No. 20-9422

THE SUPREME COURT OF THE UNITED STATES

LEVI JONES,
Petitioner,

v.

CHRISTOPHER SMITHERS,
Respondent.

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

BRIEF FOR THE PETITIONER

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II. Whether the United States Court of Appeals for the Eighteenth Circuit erred in finding that mandated contact tracing through the use of mobile phones and government-issued SIM cards is neutral and generally applicable, despite religious objections to technology.

STATEMENT OF JURISDICTION

The District Court for the District of Delmont entered final judgment on this matter on October 6, 2020. (R. at 23.) Finding no "jurisdictional issues in this action." *Id.* Appellant properly filed an appeal with the United States Court of Appeals for the Eighteenth Circuit which delivered an opinion on this matter. (R. at 29.) The Petitioner timely filed a petition for a Writ of Certiorari, which this court granted pursuant to 28 U.S.C. § 1254 (2018). (R. at 42.)

STATEMENT OF THE CASE

This case comes under review from Levi Jones' Petition for a Writ of Certiorari from the United States Court of Appeals for the Eighteenth Circuit. (R. at 42.) On October 5, 2020, Mr. Jones, the Petitioner, and Mr. Smithers, in his official capacity as Commissioner of the Federal Communications Commission (FCC), filed cross motions for summary judgment. (R. at 3.) The material facts of this case are not in dispute. *Id*.

The Combat Hoof and Beak Disease Act

In December 2019 the unprecedented Hoof and Beak Disease (Hoof and Beak) broke out across the globe, causing a world-wide pandemic. (R. at 1.) The virus mainly affects children and young- to middle-aged adults. *Id*. It is highly contagious, causing 70 million confirmed cases and 230 thousand deaths. *Id*. Many measures have been taken in order to curb the spread of the virus, including lockdowns and the creation of a Hoof and Beak Task Force. *Id*. However, on April 15, 2020, in an unprecedented move, Congress passed the Combat Hoof and Beak Disease Act ("CHBDA" or "the Act"), mandating contact tracing through government issued SIM cards for use in mobile phones. *Id*. The CHBDA named the FCC as the lead agency to execute and enforce its parameters. (R. at 2.) Respondent, Christopher Smithers, is the Commissioner of the FCC, and is primarily responsible for implementing and enforcing contact tracing efforts throughout the country. (R. at 21.) Under the Act, the government provides SIM cards to every citizen and mobile phones to those who do not have them. (R. at 2.) The Act additionally recognizes an exemption for senior citizens over the age of sixty-five and people with certain qualifying health conditions, including late-stage cancer, Ischemic heart disease, and Alzheimer's disease. (R. at 19). No other exemptions are accepted, including religious objections to the use of mobile phones. (R. at 6.) The Act requires every living person in the United States to comply with the mandate by October 1, 2020 or incur a penalty. (R. at 2.)

In recognition of growing protests around the FCC facilities distributing the SIM cards and mobile phones, Congress issued an emergency amendment to the CHBDA, stating that "protestors are prohibited within sixty feet of the facility entrance, including public sidewalks, during operating hours," effectively creating a buffer zone. CHBDA §42(d) (R. at 7.) Demonstrations are also limited to no more than six people and enforcement of the amendment is

subject to the discretion of local officials. *Id.* The Delmont Federal Facility began distributing SIM cards and mobile phones on May 1, 2020, from 8am to 5pm. The facility officials clearly marked a "buffer zone" in compliance with the CHBDA § 42(d)(2). (R. at 22.)

Religious Objections to the Method of Contact Tracing

The Petitioner, Levi Jones, is the spiritual leader of the Delmont Church of Luddite. (R. at 21.) This particular congregation of Luddites does not believe in the use of technology, including mobile phones, in order to preserve family unity, faith, community, and cultural identity.[1] (R. at 4.) On May 1, 2020, around 9am, Mr. Jones and six other Luddites arrived at the Delmont Federal Facility to protest the mandated use of mobile phones and government issued SIM cards. (R. at 7.) They wore masks, maintained a six-foot social distance, and voiced their concerns to various people about the mandated use of mobile phones. (R. at 7.) At approximately the same time, a group of women from the Mothers for Mandates (MOMs) organization, held up signs and provided pamphlets to other people in the line expressing their support for the government mandate. (R. at 8.) Unlike the Luddites, the MOMs organization members stayed stationary and did not move about the line to engage with people. (R. at 8.) They did, however, stand fifty-five feet from the entrance, in violation of the mandated sixty-foot perimeter required by the CHBDA. (R. at 26.)

