NO. 20-9422

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

Levi JONES,

Petitioner,

v.

Christopher SMITHERS,

Respondent.

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

BRIEF FOR RESPONDENT

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether the CHBDA amendment's buffer zone aimed at combating the spread of Hoof and Beak by limiting the number of people and spacing for a protest outside a federal facility, is a valid time, place, and manner regulation of speech?

II. Whether the contact-tracing mandate, is a neutral, generally applied law when it applies to all citizens prone to spreading Hoof and Beak and exempts an objective category of people?

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STATEMENT OF JURISDICTION

The United States District Court of Delmont had jurisdiction under 18 U.S.C. § 3231, because this case involves violations of federal law and the First Amendment. R. at 10. The Eighteenth Circuit had jurisdiction under 28 U.S.C. § 1291. R. at 30. This Court has jurisdiction under 28 U.S.C. § 1254(1), because certiorari was granted. R. at 42.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which is reproduced as Appendix "A." This case also involves the Combat Hoof and Beak Disease Act and subsequent amendment, which is reproduced in Appendix "B."

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

A novel disease, Hoof and Beak Disease, quickly spread around the world and caused a global pandemic. R. at 1. Hoof and Beak is highly contagious, spread by person-to-person contact which causes severe flu-like symptoms and skin rashes. R. at 1. The disease primarily affects children and young and middle-aged adults. R. at 1. In response to this crisis, the United States created a Hoof and Beak Task Force and passed the Combat Hoof and Beak Disease Act (CHBDA). R. at 1. The CHBDA mandates contact tracing to slow the spread of the disease through the use of SIM cards in government provided mobile phones. R. at 1. Only senior citizens over the age of sixty-five are exempt from this mandate, as they are not as affected by

the disease. R. at 2. Other serious health-related exemptions are solely permitted on a case-by-case basis. R. at 2. The Federal Communications Commission (FCC) is the lead agency for executing and enforcing the CHBDA contact-tracing mandate. R. at 2. The purpose for the contract tracing program is to "protect Americans, their families, and their communities by letting people know that they may have been exposed to Hoof and Beak Disease and should therefore monitor their health for signs and symptoms of Hoof and Beak." CHBDA § 42(a)(1). Because of increased activity near the federal distribution facilities and the need for social distancing, Congress amended the CHBDA to include a "buffer zone" around the federal facility entrances prohibiting protests of more than six people and protests within sixty feet of the entrance. R. at 2.

Petitioner, Levi Jones, refused to comply with CHBDA and organized protests outside the Delmont federal facility that distributed the SIM cards and mobile phones. R. at 2. Jones is the leader of the State of Delmont's Church of Luddite and opposes the CHBDA because of his religious beliefs prohibiting the use of mobile phones. R. at 5. On May 1, 2020, Jones and six others protested on the sidewalk seventy-five feet from the facility entrance, entering the buffer zone periodically to approach those in line at the facility and discourage them from complying with the CHBDA. R. at 7. A group called Mothers for Mandates (MOMs) had five members also assembled on the sidewalk, closer to the entrance of the facility, but not approaching individuals or moving about. R. at 8. That afternoon, the Federal Facilities Police Officers asked Jones to leave because they had seven people protesting in violation of the Act. R. at 8. Jones refused to comply and was arrested. R. at 8. Five days later, on May 6, 2020, Jones and five others returned to the facility to protest the mandate once again. R. at 8. While there, seven members of the MOMs group also returned to the facility and stood fifty-five feet from the entrance of the

facility, not approaching individuals or moving. R. at 8. An officer recognized Jones and told him he could not remain outside the facility, but Jones contended he was in compliance with the Act and would not leave. R. at 9. He was again, arrested for violating the Act. R. at 9.

II. PROCEDURAL HISTORY

The District of Delmont. In response to his second arrest, Jones sued Christopher Smithers, the FCC Commissioner, for violating his right to freedom of speech and free exercise of religion guaranteed by the First Amendment. R. at 3. Jones and the FCC Commissioner filed cross motions for summary judgment. R. at 3. The district court granted summary judgment for the FCC Commissioner on the Free Speech issue because the regulation's buffer zone and limitations on the number of protestors were valid time, place, and manner restrictions. R. at 14–16. The district court granted summary judgment for Jones on the free exercise issue because the contact-tracing mandate, although neutral, was not generally applicable. R. at 19–20.

The Eighteenth Circuit. The Eighteenth Circuit reversed the district court's ruling in its entirety. R. at 40. The Eighteenth Circuit held the regulation was not a valid time, place, and manner regulation because it was not narrowly tailored to further the government's interests. R. at 38. It also held the contact-tracing mandate does not violate the Free Exercise Clause because it is a neutral, generally applicable law. R. at 40. The case was remanded with instructions to grant the FCC's motion for summary judgment with respect to the free exercise issue and grant Jones' motion for summary judgment as to the free speech issue. R. at 41.

SUMMARY OF THE ARGUMENT

I.

The CHBDA amendment, which prohibits protesting within sixty-feet of a federal facility's entrance and limits groups of protestors to six persons, is a valid time, place, and manner

restriction under the Free Speech Clause of the First Amendment. The CHBDA amendment's buffer zone is content neutral because it does not draw distinctions based on the content of speech, rather where it occurs. Additionally, enforcement of the buffer zone is justified without reference to the content of the speech. Accordingly, the buffer zone merely must be narrowly tailored to serve a significant interest that leaves open ample alternatives of communication. The buffer zone is narrowly tailored because it infringes on no more speech than necessary to pursue the government's interest of stopping the spread of Hoof and Beak. Finally, the buffer zone leaves open ample alternatives for speech because protestors can still disseminate their message if they comply with the CHBDA amendment.

