No. 20-9422

In the Supreme Court of the United States

LEVI JONES,

Petitioner,

v.

CHRISTOPHER SMITHERS,

Respondent.

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

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BRIEF FOR PETITIONER

TEAM 9
Counsel for Levi Jones

QUESTIONS PRESENTED

1. Whether the sixty-foot no-protest buffer zone created by Congress in its amendment to the Combat Hoof and Beak Disease Act violates the Free Speech Clause of the First Amendment.
2. Whether religious exemptions alongside other hardship exemptions from the government's SIM card contact tracing mandate are warranted under the Free Exercise Clause of the First Amendment.

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STATEMENT OF THE CASE

Petitioner Levi Jones wanted to exercise the full range of his First Amendment rights in opposition to the government's Combat Hoof and Beak Disease Act. The government's response—jailing and fining Mr. Jones—has led to these proceedings.

On April 15, 2020, Congress passed the Combat Hoof and Beak Disease Act ("CHBDA" or "the Act"), which mandates contact tracing through SIM cards in cell phones, provided and distributed by the federal government. Stipulation ¶ 8. The Act's express purpose is to protect Americans by tracking all people that may have been exposed to Hoof and Beak. CHBDA § 42(a)(1). Although the Act mandates that "[e]ach person living in the United States shall participate in a mandatory contact tracing program," the Act creates an extensive exemptions regime. CHBDA § 42(a). Everyone over the age of sixty-five (65) is wholly exempt from the program. CHBDA § 42(b)(1)(B). In addition, officials at local federal facilities grant exemptions on a "case-by-case" basis, resulting in individual health exemptions for those with late-stage cancer, Ischemic heart disease, and Alzheimer's disease as well as individual hardship exemptions for those with physical disabilities that prevent them from operating a mobile device. CHBDA § 42(b)(1)(C); Stipulation ¶ 9. The Federal Communications Commission ("FCC") was named as the lead agency to execute the SIM card mandate. Stipulation ¶ 8. Non-compliance "will result in punishment of up to one year in jail and/or a fine of up to $2,000." CHBDA § 42(c).

After anti-mandate protests proliferated at federal facilities, Congress passed an emergency amendment in response. Stipulation ¶ 8. The CHBDA amendment targets protestors explicitly, requiring that "[p]rotestors are prohibited within sixty (60) feet of the facility entrance, including public sidewalks, during operating hours" and limiting groups of protestors to "no more than six persons." CHBDA § 42(d). Local federal officials have discretion in enforcing the amendment.

CHBDA § 42(e). The federal government claims that its interest in the amendment is safety in implementing the contact tracing mandate and ensuring socially-distanced access to the federal facilities. R. at 14.

Mr. Jones is the spiritual leader of the Delmont Luddite Church, a congregation devoted to following its own particularized set of Community Orders. Stipulation ¶ 10. Although some congregations like the Eastmont Luddites allow mobile phones as a necessary tool, the Delmont Luddites are firmly anti-phone, believing them to be detrimental to the spiritual health of the Luddite community. Jones Aff. ¶ 5–6. Because no religious exemption from the government's contact tracing mandate is permitted and because the mandate poses a "direct conflict" with his religious beliefs, Mr. Jones began protesting the mandate outside the Delmont federal facility, a public forum. CHBDA § 42(b)(1)(D); Jones Aff. ¶ 4; Stipulation ¶ 5. The Luddites wanted to communicate their opposition to the Act personally to those in line at the federal facility. Jones Aff. ¶ 7; Mathers Aff. ¶ 7. Simultaneously, a group of well-known pro-mandate demonstrators, the Mothers for Mandates ("MOMs"), were inside the buffer zone expressing their support for the government's policy. Mathers Aff. ¶ 5; Jones Aff. ¶ 12. Federal officials determined that Mr. Jones was a protestor violating the amendment and that the MOMs were not. Jones Aff. ¶ 10; Mathers Aff. ¶ 9. Mr. Jones was arrested, jailed, and fined on two different occasions. Jones Aff. ¶ 10–12.

Asking the district court to vindicate his First Amendment rights, Mr. Jones sued FCC Commissioner Smithers on June 1, 2020. After Mr. Jones and Mr. Smithers filed cross motions for summary judgment, the district court denied Mr. Jones's motion for summary judgment respecting the free speech issue and granted the same for the free exercise issue on October 30, 2020. The Eighteenth Circuit reversed the district court on both issues, and the Supreme Court has now granted certiorari to hear this case.

SUMMARY OF THE ARGUMENT

The CHBDA amendment violates the free speech rights of Mr. Jones. The amendment is content-based, targeting protestors like Mr. Jones because of their anti-mandate viewpoint. Purposed to restrict protests, the amendment draws distinctions between anti-mandate protesting and other demonstrations on its face, thereby singling out a political subject matter for differential treatment. The law can only be justified in reference to the anti-mandate protests. Moreover, the amendment discriminates among viewpoints by only facilitating speech on the pro-mandate side of the contact tracing mandate debate. In order to accurately enforce the mandate's penalties, enforcement officials at the federal facilities are required to determine whether demonstrators are anti-mandate protestors. For any of these reasons, the amendment is content-based and must face strict scrutiny, which it fails, because its interest in preventing the spread of Hoof and Beak is fatally undermined by the Act's failure to include all demonstrators in its gamut, instead targeting only anti-mandate protestors. Even if the amendment were content-neutral, the sixty-foot buffer zone wholly prevents Mr. Jones and other anti-mandate protestors from communicating their views to those in line at a normal conversational distance. The buffer zone cannot be considered a reasonable place and manner restriction of speech that is narrowly tailored to a significant government interest. By closing off all anti-mandate speech in the buffer zone, the amendment does not leave open ample alternatives for the protestors to speak. Therefore, the amendment fails either level of scrutiny for speech regulation in a public forum.

