No. 20–9422

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2021

LEVI JONES,
Petitioner,
v.
CHRISTOPHER SMITHERS,
Respondent.

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

BRIEF FOR THE PETITIONER

Team No. 19
Counsel for Levi Jones, Petitioner

QUESTIONS PRESENTED

I. Whether the Combat Hoof and Beak Disease Act infringes the First Amendment's Free Speech Clause when its Amendment requiring buffer zones is not narrowly tailored and does not leave open ample alternatives to communication.

II. Whether the Combat Hoof and Beak Disease Act infringes the First Amendment's Free Exercise Clause when its underinclusive exemptions preclude the law from being generally applicable and when the government fails to provide a compelling reason for excluding religious exemptions while granting secular exemptions.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered final judgment on this matter. (R. at 41.) Thereafter, Petitioner timely filed a writ of certiorari, which this Court granted. (*Id.* at 42.) This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Disposition Below

This lawsuit concerns Levi Jones ("Mr. Jones"), the leader of Delmont's Church of Luddite ("the Church" or "Delmont Luddites"), and Congress's Combat Hoof and Beak Disease Act ("CHBDA" or "the Act"). In effect, the Act is not narrowly tailored to stop the spread of the Hoof and Beak disease ("Hoof and Beak"). Thus, it violates Mr. Jones's rights of Free Speech and Free Exercise.

On June 1, 2020, Mr. Jones brought this action against Christopher Smithers ("Respondent"), the Commissioner of the Federal Communications Commission ("FCC"). Mr. Jones alleged that the CHBDA's enforcement against his congregation violates two fundamental clauses of the First Amendment: the Free Speech Clause and the Free Exercise Clause. (*Id.* at 9.) Thereafter, the parties submitted cross motions for summary judgment. (*Id.* at 3.) On October 30, 2020, the district court denied Mr. Jones's motion with respect to the Free Speech Clause issue while granting his motion on the Free Exercise Clause issue. (*Id.* at 20.) On appeal, the Eighteenth Circuit reversed the ruling below in its entirety and remanded the case for entry of summary judgment in accordance with the decision. (*Id.* at 40.) Mr. Jones timely filed a petition for writ of certiorari, and this Court granted same. (*Id.* at 42.)

II. Statement of the Facts

A. A Global Pandemic and The U.S. Government's Response

Over the last year, a pandemic caused by Hoof and Beak swept the globe, causing illness and deaths to hundreds of thousands. (*Id.* at 1.) A highly contagious disease, Hoof and Beak spreads person-to-person, causing severe flu-like symptoms and skin rashes. (*Id.*) This disease primarily affects children and young to middle-aged adults. Specifically, in the United States there are over 70 million confirmed cases of Hoof and Beak resulting in over 230 thousand deaths. (*Id.*) As a result, the U.S. government acted rashly by creating the Hoof and Beak Task Force ("the Task Force") and passing the CHBDA. (*Id.*) The Task Force is led by officials from the administration, including Respondent, and its mission is "coordinating and overseeing the administration's efforts to prevent, monitor, contain, and mitigate the spread of Hoof and Beak." (*Id.*)

The CHBDA requires every citizen—except those exempted by the Act—to comply with federal contact tracing mandates by using government-provided SIM cards[1] used in mobile phones. (*Id.* at 2.) Individuals exempt from contact tracing include senior citizens over the age of sixty-five and others who have health issues and are granted the exemption on a case-by-case basis. (*Id.*) Under the Act, individuals pick up government-issued mobile phones or contact-tracing SIM cards at designated federal facilities. (*Id.* at 2, 6.) Section 42(b)(2) of the Act requires all individuals at federal facilities to wear masks and observe social distancing guidelines. (*Id.*)

On October 1, 2020, the FCC began assessing penalties against individuals not complying with the CHBDA. (*Id.* at 2, 5.) The CHBDA's call for strict adherence and issuance of penalties met strong bouts of protest. (*Id.* at 2.) Subsequently, Congress amended the law, adding section

[1] A SIM card is a "smart card inside a mobile phone [that carries] an identification number unique to the owner, stor[es] personal data, and prevent[s] operation [of the device] if removed. *SIM*, Lexico by *Oxford Dictionary*, https://www.lexico.com/en/definition/sim (last visited Jan. 5, 2021).

42(d) ("the Amendment"), which prohibits protests of more than six people occurring within sixty feet of federal facility entrances, including public sidewalks. (*Id.*)

B. Salient Facts Giving Rise to Levi Jones's and the Delmont Luddites' Demonstrations Against the CHBDA

Levi Jones is the congregational leader of the Delmont-based Church of Luddite. (*Id.* at 4.) An essential pillar of the Church is total obedience of "Community Orders"—the congregation's specific set of religious authority and rules—in order to "preserve family unity, faith, community, and cultural identity." (*Id.*) Therefore, the Delmont congregation adheres to one of the Church's primary beliefs: being skeptical of all technology because of the harm it may cause their community. (*Id.*) Even though the Delmont Luddites use a community telephone during emergencies, they forbid more advanced technology like mobile phones, despite being allowed in other congregations, because leaders cannot reach a consensus to change their Community Orders. (*Id.*) Specifically, the Delmont Luddites refuse to allow mobile phones because they "provide unfettered access to ideas that are outside of [their] teachings and value systems[,]" which could distract their members and erode their community ties. (*Id.* at 25.)