II.

The CHBDA, which requires persons to carry mobile phones with government-issued SIM cards, is a neutral, generally applicable law that does not violate the First Amendment's Free Exercise Clause. The Luddites may not circumvent the CHBDA because the law prescribes an action their religion forbids. The contact-tracing mandate is a neutral law because it does not discriminate against religion either on its face or in application. The record contains no evidence of hostility toward the Luddite religion and thus is neutral. The contact-tracing mandate is also applied generally because it is not underinclusive and does not create a system of individualized exemptions. The contact-tracing mandate is not underinclusive because stopping the spread of Hoof and Beak is being pursued against those most likely to spread the disease despite religious beliefs. Additionally, the mandate does not create a subjective system of individualized exemptions because it exempts an objective category of individuals only and does not grant the government unfettered discretion to infringe of religious beliefs. The mandate does not violate the Free Exercise Clause of the First Amendment.

ARGUMENT AND AUTHORITIES

Standard of Review. Cross motions for summary judgment must be considered on the merits to see if either deserves a judgment as a matter of law. *Wightman v. Springfield Terminal Ry.*, 100 F.3d 228, 230 (1st Cir. 1996). Both issues before this Court are legal in nature and reviewed de novo. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). During an ongoing public health crisis a statute enacted to combat this concern can be overturned only if it "has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by fundamental law." *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905).

I. THE CHBDA AMENDMENT, WHICH PROHIBITS PROTESTING WITHIN SIXTY-FEET OF A FEDERAL FACILITY'S ENTRANCE AND LIMITS GROUPS OF PROTESTORS TO SIX PERSONS, IS A VALID TIME, PLACE, AND MANNER RESTRICTION UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

The CHBDA amendment protects the health and safety of the public during an ongoing pandemic. It is a permissible regulation on the time, place, or manner of speech. The First Amendment protects speech, but does not warrant absolute unrestricted speech. *Id.*; *see also Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). All forms of expression, including protesting, counseling, and otherwise voicing one's opinion are subject to reasonable restrictions of time, place, or manner. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The enjoyment of constitutional rights may be subject to, "reasonable conditions . . . essential to the safety, health, peace, good order, and morals of the community." *Jacobson*, 197 U.S. at 26. The CHBDA amendment is a content-neutral regulation, narrowly tailored to protect the health and safety of Americans by preventing the spread of Hoof and Beak that leave ample alternative modes of communication. *Clark*, 468 U.S. at 293.

The CHBDA amendment limits protesting to six people per group and requires individuals to protest at least sixty-feet from the entrance of the federal facility. While restrictions on

"traditional public fora," like sidewalks, have been scrutinized, if the act is content neutral the government is afforded greater leeway to regulate speech. *McCullen v. Coakley*, 573 U.S. 464, 477 (2014). "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property *without regard to the nature of the property* or *to the disruption that might be caused by the speaker's activities*." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799 (1985) (emphasis added). Due to the increasing danger posed to the public by the Hoof and Beak disease, all Americans must visit a federal facility to receive a SIM card and mobile device if they do not already own one. CHBDA § 42(a). Because of the high number of individuals who must go to the facility and the relative ease in which Hoof and Beak spreads, it is imperative to limit crowding outside the federal facilities with a buffer zone.

A. The CHBDA Buffer Zone Around the Federal Facility Is Content Neutral.

The CHBDA amendment does not draw distinctions based on the content of the speech rather only where it occurs. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (recognizing a regulation will be deemed content based only if it "draws distinctions based on the *message* a speaker conveys") (emphasis added).Nor is it a law that is solely justified by reference to the content of speech or adopted out of disagreement with a particular message. *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989).

1. The CHBDA amendment does not explicitly regulate speech on its face.

The CHBDA amendment applies evenhandedly on its face regardless of the subject discussed. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002); *see also Carey v. Brown*, 447 U.S. 455, 461 (1980) (stating a government regulation cannot discriminate among speech-related activities in a public forum); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92,

95 (1972). It applies to all speakers evenhandedly, all those who assemble outside of federal facilities regardless of the message they convey. *Heffron*, 452 U.S. at 649.

This Court has explained that a regulation which applies to all speech, despite the message conveyed, is content neutral. *Id.* For example, in *Thomas v. Chicago Park District*, an ordinance requiring a permit for gatherings of over fifty people was content neutral because it applied to all park goers. 534 U.S. 316, 322 (2002). The ordinance did not authorize the licensor "to pass judgment on the content of speech"; in fact, it was "not even directed to communicative activity, but rather, to *all* activity conducted in a public park." *Id.* Similarly in *Heffron v. International Society for Krishna Consciousness*, a regulation requiring organizations stay in a designated area to solicit funds or distribute materials was content neutral. 452 U.S. at 649. It was content neutral because it applied evenhandedly to all speech and was not based on the subject of the speech. *Id.* at 649–50. These regulations differed from the content-based regulation at issue in *Carey v. Brown*, because on its face the regulation required the government to discriminate between speech based on its subject. 447 U.S. at 465 (banning all picketing besides "peaceful labor picketing" was content based).

