Case No. 20-9422

In the

SUPREME COURT OF THE UNITED STATES

LEVI JONES,

Petitioner,

v.

CHRISTOPHER SMITHERS,

Respondent.

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

BRIEF FOR PETITIONER

Team No. 5

Attorneys for Petitioner

QUESTIONS PRESENTED

1) Whether the Eighteenth Circuit correctly held that a law was not sufficiently narrowly tailored to compelling government interests when the law established a sixty-foot buffer zone outside all federal distribution facilities, banned all demonstrations within that zone, and imposed additional regulations on the size and form of public speech?

2) Whether the Eighteenth Circuit erred in holding that a law restricting free religious exercise was neutral and generally applicable when the law provided exemptions on the basis of age and medical necessity, but refused to provide exemptions on the basis of religious hardship?

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

STATEMENT OF JURISDICTION

The United States Court of Appeals entered a final judgment on this matter. R. at 41. The parties submitted a timely writ of certiorari, which this Court granted. R. at 42. This Court has jurisdiction over the present case pursuant to 18 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution and relevant portions of the Combat Hoof and Beak Disease Act are set forth in the Appendix.

STATEMENT OF THE CASE

The novel Hoof and Beak Disease ("Hoof and Beak") is a global, highly contagious disease that has thus far resulted in 70 million cases and 230 thousand deaths in the United States. R. at 1. Congress passed the Combat Hoof and Beak Disease Act ("CHBDA" or "the Act") on April 15, 2020, *id*, to protect Americans by ensuring timely notice of exposure to Hoof and Beak Disease. R. at 6. The CHBDA requires every person in the country to participate in contact tracing through the monitoring of SIM cards in cellphones. *Id*. If a citizen does not have a cellphone with a SIM card installed, they are required to obtain such a device from a federal distribution facility. *Id*. At all distribution facilities, the Act requires the use of face masks and six-foot social distancing both indoors and outdoors. *Id*. The CHBDA provides exemptions for

contact tracing which omit citizens over the age of sixty-five categorically and allow for certain medical afflictions to be exempted on a case-by-case basis. *Id*.

The Act was met with significant backlash by members of the public. R. at 7. In response to growing protests at SIM card distribution centers, Congress amended the CHBDA to include restrictions on activities outside federal distribution facilities. *Id*. The amendments prohibit protestors "within sixty feet of the facility entrance including public sidewalks, during operating hours." *Id*. Furthermore, groups of protestors are limited to no more than six individuals. *Id*. Enforcement of the Act is "subject to the discretion of local facility officials" in consideration of the unique locational identity of each distribution facility. *Id*.

Levi Jones is the leader of the highly reclusive Delmont Church of Luddite. R. at 2. The Delmont Luddites form a religious group that is fundamentally opposed to the use of technology, believing it causes significant harm to relationships within their community. R. at 24-5. The Delmont Luddite sect does have a landline phone, but the group imposes strict limitations on the phone's use. *Id*. The Luddites also believe only in quiet, interpersonal communication and do not speak loudly, use amplification equipment, or use mass-produced literature or signage. R. at 25.

On May 1, 2020, Mr. Jones and six other Luddites gathered on a public walkway seventy-five feet from the entrance to the Delmont facility to protest implementation of the Act during business hours. R. at 7. The group wore masks and maintained social distancing, but periodically entered the buffer zone to speak with people waiting outside the site. *Id*. A pro-contact tracing group of five individuals, called MOMs, were distributing literature in support of the Act by remaining stationary at a pamphlet table within fifty-five feet of the entrance. R. at 8. At 4:00 PM on May 1, Mr. Jones was arrested for violating the CHBDA. *Id*. On May 6, Mr. Jones and five Luddites returned to demonstrate, again wearing masks, maintaining social

distancing, and speaking to people outside the facility. *Id*. A group of seven MOMs were also present and protested within the buffer zone. R. at 9. Mr. Jones was arrested after he was recognized as the "anti-tech preacher," no MOMs were arrested for violations on either date. *Id*.

Mr. Jones filed the current action against the Federal Communications Commission ("FCC") on June 1, 2020, alleging that the enforcement of the CHBDA against him and the Delmont Luddites violated the Free Speech and Free Exercise clauses of the First Amendment. R. at 9. Petitioner Jones and Defendant Christopher Smithers, Commissioner of the FCC, filed cross motions for summary judgement on both issues. R. at 3. The United States District Court for the District of Delmont granted Defendant FCC's motion for summary judgment regarding the allegations of free speech violations and granted Petitioner Jones's motion for summary judgment regarding the free exercise issue. R. at 20. Parties appealed to the United States Court of Appeals for the Eighteenth Circuit. R. at 29. On appeal, the Circuit Court granted Petitioner Jones's motion for summary judgment regarding the free speech issue and granted Defendant FCC's motion for summary judgment regarding the free exercise issue. R. at 40-41.

