Case No. 20-9422

IN THE
Supreme Court of the United States

LEVI JONES,

Plaintiff-Petitioner,

v.

CHRISTOPHER SMITHERS,

Defendant-Respondent.

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

BRIEF OF RESPONDENT
Christopher Smithers

Team Number 16
January 31, 2021
Attorneys for Christopher Smithers, in his official capacity

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; and

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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STATEMENT OF THE CASE

The Hoof and Beak Disease (HBD) pandemic has required swift and decisive action from the federal government. The executive branch created Hoof and Beak Task Force ("Task Force") and the legislature passed the Combat Hoof and Beak Disease Act ("CHBDA" or "the Act") to counter the fast-spreading, fatal disease. (R. at 1). The Federal Communications Commission (FCC), led by Commissioner Christopher Smithers, has played an important role in a contact tracing policy meant to stop the spread of the aggressive illness. The FCC has managed facilities that provide free cell phones and SIM cards to vulnerable citizens in order to track in-person contacts made by individuals diagnosed with the disease and advise those contacts to take appropriate precautions. (R. at 2). All those not included in narrow age-based or health-related exceptions were set to receive a phone or SIM card by October 2020. *Id.*

Citizen groups formed both to support and oppose the mandate and sought to demonstrate outside of FCC-managed facilities providing the technology. *Id.* To promote expression while preventing disease spread, Congress amended the CHBDA to require social distancing by protestors at government facilities. The protest distancing policy required that groups of protestors be no larger than six people and that they conduct their activity at least sixty feet away from the entrances of the facilities. *Id.* In Delmont, at least two different groups of demonstrators staged activities around a local facility. The State of Delmont's Church of Luddite rallied to oppose the mandate, headed by church leader Levi Jones. *Id.* Mr. Jones and the Luddites violated the protest distancing guidelines on two different occasions. On May 1, 2020, the group of Luddites totaled seven protestors, exceeding the policy's limit. *Id.* These seven people also directly approached the persons waiting in line to access the facility, despite the fact that they had set up a rally point outside of the clearly marked buffer zone. *Id.* On May 6, 2020, despite

having been previously arrested and fined, Mr. Jones again led a protest that involved directly approaching individuals waiting in line. *Id.* Though this time the group did not exceed six people, the Luddites again not only entered the buffer zone but directly approached other persons at the facility. *Id.* The other protest group present at the facility also failed to obey the protest distancing policy but faced no sanctions. (R. at 3). Though this pro-contact tracing group, the Mothers for Mandates (MOMs), stood five feet beyond the buffer zone boundary and gathered in a group larger than six, they did not approach individuals in line and presented pamphlets on a table at a sufficient distance from protestors. (R. at 8, 9). Mr. Jones has challenged the policy, arguing that it is not narrowly tailored and burdens too much speech.

The Delmont Luddites also argue that they should be exempted from the contact tracing policy because of their religious beliefs. Luddites are guided by local leadership, which creates significant variation across congregations. (R. at 4). "Community Orders," created by individual congregations, set out permitted and forbidden conduct. The Luddites believe that "total obedience" to local Community Orders is crucial to preserving "family unity, faith, community, and cultural identity." *Id.* Delmont Luddites follow a set of Community Orders requiring skepticism of technology and specifically prohibiting ownership and use of cell phones. Local congregations can opt to permit or forbid specific technologies on a case-by-case basis after community-wide consideration. *Id.* For example, the Eastmont Church of Luddite has no ban on cell phones because of community support of them as "necessary tool[s]." *Id.* Because of their local Community Orders, the Delmont Luddites believe that they should not be subject to the cell phone/SIM card mandate included in the CHBDA.

