Case No. 20-9422

IN THE

Supreme Court of the United States

LEVI JONES,

Petitioner,

v.

CHRISTOPHER SMITHERS,

Respondent.

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

BRIEF OF PETITIONER
Levi Jones

Team Number 21
January 31, 2021

Attorneys for Levi Jones

QUESTIONS PRESENTED

(1) Whether a law that expressly targets a specific type and intention of speech with an overbroad time, place, manner restriction is narrowly tailored when it allows for selection enforcement and creates an arbitrary distinction not based on science or rational policy.

(2) Whether a law that expressly favors secular concerns, which are not inherently burdened or harmed by the government's program, over religious exercise, freedom of beliefs, and parental and community rights, is neutral and generally applicable, despite the closely held and genuine religious objections.

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The citation to the opinion of the United States District Court for the District of Delmont is *Jones v. Smithers*, No. 20-CV-9422 (D. Delmont Jan. 10, 2019) and is contained in the record on appeal. 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. 20-9422 (18th Cir. 2020) and is contained in the record on appeal. R. at 29-41.

CONSTITUTIONAL PROVISIONS INVOLVED

The text of the First Amendment to the United States Constitution is set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner Levi Jones ("Mr. Jones") is a resident of the state of Delmont and the leader of the Delmont Church of the Luddite. R. at 21. The Church of the Luddite is a decentralized collection of congregations that believe in a strong reliance on family and community as the central tenant of their religion. R. at 22. Each congregation creates its own Community Orders to which the members owe total obedience. R. at 22-23. The Delmont Luddites' Community Orders command that the members should be skeptical and avoid technology because of its ability to break down reliance on and distract from the community and their families. R. at 24-25. The members of Mr. Jones' congregation do not use mobile phones, sound amplification devices, computers, the internet, or literature mass-production devices, though they have a single landline in the community for emergencies. R. at 24-25.

On February 1, 2020, President Felicia Underwood established the Hoof and Beak Task Force to prevent the spread of the novel Hoof and Beak Disease that broke out in the United States two months prior. R. at 1, 22. On April 15, 2020, Congress enacted the Combat Hoof and

Beak Disease Act ("CHBDA" or the "Act") to create a contact tracing program to avert the spread of Hoof and Beak Disease, with the Federal Communications Commissions ("FCC") as the lead agency. R. at 22. The Act requires that Americans install a special SIM card in their mobile phone that can monitor the individuals' location and notify them when they encounter an infected person. R at 6; CHBDA § 42(a)-(b). All citizens must participate in this program unless they are over the age of sixty-five or receive a health exemption from an official on a case-by-case basis. R at 6; CHBDA § 42(a)-(b). The government has granted health exemptions for individuals with late-stage cancer, Ischemic heart disease, Alzheimer's disease, and severe physical disabilities. R. at 22. If a person does not have a mobile phone, he or she may receive one for free at the distribution center responsible for supplying the SIMs cards and collecting personal identification information needed for the contact program. R at 6; CHBDA § 42(b)(1). Congress has explicitly stated that the Religious Freedoms and Restoration Act ("RFRA") is not applicable this law. R. at 6; CHBDA § 42(f)(8). Mr. Jones and the Delmont Luddites refuse to comply with this mandate because it threatens their religious beliefs and ability to practice in accordance with those beliefs. R. at 26.

After growing protests at federal facilities against the contact tracing mandate, Congress amended the CHBDA to restrict demonstrations around the federal distribution facilities. R. at 22. In addition to the original requirements that all persons at the facilities wear a mask and social distance by maintaining at least six feet distance from other individuals, R. at 6; CHBDA § 42(b)(2), Congress prohibited protests within a "clearly marked and posted" buffer zone of sixty feet from the facility's entrance, even when that zone includes public sidewalks, like the distribution center in Delmont. R. at 7; CHBDA § 42(d). It also limits the size of a group of protestors to no more than six people. R. at 7; CHBDA § 42(d)(1).

On May 1, 2020, Mr. Jones and six other members of his congregation traveled to the Delmont Federal Facility to express their opposition to the government intrusion on privacy and their religion. R. at 24-25. All the Luddites wore masks, remained six feet apart, and only entered the buffer zone to speak directly with individuals at the facility. R. at 25-26. Their religious beliefs prohibit the use of technology to amply their voice, such as with a bullhorn, or printing pamphlets to distribute, so they must speak directly to individuals to convey their beliefs. In addition to the Luddites, Mother for Mandates ("MOMs"), a clearly identifiable group that supports and encourages compliance with the contact tracing provisions, was present at the Delmont Facility to demonstrate in favor of the law. R. at 27. While the MOMs left their literature at a table outside the buffer zone and did not approach individuals, R. at 27-28, they gathered in groups greater than six individuals and frequently stood within the buffer zone. R. at 26. After demonstrating for seven hours, Mr. Jones was arrested, spent four days in jail, and was fined $1,000 for having a group of more than six people protest. R. at 25-26. No members of MOMs were arrested. R at 26.