SUMMARY OF THE ARGUMENTS

The ruling of the Eighteenth Circuit on the first issue, granting Petitioners summary judgement because enforcement of the sixty-foot buffer zone is not narrowly tailored, should be affirmed. The zone is unconstitutional because it does not adequately support the government interests in health and safety, and the significant burdens imposed by the Act have not been shown to stop the spread of Hoof and Beak disease. Additional regulations encompassed within the CHBDA, as well as other potential mandates, could sufficiently inhibit the transmission of Hoof and Beak through less egregious attacks on free speech. Moreover, the size and scope of

the buffer zone distinguish it from every other similar regulation previously analyzed by this Court.

The CHBDA is not neutral, nor is it generally applicable towards religion. Accordingly, the Eighteenth Circuit's holding on this issue should be reversed. The Act is facially neutral; however, it unduly burdens religious entities. The law threatens core values of anti-technology groups such as the Luddites, yet provides secular exemptions, thus suggesting a lack of neutrality in implementation. Furthermore, the CHBDA is not generally applicable. The combined scope of the group omissions from the contact tracing program, and the under-inclusivity of the burdens the Act imposes, are not justifiable under the interests cited to establish the regulations. These factors indicate that exempting the Luddites from technological contact tracing will not impair government interests, and that free exercise rights are being unduly violated as the Act is currently enforced.

ARGUMENT

I. THE SIXTY FOOT BUFFER ZONE IS NOT NARROWLY TAILORED BECAUSE OF THE INADEQUATE RELATIONSHIP BETWEEN THE FREE SPEECH BURDENS AND GOVERNMENT GOALS, AND BECAUSE IT IS BROADER THAN NECESSARY TO FURTHER THE COMPELLING INTEREST IN PROTECTING PUBLIC HEALTH.

"Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Constitutional protections, however, are not absolute and regulations of speech within the confines of the First Amendment must generally be "narrowly tailored to accomplish a compelling government interest." *United States v. Grace*, 461 U.S. 171, 177 (1983). The government may likewise impose reasonable time, place, and manner ("TPM") restrictions on expressive conduct, even within a forum in which public speech is encouraged. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). TPM restrictions "are valid provided that they are

justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Constitutional protections of free speech are particularly applicable in public forums such as streets, parks, sidewalks, and areas that have traditionally been used by citizens for expressive activity. *See Int'l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). Though the narrowly tailored requirement does not mean regulations must be the least restrictive means of control, government restrictions must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799.

The first question for review is whether the sixty-foot buffer zone is narrowly tailored to preventing the spread of Hoof and Beak disease. While both the trial court and appellate court concluded the Act is content neutral, R. at 12, 37, the Eighteenth Circuit Court held that the Act was not narrowly tailored because it placed a significant burden on speech without advancing the government's goal of fighting a contagious disease. R. at 38. Importantly, neither party disputes the compelling nature of fighting a highly contagious disease. *See Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) ("[A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members.").

The ruling of the Eighteenth Circuit, that the sixty-foot buffer zone was not narrowly tailored, should be affirmed for two reasons. First, the primary function of the zone fails to adequately support the compelling government interest in public safety. People are already congregating within these zones to enter the facilities. Because protests are allowed at non-government facilities, and outside the buffer zone, the Act concedes that demonstrations themselves are not averse to public health. The discretionary enforcement clause also reveals this

concession while simultaneously permitting discriminatory application of criminal penalties. Second, the sixty-foot buffer zones impose significant burdens that do not further state interests while ignoring less restrictive means of protection. All protests within this zone are forbidden regardless of factors such as group size, compliance with other CHBDA sections, or conditions surrounding the distribution facility. The large size of the zone greatly hampers the effectiveness of all forms of communication, specifically the Luddites verbal protest techniques. Moreover, less intrusive regulations, such as CHBDA § 42(b)(2) mandating masks and social distancing and § 42(d)(1) limiting protest groups to six or fewer people, can promote health and safety without substantially burdening free speech.

a) <u>The Sixty-Foot Buffer Zones Create a Substantial Burden on Speech Without a Sufficient Relationship to the Compelling Government Interests.</u>

Although TPM restrictions can be constitutional, the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. The requirement of narrow tailoring is only satisfied "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). Because such a substantial relationship is necessary for the means of restraint to justify the ends, the narrowly tailored analysis prohibits "sacrific[ing] speech for efficiency." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Cordoning off portions of a public forum make free speech restrictions easily enforceable, "but the prime objective of the First Amendment is not efficiency." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

The strength of the nexus between restraints on fundamental rights and the established government interests is a direct indicator of the constitutionality of a TPM regulation. *See Ward*, 491 U.S. at 800. In *Ward*, the Court relied heavily on this idea when analyzing New York City

"Use Guidelines" on performances at a theatre in Central Park. *Id*. at 786-87. The guidelines required that all sound mixing be done by a city technician, and that all acts use city sound equipment. *Id*. The mandates were perpetuated on behalf of substantial government interests in protecting noise intrusion in neighboring residences, while still ensuring sufficient amplification for concertgoers. *Id*. at 800. This Court ultimately found the regulations to be narrowly tailored because allowing audio to be controlled by a city agent "direct[ly] and effective[ly]" served the substantial interests. *Id*.

