Docket No. 20-9422

IN THE

SUPREME COURT OF THE UNITED STATES

January 31, 2021

LEVI JONES,

Petitioner

-against-

CHRISTOPHER SMITHERS,

Respondent

On Appeal from the Order of the
United States Court of Appeals for the Eighteenth Circuit In C.A. No. 20-CV-9422
(Hon. Sammie Miredell, Circuit Judge)

Brief for Respondent CHRISTOPHER SMITHERS

Team 2

QUESTION PRESENTED

I. Under the First Amendment, does the Government violate Mr. Jones' First Amendment right to free speech when it enforces a sixty-foot no protest buffer zone and six-person congregation limit in the interest of preventing the spread of a contagious disease and arrests those that exceed the congregation limit, directly interact with numerous individuals who are trying to comply with a government mandate, and refuse to leave after being given a prior warning?

II. Under the First Amendment, does the Combat Hoof and Beak Disease Act violate the Luddites' free exercise of religion when it establishes a mandatory nation-wide contact tracing program via mobile phones; seeks to stop the spread a deadly disease during a pandemic; does not specifically target the Luddites' religious practices; and provides exemptions only for groups that are unlikely to become infected or are medically unable to participate.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit rendered its decision in favor of Levi Jones with respect to free speech and in favor of the FCC with respect to the issue of free exercise. *Jones v. Smithers*, no. 20-CV-9422 (18th Cir. 2020). A petition for Writ of Certiorari was filed and granted. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

STATEMENT OF THE CASE

Hoof and Beak Disease is a novel and highly contagious disease, first detected in December 2019. (T. 1). The outbreak of Hoof and Beak disease has risen to the level of a global pandemic and has killed over two hundred thousand Americans. *Id.* There is currently no known cure for Hoof and Beak Disease; doctors and scientists are working hard to develop a vaccine, but they have not yet been successful and governments have imposed lockdowns to stop the virus from spreading. *Id*.

In the United States, Congress passed the Combat Hoof and Beak Disease Act ("the Act") with the dual aim of stopping the spread of the disease and alerting people who have come into contact with an infected person. (T. 1; 5–6). The Act's contact tracing program is mandatory. (T. 5). There are limited exemptions to the contact tracing mandate. *Id.* As the disease predominately impacts younger people—children, young adults, and middle-aged adults––all seniors over the age of sixty-five are exempt. *Id*. Also, those with certain health conditions, such as late-stage cancer, ischemic heart disease, Alzheimer's disease, and severe disabilities that make it difficult to use a phone, may be granted an exemption by local officials on a case-by-case basis. (T. 6, 22). No other exemptions are permitted under the law. *Id.* The Act aims for "quick and effective implementation of the mandate." (T. 6).

The Federal Communications Commission ("FCC"), headed by Commissioner Christopher Smithers, oversees the contact tracing program. (T. 5). The contact tracing program is conducted through mobile phones with federally provided SIM cards. (T. 5–6). Individuals must visit these federal facilities where they will be provided their SIM card, or in the event that they do not own a mobile phone, they will be provided a mobile phone and a SIM card. (T. 6). In order to ensure that the SIM card distribution process does not become a super-spreader event, the Act provides essential public health regulations that apply to all distribution centers. *Id*. Specifically, at the distribution centers "(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." *Id.* (internal quotations omitted). 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." *Id.*

The Delmont-based Church of Luddite, led by Levi Jones, has refused to comply with the Act and claims that the mandate interferes with its free exercise of religion, as protected by the First Amendment. (T. 2–3). The Church of Luddite is a decentralized religion and adherents follow their local "Community Orders" — rules established and administered by the local congregation. (T. 4). The Community Orders vary from one congregation to another. *Id.* For instance, although Mr. Jones' Delmont Community Orders mandate that Luddites "shall be skeptical of all technology," the neighboring Eastmont Luddite Community permits the use of mobile phones as a "necessary tool" for maintaining family and business ties. (T.5; 31). Although the Delmont Luddite community is skeptical of technology, they have a landline phone next to the main church building which they use for emergency purposes. (T. 5; 31).

Throughout the roll-out of the Act, there have been protests at federal SIM card distribution centers which led Congress to amend the Act to prohibit people from congregating

"within sixty feet of the facility entrance, including public sidewalks, during operating hours." (T. 6–7). The protest zone must be "clearly marked and posted" and protests are limited to "no more than six people." (T. 33). Due to "the varied location characteristics for each center," local officials were given discretionary enforcement power. *Id*.

The Delmont center began distributing phones and SIM cards on May 1, 2020. Shortly after the facility opened, Mr. Jones and six other Delmont Luddites, showed up to protest. (T. 7). Although the facility had clearly marked the "buffer zone," Mr. Jones' group, which congregated seventy-five feet from the entrance, repeatedly crossed into the buffer zone to talk to people waiting for their SIM cards. *Id*. Mr. Jones' group wore masks and generally stayed six feet apart; however, the group communicated their opposition to the contact tracing mandate by speaking directly person-to-person and did not use any pamphlets or signage. (T. 7, 25).

