**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 THE PETITIONER**

*COUNSEL OF THE PETITIONER*
**TEAM NUMBER 25**

## Questions Presented

I. Does the Amendment to the Combat Hoof and Beak Disease Act violate the requirements of a time, place, and manner restriction when it substantially reduces his ability to communicate to others, does not allow for alternatives available to the group, and is not enforced against a different group which advocates for the governmental regulation?

II. Does the Combat Hoof and Beak Disease Act violate the requirements of neutrality and general applicability laws when they wholly disregard religious objections while allowing generalized secular exemptions and did not consider religious exemptions in the enactment of the Act?

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## Statement of Jurisdiction

The District Court had jurisdiction of the case docketed as C.A. No. 20-CV-9422 pursuant to 28 U.S.C. § 1331 because the CHBDA is a federal act passed by the Congress of the United States. The Court of Appeals for the Eighteenth Circuit had jurisdiction of the appeal pursuant to 21 U.S.C. § 1291 because the District Court granted summary judgment, a final decision. The Supreme Court of the United States has jurisdiction over this case because they granted the petition for a Writ of Certiorari.

## Statement of Case

### I. Procedural History

Mr. Jones brought these First Amendment violation claims in the United States District Court for the District of Delmont against Mr. Smithers, in his official capacity as Commissioner of the Federal Communications Commission. R. at 1. The complaint alleged that Mr. Smithers, in his official capacity, violated Mr. Jones' constitutional right to free speech and free exercise of religion pursuant to the First Amendment. R. at 3. The complaint alleges that Mr. Smithers violated Mr. Jones's constitutional right to free speech by enacting an amendment (Amendment) that allows for selective enforcement of the Amendment and for the Amendment not being narrowly tailored to the governmental interest. R. at 12, 14. The complaint further alleges that Mr. Smithers violated Mr. Jones's constitutional right of free exercise of religion by enacting an Act that forces him to act in a way which would violate his religious beliefs R. at 17. Both parties motioned for summary judgment. R. at 3.

For the free speech issue, the District Court granted the motion for summary judgment in favor of Mr. Smithers. For the free exercise issue, the District Court granted the motion for summary judgment in favor of Mr. Jones. R. at 30. Following the grants of summary judgment,

Mr. Jones appealed to the United States Court of Appeals for the Eighteenth Circuit. R. at 29. The Court of Appeals granted the motion for summary judgment to Mr. Smithers for the free exercise issue and granted the motion for summary judgment in favor of Mr. Jones for the free speech issue. R. at 40-1. Following the decision of the Court of Appeals, Mr. Jones petitioned for this Writ of Certiorari for the Supreme Court of the United States, which was granted. R. at 42.

**II. Statement of the Facts**

Due to the outbreak of a new disease called the Hoof and Beak Disease, Congress enacted the Combat Hoof and Beak Disease Act (CHBDA or Act). R. at 1. The Act requires contact tracing through SIM cards in mobile phones that are provided and distributed by the government. R. at 1. The purpose is to protect American citizens by letting them know they may have been exposed to the Hoof and Beak Disease and should "monitor their health for signs and symptoms" of the disease. R. at 6. Exemptions to the Act are for people over sixty-five and other health related issues, which are granted on a case-by-case basis. R. at 2. Moreover, the Act allowed for generalized health exemptions given on an individualized basis. R. at 2. The requirements at the federal distribution facilities, which distribute the mobile phones with the required SIM cards, are that everyone wear a mask and stay six feet away from each other. R. at 6. After protests around the federal distribution facilities started occurring, Congress enacted the Amendment to the Act which provided that protests be no more than six people and cannot occur "within sixty feet of the facility entrance, including on public sidewalks." R. at 2. Enforcement of the Amendment is left to the discretion of the facility officials. R. at 7. A person who violates the Act may be punished by "up to one year in jail and/or a fine of up to $2,000." R. at 6. The Act further states that "the Religious Freedom and Restoration Act is inapplicable." R. at 6. The Federal Communications Commission (FCC) is a United States "governmental agency that regulates communications by telephone SIM

cards." R. at 5. The FCC is in charge of enforcing the Act and has the appeal authority for exemption purposes. R. at 2, 6. Mr. Smithers is the Commissioner of the FCC. R. at 3.

