Brief on the Merits

No. 20-9422

In the Supreme Court of the United States

LEVI JONES,

Petitioner,

v.

CHRISTOPHER SMITHERS,

Respondent.

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

BRIEF FOR PETITIONER

Team 1

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighteenth Circuit erred in concluding that a sixty-foot no protest buffer zone was not narrowly tailored to the governmental interest in public health and preventing the spread of Hoof and Beak; and
2. Whether the United States Court of Appeals for the Eighteenth Circuit erred in finding that mandated contact tracing through the use of mobile phones and government-issued SIM cards is neutral and generally applicable, despite religious objections to technology.

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STATEMENT OF JURSIDICTION

The United States Court of Appeals for the Eighteenth Circuit entered a final judgment on this matter. R. at 40-41. This Court granted the petition for writ of certiorari. R. at 42. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution is set forth in the Appendix.

STATEMENT OF THE CASE

I. Factual Background

Petitioner Levi Jones ("Petitioner") leads the Church of Luddite in Delmont. R. at 4. The Luddites adhere to a set of values, "Community Orders," that guide their religious beliefs. *Id.* Community Orders preserve family, faith, community, and cultural identity. R. at 23. Delmont Luddites abide by a Community Order that requires them to be skeptical of all technology, including mobile phones. R. at 24. This belief is based on a concern that technology can introduce ideas contrary to those of the Luddite community and break down familial communication. R. at 24-25. Based upon this Community Order, when Congress passed the Combat Hoof and Beak Disease Act ("the Act"), the Luddites believed they could not comply. R. at 1, 24. The Luddites' objections led to this case against Christopher Smithers ("Respondent"), the Federal Communications Commission commissioner who oversees the nationwide contact tracing implemented by the Act. R. at 3, 5. Congress passed the Act to attempt to curb Hoof and Beak

Disease ("Hoof and Beak"), a pandemic which has killed 230 thousand people and sickened 70 million people in the United States. R. at 1, 5. The Act requires that "every person living in the United States shall participate in a mandatory contact tracing program." CHBDA § 42(a). Congress's goal is to protect the public by communicating potential exposure to Hoof and Beak and to encourage self-monitoring for symptoms. CHBDA § 42(a)(1).

Contact tracing requires every person to carry a government-provided SIM card that is placed in a mobile phone. CHBDA § 42(b)(1). Federal facilities located in each state distribute the SIM cards and mobile phones. R. at 6. While compliance is mandatory, individuals over the age of 65 and those with certain health conditions may seek an exemption. CHBDA §§ 42(b)(1)(B)—(C). Health-related exemptions are considered on a case-by-case basis, and prior exemptions have included late-stage cancer, ischemic heart disease, Alzheimer's disease, and physical disabilities. R. at 6, 22. Generally, health-related exemptions are granted if the government determines that the health condition outweighs the public benefit. R. at 19. No other exemptions are permitted. CHBDA § 42(b)(1)(D). To enforce compliance, penalties of "up to one year in jail and/or a fine of up to $2,000" may be imposed. CHBDA § 42(c).

In response to protests at the federal facilities, Congress passed an amendment that prohibited protesters "within sixty feet of the facility entrance, including public sidewalks, during operating hours." CHBDA § 42(b)(2). Protesters are capped at groups of six and must stay within clearly marked "buffer zones." CHBDA § 42(d)(2). Additionally, everyone must wear a mask and remain six feet apart. CHBDA § 42(b)(2). Local officials have complete discretion in enforcing the amendment. CHBDA § 42(d)(e). On May 1, 2020, Petitioner and six other Luddites arrived at the federal facility to express their opposition to government interference with their religious beliefs. R. at 8. The Luddites remained seventy-five feet from the facility's entrance, in accordance

with the Act. *Id.* In contrast to the Luddites, the Mothers for Mandates ("MOMs"), a group advocating in support of the Act, gathered fifty-five feet from the entrance, sometimes entering the buffer zone. R. at 8.

While the Luddites did sporadically enter the buffer zone, the only way the Luddites can communicate with people is by speaking directly to them, as they believe speaking loudly is offensive to others. R. at 25. In addition, the Community Orders prohibit the use of sound-amplification devices or signage, both of which require the use of technology. R. at 7, 25. That afternoon, Federal Facilities Police surrounded the Luddites, but not the MOMs, and ordered the Luddites to leave for allegedly violating the Act. R. at 8. When Petitioner refused to leave, he was arrested, spent four days in jail, and received a $1,000 fine. *Id.* No member of the MOMs was arrested even though some were inside the buffer zone. *Id.*

Five days later, Petitioner, five Luddites, and the MOMs returned to the federal facility. *Id.* While the Luddites followed the guidelines of the Act, the MOMs were fifty-five feet from the entrance and within the buffer zone. R. at 8-9. Like before, the police singled Petitioner out by reprimanding him, stating: "Hey, aren't you that anti-tech preacher? You can't be here." R. at 9. Petitioner reminded them he was in full compliance with the Act and refused to leave. *Id.* Police arrested him again, and Petitioner spent five days in jail and was fined $1,500. *Id.* Once again, no member of the MOMs was arrested or fined, despite being in violation of the Act. R. at 8-9.