That is why Mr. Jones and his congregation oppose the Act requiring mobile phones and SIM cards for contact tracing. (*Id.* at 7.) The Delmont Luddites feel that the Act is both a "gross intrusion" of privacy and an affront to their religious beliefs. (*See id.*) Consequently, on May 1, 2020, Mr. Jones and six other members of his congregation peacefully demonstrated their opposition to the Act outside a federal facility. (*Id.*) The Delmont Luddites set up on the sidewalk seventy-five feet from the facility's entrance, all wore masks, and remained the required six feet apart. (*Id.*) Because the Church did not have viable alternatives to communication, in large part

due to their religious beliefs barring technology,[2] Mr. Jones decided to employ personal conversations to get his message across. (*Id.* at 7, 25.) Mr. Jones occasionally entered the federal building's buffer zone to safely converse with individuals waiting in line. (*Id.* at 34.) The Delmont Luddites chose not to use any sound amplification devices because their beliefs consider speaking loudly offensive and disrespectful, especially when discussing the sensitive nature of their religious beliefs and peaceful opposition to the Act. (*See id.* at 25.)

Another group, the Mothers for Mandates (MOMs), was also present at the Delmont federal facility during the Luddites' peaceful demonstration. (*Id.* at 2.) The MOMs are a well-known group with a robust internet presence that support the Act. (*Id.*) The MOMs assembled on the sidewalk fifty-five feet away from the facility entrance, disregarding the Act's sixty-foot buffer zone requirement. (*Id.*) Additionally, members of the MOMs group stood inside the buffer zones to hand out pamphlets in support of the CHBDA. (*Id.*)

Nevertheless, when Federal Facilities Police arrived that afternoon, they only surrounded Mr. Jones and the Delmont Luddites. (*Id.*) The officers insisted Mr. Jones's group had to leave because they were allegedly violating the Act by having a seventh member present. (*Id.*) When Mr. Jones declined to leave from his rightful spot to engage in peaceful protest, police arrested him. (*Id.*) Mr. Jones spent four days in jail and received a $1,000 fine. (*Id.*) No members of the MOMs group were arrested or fined as a result of their own indiscretions that day. (*Id.*)

Mr. Jones returned to the federal facility on May 6, 2020, with five members of his congregation. (*Id.*) The group of six Delmont Luddites assembled sixty feet from the facility, wore

[2] The Delmont Church of Luddite's Community Orders command its followers to be skeptical of all technology because of its effect on the community. (R. at 24–25.) Thus, the Delmont Luddites are unable to promote their views by internet, telephone, or even mass-printing pamphlets. (*Id.* at 25.)

masks, and kept six feet apart from one another—all in accordance with the Act. (*Id.*) They continued to speak to individuals waiting in line to better communicate their message. (*Id.* at 9.) At the same time, a group of seven MOMs members stood within the buffer zone just fifty-five feet away from the facility's entrance in blatant disregard of the Amendment. (*Id.*)

Federal Facilities Police appeared at the site later that afternoon. (*Id.*) As soon as one of the officers recognized Mr. Jones, they singled him out as the "anti-tech preacher" and told him, "You can't be here." (*Id.*) Because Mr. Jones and his group were in full compliance with the mandate, he refused to leave. (*Id.*) The officers arrested Mr. Jones, who spent five days in jail, and fined him $1,500. (*Id.*) Once again, even though the MOMs did not comply with the Act, officers did not arrest or fine anyone from this pro-contact-tracing group. (*Id.*)

SUMMARY OF THE ARGUMENT

This Court should affirm the Eighteenth Circuit's decision that the CHBDA and its Amendment requiring buffer zones violate the First Amendment's Free Speech Clause. The Amendment fails constitutional muster because although it is a content-neutral time, place, and manner regulation, it is not narrowly tailored to serve Respondent's alleged interest in preventing the spread of Hoof and Beak. The buffer zone requirement pushes individuals far back from historically public forums like sidewalks, creating immense burdens on speech. Further, the Amendment's restrictive nature is wholly unnecessary because the Act already provides a statute that requires individuals gathering at federal facilities to practice safety protocols to curb the spread of Hoof and Beak. Thus, the Amendment is hardly narrowly tailored. Further, even if the Court finds the Amendment to be narrowly tailored, it still violates the Free Speech Clause because it does not provide ample alternatives for communication. The Amendment inadvertently undermines the subject matter of Mr. Jones's speech and his ability to express it by giving officials

unfettered discretion. Moreover, the Amendment restricts Mr. Jones from expressing himself with the mode of communication uniquely valuable to his speech. As a result, the Court must strike down the CHBDA Amendment as unconstitutional.

In turn, this Court should reverse the Eighteenth Circuit's decision regarding Mr. Jones's Free Exercise issue because the Act is not generally applicable due to its underinclusive exemptions that undermine the government's interest. Consequently, the Court must apply strict scrutiny and find the Act not narrowly tailored to achieve the government's goal of reducing the spread of Hoof and Beak because the Act—through its exemptions—excludes a major portion of the population capable of transmitting Hoof and Beak. Even if this Court finds the CHBDA to be generally applicable, the Court should nonetheless apply heightened scrutiny and find the Act unconstitutional because Respondent offers no compelling reason why the Act fails to grant a religious exemption while granting secular exemptions. Respondent's decision to omit religious exemptions represents a value judgment by the government resulting in a substantial burden and discriminatory impact on Mr. Jones's faith. Thus, the Act violates Mr. Jones's First Amendment right of free exercise.

