No. 20-9422

In the

Supreme Court of the United States

March 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 RESPONDENT
Christopher Smithers

TEAM 20
Counsel for Respondent

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 contact tracing through the use of mobile phones and government-issued SIM cards is neutral and generally applicable, despite religious objections to technology.

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The citation to the opinion of the United States District Court for the District of Delmont is *Jones v. Smithers*, C.A. No. 20-CV-9422 (D. Del. Oct. 30, 2020) and is the Record (R.) at 1–20. The citation to the opinion of the United States Court of Appeals for the Eighteenth Circuit is *Jones v. Smithers*, C.A. No. 20-CV-9422 (18th Cir. 2020) and is in the Record at 29–41.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit has entered a final judgment in this matter. R. at 40–41. Petitioner filed a timely petition for writ of certiorari, which this Court granted. R. at 42. This Court has jurisdiction in this case pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

In response to the outbreak of the contagious Hoof and Beak Disease, President Felicia Underwood, on February 1, 2020, created the federal government's Hoof and Beak Task Force "to coordinate and oversee the administration's efforts to prevent, monitor, contain, and mitigate the spread of Hoof and Beak." Stipulation ¶ 4. On April 15, 2020, Congress passed the Combat Hoof and Beak Disease Act ("CHBDA" or "the Act"), which mandated a contact tracing program enforced by the Federal Communications Commission (FCC). Stipulation ¶ 8. The FCC regulates communications by telephone and SIM cards and is an independent government agency of the United States. Stipulation ¶ 2. The Respondent, Mr. Christopher Smithers, is the Commissioner of the FCC and works for the Hoof and Beak Task Force. *Id*. Mr. Smithers is responsible for implementing the contact tracing mandate throughout the United States. *Id*. This lawful exercise of congressional authority serves an important purpose, through contact tracing,

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 contact tracing program utilizes federal facilities in each state to distribute SIM cards containing contact tracing software. CHBDA § 42(b). The SIM cards "shall be installed in mobile phones." CHBDA § 42(b)(1). Under the CHBDA, if a citizen does not own a cell phone, one will be provided to them which will include the government-provided SIM card. CHBDA § 42(b)(1)(A). Every person living in the United States, except senior citizens over the age of sixty-five, is required to comply with the CHBDA's mandate. CHBDA § 42(b)(1)(B). Local facilities may grant certain health exemptions on a case-by-case basis. CHBDA §42(b)(1)(C).

Due to growing protest activity and the contagious nature of Hoof and Beak, Congress issued an emergency amendment. Stipulation ¶ 8. The amendment created a buffer zone within sixty feet of facility entrances that were to be clearly marked and limited the number of protestors to six, to slow the spread of the disease. CHBDA §§ 42(d).Enforcement of the amendment is "subject to discretion of local facility officials in acknowledgment of the varied location characteristics for each center." CHBDA §42(e).

The Petitioner, Mr. Levi Jones, is the congregational leader of the Delmont-based Church of Luddite. Jones Aff. ¶ 3. Under the Delmont Church of Luddite Community Orders, the primary dogma is a skepticism founded in the belief that "…technology has great potential to cause harm to [their] families and community. When it comes to mobile phones, [they] do not allow them in [their] community…[because] these devices provide unfettered access to ideas that are outside of [their] teachings and value systems and will break down [their] families and communities…" Jones Aff. ¶ 5. Mr. Jones states, "The Delmont Luddites will not comply with

this unfair mandate which is a clear violation and threat to our way of life and exercise religion." Jones Aff. ¶13. However, this "skepticism of technology" does not apply to all Luddites, because the Eastmont Luddites do not forbid mobile phones. Jones Aff. ¶ 6. Eastmont's Community Orders allow them because they are a "necessary tool for them to communicate." *Id*. The Eastmont Luddite's understand that technology can help them stay in contact with family outside the congregation and for business purposes, *inter alia*. *Id*.

The Delmont Federal Facility began the distribution of SIM cards on May 1, 2020. Stipulation ¶ 6. The federal facility complied with CHBDA § 42(d)(2) at the onset by having the "buffer zone" clearly marked, signs posted, and painted boundary lines on the streets and sidewalk outside the facility. *Id*. Furthermore, it has been conceded that the Delmont Federal Facility is a public forum. Stipulation ¶ 5.