The Act's SIM card contact tracing mandate violates the free exercise rights of Mr. Jones. The mandate burdens Mr. Jones's sincerely held religious beliefs and fails strict scrutiny. First, the mandate is not generally applicable, because the Act's gargantuan amount of exemptions fatally undermines the CHBDA's purpose to contact trace each person living in the United States. Any

religious exemptions to the Act would not nearly undermine that purpose to the extent that the secular exemptions already do. Second, the Act's discretionary case-by-case system creates a regime of individual exemptions, because officials are required to make subjective, individualized assessments about the reasons behind an individual's seeking a hardship exemption from the mandate. The Eighteenth Circuit's "logical" exemption approach to general applicability must be rejected by this Court as contradictory to the logic of *Lukumi* and other circuit courts. Because the Act fails to include so many millions of Americans in the contact tracing program, the government cannot claim to have a compelling interest in denying religious exemptions. Therefore, Mr. Jones must be given an exemption to the Act's SIM card contact tracing mandate.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit has entered a judgment in this matter. *Jones v. Smithers*, C.A. No. 20-CV-9422, at *40–41 (18th Cir. 2020). After Mr. Jones filed a timely petition for writ of certiorari, this Court granted that petition. The Supreme Court of the United States has jurisdiction under 28 U.S.C. § 1254(1) (2021).

ARGUMENT

I. CONGRESS'S EMERGENCY ANTI-PROTEST AMENDMENT TO THE ACT VIOLATES THE FREE SPEECH RIGHTS OF MR. JONES.

This Court safeguards the First Amendment's demand that Congress make no law "abridging the freedom of speech." U.S. CONST. amend. I. That Amendment means "above all else" that government generally "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Content-based laws are therefore "presumptively unconstitutional" and must face the crucible of strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). All agree that the Delmont Federal Facility is a public forum. Stipulation ¶ 5. Public fora occupy a "special position in terms

of First Amendment protection" because of their traditional role as sites for debate. *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). In public fora, the government cannot impose content-neutral, time, place, or manner restrictions on speech unless such restrictions are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication. *Clark v. Cmty. for Creative Non–Violence,* 468 U.S. 288, 293 (1984).

a. The Act's buffer zone amendment on its face and by its design targets protestors like Mr. Jones because of the anti-mandate content of their speech.

Content-based laws face strict scrutiny. *Reed*, 576 U.S. at 163. A law that "on its face" draws distinctions based on the message a speaker conveys is content-based because it singles out a specific subject matter for differential treatment. *Id.* Even when a law seems facially content-neutral, it will be treated as a "content-based regulation" if it cannot be justified without reference to the content of the regulated speech or if it was adopted by the government because of disagreement with the message the speech conveys. *Id.* at 164; *Ward v. Rock Against Racism,* 491 U.S. 781, 791–92 (1989). The "government's purpose is the controlling consideration" in determining whether a regulation was adopted because of disagreement with the message conveyed. *Id.* at 791. Viewpoint discrimination, an "egregious form of content discrimination" that treats one view favorably while treating competing views unfavorably, likewise triggers strict scrutiny. *Rosenberger v. Rector and Visitors of Univ. of Va*., 515 U.S. 819, 829 (1995); *McCullen,* 573 U.S. at 478. Laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference. *Reed,* 576 U.S. at 170. Finally, a law is treated as content-based when it requires enforcement authorities to examine the content of the message conveyed to determine whether a violation has occurred. *McCullen,* 573 U.S. at 479.

A law draws "content-based distinctions on its face" by expressly targeting political subject matter for negative treatment. The town's sign code in *Reed* subjected "Political Signs" to greater

restrictions than "Ideological Signs," thereby singling out a specific subject matter—politics—for differential treatment even though it did not target specific viewpoints within that subject matter. 576 U.S. at 164. An ordinance expressly prohibiting signs that protested the "political, social, or economic acts" of foreign governments was content-based. *Boos v. Barry*, 485 U.S. 312, 315 (1988) (plurality opinion).

A law is justified without reference to speech content only if the justification proffered does not make content-based distinctions. In *McCullen*, the Court identified "interference with ingress or egress" as a content-neutral concern because all "individuals can obstruct clinic access and clog sidewalks just as much when they loiter as when they protest abortion or counsel patients." 573 U.S. at 480–81. Likewise, the government's noise-control justification in *Ward* applied to all musicians and had nothing to do with musical content. 491 U.S. at 792.

A law discriminates among viewpoints if some speakers are not equally allowed to speak on the same topic as other speakers. Laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994). Such a content preference was reflected by the statute in *Carey v. Brown* prohibiting all residential picketing except "peaceful labor picketing," which favored the speech content of labor picketers but not others. 447 U.S. 455, 462–63 (1980). Consistent with that approach, the Court considered two abortion protest laws to be content-neutral because their restrictions applied to all demonstrators, regardless of viewpoint. *McCullen*, 573 U.S. at 484–85; *Hill v. Colorado*, 530 U.S. 703, 725 (2000). Because "the relevant First Amendment point is that the statute would prevent both speakers" from entering the buffer zone, both pro-abortion and anti-abortion demonstrators were treated equally under the law. *Id.* In *McCullen*, the Chief Justice explained that the exemption for clinic employees did not make the law content-

based, because the exemption did not authorize employees to speak about abortion in the buffer zones. 573 U.S. at 484. Allowing such speaker preference "would then facilitate speech on only one side of the abortion debate—a clear form of viewpoint discrimination that would support an as-applied challenge to the buffer zone at that clinic." *Id*. at 485.