Five days later, on May 6, Mr. Jones and five members of his congregation returned to the Delmont Facility. R at 26. On this occasion, the Luddites ensured they complied with the buffer zone, social distancing requirements, and mask requirements while keeping their group from exceeding the maximum size of six people. R. at 26. In the afternoon, an officer of the Federal Facilities Police recognized Mr. Jones, and he was arrested, jailed for five days, and fined $1,500, despite complying with the CHBDA. R at 26. Seven members of MOMs were also present, but again no members of their group were arrested, despite the MOMs' non-compliance with the CHBDA. R. at 26.

Mr. Jones brought this suit against Christopher Smithers ("Mr. Smithers"), the FCC Commissioner, for violating his First Amendment rights under the Free Speech and Free Exercise Clauses. R. at 3. On October 5, 2020, Mr. Jones and Mr. Smithers filed cross motions for summary judgment because there are no material facts in dispute. R. at 3. The District Court for the District of Delmont granted partial summary judgment for Mr. Jones finding that the CHBDA violates the Free Exercise Clause because the mandate is not generally applicable. R. at 9-20. The District Court for the District of Delmont also granted partial summary judgment for Mr. Smithers finding that the amendment to the CHBDA is a valid time, place, and manner restriction that does not violate the Free Speech Clause. R. at 9-20. The Court of Appeals for the Eighteenth Circuit reversed both District Court holdings, finding that the CHBDA was neutral and generally applicable and did not violate the Free Exercise Clause, but the amendment was not a valid time, place, and manner restriction because it was not narrowly tailored and violated the Free Speech Clause. R. at 38-40. Mr. Jones, seeking freedom for him and his congregation to practice and speak in accords with their religious beliefs, requested and was granted a Writ of Certiorari on the questions of whether the amendment to the CHBDA is an unconstitutional time, place, and manner restriction and whether the CHBDA is an unconstitutional interference with religious beliefs because it is not a neutral or generally applicable law. R. at 42.

SUMMARY OF THE ARGUMENT

This Court should affirm in part and reverse in part the decision of the United States Court of Appeals for the Eighteenth Circuit.

I. The CHBDA fails all three prongs required for a permissible time, place, and manner restriction on speech and violates the First Amendment.

The CHBDA does not constitute a permissible time, place, or manner restriction and violates the First Amendment. This Court has only found a time, place, or manner restriction in a public forum permissible when the regulation is content-neutral, narrowly tailored to serve a compelling government interest, and leaves open ample alternative channels of communication. The Act at issue fails each of these requirements and violates the Free Speech Clause of the First Amendment. Further, the CHBDA is content-based discrimination with illicit legislative intent to suppress protestors of the contact-tracing distribution sites. Furthermore, the CHBDA allows for selective enforcement, which, in practice, is enforced with reference to the content of the speech made.

The CHBDA establishes two limitations, neither of which are narrowly tailored to serve a compelling government interest. First, the Act places a stagnant buffer zone that is both overbroad and under-inclusive in achieving its goal of enforcing social distancing to prevent the spread of Hoof and Beak Disease. Second, the Act restricts arbitrarily the number of people that are permitted to gather while protesting. This limitation on group sizes is not grounded in science or data that suggests that such a group size, as opposed to any larger, significantly impacts the transmission of Hoof and Beak Disease. Both limitations of the CHBDA limit speech more than is necessary to achieve the government interest and are not narrowly tailored to serve that interest. Third, the CHNBA does not allow for ample alternative channels for communication because it denies Mr. Jones and the Delmont Luddites adequate access to their intended audience.

II. The CHBDA is not a neutral or generally applicable law and impermissibly interferes with free exercise of religious beliefs.

The contact tracing provisions of the CHBDA are not neutral nor generally applicable. The provisions are not neutral because it places a higher value on American citizens' secular concerns over genuine religious beliefs. The provisions are also not generally applicable because it allows for individualized assessment by a government official but does not provide for exceptions to be allotted for closely held religious beliefs. Further, the contact tracing mandate interferes with the parental rights of the Luddite congregation by preventing the community's ability to shield themselves and their children from outside modern influences. The law's impact on Mr. Jones' religious freedom should be treated by this Court with rigorous scrutiny, and this Court should find these provisions unconstitutional.

Moreover, Mr. Jones' case exemplifies the folly of the current Free Exercise Clause's test for neutral and generally applicable laws under *Employment Division, Department of Human Resources of Oregon v. Smith*. The test does not accurately determine when an individual's freedom of belief is meaningfully infringed despite legislative intents to remain neutral. It is impossible to detangle freedom of belief from freedom to exercise when the latter is necessary for the former. Moreover, the legitimate goal of avoiding a patchwork of exemptions has not been avoided under the neutral and generally appliable test, and it should be overturned.

