Team 13

No. 20-9422

IN THE
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 13

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether 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 disease when it completely foreclosed one-on-one conversation at a normal conversational distance.
2. Whether 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, when the statute contains secular exemptions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

SUPREME COURT CASES

FEDERAL CIRCUIT CASES

FEDERAL DISTRICT CASES

OTHER AUTHORITIES

STATEMENT OF THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered a final judgment on this matter. *Levi Jones v. Christopher Smithers*, No. 20-9422, slip op. (18th Cir. 2020). The petition for writ of certiorari was timely and this Court granted it. (R. at 42.) This Court now has jurisdiction pursuant to 28 U.S.C § 1254(1).

STATEMENT OF THE CASE

Levi Jones is the congregational leader of the Delmont-based Church of Luddite ("The Church"). (R. at 4.) The Church has no central authority, and instead delegates authority to each congregation to establish its own set of rules, called Community Orders. (R. at 4.) In light of the Church's organizational structure, Community Orders vary among congregations, yet the members of the Delmont Church of Luddite ("Delmont Luddites" or "Luddites") believe in total obedience to whatever set of Community Orders govern their congregation. (R. at 4.) Such obedience stems from the belief that Community Orders are themselves a means to preserve family unity, faith, community, and cultural identity. (R. at 4.) One of the primary Delmont Community Orders is that members be skeptical of all technology because of the harm it could bring to Luddite values. (R. at 4). As such, Delmont Luddites do not own or use mobile phones, as they provide access to outside ideas and values that might break down the family or wider Delmont-Luddite community. (R. at 4–5.) The Church itself, however, maintains a landline in a small wooden shed next to their church building. (R. at 5). The landline is only to be used in emergency situations. (R. at 5).

In December 2019, researchers identified the novel Hoof and Beak Disease ("Hoof and Beak" or "the Disease") in Pangaea. (R. at 1.) Hoof and Beak, a highly contagious disease that is

spread person-to-person, causes severe flu-like symptoms and skin rashes. (R. at 1.) In the United States to date, there are 70 million confirmed cases of Hoof and Beak, along with 230 thousand deaths caused by the Disease. (R. at 1). Hoof and Beak primarily affects children and young to middle-aged adults. (R. at 1.).

On February 1, 2020, President Felicia Underwood created the federal government's Hoof and Beak Task Force, focused on curbing the spread of the Disease. (R. at 1.) On April 15, 2020, Congress passed the Combat Hoof and Beak Disease Act ("CHBDA" or "Act"), which mandated contact tracing through a government-provided and distributed SIM card for use in mobile phones. (R. at 1.) The purpose of the contact-tracing program is to protect communities against Hoof and Beak by letting people know that they have been exposed to the Disease and should therefore monitor their health for symptoms. (R. at 6.) Under the Act, federal facilities located in each state will be used to distribute SIM cards containing contact tracing software. (R. at 6.) After receiving the SIM cards, individuals must then install them in their mobile phones and, if citizens do not have a mobile phone, the distribution centers will distribute mobile phones containing the contact tracing SIM card. (R. at 6.) The Act grants a categorical exemption for senior citizens over the age of sixty-five and allows for individualized health exemptions to be granted on a "case-by-case basis." (R. at 6.) Since the Act was enacted, the FCC has granted individual health exemptions for late-stage cancer, Ischemic heart disease, and Alzheimer's; other individuals have been granted an exemption for severe physical disabilities that make them unable to operate a mobile device. (R. at 22.) No other exemption is contained in the CHBDA. (R. at 6). In an effort to allow for quick implementation of the Act and its SIM card mandate, the CHBDA states, "pursuant to 42 U.S. Code §200bb–3, the Religious Freedom and Restoration

Act ("RFRA") is inapplicable to this act." (R. at 6.) Thus, the Act correctly and permissibly excludes the RFRA from its application under current U.S. law. (R. at 6.)

Pursuant to the Act, all persons at federal distribution facilities must both wear a mask and observe social distancing by maintaining a distance of six feet from other individuals. (R. at 6.) Failure to comply with the CHBDA results in up to one year imprisonment and/or a fine of up to $2,000 (R. at 6.) Congress charged Christopher Smithers and the Federal Communications Commission (FCC) with carrying out the Act. (R. at 5.) Smithers is the FCC Commissioner and is a member of the President's Task Force, spearheading the nationwide contact tracing efforts. (R. at 5.)

In light of growing protests against the Act at federal distribution facilities, Congress passed an emergency amendment to the CHBDA. (R. at 7.) The amendment prohibits protestors from entering a buffer zone "within sixty feet of a facility entrance, including public sidewalks, during operating hours." (R. at 7.) Furthermore, groups of protestors are limited to six people and protestors must stand outside of the sixty-foot buffer zone that is clearly marked and posted. (R. at 7.) Enforcement of the amendment is subject to the discretion of facility officials. (R. at 7.)

