NO. 20-9422

IN THE SUPREME COURT OF THE UNITED STATES

LEVI JONES,
Petitioner,
v.

CHRISTOPHER SMITHERS.
Respondent.

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

BRIEF FOR THE RESPONDENT

Team Number 8

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether a sixty-foot no protest buffer zone and limits on groups sizes outside a federal facility during a global pandemic is content-neutral, narrowly tailored to a government interest, and leaves open ample alternative channels of communication.

II. Whether a mandated contact tracing program which only provides exemptions for senior citizens and certain severe health conditions using SIM cards in mobile phones in response to a global pandemic is a neutral and generally applicable law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

OPINIONS BELOW

The opinion of the United States District Court for the District of Delmont appears in the record at pages 1-20. The opinion of the United States Court of Appeals for the Eighteenth Circuit appears in the record at pages 29-41.

STATEMENT OF THE CASE

Hoof and Beak disease was first discovered in December 2019 and has created an ongoing global pandemic. R. at 1. The disease is highly contagious, causes severe flu-like symptoms and skin rashes, and primarily affects young- to middle-aged adults. R. at 1. The disease has all but crippled the United States. So far, there are over seventy million confirmed cases of the disease in the United States and 230,000 deaths. R. at 1. Governments around the world have attempted to stop the spread of the disease using various methods, including lockdowns. R. at 1. Congress passed the Combat Hoof and Beak Disease Act (CHBDA) on April 15, 2020. R. at 1. The Act mandated contact tracing using a government-provided SIM card in a mobile phone for all people living in the United States. The Federal Communications Commission (FCC) was named the leading enforcement agency in regard to this mandate. The Commissioner of the FCC is Christopher Smithers. R. at 5. The government provides a mobile phone to those who do not have one in order to comply with the mandate. R. at 2. The only exemptions from the mandated contact tracing are senior citizens over the age of sixty-five and some health-related exemptions such as late-stage cancer, Ischemic heart disease, Alzheimer's disease, and severe physical disabilities which prevent the individual from operating a mobile device. R. at 22. The purpose of this 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." R. at 6. The Act specified that the Religious Freedom and Restoration Act was inapplicable. R. at 6.

The Respondent, Mr. Jones, is the leader of the Delmont Church of Luddite. R. at 2. The Delmont Luddites are governed by its rules called the "Community Orders." One of these orders is that they must be skeptical of all technology. R. at 4. The Delmont Luddites are prohibited from owning or using their own mobile phones, but a landline in the community may be used for emergencies. R. at 5.

Initially, the Act only required that those at the federal facilities wear a mask and maintain a distance of six feet from one another. R. at. 6. However, in light of growing protests at the facilities that created heightened risks of infection, an emergency amendment was passed. This amendment created a sixty-foot no protest buffer zone from the facility entrance. R. at 7. Further, groups of protestors cannot exceed six people. Enforcement of the zone is subject to the discretion of local officials. R. at 7.

On May 1, 2020, the Delmont Facility began issuing the contract tracing devices, and the buffer zone for protest was clearly marked with signs and painted lines. R. at 7. Mr. Jones and six other Delmont Luddites came to the Delmont facility to protest. While the group set up outside the buffer zone, Mr. Jones and others from the group would disregard the buffer zone to approach and speak to those waiting in line at the facility. R. at 7. The Luddite's beliefs prevent them from using the internet or a phone to communicate their message. R. at 7. At the same time, a group of five protestors from the MOMs group showed up to protest. R. at 8. The MOMs group is a group of mothers who have lost loved ones to the disease and who support the mandate and encourage compliance. R. at 27. While the MOMs group stood just five feet into the buffer zone, they remained in one spot and did not approach anyone in light of the need for social distancing

to prevent the spread of the disease. R. at 8. In contrast with Mr. Jones and the Luddites, the MOMs did not initiate contact with anyone at the facility. R. at 28. On that day, Mr. Jones was asked to leave by the facility police for violating the mandate by approaching individuals in line, and when he refused, he was arrested. No one from the MOMs group was arrested. R. at 8. Both groups returned to the facility on May 6. Mr. Jones and five other Luddites set up sixty feet from the entrance, and again flouted the health and safety precautions to approach and speak to people waiting in the line. A group of seven MOMs stood five feet within the buffer zone again, but they continued to remain in one spot, preventing undue risk of spreading the disease or interfering with the operations of the facility. R. at 9. Again, the facility police asked Mr. Jones to leave and arrested him when he refused. No one from the MOMs group was arrested. R. at 9.