If enforcement officials are required to inquire into the content of demonstrators' speech in order to determine whether they are violating a speech regulation, that law is considered content-based. *McCullen*, 573 U.S. at 479. In *Hill*, enforcement officers did not need to know exactly what words were spoken to determine whether counselors were engaged in oral protest, education, or counseling rather than social or random conversation. 530 U.S. at 721.

Congress's buffer zone amendment to CHBDA was adopted because of Congress's disagreement with the protestors' message. The amendment, passed "in response" to the growing anti-mandate protests at federal facilities, targets protestors: "[p]rotestors are prohibited within sixty (60) feet of the facility entrance, including public sidewalks, during operating hours;" groups of protestors are "limited to no more than six persons." Stipulation ¶ 8; CHBDA § 42(d).

On its face, the amendment targets political subject matter for negative treatment. Just as those who had "Political Signs" in *Reed* were expressly targeted for stricter restrictions, those who protest the government's CHBDA mandate policy at federal facilities are expressly targeted as "protestors" and restricted. The anti-mandate protestors are protesting the federal government's "political . . . acts," so express restriction of their protesting is as content-based as the ordinance that restricted protests of the political acts of foreign governments in *Boos.* The district court failed to read the plain text of the amendment restricting "protestors" of the mandate, instead claiming errantly that the amendment "does not explicitly regulate speech." R. at 12.

The record stipulates that Congress adopted the buffer zone amendment "in response" to anti-mandate protests. Stipulation ¶ 8. Therefore, the amendment's restrictions on protestors, are, according to the accepted facts, explicitly justified with respect to the anti-mandate speech of the protestors. The amendment cannot be justified by the FCC's proffered "safety" and "access" interests without respect to the protests—like the regulation in *McCullen* was—because here the regulation restricts protestors exclusively instead of all persons who might cause "ingress" and "egress" problems into the facility. If the amendment were to restrict all individuals like the *Ward* noise-control regulation restricted all musicians, then the amendment could by justified without reference to the content of the protests. Instead, the amendment singles out "protestors" and thereby can only sensibly be justified by reference to the anti-mandate protests.

The amendment discriminates among viewpoints by singling out anti-mandate protestors for negative treatment while not treating pro-mandate demonstrators the same way, despite the fact that both sides are speaking on the same topic: the Act. In so doing, Congress evinces a content preference for pro-mandate speech. The amendment favors speakers like the MOMs based on the content of their pro-mandate speech just as the statute in *Carey* favored speakers based on the content of their labor-concerned speech. The district court insufficiently claimed that "Mr. Jones, the MOMs, or any other individual could violate the regulation[.]" R. at 12. On the contrary, Mr. Jones and the Luddites could violate the amendment by protesting the Act within the buffer zone while the MOMs could not violate the amendment by supporting the very same Act within the very same buffer zone. By applying restrictions to some demonstrators on one side of the debate but not to demonstrators on the other side, the CHBDA amendment takes precisely the impermissible step avoided by the laws in *McCullen* and *Hill*. Whereas the zone restrictions in those two cases did not pick winners and losers based on whether speech was pro- or anti-abortion,

this buffer zone amendment explicitly favors the speech of pro-mandate demonstrators. The amendment facilitates speech on only one side of the contact tracing mandate debate—the "clear form of viewpoint discrimination" about which this Court warned in *McCullen*.

The federal officials have no choice under the CHBDA amendment but to inquire into the content of speech to determine whether speakers are pro-mandate demonstrators like MOMs or anti-mandate protestors like Mr. Jones. That is the only method by which enforcement officials can determine whether demonstrators in the buffer zone are "protestors" violating the Act. *See* CHBDA § 42(d); § 42(e). The district court claimed that "[w]hat the protestors say is irrelevant," and that officials need only look at the number of people within the area. R. at 12. The Eighteenth Circuit claimed that a violation of the Act is based "only on *where* something is said, not *what* is said." R. at 37. Yet, enforcement officials for the CHBDA amendment must inquire into the content, the "what" that is said, in order to determine whether the congregated people supposedly violating the Act are indeed protestors. For an example, we need look no further than the facts of this very case. When MOMs gathered within the boundaries of the buffer zone, enforcement officials had to inquire into whether the MOMs were supporting the Act or protesting the Act in order to determine whether the MOMs were violating the buffer zone amendment. *See* Mathers Aff. ¶ 5. The MOMs are a "recognizable" and "well-known group" in support of the Act, which means that the content of their demonstration—visible support for the Act—was the reason why enforcement officials determined the MOMs were not in violation of the Act by entering the buffer zone. *See id.*; Jones Aff. ¶ 12. At the same time, the federal officials had to determine that Mr. Jones was protesting the Act in order to arrest him for violating the amendment. Therefore, the officials had to inquire into the content—whether pro- or anti-mandate—of the two groups of demonstrators in order to enforce the Act. This requisite inquiry into the content of the speech is

the opposite of the content-neutral inquiry in *Hill*, because here the FCC enforcement officials must figure out exactly what speech is being uttered to determine whether a violation is occurring.

