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 RESPONDENT

Team 28
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the CHBDA – which provides for a time, place, and manner restriction imposing a sixty-foot no protest buffer zone – is narrowly tailored to further the FCC's significant governmental interest in public safety and preventing the spread of Hoof and Beak under the Free Speech Clause.

2. Whether the CHBDA – which provides for a universally mandated contact tracing program for all persons in the United States – is neutral and generally applicable, despite religious objections, under the Free Exercise Clause.

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The order of the United States District Court for the District of Delmont is unreported, but may be found at *Jones v. Smithers*, No. 20-CV-9422 (D. Delmont 2020).

The opinion of the United States Court of Appeals for the Eighteenth Circuit is reported in *Jones v. Smithers*, No. 20-CV-9422 (18th Cir. 2020).

JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered final judgment on this matter. Petitioner filed a timely Petition for a Writ of Certiorari, which this Court granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Statement of the Facts

On February 1, 2020, President Felicia Underwood created the federal government's Hoof and Beak Task Force in response to the ongoing global pandemic of Hoof and Beak Disease. R. at 1. The Hoof and Beak Task Force prevents, monitors, and contains the spread of the highly contagious disease. Stipulations ¶ 4. On April 15, 2020, Congress passed the Combat Hoof and Beak Disease Act ("CHBDA" or the "Act"). R. at 1. The CHBDA mandates every living person in the United States to participate in contact tracing through government-provided and distributed SIM cards for use in mobile phones. R. at 1; CHBDA § 42(a). The Act names the Federal Communications Commission ("FCC") as the lead agency to execute and enforce the mandate. R. at 1. The purpose of the contact tracing program 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." R. at 6; CHBDA § 42(a)(1).

The Act designated federal facilities in each state to distribute the SIM cards containing the contact tracing software. CHBDA § 42(b). The SIM cards are installed in mobile phones. CHBDA §42(b)(1). Mobile phones containing the contact tracing SIM card are distributed to citizens that do not have mobile phones. CHBDA § 42(b)(1)(A). The only exemptions under the Act are provided to citizens over the age of sixty-five and health-related exemptions determined on a case-by-case basis. CHBDA § 42(b)(1)(B)-(D). At the federal facilities, both inside and outside, all persons are required to "wear a mask" and "observe social distancing and maintain a distance of six feet apart from one another". CHBDA § 42(b)(2). In light of growing protests at the federal facilities, Congress issued an emergency amendment to the Act indicating protestors are "[p]rohibited within sixty feet of the facility entrance, including public sidewalks, during operating hours." CHBDA 42(d). Additionally, the amendment limited groups of protestors to "no more than six persons." CHBDA § 42(d)(1). The buffer zones at each facility must be "clearly marked and posted." CHBDA § 42(d)(2). Enforcement of the Act is "subject to the discretion of the local facility officials in acknowledgement of the varied location characteristics for each center." CHBDA §42(e).

Levi Jones ("Jones"), the spiritual leader of the State of Delmont's Church of Luddite, organized protests outside a Delmont federal facility tasked with distribution of the SIM cards and mobile phones. R. at 2. The Church of Luddite has no central authority and allows each congregation, or district, to set its own rules called the "Community Orders," to be followed with total obedience. Stipulations ¶ 10; Jones Aff. ¶ 3. The Delmont Luddites do not own or use mobile phones and believe technology "has great potential to cause harm to [their] families and community." Stipulations ¶ 11; Jones Aff. ¶ 5. Due to this tenant, the Delmont Luddites do not allow mobile phones in their community except for a community landline telephone used during

emergencies. Jones Aff. ¶ 6. Jones states the only acceptable way for the Delmont Luddites to tell people their message is to speak with them as they do not use the assistance of sound amplification devices or make signs and distribute literature due to the high amount of technological involvement. Jones Aff. ¶ 7.

On May 1, 2020, facility officials marked the buffer zone at the Delmont Federal Facility and distributed the mobile phones and SIM cards from 8:00 AM to 5:00 PM. Stipulations ¶ 6. Jones and six other Delmont Luddites arrived at the facility at 9:00 AM to protest the CHBDA. R. at 7; Jones Aff. ¶ 10. Jones and the Delmont Luddites wore masks, remained six feet apart, and stood seventy-five feet from the entrance, though they periodically entered the buffer zone to approach people in line. R. at 7; Jones Aff. ¶ 10. A group of five from an organization called Mothers for Mandates ("MOMs") appeared advocating for the CHBDA. R. at 8; Mathers Aff. ¶ 6. The MOMs brought signs and placed literature on a small table at least six feet away from where they were advocating. Mathers Aff. ¶ 6. The MOMs remained stationary and did not approach anyone while some stood outside the buffer zone and some stood inside the buffer zone. R. at 8. At 4:00 PM, the Federal Facilities Police approached Jones and the Delmont Luddites instructing them to leave because they were in violation of the mandate. R. at 8; Jones Aff. ¶ 8, 10. After refusing, the police officers arrested Jones. R. at 8. Jones spent four days in jail and received a $1,000 fine. R. at 8; Jones Aff. ¶ 10.