Believing that the CHBDA was a gross invasion of privacy, Mr. Jones and the Delmont Church of Luddite declared that it and its members would not comply with the Act because having a mobile phone is in direct conflict with their religious beliefs. (R. at 7.) As a result, Jones and a group of six other Delmont Luddites showed up at the Delmont distribution facility around 9:00 AM on May 1, 2020 to protest the Act on the sidewalk. The group stood seventy-five feet from the facility entrance, wore masks, and remained six feet apart. (R. at 7.) Because their beliefs prohibit the use of technology to share their message, Jones and the other Luddites spoke

with people directly to voice their concerns regarding the Act—sometimes entering the sixty-foot buffer zone in order to do so. (R. at 7.)

Also outside the facility on May 1, 2020, was Delmont resident Maura Mathers, and her group, Mothers for Mandates ("MOMs"). (R. at 2.) The MOMs are a group of mothers who encourage compliance with the Act by educating communities about the dangers of Hoof and Beak and the need to participate in the federal government's contact tracing program. (R. at 2.) Unlike the Luddites, the MOMs remained stationary while protesting, never approaching others outside of the facility. (R. at 3.) Instead, The MOMs held up signs and left pamphlets supporting their cause on a small table six feet away from them for others to take. (R. at 8.) Some members of the MOMs stood up to five feet within the sixty-foot buffer zone. (R. at 3.) Lastly, the MOMs are recognizable wherever they go as they wear matching pink t-shirts at any event they attend. (R. at 8.)

At 4:00 PM, officers of the Federal Facilities Police surrounded Mr. Jones and the Luddites, ordering the group to leave because their group was too large, in violation of the mandate. (R. at 8.) Mr. Jones refused to leave and was then arrested by the officers. (R. at 8.) He spent four days in jail and received an $1,000 fine—eventually being released on May 5, 2020. (R. at 8.) No member of the MOMs was arrested or fined, though they too were in violation of the mandate by standing within the sixty-foot buffer zone. (R. at 3, 8.)

On May 6, 2020, at 8:30 AM, Mr. Jones and five other Delmont Luddites returned to the facility to continue their protest. (R. at 8.) All members of the group again wore masks and stood six feet apart from one another, though they still approached people in the facility line to speak with them. (R. at 9.) The MOMs also returned to the facility, this time with seven group

members. (R. at 9.) All of the MOMs stood fifty-five feet away from the facility entrance, within the sixty-foot buffer zone. (R. at 9.)

At 3:45 PM the Federal Facilities Police appeared. (R. at 9.) One of the officers recognized Mr. Jones and stated, "Hey, aren't you that anti-tech preacher? You can't be here." (R. at 9.) Urging that the group was in full compliance with the mandate, Mr. Jones refused to leave. (R. at 9.) He was arrested again, this time spending five days in jail and paying a fine of $1,500. (R. at 9.) No one from the MOMs group was arrested or fined, though they were in a group of seven and were standing within the sixty-foot buffer zone. (R. at 9.)

On June 1, 2020, Mr. Jones filed an action against FCC Commissioner Smithers in the District Court for the District of Delmont, alleging that enforcing the CHBDA against him and the Luddites violates their First Amendment rights under both the Free Exercise Clause and the Free Speech Clause. (R. at 9.) On October 5, 2020, the parties filed Cross-Motions for Summary Judgment. (R. at 3.) The district court granted Smither's Motion with respect to the free speech issue, and denied it with respect to the free exercise issue. (R. at 20.) The court further granted Mr. Jones' Motion with respect to the free exercise issue, and denied it with respect to the free speech issue. (R. at 20.)

Mr. Jones subsequently appealed the district court's ruling to the United States Court of Appeals for the Eighteenth Circuit. (R. at 29). The appellate court reversed the district court's decision in its entirety, granting Smither's Motion for Summary Judgment with respect to the free exercise issue and denying it with respect to the free speech issue. (R. at 40.) Furthermore, the court granted Mr. Jones' Motion with respect to the free speech issue, but denied it with respect to the free exercise issue. (R. at 41).

Mr. Jones then submitted a Petition for a Writ of Certiorari before the Supreme Court of the United States in order to challenge the appellate court's holding. (R. at 42.) The Court granted Mr. Jones' Petition with respect to the two issues before the Court today. (R. at 42.)

SUMMARY OF THE ARGUMENT

This Court should affirm the Eighteenth Circuit's determination that the CHBDA is not narrowly tailored because it creates a substantial burden on speech without advancing the government's goals. The sixty-foot buffer zone imposed by the CHBDA completely forecloses Petitioner's and other protestors' ability to have normal, one-on-one conversations with individuals waiting at the distribution facility. This restriction was an amendment to the original language of the statute that only imposed floating buffer zones around individuals, which would have been sufficient to serve the government's goals in preventing the spread of Hoof and Beak and ensuring access to the facilities. More importantly, the government did not show that the original language of the statute or other less restrictive alternatives would not have adequately served these interests and so the sixty-foot buffer zone restriction is not narrowly tailored.