After his arrests, Mr. Jones filed suit. Arguing First Amendment violations, he challenged the buffer zone policy as a free speech violation and the cell phone/SIM card mandate as a free

exercise violation. (R. at 3). The District Court for the District of Delmont held that the buffer zone policy was a permissible time, place and manner regulation but that the cell phone/SIM card mandate was unconstitutional because it was not generally applicable. (R. at 20). The Eighteenth Circuit reversed on both policies, finding the speech restrictions to be unconstitutionally broad but the cell phone/SIM card policy to be neutral and generally applicable. (R. at 41). This court granted Certiorari to resolve these two First Amendment issues. (R. at 42).

SUMMARY OF THE ARGUMENT

I. The protest distancing policy is constitutional as it is content-neutral, narrowly tailored, and allows ample alternatives for speech.

First Amendment doctrine establishes clear parameters for acceptable time, place, and manner limitations on individual speech. The policy created by the CHBDA amendment falls within these boundaries, based on the test applied in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

The policy is content-neutral, narrowly tailored to serve an important government interest, and allows alternative avenues for speech. Because the policy does not target protestors based on their message, it is content-neutral. The policy also does not burden more speech than necessary to serve the important public health interests motivating it, allowing protestors opportunities to communicate their message without facilitating disease spread, making it narrowly tailored. The policy allows protestors myriad ways to express their concerns while standing outside of the designated buffer zone, providing ample alternatives for protestors to engage in First Amendment activity. These are hallmarks of an acceptable time, place, and manner limitation.

II. The government's contract-tracing policy is constitutional because it is a neutral and generally applicable law which aims to protect public health, not burden religious groups.

First Amendment doctrine establishes reasonable limits on an individual's right to exercise their religion as allowed under the "Free Exercise" clause. U.S. CONST., amend. I. Under the test originally articulated in *Employment Div. v. Smith*, as long as a law is both neutral and generally applicable, it is constitutional. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

The CHBDA is neutral because it has no discriminatory intent. Using the evaluation standards articulated in *Lukumi*, the law is facially neutral because it does not discriminate against, or refer to, any religious practice. *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 540 (1993). It is also not covertly suppressing religious beliefs under the guise of protecting public health because there is nothing in the legislative history or record to suggest that anything other than the ongoing pandemic and protection of public health motivated the law. *See id.* The CHBDA is generally applicable because its aim is to protect public health broadly, even though the Luddites do not qualify for an exemption. As articulated in *Smith*, the burden on exercising religion is only an "incidental effect of a generally applicable and otherwise valid provision." *Smith*, 94 U.S. at 878 (1990). The government is not making an arbitrary value judgment on the legitimacy of a health exemption versus a religious exemption; it is preserving the original impetus of the law -- the protection of citizens' health -- by allowing only relevant health exemptions to a public health law. Finally, the fact that the CHBDA carves out an age exemption and a health exemption is not sufficient to show that the CHBDA is not neutral and generally applicable. These exemptions, on their face, do not disproportionately exclude religious objectors. Nor do these exemptions use vague or open-ended eligibility criteria that health officials administering the law can use to discriminate against religious objectors.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit has entered a final judgment in this matter. Jones v. Smithers, C.A. No. 20-CV-9422 at *29 (18th Cir. 2020). Petitioner filed a timely petition for writ of certiorari, which this Court granted. This Court has jurisdiction in this case pursuant to 28 U.S.C. § 1254(1) (2018).

ARGUMENT

I. THE PROTEST DISTANCING POLICY IS AN APPROPRIATE TIME, PLACE, AND MANNER RESTRICTION, CRUCIAL TO PROTECTING PUBLIC HEALTH

Time, place, and manner restrictions on speech are assessed under a form of intermediate scrutiny. Applying the test from *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), a "time, place, and manner" restriction must 1) be "content-neutral," 2) be "narrowly tailored to serve a significant government interest," and 3) "leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45. The social distancing policy for protestors meets all three criteria, though the certified question at hand only concerns the policy's narrow tailoring.