On May 6, 2020, at 8:30 AM, Jones returned with five Delmont Luddites to protest. Jones Aff. ¶ 11. They wore masks, kept six feet apart from one another, stored their belongings outside the buffer zone, and spoke to people in the facility line. R. at 8-9; Jones Aff. ¶ 11. A group of seven masked members of the MOMs group also returned, stood fifty-five feet from the facility entrance, and distributed their advocacy pamphlets. R. at 9. Around 3:45 PM, one of the police

officers recognized Jones and informed him that he was not permitted to be there. R. at 9; Jones Aff. ¶ 11. Jones refused to leave and responded he and the Luddites were not leaving because they were in "full compliance with the mandate." R. at 9; Jones Aff. ¶ 11. Jones was arrested, fined $1,500, and spent five days in jail. R. at 9; Jones Aff. ¶ 11.

II. Nature of the Proceedings

On June 1, 2020, Jones filed an action in the United States District Court of Delmont against Christopher Smithers ("Smithers") as the FCC Commissioner. R. at 9. Jones alleged the enforcement of the CHBDA against him violated his First Amendment rights under both the Free Speech Clause and the Free Exercise Clause. *Id.* On October 30, 2020, the District Court ruled on the parties' cross-motions for summary judgment finding the Act (1) to be a valid time, place, and manner restriction under the Free Speech Clause and (2) to not be generally applicable under the Free Exercise Clause. R. at 16, 20. The parties appealed to the United States Court of Appeals for the Eighteenth Circuit. R. at 29. The Court of Appeals reversed the District Court's order in its entirety and found the Act (1) to not be narrowly tailored in violation of the Free Speech Clause and (2) to be generally applicable under the Free Exercise Clause and the RFRA to not be applicable. The Supreme Court granted the Petition for Writ of Certiorari, certifying the questions presented above. R. at 42.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the United States Court of Appeals for the Eighteenth Circuit and find the CHBDA is consistent with the Free Speech Clause because it satisfies First Amendment scrutiny. Further, this Court should affirm the decision of the United States Court of Appeals for the Eighteenth Circuit finding the CHBDA is consistent with the Free Exercise Clause because the CHBDA is a neutral and generally applicable mandate.

First, this Court should find the CHBDA's sixty-foot no protest buffer zone is narrowly tailored to the FCC's significant governmental interest in public safety and preventing the spread of Hoof and Beak. The CHBDA is a proper content-neutral time, place, and manner regulation which does not "burden substantially more speech than is necessary" because each provision of the Act directly advances the FCC's legitimate interests. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). The CHBDA is narrowly tailored because it "would be achieved less effectively absent the regulation" and does not foreclose any means of communication. *Hill v. Colorado*, 530 U.S. 703, 726 (2000). Further, while some less-speech-restrictive alternative to the CHBDA may exist, the regulation "need not be the *least restrictive* means of doing so." *United States v. Albertini*, 472 U.S. 675, 689 (1985) (emphasis added).

Second, this Court should find the CHBDA's contact tracing program, through the use of mobile phones and government-issued SIM cards, is a neutral and generally applicable mandate, despite religious objections to technology. The CHBDA is neutral because (1) the Act, on its face, does not refer to a religious practice without a secular meaning discernable from the language, and (2) the Act does not have as its object the suppression of religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 542 (1993). Further, the CHBDA is generally applicable because the Act does not selectively impose burdens on conduct motivated by religious belief, *Id.* at 543, nor does it create a mechanism for individualized exemptions. *Bowen v. Roy*, 476 U.S. 693, 708 (1986).

ARGUMENT

I. A SIXTY-FOOT NO PROTEST BUFFER ZONE IS NARROWLY TAILORED TO THE GOVERNMENTAL INTEREST IN PUBLIC SAFETY AND PREVENTING THE SPREAD OF HOOF AND BEAK

Congress enacted a valid time, place, and manner restriction when it enacted the CHBDA prohibiting protestors, like Jones, within sixty feet of federal facilities issuing contact tracing

software as part of the Hoof and Beak Task Force contact tracing program. While the First Amendment provides protections from laws abridging the freedom of speech, "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985). Certain time, place, and manner restrictions on speech are valid under the First Amendment provided the restriction (1) is content-neutral, (2) is narrowly tailored to serve a significant governmental interest, and (3) leaves open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Berger v. City of Seattle*, 569 F.3d 1029, 1036 (9th Cir. 2009). While laws that are content-neutral are subject to lesser scrutiny, *Clark*, 468 U.S. at 295, regulations that facially say nothing about speech, but restrict access to traditional public fora, are subject to strict scrutiny. *See McCullen* , 573 U.S. at 476 .

