No. 20-9422

In the

Supreme Court of the United States

LEVI JONES,

Petitioner,

v.

CHRISTOPHER SMITHERS, Commissioner of the Federal Communications Commission,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighteenth Circuit

BRIEF FOR RESPONDENT

THE CATHOLIC UNIVERSITY OF AMERICA
SEIGENTHALER -SUTHERLAND MOOT COURT COMPETITION

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January 31, 2021

I. Questions Presented

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

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A. Factual Summary

First identified in December 2019, the Hoof and Beak Disease ("Hoof and Beak") is an ongoing global pandemic that spreads person-to-person and is highly contagious, causing severe flu-like symptoms and skin rashes. Op. 1. In the United States there are 70 million confirmed cases and 230 thousand deaths, primarily affecting children and young- to middle-aged adults. *Id.* While the world awaits a vaccine, the U.S. Congress passed the Combat Hoof and Beak Disease Act ("CHBDA" or "the Act"). *Id.* Executed and enforced by the Federal Communications Commission ("FCC"), the Act mandates contact tracing through government-provided SIM cards for mobile phones. Stipulation ¶ 2; CHBDA § 42(a). If a person does not have a mobile phone, the Act mandates both a phone and SIM card be provided to them. CHBDA § 42(b)(1)(A). Christopher Smithers ("Respondent" or "Smithers") spearheads the nationwide contact tracing efforts. Stipulation ¶ 2.

The contact tracing program aims to "protect Americans, their families, and their communities by letting people know that they may have been exposed to Hoof and Beak [] and should therefore monitor their health for signs and symptoms of Hoof and Beak." CHBDA § 42(a)(1). Senior citizens over sixty-five years of age are exempt from the law. CHBDA § 42(b)(1)(B). Health exemptions are also granted on a case-by-case basis. CHBDA § 42(b)(1)(C). No other type of exemption is permitted. CHBDA § 42(b)(1)(D). Due to the immediate need to implement the Act, the Religious Freedom and Restoration Act ("RFRA") is inapplicable to the Act. CHBDA § 42(f)(8).

Federal facilities in each state distribute the mandated SIM cards. CHDBA § 42(b). Both inside and outside the facilities, everyone must wear a mask and keep six feet apart from one

another. CHBDA § 42(b)(2). The penalty for violating the Act is "up to one year in jail and/or a fine of up to $2,000." CHBDA § 42(c). In response to growing protests at the facilities, Congress issued an amendment to the Act. Stipulation ¶ 8. Subject to the discretion of local facility officials, "[p]rotestors are prohibited within sixty feet of the facility entrance, including public sidewalks, during operating hours." CHDBA § 42(d), (e). No more than six people can protest in a group, and the zone must be "clearly marked and posted." CHDBA § 42(d)(1)-(2).

Petitioner Levi Jones ("Jones" or "Petitioner"), the leader of the State of Delmont's Church of Luddite, opposed the Act because it went against the Delmont Luddite's religious beliefs. Op. 2. While the Church of Luddite has no central authority, each congregation, sets its own rules called the "Community Orders." Stipulation ¶ 10. The Community Orders are a strict set of rules intended to preserve family unity, faith, community, and cultural identity. Stipulation ¶ 10. Pursuant to their Community Order, the Delmont Luddites are skeptical of all technology because of the harm it may bring to their community. Jones Aff. ¶ 5. Particular technology may be accepted if there is consensus among the congregation. Stipulation ¶ 13. For instance, the Delmont Luddite shares a landline phone that may only be used for emergencies. Jones Aff. ¶ 5.

On May 1, 2020, Jones and a group of seven Luddites went to the facility to protest the Act's mandate and encourage others to reject it. Op. 2. Because of their religious beliefs, they feel that speaking with people directly is the only way to communicate their message. Jones Aff. ¶ 7. They stood at least sixty feet away from the facility entrance. Op. 2. Wearing masks and remaining six feet apart, they walked in and out of the buffer zone to talk with people in line. Jones Aff. ¶ 10. Police officers told Jones's group to leave because their group size violated the mandate by one. Jones Aff. ¶ 10. Jones refused to leave and was arrested, spending four days in jail and paying a $1,000 fine. Mathers Aff. ¶ 8; Jones Aff. ¶ 10. On May 6, 2020, Jones returned

to the facility with five other Luddites. A police officer recognized Jones and said, "Hey, aren't you that anti-tech preacher? You can't be here." Jones Aff. ¶ 12. Jones refused to leave. Mathers Aff. ¶ 8. He was arrested, spending five days in jail and paying a $1,500 fine. Jones Aff. ¶ 12.

During both protests, Maura Mathers and the Mothers for Mandates ("MOMs") were also present. Mathers Aff. ¶ 6. On May 1, a group of five MOM members were present, and, on May 6, a group of seven MOM members returned. Mathers Aff. ¶ 6; Jones Aff. ¶ 12. The MOMs support the Act's mandate and encourage compliance. Op. 2. Some of the MOMs stood up to five feet within the buffer zone but remained stationary and did not approach people. Mathers Aff. ¶ 6. They also had a table six feet away from them with pamphlets. Mathers Aff. ¶ 6. On both days, no one from the MOMs group was arrested or fined. Mathers Aff. ¶ 9.