II. Procedural Background

Petitioner filed this suit against Respondent on June 1, 2020, alleging violations of his rights to freedom of speech and free exercise of religion. R. at 3, 35. On October 5, 2020, Petitioner and Respondent filed cross motions for summary judgment. R. at 3. On October 30, 2020, the United States District Court for the District of Delmont granted Respondent's motion for summary

judgment with respect to the free speech issue but denied it with respect to the free exercise issue. R. at 20. Accordingly, it denied Petitioner's motion for summary judgment with respect to the free speech issue and granted it with respect to the free exercise issue. *Id.* The Court of Appeals for the Eighteenth Circuit reversed and remanded with instructions to grant summary judgment in favor of Respondent with respect to the free exercise issue and in favor of Petitioner with respect to the free speech issue. R. at 40-41. This Court granted a Writ of Cert. R. at 42.

SUMMARY OF ARGUMENT

This Court should affirm the appellate court's grant of summary judgment to Petitioner on the free speech issue and reverse its grant of summary judgment to Respondent on the free exercise issue. The First Amendment prohibits the creation of laws that prohibit the free exercise of religion or abridge freedom of speech. In violation of these constitutional guarantees, the Act and its amendment infringe on Petitioner's protected rights of free speech and free exercise.

Under the Free Speech Clause, the Act's amendment is an unconstitutional time, place, and manner restriction. Though the government's interest in preventing the spread of Hoof and Beak is significant, the amendment burdens far more speech than necessary to realize this interest and forecloses Petitioner's only method of speech at the federal facilities. The government had viable alternatives to achieve its goal yet chose a means that infringed upon free speech. With this understanding, as well as the amendment's over- and under-inclusiveness and arbitrary enforcement, the amendment runs afoul of the First Amendment's Free Speech Clause.

Similarly, the Act fails under the Free Exercise Clause due to its discriminatory and underinclusive application. The First Amendment requires laws to be both neutral and generally applicable, two requirements that the Act does not meet. Failure to allow for religious exemptions has resulted in the unequal treatment of Petitioner and the Luddites by the government without a

valid reason for the differential treatment. Moreover, the Act fails strict scrutiny due to its lack of a compelling government interest and narrow tailoring. Even if this Court finds the Act to be neutral and generally applicable, Petitioner should succeed due to his hybrid-rights claim of free exercise and free speech violations.

ARGUMENT

I. THE ACT'S AMENDMENT IS NOT NARROWLY TAILORED TO THE GOVERNMENTAL INTEREST IN PUBLIC HEALTH AND PREVENTING THE SPREAD OF HOOF AND BEAK BECAUSE IT UNDULY BURDENS SPEECH.

The amendment to the Act is an unconstitutional time, place, and manner restriction on speech because it burdens substantially more speech than is necessary to achieve the government's interest. In traditional public forums, the government is permitted to impose reasonable time, place, and manner restrictions on protected speech provided that the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293 (1984). Assuming, arguendo, the amendment is content-neutral, its constitutionality would be assessed under the standard set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), and similar cases. Given that both parties have stipulated that the area outside the federal facility is a traditional public forum, *see Frisby v. Schultz*, 487 U.S. 474, 480 (1988), this Court would need to determine whether the time, place, and manner restrictions are "narrowly tailored to serve a significant government interest." *Ward*, 491 U.S. at 791.

A court will find that a content-neutral, time, place, and manner restriction is narrowly tailored if it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. That is not to say the government must satisfy "strict scrutiny," but instead, a lower standard that merely requires that the law promote a

substantial government interest "that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985); *see also Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1251 (11th Cir. 2004) (*citing Ward*, 491 U.S. at 799) ("A content-neutral time, place, and manner regulation must . . . survive 'intermediate scrutiny.'"). Yet, even under this lower standard, the amendment is unconstitutional because it burdens far more speech than is necessary to achieve the government's articulated interest of public health.

A. The amendment forecloses the only mode of expression available to the Luddites to communicate their message.

Government restrictions on expressive activity may be invalid if the remaining modes of communication are inadequate. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (finding of no consequence the fact that the city's restrictions reduced the potential audience for the respondent's speech where there had been no showing that the remaining avenues for communication were inadequate). Although the First Amendment does not guarantee a right to any particular form of expression, when the government makes it more difficult to engage in classic forms of expression, it imposes an especially significant First Amendment burden. *McCullen v. Coakley*, 573 U.S. 464, 489 (2014). This Court has observed that direct one-on-one communication is the "most effective, fundamental, and perhaps economical avenue of political discourse." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Accordingly, certain forms of communication, like normal conversation and leafletting on a public sidewalk, "have historically been more closely associated with the transmission of ideas" than other forms of communication. *McCullen*, 573 U.S. at 488. The First Amendment protects the right of every citizen to "reach the minds of willing listeners," but to do so, "there must be opportunity to win their attention." *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). The Act's amendment is not narrowly

tailored because it deprives the Luddites of their only opportunity to win the attention of those in line at the federal facility.