When speech itself is the main antagonist towards a stated government interest, a total ban on that form of speech may be permitted. *See Frisby v. Schultz*, 487 U.S. 474, 486 (1988). For instance, the legislation in *Frisby* prohibited "any person [from] engag[ing] in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." *Id*. at 477. The purpose of the regulation was to protect the sanctity of private residences from intrusion by protestors. *Id*. at 486 ("[T]he picketing is narrowly directed at the household, not the public. The type of picketers banned by the [town] ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."). The picketing involved continued protests outside the home of a doctor who performed abortions. *Id*. at 487. The ban was narrowly tailored only because "the substantive evil . . . [was] not merely a possible byproduct of the activity, but [was] created by the medium of expression itself." *Id*. at 486 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)).

TPM regulations that consist of hard buffer zones will be upheld when the buffer zone directly serves a government interest. *See Madsen v. Women's Health Ctr., Inc*., 512 U.S. 753, 769 (1994) (the buffer zone prevented traffic congestion); *Schneck v. Pro-Choice Network of*

Western New York, 519 U.S. 357, 380 (1997) (the buffer zone allowed for patients to access abortion clinics). In *Madsen*, an injunction forbidding congregating and protesting within thirty-six feet of the entrance and driveway of a single abortion clinic was narrowly tailored. *Madsen*, 512 U.S. at 769. The picketing was directed at patients of the clinic, and there was demonstrable concern that protestors would block a twenty-foot-wide driveway that was the sole ingress and egress route for staff and patients. *Id*. The Court simultaneously held that the extension of the buffer zone onto private property adjacent to the clinic was not narrowly tailored. *Id*. at 771. In *Schneck*, this Court analyzed a fifteen-foot buffer zone established by a temporary restraining order ("TRO") at the entrance of several abortion clinics. *Schneck*, 519 U.S. at 380. Again, there was direct evidence providing that "sidewalk counselors—both before and after the TRO—followed and crowded people right up to the doorways of the clinics (and sometimes beyond) and then tended to stay in the doorways, shouting at the individuals who had managed to get inside." *Id*. The restrictions were only narrowly tailored because "the *only* way to ensure access was to move *all* protesters away from the doorways." *Id*. at 381 (emphasis added).

The indirect service of government interests by the CHBDA is a stark contrast to the strong nexus between the regulation and interests in previous cases. In *Frisby*, *Madsen*, and *Schneck*, it was the act of protesting itself that ran counter to the government interests of each scenario. The picketing ban in *Frisby* was only narrowly tailored because the protests directly harmed the rights of people within their homes to refrain from becoming unwilling recipients of unwanted speech. *See Frisby*, 487 U.S. at 488. In *Madsen* and *Schneck*, the picketers outside the entrances to abortion facilities directly eroded established government interests related to ingress and egress at the clinics. *See Madsen*, 512 U.S. at 767-68 (acknowledging compelling interests in women's pursuit of medical and counseling services, and promoting the flow of traffic);

Schneck, 519 U.S. at 375-76 (noting government interests related to congestion around roads and sidewalks and the documented aggressive confrontations perpetuated by the picketers). Here, the government interest is in inhibiting the spread of a communicable disease in order to protect "Americans, their families, and their communities." R. at 6. This Court has never found buffer zones narrowly tailored to an interest of similar nature. Furthermore, the CHBDA does not prohibit organized action outside the sixty-foot buffer zone or at non-distribution centers. R. at 7. This indicates the restrictive area inadequately serves attempts to stop the spread because it would appear no more or less likely for the disease to transmit in one outdoor area as opposed to another. Importantly, the zone does still significantly restrain speech and the ability for the Luddites to convey their message. If the act of protesting is not responsible for the harms sought to be avoided by the government, then the targeting of such activity is unrelated to the compelling interests used to justify the regulation.

The CHBDA discretionary enforcement clause also supports the claim that the nexus between the burdens imposed by the Act and the government interest in health and safety is insufficient. In its amended form, enforcement of the buffer zone is "subject to the discretion of local facility officials in acknowledgement of the varied location characteristics of each center." CHBDA § 42(e). By recognizing the buffer may, at times, not need to be enforced, the CHBDA concedes that the distance between protestors and the entrance has no role in spreading the disease. Rather, it suggests factors like the amount of people gathered, whether they are wearing masks, and the proximity of people to each other, relate to the spread of Hoof and Beak. All these actions are already controlled by other sections of the Act. *See* CHBDA §§ 42(b)(2) & (d)(1). The Luddites were arrested on May 6 pursuant to the discretionary clause, even though they were in full compliance. R. at 8-9. Meanwhile the MOMs operated within the buffer zone

on May 1 and May 6, and violated the group size limit on May 6, yet suffered no consequences. R. at 9. This inconsistent enforcement through to the discretionary clause shows the buffer zone is not adequately related to stopping Hoof and Beak and acts mainly as a way for the government to limit speech it disfavors.