On June 1, 2020, Mr. Jones filed a complaint alleging violations of his First Amendment rights under the Free Exercise Clause and the Free Speech Clause in the United States District Court of Delmont against FCC Commissioner Smithers. Both parties filed motions for summary judgment. R. at 3. The District Court granted summary judgment in favor of the FCC on the free speech issue and found that the CHBDA was a permissible time, place, and manner restriction. R. at 4. The court granted summary judgment in favor of Mr. Jones on the free exercise issue and found that the CHBDA was not generally applicable and violated the free exercise clause. R. at 4. The case was appealed to the United States Court of Appeals for the Eighteenth Circuit. The Court of Appeals reversed the lower court on the free speech issue and found that the CHBDA was content-neutral but not narrowly tailored and therefore violated the free speech clause. R. at 30. The Court of Appeals also reversed the lower court on the free exercise issue and held that the CHBDA is a neutral and generally applicable law and does not violate the free exercise clause. R. at. 30. Mr. Jones filed for a writ of certiorari which this Court granted. R. at 42.

SUMMARY OF THE ARGUMENT

The no-protest buffer zone and limits on group sizes outside the federal facilities do not violate the free speech clause because the law is content-neutral, narrowly tailored to the government interest, and leaves open ample other avenues of communication for the protestors. Here, the law is content-neutral both on its face and as applied. The no-protest zone is neutral on its face because its primary purpose is to ensure public health and makes no distinction between the type of speech to be regulated. It is also neutral in application because the only discretion afforded to any government official in enforcement is given to the police who will always exercise some discretion. Additionally, the law is narrowly tailored to both the government interests of public health and privacy because the buffer zone provides the necessary distance to prevent the spread of Hoof and Beak disease and protects those who are required to go to the facility from being approached when they do not wish to be. Finally, there are other ways for the protestors to communicate their message - speaking to people outside the buffer zone.

Additionally, the mandated contact tracing program also passes constitutional muster under the free exercise clause because it is a neutral and generally applicable law. The program is neutral on its face because the text of the act itself contains no mention of religion. The object of the program is neutral as well because the primary purpose of the contact tracing is to prevent the spread of a global pandemic. The program is also generally applicable because it does not selectively impose burden solely on religious activities. Instead, the program is mandatory for all of those living in the United States. Further the limited exemptions to the program are justified in light of the purpose of the program.

Alternatively, even if the mandated contact tracing is not neutral and generally applicable, the program still satisfies strict scrutiny requirements. Stopping the spread of a

deadly pandemic is unquestionably a compelling government interest. This program is narrowly tailored to this interest because contact tracing has proven to be an effective method of controlling the spread of disease.

ARGUMENT AND AUTHORITIES

I. THE BUFFER ZONE IS A CONTENT-NEUTRAL, PROPERLY TAILORED RESTRICTION ON SPEECH IN LIGHT OF THE GOVERNMENT'S SIGNIFICANT INTEREST IN PROTECTING PUBLIC HEALTH AND PRIVACY AND APPROPRIATE OTHER MEANS OF COMMUNICATION ARE AVAILABLE.

The United States Court of Appeals for the Eighteenth Circuit's ruling that a sixty-foot no protest buffer zone was not narrowly tailored should be reversed because the buffer zone is content-neutral, narrowly tailored to the government's significant interest, and leaves open ample other avenues of communication. The First Amendment protects the freedom of speech, but it "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981). The government may impose reasonable restrictions on the time, place, or manner of protected speech as long as the restrictions are content neutral, narrowly tailored to a significant government interest, and leave open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 US 781, 791 (1989). As long as a content-neutral regulation leaves open ample alternative channels of communication, the regulation does not have to be the least restrictive or least intrusive means of accomplishing the government interest to be narrowly tailored. *Hill v. Colorado*, 530 U.S. 703, 726 (2000).

A. The sixty-foot buffer zone around distribution centers preventing protests is content-neutral, both facially and as applied, because it is written and applied without regard to speech.

First, a law is content-neutral if it can be "justified without reference to the content of the regulated speech" or was adopted without consideration of any "disagreement" with the speech at issue. *Ward*, 491 U.S. at 791. In *Ward*, the city passed a regulation requiring bands that sought to perform at the local bandstand to use a city-provided sound technician and equipment. *Id.* at 784. Upon challenge, the Court upheld the regulation as content-neutral because the purpose of the regulation was focused on noise control as opposed to the content of any performer's speech. While the regulation allowed for large discretion on behalf of the administering city official, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.* at 795.

Second, a law is content-neutral as long as government officials are not given unbridled discretion in prohibiting speech. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988). In *Lakewood*, the city passed an ordinance that gave the mayor the power to grant or deny applications for newsrack permits. *Id*. at 752. While the Court ultimately held that the unlimited discretion given to the mayor was too much discretion, the Court noted that,

> This is not to say that the press or a speaker may challenge as censorship any law involving discretion to which it is subject. The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.

