No. 20-9422

IN THE SUPREME COURT OF THE UNITED STATES

LEVI JONES, Petitioner,

v.

CHRISTOPHER SMITHERS

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

BRIEF FOR RESPONDENT

TEAM #6
Counsel of Record

QUESTIONS PRESENTED

On appeal to the Supreme Court of the United States, Respondent raises the following two issues:

1. Did the Eighteenth Circuit err in concluding that a sixty-foot, no-protest buffer zone was not narrowly tailored to promote public safety and prevent the spread of Hoof and Beak?
2. Did the Eighteenth Circuit err in finding that government-mandated contact tracing via cellphones and SIM cards was neutral and generally applicable?

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[1] Respondent recognizes that this Court is reviewing the lower court's grant of summary judgment *de novo* and so is not limited to its findings on neutrality. However, because this Court requested briefings on the narrow issues identified, Respondent's argument will focus on those.

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

OPINIONS BELOW

The opinion of the United States District Court for the District of Delmont is reported as *Jones v. Smithers*, No. 20-CV-9422 (D.D. 2020).

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

STATEMENT OF BASIS FOR JURISDICTION

The judgment of the district court was entered by the United States District Court for the District of Delmont. The judgment of the court of appeals was entered by the United States Court of Appeals for the Eighteenth Circuit. The petition for writ of certiorari was filed in a timely manner under 28 U.S.C. § 2101(b). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. U.S. Const. amend. I provides:

"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."

II. Under U.S.C. § 42, the Combat Hoof and Beak Disease Act ("CHBDA") provides in pertinent part:

(a) "[e]ach person living in the United States shall participate in a mandatory contact tracing program."

(1) The purpose of the mandate 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."

(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) "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.

(D) No other type of exemption is granted.

(E) Appeal authority is delegated to the FCC and must be filed within sixty days of receiving a denial.

STATEMENT OF THE CASE

I. Statement of Facts

In December of 2019, public health officials first identified the novel Hoof and Beak Disease—a deadly, flu-like contagion that spreads quickly from one person to the next and primarily affects children and young to middle-aged adults. *See* R. at 1. The Hoof and Beak pandemic has wreaked havoc across the globe, with 70 million cases and 230 thousand deaths confirmed in the United States alone. *Id*.

Acting in concert with other world leaders to curb the disease's spread, U.S. President Felicia Underwood created a federal Hoof and Beak Task Force in February of 2020. *Id*.; Stipulation ¶ 4. Thereafter, Congress passed the Combat Hoof and Beak Disease Act ("CHBDA"

or "the Act"), which mandates contact tracing through government-provided cellphones and SIM cards "to protect Americans, their families, and their communities" via public health surveillance. R. at 1-2; CHBDA §§ 42(a)-(b). Additionally, the Act orders individuals gathered at federal distribution facilities to wear masks and maintain six feet from each other. CHBDA § 42(b)(2). The Federal Communications Commission ("FCC") is charged with enforcing the CHBDA, which sanctions "punishment of up to one year in jail and/or a fine of up to $2,000" for noncompliance, subject to certain health- and age-related exemptions.[2] CHBDA §§ 42(b)(1), (c).

Given increasing protest activity near federal SIM card distribution facilities, Congress amended the CHBDA to better safeguard against the inadvertent transmission of Hoof and Beak. *See* R. at 2; Stipulation ¶ 8. As amended, the CHBDA prohibits protests of more than six people and those that occur within sixty feet of facility entrances—including public sidewalks—during operating hours. CHBDA § 42(d). Though it requires that these restricted zones be clearly marked, the CHBDA amendment permits discretionary enforcement given the varied location characteristics of each distribution center. CHBDA § 42(d)-(e).

In May of 2020, the Delmont Federal Facility began distributing cellphones and SIM cards from 8:00 AM to 5:00 PM. Stipulation ¶ 6. Local officials clearly marked the restricted zone in compliance with the Act, posting signs and painting lines on sidewalks near the facility entrance. *Id*. At 9:00 AM on May 1, Petitioner Levi Jones and six other members of the Delmont Church of Luddite—whose religious beliefs involve technological skepticism and forbid cellphone use and/or ownership—gathered outside of the Delmont Facility to protest the

[2] The Act excuses those over sixty-five and allows the FCC to grant health-related exemptions on a case-by-case basis. CHBDA § 42(b)(1)(B), (C); R. at 22; Stipulation ¶ 9. Health-related exemptions have been granted for the following conditions: late-stage cancer, Ischemic heart disease, Alzheimer's disease, and severe physical disabilities that render individuals unable to operate mobile devices. R at 22; Stipulation ¶ 9.

