**IN THE SUPREME COURT OF THE UNITED STATES**

---

LEVI JONES
*Plaintiff-Petitioner*,

v.

CHRISTOPHER SMITHERS,
*Defendant-Respondent*

---

On Appeal from the United States Court
Of Appeal for the Eighteenth Circuit
C.A. No. 20-CV-9422

---

# BRIEF OF PETITIONER

---

## QUESTIONS PRESENTED

I. 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.

II. 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.

## TABLE OF CONTENTS

## TABLE OF CITATIONS

**Cases**

**Statutes and Rules**

**Other**

## STATEMENT OF THE CASE

### A. Course of Proceedings and Disposition Below

Levi Jones ("Jones" or "Petitioner") commenced this litigation against Christopher Smithers ("Smithers" or "Respondent") in his capacity as Commissioner of the Federal Communications Commission ("FCC") by filing his complaint on June 1, 2020 alleging that enforcement of the Combat Hoof and Beak Disease Act ("CHBDA" or "FCC Mandate") violated Jones's First Amendment rights guaranteed under the Free Speech Clause and the Free Exercise Clause. Record 9. The parties filed cross motions for summary judgment on October 5, 2020. *Id.* at 30. After argument, the District Court granted Smithers's motion related to the Free Speech Clause and Jones's motion related to the Free Exercise Clause. *Id.* at 4. Both parties appealed to the Eighteenth Circuit Court of Appeals who reversed the ruling in its entirety and remanded the case with instructions to grant Smithers's motion related to the Free Exercise Clause and Jones's motion related to the Free Speech Clause. *Id.* at 40-41.

### B. Statement of Facts

Levi Jones is a sixty-two-year-old congregational leader of Delmont's Church of Luddite. Jones Aff. ¶ 2-3; Record 24. The Church of Luddite is decentralized and as such, each congregation sets its own rules known as "Community Orders." Record 31. For example, the Eastmont Luddites do not forbid mobile phones, while Delmont Luddites do not own or use mobile phones. *Id.* at 4-5. This is because one of the Delmont Luddites' fundamental orders is that members shall be skeptical of all technology due its potential to inflict damage upon the family and the Luddite community. *Id.* at 31. This belief also means Delmont Luddites do not use computers, the internet, sound amplification devices, or generate literature for distribution which would require mass production. *Id.* As a result of their deeply held beliefs, Delmont Luddites can only share their

message through casual conversations with others. *Id.* at 25. Delmont Luddites do not speak loudly during these conversations because they believe speaking loudly is both offensive and disrespectful to others. *Id.* at 31. No matter the difference in rules, Luddites believe and practice a total adherence to the Community Orders of their own congregation. *Id.* Yet, it is these very beliefs and practices which the CHBDA infringes upon.

On April 15, 2020 in response to the Hoof and Beak pandemic, Congress passed the CHBDA which mandates contact tracing through a government-provided SIM card used in mobile phones. *Id.* at 1. According to the CHBDA, the FCC is the lead agency responsible for executing and enforcing this mandate *Id.* at 2. Smithers, as the FCC Commissioner, spearheads the nationwide contact tracing efforts. *Id.* at 5.

Every person in the United States, unless exempt, is required to comply with the FCC Mandate or incur a penalty. *Id.* Those over the age of sixty-five are exempt, as are others with certain health issues. *Id.* at 6. The government grants health-concern exemptions to those with debilitating illnesses on the grounds that the burden of obtaining and/or carrying a cell phone exceeds the public health benefit. *Id.* at 19. No other type of exemption is permitted. *Id.* at 6.

The purpose of the contact tracing program is to "protect Americans… by letting people know that they may have been exposed to Hoof and Beak Disease and should therefore monitor their health signs and symptoms of Hoof and Beak." *Id.* (quoting CHBDA § 42(a)(1)). Failure to comply with the CHBDA "will result in punishment of up to one year in jail and/or a fine of up to $2,000." Record 6 (quoting CHBDA § 42(c)). At the federal facilities where the SIM cards are distributed, all persons are required to wear masks and practice social distancing, maintaining a distance of six feet between each other. Record 6.

Congress went on to pass an "emergency amendment to the CHBDA in light of growing protests" at the federal distribution facilities. *Id.* at 33; Stipulation ¶ 8. The amendment prohibited only "[p]rotestors" from being "within sixty feet of the facility entrance, including public sidewalks." Record 33 (quoting CHBDA § 42(d)). Further, only groups of protestors were "limited to no more than six" people. Record 33 (quoting CHBDA § 42(d)(1)).