Also at the Delmont center were members of the Mothers for Mandates ("MOMs"), a group of mothers who have lost loved ones to Hoof and Beak and who support the mandate. (T. 2; 8). Unlike the Luddites, the MOMs held signs and provided informative pamphlets without approaching people. (T. 8). Although some of the MOMs were located just inside of the buffer zone, they distributed their pamphlets from a table that was six feet away from them, and remained in one place, fully masked, and remained socially distanced. *Id.*

On May 1, 2020, after several hours of protesting by Mr. Jones' group, the Delmont Federal Facilities Police approached the group and instructed them to leave because the group exceeded the six-person limit. *Id*. The MOMs group was not approached for being five feet inside the buffer zone. *Id*. When Mr. Jones refused to leave after being warned, he was arrested. *Id*. Mr. Jones was fined $1,000 and spent four days in jail. *Id*.

On May 6, 2020, Mr. Jones and five other Luddites returned to the Delmont distribution center to protest again. (Tr. 8-9) This time, they had a small table outside the buffer zone but continued to walk into the zone to speak to people. (T. 8–9). A group of seven MOMs were also present but were "properly distanced and calm." (T. 9; 13). Both groups followed the mask requirements. (T. 8–9). Mr. Jones' group continued to "enter the buffer zone and directly approach people in line to speak with them," creating health risks for people who were trying to obtain a SIM card. (T. 12–13; 28). When the Delmont facility police again asked Mr. Jones to leave, acknowledging that he had already been told this behavior violated the Act, Mr. Jones refused to leave and claimed that his group was in compliance. (T. 8–9). Only after Mr. Jones refused was he arrested. (T. 28). He was charged with five days in jail and a $1,500 fine. *Id.*

This appeal arises out of the decision by the United States Court of Appeals for the Eighteenth Circuit that held that the Act did not violate Mr. Jones' free exercise of religion but did violate his free speech. (T. 41). Mr. Jones subsequently appealed and this Court grated certiorari. (T. 42).

SUMMARY OF THE ARGUMENT

The Combat Hoof and Beak Disease Act ("the Act") is a content neutral law that is narrowly tailored to the government's purpose and leaves open ample alternative channels for communication. The government did not violate Mr. Jones's First Amendment rights because Mr. Jones was arrested not for his speech, but rather for his conduct inside the buffer zone. A restriction on speech is permissible when the restriction does not reference content alone. *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 94, 96 (1972). The Government's enforcement of the Act is narrowly tailored to prevent the spread of the virus. Further, the Act provides Mr. Jones with alternative channels of speech because he could limit his protest group and remain

outside the buffer zone while continuing to spread his message. For these reasons, the Act does not violate the First Amendment.

Additionally, this Court should affirm the Court of Appeals ruling on the free exercise issue because the Act is not violative of the Free Exercise Clause. This Court has held that a law that is neutral and generally applicable may withstand constitutional scrutiny even when it incidentally infringes on religious practices. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Because the Act was enacted out of a need to safeguard public health, not religious animus towards the Luddites, it is neutral. Similarly, because the Act only provides exemptions for people who are less likely to become infected with or spread the disease, the limited exemptions do not destroy the Act's general applicability. Moreover, even if the Act was not neutral and generally applicable it would still be constitutional because safeguarding public health has long been regarded by this Court as a compelling governmental purpose. For these reasons, the Act is not violative of the First Amendment.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS ERRED IN CONCLUDING THAT THE SIXTY-FOOT NO PROTEST BUFFER ZONE VIOLATED MR. JONES' FIRST AMENDMENT RIGHT TO FREE SPEECH BECAUSE THE ORDINANCE WAS CONTENT-NEUTRAL, NARROWLY TAILORED, AND LEFT OPEN AMPLE CHANNELS OF COMMUNICATION.

The sixty-foot buffer zone was a valid time, place, and manner regulation on Mr. Jones' First Amendment right to free speech. Regulations on speech are "valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984). The government may restrict speech in a public forum so long as the regulation is content-neutral. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46

(1983). Here, the sixty-foot buffer zone was a content-neutral regulation because the ordinance restricts the number of protestors within the buffer zone rather than the viewpoint of the protestors. Further, the sixty-foot buffer zone is narrowly drawn to serve the government's interest in preventing the spread of Hoof and Beak because the buffer zone prevents the SIM card distribution from becoming a super-spreading event. The buffer zone also allows for alternative channels of protest. Mr. Jones could have conveyed his message without physically interacting with people in the buffer zone, or he could have had a smaller group. Assuming arguendo that the regulation is deemed content-based, the government's interest in combatting a global pandemic is so compelling that the regulation would satisfy strict scrutiny. For these reasons, the ordinance is constitutional.

A. The Restriction on Mr. Jones' Speech was Content-Neutral Because the Ordinance Provided a General Ban on Gatherings of Over Six People and Mr. Jones' Arrest Was Not a Consequence of His Viewpoint.

The Combat Hoof and Beak Disease Act ("the Act") is a content-neutral regulation because it regulates the manner in which people can advocate around facility entrances rather than the content of their advocacy. *See Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 94–96 (1972) (holding that "the government may not grant the use of a forum to people whose views it finds acceptable and deny use to those wishing to express less favored or more controversial views"). "Government regulation of expressive activity is content-neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark,* 468 U.S. at 293).