B. Procedural History

In the District Court for the District of Delmont, Petitioner Jones sued Respondent Smithers, the FCC Commissioner. Op. 3. Petitioner asserted that the FCC, through the CHBDA, violated his rights to freedom of speech and free exercise of religion pursuant to the First Amendment to the United States Constitution. Op. 3. On October 5, 2020, Petitioner and Respondent filed cross motions for summary judgment, and the District Court granted Respondent's motion with respect to the free speech issue and denied with respect to the free exercise issue. Op. 3, 20. Consequently, the court denied Petitioner's motion with respect to the free speech issue and granted with respect to the free exercise issue. Op. 20.

On the free speech issue, the court reasoned the Act is content-neutral because it does not explicitly regulate speech. Op. 12. Rather, it merely restricts where people can protest and how many protestors can be in a group. Op. 12. Secondly, the court held that the Act is sufficiently narrowly tailored to the FCC's substantial interest in protecting Americans from the spread of

Hoof and Beak. Op. 15. Lastly, the court held the regulation leaves open "ample alternatives" for speech because protests are allowed under the Act. Op. 15-16. On the free exercise issue, the court stated that the FCC mandate does not facially discriminate against the Luddite religious practice. Op. 18. However, the court reasoned the mandate is not generally applicable because the burden of carrying a SIM card and mobile phone impacts religiously motivated conduct. Op. 20. Meanwhile, the FCC allows non-religiously motivated exemptions. Op. 20.

Subsequently, both parties appealed to the Eighteenth Circuit Court of Appeals, and the court reversed the District Court's judgment in its entirety. Op. 40. The Eighteenth Circuit remanded the case with instructions to grant Respondent's motion for summary judgment with respect to the free exercise issue and deny with respect to the free speech issue. Op. 40. Consequently, the opinion also instructs to grant Petitioner's motion for summary judgment with respect to the free speech issue and deny with respect to the free exercise issue. Op. 40.

On the free speech issue, the Eighteenth Circuit held that although the mandate is content neutral, it is not narrowly tailored. Op. 38. They reasoned that the sixty-foot buffer zone creates a substantial burden on speech without advancing the FCC's goals. Op. 38. On the free exercise issue, the court held that the mandate is neutral. Op. 39. The mandate is aimed at the current public health crisis and no anti-Luddite sentiments were present in the legislative history or the mandate itself. Op. 39. The mandate is also one of general applicability because the government must not provide every possible exemption. Op. 40.

V. Summary of Arguments

First, an person's First Amendment right of free speech is not violated by a law that requires protests be kept to groups of six people outside of a sixty-foot buffer zone in front of a

federal facility during operating hours. This Court has long recognized that restrictions on speech are valid so long as they are content-neutral, narrowly tailored to a significant government interest, and leave open ample alternatives for communication of information. While large buffer zones have been struck down on narrowly tailored grounds in the past, it is crucial to take into account that the current pandemic requires everyone to maintain six feet of distance between one another to avoid spreading Hoof and Beak. Because of this, the Amendment to the CHBDA does not burden substantially more speech than necessary to help the government stop the spread of the disease. This Court should consider the public health emergency when determining the constitutionality of the Amendment. Accordingly, this Court should find the Amendment is a valid time, place, and manner regulation.

Second, an individual's First Amendment right of free exercise is not violated by a law that requires them to carry a mobile phone with a SIM card to contact trace Hoof and Beak disease. The CHBDA is neutral on its face and in its objective because the mandate aims to promote the general welfare, health, and safety of the entire American population. The Act is generally applicable, despite only granting health-related exemptions, because the government must not grant every possible exemption. The Act only incidentally affects the Petitioner's religious group's practices. Even if the Court finds that the Act is neither neutral nor generally applicable, the Act survives strict scrutiny because it has a compelling state interest in response to the ongoing pandemic. This Court should consider the life-threatening Hoof and Beak disease when determining the constitutionality of the mandate. Therefore, this Court should find the CHDBA contact tracing mandate is a valid, neutral, and generally applicable law.

VI. Standard of Review

The Eighteenth Circuit's reversal of summary judgment with respect to the free speech issue and the free exercise issue is reviewed de novo. *Snyder v. Phelps*, 562 U.S. 443, 453-54 (2011). In First Amendment cases, the Court "is obligated 'to "make [an independent examination of the whole record"] in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.*; *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984). This Court "has an 'obligation to test challenged judgments against the guarantees of the First . . . Amendment[],' and in doing so 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.'" *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964). "The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's de novo review." *Rosenbloom v. Metromedia*, 403 U.S. 29, 54 (1971).

VII. Arguments

A. The amendment to the Combat Hoof and Beak Act is a valid time, place, and manner restriction on speech because it is (1) narrowly tailored to serve the significant governmental interest of stopping the spread of Hoof and Beak and (2) leaves open ample alternative channels for communication.

