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 District

BRIEF FOR THE RESPONDENT

COUNSEL FOR THE RESPONDENT

TEAM 22

Seigenthaler-Sutherland
Moot Court Competition

Spring 2021

QUESTIONS PRESENTED

The Combat Hoof and Beak Disease Act ("the Act") was passed by Congress on April 15th, 2020, in response to the spread of the highly contagious Hoof and Beak Disease. R. at 1. The Act mandated contact tracing though the use of SIM cards provided by the government to curb the spread of the disease. *Id*. Congress amended the Act to prohibit protests of no more than six people within a sixty-foot radius of SIM distribution facility entrances in response to increased protest activity near the facilities. R. at 2.

The questions presented are:

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 Hoof and Beak; and

2. Whether the United States Court of Appeals for the Eighteenth Circuit erred in finding that mandated contract 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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The transcript of the record establishes the unofficial, unreported decision of the United States Court of Appeals for the Eighteenth Circuit in the record. R. at 29-41.

The transcript of the record establishes the unofficial, unreported decision of the United States District Court for the District of Delmont in the record. R. at 1-20.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered a final judgement. R. at 41. Petitioner timely filed for a writ of certiorari, which this Court granted . R. at 42. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (2012).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provision is set forth in Appendix A: Constitutional Provision.

STATEMENT OF THE CASE

Statement of Facts

In response to the spread of the highly contagious Hoof and Beak disease, which has resulted in seventy million confirmed cases and two-hundred-thirty-thousand deaths within the U.S., President Felicia Underwood established the federal Hoof and Beak Task Force to halt the spread of the disease on February 1st, 2020. R. at 1. Congress passed a bill, the Combat Hoof and Beak Disease Act ("CHBDA"), on April 15th, 2020. The CHBDA mandated contact tracing through the distribution of government-provided SIM cards and cell phones. R. at 29. There are exceptions to the mandate for senior citizens over sixty-five, who are fully exempt, and for others citizens on a case-by-case basis for health reasons. R. at 32. Hoof and Beak primarily effects children and young to middle-aged adults, causing severe flu-like symptoms after being spread by person-to-person contact. R. at 1. The CHBDA mandate was therefore designed to allow authorities to protect Americans by warning them when they may have been exposed to Hoof and Beak, so they may monitor themselves for symptoms and take any necessary health precautions. R. at 32.

As protests near government SIM distribution centers increased, Congress amended the bill, limiting protests to six or fewer people within sixty feet outside the entrances to the centers, including public sidewalks, during operating hours. R. at 2. Enforcement of the amendment to the CHBDA is left to the discretion of local officials, but at a minimum all persons at the facilities must wear masks and socially distance, both inside and outside the building. R. at 33. Failure to comply can result in fines of up to two thousand dollars and/or up to one year in jail. Additionally, the CHBDA is exempt from the Religious Freedom and Restoration Act. *Id.*

One group protesting the CHBDA's SIM mandate is the Delmont Church of Luddite, led by Petitioner Mr. Levi Jones. R. at 31. Luddites lack central authority, and instead each congregation decides on its own "Community Orders", which are the rules for the practice of the Luddite faith for that particular congregation. Even then, the Community Orders for the Delmont Luddites may be altered by consensus of the congregation. *Id.* Specifically, the Delmont Luddites' Community Orders forbid the use of cell phones, but any technology may be adopted and approved once consensus is reached among the community. *Id*. The Delmont Luddites are skeptical of technology because of the potential harm the distractions of modern technology may have on the Luddite community at large and individual Luddite families. *Id*. The Delmont Luddites do share one landline phone, which is used only for emergencies. R. at 4. Luddites in the neighboring state of Eastmont allow the use of cell phones in their Community Orders because they believe cell phones are necessary to helping bring the community together and stay in contact with the world around them. *Id*.

Mr. Jones and six other Delmont Luddites showed up one hour after the Delmont distribution center opened on May 1, 2020, and socially distanced with masks on, standing seventy-five feet from the entrance. R. at 34. Because the Luddites did not use technology to communicate, the group of seven would occasionally walk within the sixty-foot zone outside the facility to talk to people in line about the Luddites' religious objections to the SIM mandate. *Id*. Mr. Jones and the other six Luddite protestors were approached later in the day by local authorities, who asked Mr. Jones to disperse because the seven-person protest group violated the mandate and, after Mr. Jones refused to disperse, Mr. Jones was arrested, fined, and spent the next four days in jail. R. at 35.