This Court has found that buffer zones are content-neutral restrictions on speech when the restrictions were not directed at the speech or conduct at issue. In *McCullen v. Coakley*, for example, the Court held that an ordinance imposing a thirty-five-foot buffer zone around an abortion center was content-neutral because the ordinance restricted where petitioners stood

rather than what they said. *McCullen v. Coakley*, 537 U.S. 464, 464 (2014). The court held that a "neutral law does not become content-based simply because it may disproportionately affect speech on certain topics." *Id.* at 465. Likewise, in *Virginia v. Hicks*, the Supreme Court found constitutional a trespass policy which permitted police officers to give trespass citations to those who lacked a legitimate purpose to be on the premises. *Virginia v. Hicks*, 539 US 113, 113–17 (2003). The Court affirmed the conviction after a non-resident trespassed in violation of the policy, reasoning that the arrest was not because of the non-resident's speech, but rather the physical trespass. *Id.* at 123.

In addition, courts have found that Government restrictions on non-essential congregations in response to a global pandemic are content-neutral. In *Geller v. de Blasio*, a plaintiff brought a First Amendment action contesting Mayor de Blasio's executive order restricting non-essential gatherings. *Geller v. de Blasio*, 20CV3566 (DLC), 2020 WL 2520711, at *4 (S.D.N.Y. May 18, 2020). The District Court found that the ordinance was content-neutral because it "d[id] not target the contents of the speech itself" but instead the "secondary effects of public gathering—the spread of a novel virus [with] no cure or effective treatment." *Id*.

Moreover, absent a showing of a pattern of favoritism, courts have afforded wide discretion toward law enforcement in enforcing statutes. Government restrictions on speech are permissible where there is no arbitrary discretion awarded to those enforcing the regulations. *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 498 (1939). In *Cameron,* petitioners contended that a Michigan Anti-Picketing Law had selectively enforced restrictions on picketing. *Cameron v. Johnson*, 390 U.S. 611, 622 (1968). The petitioners argued that "selective enforcement was shown by [the] failure to arrest" individuals who picketed during a civil rights demonstration. *Id.* at 621. The Supreme Court rejected the challenge finding it was

"at least [] reasonable to infer from the record that the authorities did not regard [the contested individuals] conduct… as violating the statute." *Id*. at 621. *C.f. Thomas v. Chicago Park Dist*., 534 U.S. 316, 320 (2001) ("abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity."); *see also Lighthouse Fellowship Church v. Northam*, 458 F.Supp.3d 418, 425 (E.D. Va. 2020) (finding that government regulation of gatherings of ten or more people was not a form of "unconstitutional discretion" when the Governor provided sufficient guidance to the state officials regarding the permitted gatherings).

Here, the ordinance by its own terms provides a general ban on all protestors within a buffer zone, regardless of the views of the protestors. Section 42(d) of the Act provides: "Protestors are prohibited within sixty feet of the facility entrance, including public sidewalks, during operating hours" and are "limited to no more than six persons" in a "clearly marked and posted" buffer zone. (Tr. 33). Thus, the Act only restricted where Mr. Jones could stand, not what he could say. Like in *McCullen*, where the Supreme Court found that the law was not content-based when it disproportionately affected certain speech, here, the fact that the restrictions burden Mr. Jones' speech disproportionately does not render the law a content-based restriction. *McCullen*, 537 U.S. at 465. Rather, like in *Geller*, the restriction was aimed at "the spread of a novel virus" that has yet to be cured rather than the content of Mr. Jones' message. *Geller*, 2020 WL 2520711, at *4.

Additionally, Mr. Jones' arrest was not a consequence of his viewpoint. The Police told Mr. Jones' group to leave on May 1 because the group consisted of over seven people and "mov[ed] in and out of the buffer zone;" their conduct violated the Act, not their speech (Jones Aff. ¶ 10). Mr. Jones was told to leave again on May 6 for similar behavior. (Jones Aff. ¶ 11).

Like the petitioner in *Hicks* who refused to leave after being given prior warning of the ordinance violation, Jones refused to leave on May 6 after being warned by the police on May 1. *Hicks,* 539 U.S at 123; (Jones Aff. ¶ 11). In fact, Mathers, the founder of the MOMs, testified that she "watched Mr. Jones' arrest on both occasions… the Federal Facilities Police officers asked him to leave both times, but he refused. It was only after he refused that they arrested him." (Mathers Aff. ¶ 8). Thus, it was reasonable for the officers to consider Jones' behavior as violative of the statute as Jones was a repeat offender who refused to listen to law enforcement's requests. *Id.*

Importantly, Mr. Jones' conduct inside the buffer zone was more intrusive than the MOMs conduct. The MOMs stood six feet away from their table, "remain[ed] stationary outside the Federal Facilities," and "d[id] not initiate contact" with people in line (Jones Aff. ¶ 7; Mathers Aff. ¶ 6). In contrast, the Luddites approached people directly and "their interactions created additional health risks for those trying to obtain a SIM card." (Tr. 12-13). These dissimilarities show that there is no "pattern of unlawful favoritism." *Thomas,* 534 U.S. at 320. For these reasons, the ordinance is content-neutral.