CHBDA. Stipulation ¶ 11; Jones Aff. ¶¶ 5, 10. Notably, the Luddites neither used signage nor distributed literature in advocating for their cause. Jones Aff. ¶ 7. Although the group wore masks and stood six feet apart, the Luddites repeatedly entered the restricted zone to proselytize those awaiting contact-tracing equipment. Mathers Aff. ¶ 7. In addition to the Luddites, a group of five Mothers for Mandates ("MOMs") were also masked, socially distanced, and assembled to profess their beliefs; remaining near the restricted zone's perimeter, the MOMs held up signs and provided pamphlets, expressing their support for the government mandate and encouraging CHBDA compliance. Mathers Aff. ¶ 6; Jones Aff. ¶ 12. Because their group exceeded the permitted size, Federal Facilities Police asked Petitioner and the Luddites to leave. Jones Aff. ¶ 10. At Jones's refusal, the officers arrested him. Mathers Aff. ¶ 8.

Petitioner and five Delmont Luddites returned to the facility at 8:30 AM on May 6. Jones Aff. ¶ 11. Again, they wore masks, kept six feet apart, and spoke to people in the distributional queue. *Id*. Seven masked MOMs also reconvened, gathering on the sidewalk to advocate for contact-tracing adherence by distributing "stop the spread" literature. Jones Aff. ¶ 12. Recognizing Petitioner and recalling the May 1st disturbance, Federal Facilities Police again asked the Luddites to leave before arresting Jones upon his refusal. Jones Aff. ¶ 11. As a result of his statutory defiance, Petitioner spent nine days in jail and incurred $2,500 in fines altogether. Jones Aff. ¶¶ 10, 12.

Subsequently, Petitioner filed suit against FCC Commissioner Christopher Smithers in federal court, alleging that the FCC violated his First Amendment rights under the Free Speech and Free Exercise clauses when it enforced the CHBDA against the Delmont Luddites. R. at 3, 9. The parties then filed cross motions for summary judgment.

II. Procedural History

The U.S. District Court for the District of Delmont held in the FCC's favor on the free speech issue, granting its motion for summary judgment and denying that of Petitioner. Regarding the free exercise claim, the District Court ruled in favor of Petitioner, granting his motion for summary judgment and denying that of the FCC.

On appeal, the Court of Appeals for the Eighteenth Circuit reversed the District Court's judgment in its entirety, denying the FCC's motion for summary judgment on the free speech issue but granting its motion on the free exercise claim. Petitioner thereafter filed a writ of certiorari to the Eighteenth Circuit, which the United States Supreme Court granted.

SUMMARY OF THE ARGUMENT

This Court should grant summary judgment in the FCC's favor regarding Petitioner's Free Speech and Free Exercise claims to preserve the government's lawful authority to effectively combat public health crises.

Free speech and free exercise rights are subject to limitations via reasonable government action. *See Clark v. Community for Non-Violence*, 468 U.S. 288 (1984); *see also Employment Division v. Smith*, 494 U.S. 872 (1990). The FCC enacted the CHBDA to curb the spread of the fatal Hoof and Beak disease and subsequently amended the Act to ensure that the SIM card distribution process would be conducted in a safe manner that does not worsen Hoof and Beak transmission. R. at 1-2. Although the federal provisions incidentally interfere with the religious practice and protest activity of the Luddite community, such interference does not rise to the level of a constitutional violation.

The CHBDA amendment creates a sixty-foot, no-protest buffer zone as a valid restriction on speech in a public forum that (1) is content-neutral; (2) is narrowly tailored to serve a significant government interest; and (3) allows ample alternative channels for communication.

First, the amendment merely limits the number of and distance between congregants to promote public safety and does not distinguish based on subject matter or viewpoint. Furthermore, the amendment was enforced against the Luddites not given their disagreement with the CHBDA, but because their behavior severely endangered community safety. Second, the amendment is narrowly tailored to serve the government's significant public health interest because its provisions are based on reasonable social-distancing requirements and do not foreclose any avenues for expression. Third, although the amendment's restrictions impede the Luddites from engaging in intimate conversations with passersby, they are still able to effectively communicate their views by distributing literature, chanting in unison, or showcasing opinionated signage.