STATEMENT OF JURISDICTION

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

ARGUMENT

I. THE CHBDA VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

The Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST., amend. I. In the context of free speech First Amendment analysis, the court must first determine if a law is content-based. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015). In a public forum, the government's ability to restrict speech is limited to certain time, place, or manner restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989); *see also McCullen v. Coakley*, 573 U.S. 464 (2014). This Court will only find a restriction on the time, place, and manner of speech to be permissible when the restriction falls within the narrow requirements of the three-prong test. The restriction must be content-neutral, narrowly tailored to serve a compelling governmental interest, and leave open ample alternative channels of communication. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *see Ward*, 491 U.S. at 791 (applying the court's three-prong test for judging the constitutionality of the government regulation of the time, place, and manner of protected speech). The CHBDA fails each of these requirements.

First, the CHBDA violates free speech because it is a content-based regulation. The CHBDA was impermissibly amended to specifically target anti-distribution perspectives who sought to use their First Amendment rights near federal distribution facilities, where their message was best conveyed. Second, the CHBDA is not narrowly tailored in pursuit of a compelling government interest. While neither party disputes the importance of the health crisis, the CHBDA is both overbroad and under-inclusive in its methods and fails to serve its stated government interest narrowly. Third, the CHBDA does not leave open ample alternative

channels of communication because it denies Mr. Jones and the Luddites adequate access to their intended audience.

a. The CHBDA constitutes impermissible content-based discrimination and cannot be justified without reference to the content of the regulated speech.

This Court has consistently held restrictions that amount to regulations on the content of speech impermissible in the public forum. *Ward*, 491 U.S. at 791. There are two ways in which a law can be content-based. *Reed*, 576 U.S. at 163-64. First, a law is "content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 163. Second, even when a law is facially content-neutral, it is still a content-based regulation if it "cannot be justified without reference to the content of the regulated speech" or if it "was adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* at 164 (quoting *Ward*, 491 U.S. at 791). The CHBDA is a content-based regulation that was adopted because of disagreement with the message to prevent citizens from compliance with the distribution facilities and plans. The CHBDA regulation on speech cannot be justified without reference to the content of the speech and violates the first amendment.

i. <u>The government adopted the CHBDA amendment because of a disagreement with the message the speech conveys.</u>

Above all else, "the First Amendment means [the] government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *see Cohen v. California*, 403 U.S. 15, 24 (1971) (holding that California could not prohibit the words 'Fuck the Draft' from being displayed on clothing in public buildings simply because it was expletive or offensive, noting that "governmental bodies may not prescribe the form or content of individual expression.").

The essence of censorship is content control. Control does not have to be explicit, saying you cannot speak out against contact tracing, but is implicit through cutting off the legs of any reasonable means to convey one's ideas and thoughts in the place where they are most impactful.

The CHBDA was impermissibly amended to target protesters outside of federal distribution facilities who advocated against contact tracing through the distribution of SIM cards and mobile phones. Illicit legislative intent is not an essential condition of a First Amendment violation; however, a content-based purpose "may be sufficient in certain circumstances to show that the regulation is content-based[.]" *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *see also United States v. Eichmann*, 496 U.S. 310, 315 (1990) ("Although the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is related to the suppression of free expression.") (internal quotation marks omitted) (emphasis in the original). Here, the government is interested in the suppression of anti-SIM card and cell phone distribution perspectives surrounding their distribution sites.

Mr. Smithers posits the need for the amendment as being unrelated to the suppression of a particular viewpoint, but rather as a safety precaution to prevent large groups from gathering and further spreading Hoof and Beak Disease. Here, Congress issued an emergency amendment to the CHBDA in light of "growing protests" at federal facilities. R. at 22. This amendment, which limits both group sizes as well as establishes a buffer zone surrounding the facility, was in direct response to growing protests opposing the distribution facilities and encouraging citizens to be skeptical of all technology, including the technology being distributed for contact tracing. In other words, Congress amended the Act expressly to prohibit the speech Mr. Jones engaged in, and that resulted in Mr. Jones' incarceration and monetary penalties. In the present matter

there was illicit legislative intent to suppress specific messages and expressions of free speech to make it easier to contact trace cell phones and SIM cards – clear content-based regulations.

The CHBDA cannot survive the first requirement of a proper time, place, or manner restriction, and thus surmounts to an impermissible violation of the Free Speech Clause of the first amendment.

ii. The CHBDA allows for selective enforcement.