The Eighteenth Circuit Court of Appeals erred in holding that the Amendment to the Combat Hoof and Beak Act ("the Amendment") was not a valid time, place, and manner restriction on speech. Op. 36. The Free Speech clause of the First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. And there is no doubt that protesting on an issue of public concern is at the core of the First Amendment. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). However, as this Court's precedent shows, "[e]ven protected

speech is not equally permissible in all places and at all times." *Id.*, quoting *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 799 (1985).

The government can confine speech within a time, place, and manner restriction so long as it (1) is content-neutral; (2) is "narrowly tailored to serve a significant governmental interest"; and (3) "leave[s] open ample alternative channels for communication." *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984). A restriction must meet all three prongs of this test to be constitutional. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Here, Congress enacted a law that meets this test. If the Court were to find otherwise, this would go against precedent and impede the government's ability to keep its citizens safe.

1. <u>The Amendment is a content-neutral restriction on speech in a traditional public forum because it does not single out any one viewpoint as prohibited</u>.

The Amendment was enacted in response to an increasing number of protests at the federal facilities charged with distributing SIM cards under the Combat Hoof and Beak Act ("the Act" or "CHBDA"). Op. 2. The Amendment bars protests within sixty feet of a federal facility that distributes SIM cards. CHBDA § 42(d). Protestors cannot be in groups of more than six persons. CHBDA § 42(d)(1). The buffer zone is inclusive of public sidewalks, only in place during operating hours, and must be "clearly marked and posted." CHBDA § 42(d), (d)(2) . Enforcement is subject to local facility officials' discretion because of the differences in location characteristics of each facility. CHBDA § 42(e). 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).

It is undisputed that the Amendment effects speech in a traditional public forum. Stipulation ¶ 5. The language of the Amendment includes public sidewalks, which have historically been upheld as a place for public assembly and debate. *See Frisby*, 487 U.S. at 480.

As such, they have been treated as traditional public fora, enjoying special protection under the First Amendment. *See id.* As applied to the Delmont facility, the Amendment effects a traditional public forum because the buffer zone includes a public sidewalk. Op. 7. at 480-81. However, this does not preclude the government from enacting a content-neutral time, place, and manner restriction so long as it is reasonable. *McCullen v. Coakley*, 573 U.S. 464, 477 (2014).

Both the lower courts were correct in holding that the Amendment is content neutral. Op. 12 & 36. A law is content neutral if it does not implicate the content of speech on its face. *Clark*, 468 U.S. at 293. Even if a law is facially content neutral, it will be deemed content based if it (1) cannot be "justified without reference to the content of the regulated speech" or (2) was adopted because of the government's disagreement with a particular viewpoint. *Ward*, 491 U.S. at 791. However, a neutral law does not become content based because in practice it disproportionately affects certain topics or types of speech. *McCullen*, 573 U.S. at 480.

Here, the Amendment was adopted out of concern that all protests at federal facilities could worsen the spread of Hoof and Beak. *See* op. 33; *see also* stipulation ¶ 8. On its face, the Amendment does not single out any one viewpoint as being excluded from the restriction. *See* CHBDA § 42(d). In practice, it does not require an officer to judge the message of a protest to determine if it violates the act. *McCullen*, 573 U.S. at 479. An officer only needs to look to see where a protestor is standing and how many protestors make up a group to determine if the Amendment has been violated. As a content-neutral law, the Amendment is valid so long as it is narrowly tailored and leaves open ample forms of communication. *Ward*, 491 U.S. at 791.

2. The Amendment is narrowly tailored to serve a significant governmental interest because it does not burden substantially more speech than necessary to achieve the government's goal of stopping the spread of Hoof and Beak.

The Amendment contains three restrictions on the time, place, and manner of protests at federal facilities. These restrictions are invalid unless they are narrowly tailored to serve a significant governmental interest. *Ward*, 491 U.S. at 79. A restriction is narrowly tailored if it does not "burden speech more than necessary" in order to meet a significant governmental interest. *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 765 (1994). However, a regulation does not have to be the least restrictive means of meeting the government's interest to be valid. *Ward*, 491 U.S. at 799. It is undisputed that the government has a significant interest in promoting public health and safety to combat Hoof and Beak, especially as there is no vaccine to mitigate the spread of the disease. *See* op. 1 & 37. In light of this interest, the unusually narrow parameters of the restrictions are justified to accommodate these unusual times.

a. The sixty-foot buffer zone is justified both because the restriction does not burden substantially more speech than necessary and because those in line at the federal facility are a captive audience.

The restriction that petitioner takes most issue with is the sixty-foot buffer zone in front of a federal facility in which protesting is prohibited. *See* CHBDA § 42(d). Despite the Delmont facility clearly marking the zone parameters, petitioner and other Delmont Luddites continually and blatantly violated the zone by walking up to people in line outside the facility and expressing their displeasure with the Act. Op. 33-34. While it is unclear from the record, we will assume that the protestors did keep six feet of space between themselves and those in line in accordance with the Act. *See* CHBDA § 42(b)(2). Petitioner contends, and the appeals court agreed, that the

sixty-foot buffer zone is not narrowly tailored because it does not allow for flexibility. Op. 38. Additionally, petitioner argues that the regulation allows for selective enforcement. Op. 12. For two reasons, this is not the case.