Additionally, the CHBDA's contact-tracing mandate is a neutral and generally applicable law that does not selectively burden religiously motivated conduct. The mandate is neutral because the purpose of the law is clearly a secular one: to reduce the spread of the Hoof and Beak disease by keeping the community informed about transmission. The mandate's stated public health purpose is not merely a pretense; rather, it is embodied in the mandate's operation, which requires compliance from an overwhelming majority of U.S. residents—including those with secular and religious objections. Additionally, the mandate is a generally applicable law that prohibits all exemptions that undermine the government's public health interest, regardless of whether a proposed exemption is rooted in secular or religious concerns. The narrow exemptions for individuals over sixty-five and those with serious health conditions are directed at communities that are less susceptible to the disease or physically unable to comply with the mandate. The government does not have an interest in requiring action from such individuals in order to fulfill its public health interest. Aside from these exceptions, the government offers no

additional exemptions in an effort to ensure that the mandate produces accurate and helpful disease transmission data.

Accordingly, the FCC requests that this Court grant the FCC's motion for summary judgment and thereby reverse the Eighteenth Circuit on the free speech claim but uphold the Eighteenth Circuit's grant of summary judgment in favor of the FCC on the free exercise issue.

ARGUMENT

I. The CHBDA constitutes a valid time, place, and manner restriction on speech in a public forum, and this Court should accordingly grant summary judgment in the FCC's favor as to Petitioner's free speech claim.

The United States Court of Appeals for the Eighteenth Circuit erred in concluding that the CHBDA violated the Free Speech Clause of the First Amendment and thereby denying the FCC's motion for summary judgment because the CHBDA is a valid time, place, and manner restriction.

Pursuant to the Free Speech Clause of the First Amendment, Congress "shall make no law . . . abridging the freedom of speech . . . ." U.S. Const., amend. I. However, the constitutional right to free speech is not absolute; the First Amendment does not guarantee one's freedom to communicate his or her views whenever, wherever, and/or however desired. *See, e.g., Wood v. Moss*, 572 U.S. 744, 757 (2014). Accordingly, the government may in some instances impose reasonable restrictions upon the time, place, and manner of speech. *See Clark v. Community for Non-Violence*, 468 U.S. 288, 293 (1984). Restrictions on the permitted time, place, and manner of speech are closely scrutinized in traditional public fora, which have "immemorially been held in trust for the use of the public and . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939). The government may enforce such regulations as long as they are content neutral, are narrowly tailored to serve a significant

government interest, and leave open ample alternative channels for communication. *See United States v. Grace*, 461 U.S. 171, 177 (1983).

In this case, neither party disputes that both the Act and its subsequent amendment have an impact on speech within a traditional public forum. Stipulation ¶ 5. Therefore, the Court must first determine whether the regulation at issue is content-neutral.

A. The CHBDA and its amendment constitute a content-neutral restriction on speech because they are facially neutral and can be justified without regard to the content of speech regulated.

As both lower courts properly concluded, the CHBDA constitutes a content-neutral restriction on speech.

A regulation may be content-based—as opposed to content-neutral—in one of two ways: (1) if it applies to particular speech because of the topic discussed or message conveyed; or (2) if, despite being facially neutral, it cannot be justified without reference to the content of speech or was adopted given government opposition to a particular message expressed. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). For example, in *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), the Supreme Court struck down a content-based Chicago ordinance that restricted only certain types of picketing. 408 U.S. 92 (1972). In *Mosley*, the City limited when and where non-labor-related picketing could occur and thereby unconstitutionally discriminated based on "the message on a picket sign." *Id.*at 95. By contrast, the Court in *Frisby v. Schultz* upheld a city ordinance that banned residential picketing to promote public safety, privacy, and tranquility, deeming it neutral because it applied equally to all picketers and could be justified without reference to the content of speech. *Frisby v. Schultz,* 487 U.S. 474, 481-482 (1988).