The CHBDA amendment is content neutral because it applies to all protestors evenhandedly without distinction based on their message. The Act creates a buffer zone of sixty-feet around the SIM card distribution facility entrance and limits groups to six people. R. at 2. Similar to *Thomas*, the Act applies to all who congregate outside the facility and does not distinguish based on their message. Unlike *Carey*, the Act does not single out particular speech. The buffer zone applies to the Luddites, the MOMs, and anyone else who congregates outside the facilities. Analogous to *Heffron*, the regulation is simply directing groups where they can stand to speak their message. Because the Act applies evenhandedly it is facially content neutral.

2. The enforcement of the buffer zone is justified without reference to the content of the regulated speech.

The buffer zone can be justified without reference to the content of the regulated speech and was not adopted because of disagreement with a message. The government's purpose in enacting the law is the primary factor in determining its neutrality. *Ward*, 491 U.S. at 791. Even if the buffer zone disproportionately affects speech on Hoof and Beak, this does not render it content based. *See McCullen*, 573 U.S. at 481. The primary purpose of the buffer zone is to ensure access to the federal distribution facilities while protecting citizens from contracting Hoof and Beak. R. at 14. The Act can be justified without reference to the content of the speech and was not adopted because of disagreement with the Luddites' protests.

A regulation can limit particular speech more than others and remain content neutral. *McCullen*, 573 U.S. at 479. In *McCullen*, this Court held a buffer zone outside an abortion clinic was content neutral despite its tendency to restrict abortion-related speech more than other subjects. *Id.* The Massachusetts act created a buffer zone around abortion clinics where protesting, sidewalk counseling, and even displaying signs was forbidden. *Id.* at 470. This Court dismissed the petitioners' argument that the act was content-based because it only burdened abortion-related speech. *Id.* at 478. This Court noted, a "facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *Id.* at 479. The test becomes whether the law is "justified without reference to the content of the regulated speech." *Id.* Because the act's purpose was one of public safety and applied evenhandedly despite the message it was content neutral. *Id.* at 480–81 (stating the breadth of a statute can confirm it was not enacted to burden narrow, disfavored speech).

Regulating where speech can occur, rather than the content of speech, does not allow for selective enforcement and thus is content neutral. *Menotti v. City of Seattle*, 409 F.3d 1113, 1129

(9th Cir. 2005). This Court, in *Ward v. Rock Against Racism*, held a content-neutral regulation that provided the enforcement authority with specific guidance on restricted conduct was not subject to selective enforcement. 491 U.S. at 793. In *Ward*, the city required performers to use the city's sound equipment and technician. *Id.* at 787. Challenger claimed that although the guideline was not content based on its face it should be treated as such because it gives "unbridled discretion" to the city officials who enforce it. *Id.* at 793. This Court swiftly dismissed this argument, noting selective enforcement cases generally involve licensing schemes that permit the enforcer from permitting or denying expressive activity within a forum before it took place. *Id.*; *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992).

The CHBDA amendment is content neutral because it was adopted to promote the health and safety of individuals who must visit the federal distribution facilities. Similarly to *McCullen*, the Act is justified without reference to the content of speech regulated. To ensure safety, it is necessary to limit individuals who congregate outside the facilities, regardless of their purpose for being there. As the district court correctly pointed out, "[w]hat the protestors say is irrelevant, and officials need only look at the *number* of people within an area . . . ." R. at 12. Further the Act was not adopted because of disagreement with the Luddites' message. The Luddites, the MOMs, and anyone else who congregates outside the facility must obey the regulations. Even though the Act may regulate more speech on Hoof and Beak as opposed to other subjects, this does not render it content based as evident from *McCullen*. The Act is broad and applies to all those who congregate outside the facilities without analyzing the content of their speech. Without a showing that the Act singles out the Luddites' ability to protest it cannot be content based.

Additionally, the CHBDA amendment is not subject to selective enforcement. The Act provides enforcement authorities with clear guidelines regarding how to enforce it. Similar to *Ward*, the Act neither creates a licensing scheme nor allows the government to deny speakers the right to speak before the speech takes place. The Act does not give the government the ability to selectively enforce restrictions because analogous to *McCullen*, they simply have to look to the number of people and distance from the facility and each other to tell if it has been violated.

B. The Buffer Zone Is Narrowly Tailored to Serve the Significant Government Interest in Promoting Health and Safety.

Preventing the spread of easily transmittable diseases constitutes a significant interest. *See McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997) (holding stopping the spread of tuberculosis is a compelling interest). As both lower courts noted, there is no question stopping the spread of Hoof and Beak is a significant interest. R. at 37.

The buffer zone is narrowly tailored to serve the significant government interest in promoting the health of all Americans. The CHBDA meets the narrow tailoring requirement because it promotes stopping the spread of Hoof and Beak which could not be achieved without the regulation. *United States v. Albertini*, 472 U.S. 675, 689 (1985) ("[T]he validity of the regulation does not turn on whether it is the most appropriate way of promoting the government's interest but whether it directly advances the government's interest."). The CHBDA need not be the "least restrictive" or "least intrusive" way of serving the government's interest. *Ward*, 491 U.S. at 789; *see also Frisby v. Schultz*, 487 U.S. 474 (1988) (holding an outright ban on expressive activity narrowly tailored). The Act is narrowly tailored because citizens are more protected with the regulation than without it and it does not burden more speech than necessary.