The amendment to the CHBDA is further applied in a discriminatory manner that necessarily rests on reference to the content of the speech. When laws are facially neutral but are not justified "without reference to the content of the speech," it must be treated as a content-based regulation. *Reed*, 576 U.S. at 164 (quoting *Ward*, 491 U.S. at 791); *see also McCullen*, 573 U.S. at 479 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)) (stating that law is "content based if it require[s] enforcement authorities to examine the content of the message that is conveyed to determine if a violation has occurred") (internal quotation marks omitted). While buffer-zones themselves are not inherently content-based, the buffer here serves the distinct purpose of deterring certain viewpoints through regulating a traditional public forum. *McCullen*, 573 U.S. at 480 (holding that a Massachusetts law creating a "buffer zone" around abortion clinics was content-neutral).

Mr. Jones and members of his congregation were in compliance with the CHBDA on May 6, 2020 when they were arrested.[1] Concurrent to Mr. Jones' arrest on May 6, 2020, other parties who advocated in support of the contact tracing methods and distribution facilities were

[1] Mr. Jones does not dispute that he was in violation of the CHBDA on May 1, 2020. Mr. Jones is specifically refuting the instance on May 6, 2020 where the content-based restriction is most evident through Mr. Jones' arrest while in full compliance with the mandate and buffer zone regulations.

left undisturbed. R. at 26. Members of the pro-contact tracing group MOMs were not arrested despite being out of compliance with the regulation.[2] R. at 26. Preceding his arrest, an officer identified Mr. Jones as the "anti-tech preacher," telling Mr. Jones that "[he] can't be [there]." R. at 26. This Court has repeatedly held that government cannot prohibit outrageous and even offensive, in this case selectively enforced, and must be protected under the First Amendment. *See Snyder v. Phelps*, 562 U.S. 443 (2011) (shielding Westboro Baptist Church protesters from liability for offensive protests at a soldier's funeral); *see also Boos v. Barry*, 485 U.S. 312 (1988) (striking down a law prohibiting signs criticizing a foreign government near an embassy); *see also Texas v. Johnson*, 491 U.S. 397 (1989) (protecting flag burning despite social opposition and outrage regarding the protest). While the law cannot be said to be content-based on a single instance, here, the discriminatory application in conjunction with the legislative intent to reduce speech related to distribution facilities displays that this Act is a content-based restriction in violation of the First Amendment.

The Eighteenth Circuit did not go far enough by stopping its analysis at the disproportionate impact of speech regulation. The CHBDA does not violate the First Amendment because of its impact on specific groups, but rather it violates the First Amendment because it was crafted with the legislative intent to suppress protesting around distribution facilities and to allow for selective enforcement where officers are taking viewpoint into consideration for determining violations. Mr. Jones' First Amendment rights were not a collateral consequence of an otherwise neutral law – they were intentionally and meaningfully violated because he advocated against the contact tracing methods implored by the government.

[2] The MOMs were in violation of the maximum group gathering established under the CHBDA. CHBDA § 42(d)(1). On May 6, 2020 around 8:30 AM, the MOMs gathered in a group of seven, one person over the established maximum. R. at 26.

At the base of our First Amendment rights is the protection of speech that is unpopular or cumbersome. The CHBDA violates the First Amendment, and the Eighteenth Circuit decision must be affirmed.

b. The CHBDA is not narrowly tailored to serve a compelling government interest.

Even if the CHBDA were not content-based discrimination, the Act still violates the First Amendment because the regulation is not narrowly tailored to the identified government interest.

Strict scrutiny requires that the law not restrict substantially more speech than is necessary to serve the government's interest. *Hill v. Colorado*, 530 U.S. 703, 729 (2000) (noting that a statute is narrowly tailored if the regulations do not "burden speech *more than necessary*") (emphasis added). Neither party disputes the imperative nature of Hoof and Beak Disease, nor does either party deny the legitimacy of the government's interest in the contact tracing program, social distancing, and maintaining order while doing so. R. at 14. However, these legitimate government interests are not without limit. The restrictions on speech must be necessary to serve the government's compelling interest and must be the least restrictive means of doing so. Both the buffer zone and the group size limitations fail to meet this high standard and are not narrowly tailored to serve a compelling government interest.

i. <u>The buffer zone established by the CHBDA is not narrowly tailored because it restricts substantially more speech than needed to further the government interest.</u>

The requirement that the law be narrowly tailored "does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only

because it disagrees with the message . . . but also for mere convenience." *McCullen*, 573 U.S. at 486 ("Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance."). Creating a stagnant buffer zone might be a convenient way to reduce some concerns with closeness, but it does not comply with the First Amendment. *Id.* at 471 (finding an abortion clinic buffer zone law was *not* narrowly tailored because it went beyond promoting safety and interfered with the rights of the anti-abortion protesters to peacefully interact with abortion clinic patrons); *cf. Hill*, 530 U.S. at 703 (where the Supreme Court upheld a "floating buffer zone" as being narrowly tailored). The stagnant buffer zone in this case, mirrors the fixed zone in *McCullen v. Coakley*, which the court promptly struck down as an overbroad attempt to regulate a traditional public forum. Unlike the tailored floating buffer zones in *Hill v. Colorado*, these fixed buffer zones do not narrowly serve the purpose of social distancing.

