No. 20-9422

IN THE
Supreme Court of the United States

LEVI JONES,
Petitioner,

v.

CHRISTOPHER SMITHERS,
Respondent.

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

BRIEF FOR RESPONDENT

Team Number 4
Counsel for Respondent

January 31, 2021

QUESTIONS PRESENTED

(1) Whether the United States Court of Appeals for the Eighteenth Circuit erred in concluding that a sixty-foot no protest buffer zone was not narrowly tailored to the governmental interest in public safety and preventing the spread of Hook and Beak; and

(2) Whether the United States Court of Appeals for the Eighteenth Circuit erred in finding that mandated contact tracing through the use of mobile phones and government-issued SIM cards is neutral and generally applicable, despite religious objections to technology.

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STATEMENT OF THE CASE

The Hoof and Beak Disease ("Hoof and Beak") has brought our country, and the world, to a standstill. (R. at 1). Since its discovery in December 2019, the highly contagious disease has killed 230 thousand Americans with its severe flu-like symptoms and skin rashes. (R. at 1). Seventy million Americans remain infected today. (R. at 1). The government has taken steps to contain the disease by forming the federal Hoof and Beak Task Force and enacting the Combat Hoof and Beak Disease Act ("CHBDA" or "the Act") on April 15, 2020. (R. at 1). The CHBDA created a contact tracing mandate with the explicit purpose of "protect[ing] 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 Hoof and Beak." CHBDA § 42(a)(1) (2020). The FCC was tasked to coordinate this effort and was directed by Congress to distribute SIM cards imbedded with contact tracing software. (R. at 6). Citizens without mobile phones are to be given a mobile phone with the contact tracing SIM card preinstalled. (R. at 6). Congress created only two exemptions to the CHBDA's mandate: senior citizens over 65 years of age and health exemptions. (R. at 6). To date, the only health exemptions granted have involved cases of late-stage cancer, Ischemic heart disease, Alzheimer's disease, and individuals with severe disabilities incapable of operating a mobile device. (R. at 22). Additionally, Congress explicitly provided that the Religious Freedom and Restoration Act ("RFRA") is inapplicable to the CHBDA. (R. at 6).

In regulating the distribution at federal facilities, the CHBDA also provided that (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). Failure to do so was made punishable by up to a year in jail, a fine of up to $2,000, or

both. CHBDA § 42(c). In response to the growing number of protestors at federal facilities, Congress adopted an emergency amendment to the CHBDA. (R. at 7). The amendment created a "buffer zone" extending sixty feet from the entrance of a federal facility within which protestors were prohibited during operating hours. (R. at 7). Additionally, groups of protestors may not exceed six persons. (R. at 7).

Petitioner leads the Delmont congregation of the Church of Luddite. (R. at 4). Luddites believe in total adherence to their "Community Orders," which are a set of rules maintained and administered by members of the congregation. (R. at 4). Community Orders can vary significantly from congregation to congregation. (*See* R. at 4). The Delmont Luddite's Community Orders state that all congregants should be skeptical of technology, and pursuant to this order, no Delmont Luddites own a mobile phone. (R. at 4–5). In fact, the Delmont Luddites only maintain one land-line phone that is on the church premises and may be used only in the case of emergency. (R. at 5). In some Luddite communities, a particular technology may be accepted after reaching a consensus, which may lead to its adoption into the congregation's Community Orders. (R. at 23).

Petitioner and his congregation oppose the CHBDA mobile phone mandate as a violation of their freedom of religion and freedom of speech. (R. at 25). On May 1, 2020, Petitioner and six other Luddites arrived at the Delmont Federal Facility to protest the mandate. (R. at 7). While the group began on a sidewalk seventy-five feet from the entrance, they periodically entered the 60-foot buffer zone to speak with people in line. (R. at 7). Federal officers confronted Petitioner and informed him that he "must leave because [his group] has too many people and were violating the mandate." (R. at 8). Petitioner refused to comply and was

subsequently arrested. (R. at 8). Petitioner went to jail for four days and was released on May 5, 2020. (R. at 8).