The CHBDA satisfies First Amendment scrutiny for the following reasons. First, the Act is content-neutral because it facially makes no mention of speech and can be justified without reference to the content of the regulated speech. *See Ward*, 491 U.S. at 791. Second, the Act only limits speech during operating hours and within a portion of the public forum to serve the significant governmental interest of promoting public health and safety by preventing the spread of Hoof and Beak. *See* CHBDA § 42(d); *Clark*, 468 U.S. at 292. Finally, the Act does not attempt to ban any particular manner or type of expression at a given place and time, thus providing for ample alternative channels for communication for protestors. *See Ward*, 491 U.S. at 802. For these reasons, this Court should reverse the Court of Appeals' holding finding the Act to not be a valid time, place, and manner restriction on speech.

A. The CHBDA is content-neutral because it makes no mention of speech facially and can be justified without reference to the content of the regulated speech.

Content-based laws are those that target speech based on its communicative content and are presumed unconstitutional unless they satisfy strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). There are two ways regulations can be deemed content-based. First, if the regulation *on its face* draws distinctions based on the message a speaker conveys, it is facially content-based. *Id.* Second, if the regulation is facially content-neutral, it can still be deemed content-based if the regulation cannot be "'justified without reference to the content of the regulated speech'" or 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 content-neutral because the Act makes no mention of speech on its face and law enforcement administer the CHBDA merely by monitoring the number of people within a certain area. *See* CHBDA §42(d)-(e).

i. <u>The FCC did not adopt the CHBDA because of a disagreement with Jones' message and is enforced by looking at where Jones' speech occurred.</u>

The principal inquiry in determining content neutrality is whether the government adopted a regulation of speech because of disagreement with the message it conveys. *Clark*, 468 U.S. at 295. Thus, "[t]he government's purpose is the controlling consideration." *Ward*, 491 U.S. at 791. The FCC's principal justification for the CHBDA is to promote public health and safety by preventing the spread of Hoof and Beak and to ensure access to the federal facilities during a time when social distancing is imperative. *See* CHBDA § 42; R. at 15. Even though this justification restricts protestors' *access* to a portion of the federal facilities, it does so irrespective of the *content* of the protestors' speech. *See Ward*, 491 U.S. at 791 (holding a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some

speakers or messages but not others). The CHBDA does not apply to Jones' speech because of the topic discussed nor the idea or message expressed, it applies purely because of *where* Jones chose to stand while expressing his message. Accordingly, the principal inquiry into the CHBDA satisfies content neutrality.

The second inquiry turns on whether the Act required "'enforcement authorities to examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen*, 573 U.S. at 479 (quoting *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 383 (1984)). In *Reed*, the Court found a regulation prohibiting certain types of outdoor signs to be content-based because it defined signs based on the "conveyed message of the sign" or whether the sign "communicated a certain message or idea." 576 U.S. at 164. The CHBDA differs in this case because it does not require law enforcement to inquire into speech or certain messages or ideas whatsoever, rather into the location and number of individuals. *See* CHBDA §42. The CHBDA can be justified without reference to the content of Jones' speech and was not adopted by the FCC because of disagreement with the message Jones' speech conveyed. Thus, the second inquiry into the CHBDA satisfies content neutrality and the Act wholly satisfies First Amendment neutrality.

ii. The FCC may impose a reasonable time, place, or manner restriction on speech in the Delmont Federal Facility.

While the neutrality prong is satisfied, the First Amendment also protects individuals from restrictions on speech in a traditional public forum. *McCullen*, 573 U.S. at 477 (citing *Police Dep't. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Yet, even in a public forum, the government may impose reasonable time, place, or manner restrictions provided they satisfy strict scrutiny and "leave open ample alternative channels for communication of the information." *Id.* Also, a government restriction that serves to "promote the public convenience in the interest of all, and

not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection." *Cox v. State of La.*, 379 U.S. 536, 555 (1965). Governmental authorities have the duty and responsibility to keep public fora open, available, and safe. *See id.* at 554-55; *see also Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (holding restrictions of the use of public fora ensuring public safety and convenience are not inconsistent with civil liberties but are which civil liberties ultimately depend).

The parties agree the CHBDA impacts speech within the Delmont Federal Facility, a public forum. Stipulations ¶ 5. The Federal Facilities Police have a duty to ensure the facilities are open and available to the public to permit the distribution of SIM cards and mobile phones. Individuals are required to obtain such SIM cards and mobile phones, to prevent, monitor, contain, and mitigate the spread of Hoof and Beak. Thus, the FCC may impose a reasonable time, place, and manner restriction on Jones' speech within the Delmont Federal Facility as it satisfies strict scrutiny and leaves open ample alternatives for communication.