Id. at. 759. Similarly, a government official cannot base a permit fee on the content of speech. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992). In *Forsyth*, an ordinance

required permits for the use of public property by private citizens for events such as parades or marches. This permit process required a fee that could be adjusted by a government administrator based on the estimated cost of maintaining public order. *Id*. at 124. The Court held that the ordinance was not content-neutral because the fee was based on the content of the speech. The administrator was not required to rely on objective factors to determine the fee and had unbridled discretion in determining the amount. *Id*. at 133-34. However, a police officer must be given the ability to use their judgement in the enforcement of laws. *Hill v. Colorado,* 530 U.S. 703 (2000). In *Hill*, Colorado passed a statute which made it unlawful to approach another person without their consent to pass out material or engage in oral protest or counseling within 100 feet of a health care facility's entrance. *Id*. at 707. The protestors challenged the statute on the basis that it failed to give adequate guidance to law enforcement. However, the Court rejected this argument and found the specificity of the definition of the zone was adequate and the degree of judgment given to police was acceptable. *Id*. at 733. The Court noted that "[a]s always, enforcement requires the exercise of some degree of police judgment." *Id*. (citing *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972)).

Here, the statute is content-neutral on its face because its primary and significant purpose is to ensure public safety. The purpose of the buffer zone is to ensure social distancing and protect the health of both the individuals in line at the facility and the health of the protestors. Much like in *Ward* where the regulation's purpose was undue noise prevention, the purpose of the buffer zone regulation is to ensure public protection. Both the District and Circuit courts agreed that the regulation is facially neutral. The regulation is content-neutral as a facial matter.

Further, the regulation is content-neutral in application. The buffer zone provides clear guidelines for compliance for the protestors and gives the proper amount of discretion to police

in enforcement. Both times that Mr. Jones was arrested, the Delmont Luddites protesting were violating the statute. While the protestors from the MOMs group also violated some of the restrictions, their actions are distinct from the Luddite protestors. In *Lakewood*, the mayor had complete discretion on whether to allow a type of speech at all. Here, the mandate applies equally to all protestors. Unlike in *Forsyth* where a government official could base a fee off of the content of speech, the police are not basing their enforcement discretion on the content of the protestor's speech. Instead, the police are basing their decisions on the actions of the protestors and using their discretion to determine what actions create circumstances that risk the spread of the disease. In *Hill*, police were given some degree of judgment in enforcing a buffer zone to best fit the government interest. The discretion in this case is different than the discretion needed in *Hill.* The buffer zone around abortion clinics was for the purpose of ensuring access to the clinic, so the total distance of the buffer zone must be enforced. In this case, the purpose of the buffer zone is to ensure distance between people to prevent the spread of Hoof and Beak disease. Therefore, the police used their discretion to determine that the Luddite protestors approaching people in line posed more of a health risk than the MOMs standing slightly inside the buffer zone but keeping their distance from all of the people in the facility line. Importantly, the speech is not what prompted the arrest of the Luddites. Rather, it is the manner in which they tried to speak that was in violation of public health safety measures. If the MOMs had also dangerously approached individuals in line, it likely would have resulted in their arrest as well. If being a mere five feet within the buffer was the lone violation of the Luddites, they likely would have been allowed to continue. Further, both the District Court and the Court of Appeals found the mandate to be content-neutral, and that issue is not before the court today.

B. The no protest buffer zone is narrowly tailored to the government interests of protecting public health and protecting those who cannot avoid unwanted communication.

A fixed buffer zone has been held to be a narrowly tailored response to protect the government's significant interest in protecting public health. *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 770 (1994). In *Madsen*, an initial injunction prohibited protestors from blocking or interfering with access to an abortion clinic, but it failed to accomplish the goal of ensuring access to the clinic. Then the court issued another injunction which created a thirty-six foot buffer zone around abortion clinics, prohibited protestors from approaching patients without their consent within a 300-foot zone around the clinic, and restricted excessive noisemaking within the earshot of patients. *Id*. at 757-61. The thirty-six foot buffer zone and the noise restrictions were upheld because they did not burden speech more than necessary to satisfy the government interest of ensuring the health of patients and protecting access to the clinic. However, the 300-foot buffer zone was not necessary to accomplish these goals. *Id*. at 768-73. In upholding the thirty-six foot buffer zone, the Court gave deference to the state court's determination that thirty-six feet was adequate. *Id*. at 669-70. The court found that the noise produced by the protestors caused stress in the patients during their surgical procedures and while recuperating. Therefore, it was necessary to restrict the noise to ensure the health of the patients at the clinic. *Id*. at 758, 772. Similarly, a fixed buffer zone outside an abortion clinic was upheld while a floating buffer zone was not. *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997). In *Schenck*, protestors formed blockades outside abortion clinics preventing patients, nurses, and doctors from entering and engaged in aggressive sidewalk counseling. *Id*. at 362-63. The abortion providers filed a complaint, and the lower court issued an injunction banning demonstrations within a fifteen-foot fixed buffer zone of the abortion clinics and within a fifteen-foot floating