Assuming arguendo that the regulation was content-based, the Government would still meet the threshold for strict scrutiny given the severity of the Hoof and Beak pandemic. Content-based laws can withstand constitutional scrutiny if the law passes strict scrutiny—or is narrowly tailored to serve a compelling state interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Courts have eased the narrow tailoring requirement when confronted with crucial interests. *See Williams-Yulee v. Florida Bar* 135 U.S. 1656, 1669-71 (2015). In *Geller* the Southern District of New York acknowledged that "[w]hile a measure restricting all public group activity may not likely be found narrowly tailored in ordinary times, these times are extraordinary." *Geller*, 2020 WL 2520711, at *4. Applying *Jacobson,* the *Geller* court concluded

that the ban protected public health and safety in a historic time. *Id. See Jacobson,* 197 U.S. 11 at 27 (holding that the Government had the authority to mandate vaccinations under its police power during a health crisis). Thus, even assuming the Act was content-based, it still would surpass this elevated level of scrutiny.

Thus, the ordinance did not violate Mr. Jones' First Amendment right to free speech.

B. The Content-Neutral Regulation was a Valid Time, Place, and Manner Restriction on Speech Because the Ordinance was Narrowly Tailored to Serve a Compelling Government Interest of Preventing the Transmission of Hoof and Beak and Mr. Jones Had Alternative Means to Convey His Speech.

The ordinance was a valid time, place, and manner restriction on Mr. Jones' speech because it was narrowly tailored to serve a compelling interest that left ample alternative means for the Luddites to convey their message. The government is permitted to restrict speech in a public forum. *Heffron v. Int'l Soc. For Krishna Consciousness*, 452 U.S. 640, 647 (1981) ("the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired"). While the government cannot regulate the content of speech, it can place reasonable time, place, and manner restrictions on the speech to ensure public safety. *Cox v. New Hampshire*, 312 U.S. 569 (1941). Although speech is generally protected, if the speech is "likely to produce clear and present danger of serious substantive evil," it is not protected. *Terminello v. Chicago,* 337 U.S. 1, 4 (1949).

Courts have affirmed buffer-zone restrictions near health-care facilities when the Government's speech restrictions were narrowly tailored to meet the interest of preventing physical harm to users of the facilities. In *Hill v. Colorado*, the State enacted a statute that made it unlawful to come within eight feet of another person while inside a one-hundred-foot buffer zone of any health care facility. *Hill v. Colorado*, 530 U.S. 703, 707 (2000). The Supreme Court found the statute narrowly tailored because Colorado responded to a "substantial and legitimate

interest in protecting these persons from unwanted encounters, confrontation, and even assaults" where "those who attempt[ed] to enter health care facilities—for any purpose—[were] often in particularly vulnerable physical and emotional conditions." *Id*. at 729. *C.f McCullen,* 573 U.S. at 488, 490-92 (holding a buffer zone was not narrowly tailored when the restriction was unrelated to the obstruction of access to the facility; burdened too much 'one on one communication;' and was overinclusive because the state had less burdensome ways to enforce harassment statutes).

Moreover, courts have held restrictions on community gatherings to be narrowly tailored when the restrictions aim to prevent the spread of disease. In *Antietam Battlefield KOA v. Hogan*, plaintiffs challenged a Governor's order enacted in response to Covid-19. *Antietam Battlefield KOA v. Hogan*, 461 F.Supp.3d 214, 223 (D. Md. 2020). The order prohibited gatherings that exceeded ten people and ordered the closure of non-essential businesses. *Id*. at 224. The court affirmed the order, reasoning that "[r]educing the spread of COVID-19 is a legitimate and substantial government interest" and preventing large gatherings "would be achieved less effectively absent the regulation.'" *Id*. at 235. The court also noted that "since the challenged orders [were] public health measures to address a disease outbreak, *Jacobson* provide[d] the proper scope of review." *Id*. at 228 (*citing Jacobson v. Massachusetts,* 197 U.S. at 27). The scope of *Jacobson*, as articulated in *Antietam Battlefield,* provides that plaintiffs must prove "the Government's order had no 'real or substantial relation' to protecting public health or that [the orders were] 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Id*. *See also Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 353 (4th Cir. 2011) ("[T]he state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest"); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997)

("[T]he prison's interest in preventing the spread of tuberculosis, a highly contagious and deadly disease, is compelling").

Additionally, courts have found ample alternatives to group congregations. In *Lighthouse Fellowship Church v. Northman*, the District Court for the Eastern District of Virginia held that a regulation on gatherings of groups over ten people was permissible in order to prevent the spread of a contagious disease because the advantages of meeting in large groups could be accomplished by "gathering in groups of ten or fewer multiple times per day or week, mailing letters, sending emails…or deploying some combination of all these methods." *Lighthouse Fellowship Church v. Northam*, 458 F.Supp.3d 418, 437 (E.D. Va. 2020) (citing *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984)). In addition, in *Geller*, the plaintiff, in response to Mayor de Blasio's restriction on congregation, argued that a "single person protesting in public [was] not a perfect substitute for public group protests". *Geller*, 2020 WL 2520711, at *4. The District Court for the Southern District of New York found that the plaintiff had alternative channels for protesting, since she was "free to express her discontent … by protesting in public on her own." *Id*.