First, the sixty-foot buffer zone does not burden more speech than necessary because the Amendment allows for flexibility in enforcement. CHBDA § 42(b)(2). The lower court incorrectly relied on this Court's invalidation of a similar restriction in *McCullen v. Coakley* because both laws laid out a fixed zone. Op. 37-38. In *McCullen*, Massachusetts enacted a law that made it a crime to knowingly stand within a thirty-five feet in front of any entrance of driveway of health clinics where abortions were performed, inclusive of public sidewalks. *McCullen*, 573 U.S. at 469. The *McCullen* petitioners challenged the law because in its application the buffer zone was much wider, impeding their ability to protest in their preferred method: one-on-one conversations with women approaching clinics to persuade them not to get an abortion. *Id.* at 472. While petitioners here share the same preferred method of protest as the petitioners in *McCullen*, the laws are not the same.

Here, the Amendment allows for discretion in enforcement "in acknowledgment of the varied location characteristics for each center." CHBDA § 42(e). This discretion is what was missing from the law in *McCullen* because it allows officials to account for, for example, an entryway that is inside a lobby and decrease the size of their buffer zone accordingly. The language "varied location characteristics" makes it clear that discretion only goes to how strictly officials want to enforce the exact parameters set out by the Amendment. It does not give them discretion to arrest only those they disagree with. While petitioners claim this provision is what caused them to be arrested when another protest group, Mothers for Mandates, was not, *McCullen* is instructive there as well. Jones Aff. ¶ 12. As the Court points out, unequal

enforcement by police does not go to the validity of a time, place, and manner restriction, but to viewpoint discrimination by police. *McCullen*, 573 U.S. at 484. That is not a claim that petitioners have raised, and it cannot be used to invalidate the Amendment.

Additionally, the unprecedented circumstances raised by Hoof and Beak disease cannot be understated in considering the validity of the sixty-foot buffer zone. All individuals must stay six feet apart from one another or risk being fined or imprisoned, or both, under the Act. *See* CHBDA § 42(b)(2), (c). This shrinks the buffer zone considerably because, whereas a pre-pandemic buffer zone of sixty feet may accommodate upwards of forty people, the buffer zone here can only accommodate a maximum of ten people. This significantly increases petitioner's ability to persuade people who will fall just inside or outside the buffer zone. The social distance requirement also makes it much easier for petitioner to track individuals headed in or out of the buffer zone, a problem the *McCullen* petitioners expressed having with a fixed buffer zone. *McCullen*, 573 U.S. at 487.

Second, individuals who wait in line at a federal facility are more akin to the captive audience in a home. In *Frisby v. Schultz*, this Court upheld an ordinance that banned picketing in front of a private residence in large part because people in their homes are captive audiences, unable to avoid speech they are unwilling to hear. *Frisby,* 487 U.S. at 484. Here, almost everyone is required under the Act to get a SIM card for contact tracing. Op. 2; *see also* CHBDA § 42(a). The only place an individual can get the mandated SIM card is at a local federal facility. CHBDA § 42(b). The social distance requirements, as mentioned above, means that individuals cannot even push inside the federal facility to avoid interacting with protestors. They must remain in line, outside, within view, if not within hearing, of any protestor for or against the government regulations. The buffer zone gives individuals some breathing room from listening

to unwanted speech and ensures that the main purpose of the Act can be carried out safely. As such, it is a narrowly tailored restriction on the place speech may take place.

b. The limitation of protestors to six people is justified in light of the public health emergency created by Hoof and Beak disease.

The Amendment also limits groups of protestors to six people to ensure federal facilities can carry out their mandate safely and efficiently. This restriction is narrowly tailored in light of the highly contagious nature of Hoof and Beak. *See* op. 1. While there is little in the way of precedent for restricting the group size of a protest, decisions of the lower courts in enforcing executive orders limiting group size for the Covid-19 pandemic can be instructional here.

The U.S. District Court for the District of Maryland upheld the Maryland Governor's executive order that prohibited gatherings of more than ten people. *Antietam Battlefield KOA v. Hogan*, 461 F. Supp.3d 214, 224 (2020). The court recognized the order as a time, place, and manner restriction on speech, but reasoned that "'[u]nder the pressure of great dangers,' constitutional rights may be reasonably restricted 'as the safety of the general public may demand.'" *Id.* at 235, quoting *In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020) (internal citation omitted). The court found that the highly contagious nature of Covid-19 justified the restriction. *Id.* Similarly, the U.S. District Court for the Eastern District of California upheld the California Governor's stay at home order, including a blanket ban on permits for protests at the State Capitol. *Givens v. Newsom*, 459 F. Supp. 3d 1302, 1311 (E.D. Cal. 2020). The court reasoned that while under normal circumstances a blanket ban on permits would not seem to be narrowly tailored, "'narrow' in the context of a public health crisis is necessarily wider than usual." *Id.* at 1313. The same issues of containment afflict the government now with Hoof and Beak. The

Court should adopt the reasoning of the lower courts in these cases because no containment effort will succeed if the government cannot regulate the size of groups in public.