Finally, absent the buffer zone obstruction, government interests can still be served by supplemental restrictions. In *Ward*, the regulation of sound systems within a concert arena was narrowly tailored because government interests would not have been served absent the regulatory practices. *See Ward*, 491 U.S. at 800. As noted above, the Act allows enforcement of six-foot social distancing and mask mandates; CHBDA § 42(b)(2); and group constraints of six or fewer individuals. CHBDA § 42(d)(1). Because of these additional controls, the lack of precedent in applying buffer zones for similar compelling interests, and contradictory inferences drawn from the discretionary clause, the sixty-foot buffer zone is not sufficiently related to the aim of preventing Hoof and Beak transmission.

b) <u>The Total Ban on Protests within the Zone is More Restrictive Than Necessary to Accomplish the Government's Aims and It Neglects Less Intrusive Means of Promoting Public Health.</u>

In addition to being directly related to a compelling state goal, to be narrowly tailored, regulations must impose no more of a burden "than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). The unnecessary burden analysis does not require regulations "be the least restrictive or intrusive means" of serving the compelling interests. *Id*. 798. However, this slackening of the "least restrictive" mandate only applies when "a content-neutral regulation does not entirely foreclose any means of communication." *Hill v. Colorado*, 530 U.S. 703, 726 (2000). Courts must also "take account of the place to which the regulations apply in determining whether these restrictions burden more

speech than necessary." *Id.* at 728. By eliminating burdens unnecessary to the fulfillment of the government interests, the state is unable to "suppress speech not only because it disagrees with the message being expressed, but also for mere convenience." *McCullen*, 573 U.S. at 486.

The size of protest restriction zones is only one factor this Court has considered to determine if an undue burden exists. *See id*. at 488. For example, the thirty-five-foot zone in *McCullen* that forbid people from entering or remaining outside reproductive facility entrances was overturned, in part, because of the types of speech it suppressed. *Id*. The compelling interests of the case were to promote "public safety, patient access to healthcare, and the unobstructed use of sidewalks." *Id*. at 486. The *McCullen* petitioners primarily relied upon nonconfrontational "sidewalk counseling" and literature disbursement, *id*. at 472, and saw a significant decline in the counseling "success rate" after imposition of the restraints. *Id*. at 488-89. Although nothing in the First Amendment ensures the right to perpetuate any specific form of speech, the Court noted the importance of literature handouts and recognized verbal "'one-on-one communication' is 'the most effective, fundamental, and perhaps economical avenue of political discourse.'" *Id*. at 488 (quoting *Myer v. Grant*, 486 U.S. 414, 424 (1988)). Because the Commonwealth "pursued [compelling] interests to the extreme" by forbidding all activity within the buffer zone, including the only means of contact practiced by the petitioners, the overregulation was fatal to the narrowly tailored requirement. *Id*. at 497.

The existence of less restrictive means of regulation, short of a ban on all activity, is also a key component of a narrowly tailored analysis. *See, e.g.*, *id*. at 494. In *McCullen*, this Court found that separate provisions of the regulatory scheme and general criminal laws imposing sanctions for obstruction and harassment were less restrictive means that adequately served the compelling government interests of patient and doctor safety and access to abortion clinics. *Id*. at

491-92. In contrast to forbidding protest within these zones *in toto*, the state "[had] available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate." *Id*. at 494. In an analogous situation, Colorado established a 100-foot zone around the entrances to healthcare facilities but did not institute an outright ban of all expression within the area. *Hill*, 530 U.S. at 707. In practice, the legislation only imposed an eight-foot zone of restricted activity, as it forbade coming within that distance of another to speak or distribute pamphlets without their consent within the greater 100-foot zone. *Id*. The law also did not demand that protestors move away from oncoming pedestrians to abide by the eight-foot rule. *Id*. It was critical that no form of speech was totally excluded by the regulation. *Id*. at 729 ("[T]he [eight]-foot restriction on an unwanted physical approach leaves ample room to communicate a message through speech. Signs, pictures, and voice itself can cross an [eight]-foot gap with ease.").

Even in cases where a near total ban of activity was upheld, the Court ensured restraints did not render certain forms of speech ineffective, and the scope of the regulation was limited. *See Madsen*, 512 U.S. at 770. In *Madsen*, the injunction establishing a thirty-six-foot buffer zone outside the entrances of a facility conducting abortions applied to a single clinic. *Id*. at 758. Evidence showed that even with the buffer zone, protestors would be no further than ten to twelve feet from the sole roadway leading to the clinic, and therefore could satisfactorily express messages. *Id*. at 770-71. Likewise, in *Schneck*, the TRO prohibited all demonstrating within fifteen feet of the entrance to just four abortion clinics. *Schneck*, 519 U.S. at 365. To compensate for this minimal intrusion on free speech, the TRO still permitted two sidewalk counselors to enter the zone to have "a conversation of a non-threatening nature" with individuals outside the clinic. *Id*. at 367.