Because the CHBDA is facially neutral and can be justified without reference to the content of the speech it regulates, it is therefore content-neutral. First, unlike the law at issue in

Mosley, the CHBDA amendment does not distinguish based on subject matter or viewpoint; rather, it limits the number of people congregated and how close they may be to a federal SIM card distribution facility when protesting during operating hours. R. at 2. Second, similar to the *Frisby* ordinance, the CHBDA amendment can be justified irrespective of speech: the restrictions serve to promote safety throughout the Act's administration by ensuring safe access to distribution facilities. R. at 13-14. Indeed, what protestors say is completely irrelevant to whether the Act will be enforced against them; officials need only assess the number of people within an area—and their distance from one another and the facility entrance—to apply the law.[3]

Further—and contrary to Petitioner's assertions—the CHBDA amendment has not enabled selective, content-based enforcement. The rationale behind the Federal Facilities Police's conduct is readily apparent and the two incidents Petitioner cites in support of his selective enforcement allegation, easily explained. First, Petitioner was initially arrested because he directly contravened the CHBDA amendment's group number and spacing requirements; unlike the MOMs, who stood calmly near the buffer zone perimeter, did not approach passersby, and followed group number guidelines, the Luddites exceeded maximum capacity and periodically entered the buffer zone to speak directly with those waiting in line at the Delmont Facility. Mathers Aff. ¶¶ 6, 7; Jones Aff. ¶¶ 7, 12. It was only after Federal Facilities Police asked Petitioner to leave given his group's defiance—and he refused to do so—that he was taken into custody. Mathers Aff. ¶ 8. Second, although the Luddites followed the group number guidelines when they returned to Delmont Facility premises, their disregard for the health and

[3] *See, e.g., McCullen v. Coakley*, 573 U.S. 464, 481 (2014) ("All of the problems identified . . . arise irrespective of any listener's reactions. Whether or not a single person reacts to [the] protestors' chants or petitioners' counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks.").

safety of those awaiting SIM cards combined with their prior refusal to comply with the law led police officers to again arrest Petitioner. Jones Aff. ¶¶ 11-12.[4]

Ultimately, the rationale behind the contrasting federal response is twofold: (1) the way in which Hoof and Beak spreads makes close, person-to-person contact extremely dangerous; and (2) enforcement of the CHBDA amendment is "subject to discretion of local facility officials [due to] the varied location characteristics for each center," the exigency of the pandemic, and the need for effective, reasonable implementation. R. at 1-2; CHBDA § 42(e). The MOMs followed the spirit of a law enacted to contain a highly contagious disease, even where they neglected minor provisions of its letter. By contrast, the Luddites' movements and interactions endangered those attempting to obtain SIM cards—Petitioner and his group defied the CHBDA's ends even where they complied with its means. Therefore, the varied police response does not evince the discriminatory enforcement of a content-based restriction, but the emergency, discretionary application of a content-neutral one.

B. The CHBDA and its amendment are narrowly tailored to the significant government interest of ensuring public health and safety.

Next, given the reasonable limits it imposes on the time, place, and manner of protesting near the Delmont Facility Center, the CHBDA amendment is narrowly tailored to serve the significant government interest of safeguarding public health and safety. A regulation that is narrowly tailored does not burden "substantially more speech than necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. at 799. Notably, however, the government need not use the least restrictive or intrusive means of achieving its

[4] *See, e.g., Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997) ("In some situations, a record of abusive conduct makes a prohibition on classic speech in limited parts of a public sidewalk permissible."); *see also Boos v. Barry,* 485 U.S. 312, 321 (1988) (identifying "congestion" and "interference with ingress or egress" as content-neutral concerns).

statutory goal. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (citing *Ward*, 491 U.S. at 798); *see also Hill v. Colorado*, 530 U.S. 703, 704 (2000) (holding that whether or not a certain regulation provides the best accommodation for speech, the Court must accord Congress deference).[5]

In *Schenck v. Pro-Choice Network of Western New York*, the Court differentiated between "floating" and "fixed" zones of restricted speech, finding the former problematic given its challenging application while deeming the latter necessary to ensure safe facility access. 519 U.S. at 378. Expanding on the narrow tailoring requirement, the Court in *McCullen v. Coakley* adjudged the fixed zone at issue too restrictive as applied to the petitioners' preferred communicative method; because the state law in *McCullen* effectively prevented the petitioners from sidewalk counseling and distributing literature, it was not narrowly tailored to serve the government's admittedly significant interest in promoting "public safety . . . and the unobstructed use of public sidewalks and roadways." 573 U.S. at 487-88.