Here, the government has not gone so far as to limit all groups to six people or ban protests all together. Instead, it has chosen to target only "the exact source of 'evil' it seeks to remedy" by reducing the possibility of large crowds amassing at federal facilities. *Frisby*, 487 U.S. at 485. With hospitals already straining under the weight of Hoof and Beak patients, it is imperative that the government can restrict protest size at federal facilities so that the measure the government has enacted to help stop the spread of Hoof and Beak does not become the source of an outbreak. *See* op. 1. In light of the highly contagious nature of Hoof and Beak, limiting protestors to groups of six allows multiple protests to occupy space outside the buffer zone while maintaining the safety of the individuals attempting to obtain SIM cards to comply with the mandate. As such, it is a narrowly tailored restriction on the manner of speech.

3. <u>The Amendment does not ban any form of communication at the federal facility outside of the buffer zone</u>.

The last step in determining a valid content-neutral regulation is whether or not it "leave[s] open ample alternative cannels for communication of the information." *Clark*, 468 U.S. at 293. Petitioner alleges that one-on-one confrontation with people is the "only acceptable" method of protest for the Delmont Luddites. Jones Aff. ¶ 7. Speaking loudly, making signs, and distributing literature are all undesirable alternatives because they are, respectively, offensive or require too much technological involvement to produce. Id. While petitioner's religious restrictions are understandable, "the First Amendment does not guarantee the right to communicate one's views . . . in any manner that may be desired." *Heffron v. International Soc.*

for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981). Nor do religious organizations have a right to communicate its message superior to other organizations. *Id.* at 653.

Even accounting for Petitioner's religious restrictions, the Amendment allows for ample alternative forms of communication. For instance, one-on-one conversations can still be had outside of the buffer zone. Petitioner is free to discuss his views six feet away with anyone coming or going from the facility so long as he is outside the zone. Additionally, while petitioner cannot make mass produced signs, the most effective protest signs or banners can be homemade, with nothing more than a piece of recycled cardboard and a permanent marker. Likewise, handmade flyers, while more labor intensive, are also a viable form of communication so long as they are distributed in such a way as to maintain social distance.

It would be unfair to say that this regulation does not burden petitioner's speech. It certainly does. However, the Amendment burdens speech no more than necessary to protect everyone from the spread of Hoof and Beak. While petitioner's speech is curtailed, it is not silenced, and he can protest in any legal way he sees fit outside of the sixty-foot buffer zone and with five of his fellow Luddites. The Amendment meets the criteria for a valid time, place, and manner restriction and does not violate the Free Speech clause of the First Amendment.

B. The Eighteenth Circuit Court of Appeals did not err 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.

Under the Free Exercise Clause of the First Amendment, "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 held, however, that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general

applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring)).

While the Religious Freedom Restoration Act ("RFRA") prohibits the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," RFRA allows Congress to explicitly exclude RFRA's application to new legislation by reference to it. Op. 16-17. *See* CHBDA § 42(f)(8); *see also* 42 U.S.C. § 2000bb-3(b)). Because Congress explicitly excluded RFRA in the CHBDA, the federal mandate is analyzed purely under the Free Exercise Clause.

Because the CHBDA is a neutral law of general applicability, it is constitutional under the Free Exercise Clause. The federal government can require persons to carry mobile phones with government-issued SIM cards in compliance with the CHBDA, even if the use of such technology conflicts with an individual's religious beliefs. Even if a court should find that the Act is not neutral or generally applicable, the CHBDA remains constitutional because it survives strict scrutiny.

1. <u>The mandate is content neutral because it is both facially neutral and neutral in its objective.</u>

The first prong of the *Smith* test requires that the mandate be content neutral. *Smith*, 494 U.S. at 879. The mandate must be both facially neutral and neutral in its objective, meaning, that it cannot exhibit "even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1730 (2018) (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 531, 534 (1993)). The CHBDA satisfies the requisite neutrality because it is facially neutral and neutral in its objective.

a. The mandate is facially neutral because it does not refer to a religious practice in language or context.

"[T]he minimum requirement of neutrality is that a law not discriminate on its face." *Church of the Lukumi*, 508 U.S. at 533. The government "may not 'single out an individual religious denomination or religious belief for discriminatory treatment.'" *Roman Catholic Archdiocese of San Juan, P.R. v. Feliciano*, 140 S. Ct. 696, 699 (2020) (citing *Murphy v. Collier*, 139 S. Ct. 1111, 1111 (2019) (Kavanaugh, J., concurring)); *Church of the Lukumi*, 508 U.S. at 524-25; *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953). When considering a law's facial neutrality, the Court "must begin with the text." Op. 18. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or text." Op. 18.