Additionally, this Court should reverse the Eighteenth Circuit's holding that the CHBDA is both neutral and general applicable and therefore valid under the Free Exercise Clause. The Act violates the neutrality prong because it maintains both individualized and categorical secular exemptions, but does not include a corresponding religious one. In so doing, it holds secular motivations for noncompliance above religious motivations, ultimately forming a value judgment regarding the Luddites' sincerely held religious beliefs concerning technology. Such a value judgment is prohibited under the Free Exercise Clause's requirement of neutrality.

Furthermore, the CHBDA is not generally applicable because it treats analogous secular and religious conduct unequally. The conduct at issue here, noncompliance with the Act's

contact tracing mandate for either religious or secular reasons, is analogous because both harm Congress's interest in contact tracing to a similar degree. The Act treats this analogous conduct unequally, however, because it regulates the Luddites' religiously motivated conduct, but does not do the same when such motivations are compelled by medical needs or old age. Such unequal treatment is forbidden under the Free Exercise Clause's general applicability standard.

ARGUMENT

I. The Eighteenth Circuit did not err in concluding that the 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.

A. The CHBDA restricts speech related activity in a public forum and therefore must be narrowly tailored to a significant government interest.

The Free Speech Clause of the First Amendment prohibits Congress from making laws "abridging the freedom of speech." U.S. CONST., amend. I. The strength of the Free Speech Clause varies depending on the location and type of speech, but it is well established that the government can place only modest restrictions on speech in traditional public fora, such as sidewalks or public streets. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *United States v. Grace*, 461 U.S. 171, 177 (1983)). Specifically, such "time, place, and manner" restrictions must be content-neutral and narrowly tailored to serve a significant governmental interest, and must leave open ample alternative channels for individuals to communicate information. *Ward*, 491 U.S. at 791; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The parties have stipulated that the Delmont Distribution Facility ("facility") is a public forum, and the CHBDA as amended also restricts access to the public sidewalk near the facility, which the Supreme Court recognizes as a traditional public forum. (R. at 22); *Ward*, 491 U.S. at 791. Moreover, the CHBDA clearly incidentally regulates the place and time of protected

speech by prohibiting individuals from protesting within sixty feet of distribution facility entrances or in groups of more than six persons, thereby implicating the First Amendment. (R. at 7); *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (deeming a statute restricting entry to a zone surrounding an abortion clinic to implicate the First Amendment). Consequently, the government had "very limited" ability to restrict speech in this manner. *McCullen* 573 U.S. at 477 (quoting *Grace*, 461 U.S. at 171). As such, the CHBDA only passes Constitutional muster if it is narrowly tailored to serve a significant governmental interest. *McCullen*, 573 U.S. at 477; *Hill v. Colo.*, 530 U.S. 703, 725 (2000). Because the CHBDA is directly analogous to the statute in *McCullen* that was held to violate protestors' rights, it is similarly not narrowly tailored and so this Court should affirm the Eighteenth Circuit's ruling.

B. The Eighteenth Circuit properly found that the CHBDA was not narrowly tailored to a significant government interest because prohibiting normal conversation within a fixed radius outside the facilities burdens more speech than is necessary to restrict the spread of Hoof and Beak and ensure access to the facilities.

The CHBDA is not a permissible time, place, and manner restriction because the government interests at stake could have been adequately served by other measures that impose a significantly smaller burden on protected speech. A "fixed buffer zone" that prohibits certain people from entering defined boundary violates the First Amendment because it "burdens substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, 573 U.S. at 486 (citing *Ward*, 491 U.S. at 799). A "floating buffer zone," on the other hand, can be a proper time, place, and manner restriction where it stops individuals from approaching within a certain distance of others but still allows for face-to-face conversation at a normal tone. *Hill*, 530 U.S. at 726. A restriction that burdens speech is not required to be the least restrictive or intrusive means of achieving a substantial government interest in order to be narrowly tailored—but a restriction in which a substantial portion of the burden on speech does

not serve to advance its goals will not be considered narrowly tailored. *Ward*, 491 U.S. at 799; *McCullen*, 573 U.S. at 486. The burden is on the government to show that a specific statute is narrowly tailored. *See McCullen*, 573 U.S. at 494 ("[T]he Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it."); *id*. at 496 ("Respondents have not shown . . . .").

