Case No. 20-9422

IN THE

Supreme Court of the United States

LEVI JONES,

Plaintiff-Petitioner,

v.

CHRISTOPHER SMITHERS,

Defendant-Respondent.

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

BRIEF OF PETITIONER

Levi Jones

Team Number 23
January 31, 2020

Attorney for Levi Jones

QUESTIONS PRESENTED

I. Whether the Eighteenth Circuit erred by finding that the contact tracing program, mandated the Combat Hoof and Beak Disease Act, was neutral and generally applicable, despite religious objections to technology.

II. Whether the Eighteenth Circuit erred by finding that the sixty-foot no protest "buffer zone," imposed by the Combat Hoof and Beak Disease Act, was not narrowly tailored to the government interest in public safety and preventing the spread of the disease.

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OPINION BELOW

The opinion of the United States District Court for the District of Delmont is contained in the record on appeal. R. at 1-20. The opinion of the United States Court of Appeals for The Eighteenth Circuit is also contained in the record on appeal. R. at 29-41. Both opinions are unreported.

CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provisions include the Free Speech Clause and Free Exercise Clause of the First Amendment to the United States Constitution, as set forth in Appendix A: Constitutional Provisions.

STATEMENT OF THE CASE

Statement of Facts

Petitioner Levi Jones is a congregational leader of the Luddite faith in the state of Delmont. R. at 24. The Church of Luddite embraces a belief system which varies based on a particular congregation's rules, which are referred to as "Community Orders." R. at 22-23. Though each congregation is authorized to create and maintain their own set of rules, all Luddites believe in complete obedience to the Community Orders set by the congregation they belong to in order to preserve family, faith, community, and cultural identity. *Id*.

The Delmont Luddite congregation believes that followers shall be skeptical of all technology in the best interest of maintaining family values and a sense of community. R. at 24. The only way that Delmont Luddites may permissibly adopt a technology is to deliberate and come to a consensus within the congregation. R. at 23. Delmont Luddites believe that mobile phones pose a conflict with the ideals of family and community by distracting and eliminating the need for people to rely on others within the Luddite community. R. at 24-25. They, therefore, do not own or use mobile phones. R. at 23. To communicate over the phone, Delmont Luddites are only

permitted by the Community Orders to make use of a designated community landline phone, call log, and phone book next to the main building for the Delmont Church of Luddite. *Id*. The Community Orders further require that use of this phone is reserved only for emergency situations. R. at 25.

Because the Church of Luddite welcomes each congregation to create and adopt its own Community Orders to address the specific needs and goals of the local congregation, the Luddite community in the state of Eastmont allows for the use of mobile phones. *Id*. The Eastmont Community Orders accepts mobile phone usage as a "necessary tool" because it aids in maintaining family ties with non-members of the congregation, conducting business with suppliers or customers, and checking the weather. *Id*. The Eastmont Luddite community differs from Delmont in the sense that the congregation maintains significant business with people outside of the Luddite community. *Id*.

Furthermore, Luddites believe that the only way to disseminate Luddite teachings is by word of mouth. *Id*. Luddite doctrine also finds that speaking loudly – especially with the assistance of amplification devices such as a loudspeaker – is impermissible because speaking loudly is considered impolite to fellow humans. *Id*. Consistent with their practice of avoiding technology, Luddites do not make signs or distribute literature because mass production of such materials would require too high a degree of technological involvement. *Id*.

In response to the prevalence of the ongoing global pandemic of Hoof and Beak Disease ("Hoof and Beak"), President Felicia Underwood created the Hoof and Beak Task Force, which was responsible for "for coordinating and overseeing the administration's efforts to prevent, monitor, contain, and mitigate the spread of Hoof and Beak." R. at 6. Congress passed the Combat Hoof and Beak Disease Act ("CHBDA" or "the Act"), which mandated that all people living in

the United States participate in obligatory contact tracing through government-provided and distributed SIM cards for use in mobile phones. R. at 5. The Act provides that the government supplies the contact tracing SIM cards and mobile phones equipped with contact tracing SIM cards to those who do not have one. CHBDA § 42(b)(1). After receiving the government-issued SIM card or mobile phone equipped with the contact-tracing SIM, "every person's name, address, birth date, social security number, and phone number if not receiving a phone from the facility, will be logged." CHBDA § 42(b)(1)(A)(i). This program was created for the 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). The Federal Communications Commission (FCC), led by Commissioner Christopher Smithers, was selected as the agency to lead the effort. R. at 5.