The CHBDA is facially neutral because it does not discriminate against or single out any religious denomination or belief. The Act's plain text does not target the Luddites or any other religious group. While the CHBDA does refer to the carrying of a mobile phone, conduct prohibited by the Delmont Luddites, this reference reflects the Act's secular purpose of promoting contact tracing, which protects the health and safety of the people in the midst of a global pandemic. The lack of reference to any religious group renders the Act facially neutral.

b. The mandate is neutral in objective because it exhibits neither subtle departures from neutrality nor covert suppression of particular religious beliefs.

Once found to be facially neutral, a law must be more carefully scrutinized for neutrality in its objective. "[S]tate action that 'targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.'" Op. 18-19 (quoting *Church of the Lukumi*, 598 U.S. at 534). The Court determines whether the object of a law is neutral by analyzing "both direct and circumstantial evidence such as 'the historical background

of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body.'" Op. 19 (quoting *Church of the Lukumi*, 598 U.S. at 534 (citation omitted)).

Beyond its facial neutrality, the CHBDA is neutral in its objectives. As the Eighteenth Circuit held, a deeper analysis of the Act reveals that it exhibits neither subtle departures from neutrality nor covert suppression of particular religious beliefs. The record reveals that "there were no anti-Luddite statements made by officials; nor does anything else in the legislative history suggest a discriminatory intent or motive." Op. 39.

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires;" thus, the Clause "obviously excludes all 'governmental regulation of religious *beliefs* as such.'" *Smith*, 494 U.S at 884 (emphasis in the original) (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)). However, while the government "cannot interfere with mere religious belief and opinions, [it] may with practices." *Smith*, 494 U.S. at 886. Finding that "the tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief," the Court upheld the "neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion." *Id.* at 886-87.

Here, while the Luddites may hold beliefs restraining the use of mobile phones, the government may interfere with the harmful practice of refusing to use a mobile phone with a government issued SIM card for the purposes of contact tracing in the time of a global pandemic. Like the Amish employer, the Delmont Luddites seek a religious exemption from a federal mandate. This Court must reject the claim because the contact tracing system could not function

properly if denominations were allowed to challenge the mandate's requirement. The mandate aims to protect all persons living in the United States from unnecessary exposure to an unprecedented illness; allowing certain groups to avoid participation in contact tracing on religious grounds prevents the federal government from effectively protecting the people within its jurisdiction. This neutral, generally applicable regulatory law must be upheld, despite the fact that it may compel activity forbidden by an individual's religion.

c. The lack of exemption for religion does not result in the mandate's imposition of a substantial burden on the practice of religion.

A statute may include a particular exemption and not others "so long as [the] exemption is tailored broadly enough that it reflects valid secular purposes." *Gillette v. U.S.*, 401 U.S. 437, 454 (1971). Where "the affirmative purposes underlying [a law] are neutral and secular, [and] valid neutral reasons exist for limiting the exemption[s]" the law does not place an undue burden on a particular religion. *Id.* at 454. "To say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required . . . ." *Smith*, 494 U.S. at 890.

Here, while the CHBDA includes health-related exemptions and not others, the mandate is valid because these exemptions are tailored broadly enough that they reflect valid secular purposes. The Act allows federal facility officials to grant exemptions for senior citizens over sixty-five years of age and for health reasons on a case-by-case basis. CHBDA § 42(b)(1)(B)-(C). No other type of exemption is permitted. CHBDA § 42(b)(1)(D). Although the Act categorically denies religious exemptions, the exemptions that are allowed are broadly tailored in that they apply to everyone with a valid health-related reason for seeking such exemption. Senior citizens over sixty-five years of age, for example, are not within the

population that would require notice of exposure to Hoof and Beak because the disease "primarily affects children and young- to middle-aged adults." Op. 1.

Further, those granted a health exemption on a case-by-case basis fall within the population for whom contact tracing would be futile, such as individuals with cognitive or physical impairments that would prevent them from remembering and using their phones. Op. 22. For other individuals, however, contact tracing could still prove effective in preventing the spread of Hoof and Beak. The CHBDA and its exemptions reflect the valid secular purpose of "protect[ing] Americans, their families, and their communities by letting people know that they may have been exposed to Hoof and Beak [] and should therefore monitor their health for signs and symptoms of Hoof and Beak." CHBDA § 42(a)(1). The affirmative purpose underlying the CHBDA is neutral and secular, and valid neutral reasons exist for limiting the exemptions.

Petitioner may argue that "a law that discriminates against religiously motivated conduct is not 'neutral.'" *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2436 (2016) (Alito, J., dissenting). However, the CHBDA does not "in a selective manner impose burdens only on conduct motivated by religious belief." *Church of the Lukumi*, 508 U.S. at 543. Even a law that "impose[s] substantial burdens on religious exercise" may be found not to unconstitutionally encumber the practice of religion. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2611 (2020) (Alito, J., dissenting). In *Sisolak*, for example, the Governor of Nevada issued a directive "severely limit[ing] attendance at religious services" during the COVID-19 pandemic while allowing "casinos and certain other favored facilities" to admit fifty percent of their maximum occupancy. 140 S. Ct. at 2604.