In *McCullen*, the statute at issue prohibited standing on a public way or sidewalk within thirty-five feet of an entrance or driveway to any place where abortions are performed. *McCullen*, 573 U.S. at 469. The Court held that this restriction was not narrowly tailored to a substantial government interest because it completely foreclosed the petitioners' ability to converse normally with individuals outside of the clinics. *Id*. at 489; *see also Schenck v. Pro-Choice Network of W. N. Y.*, 519 U.S. 357, 377 (1997) (deeming an injunction prohibiting individuals from approaching within fifteen feet of persons entering or leaving abortion facilities unconstitutional because it prevented protestors from communicating at a normal conversational distance). The *McCullen* Court recognized one-on-one communication to be "the most effective, fundamental, and perhaps economical avenue of political discourse." *McCullen*, 573 U.S. at 488; *see also Meyer v. Grant*, 486 U.S. 414, 424 (1988) (recognizing same in the petition campaign context). Focusing on the fact that the statute at issue was an amendment to an earlier version which was narrowly tailored under the precedent set in *Hill*, discussed below, the Court faulted the respondents for failing to show that the increased restrictions were necessary or more successful in promoting the significant government interests. *McCullen*, 573 U.S. at 470, 494. Specifically, the respondents' contentions that the conduct at issue was not adequately minimized under the previous version of the statute were rejected because the Court determined

that the Commonwealth did not seriously attempt to address the problem with the tools available to it before the amendment. *Id*. at 494.

Conversely, in *Hill*, the Supreme Court upheld a statute prohibiting individuals from knowingly approaching within eight feet of another person while inside a 100-foot area around abortion clinics without that person's consent. *Hill*, 530 U.S. at 707. The statute in *Hill* did not require protestors to move out of the way of individuals entering the clinic and contained an exception for instances in which individuals consented to the protestors' advances—which the Court determined was evidence of its narrow tailoring. *Id.*at 708, 718. In rejecting the petitioners' facial challenge to the statute, the Court emphasized that while the statute made certain types of speech more difficult, *id.* at 715, it did not completely foreclose any one type of speech. *E.g. id.* at 726; *id.* at 729.

McCullen did not overrule *Hill*, and their divergent holdings can be reconciled: a statute that completely forecloses one or more modes of communication, particularly one-on-one conversation, is much less likely to be narrowly tailored than one that merely restricts how such communication can be accomplished. *Accord McCullen*, 573 U.S. at 488–89; *Hill*, 530 U.S. at 729. As the statute stands, the Delmont Luddites are essentially foreclosed from any form of communication with individuals approaching the distribution facilities. (R. at 25.) The biggest burden on speech imposed by the CHBDA is the restriction on "protestors" entering a buffer zone that extends sixty feet from the entrance to the distribution facilities, without exception. (R. at 2.) This portion of the CHBDA is directly analogous to the restriction in *McCullen* that prohibited individuals other than certain exempt individuals from entering a marked zone thirty-five feet from abortion clinic entrances, which effectively forced certain protestors to stand fifty-six feet away from a clinic entrance on the public sidewalk. *McCullen*, 573 U.S. at 473.

Consequently, like in *McCullen*, the Delmont Luddites and all other protestors are completely foreclosed from being able to speak at a normal conversational distance once individuals enter even fifteen feet into the zone. *See Schenck*, 519 U.S. at 377 (finding a floating buffer zone of fifteen feet around individuals approaching an abortion clinic to be overly restrictive as protesters could not have a normal conversation at that distance). Accordingly, the District Court was mistaken when it characterized the statute in *Hill* as having the same result as the CHBDA: "requiring that individuals maintain distance from each other." (R. at 14.) In reality, the CHBDA is significantly more restrictive than the statute in *Hill* because in *Hill*, the eight foot floating buffer zone applied within a 100 foot fixed radius, but individuals could enter the 100 foot radius freely. *Hill*, 530 U.S. at 707–08. Instead, here, individuals are not permitted approach within six feet of others but are also *completely prohibited* from entering the sixty-foot fixed zone. (R. at 6, 7.) Thus, whereas the statute in *Hill* was narrowly tailored because it did not completely foreclose any form of speech, *Hill*, 530 U.S. at 729, the CHBDA completely prohibits protestors from communicating at a normal conversational distance, making it significantly more burdensome than necessary to serve the government's interests.[1]

Further evidence of the lack of narrow tailoring in the CHBDA is found in its similarities to *McCullen*—in both instances, the statute at issue was amended from a much less burdensome restriction. *McCullen*, 573 U.S. at 470; (R. at 7.) The original language of both statutes adopted a floating buffer zone that prohibited individuals from approaching within six feet of another person within a certain radius outside of the facility or abortion clinic, respectively. (R. at 7);

[1] *See generally* Susan L. Gogniat, Note, *McCullen v. Coakley and Dying Buffer Zone Laws*, 77 U. Pitt. L. Rev. 235 (2015) (noting that while *McCullen* did not explicitly overrule *Hill*, localities across the country have amended statutes imposing fixed buffer zones to less restrictive measures, thereby recognizing *McCullen* as an absolute ban on fixed buffer zones that completely restrict normal conversations).