buffer zone around any person or vehicle seeking access to the facility. The Court struck down the floating buffer zone in part because it was difficult for protestors to comply with. A protestor who wanted to remain fifteen feet away from an individual entering the clinic would be required to move along with the individual to maintain the proper distance. Therefore, the Court found that these floating buffer zones burdened more speech than necessary to serve the government interest. *Id*. at 378. However, the fixed buffer zones were upheld because they were necessary to ensure access to the clinics. They provided clear guidelines for both the protestors and for law enforcement who were tasked with policing the zone. *Id*. at 380. *See also Evans v. Sandy City*, 944 F.3d 847 (10th Cir. 2019) (city ordinance restricting access to narrow medians had a direct relationship to the city's goal of promoting public safety and was upheld).

Additionally, the government may pass a regulation that protects listeners from unwanted communication. *Hill v. Colorado*, 530 U.S. 703, 707 (2000). In *Hill*, Colorado passed a statute which made it unlawful to "knowingly approach" any person within eight feet for the purpose of handing out materials, protesting, or counseling without that person's consent within 100 feet of the entrance of any health care facility. *Id*. at 707. The petitioners sought an injunction against the statute's enforcement because they engaged in sidewalk counseling at facilities that perform abortions. *Id*. at 708. The Court upheld the statute and found that it struck a proper balance between the petitioner's free speech rights and the government interest in protecting the patients at these facilities. A statute need not be the least restrictive means in order to be found narrowly tailored. *Id*. at 726. The Court noted that "the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Id*. at 716. The privacy interest varied in different settings but was at its highest in one's home or when persons were "powerless to avoid it." *Id*. The listener's ability to avoid unwanted

communication was a part of the broader right to be left alone which had been found to be one of the most valued rights. *Id*. Similarly, when anti-abortion protestors picketed outside an abortion provider's home, an ordinance prohibiting picketing before anyone's residence in the town was upheld. *Frisby v. Schultz*, 487 U.S. 474 (1988). In *Frisby*, anti-abortion protestors picketed on a public street outside the home of a doctor who provided abortions at nearby clinics. The picketing was generally peaceful, typically lasted one to one and a half hours, and consisted of eleven to more than forty protestors. *Id*. However, the complaints of the picketing led the town to enact an ordinance that prohibited picketing "before or about the residence or dwelling of any individual in the [t]own." *Id*. at 477. The Court found that the public streets and sidewalks in a residential neighborhood that the prohibition applied to was considered traditional public fora so the ordinance must pass stringent standards to be found constitutional. *Id*. at 480-81. The primary purpose of the ordinance was the protection of privacy within the home, and one aspect of that was protection of the unwilling listener. The Court found the "First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Id* at 487. The Court held that the nature and scope of that government interest made the prohibition narrowly tailored and upheld the ordinance. *Id*. at 488.

Here, the fixed buffer zone is narrowly tailored to further the government interest in curbing the spread of Hoof and Beak disease and protecting public health. Hoof and Beak disease is highly contagious and has resulted in a global pandemic causing 230,000 deaths in the United States alone. Initially, the CHBDA only required social distancing of six feet and masks at the federal facilities. An emergency amendment creating a sixty-foot no protest buffer zone was passed to address increasing protest activity at the federal facilities. Like *Madsen*, where additional prohibitions had to be added to accomplish the government interest, here the

amendment is needed to address the government interest in promoting public health and stopping the spread of the disease. Additionally, similar to *Madsen* where noise restrictions were upheld to ensure the health of the patients, a buffer zone is needed to ensure the health of the people waiting in line. Just as the Court gave deference to the lower court's determination that thirty-six feet was an adequate zone, this Court should defer to the task force's judgment that a sixty-foot buffer zone is required. This case involves a fixed buffer zone like the one upheld in *Schenck*, not a floating buffer zone. The fixed buffer zones were necessary to meet the government interest of ensuring access in *Schenck* just as they are necessary to ensure public health here.