In *McCullen v. Coakley*, this Court struck down a law that significantly burdened the petitioner's "ability to initiate the close, personal conversations that they view[ed] as essential to 'sidewalk counseling.'" 573 U.S. at 487 (quotations in original) (finding the law burdened more speech than necessary, in part because of the burden placed on the petitioner's primary modes of communication). The petitioners in *McCullen* engaged women who were approaching abortion clinics to offer them information on alternatives to abortion and help pursuing those options. *Id.* at 472. The petitioners considered it essential to maintain a caring demeanor, calm tone of voice, and direct eye contact during these exchanges. *Id.* at 473. The law at issue in *McCullen* made it a crime to knowingly stand on a public sidewalk within thirty-five feet of a driveway or entrance to certain abortion clinics. *Id.* at 471. As a result, the petitioner was reduced to shouting at many of the clinics so patients within the thirty-five-foot buffer zone could hear her— "a mode of communication sharply at odds with the compassionate message she wishe[d] to convey." *Id.* at 487. At one clinic, the petitioner had trouble distinguishing clinic patients from passersby in time to initiate conversation before they entered the buffer zone. *Id.* At another, the buffer zone pushed the petitioner so far back from the clinic entrance that she could no longer offer pamphlets to drivers before they entered the driveway. *Id.* at 488. The government too quickly dismissed alternative means that could have served its interest without compromising the petitioner's ability to initiate the close, personal conversations that were essential to sidewalk counseling. *Id.* at 487, 490. This Court appropriately admonished the lower court in *McCullen* for downplaying these burdens on the petitioner's speech, which deprived her of her two primary methods of communicating her message—normal conversation and pamphlets. *Id.*

The amendment places a substantial burden on the Luddites' ability to communicate their message from a normal conversational distance with people waiting in line at the federal facilities. Further, the tenets of the Church of Luddite make all alternative avenues for communication unavailable, leaving them only with their normal speaking voices. R. at 25. Like the petitioners in *McCullen* who needed a calm voice and caring demeanor to effectively share their message, the Luddites need the ability to communicate with a normal speaking voice and at a normal conversational distance. *Id.* The Community Orders governing the Delmont-based Church of Luddite prohibit speaking loudly and using sound amplification devices. *Id.* The Community Order also preclude the Luddites' ability to make signs or distribute pamphlets, as mass production of such items would require the use of technology, which is strictly prohibited. *Id*. Just as the restrictions in *McCullen* made it difficult or near impossible for the petitioner to communicate with clinic visitors from a normal conversational distance, so too does the sixty-foot buffer zone around the federal facilities. The buffer zone around the facility is sixty feet regardless of how many people are in line. Thus, even when only a few people are in line, the buffer zone pushes the Luddites so far back that they would need to resort to yelling to reach anyone in line.

This Court admonished the lower court in *McCullen* for downplaying the burdens on the petitioner's speech, as the restrictions effectively deprived her of her two primary modes of communication. Here, the Luddites can only communicate their message to people in line by speaking to them directly in a normal conversation tone. *Id.* Thus, the amendment deprives the Luddites of their *only* method of communicating with people in line at the federal facility, placing a substantial burden on their speech. The important governmental purpose of protecting public health is not enough to shield the government from the requirements of the First Amendment.

Packingham v. North Carolina, 137 S.Ct. 1730, 1736 (2017) ("[T]he assertion of a valid governmental interest cannot, in every context, be insulated from all constitutional protections.").

B. The amendment is both overinclusive and underinclusive as a means of achieving the government's interest.

When the government looks to significantly limit expressive conduct, courts must weigh the substantiality of the government's purported interest against the burden the law puts on speech. *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939). Tailoring the fit between the ends and the means of a government regulation on speech prevents the government from too readily sacrificing First Amendment rights in the name of efficacy. *Riley v. Nat'l Fed'n of Blind of N.C.*, 487 U.S. 781, 795 (1988). Here, Congress amended the Act to further its goal of preventing the spread of Hoof and Beak and ensuring public health and safety during its implementation. R. at 14. Petitioner agrees that this is a valid governmental interest, but the means used to achieve that interest is substantially broader than necessary.

In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), this Court struck down a portion of a fixed buffer zone where "congregating, picketing, patrolling, demonstrating or entering" within thirty-six feet of an abortion clinic's property line was prohibited. There, the Court upheld most of the buffer zone around the clinic. *Id.* However, a very small portion of it was located on private property on the back and sides of the clinic and did not advance the government's articulated purpose of protecting access to the clinic or facilitating an orderly flow of traffic. *Id.* The Court pointed to the fact that patients and staff wishing to enter the clinic did not need to access the private property behind it, and there was no evidence to suggest that protestors on the private property would obstruct traffic. *Id.* Thus, that small portion of the buffer zone was overinclusive because it did not advance the government's articulated interest and burdened more speech than was necessary. *Id.*

Similarly, in *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 802-04 (2011), this Court struck down a state law that sought to prohibit the sale of violent video games to minors, in part for its over- and under-inclusivity. The state's purported purpose for the law was to address a serious societal problem and help concerned parents control their children by requiring that the purchase of violent video games be made only by adults. *Id.* at 805. This Court noted that the law did not account for the fact that not all parents *cared* if their minor children purchased violent video games. *Id.* at 804. While part of the law's effect would indeed advance *some* parents' wishes, its entire effect only advanced what the state assumed parents *ought* to want. *Id.* "This [was] not the narrow tailoring to 'assisting parents' that restriction on First Amendment rights requires," and thus, the law was deemed overinclusive as a means of assisting parents. *Id*. (quotations in original). Additionally, the Court found that the law was underinclusive as a means of protecting minor children from violent video games, as it still allowed parents, or any other adult, to buy the games for minors. *Id.* at 805.