The Delmont Luddites do not support the FCC's gross intrusion into individual privacy and have declared that they will not comply with the contact tracing mandate because it conflicts with their religious beliefs. Record 7. On May 1, 2020, Jones and six other Delmont Luddites demonstrated their religious objection to the FCC Mandate by showing up to the Delmont Federal Facility to lawfully express their concerns. *Id.* Jones and the others shared their concerns by speaking directly to others at the facility. *Id.* at 34. However, when not speaking with someone directly, Jones and the others all wore masks and remained six feet apart at a distance of seventy-five feet from the facility's entrance. *Id.*

Also present at the Delmont Federal Facility on May 1, 2020 was a group of five members from Mothers for Mandates ("MOMs"). *Id.* The MOMs also wore masks and socially distanced, but some were clearly within the "buffer zone" by as much as five feet. *Id.* That afternoon, officers surrounded Jones and his group, and told them they must leave because they were in violation of the CHBDA. *Id.* at 35. When Jones refused, he was arrested and fined. *Id.* The officers never arrested or fined anyone from the MOMs group. *Id.*

On May 6, 2020, Jones returned to the Delmont Federal Facility with five other Luddites. *Id.* Jones and the group again wore masks, socially distanced, and spoke with people in line. *Id.* Again, there were MOMs present. *Id.* However, this time, there were seven MOMs, who although masked and socially distanced, were again inside the "buzzer zone." *Id.* Just like on May 1, officers

approached Jones and his group during the afternoon and told them they needed to leave. *Id.* Jones informed the officer that the group was in full compliance with the mandate but was arrested again anyway. *Id.* Once again, no MOM was arrested or fined. *Id.*

On June 1, 2020 after being repeatedly singled-out and harassed and watching the MOMs be left in peace, Jones filed suit against Smithers in his capacity as FCC Commissioner alleging that enforcement of the CHBDA violated Jones's First Amendment rights guaranteed under the Free Speech Clause and the Free Exercise Clause. *Id.* at 9.

### C. Standard of Review

This Court reviews a grant of summary judgment *de novo*, "applying the same legal standards used by the district court." *Galvez v. Bruce*, 552 F.3d 1238, 1241 (11th Cir. 2008) (emphasis added). Accordingly, this Court cannot affirm unless it finds that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law" after construing the evidence "in the light most favorable to the nonmoving party." *Id.* (quoting Fed. R. Civ. P. 56(c)). When the Court reviews cross motions for summary judgment, as here, the court must individually review each motion on the merits "to determine whether either of the parties deserves judgment as a matter of law." *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 62 n.4 (1st Cir. 1997).

## SUMMARY OF THE ARGUMENT

I. The Eighteenth Circuit did not err in ruling the CHBDA's amendment violated the Free Speech Clause of the First Amendment because the CHBDA's amendment is content-based, was enacted because the government disagreed with Jones's message, does not serve a narrowly tailored governmental interest, and does not leave open other alternative channels for communication.

II. The Eighteenth Circuit erred in reversing the District Court's grant of summary judgment on the free exercise issue because the FCC Mandate requiring contact tracing is neither a neutral law, nor is it a generally applicable law, and it does not withstand strict scrutiny because it is not the least-restrictive means of achieving the government's interest.

## ARGUMENT

### I. The Eighteenth Circuit did not err in granting Jones's Motion for Summary Judgment because the Act's amendment is an unconstitutional restriction of free speech in a traditional public forum.

The First Amendment prohibits the passage of laws which restrict the freedom of speech. U.S. CONST., Amdt. 1. Sidewalks and public walkways receive additional First Amendment protection because courts have long considered them public forum. *McCullen v. Coakley*, 573 U.S. 464, 476 (2014); *U.S. v. Grace*, 461 U.S. 171, 177 (1983) (stating that sidewalks are public forums); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (holding that streets and other public forums have been used since ancient times to gather, share, and discuss public concerns). Accordingly, the government has "very limited" power to restrict speech in public forums. *Id.* at 477 (quoting *Grace*, 461 U.S. at 177).

When it comes to unconstitutional restrictions of free speech in a traditional public forum, there are three ways in which a law can violate the First Amendment. First, a law is a violation of the First Amendment if it is content-based and is not narrowly tailored to achieve a compelling state interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Second, a law which is facially content-neutral will be treated as content-based if the law cannot be "justified without reference to the content of the regulated speech" or was enacted "because of a disagreement with the message [the speech] conveys." *Id.* (quoting *Ward v Rock Against Racism*, 491 U.S. 781, 791 (1989)). Finally, a law which is content-neutral is a violation of the First Amendment if it is not "narrowly

tailored to serve a significant governmental interest, and that [it] leave[s] open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (citations omitted). Regardless of which analysis the Court applies to the Act's amendment, the Court should find the Act's amendment to be an unconstitutional violation of the Free Speech Clause of the First Amendment and therefore unenforceable.

### A. The Act's amendment is an unconstitutional violation of the First Amendment because it is or can be treated as content-based law and cannot satisfy strict scrutiny.