The CHBDA may have a greater impact on the Delmont Luddites than on any other religious or recreational group because of their opposition to mobile phones, but this does not

qualify as "burden[ing] only… conduct motivated by religious belief." *Church of Lukumi*, 508 U.S. at 543. Rather, the Act places the onus of carrying a mobile phone on all persons living in the United States, regardless of religious belief. In situations such as this, where a "neutral, generally applicable law… incidentally burden[s] the exercise of free religion," the Free Exercise Clause is not violated. *Holt v. Hobbs*, 574 U.S. 352, 356-57 (2015). The CHBDA merely regulates activity which happens to intersect with the religious beliefs of a group not named in the Act. Carrying a mobile phone—or refusing to—is not specifically religious conduct; thus, while the Act may impact a religious group's behavior, it is still neutral in its objective.

2. The CHBDA mandate is generally applicable because it is not the first instance of government regulation incidentally abridging a religious practice, and the government is not required to grant every exemption.

The Court has never held that religious beliefs excuse an individual from complying with laws contrary to those beliefs. *Smith*, 494 U.S. at 878-879. The rationale is to prevent religion from positioning itself to be superior to the law. *Reynolds v. United States*, 98 U.S. 145, 166-167 (1879). Nonetheless, it is unconstitutional to ban religiously motivated acts and abstentions because of the religious beliefs they display. *Smith*, 494 U.S. at 877. Petitioner Jones, on behalf of the Delmont Luddite sect, argues that the CHBDA mobile phone mandate is not generally applicable because it requires performance of a forbidden act in his religion. However, this is not the first instance of a state or federal government regulation incidentally abridging a religious practice. *See, e.g.*, *Gillette*, 401 U.S. at 461 (sustaining the military Selective Service System against free exercise claims of persons who opposed war on religious grounds); *Prince v. Massachusetts*, 321 U.S. 158, 158 (1944) (holding that a state's child labor laws may prosecute a mother for her religiously-motived conduct of using her children to dispense literature in the

streets). Thus, the CHBDA mandate, although marginally impacting the Luddite religiously motivated abstention from using technology, is not purposefully targeting the religion.

In *Jimmy Swaggart Ministries v. Bd. of Equalization*, the Court held that California's sales and use tax does not infringe on an individual's sale of religious paraphernalia because it is generally applicable. 493 U.S. 378, 289 (1990). The Court illustrated that a religious organization's sale of a Bible and the bookstore's sale of a Bible are both subject to the tax regardless of the motivation for the sale or purchase. *Id. a*t 390. Crucially, the Court held that the tax law "is no different from other generally applicable laws and regulations—such as health and safety regulations . . . ." *Id.* at 392. The Court reasoned that even if the tax may put the religious organization at a economic disadvantage, it may still be generally applicable and constitutional. *Id.* at 392. Thus, the law did not intend to single out the individual's religion. *Id.*

Similar to *Jimmy Swaggart Ministries*, the CHBDA is generally applicable because it also affects both Luddites and individuals who generally detest technology. The law imposes the cellphone mandate regardless of whether a person holds religious beliefs that condemn the use of technology. The Eighteenth Circuit Court of Appeals emphasized that even though the Luddites do not fall within any of the CHDBA's exemptions, the mandate does not only burden religiously motivated conduct. Op. 40. The *Jimmy Swaggart Ministries* Court alluded to the presumption that health and safety regulations are sufficiently justified, generally applicable laws. Accordingly, the CHDBA, as a healthy and safety regulation, responds to the Hoof and Beak disease pandemic. Even though the CHBDA mandate may place a slight obstacle on the Delmont Luddite sect's technology-free lifestyle, the law may still be generally applicable and constitutional. Therefore, the CHBDA does not single out the Luddite religion.

Overturning the CHDBA for its lack of religious exemptions would lead to endless arbitrary claims to avoid complying with justified laws and civic obligations, from evading Social Security taxes and removing themselves from the military's Selective Service System. *See United States v. Lee*, 455 U.S. at 252, 258-261 (1982); *Gillette*, 401 U.S. at 461. However, the Free Exercise Clause protects unequal results when a legislature decides that a law's governmental interests are worthy of being pursued against religiously motivated conduct. *Church of the Lukumi*, 508 U.S. at 542-533. Petitioner may argue that the CHBDA's cell phone mandate is underinclusive to protect public health and prevent the spread of Hoof and Beak. However, the mandate is inclusive. Everyone is subject to the law, except for limited case-by-case, health-related exemptions. CHBDA § 42(b)(1)(A)-(B). Those granted exemptions have severe disabilities and are unable to operate a mobile phone. Stipulations ¶ 9. Otherwise, since no vaccine exists to combat Hook and Beak, contact tracing is an essential measure to contain the spread of the disease. Therefore, the CHBDA mandate regulates beyond religiously motivated conduct.