All persons living in the United States were required to comply with the Act by October 1, 2020 to avoid incurring a penalty. R. at 2. However, in addition to senior citizens over the age of 60 being allowed to decline participation in receiving contact tracing SIM cards, health-related exemptions from the Act – such as physical disabilities which hinder individuals from being able to use a mobile phone – are granted on a case-by-case basis. *Id*. Otherwise, no other type of exemption is permitted under the statute. *Id*. Additionally, the Act required that, at a minimum, all persons visiting the SIM card distribution facilities must wear masks and observe social distancing by maintaining a distance of six feet apart from one another. R. at 6. Pursuant to 42 U.S. Code § 2000bb–3–which exempts federal laws adopted after November 16, 1993, from being subject to the Religious Freedom and Restoration Act (RFRA) unless the law explicitly excludes such application by reference. Congress declared the RFRA as being inapplicable to CHBDA for a

"quick and effective implementation of the mandate." CHBDA § 42(f)(8). Failure to comply with the Act "will result in punishment of up to one year in jail and/or a fine of up to $2,000." CHBDA § 42(c).

Naturally, the mandate rendered Mr. Jones and other members of his congregation unable to comply as a result of the conflict between what the law demanded and anti-technology tenets of the Delmont Luddite faith. R. at 24. In response, Mr. Jones organized protests outside of a federal facility in Delmont that was being used to distribute the newly mandated phones and SIM cards. R. at 34. Shortly after passing the CHBDA, however, Congress amended the Act to address an increase in protest activity near the distribution centers. R. at 2. The amendment forbade protests of no more than six people and commanded that, during operating hours, demonstrations be no closer than sixty feet away from facility entrances – public sidewalks included. Although the sixty-foot zone was required to be "clearly marked and posted" by § 42(d)(2) of the CHBDA, the CHBDA also notes that enforcement is "subject to discretion of local facility officials in acknowledgement of the varied location characteristics of each center." CHBDA §42(e).

Another group of five demonstrators who named themselves Mothers for Mandates, or "MOMs", were present outside of the Delmont facility to protest in favor of the Act and to encourage compliance with the contact tracing program. R. at 2. Like the Luddite demonstrators, the MOMs also wore masks. R. at 8. The MOMs make use of signage and informational pamphlets to get their message across because they are not bound by Luddite anti-technology sentiments. R. at 34. Generally speaking, the MOMs are easily recognizable because they have managed to build a significant online presence and strong branding. *Id*.

On May 1, 2020, Mr. Jones led a demonstration with six other protestors. He and the others stood seventy-five feet away from the facility entrance – fifteen feet beyond the statutory

requirement and twenty feet further from the entrance from the MOM demonstrators. R. at 33-34. They occasionally took turns to talk with people in line as they approached the facility entrance to express their concerns about the Act. R. at 34. After about seven hours of protesting, police approached the Luddites, told Mr. Jones that their group contained too many people, and arrested him shortly thereafter. R. at 35. Mr. Jones spent four days in jail and incurred a $1,000 fine. *Id*. Still adamant to inform the world about his Luddite faith, Mr. Jones returned to the Delmont facility to continue demonstrating along with five fellow Luddites to stay in compliance with the statute. *Id*. Despite staying compliant, one of the police officers recognized Mr. Smith from his prior arrest and told him that he had to leave. *Id*. Though Mr. Jones assured the police that he was remaining considerate of what the mandate required, he was nonetheless arrested again. *Id*. This time, he incurred a $1,500 fine and spent five days in jail. *Id*.

On both occasions that Mr. Jones was arrested, the MOMs were present. *Id*. On the first occasion, the MOMs set up the table that held their literature fifty-five feet away from the facility entrance. R. at 34. However, some MOMs stood even closer than that, which was well within the buffer zone. *Id*. On the second occasion, the MOMs group contained seven demonstrators. R. at 35. However, no fines or arrests were made for MOM protestors in either instance. R. at 34-35.

Procedural History

On June 1, 2020, Levi Jones filed an action against FCC Commissioner Smithers, alleging that the enforcement of the CHBDA against him and the Delmont Church of Luddite is a violation of the Free Exercise Clause and Free Speech Clause of the First Amendment. R. at 35. In response, the FCC contended that the mandate was an appropriate exercise of congressionally delegated authority and was neutrally applied in the free speech and free exercise contexts. R. at 3. Mr. Jones and Mr. Smithers filed cross motions for summary judgment. *Id*.

The Eighteenth Circuit reversed the decision of the District Court of Delmont on granting summary judgment in favor of the FCC with regard to the free speech issue, holding that the CHBDA was not narrowly tailored to the governmental interest of preventing the spread of Hoof and Beak despite being content neutral and, consequently, violated the Free Speech Clause of the First Amendment by unduly burdening speech. R. at 30. The Eighteenth Circuit further reversed the District Court's decision to deny summary judgment to both parties on the issue of free exercise, holding that the CHBDA satisfies the constitutional requirements of *Employment Division, Department of Human Resources v. Smith* because it was neutral and generally applicable. *Id*. Thereafter, Mr. Jones filed a timely request for certiorari to which this Court granted. R. at 42.