The Act's amendment violates the Free Speech Clause of the First Amendment because it is or can be treated as a content-based law and it cannot satisfy the required strict scrutiny test. The Court has held that there are two forms of laws which are or can be treated as being content-based. *Reed*, 576 U.S. at 163-64. First, laws which are content-based target speech based on the message conveyed. *Id.* at 163. The plain meaning of "content based" requires a court to determine if the law "on its face" makes distinctions based on the speaker's message. *Id.* (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565 (2011) (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (holding that the challenged law was content-based "by any commonsense understanding of the term" because it distinguished between newspapers and commercial handbills))). All content-based laws are presumptively unconstitutional. *Id.*

In *Reed v. Town of Gilbert*, the defendant's sign code had different rules and requirements depending on the sign's message. *Id.* at 164. "Ideological Sign[s]" were treated most favorably and did not have limits regarding the length of their display. *Id.* at 159-60. "Political Sign[s]" were only allowed in a window leading up to and shortly after a general election. *Id.* at 160. "Temporary Directional Signs Relating to a Qualifying Event" were only allowed to be displayed for a number of hours before and after the qualifying event. *Id.* at 160-61. The Court held that the sign code was

content-based on its face because it placed signs into different categories and subjected them to different restrictions. *Id.* at 164. Because the sign code was content-based, it was the defendant's burden to show that the differentiating between the signs was narrowly tailored and served a compelling governmental interest. *Id.* at 171. The defendant's alleged governmental interests were preserving aesthetics and promoting traffic safety. *Id*. Assuming that either were valid government interests, the defendant could not show that limiting one type of sign instead of another furthered either interest. *Id.* at 172. Accordingly, the Court held that the sign code failed strict scrutiny. *Id.*

The second type of laws which can violate the First Amendment are laws which are facially content-neutral, meaning they do not draw distinctions on their face, but cannot be "justified without reference to the content of the regulated speech" or were enacted "because of a disagreement with the message [the speech] conveys." *Id.* at 164 (quoting *Ward*, 491 U.S. at 791). When determining if a law is content-neutral, the principal question is if the government enacted the law "because of a disagreement with the message it conveys." *Ward*, 491 U.S. at 791 (citing *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 295 (1984)). The controlling factor is the government's intent. *Id.* While the government may allege reasonable grounds for the regulation of speech, those grounds will not protect a law that is a façade for content-based discrimination. *Cornelius v. NAACP*, 473 U.S. 788, 811 (1985). Therefore, a law which is facially content-neutral but was enacted because the government disagreed with the regulated speech can be treated as content-based and is subject to strict scrutiny. *Reed,* at 164.

Strict scrutiny requires the government to prove that the challenged law is narrowly tailored to achieve a compelling government interest. *Id. at* 171. When a court determines if a law is narrowly tailored, there are several factors to consider. *In re Warner*, 21 So. 3d 218, 253 (La. April 17, 2009). One factor is if the law is underinclusive. *Id*. A law is underinclusive if it "fails to restrict

a significant amount of speech that harms the government interest to about the same degree as does the restricted speech." *Id.* (quoting Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Penn. L. Rev. 2417, 2423 (1996) (collecting cases)). As such, it weighs against finding that a law is narrowly tailored if the law allows considerable harm to the government's alleged interest. *Id.* (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 779-80 (2002)). Another factor is that the law "must actually advance" the government's alleged interest. *Id.* (citing *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989)).

A third factor is that the law must be the least restrictive means compared to other effective options. *Id.* (citing *Ashcroft v. ACLU*, 542 U.S. 656, 665-66 (2004)); *See McCullen*, 593 U.S. at 492 (holding that other options included "generic criminal statutes" against trespass, assault, and vandalism could be used to achieve government's interest). In *McCullen*, the Court held that the defendant did not provide any evidence that they tried to use other alternative measures to achieve their goals. *Id.* at 494 (stating "[defendant did] not identify a single prosecution brought under [available] laws within at least the last 17 years."). Additionally, the Court stated that "it is not enough for [defendant] simply to say that other approaches have not worked." *Id.* at 496. Because the *McCullen* defendant did not seriously try other less restrictive measures, the Court found the challenged law unconstitutional. Accordingly, the Act's amendment, whether content-based or merely treated as content-based, is unconstitutional because it fails to satisfy strict scrutiny.

The Act's amendment is content-based on its face just like the sign code in *Reed*. The Act's amendment states that "[p]rotestors are prohibited within sixty feet of the facility entrance, including public sidewalks" and cannot have a group of more than six people. CHBDA §§ 42(d)-(d)(1). The law only prohibits ***protestors*** from being within sixty feet of the facility entrance. The law only restricts ***protestors*** to a group of six people. The Act's amendment makes a distinction

on its face between protestors and any other person or group present within sixty feet of the facility entrance. A protestor can be differentiated from a non-protestor because a protestor's words or actions "express[] dissent or disapproval." *Protest*, Black's Law Dictionary (11th ed. 2019). Unsurprisingly, the only way to tell the difference between a protestor and a non-protestor is to know the content of their messages. Therefore, here just as in *Reed*, the defendant's law imposes certain restricts solely dependent on the content of the message conveyed. Accordingly, the Court, as it did in *Reed*, should find that the Act's amendment is content-based on its face and subject to strict scrutiny.