Buffer zones have been upheld as narrowly tailored in much less grave circumstances. In *Hill v. Colorado*, this Court found a statute which created an eight foot floating buffer zone

around individuals arriving at an abortion clinic was narrowly tailored to promote unimpeded access to health care facilities. 530 U.S. 703, 715 (2000). This Court acknowledged the majority of speech affected by the regulation was oral statements. *Id.* at 726. The Court noted, while the eight foot buffer zone might not be the *best* way to ensure the state's interest, significant deference must be given to the governmental body. *Id.* Additionally, the legislature has a particular interest in controlling activity in certain places. *Id.* at 728 (differentiating between schools, courthouses, public places, and health care facilities). This Court justified a bright line rule by looking to the nature of the facility and the need to protect individuals who must go to the facility. *Id.* at 729 ("A bright line . . . rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself.").

In *McCullen v. Coakley*, this Court invalidated a fixed buffer zone because of the municipality's ability to accomplish its goal with current state and local laws. 573 U.S. at 494. Massachusetts implemented a fixed buffer zone to combat congestion and obstruction around all state abortion clinics. *Id.* at 480. This Court listed several local, state, and federal laws that other jurisdictions have used to combat congestion successfully without a buffer zone. *Id.* at 490–94. While Massachusetts claimed these laws were ineffective, they pointed to no evidence where they tried to implement a less harsh strategy burdening less speech. *Id.* at 494. Because of the variety of approaches capable of serving its interests and the congestion problem arising at only one clinic in Boston, the buffer zone was not narrowly tailored. *Id.* at 493–94.

While the buffer zones in the abortion context shine light on the validity of buffer zones generally, it is necessary to view regulations instituted because of a global pandemic. In *Antietam Battlefield KOA v. Hogan*, restricting public gatherings to ten people—given the COVID-19 pandemic—was narrowly tailored to combat the spread of the virus because of the ease of which

the virus spreads and the order's gradual ban on number of individuals who could publicly gather. 461 F. Supp. 3d 214, 235 (D. Md. 2020). Similarly in *Geller v. de Blasio*, the court found New York's restriction on non-essential gatherings, including political protests, was narrowly tailored because scientific data indicated preventing gatherings was crucial to limiting the spread of the virus. No. 20cv3566, 2020 U.S. Dist. LEXIS 85938, at *10–11 (S.D.N.Y. May 15, 2020).

The CHBDA is narrowly tailored to serve the government's interest in stopping the spread of Hoof and Beak. The Eighteenth Circuit mistakenly claimed the CHBDA suppresses speech for convenience. R. at 38. The CHBDA, however, is not actually suppressing speech; rather, it is dictating the appropriate methods in which groups, protestors, and others alike can voice their opinions. Because of the Hoof and Beak pandemic, maintaining social distance and limiting the individuals who congregate outside federal facilities is necessary for the health and safety of the American people. While there may be conceivable alternatives to address this interest, this Court has never required regulations to be the least restrictive means. Similar to *Hill*, the FCC and local enforcement agencies must be given deference with how best to combat the spread of Hoof and Beak. While Jones claims there is minimal scientific data to suggest six as opposed to seven individuals should be the maximum, the FCC's findings must be given deference as dictated by this Court in *Hill*. R. at 14.

Enacting a sixty-foot buffer zone and limiting individuals from each group who can protest outside of the facilities protects the individuals mandated to visit them and the protesters themselves. All citizens may congregate outside the facilities; however, as more people congregate, the space available to comply with social distancing orders drastically decreases. While Jones claims there is no difference between one group of twelve and two groups of six, allowing the Luddites to take up more space than necessary unduly burdens other groups'

speech. The history of the CHBDA also shows it is narrowly tailored, similar to *Antietam Battlefield KOA*. The buffer zone was not enacted as an original mandate, but rather an amendment necessary to ensure compliance with the FCC's social distancing rules, given increasing protests around facilities.

The Eighteenth Circuit improperly compared this case to *McCullen*. R. at 37. While both are fixed buffer zones, they were enacted to combat very different problems. *McCullen* was only concerned with the congestion around abortion clinics, while, the FCC has been tasked with combating the spread of a deadly virus. In addition, in *McCullen*, there was ample evidence the state's interest could be readily served by variety of state and local laws. Because of the difference of the nature of the facilities (which all Americans must visit), the interests the government is attempting to combat, and the lack of current laws that could effectively address the spread of Hoof and Beak it would be a mistake to characterize this case the same as *McCullen* simply because of the fixed buffer zone.

Although conceivable alternatives to combatting Hoof and Beak may exist, the CHBDA does not burden substantially more speech that necessary. It satisfies the narrowly tailoring requirement for a time, place, or manner restriction.

C. The Buffer Zone Leaves Open Ample Alternatives for Speech.

The buffer zone leaves open ample alternative modes of communication. The alternative modes do not have to "be the speaker's first or best choice or provide the same audience or impact for speech." *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000). The buffer zone simply has to "provide avenues for 'the more general dissemination of a message.'" *See Ross v. Early*, 746 F.3d 546, 559 (4th Cir. 2014). Regulations that merely limit speech to a certain area provide ample alternative channels of communication. *Heffron*, 452 U.S. at 655. The buffer zone

limits no mode of communication; rather, it mandates protestors follow number, spacing, and time restrictions to stop the spread of Hoof and Beak.

As long as speakers are provided with a way to disseminate their message it is irrelevant that it is not their preferred form of communication. *Id.* at 654–55. In *Heffron*, this Court found requiring a religious group to solicit only at a predesignated location provided ample alternative forums for expression, even though it was not their first choice. *Id.* at 654. The group was not prevented from solicitation outside the forum nor were they denied the right to solicit within the forum, they were simply limited to a fixed location. *Id.* at 654–55. It is inaccurate to characterize this as a ban on speech solely because it was not their preferred way to communicate when there were ample means still available. *Id.* at 656.