On May 1, and May 6, 2020, Mr. Jones was arrested for violating the CHBDA's amendment guidelines at the Delmont Federal Facility. Jones Aff. ¶ 8. For his first arrest, Mr. Jones violated the amendment by having seven people at his protest. Jones Aff. ¶ 10. Mr. Jones and his group of protesters were observed entering the buffer zone and directly approaching people in order to protest the mandate. Mathers Aff. ¶ 7. For his second arrest, Mr. Jones was arrested at the discretion of the Federal Facilities Police because of his previous encounter with them five days prior. Jones Aff. ¶ 11.

Mothers for Mandate ("MOMs"), led by Maura Mathers of Delmont, is a group that advocates for compliance with the CHBDA mandate. Mathers Aff. ¶¶ 3, 5. The MOMs, "fully support the mandate to combat the disease and encourage people to comply with its provisions." Mathers Aff. ¶ 5. When they advocate at federal facilities, they bring signs and literature that are placed on a small table at a safe distance away from where they advocate. Mathers Aff. ¶ 6. The

MOMs witnessed Mr. Jones being asked to leave each time he was arrested because he violated the guidelines by directly approaching people in line to protest, yet he refused. Mathers Aff. ¶ ¶ 7, 8. Unlike Mr. Jones's Luddite protestors, MOMs protestors remained stationary and did not initiate contact. Mathers Aff. ¶ 6.

II. PROCEDURAL HISTORY

This case was originally brought before the District Court for the District of Delmont. R. at 1. Mr. Jones brought this suit against Mr. Smithers asking the District Court to recognize a violation of his rights to free speech and free exercise. R. at 3. On October 5, 2020, the parties filed cross motions for summary judgment with no material facts in dispute. R. at 3. Mr. Jones first issue claimed that the Free Speech Clause was violated when the federal government prohibited the protesters from entering the "buffer zone" and limited groups of protestors to six or less. R. at 3. Mr. Jones also claimed that his right to free exercise was violated by the government mandate that required the carrying of a mobile phone with SIM cards in order to protect the public health, despite his religious objections. R. at 3. The District Court found no material facts in dispute, granted summary judgment for Mr. Smithers on the free speech issue, and granted summary judgment for Mr. Jones on the free exercise issue. R. at 4.

A timely appeal was filed to the United States Court of Appeals for the Eighteenth Circuit. R. at 36. The Court of Appeals disagreed and reversed the judgment of the District Court on both issues. R. at 30. Therefore, the court of appeals found for Mr. Jones on the free speech issue and Mr. Smithers on the free exercise issue. *Id*. Both courts recognize the Religious Freedom Restoration Act (RFRA) is inapplicable to the case because of the provision in the Act. R. at 30. The Supreme Court granted Mr. Jones's petition for writ of certiorari. R. at 42.

SUMMARY OF THE ARGUMENT

This case is about upholding the CHBDA as a fully constitutional mandate to combat the spread of a dangerous contagion, the Hoof and Beak Disease. The Appellate Court erred when they reversed the District Court's holding that the buffer zone implemented for public health and safety reasons was not narrowly tailored to the governmental interest in public safety and preventing the spread of the disease. However, the Court of Appeals, without error, reversed the District Court's holding and held that the mandated contact tracing program is neutral and generally applicable.

For the government to regulate speech in a traditional public forum, it is required to prove that the restriction placed on speech is constitutional by showing that the limitation is justified without reference to the content of the speech, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels for communication. Furthermore, if the government imposes a restriction that impacts religious freedom, it must show either that the restriction is neutral and generally applicable, or that it is narrowly tailored to accomplish a compelling government interest.

Both the Appellate and District Court held that the CHBDA is content-neutral as to speech, and is therefore a valid time, place, or manner restriction. R. at 30. Once the restriction is deemed content neutral, to be enforceable it must be "narrowly tailored to serve a significant government interest." *McCullen v.* 573 U.S. 464, 477 (2014). The CHBDA is narrowly tailored to serve a significant government interest. The Act is a close fit between the ends and means because a global health concern exists. The buffer-zone restriction implemented does not burden more speech than necessary—the Luddites may still effectively convey their message in a socially-distanced manner during this global pandemic.

The Appellate Court, without err, reversed the District Court's holding that the CHBDA was not neutral and generally applicable. The Appellate Court agreed with the District Court finding no evidence of facial departures from neutrality, stating that "the FCC mandate satisfies this test as it does not facially discriminate against or refer to the Luddites religious practice." R. at 18. On the issue of general applicability, the Act is applicable to "each person living in the United States." *Id*. The only exceptions permitted in the CHBDA are to persons over the age of sixty-five, because they are less susceptible to the deadly disease, and to those already suffering a debilitating illness. CHBDA §§42(b)(1)(B)–(C).