While the seven Luddites were protesting, another group of five members assembled outside the facility entrance: the Mothers for Mandates ("MOMs"), who all remained stationary with their masks on. Some of the MOMs stood as close as fifty-five feet away from the entrance, and others remained outside the zone. R. at 34. The MOMs support the enforcement of the mandate and are recognizable due to their iconic tee shirts and significant internet following. *Id.* Authorities did not approach the MOMs on May 1, 2020.

Following his release from jail, Mr. Jones returned with only five other Luddites to protest on May 6, 2020. Again, they interacted with people in line to enter the facility but maintained social distancing and kept their masks on. R. at 35. That same day, the MOMs returned with seven members in the group, again standing just inside the sixty-foot buffer zone while socially distanced with masks on. *Id*. Authorities recognized Mr. Jones and asked him to leave. Again, Mr. Jones refused, and spent another five days in jail for violating the mandate, while the MOMs were left alone. *Id.*

Appeal authority for the medical exemption was granted to the FCC under the CHBDA, which spearheaded the contact tracing program for the SIM cards and cell phones. R. at 32. Mr. Jones filed suit against the Commissioner of the FCC, Mr. Smithers, on June 1, 2020, alleging that the enforcement of the CHBDA against the Delmont Luddites violates both the Free Speech and Free Exercise Clauses of the First Amendment. R. at 35.

Procedural History

The District Court for the District of Delmont held that, in respect to the free speech issue, the CHBDA was facially neutral in its implementation and enforcement under *McCullen*. R. at 16. In respect the to the free exercise issue, the CHBDA was not generally applicable under *Smith*. R. at 20. The District Court therefore granted summary judgement for the free speech issue in favor of Respondent Smithers and granted summary judgement for the free exercise issue to Petitioner Jones. *Id*.

Petitioner Jones appealed the holding of the District Court to the Eighteenth Circuit, which held that in respect to the free speech issue, the CHBDA was not narrowly tailored under *Clark* and placed undue burden on speech under *Hill*. R. at 38. In respect to the free exercise issue, the Circuit Court held that the CHBDA was generally applicable under *Church of Lukumi Babalu Aye*. R. at 40. The Eighteenth Circuit reversed the District Court in full, granting summary judgement for the free speech issue in favor of Petitioner Jones and for the free exercise issue to Respondent Smithers. R. at 40.

SUMMARY OF THE ARGUMENT

This Court should reverse the Eighteenth Circuit's holding regarding the issue of free speech. The First Amendment guarantees strong restraints against the government when the government tires to regulate speech and expression, but some restrictions on the time, place, and manner of expression may be reasonable so long as the restrictions are not designed to target the content of the speech or lack narrow tailoring and deny alternate forms through which the speech may be communicated. The CHBDA is not only facially neutral but also provides the least restrictive means for the government to further its interest in protecting the public from a highly contagious disease. The Eighteenth Circuit erred in concluding that the CHBDA was not narrowly tailored because the mandate was not the least restrictive means based on the assumption that Congress's interest in the amendment to the CHBDA sought to silence speech outright as a means of least resistance rather than least restriction.

This Court should affirm the Eighteenth Circuit's holding regarding the issue of free exercise. The Free Exercise Clause protects the right to conduct oneself within the limitations of the religious practice, but the right is limited. Laws that are facially neutral, generally applicable, and targeting an interest unrelated to religion do not violate the First Amendment. Because the legislative intent of the CHBDA is focused on widespread public safety rather than the practice of one congregation, the mandate cannot be said to unduly burden religious practice. The Eighteenth Circuit correctly held below that the CHBDA was neither generally anti-religious nor specifically anti-Luddite, and therefore the mandate is neutral.

ARGUMENT

I. The CHBDA is a content-neutral Time, Place, and Manner regulation of speech, narrowly tailored to serve the government's interest in protecting its citizens from a highly contagious disease.

The Free Speech Clause states: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST., amend. I. Free speech however is not an unlimited right, and can be subjected to time, place, and manner restrictions so long as the restrictions on free speech are reasonable. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The reasonableness of the restriction is determined valid if "they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id*. This requirement for narrowly tailoring speech is satisfied for content-neutral regulations so long as the government interest would be less effectively achieved without the restriction, rather than being the least restrictive means. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).

a. The District Court correctly applied the standards laid out in *McCullen* and *Ward* to determine that the CHBDA's amended mandate is content-neutral.