Here, the fit between the ends and means of the amendment is not sufficiently tailored because a substantial portion of the burden on speech does not serve to prevent the spread of Hoof and Beak. The purported purpose of the amendment is to maintain safe distances at the federal facilities to prevent the spread of Hoof and Beak, but the amendment does not account for the amount of people standing in line at the facility. R. at 38. Just as the buffer zone behind the abortion clinic in *Madsen* did not advance the government's goal of protecting access to the clinic, the buffer zone in the present case fails to advance the government's purpose of keeping safe distances when no one or only a few people are in line. The amendment is also underinclusive. If one hundred people stood in line at the federal facilities, the line would extend far beyond the boundary of the buffer zone. R. at 38. Whether people are standing inside or outside the buffer zone, the threat of

spreading Hoof and Beak among protestors and people standing in line is the same. If the important governmental interest of preventing the spread of Hoof and Beak exists within sixty feet of the entrance to the federal facility, what nullifies that interest just one foot outside of the buffer zone? Like the law in *Brown*, which did not protect minors from violence in video games because it left open many other avenues for minors to obtain the games, the amendment in this case leaves open ample opportunity for a lack of social distancing anytime the line extends beyond the buffer zone.

1. The government can achieve its interest through alternative means that do not foreclose a traditional public forum to protestors.

The government should have first tried pursuing a means of preventing the spread of Hoof and Beak that did not compromise the Luddites' right to free speech. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort."). The government must show that alternative means 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 495. Political speech enjoys significant constitutional protections, *Taxpayers for Vincent*, 466 U.S. at 816, but even more so on a public sidewalk. *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357 (1997) ("[S]peech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum."). To satisfy the narrow tailoring requirement, the government must show that its interest would be not be achieved by another measure that does not foreclose a traditional public forum to protestors. *McCullen*, 573 U.S. at 497.

The government has available to it other approaches to achieve its interest without substantially burdening more speech than is necessary. It can impose criminal and civil liability for certain conduct that increases the risk of spreading Hoof and Beak, instead of imposing broad restrictions on all protestors. For example, in 1811, the British government successfully pursued a

means of addressing a protest problem without substantially burden speech. [1] The original Luddites of the nineteenth century held a strong opposition to certain forms technology and expressed their opposition by setting fires to and destroying textile factories. *Id.* The British government responded to the protests by placing troops outside the factories and designating machine-breaking a crime. *Id.* By 1816, the protests had ceased entirely. *Id.*

The Act in the present case already provides a means of achieving public health and preventing the spread of Hoof and Beak without compromising First Amendment rights. Section 42(b)(2) of the Act requires that, at a minimum, "all persons must wear a mask" and "all persons shall observe social distancing and maintain a distance of six feet apart from one another, inside and outside of the building." Section 42(b)(2) is an adequate means to achieving the government's end because the penalties defined by section 42(c) provide a method of enforcing section 42(b)(2), which would ostensibly apply to protestors and non-protestors alike. 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). Instead of firmly enforcing these provisions against all persons outside the federal facilities, the government has chosen the easier route of imposing a blanket restriction on protesting within a sixty-foot buffer zone at facility entrances. As this Court explained in *McCullen*, although using fixed buffer zones as a means to achieve a governmental interest would make facility officials' job easier, "that is not enough to satisfy the First Amendment." 573 U.S. at 495. "A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." *Id.* Narrow tailoring does not require that the government enact all or any proposed alternatives that would burden substantially less speech, but the government must still show that the alternate

[1] Richard Conniff, W*hat the Luddites Really Fought Against*, SMITHSONIAN MAG. (Mar. 2011), https://www.smithsonianmag.com/history/what-the-luddites-really-fought-against-264412/.

methods "would fail to achieve the government's interests." *Id.* The government cannot make that showing in this case.

C. The lack of certainty as to complying with the amendment leads to a substantial risk that far more speech will be burdened than is necessary.

Arbitrary enforcement vested in a governmental authority to regulate speech is "inherently inconsistent" with valid time, place, and manner regulations. *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981); *see also Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) ("Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression."). This Court has condemned broad discretion in the enforcement of time, place, and manner regulations because such discretion carries with it a risk "for becoming a means of suppressing a particular point of view." *Heffron*, 452 U.S. at 649. Additionally, the government may not regulate speech "in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. The arbitrary enforcement of the amendment has the potential to stifle far more speech than is necessary to achieve the government's articulated interest of public health and preventing the spread of Hoof and Beak.

In cases where a law requires a person to obtain a license or permit before engaging in certain expressive conduct, courts have demanded adequate standards in the law to guide the licensing official's decision to grant or deny the permit. *Thomas*, 534 U.S. at 323. Where laws grant licensing officials "unduly broad discretion" in deciding whether to grant or deny a permit, there exists a substantial risk that the official "will favor or disfavor speech based on its content." *Id.* Thus, this Court has prohibited conditioning speech on obtaining a license or permit from a government official in their "boundless discretion." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S 750, 764 (1988). Though the amendment in this case does not require protestors to obtain

a license or permit before demonstrating at the federal facilities, the limitless discretion vested in facility officials to enforce the amendment is inconsistent with First Amendment principles. Enforcement of the Act is "subject to the discretion of local facility officials . . . ." CHBDA § 42(e). This "unduly broad discretion" vested in facility officials has led to an arbitrary enforcement of the Act, allowing officials to "favor or disfavor speech based on its content." *Thomas*, 534 U.S. at 323; *see also Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992).