Those in line at the facility should be protected from unwanted communication. Here, the mandate requires individuals to come to the facility to acquire their SIM card. Failure to go to the facility can result in a fine or jail time. In *Hill* and *Frisby*, the Court noted that the right to privacy is highest in settings where people were powerless to avoid others. Because individuals are required to go to the facility, they are powerless to avoid the protestors. Not only are the individuals in line powerless to avoid the protestor's speech, but they are powerless to avoid their germs as well. The buffer zone is even more necessary to ensure the protestors remain distanced from those in line to help eliminate any chance of spread. In light of the pandemic, it is even more important to protect the right to be left alone.

C. The protestors have ample alternative channels of communication because they are free to continue protesting just outside the buffer zone.

Finally, prohibiting protesting within a certain specified area still leaves open ample alternative channels of communication. *Frisby v. Schultz*, 487 U.S. 474 (1988). In *Frisby*, after anti-abortion protestors picketed outside an abortion providers home, the town passed an ordinance that prohibited picketing "before or about" any residence in the town. *Id*. at 476. The

Court interpreted the statute to only prohibit picketing focused on a particular residence. *Id*. at 482. With this narrow construction of the statute, the Court found that ample alternatives remained: marching in the neighborhoods, going door-to-door, distributing literature through the mail, and calling the residents. *Id*. at 483-84. In contrast, a thirty-five foot buffer zone around a reproductive health care facility was not narrowly tailored because it burdened more speech than necessary to serve the government interest. *McCullen v. Coakley*, 573 U.S. 464 (2014). There, Massachusetts passed a statute that created a thirty-five foot buffer zone around abortion clinics that prohibited all entry except for those that needed to access the facility such as patients or employees. The statute was passed to address protestors that had blocked entrances to the clinics and to ensure unimpeded access to the facility for those in need of its services. *Id*. at 486. However, petitioners did not engage in traditional protesting and instead chose to express themselves through sidewalk counseling and distributing literature to patients. *Id*. at 472-73. The buffer zones prevented the petitioners from communicating their message with many patients. They were unable to determine who might be a patient until the patient had already entered the buffer zone which prevented the petitioners from having personal conversations or handing out literature before the buffer zone. *Id*. at 488. The Court also noted that the government had other alternatives to achieving its interest of unimpeded access to the abortion clinics: criminal and civil penalties for impeding access to a clinic. *Id*. at 491. Additionally, a guideline that required all performances at a certain venue to use the city's sound equipment and sound technician was found to leave open alternative channels of communication. *Ward v. Rock Against Racism*, 491 US 781 (1989). In *Ward*, a group had generated many noise complaints from their performances in a bandshell in Central Park. In response, a guideline required all performances to use the city's high quality sound equipment and an experienced sound technician to keep the volume to a

reasonable level. *Id*. at 785-87. The Court found that this guideline left open ample alternative channels because it continued to allow the expressive activity and had no effect on the content of the message even though the reduction in volume may reduce the potential audience their speech can reach. *Id*. at 802.

Here, the protestors still have alternative channels of communications. The protestors are not allowed to enter the buffer zone, but they remain free to stand just outside the buffer zone to spread their message. Like the protestors in *Frisby*, the protestors are welcome to march outside the buffer zone, distribute literature outside the buffer zone or even through the mail if they chose. In *McCullen*, protestors were prevented from engaging in their chosen methods of speech including individual conversations and handing out literature. However, that was because the protestors were unable to differentiate between prospective patients at the clinic and those just passing by. Here, there is no one for the protestors to differentiate. The general population is subject to this mandate. Therefore, anyone that passes by outside the buffer zone is subject to the mandate and would be appropriate for the protestors to speak to. The protestors are welcome to have individual conversations or pass out literature as long as these interactions occur outside the buffer zone. Additionally, in *McCullen*, the court noted that there were already solutions to ensure access to an abortion clinic: criminal and civil penalties for impeding access to a clinic. However, there are no penalties for failing to socially distance or for assisting in the spread of a disease. Further, in *Ward*, the Court found that a potential reduction in audience as a result of a regulation was not relevant. Therefore, even if the protestors are unable to speak to as many individuals as a result of the buffer zone, that does not mean they do not have ample alternative channels of communication.

For the foregoing reasons, the Court of Appeal's decision should be reversed because it gives the proper amount of discretion to police while providing clear guidelines for enforcement and compliance, is narrowly tailored to the government interests in public health and privacy, and leaves open ample alternative channels of communication for the protestors outside the buffer zone.

II. THE COURT OF APPEALS PROPERLY UPHELD THE MANDATED CONTACT TRACING BECAUSE IT WAS NEUTRAL AND GENERALLY APPLICABLE AND ALTERNATIVELY COULD PASS STRICT SCRUTINY.