Time, place, and manner restrictions that encompass public sidewalks and streets hold extra protections under the First Amendment because of the historic use of such public forums as places of "discussion and debate." *United States v. Grace*, 461 U.S. 171, 180 (1983). This Court held that restrictions made in public forums designed to promote safety and convenience are a means to protect the order "upon which civil liberties ultimately depend." *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 317 (2002). Additionally, precedent allows the government flexibility in regulating public forums so long as the regulations are content-neutral. *McCullen v. Coakley*, 573

U.S. 464, 477 (2014). This Court applied the two-prong test from *Ward* in *McCullen,* and the *Ward* test applies in this case for the First Amendment analysis of the CHBDA, which established buffer zones prohibiting protests within sixty feet from the entrances to the distribution facilities and encompassed public sidewalks. R. at 2. The *Ward* test states:

> [T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Ward v. Rock Against Racism, 491 U.S. 781, 784 (1989).

i. The CHBDA is content-neutral because the mandate is unconcerned with the content of any speech incidentally impacted by the mandate.

The content neutrality prong of the *Ward* test first examines if the regulation was adopted because the government disagreed with the content of the speech. *Ward*, 491 U.S. at 784. If the regulation was not the product of government disagreement, the second consideration is whether the regulation is "justified without reference to the content of the regulated speech." *Id.* at 492. Even if a regulation has an incidental impact on some but not all speakers or topics, a regulation can still be content-neutral. *McCullen*, 573 U.S. at 480. Regulations are content based, and therefore subject to strict scrutiny, if the regulation concerns a particular topic of speech or expressed idea. *Reed v. Town of Gilbert*, 576 U.S. 155, 155 (2015).

The amendment to the CHBDA was passed by Congress in response to the increase in protests outside distribution centers, and the legislative intent of Congress in prohibiting protests of more than six people within sixty feet of facility entrances because the Hook and Beak disease is spread by personal contact, so a restriction on the amount of people within close proximity to a

distribution center where countless people were required to go to pick up their SIM cards would potentially limit the amount of personal contact where many could be exposed to the disease. R. at 2. Congress's intent in passing the amendment to the mandate justifies itself based on an interest in limiting the spread of Hoof and Beak, showing a significant interest in public health by limiting the amount of people who could possibly encounter the disease, without interest in the actual content of the protests. The Eighteenth Circuit held below that the CHBDA is content-neutral because the amendment does not require an examination into the message of the protests to violate the mandate, but rather considers only the amount of people gathered within the buffer zone. R. at 36. Again, under *McCullen*, incidental impact on speech as the result of a content-neutral regulation does not make the regulation content based. *McCullen*, 573 U.S. at 480. The Eighteenth Circuit was therefore correct in finding Petitioner's argument that the speech of CHBDA protestors to be disproportionately impacted to be unpersuasive, and this Court should similarly hold that the amendment to the CHBDA creating the buffer zones is content-neutral.

ii. The CHBDA is narrowly tailored because the mandate is concerned with the operation of vital government facilities that further a legitimate interest in public health.

To satisfy the second prong of the *Ward* test, the content-neutral regulation must be narrowly tailored to serve a legitimate government interest, but the regulation need not be the least restrictive or intrusive means of achieving that goal. *Hill v. Colorado*, 530 U.S. 703, 707 (2000). "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Turner Broad. Sys. v. Fcc*, 520 U.S. 180, 185 (1997). This Court held that peaceful protests may

be prohibited when the protests interfere with the operation of vital government facilities. *Carey v. Brown*, 447 U.S. 455, 457 (1980).

Again, the amendment to the CHBDA is focused on preventing the spread of Hook and Beak outside the distribution centers, especially given the fact that the CHBDA was originally created to distribute SIM cards with cell phones that the government would use to contact people who may have come into contact with the disease to prevent further spread. R. at 2. Public health and safety have been recognized by this Court to be a compelling government interest, and the limit on the amount of people gathered within sixty feet of the entrance may not be the least restrictive means but is not substantially broad enough to violate the First Amendment when the government's interest in protecting its citizens against a highly contagious disease still allows groups to gather outside the mere sixty-foot buffer zone. Allowing too many persons within sixty feet of the facility entrances could jeopardize the operation of the CHBDA by exposing more people to Hoof and Beak, therefore contradicting the legislative intent of using the facilities to protect citizens, rather than increase their risk of exposure.

b. The Eighteenth Circuit erred in concluding that the CHBDA was not narrowly tailored under *Hill* because the buffer zone was not employed to regulate speech in a manner that advanced the government's goal in operating the distribution centers.