The CHBDA imposes more burdens than necessary to achieve the compelling government interest in protecting the health and safety of the American public. Similar to the concurrent statutes in *McCullen* that criminalized harassment and obstruction, there are less intrusive means of promoting safe congregation during times of high risk. The minimum safety requirements imposed by the CHBDA, such as the mask and six-foot social distancing mandates in § 42(b)(2) and the group size constraint in § 42(d)(1), are less burdensome controls that still permit the exercise of free speech rights. Other tactics, such as the broad restriction on large "demonstrations" but simultaneous permittance of individual contact within buffer zones, as seen in *Schneck*, are possible alternatives. While the discretionary enforcement clause may arguably be a "less restrictive" means of control, the arrest of the Luddites and permittance of the MOMs activity show it has instead been a tool to further suppress speech otherwise in accordance with CHBDA mandates. R. at 8-9.

The Hoof and Beak related restrictions also render all forms of expression available to the Luddites ineffectual. Out of respect for others, the Delmont Luddites believe the only acceptable way to express their beliefs is through calm personal speech. R. at 25. Because of the Luddite's way of life, they do not use technology to amplify their voices or create pamphlets and signage. *Id*. The CHBDA confronts the Luddites with a Hobson's choice: either to violate their core principles through compelled use of cell phones, or to shout and use mass produced literature to oppose such compelled use. This court has recognized the importance of one-on-one dialogue, especially in the context of political speech. *See McCullen*, 573 U.S. at 488. While there is no right to expression in any precise form, the fact that the CHBDA restrictions render normal speech useless – which is both the most effective means of communication and the chosen tactic of the Luddites – is not to be ignored.

The nationwide reach of the CHBDA also differentiates it from more finite regulations as in *Madsen* and *Schneck*. *Madsen* involved an injunction at a single location, wherein the Court conducted an in-depth analysis of the exact impact of the free speech restrictions and determined speech was not unduly burdened. *See Madsen*, 512 U.S. at 770. Similarly, the TRO in *Schneck* only applied to four locations and, because of the exceptions to the blanket ban on protests, a significant amount of interaction with patients was still allowed within the buffer zone. *See Schneck*, 519 U.S. at 367. By contrast, the CHBDA zone applies at thousands of SIM card distribution centers across the country and affects a large number of people exercising free speech.

Lastly, the square footage of the area affected by the sixty-foot buffer zone is, in practice, larger than any buffer zone that has been upheld. *See Hill*, U.S. 530 at 707 (imposing only eight-foot contact barriers within a greater 100-foot zone); *Madsen*, 512 U.S. at 758 (applying a thirty-six-foot buffer zone); *Schneck*, 519 U.S. at 365 (imposing only a fifteen-foot no-protest zone). The combination of nationwide coverage, a large effected area, and complete prohibition of the Luddites preferred – and most effective – means of communication, render the CHBDA unduly burdensome. Additionally, the buffer zone ignores existing less restrictive regulations and disregards other unintrusive tactics, like requiring gloves, distributing hand sanitizer, or permitting limited personal communication within the zone. Therefore, the CHBDA is not narrowly tailored and the holding of the Eighteenth Circuit should be affirmed.

II. THE CHBDA MANDATE FOR CONTACT TRACING THROUGH MOBILE PHONES AND GOVERNMENT DISTRIBUTED SIM CARDS IS NOT NEUTRAL NOR IS IT GENERALLY APPLICABLE.

Broadly, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. Const. amend. I. To warrant protection, religious

beliefs do not have to "be acceptable, logical, consistent, or comprehensible to others." *Thomas v. Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981). It is not the place of a fact finder to put religious doctrine on trial. *See United States v. Ballard*, 322 U.S. 78, 86 (1944). Although highly protected, the right of free exercise does not excuse an individual from abiding by a neutral law of general applicability. *See Emp. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990). There is a significant difference between government regulation of "only outward physical acts" and "interference that . . . affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012). "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

The ruling of the Eighteenth Circuit, that the CHBDA is neutral and generally applicable, should be reversed for two reasons. First, although facially neutral, the Act places uneven burdens on religious entities that render its neutrality superficial. The burdens imposed by the CHBDA more significantly affect the Luddites and other non-technological groups while only marginally serving government interests. The unequal encumbrances show the restrictions were intended to suppress religious conduct rather than further compelling goals. Moreover, the contact tracing mandates are not tied to any sought-after government benefit but still seek to compel actions contrary to sincerely held beliefs. Second, the CHBDA is not generally applicable. The scope of existing exemptions from contact tracing show that allowing a significant number of people to forgo the trace will not seriously impair government efforts to contain Hoof and Beak. The Act further fails the general applicability analysis because of its

under-inclusivity and because the age and health exemptions are not justifiable under the same government interests used to enforce the cell phone tracing mandate.

a) <u>While the CHBDA Is Facially Neutral, the Undue Burdens it Unevenly Places on Religious Entities Show the Act is Not Neutral in Application.</u>

When considering whether a law is neutral towards religious expression, "facial neutrality is not the sole determining factor. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534. "The Free Exercise Clause . . . extends beyond facial discrimination" and the effect of a law can be evidence of the intent behind it. *Id.* at 534-35. Factors such as the challenged decision's background, the timeline leading up to the regulation, and the legislative history and contemporaneous statements of administrators can indicate a law is not neutral in application. *See id*. at 540. A facially neutral regulation may still violate constitutional protections if that regulation places an undue burden on the free exercise of religion. *See Wisconsin v. Yoder,* 406 U.S. 205, 220 (1972). "[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment . . . beyond the power of the State to control, even under regulations of general applicability." *Id*.