The United States Court of Appeals for the Eighteenth Circuit's ruling that mandated contract tracing through the use of mobile phones and government-issued SIM cards is constitutional should be affirmed because the mandate is neutral and generally applicable. The State cannot pass a law prohibiting the free exercise of religion. However, one's religious beliefs do not "excuse him from compliance with an otherwise valid law." *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990). Regardless of religious beliefs, an individual still must comply with a valid and neutral law of general applicability. *Id*. Neutrality and general applicability are related and typically either both are satisfied, or neither is satisfied. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). Further, the mandate specifically exempts itself from the Religious Freedom Restoration Act, so it is inapplicable here. 42 U.S. Code § 2000bb– 3(b). Alternatively, even if the mandate is not neutral or generally applicable, it still passes strict scrutiny. A law that fails to satisfy the requirements of neutral and generally applicable will still be found constitutional if it is justified by a compelling government interest and is narrowly tailored to that interest. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

A. The contact tracing program is both a neutral and generally applicable law.

1. The mandated contract tracing program is facially neutral and the object of the law is neutral.

A law is facially neutral if it does not single out a religious group for unfavorable treatment. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). In *Trinity Lutheran*, a government program offered reimbursement grants to qualifying non profit organizations that purchased playground surfaces made from recycled tires. The state policy indicated that Trinity Lutheran Church was ineligible to participate in this program solely because of its status as a church. *Id*. at 2017. The Court distinguished between a neutral and generally applicable law and a law that singled out religious groups for disfavored treatment. The Court found this policy discriminated against otherwise eligible recipients because of their religious nature. *Id*. at 2020-21. The State "expressly require[d] Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program." *Id*. at 2024. The Court found that this policy was not neutral and was subject to strict scrutiny, which it failed. *Id*. On the other hand, city ordinances that expressly prohibited animal sacrifice and ritual animal killing – central practices of the Santeria religion – were not necessarily discriminatory on their face. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993). In *Lukumi*, the city passed three ordinances that prohibited animal sacrifice and the slaughter of an animal for "any type of ritual." *Id*. at 527. The church argued that the use of the words "sacrifice" and "ritual" in the ordinances discriminated against religion because of the religious connotation of those words. However, the Court found that those words have secular meanings as well and could not hold that the ordinance lacked facial neutrality, but the Court found that the object of the ordinance was not neutral. *Id*. at 534.

Facial neutrality alone is not determinative. The object of a law must be neutral as well. The object of a law can be determined by examining the historical background of the decision, the events leading to the passage of the law, and legislative history. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993). In *Lukumi*, the church had received approval to establish a place of worship that would include ritual animal sacrifice in the city. The city held an emergency public council session and noted that the citizens expressed concern that certain religions engage in practices that are "inconsistent with public morals." *Id*. at 526. The council then passed three ordinances that prohibited animal sacrifice and ritual animal killings. The Court held that the object of the ordinances was to target the Santeria religion because they were enacted only a few weeks after the Church announced it was to open and after the citizens expressed their concern at a council meeting. *Id*. at 541. At the meeting, many councilmen and other government officials made specific, disparaging comments about the Santeria religion. *Id*. at 541-42. The Court found that the ordinances were an attempt at a "religious gerrymander" because, outside of the Santeria animal sacrifice, few other animal killings were prohibited. *Id*. at 534-36. Additionally, when commissioners at a hearing showed hostility to a baker who refused to bake a cake for a same-sex couple because of his religious beliefs, their decision was not consistent with the requirement of neutrality. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). In *Masterpiece Cakeshop*, a baker refused to make a wedding cake for a same-sex couple because same-sex marriage was against his religious beliefs. The Colorado Civil Rights Commission found that the baker violated the state's anti-discrimination act. *Id*. at 1723. During the Commission's hearings, several commissioners said that religious beliefs were "less than fully welcome in Colorado's business community." *Id*. at 1729. Commissioners also described the baker's religion as "despicable" and "merely rhetorical" and