Here, the CHBDA meets the requisite constitutional threshold for both sub-elements. First, the government certainly has a significant interest in protecting "Americans, their families, and their communities" by slowing the spread of Hoof and Beak. CHBDA § 42(a)(1); *see, e.g., Schenck*, 519 U.S. at 367 (recognizing public safety and order as legitimate government interests). Indeed, the government's authority to impose regulations to ensure public health and safety "has never been regarded as inconsistent with civil liberties but rather as [a] means of safeguarding the good order upon which" society depends. *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). Neither party disputes that the government's interest in so doing is significant.

[5] This differs from content-based restrictions, which are subject to strict scrutiny and therefore must be necessary to serve a compelling state interest and be narrowly drawn to achieve such interest. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983).

See R. at 14, 37. Second, the CHBDA amendment does not "entirely foreclose any means of communication" and therefore fulfills the narrow tailoring requirement. *Hill v. Colorado*, 530 U.S. at 704. The CHBDA amendment is distinguishable from the regulations found unconstitutional in *Schenck* and *McCullen*. For one, the CHBDA amendment establishes a fixed, rather than floating buffer zone by prohibiting protests that occur within sixty feet of the facility entrance during operating hours. CHBDA § 42(d). Not only does this fixed restriction enable easier, more certain application than the floating ordinance at issue in *Schenck*, but the sixty-foot No Man's Land is also imperative given the necessity of social distancing. With queues of people awaiting SIM cards outside of the Delmont Facility, there simply is not space for protesting near the building during operating hours if the nation hopes to quell the spread of Hoof and Beak.

Further, the challenges posed by the CHBDA differ substantially from those present in *McCullen v. Coakley*. Not only does the reason underlying Petitioner's inability to speak closely with people diverge from that in *McCullen*, but the law's practical impact is also less significant. In *McCullen*, the state ordinance precluded such conduct to ensure privacy for those seeking abortive consultation. Here, a global pandemic renders intimate conversation dangerous given the person-to-person manner in which Hoof and Beak spreads. Additionally, whereas the *McCullen* law blocked individuals from performing activities central to their cause (like initiating close conversations and distributing anti-abortion literature), the CHBDA does not so restrain Petitioner. Protesting contrasts with sidewalk counseling in this way, as conveying a message from afar comprises an inadequate expressive avenue for anti-abortion counselors wishing to persuade. Unlike the counselors in *McCullen*, Petitioner may accomplish his communicative goals by other means—via signage or demonstration, for example. The CHBDA

also permits Petitioner to distribute literature, offering him another technology-free alternative unavailable to the sidewalk counselors in *McCullen*. Thus, the CHBDA is narrowly tailored to serve the demonstrably significant public safety interest, exhibiting "a close fit between ends and means" and thereby passing constitutional muster. *McCullen*, 573 U.S. at 486.

C. The CHBDA and its amendment enable ample alternative channels for communication that enable Petitioner to reach his intended audience.

Finally, the CHBDA and its amendment leave open ample alternatives for speech. Alternative channels for communication are adequate if they enable a speaker to reach his intended audience. *See Berger v. City of Seattle*, 569 F.3d 1029, 1049 (9th Cir. 2009); *Ward*, 491 U.S. at 802. In *Hill v. Colorado*, the Court determined that an 8-foot restriction on unwanted physical approach applicable within hundred feet of a health care facility allowed ample room to communicate. 530 U.S. at 729-30. There, the regulation at issue left open ample means of expression: the zone did not prevent speakers from communicating at normal conversational distances, distributing literature, or demonstrating loudly and/or via conspicuous signage. *Id.; see also Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding a ban on residential picketing); *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding a restriction on fairground leafletting).

The same is true in this case. Because the CHBDA and its amendment only limit the number of people congregated and how close they may stand—to each other and the Delmont Facility—when protesting during operating hours, various communicative avenues remain open to Petitioner and his fellow Luddites. Although they must adhere to social distancing requirements and therefore cannot initiate intimate conversations with passersby, the Luddites may proclaim their grievances by holding opinionated signage, chanting in unison, or distributing literature. Indeed, they may even protest within the restricted zone—as long as they

do so before or after Delmont Facility operating hours. Therefore, permitting ample alternatives for communication, the CHBDA constitutes a valid time, place, and manner restriction.