A. The policy is content neutral, regulating all speakers.

Both the trial and appellate court held that the policy is content-neutral. The District Court stated that the regulation "does not explicitly regulate speech" and instead regulates how many speakers may be present in designated areas close to the relevant facilities. Ultimately, "what the protestors say is irrelevant," as enforcement officials must "only look at the *number* of people within an area—and their distance from one another and the facility entrance." (R. at 12, quoting the District Court's Opinion). Additionally, the law can be "justified without reference to

the content" of the speech and was not "adopted by the government because of disagreement" with the message of any possible speech. (R. at 11, District Court quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). In this case, the policy was not created to stifle criticism of the cell phone and SIM card policy but to promote public health. Like the regulation in *Ward*, the amendment to CHBDA makes no reference to the content or message of the speech, instead placing limits on any and all speakers protesting outside the FCC facilities.

As explained below, the anti-CHBDA protesters are welcome to protest in many ways, as long as their conduct does not facilitate disease spread. Officers opted to intervene, appropriately exercising their discretion, when the Luddites' failure to socially distance jeopardized other individuals at the facility. *See, e.g., Cameron v. Johnson*, 390 U.S. 611 (1968). Only the Luddites approached individuals in line to enter the facility in a manner that could have endangered their health. Had the Luddites and MOMs engaged in identical violations causing similar levels of risk, there may have been a case for impermissible "bad faith" enforcement, but this was not the case. *See Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965)(law enforcement officials illegally targeted civil rights advocates simply because of their viewpoint, continuously threatening prosecution under state law).Whatever message the protestors are delivering, they must do so in a manner consistent with public health directives.

B. <u>The policy does not burden more speech than necessary to preserve health and safety.</u>

The policy requiring social distancing around FCC facilities is narrowly tailored to manage the risk posed by Hoof and Beak Disease. A content-neutral policy does not violate the First Amendment where it is "narrowly tailored to serve a significant government interest." *United States v. Grace*, 461 U.S. 171, 177 (1983), quoting *Perry*. A "narrowly tailored" policy is not necessarily the least restrictive policy. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781,

797 (1989) ("[O]ur cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech," quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). In this case, requiring appropriate distance between protestors and facility entrances allows protestors to be heard from a safe distance while preventing disease transmission, a narrowly tailored policy that serves the important government interest at issue while still permitting a broad spectrum of speech.

The protest distancing policy "promotes a substantial government interest that would be achieved less effectively absent the regulation," as set out in *Ward*. Given the ongoing Hoof and Beak Disease (HBD) pandemic, both parties agree that the government must take action to protect the public. "Neither party disputes" that "promoting public health and safety by preventing the spread of Hoof and Beak" is "a legitimate interest." (R. at 37, quoting the Eighteenth Circuit opinion). The specific public health interests motivating the protest distancing policy justify a large buffer zone to create space between protestors and facility visitors. This distinguishes the protest distancing policy from many protest buffer zone cases, which are meant to protect patients accessing abortion services, and those providing the services, from the invasive tactics of some clinic protestors. *See, e.g., Madsen v. Women's Health Center*, 512 U.S. 753, 767 (1994). The physical distance between those who must enter the government facilities to receive or provide phones or SIM cards and those choosing to protest outside addresses public health concerns and only curtails the amount of speech necessary to prevent disease transmission. The interests at play in abortion clinic cases have generally justified smaller buffer zones than the one enacted via the CHBDA. However, the interests in this case are meaningfully different.

Rather than seeking to prevent inter-personal conflict between patients and protestors, this policy seeks to prevent interpersonal disease transmission. Because HBD is primarily transmitted from person to person, typically when individuals are in close proximity to one another, regulating the number of individuals within a given space is crucial to preventing the spread of the disease. In this case, the Luddites' "movements and interactions created additional health risks" for those trying to enter the facility. (R. at 12, 13, quoting District Court opinion). Other protestors may have been closer to the entrance of the facility but did not create such risks and maintained their distance from others. As in *Cameron v. Johnson*, 390 U.S. 611 (1968), the Luddites were not sanctioned for merely expressing their views but "are being prosecuted in good faith for their deliberate violation" of the statute's distancing requirements. *Id.* at 619. Unlike other protestors present at the facility, they approached other individuals to communicate within the zone while standing at a distance that could facilitate disease transmission. Because the government has mandated that citizens leave their homes and be present at these facilities, it has taken on the responsibility of protecting their health and has chosen a robust protest distancing policy to do so.