Mr. Jones is "the leader of the State of Delmont's Church of Luddite." R. at 2. The Luddites pledge total obedience to follow the rules of their Community Orders, in order to "preserve family unity, faith, community, and cultural identity." R. at 4. The Church of Luddite is decentralized, so the Community Orders are different in the different sects. R. at 4. The Delmont Community Orders require that the Luddites be skeptical of all technology because it would bring harm to their family and their community. R. at 4. The Delmont Luddites do not own mobile phones, the only phone is a landline, which is used only for emergencies and accounted for by a call log. R. at 4, 5. Furthermore, the Delmont Luddites do not speak loudly because it is impersonal. R. at 25. Nor do they use sound amplification devices, make signs, or distribute literature because of the technological involvement would be against their Community Orders. R. at 25. Mr. Jones's first protest consisted of seven protestors, who stood outside the buffer zone, occasionally entering it to speak with people in line advocating their disagreement with the Act. R. at 7. The protestors were all masked and were six feet apart from each. R. at 7. As a result of having too many people, Mr. Jones was asked to leave, which he refused, and then was arrested and punished with four days in jail and a $1,000 fine. R. at 8. Mr. Jones returned to the vicinity of the facility a second time to protest, this time with five other Luddites, all wearing masks and keeping six feet apart, and spoke to people in the facility line, in compliance with the Amendment. R. at 8-9. After the police identified Mr. Jones as the "anti-tech" preacher, they told him he had to leave, which Mr. Jones refused and was again arrested. R. at 9. Mr. Jones was punished with five days in jail and a $1,500 fine. R. at 9.

At the first protest the Mothers for Mandates (MOMs) advocated their agreement with the Act with five masked people, who stood six feet apart, but some of them stood and remained within the buffer zone. R. at 8. They held signs and provided pamphlets on a table six feet away from them. R. at 8. Even though the MOMs were in violation of the Amendment, same as Mr. Jones, no one from the MOMs were arrested or fined. R. at 8. When Mr. Jones organized his second protest, seven members of the MOMs showed up to protest, masked and standing within the buffer zone. R. at 9. Unlike Mr. Jones, who followed the Amendment, no one from the MOMs were arrested or fined in this second protest. R. at 9.

## Summary of the Argument

Because the Amendment is not a valid time, place, and manner restriction, this Court should affirm the Court of Appeals' ruling of summary judgment for the free speech issue in favor of Mr. Jones. Although the Amendment is facially content-neutral, the facilities only enforced the Amendment against Mr. Jones and not the MOMs, who were equally as culpable. Furthermore, it is not narrowly tailored to the governmental interest because it substantially affects the ability of the Luddites to advocate their position by not allowing them to advocate face-to-face. Also, the Amendment does not allow for open ample alternatives because it takes away the only way the Luddites may express their opinions to others. Therefore, this Court should find that the Amendment does not pass the requirements for a time, place, and manner restriction, and should affirm the judgment of the Court of Appeals.

Furthermore, because the Act is not neutral and generally applicable, this Court should reverse the Court of Appeals's ruling of summary judgment in favor of Mr. Smithers. Although the Act is facially neutral towards religion, it is not neutral in its administration. Namely, it compels religious organizations that oppose the use of technology to use technology while not

considering exemptions for those religious objections. Moreover, it is not generally applicable because the Act provides individualized exemptions for secular reasons while not allowing for religious exemptions for similar objections. Therefore, this Court should find that the Act does not pass the requirements for neutrality and general applicability and should reverse the judgment of the Court of Appeals.

## Argument

This Court reviews the grant of summary judgment de novo. *Gross v. Hale-Halsell Co.*, 554 F.3d 870, 875 (10th Cir. 2009). De novo means the court must give reasonable inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is only properly granted when "there is no genuine dispute to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The following sections will go over how the government (I) violated Mr. Jones's Free Speech and (II) violated Mr. Jones's Free Exercise.

### I. The Court of Appeals was correct in finding the Amendment in creating a fixed buffer zone and restricting face-to-face oral advocacy, is an invalid time, place, and manner restriction.

The First Amendment's Free Speech Clause states that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. Traditional public forums, such as a sidewalk, which are open for discussion and debate, are subject to scrutiny under the First Amendment. *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). The First Amendment limits governmental restraints upon expression; however, the government may impose reasonable restrictions upon the time, place, and manner of the speech. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The time, place, or manner restrictions that restrict speech

within a public forum must be content-neutral, "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of information." *Id.*

It is not disputed that the Amendment has "an impact on speech within a traditional public forum." R. at 11. Moreover, neither party disputes that the government's purpose is significant. R. at 14. Therefore, what is left in dispute is whether the Amendment is an invalid time, place, and manner restriction.

***A. The Court of Appeals erred in finding the Amendment to be content-neutral because it was selectively enforced against Mr. Jones.***

A law is "content-based if it applies to parties because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Furthermore, the law must "be justified without reference to the content of the regulated speech," and cannot be "adopted by the government because of disagreement with the message the speech conveys." *Id.* at 164. Also, the government cannot punish individuals for their peaceful expression of unpopular opinions. *Collin v. Smith*, 578 F.2d 1197, 1206 (7th Cir. 1978). Moreover, a facially neutral law can be found to be content-based if it is applied in such a way "as to discriminate against certain speakers or ideas in violation of the First Amendment." *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 193 (2d Cir. 2006). Content-based laws must pass strict scrutiny, which requires a compelling interest, and that the restriction is narrowly tailored to achieve that interest. *Reed*, 576 U.S. at 171.

