No. 20-9422

SUPREME COURT OF THE UNITED STATES

LEVI JONES,

Petitioner

v.

CHRISTOPHER SMITHERS,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eighteenth Circuit

---

BRIEF FOR PETITIONER

Team 27

QUESTIONS PRESENTED

I. Whether the Combat Hoof and Beak Disease Act's restriction prohibiting protesting within sixty feet of the federal distribution facility entrance is narrowly tailored to the governmental interest in public safety and preventing the spread of Hoof and Beak.

II. Whether mandated contact tracing through the use of mobile phones and government-issued SIM cards is a neutral and generally applicable law such that requiring compliance with it does not violate the Free Exercise Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

OTHER FEDERAL CASES

CONSTITUTIONAL PROVISIONS

OPINIONS BELOW

The opinion of the United States District Court for the District of Delmont appears in the record at page 1 through 20. The opinion of the United States Court of Appeals for the Eighteenth Circuit appears in the record at pages 29 through 41. Both opinions are unreported.

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL PROVISIONS

Relevant constitutional provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

A. Factual Background

Following the outbreak of the Hoof and Beak Disease pandemic, which has caused hundreds of thousands of deaths throughout the United States, President Felicia Underwood established the Hoof and Beak Task Force on February 1, 2020. Subsequently, Congress passed the Combat Hoof and Beak Disease Act ("CHBDA" or "the Act"), which created a government mandated contact tracing program through distributed mobile phone SIM cards, on April 15, 2020. The stated purpose of the Act is to "protect Americans, their families, and their communities by letting people know that they may have been exposed to Hoof and Beak Disease and should therefore monitor their health for signs and symptoms of Hoof and Beak." CHBDA § 42(a)(1).

The contact tracing portion of the Act required that the government provide SIM cards to all people living within the U.S., as well as mobile phones to those persons without one, by October 1, 2020. See CHBDA §42(a). The federal facilities would also collect information during distribution, including "every person's name, address, birth date, social security number, and phone number if not receiving a phone from the facility." CHBDA § 42(b)(1)(A)(i). Exemptions from the contact tracing program would be granted to senior citizens over sixty-five, as well as for health related reasons on a case by case basis determined by local federal facility officials. CHBDA § 42(b)(1)(B)-(C). No other exemptions are allowed, but one can appeal an exemption denial through the FCC so long as it was filed within sixty days of receiving a denial. CHBDA § 42(b)(1)(D)-(E). Further, the Act states that the Religious Freedom and Restoration Act ("RFRA") is inapplicable to the CHBDA pursuant to 42 U.S. Code § 2000bb-3. CHBDA §42(f)(8).

To further the goal of protecting Americans from Hoof and Beak, the Act further required that all persons wear a mask and observe social distancing by remaining six feet apart from one another both inside of and outside of the federal facilities. CHBDA §42(b)(2). After the federal distribution program began, protests broke out at federal distribution facilities. Therefore, Congress amended the Act to prohibit protests within sixty feet of the facility entrances during operating hours, including public sidewalks, as well as capping the amount of protestors in a single group to six persons. CHBDA §42(d). Congress also added that enforcement of the Act is subject to "the discretion of local facility officials in acknowledgement of the varied location characteristics for each center." CHBDA § 42(e). Violations of the Act can result in "up to one year in jail and/or a fine of up to $2,000." CHBDA §42(c).

Petitioner Levi Jones is a congregational leader of the Church of Luddite in the state of Delmont. Jones Aff. ¶ 3. Each Luddite sect creates its own set of rules known as "Community Orders" in place of a central church authority, which is created and administered by the individual congregation. Stipulation ¶10. While Community Orders vary between congregations, all Luddites believe in total obedience to whatever set of orders govern their Church. Id. Within the Delmont Church of Luddite, the Community Orders state that Luddites shall be skeptical of all technology due to the potential harm it could bring to one's family and Luddite congregation. Jones Aff. ¶ 5. Therefore, the members of the Delmont congregation do not own or use mobile phones, instead sharing one phone located in a wooden shed next to their main church building which should only be used in emergencies. Stipulation ¶ 11-12; Jones Aff. ¶ 5.