ARGUMENT

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I. This prohibition extends to public forums, like sidewalks and public parks. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). Here, the CHBDA unreasonably restricts speech on sidewalks near federal facilities, violating Mr. Jones's First Amendment right to free speech. Moreover, the Act as a whole unconstitutionally prohibits Mr. Jones from freely exercising his religion by requiring his congregation to defy religious orders. As

applied to this case, the Act and its subsequent Amendment violate Mr. Jones' First Amendment rights to free speech and religious expression.

I. THE COURT MUST FIND THE AMENDMENT UNCONSTITUTIONAL BECAUSE, ALTHOUGH CONTENT-NEUTRAL, IT IS AN INVALID TIME, PLACE, AND MANNER RESTRICTION.

The Court should affirm the Eighteenth Circuit's decision regarding Mr. Jones's free speech issue because the Act violates the First Amendment's Free Speech Clause. The First Amendment protection of free speech allows for *some* limitations depending on the forum. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–47 (1983) (creating a three-part division of government property: (1) the traditional public forum; (2) the limited forum; and (3) the non-public forum). In the "quintessential public forum[]," which includes public streets and sidewalks, speech is subject to only *limited* government regulation. *Id.* at 45 (emphasis added). Federal and state governments may adopt reasonable time, place, and manner restrictions to regulate demonstrations on streets and sidewalks. *See id.*; *see also Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980) ("A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable."). Time, place, and manner regulations must (1) be content neutral; (2) be narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Here, the Amendment is a content-neutral regulation. (R. at 37.) Because of this, the Court must apply intermediate scrutiny to determine whether the Amendment satisfies the other two necessary inquiries. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). The Amendment does not. First, the Amendment's improper restrictions are not narrowly tailored to serve the government's interest in curbing the spread of Hoof and Beak. Second, even if this Court considered the Amendment narrowly tailored, it impermissibly reduces viable alternative modes

of communication available to Mr. Jones. Thus, the Court must find the Amendment an unconstitutional time, place, and manner regulation.

A. The CHBDA Amendment is not narrowly tailored because it burdens more speech than necessary to promote the government's alleged interest in curbing Hoof and Beak Disease.

Courts should defer to a government's reasonable time, place, and manner regulation only if it is narrowly tailored. *Ward*, 491 U.S. at 782–83. "The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest." *Id.* Here, although Respondent proffers a substantial government interest in protecting Americans from the spread of Hoof and Beak, the Amendment does not narrowly promote such an interest. Rather, the Amendment's restrictions burden speech because the fixed buffer zones compromise Mr. Jones's ability to express his views whether or not Hoof and Beak transmission is possible. Further, although the Amendment need not impose the least restrictive means to promote the government's interest, it still may not "readily sacrifice speech for efficiency" by choosing a manner of restriction that is the path of least resistance. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014) (internal citations omitted).

1. Because the required buffer zones bleed into historically public sidewalks, the Amendment limits Mr. Jones's ability to communicate the Church of Luddite's views even when Hoof and Beak transmission would be minimal.

The First Amendment may not guarantee the right to *any* form of expression, but it does recognize that some forms, like conversations on a sidewalk, are historically associated with the transmission of ideas. *See id.* at 488; *Hague*, 307 U.S. at 515 ("Wherever the title of streets and parks may rest, they . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). Thus, this Court has held a time, place, and manner regulation unconstitutional when it creates a fixed buffer zone that burdens individuals'

speech in traditional public forums like sidewalks, especially when the form of speech is essential to the message. *McCullen*, 573 U.S. at 490. In *McCullen*, this Court confronted an issue regarding a Massachusetts statute that made it a crime to knowingly stand on a sidewalk within thirty-five feet of an entrance or driveway to any place where abortions are performed. *Id.* The petitioners, pro-life demonstrators, challenged the statute because it unconstitutionally burdened the only means of communication they had to reach out to patients. *Id.* at 474. This Court agreed that the statute hindered the petitioners' right to free speech and concluded that the fixed buffer zones did not survive intermediate scrutiny. *See id.* at 487. In the Court's view, the buffer zones burdened substantially more speech than necessary to serve the government's interest in "ensuring public safety and order, promoting the free flow of traffic . . . and protecting a woman's freedom to seek pregnancy-related services." *Id.* at 486–87. Specifically, this Court noted that the fixed buffer "push[ed] petitioners well back from the clinics' entrances and driveways." *Id.* at 487. Moreover, the zones "compromise[d] the petitioners' ability to initiate the close, personal conversations that they view as essential to 'sidewalk counseling.'" *Id.*

The Court shot down the government's contentions that the petitioners could protest from the thirty-five-foot distance by acknowledging that the petitioners were not *merely* protesting abortion but providing women with sensitive information that required subtlety. *Id.* at 489. The Court further stated that the statute still burdened the petitioners' speech because, since its enactment, the counselors reached "far fewer people" than they normally would have. *Id.*; *see also McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1074 (10th Cir. 2020) (holding that an ordinance disallowing individuals from demonstrating on over four hundred medians was not narrowly tailored because it diminished individuals' abilities to safely demonstrate in the most effective areas for their communication). *But see Hill v. Colorado*, 530 U.S. 703, 726–27 (2000)

(holding that a time, place, and manner regulation requiring eight-foot floating buffer zones was narrowly tailored because it allowed speakers to communicate at a normal conversational distance and did not have an adverse impact on readers' abilities to read demonstrators' signs).