One way a facially neutral law can still violate the First Amendment is when the regulation is selectively enforced. *Id*. In order to determine if there is selective enforcement, there must be a discriminatory effect and evidence that enforcement was motivated by a discriminatory purpose. *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 634-635 (4th Cir. 2016). In order to show

discriminatory effect, the plaintiff must show that similarly situated individuals were not prosecuted. *United States v. Armstrong*, 517 U.S. 456, 465 (1996). Discriminatory intent can be shown by "(1) evidence of a consistent pattern of actions by the decision-making body which disproportionately impacts members of a particular class of person; (2) historical background of the decision; (3) the specific sequence of events leading up to the particular decision being challenged;" "and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings." *Cent. Radio Co.*, 811 F.3d at 635. Discriminatory purpose is shown by direct or circumstantial evidence that the defendant acted "for the purpose of discriminating on account of viewpoint." *Pahls v. Thomas*, 718 F.3d 1210, 1238 (10th Cir. 2013). It can be shown by evidence such as deviating from the regulation in the enforcement, departing from normal procedures, and a pattern of unlawful favoritism. *Id*. at 1238-1239.

The first requirement of a time, place, and manner restriction is that it cannot be content-based. *Clark*, 468 U.S. at 293. A law is content-based when it applies to speech "because of the topic that is being discussed" or the regulation is not "justified without reference to the content of the regulated speech." *Reed*, 576 U.S. at 163, 164. In *Reed*, the town enacted an ordinance, which categorized signs based on the type of information they contained, then subjected each category to different restrictions. *Id*. at 159. The Supreme Court found that the state has no authority to restrict expression because of its content and that restrictions based on content are subject to strict scrutiny, which requires the regulation to be narrowly tailored to compelling state interests. *Id*. at 163.

A facially neutral law may be found as a content-based regulation if it has been selectively enforced. *Field Day, LLC*, 463 F.3d at 193. In order to determine whether there is a First Amendment violation for selective enforcement, there must be a discriminatory effect and a discriminatory purpose. *Cent. Radio Co.*, 811 F.3d at 634-635. Discriminatory effect is found

where similarly situated individuals of a different class are not prosecuted. *Armstrong*, 517 U.S. 456, 465 (1996). In *Armstrong*, the plaintiffs filed the case alleging that the prosecutor singled them out for prosecution because they were black. *Id*. at 459. The Supreme Court found that there was a discriminatory effect because of the significantly higher chance of a black person being prosecuted rather than a white person for the same crime. *Id*. at 467.

In order to prevail of the selective enforcement theory, the plaintiff must also prove that there was a discriminatory purpose. *Cent. Radio Co.*, 811 F.3d at 634-635. Discriminatory purpose can be shown by "evidence of a consistent pattern of actions by the decision-making body, which disproportionately impacts members of a particular class of persons" and "the specific sequence of events leading up to the particular decision being challenged." *Id*. at 635. In *Cent. Radio Co.*, the city enacted an ordinance, which regulated displays of signs, but exempted certain signs. *Id*. at 628. The court of appeals found that the plaintiff must show that "similarly situated individuals were treated differently" and that there was a "clear and intentional discrimination." *Id*. at 635. The court of appeals ruled that the factors would be in favor of the plaintiff if the city wanted to suppress the plaintiff's speech and if the city departed from their normal procedures of enforcement. *Id*. The court of appeals found there was no selective enforcement because the plaintiffs did not show "that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Id*.

Evidence of discriminatory purpose may also be direct or circumstantial and may also include deviating from the regulation in the enforcement, departing from normal procedures, and a "pattern of unlawful favoritism." *Pahls*, 718 F.3d at 1238-1239. In *Pahls*, the law enforcement officials moved the plaintiffs to an unfavorable location to engage in their protest and allowed the

protestors of the opposite viewpoint to remain in the location that plaintiffs were originally at. *Id*. at 1216. The policy for the secret service was to direct demonstrators to a designated area because it helps keep order and protect the President. *Id*. at 1219. The court of appeals found that there was no discriminatory purpose by the special agent because his actions implemented the policy for a non-discriminatory purpose. *Id*. at 1237.

Here, the Amendment is facially neutral. The first requirement of a time, place, and manner restriction is that it be content-neutral. *Clark*, 468 U.S. at 293. A law is content-based when it applies to speech because of its topic or the "regulation is not justified without reference to the content of the regulated speech." *Reed*, 576 U.S. at 163, 164. In *Reed*, the city ordinance categorized the types of speech and then regulated them accordingly. *Id*. at 159. Here, the Amendment prohibits protestors from being "within sixty feet of the facility entrance, including public sidewalks, during operating hours." R. at 7. Therefore, the Amendment is facially content-neutral.