If this Court finds that the Act's amendment is facially content-neutral, then the Court should treat Act's amendment as content-based because Congress passed the Act's amendment because they disagreed with the protestors's message. Congress enacted the CHBDA for the purpose of public health and safety to try to prevent the spread of Hoof and Beak. Record 6. Yet, the CHBDA did not contain any restrictions regarding protests or group size outside federal distribution facilities. After Congress passed the CHBDA, protests outside of federal distribution facilities began to rise. In ***direct response*** to the growing protests, Congress passed the Act's amendment. The parties in this matter stipulated that Congress passed the Act's amendment "in light of" increasing protests. Record 7. Respondent claims that the Act's amendment was to further the goals of the CHBDA and to ensure access to the facilities. Record 14. However, this confuses the purpose of the CHBDA with that of the Act's amendment and is merely a front to unconstitutionally restrict the speech of protestors who disagree with the Act.

The CHBDA achieves its goal of promoting public health and safety through the contact tracing program. The Act's amendment however only prohibits protestors from being within sixty feet of federal distribution facilities. There is no evidence to show that protestors being in groups

larger than six people and within sixty feet of federal distribution facilities endangers public health and safety. So then, if prohibiting protestors does not further the goal of promoting public health and safety, what is the purpose of the Act's amendment?

Respondent claims that another purpose of the Act's amendment is to ensure access to federal distribution facilities. However, if this was the true purpose of the Act's amendment, why does it only prohibit protestors? There were groups of MOMs who supported the CHBDA present outside federal distribution facilities. Mathers Aff. ¶ 6. If the true purpose was to ensure access to the facilities, why did Congress not prohibit any gathering within sixty feet of the entrance? The answer is simple. Because Congress disagreed with the message of the protestors. Congress specifically drafted legislation that would prohibit protestors from trying to persuade others not to comply with the CHBDA. This Court has held that not even a reasonable interest will save a law which is a pretense for content-based discrimination. The evidence and the respondent's claims show that the Act's amendment was enacted because the government disagreed with the protestors. Therefore, if this Court finds the Act's amendment to be facially content-neutral, the Court should find that the Act's amendment should be treated as content-based because it was enacted because the government disagreed with the message of the protestors

The Act's amendment fails the strict scrutiny test regardless of if this Court finds the Act's amendment to be content-based or treats it as content-based. The Act's amendment fails to satisfy strict scrutiny because it is underinclusive, does not actually advance the government's alleged interests, and is not the least restrictive means through which to achieve the government's alleged interests. The Act's amendment is underinclusive because it only prohibits protestors from being near the entrance but allows supporters.

There were two groups outside the federal facility each time officers arrested Jones. Jones and his protestors and the MOMs. The Act's amendment barred Jones and his group of protestors from being near the entrance yet allowed the MOMs. Even if you accept the government's claim that the Act's amendment is necessary to ensure access to the facility, barring only protestors does not ensure access to the facility. While the Act's amendment may increase access by prohibiting Jones and his group, it still allows the MOMs to restrict access to the federal facility. This is the very definition of underinclusive.

Additionally, the Act's amendment does not actually advance the government's alleged interest. There is no evidence that Jones and his group ever impeded access to the facility. There is however evidence that Jones and his group maintained social distancing and wore face masks. Arguably, social distancing and wearing a face mask does more achieve public health and safety than prohibiting protestors from being near a facility entrance.

Further, the Act's amendment is not the least restrictive means through which the government could have achieved their alleged interests. The respondent had other options through which they could have ensured access to the facility. The respondent could have sought to enforce any local laws already in place to prevent obstructing the entrance to property, trespassing on federal property, or loitering. However, there is no evidence that the respondent made any attempt to use any method which did not restrict Jones's rights. Just as the defendant in *McCullen*, it is not enough for the respondent to claim that the available options would not have worked. The respondent must present evidence that they tried these options but ultimately failed to achieve their alleged goal of ensuring access to the federal facility. Because the respondent, like the defendant in *McCullen*, cannot provide any evidence which shows they tried other less restrictive means, this

Court should find the Act's amendment is not the least restrictive means compared with other effective options.

The Court should find that the Act's amendment fails to satisfy strict scrutiny because it allows other groups to restrict access to the federal facility, does not actually achieve the respondent's alleged interests, and the respondent failed to use other less restrictive options already in place. As such, the Court should find that the Act's amendment, whether content-based or merely treated as content-based, is an unconstitutional violation of the Free Speech Clause of the First Amendment and therefore unenforceable.

### B. Should this Court find the Act's amendment is content-neutral, the Act's amendment is still an unconstitutional violation of the First Amendment because it is not a reasonable time, place, or manner restriction.

If a law is content-neutral, it is subject to a time-place-manner analysis. *McCullen,* 573 U.S. at 486. A time-place-manner analysis requires the government to show the law is "narrowly tailored to serve a significant governmental interest, and that [it] leave[s] open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (internal citations omitted)). This intermediate level of scrutiny is satisfied if the government interest would be accomplished less effectively without the law and the means utilized are not "substantially broader than necessary to achieve the government's interests." *Id.* at 800.