SUMMARY OF THE ARGUMENT

I. Because the CHBDA grants secular exemptions but not religious ones, it cannot be said to be a law of general application.

A law's lack of neutrality can be shown when it protects secular choices more than it protects comparable religious ones. Here, the contact tracing program protects secular choice more than religious choice; certain people who are unable to comply with the statute are exempt from its mandate, but not if that inability is due to their religion. The contact tracing program confers the benefit of not having to participate in the contact-tracing program onto two categories of individuals: those over a certain age and those with underlying health conditions.

When a law provides benefits only to groups of people in an "exempt" category and not to organizations in the non-exempt category the Court must ask whether the legislature is required to place religious organizations in the favored or exempt category. When non-religious groups are exempted from a regulation that religious groups must nonetheless comport to, the government has the burden of showing that the distinction made by the legislature was substantially justified.

With that understanding the Court must engage in a a two-step inquiry. First, courts must ask whether the law create a favored or exempt class of organizations and if so, do religious organizations fall outside of that class. Next, courts must ask whether the government has provided a sufficient justification for the differential treatment and disfavoring of religion." The mandated contact tracing program has made carved out exemptions for those with a secular impediment but religious groups are left out of that class. Additionally, the government's exemptions with the elderly or the ill goes without explanation, even though the government is required to provide substantial justification for that distinction. There is nothing in the record to make sense of the differential treatment. If a person is genuinely unable to comply with the statute, they should have the ability to petition the government for an exception. The Petitioner does not argue that any exemption he received needs to be sweeping or all-encompassing, he simply seeks to be treated the same as those with secular reasons to be exempted.

As such, this Court should find that the Act lost the benefit given to generally applicable laws. Accordingly, it must follow then that the Eighteenth Circuit erred when it did not evaluate the law using strict scrutiny.

II. The CBHDA restrictions on speech do not further a narrowly tailored government interest.

The First Amendment protects speech from regulations that are not narrowly tailored to the interest being served. Accordingly, it protects Petitioner from the proscribes of the CHBDA. To be considered narrowly tailored, a regulation must avoid burdening substantially more speech than is necessary to further the government's legitimate interests. Regulations on speech must also not be "so far-reaching that it applies even when the asserted non-speech-related problems are not

present." And lastly, they should also avoid regulating one form or speech while declining to regulate a different form of speech that affects its stated interest in a comparable way.

The CHBDA does all three. Congress had the ability to create a regulation that would have place a significantly lesser burden on speech at the distribution facility. In fact, embedded in the body of the statute itself was another provision that, if used properly, would have obviated the need for the challenged Section 42(d). Congress chose not to take either route and to unnecessarily place a restrictive burden on protestors at the facilities.

Relatedly, the CHBDA is also overinclusive of speakers that do not threaten its goals. Any person who outwardly disagrees with anything that stands too close to the facility is subject to civil and criminal penalties. For instance, under the CHBDA, a properly masked and distanced anti-abortion activist who uses the consistent crowd at the facility to get her message to as many people as possible who stands 55 feet away from the facility can be arrested. The statute would apply to her simply because she was "protesting." And she would not be saved by the fact that her actions were harmless to the government's interest.

However—while the activist would be jailed—an entire football team would be able to stand 5 feet from the entrance and promote their next home game without the regulation being concerned. The CHBDA would not cover their speech because it wasn't "protest." That distinction means that tons of speech that would in fact cause the congestion problems the government is concerned with would escape the restrictions of the regulation.

And it is that simultaneous over-inclusivity of speech that does not affect the stated interest and under-inclusivity of speech that does—coupled with the undue burden placed on covered speech—that show the lack of tailoring that renders the CHBDA unconstitutional.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered a final judgement for this matter. R. at 40-41. Subsequently, Mr. Jones, the Petitioner, properly filed a petition for a Writ of Certiorari and this Court granted certiorari. R. at 42. Accordingly, this Court has jurisdiction to hear this appeal. 28 U.S.C. § 1254(1).

STANDARD OF REVIEW

Motions for summary judgment are properly 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). This Court examines issues of summary judgment using the de novo standard of review. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). Under this standard, the Court gives no deference to the lower court and views issues as if they are being raised for the first time. *Id.* at 562. Furthermore, the standard of review for a motion for summary judgment requires that all inferences 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).

ARGUMENT

I. BECAUSE THE CHBDA GRANTS OF SECULAR EXEMPTIONS BUT NOT RELIGIOUS ONES, IT CANNOT BE SAID TO BE A LAW OF GENERAL APPLICATION.

The Free Exercise Clause of the First Amendment provides that:

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"* U.S. Const., amend. I.