Buffer zone policies that have been invalidated prohibited too much speech either through vagueness or through specific prohibitions on expressive activities necessary to conveying the protestors' message. The protest distancing policy does neither. Rather than creating a nebulous floating buffer zone requiring that protestors keep their distance from all other persons crossing in front of the facility, like the one invalidated in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), that required protestors to move in tandem with the individuals they were addressing, the fixed buffer zone protects public health interests and sets known, comprehensible limits on where protestors may deliver their messages. Unlike

in *Schenk*, though, the way in which HBD is transmitted requires that all persons stand more than "a normal conversational distance" from one another, again differentiating the current public health interest from the interests invoked in creating abortion clinic buffer zones. 519 U.S. at 377. Unlike in *Schenck*, the fixed buffer zone does not force protestors into the street or make it difficult for "a protestor… to know how to remain in compliance" with the limitations. *Id.* at 378. The fixed buffer zone does not create a "lack of certainty" like the floating zone, which, though smaller than the protest distancing zone, caused "a substantial risk that more speech will be burdened" than the policy expressly prohibits. *Id.* In *Schenck*, the court found that a preferable policy would "both effect… separation and yet provide certainty," which the fixed buffer zone in this case does. *Id.* at 378-79. The fixed sixty-foot zone allows multiple people to pass in and out of the facility while remaining sufficiently distanced from one another and from protestors, while making clear to protestors the areas in which their speech is welcomed and the areas in which it creates public health risks. Additionally, the sixty-foot zone does not prohibit a specific type of communication necessary to the Luddites in conveying their message. In *McCullen v. Coakley*, 573 U.S. 464 (2014), the smaller, thirty-five-foot buffer zone was overly broad because it completely prevented the "sidewalk counselor" plaintiffs from communicating with patients, as they were often unable to "distinguish patients from passersby… in time to initiate a conversation before they enter the buffer zone." *McCullen*, 573 U.S. at 487. Here, the Luddites are not attempting to engage in individualized counseling about health services but are generally protesting the policy. They may do this in a variety of ways that do not require standing in close proximity to other individuals for extended periods of time, creating a risk of HBD transmission.

The Luddites had numerous opportunities to communicate effectively while remaining outside of the buffer zone. Instead, they opted not to carry signs or pamphlets, which would not

violate the religious beliefs that prevent them from using the internet to spread their message. They also opted to set up further from the entrance than mandated by the policy, remaining seventy-five feet from the entrance. Had the Luddites chosen to stand sixty feet from the entrance, holding signs and handing out pamphlets to those who chose to approach them, or setting out pamphlets on a table at a safe distance that individuals could choose to approach, they would have been able to share their beliefs without jeopardizing public health. Like in *Hill v. Colorado*, the CHBDA places no limitations on sound amplification or on "the number, size, text, or images" on protest signs. *Hill*, 530 U.S. 703, 726 (2000). Sixty feet is the approximate distance between New York City sidewalks on opposite sides of a standard street,[1] a distance at which the Luddites could use amplification (even if the Luddites objected to electronic megaphones, they could use a non-electric type to project their voices) to be heard or display legible protest signs. Protestors, regardless of their message, can be clearly seen and heard by individuals passing by at a sixty-foot distance. The sixty-foot zone outside of the FCC facility is specifically tailored to leave enough space for staff and visitors to enter and exit, for protestors to assemble and be heard, and for pedestrians in the area to safely pass by without any of these individuals standing too closely to each other. The policy allows protestors to communicate with staff and citizens present at FCC facilities without causing further community spread of HBD.