In *McCullen v. Coakley*, the defendant passed a law which made it a crime to "knowingly stand on a 'public way or sidewalk' within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed." 573 U.S. at 469. Plaintiffs were people who would speak with women and attempt to dissuade the women from having an abortion. *Id.* The Court found the law to be content-neutral. *Id.* at 485. After finding the law content-neutral, the Court had to determine if the law was narrowly tailored to serve a government interest. *Id.* at 486. The

Court noted that the defendant's justifications for the law were to "promote public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways" *Id.* Both parties and the Court agreed to the significance and legitimacy of these interests. *Id.*

However, the Court noted that the thirty-five feet buffer zone created a serious burden on the plaintiffs' speech. *Id.* at 487. The Court found that the zone pushed plaintiffs so far away from the entrance that the plaintiffs' ability to start a close conversation was compromised. *Id.* Uncontradicted evidence showed that because of the buffer zones, the plaintiff was forced to raise her voice while outside the zone which was directly against the message she wished to share. *Id.* The Court explained that while "handbilling" and close conversations do not receive special protection, a normal conversation on a public sidewalk is more closely related to the sharing of ideas than other forms of communication. *Id.* at 488. The Court stated that when it is "more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *Id.* at 489. After hearing the evidence, the Court found that the law created more burden on speech than required to meet the defendant's interests. *Id.* at 490.

Once the Court determined that there was a significant First Amendment burden, the Court looked to see if the defendant had other options for achieving their goals which did not substantially burden the plaintiffs' speech. *Id.* at 490. The Court pointed out that the defendant had a wide array of options at their disposal which could be used to achieve their goal without prohibiting anyone from a historically important public forum. *Id.* at 493-94. Despite defendant's arguments, the Court held that the defendant failed to show that other less restrictive means were inadequate. *Id.* at 496. Accordingly, the Court found that the law was not narrowly tailored. *Id.* at 493. Because the law was not narrowly tailored, the Court held the law was unconstitutional. *Id.* at 497.

Once the court has determined that the challenged law is narrowly tailored, the court must determine if the challenged law leaves open sufficient other methods for communication of the message. Though alternate channels may exist, they may be insufficient to satisfy the time-place-manner analysis. *Linmark Assocs., Inc., v. Willingboro.*, 431 U.S. 85, 93. In *Linmark*, the defendant enacted a law which prohibited the display of a "For Sale" or "Sold" sign. *Id.* at 86. The Court noted that sellers, in theory, retained a number of alternatives, such as leaflets, sound trucks, and demonstrations. *Id.* at 93. However, the Court explained that these options are not the ones used in the practice of realty. *Id.* The Court said that the reality of the prohibition forced parties to use methods which cost more, were less autonomous, less likely to reach the intended audience, and less effective. *Id.* As such, the Court found that the alternatives were not satisfactory. *Id.* When the Court conducts the time-place-manner analysis for the Act's amendment, the Court should find that the Act's amendment is not narrowly tailored and does not leave open enough sufficient alternatives for Jones to communicate his message.

In determining if the Act's amendment is narrowly tailored, the Court should consider the present case as a parallel to *McCullen*. Here, as in *McCullen*, the law bars Jones from expressing his views on a public sidewalk. However, Jones is more restricted than the plaintiff in *McCullen* because the Act's amendment prohibits him from being within sixty feet of the entrance, which is an additional twenty-five feet compared to the plaintiff in *McCullen*. Similarly, Jones, like the plaintiff in *McCullen,* must conduct his conversations at a normal, casual volume. In both cases, the buffer zone requires the plaintiffs to raise their voice to share their message with anyone inside the buffer zone.

This is a greater burden on Jones than it was on the plaintiff in *McCullen*. The plaintiff in *McCullen* could, and often did, raise her voice to share her message from outside the buffer zone.

However, Jones simply cannot do the same. The Church of Luddite teaches that to speak loudly is offensive and disrespectful to others. Jones Affidavit ¶ 7. The only manner in which Jones can share his message is through normal, casual conversation. Thus, it is impossible for Jones to share his message from outside the sixty-foot buffer. This impossibility creates a more substantial burden on Jones than on the plaintiff in *McCullen*. Because the Act's amendment creates a significant First Amendment burden on Jones, the government must prove that the law is narrowly tailored to achieve their interests.

The government has no evidence to prove that they can achieve their goal only if protestors are not permitted within sixty feet of the entrance and in groups of six or less. While the number of protests has risen, there is no evidence that these protests have hindered access to and from the facility. There is no evidence that these protests have created an increase in the transmission of Hoof and Beak disease. Like the defendant in *McCullen*, the government has other options for achieving their alleged goal of promoting public health and safety without burdening free speech. Just like in *McCullen*, there are civil and criminal laws in place which can be enforced to ensure that the facility entrance is unobstructed and that people trying to enter the facility are not harassed, intimidated, or assaulted. There is no evidence that the government has attempted to enforce these already existing laws and been unsuccessful at satisfying their alleged interests.

Therefore, this Court should find that the law creates a substantial First Amendment burden by prohibiting anyone from being on a public sidewalk within sixty feet of the entrance. Additionally, the Court should find that Act's amendment is not a narrowly tailored solution because there were other options available to the defendant which could have been utilized and would have created substantially less First Amendment burden. Accordingly, this Court should find the Act's amendment as an unconstitutional violation of the First Amendment.