McCullen, 573 U.S. at 470. In fact, either of these statutes would have been constitutional in its original form under *Hill*. *Accord Hill*, 530 U.S. at 707 (describing a floating buffer zone that the Court found to be narrowly tailored). Admittedly, in both *McCullen* and the instant case, the government had an important and substantial interest—there, promoting public safety, ensuring access to healthcare, and unobstructed use of public sidewalks and roadways, and here, stopping the spread of a highly contagious disease and ensuring easy and safe (i.e. socially distant) access to the SIM card distribution facilities. *McCullen*, 573 U.S. at 486; (R. at 13, 14.) Moreover, Petitioner recognizes that the existence of a global pandemic in this case is an unprecedented situation that strengthens the government's important and substantial interest in public health and safety. (R. at 1.) However, the amendment still violates Petitioner's First Amendment rights because it is not narrowly tailored to the goals it serves. The burden it places on Petitioner's and others' speech burdens substantially more speech than is necessary to further Congress' goals. *McCullen*, 573 U.S. at 486.

An additional reason the fixed buffer zone in *McCullen* was found unconstitutional was that Respondents had not shown a legitimate need to amend the statute to further restrict protected speech-related activity. *McCullen*, 573 U.S. at 494–95. But, the record does not indicate that the situation in the present case was even close to as dire as the situation in *McCullen*. In *McCullen*, there was substantial evidence of significant protest activity at the clinics that was negatively affecting medical treatment by distressing the women seeking treatment—and even stopping prospective patients from entering the clinics. *McCullen*, 573 U.S. at 470. Nonetheless, the more restrictive measure of a fixed buffer zone around the clinics violated the First Amendment because the Respondents failed to show that they "seriously undertook to address the problem with less intrusive tools readily available." *Id.* at 494; *see also*

Hill, 530 U.S. at 729 (upholding speech-restricting statute after an affirmative showing that less restrictive measures would be ineffective). Specifically, the Court noted a lack of enforcement of the original statute, the fact that the statute at issue was significantly more restrictive than that used by other states in similar situations, and the fact that generic criminal statutes are available to prosecute protestors that trespass, assault, or breach the peace. *McCullen*, 573 U.S. at 492, 494.

On the other hand, in the case at bar, there is no indication in the record that any protest activity outside of the distribution facilities in this case was significantly contributing to the spread of the Hoof and Beak pandemic or stopping individuals from being able to access the facilities. *See* (R. at 2, 7) (describing "increasing protest activity" as necessitating the more restrictive amendment without showing any evidence of what such activity entailed or its effects on the distribution process or the spread of Hoof and Beak). Moreover, whereas in *McCullen* there was evidence that individuals were actively violating the original statute (although largely not prosecuted), *McCullen*, 573 U.S. at 470, there is no evidence in the record that any "protest activity" included active violations of the CHBDA's mask and social distancing mandates. In fact, the record indicates that two significant groups that were at the facilities to spread their messages, the MOMs and the Delmont Luddites, were fully compliant with the mask and social distancing requirements at all times. (R. at 7, 8.) If the more restrictive measures in *McCullen* were not justified even by an affirmative demonstration that protest activity was negatively affecting the clinics' ability to provide services, then the more restrictive measures in the CHBDA amendment certainly do not pass Constitutional muster where Respondent has not shown the alleged "protest activity" to have had any negative effects on either individuals' access to the facilities or their safety from Hoof and Beak. *See* (R. at 2, 7.)

For the above reasons alone, this Court would be justified in finding that the CHBDA as amended is not narrowly tailored, but beyond the lack of necessity for an amendment in the first place, the amendment could have been significantly less restrictive on protected speech and still adequately served Congress' interests. *McCullen*, 573 U.S. at 492. The Eighteenth Circuit, while still finding a lack of narrow tailoring, noted that "it is not the judiciary's place to debate the science of social distancing." (R. at 38.) Petitioner is not arguing that the social distancing portion of the CHBDA violates his First Amendment rights, nor does he argue that the mask mandate is unconstitutional. Instead, Petitioner asserts that Congress took a statute that was presumably deemed sufficient by scientists to substantially curb the spread of Hoof and Beak at and around the distribution facilities, and amended it to further restrict speech and speech related activity "to address increasing protest activity." (R. at 2, 7.) Yet, as discussed above, the "protest activity" is not described in any detail in the record and there is no indication that any protesting by the Delmont Luddites, the MOMs, or others was exacerbating the public health problem posed by the Hoof and Beak pandemic. Thus, Respondent has not adequately shown that the original language of the statute is not a viable option for serving the government interests at issue. Nor has Respondent shown that any other less restrictive alternatives would be inadequate to achieve the government interests at stake. *McCullen*, 573 U.S. at 495, 496; *Burson v. Freeman*, 504 U.S. 191, 207 (1992) (upholding a fixed buffer zone around polling places because a lack of police presence made less restrictive measures inadequate to serve the government interests of preventing voter intimidation and election fraud). If the protest activity was truly stopping individuals from safely and easily accessing the facilities, the statute could include a bar on blocking the entrance or a requirement that protestors leave when asked to by law enforcement. *McCullen*, 573 U.S. at 493. Even if Respondent argues that less restrictive

measures would be inconvenient to implement or enforce, the Supreme Court held in *McCullen* that the question is whether the less restrictive alternative would fail to achieve the government's interests, not whether the statute in question is "easier." *McCullen*, 573 U.S. at 495.