At 8:30 AM on May 6, 2020—the morning after his release—Petitioner returned to the federal facility with five congregants. (R. at 8). The Luddites set up a table just outside the buffer zone, sixty feet from the entrance, and proceeded to speak to people in-line for nearly eight hours. (R. at 8–9). In the late afternoon, Petitioner was approached by federal police and was arrested once again. (R. at 9).

On June 1, 2020, Petitioner Levi Jones brought this action against Respondent Christopher Smithers in his official capacity as the Commissioner of the Federal Communications Commission ("FCC") for alleged violations of the First Amendment of the United States Constitution. (R. at 1). Both parties filed cross motions for summary judgement in the United States District Court for the District of Delmont. (R. at 3). The district court granted the FCC's motion with respect to the free speech issue and granted Petitioner's motion with respect to the free exercise issue. (R. at 20).

STATEMENT OF JURISDICTION

The Court of Appeals for the Eighteenth Circuit reversed both rulings, denying the FCC's motion with respect to the free exercise issue and granting Petitioner's motion with respect to the free speech issue. (R. at 41). Petitioner filed a timely writ of certiorari, which this Court granted. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1) (2018).

STANDARD OF REVIEW

A motion for summary judgment shall be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The standard of review for a motion of summary judgment is de novo. *Hunt v. Sycamore*

Cmty. Sch. Dist. Bd. of Educ., 542 F.3d 529, 534 (6th Cir. 2008). All inferences must be viewed in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). When reviewing cross motions for summary judgement, the Court must individually review each motion on the merits "to determine whether either of the parties deserves judgment as a matter of law." *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 62 n.4 (1st Cir. 1997).

SUMMARY OF THE ARGUMENT

The CHBDA is a valid time, place, or manner restriction and thus, does not violate the First Amendment. The regulation is permissible because it meets the three elements required to qualify as a valid time, place, or manner restriction. First, the CHBDA is content-neutral because the Act regulates conduct only and draws no distinctions on the basis of what the protestor is saying. Second, the Act is narrowly tailored to the government's substantial interest in preventing the spread of Hoof and Beak and ensuring access to the federal distribution facilities. The government's interest in preventing the spread of Hoof and Beak is indisputable. The CHBDA is narrowly tailored to that interest because the Act does not affect substantially more speech than necessary. Speech is only affected in the "buffer zone," which is modest in size and does not affect Petitioner's ability to convey his message outside of the "no protest" zone. Finally, the CHBDA provides ample alternative channels of communication for Petitioner and other protestors. Petitioner's ability to speak in any manner, so long as he complies with the social distancing requirements outside of the buffer zone, remains entirely unrestricted. Although the CHBDA may not provide for Petitioner's preferred manner of communication, this Court has rejected the argument that a time, place, or manner restriction fails simply because it

denies the challenger's preferred mode of communication. *See Heffron v. ISKON* 452 U.S 640, 65(1981).

This Court has long held that neutral laws of general applicability do not trigger the protections of the First Amendment's Free Exercise Clause. *See Employment Div. v. Smith*, 494 U.S. 872 (1990). The CHBDA is a neutral law of general applicability. The text of the CHBDA does not contemplate religious viewpoints or practices, and the stated purpose of the statute is to provide notice to Americans who may have been exposed to the deadly, highly infectious disease, making the CHBDA neutral as to religion. Additionally, the CHBDA applies to all Americans with only two exemptions: senior citizens over 65 years of age and health exemptions on a case-by-case basis. Neither exemption takes an individual's beliefs (religious or otherwise), into account, making the CHBDA generally applicable. Importantly, Congress has explicitly shielded the CHBDA from the RFRA's strictures. Even if this Court concludes that Petitioner's religious practice is substantially burdened by the contact tracing mandate, the RFRA cannot uphold those religious practices.