The Supreme Court has emphasized that the Free Exercise Clause bars legislation "if the . . . effect of a law is to impede the observance of one or all religions." *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961). Under the Free Exercise Clause, restrictions on religious exercise that are not "neutral and of general applicability" must survive strict scrutiny. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). The Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion. *Masterpiece Cakeshop, Ltd. v. Colorado Civil*

Rights Comm'n, 138 S.Ct. 1719, 1731 (2018) (quoting *Church of Lukumi*, 508 U.S. at 534). It is also well-settled that a law's lack of neutrality can be shown when it protects secular choices more than it protects comparable religious ones. *Bowen v. Roy*, 476 U.S. 693, 708 (1984); *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 884 (1990).

Here, the CHBDA does just that.[1] Certain people who are unable to comply with the statute are exempt from its mandates—but not if that inability is due to their religion. The Act mandates that "each living person" participate in the contact tracing program, which requires the Petitioner to engage in with technology. CHBDA § 42(a). The mandate also imposes jail time and potential fines, if an individual fails to comply with the program. CHBDA § 42(c). The Petitioner is unable to participate in the program because a primary tenet of religion requires him not to. As a result, the program interferes with the Petitioner's free exercise of religion. R. at 4

By its terms, Section 42(b)(1) confers the benefit of not having to participate in the contact-tracing program onto two categories of individuals: those over a certain age and those with underlying health conditions. CHBDA § 41(b)(1)(B)-(C). It does not however provide the opportunity for any religious exceptions to be made. CHBDA § 41(b)(1)(D). Such a regulation does not comport with the Constitution.

This argument is not revolutionary. Recently, Justices of this Court strongly criticized the majority for overlooking the principle when it summarily denied injunctive relief to a religious group making a similar claim as Petitioner does here. *See Calvary Chapel Dayton County v. Sisolak*, 140 S.Ct. 2603 (2020). There, in response to the COVID-19 pandemic, a state passed legislation that limited the capacity of certain buildings—including religious establishments—to a flat 50-person rule, regardless of the building's capacity. *Id.* at 2604. However, other buildings—

[1] Admittedly, it is a bit paradoxical that this brief argues that the same law is simultaneously over-inclusive and under-inclusive. However, sometimes such a paradox is what the law requires. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (finding that a statute was "both under-inclusive and over-inclusive").

including restaurants and casinos—were exempt from that more restrictive limit and instead allowed to allow up to 50% of the building's fire-code capacity inside. *Id*. Four Justices, in separate dissents, took turns issuing sharp rebukes of the majority's decision not to step in. Justice Kavanaugh's dissent provides the most guidance here.

The Justice began by noting that, in cases where the law provided benefits only to groups of people in an "exempt" category and not to organizations in the non-exempt category, a question that arises is "whether the legislature is required to place religious organizations in the favored or exempt category." *Id*. at 2612. The Justice found that the Court's Free Exercise jurisprudence answered that question in the affirmative. *Id*. The Court has made clear that "Where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Smith*, 494 U.S. at 884 (quoting *Bowen*, 476 U.S. at 708). Stated another way: When non-religious groups are exempted from a regulation that religious groups must nonetheless comport to, the government has the burden of showing that the distinction made by the legislature was substantially justified. *See Calvary Chapel*, 140 S.Ct. at 2612; *see also* Laycock, *The Remnants of Free Exercise*, 1990 S. Ct. Rev. 1, 49–50 (explaining how this Court's precedents grant "something analogous to most-favored nation status" to religious organizations).

With that understanding, Justice Kavanaugh pointed out that a two-step inquiry has developed: first, courts must ask whether the "the law create a favored or exempt class of organizations and if so, do religious organizations fall outside of that class?" *Calvary Chapel*, 140 S.Ct. at 2613. Next, courts must ask "whether the government has provided a sufficient justification for the differential treatment and disfavoring of religion." *Id*. If the court finds that the government fails to provide such justification, the law falls out of the realm of general applicability. *See e.g*., *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3rd Cir. 2004) (Alito, J., writing for the majority) (citing *Church of Lukumi* and holding that "A law fails the general applicability requirement" if it burdens a category of religiously motivated conduct but exempts a

substantial category of secular conduct that also undermines the purposes of the law without adequate justification).

Having fully laid out the governing principles, the Justice applied them. He recognized that "the state ha[d] substantial room to draw lines, especially in an emergency or crisis;" but because the state had not demonstrated that public health justified "taking a looser approach with restaurants, . . . and a stricter approach with places of worship," he concluded that the statute was not one of general application. *Calvary Chapel*, 140 S.Ct. at 2613-14.

In a similar case before Third Circuit, then-Judge Alito applied an almost-identical analysis. *See Fraternal Order of Police Newark Lodge No. 12 v. Newark,* 170 F.3d 359 (3rd Cir. 1999) (Alito, J.). There, writing for the majority, he stated that the First Amendment required a police department to provide an exemption to Sunni Muslims from its no-beard policy after the department carved out a medical exemption to the policy, but did not "offer any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons." *Id*.