Here, the Government's restriction on Mr. Jones' speech is narrowly tailored to its interest in reducing the spread of Hoof and Beak. First, the severity of the Hoof and Beak pandemic requires enforcing social distancing. Hoof and Beak has forced governments across the globe to respond with lockdowns to curb its spread while scientists work tirelessly to find a vaccine. (Tr. 1). In other words, the interest is compelling because the State aims to prevent the spread of a communicable disease. *Workman*, 419 F. App'x at 353. This interest would not be achieved without the regulation, like in *Antietam Battlefield*, because any confrontation in the buffer zone could lead to the transmission of the deadly disease. *Antietam Battlefield,* F.Supp.3d,

at 235. As the Delmont District Court articulated, the present case is "[u]nlike any of the abortion cases" because allowing people to congregate in the zone outside the Delmont facility presents "a significant physical danger." (Tr. 15). Like in *Hill*, this danger extends to vulnerable populations who are entering the facilities for necessary services. *Hill*, 530 U.S. at 729. Moreover, similar to *Jacobson,* where Massachusetts' compelled vaccination statute was upheld because it was vital to the public health and safety, here, enforcing the buffer zone restrictions and congregation limitations are vital to protecting the community against Hoof and Beak. *Jacobson,* 197 U.S. at 11. Hoof and Beak is not just a disturbance, it is a grave danger. *Terminello,* 337 U.S. at 4.

Second, the number of people at risk is substantial. Since *all* residents under the age of 65 are required to go to the location to get the SIM card—with a small exemption for those with underlying health conditions—the risk of harm is much greater here than in *McCullen* or *Hill* where individuals were not *compelled* to attend a particular location at a particular time. In *McCullen* and *Hill* the government interest was to protect patients at women's reproduction health facilities—a very limited group. However, there is a captive audience here. *See Kovas v. Cooper,* 336 U.S. 77 (1949) (banning sound trucks because the listener could not turn away). It is impossible for law abiding citizens to turn away from the potential Hoof and Beak exposure because all individuals under the age of sixty-five are required to go to the location to get the SIM card, unless they meet a specific health exemption.

Third, the ordinance was not overinclusive since the threat of disease transmission arises from standing in the zone itself. The State cannot enforce other statutes as an alternative to the ordinance like in *McCullen* because Hoof and Beak is "primarily spread person-to-person" and is highly contagious (Tr. 1); *McCullen,* 573 U.S. 464 at 488.

Last, the Government did not prohibit Mr. Jones from conveying his speech in an alternative manner because he could have reduced his group to five people. Like in *Lighthouse Fellowship*, where the petitioners could "mail[] letters," or in *Antietam Battlefield*, where the petitioners could have "perform[ed] services in groups of ten or fewer people" here, there is nothing in the record to suggest that Congress prevented Mr. Jones from conveying his message in an alternative manner. *Lighthouse Fellowship*, 458 F.Supp.3d at 437; *Antietam Battlefield*, 461 F.Supp.3d at 236. As in *Geller*, where the court found that "protesting in public on [one's] own... [was an] acceptable alternative to public group protests," it was a viable alternative here. *Geller*, 2020 WL 2520711, at *4. While Mr. Jones contends that "the only acceptable way to tell people our message is to speak with them," the Government regulation did not impose an outright ban on speech. It only imposed a number and spacing restriction inside the buffer zone. Jones Aff. ¶ 7; (Tr. 15). Therefore, the government's restriction is a valid time, place, and manner regulation on the speech.

For the foregoing reasons, the Act did not violate Mr. Jones' right to free speech.

II. UNDER THE FIRST AMENDMENT, THE COMBAT HOOF AND BEAK DISEASE ACT IS CONSTITUTIONALLY PERMISSIBLE BECAUSE IT IS A NEUTRAL AND GENERALLY APPLICABLE LAW AND THE FEDERAL GOVERNMENT HAD A COMPELLING INTEREST WHEN IT ENACTED THE LAW.

The Combat Hoof and Beak Disease Act ("the Act") is a neutral and generally applicable law and does not violate the Free Exercise Clause of the First Amendment. The Supreme Court has ruled that a neutral and generally applicable law does not need to be "justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). The Act was enacted by the US government in response to the novel and deadly Hoof and Beak disease pandemic. The purpose of the law is to protect American families from

continuous spread of the deadly virus. To accomplish this goal, the law establishes a contact tracing program that mandates near universal compliance and offers only limited exemptions for the elderly and those with qualifying health conditions. Accordingly, the law is neutral and generally applicable in accordance with the Free Exercise Clause of the First Amendment and was enacted to further a compelling state interest.

A. The Act is Facially and Operationally Neutral Because Its Object is to Halt the Spread of Hoof and Beak Disease, Not to Inhibit Luddites From Practicing Their Faith, and the Act is Not Narrowly Drawn to Target the Luddites.