ARGUMENT

I. THE CHBDA IS A VALID TIME, PLACE, AND MANNER RESTRICTION UNDER THE FIRST AMENDMENT.

The Free Speech Clause provides that "Congress shall make no law … abridging the freedom of speech…." U.S. Const. amend. I. However, the government is permitted to impose "reasonable time, place, and manner restrictions" as long as those restrictions are (1) content–neutral, (2) serve a substantial governmental interest, (3) narrowly tailored to serve such interest, and (4) provide ample alternative channels for the speech. *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 293 (1984). This Court's test for the constitutionality of statutes imposing time, place, or manner restrictions has been long settled, and it does not require review.

Id.; *See also Hill v. Colo.*, 530 U.S. 703 (2000); *Burson v. Freeman*, 504 U.S. 191, 197 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The CHBDA complies with each of these elements and is therefore a permissible time, place, or manner restriction under the First Amendment.

This Court has previously upheld time, place, or manner restrictions that apply only to the area around a certain type of facility or in a particular place. *See, e.g., Heffron*, 452 U.S at 650–51 (1981) (state fair); *Cox v. Louisiana*, 379 U.S. 559, 562 (1965) (state courthouses); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (city bandshell). This Court should hold the same here.

A. Both the district court and the court of appeals correctly determined that the CHBDA is content-neutral.

In a First Amendment analysis, the court must first determine whether a law is content-based or content-neutral. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). An act is not deemed content-based simply because it establishes buffer zones only at a particular location, as opposed to other facilities. *McCullen*, 573 U.S. at 465. Indeed, this Court has long held that a restriction on speech that is "justified without reference to the law" does not offend the First Amendment. *Id.* This Court has established that a "facially neutral law does not become content-based simply because it may disproportionately affect speech on certain topics." *Id.* at 479.

The FCC's efforts to promote public health by ensuring access to the federal distribution facilities regulates conduct—not speech. Petitioner argues that because the CHBDA only applies outside of federal SIM card distribution facilities, it is a content-based restriction disproportionately impacting speech related to Hoof and Beak. This conception confuses both the aim of the CHBDA and this Court's First Amendment jurisprudence. To begin, the

restriction is a target regulation of conduct with an "incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791. The fact that Petitioner's speech is unrestrained outside of the sixty-foot zone confirms that conduct, not content, remains Congress's target.

A regulation is content-neutral when it is adopted without regard to the message it conveys and applies to all viewpoints rather than discriminating against a particular message. *Hill*, 530 U.S. at 719 (citing *Ward*, 491 U.S. at 791). In *Hill*, a Colorado statute prohibited any person, within 100 feet of the entrance to any health care facility, from "knowingly approach[ing]" within eight feet of another person to engage in protest, counseling, or education. *Id.* at 707. This Court found that the statute in *Hill* was content-neutral for three independent reasons: (1) the statute was not a "regulation of *speech*," but a "regulation of the *places* where speech may occur"; (2) the statute was not adopted "because of the disagreement with the message [Petitioner] conveys"; and (3) the State's interests were unrelated to the content of the demonstrators' speech. *Id.* at 719–20 (emphasis added). Although the statute in *Hill* restricted three specific categories of communication, this Court concluded that the statute did not regulate particular viewpoints. *Id.* at 720. Thus, this Court held that the statute merely regulated the places in which particular messages could occur, and as such, the statute was justified without reference to the content of the regulated speech and deemed content-neutral. *Id.* at 720–21.

Like the statute in *Hill*, the CHBDA is content-neutral despite its incidental effect of limiting Petitioner's opposition to the Act to areas outside of a specifically designated area. Similarly to *Hill*, the CHBDA does not explicitly regulate speech; as noted by the district court, the Act "merely limits the number of people permitted to gather in the area immediately surrounding the federal facility…." (R. at 12). Additionally, Congress's stated purpose in

enacting the CHBDA, which will be further discussed in subsection B, was not because of Congress's disagreement with Petitioner's speech. (R. at 5–6). Both the statute at issue in *Hill* and the CHBDA apply to all viewpoints—*all* protestors within the specified buffer zones. 530 U.S. at 734. As noted by the Eighteenth Circuit, "a violation of the [CHBDA] is based only on *where* something is said, not *what* is said." (R. at 37). Congress's interest in preventing the spread of Hoof and Beak and ensuring access to federal facilities is completely unrelated to the content of Petitioner's speech. (R. at 14). Thus, both the district court and the Eighteenth Circuit correctly concluded that the CHBDA is a content-neutral regulation permissible under the First Amendment.