Thus, because the CHBDA completely restricts Petitioner's ability to have normal conversations with individuals at the facilities and because there are significantly less restrictive measures available that would serve the government's substantial interests just as effectively, it is not narrowly tailored and this Court should affirm the decision of the Eighteenth Circuit.

II. The Eighteenth Circuit erred in finding that the CHBDA was neutral and generally applicable.

The Free Exercise Clause states, "Congress shall make no law . . . prohibiting the free exercise of religion." U.S. CONST., amend. I. Its purpose, fundamental to the structure of this nation, is to "secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222–23 (1963). At a minimum, the protections of the Free Exercise Clause apply if a law burdens the free exercise of religion by discriminating against religious beliefs. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). This Court, however, has held that free exercise includes not only belief and profession, but the performance of (or abstention from) physical acts driven by sincerely held religious convictions. *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). Thus, the Free Exercise Clause protects American citizens against government regulation of conduct because it is undertaken for religious reasons. *Lukumi Babalu Aye*, 508 U.S. at 532. Furthermore, it is not within this Court's, nor the government's, purview to determine whether a religious belief merits First Amendment protection. *Thomas v. Review Bd. of Indiana Sec. Div.*, 450 U.S. 707, 714 (1981). Instead, all sincerely held religious beliefs—and

actions stemming from them—receive these constitutional safeguards. *Id.* These safeguards apply here, as the CHBDA burdens the Delmont Luddites sincerely held religious beliefs, which prohibit the use of cell phones, by requiring them to obtain one for purposes of contact tracing. (R. at 1–2.)

Nonetheless, a law that is both neutral and generally applicable does not violate the First Amendment, even if it incidentally burdens the free exercise of religion. *Smith*, 494 U.S. at 879. However, if a law fails to meet either of these two requirements, then it will only pass constitutional muster if it is narrowly tailored to a compelling state interest. *Lukumi Babalu Aye*, 508 U.S. at 531–33 (applying strict scrutiny to a city ordinance that failed to meet either of the prongs); *see Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *see also Rader v. Johnston*, 924 F. Supp. 1540, 1550 (D. Neb. 1996). The requirements of neutrality and generally applicability are distinct, such that they warrant separate analyses, but are interrelated in that "failure to satisfy one is likely an indication that the other is not satisfied." *Lukumi Babalu Aye*, 508 U.S at 531. In the instant case, the CHBDA is neither neutral nor generally applicable and thus may not be afforded the presumption of validity outlined in *Smith*. Accordingly, it must undergo a strict scrutiny analysis before it is deemed valid.

A. The CHBDA is not neutral because it was enacted with a discriminatory intent and values secular motivations more than religious motivations by allowing secular exemptions but not a corresponding religious one.

The CHBDA is not neutral and therefore must undergo a strict scrutiny analysis. Courts have dictated that the minimum requirement of neutrality is that the law does "not discriminate on its face." *Id.* at 533. In the context of Free Exercise, a law is not facially neutral if it refers to a religious practice without a secular meaning. *Id.* Petitioner stipulates that the CHBDA is facially neutral, as it makes no reference to any religious practice. (R. at 5–7.) Facial

neutrality, however, is not determinative. Instead, the Free Exercise Clause "extends beyond facial discrimination" and "forbids subtle departures from neutrality." *Lukumi Babalu Aye*, 508 U.S. at 533; *Gillette v. United States*, 401 U.S. 437, 452 (1971) (holding that a law is not protected against a Free Exercise claim by "mere compliance with the requirement of facial neutrality"). Therefore, a facially neutral law will fail to meet the neutrality prong if it was enacted with a discriminatory intent or objective. *See Lukumi Babalu Aye*, 508 U.S. at 534 (striking down a facially neutral ordinance that prohibited sacrificial animal killings because its object was to target and discriminate against a religious group that participated in the practice). Thus, the requirement of neutrality prohibits the government from "deciding that secular motivations are more important than religious motivations." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d. Cir. 2002) (quoting *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d. Cir. 1999)).

Such an impermissible value judgment is present where the government includes a mechanism for secular, individualized exemptions, but refuses to extend an exemption for religious purposes. *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J.) (plurality opinion) (holding that if the legislature allows an individualized, secular exemption to a law, "its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."); *see Lukumi Babalu Aye*, 508 U.S. at 537 (holding that when the government judges religious objections to be of "lesser import than nonreligious reasons" it violates the neutrality requirement). The same holds true where the government includes a singular, categorical exemption but does not include a corresponding religious one. *Fraternal Order of Police*, 170 F.3d at 365. Ultimately, the failure to include a religious exemption where comparable secular

ones are given is sufficiently suggestive of discriminatory intent, such that the law will fail to meet the neutrality prong. *Roy,* 476 U.S. at 708; *Fraternal Order of Police*, 170 F.3d. at 365.