Following the opening of the Delmont Federal SIM card distribution facility, Mr. Jones and six members of his congregation arrived on May 1, 2020 at 9:00 AM to protest on a public sidewalk seventy-five feet from the facility entrance. Jones Aff. ¶ 10. Each member of the group

wore a mask and remained socially distanced. Id. As the group does not believe in the use of technology, they do not use the Internet or phone messaging to further their message. Jones Aff. ¶ 7. Additionally, the group did not have any pamphlets or signage, and therefore spoke one-on-one to those people in line outside the facility. Id. The group occasionally entered the buffer zone to speak with people in line at the facility to express their congregations' opposition to the government's intrusion on individual privacy as well as their personal religious opposition to the mobile phone mandate. Mathers Aff. ¶ 7.

At the same time, another group known as the Mothers for Mandates ("MOMs") were present at the facility demonstrating in support of the CHBDA. Mathers Aff. ¶ 6. The group consisted of five MOMs, who were masked and socially distanced, and they demonstrated by holding up signs and providing pamphlets. Id. The MOMs were assembled on the sidewalk approximately fifty-five feet from the facility entrance, within the sixty-foot buffer zone. Jones Aff. ¶ 12. Some of the MOMs stood outside of the buffer zone while some were clearly within the buffer zone, though the MOMs remained stationary and did not move from their spot. Mathers Aff. ¶ 6.

Around 4:00 PM on May 1, 2020, the officers of the federal facility police surrounded Mr. Jones's group and the police told the Luddites that they had to leave because their group was too large and in violation of the CHBDA. Jones Aff. ¶ 8, 10. When Mr. Jones refused, he was arrested. Mathers Aff. ¶ 8. He spent four days in jail, being released on May 5, 2020, and was fined $1,000. Jones Aff. ¶ 10. No one from the MOMs group was approached by the police, arrested, or fined, despite being within the marked buffer zone. Mathers Aff. ¶ 9.

On May 6, 2020, Mr. Jones and five Luddites gathered again at the Delmont Federal Facility to protest, bringing a small wooden table with them to store their belongings just outside

of the buffer zone. Jones Aff. ¶ 11. They all wore masks and remained socially distanced from each other while speaking to people in line at the facility. Id. The MOMs were also present, this time with a group of seven MOMs who once again demonstrated fifty-five feet from the facility, within the buffer zone. Jones Aff. ¶ 12. Despite following all the procedures in the CHBDA, Mr. Jones was once again arrested and spent a subsequent five days in jail and was issued a fine of $1,500. Id. Once again, none of the MOMs were approached by the police, arrested, or fined despite being in violation of the CHBDA. Id.

B. Trial Court Proceedings

Mr. Jones brought suit against Christopher Smithers, the FCC Commissioner in the United States District Court for the District of Delmont. He asked the District Court to declare that the FCC violated his rights to freedom of speech and free exercise of religion under the First Amendment of the United States Constitution. R. at 3.

On October 5, 2020, Mr. Jones and Mr. Smithers filed cross motions for summary judgment. R. at 3. On October 30, 2020 District Court ruled on these motions. The District Court judge granted summary judgment for Mr. Smithers with respect to the issue of free speech, holding that the prohibition limiting protesting did not violate the Free Speech Clause of the First Amendment. R. at 16, 20. The judge also granted summary judgment for Mr. Jones with respect to the issue of free exercise, holding that the mandate to carry mobile phones was not generally applicable and was unconstitutional under the *Smith* standard. R. at 19, 20.

C. Eighteenth Circuit Appellate Court Proceedings

Mr. Jones appealed to the United States Court of Appeals for the Eighteenth Circuit. The Court of Appeals considered the District Court's entry of summary judgment de novo and concluded that the District Court had erred both in holding that the CHBDA was a valid time,

place, and manner restriction on speech and that the CHBDA was not generally applicable. R. at 36, 38. As such, the Eighteenth Circuit remanded the case with instructions to grant the FCC's motion for summary judgement with respect to the free exercise issue and grant Mr. Jones' motion for summary judgment with respect to the free speech issue. R. at 40, 41.

The Supreme Court of the United States granted Mr. Jones's Petition for a Writ of Certiorari. R. at 42.