Therefore, the CHBDA is narrowly tailored to serve the governmental interest in preventing the spread of Hoof and Beak and the buffer zones do not violate the Free Speech Clause. Furthermore, the CHBDA contact tracing program is neutral and generally applicable because it applies to all Americans and does not target any religion or religious activity. Thus, does not violate the Free Exercise Clause of the Constitution.

STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The standard of review of an order granting a motion of summary judgment is de novo*." Gross v. Hale-Halsell Co.*, 554 F.3d 870, 875 (10th Cir. 2009). Likewise, when cross motions for summary judgment are under review, the Court must "determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed" *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996).

ARGUMENT

I. THE APPELLATE COURT ERRED IN FINDING THE CHBDA VIOLATED THE PETITIONER'S FIRST AMENDMENT FREE SPEECH RIGHTS BECAUSE THE CHBDA IS A CONTENT NEUTRAL STATUTE THAT IS NARROWLY TAILORED TO SERVE A SIGNIFICANT GOVERNMENT INTEREST AND LEAVES AMPLE ALTERNATIVE CHANNELS FOR COMMUNICATION.

The First Amendment of the United States Constitution includes the Free Speech Clause which, in part, states that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. However, this amendment is not without limit. *McCullen*, 573 U.S. at 477. The Constitution allows the government to implement certain time, place, or manner restrictions on speech in traditional public forums if the restriction: 1) is justified without reference to the content of the speech; 2) is narrowly tailored to serve a significant governmental interest; and 3) and leaves open ample alternative channels for communication of the speech. *Id.*

The scrutiny standard applied to this case will depend on whether the speech at issue is considered by the Court to be content neutral or content based. *Id*. at 478. If this Court finds the speech to be content neutral, then an intermediate scrutiny standard will be applied meaning that the government must show an "important government interest" that is "narrowly tailored" and does not "burden more speech than necessary". *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 791 (1994). However, if this Court finds the speech to be content based, then a strict scrutiny standard will be applied, meaning that the government must show a "compelling government interest" that is "narrowly tailored" while also using the "least restrictive means necessary". *Id.* at 766.

A. The Sixty-Foot No Protest Buffer Zone Is Content Neutral and Justified Without Reference to the Content of the Speech Because the Buffer Zone Applies Only to the Positioning of All Protestors, Regardless of Their Message.

When considering a potential violation of free speech, "the principal inquiry," especially in time, place, or manner cases, "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). If found that a government restriction on speech is enacted because of the idea or message expressed, then the regulation will be considered content-based. *Madsen*, 512 U.S. at 766. Further, if a regulation "cannot be justified without reference to the content of the regulated speech," then it will be considered content-based and receive strict scrutiny. *Id*. However, if shown that the government imposed a restriction without targeting speech directly and can justify the regulation without reference to the content, then the speech will be considered content neutral and will receive only intermediate scrutiny. *McCullen*, 573 U.S. at 465. The Court should find that this government restriction of free speech is not aimed at a certain topic of speech, nor does the content of the speech need to be referenced for its justification, and therefore it is a content neutral restriction.

Similar to the case at hand, in *Hill*, a statute was enacted in Colorado that created a 100-foot buffer zone outside of an abortion health care facility in order to protect the access and privacy of the people entering the facility from confrontational protests. *Hill v. Colorado*, 530 U.S. 703, 707 (2000). The Court reasoned that the statute was content neutral because it focused only on where the speech occurred as opposed to the speech itself. *Id*. at 719. Further, the statute made no reference to any particular kind of speech, and it applied to all protestors regardless of the viewpoint they held. *Id*. at 723. For these reasons, the Court ultimately held that the Colorado statute satisfied the content-neutrality test set forth in the landmark *Ward* case. *Id*. This finding is

also similar to that of *McCullen*, where the Court also found that a thirty-five-foot buffer zone outside an abortion clinic was a content neutral restriction. *McCullen*, 573 U.S. at 469. In *McCullen*, the Court reasoned that the buffer zone placed outside of the clinic was targeted at protecting public safety as a result of protestors' frequent harassment of patients. *Id.* at 480. Also, again the court found that because the zone only impacted where the demonstrators protested, and not what they were protesting about, the restriction was content neutral. *Id*. at 479. Again, the Court did not agree with the argument that such a restriction should be placed on all state buildings that could possibly have protests outside them, instead of just singling out abortion clinics. *Id*. at 481. The Court reasoned that governments are not required to regulate for "problems that do not exist," and thus the regulation placed outside of the health clinics was necessary for the problems that did presently exist. *Id*. The findings in these decisions further solidify the Court's position that a restriction is content neutral when it is not targeted at a certain kind of speech and can be justified by reference to something other than the content of the speech, such as health and safety.

