No. 20-9422

IN THE

Supreme Court of the United States

LEVI JONES,

Plaintiff-Petitioner,

v.

CHRISTOPHER SMITHERS
in his official capacity as Commissioner of
the Federal Communications Commission

Defendant-Respondent.

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

BRIEF FOR PLAINTIFF-PETITIONER

TEAM 11
Counsel for Petitioner

QUESTIONS PRESENTED

1. Under the Free Speech Clause of the First Amendment, is a regulation that requires a 60-foot buffer zone around a government facility narrowly tailored when it burdens substantially more speech than necessary, excludes ample alternatives to communication, and Petitioners do not jeopardize safe operation of the facility?

2. Under the Free Exercise Clause of the First Amendment, is a law that requires mandated contact tracing through the use of mobile phones and government-issued SIM cards constitutional despite religious objections to technology when secular exemptions are allowed and rights other than free exercise rights are implicated?

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STATEMENT OF JURISDICTION

The judgment of the United States District Court for the District of Delmont was entered on October 30, 2020. Appellant filed an appeal to the Court of Appeals for the Eighteenth Circuit. The Court of Appeals granted the appeal and reversed the decision of the District Court. The parties timely petitioned for writ of certiorari to this Court. The jurisdiction of this Court rests upon 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, 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 . . . ." U.S. Const. amend. I.

Fourth Amendment, United States Constitution: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

STATEMENT OF THE CASE

A. Procedural History

On May 1 and May 5, 2020, law enforcement arrested and fined Petitioner for violating the anti-protest provisions of the Combat Hoof and Beak Disease Act ("CHBDA"). R. at 2. Petitioner brought suit against the Respondent in United States District Court for the District of Delmont for violation of Petitioner's rights under the Free Speech and the Free Exercise Clauses of the First Amendment. R. at 2. On October 5, 2020, both Petitioner and Respondent filed cross

motions for summary judgment. R. at 3. The District Court granted summary judgment for Respondent regarding the Free Speech Clause issue and granted summary judgment for the Petitioner regarding the Free Exercise Clause issue. R. at 18.

The parties appealed to the Eighteenth Circuit Court of Appeals. R. at 29. The Eighteenth Circuit reversed the District Court's holding. R. at 40–41. The Eighteenth Circuit remanded the case with instructions to grant summary judgment for Petitioner regarding the Free Speech Clause issue and to grant summary judgment for Respondent regarding the Free Exercise Clause issue. Subsequently, this Court grant certiorari to determine whether summary judgment is appropriate in both of the First Amendment issues. R. at. 42.

B. Statement of the Facts

Levi Jones is the congregational leader of the Delmont-based Church of Luddite. Jones Aff. ¶ 3. While the Church of Luddite has no central church authority, each congregation sets its own rules, called the "Community Orders." Stipulation ¶ 10. This set of rules is maintained and administered by the members of the congregation. *Id.* Since the Church of Luddite is decentralized in nature, Community Orders vary among congregations. *Id.* The Luddites believe in total obedience to whatever set of Community Orders governs a particular congregation as a means to preserve family unity, faith, community, and cultural identity. *Id.*

One of the primary orders in the Delmont Community Orders is that Luddites shall be skeptical of all technology because of the harm it could bring to the family and Luddite community. Jones Aff. ¶ 5. In some cases, after much deliberation, a particular technology may be accepted and adopted into a congregation's Community Orders, but only after reaching consensus among the local congregation. Stipulation ¶ 13. For example, individual Luddites do not own or use mobile phones. Stipulation ¶ 11; Jones Aff. ¶ 5. Additionally, the only phone

located at the church is in a small wooden shed next to the main church building. Stipulation ¶ 12. The phone is a landline and is accompanied by a phone book, pen and paper, and call log. *Id.* The Community Orders dictate that the phone may only be used for emergencies. Jones Aff. ¶ 5. The Delmont Luddites believe that mobile phones provide ready access to outside ideas and values that might break down the family or community by serving as distractions or eliminating the need to rely on others in the Luddite community. *Id.*

President Felicia Underwood's Hoof and Beak Task Force was created in February 2020. Stipulation ¶ 4. The Task Force is responsible for coordinating and overseeing the administration's efforts to prevent, monitor, contain, and mitigate the spread of Hoof and Beak Disease. *Id.* Chaired by Vice President Francis Peterson, the Task Force is composed of leaders across the administration. *Id.* Christopher Smithers, the FCC Commissioner, is a member of the Task Force and spearheads nationwide contact tracing efforts. Stipulation ¶ 2. The FCC is an independent United States governmental agency that regulates communications by telephone and SIM cards. *Id.*