SUMMARY OF THE ARGUMENT

This Court should affirm the Eighteenth Circuit's grant of Mr. Jones' motion for summary judgement with respect to the free speech issue because the CHBDA is not a permissible time, place, and manner regulation. The CHBDA's stated purpose is to "protect Americans, their families, and their communities by letting people know that they may have been exposed to Hoof and Beak Disease and should therefore monitor their health for signs and symptoms of Hoof and Beak." CHBDA §42(a)(1). However, that goal is not met by the Act's full restriction on protesting within the sixty-foot buffer zone, which burdens protestors without necessarily protecting Americans from Hoof and Beak. The initial social distancing and mask mandates follow scientific guidelines to protect Americans; yet, the CHBDA goes far beyond this data to suggest a sixty-foot buffer zone against speech will somehow further protect those in line at federal distribution facilities. In fact, this buffer zone has a chilling effect on speech and discourages protestors, even those who follow the rules like Mr. Jones, from standing up against governmental regulations they do not agree with for any reason. Additionally, the CHBDA is vague and overbroad in its regulations, as the Act does not define protesting and instead allows local officials to enforce the CHBDA as they see fit. This allowance lead to Mr. Jones, who followed the Act, to be arrested, despite the MOMs violating the CHBDA at the same location never being approached by the police, let alone be jailed or fined. The over-broad effect of the enforcement regulation further chills speech, and exemplifies that the Act is not narrowly tailored to protect Americans and their families from Hoof and Beak.

Additionally, this Court should reverse the Eighteenth Circuit's denial of Mr. Jones' motion for summary judgment on the issue of free exercise. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof." This Court has held 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." However, if a law is not neutral or of general applicability, it must be narrowly tailored to achieve a compelling governmental interest. The CHBDA is not neutral and of general applicability because it creates an expansive system of both individualized and categorical exemptions due to age and health conditions while allowing no such exemptions for religious views. This effectively creates a "religious gerrymander," allowing exemptions for most people who would not want to carry the SIM card except for those who object on the basis of religion. Because the CHBDA is not a neutral law of general applicability, it must be narrowly tailored to achieve a compelling government interest. The law is not narrowly tailored because it makes no effort to require only those who are at risk of contracting or spreading Hoof and Beak Disease to carry the SIM cards. Additionally, the system of non-religious exemptions calls into question the compelling nature of the contact tracing system.

ARGUMENT

I. THE COURT OF APPEALS FOR THE EIGHTEENTH CIRCUIT CORRECTLY HELD THAT THE CHBDA'S RESTRICTIONS ARE NOT VALID TIME, PLACE, AND MANNER RESTRICTIONS BECAUSE THEY ARE NOT NARROWLY TAILORED TO A LEGITIMATE GOVERNMENT INTEREST

Under the First Amendment's Free Speech Clause, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST., amend. I. Additionally, "speech on matters of public concern . . . is at the heart of the First Amendment's protection." Snyder v. Phelps, 562 U.S. 443, 451-52 (2011) (internal quotations omitted) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-759 (1978); see Connick v. Myers, 461 U.S. 138, 145 (1983) (noting that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection"). The limitations the government can impose on traditional public fora, such as public sidewalks, are "very limited." United States v. Grace, 461 U.S. 171, 177 (1983). Due to the importance of this right, the ability of the government to restrict speech is limited to reasonable time, place, and manner restrictions. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Reasonable restrictions can only be sustained if they (1) "are justified without reference to the content of the regulated speech," (2) "are narrowly tailored to serve a significant governmental interest," and (3) "leave open ample alternative channels for communication of the information." McCullen v. Coakley, 573 U.S. 464, 476 (2014) (quoting Ward, 491 U.S. at 791).

Petitioner's protest on public sidewalks outside the federal facility is a classic exercise of the First Amendment right to free speech, and no valid governmental interest here supports the CHBDA's strict restrictions on said speech. As the Court has previously noted, "[a] statute is narrowly tailored if it targets and *eliminates no more than the exact source of the evil it seeks to*

remedy." Frisby v. Schultz, 487 U.S. 474, 485 (1988) (emphasis added). The CHBDA fails to be narrowly tailored to eliminate the "source of evil" here because the Act (1) creates a substantial burden on speech within a sixty-foot zone of the federal facility, including public sidewalks, and (2) burdens speech more than is necessary to protect the legitimate interest in public health and the prevention of Hoof and Beak.

A. The CHBDA is Not Narrowly Tailored because It Creates a Substantial Burden on Speech Without Advancing the Government's Interest to Protect Public Health and to Prevent the Spread of Hoof and Beak.