The first time Petitioner was arrested, jailed, and fined, he and six other Luddites were protesting the Act while remaining fifteen feet outside the buffer zone, wearing masks, and keeping six feet apart. R. at 25. Meanwhile, the MOMs group protested fifty-five feet from the facility entrance—in direct violation of the Act—but no one from the MOMs group was arrested. R. at 26. Five days later, Petitioner returned with five other Luddites to protest and remained in full compliance with the Act. *Id.* The MOMs group was also present, once again directly violating the Act, but no member of the group was arrested. *Id.* Facility officials targeted Petitioner, singling him out for the content of his speech. The Luddites' speech is unduly burdened by this arbitrary enforcement, which directly targets them only because they stand in opposition to the Act.

Not only are the Luddites being unfairly targeted, but the broad discretion vested in facility officials has a chilling effect on the Luddites' speech. The record shows that even when remining in full compliance with the Act, Petitioner and other Luddites are at risk of being arrested, jailed, and fined. In *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997), this Court invalidated a law partly on the grounds that because it was so difficult for protestors to be certain of how to comply with the law, there was a substantial risk that more speech than necessary would be burdened. In the present case, the facility officials' broad discretion and arbitrary enforcement tactics make it difficult for the Luddites to be certain of whether they will be punished, despite

honest attempts to comply with the Act. This uncertainty causes a chilling effect on the Luddites' speech, burdening far more speech than is necessary to achieve the government's interest.

II. THE ACT VIOLATES THE LUDDITES' FREE EXERCISE OF RELIGION DUE TO ITS DISCRIMINATORY AND UNDERINCLUSIVE APPLICATION TOWARD RELIGIOUS CONDUCT.

Granting secular exemptions while failing to allow religious exemptions impermissibly infringes on the Luddites' free exercise of religion. The First Amendment guards against government intrusion into the free exercise of religion. U.S. CONST. amend. I. Even though the government has a strong interest in preventing the spread of Hoof and Beak, it cannot enforce a law that has unequal application toward religion. *Espinoza v. Mont. Dep't of Revenue*, 140 S.Ct. 2246, 2254 (2020) (emphasizing that the Free Exercise Clause "protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status."). By allowing only secular exemptions, and not similar exemptions for religious reasons, the government has unconstitutionally discriminated against the Luddites.

Therefore, strict scrutiny applies to the free exercise claim. Applying the free exercise test for strict scrutiny developed in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888 (1990), the Act fails to be neutral and generally applicable.[2] *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Even if the Act were found to be neutral and generally applicable, strict scrutiny would still apply, as this case presents a hybrid-rights claim of free speech and free exercise and unconstitutionally mandates compliance. *See Smith*, 494 U.S. at 881; *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) ("[A] violation of the Free Exercise Clause is predicated on coercion.").

[2] The Religious Freedom and Restoration Act ("RFRA") applies to all federal laws that burden religion. 42 U.S. Code § 2000bb-1(a). However, Congress has the authority to exclude it. 42 U.S. Code § 2000bb-3(b). In this case, Congress excluded RFRA to encourage quick implementation. R. at 6. Therefore, since RFRA does not apply, the *Smith* test is the proper law to apply.

A. The Act is not neutral or generally applicable as applied to the Luddites.

The First Amendment requires laws that infringe on religious belief to be both neutral and generally applicable. *Smith*, 494 U.S. at 879. Neutral laws must not discriminate against religious conduct. *City of Hialeah*, 508 U.S. at 532. Laws of general applicability, while similar to neutrality, must not apply unequal treatment to different groups. *Id.* at 542. *Smith* intended to protect valid laws from free exercise challenges if it could be shown that the law was both neutral and generally applicable. 494 U.S. at 879. The Act fails the requirements of a valid law under *Smith* and triggers strict scrutiny, as it discriminates against the Luddites by favoring secular conduct and selectively exempts secular groups, in violation of the Free Exercise Clause.

1. The Act discriminates against the Luddites by unequally applying the exemptions.

The Act is not neutral in function, as it is a "religious gerrymander" that suppresses the Luddites' ability to obey their Community Orders. *City of Hialeah,* 508 U.S. at 534. Laws that discriminate on their face are not neutral. *Id.* However, "facial neutrality is not determinative." *Id.* Even if a law is facially neutral, a law can fail *Smith's* neutrality requirement when "the operation is considered." *Id.* at 535-36. A facially neutral law can still demonstrate animus if there is "unequal application of the law." *Washington v. Davis*, 426 U.S. 229, 239 (1976). While not facially discriminatory, the effects of the Act discriminate against the Luddites. *City of Hialeah,* 508 U.S. at 558 (Scalia J., concurring). By only permitting secular exemptions, the Act does not apply equally to both secular and religious conduct. *Id.* at 536.

Neutrality requires an "equal protection mode of analysis." *Id.* at 540 (citing *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 696 (1970) (Harlan J., concurring)). Even if a law is facially neutral, unequal impact on a protected group can be evidence of discrimination toward that group. *See Pers. Adm'r of Mass. v. Feeney,* 442 U.S. 256, 273 (1979) (*citing Davis*, 426 U.S.