Even though the Amendment is facially neutral, it is selectively enforced, which proves that it is content-based. A regulation that is facially neutral is deemed content-based when it is selectively enforced. *Field Day, LLC*, 463 F.3d at 193. To determine whether there is a First Amendment violation for selective enforcement, there must be a discriminatory effect and a discriminatory purpose. *Cent. Radio Co.*, 811 F.3d at 634-635. Discriminatory effect is found where "similarly situated individuals of a different class" are not prosecuted. *Armstrong*, 517 U.S. 456, 465 (1996). In *Armstrong*, the Supreme Court found that there was a discriminatory effect because there was a higher chance that black people were prosecuted than white people for the same crime. Here, on two separate occasions the Luddites were arrested, where no one from the

MOMs group was, when they also violated the Amendment. R. at 7-8. Therefore, like in *Armstrong*, it is clear that there was a discriminatory effect.

A discriminatory purpose is also found in this case. The second element for a selective enforcement claim is that there be a discriminatory purpose. *Cent. Radio Co.*, 811 F.3d at 634-635. Here, the amendment prohibits protests from being within sixty feet of the facility entrance during operating hours and be limited to no more than six persons. R. at 7. Further, the amendment states that the enforcement of the policy is to be in the discretion of the facility officials. R. at 7. In *Cent. Radio Co.*, the plaintiffs filed a complaint for a policy, which regulated the display of signs but exempted certain signs. *Id*. at 628. In *Pahls*, the plaintiffs argued that the policy was unconstitutional because they were removed from one area and sent to another, while a different protesting group remained in that area. 718 F.3d at 1216. Here, during the first protest, the Luddites were in a group of seven people and protested outside the sixty-foot buffer zone. R. at 7. They all wore masks, remained six feet apart, and periodically entered the buffer zone to advocate their view to the people in line at the facility. R. at 7. At the same time, the MOMs assembled a group to counter-protest. R. at 8. Their group consisted of five people, who were masked and socially distanced, but some of the MOMs stood inside of the buffer zone for the entire protest. R. at 8. Clearly, both groups of protestors were violating the amendment. However, when the Facilities Police showed up, they only arrested Mr. Jones of the Luddites, and no one from the MOMs. R. at 8. After Mr. Jones was released, the Luddites organized another protest, where they had six people, stood outside the buffer zone, wore masks, kept six feet apart, and spoke to people in the facility line. R. at 8-9. At the same time, the MOMs again showed up, this time with seven persons, masked, and they stood within the buffer zone. R. at 9. When the police showed up this time, they

again arrested Mr. Jones, even though he did not violate the amendment, and no one from the MOMs was arrested. R. at 9.

One factor in finding a discriminatory purpose is in the specific events leading up to the legislation. *Cent. Radio Co.*, 811 F.3d at 635. Here, the Amendment was enacted because of the protests outside of the facilities. R. at 7. Another consideration is when there are consistent actions by the decisionmakers that disproportionately impact a certain class. *Cent. Radio Co.*, 811 F.3d at 635. The discretion of enforcing the Amendment was given to the facility officials. R. at 7. Therefore, the facility official were the decisionmakers. Here, consistently the decisionmakers enforced the Amendment upon the Luddites and Mr. Jones, but not on the MOMs group. R. at 8, 9. Furthermore, where there is a deviation in the regulation of the enforcement, discriminatory purpose can be found. *Pahls*, 718 F.3d at 1238-1239. Here, the Amendment was enacted to prevent people from protesting in a group of more than six persons and from protesting within sixty feet of the facility. R. at 7. If the federal facility is not deemed the decisionmaker, then they are still liable because the enforcement deviated from this Amendment by allowing the MOMs to break the Amendment and enforcing the Amendment on the Luddites in the second protest where they complied with the policy. R. 8-9. Furthermore, where there is a "pattern of unlawful favoritism", discriminatory purpose may be present. *Pahls*, 718 F.3d at 1238-1239. Here, it is clear that by enforcing the Amendment against the Luddites, even when the Luddites complied with the Amendment, and not against the MOMs, when they were in violation of the Amendment in both protests, shows unlawful favoritism. R. 8-9. Ultimately, in *Cent. Radio Co.*, the court of appeals ruled that there was no discriminatory purpose since the plaintiff failed to prove that the decisionmaker selected a particular course of action because of "its adverse effects upon an identifiable group." 811 F.3d at 635. The court of appeals in *Pahls* ruled that there was no

discriminatory purpose because the special agent was implementing the policy for a non-discriminatory purpose. *Id*. at 1237. Here, the facility officials took courses of action that had adverse effects on the Luddites. Even if the facility officials are not deemed to be decisionmakers, the enforcement of the Amendment was inconsistent with the standards in the Amendment and the Amendment was being applied in a discriminatory manner.

***B. The Court of Appeals correctly found the Amendment to not be narrowly tailored because it substantially burdens the speech of the Luddites.***

In determining whether the restriction is narrowly tailored, consider whether the regulation "burdens speech more than necessary." *Hill v. Colorado*, 530 U.S. 703, 728 (2000). The requirement of the regulation being narrowly tailored does not require the "least restrictive or least intrusive means", only that the government "not regulate in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *McCullen*, 573 U.S. at 486.