On April 15, 2020, Congress passed the CHBDA, which established a contact tracing mandate and named the FCC as the lead agency. Stipulation ¶ 8. The Act mandates that "[e]ach person living in the United States shall participate in a mandatory contact tracing program." CHBDA § 42(a). 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." CHBDA § 42(a)(1). In establishing the contact tracing program, "federal facilities located in each state will be used to distribute SIM cards containing contact tracing software." CHBDA § 42(b). The SIM cards "shall be installed in mobile phones." CHBDA § 42(b)(1). If citizens do

not have a mobile phone "the centers shall distribute a mobile phone containing the contact tracing SIM card." CHBDA § 42(b)(1)(A). Senior citizens over sixty-five years of age are exempt from this law. CHBDA § 42(b)(1)(B). Health exemptions may be granted by the officials at each local federal facility on a case-by-case basis. CHBDA § 42(b)(1)(C). No other type of exemption is permitted. CHBDA § 42(b)(1)(D). Appeal authority is delegated to the FCC and must be filed within sixty days of receiving a denial. CHBDA § 42(b)(1)(E). 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."

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." CHBDA § 42(b)(1)(A)(i). 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." CHBDA § 42(b)(2). 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." CHBDA § 42(c).

Congress issued an emergency amendment to the CHBDA in light of growing protests at federal facilities during the pandemic. Stipulation ¶ 8. It stated that "[p]rotestors are prohibited within sixty feet of the facility entrance, including public sidewalks, during operating hours." CHBDA §42(d). Groups of protestors are "limited to no more than six persons." CHBDA §42(d)(1). The zone must be "clearly marked and posted." CHBDA §42(d)(2). Enforcement is "subject to discretion of local facility officials in acknowledgment of the varied location characteristics for each center." CHBDA §42(e).

On May 1, 2020, the Delmont Federal Facility started distributing SIM cards and mobile phones from 8:00 AM to 5:00 PM. Stipulation ¶ 6. The facility officials marked the "buffer zone" in compliance with CHBDA §42(d)(2), by posting signs and painting lines on the streets and sidewalks near the facility entrance. *Id.* Levi Jones and six other Delmont Luddites showed up around 9:00 AM to protest on a sidewalk seventy-five feet from the facility entrance. Jones Aff. ¶ 10. They all wore masks and remained six feet apart. *Id.* Mr. Jones and the Luddites periodically entered the buffer zone to speak with people in line at the facility, expressing their concerns about the contact tracing mandate. Mathers Aff. ¶ 7. They explained that the Delmont Church of Luddite did not support the government's gross intrusion into individual privacy and declared that the Delmont Church of Luddite would not comply with the mandate because having a mobile phone is in direct conflict with their religious beliefs. Jones Aff. ¶ 4. The Luddites did not have any pamphlets or signage. Jones Aff. ¶ 7. Because their beliefs prohibit the use of technology to share their message, which necessarily includes the internet and telephones, Mr. Jones and the other Luddites spoke to people directly to get their points across. *Id.*

At 4:00 PM that afternoon, officers of the Federal Facilities Police surrounded Mr. Jones and his group. Jones Aff. ¶ 8, 10. They told Mr. Jones' group that they must leave because they had too many people and were violating the mandate. Jones Aff. ¶ 10. Mr. Jones refused to leave. Mathers Aff. ¶ 8. The police officers then arrested Mr. Jones. *Id.* Mr. Jones spent four days in jail and received a $1,000 fine. Jones Aff. ¶ 10. He was released on May 5, 2020. *Id.*

On May 6, 2020, at 8:30 AM, Mr. Jones and five Delmont Luddites returned to the sidewalk in front of the Delmont Federal Facility to protest the mandate. Jones Aff. ¶ 11. They placed a small wooden table just outside the buffer zone line, sixty feet from the facility

entrance, to store their belongings. *Id.* They all wore masks, kept six feet apart from one another, and spoke to people in the facility line. *Id.*

The Federal Facilities Police appeared at 3:45 PM. Jones Aff. ¶ 11. One of the police officers recognized Mr. Jones and exclaimed, "Hey, aren't you that anti-tech preacher? You can't be here." *Id.* Mr. Jones refused to leave and said, "We aren't leaving because we're in full compliance with the mandate." *Id.* Mr. Jones was arrested again. *Id.* He spent five days in jail and was fined $1,500. *Id.*

SUMMARY OF THE ARGUMENT

The 60-foot buffer zone is not narrowly tailored. This Court should affirm the holding of the United States Court of Appeals for the Eighteenth Circuit with respect to the free speech issue. The 60-foot buffer zone violates the Free Speech Clause of the First Amendment because it is a content-neutral time, place, and manner restriction that is not narrowly tailored to achieve a significant government interest. The 60-foot buffer zone regulation is not narrowly tailored for 3 reasons. First, the regulation burdens substantially more speech than necessary to achieve a significant government interest because *all* speech is regulated within the sixty feet of the facility. Second, the regulation does not allow for ample alternatives of communication as the Petitioner has *no* alternative means of communication outside the facility. Finally, the regulation is not necessary for the safe operation of the facility because the Petitioner did not engage in *any* conduct that jeopardized the operation of the federal distribution facility. The Petitioner's conduct was quiet, non-disruptive, and did not impede any access to the facility. Thus, because the 60-foot buffer zone is not narrowly tailored, the buffer zone violates the Free Speech Clause.