compared his invocation of his religious beliefs to defenses of slavery and the Holocaust. *Id*. Additionally no objections to these disparaging comments were made by any of the other commissioners. The same commission had previously considered cases in which bakers refused to create cakes that had demeaning messages regarding same-sex marriage, and they found the refusal lawful. *Id*. at 1729-30. The Court found that based on the hostile treatment of the baker's religious beliefs, the Commission did not act in a neutral manner as required under the Free Exercise Clause. *Id*. at 1731. Further, when the government passed a law that infringed on individual liberty for the common good of helping curb the spread of a pandemic, the Court upheld the law. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). In *Jacobson*, a local government responded to the spread of smallpox with the passage of a compulsory vaccination law. Under this law, any adult in the community who was deemed a fit subject for the vaccine was required to receive the vaccination. The law was only enacted after the Board of Health gave its opinion that the compulsory vaccination law was necessary for public health and safety. *Id*. at 27. At the time the law was passed, smallpox was prevalent and increasing in the city of Cambridge. *Id*. at 28. The Court found that deference must be given to lawmakers when they decide what mode will be most effective for protecting the public against disease. *Id*. at 30. The Court noted that it "was the duty of the constituted authorities primarily to keep in view the welfare, comfort and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few." *Id*. at 29. *See also McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky*., 545 U.S. 844, 864 (2005) ("Although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.").

Here, the mandate is neutral. It is facially neutral because it does not single out the Delmont Luddites or any other religious group for unfavorable treatment. The mandate requires all persons living in the United States to carry a SIM card in a mobile phone for contract tracing purposes. The mandate grants exemptions for senior citizens over the age of 65 and some health-related exemptions on a case-by-case basis. Unlike the church in *Trinity Lutheran* which was singled out for discriminatory treatment due to its religious nature, here no one is singled out because of their religious nature. Instead, the mandate applies equally to all people regardless of religion. Unlike the ordinance in *Lukumi*, no words used in this mandate carry any sort of religious connotation.

The object of this mandate is neutral as well. The contract tracing program was passed by Congress in response to the Hoof and Beak pandemic, a highly contagious disease that has caused 230,000 deaths in the United States so far. Congress named the Federal Communications Commission (FCC) as the lead agency in charge of the program. The mandate itself describes its purpose as protecting Americans, their families, and their communities. In *Lukumi*, the ordinances were passed directly as a result of the introduction of a new place of worship that engaged in animal sacrifice. In this case, the mandate is passed in direct response to a global pandemic, and governments across the world are instituting similar measures designed to control the spread to protect their citizens. Further, unlike the commission in *Masterpiece Cakeshop*, which made disparaging comments about the baker's religion, there is no evidence of any hostile treatment towards any religion by Congress or the FCC here. There is nothing to even suggest that Congress thought this mandate would have any effect on religious activity at all. Just as in *Jacobson,* the government passed this mandate in response to the spread of disease. Additionally, contact tracing is arguably less invasive than a compulsory vaccination law that was upheld. As

McCreary County stated, deference should be given to a legislature's stated purpose in the face of a threat to public safety. The mandate describes its purpose as protecting Americans and there is no evidence to suggest that is not a genuine, primary purpose. The mandate was both facially neutral and had a neutral objective.

2. The contact tracing program is generally applicable because it does not selectively impose burdens solely on religious conduct and only provides for very limited exemptions.

For a law to be generally applicable, it cannot selectively impose burdens solely on religiously motivated conduct. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543 (1993). In *Lukumi*, the Court held that the city ordinances prohibiting animal sacrifice were neither generally applicable nor neutral. The Court noted that all laws are selective, but the categories of selection are what is relevant. *Id*. at 542. The Court held that the ordinances were underinclusive in advancing the government interests of protecting public health and preventing animal cruelty because it did not prohibit secular conduct that threatened those interests just as much. *Id*. at 543. Practices that could be considered cruel to animals including fishing, extermination, and euthanasia were not prohibited. *Id*. at 544. Additionally, public health risks like improper disposal of animal carcasses and consumption of uninspected meat were only addressed when these risks arose from religious exercise. Restaurants and hunters did not fall under the scope of those ordinances. *Id*. at 544-45. Similarly, a law that primarily targeted a Jewish practice that only accounted for a small percentage of the spread of herpes simplex virus (HSV) was found underinclusive because it did nothing to address the remaining causes of the spread of HSV. *Cent. Rabbinical Cong. of the United States v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014). In that case, some sects of the Jewish faith performed ritual circumcision on infants. Part of this ritual included direct oral suction of the circumcision

wound. *Id*. at 185. The practice of this ritual could contribute to up to 10% of HSV infections in infants after birth. *Id*. at 188. The New York Health Department added a provision to the Health Code which required written consent from a child's parents before a circumcision involving direct oral suction could be performed. The consent included a statement that the Health Department advised against this practice. *Id*. at 191. The court held that this provision was underinclusive because it applied only to religious conduct accounting for fewer than 10% of HSV cases while it failed to regulate nonreligious conduct that accounted for at least 90% of the infections. *Id*. at 197. Additionally, an order to prohibit mass gatherings including religious services but offered numerous secular exceptions was found to be not generally applicable. *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020). In *Roberts*, the governor issued an order requiring all organizations that were not life-sustaining to close in light of the COVID-19 pandemic. The list of organizations that were considered life-sustaining was four pages long and included laundromats, law firms, airlines, landscaping businesses, and many more, but religious organizations did not make the list. *Id*. at 411-12. The court noted that "the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law." *Id*. at 413. Many of the exempted secular organizations provided just as much of a risk to public health as religious services. *Id*. at 414. Therefore, the court could not find that a law with four pages of exceptions was generally applicable. *Id.*