B. The CHBDA is narrowly tailored to serve the government's interest in promoting public health and safety by preventing the spread of Hoof and Beak.

The CHBDA's explicit purpose is to "protect Americans, their families, and their communities by: letting people know they may have been exposed to Hoof and Beak and should monitor their health for signs and symptoms of Hoof and Beak." CHBDA § 42(a)(1); R. at 13-14. The parties agree this is a significant governmental interest. R. at 14. The CHBDA seeks to advance this interest by imposing social distancing and a sixty-foot buffer zone for protestors. *See* CHBDA §§ 42(b)(2), (d). As both the District Court and Court of Appeals recognized, it is not for the Court to "debate the science underlying social distancing and the necessity of limiting the number of individuals permitted within a specifically delineated area." R. at 14, 38. The Act must

meet the requirements of narrow tailoring such that it does not burden speech more than necessary and that a substantial portion of the burden on speech does not serve to advance its goals. *Hill*, 530 U.S. at 729; *McCullen*, 573 U.S. at 486. The provisions of the CHBDA directly advance the FCC's goal by imposing social distancing and ensuring access to the federal facilities without seriously burdening speech.

i. The CHBDA does not impose serious burdens on Jones' speech.

Content-neutral time, place, or manner regulations must be narrowly tailored such that it must not "burden substantially more speech than is necessary to further the government's legitimate interest." *McCullen* , 573 U.S. at 486. Such a regulation need not be the least restrictive, but the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* (citing *Ward*, 491 U.S. at 799). There remains no clear rule on what constitutes a "substantial burden;" in fact, this Court recognized the "'burden no more speech than is necessary' test has become an 'arguably burden no more speech than is necessary' test." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 813 (1994). The analysis then turns on precedent for what this Court deems a substantial burden in its application to the present facts.

In *McCullen,* a regulation establishing a thirty-five-foot buffer zone to the entrance or driveway of places performing abortions was found to be a substantial burden on petitioners attempting to counsel patients. 573 U.S. at 464. The zone substantially burdened speech because it carved out a significant portion of the premises such that petitioners were not permitted in the clinics' entrances and driveways and, thus, petitioners barely had opportunities to talk with patients. *Id.* at 487. Additionally, the buffer zones made it substantially more difficult for petitioners to distribute literature to arriving patients. *Id.* at 488. In the present case, Jones does not

argue the buffer zone abruptly concluded their discussions with persons in attendance. In fact, on May 1, 2020, the Luddites stood about fifteen feet outside the buffer zone while communicating with people in line at the facility, demonstrating the ability to spread their message while complying with the Act. R. at 7. Jones does not allege the Luddites were unable to interact with people at the facility due to the buffer zone. The buffer zone also does not prevent the distribution of literature seeing as the MOMs successfully provided literature. R. at 8; Mathers Aff. ¶ 6.

In *Madsen*, antiabortion protestors challenged an injunction for restricting their speech. 512 U.S. at 753. The Court found a provision prohibiting picketing, demonstrating, or using sound amplification equipment within 300 feet of clinic staff to be a substantial burden. *Id.* at 773-74. A buffer with limitations on time, duration, and number of pickets, versus a blanket 300-foot buffer, would not be a substantial burden. *See id.* Thus, a buffer with specific limitations does not substantially burden speech. The CHBDA places no limits on images nor persons to which protestors, like Jones and the Luddites, may interact with. Further, it *does* place a limitation on time, duration, and number of persons within a much smaller buffer zone in order to narrowly tailor the provision to accomplish the desired result without substantially burdening individuals.

In *Hill*, the Court found an eight-foot restriction on persons knowingly approaching another person near a health care facility performing abortions to not substantially burden speech. 530 U.S. 703. The Court reasoned the eight-foot restriction only occurred within 100 feet of the facility and was far less restricting than "the total ban on picketing on the sidewalk outside a residence (upheld in *Frisby v. Schultz*, 487 U.S. 474 (1988)), the restriction of leafletting at a fairground to a booth (upheld in *Heffron v. Int'l Soc. For Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)), or the 'silence' often required outside a hospital." *Hill*, 530 U.S. at 703. Similarly, the CHBDA places a sixty-foot buffer only from the entrance of the facilities which still allowed Jones and the Luddites

sidewalk access to talk with people in line. Jones Aff. ¶ 10. While the CHBDA does additionally place a six-foot social distancing requirement, the emergent state of Hoof and Beak necessitates such distancing. The CHBDA does not completely limit access to the federal facilities with a large buffer zone and places no limitations on which persons in line protestors may interact with. The CHBDA contains limitations in order to narrowly tailor it such as only placing a buffer on a portion of the property, being enforced only during operating hours, and limiting the number of persons within the groups of protestors. CHBDA § 42(d). Each of these provisions directly advance the FCC's significant governmental interest.

ii. The CHBDA does not need to be the least intrusive means of serving the FCC's significant governmental interest.