The Eighteenth Circuit correctly held that the Act is not narrowly tailored to the government's interest in protecting public health because the CHBDA creates a substantial burden on speech without advancing the Act's stated goal. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Frisby, 487 U.S. at 485. The Court has further noted that the regulation of expression cannot be "in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Ward, 491 U.S. at 799 (citing Frisby, 487 U.S. at 485). The Court has further recognized the importance of the right "of every citizen to reach into the minds of willing listeners and to do so there must be an opportunity to win their attention." Hill v. Colorado, 530 U.S. 703, 728 (2000). The overall determination looks for "the relation [the statute] bears to the overall problem the government seeks to correct." Ward, 491 U.S. at 801. "[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency." McCullen, 573 U.S. at 486.

Here, the narrow tailoring requirement is not met because CHBDA's creates a substantial burden on protestors without a strong nexus to its purpose of protecting public health and safety. The CHBDA seeks to "protect Americans, their families, and their communities by letting

people know they may have been exposed to Hoof and Beak Disease and should therefore monitor their health . . .” CHBDA § 42(a)(1). The Act initially required only that individuals wear masks and practice social distancing of at least six feet at federal distribution facilities, which closely follows scientific findings to prevent the spread of Hoof and Beak. CHBDA § 42(b)(2). Therefore, these measures are in close accordance with the goal of protecting the health and safety of American citizens.

However, the amendment to the Act further prohibits protestors from being ten times social distancing guidelines, totaling a sixty feet from the door of the facility, which reaches far outside the stated goal of the act. CHBDA § 42(d)(1)-(2). Neither party disputes the legitimacy of the stated interest in protecting health, but the Act here eliminates more than the required speech to prevent further spread. Unlike Hill, where protestors could still enter the 100-foot buffer zone so long as they remained eight feet away from other people or obtained consent to approach further, the CHBDA places a total restriction on protestors being within a sixty-foot zone around the facility. 530 U.S. at 729. The Hill court specifically takes note that conversation can still be had at a distance of eight feet which “leaves ample room to communicate a message through speech.” Id. Here, Mr. Jones and the Luddites are unable to pass the painted barrier at the federal facility and thus fully restricted from peacefully explaining their message to those who advance too far in line to the facility. Jones Aff. ¶ 7. The goal of protecting public health here is met, but the CHBDA further quashes contact of protestors within the entire sixty-foot area of the buffer zone. The government has not put forward any reasoning for this specific distance, and the use of social distancing would be met without eliminating all speech if the CHBDA employed the floating buffer upheld in Hill.

While courts have noted alternative methods of demonstrating that can be utilized from a distance, such as leafleting, voice amplification equipment, or meeting people at a further distance before the buffer zone, the Luddites' beliefs prevent them from utilizing technology and reinforce the importance of peaceful communication of their message. See Riley v. National Federation of Blind of N.C., Inc., 487 U.S. 781, 790-191 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."); see also McCullen, 573 U.S. at 487 (finding a serious burden on petitioners' speech where thirty-five-foot buffer zone inhibited ability to speak one-on-one with patients outside of clinic). Further, the outside of the federal distribution center is the last place the Luddites can give their message to the community before they are issued a mobile phone and SIM card for contract tracing, which makes this location the most important area to communicate their message. See Hill, 530 U.S. at 789 ("For these protestors, the 100-foot zone . . . is not just the last place where the message can be communicated. It likely is the only place. It is the location where the Court should expend its utmost effort to vindicate free speech, not to burden or suppress it.") By restricting all speech within the sixty-foot buffer zone, the government has placed an enormous burden on protestors who are fully restricted from delivering their message in the way they feel appropriate at the most critical point before a person can enter the federal facility.

B. The CHBDA is Not Narrowly Tailored because the Act is Vague and Substantially Broader than Necessary to Achieve its Interest.

The Eighteenth Circuit correctly held that the Act is not narrowly tailored to the government's interest in protecting public health because the CHBDA is vague and overbroad in trying to achieve its goal. A law can be invalidated as overbroad in a First Amendment challenge when "a substantial number of its applications are unconstitutional, judged in relation to the

statute's plainly legitimate sweep." United States v. Stevens, 559 U.S. 460, 473 (2010) (quoting Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449, n. 6 (2008)). This Court has previously held that, in a non-public forum, "no conceivable governmental interest would justify an absolute prohibition of speech." Board of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987). The government may enact laws to "prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct." Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). Additionally, the regulation "need not be the least restrictive or intrusive means of serving the government's interests." McCullen, 573 U.S. at 486. However, such laws must reflect goals that are "directed with reasonable specificity toward the conduct to be prohibited." Coates, 402 U.S. at 614.