This Court has held that sidewalks are a natural and proper place for free citizens to engage in information and ideas. For that reason, the court has held that public sidewalks hold a special place in First Amendment analysis. That same principle remains true in a time where we recognize the importance and value of social distancing. The CHBDA makes it a crime to enter onto the traditional public fora for peaceful conversation, even if the closest facility patron is thirty feet away. The fixed sixty-foot buffer is not tailored to provide for the least restrictive means of speech and is both overboard and under-inclusive for its asserted interest. The sixty-foot buffer zone burdens substantially more speech than needed to address the government's interest and is not narrowly tailored.

The sixty-foot buffer zone is not narrowly tailored to serve the governmental interest of social distancing to prevent the spread of Hoof and Beak Disease. It prohibits protesting within

the sixty-foot buffer zone, which includes a public sidewalk, whether the line of persons waiting to receive their contact tracing SIMs or cell phones extends beyond the boundary or not. This zone creates a *substantial* burden on speech without advancing the government's interest. The zone distance does not change if a person is the entire sixty feet away or if the line extends into the buffer zone. Thus, this law would make it a criminal act to be twenty feet away from a patron entering the distribution facility, but not a criminal act to be one foot away from a patron, insofar as the line extends into the buffer zone. This zone does not advance the health concerns and is not tailored to social distancing to the spread of Hoof and Beak Disease. Rather, it uses a blanket buffer zone that, while enabling distancing when the line is short, is not tailored to its purpose. This overbroad buffer zone violates the Free Speech Clause of the First Amendment.

ii. <u>The limitation on group sizes is not narrowly tailored to a compelling government interest.</u>

The limitation of six members to a group protesting at a time is not narrowly tailored to serve a compelling government interest. There is no scientific evidence that asserts that six, rather than seven, eight, or ten, is a "safe" number of people in a group to prevent the spreading of Hoof and Beak Disease. Congress did not rely on any scientific data or research in determining its maximum group size, and in doing so, it arbitrarily selected six people groups, severely limiting speech more than is necessary to achieve their purpose. Despite the acknowledged concern with the spread of Hoof and Beak Disease, the regulations in place must nevertheless be narrowly tailored to serve its purpose and not a blanket restriction for the sake of ease. Here the six-person limitation is unfounded in science, arbitrary, and is not narrowly tailored.

c. The CHBDA does not leave open ample alternative channels for communication.

Even if the CHBDA were content-neutral and narrowly tailored, it would still violate the First Amendment because it denies Mr. Jones and the Delmont Luddites adequate alternative channels to reach their intended audience. An alternative is not ample if "the speaker is not permitted to reach the intended audience." *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). In *Laude,* this Court held that an ordinance that banned signs in residential yards failed this third prong because "the audience intended to be reached by a residential sign – neighbors – could not be reached *as well* by other means." *Gilleo*, 512 U.S. at 57-59 (emphasis added).

Similar to the ordinance in *Laude,* the present regulation prohibits Mr. Jones and the Delmont Luddites from reaching their target audience—people entering the distribution site to sign up for contact tracing programs. The target audience here is specifically those people who are about to enter the distribution facility to receive a SIM card or cell phone to engage in the contact-tracing program. The Delmont Luddites are left without alternatives to pursue this audience in a lawful manner. They are prohibited from engaging in consensual conversations with people who are in line to enter the facility within a set boundary. The alternatives for the Delmont Luddites are further limited by their religious beliefs. The Delmont Luddites believe that speaking loudly is offensive and disrespectful to fellow humans. R. at 24. Furthermore, the distribution of signage or pamphlets is also unavailable to the Delmont Luddites because mass production requires high amounts of technological involvement, which is against their faith. R. at 24. Just as a ban on yard signs keeps the residents of *Laude* from effectively reaching their

neighbors, enforcing stagnant buffers keeps Mr. Jones and the Luddites from effectively communicating with their intended audience.

Thus, the Delmont Luddites are faced with an impossible decision: either forgo their First Amendment right to voice their concerns to people entering the distribution facility or risk criminal charges for engaging in consensual conversations, even at a safe distance. Under the precedent established in *Laude*, this Court must find that the CHBDA does not offer ample alternative channels of communication.

II. THE CHBDA'S CONTACT TRACING PROVISIONS VIOLATE THE RIGHT TO FREE EXERCISE OF RELIGIOUS BELIEFS.

The provisions of the CHBDA that mandate contact tracing through SIM cards and mobile phones violate the Free Exercise Clause. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST., amend. I. The Free Exercise Clause is relevant when "the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). A law may be unconstitutional for violating an individual's free exercise rights if it is not neutral and generally applicable or if it raises questions of hybrid rights.

a. The CHBDA is not neutral nor generally applicable because it values secular concerns over religious beliefs during individual assessments.