The tailoring requirement of narrow tailoring is satisfied "'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation,'" but the regulation "need not be the *least restrictive* or *least intrusive* means of doing so." *Ward*, 491 U.S. at 798-99 (emphasis added) (quoting *Albertini*, 472 U.S. at 689); *see also Hill*, 530 U.S. at 703 . A regulation will not be deemed invalid simply because a court concludes that the government interest could be adequately served by some less-speech-restrictive alternative. *Albertini*, 472 U.S. at 689 (holding the validity of a regulation does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests); *see also Ward*, 491 U.S. at 800; *Clark*, 468 U.S. at 299. The Act is a reasonable time, place, and manner regulation that withstands constitutional scrutiny because all of the CHBDA's provisions are related to the ends that it was designed to serve. *See Clark*, 468 U.S. at 298; CHBDA § 42.

The Court of Appeals found the Act to not be narrowly tailored because it prohibits protesting within the buffer zone whether there is a line of fifteen people or whether there is no

line. R. at 38. This, the Court of Appeals believes, creates a "substantial burden on speech without advancing the governmental goals." *Id.* While it may be less intrusive to only prohibit protesting when there is a line, if the Act (1) advances the FCC's goals of promoting health and safety by preventing the spread of Hoof and Beak, (2) would be achieved less effectively absent the Act, and (3) does not foreclose any means of communication, then the Act does not need to be the least intrusive means. *See Hill*, 530 U.S. at 726. The Act's purpose is both to limit the spread of Hoof and Beak *and* to provide access to federal facilities. CHBDA § 42; R. at 15. Prohibiting protesting within the buffer zone when there is no line serves to provide the public assured access to the facilities during business hours. The validity of the Act is not contingent upon a judge's agreement with the FCC on the most appropriate method for promoting this interest. *See Albertini*, 472 U.S. at 689.

The Act, in its entirety, advances the FCC's goals. The CHBDA limits the number of protestors at the federal facilities during a time where social distancing is imperative, and individuals are *required* to go to the facility. The Act advances the FCC's additional goal of ensuring access to the facilities by providing a sixty-foot buffer from the facility entrance to protect those present for their SIM cards and mobile phones in entering the building. *See Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (upholding regulations that assure the safety and convenience of the people in the use of public fora). Unlike *Hill*, where a statute regulated three types of communication (display of signs, leafletting, and oral speech), the CHBDA does not prohibit specific means of communication. 530 U.S. at 719. Thus, the tailoring requirement is satisfied because the provisions of the Act advance the FCC's goal, would be achieved less

effectively absent the Act,[1] and does not foreclose any means of communication, even though some less-speech-restrictive alternative may exist. Any quest to determine whether there is a less-speech-restrictive alternative is moot.

C. The CHBDA leaves open ample alternative channels for communication of Jones' message.

A time, place, or manner restriction must "'leave open ample alternative channels for communication of the information.'" *Berger*, 569 F.3d at 1036 (quoting *Ward*, 491 U.S. at 791). "An alternative is not ample if the speaker is not permitted to reach the intended audience." *Id.* at 1049. If a regulation does not attempt to ban any particular manner or type of expression at a given place or time, it satisfies ample alternatives. *See Ward*, 491 U.S. at 802. The CHBDA places no limitations on manner or type of expression, it merely restricts where a person may stand when expressing their message. *See* CHBDA § 42.

The CHBDA provides several provisions regarding the federal facilities encompassing (1) a sixty-foot buffer from the facility entrance, (2) a limitation on the number of persons within a group of protestors, and (3) a social distancing requirement of six feet. CHBDA §§ 42(b)(2), (d). None of these provisions indicate a particular manner of communication is prohibited. In *Ward*, even though the city placed a noise regulation limiting volume to a degree, the Court found since remaining avenues of communication were available, the regulation allowed for ample alternatives. 491 U.S. at 802. In *Berger*, street performers argued a city regulation on the behavior

[1] The CHBDA originally did not contain limitations on the number of protestors nor did it impose a buffer zone; however, Congress issued an emergency amendment to the CHBDA as a reaction to the growing protests at the federal facilities demonstrating the failed effectiveness of advancing the FCC's interest absent the Act. Stipulations ¶ 7; *See* Madsen, 512 U.S. at 770 (taking into consideration the failure of an original injunction to accomplish a governmental interest in evaluating the constitutionality of a broader injunction).

of street performers, including prohibiting communication within thirty feet of visitors, did not allow the performer to reach their intended audience. 569 F.3d at 1050.