Even with a facially neutral law, if its practical effect burdens religious groups more than other citizens, it is unduly burdensome. Such was the case in *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 538-39, where this Court concluded that certain ordinances unduly burdened religious practitioners. *See id.* There, the city of Hialeah drafted multiple ordinances forbidding the killing of animals for ritualistic purposes in direct response to the expansion of a local Santeria church known to practice animal sacrifice. *Id*. at 526. The slaughter of animals and disposal of carcasses in the Santeria church mirrored that of killings exempted for secular purposes. *See id*. at 526. The City claimed to be pursuing compelling interests in public health and animal rights, yet its justifications for other forms of animal harm – killing animals for food,

eradicating pests and euthanizing stray animals – did not justify why religion alone "bear[ed] the burden of the ordinances." *Id*. at 544. Statements by city council members and the timing of the ordinances also suggested a non-neutral impetus for the regulations. *Id*. at 538-39. Because the burden of the restraint was felt solely by Santeria church members, the Court found the law imposed "gratuitous restrictions" on religious conduct and was actually intended to suppress disfavored religious activity. *Id*. at 538.

This Court has recognized the difference between the government compelling behavior contradictory to religious beliefs, versus conditioning receipt of government benefits on pursuing or refraining from certain activities. *See Bowen v. Roy*, 476 U.S. 693, 695-96 (1986). For example, in *Bowen*, Native American parents held genuine beliefs that making their two-year-old daughter use her social security number would "rob her of her spirit," yet they still sought welfare support through the social security program. *Id*. Importantly, the number had already been assigned to the child, and the parents only opposed the use of the number on a social security form. *Id*. at 697. The Court concluded that the simple use of a pre-assigned number on a benefit form "may indeed confront some applicants for benefits with choices, but in no sense does it affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable." *Id*. at 703. The Court affirmed a distinction between "government compulsion and conditions relating to government benefits." *Id*. at 705; *See also West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 631-32 (1943) ("[T]hose who take advantage of [government provided] opportunities may not on ground of conscience refuse compliance with such conditions.").

When burdening a right so fundamental as the free exercise of religion, only the most compelling government interests, which would fail to be served absent regulation, can justify

restraints. *See Yoder*, 406 U.S. at 215. In *Yoder*, this Court permitted Amish citizens to pull children out of school after eighth grade, despite a law mandating education until minors reach the age of sixteen. *Id.* ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). The Amish petitioners sought to avoid the corrupting influence of secondary public education. *Id*. at 208-09. Although ensuring all children became intelligent voters and self-reliant participants in society were compelling government interests, the significant burden placed on Amish beliefs did little to further those interests because Amish communities were insulated from society and had established adequate functionality with those outside the Amish lifestyle. *Id*. at 222.

In the case at bar, the Eighteenth Circuit concluded "since the [Luddites] are not targeted by name and the purpose [of] the mandate was not anti-religious, the Act is neutral." R. at 39. However, the crucial factor is often not the facial neutrality of a law but its practical effects. Like *Lukumi*, because the CHBDA proscribes more conduct than necessary to achieve its purpose, the application of the mandate to the Luddite community suggests there is a lack of neutrality. The Delmont Luddites work to avoid society's teachings and beliefs and actively attempt to limit interaction with the general populace. R. at 25. Even so, they have made concessions and do possess a landline phone, with strict requirements for use. R. at 23. Because of their insular lifestyle, the Luddites and greater public would only marginally benefit from the contact trace, but the Luddites alone would suffer a severe burden upon their closely held beliefs. Most Americans own cell phones, and exemptions to the CHBDA are provided for senior citizens and medical cases. Therefore, the brunt of the burden for unwanted contact tracing is felt by the Luddites and other anti-technology religious groups, similar to how burdens were exclusively

placed on Santeria practitioners in *Lukumi*. This unequal burden does not support a claim that the CHBDA is neutral towards religion.

The balance of religious burdens and compelling interests here is closely analogous to *Yoder*, wherein free exercise rights outweighed the goals perpetuated by a government restriction. *Yoder* established that only state interests of the "highest order" which can only be served through burdens on religious observance are permitted to restrict free exercise. *Yoder*, 406 U.S. at 215. Like the Amish, the Luddites are highly insular and do not pursue significant business or social connections outside the religious community. R. at 25. The only reason Mr. Jones' group demonstrated was to oppose burdens forced on them by the CHBDA. The notion that compulsory high school attendance would instill Amish students with ideas that are destructive towards the ideals of the Amish community is identical to the concerns of the Luddites. The distinct agrarian and family characteristics of the Amish community further weakened the states' interests in compelling education and preventing child labor. *Yoder*, 406 U.S. at 228-29 (viewing state interests as "somewhat less substantial" in Amish children compared to children generally). Likewise, the reclusiveness of the Luddites weakens the government concerns about the spread of Hoof and Beak disease within the small enclave.