Specifically, *Hill* and *McCullen* are similar to the case at hand, in that both involve a buffer zone placed outside of a facility in the name of health and safety, much like the buffer zone placed outside the federal SIM card distribution facilities. R. at 2. The *Hill* and *McCullen* restrictions are focused mainly on protecting women from some of the trauma associated with getting an abortion. *McCullen*, 573 U.S. at 469; *Hill*, 530 U.S. at 707. However, here, the government is addressing an even more widespread health concern by implementing this restriction in order to minimize the risk of spreading Hoof and Beak Disease, a deadly virus which caused a pandemic. R. at 15. Also, much like in *Hill* and *McCullen*, the implementation of this restriction only deals with where the protestors may convey their messages, as opposed to

restricting what viewpoint or message they may convey. R. at 2. Thus, the effects on the speech of the protestors are merely incidental to the government's goal of promoting health and safety. The case at hand falls in line with the content neutral precedent that this Court has previously established.

Clearly, the no protest buffer zone restriction is content neutral because it is not designed to silence a certain message, but rather only to maintain the health and safety among those present. Furthermore, this justification comes without reference to the content of the protestors' messages.

B. The Sixty-Foot No Protest Buffer Zone Implemented by Mr. Smithers and the FCC Is Narrowly Tailored to Serve a Significant Government Interest Because a Close Fit Between Ends and Means Exists Between the Global Health Interest and the Restriction Implemented While Also Not Burdening More Speech than Necessary.

Once the restriction is deemed content neutral, to be enforceable it must be "narrowly tailored to serve a significant government interest." *McCullen*, 573 U.S. at 477. This narrowly tailored requirement is in place to prevent the government from "too readily sacrificing speech for efficiency," and does so by requiring a "close fit between ends and means." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 365 (3d Cir. 2016). Additionally, the court required that the government restriction must not "burden more speech than necessary" to achieve the government goal. *Id*.

In *Madsen*, this Court found that a thirty-six-foot buffer zone outside of an abortion clinic was sufficiently narrowly tailored to the government interest of protecting a "women's access to seek lawful medical or counseling services in connection with her pregnancy." *Madsen*, 512 U.S. at 767. Uniquely, the Court used a slightly more stringent standard when analyzing this issue because it dealt with an injunction relief request and was focused on the unique issue of abortion. *Id*. at 791. The standard that this Court introduced, required that the restriction "burden no more

speech than necessary to serve a significant government interest." *Id*. The court did find that certain portions of the restriction, like those dealing with private property, were overly burdensome. *Id*. at 776. However, it still found that even under this slightly heightened scrutiny, the "thirty-six-foot buffer zone around the entrances and driveway" … "burden[ed] no more speech than necessary." *Id*. at 770. The fact that the buffer zone included traditional public forums, such as sidewalks and public streets, did not prevent the Court from deeming that restriction valid. The Court reasoned that "protestors could still be seen and heard from the clinic parking lots," and that the "narrowness of the confines around the clinic" made this restriction one that fulfilled the heightened standard of not burdening more speech than necessary. *Id*. at 814.

Much like in *Madsen*, in this case at hand the government has implemented a no protest buffer zone of sixty feet to protect the health and safety of those in the area from the widespread disease. R. at 2. Like *Madsen*, this buffer zone includes areas deemed traditional public forums. Stipulation ¶ 5. However, through the holding in *Madsen*, it is clear that this Court is willing to allow the government to restrict the speech in these areas, to a certain degree, in the name of health and safety. In the case at hand, the MOM's group, which demonstrates with signs and pamphlets outside of the federal SIM card facility, has not had any grievances associated with their ability to be seen and heard. R. at 3. Mr. Jones claims the Luddite's are restricted to speaking directly to people at the protest due to their religious beliefs. Jones Aff. ¶ 7. Thus, they believe that they are effectively being silenced because they are not able to "make signs and distribute literature because mass production would require a high amount of technological involvement, which is against [their] faith." *Id*. However, given that the nature of the buffer zone restriction only allows for permits the presence six protestors, the need for "mass production"

and the use of technology is unnecessary. R. at 30. The Luddites could easily create such a small number of signs and literature without the use of technology to convey their message. Because the *Madsen* court used a slightly more stringent standard when reviewing the buffer zone restriction and still found that the thirty-six-foot buffer zone was narrowly tailored, the Court should find similarly here because it is using a slightly lesser standard.