The FCC contact tracing mandate is subject to strict scrutiny. This Court should reverse the holding of the United States Court of Appeals for the Eighteenth Circuit with respect to the

free exercise issue. To avoid strict scrutiny, a law that implicates Free Exercise rights under the First Amendment must be neutral and generally applicable. The mandate is subject to strict scrutiny for two reasons. First, although neutral, the mandate is not generally applicable because the mandate grants secular exemptions and excludes analogous religious exemptions. Thus, strict scrutiny is required. Second, even if the mandate is *not* generally applicable, strict scrutiny is still required because the mandate implicates not only Free Exercise rights, but also privacy rights. Therefore, because less restrictive alternatives are available to prevent the spread of Hoof and Beak disease, the mandate does not satisfy strict scrutiny and violates the Free Exercise Clause.

ARGUMENT

A. The 60-foot buffer zone violates the Free Speech Clause of the First Amendment.

The 60-foot buffer zone violates the Free Speech Clause of the First Amendment because it is a content-neutral time, place, and manner restriction that is not narrowly tailored to achieve a significant government interest. Under the Free Speech Clause, a content-neutral time, place, or manner regulation on speech must be "narrowly tailored to a significant government interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989). A content-neutral time, place, or manner regulation will be narrowly tailored even if "a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative," "[s]o long as the means chosen are not substantially broader than necessary to achieve [that] interest." *Id.* at 800.

Moreover, in the context of fixed buffer zones, the conduct of protestors and their behavior serve as guideposts for this Court to determine whether a regulation requiring a fixed buffer zone is narrowly tailored. *Brown v. City of Pittsburgh*, 586 F.3d 263, 279 (3d Cir. 2009). If the conduct of the protestors is not egregious or disruptive to the operations of a facility or clinic or could be categorized as nothing more than the dissemination of information in a

traditional public forum, then the buffer zone will burden substantially more speech than is necessary to achieving the government interest. *See McCullen v. Coakley*, 573 U.S. 464, 497 (2014). Thus, the statute will not be narrowly tailored. Conversely, when protestors prohibit the safe operation of a facility, then the speech is burdened necessarily for achieving the government interest, and a fixed buffer zone is narrowly tailored. *See Schneck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 380 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 769–71 (1994).

The Petitioner concedes that the 60-foot buffer zone regulation is a content-neutral time, place, or manner regulation. Hence, whether the regulation is narrowly tailored is at the crux of the issue. The regulation is not narrowly tailored on three independent grounds. First, the regulation burdens substantially more speech than necessary. Second, the regulation does not allow for ample alternatives of communication. Finally, the regulation is not necessary for the safe operation of the facility.

1. The 60-foot buffer zone is not narrowly tailored because it substantially burdens more speech than necessary.

The use of a 60-foot buffer zone is not narrowly tailored to achieve a significant government interest because it substantially burdens more speech than necessary. For a content-neutral time, place, or manner regulation to be narrowly tailored, the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. *See Casey v. City of Newport*, 308 F.3d 106, 112 & n. 4 (1st Cir. 2002). A content-neutral time, place, or manner statute violates the Free Speech Clause when the statute burdens *substantially more speech than necessary* to achieve a significant government interest. *McCullen*, 573 U.S. at 486.

In *McCullen*, the Massachusetts legislature enacted a statute to prevent protesting outside of healthcare facilities that provided abortions. *Id.* at 471. To do so, the statute created a 35-foot *fixed* buffer zone around any health care facility providing abortions that excluded *any* person not permitted to be inside of the zone during the operating hours of the facility. *Id.* Those entering the facilities for its services, or those who worked at the facilities, could enter this buffer zone; however, protestors were barred from this area. *Id.* The petitioners in *McCullen* did not loudly protest and picket the faculties, but instead engaged in quiet conversations with those entering the abortion clinics to discuss alternatives to abortion. *Id.* at 472–74. The petitioners challenged the statute for violating their First Amendment right to Free Speech. *Id.* at 475. This Court held that the 35-foot fixed buffer zone created serious burdens on the petitioners' abilities to engage in close, personal conversations, and that those burdens outweighed and were not narrowly tailored to the government's interest in public safety and access to healthcare facilities. *Id.* at 486–87. Thus, the Free Exercise Clause was violated. This Court concluded by saying, "here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers." *Id.* at 497.