B. The CHBDA is narrowly tailored to serve significant governmental interests in public safety and preventing the spread of Hoof and Beak.

Because the CHBDA is content-neutral, the government is permitted to impose "reasonable" time, place, or manner restrictions as long as those content-neutral restrictions are "narrowly tailored to serve a significant governmental interest[s]." *Clark*, 468 U.S. at 293.

A time, place, or manner restriction that is "narrowly tailored" neither (1) "burden[s] substantially more speech than necessary to further the government's legitimate interests" nor (2) "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799, 801. In *Ward*, the city attempted to regulate the volume of amplified music at the bandshell by requiring performers to use sound-amplification equipment and a sound technician provided by the city. *Id.* at 787. This Court held that the regulation was a valid time, place, or manner restriction and was sufficiently narrowly tailored to the government's interest in protecting citizens from unwelcome noise. *Id.* at 796. In determining whether the regulation was "narrowly tailored," this Court found that the regulation: (1) directly served the government's interest in avoiding excessive volume; (2) was not substantially broader

than necessary to achieve that interest; and (3) had no material impact on the quality or content of the speaker's message. *Id.* at 801–02.

Petitioner does not dispute that the governmental interests at stake are legitimate. (R. at 37). The Government has a significant interest in protecting the public health and safety by preventing the spread of Hoof and Beak. The CHBDA's explicit purpose is to "protect Americans, their families, and their communities by: letting people know they may have been exposed to Hoof and Break and should monitor their health for signs and symptoms of [the disease]." CHBDA § 42(a)(1). The buffer zone serves the FCC's legitimate interest in preventing the spread of Hoof and Beak and ensuring access to the facility entrance. While Petitioner does not disagree that both Congress and the FCC have significant governmental interests in enacting and enforcing the CHBDA, he contends that the law is not narrowly tailored to the interest in preventing the spread of Hoof and Beak. (R. at 14).

However, the CHBDA does not burden substantially more speech than necessary to further its interest in protecting the public from the spread of Hook and Beak. First, given the state of emergency created by the pandemic, both the distancing requirements and gathering limitations of the CHBDA directly serve the government's interest in preventing the spread of Hook and Beak. The prohibition of protestors' speech within the sixty-foot buffer zone directly advances that interest by prohibiting unnecessary gathering outside the distribution facility, where individuals are *required* to go, risking exposure to the disease. CHBDA § 42(b)–(c). Specifically, with regard to the effect of the emergency amendment, implementing social distancing and gathering requirements and ensuring safe access to the federal facility directly advances the government's interest in public health and safety. Second, like the speakers in *Ward*, a protestor opposing the CHBDA still has the autonomy to convey his message outside of

the buffer zone even if its potential reach is lessened by the regulation. 491 U.S. at 788. The city's regulation in *Ward* was narrowly tailored to only limit the *manner* in which performers may convey their messages, and similarly, here, the CHBDA merely restricts the *place* in which protestors' speech may occur. With these restrictions, Petitioner—and all other protestors—remain free to convey their message to the world, so as long as they do so outside of the buffer zone. Based on the reasoning of this Court in *Ward*, the sixty-foot buffer zone is, in fact, narrowly tailored to serve the government's significant interest, and the CHBDA does not burden substantially more speech than is necessary to further that interest.