Lastly, the Eighteenth Circuit Court of Appeals held that "the government must not provide every possible exemption." Op. 40. The slippery-slope argument is that granting one exemption may lead to more arbitrary and fraudulent claims for exemptions. Petitioner Jones may argue that this argument has been rejected as "no more than a possibility." *Sherbert*, 374 U.S. at 407. However, granting this exemption would be a "preferential exemption" from the CHBDA mandate. *Christian Legal Soc'y Chapter of the Univ. Of Cal. v. Martinez*, 561 U.S. 661, 669 (2010). In *Christian Legal Society*, the all-comers policy at issue was content neutral, but a student religious organization demanded an exemption to exclude non-followers of the organization's faith. 561 U.S. at 559. Here, Petitioner Jones may be "motivated by religious

beliefs" to not use technology, but "that does not convert the reason" for the CHDBA mandate "to be one that is religiously-based." *Id.* at 674. Thus, granting the mobile phone exemption to Petitioner Jones would impose preferential treatment upon him and the Luddites.

3. Even if the mandate is not neutral and generally applicable, it is constitutional because it survives strict scrutiny.

"Under the Free Exercise Clause, restrictions on religious exercise that are not 'neutral and of general applicability' must survive strict scrutiny. *Sisolak*, 140 S. Ct. at 2605 (Alito, J., dissenting) (quoting *Church of the Lukumi*, 508 U.S. at 531). A statute satisfies strict scrutiny if the government can show that "its restrictions on religion both serve a compelling interest and are narrowly tailored." *Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., concurring) (citing *Church of the Lukumi,* 508 U.S. at 546). Under this "stringent standard" the law "must advance 'interests of the highest order.'" *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)).

The CHBDA serves a compelling interest. The government "undoubtedly has a compelling interest in combating the spread of [a global pandemic] and protecting the health of [American] citizens." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (referring to measures taken to stop the spread of COVID-19); *see Sisolak*, 140 S. Ct. at 2613 (discussing "Nevada undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens"). Additionally, "[c]ourts have traditionally given significant deference to the government" under the emergence of a "public health crisis." Op. 39. Given Hoof and Beak Disease's status as a global pandemic, the government's interest in stopping its spread is clearly compelling.

Further, the Act is narrowly tailored. A law is narrowly tailored if it "targets and eliminates no more than the exact source of 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984)). Even "a complete ban can be narrowly tailored." *Frisby*, 487 U.S. at 485. So long as "each activity within the proscription's scope is an appropriately targeted evil," the law is sufficiently narrowly tailored. *Id.* at 485. The CHBDA targets and eliminates no more than the source of evil it seeks to remedy. The government does not require that the Luddites use their phones frequently, only that they carry them equipped with the government issued SIM cards. The Act is narrowly drawn to allow people as much freedom as possible while still effectively contact trace. Because the mandate is appropriately targeted toward an action that will help stop the spread of Hoof and Beak, the CHBDA is sufficiently narrowly tailored.

The CHBDA is narrowly tailored to serve a compelling interest. Thus, even if strict scrutiny applied, the Act remains constitutional.

VIII. Conclusion

Respondent has shown that the Amendment to the CHBDA is a valid content-neutral time, place, and manner restriction and so does not violate the Free Speech Clause of the First Amendment. Further, Respondent has shown that the CHBDA does not violate the Free Exercise Clause of the First Amendment because it is generally appliable and neutral. For the foregoing reasons, the judgment of the United States Court of Appeals for the Eighteenth Circuit should be reversed with respect to the Free Speech issue and upheld with respect to the Free Exercise issue.

APPENDIX A: Constitutional and Statutory Provisions

A. Constitutional Provisions

First Amendment to the United States Constitution

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

B. Statutory Provisions

42 U.S.C.A. § 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(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.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

Combat Hoof and Beak Disease Act[1]

(a) Each person living in the United States shall participate in a mandatory contact tracing program.

[1] Recreated from the record.

(1) Purpose: protect 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.

(b) Federal facilities located in each state will be used to distribute SIM cards containing contract tracing software.

(1) SIM cards shall be installed in mobile phones.

(A) If citizens do not have a mobile phone the centers shall distribute a mobile phone containing the contract tracing SIM car.

i. Upon receiving a SIM card or mobile phone, every person's name, address, birth date, social security number, and phone number if not receiving a phone from the facility, will be logged.

(B) Senior citizens over sixty-five years of age are exempt from this law.

(C) Health exemptions may be granted by the officials at each local federal facility on a case-by-case basis.

(D) No other type of exemption is permitted.

(E) Appeal authority is delegated to the FCC and must be filed within sixty day of receiving a denial.

(2) 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 the building.

(c) 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.

(d) Protestors are prohibited within sixty feet of the facility entrance, including public sidewalks, during operating hours.

(1) Groups of protestors are limited to no more than six persons.

(2) The zone must be clearly market and posted.

(e) Enforcement is subject to discretion of local facility officials in acknowledgment of the varied location characteristics for each center.

Combat Hoof and Beak Act

"pursuant to 42 U.S. Code § 2000bb-3, the Religious Freedom and Restoration Act is inapplicable to this act." CHBA § 42(f)(8).

Brief Certificate

We certify that all work product contained in all copies of Team 14's brief is our own and only our own. We have fully complied with our school's governing honor code as well as the Rules of the Competition.

s/ Team 14