In assessing the tailoring of specific limitations and how speech policies serve identified important interests, courts "must accord a measure of deference" to legislatures. *Hill*, 530 U.S. at 727. Both the legislature and the trial court in this case have deeper familiarity with the particular facts and specific needs that arise around protests and public health at the FCC facilities and both

[1] *See, e.g., The Greatest Grid, Master Plan of Manhattan (1811-2011)*, Baruch College: NYCdata, https://www.baruch.cuny.edu/nycdata/infrastructure/the_grid.html (last visited Jan. 31, 2021).

determined that the fixed, sixty-foot zone was an appropriate limitation on speech. Unlike protest buffer zone policies that have been invalidated, the sixty-foot distancing zone does not overburden speech in its effort to protect public health.

C. There are ample alternatives for the protestors to speak and be heard under the policy.

The analysis of the policy's tailoring overlaps with this issue. The policy does not prevent too much speech in part because of the many alternatives available outside of standing specifically within the buffer zone to communicate. As noted above, the Luddites may communicate by placing pamphlets on the table they have previously set up outside the buffer zone, addressing those entering the facility at a safe distance before they enter the buffer zone, and holding signs legible from within the buffer zone. The Luddites' message will not be suppressed if they are unable to stand within the buffer zone, it must merely be presented in a different manner. Again, the Luddites' approach is not counseling-specific and does not inherently require "close, personal conversations" as used in "sidewalk counseling" in *McCullen*. 573 U.S. at 487. Even if the Luddites would like to share their message in a personal manner, they can do so in a socially distanced way by speaking to pedestrians at a safe distance outside of the buffer zone. To further spread their message, the Luddites may disseminate fliers or pamphlets, post signs on telephone poles near the facility, host socially distanced community meetings, or safely engage with individuals outside of the buffer zone intended to protect public health. As in *Frisby v. Schultz*, 487 U.S. 474, 484 (1988), the protestors "have not been barred" from the neighborhoods around FCC facilities. "They may enter such neighborhoods, alone or in groups, even marching… They may go door-to-door to proselytize their views. They may distribute literature in this manner… or through the mails." *Id.* Though the Luddites do not use telephones and should consider public health directives when conducting in-person outreach,

they are clearly not silenced by the protest distancing policy. They have ample alternatives for sharing their beliefs with other members of the community.

Given the unique interests at play during the pandemic, the ability of the protestors to be seen and heard from the designated distance, and the many alternate means for protestors to convey their messages, the policy is an appropriate time, place, and manner restriction.

II. THE CHBDA'S CONTACT TRACING PROGRAM IS NEUTRAL AND GENERALLY APPLICABLE BECAUSE THE LAW'S AIM IS TO PROTECT THE HEALTH OF THE PUBLIC, NOT TO BURDEN RELIGIOUS GROUPS.

A law burdening religious exercise nevertheless receives rational basis scrutiny under the Free Exercise Clause if the law is neutral and generally applicable. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). As this Court has explained, a law is neutral towards religion so long as the sole objective of the law is to advance legitimate government interests rather than discriminate on the basis of religion. *See id.* at 533. Second, a law is generally applicable if it equally burdens religiously-motivated and secularly-motivated conduct. *See id.* at 545-46. Finally, if a law provides for certain secular exemptions, it still passes this Court's neutral and generally applicable standard so long as those exemptions do not render the law a "religious gerrymander" or use eligibility criteria that are not vague or open-ended. *See id.* at 537.

Here, the court of appeals rightly concluded that, despite burdening Petitioner's ability to practice as a Luddite, the CHBDA's contact tracing program is neutral and generally applicable. With respect to neutrality, it is clear both on the face of the CHBDA and in its operation that the object motivating the contact tracing program was not to burden religiously-motivated conduct but to curb the deadly impact of an unprecedented global pandemic already responsible for

nearly a quarter million deaths in the United States alone. The CHBDA also satisfies the general applicability requirement; participation in the contact tracing program is mandatory regardless of whether someone objects for religious, personal, moral, or philosophical reasons. Finally, while the contact tracing program exempts senior citizens and those with serious health concerns, these exemptions use clear eligibility criteria do not disproportionately disfavor religious objectors.