A law is neutral under the Free Exercise Clause when it does not "discriminate on its face" or represent "government hostility" towards religion. *Id.* at 533-34. A law is not neutral if the law necessarily "devalues religious reasons . . . by judging them to be of lesser import than

nonreligious reasons" when it considers statutory exceptions. *Id.* at 520, 537; *c.f. Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 884 (1990) (finding the Oregon statute did not devalue religious justifications because it made no exceptions for any reason). This might include legislative intent to target a specific religion, religious persons over nonreligious persons, a "pattern of narrow prohibitions" that amount to targeting a religious practice, or "gratuitous restrictions" on the exercise of religion. *City of Hialeah*, 508 U.S. at 537-38 (quoting *McGowan v. Maryland*, 366 U.S. 420, 520 (1961)).

Relatedly, a law is generally applicable when the law is equally applied to all groups irrespective of religious motivations. The legislature "cannot in a selective manner impose burdens only on conduct motivated by religious belief," while relieving secular conduct of similar burdens. *City of Hialeah*, 508 U.S. at 543. This particularly applies "where the State has in place a system of individual exemptions" to determine which justifications merit relief. *Smith*, 494 U.S. at 884. A system of government assessments is not generally applicable when government officials "invite consideration of the particular circumstances," in which case, the state cannot "refuse to extend that system to cases of 'religious hardship' without a compelling reason." *Id.* at 884 (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986)); *see also Sherbert v. Verner*, 374 U.S. 398 (1963) (rejecting religious hardship as a legitimate justification for exemption "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her [] worship."). Moreover, the government may not impose penalties or fines that effectively inhibit specific religious views under the guise of targeting both secular and religious behaviors. *See e.g., Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invaliding a licensing scheme that financially prohibited Jehovah's Witnesses from distributing religious materials).

The CHBDA's contact tracing provisions are neither neutral nor generally applicable. While the provisions were not designed or intended to target the Luddites, it does create a carve-out suggesting it devalues religious exceptions and deems them to be lesser than nonreligious exceptions. R. at 25-26. Seniors over the age of sixty-five and individuals with health concerns can receive exemptions to this provision, unlike the strict ban in *Employment Division, Department of Human Resources of Oregon v. Smith*, which suggests that strict compliance with the provision is not necessary for the government's purpose. CHMBA § 42(b)(1)(B)-(C). Failure to provide similar exemptions for those with genuine and closely held religious beliefs against carrying cell phones clearly places the generic and unarticulated concerns of older individuals above those with religious justification. Further, there is clear legislative intent to disregard the legitimate religious justification that arises from implementation of the Act. Under CHBDA § 42(f)(8), lawmakers excluded the applicability of the RFRA to avoid challenges to implementation, showing that lawmakers were aware that this law would impact the religious beliefs and conducts of American citizens, like Mr. Jones, and intended to disregard those concerns. CHBDA § 42(f)(8); R. at 6 ("In an effort to allow for quick and effective implementation of the mandate," Congress included CHBDA § 42(f)(8) to make RFRA inapplicable.).[3] This law is not neutral with respect to the Free Exercise Clause.

The law is not generally applicable because the system of individualized government assessment for exemptions does not extend to religious hardship, and it imposes a tax or penalty that would effectively annihilate the Luddites' religious beliefs. The exemption has been granted for justifications, including an inability to use the phone (physical disability), memory

[3] Mr. Jones does not challenge whether CHBDA § 42(f)(8) properly makes RFRA inapplicable to this act.

(Alzheimer's), and medical risk from using the phone (cancer and heart disease). R. at 22.[4] While the government does not need to provide every possible exemption, *see* R. at 40, when the government has invited considerations, it cannot exclude religious grounds and remain generally applicable under the First Amendment. The rejection of cell phones and modern technology underpins the Delmont Luddites' religious community and practices, using the devices would break down their community by distracting the congregation and eliminating the need for community. R. at 25-26. Mr. Smithers and the FCC have created a situation whether the Luddites are forced to accept a tax on their community or abandon those beliefs entirely, effectively rendering it impossible to continue their religious beliefs. Religious freedom has been set aside by the Constitution. While it is not absolute, the government cannot interfere with closely held beliefs. This Court must reverse the Eighteenth Circuit in order to preserve Mr. Jones and the Luddites religious freedoms.

b. The CHBDA violates the right to free exercise even if it is neutral and generally applicable because it interferes with the parental rights of the Luddite congregation.