If the Court finds that the Act's amendment is narrowly tailored to serve a significant government interest, the Court must determine if the Act's amendment leaves open enough sufficient alternatives for Jones to communicate his message. Like the challenged law in *Linmark*, the Act's amendment does not leave ample alternative channels of communication. There are a number of ways Jones can share his message with others outside the federal facility. Jones could yell, sing, chant, hold up signs, pass out pamphlets, pray, or use a megaphone. However, just as in *Linmark*, the reality of the situation limits what is truly available. The Act's amendment requires Jones to try and share his message from sixty feet away. Jones cannot yell or use sound amplification devices in order to be heard from such a distance. Nor can he use printers to make signs large enough to be seen or a large number of pamphlets to pass out. He cannot sing, chant, or pray at a volume to be heard from sixty feet away. The Act's amendment pushes Jones so far away from the entrance that it effectively silences his message. Precisely like in *Linmark*, while there appears to be ample alternative channels of communication, the reality of the situation is that the only means left are more expensive, are less autonomous, less likely to reach the intended audience, and less effective. As such, the Court should find, as they did in *Linmark*, that the alternatives are not satisfactory.

Therefore, this Court should find that Act's amendment does not leave open ample channels of communication. Accordingly, this Court should find the Act's amendment is an unconstitutional violation of the Free Speech Clause of the First Amendment and therefore unenforceable.

## II. The Act's contact tracing mandate violates the Free Exercise Clause of the First Amendment because it is neither neutral nor generally applicable.

Smithers is not entitled to summary judgment because the FCC Mandate requiring contact tracing through the use of mobile phones and government-issued SIM cards is neither a neutral law, nor is it a generally applicable law, making it unconstitutional under the Free Exercise Clause. A federal court may not grant summary judgment unless the movant—here, FCC—shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Therefore, judgment as a matter of law is not appropriate unless the evidence "is so one-sided that one party must prevail." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). In order for the non-movant—here, Jones—to survive the movant's motion, he "need only present evidence from which a jury might return a verdict in his favor." *Id.* at 257. Also, all inferences drawn from the record are viewed "in the light most favorable to the party opposing the motion"—here, Jones. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion or *prohibiting the free exercise thereof*…." U.S. CONST., Amdt. 1 (emphasis added). The exercise of religion "often involves not only belief and profession but the performance of (or abstention from) physical acts." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). However, "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).'" *Id.* at 879. Accordingly, a law must be neutral and generally applicable if it is to operate as a constitutional suppression of the free exercise of religion. Even if the FCC Mandate were found to be neutral *but not* generally applicable, as the United States Court for the District

Court of Delmont found in this case, Record 4, "[n]eutrality and general applicability are interrelated, and… failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

When a law fails to be neutral and generally applicable and gives rise to a burden on the free exercise of religion, it is subject to strict scrutiny and "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* The government can justify a law that burdens the free exercise of religion by showing that it is "the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. Of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). However, "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in *rare* cases." *Church of the Lukumi*, 508 U.S. at 546 (emphasis added).

Because the FCC Mandate in this case is neither neutral nor generally applicable, and because it is not narrowly tailored to serve the government's interest, it is an unconstitutional violation of the Free Exercise Clause and Petitioner is entitled to summary judgment on this issue.

### A. The FCC Mandate requiring contact tracing is unconstitutional under the Free Exercise Clause because it is not a neutral law.

The FCC is not entitled to judgment as a matter of law because the contact tracing mandate is not a neutral law. The mandate is not a neutral law because the facts show that the object of the law, as evidenced by the effects of it, is to infringe upon the religious practices of the Delmont Luddites. Further, the refusal of a religion-based exemption is evidence that the contact tracing mandate is not a neutral law and is therefore unconstitutional.

1. Facial Neutrality

Under federal law, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533. The Court begins with the text of the law in order to determine its object, because "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* Here, both the District Court and the Eighteenth Circuit correctly concluded that the FCC mandate did not discriminate against the Delmont Luddites on its face. Record 18, 39.

2. Subtle Departures and Covert Suppression

Alone, "facial neutrality" does not determine the constitutionality of a law that infringes the religious rights of an individual because "[t]he [Free Exercise] Clause forbids subtle departures from neutrality, and covert suppression of particular religious beliefs" as well. *Church of the Lukumi*, 508 U.S. at 534. Accordingly, "the effect of a law in its real operation is strong evidence of its object." *Id.* at 533. Further, "a law can reveal a lack of neutrality by protecting secular activities more than comparable religious ones." *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020). Therefore, even if a law satisfies the test for "facial neutrality," it may, in its operation, "nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

In *Wisconsin v. Yoder*, members of the Old Order Amish faith objected to a State mandate requiring children to attend public school until the age of sixteen because high school education was "contrary to the Amish religion and way of life." *See* 406 U.S. at 205. While the Court stated that "[p]roviding public schools ranks at the very apex of the function of the State," the State's interest was "not totally free from a balancing process when it impinge[d] on fundamental rights

and interests, such as those specifically protected by the Free Exercise Clause." *Id.* at 213-214. In the Court's discussion of Free Exercise, it stated, "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order… can overbalance legitimate claims to the free exercise of religion." *Id.* at 215. The Court concluded that even though the State had a great interest in universal public education, that interest was outweighed by the Amish community's religion-based objection and The Court allowed an exemption to the Amish community on Free Exercise grounds. *See id.* at 228-29.