At 4pm, that same day, officers surrounded Mr. Jones and the Luddites, ordering them to leave because they were in violation of the CHDBA by having too many people protesting. (R. at 8). Police Officers arrested Mr. Jones after he refused to leave. (R. at 8.) Mr. Jones spent four days in jail and received a fine of $1,000. *Id.* None of the people from the MOMs organization

[1] The Church of Luddite has no central church authority. (R. at 22–23.) Each congregation sets its own rules, called "Community Orders" which are maintained and administered by the congregation. *Id*. The Community Orders vary from church to church, but the Luddites believe in total obedience to whatever Community Orders are provided. *Id*.

were arrested. *Id*. On May 6, 2020, at 8:30am, Mr. Jones and five Luddites returned to protest the mandate. *Id*. This time, a larger group of seven people from the MOMs organization arrived to support the mandate. (R. at 9). Several hours later, at 3:45pm, an officer recognized Mr. Jones and demanded that he leave. *Id*. The police again arrested Mr. Jones after he refused to vacate the premises. *Id*. Mr. Jones and the Luddites were in full compliance with the mandate at the time, while the MOMs organization had two members over the mandated limit. *Id*. Mr. Jones spent five days in jail and received a fine of $1,500. *Id*. None of the people from the MOMs organization were arrested or fined. *Id*.

Procedural History

On June 1, 2020, Mr. Jones filed this action in the District Court of Delmont against the FCC Commissioner, Mr. Smithers, alleging that the enforcement of the CHBDA violates the First Amendment under both the Free Speech Clause and the Free Exercise Clause. *Id*. Both parties subsequently filed a Motion for Summary Judgment. The District Court found that the CHBDA is not in violation of the Free Speech clause of the First Amendment, granting the FCC's motion for summary judgment and denying Mr. Jones' motion. (R. at 20.) Conversely, the District Court found that the burden of carrying a SIM card and mobile phone does in fact affect conduct only motivated by religious belief because the FCC allows non-religiously motivated exemptions. *Id*. Thus, denying the FCC's motion for summary judgment with respect to the Free Exercise issue and granting Mr. Jones' motion. *Id*. The Court of Appeals for the Eighteenth Circuit reversed the District Court's decision in its entirety, holding that the Act is not narrowly tailored under the Free Speech clause, but it is sufficiently neutral under the Free Exercise clause. (R. at 40–41.)

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Eighteenth Circuit correctly found that the amendment to the CHBDA was not narrowly tailored as its time, place, and manner requirements are too restrictive to be permissible under the First Amendment. Both parties agree that there is a legitimate governmental interest in enforcing social distancing in response to the Hoof and Beak pandemic. However, that interest does not outweigh the officer's improper use of viewpoint discrimination and the amendment's overly restrictive rules regarding speech in a traditionally public forum. The Amendment allows for a broad range of police officer discretion as there is a clear distinction between the enforcement of the Amendment upon Mr. Jones and the Luddites as compared to the MOMs organization. Further, the fixed buffer zone does not surpass the strict scrutiny standard as it places a substantial burden on speech and suppresses a protestor's rights to speak without sufficiently advancing the government's stated goals.

Conversely, the Court of Appeals for the Eighteenth Circuit erred in applying the *Smith* standard by finding that mandated contact tracing through the use of mobile phones and government-issued SIM cards is neutral and generally applicable. The First Amendment does not permit the governmental regulation of religious beliefs. However, if a law is validly enacted, neutral, and generally applicable then the right to free exercise does not simply relieve an individual of that obligation to comply with the law. Congress validly enacted the CHBDA, but it is not generally applicable as some citizens may be exempt for health reasons but not for religious reasons. The burden of carrying a mobile phone and government-issued SIM card does in fact affect conduct only motivated by religious belief because the FCC allows non-religiously motivated exemptions. Therefore, the CHBDA is not generally applicable and is unconstitutional under the *Smith* standard.