Similarly, this Court should strike down the Amendment because it significantly burdens Mr. Jones's speech. Like in *McCullen*, the Amendment here pushes Mr. Jones well back from the federal facility's entrance. *See* 573 U.S. at 487. In fact, the Amendment requires a sixty-foot buffer zone—almost double the size of the unconstitutional zones in *McCullen*—further diminishing Mr. Jones's ability to communicate with other individuals. *See id.* at 470. Further, it is apparent that sixty feet would *not* be normal conversational distance. *See Hill*, 530 U.S. at 727. Therefore, the fixed buffer zones deprive Mr. Jones from conversing with others to relay the sensitive nature of his opposition to the Act.

While demonstrating at the federal facilities Mr. Jones and his congregation are not *just* "vociferous opponents" to the contact-tracing requirement. Just like the counselors in *McCullen*, they act as educators and counselors, providing essential information about their religion and the privacy implications of the Act. *See McCullen*, 573 U.S. at 490. To better relay this sensitive and information, Mr. Jones speaks to individuals on a one-on-one basis like the counselors in *McCullen*. *See* 573 U.S. at 487. The Church values personal conversation because it allows for better understanding of their religion and promotes their religious tenet of not speaking loudly to avoid disrespecting others. (R. at 25.) Thus, the buffer zones burden Mr. Jones's speech and disallow him from using the methods of communication most essential to his message. Additionally, the area around federal facilities pose the most beneficial forum for Mr. Jones's speech because he can reach individuals receiving the required contact-tracing equipment. Similar to the ordinance that forbid demonstrators from using hundreds of medians in *McCraw*, the

Amendment's broad inclusion of *every* federal facility limits Mr. Jones's ability to demonstrate in the most effective areas to convey his message. *See* 973 F.3d at 1074.

Further, the Amendment's required buffer zone excessively burdens Mr. Jones's speech while on historically open public sidewalks, even when those public sidewalks are littered with individuals waiting in line for mobile phones or SIM cards. (R. at 33.) While this would be the perfect audience and forum for Mr. Jones' speech, he cannot express himself because of the buffer zone's restrictive nature. Even though Mr. Jones cannot express himself on the sidewalk because of alleged Hoof and Beak transmission, the government allows presumably hundreds of individuals to stand and wait in line inside or directly outside of federal facilities, and on sidewalks. (*See id.* at 32.)

Respondent may argue that creating a sixty-foot barrier maintains the social distance necessary to curb the spread of Hoof and Beak. That simply is not true. The Amendment includes *every* federal facility, even those not distributing mobile phones and SIM cards. (*Id.* at 33.) This burdens Mr. Jones's speech because the Amendment limits him from entering the buffer zones around federal facilities even when no one else is present—even when there is *no possibility* of Hoof and Beak transmission. This sharply contradicts Respondent's contention that the Amendment actually curbs the spread of the disease because it limits speech even when there would be no spread. Therefore, this Court should strike down the Amendment under intermediate scrutiny.

2. <u>The Amendment's unnecessarily restrictive nature offers Respondent the path of least resistance in limiting free speech even though existing statutes that pose less restrictive alternatives already promote the government's interest.</u>

The requirement of narrow tailoring provides protection from a government's possible censorship and also assures that enforcement officials are not taking the easy way out by restricting speech. *See McCullen*, 573 U.S. at 486. Narrow tailoring does not require applying the "least

restrictive . . . means"; but it requires that the government consider how much speech will be burdened by their choice of enforcement. *Id.* In *McCullen*, the Court noted that the statute prohibiting counselors from standing on sidewalks near abortion clinics burdened speech because it chose a restrictive approach despite there being a variety of alternatives available to serve the government's interest "without excluding individuals from areas historically open for speech and debate." *Id.* at 494. The Court criticized the use of regulations on speech "for mere convenience." *Id.* Specifically, the Court disapproved of the respondent's proffered reason that buffer zones allowed for easier enforcement, stating that "the prime objective of the First Amendment is not efficiency." *Id.* at 495. Because the government had other viable alternatives, like already-existing local ordinances to promote its interest in keeping sidewalks safe, the Court concluded the statute was hardly narrowly tailored. *Id.* at 497.

Here, the Amendment too "sacrific[es] speech for efficiency." *Id.* at 486 (internal citations omitted). Respondent's unmerited contention that the restrictive nature of the Amendment promotes the government's interest of health and safety should not be considered. It is true that painted lines on a sidewalk, like those seen on the buffer zones here and in *McCullen*, are easy to enforce. *See id.* at 495. However, enforcement should not limit traditional discourse in traditional forums more than necessary, especially when already-existing statutes provide less restrictions on speech. *See id.* at 497.

The Act requires all individuals to follow safety regulations while at federal facilities. (R. at 33.) Particularly, section 42(b)(2) of the Act allows individuals to stand in line outside of federal facilities to await their mobile phones or SIM cards if they adhere to the mask mandate and social distancing requirements. *(Id.)* In accordance with the Act, Mr. Jones and his group wore masks

during every demonstration and maintained a safe distance even when speaking personally with individuals. (*Id.* at 25–26.)

Like the already-existing local ordinance in *McCullen*, CHBDA § 42(b)(2) provides Respondent with less restrictive measures to promote its interest in public health and safety. *See* 573 U.S. at 493–94. Respondent could have easily applied section 42(b)(2) to demonstrators like Mr. Jones. Instead of enforcing the Amendment—which restricts speech and access to areas historically open for speech in exchange for easier enforcement practices—Respondent can promote the government's mission in preserving public health and safety by simply requiring demonstrators to comply with already-existing mask mandates and social distancing requirements. Therefore, this Court should find the Amendment unconstitutional because it unnecessarily burdens Mr. Jones's speech.