Jones argues the only way for his group to tell people their message is to speak with them directly because it is against the Luddites' beliefs to use the assistance of sound amplification devices, make signs, or distribute literature. Jones Aff. ¶ 7. However, it is not the CHBDA that renders Jones incapable of reaching his intended audience but Jones' decision to not utilize the available avenues of communication. The MOMs successfully reach the same intended audience utilizing a website, t-shirts, signs, and literature. Mathers Aff. ¶¶ 5-6. While Jones may have a preferred method to communicate his message, the remaining avenues of communication are not inadequate. *Ward,* 491 U.S. at 802. Notwithstanding the alternative means, Jones may still communicate his message in his preferred method, which he demonstrated by standing outside the buffer zone, speaking with people in line. R. at 7. The CHBDA provides ample alternatives demonstrated by the MOMs and does not foreclose Jones' opportunity to speak with persons in line.

The Court of Appeals properly found the CHBDA to be a content-neutral regulation because the Act, on its face, does not regulate speech and is enforced without reference to the message conveyed. R. at 36-37. However, the Court of Appeals erred in finding the CHBDA to not be narrowly tailored because the provisions of the Act (1) advance the FCC's goals in preventing the spread of Hoof and Beak, (2) do not substantially burden speech more than necessary, and (3) do not need to be the least restrictive means possible to achieve the FCC's goals. Finally, because the Act does not foreclose any means of communication and provides ample alternative channels for communication, including Jones' preferred method, the CHBDA satisfies First Amendment strict scrutiny.

II. MANDATED CONTACT TRACING THROUGH THE USE OF MOBILE PHONES AND GOVERNMENT-ISSUED SIM CARDS IS NEUTRAL AND GENERALLY APPLICABLE, DESPITE RELIGIOUS OBJECTIONS TO TECHNOLOGY.

The Free Exercise Clause of 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. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 877 (1990). Therefore, "[t]he government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." *Id.* at 877 (citations omitted).

Yet, "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation*." Id.* The Supreme Court consistently holds "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982)). In *Smith*, the Supreme Court states free exercise of religion does not relieve the individual of all obligations to comply with valid and neutral laws of general applicability:

> Laws, we said, are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Id. (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878)) (internal quotations omitted). The CHBDA's mandated contact tracing program neither explicitly nor implicitly suppresses any religious preferences. Further, the CHBDA elicits participation by all residents of the United States and does not create a mechanism for individualized exemptions. For these reasons, this Court should affirm the Court of Appeals' holding finding the Act to be neutral and generally applicable, despite religious objections to technology.

A. The RFRA is inapplicable to the CHBDA and falls purely under the Free Exercise Clause.

In direct response to the Supreme Court's holding in *Smith,* Congress enacted the Religious Freedom and Restoration Act (the "RFRA"). The RFRA prohibits the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The government can overcome this prohibition by proving "the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *City of Boerne v. Flores*, 521 U.S. 507, 515–16 (1997) (quoting 42 U.S.C. § 2000bb-1). The RFRA's mandate applies to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States . . . ." 42 U.S.C. § 2000bb–2(1). The RFRA typically applies to all federal law and thus the CHBDA is covered by the RFRA. 42 U.S.C. § 2000bb–3(a). However, in implementing the CHBDA, Congress explicitly excluded the RFRA and it is therefore inapplicable. CHBDA § 42(f)(8) ("pursuant to 42 U.S. Code § 2000bb-3, the Religious Freedom and Restoration Act is inapplicable to this act"); *see also* 42 U.S.C. § 2000bb-3(b) (stating all federal law "is subject to this chapter unless such law explicitly excludes such application by reference to this chapter."). Therefore, analysis of a person's free exercise of religion under the CHBDA falls purely under the Free Exercise Clause of the First Amendment.

B. The CHBDA's mandated contact tracing through the use of mobile phones and government-issued SIM cards is neutral.

In determining whether a law is neutral, the analysis focuses on the legislature's object. *See generally Church of the Lukumi Babalu Aye, Inc.*, 508 U.S.at 540. To begin, in "determin[ing] the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* at 534. However, legislative materials that "target religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* Laws lack neutrality when the neutrality inquiry leads to the conclusion that the law had as its object the suppression of religion. *Id.* at 542.

i. The text of the CHBDA does not refer to a religious practice or reference a religious preference.

The first step in determining the object of a law requires an analysis of the text of the Act for facial neutrality. Such analysis determines whether the Act "refers to a religious practice" or contains "secular meanings" in the language itself. *Id.* at 534. The CHBDA's mandated contact tracing program is neutral because the Act does not explicitly reference any religious preference nor do any of the chosen words contain secular meanings.

The CHBDA is facially neutral because the plain text of the CHBDA makes no reference to a religious preference. Instead, the Act mandates that "[e]ach person living in the United States shall participate in a mandatory contact tracing program." CHBDA § 42(a). The purpose of the program is to "protect Americans, their families, and their communities by letting people know that they 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). In *Church of the Lukumi Babalu Aye, Inc.*, the petitioners argued that three city ordinances "fail[ed] the test of facial neutrality

because they use the words 'sacrifice' and 'ritual.'" 508 U.S. at 533-34. The Court found the petitioner's argument "not conclusive" because the words "sacrifice" and "ritual" have become secular terms in common usage. *Id.* at 534. The words "sacrifice" and "ritual" are far more religious in nature than any phrases used in the CHBDA. Considering the CHBDA does not reference religious preferences nor contain religious phrases, the Act satisfies facial neutrality.

ii. The FCC does not have as its object the suppression of religion.