C. The CHBDA preserves ample alternative channels of communication for Petitioner and other protesters.

Finally, the CHBDA leaves open ample alternative channels of communication. A regulation provides ample alternative channels for communication when a speaker has additional outlets to convey their message to his target audience. *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). A valid regulation need not be the least intrusive means of achieving the government's interest, but so long as there is a "reasonable opportunity" for communication, a regulation is deemed to have ample alternative channels. *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005) (quoting *Renton v. Playtime Theatres*, 475 U.S. 41, 54 (1986)). Further, "a time, place, and manner restriction does not violate the First Amendment 'simply because there is some imaginable alternative that might be less burdensome on speech.'" *Id.* at 1138 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

The alternative channels of communication available to a speaker need not be as direct as the speaker's preferred method. *Id.* In *Menotti*, the state issued an emergency order excluding all persons except specific essential personnel from being in the downtown area. *Id.* at 1120–21, 1125. When persons were prohibited from protesting in the restricted area, the protestors

challenged the constitutionality of the emergency order. *Id.* at 1118. While speakers were not permitted to deliver their message directly in the restricted zone, they were permitted to conduct their demonstrations outside of the restricted area. *Id.* at 1138. Even though the protestors' messages were less proximate than the speakers desired, the speakers were able to convey their messages—both visually and audibly—to their target audience. *Id.* The Ninth Circuit concluded that the requirement of ample alternative channels does not demand that a speaker be able to deliver his message in the manner it prefers; the speaker is merely entitled to a "reasonable opportunity for communication." *Id.* at 1141 (internal quotations and citations omitted). Thus, the court in *Menotti* held that the regulation was valid time, place, or manner restriction and provided ample alternatives for speech. *Id.*

Petitioner's ability to protest and speak in any manner, so long as he does so without physically entering the clearly marked "buffer zone" that extends sixty feet from the facility entrance, remains entirely unrestricted. In fact, the record reflects that Petitioner continued to convey his message outside of the buffer zone, while wearing a mask, maintaining a six foot distance, and with a group of no more than six persons. (R. at 7–8). The Act does not affect the ability of protestors, including Petitioner, standing outside the buffer zone, to speak, counsel, leaflet, picket, or engage in any other activities protected by the First Amendment. Nevertheless, Petitioner contends that the enforcement of the CHBDA against him and the Delmont Church of Luddite violates their First Amendment right under the Free Speech Clause.

In the case *sub judice*, the CHBDA preserves ample alternatives for protestors to convey their opposition to the Act. First, Petitioner is permitted to communicate his message with those outside of the sixty-foot buffer zone, while maintaining social distancing. Like the protestors in *Menotti*, the buffer zone prevents Petitioner from communicating his message in his desired

proximity, but nonetheless, Petitioner is still able to convey his message to others as long as he refrains from entering the no protest zone. Petitioner contends that the only way in which he, and other Delmont Luddites, can communicate with their target audience is face-to-face. (R. at 25). Although face-to-face communication may be the manner of communication in which Petitioner prefers, the CHBDA preserves ample alternatives to allow Petitioner a "reasonable opportunity" to communicate with others. Further, Petitioner himself identified and acknowledged numerous reasonable alternatives for communications. Though these methods may not be desirable to the Delmont Luddite community, protestors are afforded ample opportunity to communicate their message to their target audience through numerous outlets.

In conclusion, because the CHBDA is content-neutral, narrowly tailored to serve the government's substantial interest, and provides ample alternative channels for communication, the Eighteenth Circuit erred in concluding that the Act is not a valid time, place, or manner restriction under the First Amendment.

II. THE CHBDA DOES NOT OFFEND THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT BECAUSE IT IS BOTH NEUTRAL AND GENERALLY APPLICABLE.

In addition to free-speech protections, the First Amendment of the Constitution secures religious freedom for the American people. U.S. Const. amend. I. The text provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.* "The First Amendment [Free Exercise Clause] embraces two concepts: freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell v. Conn.*, 310 U.S. 296, 303–04 (1940). Thus, the government may permissibly enact and enforce legislation which burdens the religious practices of individuals when certain conditions are met. *Id.*