The Act is a neutral law under the Free Exercise Clause because the purpose of the law is to effectively alert American families to potential exposure to the Hoof and Beak virus and prevent further spread, not to target specific religious conduct. The Free Exercise Clause offers religious persons strong protections against government interference, but "even when the action is in accord with one's religious convictions, (it) is not totally free from legislative restrictions." *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (internal quotations omitted). Since the Supreme Court decided *Employment Div., Dept. of Human Resources of Oregon v. Smith* in 1990, the prevailing Free Exercise Clause test is whether a law is generally applicable and has a neutral purpose unrelated to the exercise of religion. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878–79 (1990). If the law is neutral and generally applicable, then the court applies deferential rational basis review rather than strict scrutiny. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075–76 (9th Cir. 2015). The Supreme Court clarified in *Lukumi*, that while neutrality and general applicability are connected, each prong should be evaluated separately. *Lukumi*, 508 U.S. at 534–35. A law is not neutral when "the object of a law is to infringe upon or restrict practices because of their religious motivation" and the law may lack neutrality on its face or in its application. *Lukumi*, 508 U.S. at 533 (citing *Smith*, 494 U.S. at 878–879). In short, a law is not neutral if it amounts to a "religious gerrymander;" a law that

appears neutral on its face yet is impermissibly drawn to target religious activity. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

This Court held in *Lukumi*, that a law lacks neutrality when it is enacted to target religious conduct. *Lukumi*, 508 U.S. at 524. In *Lukumi*, a city council enacted an ordinance that prohibited animal sacrifice upon learning that a Santeria church was opening—a religion that practiced animal sacrifice. *Id*. at 526. The law was not only explicitly enacted out of residents' "concern that certain religions ... are inconsistent with public morals, peace or safety," but it also specifically outlawed animal killings that were part of a "sacrifice" or "ritual" and allowed other slaughter like butchery, even for kosher purposes. *Id*. at 534–36. The Court found that the law was not neutral because its object was to suppress religion. *Id.* at 542. This ordinance, the Court reasoned, lacked facial and operational neutrality. *Id.* at 535. It lacked facial neutrality because it directly mentioned religious killings and it lacked operational neutrality because it suppressed more religious conduct than necessary to achieve its purpose. *Id.* at 542. Thus, the Court found that the law was a "religious gerrymander" that impermissibly targeted Santeria practices. *Id*. at 535 (quoting *Walz*, 397 U.S. at 696 (Harlan, J., concurring)).

Applying the neutrality inquiry laid out in *Lukumi*, the District Court for New Mexico found a public health order that prohibited mass gatherings and imposed capacity limits on non-essential businesses and houses of worship due to the COVID-19 pandemic was neutral because its object was not to restrict religious practices. *Legacy Church, Inc. v. Kunkel*, 472 F. Supp. 3d 926, 1035 (D.N.M. 2020). In order to curb the spread of the deadly COVID-19, New Mexico imposed public health measures that required houses of worship and businesses to limit their capacity to twenty-five percent and practice social-distancing. *Id.* at 1033. In *Legacy Church*, the plaintiff—a megachurch with a congregation of 23,000 parishioners—claimed that the order

violated the Free Exercise Clause because it restricted its capacity for in-person services. *Id.* at 935; 960. The church argued that the law lacked neutrality because it imposed special disabilities on religious institutions. *Id.* at 1033. The court disagreed, however, because religious institutions were subject to the same public health restrictions as secular retail institutions. *Id.* Additionally, the court reasoned that the object of the law was to safeguard public health and the law applied to houses of worship because, "[the] churches plans…endangered the public health, not because of their religious nature, but because they involved masses of people in closed spaces and in close proximity," which had been shown to increase the spread of the virus. *Id.* at 1035. As such, the court held that the order did not violate the Free Exercise Clause because its "object [was] something other than the infringement or restriction of religious practices." *Id.* at 1035 (quoting *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649–50 (10th Cir. 2006)).

First, facial neutrality depends on whether the law directly refers to religious practices in its text. *See Lukumi,* 508 U.S. at 533. Unlike the laws in *Lukumi* and *Legacy Church*, which both referenced religious practices or institutions either in the text of the law or the reasons behind it, the Act makes no mention of religious practices. (T. 1-2). Instead, the legislation treats secular and religious people equally, requiring "each person living in the United States [to] participate in a mandatory contact tracing program." (T. 5). Thus, the Act is facially neutral.

However, as the Court made clear in *Lukumi*, "[f]acial neutrality is not determinative" and a law may still lack neutrality when its object is to "target[] religious conduct for distinctive treatment." *Lukumi,* 508 U.S. at 533–34. Unlike *Lukumi*, in the present case, there is no indication that religious animus toward the Luddite community animated the Act. Instead, the Act is more closely analogous to the order at issue in *Legacy Church*, which imposed capacity caps on houses of worship and retail facilities to enforce social-distancing health guidelines.

Legacy Church, 472 F. Supp. at 1033. Here, the object of the Act is not to prevent Luddites from carrying out religious practices, but to stop the spread of a deadly virus and to promptly notify families of potential exposure so that they can take appropriate precautions. (T. 6). Additionally, unlike the ordinance in *Lukumi*, which prohibited specific ritualistic animal sacrifices, the Act uses broad language and does not provide specific carveouts that indicate the targeting of Luddites. (T. 5-6). Because the object of the Act is not to suppress specific religious beliefs or conduct, it is operationally neutral.

For these reasons, the Act is neutral under the Free Exercise Clause.

B. The Act is a Generally Applicable Law Because It is Not Underinclusive of its Stated Purpose and It Does Not Selectively Impose Burdens on The Luddites' Religious Conduct.