Applying that inquiry here, Like the capacity limit in *Calvary Chapel* and the no-beard policy in *Fraternal Order*, the CHBDA has made carved out exemptions for those with a secular impediment. But it has not done the same for religious groups. Not only does the statute fail to include religious groups in the list of exemptions, it expressly forecloses the opportunity for religious groups to even apply for one. Yet, the CHBDA plainly provides medical and health exemptions. As a result, religious individuals and groups are given two options, both untenable. Religious groups must decide whether to accept criminal sanction by violating the law or accept religious sanction by ignoring their fundamental tenets. The Free Exercise Clause protects religious practitioners from deciding between the lesser of two evils.

The second question answers itself. The government's "looser approach" with the elderly or the ill goes without explanation. Those groups of people are at least (and likely more) susceptible to contracting and spreading the disease as anyone else; yet, they are exempt from having to carry around cellphones equipped with the contact-tracing SIM card. Exempting those groups harms the government interest just as much as would exempting Petitioner (or anyone else). So it appears that Congress believes there are some considerations that outweigh its goals. It simply left religion out of that favored group.

Having done so, the government is required to provide "substantial justification" for that distinction. It has not begun to do so. There is nothing in the record to make sense of the differential treatment. Neither Congress nor the FCC has explained why a person's age or health could exempt them from having to participate in the CBHBDA's contact tracing program—but their deeply-held religious objections could not. The distinction between the reasons for noncompliance lacks any justification—let alone a substantial one. And that absence removes mandated contact tracing program from the safe harbor for generally applicable laws. *See Thomas v. Review Bd., Ind. Emp. Sec. Div.*, 450 U.S. 707, 719 (1981) (rejecting State's reasons for refusing religious exemption, for lack of "evidence in the record"); *Wisconsin v. Yoder*, 406 U.S. 205, 224-229 (1972) (rejecting State's argument concerning the dangers of a religious exemption as speculative, and unsupported by the record); *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020).

Petitioner does not intend to suggest that those other exemptions are unwarranted. To be clear, if a person is genuinely unable to comply with the statute, they should have the ability to petition the government for an exception. It should not matter if the thing that stands in the way of compliance was their age, health, or religion. But the government does not agree. It seems to put less credence in the religiously motivated objections to the CHBDA. And by doing so, it impermissibly "devalues religious reasons for [failing to participate in the program] to be of lesser import than nonreligious reasons." *See Church of Lukumi*, 508 U.S. at 537–538. The Free Exercise Clause flatly forbids the government from making such a judgment. *See e.g.*, *Fraternal Order*, 170

F.3d at 366 (“[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive [strict] scrutiny.”) (Alito, J., writing for the majority).

Neither does Petitioner contend that any exemption he received needs to be sweeping or all-encompassing. He only seeks to be treated the same as those with secular reasons to be exempted. *Calvary Chapel*, 140 S.Ct. at 2613 (“The Court's precedents do not require that religious organizations be treated more favorably than all secular organizations. Rather, the First Amendment requires that religious organizations be treated equally to the favored or exempt secular organizations, unless the State can sufficiently justify the differentiation.”). It is enough that he simply has the opportunity to make his case for the exemption he seeks. But, if left standing, the CHBDA would continue to prevent him from doing even that. And providing that avenue would not be difficult. There is already a process in place. It may be argued that the increase of applications will cause administrative congestion, but that is no excuse. Each person entitled to a constitutionally conferred right to exemption should get that exemption. The Constitution does not work on a first-come-first-served basis. Nor does it permit the deprivation of a civil liberty for administrative convenience.

Finally, Petitioner understands that the presence of that disease may necessitate some strict across-the-board standards like social distancing, mask requirements, and other voluntary safety measures that do not infringe on their religion. And of course, the government has a strong interest in trying to limit the spread of Hook and Beak Disease. But the Hoof and Beak Disease does not give the government a blank check to violate the Constitution. *Calvary Chapel*, 140 S.Ct. at 2614. Today, the government seeks to cash such a check by exempting only its favorites from it the CHBDA and turning a blind eye to Petitioner's deeply held religious objections that prevent him from participating in the program. The Constitution forbids it from doing so without surviving the most-exacting level of scrutiny. The government can only compel religiously prohibited conduct with laws that are neutral and generally applicable. Congress’s decision to exempt people for

secular reasons but not for religious ones removes the CHBDA from that category. As such, this Court should find that the Act lost the benefit given to generally applicable laws. Accordingly, it must follow then that the Eighteenth Circuit erred when it did not evaluate the law using strict scrutiny.[2]

II. THE CHBDA IS FAILS THE NARROW TAILORING REQUIREMENT AND THUS SHOULD BE STRUCK DOWN AS A VIOLATION OF THE FIRST AMENDMENT PROTECTION OF SPEECH.