II. The CHBDA is a neutral and generally applicable law with which the Luddites must comply despite their religious objections.

The United States Court of Appeals for the Eighteenth Circuit correctly concluded that the CHBDA's contact tracing mandate is a neutral and generally applicable law, thereby granting the FCC's motion for summary judgment on the free exercise issue. Free exercise rights are codified in the First Amendment of the U.S. Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. While religiously motivated conduct is certainly granted heightened protection by the Free Exercise Clause, this protection is not without limits—particularly in the context of legitimate government legislation enacted for the general welfare of the nation. *See Employment Division v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Minersville School Dist. Bd. of Ed. V. Gobitis*, 310 U.S. 586, 594-95 (1940) ("The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."). The limits of religious freedom rights were defined in *Employment Division v. Smith,* where this Court held that the government does not compromise free exercise rights when it requires religious entities to comply with neutral laws of general applicability. *Id*. at 890. A neutral and generally applicable law that incidentally burdens religiously motivated conduct is held to the rational basis standard of review, under which the government must merely show that its actions are rooted in a legitimate interest to survive a free exercise challenge. *See id.* Further, this Court has traditionally given broad deference to legislative decisions in areas of scientific and medical uncertainty. *See, e.g., Gonzalez v. Carhart*, 550 U.S. 124, 163 (2007).

The CHBDA is a neutral and generally applicable law that was enacted for a legitimate public health purpose: to stop the spread of a deadly disease. R. at 1-2. Amid a novel and unprecedented public health crisis, it is imperative for this Court to reject Petitioner's request to impermissibly expand the established constitutional bounds of the Free Exercise Clause—an expansion that would dangerously constrain the FCC's ability to implement a comprehensive contact-tracing scheme to mitigate the effects of the pandemic. Given the broad deference shown to legislative bodies during national crises—particularly those involving public health—and the CHBDA's reasonable and widely applicable solution to address the crisis at hand, this Court should respect its neutral and generally applicable mandate.

A. The CHBDA is a neutral law because it was designed to combat the Hoof and Beak disease and not to restrict the Luddite Church's religious practices.

A law fails to be neutral "if the object of the law is to infringe upon or restrict practices because of their religious motivation" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Neutrality requires a showing of facial as well as operational neutrality. *Id*. at 534. A law is facially neutral if its text promulgates a discernable secular purpose and does not rely on language that indicates animosity or discrimination toward religiously motivated conduct. *Id.* at 533. Facial neutrality is not determinative, and courts must additionally look to the law's operation and effect to account for "subtle departures from neutrality" that are not obviously discernable from the text. *Id.* at 534. In *Church of the Lukumi*, this Court held that a series of city ordinances singling out ancient Santeria animal sacrifice practices were not neutral because such provisions explicitly targeted religious practices in text and operation. *Id.* at 533-40. The ordinances prohibited the unnecessary killing of animals for purposes of "ritual" or "sacrifice"—both terms with religious connotations. *Id.* at 533-34. While the Court found such language facially suggestive of an impermissible discriminatory purpose, it

was further convinced by the ordinance's discriminatory operation. *Id.* at 534. Notably, the law contained carefully crafted wording and exemptions that excluded Santeria rituals while exempting secular conduct, like hunting, that undermined the City's purported interest in protecting public health and preventing animal cruelty. *Id.* at 534-40.

Unlike the ordinances in *Church of the Lukumi,* which were designed for an impermissible discriminatory purpose embodied in the language and operation of the law, the CHBDA's permissible purpose of stopping the spread of Hoof and Beak disease is genuinely aligned with the language and the operation of the Act. *See* CHBDA § 42(a)(1). The CHBDA's contact-tracing mandate is designed to increase public awareness of Hoof and Beak transmission. The law allows residents to take necessary precautions to contain the disease and prevent further death. *See id.* The CHBDA is facially neutral because it clearly states its secular purpose, and the text includes no language suggesting an intention to target religious practices. *Id.* §§ (a)-(b). Furthermore, the mandate is neutral in its operation because it applies to the overwhelming majority of U.S. residents, including two narrow exceptions to accommodate circumstances that outweigh the public health benefits of carrying or obtaining a SIM card. *Id.* §§ (b)(1)(B)-(C). Aside from these narrow exemptions, all residents must comply with the mandate, and the FCC refuses to grant exemptions for any ideological objections—regardless of whether the objections are rooted in religion, politics, information security, or ethics. *Id.* § (b)(1)(D). Though the CHBDA's contact-tracing mandate does encroach on the Luddite Church's religious practice of renouncing cellphones, such encroachment is merely incidental to the mandate's permissible public health purpose. As both lower courts correctly held, the CHBDA includes neither an overt nor covert agenda to target Luddite practices, and the mandate is therefore neutral.