The Act is a generally applicable law under the Free Exercise Clause because it treats all people under the age of sixty-five equally and its legislative purpose depends on maximum compliance with the contact tracing program. In addition to neutrality, a law must also be generally applicable to receive deferential, rational basis review under the Free Exercise Clause. *Smith,* 494 U.S. at 878. The Supreme Court has long recognized that the government may constitutionally regulate actions to maintain law and order, even when those regulations have an incidental effect on religious conduct. *E.g., Reynolds v. United States*, 98 U.S. 145, 164–66 (1878) (holding that the government may constitutionally enact laws that interfere with religious practices); *United States v. Lee*, 455 U.S. 252, 259 (1982) (reasoning that the pursuit of an "organized society…requires that some religious practices yield to the common good"). For a law to be generally applicable, it must not be underinclusive of secular conduct that threatens the stated governmental interest, *Lukumi*, 508 U.S. at 544, and it must apply equally to conduct, regardless of its religious motivation. *Smith*, 494 U.S. at 878.

This Court held in *Smith,* that when a criminal law treats specific conduct the same, whether such conduct is undertaken for religious or secular purposes, the law is generally applicable in accordance with the Free Exercise Clause. *Smith,* 494 U.S. at 885. In *Smith*, an Oregon law criminalized the consumption of peyote—a drug with religious significance to Native Americans. *Id.* at 874. Plaintiffs, observant Native Americans who had been penalized for their spiritual use of peyote, argued that the law unconstitutionally interfered with their free exercise of religion, and that their use should be exempt. *Id.* at 876–78. The Court disagreed, and held that the law did not violate the Constitution because it outlawed the use of peyote for religious and recreational purposes. *Id.* at 877. Underlining an important distinction, the Court reasoned that a "[s]tate would be [violating] free exercise if it sought to ban…acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Id.* (internal citations omitted). Thus, because the state prohibited using peyote regardless of religious motivation, it was a permissible and generally applicable law. *Id.* at 885.

Similarly, in *Stormans Inc. v. Weisman*, the Ninth Circuit Court of Appeals found that a law's general applicability was not undermined when it included specific exemptions to a general policy so long as the exemptions reasonably furthered the governmental purpose. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1071 (9th Cir. 2015). Washington State enacted a law that required pharmacies to timely fill all prescriptions, including emergency contraceptive prescriptions. *Id.* The law provided no exemption for pharmacy owners who opposed emergency contraceptives on religious grounds, but it did enumerate other acceptable reasons why a pharmacy could refuse to timely fill a prescription, such as suspected fraud or a patient's inability to pay. *Id*. at 1072–73. The pharmacy challenged the law, arguing that the lack of a religious exemption violated their religious freedom when other exemptions had been provided.

Id. at 1081–82. The court disagreed that the absence of a religious exemption destroyed the law's general applicability, explaining that "what makes a system of individualized exemptions suspicious is the possibility that certain violations may be condoned when they occur for secular reasons but not when they occur for religious reasons." *Id*. Thus, the court reasoned that because the pharmacy regulation aimed to promote patient safety and ensure that patients received time sensitive medication, the exemptions included in the law were consistent with the permissible legislative purpose and providing religious exemptions would undermine that purpose. *Id.* at 1071, 1081.

In the present case, the Act is generally applicable because it does not selectively impose burdens on religiously motivated conduct. Like the peyote prohibition in *Smith*, the Act does not consider whether one's failure to participate in the contact tracing program is for secular or religious reasons, and treats everyone under sixty-five equally. (T. 5–6). In *Smith,* peyote consumers were punished regardless of whether they used the drug during a religious ceremony or recreationally. *Smith*, 494 U.S. at 877. Similarly, the Act punishes all who fail to comply with the Act—for any reason—with "up to one year in jail and/or a fine of up to $2,000." (T. 6).

Second, the exemptions included in the Act do not destroy its general applicability because the exemptions further the government's purpose. The purpose of the Act is to protect American families from the virus by promptly notifying them if they have been exposed to the disease and by encouraging them to monitor their symptoms and take precautions. (T. 6). In essence, the main purpose of the law is to quickly and effectively notify people if they have been exposed. The Act exempts the elderly and permits individuals with health conditions to apply for a specific exemption. (T. 6). Like in *Storman*, these exemptions further the general purpose to quickly alert and trace people in order to stop the spread of the virus. The exemption of the

elderly falls in line with the purpose of the law because elderly people are less likely to contract the disease and their exclusion is not a danger to public health. (T. 1). Additionally, exemptions have been extended to specific groups of people with health conditions and disabilities that make it difficult for them to use phones. (T. 22). Thus, because these specific groups of people are unlikely to be able to answer the phone, mandating their participation does not further the Act's goal of delivering effective exposure notifications over the phone. The Luddites, on the other hand, are accustomed to using telecommunication technology for emergency purposes and there is no indication that they are physically or mentally incapable of answering a phone call. (T. 25). Additionally, the facts available do not indicate that the Luddites are any less susceptible to the deadly virus than the general population and there is no health reason why they should be excluded from the contact tracing program.

Therefore, the Act is generally applicable in accordance with the Free Exercise Clause.

C. Although the Act is Neutral and Generally Applicable, Assuming Arguendo That It Was Not, It Would Nonetheless Survive Strict Scrutiny Because Protecting Americans During The Public Health Crisis and Preventing Spread of the Deadly Hoof and Beak Disease Are Compelling Interests.