The speech provision of the First Amendment "reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 562 U.S. 443 (2011). Surely, since the Amendment's drafting, speech on matters of public concern uttered in public fora has been at the heart of what we consider to be protected speech. And Petitioner's speech falls squarely into that most quintessential category. It cannot be debated then that the Act implicates the First Amendment and its protections. That Amendment reads, in relevant part that:

> *"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."* U.S. Const., amend. I.

First Amendment principles dictate that this Court address this case with the utmost concern for the speech being silenced. Indeed, "commenting on matters of public concern are

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[2] Even if this Court found the contact tracing program to be neutral and generally applicable, the program as-applied to the Petitioner imposes a substantial burden on his exercise of religious beliefs so as to offend the First Amendment. This Court's past decisions reveal that the Court has been willing to invalidate generally applicable laws that have imposed a substantial burden on religiously motivated activity. See *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); see also *Sherbert v. Verner*, 374 U.S. 398 (1963). Here, the contact tracing program compels the petitioner, under threat of imprisonment and/or serious fines, to forego his religious beliefs in order to participate in a mandatory program that is at odds with a fundamental tenet of his religion. CHBDA § 42(c). The program forces the Petitioner to either violate a primary religious tenet and participate, or risk imprisonment and fines. As a result, even if the Court found the program to be neutral and generally applicable, the law as applied severely effects the Petitioner's ability to exercise his religious belief of not engaging in a technological lifestyle.

classic forms of speech that lie at the heart of the First Amendment" *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997). And sidewalks and other public ways "occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." *McCullen v. Coakley*, 573 U.S. 476 (2014).

Plainly: Speech on matters of public concern "is at its most protected on public sidewalks." *Schenck*, 519 U.S. at 377. However, the government still boldly asks this Court to turn a blind eye to even that most axiomatic mandate.

The regulation Respondent sets out to defend prohibits two distinct forms of speech: (1) "protest of more than six people" and (2) "protests that occur within sixty feet of the facility entrances, including public sidewalk." CHBDA §42(d).[3] Both violated the Constitution.

The government's stated purpose for that regulation is to "protect Americans, their families, and their communities by letting people know they may have been exposed to Hoof and Beak and should monitor their health for signs and symptoms of Hoof and Beak" and the amendment was passed to further those interests and ensure safety during implementation. The FCC also adds that the government has an interest in securing access to the facility during the times the SIM cards are being distributed. The lower courts quickly deemed these government interests substantial. And we raise no objections on that point. However, the point on which there is contention and the one on which this Court granted certiorari on is one of narrow tailoring. CHBDA does not meet this requirement.

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[3] The CHBDA does not define the term "protest." However, it is generally defined as a "formal statement or action expressing dissent or disapproval." Protest, Black's Law Dictionary (11th ed. 2019); *see also* Merriam-Webster Online Dictionary (last accessed Jan. 21, 2021) (defining "protest" as "a solemn declaration of opinion and usually of dissent").

A. The CHBDA offends the First Amendment's protection of speech on a number of fronts: first, it is unduly burdensome; second, it unnecessarily prohibits forms of speech that do not affect its stated goals; and third, it simultaneously ignores forms of speech that do.

Even if this Court agrees with the lower courts that the regulation was content-neutral and evaluated it as a time, place, or manner regulation, the CHBDA still does not avoid the strictures of the tailoring requirement. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). It must still be narrowly tailored to a substantial government interest. *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293 (1984). Admittedly, such a regulation need not be the least restrictive means of achieving the government interest, but it must avoid "burden[ing] substantially more speech than is necessary to further the government's legitimate interests." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *see also McCullen*, 573 U.S. at 486; *Ward*, 491 U.S. at 799). Restrictions on speech should also avoid regulating one form or speech while declining to regulate a different form of speech that affects its stated interest in a comparable way. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 454 (2015). To be sure, "silencing the speech is sometimes the path of least resistance," but this Court must be satisfied that there is a "close fit" between the means and the ends sought. It is the only way to ensure that the government is not simply sacrificing speech in pursuit of convenience. *Riley v. Nat'l Federation of Blind of N. C., Inc.*, 487 U.S. 781, 795 (1988). Unfortunately, that is what the government seems to be doing here.

B. The CHBDA's restrictions are unduly burdensome on speakers and thus "substantially broader than necessary" to achieve the government's purported goals.

The circuit court assuredly and definitively held that the CHBDA violated the First Amendment because it substantially burdened the demonstrators' speech without advancing the government's stated goals—and rightfully so. That court, relying on this Court's decision in *McCullen*, held that because the zone applied regardless of whether there were fifteen people in

line or no line at all, the regulation imposed a restriction on speakers that did not serve the government's purpose.