Like the Amish community in *Yoder*, the Delmont Luddites should be able to gain an exemption from the government mandate on religious grounds. Here, the FCC mandate provides for several exemptions from the contact tracing requirement. Record 6. Senior citizens over the age of sixty-five are exempt, as are those with certain health conditions and disabilities. *Id.* The FCC has granted health-concern exemptions on the grounds that "the burden of obtaining and/or carrying a cell phone exceeds the public health benefit." *Id.* at 19. However, the FCC Mandate permits no other type of exemption and the Delmont Luddites have not gained an exemption on religious grounds. *Id.* at 6, 20.

The Delmont Luddites are being singled-out for discriminatory treatment in this case. The FCC's refusal of a religion-based exemption serves as a judgment that the Delmont Luddite's religious practices are of lesser importance than secular reasons. "[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" *Church of the Lukumi*, 508 U.S. at 537.

Here, the government's compelling reason for the contact tracing mandate is to "protect Americans" by monitoring their potential exposures to Hoof and Beak through the use of

government-issues SIM cards in mobile phones. Record 6. However, not all Americans are required to follow the mandate, including any American over sixty-five years of age. *Id.* It is likely that the exemption for Americans over sixty-five would lead to a large number of "unmonitored" individuals potentially exposing others to Hoof and Beak. Such a number would pose a greater threat to Americans than would the Delmont Luddite church congregation as a whole.

The logic behind permitting one exemption (based on age) and denying the other (based on religious objection) does not stand up to scrutiny here. For example, if a healthy sixty-four-year-old Delmont Luddite applied for an exemption, he would be denied that exemption if it were based on his religious objection; but if the same Luddite requested an exemption on his sixty-fifth birthday, he would be granted one. It is likely that nothing changed about his potential risk of exposure or the risk of him potentially exposing others to Hoof and Beak. Consequently, the age-based exemption poses considerably great public health risk and a large number of exposures. This result is contrary to the express purpose of the FCC mandate, and the Delmont Luddites' desired exemption based on religious grounds poses much less of a risk. Thus, if the "compelling interest" of the government here is to "protect Americans" from being exposed to Hoof and Beak disease, and that is how they hope to justify their strict mandate, the Delmont Luddites' religious objection should serve as just grounds for an exemption because their numbers are likely smaller, and they pose a much smaller threat than does the large number of those already exempt who are over the age of sixty-five. *See Roberts*, 958 F.3d at 414 ("[R]estrictions inexplicably applied to one group and exempted from another do little to further these goals [keeping the community free from exposure to communicable disease] and do much to burden religious freedom."). Therefore, like the Amish community in *Yoder*, the Delmont Luddites' religion-based objection should lead to

their exemption from the government's mandate because the unconstitutional burden imposed on their religious practice outweighs the benefits of the regulation.

The application of the FCC Mandate here is not neutral under the *Smith* standard and is therefore unconstitutional. The FCC mandate is not neutral because the effect of it in operation reveals its object, which burdens the free exercise of religion. *See Church of the Lukumi*, 508 U.S. at 533-34 ("[T]he effect of a law in its real operation is strong evidence of its object."). While the mandate does not facially discriminate against religious practice, it burdens the Delmont Luddite's religion by requiring them to carry a mobile phone, in direct conflict with their religious views. Further, because the FCC will not grant an exemption on religious grounds, the mandate is not neutral because the Luddite's religious objection is singled-out to be of lesser importance than the age-based exemption, which poses a greater threat to the express purpose of the mandate itself. *See id.* at 537 ("[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'")

3. Guidance from Equal Protection Cases

In further determining the object of a law, and whether it is neutral under the Free Exercise Clause, courts also find guidance in equal protection cases. *Id.* at 540. As the District Court pointed out here, Record 19, both direct and circumstantial evidence is used in this analysis, including "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." *Church of the Lukumi*, 508 U.S. at 540. As the Eighteenth Circuit correctly stated in this case, the contact tracing mandate and its legislative history reflect no anti-Luddite intent or motive because it was directed at a public health crisis. Record 39. However, this does not mean that the contact tracing

mandate was entirely neutral for Free Exercise purposes, as explained above. *See Church of the Lukumi*, 508 U.S. at 533-34.

Because the FCC Mandate is not a neutral law, it is unconstitutional under the Free Exercise Clause and Smithers is not entitled to summary judgment on this issue. Accordingly, the Eighteenth Circuit erred in their finding on this issue, and it should be reversed.

### B. Even if the FCC Mandate requiring contact tracing is a neutral law, it is not a generally applicable law under the Free Exercise Clause and is therefore unconstitutional.