The Eighteenth Circuit erred by failing to evaluate this law under the exceptions in *Smith* for joint constitutional claims. Where a petitioner makes a "Free Exercise Clause in conjunction

[4] These exceptions run counter to scientific consensus, which suggests that there is no risk to severely ill patients from exposure to cell phones and they are frequently used in the treatment of such diseases. Cell Phones and Cancer Risk, NATIONAL CANCER INSTITUTE (Jan. 9, 2019), https://www.cancer.gov/about-cancer/causes-prevention/risk/radiation/cell-phones-fact-sheet; Jin Yi Choi, et al., Mobile-Application-Based Interventions for Patients With Hypertension and Ischemic Heart Disease: A Systematic Review, 28 J. Nursing Research 117 (2020). Further, the inability to use the cell phone through mental or physical impairments does not prevent an individual from carrying a cell phone and gaining the data the government seeks to prevent the spread of Hoof and Beak.

with other constitutional protections," then "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action." *Smith*, 494 U.S. at 881. The Court in *Smith* expressly includes parental rights as one of the joint rights that would trigger a hybrid, citing *Wisconsin v. Yoder* as a prime example of such rights. *Id.* The Court in *Yoder* held that the petitioners free exercise rights were being violated by a Wisconsin statute that required their teenage children to continue to attend public school despite the petitioner's closely held religious beliefs that public school "expose[d] themselves to the danger of the censure of the church community" and "endanger[ed] their own salvation and that of their children" by introducing beliefs hostile to their religious community's way of life – "ultimately result[ing] in the destruction of the Old Order Amish church community." *Wisconsin v. Yoder*, 406 U.S. 205, 209, 212 (1972). The Court found that religious beliefs and conduct were so intertwined and interconnected that the Wisconsin law's impact would "gravely endanger if not destroy the free exercise of respondents' religious beliefs." *Id.* at 217. Even though the Court found that the law was generally applicable and motivated by compelling government interest, it could not survive the balancing test of strict scrutiny because of the impact on the Old Order Amish community. *Id.* at 236.

This parental right is necessary as a means to preserve the religious community structure, which was threatened by an otherwise neutral and generally applicable law. Requiring Luddites to obtain and carry cell phones equipped with a SIM card would also gravely endanger their religious community and prohibit Mr. Jones and his congregation from raising their children in their religious faith.[5] A core tenant of the Delmont Church of the Luddite is that Luddites must

[5] Notwithstanding the Eastmont Luddites' decision not to forbid the use of mobile phones, R. at 25, it not for the courts to determine what the proper tenants of the Luddites' faith ought to be. *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 714 (1981).

follow the Community Orders to "perverse [] family connections, faith, community, and cultural identity." R. at 23. As with the Old Order Amish, it is impossible to detangle their religious beliefs against the use of modern cell phone technology from the conduct itself. The government imposition of the contact tracing provisions would erode the community's ability to raise the next generation in line with the Community Orders and invade on the Luddite's community and parental rights. This Court should apply the highest level of scrutiny on the government's failure to provide a religious exemption to the contact tracing provisions.

c. The CHBDA infringes on the fundamental rights of Mr. Jones and should be treated with rigorous scrutiny.

i. <u>The CHBDA cannot pass strict scrutiny because it is not narrowly tailored to ensure compliance with the contact tracing provisions and it is unnecessary to prevent the spread of Hoof and Beak Disease.</u>

If a law is not neutral or generally applicable, or if there is a violation of religious exercise and parental rights, then it "must undergo the most rigorous of scrutiny." *City of Hialeah*, 508 U.S. at 546. To pass strict scrutiny, the government must show that its "actions that substantially burden a religious practice [are] justified by a compelling governmental interest," *Smith*, 494 U.S. at 883 (quoting *Verner*, 374 U.S. at 402-03), and "by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas*, 450 U.S. at 718; *see also* 42 U.S.C. § 2000bb-1. The government's case cuts against itself by allowing broad exceptions for groups without equally strong justifications. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727 (2014). Further, if the interests of the law "could be achieved by narrower ordinances that burden[s] religion to a far lesser degree," then the "absence of narrow tailoring suffices to establish the invalidity of the [law]." *City of Hialeah*, 508 U.S. at 546.

Mr. Smithers and the FCC are unable to meet the rigorous standard of strict scrutiny. Mr. Jones does not deny that the government has a compelling interest in combating Hoof and Beak Disease, but the CHBDA does not achieve that interest by the least restrictive means. The government has demonstrated that combatting Hoof and Beak Disease does not require blanket adherence to the contact tracing provisions by giving exemptions to all persons over the age of sixty-five. CHBDA § 42(b)(1)(B). It is not sufficient for Mr. Smithers to argue that the disease affects fewer individuals in this age group because this group is still subject to the social distancing provisions, CHBDA §42(b)(2), and is still affected by the disease. R. at 1. Without a strong justification for these exemptions, the government cut against their case that this law serves the compelling government and that this law was the least restrictive means to carry out the compelling interest.

ii. <u>This Court should adopt a modified rational basis test when there are high levels of government intrusion into the privacy interests of individuals.</u>

This Court should adopt a heightened standard for governmental intrusion into personal data gathered by cell phones and SIM cards, even under a rational scrutiny framework. In the context of privacy rights under the Fourth Amendment, this Court has repeatedly held that cell phone information and cell-site location information (location data generated by cell phones) create "an intimate window into a person's life revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J. concurring)). The quantity and quality of the information provided by cell phones to the government have led this Court to "decline to grant the state unrestricted access" to such information. *Carpenter*, 138 S. Ct. at 2223.