The CHBDA goes far beyond its interest in protecting public health and safety by refusing to allow any speech within the sixty-foot zone during federal facility operating hours. As the Eighteenth Circuit noted, the Act "prohibits protesting within that zone, on a public sidewalk, whether there is a line of fifteen people, likely extending beyond the boundary of the zone, or whether there is no line at all." R. at 38. Additionally, even when the Luddites followed the CHBDA as written, Mr. Jones was still arrested due to the vagueness of the term "protest" within the Act, which gives discretion to local officials to determine the best way to enforce the buffer zone. CHBDA §42(e). Mr. Jones and his group correctly honored the interest in protecting public health and safety by wearing masks, social distancing, and having a group limited to six members, and yet the vagueness of the CHBDA led to penal sanctions in the face of trying to utilize their right to freedom of speech. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (noting that "[v]ague laws may trap the innocent by not providing fair warning" and that

"if arbitrary and discriminatory enforcement is to be prevented law must provide explicit standards for those who apply them"). On the other hand, the MOMs demonstrating at the same facility while in clear defiance of the sixty-foot buffer zone as well as the group size limit were never approached, jailed, or fined. Jones Aff. ¶ 12. This example provides one look at how the vagueness of the CHBDA has led to its over breadth in restricting speech it purports to allow, and epitomizes the lack specificity connecting the CHBDA to the conduct that the government seeks to prevent to protect Americans from Hoof and Beak. See Secretary of State v. J. H. Munson Co., 467 U.S. 947, 967-68 (1984) (finding statute overbroad where "the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech").

Thus, the CHBDA weighs heavily on the speech rights of protestors while simultaneously limiting more than necessary to advance the stated purpose of protecting public health and preventing the spread of Hoof and Beak. Therefore, the Eighteenth Circuit should be affirmed with respect to the free speech issue.

II. THE COURT OF APPEALS FOR THE EIGHTEENTH CIRCUIT ERRED IN FINDING THAT THE MANDATED CONTACT TRACING THROUGH THE USE OF MOBILE PHONES AND GOVERNMENT-ISSUED SIM CARDS IS NEUTRAL AND GENERALLY APPLICABLE.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST., amend. I. Religious beliefs need not be "acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div, 450 U.S. 707, 714 (1981)). Religious views should not be made suspect before the law and an individual should

not be required to show the veracity of their beliefs. United States v. Ballard, 322 U.S. 78, 86-87 (1944) (stating that Founding Fathers created a government in which "Man's relation to his God was made no concern of the state"). The Free Exercise clause protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions on a way of worshipping. See Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017) (citing Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 450 (1988)).

Recent interpretations of the Free Exercise clause have followed the Supreme Court's opinion in Employment Division, Department of Human Resources v. Smith.[1] In this case, the Supreme Court held 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." Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 879 (1990). However, if a law is not neutral or of general applicability, it must be narrowly tailored to achieve a compelling governmental interest. Lukumi, 508 U.S. at 531.

Neutrality and general applicability are interrelated, and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." Id. at 531. Even if a law is facially neutral, the Free Exercise Clause of the Constitution "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs." Id. at 534. A court will also consider "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 decision-making body." Id. at 540. While the CHBDA may be considered neutral, it is certainly not generally applicable.

[1] The Religious Freedom Restoration Act also would typically apply to cases like the one at hand, but CHBDA section § 42(f)(8) states that this Act is exempt from the RFRA.

Given the decision to provide both age-related and medical exemptions while providing no such exemptions for religious beliefs, this law fails the test of being neutral and generally applicable. As such, a court must consider whether it is narrowly tailored to achieve a compelling governmental interest. Examining the law under this standard, it is clear that the law is not narrowly tailored because it applies all citizens without regard for their risk of contracting and transmitting Hoof and Beak disease. Furthermore, its system of exemptions calls into question the compelling interest of the contact tracing measures at hand.

A. The CHBDA is not of general applicability because it allows for secular exceptions and creates a "religious gerrymander."

The Act is not of general applicability because of the substantial secular exemptions it presents. As such, the CHBDA must be examined to determine if it is narrowly tailored to achieve a compelling state interest.

A law is not of general applicability if its prohibitions are substantially underinclusive of non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect. Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1079 (9th Cir. 2015) (citing Lukumi, 508 U.S. at 542-546). While all laws are selective to some extent, categories of selection are "of paramount concern when a law has the incidental effect of burdening religious practice" and a law is unequal when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation and not conduct with a secular motivation. Lukumi, 508 U.S. at 542-543.