In the *Schenck* case, the Court deemed that a fifteen-foot buffer zone outside of an abortion clinic "around entrances…and people seeking access" was narrowly tailored because it is important that access to the clinics "not be impeded" and is needed to "prevent defendants from crowding patients and invading their personal space." *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 369 (1997). This is similar to the case at hand because social distancing is critical to the curtailing of the spread of the deadly Hoof and Beak Disease. R. at 14. Thus, the means of a buffer zone restriction intended to reach the end of avoiding crowded spaces and the invasion of personal spaces should be found to be narrowly tailored as in *Schenck*.

This Court's evaluation of the *McCullen* case is one that needs to be distinguished from the case at hand. In *McCullen*, the Court found that the government implementation of thirty-five-foot buffer zones outside of Massachusetts reproductive health care facilities was not narrowly tailored because it burdened more speech than necessary to achieve the government's goal. *McCullen*, 573 U.S. at 478. The Court accepted that health and safety was indeed a legitimate government interest, however, the buffer zones deprived the anti-abortion protestors of their "two primary methods of communicating with arriving patients: close, personal conversations and distribution of literature." *Id*. at 466. The protestors understood the intense emotional nature of the process of receiving an abortion and believed that raising their voice to yell at patients from outside of the thirty-five-foot buffer zone was a "mode of communication

sharply at odds with the compassionate message they wish[ed] to convey." *Id*. at 487. However, this situation can be distinguished from the case at hand because the protests occurring outside of the federal SIM card facilities do not deal with the life and death of unborn babies. The emotional trauma associated with receiving an abortion is not one that can be likened to receiving a mobile phone with a SIM card placed in it. The necessity of "close, personal conversations" in the context of talking to an abortion patient is completely understandable due to the life and death outcome at stake. However, the case at hand does not present such an emotional and potentially traumatizing situation that the *McCullen* case does, and therefore the "primary methods" of communicating in this context differ. Further, the petitioner is likely to argue that in this case the sixty-foot buffer zone is larger than the thirty-five-foot buffer zone in *McCullen* and therefore should be deemed overburdensome. However, courts have found that zone size is but one consideration in determining the level of burden on speech and is not a dispositive point. *Bruni,* 824 F.3d at 368. Therefore, in the present case the buffer zone is not burdening more speech than necessary due to the ability of the Luddites to effectively convey their message absent the need for close, personal conversation.

The sixty-foot no protest buffer zone implemented by Mr. Smithers and the FCC is narrowly tailored to serve a significant government interest because a close fit between ends and means exists between the global health interest and the restriction implemented while also not burdening more speech than necessary.

C. The Sixty-Foot No Protest Buffer Zone Implemented by Mr. Smithers and the FCC Allows for Ample Alternative Channels for Communication Because the Luddites Message Is Still Able to Reach Their Intended Audience.

A government restriction on free speech is unconstitutional if the "speaker is not permitted to reach the intended audience" by ways of an alternative channel. *Berger v. City of*

Seattle, 569 F.3d 1029, 1049 (9th Cir. 2009) (quoting *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d. 1010, 1024 (9th Cir. 2008)). Further, the government must not "ban any particular manner or type of expression at a given place and time" for the alternative channel to be adequate. *Ward*, 491 U.S. at 791.

In *Ward*, the government issued a sound regulation that applied to a concert, which took place in New York City's Central Park, due to numerous excessive noise complaints received from people living or enjoying the nearby areas. *Id*. at 785. The Court reasoned that because the city regulation "has no effect on the quantity or content of that expression beyond regulating the extent of amplification," there remained open ample alternative channels for communication of the band's message. *Id*. at 802. This holding shows that the Court is more focused on the effect on the actual content of the speech rather than the amplification of that speech, and if there is little to no effect on that content then the Court will find that ample alternative channels are available for the communication of the message.

The case at hand can be compared to *Ward* because the only part of the message that is impacted by the sixty-foot buffer zone is the amplification of the message that the Luddites wish to share. The protesting Luddites are still more than capable of creating signs and delivering the content of their message from outside the sixty-foot buffer zone. As previously mentioned, the Luddites mistakenly claim that they need technology to convey their message sixty feet to people, however given the small number of protestors allowed to be at the site, it is feasible for them to convey the message without the use of technology. R. at 7. As long as people can still "picket, carry signs, pray, sing, or chant in full view," then this Court has deemed that ample alternative channels for communication still exist. *Schenck*, 519 U.S. at 370. This is exactly the case with the Luddites here.