Because of a pandemic, several courts have found limiting protestors to a specific number still provides several alternative modes of communication. *Lighthouse Fellowship Church v. Northam*, 458 F. Supp. 3d 418, 437 (E.D. Va. 2020). In *Antietam Battlefield KOA*, the court held limiting protestors to groups of smaller than ten provided ample alternatives of communication. 461 F. Supp. 3d at 236. Several groups during the COVID-19 pandemic challenged this order claiming it limited their ability to protest. *Id.* at 225–26. The court dismissed the claim stating there were ample alternatives available to protestors including, complying with the order, protesting through other means, or conducting drive-by protests. *Id.* at 236. While the alternatives may not carry the same force as a large protests, given the pandemic, these were ample alternatives.

The CHBDA's buffer zone and number restrictions leave open ample alternative modes of speech. Similarly to the orders in *Antietam Battlefield KOA*, the Luddites and other protestors may comply with the order or protest by other means. Having a large, in-person, protest would

be preferable to the Luddites, but this Court does not evaluate whether there are alternatives regarding a group's *preferred* way of communicating. Similarly to *Heffron*, while being prescribed to a specific location, sixty-feet from the facility, is not their preferred method of communicating, it still provides a means to communicate their message. Unlike *Heffron*, they are not confined to a booth, but rather have the leeway to walk up and down the sidewalk engaging people in conversation. They can still engage visitors in conversation, as long as they respect the safety of the individuals and the buffer zone. Although it may not be their first choice,[1] similar to *Heffron*, the Luddites can communicate in other ways such as handwritten signs, singing and chanting, or complying with the mandate. The fact these methods are not their first choice is unimportant because this Court has never required the speaker be afforded the exact means he wants to communicate his message if there are still alternative ways for it to be expressed. The CHBDA provides several alternative mediums for the Luddites to convey their message. The buffer zone is a valid time, place, and manner regulation as it is narrowly tailored to serve the government interests while leaving open ample alternatives.

II. THE CHBDA, WHICH REQUIRES PERSONS TO CARRY MOBILE PHONES WITH GOVERNMENT-ISSUED SIM CARDS, IS A NEUTRAL, GENERALLY APPLICABLE LAW THAT DOES NOT VIOLATE THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE.

The SIM card requirement is neutral towards religion and applies to all Americans prone to spreading Hoof and Beak. Accordingly, it is valid under the Free Exercise Clause. The Free Exercise Clause dictates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The Free Exercise Clause supports two notions: the right to believe and the right to act. *Cantwell v. Connecticut*,

[1] Jones claims the only acceptable way to convey his message is by speaking to people. The Luddites do not speak loudly, use amplification devices, signs, or distribute literature. R. at 25.

310 U.S. 296, 303–04 (1940). While the right to believe is absolute, the right to act, is not. *Id.* (stating allowing individuals to act on religious beliefs in violation of the law would in effect "permit every citizen to become a law unto himself"). The Luddites' right to act does not include conduct that could lead to the spread of the Hoof and Beak Virus. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added) (holding the right to act "does not include liberty to expose the community or the child to *communicable disease*"). The Luddites may believe the use of technology is sinful, but the Luddites may not violate the CHBDA based on this belief because it is a neutral law of general applicability.

The CHBDA is subject to rational basis because it is a neutral, generally applicable law.[2] Even if the CHBDA incidentally burdens religious it need not be justified by a compelling interest. *See Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990). This Court denied using the compelling interest test to all cases stating it "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.* at 877 (listing several civic duties that could be avoided including, military service, payment of taxes, *health and safety regulations*, and *compulsory vaccination laws*). The CHBDA is subject to rational basis review because: first, the Act is neutral as it requires uniform treatment for all, regardless of religion; and second, the Act applies generally to all Americans under the age of sixty-five, without exception.

[2] While the Religious Freedom Restoration Act imposes a higher burden on the government enacting a federal law. The RFRA can be made inapplicable by explicit reference. 42 U.S.C. § 2000bb-3(b). Section 42(f)(8) clearly makes the RFRA inapplicable. R. at 40; *see also* CHBDA § 42(f)(8) ("[P]ursuant to 42 U.S. Code § 2000bb-3, the Religious Freedom and Restoration Act is inapplicable to this act.").

A. The Contact-Tracing Mandate Is a Neutral Law.

The contact tracing mandate will only violate neutrality if its purpose is to infringe on or impermissibly target religious practices. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). The purpose of the mandate is determined by both the mandate's neutrality on its face or in application. *Id.* Even if the mandate adversely impacts the Luddites, this alone is not conclusive that the law targets religion. *Id.* at 535. As evident from both the face of the Act and its application, the contact-tracing mandate has a neutral purpose.

1. The CHBDA does not facially discriminate or refer to the Luddites' religious practices opposing technology.

Textually, the CHBDA is neutral because it makes no reference to religious conduct or practices and is solely secular. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1130 (9th Cir. 2009). The CHBDA requires "[e]ach person living in the United States . . . participate in a mandatory contract tracing program." CHBDA § 42(a). The Act is facially neutral because it makes no reference to the Luddites' religious conduct or practices. R. at 18, 39.