Congress adopted the CHBDA buffer zone amendment to regulate protestors exclusively because it disagreed with the anti-mandate message the protests conveyed. One can hardly conjure up a hypothetical law more content-based and abhorrent to the First Amendment than one that places restrictions on protestors of a government policy but not on its supporters. If it truly cared about preventing the spread of Hoof and Beak and implementing the mandate safely, Congress would have restricted all demonstrators at federal facilities, not just protestors.

b. The federal government has no interest of the highest order to keep protestors out of the buffer zone while allowing other demonstrators in.

A content-based law must satisfy strict scrutiny; that is, the law must be the least restrictive means of achieving a compelling state interest. *McCullen*, 573 U.S. at 478. The least restrictive means requirement for narrow tailoring in the content-based framework is stricter than the requirements for narrow tailoring in the content-neutral framework. *Compare Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (requiring the government to prove that a restriction "furthers a compelling interest and is narrowly tailored to achieve that interest") *with Clark*, 468 U.S. at 295 (requiring a "lesser" standard of narrow tailoring).

A law that ignores appreciable damage to its putatively vital interest fails strict scrutiny. *Reed*, 576 U.S. at 172. The town's sign code in *Reed* was adopted as "necessary to eliminate threats" for traffic safety, but the Court held that that interest was severely undercut by the code's leaving other equal threats unregulated. *Id*. at 171–72. So too was the California video game regulation at issue in *Brown v. Entm't Merchants Ass'n* "wildly underinclusive" because it failed to restrict other media that had the same or greater potential to harm California's interest in reducing minors' viewing of violence in media. 564 U.S. 786, 801–02 (2011). In *Williams-Yulee*

v. Fla. Bar, the regulation's different treatment for different groups did not make the law underinclusive, because it was addressing different problems. 575 U.S. 433, 450 (2015).

The CHBDA amendment's failure to include pro-mandate demonstrators in its restrictions is fatal to the government's interest. The government's purported interest in the buffer zone is safety in implementing the contact tracing mandate at the federal facilities and maintaining social distancing while ensuring access to the facilities. R. at 14. But the government cannot show that supporters of the Act are less likely to spread Hook and Beak than protestors of the Act. The amendment leaves unregulated certain conduct—pro-mandate demonstrations inside the buffer zone—that is equally as harmful to the government's interest as anti-mandate demonstrations. The amendment is as fatally underinclusive as the sign code in *Reed* or the video game regulation in *Brown* that failed to address the harmful conduct done by all speakers, instead only focusing on speakers of a certain viewpoint. Nor is any differential treatment among groups of speakers warranted as it was in *Williams-Yulee*, because the same problem (namely, congregation within the buffer zone) applies to both pro- and anti-mandate demonstrators. The amendment's non-inclusion of the pro-mandate demonstrators raises "serious doubts" about whether the government is pursuing its invoked interest of pandemic safety or whether it is "instead disfavoring a particular speaker or viewpoint." *See Brown*, 564 U.S. at 801–02. "[I]t is the rare case" indeed that the government can demonstrate that a speech restriction is narrowly tailored to serve a compelling interest. *Williams-Yulee*, 575 U.S. at 444. This case is not it.

c. The sixty-foot buffer zone wholly prevents Mr. Jones and other anti-mandate protestors from communicating their beliefs one-on-one to those in line at the federal facility.

Even if its restrictions are content-neutral, the government may only impose restrictions on the time, place, or manner of protected speech provided that the restrictions are narrowly tailored

to serve a significant governmental interest and that the restrictions leave open ample alternative channels for communication of the information. *Clark*, 468 U.S. at 293; *Ward*, 491 U.S. at 791. Preventing a speaker from communicating "one-on-one" in the context of a public forum "imposes an especially significant First Amendment burden." *McCullen*, 573 U.S. at 488–89.

A buffer zone that stops protestors from communicating their message at a normal conversation distance is not a narrowly tailored reasonable restriction on the place and manner of speech in a public forum. *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 377 (1997). In *Schenck*, a fifteen-foot (15) zone did not allow for such normal conversation between protestors and people entering or leaving clinics on public sidewalks. *Id.* The Court later found that an eight-foot (8) zone separating anti-abortion protestors and individuals entering or leaving clinics was sufficiently shorter than the one in *Schenk*, allowing the speakers to communicate at a "normal conversational distance." *Hill*, 530 U.S. at 726–27. The voices of the anti-abortion demonstrators could cross an eight-foot gap "with ease." *Id.* at 730. The Court upheld "limited noise restrictions" within a thirty-six-foot buffer zone outside a clinic in *Madsen v. Women's Health Ctr.*, noting that demonstrators could still be within ten (10) to twelve (12) feet of cars entering and leaving the clinic. 512 U.S. 753, 770 (1994). That distance was close enough for the demonstrators "to be seen and heard." *Id.* These cases together define "normal conversational distance" as around eight to twelve feet but not so long as fifteen feet.

The government has not provided ample alternatives for speech when it has attempted to ban completely a particular type or manner of expression at a given place or time. *Ward*, 491 U.S. at 802. In *Ward*, the guideline permitted at least some expressive activity in the bandshell while still regulating the level of noise, so alternatives remained. *Id.* As one federal court of appeals has

phrased it, alternatives are not ample when the regulation disallows speakers from reaching their intended audience. *Berger v. City of Seattle*, 569 F.3d 1029, 1049 (9th Cir. 2009).