Therefore, the sixty-foot no protest buffer zone implemented by Mr. Smithers and the FCC allows for ample alternative channels for communication because the Luddites message is still able to reach their intended audience.

II. MR. SMITHERS AND THE FCC DID NOT IMPERMISSIBLY VIOLATE MR. JONES'S RIGHT OF FREE EXERCISE BY ENFORCEMENT OF THE ACT BECAUSE THE RESTRICTIONS IT IMPOSES ARE NEUTRAL AND GENERALLY APPLICABLE AND, EVEN IF THEY ARE NOT, THEY ARE NARROWLY TAILORED TO ACCOMPLISH A COMPELLING GOVERNMENT INTEREST, NAMELY, THE HEALTH AND SAFETY OF UNITED STATES CITIZENS.

The First Amendment establishes that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therof…" U.S. Const. amend. I. However, this important right is not unlimited. Even sincerely-held beliefs "[do] not relieve the citizen from the discharge of political responsibilities." *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 595 (1940). Rather, the Supreme Court has established that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law [prescribes] conduct that his religion [proscribes].'" *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)). Nevertheless, even if the government fails to prove that its regulation is neutral and generally applicable, the regulation must still be enforced if it is narrowly tailored to advance a compelling government interest. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

The sincerity of Mr. Jones's religious beliefs is not in question. *United States v. Ballard*, 322 U.S. 78, 86 (1994) (finding irrelevant the veracity of the respondents' religious doctrines). Additionally, there is no question that the Act was validly enacted as it was essentially stipulated by the parties, Stipulation ¶ 8, established by the District Court, R. at 18, and not considered by the Court of Appeals. Finally, both lower courts recognized that RFRA is not applicable here. R.

at 30. Therefore, the issues to be considered before this Court are whether the Act is neutral and generally applicable, and, if not, whether it can survive strict scrutiny analysis. For the following reasons, the Court should find that it is, and that it can.

A. The CHBDA Is Neutral in Application Because It Is Devoid of Both Explicit and Implicit Discrimination as to Mr. Jones's Religious Belief or Practice.

The Free Exercise Clause of the First Amendment forbids the disapproval of "a particular religion or religion in general." *Lukumi*, 508 U.S. at 532. This prohibition extends to laws which "discriminate against some or all religious beliefs" or target specific "practices because of their religious motivation." *Id*. at 532–33. This is evaluated first according to the text of the statute because "the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without secular meaning discernible from the language or context." *Id*. at 533. Facial neutrality, however, will not suffice. *Id*. at 534. "Subtle," "covert, or "masked" departures from neutrality which target religious conduct discriminatorily also violate the Free Exercise Clause. *Id*. These instances are evaluated by their direct and circumstantial evidence. *Id*. at 540.

The District Court found no evidence of facial departures from neutrality stating that "the FCC mandate satisfies this test as it does not facially discriminate against or refer to the Luddites religious practice." R. at 18. The Court of Appeals agreed. R. at 39. Indeed, there are no explicit references to Luddite or any religious practice or belief within the Act. *Cf* R. 5–7 (quoting relevant sections of the Act which make no mention of religion). Therefore, this Court should also find that the Act is facially neutral with regard to the allegations of free exercise discrimination.

Implicit neutrality is violated where objective equal protection factors indicate discriminatory object. In *Lukumi*, the Court was faced with the question of whether a government

regulation violated the free exercise rights of a Santeria church by effectively outlawing any type of religious animal sacrifice. *Lukumi,* 508 U.S. at 520. In its analysis of the law's neutrality, the court considered all relevant evidence including "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id*. at 540. The Court found that this circumstantial evidence pointed directly towards the Santeria religious practice because its object was direct suppression: a demonstrated animosity towards Santeria, targeting of religious exercise, restrictions exclusive to the church in question, and broader suppression than necessary to achieve any legitimate ends. *Id*. at 542.

Here, none of the forgoing considerations illuminate similar lack of neutrality as to Mr. Jones or the Luddite practice of religion. No evidence suggests that religious animus inspired the contact tracing program or the enactment of the CHBDA in general; rather, it was to "protect Americans…by letting people know that they may have been exposed to Hoof and Beak Disease and therefore should monitor their health for signs and symptoms of Hoof and Beak." CHBDA § 42(a)(1). Although an amendment to the Act was set forth in response to growing protests, Stipulation ¶ 8, there is no indication that it was directed towards religious-based protests specifically as the government would have an interest in regulating all kinds of protests, including those with hypothetical secular objections to the contact tracing program. Mr. Jones offers no contemporaneous statements of the policy makers to indicate religious targeting, much less hostility. Finally, the Act does not infringe upon religious practice any more than necessary to achieve its ends. For example, contact tracing would simply not be effective if many exceptions were granted—including broad religious based ones. Furthermore, the Act does not

require any member of the Delmont Church to actually use the phone he is issued—only that he carry it.