A. The CHBDA's contact tracing program is neutral towards religion.

Smith and C*hurch of the Lukumi Babalu Aye v. City of Hialeah* require that laws restricting speech be both neutral and generally applicable. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993). To evaluate whether a law is neutral, courts must examine both direct and circumstantial evidence as they would in equal protection cases. *Id.* The court begins by examining the law's text to determine whether it is "facially" neutral, meaning it does not refer to a "religious practice without a secular meaning discernible from the language or context." *Id* at 534. As both the district court and appellate court found, the CHBDA is facially neutral because it does not facially discriminate against, or specifically refer to, any religious practice. The stated purpose of the law is to "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." CHBDA § 42(a)(1). The only exemptions are for all senior citizens and for health reasons granted on a case-by-case basis. CHBDA § 42(b)(1)(B)-(D). Given the backdrop of the public health crisis and lack of mention or motivation pertaining to religious discrimination, the law is facially neutral.

However, to rightly safeguard full protection for religious groups, the Free Exercise Clause "extends beyond facial discrimination." *Id* at 534. To ensure that a law is not subtly

discriminating against a religious group whilst appearing to be neutral, and to avoid "covert suppression of religious beliefs," the court must then examine the circumstances of the creation of the law. *Bowen v. Roy*, 476 U.S. 693, 703 (1986). This analysis includes the "specific series of events leading" to the law and the legislative or administrative history of the law or policy. *Lukumi*, 508 U.S. at 540. In weighing up this evidence, courts determine the question of "discriminatory object." *Id.*, citing *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

In this case, both the appellate and district courts noted the backdrop of the public health crisis motivating officials to pass this legislation, rather than discriminatory intent. *Jones v. Smithers*, C.A. No. 20-CV-9422 at *19, 39 (18th Cir. 2020) The appellate court noted that "nothing in the legislative history suggests a discriminatory intent or motive" and that there were no "anti-Luddite statements." *Id*. By contrast, in *Lukumi*, the Court determined that ordinances dealing with ritual slaughter of animals "were enacted "'because of,' not merely 'in spite of,' " their suppression of Santeria religious practice," as revealed by numerous public statements by city officials disparaging the religion of Santeria. *Lukumi*, 508 U.S. at 540. Moreover, unlike in *Lukumi*, where "the announcement of the plans to open a Santeria church in Hialeah prompted the city council to hold an emergency public session" where the discriminatory ordinances were then passed, the CHBDA was enacted to deal with a disastrous public health crisis that in no way originated from any citizens' or communities' issues with the Luddites' religious beliefs.

B. <u>The CHBDA's contact tracing program is generally applicable.</u>

The latter half of the two-part test from *Smith* and *Lukumi* is that the law must be generally applicable. This was articulated most clearly in *Smith* when the Court stated: "if prohibiting the exercise of religion" is "merely the incidental effect of a generally applicable and

otherwise valid provision, the First Amendment has not been offended." *Smith*, 494 U.S. at 878. In this instance, the law mandates that all citizens install a mandatory SIM card into their mobile phones, with one provided if they do not own a phone, for contact tracing. CHBDA § 42(b). Only those over the age of sixty-five, or with an approved health exemption granted on a case-by-case basis, are exempt. CHBDA § 42(b)(1)(B). The law is generally applicable for a valid reason (the protection of the health of the public through contact-tracing), and the infringement on the Luddites' beliefs regarding mobile phones are a "merely incidental effect." *Smith*, 494 U.S. at 878.

Just as a law's motivation applies in the neutrality analysis, it also applies when deciding if it is generally applicable. Moreover, both the appellate and district courts found that the CHBDA was neutral. In *Lukumi*, Justice Kennedy succinctly stated that "Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied." 508 U.S. at 521 (1993). The central motivation of the CHBDA is to protect the health and well being of individuals, not to burden religious groups.