The CHBDA amendment's sixty-foot buffer zone, preventing all protestor speech within it, stops anti-mandate demonstrators like Mr. Jones from communicating their message to those entering and leaving the federal facility. *See* CHBDA § 42(d). The district court below stated that "[t]he Supreme Court has upheld much stricter statutes in the past." R. at 15. The district court certainly cannot mean "stricter" as "longer" in terms of distance. The "normal conversational distance" that Court precedent so far has capped at twelve feet in *Madsen* is exceeded by a factor of five in the CHBDA amendment. This buffer zone is four times bigger than the one in *Schenck* that prevented normal one-on-one conversations between demonstrators and those in line. That the amendment prevents one-on-one interactions is exemplified by the facts of this case. Mr. Jones and the Luddites had to enter the buffer zone in order to speak with people in line at the facility about their concerns with the contact tracing mandate. Mathers Aff. ¶ 7; Jones Aff. ¶ 7. The sixty feet between the line and the edge of the zone far exceeds a "normal conversational distance" at which protestors can speak with people in line "with ease."

For the same reasons, the buffer zone forecloses ample alternatives for speech. The zone here wholly disallows protestor speech within it and stops the anti-mandate protestors from reaching their intended audience, unlike the regulation in *Ward* that allowed some expressive activity in the bandshell. There simply is no alternative speech to be had in the buffer zone.

The CHBDA amendment forecloses one-on-one communication between protestors and their intended audience in a public forum. It therefore cannot be considered a reasonable place and manner restriction that is narrowly tailored to a significant government interest.

Peaceful protests of government action considered unjust by the protestors "reflect an exercise of [free speech] rights in their most pristine and classic form." *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). Congress might not like what the Delmont Luddites and other anti-mandate protestors have to say, but "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The amendment to the Act fails both levels of scrutiny.

II. THE FREE EXERCISE CLAUSE ENTITLES MR. JONES TO AN EXEMPTION FROM THE EXEMPTION-RIDDLED ACT.

Because Congress explicitly excluded CHBDA from the Religious Freedom Restoration Act pursuant to 42 U.S.C. § 2000bb–3(b) (2021), the rule announced in *Emp. Div., Dep't of Hum. Res. v. Smith* controls. *See* CHBDA § 42(f)(8); 494 U.S. 872 (1990). Under the *Smith* regime, a law that burdens religious exercise must undergo strict scrutiny if it is not generally applicable or if it falls under *Smith*'s "individual exemptions" exception. *Id.* at 879, 884. To pass the high bar of strict scrutiny, a law must be narrowly tailored to a compelling government interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

a. Mr. Jones must choose between following his anti-cell-phone religious beliefs or following the Act's SIM card contact tracing mandate.

A Free Exercise claimant's religious exercise is burdened by the government when the claimant is forced "to choose between fidelity to religious belief" and a penalty. *Hobbie v. Unemp. Appeals Comm'n*, 480 U.S. 136, 144 (1987); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014). The Act would force Mr. Jones to perform a physical act that his religion proscribes—namely, to receive a mobile phone with a SIM card from the government. CHBDA § 42(b)(1)(A). Believing mobile phones to pose serious dangers to the Luddite community, Mr. Jones is sincerely

convinced that receiving the government phone would "pose a direct conflict" with his religious beliefs. Jones Aff. ¶ 4–5. If Mr. Jones complies with the mandate, he violates his sincerely-held beliefs. If he does not comply, he faces "punishment of up to one year in jail and/or a fine of up to $2,000." CHBDA § 42(c). The exercise of his faith is burdened by the Act's SIM card mandate.

b. The Act's secular senior citizen and individual hardship exemptions fatally undermine CHBDA's mandate that "[e]ach person living in the United States" participate in its contact tracing program.

Where exemptions for non-religiously motivated conduct endanger the government's purported interest for a government action, that action is not generally applicable. *Lukumi*, 508 U.S. at 543. To phrase it differently, when a law or system burdens religious conduct while failing to include in its requirements substantial, comparable secular conduct that would similarly threaten the government's interest, that law must face strict scrutiny. *Id*. at 545. In *Lukumi*, the ordinances at issue gave exemptions for commercial operations to slaughter small numbers of hogs and cattle but did not grant the same exemptions for religious observers. *Id*. The Court held that the ordinances therefore "fail to prohibit nonreligious conduct that endangers" the professed interests of public health and preventing cruelty to animals "in a similar or greater degree than Santeria sacrifice does." *Id*. at 543.

Lower courts have taken the mathematical formulation of *Lukumi*'s endangerment rule seriously. In *Blackhawk v. Pennsylvania*, then-Judge Alito faulted the government for failing to show that the damage from religious exemptions to the Commonwealth's interest in bringing in money and preventing the domestic captivity of wild animals would "exceed" the damage from the secular exemptions for qualifying zoos, circuses, and individual waivers. 381 F.3d 202, 211 (3d Cir. 2004). In other words, the onus was on the government to show a calculus that the *Lukumi* comparability requirement was satisfied. The court in *Rader v. Johnston* noted that the school's

exemptions for its live-on-campus rule resulted in only 1,600 out of 2,500 freshmen complying with the rule. 924 F. Supp. 1540, 1551 (D. Neb. 1996). Indulging in some mathematical framing, that court held that, because over a third of freshmen were exempted from the policy, the stated policy goals of academic achievement, diversity, tolerance, and money were all severely undermined, rendering the policy not generally applicable. *Id*. But a court need not make use of a calculator to evaluate whether secular exemptions comparably endanger an interest. The Sixth Circuit, in recently applying strict scrutiny to pandemic-related orders, simply concluded that the serial exemptions for laundromats, accounting services, hardware stores, airlines, mining operations, funeral homes, landscaping businesses, and grocery stores posed "comparable public health risks to worship services." *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020).