Neutrality may also be evaluated according to whether the objector was treated differently on the basis of his religion. *Fulton v. City of Phila.*, 922 F.3d 140, 156 (3d Cir. 2019). While the *Lukumi* Court considered objections to government proscription, the *Fulton* court centered on a more analogous objection to government prescription: enforcement of equal treatment of same-sex couples as foster parent candidates. *Id*. at 140. The court found the government action to be neutral, in part because no evidence existed that non-religious objectors were or would have been treated any differently. *Id.* at 156. This Court should find similarly in the case before it. The Act treats all citizens the same, regardless of whether they objected for religious reasons, like Mr. Jones, for non-religious reasons, or for no reason at all. CHBDA § 42(a) ("[e]ach person living in the United States shall participate in a mandatory contact tracing program."); CHBDA § 42(c) (Failure to comply with the Act "will result in punishment of up to one year in jail and/or a fine of up to $2,000.").

Therefore, this Court should find that the Act is neutral, both explicitly and implicitly, as to its treatment of religion. Furthermore, this neutrality may bear on the general applicability of the Act. *Lukumi,* 508, U.S. at 531 (stating that neutrality and general applicability are interrelated).

B. The CHBDA is Generally Applicable Because It Is Not Substantially Underinclusive In Its Treatment of the Luddite Religion to Achieve Its Goals.

The Court has recognized the inherent selectivity of all laws; however, the Free Exercise Clause establishes that those which burden "religious practice must be of general applicability." *Lukumi*, 508 U.S. at 542. Thus, religious observers are protected against unequal treatment. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987).

The Court in *Lukumi* considered applicability from the perspective of the ordinances' underinclusivity. *Lukumi*, 508 U.S. at 543. The Court found that there is no general applicability where the government's action fails to prohibit nonreligious conduct that endangers the government's interest just as much as the religious conduct. *Id*. Here, Mr. Jones points towards exceptions to the Act provided for the elderly and those with debilitating illness. CHBDA §§ 42(b)(1)(B)–(C). However, these exceptions are not blanket. Rather, the government has chosen to tailor them through an application and appeals process which decides the exemptions on a case-by-case basis. R. at 6. Additionally, the Act does not exclude only those with religious objections. Thus, those who object to the government mandate on other, non-religious grounds such as inconvenience or infringement of personal liberty similarly have no recourse. Therefore, the Court should find that the Act is generally applicable.

C. If the CHBDA is Not Neutral and Generally Applicable, It Nevertheless Is Narrowly Tailored to Advance a Compelling Government Interest, Namely, the Health and Safety of United States Citizens in the Midst of a Global Pandemic.

A government regulation that fails to satisfy the neutrality or general applicability requirements is still binding provided it is "justified by a compelling government interest and…narrowly tailored to advance that interest." *Lukumi*, 508 U.S. 531–32.

There can be no doubt that the protection of the health and safety of a government's citizens is a compelling state interest. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) ("The police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."). The compelling interest described in *Jacobson* was held to apply to SARS-CoV-2, a virus which caused a pandemic similar in many ways to Hoof and Beak Disease. *Denver Bible Church v. Azar*, No. 1:20-cv-02362-DDD-NRN, 2020 U.S. Dist. LEXIS 195607, at *15 (D. Colo. Oct. 15,

2020) ("For one thing, there is no question that the State here has a compelling interest in protecting its citizens from the SARS-CoV-2 virus."). Therefore, this Court should find that the protection of the health and safety of the public from Hoof and Beak Disease is a compelling state interest.

Regarding the tailoring of the Act to achieve this compelling interest, the context of a global pandemic should afford the state some deference, thereby making judicial intervention rare. *Id*. Justice Alito recognized as much in the wake of the SARS-CoV-2 pandemic stating:

> In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the [SARS-CoV-2] outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules.

Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting). Although it may be argued that the country is past the outset of the Hoof and Beak emergency and therefore should afford less emergency deference, the facts continue to indicate that to date no vaccination has been established and medical professionals are still "laboring around the clock to treat patients." R. at 1. Moreover, President Underwood established the Hoof and Beak task force only two months after the disease was first identified, and Congress passed the Act only two months after that. R. at 1. Thus, both at the time the legislation was passed and at the time it is being enforced, a "time of crisis" remains which the Court should weigh in calculating the scope of the legislation under strict scrutiny.