This Court in *McCullen* reasoned that the 35-foot fixed buffer zone created serious burdens on the petitioners' right to free speech for multiple reasons. The petitioners were unable to engage in close, personal conversations. *Id.* at 486–87. They were also unable to distribute their literature in an effective manner because of the fixed buffer zone. *Id.* at 488. The fixed buffer zone made it very hard for petitioners to distinguish between a passerby and a patient to the healthcare facility, and their distance from the facility meant they had to raise their voice in some instances—instead of personal conversations. *Id.* 478–88. This Court noted that "It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm." *Id.*

The *McCullen* Court acknowledged the importance of one-on-one conversations and the dissemination of ideas, as it is "the most effective, fundamental, and perhaps economical avenue of political discourse." *Id.* (quoting *Meyer v. Grant*, 486 U.S. 414, 424 (1988)). As it related to handbills and communications on sidewalks and public roads, "handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression" and "[n]o form of speech is entitled to greater constitutional protection." *Id.* at 488–89 (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, (1995)).

Here, like the statute in *McCullen*, which was enacted to prevent protesting outside of a healthcare facility, the CHBDA's emergency amendment was enacted to prevent *any* protesting outside of the federal distribution facilities. R. at 7. Similarly, the statute in *McCullen* created a 35-foot fixed buffer zone around the abortion clinics, and here, the CHBDA created a 60-foot fixed buffer zone around the federal distribution facilities, which is significantly larger than the buffer zone in *McCullen*. R. at 7. The petitioners in *McCullen* did not loudly protest and picket the abortion facilities and likewise, the Petitioner here did not loudly protest the CHBDA at the federal distribution facilities. Like the petitioners in *McCullen*, who wished to engage in one-on-one conversations to disseminate information about alternatives to abortions, here, the Petitioner wanted to engage in one-on-one conversations to disseminate information about their beliefs in the dangers of the SIM cards but were barred from doing so. R. at 7. The government in *McCullen* did not choose a narrowly tailored option because *all* speech was unnecessarily burdened in the 35-foot buffer zone. Similarly, here, the government did not choose a narrowly tailored option because it burdened *all* speech within the 60-foot buffer zone to combat the same problem in *McCullen.* Prohibiting all speech is substantially more than necessary.

Therefore, because the 60-foot buffer zone substantially burdens more speech than necessary, the statute is not narrowly tailored.

2. The 60-foot buffer zone is not narrowly tailored because it does not allow ample alternatives of communication.

The 60-foot buffer zone is not narrowly tailored because it does not allow ample alternatives of communication. The government is permitted to impose "reasonable time, place, or manner restrictions" as long as those content-neutral restrictions "are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). For a content-neutral time, place, or manner restriction to not substantially burden more speech than is necessary in achieving a significant government interest, the restriction must allow for *ample alternative channels of communication*. *Hill v. Colorado*, 530 U.S. 703, 726 (2000).

In *Hill*, Colorado passed a statute that prohibited anyone within 100 feet of a healthcare facility from moving within eight feet of another person "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person . . . ." *Id.* at 707. The petitioners challenged the statute as violating the Free Speech Clause because it would significantly hamper their ability to approach those outside of an abortion clinic to have a one-on-one conversation about alternatives to abortion. *Id.* at 708. This Court held that this statute was a valid content-neutral time, place, or manner restriction because it was narrowly tailored to the significant government interest. *Id.* at 725. This Court reasoned that because the statute allowed for the speaker to be within eight feet of the intended audience, the statute did not create an adverse impact on the audience's ability to understand the message. *Id.* at 726. This Court noted that the 8-foot separation was broad and did not proscribe how many signs or protesters could be within the 100-foot buffer zone; the statute also did not limit

the number of speakers or their volume. *Id.* With the 8-foot separation, this Court was satisfied that there were ample alternative channels of communications so as to not overly burden speech beyond what was necessary to achieve the government interest. *Id.*

Here, the CHBDA does not have ample alternative channels of communication. Unlike the statute in *Hill*, which was a floating buffer zone, here, the buffer zone is a fixed 60-foot buffer zone. R. at 7. Unlike the statute in *Hill*, which allowed for speakers to be within 8 feet of their audience outside of an abortion clinic, here, the CHBDA does not allow for speakers to be inside the 60-foot buffer zone of the federal distribution facility at all. R. at 7. Unlike the statute in *Hill*, which did not limit the number of protesters within the floating buffer zone, here, the CHBDA limits that amount of people who are allowed to protest. R. at 7. The CHBDA does not allow for speakers to protest outside federal distribution facilities while maintaining some form of separation from the speaker and the audience. Like the petitioners in *McCullen*, who had their ability to engage in one-on-one conversations with abortion seekers unnecessarily restricted, here the Petitioner is unable to engage in one-on-one conversations with those receiving a SIM card. The CHBDA does not allow for ample alternative channels of communication because *any* effective communication is virtually eliminated, including one-on-one conversations.