Alternatively, a law lacks facially neutrality if it uses words or alludes to religious practices without a secular meaning. *Lukumi*, 508 U.S. at 534. In *Church of Lukumi*, this Court found the use of the words "sacrifice" and "ritual" had strong religious connotations but even the use of these words did not indicate religious bias. *Id.* This Court noted that while these words could follow a claim of a departure from facial neutrality, because they had secular meaning in that context, using these words alone did not indicate religious bias. *Id.*

The CHBDA is facially neutral as it solely uses words with a secular meaning. Unlike *Lukumi*, the CHBDA makes no reference to religion nor uses words with religious connotations. Without words with religious undertones it is undisputable the CHBDA is merely secular.

Adhering to the precedent set in *Lukumi*, the CHBDA is facially neutral. The inquiry does not end here as this Court must still ensure the purpose of the Act is neutral in its application.

2. No evidence suggests that the contact-tracing mandate specifically targeted the Luddites for distinctive religious treatment.

Nothing in the record suggests that the FCC singled out the Luddites for distinctive treatment based on their religious views. To determine whether the purpose of the law targets religion, courts consider the effect of the law in operation including objective factors that may indicate government hostility towards religious conduct. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018). The factors include the historical background of the law, the series of events leading to the enactment of the law, and any statements made by members of the decision-making body. *Id.* If in its operation a law is being enforced evenhandedly it is neutral, although a religious group may be more likely to object to it. *Stormans, Inc. v. Selecky*, 586 F.3d at 1130. The record before this Court presents no evidence that the Act impermissibly targets the Luddites. R. at 19, 39.

When a law singles out a specific religion, the law is not being applied neutrally. *Lukumi*, 508 U.S. at 534. 168. In *Tenafly Eruv Ass'n v. Borough of Tenafly*, the court held because the Borough did not enforce the law evenhandedly, but instead only against the Orthodox Jewish community they violated the principle of neutrality. 309 F.3d 144, 168 (3d Cir. 2002). An ordinance prohibited any posting on utility poles, but churches and private citizens routinely posted religious and nonreligious items on the poles. *Id.* at 151–52. When the Orthodox Jewish residents attempted to place items on the poles for religious purposes the council ordered their removal. *Id.* at 154. By continually granting exemptions to the ordinance, officials impermissibly targeted religious conduct. *Id.* at 168. Had the council applied the ordinance in a uniform fashion, it would have not violated the principle of neutrality in its application. *Id.* at 167.

A governmental authority may not act in a way so it passes judgment on or presupposes the illegitimacy of religious beliefs and practices. *Masterpiece*, 138 S. Ct. at 1729. In *Masterpiece*, this Court held characterizing the petitioner's religious beliefs as "despicable" and "rhetorical" displayed bias. *Id.* While investigating a Christian baker's actions, the commissioner suggested his beliefs were not welcome in the community and compared them to the beliefs of those who justified the Holocaust and slavery. *Id.* This Court stated the commissioner's sentiment toward petitioner's beliefs were not only inappropriate, but violated the principle of neutrality because petitioner was entitled to respectful consideration. *Id.*

The record contains no evidence of hostility toward the Luddite religion. The CHBDA was drafted and implemented to combat the Hoof and Beak disease. R. at 6. The purpose of the CHBDA is to "protect Americans, their families, and their communities" which includes the Luddite community. Unlike *Masterpiece* and *Tenafly*, there is no evidence of religious hostility or selective enforcement. Rather the act applies uniformly to protect all citizens including the Luddites. As both the district court and the Eighteenth Circuit correctly held, "there is no factual support for the proposition that the mandate specifically targeted the Luddites." R. at 19, 39. The only evidence that could be construed as hostile, is an isolated comment by one of the security guards at the Delmont federal facility. R. at 9. The statement, however, did not rise to the level of hostility in *Masterpiece*, and was not regarding the contact-tracing program, but concerned Jones' violation of the social distancing laws. Without some evidence of hostility, it is impermissible to characterize the contact-tracing program as anything but neutral. Because the purpose of the contact-tracing program—to protect the American people—is neutral, the Court must determine whether it is generally applicable.

B. The Contact-Tracing Mandate Is Generally Applicable.

The contact-tracing mandate applies generally because it is not underinclusive and does not create a system of individualized exemptions. Every law is selective to a degree; the general applicability requirement focuses on whether a law is being enforced *only* against religious conduct. *Lukumi*, 508 U.S. at 542–43. General applicability requires the Court to determine two things: first, whether the government's interests are being pursued in an underinclusive manner against religious conduct; second, whether the government has created a system of discretionary individualized exemptions. *Id.* at 453. The CHBDA applies generally because it is not underinclusive and it does not create a system of subjective individualized exemptions.

1. The contact-tracing mandate is not underinclusive to stopping the spread of Hoof and Beak disease.

The contact tracing mandate is not underinclusive because stopping the spread of Hoof and Beak is being pursued against those most likely to spread the disease regardless of religious beliefs. The fact a law is selective to a degree does not mean it is underinclusive; only where the law subjects religious observers to unequal treatment will it be found underinclusive. *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987). The contact-tracing mandate is a necessary burden to stop the spread of Hoof and Beak. It is not underinclusive because society as a whole is subject to the burdens of the mandate, not just the Luddites.