Finally, a broad scope is permitted where voluntary participation or frequent exceptions would undermine the government action and render it ineffective. *United States v. Lee*, 455 U.S.

252, 258–59 (1982). In *Lee*, the Court considered free exercise objections to mandatory social security contributions. *Id.* at 252. Because of the nature of the social security program and the pervasive exceptions that would likely follow in the floodgates of a ruling for the objector, the Court found the government regulation sufficiently narrowed. *Id*. at 259–61. In the case before the Court, a contact tracing program is similar in that it requires the participation of a vast number of individuals, and that its efficacy decreases in proportion to the number of exceptions. Therefore, the government has an interest in limiting the number of exceptions to the program. Indeed, as the Eighteenth Circuit Court stated, Congress need not recognize every available exception. R. at 40.

Because the protection of the health and safety of American citizens is a compelling government interest, and because this interest is sufficiently narrow given the context of a global crisis and type of regulation at hand, this Court should find that the Act survives a strict scrutiny analysis.

In conclusion, the First Amendment protections of free exercise are so well-recognized that their violations are rare. *Lukumi*, 508 U.S. at 523. The case before the Court is no exception as the CHBDA is valid, neutral, and generally applicable, and, in the event the Court decides otherwise, the CHBDA is narrowly tailored to achieve a compelling government interest—the health and safety of American citizens.

CONCLUSION

The First Amendment protects some of the most cherished rights of American citizens, including the rights to free speech and free exercise of religion. U.S. Const. amend. I. However, to say that these rights are unlimited would effectively ensure that every man becomes "a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878). Here, for the foregoing

reasons, Mr. Smithers and the FCC acted consistently with the Constitution in their enforcement of the CHBDA regarding both the free speech and free exercise rights of Mr. Jones. Congress could have carved out religious exemptions to the CHBDA, and yet it properly exercised its right not to, because "to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts." *Smith*, 494 U.S. at 890.

Therefore, Mr. Smithers respectfully requests that this Court reverse the decision of the appellate court with respect to the issue of free speech and affirm the decision of the appellate court with respect to the issue of free exercise.

Dated: January 31, 2021

Respectfully submitted,

/s/ Team 20

CERTIFICATE OF COMPLIANCE

Pursuant to the Seigenthaler-Sutherland Official Rules, we, the under-signed counsel, certify that (i) this brief is entirely the work product of competition team members, (ii) the team has complied fully with its school's governing honor code, and (iii) the team has complied with all Rules of the Competition.

/s/ Team 20

Dated: January 31, 2021

APPENDIX: 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 people peaceably to assemble, and to petition the Government for a redress of grievances.

28 U.S.C. § 1254(1): 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 a civil or criminal case, before or after rendition of judgment or decree.

CHBDA §42: Combat Hoof and Beak Disease Act; Relevant Provisions

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

(b) Federal facilities located in each state will be used to distribute SIM cards containing contact tracing software.
  (1) The SIM cards shall be installed on mobile phones.
    (A) If a citizen does not have a mobile phone, the centers shall distribute a mobile phone containing the contact tracing SIM card.
      (i) Upon receiving a SIM card of mobile phone, every person's name, address, birth date, social security number, and phone number if not receiving a phone from the facility, will be logged.
    (B) Senior Citizen over sixty-five years of age are exempt from this law.
    (C) Health exemptions may be granted by the officials at each local federal facility on a case-by-case basis.
    (D) No other type of exemption is permitted.
    (E) Appeal authority is delegated to the FCC and must be filed within sixty days of receiving denial.
  (2) At the federal facilities, at a minimum, the following must be observed and enforced:
    1. All persons must wear a mask
    2. All persons shall observe social distancing and maintain a distance of six feet apart from one another, inside and outside of the building.

(c) Failure to comply with the Act will result in punishment of up to one year in jail and/or a fine of up to $2000.

(d) Protestors are prohibited within sixty feet of the facility entrance, including public sidewalks, during operating hours.
  (1) Groups of protestors are limited to no more than six persons.
  (2) The zone must be clearly marked and posted.

(e) Enforcement is subject to discretion of local facility officials in acknowledgment of the varied location characteristics of each center.
(f) (8) Pursuant to 42 U.S. Code §2000bb-3, the Religious Freedom and Restoration Act is inapplicable to this act;

42 U.S.C. §2000bb: Religious Freedom and Restoration Act (RFRA); Relevant Provision

42 U.S.C. §2000bb-3(b): All federal law is subject to this Act unless such law explicitly excludes such application by reference to this Act.