B. Even if this Court finds the Amendment narrowly tailored, it impermissibly diminishes alternative channels for communication and therefore violates the Free Speech Clause of the First Amendment.

Besides narrow tailoring, courts must also consider whether time, place, manner regulations leave open ample alternatives for communication. *Ward*, 491 U.S. at 791. This Court has upheld regulations that have "no effect on the quantity or content of the expression" and show that the remaining avenues of communication are adequate. *Id.* at 802; *see Members of City Council of City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 812 (1984) ("While the First Amendment does not guarantee the right to employ every conceivable method of communication . . . a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate."). In *Ward*, the Court held that a New York City sound-amplification guideline regulating the volume of speakers at a bandshell concert venue was constitutional in part because it provided ample alternatives for communication. *Id.* The regulation "d[id] not attempt to ban any particular manner or type of expression at a given place or time,"

only regulate the volume of the speakers to better serve the government's interest in controlling noise from bleeding into surrounding areas. *Id.* at 792, 802. Additionally, the city made efforts to ensure that the noise regulation "me[t] the needs of all the varied users of the bandshell." *Id.* at 787. Thus, the sound-amplification regulation "easily met" the requirement of providing alternative modes of communication. *Id.* at 802; *see also Taxpayers for Vincent*, 466 U.S. at 812 (upholding a city ordinance prohibiting posting of signs on public property because the Court considered that respondent's need to place political posters in public was not "uniquely valuable or important mode of communication," or that their ability to communicate effectively was threatened or restricted); *cf. McCullen*, 573 U.S. at 489 (noting that anti-abortion counselors' ability to protest outside of buffer zones "misses the point" that counselors must use "personal, caring, consensual conversations" to better inform women about the various alternatives to abortion).

Here, the Amendment does not provide ample alternative modes of communication. First, the unfettered discretion given to law enforcement by the Amendment inadvertently affects the quantity and content of the expression and creates limitations on modes of communication. *Cf. Ward*, 491 U.S. at 802. This is portrayed when Federal Facilities Police specifically persecute Mr. Jones while demonstrating at the federal facility even when other parties are present and violating the Amendment. (*See* R. at 13, 35). For instance, the police exercised selective enforcement when singling out Mr. Jones during his first demonstration on May 1, 2020, arresting him because his seven-member group violated the Amendment. (*Id.* at 34–35.) At the same time, the police turned their cheek while members of another group—which supported the Act—was "clearly within the [buffer] zone." (*Id.* at 34.) This unbridled use of discretion affects the content of the speech because it prohibits Mr. Jones from expressing his opposition.

Subsequently, during a second demonstration, police automatically recognized Mr. Jones as the "anti-tech preacher" and arrested him. (*Id.* at 35.) Despite following all of the Amendment's requirements and setting up well outside the buffer zones, Mr. Jones faced jail time for simply having been recognized by officials as someone who opposed the Act and could not be at the federal facility. (*Id.*) This interaction depicts how the officers' unchecked discretion surreptitiously affects the content of expression because the officers knew of Mr. Jones's opposition to the Act and automatically stifled his speech upon seeing him.

On the other hand, Federal Facilities Police never penalized the MOMs while they plainly violated the law by setting up well inside the buffer zones and having more members in attendance than allowed by the Amendment. (*Id.*) Federal officials refused to employ the same show of force regarding the same violations simply because of the distinct methods of expressions used and the subject of the speech. (*See Id.* at 34–35.) Unlike the noise regulation in *Ward* that equally affected all groups using the venue, Respondent enforced the Act in a discretionary manner that restricts Mr. Jones and others like him from employing necessary modes of expression while other groups are allowed to disseminate information even if they violate the Amendment. *See* 491 U.S. at 802.

Second, the Amendment restricts a "uniquely valuable or important mode of communication" available to Mr. Jones because it prohibits him from expressing himself through conversations in a public area. *See Taxpayers for Vincent*, 466 U.S. at 812. Like in *McCullen*, personal conversations can be considered uniquely valuable because they are the perfect venue for the subject matter of the speech. *See* 573 U.S. at 489. Here, Mr. Jones engages in conversations to better provide information on the sensitive nature of both his religion and his opposition to the Act. Mr. Jones uses conversation as the form of expression uniquely valuable to his speech because he refuses to violate religious orders that bar his ability to use technology. (*See* R. at 24–25.) Further,

Mr. Jones finds it necessary to use sidewalks near federal facilities as the forum for his message because his Church is unable to have a more sweeping community presence. (R. at 25.) In fact, Mr. Jones cannot mass produce pamphlets or set up websites to further his opposition to the Act like other groups. (*Id.*) Thus, all other methods of communication available to Mr. Jones are inadequate. *See also* 466 U.S. at 812. The Act effectively stifles Mr. Jones's message, which is better suited and more likely heard through "direct greeting[s] or an outstretched arm[,]" because its Amendment restricts Mr. Jones from being able to apply the only unique mode of communication available to him. *See McCullen*, 573 U.S. at 489.