229; *Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252 (1977)) (establishing that a neutral law's impact can show discriminatory classifications). Failing to abide by the Constitution, even absent discriminatory purpose, can be sufficient to show a violation of equal protection principles. *Wright v. Council of City of Emporia*, 407 U.S. 451, 459 (1972) (finding that the effects of a law enforcing segregation in violation of a court order were sufficient to show a violation of equal protection). Just as the impact of racial discrimination under equal protection defeats neutrality, the impact of religious discrimination on protected groups defeats facially neutral laws. *City of Hialeah*, 508 U.S. at 540. While traditional tools used in equal protection cases do not necessarily show that the Act fails neutrality, *see Arlington Heights*, 429 U.S. at 266-67 (determining neutrality by considering historic background, sequence of events, legislative history, and contemporaneous statements), the overall effect of the Act on the Luddites demonstrates discriminatory application by the government. *See generally Feeney*, 442 U.S. at 273; *City of Hialeah*, 508 U.S. at 535 ("the effect of a law in its real operation is strong evidence of its object").

Even if the government has valid motives, unequally applied laws still discriminate against religious groups. *City of Hialeah*, 508 U.S. at 559 (arguing valid motives that "single out religious practice for special burdens" are not neutral). In *City of Hialeah*, the government adopted ordinances that made it unlawful to sacrifice animals within city limits. *Id.* at 528. Prior to the enactment of the ordinances, members of the Santeria faith who believed in ritual animal sacrifice had attempted to establish a permanent location in Hialeah. *Id.* at 526. This Court determined that, while the ordinances did not mention the Santeria faith, the ordinances specifically targeted the Santeria adherents. *Id.* Specifically, the ordinances outlawed animal sacrifice but allowed a number of unnecessary exemptions permitting the killing of animals. *Id.* at 536. Thus, the government had targeted the killing of animals for religious purposes while granting numerous secular exemptions

for the same conduct. *Id.* at 537. Even though nothing in the ordinances mentioned the Santeria faith or its adherents, the exemptions made it clear that the ordinances only discriminated against Santeria adherents. *Id.* at 538. The government's valid motive of preventing animal cruelty did not achieve its goal, as it burdened religious activities unequally against secular activities. *Id.* at 545.

Like the ordinances in *City of Hialeah*, the Act does not facially discriminate against the Luddites. *See Davis*, 429 U.S. at 246. However, the effects of the Act apply unequally toward the Luddites. *Wright*, 407 U.S. at 459. The government's motive for allowing exemptions is valid; requiring some groups to use a mobile phone is more burdensome than the public health benefit. R. at 19. However, the government's motive is not equally applied and burdens religious conduct unequally against secular conduct. *City of Hialeah*, 508 U.S. at 545; *Davis*, 429 U.S. at 239. The Luddites do not use mobile phones and are thereby burdened by having to carry a mobile phone and SIM card in violation of their religious tenets. R. at 5. By purposely excluding all other exemptions, the government created an unequal impact in the application of the Act. R. at 6. Few, if any, other groups besides the Luddites are burdened by the government's refusal to allow other exemptions. *City of Hialeah*, 508 U.S. at 536. By only burdening the Luddites, the government created a religious gerrymander. *Id.* at 534. The government's strong motive cannot overcome the unequal impact it created. *Wright*, 407 U.S. at 459. Therefore, the burden and unequal impact on the Luddites is not neutral under the Free Exercise Clause. *City of Hialeah*, 508 U.S. at 559.

2. The government has failed to show a strong interest for the categorical and individualized exemptions to apply only to secular groups.

The Act selectively allows exemptions for secular groups at the exclusion of the Luddites without showing why the exemptions are more necessary for secular groups. If the government allows exemptions, the exemptions must not regulate secular and religious groups differently. *Smith*, 494 U.S. at 884 (citing *Bowen v. Roy*, 476 U.S. 693, 706 (1986)). The Free Exercise Clause

requires that religious groups be protected from legislative "inequality," which includes protection from government justifications that determine the need for secular exemptions at the exclusion of religious exemptions. *Id.*; *City of Hialeah*, 508 U.S. at 542. Selectively applied laws fail the general applicability prong of *Smith* absent a strong government interest. 494 U.S. at 884.

If secular exemptions are counter to the government's interest "in a similar or greater degree" than exemptions for religious conduct, the groups must not be treated unequally. *City of Hialeah*, 508 U.S. at 542-43. Here, the government has created a categorical exemption by exempting everyone over the age of 65 from mandatory contact tracing. R. at 6. Similarly, in *City of Hialeah*, the government made categorical exemptions that permitted killing of animals that were "important," "obviously justified," and "[made] sense," even though the exemptions conflicted with the city's interests. 508 U.S. at 544. However, the ordinances could not be generally applicable because, while the secular exemptions "fell within the city's interest," religion alone had to "bear the burden." *Id.* Religious reasons cannot bear the burden when the government's interest is foiled just as much by the secular interest as it would be by the religious exemption. *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-66 (3d. Cir. 1999) (overturning an order that provided an exemption allowing police officers to have a beard for medical reasons, but did not provide a religious exemption, even though the medical exemption undermined the government's interest in uniformity to the same degree as a religious exemption). By exempting every person over the age of 65, the government valued those of a certain age as requiring an exemption from contact tracing more than the Luddites. *See id*. at 366.

However, any person or group who does not participate in contract tracing creates holes in the government's interest to the same degree. *City of Hialeah*, 508 U.S. at 544. Contact tracing is not effective unless there is widespread participation and people proactively take steps to guarantee

their health and the health of others.[3] Failing to participate in contact tracing stops someone from knowing if they may have come into contact with a person who has Hoof and Beak. Regardless of which group is exempt, the government's justification for the exemptions undermines its goals, as every person or group that is exempt decreases the effectiveness of contact tracing. *Id.* Valuing those over the age of 65 as needing an exemption, regardless of the validity of the reason, at the exclusion of the Luddites fails the requirements of general applicability. *Id.* at 546.