ARGUMENT

STANDARD OF REVIEW

When reviewing cross motions for summary judgment and the Court of Appeals decision below, this Court must review the finding of fact for clear error and its legal conclusions *de novo*. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

I. The Eighteenth Circuit correctly concluded that a sixty-foot no protest buffer zone was not narrowly tailored to the governmental interest in public safety and preventing the spread of Hoof and Beak

In this case, the first issue requires the Court to consider whether the Amendment to the CHBDA, prohibiting protests within sixty feet of the federal facility's entrance and limiting groups of protestors to six persons or less during operating hours, violates the Free Speech Clause of the First Amendment. Congress amended the CHBDA permitting these restrictions in an attempt to prevent the spread of Hoof and Beak disease. However, the Amendment is not narrowly tailored to the governmental interest in public safety as it provides too much officer discretion and is overly restrictive.

The Free Speech Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech. . . ." U.S. CONST., AMEND. I. In recognition of the Free Speech Clause the Supreme Court has established varying protections regarding the right to speak and assemble based on the forum. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *see also Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975). There are currently three types of forums, those that are public, designated, or nonpublic. *Id*. Public forums encompass those areas that are traditionally open to political speech, including public parks and sidewalks. *See Hague v. Committee for Indus. Organization,* 307 U.S. 496 (1939). Designated public forums, on

the other hand, are areas that are sometimes set aside by the government for the use of public expression, and nonpublic forums include areas like government mailing systems. *Perry*, at 37. This case clearly presents a traditional public forum as laid out in *Perry* because the Luddites were protesting outside of a federal building on a public sidewalk. People who wish to assemble and speak in traditionally public forums enjoy the strongest First Amendment protections, including protection from viewpoint discrimination. Viewpoint discrimination prevents the government from discriminating against speakers in a public forum simply based on the content of their speech. In analyzing government restrictions of speech in public forums the Supreme Court must apply strict scrutiny.

In *McCullen v. Coakley*, this Court held that statutes violate free speech guarantees if they are not narrowly tailored to serve a significant governmental interest. 573 U.S. 464 (2014). This requires that any law enacted in the United States be content-neutral, meaning that its time, place, or manner restrictions do not burden more speech than necessary for it to be permissible under the First Amendment. *Id.* at 486. Further, in *Clark v. Cmty. for Creative Non-Violence*, the Supreme Court made it clear that such restrictions must leave open ample alternative channels for communication of information. 468 U.S. 288, 293 (1984). Both parties to this action agree that there is a legitimate governmental interest in enforcing social distancing in response to the pandemic. However, that interest does not outweigh local law enforcement's improper use of viewpoint discrimination in enforcing the amendment to the CHBDA nor the amendment's overly restrictive nature.

The emergency amendment to the CHBDA violates the Free Speech Clause of the First Amendment because a sixty-foot no protest buffer zone is too restrictive and is not narrowly tailored to the government's stated interest. *See* CHBDA §42(d)(1). In *Hill v. Colorado*, the

Supreme Court established that a floating buffer zone did not violate the First Amendment because it was sufficiently tailored. 530 U.S. 703, 729 (2000). The Court in *Hill* applied a "knowingly approaches" requirement for the changing buffer zone to protect the speaker and maintain a conversation at a safe distance. *Id*. at 727. However, the amendment to the CHBDA did not implement this type of permissible floating buffer zone. The CHBDA creates a "fixed zone," which is strictly marked and enforced by local officials. *See* CHBDA §42(d)(2). Unlike a floating buffer zone, which allows for more freedom for speakers to "knowingly approach" others, the amendment to the CHBDA requires an arbitrary sixty-foot perimeter that is not substantially related to the government's stated goals. For these reasons the mandated fixed buffer zone is too restrictive as it places a substantial burden on the freedom of speech and suppresses a protestor's right to speak while not advancing the governmental interest.