Conversely, the MOMs can express their speech through modes that are not uniquely available to the group. The MOMs group has many alternative forms of communication because of its strong internet presence and recognizable trademarks. (R. at 8.) Nevertheless, the Federal Facilities Police allow the MOMs to distribute pro-contact-tracing pamphlets while standing within buffer zones and violating the Amendment. (*Id.*) Here, akin to the political posters in *Taxpayers for Vincent*, the MOMs' distribution of pamphlets is not uniquely valuable to the group's speech because other forms of communication are available. *See* 466 U.S. at 812. Just as the city ordinance in *Taxpayers for Vincent* did not forbid the placing of political posters in other areas of the city, the Amendment does not forbid the MOMs from spreading their message through the other platforms available to them. *See id.* at 811–12. The MOMs can likely reach a much larger audience through their internet presence, yet they continue to express themselves in a manner not uniquely valuable to their cause. All the while, Mr. Jones is persecuted for using the only form of expression available to him. Therefore, the Court should affirm the Eighteenth Circuit's decision that the Amendment is unconstitutional because it allows for unfair discretion and enforcement, stifling the mode of communication uniquely available to Mr. Jones and the Delmont Luddites.

II. BECAUSE OF ITS EXEMPTIONS, THE CHBDA FAILS UNDER STRICT SCRUTINY AND THEREFORE VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

This Court should reverse the Eighteenth Circuit's decision regarding Mr. Jones's Free Exercise issue because the CHBDA unconstitutionally restricts this right. The Act allows for two secular exemptions: one creating a system for health-related exemptions reviewed on a case-by-case basis, and another exempting all senior citizens over the age of sixty-five. (R. at 2.) Respondent claims the Act's exemptions promote the government's interest in preventing Hoof and Beak transmission, but the broad and sweeping nature of the exemptions creates the opposite effect. A law is not generally applicable when it is underinclusive, thus the Court must apply strict scrutiny here to determine the Act's validity. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543 (1993). After the Court applies strict scrutiny, it will find the Act unconstitutional.

Additionally, the Court must still apply heightened scrutiny even if it finds the Act to be generally applicable because the Act contains secular exemptions while excluding religious exemptions without reason. *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990). This exclusion without reason is discriminatory in nature. *See, e.g.*, *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999). Respectfully, this Court should hold that the means of achieving the compelling government interest here is not at all the least restrictive. In fact, the Act is overbroad and underinclusive.

A. The Court must analyze the Act under strict scrutiny because it is not generally applicable due to its underinclusive exemptions that undermine the government's interest in public safety.

The CHBDA is not a law of general applicability. This Court holds that a law is not generally applicable if the law selectively imposes a burden "on conduct motivated by religious belief" or religious practice. *Church of Lukumi*, 508 U.S. at 543, 560 n.1. In *Church of Lukumi*,

this Court held that a city ordinance prohibiting the ritualistic sacrifice of animals violated the First Amendment. *Id* at 543. The city council passed the ordinance in response to members of the Santeria religion sacrificing animals for religious purposes. *Id.* at 526. The city argued that the ordinance promoted the government's interest in protecting public health and preventing cruelty to animals. *Id.* The Court stated that the ordinance could not accomplish the government's interest because its underinclusive nature "fail[s] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does." *Id.* at 545. Specifically, the Court emphasized that the ordinance regulated *only* the religious animal killings while ignoring their secular killings. *Id.* at 543. ***But see Stormans, Inc. v. Wiesman***, 794 F.3d 1064, 1079–80 (9th Cir. 2015) (holding that, even when an owner had religious objections, a law requiring pharmacies to deliver prescriptions was generally applicable because the law "[was] not substantially underinclusive in [its] prohibition of religious objections . . . .").

Similarly, the CHBDA is not generally applicable because its inclusion of broad secular exemptions makes it underinclusive in achieving the government's interest in preventing the spread of Hoof and Beak. The Act completely undermines Respondent's proffered government interest because its secular exemptions *still* include individuals that spread and transmit the disease. The Act does not offer the public or its exempted groups more protection from Hoof and Beak's spread, just as the city ordinance in *Church of Lukumi* failed to protect animals from cruelty in secular practices. *See* 508 U.S. at 543. Moreover, the CHBDA's exemptions differ from the generally applicable exemptions in *Wiesman* because the underinclusive system of secular exemptions here do not allow for any religious objections. *See generally* 794 F.3d at 1078.

Respondent may argue that the Court's holding in *Smith* applies here. *See* 494 U.S. at 904. That is not the law. In *Smith*, the Court held that an Oregon law prohibiting the unregulated use of

a narcotic was not generally applicable—even though it contained a prescription exemption issued at the discretion of a medical practitioner—because it promoted the government's interest in preventing the unregulated use of narcotic. *Id.* at 874, 904. Unlike the prescription exemption in *Smith*, the Act excludes a major segment of the population during a deadly global pandemic. *See id.* at 904. In fact, the CHBDA's medical exemption excludes a class of individuals—who can still contract and transmit Hoof and Beak—from contact tracing, further undermining the government's interest of slowing the spread.

Moreover, the Act's second exemption for senior citizens also undermines the government interest of curbing the spread of Hoof and Beak. With this specific exemption, the government is conflating the fact that Hoof and Beak does not severely affect senior citizens with senior citizens not being able to spread Hoof and Beak. That is incorrect. Both of the Act's exemptions undermine the government's interest in preventing Hoof and Beak transmission by failing to contact-trace a major segment of the population. Thus, this Court must find the CHBDA not generally applicable.

