. *Smith* limits *Sherbert* even more by declining to extend it to neutral and generally applicable laws. *Smith*, 494 U.S. at 884. This Court applied strict scrutiny to cases where a government action was explicitly not neutral or generally applicable. *Holt v. Hobbs*, 574 U.S. 352 (2015); *United States v. Lee*, 455 U.S. 252 (1982); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Here, Respondent's interest in reacting to the public health crisis caused by Hoof and Beak is nothing short of compelling. This Court has recognized government actions concerned

with furthering a public health objective as a compelling government interest on multiple occasions. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 683, 691-92 (2014); *Buchwald v. Uni. N.M. Sch. Med.*, 159 F.3d 487, 498 (10th Cir. 1998) (noting that "public health is a compelling government interest" and survives the first prong of strict scrutiny review). Because of the novel Hoof and Beak Disease, the entire globe has responded with lockdowns to desperately try to curb the spread of the disease while scientists tirelessly work to create a vaccination. Courts recognize that individual rights must sometimes be subordinate to the compelling government interest in protecting society from communicable diseases and thus, requests for religious exemptions may be denied to satisfy the compelling interest. *See* Megan Gibson, Note*, Competing Concerns: Can Religious Exemptions to Mandatory Childhood Vaccinations and Public Health Successfully Coexist?*, 54 U. Louisville L. Rev. 527, 544 (2016). It is difficult to contest that the interest in preventing the spread of Hoof and Beak is not only compelling, but of the most serious national emergencies in American history that calls for immediate government intervention.

A statute is the least restrictive means of achieving a compelling government interest if granting the exemption would not infringe another person or groups' constitutional rights or destroy the purpose of the compelling government interest. *Walker v. Beard*, 789 F.3d 1125, 1137–38 (9th Cir. 2015). Also, a statute is the least restrictive means if the statute gives the challenger ample opportunities to practice their religion while simultaneously complying with the statute. *Helland v. S. Bend Cnty. Sch. Corp.*, 93 F.3d 327, 331 (7th Cir. 1996). The device mandate is the least restrictive means to enforce the government's compelling public health interest because no other way of contact tracing, other than the program enumerated in CHBDA § 42(b)(1), would provide the degree of accuracy in data that this crisis so desperately needs.

Further, granting a religious exemption would destroy Congress' compelling public health interest, and Petitioner can easily comply with his religious obligations and the CHBDA without a conflict.

The CHBDA employs the least restrictive means to pursuing a compelling government interest because Congress could have required even *more* restrictive means, such as GPS tracking or requiring people to use and download an "app" on their phone and regularly use it. Instead, Congress enacted a minimally restrictive program that only requires individuals to receive a government-issued SIM card or mobile phone. The CHBDA does not require the Luddites to use the phone in any capacity and only requires that they are issued one. Thus, the Luddites can successfully comply with the statute and adhere to their religious obligations.

CONCLUSION

Therefore, for the forgoing reasons, the Court of Appeals for the Eighteenth Circuit erred in determining that the sixty-foot no-protest buffer-zone was not narrowly tailored to serve a significant governmental interest and thus, this Court should reverse on this issue. Furthermore, for the foregoing reasons, the Court of Appeals for the Eighteenth Circuit properly determined that the CHBDA was neutral and generally applicable and thus, this Court should affirm on this issue.

Respectfully Submitted,

Team 30

Attorneys for the Respondent

Dated: January 31, 2021

Brief Certification

Team 30 hereby affirms that the work product contained in all copies of this team's brief is, in fact, the work product of the team members. This team has fully complied with our school's governing honor code. Furthermore, this team has fully complied with all Rules of the Competition.

Respectfully Submitted,

Team 30