Drawing from this Court's decision in *Roy*, the court in *Fraternal Order of Police* struck down a police department's policy prohibiting its male officers from keeping beards or other forms of facial hair. *Fraternal Order of Police*, 170 F.3d at 360. The policy, however, allowed officers to keep a beard for medical reasons but did not maintain a corresponding religious exemption. *Id*. This failure to include a religious exemption, the court stated, is "sufficiently suggestive of discriminatory intent," such that the policy failed to meet the standard of neutrality that the First Amendment demands. *Id.* at 365.

In the instant case, the CHBDA maintains two separate secular exemptions, but fails to provide any religious one. (R. at 6.) The first exemption—a singular, categorical one—relieves any obligation for individuals over the age of sixty-five to comply with the CHBDA. *Id.* The second, individualized exemption, allows for those with health concerns to be free from their obligations under the Act on a "case-by-case basis." *Id.* Under the precedent set in *Roy*, and applied by the court in *Fraternal Order of Police*, this Court should similarly hold that Congress's blatant failure to include a corresponding religious exemption is sufficient evidence of discriminatory intent, such that the CHBDA is *not neutral*.

If this Court were to find the CHBDA neutral, it would reveal to the Luddites, and indeed all religious adherents, that their religious concerns are of lesser import than secular ones. To illustrate this point, consider the following: the two exemptions outlined in the CHBDA show that the government considers medical needs and old age to be more important than its interest in contact tracing. The refusal to exempt religious obligations from the Act's requirements further demonstrates that the government's interest in contact tracing is more important than its citizens'

religious obligations. By nature of the transitive property, if medial needs and old age are more important than contact tracing, and contact tracing is more important than religion, then medical needs and old age are more important than religion.[2] While the government certainly has wide latitude in issuing legislation during a public health emergency, it does not have "*carte blanche* to impose any measure without justification." *Robinson v. Attorney General*, 957 F.3d 1171, 1179 (11th Cir. 2020). This should hold especially true when it decides religious beliefs are not on-par with their secular counterparts. As the Third Circuit wisely indicated in *Tenafly*, and as this Court urged in *Lukumi Babalu Aye*, the First Amendment's mandate of neutrality prohibits the government from making this kind of value judgement. Since it did so here through its enactment of the CHBDA, the Act is not neutral.

Therefore, since the CHBDA has two separate secular exemptions, its failure to provide a religious exemption is concrete evidence of a discriminatory intent. The First Amendment's requirement of neutrality forbids the use of a discriminatory intent in laws that burden religion. As such, Petitioner urges this Court to hold that the CHBDA is *not neutral* within the meaning of the Free Exercise Clause, and instead review the Act under a strict scrutiny standard.

B. The CHBDA is not generally applicable because it treats analogous religious and secular conduct unequally by allowing a secular exemption that harms the government's interest in contact tracing, but not a corresponding religious one.

The CHBDA is not generally applicable and therefore must undergo a strict scrutiny analysis. At a minimum, in order to meet the general applicability requirement, the government cannot selectively impose burdens only on conduct motivated by religious beliefs. *Lukumi Babalu Aye*, 508 U.S. at 543 ("All laws are selective to some extent, but categories of

[2] Douglas Laycock & Steven T. Collins, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 26 (2016) (applying the transitive property to laws that provide secular exemptions but fail to include religious ones).

selection are of paramount concern when a law has the incidental effect of burdening religious practice."); *see Rader*, 924 F. Supp. at 1553. Thus, a law is generally applicable where it regulates both religious action and every conceivable secular action—when it maintains no exceptions. *Smith*, 494 U.S. at 884 (holding that an "across-the-board criminal prohibition on a particular form of conduct" constitutes a generally applicable law). Conversely, a law is not generally applicable where it treats analogous religious and secular conduct unequally. *Lukumi Babalu Aye*, 508 U.S. at 543–44; *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in judgment).

As an initial matter, religious and secular conduct are considered analogous when each endangers the state's interest to a similar degree. *Lukumi Babalu Aye*, 508 U.S. at 544. Inequality, with regard to analogous conduct, results when the legislature decides that the governmental interests it seeks to advance are "worthy of being pursued only against conduct with a religious motivation." *Id.* at 543–44. Additionally, a law will not satisfy general applicability just because a secular exemption is justified or logical. *Id.* at 544 (stating that just because a law and its exceptions are "important" or "obviously justified" does not explain why religion "must bear the burden" of the state's interest). Thus, secular exemptions defeat the general applicability requirement, no matter how important, justified, or sensible, unless a corresponding religious exemption is included. *See id.* Ultimately, where secular exemptions from a general requirement are available, the government may not refuse to extend that system of exemptions to cases of religious hardship without compelling reason. *Id.* at 537; *Roy*, 476 U.S. at 708; *Rader*, 924 F. Supp. at 1552.