In a case with seemingly similar facts to ours, the Third Circuit held in 1999 that the Newark N.J. Police Department's policy requiring officers to be clean-shaven was unconstitutional because it allowed only medical, but not religious, exemptions. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 367 (3rd Circuit, 1999). The court held that the department was making a "value judgment" that favored "secular motivations, but not religious motivations." Id at 336.

In justifying its reasoning, the Third Circuit distinguished its facts to those of *Smith*, where the Court had held that Oregon's law prohibiting use of peyote in religious ceremonies

was constitutional because the State had a legitimate interest in regulating drug laws. See *Smith*, 494 U.S. at 874. Importantly, the Court found Oregon's law constitutional even though the law contained an exception for prescription peyote. *Id* ("Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner.") The court in *City of Newark* found that its rejection of a medical-only exemption was different to that in *Smith* because "the prescription exception to Oregon's drug law does not necessarily undermine Oregon's interest in curbing the unregulated use of dangerous drugs," whereas a police department that allowed exemptions to grow beards only for medical reasons "undoubtedly undermine[d] the Department's interest in fostering a uniform appearance." 170 F.3d at 366 (1999).

The facts and context of the CHBDA are much closer to those of *Smith* than *City of Newark*. In *City of Newark*, any "value judgment" favouring a secular exemption over a medical exemption was problematic because it was divorced from the ultimate point of the rule -- i.e. the police force's "general interest in uniformity." *Id*. By contrast, the CHBDA's exemption solely for health or age reasons is like the prescription exemption in *Smith*, where the ultimate point of both laws is (or was) to protect the health and well-being of the community. The government is not arbitrarily making a value judgment about whether a health exemption is more worthy than a religious exemption in an otherwise unrelated law like in *City of Newark*; the relevant law in this case is a health law, and therefore its ultimate motivation is to protect the health of the citizens. It is both rational and non-discriminatory to exempt a citizen from a law for health reasons if otherwise following the law would lead the citizen to undermine their own health, and therefore the law's intent.

C. <u>The contact tracing programs age and health exemptions are not dispositive.</u>

Finally, the CHBDA does not fail on neutrality and general applicability simply because it includes age and health exemptions. Indeed, as this Court recognized in *Lukumi*, "All laws are selective to some extent." *Lukumi*, 508 U.S. at 542. Rather, when a law carves out certain exemptions, the central issue under the Free Exercise Clause is whether those exemptions reveal a discriminatory purpose motivating that law. *See id.* at 533. As this Court has explained, a law's exemptions can reveal this purpose in two ways: First, if the exemptions, on their face, render the law a "religious gerrymander"—that is, a law that targets only religiously-motivated conduct. *See id.* at 533-37 (striking down city ordinance exempting all "secular" forms of animal slaughter while prohibiting only religiously-motivated animal slaughter). Second, equally revealing are exemptions that use vague or open-ended eligibility criteria, which officials can apply to the same discriminatory effect. *See Sherbert v. Verner*, 374 U.S. 398 (1963) (striking down unemployment compensation law conditioning benefits on whether applicants could show "good cause" for missing work). But the CHBDA's age and health exemptions suffer from neither of these flaws.

The CHBDA's age exemption, for example, uses clear eligibility criteria: *any* individual over the age of sixty-five qualifies for the exemption. CHBDA § 42(b)(1)(B). No other considerations about an applicant are relevant. As a result of this bright line rule, so long as an applicant meets the minimal age requirement, health officials have *no choice* but to grant that person's exemption request. Thus, the CHBDA's age exemption eligibility criteria do not give health officials "unfettered discretion" to exclude religious objectors who otherwise qualify under this exemption. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081-82 (9th Cir. 2015)

In a similar vein, if a person applying for the age exemption falls below the age requirement, health officials *must reject* that person's age exemption request regardless of

whether that person has other secular reasons for seeking an exemption. In this respect, the age exemption does not render the CHBDA a "religious gerrymander": Those younger than sixty-five who object to the contact tracing program for moral, personal, or philosophical reasons fair no better under the age exemption than similarly situated religious objectors. *Lukumi*, 508 U.S. at 535.