In the context of religious liberty, this Court has been careful not to erode the protections of the Free Exercise Clause, holding that "[a] law burdening religious practice which is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of Lukumi*, 508 U.S. at 546. Under strict scrutiny, the government must justify the burden it places on religious liberty by showing that it used the least restrictive means of achieving the interest at stake. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (holding that the state review board violated claimant's right to free exercise when it denied him unemployment benefits because of conduct mandated by religious belief). In fact, in *Jacobson v. Massachusetts*, this Court held that a statute enacted to protect public health must be substantially related to the object of the law, and the law must not be a "palpable invasion of rights[.]" 197 U.S. 11, 31 (1905). In other words,

the restrictions must be narrowly tailored to serve the government's interest at stake. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (holding that a law requiring all children to attend school unduly burdened the Free Exercise right of Amish parents who wished to withdraw their children from school because of religious beliefs). By extension, because the Act is not generally applicable, it is therefore subject to strict scrutiny. *Church of Lukumi*, 508 U.S. at 546. Thus, in order for this Court to uphold the Act, its restrictions must be narrowly tailored to accomplish the government's interest of stopping the spread of Hoof and Beak and be substantially related to achieving that compelling interest. *See Yoder*, 406 U.S. at 215. Here, when the Court applies strict scrutiny, it will find the Act to be neither narrowly tailored nor aiding in the government's interest.

Respondent may argue that this Court should apply its decision in *Jacobson* because of the presence of a pandemic. In *Jacobson*, the Court concluded that a vaccination mandate for "all civilized people" to eradicate smallpox had a substantial relation to public health and safety. 197 U.S. at 28. The Court stated that, during a pandemic, it defers to the state's judgment and does not intervene unless "plainly necessary" in matters that "do not ordinarily concern the federal government." *Id.* at 38. The Court reasoned that the law's limited medical exemption for children who may be "unfit subjects" for the vaccine—that had to be issued by a registered physician—did not sufficiently deny equal protection rights because the statute applied equally to everyone, except the small exempted group of children. *Id.* at 30. As a result, the Court upheld the vaccine mandate because its exemption was narrowly tailored to serve the government's interest in stopping the spread of smallpox because it was substantially related to that interest and did not offend individual liberties. *See id.* at 38–39 (stating that "[all laws] should receive a sensible construction [and] [g]eneral terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence.").

In contrast, Respondent's arguments would be misplaced because the federal government—not the state—enacted the CHBDA. (R. at 1.) Further, because of the Act's underinclusive exemptions, the Court's intervention is necessary. The Act's medical exemption creates a system for the government to evaluate potentially qualifying individuals on a case-by-case basis. (*Id.* at 2.) The vaccine mandate in *Jacobson* was significantly more invasive than the Act but was better suited to promote the government's interest in controlling a pandemic. *See* 197 U.S. at 30–31. Unlike the Act's sweeping exemptions that include a large part of the population, the applicable exemption in *Jacobson* was narrowly tailored to include only children who may be "unfit subjects" on a limited basis. *See id.* at 31. Therefore, the application of *Jacobson* to this case, except to show that the government action must be substantially related to the interest at stake, would be unfounded.

Generally, although not as effective as a vaccine, a contact-tracing mandate may help slow the spread of Hoof and Beak. However, to be successful, the mandate must apply to *all* individuals capable of contracting and spreading Hoof and Beak. The Act does not. At its core, the Act is underinclusive and therefore not narrowly tailored. The CHBDA's own exemptions "endanger" the governmental interest it is designed to address because the government exempts a major segment of the population. *See Wiesman*, 794 F.3d at 107. Respondent claims that its greatest priority is stopping the spread of Hoof and Beak; yet this legislation undermines that priority by exempting individuals who can still spread the disease. By exempting a sizeable portion of the population the CHBDA is not narrowly tailored to accomplish the government's interest. Accordingly, the Act violates the Free Exercise Clause of the First Amendment because the Act's exemptions are not narrowly tailored to the government interest at stake.

B. Even if this Court finds the Act to be generally applicable, it should still apply heightened scrutiny and find it unconstitutional because Respondent fails to provide a compelling reason for denying religious exemptions while granting secular exemptions.

Even if the Court determines that the CHBDA is generally applicable, the Act is *still* subject to heightened scrutiny because it creates a system for evaluating secular medical exemptions on a case-by-case basis while ignoring any possible system for potential religious exemptions. Notably, in *Smith*, this Court held that a neutral law of general applicability, which incidentally burdens the free exercise of religion, does not offend the First Amendment. 494 U.S. at 879. That said, in the same case, the Court was careful not to erode the First Amendment's protections, stating that "it may not refuse to extend that system [of individualized exemptions] to cases of religious hardship without compelling reason." *Id.* at 884. It follows that, when the government creates a system for secular exemptions to a law of general applicability, it cannot deny exemptions in cases of "religious hardship" without a "compelling reason." *See Church of Lukumi*, 508 U.S. at 537 (discussing that if a government chooses to create a law with only secular exclusions, it must justify any potential intrusion on religion with a compelling reason).

In further support of this premise, the Third Circuit held that a policy with a system for granting exemptions for secular reasons must offer a substantial justification for not extending religious exemptions. *FOP Newark Lodge No. 12*, 170 F.3d at 360. The Third Circuit reasoned that failure to offer a "substantial justification" for a burden on religion is "suggestive of discriminatory intent so as to trigger heightened scrutiny under both *Smith* and *Lukumi*." *Id.* As a result, if the "government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Id.* at 366. In other words, a scheme of "individualized and categorical secular exemptions" triggers strict scrutiny. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 212 (3d Cir. 2004) (holding that the government's

refusal to exempt religiously motivated activities from a permit fee while allowing exemptions for secular reasons violated the Free Exercise Clause). Under strict scrutiny, the government must justify the burden on religious liberty by showing that the method used is the least restrictive means of achieving the compelling government interest at stake. *Thomas*, 450 U.S. 707, 718 (1981).