There are two important considerations to evaluate when examining whether government action violates the Free Exercise clause: (1) whether the act is neutral and generally applicable and (2) whether the act unnecessarily burdens religious exercise. This court addressed the former in *Employment Division v. Smith*. 494 U.S. 872 (1990). *Smith* and its progeny establish that neutral, generally applicable laws do not trigger the protections of the Free Exercise Clause and are therefore subject to rational basis scrutiny. *Id*. at 889–90. However, if state action is targeted at regulating a religious practice—or even religion in general—strict scrutiny must be satisfied by a compelling government interest applied using the least restrictive means. *Church of Lukumi Babalu Aye v. City of Hiaheah*, 508 U.S. 520, 546 (1993). The latter consideration does not apply to our analysis because Congress has explicitly proscribed RFRA from applying to the CHBDA. Thus, the CHBDA satisfies constitutional muster against Petitioner if it is a neutral, generally applicable law.

The CHBDA is a religion-neutral, generally applicable public health regulation passed with the express purpose of informing Americans if they have been exposed to Hoof and Beak. (R. at 6). While the CHBDA does burden the Delmont Luddites, the act satisfies rational basis scrutiny as rationally related to a legitimate government interest—tracking the spread of the ongoing global pandemic.

A. <u>The CHBDA is both neutral and generally applicable.</u>

Religion-neutral laws of generally applicability do not trigger the protections of the Free Exercise Clause. *Smith*, 494 U.S. at 886 ("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 (or prescribes) conduct that his religion prescribes' (or proscribes)") (quoting *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982)). This Court has long

held that a person's religious beliefs do not excuse him from compliance with an otherwise valid law affecting conduct that the State is free to regulate. *Id.* at 885; *see also Minersville School Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594–595 (1940) ("[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."). Indeed, to allow a person to abstain from following neutral and generally applicable laws on the basis of religious belief would make religious beliefs "superior to the law of the land, and in effect permit every citizen to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879).

1. Congress did not take religion, or any other belief, into account when enacting the CHBDA.

The threshold question in Free Exercise cases is whether the offending government action is neutral as to religion. To be neutral, a law must first meet the minimum requirement of facial neutrality, which it fails only if the text "refers to a religious practice without a secular meaning discernable from the language of context." *Lukumi*, 508 U.S. at 533. Facial neutrality is not dispositive, though, and this Court must also look to the effect of the law "in its real operation," and whether that effect is targeted at regulating a certain religion or religious practices. *Id*. Analyzing neutrality is akin to "an equal protection mode of analysis," which includes evaluating circumstantial evidence of the act's purpose, including: (1) the historical background of the act; (2) the series of events leading to the passage of the act; and (3) the legislative history, "including contemporaneous statements made by members of the decision-making body." *Id.* at 540 (citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

Here, the CHBDA satisfies all requirements outlined by this Court as a neutral act of legislation. Beginning with the text, the mandate stipulates that "each person living in the United States shall participate in mandatory contact tracing." CHBDA § 42(a). The stated purpose is to

"protect Americans . . . by letting people know that they may have been exposed to [the disease] and should therefore monitor their health for signs and symptoms." CHBDA § 42(a)(1). The government tasked the FCC to carry out this purpose, and the FCC chose to contact trace by distributing SIM cards to American cell-phone holders. CHBDA § 42(b). Importantly, the act provides that citizens without cell-phones will be provided one. CHBDA § 42(b)(1)(A). The only exemptions from CHBDA are for health concerns on a case-by-case basis and senior citizens over the age of 65. CHBDA § 42 (b)(1)(B–D). The text makes no mention of a religious creed or religious practice. Thus, on its face, the CHBDA is neutral as to religion.

The history and events leading to the passage of the CHBDA indicate that religious beliefs and practices were never contemplated—much less determinative—in passing the act. The Hoof and Beak Disease is a highly contagious disease. (R. at 1). To date, almost a quarter of a million of Americans have died from Hoof and Beak Disease, with 70 million currently infected. (R. at 1). This disease has locked-down the world and brought economies to a stand-still. (R. at 1). As medical professionals work tirelessly around-the-clock to find a vaccine, Congress has enacted the CHBDA to track the spread of Hoof and Beak. (R. at 1–2). Contact tracing is instrumental to this end, as it informs citizens as to whether they were exposed to the disease and allows both individuals and the government to identify and respond to outbreaks. (R. at 1–2). The events that compelled Congress to pass CHBDA are unprecedented. The CHBDA has everything to do with preserving the lives and the health of the American people and nothing to do with suppressing religious practices. *Church of Lukumi Babalu Aye v. City of Hiaheah* is illustrative here.