The emergency amendment to the CHBDA additionally provides local officials with too much discretion resulting in inequitable enforcement and viewpoint discrimination. *See Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011) (holding that the city's policy for enforcing an ordinance was constitutionally invalid because of its selective enforcement or content-discriminatory enforcement). On both occasions the Luddites were arrested for protesting while members of the MOMs organization were not. Mr. Jones has conceded that the Luddites had seven members protesting on May 1, 2020, in violation of the CHBDA. However, on that same day, members of the MOMs organization were standing five feet inside the sixty-foot no protest buffer zone, in clear violation of the mandate as well. Jones Aff. ¶ 12. Yet, local officials never arrested members of the MOMs organization or asked them to leave. *Id.* During the second protest on May 6, 2020, Mr. Jones and the Luddites clearly followed all of the mandated guidelines but were subsequently arrested when a local official recognized Mr. Jones.

Meanwhile, on that same day, the MOMs organization was again in apparent violation of the CHBDA but never faced an arrest. Jones Aff. ¶ 12. The only distinction between the Luddites and the MOMs organization is that the Luddites were protesting in opposition to the government's mandated contact tracing while the MOMs organization was protesting in favor of it. Mathers Aff. ¶ 5. From these facts it is clear that local officials were engaging in viewpoint discrimination because their enforcement of the CHBDA was inequitably applied to the Luddites as opposed to the MOMs organization.

The stated governmental purpose of the CHBDA and its following Amendment is to prevent the spread of Hoof and Beak disease while protecting people's health through transparent communication. CHBDA § 42(a)(1). Under *McCullen*, this Court established that the government must have legitimate reasons to enforce its rules and place "as few restrictions as possible" on those being regulated. 573 U.S. 464, 486 (2014) (emphasizing that 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."). Unfortunately, the current amendment to the CHBDA allows for discretionary enforcement and is not narrowly tailored enough to meet the *McCullen* standard to be permissible under the First Amendment. For these reasons this Court should find that the Amendment does not meet a strict scrutiny standard because the sixty-foot no protest buffer zone is not narrowly tailored to the stated governmental interest in public safety and does not substantially aid in preventing the spread of Hoof and Beak disease.

II. The Eighteenth Circuit erred in finding that mandated contact tracing through the use of mobile phones and government-issued SIM cards is neutral and generally applicable, despite religious objections to technology

The second issue in this case requires the Court to decide whether the Free Exercise Clause of the First Amendment permits the federal government to require persons to carry

mobile phones with government-issued SIM cards in order to protect public health even if the use of technology conflicts with an individual's religious beliefs. The CHBDA permits these actions by the federal government despite clear religious objections to the use of technology by the Petitioner and his religious group. Therefore, the mandate is not generally applicable and should be struck down by this Court as a violation of the Free Exercise Clause of the First Amendment.

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . . " U.S. CONT., AMEND. I. First and foremost, the free exercise of religion means that the right to believe and profess whatever religious doctrine one desires is protected. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). Thus, the First Amendment excludes all "governmental regulation of religious beliefs." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). Because of this the government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma. See *Torcaso v. Watkins*, 367 U.S. 488 (1961); *United States v. Ballard*, 322 U.S. 78, 86 (1944); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445 (1969).

In an analysis of the CHBDA it is imperative to understand the limits of the First Amendment in order to decipher what the government is and is not allowed to establish under the law. The Supreme Court held in *Smith* that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on

the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). From *Smith* it is clear that no law should be upheld that is not valid, neutral, or generally applicable as the First Amendment does not permit "governmental regulation of religious beliefs." *Sherbert*, at 402. Therefore, the right to perform or abstain from physical acts is constitutionally protected. *Id.*

The CHBDA, as issued by the federal government on April 15, 2020, was validly enacted law and one that applies to every lawful person in the United States, thus, satisfying the first prong of the *Smith* test. The Act is also facially neutral as its language does not inherently discriminate against certain religious groups, stating that the purpose of the CHBDA is to "protect Americans, their families, and their communities by letting people know that they may have been exposed to Hoof and Beak Disease and should therefore monitor their health for signs and symptoms of Hoof and Beak." CHBDA §42(a)(1). This language does not differentiate or discriminate against classes of persons, making it neutral and permissible under the second prong of the *Smith* test. *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534 (1993) (stating that a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable form the language or context). However, facial neutrality is not ultimately determinative.