Laws that burden a specific religion to pursue a governmental interest, but allow comparable secular conduct are underinclusive. *Lukumi*, 508 U.S. at 543. In *Lukumi*, this Court held a city's ordinances that solely burdened the Santeria religion, without prohibiting comparable secular conduct that undermined the same government interests were underinclusive. *Id.* Members of the Santeria religion practice animal sacrifice. *Id.* at 526. The City enacted several ordinances prohibiting sacrificing animals, stating their interest was to protect public

health. *Id.* at 528–29. But the ordinances exempted hunters, slaughterhouses, and other organizations. *Id.* at 543–45. This ordinance failed to prohibit nonreligious conduct that similarly violated the city's interest. *Id.* at 543. The under-inclusion was evident because while the ordinance pursued various interests, they only burdened the Santeria religion. *Id.*

The contact-tracing mandate is not underinclusive because society as a whole is subject to its burden. Whether one objects to the mandate because of privacy reasons, does not believe in Hoof and Beak, or has a religious objection the mandate imposes a civic duty to comply. Unlike *Lukumi*, the Luddites are not the only individuals subject to the contact-tracing mandate, but rather all individuals under the age of sixty-five. CHBDA §§ 42(a). The government interest pursued is stopping the spread of Hoof and Beak. *Id.* § 42(a)(1). The mandate is not underinclusive because it is furthering this interest by requiring compliance for all those who are most susceptible to the disease.[3] R. at 1. Regardless if a person has secular or religious objections, if they are prone to spreading Hoof and Beak they must comply with the mandate. Without some evidence that the mandate is permitting individuals with secular objections to undermine the government's interest, it simply cannot be underinclusive.

2. The contact-tracing mandate does not create a system of subjective individualized exemptions.

The contact-tracing mandate does not grant the government the authority to make subjective exemptions. If the mandate created a system where *subjective* individualized exemptions were routinely made it would not be generally applicable. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004); *see also Smith*, 494 U.S. at 884 (stating where the state has in place a system of individual exemptions it may not refuse to extend that system to

[3] Hoof and Beak primarily affects children and middle-aged adults. R. at 1.

cases of religious hardship). *Smith* does not stand for the proposition that a singular secular exemption automatically creates a claim for a religious exemption. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006). The mandate can still be applied generally because the exemptions are for objectively defined categories of individuals. *See Axson-Flynn*, 356 F.3d at 1298; *see also United States v. Lee*, 455 U.S. 252 (1982) (upholding a regulation exempting self-employed Amish from social security taxes, but not for Amish employers or employees). Since the contact-tracing mandate objectively exempts people over the age of sixty-five and those with severe health concerns it is generally applicable.

A generally applicable law may objectively define an exemption. In *Swanson by & Through Swanson v. Guthrie Independent School District No. I-L*, the Court found a school district's policy against part-time attendance, exempting particular categories of students, did not create a system of individualized exemptions. 135 F.3d 694 (10th Cir. 1998). The Swanson's, due to religious convictions, wanted their daughter to attend school part-time. *Id.* at 696. The school district had a policy against part-time enrollment, but exempted fifth-year seniors and special education students. *Id.* at 697. The court noted that the policy applied to all students who wished to attend part time for both secular and religious reasons. *Id.* at 698. While certain categories of students were exempt from this policy, it did not create a system of individualized exemptions. *Id.* at 701. Rather, it recognized a strict category of students eligible for the exemption. *Id.* Secular and religious students who did not fit into this category were ineligible. *Id.* Accordingly, because the policy created objective categories of individuals eligible for the exemption, the policy was generally applicable. *Id.* at 699.

Although a regulation contains discretion, if it is tied to objective criteria it will not be considered a subjective system of individualized exemptions. *Stormans Inc. v. Wiesman*, 794

F.3d 1064, 1081–82 (9th Cir. 2014). In *Stormans v. Wiesman*, the court held that although a rule's exemptions used the phrases "substantially similar" and "good faith compliance," this did not create a system of discretionary exemptions. *Id.* The "delivery rule" required pharmacies to deliver any lawful drug to a patient despite their religious objections. *Id.* at 1072–73. The rule, however, contained five exemptions and a catchall provision. *Id.* at 1073. Pharmacy owners complained that the good faith compliance exemption and the catchall provision could not be allowed without also granting a religious exemption. *Id.* at 1081. The court refused to find these were subjective, individualized exemptions because the exemptions were all tied to objective criteria. *Id.* at 1082.

Only when it is clear a law governs with unfettered discretion to assess particular conduct will a law be invalidated as not generally applicable. *Smith*, 494 U.S. at 884; *see also Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (holding the denial of unemployment benefits for failing to demonstrate "good cause" placed secular reasons for unemployment above religious ones); *Axson-Flynn*, 356 F.3d at 1299 (holding a program's willingness to grant religious exemptions, but denying Axson-Flynn's religious-based exemption demonstrated a system of individualized exemptions); *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012) (granting value-based referrals to other counselors, but not a religious referral created a system of individualized exemptions).

Only where an exemption would undermine the very purpose of the program could it invalidate the regulation. *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999). In *FOP Newark Lodge No. 12*, police officers had to be clean shaved because of the department's interest in uniformity. *Id.* at 306. The department granted exemptions for medical reasons, but refused to grant a religious exemption. *Id.* at 366. The court invalidated the rule because it created categorical secular exemptions, without religious ones. *Id.* Allowing these

medical exemptions undermined the department's interest in uniformity. *Id.* Alternatively, the court upheld exemptions for undercover officers because they were not held out as law enforcement and thus it did not undermine the department's interest in uniformity. *Id.*

The contact-tracing mandate exempts a narrow and objective category of individuals. Granting exemptions to people over the age of sixty-five is equivalent to the fifth-year senior exemption in *Swanson*. Identifying if an individual is over the age of sixty-five, requires no discretion. Analogous to *Swanson*, the person is eligible or not. The government does not have to subjectively determine anything. Luddites and nonreligious individuals over the age of sixty-five may be exempt from the mandate because they are less likely to spread Hoof and Beak. Granting this exemption helps further the government's interest by ensuring the individuals more likely to spread the disease, religious and nonreligious, have access to the SIM cards. Accordingly, this does not create a system of individualized exemptions.