In *Smith*, the Court did not apply heightened scrutiny to an Oregon law that prohibited the use or possession of peyote or other narcotics, even though the law contained secular exemptions excluding narcotics prescribed by a medical practitioner. 494 U.S. at 874; *see FOP Newark Lodge No. 12*, 170 F.3d at 366 (remarking that the *Smith* Court avoided heightened scrutiny because the exemption did not compromise the interest at stake: "curbing the unregulated use of dangerous drugs[.]"). The Court discussed that a regulated therapeutic use of prescription narcotics actually aided the government in its mission to prevent the unregulated use of drugs. *Smith*, 494 U.S. at 874. Therefore, the Court justified its decision, stating that the exemption did not undermine the government's interest. *Id.*

However, in *FOP Newark Lodge*, the Third Circuit distinguished *Smith*, applying heightened scrutiny to hold that a police department's policy was unconstitutional. 170 F.3d at 365. In *FOP Newark Lodge*, two police officers of devout Sunni Muslim faith sued their employer in response to a new policy forbidding officers from having beards—creating an incurable conflict with the plaintiffs' religious requirements. *Id.* at 367. The police department purportedly created the policy to foster "uniformity." *Id.* Nevertheless, uniformity could be forsaken if individuals fell within two secular exemptions: one for medical reasons and another excluding undercover officers. *Id.* The Third Circuit held that the department, while offering secular exemptions, may not refuse a religious exemption without a compelling reason because doing so would be "suggestive of discriminatory intent" and therefore "cannot survive any degree of heightened scrutiny[.]" *Id.* at

365, 367. With that in mind, the reason heightened scrutiny applied in *FOP Newark Lodge* and not in *Smith* is because the exemption in *Smith* did not selectively undermine the purpose of the law. *Compare id.* (where the secular exemptions undermine the police department's proffered interest in uniformity) *with* 494 U.S. at 874 (where the secular exemptions did not undermine the government's interest in preventing the unregulated use of narcotics like peyote).

Here, the Court should apply heightened scrutiny and find the Act unconstitutional because of its complete disregard of possible religious exemptions. The CHBDA's already-existing system excludes the possibility of religious exemptions. (R. at 1.) Like the medical exemption in *FOP Newark Lodge*, the Act's medical exemption creates a value judgment in favor of secular reasons without providing a path for religiously motivated exemptions. *See* 170 F.3d at 366; *see also Blackhawk*, 381 F.3d at 212 (advocating that when a system of secular exemptions exists, the government may not deny religious exemptions without a compelling reason).

Therefore, the Court should adopt the Third Circuit's presumption of discriminatory intent here because Respondent does not proffer any compelling reasons as to why secular exemptions are more necessary than religious. *See FOP Newark Lodge No. 12*, 170 F.3d at 360. As a result, the Court must protect First Amendment rights and apply strict scrutiny because of the Act's discriminatory nature. Like the policy in *FOP Newark Lodge*, the Act's exemptions place the weight of the governmental restriction on religious practices. *See id.* Further, in *Church of Lukumi*, Justice Scalia stated that First Amendment jurisprudence focuses not on "the purposes for which legislators enact laws, but to the effects of the laws enacted[.]" *Church of Lukumi*, 508 U.S. at 558 (Scalia, J., concurring). Justice Scalia reasoned that if the ordinances banning religious animal sacrifices had been passed solely because of the city's "ardent desire to prevent cruelty to animals . . . they would nonetheless be invalid." *Id.* (Scalia, J., concurring). Similarly, the Act may have

originally been passed with neutral motive; yet, its solely secular exemptions' burdening effect on religious practice, without reason, sufficiently undermines the First Amendment.

Respondent may claim that providing too many exemptions will undermine the purpose of the legislation. However, the government willfully created these exemptions that conflict with that purpose. Therefore, because the government cannot justify the exclusion of religiously motivated exemptions, this Court should apply heightened scrutiny. Under this analysis, the Court will find the Act underinclusive in accomplishing the government's interest in curbing the disease's spread.

To be successful in accomplishing its goal of stopping the spread of Hoof and Beak, the CHBDA should apply to *all* Americans capable of contracting and spreading the disease. Instead, the Act placed the weight of the governmental restriction on the Delmont Church of Luddite. Moreover, the failure of the government to narrowly tailor the CHBDA is sufficient to invalidate the Act's ordinances. *See generally id.* at 546. Therefore, this Court should invalidate the CHBDA because Respondent fails to provide any compelling reason for the Act's discriminatory impact on the Delmont Church of Luddite's right to free exercise. The bottom line is that the Act bludgeons Mr. Jones's First Amendment rights.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court affirm in part and reverse in part the lower court's decision regarding Mr. Jones's free speech and free exercise rights, respectively, and find that the CHBDA violates the First Amendment of the U.S. Constitution.

CERTIFICATION

This team certifies that (i) the work product contained in all copies of this brief is in fact the work product of the team members; (ii) this team has complied fully with its school's governing honor code; and (iii) this team has complied with all Rules of the Competition.