Thus, because the CHBDA does not allow for ample alternative channels of communication, the statute is not narrowly tailored.

3. The 60-foot buffer zone is not narrowly tailored because the 60-foot fixed buffer zone is not necessary to the operation of the federal facility.

The 60-foot buffer zone is not narrowly tailored because the 60-foot fixed buffer zone is not necessary to the operation of the federal facility. Fixed buffer zones are justified and do not violate the Free Speech Clause of the First Amendment if they are *necessary to secure the safe operation* of a clinic. *Schneck*, 519 U.S. at 380. *See also Madsen*, 512 U.S. at 769–71; *accord*

Brown v. City of Pittsburgh, 586 F.3d 263, 279 (3d Cir. 2009) ("in *Madsen* and *Schenck*, for example, the Supreme Court relied on the factual findings of the district court regarding defendant protesters' behavior"). In *Schneck*, protestors illegally blocked entrance to an abortion clinic. *Id.* at 362. The protestors would regularly "march, stand, kneel, sit, or lie in parking lot driveways and in doorways." *Id.* As a result, a New York state court entered an injunction which created a 15-foot fixed buffer zone around the entrances to the clinic. *Id.* at 367. This Court upheld this fixed buffer zone because it was necessary to ensure patients' ability to access healthcare. *Id.* at 380. This Court noted "that protesters purposefully or effectively blocked or hindered people from entering and exiting the clinic doorways, from driving up to and away from clinic entrances, and from driving in and out of clinic parking lots." *Id.* Because of this conduct, this Court determined that the only way to effectively ensure access to the clinic was to create the 15-foot fixed buffer zone. *Id.*

In *Madsen*, a Florida state court enjoined the petitioners from protesting and interfering with the operations of an abortion clinic. *Madsen*, 512 U.S. at 758. The state court then broadened the injunction because of the petitioners continued to impede and block access to the clinic. *Id.* The protestors were incredibly loud and created high levels of anxiety in those seeking the services of the clinic. *Id.* at 758–59. The petitioners would also harass the clinic doctors at their homes and sometimes interact with the doctor's minor children. *Id.* at 759. The injunction created a fixed 36-foot buffer zone around the clinic that the protestors would not be able to enter. *Id.* at 762. In regard to the buffer zone, the Supreme Court held that the buffer zone did not substantially burden more speech than necessary, and thus, did not violate the Free Speech Clause of the First Amendment because of the egregious behavior of the protestors. *Id.* at 776. This Court acknowledged that this injunction did not fall under the analysis set for in *Ward v.*

Rock Against Racism and *Frisby v. Schultz*, because at issue here was an injunction rather than an ordinance or statute. *Id.* at 764. However, this Court reasoned that the behavior of the protestors justified the validity of the injunction against them. *See id.* at 764–74.

Here, the Petitioner's conduct does not justify the use of a 60-foot buffer zone around the federal distribution facility because his conduct did not rise to the same level of disruption that justified a fixed buffer zone in *Schneck* and *Madsen*. The anti-abortion protestors in both *Madsen* and *Schneck* disrupted the activities of the abortion clinics by blocking the entryways or loudly protesting outside the doors. The Petitioner here did not obstruct the operations of the facility in his efforts to disseminate information against the CHBDA. Unlike the fixed buffer zone in *Schneck*, which was 15-feet and the fixed buffer zone in *Madsen*, which was 35-feet, here, the fixed buffer zone extends 60-feet outside of the federal distribution facility, which is significantly larger than the buffer zone in *Schneck*. R. at 7. The 15-foot buffer zone in *Schneck* was necessary to ensure the safe operation of the abortion clinic, while here, the Petitioner did not engage in *any* conduct that jeopardized the operation of the federal distribution facility. The Petitioner's conduct was quiet, non-disruptive, and did not impede any access to the facility. The Petitioner's conduct does not justify the use of a 60-foot buffer zone around the federal distribution facility.

Thus, because the 60-foot buffer zone is not necessary for safe operation of the federal distribution facility, the statute is not narrowly tailored. In sum, because the 60-foot buffer zone burdens substantially more speech than necessary, does not allow ample alternatives of communications, and is not necessary for the safe operation of the clinic, the statute is not narrowly tailored to achieve a significant government interest.

B. The contact tracing mandate violates the Free Exercise Clause of the First Amendment.

Under the Free Exercise Clause of the First Amendment to the United States Constitution, a law that requires mandated contact tracing through the use of mobile phones and government-issued SIM cards ("the mandate") despite religious objections to technology is unconstitutional.