The CHBDA also exempts "individuals suffering from a *debilitating illness*."[4] R. at 19 (emphasis added). This does not rise to a subjective, individualized exemption as was present in *FOP Newark Lodge No. 12*. Although the CHBDA characterizes this exemption as made on a case-by-case basis, it is more comparable to creating categories of individuals like *Swanson* and *Stormans* because it is being applied objectively; the government official is solely determining if the individual has a health condition. Distinguishable from *Sherbert*, *Ward*, and *FOP Newark Lodge No. 12*, the government is not weighing religious objections against secular objections, they are solely determining whether one falls into a certain, objective category.

While the medical exemption may seem analogous to that in *FOP Newark Lodge No. 12*, it is distinguishable. First, the FCC's task is much more grave than promoting uniformity. Seventy

[4] Exemptions have included individuals with late stage cancer, ischemic heart disease, and Alzheimer's disease. R. at 19.

million people have contracted this deadly virus, which continues to spread. R. at 1. Second, the medical exemption is more comparable to the undercover exemption which the court allowed because it did not affect the purpose of the regulation. Similarly, the Act was intended to slow the spread of Hoof and Beak, but persons with a debilitating illness are much less likely to be spreading this disease. Additionally, the government's interest is to promote the health of Americans, but requiring seriously ill individuals to expose themselves to comply with the mandate would be counterproductive. Granting exemptions for serious medical reasons does not undermine the FCC's purpose of protecting Americans, but furthers this purpose.

CONCLUSION

This Court should reverse in part and affirm in part. The portion of the judgment regarding the free exercise issue should be reversed, and the portion of the judgment regarding the free speech issue should be affirmed. The FCC Commissioner was entitled to summary judgment on both claims.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

BRIEF CERTIFICATE

Team 10 certifies that the work product contained in all copies of Team 10's brief is in fact the work product of the members of Team 10 only; and that Team 10 has complied fully with its law school's governing honor code; and that Team 10 has complied with all Rules of the Competition.

Team 10

TEAM 10

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APPENDIX "A"

CONSTITUTIONAL PROVISION

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.

APPENDIX "B"

RELEVANT STATUTES

Combat Hoof and Beak Disease Act § 42

(a): Each person living in the United States shall participate in a mandatory contact tracing program. R. at 5; CHBDA § 42(a).

> (1): The purpose of the contact tracing program is to "protect Americans, their families, and their communities by letting people know that they may have been exposed to Hoof and Beak Disease and should therefore monitor their health for signs and symptoms of Hoof and Beak." R. at 6; CHBDA § 42(a)(1).

(b): In establishing the contact tracing program, "federal facilities located in each state will be used to distribute SIM cards containing contact tracing software." R. at 6; CHBDA § 42(b).

> (1): The SIM cards "shall be installed in mobile phones." R. at 6; CHBDA § 42(b)(1).
>
> > (A): If citizens do not have a mobile phone "the centers shall distribute a mobile phone containing the contact tracing SIM card." R. at 6; CHBDA § 42(b)(1)(A).
> >
> > > (i): Upon receiving a SIM card or mobile phone, "every person's name, address, birth date, social security number, and phone number if not receiving a phone from the facility, will be logged." R. at 6; CHBDA § 42(b)(1)(A)(i).
> >
> > (B): Senior citizens over sixty-five years of age are exempt from this law. R. at 6; CHBDA § 42(b)(1)(B).
> >
> > (C): Health exemptions may be granted by the officials at each local federal facility on a case-by-case basis. R. at 6; CHBDA § 42(b)(1)(C).
> >
> > (D): No other type of exemption is permitted. R. at 6; CHBDA § 42(b)(1)(D).
> >
> > (E): Appeal authority is delegated to the FCC and must be filed within sixty days of receiving a denial. R. at 6; CHBDA § 42(b)(1)(E).
>
> (2): At the federal facilities, at a minimum, the following must be observed and enforced:
>
> > (1) "all persons must wear a mask"; and
> >
> > (2) "all persons shall observe social distancing and maintain a distance of six feet apart from one another, inside and outside of the building." R. at 6; CHBDA § 42(b)(2).

(c): Failure to comply with the Act "will result in punishment of up to one year in jail and/or a fine of up to $2,000." R. at 6; CHBDA § 42(c).

(d): Protestors are prohibited within sixty feet of the facility entrance, including public sidewalks, during operating hours. R. at 7; CHBDA § 42(d).

> (1): Groups of protestors are "limited to no more than six persons." R. at 7; CHBDA § 42(d)(1).
>
> (2): The zone must be "clearly marked and posted." R. at 7; CHBDA § 42(d)(2).

(e): Enforcement is "subject to discretion of local facility officials in acknowledgment of the varied location characteristics for each center." R. at 7; CHBDA § 42(e).

(f)(8): In an effort to allow for quick and effective implementation of the mandate, CHBDA § 42(f)(8) states "pursuant to 42 U.S. Code § 2000bb-3, the Religious Freedom and Restoration Act is inapplicable to this act." R. at 6; CHBDA § 42(f)(8).