The FCC is not entitled to judgment as a matter of law here because the contact tracing mandate is not a generally applicable law. The mandate is not "generally applicable" because it discriminates against the religious practices of the Delmont Luddites while also forbidding their desired religion-based exemption.

Under federal law, "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment,' and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only *against* conduct with a religious motivation." *Church of the Lukumi*, 508 U.S. at 542-43 (emphasis added). At its foundation, "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.*

Where a generally applicable law only "incidentally burdens religious practices," that law will usually be upheld; however, "a law that discriminates against religious practices usually will be invalidated because it is the *rare* law that can be 'justified by a compelling interest and is narrowly tailored to advance that interest.'" *Roberts*, 958 F.3d at 413 (emphasis added). Again, "a

law might appear to be generally applicable on the surface but not be so in practice due to exceptions for comparable secular activities." *Id.*

Here, the government interest behind the FCC mandate, as explained above, is to "protect Americans" by monitoring the potential exposures to Hoof and Beak Disease carriers. Record 6. The same mandate allows for exemptions based on the grounds that the "burden of obtaining and/or carrying a cell phone exceeds the public health benefit." *Id.* at 19. Those over the age of sixty-five are exempt from the contact tracing mandate. *Id.* at 6. The burden of carrying a mobile phone likely is no different between many sixty-five-year-olds and those who choose to practice the Luddite faith in Delmont. The biggest difference between the two is that the Delmont Luddites' religion prohibits them from carrying mobile phones, but, without explanation, they are not allowed a religion-based exemption under the FCC Mandate. *Id.* at 6-7. Thus, the District Court was correct when it found that the burden to carry the mobile phone and SIM card "in fact affect[ed] conduct only motivated by [Luddite] religious belief, because the FCC allows non-religiously motivated exemptions," and is therefore not generally applicable. *Id.* at 20. *See Roberts*, 958 F.3d at 414 ("[R]estrictions inexplicably applied to one group and exempted from another… do much to burden religious freedom.").

Here, the Eighteenth Circuit reversed, finding that the FCC had *not* selectively imposed a burden on religiously motivated conduct because there are "many other possible concerns the mandate could have granted an exemption for that are not 'religiously-motivated.'" Record 39-40. While it is true that the government "has authority to choose which [exemptions] to grant and which ones not to, as long as it is logical[,]" *Id.* at 40, the Eighteenth Circuit's logic is flawed in this case. Here, one congregation (Delmont Luddites, but not the Eastmont Luddites) objects to the contact tracing mandate on religious grounds, *Id.* at 4-5, and cannot gain an exemption, while

the entire American population over the age of sixty-five is exempt simply because of their age. *Id.* at 6. It defies logic that the latter, much larger, group of individuals are exempt from the contact tracing if the purpose of the mandate is to monitor exposures. *Id. See Roberts*, 958 F.3d at 413 ("As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law."); *see also Thomas*, 450 U.S. at 715-16 ("The guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."). If the government is to exempt certain individuals from this mandate, the more logical approach, even without a Free Exercise issue to consider, would be to exempt a smaller group that poses less of a threat, if the threat is the spread of a disease.

The issue for the Delmont Luddites is that "[t]he mere fact that [their] religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted." *Thomas*, 450 U.S. at 718. However, the fact that "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest" helps the Delmont Luddites in this case. *Id.* Mandated contact tracing through the use of government-issued SIM cards and mobile phones is not the "least restrictive means" for the government here. A reasonable alternative would be a mandate that insists on social-distancing and mask-wearing, like the one mentioned in the record. Record 6 (referencing CHBDA § 42(b)(2)). *See Roberts*, 958 F.3d at 415 ("Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that?").

The FCC Mandate here is not a generally applicable law and is therefore unconstitutional. It is not generally applicable because it is not narrowly tailored in pursuit of the government's interest and illogically allows for exemptions that contradict its own express purpose while denying less-threatening exemptions based on religious objections. Thus, the FCC Mandate places

a selective burden on religiously motivated conduct and is not generally applicable. Because the FCC Mandate is neither neutral nor generally applicable, and because it fails to satisfy strict scrutiny under the Free Exercise Clause, Smithers is not entitled to summary judgment on this issue, the Eighteenth Circuit's erred on this issue, and its finding should be reversed.

## CONCLUSION

The Eighteenth Circuit's judgment should be affirmed on the Free Speech issue because the Act's amendment is or can be treated as content-based, fails to satisfy strict scrutiny, is not narrowly tailored, and does not leave open sufficient alternatives for Jones to communicate his message. The Eighteenth Circuit's judgment should be reversed on the Free Exercise issue because the CHBDA is not neutral nor generally applicable and because it fails to satisfy strict scrutiny. Therefore, this Court should find that the CHBDA and the Act's Amendment are unconstitutional and unenforceable.

## BRIEF CERTIFICATE

I certify that the work product contained in all copies of the team's brief is in fact the work product of the team members. Also, that the team has complied fully with their school's governing honor code and all Rules of the Competition.

January 31, 2020

Respectfully submitted,

S/ Team #15