In 1990, this Court in *Employment Division, Department of Human Resources v. Smith* stated the test for free exercise claims: "[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and *neutral* law of *general applicability* on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 879 (1990) (emphasis added). In *Smith*, this Court decided that instead of strict scrutiny as the standard of review for Free Exercise issues, minimal scrutiny is the standard when the government action is both neutral and generally applicable.[1] *Id.* at 879. The Petitioner agrees with both the District Court and the Court of Appeals that the mandate is neutral—the Petitioner concedes neutrality. However, the Petitioner agrees with the District Court and disagrees with the Court of Appeals regarding general applicability. Hence, general applicability is at the heart of whether the mandate is constitutional under strict scrutiny.

The mandate is unconstitutional under strict scrutiny for two reasons. First, the mandate is not generally applicable because it grants secular exemptions yet excludes analogous religious

[1] Although enacted in response to this Court's decision in *Smith* to restore Free Exercise protections endangered by *Smith*, the RFRA (Religious Freedom and Restoration Act) does not apply in this case. Under federal law, a law can explicitly exclude application of the RFRA. The FCC mandate properly stated in its text that the RFRA does not apply. Thus, the RFRA does not apply here.

exemptions. And second, even if the mandate is generally applicable, the mandate includes both Free Exercise rights and privacy rights.

1. The mandate is not generally applicable because the mandate grants secular exemptions and excludes religious exemptions.

The mandate is not generally applicable because the mandate grants secular exemptions and excludes religious exemptions. To determine whether a law is generally applicable, the phrase "generally applicable" requires a definition. However, although establishing the requirements of neutrality and general applicability, *Smith* did not define these concepts. *Smith* involved a prohibition on the use of peyote, a hallucinogenic drug, which was used by Native Americans for religious purposes. *Smith*, 494 U.S. at 874. The prohibition prohibited *all* use of peyote. *Id.* It did not mention or target religious uses. *Id.* In its holding, this Court assumed that the prohibition on peyote was neutral and generally applicable and upheld the ban. *Id.* However, it did not define neutrality and general applicability.

Subsequently, three years later, this Court returned to these concepts in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Lukumi* involved a ban that specifically prohibited religious sacrifice of small animals. *Id.* This Court unanimously held that the ban was neither neutral nor generally applicable because it specifically targeted religious conduct. *Id.* at 527. Since *Lukumi*, this Court has not given further indication into the meanings of neutrality or general applicability. Both *Smith* and *Lukumi* are cases at opposite ends of the spectrum. This Court in *Smith* found the law to be *both* neutral and generally applicable because the law applied to everyone, religious or secular, *without any exemptions*. In contrast, this Court in *Lukumi* found the law to be *neither* neutral nor generally applicable because the law *only* regulated religious conduct yet allowed secular use. Like the present case, many cases fall within the boundaries of the extremes found in *Smith* and *Lukumi*.

In *Smith*, this Court held that the prohibition on peyote was generally applicable as there were no exemptions to the prohibition. However, the existence of an exemption may cause a law to fail to be generally applicable. This Court reasoned that a law is not generally applicable if there are "at least some" exemptions to that law. *Smith*, 494 U.S. at 884. As this Court stated in *Smith* and *Lukumi*, "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" *Lukumi*, 508 U.S. at 537 (citing *Smith*, 494 U.S. at 884). Allowing secular exemptions without religious exemptions "devalues religious reasons [] by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment." *Id.* at 537–38. If a law allows a secular exemption, then the law must allow an analogous religious exemption. *Id.* at 537–38, 546. Religious and secular conduct are analogous when the "nonreligious conduct . . . endangers these [government] interests in a similar or greater degree" than the burdened religious conduct. *Id.* at 543.

Although this Court has not yet applied the principles enumerated in *Smith* and *Lukumi* to a case that is between the extremes of *Smith* and *Lukumi*, the lower courts are abundant with examples. In *Radar v. Johnston*, a young student wanted an exemption for religious reasons from the University of Nebraska's policy that required all freshmen students to live in the dorms. *Radar v. Johnston*, 924 F. Supp. 1540, 1545 (D. Neb. 1996). The student wanted to live in a Christian group house to avoid the drugs, alcohol, and premarital sex he believed would be prevalent in the dorms and that were against his faith. *Id.* at 1544–46. The University denied his request although it offered numerous exemptions for students older than nineteen, married students, students living with their parents, those experiencing undue hardship, and many other

reasons. *Id.* at 1546–48. The court in *Radar* held that the rule was not generally applicable because "exceptions are granted for a variety of non-religious reasons, [but] they are not granted for religious reasons." *Id.* at 1553.

Other cases offer similar results. In *Blackhawk v. Pennsylvania*, the Third Circuit found that the requirement of a permit fee for possessing wild animals was not generally applicable because the law allowed secular exemptions for zoos, circuses, hardship, and extraordinary circumstances, yet disallowed religious exemptions. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 206–12 (3d Cir. 2004) (plaintiff owned bears that he used in conducting religious ceremonies with American Indian tribes). The Sixth Circuit held that a rule that penalized a counselor for referring a client who was seeking same-sex relationship advice to another counselor was not generally applicable because referrals were allowed for other secular reasons, yet not religious reasons. *Ward v. Polite*, 667 F.3d 727, 738–40 (6th Cir. 2012). Similarly, the Iowa Supreme Court found that a county ordinance prohibiting certain kinds of vehicles with metal tires that included vehicles used specifically by the Mennonite community was not generally applicable as it had multiple secular exemptions, but disallowed religious exemptions. *Mitchell County v. Zimmerman*, 810 N.W.2d 1, 4–5, 15–16 (Iowa 2012).