The circuit court got it right. This is a case that falls squarely under *McCullen*'s mandate that the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." 573 U.S. at 486. There—pointing to the fact that "the zones carve[d] out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics' entrances and driveways"—this Court held that a 35-foot buffer zone in front of Planned Parenthood clinics "impose[d] serious burdens on [the] petitioners' speech." *Id.* at 487. It rejected the idea that the petitioners were seeking some sort of "special protection to close conversations or hand-billing," recognizing the historic significance of this form of communication. *See Meyer v. Grant*, 486 U.S. 414, 424 (1988) (observing that "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse"). This Court then noted that when the government makes it more difficult to engage in those most basic forms of communication, "it imposes an especially significant First Amendment burden." *McCullen*, 573 U.S. at 489. And because the government forewent the readily available "options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage," the Court invalidated the buffer zone provision there.

This Court should do the same here. Petitioner's speech is similarly burdened by a law that carves out significant portions of public sidewalks and pushes him well back from the distribution facilities that are the subject of his speech. The law also prevents him from engaging in the type of one-on-one communication that this court found to be so essential to the dissemination of

dissent.[4] True, this reality would only offend the Constitution if that burden is "significantly more than needed to achieve the [government]'s asserted ends." And it does.

Congress had at its disposal a number of alternatives that would lift some of the burden from Petitioner's speech while still serving the government's goals. In fact, the CHBDA already contained a straightforward mask and social distancing mandates. CHBDA §42(b) ("(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"). That provision alone would have sufficiently served the government's interest by ensuring the public was safe and uncongested at the facilities. No matter how many people were at the facilities—protestors included—the provision would have ensured that each person conducted themselves responsibly in light of the contagious disease or risk civil and criminal penalties. *See* CHBDA §42(c) (statutorily mandating that failure to comply with the Act "will result in punishment of up to one year in jail and/or a fine of up to $2,000").

But even if for some reason that was not enough, the government could have supplemented that provision with something less burdensome than Section 42(d). For example, it could have enacted a statute that criminalized the refusal to obey an officer's order to disperse when the officer reasonably believes that the congregation obstructed access to the facility or posed a threat to the public safety (with "threat to public safety" being read to include risking the spread of Hoof and Beak by not being masked or maintaining proper social distances). Such a regulation would have still furthered the interest without silencing speech.

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[4] Rejecting the idea that the petitioners were seeking some sort of "special protection to close conversations or hand-billing," this Court recognized the historic significance of this form of communication. See *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (observing that "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse").

Without the benefit of investigative resources, legal aides, staffers, or decades of legislative experience, Petitioner has provided adequate alternatives to the CHBDA that Congress either overlooked or ignored alternatives that we know will pass constitutional muster. Congress then could have certainly used the tools in its arsenal to create a similar non-speech-restricting law that achieved its goals. It simply chose not to deploy them. The problem is that the First Amendment does not permit such a choice.

Still, Respondent may point this Court to its decisions in *Hill* and *Ward*. In *Hill v. Colorado*, this Court upheld a regulation because, while making it more difficult to speak to passersby, the law did not place a limit of the number or people allowed or the use of leaflets. *Hill v. Colorado*, 530 U.S. 703, 726–27 (2000). In *Ward*, this Court held that a content neutral restriction on speech "need not be the least restrictive or least intrusive means of serving the government's interests." 491 U.S. at 798.

First, *Hill* is distinguishable. The facts that gave this Court comfort in that case are not applicable here: there is a strict limitation on the number of people allowed, and because of his religion, Petitioner cannot use leaflets or other visual displays.

And the more general rule in *Ward* has been clarified. Sure, *McCullen* did not do away with Ward's general rule; but it did set out the "substantially broader than necessary analysis" that can aid a court's narrow-tailoring analysis in cases like this one.[5] To be clear: The CHBDA should be stuck down, not because Congress failed to choose the least intrusive means of serving its goal—but because it chose one that was "substantially broader than necessary" to do so.

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[5] And the lower courts have readily taken this Court's help—using that case as such a guide. See e.g., Bruni v. City of Pittsburg, 824 F.3d 353, 366 (2016) (discussing McCullen's "important clarification of the rigorous and fact-intensive nature of intermediate scrutiny's narrow-tailoring analysis"); *Clatterbuck v. City of Charlottesville*, 92 F.Supp.3d 478, 490 (2015) (citing McCullen and holding that a regulation that "criminalizes a significant amount of protected speech that poses no demonstrable threat to pedestrian safety" was not narrowly tailored).

And, as a last resort, Respondents may plainly argue that those measures are more difficult to enforce and they should not be forced to implement them. But that is not relevant here: "The government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, *not simply that the chosen route is easier*." *McCullen*, 573 U.S. at 467 (emphasis added).

C. The CHBDA's proscriptions are also overinclusive of speech that does not threaten the government's stated goals.

Embedded in the issue of being unduly burdensome is one of over-inclusivity. The two are closely related. The distinction being: the former's focus on how heavy the burden is, the latter's concern with the number of people forced to bear that burden. As one Justice of this Court has noted: A tell-tell sign "relevant to the tailoring component of the First Amendment analysis" appears when a law's suppression on speech "is so far-reaching that it applies even when the asserted non-speech-related problems are not present." *McCullen*, 573 U.S. at 503 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring).