The second requirement of a time, place, and manner restriction is that it be narrowly tailored. *Clark*, 468 U.S. at 293. When determining whether a regulation is narrowly tailored, courts have looked at whether the regulation "burdens more speech than necessary." *Hill*, 530 U.S. at 729. In *Hill*, the statute regulated speech within certain areas for people, who were protesting, to not be within eight feet of another person, without consent from the other person. *Id*. at 707. The Supreme Court found that the regulation was narrowly tailored because it did not "entirely foreclose any means of communication" and the protestors would still be able to get their messages to the targeted audience. *Id*. at 726. Furthermore, when considering if the regulation is narrowly tailored, even though the regulation does not have to be the least restrictive or least intrusive means, the government must look at less intrusive means if they are equally as effective. *McCullen*, 573 U.S. at 492. In *McCullen*, the state prohibited people from standing within a certain amount of feet from an entrance or driveway of any place. *Id*. at 469. Protestors in the case approached people to

protest abortions, in which they were prohibited to do near the entrances. *Id*. Supreme Court ruled that the regulation was not narrowly tailored because it would place a substantial burden on speech by limiting one-on-one speech, which is the most effective avenue of communication. *Id*. at 488. Further, the Supreme Court ruled that it is not narrowly tailored because there were less intrusive means available, which were equally as effective as the regulation in the state's interest, such as already existing regulations. *Id*. at 492.

In this instance, the Amendment is not narrowly tailored to the significant governmental interest. The second requirement for a time, place, and manner restriction is that the restrictions be narrowly tailored to a significant governmental interest. *Clark*, 468 U.S. at 293. A regulation is not narrowly tailored if it "burdens more speech than necessary." *Hill*, 530 U.S. at 729. Here, the Amendment prohibits protests from being "within sixty feet of the facility entrance, including public sidewalks, during operating hours" and limits that amount of protestors to six people, and be no closer than six feet apart. R. at 7. In *Hill*, the Supreme Court ruled that the regulation was narrowly tailored because it did not "entirely foreclose any means of communication" and the protestors were still able to get their message to the intended audience. 530 U.S. at 726. In *Hill*, the regulations stated that the protestors cannot be within eight feet of the intended audience. *Id*. at 707. Here, the Amendment prohibits entering both within a certain distance of the facility, sixty feet away, and within a certain distance of other people, in this case six feet apart. R. at 7. However, in *Hill*, the regulation allowed for the ability to approach the intended audience if consent was given by the intended audience. 530 U.S. at 707. Unlike *Hill*, here, the Amendment does not provide for the exception of consent. Furthermore, the Luddites are skeptical of technology, therefore they do not use signs nor leaflets, but instead rely solely on oral communication. R. at 25. Therefore, even though the Supreme Court in *Hill*, found that

communication was not entirely foreclosed, it is entirely foreclosed in circumstances such as the one in this case.

Also, along the lines of the requirement of the regulation being narrowly tailored, in *McCullen*, the Supreme Court ruled that the regulation was not narrowly tailored because it is substantial burdened communication, in specific one-on-one communication, which is seen as the most effective way to communicate. *Id*. at 488. In *McCullen*, the regulation prohibited protestors from entering a buffer zone in front of the facility. *Id*. at 469. Just like in *McCullen*, here, part of the Amendment also creates a fixed buffer zone. In this case, the fixed buffer zone prohibits protestors from being within sixty feet of the facility entrance during operating hours. R. at 7. Further, just like in *McCullen*, the essential way for protesting is via oral communication, which means one-on-one advocacy. R. at 25. Therefore, just like in *McCullen*, it should be found that the Amendment is not narrowly tailored because it prohibits oral advocacy within a certain buffer zone of the facility entrance. Also in *McCullen*, the Supreme Court found that the regulation was not narrowly tailored because there were alternatives to the regulation that could have been used that were less intrusive and equally efficient. *Id*. at 492. In *McCullen*, the Supreme Court found that there were alternative, less intrusive ways to promote the governmental interest, such as the already existing ordinances. *Id*. Besides retaining the fixed buffer zone of sixty feet, alternative solutions were already found within the Amendment, such as the floating buffer zone and the requirement to wear masks. R. at 7. These requirements in the Amendment already ensure that the significant governmental interest in protecting people from the Hoof and Beak Disease is satisfied. Therefore, like in *McCullen*, here, there is already preexisting rules that are equally as efficient in promoting the governmental interest. Therefore, the addition of a fixed buffer zone onto the Amendment is not narrowly tailored.

***C. The Court of Appeals likely would have found that there were not any open ample alternatives because, in spite of their religion, the Luddites had no other effective way of communicating to people other than through face-to-face oral advocacy.***

In order for the alternatives to be considered ample, the speaker must be permitted to reach the intended audience. *United Bhd. of Carpenters v. NLRB*, 540 F.3d 957, 971 (9th Cir. 2007). Even though the adequacy of alternative channels does not need to be the most favorable, "where 'there is no other effective way for an individual to communicate his or her message', alternative methods of communications are insufficient." *Id*. at 969. If a regulation prohibits an entire medium of public expression across a particular community or settings, it fails to leave open ample alternatives. *Id*.