Sometimes, a single exemption is enough to make a law not generally applicable if the exemption is potentially fatal to the government's interest. The Eleventh Circuit applied strict scrutiny to a zoning ordinance that did not exempt religious assemblies, holding that the ordinance's single exemption for lodges and private clubs "violates the principles of neutrality and general applicability because private clubs and lodges endanger Surfside's interest in retail synergy as much or more than churches and synagogues." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004). The failure to treat analogous secular and religious groups equally indicated that the government "improperly targeted religious assemblies." *Id*. In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, then-Judge Alito clarified that a single narrow health exception was sufficient to violate general applicability. 170 F.3d 359, 366 (3d Cir. 1999). There, the city claimed an interest in the uniform appearance of its officers and disallowed beards, exempting undercover work and health reasons. *Id.* The Third Circuit concluded that, although the undercover exemption did not undermine the uniformity interest, the health

exemption was enough by itself to be fatal to that interest. *Id.* The government's policy had to face strict scrutiny because it implied that "secular (i.e., medical) motivations . . . are important enough to overcome its general interest . . . but that religious motivations are not." *Id*. Following the reasoning of *Fraternal Order*, the Iowa supreme court held that a road protection ordinance forbidding Mennonites to drive tractors with steel cleats was not generally applicable, because the ordinance allowed school buses to do the same for the entirety of the year. *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 16 (Iowa 2012). The school bus exemption alone defeated the government's putative interest in protecting the county's hard surfaced roads as much or more than any religious exemptions for the Mennonites would have. *Id*.

The calculations here are easy and demand one conclusion: CHBDA's contact tracing mandate is fatally underinclusive. The senior citizen exemption and the aggregate individual exemptions endanger the government's interest more than any individual religious exemptions could. Congress's interest in the Act was that "[e]ach person living in the United States shall participate in a mandatory contact tracing program." CHBDA § 42(a). Yet the Act specifies that all citizens over the age of sixty-five are exempt entirely from the Act's requirements. CHBDA § 42(b)(1)(B). Pursuant to the discretion afforded by CHBDA § 42(b)(1)(C) for federal officials to grant case-by-case health exemptions, individuals with late-stage cancer, Ischemic heart disease, and Alzheimer's disease, as well as certain individuals with physical disabilities, have been granted exemptions in addition to the blanket exemption for seniors. Stipulation ¶ 9. No other exemptions are allowed. CHBDA § 42(b)(1)(D). The federal government has estimated that, in 2020, there were over fifty-six (56) million Americans over the age of sixty-five (65). UNITED STATES CENSUS BUREAU, 2017 NATIONAL POPULATION PROJECTIONS TABLES: MAIN SERIES (2017) https://www.census.gov/data/tables/2017/demo/popproj/2017-summary-tables.html (last visited

Dec. 4, 2020). That means that roughly one-sixth of all Americans are wholly exempt from the SIM card requirements of the Act. Although seniors are not the most vulnerable population, the government has provided no data suggesting that seniors do not spread Hook and Beak as much as everyone else. Therefore, the Act's exemptions frustrate its purposes in the same way that any religious exemptions would, thereby failing "to prohibit nonreligious conduct that endangers" the professed interests of public health, just like the ordinances in *Lukumi*. As in *Blackhawk*, the government has shown no evidence that religious exemptions to the contact tracing mandate would exceed or even match the damage to the interest done by the Act's age and health exemptions. The government has not suggested that fifty-six million religious exemptions would be sought by religious practitioners, nor is it remotely likely that it could. Religious exemptions to the Act in the aggregate are highly unlikely to amount to anything close to comparable; most mainstream faiths are not as anti-technology as the Luddites, and not even all Luddites themselves are going to claim an exemption. *See* Jones Aff. ¶ 6. Just as the university's interest in *Rader* in having all freshmen live on campus was obviously defeated by allowing one-third of freshmen to not comply, the government's CHBDA interest in having "[e]ach person living in the United States" participate in contact tracing through the SIM cards is obviously defeated by allowing at least one-six of Americans not to comply. We have no data belying the logical assumption that senior citizens exempted from being contact traced through their phones pose "comparable public health risks" to any people of faith exempted from the same. *See Roberts*, 958 F.3d at 414.

Even if the individual exemptions were not considered in the calculus, the single exemption for seniors is enough. The exemption here for more than one-sixth of Americans is fatal to the government's interest in contact tracing all Americans. Two federal courts of appeals and a state high court have applied strict scrutiny when only one interest-defeating exemption was present.

One-sixth of Americans left untraced is blatantly harmful to the government's professed interest in the Act. The single blanket exemption for citizens over sixty-five is enough to make the Act not generally applicable, because the senior citizen exemption so obviously imperils the Act's putative interest in tracing all Americans.

Here, "[t]he underinclusion is substantial, not inconsequential." *See Lukumi*, 508 U.S. at 543. Because the Act's express secular exemptions and individual exemption system threaten Congress's interest equally or more so than individual religious exemptions would, CHBDA is not a generally applicable law. The Act must face strict scrutiny.

c. The Act's discretionary case-by-case system for granting exemptions from the SIM card mandate requires FCC officials to inquire subjectively into whether an applicant has acceptable secular hardship reasons or unacceptable religious hardship reasons.