B. The CHBDA is a generally applicable law because it prohibits exemptions for all secular and religious objections that endanger the mandate's public health purpose.

Whether a law is generally applicable hinges on the extent to which the government pursues its interest against conduct motivated by religious belief while exempting analogous conduct motivated by secular belief. *Church of the Lukumi*, 508 U.S. at 542-43. In other words, the government is free to exempt conduct that does not endanger its interest without violating free exercise rights. *Id.* However, if the government implements an exemption system that takes the form of "individualized government assessment," it cannot deny such exemptions to religious parties without a compelling interest. *See, e.g.*, *Employment Division*, 494 U.S. at 884. In *Employment Division,* this Court outlined the contours of individualized exemptions by looking to the exemption mechanism at issue in *Sherbert v. Verner. Id.* In *Sherbert,* a state's case-by-case exemption system—which allowed officials to analyze each applicant's particular circumstances before making an unemployment compensation determination—constituted an unconstitutional infringement on free exercise rights. *See Sherbert v. Verner* 374 U.S. 398 (1963). *Sherbert* highlights the defining characteristic of unconstitutional individualized exemptions: subjective, case-by-case systems that give the government broad discretion to evaluate the merits of both secular and religious claims and make problematic value determinations.

Given ambiguity surrounding the parameters of individualized exemptions as set out in *Employment Division,* federal courts have subsequently adopted different approaches in defining what constitutes an individualized exemption. The Tenth Circuit, for example, has stayed true to the text of *Employment Division,* ruling that only the same sort of case-by-case discretionary mechanism at issue in *Sherbert* can qualify as an individualized exemption. *See Swanson v. Guthrie Independent School Dist. No. 1-L*, 135 F.3d 694 (10th Cir. 1998); *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004) ("[*Employment Division's*] 'individualized

exemption' exception is limited, then, to systems that are designed to make case-by-case determinations. The exception does not apply to statutes that . . . contain express exceptions for objectively defined categories of persons."). In *Swanson*, a public school district precluded a religious student from enrolling as a part-time student because school policy required full-time attendance. *Swanson*, 135 F.3d 694 at 696. However, the school exempted fifth-year seniors and special education students from such policy. *Id.* at 696-97. Because these categorical policy exceptions were based on reasonable fiscal considerations rather than religious animosity, the Tenth Circuit did not consider them individualized exemptions and, therefore, the school district's refusal to grant a religious exemption did not violate the plaintiff's free exercise rights. *Id.* at 701.

By contrast, the Third Circuit has deemed certain categorical exemptions to be individualized exemptions based on their incongruity with free exercise principles. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). In *Fraternal Order*, two Muslim police officers were prohibited from growing beards—as required by their faith—by a "no-beard" department policy. *Id.* at 361. The order was issued to promote uniformity, camaraderie, and easy identification within the police force. *Id.* at 366 ("The Department hints that officers and citizens might have difficulty identifying a bearded officer as a genuine [police] officer and that this might undermine safety[,] the force's morale and esprit de corps."). However, the Department did permit exceptions for undercover officers and to those with medical conditions. *Id.* at 360. Notably, the court did not take issue with the Department's undercover exemption because the Free Exercise Clause "does not require the government to apply its laws to activities that it does not have an interest in preventing." *Id.* at 366. Unlike typical police officers, undercover agents aim not to be easily identifiable. *Id.* The court did,

however, find the medical exception at odds with the policy's alleged purpose because medically necessary facial hair conflicts with safety, morale, and esprit de corps in the same way that religiously required beards do. *Id.* Ultimately, the Third Circuit held that the Department's decision to grant medical exemptions while denying religious exemptions violated the plaintiffs' free exercise rights because this policy embodied a value judgment that "secular (i.e., medical) motivations for wearing a beard [were] important enough to overcome [the Department's] general interest in uniformity but that the religious motivations [were] not." *Id.* at 366.