The Act also fails general applicability as the government selectively chooses which health-related reasons are eligible for individualized exemptions. The government is not permitted to engage in "individualized governmental assessments of the reasons of the relevant conduct." *Smith*, 494 U.S. at 884. For example, in *Sherbert v. Verner*, 374 U.S. 398, 401 (1963), the state's unemployment benefits program allowed an exemption for "good cause" if an applicant failed to find work. This Court held that the state could not present a valid reason for denying a woman's unemployment claim based on a religious belief not to work on the Sabbath. *Id.* at 407. By permitting the "good cause" exemption, the government was making case-by-case determinations at the expense of the woman's religious beliefs. *Id.* In this case, by determining which health-related reasons are deserving of an exemption, the government is justifying health exemptions as deserving greater protection than potential religious exemptions. *Smith*, 494 U.S. at 884. Like in *Sherbert*, the government is making case-by-case determinations that come at the expense of the Luddites. The government has a strong interest in granting the exemptions because carrying a mobile phone may outweigh the benefits of contact tracing for some groups. R. at 19. However, the government selectively applies exemptions when it assesses the potential burden on individuals

[3] *See generally* P. Tupper et al., *Fundamental Limitations of Contact Tracing for COVID-19*, MEDRXIV (2020), https://doi.org/10.1101/2020.12.15.20248299.

for health reasons. *Sherbert*, 374 U.S. at 407. Similar to *Sherbert*, the government cannot show a valid reason why the Act should selectively apply to secular groups but not the Luddites.

Exempting groups for health-related reasons is a strong government interest. R. at 19, 22. Using this reasoning, the appellate court found the Act to be generally applicable, as the government could have made other exemptions. R. at 40. However, laws of general applicability do not apply to every group that *could* be included; groups that *are* included provide the comparison point. *City of Hialeah*, 508 U.S. at 542. ("categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice"). For free exercise purposes, the Luddites are not being compared against those hitherto dormant groups, but rather groups receiving age and health-related exemptions. Regardless of the government's interest, it cannot come at the price of fatally disenfranchising religious belief. *See Stormans, Inc. v. Wiesman*, 136 S.Ct. 2433, 2437 (2016) (Alito J., dissenting) (arguing that broad secular exclusions negatively impact the government's goal just as much as religious exemptions would).

B. The government has failed to satisfy strict scrutiny.

Laws that fail to be neutral and generally applicable are subject to strict scrutiny. *City of Hialeah*, 508 U.S. at 546. To pass strict scrutiny, a law must advance "interests of the highest order" and be narrowly tailored in "pursuit of those interests." *Id.* This burden rests on the government. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). The government has failed to present a compelling reason, given that the current exemptions already frustrate the government's goals. Neither is the Act the least restrictive means to advance the government's goal, as the government's goal of protecting the public is thwarted by allowing the exemptions.

Including secular exemptions for public health reasons is not a strong enough interest to overcome free exercise protections. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). *Yoder* required

this Court to determine if the state's interest in education was more compelling than an Amish parent's right to raise their child as they believed. *Id.* 213-14. While the state had a strong interest in having an educated population, those interests came at the cost of infringing on Amish values. *Id.* at 219. Ultimately, the state's interest in compulsory education could not overcome free exercise protections, which guarantee the right to follow religious values and beliefs. *Id.* at 235. Protecting public health and safety is a compelling government interest. *Id.* at 220; *S. Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting). However, the government does not have a strong interest in determining that the Luddites' religious values do not permit an exemption. *Id.* at 219. Even though public health is an important interest, like in *Yoder*, the government's action is not permissible when it burdens religion. *Id.* Contact tracing may be effective and necessary, but refusing to allow other exemptions is not compelling when secular exemptions already exist and only the Luddites are burdened.

Even if protecting the public health is a compelling interest, the Act is not narrowly tailored. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997). A law is narrowly tailored if it is the least restrictive means of accomplishing the government's goal. *Town of Gilbert,* 576 U.S. at 172. Choosing which groups are granted exemptions is not the least restrictive means the government can pursue to protect public health. *Id.* The government needs uniform application to inform members of the public that they may have been in contact with someone who has Hoof and Beak.[4] However, the government has chosen not to apply the Act uniformly. R. at 6. For example, health-related reasons such as Ischemic heart disease are an allowable exemption. R. at 22. Each

[4] Tupper, *supra* note 3.

year, there are over 800,000 cases of coronary (Ischemic) heart disease in the United States.[5] By exempting thousands of individuals, the Act is underinclusive, as it excludes significant portions of the population needed for effective contact tracing. *City of Hialeah*, 508 U.S. at 546. The objectives of the Act are not pursued "with respect to analogous non-religious conduct" and force the Luddites to bear the burden. *Id.* at 546-47. Arbitrarily prohibiting all other exemptions does not protect the public health when the government has already determined secular exemptions are not a significant threat. Therefore, the government cannot satisfy strict scrutiny. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603, 2615 (2020) (Kavanaugh J., dissenting) (compelling governmental interests do not justify disparate religious treatment even during a crisis).