In *Lukumi*, a city council enacted a series of ordinances which prohibited the killing of animals for sacrificial purposes. 508 U.S. 520 (1993). Specifically, the ordinances made it

illegal to sacrifice animals for ritualistic purposes, regardless of whether the animals were to be later consumed. *Id*. at 527. Importantly, the ordinance made "licensed establishments of animals specifically raised for food purposes" exempt from the ordinance. *Id* at 528. The city made further exemptions for "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." *Id*. Together, the ordinances were aimed "to oppose the ritual sacrifices of animals." *Id*. at 527. This Court found that the Hiaheah ordinances were not neutral, but "gerrymandered with care" and "suppress[ed] much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense." *Id*. at 541.

The CHBDA and the circumstances surrounding it are clearly distinguishable from the circumstances in *Lukumi*. First, the global pandemic necessitated the passage of the CHBDA. Unlike the Hialeah city ordinances**,** which were an attack on Santeria adherents thinly veiled behind "health concerns at killing animals," the CHBDA was passed with the express purpose of protecting Americans during an ongoing public health crisis. This Court need look no further than the 230 thousand Americans graves to determine that there is no "subtle departure from [religious] neutrality" in CHBDA's aims. *Gillette v. United States*, 401 U.S. 437, 452 (1971). Because the CHBDA was passed in response to an ongoing global pandemic, and its provisions are directly aimed at slowing the spread of that pandemic, the text, historical background, and series of events leading to enactment indicate that religion was not contemplated in the passage of CHBDA, making it a neutral law.

2. The CHBDA is generally applicable to all Americans.

While the requirements of neutrality and general applicability are interrelated such that "failure to satisfy one requirement is a likely indication that the other has not been satisfied," they are separate analyses. *Lukumi*, 508 U.S. at 531. Thus, it is necessary to determine whether

the CHBDA is generally applicable or whether the federal government targeted religious beliefs and practices when it passed CHBDA. It did not.

While "all laws are selective to some extent . . . [t]he Free Exercise Clause protects religious observers against unequal treatment." *Id.* at 542 (internal citations and quotation marks omitted). General applicability is offended where the government interest is pursued "only against conduct with a religious motivation." *Id.* at 542–43. The guiding principle is that, in pursuit of its legitimate ends, the government may not selectively impose burdens "only on conduct motivated by religious belief." *Id.*

The CHBDA unquestionably burdened the Delmont Luddites' religious practices. Specifically, the contact tracing mandate prescribed conduct, which Delmont Ludditism proscribes. But this burden was not the result of a targeted attack on Delmont Ludditism—or any mode of belief for that matter. The CHBDA imposes its burdens on all Americans with only two exemptions: senior citizens over the age of 65 and health exemptions on a case-by-case basis. (R. at 2). There are a number of legitimate reasons why Congress would exempt these two classes but, frankly, the reasoning is irrelevant to general applicability analysis. The law requires general applicability, not *total* applicability.

Unlike *Lukumi*, where city council members outlawed the killing of animals for sacrificial purposes while allowing animals to be killed for other purposes, the CHBDA's contact tracing mandate does not specifically target religious-motivated conduct. The CHBDA mandates that *every* American receive a contact tracing SIM card, or mobile phone containing a contact tracing SIM card, regardless of their beliefs. Senior citizens over 65 years of age attain that age regardless of their beliefs. Persons afflicted such that possessing a mobile phone will negatively impact their health are afflicted regardless of their beliefs. Because the CHBDA

applies without regard to an individual's beliefs, the contact tracing mandate is generally applicable.

3. Any burden that the CHBDA places on Petitioner's religious practices is irrelevant when considering the constitutionality of the contact tracing mandate.