Here, the law categorically exempts all individuals over 65 and allows for individualized exemptions based on health reasons. No justification is offered for refusing to allow religious exemptions while at the same time allowing for age and health based exemptions. This effectively creates a "religious gerrymander" - providing exemptions for a large category of

reasons other than religion. See id. at 535 (stating that when considered together, ordinance disclosed object remote from legitimate concerns). The burden to carry the SIM card and mobile phone does in fact affect conduct only motivated by religious belief because the FCC allows non-religiously-motivated exemptions. See id.

No justification is offered for refusing to allow religious exemptions when exemptions are allowed for health reasons - a nebulous category - and for those over 65 - a very large swath of the population. The government claims that the mobile phones and SIM cards are needed for contact tracing, but allowing such broad exemptions indicates that allowing religious exemptions would not harm the interests advanced by the government by this act. See A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248, 272 (5th Cir. 2010) (stating the fact that school district itself contemplates secular exceptions to grooming policy indicates that none of generalized interests purportedly advanced by policy should carry "determinative weight" for purposes of analysis under Texas Religious Freedom Restoration Act). The government has not provided a public health rationale for differing treatment between exemptions based on age or health and those based on religious beliefs, which strongly suggests that the law is not generally applicable. See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) (stating that Department's decision to provide medical exemptions while refusing religious exemptions "is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*").

B. The CHBDA is not narrowly tailored to pursue a compelling state interest.

In order for a law burdening religious practice that is not neutral or not of general application to be constitutional under the First Amendment, the law must advance "interests of the highest order" and must be narrowly tailored to pursue those interests. Lukumi, 508 U.S. at

546 (citing McDaniel v. Paty, 435 U.S. 618, 628 (1978)). The Supreme Court has described this compelling interest standard as "not water[ed] down" but rather a standard that "really means what it says." Lukumi, 508 U.S. at 546 (citing Smith, 494 U.S. at 888). The CHBDA cannot hold up to this high standard because of the substantial secular exemptions it includes.

While controlling the outbreak of Hoof and Beak is certainly a compelling interest, the use of contact tracing and the way it is employed here is not narrowly tailored to achieve that interest. The government offered no public health rationale in differing treatment for different objections to the SIM card requirement. See Merced v. Kasson, 577 F.3d 578, 594 (5th Cir. 2009) (discussing that city's experts did not explain public health rationale between differing treatments afforded to different animals in laws regarding slaughtering).

The law is both underinclusive and overinclusive. In addition to the case by case health exemptions, which could create a large number of people exempt from the requirement, the CHBDA creates a blanket exclusion on all individuals over sixty-five, exempting a large portion of the population who would be at a high risk for the disease without a rationale; this challenges the government's contention that these particular contact tracing methods are necessary to fight Hoof and Beak Disease. See Lukumi, 508 U.S. at 546-547 (stating that when "government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the governmental interests given in justification of the restriction cannot be regarded as compelling"). Additionally, the law includes everyone under the age of sixty-five without a health-related reason to seek an exemption, a category includes those who are already taking the precaution of sheltering in place to prevent contracting or spreading the disease. This is not the most restrictive way possible to combat Hoof and Beak and the government has offered no

reason why health related or age-related exemptions do not pose a risk to the efficacy of contract tracing, but religious ones do. See Fraternal Order, 170 F.3d. at 367 (finding that department that disallowed religious exemptions to no-beard requirement on grounds that it would cause issues with public identification of officers and undermine the force's morale did not present reason for differentiating between medical exemptions to the no-beard requirement, which were permitted).

The CHBDA is not narrowly tailored to achieve a compelling state interest. Therefore, the Eighteenth Circuit's grant of summary judgment to the FCC on the issue of free exercise should be reversed.

CONCLUSION

This Court should REVERSE the Eighteenth Circuit's grant of summary judgment to the FCC with respect to the free exercise issue and AFFIRM the Eighteenth Circuit's grant of summary judgment to Mr. Jones with respect to the free speech issue.

Respectfully submitted,

Levi Jones

Counsel of Record
Team 27

JANUARY 31, 2021

BRIEF CERTIFICATE

I. We affirm that the work shown in this brief is solely the work product of the members of Team 27.

II. We affirm that we have complied with Team 27's school's honor code in the creation of this brief.

III. We acknowledge and affirm that we have abided by the Rules of the Competition.

APPENDIX A: Constitutional Provisions

U.S. Const. Amend. I.

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