The CHBDA is that far-reaching. The government has a stated goal, but choses to pose restraints or more speech than is necessary to achieve it. Of course, the government's goal is not served by silencing three senior citizens protesting recent cuts to Medicare; or by muzzling a group of two college students protesting their school's shift to virtual learning; or by hushing a single toddler who simply disagrees with her parent's ban on ice cream before dinner. None of those "protests" stop the disbursement of the SIM cards. None of those "protests" create threats to public safety. None of those "protests" prevent access to the facilities. And so, none of those "protests" present the problems the CHBDA claims to be concerned with. But still, all of them would be prohibited by the statute if they came too close to the government's distribution sites.

Like those "protests," Petitioner's demonstrations were also harmless on the government's interests. The record shows no sign that the demonstrations threatened public safety or blocked anyone's access to the facility. Nor is there any indication that there would have been issues had the officers not arrested him. Surely, Petitioner's actions did not threaten the government's interests at all. But—like it would the seniors, the students, and the toddler—the CHBDA impermissibly censored Petitioner.

If left standing, the buffer-zone will prevent an untold number of people from exercising their constitutionally protected right to peaceful public presence. And it is true that such broad and anticipatory provisions are the antithesis of narrow tailoring. *See Hill,* 503 U.S. at 762; *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect . . . Precision of regulation must be the touchstone in an area touching our most precious freedoms."). Because the First Amendment disfavors these types of restrictions on speech, the CHBDA's over-inclusivity should render it unconstitutional.

D. Simultaneously, the CHBDA is underinclusive of speech that would seem likely to harm the government's stated interest.

"While surprising at first glance, the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles." *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994). And while narrow tailoring requires that a statute not cover more speech than is necessary to serve a compelling government interest, a statute can also fail the narrow tailoring requirement if it covers too little speech. The CHBDA does just that.

Now, put simply: The government may not regulate one message because it harms a government interest yet refuse to regulate other messages that impair the interest in a comparable way. *Williams-Yulee*, 575 U.S. at 454 (Roberts, C.J., majority opinion); *id.* at 470 (Scalia, J., dissenting) (holding that the regulations were not narrowly tailored, this Court applied that

principle in two cases: *Carey v. Brown,* 447 U.S. 455, 464–465 (1980), and *Erznoznik v. Jacksonville*, 422 U.S. 205, 214–215 (1975)).

In that first case, this Court evaluated a regulation that prohibited all picketing in front of dwellings, with an exception for labor-related demonstrations. The facts showed that both types of speech injured the government interest equally, and there was no identifiable reason to treat them differently. So, the regulation was struck down because the law distinguished between two forms of speech that seemed to harm the government's interest equally.

Similarly, in the second case, this Court struck down a restriction on nude scenes played at drive-in theatres because there was no indication that the government's interest in limiting the distraction to passersby was any more harmed by those types of scenes than by, say, violent scenes. Both types of scenes had distracting potential, and therefore both should have been regulated.

This case presents an identical problem. Once again, the purported government interest is maintaining public safety and ensuring access to the facilities. However, the means chosen to achieve those ends only limits "protests." Assuming its stated purposes are genuine, why would the CHBDA limit its proscriptions only to this narrow class of speech? If it is the gathering of people that harm the interests, doesn't a group of people who—like the MOMs—support the distribution of SIM cards also raise concerns? What about a troop of Girl Scouts selling cookies to those in line; or a high school marching band performing their fight song; or even a local baseball team soliciting donations for their new uniforms? It cannot be argued that the troop, band, or team wouldn't also present the sort of congestion problems the government seeks to avoid. Yet, the government leaves them unregulated. Now, the government need not proscribe all conduct that raises concern nor does its law need to be "perfectly tailored." *Williams-Yulee*, 575 U.S. at 454. But it would intuitive that a law that was even *remotely* tailored to the goal of reducing the

congestion at the facilities would limit most (if not all) types of gatherings that raise those concerns—not just those that express some sort of disapproval to a government program. Nonetheless, the government argues that its law—that fails to do so—meets the more demanding narrow tailoring requirement. This Court has not been so easily persuaded in previous cases. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 172 (2015) ("In light of this under-inclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest."); *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 802 (2011) ("The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it."). Today should be no different.

CONCLUSION

It is for these reasons that the Petitioner respectfully asks this Court should find in its favor and reverse the Eighteenth Circuit's finding that the contact tracing program is neutral and generally applicable, and affirm the circuit court's finding that the no protest buffer zone is not narrowly tailored towards the governmental interests.

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 23

Dated: January 31, 2020

APPENDIX A: 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