In *Lukumi*, a small Florida city enacted an ordinance that prohibited the sacrificial killing of animals, but included an exemption for restaurants and other similar establishments. *Lukumi*

Babalu Aye, 508 U.S. at 527–28. One of the key reasons for the ordinance, according to the city, was that the improper disposal of sacrificed animals threatened public health. *Id.* at 538. At trial, however, a county health official testified that improper disposal of garbage from restaurants posed a much greater public health hazard than sacrificed animals. *Id.* at 544–45. Since both improper disposal of garbage and improper disposal of animal carcasses hindered the city's interest in public health, the Court held them to be analogous. *Id.* Moreover, because the ordinance prohibited religiously motivated conduct, but did not similarly regulate analogous secular conduct, it treated both in an unequal manner. *Id.* As such, the Court held that the ordinance was not generally applicable and therefore not constitutionally valid under the Free Exercise Clause. *Id.* at 545.

In the instant case, the CHBDA maintains two exemptions, both of which hinder the government's interest in contact tracing. That is, in order for the government to have the most adequate contact tracing program, it must include as much of the population as it can.[3] Both exemptions significantly undermine this interest by allowing certain individuals to not participate. A religious exemption would similarly burden the government's interest as it would further reduce the number of individuals obligated to comply with the Act. Thus, the religious and secular conduct at issue are analogous when viewed in light of this Courts holding in *Lukumi Babalu Aye*.

The CHBDA, however, treats this analogous conduct unequally. That is, it regulates the Luddites' religiously motivated conduct, but does not do the same when such motivations are

[3] *Principles of Contact Tracing*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/php/principles-contact-tracing.html (last updated Dec. 3, 2020) (explaining that widespread community involvement with contact tracing is the best way to "protect friends, family, and community members from future potential infections").

compelled by either medical needs or old age. As this Court has repeatedly held, the most fundamental aspect of the Free Exercise Clause is to "protect religious observers against unequal treatment." *E.g.*, *Hobbie*, 480 U.S. at 148. Yet if the CHBDA were allowed to stand as is, then this Court would be perpetuating the unequal treatment of religious adherents, going against the most basic principle of not only the First Amendment, but of our entire system of governance. Therefore, the CHBDA is clearly not generally applicable, as it unmistakably flouts the Constitution's mandate of equality by treating the Luddites differently than their secular counterparts.

This, however, is not the only way that the CHBDA treats the Luddites unequally. One of the main functions of the general applicability prong is to offer vicarious protection to religious minorities through more powerful, secular interest groups. This notion allows for religious minorities, who rarely have the ability to defeat burdensome laws or regulations, to piggyback on the battles fought for secular interests in the political branches by requiring a corresponding religious exemption where a secular one is given.[4] In this case, Congress has already handed the secular interests a victory by exempting them from the CHBDA, leaving the Luddites standing alone in their fight to change the Act via legislative processes. As this Court has intimated, when religious minorities are left alone in their battle for equal treatment, a heightened degree of judicial protection must be afforded to them.[5] The only available judicial protection that this

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[4] Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J. L. & Pub. Pol'y 627, 637 (2003) ("Whenever a secular group gets an exception, they have automatically and unwittingly provided religious claimants with the basis for a possible religious exception. As a result, religious groups receive vicarious protection through the legislative process.").

[5] *See United States v. Carolene Prod. Co.,* 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

Court may offer to the Luddites today is to hold the Act not generally applicable and instead review the Act under a strict scrutiny standard. To hold otherwise would tell religious minorities across America that no branch of their government is willing to treat them fairly—again flouting the Constitution's mandate of equality.

Ultimately, since the CHBDA treats analogous secular and religious conduct unequally by failing to include a corresponding religious exemption, and since the Free Exercise Clause requires the government to protect religious adherents against unequal treatment, the Act must not be held as generally applicable. As such, it cannot be afforded the presumption of validity laid out in *Smith* and must undergo a strict scrutiny analysis before being deemed constitutional.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court affirm the decision of the United States Court of Appeals for the Eighteenth Circuit with respect to the free speech issue and reverse the decision of the Eighteenth Circuit with respect to the free exercise issue and remand the case to the United States District Court for the District of Delmont with instructions to enter summary judgment in favor of Petitioner, Levi Jones.

CERTIFICATE

Team 13 hereby certifies that the following statements are true:

(1) The work product contained in all copies of Team 13's brief is in fact the work product of the members of Team 13 only;

(2) Team 13 has complied fully with its school's governing honor code; and

(3) Team 13 has complied with all Rules of the Competition.

Team 13

Counsel for Petitioner

APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment states as follows:

> 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.