The same is true with respect to the CHBDA's health exemption: religious *and* secular objectors to the contact tracing program are equally ineligible under this exemption. Indeed, as the court of appeals correctly observed, while the exemption excuses those with serious health objections from participating in the contact tracing program, *see* CHBDA § 42(b)(1)(C), there are many other secular concerns a person may have about participating in the contact tracing program that are unrelated to health and thus uncovered by the exemption. (R. at 40). Just take privacy, for example: the CHBDA's contact tracing program mandates that participants install government-issued SIM cards into their phones, CHBDA § 42(b)(1)(A), which allows federal authorities to log a variety of "personal data" about the phone's owner, such as the person's "name, address, birth date, social security number, and phone number." (R. at 6.) It is not difficult to imagine the privacy concerns the average American would have about giving this information to federal authorities. But not only are such concerns unrelated to health (and thus uncovered by the exemption) they are also separate from any religious belief. Thus, like the age exemption, the CHBDA's health exemption does not render the contact tracing program a "religious gerrymander." *Lukumi*, 508 U.S. at 535.

Nor does the CHBDA's health exemption use vague or open-ended eligibility criteria that government officials can use as a back door for religious discrimination. *See Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 276 (3d Cir. 2007) (explaining that

vague standards are suspect because they can be used to condone secular conduct and eschew religious conduct). This was precisely the problem in *Lukumi*, for example, where the challenged city ordinance prohibited the "unnecessary" killing of animals. *Id.* at 537-38. By interpreting "unnecessary" to cover *only* religiously-motivated animal killings (killing animals for secular reasons like hunting or pest control was permissible), city officials had applied the ordinance in a way that unconstitutionally "singled out" religious conduct for discriminatory treatment. *Id.* Not so with respect to the CHBDA's health exemption. As the representative examples show, health officials have used a narrow and objective standard for applying the exemption, excusing only those with "debilitating" health conditions that prevent them from participating in the contact tracing program. *See* (R. at 19) ("Individuals with late-stage cancer, Ischemic heart disease, and Alzheimer's disease have been granted exemptions . . . [I]ndividuals with severe physical disabilities, unable to operate a mobile device have [also] been granted an exemption."); (R. at 22) ("Generally, the government has granted health[] exemptions for individuals suffering from a debilitating illness on the grounds that the burden of obtaining and/or carrying a cell phone exceeds the public health benefit."). Thus, under this standard, able-bodied Americans with non-religious objections to the contact tracing program are no more eligible for the health exemption than people like Petitioner.

CONCLUSION

The CHBDA's sixty foot no protest buffer zone and its mandatory contact tracing program comply with the Free Speech Clause and Free Exercise Clause of the First Amendment respectively. Specifically, the CHBDA's sixty foot buffer zone does not run afoul of the Free Speech Clause because it amounts to content neutral law, narrowly tailored to curtail the transmission of Hoof and Beak, and leaves ample, alternative avenues for demonstrators to

express their views. The CHBDA's contact tracing program satisfies the Free Exercise Clause's requirements of neutrality and general applicability. Because the contact tracing program's objective is to limit the transmission of Hoof and Beak, the program is neutral towards religion. And by mandating participation for both secular and religious objectors, the program is generally applicable. Thus, Respondent respectfully requests this Court reverse the court of appeals' holding as to the Free Speech issue and uphold the court of appeals' holding with respect to the Free Exercise issue.

CERTIFICATE OF COMPLIANCE

We, the under-signed counsel, certify that:

(i) the work product contained in all copies of this brief is entirely the work product of the team members;

(ii) the team has complied fully with our school's governing honor code; and

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

s/ TEAM 16
Dated: January 31, 2021

APPENDIX A: STATUTES AND CONSTITUTIONAL PROVISIONS

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

28 U.S.C. § 1254(1) (2018): Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

42 .S.C. § 2000bb-1: Free exercise of religion protected

(a) In general
Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
(b) Exception
Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.
(c) Judicial relief
A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.