Here, the mandate is generally applicable because it does not apply only to religious conduct. The mandate applies to all persons living in the United States. The only exemptions are for senior citizens over the age of sixty-five and some health conditions such as late-stage cancer, Alzheimer's, and severe physical disabilities that prevent one from using a mobile device. In *Lukumi* and *Cent. Rabbinical Cong.*, the regulations were underinclusive because they only

applied to religious conduct and did not address harmful secular conduct. However, in this case, the mandate applies to all people including those with religious objections to mobile phones. The only exemptions are ones that appear to provide less risk to public health. The pandemic primarily affects children and young-to-middle-age adults. Therefore, it is less necessary to mandate contact tracing for senior citizens because the disease affects them much less. Additionally, there are health-based exemptions for a mandate that is enacted with the purpose of protecting public health. These are the only exemptions from the mandate. This is in large contrast to the four-page list of exceptions in *Roberts*.

B. The mandated contract tracing program passes strict scrutiny because it is justified by a compelling state interest and is narrowly tailored to that interest.

Alternatively, even if the mandate is not neutral or generally applicable, it still passes strict scrutiny. A law that fails to satisfy the requirements of neutrality and general applicability will still be found constitutional if it is justified by a compelling government interest and is narrowly tailored to that interest. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). In *Roberts*, it was uncontested that curbing the spread of a pandemic was a compelling government interest. *Roberts,* 958 F.3d at 415. However, the order prohibiting in-person religious services failed strict scrutiny because it was not narrowly tailored to this interest. *Id*. The court found there were less restrictive ways to address the public health risk such as limiting the number of people allowed at services. *Id*. Additionally the ordinances in *Lukumi* were not narrowly tailored. They were too narrow because they failed to regulate secular conduct that could have endangered the government interests of public health and preventing animal cruelty, and they were too broad because even if the ritualistic animal killings had occurred in a licensed

slaughterhouse following all health and safety protocol, it would still have been illegal. *Church of Lukumi Babalu Aye,* 508 U.S. at 538-40, 543-46.

Here, the mandate would survive strict scrutiny because it is narrowly tailored to the government interest of public health. In this case, the government interest is protecting the American people by curbing the spread of the Hoof and Beak disease. As *Roberts* shows, there is no question that stopping the spread of a pandemic is a compelling interest. Additionally, the mandate is narrowly tailored to this interest. Contact tracing has proven to be an effective way of helping stop the spread of a pandemic. In *Roberts*, there were less restrictive ways of preventing large gatherings such as limiting numbers rather than prohibiting events entirely. However, there is no less restrictive way of contact tracing than by simply tracking people's movements. In *Lukumi*, the ordinances were not narrowly tailored because even if religious conduct had been conducted safely, it was still prohibited. Here, for contact tracing to work properly, everyone's actions must be noted to track the spread of the disease. There is no way to effectively implement a program of contact tracing unless everyone is included. Therefore, the contract tracing mandate is narrowly tailored and would pass strict scrutiny.

For the foregoing reasons, the Court of Appeals ruling that mandated contract tracing through the use of mobile phones and government-issued SIM cards is constitutional should be affirmed because the mandate is neutral and generally applicable, and alternatively passes strict scrutiny because it is narrowly tailored to the compelling government interest of curbing a pandemic.

CONCLUSION

For the foregoing reasons, the Court of Appeal's decision to hold the buffer zone unconstitutional should be reversed because it gives the proper amount of discretion to police

while providing clear guidelines for enforcement and compliance, is narrowly tailored to the government interests in public health and privacy, and leaves open ample alternative channels of communication for the protestors outside the buffer zone. Additionally, the Court of Appeals ruling that mandated contract tracing through the use of mobile phones and government-issued SIM cards is constitutional should be affirmed because the mandate is neutral and generally applicable. Alternatively, the mandate passes strict scrutiny because it is narrowly tailored to the compelling government interest of curbing a pandemic.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

BRIEF CERTIFICATE

1. All work contained in all copies of this brief is the work product of only the named team members.
2. This team has complied fully with our school's governing honor code.
3. This team has complied with all Rules of the Competition.