In this case, the intrusion into the religious beliefs and conduct of Mr. Jones' privacy is no less pernicious than if the government sought this mandate to combat criminal activity. Mr. Jones urges this Court to find that where there is a restriction of religious freedoms through cell phones and SIM card data, the court should place a higher level of scrutiny on the government's justifications as it impedes the privacy interests of American citizens. Under such a standard, Mr. Smithers cannot prevail even under the conclusions made by the Eighteenth Circuit.

d. The continued interference with religious free exercise should lead this Court to overturn *Smith* because it failed its intended purpose and is inconsistent with the text of the Free Exercise Clause.

Finally, Mr. Jones urges this Court to reconsider *Smith* and return to the presumption that a law that substantially burdens an individual's religious exercise is unconstitutional without a compelling government interest. The justification underlying the decision in *Smith* is that enforcing religious exemptions in neutral and generally applicable laws "would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applicability," *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997), and "permit every citizen to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 167 (1878). However, in doing so, it created a distinction between religious belief and religious conduct that does not exist in the text of the First Amendment, but "conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected." *Smith*, 494 U.S. at 893 (O'Connor, J., concurring).

Functionally, a neutral law that prohibits religious conduct is not less burdensome on an individual's religious exercise than carve-outs *Smith* created for the neutral statutes that award state benefits. *Smith*, 494 U.S. at 898-99 (O'Connor, J., concurring). The *Smith* doctrine's failure is most apparent in Mr. Jones' case. This government imposition poses an existential

threat to his religious community's coherence and doctrine, and the government must have a compelling justification for this interference on his fundamental rights.

Both Congress and this Court have acknowledged this failure. In response to this threat, Congress passed the RFRA[6] because "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, [and] . . . laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(1)-(2). Since the enactment of RFRA, this Court has extended it to additional categories of petitioners, *see e.g.*, *Burwell*, 573 U.S. at 682, and cabined *Smith* by declining to extend it to other categories of free exercise claims. *See e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC.*, 565 U.S. 171 (2012) (declining to extend *Smith* to cases "concern[ing] government interference with an internal church decision."); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (declining to extend *Smith* to grant awards that exclude schools with religious characteristics from applying). "There is nothing talismanic about neutral laws of general applicability . . . laws neutral toward religion can coerce a person to violate his religious conscience . . . just as effectively as laws aimed at religion." *Smith*, 494 U.S. at 901 (O'Connor, J., concurring). The time has come to overrule *Smith* and apply the standards under RFRA to all free exercise claims.

CONCLUSION

Mr. Smithers and the government have a legitimate and compelling interest in combatting Hoof and Beak Disease, but that interest cannot exceed the Constitutional constraints on the government meant to protect those individual liberties necessary to the function of a free and fair

[6] Mr. Jones acknowledge that CHBDA § 42(f)(8) may exclude application of RFRA in an effort to quickly implement the law, *see* R. at 6, but that exclusion was not successful in limiting the impact on religious practices or subsequent challenges to the law.

society. Both the original text of CHBDA and the amendment later passed by Congress substantially interfere with Mr. Jones and Delmont Luddites' First Amendment rights. Congress designed the amendment to target the content of the speech that Mr. Jones sought to share with other individuals and placed impermissible time, place, and manner restrictions on the distribution of his message. Further, the CHBDA's contact tracing mandate infringes on Mr. Jones and his congregation's belief system in such a way that it would effectively annihilate their religious beliefs and practice through a law that is not neutral nor generally applicable. None of the challenged provisions can survive strict scrutiny because Congress and Mr. Smithers failed to narrowly tailor these regulations by enacting arbitrary categories and limits without regard for its impact on the freedoms of American citizens. Mr. Jones urges this Court to affirm the Eighteenth Circuit's position on the Free Speech Clause and findings that the amendment is not narrowly tailored. Further, this Court should reverse the Eighteenth Circuit's position on the Free Exercise Clause and findings that the CHBDA is neutral and generally applicable or overturn *Smith*.

APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment

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

CERTIFICATE OF COMPLIANCE

In accordance with the Rules of the 2021 Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition, attorneys for Petitioner certify that:

(i) The work product contained in all copies of Team 21's briefs are the work product of the members of the team only;

(ii) Team 21 has compiled fully with our law school honor code;

(iii) Team 21 has complied with all Rules of the Competition.

s/ TEAM 21

Dated: January 31, 2021