Lastly, the compulsory technology enforced on the Luddites is not in response to any attempt to retain government benefits. Unlike *Bowen*, CHBDA contact tracing does "affirmatively compel [petitioners], by threat of sanctions. . . to engage in conduct that they find objectionable for religious reasons." *Bowen*, 476 U.S. at 703. The Luddites are not seeking any form of support during the health crisis. This case does not involve an act as innocuous as writing a pre-assigned social security number on a government form to obtain welfare. The use of cell phones is directly contrary to fundamental beliefs held by the Delmont Luddites. R. at 25.

Failure to abide by the mandate does not just deny benefits to this religious sect but imposes up to one year of jail time and a $2,000 fine, further burdening the Luddites religious expression. R. at 6. Because the Luddites are not seeking government benefits, and this religious community bears the heaviest burden of contact tracing while only marginally serving the government interests in health and safety, the CHBDA is not neutral towards religion.

b) <u>The Wide Scope of the CHBDA Immunities and the Forms of Established Exemptions Render the Act Underinclusive and Not Generally Applicable.</u>

One cannot shield themselves from criminal liability with religious beliefs because doing so would "make professed doctrines of religious belief the superior law of the land." *See Reynolds v. United States*, 98 U.S. 145, 167 (1878). Reconciling religious conduct and government regulations of that conduct is difficult because enforcing a government regulation of religious doctrine necessarily requires an individual to "either abandon[] his religious principle or fac[e] ... prosecution." *See Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). It is essential to the protection of First Amendment free exercise rights that "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 543. Substantial under-inclusiveness, which "fails to prohibit nonreligious conduct that endangers [state interests] in a similar or greater degree than [religious conduct]" indicates that a law is not generally applicable. *Id.*

Issues in which government interests demand near universal application of laws often provide few interpretational challenges for the courts. *See Smith*, 494 U.S. at 890. In *Smith*, this Court determined that a state criminal statute forbidding the use of peyote and other drugs was generally applicable. *Id*. The Court categorized the state code as "an across-the-board criminal prohibition on a particular form of conduct." *Id.* at 884. The case *United States v. Lee*, 455 U.S.

252, 260 (1982), provides more than the *de minimis* analysis offered in *Smith*. In *Lee*, an Amish employer sought exemption from Social Security taxes because his faith prohibited participation in government support programs. *Id*. at 254. This court concluded that the "tax system could not function" if religious exemptions were granted based on belief. *Id*. at 260. The distinction between self-employed Amish and those who employed others was central to this decision. *Id*. at 260-61 ("Self-employed persons in a religious community having its own 'welfare' system are distinguishable from the generality of wage earners employed by others."). In both *Smith* and *Lee*, the regulations were nearly universally applied, and exemptions were strictly limited, giving the Court no qualms with labeling these laws generally applicable.

In cases involving a less clear-cut application of the law, the critical factor is often whether a law is underinclusive. *See Church of the Lukumi Babalu Aye, Inc*., 508 U.S. at 543. The number and types of exemptions provided for non-religious activities in *Lukumi*, which were identical to those practiced by Santeria, were so underinclusive that the ordinances "fell well below the minimum standard necessary to protect First Amendment rights." *Id*. at 545. The key to that underinclusive analysis was that the government interests justifying the religious restrictions were distinct from the interests justifying the secular exceptions. *Id*. at 544-45. The exemptions meant the law failed to "prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does." *Id*. at 543.

In the absence of clear guidelines for a determination of general applicability, lower courts have relied on similar underinclusive analyses. Under-inclusivity was critical to the finding that a university housing policy mandating on-campus residency for Freshman students was not generally applicable. *See Rader v. Johnston*, 924 F. Supp. 1540, 1553 (D. Neb. 1996). In *Rader*, a freshman student's request to live off campus with a Christian fellowship was denied.

Id. at 1544. Simultaneously, over 900 of 2,500 university freshman lived off campus because of exemptions provided for married and commuter students, students over the age of nineteen, and students "at the discretion of [University] administrators." *Id*. Heavily referencing *Lukumi*, the court concluded that where individualized exemptions are available, "the government may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id*. at 1552 (quoting *Church of Lukumi Babalu Aye Inc.*, 508 U.S. at 537). Similar reasoning was used in *Fraternal Ord. of Police v. Newark*, 170 F.3d 359, 367 (3d Cir. 1999), to determine that the Newark Police Department prohibition on beards violated the rights of two Sunni Muslim officers who desired beards for religious reasons. *Id*. The only exemptions to the beard restrictions were for situations required by undercover assignments or medical reasons. *Id*. at 360-61. Writing on behalf of the Third Circuit, Justice Alito found the law was not generally applicable and rejected the notion of employing medical but not religious immunities. *Id*. at 365. The concern for government bias favoring secular over religious conduct "is only further implicated when the government . . . creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection." *Id*.