Even a singular analogous secular exemption can cause a law to not be generally applicable. For example, in the Third Circuit case, *Fraternal Order of Police v. City of Newark*, then-Judge Alito opined that the so-called "zero-tolerance" policy that required policemen to be clean-shaven despite religious objections was not generally applicable because the policy allowed exemptions for medical reasons. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (plaintiffs were two Muslim police officers whose faith required them to grow beards). All these cases implement the principles that *Smith* and *Lukumi* set out. When

secular exemptions are allowed, analogous religious exemptions must also be allowed. Analogous exemptions are those exemptions to a law that undermine the government interest to a same or similar degree. *Lukumi*, 508 U.S. at 543.

Here, the FCC contact tracing mandate allows multiple analogous secular exemptions. The mandate grants exemptions from obtaining a mobile phone and government-issued SIM card for those individuals over sixty-five years old and those with health-related reasons on the grounds that "the burden of obtaining and/or carrying a cell phone exceeds the public health benefit." R. at 9. Health-related exemptions include those individuals with late-stage cancer, Ischemic heart disease, Alzheimer's disease, severe physical disabilities, and those unable to operate a mobile device. R. at 22. Further, the mandate allows officials discretion to grant health exemptions on a case-by-case basis. R. at 32. Despite multiple secular exemptions, the FCC mandate prohibits any religious exemptions. R. at 32–33.

These secular exemptions undermine the government interest, just as any religious exemption would. The government interest in enacting the mandate is "promoting public health and safety by preventing the spread of Hoof and Beak." R. at 37. However, each of the exemptions to the mandate undermine the government's interest in preventing the spread of Hoof and Beak because each individual subject to an exemption can, in fact, spread the disease. Despite this, the mandate prohibits religious exemptions in the interest of preventing the spread of Hoof and Beak disease. Because both religious and secular exemptions would undermine the government interest of preventing the spread of Hoof and Beak disease to a similar degree, the exemptions are analogous.

Thus, according to *Smith* and *Lukumi*, because the mandate allows multiple secular exemptions that undermine the government interest of preventing the spread of Hoof and Beak

disease yet disallows analogous religious exemptions that undermine to a similar degree, the mandate is not generally applicable. And because the mandate *is not* generally applicable, the mandate is subject to strict scrutiny.

2. Even if the mandate is generally applicable, strict scrutiny is required because the mandate implicates not only Free Exercise rights, but also privacy rights.

Even if the mandate is generally applicable, strict scrutiny is required because the mandate implicates not only Free Exercise rights, but also privacy rights. "[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the [government] to control, even under regulations of general applicability." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). In *Smith*, this Court noted that even if a law is neutral and generally applicable, the First Amendment may "bar[] application of a neutral, generally applicable law to religiously motivated action" if the case "involve[s] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881 (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Yoder*, 406 U.S. 205; *Wooley v. Maynard*, 430 U.S. 705 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)). Overwhelmingly, this Court's precedent shows that when a case presents a "hybrid" claim—meaning a claim that involves a Free Exercise right *and* another constitutional right—strict scrutiny applies, regardless of whether the law is neutral and generally applicable. *Id.*

Indeed, mandatory contact tracing through the use of mobile phones and government-issued SIM cards implicates other constitutional rights. Chiefly, the mandate implicates Fourth Amendment rights to privacy. The "basic purpose of [the Fourth] Amendment . . . is to safeguard

the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court of City and County of San Francisco*, 387 U. S. 523, 528 (1967). "When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, . . . official intrusion into that private sphere generally qualifies as a search." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). This Court in *Carpenter* held that an "individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell phone location data]." *Id.* at 2217. This Court noted that the privacy implications of cell phone data usage by the government are concerning and vast. *Id.* at 2010. Cell phone data gives the "[g]overnment near perfect surveillance and allow[s] it to travel back in time to retrace a person's whereabouts." *Id.* "[C]ell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access [a person's] historical location information at practically no expense." *Id.* at 2217–18.