Here, the CHBDA's contact-tracing mandate is a generally applicable law that does not selectively target religiously motivated conduct in pursuit of the law's stated interest. Additionally, the narrowly defined age and health exemptions do not constitute an individualized exemption under both the Tenth Circuit's text-based approach or the Third Circuit's principle-based approach. The CHBDA is applicable to all U.S. residents with the exception of residents sixty-five and older and those with debilitating health conditions. CHBDA §§ 42(b)(1)(B)-(C). These exemptions do not undermine the FCC's purpose in enacting the mandate. Further, the FCC has excluded all other exemptions—including those grounded in secular and religious ideological objections—that undermine the purpose of the mandate. *See id.* § (b)(1)(D).

Neither the age- nor health-related exemptions constitute individualized exemptions. Just like the exemptions in *Swanson*, both CHBDA exceptions are categorial exemptions that do not resemble the broad, case-by-case exemption mechanism at issue in *Sherbert*. The government's decision to exempt residents over sixty-five is a clear categorical exemption motivated by a reasoned legislative decision not to impose a physical burden on an elderly population that is not commonly affected by Hoof and Beak disease. S*ee* R. at 1 ("Hoof and Beak primarily affects children and young to middle aged adults."). Although the health-related exemption allows the

FCC to exercise some level of judgment, such discretion is confined to an individual's health circumstances. In evaluating the validity and necessity of health exemption requests, the government does not evaluate the merits of secular requests against those of religious requests and engage in a subjective, *Sherbert*-esque values-based analysis; rather, the exemptions that have been granted are all clearly confined to health concerns. *See* Stipulation ¶ 9. Thus far, exemptions have been granted to individuals with late-stage cancer, Alzheimer's disease, Ischemic heart disease, and severe physical disabilities that leave them unable to operate a mobile device. *Id*.

Additionally, under the Third Circuit's approach, neither exemption constitutes an individualized exemption. Unlike the medical exemption in *Fraternal Order*, which frustrated the purpose of the department-wide policy, the age and health exemptions do not undermine the primary objective of the CHBDA. In fact, just like the undercover exemption in *Fraternal Order,* the government has no interest in applying the mandate to individuals over sixty-five or to those with significant health conditions because Hoof and Beak primarily affects children and young-to-middle-aged adults. R. at 1. Individuals over the age of sixty-five are therefore far less likely to be affected by Hoof and Beak than other segments of the population. *See id.* Further, the health exemption is designed to accommodate individuals who cannot easily obtain or carry a cellphone with the government-issued SIM card. R. at 19. The government does not have an interest in enforcing the mandate against segments of the population who are less susceptible to Hoof and Beak disease or cannot physically comply with the mandate. By contrast, ideological exemptions (including those for religious objections) directly subvert the public health purpose behind the CHBDA. Individuals with ideological objections who do not fall into either of the statutorily exempt categories are among those most likely to contract and transmit the disease

and most physically able to comply with the demands of the mandate. The CHBDA is only effective in achieving its goal if this segment of the population complies with the measure, and the FCC is well within its constitutional authority to include certain age- and health-related exemptions. In so doing, the FCC is not implementing an impermissible value judgment against religiously motivated conduct; rather, the agency is making a reasoned policy decision based on scientific and medical considerations that (a) is equally applicable to both secular and religious conduct and (b) is aligned with the public health purpose of the mandate. While this decision imposes an incidental burden on the Luddite Church's religious practice, it does not signify the mandate's failure to meet the standard of general applicability. Because its contact-tracing requirements do not burden religiously motivated conduct that undermine the purpose of the mandate any more than similarly violative secular conduct, the CHBDA is a neutral and generally applicable law.

CONCLUSION

For the aforementioned reasons, Respondent Christopher Smithers respectfully requests that this Court grant his motions for summary judgment.

Respectfully submitted,

Team #6

Counsel for Respondent,

FCC Commissioner

Christopher Smithers

Dated: January 31, 2021

Team 6 Brief Certificate

We, the members of Team 6, certify the following:

1. The work product contained in all copies of our team's brief is the work product of only our team members;

2. Our team has fully complied with our law school's governing honor code; and

3. Our team has complied with all of the Rules for the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.

Dated: January 31, 2021.