Just as under-inclusivity was fatal to the policies in *Lukumi* and *Rader*, so too is it fatal to the CHBDA. *Lukumi* exempted nearly all secular animal killings, despite identical state interests being attached to secular and religious animal slaughter. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 537. Similarly, nearly one-third of university students in *Rader* were excused from compliance with the on-campus housing mandate, but in no way were the stated government interests in off-campus students weaker than those in on-campus students. *Rader*, 924 F. Supp. at 1548. The CHBDA exempts not only individuals on a case-by-case basis for medical conditions, but categorically exempts citizens over the age of sixty-five. R. at 6. As of 2018, there were

approximately 52 million Americans over the age of sixty-five. America Counts Staff, *2020 Census Will Help Policymakers Prepare for Incoming Wave of Aging Boomers*, UNITED STATES CENSUS BUREAU (Dec. 10, 2019), https://www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html. The number of Americans immune from this bill alone suggests it is underinclusive. In addition, the District Court noted the most common medical exemptions were for "individuals with late-stage cancer, Ischemic heart disease, and Alzheimer's disease," potentially excusing millions more from regulation. R. at 19-20. The nature of exemptions provided by the CHBDA, like in *Newark*, suggest the government's refusal to grant religious exemptions selectively burdens individuals based on their belief system.

Furthermore, in accordance with *Lukumi* and *Rader*, only compelling interests justifying the original regulations can condone providing exceptions to the rule. *See Church of the Lukumi Babalu Aye Inc.*, 508 U.S. at 544-45; *Rader*, 924 F. Supp. at 1558. No evidence has been provided for how these exemptions, particularly the age exemption, further the government interests in preventing the spread of Hoof and Beak disease. If the age exemption is related to senior citizen's struggles to understand and use technology, the Luddites religious convictions make them equally foreign to devices such as cell phones. R. at 25. If there is evidence to suggest that older Americans are less likely to spread the virus, the lack of significant social or business ties between Delmont Luddites and outside communities, *id*, also lends itself to a weaker chance of transmission. The crux of under-inclusivity is the relationship between compelling government interests and the regulation, any interests justifying the Act's exemptions of senior citizens and medically infirm are not identical to those requiring the contact trace.

Lastly, the present case is more analogous to the "covert suppression of religious beliefs" in *Lukumi*, rather than the cut and dry scenarios in *Smith* or *Lee*. In *Smith*, the state criminal code

provided almost a complete ban on peyote, drugs, and other substances, both on its face and in effect. *Smith*, 494 U.S. at 884. Here, the broad exemptions mean a significant portion of the population can already avoid CHBDA controls. Similarly, in *Lee*, the integrity of the entire tax system would be compromised if religious entities could avoid any taxes it felt were contrary to its beliefs. *Lee*, 455 U.S. at 260. Even so, there were limited immunities to social security taxes provided for self-employed Amish. *Id*. Here, the breadth of the existing exemptions indicates that the scheme to fight Hoof and Beak disease would not be seriously threatened if small sections of religious groups were exempt from the contact tracing. The religious opposition to the Act only addresses the mandatory use of technology, not the idea of contact tracing generally. R. at 24. The existing exemptions do not further government health and safety interests because the Act is underinclusive, and the overall effectiveness of the regulatory scheme would not be threatened by limited religious exemptions. Therefore, the CHBDA is not generally applicable. Accordingly, the decision of the Eighteenth Circuit, with regard to the free exercise issue, should be reversed.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Petitioner asks this Court to AFFIRM the decision of the Circuit Court on Issue One and REVERSE the decision of the Circuit Court on Issue Two.

Dated: January 31, 2021 Respectfully Submitted

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Team No. 5
Attorneys for Petitioner

APPENDIX: CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. I

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

Combat Hoof and Beak Disease Act § 42 (2020)

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

    1) [The purpose of this Act] is to protect Americans, their families, and their communities by letting people know that they may have been exposed to Hoof and Beak disease and should therefore monitor their health and for signs and symptoms of Hoof and Beak.

b) Federal facilities located in each state will be used to distribute SIM cards containing contact tracing software.

    1) SIM cards shall be installed in mobile phones.

        A) [If a resident does not have a device] Centers shall distribute a mobile phone containing the contact tracing SIM card.

            i. Every person's name, address, birth date, social security number, and phone number if not receiving a phone from the facility will be logged.

        B) [Senior citizens over sixty-five years of age are exempt from this law].

        C) [Health exemptions may be granted by federal facility officials on a case-by-case basis].

        D) [No other type of exemption is permitted].

        E) [Appeal authority is delegated to the Federal Communications Commission. All appeals must be filed within sixty days of receiving denial].

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

c) [Failure to comply] will result in punishment of up to one year in jail and/or a fine of up to $2,000.

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) [Non-protest zones] must be clearly marked and posted.

e) [Enforcement is] subject to the discretion of local facility officials in the acknowledgement of the varied location characteristics of each center.

f) []

8) Pursuant to 42 U.S.C. § 2000bb–3, the Religious Freedom and Restoration Act is inapplicable to this Act.

CERTIFICATE OF COMPLIANCE

Pursuant to the 2020-2021 Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition Rules, attorneys for Petitioner certify that:

i. The work product contained within all copies of Team 5's brief is in fact the work product of the team members;

ii. Team 5 has complied fully with our school's governing honor code; and

iii. Team 5 has complied with all Rules set forth by the Competition.

January 31, 2021

Signed
Team 5