The final requirement of a time, place, and manner restriction is that the regulation provide for "open ample alternative channels for communication of information." *Clark*, 468 U.S. at 293. In order for alternatives to be considered ample, the speaker must be able to reach the intended audience. *United Bhd. of Carpenters*, 540 F.3d at 971. In *Carpenters*, the regulation required demonstrators to protest in an area that was "150 to 175 yards away from the visitor's center." *Id*. The court of appeals found that this alternative was not ample because it still cut off access for the demonstrators to reach their intended audience. *Id*. at 972. Also, even though the alternative channels do not need to be the favorite of the speaker, "where 'there is no other effective way for an individual to communicate his or her message', alternative methods of communications are insufficient." *Id*. at 969. If a regulation prohibits an entire medium of public expression across a particular community or settings, it fails to leave open ample alternatives. *Id*. In *Carpenters*, the court of appeals found that there were not ample alternative channels for communication because the demonstrators were not able to protest within the vicinity of the mall. *Id*. at 971. The court of appeals also reasoned that even though the demonstrators could use the media, picket, and handbill,

it would still not be an ample alternative channel of communication because it may not reach the intended audience. *Id*. at 970.

Here, there were no open ample alternative channels for communication of information. The final requirement of a time, place, and manner restriction is that there be "open ample alternative channels for communication of information." *Clark*, 468 U.S. at 293. In order for alternatives to be considered ample, the speaker must be able to reach the intended audience. *United Bhd. of Carpenters*, 540 F.3d at 971. In *Carpenters*, the regulation required that the demonstrators protest in a certain area 150 yards away from the mall and intended audience. *Id*. Similarly, here, the regulation requires that the protestors keep "sixty feet away from the facility entrance." R. at 7. In *Carpenters*, the argument was that the alternative channels allowed were the ability to protest from a distance, and the ability to use the media, picket, and handbill. 540 F.3d at 970. Here, the only alternative provided is that the Luddites may protest outside of the sixty-foot zone. R. at 15-6. In *Carpenters*, the court of appeals ruled that, because the protestors were not allowed to protest within the vicinity of the mall, the alternatives could not be considered ample because it would still cut off the protestors from their intended audience. 540 F.3d at 972. Further, the court of appeals ruled that even though there were other alternatives, such as the media and handbilling, and the medium of communication allowed does not have to be the favorite of the protestors that "where 'there is no other effective way for an individual to communicate his or her message', alternative methods of communications are insufficient." *Id*. at 969. Here, protestors were required to stand "sixty feet away from the entrance of the facility." R. at 7. This creates a substantial burden on reaching the intended audience. Further, the Luddites are skeptical of all technology, therefore, they do not use sound amplification devices nor signs or literature. R. at 24-5. Therefore, like in *Carpenters*, there is no other effective way for the Luddites to communicate

their message, other than face-to-face communication. Since, the only effective way is face-to-face communication, restricting that ability with the sixty-foot buffer zone would mean that there are no ample alternatives.

## II. The United States Court of Appeals erred in finding that the mandated contact tracing through the use of government issued SIM-cards in conjunction with mobile phones was neutral and generally applicable.

The Court should reverse the Appellate Court's decision because the Act prescribes a religious organization to use technology when they proscribe the action, R. at 1-2, 4, and it provided aged-based exceptions while prohibiting religious exemptions. R. at 1-2. "Congress shall make no laws . . . prohibiting the free exercise [of religion]," is the cornerstone of free exercise rights. U.S. CONST. amend. I Therefore, the government cannot regulate religious beliefs. *Sherbert v. Verner*, 374 U.S. 398, 402 1963. If a law is not neutral or generally applicable, it unconstitutionally impinges on citizens' free exercise rights if it "proscribes (or prescribes) conduct that his religions prescribes (or proscribes)." *Emp. Div., Dept. of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). Therefore, laws that prohibit an individual from doing something their religion requires and the opposite are treated the same. *Id*. Neutrality and general applicability serve similar functions, if a law fails to meet one, it has a higher chance of not meeting the other. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). The following sections will show that CHBDA was neither neutral nor generally applicable, respectively.

### *A. The United States Court of Appeals erred in finding the Act was neutral because the law compelled a religious organization to participate in an act that they found objectionable, and there was no consideration for religious exemptions.*

A law violates the First Amendment's Free Exercise Clause when it is not neutral. *Smith*, 494 U.S. at 879. Generally, a law is not neutral if its objective is the infringement upon a religious activity. *Lukumi*, 508 U.S. at 533. A law is not neutral if it is discriminatory directly in its text. *Id*.