The *Smith* Court explicitly carved out an exception to its approach in that case, holding that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884 (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986)). The Court soon reaffirmed that a system that "requires an evaluation of the particular justification" for conduct must face strict scrutiny. *Lukumi*, 508 U.S. at 537. Such a "suspicious" system triggers higher scrutiny under the Free Exercise Clause because of "the possibility that certain violations may be condoned when they occur for secular reasons but not when they occur for religious reasons." *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 276 (3d Cir. 2007). If government officials must ask *why*—for secular reasons or for religious reasons—an applicant is requesting an exemption, that creates a system of individual exemptions that must be subjected to heightened scrutiny.

Three Supreme Court precedents have applied strict scrutiny where a system "lent itself to individualized governmental assessment of the reasons for the relevant conduct." *Smith*, 494 U.S.

at 884. Each system had some mechanism that invited "consideration of the particular circumstances" behind an applicant's actions. *Id.* In *Sherbert v. Verner*, the Court granted an exception to an unemployment compensation benefits regime because the system required the governing body to make a determination of "good cause" for the application. 374 U.S. 398, 404 (1963). According to Justice Scalia, that meant that officials had to make value judgments concerning whether religious reasons or secular reasons were good cause. *Smith*, 494 U.S. at 884. Similarly, the Court in *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div*. found the denial of unemployment benefits unconstitutional because the state determined that the applicant's religiously-motivated voluntary termination of his employment in producing arms was "without good cause." 450 U.S. 707, 717–18 (1981). Finally, in *Hobbie*, the Court found unconstitutional a denial of benefits because the system required the government to make a "no fault" determination, which resulted in a strict-scrutiny-triggering inquiry into the plaintiff's religious reasons for refusing to work on a Saturday. 480 U.S. at 140–46.

Lower courts generally agree that a case-by-case system where administrators must make subjective value judgments between secular and religious reasons places that system outside of the *Smith* rule, including in contexts outside unemployment compensation. Whether the individualized exemption exception to *Smith* is regarded as part of the general applicability analysis or as a separate analysis, the result is the same: a system creating individualized exemptions triggers strict scrutiny. The Third Circuit held that Newark's medical exemption system asked the city to decide that secular (i.e., medical) motivations were more important than religious motivations. *Fraternal Order*, 170 F.3d at 365. And, the categorical exemption for individuals with a secular but not religious exemption "only further implicated" Free Exercise concerns. *Id*. Then-Judge Alito later held that the Pennsylvania Game Code created a "regime of individualized, discretionary

exemptions that is not materially distinguishable from those that triggered strict scrutiny in the unemployment compensation cases." *Blackhawk*, 381 F.3d at 209. That system required the government to examine whether an applicant for an individual waiver had shown "hardship" or "extraordinary circumstances," which caused the same type of problem as the "good cause" systems in the three Supreme Court unemployment compensation cases. *Id*. at 210. The Sixth Circuit subjected a system to strict scrutiny that allowed individual counseling referral requests for secular reasons (e.g., lack of payment and philosophical disagreements on end-of-life issues) but not religious reasons. *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). Judge Sutton reasoned that, at some point, "an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Id*. The Tenth Circuit held that a school board policy that only recognized exemptions for a strict category of full-time-attendance students did not establish a system of individualized exemptions that requires "the application of a subjective test." *Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998). According to that court, a system that has objectively-defined categories of persons is not suspect, because it requires a simple "yes-or-no inquiry" rather than an inquiry into the particular circumstances, religious or secular, behind a request for an exemption. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297–98 (10th Cir. 2004). Case-by-case systems, on the other hand, require an impermissible subjective test by the government. *Id.*

The Act's discretionary exemption system requires the FCC to make individual assessments of the reasons for applying for an exemption from the SIM card mandate. Health exemptions may be granted by federal officials on a "case-by-case basis." CHBDA § 42(b)(1)(C). The SIM card mandate is not the type of "across-the-board criminal prohibition" Justice Scalia

had in mind in *Smith*. Rather, CHBDA's exemption system looks more like the unemployment compensation systems in *Sherbert*, *Thomas*, and *Hobbie* and the waiver system in *Blackhawk*. An inquiry into whether an applicant for an exemption from the SIM card mandate is "unable to operate a mobile device" is a species of inquiry into "hardship" or "good cause." *See* Stipulation ¶ 9. As the court in *Fraternal Order* reasoned, health exemptions are secular exemptions. 170 F.3d at 366. When FCC officials inquire into an individual's particular circumstances to grant exemptions for secular, physical hardship reasons, they must do the same to deny exemptions for religious hardship reasons. Violations of the mandate, then, are validated on a case-by-case basis by the government for secular reasons, but not for religious reasons, the type of system rightly deemed "suspicious." *Lighthouse*, 510 F.3d at 376; *see also Ward*, 667 F.3d at 740. And, although senior citizens are certainly the kind of "objectively defined categories of persons" envisioned by *Axson-Flynn*, CHBDA's "case-by-case basis" exemption system is exactly the same as a problematic system of "case-by-case determinations" that requires a subjective test by the government. *See Axson-Flynn*, 356 F.3d at 1297–98. "Are you over the age of sixty-five?" is a yes-or-no inquiry, whereas "do you qualify for an individual exemption because of some personal hardship?" forces a government inquiry into the particular circumstances of the individual. As a result, the FCC is impermissibly required to subjectively inquire into an applicant's circumstances and make a distinction between secular, medical, and disability reasons for an exemption from the SIM card mandate and any religious reasons for such an exemption.