The fact that the CHBDA has burdened the religious practice of the Delmont Luddites by mandating possession of a contract-tracing SIM card is indisputable. Recall that this Court established religion-neutral, generally applicable laws do not offend the Free Exercise Clause in *Smith*. 494 U.S. at 886. Congress blunted the sting of *Smith* in 1993 when it passed the RFRA, which provided, in relevant part, that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a) (1993). Here, Congress has explicitly stated that the RFRA does not apply to the CHBDA. (R. at 6). Thus, any burden the CHBDA places on religious practice—substantial or otherwise—does not trigger the protections of the Free Exercise Clause.

B. <u>The CHBDA serves a legitimate purpose—combating the spread of a highly infectious and deadly disease—and its means are rationally related to that purpose.</u>

Without the luxury of heightened scrutiny, petitioner must "demonstrate that [the act] does not bear the fair and substantial relation to the object of the legislation required under the constitution." *United States R. Ret. Bd. v. Fritz*, 449 U.S. 166, 184 (1980) (citations and internal quotation marks omitted). Under rational basis scrutiny, "the court should ask, first, what the purposes of the statute are" and secondly, whether the means are "rationally related to achievement of those purposes." *Id*. Petitioner fails to meet this burden.

To satisfy the first prong of rational basis scrutiny, Congress must have passed the CHBDA with a legitimate governmental purpose. The stated purpose of the Act is to "protect

Americans, their families, and their communities by letting people know that they may have been exposed to Hoof and Beak." CHBDA § 42(a)(1). This Court has recently indicated that combatting the spread of a highly infectious disease qualifies as a compelling interest. *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2613 (2020) (Alito, J., dissenting) ("Nevada undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens."); *see also S. Bay United Pentecostal Church v. Newsome*, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring). It is important to note that the above opinions were in response to this Court denying injunctive relief for religious organizations that alleged First Amendment violations. *Sisolak*, 140 S. Ct. at 2603; *Newsome*, 140 S. Ct. at 1613. That is, this Court has shown a tendency to prioritize public health during a global pandemic over alleged First Amendment violations. Having recognized that Congress has a compelling interest in combatting the spread of a deadly pandemic, it necessarily follows that the CHBDA's purpose is legitimate.

The CHBDA's means are rationally related to combatting the spread of Hoof and Beak Disease. The general mandate states that "each person living in the U.S. shall participate in mandatory contact tracing program." CHBDA § 42(a). To that end, federal facilities are used to distribute SIM cards—or a mobile phone with a SIM card pre-installed for citizens without a phone—in order to track the spread of Hoof and Beak and notify affected parties. CHBDA § 42(b)(1)(A). Contact tracing via mobile phone is a safe and easy means to trace the spread of a deadly disease and has been explored by the private sector in analogous situations. While not perfect, digital contact tracing is rationally related to informing citizens as to whether they have been exposed to a deadly disease. Thus, CHBDA's means are rationally related to its stated purpose, satisfying the second prong of rational basis analysis. The CHBDA applies equally to

all Americans—regardless of race, religion, or creed— and it serves a legitimate governmental purpose by means rationally related to that purpose.

In sum, the CHBDA is both generally applicable and neutral as to religion. Any alleged burden it places on Petitioner's religious practices is irrelevant because the RFRA is inapplicable to the CHBDA's mandate.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Eighteenth Circuit with respect to the free speech issue and hold that the sixty-foot no protest buffer zone is narrowly tailored to the governmental interest in public safety and preventing the spread of Hook and Beak. With respect to the free exercise issue, Respondent respectfully requests that this Court affirm the appellate court's decision that the CHBDA's contact tracing mandate is neutral and generally applicable.

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.

s/ TEAM 4

Dated: January 31, 2020

APPENDIX A: STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I.
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.

28 U.S.C. § 1254(1) (2018). Court of appeals; certiorari; certified questions
Cases in the court 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.

42 U.S.C. § 20000bb-1 (1993). Free exercise of religion protected
(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.
(c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.