Moreover, "subtle departures from neutrality", *id*, at 534 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)), as well as "covert suppression of particular religious beliefs", *id* (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986)), are considerations in determining non-neutrality. *Id*. Moreover, compulsions of conduct that is religiously objectionable points towards non-neutrality. *Bowen*, 476 U.S. at 706. Furthermore, a non-neutral administration of a law violates neutrality. *Lukumi*, 508 U.S. at 534.

When a government entity does not consider religious exemptions in the passage of a law, a court will likely find that it is not neutral. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Com'n*, 138 S.Ct. 1719, 1731-2 (2018). For example, in *Masterpiece*, a commission ordered a business to comply with an anti-discrimination act. *Id*, at 1722. However, the act prescribed a viewpoint on the business owner that the business owner's religion proscribed. *Id*. In enacting the order, the commission did not consider the owner's religious objections, and compelled them to do something their religion prohibited. *Id*. at 1722, 1731. Therefore, the Supreme Court found that the law was not neutral because it did not consider the owner's religious objections. *Id*. at 1731.

However, when a law does not even burden the religious belief, it is likely neutral. *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1255-6 (11th Cir. 2012). For example, in *GeorgiaCarry.Org*, a religious organization believed that a gun law, proscribing specific carry areas, violated their free exercise of their religion. *Id*. However, the court held that it did not because they provide evidence on *how* it burdened them; therefore, it was neutral. *Id*.

In this instance, the government acted without considering whether the technology requirement would conflict with any religious beliefs, while creating exemptions for a reason not related to religion. R. at 2. This instance is similar to *Masterpiece*, where there was no consideration of a business owner's religious objections in the creation of a law, 138 S.Ct. at 1722,

there was no consideration of any religious objections in enacting exemptions to the CHBDA. R. at 2, 6. While there is no record to show the consideration, a court should view the dearth of evidence in favor of the Luddites (appellees) because the standard of review is *de novo*. Moreover, like in *Masterpiece*, where the court found that the law was not neutral because of the lack of consideration for a religious objection, *id*, the Court here should also find this Act not neutral because here too there was lack of consideration for religious objections. R. at 2, 6.

Furthermore, the Court should also find the Act to not be neutral because the facts here actually show a burden imposed on the Luddites. R. at 3. Similarly in *GeorgiaCarry.Org*, where a religious organization believed a law was burdening their religious doctrine, 687 F.3d at 1255-6, the Luddites believe that the Act burdens their religious doctrine. R. at 3. However, unlike *GeorgiaCarry.Org*, where the religious organization did not present evidence as to how it burdens their religious doctrine, *id*, the Luddites did present evidence as to how it burdens their religious doctrine. R. at 3-5. Specifically, the Luddites believe that technology brings harm to their families and community. R. at 4. Therefore, Act burdens the Luddites, so the Court should consider this Act more likely to be not neutral.

There is also a policy argument, if the law cannot provide for a religious exemption, a snowball that is ever growing will continue to grow, creating silence on religious freedom of expression. Therefore, laws that are neutral on their face, but allow secular exemptions could be construed as neutral. Scholars have found if laws continue to be passed similar to this, it could be "the end of religious liberty in America" as we know it. Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 UPAJCL 850, 860 (2001) (discussing why rules that are perceived under *Smith* to be neutral and generally applicable should still be considered non-neutral because of the unfairness imposed on religions).

Therefore, if the Court does find neutrality, it should consider overruling the previous law for the rule that facially neutral laws that impose burdens on religion(s) are not neutral if they allow for secular exemptions while not allowing for religious exemptions.

In conclusion, the Court should rule that the Act is not neutral because the enactment of the Act never considered religious exemptions and the Luddites were burdened. R. at 2-6.

### *B. The United States Court of Appeals erred in finding the law generally applicable because the law burdened religious conduct by requiring a use of technology, and the law allowed for individualized age-based exemptions while not allowing for religious exemptions.*

A law violates the First Amendment's Free Exercise Clause when it is not Generally Applicable. *Smith*, 494 U.S. at 879. General applicability prohibits the government from selectively imposing burdens on religious conduct, even if the burden is incidental. *Lukumi*, 508 U.S. at 542-43. Therefore, a law is not generally applicable if it is substantially underinclusive, burdening religious conduct while allowing other comparative secular exemptions. *Id*. at 543. Therefore, it can be assumed that the more exceptions in a generally applicable on-its-face law, the less generally applicable. *Id, see also Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) ("the more exceptions to a prohibition, the less likely it will count as a generally applicable … law"). Moreover, like neutrality, there must be equal protection between religion and non-religion. *Lukumi*, 508 U.S. at 532. Therefore, individualized exceptions are subject to harsher scrutiny when determining general applicability. *Id*. at 537.