Here, at least two constitutional rights are implicated: a Free Exercise right and the right to privacy. The right to privacy is implicated because the government is able to obtain a significant amount of data from a person's cell phone and a government-issued SIM card. As noted in *Carpenter*, mapping a person's location through their cell phone provides an all-encompassing record of their whereabouts which completely undermines a person's privacy. *Id.* at 2217. The cell phone data provides an explicit and intimate view into a person's familial, political, religious, and sexual affiliations. *Id.* Many Americans view these affiliations as private. *Id.* Cell phones are "almost a feature of human anatomy" and can easily track all or most of the movements of owner. *Id.* at 2218. When the government is able to track the location of a cell phone, it can achieve near perfect surveillance, "as if it had attached an ankle monitor to the

phone's user." *Id.* The mandate allows the government to track the location of a cell phone and to surveil private citizens and, thus, implicates privacy rights.

The mandate implicates Fourth Amendment rights because it unreasonably invades individuals' privacy. Because this case involves a "hybrid" claim where both First Amendment Free Exercise rights and Fourth Amendment privacy rights are implicated, strict scrutiny is required, regardless of whether the law is neutral and generally applicable.

The mandate is subject to strict scrutiny because it is not generally applicable as it allows secular exemptions yet excludes analogous religious exemptions. Moreover, even if the mandate is generally applicable, strict scrutiny is still required because the mandate implicates privacy rights in addition to Free Exercise rights. Strict scrutiny requires the government to prove the mandate is narrowly tailored to further a compelling governmental interest. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). If a less restrictive alternative is available to achieve that compelling government interest, the legislature must use that alternative. *Id.* The government has the burden of proving that it has used the least restrictive alternative in order to survive strict scrutiny. *Id.*

Here, the interest of preventing the spread of Hoof and Beak disease is a compelling government interest. The Petitioner concedes this. However, the government has the burden of proving the contact tracing mandate is the least restrictive means of achieving this compelling government interest or the mandate is presumed invalid. Other less restrictive means to prevent the spread of the disease include quarantining, wearing face masks, and social distancing. The government has not proved that contact tracing through the use of mobile phones and government-issued SIM cards is the least restrictive alternative.

Because the government has not carried its burden to prove that contact tracing through the use of mobile phones and government-issued SIM cards is the least restrictive means of preventing the spread of Hoof and Beak disease, the FCC mandate is unconstitutional.

3. The Court of Appeals holding is incorrect.

The Court of Appeals for the Eighteenth District's holding that the mandate *is* generally applicable and subject to minimal scrutiny is incorrect. First, in addressing neutrality, the court highlights several "factors" found in *Lukumi* that help discern whether a law is neutral. R. at 39. However, because the Petitioner concedes neutrality, these factors are irrelevant.

Second, in addressing general applicability, the analysis is illogical and incomplete. The court reasons that because other secular reasons exist that Congress did not exempt but could have exempted, religion is being treated fairly because it is situated similarly to those non-exempted secular reasons. R. at 40. However, the free exercise of religion is a fundamental right, and it is afforded protections under the First Amendment unlike other non-exempted secular reasons. By analogy, if an African-American plaintiff-employee is treated worse in the workplace compared to a white employee, the employer would not be able to effectively defend on the ground that Hispanic or Asian employees were treated just as badly as the plaintiff. *Generally Applicable Law and the Free Exercise of Religion*, 95. Neb. L. Rev. 1, 26. Minority employees should be treated just as well as the best-treated race, and not merely as bad as another badly-treated race. *Id.* Similarly, religious reasons for avoiding the mandate should be treated just as well as the best-treated secular reasons.

Third, the court states that Congress may grant any exemptions it wants as long as the exemptions are "logical." R. at 40. However, the court asserts this without any precedent or policy to support the "logical" qualification. It then concludes, without any analysis, that the

exemptions are "perfectly logical," and thus, the exemptions are constitutional. *Id.* The Court of Appeals conclusion that the mandate is neutral and generally applicable is fraught with illogical reasoning, lack of precedent, and lack of analysis. Thus, the Court of Appeals holding is incorrect.

CONCLUSION

The 60-foot buffer zone regulation is not narrowly tailored and thus, is unconstitutional for three reasons. First, the regulation burdens substantially more speech than necessary. Second, the regulation does not allow for ample alternatives of communication. Finally, the regulation is not necessary for the safe operation of the facility. Thus, the buffer zone is unconstitutional.

Further, the contact tracing mandate is unconstitutional for two reasons. First, the mandate is not generally applicable because it allows secular exemptions but excludes analogous religious exemptions. Second, even if the mandate were generally applicable, the mandate implicates both Free Exercise rights and privacy rights. For these reasons strict scrutiny is required. The mandate fails to survive strict scrutiny as it does not employ the least restrictive means to prevent the spread of the disease. Hence, the mandate is unconstitutional.

Therefore, the Petitioner respectfully requests that the decision of the United States Court of Appeals for the Eighteenth Circuit be reversed with respect to the free exercise issue and affirmed with respect to the free speech issue.

Respectfully submitted,

s/ **TEAM 11**

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CERTIFICATE OF COMPLIANCE

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

s/ **TEAM 11**

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