Although The Act is a neutral and generally applicable law—and should therefore be subject to rational basis review—assuming arguendo that it is not, it would still survive strict scrutiny because it was enacted to further compelling governmental interests: to protect Americans during the ongoing public health crisis and to prevent the spread of a deadly disease. This Court has recognized that the free exercise of religion is not absolute. *See Sherbert*, 374 U.S. at 403 ("even when the action is in accord with one's religious convictions, it is not totally free from legislative restrictions"); *Reynolds*, 98 U.S. at 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."). A law that is neither neutral nor generally applicable may still be

constitutional if it is justified by a compelling interest and is sufficiently tailored to that interest. *Lukumi*, 508 U.S. at 531–32. Public health crises present acute challenges and this Court has found that efforts to respond to these crises fall within the scope of a state's police power. *Jacobson*, 197 U.S. at 24–26. In public health cases, this Court has indicated that the legislature is owed some degree of deference regarding its chosen response. *Id.* at 30–31.

This Court, in 1905, held that a government response to a serious public health threat deserves deference. *Jacobson*, 197 U.S. at 30–31. In *Jacobson,* Massachusetts faced a smallpox outbreak and permitted local health authorities to require residents to be vaccinated and imposed penalties for noncompliance. *Id.* at 12–13. The Court upheld the law and reasoned that "reasonable regulations … [to] protect the public health and the public safety" clearly fall under a state's police power and that "[t]he mode or manner in which those results are to be accomplished is within the discretion of the state," so long as it does not "contravene the Constitution." *Id.* at 25. In other words, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. Vaccinations, the Court found, were a reasonably effective way to prevent or slow the spread of the smallpox epidemic and the compulsory vaccination program was upheld because it was not for the Court to choose between multiple reasonable policy options. *Id.* at 30–31.

More recently, courts have evoked the reasoning and holding of *Jacobson* to uphold laws challenged under the Free Exercise Clause of the First Amendment. *See Workman,* 419 F. App'x, at 353; *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015). For instance, the Court of Appeals for the Second Circuit held that the New York law requiring children to receive certain vaccinations to enroll in public school did not violate the Free Exercise Clause. *Phillips*, 775 F.3d, at 543. In *Phillips*, New York provided children a religious exemption from vaccination

requirements, but the state reserved the right to exclude unvaccinated children from school in the event of an outbreak. *Id.* at 540–41. The court held that New York could constitutionally require all children to be vaccinated to attend public school—even without an outbreak—and the availability of a religious exemption went above what is required by the Free Exercise Clause. *Id.* at 543. Explaining the severe risks involved in public health matters, the court quoted *Prince v. Massachusetts* which stated that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* (quoting *Prince*, 321 U.S. at 166–67).

Additionally, in *Workman*, the Court of Appeals for the Fourth Circuit held that West Virginia's refusal to enroll unvaccinated students in public schools, even when there was no outbreak of disease, was consistent with the Free Exercise Clause because preventing the spread of disease is a compelling state interest. *Workman*, 419 F. App'x, at 353. In *Workman*, the plaintiff argued that the requirement inhibited her free exercise of religion and that strict scrutiny was appropriate. *Id.* The court held that even if strict scrutiny was the proper standard to apply, the law would survive since it is in furtherance of a compelling state interest. *Id.* To support its holding, the court looked to the reasoning from Supreme Court cases like *Jacobson* and *Prince* which emphasized the importance of effective and quick action on matters of public health. *Id.* Importantly, the court found that a "state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest," even when a disease is not actively spreading. *Id.*

Here, the government has a compelling interest for implementing the Act because the purpose of the law is to stop the contagious disease currently ravishing the country and to prevent people from becoming ill and dying. (T. 1; 6). Like in *Jacobson* and *Phillips*, where there was an outbreak of communicable disease, Hoof and Beak disease is presently spreading

from person-to-person, affecting hundreds of thousands of Americans. (T. 1). Unlike *Jacobson*, *Phillips*, and *Workman*, where a vaccine effectively prevented the transmission of the relevant diseases, there is no vaccine or cure for Hoof and Beak Disease. (T. 1). The only tools that the government has to combat the spread of Hoof and Beak Disease are social-distancing and contact tracing. (T. 5). Since both the Second and Fourth circuits have indicated that an ongoing public health crisis is not even necessary for the government to have a compelling interest in disease prevention, the present case—in which a deadly disease is currently spreading form person-to-person—presents a more urgent and compelling governmental interest. (T. 1). Additionally, since the Task Force is very limited in its policy responses, the law is also narrowly tailored because it uses the only tool known to successfully combat the virus. (T. 5).

Thus, the Act is Constitutional under the Free Exercise Clause of the First Amendment.

CONCLUSION

For the forgoing reasons, this Court should reverse the United States Court of Appeals decision to grant Mr. Jones' motion for summary judgment with respect to free speech and affirm its decision with respect to free exercise.

Dated: January 31, 2020

Respectfully submitted,

Team 2, *Attorneys for Respondent*

APPENDIX A

Amendment I to the United States Constitution:

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. U.S. CONST. amend. I.

COMPETITION CERTIFICATE

Team 2 affirms the following:

1. All copies of the brief are the work product of the members of the team only;
2. The team has complied fully with its law school honor code; and
3. The team has complied with all the Rules of the Competition.

Sincerely, Team 2