When a government entity allows for a multitude of exemptions to a law, it cannot bar the exemption of a religious exemption. *Lukumi*, 508 U.S. at 537. For example, in *Lukumi*, a law was passed that prohibited the killing of animals otherwise not provided for by the rule. *Id*. at 526-7. Moreover, the government provided a multitude of exemptions for secular reasons but denied exemptions for religious reasons. *Id*. at 527. The Supreme Court ruled that the law was

underinclusive because it forbade animal killing generally but allowed individualized exemptions to the law while not providing a religious exemption. *Id*. at 543.

On the other hand, when a government entity does not allow any exemptions to a law, it is likely generally applicable. *First Assembly of God of Naples, Fla., Inc. v. Collier Cnty., Fla*, 20 F.3d 419, 423 (11th Cir. 1994). For example, in *Collier*, a law was passed that required homeless shelters be zoned to a particular area. *Id*. at 420. A religious organization had previously housed homeless pursuant to their religious doctrine, in a residential zoning area. *Id*. at 420, 423. However, the law required all residential areas to not contain homeless shelters, providing other areas for the like. *Id*. at 423. The court ruled that the law was generally applicable because it only incidentally affected the church, while not allowing any exemptions to other similar shelters in zones that did not permit shelters. *Id*.

In this instance, there are two general exemptions to the Act: (1) for "[s]enior citizens over sixty-five years of age, and (2) for health-related concerns "on a case-by-case basis." R. at 6. This is similar *Lukumi*, where the law provided multiple exemptions on a case-by-case basis without providing for a religious exemption, 508 U.S. at 527, because here there were exemptions on a case-by-case basis without providing the Luddites, or any other religion, a religious exemption. R. at 24. Similarly in *Lukumi*, where the court ruled the law to be underinclusive, *id*, at 543, the Act here is likely underinclusive because it allows for secular exemptions while not allowing a religious exemption. R. at 24. Therefore, the Act creates a chilling effect on the Luddite religion by prescribing them to use technology, something their religion proscribes. R. at 24. Moreover, the exemptions in this instance may be provided on a case-by-case basis, R. at 6, a highly individualized program. This is similar to *Lukumi*, where exemptions provided to secular entities were considered individualized, *id*, at 521, because the individualized exemptions here were only

secular in nature. R. at 6. Moreover, like *Lukumi*, where non-religious acts were exempt while the religion's act was not, *id*, a very similar exemption was made to the requested exemption by the Luddites. R. at 22. Specifically, there was an exemption given for people who could not physically use mobile phones. R. at 22. This exemption is essentially a secular version of religiously objecting to the use of technology because where the physical disability prevents the individuals from using the technology, the Luddites religion prevents them from using the technology. R. at 22-3. Therefore, the substantial under-inclusiveness assuredly shows non-general applicability.

On the other hand, the Act is unlike that in *Collier*, where there were no general exemptions, 20 F.3d at 423, because there were general, case-by-case exemptions. R. at 6. Therefore, the incidental effect imposed upon the church in *Collier* is unlike that effect imposed upon Mr. Jones' Luddites because there was an existence of general, secular, case-by-case exemptions. 20 F.3d at 423; R. at 6.

It may be argued that because the Eastmont Luddites allow the use of technology, the religion generally does not proscribe the use, R. at 25; however, religions may vary drastically between sects. Luis Lugo, *Muslims Widely Seen As Facing Discrimination*, Pew Research Center, (Sep. 9, 2009), https://www.pewforum.org/2009/09/09/muslims-widely-seen-as-facing-discrimination/. Therefore, each sect of a religion should be considered their own religion. So, the chilling effect, while it may not affect the Eastmont Luddites, will still affect Mr. Jones' Luddites. Moreover, it will especially chill the Luddites' expression of religion because it is possible that this Act could snowball into other non-generally applicable laws that would prescribe citizens to participate in things they religiously oppose. Aleksandra Sandstrom, *Amid measles outbreak, New York closes religious exemption for vaccinations – but most states retain it*, Pew Research Center, (Jun. 28, 2019), https://www.pewresearch.org/fact-tank/2019/06/28/nearly-all-states-allow-

religious-exemptions-for-vaccinations/. Therefore, the Act is not generally applicable because it fails to provide valid religious objections while including highly individualized exemptions. R. at 24.

## Conclusion

The Court of Appeals was correct because the Amendment, even though is content-neutral on its face, fails to be content-neutral because of it being selectively applied. Therefore, the time, place, and manner restriction is unconstitutional. Even if the Amendment is found not to be selectively enforced, the time, place, and manner, restriction is still invalid because it is neither narrowly tailored nor allows for open ample alternatives of channels of communication. However, the Court of Appeals incorrect with regards to the Act because it was not neutral or generally applicable. Therefore, the Court should affirm in part (with regards to the Amendment) and reverse in part (with regards to the Act).

## Appendix A: Constitutional Provisions

"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.

## Certificate

Team 25 certifies the following:

1. The work product contained in this petitioner's brief are the work product of this team and this team only.
2. This team has complied fully with the governing honor code.
3. This team has complied fully with the Siegenthaler-Sutherland Cup 2020-2021 Official Competition Rules.

Team 25.