The Free Exercise Clause of the First Amendment "forbids subtle departures from neutrality" including "covert suppression of particular religious beliefs." *Id.* at 534; *see also Gillette v. United States*, 401 U.S. 437, 452 (1971); *Bowen v. Roy*, 476 U.S. 693, 703 (1986). The CHBDA does in fact engage in "covert suppression" of religious beliefs as it not generally applicable, thus failing the third prong of the *Smith* test. The Act states that it applies to all

persons living within the United States but explicitly provides for exemptions for people over the age of sixty-five or others with health concerns. CHBDA §§ 42(b)(1)(A)–(C). Persons that fall within these two categories may apply for an exemption. Exemptions have been granted to those with late-stage cancer, Ischemic heart disease, and Alzheimer's disease. Despite the government's willingness to grant health exemptions, the authors of the CHBDA overlooked the possible religious implications of the mandate as the Act explicitly forbids any other types of exemptions. For these reasons the CHBDA is not generally applicable and is unconstitutional under the *Smith* standard as it provides some classes of persons with exemptions while discriminating against other classes of persons with valid objections.

The Supreme Court has held that free exercise "involves not only belief and profession but the performance of (or abstention from) physical acts. . . ." *Smith*, at 877 (1990). The Petitioner, Mr. Jones, and the Luddites have long been against the use of technology in their everyday lives and the government should not be able to dictate the actions of Mr. Jones and the Luddites simply because the mandate was not sufficiently tailored to encompass religious objections. Neither this Court nor a jury can pass judgment on the beliefs of litigants and are in no position to question the wisdom or sincerity of this order. *See United States v. Ballard*, 322 U.S. 78, 86 (1944) ("[W]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury.") The Luddites have adapted themselves as much as possible to peacefully exist in a society where technology is all around them. They have access to a telephone, which can be used when necessary, but have abstained from the use of cellphones in hopes to maintain a strong community and family unity. It is not this Court's responsibility to pass judgment on the worthiness of their beliefs but to ensure that the laws of this Country do not disproportionately burden their right to free exercise of their religion.

Requiring the Luddites to carry cellphones with a government issued SIM card while allowing others with health-related objections to abstain clearly demonstrates how the CHBDA is not generally applicable under the *Smith* standard.

For the forgoing reasons the Eighteenth Circuit erred in finding that mandated contact tracing through the use of mobile phones and government-issued SIM cards is neutral and generally applicable. Under the *Smith* standard, as implemented by the District Court and the Court of Appeals in this case, the CHBDA must pass a three-prong test. The Act must be validly enacted, neutral, and generally applicable. The CHBDA was validly enacted and is facially neutral but fails to be generally applicable as age and health exemptions are permitted but religious exemptions are not. For these reasons the CHBDA fails under the *Smith* standard and should be held unconstitutional by this Court.

CONCLUSION

This Court should affirm the Eighteenth Circuit Court of Appeals grant of Mr. Jones' motion for summary judgment with respect to the free speech issue because it correctly concluded that a sixty-foot no protest buffer zone was not narrowly tailored to the governmental interest in public safety and preventing the spread of Hoof and Beak. Conversely, this Court should find that the Eighteenth Circuit erred in concluding that mandated contact tracing through the use of mobile phones and government-issued SIM cards is neutral and generally applicable, despite religious objections to technology. Thus, granting Mr. Jones' motion for summary judgment with respect to the free exercise issue.

Brief Certificate

We, as a team, certify that the work product contained in all copies of the appellate brief is in fact the work product solely of the team members. Additionally, as a team, we have complied with our school's governing honor code and acknowledge that we have complied with all of the Rules of the Competition set forth by the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.

Team #7