This Court held in *Hill* that the narrow tailoring requirement of content-neutral regulations does not require the regulation to be tailored to the least restrictive means possible, but rather the regulation cannot burden free speech beyond what is necessary to achieve the government's compelling interest. *Hill*, 503 U.S. at 707. Additionally, the tailoring may not be used out of convenience to burden speech that is contrary to the government's interest. *McCullen*, 573 U.S. at 486.

The Eighteenth Circuit asserts that the buffer zone is a means of convenience for censoring anti-CHBDA protestors. However, any group of protestors outside the sixty-foot buffer zone would still be able to express their thoughts and concerns audibly or through other media to those inside the zone without restriction on their message. Additionally, the enforcement of the buffer zone amendment to the CHBDA is left to the discretion of local facility authorities, who Congress believed best suited to act based on the needs of their communities. R. at 7. This flexibility within the mandate allowed for the MOMs to set up their media table and remain socially distanced even when they dipped inside the buffer zone without being approached by authorities because the MOMs were able to maintain safe distance from others, and this social distancing to limit personal contact was the intent behind the CHBDA's amendment. R. at 2. Petitioner Jones argues that the discretion allows for selective enforcement, but the District Court correctly identified that because the Luddites walked into the zone and broke social distancing to interact with other people, the Luddites created a health risk that the mandate sought to prevent, and it was the conduct therefore and not the speech of the Luddites that resulted in the authorities approaching the Luddites and not the MOMs on both occasions.

Because the buffer zone was mandated to protect citizens from potentially dangerous personal contact, restricting protests to groups of six within the relatively small sixty-foot zone falls directly into the category of content-neutral regulations described in *Hill* that may not be the least restrictive means, but are sufficiently narrowly tailored as to not unduly burden the free speech incidentally effected by the mandate. The CHBDA therefore is both content-neutral and narrowly tailored to satisfy a compelling government interest, meeting the two-prong test of *Ward*. For these reasons, this Court should reverse the Eighteenth Circuit's holding on the free speech issue and grant summary judgement in favor of Respondent Smithers.

III. The CHBDA is a generally applicable regulation that is content neutral without pretext for infringing on religious beliefs.

The Free Exercise Clause states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .." U.S. CONST., amend. I. While the government cannot regulate religious beliefs, it can regulate practice. *Reynolds v. United States*, 98 U.S. 145, 166 (1878). This Court has long held that superiority of religious practices over the law would make every citizen "a law unto himself", undermining the purpose of a government passing laws. *Id*. at 166-67. If a law incidentally burdens the practice of religions but the law is generally applicable, then that law does not violate the Free Exercise Clause because the law does not specifically seek to regulate the practice. *Emp't Div. v. Smith*, 494 U.S. 872, 874 (1990).

If a citizen can demonstrate substantial burden to their free exercise, the government must satisfy strict scrutiny by showing that the government has a compelling interest and that the law creating the substantial burden is the least restrictive means of furthering the compelling interest. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). The burden on the government to pass strict scrutiny is a high standard. *Id.*

a. The Eighteenth Circuit correctly applied the standards laid out in *Smith* and *Church of the Lukumi Babalu Aye* when it found the CHBDA is a generally applicable regulation that does not target religious practice.

In *Church of Lukumi Babalu Aye*, this Court held that "[f]acial neutrality is not determinative in a case alleging violations of the Free Exercise Clause…" *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523 (1993). "Subtle departures from neutrality" and "covert suppression of particular beliefs" that target particular religious practices must pass strict scrutiny even if the law is facially neutral. *Id*.

The CHBDA meets the standards laid out in *Smith* because the mandate makes no mention of religious practice or belief within the statute, and absent language that facially discriminates against the practices of the Luddites, the mandate is facially neutral. *Smith* 494 U.S. at 874.

Both the District Court and the Eighteenth Circuit below held that the CHBDA is not facially discriminatory, as this Court should, because the mandate applies to every citizen not excluded by age or medical exception, without any mention of religions. However, only the Eighteenth Circuit correctly weighed the evidence of the intent of the CHBDA considering the factors used in *Church of Lukumi Babalu*, which include the reasons for the enactment of the law, the legislative history and intent, and historical background of the challenged decision. *Id*. at 540.

The CHBDA was passed in response to seventy million Americans with confirmed cases of Hoof and Beak and the tragic death of two-hundred-thirty thousand more due to the disease. R. at 1. The intent of mandating all citizens to have the government-issued cell phones and SIM cards was to protect Americans and their families from exposure to the highly contagious disease. These facts paint a clear picture of the cause for the creation of the CHBDA, as well as demonstrate the government's interest in protecting as many citizens as possible with a significant concern for the health of American citizens.

b. The District Court erred in holding that the CHBDA is not generally applicable because the exclusion of a religious exemption passes strict scrutiny given the extraordinary circumstances involved in a pandemic.