1. The Luddites have a hybrid-rights claim of free exercise and free speech.

Recognizing that free exercise claims are often asserted along with other constitutional protections, such as freedom of speech, this Court in *Smith* held that a neutral, generally applicable law can still violate First Amendment protections when two constitutional claims are present. *Smith*, 494 U.S. at 881 (citing *Yoder*, 406 U.S. at 236 (1972) (applying strict scrutiny where the hybrid of a free exercise claim and parental rights claim defeated government interest in compulsory education)); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 824 (1943) (finding that the hybrid of free speech and free exercise claims overcame the government interest in compulsory flag salute). While *Smith* generally requires a rational basis review for a neutral, generally applicable law, a hybrid-rights claim requires strict scrutiny. *Smith*, 494 U.S. at 881-82.

Petitioner has asserted a claim showing that the Act is not neutrally and generally applicable as applied to the Luddites, as it violates their free exercise of religion. *See supra* Section

[5] *2021 Heart Disease and Stroke Statistical Fact Sheet At-a-Glance*, AMERICAN HEART ASS'N, https://www.heart.org/-/media/files/about-us/statistics/2021-heart-disease-and-stroke-ucm_505473.pdf?la=en. (last visited Jan. 31, 2020).

IIA. However, even if this Court were to find that the Act is neutral and generally applicable, Petitioner has a hybrid-rights claim of free exercise and free speech. *See Telescope Media Grp. v. Lucero*, 936 F.3d 740, 759 (8th Cir. 2019) (recognizing a hybrid-right when a free exercise claim was connected with a "communicative activity"). While this Court has yet to rule on the preciseness of the hybrid-rights exemption articulated in *Smith*, appellate courts applying *Smith* have found hybrid-rights to exist when there is a "colorable" claim. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004) (finding the *Smith* exception to apply when there is "a fair probability, or a likelihood of success on the companion claim"). The Act compels individuals to carry a mobile phone. R. at 2. Therefore, this mandate requires the Luddites, who oppose the use of technology, to participate in compelled speech. *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961) (prohibiting state law requiring elected official to profess faith in God as a pre-condition for public office). Even mandating that individuals carry a mobile phone is a violation of compelled speech, as a mobile phone is inherently used for communication. *See generally Wooley v Maynard*, 430 U.S. 705 (1975) (holding that a state could not require its residents to display an ideological message on their privately-owned vehicles via license plates). Therefore, Petitioner's case is a colorable free speech claim and has a likelihood of success. *Johnson*, 356 F.3d at 1295.

2. The Act unconstitutionally coerces the Luddites to violate their beliefs.

Even if the Act were found to be neutral and generally applicable, strict scrutiny would still apply as coercion, whether an indirect or a direct prohibition, triggers strict scrutiny. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988); *Espinoza*, 140 S.Ct. at 2257. The Free Exercise Clause prohibits placing a religious group in a choice of surrendering their religious beliefs, protected by the Free Exercise Clause, to comply with a law. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2022 (2017). There are situations, however, when the government can compel individuals to participate in an activity regardless of religious beliefs. *U.S.*

v. Lee, 455 U.S. 252, 257 (1982) (finding that the government can compel participation in nation-wide taxation for cohesiveness, as the business owners freely entered into commercial activity regulated by the government).

Just because it is more difficult for an individual to practice their religion does not mean the government has necessarily coerced that individual. *Lyng*, 485 U.S. at 451. There is a distinction between making it more difficult to practice a religious belief and coercing someone to violate their beliefs. *Id.* at 459. The law in *Lyng* made it more difficult for Native Americans' to practice their beliefs on land traditionally used for their religious practices. *Id.* at 442. While this Court held that it was permissible for the government to use the land over the objections, it distinguished that this was a large public program applying to everyone except for these Native Americans and that their "veto" would override the program. *Id.* at 452. In contrast to *Lyng*, the government in the present case is not making it harder for the Luddites to practice their religion but making it impossible for them to adhere to their religious values set forth in their Community Orders. R. at 23. By not allowing the Luddites an exemption and mandating them to use mobile phones, the government is requiring the Luddites to make a choice between adhering to their religious beliefs or complying with the law. *See Comer*, 137 S.Ct. at 2022. The Luddites' claim survives strict scrutiny here, because unlike in *Lee* or *Lyng*, the Luddites are not trying to completely overturn a uniform system or gain a rare exemption from a law. Rather, the Act is full of exemptions, and the Free Exercise Clause requires the Luddites be exempt.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court AFFIRM the decision of the United States Court of Appeals for the Eighteenth Circuit with respect to the free speech issue and REVERSE with respect to the free exercise issue.

CERTIFICATE OF COMPLIANCE

In accordance with Rule III.C.3 of the Official Rules of the 2021 Seigenthaler-Sutherland Moot Court Competition, we hereby submit this certificate of compliance to certify that:

(i) The work product contained in all copies of this team's brief is in fact the work product of the team members, and only the team members;

(ii) The team has complied with the governing honor code of our school; and

(iii) The team has complied with all Rules of the Competition.

Respectfully submitted,

/s/ Team 1
Team 1
Counsel for Petitioner

January 31, 2021

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.

APPENDIX B

STATUTORY PROVISIONS

42 U.S. Code § 2000bb-1(a). Free exercise of religion protected.

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

42 U.S. Code § 2000bb-3(b). Applicability.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.