While the CHBDA is facially neutral, the Supreme Court states facial neutrality is not dispositive in finding a law neutral. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520. The second step in determining the object of a law involves an inquiry into both direct and circumstantial evidence because the Free Exercise Clause bars "subtle departures from neutrality" and "covert suppression of particular religious beliefs." *Id.* at 534, 540 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). Legislative materials that "target religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534. A court may consider factors including, among others: "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. Laws lack neutrality if an inquiry leads to the conclusion that the legislature had as its object the suppression of religion. *Id.* at 542. The CHBDA satisfies neutrality because the FCC's object in implementing the CHBDA is to "prevent, monitor, contain, and mitigate the spread of Hoof and Beak" which by no means intends to suppress religion. *See* Stipulations ¶ 4.

Hoof and Beak Disease is a novel disease which originated in the Tasmanian platypus and spreads person-to-person at a rate which led to 70 million confirmed cases and 230 thousand deaths

in the United States to date. R. at 1. Hoof and Beak is highly contagious such that it is an ongoing global pandemic forcing governments around the globe to respond with lockdowns to curb the spread. *Id.* President Underwood created the Hoof and Beak Task Force to coordinate and oversee the administration's efforts to prevent, monitor, contain, and mitigate the spread of Hoof and Beak. Stipulations ¶ 4. In response to the growing pandemic, Congress enacted the CHBDA on April 15, 2020, establishing a contact tracing mandate. Stipulations ¶ 8. The historical background of the CHBDA, the series of events leading up to the passage of the CHBDA, and any contemporaneous statements made by members of the decision-making body of the CHBDA, provides no indication that the FCC had as its object the suppression of religion, generally, or the Luddites specifically. The FCC merely enacted the CHBDA in response to the ongoing pandemic to further prevent the spread of the contagious disease and not to target any religious conduct. Thus, an inquiry into direct and circumstantial evidence of the CHBDA demonstrates the FCC's object in implementing mandated contact tracing is neutral and absent the suppression of religion.

C. The CHBDA's mandated contact tracing through the use of mobile phones and government-issued SIM cards is generally applicable.

The Free Exercise Clause guarantees that the government, in pursuit of legitimate interests, cannot selectively impose burdens only on conduct motivated by religious beliefs. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 543. When legislative action singles out conduct with a religious motivation in pursuit of legitimate governmental interests, inequality results. *Id.* at 542-43. Statutory conditions that create a mechanism for individualized exemptions but refuse to extend an exemption for religious hardship, suggests a discriminatory intent. *Bowen*, 476 U.S. at 708. The CHBDA neither selectively imposes burdens only on conduct motivated by religious belief nor creates a mechanism for individualized exemptions. Therefore, the CHBDA's mandated contact tracing program is generally applicable.

i. The CHBDA does not selectively impose burdens only on conduct motivated by religious belief.

"The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 543. "All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* "[I]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542-43. The CHBDA's language, eliciting participation from all United States residents, evidences the Act's intention to not selectively impose burdens only on conduct motivated by religious belief.

The CHBDA does not selectively impose burdens only on conduct motivated by *religious belief*. *See id.* at 543. The law mandates that all residents of the United States must participate in the program. CHBDA § 42(a). The CHBDA's requirement that "each person living in the United States shall participate" indicates the legislature's intent to elicit cooperation from *all* United States residents and is not selectively directed at residents, like Jones and the Luddites, who hold specific religious beliefs. *Id.* Additionally, Congress did not draft the Act in a manner to generally burden religious practices nor any specific religious practice. Rather, the CHBDA includes a general imposition on *all* United States residents for the purpose of informing residents of exposure to the contagious disease and warning them to monitor their health for symptoms. *See* CHBDA § 42(a)(1).

ii. The CHBDA does not create a mechanism for individualized exemptions.

The District Court found the CHBDA to not be generally applicable because the Act "allows non-religiously motivated exemptions." R. at 19-20. The Supreme Court addresses this

exact issue in *Bowen*, recognizing statutory conditions that create a mechanism for individualized exemptions suggest a discriminatory intent if it refuses to extend an exemption to an instance of religious hardship. 476 U.S. at 708. In *Sherbert* and *Thomas*, the statutory conditions at issue provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he quit work or refused available work. *See id.*; *see also Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981). This "good cause" standard created a mechanism for individualized exemptions. *See Bowen*, 476 U.S. 693.