We do not request this Court to create a rule that would apply strict scrutiny in the presence of any individual exemptions. Rather, the Court should follow the directions of *Smith* and apply strict scrutiny here, where CHBDA's individual exemption regime requires the FCC to make a value judgment between religious and secular reasons for certain conduct. Officials must employ

a subjective test and evaluate "the particular justification" for an application for an exemption from the mandate. *See Lukumi*, 508 U.S. at 537. The Act's SIM card mandate must face strict scrutiny.

d. This Court should reject the Eighteenth Circuit's counter-*Lukumi* "logical" exemption approach.

The Eighteenth Circuit, in its opinion below, held that the Act was generally applicable, despite the exemptions for millions of people and the FCC's incredibly wide discretion. The court found general applicability in the face of such deficiencies because the FCC "has the authority to choose which ones to grant and which ones not to, as long as it is logical. The exemption for health concerns but not religious concerns is perfectly logical." R. at 40. In other words, the court adopted this rule: if exemptions from a law are "logical," then the law is generally applicable, even if those exemptions frustrate the purpose of the law or even if the law creates a system of individual exemptions. In so doing, the Eighteenth Circuit has followed the deficient reasoning of the Ninth Circuit in *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016). There, the Ninth Circuit found an exemption-ridden law to be generally applicable because the exemptions—e.g., error, emergencies, lack of expertise, and fraud—were "necessary" for the "normal course of business." *Stormans*, 794 F.3d at 1080. That court made a firm rule: when "exemptions at issue are tied directly to limited, particularized, business-related, objective criteria, they do not create a regime of unfettered discretion that would permit discriminatory treatment of religion or religiously motivated conduct." *Id*. at 1082. The Ninth Circuit thus held that the government can make a value judgment declaring that business reasons are necessary, valid, and reasonable, while religious reasons are not.

Like the Ninth Circuit, the Eighteenth Circuit seems to believe that the rationality of exemptions covers a multitude of sins. Not so; granting secular exemptions because they are logical while denying religious exemptions "is precisely the preference for secular reasons over

religious reasons that *Smith* and *Lukumi* prohibit." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 15 (2016). Moreover, the Eighteenth and Ninth Circuits have few friends on the "logical" exemptions side. The "good cause" standard for exemptions in *Sherbert* was logical but did not make the policy there generally applicable. 374 U.S. at 404. Medical exemptions from Newark's no-beard policy were reasonable and likely necessary for those officers, as were the "hardship" waivers from the Pennsylvania Game Code, yet then-Judge Alito held that neither policy was generally applicable. *Fraternal Order*, 170 F.3d at 365; *Blackhawk*, 381 F.3d at 209. Judge Sutton made no such rationality inquiry into the secular exemptions in *Ward*, because the policy was "exception-ridden" regardless of whether lack of payment or philosophical disagreements were logical. 667 F.3d at 740. The *Lukumi* Court itself rejected a necessity standard: "the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons." 508 U.S. at 537–38. The Eighteenth Circuit's test of logicalness should suffer the same fate.

This Court should not adopt the approach of the Eighteenth Circuit. Whether exemptions are "logical" must not become an element of the general applicability analysis, lest policies be upheld that violate the very principles that the *Lukumi* Court was trying to protect. The putative reasonableness of the individual exemptions granted by the FCC in this case does not save the Act from its interest-endangering senior citizens exemption or from its discretionary, case-by-case regime of individual exemptions.

e. The federal government has no interest of the highest order to deny religious exemptions to the exemption-riddled Act.

The government's putative interest is undermined if its law "leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (internal quotation marks omitted). Therefore, underinclusion can be fatal both to compelling interest and to narrow

tailoring. *See id.* (finding no compelling interest because "the ordinances [were] underinclusive to a substantial extent"). Those ordinances were underinclusive because the "proffered objectives [were] not pursued with respect to analogous non-religious conduct." *Id*. at 546. Likewise, when hundreds of thousands of people are permitted to use a certain drug, the government cannot claim a compelling interest in disallowing exemptions for use of a comparably-dangerous drug. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 433 (2006).

In this case, the vast underinclusiveness of the Act is fatal both to the federal government's interest and to the tailoring of the law. Just as exemptions for hundreds of thousands of people in *Gonzales* undercut the government's interest in denying exemptions for analogous conduct, the CHBDA exemptions for the millions and millions of Americans over the age of sixty-five undercut the government's interest in denying religious exemptions. The proffered objective of ensuring that every single American received a SIM card was simply not pursued with respect to the senior citizens and to those granted various individual hardship exemptions.

Because the Act is not narrowly tailored to a compelling government interest, CHBDA fails strict scrutiny. Mr. Jones and other religious claimants must be given an exemption to the Act's SIM card contact tracing mandate. Otherwise, the Act will continue "prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

CONCLUSION

We respectfully request that this Court affirm the lower court's ruling on Mr. Jones's free speech claim and reverse the lower court's ruling on Mr. Jones's free exercise claim.

CERTIFICATE OF COMPLIANCE

Pursuant to the Seigenthaler-Sutherland Official Rules, we, the under-signed counsel, certify that (i) this brief is entirely the work product of competition team members; (ii) the team has complied fully with its school's governing honor code; and (iii) the team has complied with all Rules of the Competition.

s/ TEAM 9

Dated: January 31, 2021

APPENDIX

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.