The offset of highly contagious diseases changes the atmosphere of what is deemed to be a permissible burden on the practice of religion as the government seeks to protect its citizens. The District Court and Petitioner claim that the lack of a religious exemption while exemptions

exist for both senior citizens generally and medically for others on a case-by-case basis would be indicative of a "departure from neutrality" under *Church of Lukumi Babalu*, therefore subjecting the CHBDA to strict scrutiny. Even if the CHBDA failed under *Church of Lukumi Babalu*, despite the Eighteenth Circuit holding below that the CHBDA did, the mandate should pass strict scrutiny.

To pass strict scrutiny, the government must show that it has a compelling interest, and that the law that causes the burden on free exercise is the least restrictive means of advancing the compelling interest. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). The compelling interest in the health and safety of Americans in preventing citizens from being exposed to a highly contagious disease is sufficiently compelling, as both Courts below held. The point of contention therefore is whether the CHBDA is the least restrictive means of protecting American citizens.

This Court held that, when Congress tackles issues of medical and scientific uncertainty, Congress's options must be broad and courts "should be cautious not to rewrite legislation, even assuming, arguendo, that judges with more direct exposure to the problem might make wiser choices." *Marshall v. United States*, 414 U.S. 417, 427 (1974). This Court has also concluded that free exercise does not create a right to expose the community to harmful diseases. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The government has a specific interest in being able to contact the Luddites because, as a religion focused on community, they would be at greater risk of exposure if they were unable to be contacted in accordance with the mandate. While the Delmont Luddites have one phone the government could reach them at, the government would be unable to fulfill its interest in letting individuals know they may have been in contact with the disease and should watch themselves for symptoms. If a Delmont Luddite were to come into contact with someone with Hoof and Beak, they could potentially spread the disease to the rest

of the community before the government could warn them of the exposure. Additionally, the Delmont Luddites would not be required to use the phones for anything other than to be notified about potential exposure. The concern of the Luddites is that the cell phones are a distraction from the community, but technologies may be adopted into the community if agreed upon. The one phone the Luddites currently own is used for emergencies only, and the cell phones would serve the exact same purpose.

However, this Court does not question the validity or centrality of particular interpretations as to the practice or beliefs of individual litigants. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). For that reason, it would be unfair to compare the beliefs of the Delmont Luddites to those of the Eastmont Luddites, who do accept the use of cell phones. However, given the substantial need of the government to contact individuals as soon as possible to warn of any potential exposure, the distribution and mandated use of the cell phones is the least restrictive means for the government to protect not only the Luddite community, which is hard to contact without the use of phones, but also the community of Delmont at large, who could risk exposure from Luddites who do not comply with the mandate and fail to determine if they are infected before going outside their community. There is no less intrusive means than a small handheld device that can be used to reach individuals almost immediately when the need arises, and absent a safer or more convenient means of communication to use, the SIM mandate of the CHBDA would pass strict scrutiny, given the extraordinary circumstances that prompt the government's interest in using the phones to promote public health and safety. Because not only is the CHBDA facially neutral and general under *Smith* but would also pass strict scrutiny under *Church of Lukumi Babala* and *City of Borne*, this Court should affirm the Eighteenth Circuit's decision granting Respondent Smithers summary judgement for the free exercise issue.

CONCLUSION

The Respondent, Mr. Smithers, respectfully asks this Court to reverse in part and affirm in part the holding of the Eighteenth Circuit by granting summary judgement in favor of the Respondent for both the free speech and free exercise issues.

Respectfully submitted,

TEAM 22

Attorneys for Respondent

CERTIFICATE OF SERVICE

We hereby certify that on January 31, 2021, we, attorneys for the Respondent, have served Petitioner a complete, accurate copy of this Brief for Respondent via United States Mail.

TEAM 22

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

We hereby certify that:

1. All work contained within this brief is the work product of this team's members alone.
2. All work contained within this brief and all work performed during the formation of this brief complies with the governing code of professional conduct for this team's school.
3. All work contained within this brief and all work performed during the formation of this brief complies with the Rules of this competition.

TEAM 22

Attorneys for Respondent

APPENDIX A: CONSTITUTIONAL PROVISION

First Amendment to the United States Constitution:

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