However, the CHBDA does not create a *mechanism* for individualized exemptions, but rather, creates *specific exemptions* for age and health. CHBDA §§ 42(b)(1)(B), (C). In *Sherbert* and *Thomas*, the legislatures drafted, what should be considered, a test for determining exemptions. *See Sherbert*, 374 U.S. 398; *Thomas*, 450 U.S. 707. The use of the phrase "good cause" opened the possibility for countless forms of exemptions. *See Bowen*, 476 U.S. 693. The Court found that to consider a religiously motivated resignation to be "without good cause," and, therefore, not within the open-ended category of exceptions created by the legislature, "exhibit[s] hostility, not neutrality, towards religion." *Id.* at 708. The CHBDA does not leave open the possibility for countless forms of exemptions nor does it contain a vague and open-ended test, such as "good cause," for determining whether an exception is warranted. Instead, Congress provided for specific exemptions related to age and health. Therefore, the findings in *Sherbert* and *Thomas* are inapplicable to the CHBDA. *See Sherbert*, 374 U.S. 398; *Thomas*, 450 U.S. 707.

The presence of a religious exemption (exclusion) is not indicative of favoritism (hostility) towards religion. The Court's conclusion in *Bowen* exemplifies this by stating, "[a]s a matter of legislative policy, a legislature might decide to make religious accommodations to a general and neutral system of awarding benefits, '[b]ut our concern is not with the wisdom of legislation but

with its constitutional limitation.'" 476 U.S. at 712 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961)). Jones' request for the inclusion of a religious exemption would be best served by congressional action than a constitutionally mandated inclusion by this Court.

Therefore, the Act is facially neutral as it neither explicitly nor implicitly sought the suppression of religion and the language of the Act does not contain religious phrases. The text of the CHBDA does not refer to any religious practice nor does the historical background of the CHBDA, the series of events leading up to the passage of the CHBDA, or any contemporaneous statements made by members of the decision-making body indicate the FCC had as its object the suppression of religion. Further, the CHBDA is generally applicable as it provides for the inclusion of all residents of the United States and creates a mechanism only for specific exemptions for age and health, not for individualized exemptions.

CONCLUSION

For the foregoing reasons, Smithers respectfully requests this Court to reverse the Eighteenth Circuit's decision finding the CHBDA to be inconsistent with the Free Speech Clause and find that the Act satisfies First Amendment scrutiny. In addition, Smithers respectfully requests this Court affirm the Eighteenth Circuit's decision finding the CHBDA to be consistent with the Free Exercise Clause as the Act is neutral and generally applicable.

Respectfully submitted,

Dated: January 31, 2021.

/s/ Team 28
Team 28

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 of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

APPENDIX B

STATUTORY PROVISIONS

Title 28 of the United States Code

28 U.S. Code § 1254(1)
By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Title 42 of the United States Code

42 U.S. Code § 2000bb-1(a)
Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

42 U.S. Code § 2000bb-2(1)
The term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity.

42 U.S. Code § 2000bb-3(a)-(b)
(a) This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.
(b) Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

Section 42 of the Combat Hood and Beak Disease Act

CHBDA § 42(a)(1)
(a) Each person living in the United States shall participate in a mandatory contact tracing program.
    (1) The purpose of the contact tracing program 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(b)(1)(A)-(D), (2)
(b) In establishing the contact tracing program, federal facilities located in each state will be used to distribute SIM cards containing contact tracing software.
    (1) The SIM cards shall be installed in mobile phones.
        (A) If citizens do not have a mobile phone the centers shall distribute a mobile phone containing the contact tracing SIM card.
        (B) Senior citizens over sixty-five years of age are exempt from this law.

(C) Health exemptions may be granted by the officials at each local federal facility on a case-by-case basis.
(D) No other type of exemption is permitted.

(2) At the federal facilities, at a minimum, the following must be observed and enforced: (1) all persons must wear a mask, and (2) all persons shall observe social distancing and maintain a distance of six feet apart from one another, inside and outside of the building.

CHBDA § 42(d)(1)-(2)

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

CHBDA § 42(e)

Enforcement is subject to discretion of local facility officials in acknowledgment of the varied location characteristics for each center.

CHBDA § 42(f)(8)

Pursuant to 42 U.S. Code § 2000bb-3, the Religious Freedom and Restoration Act is inapplicable to this act.

CERTIFICATE OF COMPLIANCE

1. Pursuant to Official Competition Rule III(C)(3)(i), the undersigned certifies the work product contained in all copies of the team's brief is in fact the work product of the team members.

2. Pursuant to Official Competition Rule III(C)(3)(ii), the undersigned certifies the team has complied fully with our school's governing honor code.

3. Pursuant to Official Competition Rule III(C)(3)(iii), the undersigned certifies and acknowledges that the team has complied with all Rules of the Competition.

Dated: January 31, 2021.

/s/ Team 28
Team 28